IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 11-0081

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

Plaintiffs/Appellees/Cross-Appellants,

v.

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

Defendants/Appellants.

APPELLEES AND CROSS-APPELLANTS' OPENING BRIEF

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

---

APPEARANCES:

For Plaintiffs/Appellees/Cross-Appellants:

MARGOT E. BARG
Wittich Law Firm, P.C.
602 Ferguson Ave., Suite 5
Bozeman, Montana 59718

For Defendants/Appellants:

Steve Bullock
Montana Attorney General
ANTHONY JOHNSTONE
JAMES P. MOLLOY
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

ISSUES PRESENTED

(1) Does § 13-35-227(1), MCA, which expressly prohibits corporations (but not individuals, unincorporated associations, partnerships, or the media) from making independent expenditures to support or oppose political candidates or political parties, ban speech protected by the First Amendment?

(2) Does the State have a compelling interest in banning corporate political speech; and, if so, is the statute narrowly tailored to meet that interest?

(3) If the statute is unconstitutional, may the State be enjoined from enforcing the ban against corporate political speech?

(4) If the statute is unconstitutional, did the District Court abuse its discretion by not awarding the Appellees their attorney fees under either the Uniform Declaratory Judgment Act or the public attorney general doctrine?

STATEMENT OF THE CASE

The lesson of last year's decision in *Citizens United v. Federal Election Comm'n,* 130 S. Ct. 876 (2010), is that more speech, not less, is good. However, Champion Painting, Montana Shooting Sports Association ("MSSA"), and Western Tradition Partnership ("WTP"), as corporations, are subject to § 13-35-227(1), MCA[1] (hereinafter referred to as "Section 227") which expressly singles

[1] Unless otherwise noted, all statutory references are to the Montana Code Annotated.

out and prohibits corporations from using corporate funds to support or oppose candidates or political parties, and it punishes corporations if they do. Based on these undisputed facts, under the holding in *Citizens United*, Section 227(1) (as it applies to corporate independent expenditures) bans corporate political speech.

As a ban on political speech, the statute is subject to strict scrutiny, which means the Appellants, the Attorney General and the Commissioner for Political Practices (collectively referred to as "the State"), must demonstrate that the restriction on political speech furthers a compelling interest and is narrowly tailored to achieve that interest.

The State asserts that it has a compelling interest in preventing corruption, protecting individual voices and the political process (also known as the anti-distortion interest), enforcing disclosure laws, and protecting dissenting shareholders.

Citizens United rejected the anticorruption interest in independent expenditure cases: "Limits on independent expenditures . . . have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption." *Citizens United,* 130 S.Ct. at 908. Thus, "[t]he anticorruption interest is not sufficient to displace the speech here in question." *Id.*

Next, the State does not have a compelling interest in prohibiting corporate political speech in order to protect citizens from the alleged "distorting" wealth and

power of corporations. Also known as the anti-distortion interest, this interest was also rejected in *Citizens United*: "By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices from reaching the public and advising voters on which persons or entities are hostile to their interest. Factions will necessarily form in our Republic . . . . Factions should be checked by permitting them all to speak . . . and by trusting the people to judge what is true and what is false." *Id.* at 907.

Regarding the State's alleged interest in protecting disclosure laws, this interest has not been recognized by the United States Supreme Court or by this Court. As the District Court aptly stated, "the answer to this problem is not a ban on speech, but the enactment of more comprehensive disclosure laws." *Order on Cross-Motions for Summary Judgment,* p. 11 (Doc. 47).

Next, *Citizens United* also rejected the dissenting shareholder interest, noting that if allowed, this interest would also allow governments to ban the media from speaking. Furthermore, shareholders can protect themselves "through the procedures of corporate democracy. *Citizens United.*, 130 S. Ct. at 911.

In addition to not having a compelling interest, Section 227(1) is also not narrowly tailored. Except for the media, it extends to every corporation. It does not distinguish between wealthy corporations and corporations with limited capital; for profit corporations and nonprofit corporations; corporations with zero, one, or

numerous shareholders; corporations whose shareholders agree to support or oppose a specific candidate; foreign or domestic corporations; or corporations that accept donations and those that do not. Furthermore, the statute only applies to corporations, not wealthy individuals, partnerships, trade associations, and the media. Consequently, Section 227(1) is not narrowly tailored and cannot survive strict scrutiny.

Therefore, Appellees respectfully request that the Supreme Court affirm the District Court's decision and declare that Section 227(1) (as it applies to corporate expenditures) is unconstitutional, and to affirm the injunction prohibiting the State from enforcing it.

Finally, Appellees respectfully request that this Court hold that the District Court abused its discretion in denying the Appellees their attorney fees under either § 27-8-313 of the Uniform Declaratory Judgment Act or the private attorney general doctrine. In analyzing § 27-8-313, the District Court improperly held that because of the State's good faith conduct throughout this litigation, attorney fees were not "necessary and proper." But whether the State acted in good faith is not the standard. The standard is whether attorney fees are necessary and proper to provide meaningful relief. In this case, Appellees had no choice but to go to court to secure their First Amendment right to make independent expenditures to support or oppose candidates. Under similar circumstances in other cases, this Court has

recognized that it is "necessary and proper" to award attorney fees in order to provide meaningful relief.

Also, the District Court abused its discretion in denying attorney fees under the private attorney general doctrine. Although the District Court recognized that Appellees litigated an important constitutional right, and although the District Court recognized that Appellees had no choice but to litigate since the State was defending the statute, the District Court nonetheless held that it was "not so sure" that securing the right for corporations to engage in political speech benefited a large class. In *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Comm'rs*, 1999 MT 236, ¶ 67, 296 Mont. 402, 989 P.2d 800, this Court held that the decision benefited "all Montana citizens interested in Montana's public schools," *Id.*, ¶ 67. Similarly, this case benefits all Montana citizens because they will now have access to more ideas, thoughts, and views in the political debate. Thus, the District Court abused its discretion in denying the Appellee's request for attorney fees under the private attorney general doctrine.

Therefore, the Appellees respectfully request that this case be remanded to the District Court for a hearing on attorney fees.

