MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

JEANNIE MARIE RICKERT, individually and as a Qualified Elector, and GEOFFREY L. GOBLE, individually and as a Qualified Elector, Plaintiffs and Counter-Defendants, v. LINDA MCCULLOCH, in her capacity as Secretary of State of the State of Montana, and TIM FOX, in his capacity as Attorney General for the State of Montana, Defendants, and STAND WITH MONTANANS; CORPORATIONS AREN'T PEOPLE – BAN CORPORATE CAMPAIGN SPENDING, Defendant Intervenor and Counterlaimant.	Cause No. CDV-2012-1003 **MEMORANDUM AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

/////

BACKGROUND

Ballot Initiative 166 (I-166) relates to corporations within the context of campaign contributions. After it was reviewed by the Secretary of State and the Attorney General, its legality was challenged in the Montana Supreme Court. On August 10, 2012, limiting its review to procedural requirements, the Court denied the challenge. *Montanans Opposed to I-166 v. State*, 2012 MT 168, ¶¶ 7 - 8, 365 Mont. 520, 285 P.3d 435.

This case was filed in the Tenth Judicial District Court, Fergus County, on August 13, 2012. In their complaint and amended complaint, Plaintiffs alleged inappropriate signature certification in two counts, and constitutional challenges in four additional counts. Plaintiffs sought a declaration that the initiative is unconstitutional and decertification of the initiative.

On October 15, 2012, the Tenth Judicial District Court allowed the organization Stand with Montanans: Corporations Aren't People – Ban Corporate Campaign Spending (SWM) to intervene in the lawsuit as a defendant intervenor. In an order filed November 1, 2012, the Tenth Judicial District Court dismissed the first two counts of the complaint.

The initiative appeared on ballots in the statewide Montana elections held November 6, 2012 and was passed by the voters. In an order filed November 23, 2012, the Tenth Judicial District Court denied attorney fees for Defendant Intervenor with regard counts I and II, granted the motion for change of venue and transferred the case to Lewis and Clark County.

Before the Court is Plaintiffs' renewed motion for summary judgment regarding the remaining claims, Counts III through VI of the amended complaint. In its response filed December 12, 2012, Defendant State requested summary judgment

in its favor. On July 15, 2013, Defendant Intervenors filed a motion for summary judgment. This memorandum and order covers the above motions.

STANDARDS OF REVIEW

> Whether enacted by the legislature or created by the people through initiative, all statutes carry with them a presumption of constitutionality. *State v. Erickson* (1926), 75 Mont. 429, 438, 244 P. 287, 290. When a statute is challenged as being unconstitutional, the challenger must show that it does in fact infringe upon a right guaranteed by the Constitution. *N.A.A.C.P. v. Alabama* (1958), 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488.

Mont. Automobile Ass'n v. Greely, 193 Mont. 378, 382-83, 632 P.2d 300, 303 (1981).

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). "All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment." *Hopkins v. Super. Metal Workings Sys.*, 2009 MT 48, ¶ 5, 349 Mont. 292, 203 P.3d 803 (citing *Schmidt v. Wash. Contractors Group*, 1998 MT 194, ¶ 7, 290 Mont 276, 964 P.2d 34).

When considering cross-motions for summary judgment, the Court must evaluate each party's motion on its own merits. *Steadele v. Colony Ins. Co.*, 2011 MT 208, ¶ 14, 361 Mont. 459, 260 P.3d 145.

DISCUSSION

The parties raise no genuine issues of material fact. All issues may be resolved by reference to Montana law and the undisputed language of I-166, as codified at Montana Code Annotated §§ 13-35-501 through -504.

Article III, Section 4 of the Montana Constitution provides:

> **Initiative.** (1) The people may enact laws by initiative on all matters except appropriations of money and local or special laws.

/////

(2) Initiative petitions must contain the full text of the proposed measure, shall be signed by at least five percent of the qualified electors in each of at least one-half of the counties and the total number of signers must be at least five percent of the total qualified electors of the state. Petitions shall be filed with the secretary of state at least three months prior to the election at which the measure will be voted upon.

(3) The sufficiency of the initiative petition shall not be questioned after the election is held.

