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.

BRIEF OF DOMINI SOCIAL INVESTMENTS LLC, TRILLIUM ASSET MANAGEMENT CORPORATION, NEWGROUND SOCIAL INVESTMENT, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY, HARRINGTON INVESTMENTS, INC., THE SUSTAINABILITY GROUP OF LORING, WOLCOTT & COOLIDGE, CALVERT ASSET MANAGEMENT COMPANY, INC., THE CHRISTOPHER REYNOLDS FOUNDATION, INC., AND WALDEN ASSET MANAGEMENT, A DIVISION OF BOSTON TRUST & INVESTMENT MANAGEMENT COMPANY AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS/APPELLANTS

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SUMMARY OF ARGUMENT

One of the principles recognized by the United States Supreme Court in *Citizens United v. Federal Election Commission* is that a corporation, as a collective and voluntary association of shareholders, has a right to participate in the democratic process. 130 S. Ct. 876, 911 (2010) (lauding "'the procedures of corporate democracy'" as a means for shareholders to express their views) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)); *see also id*. at 928 ("[T]he individual person's right to speak includes the right to speak *in association with other individual persons*.") (Scalia, J., concurring).

For shareholders of widely held, publicly traded corporations, the reality is that the procedures of corporate democracy are unavailable to them to safeguard their political interests. These shareholders discover that the financial security and benefits they seek by investing in publicly traded companies will compel them to support political views that they find objectionable. Shareholders of publicly traded companies find that either they must surrender their political autonomy or forego investing in our nation's premier businesses. For *amici*, it is a Hobson's choice because investing in publicly traded companies is their principal activity.

Legal and practical constraints prevent the majority of shareholders of large public corporations from even registering their political preferences, much less actually expressing them through corporate political expenditures. Some two-

thirds of stock in the United States is owned in trust by institutional investors rather than directly by "retail shareholders."[1] These institutional investors—commonly mutual funds, foundations, pension funds and life insurance companies—hold stock as beneficial owners for their shareholders and beneficiaries. Those shareholders and beneficiaries do not own the underlying investment, and therefore they cannot "speak" by voting or selling the shares in the companies in which they are invested. No means exist in a publicly traded company to identify and pursue shareholder political preferences. In turn, it is not feasible for an institutional shareholder to aggregate the highly diverse electoral interests and candidate preferences of its beneficiaries, and somehow transmit those preferences to the corporation. It can safely be assumed that no institutional investor invests in a company in order to pursue a common political agenda with other shareholders, and no individual buys a mutual fund for that purpose.

Even if a corporation or an institutional investor were able to identify which candidates its shareholders or beneficiaries preferred, it could not act on that knowledge. An institutional shareholder is bound by its fiduciary duties to pursue the common interests of *all* of its beneficiaries. A mutual fund, for example, could violate its mandate and breach its fiduciary duties by using investment funds to advance a political agenda that was not in the best interests of the fund, regardless

[1] *See* Colin Diamond et al., *New Media and Retail Shareholder Participation*, Bloomberg Law Reports, Apr. 6, 2009, at 1.

of how many fund investors shared that political agenda. Corporate officers are also bound to act in the company's interest and not in the interest of only some its shareholders. Consequently, a company's political spending can only be, at best, a reflection of the board's or management's business judgment as to what is in *the financial interests of the company*, which is a poor proxy for *the political interests of shareholders*. A corporation will inevitably make political expenditures that are at odds with the sentiments of a majority of its shareholders, and will regularly make political expenditures that some of its shareholders would find objectionable.[2] In addition, the disconnect between shareholder preferences and corporate political spending opens the door to rent-seeking behavior by the executives who hold the purse-strings.

