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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' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT** **(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"), through their counsel, Michael L. Rausch of Browning, Kaleczyc, Berry, & Hoven, P.C., move

this Court pursuant to Rule 56, M.R.Civ.P., for its order granting summary judgment to Intervenors on Intervenors' claims.

UNCONTESTED FACTS

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 and effect on 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. Intervenors' Complaint, ¶ 1.

2. Intervenor City of Helena is an incorporated municipality in the State of Montana and has its own charter. Intervenors' Complaint, ¶ 2.

3. Defendant State of Montana is being sued by and through Corey Stapleton, in his official capacity as Montana's present Secretary of State. Intervenors' Complaint, ¶ 3.

4. I-183 is a proposed ballot initiative. A true and correct copy of that initiative is attached hereto as Exhibit A. Intervenors' Complaint, ¶ 4.

5. Intervenors were allowed to intervene by Court order dated March 30, 2018. Doc. # 26.

6. Intervenors filed their Complaint for Declaratory relief and Injunctive relief on May 4, 2018. Doc. # 30.

SUMMARY JUDGMENT STANDARD

Summary judgment enables a court to dismiss an action when the moving party establishes that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. McDonald v. Anderson, 261 Mont. 268, 272, 862 P.2d 402 (1993). The Montana Rules of Civil Procedure govern summary judgment motions. Rule 56(c) provides in pertinent part:

> [Summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Mont. R. Civ. P. 56(c). The primary policy and the general purpose underlying summary judgment is to encourage judicial economy through the prompt elimination of questions not deserving of resolution by trial. McDonald, 261 Mont. at 273.

The burden of showing the appropriateness of such judgment falls initially upon the moving party. Summary judgment is appropriate when the moving party shows a complete absence of any genuine issue as to all of the facts that are material in light of the substantive principles that entitle him to a judgment as a matter of law. Wilson v. Taylor, 194 Mont. 123, 129, 634 P.2d 1180 (1981). Where the record discloses no genuine issue of material fact, the party opposing the Motion for Summary Judgment has the burden of coming forward with substantial evidence, not mere speculation or conclusory statements. McDonald, 261 Mont. at 272, Bruner v. Yellowstone County, 272 Mont. 261, 900 P.2d 901 (1995); Gentry v. Douglas Hereford Ranch, Inc., 1998 MT 182, 290 Mont. 126, 962 P.2d 1205. This burden does not consist merely of showing the possibility of the existence of a controverted material fact; the party opposing must show that such a controverted material fact does exist. "A trial court ... has no duty to anticipate possible proof that might be offered under the pleadings." Taylor v. Koslosky, 249 Mont. 215, 220, 814 P.2d 985 (1991).

MEMORANDUM

Intervenors are entitled to summary judgment on their claims for the following reasons.

I. THIS CONTROVERSY IS RIPE AND JUSTICIABLE.

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. In the case of MEA-MFT v. McCulloch, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075, the Court set forth the following principles regarding ripeness and justiciability:

> A component of justiciability is ripeness—whether there is an actual, present controversy, and not merely a hypothetical or speculative issue. Montana Power Co. v. PSC, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91. Ripeness has both a constitutional dimension based upon the case or controversy requirement, and a "prudential" dimension that weighs the fitness of the issues for judicial decision and the hardship to the parties of withholding a decision. Reichert, ¶ 56.

Id., ¶ 17. In both of the above cases, the Court found the issues presented definite and concrete issues and were not simply hypotheticals or abstract issues. In MEA-MFT, the Court stated LR-123 "**would have** a definite impact upon the State treasury and **would require** the LFA's predictions of surpluses and calculations of refunds and payments in August, 2013." Id., ¶ 18 (emphasis added). Clearly, ballot initiatives which have not yet become law are subject to judicial review as this string of cases cited in MEA-MFT shows:

