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STATE OF MONTANA
Case Number: OP 23-0331

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. OP 23-0331

MATTHEW G. MONFORTON,

Petitioner

v.

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

Respondents.

ORIGINAL PROCEEDING

AMICUS CURIAE BRIEF OF THE MONTANA ASSOCIATION OF REALTORS, THE MONTANA BANKERS ASSOCIATION, THE MONTANA BUILDING INDUSTRY ASSOCIATION, AND THE MONTANA CHAMBER OF COMMERCE

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The Montana Association of REALTORS, the Montana Bankers Association, the Montana Building Industry Association, and the Montana Chamber of Commerce (collectively "Business Amici") respectfully submit the following brief.

SUMMARY OF THE ARGUMENT

The Attorney General ("AG") correctly rejected Ballot Issue No. 2 ("BI-2") as legally insufficient because it violates the single-purpose vote requirement and is improperly vague.

BI-2 violates the Montana Constitution's single-purpose vote requirement by proposing at least three independent amendments for a single vote: 1) limit value increase, 2) cap local governments and voters' authority to approve and impose property taxes necessary to meet local needs, and 3) impose taxes based on real estate sales and improvements. Petitioner's argument that his proposal has a single unifying purpose of limiting tax increases ignores that he proposes to add nine new subsections to the existing single section of Article VIII, Section 3. These nine new provisions would not carry out a single change but would fundamentally alter the way the state administers property tax appraisals, violate the prohibition against taxes on real estate sales, materially limit local governments' authority to impose and collect property taxes, and eliminate voters' ability to influence their communities' tax policy.

The intended change to an acquisition-based system threatens to cause statewide disruption to housing availability and economic development by imposing a substantial penalty on real estate development, construction and sales, and violate the long-expressed will of voters. The imposition of a constitutional limit to local government's ability to generate funds to satisfy their legal obligations, will have a devastating impact on local communities and schools, and will eliminate the ability of local voters to influence directly the funding priorities of their governing bodies through mill levy elections. These separate fundamental changes must each be separately approved.

Additionally, BI-2 must be rejected because its terms are ambiguous, and the proposed statement of purpose is misleading. The terms of the proposed amendments do not reflect the Petitioner's intent as stated in his Petition in this matter. More importantly, the proposed amendments leave significant ambiguity about how the new requirements and limitations could or may be implemented. Clarification of these obvious ambiguities is the minimum requirement to ensure Montanans know what they are being asked to approve.

These flaws demonstrate the importance of the AG's legal sufficiency determination. The confusion in BI-2 would unnecessarily cost groups like Business Amici significant resources to clarify and oppose and would result in

serious financial uncertainty for communities and schools across Montana. As a result, the Court must deny the Petition.

DISCUSSION

The Court should uphold the AG's determination that BI-2 is legally insufficient. "Legally sufficient" for purposes of this review is statutorily defined to mean "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." § 13-27-312, MCA (2021). BI-2 fails to meet this standard.

I. BI-2 Violates the Constitution's Separate-Vote Requirement.

Montana Constitution Article XIV, Section 11 states "[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." The dual purposes behind this longstanding requirement, are 1) "to avoid voter confusion and deceit of the public," and 2) "to avoid 'logrolling' or combining unrelated amendments into a single measure which might not otherwise command majority support." *Mont. Ass'n of Ctys. v. State*, 2017 MT 267, ¶ 15, 389 Mont. 183, 404 P.3d 733 (citations omitted).

Here, BI-2 includes at least three separate amendments to constitutional requirements which are not qualitatively similar and have not treated historically as a single subject. Allowing this proposal to move forward will result in Montana voters not knowing what they are voting for.

A. BI-2 fundamentally modifies the Constitution's Property Tax Administration provision.

There is no dispute that BI-2 seeks to amend Article VIII, Section 3. This section is devoted exclusively to the State's property tax administration obligation to "appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law." Subsections 2 through 6 of BI-2 fundamentally alter these obligations by eliminating statewide equalization in favor of a new system that discriminates against property owners based on whether they have sold or modified their property after 2019. The original purpose of this provision was to move all property tax assessment authority from the counties to the State. 1972 Mont. Const. Convention Notes, Art. VIII, § 3. This provision replaced stand-alone Section 15, of Article XII of the 1889 Constitution, which was similarly devoted solely to valuation and equalization.