In the face of these practical and legal constraints, the mechanisms of corporate democracy are grossly inadequate to ensure that shareholders have a meaningful say—or any say—in corporate political speech. And safeguarding the First Amendment interests of non-approving or dissenting shareholders[3] is

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[2] *See, e.g.*, Center for Political Accountability ("CPA"), *Corporate Political Spending: A Survey of American Shareholders 2006*, at 8, *available at* http://www.politicalaccountability.net/index.php?ht=display/ContentDetails/i/1027 (80% of American shareholders oppose corporate political contributions to support controversial social agendas).

[3] Since corporations and institutional investors typically do not know whether their shareholders approve or disapprove of corporate political expenditures, the brief refers to "non-approving shareholders," as well as the commonly used "dissenting shareholders."

certainly an interest that Montana may constitutionally pursue. Indeed, a corporate and securities law regime that compels millions of investors to underwrite political speech to which they cannot meaningfully object may itself be unconstitutional. *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) ("*IAM v. Street*").

For these reasons, the State of Montana may take reasonable measures to protect non-approving and dissenting shareholders from unchecked, unaccountable corporate political spending. The measures in the corporate campaign expenditure provision of the 1912 Corrupt Practices Act, Section 13-35-227(1), Montana Code Annotated ("MCA"), are reasonable and narrowly drawn to protect that interest. The practical and legal constraints at issue are unique to widely held, publicly traded corporations, thus the statute should not be understood to apply to most small businesses or non-profit corporations, including close corporations such as Appellee Champion Painting, Inc. In these corporate forms, shareholders have the ability to express their views and meaningfully assent to or dissent from corporate political spending decisions. Where shareholders lack the means to engage in such expression, as is the case for shareholders of large public corporations, the state has not only an interest, but an obligation to protect shareholders from being compelled to speak.

ARGUMENT

I. "The Procedures of Corporate Democracy" Are Effectively Unavailable to Protect Dissenting or Non-Approving Shareholders of Widely Held, Publicly Traded Companies.

The United States Supreme Court observed in *Citizens United* that "associations of citizens . . . that have taken on the corporate form" have the same First Amendment right to engage in political speech as other voluntary associations of individuals. 130 S. Ct. at 908; *see also id*. at 925 (freedom of speech includes "the freedom to speak in association with other individuals, including association in the corporate form") (Scalia, J., concurring). The Court acknowledged the interests of "dissenting shareholders" in not being compelled to fund corporate political speech, but concluded that those shareholders could protect themselves "'through the procedures of corporate democracy.'" *Id.* at 911 (quoting *Bellotti*, 435 U.S. at 794).

But what may work for voluntary associations, including small, privately held companies such as Appellees and the Appellants in *Citizens United*, simply does not hold true for widely held, publicly traded companies. Shareholders of large public corporations cannot employ the procedures of corporate democracy—generally either voting or selling one's shares—to protect their political interests. The practical and legal constraints inherent in the ownership structure of publicly traded corporations prevent the majority of shareholders from even making their

political views known to the corporation, much less getting the corporation to express those views through political spending decisions. Absent any system of accountability for corporate political spending, shareholders face the "choice" of foregoing the financial benefits of investing in our nation's premier businesses, or subsidizing political spending that they will often find objectionable.

A. Publicly traded corporations are not voluntary associations of individuals.

Viewing publicly traded companies as associations of individuals is at odds with the reality of the modern, widely held, publicly traded corporation. A significant majority of U.S. stock—approximately 66%—is owned in trust by institutional investors, not by individual or "retail" shareholders.[4] These institutional investors—most commonly mutual funds, pension funds, life insurance companies and foundations[5]—hold stock as beneficial owners for a class of individuals—most commonly shareholders, employees, policy holders and trust beneficiaries (collectively, "beneficiaries"). A single institutional investor such as the Federal Thrift Plan or the California Public Employees Retirement System may invest on behalf of millions of individuals.

The individual members of a class of beneficiaries have a claim on the benefits or proceeds of their investment, but they *do not own* and therefore *cannot*

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[4] *See* Diamond et al., *supra* note 1.

