No. 11-1179

In The Supreme Court of the United States

AMERICAN TRADITION PARTNERSHIP, INC., f.k.a. WESTERN TRADITION PARTNERSHIP, INC., et al.,

Petitioners,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

AMICUS CURIAE BRIEF OF FREE SPEECH FOR PEOPLE, AMERICAN SUSTAINABLE BUSINESS COUNCIL, NOVAK AND NOVAK, INC., D/B/A MIKE'S THRIFTWAY, AND THE AMERICAN INDEPENDENT BUSINESS ALLIANCE IN SUPPORT OF GRANTING CERTIORARI

DANIEL J.H. GREENWOOD
HOFSTRA UNIVERSITY SCHOOL OF LAW
121 Hofstra University
Hempstead, NY 11549
(516) 463-7013

BEN T. CLEMENTS
Counsel of Record
ANJALI SAKARIA
CLEMENTS & PINEAULT, LLP
24 Federal Street
Boston, MA 02110
(857) 445-0133
bclements@clementspineault.com

JOHN C. BONIFAZ
FREE SPEECH FOR PEOPLE
48 North Pleasant Street, Suite 304
Amherst, MA 01002
(413) 253-2700

JEFFREY D. CLEMENTS
CLEMENTS LAW OFFICE, LLC
9 Damonmill Square, Suite 4B
Concord, MA 01742
(978) 287-4901

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*

With the parties' consent, *Amici Curiae* file this brief in support of granting *certiorari*.[1]

Free Speech for People is a national non-partisan campaign committed to the propositions that the Constitution protects the rights of people rather than state-created corporate entities; that the people's oversight of corporations is an essential obligation of citizenship and self-government; and that the doctrine of "corporate speech" improperly moves legislative debates about economic policy from the democratic process to the judiciary, contrary to our Constitution. Free Speech for People's thousands of supporters around the country, including in Montana, engage in education and non-partisan advocacy to encourage and support effective government of, for and by the American people.

The American Sustainable Business Council is a coalition of business organizations and businesses committed to advancing policies for a vibrant, fair and sustainable economy. The Council's organizations represent over 100,000 businesses and more than 300,000 entrepreneurs, owners, executives, investors

[1] The parties were notified ten days prior to the due date of this brief of the intention to file and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

and business professionals, including in Montana. The Council led the formation of Business for Democracy, an initiative of companies and business leaders who believe that *Citizens United v. FEC* is in direct conflict with American principles of republican government, democracy, and a fair economy, and who seek a reversal of the decision.

Novak & Novak, Inc., d/b/a Mike's Thriftway, a Montana corporation, has operated a full-service supermarket employing 26 people, in Chester, Montana since 1971. Novak & Novak, Inc. seeks to conduct its business for which it was chartered under Montana law and does not seek to use company assets to influence the outcome of any election. The corporation seeks to uphold the Montana Corrupt Practices Act to ensure that all businesses are treated equally under Montana law and to prevent the undue influence that would occur by allowing corporations to influence electoral races.

The American Independent Business Alliance (AMIBA) is a Bozeman, Montana-based non-profit organization helping communities implement programs to support independent locally-owned businesses and maintain ongoing opportunities for entrepreneurs. AMIBA supports more than 80 affiliated community organizations across 35 states, including three Montana cities and towns. AMIBA's affiliates represent approximately 22,000 independent businesses covering virtually every sector of business, many of which face direct competition from multinational and other large corporations. Many of these large corporations

have converted their economic power into political favors that disadvantage small business. AMIBA seeks to uphold the Montana Corrupt Practices Act to help ensure market competition, not political favors, determine the success or failure of businesses.

