IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 11-0081

WESTERN TRADITION PARTNERSHIP, INC. a corporation, registered in the State of Montana, and CHAMPION PAINTING, INC., a Montana Corporation, MONTANA SHOOTING SPORTS ASSOCIATION, INC., a Montana Corporation,

Plaintiffs and Appellees,

v.

ATTORNEY GENERAL of the State of Montana, and COMMISSIONER OF POLITICAL PRACTICES,

Defendants and Appellants.

AMICUS CURIAE BRIEF OF FREE SPEECH FOR PEOPLE, AMERICAN SUSTAINABLE BUSINESS COUNCIL, NOVAK AND NOVAK, INC., d/b/a MIKE'S THRIFTWAY, HOME RESOURCE, INC. AND THE AMERICAN INDEPENDENT BUSINESS ALLIANCE IN SUPPORT OF THE STATE PARTIES

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Jeffrey M. Sherlock, Presiding

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APPEARANCES:

STEVE BULLOCK
MONTANA ATTORNEY GENERAL
ANTHONY JOHNSTONE
SOLICITOR
JAMES P. MOLLOY
ASSISTANT ATTORNEY GENERAL
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-1220 Phone
(406) 444-3549 Fax
ajohnstone@mt.gov

COUNSEL FOR DEFENDANTS AND APPELLANTS

MARGOT E. BARG
WITTICH LAW FIRM, P.C.
602 Ferguson Ave., Ste. 5
Bozeman, MT 59718
(406) 585-5598 Phone
(406) 585-2811 Fax
barg@law-advisor.com

COUNSEL FOR PLAINTIFFS AND APPELLEES

JEFFREY D. CLEMENTS
GENERAL COUNSEL
FREE SPEECH FOR PEOPLE
CLEMENTS LAW OFFICE, LLC
9 Damonmill Square, Suite 4B
Concord, Massachusetts 01742
(978) 287-4901 Phone
(978) 287-4900 Fax
jclements@clementsllc.com
(*Not admitted in Montana*)

COUNSEL FOR AMICI CURIAE
FREE SPEECH FOR PEOPLE

JONATHAN MOTL
MORRISON MOTL & SHERWOOD
401 North Last Chance Gulch
Helena, Montana 59601
(406) 442-3261 Phone
(406) 443-7294 Fax
jonathan@mmslawgroup.com

COUNSEL FOR AMICI CURIAE
FREE SPEECH FOR PEOPLE

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INTEREST OF *AMICI CURIAE*

Amici Curiae file this brief in support of the Attorney General of the State of Montana and Commissioner of Political Practices.

Free Speech for People (www.freespeechforpeople.org) is a national non-partisan campaign committed to the proposition that we the people who ordain and establish the Constitution do so to protect the rights of people rather than state-created corporate entities; that the people's oversight of state-created corporations is an essential obligation of citizenship and self-government; and that the doctrine of "corporate speech" improperly moves legislative debates about economic policy from the democratic process to the judiciary, contrary to our Constitution and to the republican principles of the United States of America and the States. Free Speech for People's thousands of supporters around the country, including in Montana, engage in education and non-partisan advocacy to encourage and support effective government of, for and by the American people.

The American Sustainable Business Council (www.asbcouncil.org) is a growing coalition of business networks and businesses committed to a new vision and policies for a vibrant, equitable and sustainable economy. The Council's organizations represent over 70,000 businesses and social enterprises and more than 200,000 entrepreneurs, owners, executives, investors and business professionals, including in Montana. The American Sustainable Business Council

led the formation of Business for Democracy (www.businessfordemocracy.com), an initiative of companies and business leaders who believe that *Citizens United* is in direct conflict with American principles of republican government, democracy, and a fair economy, and who support a Constitutional amendment to overturn the decision.