[5] Other prominent institutional owners include sovereign wealth funds, foreign banks and other corporations.

vote or sell the underlying investment. The procedures of corporate democracy are simply unavailable to them—be they shareholders in a mutual fund, employees in a public pension plan, policy holders in a mutual life insurance company, or the students and faculty of an endowed university—to approve of or dissent from the political spending undertaken by a corporation in which they are invested.

Beneficiaries have no practical means to "speak" on political matters through institutional investors acting on their behalf. As detailed in Section II below, institutional shareholders are legally and practically constrained from assessing and pursuing the highly diverse political interests of their beneficiaries. And institutional shareholders have no independent political interests which they are permitted to pursue. This confluence of factors results in the principal owners of the nation's publicly traded companies, and those whose interests they represent, being denied the ability to use the procedures of corporate democracy to restrain or direct corporate political spending.

B. Montana has a state interest in assuring that shareholders are not forced to subsidize political speech to which they have no true opportunity to object.

Compelling a citizen to underwrite political speech to which he or she has no meaningful opportunity to object is alien to the values of individual autonomy and free speech expressed in our Constitution. *See IAM v.* Street, 367 U.S. at 769 (holding that the Railway Labor Act denied unions "the power to use [an

employee's] exacted funds to support political causes which he opposes"). Montana's Corrupt Practices Act promotes those values by assuring that shareholders and those whose interests they are duty bound to attend are not forced to acquiesce in political spending choices over which they can exercise no control.

One might suggest that shareholder speech is not "compelled" insofar as shareholders can sell their shares if they object. This argument, to the limited degree that it is true, does not hold at all for institutional shareholders. Institutional shareholders cannot buy and sell shares based on which candidates a company's management chooses to support or oppose, unless they believe it is in the best interests of their investors to do so. *See, e.g.*, Mont. Const. art. VIII, § 13(3) (requiring the State of Montana to manage its retirement funds in "the same manner that a prudent expert acting in a fiduciary capacity and familiar with the circumstances would use in the conduct of an enterprise of a similar character with similar aims"). An institutional shareholder cannot shirk its duty to its beneficiaries. It cannot shun the best means to secure the financial objectives that it is mandated to pursue.

Surrendering the right to free speech to preserve another right—here, the right to freely invest one's earnings in association with others—is no choice at all. The Supreme Court said as much in *IAM v. Street*:

> Once an association with others is compelled by the facts of life . . . the individual should not be forced to surrender any matters of conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical; nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in minor or major ways; *and he should not be required to finance the promotion of causes with which he disagrees*.

367 U.S. at 776 (Douglas, J., concurring) (emphasis added). For *amici*, investing is a fact of life, as it is for their beneficiaries, who need to finance retirements, college educations, home purchases and other necessities.

As a practical matter, "the volitional nature of being a shareholder in a public company does not protect shareholders from the consequences of political speech they disfavor."[6] Corporate law regimes protect minority shareholders in a number of ways, and do not simply abandon them to market forces based on the notion that minority shareholders can sell out if they do not like the terms of the investment.[7] With respect to corporate political speech, leaving non-approving shareholders with the sole remedy of selling their shares places an onerous burden on their First Amendment rights, without remedying the harm that has already

[6] *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?* 29 (The Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 676, Sept. 2010).

[7] *See id*. at 28 & n.65 (citing literature on why market forces are inadequate to protect shareholder interests that diverge from the interests of management).

occurred. And this weak remedy is not even available to individuals who invest through intermediaries such as mutual funds, which make up the majority of investors. If one company in a fund's diversified portfolio engages in political speech that a fund shareholder finds objectionable, the shareholder would have to disinvest from the entire portfolio to dissociate himself from that speech.

