No. 11-A762

In the Supreme Court of the United States

American Tradition Partnership, Inc., Champion Painting, Inc., and **Montana Shooting Sports Association, Inc.,** *Petitioners*

v.

Attorney General of the State of Montana, and Commissioner of the Commission for Political Practices, *Respondents*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Montana

Montana's Opposition to the Application for a Stay of the Montana Supreme Court's Decision Pending Certiorari

To the Honorable Anthony M. Kennedy
Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

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Respondents the Attorney General and Commissioner of Political Practices of Montana (collectively, "Montana") oppose Petitioner Corporations' Application to Stay the Montana Supreme Court's Decision Pending their Petition for Certiorari.

The Applicants' request to this Court should be understood for what it is: they ask this Court to invalidate Montana's Corrupt Practices Act--an Act that has safeguarded the republican form of government in Montana for a century from the scourge of political corruption--without a record, briefing, or argument. The Applicants assert that they will suffer irreparable harm from leaving this Act on the books during the regular pendency of this Court's consideration of their petition for certiorari. Yet as the last 100 years have shown, nothing in the Act's ordinary operation necessitates truncating this Court's standard procedures.

In *Citizens United v. FEC*, 130 S. Ct. 876, 558 U.S. 50 (2010), this Court measured against the Constitution a complex scheme of recent federal laws applied to a well-established and repeatedly litigated record of federal elections. In this case, the Montana Supreme Court measured against the Constitution and *Citizens United* a state law of very different origin applied to a detailed yet previously unexamined record of state and local elections. Applying strict scrutiny to the parties before it, the law as administered, and the record at issue, the court determined that the Corrupt Practices Act did not violate the Constitution. Here,

Montana asks only that any review of that law by this Court be given the same consideration on the merits.

STATEMENT

This case concerns the Corrupt Practices Act of 1912, enacted by the People of Montana by ballot initiative. Init. Act. Nov. 1912, § 25, 1913 Mont. Laws at 604. That act prohibited certain business corporations from "pay[ing] or contribut[ing] in order to aid, promote or prevent the nomination or election of any person." *Id.* After legislative clarification in 1979, current law provides that corporations make campaign contributions and expenditures by accounting for and disclosing them through of a separate, segregated fund of voluntarily solicited contributions from shareholders, employees, and members. *See* Mont. Code Ann. § 13-35-227(3); *cf.* 1979 Mont. Laws, ch. 404 at 1011. For expenditures not subject to this transparency requirement, the Corrupt Practices Act 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." Mont. Code Ann. § 13-35-227(1).

The Commissioner of Political Practices administers the Corrupt Practices Act to further its purposes in a minimally burdensome manner. Every group making independent campaign expenditures qualifies as either a political action committee (if it has a primary purpose to influence elections) or an incidental

committee (if it does not have a primary purpose of influencing elections). *See* Mont. Code Ann. § 13-1-101(22) (defining political committee); Mont. Admin. R. § 44.10.327 (political committee types). Each group files the same simple two-page disclosure form, and subsequent short-form expenditure disclosures as appropriate, whether they constitute an unincorporated association of individuals, an incorporated voluntary association, or a business corporation. *See* Mont. Admin. R. §§ 44.10.327 (political committee types), 44.10.405 (statement of organization), & 44.10.531(4) (independent expenditure reporting); *cf.* Form C-2, *available at* http://politicalpractices.mt.gov/content/pdf/5cfp/fillC-2COMPLETE.pdf.

The Applicants are an incorporated voluntary association (Montana Shooting Sports Association, "MSSA"), an incorporated sole proprietorship (Champion Painting, "Champion"), and a foreign corporation registered to do business in Montana (American Tradition Partnership, formerly Western Tradition Partnership, "ATP"). App. 5a-6a. They filed this action on March 8, 2010, and an Amended Complaint dated April 15, 2010. App. Br. 6. The Applicants pleaded, but never moved for, a preliminary injunction. App. 107a. They conducted no discovery prior to moving for summary judgment, and instead presented two affidavits consisting of fewer than six double-spaced pages of conclusory testimony from the principals of MSSA and Champion. App. 11a. Montana

cross-moved on the basis of an extensive record, including depositions of the Applicants' principals, affidavits detailing the function of the Corrupt Practices Act, and expert affidavits from historians, public officials, and campaign finance analysts. *Id.* Plaintiffs did not rebut these facts. *Id.*

The district court granted summary judgment to the Applicants on October 18, 2010. App. 81a. Montana appealed and the Montana Supreme Court reversed. App. 28a. It relied on a close reading of *Citizens United v. FEC*, 130 S. Ct. 876, citing it two dozen times in concluding that "[t]he District Court erroneously construed and applied the *Citizens United* case." App. 8a. In its own application of the case, it considered this Court's careful analysis of the record and the particular burdens imposed by the federal law and regulatory system at issue. App. 8a-10a. The Montana court expressly adopted and applied the strict scrutiny analysis required by *Citizens United*, App. 10a-11a, as well as by the Montana Constitution, App. 21a. The court distinguished *Citizens United* on three primary grounds.