Novak and Novak Inc., d/b/a Mike's Thriftway, a Montana corporation, has operated a full-service supermarket employing 26 people, in Chester, Montana since 1971. Home Resource Center, Inc., a Montana not-for-profit corporation, operates a building materials and re-use center in Missoula, Montana, selling reusable building materials to reduce waste and build healthier communities (with Novak & Novak, Inc., the "Montana corporations"). The Montana corporations seek to conduct their business for which they were chartered under Montana law and do not seek to use company assets to influence the outcome of any election. The Montana corporations seek to uphold the Corrupt Practices Act to ensure that all businesses are treated equally under Montana law and to prevent the undue influence that would occur by allowing corporations to influence electoral races.

The American Independent Business Alliance (AMIBA) is a Bozeman, Montana-based non-profit organization helping communities implement programs to support independent locally owned businesses and maintain ongoing opportunities for entrepreneurs. AMIBA supports more than 70 affiliated

community organizations across 31 states, including three Montana cities and towns. AMIBA's affiliates represent approximately 18,000 independent businesses covering virtually every sector of business, many of which face direct competition from multinational and other large corporations. Many of these corporations have converted their economic power into political favors that extract subsidies from taxpayers, stifle enforcement of antitrust laws, create legal tax evasion opportunities, and other rules that disadvantage small business. AMIBA seeks to uphold the Corrupt Practices Act to help ensure market competition, not political favors, determine the success or failure of businesses.

STATEMENT OF THE ISSUE, CASE AND FACTS

Amici accept and adopt the statement of the issue, case and facts as set forth in the Brief of the Attorney General.

SUMMARY OF ARGUMENT

The 5-4 decision in *Citizens United v. Federal Election Commission* (2010), 558 U.S. ___, 130 S. Ct. 876, was an extreme extension of an erroneous corporate rights doctrine that has eroded the First Amendment and the Constitution for the past 30 years. The decision has caused uproar and deep concern for American republican democracy among dissenting Justices, the President of the United States, scores of members of Congress, Governors, state legislators and officials,

Attorneys General, law professors, businesspeople and, to an unusual extent, an extraordinary number of Americans across the political spectrum.

A corporate pay-to-play, "crony capitalism" vision of elections is contrary not only to our republican principles of government, but also to American principles of free and fair commerce among free people and the States. Both Montana politics and Montana businesses would be badly undermined by judicial invalidation of the Corrupt Practices Act. The State did not create or authorize corporations to do business in order to become political entities in conflict with the purposes and clear rules for which they were chartered.

Amici appreciate that whether *Citizens United* was wrongly decided is not for this Supreme Court of Montana to determine. It is for this Court to decide, however, whether to extend *Citizens United* so as to invalidate the century-old Corrupt Practices Act where there are such significant distinctions in the facts, law, and Constitutional provisions at issue here as compared to *Citizens United. Amici* respectfully urge the Court to decline to extend *Citizens United* to state laws and to the Fourteenth Amendment until the federal Supreme Court has an opportunity to consider whether and upon what factual record such an extension is warranted.

ARGUMENT

I. FREE SPEECH IS A CIVIL LIBERTY OF THE PEOPLE

A. This Court Should Decline to Extend *Citizens United* Before the United States Supreme Court Considers the Significant Federalism Questions Implicated By *Citizens United.*

Citizens United held that the federal regulation of corporate "independent expenditures" in elections under the Bipartisan Campaign Reform Act, 2 U.S.C. § 431, *et seq.* ("BCRA") violates the free speech clause of the First Amendment of the United States Constitution.[1] No state or state law was before the Court, and the Court did not address significant issues of federalism and state authority to regulate state-created corporations in state elections.

Citizens United concerned a federal lawsuit by a Virginia non-profit corporation against the Federal Election Commission to block application of BCRA's corporate spending regulation to the non-profit corporation's advertisements, production and distribution of a feature-length movie attacking then-Senator Hillary Clinton's fitness to be President of the United States. Despite these somewhat narrow facts, *Citizens United* has been widely understood, not the least by multinational for-profit corporations, as a license for business corporations to ignore, violate, or challenge campaign spending regulations of every sort. This broad reading of *Citizens United* is due in part to the Court's explicit overruling of

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[1] U.S. CONST. Amend. I provides: "Congress shall make no law... abridging the freedom of speech, or of the press...."

