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MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

ELLIOTT HOBAUGH, EZERAE COATES, ROBERTA ZENKER, MICAH HARTUNG, JANE and JOHN DOE on behalf of their minor child, J.D., ACTON SIEBEL, SHAWN REAGOR, KASANDRA REDDINGTON, and THE CITY OF MISSOULA, Plaintiffs, vs. THE STATE OF MONTANA, by and through Corey Stapleton in his official capacity as Secretary of State, Defendant.	Cause No. CDV-17-0673 Hon. John A. Kutzman **BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiffs have filed a premature challenge to a ballot initiative that has yet to even qualify for the ballot. This ripeness problem is a barrier to justiciability of the issues they plead. Their challenge to I-183 should only move forward when the initiative has been approved by the voters. The State should not have to expend taxpayer resources to defend proposed laws that may never qualify for the ballot or be ratified. In the interest of judicial economy and in recognition of the people's clear right to participate in the lawmaking process through ballot initiatives, Plaintiffs' claims should be dismissed.

THE UNDISPUTED RELEVANT FACTS

1. On May 10, 2017, Jeff Laszloffy submitted language for a proposed ballot initiative along with proposed ballot statements to the Secretary of State's Office. This initiative is now known as I-183.
2. On June 16, 2017 the Secretary of State forwarded the proposed ballot measure to the Attorney General's Office for a legal sufficiency review pursuant to Mont. Code Ann. § 13-27-312.

3. On July 20, 2017, the Attorney General's Office found that the measure conformed to all legal requirements for initiative petitions and submitted revised ballot statements to the Secretary of State's Office.

4. On July 31, 2017, the ACLU of Montana challenged the sufficiency of the ballot statements, alleging they did not conform to Mont. Code Ann. § 13-27-312(4).

5. On September 19, 2017, the Montana Supreme Court found that the ballot statements did not conform to Mont. Code Ann. §13-27-312(4) and ordered the Attorney General's Office to revise them.

6. On September 25, 2017, the Attorney General's Office forwarded revised ballot statements to the Secretary of State's Office.

7. I-183 has been approved for signature gathering, but any signatures gathered under the petitions containing the original ballot statements are void. Only those petitions with signatures gathered after the ballot statements were revised are valid.

8. To qualify for the ballot, I-183 will need to submit 25,468 signatures by July 20, 2018.

9. Plaintiffs filed their Complaint in the current case on October 17, 2017, claiming I-183 is unconstitutional under article II, section

3, article II, section 4, article II section 10, and article II, section 17 of the Montana Constitution.

STANDARD FOR RULE 12(b)(6) MOTION TO DISMISS

Consideration of a motion to dismiss for failure to state a claim under Mont. R. Civ. P. 12(b)(6) is limited to an examination of the facts alleged in the complaint, "and all well pled allegations of the complaint are to be taken as admitted and true for the limited purpose of the motion to dismiss." *Salminen v. Morrison & Frampton*, 2014 MT 323, ¶ 3, 377 Mont. 244, 339 P.3d 602.

However, a motion to dismiss "only admits facts well pleaded; it does not admit matters of inference and argument however clearly stated." *Holtz v. Babcock*, 143 Mont. 341, 353, 389 P.2d 869, 875 (1963). "The truth of allegations in the complaint is not admitted by a motion to dismiss if they are in conflict with facts judicially known to the court, or contradicted by exhibits attached to or referred to in the complaint." *Id.*

Here, Plaintiffs cannot show their claims are ripe since I-183 has not yet qualified for the ballot or been passed by a majority of Montana voters. Nor can they even show I-183 is likely to be certified for the general election

ballot. Therefore, the Complaint fails to state a claim upon which relief may be granted.

PLAINTIFFS' CHALLENGE TO I-183 IS NOT RIPE.

Within their Complaint, Plaintiffs put great detail into how I-183 will negatively affect them. The most glaring problem with their allegations at this time is that Plaintiffs readily admit that I-183 has not even been certified for the 2018 general election ballot, much less become the law of the land through a majority vote of Montana electors. Court review of a *proposed* citizen ballot initiative prior to certification for the ballot would be unprecedented. Plaintiffs' case should be dismissed without prejudice and allowed to proceed only if I-183 has been approved by voters.