I-166, as passed by the Montana electorate on November 6, 2012, states:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title**. [Sections 1 through 4] may be cited as the "Prohibition on Corporate Contributions and Expenditures in Montana Elections Act."

NEW SECTION. **Section 2. Preamble**. The people of the state of Montana find that:

(1) since 1912, through passage of the Corrupt Practices Act by initiative, Montana has prohibited corporate contributions to and expenditures on candidate elections;

(2) in 1996, by passage of Initiative No. 125, Montana prohibited corporations from using corporate funds to make contributions to or expenditures on ballot issue campaigns;

(3) Montana's 1996 prohibition on corporate contributions to ballot issue campaigns was invalidated by Montana Chamber of *Commerce v. Argenbright*, 226 F.3d 1049 (2000). Montana's 1912 prohibition on corporate contributions to and expenditures on candidate elections is also being challenged under the holding of *Citizens United v. FEC*, 558 U.S. _____, 130 S.Ct. 876 (2010). This decision equated the political speech rights of corporations with those of human beings.

(4) in 2011 the Montana Supreme Court, in its decision, *Western Tradition Partnership, Inc. v. Attorney General*, 2011 MT 328, upheld Montana's 1912 prohibition on corporate contributions to and expenditures on candidate campaigns, stating in its opinion as follows:

(a) examples of well-financed corruption involving corporate money abound in Montana;

(b) the corporate power that can be exerted with unlimited corporate political spending is still a vital interest to the people of Montana;

(c) corporate independent spending on Montana ballot issues has far exceeded spending from other sources;

(d) unlimited corporate money into candidate elections would irrevocably change the dynamic of local Montana political office races;

(e) with the infusion of unlimited corporate money in support of or opposition to a targeted candidate, the average citizen candidate in Montana would be unable to compete against the corporate-sponsored

candidate, and Montana citizens, who for over 100 years have made their modest election contributions meaningfully count, would be effectively shut out of the process; and

(f) clearly the impact of unlimited corporate donations creates a dominating impact on the Montana political process and inevitably minimizes the impact of individual Montana citizens.[1]

NEW SECTION. **Section 3. Policy**. (1) It is policy of the state of Montana that each elected and appointed official in Montana, whether acting on a state or federal level, advance the philosophy that corporations are not human beings with constitutional rights and that each such elected and appointed official is charged to act to prohibit, whenever possible, corporations from making contributions to or expenditures on the campaigns of candidates or ballot issues. As part of this policy, each such elected and appointed official in Montana is charged to promote actions that accomplish a level playing field in election spending,

(2) When carrying out the policy under subsection (1), Montana's elected and appointed officials are generally directed as follows:

(a) that the people of Montana regard money as property, not speech;

(b) that the people of Montana regard the rights under the United States Constitution as rights of human beings, not rights of corporations;

(c) that the people of Montana regard the immense aggregation of wealth that is accumulated by corporations using advantages provided by the government to be corrosive and distorting when used to advance the political interests of corporations;

(d) that the people of Montana intend that there should be a level playing field in campaign spending that allows all individuals, regardless of wealth, to express their views to one another and their government; and

(e) that the people of Montana intend that a level playing field in campaign spending includes limits on overall campaign expenditures and limits on large contributions to or expenditures for the benefit of any campaign by any source, including corporations, individuals, or political committees.

NEW SECTION. **Section 4. Promotion of policy by elected or appointed officials**.

(1) Montana's congressional delegation is charged with proposing a joint resolution offering an amendment to the United States constitution that accomplishes the following:

---

[1] Section 2 is an incomplete statement of current law. While the description in (4) of the Montana Supreme Court decision in *Western Trade Partnership, Inc.* may be accurate, the United States Supreme Court decision in this case (relevant and binding in this state) overturned that decision.

(a) overturns the U.S. Supreme Court's ruling in *Citizens United v. Federal Election Commission*;

(b) establishes that corporations are not human beings with constitutional rights;

(c) establishes that campaign contributions or expenditures by corporations, whether to candidates or ballot issues, may be prohibited by a political body at any level of government; and

(d) accomplishes the goals of Montanans in achieving a level playing field in election spending.

