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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; THE CITY OF MISSOULA; and THE CITY OF BOZEMAN, Plaintiffs, v. THE STATE OF MONTANA, by and through COREY STAPLETON in his official capacity as Secretary of State, Defendant.	Case No. CDV-17-0673 Hon. John A. Kutzman **INTERVENORS' COMPLAINT** **(MONTANA LEAGUE OF CITIES & TOWNS and CITY OF HELENA)**
MONTANA LEAGUE OF CITIES AND TOWNS, Intervenors, v. THE STATE OF MONTANA, by and through COREY STAPLETON in his official capacity as Secretary of State, Defendant.	

The Montana League of Cities and Towns and the City of Helena ("Intervenors"), pursuant to the Court's order allowing intervention, for their Complaint in this matter, hereby assert and allege on information and belief as follows:

1. Intervenor Montana League of Cities and Towns ("League") is an incorporated, nonpartisan, nonprofit association of all 127 of Montana incorporated cities, towns, and consolidated city-county governments. It acts as a clearinghouse and advocacy organization through which Montana municipalities cooperate for their mutual benefit. The League's purpose is to: (1) promote cooperation among the cities and towns of the state of Montana, to study local and common problems, to seek solutions and suggest efficient operational methods; and (2) to provide a forum and an organization whereby, through cooperative effort and appropriate action, municipal governments may exercise their impact to effect local, state and national affairs that are of concern to Montana cities and towns. The impact of the proposed initiative and the issues raised in this litigation are germane and central to the League's purpose.

2. Intervenor City of Helena is an incorporated municipality in the State of Montana and has its own charter.

3. Defendant State of Montana is being sued by and through Corey Stapleton, in his official capacity as Montana's present Secretary of State. The power to certify an issue as qualifying for the ballot (Mont. Code Ann. § 13-27-308) and the duty to distribute forms for voting on ballot issues (Mont. Code Ann. § 13-27-501) rests with the Montana Secretary of State.

4. A proposed ballot initiative, taken from the Montana Secretary of State's website and attached hereto and incorporated herein by reference as Exhibit A, is planned for the November 2018 election identified as I-183. According to the Secretary of State's website, this initiative is presently in the signature-gathering stage. The proposed ballot initiative places onerous and inconsistent obligations on the Intervenors. I-183 states in

part:

a. "The governmental entity that controls the protected facility **shall ensure** that each protected facility provides privacy from person of the opposite sex." (New Section 4(1)) (emphasis added).
b. "(3) Nothing in this section may be construed to prohibit a governmental entity from:
    (a) **Adopting a policy** necessary to accommodate a disabled person in need of physical assistance or a minor in need of physical assistance when using a protected facility; … " (New Section 4(3)(a))). (emphasis added).
c. "(4) **Nothing in this act may be construed to require a governmental entity to:**
    (a) **Employ any technology** except for posting signs to ensure that a protected facility provides privacy from person of the opposite sex;
    (b) **Alter any existing signs** that meet the requirements in [section 5(a)(c)]; or
    (c) **Maintain any staff** stationed in or near a protected facility." (New Section 4(3)). (emphasis added).
d. "(1) **A person** using or accessing a protected facility that is designated for use by that person's sex who encounters a person of the opposite sex in the protected facility **may bring a civil action against the governmental entity** that controls the protected facility if:
    (a) The governmental entity gave the person of the opposite sex permission to use the protected facility;
    (b) The governmental entity **failed to take reasonable steps** to prohibit a person of the opposite sex from using the protected facility; **or**
    (c) The governmental entity **failed to post signs** indicating which sex may use the protected facility.
    …
    (2) An action under this section may be filed in the district court of the county in which the person initiating the action resides."
    (3) If the person prevails against a governmental entity under this section, **the person may recover**:
    (a) **Compensatory damages** for all emotional and mental distress;
    (b) Reasonable **attorney fees** and costs; and
    (c) **Any other relief** the court considers appropriate." (New Section 5). (emphasis added).

