EXHIBIT 1
DATE 3/20/15
HB 594

COMMISSIONER OF POLITICAL PRACTICES

STATE OF MONTANA

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March 20, 2015

Honorable Jeff Essmann
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House State Administration Committee
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Re: House Bill 594
Hearing Date: Tuesday, March 20, 2014 at 8:00 AM
Sponsor: Representative Steve Fitzpatrick

Dear Chairperson Essmann and members of the Committee:

The Office of the Commissioner of Political Practices (COPP) supports House Bill 594 and respectfully offers the following information to the members of the House State Administration Committee.

HB 594 provides the potential for consequences for a party who files a frivolous complaint with the COPP. The State of Montana offers its citizens an accessible and free system of filing campaign practice complaints with the COPP. 44.10.307(1)(2) ARM. Complaints are subjected to minimal filing standards. *Id.* After a complaint is filed the Commissioner is required ("shall")

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to investigate the matters set out in the complaint. 44.10.307(3) ARM. The investigation is conducted by the COPP investigator and other staff, all funded under the COPP general fund allocation.

The COPP complaint process has served the people of Montana well by providing Montana citizens a way to take respond to what they see as improper actions taken during an election. While most COPP complaints raise legitimate election related issues, some do not. The Commissioner is provided authority to reject illegitimate complaints as frivolous. 44.10.307(3)(a) ARM. The COPP has defined the measure of such a frivolous complaint in *Lansgaard v. Peterson* COPP-2014-CFP-008, a copy of which accompanies this testimony.

In 2014 there were 81 campaign practice complaints accepted for filing with the COPP. Nineteen of these complaints were determined to be frivolous complaints [*Lansgaard v. 18 Legislative Candidates* COPP-2014-CFP-006 and *Lansgaard v. Peterson*] and dismissed as frivolous. HB 594 provides further authority discouraging the filing of such Complaints by allowing the Commissioner to assess a fine against the person filing the frivolous complaint.

The COPP believes the complaint filing process should remain open and accessible to Montana citizens. Accordingly, the authority provided in HB 594, if granted by passage into law, will be applied sparingly in such a manner that it does not inhibit the average Montanan from filing a complaint with the COPP.

Thank you for your consideration of this testimony.

Sincerely,

Jonathan R. Motl
Commissioner of Political Practices

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Landsgaard v. Peterson and Wilks No. COPP 2014-CFP-008	DISMISSAL OF COMPLAINT AS FRIVOLOUS

On February 18, 2014, Bozeman resident Paul Landsgaard filed a complaint with the Office of the Commissioner of Political Practices (COPP) against Senator Jim Peterson (Senate District 15), Dan Wilks, Staci Wilks, Farris Wilks, and Joann Wilks. Senator Peterson is from Buffalo, Montana while the Wilks family members are from Cisco, TX.

Landsgaard's complaint alleges that Peterson and/or the Wilks violated Montana finance and practice laws during the 2012 campaign cycle by: making contributions that were over the limit; failing to file as a political committee; making bundled campaign contributions; and, failing to properly report and disclose campaign contributions.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is dismissal of a complaint as frivolous.

FINDING OF FACT

The foundational fact necessary for this Decision is that Dan Wilks, Staci Wilks, Farris Wilks, and Joann Wilks each made a $160 contribution to the general election campaign of a number of candidates seeking election as legislators to the 2012 session of the Montana legislature. (Stated Fact in Complaint).

DISCUSSION

The complaint in this matter alleges that a $160 contribution by an individual to a 2012 Montana legislative candidate can be construed, based on certain associated actions, to be an illegal contribution in violation of Montana law. The single fact necessary for a determination of the complaint is set out in the complaint and restated, above, as a foundational fact. That fact is that Dan Wilks and Staci Wilks each made a contribution to a candidate through a separate check in the amount of $160. Farris Wilks and Joann Wilks also made a contribution to a candidate by separately issued and signed $160 checks.

The limit in place for a 2012 Montana legislative election was $160 per individual per election. *See* §13-37-216 MCA (2010 code) with amounts adjusted for inflation by 44.10.338 ARM. The amount contributed by each of the four Wilks individuals was $160, the amount allowed under Montana law.

