No. 11-1179

IN THE

Supreme Court of the United States

AMERICAN TRADITION PARTNERSHIP, INC., F.K.A. WESTERN TRADITION PARTNERSHIP, INC., ET AL., PETITIONERS

v.

STEVE BULLOCK, ATTORNEY GENERAL OF MONTANA ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF ESSENTIAL INFORMATION AS *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. HAGER
Counsel of record

808 Nevada St
Northfield MN 55057
robhager@hotmail.com
(507) 645-8938

CURRY & TAYLOR ♦ (202) 393-4141

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INTEREST OF *AMICUS CURIAE*

With the parties' consent, Essential Information files this brief in opposition to writ of certiorari.*

Essential Information is a non-profit, tax-exempt organization involved in projects encouraging active citizenship, including by providing information on topics important to the public, the media and policy makers. Corporate purchase of elections short circuits the connection between citizens and their government, reducing the value of information in policy making. *Amicus* is interested in this case as an opportunity to both provide essential information on an important public policy and to make information itself more meaningful in policy-making.

SUMMARY OF THE ARGUMENT

Eleventh Amendment immunity bars the Supreme Court from hearing a private suit against a state without its consent. Montana has not given its consent, and Congress has not authorized this suit by 14th Amendment abrogation of Eleventh Amendment immunity.[1] Petitioners have only two other potential arguments to support jurisdiction for their Petition.

* The parties were notified ten days prior to the due date of this brief of the intention to file and have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amicus curiae*, its members, or its counsel made such a monetary contribution.

1 The Amicus Brief of The Eleventh Amendment Movement (TEAM) ("TEAM Br.") has provided historical background on the development of Eleventh Amendment immunity that is incorporated by reference to avoid duplication. See TEAM Br. I.B; pp. 1-2 notes 1&2.

1. An historical exception to 11th Amendment immunity, "the *Young* fiction," *Idaho* v. *Coeur d'Alene Tribe of Idaho* , 521 U. S. 261, 270 (1997) (Kennedy, J.) finds no textual support in the Constitution. See *Ex Parte Young*, 209 U.S. 123 (1908). There is no valid basis for distinguishing this private suit against Montana from the Court's recent decisions applying Eleventh Amendment immunity. Part I.A. As interpreted in *Coeur d'Alene Tribe, Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and other cases the "rote application" of the *Young* fiction would not apply to this case. Congress has implied it should not. Because the integrity of a state's elections affect Montana's core sovereign legitimacy, careful consideration of interests at stake in this suit precludes *Young* jurisdiction over its officials when this suit is actually against Montana. Part I.B

If the *Young* exception applies in this case, it should be redefined to conform to the text of the Constitution and the Court's more recent doctrinal developments that have brought state immunity from private suit into line with the constitutional text and design. The "rote application" of the fiction that a suit is not against the state itself, although against the highest official of an arm of the state, when acting in a purely official capacity to carry out state law, and the suit impacts state law and policy, should be, if it has not already been, abandoned as the unnecessary, textually unsupported, historical artifact that it has become. Part II.

2. A second court-made exception for "federal question" appeals from state courts, relying on a distinction between suits entertained under the Supreme Court's original jurisdiction and its appellate jurisdiction over appeals from state courts, also finds no textual basis in the Constitution. This remnant of "federal question" abrogation of immunity is inconsistent with over a century of precedent, and rests on fictional consent, while it directly violates the text of the 11th Amendment and lacks persuasive precedent in point. Part III.A.

The Tenth Amendment guards against insertion of unstated exceptions in constitutional text in order to expand the jurisdiction of this Court at the expense of the sovereign states, without support from either elected branch of the United States. Part III.B. The Supreme Court is equally bound as are other federal courts, Congress or the executive branch, to comply with the fundamental principles of Eleventh Amendment immunity without creating, on the basis of discarded policies, see Part IV, exceptions for itself in derogation of the Constitution.

ARGUMENT

I. ELEVENTH AMENDMENT IMMUNITY HAS UNDERGONE DOCTRINAL CHANGE THAT PRECLUDES THE *YOUNG* FICTION FROM APPLYING TO THIS SUIT

A. Eleventh Amendment immunity as charted in *Alden* and *Federal Maritime* allows no textually unsupported exception

Alden v. Maine, 527 U.S. 706 (1999) and *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002) provided recent opportunity to explore the wider contours of Eleventh Amendment immunity in light of the "fundamental structural importance" of *Hans v. Louisiana*, 134 U.S. 1 (1890). *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 44 (1989) (Scalia, J., concurring in part and dissenting in part). These cases teach that the original immunity doctrine, prior to the Civil War Amendments,

- recognized that the 11th Amendment exemplifies a broader rule of immunity from suit, beyond the text itself, that inheres in the "constitutional design;"

- precluded any federal question basis for jurisdiction over private claims against a non-consenting state; and

- foreclosed any source of jurisdiction for private breach of state immunity whether contained elsewhere in the Constitution or statute.

Alden held that Congress, under Article I, could not commandeer a state court to enforce federal law by authorizing private state court suits against the state. *Federal Maritime* held that an independent federal agency could not entertain a private party's proceeding against a state in an Article II adjudication even though it involved prospective relief. Both cases found that the alternative of a direct suit by the United States against the state, and other available means, sufficed for enforcing federal supremacy interests. Part I.B.3

If certiorari were granted here, it would be the Supreme Court under Article III, not Congress, or the executive branch, that would unconstitutionally allow "a private party to haul a State in front of" a tribunal, 535 US 760 n.11. This Court has identified no textual basis for distinguishing itself from the Article I (*Alden)* and Article II (*Federal Maritime*) contexts in which it has found Eleventh Amendment immunity to absolutely preclude such jurisdiction over non-consenting states. No factors present here distinguish this case against Montana from *Alden* and *Federal Maritime*.