SUMMARY OF ARGUMENT

In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Court rejected several justifications for restrictions on corporate spending on elections partly because they were not pressed by the Government or not supported by the record before the Court. As a result, the decision relied on several largely unchallenged assumptions: first, that unlimited "independent" spending on elections never leads to corruption or the appearance of corruption; second, that corporations are the functional equivalent of people and entitled to the same rights as actual people for First Amendment purposes; and third, that preventing unlimited expenditures in our electoral process from drowning out the voices of all but an elite class of global corporations and a fraction of the wealthiest Americans may never serve as a proper governmental interest. The public record and experience developed in the two years since *Citizens United*, during which our election process has come to be dominated by super PACs funded by the corporate and wealthy elite, has placed all three premises in serious doubt. Continued adherence to them will only serve to undermine First Amendment values and the integrity

of our republican democracy itself. The Court should grant *certiorari* and reconsider *Citizens United* in light of these developments over the past two years.

ARGUMENT

I. In the Face of the Massive Post-*Citizens United* "Independent" Spending By Corporate and Wealthy Elites to Influence Political Candidates, this Court's Assumption that Unlimited Independent Expenditures Never Lead to Corruption or the Appearance of Corruption Is No Longer Sustainable as a Matter of Fact or Constitutional Principle.

A fundamental *factual* predicate of *Citizens United* was the Court's determination "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 130 S. Ct. at 909. In reaching this conclusion, the Court relied heavily on the similar holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), with respect to independent expenditures of persons. 130 S. Ct. at 908. Whatever the validity of this assumption in 1976 when *Buckley* was decided or even in 2010 when *Citizens United* was decided, it flies in the face of the reality of the super PAC-dominated electoral politics of 2012.

The Court's unleashing of unlimited corporate funds and the post-*Citizens United* rise of super PACs

have fundamentally altered the nature of our electoral politics and political fundraising:

- Total outside spending, excluding party committees, during the 2010 elections was over $300 million, more than quadruple the amount during the 2006 elections. http://www.opensecrets.org/outsidespending/cycle_tots.php.[2]

- Independent expenditures from outside groups in the 2012 presidential election year totaled $95 million by mid-April 2012, more than quadruple the amount for the same time frame in the 2008 election year. http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=Y&chart=N#viewpt.

- Outside spending, excluding party committees, totaled $104 million by mid-April in the 2012 election year, of which $87 million was spent by super PACs. http://www.opensecrets.org/outsidespending/index.php.

- From 2010 through 2011, 17% of the itemized funds raised by super PACs – more than $30 million – came from 566 for-profit businesses. Blair Bowie, U.S. PIRG, & Adam Lioz, Dēmos, *Auctioning Democracy: The Rise of Super PACs & the 2012 Election* 1, 4 (2012), http://

[2] OpenSecrets.org is a non-partisan website run by the Center for Responsive Politics to track money in American politics and its effect on elections and public policy. http://www.opensecrets.org/about/index.php.

www.demos.org/sites/default/files/publications/AuctioningDemocracy-withAppendix.pdf.[3]

To enjoy the protections provided by *Citizens United* and *Buckley*, contributions made to super PACs are nominally "independent." But the political reality is that everyone – the candidates, the media, and any citizen who pays attention – knows full well which super PAC supports which candidate: Restore Our Future is pro-Romney (http://restoreourfuture.com/about/); Red White and Blue Fund is pro-Santorum (http://rwbfund.com/); Priorities USA Action is pro-Obama (http://www.prioritiesusaaction.org/about); and Winning Our Future is pro-Gingrich (http://www.winningourfuture.com/about). *See* Phil Hirschkorn, *Super PAC Donors by the Numbers*, CBS News, March 22, 2012 (updated March 28), http://www.cbsnews.com/8301-503544_162-57402073-503544/super-pac-donors-by-the-numbers/. *See also Citizens United*, 130 S. Ct. at 961-62 (Stevens, J., concurring in part and dissenting in part) (record establishes that elected officials are fully aware and appreciative of the corporations and unions that pay for advertising benefiting their campaigns).

