

No. 11-1179

---

---

IN THE  
**Supreme Court of the United States**

AMERICAN TRADITION PARTNERSHIP, INC., F.K.A.  
WESTERN TRADITION PARTNERSHIP, INC., ET AL.,  
*Petitioners,*

v.

STEVE BULLOCK, ATTORNEY GENERAL OF MONTANA,  
ET AL.,  
*Respondents.*

On Petition For A Writ Of Certiorari  
To The Supreme Court of Montana

**BRIEF OF UNITED STATES SENATORS SHELDON  
WHITEHOUSE AND JOHN MCCAIN AS *AMICI  
CURIAE* IN SUPPORT OF RESPONDENTS**

NEAL KUMAR KATYAL  
*Counsel of Record*  
JUDITH E. COLEMAN  
HOGAN LOVELLS US LLP  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5528  
neal.katyal@hoganlovells.com  
*Counsel for Amici Curiae*

---

---

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	3
I. THE MONTANA SUPREME COURT APPLIED THE CORRECT LEGAL STANDARD TO THE FACTUAL RECORD BEFORE IT.....	3
II. THE COURT SHOULD IN ALL EVENTS DECLINE PETITIONERS' INVITATION TO SUMMARILY REVERSE.....	5
A. Political Spending After <i>Citizens United</i> Demonstrates that Coordination and Disclosure Rules Do Not Impose a Meaningful Check on the System.....	8
B. Unlimited, Coordinated and Undisclosed Spending Creates a Strong Potential for <i>Quid Pro Quo</i> Corruption.....	17
C. The Appearance of Corruption Created by Independent Expenditures is Strong.....	20
CONCLUSION.....	22

**TABLE OF AUTHORITIES**

Page(s)

**CASES:**

*Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) .....9

*Buckley v. Valeo*,  
424 U.S. 1 (1976) .....5, 8

*Caperton v. A.T. Massey Coal Co.*,  
556 U.S. 868 (2009) ..... 19

*Citizens United v. FEC*,  
130 S. Ct. 876 (2010)..... *passim*

*McConnell v. FEC*,  
540 U.S. 93 (2003) .....6, 16

*Youngblood v. West Virginia*,  
547 U.S. 867 (2006) ..... 5

**STATUTE:**

26 U.S.C. § 501(c) ..... 13

**REGULATION:**

26 C.F.R. § 1.501(c)(4)-1(a)(2) ..... 13

**RULES:**

Sup. Ct. R. 10.....2, 4

Sup. Ct. R. 36.7..... 1

**TABLE OF AUTHORITIES—Continued**

Page(s)

**OTHER AUTHORITIES:\***

American Crossroads, Request for FEC Advisory Opinion, No. 2011-23, Oct. 28, 2011 .....	11
Kim Barker, <i>et al.</i> , <i>With Spotlight on Super PACs, Nonprofits Escape Scrutiny</i> , ProPublica, Feb. 3, 2012, <a href="http://www.propublica.org/article/with-spotlight-on-super-pac-dollars-nonprofits-escape-scrutiny">http://www. propublica.org/article/with-spotlight-on- super-pac-dollars-nonprofits-escape- scrutiny</a> .....	14
Center for Responsive Politics, Outside Spend- ing Database, <a href="http://www.opensecrets.org/outside-spending/cycle_tots.php">http://www.opensecrets.org/ outside-spending/cycle_tots.php</a> .....	17
Russ Choma, <i>Super PAC Spending Teeters at \$100 Million Mark</i> , Center for Responsive Politics Open Secrets Blog, May 10, 2012, <a href="http://www.opensecrets.org/news/2012/05/super-pac-spending-teeters-at-100-million-mark.html">http://www.opensecrets.org/news/ 2012/05/super-pac-spending-teeters-at-100- million-mark.html</a> .....	9
Democracy Corps & Public Campaign Action Fund, <i>Two Years After Citizens United, Voters Fed Up with Money in Politics</i> (Jan. 19, 2012), <a href="http://www.democracycorps.com/wp-content/files/PCAF-memo-FINAL1.pdf">http://www.democracycorps.com/ wp-content/files/PCAF-memo-FINAL1.pdf</a> .....	20

**TABLE OF AUTHORITIES—Continued**

Page(s)

Demos & U.S. PIRG Education Fund,  
*Auctioning Democracy: The Rise of Super  
PACs and the 2012 Election*, Feb. 8, 2012,  
*available at* [http://www.demos.org/  
publication/auctioning-democracy-rise-  
super-pacs-and-2012-election](http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election) .....15-16

Dan Eggen, *Most Independent Ads for 2012  
Election Are From Groups That Don't  
Disclose Donors*, Wash. Post, Apr. 24, 2012 ..... 18

Kim Geiger, *FEC Deadlocks on Question of  
Coordinated Advertising*, L.A. Times, Dec.  
5, 2011, [http://articles.latimes.com/2011/  
dec/05/news/la-pn-crossroads-fec-20111205](http://articles.latimes.com/2011/dec/05/news/la-pn-crossroads-fec-20111205)..... 11

Maggie Haberman, *Coordination Rules A One-  
Way Street*, Politico, May 2, 2012,  
[http://www.politico.com/news/stories/  
0512/75834.html](http://www.politico.com/news/stories/0512/75834.html) ..... 10

Richard L. Hasen, *The Numbers Don't Lie*,  
Slate, Mar. 9, 2012, [http://www.slate.  
com/articles/news\\_and\\_politics/politics/201  
2/03/the\\_supreme\\_court\\_s\\_citizens\\_united\\_  
decision\\_has\\_led\\_to\\_an\\_explosion\\_of\\_camp  
aign\\_spending\\_.html](http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html)..... 13

