No. 11-1179

IN THE

Supreme Court of the United States

AMERICAN TRADITION PARTNERSHIP, INC., ET AL.,

Petitioners,

—v.—

STEVE BULLOCK, ATTORNEY GENERAL OF THE STATE OF MONTANA, ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF SENATOR MITCH MCCONNELL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Senator Mitch McConnell is the Senior Senator from the Commonwealth of Kentucky and the Republican Leader in the 112th Congress. Senator McConnell was the lead plaintiff in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003), litigation challenging, *inter alia*, the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Senator McConnell filed a brief, *amicus curiae*, in *Citizens United* v. *Federal Election Commission*, 558 U.S. __, 130 S. Ct. 876 (2010) ("*Citizens United*"), and his counsel participated in oral argument on his behalf in that case. For many years, Senator McConnell has been a leader in the United States Senate in opposing Congressional efforts to restrict speech about elections in the name of campaign finance reform.

SUMMARY OF ARGUMENT

The ruling of the Montana Supreme Court is in direct contravention of this Court's ruling in *Citizens United*. Nothing that has occurred since that ruling warrants its reconsideration. In fact, the central concerns expressed by those members of this Court who dissented in *Citizens United* or joined earlier opinions

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel for the parties received timely notice of the intent to file this brief and have consented to its filing.

sustaining campaign finance laws that limited speech have not been borne out by events of the past two years. Corporate donations to the so-called Super PACs created after *Citizens United* have been minimal. Individual donations, already constitutionally protected under *Buckley* v. *Valeo*, 424 U.S. 1 (1976), have been substantial and have led to more political debate over a lengthier period of time during which more voters had the opportunity to participate in the choice of a presidential candidate.

The *Citizens United* ruling was rooted in long-established First Amendment principles. There is no basis for reconsidering them or the *Citizens United* ruling itself.

ARGUMENT

From the day it was issued, this Court's ruling in *Citizens United* has been the subject of sustained, overheated, and sometimes irresponsible attack. This is hardly the first time in the Court's history that its application of one or another of the provisions of the Bill of Rights has led to such commentary. Just as *Citizens United* was rooted in the First Amendment, criticism of it is, of course, fully protected by that provision. In this case, however, the Court is confronted with a ruling of the Montana Supreme Court that is disdainful, even scornful, of this Court's ruling and that effectively refuses to abide by it. It is no wonder that, as a result, one of that court's members was obliged to remind his colleagues that "when the highest court in the country has spoken clearly on a matter of federal constitutional law, as it did in *Citizens United* . . . this Court . . . is not at liberty to disregard or parse that decision in order to uphold a state law

that, while politically popular, is clearly at odds with the Supreme Court's opinion." App. 47a.

The petition for a writ of certiorari in this case sets forth persuasively the nature of the conflict between *Citizens United* and the ruling of the Montana Supreme Court and the reasons why summary reversal is appropriate. This brief, *amicus curiae*, is submitted to advise the Court of events that have occurred since the *Citizens United* ruling, events that further support the correctness of that ruling and the absence of any basis to reconsider, let alone reverse, it.

We begin with the nature of the concerns expressed by those who opposed the ruling. In one opinion after another, whether in the majority or in dissent, those members of this Court who have concluded that state and federal campaign finance laws limiting speech were constitutional have expressed their disquiet with what they perceived as the visage of illicit corporate dominance of the electoral process. In *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 669 (1990), this Court concluded that the Michigan Campaign Finance Act, at issue in that case, "reduce[d] the threat that huge corporate treasuries amassed with the aid of state laws will be used to influence unfairly the outcome of elections," and that the statute at issue addressed "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form. . ." *Id.* at 660. In *McConnell* v. *Federal Election Commission*, 540 U.S. 93, 115 (2003), the majority quoted with approval Elihu Root's assertion that legislation was required to prevent "'the great aggregations of wealth, from using their corporate funds, directly or indirectly' to elect legislators who would 'vote for their

protection and the advancement of their interests as against those of the public.'" And when *Citizens United* overruled both those rulings, the dissenting opinion of Justice Stevens expressed concern that "[t]he influx of unlimited corporate money into the electoral realm . . . creates new opportunities for the mirror image of quid pro quo deals: threats both explicit and implicit. Starting today, corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests." 130 S. Ct. at 965-66.