STATEMENT OF THE FACTS

A. The Appellees.

Champion Painting, Inc. is a small family-owned painting and drywall business incorporated in the State of Montana. *See, Affidavit of Kenneth Champion ("Champion Affidavit"),* ¶¶ 2-4 (Doc. 24). Champion Painting does not have employees or members; its sole shareholder is Kenneth Champion, who also owns and manages the business. *Id.,* ¶ 2-4. As a small business owner, Mr. Champion is concerned with the way inflation, taxation, and spending are exploiting, impacting, and bankrupting America and Montana's small businesses. Because Champion Painting is a small business, its voice will be more effective than Mr. Champion's voice when supporting or opposing candidates who may have an impact on small businesses. *Id.,* ¶ 6. Thus, Champion Painting would like to, and intends to, spend corporate funds to educate the citizens of Montana and Bozeman about candidates and parties who will positively or negatively impact Montana's small businesses. The corporate funds will be spent participate in public discussions, to purchase TV spots and radio advertisements, and to create and distribute brochures and fliers. *Id.,* ¶ 7.

MSSA is a not-for-profit corporation incorporated under the laws of the State of Montana. *Affidavit of Gary Marbut ("Marbut Affidavit"),* ¶¶ 2-3 (Doc. 25). MSSA is supported by members who subscribe to MSSA's mission statement

and objectives, pay annual dues, and are accepted as members. Member dues largely sustain MSSA's activities. *Id.,* ¶ 5. MSSA would like to use its corporate funds to support or oppose candidates depending on the candidates' positions on issues MSSA supports and promotes, such as the right to bear and keep arms, firearm safety, hunting, personal protection when using firearms, privacy, and the First Amendment right to petition the government and the freedom of association. *Id.,* ¶¶ 6-8. Montana's current laws prevent MSSA from spending member dues to directly support or oppose candidates in the public forum, at least not without risk of being sued by the State, and not without risk of being penalized. *Id.,* ¶¶ 8-9. If it could, MSSA would use its corporate funds to directly support or oppose candidates and issues via direct mail, newspaper, and radio advertising to its members and to the general public. *Id.,* ¶ 10.

WTP is a non-profit corporation registered to do business in Montana. *Order on Cross Motions for Summary Judgment,,* p. 2 (Doc. 47).

B. <u>The Appellants.</u>

The Appellants are the Attorney General and the Commissioner of the Commission for Political Practices (collectively referred to as the "State"). The State admits that it has the statutory power to enforce Section 227(1). *See,* § 13-37-111, § 13-37-125, and § 13-37-128. *See also, State's Answer,* ¶¶ 15, 17 (Doc.6). Furthermore, the State admits that the Commissioner supports Section

227(1), and that the Commissioner has enforced the statute in the past. See, *State's Answer,* ¶ 18 (Doc. 6).

C. The statutes at issue.

Montana law prohibits a corporation from making "an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or political party." Section 227(1). An "expenditure includes "a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an election." § 13-1-101(11). An expenditure also includes an independent expenditure, which is defined as:

> "Independent expenditure" means an expenditure for communications expressly advocating the success or defeat of a candidate or ballot issue which is not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or political committee or an agent of a candidate or political committee.

See, Rule 44.10.323(3), ARM.

"Expenditure" does **not** include, among other things, "the cost of any bona fide news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation[.]" § 13-1-101(11)(b)(iii).

A corporation may establish a separate segregated fund ("PAC") to make

expenditures, but it may only use "voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation." Section 227(3).

A corporation who violates Section 227 is subject to the civil penalty provision for "an amount up to $500 or three times the amount of the unlawful contribution or expenditure, whichever is greater." § 13-37-128(2); § 13-35-227(4).

Under the plain language in Section 227(1) and § 13-1-101(11), the prohibition against corporate independent expenditures to support or oppose candidates applies to **all** corporations (except the media), but it does not apply to individuals, partnerships, unincorporated associations, or unions.

Since Section 227(1) expressly prohibits each of the Appellees from making corporate independent expenditures to support or oppose candidates, and subjects them to a civil action and penalties if they do, this lawsuit was filed in order to protect political speech. Following cross motions for summary judgment, the District Court held that Section 227(1) (as it applies to independent expenditures) was unconstitutional, and it enjoined the State from enforcing it. *Order,* p. 14 (Doc. 47). Although the District Court granted costs to Appellees, it denied attorney fees. *Id.*

STANDARD OF REVIEW

The Supreme Court reviews the District Court's decision to grant summary judgment de novo, using the same standards applied by the District Court under Mont. R. Civ. P. 56. *See, Bud-Kal v. City of Kalispell*, 2009 MT 93, ¶ 15, 350 Mont. 25, 204 P.3d 738. Applying those standards, the District Court's decision that Section 227(1) (as it applies to independent expenditures) is unconstitutional should be affirmed because "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the [Appellees are] entitled to judgment as a matter of law." Rule 56(c), MRCP. Furthermore, the State did not present facts (as opposed to conclusory statements and assertions) sufficient to raise a genuine issue as to one or more elements of the case. *See, Tin Cup County Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.,* 2008 MT 434, ¶ 54, 347 Mont. 468, 200 P.3d 60.

Regarding the attorney fees issue, "[A] district court's grant or denial of attorney fees is a discretionary ruling which we review for abuse of discretion." *Trustees of Indiana Univ. v. Buxbaum,* 2003 MT 97, ¶ 15, 315 Mont. 210, 69 P.3d 663.

SUMMARY OF THE ARGUMENT

The material facts, none of which are disputed, are as follows: (1) Section 227(1) expressly prohibits corporations from using their corporate funds to support or oppose political candidates or political parties; (2) Section 227 does not prohibit individuals, unincorporated associations, trade unions, or the media from using their funds to support or oppose political candidates or political parties; (3) the Appellees are corporations, (4) the Appellees would like to spend corporate funds to publicly support or oppose political candidates and/or political parties, and (5) the State has the statutory authority to prosecute and seek penalties against the Appellees if the Appellees violate Section 227(1).

Based on these undisputed facts, as a matter of law Appellees are entitled to summary judgment. *Citizens United* held that the First Amendment of the Constitution of the United States protects political speech, even if the source of such speech is a corporation. Political speech includes independent expenditures made to support or oppose candidates or political parties. Prohibiting such independent expenditures is a ban on speech. However, such speech cannot be banned absent a compelling interest that is narrowly tailored to achieve that interest.

The State has asserted 4 alleged compelling interests, but none of the interests are sufficient to ban the ideas, thoughts, and comments that corporations can add to the debate on who our elected officials should be.

Consequently, Appellees seek to have this Court declare that Section 227(1) (as it applies to corporate expenditures) is unconstitutional. Appellees also seek to enjoin the State from enforcing Section 227(1), and Appellees seek their attorney fees and costs under the Uniform Declaratory Judgment Act or the private attorney general doctrine for having to bring this action to secure the right to engage in protected political speech.

