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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 17-0449

ACLU OF MONTANA FOUNDATION, INC.,

Petitioner,

v.

STATE OF MONTANA, by and through TIMOTHY C. FOX, in his official capacity as Attorney General, and COREY STAPLETON, in his official capacity of Secretary of State,

Respondents.

ATTORNEY GENERAL'S RESPONSE TO THE PETITION OF THE ACLU OF MONTANA FOUNDATION, INC., PURSUANT TO MONT. CODE ANN. § 13-27-316

Pursuant to Mont. Code Ann. § 13-27-316(2), the Attorney General of the State of Montana hereby offers this response to the above-captioned petition filed July 31, 2017.

BACKGROUND

Initiative No. 183 (I-183) is a proposed ballot measure for the 2018 General Election. On June 16, 2017, the Attorney General's Office received the proposed initiative from the Secretary of State pursuant to Mont. Code. Ann. §13-27-312. A fiscal note was requested that same day and delivered via email from the budget office on June 26, 2017. The Attorney General's Office subsequently prepared a fiscal statement from the fiscal note. The initiative sponsor's proposed statement of purpose and the Attorney General's fiscal statement were forwarded on July 3, 2017 to interested parties pursuant to Mont. Code Ann. § 13-27-312(2). Comments were allowed until noon on July 12, 2017.

The office conducted a legal sufficiency review pursuant to statutory and common law standards. Based on that review and the comments from interested parties, the Attorney General's Office determined that the sponsor's proposed statement of purpose required revision under Mont. Code Ann. §13-27-312(4). The final ballot

statements, along with the approval of the form of the petition, were forwarded to the Secretary of State's Office on July 20, 2017.

The Attorney General's Office was emailed a copy of Petitioner's suit challenging the Attorney General's legal sufficiency review on July 31, 2017. Petitioner has asked the Court to hold that the ballot and fiscal statements do not follow statutory guidelines, the ballot issue should be thrown out or, in the alternative, the ballot statements should be revised and any existing petitions should be void.

STATEMENT OF THE ISSUES

Petitioner has three main grievances with I-183, as restated below:

1. Did the Attorney General's Office correctly determine that I-183 was legally sufficient?

2. Does the statement of purpose conform to statutory standards?

3. Does the fiscal statement conform to statutory standards?

ARGUMENT

I. Petitioner's brief fails to support any claims that I-183 is legally deficient.

In the relief requested and in the conclusion, Petitioner asks the Court to find I-183 "legally insufficient" and "order that the issue may not appear on the ballot." Pet. at 1, 18. Petitioner seems confused by the remedies available under Mont. Code Ann. § 13-27-316. Such relief is unwarranted, since Petitioner has failed to provide the Court any support for a finding that I-183 is legally deficient.

In the legal sufficiency review process, the Attorney General is charged with simply assessing whether "the petition complies with statutory and constitutional requirements governing submission of the proposed issue to the electors." Mont. Code Ann. §§ 13-27-312(1), (7). The legal sufficiency analysis is limited to a procedural review as to the legal form of the proposed initiative. *See Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, 365 Mont. 520, 285 P.3d 435. In other words, the Attorney General's review serves as an early-warning system, identifying and disqualifying nonsubstantive legal deficiencies regarding submission of the petition to voters, while leaving substantive

questions to later judicial review rather than short-circuiting the democratic process at the earliest stage. *Id*.

Montana Code Annotated § 13-27-316 governs the Court's review of a petition challenging the conclusions of a legal sufficiency review and the final versions of the ballot statements. Those two issues are separate matters that have different remedies. As outlined in Mont. Code Ann. § 13-27-316(3)(c)(ii), ballot statements that do not conform with statutory standards can be revised upon an order from the Court. If a Court finds that the petition was legally deficient, only then can the Court order that the issue not appear on the ballot pursuant to Mont. Code Ann. §13-27-316(3)(c)(iii).