Indeed, specific super PACs and campaigns are so connected that their nominal "independence" only heightens the appearance of corruption. The major

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[3] Dēmos is a non-partisan research and advocacy organization. Bowie & Lioz, *supra*. The U.S. PIRG Education Fund is a non-partisan research and public education organization. *Id*.

presidential super PACs are headed by persons previously involved in the candidate's campaign. http://factcheck.org/2011/09/restore-our-future/; http://factcheck.org/2011/09/priorities-usapriorities-usa-action/; http://factcheck.org/2012/01/winning-our-future.[4] Candidates openly express their support for and encourage donations to super PACs supporting their candidacy. In July 2011, Romney appeared at a fund-raising event for Restore Our Future (*see* Peter H. Stone, The Center for Public Integrity, *Democrats and Republicans Alike are Exploiting New Fundraising Loophole*, iWatch News, July 27, 2011 (updated August 19, 2011), http://www.iwatchnews.org/2011/07/27/5409/democrats-and-republicans-alike-are-exploiting-new-fundraising-loophole), and in February 2012, President Obama signaled to wealthy supporters to contribute to the super PAC supporting him and that officials from the Obama administration would appear on behalf of Obama at super PAC fundraising events (Jeff Zeleny & Jim Rutenberg, *Obama Yields in Marshaling of 'Super PAC*,' N.Y. Times, February 6, 2012, http://www.nytimes.com/2012/02/07/us/politics/with-a-signal-to-donors-obama-yields-on-super-pacs.html).[5] And the

[4] FactCheck.org is a nonpartisan project of the Annenberg Center for Public Policy that aims to reduce the level of deception and confusion in U.S. politics. http://factcheck.org/about/.

[5] The Federal Election Commission has concluded that "officeholders and candidates, and national party officers, may attend, speak at, and be featured guests at fundraisers for [a super PAC] at which unlimited individual, corporate, and labor organization contributions are solicited, so long as they restrict

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Romney campaign and its supporting super PAC share the same political consultant. *Campaign Finance* (*Super PACs*), N.Y. Times, updated April 12, 2012, http://topics.nytimes.com/top/reference/timestopics/subjects/c/campaign_finance/index.html.

The corrupting influence of corporate spending is not limited to super PACs. In 2010, S&P 500 companies spent $1.1 billion, contributing $112 million to state contests, $30.8 million to nationally registered political committees, and $979.3 million on federal lobbying efforts. Heidi Welsh & Robin Young, Sustainable Investments Institute, *Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies* 3-4, 9 (2011), http://www.irrcinstitute.org/pdf/Political_Spending_Report_Nov_10_2011.pdf. The wealthiest corporations (over $10 billion annual revenue) were responsible for most of these contributions – $915 million – representing 93 percent of the S&P 500's total. *Id*. at 2, 59. These numbers do not include corporate contributions to non-profit groups, which then funnel the money into political campaigns and lobbying efforts. *Id*. at 14.[6]

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any solicitation they make to funds subject to the limitations, prohibitions and reporting requirements of the [Federal Election Campaign] Act [of 1971]." FEC Advisory Opinion 2011-12 (June 30, 2011), http://saos.nictusa.com/saos/searchao (enter AO number "2011-12").

[6] For example, in the 2010 election cycle, the U.S. Chamber of Commerce spent $31,207,114 on such efforts. Public Citizen's Congress Watch, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process* 10 (2011),

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Major candidates have become so thoroughly dependent on "independent" expenditures that there is no longer a meaningful distinction between independent expenditures and campaign contributions, except that independent expenditures are limitless and thus pose a far greater danger of corruption and the appearance of corruption. As of mid-April 2012, super PACs aligned in support of a specific presidential candidate spent approximately $80 million in this