First, the court relied on the Applicants' various admissions that their core political speech was neither banned nor abridged in any material way. MSSA "has been an active fixture in Montana politics and in the legislative process for many years," including in candidate campaigns through its long-established political committee funded by member donations. App. 11a-12a. As the court explained,

the only First Amendment burden MSSA claimed was based on its misreading of laws it has complied with for years. *Id.* & App. 14a. Champion's only claimed First Amendment burdens were based on ignorance of the law: it sought a tax benefit for political expenditures (which is prohibited by other law) and the ability to lend the company's endorsement to campaign speech (which is allowed by the Corrupt Practices Act). App. 12a. Finally, ATP, which presented no evidence of any burden on its political speech, objected primarily to its classification as a political committee subject to full disclosure of its funding sources. App. 13a.

Second, the court held that Montana law as administered imposed no significant regulatory burden. Unlike the "length, complexity and ambiguity" of the federal laws administered by the Federal Election Commission and relied upon in *Citizens United*, compliance with the Corrupt Practices Act only requires "filing simple and straight-forward forms or reports." App. 14a. In contrast to the 33 different types of speech covering 71 distinct entities and thousands of pages of regulations and explanatory materials supporting the federal law's criminal sanctions, Montana's simple forms are backed by civil and administrative enforcement oriented at disclosure rather than deterrence. App. 8a. As a result, the record shows businesses of all sizes are active in Montana politics, ranging from Blue-Cross-Blue-Shield of Montana to the Tri-County Beverage Hospitality association of businesses.

Third, the court recounted the compelling interests that lay behind the adoption of the Corrupt Practices Act, as well as the modern-day realities that continue to support those compelling interests. Those interests include responding to an extraordinary history of political corruption by out-of-state foreign corporations and interests in the years leading up to the aptly-named Act, App. 14a-18a, 22a, maintaining an extraordinarily accessible government in a sparsely populated state, App. 19a-20a, 23a-24a, and preserving citizens' control of and confidence in an elected judiciary, what this Court has held is "a state interest of the highest order," App. 21a, 24a-27a. The Montana Supreme Court did not limit its consideration to history; it also detailed testimony on politics as currently practiced in Montana by candidates, electors, and businesses and other interest groups of all sizes. App. 18a-20a.

The court concluded that the distance between the transparent and accountable Montana politics of today and the dark days of Copper Kings confirmed rather than rebutted the People's compelling interest in the Corrupt Practices Act:

> The question then, is when in the last 99 years did Montana lose the power or interest sufficient to support the statute, if it ever did. If the statute has worked to preserve a degree of political and social autonomy is the State required to throw away its protections because the shadowy backers of WTP seek to promote their interests? Does a state have to repeal or invalidate its murder prohibition if the homicide rate declines? We think not. Issues 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. Clearly Montana has unique and compelling interests to protect through preservation of this statute.

App. 22a-23a. The court entered summary judgment in favor of Montana and against the Applicants. App. 28a-29a.

Two weeks after the Montana Supreme Court's decision, the Applicants sought a stay in the Montana Supreme Court. In the absence of any state procedural rule governing a stay of judgment pending review in this Court, Montana argued that the Applicants failed to meet this Court's standards for a stay. Consistent with those standards, the Montana Supreme Court denied the motion for a stay. App. 110a.

ARGUMENT

While the Applicants style their application as one for a stay, the relief they seek is in effect an injunction against enforcement of the Act, as well as a summary reversal. The Applicants have failed to show their entitlement to such extraordinary remedies at this stage of these proceedings. "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below--both on the merits and on the proper interim disposition of the case--are correct." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J.).