5. The above language from I-183 demonstrates that the Intervenors would be subject to inconsistent obligations and duties. Although they "shall ensure" privacy (a possible strict liability standard), and although they are not required to employ staff or technology (identifying what they do not have to do), they may still be held liable if they "failed to

take reasonable steps" (a reasonable person standard). This language begs the question as to what action(s) Intervenors and their members are required to take to avoid the liabilities imposed by I-183. As such, this language is not only internally contradictory, it also fails to provide the Intervenors with a clear duty and/or direction on how to comply with this law in order to prevent them from the liabilities imposed on them.

6. This Court has jurisdiction over this action pursuant to the Montana Uniform Declaratory Judgments Act and pursuant to the power of the Court to issue injunctions. Mont. Code Ann. §§ 27-8-101 *et. seq.* and 27-19-101 *et. seq.*

7. Where a challenged measure is facially defective, the "courts have a duty to exercise jurisdiction and declare the measure invalid." *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 59, 365 Mont. 92, 278 P.3d 455.

8. Venue in this action is proper in Cascade County pursuant to Mont. Code Ann. § 25-2-126 because one or more named Plaintiffs resides in Cascade County (as alleged by the Plaintiffs in this case).

COUNT I (Declaratory and Supplemental Relief)

9. Allegations 1 through 8 are incorporated herein by reference.

10. The purpose of the Uniform Declaratory Judgments Act, Mont. Code Ann. § 27-8-101 *et. seq.*, is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered."

11. Intervenors seek the Court's Order declaring I-183 unconstitutional and/or invalid on the following grounds.

12. Montana Constitution, Art. III, § 4(3) states, "The sufficiency of the initiative petition

shall not be questioned after the election is held." As such, since Intervenors are contesting the constitutionality of I-183, this matter is justiciable and ripe.

DUE PROCESS/UNCONSTITUTIONALLY VAGUE

13. Montana's constitution ensures that no person shall be deprived of life, liberty or property without due process of law. Art. II, § 17.

14. I-183 violates Intervenors' rights to due process and is unconstitutionally vague on its face and as applied to Intervenors.

15. I-183 creates uncertainty and insecurity with respect to the rights and legal relations of Intervenors and potential claimants.

16. I-183 on its face fails to give Intervenors fair notice or actual notice of what conduct on Intervenors' part is prohibited and what conduct is actually required to avoid liability. Terms within I-183 including "shall ensure" and "reasonable steps" are not defined by the initiative.

17. I-183 is unconstitutionally vague. It provides unclear and contradictory legal standards by which Intervenors are to comply with the proposed law. As such, I-183 violates Intervenors' right to due process.

18. Intervenors, therefore, seek a declaration from this Court that I-183 is unconstitutionally vague as written and as applied to Intervenors.

19. "Placing a facially invalid measure on the ballot would be a waste of time and money for all involved, including State and local voting officials, the proponents and opponents of the measure, the voters, and the taxpayers who bear the expense of the election." MEA-MFT v. McCulloch, 2012 MT 211, ¶ 18, 366 Mont. 266, 271, 291 P.3d 1075, 1079.

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PROHIBITIONS AGAINST APPROPRIATIONS OF MONEY AND LOCAL AND SPECIAL LAWS

20. Art. III, § 4 of the Montana Constitution prohibits initiatives which require appropriation of funds by local governments. It also prohibits initiatives which are local or special laws.

21. I-183 effectively requires Intervenors and their members to appropriate funds to comply with the liability provisions of the act. Its enforcement provision imposes on Intervenors legal liability for failure to comply with provisions which effectively require expenditure of funds.

22. I-183 constitutes a local and special law prohibited by the Montana Constitution. I-183 does not operate uniformly and equally as applied to all local governments. Its disabilities (liability provisions) will operate arbitrarily when applied to local governments due, in part, to its delegation of rulemaking authority to such local governments.

23. I-183 allows local governments to enact their own policies, procedures, and rules relative to the act which, in turn, creates diversity of laws on the same subject within the State.