Dave Johnson, *Super PAC Hate-Spending*,  
Slate, Mar. 9, 2012, [http://www.slate.  
com/articles/news\\_and\\_politics/map\\_of\\_the  
\\_week/2012/03/where\\_super\\_pacs\\_are\\_spen  
ding\\_their\\_money\\_and\\_how\\_.html](http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/03/where_super_pacs_are_spending_their_money_and_how_.html) ..... 19

**TABLE OF AUTHORITIES—Continued**

	<u>Page(s)</u>
Letter to IRS from Campaign Legal Center, Sept. 28, 2011, <a href="http://www.campaignlegalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf">http://www.campaignlegalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf</a> .....	10, 13
Letter to IRS from Campaign Legal Center, Dec. 14, 2011, <a href="http://www.campaignlegalcenter.org/attachments/IRS_LETTER_12_14_2011.pdf">http://www.campaignlegalcenter.org/attachments/IRS_LETTER_12_14_2011.pdf</a> .....	13
Dave Levinthal, <i>2011 Sees Super PAC Explosion</i> , Politico, Oct. 6, 2011, <a href="http://www.politico.com/news/stories/1011/65310.html">http://www.politico.com/news/stories/1011/65310.html</a> .....	9-10
Morgan Little, <i>Negative Ads Increase Dramatically During 2012 Presidential Election</i> , L.A. Times, May 3, 2012.....	9
Michael Luo, <i>Groups Push Legal Limits in Advertising</i> , N.Y. Times, Oct. 17, 2010.....	15
Spencer MacColl, <i>A Center for Responsive Politics Analysis of the Effects of Citizens United</i> , May 5, 2011, available at <a href="http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html">http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html</a> .....	13, 17

**TABLE OF AUTHORITIES—Continued**

	<u>Page(s)</u>
Evan Mackinder, <i>Super PACS Cast Long Shadow Over 2012 Race</i> , Center for Responsive Politics Open Secrets Blog, Mar. 21, 2012, <a href="http://www.opensecrets.org/news/2012/03/super-pacs-continued-to-show.html">http://www.opensecrets.org/news/2012/03/super-pacs-continued-to-show.html</a> .....	18
Robert Maguire & Viveca Novack, <i>The FreedomWorks Network: Many Connections, Little Disclosure</i> , Center for Responsive Politics Open Secrets Blog, Mar. 16, 2012, <a href="http://www.opensecrets.org/news/2012/03/if-tk-year-veteran-indiana-sen.html">http://www.opensecrets.org/news/2012/03/if-tk-year-veteran-indiana-sen.html</a> .....	15
Brody Mullins & Danny Yadron, <i>Gingrich Super PAC’s Funding Runs Dry</i> , Wall St. J., Mar. 21, 2012 .....	18
Viveca Novack & Robert Maguire, <i>For Friends, Crossroads Helps With the Tab</i> , Center for Responsive Politics Open Secrets Blog, Apr. 18, 2012, <a href="http://www.opensecrets.org/news/2012/04/for-friends-crossroads-helps-with-t.html">http://www.opensecrets.org/news/2012/04/for-friends-crossroads-helps-with-t.html</a> .....	15
N.Y. Times, <i>Who’s Financing The Super PACs</i> , <a href="http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html">http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html</a> (last updated May 7, 2012) .....	16
Norman Ornstein, <i>Effect of Citizens United Felt Two Years Later</i> , Roll Call, Jan. 18, 2012 .....	12

**TABLE OF AUTHORITIES—Continued**

	<u>Page(s)</u>
Pew Research Center for People and the Press, <i>Super PACs Are Having A Negative Impact, Say Voters Aware of ‘Citizens United’ Ruling</i> (Jan. 17, 2012), <a href="http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf">http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf</a> .....	20
Molly Redden, <i>Mitt Romney’s Southern Strategy</i> , Salon, Mar. 28, 2012, <a href="http://www.salon.com/2012/03/28/mitt_romneys_southern_strategy">http://www.salon.com/2012/03/28/mitt_romneys_southern_strategy</a> .....	11, 12
Jim Rutenberg & Nicholas Confessore, <i>A Wealthy Backer Likes the Odds on Santorum</i> , N.Y. Times, Feb. 8, 2012.....	11, 18
Fredreka Schouten, <i>Super PAC Limits Blur Ahead of Nov. 6</i> , USA Today, Mar. 1, 2012 .....	8, 9, 10, 11
Al Shaw, <i>et al.</i> , <i>A Tangled Web: Who’s Making Money from All This Campaign Spending?</i> , ProPublica, <a href="http://www.propublica.org/special/a-tangled-web">http://www.propublica.org/special/a-tangled-web</a> (last updated Mar. 21, 2012) .....	10
<i>This American Life: Take the Money and Run for Office</i> , No. 461 (WBEZ radio broadcast Mar. 30, 2012) (transcript <i>available at</i> <a href="http://www.thisamericanlife.org/radio-archives/episode/461/transcript">http://www.thisamericanlife.org/radio-archives/episode/461/transcript</a> ).....	7, 19



**TABLE OF AUTHORITIES—Continued**

	<u>Page(s)</u>
Kenneth P. Vogel, <i>Both Sides Now in Dash for Political Cash</i> , Politico, Jun. 29, 2011, <a href="http://www.politico.com/news/stories/0811/60731.html">http://www.politico.com/news/stories/0811/60731.html</a> .....	15
Kenneth P. Vogel, <i>SEIU, American Crossroads Look Back at 2010 Spending</i> , Politico, Dec. 13, 2010, <a href="http://www.politico.com/news/stories/1210/46355.html">http://www.politico.com/news/stories/1210/46355.html</a> .....	15
Voltaire, <i>Candide</i> (1759) .....	7
Marian Wang, <i>Uncoordinated Coordination: Six Reasons Limits on Super PACs Are Barely Limits at All</i> , ProPublica, Nov. 21, 2011, <a href="http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all">http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all</a> .....	8, 10, 12
Drew Westen, <i>Why Attack Ads? Because They Work</i> , L.A. Times, Feb. 19, 2012, <a href="http://articles.latimes.com/2012/feb/19/opinion/la-oe-westen-why-negative-campaigning-works-20120219">http://articles.latimes.com/2012/feb/19/opinion/la-oe-westen-why-negative-campaigning-works-20120219</a> .....	6

\* All web addresses were last accessed on May 14, 2012.

