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 MONTANA

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief as *amicus curiae* in support of Petitioners American Tradition Partnership, Inc. and Western Tradition Partnership, Inc. ("Petitioners").[1]

INTEREST OF *AMICUS CURIAE*

The Chamber, founded in 1912, is the world's largest not-for-profit business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. The Chamber's members—from large Fortune 500 companies to home-based, one-person operations—are central to our nation's economy and well-being. The Chamber is incorporated. For purposes of federal and state campaign finance regulation, the Chamber and most of its members are classified as corporations.

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioners and Respondents, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing. Such consents are being submitted herein.

The Chamber plays a key role in advocating for the interests of its members, including their First Amendment rights. In that role, the Chamber was a party to the *McConnell v. FEC*, 540 U.S. 93 (2003), litigation challenging the facial constitutionality of the federal electioneering communication ban on corporate political speech that was overturned in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The Chamber filed two *amicus* briefs in *Citizens United* and regularly files *amicus* briefs where the business community's right to political speech is at stake. *See, e.g.*, *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL*"); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Chamber has litigated to preserve its own First Amendment rights of speech and association in other cases as well. *See, e.g.*, *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

The petition for a writ of certiorari asks the Court to reaffirm the fundamental proposition that lower courts, including state courts, are bound to faithfully apply the Constitution as interpreted by this Court. The Montana Supreme Court, over the emphatic dissent of two justices, nevertheless upheld a state-law ban on corporate political speech materially indistinguishable from the federal law this Court declared unconstitutional in *Citizens United*. Because this Montana statute outlaws the fully protected speech of the Chamber and its members in clear violation of the First Amendment, the Chamber joins Petitioners in urging the Court to grant the petition and summarily reverse the decision below.

SUMMARY OF ARGUMENT

In *Citizens United*, this Court confirmed once again that the First Amendment does not tolerate suppression of speech based on the speaker's identity, which has the inevitable effect of targeting specific content and viewpoints. "The [First] Amendment is written in terms of 'speech,' not speakers." *Citizens United*, 130 S. Ct. at 929 (Scalia, J., concurring). For decades, this Court has held that corporations—whether not-for-profit or for-profit, whether sole proprietor small businesses or publicly traded corporations—are no exception to that core constitutional principle, and therefore have the right under the First Amendment to engage in political speech. *See id.* at 899-900 (collecting cases); *see, e.g.*, *NAACP v. Button*, 371 U.S. 415, 428-29 (1963); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). The First Amendment guarantees, therefore, that corporations and labor unions have the right to engage in issue advocacy. *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 456-57 (2007) (Roberts, C.J.).

Despite this long history, federal law banned corporations and labor unions from expending general treasury funds on speech expressly advocating for the election or defeat of a candidate for office. In *Citizens United*, this Court struck down that complete ban as flatly inconsistent with the vast majority of campaign-speech precedent and, ultimately, irreconcilable with basic First Amendment principles. "[T]he 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 913.

In the wake of *Citizens United*, the state laws that track the now-unenforceable federal ban on election-related corporate and labor speech were modified or repealed to meet constitutional requirements. The sole exception is the Montana Supreme Court, which upheld a state law rendering it unlawful for a corporation to "make … an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or political party." Mont. Code Ann. § 13-35-227(1). According to the Montana Supreme Court, *Citizens United* is distinguishable because it was decided on its "facts or lack of facts" and "this case concerns Montana law, Montana elections and it arises from Montana history." Pet. App. 12a-13a. But neither *Citizens United* nor the First Amendment itself makes an exception for Montana.

The Court should grant the petition and summarily reverse the Montana Supreme Court's decision. Pet. 23-34. Summary reversal is appropriate when the ruling under review is demonstrably incorrect. This case easily meets that standard. Even if legislators and regulators come to believe that a problem somehow warrants censorship, "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy." *Citizens United*, 130 S. Ct. at 911. As a matter of law, therefore, no government body—state or federal—can prohibit corporations from using general treasury funds to independently advocate support of or opposition to a candidate for office. The Montana Supreme Court's attempt to distinguish this case from *Citizens United* on its "facts" is untenable. Every "factual" reason offered as a basis for upholding the Montana ban on corporate speech was soundly rejected in *Citizens United* as a matter of

law "in broad and unqualified language." Pet. App. 84a (Nelson, J., dissenting). In short, "*Citizens United* is the law of the land" and the Montana Supreme Court "is duty-bound to follow it." *Id.* at 93a. Because the court did not, "summary reversal on the merits" is the appropriate remedy. *Id.*

Summary reversal is also the appropriate remedy because full briefing and argument would be a waste of the Court's time and resources. This Court devoted significant resources to briefing, arguing, and then re-briefing and re-arguing *Citizens United*. Briefing and arguing a case that is so obviously controlled by precedent is not only repetitive, but diverts resources from other important cases and wastes time. Indeed, Montana filed an *amicus* brief in *Citizens United* making the same arguments it does here. Additional briefing and argument will not aid the Court in its resolution of this case.

