IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 23–0634

MONTANANS FOR ELECTION REFORM ACTION FUND, ROB COOK, FRANK GARNER, BRUCE TUTVEDT, DOUG CAMPBELL, TED KRONEBUSCH, and BRUCE GRUBBS,

Petitioners,

v.

AUSTIN KNUDSEN, in his official capacity as MONTANA ATTORNEY GENERAL; and CHRISTI JACOBSEN, in her official capacity as MONTANA SECRETARY OF STATE,

Respondents.

Original Proceeding Arising Under Mont. Code Ann. § 13-27-605(1)

RESPONDENTS' RESPONSE BRIEF

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INTRODUCTION

Ballot Issue No. 12 ("BI–12") is a constitutional initiative that creates a new Section 9 in Article IV of the Montana Constitution, drastically changing Montana's primary election system to allow the top four vote getters to advance to the general election, define the offices to which the new top four system applies, prohibit political party endorsements or nominations from appearing on the ballot, and limiting the number of signatures that may be required to qualify a candidate for the ballot. (Pet. at Ex. 4, pp. 4–6.)[1] The Attorney General ("AG") determined BI–12 to be legally insufficient because it failed to meet the constitutional requirements to appear on the ballot. (*See* Pet. at Ex. 1.)

Petitioners seek the invalidation of the AG's determination by attempting to characterize BI–12's provisions as far narrower and interrelated than they truly are.[2] The reality is that BI–12 contains within it numerous discrete matters that Montana's electorate cannot vote upon apart from BI–12's primary purpose of constitutionally mandating a top-four primary election for specified offices. This violates Montana's

[1] Because Petitioners' characterization of Montana's current primary election system and representations regarding the purpose of top-four primary reform have no bearing on the applicable analysis, Respondents express no position on that matter.

[2] Respondents accept Petitioners' Fact Nos. 1–10 as the factual jurisdictional basis of their Petition for purposes of this Response only.

strict separate-vote requirement for constitutional initiatives that appear on the ballot, and the Court should reject Petitioners' challenge as explained further below.[3]

ARGUMENT

"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. "The plain language of the provision conveys an anticipatory, pre-election purpose—to ensure that constitutional ballot issues are prepared and submitted so they can be voted upon separately." *Monforton v. Knudsen*, 2023 MT 179, ¶ 10, 413 Mont. 367. This imposed a strict check on the 1972 Constitution's new power of popular initiative. *Mont. Assn. of Ctys. ("MACo") v. State*, 2017 MT 267, ¶ 14, 389 Mont. 183, 404 P.3d 733.

> The separate-vote requirement has two well-recognized objectives. The first is to avoid voter confusion and deceit of the public by ensuring proposals are not misleading or the effects of which are concealed or not readily understandable. The second is to avoid "logrolling" or combining unrelated amendments into a single measure which might not otherwise command majority support. By combining unrelated amendments, approval of the measure may be secured by different groups, each of which will support the entire proposal in order to secure some part, even though not approving all parts of a multifarious amendment.

Monforton, ¶ 10 (quoting *MACo*, ¶ 15). "It is this Court's obligation to ensure that interest groups and individuals advocating for passage or defeat of a measure do not

[3] Respondents invite the Court to order full briefing considering the fundamental and complex constitutional issues implicated here.

undermine the right of the voters to decide upon each constitutional change separately, either as a result of expressly incorporating more than one change or doing so by implication." *MACo*, ¶ 24.

"To determine compliance with Article XIV, Section 11 separate-vote provision the proper inquiry is whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and not closely related." *Monforton*, ¶ 12. Voters must be able to "express their opinions as to each proposed constitutional change" separately. *MACo*, ¶ 52.

