

OA671

A. House of Representatives

1. structure

-Kevin McCarthy has failed five votes and counting – **he does not even have the votes to adjourn**

In the three Tuesday votes, all 434 members voted in all ballots, putting the majority threshold at 218. In the first and second ballots, McCarthy got 203 votes, House Minority Leader Hakeem Jeffries (D-N.Y.) got 212, and 19 McCarthy opponents voted for other candidates. In the third vote, a 20th member joined the detractors, putting McCarthy at 202.

Fourth vote McCarthy lost another half-vote; he's down to 201: 20 votes for Donalds (the wingnut candidate), and 1 former McCarthy supporter – Victoria Sparks of Indiana - who switched her vote to "Present." If 10 more Republicans defect to "Present" and the Democrats hold, then Jefferies (holding at 212) would be speaker

-because "Present" means you don't count them in the denominator. A House Speaker is elected by an absolute majority of all those voting for a specific Speaker candidate, not necessarily all members. Those voting "present" and those who are absent do not count toward that total, lowering the threshold.

Former House Speakers Nancy Pelosi (D-Calif.) and John Boehner (R-Ohio) each won the Speakership with just 216 votes in 2021 and 2015, respectively.

So this 4th vote needed just 217 – because it was 433 votes for candidates and 1 vote present. Drop to 423, and 212 is an absolute majority.

I do not think this is likely. But I think the possibility will keep Democrats united.

Sparks said she did this to "send a message"

Marcy Kaptur (D-OH) said she wanted a "unity caucus" but that's just because she's dumb.

2. history

Only 14 previous times in history – 13 before the civil war, and one in 1923.

- 1) Not a continuing body – passes a new set of Rules every Congress. So there are literally no* rules right now other than the Constitution and how it's been
- 2) Every previous member is automatically terminated by the 20th Amendment

The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

- 3) The Constitution does not require that Members have the oath administered by the Speaker of the House – but it does require that they take an oath; that's Article VI of the Constitution

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

- 4) The “Dean” of the House administers the oath to the speaker – could administer to everyone

The longest-serving member of the House, or dean, traditionally administers the oath to the speaker-elect. The current dean is Rep. Hal Rogers (R-Ky.), who has the same length of House service as Chris Smith (R-N.J.) but has an edge because his last name comes first in the alphabet.

- 5) Art. I, Section 2 says the House of Representatives shall choose their speaker and other officers
<https://www.law.cornell.edu/constitution/articlei>

- 6) Art. I, Section 5 says the House can judge the elections of its members
Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

- 7) So is it really a rule that the Speaker has to be a majority?

No, but... probably? The House can adopt another resolution

House Practice: A Guide to the Rules, Precedents, and Procedures of the House

Chapter 34, Office of the Speaker

<https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-108/html/GPO-HPRACTICE-108-35.htm>

In two instances the House agreed to choose and subsequently did choose a Speaker by a plurality of votes but confirmed the choice by majority vote. In 1849 the House had been in session 19 days without being able to elect a Speaker, no candidate having received a majority of the votes cast. The voting was viva voce, each Member responding to the call of the roll by naming the candidate for whom he voted. Finally, after the fifty-ninth ballot, the House adopted a resolution declaring that a Speaker could be elected by a plurality. 1 Hinds Sec. 221. In 1856 the House again struggled over the election of a Speaker. Ballots numbering 129 had been taken without any candidate receiving a majority of the votes cast. The House then adopted a resolution permitting the election to be decided by a plurality. 1 Hinds Sec. 222. On both of these occasions, the House ratified the plurality election by a majority vote.

In 1849, it took 63 ballots and three weeks for the House to elect Howell Cobb (D-Ga.) as speaker. In late 1855 and early 1856, when the slavery issue intensified divisions between the parties, Nathaniel “Bobbin Boy” Banks (R-Mass.) won after 133 ballots and two months.

<https://www.washingtonpost.com/history/2022/12/30/house-speaker-longest-vote/>

But the longest speaker vote began on Dec. 3, 1855, when the 34th Congress convened. Democrats controlled the Senate, but no party controlled the House after the disintegration of the Whig Party. About a third of House members were Democrats. The rest belonged to a mix of parties, including the new Republican Party. Many were members of the secretive American Party, also known as the Know Nothing party.

On the first day, 21 candidates vied for the speakership. Four votes were taken. The early leader was Rep. William Richardson (D-Ill.), who favored permitting future states to allow slavery, with 74 votes, far short of the 113 needed for a majority. A few days later, antislavery members lined up behind the American Party's "Bobbin Boy" Banks, who as a boy worked in a textile factory carrying bobbins of thread to the women who operated the looms. [The 39-year-old Banks, the New York Herald reported, was "a good looking man" with a stiff, puritanical manner who "is even said never to have drank a glass of liquor in his life."]

33 votes in - mid-December, Banks received 100 votes to Richardson's 73, and the deadlock continued into the new year as the slavery debate heated up.

Finally, on Feb. 1, 1856, Democrats adopted a new strategy. First, they backed a new speaker candidate, proslavery Rep. William Aiken Jr. (D-S.C.), the 50-year-old son of railroad magnate William Aiken Sr., after whom Aiken, S.C., was named. Second, Democratic leaders announced that they would propose the next day a previously rejected resolution to elect a speaker with only a plurality vote. Under this plan, if a majority of members failed to elect a speaker in three consecutive votes, the candidate who got the most votes on a fourth tally would win.

Aiken was sure to win over enough Southern House members to gain a plurality and the speakership, newspapers reported. "We think we can count 109 votes for Mr. Aiken, if jealousy or something else does not defeat him," a Washington Star correspondent wrote. That night, Democratic President Franklin Pierce congratulated Aiken in advance on his victory.