Furthermore, delaying resolution of this case could wrongly signal to lower courts that they can control when this Court reconsiders its decisions simply by refusing to follow controlling precedent. Such a result would not only reward the state court's derogation of its obligation under the Supremacy Clause to adhere to this Court's decisions, but would undermine the rule of law. Under Article III, this Court has the singular responsibility of ensuring that States (including state courts) do not disregard federally-protected rights. When those rights are jeopardized, this Court should assert itself swiftly and decisively.

More broadly, summary reversal would remind Montana of the binding effect of this Court's decisions. Montana has a long and unfortunate history of flouting

controlling precedent. Indeed, it took the Ninth Circuit more than twenty years to bring Montana into compliance with *Bellotti*. And in an apparent act of protest, justices of the Montana Supreme Court refused to sign an order on remand after being twice reversed by this Court in an arbitration case. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). For a system that allows state courts to decide federal issues to function properly, litigants must have confidence that this Court will vigorously exercise its appellate jurisdiction when state courts willfully disregard controlling precedent.

Finally, although Justice Ginsburg agreed that the decision below is inconsistent with controlling precedent and voted to grant the stay, she suggested that the Court should use this case to reconsider *Citizens United* based on the level of election spending that has occurred since 2009. But to the extent that there has been more speech in recent elections, that is a First Amendment good, not an excuse to resurrect a censorship regime. Moreover, it is settled law that independent expenditures do not create the appearance of corruption because there is no coordination between the candidate and the speaker. More briefing and argument will not disturb that fundamental legal conclusion.

In any event, even if new nationwide evidence could justify reconsidering the Court's legal decision—which it does not—the record in this case contains absolutely no evidence regarding corporate political speech since *Citizens United* was decided, much less any evidence that independent political speech is having a corrupting effect. Montana's long-ago experience with corruption, which was unrelated to independent political speech, is not a substitute. Accordingly, this appeal provides no

basis for reconsidering *Citizens United* irrespective of whether one agrees or disagrees with that thorough decision. The Montana Supreme Court's ruling should be summarily reversed as plainly inconsistent with controlling precedent.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION AND SUMMARILY REVERSE THE MONTANA SUPREME COURT.

A. The Montana Supreme Court's Decision Upholding a Complete Ban on Corporate Political Speech Undeniably Conflicts With *Citizens United*.

1. The Montana Supreme Court's decision conflicts with the holding of *Citizens United* that a complete ban on corporate political speech violates the First Amendment.

A "major purpose of [the First Amendment] was to protect the free discussion of government affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Importantly, First Amendment protection for political speech serves the interests of the entire country, not just would-be speakers. "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." *Citizens United*, 130 S. Ct. at 898.

"The inherent worth of [such] speech … does not depend upon the identity of the source, whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777; *see, e.g.*, *Citizens United*, 130 S. Ct. at 899; *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Button*, 371 U.S. at 428-29. Accordingly, this Court has "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United*, 130 S. Ct. at 900 (citation omitted).

Given this history of protecting corporations' First Amendment right to engage in political discourse, any government's "outright ban on corporate political speech" is plainly unconstitutional. *Id.* at 911. Unlike contributions to candidates,[2] "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id.* at 909; *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976) (individuals); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497-98 (1985) (political committees); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (political parties). The federal prohibition on corporate independent expenditures, 2 U.S.C. § 441b, thus violated "the principle established in *Buckley* and *Bellotti* that the 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 913.

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2. Contributions to candidates by corporations and labor unions are banned by federal law. *See* 2 U.S.C. § 441b. That ban was unaffected by *Citizens United* and remains in place.

The Montana statute is materially identical to the federal law declared unconstitutional in *Citizens United*. Like Section 441b, Montana law makes it unlawful for a corporation to "make … an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or political party" and purports to temper that ban on speech by allowing expenditures through a political action committee ("PAC"). Mont. Code Ann. § 13-35-227(1), (3).[3] The Montana Supreme Court nevertheless upheld the law because "this case concerns Montana law, Montana elections and it arises from Montana history." Pet. App. 13a. In other words, the court framed *Citizens United* as "decided under its facts or lack of facts" and upheld the total ban on corporate political speech based on "Montana history." *Id.* at 12a-13a.