1. *That* Alden *presented a statutory claim, whereas Petitioners invoke the Fourteenth Amendment makes no relevant difference*

The Eleventh Amendment clarified that this Court lacks any authority under Article III to hear any private suit against a non-consenting state. When the Supreme Court laid claim to such power in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) it was emphatically denied. TEAM Br.I.A

Congress acquired authority under the Fourteenth Amendment to provide remedies for its violation, including the remedy of abrogating Eleventh Amendment immunity. The Supreme Court supervises this abrogation authority. TEAM Br I.B.1&2. It does not exercise that authority. "It is not said the *judicial power* of the general government shall extend to enforcing … rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. *It is the power of Congress which has been enlarged.*" *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (citation omitted).

Plaintiffs in *Alden*, as in *Seminole Tribe*, invoked an abrogation statute, but their claim was grounded in Article I, not the 14th Amendment. Here petitioners recite a claim under the 14th Amendment, but do not, and cannot, cite to a statute abrogating state immunity. Since both 14th Amendment and statutory abrogation legs are necessary for Petitioners' suit against the state to stand, it makes no difference which of the two prerequisites to suit against Montana is missing here.

The only other relevant text of the Constitution from which such a distinction between statute and Constitution could potentially be drawn is the Supremacy Clause. But the Supremacy Clause provides no basis for elevating constitutionally-based claims as any more enforceable than "laws" or "treaties." "[T]he Framers adopted the very same mechanism for enforcing treaties, federal statutes, and the Constitution itself." Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L Rev 1082, 1108 (1992). And "neither the Supremacy Clause nor the

enumerated powers of Congress confer authority to abrogate the States' immunity from suit in federal court." 527 U.S. 732-33. Part IV.B.

2. *That* Alden *involved an action for damages, whereas Petitioners seek a declaratory judgment makes no relevant difference*

Petitioners would argue that their declaratory judgment action seeks equitable prospective relief, bringing this suit within "the *Young* fiction." There is no textual basis for drawing a distinction between suits in law or equity for enforcing Eleventh Amendment immunity. The text expressly bars "any suit in law or equity." A declaratory judgment, though an action in law, shares features of both.

This Court has held, "[t]he propriety of issuing a declaratory judgment may depend upon equitable considerations." *Green v. Mansour*, 474 U.S. 64, 72 (1985). But as held in *Federal Maritime*, 535 U.S. 765, "sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief," such as the declaratory judgment sought in the present case. *Federal Maritime* thus hobbled one of the legs on which *Young* stands.

B. Erosion of the "rote application" of *Young* makes it inapplicable to this case

Edelman v. Jordan, 415 U.S. 651 (1974) began the retreat from *Young* where "payment of funds from the state treasury" was threatened. Going beyond *Edelman*, the Court more recently denied equitable relief on other grounds. While the Court has declined

to overrule *Young* by word, see e.g. *Seminole Tribe*, 517 U.S. 71, n.14, *Coeur d'Alene Tribe*, 521 U. S. 269, dissents allege that it is doing so in deed.

Young is still applied when a case "parallels the very suit permitted by *Ex parte Young* itself," in the area of state utility regulation, *Verizon Maryland, Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 649 (2002) (Kennedy, J. concurring). But the doctrine has been eroding in two major areas which preclude its application to this case against Montana.

One line of authority asks whether Congress has chosen to deny *Young* jurisdiction. *Seminole Tribe*, 517 U.S. 75-76 & n.17, found Congress' statutory remedies implied rejection of *Young*. Justice Souter dissenting in S*eminole Tribe*, 517 U.S. 102, observed: "To reach the Court's result, it must ... displace the doctrine of *Ex parte Young*." Justice Souter read Congress' intention as allowing a *Young* injunction. Thus both majority and minority accepted that Congress determines when *Young* applies.

Verizon Maryland involved a hybrid regulatory adjudication under federal law by a state agency subject to federal appeal. The Court considered whether acts of Congress "display any intent to foreclose jurisdiction under *Ex parte Young*" or "implicitly exclud[e] *Ex parte Young* actions." 535 U.S. 635, 647. "Only after determining that Congress had not done so did the [*Verizon Maryland*] Court conclude that the suit could go forward under *Ex parte Young*." *Virginia Office*, 563 U.S. ___ (2011) n.3 (Roberts, C.J. dissenting).

The presumption that *Young* is available unless Congress implies otherwise is overcome in this case by Congress' own restriction of corporate independent expenditures in line with Montana's law. Such federal law "implicitly exclud[es] *Ex parte Young* actions" in this field of election integrity that Congress either no longer occupies (federal elections), or never did (state elections).

Another line of authority refuses to enforce *Young* when suit is actually against the state. In *Coeur d'Alene Tribe* Justice Kennedy opens his discussion that redefines *Young* by saying: "Of course, questions will arise as to [*Young*']s proper scope and application." 521 U. S. 269. Contrary to the rote application of *Young*, Justice Kennedy would not "proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity.... Application of the *Young* exception must reflect ... respect for state courts instead of a reflexive reliance on an obvious fiction." 521 U. S. 270.

Alden went even further to limit the "obvious fiction" on which *Young* is premised, saying: "suits against state officers are barred ... if the suits are, in fact, against the State." 527 U.S. 706. "*Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the State." *Verizon Maryland*, 535 U.S. 649 (Kennedy J., concurring). "The [*Young*] doctrine...does not apply when the state is the real, substantial party in interest," confirms *Virginia Office*, 563 U.S.___, ___ (2011) (internal quotes and citations omitted).