Landsgaard's claim of illegal action is based on his assertion that the Wilks family members acted together when making their contributions and thereby became a political committee. Landsgaard thus argues that the four

contributions from four individuals were really 4 contributions from a single entity, the political committee. A political committee is subject to a single $160 limit, thereby, under Landsgaard's approach, making the $640 in total contributions four times the amount allowed. Further, Landsgaard claims that the four $160 contributions became suspect because some sets of four contributions were "bundled" and delivered to the candidate in a single envelope by Senator Peterson.

The facts of this Matter allow the Commissioner to use this complaint to establish the principles of recognition and handling of a complaint as a frivolous complaint. Hereafter, based on the principles set out in this Decision, the Commissioner will identify frivolous complaints. Complaints identified as frivolous will be swiftly dismissed so as to lessen the burden on participants (contributors, candidates, ballot committees and others) frivolously accused of campaign practice violations.[1]

I. Complaint Filing Is and Will Continue to Be Informal and Inexpensive

The process of filing a campaign practices complaint with the COPP is informal with minimal requirements. 44.10.307 ARM. There is no filing fee. *Id.* This accessible and inexpensive complaint filing process is not altered by this Decision. There are scant public resources in Montana devoted to review of political actions. In general, the issues presented to the Commissioner by complaints and resolved through Decisions (and enforcement) foster civic

[1]. The Commissioner must generally investigate the matters alleged in any complaint: "shall investigate" § 13-37-111(2)(a) MCA. Frivolous complaints, however, can be dismissed without investigation if the complaint is "frivolous on its face." 44.10.307(3)(a) ARM.

debate that is essential to good governance.

This Decision does, however, declare that the Commissioner will hereafter classify some complaints, such as those addressed in this Decision, as frivolous complaints. The Decision in this Matter is detailed because it sets out the criteria for deeming a complaint frivolous. Future complaints identified as frivolous will be dismissed summarily with minimal discussion. The authority for this approach is 44.10.307(3)(a) ARM, allowing summary disposal of a frivolous complaint.

Complaints over the campaign practices of candidates and committees have grown steadily over the past 40 years. The Commissioner's office was established in 1975. Only one campaign practice complaint was filed during the first ten years of its existence. Complaints grew steadily in number averaging: 3 a year (1987-1992); 8 a year (1993 to 1998); and, 10 a year (1999 to 2004). In the last 10 years complaints have exploded to the point where over 40 complaints were filed in 2013, an off-election year.

An increased number of complaints is not by itself a bad omen, but it does require that the COPP adapt the manner in which it responds to and decides complaints, given its limited resources. The Commissioner initially engaged contract attorneys to assist in preparing Decisions on complaints. That approach worked well during the years when complaints were few in number. However, when complaint numbers increased the contract attorney approach resulted in large backlogs of pending Decisions, long delays in reaching Decisions and little enforcement follow-up to sufficiency findings set out in

Decisions. In 2013 the Montana Legislature provided funding for a COPP in-house attorney and the Governor appointed an attorney as Commissioner. The resulting less costly and more efficient use of in-house lawyers[2] to prepare Decisions and follow through with enforcement, coupled with the decision-making continuity provided by continued involvement of long time staffer Mary Baker and agency legal counsel Jim Scheier of the Attorney General's office, has allowed Decisions and enforcement to retain quality while proceeding at a much faster pace.[3]

Regardless of any increase in Decision making speed there is still a social cost accompanying every COPP complaint. Most COPP complaints raise a campaign practice issue and initiate a valuable civic debate that justifies the social cost. Some complaints, however (labeled frivolous by this Decision) do not raise a legitimate issue and still assess a social cost. The targets of a frivolous complaint (legislators, contributors and others) bear the monetary cost of defending against a COPP complaint and the social cost associated with the stigma of being accused of wrong doing. The Commissioner's staff (and the public) bear the cost of applying limited public resources to less worthy complaint issues rather than prosecution of serious campaign violations. The Commissioner should, and hereafter will, reduce the effect of such frivolous complaints.

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[2] Jaime MacNaughton is COPP legal counsel. Jonathan Motl, Commissioner, is also licensed as a Montana attorney. Both Motl and MacNaughton are full-time COPP employees.
[3] By the end of March of 2014 the current COPP Decision making system will have reduced backlog by 50% while keeping current on 2014 complaints. In addition, in-house counsel has regularly taken Decisions into enforcement as needed.