ARGUMENT

I. SPEECH PROTECTED BY THE FIRST AMENDMENT IS PROTECTED BY THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE, REGARDLESS OF ITS SOURCE.

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[2] The Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The State argues that "while 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." *Brief of Appellants,* p. 25. The State goes on to say that while corporations might have some rights to free speech, the State is allowed to distinguish corporations from natural persons in order to regulate corporate speech. *Id.,* pp. 24-28.

The State's argument ignores the law. In *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), several associations and corporations challenged a state statute preventing corporations from making contributions or expenditures

[2] The Constitution of the State of Montana also protects the right of people to speak freely: "No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty." 1972 Mont. Const., Art. II, § 7. The same analysis applied under the First Amendment should also be applied to invalidate Section 227(1) under the Montana Constitution.

unless the issue was one that materially affected the corporation's property, business, or assets. *Id.* at 767-768. At the state court level, the court held that corporations could not "claim for themselves the liberty which the Fourteenth Amendment guarantees." *Id.* at 778.

The *Bellotti* Court disagreed. First, the court recognized that the term "liberty" in the Due Process Clause includes the freedom of speech:

> In a series of decisions beginning with *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), [the United States Supreme Court] held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the *liberty* safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day.

Id. at 779 (citations omitted).

Second, the court recognized that "[i]t has been settled for over a century that corporations are persons within the meaning of the Fourteenth Amendment." *Id.* at 780, n. 15.

Third, the court held that states do "not have greater latitude than Congress to abridge freedom of speech." *Id.* at 780, n. 16. Thus, even if corporations are creatures of the state, corporations are **not** limited to only those rights given to them by the state:

> The Massachusetts court did not go so far as to accept [the State's] argument that corporations as creatures of the State, have only those powers granted them by the State. . . . such an extreme position could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies (citations omitted), or with decisions affording corporations the protection of constitutional guarantees other than the First Amendment.

Id. at 778, n. 14.

Thus, it is well-settled that the term "liberty" in the Fourteenth Amendment Due Process Clause protects speech, including speech made by corporations, and the State has no greater latitude than Congress to prohibit protected speech.

II. THE FIRST AMENDMENT PROTECTS POLITICAL SPEECH, REGARDLESS OF ITS SOURCE, AND A BAN ON SUCH SPEECH IS UNCONSTITUTIONAL.

The freedom of speech guaranteed by the First Amendment is the cornerstone of our democracy. It is to be zealously and vigorously safeguarded, and the general principle is that more speech, not less, is good; and attempts to ban speech, especially political speech, usually fail.

A. The First Amendment protects political speech, regardless of its source.

At the heart of the First Amendment's protection is the freedom and ability to speak about politics. *See, Mills v. Alabama*, 284 U.S. 214, 218 (1966). As the *Citizens United* Court stated:

> Speech is an essential mechanism of democracy for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.

Citizens United, 130 S.Ct. at 898 (quotations omitted).

Furthermore, the First Amendment right to engage in political speech extends to corporations: "[P]olitical speech does not lose First Amendment protection 'simply because its source is a corporation.'" *Id.* at 900 (*citing, e.g., Bellotti*, 435 U.S. at 784; *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.'")).

This rule of law stems from the deeply rooted principal that the First Amendment stands against attempts to restrict political speech from certain speakers. *See, Citizens United*, 130 S.Ct. at 898-900 (*citing, United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) and *Bellotti*, 435 U.S. at 784).

> By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.

Citizens United, 130 S.Ct. at 899.

Furthermore, when the State enforces laws that dictate "where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves." *Id.* at 908.

Even Montana recognizes that "[t]he First Amendment applies to associations as well as individuals, and protects the rights of associations to engage in advocacy on behalf of their members." *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 388, 632 P.2d 300, 305 (1981).

Consequently, because political speech is protected by the First Amendment, the State cannot restrict corporate political speech just because the State disfavors corporations or because corporations are not 'natural persons.' *See, Citizens United,* 130 S.Ct. at 899-900.

B. Laws restricting corporate independent expenditures are a ban on political speech.

In *Citizens United,* the court reviewed certain provisions of the Bipartisan Campaign Reform Act of 2002 (as amended) ("BCRA") that prohibited and punished corporations for using their general treasury funds within 30-60 days of an election on speech that expressly advocated for the election or defeat of a candidate. *Id.* at 887. Corporations could create political action committees ("PACs") for these purposes, but these PACs could only be funded by voluntary contributions from stockholders and employees of the corporation. *Id.* at 887-888.

The Supreme Court held that the restriction was an **"outright ban"** on corporate political speech because it prevented "corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public." *Id.* at 897, 907.

Following the decision in *Citizens United*, the Wisconsin Attorney General determined that Wisconsin statute § 11.38(1)(a)1., which also prohibited corporations from making expenditures for the purpose of influencing the election or nomination of a political candidate, was unconstitutional. Like BCRA, the Wisconsin statute prohibited corporate expenditures for political purposes, and took the right to speak away from some speakers (i.e., corporations) and gave it to the others. *See, Wisconsin Attorney General's August 9, 2010 letter*, attached as Exhibit 1 to *Plaintiff's Memorandum of Law In Support of Motion for Summary*

Judgment, (Doc. 23).

Also following *Citizens United*, the Minnesota Chamber of Commerce ("MCC") challenged Minnesota statute § 211B.15, subd. 3, another statute prohibiting corporations from directly or indirectly spending corporate funds "to promote or defeat the candidacy" of a political candidate. *Minnesota Chamber of Commerce v. Gaertner*, Civ. No. 10-426 (D.C. Minn. 2010). The Minnesota Attorney General did not dispute that the statute violated the First Amendment as applied to corporate independent expenditures. Consequently, the district court granted MCC's summary judgment on this issue.

In summary, prohibiting corporations from making independent expenditures to support or oppose candidates or political parties is a ban on political speech protected by the First Amendment.

III. SECTION 227(1), WHICH SINGLES OUT CORPORATIONS AND PROHIBITS THEM FROM SPENDING CORPORATE FUNDS TO SUPPORT OR OPPOSE CANDIDATES OR PARTIES, IS A BAN ON POLITICAL SPEECH AND UNLAWFUL CENSORSHIP.

In Montana, statutes are presumed to be constitutional. *Bean v. State,* 2008 MT 67, ¶ 12, 342 Mont. 85, 179 P.3d 524. The party challenging the statute bears the burden of establishing that the statute infringes upon a constitutional right. *Id. See also, Greely*, 193 Mont. at 382-383, 632 P.2d at 303. Once this burden is met, "the presumption of constitutionality is no longer available." *Greely,* 193 Mont. at 382-383; 632 P.2d at 303.