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http://www.citizen.org/documents/Citizens-United-20110113.pdf. While the U.S. Chamber of Commerce keeps its donor list secret, million dollar plus corporate donations have coincided with specific lobbying efforts by the Chamber. In October 2010, Prudential Financial donated $2 million to the Chamber to kick off a national advertising campaign to weaken federal financial regulations and Dow Chemical donated $1.7 million to the Chamber just as the group aggressively fought proposed rules that would impose tighter security requirements on chemical facilities. Eric Lipton, Mike McIntire & Don Van Natta Jr., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N.Y. Times, October 21, 2010, http://www.nytimes.com/2010/10/22/us/politics/22chamber.html?_r=1&pagewanted=all. The National Rifle Association (NRA) in 2010 spent more than $7.2 million on independent expenditures at the federal level (http://www.opensecrets.org/orgs/summary.php?id=D000000082) and endorsed candidates in about two-thirds of congressional races in the mid-term elections (*The NRA's Electoral Influence*, Washington Post, December 15, 2010, http://www.washingtonpost.com/wp-srv/special/nation/guns/nra-endorsements-campaign-spending/). Of those candidates that the NRA endorsed, 80% won. *Id*. A recent report on the NRA reveals that, "[s]ince 2005, corporations – gun related and other – have contributed between $19.8 million and $52.6 million to the NRA. . . ." Josh Sugarmann & Marty Langley, Violence Policy Center, *Blood Money: How the Gun Industry Bankrolls the NRA* 1 (2011), http://www.vpc.org/studies/bloodmoney.pdf.

election year cycle. http://www.opensecrets.org/pres12/superpacs.php. As candidates increasingly depend on super PACs and other independent expenditures, they are far more likely to be corruptly influenced by the corporations and wealthy persons who fund those expenditures than by contributors of capped contributions. *See* Nicholas Confessore, *SuperPacs Step Up as GOP Candidates Bleeding Cash*, N.Y. Times, Denver Post, Mar. 21, 2012, http://www.denverpost.com/nationworld/ci_20219046/super-pacs-step-up-gop-candidates-bleeding-cash?source=rss ("Republican presidential candidates are running low on campaign cash . . . leaving them increasingly reliant on a small group of supporters funneling millions of dollars in unlimited campaign contributions into super PACs.") To cite just one example, when one wealthy person, Sheldon Adelson, and his family contribute $16.5 million to a candidate super PAC over the course of a few weeks (*see* Hirschkorn, *supra*), it cannot be seriously doubted that it presents a danger of corruption and its appearance exponentially greater than a $2,500 direct contribution to the candidate's campaign, which under this Court's precedent may be prohibited to prevent corruption or the appearance of corruption. *Buckley*, 424 U.S. at 29.[7]

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[7] While Sheldon Adelson is in a super elite class, he is not alone: Harold Simmons: $15.4 million to Republican super PACs; Bob Perry: $6.6 million to Republican super PACs.; Jeffrey Katzenberg: $2 million to pro-Obama super PAC.; and Foster Friess: $1.6 million to pro-Rick Santorum super PAC. Hirschkorn, *supra*.

This Court has consistently recognized that in the face of a genuine danger of corruption and appearance of corruption of this magnitude, Congress and the states cannot be left powerless to act. *E.g.*, *Buckley*, 424 U.S. at 27 ("Congress could legitimately conclude that the avoidance of the appearance of improper influence [is critical] 'if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) (It "has never been doubted" that legislatures may prevent "the problem of corruption of elected representatives through the creation of political debts."); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (government may act to curb "undue influence on an officeholder's judgment, and the appearance of such influence"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) (corruption includes "broader threat from politicians too compliant with the wishes of large contributors").

Further, from *Buckley* to *Citizens United*, the Court has recognized that a determination that independent expenditures presented a danger of corruption or its appearance might justify restrictions on expenditures. In *Buckley*, the Court recognized that preventing corruption or the appearance of corruption "might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.'" *FEC v. Wisconsin Right to*

Life, Inc., 551 U.S. 449, 478 (2007) (Roberts, C.J.) (quoting *Buckley*, 424 U.S. at 45); *see also Citizens United*, 130 S. Ct. at 911 ("If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern."); *id.* at 965 (Stevens, J., concurring in part and dissenting in part) ("Many corporate independent expenditures [have] become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements.") Indeed, the Court has recently treated independent expenditures made on behalf of an elected judge as equivalent to "contributions" and determined that the expenditures created a "serious, objective risk of actual bias," *i.e.*, corrupt influence, on the part of the judge. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 886 (2009).[8]

Applying these principles to today's environment, it can no longer be questioned that independent expenditures create a danger of corruption – including *quid pro quo* corruption – and the appearance of corruption. As Judge Nelson observed in his dissenting opinion below:

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[8] *Cf. Nixon*, 528 U.S. at 409 (Kennedy, J., dissenting) (suggesting that Buckley's limitation on expenditures should be overruled to allow Congress or the states to "devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising").