As the dissenting Montana justices recognized, however, the decision merely rehashes the arguments that were "presented in the 90-page dissenting opinion of Justice Stevens and emphatically rejected by the majority in *Citizens United*." *Id.* at 33a (Baker, J., dissenting); *Id.* at 43a-44a (Nelson, J., dissenting) ("[E]very one of … this Court's rationales … was argued, considered, and then flatly rejected by the Supreme Court."). Instead of trying to circumvent a clear legal decision based on illegitimate and irrelevant factual distinctions, the court

3. 2 U.S.C. § 441b made it unlawful for a corporation to make an "expenditure in connection with any election" for federal office, *id.* § 441b(a), and extended that ban to any "electioneering communication," *id.* § 441b(b)(2). Prior to *Citizens United*, the Court had limited the constitutional reach of this ban on electioneering communications. *Wis. Right to Life*, 551 U.S. at 469-70, 481 (Roberts, C.J.). Montana law is so broad that it arguably conflicts with this precedent too.

was "constrained by *Citizens United* to declare [the state law] unconstitutional" because it "prohibits independent corporate expenditures for political speech." *Id.* at 33a (Baker, J., dissenting).

2. *Citizens United* squarely rejected every one of the Montana Supreme Court's reasons for upholding the state law under review.

The "proof" of the Montana Supreme Court's "error is found in a comparison of the rationales provided in [its] Opinion with the statements by the Supreme Court rejecting those rationales." *Id.* at 49a (Nelson, J., dissenting). *First*, the court distinguished *Citizens United* because "under Montana law a [PAC] can be formed and maintained by filing simple and straight-forward forms or reports." Pet. App. 16a. But this Court made clear that the availability of PACs does not make the outright ban on corporate spending constitutional. As a legal matter, both Section 441b and this Montana statute are "a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." *Citizens United*, 130 S. Ct. at 897. That conclusion was not dependent on the relative burdens and complexities associated with PAC formation and governance. A PAC is still "a separate association from the corporation" and, therefore, "the PAC exemption … does not allow corporations to speak." *Id.* The Montana Supreme Court was not at liberty to disregard this clear legal holding.

Second, the Montana Supreme Court extensively relied on the state's experience with corruption "during the early twentieth century." Pet. App. 17a-22a. As an initial matter, the examples that the court pointed to

included control over state judges, obtaining a Senate seat through bribery, and consolidated ownership of Montana's newspapers. *Id.* at 17a-20a. But bribery is already illegal, *Citizens United*, 130 S. Ct. at 908, and "it is not clear that any of [these examples] involved independent expenditures," Pet. App. 69a (Nelson, J., dissenting).

In any event, like federal law, Montana law already bans corporate contributions to candidates. *Id.* at 5a. The law under review concerns corporate independent expenditures, which "do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909; *see also id.* at 910 ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors" and "independent expenditures do not lead to, or create the appearance of *quid pro quo* corruption."). Moreover, even accepting the court's unfounded speculation that "independent expenditures by corporations will return Montana to its pre-1912 days of corruption and corporate domination, … '[a]n outright ban on corporate political speech … is not a permissible remedy'" as a matter of law. Pet. App. 73a (Nelson, J., dissenting) (quoting *Citizens United*, 130 S. Ct. at 911).

Third, the court found that allowing corporations to engage in political speech would distort state elections "by shifting the emphasis to raising funds," *id.* at 22a, and by discouraging "the full participation of the Montana electorate," *id.* at 26a. The assertion that corporate expenditures will distort Montana elections was rejected in *Citizens United* as well: "'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.'" 130

S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48-49). The Montana Supreme Court's concern over the shift in focus to fundraising is equally unsustainable. "*Buckley* was specific in stating that the 'skyrocketing cost of political campaigns' could not sustain the governmental prohibition. The First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion.'" *Id.* (emphasis added).[4]

Fourth, and last, the Montana Supreme Court relied on *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), to find that the state "has a compelling interest in protecting and preserving its system of elected judges." Pet. App. 27a. But "[t]he remedy of recusal" in *Caperton* "was based on a litigant's due process right to a fair trial before an unbiased judge. *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. In fact, "Justice Stevens raised this exact issue in his dissent," but "[t]he majority … remained firm and categorical: the First Amendment does not allow political speech restrictions based on a speaker's

