No. 11-1179

In The
Supreme Court of the United States

AMERICAN TRADITION PARTNERSHIP, INC., fka 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 The State Of Montana

AMICUS CURIAE BRIEF OF RETIRED JUSTICES OF THE MONTANA SUPREME COURT AND JUSTICE AT STAKE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are eight of the eleven living[2] retired Justices of the Montana Supreme Court – Diane Barz, William E. Hunt, Sr., W. William Leaphart, R.C. McDonough, James M. Regnier, Terry N. Trieweler, Jean Turnage, and John Warner – and Justice at Stake.

These retired Justices filed a brief as *amici curiae* before the Montana Supreme Court asking that court to uphold the law challenged in this case. They have all run nonpartisan statewide campaigns for election to the Montana Supreme Court, or have been appointed to the Montana Supreme Court and, with one exception, faced subsequent re-election. These *amici* are interested in the issue before the Court because the *Citizens United* paradigm authorizing corporate political speech implicates the fundamental due process rights of litigants, as well as the

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties' letters of consent to the filing of this brief have been filed with the Clerk. *Amici* state that no counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. Matthew Lee Wiener, while affiliated with the firm of Cuneo Gilbert & LaDuca, LLP, assisted in the preparation of this brief.

[2] The three other retired Justices are: Judge Charles E. Erdmann, who is currently sitting on the Military Court of Appeals; Justice John C. Sheehy, who is 93 years old; and former Chief Justice Karla M. Gray, who has not participated in any *amicus curiae* efforts since her retirement in 2008.

compelling state interest in preserving a fair and independent judiciary.

Justice at Stake is a nonpartisan campaign of more than fifty organizations working to keep the courts fair and impartial. Justice at Stake and its partner organizations educate the public and work for reforms to ensure special interests do not affect judicial proceedings.[3]

Amici are united in their concern that skyrocketing spending in state judicial elections – especially expenditures from corporate and union treasuries – impermissibly impacts litigants' constitutional due process rights, and erodes the public's confidence that the judiciary is fair and impartial. Invalidating laws like Montana's leaves states powerless to protect these important interests.

SUMMARY OF ARGUMENT

Amici join Respondents in asking the Court to deny the petition for a writ of certiorari because the decision of the Montana Supreme Court does not conflict with *Citizens United v. Federal Election Commission*.[4]

[3] The arguments expressed in this brief do not necessarily reflect the opinions of every Justice at Stake partner organization or board member. Members of Justice at Stake's board of directors who are judges did not participate in the formulation or approval of this brief.

[4] 130 S. Ct. 876 (2010).

Instead, the Montana Supreme Court's decision below directly addressed the constitutional tension between *Citizens United* and *Caperton v. A.T. Massey Coal Co., Inc.*,[5] and held that, within the context of Montana's compelling state interest in protecting the integrity of its courts, the Corrupt Practices Act struck a proper balance between the competing constitutional rights of due process and free speech.

If this Court concludes otherwise and grants the petition, it should docket the case for full briefing and argument. As two Justices of this Court put in their statement respecting the stay, it may be time to consider "whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway."[6] As it relates to judicial elections, this question cannot be answered without carefully considering the competing constitutional rights at issue. The proper balance is essential to the integrity of independent judiciaries, which are fundamental to the fabric of our system of government.

Enormous special interest expenditures in state judicial elections are threatening one of the Constitution's most central guarantees – the right to due process and a fair trial. The compelling state interest in maintaining fair, impartial courts has been

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[5] 129 S. Ct. 2252 (2009).

[6] *American Tradition Partnership v. Bullock*, 132 S. Ct. 1307 (2012) (statement Ginsburg, J., joined by Breyer, J., respecting grant of application for stay).

endangered by the surge in judicial campaign spending, creating the appearance and expectation that judges are beholden to special interests. These interests were not addressed in *Citizens United*, and are ripe for substantive consideration by this Court.

Invalidating state laws on the authority of *Citizens United* cripples the ability of the 39 states whose judges are elected to maintain the integrity of their judiciaries.[7] Contrary to the suggestion of Petitioners' *amicus*, Citizens United, case-by-case recusal by judges simply cannot vindicate this compelling state interest. The Petitioners' parallel challenges to Montana's disclosure requirements[8] demonstrate the practical impossibility of bringing these types of motions.

These important considerations are unique to the constitutional status of state laws regulating independent expenditures by corporations in judicial

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[7] *See generally* American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts: Initial Selection, Retention, and Term Length*, *available at* http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_1196092850316.pdf.