Cases seeking to enjoin individual office holders acting under color of, but not under the clear commands of, state law may not actually be directed against the state's core sovereign interests. But this suit to block a law enacted by Montana's people and legislature, supported by its governor, enforced by its agency, defended by its attorney general, upheld by its Supreme Court, and protective of Montana's republican legitimacy is, "in fact, against the State" of Montana. It is not against officials acting in their individual capacity on matters peripheral to sovereign interests. In the words of Justice O'Connor, writing separately in *Coeur d'Alene Tribe* for herself, Justices Scalia and Thomas, "it simply cannot be said that the suit is not a suit against the State," 521 U.S. 296, where, as here, named state offices and officials are charged with no more than an intention to properly carry out their duty to enforce a state law actively supported by all branches of Montana's government.

Justice Souter, dissenting, accurately observed that "[*Coeur d'Alene Tribe*] pierces *Young's* distinction between State and officer" and "would redefine the doctrine … to a principle of equitable discretion ... at odds with *Young*.." 521 U.S. 297, 306. Justice Souter thus describes the redefinition of *Young* that at least four justices of this Court have pursued. Without this change of direction, as Justice Kennedy has put it, "the Eleventh Amendment, and not *Ex parte Young*, would become the legal fiction." 535 U.S. 649.

Justice Kennedy posits the "commonsense observation" that "[w]hen suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing

interest in the litigation whenever state policies or procedures are at stake." 521 U.S. 269. Careful analysis is required to determine when those state interests are sufficient to "pierce[] *Young's* distinction between State and officer." Justice Kennedy suggests several tests counseling rejection of "reflexive" *Young* remedies.

Tests for determining application of *Young* to the present case should be liberally construed in favor of Montana. "*Young* is a fiction that has been narrowly construed," 465 U.S. at 114 n.25, and like any derogation of sovereign immunity is "strictly construed ... in favor of the sovereign." *Sossamon* v. *Texas*, 563 U.S.___ (2011). Each of the following tests should benefit from a presumption in favor of its broadest application. Even if questioned as to whether the state's "arguments in this respect are general and speculative," *Holder v. Humanitarian Law Project*, 561 U.S.___ (2010)(Breyer, J. dissenting), the state's assertions of fact with respect to these factors should receive deference when the state is defending itself against corruption, as here, just as much as when defending against violence, as in *Holder*. This Court has recognized the sovereign's equal "power of self-protection ... whether threatened by force or by corruption.'" 290 U.S. 534.

1. *The financial burden on Montana in this suit is potentially great*

Edelman held "a federal court's remedial power, consistent with the Eleventh Amendment ... may not include a retroactive award which requires the payment of funds from the state treasury." *Coeur*

d'Alene Tribe expanded this consideration to bar an injunction concerning future title to property under which "substantially all benefits of ownership and control would shift from the State." 521 U. S. 282. Justice Kennedy's explanation can be equally applied to this case against Montana's officials: "[I]f [Petitioner] were to prevail, [Montana]'s sovereign interest...would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." 521 U. S. 287.

Requiring Montana to enforce a mandate that "candidates [and their supporters] have the constitutional right to purchase their election," *Buckley v. Valeo*, 424 U.S. 1, 260 (1976) (White, J. dissenting) threatens a financial burden on the state and its taxpayers. The purpose and effect of corporate investment in electioneering expenditures is the access and policy it buys for the private interests which profit from them, to the detriment of the state's Treasury. Virtually all Americans agree: "Corporations spend money on politics to buy influence/elect people favorable to their financial interests." *Hart Research* (2010) http://www.scribd.com/doc/33469294/CitUPoll-PFAW

While the fiscal impact of money in politics also goes to the merits of this suit, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Maryland*, 535 U.S. 646. Under *Edelman* and *Coeur d'Alene Tribe* any significant impact on the Treasury should defeat *Young* jurisdiction, whatever weight this factor might possess when the First Amendment balance is struck on the merits.

The effect on Montana's Treasury could be enormous. One study found that private expenditures to obtain one federal law yielded a 22,000% return on investment in lost government revenues. Alexander, Mazza, & Scholz, *Measuring Rates of Return for Lobbying Expenditures: An Empirical Analysis under the American Jobs Creation Act* (April 8, 2009). http://ssrn.com/abstract=1375082. Wisconsin Democracy Campaign estimated one state's "graft tax" at about $1200 per capita for losses to the state from business subsidies allegedly procured with corresponding electioneering expenditures. http://www.wisdc.org/grafttax2report.php

Even if not *quid pro quo* corruption, money of all kinds in politics takes a toll on a government's and its taxpayers' finances. The exact toll on Montana's Treasury resulting from transfer of its control from voters to election financiers could easily exceed that from Idaho's loss of lands to the Coeur d'Alene Tribe. E.g. Hacker and Pierson, *Winner Take All Politics: How Washington Made the Rich Richer and Turned Its Back on the Middle Class* (2010).

2. *Special sovereignty interests of Montana are at stake in this suit*

As Justice Kennedy said of the state of Idaho, it can also be said here, where "[t]he dignity and status of its statehood," 521 U. S. 287, is compromised by an "action which implicates special sovereignty interests ... [w]e must examine the effect of the [Petitioners'] suit and its impact on these special sovereignty interests in order to decide whether the *Ex parte Young* fiction is applicable." As in *Coeur d'Alene Tribe*, the Petition

here "seeks relief with consequences going well beyond the typical stakes" and "would bar the State's principal officers from exercising their governmental powers." 521 U. S. 281-82

This is not a case seeking, for example, federal preemption of state law affecting the size of federal benefits supervised by a federal regulator. 365 *Douglas v. Independent Living Center of Southern California, Inc.*, __U.S.__ (2012) (Roberts, C.J., dissenting, would deny *Young* remedy). This suit involves the fundamental relationship between the people and their sovereign state and hence special sovereignty interests well-recognized in this Court's decisions.