> And, when faced with a measure properly challenged as not properly submitted under the election laws, or as facially defective, this Court has often considered the substance of the challenge. *Sawyer Stores, Inc. v. Mitchell,* 103 Mont. 148, 62 P.2d 342 (1936) (vote on initiative enjoined because the form of the ballot was defective); *Burgan & Walker v. State,* 114 Mont. 459, 137 P.2d 663 (1943) (vote on legislative referendum enjoined because the measure was unconstitutional); *Steen v. Murray,* 144 Mont. 61, 394 P.2d 761 (1964) (vote on initiative enjoined because the measure was substantively unconstitutional); *Montana Citizens for the Preservation of Citizens' Rights v. Waltermire,* 224 Mont. 273, 729 P.2d 1283 (1986) (vote on initiative allowed to proceed after substantive analysis of the proposal); *Nicholson v. Cooney,* 265 Mont. 406, 877 P.2d 486 (1994) (vote allowed on referendum after Court finds the measure to be constitutional); *Livingstone v. Murray,* 137 Mont. 557, 354 P.2d 552 (1960) (vote on legislative

> referendum enjoined because the measure was unconstitutional); *Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826 (1984) (election on constitutional initiative enjoined because the measure was unconstitutional); *Harper v. Greely*, 234 Mont. 259, 763 P.2d 650 (1988) (Court rejected a challenge to a legislative referendum that the form of the ballot was deficient, and allowed the election to proceed); *Cobb* (election on legislative referendum enjoined based upon substantive defect); *Reichert* (election on legislative referendum enjoined because it was unconstitutional); and *Montanans Opposed to I–166* (election allowed to proceed, form of ballot initiative not defective). In each of these cases the Court considered the substantive challenge to the measure under consideration, and did not decline to act on the ground that the issues were non-justiciable until after the election.

Id., ¶ 14. Thus, "when faced with a measure properly challenged as not properly submitted under the election laws, or as facially defective, this Court has often considered the substance of the challenge." Id.

In this case, Intervenors are challenging I-183 as being facially defective, invalid, and unconstitutional on several grounds. Because the initiative has a January 1, 2019, effective date, Intervenors cannot wait until after the November election to determine its validity. Intervenors' liability would start before the constitutionality of I-183 could be considered by the Courts. The obligations I-183 imposes on Intervenors (regardless of the fact such obligations are completely unknown based on the language of I-183) begin on January 1, 2019. As such, Intervenors have no viable remedy except to address the invalidity of the measure now. Intervenors simply have too little time after the November election to get a ruling on its constitutionality. This case presents definite and concrete issues whose timing is of the utmost importance.

If this Court were to assert this conflict is not yet ripe, it would also have to find that the Intervenors would not suffer immediate harm by its passage. However, deferring the justiciability of this conflict until after the measure is voted on in November, 2018 does not create a valid remedy for this facially defective initiative because the initiative's effective date is January 1, 2019. Asserting a challenge to the initiative after it passes leaves only six weeks after

the election to file and serve a Complaint and file a motion for summary judgment which, of course, could not be fully briefed prior to the effective date of the initiative. Meanwhile, starting January 1, 2019, the liability of the Intervenors begins. Local governments will then have to address the potential and unknown liabilities and assess their resources for compliance with the measure. Are they supposed to do that now, during the summer of 2018 when the fiscal year 2019 budgets are being publicly discussed, debated, drafted and approved? In the dissenting opinion in MEA-MFT v. McCulloch, 2012 MT 211, ¶¶ 33-39, three justices stated there would be "plenty of time for this Court to consider and decide the constitutional issues before any action would be required by the new law." Id., ¶ 37 (noting in *McCulloch* that the LFA's calculations as to tax refunds would not start until August, 2013 and as such, pre-election review was not necessary). However, this action does not include that expansive time frame. Therefore, the issues should be addressed now. As noted in MEA-MFT:

> As in *Reichert,* allowing the defective referendum to proceed to election does nothing to protect voter rights. **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.

Id., ¶ 18 (emphasis added). Finally, the Montana Constitution, Art. III, § 4(3) states, "The sufficiency of the initiative petition shall not be questioned after the election is held." As such, because Intervenors are contesting the constitutionality of I-183, this matter is justiciable and ripe now.

