IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 23-0331

MATTHEW G. MONFORTON,

Petitioner,

v.

AUSTIN KNUDSEN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL; CHRISTIE JACOBSEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE,

Respondents.

Original Proceeding Arising Under Mont. Code Ann. § 13-27-316(1)

RESPONDENTS RESPONSE BRIEF

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INTRODUCTION

The Attorney General ("AG") acted within his statutory and constitutional authority determining Ballot Issue No. 2 ("BI2") legally insufficient because it failed to meet the constitutional requirements to appear on the ballot. Furthermore, the fiscal note and accompanying statement of fiscal impact accurately convey the financial implications of BI2 in a manner that facilitates, rather than impairs, the initiative process.

Petitioner raises additional constitutional claims that fall outside the limited jurisdiction conferred by MCA § 13-27-316 and this Court shouldn't consider them.[1]

[1] Like Petitioner, unless otherwise noted, any references to the Montana Code Annotated refer to the 2021 MCA.

Petitioner complains of defects in his own measure. Petitioner should, instead, revise his proposal to conform with the requirements governing submission of amendments to Montana's Constitution.[2]

ARGUMENT

I. The Petition suffers from fatal jurisdictional defects.

Petitioner's claims at paragraphs 11(a) and 11(d) fail because they fall outside the limited scope of MCA § 13-27-316. The statute limits challenges to the "adequacy of the [ballot] statement or the attorney general's [legal sufficiency] determination." MCA § 13-27-316(1). Petitioner uses MCA § 13-27-316 to challenge the underlying constitutionality of MCA § 13-27-312(3), (8). Pet., ¶¶ 11(a), (d). But MCA § 13-27-316 doesn't impart jurisdiction to consider the constitutionality of these laws, and the Court should not entertain them here. *See Hoffman v. State*, 2014 MT 90, ¶ 10, 374 Mont. 405, 328 P.3d 604 (denying jurisdiction based on 2007 changes removing the Court's

[2] The AG accepts paragraphs 1, 4–7, 9-10 of the Petition as the factual jurisdictional basis. Paragraphs 2, 3, and 8 contain non-jurisdictional legal arguments. Additionally, this Court's June 16, 2023, Order limited the responsive briefing to the "[AG's] (1) Legal Insufficiency Determination and (2) Fiscal Statement concerning a proposed constitutional initiative for the 2024 ballot, pursuant to § 13-27-316(1), MCA (1)." This seemingly limits the response to the legal questions raised in paragraphs 11(b), (c), and (e). However, the AG also responds to the issues raised in paragraphs 11(a) and (d), notwithstanding their falling outside the scope of MCA § 13-27-316.

jurisdiction to hear substantive challenges to ballot issues). Instead, Petitioner must raise those challenges in district court and follow the ordinary course of appeals. *Id.*

II. The AG correctly determined BI2 legally insufficient.

A. The AG acted within his statutory and constitutional authority.

"The [AG] is the legal officer of the state and shall have the duties and powers provided by law." Mont. Const. art. VI, § 4(4). "[T]he [AG] shall examine the proposed ballot issue for legal sufficiency as provided in this section and shall determine whether the ballot statements comply with the requirements of this section." MCA § 13-27-312(1). "As used in this part, 'legal sufficiency' means that the petition complies with statutory and constitutional requirements governing submission of the proposed issue to the electors, the substantive legality of the proposed issue if approved by the voters, and whether the proposed issue constitutes an appropriation as set forth in 13-27-211." MCA § 13-27-312(8).

In construing statutory text, "'shall' means 'must' and that use of the term 'shall' connotes a mandatory obligation." *Swearingen v. State*, 2001 MT 10, ¶ 6, 304 Mont. 97, 18 P.3d 998.