> In the real world of politics, the "*quid pro quo*" of both direct contributions to candidates and independent expenditures on their behalf is *loyalty*. And, in practical effect, experience teaches that money corrupts, and enough of it corrupts absolutely.

W. Tradition P'ship, Inc. v. Attorney Gen. of State, 271 P.3d 1, 35 (Mont. 2011) (Nelson, J., dissenting) (citing *Caperton*, 556 U.S. 868). To deprive the states and Congress of the power to address the undeniable threat of corruption now posed by corporate and other independent expenditures places our republican democracy in grave jeopardy. *See Burroughs v. United States*, 290 U.S. 534, 545 (1934) ("To say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.")

II. This Court's Precedents Establishing that the Constitution Protects the Rights of Natural – Not Artificial – Persons Require Reconsideration and Rejection of the Principle that the Government Cannot Regulate Independent Expenditures Based on the Corporate Source of the Expenditures.

The challenge to Montana's regulation of corporate expenditures in state elections, like the challenge to the federal restrictions in *Citizens United*, presumes that corporations are the constitutional equivalent of human beings for purposes of free speech

rights under the First and Fourteenth Amendment. In *Citizens United*, the Court relied on this proposition, apparently without challenge from the Government, and cited to a series of decisions recognizing free speech rights in cases involving corporate parties, with no analysis of whether the rights at issue belonged to the corporate party or specific people acting through the corporation. 130 S. Ct. at 899-900. Thus, *Citizens United* accepted that corporations have free speech rights separate and apart from the rights of any particular persons (*e.g.*, 130 S. Ct. at 898-900, 904-05 (treating corporations as "speakers" and "voices")), without analyzing the fundamental question whether the First Amendment – or in this case, the free speech component of the Fourteenth Amendment – was ever intended to protect corporations. An examination of the historical record and the nature of corporations – an examination not undertaken in *Citizens United* or the cases on which it relied – demonstrates that the First and Fourteenth Amendment protect the rights of actual people and not corporations.[9]

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[9] Of course, persons acting through corporations (or other legal entities) retain all of their constitutional rights, and corporations often have standing (entirely apart from any theory of corporate personhood) to assert the constitutional rights of actual people. *See*, *e.g.*, *NAACP v. Ala., ex rel. Patterson*, 357 U.S. 449, 458-59 (1958) (NAACP corporation's "nexus" with its members provided standing to assert members' constitutional rights; declining to rely on asserted constitutional rights of corporation itself). *See also Bellotti*, 435 U.S. at 808, n.8 (White, J., dissenting) (First Amendment requires state "neutrality" in

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The corporate legal form is not fundamentally different today than when Chief Justice Marshall for the Court explained that a corporation, as a "mere creature of law . . . possesses only those properties which the charter of its creation confers upon it. . . ." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). Today, corporations remain "entities whose very existence and attributes are a product of state law." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89-91 (1987).

No evidence suggests that the Framers or the American people intended to include corporations in the Bill of Rights. Indeed, the evidence compels the opposite conclusion. The Framers believed, as James Wilson – signer of the Declaration of Independence, member of the Continental Congress, a drafter of the Constitution, and among the nation's first six Justices – stated, that corporations needed to "be erected with caution, and inspected with care," lest they "counteract[ ] the design of their original formation." James Wilson, *Of Corporations*, *in Collected Works of James Wilson* Vol. 2, ch. X., (Kermit L. Hall & Mark David Hall eds., 2007), http://oll.libertyfund.org/title/2074/166648/2957866. James Madison viewed corporations as "a necessary evil" subject to "proper limitations and guards." James Madison, *To J.K. Paulding*, *in The Writings of James Madison* Vol. 9 (Gaillard Hunt ed., G.P. Putnam's Sons, 1900), http://oll.libertyfund.

