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.

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

## BRIEF OF THE ELEVENTH AMENDMENT MOVEMENT (TEAM) AS *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS





## TABLE OF AUTHORITIES

**STATUTES**



**CONSTITUTIONAL PROVISIONS**



**OTHER AUTHORITIES**

## INTEREST OF *AMICUS CURIAE*

With the parties' consent, Amicus Curiae files this brief in opposition to granting the petition for writ of certiorari.*

*Amicus*, *The Eleventh Amendment Movement ("TEAM")* is a national non-partisan association dedicated to education, non-partisan advocacy and litigation to support the restoration and protection of fundamental special sovereign interests of the states as protected by the Eleventh Amendment of the United States Constitution. *Amicus* is interested in this suit by corporate petitioners against the state of Montana because, should their Petition for Certiorari be granted, it would violate fundamental principles of states rights and the immunity which inheres in the design of the Constitution, as exemplified by the Eleventh Amendment.

## SUMMARY OF THE ARGUMENT

It is well-established that Eleventh Amendment immunity bars the Supreme Court from entertaining a private suit against a state without its consent.[1]

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

[1]See *Hans v. Louisiana*, 134 U.S. 1 (1890). Under the US Constitution, Article III, Sec 2 (e.g. *Employees v. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973) ( Marshall, J. concurring)) as reinforced by the 11th Amendment's "affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III" (*Pennhurst State Sch. & Hosp. v. Halderman*, 465 U. S. 89 (1984)), it is well-established that the "judicial power of the United States shall not be construed to extend" to a case brought by citizens of Montana against the State of Montana, without its consent. E.g. *Duhne v. New Jersey*, 251 U.S. 311, 313 (1920) (in a claim concerning the Constitution the Supreme Court lacks constitutional "authority to entertain a suit brought by a citizen against his own State without its consent").



Montana has not given its consent to this suit in federal court.[2]

Since 1974 this Court has developed doctrine defining how the federal government may authorize private enforcement of federal law against the states. Enforcement Clause authority of 14th Amendment, Sec. 5, allows Congress to abrogate states' Eleventh Amendment immunity. As Justice Scalia held in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999), other than express waiver of its immunity by a state, the "only ... circumstances in which an individual may sue a State" now recognized by the Court is if "Congress ... authorize[d] such a suit in the exercise of its power to enforce the Fourteenth Amendment." No such

[2]See Part I.B.3. "[I]t is elementary that even if a State has consented to be sued in its own courts ... a right would not exist ... to sue the State in a court of the United States." *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 172 (1909). *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1658 (2011) ("a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court."). Such waiver must be made "specifically applicable to federal court jurisdiction." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 (1985).

authorization by Congress applies to this case. See Part I.B.2.

The development of this exception rooted in the 14th Amendment of the Constitution has functionally served to displace an historical exception to the 11th Amendment immunity that finds no textual support in the Constitution, known as "the *Young* fiction." *Idaho* v. *Coeur d'Alene Tribe of Idaho* , 521 U. S. 261 (1997) (Kennedy, J.) Part I.C.1. Justice Kennedy's opinion in *Coeur d'Alene Tribe* is one of a series of decisions by this Court reinforcing the doctrinal underpinnings of the landmark decision in *Hans*. E.g. *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002) (Thomas, J.); *Alden v. Maine*, 527 U.S. 706 (1999) (Kennedy, J.) ("*Alden*"); and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). These decisions have recently drawn into question the viability of any historical exception to 11th Amendment immunity not rooted in the Constitution.

By significantly developing and harmonizing 11th Amendment doctrine, these cases bring the previously much-criticized doctrine, [See Essential Information Brief ("EI Br.") II, note 2.] closer to the text and historical antecedents of the 11th Amendment, and to relevant constitutional development after that Amendment. These cases teach that no branch of the federal government has authority to abrogate a state's immunity from private non-consensual suit established by both the 11th Amendment and prior constitutional design, other than through valid exercise of Congress' 14th Amendment enforcement powers.[3]

[3]But see *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (5-4). As an exception to the general principle that Article I does not authorize Congress to abrogate States' immunity from private suits, contrary to the constitutional design explained in *Alden*, *Central Virginia* is best understood as being an anomaly confined to its facts. Its holding relating to bankruptcy law does not in any event affect the 14th Amendment issue presented in this case.



"Eleventh Amendment immunity" bars this Court from entertaining the Petition in this private suit against Montana or its state officials in their official capacities because:

1. Petitioners do not claim that Congress authorized this suit under the enforcement clause of the 14th amendment, and no such authority exists. Part I.B.

2. "The *Young* fiction," a controversial non-constitutional exception to Eleventh Amendment immunity created by *Ex Parte Young*, 209 U.S. 123 (1908), has been limited by the Court's recent 11th Amendment jurisprudence. This exception should not be available in this case for each of the following independent alternative reasons:

a) The *Ex Parte Young* exception is based on the fiction that a suit is brought against an individual and not the state if it names an official of the state in the official's individual capacity. Part I.C.1. This fiction has not been properly invoked here because this suit was expressly commenced against two state offices, and only

arguably prosecuted against their official incumbents in their official capacities, but not against the incumbents in their individual capacities, as required to invoke the *Young* fiction. Part II.

b) The facts of this case do not satisfy the requirements of the *Young* fiction as limited by such cases as *Seminole Tribe* and *Coeur d'Alene Tribe:* this case involves public policy supported by all three branches of the Montana government; it involves special sovereignty interests of Montana in the integrity of its elections; it involves great potential financial burdens on the state from political corruption; and alternative means for enforcing federal law in this case which do not raise 11th Amendment immunity issues are available. [See EI Br.I.B]

The 11th Amendment was the first amendment adopted after the Bill of Rights, and also the first of several required to reverse a decision of this Court. The decision it reversed, *Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)*, promptly earned general opprobrium by attempting to extend this Court's jurisdictional powers beyond that widely considered – only a few years after its adoption - to have been granted by the Constitution to the U.S. Supreme Court.