On Saturday, Feb. 2, in Washington, "the sun rose on an excited city," the New Orleans Picayune reported. That afternoon, Rep. Samuel Smith (D-Tenn.) proposed the plurality resolution, "intimating his belief it would elect Mr. Aiken." The resolution passed. "The excitement now became very great," the Picayune wrote. On the third vote, Banks led Aiken 103 votes to 95, short of a majority. Some of the remaining speaker candidates then dropped out, with Aiken poised to scoop up their backers.

The fourth vote — with the plurality resolution in place — began. As the clerk tallied the total, "the excited crowd on the floor and in the galleries looked on in silence," the Picayune reported. "The suspense at this crisis was agonizing. Every eye turned and every ear inclined with intense interest towards the clerk's desk to hear the result."

Just before 7 p.m., the clerk announced the total: 103 votes for Banks, 100 for Aiken. Some lawmakers who had been expected to switch to Aiken had not come through. "As the result was announced, the audience in the galleries manifest their joy by peal after peal of deafening cheers," the Picayune wrote. "The ladies waved their handkerchiefs wildly and clapped, and [anti-Banks] gentlemen stamped and raved, and swore."

B. Updates

1. Elon Musk

TSLA: \$108

Two new insider deals

-Andrew Baglino, Senior VP (12/27)

Exercised 10,500 options (bought at \$21), immediately sold at \$117.50

He's got 64,000 shares – so this was basically 15% of his total holdings

-CFO Zachary Kirkhorn (12/28)

Converted 13,500 options at \$18.44 – now has 204,000 shares. Watching to see what he does.

-Form 8-K – “current report” – any information that is material to shareholders

https://www.sec.gov/ix?doc=/Archives/edgar/data/0001318605/000156459023000002/tsla-8k_20230102.htm

* amount of cars sold in Q4 and 2022 total

* January 25 – final report & live Q&A webcast – ir.tesla.com

* March 1 – investor day

Why I care: what they disclose about Musk – will scrutinize every line – shareholder derivative lawsuit

Also.. Twitter isn't paying it's rent [to Columbia REIT – 650 California LLC]

<https://cdn.arstechnica.net/wp-content/uploads/2023/01/twitter-rent.pdf>

30th Floor of 650 California Street, SF CA 94108

15,546 square feet – Twitter subleases this out to Dentsu International Americas, LLC starting OCTOBER 5, 2022 – just before Musk took over – ordinary due diligence would have

- A huge international media company HQ in London

Leased from September 12, 2017 for 7 years (+ a 5-year option)

- Craziest provision I've ever seen – arbitration

Twitter owes ~\$120,000 per month, but you know, that's downtown SF

-includes 3 valet parking passes

-they're only getting \$92,000 per month from their subtenant

-a pretty onerous lease

Article 6: 150% holdover for first 2 months, 200% thereafter

Article 19: can enter the premises

Article 21: a \$770,000 “letter of credit” that's basically like a security deposit, but without the protections that your security deposit gets / Twitter only gets \$184,000 for theirs

Article 29.13: limits on liability

Article 29.21: In the event that either Landlord or Tenant should bring suit for the possession of the Premises, for the recovery of any sum due under the Lease. or because of the breach of any provision of this Lease or for any other relief against the other, then all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party therein shall be paid by the other party.

That's super not great.

So what's the dispute?

-a month behind plus late fees

Article 19: 5 days to cure

19.2

-can enter the premises, kick you out, and sue you for

1) unpaid rent

2) the balance of the contract minus your efforts to relet it

3) the delta if you have to relet it at a lower price

4) brokerage commissions, advertising expenses, remodeling, special concessions to get a new tenant

Save \$30,000 per month for 21 months: \$630,000

-can't charge back the landlord's attorneys' fees to their subtenant

OA 672

A. Sidney Powell

Her attorney:

David Tobin, McDermott, Will & Emery

<https://www.mwe.com/people/david-tobin/>

IP lawyer (??)

-just made partner

-representing Sidney Powell is NOT on his webpage

People found the "Magic Fraction" video

https://www.youtube.com/watch?v=Fob-AGgZn44&ab_channel=BevHarris

Hacking Democracy.com

Diebold machines, bought by Dominion in 2010.

"The same hackable software is still inside it" ... 20 years later?

Incidentally, Bev Harris thinks the guy who Sidney Powell refers to in her testimony and who's stuff IS up at DTR.. is a crank

Orlando Weekly – Clint Curtis - "Is This Man Crazy?"

<https://www.orlandoweekly.com/news/is-this-man-crazy-2274003>

1. Bev Harris: ""The Clint Curtis testimony [before the House Democratic panel] ... does an excellent job of stimulating public imagination, but has a few problems of its own." Curtis' testimony assumed that Ohio's election had been rigged, though he admitted to never having studied the results, Harris writes. And because Feeney allegedly pitched the program two years before any South Florida counties used electronic voting machines, it would have been impossible for Curtis to know what specific types of software would be used in the future.

"You can't do one-size-fits-all software," Harris says, noting that Curtis isn't the only person to build a prototype that alters election results on theoretical vote-counting platforms. The only way this scheme would work, she says, is if Feeney knew which company was going to run the voting machines, then approached a programmer inside that company to write a vote-rigging program that would work on those machines. "It wouldn't make sense to call in some random guy," she says. "It wouldn't even help."

2. So what did Curtis say? On Dec. 13, 2004, when he testified before a panel of House Judiciary Committee Democrats investigating voting irregularities in Ohio. At first, Curtis told them that his 2000 meeting with Feeney, and the subsequent software he developed, made him think Republicans stole the 2004 election. "Yes, I would say it was. I mean, if you ... have exit poll data that is significantly off from the vote, then it's probably hacked." A few minutes later, though, he backed off. Rep. Jerrold Nadler, D-N.Y., asked him, "To your knowledge, was this [the vote-rigging program] used?" "I have no idea," Curtis answered.