State voters uniquely possess a right to a "republican form of government." This right, "guarantee[d] to every state in this union" by the Guaranty Clause, Article IV, §4, assures the state's citizens against the dilution of that "consent of the governed" which legitimizes a republican state. State elections undermined by corruption are inherently not "republican," and thereby violate the constitutional guarantee. This Court has recognized that republican govenment requires active protection of elections from corruption. The Court's unanimous decision in *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934), read with *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), suggests that states, even more than Congress, possess untrammeled "power to pass appropriate legislation to safeguard ... an election from the *improper use of money to influence the result.*" This is "a vital particular [of] 'the power of self-protection ... essential to preserve [its] departments and institutions ... from impairment or destruction, whether threatened by

force *or by corruption*.'" 290 U.S. 534, (emphasis added). Cf. *Alden*, 527 U.S. 750-51 ("political accountability ... essential to ... republican form of government").

The Guaranty Clause compels a state to protect its elective processes against the "two great natural and historical enemies of all republics, open violence and insidious corruption." *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884). A state "must have the power to protect the elections on which its existence depends from violence and corruption," the latter being the consequence of "the free use of money in elections, arising," as in our own era of increasing inequality, "from the vast growth of recent wealth." Id., at 657-658, 667. In weighing Montana's sovereignty interests for determining the availability of *Young*, the extent of "impairment or destruction ... by corruption" of the state's sovereignty threatened by this suit is a question for the state legislature, not this Court, if the *Young* exception is to be construed narrowly in favor of the sovereign.

The sovereign interest in "safeguard[ing] ... an election from the improper use of money'" 290 U.S. 534, could hardly be more profound. "No function is more essential to the separate and independent existence of the States and their governments." 400 U.S. 124-25. This sovereign concern was aptly summed up by the Governor of Montana when he said "[t]his business of allowing corporations to bribe their way into government has got to stop." "This is our government and we are not going to allow any corporation to steal it from us." http://www.kaj18.com/news/schweitzer-bohlinger-say-i-166-will-keep-corruption-out-of-politics/

The special sovereign interest described by Governor Schwietzer is at least the equal of the state's interest in title to land under navigable waters involved in *Coeur d'Alene Tribe.* Deference is due this interest when determining whether to intrude upon the sovereignty of the state by displacing 11th Amendment immunity.

3. *Alternative constitutional remedies make an unconstitutional remedy unnecessary in this case*

Justice Kennedy observed that "'the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights. It is difficult to say States consented to these types of suits in the plan of the convention." 521 U. S. 272 (citation omitted). The type of suit to which the states did give their consent "in the plan of the convention" show that the *Young* doctrine cannot be "accepted as necessary" here.

The Court rejects *Young* when alternative remedies can vindicate federal interests. See *Alden,* 527 U.S. 755-57; *Seminole Tribe,* 517 U.S. 71 n.14; *Federal Maritime,* 535 U.S. 743. As Justice Thomas stated: "The only step [the federal government] may not take, consistent with this Court's sovereign immunity jurisprudence, is to adjudicate a dispute between a private party and a non-consenting State." Id. 768 n.19. Aside from Congress' 14th Amendment enforcement powers, the most suitable alternative here is a sovereign plaintiff suit.

"States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the

Federal Government." 527 U.S. 755. Justice Kennedy explains that a suit "commenced and prosecuted against a State in the name of the United States ... differs in kind from the suit of an individual." "Suits brought by the United States itself require the exercise of political responsibility." 527 U.S. 755-56.

For a claim barred by Eleventh Amendment immunity due to special sovereign interests, such as *Coeur d'Alene Tribe* or this case, suit by the United States is the proper remedy. See *Idaho v. United States*, 533 U.S. 262, 271 n.4 (2001). The "political responsibility" required for a suit by the United States is especially suitable for a case, as here, where political questions outweigh the marginally justiciable particularized interest of a private suitor, as shown by weighing the following factors:

- the state's fundamental sovereign interest in a republican form of government, guaranteed solely by the elected branches of the United States government;

- Petitioners cannot assert their own particularized rights here but, as explained in *Citizens United* and *Bellotti*, see p. 33 note 3, must invoke the generalized rights of all voters of Montana, who are politically represented by the state;

- Petitioners assertion of the First Amendment rights of others to obtain an advisory opinion on those rights, e.g. *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 38–39 (1999), employs a narrow attenuated exception to the general rules of standing required for invoking Article III powers; and

- the voters of Montana demonstrate greater interest in their Guaranty Clause right to an election protected from corrupting interests by the challenged law they and their political representatives enacted, than they do in the rights invoked for them by these Petitioners.

If such "political questions," see p. 32 note 3, are to be resolved by the judicial branch rather than the legislative branch as would normally be appropriate, suit should at least be initiated, if not authorized, by a department of the United States that can "exercise ... political responsibility."

II. THE "ROTE APPLICATION" OF *YOUNG* LACKS DOCTRINAL SUPPORT

Ex Parte Young departs from the constitutionally-supported rule that only Congress can abrogate a state's immunity from suit. Justice Scalia provides a textually-supported statement of the rule:

> [W]e have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment ... Second, a State may waive its sovereign immunity by consenting to suit.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670

(1999)(citations omitted). See also *Virginia Office Prot. & Advocacy v. Stewart*, 563 U.S.___ (2011) (Scalia, J.) ("absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State.")

