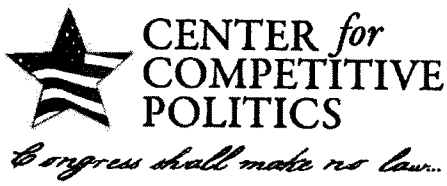
EXHIBIT 1
DATE 4/4/2013
SB 320



April 4, 2013

The Honorable Krayton Kerns
Montana House of Representatives
P.O. Box 200400
Helena, MT 59620-0400

The Honorable Chas Vincent
Montana Senate
P.O. Box 200500
Helena, MT 59620-0500

Re: Constitutional Issues with Senate Bill 320

Dear Chairman Kerns, Vice-Chairs Bennett and MacDonald, and Members of the Committee:

On behalf of the Center for Competitive Politics, I respectfully submit the following comments regarding the legal impact of Senate Bill 320, which prohibits corporations from making independent expenditures or from funding electioneering communications.

The Center is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former member and Chairman of the Federal Election Commission.

S.B. 320 is scheduled for a hearing before the House Judiciary Committee on April 4, 2013 at 8:00 AM. The bill would directly and unambiguously contradict the Supreme Court's holding in *Citizens United v. Federal Election Commission*[1] and the subsequent reaffirmation of that holding in *American Tradition Partnership v. Bullock.*[2] Its passage would evidence a marked lack of concern for the rule of law and would expose Montana to costly re-litigation of an already-settled legal question.

In a misguided attempt to respond to Montanans' passage of Initiative-166, which, as passed, "charg[ed] Montana elected and appointed officials, state and federal, with implementing a policy that corporations are not human beings with constitutional rights," the proposed legislation ignores the policy directions of the initiative and is unequivocally unconstitutional.

Accordingly, if S.B. 320 is signed into law as written, the provision will again be successfully challenged. Any potential legal action will cost the state a great deal of money defending the case, and will distract the Attorney General's office from meritorious legal work. Additionally, it is probable that the state will be forced by the courts to pay legal fees to any potential plaintiffs. Legal fee awards can cost governments well over one hundred thousand dollars.

[1] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[2] *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012).

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I. The provisions in S.B. 320 directly violate the Supreme Court's holding in *Citizens United.*

In *Citizens United*, the Court held that corporations, along with trade associations and labor organizations, could not be prevented from making independent expenditures. As independent expenditures are disseminated independently of any candidate, the Court reasoned that they pose no danger of corruption or the appearance of corruption – and, therefore, no sufficient governmental interest exists for banning them.

Indeed, writing for the majority, Justice Kennedy stated: "The worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual." He continued: "prohibited... are restrictions distinguishing among different speakers, allowing speech by some but not others... restrictions based on the identity of the speaker are all too often simply a means to control content."[3]

II. Furthermore, S.B. 320 directly violates the Supreme Court's holding in *American Tradition Partnership v. Bullock*, a case decided just last year.

Any reference to *Citizens United* is superfluous. Just last year, Montana argued that *Citizens United* should not apply to its state ban on corporate independent expenditures. In that case, *American Tradition Partnership v. Bullock*, the Montana Supreme Court found that the state had a compelling interest justifying such a ban.[4]

In a brief and unambiguous *per curiam* opinion, the U.S. Supreme Court disagreed. The Court wrote that "[t]he 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."[5] Citing the Supremacy Clause of the federal Constitution, the Court further noted that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."[6]

Again, S.B. 320 seeks to prohibit exactly the speech the Court granted to corporate entities in *Citizens United.* In doing so, it brazenly ignores *American Tradition Partnership v. Bullock.* It goes without saying that the law has not changed, and that this latest iteration is equally unconstitutional. Moreover, if a state decided to ignore a clearly binding Supreme Court precedent, that would signal a troubling development for the rule of law in that state.

III. S.B. 320 misreads the direction of the voters who supported I-166 and ignores the policy directive allowed by the ballot initiative.

Finally, S.B. 320 ignores the will of the voters who supported I-166 by proposing to do what I-166 does not.

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[3] *First National Bank of Boston v. Bellotti,* 435 U. S., at 777 (1978) as quoted in *Citizens United.*
[4] *Western Tradition Partnership v. Attorney General of Montana*, 2011 MT 328.
[5] *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. ___ (2012) (*per curiam*), slip op. at 1.
[6] *Id.*, at note 5.

Specifically, I-166 states that "Montana's congressional delegation is charged with proposing a joint resolution offering an amendment to the United States constitution..."[7] Whatever the merits of such an instruction, it implicitly acknowledges that the Supreme Court has spoken on the scope of the First Amendment as it applies to independent corporate political expenditures and that, absent a constitutional amendment, that pronouncement is the law of the land.

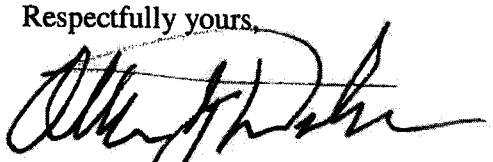
Nothing in the ballot initiative authorized the Legislature to propose legislation that prohibits corporations from making independent expenditures or from funding electioneering communications. Nothing in the ballot initiative asks the Legislature to again, pointlessly challenge *Citizens United*. Thus, this legislation finds no support in the will of Montanans who supported this initiative.

* * *

As noted, Senate Bill 320 would violate the Supreme Court's holdings in both *Citizens United* and *American Tradition Partnership v. Bullock*, and does so based on a failed reading of Initiative-166. If the bill becomes law, it would likely force a successful and costly legal challenge for the state to defend and would be a clear violation of the political speech rights of Montanans.

Thank you for allowing me to submit these comments. Should you have any further questions regarding this legislation or any other campaign finance proposals, please do not hesitate to contact me at (703) 894-6800 or by e-mail at adickerson@campaignfreedom.org.

Respectfully yours,



Allen Dickerson
Legal Director
Center for Competitive Politics

[7] Montana Secretary of State, "Ballot Language for Initiative No. 166 (I-166)," Available at: http://sos.mt.gov/elections/2012/BallotIssues/I-166.pdf (2012), p. 3.