IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. OP 23-0331

MATTHEW MONFORTON,

Petitioner,

v.

AUSTIN KNUDSEN, in his official capacity as Attorney General; CHRISTI JACOBSEN, in her official capacity as Secretary of State,

Respondents.

PETITIONER'S REPLY

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

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INTRODUCTION

Petitioner Matthew Monforton submits this Reply pursuant to the Court's order issued on July 20, 2023. In his legal insufficiency memorandum from which this action arises, the Attorney General made the following concession:

> The fact that *the proposed measure amends a single section of the Montana Constitution* and relates to a single purpose of limiting property tax increases tilts towards finding legal sufficiency.

See Petn., Exhibit 5 at 27 (emphasis added). In his subsequent filing in this Court, however, the Attorney General shifted gears:

> 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).

Resp. Brf. at 10. As shown below, none of these constitutional provisions would be "amended" by Ballot Issue #2.

Every day the Attorney General blocks the circulation of Ballot Issue #2 is a day that cannot be regained by the measure's supporters. They already face daunting signature requirements. Mont. Const. Art XIV, § 9. Thus, Monforton requests that this Court "as soon as possible render a decision as to the adequacy of the ballot statements [and] the correctness of the Attorney General's determination." Mont. Code Ann. § 13-27-316(3)(c).

ARGUMENT

I. Ballot Issue #2 Does Not Violate the Single-Vote Rule

The Montana Constitution requires that "[i]f 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 single-vote rule prohibits a constitutional initiative that "would make two or more changes to the Constitution that are substantive and not closely related." *Montana Ass'n of Counties v. State,* 2017 MT 267, ¶ 28, 389 Mont. 183, 404 P.3d 733. Ballot Issue #2 clearly complies with this rule.

A. Ballot Issue #2 Does Not Amend Article VIII, Section 17

The Attorney General argues that Ballot Issue #2 would create a property transfer tax and thereby amend the ban on such taxes in Mont. Const. Art. VIII, § 17.[1] Resp. Brf. at 10. This Court, however, has distinguished property taxes from property *transfer* taxes for nearly a century. *State ex. rel. Walker v. Jones*, 80 Mont. 574, 261 P. 356, 358 (1927) ("[a]n excise, or succession, tax is not a tax on property….It is a tax upon the transfer, transaction, or right to receive property."). Courts around the nation have as well. See, *e.g., United States v. Wells Fargo*

[1] Article VIII, Section 17 of the Montana Constitution states as follows: "**Prohibition on real property transfer taxes.** The state or any local government unit may not impose any tax, including a sales tax, on the sale or transfer of real property."

Bank, 485 U.S. 351, 355 (1988) (noting "the distinction between an excise tax, which is levied upon the use or transfer of property even though it might be measured by the property's value, and a tax levied upon the property itself."); *City of Columbus v. Ronald A. Edwards Const. Co*., 271 S.E.2d 643, 644 (Ga. 1980) (Georgia's "Real Estate Transfer Tax is not a property tax; it is an excise tax on transactions involving the sale of property.").

A California appellate court explained the distinction between the two types of taxes:

> Real property taxes are imposed on the ownership of property as such; they recur annually on a fixed date; and no personal liability arises from their nonpayment, the sole security for the taxes being the property itself…The absence of those characteristics distinguishes [a] transfer tax from a real property tax. Liability for the tax in question arises only when property is conveyed; the transferor and transferee become jointly and severally liable for the tax upon delivery of the instrument of transfer; and the tax is a debt collectible by an action against the persons liable. The tax is, therefore, on the exercise of one of the incidences of property ownership and as such is an excise tax.

City of Huntington Beach v. Superior Court, 78 Cal.App.3d 333, 340-41, 144 Cal.Rptr. 236, 240 (1978) (citations omitted).

Though California switched to an acquisition-based property tax system after the passage of Proposition 13 in 1978, its courts continue to differentiate property taxes from property transfer taxes. See, *e.g., County of Los Angeles v. Southern Cal. Edison Co.*, 112 Cal.App.4th 1108, 5 Cal. Rptr. 3d 575, 586 n.7 (2003) (noting that a "documentary transfer tax is not a property tax, but rather a

tax on the exercise of the privilege of conveying property."); *Fielder v. City of Los Angeles*, 14 Cal.App.4th 137, 17 Cal.Rptr.2d 630, 635 (1993) ("A transfer tax attaches to the privilege of exercising one of the incidents of property ownership, its conveyance. Such a tax is an excise tax rather than a property tax.").