This Court has "acknowledged that the *Chisholm* decision was erroneous. See, *e. g.*, *Alden*, 527 U. S., at 721-722." 535 U.S. 753. Part I.A. The time has come to abandon, as equally erroneous, both the *Young* fiction created in the *Lochner* era to circumvent the 11th Amendment, and any "federal question" exception



remnant of pre-*Hans* doctrine based on waiver fiction. [See EI Br.III.A] Both have undermined Eleventh Amendment immunity by self-created extensions of the Court's jurisdiction similar to that involved in *Chisholm*. The *Young* fiction artificially distinguished state officials obviously working for an arm of the state in their official capacity from the states they work for. To support this fiction the Court also invented a distinction between private suits for injunctive or prospective relief and private suits for damages, which directly contradicted the text of the 11th Amendment barring "any suit in law or equity." Part I.C.2.

Judge-made exceptions to the 11th Amendment, resting on the infirm foundation of fiction, should not apply to force Montana to defend in federal court this suit by private corporations in the absence of a clear mandate from Congress abrogating Eleventh Amendment immunity by valid exercise of its Fourteenth Amendment, Sec. 5, remedial power. Part I.B.

Rejection of the Petition in this case for lack of jurisdiction would still "allow[] Congress to abrogate the immunity from suit guaranteed by th[e Eleventh] Amendment," 517 U.S. 59, in order to enforce the 14th Amendment rights alleged by Petitioners, or alternatively the Executive branch to prosecute a direct suit against the state. Without such support from an elected branch of the United States, [See EI Br.I.B.3], the *Chisholm*/Eleventh Amendment episode of American history teaches that this Court lacks the "judicial power" to hear the claim Petitioners seek to prosecute in this Court against Montana. This Court

otherwise denies Montana the dignity and the rights appertaining to its sovereign role. Part I.A.

## ARGUMENT

### I. THE SUPREME COURT LACKS JURISDICTION OF THIS CASE UNDER ARTICLE III AND THE 10TH AND 11TH AMENDMENTS OF THE UNITED STATES CONSTITUTION

This Court is foreclosed by Eleventh Amendment immunity from construing its judicial power to include a suit, commenced in state court and prosecuted in this Court by two Montana corporations against arms of the state of Montana, or officials acting in their official capacity, for the purpose of enjoining Montana's enforcement of election finance anti-corruption law.

#### A. The *Chisholm*/Eleventh Amendment Episode Confirmed Fundamental Jurisdictional Principles of State Immunity from Private Suit in the Supreme Court That Preclude Grant of Certiorari In This Case

In *Chisholm*, a private creditor brought suit against the State of Georgia in the United States Supreme Court. The governor and attorney general of Georgia, who had been summoned, refused to appear. According to widespread understanding, the newly adopted Constitution did not allow the Supreme Court to entertain a suit by a private citizen against a sovereign state without its consent. Georgia's House of



Representatives passed a resolution declaring that Georgia would regard any judgment in the case as unconstitutional. 527 US 717.

In a decision considered to be the first significant act of the Supreme Court, four justices held that Art III, Sec 2's mention of cases in which a State is a party conferred jurisdiction over private suits against states. Justice Iredell - a former delegate to the Constitutional Convention - in dissent argued that it did not, because Article III is not self-executing. "[I]n respect to the manner of [the Court's] proceeding, we must receive our directions from the Legislature .... It is their duty to legislate so far as is necessary to carry the Constitution into effect. It is ours only to judge." Accordingly "even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies" 2 U.S. 433, 448-49.

This Court has attributed authority to Justice Iredell's dissent. 134 U. S. 12-19. His views that the Constitution did not grant the Court power to entertain the suit against Georgia was swiftly vindicated by Congress. Faced with a case similar to *Chisholm*, the Massachusetts legislature, like Georgia's, had similarly resolved not to appear before the Supreme Court, and instructed its congressional delegation to pursue an amendment restoring the original understanding that no state could be privately sued in federal court. Because the Court seized power under its original, not appellate, jurisdiction, Congress could not, by exercise of its Art. III, Sec. 2, Clause 2 "Exceptions Clause" powers, simply nullify the Court's decision by stripping its appellate jurisdiction over suits against states, as

Justice Iredell's views might suggest. Reversal of *Chisholm* required a constitutional amendment.

Massachusetts recruited four other states to support such an Amendment. "Georgia's response was more intemperate: Its House of Representatives passed a bill providing that anyone attempting to enforce *Chisholm* would be 'guilty of felony and shall suffer death, without benefit of clergy, by being hanged.'" 527 U.S. 717. Two days after the Court's opinion, amendments reversing the decision were proposed in both houses of Congress.

The framers of both the Constitution and the 11th Amendment thought that an imposition of federal coercive power against the states by entertaining private suits against them in federal court could initiate war. The denial of such authority had been fundamental to the Constitutional settlement, albeit absent from the text. Failure to honor that settlement was a potential *casus belli*. Much as the Supreme Court's decision in *Dred Scott v. Sandford*, U.S. (19 How.) 393 (1857) sixty years later did lead to civil war over similar issues of federalism, *Chisholm* in its time was considered equally as dangerous if not corrected by peaceful means. "The adverse reaction to Chisholm was immediate, widespread, and vociferous." 440 U.S. 437 n. 4. Congress' quick approval of the proposed 11th Amendment to reverse the majority decision was "close to unanimous." 527 US 721. The requisite 3/4 of the states quickly ratified by February 1795, within a year after submission of the Amendment to them, with virtually no political opposition. W. A. LaBach, *The Supreme Court Fails Its First Test: Chisholm v. Georgia* (2009).