A. Section 227(1) bans corporate political speech and is, therefore, unconstitutional.

In this case, the presumption of constitutionally is inapplicable to the independent expenditure ban found in Section 227(1). Under BCRA, corporations could spend money on independent expenditures *until 30-60 days before* the election. Section 227(1) is even more restrictive because under its plain language, no corporation (except the media) may spend money from its general treasury funds *at any time* to support or oppose candidates.

> As a 'restriction on the amount of money a person or group can spend on political communications during a campaign,' that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. (Citation omitted) . . . Accordingly, the prohibition on corporate independent expenditures is thus a ban on speech.

Citizens United, 130 S.Ct, at 898.

Also, like BCRA, Section 227 applies to some speakers (i.e., corporations) but not to other speakers (i.e. individuals, unincorporated associations, trade groups, or the media). Thus, Section 227 is nothing more than an attempt by the State to favor one speaker over another and to censor the thoughts and ideas of corporations.

Finally, just as corporations could be penalized under BCRA for spending money to engage in corporate political speech, so to can corporations in Montana. Section 227(4); § 13-37-128. The Commissioner supports the law, and the law has been enforced in the past.

In summary, just like the statute in *Citizens United*, the statute at issue here bans and punishes corporate political speech and favors some speakers over corporations. Consequently, Appelles have met their burden of demonstrating that Section 227(1) abridges their First Amendment right to engage in political speech.

B. The State's arguments that Section 227(1) does not burden political speech must fail.

The State attempts to salvage Section 227(1) by arguing that (1) corporations can create and speak through PACs; (2) MSSA campaigns as a political committee; (3) Champion Painting's owner, Ken Champion, can still speak; and (4) WTP is trying to commit fraud. Despite these arguments, Section 227(1) is still a ban on corporate political speech.

1. Even if corporations can establish a PAC, since a PAC is a separate entity, Section 227(1) still bans corporate political speech.

The State rationalizes the ban on corporate political speech by arguing that corporations may create a PAC in order to spend money to support or oppose political candidates. *Brief of Appellants,* p. 19. This position disregards Supreme Court and Ninth Circuit law. *Citizens United* was unequivocal: **"A PAC is a separate association from the corporation. So the PAC exemption . . . does not allow corporations to speak."** *Citizens United*, 130 S.Ct. at 897. Thus, regardless of whether a corporation can form a PAC, the restriction against corporations is still on "ban on speech." *Id.* at 898.

Similarly, in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), the Ninth Circuit held that Montana Initiative I-125, which prohibited corporations from making independent expenditures to support or oppose ballot initiatives, banned speech. This was true even though voters approved the Initiative, and even though corporations could form a PAC to spend money to support ballot issues. "There is **no question** that a law requiring corporations to make independent expenditures **(even for candidates)** through a segregated fund burdens corporate expression. . . . It follows that I-125 unconstitutionally restricts public discussion in the ballot (initiative) process." *Id.* at 1057 (emphasis added).

These holdings are obvious. It does not matter whether corporations can create PACs; the statute still bans corporate political speech.

2. Section 227 does not exempt so-called "voluntary associations."

Next, the State argues that MSSA is not banned from speaking because it supposedly qualifies as a "voluntary association." *Brief of Appellants,* pp. 19-21. It is undisputed that MSSA is a corporation. As a corporation, it falls within the express language of Section 227(1).

More importantly, **nothing in Section 227 provides an exemption for so-called "voluntary associations."** In fact, in Exhibit D, page 3, attached to the Affidavit of Dennis Unsworth, then-Commissioner Linda L. Vaughey admits, "Montana Code Annotated § 13-35-227 appears on its face to prohibit all corporations, including non-profit corporations, from making contributions or expenditures in connection with candidates, other than through separate, segregated funds."

Furthermore, Exhibit D illustrates the difficulty in knowing whether a corporation qualifies as a "voluntary association." According to the State, to qualify a corporation must meet multiple criteria: (1) it must be formed for the express purpose of promoting political ideas; (2) it cannot engage in business activities; (3) it cannot have shareholders or other persons affiliated so as to have a claim on the corporation's assets or earnings; (4) it cannot be established as a

business corporation; and (5) it cannot accept contributions from business corporations.[3] See, Affidavit of Dennis Unsworth, ¶ 15.

In *Bellotti, supra,* the lower court held that the state could restrict corporate independent expenditures on ballot issues unless the corporation was spending money to support or oppose issues that *materially affected* its business property or assets. 435 U.S. at 777-778. The Supreme Court rejected this test, noting that it "would have an impermissible restraining effect on protected speech[]" because management could not know if a court would disagree with management's judgment, and the expense and burden of litigating the issue would deter corporations from speaking in the first place. *Id.* at 785, n. 21. *See also, Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940).

The "voluntary association" test outlined by the Commissioner is also a prior restraint on speech. A corporation cannot know in advance when it crosses the line between "express purpose" and "incidental purpose;" whether promoting gun safety is a "political idea" or something else; or whether a "business activity" includes selling baked goods or bumper sticker (both of which MSSA has done). If MSSA fails any part of the test at any time, whether intentionally or not, it can be prohibited under Section 227 from making independent expenditures or punished for it after the fact. To avoid the risk of being penalized or having to

[3] Since the definition of and alleged exemption for "voluntary associations" is not codified under Montana law, nothing prevents the Commissioner from eliminating the so-called "voluntary association" today, tomorrow, next week, or next year.

spend time and money litigating the issue, MSSA and other corporations will simply forego making any independent expenditure to support or oppose candidates. This type of prior restraint on political speech is exactly what the Supreme Court wants to avoid.

Thus, Section 227(1), which expressly applies to MSSA, bans MSSA from engaging in political speech.

3. Section 227 does not exempt "sole proprietorships."

The State argues that Champion Painting can speak because it is a "sole proprietorship." *Brief of Appellants,* pp. 21-22. Once again, **nothing** in Section 227 exempts "sole proprietorships." Whether Champion Painting has one shareholder, two shareholders, or more, under the plain language in Section 227(1), it cannot spend its general treasury funds to support or oppose political candidates.

The State argues that Mr. Champion only wants a tax break for money spent on campaign expenditures. This is not true. Champion Painting wants to have the same right as individuals to spend money in support of or in opposition to political candidates. And it wants to use its business name and its voice as a small Montana business to support political candidates that support small businesses, and to oppose candidates that oppose small businesses. *See, Champion Affidavit,* ¶¶ 6-10 (Doc. 24).