The distinction between property taxes and property transfer taxes can be seen in rulings involving the taxation of federally chartered mortgage corporations (*e.g.*, Freddie Mac, Fannie Mae, etc.). Congress exempts these entities from all taxation except property taxes. 12 U.S.C. § 1723a(c)(2). Several municipalities argued that they could impose property transfer taxes against the entities because the taxes were a type of property tax. In rejecting their argument, the First Circuit noted that "[s]ix other circuits have recently considered this attempt to shoe-horn a transfer tax into a real property tax, and they have unanimously rejected the argument." *Town of Johnston v. Federal Housing Finance Authority*, 765 F.3d 80, 83 (1st Cir. 2014).

Indeed, proponents of CI-105, the ballot initiative that added Article VIII, Section 17 to the Montana Constitution, expressly distinguished property taxes from property transfer taxes when urging Montana voters to support the initiative:

> A Real Estate Transfer Tax <u>*would be on top of*</u> the property and income taxes we already pay. An RETT can rightly be described as an unfair "double tax" on property. This double tax would make it harder and more costly for families to buy or sell a home.

2010 Voter Information Pamphlet, p. 5 (emphasis added).[2]

The property taxes created by Ballot Issue #2 would still be "imposed on the ownership of property as such; they [would] recur annually on a fixed date; and no personal liability [would] arise[] from their nonpayment, the sole security for the taxes being the property itself." *Huntington Beach*, 144 Cal.Rptr. at 240. The transfer taxes banned by Article VIII, Section 17, by contrast, "arise only when property is conveyed; the transferor and transferee become jointly and severally liable for the tax upon delivery of the instrument of transfer; and the tax is a debt collectible by an action against the persons liable." *Id.*

Ballot Issue #2 would not transform Montana's property taxes into property transfer taxes. Thus, it would not "ha[ve] the effect of modifying" the ban on property transfer taxes in Article VIII, Section 17 and would not violate the single-vote rule in Article XIV, § 11. *Montana Ass'n of Counties*, ¶ 28.

B. Ballot Issue #2 Does Not Amend Article X, Section 1

The Attorney General insists that Ballot Issue #2 "limits the existing taxing authority in Article X, Section 1; Article XI, Section 4; and Article XI, Section 8 of

[2] Pertinent portions of the 2010 Voter Information Pamphlet are attached as Exhibit 1. The 2010 Pamphlet can also be found at: <https://sosmt.gov/Portals/142/Elections/archives/2010s/2010/2010_VIP.pdf?dt=1523477333219>

the Montana Constitution." Resp. Brf. at 11. None of these provisions, however, include taxing authority and none would be amended by Ballot Issue No. 2.

Under the Montana Constitution, "[e]quality of educational opportunity is guaranteed to each person of the state." Mont. Const. Art. X, §1(1). This Court has held that "spending disparities among the State's school districts translate into a denial of equality of educational opportunity." *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 54, 769 P.2d 684, 690 (1989). The Court has also made clear that funds to alleviate these disparities need not come from property taxes. *Id.* at 55, 769 P.2d at 691 ("[o]ur opinion is not directed at only one element of the system of funding public schools in Montana, as we recognize that the Legislature has the power to increase or reduce various parts of these elements, *and in addition to add other elements for such funding*.") (emphasis added). If the property tax system established by Ballot Issue #2 results in projections of funding disparities, the Legislature can prevent those disparities from occurring by supplementing school funding with other revenues, such as severance taxes or income taxes.

Though Ballot Issue No. 2 could change the sources that fund equal educational opportunities, it does nothing to change the opportunities themselves. Therefore, Ballot Issue No. 2 would not "ha[ve] the effect of modifying" Article X and would not violate the single-vote rule. *Montana Ass'n of Counties*, ¶ 28.

C. Ballot Issue # 2 Does Not Amend Article XI, Section 4

The Attorney General claims that Ballot Issue #2 would amend Article XI, Section 4 because local governments would be unable to tax real property at a rate higher than 1%. Resp. Brf. at 11. He misreads the Constitution. The plain language of Article XI, Section 4 states that local governmental powers consist of those that are "provided or implied by law." For example, the Legislature allows local governments to tax residential property but caps residential rates at 1.35%. Mont. Code Ann. § 15-6-134. If the Legislature reduced that cap to 1% (as Ballot Issue #2 would do), it would not be "amending" Article XI, Section 4. Rather, the Legislature would be conforming to Article XI, Section 4, which states that local governmental power consists of that "provided or implied by law."