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) and *McConnell v. Federal Election Comm'n* (2003), 540 U.S. 93, and in part to the majority's *dicta* concerning corporate "voices" and its omission of any distinction among human beings, corporations, or non-incorporated associations. The alarmingly broad implications of *Citizens United* also became clear, however, as key assumptions in the decision failed the test of even one year's experience.

Despite Justice Kennedy's reliance on disclosure and "transparency,"[2] spending in the November 2010 elections by front-group entities that took corporate contributions soared into the hundreds of millions of dollars with no requirement of disclosure and virtually no transparency.[3] Despite nervous assurances by some that *Citizens United* could not possibly allow foreign corporations to influence elections with corporate money, nothing has prevented multinational corporations owned in significant part by foreign shareholders and the multinational United States Chamber of Commerce from spending money to

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2 558 U.S. at ___; 130 S. Ct. at 916.

3 Report of Public Citizen, January 23, 2011, at 10, available at http://www.citizen.org/documents/Citizens-United-20110113.pdf (accessed April 22, 2011).

influence American elections, and they are doing so.[4] Despite the early assumption that "corporate speech" (i.e., the unregulated political spending of corporate funds) might give "business" a "voice," the thousands of small and medium-sized businesses that create most American jobs, and the vast majority of all American businesses that seek to compete on a level playing field without spending precious capital on politics, are losing ground to giant corporations that spend millions to buy unfair advantage.[5]

Amici do not maintain that *Citizens United*, even if wrongly decided, can or should be disregarded by this Court, or that the Supreme Court of the United States is not entitled to appropriate respect. Rather, *Amici* maintain that even after *Citizens United*, longstanding questions about corporate power and corporate money in politics remain unresolved. Accordingly, on the significant factual record presented by the Attorney General in this case, this Court has latitude to refrain

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4 For example, News Corporation contributed at least $1 million to the U.S. Chamber of Commerce election spending campaign and $1 million to the Republican Governors Association campaign. While the corporation's largest shareholder is the family of Rupert Murdoch, a naturalized Australian-American, the second largest shareholder, with $2 billion in shares, is Prince Alalweed bin Talal's Kingdom Holding Company of Saudi Arabia. (*See* Interview with Prince bin Talal, available at http://www.businessweek.com/magazine/content/10_05/b4165010350026.htm (accessed April 25, 2011); *News Corp Gave $1 Million to GOP Group*, POLITICO, September 30, 2010, available at http://www.politico.com/news/stories/0910/42989.html (accessed April 25, 2011).

5 In recent years, 83% of U.S. Chamber contributions were $100,000 or more; 40% came from 25 contributors; three contributors provided 20% of the Chamber's dollars. In 2009, one contribution of $86.2 million came to 42% of all Chamber contributions. (U.S. Chamber Watch findings at http://www.fixtheuschamber.org/news/news/inside-chambers-million-dollar-shell-game, and http://www.fixtheuschamber.org/tracking-the-chamber/beyond-86-million-buyout-what-else-we-found-chambers-990s (accessed April 14, 2011).)

from overturning the century-long judgment of the people and leadership of Montana that fair elections and the integrity of state representative government require corporations to comply with the Act.

The federal Supreme Court, with narrow majorities and vigorous dissents, has four times reached inconsistent conclusions about regulation of corporate political spending. *See First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) (Massachusetts law invalidated); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (Michigan law upheld because of "the unique state-conferred corporate structure..."); *McConnell v. Federal Election Comm'n* (2003), 540 U.S. 93, 205 (BCRA upheld because of "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."); *Citizens United* (the same BCRA law invalidated).