The Legislature created the Department of Revenue and assigned these constitutional duties to it. § 15-8-101, MCA, *et seq.* It cannot be disputed that Montana has treated appraisal and equalization as a single constitutional subject

since inception. The proposed modification to this provision, then, stands on its own as a single purpose for electoral purposes.

B. BI-2 also seeks to impose a new property tax cap, which is entirely independent of the valuation limitation.

Subsections 7 and 8 of BI-2 propose a unified statewide "1 percent" cap on all ad valorem taxes in the state. Ad valorem taxes are assessed and collected by local jurisdictions, not the State. *See* §§ 15-10-201, 202, and 305, MCA. The Constitution and Montana law generally recognize a difference between the "State" and "local jurisdictions" and treats them very differently. At a minimum then, BI-2's attempt to expand the application of Section 3 from the State to all local governments and taxing jurisdictions within the State is its own separate amendment. BI-2 goes even further though in attempting to impose a new limitation on taxation which has not existed in Section 3 or anywhere else in the Constitution. Amending an existing constitutional section to expand its application and impose a new limitation on taxes must be considered a separate change requiring its own vote from the appraisal changes discussed above.

Article VIII, Section 3 is unchanged from its adoption in 1972. It has never addressed property tax liabilities or their limitations. More importantly, both the 1889 and the current Constitution have historically treated tax limitations as stand-alone provisions separate from valuation.

Property valuation is performed exclusively by the Department of Revenue, and it is entirely separate from the obligations of the government and school districts to levy and collect property taxes. *Zinvest, LLC v. Gunnersfield Enterprises, Inc.*, 2017 MT 284, ¶ 17, 389 Mont. 334, 405 P.3d 1270 ("Assessment [is] the process by which persons subject to taxation [are] listed, their property described, and its value ascertained and stated. Taxation consist[s] in determining the rate of the levy and imposing it." (citation omitted) (alterations in original)); § 15-8-101, MCA. The Department of Revenue must complete its valuation obligations under Article VII, Section 3 before property taxes can be levied and imposed. § 15-10-202(1), MCA.

Local jurisdictions and school districts then levy, impose, and collect property taxes based on the taxable value assessed by the Department.[1] *See* §§ 15-10-201, 202, and 305, MCA. The authority of local governments to increase tax rates is statutorily limited. §§ 15-10-420, 15-10-305(1)(a), MCA. Additional mills can only be levied by a jurisdiction's electorate. § 15-10-425, MCA.

Historically, tax limitations have been stand-alone constitutional provision. For example, the 1889 Constitution limited the State to imposing a maximum of 3 mills of property tax for "State purposes." *See* 1889 Constitution, Art. XII, § 9.

[1] The State is only authorized to levy the statewide 6 mill levy for the Montana University System. § 15-10-109, MCA

Similarly, new limitations or bans on taxes have been drafted as standalone sections, with each amendment requiring its own initiative. For example, in 1994, Montana voters approved by initiative the standalone limitation on sales or use tax rates now embodied in Article VIII, Section 16. As discussed below, in 2010, Montana voters approved a ban on real property transfer taxes by initiative by adding an independent provision as Article VIII, Section 17. These provisions establish that Montana has historically and consistently treated tax limitation provisions separate from the provisions governing administration, appraisal, and equalization.

Given that the property tax cap impacts local governments, rather than the State, and tax limitations have been historically considered and enacted as standalone provisions, they must be considered a subject independent from tax administration. Therefore, the tax limitation must be submitted by a separate initiative.

C. BI-2 implicitly amends the prohibition on real property transfer taxes.

BI-2 again violates the separate-initiative rule in a particularly misleading way by imposing an unstated amendment to Article VIII, Section 17. This section prohibits tax of any kind on the sale of property. It states "[t]he state or any local government unit may not impose <u>any tax</u>, including a sales tax, on the sale or

transfer of real property." Mont. Const. Art. VIII, § 17 (emphasis added). This prohibition includes property tax, as it bars "any tax" under Montana law.

