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 WALTER DELLINGER AND JAMES SAMPLE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' OPPOSITION TO SUMMARY REVERSAL

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QUESTION PRESENTED

Whether summary reversal is appropriate in a case where the Supreme Court of a State sought to apply the new constitutional holding in *Citizens United* to a detailed factual record, grappling with significant open questions that were not directly resolved in that decision and which would benefit not only from further consideration by this Court but also from further percolation in the lower courts.

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INTEREST OF *AMICI CURIAE*

Amici are professors and practitioners of law. Their interest in the Petition arises from a desire to promote fair procedures for practice before this Court and to encourage the sound development of constitutional law.*

Walter Dellinger is a member of the faculty of the Duke University School of Law, leads the Harvard Law School Supreme Court and Appellate Practice Clinic, and is a partner in the appellate practice group at the law firm of O'Melveny & Myers LLP. He served as acting Solicitor General for the 1996-97 Term of this Court, and as a law clerk to Justice Hugo L. Black for the 1968-69 Term of this Court.

James Sample is a member of the faculty of the Hofstra Law School. His teaching and scholarship concern issues related to democracy, with a focus on judicial elections. He recently authored *Lawyer, Candidate, Beneficiary, and Judge? Role Differentiation in Elected Judiciaries*, U. CHI. LEGAL F. (2011), and coauthored THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE (2010).

SUMMARY OF ARGUMENT

This case is not an appropriate candidate for summary reversal. The case drew two dozen *amici* to the Supreme Court of the State of Montana and resulted

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*The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae*'s intention to file this brief. Letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund preparation of this brief.

in three opinions—totaling eighty pages—that disagreed sharply over the inferences to be drawn from the record and the proper application of the rule for evaluation of independent expenditures in elections for political office, as announced in this Court's *Citizens United* decision.

To be sure, summary reversal may be useful when a lower court overtly disregards this Court's definitively settled precedent. In such cases, summary reversal can help ensure consistency in the law and respect for this Court's precedents. But this is not such a case.

1. The Petition and *amicus* briefs by Citizens United (the entity) and the U.S. Chamber of Commerce urge summary reversal based on a caricature of the Montana Supreme Court's Opinion, suggesting that the majority of that court overtly disregarded the rule of law set forth in this Court's decision in *Citizens United v. FEC*, —U.S.—, 130 S. Ct. 876 (2010). Reading those documents leaves the incorrect impression that the Montana Supreme Court was attempting to apply an irrational form of geographic exceptionalism. In reality, both the majority and the dissenters in the Montana Supreme Court applied the holding announced in *Citizens United* to the record before them to evaluate whether the state law restriction at issue was narrowly tailored to serve a compelling state interest. To be sure, the majority and the dissent clashed sharply over the application of that rule to the record in the case. But it is neither correct nor reasonable to say that the Montana Supreme Court was thumbing its nose at this Court rather than conducting a good faith application of the governing precedent in light of the particular interests advanced by the State, the record evidence and the

contours of the statutory provision at issue. *See* Part I, *infra*.

2. In *Citizens United* this Court left significant questions unanswered, as is evident from the divergent analysis of the Montana Supreme Court's majority and dissent. Debate and discussion among the lower courts will help identify and inform these open questions. Stopping that process in its tracks by summarily reversing a decision of a State Supreme Court just two years after deciding *Citizens United* will impede thoughtful development of the law by the lower courts. *See* Part II, *infra*.

3. The "bitter medicine of summary reversal" (*Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal)) should be reserved for decisions so clearly contrary to well-settled precedent of this Court as to constitute a manifest and grievous error plainly not worth the time required for briefing and argument on the merits. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1480 (6th ed. 2009). The cases listed in Citizens United's *amicus* briefs fit that description. For example, in *Marmet Health Care Center, Inc. v. Brown*, —U.S.—, 132 S. Ct. 1201 (2012), the West Virginia Supreme Court expressly refused to apply this Court's construction of the Federal Arbitration Act, describing this Court's decision as "'tendentious,' and 'created from whole cloth.'" *Id.* at 1203 (citation omitted) (quoting *Brown ex rel. Brown v. Genesis Healthcare Corp.*, —S.E.2d—, No. 35494, 2011 WL 2611327, at *18 (W. Va. June 29, 2011)). This Court summarily and unanimously reversed. *Id.* at 1204. The Montana Supreme Court decision at issue here is starkly different from such cases. *See* Part III, *infra*.