While the majority in *Citizens United* seems eager to end the debate, four members of the Court, as well as the American people and their representatives, were unwilling to read the decision as the last word. The dissenting Justices found *Citizens United* to be a "radical departure from what has been settled First Amendment law," adding:

> The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.

Justice Stevens and his fellow dissenters called the decision "a rejection of the common sense of the American people," and most Americans apparently agree. In a recent comprehensive poll, 79% of respondents supported a Constitutional amendment to overturn *Citizens United.*[6] In the past year, more than one million people have signed petitions to overturn *Citizens United* by Constitutional amendment, more than 50 law professors and former state officials called on Congress to consider a Constitutional amendment, several amendment bills were introduced in Congress, and amendment resolutions have been introduced in States across the country.[7]

Clearly *Citizens United* has not settled the question and the States, which create and define corporations and retain the duty to ensure that state elections are free and fair, would be wise to hesitate before giving the broadest possible reading to *Citizens United.* Apart from the likelihood that the Supreme Court is not finished with its seesawing debate about the First Amendment and political use of corporate general treasuries, federalism issues not addressed in *Citizens United* remain unsettled. Any conclusion that corporations are "persons" under the Fourteenth Amendment is itself doubtful. *First National Bank of Boston,* 435 U.S. at 826 and n.6 (Rehnquist, J., dissenting) ("Fourteenth Amendment does not

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6 Hart Research Associates Poll, available at http://freespeechforpeople.org/sites/default/files/FSFP%20Nationwide%20Voter%20Survey-1.pdf (accessed April 22, 2011)

7 *See* http://www.freespeechforpeople.org/

require a State to endow a business corporation with the power of political speech...."); *Connecticut Life Insurance Company v. Johnson,* 303 U.S. 77, 85-86 (1938) (Black, J., dissenting) ("[n]either the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protections."); *Slaughter-House Cases* 83 U.S. 36 (1872); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 581 (1949) (Douglas, J. dissenting); Morton J. Horowitz, *The Transformation of American Law* (1870-1960), Oxford University Press, Inc. (1992).

While cited for that proposition, *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886), did not decide that or *any* other federal Constitutional question. *Id.* at 416 ("As the judgment can be sustained upon this [state law] ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.") Following *Santa Clara*, the Court asserted without explanation that a corporation is a person under the Fourteenth Amendment. None actually found any Fourteenth Amendment violation. *See Pembina Con. Silver Mining & Milling Co. v. Pennsylvania,* 125 U.S. 181, 188-89 (1888); *Missouri Pac. Railway Co. v. Mackey*, 127 U.S. 205 (1888); *Minneapolis & S.L. Ry. Co. v. Herrick,* 127 U.S. 210 (1888); *Minneapolis & S.L. Ry. Co. v. Beckwith*, 129 U.S. 26 (1889); *Charlotte C & A Railway Co. v. Gibbes*, 142 U.S. 386 (1892). The Court later stated, again without explanation, that corporations

could make Fourteenth Amendment due process claims. *See Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896); *Gulf C & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923). None of these involved "corporate speech," which was unheard of at the time.

Only in 1938 would an opinion, albeit dissenting, actually examine the Fourteenth Amendment "person" question. Justice Black concluded, "this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations." 303 U.S. at 85. Serious doubt remains about using the Fourteenth Amendment to restrain the state regulation of the partisan role of corporations in state elections, and the judgment below should be reversed.

B. Corporations Are Not People.

The corporations that brought this litigation exist only because State law has permitted incorporation and provided rules that accompany any use of the corporate form. Incorporation is available only by statute and is not a private matter. Harry G. Henn & John R. Alexander, *Law of Corporations* (3rd ed.) (West Hornbook Series 1981) at 14-35. While lawmakers may deem a corporation to be a "person" for purposes of transacting business, suing and being sued, and other acts, legislative policy cannot create Constitutional "persons" or rights.

The corporate legal form is not fundamentally different today than when Chief Justice Marshall for the Court explained that a corporation, as a "mere creature of law... possesses only those properties which the charter confers upon it...." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). Corporations remain creatures of statute. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89-91 (1987) ("state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.").