4. Section 227 admittedly applies to WTP.

Regarding WTP, the State acknowledges that Section 227(1) applies to WTP, but states that WTP should not be allowed to speak because its only purpose is to circumvent disclosure laws. *Brief of Appellants,* pp. 22-24. The State's assumption regarding WTP's purpose is based on nothing more than speculation and hearsay documents attached to the Affidavit of Robert Hoffman. The first document was supposedly given to Hoffman by some alleged unknown former employee of WTP, and therefore cannot be offered for its truth. And the second document was allegedly sent out by a separate organization with an unknown "affiliation" (whatever that means) to WTP.

Regardless, WTP is a corporation. Therefore, WTP, like every other corporation, has the First Amendment right to engage in protected political speech. If the State takes issue with where WTP is obtaining its income and from whom, then it can and should address these concerns through disclosure laws.

In summary, the First Amendment protects political speech, even if the source of such speech is corporations. Because Section 227(1) expressly prohibits corporations, including MSSA, Champion Painting, and WTP, from making independent expenditures to support or oppose candidates, it bans corporate political speech. Consequently, the independent expenditure ban found in Section 227(1) is unconstitutional unless it survives strict scrutiny.

IV. THE STATE DOES NOT HAVE COMPELLING INTEREST IN BANNING CORPORATE POLITICAL SPEECH, NOR IS THE STATUTE NARROWLY TAILORED TO ACHIEVE ANY ALLEGED COMPELLING INTEREST.

Since Section 227 bans political speech protected by the First Amendment, the law is "'subject to strict scrutiny,' which requires the State to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 130 S.Ct. at 898 (citations omitted). *See also, Greely*, 193 Mont. at 383, 632 P.2d at 303. Although the State argues that it has 4 compelling interests, the Supreme Court has rejected 3 of these interests, and has never recognized the other.

A. The Supreme Court expressly rejected the anti-corruption interest in independent expenditure cases since there is no threat of *quid pro quo* corruption.

The State argues that it has a compelling interest in preventing corruption. However, the *Citizens United* Court explained that a marked difference exists between direct *contributions* to candidates and independent *expenditures*. "Limits on independent expenditures . . . have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. **The anticorruption interest is not sufficient to displace the speech here in question.**" *Citizens United,* 130 S.Ct. at 908. The court also noted that the anticorruption interest was undermined by the fact that 26 states (and even more now) allow corporations to make independent expenditures. *Id.* at 908-909. Thus, according to the Supreme

Court, the anticorruption interest cannot justify Section 227(1)'s prohibition against independent expenditures.

Even though *Citizen United* explicitly rejected the anticorruption interest, the State still asserts it, relying on footnote 26 in *Bellotti*; *Greely*, 632 P.2d at 303; *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm. ("Colorado Republican")*, 533 U.S. 431 (2001); *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999); and *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009).[4] Each of these cases is addressed below.

In *Bellotti*, in footnote 26 the court stated, "The importance of the government interest in preventing the occurrence of corruption has never been doubted." *Bellotti,* 435 U.S. at 788, n. 26. Following up on this in *Citizens United*, the court remarked, "A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. (citation omitted). . . . **[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.**" *Citizens United,* 130 S.Ct. at 909 (emphasis added). Thus, it is now settled that the State may **not** rely on a anticorruption interest to support independent expenditure restrictions.

[4] The State also relies on several law review articles and an Internet article. These secondary sources are not binding on this Court. The law that is binding is the law in *Citizens United*, which unequivocally eliminated the corruption interest in independent expenditure cases in favor expanding the scope of political discussion and debate on political candidates.

Next, the State's reliance on *Greely* is misplaced. *Greely* recognized a compelling interest in preventing corruption in *disclosure cases,* not independent expenditure cases. *Greely*, 632 P.2d at 303.

In *Colorado Republican*, the issue was whether the government could place limits on expenditures made in coordination with a candidate (which, by their very nature, are not independent expenditures). In contrast, the court pointed out that courts should "closely scrutinize" any attempt to limit independent expenditures because "the absence of prearrangement and coordination . . . alleviates the danger that expenditures will be give as *quid pro quo* for improper commitments from the candidate." *Id.* at 441 (*quoting Buckley v. Valeo,* 424 U.S. 1, 47 (1976)).

The State next cites to *Alaska Civil Liberties Union,* wherein the Alaska Supreme Court addressed both contributions and expenditures. The lengthy quote relied on by the State relates to candidate contributions, **not** independent expenditures. 978 P.2d at 617. Furthermore, although the court held that the state could regulate corporate independent expenditures if the corporation was the type that amassed that great wealth, *id.* at 609-610, the case was decided before *Citizens United* and it relied primarily on *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). As explained below, *Austin's* reasoning was expressly overruled in *Citizens United.* Thus, whether this case remains good law in Alaska is questionable.

In one last push, the State endeavors to distinguish *Citizens United* by arguing that corruption is more of a concern in Montana since Montana has more elected positions. *Brief of Appellants*, pp. 31, 33-34. In particular, the State, relying on *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009), speculates that independent expenditures will corrupt Montana judges. In *Caperton*, the defendant corporation received a $50 million verdict against it. While the case was on appeal, the corporation's CEO personally spent $3 million to support a judicial candidate. The candidate beat the incumbent, and then refused to recuse himself from the appeal. On appeal, the Supreme Court determined that the judge should have recused himself.

Although relied on by the State, the *Caperton* Court did not discuss or analyze independent expenditures. Furthermore, the Court in *Citizens United* knew of the *Caperton* case and recognized that "*Caperton's* holding was limited to the rule that the judge must be recused, **not that the litigant's political speech could be banned.**" *Citizens United,* 130 S.Ct. at 910 (emphasis added). Moreover, *Citizens United* also recognized that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. (Citations omitted.) Ingratiation and access, in any event, are not corruption." *Id.*

Finally, regardless of whether corruption is a compelling interest, Section

227(1) is not narrowly tailored to meet the interest. It is under inclusive because it exempts media corporations[5], partnerships, unincorporated associations, and wealthy individuals, and it does not limit the prohibition against independent expenditures to elected officials it believes are particularly susceptible. It is over inclusive because it applies to any expenditure, large or small, and to almost all corporations, regardless of their wealth.

Thus, as matter of law, the State cannot rely upon the anticorruption interest.

B. The Supreme Court expressly rejected the anti-distortion interest because states cannot elevate one voice over another.