[8] *Western Tradition Partnership, Inc. v. Bullock*, 2011 MT 328, ¶9, 363 Mont. 220, 271 P.3d 1 (noting that in Montana state and federal courts "Western Tradition appears to be engaged in a multi-front attack on both contribution restrictions and the transparency that accompanies campaign disclosure requirements . . . challeng[ing] the constitutionality of most of the limits and disclosure requirements contained in §13-37-216, MCA.").

elections, and they counsel strongly against a summary disposition of this case.[9]

ARGUMENT

Erosion of public trust in the judiciary was the exact concern that led Montana citizens to enact the Corrupt Practices Act in 1912 through a citizens' initiative. At that time, state trial judges had literally been bought by the Copper Kings to do their bidding – resulting in corruption of the highest order – even though *quid pro quo* bribery was never proven.[10]

For example, in 1903, following an adverse district court decision in favor of a competitor, Amalgamated Copper shut down its mines in protest and laid off 15,000 workers – the majority of wage earners in Montana at the time. The corporation blackmailed Governor Toole into calling a special session of the Legislature to adopt a bill allowing a judge to be removed on a simple charge of bias – thereby allowing the corporation to have its cases heard only by judges

[9] *Citizens United*, 130 S. Ct. at 968 (Stevens, J., joined by Ginsburg, Breyer, & Sotomayor, JJ.) (dissenting) (noting the unaddressed "consequences" of the Court's holding on state judicial elections).

[10] *See* Howell, Larry, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 Mont. L. Rev. 25 (2012) (describing the bribery, corruption and favors that characterized this "colorful" period of history for the Montana judiciary).

it approved of or literally "owned."[11] In the face of certain economic ruin, the Legislature passed the "Fair Trials Bill." Amalgamated Copper promptly sent the miners back to work, assured the judiciary would protect its economic interests.

The public's right to due process and confidence in the integrity and independence of state judicial systems is now being undermined again by the dramatic increase in independent expenditures by special interest groups. Only through narrowly tailored state campaign finance regulations can these interests be protected, especially in sovereign states like Montana whose citizens have adopted constitutional provisions for the nonpartisan popular election of judges. As demonstrated below, while the "Copper Kings are a long time gone to their tombs,"[12] their specter hangs over Montana. The Corrupt Practices Act has insulated Montana's courts from the factors that have diminished public confidence in courts across the country; without it, Montana may find its courts once again bought by corporate special interests.

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[11] Howell, *supra* note 10, at 39-41.

[12] *Id*. at 25.

I. The dramatic increase in independent expenditures in judicial elections has adversely impacted the judiciary's effective functioning.

The surge in spending in judicial elections has already had a profound and detrimental impact on the public's confidence in the integrity and independence of state judicial systems.

A. Judicial election spending by outside interest groups has been skyrocketing.

Between 2000 and 2009, state high court candidates raised and spent over $206.9 million nationally in their judicial elections.[13] That is more than double the $83.3 million raised for the same purpose from 1990 to 1999.[14] All but two of the 22 states with contestable high court elections had their costliest-ever contests between 2000 and 2009.[15]

Despite this surge in candidate fundraising, independent spending by special interest groups frequently has dwarfed spending by the candidates themselves. These special interest "super-spenders," which are strikingly similar to the super PACs now fueling national campaigns, have added to the spending records

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[13] James Sample, et al., Justice at Stake, *The New Politics of Judicial Elections 2000-2009* 1 (2010), *available at* http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf.

[14] *Id.* at 8.

[15] *Id.* at 1.

being set in judicial races around the country. In 29 of the most expensive judicial elections between 2000 and 2009, the average non-super-spender donated $850, while the top five super-spender in each election spent an average of nearly $500,000.[16]

In the 2010 Michigan Supreme Court race, for instance, candidates raised and spent just over $2.3 million, while special interest groups spent nearly $6.8 million, mostly on television advertisements.[17] In fact, four of the top five spenders on television advertisements in 2010 were independent special interest groups.[18] The one candidate on that list, Illinois Justice Thomas Kilbride, spent heavily to defend his seat on the bench against an attack by independent groups.[19] By paving the way for unlimited corporate and union independent expenditures on these elections, *Citizens United* will only exacerbate the problem.

The 2011 Wisconsin Supreme Court race highlights the immense impact of this super-spending.

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[16] Sample, *supra* note 13, at 10.