4. The Montana court was concerned that the "modest election contributions" of individuals would not "meaningfully count" and would be "shut out of the process" by corporate political spending. Pet. App. 27a. As noted above, however, corporations cannot make any contributions to candidates—"modest" or otherwise—under both federal and state law. *See supra* note 2. In addition, looking at "corporate" and "individual" spending as a simple dichotomy is a seemingly convenient, but ultimately inaccurate, way of identifying the source of money used for political speech. "Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, and salary." *Citizens United*, 130 S. Ct. at 905 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 707 (1990) (Kennedy, J., dissenting)).

corporate identity, and speech restrictions aimed at reducing the relative ability of corporations to influence the outcome of elections are invalid." Pet. App. 78a-79a (Nelson, J., dissenting) (citations omitted). Further, the Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), "strongly indicates that the interests cited by the Court here are insufficient for prohibiting corporate speech in judicial elections," Pet. App. 79a (Nelson, J., dissenting).

In sum, "the Court in *Citizens United* (and in *White*) rejected several asserted governmental interests" and the Montana Supreme Court then "retrieved those [same] interests from the garbage can, dusted them off, slapped a 'Made in Montana' sticker on them, and held them up as grounds for sustaining a patently unconstitutional state statute." *Id.* at 84a. The ruling below was "extremely misguided, therefore, in attempting to resurrect the rejected governmental interests under a 'Montana is unique' theory." *Id*. at 84a-85a.

B. Summary Reversal Is The Appropriate Remedy.

This is a case in which "summary disposition on the merits" is appropriate. Sup. Ct. R. 16.1; *see also* Pet. 23. This Court has routinely exercised this authority where "the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Eugene Gressman *et al.*, Supreme Court Practice 344 (9th ed. 2007).

Exercising that discretion is appropriate where, as here, a state's highest court clearly misapplies controlling Supreme Court precedent on a constitutional question.

See, e.g., *Presley v. Georgia*, 130 S. Ct. 721, 722 (2010) (per curiam) (Georgia Supreme Court "contravened this Court's clear precedents" under Sixth Amendment); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (Arkansas Supreme Court decision was "flatly contrary to this Court's controlling precedent" under Fourth Amendment); *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (per curiam) (Ohio Supreme Court ruling "clearly conflicts with" Fifth Amendment precedent); *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308, 310 (1977) (per curiam) (summary reversal of Oklahoma Supreme Court was "compelled by [this Court's] recent decisions" regarding the First Amendment).

The Court also has not hesitated to invalidate state laws by summary disposition. *See, e.g.*, *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149 (1993) (per curiam) (summarily reversing Puerto Rico Supreme Court decision upholding privacy rule closing preliminary hearings in criminal cases as "irreconcilable" with controlling First Amendment precedent); *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam) (summarily reversing Georgia Supreme Court decision upholding state statute providing a $5 fee to a magistrate for issuing a requested search warrant as clearly violating the Fourth Amendment); *Turner v. Dep't of Emp't Sec.*, 423 U.S. 44, 46 (1975) (per curiam) (summarily reversing Utah Supreme Court decision upholding a state law that was "virtually identical" to another statute this Court had held violated the Fourteenth Amendment).

The summary reversal in *El Vocero* is instructive. In that case, the Puerto Rico Supreme Court upheld the privacy rule based on the "unique history and traditions

of the Commonwealth," notwithstanding a Supreme Court decision invalidating a similar law. 508 U.S. at 149. Because the "distinctions drawn by the court below [were] insubstantial" and its "reliance on Puerto Rican tradition" was "misplaced," this Court summarily reversed and thus struck down the privacy rule "for precisely the reasons stated in" its earlier decision. *Id.* at 149-50. The Court should follow the same course here. For the reasons set forth in the petition, and as further explained above, the various "distinctions drawn" by the Montana Supreme Court are "insubstantial" and "misplaced." The decision below clearly misapplied *Citizens United* and should be summarily reversed "for precisely the reasons stated in" that decision.