The State also defends the statute on the basis that corporate expenditures "would quickly swamp citizens' support for their chosen candidates." *Brief of Appellants,* p. 25. They argue, "In the only campaigns where corporate managers have been allowed to amass their shareholders' money for political purposes, they have dwarfed the political process in Montana." *Id.* However, this is nothing more than an attempt to elevate one speaker over another, an argument adopted in *Austin,* and subsequently discarded and overruled by *Citizens United*, 130 S.Ct. at 913.

In *Austin*, the Supreme Court considered and upheld a new government interest called the "anti-distortion interest," which is an interest against "the

[5] In Justice Burger's concurring opinion in *Bellotti* notes that media corporations "pose a much more realistic threat to valid interests than do appellants and similar entities not regularly concerned with shaping popular opinion on public concern." *Bellotti,* 435 U.S. at 796-797 (Burger, J., concurring).

corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. However, relying in part on *Buckley, Citizens United* expressly rejected the reasoning in *Austin* and overruled it. *Citizens United,* 130 S.Ct at 913.

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to "secure the widest possible dissemination of information from diverse and antagonistic sources" and "to assure an unfettered interchange of ideas for bringing about of political and social change desired by the people."

Buckley, 424 U.S. at 48-49 (citations omitted). Thus, based on *Citizens United* and *Buckley*, the State does not have a compelling interest in protecting or elevating individual speech by prohibiting corporate speech.

> Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors and fallacies in speech of all sorts, including the speech of candidates and elected officials. . . . Government may not suppress political speech on the basis of the speaker's corporate identity. **No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.**

Citizens United, 130 S.Ct. at 912 (emphasis added).

Furthermore, the evidence submitted by the State does not demonstrate that corporate independent expenditures will dwarf speech or the political process. Most of the evidence presented by the State relates to events that happened *almost*

100 years ago in a different world and with *corporations that no longer exist.*

The remaining evidence does not demonstrate that the State's fears will come true. In fact, the State's own evidence- *Independent Expenditures: Independent Expenditures in Five States Alter Political Landscapes*, Exhibit B to the Affidavit of Edwin Bender- illustrates and bolsters the principal that the public has "the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United*, 130 S.Ct. at 899.

The article describes how independent expenditures were spent in 2006 in 5 states, and the they had on the political process. In Alaska, of the $2 million spent on independent expenditures, 95% was used to target 2 ballot measures. Exh. B, pp. 7, 9. NorthWest CruiseShip spent $181,752 to oppose a measure levying a voyage and gambling tax on cruise ships in Alaskan waters. **The voters passed the measure anyway.** *Id.* at p. 7.

In California (which, like Montana, has contribution limits), over $100 million was spent in independent expenditures. *Id.* at p. 11. One committee spent 25% of this amount (or $25 million) to support 4 ballot initiatives. **The voters rejected all 4 ballot measures.** *Id.* at pp. 12, 16-17. Furthermore, of the $5.5 million spent on independent expenditures in the governor campaign, $5.3 million was spent to oppose Governor Schwarzenegger's re-election campaign. **Voters re-elected him anyway.** *Id.* at p. 17.

In Colorado, only $383,535 was spent on independent expenditures. *Id.* at p. 19. Although 3 candidates received a significant boost from the independent expenditures, **the voters rejected all 3 candidates.** *Id.* at pp. 19, 21. Furthermore, 5 individuals made 9% of the independent expenditures, and even they were not successful in getting the candidate they wanted elected. *Id.* at p. 20.

In Maine (which has very limited contribution limits), $1.3 million was spent in independent expenditures, mostly by political parties, particularly the Republican Party. *Id.* at pp. 22, 24. The Republican Party supported a candidate who successfully defeated an incumbent, and 2 other candidates who the voters rejected. *Id.* at p. 24. Also, another PAC spent significant sums to support 3 candidates, 2 of whom lost. *Id.* at p. 24.

In Washington, $6.4 million was spent by individuals and committees. Of those expenditures, 48% was spent to support or oppose legislative candidates; 43% ($2.7 million) was spent to support or oppose Supreme Court justices. *Id.* at p. 27. In the legislative race, $200,000 in independent expenditures was spent to unseat Senator Timothy Sheldon, which was substantially more than the $69,105 his opponent spent to get elected. **Nonetheless, the voters still elected Senator Sheldon.** *Id.* at p. 32.

In the Supreme Court races, $1.4 million was spent to support John Groen against Justice Gerry Alexander. In fact, Justice Alexander "was the focus of an

onslaught of negative advertising, with 92% of independent expenditures directed at Alexander [sic] made in opposition to him." *Id.* at pp. 27, 30. **Alexander still prevailed.** *Id.* at p. 30. In addition, even though $571,150 was spent to support Stephen Johnson against Justice Susan Owens, **Justice Owens prevailed.** *Id.* at p. 27. Finally, $164,659 (91% of the independent expenditures made in this particular race) was spent to oppose Justice Tom Chambers because of his position siding with gay marriage. **Justice Chambers still defeated Jeannette Burrage with nearly 60% of the vote.** *Id.* at p. 31.

What the article reveals, then, is that voters can, and do, get it right.

And not only is this demonstrated in those 5 states, but in Montana as well. Mr. Bender states that corporate interests spent large sums of money on ballot issues in order to have a "significant impact on the outcomes of state-level candidate elections." *Affidavit of Edwin Bender,* ¶ 11. Specifically, Canyon Resources spent $3.5 million to support I-147, which would have reversed the ban on spraying cyanide over ore piles to extract gold and silver. *Id.* at ¶¶ 11, 21. **But the voters rejected this Initiative.**

In other words, merely because corporations spend money to support or oppose candidates, the money they spend does not necessarily decide the outcome.

Finally, even if the State could justify the ban on corporate speech under the anti-distortion interest (which it cannot), the statute is not narrowly tailored to meet

that interest. The statute is over inclusive because it extends to large and small corporations, wealthy corporations and corporations with no excess capital, and for-profit and not-for-profit corporations. Also, the statute is under inclusive because it exempts the media, which has an incredible ability to dictate what the voters will or will not hear, see, or read.

Consequently, as a matter of law, the State's desire to protect individual political speech does not justify its ban on corporate political speech.

C. The State cannot ban corporate political speech in order to enforce disclosure laws.

The next interest asserted by the State is the alleged interest in enforcing disclosure laws. *Brief of Apellants,* pp. 36-38. No case has recognized that the interest in requiring disclosures is a compelling reason to prohibit independent expenditures. In fact, the Supreme Court has made it clear that while states may impose disclosure requirements for independent expenditures, the states may not impose a ceiling on the expenditure themselves. *Citizens United,* 130 S.Ct. at 915, (*citing Buckley,* 424 U.S. at 75-76).

