No. 11-1179

In The
Supreme Court of the United States

American Tradition Partnership, Inc., f.k.a. Western Tradition Partnership, Inc., *Petitioners*,

v.

Steve Bullock, Attorney General of Montana, et al., *Respondents*.

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

BRIEF FOR UNITED STATES REPRESENTATIVES ROBERT BRADY, CHRIS VAN HOLLEN, ZOE LOFGREN AND CHARLES GONZALEZ AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[*]

Amici Curiae are Members of the United States House of Representatives. United States Representative Brady is the Ranking Member and former Chairman of the Committee on House Administration. Representative Van Hollen was the lead sponsor of the DISCLOSE Act. Representative Lofgren is the Former Chairwoman of the Subcommittee on Elections. Representative Gonzalez is the Ranking Member of the Subcommittee on Elections.

As Members of Congress, *amici* have a strong interest in ensuring that our electoral process is not corrupted by lack of disclosure, transparency, or accountability in political spending. And, as this Court recognized in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), Congress' important interest in preserving the integrity of the political process entitles it to enact legislation that promotes and protects these values. Because the decision below is consistent with these interests, *amici* file this brief in support of

[*] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of *amici*'s intention to file this brief more than 10 days before it was due. Notices reflecting the consent of the parties to the filing of this brief have been filed with the Clerk of this Court.

respondents and in opposition to the petition for a *writ of certiorari*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When this Court held in *Citizens United* that the First Amendment protects corporate independent expenditures, it sought to place corporations in the same position as all others who express themselves through political spending. The Court's central premise was that the protection of speech does not depend on the identity of the speaker, *id.* at 913, and that corporations must be afforded the same freedom of political speech that individuals enjoy. But an equally important component of the Court's holding was that this freedom is not unfettered, and that Congress may impose disclosure requirements as a "less restrictive alternative to more comprehensive regulations of speech." *Id.* at 915. As the Court emphasized, "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," leading to a "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916.

In the wake of *Citizens United*, however, it has become glaringly apparent that the decision has not been interpreted or implemented in the way the Court envisioned. What has developed is a dramatic new source of spending, but without meaningful

disclosure or accountability. Citizens and shareholders are too often unable to see, as the Court put it, "whether elected officials are 'in the pocket' of so-called moneyed interests,'" and are thus unable "to hold corporations and elected officials accountable for their positions and supporters." *Id.* (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 259 (2003) (opinion of Scalia, J.)).

Legislators face serious challenges in fashioning and implementing the type of disclosure regime the Court assumed would ensure transparency and accountability in our election financing. For this reason, *amici* – House Members who are among those who have been on the forefront of campaign finance reform – focus in this brief on these new and increasingly urgent disclosure issues and their implication for transparency and accountability in our campaign finance system after *Citizens United*. *Amici* urge the Court to deny the petition for a *writ of certiorari*, because Montana law appropriately seeks the transparency essential to a well ordered democracy. But if the Court issues an order in response to the petition, *amici* urge the Court to address the important disclosure and accountability issues that are discussed here, and affirm once again that legislators may act to address them.

The purpose of this brief is three-fold: first, to inform the Court why the transparency and accountability presumed by *Citizens United* has not,

in fact, materialized; second, to explain that misinterpretation of *Citizens United* has prevented a legislative solution to the lack of transparency and accountability; and third, to urge the Court, if it issues an order, to affirm that *Citizens United* leaves room for – and, indeed, expressly contemplates – legislative action to ensure disclosure, transparency, and accountability in corporate independent expenditures. Any lack of clarity from the Court on this point risks accelerating the descent of the electoral process into a world shaped by anonymous donors, while emboldening those who stand to benefit from this new world to claim that neither the Congress nor state legislatures can do anything about it.