**STATEMENT OF INTEREST<sup>1</sup>**

*Amici* are U.S. Senator Sheldon Whitehouse of Rhode Island and U.S. Senator John McCain of Arizona.

*Amici* file this brief for two reasons. First, as active, democratically elected legislators, they have a direct understanding of the effects of unlimited independent election expenditures on our legislative system and our democracy. *Amici*'s observations about both the risk and the appearance of corruption created by unlimited independent expenditures will assist the Court as it decides to consider "whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway," 132 S. Ct. 1307 (2012) (statement of Justices Ginsburg and Breyer).

Second, as national political leaders, *amici* have a strong interest in the proper functioning of our democracy. In their view, the appearance of corruption undermines trust and participation in our elections, the opportunity for corruption makes the legislative process more difficult, and both diminish the standing of our democracy in the eyes of the world. Accordingly, *amici* respectfully ask the Court to confirm that Congress and state legislators may, upon an appropriate record demonstrating the potential for corruption or perceived corruption created by independent expenditures, enact legislation in response to that real and significant threat.

---

<sup>1</sup> Pursuant to Rule 37.6, counsel certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties.

## SUMMARY OF ARGUMENT

This case concerns an issue of paramount importance to our nation: the effective functioning of American democracy. America's democracy has long stood as a model to the world. The costs of disrupting a fair and effective American democracy are high – to our states, our nation, and our world.

1. The Montana court reviewed extensive record evidence of corruption, evidence of the type this Court deemed a “cause for concern” in *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010). *Citizens United* held that when a legislature “finds that a problem exists” – when it makes a legislative finding based on evidence that “elected officials succumb to improper influences from independent expenditures” – judges “must give that finding due deference” and “must give weight” to laws that “seek to dispel the appearance or reality of these influences.” *Id.* That is what the Montana Supreme Court did in this case, which is reason enough to deny the petition. Sup. Ct. R. 10. Petitioners' inevitable disagreement with the ruling against them does not justify the exercise of certiorari here.

2. If the Court does grant the writ, however, summary reversal is not the appropriate disposition of the case. Full briefing and argument, and a decision in the ordinary course, would allow the Court to confirm lawmakers' continuing authority to respond when the evidence shows “that a problem exists.” *Citizens United*, 130 S. Ct. at 911.

And a problem does exist. Evidence from the 2010 and 2012 electoral cycles has demonstrated that so-called independent expenditures create a strong potential for corruption and the perception thereof. The news confirms, daily, that existing campaign finance rules purporting to provide for “independence” and “disclosure” in fact provide neither. Regulatory

filings show that much of the funding for independent expenditures comes from shell companies, pass-through entities, and non-profit organizations that conceal the true source of the individuals and companies supporting them. These non-disclosed funding sources were not what the Court had in mind when it issued its ruling in *Citizens United*, and therefore it did not consider the strong potential for corruption and the appearance of corruption they would create, including through threats and promises of spending.

In light of these developments, if the Court grants the petition, it should revisit *Citizens United's* finding that vast independent expenditures do not give rise to corruption or the appearance of corruption. The Court should clarify that when legislatures build an appropriate record demonstrating the potential for corruption or the appearance thereof created by independent expenditures, they may enact appropriate preventative legislation in response.

## ARGUMENT

### I. THE MONTANA SUPREME COURT APPLIED THE CORRECT LEGAL STANDARD TO THE FACTUAL RECORD BEFORE IT.

The Court in *Citizens United* explained its holding as an application of the basic principle that when an elected legislature “finds that a problem exists,” it may not choose a remedy that is “asymmetrical” to the risk. 130 S. Ct. at 911. The Court anticipated that if Congress found that “a problem exists” as the result of independent expenditures, the Court would “give that finding due deference” and “give weight” to any legislative remedy. *Id.* These statements are inconsistent with Petitioners’ *per se* rule prohibiting laws like the Montana Corrupt Practices Act.

The Montana Supreme Court did just as this Court instructed. First, it determined that the State had a “compelling interest” justifying the law based on the extensive evidence in the trial record (a record this Court did not enjoy in *Citizens United*). *See* Pet. App. 17a-29a. It noted the historical evidence of actual corruption, including vote-buying in the legislature, *id.* at ¶¶ 24-26, 36; gubernatorial misconduct, *id.* at ¶ 24; and judicial bias and bribery, *id.* at ¶¶ 23, 36, noting a particular danger in Montana, where advertising is cheap. *Id.* at ¶¶ 29-32, 38. It cited concerns about the independence of the State’s judiciary. *Id.* at ¶¶ 42-45. The court also found substantial evidence that Montana voters believe that corporate independent expenditures lead to corruption, and that this belief has contributed to widespread cynicism and low voter turnout. *See id.* at ¶¶ 28, 33, 38.

Then, the Montana Supreme Court assessed whether the State’s prohibition of corporate expenditures was “narrowly tailored” to the problem identified in the record. *See* Pet. App. 31a-32a. Looking specifically at the characteristics of Petitioners’ corporate entities, the Court concluded that the law, *as it applied to them*, had no more than a “minimal impact,” if any. *Id.*

This Court has “rarely granted” a petition for certiorari “when the asserted error consists of \* \* \* the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. The Montana Supreme Court faithfully applied the law to the factual record before it. No further justification should be needed to deny the petition.

