IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 17-0449

ACLU OF MONTANA FOUNDATION, INC.,

Petitioner,

v.

THE STATE OF MONTANA, BY AND THROUGH TIMOTHY C. FOX, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, AND COREY STAPLETON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE,

Respondents.

ORDER

The ACLU of Montana Foundation (ACLU) has requested this Court to declare that the ballot statement and fiscal note approved by the Attorney General for the "Montana Locker Room Privacy Act" are insufficient under § 13-27-312, MCA.[1] The office of the Attorney General has filed a response objecting to the ACLU's petition.

BACKGROUND

The Constitution of the State of Montana authorizes the people of this state to enact laws by initiative on all matters except appropriations of money and local or special laws. Mont. Const. art III, § 4(1). Petitions for initiative, accompanied by a draft ballot issue statement of up to 135 words, are initially prepared by the initiative's proponents and submitted to the Secretary of State. Sections 13-27-201 and -202(1), MCA. After review, the Secretary of State refers the ballot statement to the Attorney General for determination of legal sufficiency and approval, and for a determination of whether a fiscal note is necessary. Section 13-27-202(4), MCA.

In May 2017, the Montana Family Foundation submitted proposed text for the "Montana Locker Room Privacy Act" to the Montana Secretary of State for review for

[1] The ACLU asks, alternatively, that we declare any petitions supporting this ballot issue void and that the issue may not appear on the ballot. However, because the ACLU does not present any legal argument—or even any further discussion—on this alternative request, we will not address it further.

the 2018 general election ballot. The text of the proposed ballot initiative is approximately four pages long. Pursuant to § 13-27-312, MCA, the Attorney General examined the proposed ballot issue for legal sufficiency and accepted comments on the proponents' proposed "statement of purpose and implication," or ballot statement. *See* § 13-27-312(2)(a), MCA. The Attorney General revised the ballot statement to read as follows:

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

Pursuant to § 13-27-312(3), MCA, and based on a fiscal note provided by the Office of Budget and Program Planning, the Attorney General also prepared the following fiscal statement concerning the initiative: "The State of Montana will spend an estimated $545,699 in general fund money to comply with the requirements of [this initiative]. The costs are related to the renovation and proper signage for protected facilities owned by the State."

The ACLU challenges the adequacy of the ballot statement and fiscal statement on multiple grounds.

DISCUSSION

In preparing and approving a ballot statement, the Attorney General is to "endeavor to seek out parties on both sides of the issue and obtain their advice" and to ensure that the ballot statement "express[es] the true and impartial explanation of the proposed ballot issue in plain, easily understood language and [is] not . . . arguments or

written so as to create prejudice for or against the issue." Section 13-27-312(3) and (4), MCA.

This Court has upheld ballot statements approved by the Attorney General as long as they employ "ordinary plain language, explaining the general purpose of the issues submitted in language that is true and impartial, and [are] not argumentative or likely to create prejudice either for or against the issue." *Stop Over Spending Montana v. McGrath*, 2006 MT 178, ¶ 28, 333 Mont. 42, 139 P.3d 788. As long as the Attorney General's wording "fairly states to the voters what is proposed within the Initiative, discretion as to the choice of language . . . is entirely his." *State ex rel. Wenzel v. Murray*, 178 Mont. 441, 448, 585 P.2d 633, 637-38 (1978). However, a court must intervene when a ballot statement's language would "prevent a voter from casting an intelligent and informed ballot." *Citizens Right to Recall v. McGrath*, 2006 MT 192, ¶ 16, 333 Mont. 153, 142 P.3d 764, quoting *Advisory Opinion re Term Limits Pledge*, 718 So.2d 798, 803 (Fla. 1998).

Given the 135-word limit on ballot statements, not every detail of an initiative can be explained. *See Montana Consumer Fin. Ass'n v. State ex rel. Bullock*, 2010 MT 185, ¶ 12, 357 Mont. 237, 243, 238 P.3d 765, 768. However, "if the information would give the elector 'serious grounds for reflection' it is not a mere detail, and it must be disclosed." *Pebble P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1082 (Alaska 2009).

In this case, we conclude that both the ballot statement and the fiscal statement prepared by the Attorney General are deficient in five respects, as detailed below:

(1) The first sentence of the ballot statement refers to "members of one sex" and "that person's sex." Yet the ballot statement fails to present the initiative's specific definition of "sex" as "a person's immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth." The ACLU contends that very few people possess genetic evidence of their sex at the time of their birth. The ACLU argues that anatomy and genetics at birth will not yield an "objective" determination of binary sex for everyone such as intersex individuals (people born with both male and female

sexual characteristics and genes),[2] and transsexual and transgender individuals (people "born with the physical characteristics of one gender but [who have] undergone, or [are] preparing to undergo, sex-change surgery."[3]) Irrespective of whether the ACLU's argument may or may not have merit, the point is well-taken that omitting the initiative's specific definition of "sex" in the ballot statement impedes voters from understanding how the initiative may apply to transgender and intersex individuals. We appreciate the difficulty of providing a true, impartial, and non-argumentative explanation within at 135-word constraint; simply including the definition from the proposed measure itself may prove the best option.