II. I-183 IS INVALID, FACIALLY DEFECTIVE, AND UNCONSTITUTIONAL.

A. I-183 Is Unconstitutionally Vague on Its Face and as Applied to Intervenors.

"The rules applicable to judicial interpretation of initiatives are the same as those applying to legislation enacted by the legislature." State Bar of Montana v. Krivec, 193 Mont. 477, 480, 632 P.2d 707, 710 (1981). The issue of vagueness may be raised in two different

connotations: (1) whether it is vague on its face; and (2) whether it is vague as applied. State v. Martel, 273 Mont. 143, 149, 902 P.2d 14, 18 (1995).

> "'[A] statute ... is void [for vagueness] on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute.' " *Monroe,* 873 P.2d at 231 (quoting *Choteau,* 678 P.2d at 668). *See also State v. Crisp* (1991), 249 Mont. 199, 814 P.2d 981; *State v. Woods* (1986), 221 Mont. 17, 716 P.2d 624.

Id., p. 150, 18. "The Legislature is not required to define every term it employs when constructing a statute." Id. "The failure to include exhaustive definitions will not automatically render a statute overly vague, so long as the meaning of the statute is clear and provides a defendant with adequate notice of what conduct is proscribed." Id., p. 151, 19.

Additionally, "[t]he proper inquiry is whether the statute is impermissibly vague in every application, not whether the statute is vague as applied to some, but not all, hypothetical scenarios. *Dixon*, ¶ 18." State v. Thirteenth Judicial Dist. Court, 2009 MT 163, ¶ 30, 350 Mont. 465, 208 P.3d 408. Further, "A person challenging a statute as facially void must demonstrate that the statute is vague in the sense that no standard of conduct is specified at all." Id., ¶ 31. Finally, the Supreme Court has recognized that "an unreasonable interpretation and dissection of a statute will not render it void for vagueness." Broers v. Montana Dept. of Revenue, 237 Mont. 367, 371, 773 P.2d 320, 323 (1989).

(1) I-183 is Vague on Its Face.

In this case, the standard of conduct I-183 imposes on Intervenors is incomprehensible, unspecified, contradictory, or so imprecise that Intervenors cannot conform their conduct to its requirements even if they tried. As noted in Intervenors' Complaint, I-183 sets forth the following requirements for its conduct:

> 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).

New Section. **Section 4. Protection of physical privacy – protected facilities.**

...

(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).

(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(1)(c)]; or

(c) **Maintain any staff** stationed in or near a protected facility." (New Section 4(4)). (emphasis added).

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....

(2) 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).

This language begs the following questions:

1) If Intervenors are not required to change existing signs, install technology, or staff these "protected facilities", then what is it they are supposed to do to avoid liability?

2) If Intervenors "shall ensure" that "protected facilities" are not entered by the wrong sex, then what standard of care does that language impose? Is this strict liability? What are they, in fact, supposed to do to comply with the statute?

3) If Intervenors "failed to take reasonable steps" when they are not required to change existing signs, install technology or staff these facilities, then what exactly is it they are supposed to do to comply with the law? This appears to be a reasonable person standard.

4) Which standard applies to Intervenors: strict liability or the reasonable person standard? The language of I-183 is contradictory.

Clearly, I-183 imposes inconsistent obligations and standards on Intervenors. It also provides for Intervenors' liability in the event one of these inconsistent standards is breached. The language of I-183 is not clear and, in fact, is patently vague on its face regarding the applicable standard of conduct Intervenors are to be held to. Given this language, Intervenors are unable, as reasonable persons under the law, to comply with this language because it is simply incomprehensible what is required of them to avoid the liability imposed by the initiative. As such, I-183 is invalid and unconstitutional on its face. Therefore, the Court should award summary judgment to Intervenors on its claims.

(2) I-183 is Vague as Applied to Intervenors.

I-183 is also unconstitutionally vague as applied to Intervenors.

> When faced with a vague-as-applied challenge to a statute, we determine whether the challenged statute provides a person with **actual notice** and whether the statute provides **minimal guidelines** to law enforcement. Dixon, ¶ 27. To determine whether the statute provides actual notice, we examine the statute in light of the defendant's conduct to determine if the defendant **reasonably could have understood** that the statute prohibited such conduct. Dixon, ¶ 28. (Emphasis added).