The central issue for purposes of the State's Motion is ripeness, which addresses whether a case presents an "actual, present" controversy. *Mont. Power Co. v. Mont. Pub. Serv. Commn.*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91. The scope of judicial power of Montana's courts is limited to "justiciable controversies." *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567. In general, a justiciable controversy is one that is "definite and concrete, touching legal relations of parties having adverse legal interests" and "admitting of specific relief through decree of conclusive character, as distinguished from an opinion

advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition." *Chovanak v. Matthews,* 120 Mont. 520, 526, 188 P.2d 582, 585 (1948) (emphasis omitted).

Ripeness is one of the "central concepts of justiciability" that must be satisfied before addressing the merits in any case. *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 26, 366 Mont. 450, 288 P.3d 193. A court must ask "whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication." *Id.* ¶ 27. This ripeness inquiry is especially important in protecting courts from "determining purely speculative or academic matters, entering anticipatory judgments, providing for contingencies which may arise later, [or] dealing with theoretical problems." *Northfield Ins. Co. v. Montana Ass'n of Counties,* 2000 MT 256, ¶ 12, 301 Mont. 472, 10 P.3d 813. Ripeness is predicated on the central perception that courts should not render decisions absent a genuine need to resolve a real dispute; hence, cases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts. *Wis. Cent., Ltd. v. Shannon,* 539 F.3d 751, 759 (7th Cir.2008); *see also Mont. Power Co.,* ¶ 32. Ripeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication.

Wright et al., *Federal Practice and Procedure* § 3531.12, 163, § 3532.1, 383; *see also Texas v. United States,* 497 F.3d 491, 496 (5th Cir. 2007).

A. Plaintiffs' Claims Are Not Ripe Because They Plead No Basis for a Substantive Constitutional Challenge to a Citizen Ballot Initiative Before the Initiative Has Been Approved by Voters or Even Qualified for the Ballot.

For an injury that has not yet happened, the issue of ripeness requires a plaintiff to show that there is an "actual, present controversy" which is not "hypothetical, speculative, or illusory." *Reichert v. State*, 2012 MT 111, ¶ 54, 365 Mont. 92, 278 P.3d 455 (citation and quotation omitted). In this case, Plaintiffs cannot meet this burden since I-183 is not even statistically likely to qualify for the general election ballot on or near the deadline of July 20, 2018. Based on the citizen ballot initiative history drawn from the last decade in Montana, it is very unlikely that any given ballot measure will qualify for the ballot after it is filed with the Secretary of State. In the past decade, only 10 of 48 (21%) of proposed citizen ballot initiatives were certified for the general election ballot.[1]

To allow opponents of a citizen-sponsored ballot initiative to commence a substantive constitutional challenge at this stage in the process would be unprecedented and analogous to someone asking a court to enjoin a

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[1] The Court can take judicial notice of this information that is readily available on the public website for the Secretary of State: http://sos.mt.gov/elections/ballot_issues.

legislative committee hearing or floor vote. Courts in several other jurisdictions have recognized this comparison. As the Idaho Supreme Court noted, "[j]ust as the Court would not interrupt the legislature in consideration of a bill prior to enactment, the Court will not interrupt the consideration of a properly qualified initiative." *City of Boise v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (Idaho 2006); *see also Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (Ariz. 1997) ("Voter initiatives, part and parcel of the legislative process, receive the same judicial deference as proposals before the legislature - courts are powerless to determine their substantive validity unless and until they are adopted . . . this court will not intervene in a wholly legislative process.").

Ruling on potential or hypothetical legislation would clearly be in violation of the separation of powers and constitute an inappropriate "advisory opinion" from the judiciary. *See Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881 ("[T]he constitutional requirement of a 'case or controversy'" obligates the courts to refrain from issuing advisory opinions.); *Reichert*, ¶ 54; *see also Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589 (1972) (case is not ripe when "nothing in the record shows that appellants have suffered any injury thus far, and the law's future effect remains wholly

speculative."). With all this in mind, it is no wonder the Plaintiffs cite no examples of any court enjoining the placement of a ballot measure based on substantive unconstitutionality before the measure has received the requisite number of signatures to qualify for the ballot.

Plaintiffs' request not only flies in the face of judicial economy, it also directly infringes on the right of Montana citizens to participate in direct democracy as guaranteed by article III section 4(1): "The people may enact laws by initiative on all matters except appropriations of money and local or special laws." This language restricts the right to vote on only those matters involving appropriations of money and local or special laws – none of which have been pled in the Complaint. As the Supreme Court has long held, the "initiative and referendum provisions of the Constitution should be broadly construed to maintain the maximum power in the people." *Chouteau Cty. v. Grossman*, 172 Mont. 373, 378, 563 P.2d 1125, 1128 (1977).