The Congressional committee released its report Jan. 5, 2005. It noted a laundry list of voting problems in Ohio that "resulted in a significant disenfranchisement of voters" and "raise grave doubts" about the presidential election's outcome. It wasn't a Bush-friendly report. But nowhere in its 102 pages does the report mention Clint Curtis.

To bolster his credibility, Curtis points to the lie-detector test he passed in March 2005. Feeney's camp responds by noting that the test — administered by a former Florida Department of Law Enforcement chief polygrapher — was paid for by an anonymous group investigating vote fraud.

3. Curtis' published-on-demand book, *Just a Fly on the Wall*, and gave it to friends as Christmas presents. The book, originally published in September 2004, is poorly written and full of off-topic rambling and grammatical errors. Curtis makes his distaste for Feeney clear in the last chapter: "This request [to set up the vote-tampering program] was early in my exposure to Congressman Feeney, so I was not familiar with what a total piece of crap he truly was."
4. That last chapter, in fact, illustrates one of Curtis' biggest credibility problems. It's the one in which he describes Feeney's supposed scheme to rig an election. But when Curtis first published the book, the chapter wasn't in there. "No one really cared back then," he says. "It wasn't as important as espionage." After the 2004 election, Curtis changed his mind. That means he waited four years to go public from the time he says Feeney asked him to create the vote-rigging program. In the meantime came his protracted war with YEI, Feeney's client.
5. Another problem with Curtis' story: The alleged meetings took place in the fall of 2000, before Florida used such machines. The push for electronic voting didn't even happen until the disastrous November election, which added "butterfly ballots" and "hanging chads" to the national lexicon.
6. Here's another hole: Curtis and Georgalis requested a state investigation into YEI's billing practices on May 10, 2001. But the day before that, YEI's lawyers had contacted FDOT to allege that Curtis had violated a non-compete clause by working for an FDOT subcontractor and, more important, accused Curtis and Georgalis of stealing some of YEI's software and trying to sell it. Later, the company sued the pair. It wasn't the first time an employer sued him for theft of intellectual property. In 2000, a Winter Park company called Electrical Resources Inc. filed a lawsuit against Curtis for copyright infringement and deceptive trade practices. According to the complaint, the company hired Curtis in 1997 to replace a computer programmer who had constructed a digital version of a 1995 book written by Electrical Resources' president Richard Jaffarian called *National Electrical Price Guide — 1995 Edition*. "He's wacko," Jaffarian says. "I think he's just a compulsive liar."
7. A December 2004 article in *Wired News* states that Curtis didn't know touchscreen machines weren't used in 2000 until a reporter told him.
8. In the same article, a Johns Hopkins University computer science grad student who had previously authored a paper critical of security flaws in Diebold's election machines said there is almost no chance Curtis' code was used in any voting machine. "(Curtis) clearly didn't have the source code to any voting machine," the student, Adam Stubblefield, said, "and his program is so trivial that it would be much easier to rewrite it than to rework it."

B. More on *Citizens United*

Western Tradition Partnership, Inc. v. Montana, 271 P.3d 1 (2011)
https://scholar.google.com/scholar_case?case=4661146541441340211

100 Years of this law Section 13-35-227, MCA, was originally enacted as an initiative by the Montana voters in 1912. It provides:

(1) 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.

(2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

(4) A person who violates this section is subject to the civil penalty provisions of XX-XX-XXX.

Section 13-37-128, MCA, provides the sanction for a violation of § 13-35-227, MCA, and allows the Commissioner of Political Practices to recover a civil penalty up to \$500 or triple the amount of the unlawful expenditure.

You have the PAC system

the Montana law at issue in this case cannot be understood outside the context of the time and place it was enacted, during the early twentieth century. (Montana became a state in 1889.) Those tumultuous years were marked by rough contests for political and economic domination primarily in the mining center of Butte, between mining and industrial enterprises controlled by foreign trusts or corporations. These disputes had profound long-term impacts on the entire State, including issues regarding the judiciary, the location of the state capitol, the procedure for election of U.S. Senators, and the ownership and control of virtually all media outlets in the State.

¶ 23 Examples of well-financed corruption abound. In the fight over mineral rights between entrepreneur F. Augustus Heinze and the Anaconda Company, then controlled by Standard Oil, Heinze managed to control the two State judges in Butte, who routinely decided cases in his favor. K. Ross Toole, *Montana, An Uncommon Land*, 196-99 (Univ. of Okla. Press 1959) the Butte judges denied being bribed, but one of them admitted that Anaconda representatives had offered him \$250,000 cash to sign an affidavit that Heinze had bribed him. Toole, *Montana, An Uncommon Land*, 204.

¶ 24 In response to the legal conflicts with Heinze, in 1903 Anaconda/Standard closed down all its industrial and mining operations (but not the many newspapers it controlled), throwing 4/5 of the labor force of Montana out of work. Toole, *Montana, An Uncommon Land*, 206. Its price for sending its employees back to work was that the Governor call a special session of the Legislature to enact a measure that would allow Anaconda to avoid having to litigate in front of the Butte judges. The Governor and Legislature capitulated and the statute survives. See e.g. [Patrick v. State, 2011 MT 169, ¶¶ 17-23, 361 Mont. 204, 257 P.3d 365.](#)

¶ 25 W.A. Clark, who had amassed a fortune from the industrial operations in Butte, set his sights on the United States Senate. In 1899, in the wake of a large number of suddenly affluent members, the Montana Legislature elected Clark to the U.S. Senate. Clark admitted to spending \$272,000 in the effort and the estimated expense was over \$400,000. Complaints of Clark's bribery of the Montana Legislature led to an investigation by the U.S. Senate in 1900. The Senate investigating committee concluded that Clark had won his seat through bribery and unseated him. The Senate committee "expressed horror at the amount of money which had been poured into politics in Montana elections... and expressed its concern with respect to the general aura of corruption in Montana." Toole, *Montana, An Uncommon Land*, 186-94.