The Art III, Sec. 2 language interpreted by the Court to extend its jurisdiction in *Chisholm* did not include mention of cases between a state and its own citizens. "Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to "address the specific provisions of the Constitution that had raised concern during the ratification debates and formed the basis of the *Chisholm* decision." [527 US] at 723." 535 US 753. "The Amendment did not attempt to bar in-state citizens from suing their own states because no one had suggested that Article III would permit such suits." Clark, *The Eleventh Amendment And The Nature Of The Union*, 123 Harv. L. Rev. 1820 (2010). The Amendment accordingly did not address this aspect of sovereign immunity from private non-diversity cases in order to overturn the specific Court's decision in *Chisholm.* A contemporary decision of this Court observed that "the amendment . . . does not import an alteration of the Constitution, but an authoritative declaration of its true construction." *Respublica v. Cobbet*, 3 U.S. (3 Dall.) 467, 472 (1798). The 11th Amendment did not change, but rather explained or construed, the constitutional design.

This "true construction" of the original constitutional design had been understood to exclude all non-diversity federal question suits against a non-consenting state from federal jurisdiction as a fundamental feature of the constitutional settlement.

Justice Kennedy in *Alden v. Maine*, 527 U.S. 706, 713 (1999) clarifies that the "Eleventh Amendment immunity ... phrase is convenient shorthand but ... the

Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the[ir] sovereignty." *Amicus* follows Justice Kennedy's use of the "Eleventh Amendment immunity" phrase to refer to the amendment's explanation, occasioned by *Chisholm*, of the intention of the "plan of the convention" not to permit "any suit in law or Equity" by any person to be prosecuted against a non-consenting state in the Supreme Court, or other federal court. "Simply put, "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 239, n. 2 (1985); accord, *Edelman* v. *Jordan*, *415 U. S. 651*, 660 (1974)." 527 U.S. 706.

The "shock of surprise," *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934), and "outraged reaction to *Chisholm*," 527 U.S. 706, expressed itself in immediate opposition to what was perceived as a power-grab by this Court at the expense of the states. It was so strong that the Amendment did more than only remove the Article III judicial power claimed by this Court. Justice Iredell's dissenting view that "the judicial authority, can only be carried into effect by acts of the Legislature" suggests the Court could acquire jurisdiction by act of Congress. But the Amendment goes beyond this reasoning by confirming that the 1789 Constitution, as amended by the 1791 Bill of Rights, intended that even Congress, under its Article I powers, may not "construe" any part of the Constitution to authorize a law empowering the Supreme Court, or other court, to entertain a private



party's suit against a State without its consent. See *Seminole Tribe*, 517 U.S. 64-68; *Alden*, 527 U.S. 754 (*"States ... immunity from private suit ... is beyond the congressional power to abrogate by Article I legislation"); *College Sav.*, 527 U.S. 666, 669-75 (1999) (Scalia, J.); *Board of Trs. of the Univ. of Alabama* v. *Garrett*, 531 U. S. 356, 363 (2001). But see *Cent. Virginia*, 546 U.S. 356, note 3. The states' immunity from private suit is an undelegated element of their sovereign immunity which is protected against federal intrusion by the Tenth Amendment. Cf *Printz v. United States*, 521 U.S. 898 (1997). [See EI Br. III.B]

As shown below, this absolute constitutional prohibition has only one constitutional exception, which cannot be invoked here.

### B. Civil War Amendments Give Congress Exclusive Authority to Abrogate Eleventh Amendment Immunity

The Civil War changed relations between the United States and the several states from the original constitutional design confirmed by the 11th Amendment. This change was embodied in the Civil War Amendments ("CWA") which empowered Congress to enforce against the states abolition of slavery (13th), civil rights and liberties (14th) and the franchise (15th) for freed slaves and others.

This enforcement power was immediately used. "One of the first pieces of legislation passed under Congress 's [14th Amendment] § 5 power was the Ku Klux Klan Act" of 1871." *Tennessee* v. *Lane*, 541 U.S. 509, (2004) (Scalia, J., dissenting). See also *The Civil*

*Rights Cases*, 109 U.S. 3 (1883) (Civil Rights Act of 1875); *Ex parte Yarbrough (The Ku Klux Cases)*, 110 U.S. 651, 658 (1884) (Enforcement Act of 1870).

With the end of Reconstruction, after the presidential election compromise of 1876, see Polakoff, *The Politics of Inertia: The Election of 1876 and the End of Reconstruction* (1973), this Court converted the 14th Amendment to protect railroads, e.g. *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (constitutional corporate personhood fiction), more than former slaves, e.g. *Plessy v. Ferguson*, 163 U. S, 537 (1896) ("separate but equal" Jim Crow enabling act). See A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2009). In *The Civil Rights Cases*, the Court narrowed Congress' authority to remedy racial discrimination under its CWA enforcement powers, which entered a century of congressional neglect.

The 20th century "second reconstruction" rediscovered those powers. Cf. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249-50 (1964) (primarily based in commerce clause) with *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (based in Sec. 5 of the 14th Amendment). Meanwhile there was no discussion of the impact of the enforcement clauses on Eleventh Amendment immunity. After their rediscovery, the question of their effect on Eleventh Amendment immunity soon emerged.