(2) Montana's congressional delegation is charged to work diligently to bring such a joint resolution to a vote and passage, including use of discharge petitions, cloture, and every other procedural method to secure a vote and passage,

(3) The members of the Montana legislature, if given the opportunity, are charged with ratifying any amendment to the United States constitution that is consistent with the policy of the state of Montana.

NEW SECTION. **Section 5. Saving clause**. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act.]

NEW SECTION. **Section 6. Severability**. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 7. Effective date**. [This act] is effective upon approval by the electorate.

NEW SECTION. **Section 8. Codification instruction**. Sections [1 through 4] are intended to be codified as an integral part of Title 13 and the provisions of Title 13 apply to sections [1 through 4].[2]

Plaintiff's claims regarding I-166 are summarized as follows:

Count III: the initiative process was improperly used to create a "non-binding statement of policy," rather than law in violation of Article III, section 4, of the Montana Constitution;

/////

[2] The initiative is codified in Montana Code Annotated §§ 13-35-501 through -504.

Count IV: the portion of the initiative that "charges" Montana legislators to ratify "any amendment to the United States constitution that is consistent with the policy of the state of Montana" violates the constitutionally-set procedures of allowing legislators to vote as they see fit;

Count V: the initiative violates Article V, section 11, of the Montana Constitution by addressing more than one subject;

Count VI: the portions of the initiative that "charge" Montana's congressional delegation and Montana legislators to act regarding an amendment to the United States Constitution violates the prohibition on use of the initiative process to amend the federal constitution.

A. Initiative States Policy, Not Law

Plaintiffs first claim that the language of I-166 is a statement of policy, rather than law. They argue that its passage violates the purpose and provisions of the initiative process, because the language should be presented in a resolution rather than an initiative.

In support of their argument, Plaintiffs cite *Reichert v. State*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455, *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826 (1984), and Justice Nelson's dissent in *Montanans Opposed to I*-166.[3] *Reichert* involved a legislative referendum regarding the election of Montana Supreme Court justices. The *Reichert* Court decided that the referendum was unconstitutional both as to its goal of restating the process of electing justices and in the way the change would be made to the Montana Constitution. *Reichert*, ¶¶ 64, 65, 70, 71, 82.

[3] Plaintiffs also refer to a letter written by Attorney General Joseph P. Mazurek in 1994 to Secretary of State Mike Cooney. The initiative reviewed in 1994 by Mazurek called for the resignation of United States Senator Max Baucus on December 1, 1994. The letter does not constitute case law binding on any court.

In *Waltermire*, the Montana Supreme Court reviewed a constitutional initiative that attempted to direct the Montana Legislature "to apply to Congress pursuant to Article V of the United States Constitution to call a convention to consider a federal balanced budget amendment." *Waltermire*, at 426, 691 P.2d at 827. Because the initiative provided that the Montana Legislature was to adopt a resolution, the Montana Supreme Court found that the initiative was violative of law. Looking to the substance of the initiative, the Court stated:

> Labeling a document a constitutional amendment does not make it one. This simple truth is particularly appropriate here where the initiative at issue would create a transient amendment for a specialized purpose. A temporary initiative measure is not a part of the permanent fundamental law of a state and should not be submitted under the guise of a constitutional amendment.

Waltermire, at 4228-29, 691 P.2d at 827.

None of the objectionable components that existed in *Reichert* and *Waltermire* exist in I-166. To the extent that Plaintiffs argue that the presentation of I-166 to the public was improper, they urge decision on that which is already decided — the statements approved by the Attorney General prior to an election regarding I-166 were not clearly illegal or improper and the initiative was properly placed on the ballot in 2012. *Montanans Opposed to I-166.*