Courts traditionally give considerable weight to historical, accepted practices. *Moore v. Harper*, 600 U.S. ___, 24 (2023). The AG traditionally exercised authority to withhold ballot measures that failed to comply with the constitutional requirements governing submission to the voters. *Meyer v. Knudsen*, 2022 MT 109, ¶ 9, 409 Mont. 19, 510 P.3d 1246. Moreover, the AG has engaged in constitutional interpretation for more than a century in fulfilling his duties. 1 Op. Att'y Gen. Mont. 18 (Galen) (interpreting 1889 Mont. Const. art. VIII, § 18).

Petitioner doesn't argue the AG failed to meet his statutory obligations under MCA § 13-27-312. Pet., ¶¶ 12–18. The statute unambiguously requires the AG to consider the constitutionality of a proposed measure—both whether it meets the constitutional requirements for submission and substantive constitutionality if passed. MCA § 13-27-312(8).

Instead, Petitioner indirectly attacks the constitutionality of the statute. For reasons already stated, this Court lacks jurisdiction to entertain that challenge under MCA § 13-27-316.

Petitioner's arguments misconstrue *Larson* and *Hoffman*. Pet., ¶¶ 12–13, 16. First, Petitioner recites *Larson* without recognizing any

commonsense application of the decision. Pet., ¶ 12 (quoting *Larson v. State*, 2019 MT 28, ¶ 42, 394 Mont. 167, 434 P.3d 241). Under Petitioner's recitation, the AG cannot interpret constitutional, statutory, or common law. That is patently absurd. *Larson* involved adjudications, which properly rest in the judicial sphere, not interpretations. *Larson*, ¶ 42. MCA § 13-27-312 doesn't authorize an adjudication, and the AG didn't make one. *See* BLACK'S LAW DICTIONARY 52 (11th ed. 2019) (defining "adjudication" as "[t]he legal process of resolving a dispute; the process of judicially deciding a case.").

Next, *Hoffman* cites to an earlier version of MCA § 13-27-312 where the AG lacked authority to make substantive legal sufficiency findings. *Hoffman*, ¶ 9. Tracing *Hoffman* back to *MEA-MFT v. State*, 2014 MT 33, ¶ 11, 374 Mont. 1, 318 P.3d 702 and *Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, ¶ 6, 365 Mont. 520, 285 P.3d 435, it becomes apparent that the AG, himself, raised arguments regarding his limited statutory authority. *MEA-MFT*, ¶ 11. The statute changed. *See* HB 651 (2021). *Hoffman* relied on statutory (not constitutional) principles, and the change in statute necessitates the AG possessing a different duty.

See also Bullock, ¶ 6 ("By statute, the [AG] had no power to review the substantive legality of I-166.").

This interpretation harmonizes with the AG's unquestioned authority to withhold measures failing to satisfy constitutional criteria governing submission to the voters. *Meyer v. Knudsen*, ¶ 9. Petitioner acknowledges these previous legal sufficiency determinations involve constitutional interpretation. Pet., ¶¶ 15–16. This Court has never held it improper for the AG to withhold such constitutionally infirm measures. *Meyer v. Knudsen*, ¶ 9 (citing *Bullock*, ¶ 6).

Petitioner doesn't dispute that a violation of Mont. Const. art. XIV, § 11 precludes placement of the measure on the ballot. Pet., ¶¶ 12–18. Instead, Petitioner challenges the constitutionality of MCA § 13-27-312(8) writ large. This Court rejected similar arguments two years ago. *Meyer v. Knudsen*, ¶ 9.

If the Court considers Petitioner's arguments, it must reject them again. First, MCA § 13-27-312(8) doesn't impair or assume any aspect of the judicial power. Second, Petitioner confuses the ordinary duty of constitutional interpretation with the judicial power to adjudicate constitutional disputes. Pet., ¶ 18.

The legislative scheme reserves the power of judicial review and final adjudication of constitutional issues to the judiciary. MCA § 13-27-316. Nothing in the statutory scheme grants the AG authority to finally decide the issue. *Id. see also Hoffman*, ¶ 10. For example, in *Meyer v. Knudsen*, the AG interpreted whether a measure met the constitutional requirements for submission of a measure to the voters—subject to judicial review. *Id.* ¶¶ 9, 12.