To effectively authorize an acquisition-based system as advocated by Petitioner, any proposed amendment must amend this longstanding ban on imposing taxes on the sale of real property, but BI-2 fails to do so. Under its proposed terms, the sale of real property to anyone other than a spouse, parent, or child would trigger significant additional tax into perpetuity. BI-2 proposed limitation on valuation increases only applies until a sale, improvement, or construction occurs. As a result, upon the first sale of a property after 2020, the 2% cap on the value increase no longer applies, and due to the sale, the property will be exposed to market-based assessments and higher taxes going forward. This permanent material change in the taxation of property would be triggered solely by "the sale" of the property.

As a hypothetical example, consider a residential property in Bozeman valued at $500,000 as of December 31, 2019. For the current reappraisal cycle, this market value of the property was $1,000,000. Under BI-2, if the property has not been sold or transferred since January 1, 2020, the valuation increase would be capped at 2% or $510,000. However, any sale to a third party, other than an immediate family member, after January 1, 2020, would trigger a significant increase in tax liability. Using the maximum tax liability under BI-2's 1% tax

liability cap, if no sale occurred, the property would be subject to $5,100 in property taxes. The sale triggers a tax liability of $10,000.

This contradicts the express language of Article VIII, Section 17, which prohibits "any tax" based on the sale of real property. Making matters worse, that difference in tax will be likely increase each year, all else being equal, based solely on that singular sale of the house. Similar tax differences could arise for real property in every classification and across the state of Montana.

This change to the prohibition on transfer taxes is another separate amendment that must be provided to Montana voters for approval. BI-2 as submitted violates this requirement.

II. BI-2 is Legally Insufficient Because it is Ambiguous and Fails to Properly Inform Voters.

The Court has determined both the purpose statement and the text of the proposal of constitutional changes proposed by initiative must be clear. "It is elementary that voters may not be misled to the extent they do not know what they are voting for or against." *Mont. Citizens for the Pres. of Citizens' Rts. v. Waltermire*, 227 Mont. 85, 90, 738 P.2d 1255, 1258 (1987) (citing *Burger v. Judge*, 364 F. Supp. 504 (D. Mont. July 11, 1973), *aff'd* 414 U.S. 1058 (1973)). For an initiative to be constitutionally valid, it is essential that voters are "not deceived by the ballot's words." *Id. (*citing *Kohler v. Tugwell*, 292 F. Supp. 978 (D. La. Oct. 24, 1968), affd. 393 U.S. 531 (1969)). A ballot proposal cannot stand

if it is "misleading." *Id.* (citing *W. Shore Cmty. Coll. v. Manistee Cnty. Bd. of Comm'rs*, 389 Mich. 287, 205 N.W.2d 441 (1973)).

A. The 2% valuation limitation in BI-2 is ambiguous and Petitioner's statements are misleading.

Petitioner's Proposed Ballot Issue Statement and his Petition both suggest the intent is to limit annual increases of taxable value to 2%. That intent, however, is not consistent with the actual language of the proposed amendment language. Currently, BI-2 states in relevant part:

> (2) The base valuation of real property must be the amount assessed by the state as of December 31, 2019.
> (3) The value of real property may be reassessed annually on January 1 of each year. If real property is not newly constructed or significantly improved or did not have a change of ownership after January 1, 2020, any increase in the assessed valuation may not exceed 2 percent.

Subsection 3 appears incomplete because it fails to indicate to what the 2% is applied. As a result, it is not clear whether the limitation is (a) 2% over the 2019 "base valuation," or (b) 2% over the value the Department of Revenue reassessed on January 1 of the prior year. Similarly, it is not clear whether the "annual" 2% increases will apply to the passage of time between the stated 2019 "base" year and 2025, the first year to which this amendment could be applied. The purpose statement implies 2% annually, but the operative limitation language does not include the word annually.