Most relevant to Plaintiffs' claim that I-166 is not properly called "law" is Justice Nelson's dissent in *Montanans Opposed to I-166*. However, the dissent concludes that the language of I-166 is not properly regarded as law by imposing limitations on the constitutional initiative provision that are not stated in the constitutional provision. Restrictions on the subject matter of initiatives include only "appropriations of money and local or special laws." Mont. Const., Art. 11, § 4. The dissent urges the addition of narrower definitional language to the provision. A court

is to ascertain and declare the terms or substance of a statute or constitutional provision; a court is not to insert what has been omitted or to omit what has been inserted. *See City of Missoula v. Cox*, 2008 MT 364, ¶¶ 9, 11, 346 Mont. 422, 196 P.3d 452; Mont. Code Ann. § 1-2-101; *see also Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶ 46, 302 Mont. 209, 14 P.3d 487. In addition, the Montana Supreme Court has long recognized "the principle that 'initiative and referendum provisions of the Constitution should be broadly construed to maintain the maximum power in the people.'" *Nicholson v. Cooney*, 265 Mont. 406, 411, 877 P.2d 486, 488 (1994) (*quoting Chouteau Co. v. Grossman*, 172 Mont. 373, 378, 563 P.2d 1125, 1128 (1977). Applying these principles to the question of whether or not the people of the state of Montana may pass as an initiative a law that states policy, the Court concludes that they may.

B. Initiative Directs Elected Officials as to Voting

Section 4 of I-166 (now Montana Code Annotated § 13-35-504) provides:

> (1) Montana's congressional delegation is charged with proposing a joint resolution offering an amendment to the United States constitution that accomplishes the following:
> (a) overturns the U.S. Supreme Court's ruling in *Citizens United v. Federal Election Commission*;
> (b) establishes that corporations are not human beings with constitutional rights;
> (c) establishes that campaign contributions or expenditures by corporations, whether to candidates or ballot issues, may be prohibited by a political body at any level of government; and
> (d) accomplishes the goals of Montanans in achieving a level playing field in election spending.
> (2) Montana's congressional delegation is charged to work diligently to bring such a joint resolution to a vote and passage, including use of discharge petitions, cloture, and every other procedural method to secure a vote and passage,

/////

/////

> (3) The members of the Montana legislature, if given the opportunity, are charged with ratifying any amendment to the United States constitution that is consistent with the policy of the state of Montana.

The language does not merely encourage action by legislative representatives. It uses clearly imperative language — the section "charges" both Montana's congressional delegation and its legislature to act (including to vote) in accordance with Section 3 of the initiative (now Montana Code Annotated §13-35-503).

The Montana Supreme Court in *Waltermire* specifically found it inappropriate to direct Montana legislators to vote or act in a way contrary to their function as elected officials tasked with independent study, thought, and action:

> We have invalidated this ballot measure recognizing that the initiative power should be broadly construed to maintain the maximum power in the people. Chouteau County v. Grossman (1977), 172 Mont. 373, 563 P.2d 1125. **However, we cannot fail to recognize the independent legislative power vested in the legislature. Art. V, Sec. 1, 1972, Mont. Const. The stricken ballot measure would compel the Legislature to reach a specific result under threat of confinement and no pay. Such coercion is repugnant to the basic tenets of our representative form of government guaranteed by the Montana Constitution.**

Waltermire, at 429, 691 P.2d at 829 (emphasis added). The *Waltermire* Court went on to declare unconstitutional the initiative in that case, because it dictated a procedure for amending the United States Constitution contrary to Article V of the federal constitution.[4] Declaring the initiative unconstitutional, the Court stated:

> [W]e find that whenever a state legislature acts to amend the United States Constitution under Article V powers, the body must be a

---

[4] In relevant part, Article V of the United States Constitution provides: "The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments which in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress;. . ."

> deliberative representative assemblage acting in the absence of any external restrictions or limitations. Initiative No. 23 is facially unconstitutional for precisely this reason. The measure attempts to direct and orchestrate the legislative application process in contravention of the plain language of Article V.
> . . .
>
> The framers of the United States Constitution could have provided the people, through direct vote, a role in the Article V application process. They chose instead to solely vest this power within deliberative bodies, the state legislatures. The people through initiative cannot affect the deliberative process. As Initiative No. 23 places significant constraints on the Montana Legislature it is facially unconstitutional under Article V.

Waltermire, at 432-33, 691 P.2d at 830-31.