The submission of the United States to this Court in *Citizens United* offered its own doomsday scenario about the consequences of overruling *Austin* and the relevant portion of *McConnell*. Fortune 100 companies, the government argued, had "combined revenues of $13.1 trillion and profits of $605 billion. If those 100 companies alone had devoted just one percent of their profits (or one-twentieth of one percent of their revenues) to electoral advocacy, such spending would have more than doubled the federally-reported disbursements of all American political parties and PACs combined." Such an "amount of corporate spending," the government urged, "could dramatically increase the reality and appearance of quid pro quo corruption." Supplemental Brief of Appellee at 17, *Citizens United* v. *Federal Election Commission*, 130 S. Ct. 876 (2010) (No. 08-205).[2]

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[2] Large elements of the press offered similar predictions after *Citizens United* was released. *See*, *e.g.*, Editorial, *The Court's Blow to Democracy*, The New York Times, Jan. 22, 2010, at A30 ("the court's conservative majority has paved the way for

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Over two years have passed since the *Citizens United* ruling. One national election has been held and a vigorously fought primary campaign has been waged in a large number of states around the nation to choose a Republican candidate to run against President Obama this year. In that time period, nothing has occurred to warrant reconsideration of *Citizens United*. The First Amendment barrier to such legislation has not diminished. And there is no basis for concluding that any quid pro quo corruption, the only kind that this Court has found relevant, has occurred as a result of the ruling. *Citizens United*, 130 S. Ct. at 909-10. While the issue of what creates the "appearance" of corruption is necessarily subjective in nature,

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corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding"); Editorial, *The Supreme Court Removes Important Limits on Campaign Finance*, The Washington Post, Jan. 22, 2010, at A20 ("[the decision] was dangerous because corporate money, never lacking in the American political process, may now overwhelm both the contributions of individuals and the faith they may harbor in their democracy"); Editorial, *Justices Strike Down Campaign Finance Laws*, San Francisco Chronicle, Jan. 22, 2010, at A14 ("Voters should prepare for the worst: cash-drenched elections presided over by free-spending corporations"); Bob Kerrey, *The Senator from Exxon-Mobil?*, Huffington Post, Jan. 21, 2010 (available at http://www.huffingtonpost.com/bob-kerrey/the-senator-from-exxon-mo_b_431245.html) ("What does this ruling mean? Consider the influence of a single corporation like Exxon Mobil. . . With $85 billion in profits during the 2008 election. Exxon Mobil would have been able to fully fund over 65,000 winning campaigns for U.S. House. . .").

we are aware of no basis for concluding that there has been any change in that area as well.[3]

Such conclusions should occasion no surprise. At the time *Citizens United* was decided, 26 states imposed no restrictions on the amount of independent expenditures by for-profit corporations. *Citizens United*, 180 S. Ct. 908. There was not then any basis for concluding that corporate spending in those states (including states rarely associated with scandalous behavior, such as Virginia, Washington, and Utah) had "corrupted the political process," and the United States made no claim to that effect. *Id.* at 909. The same is true today.

What is new, however, is that there are now facts that bear on the concerns expressed by critics of the ruling. A review of FEC records for independent expenditure-only committees — *i.e.* the so-called Super PACs — supporting the eight leading Republican Presidential candidates has evidenced minimal corporate involvement in the 2012 election cycle.[4] For ex-

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[3] We do not believe that published criticism of the Court's ruling in *Citizens United*, however repeated and with whatever impact it may have had on public opinion, can constitute the sort of "appearance of corruption" that can warrant overcoming what would otherwise constitute First Amendment protected speech. If it did, the mere recitation of criticism could carry the day, an unacceptable result in any case and surely one in a case in which the right of free expression is at stake.