In 1964 this Court observed "Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress." *Parden v.*



*Terminal R. Co.*, 377 U. S. 184, 187 (1964). The Court made a rocky start on the issue in *Parden*. *Parden's* rationale for lifting the bar of immunity eroded over the years until it was expressly reversed as wrongly decided in *College Sav.*, 527 U.S. 666 (1999).

Ten years after *Parden*, *Edelman* v. *Jordan*, 415 U. S. 651, 660 (1974), upheld certain Eleventh Amendment immunity against claims made under the Fourteenth Amendment. The Court found as support for its broadened recognition of state immunity that "in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent," 415 U. S. 672. This ruling foresaged the unanimous landmark decision in *Fitzpatrick v. Bitzer*, 427 U. S. 445, 455 (1976), which expressly approved congressional abrogation of Eleventh Amendment immunity under §5. Observing that its "analysis begins where *Edelman* ended," 427 U. S. 452, the Court held for the first time that the presence of "the threshold fact of congressional authorization," in the case before it abrogated Eleventh Amendment immunity.

For support the *Fitzpatrick* Court looked to the late reconstruction era case, *Ex parte Virginia*, 100 U. S. 339 (1880), and more recent "second reconstruction" cases, while acknowledging,

> that none of these previous cases presented the question of the relationship between the 11th Amendment and the enforcement power granted to Congress under Sec 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state

> sovereignty which it embodies ... are necessarily limited by the enforcement provisions… Congress may, ... for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

This decision left two questions: first, how to determine when Congress has validly used its enforcement clause powers, as distinguished from Art I powers; second, the degree of clarity required to conclude that Congress has in fact used those powers. "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Board of Trs.*, 531 U. S. 356, 363 (2001) (internal citation and quotes omitted).

The other area of significant development of Eleventh Amendment immunity doctrine during the next several decades was the question of how a state expresses consent to jurisdiction in those cases where Congress has not abrogated immunity. The three issues are discussed briefly below to illustrate the significant development of state immunity doctrine after rediscovery of the CWA Enforcement Clauses.

1. *Abrogation Must Have Valid Relation to Congress' Enforcement Power*

In response to what became Congress' routine use of its abrogation authority, the Court confirmed that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of



Congress' [14th Amendment] enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States,"" *City of Boerne v. Flores*, 521 U.S. 507 (1997)(citation omitted). This included the state's "sphere[] of autonomy" derived from its 11th Amendment immunity from private suit. However the Court distinguished the responsibilities of the "Court, not Congress, to define the substance of constitutional guarantees, 521 U. S., at 519-524, " 531 U.S. 365, as distinct from the power of Congress to enforce those guarantees by defining remedies for their violation.

To distinguish legitimate from illegitimate applications of enforcement clause authority the Court eventually pulled in the reins when it deemed that Congress had strayed beyond the "metes and bounds of the constitutional right in question," 531 U.S. 365, that is, the substantive 14th Amendment guarantees as defined by the Court. In *Boerne* the Court found Congress had exceeded its enforcement power. See also *Nevada Dep't. of Human Res.* v. *Hibbs*, 538 U. S. 721 (2003); *United States* v. *Morrison*, 529 U. S. 598 (2000) (Violence Against Women Act). Such limitations applied with even more force to the remedy of abrogation of state immunity. See e.g. *Florida. Prepaid Postsecondary Educ. Expense Bd. v. College Sav.*, 527 U.S. 627 (1999) (abrogation of state immunity invalid); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (abrogation invalid); *Board. of Trs.*, 531 U.S. 356 (2001) ("a history and pattern" of violations must be shown). *Coleman v. Court Of App. Of Md.*, 132 U. S. 1327 (2012) ("Congress must identify a pattern of constitutional violations and tailor a remedy congruent

and proportional to the documented violations.") *But see Tennessee* v. *Lane*, 541 U.S. 509 (2004) (abrogation valid).

After a good deal of such litigation refining the boundaries of Congress' abrogation authority, the jurisprudence has become reasonably settled. Justice Scalia could conclude by 2006 that "no one doubts that §5 grants Congress the power to "enforce … the provisions" of the [Fourteenth] Amendment by creating private remedies against the States for *actual* violations of those provisions." *United States v. Georgia*, 546 U.S. 151 (2006) (14th Amendment remedy; abrogation upheld). This rule would, for purposes of argument, allow Congress to authorize Petitioners' underlying 14th amendment claim against Montana in this case, though it has not done so. Since Congress could arguably have authorized such a remedy, Enforcement Clause abrogation provides the sole means by which the bar to Supreme Court jurisdiction could be lifted in this case.

2. *Abrogation must be clearly expressed*

The Court has also specified how Congress may exercise its Enforcement Clause abrogation authority. Enforcement Clause abrogation requires a specific statute addressing the subject of the suit which expresses Congress' intent to abrogate the states' immunity from private suit in clear, unmistakable, and unequivocal terms. Abrogation will not be inferred from a general authorization for suit in federal court. This strict requirement is essential to respect sovereign immunity.



In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-99 (1984) the Court was unwilling to infer that Congress intended to negate the States' immunity given "the vital role of the doctrine of sovereign immunity in our federal system," quoted by *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The Court held that, "The fundamental nature of the interests implicated by the Eleventh Amendment dictates" that Congress express "its intention unmistakably clear in the language of the statute." Id. In *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 469 (1987) the Court rejected abrogation because "Congress has not expressed in unmistakable statutory language its intention to allow States to be sued in federal court." Abrogation requires "an unequivocal expression that Congress intended to override Eleventh Amendment immunity," *id.*, citing *Pennhurst* and *Atascadero*. "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 U.S. at 246.