¶ 26 In a demonstration of extraordinary boldness, Clark returned to Montana, caused the Governor to leave the state on a ruse and, with assistance of the supportive Lt. Governor, won appointment to the very U.S. Senate seat that had just been denied him. Toole, *Montana, An Uncommon Land*, 192-93. When the Senate threatened to investigate and unseat Clark a second time, he resigned. Clark eventually won his Senate seat after spending enough on political campaigns to seat a Montana Legislature favorable to his candidacy.

¶ 27 After the Anaconda Company cleared itself of opposition from Heinze and others, it controlled 90% of the press in the state and a majority of the legislature. C. B. Glasscock, *The War of the Copper Kings*, 290 (Grosset & Dunlap, N.Y. 1935). By 1915 the company, after having acquired all of Clark's holdings as well as many others, "clearly dominated the Montana economy and political order ... [and] local folks now found themselves locked in the grip of a corporation controlled from Wall Street and insensitive to their concerns." Michael Malone and Richard Roeder, *Montana, a History of Two Centuries*, 176 (Univ. of Wash. Press, Seattle 1976). Even at that time it was evident that industrial corporations controlled the state "thus 9*9 converting the state government into a political instrument for the furthering and accomplishment of legislation and the execution of laws favorable to the absentee stockholders of the large corporations and inimical to the economic interests of the wage earning and farming classes who constitute by far the larger percentage of the population in Montana." Helen Fisk Sanders, *History of Montana*, Vol. 1, 429-30 (Lewis Pub. Co. 1913).

¶ 28 In 1900 Clark himself testified in the United States Senate that "[m]any people have become so indifferent to voting" in Montana as a result of the "large sums of money that have been expended in the state..." Toole, *Montana, An Uncommon Land*, 184-85. This naked corporate manipulation of the very government (Governor and Legislature) of the State ultimately resulted in populist reforms that are still part of Montana law. In 1906 the people voted to amend the state Constitution to allow for voter initiatives. Not long thereafter, in 1906 this new initiative power was used to enact reforms including primary elections to choose political candidates; the direct election of United States Senators; and the Corrupt Practices Act, part of which survives as § 13-35-227, MCA, at issue in this case.

¶ 29 The State of Montana was still contending with corporate domination even in the mid-20th century. For example, the Anaconda Company maintained controlling ownership of all but one of Montana's major newspapers until 1959. Writing in 1959, historian K. Ross Toole so noted and described the state:

Today the influence of the Anaconda Company in the state legislature is unspectacular but very great. It has been a long time since the company showed the mailed fist. But no informed person denies its influence or the fact that the basic use to which it is put is to maintain the status quo — to keep taxes down, not to rock the boat. Few of the company personnel either in Butte or in New York remember F. Augustus Heinze, or even for that matter, [U.S. Senator] Joseph M. Dixon, but it would

be foolish for anyone to deny that the pervasive influence of the Anaconda Company in Montana politics is part and parcel of the Montana heritage.

Toole, *Montana, An Uncommon Land*, 244. A study of Montana in the early 1970s concluded that corporate influence of the Anaconda Company had been "replaced by a corporate power structure, with interlocked directorates, the same law firms and common business interests" among the Anaconda Company, Montana Power Company, Burlington Northern Railway and the First Bank System. Malone and Roeder, *Montana, a History of Two Centuries*, 290. History professor Dr. Harry Fritz, in his affidavit presented in the District Court, affirmed that the "dangers of corporate influence remain in Montana" because the resources upon which its economy depends in turn depend upon distant markets. He affirmed: "What was true a century ago is as true today: distant corporate interests mean that corporate dominated campaigns will only work in the essential interest of outsiders with local interests a very secondary consideration." While specific corporate interests come and go in Montana, they are always present. Montana's mineral wealth, for example, has historically been exported from the State, and that is still true today. [Commonwealth Edison Co. v. State of Montana, 189 Mont. 191, 196, 615 P.2d 847, 850 \(1980\), aff'd, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884.](#) The corporate power that can be exerted with unlimited political spending is still a vital interest to the people of Montana.

¶ 30 Furthermore, in the evidence presented below the State demonstrated aptly how even small expenditures of money can impact Montana elections. The State submitted affidavits from two respected and experienced politicians and public servants. Bob Brown, a Republican, served in the Montana House of Representative, in the Montana Senate, as the Montana Secretary of State and as an unsuccessful candidate for Governor. He retired in 2010 as a Senior Fellow at the Center for the Rocky Mountain West and the Mansfield Center, at the University of Montana. Mike Cooney, a Democrat, served in the Montana House of Representatives, in the Montana Senate, as the Montana Secretary of State, and also as an unsuccessful candidate for Governor. Both affirmed that 10*10 Montana, with its small population, enjoys political campaigns marked by person-to-person contact and a low cost of advertising compared to other states. They affirmed that allowing unlimited independent expenditures of corporate money into the Montana political process would drastically change campaigning by shifting the emphasis to raising funds.