Here, a state supreme court has definitively construed and upheld as constitutional a state law that governs only state and local elections. The effect of a stay would be to enjoin enforcement of that law, so the Applicants' request "demands a significantly higher justification" than a stay because rather than "simply suspend[ing] judicial alteration of the status quo," it effectively "grants judicial intervention that has been withheld by lower courts," here the Montana Supreme Court. *Ohio Citizens for Responsible Energy* v. *Nuclear Regulatory Comm'n*, 479 U. S. 1312, 1313 (1986) (Scalia, J., in chambers). To the extent they seek to alter the status quo, the Applicants identify nothing about the continued operation of the century-old law at issue that would make such relief necessary or appropriate in aid of this Court's jurisdiction. *See Turner Broad. Sys. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J.). Moreover, the "normal presumption" that the interim denial of a stay below is correct "deserves even greater respect in cases where the applicant is asking a Circuit Justice to interfere with the state judicial process." *Bateman v. Arizona*, 429 U.S. 1302, 1304 (1976) (Rehnquist, J.).

The Applicants therefore bear a significantly greater burden than usual to establish the elements of a stay: (1) a strong showing that they are likely to succeed on the merits; (2) irreparable injury to them absent a stay; (3) protection of other interested parties from substantial injury; and (4) that, in the balance of

equities, the public interest lies with them. *See Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009); *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J.). Even if the first two elements are met, still "the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 129 S. Ct. at 1762; *see also id.* at 1763 ("courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other") (Kennedy, J., concurring). The propriety of a stay "is dependent upon the circumstances of the particular case," because "the traditional stay factors contemplate individualized judgments in each case." *Nken*, 129 S. Ct. at 1761-62. A stay is an exercise of judicial discretion, and a "denial of a stay is not a decision on the merits of the underlying legal issues." *Indiana State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275, 2276 (2009) (*per curiam*).

In no event should the Court entertain the Applicants' request for a summary reversal. They cite no authority for such a rare form of relief, and their leading authority for a stay does not support summary disposition. App. Br. at 24, *citing Jaffree v. Board of School Commiss'Rs of Mobile County*, 459 U.S. 1314 (1983) (Powell, J.) (granting stay); *cf. Wallace v. Jaffree*, 472 U.S. 38 (1985) (deciding case on the merits after full briefing and argument). This Court traditionally and properly has accorded due respect for its sister supreme courts in the states, all of whom are also "bound by Oath or Affirmation, to support this Constitution."

U.S. Const. art. VI, ¶ 3. In the past decade it appears that this Court has summarily reversed state supreme courts only a handful of times, and almost always on grounds of criminal or civil procedure rather than the substantive unconstitutionality of state laws. *See, e.g.*, *Sears v. Upton*, 130 S. Ct. 3259 (2010) (criminal ineffective assistance of counsel claim); *Presley v. Georgia*, 130 S. Ct. 721 (2010) (criminal public trial claim); *Michigan v. Fisher*, 130 S. Ct. 546 (2009) (criminal unreasonable search and seizure claim); *CSX Transport v. Hensley*, 129 S. Ct. 2139 (2009) (civil jury instruction under federal tort law); *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (criminal prosecution's failure to disclose favorable evidence). This case does not fall into that extraordinarily narrow category.

I. ANY MERITS DETERMINATION SHOULD BE BASED ON FULL BRIEFING AND REVIEW OF THE RECORD.

The Applicants' claim that the decision below is "an obvious, blatant disregard of [the court's] duty to follow this Court's decisions." App. Br. 2. That can only be true if the facts are irrelevant. Montana is mindful, in view of the Applicants' exclusive reliance on *Citizens United*, that the Constitution of the United States is the supreme law of the land. U.S. Const. art. VI, ¶ 2. Montana is equally mindful, in view of the same, that a court's authority is defined as the "judicial power" of applying that law to the case before it. U.S. Const. art. III, § 2.

The Applicants make an extraordinary request not just for an injunction against, but for summary invalidation of, a century-old law in the absence of full briefing and review of the record. App. Br. 2. Yet, as the Court in *Citizens United* recognized, facts matter.

First, the record shows the Act imposes far different obligations, and therefore affects corporate speech in a far different manner, than the federal law at issue in *Citizens United*. Notably, the Corrupt Practices Act merely requires political committees regardless of corporate status to file a simple initial two-page disclosure form and short-form disclosures of subsequent expenditures. In contrast, the Federal Election Commission had "adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975." *Citizens United*, 130 S. Ct. at 895. This complicated regulatory scheme "force[d] speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Id.* at 889. As a result, "smaller or nonprofit corporations cannot raise a voice" under the federal regime. *Id.* at 907. This is demonstrably false in Montana, as the unrebutted record establishes. The federal law in *Citizens United* also constituted "an outright ban, backed by criminal sanctions" as a felony. *Id.* The Commissioner's priority, as reflected by Montana laws, is disclosure and not sanctions. Such disclosure, an

undisputedly important interest, is made less not more burdensome through the use of a corporate segregated fund.