In the context of widely held, publicly traded corporations, the procedures of corporate democracy cannot remove the compulsion. There is no way for a corporation to put the question of a given political expenditure to a vote that would vindicate individual shareholders' rights. The majority of shares—and therefore the majority of votes—are held and cast by institutional investors, and each share is held for the collective benefit. In other words, votes are counted based on a *one share-one vote* formula, not *one person-one vote*. Assuming institutional investors could identify the various political preferences of their shareholders or beneficiaries, and could legally express these views consistent with their fiduciary duties, they would have no way of splitting their votes to faithfully represent all of those interests.

For these reasons, the State of Montana may take reasonable steps to protect non-approving shareholders. The corporate campaign expenditure prohibition of Section 13-35-227(1), MCA, is a reasonable measure that respects both the right of those corporations that are associations of individuals—non-profits and closely

held companies—to support or oppose candidates for office in Montana, and the right of shareholders in publicly traded companies from being compelled to do so.

II. Legal and Practical Constraints Prevent Corporations and Institutional Investors From Considering or Representing Political Preferences of Shareholders and Beneficiaries.

Shareholders invest in public companies to make money, not to endow those companies with the authority to speak on their behalf on political matters.[8] Shareholders share common investment goals, but not a common political strategy. Shareholders in publicly traded companies are as diverse in their political preferences as the country at large is.

If through a miracle of technology, institutional shareholders and corporations were able to identify and aggregate the relevant political preferences, fiduciary duties and other legal constraints would prevent them from expressing those preferences. The corporation must pursue the best interest of the corporation as a whole, not just represent the political interests of some shareholders. Likewise, institutional investors are obligated by their fiduciary duties to pursue only the mandate of the investment fund and cannot favor any group of shareholders over another.

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

Together, these constraints render useless the procedures of corporate democracy as a means of assuring that corporate political spending by publicly traded companies reflects the political interests of any shareholders.

A. Corporations and institutional shareholders are practically constrained from identifying, aggregating or expressing shareholders' political interests.

Publicly traded companies face numerous challenges in ascertaining the political preferences of shareholders. "The shareholders in large publicly traded corporations . . . number in the thousands and are not a static set of identifiable human actors. They are often institutional, short-term investors, which change frequently and add layers of distance in terms of decisionmaking and monitoring from the humans who invested their capital."[9] The majority of corporations' shares are held by institutional investors, making any sort of "direct democracy" impossible. All of these factors—the sheer number of shareholders, their diverse interests, constant shareholder turnover, and indirect ownership—create an insurmountable obstacle to a corporation determining shareholders' political interests.

For similar reasons, institutional investors have no means to assess their shareholders' or beneficiaries' array and intensity of candidate preferences. The foremost barrier is that an individual's investment in a pension fund, a 401(k) plan,

[9] Pollman, *supra* note 8, at 38.

an insurance policy or a mutual fund does not convey the investor's candidate preferences or a desire to relinquish that choice to the fund. Once the investment is made, an institutional investor has no means of polling its investors or policy holders to determine their preferred political choices.

When one speaks of the procedures of corporate democracy in connection with publicly traded companies, what one is alluding to is the corporate proxy. "[G]iven the wide dispersion of shareholders, [the corporate proxy] is the principal means by which shareholders can exercise their voting rights."[10] But the proxy system, with votes at annual meetings, is at best an imperfect system for governing political spending and is thoroughly incapable of taking into account individual shareholder, let alone institutional shareholder, choice. At most, the proxy system provides an up or down vote on single question matters of corporate governance. It is also incapable of weighing the intensity of a shareholder's vote. Questions posed by political spending such as who to support, how much to spend and when to spend it are beyond its capacity to answer.

That is why questions of a similar nature are treated as ordinary business decisions that do not require shareholder approval. In electing to prohibit corporate political spending, Montana has recognized that those decisions

[10] Securities and Exchange Commission ("SEC"), *Concept Release on the U.S. Proxy System*, at 6 (July 14, 2010), *available at* www.sec.gov/rules/concept/2010/34-62495.pdf.

implicate First Amendment values and should not be within the province of management to make. At the same time, Montana recognized the proxy system's inability to protect the interests of shareholders.