¶ 31 Cooney, for example, ran his first state legislative campaign for \$750 as a "grassroots" effort that he believed could have been derailed by an opposing expenditure of even a couple of thousand dollars. Brown affirmed that Montana politics are more susceptible to corruption than Federal campaigns, and that infusions of large amounts of corporate independent expenditure on just media coverage "could accomplish the same type of corruption of Montana politics as that which led to the enactment of" § 13-35-227, MCA. Cooney recounted his experience from his most recent campaign when he found that voters were concerned that they "didn't really count" in the political process unless they can make a material financial contribution, and that special interests therefore hold sway. This is much the same sentiment described by W.A. Clark to the United States Senate Based upon the background of § 13-35-227(1), MCA, the State of Montana, or more accurately its voters, clearly had a compelling interest to enact the challenged statute in 1912. At that time the State of Montana and its government were operating under a mere shell of legal authority, and the real social and political power was wielded by powerful corporate managers to further their own business interests. The voters had more than enough of the corrupt practices and heavy-handed influence asserted by the special interests controlling Montana's political institutions. Bribery of public officials and unlimited campaign spending by the mining interests were commonplace and well known to the public. Referring to W.A. Clark, but describing the general state of affairs in Montana, Mark Twain wrote in 1907 that Clark "is said to have bought legislatures and judges as other men buy food and raiment. By his example he has so excused and so sweetened corruption that in Montana it no longer has an offensive smell." Mark Twain, *Mark Twain in Eruption*, 72 (Harper & Bros. 1940).over a century ago, quoted above.

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.

As discussed above, the statute has no or minimal impact on MSSF and Champion. Because of this minimal impact, the State is not required to demonstrate a compelling interest to support § 13-35-227(1), MCA. It is required only to demonstrate the less exacting sufficiently important interest. For the same reasons discussed above with regard to the compelling state interest, the statute is clearly supported by important governmental interests. Therefore, as to MSSF and Champion, it passes constitutional muster as well.

¶ 47 Finally, § 13-35-227(1), MCA, is narrowly tailored to meet its objectives. The statute only minimally affects entities like MSSF and Champion. Even if it applies directly to WTP, WTP can still speak through its own political committee/PAC as hundreds of organizations in Montana do on an ongoing basis. Unlike the Federal law PACs considered in *Citizens United*, under Montana law political committees are easy to establish and easy to use to make independent expenditures for political speech. As the Bender affidavit submitted by the State in District Court confirms, corporate PACs can make unlimited independent expenditures on behalf of candidates. The difference then is that under Montana law the PAC has to comply with Montana's disclosure and reporting laws. And as noted earlier, corporations are allowed to contribute to ballot issues in Montana, which is a significant distinction because ballot issues often have a direct impact on corporate business activities within Montana but present less danger of corruptive influences that have concerned Montana voters since 1912. The statute only addresses contributions regarding candidates for state political office.

SCOTUS DON'T GIVE A SHIT

per curiam reversed by

American Tradition Partnership, Inc. v. Bullock, 567 U.S. 516 (2012)

https://scholar.google.com/scholar_case?case=14730023294192604799

A Montana state law provides that a "corporation may not make ... 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) (2011). The Montana Supreme Court rejected petitioners' claim that this statute violates the First Amendment. 2011 MT 328, 363 Mont. 220, 271 P.3d 1. In [*Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 75 \(2010\)](#), this Court struck down a similar federal law, holding that "political speech does not lose First Amendment protection simply because its source is a corporation." *Id.*, at 342, 130 S.Ct., at 900 (internal quotation marks omitted). The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. See U.S. Const., Art. VI, cl. 2. Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.

You know it's 5-4, because of the Breyer/Ginsburg/Sotomayor/Kagan dissent
-4 votes that Citizens United was wrong

Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case. But given the Court's *per curiam* disposition, I do not see a significant possibility of reconsideration. Consequently, I vote instead to deny the petition.

OA 673

Dersh

<https://storage.courtlistener.com/recap/gov.uscourts.azd.1294569/gov.uscourts.azd.1294569.108.0.pdf>

A. read it backwards

-who represents Alan Dershowitz, one of the most well-known lawyers in the world?

* remember Sidney Powell has a real lawyer

John D. "Jack" Wilenchik, a Phoenix-based lawyer who

...represented Kelli Ward, head of the Arizona Republican Party is moving to have a court declare that

<https://azcapitoltimes.com/news/2020/11/25/top-gop-official-wants-court-to-void-arizonas-electoral-votes-for-biden/>

the election results, which gave the state's 11 electoral votes to Joe Biden, is void.

Legal papers filed late Wednesday on behalf of Kelli Ward claim that the system used in Arizona to check signatures on mail-in ballots lacks sufficient safeguards to ensure that they actually came from the registered voters whose envelopes were submitted. Her attorney, Jack Wilenchik, also said that the legally required observers were unable to see the process from where they were placed.

And Wilenchik said software, which would try to read and prefill the rejected ballot, was highly inaccurate and would flip votes. He said that the software would "erroneously prefill 'Biden' much more often (apparently twice as often) as it did 'Trump.'"

...represented the "Cyber Ninjas," despite the fact that his client was sanctioned \$50,000 per day for not turning over the records of their audit

<https://azcapitoltimes.com/news/2022/01/06/cyber-ninjas-faces-fine-over-arizona-election-review-records/>

The judge found Cyber Ninjas in contempt for its failure to turn over documents, which two Maricopa County judges and the state Court of Appeals have ruled are subject to public records laws.

The \$50,000 daily fine imposed by Maricopa County Superior Court judge John Hannah far exceeds the \$1,000 levy suggested by a lawyer for The Arizona Republic newspaper, which filed the public records lawsuit earlier this year. Hannah said the lower amount would be "grossly insufficient" to coerce Cyber Ninjas to comply with his orders. **A lawyer for Cyber Ninjas, Jack Wilenchik, said the company is insolvent, has laid off all employees, including former CEO Doug Logan, and can't afford to sift through its records to find those related to the audit.** Hannah said the \$50,000 daily fine would begin accruing on Friday and warned that, if necessary, he will apply the fine to individuals, not just the Cyber Ninjas corporation. "The court is not going to accept the assertion that Cyber Ninjas is an empty shell and that no one is responsible for seeing that it complies," Hannah said. He said there's been no evidence submitted showing that Cyber Ninjas is actually insolvent and noted that millions of dollars were donated to the election review. He also said the company could comply for very little cost by turning its records over to the Senate and allowing legislative lawyers to determine which must be publicly released. Wilenchik maintains Cyber Ninjas is not subject to the Arizona public records law because it's a private company. Trial and appellate judges have disagreed, ruling that the documents must be released because the firm was performing a core government function on behalf of the Senate. The Arizona Supreme Court declined to take the case on appeal.

