STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

October 20, 2015

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Amending the Idaho Sunshine Act to Limit Campaign Contributors to a State Office to Constituents of that Office

Dear Secretary of State Denney:

An initiative petition was filed with your office on September 28, 2015, and forwarded to this office on the same day. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative nor the potential revenue impact to the state budget.

BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

The principal purpose of the proposed initiative is clearly stated in the first sentence of the proposed law itself: To require any person who contributes to a candidate for office, to be a

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constituent of that office, i.e., to live in the district (or in Idaho for statewide offices). The proposed initiative would amend Idaho Code sections 67-6610 and 67-6610A to restrict contributions from candidates to State offices to contributions from a constituent of that office.[1] Further, contributions from corporations to a "Legislative Authorized Candidate Committee" or "State Authorized Candidate Committee" would not be permitted. (The quoted terms are used but not defined in the proposed initiative.) The proposed initiative would not restrict contributions to Political Action Committees or to State Party Committees if the contributions were not earmarked for specific candidates.

First, reviewing the proposed initiative for form and style pursuant to Idaho Code § 34-1809(1)(c), the amendments to sections 67-6610 and 67-6610A are not shown in "legislative format," *i.e.*, they do not show which words in the current statutes would be stricken and do not show which words not in the current statutes would be inserted. This is the normal way in which changes from existing statutes are shown by amending legislation. This office recommends that the initiative should be revised to show changes from current sections of the Idaho Code by use of legislative format. See, for example, the legislative format used in another proposed initiative reviewed earlier this year: http://www.sos.idaho.gov/elect/inits/2016/init02.html. In addition, the proposed initiative uses capitalized terms like "Legislative Authorized Candidate Committee" or "State Authorized Candidate Committee" that are intended to have a specific meaning, but are not defined in the law. This office recommends that these and other capitalized terms contained in the proposed initiative that are not now found in Idaho law be defined in the initiative.

Second, reviewing the proposed initiative for matters of substantive import under Idaho Code § 34-1809(1)(a), the initiative is unconstitutional under the First Amendment. To begin, its prohibition of corporate contributions to candidates is unconstitutional under the natural extension of the holding in Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L.Ed.2d 753 (2010). Citizens United was a case involving a Federal law that prohibited corporations and unions from making independent expenditures for electioneering communications (broadcasts or wide deliveries of materials that mention a candidate by name during the month or two before an election) or that advocate for the election or defeat of a candidate for Federal office. For example, Citizens United said: "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office," 558 U.S. at 339; "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others," *id.* at 340; and, "No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations," *id.* at 365.

Citizens United struck down a law limiting corporations' electioneering communications or independent advocacy for or against Federal candidates as a violation of the First Amendment's Free Speech Clause. It did not address the constitutionality of prohibiting

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[1] This means that contributors to a legislative campaign would have to live in that legislative district, contributors to a district judge's campaign would have to live in that judicial district, and contributors to a campaign for statewide office like Governor or Justice of the Supreme Court would have to live in Idaho. The rest of this review focuses on legislative candidates, but a similar analysis would apply for a candidate for district judge in a judicial district or for a candidate for statewide office.

corporate donations to a candidate's campaign. But it is clear from Citizens United that the same rules of constitutional law would apply to individuals and corporations in the law of Free Speech under the First Amendment and elections.

The rules of First Amendment Free Speech law for campaign contributions were elaborated in McCutcheon v. Federal Election Comm'n, 572 U.S. —, 134 S. Ct. 1434, 188 L.Ed.2d 468 (2014). McCutcheon involved a Federal statute that as practical matter, limited the number of candidates for Federal office to whom a political donor could contribute the maximum allowed contributions per candidate by the indirect means of an aggregate limit on total donations to Federal candidates and political action committees (PACs). 134 S. Ct. at 1442-1444. This prohibition against giving the maximum contribution to as many candidates or PACs as the donor wished was struck down as a violation of the donor's Free Speech rights to donate. Among other things, the Court said:

> The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. ... At the same time, we have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or ***to restrict the political participation of some in order to enhance the relative influence of others***.