During the first two months of 2014 the Commissioner's Office received over 20 complaint documents alleging campaign violations against 2012 legislative candidates, including the complaints addressed by this Decision. The complaints were marked by strident language comparing the alleged violations, all of which lacked support in policy or law, with the serious campaign practice issues addressed by the Commissioner in recent decisions. These complaints provide an opportunity for the Commissioner to establish rules by which such frivolous complaints, unfairly assessing social costs on candidates, committees, the COPP, and the public can be dismissed promptly with minimal analysis. The Commissioner first sets out the constitutional and policy principles defining a frivolous complaint and then, based on those principles, sets out the criteria establishing a frivolous complaint.

II. Federal Court Established Constitutional Principles

Montana's campaign practice laws are primarily set out in Chapters 35 and 37 of Title 13 of the Montana Code. University of Montana law professor, Anthony Johnstone, noted that "Montana's campaign finance laws are relatively simple, stable, and (until recently) rarely adjudicated."[4] The "recent" litigation referred by Professor Johnstone began with the 2010 U. S. Supreme Court decision in the famous *Citizens United* case. [5] The holdings and comments in the *Citizens United* decision were followed by 3 years of federal court litigation in Montana leading to a massive judicial dissection of

[4] Anthony Johnstone, associate professor (constitutional law) University of Montana *Republican Form of Government in Montana* Montana Law Review, Vol. 74, p. 701 at p. 723 (2013).

[5] *Citizens United v. Fed. Election Comm.* 130 S. Ct. 876 (2010).

Montana's campaign practice laws by federal courts. Judicial intervention by federal courts into Montana's campaign practice laws was observed to be extensive so as to become "...the most significant federal constitutional intervention in Montana politics..." in the last 50 years.[6]

Federal Court intervention following the *Citizens United* ruling included rulings that invalided Montana's: ban (since 1912) on corporate independent expenditures[7]; ban (since 1935) on political party endorsement of judicial candidates[8]; requirement of accurate reporting of a candidate's voting record[9], political criminal liability cause of action[10], and ban on religious or corporate directives to vote in a certain way[11]. The federal courts applied skepticism of campaign corruption by money, overregulation, first amendment association rights, and first amendment speech rights to invalidate those of Montana's campaign practice laws set out above. The Commissioner applies the federal court constitutional principles articulated in the above listed cases in establishing the indicia of a frivolous complaint.

III. Montana Campaign Practice Policy Considerations

Professor Johnstone places the federal court campaign finance intervention in Montana within the broad theme of "federal intervention in state republicanism."[12] Professor Johnstone particularly sees the US Supreme Court's summary reversal of the Montana Supreme Court's Decision upholding

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[6] Johnstone, Montana Law Review, Vol. 74, p. 707.
[7] *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012).
[8] *Sanders County Republican Party v. Bullock*, 698 F3d 741 (9th Cir, 2012).
[9] *Lair v. Murray*, 871 F. Supp 2d. 1058 (D. Mont. 2012).
[10] *Id.*
[11] *Zastrow v. Bullock*, No-CV-18-BLG-RFC, 2012 WL 3066362 (D. Mont. 2012)
[12] Johnstone, Montana Law Review, p. 705.

a ban on corporate independent expenditures[13] as a rejection of state campaign practice concerns in that the decision "does not distinguish between state and federal regulation of politics, and because it (the American Tradition Partnership Decision) facilitates the increased influence of national political forces that can overwhelm state politics."[14]

Montana, indeed, has established policies that apply to any campaign practice analysis, laying a platform for a determination of a frivolous complaint. Professor Johnstone's cautionary analysis means that Montana's policy considerations can be applied only to the extent that they do not run afoul of a contrary constitutional principle established by the federal courts.

IV. Indicia of a Frivolous Complaint

The Commissioner, as set out below, hereby applies constitutional principles as well as Montana policy applicable to campaign practices in Montana to set out indicia of a frivolous complaint.

Indicia No. 1. **A Demand For Restriction On Base Level Participation**

An indicia of a frivolous complaint will be a complaint demanding an interpretation that restricts a contribution or expenditure that affords a base level of participation in a Montana campaign. A complaint that demands interpretations resulting in restrictions on the base contribution amount allowed an individual will be an example of such a frivolous complaint.