Petitioner has conflated the two issues and asked the Court to order that the issue may not appear on the ballot without a showing of legal deficiency. The petition appears to focus exclusively on whether the ballot statements conform to statutory guidelines. The remedy for deficiencies in ballot statements is not removal from the ballot—it is revision of the statements. As such, the Court should ignore Petitioner's request for an order stating the issue may not appear on the ballot because there is no proof of legal deficiency.

II. The statement of purpose is true and impartial and does not create prejudice for or against the initiative.

Following the interested party process, the Attorney General redrafted the statement of purpose for I-183, which now reads:

> I-183 requires government entities to designate a protected facility in a government building or public school for use only by members of one sex, and prohibits persons from using a protected facility other than the facility that is designated for that person's sex. Protected facilities under this proposal include, but are not limited to, locker rooms, changing rooms, restrooms, and shower rooms. This proposal allows a governmental entity to provide an accommodation such as single occupancy facilities upon a person's request due to special circumstances. I-183 also requires governmental entities, including public schools, to ensure that each protected facility provides privacy from persons of the opposite sex and authorizes civil penalties if a governmental entity fails to provide such privacy.

The ballot statement as revised by the Attorney General's Office fully conforms to the requirements of Mont. Code Ann. § 13-27-316.

A. Petitioner's arguments against the statement of purpose as currently written are inadequate to ask the court to rewrite it.

Petitioner's main argument centers on whether the ballot statement approved by the Attorney General's Office conforms to statutory standards. Petitioner cites several alleged problems and offers its own versions of ballot statements as required in an original

proceeding under Mont. Code Ann. § 13-27-316(3)(b). However, Petitioner's arguments fall far short of making a case for revisions to the ballot statements.

Montana law requires that "the ballot statements must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language and may not be arguments or written so as to create prejudice for or against the issue." Mont. Code Ann. § 13-27-312(4). A ballot statement challenge is not an opportunity for the Court or opponents of a ballot issue to express their preferences for other language that in their view may better express how they see a particular referendum. "To foreclose the prospect of endless and subjective challenges," the Court will uphold ballot statements that meet the basic statutory requirements. *Stop Over Spending Montana v. McGrath*, 2006 MT 178, ¶ 18, 333 Mont. 42, 139 P.3d 788. Therefore, as long as the Attorney General's wording "fairly states to the voters what is proposed within the Initiative, discretion as to the choice of language . . . is entirely his." S*tate ex rel. Wenzel v. Murray*, 178 Mont. 441, 448, 585 P.2d 633, 637-38 (1978); *cf. Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650 (1988) (rejecting challenge to referendum ballot

statements even though "the language may not be the best conceivable statement").

The Court has traditionally upheld the Attorney General's ballot statements so long as they employ "ordinary plain language, explain[] the general purpose of the issues submitted in language that is true and impartial, and [are] not argumentative or likely to create prejudice either for or against the issue." *Stop Over Spending Montana*, ¶ 12. This approach is consistent with the rule followed in other states recognizing that courts "do not sit as some kind of literary editorial board." *Schulte v. Long*, 687 N.W.2d 495, 498 (S.D. 2004). Courts will not "invalidate a summary simply because they believe a better one could be written." *Burgess v. Miller*, 654 P.2d 273, 276 n.7 (Alaska 1982).

Petitioner fails to even come close to showing how the proposed statement amounts to a "fraud upon the electorate." *Sawyer Stores v. Mitchell*, 103 Mont. 148, 164, 62 P.2d 342, 349 (1936). Similar efforts have been made over the past few decades to have the Court throw out initiatives following the legal sufficiency review and/or revise the ballot statements. However, in the vast majority of cases, the Court has recognized and supported the Attorney General's "considerable

discretion" in the drafting of ballot statements. *Montana Consumer Fin. Ass'n v. State ex rel. Bullock*, 2010 MT 185, ¶ 19, 357 Mont. 237, 238 P.3d 768. Absent untruth, partiality, argumentation, or prejudice in the ballot statements, this Court has not and should not intervene.