The difference is significant. The limitation as drafted indicates a single 2% increase over the "base valuation," so real property values could remain at 102% of the base value in perpetuity. The only way this language can be reconciled with the difference between the 2019 base year and the 2025 initial implementation is if it imposes a single cap of 102% of the 2019 value starting in 2025. Otherwise, if this is intended to be an annual 2% increase, the allowable increase over the base in 2025 would be 112% (2% x 6 years—from 2019 to 2023). This is not contemplated in the text, acknowledged in the statement of intent or even mentioned by the Petitioner. As a result, the 2% cap itself is ambiguous.

B. The triggers for removal of the cap and the Petitioner's statements regarding acquisition-based valuation are also ambiguous and misleading.

The proposed text provides three potential triggers which would lift the 2% cap, and the Petitioner has suggested that after such triggers the property would then be subject to an acquisition-based system of taxation. As an initial matter, at least two of the triggers are ambiguous when viewed on their own, and the proper tax treatment of properties that have met a trigger is nothing like an "acquisition-based" system and are similarly ambiguous. The first two triggers are "newly constructed or significantly improved." These terms may have been more appropriate under earlier iterations of this proposal which were limited to residential property. In the context of a trigger for "real property" though, these

terms provide very little guidance. For example, it is not clear whether the subdivision of a parcel of bare land into multiple lots would be considered construction or improvement.

Similarly, the language regarding the treatment of properties after a trigger is met is completely circular and unclear. Subsection (4) says real property can be assessed "at its fair market value" whenever it is newly constructed or significantly improved or has a change of ownership, but subsequent changes must be made "in accordance with the limits in subsection (3) and this subsection." Presumably this is an attempt to impose a new 2% cap on future increases, but it is ineffective. The 2% cap imposed by subsection (3) is inapplicable to the newly improved or sold property because that limit only applies if the real property is "not newly constructed or significantly improved or did not have a change of ownership after January 1, 2020." The only provision of subsection (3) which would apply is the language granting the state authority to reassess annually.

As a result, despite Petitioner's expressed intent to impose acquisition-based system, what BI-2 would actually impose is some form of a 2% cap on real property until the first improvement, construction or sale, after which it would then be subject to annual fair market value assessments. This would create a completely lopsided and perverse property tax system in which property frozen in its pre-2020 condition would be subject to a very low value cap, but all real

property which has already been or will be sold, constructed, or improved in the future, will be subject to annual reassessments under essentially the same system as exists today.

There is simply no basis on which Petitioner can argue that his proposed language will implement an acquisition-based system, because "acquisition" value is never mentioned or referenced in the language. Even if the language could be established as resetting the base value each time a sale or improvement occurred, the new base would not be based on acquisition value, but on fair market value at the time of the triggering changes. Petitioner's statements to the contrary are therefore misleading, and the Court should reject Petitioner's attempt to promote a voluminous, ambiguous and circular amendment under the guise of implementing something other than what is actually being proposed.

In addition, the dates used in BI-2 create confusion and inequity, because property sold, transferred, or improved in 2019 are in a constitutional no-man's land. While the difference between the valuation date of December 31, 2019, and the trigger date for changes of January 1, 2022 are aligned on a calendar, for Montana tax purposes, they are actually a year apart. The base value for assessment under the proposal is the "amount assessed by the state as of December 31, 2019." Under current law, the December 31, 2019 assessed value of real property was based on the condition of the property on January 1, 2019, based on

the value of the property on January 1, 2018. §§ 15-7-111(5); 15-8-201(1), MCA; ARM 42.18.121 (2019). BI-2 then identifies January 1, 2020, as the start date for sales, new construction, and improvements. With this timing disparity, those sales, construction, and improvements which occurred during 2019 will have to be ignored, with the value of those properties set at the base January 1, 2018 value, despite that value not actually representing the condition of the property on December 31, 2019 or on January 1, 2020. This creates yet another special class of properties receiving inconsistent and inequitable treatment which is not disclosed to voters if BI-2 is allowed to move forward as proposed.

As a result, the language of BI-2 is unclear, and voters will not know what they are voting for. The Court must not allow this Ballot Issue to move forward with these ambiguities in place.

C. BI-2 fails to inform voters that it will undercut Montana's constitutional prohibition against real property transfer taxes.

