IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 11-0081

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

Appellees,

vs.

ATTORNEY GENERAL OF THE STATE OF MONTANA; and MONTANA COMMISSIONER OF POLITICAL PRACTICES

Appellants.

AMICUS BRIEF OF THE CENTER FOR COMPETITIVE POLITICS

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

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In the aftermath of *Citizens United*, Montana's law prohibiting corporate independent expenditures was placed in constitutional jeopardy, along with similar laws in 23 other states. Citizens United *and the States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (January 4, 2011)[1]. The Attorney General of Montana seeks to defend that law, despite conclusions across the country—through attorney general opinions, administrative agency rulings, and state supreme court decisions—that it is "clear that under *Citizens United*" that other states' bans on corporate independent expenditures are unconstitutional. *Ethics Advisory Opinion No. 489*, TEXAS ETHICS COMMISSION (2010), http://www.ethics.state.tx.us/opinions/489.html. Further, many states have replaced these unconstitutional statutes with other tools, such as disclaimer and disclosure provisions, that the Supreme Court has suggested are constitutional.

The Attorney General's defense of the current law relies on arguments that have already been directly dismissed by the Supreme Court, and which furthermore do not serve an anti-corruption rationale. The Attorney General also offers as a peculiar and conclusory view of history which asserts that the removal of the ban on corporate expenditures will return Montana—and no other state in

[1] http://www.ncsl.org/default.aspx?tabid=19607

the country—to the early Twentieth Century's history of malfeasance and corporate dominance.

ARGUMENT

I. Other states have responded to *Citizens United* constructively and constitutionally without seeking *ad hoc* judicial exceptions to the First Amendment.

When *Citizens United* was handed down, a majority of states already permitted corporate independent expenditures. Of the remaining states, only Montana has waged a "court battle to maintain the ban." Robert Barnes, WASH. POST, May 22, 2011, *Citizens United Decision Reverberates in Courts Across Country*[2]. Other states quickly realized that their statutes were unconstitutional, and many enacted new laws in order to regulate corporate expenditures in a constitutional manner.

A. States quickly came to the conclusion that *Citizens United* invalidated their bans on corporate expenditures.

The Attorney General's irrepressible insistence that *Citizens United* does not affect Montana's ban on corporate independent expenditures contrasts starkly with the behavior of other states whose laws were affected by the Court's ruling. These politically and regionally diverse states swiftly recognized that their bans on

[2] http://www.washingtonpost.com/politics/citizens-united-decision-reverberates-in-courts-across-country/2011/05/20/AFbJEK9G_story.html

corporate expenditures no longer squared with the meaning of the First Amendment, and reacted accordingly.

For instance, in Colorado, Governor Bill Ritter asked for an advisory opinion from that state's Supreme Court as to whether Colorado's ban on corporate and union independent expenditures was unconstitutional in light of *Citizens United*. Colorado, like Montana and Alaska, has great natural resource wealth and a long experience of corporations interested in putting those resources toward commercial uses. Mary Harris Jones, THE AUTOBIOGRAPHY OF MOTHER JONES, 54 (Dover Publications, Inc. 2004) (1925); ("The state of Colorado belonged not to a republic but to the Colorado Fuel and Iron Company, the Victor-Company and their dependencies. The governor was their agent. The militia under Bell did their bidding.") Nonetheless, the Court, after accepting amicus briefs from a wide range of state officials and advocacy organizations, handed down an exceptionally short decision flatly stating that the laws were incompatible with the First Amendment. *In re Interrogatories Propounded by Governor Ritter, Jr., Concerning Effect of Citizens United v. Fed. Election Comm'n, 558 U.S. ---- (2010) on Certain Provisions of Article XXIII of Constitution of State*, 227 P.3d 892, 894 (Colo. 2010).