In sum, in the circumstances presented here, summary reversal of the Montana Supreme Court would represent a sharp departure from this Court's traditional practices, cut off development of the law and stand as an unwarranted rebuke to the high court of a coordinate sovereign.

ARGUMENT

I.

THE MONTANA SUPREME COURT MAJORITY AND DISSENT EACH TRIED FAITHFULLY TO APPLY THIS COURT'S PRECEDENT TO THE RECORD.

The Petition for Certiorari does not fairly characterize the decision of the Montana Supreme Court, ten times claiming that the majority simply "refused" to be bound by this Court's decision in *Citizens United*.[1] Two *amicus* briefs follow Petitioners' lead, claiming that summary reversal is needed to "disapprove the Montana Supreme Court's transparent attempt to evade this Court's clear mandate" (Citizens United *Amicus* Br. 3), and to "remind Montana of the binding effect of this Court's decisions" (U.S. Chamber *Amicus* Br. 5).

Repetition is not a substitute for accuracy. No fair reading of the Montana Supreme Court's majority and dissenting opinions supports Petitioners' caricature of a renegade court stubbornly refusing to apply the First Amendment. Contrary to the Petitioners' assertion that the Montana Supreme Court "refused

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[1]Petn. 8 ("unjustified refusal of the court below to follow" *Citizens United*), 10 ("refusal to adhere"), 10 ("refused to follow"), 11 ("refused to apply"), 12 ("refused to apply"), 13 ("refused to abide"), 19 ("refusal to comply"), 21 ("refusing to follow"), 23 ("refusing to follow"), 26 ("refusal to be bound").

to apply this Court's First Amendment strict-scrutiny analysis" (Petn. 12), the Montana Supreme Court majority and dissent both began from the same premise—that a restriction that burdens political speech may be upheld only if the record demonstrates that the restriction "furthers a compelling state interest and is narrowly tailored to that interest." App. 13a. The Montana Supreme Court majority and dissent then assessed whether the State had met that high burden on the specific facts presented. The majority and the dissenting opinions each strove to apply with fidelity the rule announced in *Citizens United* to the record as they saw it. Both the majority and dissenting opinions reflect significant analysis of the meaning and scope of *Citizens United*. App. 10a-13a; App. 33a-35a (Baker, J., dissenting); App. 49a-62a (Nelson, J., dissenting). These reasoned opinions reach different conclusions on such critical questions as:

- Whether the burden of establishing a compelling state interest was met where the record demonstrated a particularized need to combat corruption or encourage the full participation of the electorate—as found by the Montana Supreme Court majority (*see* App. 12a-13a)—or whether *Citizens United* means that no government interest can ever justify restrictions on corporate political expenditures, as urged by the Montana Supreme Court dissenters (*see, e.g.*, App. 40a-41a (Nelson, J., dissenting));
- Whether spending through a segregated fund can ever be a sufficient alternative to direct corporate spending if the state's procedures for formation of the fund are not burdensome to the corporation (*see* App. 10a-11a); and

- Whether the state's interest in the integrity of the judicial process implicates special concerns that arise in the context of judicial elections, which were not before this Court in *Citizens United* (*see* App. 27a-31a).

Based on the record evidence concerning Montana's unique history of political corruption, the majority held that Montana had a compelling interest in preserving the integrity of its election process at the time the statute was enacted (App. 25a), and that the State had never "los[t] the power or interest sufficient to support the statute," given that "[i]ssues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government." App. 26a. The dissent disagreed on this point. It acknowledged this Court's "concern" in *Citizens United* about improper influence from independent expenditures and its desire to give weight to legislative efforts that "'seek to dispel either the appearance or the reality of these influences.'" App. 44a (quoting *Citizens United*, 130 S. Ct. at 911). But the dissenters concluded that as a matter of law, "independent expenditures, including those made by corporations, do not [ever] give rise to corruption or the appearance of corruption." App. 59a (quoting *Citizens United*, 130 S. Ct. at 909) (bracketed material added).