State v. Thirteenth Judicial Dist. Court, 2009 MT 163, ¶ 32, 350 Mont. 465, 208 P.3d 408. Here, in I-183, the initiative does not provide any guidelines to Intervenors. Indeed, I-183 allows Intervenors to adopt their own individual policies for implementation. Also, Intervenors are not on actual notice of what the statute requires of them other than not giving permission to users of the opposite sex and failing to post signs. Since liability can still be imposed for Intervenors' "failure to take reasonable steps", what else is required of Intervenors? What are they to do to

"[e]nsure no person of the opposite sex enters a protected facility"? Although the reasonable person standard itself is not impermissibly vague and is used throughout the civil law, I-183 mandates compliance with its "shall ensure" language and mixes up that strict liability standard with the reasonable person standard. Thus, Intervenors would still be liable for failing to "ensure" no one of the opposite sex goes into a protected facility even though they had signs posted and did not give permission to the user of the protected facility—that is, they would be liable for failing to take other steps (which are not identified). This language impermissibly imposes liability through double and inconsistent standards without identifying the means by which to avoid that liability. Further, if Intervenors are not required to adopt policies, employ technology, maintain staff, or alter existing signs, then what else would a reasonable person be expected to do?

B. I-183 Violates the Montana Constitutional Prohibitions Against Appropriations of Money and Local and Special Laws.

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 (emphasis added).[1] I-183 violates these constitutional prohibitions.

1. I-183 Requires An Appropriation of Money by Local Governments.

I-183 requires local governments to appropriate money which the initiative itself does not fund. It does so in the following ways. First, New Section 4(3) of I-183 allows local governments (i.e., does not prevent them from) to provide accommodations "such as a single occupancy restroom or changing facility upon a person's request due to a special circumstance." Providing such restrooms where they do not already exist requires an appropriation of money by

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[1] The Montana Constitution further provides, "The legislature shall not pass a **special or local act** when a general act is, or can be made, applicable." Art. V, § 12 (emphasis added). Clearly, special or local laws cannot be passed either by the legislature or through the initiative process.

the local government. When read in conjunction with the liability section of the initiative, it appears local governments are actually required to provide such restrooms to avoid liability due to the "shall ensure" language in Section 4 when read in conjunction with the "take reasonable steps" liability language in Section 5. This cost equates to an unfunded mandate discussed below.

Second, although I-183 states providing single occupancy restrooms is discretionary, such discretion, if not exercised, will likely be interpreted to be a violation of the reasonable person standard as well as of the strict liability ("shall ensure") standard in the initiative. Therefore, in order to comply with the law, costly modifications paid by local governments will be likely. Further, such discretion, if exercised by any of the 127 different local governments in the State of Montana would likely result in disparate treatment of individuals in the state who are similarly situated—making the liability of the local governments even greater.[2]

Third, if I-183 were to pass, local governments would be required to advise their liability coverage providers of the new liability imposed by the act. Indeed, MMIA, the liability coverage provider for Plaintiffs' City of Missoula and City of Bozeman, Intervenor City of Helena, and the vast majority of the Intervenors' membership, is already aware of this new liability. This will, undoubtedly, be factored into the assessments paid by such local governments. Additional liabilities equal higher coverage assessments to cover the provider's additional defense and indemnity obligations. Such costs may not be able to be absorbed into the budget of the existing programs of the various local governments.

Therefore, as applied to local governments, I-183 requires appropriations by local

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[2] Plaintiffs have alleged I-183 treats similarly situated individuals differently and, therefore, violates equal protection; Intervenors are claiming that they may end up contributing to such disparate treatment due to I-183's allowance of adopting policies for accommodation (New Section 4(3)).

governments and is, therefore, unconstitutional. Are local governments expected during the summer of 2018 to consider new budget line items required by I-183 (e.g. increased coverage premiums, construction costs, etc.) during their fiscal year 2019 budget approval process? Indeed, since I-183 is not yet law, they should not have to and likely will not. Nevertheless, if the measure passes with the effective date of January 1, 2019, local governments will then be seriously harmed because their budgets will not have the resources for immediate compliance, thereby exposing them to the liabilities imposed by the measure.