ARGUMENT

I. *Citizens United* Has Reduced Disclosure, Transparency and Accountability

The facts relating to the effects of *Citizens United* are stark and inescapable. The 2010 mid-term elections were the first federal elections after the decision, and "[a] substantial portion" of the spending by outside groups in those elections "was shrouded in secrecy . . . [a]ll told, four of the top 10 spending organizations did not disclose who funded their election-related activities." Danielle Kurtzleben, *2010 Set Campaign Spending Records*, U.S. NEWS & WORLD RPT., Jan. 7, 2011, *available at*

http://www.usnews.com/news/articles/2011/01/07/20 1 0-set-campaign-spending-records. *See also* Monica Youn, Testimony on "The Fair Elections Now Act: A Comprehensive Response to Citizens United" before the Subcommittee of the Constitution, Civil Rights & Human Rights of the U.S. Senate Judiciary Committee (Apr. 12, 2011), *available at* http://brennan.3cdn.net/115f40822288b1bbd2_onm6 bn0oy.pdf (noting that disclosure of donors has dropped significantly among outside groups making electioneering communications and independent expenditures). And recent reports show that the same untraceable expenditures are already dominating the 2012 elections. Fredreka Schouten & Christopher Schnaars, *Reports show hard-to-track donors dominate outside giving*, USA TODAY, Apr. 22, 2012 (reporting that newly-filed campaign reports show that "[m]illions of dollars flowing to independent political groups dominating this year's presidential and congressional contests have come from mystery and hard-to-find donors"), *available at* http://www.usatoday.com/news/politics/story/2012-04-22/mystery-donors-dominate-politicalgiving/54474378/1.[1]

Thus, while the Court in *Citizens United* envisioned transparency that would enable the electorate "to make informed decisions and give

[1] *See also* http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals (N.Y. Times table charting 2012 independent expenditures).

proper weight to different speakers and messages," 130 S. Ct. at 916, precisely the opposite has occurred. The electorate often has no idea who the speaker is and therefore cannot determine the weight to give many political messages. As important, with the ability to remain anonymous, speakers have little incentive to exercise any caution in their speech, knowing that they are insulated from accountability.

Petitioner Western Tradition Partnership (WTP) is a ready example of the urgency of these disclosure issues and the risks to transparency by those who would take advantage of the corporate form. No one knows WTP's funding sources or the identity of its contributors and, even if one did, those contributors themselves may only be acting for other undisclosed contributors. Indeed, WTP is designed to be opaque and unaccountable, boasting in its promotional materials that

> [W]e're not required to report the name or the amount of any contribution that we receive. So, if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible.

Pet. App. 15a.

WTP is hardly an outlier. The path too many have taken from *Citizens United* is to use the corporate form to speak anonymously and without accountability. Multiple nonprofit corporations have been formed in the aftermath of *Citizens United* for the exclusive or predominate purpose of operating with minimal or no disclosure. *See* Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 20, 2010 at A1 (reporting that nonprofits which, like WTP, are formed under Section 501(c) of the tax code and are generally not required to report their donors started "popping up like mushrooms after a rain" in connection with the 2010 mid-term elections "and many of them will be out of business by late November"), *available at* http://www.nytimes.com/2010/09/21/us/politics/21money.html?pagewanted=all. And, political spending by these nonprofits has grown exponentially. *See* Center for Responsive Politics Study (showing that independent expenditures and electioneering communications by 501(c)s rose 42% after *Citizens United* from $0 in 2006 to $134,432,526 in 2010), *available at* http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html.

The sponsors of independent expenditures have been able to do what WTP did: organize themselves outside the campaign finance laws; seek funds for

general political activity with the assurance that no one "will ever know you helped make this program possible," Pet. App. 15a; and make independent expenditures without disclosing any donors.[2] Thus, a company can influence elections and avoid public scrutiny by giving to a nonprofit organization like WTP, ostensibly to support its general activities. *See* Luo & Strom, *supra* (reporting that many companies financing political speech through independent expendituеs "are doing so through 501(c) organizations, as opposed to directly sponsoring advertisements themselves"). The nonprofit organization can then use the company's money to make independent expenditures, disclose only its spending, and identify none of its donors, allowing the donor – whether an individual or a major corporation – to remain anonymous. While the identities of donors are unknown to the public, by contrast, the donors can ensure that their identities and spending are known to the candidates they support and often attempt to influence.