I. THE AG CORRECT DETERMINED BI–12 LEGAL INSUFFICIENT.

A. BI–12 VIOLATES ARTICLE XIV, SECTION 11'S STRICT STANDARD.

In revisiting its separate-vote reasoning and jurisprudence following the ratification of Montana's 1972 Constitution, this Court made a clear distinction between Article V, § 11(3)'s single-subject rule for legislation and Article XIV, § 11's separate-vote requirement for constitutional initiatives. *See MACo*, ¶ 17 (citing *Marshall v. State*, 1999 MT 33, ¶ 19, 293 Mont. 274, 975 P.2d 325). This is because "when a when a constitutional amendment is proposed by the Legislature through referendum, representatives debate and deliberate the proposition." *Id.* at ¶ 17 (citing *Marshall*, ¶ 19). "On the other hand, when a constitutional amendment is proposed by initiative, Montana voters do not have the same opportunity to consider and debate the proposition." *Id.* (citing *Marshall*, ¶ 19); *see also id.* at ¶ 18 ("Voters do

not have the opportunity to consider, discuss, and potentially change constitutional amendments proposed by initiative in the same way the Legislature does those proposed by referendum.").

"Therefore, the separate-vote requirement serves as an important check on the initiative process, confirming the integrity of the vote and ensuring the voters actually approve of a particular amendment." *Id.* at ¶ 18. It logically follows that "the test for the separate-vote requirement is stricter than that of the single-subject requirement." *Id.* at ¶ 19; *see also id.* at ¶ 26 (in light of the "considerable variance in the way other state courts interpret their separate-vote requirements[,]" this Court's interpretation is among the narrowest). 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.* at ¶ 18.

Determining whether the provisions of a constitutional amendment, themselves, are closely related is among the Court's first inquiries. *Id.* at ¶ 29. This involves a multi-factor test that may consider, among other things, whether the proposal amends a single section of the constitution, concerns qualitatively similar matters, and addresses matters historically treated as a single subject. *Id.* BI–12 fails this test, as it presents voters with numerous separate decision points that may not command majority support if considered individually.

On its face, BI–12's primary purpose is to constitutionally mandate a top-four primary for specified offices. (Pet. at Ex. 4, p. 5, §§ 1(1)-(2).) However, BI–12 also includes provisions that: effectively ban Montana's current system of political party nominations; institute an all-party primary; prohibit requiring political party endorsements or nominations to appear on the primary ballot; and prohibit the placement of any political party endorsements or nominations on the ballot. (*Id.* at Ex. 4, pp. 5–6, §§ 1(3)(a), (g), (j).) While Petitioners may dispute the AG's "all-party" primary characterization, they nonetheless acknowledge that "BI–12 fundamentally changes the function of the primary election ***and*** removes the current role of the state in selecting party nominees." (*Id.* at 9) (emphasis added). Whether to allow political parties to nominate or endorse candidates on the ballot is a separate choice for voters apart from the creation of a top-four primary.

The same conclusion follows regarding the decision of which particular offices should fall under the top-four primary, and Petitioners' assertion that the AG's position in this regard is inconsistent with his approval of Ballot Initiative 11 ("BI–11") misses the mark. (*See* Pet. at 13.) BI–11 concerned a single amendment to Article IV, Section 5 of the Montana Constitution and did not seek to amend the existing constitutional text, "[i]n all elections held by the people...." Mont. Const. art. IV, §. 5. That text, adopted by voters on ratification of the new Constitution, establishes the scope of the section. BI–11 did not amend the scope of the section,

but instead confined itself to amending the threshold vote required to be elected. A proposed ballot measure that amended both the scope of Article IV, Section 5, and imposes a different threshold required to be elected likely raises different considerations. But BI–11 did not raise those concerns. It concerned only the threshold required to be elected, not the scope. The AG properly determined BI–11 legally sufficient. This stands in stark contrast with the multiple amendments found in BI–12.