Summary reversal also is warranted here because full briefing and argument would waste the Court's time and resources. *Citizens United* painstakingly reviewed the question presented in this case and definitively answered it. *Citizens United* "had two rounds of briefing … , two oral arguments, and 54 *amicus* briefs" as well as "a comprehensive dissent that … helped ensure that the Court … considered all the relevant issues." 130 S. Ct. at 924-25 (Roberts, C.J., concurring). There is no need to plow that ground again. This case offers nothing new for the Court to consider that was not "already rebuffed" in *Citizens United*. Pet. App. 41a (Nelson, J., dissenting). Montana even filed an *amicus* brief in *Citizens United* arguing that the federal ban on corporate speech should be upheld in part based on Montana's history with corruption in the early twentieth century. Pet. 15 (citations omitted). The Court need not refamiliarize itself with Montana history to know that Montana's law plainly conflicts with *Citizens United*.

Finally, full briefing and oral argument would also send a dangerous signal to the lower courts that they set the terms on which this Court reconsiders its precedents. Pet. 23, 32-33. The Court has instructed lower courts to "follow the case which directly controls," *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), precisely because "it is this Court's prerogative alone to overrule one of its precedents," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam). If Montana succeeds in forcing reconsideration of this Court's decision, lower courts will be encouraged to ignore unambiguous controlling precedent and usurp this Court's prerogative to reconsider precedent, if at all, at the time of its choosing.

II. MONTANA'S REPEATED REFUSAL TO FOLLOW THIS COURT'S DECISIONS MAKES SUMMARY REVERSAL PARTICULARLY APPROPRIATE IN THIS CASE.

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are," *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). Article III of the Constitution tasks the Supreme Court with the special responsibility of enforcing that command. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 347-49 (1816). Only this Court's appellate review, then, ensures that state courts cannot "dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 371 (1990).

The Montana Supreme Court thus was under a firm obligation here "to acknowledge that the Supreme Court's interpretation of the United States Constitution is, for better or worse, binding on this Court and on the officers of this state, and to apply the law faithfully to the Supreme Court's ruling." Pet. App. 46a (Nelson, J., dissenting). In other words, it was incumbent on the court to resist any temptation to "thumb its nose" at this Court and "boldly ignore the Supremacy Clause." *Id.* (citation omitted). As explained above, however, the court utterly failed in this instance to fulfill its "unflagging obligation, in keeping with the courts' duty to safeguard the rule of law, to honor the decisions of our nation's highest court." *Id.* at 39a-40a (Baker, J., dissenting).

This is not the first time Montana has abandoned its obligation under the Supremacy Clause to implement this Court's decisions. This is the *second* time that Montana has tried to circumvent a Supreme Court decision guaranteeing the political free speech rights of corporations. In 1978, this Court held that Massachusetts violated the First Amendment by banning corporate independent expenditures that advocate for or against referendum proposals. *See Bellotti*, 435 U.S. at 784. As this Court recently explained, *Bellotti* "could not have been clearer" in "reaffirm[ing] the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity." *Citizens United*, 130 S. Ct. at 902.

Yet the Ninth Circuit twice had to remind Montana of this rule by striking down restrictions on corporate political speech. Nearly six months after *Bellotti* was decided, the Ninth Circuit struck down Montana's

analogous law banning corporations from spending general treasury funds to promote or defeat any ballot issue as "an unconstitutional restriction of corporate First Amendment rights." *C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 425 (9th Cir. 1978) ("Under *Bellotti* such blanket infringements of First Amendment rights cannot stand."). Undeterred, Montana later adopted a new law resurrecting the old ban on corporate expenditures in connection with ballot initiative campaigns. Of course, the Ninth Circuit invalidated this law as well, as it too was obviously "controlled by *Bellotti*." *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1055 (9th Cir. 2000).

Montana's recalcitrance is not limited to campaign finance law. In *Doctor's Associates, Inc. v. Casarotto*, 515 U.S. 1129 (1995), this Court granted, vacated, and remanded a Montana Supreme Court decision refusing to enforce a contractual arbitration provision because the provision did not comply with a state law dictating the location of arbitration provisions. On remand, the Montana court simply reinstated its opinion without further briefing or argument. *See Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995). On certiorari again, this Court reversed the Montana Supreme Court and remanded a second time after finding the Montana law was preempted by the Federal Arbitration Act. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

Even after this Court reversed the Montana court twice, however, two Montana justices insisted on a well-publicized and final act of defiance. When the case returned to the Montana Supreme Court for further proceedings, Justices Trieweiler and Hunt refused to

sign the routine remand order, boldly declaring that they could not "in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the U.S. Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." Richard C. Rueben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16.