In addition to violating the separate vote requirement discussed above, BI-2 fails to disclose its impact on Section 17 of Article VIII, further misleading Montana voters. As explained above, BI-2 significantly undercuts this longstanding tax prohibition without notifying voters. It allows additional property to be assessed in perpetuity, triggered by the sale of the property, in direct contravention of Article VIII, Section 17. However, BI-2 makes no mention of this prohibition or how it will be impacted. As a result, BI-2 is misleading.

If voters rights are going to be impacted via initiative, they should know what they are voting for. The Montana Constitution is the supreme law of the State, and no provision should be changed without the express intent of the voters it governs. Therefore, the Court should reject BI-2 in its current form.

III. BI-2 Demonstrates the Importance of the AG's Legal Sufficiency Review.

The AG's legal sufficiency review process found in § 13-27-312, MCA (2021) has been a necessary part of the initiative process since 1999. *See* 1999 Mont. Laws Ch. 191 (H.B. 508). The AG's review and involvement in the process, including petition approval and the drafting or review of ballot statements, dates back even further. *See, e.g.*, R.C.M. § 37-117 (1977); 1979 Mont. Laws Ch. 400 (S.B. 256). Montana voters have relied on the AG's input to make informed decisions regarding ballot initiatives since that time.

The AG's determination is limited and subject to judicial review by this Court, as shown by these proceedings. The law restricts the determination to compliance "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." § 13-27-312, MCA. Therefore, the AG is prohibited from weighing in on the merits or policy of any ballot initiative. The law permits the Court's current review to ensure the AG acts within the bound prescribed by

statute. § 13-27-316, MCA (2021). The Court has acted under this authority at various times since the statute was enacted to evaluate the AG's determination.

Although restricted and subject to judicial review, the AG's legal sufficiency review is incredibly valuable to Business Amici, their members, and other Montana organizations and voters. Business Amici dedicate significant resources and funding to ballot initiatives that may affect their membership as well as the Montanans they serve. Business Amici participate in the ballot initiative process, submit comments to the AG prior to the legal sufficiency review, support or oppose statutory or constitutional initiatives proposed by third parties, provide educational materials to members, other organizations, and Montana voters, and otherwise participate depending on the initiative at issue. Even when ballot initiatives meet the applicable legal standards, provide the required notice to voters, and are clear and straightforward, these efforts are expensive, time consuming, and require significant investment of personnel and other resources.

Where an initiative does not meet the requirements of Montana law, such as BI-2 in this matter, the costs to Business Amici increase significantly if allowed to proceed past the legal review stage. To provide an accurate message regarding BI-2, Business Amici must expend resources attempt to clarify the confusion that may result. They must notify their respective members and voters of impacts to

their constitutional protections, such as the impact on the constitutional prohibition on real property transfer taxes.

Moreover, without the AG's review, ballot initiatives like BI-2 create unnecessary uncertainty for voters and all levels of government officials. If BI-2 is permitted to move forward and is ultimately approved, communities across the State, along with state and local officials, and school districts, could face critical budget shortfalls. BI-2 could later be overturned through a post-election judicial challenge based in part on the same issues identified by the AG and Business Amici, which are before the Court today.

The fiscal note prepared for BI-2 estimates it will reduce the budgets of state and local governments and school districts by a combined total of approximately $2 billion annually. Pet., App_19-20. BI-2 leaves these governmental entities and schools no other option to fund their obligations to the public.

After all, Montana taxpayers have the right to know what government officials will say about BI-2 before it is put into place. It serves no purpose for the AG to remain silent on the legal insufficiencies of BI-2 before it becomes law, only to raise these issues or attempt to invalidate BI-2 after the electorate votes. This only ensures the voters do not have complete information before casting a ballot.

The Montana Constitution is too important to allow a legally insufficient ballot initiative to erode taxpayer protections, insert ambiguous terms, and threaten

community funding across the State. The Court should not allow BI-2 to go forward without ensuring it meets the necessary legal standards.

CONCLUSION

For these reasons, Business Amici request the Court uphold the AG's determination that Ballot No. 2 is legally insufficient.

DATED this 17th day of July, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 3,975 words including footnotes. Rule 11(4).

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CERTIFICATE OF SERVICE

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