All officials—legislative, executive, and judicial—possess an inherent authority to interpret the constitution within the scope of their duties. *See* Federalist No. 49, at 321–25 (R. Sciliano ed. 2001) ("The several departments being perfectly coordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."); *see also Western Tradition Partnership v. AG of Mont.*, 2012 MT 271, ¶ 17, 367 Mont. 112, 118, 291 P.3d 545, 550 (the AG can exercise independent constitutional judgment and decline to defend the constitutionality of government actions). Petitioner's arguments offend this foundational principle of American government.

In an analogous context, the Legislature granted the AG authority to issue binding opinions on state and local agencies "unless overruled by a state district court or the supreme court." MCA § 2-15-501(7). AG opinions often interpret constitutional provisions. *E.g.*, 40 Op. Att'y Gen. Mont. No. 67 at 266-67 (Greeley) (interpreting Mont. Const. art. X, § 9); 44 Op. Att'y Gen. Mont. No. 7 at 40–41 (Racicot) (interpreting U.S. Const. amend. I, XIV; Mont. Const. art. X, § 7); 49 Op. Att'y Gen. Mont. 18 (McGrath) (interpreting Mont. Const. art. II, § 21). Like legal sufficiency determinations, AG Opinions are not binding on reviewing courts. *O'Shaughnessy v. Wolfe*, 212 Mont. 12, 16–17, 685 P.2d 361, 363–64 (1984).

In this case, the AG determined BI2 violates constitutional requirements governing submission of the issue to voters. Pet. at App. 24–29. That authority is longstanding, subject to judicial review, and constitutional.

B. BI2 violates Article XIV, Section 11 of the Montana Constitution.

"If more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately." Mont. Const. art. XIV, § 11. This imposed a strict check on

the 1972 Constitution's new power of popular initiative. *Mont. Ass'n of Ctys. ("MACo") v. State*, 2017 MT 267, ¶ 14, 389 Mont. 183, 404 P.3d 733. The separate-vote requirement avoids voter confusion and deceit, and it prevents combining multiple amendments, which might not command majority support, into a single measure. *Id.* ¶ 15. The separate-vote requirement is narrower than the single subject rule found in Article V. *Id.* ¶ 19. Ultimately, Article XIV, § 11, always allows Montana voters the ability to accept or reject each amendment, "guaranteeing the people have complete control over Montana's fundamental law." *Id.* ¶ 18.

Montana's separate-vote test asks whether "the proposal would make two or more changes to the constitution that are substantive and that are not closely related." *Id.* ¶ 27. Changes may be explicit or implicit. *Id.* ¶ 28. The closely-related prong involves a multi-factor test that considers, among other things, whether the proposal amends a single section, concerns qualitatively similar matters, and addresses matters historically treated as a single subject. *Id.* ¶ 29.

BI2 proposes multiple substantive changes. Pet., ¶¶ 2–3. The fiscal note highlights the independent effects of each change. Pet. at App. 16-20. The property valuation increase cap reduces statewide revenue by

$87.5 million in 2027. Pet. at App. 17, ¶ 17. The ad valorem limitation results in an independent revenue reduction of 88% for affected property taxes. Pet. at App. 19, ¶¶ 31–32. As expressly stated in the fiscal note, the 88% revenue reductions from the ad valorem tax cap occur independently from and after any application of the valuation increase cap.

BI2 also implicitly amends at least Article VIII, Section 17 (prohibition on real estate transfer taxes); Article X, Section 1 (equal education opportunity guarantee); Article XI, Section 4 (general local government powers); and Article XI, Section 8 of the Montana Constitution (local powers of initiative and referendum).

First, Petitioner acknowledges that his measure moves the State to an "acquisition-based" system of taxation. Pet., ¶ 2. But Montana voters decided in 2010 to prohibit any taxation based on the transfer of real property. Mont. Const. art. VIII, § 17 (adopted by CI-105). BI2 impliedly amends Article 8, Section 17 by allowing the State to impose a higher tax on properties sold or transferred after 2019. That is a tax on the sale or transfer of property, and thus BI2 impliedly amends Article VIII, Section 17.