[2] Federal Election Commission ("FEC") rules curtailed even further the disclosure made by sponsors of electioneering communications, requiring them to disclose only those donors who gave for the specific purpose of "furthering" a particular expenditure. On March 30, 2012, a D.C. District Court judge found that these regulations impermissibly narrowed the disclosure requirements mandated by Congress in the BCRA. *Van Hollen v. Fed. Election Comm'n*, -- F.Supp.2d --, 2012 WL 1066717, at *1 (D.D.C. Mar. 30, 2012). That decision is on appeal.

The issues of disclosure and accountability raised in the aftermath of *Citizens United* are not limited to corporations like WTP that were established to operate with minimal or no corporate disclosure. Many of the same issues are implicated by the realities of the form of ownership of large, publicly traded corporations. The fundamental objective of a campaign finance disclosure regime is, of course, to assist the public in identifying the authors of the speech distributed in the form of political messages. Yet,

> shareholders in large publicly traded corporations . . . number in the thousands and are not a static set of identifiable human actors. They are often institutional, short-term investors, which change frequently and add layers of distance in terms of decisionmaking and monitoring from the humans who invested their capital.

Elizabeth Pollman, *Reconceiving Corporate Personhood*, at 38 (Dec. 31, 2010), *available at* http://ssrn.com/abstract=1732910.

The Court in *Citizens United* assumed that abuse could be "corrected by shareholders 'through the procedures of corporate democracy.'" 130 S. Ct. at 911 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)). In fact, institutional investors presently own more than two-thirds of the corporate

stock in the top 1,000 United States firms and own it on behalf of plan participants or shareholders. *See* Jennifer S. Taub, *Money Managers In The Middle: Seeing and Sanctioning Political Spending After Citizens United*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 443, 462 (2012). They are legally constrained from advancing the political preferences of their shareholders or beneficiaries, and in any event, have no means of assessing them. Shareholders invest in publicly traded companies primarily to make money—thus, they "do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion." *Bellotti*, 435 U.S. at 805 (White, J., dissenting).

When the managers of a publicly traded company choose to finance, either directly or indirectly, an independent expenditure campaign, it is difficult, if not impossible, to identify whose political interests are being advanced. The managers are ostensibly barred from pursuing their own political interests,[3] but at the same time lack the capacity to pursue the

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[3] Shareholders are largely skeptical that this bar is effective. *See* Jeanne Cummings, *Investors Seek Clarity on Campaign Giving*, WALL ST. J., Apr. 5, 2006 (citing 2006 survey by Mason-Dixon Polling & Research in which "[n]early three-quarters of [shareholder] respondents agreed that corporate giving is often aimed at advancing the private interests of executives rather than the company's interests"), *available at* http://online.wsj.com/article/SB114419178325217080.html.

political interests of all of the shareholders or their beneficiaries. Thus, when choosing to make a political expenditure, a manager of a widely held company must base the decision on his or her business judgment of what is in the financial interest of the company's shareholders generally. The business judgment rule then shields the manager from being held to account for the political consequences of that decision. *See* Taub, *supra* at 468. Identifying actual people on whose behalf the company is politically speaking is impossible. *See* Jessica A. Levinson, *We the Corporations? The Constitutionality of Limitations on Corporate Electoral Speech After Citizens United*, 46 U.S.F.L. REV. 307, 333-34 (2011). The larger political interests of real people gets subsumed into the narrower economic interest of the corporate entity.

Consequently, when a corporation uses treasury funds rather than funds voluntarily contributed by individuals or approved by shareholders to make a political expenditure, it is not the act of an individual or an association of individuals. It is a corporate act motivated exclusively by a corporate purpose for which no individual can be held politically accountable. In this context, it cannot be said that the corporation "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916.

