

No. 11-1179

IN THE
Supreme Court of the United States

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

v.

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

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

**BRIEF OF AMICI CURIAE FORMER FEDERAL
ELECTION COMMISSION OFFICIALS AND
FORMER STATE AND LOCAL ELECTION AND
CAMPAIGN FINANCE OFFICIALS
IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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INTEREST OF AMICI CURIAE¹

Amici are former officers and employees of the Federal Election Commission and state and local agen-

¹ Letters consenting to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or part by counsel for a party. No person or entity other than amici or their counsel made a monetary contribution to this brief's preparation or submission. Amici submit this brief solely in their individual capacities and not on behalf of any organizations or clients.

cies responsible for campaign finance laws. They have devoted substantial parts of their careers to protecting our nation's elections from the corrupting effects of unrestrained financing of political campaigns. Although no longer in government service, they continue to participate actively in the field of campaign finance regulation and are keenly interested in fostering the success of our campaign finance laws. Amici are described and identified in the appendix to this brief.

INTRODUCTION

Amici are gravely concerned about how broad interpretations of *Citizens United v. FEC*, 130 S. Ct. 876 (2010), affect our system of elected government. Amici are particularly alarmed at the consequences of the view that, under *Citizens United*, electoral expenditures that are independent only in the sense that they are not “coordinated” with a candidate within the narrow meaning of current campaign finance laws and regulations can *never* give rise to corruption or even its *appearance*. The difficulty of proving “coordination” exacerbates the problem.

A broad reading of *Citizens United* has led to the invalidation not only of limits on independent expenditures by corporations and corporate-backed entities, but also of limits on *contributions* by individuals, corporations, and labor unions to political committees that make such expenditures. See *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). The demise of contribution limits for such committees, combined with *Citizens United*'s permission for nonprofit and for-profit corporations, however financed, to make electoral expenditures, has fostered two developments that have already had major effects on elections: the rise of “Super PACs”—political committees that use unlimited

contributions for express advocacy, often devoted exclusively to assisting particular candidates—and the use of purportedly tax-exempt nonprofit corporations to collect unlimited, unreported contributions that are used for political expenditures or passed along to Super PACs (with the true donors’ identities concealed).

In the 2012 primaries, Super PACs and nonprofits have raised and spent money on a massive scale, yet the amounts collected and spent to date are only a fraction of those expected in this year’s elections. Candidates’ increasing reliance on expenditures by outside groups financed by unlimited corporate, union, and individual contributions, as well as the growing strategic symbiosis (but not necessarily illegal “coordination”) between the official campaigns and supporting Super PACs and nonprofits, creates opportunities for rampant evasion of limits on contributions to candidates—limits that are a principal bulwark against corruption and its appearance.

Contributors who want to give enough money to buy candidates now have an obvious place to turn: “outside” groups with a publicly stated intent to pour massive sums into supporting those candidates. Official contribution limits, paltry by comparison to the sums now being contributed to these shadow campaign committees, are now readily avoided by all but those who are uninterested in buying influence or cannot afford to do so.

Thus, as Justices Ginsburg and Breyer have observed, events “since this Court’s decision in *Citizens United* make it exceedingly difficult to maintain that independent expenditures ... ‘do not give rise to corruption or the appearance of corruption.’” *American Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 1307, 1307-

1308 (2012) (statement respecting stay) (quoting *Citizens United*, 130 S. Ct. at 909).

This brief explains the perhaps unintended consequences of *Citizens United*'s broad statements about the supposed inability of independent expenditures to create actual or apparent corruption. It also apprises the Court of recent events, attributable to *Citizens United*, demonstrating the fallacy of the idea that expenditures can never corrupt. Because the decision below takes a realistic view of the potential corrupting influence of "independent" expenditures, reinforced by a factual record concerning political corruption in Montana, amici ask the Court not to review the Montana Supreme Court's judgment. If the Court is inclined to grant review, however, amici urge it not to summarily reverse, which would reinforce an overbroad interpretation of *Citizens United*. If the Court does decide the merits, it should reconsider *Citizen United*'s statements that uncoordinated expenditures cannot corrupt candidates.

REASONS FOR DENYING THE WRIT

I. *CITIZENS UNITED* RESTS ON THE ASSERTION THAT INDEPENDENT EXPENDITURES HAVE NO POTENTIALLY CORRUPTING EFFECTS

Critical to *Citizens United*'s ruling that federal prohibitions on corporate political spending were unconstitutional was the Court's conclusion that those prohibitions served no substantial governmental interest. Holding that the laws did not advance the interest in preventing corruption and its appearance—an interest the Court has long recognized as substantial and, indeed, compelling, *see, e.g., FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 500-501 (1985)—the Court asserted that "independent expendi-

tures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Citizens United*, 130 S. Ct. at 909.