## II. THE COURT SHOULD IN ALL EVENTS DECLINE PETITIONERS' INVITATION TO SUMMARILY REVERSE.

If this Court concludes that review of the Montana court's decision is nevertheless warranted, a full hearing is necessary. Summary reversal is plainly not the appropriate course, whatever this Court concludes about the petition's merits. *Cf. Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting) ("In vacating the judgment of a state court for no better reason than our own convenience, we not only fail to observe, but positively flout the special deference owed \* \* \* to state courts") (internal quotation marks omitted).

The linchpin of the Petition concerns this Court's statement in *Citizens United* that vast corporate independent expenditures "do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909. Petitioners repeatedly refer to that statement from *Citizens United* as a "holding" and "a matter of law." Application to Stay Decision at 19; *see* Pet. at 15, 16.

That cannot be so. Whether independent expenditures pose dangers of corruption or apparent corruption depends on the actual workings of the electoral system; it is a factual question, not a legal syllogism. In a passage from *Buckley v. Valeo* discussed in *Citizens United*, this Court stated that "the independent advocacy restricted by the provision does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. 1, 46 (1976) (emphasis added). The *Buckley* Court's use of the phrase "presently appear" reflects that the risk of corruption is in reality a factual determination to be made about the functioning of the electoral system at a particular time.

The peculiar posture of *Citizens United* deprived the Court of a factual record (in contrast to previous decisions of this Court, such as *McConnell v. FEC*, 540 U.S. 93 (2003), which relied heavily on exhaustive records developed by Congress and in the litigation).<sup>2</sup> The Court acknowledged that “[w]hen Congress finds that a problem exists, we must give that finding due deference” and “give weight to attempts by Congress to seek to dispel either the appearance or reality of these influences.” *Citizens United*, 130 S. Ct. at 911.

Evidence from the 2010 and 2012 election cycles confirms that “a problem exists” – new political expenditures have opened the door to *quid pro quo* corruption and the appearance thereof. Massive new spending, most of it on negative attack ads that are proven to change voting patterns,<sup>3</sup> has been closely coordinated with campaigns, and much of it has been undisclosed. As a result, outside groups can now spend – or credibly threaten to spend – overwhelming amounts of money in support of or against a candidate, without a publicly disclosed paper trail. If spent on negative attack ads, the substance of the ads may not even yield a clue to the interest of the attackers, let alone their identities.

---

<sup>2</sup> The Supreme Court (and appellate tribunals generally) have traditionally limited themselves to reviewing factual findings made by a lower court, and have not made factual determinations themselves.

<sup>3</sup> See n.35, *infra*; Drew Westen, *Why Attack Ads? Because They Work*, L.A. Times, Feb. 19, 2012 (“A well-crafted positive ad can ‘stick’ too, but there’s nothing like a sinister portrayal of a greedy, self-centered villain, replete with grainy images and menacing music, to stir up our unconscious minds.”); see also Morgan Little, *Negative Ads Increase Dramatically During 2012 Presidential Election*, L.A. Times, May 3, 2012 (seventy percent of political ads aired in the 2012 election cycle have been negative – up from only nine percent in 2008).

The ability to make and to credibly threaten large expenditures gives outside groups the opportunity to exert improper leverage over politicians running for office. Through backchannel communications, or simply a quiet phone call, candidates can be warned, for example, that failure to take the “right” position will be punished with a large expenditure against them.<sup>4</sup> “Killing an admiral” from time to time might be enough.<sup>5</sup> Alternatively, interest groups can gain improper influence by promising to support a political candidate with a large expenditure if the need arises. Before *Citizens United*, a threat of attack or pledge of support would mean a maximum \$5,000 PAC contribution, or perhaps hosting a fundraiser for a legislator, with all contributions disclosed. Today, this could mean an unlimited independent expenditure, including an anonymous one, that could elect or defeat a candidate.

If the threat is successful or if the pledge of support turns out to be unnecessary, there will be no record of the *quid pro quo*: no public advertising, no disclosure, no trail of receipts, and no account statements for regulators, prosecutors and media outlets to track. The lack of disclosure thus makes ferreting

---

<sup>4</sup> See *This American Life: Take the Money and Run for Office*, No. 461 (WBEZ radio broadcast Mar. 30, 2012) (transcript available at <http://www.thisamericanlife.org/radio-archives/episode/461/transcript>) (Norman Ornstein: “I’ve had this tale told to me by a number of lawmakers. You’re sitting in your office and a lobbyist comes in and says, ‘I’m working with Americans for a Better America. And I can’t tell you who’s funding them, but I can tell you they really, really want this amendment in the bill.’ And who knows what they’ll do? They’ve got more money than God.”).

<sup>5</sup> See Voltaire, *Candide*, ch.23 (1759) (“In this country, it is good to kill an admiral from time to time, in order to encourage the others.”).



out this *quid pro quo* corruption extremely difficult. Plenary review would afford the Court an opportunity to consider the implications of this phenomenon for its finding that independent expenditures do not corrupt.

**A. Political Spending After *Citizens United* Demonstrates that Coordination and Disclosure Rules Do Not Impose a Meaningful Check on the System.**

A premise of *Citizens United* was its finding that independent expenditures do not create a risk of corruption or the appearance of corruption. That premise rested on two critical assumptions: (i) that anti-coordination rules “substantially diminish[ ]” the “potential for abuse” of independent expenditures, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47); and (ii) that the Bipartisan Campaign Reform Act created a regime of “effective disclosure” that would “provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.” *Id.* at 916.

Political spending in the 2010 and 2012 election cycles has undermined both of these core assumptions.

1. Coordination Rules are Ineffective.<sup>6</sup>

In *Citizens United*, the Court assumed a strong and well-enforced prohibition on coordination between campaigns and “independent” advocates. As

---

<sup>6</sup> See Fredreka Schouten, *Super PAC Limits Blur Ahead of Nov. 6*, USA Today, Mar. 1, 2012; Marian Wang, *Uncoordinated Coordination: Six Reasons Limits on Super PACs Are Barely Limits at All*, ProPublica, Nov. 21, 2011, <http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all>.

the Court saw it, “[t]he separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned.” *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) (citing *Citizens United*, 130 S. Ct. at 908).