The majority also found that Montana has a compelling interest in encouraging the full participation of the electorate. Data in the record showed that Montana citizens "generally support candidates with modest campaign donations," and the majority con-

cluded that "[w]ith the infusion of unlimited corporate money in support of or opposition to a targeted candidate, the average citizen[-sponsored] candidate would be unable to compete against the corporate-sponsored candidate, and Montana citizens, who for over 100 years have made their modest election contributions meaningfully count would be effectively shut out of the process." App. 26a-27a. The dissent acknowledged the legitimacy of a state's "desire to protect the ability of citizen candidates to compete, and the ability of citizens to meaningfully participate and be heard in the political process," but considered this reasoning to be "essentially a repackaged version of the antidistortion rationale" rejected in *Citizens United*. App. 75a. (The dissent did not discuss why the "essence" of a state interest in meaningful participation was the same as the "essence" of a state interest in preventing distortion among speakers, and the sameness of the two interests is not facially obvious—meaningful participation seems process-oriented, while antidistortion may suggest a qualitative evaluation of the speakers' respective messages.)

Finally, the majority found that the record supported the existence of a compelling interest in protecting and preserving Montana's system of elected judges (App. 27a-31a), which interest would doom Petitioners' facial challenge to the statute. The Montana Supreme Court dissenters disagreed, predicting that this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) "strongly indicates that the interests cited by the Court here are insufficient for prohibiting corporate speech in judicial elections." App. 79a. (More recently, however, this Court has in fact suggested that states may have special interests in avoiding a

system of judicial elections that "leaves judicial selection to voters uninformed about judicial qualifications, and places a high premium upon the ability to raise money." *New York State Bd. of Elections v. López Torres*, 552 U.S. 196, 206 (2008).)

The Petition points out that Justice Stevens' dissent in *Citizens United* raised concerns about corporate and union independent expenditures in judicial elections (Petn. 18), but Petitioners cannot avoid the fact that judicial elections were not before this Court in *Citizens United*. Petitioners' assertion that the Court gave no "indication that the [judicial election] question remained open" (*id.*) is unpersuasive. The Court gave no indication one way or the other of how it would resolve a case involving the State's interests in managing judicial elections. It is difficult to imagine that the Court intended to foreclose evaluation of whether judicial elections present compelling government interests in a case that did not involve judicial elections. Certainly the Court's *silence* would not lead a reasonable observer to think the issue had been foreclosed, nor that the members of the highest court of a state that has chosen to select its judiciary by election would be "refusing" to follow *Citizens United* by having a vigorous debate about the state's interest in such elections under the standards set forth by this Court only two years earlier.

In sum, five members of the Montana Supreme Court concluded that under *Citizens United* the particular interests presented in the record before that Court were compelling. Two members of the Montana Supreme Court disagreed with the majority's analysis of the record and the inferences to be drawn from the record. But regardless of which opinion was ultimately correct on these matters, it is grossly inaccurate to say—as the Petition and its

amici do—that the Montana Supreme Court simply "rejected,"[2] "disregard[ed],"[3] or "refused to follow"[4] this Court's decision in *Citizens United*.

At bottom, Petitioners view *Citizens United* as such a sweeping decision that "[t]he facts are irrelevant." Petn. 32 (emphasis omitted). As far as Petitioners are concerned, no "cognizable governmental interest justifies banning corporate independent expenditures"—ever. *Id.* Petn. 32-33. Earlier this Term, this Court rejected such extremism in *Bluman v. FEC*, No. 11-275. There, the plaintiffs challenged the federal ban on independent election expenditures by foreign citizens, including corporations. In its brief to this Court, the plaintiffs argued that the court "meant what it said" in *Citizens United* that the First Amendment "'offers no foothold for excluding any category of speaker. . . .'" Jurisdictional Statement, *Bluman v. FEC*, No. 11-275, 2011 WL 3919650, at *11-*12 (Sept. 1, 2011) (quoting *Citizens United*, 130 S. Ct. at 929 (Scalia, J., concurring)). This Court disagreed, summarily affirming a three-judge court's rejection of that attempt to over-read *Citizens United*. *Bluman v. FEC*, —U.S.—, 132 S. Ct. 1087 (2012). Petitioners similarly over-read *Citizens United*.