2. I-183 Violates Montana's Constitutional Prohibition Against Local and Special Laws.

In the case of Rohlfs v. Klemenhagen, LLC, 2009 MT 440, ¶ 12 354 Mont. 133, 136, 227 P.3d 42, 46, the Montana Supreme Court stated, "In the constitutional context, a law is not local or special if it operates in the same manner upon all persons in like circumstances. If a law operates uniformly and equally upon all brought within the circumstances for which it provides, it is not a local or special law." Rohlfs also stated, "On the other hand, a law is special legislation if it confers particular privileges or disabilities upon a class of persons arbitrarily selected from a larger group of persons, all of whom stand in the same relation to the privileges or disabilities." Id.

Additionally, the Court in D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 442, 713 P.2d 977, 980 (1986) stated:

> Special laws are laws made for individual cases, or for less than a class; local laws are special as to place. Such laws are prohibited in order **to prevent a diversity of laws on the same subject**. *Id.* The test for a special law is: "Does it operate equally upon all of a group of objects which, having regard to the purpose of the legislature, are distinguished by characteristics sufficiently marked and important to make them a class by themselves?" State ex rel. Redman v. Meyers (1922), 65 Mont. 124, 128, 210 P. 1064, 1066.

I-183 constitutes a local law and violates Montana's constitution. The implementation of

I-183 will differ among the 127 municipalities in Montana. Since what constitutes "reasonable steps" is patently vague in I-183, and because specific guidance is not provided, each municipality is likely to do something different in terms of protecting themselves from liability. Not only is it vague for Intervenors, but members of the public will face a litany of varying requirements when using a local, state, or educational restrooms. They won't know what to do or how to act across the state as there will not be a uniform rule to apply. When they do act wrongly, it is the municipality, not the person, who is liable. Such disparities among municipalities will undoubtedly create disparate application of this law among said municipalities. More importantly, I-183 creates a diversity of laws on this one subject matter among the numerous municipalities in Montana, much less across the variety of local governments, state agencies, and school districts to which these vague requirements apply.

I-183 is also a special law because it not only creates a diversity of laws, it also creates a conflict of laws on the same subject. For example, the ADA requires Title II entities to provide accommodations to the disabled without regard to some "policy" as allowed under this initiative. Under the ADA, it is undebatable that the City of Helena would have to allow a mother to take her disabled adult son into the women's restroom if he needs assistance, and that the mother does not have to wait until the City adopts some sort of policy under the Initiative to allow that to happen. If someone then encounters the disabled adult son in the women's restroom, they can sue the City under the Initiative for giving the mom permission to enter with her son (or failing to take reasonable steps to keep her from doing so). So the City cannot comply with both the federal law and this Initiative. This creates additional risk of liability for municipalities for complying with the federal ADA law in the absence of an accommodations policy. In one case, a municipality who enacts such policies will likely be treated differently than a municipality which does not pass such policies. As this Court is aware, a failure to follow a person's own

policies is evidence of negligence. Lawyers who represent claimants pursuant to New Section 5 of the Initiative will also likely assert that the failure to enact such policies (which are allowed by the act) violates the standards imposed by the act (whether that be the reasonable person standard or the strict liability standard).

It is also a special law because it arbitrarily imposes liability on some municipalities by allowing each city or town to determine how to implement the law. In other words, by allowing local governments the ability to enact policies allowing for accommodations for disabled persons, it will likely result in disparate treatment of those local governments as to their liabilities. As set forth above, if they enact such accommodations, they will be bound to follow them and may be held liable for failing to abide by them. On the other hand, if they fail to enact such policies, they may still be held liable for failing to enact such policies under the disparate standards the act imposes (whether strict liability or reasonable person standard).

Ultimately, I-183 will operate such that individual municipalities will be treated differently, will be held to different legal standards, and will impose disparate requirements upon similarly situated members of the public in attempting to avoid liability under the initiative. The law will not operate uniformly and equally as to all municipalities or members of the public, much less the other entities subject to compliance with the initiative. As such, it is a local or special law which violates Montana's constitution.