Prior to this concise definition, three justices joined Justice Scalia in mentioning "the clutter" and the need for "cleaning up the allegedly muddled Eleventh Amendment jurisprudence." 491 U. S. 44. Recent decisions have not fully stemmed criticism of Eleventh Amendment immunity jurisprudence as "a hodgepodge of confusing and intellectually indefensible judge-made law."[2]

The Court has made progress on the problem by limiting the "rote" (*Virginia Office* (Roberts, J.)) or "reflexive," (521 U. S. 270 (Kennedy, J.)) version of *Young*. Standing on two legs, one contravening the text of the Constitution ("any suit in law or equity"), and the other an "obvious fiction," id., the rote version of *Young* has outlasted its usefulness. The Court's own §5, 14th Amendment, jurisprudence appropriately denies Congress power to abrogate immunity inconsistent with its textual authority. Incongruously,

2 Gibbons, *The Eleventh Amendment and State Sovereign Immunity*, 83 Colum. L. Rev. 1889, 1891 (1983). See Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033 (1983) ("complicated, jerry-built system that is fully understood only by those who specialize in this difficult field"); Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 Hastings Const. Law Q. 721, 723 (2002) ("No coherent theory ... arises from this bizarre quagmire."); Nguyen, *Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction*, 93 Cal. L. Rev. 587, 595 (2005) ("current mess"); Fruehwald, *The Supreme Court's Confusing State Sovereign Immunity Jurisprudence*, 56 Drake L. Rev. 253 (2007-08).

under the rote version of *Young*, some justices claim the same power denied Congress, without textual support. The Court now divides between justices willing to apply an admitted fiction, allowing rote abrogation of immunity if a suit seeks prospective relief and names officials as individuals, and justices who, as characterized by Justice Souter, 521 U.S. 297, 306, would "redefine the doctrine" to prohibit suits "in fact, against the State," whoever the suit names.

The existence of "special sovereignty interests" distinguishes this case from *Virginia Office*, the only significant decision in which the Court applied *Young* or discussed 11th Amendment issues at any length since *Federal Maritime*. Detailed consideration of Virginia *Office* reveals that the rote application of *Young*, though perhaps convenient, is unnecessary.

Virginia Office involved a federally supported investigation of patient deaths in a state hospital, not fundamental sovereignty interests. There was no suggestion of a state policy to kill patients and hide the evidence. *Virginia Office* was more akin to court-assisted civil discovery against errant hospital employees.

The state-agency plaintiff's investigation was not aimed at high policy-implementing officials such as those sued here. The *Virginia Office* Court heard "no argument that the relief sought in [*Virginia Office*] threatens any similar invasion of Virginia's sovereignty" as *Coeur d'Alene Tribe*. Accordingly, *Virginia Office*, unlike this case, arguably fell outside the rule that "[t]he [*Young*] doctrine...does not apply when the state is the real, substantial party in interest"

and thus required no fictional disguise for a suit actually against a state. Hence the Court was "satisfied that [*Young* jurisdiction] does not offend the distinctive interests protected by sovereign immunity."

Justices Kennedy and Thomas concurred that Young jurisdiction would not violate "special sovereignty interests," but upon more "careful consideration" than undertaken by the principal opinion. Two dissenting Justices, Roberts and Alito, disagreed with that result, but not with the concurrence's closer consideration of sovereignty interests. Justice Roberts explained that "refusing to extend *Ex parte Young* to claims that involve "special sovereignty interests," the Court in *Coeur d'Alene Tribe* warned against a rote application of the *Ex parte Young* fiction." Half of the justices voting in *Virginia Office* agreed that the Court should closely analyze the state's "special sovereignty interests," and avoid a "rote application" of *Young*.

The 2-2 split on the answer such a "careful consideration" should yield indicates how close the question of "special sovereignty interests" was for the four *Virginia Office* justices who reject rote application of *Young*. In view of the substantial grounds for raising the bar of immunity in *Virginia Office*, discussed below, those justices should not consider Montana's vastly more weighty "sovereign interests" threatened in this case even a close question.

In making the inquiry that Chief Justice Roberts advocates for limiting "*Young*'s fiction," Justice Kennedy noted that "the statutory framework in [*Virginia Office*] is unusual in that it vests a state

agency itself with federal rights against the State." 563 U.S.___ (2011) (concurring). The majority also acknowledge that the Court had "never encountered such a suit before." 563 U.S.___ (2011) This unlikely case occasioning a state suing itself was the product of a "body-snatcher" legislative scheme for operating a federal program through the nominal persona of a dedicated state agency. Justice Kennedy's reference to this arrangement suggests a valid alternative ground for deciding *Virginia Office*.

Although a state agency in form, with plaintiff's governing body appointed by the state, its budget was provided by the federal government, and it operated pursuant to federal law. A functional analysis could have concluded that the agency's suit was either by the United States, or a state, or both. The 11th Amendment does not bar suits by U.S. sovereign plaintiffs. This hybrid sovereign's suit against its own member state – though unusual – fits comfortably within the sovereign plaintiff exclusion.

Virginia Office presented an unusual convergence of all four major strands of legitimate definitional exclusions and constitutional exceptions from Eleventh Amendment immunity. In addition to the exclusions discussed above for a suit, 1) arguably against individuals and not against the state, and 2) brought by a sovereign plaintiff, other arguable grounds included the 3) state consent and 4) 14th Amendment abrogation exceptions.

Congress authorized the *Virginia Office* suit, clearly intending to abrogate the states' immunity. Congress plausibly acted under the 14th Amendment.

Agency powers were designed to protect the developmentally-disabled, a population that has suffered discrimination. Exploring this exception would have entailed analysis whether safeguarding the equal protection of this class of citizens enforced valid 14th Amendment rights.

The fourth justification can be analyzed within the framework of waiver doctrine. As Justice Kennedy suggested in *Wisconsin Dept. of Corrections v. Schacht,* 524 U.S. 381, 400 (1998), waiver of state immunity by lawyers in federal court is doctrinally undeveloped. *Virginia Office* fell within the scope of this developing doctrine. As Justice Kennedy explained, "state law must authorize an agency or official to sue another arm of the State. If States do not wish to see their internal conflicts aired in federal court, they need not empower their officers or agencies to sue one another in a federal forum." He also points out that federal abstention would preclude misinterpreting state law by federally constructed waivers.

Because the legislature could enact, or state courts interpret, state law to foreclose suit against the state in federal Court, "*Young*--a court-made doctrine based on convenience, fiction, or both," Justice Kennedy concludes, "poses no serious affront to state sovereignty in light of the options available to the State." To the extent this concurrence relies on waiver, or the other three textually-supported factors, it rests on constitutional grounds.