It is self-evident that contributions by Montanans (or non-Montanans) to political campaigns demonstrate involvement by citizens in the process of

[13] *Am. Tradition Partn. Inc. v. Bullock*, 132 S. Ct. 2490 (2012).
[14] Johnstone, Montana Law Review, p. 705.

governance, thereby promoting civic involvement and governance. The expressed campaign practice policy of Montana explicitly supports this approach through its policy of seeking a "level playing field in campaign spending that allows all individuals, regardless of wealth, to express their views to one another and their government." §13-35-503(2)(d) MCA.[15] Professor Johnstone articulates enhancement of participation by individuals in campaigns as one way to "level up citizen participation in campaign finance."[16] Participation by citizens is advanced by an unencumbered individual contribution limit ($160 for the 2012 election cycle). Participation by individuals is further enhanced by dismissing complaints challenging individual contribution limits since dismissal will: "reduce[ing] the participation costs of smaller political players."[17]

There are no constitutional issues associated with engaging the "leveling up" element of Montana policy when that policy element is applied in support of reducing the participation costs of individual contributors. In fact, an approach of less restriction on individual contributions serves the related constitutional goal of lowering regulatory burdens, as discussed below.

The Commissioner therefore determines that a complaint that argues for a COPP interpretation that results in increased restrictions on a smaller

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[15] The policy, established by passage of Initiative 166 in 2013, was sustained upon judicial review: Order of December 20, 2013 (Judge Seeley); *Rickert v. McCulloch*, No. CDV-2012-1003, 1st Judicial District, Lewis and Clark County, Montana. The Order was not appealed.
[16] Johnstone, Montana Law Review, pp. 706, 723.
[17] *Id.*, p. 725. Candidate Peterson and contributors Wilks engaged an attorney in this Matter, thereby costing money which constitutes a participation cost. Further, the Candidate and contributors were and are under the social stigma of being accused of wrongdoing and this social stigma is also a participation cost.

political player contribution is in conflict with Montana campaign practice policy and federal constitutional principles. The Commissioner determines that a complaint or a portion of a complaint making this argument demonstrates an indicia of a frivolous complaint.

The Commissioner notes that this indicia will be measured and applied specifically on a complaint-by-complaint basis. There may be facts that make it applicable to one complaint while not applicable to another.

Indicia No. 2. **A Demand For Increased Disclosure Burden On Individuals**

A second indicia of a frivolous complaint will be one that demands an interpretation of campaign finance data so as to create increased disclosure issues for individual contributions. An example of this type of complaint will be one demanding that a $320 joint contribution made at $160 each for a husband and wife not be allowed unless made separately by each spouse or partner.

The State of Montana policy consideration is again the leveling up policy set out in regard to Indicia No. 1. The policy considerations are applied to individual contribution issues because Montana's policy favors enhancing political involvement (including campaign contributions) by individuals so as to create a more "level playing field in election spending." §13-35-503 MCA.

The applicable constitutional considerations support application of Montana's policy considerations because the policy, as applied in this Decision, results in less regulation. *Citizens United* framed its constitutional considerations, in part, by noting that the Federal Election Commission

"adopted 568 pages of regulations, 1,278 pages of explanations and justifications for these regulations, and 1,771 advisory opinions since 1975"[18] during the course of regulation of federal campaigns. Professor Johnstone succinctly describes this approach as "the dysfunctional federal disclosure regime."[19]

Without disregarding the necessity of basic regulation of campaigns, this Decision notes the contrasting minimalistic, plain language and common sense approach taken by Montana's regulatory scheme. When Montana's registration and contribution disclosure laws were challenged, even the federal courts sustained the constitutionality of Montana's political committee registration and disclosure requirements"...the public's interest in transparent political funding outweighs the minimal burden the incidental disclosure requirements impose..."*Nat'l Ass'n for Gun Rights, Inc. v. Murry* CV-12-95-H-DLC (D. Mont.), 2013 U. S. Dist. Lexis 132922, ¶18.

The Commissioner determines that a second indicia of a frivolous complaint is a demand for an interpretation of the campaign practice act that results in further disclosure burdens on contributions by individuals.

The Commissioner notes that this indicia will be measured and applied specifically on a complaint-by-complaint basis. There may be facts that make it applicable to one complaint while not applicable to another.