Similarly, in Massachusetts, the Office of Campaign and Political Finance issued a one-page statement asserting that *Citizens United* "call[ed] into question"

the state's longstanding prohibition on corporate and union independent expenditures. *Statement by OCPF on* Citizens United v. Federal Elections Commission, MASSACHUSETTS OFFICE OF CAMPAIGN AND POLITICAL FINANCE (2010)[3]. The Office quickly held that, after *Citizens United,* the ban could not be reconciled with the First Amendment. Consequently, both corporations and unions could make independent expenditures, but would be subject to disclosure rules. *Id.*

The Texas Ethics Commission responded to *Citizens United* by declaring the state's ban on corporate expenditures unconstitutional under the First Amendment. *Ethics Advisory Opinion No.* 489. But the Commission noted that disclaimer statutes were not affected by the Supreme Court's ruling. *Id.* Meanwhile, even though Texas's law was silent on the issue of mandating disclosure from corporations (unsurprising, given that the unconstitutional statute banned such contributions in the first place), the Commission "determine[d that] the legislature's intent" was that if such expenditures were legal, they ought to be subject to the same disclosure regimen as individuals. *Id.*

B. Some states enacted new campaign finance reforms in order to regulate, but not ban, corporate expenditures.

As the Attorney General's brief correctly maintains, *Citizens United* expressly accepted certain state programs, such as mandated disclosure, as

[3] http://www.ocpf.net/legaldoc/citizensunitedstatement.pdf

constitutional regulations on corporate speech. Brief for Appellant at 17. Eleven states responded to the invalidation of bans on corporate independent expenditures by embracing new regulations. Citizens United *and the States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (January 4, 2011)[4]. While CCP does not specifically endorse any of these policies, we include them to call the Court's attention to the fact that this is not an all-or-nothing scenario. The choice before Montana is not between a complete ban on corporate speech or a Hobbesian state of nature where corporations run wild.

Many of the 11 states that have passed new laws expressly reforming their systems have followed the path taken by Arizona. In 2010, the Arizona Legislature passed a law allowing corporations to speak in Arizona's elections, while subjecting them to registration with Arizona's secretary of state (or, for local elections, a local official) if they spent over a specific limit. ARIZ. REV. STAT. ANN. § 16-914.02B (2011). The law requires that the name and address of the association, as well as the name, title, email address and phone number of the person authorizing the expenditure, be filed with the state. ARIZ. REV. STAT. ANN. § 16-914.02C (2011). The law also requires literature and ads to bear a legend stating the actual name of the corporation financing their creation. ARIZ. REV. STAT. ANN. § 16-914.02F-G (2011).

[4] http://www.ncsl.org/default.aspx?tabid=19607#states_respond

Seven other states (Alaska, Colorado, Connecticut, Minnesota, North Carolina, South Dakota, and West Virginia) enacted similar laws requiring some form of corporate registration after *Citizens United*. ALASKA STAT. ANN. § 15.13.040(d)-(e) (West 2011); COLORADO REV. STAT. ANN. § 1-45-107.5(3-4) (West 2011); CONN. GEN. STAT. ANN. § 9-612(e) (West 2011); MINN. STAT. ANN. § 10A.12(1a) (West 2011); N.C. GEN. STAT. ANN. § 163-278.12(a) (West 2011); S.D. CODIFIED LAWS § 12-27-16(4-7) (2011); W. VA. CODE ANN. § 3-8-2(b) (West 2011). All seven of these states also enacted some sort of "stand by your ad" disclaimer regime as well. ALASKA STAT. ANN. § 15.13.090 (West 2011), COLORADO REV. STAT. § 1-45-107.5 (2010); CONN. GEN. STAT. ANN. § 9-621(c), (h) (West 2011); MINN. STAT. ANN. § 211B.04 (West 2011); N.C. GEN. STAT. ANN. § 163-278.39, 163-278.39A (West 2011); S.D. CODIFIED LAWS § 12-27-16(1-2) (2011); W. VA. CODE ANN. § 3-8-2(e) (West 2011).

As mentioned *supra*, Massachusetts also concluded that their corporate expenditure prohibition did not square with the First Amendment. As a result, in 2011, Governor Deval Patrick signed into law a disclaimer requirement for corporate independent expenditures. *See* Citizens United *and the States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (January 4, 2011)[5]. The new law requires the chief executive officer of a corporation to "stand by their ad." MASS. GEN.

[5] http://www.ncsl.org/default.aspx?tabid=19607#states_respond

LAWS ch. 55 § 18G (2011). In TV ads, for instance, said individual must speak into the camera and appear "in unobscured, full-screen view." *Id.*

In Iowa, the state has enacted a law that goes further than the Arizona approach. Iowa's measure requires the leadership body of a corporation to approve political independent expenditures. IOWA CODE ANN. § 68A.404(2)(a) (West 2011). The corporation cannot work with any consultants or political advisers serving the initiative or campaign the corporation's speech supports. IOWA CODE ANN. § 68A.404(7) (West 2011). The statute also provides for the familiar "stand by your ad" disclaimer, which includes the actual name of the corporation paying for the ad, as well as the name and title of the corporation's CEO. IOWA CODE ANN. § 68A.405(2)(f) (West 2011).

