authorization of an abortion pursuant to Pennsylvania's judicial bypass statute.[10] The trial court held a confidential hearing regarding the application on the same day, and the girl testified she had been pregnant for ten weeks.[11] She testified that she had seen a physician who had explained the abortion procedure, the risks associated with it, and the available alternatives of adoption and raising the child herself. The girl testified that, having considered this information, she desired to proceed with an abortion.[12]

A high school senior with average grades, the girl informed the court that she planned to attend college and hoped to become a lawyer.[13] The girl still lived with her mother, on whom she depended for financial support.[14] According to her testimony, she lacked the fiscal means to support a child, and having to care for one would frustrate her educational plans.[15] In her own words, she was simply "not physically, mentally[,] or emotionally ready for this baby."[16]

The minor further testified that she had not attempted to procure her mother's consent for the abortion because she feared that her mother would "throw her out."[17] On further questioning, she revealed that both her brother and her sister had children through unplanned pregnancies and were struggling financially to provide for those children. Her mother was "happy" about those children, she explained, because unlike her, her siblings "were old enough and actually on their own already to have children."[18] Finally, the girl testified that although she knew that agencies could assist her in locating adoptive parents for the child, the abortion provider had not offered her printed materials listing such agencies.[19]

The trial court initially reserved judgment because of the provider's failure to give the girl printed materials regarding adoption agencies, which the court thought Pennsylvania law required.[20] But after the girl reviewed those materials during a recess, the court denied her application, finding that she lacked the requisite maturity and capacity to consent to an abortion, and that an abortion would not be in her best interests.[21]

In its order, the court cited several reasons for its findings. As to the girl's intelligence and experience, the court noted her average high school grades, improper use of English at the hearing, lack of work experience, unfamiliarity with personal finances, and lack of prior significant decision-making.[22] The court further found that the provider's failure to timely furnish printed

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Montana Takes on *Citizens United*

by Edward Greim and Justin Whitworth

From the Montana Supreme Court comes a potential challenge to the United States Supreme Court's landmark decision in *Citizens United v. Federal Election Commission* ("*Citizens United*"). The Supreme Court's 2010 decision ruled, 5-4, that corporations' and labor unions' independent spending in elections is political speech and does not corrupt the political process; therefore, a ban on such spending included in section 203 of the 2002 Bipartisan Campaign Reform Act ("BCRA") could not survive strict scrutiny under the First Amendment.[1]

Relying largely on Montana history, the majority of a divided Montana Supreme Court attempted to distinguish *Citizens United* in rejecting a similar challenge to the Montana Corrupt Practices Act of 1912 (the "MCPA"). The MCPA, the first ballot measure passed in Montana,[2] was characterized by the Montana court's majority as a reaction by the state's small residential population against out-of-state corporations that had historically controlled the state's natural resources, using corporate funds to elect compliant state legislators.[3] Among these natural resources were mining interests, which were controlled by what the court called "Copper Kings." For this reason, the court said, the MCPA requires corporations to make contributions and expenditures through a separate, segregated fund of voluntary contributions from shareholders, employees, and members.[4] Otherwise, corporations are absolutely prohibited from making expenditures or contributions "in connection with a candidate or a political committee that supports or opposes a candidate or a political party."[5] Like the federal independent expenditure ban invalidated in *Citizens United*, Montana's law prohibits corporations from using their own funds to make independent expenditures in candidate elections.

Constitutionality of Montana's Act Challenged

The case, originally styled *Western Tradition Partnership, Inc. v. Attorney General*,[6] was filed in a Montana District Court by three separate corporations operating in the state. The plaintiffs argued that the MCPA violated their free speech rights under the First Amendment and the Montana Constitution.[7] Western Tradition Partnership, Inc., is a "nonprofit ideological corporation,"[8] the Montana Shooting

Sports Association, Inc., is a "nonprofit corporation promoting issues relating to sports,"[9] and Champion Painting, Inc. is a "small, family-owned painting and drywall business."[10] All three corporations sought to make independent expenditures in candidate elections, a category of speech that is prohibited by the MCPA.