For these reasons, courts have routinely rejected constitutional challenges to initiatives before they are actually passed by the people because the challenges are unripe. As the Nevada Supreme Court noted, "[p]reelection challenges to an initiative's substantive constitutionality are not ripe. They lack a concrete factual context in which a provision may be evaluated, and any harm is highly speculative since the measure may not even pass at

election time." *Herbst Gaming Inc. v. Heller*, 122 Nev. 877, 887-88,141 P.3d 1224, 1231 (Nev. 2006). The court noted that state courts routinely reject such challenges. *Id.* at 1229, n.13 (collecting cases); *see also State ex rel. Walter v. Edgar*, 13 Ohio St. 3d 1, 469 N.E.2d 842 (Ohio 1984) ("It is well-settled that any claim alleging the unconstitutionality of a proposal prior to its approval is premature."); *McKee v. Louisville*, 200 Colo. 525, 530, 616 P.2d 969, 972 (Colo. 1980) ("Governmental officials have no power to prohibit the exercise of the initiative by prematurely passing upon the substantive merits of the initiated measure."). Federal courts have come to the same conclusion. *See Ranjel v. City of Lansing*, 417 F.2d 321, 325 (6th Cir. 1969); *Diaz v. Bd. of County Comm'rs*, 502 F.Supp. 190 (S.D. Fla. 1980) (finding that "the issue of the proposal's constitutionality is not yet ripe for a decision. Courts avoid hypothetical questions and will not make a declaration of unconstitutionality when it is not necessary.").

The State can understand why Plaintiffs prefer to challenge I-183 at this stage in the initiative process. Plaintiffs could save the time and money they would normally use to participate in the debate over a proposed state law. Plaintiffs also likely appreciate the fact that as a proposed law, I-183 does not have the same presumption of constitutionality of an enacted law. See *Ravalli Co. v. Erickson*, 2004 MT 35, ¶ 15, 320 Mont. 31, 85 P.3d 772.

The State does not have any obligation to defend proposed laws – only to defend the integrity of the lawmaking process overall and the constitutional right of Montanans to participate in the initiative process. It should not be required to expend taxpayer dollars to defend proposed laws when I-183 has several hurdles to clear before it can be enforced. As such, the merits of I-183 are left defenseless and plaintiffs to proposed initiatives can utilize pre-qualification challenges to their strategic advantage.

B. Plaintiffs' Claims Should Not be Reviewed Unless I-183 Is Ratified by a Majority of Montana Voters.

Plaintiffs can cite a handful of examples of pre-election challenges to ballot initiatives in Montana since statehood, although most will be unhelpful. The vast majority of those examples come before key statutory changes in 2007, and the more recent examples are distinguishable from the present case.

The Court has consistently noted reluctance to intervene in ballot initiative issues before a vote of the people. "Judicial intervention in referenda or initiatives prior to an election is not encouraged." *Cobb v. State,* 278 Mont. 307, 310, 924 P.2d 268, 269 (1996); "We have reasoned that to effectively protect and preserve the rights which Montanans have reserved to themselves to change the laws or the Constitution through the initiative process, Mont. Const. art. III, § 4, art. XIV, § 9, and to approve or reject by

referendum legislative acts (except appropriations of money) and proposed constitutional amendments, Mont. Const. art. III, § 5, art. XIV, § 8, pre-election judicial review should not be routinely conducted." *Reichert,* ¶59, *State ex rel. Boese v. Waltermire,* 224 Mont. 230, 234, 730 P.2d 375, 378 (1986); *Harper v. Greely,* 234 Mont. 259, 267-68, 763 P.2d 650, 655-56 (1988). From 1972 through 2007, the Montana Supreme Court only removed two ballot measures for substantive constitutional defects. *See State ex rel. Harper v. Waltermire,* 213 Mont. 425, 691 P.2d 826 (1984); *Cobb v. State,* 278 Mont. 307, 924 P.2d 268 (1996).

Ten years ago, during the 2007 Legislative Session, noteworthy changes were made in the Montana Code Annotated through Senate Bill 96 (SB 96). These amendments dramatically altered Montana's ballot initiative law. Most notably, the statutory timetables and review processes before a citizen ballot initiative could appear on the ballot were significantly revised. The changes also made noteworthy amendments on how and when an initiative could be challenged in court, either for defects in the ballot statement or legal sufficiency. Notably stricken from the judiciary's jurisdiction was the pre-2007 authority to review a ballot measure prior to the election. The *stricken* language provided:

> (3)(a) Except as provided in subsection (3)(b), a contest of a ballot issue submitted by initiative or referendum may be brought prior to the

election only if it is filed within 30 days after the date on which the issue was certified to the governor, as provided in 13-27-308, and only for the following causes:

(i) violation of the law relating to qualifications for inclusion on the ballot;

(ii) constitutional defect in the substance of a proposed ballot issue; or

(iii) illegal petition signatures or an erroneous or fraudulent count or canvass of petition signatures.