[17] Charles Hall, ed., Justice at Stake, *The New Politics of Judicial Elections 2009-2010*, 5 (2011), *available at* http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf. *See also id.* at 4 n.2, 12 (noting that limitations on disclosure in Michigan hides many independent expenditures, and that some estimates indicate that spending may be higher).

[18] *Id.* at 16.

[19] *Id.* at 20.

Both candidates for the seat agreed to take public financing, limiting the amount they could spend on their respective campaigns to approximately $400,000.[20] But various special interest groups spent $3.5 million on independent expenditures and issue advertisements.[21] The result was one of the most partisan "nonpartisan" judicial races in recent history. The independent spending was all clearly directed at, and perceived by the public as, buying a vote in a very specific and politicized case.[22] The incumbent and eventual victor, Justice David Prosser, cast the tie-breaking vote in that case, consistent with the interests of the outside groups who paid for his re-election.[23]

Recently, the surge in independent judicial election spending moved squarely into retention elections, with special interest groups seeking to unseat judges that do not share their views.[24] The 2010 retention election in Iowa was particularly alarming. There, in an unprecedented move, out-of-state special interest groups purposefully poured money into a successful campaign to remove three justices who had

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[20] Press Release, Justice at Stake, *Nasty Campaign Deepens 'Crisis' for Wisconsin High Court* (Apr. 6, 2011), *available at* http://www.justiceatstake.org/newsroom/press-releases-16824/?nasty_campaign_deepens_crisis_for_wisconsin_high_court&show=news&newsID=10401.

[21] *Id.*

[22] *Id.*

[23] Patrick Marley and Don Walker, *Court Allows Union Limits*, Milwaukee Journal Sentinel (June 15, 2011, at A1).

[24] Hall, *supra* note 17, at 5.

joined a unanimous decision under the Iowa Constitution.[25] Groups involved in funding the campaign included the National Organization for Marriage, the American Family Association, the Family Research Council, the Campaign for Working Families, and petitioners' amicus in this case, Citizens United.[26] Fueled by almost $1 million from these groups, television ads labeled the judges "activist" and accused them of "usurp[ing] the will of the voters."[27]

The justices, not wanting to politicize the courts or their decisions, did not campaign or raise money. At a forum, Chief Justice Marsha Ternus explained: "We [do] not want to contribute to the politicization of the judiciary here in Iowa and so we have not formed campaign committees and we have not engaged in fundraising."[28] In the end, the justices were each defeated by margins of roughly 55 percent to 45

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[25] The court ruled under the Equal Protection Clause of the Iowa Constitution that a class of Iowa families could not be denied equal rights. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) ("We have a constitutional duty to ensure equal protection of the law. Faithfulness to that duty requires us to hold Iowa's [Defense of Marriage Act] violates the Iowa Constitution. To decide otherwise would be an abdication of our constitutional duty.").

[26] Hall, *supra* note 17, at 8.

[27] *Id.* at 8-9.

[28] Josh Nelson, *Chief Justice: Don't Politicize Judicial System*, Waterloo-Cedar Falls Courier (Oct. 21, 2010), *available at* http://wcfcourier.com/news/local/article_722dbfe9-90d1-5ab3-b37f-a5a7f988e9ee.html.

percent.[29] Bob Vander Plaats, spokesperson for the campaign against the judges, indicated that their goal was to send a message not just to Iowa's courts, but to courts across the country: "We have ended 2010 by sending a strong message for freedom to the Iowa Supreme Court and to the entire nation – that activist judges who seek to write their own law won't be tolerated any longer."[30]

After the campaign, current Chief Justice Mark Cady warned that it threatened to undermine Iowa's courts: "The fear I have, and that is growing in this state, is if we have another election where judges are removed because a decision is unpopular at the time it was made, then we'll have a politicized court system."[31] It goes without saying that these groups intend to sway judicial decision-making in a way that threatens the independence of our courts.

A dramatic increase in the proportion of television ads run by independent special interest groups has followed *Citizens United*. Independent groups sponsored just over 40 percent of the total television ads in 2010.[32] That is double the 20 percent sponsored by independent groups in 2006, before *Citizens United*

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[29] Hall, *supra* note 17, at 8.

[30] *Id.*

[31] Emily Schettler, *Iowa Chief Justice Visits Area*, Iowa City Press-Citizen (May 21, 2011, at A3).