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allowing businesses engaged in dissemination of information to take advantage of corporate form available to other businesses).

org/title/1940/119324. Thomas Jefferson hoped to "crush in it's [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country." Thomas Jefferson, *To George Logan*, *in The Works of Thomas Jefferson* Vol. 12 (Paul Leicester Ford ed., Fed. Ed., G.P. Putnam's Sons, 1904-5), http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=808&chapter=88352&layout=html&Itemid=27. As Justice Stevens concluded in *Citizens United*, the Framers "had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." 130 S. Ct. at 950.

Likewise, since the Founding, the American people and their leaders have recognized the need to prevent corporations from using their economic power to dominate politics. President Jackson warned that the people must choose "whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions." Andrew Jackson, Fifth Annual Message to Congress (Dec. 3, 1833), http://millercenter.org/scripps/archive/speeches/detail/3640. "Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters," warned President

Cleveland. Grover Cleveland, Fourth Annual Message (Dec. 3, 1888), http://millercenter.org/president/speeches/detail/3758. President Theodore Roosevelt successfully called on Congress to "prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly." Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), http://millercenter.org/scripps/archive/speeches/detail/3778.

This Court, too, has, through most of its history, recognized the distinction between people, whose rights are enshrined in the Constitution, and corporations, which as government-created entities are generally entitled only to the rights established by the law under which they are created. In *Bank of Augusta v. Earle*, 38 U.S. 519 (1839), the Court rejected a claim that a corporation was protected by the Privileges and Immunities Clause, because "[t]he only rights it can claim are the rights which are given to it [by the charter], and not the rights which belong to its members as citizens of a state. . . ." *Id*. at 587. *See also Paul v. Virginia*, 75 U.S. 168, 181 (1868) (a corporation is a "mere creation of local law"), *overruled as to unrelated issue, United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

The Court continued through the twentieth century to distinguish between people and corporations. For example, the Court has rejected claims that corporations are entitled to the protection of "liberty," because "[t]he liberty referred to in that [Fourteenth] Amendment is the liberty of natural, not artificial, persons." *Northwestern Nat. Life Ins. Co. v. Riggs*, 203

U.S. 243, 255 (1906); *see also New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 387 (1918) (same); *Asbury Hosp. v. Cass County, N.D.*, 326 U.S. 207 (1945) (rejecting corporate privileges and immunities claim).

The Court has applied similar reasoning in holding that corporations have no Fifth Amendment right against self-incrimination:

> [T]he corporation is a creature of the state. . . . , incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. . . . Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. . . . While an individual may lawfully refuse to answer incriminating questions . . . , it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

Hale v. Henkel, 201 U.S. 43, 74-75 (1906), *overruled as to unrelated issue, Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52 (1964). The Court has since reaffirmed *Hale*'s rejection of corporate self-incrimination rights:

> The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such

> organizations so as to nullify appropriate governmental regulations. . . . [T]he privilege against self-incrimination [is] limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

United States v. White, 322 U.S. 694, 700-01 (1944).

Again emphasizing the special "public attributes" of corporations, the Court has rejected corporate privacy claims under the Fourth Amendment:

> [C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.

United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (citations omitted).

The Court has recognized limited Fourth Amendment rights in the context of corporate activity, but it has done so with respect to the privacy interests of a specific person (the corporate General Manager) where the intrusion of "privacy was not based on the nature of [the corporation's] business, its license or any regulation of its activities." *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353-54 (1977). The Court made clear the limitation of its holding, noting that "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be

permissible in a purely private context." *Id.* at 353. *See also Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 205 (1946) ("corporations are not entitled to all of the constitutional protections which private individuals have").