Assuming that a corporation was open to receiving shareholder input on corporate political spending, and institutional investors were capable of conveying a meaningful response, the logistics are unworkable. Corporations make political spending decisions throughout the year, as often as state and federal elections and issue campaigns occur, while shareholder meetings take place annually. The corporation would have to organize several special meetings and comply with the statutory requirements for each meeting, including the strict time constraints for meeting notices, record dates, and the creation of shareholder lists. *See* Sections 35-1-520, 35-1-522, & 35-1-523, MCA. To the extent that the shift to "e-proxy" voting creates the potential for greater shareholder participation, that potential is far from realized,[11] and it remains to be seen how such a system might be devised to govern voting on what candidates to support.

B. Fiduciary and other legal duties foreclose publicly traded corporations from advancing shareholder political views.

Given these practical realities, the procedures of corporate democracy are inadequate to the daunting task of identifying shareholders' views on corporate

[11] *See* Diamond et al., *supra* note 1, at 2 ("The small number of retail shareholder votes was on average halved among companies that adopted notice-and-access.")

political spending. Even if publicly traded corporations could assess and aggregate shareholders' political views, they would be constrained by their fiduciary duties from acting on them. Corporations are "creatures of state law,"[12] and corporate directors in Montana, as elsewhere, are bound by state law to fulfill their fiduciary duties of care and loyalty to the corporation and its shareholders. "A director shall discharge the duties as a director . . . (a) in good faith; (b) with the care an ordinarily prudent person in a similar position would exercise under similar circumstances; and (c) in a manner that the director reasonably believes to be in the best interests of the corporation." Section 35-1-418, MCA. Officers are held to the same standards of conduct. *See* Section 35-1-443(1), MCA.

Even if the board of directors and senior management of a public corporation could determine whether shareholders approve or disapprove of the company's political spending, the only good-faith, prudent basis for making (or abstaining from) such expenditures would be the board's or management's belief of what is in the company's best financial interest. If shareholders' political views conflicted with the company's best interests, the board would be compelled to ignore those views. Management's and the board's determinations in this regard are generally protected by the business judgment rule. *See Ski Roundtop, Inc. v. Hall*, 202 Mont. 260, 273, 658 P.2d 1071, 1078 (1983) ("The 'business judgment

[12] *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977).

rule' immunizes management from liability in a corporate transaction undertaken within both the power of the corporation and the authority of management where there is a reasonable basis to indicate that the transaction was made in good faith.") (citation and internal quotation marks omitted). Thus the decisions of the board or management as to corporate political spending may only take into account the *business interests* of the corporation (as a proxy for the interests of shareholders). The *political interests* of individual shareholders are not a proper subject of consideration.

C. Institutional shareholders are legally prohibited from assessing and pursuing the diverse political interests of their beneficiaries.

Institutional shareholders, including mutual funds, public and private pension funds, the Federal Thrift Plan, foundations and insurance companies, are legally required to comply with the terms of their governing documents and must vote or invest strictly in accord with the investment objectives set out. A typical example is the investment objective of the Domini Social Equity Fund, administered by *amici* Domini Social Investments LLC, which focuses on long-term total return. Domini pursues this objective subject to a wide range of social, environmental and corporate governance standards, but does not utilize any partisan political criteria to select its investments or vote its proxies. As fiduciaries, institutional investors must make decisions that serve all beneficiaries and cannot place the interests of some beneficiaries above others. In furtherance of

the fund's common interests, an institutional investor's use of investment funds will therefore always incidentally align with the political preferences of some fund shareholders, and not others. A mutual fund manager would expose herself to lawsuits or regulatory enforcement actions asserting breach of fiduciary duty if she attempted to base proxy voting or investment decisions on what she believes are a shareholder's political priorities.