C. I-183 Constitutes an Invalid Unfunded Mandate.

MCA § 1-2-112(1) prohibits enactments from requiring a local government to provide any service or facility which requires the direct expenditure of funds not expected of local governments:

> (1) As provided in subsection (3), a law enacted by the legislature that requires a local government unit to perform an activity or provide a service or facility that requires the direct expenditure of additional funds and that is not expected of local

governments in the scope of their usual operations must provide a specific means to finance the activity, service, or facility other than a mill levy. Any law that fails to provide a specific means to finance any activity, service, or facility is not effective until specific means of financing are provided by the legislature from state or federal funds.

(2) Subsequent legislation may not be considered to supersede or modify any provision of this section by implication. Subsequent legislation may supersede or modify the provisions of this section if the legislation does so expressly.

(3) The mandates that the legislature is required to fund under subsection (1) are legislatively imposed requirements that are not necessary for the operation of local governments but that provide a valuable service or benefit to Montana citizens, including but not limited to:

(a) entitlement mandates that provide that certain classes of citizens may receive specific benefits;

(b) membership mandates that require local governments to join specific organizations, such as waste districts or a national organization of regulators; and

(c) service level mandates requiring local governments to meet certain minimum standards.

(4) Subsection (1) does not apply to: ...

(b) any law under which the required expenditure of additional local funds is an insubstantial amount that can be readily absorbed into the budget of an existing program. A required expenditure of the equivalent of approximately 1 mill levied on taxable property of the local government unit or $10,000, whichever is less, may be considered an insubstantial amount....

As noted above, I-183 requires municipalities to "ensure" privacy in each protected facility, and to take "reasonable steps" to prohibit certain persons from using certain facilities. While it purports to not require certain actions, it doesn't specify what actions a local government must take to avoid liability. Any "reasonable steps" to prohibit certain persons from taking an action involve the expenditure of limited local resources, up to and including the construction of separate restrooms for each building or facility controlled by a municipality. Although the language does not mandate certain actions, the liability imposed by the act effectively makes such actions and their related costs mandatory in order to avoid that liability. Such expenditures are "not expected of local governments in the scope of their usual operations." Further, since such expenditures are not insubstantial, I-183 constitutes an unfunded mandate.

Under Montana law, cities and towns are prohibited from increasing existing mill levies more than half the average rate of inflation for the prior 3 years or imposing any new mill levies. With limited exceptions, any new revenue sources for municipalities must be put before the local electorate for a vote pursuant to § 15-10-420, MCA. These restrictions on revenues make the annual budgeting process an important process of prioritizing local services and directing limited resources according to goals and needs unique to each city and town in Montana. New mandates that require local governments to take particular actions, enforce particular regulations, and be subject to new causes of actions, without new sources of revenue, further dilutes existing resources and strains local government services. The prohibition contained in § 1-2-112(1), MCA is designed to avoid such unfunded mandates.

I-183 also provides no source of funding for municipalities to comply with its provisions. As such, it constitutes an unfunded mandate which violates Montana law.

D. I-183's Effective Date Fails To Consider The Budgeting Needs And Processes of Local Governments.

If I-183 is allowed on the ballot and if it passes, it would become effective January 1, 2019. (New Section 9). However, January 1, 2019, is in the middle of local governments' budget year. Budgets for 2018-2019 will be set as of September 6, 2018. See § 7-6-4024(3), MCA. As such, the fiscal budget year for 2018-2019 will have already been set prior to I-183 becoming law. If I-183 becomes law, it will require Intervenors to amend their budgets (§§ 7-6-4021 and 7-6-4030, MCA) thereby "stealing from Peter to pay Paul". In other words, although Intervenors would do what they can to comply with the law, such compliance would likely come at the cost of other public services already budgeted for to the detriment of its citizens. Further, implementation of the law by the building of single occupancy restrooms or taking other actions to comply with the law will not occur immediately based on the need to have public contracts bid

out. As such, local governments will still be exposed to liability under the law even though they have not been given a chance to comply with its provisions. Such a process is patently unfair and violates Intervenors' rights to due process.