Meanwhile, Tennessee chose to simply repeal its old law banning corporate expenditures and required corporations to file expenditure reports as if they were a "political campaign committee." 2010 Tenn. Pub. Acts, Public Chapter No. 1095 (available at: http://state.tn.us/sos/acts/106/pub/pc1095.pdf). No new innovation or regulation was attached to the law. *Id.* This law passed both houses of the Tennessee legislature unanimously.[6]

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[6] Tennessee General Assembly, "HB3182", FLOOR AND COMMITTEE VOTES (2010), http://wapp.capitol.tn.gov/apps/BillInfo/BillVotesArchive.aspx?ChamberVoting=H&BillNumber=HB3182&ga=106; Tennessee General Assembly, "SB3198", FLOOR AND COMMITTEE VOTES (2010),

As the experiences of Montana's sister states show, there are plenty of constitutional tools in the state toolkits to regulate elections. There is no need to resort to the extraordinary remedy of seeking a "Montana Exception" to the Free Speech Clause.

II. The Attorney General's objections have already been refuted by the Supreme Court and there is no rationale for a "Montana Exception" to the First Amendment.

The Attorney General seeks to ignore the Supreme Court's decision in *Citizens United*. The Attorney General argues that Montana, unlike any other state in the Union, is so specifically vulnerable to corruption that laws which otherwise would violate the First Amendment are necessary to inoculate the state from being overrun by corporate evil. Leaving aside the explicit paternalism of this charge, the Attorney General's request for a "Montana Exception" to the Free Speech Clause is incompatible with the Constitution.

Montana's arguments directly challenge the Supreme Court's holding: "the concept that the 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

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http://wapp.capitol.tn.gov/apps/BillInfo/BillVotesArchive.aspx?ChamberVoting=S&BillNumber=SB3198&ga=106.

Amendment." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 904 (2010). This statement is unambiguous.

The Attorney General proffers several arguments as to why Montana should be excused from compliance with the Free Speech Clause. While reading the Attorney General's brief, one cannot help but be struck by how similar the Attorney General's arguments are to those advanced, unsuccessfully, by the Federal Elections Commission during *Citizens United.*

A. The Supreme Court held that a ban on corporate independent expenditures cannot be cured by allowing corporations to speak through PACs.

The Attorney General suggests that because speakers can form political committees, and can do so easily (unlike the onerous formation of a Federal PAC), there is no prohibition on campaign speech by associations. Brief at 19. However, the Supreme Court already addressed this objection in *Citizens United.* Despite the alternative route of creating a political committee, the Supreme Court still found the law to be a ban on corporate speech "notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption...does not allow corporations to speak." *Citizens United* at 897. Contrary to the Attorney General's suggestion, the Court did not permit associational organizations to conduct independent

expenditures on the narrow grounds that it was too onerous to form a committee. Brief at 19. The fact that creating a PAC may be difficult only aggravated the Court's constitutional objections to the Federal ban on corporate expenditures, it did not create them. The Court opposed the law because it banned associations from speaking, full stop. *Citizens United* at 897.

B. The Supreme Court held that allowing speech by some groups and not others violates the First Amendment, regardless of public policy rationale.

The Attorney General asserts that another rationale for the "Montana Exception" to the First Amendment is that "individual participation in campaign finance" may drop dramatically once associational speakers are permitted to enter the arena. Brief at 31. Again, the Supreme Court addressed this concern in *Citizens United*, finding that "the First Amendment stands against attempts to disfavor certain subjects or viewpoints...[and] restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United* at 898.

C. The Supreme Court held that a favoritism or influence theory does not permit a ban on corporate independent expenditures.

The Attorney General maintains that "[c]orporate electioneering corrupts the relationship between public officials and the public interest by encouraging

political dependence" on associations because corporations are "backed only by 'the economically motivated decisions of investors and customers'." Brief at 32 (internal citations omitted). Once again, the Supreme Court already addressed this argument in *Citizens United.* The Court directly rejected analogous reliance concerns. The Court pointed out that simply because "speakers may have influence over or access to elected officials does not mean that these officials are corrupt" and that "[r]eliance on a "generic favoritism or influence theory ... is at odds with standard First Amendment analyses." *Citizens United* at 910 (internal citations omitted). Indeed, "[f]avoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies." *Id.* (internal citations omitted). This natural outgrowth of republican government is no rationale for a ban on speech.