Second, the Montana Supreme Court rejected the Plaintiff Corporations' challenge to the Act by detailing the distinct history of corruption, and nature of political discourse, in Montana. Geographic, economic, and demographic factors "make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government," App. 22a, and give rise to interests in preserving the integrity of its electoral process, App. 23a, encouraging full participation of the Montana electorate, *id.*, and protecting and preserving its system of elected judges, App. 24a. In *Citizens United* "[t]he Government d[id] not claim that [corporate independent] expenditures have corrupted the political process in those States" without Corrupt Practices Acts. *Id.*, at 909. With respect to the circumstances in Montana before its Corrupt Practices Act, Montana does make that claim, and it deserves a full hearing before any review by this Court.

Applicants treat this Court's conclusion "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," *Citizens United*, 130 S. Ct. at 909, as an axiom rather than a claim about how politics actually works. Their suggestion that "only quid-pro-quo corruption [i.e., bribery] can justify restricting core political speech,"

App. Br. 2, appears to be inconsistent with this Court's more recent decisions. *See Bluman v. Federal Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011) (protecting the overall process of democratic self-government is a compelling state interest sufficient to ban campaign expenditures), *affirmed*, No. 11-275 (Jan. 9, 2012); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 561 U.S. __ (2010) (protecting national security is a compelling state interest sufficient to ban political advocacy coordinated with designated terrorist groups). There is no need, however, for this Court to enjoin operation of the Montana statute, let alone summarily reverse the Montana Supreme Court decision, based on that court's discussion of the corruption issue. The Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (*per curiam*).

The scant burden the Act imposes on the three Applicants makes this case materially different from *Citizens United* and justifies rejection of their application independent of the broader issues implicated by this case. As to the Applicants themselves the Corrupt Practices Act requires no additional filing or reporting beyond what is required as a matter of disclosure for any person making independent expenditures. This means that for a closely held corporation like Champion the Act operates as no more than a disclosure law of the sort this Court has long upheld. The same is true with respect to MSSA, a nonprofit political advocacy corporation, which has been politically active for many years

unrestricted by the Act. App. 11a-12a. So it is also true with lead petitioner ATP, a 501(c)(4) "nonprofit ideological corporation," App. Br. at 5, which in the absence of the Act could serve as a conduit "for anonymous spending by others." App. 13a. As its solicitation to prospective donors revealed, ATP sought to serve as precisely that sort of conduit:

> There's no limit to how much you can give. As you know, Montana has very strict limits on contributions to candidates, but there is no limit to how much you can give to this program. You can give whatever you're comfortable with and make as big of an impact as you wish.
>
> Finally, we're not required to report the name or the amount of any contribution that we receive. So, if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible. *The only thing we plan on reporting is our success to contributors like you who can see the benefits of a program like this. You can just sit back on election night and see what a difference you've made.*

App. 13a. This is cause for enforcement of, not an injunction against, the Act.

Finally, the Applicants' analogy of the Montana Supreme Court's careful analysis and application of *Citizens United* to a lone Alabama district court judge is inapt. App. Br. at 24, *citing Jaffree v. Board of School Comm'rs of Mobile County*, 459 U.S. 1314 (1983) (Powell, J.). Far from claiming that "the United States Supreme Court has erred" as did the judge in *Jaffree*, 459 U.S. at 1315, the state supreme court applied *Citizens United* by its own terms. The only member of that court to disagree with, rather than distinguish, *Citizens United* wrote a lone dissent. App. 75a ("I do not agree with it . . . the notion that corporations are disadvantaged

in the political realm is unbelievable") (Nelson, J., dissenting). Moreover, in the less settled area of campaign finance regulation, Montana is free to offer, and the Court is "free to accept," new arguments and evidence to support a Corrupt Practices Act that has not been the subject of judicial review until this case. *Citizens United*, 130 S. Ct. 876, 924 (2010) (Roberts, C.J., concurring).

II. THE APPLICANTS HAVE NOT SHOWN IRREPARABLE HARM.

The Court need not reach the questions raised above, however, because the Applicants' "likelihood of success on the merits need not be considered . . . if [they] fail[] to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto*, 463 U.S. 1315, 1317 (1983) (Blackmun, J. in chambers). In just half a page, relying on a bare assertion of an unestablished violation of their rights, the Applicants fail to identify any harm resulting from the longstanding enforcement of the Corrupt Practices Act. The irreparable harm the Applicants claim is premised on an inability to speak that has no basis in the record. Throughout the case the Applicants were unable to evince any cognizable First Amendment harm beyond the *de minimis* task of filing disclosures consistent with the holding of *Citizens United*. *See Id.*, 130 S. Ct. at 916. What they have shown is far below the irreparable harm standard.