These diverse corporate plaintiffs argued that the MCPA presents precisely the sort of corporate independent expenditure ban invalidated by the United States Supreme Court in *Citizens United*.[11] Montana Attorney General Steve Bullock and the Commissioner of Political Practices, on the other hand, argued that the statute was distinguishable from the federal ban at issue in *Citizens United*.[12] The most important distinction, Montana argued, was that *Citizens United* interpreted a federal statute that applied to federal elections, not a Montana statute governing Montana elections.[13] Therefore, they contended, while the *Citizens United* Court might have found a dearth of evidence linking independent corporate expenditures and corruption in federal elections, Montana had an extensive history demonstrating a causal connection between campaign expenditures and wide-sweeping corruption prior to the MCPA's enactment in 1912.[14]

In October 2010, District Court Judge Jeffery Sherlock of Lewis and Clark County granted the plaintiff corporations' joint motion for summary judgment.[15] Observing that "the Copper Kings are a long time gone to their tombs," Judge Sherlock ruled that Montana's ban on corporate expenditures fell under the umbrella of *Citizens United,* failed to pass strict scrutiny, and violated both the federal and Montana constitutions.[16]

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Georgia Supreme Court Strikes Down Ban on Assisted Suicide Advertisements

by Jack Park

In *Final Exit Network, Inc. v. Georgia*,[1] the Georgia Supreme Court unanimously[2] concluded that Georgia's statutory prohibition on advertising or offering to assist in the commission of a suicide was an unconstitutional restriction on free speech protected by both the United States and Georgia Constitutions. The court suggested that the state could have prohibited all assisted suicides instead of just public offers of assistance, leaving a potential opening for the State Legislature to pass a different law.[3]

In 1994, prompted by the activities of Dr. Jack Kevorkian in Michigan, the Georgia Legislature enacted a statute which provides that any person who "publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony."[4] The statute does not affect laws that "may be applicable to the withholding or withdrawal of medical or health care treatment," or laws related to "a living will, a durable power of attorney for health care, an advance directive for medical care, or a written order not to resuscitate."[5]

Issues relating to natural death and the practice of assisted suicide have been the subject of many court decisions both before and after the Georgia Legislature acted in 1994. In 1990, for example, the United States Supreme Court held that the Due Process Clause of the Fifth and Fourteenth Amendments protects the right to refuse unwanted lifesaving medical treatment.[6] The Michigan Supreme Court rejected challenges to the constitutionality of the Michigan assisted suicide law in 1994, opening the door to the prosecution of Dr. Kevorkian for assisting in three suicides.[7] In 1997, the United States Supreme Court held that a Washington state statute that prohibited "caus[ing]" or "aid[ing]" in the commission of a suicide did not violate the Due Process Clause.[8] Then, in 2006, the Court held that an interpretive rule promulgated by the Attorney General of the United States that made it a violation of the Controlled Substances Act for a physician to assist in a suicide by dispensing or prescribing drugs was not entitled to administrative law deference and, therefore, could not override the Oregon Death with Dignity Act.[9]

The Georgia case arose after the 2008 suicide of a fifty-eight-year-old Georgian named John Celmer. According to the indictment, the Final Exit Network is a Georgia corporation that offers "exit guide" services through an internet site and by mail. Celmer, who had cancer but was in remission, contacted the Network by telephone and sent them certain parts of his medical records and a written statement expressing his wish to die. After a review of his case, the Network agreed to assist him. Celmer bought an "exit hood" and, after meeting with one of the defendants, ordered two helium tanks. At the meeting the discussion included "security concerns

31 *Doe*, J-108-2010 at 9.

32 *Id.* at 10-11, 11 n.11.

33 *Id.* at 12, 12-13 n.12. The pro-life amici included the Pennsylvania Family Institute and the Pennsylvania Pro-Life Federation. *Id.* at 12 n.12.

34 *Id.* at 13.

35 *Id.* at 14.

36 *Id.* at 15.

37 *Id.* at 19.

38 *Id.*

39 *Id.* at 20.

40 *Id.* at 22.

41 *Id.* at 21.

42 *Id.* at 22.

43 *Id.* at 4 (concurring and dissenting ops.), *available at* http://www.pacourts.us/OpPosting/Supreme/out/J-108-2010codo.pdf.

44 *Id.* at 3 (majority op.).

45 *Id.* at 4.

46 *Id.* at 4 n.1.

47 *See* Torsten Ove & Marylynne Pitz, *Teen Rights to Abortion in Dispute*, Pittsburgh Post-Gazette (Feb. 18, 2011), *available at* http://old.post-gazette.com/pg/11049/1126272-455.stm.

48 *See* Ertelt, *supra* note 1; *see also* Kerlik, *Abortion Opponents Heartened by Pennsylvania High Court Ruling*, *supra* note 1.

49 *See Ex Parte* Anonymous, 806 So. 2d 1269 (Ala. 2001) (declining to adopt de novo appellate review of maturity and capacity determinations).

50 *See In re* R.B., 790 So. 2d 830 (Miss. 2001) (adopting an abuse of discretion standard of appellate review).