Indicia No. 3. **A Complaint is Directed to a Corrected Campaign Practice**

A third indicia of a trivial complaint is one that focuses on a campaign

[18] *Citizens United* (majority opinion), 130 S. Ct. at 895.
[19] Johnstone, Montana Law Review, p. 716.

error that has been promptly corrected by the campaign. An example is a complaint filed over an attribution omission on a candidate sign or website, an error that could be and was corrected by the campaign once informed of the omission. Errors that cannot be corrected, such as untimely filing of a report or an attribution error in published material are not included in this indicia since those errors cannot be corrected.

The policy of Montana does not favor "got you" campaign practice complaints. Instead, where it is possible to do so, Montana law favors correcting campaign reporting errors.[20] Complaints seeking to score campaign related media hits based on corrected mistakes falls within this indicia of a frivolous complaint. Professor Johnstone points out the Commissioner dilutes the impact of Decisions and the ability to make Decisions (and therefore service to the public) when limited resources are spent on a complaint that serves opposing campaign interests rather than the public interest.[21]

The applicable constitutional considerations support application of Montana's policy considerations because, as applied in this Decision, the policy reduces regulation. The Commissioner determines that an indicia of a frivolous complaint is a complaint making a challenge to a corrected campaign action.

The Commissioner notes that this indicia will be measured and applied

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[20] Each campaign finance report is inspected within 20 days of filing by the Commissioner's staff [§13-37-121(1)MCA] and COPP staff are directed to notify the campaign of any readily identifiable issues or non-compliance with reporting requirements. The campaign is then allowed to correct.

[21] Johnstone, Montana Law Review, p. 725.

specifically on a complaint-by-complaint basis. There may be facts that make it applicable to one complaint while not applicable to another.

Indicia No. 4 **De Minimis Violations Are Not Favored**

A fourth indicia of a trivial complaint is one that focuses on a technical violation. An example of such a complaint is one that complains of a partial disclosure of employment or address information.

The constitutional and policy principles, including over regulation and cost of participation, apply to this indicia of a trivial complaint.

The Commissioner notes that this indicia will be measured and applied specifically on a complaint-by-complaint basis. There may be facts that make it applicable to one complaint while not applicable to another.

Indicia No. 5. **Reserved Items.**

The trivial complaint approach will be further defined, as need be, to accommodate and apply to future complaints that raise additional issues that will trigger classification of the complaint as trivial.

V. Applying Indicia of Frivolous Complaint to this Matter

The sole fact (see Finding of Fact, this Decision) necessary to determine the complaint in this matter was set out in the complaint itself. There was no necessity of further investigation in order to make a Decision resolving this matter in its entirety. The entirety of this complaint may therefore be dismissed as a complaint "frivolous on its face." 44.10.307(3)(a) ARM.

The amount of the contribution ($160) attributed to each Wilks individual

is the amount allowed by law.[22] The allegation in the complaint that the Wilks family is a "billionaire" Texas family is of no consequence. Protecting a clear and simple contribution limit for the Wilks individuals protects the same limit for a Montana individual. Each of the 4 individual contributions at issue in this Matter is allowed by law. The interpretations that Landsgaard seeks so as to group these four contributions into a single political committee limit is without credible support in policy or law.[23] The right to an individual contribution limit under Montana law needs to be protected, not reduced or made complicated by the sort of interpretations demanded by the complaint in this Matter. This complaint is a frivolous complaint under Indicia No. 1 and No. 2 discussed above.

OVERALL DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. In most cases the Commissioner must follow a process requiring that the Commissioner ("shall investigate," *See*, § 13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law. However, "no investigation shall be required if a complaint is frivolous on its face...." 44.10.307(3)(3)(a) ARM. Here no investigation is required at all as the entire complaint is frivolous on its face.

This Commissioner having duly considered the matters raised in the Complaint, determines the same to be frivolous. The Commissioner hereby

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[22] *See* §13-37-216 MCA (2010 code) with amounts adjusted for inflation by 44.10.338 ARM.

[23] Likewise as to the complaint that "bundling" (something that is not defined or limited under Montana campaign practice law) somehow defeats an individual's right to make an individual contribution.

dismisses this complaint in full and deems it to be a frivolous complaint.

DATED this 12th day of March, 2014.

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