The Court’s statement was not based on a factual record concerning effects of independent spending, and the Court rejected Congress’s contrary findings. Rather, the crux of the Court’s analysis was one sentence quoted from *Buckley v. Valeo*, 424 U.S. 1 (1976): “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” 130 S. Ct. at 908 (quoting 424 U.S. at 47). The Court also asserted that independent expenditures create no public perception of corruption, because “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. 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 910 (citation omitted).

In making these assertions, *Citizens United* repeatedly invoked *Buckley*. But *Buckley* was considerably more cautious and equivocal than *Citizens United* appears to suggest. *Buckley* struck down an expenditure limitation for failing to advance the substantial governmental interest in checking corruption. But it began by stressing the underinclusiveness of the law, which (as construed) allowed unlimited expenditures “to promote [a] candidate and his views” as long as the spender avoided express advocacy. *Buckley*, 424 U.S. at 45. The law thus “permitted unscrupulous persons and organizations to expend unlimited sums of

money in order to obtain improper influence over candidates for elective office.” *Id.* The Court’s underinclusiveness rationale presupposed that independent spending could have a corrupting effect.

The Court went on to say that it was *not yet persuaded* that independent expenditures posed the same threat of corruption as contributions to a candidate. The Court stated that “independent advocacy ... does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.” *Buckley*, 424 U.S. at 46 (emphasis added). Assuming that independent expenditures were necessarily made “*totally* independently of the candidate and his campaign,” the Court stated that “[u]nlike contributions, such independent expenditures *may well* provide little assistance to the candidate’s campaign and indeed *may* prove counterproductive.” *Id.* at 47 (emphases added). These carefully qualified statements preceded the observation, quoted in *Citizens United*, that the absence of prearrangement and coordination “alleviate[d]” the threat of corruption. *Id.* Nowhere did *Buckley* conclude that independent spending must be deemed non-corrupting in all circumstances, regardless of empirical experience to the contrary.

Subsequent decisions similarly avoided categorical assertions that regulations aimed at independent spenders could serve no anticorruption interest. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court upheld the prohibitions on corporate spending for electioneering communications (overruled in *Citizens United*). It *also* held that soft-money contributions to political parties—and their use for uncoordinated spending to support candidates—could be prohibited because the relationship between candidates and par-

ties made unlimited contributions to parties an effective way to exert corrupting influence on candidates: “It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude.” *Id.* at 145; see also *id.* at 155.

Even after *Citizens United*, a three-judge district court held that *McConnell*’s reasoning sustained these provisions. The court interpreted *McConnell* to hold that

federal officeholders and candidates may value contributions to *their national parties*—regardless of how those contributions ultimately may be used—in much the same way they value contributions to *their own campaigns*. As a result, the reasoning goes, contributions to national parties have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption.

RNC v. FEC, 698 F. Supp. 2d 150, 159 (D.D.C. 2010). This Court summarily affirmed. 130 S. Ct. 3544 (2010).

Similarly, recognizing that contributions to non-profit groups whose spending supported a candidate created a threat of corruption, *McConnell* upheld limits on candidates’ solicitation of contributions for such groups. The Court understood that such contributions had the same potential to corrupt as contributions to the candidate, even “[t]hrough the candidate may not ultimately control how the funds are spent,” because, “[w]ithout some restriction on solicitations, federal candidates and officeholders could easily avoid [the Federal Election Campaign Act]’s contribution limits by soliciting funds from large donors and restricted

sources to like-minded organizations engaging in federal election activities.” *McConnell*, 540 U.S. at 182-183. *McConnell* recognized that the relationship between candidates and “independent” outside groups is such that outside spending and its financing may present risks of circumvention of limits on contributions to candidates, the most fundamental of anticorruption measures.

Read broadly, however, *Citizens United* seemingly casts aside any possibility that outside spending could improperly influence candidates under any circumstances. Taken literally, the Court’s apparently unqualified statement in *Citizens United* that independent expenditures “do not give rise to corruption or the appearance of corruption,” 130 S. Ct. at 909, suggests that limitations on sources or amounts of funds for outside spending are categorically impermissible.

II. *CITIZENS UNITED* HAS ENDED EFFECTIVE LIMITS ON CONTRIBUTIONS TO POLITICAL SPENDING GROUPS

On the federal level, a broad reading of *Citizens United* has already led to effective negation of limits on fundraising by outside groups. The resulting fundraising and spending have compellingly demonstrated that *Citizens United*’s premise is wrong: Even expenditures that satisfy legal standards for “independence” can pose direct threats of corruption and apparent corruption.