[4] The FEC records for the following eight Super PACs were reviewed: Winning Our Future (supporting Newt Gingrich), Restore Our Future, Inc. (supporting Mitt Romney), Red White and Blue Fund (supporting Rick Santorum), Make Us Great Again, Inc. (supporting Rick Perry), Endorse Liberty, Inc. (sup-

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ample, notwithstanding the government's hypothetical positing of enormous political expenditures by Fortune 100 companies, we now know that not a single one of the Fortune 100 companies has contributed a cent to any of these eight Super PACs — a fact discernable from records filed with the Federal Election Commission in accordance with disclosure requirements upheld in *Citizens United*.[5] That includes what President Obama referred to, in the course of his denunciation of the ruling, as "big oil, Wall Street banks [and] health insurance companies," all of which, he asserted, had attained a "victory" in *Citizens United*. Press Release, The White House, Office of the Press Secretary, Statement from the President on Today's Supreme Court Decision (Jan. 21, 2010).

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porting Ron Paul), Our Destiny PAC (supporting Jon Huntsman), 9-9-9 Fund (supporting Herman Cain), and Keep Conservatives United (supporting Michele Bachmann).

[5] Analysis was performed for all contributions received by the eight Super PACs through March 31, 2012 of the 2011-2012 Election Cycle. For contributions received on or before February 29, 2012, FEC-compiled reports of individual and committee contributions were reviewed for each Super PAC. These reports can be accessed through the Committee Search link on the FEC's Campaign Finance Disclosure Portal. For contributions made between March 1, 2012 and March 31, 2012, contribution information was obtained from the Schedule A section ("Itemized Receipts") on each Super PAC's FEC Form 3X ("Reports of Receipts and Disbursements For Other Than An Authorized Committee"). These forms can be accessed through the Report Image Search link on the FEC's Campaign Finance Disclosure Portal.

A review of FEC records for the eight Super PACs referenced above reveals that a total of $96,410,614 has been contributed to those Super PACs through March 31, 2012. The chart that follows sets forth the total amount contributed to all Super PACs supporting those eight candidates and the amount contributed to each Super PAC supporting each candidate:

Total Amount Contributed to Super PACs:	$96,410,614
Gingrich	$23,808,236
Romney	$51,962,295
Santorum	$8,150,420
Perry	$5,585,174
Paul	$3,588,098
Huntsman	$3,165,044
Cain	$124,597
Bachmann	$26,750

We also know exactly how much money has been donated by all corporations to those Super PACS. Of the total of $96,410,614 contributed to Super PACs supporting those candidates, $83,220,167 — 86.32% — was contributed by individuals and $13,190,447 — 13.68% — by corporations as shown in the charts that follow.

Total Amount Contributed by Individuals	$83,220,167
Gingrich	$23,807,236
Romney	$40,959,795
Santorum	$7,977,973
Perry	$3,593,174
Paul	$3,565,598
Huntsman	$3,165,044
Cain	$124,597
Bachmann	$26,750

Total Amount Contributed by Corporations	$13,190,447
Gingrich	$1,000
Romney	$11,002,500
Santorum	$172,447
Perry	$1,992,000
Paul	$22,500
Huntsman	$0
Cain	$0
Bachmann	$0

Total Percentage of All Contributions	
By Individuals	86.32%
By Corporations	13.68%

And, as the data reveals, of the entire $96,410,614, 86.32% was contributed by individuals, 12.87% by privately held corporations and less than one percent — 0.81% — by public companies.

Total Percentage of All Contributions	
Individual	86.32%
Private Company	12.87%
Public Company	0.81%

Of total corporate contributions, $12,410,447 — 94.09% — was contributed by privately held corporations and $780,000 — 5.91% — by public corporations.