In addition to the fiduciary duties incumbent upon any institutional shareholder, federal law provides specific obligations for certain types of funds. For example, federal law requires a fiduciary of an ERISA-covered pension plan to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1). Under this rule, a fiduciary is required to act solely in the interest of plan participants and beneficiaries when deciding about the management or disposition of plan assets.[13] During proxy voting, therefore, a fiduciary must "consider those factors that affect the value of the plan's investment and may not subordinate the interests of the participants and

[13] *See* Dep't of Labor Adv. Op. 85-36A (Oct. 23, 1985), *available at* http://www.erisaadvisoryopinions.com/index.php?p=indices_alpha/no.index.

beneficiaries in their retirement income to unrelated objectives."[14] The Department of Labor determined that "the use of pension plan assets by plan fiduciaries to further policy or political issues through proxy resolutions that have no connection to enhancing the value of the plan's investment in a corporation would . . . violate the . . . requirements of [ERISA]."[15]

To comply with their duties, mutual funds' fiduciaries must vote proxies in the best interests of their shareholders. Some of the largest mutual fund managers interpret these interests quite narrowly. In its proxy voting guidelines, Fidelity provides that "[it] will vote on shareholder proposals … based on an evaluation of a proposal's likelihood to enhance the economic returns or profitability of the portfolio company or to maximize shareholder value. Where information is not readily available to analyze the economic impact of the proposal, [Fidelity] will generally abstain."[16] Securities laws obligate mutual funds' fiduciaries to pursue the investment strategy expressed in their prospectus and prohibit them from pursuing an unexpressed political agenda.

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[14] Dep't of Labor Adv. Op. 2007-07A (Dec. 21, 2007), *available at* http://www.dol.gov/ebsa/regs/aos/ao2007-07a.html.

[15] *Id.*

[16] Funds of Fidelity National Trust & Fidelity Mt. Vernon Street Trust, *Statement of Additional Information*, at 43 (Jan. 29, 2011), *available at* http://fundresearch.fidelity.com/mutual-funds/summary/316145200; *see also* Vanguard World Fund, *Statement of Additional Information*, at B-65 (Apr. 8, 2011), *available at* https://personal.vanguard.com/us/literature/search?searchInput=B5483&search_mode=true.

Foundations organized under Section 501(c)(3) of the Internal Revenue Code must operate exclusively for a charitable purpose and may not intervene in elections in support or opposition to any candidate. This duty precludes a foundation from voting if the vote were on a political decision.

Institutional shareholders do not have the freedom to act as the political agent of their beneficiaries. The law does not permit it.

III. The Corrupt Practices Act is Not Overbroad.

The Corrupt Practices Act, Section 13-35-227(1), MCA, serves the plainly legitimate purpose of protecting shareholders from compelled speech. *See also* Appellant's Brief at 4-8, 29-38 (statute was enacted to prevent corporate corruption of state elections). Moreover, the statute is narrowly drawn to meet that interest, as the shareholder protection interest should be read to implicate only widely held, publicly traded corporations.[17] For the reasons identified above, such corporations are not "associations of individuals" in a constitutionally meaningful sense, their political contributions cannot practically or legally represent the political preferences of individual shareholders, and the "procedures of corporate democracy" cannot remedy these problems. By regulating political expenditures of such corporations, the statute safeguards the shareholders' interests as well as

[17] The statute provides that "[a] corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." Section 13-35-227(1), MCA.

protects the integrity of state elections. The statute does not overburden the rights of this class of corporations and in application exempts most corporations altogether. The statute, therefore, is not substantially overbroad.[18]

Section 13-35-227(1), MCA, should be read narrowly to exclude non-profits that are not established or financed by for-profit corporations, Subchapter S corporations, and LLCs that are taxed as partnerships.[19] Unlike large for-profits, these corporations may have particular political views that, if voiced, will contribute to "the 'open marketplace' of ideas protected by the First Amendment." *Citizens United*, 130 S. Ct. at 906. Indeed, non-profit corporations are often formed specifically to "advance particular ideological causes shared by all members,"[20] while dissenting shareholders in a small corporation likely are protected by corporate bylaws. They also can receive additional protection by amending their corporate charters to treat any political contributions as distributions to the approving shareholders, resulting in capital gains in Subchapter S corporations or reducing membership interests in LLCs.