Citizens United led immediately to the D.C. Circuit’s unanimous en banc opinion in *Speechnow.org*, 599 F.3d 686. In *Speechnow.org*, a political committee that planned to engage only in independent expenditures challenged longstanding provisions of the Federal Election Campaign Act (FECA) restricting the amount that

any individual could contribute to the political committee.² The plaintiffs argued that the political committee could not corrupt a candidate by spending money to support him, and therefore giving the group money in any amount for such spending also could not cause corruption.

Stating that *Citizens United* “resolves this appeal,” *Speechnow.org*, 599 F.3d at 689, the court of appeals agreed. The court held that limiting contributions to an organization that engaged only in independent expenditures served no valid anticorruption interest:

In light of the [Supreme] Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. ...

Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow.

Id. at 694-695 (citation omitted).

The Seventh and Ninth Circuits have agreed that, under *Citizens United*, political committees that en-

² Annual contributions to a non-candidate, non-party committee are limited to \$5,000. 2 U.S.C. § 441a(a)(1)(C). There is an aggregate, inflation-indexed cap on contributions to such committees, now \$46,200 per election cycle. *Id.* § 441a(a)(3)(B); FEC, *Contribution Limits 2011-12*, <http://www.fec.gov/pages/brochures/contrib.shtml#Chart> (visited May 17, 2012).

gage only in independent expenditures may receive unlimited contributions from individuals, corporations, and unions. *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010).

The government did not seek review of *Speechnow.org*, and the FEC issued guidance implementing its holding.³ The FEC now permits political committees that undertake to make independent expenditures—committees the FEC designates “Independent Expenditure-Only Committees,” more commonly known as “Super PACs”—to accept unlimited contributions from individuals, corporations, labor unions, and other political committees, subject to FECA’s reporting and disclosure requirements.

More recently, the United States District Court for the District of Columbia held that under *Citizens United* and *Speechnow.org*, a political committee that intends to make independent expenditures *and* contribute to candidates may accept unlimited individual, corporate, and union contributions for its expenditures if it places them in a segregated account. *Carey v. FEC*, 791 F. Supp. 2d 121 (2011). The FEC acquiesced, allowing political committees to establish separate accounts for candidate contributions and independent expenditures and use unlimited contributions for the latter.⁴ Thus, a committee may now operate simultane-

³ FEC Advisory Ops. 2010-09 & 2010-11 (July 22, 2010).

⁴ See FEC, *Statement on Carey v. FEC*, <http://www.fec.gov/press/Press2011/20111006postcarey.shtml> (Oct. 5, 2011).

ously as a conventional PAC making candidate contributions and a Super PAC collecting unlimited contributions for independent expenditures.

Beyond Super PACs, *Citizens United* also directly enabled nonprofit corporations to use unlimited corporate, union, and individual contributions for independent expenditures. A nonprofit corporation that does not have the “major purpose” of influencing federal elections may make such expenditures without complying with FECA’s reporting and disclosure requirements for political committees. *See, e.g., Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010).⁵ The IRS permits such organizations to claim tax-exemption under 26 U.S.C. § 501(c)(4) and (c)(6) if their “primary purpose” is not to influence elections, and thus does not require them to report donors publicly, as it would if they claimed tax exemption under 26 U.S.C. § 527. *Citizens United* accordingly allows nonprofit organizations to raise and spend funds for direct candidate advocacy, with neither limits on contributions nor effective disclosure requirements.

Citizens United’s statements that independent expenditures pose no corruption threat have thus created

⁵ FECA requires entities that are not political committees to report contributions used for independent expenditures, *see* 2 U.S.C. § 434(c)(2)(C), but the FEC construes the requirement to apply only to contributions earmarked for specific outlays, *see* 11 C.F.R. § 109.10(e)(1)(vi). Thus, contributions used for independent expenditures by nonprofit corporations that are not political committees are almost never reported. A federal district court recently required disclosure of non-earmarked contributions used to finance “electioneering communications,” but the ruling does not apply to express-advocacy expenditures. *Van Hollen v. FEC*, 2012 WL 1066717 (D.D.C. Mar. 30, 2012).

two new engines for deploying vast sums for direct candidate advocacy: Super PACs, which devote themselves exclusively to backing candidates and accept the consequence of disclosing contributors; and tax-exempt nonprofit corporations, which maintain the semblance of a primary purpose other than electioneering, but may raise and spend unlimited amounts on candidate advocacy without disclosing their funders. Both allow corporations, unions, and individuals to make contributions to organizations committed to support candidates without regard to limits on amounts and sources of contributions that may be made directly to the candidates.