The Court will not look to legislative history in making its inquiry. *Dellmuth v. Muth*, 491 US 223, 227, 230 (1989). Arguments "not based in the text of the statute" are unavailing. *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 103-04 (1989).

Petitioners invoke this court's jurisdiction only under 28 U.S.C. § 1257, Pet. at 1, a general federal question statute which does not mention suits against states, or their immunity, let alone satisfy the strict requirements to abrogate states' immunity from such a suit. Petitioners have not alleged that Congress abrogated Montana's Eleventh Amendment immunity

from private suit regarding its election finance anti-corruption laws by means of a federal statute that could satisfy such standards of specificity. Sec. 1257 is not the specific abrogation of state sovereignty required to confer jurisdiction over this case, and *Hans* specifically rejected federal question jurisdiction as support for any exception to Eleventh Amendment immunity. [See EI Br.III.A.2]

3. *Waiver Must Be Clear and Unmistakable and Not Implied Or Construed*

Waiver by a state of its immunity from the Court's subject matter jurisdiction is an anomaly of the Eleventh Amendment immunity doctrine. This waiver doctrine departs from the general rule that no person can confer subject matter jurisdiction on a federal court. The states retained this power, which preserves an option to defend. "[D]eparture from the usual rules of waiver stems from the hybrid nature of the jurisdictional bar erected by the Eleventh Amendment." *Wisconsin Dept. of Corr. v. Schacht*, 524 U.S. 381, 394-95 (1998) (Kennedy, J., concurring) (suggesting an "attorney authorized to represent the State can bind it to the jurisdiction of the federal court for Eleventh Amendment purposes") *Id.* at 400.

This unique power of the states to confer federal subject matter jurisdiction in derogation of its sovereign immunity makes it important that the waiver is executed in a voluntary, deliberate manner. The judicial power cannot be abused to "construe" waiver where it did not actually exist. Nor may Congress construe certain activities as inferring waiver where it



would not otherwise have power to abrogate immunity. For example, mere involvement in litigation may not be construed as a waiver. See note 2.

The Court has developed extensive jurisprudence to define the requirements of a legitimate waiver, in order to avoid illegitimate exercise of federal power. Waiver doctrine is long-standing, e.g. *Clark v. Barnard*, 108 U.S. 436 (1883), but has undergone recent development in readjusting to the developing doctrines discussed in Part I.B(1-2).

**C. The judge-made *Ex Parte Young* Exception to Eleventh Amendment Immunity, dating from the *Lochner*-era, rests on an outdated legal fiction and violates unambiguous Constitutional text**

1. *The legal fiction*

By 1908 state sovereignty was no longer the fighting faith it was prior to the Civil War. The Court was prepared to make another *Chisholm*-like reach for power from the states. It did so to prevent Minnesota from regulating railroad freight tariffs in its state. Bearing in mind the constitutional changes wrought in federal relations by the Civil War four decades earlier, the Court nevertheless held that "a decision of this case does not require an examination or decision of the question whether [the] adoption [of the Fourteenth Amendment] in any way altered or limited the effect of the [Eleventh] Amendment" *Ex Parte Young*, 209 U.S. 123, 150 (1908).

This retreat from the text of the Constitution is perhaps understandable in light of the almost three decades the Court necessarily took since 1974 to actively deliberate issues and elaborate doctrines related to Enforcement Clause abrogation. The 1908 Court could not be expected to resolve the doctrinal issues in its first glimpse at how a 14th Amendment claim may affect Eleventh Amendment immunity. So it took a shortcut. Like *Parden*, this first effort was a wrong turn. But it was a route to be expected of the most activist Court in United States history, reaching "the nadir of competence that we identify with *Lochner v. New York*, 198 U.S. 45 (1905)," *Seminole*, 517 U.S. 44 (Souter, J. dissenting), acting on what Justice Breyer has described as "*Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue." *Sorrell v. IMS Health Inc.*, 131 U. S. 2653 (2011)(dissent).

Congress having not acted to subject Minnesota's ordinary police power regulation of a natural monopoly to the railroads' 14th Amendment liberty to be free from regulation, the *Lochner* era Court nevertheless predictably suffered no doubt or hesitation in "substituting judicial for democratic decisionmaking" in order to legislate this result. *Young* created an alternative way to grab power from the states that did not involve Congress' enforcement powers under the Fourteenth Amendment. For this purpose it invented a legal fiction. The fiction in principle repealed the 11th Amendment. A refinement partially concealed the offense by limiting the repealer in a way that violated the text of the Amendment. Part I.C.2



The Court has acknowledged that this exception rests on an "obvious fiction," 521 U. S. 270, to get around the express constitutional prohibition of such suits. A suit such as this suit against Montana, brought under "[t]he provisions of the Fourteenth Amendment of the Constitution," must "have reference to state action exclusively, and not to any action of private individuals." *Virginia v. Rives*, 100 U.S. 313, 318 (1880). In order to avoid the 11th Amendment's bar to suing a state, however, a party must inconsistently and counter-factually sue a state official as a private individual. This gives rise to *Young*'s fictional avoidance of the 11th Amendment by means of suit nominally, but not actually, against an individual official.