Second, BI2's ad valorem tax cap limits the existing taxing authority in Article X, Section 1; Article XI, Section 4; and Article XI, Section 8 of the Montana Constitution. This Court held that local property taxes factor into the constitutionality of the Legislature's school funding scheme. *See Helena Elementary Sch. Dist. No. 1 v. State,* 236 Mont. 44, 48, 769 P.2d 684, 686 (1989) (local property tax disparities resulted in an unconstitutional funding scheme). BI2's ad valorem tax limitation will result in some school districts exceeding the 1% cap and thus be treated unequally compared to school districts not exceeding the 1% cap. Pet. at App. 20. That imbalance results from the combined effects of other taxing jurisdictions' decisions—not the school funding formula, itself.

BI2 further limits the power of local citizens to pass levies under Article XI, Section 8 of the Montana Constitution if the levy would exceed the ad valorem tax cap. This same principle applies to local governments' general powers. Mont. Const. art. XI, § 4.

Even considering only the express amendments to Article VIII, Section 3, BI2 still fails the separate-vote requirement. Petitioner acknowledges his measure amends multiple variables in the property tax

system. Pet., ¶ 3. Those variables cause independent fiscal impacts. By combining multiple variables, Petitioner denies citizens the ability to accept or reject each independent change. *MACo*, ¶ 18. For example, a citizen could reasonably decide to limit the State's ability to increase property values by more than 2% per appraisal cycle, but not support a 1% tax cap that results in a revenue loss to their local school district, county, and rural fire district. Those present distinct political decisions for citizens. *MACo*, ¶ 27 (the implication of a measure may result in two or more amendments).

A measure violating Article XIV, Section 11 cannot be submitted to voters. *MACo*, ¶ 51. "The constitutional defect lies in the submission of the proposed amendment to the voters of Montana with more than one constitutional amendment." *Id.* (cleaned up).

Petitioner must resubmit his plan as separate, independent initiatives that the people may accept or reject in turn.

C. BI2 unconstitutionally deprives voters of information necessary to cast an informed ballot.

"It is elementary that voters may not be misled to the extent they do not know what they are voting for or against." *State ex rel. Mont. Citizens for Pres. of Citizen's Rights v. Waltermire*, 227 Mont. 85, 90, 738

P.2d 1255, 1258 (1987). "Due process is satisfied if the voters are informed by or with the ballot of the subject of the amendment, are given a fair opportunity by publication to consider its full text, and are not deceived by the ballot's words." *Id.* "Where a ballot proposal is misleading, the remedy is to void the election." *Id.*

Waltermire acknowledges a requirement that voters may not be misled "by the ballot's words." *Id.* This must include a requirement that the terms of the initiative can be understood by the average voter. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (the void-for-vagueness doctrine of the Due Process Clause requires people of ordinary intelligence to understand the law's meaning). The people shouldn't need a law degree, much less knowledge of legal terms of art, to know what their government's foundational document says.

Petitioner responds that "real property" and "ad valorem" are clearly defined legal terms. Pet., ¶ 32. Maybe so, but that still fails to present the measure in terms easily understood by the electorate. *See* MCA § 13-27-312. Petitioner fails to raise any argument as to how the electorate can know what classes of property fall within the ambit of BI2 or that his ad valorem tax cap is a limitation on total property taxes. By

failing to communicate to the electorate in easily understood language, Petitioner contradicts *Waltermire*'s Due Process requirement.

Voters must also be able to "draw[] on both official and unofficial sources of information and education [to] exercise his or her political judgment." *Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650, 657 (1988). Petitioner acknowledges it will be impossible for a voter to draw on official or unofficial information to understand how his measure affects that voter's local governments. Pet., ¶ 49. Because BI2 imposes variable revenue reductions (or tax cuts) on different areas of the state, a voter cannot reasonably know how the issue will affect their property, schools, and local governments prior to signing or voting on the issue. That too violates *Waltermire*'s command. 227 Mont. at 89–90.