These two types of organizations may also work in tandem: Affiliated nonprofits and Super PACs allow donors the choice of contributing with or without disclosure.⁶ In such circumstances, the nonprofit may pass along funds to the Super PAC, with only the nonprofit reported as the contributor.⁷

Notwithstanding *Buckley's* assumption that outside groups are limited to “totally independent[]”

⁶The best-known examples of such affiliated groups are American Crossroads, an independent expenditure-only committee, and Crossroads GPS, a 501(c)(4) corporation, both of which make expenditures supporting Republicans and opposing Democrats, including President Obama. On the other side, former Obama aides have formed Priorities USA Action, an independent expenditure-only committee, and Priorities USA, a 501(c)(4) corporation, to support President Obama's reelection.

⁷For example, the pro-Obama Super PAC Priorities USA Action reports that it has received over \$215,000 from its affiliated 501(c)(4), Priorities USA. *Top Organizations Donating to Priorities USA Action, 2012*, http://www.opensecrets.org/outside_spending/contrib.php?cmte=C00495861&cycle=2012 (visited May 17, 2012).

spending, 424 U.S. at 47, the spending for which such groups may now use funds not subject to contribution limits is only “independent” in the sense that it is not “coordinated” with a candidate, as narrowly defined under FECA and its implementing regulations. *See* 2 U.S.C. § 441a(a)(7); 11 C.F.R. §§ 109.20, 109.21.⁸ An expenditure is “coordinated” only if “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party committee.” 11 C.F.R. § 109.20(a). Expenditures are “coordinated” if they meet detailed content standards, *id.* § 109.21(c), and result from particular “conduct,” *id.* § 109.21(d). Such conduct includes a candidate’s “request,” “suggestion,” or “assent” that an expenditure be made; “[m]aterial involvement” by the candidate in creating an election-related communication; “[s]ubstantial discussion” with the candidate about a communication’s content; use of common vendors (without a “firewall”); involvement of former campaign employees; or re-publication of the candidate’s campaign materials. *Id.*

These coordination regulations, however, are not interpreted by the FEC to preclude involvement of the candidate’s close associates, friends, and family in founding or directing an independent-expenditure organization. Nor do they embrace communications developed by sophisticated political operatives consciously to parallel those of the candidate. The coordination rules do not themselves bar a Super PAC from devoting itself *exclusively* to supporting a particular

⁸ A “coordinated” expenditure is treated as a contribution subject to FECA’s source and amount limitations. *See Buckley*, 424 U.S. at 46-47.

candidate or from representing to donors that it is “the” Super PAC for that candidate.⁹ Nor, according to the FEC, is there anything improper about a candidate or his agents endorsing the efforts of a Super PAC or nonprofit that supports his candidacy, or even directly asking supporters to contribute to the supposedly independent entity: The FEC has ruled that candidates may attend fundraisers for Super PACs and explicitly solicit contributions for them, as long as they *say* they are asking only for amounts within FECA’s contribution limits.¹⁰

In short, *Citizens United* created conditions under which candidates may be closely aligned with shadow campaign organizations promoting their election but thinly disguised as “independent” spending groups. These organizations may be endorsed and aided by candidates, and the unlimited corporate, union, and individual contributions they obtain may be perceived as the equivalent of contributions to the candidates themselves.

III. THE EFFECTS OF *CITIZENS UNITED* DEMONSTRATE THAT INDEPENDENT SPENDING HAS THE POTENTIAL TO CORRUPT

The forces *Citizens United* unleashed have transformed the financing of American elections. That

⁹ The Super PAC Make Us Great Again, formed to support the presidential candidacy of Texas Governor Rick Perry, warned donors to “avoid any other group claiming to be ‘the’ pro-Perry independent effort.” *Another Group Helps Rick Perry Out*, <http://thecaucus.blogs.nytimes.com/2011/08/09/another-group-helps-rick-perry-out/> (Aug. 9, 2011).

¹⁰ FEC Advisory Op. 2011-12 (June 30, 2011).

transformation has demonstrated the fallacy of *Citizens United's* assumption that independent expenditures cannot corrupt. By fostering explosive growth of organizations that are closely connected to candidates and political parties and that collect and spend unlimited amounts to support specific candidates, *Citizens United* has altered the relation between “outside” spenders and candidates. The result has been increasing dependence by candidates on extremely large donations to Super PACs and nonprofits, with attendant risks of corruption equivalent to those posed by contributions to the candidates themselves.

The transformation began quickly. Only four months elapsed between the FEC's 2010 publication of advisory opinions allowing the formation of Super PACs and election day. Yet Super PACs spent over \$65 million in the 2010 congressional elections.¹¹ Non-profit corporations that did not disclose donors spent approximately \$130 million.¹² Overall, outside spending by nonparty groups rocketed to nearly \$305 million in 2010, exceeding outside spending in the 2008 presidential election cycle and dwarfing the \$69 million in outside spending in 2006, the last nonpresidential election cycle.¹³

¹¹ *2010 Outside Spending, by Super PACs*, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> (visited May 17, 2012).