Furthermore, this argument lacks credibility since corporations can make independent expenditures for ballot issues, and the public has just as much interest in knowing who is supporting or opposing ballot issues as it does in knowing who is supporting or opposing candidates or political parties.

Finally, the statute is not narrowly tailored to meet this interest since it

applies to all corporations. It does not distinguish between corporations that make proper disclosures and those that do not, or between those that rely exclusively on their own profits rather than accepting money from other businesses, or between those that have legitimate names from those that may have misleading names.

D. The State does not have a compelling interest in protecting dissenting shareholders.

Last, the State argues that it has a compelling interest in protecting dissenting shareholders from being compelled to fund corporate political speech. *Brief of Appellants,* pp. 39-41. The State claims to be "Masters of the Corporate Form They Create." *Id.* at p. 39. "It is the State that provides for incorporation, and it is the State that 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."" *Id.* at pp. 40-41 (citations omitted).

Both *Bellotti* and *Citizens United* cast this paternalistic approach aside. *Bellotti* considered the shareholder interest in the context of restricting independent expenditures in referendum issues. *Bellotti*, 89 S.Ct. at 792-795. Like the State here, the government argued the statute was necessary to prevent corporations from spending money on issues in which some shareholders might disagree. *Id.* at 792-793. The Supreme Court disagreed for the following reasons: (1) the statute failed to allow independent expenditures even if the shareholders unanimously

agreed to support or oppose a particular referendum issue; and (2) shareholders are capable of protecting themselves through "procedures of corporate democracy," such as electing or removing directors, placing protective provision in their governing documents, filing derivative suits, or withdrawing from the corporation. *Id.* at 794-795.

Citizens United not only adopted the reasoning in *Bellotti*, it also noted that if it adopted the government's argument, then governments could also ban media corporations from speaking if a single shareholder disagreed with a position the media corporation took. *Id.* at 911.

Nevertheless, to justify the shareholder interest, the State grasp upon the phrase "procedures of democracy" found in *Bellotti* to argue that Montana citizens chose to protect themselves through the "procedure of democracy" by enacting the Corrupt Practices Act almost 100 years ago. However, like Initiative I-125 in *Argenbright, supra,* Section 227(1) cannot be saved simply because the people voted for it. Neither the people nor the legislature may create laws abridging the right to engage in political speech. If this were the case, then the people could also pass a law preventing the media from spending money to support or oppose political candidates, and certainly the State does not argue that this is constitutional.

In any event, Section 227(1) is not narrowly tailored to meet the alleged dissenting shareholder interest. It is over inclusive because it applies to all corporations, including Champion Painting, which only has one shareholder, and to MSSA, which has no shareholders. *See, Citizens United*, 130 S.Ct. at 911. Furthermore, it applies regardless of whether the shareholders unanimously agree to support or oppose a candidate, and regardless of whether the members fund the corporation with the knowledge of who will be supported and opposed. *See, Bellotti*, 89 S.Ct. at 794-795.

Also, it is under inclusive because it does not extend to media, whose shareholders might disagree with a position the media is taking. As Justice Burger stated, "I perceive no basis for saying that the managers and directors of the media conglomerates are more or less sensitive to the views and desires of minority shareholder than are the corporate officers generally." *Bellotti,* 435 U.S. at 797 (concurring opinion).

Therefore, based on *Bellotti* and *Citizens United*, as a matter of law the State cannot rely on the dissenting shareholder interest to support Section 227(1)'s ban on corporate political speech.

V. THIS COURT HAS THE POWER TO DECLARE THAT SECTION 227(1) IS UNCONSTITUTIONAL, AND TO ENJOIN ITS ENFORCEMENT.

Without dispute, this Court has the power under § 27-8-201 and § 27-8-202 to declare that Section 227(1) (as it applied to independent expenditures), is unconstitutional. *See, Greely*, 193 Mont. at 399, 632 P.2d at 311 ("If an invalid part of a statute is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected.").

Furthermore, this Court has the power under § 27-19-101 to permanently enjoin the State and all other county attorneys in the State from enforcing that part of Section 227(1) that prohibits corporations from making expenditures that support or oppose political candidates or political parties. *See,* § 27-8-313, ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.") *See also, Argenbright*, 226 F.3d at 1058 (affirming injunction against enforcing unconstitutional statute).

VI. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE APPELLEES' REQUEST FOR ATTORNEY FEES UNDER EITHER THE UNIFORM DECLARATORY JUDGMENT ACT OR THE PRIVATE ATTORNEY GENERAL DOCTRINE.

Finally, Appellees sought their attorney fees and costs for having to bring this action to prevent further abridgment of their First Amendment rights. The District Court awarded them their costs, but denied their request for attorney fees under both § 27-8-313 of the Uniform Declaratory Judgment Act ("UDJA") and

the private attorney general doctrine. The District Court's decision was an abuse of discretion.

A. Attorney fees are "necessary and proper" to provide meaningful relief to the Appellees.

Pursuant to § 27-8-313 of the UDJA, the District Court could award any relief that was "necessary and proper" to provide meaningful relief to parties. "Necessary and proper" relief may include attorney fees. *See, Trustees of Indiana Univ. v. Buxbaum*, 2003 MT 97, ¶ 42 and ¶ 46, 315 Mont. 210, 69 P.3d 633.

In *Buxbaum*, a declaratory relief action, the district court held that the University had a duty to indemnify its insured. The district court then denied the insured's request for attorney fees under the UDJA. *Id.*, ¶ 2. The insured appealed.

After reviewing the statute, legislative intent, and an Ohio case, this Court determined that the statute "contains no provision which narrows the broad, discretionary authority conferred by § 27-8-313, MCA." *Id.*, ¶ 41. The statute is designed "to settle and to afford relief" and is to be "liberally construed and administered" to provide "complete relief to the parties, which may include monetary judgment or coercive relief or both." *Id.* This includes an award of attorney fees. *Id.*, ¶ 42.

In addition, an award of attorney fees should not be based on the non-prevailing party's conduct. *Id.*, at ¶ 40. Rather, it should be based on whether an

award of attorney fees is necessary and proper to provide meaningful relief. An award of attorney fees is "necessary and proper" in the following instances: (1) if the litigations was required to prevent a party from being worse off than if the party's rights had never been declared; (2) if litigation was required to obtain relief; (3) if no other alternative was available to obtain relief; (4) if the defendant possessed what the plaintiff needed; or (5) if the litigation changed the status quo. *Id.*, ¶¶ 43-45.