No evidence suggests that the framers of the Constitution or the American people intended to include corporations in the Bill of Rights.[8] Indeed, the evidence is to the contrary. "Those who feel that the essence of the corporation rests in the contract among its members rather than in the government decree ... fail to distinguish, as the eighteenth century did, between the corporation and the voluntary association." Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy, Massachusetts, 1774-1861* at 92 and n. 18.

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8 Further, no evidence suggests that the Montana Constitution is intended to protect corporations. In fact, under the Montana Constitution, "[a]ll political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole." Montana Constitution, Article II, Section 1.

During the colonial period, only "a handful of native business corporations carried on business," and only twenty business corporations were formed by 1787, when the American people convened the Constitutional Convention. Henn & Alexander, *supra*, at 24 and n. 2, *citing* E. Dodd, *American Business Corporations Until 1860* (1954); 2 J. Davis, *Essays in the Earlier History of American Corporations* (1917); Baldwin, *American Business Corporations Before 1789*, 1 Annual Rep't of American Historical Ass'n, 253-274 (1902). *See also* Handlin, *supra,* at 99, 162. Legislatures soon created more corporations but chartered these only for specific *public* purposes, often with limited time periods. Handlin, *supra,* at 106-133; *Louis K. Liggett Co. v. Lee,* 288 U.S. 517, 548-560 (1933) (Brandeis, J., dissenting). Restrictions on corporate purposes were the norm. *Id.*; *Head and Amory v. Providence Insurance Co.*, 6 U.S. (2 Cranch) 127, 166-167 (1804) ("corporation can only act in the manner prescribed by law.")

The Framers would have been surprised to find corporations claiming "rights" to defy state law. James Wilson -- signer of the Declaration of Independence, member of the Continental Congress, a drafter of the Constitution, and among the nation's first six Justices -- expressed a prevailing view:

> A corporation is described to be a person in a political capacity created by the law... It must be admitted, however, that, in too many instances, those bodies politick have, in their progress, counteracted the design of their original formation... This is not mentioned with a view to insinuate, that such establishments ought to be prevented or

> destroyed: I mean only to intimate, that they should be erected with caution, and inspected with care.

Collected Works of James Wilson, Vol. 2. Ch. X, *Of Corporations*, (ed. Kermit L. Hall and Mark David Hall) (http://oll.libertyfund.org/title/2074/166648/2957866, accessed 2009-07-22). James Madison viewed corporations as "a necessary evil" subject to "proper limitations and guards." *Writings of James Madison*, ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1900), Vol. 9. To J.K Paulding (http://oll.libertyfund.org/title/1940/119324, accessed 2009-07-22) Thomas Jefferson hoped to "crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country." University of Virginia, Thomas Jefferson to George Logan, http://etext.virginia.edu/jefferson/quotations/jeff5.htm, accessed 2009-07-22).

The traditions and practices of the American people for more than two centuries support the sharp distinction that courts may properly draw between conduct of state-created corporations and the conduct of human beings who engage in speech and debate. President Jackson warned of partisan activity by the second Bank of the United States corporation: "[T]he question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their

decisions." 1833 Annual Message, University of Virginia, Miller Center of Public Affairs, http://millercenter.org/scripps/archive/speeches/detail/3640, ("Miller Center," all accessed 2009-7-15). President Van Buren spoke "of the dangers to which the free and unbiased exercise of political opinion ... would be exposed by any further increase of the already overgrown influence of corporate authorities." 1837 Annual Message, Miller Center (http://millercenter.org/scripps/archive/speeches/detail/3589).

These warnings continued as corporations became dominant in our economy. "Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters," wrote President Cleveland. 1888 Annual Message, Miller Center, http://millercenter.org/scripps/archive/speeches/detail/3578. President Theodore Roosevelt successfully called on Congress to "prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly." 1906 Annual Message, Miller Center, http://millercenter.org/scripps/archive/speeches/detail/3778.