¹² *2010 Outside Spending, by Groups*, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U> (visited May 17, 2012).

¹³ *Total Outside Spending by Election Cycle, Excluding Party Committees*, http://www.opensecrets.org/outsidespending/cycle_tots.php (visited May 17, 2012).

In specific, hotly fought contests, outside spending played a critical role. In Illinois's Senate race, nonparty outside spending supporting successful candidate Mark Kirk exceeded \$7 million, significantly more than the \$5.7 million spent by his own party's committees, and more than half as much as the candidate himself spent. The two Crossroads groups alone poured \$5.6 million into supporting Kirk, approximately the same amount as the Republican Party. Likewise, in both the Washington and Colorado Senate races, outside spending in support of both candidates was roughly on par with or in excess of spending by the political parties, and, in the Colorado race, exceeded the amount spent by the Republican challenger on his own campaign. Senate races in Pennsylvania, Nevada, Missouri, California, and other states experienced similar influxes of outside spending.¹⁴

The changes that began in 2010 have accelerated in 2012. Already, Super PACs have raised over \$200 million—over three times their total for the entire 2010 cycle—and spent almost \$106 million.¹⁵ Super PAC spending is expected to explode in the general election, with the Crossroads Super PAC and its affiliated non-profit group, Crossroads GPS, planning to raise and spend \$300 million.¹⁶ By comparison, John McCain

¹⁴ *2010 Outside Spending, by Races*, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=R&pty=A&type=A> (visited May 17, 2012).

¹⁵ *2012 Outside Spending, by Super PACs*, *supra* n.11.

¹⁶ 'Super PAC,' *Eyeing General Election*, N.Y. Times, http://www.nytimes.com/2012/04/09/us/politics/major-republican-super-pac-prepares-to-take-on-obama.html?_r=1&smid=tw-nytimes-politics&seid=auto (Apr. 8, 2012).

spent a total of \$333 million in the 2008 presidential election.¹⁷ Nonprofit groups so far have spent nearly \$10 million and are reportedly raising large amounts for the general elections, much of it from corporations and other very large donors—including at least one undisclosed \$10 million donor—who prefer to channel spending through groups that do not disclose contributors.¹⁸ Unions are also planning major spending in the general election, using both treasury funds and newly created Super PACs, as well as making contributions (not subject to limits) to other Super PACs.¹⁹

Simultaneously, outside spending groups have evolved in ways that make ever more apparent their potential to foster corruption. The key development has been the rise of candidate-specific Super PACs, which devote themselves almost exclusively to promoting particular candidates through expenditures that, they claim, are “independent” enough to avoid demonstrable coordination.

Many candidate-specific Super PACs have been formed by individuals closely associated with presidential candidates. Restore Our Future, the Super PAC backing Mitt Romney, was founded by a trio of former staffers from Romney’s 2008 campaign. Make Us Great Again PAC, backing Rick Perry, was founded by

¹⁷ *Banking on Becoming President*, <http://www.opensecrets.org/pres08/> (visited May 17, 2012).

¹⁸ *Mystery donor gives \$10 million to Crossroads GPS group to run anti-Obama ads*, Wash. Post, Apr. 14, 2012 at A6.

¹⁹ *Unions Finally Make a Showing On Super PAC Stage*, <http://www.opensecrets.org/news/2012/04/very-wealthy-conservative-indivdua.html> (Apr. 22, 2012).

Perry's former chief of staff. Newt Gingrich's Super PAC, Winning Our Future, was formed by Gingrich's longtime fundraiser. And two Obama aides went directly from White House positions to form the Super PAC supporting the President's reelection, Priorities USA Action, and its affiliated nonprofit group, Priorities USA.²⁰ These "independent" entities can—and do—host their favored candidates at fundraising events and can receive funding from donors requested by those candidates to contribute to the Super PACs.

Candidate-specific Super PACs have already devoted enormous financial resources to electing their favored candidates. The Romney Super PAC has raised nearly \$52 million, 60% as much as the Romney campaign itself. The Super PAC backing Rick Santorum's presidential bid raised \$8.3 million, 40% as much as the official campaign. And the Gingrich Super PAC raised nearly \$24 million, over a million dollars *more* than the Gingrich campaign.²¹

Much support for Super PACs has come from very large donors. Through March 31, 2012, more than half of the money raised by Super PACs came from 46 indi-

²⁰ These and other relationships between candidates and their Super PACs, too numerous to set forth fully here, are detailed in Democracy 21's report, *Leading Presidential-Candidate Super PACs and the Serious Questions That Exist About Their Legality*, http://www.democracy21.org/vertical/sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/Democracy_21_Super_PAC_Report__1_4_2012.pdf (Jan. 4, 2011).