Montana Takes on *Citizens United*

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Montana High Court Reverses and Distinguishes the Case from *Citizens United*

Attorney General Bullock immediately appealed to the Montana Supreme Court. "[T]he issue isn't a matter of overturning *Citizens United*," he argued, "but rather looking at Montana's unique historical circumstances and why people passed the initiative to impose the ban [on independent corporate expenditures.]"[17]

In a December 30, 2011, decision, the court by a 5-2 majority reversed Judge Sherlock and ruled that the MCPA's corporate expenditure ban was, in fact, constitutional.[18] Writing for the majority, Chief Justice Mike McGrath appeared concerned that American tradition was engaged in "a multi-front attack" both on contribution restrictions and "the transparency that accompanies campaign disclosure requirements."[19] Justice McGrath found that this danger distinguished the case from *Citizens United*.

Citizens United could be distinguished, the majority found, on at least two other grounds. First, setting up a Montana PAC is less burdensome than complying with analogous federal law.[20] Second, the risk of corruption from corporate contributions is much greater in Montana than in federal elections.[21] Judge McGrath cited Montana's unique history from the turn of the nineteenth century as well as recent evidence of corporate involvement in Montana ballot measure elections, but did not cite any evidence of actual corruption stemming from recent corporate contributions or expenditures in Montana. Finally, citing canons of Montana's Code of Judicial Conduct, the majority stated that the independence of Montana's judiciary, which is elected, would be imperiled by independent corporate contributions.[22] Montana corporations, Judge McGrath wrote, could "effectively drown out all other voices" by making independent expenditures in judicial elections.[23]

Ultimately, the majority concluded that Montana had proved a compelling state interest—the avoidance of corruption—and that the ban was narrowly tailored.[24] With an eye to the United States Supreme Court, the Montana court agreed emphatically with the Attorney General's argument that *Citizens United* is applicable only to instances that are factually similar involving federal statutes and elections.[25]

One of the two dissenters, Justice Jane Baker, criticized the majority for "inventing distinctions in what I fear will be a vain attempt to rescue [the MCPA]," suggesting instead that the court should have construed the MCPA so that at least its reporting provisions would remain intact.[26] Justice James C. Nelson also dissented, stating that while he "thoroughly disagree[d]" with *Citizens United*, Montana's anti-corruption interests were not so unique among the fifty states to justify a different analysis under strict scrutiny.[27] Montana, he wrote, was not entitled to "a special 'no peeing zone' in the First Amendment swimming pool."[28] Responding at length to the majority's apparent concern that independent corporate expenditures in judicial elections would endanger the independent judiciary, Judge Nelson noted that strict recusal requirements, censure provisions, and other judicial conduct rules could be adopted, but that the state could not constitutionally "censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer."[29] Justice Nelson concluded, "When this case is appealed to the Supreme Court, as I expect it will be, a summary reversal on the merits . . . would not surprise me in the least."[30]

Application to the U.S. Supreme Court

The plaintiffs retained attorney James Bopp, Jr., the architect of the *Citizens United* litigation, and applied to Justice Anthony M. Kennedy for a stay pending certiorari[31] on February 9, 2012.[32] The plaintiffs argued that the Montana Supreme Court's decision was in direct conflict with *Citizens United*, causing irreparable harm, and should, in the public's best interest, be summarily reversed.[33]

Attorney General Bullock responded on February 15, 2012.[34] In its brief, Montana asserted that its supreme court had applied strict scrutiny to the record and had determined based on the facts that the MCPA violated neither the U.S. Constitution nor the Montana Constitution.[35] Not only should the stay be denied, Bullock argued, but the case should not be decided on the merits without full briefing and a review of the record.[36]

Supreme Court Justice Anthony M. Kennedy Grants Stay

Two days later, on Friday, February 17, 2012, Justice Kennedy temporarily stayed enforcement of the ruling[37] until the Supreme Court decides whether to grant or deny certiorari.[38] As a result, corporations may now make independent expenditures in Montana candidate races, although they must truly be independent: Montana's ban on corporate contributions to candidates and PACs, and its ban on coordinated corporate expenditures (i.e., in-kind contributions) remains in effect.

But even if political speech begins to fill the airwaves in the high country of Montana—and even, as the Montana Supreme Court feared, in judicial elections—what of *Citizens United*? Justice Ruth Bader Ginsburg, joined by Justice Steven Breyer, added the following statement to Justice Kennedy's brief memorandum granting the stay:

> Montana's experience, and experience elsewhere since this Court's decision in Citizens United[,] . . . make it exceedingly difficult to maintain that independent expenditures by corporations "do not give rise to corruption or the appearance of corruption." . . . A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, Citizens United should continue to hold sway.[39]

Stay tuned.

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Endnotes

1 Citizens United v. Fed. Election Comm'n, 558 U.S. __ (2010).

2 *See* Jess Bravin, *A Lone Stance on Ad Spending*, Wall St. J. (Oct. 12, 2010).

3 *Id.*

4 *See* Mont. Code Ann. § 13-35-227(3).