UNFUNDED MANDATE

24. Montana's constitution states, "The people may enact laws by initiative on all matters except appropriations of money and local or special laws." Art. III, § 4 (Initiative).

25. I-183 requires Intervenors to perform activities and/or provide facilities that require the direct expenditure of funds not expected of local governments in the scope of their usual operations. I-183 also involves promulgation of local or special laws. As such, I-183 violates Art. III, § 4, of the Montana Constitution.

26. I-183 does not provide any specific means to finance these activities and/or facilities.

27. I-183 also creates an illegal unfunded mandate on Intervenors in violation of Mont. Code Ann. § 1-2-112.

BUDGETING

28. If I-183 is allowed on the ballot and if it passes, it would become effective January 1, 2019. (New Section 9).

29. January 1, 2019, is in the middle of Intervenors' budget year. Budgets for 2018-2019 will be set as of September 6, 2018. See Mont. Code Ann. § 7-6-4024(3). As such, the fiscal budget year for 2018-2019 will have already been set prior to I-183 becoming law.

30. If I-183 becomes law, it will require Intervenors to amend their budgets (Mont. Code Ann. §§ 7-6-4021 and 7-6-4030) thereby "stealing from Peter to pay Paul." In other words, Intervenors would do what they can to comply with the law, but such compliance would come at the cost of other public services already budgeted for to the detriment of its citizens.

31. Further, insurance rates for local governments change based on anticipated liabilities. Since I-183 is not yet law, if it becomes law and becomes effective on January 1, 2019, as written, it is anticipated the Intervenors' liability insurance rates will be adversely affected.

SEVERABILITY

32. I-183 has a severability clause. New Section 8.

33. "A statute is not destroyed in toto because of an improper provision, unless such provision is necessary to the integrity of the statute or was the inducement to its enactment." Reichert v. State ex Rel. McCulloch, 2012 MT 111, ¶ 86, 365 Mont. 92, 278 P.3d 455. Stated alternatively, where an invalid provision of a law is necessary to the

integrity of the law as a whole or is the inducement to its enactment, the law as a whole is invalid.

34. The language of I-183 that imposes liability on local governments is the enforcement mechanism for I-183. It is inseparable from the remainder of the initiative.

35. Courts cannot rewrite the initiative to make it constitutional. Reichert, ¶ 87.

36. The constitutionally infirm portions of I-183 cannot be severed from the remainder of the initiative. As such, the entire initiative must be struck down for the reasons set forth above.

REQUESTED RELIEF

37. The UDJA authorizes a court to provide monetary relief and coercive relief pursuant to its supplemental relief provision, Mont. Code Ann. § 27-8-313. See Goodover v. Lindey's, Inc., 246 Mont. 80, 82, 802 P.2d 1258, 1260 (1990) (citations omitted) which states, "The statute enables the District Court to retain jurisdiction to grant further relief as it deems necessary and proper to enforce the declaratory judgment. The supplemental relief should be designed to provide complete relief to the parties, which may include a monetary judgment or coercive relief or both. In fashioning the remedy, the court is not bound by the relief requested in the complaint but may order any relief needed to effectuate the judgment."

38. Intervenors request, pursuant to the supplemental relief provisions of the Uniform Declaratory Judgments Act, Mont. Code Ann. § 27-8-313:

    a. Its order preventing the State and the Secretary of State from:

        i. Certifying I-183 as qualifying for the ballot in its present form (Mont. Code Ann. § 13-27-308);

        ii. Distributing forms for voting on this ballot issue (Mont. Code Ann. § 13-

27-501); and

iii. Placing I-183 on the November, 2018, ballot;

b. The State pay Intervenors' attorney's fees (See Trustees of Indiana Univ. v. Buxbaum, 2003 MT 97, ¶ 46, 315 Mont. 210, 228, 69 P.3d 663, 674 (authorizing discretionary award of attorney's fees).

c. The State pay Intervenors' costs.