D. A ban on corporate independent expenditures does nothing to promote disclosure.

The Attorney General asserts that Montana's ban on corporate independent expenditures "is necessary to effective disclosure." Brief at 17. This assertion is designed to protect Montana's law under the Supreme Court's acceptance of disclosure measures, most recently identified in *Citizens United.* However, the Attorney General's arguments are mere sophistry. As former Commissioner of

Political Practices Dennis Unsworth noted, "if the law allowed corporate managers to make...independent expenditures", those corporations would have to register with the state and file expenditure reports. *Affadavit of Dennis Unsworth*, ¶¶16 at 7. And, as already discussed *infra*, many states whose laws conflicted with the First Amendment after *Citizens United* replaced the unconstitutional bans with disclosure and disclaimer measures that require corporations to, as the Attorney General asks, "show 'civic courage' to 'stand up in public for their political acts.'" Brief at 23 (internal citations omitted).

E. The Supreme Court held that *Caperton* cannot be used as a shield to ban corporate independent expenditures.

The Attorney General also suggests that Montana's direct elections, especially of members of the judiciary, primes those elected officials to be corrupted by corporate dollars. To support this contention, the Attorney General cites the Supreme Court's decision in *Caperton v. A.T. Massey Coal Company*. Brief at 34-35, *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009). However, in *Citizens United*, the Supreme Court dismissed a similar argument based on *Caperton*. The Court declared that "*Caperton* held that a judge was required to recuse himself when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending

or imminent...*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* at 910 (internal citations and quotations omitted). Further undermining his own case, the Attorney General admits that "[n]ot even Plaintiffs claim a right to influence judicial campaigns through corporate expenditures." Brief at 34-35.

F. There is no evidence that aligning Montana's campaign laws with the First Amendment would reset the state to the early 1900's.

The Attorney General's message that Montana is uniquely vulnerable to takeover and corporate domination is surreal and unconvincing. As the lower court properly observed, "the Copper Kings have long ago gone to their tombs." *Order on Cross Motions for Summary Judgment* at 10. But more than just the Copper Kings have passed away: so has the entire world in which the Corrupt Practices Act of 1912 was passed.

At the height of its power, Amalgamated Copper employed *eighty percent* of Montana's wage-earners. *Affadavit of Harry Fritz*, ¶¶16 at 5. Now, Montana has more than 2,500 limited liability partnerships, 52,000 domestic limited liability companies, and 46,000 domestic corporations. *Corporate Records*, OFFICE OF THE SECRETARY OF STATE[7]. The notion that allowing these many thousands of entities the opportunity to speak in Montana elections would somehow hold the entire

[7] https://app.mt.gov/cgi-bin/corprecords/corprecords.cgi

legislature hostage to corrupt copper titans is absurd. As the Supreme Court has said, "[c]orporations, like individuals, do not have monolithic views." *Citizens United* at 912.

In addition, new regulatory measures have developed to prevent corporations from achieving the sort of influence Montana experienced during the days of the Copper Kings. From modern antitrust law, to protections for labor unions and workers, to the National Labor Relations Board, our polity has developed numerous safeguards against corporate domination.

Finally, individuals have more space to speak out and air grievances against corporations than ever before. Modern Montanans live in a 21st Century with a broad, diverse national media comprised of newspapers, radio stations, cable channels, and the nearly-unlimited frontier of the Internet. With this in mind, the idea that Montana could turn the clock back to 1900 merely by allowing corporations to speak in elections cannot withstand scrutiny.

G. The Attorney General's suggestion that Montana is analogous to Alaska undermines his own case.

Nonetheless, the Attorney General asserts that since Montana's "enormous natural resource wealth" allowed for corruption in the past, the state's ban on a category of speakers must continue in the present. Brief at 32. For proof, the Attorney General suggests that "Montana has much in common with Alaska",

where because of the "exploitation by nonresident interests...elected officials can be subjected to purchased or coerced influence." Brief at 33 (internal citations and quotations omitted). This is a peculiar argument. Alaska's Attorney General has advised the Governor's office that Alaska's ban on corporate independent expenditures is "likely unconstitutional" under the First Amendment. Daniel S. Sullivan, *Analysis of* Citizens United v. Federal Election Commission *and its Impact on Alaska Campaign Finance Laws*, STATE OF ALASKA—DEPARTMENT OF LAW (February 22, 2010), at 1, http://www.law.state.ak.us/pdf/civil/021910-citizen.pdf. In fact, Alaska has unanimously repealed its own ban on corporate independent expenditures, and has enacted other laws to check any possible corruption that may arise from aligning Alaskan law with the Free Speech Clause. *Bill History/Act for S.B. 284*, THE ALASKA STATE LEGISLATURE (2011)[8].