Likewise, the 1% cap on tax rates in Ballot Issue #2 would not "amend" Article XI, Section 4. Rather, it would be "provided by or implied by law" under Article XI, Section 4. *In re Lacy*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989) (persons "authorized by law" to receive criminal justice information under § 44-5-303, MCA, included persons invoking the Constitution's "Right to Know" provision because constitutional provisions are "laws").[3] This would be entirely

[3] Another example of a constitutional initiative lawfully modifying the powers of local governments is CI-105, which prohibits the imposition of property transfer taxes not only by the state but also by "any local government unit." Mont. Const. Art. VIII, § 17.

consistent with Article XI, Section 4, and would not create a violation of the single-vote rule.

D. Ballot Issue # 2 Does Not Amend Article XI, Section 8

The Attorney General is also wrong in claiming that Ballot Issue #2 amends Article XI, Section 8, which extends initiative powers to local governments.[4] His argument appears to be that Ballot Issue #2 would prevent local voters from passing levies to raise property tax rates above 1%, thereby "amending" Article XI, Section 8. Resp. Brf. at 11.

The Attorney General errs because Article XI, Section 8 does not authorize every conceivable initiative. Instead, local initiatives are limited to "the legislative jurisdiction and power of the governing body of the local government…." Mont. Code Ann. § 7-5-131(1). For example, local governments are barred from prohibiting the sale of vaping products. Mont. Code Ann. § 7-1-111(25). This statute not only prevents county commissioners from banning the sale of vaping products through a county ordinance but also prevents county voters from doing so through a local ballot initiative, notwithstanding Article XI, Section 8.

[4] Article XI, Section 8, states as follows: "**Initiative and referendum.** The legislature shall extend the initiative and referendum powers reserved to the people by the constitution to the qualified electors of each local government unit."

The scope of a local initiative cannot exceed the local government's legislative jurisdiction. That jurisdiction, in turn, is limited to subject matter that is "provided or implied by law." Article XI, Section 4. The taxation limits in Ballot Issue No. 2 would not "amend" Article XI, Section 8 any more than they would "amend" Article XI, Section 4. Local governments would still retain initiative powers as to any subject within their legislative jurisdiction. Therefore, Ballot Issue No. 2 would not "ha[ve] the effect of modifying" Article XI and would not violate the single-vote rule in Article XIV, § 11. *Montana Ass'n of Counties*, ¶ 28.

E. The Provisions in Ballot Issue No. 2 Are Closely Related

Amici Montana Realtors Association, Montana Bankers Association, Montana Building Industry Association, and Montana Chamber of Commerce argue that Ballot Issue #2 contains two amendments because its 2% cap on increases in annual valuations amends Article VIII, Section 3, and its 1% cap on tax rates constitutes a separate, additional amendment. Amicus Brf. at 5.[5] The Attorney General appears to make a similar argument. Resp. Brf. at 12.

[5] Amici also argue that "BI-2's attempt to expand the application of [Article VIII] Section 3 from the State to all local governments and taxing jurisdictions with the State is its own separate amendment." Amicus Brf. at 5. This argument is a non-starter. The very next section of the Montana Constitution already provides that "[a]ll taxing jurisdictions shall use the assessed valuation of property established by the state." Mont. Const. Art. VIII, Section 4.

It is quite a stretch to argue that a ballot issue limiting property taxes consists of two separate amendments simply because property tax calculations consist of two components: property valuations and tax rates. But even if the Court accepts amici's argument, the single-vote inquiry does not end. A violation of the single-vote rule also requires that the constitutional changes not be "closely related." *Montana Ass'n of Counties*, ¶ 27. The purpose of the closely-related prong of the single-vote rule is to "ensur[e] that each constitutional amendment receives its own *vote without unduly restricting constitutional change*." *Id.*, at ¶ 30 (emphasis added). Determining whether provisions are "closely related" includes examining the overall purpose of the initiative. Thus, this Court has cited approvingly of a decision validating an initiative that dedicated two separate revenue streams to a state transportation fund; the initiative "constituted a reasonably integrated whole in which the parts are closely related to one another." *Id., citing Cambria v. Soaries*, 776 A.2d 754, 765 (N.J. 2000).

Factors determining whether the provisions of a constitutional initiative are "closely related" may include the following:

> Whether various provisions are facially related, whether all the matters addressed by the proposition concern a single section of the constitution, whether the voters or the legislature historically has treated the matters addressed as one subject, and whether the various provisions are qualitatively similar in their effect on either procedural or substantive law.

Montana Ass'n of Counties, ¶ 30 (citations omitted). All of these factors tip sharply toward a finding that the provisions in Ballot Issue #2 are closely related.