Petitioner argues that the failure to place certain definitions within the ballot statement is misleading, including a definition of "sex." I-183 uses nearly 50 words to define "sex" for purposes of the initiative and includes terms like "immutable biological sex" that may not be easily understood by voters in an abbreviated statement of purpose format. Petitioner's brief includes a number of reasons why Petitioner believes the initiative's definition is both confusing and bad policy, including the use of "anatomy and genetics" to determine a person's sex under I-183. Petitioner's own discussion on terms like "sex," "transgender," "intersex," "gender identity," and other terms requires several hundred words to explain in its petition alone[1]—far

[1] See *Citizens Right to Recall v. State*, 206 MT 192, ¶ 17, 333 Mont. 153, 1425 P.3d 764, where the Court notes that Petitioner's brief required 193 words to describe the salient provisions that they claim the Attorney General's ballot statement illegally omits. The Court ultimately upheld the Attorney General's ballot statements.

more than the 135-word limit for a statement of purpose even if there were nothing else to explain about the initiative.

Petitioner's argument mirrors those made in previous cases where the Court has upheld the Attorney General's ballot statements. In *Hoffman v. State*, the petitioners claimed that the ballot statements for I-171 (a proposed initiative to prohibit the State from using funds, resources or personnel to administer or enforce the Affordable Care Act (ACA)) were faulty because they did not explain to voters all the substantive provisions of the ACA that would have been voided by the initiative if passed. 2014 MT 90, 374 Mont. 405, 328 P.3d 604. The Court rejected the argument because of the "complexity of the ACA and the impacts of its nonenforcement in Montana," and upheld the ballot statements. *Id.,* ¶ 16.

Indeed, the Court has on several occasions acknowledged how the word limitation for ballot statements will inevitably lead to the omission of some provisions that petitioners would like to include. *Citizens Right to Recall*, ¶ 18; *MCFA*, ¶ 12. As noted in other cases, "a complete description of every part of the measure cannot be included." *Stop Over Spending Montana,* ¶ 17. Although, in 2011 the word limit

was increased from 100 words to 135 words for statements of purpose, it is still impossible to capture the entire essence of most ballot initiatives.

Recognizing these limitations, the Court has articulated a standard for reviewing ballot statements that recognizes that the ballot statement cannot detail every aspect of the initiative. Questions not fully answered by the statement of purpose can be resolved by a simple reading of the initiative text. The use of the term "a protected facility" is drawn from the initiative itself, and any concern that it implies to only a single facility within a government entity is debunked by the fact that the definition for "protected facility" immediately follows the first sentence of the statement of purpose. That definition includes several different kinds of facilities, which should clarify any untrue speculation that a government entity would only have the new law apply to a single facility in its building. Petitioner also has concerns about the use of the term "civil penalty," but the section heading describing the process used to enforce I-183 is called "Civil action for protected facilities—penalties." In addition, the term "privacy" is used continuously in the initiative to describe the duty the government would have under I-183 to ensure that

any protected facility is accessed only by those individuals of the same sex.

This Court will uphold ballot statements as long as they "identify the measure on the ballot so that a Montana voter, drawing on both official and unofficial sources of information and education, will exercise his or her political judgment." *Harper v. Greely,* 234 Mont. 259, 269, 763 P.2d 650, 657; *MEA-MFT v. State,* 2014 MT 33, ¶ 11, 374 Mont. 1, 318 P.3d 702. The Attorney General's revision of the ballot statement for I-183 fully complies with that standard. If I-183 qualifies for the ballot, there are numerous official and unofficial sources voters may draw upon to make an informed decision. Official sources include the state-issued voter information pamphlet mandated by Mont. Code Ann. § 13-27-401, which will include arguments for and against the initiative as required by Mont. Code Ann. § 13-27-402. The pamphlet is paid for by the State and is distributed to all registered voters as required by Mont. Code Ann. § 13-27-410. Based on the amount of media coverage, editorials and independent advocacy both for and against I-183 up to this point, there will undoubtedly be an abundance of sources of

information for voters to review before casting an informed vote if I-183 qualifies for the ballot.