While I-166 does not provide that Montana legislators remain in session without pay until the specified actions are taken, the enforcement provisions in Title 13, chapter 35, of the Montana Code Annotated are applicable to I-166. The provisions include the designation of a violation of "the election laws of this state" a misdemeanor (Mont. Code Ann. § 13-35-103), attempt and accountability provisions (Mont. Code Ann. §§ 13-35-104 and -105), prohibitions applicable to candidates and campaign treasurers, and elected officials (Mont. Code Ann. § 13-35-106), and the voiding of elections (Mont. Code Ann. § 13-35-107). These statutes, a part of the same election laws as the I-166 language, cannot be ignored during consideration of the effects of I-166 and its requirement that Montana's congressional delegation and legislature act in particular ways.

The initiative language dictates the action required and the votes to be cast. In essence, therefore, it predetermines actions and takes from public officials the freedom to vote as they see fit. These constraints, as well as the criminal liability for violation of the provisions, are not insignificant. The initiative also improperly attempts to direct and orchestrate the legislative application process in contravention

of the plain language of Article V of the United States Constitution. The result is that Section 4 of I-166 must be declared unconstitutional.

This Court's conclusion that Section 4 of I-166 is unconstitutional does not affect the remainder of the law. *Reichert*, ¶ 86. Section 6 of the initiative specifically states an intent to sever from the act any invalid parts.

C. Constitutional Prohibition Against Multiple Subjects in an Enactment

Article V, section 11, of the Montana Constitution provides in pertinent part:

> **Bills**. . . . (3) Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.

The title of I-166, as printed in the Voter Information Pamphlet, reads as follows:

> Ballot initiative I-166 establishes a state policy that corporations are not entitled to constitutional rights because they are not human beings, and charges Montana elected and appointed officials, state and federal, to implement that policy. With this policy, the people of Montana establish that there should be a level playing field in campaign spending, in part by prohibiting corporate campaign contributions and expenditures and by limiting political spending in elections. Further, Montana's congressional delegation is charged with proposing a joint resolution offering an amendment to the United States Constitution establishing that corporations are not human beings entitled to constitutional rights.

Plaintiffs maintain that there is more than one subject covered by the title and by the initiative language. Defendants argue that the title contains only the subject of limiting corporate campaign contributions in Montana elections (including "tasks to effectuate this policy"). According to the Montana Supreme Court, the

/////

following standard is used to evaluate whether or not a law contains more than one subject:

> The constitutional requirement that a law should contain only one subject has been strictly construed. *State v. Joyland Club* (1950), 124 Mont. 122, 143, 220 P.2d 988, 998. The purpose of requiring singleness of subject is to prevent the practice of embracing in the same bill incongruous matters which have no relation to each other or to the subject specified in the title, so that measures may not be adopted without attracting attention to them. *Rosebud County v. Flinn* (1940), 109 Mont. 537, 543-44, 98 P.2d 330, 334; *Jobb v. Meagher County* (1898), 20 Mont. 424, 437, 51 P. 1034, 1038. The "one subject" limitation has been applied to initiatives as well as laws passed by the Legislature. *Martin v. State Highway Commission* (1939), 107 Mont. 603, 88 P.2d 41. The test under this provision of the Montana Constitution is simply whether the title is of such character as to mislead the public as to the subjects embraced. *City of Helena v. Omholt* (1970), 155 Mont. 212, 220-21, 468 P.2d 764, 768.

Montana Automobile Association v. Greely, at 398, 632 P.2d at 311. There are no distinctions between the title and the substance of the initiative that provide a basis for finding that it addresses subjects with no relation to each other or that the title misled the public as to the subjects at hand. Plaintiffs claim as to multiple subjects is not persuasive.

Based on the foregoing, IT IS HEREBY ORDERED Plaintiffs' motion for summary judgment is GRANTED as to Section 4 of Initiative 166 — Counts IV and VI of the Amended Complaint. It is DENIED with regard to Counts III and Count V. Defendants' and Defendant Intervenors' motions for summary judgment are DENIED as to Counts IV and VI of the Amended Complaint. They are GRANTED with regard to Counts III and Count V.

DATED this 20 day of December 2013.

Kathy Seeley

KATHY SEELEY
District Court Judge

pc: James E. Brown
Chris J. Gallus
J. Stuart Segrest
Jorge Quintana
David K.W. Wilson, Jr./Brian J. Miller

T/KS/rickert v mcculloch m&o ord mots sj.wpd