Under well-accepted principles, suit against an office or officer where the state is the real party in interest, is barred by 11th Amendment immunity. For example, Chief Justice Marshall in *Governor of Ga. v. Madrazo*, 1 Pet. 110, 123-124 (1828) found the "claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially." *Madrazo* held this equivalent to suing the State itself in violation of the 11th Amendment, which provided an alternative ground for dismissing the suit. The Court similarly held in *Ex Parte Ayers*, 123 U.S. 443, 489 (1887) "where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question ... is one of jurisdiction."

Where, as here, all three branches of its government were closely involved in making, enforcing and adjudicating Montana's challenged legislation, "The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment. " *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 169 (1909) (11th Amendment bars "bill in equity to compel the specific performance of a contract"). It bears noting that in *Murray*, decided the following year after *Young*, which lifted the bar in a 14th Amendment suit, the Court declined to lift the bar of immunity for a private suit in equity brought against individual officials acting in their official capacity in a case that did not implicate the 14th Amendment.

In *Pennhurst* the Court explained: "The general rule is that a suit is against the sovereign if `the judgment sought ... to interfere with the public administration,' or if the effect of the judgment would be `to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963)." 465 U. S. 89, 101 n.11. See also 527 U.S. 706.

*Ex Parte Young*, 209 U.S. 123 (1908) held that a federal court nevertheless does have jurisdiction, consistent with the 11th Amendment, to hear a private suit against a state officer named as an individual in order to enjoin official state actions violating federal law, even though the state itself may be immune had the suit been brought in the name of a state office or officer to accomplish the identical result. Since the state cannot act but through individuals, that of course



is the opposite of immunity. And that is how legal fictions work, to turn rules upside down.

The state and its various "arms," its agencies, offices, departments, commissions and bureaus, can only act through officials. A state is a human institution representing the people who create it with no existence or ability to act apart from those people who comprise it. So if an official does not benefit from immunity when acting in an official capacity, then the state itself is not immune. Hence, "*Young* rests on a fictional distinction between the official and the State." 521 U. S 270 n. 25, citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U. S. 89, 114, n. 25 (1984). The fiction rested on a pretense that if the officer was named as an individual acting in an individual capacity the suit was actually against the individual, when it was obviously not.

This Court has explained the "stripping" justification for this fiction.

> The injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character," *Young*, 209 U.S. 160. This "stripping" rationale, of course, created the "well-recognized irony" that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982)

(opinion of Stevens, J.)" 465 U.S. at 104-05, 114 n.25.

In addition to this "irony," which creates inconsistent and hyper-technical pleading requirements, see Part II, suits brought to prohibit officials from carrying out policies supported by all three branches of the state government without any element of individual discretion or motivation, as here, are clearly suits against the state itself in the constitutional sense and it is fictional to hold otherwise. The "expedient 'fiction'" created in *Ex Parte Young*, in effect amended the Constitution without a 2/3 approval of Congress or ratification by 3/4 of the states.

By disabling the officials who carry out state policies, "the *Young* fiction," 521 U.S. 281, eroded the protection the states had enjoyed from "private suits ... not permitted under Article III (by virtue of the understanding represented by the Eleventh Amendment)," *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 at 40 (1989) (Scalia, J., concurring in part and dissenting in part). The *Young* fiction revived the Court's discredited decision in *Chisholm* by ignoring, at the Court's discretion, the 11th Amendment's bar of private suit against the state. *Young* failed to distinguish between an official acting within the general scope of authority given by the state, who a state has merely allowed to inflict a justiciable injury in violation of federal law as "mavericks under state law," 521 U. S 310 (Souter, J. dissenting), and an official who is carrying out the fully-supported policies of the state. The "stripping" metaphor might apply to the former, but not to the latter without altering the Constitution.



Whether it is true as Jeremy Bentham said that "fictions are to law what fraud is to trade," they are a common law device that do not sit easily in constitutional law. A legal fiction applied to the Constitution, by judicially amending the Constitution, circumvents the approval by Congress and the elected sovereign state legislatures that Article V of the Constitution requires. This is what *Young* did in an era that marked the high-point of judicial amendments to the Constitution.

When a fiction is created for the very purpose of amending the constitutional text so as to diminish the sovereign powers of the states in order to enlarge the jurisdiction of the Supreme Court which invented the fiction, and thus deny the states their right to approve or reject such an amendment, the validity of the fiction is highly suspect. Normally, "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." *Am. Fire & Cas. Co. v. Finn*, 341 U. S. 6, 17 (1951). This is especially true when the expansion is at the expense of the constitutionally protected power of the states. Cf. *Printz v. United States*, 521 U.S. 898 (1997) (Scalia, J.) ("the Tenth Amendment ... prohibits the exercise of powers "*not* delegated to the United States."). A constitutional fiction is particularly difficult because it requires a constitutional amendment to undo, unless the Court itself will scrap it when it no longer serves a justifiable purpose.

A more helpful metaphor in understanding why the time has now arrived to complete the dismantling of this particular instance of a constitutional legal fiction is provided by Professor Fuller. He observed that legal

fictions are like scaffolding around a building under construction. Fuller, *Legal Fictions*, 25 Ill. L. Rev. 363, 513, 877 (1930-31). The scaffolding is not itself a building and has no permanent value, but it serves a temporary function as construction proceeds. The basic architecture of the jurisprudence supportive of Enforcement Clause abrogation has been completed in its essential parts for only a decade. In 1908, when the *Young* fiction scaffolding went up, the foundation stone had barely been laid for this doctrinal edifice. Now, after the building of Enforcement Clause abrogation is complete, the Court should not hesitate to bring down the unsafe scaffolding represented by the *Young* fiction. *Young* was judicial legislation typical of the *Lochner* era, and is now unnecessary.