All of those examples are present in this case. Under the plain language of Section 227(1), the Appellees and all Montana corporations (except the media) were denied a First Amendment right to make independent expenditures to support or oppose political candidates. They were worse off because they could not engage in the same type of political speech as individuals, the media, and other trade associations, which meant that they could not add to the exchange of ideas, thoughts, and political debate as everyone else. Furthermore, even though the *Citizens United* decision should have been a wake up call to the State, the State continued to support Section 227(1) and litigation was required to obtain relief. Finally, the Appellees succeeded in changing the status quo and they, along with all other corporations, can now exercise a vital constitutional right. Thus, based on the guidelines enunciated by this Court in *Buxbaum*, an award of attorney fees is necessary and proper.

Nonetheless, the District Court denied attorney fees under § 27-8-313, stating, "While the Court may have authority to award attorney fees under the Declaratory Judgment Act, it does not feel it is necessary and proper to do so in case. The State's arguments were made in good faith and were supported by briefs that were meticulously researched, well written, and well argued." *Order on Cross-Motions for Summary Judgment,* p. 13 (Doc. 47.)

In basing its decision on the State's conduct in litigation, the District Court abused its discretion. No legal significance is to be placed on the State's conduct. *Buxbaum*, ¶ 40. Rather, the question is whether attorney fees are "necessary and proper" to provide meaningful relief. Under the guidelines enunciated above, in this case meaningful relief clearly includes an award of attorney fees.

B. Attorney fees should be awarded to the Appellees under the private attorney general doctrine.

In addition, the District Court abused had discretion to award attorney fees under the private attorney general doctrine. The private attorney general doctrine was first adopted in *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Comm'rs*, 1999 MT 236, ¶ 67, 296 Mont. 402, 989 P.2d 800 (hereinafter "School Trust).

In *School Trust*, the district court, pursuant to the plaintiff's request, enjoined 11 statutes. *Id.*, ¶ 12. The district court then denied the plaintiff's request for attorney fees, and the plaintiff appealed. *Id.* After adopting the private

attorney general doctrine, this Court identified 3 factors to consider in deciding whether the private attorney general doctrine should be applied: (1) the societal importance of the public policy at issue; (2) the necessity for private enforcement and the burden on the plaintiff; and (3) the number of people standing to benefit from the decision. *Id.* at ¶ 66.

In *School Trust*, the right at issue was based on the Montana Constitution. Furthermore, the plaintiff had no choice but to sue to enforce the statute since the defendant was enforcing it. And finally, the litigation "clearly benefited a large class: all Montana citizens interested in Montana's public schools." *Id.*, ¶ 67. *See also, Serrano v. Priest*, 20 Cal. 3d 25, 141 Cal. Rptr. 315, 369 P.2d 1303 (1977). Thus, based on a review of the factors, this Court held that the district court abused its discretion in not awarding attorney fees to the plaintiff.

In this case, the District Court properly recognized that "the issues here are very important and are grounded in the United States Constitution." *Order on Cross-Motions for Summary Judgment,* p. 13 (Doc. 47.) In fact, the right at issue is based on the First Amendment of the United States Constitution and the right of free speech guaranteed by the 1972 Montana Constitution, Art. II, § 7. Furthermore, the District Court properly recognized that "since the State is required to defend the statute in the present case, private enforcement of these important constitutional rights was required." *Id.* In fact, the State, particularly the

Commissioner, declared their support for Section 227(1) and it has been enforced in the past, thereby leaving the Appellees no choice but to initiate this lawsuit in order to enforce a constitutional right.

But then, surprisingly, the District Court stated that it was "not so sure" that a large number of people would benefit from the decision." *Id.* In *School Trust*, this Court recognized that the district court's decision would benefit "all Montana citizens interested in Montana's public schools." *Id.*, ¶ 67. This case benefits at least the same number of people, if not more. It benefits all Montana corporations and Montana citizens interested in Montana's politics or in any elected official across the State. It finally allows corporations to engage in political speech that has been denied to them for over 100 years, and all citizens will benefit because more ideas and thoughts and views will be added to the political debate. Therefore, under the private attorney general doctrine, the District Court abused its discretion in denying the Appellees' request for attorney fees.

Since this case is ongoing and the total costs and fees are not yet determined, the Appellees respectfully request the opportunity to present their fees and costs to the District Court on remand.

CONCLUSION

Citizens United decidedly established that the right to make independent expenditures to support or oppose political candidates is political speech protected under the First Amendment, even if the source of such speech is a corporation. This right is already being enjoyed by everyone in Montana except corporations, even though the State has no compelling interest in depriving corporations of this right. Therefore, the ban against independent expenditures found in Section 227(1) is unconstitutional, and the State should be enjoined from enforcing it.

Further, under either the UDJA or the public attorney general doctrine, Champion Painting, MSSA, and WTP should be awarded their attorney fees and costs. Despite the holding in *Citizens United*, the State supports Section 227(1), which means the Appellees were forced to initiate this lawsuit to prevent further deprivation of a constitutional right, to change the status quo, and to secure for all corporations and all Montana citizens the benefit received from the additional exchange of ideas, thought, and political debate in the public forum.

Thus, in summary, the Appellees respectfully request that the District Court's decision declaring Section 227(1) (as it applies to corporate expenditures) be affirmed. They further request that the State continue to be enjoined from enforcing the prohibition against corporate expenditures to support or oppose

candidates and/or parties. Finally, they request that this matter be remanded to the District Court for an award of attorney fees.

Respectfully Submitted this 19th day of May, 2011.

Margot E. Barg

Margot E. Barg
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Appellee's Opening Brief to be mailed to:

Ms. Nancy Sweeney Clerk of Lewis and Clark District Court P.O. Box 158 Helena, MT 59624-0158	☑ First-class mail, postage prepaid □ FedEx □ Hand delivery □ Via fax: □ Via Email:
Steve Bullock Montana Attorney General ANTHONY JOHNSTONE JAMES P. MOLLOY 215 North Sanders P.O. Box 201401 Helena, MT 59620-1401	☑ First-class mail, postage prepaid □ FedEx □ Hand delivery □ Via fax: □ Via Email:

By: Margot E. Barg
MARGOT E. BARG

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with 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 is 9,952, excluding Certificate of Service and Certificate of Compliance.

DATED this 19th day of May, 2011.

Margot E. Barg
MARGOT E. BARG