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[18] *See Broers v. Mont. Dep't of Revenue*, 237 Mont. 367, 373, 773 P.2d 320, 324 (1989) ("Only a statute that is substantially overbroad may be invalidated on its face.").

[19] *See id.* ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld.").

[20] Pollman, *supra* note 8, at 35.

The statute predates laws recognizing these forms of organizations. As noted in Appellant's Brief, Montana's restriction on corporate contributions to political campaigns was originally enacted as part of the Corrupt Practices Act of 1912. Appellant's Brief at 5. Subchapter S, however, was not added to the Internal Revenue Code until 1958.[21] And the first statute authorizing a limited liability company was not enacted until 1977.[22] Accordingly, Section 13-35-227(1), MCA, should be narrowly interpreted to apply to widely held, publicly traded corporations.

The First Amendment burdens on the affected subset of corporations are slight. These corporations may engage in unlimited political speech by forming Political Action Committees ("PACs"), as roughly 1,600 large corporations already do. PACs provide those affiliated with the corporation who *affirmatively seek* to engage in political expression a full opportunity to do so, without compelling non-approving or dissenting shareholders to subsidize corporate political speech.

CONCLUSION

Corporate democracy serves as an important check on the vast power that is enjoyed by corporate management. Its procedures are necessarily limited and

[21] *See* Michael John Matheson, *Shareholder Advances to "Thin" Subchapter S Corporations*, 19 Stan. L. Rev. 628 (1967).

[22] *See* Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure*, Business Tax Stories: An In-depth Look at Ten Leading Developments in Corporate and Partnership Taxation 295 (Foundation Press 2005), *available at* http://www.law.ua.edu/susanhamill/.

suitable principally for the purpose of assuring that the common interests of shareholders are pursued. The complex and ever-shifting structure of shareholder holdings prevents a modern public corporation from being the voice of shareholders on any matter other than these long-term interests. Shareholders who wish to speak through a corporation and institutional investors who seek to faithfully represent the interests of their shareholders and beneficiaries simply face too many practical and legal hurdles to collective shareholder expression on matters of corporate political spending.

Shareholders do not invest in a publicly traded company for the purpose of pursuing a common political agenda. Their right to associate for political purposes is not implicated by Montana's Corporate Practices Act. Shareholders in publicly traded companies are as diverse in their political views as the public at large because they are a fair representation of that public. Montana allows shareholders to make wise financial decisions without surrendering their right to choose what political candidates in Montana to support. Compelled speech is not free speech. Montana's Corrupt Practices Act serves the mandate of the First Amendment by ensuring that when shareholders speak in association on matters of political concern, they do so knowingly and voluntarily.

April 28, 2011

Respectfully submitted,

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I hereby certify that I caused a true and accurate copy of the foregoing Brief of Domini Social Investments LLC, Trillium Asset Management Corporation, Newground Social Investment, Interfaith Center on Corporate Responsibility, Harrington Investments, Inc., The Sustainability Group of Loring, Wolcott & Coolidge, Calvert Asset Management Company, Inc., The Christopher Reynolds Foundation, Inc., and Walden asset management, a Division of Boston Trust & Investment Company as *Amici Curiae* in Support of Defendants/Appellants to be mailed to:

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CERTIFICATE OF COMPLIANCE

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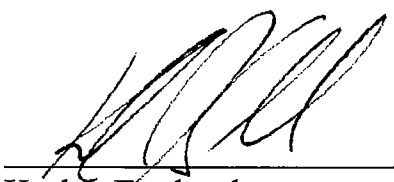

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