The Court did not anticipate how coordination rules operate – or fail to operate – with respect to the new breed of “independent expenditure-only committees,” commonly known as super PACs. In effect the “separation between candidates and independent expenditure groups” that was an essential predicate to the *Citizens United* decision has been eliminated. Evidence from the current election cycle bears this out:

*Candidate-Specific Super PACs.* The ongoing presidential and congressional races are now heavily driven by a handful of super PACs, each founded and managed for the benefit of a single candidate.<sup>7</sup> Wealthy donors who have maxed out their contributions to the candidate are now using these candidate-specific super PACs as convenient proxies to make the functional equivalent of campaign contributions.<sup>8</sup>

---

<sup>7</sup> Russ Choma, *Super PAC Spending Teeters at \$100 Million Mark*, Center for Responsive Politics Open Secrets Blog, May 10, 2012, <http://www.opensecrets.org/news/2012/05/super-pac-spending-teeters-at-100-million-mark.html> (“The hard-fought Republican primary, which dragged out longer than many expected, attracted the bulk of the super PAC money. The five top outside spenders, all of them super PACs formed to support one of the GOP candidates, account for \$86 million of this first \$100 million spent.”).

<sup>8</sup> See Schouten, *supra* n.6 (prominent campaign supporter was also single-largest donor to candidate’s super PAC); Dave

*Closely Connected Staff and Consultants.* Many prominent candidate-specific super PACs are run by former high-level aides to the candidate,<sup>9</sup> and nothing prevents those affiliated with a super PAC from later taking a job with the candidate's campaign.<sup>10</sup> It is probably not a coincidence, then, that super PACs and the candidates they support also often use the same outside consultants and advisers.<sup>11</sup>

*Coordinated Fundraising and Advertising.* Campaign committees and super PACs openly coordinate on fundraising. Candidates appear at super PAC fundraising events and share their fundraising lists.<sup>12</sup> Super PACs are permitted to run ads that

---

[Footnote continued from previous page]

Levinthal, *2011 Sees Super PAC Explosion*, Politico, Oct. 6, 2011, <http://www.politico.com/news/stories/1011/65310.html>.

<sup>9</sup> For example, the President's super PAC, Priorities USA Action, is run by his former deputy press secretary, and Mitt Romney's super PAC was founded by his 2008 campaign general counsel. See Wang, *supra* n.6; see also Letter to IRS from Campaign Legal Center, Sept. 28, 2011, at 4, 9, [http://www.campaign.legalcenter.org/attachments/Letter\\_to\\_the\\_IRS\\_from\\_Democracy\\_21\\_and\\_Campaign\\_Legal\\_Center\\_9\\_28\\_2011.pdf](http://www.campaign.legalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf).

<sup>10</sup> See Maggie Haberman, *Coordination Rules A One-Way Street*, Politico, May 2, 2012, <http://www.politico.com/news/stories/0512/75834.html> (top Republican strategist who advised American Crossroads joined Romney campaign as Senior Adviser).

<sup>11</sup> See Al Shaw, *et al.*, *A Tangled Web: Who's Making Money from All This Campaign Spending?*, ProPublica, <http://www.propublica.org/special/a-tangled-web> (last updated Mar. 21, 2012); see, e.g., Schouten, *supra* n.6 (super PAC uses same polling and direct-mail consultant as campaign).

<sup>12</sup> See, e.g., Schouten, *supra* n.6 (President Obama's campaign manager at a Priorities USA fundraiser); Wang, *supra* n.6 (Rep.

are “fully coordinated” with a candidate, feature an appearance from the candidate, and follow a script reviewed and approved by the candidate.<sup>13</sup> In some cases, super PACs have simply reused and repackaged material from the candidate’s old advertisements.<sup>14</sup>

*Strategic Timing.* In light of their closely connected staff and fully coordinated fundraising efforts, it should come as little surprise that super PACs have been acting as successful surrogates for campaign committees in states where the candidate has made few appearances or spent little money on advertising.<sup>15</sup> The candidate and the super PAC need not

---

[Footnote continued from previous page]

Pelosi and Sen. Reid fundraising for super PACs; also Mitt Romney for Restore Our Future).

<sup>13</sup> Kim Geiger, *FEC Deadlocks on Question of Coordinated Advertising*, L.A. Times, Dec. 5, 2011, <http://articles.latimes.com/2011/dec/05/news/la-pn-crossroads-fec-20111205>; see American Crossroads, Request for FEC Advisory Opinion, No. 2011-23, at 3 (Oct. 28, 2011) (advertisements “would be fully coordinated with incumbent Members of Congress facing re-election in 2012 insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement”).

<sup>14</sup> American Crossroads, *supra* n.13, at 3 n.2 (advertisements “may include phrases or slogans that the featured [candidate] has previously used”); Schouten, *supra* n.6 (super PAC ran television commercial candidate aired in 2007 during previous campaign).

<sup>15</sup> See Jim Rutenberg & Nicholas Confessore, *A Wealthy Backer Likes the Odds on Santorum*, N.Y. Times, Feb. 8, 2012 (candidate-specific super PAC spent millions to win Minnesota for Santorum, when candidate had no money left to spend); Molly Redden, *Mitt Romney’s Southern Strategy*, Salon, Mar. 28, 2012, [http://www.salon.com/2012/03/28/mitt\\_romneys\\_southern\\_strategy](http://www.salon.com/2012/03/28/mitt_romneys_southern_strategy) (candidate-specific super PAC “consistently

communicate for spending to be coordinated in this way; news articles and shared consultants provide all the information a super PAC needs to direct the money to where it is needed most.<sup>16</sup>

In sum, super PACs *are* coordinating with campaigns, and they are using methods the Court did not contemplate in its *Citizens United* decision. Contrary to the Court's assumption, there is now little distinction in practice between a contribution to a candidate-specific super PAC and a direct contribution to the candidate's campaign, other than its being unlimited, and potentially concealed.<sup>17</sup>

## 2. Disclosure Rules Are Inadequate.

The second critical assumption of *Citizens United* was that unlimited independent expenditures would take place under the glare of complete and effective disclosure. That is plainly not the case today. Much of the outside money spent in the 2010 election came from groups that are not required to – and do not – disclose their donors.