Wilenchik has asked to quit as the Cyber Ninjas lawyer because he hasn't been paid, but Hannah refused to approve until new local attorneys are in place to represent the firm. Two out of state lawyers, Jonathan Miller of Georgia and Mike Smith of Michigan, said they'll represent Logan as the former CEO, but Hannah said they couldn't participate in the hearing until they're given temporary approval to practice in Arizona. Hannah's refusal to release Wilenchik prompted a tense exchange in which the lawyer said the judge has "shown an intemperate attitude towards me and my firm" and was biased against conservatives. He vowed to appeal.

Of course Dershowitz is still playing the "I'm not a Republican shill" card, even though he's represented by a conservative election-denier. Paragraph 2, page 1: "I am a liberal Democrat who has almost never voted for a Republican candidate. I strongly believe that the 2020 election was fair and resulted in the correct outcome."

...but that's not the most disturbing thing. The most disturbing thing is that Wilenchik was on board with the Eastman/Chesebro fake electors scheme despite knowing it was illegal. Here's what he said in an email, word-for-word:

<https://ldad.org/wp-content/uploads/2022/10/Ethics-Complaint-against-Kenneth-Chesebro.pdf>

Mr. [Jack] Wilenchik [(a Trump campaign lawyer in Arizona)] told his fellow lawyers he had been discussing an idea proposed by still another lawyer working with the campaign, Kenneth Chesebro, an ally of Mr. Eastman's, to submit slates of electors loyal to Trump. "His idea is basically that all of us (GA, WI, AZ, PA, etc.) have our electors send in their votes (even though the votes aren't legal under federal law – because they're not signed by the Governor); so that members of Congress can fight about whether they should be counted on January 6th . . . "[W]e would just be sending in 'fake' electoral votes to Pence so that 'someone' in Congress can make an objection when they start counting votes, and start arguing that the 'fake' votes should be counted." (Emphasis added.)

B. The Order

<https://storage.courtlistener.com/recap/gov.uscourts.azd.1294569/gov.uscourts.azd.1294569.106.0.pdf>

1. Legal Framework

a) Rule 11

Rule 11(b) provides, in relevant part: By presenting to the court a pleading, written motion, or other paper— whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and] (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Rule 11(c)(1) provides: "If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation."

Applying Rule 11 “requires sensitivity to two competing considerations.” *United Nat’l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001). “On the one hand, . . . on occasion attorneys engage in litigation tactics so vexatious as to be unjustifiable even within the broad bounds of our adversarial system, and . . . neither the other parties nor the courts should have to abide such behavior or waste time and money coping with it.” *Id.* Thus, “the central purpose of Rule 11 is to deter baseless filings.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). “On the other hand, . . . our system of litigation is an adversary one, and . . . presenting the facts and law as favorably as fairly possible in favor of one’s client is the nub of the lawyer’s task.”

Where “a complaint is the primary focus of a Rule 11 proceeding, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it.”

In assessing the pre-filing inquiry required under Rule 11, the court’s task is to determine “whether an attorney, after conducting an objectively reasonable inquiry into the facts and law, would have found the complaint to be well-founded.” *Holgate*, 425 F.3d at 677 (citation omitted). The court must consider “all the circumstances of a case,” *Cooter*, 496 U.S. at 401, focusing on the information available when the paper is filed. See *Golden Eagle Dist. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986). Courts consider factors including time constraints and deadlines, the complexity of the subject matter and the party’s familiarity with it, and the ease of access to the requisite information.

b) 28 U.S.C. § 1927

Section 1927 provides: “Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”

Catch-all

“Sanctions pursuant to section 1927 must be supported by a finding of subjective bad faith.” *Blixseth v. Yellowstone Mtn. Club, LLC*, 796 F.3d 1004, 1008 (9th Cir. 2015) (quoting *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989)). “Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent.” *Id.* at 1007; see also *Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001) (“[R]ecklessness suffices for section 1927.”). Sanctions based on recklessness must be accompanied by a finding that the objectionable conduct is frivolous or was intended to harass. In *re Keegan Mgmt. Co., Secs. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996). Section 1927, like Rule 11, is an extraordinary remedy that courts should exercise with caution. *Id.* at 437.

2. Findings of failure to investigate: 4 of 6

a) Paper Ballots

58. Prior to 2002, most states, including Arizona, conducted their elections overwhelmingly using relatively secure, reliable, and auditable paper-based systems.

59. After the recount of the 2000 presidential election in Florida and the ensuing *Bush v. Gore* decision, Congress passed the Help America Vote Act in 2002. In so doing, Congress opened the proverbial spigot. Billions of federal dollars were spent to move states, including Arizona, from paper-based voting systems to electronic, computer-based systems.

60. Since 2002, elections throughout the United States have increasingly and largely been conducted using a handful of computer-based election management systems. These systems are created, maintained, and administered by a small number of companies having little to no transparency to the public, producing results that are far more difficult to audit than paperbased systems, and lack any meaningful federal standards or security requirements beyond what individual states may choose to certify. Leaders of both major parties have expressed concern about this lack of transparency, analysis and accountability.