134 S. Ct. at 1441 (emphasis added; citations omitted). Thus, we may infer that it is unconstitutional to limit persons to donating only within their own legislative district to enhance the relative influence of those within the district compared to those without the district.

> Any regulation must . . . target what we have called quid pro quo corruption or its appearance . . . dollars for political favors. . . . Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government into the debate over who should govern.

134 S. Ct. at 1441 (citations and internal punctuation omitted). Thus, we may infer that limiting political donations to persons within a legislative district is unconstitutional.

> The First Amendment is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. . . . ***[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. . . . When an individual contributes money to a candidate, he exercises both of those rights:*** The contribution serves as a general expression of support for the candidate and his views and serves to affiliate a person with a candidate.
>
> . . . .

> . . . ***The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.***
>
> . . . [Under the statute under review a] donor must ***limit the number of candidates he supports***, and may have to choose which of several policy concerns he will advance—***clear First Amendment harms*** . . . .

134 S. Ct. at 1448-1449 (emphasis added; citations and internal punctuation omitted). Thus, we may again infer an unlimited First Amendment right to donate to any candidate.

> . . . This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. . . . We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to level the playing field, or to level electoral opportunities, or to equalize the financial resources of candidates. . . . The First Amendment prohibits such legislative attempts to fine-tune the electoral process, no matter how well intentioned.

Id. at –, 134 S. Ct. at 1450 (citations and internal punctuation omitted). Thus, we may infer that limiting allowable donors to those who live in a particular legislative district is unconstitutional because it is not tailored to the issue of *quid pro quo* corruption.

McCutcheon did not explicitly address the issue of whether contributions to candidates can be limited in whole or in part to contributions from people in the candidate's constituency. But decisions of two Federal Courts of Appeals have, and both have concluded that such restrictions were unconstitutional.

- In Landell v. Sorrell, 382 F.3d 91, 146 (2nd Cir. 2002), *reversed on other grounds*, Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L.Ed.2d 482 (2006), a Vermont statute that limited out-of-state contributions to a candidate to 25% of total contributions to the candidate was held unconstitutional. As the United States Supreme Court said: "The Act also limits the amount of contributions a candidate, political committee, or political party can receive from out-of-state sources. . . . The lower courts held these out-of-state contribution limits unconstitutional, and the parties do not challenge that holding." *Id.* at 239.

- In VanNatta v. Keisling, 151 F.3d 1215 (9th Cir. 1998) , cert denied, 525 U.S. 1104, 119 S. Ct. 870, 142 L.Ed.2d 771 (1999), an Oregon initiative that prohibited a candidate's use of donations from out-of-district residents was held unconstitutional: "Measure 6 is not closely drawn to advance the goal of preventing corruption and under this analysis fails to pass muster under the First Amendment." 151 F.3d at 1221.

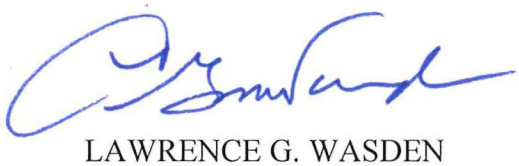
Contrary decisions like State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L.Ed.2d 1069 (2000), pre-date Citizens United and McCutcheon and would not seem to be consistent with them.

This constitutional analysis is not complete; further analysis would only identify more First Amendment problems. Suffice it to say, no initiative prohibiting corporate donations to candidates for State office or restricting allowable donations to those from constituents within a district will withstand constitutional challenge. There does not seem to be any way to preserve the proposed initiative's goal in a constitutional manner.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certification of Review, deposited in the U.S. Mail to Robert A. Perry, 9215 N. Great Hall Drive, Hayden, Idaho 83835.

Sincerely,



LAWRENCE G. WASDEN
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Analysis by:

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