[32] Sample, *supra* note 13, at 16.

was decided.[33] Overall, independent expenditures increased from 18 percent of total judicial campaign expenditures in 2005-06 to 30 percent in 2009-10.[34]

Along with this increase in independent spending has come a rapid deterioration of the tenor and tone of judicial races. Nearly 73 percent of the total ads run that attacked candidates in 2010 came from outside independent groups.[35] Candidates, while accounting for almost 60 percent of the total ads run, only accounted for 27 percent of the attack ads.[36]

In one example, the innocuous-sounding Illinois Civil Justice League spent $688,000 on a campaign that included an advertisement against Justice Thomas Kilbride.[37] The ad featured actors, dressed in orange jumpsuits, posing as convicted criminals recounting the grisly details of their crimes.[38] It said Justice Kilbride had sided with them on appeal, voting against victims and law enforcement.[39] After *Citizens United*, independent ads like these, which are not

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[33] Jesse Rutledge, ed., Justice at Stake, *The New Politics of Judicial Elections 2006* 3 (2007), *available at* http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf.

[34] Hall, *supra* note 17, at 3.

[35] *Id.* at 16.

[36] *Id.*

[37] *Id*. at 20.

[38] *Id*.

[39] *Id*. at 16.

unusual, will only play a larger role in judicial elections across the country.

B. The dramatic increase in judicial election spending has created the widespread appearance that justice is for sale.

As the tide of money has risen in judicial elections, so, too, have public perceptions that outsized spending affects judicial decision-making. Recent data repeatedly show that the public has deep concerns that judicial outcomes are, in fact, influenced by campaign contributions:[40]

- A 2011 national survey found that 83% worry campaign contributions influenced judges' decisions. A mere 3% believe they had no influence.[41]
- A 2010 national survey found that 71% worry campaign contributions influenced judges'

[40] Members of the public generally do not distinguish between direct contributions and independent expenditures in favor of a judge or against the judge's opponent. *Cf. Caperton*, 129 S. Ct. at 2256-57.

[41] 20/20 Insight LLC, *National Registered Voter Survey*, Oct. 10-11, 2011, at 2, *available at* http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf.

decisions. Only 9% believe they had no influence.[42]

Data from several recent surveys in states that hold judicial elections confirm these concerns:

- A 2012 poll in Minnesota showed that only 9% believe campaign contributions do not influence judges' decisions. Meanwhile, 65%, up from 59% in 2008, worried that they have some influence.[43]
- A 2010 poll in West Virginia showed that only 5% believe campaign contributions do not influence judges' decisions. Meanwhile, 78% worried that they have some influence.[44]

In addition to these polls, in Wisconsin, in the wake of the 2011 supreme court race dominated by special interests, a poll showed that 88% are concerned that rising judicial election spending and

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[42] *The Harris Poll National Quorum Justice at Stake Campaign,* June 9-13, 2010, at 1, *available at* http://www.justiceatstake.org/media/cms/The_Harris_Poll_National_Quorum_Jus_F847FF6BF6CD0.pdf.

[43] The Tarrance Group, Inc., *Minnesota Statewide Registered Voter Survey*, May 1-2, 2012, at 5, *available at* http://www.justiceatstake.org/media/cms/MN_Statewide_Justice_Survey_170811AFB695E.pdf; Decision Resources, Ltd., *Justice at Stake Study Minnesota Statewide*, Jan. 2008, at 5, *available at* http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey_717C253F67D9B.pdf.

[44] Anzalone Liszt Research, Inc., *Justice at Stake West Virginia 2010 Poll*, Feb. 21-24, 2010, at 2, *available at* http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf.

nasty campaign tactics are compromising the fairness of Wisconsin's courts.[45]

Taken together, these results demonstrate that the public *perceives* campaign cash to affect judicial decisions. This growing belief that justice is for sale undermines public confidence in the courts and diminishes the integrity of all judicial decisions.[46] The erosion of public confidence in the judiciary is more than an academic issue; it reflects a fundamental concern with the ongoing viability of the judicial system as we know it.

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[45] 20/20 Insight LLC, *Wisconsin Registered Voter Survey*, July 18-20, 2011, at 3, *available at* http://www.justiceatstake.org/media/cms/WI_Merit_Poll_Results_734DCFE0AA5C8.pdf.