²¹ *2010 Outside Spending, by Super PACs*, *supra* n.11 (figures for Super PACs); *2012 Presidential Candidate Fundraising*, <http://www.opensecrets.org/pres12/index.php> (visited May 17, 2012) (figures for campaigns).

viduals, corporations, and organizations that contributed *at least* \$1 million—including \$25 million from Sheldon and Miriam Adelson, \$13.7 million from Harold and Annette Simmons, and \$6.7 million from Bob Perry.²² Many Super PAC donors contribute the legal maximum to the candidates' campaigns and turn to Super PACs to increase that support exponentially. As of February 2012, 84% of the contributors to the Romney Super PAC had maxed out their donations to his primary campaign, and Obama supporters who have made the maximum contribution for both the primary and general elections are contributing to pro-Obama Super PACs in increasing numbers.²³

The candidates have encouraged these contributions and made clear that they regard the resulting influx of big dollars into supportive groups to be the functional equivalent of contributions to their campaigns. Mitt Romney, for example, stated: “We raise money for super PACs. We encourage super PACs. Each candidate has done that.”²⁴ Romney personally partici-

²² *Track large donations to super PACs during the 2012 campaign*, USA Today, <http://www.usatoday.com/news/politics/story/2012-05-02/super-pacs-mega-donors/54701270/1> (visited May 17, 2012).

²³ *Super-PAC donors also maxing out with campaigns, study finds*, The Hill, <http://thehill.com/blogs/ballot-box/fundraising/211777-super-pac-donors-also-maxing-out-with-campaigns-study-finds> (Feb. 21, 2012); *Presidential campaign donors moving to super PACs*, <http://reporting.sunlightfoundation.com/2012/maxed-out-donors/> (Apr. 26, 2012).

²⁴ *Mitt Romney backs super PACs, but says ads should be accurate*, Wash. Post, <http://www.washingtonpost.com/blogs/election-2012/post/mitt-romney-backs-super-pacs-but-says-adds->

pated in fundraising for Restore Our Future and described a contributor to his Super PAC as having given “to me.”²⁵ Rick Santorum similarly referred to the Super PAC supporting him as “my super PAC.”²⁶

President Obama’s campaign manager, Jim Messina, likewise called on the President’s supporters to contribute to the pro-Obama Super PAC:

[T]he campaign has decided to do what we can, consistent with the law, to support Priorities USA in its effort to counter the weight of the GOP Super PAC. ...

Senior campaign officials as well as some White House and Cabinet officials will attend and speak at Priorities USA fundraising events. ...

This decision will help fill a hole on our side. But it’s only one part of the overall effort.

Supporting Priorities USA means that our side will not concede the battles on the air²⁷

should-be-accurate/2012/01/17/gIQAvw8k5P_blog.html (Jan. 17, 2012).

²⁵ *Romney \$1 Million Mystery Corporate Donation*, http://www.youtube.com/watch?v=rDUELklbY6M&feature=player_embedded (Aug. 25, 2011).

²⁶ *Super PAC? What Super PAC?*, Nat’l J., <http://decoded.nationaljournal.com/2012/02/campaign-2012-weve-memorized-t.php> (Feb. 9, 2012).

²⁷ *We Will Not Play by Two Sets of Rules*, <http://www.barackobama.com/news/entry/we-will-not-play-by-two-sets-of-rules/> (Feb. 6, 2012).

Reportedly, the President “personally signed off on his campaign’s decision to actively encourage donations to Democratic Super PAC Priorities USA.”²⁸

Most striking, Newt Gingrich, when ending his campaign, singled out his Super PAC’s largest backers for special thanks: “[I]t would be impossible for me to be here and thank everybody without mentioning Sheldon and Miriam Adelson, who single-handedly came pretty close to matching Romney’s Super PAC, and I’m very, very grateful to them.”²⁹

These developments are not limited to presidential campaigns. Congressional races are even more susceptible to outside spending, as infusions of a few million dollars or less can have a decisive effect in such races.³⁰ Candidate-specific Super PACs have made their appearance in congressional races, and other Super PACs and nonprofits are planning major outlays in many races.³¹ Already, Super PACs outspent their favored

²⁸ *Obama signs off on Super PAC donation encouragement*, http://firstread.msnbc.msn.com/_news/2012/02/07/10343546-obama-signs-off-on-super-pac-donation-encouragement (Feb. 7, 2012).

²⁹ *Newt Gingrich to Adelson: Thanks for the Cash*, <http://abcnews.go.com/Politics/video/newt-gingrich-sheldon-adelson-cash-16263913> (May 2, 2012).