(2) As defined at Section 3(3) of the proposed initiative, "government entities" include not only the state, but also any political subdivision of the state, a county, city, town, or consolidated government, school districts, and public institutions of higher education. The ballot statement does not sufficiently reflect that broad definition—it fails entirely to disclose that the initiative applies to the various forms of local government and to public institutions of higher education.

(3) The first sentence in the ballot statement says the initiative "[r]equires government entities to designate ***a*** protected facility in a government building or public school for use only by members of one sex." [Emphasis supplied.] This implies that government entities would need to designate one facility per building to comply with the measure's requirements. But section 4(1) of the initiative states that "a protected facility that is accessible by multiple persons at the same time must be designated for use only by members of one sex." "Protected facility" is defined in Section 3(5) as "a changing facility, locker room, restroom, or shower room that is located in a government building, or that is controlled by a governmental entity." Thus, the ballot statement is inaccurate in that it would lead voters to believe that the initiative only applies to one "protected facility" at any government building, rather than all of them, as the text of the initiative requires.

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[2] *Black's Law Dictionary* 947 (Bryan A. Garner ed., 10th ed. 2014).
[3] *Black's Law Dictionary* 1729 (Bryan A. Garner ed., 10th ed. 2014).

(4) The ballot statement refers to "civil penalties if a governmental entity fails to provide such privacy," but it does not acknowledge the extent of government liability the initiative creates. The language used in the ballot statement obscures the important fact that Section 5(3) of the initiative allows any person to bring a civil action for damages—including emotional and mental distress, reasonable attorney fees and costs, and "other relief"—against the "governmental entity" that controls the facility. The ballot statement does not clearly inform the reader that the initiative authorizes people to sue government entities and to recover monetary damages for violations of the initiative's provisions.

(5) The fiscal statement prepared by the Attorney General includes only one part of the costs of the initiative, as determined by the Governor's Office of Budget and Program Planning ("Budget Office"). Section 13-27-312(3), MCA, requires a fiscal statement of the "revenue, expenditures, or fiscal liability of the state." According to the fiscal note prepared by the Budget Office, the amount the Attorney General has provided in the fiscal statement pertains only to State government, and only for the next four years. Long-term costs, and costs to local governments, K-12 and college-level educational facilities, and legal fees are uncertain and are not included. The fiscal note should reflect that. According to the Budget Office, costs for the Montana University System alone could exceed $250 million per year.

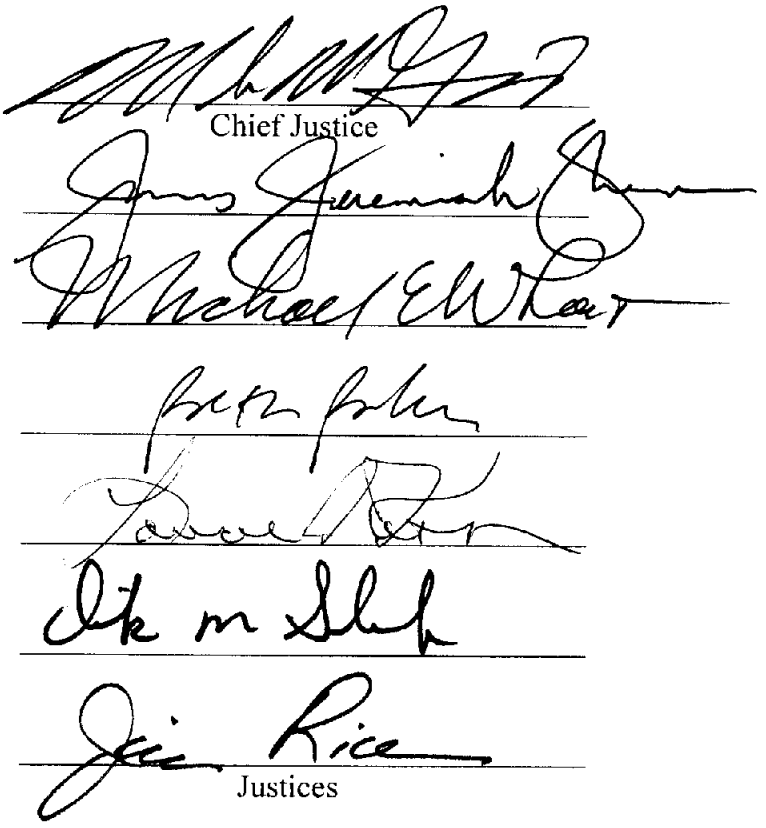
This Court must intervene when a ballot statement's language would "prevent a voter from casting an intelligent and informed ballot." As detailed above, the ballot statement as revised and approved by the Attorney General does not meet this standard in the areas discussed.

Therefore,

IT IS ORDERED that the ballot statement and fiscal statement prepared by the Attorney General for the "Montana Locker Room Privacy Act" are declared legally insufficient. The Attorney General is directed to revise them to rectify the deficiencies identified in this Order.

The Clerk is directed to provide copies of this Order to all counsel of record.

Dated this 19th day of September, 2017.



Chief Justice

Justices

Justice Beth Baker, concurring.

Today's Order may appear to pose an insurmountable task for the Attorney General to incorporate all of the Court's points in "plain, easily understood language" within 135 words. Not so. I offer one example, at 123 words:

> This measure 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.

Justice

Chief Justice Mike McGrath and Justice Jim Rice join in Justice Baker's concurrence.

Chief Justice

Justice