[46] Even James Bopp, Jr., counsel for the Petitioners in this case and a frequent critic of campaign finance reform, has noted that "[b]ecause courts have neither the power to levy taxes nor to command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice, rather than mere political actors." James Bopp, Jr. and Josiah Neeley*, How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 Den. U.L. Rev. 195, 198 (2008); *see also* Paul J. Nyden, *Mining Appeal Moving Along: Olson to Argue Harman Case Against Massey Before Supreme Court*, Charleston Gazette, May 16, 2008 (quoting Citizens United's counsel, Theodore Olson, as saying that the "improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today").

II. The States' ability to regulate judicial election spending must be decided within the balance of competing constitutional rights of free speech and due process.

The free speech rights of the Petitioners must be balanced against the due process rights of litigants before the courts, both of which are constitutionally protected. "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[47] "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."[48] Accordingly, the due process rights of litigants should be given at least equal weight when balancing these competing rights.[49] Without a fair trial before an independent tribunal, no other constitutional right can be vindicated.

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"[50] "Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances would offer a possible temptation to the average . . . judge to . . . lead him not to hold the

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[47] *Bridges v. California*, 314 U.S. 252, 260 (1941).

[48] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

[49] *See In re Independent Pub. Co.*, 240 F. 849, 862 (9th Cir. 1917).

[50] *Caperton*, 129 S. Ct. at 2259 (internal citations omitted).

balance nice, clear and true."[51] In determining whether due process concerns have been met, the Court must ask whether, "under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[52]

The scope of the free speech right possessed by the Petitioners is addressed by the parties and will not be reiterated here. Suffice to say, the competing interests cannot be ignored, and must be balanced within the context of a compelling state interest in maintaining judicial integrity.

III. The States have a compelling state interest in maintaining the integrity and independence of their judiciaries.

Maintaining judicial integrity is a state interest of the "highest order":

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity.

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[51] *Caperton*, 129 S. Ct. at 2264.

[52] *Id*. at 2263.

> Judicial integrity is, in consequence, a state interest of the highest order.[53]

Preserving that integrity requires not only that litigants receive their constitutional due process before a neutral decision-maker,[54] but also, as the Montana Supreme Court emphasized in the decision under review, that the public continues to place its confidence in state judiciaries.[55]

> The people of the State of Montana have a continuing and compelling interest in, and a constitutional right to, an independent, fair and impartial judiciary. The State has a concomitant interest in preserving the appearance of judicial propriety and independence so as to maintain the public's trust and confidence. In the present case, the free speech rights of the corporations are no more important than the due process rights of litigants in Montana courts to a fair and independent judiciary, and both are constitutionally protected. The Bill of Rights does not assign priorities as among the rights it guarantees.[56]

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[53] *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring); *Caperton*, 129 S. Ct. at 2266-67.

[54] *See Caperton,* 129 S. Ct. at 2259.

[55] *Western Tradition Partnership*, ¶40 (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. at 561).

[56] *Id.*

This Court has recognized "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."[57] That reputation depends upon the absence of not only actual bias, but, also, *perceived* bias. "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."[58] No such obligation is, of course, placed on the executive or legislative branches of government, which are expected to be representative of their individual constituents.

Historically, bias or "favoritism" has been perfectly acceptable in – if not a defining feature of – the "representative politics" of the other branches of government.[59] This Court explained in *Citizens United* that the "appearance of influence or access" occasioned by independent (corporate) expenditures "will not cause the electorate to lose faith in our democracy."[60] This Court's findings in *Caperton* raise serious questions about this assertion from *Citizens United*

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[57] *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

[58] *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968); *see White*, 536 U.S. at 789 (O'Connor, J., concurring) (emphasizing the importance of the state interest in maintaining "the public's confidence in the judiciary").

[59] *Citizens United*, 130 S. Ct. at 910 (citing *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (Kennedy, J., concurring)); *see also Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2349 (2011) (noting the differences between a legislator's vote and a judge's decision).

[60] *Citizens United*, 130 S. Ct. at 910.

as it relates to the judiciary. However, even assuming this to be true, the same cannot be said with respect to such expenditures in state judicial elections. In states where spending has soared, the appearance of influence and access has caused the electorate to lose faith in our judiciary, thereby impacting its effective functioning.

Citizens United specifically recognized that a narrow ban on political speech is appropriate when a particular governmental function cannot operate effectively absent the ban:

> The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.[61]

These *Amici* respectfully submit the effective functioning of the judiciary is adversely impacted by unlimited corporate independent expenditures in judicial elections. Judicial elections properly fall within this narrow category wherein the political speech of corporations may be narrowly restricted to allow the judiciary to perform properly. Judicial independence is certainly as important a governmental function as public education, the corrections system, and the military.[62]

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[61] *Citizens United*, 130 S. Ct. at 899.