COUNT II (Injunctive Relief)

39. Allegations 1 through 38 are incorporated herein by reference.

40. Intervenors believe I-183 will irreparably harm Intervenors because its liabilities may expose them to claims which are not covered by insurance. Many of the members of the League of Cities and Towns cannot afford such liabilities, much less an increase in their insurance rates due to such created liabilities.

41. Compensation of Intervenors is not an adequate remedy because it would be extremely difficult to ascertain the amount of compensation which would afford Intervenors adequate relief, particularly because this represents an unfunded mandate as alleged above. Mont. Code Ann. § 27-19-102(2).

42. Injunctive relief is necessary to prevent multiple judicial proceedings to prevent the enforcement of I-183 by individual local governments. Mont. Code Ann. § 27-19-102(3).

WHEREFORE, Intervenors respectfully pray for the following relief:

1. That the Court issue its order declaring I-183 unconstitutional and/or invalid on the grounds set forth herein;

2. That pursuant to the supplemental relief provision of the UDJA and pursuant to the Court's injunctive relief powers, the Court issue its order preventing the State and Mr. Stapleton from:

a. Certifying I-183 as qualifying for the ballot in its present form (Mont. Code Ann. § 13-27-308);

b. Distributing forms for voting on this ballot issue (Mont. Code Ann. § 13-27-501); and

c. Placing I-183 on the November, 2018, ballot;

3. The State pay Intervenors' attorney's fees;

4. Enter judgment in favor of Intervenors on all claims herein;

5. Award costs and fees as allowed by law to Intervenors; and

6. Such other relief as the Court deems just and/or necessary and proper.

DATED this 4th day of May, 2018.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By _____
Steven T. Wade
Michael L. Rausch
Christy S. McCann
Attorneys for Montana League of Cities and Towns and the City of Helena

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2018, a true copy of the foregoing was mailed by first-class mail, postage prepaid, addressed as follows:

Alex Rate
ACLU of Montana
P.O. Box 9138
Missoula, MT 59807

Timothy C. Fox. Montana Attorney General
Jon Bennion, Chief Deputy Attorney General
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Judge John Kutzman
Montana Eighth Judicial District Court
415 2nd Ave. No.
Great Falls, MT 59401
Courtesy copy by e-mail and by hand-delivery

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

REVISED BALLOT LANGUAGE FOR INITIATIVE NO. 183 (I-183)

INITIATIVE NO. 183

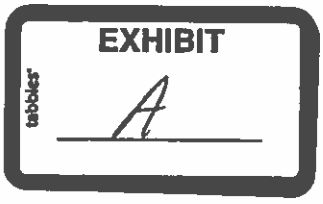
A LAW PROPOSED BY INITIATIVE PETITION

I-183 requires all state and local government entities, including schools and universities, to designate "protected facilities" in government buildings – such as locker rooms, changing rooms, restrooms, and shower rooms – for use by members of only one sex. It defines "sex" as "a person's immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth." A person may not use protected facilities that are not designated for that person's sex. The government may provide an accommodation, such as single occupancy facilities, for special circumstances upon request. The measure requires the government to "ensure that each protected facility provides privacy from persons of the opposite sex." It authorizes people to sue governmental entities and recover monetary damages for violations.

The State of Montana will spend an estimated $545,699 in general fund money in the first four years to renovate facilities and provide proper signage for protected facilities. Long-term costs and legal fees for state and local governments, K-12 schools, and universities could be substantial, but are uncertain.

[] YES ON INITIATIVE I-183

[] NO ON INITIATIVE I-183



THE COMPLETE TEXT OF INITIATIVE NO. 183 (I-183)

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

NEW SECTION. **Section 1. Short title.** [Sections 1 through 5] may be cited as the "Montana Locker Room Privacy Act".

NEW SECTION. **Section 2. Statement of purpose.** The purpose of [sections 1 through 5] is to:

(1) further the state's interest in protecting all persons in public schools, colleges, universities, and government buildings in this state;

(2) provide for the privacy and safety of all persons in public schools, colleges, universities, and government buildings in this state; and

(3) maintain order and dignity in a changing facility, locker room, or other protected facility where a person may be in various states of undress in the presence of others.