³⁰ *Super PACs Already Spending Big*, Am. Prospect, <http://prospect.org/article/super-pacs-already-spending-big> (May 8, 2012).

³¹ *Super PACs, Conservatives Lead Surge In Independent Spending On Congressional Races*, Huffington Post, http://www.huffingtonpost.com/2012/05/10/super-pacs-congress-races-conservatives_n_1507345.html?ref=elections-2012 (May 10, 2012).

candidate in the Indiana Senate primary.³² As the general elections approach, candidates across the country will rely on similar support.

To paraphrase Judge Kavanaugh’s *RNC* opinion dealing with political-party soft money, the evidence is compelling that “federal officeholders and candidates may value contributions to” Super PACs “in much the same way they value contributions to *their own campaigns*,” and thus Super PAC contributions “have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption.” 698 F. Supp. 2d at 159.

That candidates today consider outside spending groups, fueled by unlimited contributions, to be essential to their efforts refutes *Buckley*’s speculation that “such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” 424 U.S. at 47. Experience in the new era of unrestrained Super PAC fundraising and spending contradicts any notion that candidates find such spending embarrassing or useless. Rather, candidates openly encourage donations to “their” Super PACs. The professional political operatives—with longstanding ties to the candidates—who direct those Super PACs are adept at echoing the themes and strategies of the candidates’ campaigns. As Steven Law, president of the Crossroads groups, candidly stated, “People have just gotten a lot better about telegraphing their intentions in a way that doesn’t create

³² *Super PACs outspend favorite candidate in Indiana Senate race*, <http://www.iwatchnews.org/2012/05/07/8825/super-pacs-outspend-favorite-candidate-indiana-senate-race> (May 7, 2012).

any legal problems, and doesn't give away too much to the other side."³³ Rick Tyler, the former Gingrich aide heading the pro-Gingrich Super PAC, said, "I follow my lead from Newt Gingrich I watch what he says on TV. I read about him in the newspaper."³⁴

The nominal independence of outside spending groups has proved particularly useful to the official campaigns, which have allowed Super PACs and non-profit corporations to take the lead in highly effective negative advertising while denying any responsibility for such attacks.³⁵ A Wesleyan University professor who documented the overwhelming prevalence of negative advertising by outside groups explains that, "[a]s candidates, you do want to outsource some of the negativity."³⁶

Nor do the facts support the supposition that the "absence of prearrangement" of outside spending will obviate possible corruption. *Citizens United*, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47). Although coordination rules forbid prearrangement of *particular expenditures*, there are ample opportunities for quid pro quo arrangements when contributors seeking to

³³ *Cash-Rich Republicans Prepare to Attack*, Fin. Times, <http://www.cnbc.com/id/47349129> (May 9, 2012).

³⁴ *Attack of the Super PACs*, Time, Jan. 23, 2012, at 28.

³⁵ See Brooks & Murov, *Assessing Accountability in a Post-Citizens United Era*, 40 Am. Politics Research 383 (2012).

³⁶ *Do Campaign Ads Seem More Negative This Year? It's Not Just You*, NPR: All Things Considered, <http://www.npr.org/blogs/itsallpolitics/2012/05/09/151956938/do-campaign-ads-seem-more-negative-this-year-its-not-just-you> (May 3, 2012) (quoting Erika Fowler).

support a candidate in return for preferential treatment can be steered to give *unlimited* sums to organizations committed to support the candidate. The potential for illicit quid pro quo arrangements, or their appearance, is much greater when millions of dollars are at stake than when a contributor merely wants to give a few thousand dollars directly to a campaign.³⁷ The free-for-all created by *Citizens United* threatens circumvention on a massive scale of contribution limits, the fundamental anticorruption measure that this Court has consistently upheld.

The direct consequences of *Citizens United* have thus undermined its premise that independent expenditures cannot corrupt candidates. Judge Richard Posner, surveying the fallout, recently observed:

The Supreme Court allows donations to political campaigns to be regulated (and limited) because of fear that donations unlimited in amount corrupt the political process, because the candidate recipient knows that a donor of a large amount of money expects something in return, usually favorable consideration of a policy that would benefit the donor, and hence a

³⁷ According to press reports, Sheldon Adelson not only met with Newt Gingrich while he was providing critical support for the pro-Gingrich Super PAC, but also communicated with Mitt Romney about similar support should Romney become the nominee. See *Gingrich Patron Could Have a Plan B: Romney*, N.Y. Times, Feb. 5, 2012, at A1. It takes little imagination to conclude that when multi-million-dollar donors talk privately with the candidates they sponsor, there is an *opportunity* for actual or apparent quid pro quo corruption. Although some will resist the urge to ask for some commitment in exchange for their massive financial support, others will not exercise such restraint.

large donation is likely to be a tacit bribe. But the Court, rather naively as it seems to most observers, reasoned in the *Citizens United* case that the risk of corruption would be slight if the donor was not contributing to a candidate or a political party, but merely expressing his political preferences through an independent organization such as a super PAC—an organization neither controlled by nor even coordinating with a candidate or political party.