That an association of individuals that chooses to participate in the political process is incorporated does not, by itself, pose a risk to the electoral system. The threat comes when the corporate form enables those individuals to avoid disclosure and accountability and forces others to support political causes to which they object.[4] This is in fact what has occurred in the wake of the Court's decision in *Citizens United*. The federal elections that have followed have been rife with political spending that is difficult if not impossible to trace and does not reflect the individual choices of the shareholders whose association gives rise to the corporation's right to speak. *See id.* at 904, 911 (describing corporations as "associations of citizens" and stating that there was "little evidence of abuse that cannot be corrected by shareholders" through corporate democracy). This increasing lack of accountability and personal responsibility for political spending seriously threatens the integrity of our elections and our democracy.

The loss of disclosure and accountability comes at a great cost. It exposes our elections and democratic institutions to the particularly corruptive influence of secret, unaccountable money. The spenders of these huge sums may avoid being held to account,

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[4] To compare, federal law permits associations of individuals organized as partnerships to make contributions, but the contributions are then attributed to both the partnership and to each partner individually. 11 C.F.R. § 110.1(e).

but nothing prevents them from seeking credit from those officials whose favor they seek.

II. The Court Should Reaffirm That Citizens United Permits Congress And State Legislatures To Establish Disclosure Requirements For Corporate Independent Expenditures

As described, *amici* urge the Court to deny the petition for a *writ of certiorari*. But, if the Court grants the petition, it should ultimately issue an opinion – after full briefing and argument – emphasizing that nothing in *Citizens United* precludes Congress and state legislatures from enacting laws that ensure meaningful disclosure of corporate independent expenditures.

This Court has long recognized the power of the states and Congress to legislate to protect elections against the improper use of money and influence. *See* U.S. CONST., art. I, § 4, cl. 1 (empowering State legislatures to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to alteration by Congress)[5];

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[5] The power conferred by the Election Clause is "comprehensive," authorizing regulations "not only as to times and places," but also the "protection of voters, [and] prevention of fraud and corrupt practices . . . in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the

Burroughs v. United States, 290 U.S. 534, 545 (1934) (holding Congress "undoubtedly" possesses the power "to pass appropriate legislation to safeguard [the election of the President and Vice-President] from the improper use of money to influence the result . . . as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption"). *See also United States v. Harriss*, 347 U.S. 612, 625 (1954) (holding Congress may legislate to obtain "information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose" to determine "who is being hired, who is putting up the money, and how much").

Citizens United did not divest the states or Congress of these powers. To the contrary, the Court strongly reaffirmed them when it rejected 8-1 the petitioner's challenge to the Bipartisan Campaign Reform Act's disclaimer and disclosure requirements. *Citizens United*, 130 S. Ct. at 913-14. And, six months later, in *Doe v. Reed*, the Court again underscored the importance of the government's interest "in preserving the integrity of the electoral process," this time upholding against First Amendment challenge a law that provided for the public release of Washington State referendum petitions, including the names and addresses of all

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fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

who sign them. 130 S. Ct. 2811, 2815, 2819 (2010). *See also id.* at 2837 (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."); *Randall v. Sorrell*, 548 U.S. 230, 265 (2006) (Kennedy, J., concurring) (recognizing the rise of entities created for political influence "which are as much the creatures of law as of traditional forces of speech and association" and "can manipulate the system and attract their own elite power brokers, who operate in ways obscure to the ordinary citizen").[6]

Although this body of case law should leave no question about the ability of Congress and the states to enact legislation ensuring the disclosure of independent corporate contributions, some Members of Congress have opposed such legislation on the ground that disclosure requirements would conflict

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[6] Central to the Montana Supreme Court's decision below was its finding that "[o]rganizations like WTP that act as conduits for anonymous spending by others represent a threat to the 'political marketplace.'" Pet. App. 16a (quoting *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986)). WTP refused to disclose information about its operation, so it was "difficult" for the Montana Supreme Court to determine how it was impacted by the Montana law. *Id.* Based on the record before it, the Court found that none of the corporate plaintiffs were actually burdened by the law, which promotes accountability and transparency and ensures that the political speech in Montana's political marketplace can be traced back to identifiable sources.