Since the beginning of the Republic, the Supreme Court has affirmed that elected governments of the state may regulate in an even-handed manner "the corporate structure" because governments create that structure. *Dartmouth College* described the corporate entity as "an artificial being ... existing only in

contemplation of law," and created only for such "objects as the government wishes to promote." 17 U.S. at 636-637.

The Court brought this understanding of the corporation to other Constitutional provisions, such as diversity jurisdiction under Article III and the judiciary statutes.[9] In the Founders' era and beyond, the Court considered state citizenship of the human shareholders, not the corporation, to determine diversity jurisdictions when corporations sought to use the federal courts. *Bank of the United States v. Deveaux,* 9 U.S. (5 Cranch) 61, 86 (1809) (corporation is "mere legal entity ... not a citizen"); *Hope Insurance Co. v. Boardman,* 9 U.S. (5 Cranch) 57, 58 (1809); *Sullivan v. Fulton Steamboat Co.*, 19 U.S. (6 Wheat.) 450 (1821); *Breithaupt v. Bank of Georgia,* 26 U.S. (1 Pet.) 238 (1828); *Commercial & Railroad Bank of Vicksburg v. Slocomb*, 39 U.S. (14 Pet.) 60 (1840). Over time, the Court developed a shortcut strictly limited to diversity jurisdiction. *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990) ("special treatment for corporations.")[10] *Louisville Railroad Co. v. Letson,* 43 U.S. (2 How.) 497, 557-558 (1844), decreed that a corporation "is to be deemed" a citizen of the state of its creation. 43 U.S at 557-8. Nine years later, the Court followed *Letson* but reiterated that "an artificial entity cannot be a citizen," and "State laws by combining large

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9 Article III provides "The judicial Power shall extend ... to Controversies ... between Citizens of different States...." U.S. CONST. Art. III, § 2.

10 "Special treatment" refers to the fact that the Court and Congress do not extend the same treatment to non-corporate associations.

masses of men under a corporate name, cannot repeal the Constitution." *Marshall v. Baltimore and Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327 (1853) (quotation and citation omitted).[11] The Court began to treat "a suit by or against a corporation in its corporate name, as a suit by or against citizens of the State which created the corporate body...." *Ohio and Mississippi Railroad Co. v. Wheeler*, 66 U.S. 286, 296 (1861). The Court confined this doctrine to diversity jurisdiction, and it has never been defended with enthusiasm for its soundness.[12]

In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), and *Paul v. Virginia*, 75 U.S. 168 (1868), the Court refused to extend "special treatment" for corporations to the protection of rights under the Privileges and Immunities Clause of Article IV. Repeatedly, the Court has held that corporations are not citizens under that clause, or under the Privileges or Immunities Clause of the Fourteenth

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11 *Marshall* reflects grave concern about corporations and rights. *See* 57 U.S. at 329 ("The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every State."); 57 U.S. at 339 (Daniel, J., dissenting) ("citizens only... men, material, moral, sentient beings, must be parties, in order to give jurisdiction"); 57 U.S. at 351, 352-353 (Campbell, J., dissenting) (courts should "repel[] these pretensions and expose[] [corporations'] perilous character..."; corporations are "disdainful" of legislators, ready "to make of them a prey; and to accomplish this, to employ corrupting and polluting appliances.")

12 *See Carden,* 494 U.S. 185. *See also* Frankfurter, *Distribution of Judicial Power between United States and State Courts,* 13 CORN. L. Q. 499, 523 (1928).

Amendment. *Pembina,* 125 U.S. 181; *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945).[13]

As the Industrial Revolution gathered pace, the Court maintained with clarity that "[t]he only rights [a corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state...." *Bank of Augusta*, 38 U.S. at 587. The Court did not examine the Constitution to determine rights "given to it in that character" because the Constitution does not create corporate rights. In upholding corporate contracts outside the place of incorporation, *Bank of Augusta* declined to rest on any Constitutional provision, instead applying the law that created the corporation, the law of the state where the corporation wished to enforce a contract, and "comity." 38 U.S. at 586-590.