The *Citizens United* Court definitively answered the Attorney General's concerns about corruption. It would be best to quote the Court in full:

> 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. We must give weight to attempts by [the legislature] to seek to dispel either the appearance or the reality of these influences. *The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule.* An outright ban on corporate political speech during

[8] http://www.legis.state.ak.us/basis/get_bill.asp?session=26&bill=SB284

the critical preelection period is not a permissible remedy. *Citizens United* at 911 (emphasis supplied).

CONCLUSION

In the opinion below, the Montana First Judicial District for Lewis and Clark County concluded that this state's ban on corporate independent expenditures was inconsistent with the First Amendment. This Court should uphold that ruling.

The Attorney General ignores the experience of other states whose laws were affected by the ruling in *Citizens United.* Many of these states, such as Alaska, Colorado, Massachusetts, and Texas, have found that their bans on corporate independent expenditures were unconstitutional. Some of these states have used tools that have been approved by the Supreme Court, such as disclosure and disclaimer laws, in order to bring the new corporate expenditures firmly under state control. Only Montana has attempted to simply defend its unconstitutional statute.

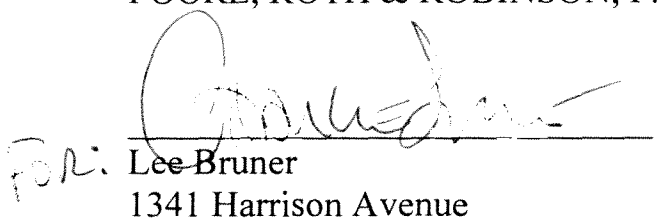
The Attorney General seeks to establish a special exception to the First Amendment, a remedy that no other state has sought. In seeking a "Montana Exception", the Attorney General rehashes a series of arguments that the Supreme Court rejected in *Citizens United.* Moreover, given the dramatic personal, political, and technological changes in Montana and the United States since the days of the Copper Kings, the suggestion that removal of the ban will cause

Montana to relapse into corporate serfdom is unsupported by anything other than the Attorney General's conclusory statements.

Put bluntly: the Attorney General is asking this Court to enshrine a system where the First Amendment means one thing in 49 states, and something else in Montana. In a nation of laws, that result cannot be tolerated.

Respectfully submitted,

POORE, ROTH & ROBINSON, P.C.



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 3,415 words, not averaging more than 201 words per page, excluding the Certificate of Service and Certificate of Compliance.

DATED this 27th day of May, 2011.

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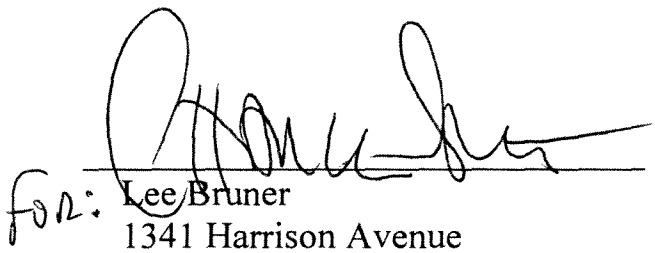

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing AMICUS BRIEF OF THE CENTER FOR COMPETITIVE POLITICS has been duly served upon the attorneys listed below depositing same in the U.S. Mail on this 27th day of May, 2011.

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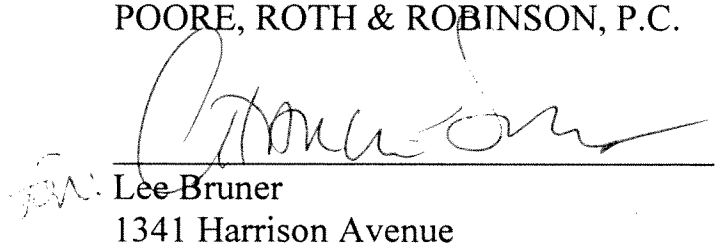

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