Virginia Office illuminates a potential redefinition of the *Young* fiction as a "confluence of factors" doctrine. Such an application of *Young* would

find justification for its results not in fiction but within the Constitution. A redefined doctrine would hold that constitutionally legitimate factors may cumulatively reinforce one another to allow suit where no single factor raises the bar of immunity.

Since grounds consistent with the Constitution support *Virginia Office*'s result, it teaches that rote application of *Young* is unnecessary. *Virginia Office* does not in any event support raising the bar of immunity in this suit against Montana since no one of these four constitutionally valid factors is even arguably present here.

Often through decisive concurrences or key dissents, this Court's decisions provide for a fully constitutional Eleventh Amendment immunity doctrine. Justice Scalia's statement of the valid exceptions to 11th Amendment immunity, informed by Justice Kennedy's understanding of when "suits against state officers are barred ... if the suits are, in fact, against the State," Justice Thomas' rejection of any remedy-based exception, and Justice Roberts' deference to careful analysis of "special sovereignty interests" all support denial of certiorari in this suit.

III. THE SUPREME COURT'S APPELLATE JURISDICTION IS AS FULLY BOUND BY "ELEVENTH AMENDMENT IMMUNITY" AS IS ITS ORIGINAL JURISDICTION

A. Eleventh Amendment immunity precludes any exception for an appeal from Montana's Supreme Court

"[N]o private person has a right to commence an original suit in this court against a state … because of the fundamental rule of which the [11th] Amendment is but an exemplification." *Ex parte New York, No. 1,* 256 U.S. 490, 497, 499 (1921).

1. *No textual basis exists for distinguishing this Court's lack of original from its lack of appellate jurisdiction over private suits against a state*

In overturning *Chisholm*, the 11th Amendment made no distinction between the Supreme Court's original jurisdiction and its appellate jurisdiction. It limits the "judicial power" as a whole, which encompasses all heads of jurisdiction. The Court's original jurisdiction is superior to its appellate jurisdiction, which can be stripped by ordinary statute under the Exceptions Clause of Art III. The former cannot. When the text itself makes no distinction between the two, the restriction on the superior original jurisdiction – clearly conceded by the Court - would, *a fortiori*, apply equally to the revocable appellate jurisdiction.

Nothing in the Constitution distinguishes this Court's appellate power over federal suits against States and similar appeals from the highest court of a state. Nor could the text of the Constitution support such a distinction since it nowhere mentions appeals from state courts. The Supreme Court, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816), seized for itself such jurisdiction based on Art. III federal question jurisdiction, which lacks any mention of such appeals.

The same federal question hook that is silent about any appeals from state court will not bear the added weight of authorizing a private appeal against a non-consenting state. The text of the 11th Amendment expressly disallows federal question "power [from] be[ing] construed to" allow such a suit.

2. *Federal question jurisdiction provides no basis for judicial abrogation of immunity*

The theory that federal question jurisdiction supports this Court's hearing a non-consensual private suit against a state, whether on appeal from state court as asserted in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821), or otherwise, has been long undermined by decisions of this Court. This argument violates the 11th Amendment understanding that is more faithful to its text and history set out in *Hans v. Louisiana*, 134 U.S. 1 (1890). *See Union Gas*, 491 U.S. 7 (*Hans* immunizes states from private suits "even where jurisdiction was premised on the presence of a federal question."); *Alden*, 527 U.S. 724 ("*Hans* ... held that sovereign immunity barred a citizen from suing his own State under the federal-question head of jurisdiction");

Seminole Tribe, 517 U.S. 170, (Souter, J dissenting) ("*Hans* Court's broad recognition of immunity in federal question cases"). *Hans* is even more deeply rooted now than when decided over a century ago. This line of authority rejects the concept that federal question jurisdiction can "be construed" to permit breaching a state's immunity from private suit.

Without "circumvent[ing] the constitutional limitations placed upon federal jurisdiction," 517 U.S. 72-73, there is no authority for this Court to entertain this suit. "'[A] suit directly against a [non-consenting] State by one of its own citizens is not one to which the judicial power of the United States extends.'" 491 U.S. at 39 (Scalia, J. dissenting) (citations omitted).

Justice Scalia cited *Cohens* in answer to his rhetorical question, "is [state court] appeal also to be disallowed on grounds of sovereign immunity?" *Virginia Office*, 563 U.S.___ (2011). But Montana's position in this case is distinguishable from *Cohens*. *Cohens* conceded: "[e]ven granting ... that a State cannot be sued in any case; the State is not sued here: she has sued a citizen." 19 U.S. 349-50. Montana neither "commenced" this case in Montana court, nor "prosecuted" it in this Court. *Cohens*' holding would not, on its own facts or reasoning, apply here.

3. *A State's use of state courts does not waive its immunity*

On slight authority, Justice Brennan supported a broader reach for *Cohens* with the theory that "when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues."

McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18, 26-29 (1990). Cf. 517 U.S. 71, n.14. Such a lax, counter-factual consent rule "affronts" the dignity of a sovereign state.

The current "'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." ... [A] State does not consent to suit in federal court merely by consenting to suit in [its own] courts." *College Savings*, 527 U.S. 675 (citations omitted). See *Sossamon* v. *Texas*, 563 U.S.___ (2011). ("a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court.") It follows, "if consent to suit in state court is not sufficient to show consent in federal court, ... then Article III would hardly permit this Court to exercise appellate jurisdiction over issues of federal law arising in lawsuits brought against the States in their own courts." S*eminole Tribe*, 517 U.S. 128 (Souter, J. dissenting).

Waiver was never construed from core governmental activities, like elections, rather than peripheral commercial activities, *Parden v. Terminal R. Co.*, 377 U. S. 184, 196 (1964), nor, more recently, under any circumstances at all. See *College Savings*, 527 U.S. 666, 680-84 (overruling the only precedent for *any* constructive waiver of Eleventh Amendment immunity). Recent decisions require that waiver be express, not implied. Id.