BI–12's signature gathering provision likewise presents a separate decision point for voters. The Montana Constitution sets different signature requirements for different activities, and these differences obviously reflect some internal debate. For instance, Article XIV, Section 2 requires 10 percent of electors to call for a general constitutional convention. The discussion of the Committee Proposal for what became Article XIV, Section 2, reflects the Committee's opinion that "such a number is high enough to prevent frivolous attempts at constitutional change and yet low enough to insure citizen constitutional control." General Government and Constitutional Amendment Committee Proposal on Constitutional Revision 11:19–22 (Feb. 12, 1972).[4] By contrast, the Committee Proposal for what became Article XIV, Section 9 required 15 percent of electors to sign a proposed constitutional initiative. "The 15 percent petition requirement and the geographical requirement

[4] Available at https://tinyurl.com/2v8942hw (accessed Nov. 7, 2023).

are high, but the Committee feels it is not unreasonable to demand strict standards when dealing with something as fundamental and important as constitutional change." *Id.* at 20:12–16. The text of Article XIV, Section 9 requires only 10 percent of electors to sign. Mont. Const. art. XIV, § 9. That the signature requirement in Article XIV, Section 9 changed further demonstrates that determining the appropriate signature requirement is a separate consideration about which different people may take different views and cast their ballots on the proposed changes differently.

In sum, although BI–12's various provisions may be part and parcel of Petitioners' preferred form of a top-four primary, this does not mean that they are closely related to the creation of a primary system that allows the top-four vote getters to advance to the general election. The inclusion or adoption of the extra provisions at issue are simply separate choices to make, but BI–12 deprives voters of the ability to make those choices independently.[5] It may be that BI–12 in its current form could satisfy the single-subject rule if it were introduced as a legislative initiative, where the various provisions could be debated, discussed, and possibly

[5] Petitioners emphasize their claim that BI–12's provisions are necessary to ensure its constitutionality, but the AG did not determine or consider its substantive constitutionality. *Cf. Monforton*, ¶ 6. Petitioners' First Amendment arguments fall outside the scope of the AG's review and should not be considered.

revised.[6] However, this is not the applicable test, and the fact remains that Montana voters would not have the same opportunity to consider and debate those provisions.

B. BI–12 Regulates Matters Traditionally Entrusted to the Legislature.

BI–12's provisions, taken as a whole, amount to yet another separate amendment due to their significant limitation on the authority of the Legislature to regulate elections. *See* Mont. Const. art. IV, § 3 ("The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process."). To be sure, the Legislature's authority for the entirety of Title 13 of Montana's statutory code pertaining to the regulation of elections is directly traceable to Article IV, Section 3. *See*, *e.g.*, Mont. Code Ann. §§ 13-10-201–13-10-211 (preprimary procedures); §§ 13-10-301–13-10-328 (primary election procedure); §§ 13-10-401–13-10-407 (presidential preference primary); §§ 13-10-501–13-10-507 (methods of nomination other than by primary election); §§ 13-10-601–13-10-613 (nominations by primary election); *see also* Mont. Const. art. VI, § 2(1) (stating that the

[6] Any substantive constitutional concerns would be addressed in the legislative process if, for example, BI–12 simply required a top-four primary "as provided by law." This would leave the parameters of such a system for the Legislature to establish within First Amendment boundaries.

constitutional executive officers "shall be elected by the qualified electors at a general election *provided by law*.") (emphasis added).

There can be no reasonable dispute against this backdrop that BI–12 significantly limits the Legislature's authority under Article IV, Section 3. Indeed, Petitioners are unequivocal about their intent to constrain the Legislature's ability to regulate primary elections. (*See*, *e.g.*, Pet. at 14 (explaining that "a central purpose of the top-four primary…[is to] prevent the legislature from functionally converting the top-four primary into a top-two primary, through imposing an onerous signature-gathering requirement….").) BI–12's implicit limitation of the Legislature's constitutional authority amounts to yet another separate amendment requiring a separate vote. *See MACo*, ¶¶ 41, 44 (a ballot measure that—in addition to its own effects—adds or subtracts from pre-existing constitutional provisions violates Article XIV, § 11). The AG's determination that BI–12 is insufficient was proper for this reason as well.

CONCLUSION

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). If they wish to continue their efforts to amend Montana's Constitution to mandate their preferred top-four primary system, Petitioners must

resubmit their plan as separate, independent initiatives that the people may accept or reject in turn. This Court should thus concur in the AG's legal insufficiency finding and dismiss Petitioners' Petition.

DATED this 7th day of November, 2023.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 2,170 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

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