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[2]Petn. 13.

[3]Citizens United *Amicus* Br. 4.

[4]*See supra* note 1.

II.

FURTHER PERCOLATION IN THE LOWER COURTS WILL FOSTER THOUGHTFUL RESOLUTION OF QUESTIONS LEFT UNANSWERED BY *CITIZENS UNITED*, WHICH AT LEAST REQUIRE PLENARY CONSIDERATION BY THIS COURT.

As the above discussion (and the differing opinions of the Montana Supreme Court Justices) demonstrates, *Citizens United* left important questions unanswered and the law in a state of development. Indeed, the Petition itself acknowledges that at least one other court has recognized open questions about "'the parameters of *Citizens United* as applied to political climates of individual states.'" Petn. 22-23 (quoting *Personal PAC v. McGuffage*, No. 12-CV-1043, 2012 WL 850744, at *4 (N.D. Ill. Mar. 13, 2012)); *see also United States v. Danielczyk*, 791 F. Supp. 2d 513 (E.D. Va. 2011) (on rehearing, narrowing extent to which the court thought that *Citizens United* renders federal election law unconstitutional) (appeal pending).

"To identify rules that will endure, [the Court] must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law. Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves 'whatever is pure and sound and fine.'" *California v. Carney*, 471 U.S. 386, 400-01 (1985) (Stevens, J., dissenting) (footnote omitted) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 179 (1921)).

As one "perceptive study" (*id.* at 398) of this Court's docket explained:

> Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable. (Samuel Estreicher & John E. Sexton, *New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 677, 681, 716 (1984))

This principle applies with full force here. Summarily reversing the Montana Supreme Court's decision just two years after deciding *Citizens United* would prematurely and artificially curtail the critical "period of exploratory consideration and experimentation by lower courts." *Id.*; *see also Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal) ("[T]his is exactly the sort of issue that could benefit from further attention" by lower courts); *see Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court"). And summary reversal would prevent the "various States [from] serv[ing] as laboratories in

which the issue receives further study before it is addressed by this Court." *McCray v. New York,* 461 U.S. 961, 961-63 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari).

In short, summary reversal would impede thoughtful development of the law on "an issue of national importance." Citizens United *Amicus* Br. 12.

III.

THE CASES CITED IN CITIZENS UNITED'S *AMICUS* BRIEF DO NOT SUPPORT SUMMARY REVERSAL IN THIS CASE.

Amicus Citizens United (the entity) urges the Court to reverse summarily. Summary reversal "usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 344 (9th ed. 2007) (hereafter, "STERN & GRESSMAN"). One authority has suggested that the Court should act summarily "if the lower court has committed a manifest and grievous error in a case plainly not worth the time required for full briefing and argument." RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1480 (6th ed. 2009).

For the reasons explained in Part I, *supra*, this is *not* a case like *Marmet Health Care Center, Inc. v. Brown*, —U.S.—, 132 S. Ct. 1201 (2012) (cited at Citizens United *Amicus* Br. 15), in which the state Supreme Court thumbed its nose at this Court's definitive construction of a federal statute, describing this Court's interpretation of the Federal

Arbitration Act as "'tendentious,' and 'created from whole cloth.'" *Id.* at 1203 (quoting *Brown ex rel. Brown v. Genesis Healthcare Corp.*, —S.E.2d—, No. 35494, 2011 WL 2611327, at *18 (W. Va. June 29, 2011) (*rev'd per curiam*)).

Nor, for the reasons explained in Part II, *supra*, is this a case like *Ohio v. Reiner*, 532 U.S. 17 (2001) (cited at Citizens United *Amicus* Br. 15), where the relevant law had been completely and definitively settled by this Court's prior rulings and no further percolation or consideration would be useful. *Id.* at 21 (reversing Ohio Supreme Court's holding that forbade a witness to invoke the Fifth Amendment privilege against self-incrimination because he had denied culpability, in light of this Court's definitive holding that "one of the Fifth Amendment's basic functions is to protect *innocent men* who otherwise might be ensnared by ambiguous circumstances") (citation, ellipses and internal quotation marks omitted; emphasis added).