The criticisms of the Court's reasoning are several. First, the notion of "coordination" is vague, and tacit coordination with a candidate or a party seems to occupy the same never-never land as tacit collusion in antitrust law. It can be quite effective yet is hard to condemn as actual coordination. Allies of the candidate or members of the party can run the super PAC, and without even talking to the candidate or to party officials can figure out what kind of political advertising will be helpful to the candidate. ...

It thus is difficult to see what practical difference there is between super PAC donations and direct campaign donations, from a corruption standpoint. A super PAC is a valuable weapon for a campaign... ; the donors to it are known; and it is unclear why they should expect less quid pro quo from their favored can-

didate if he's successful than a direct donor to the candidate's campaign would be.³⁸

As Judge Posner explains, the unreality of the notion of “totally independent” spending and the great value of such spending to today's candidates means that large-scale spending by outside groups and the contributions that support it are the functional equivalent of candidate contributions.

The public rightly agrees with Judge Posner. In a recent national poll by the independent Opinion Research Corporation, 69% agreed that “new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption,” while 73% said “there would be less corruption if there were limits on how much could be given to Super PACs.”³⁹ Sixty-five percent of respondents said they trust government less because donors to Super PACs have more influence than average voters, and 26% said they were less likely to vote as a result.⁴⁰ Far from “presuppos[ing]” the “ultimate influence” of the voters, as *Citizens United* posited, 130 S. Ct. at 910, the perception of corruption fostered by candidates' reliance on big-money donors to “independent” spending groups directly harms our political system.

³⁸ Posner, *Unlimited Campaign Spending—A Good Thing?*, The Becker-Posner Blog, <http://www.becker-posner-blog.com/2012/04/unlimited-campaign-spending-a-good-thing-posner.html> (Apr. 8, 2012).

³⁹ *National Survey: Super PACs, Corruption, and Democracy*, http://www.brennancenter.org/content/resource/national_survey_super_pacs_corruption_and_democracy (Apr. 24, 2012).

⁴⁰ *Id.*

CONCLUSION

Denying certiorari would send a welcome message that *Citizens United* should not be read overbroadly. In the alternative, amici urge the Court to grant plenary review in which those broad statements, and other critical premises of *Citizens United*, may be reconsidered. The Court should deny the petition for a writ of certiorari or reject petitioners' request for summary reversal and set the case for briefing and oral argument.

Respectfully submitted.

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MAY 2012

APPENDIX

LIST OF AMICI CURIAE

Trevor Potter was appointed a Commissioner of the Federal Election Commission by President George H. W. Bush in 1991 and served as Chairman in 1994. He has also served as legal counsel to three Republican presidential campaigns, and is currently head of the Political Law practice at Caplin & Drysdale, chartered in Washington, D.C.

Frank P. Reiche was appointed to the Federal Election Commission by President Carter, where he served from 1979 to 1985 and was Chairman in 1982. Before that, he served as Chairman of the New Jersey Election Law Enforcement Commission from 1973 to 1979.

Lawrence M. Noble was General Counsel of the Federal Election Commission from 1987 to 2000 and Executive Director of the Center for Responsive Politics from 2000 to 2006. He currently practices political law and is an adjunct professor at George Washington University Law School, where he teaches campaign finance law.

Charles N. Steele served as General Counsel of the Federal Election Commission from 1979 to 1987. Prior to that he served the Commission as Deputy Assistant General Counsel and Associate General Counsel for Enforcement and Litigation from 1977 to 1979, and as Acting General Counsel in 1979.

Jeffrey B. Garfield served as the Executive Director and General Counsel of the Connecticut Elections Enforcement Commission for more than 30 years before retiring in 2009. He successfully implemented the most comprehensive campaign finance reform legislation in

the United States and is now is a solo practitioner in Connecticut handling political clientele.

Nicole A. Gordon was the founding Executive Director of New York City's pioneer Campaign Finance Board for eighteen years, building it into a nationally recognized model and the largest public funding program in the United States after that of the federal government. She is a consultant to New York State and adjunct professor at the NYU Wagner School of Public Service where she teaches Law and Public Policy.

Robert M. Stern was General Counsel of the California Fair Political Practices Commission and is the former President of the Los Angeles-based Center for Governmental Studies.