Paragraph 168 alleges that “Plaintiff Lake intends to vote in the Midterm Election in Arizona. To do so, she will be required to cast her vote, and have her vote counted, through electronic voting systems.” (FAC ¶ 168.) Paragraph 171 makes the same allegation as to Plaintiff Finchem. (Id. ¶ 171.) These assertions are wrong: Plaintiffs are not required under Arizona’s current procedures to “cast [their] vote[s]” “through electronic voting systems.”³ Indeed, Defendants have submitted evidence indicating Plaintiffs themselves have voted on paper ballots for nearly twenty years.

b) Allegations that Dominion is not tested

Paragraph 20 alleges that the Secretary’s “certification of the Dominion Democracy Suite 5.5b voting system, as well as its component parts, was improper, absent objective evaluation.” (FAC ¶ 20 (emphasis added).) Paragraph 57 alleges that “Arizona intends to rely on electronic voting systems to record some votes and to tabulate all votes cast in the State of Arizona in the 2022 Midterm Election, without disclosing the systems and subjecting them to neutral, expert analysis.” (Id. ¶ 57 (first emphasis in original and second emphasis added).) These are allegations that Arizona’s electronic voting systems have not been subjected to objective evaluation or neutral, expert analysis. And they are wrong. As the Court previously discussed, Arizona’s equipment undergoes thorough testing by independent, neutral experts with the Secretary of State’s Certification Committee and a testing laboratory accredited by the Election Assistance Commission (“EAC”).

c) Cyber Ninjas

Setting aside issues concerning the reliability of the Cyber Ninjas’ audit, it strains credulity to characterize the hand count as a proof-of-concept that a full hand count is “feasible”—let alone a “superior alternative.” Arizona law requires that county boards of supervisors canvass general elections within twenty days after the election. A.R.S. § 16-642(A). Mr. Logan testified that in the Cyber Ninjas’ hand count, it took roughly 2,000 people more than two-and-a-half months to hand count only two (out of several dozen) contests on each ballot in only one of Arizona’s fifteen counties.

d) catch-all

Whatever weight one assigns to Plaintiffs’ evidence, an essential flaw remains in their overarching theory of the case. Simply put, there are yawning gaps between the factual assertions made, the harm claimed, and the ultimate relief requested. Plaintiffs never put forth sufficient allegations about Arizona’s election systems— let alone sufficient evidence to support any such allegations—to demonstrate a likelihood that Arizonans’ votes would be incorrectly counted in the 2022 midterm election due to manipulation. The Court reached this conclusion in its Dismissal Order, where it ruled that Plaintiffs’ claimed injuries were too speculative to meet the injury-in-fact requirement

3. Dersh's response

1. I am 84 years old and mostly retired from the practice of law and teaching. I limit my role to consultation on legal and constitutional issues. I have no office staff and my medical conditions – I have had three strokes – limit my travel and court appearances. I am in bed with Covid now.

2. Earlier this year, I was retained by Mike Lindell to represent him and his company against defamation charges. My role was to serve as a consultant to his primary legal team on First Amendment and related constitutional issues. I helped to develop the following argument: when a private company is hired by the government to perform a quintessential governmental function such as vote counting, it cannot refuse to provide relevant information about the workings of its machines on the ground of business secrets. I believed and still believe that this is a profoundly important issue that goes to the heart of future voting integrity. I am a liberal Democrat who has almost never voted for a Republican candidate. I strongly believe that the 2020 election was fair and resulted in the correct outcome. The only election I have ever challenged was in 2000, when the Supreme Court stopped the Florida count that resulted in Bush v. Gore. I wrote a book about that election entitled Supreme Injustice. I have never challenged the outcome of any 2020 elections in Arizona or elsewhere.

3. I have not familiarized myself with the details of the 2022 Arizona election. I was asked to provide my consultation only on constitutional issues in lawsuits involving voting machines. My role was expressly limited to the potential for future abuses based on the unwillingness of voting machine companies to disclose the inner workings of their machines. I am not an expert on voting machines, but I am an expert on constitutional law, and I have limited my advice to the area of my expertise.

4. I expressly refused to become counsel in the case, and I insisted on being listed as "Of Counsel." On May 10th, I was informed by Plaintiffs' counsel Andrew Parker that I needed to be admitted pro hac vice even though I was only "of counsel" and not retained to be on proceedings in the matter. I have been listed as "of counsel" in many other cases in which my role was limited to consulting on constitutional or other legal issues. I have long regarded that as the proper designation in such cases. I was not assigned to investigate any aspect of this case and did not participate in the drafting of the Complaint other than to advise on the paragraphs pertaining to the legal claim that a private company hired to perform a governmental function may not claim business secrets in response to a relevant discovery request. My only role was as a legal consultant – a role I have played in numerous cases. I was not retained to participate in any investigation regarding the underlying factual basis for the complaint. I did not believe that agreeing to be an "of counsel" legal consultant places any obligation on me to evaluate factual allegations. If that were the case, I could never be a legal or constitutional consultant because at my age, and because I do not have the resources or energy to do anything but

provide my legal and constitutional expertise. In my nearly 60 years as a lawyer, I have never been sanctioned, disciplined or subjected to a bar complaint. I do not believe that I violated any ethical rules in this case. I taught legal ethics for 25 years and would never knowingly violate any ethical rule. If I inadvertently violated any Arizona rule, I apologize and will not do it again.

5. I have already suffered greatly and disproportionately from the sanction order. To my knowledge I am the only lawyer against whom a bar complaint has been filed based on the order. My name has been highlighted in all the media reporting, including the claim that “[a]ccording to the court docket, Harvard Law School Professor Alan Dershowitz is Lake’s lead attorney in the matter.” (Law and Crime, December 1, 2022, emphasis added). Not only am I not Lake’s lead attorney, I have never met her and have no retainer agreement with her. My consulting agreement is with one of the lawyers.