Petitioner's arguments fail because the current statement of purpose language fairly states to the voters what is proposed within the initiative.

B. Revisions to the sponsor's ballot statement were made to conform it to statutory standards.

During the review process at the Attorney General's Office and following the comment period, a determination was made that the sponsor's proposed ballot statement of purpose did not conform with the requirements of Mont. Code Ann. § 13-27-312(4), and revisions were made to ensure a "true and impartial explanation of the proposed ballot issue." Although there were several commenters during the Attorney General's interested party process who asked that *no changes* be made to the ballot statements, an independent analysis of the language led the Attorney General's Office to make several changes to the sponsor's statement of purpose.

The sponsor's name for I-183, the "Montana Locker Room Privacy Act," was stricken from the statement of purpose based on Petitioner's suggestions. It was determined that including the title of the initiative

offered no real information to voters and could lead voters to believe the measure applied only to locker rooms. Also consistent with Petitioner's specific recommendations, the definition of "protected facility" was expanded with the term "but not limited to" in order to ensure voters understood that a protected facility could be more than just a locker room, changing room, restroom, or shower facility.

In addition to amendments made at the request of Petitioner, the statement of purpose was revised further to: 1) ensure voters understood that the onus was on the government to enforce I-183; 2) remove redundant references to locker rooms; 3) use language more consistent with the initiative's language when the language was still plain and easily understood; 4) rearrange sentences so that the definition of "protected facility" fell directly after its use in the ballot statement; and 5) add language to specify that the measure prohibits persons from using a protected facility other than the facility that is designated for that person's sex.

The Attorney General's Office made these changes to ensure the statement of purpose was a "true and impartial explanation of the

proposed ballot initiative in plain, easily understood language" and not "written so as to create prejudice for or against the issue."

C. Petitioner did not truly avail itself of the Attorney General's interested party process.

As required by Mont. Code Ann. § 13-27-314, the Attorney General sought the advice of proponents and opponents of I-183. Petitioner filed joint comments with several other organizations opposed to I-183. Pet. Exhibit B. While the Attorney General's Office did its best to incorporate specific suggestions that fell within statutory guidelines, most of Petitioner's comments ranged from critiques of the ballot language without advice on specific changes to several pages of frivolous arguments for why the Attorney General should go beyond his authority in the legal sufficiency process and strike down the initiative. In addition, when the Petitioners provided a wholesale rewrite of the ballot statement in its comments, there was little doubt that Petitioner's true intentions were to craft ballot statements that were neither true nor impartial, and clearly were designed to create prejudice against the initiative:

> The Transgender Discrimination Act would bar transgender people from using any public facilities (such as restrooms or

> locker rooms) that match their gender identity. It would prevent schools and other government entities from allowing transgender people to use these restrooms at all times, regardless of state laws, local non-discrimination ordinances, or individual circumstances. It would further allow individuals to sue the government for emotional distress and attorneys fees if they come in contact with a transgender person of the same gender identity in any such facility.

Petitioner's use of the interested party process as a political platform to oppose the substance of the initiative rather than making an effort to bring the ballot statement into conformity with statutory standards should not go unnoticed by the Court. In the order denying the petition in *If You Like Your MSU Funding v. State*, where petitioners argued the accuracy of an initiative's fiscal statement, the Court noted petitioners had not "availed themselves of this early comment opportunity." *See* OP 14-0185.