E. I-183's Severability Clause is Unenforceable Because the Invalid Portions of the Initiative Cannot Be Severed From the Remainder of the Act.

The Montana Supreme Court has held, "if a statute "contains both constitutional and unconstitutional provisions, we examine the legislation to determine if there is a severability clause.'" State v. Theeler, 2016 MT 318, ¶ 12, 385 Mont. 471, 474, 385 P.3d 551, 553, *cert. denied*, 138 S. Ct. 66, 199 L. Ed. 2d 47 (2017). "If a statute does not contain a severability clause, we still may sever an unconstitutional provision." Id.

> In doing so, we "must determine whether the unconstitutional provisions are necessary for the integrity of the law or were an inducement for its enactment." *Williams*, ¶ 64 .... In order to sever an unconstitutional provision, "the remainder of the statute must be complete in itself and capable of being executed in accordance with the apparent legislative intent." *Williams*, ¶ 64. That is, if severing "the offending provisions will not frustrate the purpose or disrupt the integrity of the law, we will strike only those provisions of the statute that are unconstitutional." *Williams*, ¶ 64. We have long held that "[i]f an invalid part of a statute is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected." *Sheehy v. Public Employees Retirement Div.*, 262 Mont. 129, 141, 864 P.2d 762, 770 (1993); Mont. Auto. Ass'n v. Greely, 193 Mont. 378, 399, 632 P.2d 300, 311 (1981).

Id., ¶ 12. "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. Courts cannot rewrite the initiative to make it constitutional. Reichert, ¶ 87.

Here, I-183 has a severability clause at New Section 8. Intervenors have shown how the initiative as a whole is unconstitutionally vague on its face, that it violates Montana's

constitution against local and special laws and requires appropriations of money by local governments, and that it constitutes an unconstitutional delegation of legislative power. Intervenors have shown how the initiative sets forth two different and conflicting standards of care. Further, the language of I-183 that imposes liability on local governments is the enforcement mechanism for I-183. It is, therefore, inseparable from the remainder of the initiative. Intervenors have identified the constitutionally infirm portions of I-183. If those provisions were to be be severed from the remainder of the initiative, the remaining portions would be unable to stand on their own—that is, the remainder of the initiative would not be complete in and of itself and would not be capable of being executed in accordance with its apparent legislative intent. Indeed, the enforcement section in New Section 5 is the inducement for the initiative itself—it is the mechanism by which the initiative accomplishes its goals of ensuring privacy in protected facilities. It forces local governments, state agencies, and school districts to comply with its provisions by threat of liability for compensatory damages and attorney fees up to a year after an alleged violation occurs. As such, severing the enforcement provisions of the initiative destroys the initiative itself. Given the numerous constitutional violations identified herein, it should not be the function of this Court to try to re-write the law to make it pass constitutional muster. The Court should simply strike it down in its present form.

III. INTERVENORS ARE ENTITLED TO AN INJUNCTION PRECLUDING I-183 FROM BEING PLACED ON THE BALLOT.

Based on the above arguments, Intervenors will sustain irreparable harm if this unconstitutional initiative is allowed to be on the November ballot and if it passes. § 27-19-102, MCA. They will be exposed to multiple and undetermined liabilities without any clear standard of conduct, without any direction regarding its rule making authority, and with unplanned and unfunded costs of implementation. Compensation of Intervenors is not an adequate remedy

because such costs are unknown. As such, injunctive relief is the only effective remedy for Intervenors. It is the only remedy which takes into account judicial resources and the inevitable multiple judicial proceedings which will arise related to I-183 in the event it passes.

CONCLUSION

There are no issues of material fact relative to the claims asserted by Intervenors in this case. I-183 is unconstitutionally vague and violates the due process rights of Intervenors. It violates Montana's constitutional prohibitions against local and special laws and against local appropriations. It constitutes an improper delegation of legislative authority. It violates Montana law because it is an unfunded mandate. It fails to consider the budgeting processes of local governments and puts them in a position of liability without any ability to immediately comply with its provisions. The Court should grant Intervenors' Motion for Summary Judgment and enjoin the State from placing this initiative on the November ballot.

DATED this 4th day of May, 2018.

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

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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:

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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.