4. State response

<https://storage.courtlistener.com/recap/gov.uscourts.azd.1294569/gov.uscourts.azd.1294569.111.0.pdf>

Plaintiffs’ FAC and MPI were signed with “/s/” signatures by three of Plaintiffs’ attorneys—Andrew Parker, Kurt Olsen, and Alan Dershowitz. [Doc. 3 at 51; Doc. 50 at 35- 36.] This Court expressly, and correctly, imposed the sanctions against all three attorneys. Dershowitz has now filed an Application for an Order to Show Cause against the Maricopa County Defendants (the “OSC Application”), seeking to overturn this Court’s Sanctions Order as it applies to him. [Doc. 108.] But as explained below, Dershowitz’s arguments are misdirected. And even were that not so, they are too late. To the extent that any of Dershowitz’s contentions are both true and legally significant, his OSC Application should be brought against his co-counsel, not the Maricopa County Defendants.

A) Signatures

Although dramatically understated, the gravity of this allegation cannot be missed. Dershowitz accuses one or both of his co-counsel of using his signature on the MPI and other filings without his knowledge and permission. The Maricopa County Defendants take no position on whether this allegation is true.¹ Indeed, the Maricopa County Defendants cannot know whether Dershowitz’s allegations are true, and so cannot respond to allegations made in the OSC Application. Only Dershowitz’s co-counsel could do that—but, for whatever reason, Dershowitz—who is himself an attorney and is represented here by counsel—has declined to bring his OSC Application against his co-counsel, to whom it should be directed.

B) “It’s my first day”

Dershowitz also argues in the OSC Application that he had a very “limited role” in the litigation. [OSC Application, passim.] While he says this in many different ways, one clear statement of it is his allegation that he “did not present, file or advocate for any of the matters that were the actual subject of this Court’s order granting sanctions, and thus sanctions against him would be unwarranted.” [Id. at 5.] The Maricopa County Defendants have no way of knowing the extent of Dershowitz’s role in drafting the Complaint, First Amended Complaint, or Motion for Preliminary Injunction in this matter—again, Dershowitz’s cocounsel are the only ones who can possibly know whether Dershowitz’s allegation is

true. But the Maricopa County Defendants do know that Dershowitz participated in teleconferences and was present telephonically for the preliminary injunction hearing. See, e.g., July 21, 2022 Hr'g Tr. at 12:13-16; Doc. 107-1, at 1 (Statement of Consultation); *id.* at 8 (email seeking to reschedule teleconference to permit Dershowitz, who was traveling, to participate). Indeed, Dershowitz sought and obtained admission to practice *pro hac vice* in this Court, which would not have been necessary if he were merely "consulting."

-Dersh's cases had evidence introduced before sanctions

C) Lin Wood

As this Court has previously noted, there are many similarities between this action and *King v. Whitmer*. See Doc. 106, at 24. So again, with Dershowitz's attempts to avoid sanctions. In *King*, it was high-profile attorney L. Lin Wood who sought to distance himself from the case and assert that he had not authorized the other attorneys in the case to include him on sanctionable filings. 556 F. Supp. 3d 680, 699-700. But as the Eastern District of Michigan Court did in *King*, this Court should reject Dershowitz's attempts to distance himself from the sanctions this Court has already awarded. *Id.* at 701-02 ("[W]hile Wood now seeks to distance himself from this litigation to avoid sanctions, the Court concludes that he was aware of this lawsuit when it was filed, was aware that he was identified as cocounsel for Plaintiffs, and as a result, shares the responsibility with the other lawyers for any sanctionable conduct.").

D) Too Late Bro

But those arguments are untimely by over four months and this Court should not consider them. Dershowitz could have made those arguments in the timely-filed Opposition to the Motion for Sanctions. Or, he could have timely filed his own response opposing sanctions. Dershowitz did neither. This Court should not award him a second bite at the apple four months after the fact, when the Court has already ruled on the Motion.

Further, the Maricopa County Defendants emailed their Rule 11 letter to Dershowitz at his gmail address on May 20, 2022, and again on May 27, 2022. [Doc. 97-2.] That letter put Dershowitz on notice that "[a]bsent immediate dismissal, in addition to filing a motion to dismiss, our client will seek Rule 11 sanctions, including attorneys' fees and costs." [Doc. 97-1 at 1.] Dershowitz's "I didn't know" argument is unpersuasive and is further belied by the fact that he signed the Response Opposing Sanctions. The time for arguing whether sanctions are appropriate is long past. This Court has already ruled on that question and issued its Order concerning it. The Court should deny the OSC Application as untimely

E) Conclusion

Dershowitz claims that he had little to nothing to do with the lawsuit and filings that gave rise to this Court's sanctions order against him. But that is false. Dershowitz—a prominent, well-known attorney—lent his name to Plaintiffs and their benefactor, Mike Lindell, to bring an action that made allegations about elections in Arizona and Maricopa County that were demonstrably false. Presumably, Dershowitz was paid for his role in this lawsuit. Now, faced with sanctions, Dershowitz seeks to re-write history and gloss over his role. But Dershowitz already participated in the offensive conduct that this Court determined warrants sanctions. His "/s/" signature appears on the FAC and MPI, just the same as the other attorneys' signatures.

If he really had nothing to do with anything, as he now alleges, the time to alert the Court to that fact was in August 2022, when the Opposition to the Sanctions Motion was filed. Dershowitz's "/s/" signature appears on that Opposition, the same as the other attorneys'. But no mention is made of Dershowitz's limited involvement. This Court should not allow Dershowitz to avoid the consequences of his actions. He participated in the attempt to frivolously discredit Arizona and Maricopa County. He should be held responsible. Because the OSC Application is both misdirected and also untimely, this Court should deny it.