---

[Footnote continued from previous page]

spent millions in Southern primaries” including in one state where candidate bought no television advertising).

<sup>16</sup> See Wang, *supra* n.6 (quoting public statements by campaign officials about spending strategy); Redden, *supra* n.15 (quoting former FEC counsel: “This is clearly not being done by people who have absolutely no idea what the candidate or campaign is doing”).

<sup>17</sup> Cf. Norman Ornstein, *Effect of Citizens United Felt Two Years Later*, Roll Call, Jan. 18, 2012 (the mandatory non-coordination disclaimer at the end of a super PAC's advertisement is “nonsensical,” and voters realize super PACs “are effectively arms of the campaigns,” but “without any of the restrictions or timely disclosure requirements the candidates themselves face”).

Certain types of political spending groups, organized under section 501(c) of the tax code, are not required to disclose their donors to the public, but only to the IRS on confidential grounds. These groups include so-called social welfare groups, which are permitted to engage in political advocacy so long as it is not the organization's primary purpose. *See* 26 U.S.C. § 501(c)(4); 26 C.F.R. § 1.501(c)(4)-1(a)(2). Several "(c)(4)" entities have interpreted IRS rules to allow them to spend up to *49 percent* of their funds on express advocacy<sup>18</sup> – and one has evidently spent 87 percent of its funds on political ads.<sup>19</sup> When a (c)(4) organization spends money on political advocacy, its donors are not publicly disclosed.

Much of the outside money spent on electioneering communications in the post-*Citizens United* 2010 election came from (c)(4) organizations and other non-disclosing groups. These organizations spent so much money – \$134 million – that by the end of the 2010 cycle, they accounted for 47 percent of all outside political spending.<sup>20</sup> In the 2006 election, by contrast, these groups spent \$0.<sup>21</sup>

---

<sup>18</sup> Letter to IRS from Campaign Legal Center, Sept. 28, 2011, at 1, [http://www.campaignlegalcenter.org/attachments/Letter\\_to\\_the\\_IRS\\_from\\_Democracy\\_21\\_and\\_Campaign\\_Legal\\_Center\\_9\\_28\\_2011.pdf](http://www.campaignlegalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf).

<sup>19</sup> Letter to IRS from Campaign Legal Center, Dec. 14, 2011, at 3, [http://www.campaignlegalcenter.org/attachments/IRS\\_LETTER\\_12\\_14\\_2011.pdf](http://www.campaignlegalcenter.org/attachments/IRS_LETTER_12_14_2011.pdf).

<sup>20</sup> Spencer MacColl, *A Center for Responsive Politics Analysis of the Effects of Citizens United*, May 5, 2011, at 4, 5, available at <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

<sup>21</sup> *See* Richard L. Hasen, *The Numbers Don't Lie*, Slate, Mar. 9, 2012, [http://www.slate.com/articles/news\\_and\\_politics/politics/](http://www.slate.com/articles/news_and_politics/politics/)

Super PACs, 501(c)(4) organizations and political campaigns are knitted into a fundraising web that allows unlimited, non-independent and anonymous (to the public) political donations for the benefit of a specific candidate. With respect to political campaigns, the disclosure issue is not limited to what would be characterized as larger donations. For instance, political campaigns are not required to disclose contributions that are \$200 or less. Additionally, under IRS rules, (c)(4) groups are permitted to make independent expenditures in their own name, to donate money to super PACs, and to give to other (c)(4) entities. As a result, a person or company seeking to support or influence a candidate without public disclosure can donate to a (c)(4), which will in turn do one of three things: (1) spend the money on advocacy, (2) donate it to a super PAC to spend on advocacy, or (3) donate it to another (c)(4), which would then have the same set of options, behind an additional layer of “identity-laundering” for the donor.

Many of the most prominent super PACs have created affiliated (c)(4) entities to take advantage of the considerable sums of anonymous money they can raise.<sup>22</sup> In one instance, the (c)(4) had supplied the

---

[Footnote continued from previous page]

2012/03/the\_supreme\_court\_s\_citizens\_united\_decision\_has\_led\_to\_an\_explosion\_of\_campaign\_spending\_.html.

<sup>22</sup> See Kim Barker, *et al.*, *With Spotlight on Super PACs, Nonprofits Escape Scrutiny*, ProPublica, Feb. 3, 2012, <http://www.propublica.org/article/with-spotlight-on-super-pac-dollars-nonprofits-escape-scrutiny>. Super PACs with 501(c)(4) affiliates include: Priorities USA Action (Priorities USA); American Crossroads (Crossroads GPS); Majority PAC (Patriot Majority USA); FreedomWorks for America (FreedomWorks, Inc.); American Bridge 21st Century (American Bridge 21st Century Foundation). Priorities USA Action and American

super PAC with almost half of its \$3 million in funding.<sup>23</sup> Another group, American Crossroads, set up its (c)(4) affiliate, Crossroads GPS, precisely because “some donors didn’t want to be disclosed.”<sup>24</sup> Crossroads GPS spends 40 percent of its money on explicit, declared political activity.<sup>25</sup> Moreover, as part of its mandatory “non-political” spending, it gave several million dollars to a dozen groups that in turn spent

---

[Footnote continued from previous page]

Bridge 21st Century received \$438,000 from their affiliated nonprofits last year. A Democratic-leaning super PAC, Citizens for Strength and Security, reported that almost all of its \$72,000 came from a (c)(4) – also called Citizens for Strength and Security. The super PAC FreedomWorks for America reported that half of the contributions it received last year – \$1.34 million – were “in kind” payments from its affiliate (c)(4), FreedomWorks, Inc.