Breakdown of Corporate Donors		
Super PAC	**Private**	**Public**
Gingrich	$1,000	$0
Romney	$10,622,500	$380,000
Santorum	$172,447	$0
Perry	$1,592,000	$400,000
Paul	$22,500	$0
Huntsman	$0	$0
Cain	$0	$0
Bachmann	$0	$0
TOTAL	$12,410,447	$780,000

Total Percentage of Corporate Contributions	
Private	94.09%
Public	5.91%

As the data reflects, the Super PACs supporting three of the eight candidates received no corporate donations at all and six of the eight received none from public companies. Put another way, the much predicted corporate tsunami simply did not occur.

As for independent expenditures by individuals, the numbers cited above indicate a considerable in-

crease in the amount of funds expended. The law had been clear since *Buckley* that individuals could make unlimited independent expenditures in support of a candidate's campaign. As a result, large sums had been spent supporting or opposing candidates for election by individuals ranging from those who paid for the anti-Kerry Swift Boat advertisements in the 2004 campaign to wealthy individuals such as George Soros who spent over $24 million dollars supporting Democratic candidates that same year. Matt Kelley and Fredreka Schouten, *Top donors slice gifts to political groups since '04*, USA Today, Jul. 22, 2008.

The large amounts of individual independent expenditures during the contested 2012 Republican nomination battle may stem from a number of factors – the level of ideological dispute within the party, the intensity of the desire of Republicans to choose the strongest candidate to oppose President Obama and/or the extraordinary level of publicity regarding the *Citizens United* ruling. Whatever the reasons, the result of those expenditures has been far more political speech in 2012 than would otherwise have been the case. Races, as one observer has pointed out, have been "less predictable and more interesting, boosting candidates who would've been crippled by a lack of money."[6] As another concluded, "[t]his is our second election under *Citizens United*. . . In 2010, turnout was up from 2006, we had more competitive races than at almost any time in recent memory. In fact . . . over the last three years we've had the best public de-

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[6] Jacob Sullum, *Big Donors are Fueling Democracy*, New York Post, Mar. 15, 2012, at 29.

bate about the overall size and scope of the federal government — What do we want government to do? Where do we want to go — that we've had since the civil rights era." Interview by Lee Pacchia of Bloomberg Law with Bradley Smith, Former Chair, Federal Election Commission (Jan. 5, 2012) (available at http://www.youtube.com/watch?v=_BvYWdM6n44).

Consider the advertisements themselves that have been funded by the independent expenditures discussed above. We have chosen, by way of example, three that were shown during the primary contests within the Republican Party — one broadcast by a pro-Gingrich Super PAC ("Winning Our Future"), a second broadcast by a pro-Santorum one ("Red White and Blue") and a third by one that is pro-Romney ("Restore our Future"). They are, as would be expected, pure political speech of the sort that the First Amendment most indisputably protects.

The "Winning Our Future" advertisement was a rebroadcast of one from the McCain campaign in 2008 when Senator McCain was seeking the Republican nomination and Governor Romney was one of his opponents. Entitled "A Tale of Two Mitts," it shows 11 clips of Governor Romney taking what are arguably inconsistent positions. In two of them, for example, he supports "a woman's right to choose" to have an abortion; in another, he states he is "pro-life." In one he supports "tough gun laws in Massachusetts" and in another he states that he "support[s] the Second Amendment." In one he states that he was "an independent during the time of Reagan-Bush"; in another

he states that "I'm not trying to return to Reagan-Bush"; in a third, he states that [i]t's time for Republicans to start acting like Republicans."[7]

The advertisement offered by "Red White and Blue" stated: "Meet the real Mitt Romney: supported by the Wall Street Bailout, putting America's trillions in debt; raised job-killing taxes and fees by 700 million, leaving Massachusetts over a billion in debt, his healthcare takeover — the blueprint for Obama-care. Mitt Romney — more debt and taxes, less jobs, more of the same." It concludes "Rick Santorum — a bold plan for the middle class; create dynamic jobs and cut wasteful spending. Rick Santorum for President."[8]