(b) A contest of a ballot issue based on subsection (3)(a)(i) or (3)(a)(iii) may be brought at any time after discovery of illegal petition signatures or an erroneous or fraudulent count or canvass of petition signatures.

New language was added implying that a court should defer ruling on the constitutionality of a proposed initiative petition until after the results of the election. ("This section does not limit the right to challenge a constitutional defect in the substance of an issue *approved by a vote of the people*." Mont. Code Ann. § 13-27-316(6)). This new language, coupled with the elimination of the court's authority to determine the constitutionality of ballot issues prior to the election, now reflects a clear preference to defer ruling on the constitutionality of a proposed initiative until *after* the results of the election at which it is submitted to the voters. As such, reliance on cases involving pre-election challenges prior to the 2007 revisions should be cautioned.

In two cases since 2007, legislative referenda (not citizen-initiated ballot measures like I-183) have been thrown off the ballot prior to a vote. The first example, *Reichert v. State,* is distinguishable from the present case

in many respects. In *Reichert*, plaintiffs challenged Legislative Referendum No. 119 (LR-119), which would have changed the qualification and selection process for Montana Supreme Court justices. The measure was set for the *primary election* ballot of 2012 and would have been immediately effective, thereby changing the process for justices up for election in the 2012 *general election* ballot. *Reichert,* ¶ 58. As part of a vague hardship analysis, the Court found in *Reichert* that it would be wasteful to allow a constitutionally infirm measure to remain on the ballot. *Id.* at 59. In its examination of the issue, the Court relied on cases decided prior to the 2007 amendments – changes that effectively eliminated its own authority to entertain pre-election challenges to ballot measures based on substantive constitutional questions.

Even if *Reichert* was correctly decided, Plaintiffs' present case is very different. *Reichert* was a case challenging LR-119, a legislative referendum that automatically qualified for the ballot without a signature gathering requirement. In the present case, I-183 must receive 25,468 signatures of registered voters before it can qualify – a steep hill to climb that most initiatives have not met over the past ten years. This fact directly undermines Plaintiffs' ability to show the case is currently ripe. Secondly, LR-119 in the *Reichert* case would have taken effect upon passage and would have had immediate consequences for the judicial races in the general

election, creating a more urgent case for a speedy resolution. I-183, however, would not take effect until January 1, 2019, following a general election. The window of time between the election and the effective date gives any potential plaintiffs plenty of time to seek judicial review of the law.

One other case involving a successful pre-election challenge following the 2007 statutory amendments was *MEA-MFT v. McCulloch,* 2012 MT 211, 366 Mont. 266, 291 P.3d 1075. The case involved a challenge to Legislative Referendum No. 123 (LR-123), which would have provided a tax credit and possible tax refund triggered by state revenue surpluses. *Id.* On the question of ripeness, the majority in *MEA-MFT* relied heavily on the reasoning of the recently-decided *Reichert* case without noting how any analysis on ripeness for a challenge to LR-123 was distinguishable from the circumstances of LR-119. These differences were noted by Justice Baker and two other justices in a well-reasoned dissent that hinged solely on the question of ripeness. *Id.* at ¶ 35. (". . . LR-123 would not have taken effect until January 1, 2013, and affected no one's immediate interest. Even under the principles of *Reichert*, this case is not the extraordinary one in which pre-election review should be granted.")

To the extent that *Reichert* was even appropriately decided, the lack of a showing of true hardship in *MEA-MFT* raises questions about the long-

term precedential value of the ripeness analysis from the majority. In addition, unlike I-183 which hasn't qualified for the ballot, LR-123 was a referendum that required no signature gathering and had an automatic spot reserved on the ballot. Any court should think long and hard about drawing any conclusions in the present case based off of *Reichert* or *MEA-MFT*.

For these reasons, Plaintiffs should only have the ability to challenge I-183 following an election where it receives a majority of votes from Montana electors.

CONCLUSION

For the foregoing reasons, the State of Montana respectfully requests the Court to dismiss this case.

DATED this 8th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS to counsel for the Plaintiffs via regular mail, postage pre-paid.

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Dated: Dec 8, 2017

Julie James