The Court rejects "a waiver presumed in law and contrary to fact," 521 U. S. 274, as employed in *Parden* and *McKesson*. Constitutional text and contemporary

waiver doctrine preclude such judge-constructed exceptions.

This Court has reined in constructive waivers serving "legislative flexibility." 527 U.S. 690. As Madison understood "the compound republic of America" (The Federalist No. 51, at 323, which is a system of "dual sovereignty," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), the judiciary is not immune from the understanding that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Id. 458. The "'element of ... security" [against tyranny] alluded to by Madison: the division of power between State and Federal Governments," *Printz v. United States*, 521 U.S. 898 (1997), applies equally to the judicial power. If the Petition here were granted on the basis of constructive waiver, it could be as truly said in this case, as the Court said of Congress that "to be governed by the [Supreme Court]'s need for "[judicial] flexibility" is to deny federalism utterly." 527 U.S. 690.

4. *This is not a case where a state has tactically forced a taxpayer to initiate a suit in order to contest asserted tax liability*

McKesson, 496 U.S. 26-29, involving a tax alleged to violate the Commerce and Due Process Clauses, applied collection processes requiring advance payment to preserve the right to contest the tax. That procedure deliberately reversed the normal posture of the parties where the state would otherwise be the plaintiff seeking collection of taxes, thereby bringing the state within the rule of *Cohens*. *McKesson* is poorly reasoned, premised on rejected views of federal

question and state waiver, and should be limited to its facts where the state has exerted coercive powers on the plaintiff, specifically to change the litigation posture of the parties, and the suit commenced by the taxpayer against the state is, in fact, the only defense available.

B. The Tenth Amendment bars judicial insertion in the Constitution of any exception allowing the U.S. Supreme Court to hear private suits against a state

"The Tenth Amendment ... prohibits the exercise of powers "not delegated to the United States."" 521 U.S. 906 n.16 (citation omitted). The Constitution lacks express delegation of authority to hear this case on appeal from the Montana Supreme Court; the 11th Amendment intended, by its terms and history, to divide state and federal judicial powers by denying the Supreme Court jurisdiction over this private suit against a state. "[I]n view of the Tenth Amendment ... the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers." *Nevada* v. *Hall*, 440 U. S. 410, 425 (1979).

While considering the Tenth Amendment's role in reinforcing Montana's immunity from Petitioners' suit, the objective of this suit to prevent enforcement of Montana's election integrity law also bears noting. "Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.... No function is more essential to the[ir] separate and independent existence ... than ... their own machinery

for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970).

Justice Kennedy elucidates why this most essential function is invested with immunity.

> ""The principle of immunity from litigation assures the states ... from unanticipated intervention in the processes of government." *Great Northern Life Ins. Co. v. Read*, 322 U. S. 47, at 53. When the States' immunity from private suit is disregarded, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." ... When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." 527 U. S. 750-51.

Justice Kennedy could not address more directly the central issue of this case. Because it directly threatens "political accountability," this is the case for which the 11th Amendment was designed. The Montana Supreme Court has described the "individual interests" that were favored prior to enactment of the legislation challenged here. Corruption of Montana's elections - a national scandal etched in the state's history - just as disregard for Montana's immunity, could undermine its "liberty and republican form of government" by distorting it "in favor of individual interests" and foreclosing accountability to voters.

Justice Kennedy explains: "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.[3] But here the "judicial

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3 These Eleventh Amendment immunity concerns, separating respectively "political process" from "judicial decree," were traditionally addressed through the political question doctrine. Now in apparent decline for separating political from judicial in federal election law, *see* Barkow, *More supreme than court? The fall of the political question doctrine and the rise of judicial supremacy*, 102 Colum. L. Rev. 237 (2002), the doctrine originally arose in the context of federal-state relations and has heightened implications for federalism.

Luther v. Borden, 48 U.S. 1, 47 (1849) held that only elected branches of the federal government – not a federal court – can determine the political question presented there between two competing election processes for legitimizing Rhode Island's government. *Luther* described the political question doctrine as a "boundar[y] which limit[s the Court']s own jurisdiction," as does the cognate Eleventh Amendment immunity doctrine.

Baker v. Carr, 369 U.S. 186, 227 (1962) affirmed "those political question elements which render Guaranty Clause claims nonjusticiable." When, as here, minority entrenchment is not the issue, the doctrine may have greater force in a state-federal context, fortified by the Guaranty Clause, than in the purely federal separation of powers context. James Madison would agree. In his discussion of the third resolution of the Virginia Report of 1799 (http://constitution.org/rf/vr_1799.htm) he warned that "the judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution." He considered it the "duty" of a state – though not of "the other departments of the government" - to object to usurpation by "the judicial department." Otherwise the "delegation of judicial power would annul the authority delegating it," and by such "usurped powers, subvert [the Constitution] for ever, and beyond the possible reach of any rightful remedy." In discharging Madison's "duty," the states are

decree" sought by Petitioners is not even "mandated by the Federal Government." If certiorari were granted

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empowered by the fact, as Justice Frankfurter wrote, "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what [justices] have said about it." *Graves v. New York*, 306 US 466, 491-92 (1939)(concurring opinion).