5 *See* Mont. Code Ann. § 13-35-227(1).

6 The case is now styled *American Tradition Partnership, Inc. v. Attorney General* because Western Tradition Partnership, Inc. has changed its name.

7 *See* Western Tradition P'ship, Inc. v. Attorney Gen., No. DA 11-0081, 2011 WL 6888567, at *1 (Mont. Dec. 30, 2011).

8 Brief for Petitioners at 5, Am. Tradition P'ship, Inc. v. Bullock, No. 11-A762 (Feb. 9, 2012).

9 *Id.*

10 *Id.*

11 *Id.* at 6.

12 *See* Charles S. Johnson, *Court to Hear Challenge of Corporate*

Spending Ban, Helena Indep. Rec. (Sept. 30, 2010).

13 *Id.*; *see also* W. Tradition P'ship, Inc. v. Attorney Gen., No. BVD-2010-238, 2010 WL 4257195 (Mont. D. Ct. Oct. 18, 2010).

14 *Id.*; *see also* W. Tradition P'ship, Inc. v. Attorney Gen., No. BVD-2010-238, 2010 WL 4257195 (Mont. D. Ct. Oct. 18, 2010).

15 *See* W. Tradition P'ship, Inc. v. Attorney Gen., No. BVD-2010-238, 2010 WL 4257195 (Mont. D. Ct. Oct. 18, 2010).

16 *Id.*; *see also* Jess Bravin, *Judge Strikes down Montana's Ban on Corporate Political Expenditures*, Wall St. J. (Oct. 18, 2010).

17 *See* Charles S. Johnson, *High Court to Decide Fate of State Ban on Corporate Donations*, Helena Indep. Rec. (Sept. 18, 2011).

18 *See* W. Tradition P'ship, Inc. v. Attorney Gen., No. DA 11-0081, 2011 WL 6888567, at *1 (Mont. Dec. 30, 2011).

19 *Id.* at *3.

20 *Id.* at *7.

21 *Id.* at *7-11.

22 *Id.* at *12-15.

23 *Id.* at *14.

24 *Id.* at *15.

25 *Id.* at *3-4.

26 *Id.* at *15.

27 *Id.* at *21.

28 *Id.* at *20.

29 *Id.* at *37.

30 *Id.* at *41.

31 Justice Kennedy is the Circuit Justice for the Ninth Circuit.

32 *See* Brief for Petitioners, Am. Tradition P'ship, Inc. v. Bullock, No. 11-A762 (Feb. 9, 2012).

33 *Id.* at 27-36.

34 *See* Brief for Respondents, Am. Tradition P'ship, Inc. v. Bullock, No. 11-A762 (Feb. 15, 2012).

35 *Id.* at 4-6.

36 *Id.* at 7-15.

37 *See* Charles S. Johnson, *US Supreme Court Blocks MT's Ban on Corporate Election Spending*, Helena Indep. Rec. (Feb. 18, 2012).

38 *See* Am. Tradition P'ship, Inc. v. Bullock, No. 11-A762 (Feb. 17, 2012) (order granting application for stay).

39 *Id.*

Georgia Supreme Court Strikes Down Ban on Assisted Suicide Advertisements

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all offers to assist in suicide when accompanied by an overt act to accomplish that goal."[15] However, without an "explanation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity is sufficiently problematic," the necessary narrow tailoring was lacking.[16]

In the aftermath of the court's ruling, the consensus was that new legislation was needed. The Forsyth County District Attorney announced that she would dismiss the entire case.[17] In response, the Georgia General Assembly passed a stronger bill (H.B. 1114), which Governor Deal has signed.

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Endnotes

1 2012 WL 360523 (Ga. Feb. 6, 2012).

2 Judge Christopher Brasher from the Fulton County Superior Court participated in place of Associate Justice David Nahmias, who was disqualified.

3 The court did say that, in light of its holding, it would not consider the "other constitutional challenges" made by the appellants. 2012 WL 360523 at * 3. The court did not identify those other challenges.

4 OCGA § 16-5-5(b).

5 OCGA § 16-5-5(d).

6 Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261(1990).

7 Michigan v. Kevorkian, 527 N.W. 2d 714 (Mich. 1994).

8 Washington v. Glucksberg, 521 U.S. 702 (1997).

9 Gonzales v. Oregon, 546 U.S. 243 (2006).

10 *See supra* note 2.

11 Apart from quoting the free speech provision of the Georgia Constitution, 2012 WL 360523 at * 3 n.2, the court largely invoked decisions of the U.S. Supreme Court and cited parallel decisions of its own.

12 2102 WL 360523 at *2 (quoting Brown v. Entm't Merchs. Ass'n USA, 131 S. Ct. 2729, 2740 (2011)).

13 2012 WL 360523 at *2.