The remaining cases cited in Citizens United's *Amicus* Brief are similarly inapposite.

Three concerned civil-rights era challenges to racial discrimination, in an era in which some state officials (and occasionally state courts) openly defied this Court's precedents. *See Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam); *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230, 231 (1957) (per curiam); *Trustees of the Monroe Avenue Church of Christ v. Perkins*, 334 U.S. 813, 813 (1948) (per curiam). (Notably, even during this period of open defiance, commentators criticized the use of summary reversal, and the Court later reduced its reliance on the practice. *See, e.g.*, Ernest J. Brown, *The Supreme Court, 1957 Term—Foreword: Process*

of Law, 72 HARV. L. REV. 77 (1958); STERN & GRESSMAN, *supra,* at 350 n.106.)

Several others involved statutes or jury instructions that were either literally or substantively identical to ones addressed in prior decisions by this Court, so that the Court had no need for full briefing and argument. *See Bobby v. Mitts*, —U.S.—, 131 S. Ct. 1762, 1763-64 (2011) (per curiam) (reversing where the Court had decided the relevant question in a case from the prior Term involving "virtually the same Ohio jury instructions"); *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 918 (1990) (per curiam) (deciding only whether to retroactively apply the Court's prior decision invalidating the same state statute at issue); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (considering a challenge to a territorial law that had been modeled on a state law previously struck down by the Court).

Still others concerned topics well trodden in this Court's case law and lower court opinions that self-evidently deviated from the applicable black letter law. *See California v. Beheler*, 463 U.S. 1121, 1123-24 (1983) (per curiam) (reversing state court's ruling, in a factual context "remarkably similar" to one the Court had already addressed in a prior summary reversal, on what constituted "custody" for purposes of Miranda warnings); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam) (summary reversal referred to in *Beheler*); *Brousseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam) (reversing Ninth Circuit's decision that reflected a "clear misapprehension of the qualified immunity standard").

In the remaining decisions, the lower court's decision was so flatly contrary to this Court's precedents that the error was too glaring to ignore. *See CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841-42 (2009)

(per curiam) (lower court refused to give a jury instruction despite this Court's statement in prior decision that such an instruction was available); *Spears v. United States*, 555 U.S. 261, 263-64 (2009) (per curiam) (reversing lower court's refusal to allow a district court to depart from Sentencing Guidelines, despite this Court's precedent declaring the Guidelines to be advisory); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (reversing the Arkansas Supreme Court's claim that "there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court . . ."); *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986) (per curiam) (reversing where state court "'fail[ed] to see a supremacy clause argument" that was self-evident from the face of federal and state statutes); *Connally v. Georgia*, 429 U.S. 245, 246, 250 (1977) (per curiam) (reversing conviction based on a warrant issued by a justice of the peace who was financially incentivized to approve warrants); *Turner v. Dep't of Employment Security*, 423 U.S. 44, 46 (1975) (per curiam) (reversing state ruling founded on presumption that pregnancy incapacitates women that was "virtually identical" to presumption previously held unconstitutional).

The Montana Supreme Court's decision here is not like any of these decisions. The Montana Supreme Court did not defy this Court's precedents. The statute at issue is different in several respects from the federal statute struck down in *Citizens United*, and neither served as the model or template for the other. Nor is the doctrine established by *Citizens United* so comprehensive and settled that, on the facts of this case, the decision can only be viewed as a grievous and manifest error, reflecting "error so

apparent as to warrant the bitter medicine of summary reversal." *Spears*, 555 U.S. at 268 (Roberts, C.J., dissenting).

Indeed, not one of the summary reversals cited by Citizens United involved a case that (1) drew two dozen *amici* to the Supreme Court of a coordinate sovereign, (2) involved a materially different statute than the statute at issue in the allegedly controlling cases or (3) resulted in three opinions that agreed on the legal standard that should be applied, but clashed sharply over the application of that standard to the record in the case and the inferences to be drawn from that record.

CONCLUSION

This Court should not summarily reverse the decision of the Supreme Court of Montana.

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