By 1868, corporations had "multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them." *Paul,* 75 U.S. at 181-182. Nevertheless, the Court denied the claim of corporations to the privileges and immunities of citizenship, as a corporation is "a mere creation of local law." *Id.* at 181.

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13 Unrelated part of *Paul* overruled by *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

With exceptions during the era defined by *Lochner v. New York*, 198 U.S. 45 (1905), overruled by *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952), the Court continued through the twentieth century to distinguish between people and corporations. In *Asbury Hosp.*, for example, the Court, citing numerous cases and without dissent, rejected a Constitutional challenge to a state law requiring corporations holding land suitable for farming to sell the land within ten years. 326 U.S. 207. Five years later, the Court again emphasized the "public attributes" of corporations in turning aside corporate privacy claims:

> [C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.

United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (citations omitted).

The Court has recognized, in a limited fashion, assertions of corporate rights. *See infra.* n.9; Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577, 664-667 (1990); *GM Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (corporations have "some Fourth Amendment rights"). As the Court has observed, however, a corporation has lesser Fourth Amendment rights because:

> Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce. Correspondingly it has been settled that corporations are not entitled

> to all of the constitutional protections which private individuals have in these and related matters.

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 204-205 (1946) (footnotes omitted). Accordingly, "it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons...." *Bellotti*, 435 U.S. at 823 (Rehnquist, J., dissenting) *citing United States v. White*, 322 U.S. 694, 698-701 (1944). *See also Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) ("The liberty referred to in that [Fourteenth] Amendment is the liberty of natural, not artificial, persons.").

The Corrupt Practices Act is perfectly consistent with this longstanding balance of state policy between encouraging ready use of the laws of incorporation to facilitate economic activity and preventing abuses of incorporation to corrupt, distort and unfairly dominate state elections and government. This approach is essential to freedom and self-government. It also is good economics. And it is consistent with the Fourteenth Amendment, freedom of speech, and the powers of the States to define and regulate corporations and their own elections.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court reverse the judgment below.

Respectfully submitted this 29th day of April, 2011.

By 

JONATHAN MOTL
MORRISON MOTL & SHERWOOD
401 NORTH LAST CHANCE GULCH
HELENA, MONTANA 59601

JEFFREY D. CLEMENTS
GENERAL COUNSEL
FREE SPEECH FOR PEOPLE
CLEMENTS LAW OFFICE, LLC
9 DAMONMILL SQUARE, SUITE 4B
CONCORD, MASSACHUSETTS 01742

COUNSEL FOR AMICUS CURIAE
FREE SPEECH FOR PEOPLE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(e) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2004 is 4,560, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

By _____

CERTIFICATE OF SERVICE

I certify that on April 29, 2011, a true and correct copy of the foregoing was sent by U.S. mail, first class postage prepaid, to the following:

Steve Bullock
Montana Attorney General
ANTHONY JOHNSTONE
JAMES P. MOLLOY
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Counsel for Defendants and Appellants

Margot E. Barg
Wittich Law Firm, P.C.
602 Ferguson Ave., Suite 5
Bozeman, MT 59718
Counsel for Plaintiffs and Appellees

Elizabeth L. Griffing
ACLU of Montana Foundation
P.O. Box 9138
Missoula, MT 59802
Counsel for Amicus
ACLU of Montana Foundation

Lawrence A. Anderson
Attorney at Law, P.C.
300 4th Street North
P.O. Box 2608
Great Falls, MT 59403-2608
Counsel for Amicus MTLA

Amy Poehling Eddy
Bottomly Eddy & Sandler
Trial Attorneys, PLLP
1230 Whitefish Stage Road, Suite 100
Kalispell, MT 59901
Counsel for Amicus Former
Montana Supreme Court Justices

By _____