The Court has also applied the First Amendment in cases involving corporate parties, but, with the exception of *Bellotti*, these cases have implicated the free speech or press interests of actual, specific persons acting through a corporation, and, unlike the case currently before the Court, have not involved laws directed specifically at regulating corporate activity. *See Citizens United*, 130 S. Ct. at 899-900 (collecting free speech and press cases involving corporate parties); *Bellotti*, 435 U.S. at 778, n.14 (same). These cases happened to involve corporate parties but they concerned generally applicable restrictions. *See Bellotti*, 435 U.S. at 822, n.1 (Rehnquist, J., dissenting) ("Our prior cases [applying the First Amendment in cases involving corporate parties] have discussed the boundaries of protected speech without distinguishing between artificial and natural persons.").

To the extent these cases have been construed to create corporate First Amendment rights independent of the rights of any actual persons, as suggested by the majority in *Citizens United*, this approach fails to account for the special public features of corporations – features which have led this Court to reject claims of corporate constitutional rights in various other contexts. Indeed, failing to distinguish between corporations and people threatens to

undermine, rather than protect, First Amendment speech rights. As Justice Rehnquist aptly observed:

> A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist.

Bellotti, 435 U.S. at 825-26 (Rehnquist, J., dissenting). *See also id*. at 809-10 (White, J., dissenting) ("[The Government] could permissibly conclude that not to impose limits upon the political activities of corporations would [place] it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities. Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas.")[10]

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[10] While *Citizens United* is certainly not the first case to adopt the fiction of corporate constitutional personhood, this is a concept of dubious historical and doctrinal support. *See generally Bellotti*, 435 U.S. at 824 (Rehnquist, J., dissenting) ("mere

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In the spirit of this Court's long history of distinguishing corporations from persons, one of the dissenting Justices below captured the danger of eroding that distinction:

> Corporations are artificial creatures of law. As such, they should enjoy only those powers – not constitutional rights, but legislatively-conferred powers – that are concomitant with their legitimate function, that being limited-liability investment vehicles for business. Corporations are not persons. Human beings are persons, and it is an affront to the inviolable dignity of our species that courts have created a legal fiction which forces people – human beings – to share fundamental, natural rights with soulless creations of government. Worse still, while corporations and human beings share many of the same rights under the law, they clearly are not bound equally to the same codes of good conduct, decency, and morality, and they are not held equally accountable for their sins. Indeed, it is truly ironic that the death penalty and hell are reserved only to natural persons.

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creation of a corporation does not invest it with all the liberties enjoyed by natural persons. . . ."). Indeed, the case traditionally cited as establishing that corporations are people for purposes of the Fourteenth Amendment, *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886), did not actually decide that or any other federal constitutional question. *Id*. at 416 ("As the judgment can be sustained upon this [state law] ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.")

W. Tradition P'ship, 271 P.3d at 36 (Nelson, J., dissenting).

Given the importance of the issues raised by this case and the threat to First Amendment values created by the activities unleashed by *Citizens United*, this Court should grant *certiorari* and address whether the challenge to the Montana Corrupt Practices Act, Mont. Code Ann. 13-35-227, must fail because the Act's restriction of corporate spending does not restrict the free speech of any actual persons.

III. This Court Has Repeatedly Recognized the Government's Legitimate Role in Preventing the Use of Wealth or Other Means of Amplifying Speech From Drowning Out Other Voices and Should Now Reaffirm That Principle in the Context of Campaign Finance Law.

In *Citizens United*, the Court observed that: "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." 130 S. Ct. at 899. Ironically, by unleashing unlimited amounts of unregulated corporate treasury funds into our elections, this Court has done precisely that. People exist with or without government; corporations only exist to the extent that governments create them, define them, and provide special legal protections and benefits to facilitate their economic

activities and growth. By facilitating the accumulation of vast amounts of corporate wealth through special benefits and protections, including limited liability and perpetual existence, the government has already created a special class that enjoys special economic benefits and powers, enjoyed by no human being. To then hold the government powerless to prevent those corporate entities from spending unlimited amounts of the resulting wealth to influence our elections is to take "the right to speak from some [all but a tiny elite of mega-wealthy individuals] and giving it to others [government-created corporations]," thereby depriving regular people "of the right to use speech to strive to establish worth, standing, and respect for" their voices.