NEW SECTION. **Section 3. Definitions.** For purposes of [sections 1 through 5], the following definitions apply:

(1) "Changing facility" means a facility in which a person may be in a state of undress in the presence of others, including but not limited to a locker room, changing room, or shower room.

(2) "Government building" means a building or structure that is owned, leased, or otherwise under the control of a governmental entity.

(3) "Governmental entity" means:

(a) the state or any political subdivision of the state;

(b) a county, city, town, or consolidated government;

(c) school district as defined in 20-4-502 or school as defined in 20-6-501; or

(d) a public institution of higher education.

(4) "Locker room" has the same meaning as "changing facility".

(5) "Protected facility" means a changing facility, locker room, restroom, or shower room that is located in a government building or that is controlled by a governmental entity.

(6) "Restroom" means a facility that includes one or more toilets or urinals.

(7) "Sex" means a person's immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth. Evidence of a person's biological sex includes but is not limited to any government-issued identification document that accurately reflects a person's sex listed on the person's original birth certificate.

(8) "Shower room" means an area with an apparatus that provides a shower of the body for use by more than one person at a time.

NEW SECTION. **Section 4. Protection of physical privacy -- protected facilities.** (1) A protected facility that is accessible by multiple persons at the same time must be designated for use only by members of one sex. A protected facility that is designated for one sex may be used only by members of that sex. The governmental entity that controls the protected facility shall ensure that each protected facility provides privacy from persons of the opposite sex.

(2) Subsection (1) does not apply to a person who enters a protected facility designated for the opposite sex:

(a) for custodial or maintenance purposes when the restroom or changing facility is not occupied by a person of the opposite sex;

(b) to render medical assistance;

(c) during a natural disaster or emergency or when necessary to prevent a serious threat to good order or safety;

(d) during an event when a locker room may temporarily be used by a visiting athletic team that includes persons who are not members of the sex for which the locker room is normally designated; or

(e) during the performance of that person's official duties as an employee of any government agency.

(3) Nothing in this section may be construed to prohibit a governmental entity from:

(a) adopting a policy necessary to accommodate a disabled person in need of physical assistance or a minor in need of physical assistance when using a protected facility; or

(b) providing an accommodation such as a single occupancy restroom or changing facility upon a person's request due to a special circumstance. The accommodation may not provide access to a locker room or other protected facility that is designated for use by a person of the opposite sex while a person of the opposite sex is present or could be present.

(4) Nothing in this act may be construed to require a governmental entity to:

(a) employ any technology except for posting signs to ensure that a protected facility provides privacy from persons of the opposite sex;

(b) alter any existing signs that meet the requirements in [section 5(1)(c)]; or

(c) maintain any staff stationed in or near a protected facility.

NEW SECTION. **Section 5. Civil action for protected facilities -- penalties.** (1) A person using or accessing a protected facility that is designated for use by that person's sex who encounters a person of the opposite sex in the protected facility may bring a civil action against the governmental entity that controls the protected facility if:

(a) the governmental entity gave the person of the opposite sex permission to use the protected facility;

(b) the governmental entity failed to take reasonable steps to prohibit a person of the opposite sex from using the protected facility; or

(c) the governmental entity failed to post signs indicating which sex may use the protected facility. Signs sufficient to comply with [sections 1 through 5] include the word "men" or "women," graphical representations of the word "men" or "women", or similar text.

(2) An action under this section may be filed in the district court of the county in which the person initiating the action resides.

(3) If a person prevails against a governmental entity under this section, the person may recover:

(a) compensatory damages for all emotional or mental distress;

(b) reasonable attorney fees and costs; and

(c) any other relief the court considers appropriate.

(4) An action under this section must be commenced within 1 year of the date on which the violation of this section occurred.

(5) Nothing in this section limits other remedies at law or equity that may be available to a person who prevails against a governmental entity under this section.