The "Restore Our Future" ad begins with the statement "You know what makes Barack Obama happy? Newt Gingrich's baggage. Newt has more baggage than the airlines." The advertisement then cites a number of instances in which it claims Speaker Gingrich had acted, in one way or other, improperly — *i.e.* being paid "$30,000 an hour" and $1,600,000 in total by Freddie Mac which "helped cause the recession"; working with Nancy Pelosi on solutions to global warming; supporting "taxpayer funding of some abortions"; and being "the only speaker in history to be reprimanded."[9]

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[7] The complete advertisement can be viewed at http://www.winningourfuture.com/_blog/Media_Center/post/Video_A_flashback_to_2008/.

[8] The complete advertisement can be viewed at http://rwbfund.com/category/ads/.

[9] The complete advertisement can be viewed at

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These and other political advertisements have been the subject of criticism, sometimes on the merits as to what they convey, sometimes on the ground that the very existence of Super PACs funded by wealthier elements of our society is problematic in a democratic society. The first criticism is a staple of all political campaigns. People routinely disagree about what the facts are with respect to candidates for public office and which opinions about them should be taken seriously. The second criticism may be worthy of debate but is flatly at odds with this Court's conclusion in both *Buckley* and *Citizens United* that "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Citizens United*, 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48-49).

What should ultimately guide the Court, we suggest, is not what has supposedly changed in the past two years but what has remained unchanged since the founding of this nation. The First Amendment has not changed. Indeed, it is so well-established that the First Amendment is especially protective of political speech and so rare that such speech is the subject of attempted regulation or censorship that most First Amendment battles have been fought over other questions such as how far *beyond* political speech the First

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http://www.youtube.com/watch?v=hjD_IFclRro&context=C458c787ADvjVQa1PpcFOzv8lhlG0FW8KEvhRXKpRKr-OWqqC5QBQ.

Amendment provides protection,[10] how closely the protections afforded to less protected speech track those afforded to political speech,[11] and how to characterize the particular speech at issue.[12]

What cannot be subject to serious debate is that the speech at issue here — speech, that is, that was criminal prior to *Citizens United* — is what the First Amendment protects with the greatest level of vigilance. It remains the case, as Justice Kennedy's opinion in *Citizens United* reiterates, that the First Amendment "'has its fullest and most urgent applica-

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[10] *See, e.g.,* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971) (arguing that "[c]onstitutional protection should be accorded only to speech that is explicitly political"). Judge Bork later changed his position on that issue. *See* Robert H. Bork, *Judge Bork Replies*, 70 A.B.A. J. 132 (1984).

[11] *See*, *e.g.*, *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653 (2011) (applying heightened scrutiny to content-based statute in commercial context); *id.* at 2673 (Breyer, J. dissenting).

[12] *See*, *e.g.*, *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1219 (2011) (Roberts, C.J., writing for the Court and holding that picketing near site of military funeral was protected speech because that speech "was at a public place on a matter of public concern"); *id.* at 1226 (Alito, J., dissenting, because the speech at issue went "far beyond commentary on matters of public concern" in that it attacked the "purely private conduct" of a "private figure"); *Nike* v. *Kasky*, 539 U.S. 654 (2003) (dismissing writ of certiorari as improvidently granted); *id.* at 663-64 (Stevens, J., concurring in dismissal because *inter alia*, "the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance"); *id*. at 667 (Breyer, J., dissenting, because "the questions presented directly concern the freedom of Americans to speak about public matters in public debate").

tion' to speech uttered during a campaign for political office," *Citizens United*, 130 S. Ct. at 898 (quoting *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) (internal citation omitted)), and that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 898. And it remains true, as set forth in *Buckley* and repeated with approval in *Citizens United*, that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* (quoting *Buckley*, 424 U.S. at 14). That is what *Citizens United* was about and what this case is about.

CONCLUSION

For the same reasons that this Court ruled as it did in *Citizens United*, a writ of certiorari should issue and the ruling of the Montana Supreme Court should be summarily reversed.

April 26, 2012

Respectfully submitted,

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