Indeed, it is precisely this interest in protecting the rights of all persons to "use speech to establish worth, standing and respect" for their views that has led the Court in other areas to recognize the government's authority to prevent the use of wealth or other property from being used to enhance the speech of some, while threatening to drown out the voices of others. *See*, *e.g.*, *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding restrictions on sound truck speech); *id*. at 97 (Jackson, J., concurring) (freedom of speech does not include "freedom to use sound amplifiers to drown out the natural speech of others"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387 (1969) (the broadcaster's right of free speech "does not embrace a right to snuff out the free speech of others.") As Justice Breyer has explained:

> The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many – in Congress, for example, where constitutionally protected debate, Art. I, § 6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate.

Nixon, 528 U.S. at 402 (Breyer, J., concurring).

This Court's endorsement of prohibitions of vote-buying to prevent undue influence over election results, *see Brown v. Hartlage*, 456 U.S. 45, 54-55 (1982), similarly supports campaign spending restrictions to prevent undue influence in our elections.

> The critical problem with vote-buying is not corruption; it is rather that allowing the practice would give the wealthiest individuals a huge effect over political elections, making even their relatively minor preferences matter immensely and the possibly intense preferences of the poor matter not much at all. This same concern, of course, explains why a state has a valid interest in leveling the playing field with respect to campaign contributions [and expenditures].

Ognibene v. Parkes, 671 F.3d 174, 200 (2d Cir. 2012) (Calabresi, J., concurring); *id*. at 197 n.2 ("much of what I say applies with equal force to restrictions on independent expenditures").

The government's interest in preventing expenditures by the wealthy from drowning out the rest is even more compelling in today's economic climate, in which only mega-wealthy corporations and individuals can participate in a meaningful way.

> The wider the economic disparities in a democratic society, the more difficult it becomes to convey, with financial donations, the intensity of one's political beliefs. People who care a little will, if they are rich, still give a lot. People who care a lot must, if they are poor, give only a little.

Id. at 199. And these concerns have been exacerbated in the post-*Citizens United* world in which the wealthiest individuals and corporations magnify their dominant impact through super PACs. *See* http://www.opensecrets.org/outsidespending/summ.php?disp=D ("The top 100 individual donors to super PACs, along with their spouses, represent just 3.0% of all individual donors to super PACs, but 79.4% of the money they delivered.") (emphasis omitted); Bowie & Lioz, *supra*, at 7 (For the years 2010 and 2011, "[m]ore than half of itemized Super PAC money came from just 37 people giving at least $500,000.")

Restrictions such as the Montana Corrupt Practices Act, directed specifically at corporate spending, are particularly essential, because the significant wealth advantage of the corporations is facilitated by the government itself.

> [The government's interest] is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process. . . . The State need not permit its own creation to consume it.

Bellotti, 435 U.S. at 809 (White, J., dissenting).

In view of the increasingly dominant role of corporate and private independent expenditures in our electoral politics, this Court should grant *certiorari* and reexamine whether its long-standing precedent permitting regulations designed to prevent the use of wealth from drowning out other voices provides an additional basis for upholding restrictions on independent expenditures.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant *certiorari*, revisit *Citizens United*, and affirm the judgment below.

Respectfully submitted,

BEN T. CLEMENTS
Counsel of Record
ANJALI SAKARIA
CLEMENTS & PINEAULT, LLP
24 Federal Street
Boston, Massachusetts 02110
(857) 445-0133
bclements@clementspineault.com

DANIEL J. H. GREENWOOD
MAURICE A. DEANE SCHOOL OF LAW
HOFSTRA UNIVERSITY
121 Hofstra University
Hempstead, New York 11549
(516) 463-7013

JEFFREY D. CLEMENTS
CLEMENTS LAW OFFICE, LLC
9 Damonmill Square, Suite 4B
Concord, Massachusetts 01742
(978) 287-4901

JOHN C. BONIFAZ
FREE SPEECH FOR PEOPLE
48 North Pleasant Street, Suite 304
Amherst, Massachusetts 01002
(413) 253-2700