III. The AG's fiscal statement complies with applicable requirements.

If the proposed ballot issue affects "the revenue, expenditures, or fiscal liability of the state, the attorney general shall order a fiscal note incorporating an estimate of the effect [as contemplated by Section 5-4-205]…." MCA § 13-27-312(3). "If the fiscal note indicates a fiscal impact, the attorney general shall prepare a fiscal statement of no more than 50 words, and the statement must be used on the petition and ballot if the

issue is placed on the ballot." *Id.* "It is the legislature's intent that a fiscal note be prepared as an objective analysis of the fiscal impact of legislation. The fiscal note should represent only the estimate of the revenue and expenditures that would result from the implementation of the legislation, if enacted, and may not in any way reflect the views or opinions of the preparing agencies, the sponsor, or other interested parties." MCA § 5-4-205(2). A preparing agency includes both state and local agencies. MCA § 5-4-203. This is because the statutory structure governing fiscal notes requires local government input. MCA § 5-4-210.

Petitioner reads out the reference to MCA § 5-4-205 entirely. Pet., ¶¶ 43–50. But MCA § 13-27-312 requires fiscal notes for ballot measures substantially comply with MCA § 5-4-205. MCA § 5-4-205 governs the contents of fiscal notes and the adjoining sections of law make clear that local governments are a necessary component to the contents of a fiscal note. *See* MCA §§ 5-4-203; -210.

This complies with the legislative intent of providing an "objective analysis" as to the legislation's fiscal impact. MCA § 5-4-205(2). Excluding local governments from this analysis results in a knowledge void that deprives the legislative body—either the Legislature itself or

citizens—of information necessary to intelligently exercise political judgment. *Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650, 657 (1988).

Petitioner doesn't challenge the accuracy of the fiscal note or the AG's proposed fiscal statement. Pet., ¶¶ 36–50. Petitioner instead asks the Court to deprive citizens the full account of BI2's effect. *Id.* ¶ 49.

Petitioner complains about the measure's effects being confusing and misleading. *Id.* ¶ 49. He misses that said confusion stems from the measure, itself. *Supra* Part.II.C. Nor does Petitioner offer any suggested description of the effects on revenue for all 56 counties, never mind the differing effects on school districts, rural fire districts, and municipalities, within the prescribed 50-word limit. *Id.* ¶ 48. Instead, Petitioner asks the Court to deprive voters of neutral information aggregating local impacts. *Id.* ¶ 50.

The AG drafted the requisite 50-word fiscal statement that accurately and impartially reflects the impact on revenues and expenditures. *See Mont. Consumer Fin. Ass'n v. State*, 2010 MT 185, ¶ 10, 357 Mont. 237, 238 P.3d 765 (the Court will not disturb a ballot

statement that complies with the law even if a better one could be written).

A. MCA § 13-27-312(3) is constitutional.

"Subject to constitutional protections, the election process is purely statutory." *Meyer v. Jacobsen*, 2022 MT 93, ¶ 21, 408 Mont. 369, 510 P.3d 52. "The Montana Legislature has enacted statutes that govern the form of initiatives and the procedures for ensuring their validity prior to signature collection." *Meyer v. Knudsen*, 2022 MT 109, ¶ 5, 409 Mont. 19, 510 P.3d 1246; *see also Cottonwood Envtl. Law Ctr. v. Knudsen*, 2022 MT 49, ¶ 3, 408 Mont. 57, 505 P.3d 837 (the Legislature passed laws to "facilitate" the initiative process).

Petitioner's constitutional challenge to MCA § 13-27-312 fails to identify any impairment of the initiative power. Pet., ¶ 41. Fiscal notes and fiscal statements facilitate, not impair, the power. *See State ex rel. Ethics First-You Decide Ohio PAC v. DeWine*, 2016-Ohio-3144, ¶ 16, 147 Ohio St. 3d 373, 377, 66 N.E.3d 689, 694 (Considering an analogous constitutional provision the Ohio Court determined statutes that help voters make more informed decisions and ensure procedural integrity facilitate the initiative power if they don't limit the power of citizens to

vote on or sign petitions). The citizens and the Legislature possess concurrent authority over constitutional amendments, and fiscal notes facilitate both.