In practical terms, all any of the three Applicants have to do to engage in independent expenditures consistent with the Corrupt Practices Act is identical to

what they would need to do for disclosure purposes even if their constitutional claims were successful. MSSA has done exactly this for more than a decade. App. 11a-12a, 14a. Champion can do the same, either by having its sole principal account for the source of his expenditure, or by endorsing his own speech as that of Champion--which as such would require no disclosure at all. App. 12a. ATP can too, but has not because of its core purpose to influence Montana elections by concealing the identities of its principals and funding sources. App. 13a.

III. SUSPENDING THE CORRUPT PRACTICES ACT WOULD IMPOSE SUBSTANTIAL HARM ON OTHERS.

On the other side, the relief the Applicants seek would visit an irreparable injury upon Montana, and more precisely upon Montanans themselves. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J.). That is especially true here, where an injunction would "throw away [the Corrupt Practices Act's] protections," surrendering "a degree of political and social autonomy" it has enjoyed for nearly a century. App. 22a.

Over that century, and during the current election year, voters, political committees, candidates, and corporations and their shareholders have come to rely on the simple framework the Corrupt Practices Act provides for accounting and

disclosure of corporate campaign expenditures. Voters, through the mediation of the press and online databases, rely on the fact that corporations engaged in campaign speech must disclose more than a veil of shifting shell corporations, *e.g.* App. Br. at 3 (change of ATP's name), but also account for the principals doing the funding. "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages," *Citizens United*, 130 S. Ct. at 916, and is effective in this case only to the extent the lead Plaintiff complies with the Act. Political committees and candidates similarly depend on the disclosure facilitated by the Corrupt Practices Act, so that they may raise and spend money confident that their supporters and opponents play by the same rules of transparency. Corporations and their shareholders have similar reliance interests, so that those corporate principals who do choose to participate in campaigns can do so transparently and voluntarily, and those who do not need not fund speech with which they disagree.

IV. THE EQUITIES TILT AGAINST THE APPLICANTS.

For all the urgency underlying the Applicants' demand for relief, no one, apparently, had challenged the century-old corporate expenditure law of the Corrupt Practices Act until this case was filed just two years ago. The balance of equities weighs heavily against such latecomers to a long-established law. *See Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984)

(Rehnquist, J.) (granting stay of decision declaring unconstitutional a law "that has been on the books for more than 120 years").

After filing their Complaint in March 2010, the Applicants made no attempt to secure a preliminary injunction before either the primary or general elections that year. When they did prevail before the district court, the Applicants postponed entry of judgment--and Montana's time to appeal--for nearly four months with an unprecedented post-submission motion to dismiss their lead plaintiff ATP, calculated to erase its unfavorable conduct from the record on appeal. Docs. 59-77. Only now do the Applicants seek to suspend enforcement of the Corrupt Practices Act in an election year for the first time in its century-long history. The equities therefore weigh in favor of the continued operation of the Corrupt Practices Act, which "is in itself a declaration of the public interest" by the People of Montana. *Virginian Ry. v. System Federation No. 40,* 300 U.S. 515, 552 (1937).

The last seven pages of the application is based on a false assertion that the Commissioner is enforcing "the Ban" in a separate proceeding. App. Br. 28-35. That case, a legal challenge brought by ATP to the rest of Montana's disclosure laws and in which the Commissioner has counterclaimed with a campaign finance disclosure enforcement action, was not before the Montana Supreme Court and is not before this Court. The administrative decision referred to in those pages

expressly disclaims any enforcement of the Corrupt Practices Act, and was introduced in this case only in opposition to the Applicants' motion to dismiss its lead Plaintiff. The resulting disclosure enforcement action, including ATP's asserted constitutional defenses against it, remains pending in the same court that heard this case. *See Western Tradition Partnership v. Gallik*, 2011 Mont. Dist. LEXIS 83 (Mont. 1st Dist., Cause No. BDV-2010-1120, Dec. 14, 2011).

CONCLUSION

The Corrupt Practices Act of 1912, and the judgment of the Montana Supreme Court, should stand pending this Court's resolution of Applicants' petition for certiorari and any subsequent review by this Court on the merits.

Respectfully submitted this 15th day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that the original and two copies of Defendants' Response to Application to Stay Montana Supreme Court Decision Pending Certiorari was sent via email and via prepaid UPS Overnight courier service on February 15, 2012, to:

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I further certify that one copy of Defendants' Response to Application to Stay Montana Supreme Court Decision Pending Certiorari was sent via email and via First Class Mail on February 15, 2012 to:

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