The abrogation edifice is complete. Congress' fully evolved textually-based Enforcement clause abrogation is an accepted feature of American law, with extensive doctrinal development. Aside from one small annex to the building, see *Cent. Virginia*, note 3, there has been no major construction for about a decade. See *Fed. Mar Comm'n v. S.C . State Ports Auth.*, 535 U.S. 743 (2002) (Thomas, J.). It is now time to complete removal of the scaffolding erected by the *Young* fiction. At this point, it presents little more than a hazard that can easily trip up potential users of the building. See discussion of *Virginia Office*. [See EI Br.II] As discussed below, the Court is well along in the process, has dismantled and reformulated the doctrine, and perhaps even abandoned its prior textually unsupported applications. [See EI Br. I.B-II]



2. *The unambiguous Constitutional text*

In *Young* the Court enjoined enforcement of a Minnesota statute that fixed maximum rates in a suit under the Fourteenth Amendment by a railroad's shareholders. *Young* asserted that equitable remedies against states, but not civil damages, were available from the federal courts for private claimants. This precedent was elaborated and refined over the years. Then *Edelman v. Jordan*, 415 U.S. 651 (1974) started to dismantle *Young* at the same time that it initiated the earliest intimation of Enforcement Clause immunity abrogation. Part I.B.

With *Edelman* both the Enforcement Clause immunity abrogation edifice, built on a solid textually-supported constitutional footing, started rising, at the same time that the doctrine *Young* created wholly in violation and disrespect of the Constitution started to deteriorate. *Edelman* allowed prospective relief under *Young*, but cut back previous authority that had allowed other types of equitable relief that entailed a burden on the state treasury similar to a civil damages action.

This law-equity distinction, reinforced by *Edelman*, had been maintained since *Young* to give the appearance that the 11th Amendment still had some scope of operation in law, while in practice commandeering state officials to obey federal decrees in equity. Like the problem with *Young*, the problem with the decision in *Edelman* was that it violates the text of the 11th Amendment which prohibits "any [private] suit in law or Equity, commenced or prosecuted" against a state. As stated in *Cory v. White*,

457 U.S. 85, 91 (1982) "It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought.... the Eleventh Amendment, by its terms, clearly applies to a suit seeking an injunction, a remedy available only from equity." 457 U. S. 90-91.

The language of the 11th Amendment simply does not allow it to be enforced only against suits at law for damages but not against an action in equity to enjoin officials. Though there is no principled basis for such a rule, this flagrant violation of constitutional text was required to support the central *Young* fiction that a state's officials are somehow separate from the state when the remedy sought by a private plaintiff is prospective.

If the 11th Amendment had been swallowed whole by the *Young* fiction, the offense to the Constitution would have been too chokingly obvious. Ignoring some but not all the terms of the text sustained the view that it had not been completely repealed. Justice Douglas, impatient of the limitations of this ruse, objected that *Edelman* was a constitutional case seeking equitable remedies within the ambit of the *Young* fiction: "If that 'judicial power' ... may not be exercised even in 'any suit in . . . equity' then *Ex parte Young* should be overruled. But there is none eager to take the step.... There is nothing in the Eleventh Amendment to suggest a difference between suits at law and suits in equity, for it treats the two without distinction." 415 U. S. 685 (dissent).

Justice Douglas is entirely correct on this point, although he makes it to argue for dropping the pretense



in order to expand the fiction to swallow even more of the 11th Amendment. But the Court did eventually "take the step" in one of its last major cases on the subject. It held that "sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief." *Fed. Mar.*, 535 US at 765-66 (2002) (Thomas, J.). This ruling did not expressly overrule *Young*. But to the extent that *Young* relies on the false premise that the Constitution allows suit where the remedy is prospective, *Federal Maritime* left that fiction without support. Since *Young* stands on two legs – one a fiction and the other the pretense of the law/equity distinction, without the support of the latter *Young* cannot stand. No "rote" application of *Young* may now be made to a case merely because a non-sovereign plaintiff seeks prospective relief. Cutting *Young* loose from the pretense that prospective relief is not barred by the literal text of the Amendment, forces the doctrine to find a new justification, or die. That support would be based on a suits' lack of actual impact on the state's special sovereign interests. See [See EI Br.I.B.2]

Montana's enforcement of its election finance anti-corruption law, because it is fundamental to Montana's sovereign legitimacy, cannot be enjoined by the U.S. Supreme Court in a non-consensual suit by a private petitioner which is not authorized by congressional enforcement of the 14th Amendment.

## II. THE *YOUNG* FICTION DOES NOT APPLY IN THIS CASE BECAUSE PETITIONERS SUED ARMS OF THE STATE AND OFFICERS IN THEIR OFFICIAL CAPACITY IN VIOLATION OF THE ELEVENTH AMENDMENT

The fiction and "irony" of the Young exception discussed above, Part I.C.1, entails very technical, counter-factual, and inconsistent pleading requirements.

The rule has long endured that an unauthorized, private suit directly against a non-consenting state, its offices or "arms" is prohibited. "States and arms of the State possess immunity from suits authorized by federal law." *Northern Ins. Co. v. Chatham Cnty,* 547 U.S. 189 (2006). For example, Chief Justice Marshall held in *Madrazo*, where an official is "sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record." 26 U.S. 123-24.