Montana's penchant for ignoring its obligations under the Supremacy Clause is not a trivial matter. It is a threat to the sensible operation of "a system of federalism in which the state courts share responsibility for the application and enforcement of federal law." *Howlett*, 496 U.S. at 372-73. The Framers agreed to leave the creation of lower federal courts within the discretion of Congress because state courts would remain open for the resolution of federal claims. *See Haywood v. Drown*, 556 U.S. 729, 735 (2009) ("[S]tate courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law."). For this system to function, however, all litigants—including corporations—must have confidence that state courts will protect rights guaranteed to them by the Constitution.

Montana argues that summary reversal would not show "due respect" for "sister supreme courts in the states, all of whom are also 'bound by Oath or Affirmation, to support this Constitution.'" Opp. to App. for Stay at 9, *Am. Tradition P'ship v. Bullock*, No. 11A762 (U.S. Feb. 15, 2012). But Montana has it backwards. If the Montana Supreme Court had shown due respect for its oath to "'support, protect and defend the constitution of

the United States,'" then it would not have "disregard[ed] or parse[d] [*Citizens United*] in order to uphold a state law, while politically popular, is clearly at odds with the Supreme Court's decision." Pet. App. 47a (Nelson, J., dissenting).

In the end, while fashioning a system allowing state courts to decide federal questions, the Framers understood (as this case illustrates) that they would not always jealously guard federal rights. *See Martin*, 14 U.S. at 347. Article III thus empowers the "one Supreme Court" to intercede swiftly and decisively when a state fails to yield to this Court's controlling precedent. "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery ...." *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809). Indeed, this Court's appellate intervention is all the more indispensible when the highest court of a state fails to strike down the offending state law in the first instance:

> Without the supreme court, as it has been constitutionally and legislatively constituted, neither the constitution nor the laws of congress passed in pursuance of it, nor treaties, would be in practice or in fact the supreme law of the land, and the injunction that the judges in every State should be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding, would be useless, if the judges of state courts, in any one of the States, could finally determine what was the meaning and operation of the constitution and

> laws of congress, or the extent of the obligation of treaties.

Dodge v. Woolsey, 59 U.S. 331, 355 (1855).

Summarily reversing the Montana Supreme Court's decision will reassure state-court litigants that this Court will continue to vigilantly exercise the appellate authority entrusted to it by Article III and, moreover, will signal that blatant disregard of controlling precedent will not be tolerated.

III. NOTHING THAT HAS OCCURRED SINCE *CITIZENS UNITED* PROVIDES A BASIS FOR RECONSIDERING THE DECISION.

Contrary to Justice Ginsburg's suggestion, *see Am. Tradition P'ship v. Bullock*, No. 11A762, 2012 WL 521107 (U.S. Feb. 17, 2012) ("Stay Order"), increased spending on political speech, to the extent it is occurring, *but see* Pet. 28-30, is not an unintended and troubling consequence of *Citizens United*. Reaffirming the constitutional right of corporations and labor unions to freely engage in political speech on equal terms was the entire point of the case. The Court properly understood that "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 130 S. Ct. at 911. Thus, the First Amendment requires that any perceived concern with speech must be remedied by "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927). It would be strange indeed if a speaker's decision to vigorously exercise a newly restored First Amendment right to speak could serve as the justification for revoking that right.

It also is incorrect to assume that a corporation's (or anyone's) independent expenditures can improperly "buy candidates' allegiance." Stay Order at 1. As this Court already held, independent expenditures "do not give rise to corruption or the appearance of corruption" as a matter of law. *Citizens United*, 130 S. Ct. at 909. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent … alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 908 (quoting *Buckley*, 424 U.S. at 47). "The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials." *Id.* at 901.

But even if the Court were inclined to reconsider *Citizens United* based on empirical data, which it should not, there is no evidence in the record of this case detailing the level of spending on political speech since *Citizens United* was decided. Pet. 27-28. The Montana Supreme Court only considered evidence of corruption in Montana "during the early twentieth century," Pet. App. 17a, and, even then, the evidence had nothing to do with independent expenditures, *see supra* p. 11. Moreover, this Montana-specific evidence offers no insight into the effect or scope of corporate speech in the rest of the country. As this Court is aware, a majority of states permitted corporations to speak freely long before *Citizens United*, yet there was no evidence then (and there is no evidence now) that elections in those states have been corrupted by immense corporate wealth. *Citizens United*, 130 S. Ct. at 909 (citing Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* at 8-9). In short, this case is not a suitable vehicle for addressing the question that Justice Ginsburg posed in the Stay Order.

CONCLUSION

For the foregoing reasons, and for those stated by the Petitioners, the Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Montana Supreme Court.

Respectfully submitted,

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