Elections present quintessential political questions. *Marbury* v. *Madison*, 5 U. S.(1 Cranch) 137, 166, 170 (1803) (holding nonjusticiable any "Questions, in their nature political" and subjects which "are political. They respect the nation, not individual rights.") With respect to the rights at issue here, Petitioners are misled by the dissent below in asserting that "corporations have broad rights under the First Amendment . . . to engage in political speech." Pet. 8. This Court ruled the "question [is] not whether corporations 'have' first amendment rights" like "those of natural persons." The rights protected are the broad informational rights of all "members of the public," *First National Bank v. Bellotti*, 435 U.S. 765, 775-76, 777, 783 (1978), and of all "voters [to] be free to obtain information," *Citizens United v. Federal Election Commission*, 558 U.S.__,__(2010). Such a "generalized grievance" for access to information, if presented by an actual voter, would have been a political question which the voter lacked standing to present and this Court power to hear. *United States v. Richardson*, 418 U.S. 166, 179 (1974). Decision of a political question, resting on nonjusticiable rights that no party did or could have standing to raise, is an advisory opinion.

Under *Marbury*, *Luther*, and *Baker* the United States' interest in this suit must be pursued by a "coordinate political department" possessing, in Article I, §§4&5, a "textually demonstrable constitutional commitment of the issue." The states have independent standing to raise this political question issue in this federalism context. Under Article I and the Guaranty Clause, Congress, not the Court, is empowered to review state election law and "be the judge" of federal elections and the republican nature of state elections.

Eleventh Amendment immunity and political question jurisdictional doctrines thus converge, along with prudential rules, to counsel that the highly political questions in this case should not be resolved through Petitioners' suit against Montana.

here, the Court would infringe sovereign dignity without support from either elected department.

The Court initiated this controversy by overturning provisions of Congress' "Bipartisan Campaign Reform Act of 2002," signed by President Bush. Petitioners note, Pet. 25, the President when *Citizens United* was decided took the unusual step of formally urging Congress to correct the decision. The position Petitioners seek to enforce by ignoring the 11th Amendment was not "mandated," but rather opposed by both elected branches.

IV. NO VALID POLICY JUSTIFICATION EXISTS FOR PERPETUATING EXCEPTIONS THAT VIOLATE THE CONSTITUTION

A. Interest in uniformity or convenience does not outweigh the Constitution

Cohens asserted, "if [a State] commences a suit [in its own Courts] against a citizen ... there must be power in this Court to revise the decision of the State Court, in order to produce uniformity in the construction of the Constitution, &c." 19 U.S. 349-50. But *Federal Maritime* rejects "[t]he constitutional necessity of uniformity" argument. Justice Thomas noted that alternative means of enforcement are available, including a direct suit by the United States against a state. *Federal Maritime* discards the "uniformity" exception to Eleventh Amendment immunity even for a subject, maritime affairs, over which Congress has constitutional power to preempt state law, U. S. Const., Art. I, § 8, cl. 3, id., or even if a "suit is an area ... that is under the exclusive control of

the Federal Government." 535 US 767-68. If constitutional support for uniformity cannot justify an exception to Eleventh Amendment immunity, "uniformity" has no relevance to Montana's Tenth Amendment powers over its elections.

This Court commonly reverses decisions without drawing into question its fidelity to constitutional supremacy, although that undermines temporal "uniformity." For centuries prior to Justice Powell's decision in *Pittsburgh Press Co. v. Comm'n on Human Relations*, 413 U.S. 376 (1973) the republic survived without any intimation that the "free speech" essential to a free people included the unreliable kind of paid commercial or political speech primarily motivated by corporate profit-seeking. Some temporary geographical diversity in understanding the Constitution's constraints, if any, on state election finance laws need not raise questions whether state courts interpret conflicting constitutional values in good faith.

Young, 209 U.S. 166, justified suits prohibited by the Constitution as "the most convenient ... way in which the rights of all parties can be ... passed upon." But *Federal Maritime* rejected this rationalization, observing that "our system of dual sovereignty is not a model of administrative convenience,...that is not its purpose." 535 US 769. Madisonian deterrence of tyranny properly ousts administrative values like convenience and uniformity. 535 US 759-60 (2002).

B. The Supremacy Clause did not prospectively nullify the 11th Amendment

Another argument for the *Young* fiction is federal supremacy. In *Green v. Mansour*, 474 U.S. 68, 72, the Court sought to rationalize the *Young* Stripping Doctrine's inconsistency with the Constitution. "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief [under] *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."

Alternatives for enforcing federal law, Part I.B.3, belie the "necessity" for ignoring one part of the Constitution in order to give "life" to another part. In the name of the Supremacy Clause, this Court carved a judge-made exception to the 11th Amendment. The Supremacy Clause makes the Eleventh Amendment supreme, not the Court's textually unsupported *Young* jurisdiction. Resolution of any conflict between the 11th Amendment and the Supremacy Clause would favor the 11th Amendment, which, by following, qualified the Supremacy Clause. A more satisfactory resolution is for both provisions to "live" together. As Justice Kennedy explained, "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." 527 U.S. 732-33.

"The Supremacy Clause merely brings us back to the question... whether laws ... violate state sovereignty

and are thus not in accord with the Constitution." 521 U.S. 898. "When a 'La[w] ... violates the principle of state sovereignty ... it is ... in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such." 527 U.S. 733 (citation omitted). Court rulings are the same as laws.

In any contest between supremacy and state sovereignty, the Constitution has already chosen the winner: for interpretation of federal law, Eleventh Amendment immunity sacrifices some supremacy, uniformity and convenience as lesser values than the dual sovereignty that prevents tyranny. That choice requires honoring Montana's immunity from this private suit.

CONCLUSION

Congress could have abrogated Montana's immunity from this suit. Article II enforcement of federal law could be deployed against Montana in a suit by the United States. But this Court cannot, in contravention of the 11th Amendment, circumvent these constitutional means by which the elected branches may confer upon this Court jurisdiction over a non-consenting state. Contrary fictions have lost doctrinal support. These fictions do not apply in this suit which implicates Montana's essential foundation for its sovereignty, as they did not apply to similar suits.

Respectfully submitted,

ROBERT M. HAGER
Counsel of record

808 Nevada St
Northfield MN 55057
robhager@hotmail.com
(507) 645-8938

APPENDIX:

11th Amendment :

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.