In *Smith v. Reeves*, 178 U.S.436, 438-39 (1900) the Court addressed the question whether a suit against state officials should "be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the State, as such, is not made a party defendant, the suit is against one of its officers *as Treasurer;* the relief sought is a judgment against that officer *in his official capacity.*"



*Great N. Life Ins. Co.* v. *Read,* 322 U. S. 47 (1944), presented a 14th amendment claim. The Court held, "The right of petitioner to maintain this suit in a federal court depends, first, upon whether the action is against an individual or against the State .... Secondly, if the action is determined to be against the state, the question arises as to whether or not the state has consented to suit against itself in the federal court. ... In the *Reeves* case, as here, the suit was against the official, not the individual. ... We are of the view that the present proceeding ... is like *Smith v. Reeves, a suit against the state.*" *See also Ford Motor Co. v. Dep't of Treas. of Indiana,* 323 U.S. 459, 464 (1945). ("[A] suit against state officials that is in fact a suit against a state is barred.")

*Young* did not affect this rule. It only excepted suits against states, in fact, under the guise of suing individuals by name, and not in their official capacity. This guise must be carefully invoked by a private party who would use the *Young* fiction to sue a state. Crossing this clear line justifies dismissal. In *Coeur d'Alene Tribe* this Court confirmed the rule that "'suit ... is barred by a state's Eleventh Amendment immunity unless it falls within the exception this Court has recognized for certain suits ... against state officers in their *individual capacities*.' See *Ex parte Young*, 209 U.S. 123 (1908). " 521 U. S. 261, 269 (emphasis added).

The Petitioners bring before the U.S. Supreme Court a suit styled *Western Tradition P'ship v. Attorney General*, 363 MT 220 (2011), stayed pending writ of certiorari sub nom. *Am. Tradition P'ship, Inc. v. Bullock*, 565 U.S. ___, 132 S.Ct. 1307 (February 17, 2012) which, according to the Petition, was commenced

against two offices which are arms of the State of Montana. They name as appellees 1) the "Attorney General of the State of Montana" and 2) the "Commissioner of the Commission for Political Practices." Pet. ii. Petitioners only mention the individual names of the current incumbents of those offices parenthetically. The appearance of suing the state by naming an arm of the state as a party, rather than the individual office holder, is confirmed by the statement of the case where Petitioner recites that "Montana officials ... are sued *in their official capacities*," Pet. 4, rather than officeholders in their *individual capacities* as required to sustain the *Young* fiction.

According to *Cohens v. Virginia*, 19 U.S. 264 (1821), it is "a rule which admits of no exception that, in all cases where jurisdiction depends on the party, it is the party named in the record." The party named in the record in this case is not an individual sued in an "individual capacity."

Petitioners did not change the caption of this case to omit the named plaintiff-appellant below who is not before this Court. But it did make a belated attempt to change the record by naming in its caption of the case in this Court as party defendant, "Steve Bullock", an individual officeholder distinct from the offices which were defendants named in the complaint below. This unauthorized change, seeking to change the party of record without benefit of a Rule 15 FRCP motion, is evidence that petitioners recognize their pleading error. This change of party in Petitioners' erroneous caption does not change the record of petitioners' claim against offices which are arms of the



state and the occupants of those offices in their official capacities as stated in the body of the Petition.

This is a case where the suit seeks to prevent conduct that does raise core sovereign interests of the state and so is "in fact, against the State." 527 U.S. 706;[See EI Br.I.B.]. This suit has been brought to prevent enforcement of a law supported by the full sovereign authority of Montana. "The object and purpose of the Eleventh Amendment [is] to prevent the indignity of subjecting a state to the coercive process of [federal] judicial tribunals at the instance of private parties" *Ex parte Ayers*, 123 U.S. 443, (1887). *Young's* "stripping" doctrine exception was not adopted by means of formal amendment to the Constitution ratified by the States, though it significantly erodes the states' constitutional immunity from suit, and hence the states' dignity as sovereign states. Accordingly, "The authority-stripping theory of *Young* is a fiction that has been narrowly construed." 465 U.S. at 114 n.25.

A threshold requirement for invoking the *Young* fiction is simple compliance with the pleading rule that the suit be brought under "the exception this Court has recognized for certain suits ... against state officers in their *individual capacities*." 521 U. S. 269.

Such a fictional exception must be strictly complied with in its particulars by a party who would invoke the exception in this Court. "[A] waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign."" *Sossamon* v. *Texas*, 131 U. S. 1651, 1654 (2011)(citation omitted). *Cf. Irwin v. Dep't Of Veterans Affairs*, 498 U.S. 89 (1990) (affirming judgment of lower court;

"[s]ince waivers of sovereign immunity are traditionally construed narrowly, the court determined that strict compliance ... is a necessary predicate"). Petitioner has failed to comply with the narrow threshold requirements of the *Young* fiction that the pleading "strip" Respondent officeholder of their official character. There are no shades of gray or equitable considerations between "official capacity" and "individual capacity" or between suing an individual or suing the official or office.

In *Hutto v. Finney*, 437 U.S. 678 (1978), a 14th Amendment action where immunity was abrogated by Congress, the Court held that "the Eleventh Amendment prevented respondents from suing the State by name." Here Petitioners have violated that rule by suing two arms of the State of Montana by name. As discussed above, suing an arm of the state is the same as suing the state. The Petition must be dismissed because the suit was actually commenced against a state, which is barred by the 11th Amendment.

If it is deemed an extremely technical objection that Petitioners were required to sue appellees in their individual capacities to comply with the *Young* fiction for circumventing the 11th Amendment, the blame should reside on the "irony" or fractured logic of the fiction itself. It requires "a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism." 411 U.S. 279 (justifying an 11th Amendment rejection from federal court).



## CONCLUSION

Writ of certiorari must be denied for lack of jurisdiction.

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APPENDIX:

11th Amendment :

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.