[62] *Id*.

IV. Individual "*Caperton*" motions will not vindicate the States' compelling state interest in maintaining the integrity of the judiciaries, nor protect litigants' due process rights.

The Petitioner in *Citizens United* has filed an *amicus curiae* brief arguing against the Montana Supreme Court's position that the regulation of corporate campaign expenditures "is necessary to ensure that elected judges are not biased in favor of campaign supporters."[63] Judicial bias is appropriately addressed, according to Citizens United, through "*Caperton*" recusal motions in individual cases.

That is neither true nor does it address the argument made in this brief. It is not true because, as four Justices of this Court have noted, so-called *Caperton* motions will "catch" only the "worst abuses."[64] Many instances of bias resulting from campaign support will go undetected because, as persuasively argued by the *amicus* brief filed in *Caperton* by 27 retired state supreme court justices, it is often difficult for judges to identify – let alone admit to – bias in their own decisions.[65] Researchers have noted even judges who believe themselves to be fair and unbiased may, in

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[63] Brief of Citizens United as *Amicus Curiae* in Support of Petitioners 9 (citing App. 30a ¶44).

[64] *Citizens United*, 130 S. Ct. at 968 (Stevens, J., joined by Ginsburg, Breyer, & Sotomayor, JJ., dissenting).

[65] *Caperton*, Brief *Amicus Curiae* of 27 Former Chief Justices and Justices in Support of Petitioner, p. 7 (citing Lord MacMillan, *Law and Other Things* 217-18 (1937)).

fact, harbor unrecognized prejudices that manifest themselves in their judicial decisions.[66]

But whether or not *Caperton* motions are adequate to eliminate actual bias in decision-making is ultimately beside the point. The fact remains they will almost certainly do nothing to address the public perception that spending in judicial campaigns has resulted in systemic bias in state courts. Only through narrowly tailored regulations like Montana's can states address the public's perception of the integrity of their courts.

Finally, as a practical matter it is currently all but impossible for judges to determine whether individual litigants have contributed to independent expenditure campaigns due to the ability of special interests to use several layers of shell corporations to launder money and hide their election spending. Even in this case, Western Tradition Partnership bragged to its potential donors their identity would not be disclosed.[67]

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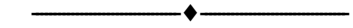
[66] *See, e.g.,* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1248-50, n.176-84 (2002).

[67] *Western Tradition Partnership*, ¶7 (Western Tradition Partnership does not dispute "that its purpose is to act as a conduit of funds for persons and entities including corporations who want to spend money *anonymously* to influence Montana elections. WTP seeks to make unlimited expenditures in Montana elections from these *anonymous* funding sources.") (emphasis added).

The behavior of the Michigan Chamber of Commerce in 2010 helps illustrate what Western Tradition Partnership likely intended to do. The Michigan Chamber gave $5.4 million to a national PAC operated by the Republican Governors Association, which then sent $8.4 million to its state affiliate in Michigan.[68] The state affiliate sent $3 million to Texas for Governor Rick Perry's re-election campaign, and $5.2 million to the Michigan Republican Party, closely approximating the original $5.4 million donated by the Michigan Chamber.[69] The Michigan Republican Party then made $4.8 million in independent expenditures on the 2010 Michigan Supreme Court race.[70] These labyrinthine transactions are not catalogued on a single disclosure form or website, but were put together through the heroic work of the Michigan Campaign Finance Network.[71]

In the wake of *Citizens United*, stories like these will only become more common. Following the money is no task easily and timely achievable by litigants, thereby defeating the ability to even bring a *Caperton* motion.



[68] Hall, *supra* note 17, at 12.

[69] *Id.*

[70] *Id.*

[71] *See generally* Rich Robinson, *$70 Million Hidden in Plain View: Michigan's Spectacular Failure of Campaign Finance Disclosure, 2000-2010* (June 2011), *available at* http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf.

CONCLUSION

Preserving an independent, fair and impartial judiciary, as well as avoiding the appearance of impropriety, is a compelling state interest of the "highest order." The constitutional right to due process is fundamental, and in the context of campaign finance laws, must be balanced against free speech. The constitutional tension between these countervailing rights cannot be denied, and cannot be ignored.

For the foregoing reasons, the petition for a writ of certiorari should be denied. If the Court grants the petition, it should set the case down for oral argument rather than summarily reverse the decision of the Montana Supreme Court.

Respectfully submitted,

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