with *Citizens United*. In 2010, majorities of Members of Congress in each chamber correctly saw that, without legislation, there would be no real way for the public "to hold corporations and elected officials accountable for their positions and supporters," or for shareholders to "determine whether their corporation's political speech advances the corporation's interest in making profits." *Citizens United*, 130 S. Ct. at 916. The DISCLOSE Act was introduced to restore this transparency to the system. *See* H.R. 5175, 111th Cong. (2010). Its central provision would have required corporations, unions, and other nonprofit organizations to disclose donors above fixed thresholds when making independent expenditures or electioneering communications, or when transferring funds to others who make them. *See id.* The bill passed the House on a vote of 219-206. 156 Cong. Rec. H4828 (daily ed. June 24, 2010). However, it failed to reach a vote in the Senate on a party-line filibuster, with 59 Democratic and Independent votes to proceed, and 39 Republican votes against cloture. *See* 156 Cong. Rec. S7388 (daily ed. Sep. 23, 2010).

The opposition to enhanced disclosure – and specifically, the opponents' citation of *Citizens United* as a basis for rejection – demonstrates the serious challenges Congress faces in fashioning and implementing the type of disclosure regime for corporate independent spending that the Court, in *Citizens United*, assumed would exist. For example,

in speaking against the DISCLOSE Act, Representative Pence (Indiana) asserted that requiring "identifying disclaimers" by corporations engaging in independent expenditures would "suppress speech by those who choose to speak out through associations" and "set[] back the freedoms affirmed . . . by the Supreme Court [in *Citizens United*]." 156 Cong. Rec. H4806 (daily ed. June 24, 2010). Representative Smith (Texas) similarly objected that the Act's disclosure requirements "would unconstitutionally limit the amount of information that organizations can include in ads stating their political opinions" and "unconstitutionally require the disclosure of an organization's donors, in violation of their right to free association." 156 Cong. Rec. H4799-4800 (daily ed. June 24, 2010). These statements sharply demonstrate the depth of the problem: legislators, misunderstanding the Court's position, are using *Citizens United* as a cudgel to beat back any effort to ensure the very transparency and accountability that was vital to the Court's determination to allow corporate independent expenditures.

Unless the Court speaks clearly, those who seek a regime characterized by anonymous donors and a lack of accountability will continue to use *Citizens United* to oppose any legislation aimed at establishing disclosure obligations. The Court can use the opportunity of this case to affirm that those who seek to deny the voting public and concerned

shareholders of knowledge that enables them to exercise their rights and responsibilities respectively as citizens and stewards of their own property will find no support in the decisions of this Court. *Amici* believe that transparency and accountability are fully compatible with our democratic values; in fact, they are the foundation on which our democracy rests. *Amici,* as does the respondent, seek to assure that foundation is not eroded and transparency and accountability remain essential features of campaign financing in this country.

Accordingly, *amici* requests that the Court deny the petition for a *writ of certiorari*. But, if the Court grants the petition, *amici* urge the Court to affirm – after full briefing and argument – that *Citizens United* does not prevent Congress and the states from passing legislation to fill this void in disclosure laws. Such a message can only help ensure, as the Court put it, that the electorate may "make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916.

CONCLUSION

The Court's decision in *Citizens United* to permit corporate independent expenditures reaffirms the long-standing, compelling interests in ensuring disclosure, transparency, and accountability in the electoral process. But instead of reinforcing and promoting these interests, *Citizens United* is being

misapplied and misused as an obstacle to them. Because the decision below is consistent with these interests, the Court should deny the petition for a *writ of certiorari*. But, if the Court grants the petition, it should, after full briefing and argument, affirm that *Citizens United* permits legislation requiring disclosure and accountability for corporate independent expenditures. That result will achieve the Court's own clearly stated objective of ensuring "disclosure [that] permits citizens and shareholders to react to the speech of corporate entities in a proper way," and "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916.

Respectfully submitted,

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