<sup>23</sup> Robert Maguire & Viveca Novack, *The FreedomWorks Network: Many Connections, Little Disclosure*, Center for Responsive Politics, Open Secrets Blog, Mar. 16, 2012, <http://www.opensecrets.org/news/2012/03/if-tk-year-veteran-indiana-sen.html>.

<sup>24</sup> Kenneth P. Vogel, *SEIU, American Crossroads Look Back at 2010 Spending*, Politico, Dec. 13, 2010, <http://www.politico.com/news/stories/1210/46355.html> (quoting super PAC’s political director); *see also* Vogel, *Both Sides Now in Dash for Political Cash*, Politico, Jun. 29, 2011, <http://www.politico.com/news/stories/0811/60731.html> (quoting Democratic strategist: “Many such donors [to (c)(4) organizations] ‘feel more comfortable donating to groups that don’t disclose’ because they do not want publicity or to be on fundraising lists).

<sup>25</sup> Michael Luo, *Groups Push Legal Limits in Advertising*, N.Y. Times, Oct. 17, 2010.



millions on independent expenditures and electioneering communications.<sup>26</sup>

Even excluding the (c)(4) organizations, many of the top donors to super PACs are themselves limited-liability corporations or otherwise obscure entities.<sup>27</sup> *Cf. McConnell*, 540 U.S. at 197 (federal disclosure laws intended to prevent confusion by groups “hiding behind dubious and misleading names”). Many have only a P.O. Box as an address; and several – including the single largest donor in 2010 and 2011 – have been discovered to be primarily pass-through entities for wealthy individuals.<sup>28</sup>

The coupling of 501(c) anonymity and corporate obscurity to super PAC fundraising and coordination has catalyzed an explosion of undisclosed outside spending, which this Court could not foresee when it suggested that disclosure rules are an “adequate” and “effective” means of serving the public’s substantial information interest. 130 S. Ct. at 916; *cf. McConnell*, 540 U.S. at 197 (noting that plaintiffs “never satisfactorily answer[ed] the question of how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public”). Where the spending is on negative attack ads, the substance of the ad might

---

<sup>26</sup> Viveca Novack & Robert Maguire, *For Friends, Crossroads Helps With the Tab*, Center for Responsive Politics Open Secrets Blog, Apr. 18, 2012, <http://www.opensecrets.org/news/2012/04/for-friends-crossroads-helps-with-t.html>.

<sup>27</sup> See Demos & U.S. PIRG Education Fund, *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, Feb. 8, 2012, at 17, table 1, available at <http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election>.

<sup>28</sup> See N.Y. Times, *Who’s Financing The Super PACs*, at <http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html> (last updated May 7, 2012).

not even provide a hint of what interest is behind the expenditure.

**B. Unlimited, Coordinated and Undisclosed Spending Creates a Strong Potential for *Quid Pro Quo* Corruption.**

The unprecedented scale of new spending, often on negative attack ads, coupled with the failure of the disclosure and coordination rules, enhances the risk of corruption. Counting both independent expenditures and spending on electioneering communications,<sup>29</sup> outside spending on the 2010 election exceeded spending by political parties, \$289 million to \$184 million.<sup>30</sup> Of the \$210 million spent on independent expenditures alone, two-thirds of that money came from groups that benefited from the removal of caps on corporate donations after *Citizens United*.<sup>31</sup>

For the 2012 election, outside spending exceeded \$120 million as of May 14, with six months still to go.<sup>32</sup> That is double the amount spent by this date in the 2008 presidential election cycle. As the election nears, the pace of outside spending will significantly augment these already massive figures. Super PACs, which alone have spent over \$100 million in

---

<sup>29</sup> “Independent expenditures” fund express advocacy for or against a candidate, as opposed to “electioneering communications,” which are advertisements that appear in the 30 days preceding a primary or 60 days preceding a general election and mention a candidate’s name but do not expressly advocate for or against that candidate. These figures exclude spending by political parties.

<sup>30</sup> MacColl, *supra* n.20, at 11.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> Statistics in this paragraph are taken from the Center for Responsive Politics Outside Spending Database, [http://www.opensecrets.org/outside-spending/cycle\\_tots.php](http://www.opensecrets.org/outside-spending/cycle_tots.php).

this election cycle, have another \$100 million on hand to spend in the remaining months leading up to November – meaning that those groups can spend over half a million dollars *every day* (\$570,000) until the election, without even raising another cent.

As for spending by 501(c)(4) nonprofit organizations, there is no way to predict how much they will spend on the 2012 election – because they disclose their finances after the election year – but it is estimated they will spend more than super PACs this election cycle.<sup>33</sup>

A well-heeled super PAC can now influence or threaten to influence a race with a single mammoth expenditure. The ongoing presidential primary season has shown this to be true on several occasions.<sup>34</sup> The dominating influence of super PACs is particularly significant for those in congressional races with

---

<sup>33</sup> Dan Eggen, *Most Independent Ads for 2012 Election Are From Groups That Don't Disclose Donors*, Wash. Post, Apr. 24, 2012 (“The numbers signal a *shift* away from super PACs, which are required to disclose their donors” toward “big-spending nonprofits that do not have to identify their financial backers.”).