Petitioner mistakes the constitutional floor of Article XIV, § 9, for a constitutional bar on facilitating legislation. Ballot issues noncompliant with Article XIV, § 9 of the Montana Constitution may be rejected or nullified. *Waltermire*, 227 Mont. at 90. But Article XIV, § 9 doesn't supplant all facilitating regulation. *Cottonwood*, ¶ 3. The Legislature facilitates the initiative process by making professional drafters available to citizen petitioners, MCA § 13-27-202(2)(a), imposes signature requirements, *Meyer v. Jacobsen*, ¶ 13, and imposes various deadlines on signature gathering, *Meyer v. Knudsen*, ¶¶ 17–18. These provisions all go beyond the language of Article XIV, § 9, but facilitate the initiative process by ensuring procedural integrity and citizens' access to necessary information. None of these provisions, nor the fiscal note and fiscal statement provisions, impair the initiative power because they don't affect the ability to sign or vote on a valid initiative. *See DeWine*, 66 N.E.3d at 694.

B. The AG's fiscal statement accurately and appropriately summarized impacts on local agencies.

The AG requested a fiscal note and prepared a 50-word fiscal statement in accordance with MCA § 13-27-312(3). Pet. at App. 13, 21-22. The Budget Director worked with state and local agencies to prepare the fiscal note pursuant to MCA § 13-27-312 and MCA § 5-4-205. The AG and Budget Director followed the law and accurately conveyed the fiscal implications of BI2.

Petitioner argues that an initiative brought under Article XIV, Section 9 should deprive citizens of information available to legislators for referenda brought under Article XIV, Section 8. Pet., ¶ 44; *see also* SB 542 (2023) (a constitutional amendment substantially identical to Ballot Issue No. 2, with fiscal note). That violates basic principles of information parity. *See Sawyer Stores v. Mitchell*, 62 P.2d 342, 350–51 (Mont. 1936) (the citizen initiative process generally requires more safeguards compared to the legislative process because citizens have less access to information).

The constitution requires voters possess sufficient information to intelligently exercise their political rights. *Waltermire*, 227 Mont. at 89—

90. The fiscal note reflects the full effects of the ballot measure. Pet. at App. 16-20. BI2 imposes a far larger fiscal effect on local agencies than on state funds. But Petitioner would deny citizens the ability to see those official estimates when making the choice of how to exercise their political rights. That undercuts this Court's decision in *Waltermire*.

Second, as previously argued, MCA § 13-27-312(3) incorporates the fiscal note structure found in Title 5, Chapter 4, Part 2. This puts both sources for constitutional amendments—the people and the Legislature—on equal informational footing.

Petitioner fails to identify any practical harm arising from citizens accessing neutral, official fiscal estimates. Pet., ¶¶ 43–50. If he thinks these estimates prejudice the issue, he should say so. But he doesn't. Instead, he alleges an injury arising from *too much* information, rather than too little. But he doesn't argue how too much information impairs a citizen's power to sign or vote on the proposed measure.

Any confusion alleged in the Petition results from the measure, itself, not the fiscal statement. Petitioner fails to challenge the accuracy of the fiscal note or the fiscal statement. Pet., ¶¶ 43–50. He doesn't challenge that $1.508 billion accurately reflects the aggregate statewide

revenue reductions to local agencies. *Id.* He only requests that this figure contain more detail while acknowledging the impossibility of that task. Pet., ¶ 49. That impossibility results from his own measure, not the AG or Budget Director.

CONCLUSION

This Court should concur in the AG's legal insufficiency finding. If the Court disagrees, it should uphold the AG's statement of fiscal impact and remand the issue back to the AG to complete a statement of purpose and implication under § 13-27-312. *MEA-MFT*, ¶ 11.

DATED this 17th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,936 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

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