First, the valuation and rate limits in Ballot Issue #2 are facially related. Subsections (2)-(6) determine the valuation of real property for taxation purposes. Petition, Exhibit 1 at 3. Subsection (7) establishes that the tax rate "may not exceed 1 percent of the valuation established by this section." *Id.* The rate and valuation provisions of Ballot Issue #2 are facially related. This factor weighs in favor of the validity of Ballot Issue #2.

Second, all of the provisions of Ballot Issue #2 are properly included in Article VIII, Section 3 – the "Property Tax Administration" provision.[6] As with rules governing tax valuations, rules governing tax rates are very much a part of the administration of a property tax system. And, as previously explained in detail, the provisions in Ballot Issue #2 do not amend, or belong inside, any other part of the Montana Constitution. This factor weighs in favor of the validity of Ballot Issue #2.

Third, voters have historically approved ballot measures that include both valuation limits and rate limits on real property taxes:

[6] Article VIII, Section 3 provides as follows: **"Property tax administration.** The state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law."

California's Proposition 13 (1978): Proposition 13 imposed a 1% cap on rates and a 2% cap on annual valuation increases. *Amador Valley Joint Union High Sch. Dist. v. State Bd of Equalization*, 583 P.2d 1281, 1284 (Cal. 1978);

Massachusetts' Proposition 2 ½ (1980): This ballot measure capped property tax rates at 2.5% and limited increases in annual assessments to 2.5%. MA ST 59 § 21C; *Massachusetts Teachers Ass'n v. Secretary of Commerce*, 424 N.E.2d 469, 472-74 (Mass. 1981).

Montana's I-105 (1986): This statutory initiative froze the amount of taxes levied on certain classes of real property at 1986 levels by capping both rate and valuation increases. See I-105, Section 2(4).[7]

Thus, the history factor weighs heavily in favor of the validity of Ballot Issue #2.

Amici cite the ban on property transfer taxes (Article VIII, Section 17) as an example of a "standalone" limitation approved by voters. Amicus Brf. at 7. As explained previously, however, property transfer taxes differ fundamentally from property taxes, so this example offers no insight into the history of property tax initiatives. Nor is the sales tax limit in Article VIII, Section 16 relevant because it concerns the taxation of sales, not the taxation of ownership of real property.

Fourth, the valuation and rate provisions of Ballot Issue No. 2 are qualitatively similar in their effect on property tax calculations. Indeed, they are the two integral components of every property tax. A tax on property is calculated

[7] The text of I-105 is contained in the Secretary's 1986 Voter Information Pamphlet, which can be found at <https://ia802804.us.archive.org/26/items/voterinformation1986montrich/voterinformation1986montrich.pdf>. Pertinent portions of the 1986 Pamphlet are attached as Exhibit 2.

by multiplying the applicable tax rate and the property valuation. Property taxes cannot be calculated without knowing both variables. Property tax valuations serve no purpose without property tax rates, and vice versa. *Amador Valley*, 583 P.2d at 1290 (Proposition 13's valuation and rate components were "reasonably interrelated and interdependent, forming an interlocking 'package' deemed necessary by the initiative's framers to assure effective real property tax relief."). Thus, this factor also bolsters the validity of Ballot Issue No 2.

All of the factors identified by this Court in determining whether an initiative's provisions are "clearly related" tip sharply in favor of Ballot Issue #2. This might explain why neither the Attorney General nor any of the amici address the issue in their briefs to this Court.

II. The Attorney General's Complaints About the Clarity of Ballot Issue #2 Are Meritless

In his June 2023 memorandum, the Attorney General complained about "ambiguous" terms in Ballot Issue #2 such as "real property" and "ad valorem." Petition, Exhibit 5 at 28. In his subsequent response to this Court, he waters down his criticism to that of "failing to communicate to the electorate in easily understood language." Resp. Brf. at 14. Even this criticism is unwarranted. The text of Ballot Issue #2 was vetted and approved by the Legal Services Office of the Montana Legislative Services Division. Petition, Exhibit 2. Unlike the Attorney

General, the Division is "nonpartisan and serves the entire Legislature." See <https://leg.mt.gov/lsd/>. The Attorney General's failure-to-communicate claim lacks merit and should be rejected by the Court.

CONCLUSION

For all of the foregoing reasons, Petitioner Matthew Monforton respectfully requests that the Court grant his Petition in its entirety and issue:

- an order overruling the Attorney General's determination that Ballot Issue #2 is legally insufficient; and
- an order invalidating the fiscal statement for Ballot Issue #2.

DATED: July 26, 2023

Respectfully submitted,

/s/ Matthew G. Monforton
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word is exactly 3344 words, excluding caption page, Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED: July 26, 2023

Respectfully submitted,

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