Section 6. Section 7-1-111, MCA, is amended to read:

"**7-1-111. Powers denied.** A local government unit with self-government powers is prohibited from exercising the following:

(1) any power that applies to or affects any private or civil relationship, except as an

incident to the exercise of an independent self-government power;

(2) any power that applies to or affects the provisions of 7-33-4128 or Title 39, except that subject to those provisions, it may exercise any power of a public employer with regard to its employees;

(3) any power that applies to or affects the public school system, except that a local unit may impose an assessment reasonably related to the cost of any service or special benefit provided by the unit and shall exercise any power that it is required by law to exercise regarding the public school system;

(4) any power that prohibits the grant or denial of a certificate of compliance or a certificate of public convenience and necessity pursuant to Title 69, chapter 12;

(5) any power that establishes a rate or price otherwise determined by a state agency;

(6) any power that applies to or affects any determination of the department of environmental quality with regard to any mining plan, permit, or contract;

(7) any power that applies to or affects any determination by the department of environmental quality with regard to a certificate of compliance;

(8) any power that defines as an offense conduct made criminal by state statute, that defines an offense as a felony, or that fixes the penalty or sentence for a misdemeanor in excess of a fine of $500, 6 months' imprisonment, or both, except as specifically authorized by statute;

(9) any power that applies to or affects the right to keep or bear arms, except that a local government has the power to regulate the carrying of concealed weapons;

(10) any power that applies to or affects a public employee's pension or retirement rights as established by state law, except that a local government may establish additional pension or retirement systems;

(11) any power that applies to or affects the standards of professional or occupational competence established pursuant to Title 37 as prerequisites to the carrying on of a profession or occupation;

(12) except as provided in 7-3-1105, 7-3-1222, or 7-31-4110, any power that applies to or affects Title 75, chapter 7, part 1, or Title 87;

(13) any power that applies to or affects landlords, as defined in 70-24-103, when that power is intended to license landlords or to regulate their activities with regard to tenants beyond what is provided in Title 70, chapters 24 and 25. This subsection is not intended to restrict a local government's ability to require landlords to comply with ordinances or provisions that are applicable to all other businesses or residences within the local government's jurisdiction.

(14) subject to 7-32-4304, any power to enact ordinances prohibiting or penalizing vagrancy;

(15) subject to 80-10-110, any power to regulate the registration, packaging, labeling, sale, storage, distribution, use, or application of commercial fertilizers or soil amendments, except that a local government may enter into a cooperative agreement with the department of agriculture concerning the use and application of commercial fertilizers or soil amendments. This subsection is not intended to prevent or restrict a local government from adopting or implementing zoning regulations or fire codes governing the physical location or siting of fertilizer manufacturing, storage, and sales facilities.

(16) any power that prohibits the operation of a mobile amateur radio station from a motor vehicle, including while the vehicle is in motion, that is operated by a person who holds an unrevoked and unexpired official amateur radio station license and operator's license, "technician" or higher class, issued by the federal communications commission of the United States;

(17) subject to 76-2-240 and 76-2-340, any power that prevents the erection of an amateur radio antenna at heights and dimensions sufficient to accommodate amateur radio service communications by a person who holds an unrevoked and unexpired official amateur radio station license and operator's license, "technician" or higher class, issued by the federal communications commission of the United States;

(18) any power to require a fee and a permit for the movement of a vehicle, combination of vehicles, load, object, or other thing of a size exceeding the maximum specified in 61-10-101 through 61-10-104 on a highway that is under the jurisdiction of an entity other than the local government unit~~.~~;

(19) any power that applies to or affects provisions in the Montana Locker Room Privacy Act as provided in [sections 1 through 5]."

NEW SECTION. **Section 7. {standard} Codification instruction.** [Sections 1 through 5] are intended to be codified as an integral part of Title 50, and the provisions of Title 50 apply to [sections 1 through 5].

NEW SECTION. **Section 8. {standard} 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 9. {standard} Effective date.** If approved by the electorate, [this act] is effective January 1, 2019.