In the present case, while Petitioner certainly provided comments during the interested party process, it can hardly be said that Petitioner truly availed itself of this opportunity when it provided a ballot statement that reads more like a political attack ad than a neutral statement of the initiative's purpose. If the Attorney General's review and comment period is to have any importance, the Court should send a signal that commenters should sincerely avail themselves of that

opportunity before running to the Court pursuant to Mont. Code Ann. § 13-27-316.

D. Petitioner's alternative ballot statement is not true and impartial and is designed to create prejudice against the initiative.

Petitioner's brief now contains a strikingly different proposal for a new statement of purpose, but that too falls short of the requirements of Mont. Code Ann. § 13-27-312(4). No explanation is given why the Petitioner's proposal in this original proceeding is far different than what was provided in the Attorney General's comment period, but the redraft of Petitioner's original alternative fails for the same reasons. The statute does not grant petitioners "the right to the ballot statements of their choosing." *MCFA*, ¶ 10.

On its face, the newly-revised version of Petitioner's ballot statement does not conform to statutory standards. Terms are used throughout the proposal that are not mentioned in I-183 or even defined in state law. Doing so does not provide a statement of purpose that uses "plain, easily understood language." In other parts of the proposal, portions of the definition of "protected facility" are left out and the basis for a lawsuit against the government is oversimplified. Finally, mention

of local laws that may be "invalidated" without explaining what those laws are or which localities have enacted them appears to be an attempt to introduce arguments that create prejudice against I-183, rather than an impartial summary of the ballot issue.

Through the comment process, the press, and this petition, Petitioner's resolve to oppose this measure has been made clear, which it has every right to do. Ballot initiatives usually have people and associations with strong opinions on both sides of the issue. The Attorney General's Office does its best to remain a neutral arbiter in the determination of how ballot statements are drafted so voters can easily identify a measure and seek out additional information before making an informed vote. It's not uncommon to leave people on both sides of any ballot issue unsatisfied with how ballot statements look after review by the Attorney General's Office.

The ballot statements for I-183, as they now appear on the petitions, are far more impartial and neutral than Petitioner's versions, and they conform to the requirements of Mont. Code Ann. § 13-27-312. Petitioner's latest redraft of their original ballot statement alternative should be rejected.

III. The fiscal statement is true and impartial and does not create prejudice for or against the initiative.

After the budget office drafted a fiscal note for I-183, the Attorney General's Office drafted a fiscal statement detailing the identifiable fiscal impacts of the initiative:

> The State of Montana will spend an estimated $545,699 in general fund money to comply with the requirements of I-183. The costs are related to the renovation and proper signage for protected facilities owned by the State.

Petitioner insists the fiscal statement is "legally deficient" and does not meet the statutory requirements in Mont. Code Ann. § 13-27-312(4). The Attorney General's Office determined that several points raised in the fiscal note were speculative in nature and, as a result, could be misleading to include in the fiscal statement. For example, the fiscal note's attempt to speculate on how federal law *may change* and affect Montana's eligibility for Title IX funds has no place in a fiscal statement, much less a fiscal note. During the interested party process, the Attorney General's Office reviewed and rejected Petitioner's suggestions that these speculative and unknown financial impacts be incorporated into the fiscal statement.

As the Court noted in another case, the statute for the fiscal statement from the Attorney General's Office, "does not stipulate what information must be included in the fiscal statement." *MCFA*, ¶14. The fiscal statement adequately expresses the identifiable costs of the initiative in an impartial manner and should move forward. The Court should reject Petitioner's proposed changes, which contain speculative information that is merely argument against the initiative.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted this 11th day of August, 2017.

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By: */s/ Jon Bennion*
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CERTIFICATE OF COMPLIANCE

I certify that this Response is printed with a proportionately spaced Century Schoolbook typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3795 words, excluding certificate of service and certificate of compliance.

/s/ *Jon Bennion*
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CERTIFICATE OF SERVICE

I, Jonathan William Bennion, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition-General to the following on 08-11-2017:

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