<sup>34</sup> See Brody Mullins & Danny Yadron, *Gingrich Super PAC's Funding Runs Dry*, Wall Street Journal, Mar. 21, 2012 (candidate won South Carolina primary despite ranking fourth in Iowa “in part because [the Gingrich super PAC] spent nearly \$1 million on TV ads for him in the final week, while his own campaign could muster only \$337,000”); Rutenberg & Confessore, *supra* n.15 (candidate who “could not afford to pay for a single commercial” at the time won Minnesota primary owing to the “critical support” of a super PAC); see also Evan Mackinder, *Super PACS Cast Long Shadow Over 2012 Race*, Center for Responsive Politics Open Secrets Blog, Mar. 21, 2012, <http://www.opensecrets.org/news/2012/03/super-pacs-continued-to-show.html> (super PACs’ earlier support for several failed candidates was “propping them up entirely”).

smaller media markets, such as Montana’s, and makes it all the easier for those seeking legislative favors and results to discreetly threaten such expenditures if Members of Congress do not accede to their demands.<sup>35</sup>

A promise or threat to a candidate that goes unseen or unheard by the public is a means of corruption that was not considered in *Citizens United*. This massive leverage goes beyond the mere “influence” this Court deemed inadequate to support the restrictions at issue in that case. *Cf. Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868, 884 (2009) (“there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign”). The Court in *Caperton* found that the remedy for such massive expenditures was recusal by the Judge – but there is no such remedy available for Members of Congress.

\* \* \* \* \*

The Court’s opinion in *Citizens United* could not account for the particular risks and appearances of

---

<sup>35</sup> See, e.g., *This American Life*, *supra* n.4 (super PAC’s \$680,000 expenditure paid for negative advertisement to be shown so frequently that average viewer was likely to see it 16 times per week; in same period, target candidate’s support dropped six percentage points). As of March 5, 2012, 54 percent of money spent in the 2012 presidential election (over \$35 million) was spent on negative attack ads. The Restore Our Future PAC supporting Mitt Romney spent 97 percent of its \$31 million in spending on negative ads against Rick Santorum and Newt Gingrich. Dave Johnson, *Super PAC Hate-Spending*, Mar. 9, 2012. [http://www.slate.com/articles/news\\_and\\_politics/map\\_of\\_the\\_week/2012/03/where\\_super\\_pacs\\_are\\_spending\\_their\\_money\\_and\\_how\\_.html](http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/03/where_super_pacs_are_spending_their_money_and_how_.html).

corruption, by expenditures or by threats and promises, associated with super PACs and (c)(4) entities. Put succinctly, the protective factors that the *Citizens United* Court invoked when it stated that independent expenditures present no risk of corruption have not materialized.

**C. The Appearance of Corruption Created by Independent Expenditures is Strong.**

In *Citizens United*, this Court held there could be no “appearance of corruption” associated with independent expenditures to the extent they secure only “access” and “influence,” and are “not coordinated” with a candidate. 130 S. Ct. at 909-910. As shown above, these assumptions no longer hold; therefore, the Court’s assessment of the potential for perceived corruption is worth reconsideration.

Americans believe that the current system of campaign finance is corrupt, and that *Citizens United*, thanks to the anonymous spending it unleashed, has made the problem worse. A recent study by the Pew Center found that 65 percent of registered voters who had heard of *Citizens United* said super PAC spending has had a negative effect on the 2012 presidential campaign.<sup>36</sup> There was no partisan divide on this question: 60 percent of Republicans, 63 percent of Democrats, and 67 percent of independents who had heard of the decision believe it has had a negative effect on the campaign.

---

<sup>36</sup> Pew Research Center for People and the Press, *Super PACs Are Having A Negative Impact, Say Voters Aware of ‘Citizens United’ Ruling* (Jan. 17, 2012), <http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf>

Another recent study<sup>37</sup> found that 80 percent of voters think there is too much “big money” spent on political campaigns and elections and that campaign contributions and spending should be limited. A large majority – including 75 percent of independents – believe that big donors and secret money<sup>38</sup> undermine democracy, and 62 percent said they oppose the *Citizens United* decision.

Trust in public institutions is at an all-time low, in part because of the perceived influence of money in politics. When Americans believe the campaign finance system has been corrupted, they lose faith in their democracy. The appearance that large special interest donors, including corporations and labor organizations which have the ability to manipulate the campaign finance system, hold undue sway over elected officials tarnishes our American democracy. It can lead voters to disengage from healthy political engagement. And that, in turn, compounds the problem, increasing cynicism in a vicious cycle undermining representative democracy.

Poll results should not direct Court decisions. But these results show that the Court’s assessment of perceived corruption was at odds with the perception held by most Americans. Only plenary review will provide the Court with the opportunity for full inquiry into the harms to American democracy caused by the appearance and threat of corruption.

\* \* \* \* \*

---

<sup>37</sup> Democracy Corps & Public Campaign Action Fund, *Two Years After Citizens United, Voters Fed Up with Money in Politics* (Jan. 19, 2012), <http://www.democracycorps.com/wp-content/files/PCAF-memo-FINAL1.pdf>.

<sup>38</sup> Secret money could include contributions to political campaigns that do not reach the amount threshold of current disclosure requirements.

The campaign finance system assumed by *Citizens United* is no longer a reality, if it ever was. The Court, if it grants the petition, should use this case to make clear that when legislatures build an appropriate record demonstrating the potential for corruption or the appearance thereof created by independent expenditures, they may enact appropriately tailored preventative legislation in response. The integrity of America's elections has long been a bulwark of our nation and a beacon to other nations, and it is a worthy exercise of this Court's attention to protect our elections from the manifest damage of its decision allowing the vast, unregulated expenditures that now darken our political landscape.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied or in the alternative granted for plenary review of the question presented.

Respectfully submitted,

NEAL KUMAR KATYAL  
*Counsel of Record*  
JUDITH E. COLEMAN  
HOGAN LOVELLS US LLP  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5528  
neal.katyal@hoganlovells.com

*Counsel for Amici Curiae*

May 2012