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MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

ELLIOTT HOBAUGH, EZERAE COATES, ROBERTA ZENKER, MICAH HARTUNG, JANE and JOHN DOE on behalf of their minor child, J.D., ACTON SIEBEL, SHAWN REAGOR, KASANDRA REDDINGTON, and THE CITY OF MISSOULA, Plaintiffs, vs. THE STATE OF MONTANA, by and through Corey Stapleton in his official capacity as Secretary of State, Defendant.	Cause No. CDV-17-0673 Hon. John A. Kutzman **STATE OF MONTANA'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT**

INTRODUCTION

Plaintiffs' argument in opposition to the State of Montana's (State) Motion to Dismiss avoids key discussions and introduces unrecognized legal theories for inviting judicial intervention in the ballot initiative process. No court in Montana has removed a citizen ballot initiative due to a constitutional defect before the initiative has qualified for the ballot. In addition, there is no precedent for Plaintiffs' argument that a potential harm stemming from the public debate during the signature-gathering process can serve as the basis for depriving Montana citizens of their constitutional rights to enact laws through ballot initiatives. Finally, Plaintiffs' timing on challenging I-183 at this stage invites more costly, unnecessary litigation that is best left for if I-183 is actually ratified by voters. For these reasons, the Court should dismiss Plaintiffs' lawsuit without prejudice.

I. PLAINTIFFS CLAIMS ARE NOT RIPE BECAUSE I-183 HAS NOT QUALIFIED FOR THE BALLOT.

A. The Present Challenge to I-183 Is Distinguishable From the Ripeness Analysis in *Reichert* and *MEA-MFT*.

While doing their best to draw the beneficial facts and ripeness analysis from previous Montana cases involving constitutional challenges to ballot initiatives, Plaintiffs continue to ignore how the present case is distinguishable from all of those cases. None of the previous cases involved a

successful constitutional challenge to a citizen ballot initiative that had not yet qualified for the ballot. The only post-2007 examples Plaintiffs have cited are *Reichert* and *MEA-MFT*, both of which were referred from the Legislature and were automatically qualified to appear on the ballot without the need to collect signatures. *See Reichert v. State*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455; *MEA-MFT v. McCulloch*, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075. Under Plaintiffs' ripeness reasoning, little could stop an initiative's opponent from seeking judicial intervention even before the signature gathering phase, such as before the Attorney General's office has performed the legal sufficiency review.

A lack of ripeness is the primary reason that no Court has allowed for constitutional review of an initiative that has not yet received the number of necessary signatures to qualify. With a proposed law needing to affirmatively clear several more hurdles before it can be enforced, entertaining constitutional challenges only draws the Court into "abstract disagreements." *See Montana Power Co. v. Public Service Comm.*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91. To make this less "abstract" and qualify I-183 for the ballot, supporters of the initiative must collect 25,468 valid signatures from registered Montana voters. However, it is statistically doubtful this is a hurdle that can be met. Whether the Court recognizes the State's calculations

of 21% of proposed citizen ballot initiatives that were certified for the general election ballot in the last 10 years, or Plaintiffs' calculation of between 40-42% qualifying for the ballot since 1974, both show that, statistically speaking, I-183 is unlikely to even qualify for the ballot. Even if I-183 qualifies for the ballot, nothing *requires* any Court to consider a constitutional challenge prior to the election. *See Parker v. Los Angeles County,* 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."). In fact, Mont. Code Ann. §13-27-316(6), several Montana cases and a majority of other jurisdictions provide ample reason for a court to delay any constitutional analysis until after voters have determined whether to support the measure or not. *See Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire*, 224 Mont. 273, 276, 729 P.2d 1283, 1285 ("[W]e should decline to interfere with this right...unless it appears to be absolutely essential.").

Plaintiffs' attempt to garner support from cases allowing pre-enforcement challenges likewise fails. *See* Pls. Br. Opposing Motion to Dismiss, at 4-5. As Plaintiffs admit, those cases stand for the proposition that under certain circumstances plaintiffs may challenge "threatened enforcement of a *law*," even if the law has not yet been enforced against

them. *Id.* at 4 (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014)) (emphasis added). In those cases, an actual law was in place and the government was threatening to enforce it. None of them involved a proposed ballot initiative or proposed law in the legislature that *might* become law. As the State has noted, Montana law does not allow challenges to be based on such thin speculation that an initiative may get enough signatures to make it to the ballot, then may get enough votes to actually become a law. Only after the initiative became law could Plaintiffs have a credible argument to support a pre-enforcement challenge.

What Plaintiffs' pre-enforcement cases do show, however, is that Plaintiffs have an adequate legal remedy should I-183 defeat the odds and actually become a law. The proper time for them to make their pre-enforcement challenge is when the initiative is actually passed by the voters.

B. There Is No Legal Basis to Prevent an Initiative From Qualifying for the Ballot Due to Alleged Harmful Debate.

In order to overcome ripeness problems, Plaintiffs have set forth a novel claim that the ballot campaign and debate itself has and will cause them injury. Plaintiffs cite no cases where a court has struck a ballot measure because of debate that may occur surrounding the campaigns for or against an initiative. Taking Plaintiffs' allegations of harm as true, there is nothing that would allow them the legal remedy of removing a ballot

initiative for those potential injuries. Much worse, allowing Plaintiffs to stop an initiative from even qualifying for the ballot due to concerns over the political debate runs afoul of free speech rights guaranteed by the U.S. and Montana Constitutions.

"Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (Thomas, J. concurring). Much legal discourse has taken place regarding the special place held for political discussion in our system of government, and the application of these principles, which "extend[s] equally to issue-based elections such as [political campaigns on a ballot issue]." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484. Debate on public issues should be uninhibited, robust, and wide-open. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). The ability to freely advocate on a politically controversial viewpoint is the essence of First Amendment expression. *McIntyre,* at 347.

Plaintiffs cite no cases in which a court barred a ballot measure in order to save the public from a political debate, no matter how controversial

the issue. The Court should ensure political speech and free expression are encouraged, and not allow speculative pre-election challenges like this one to be a tool to crush it. As such, Plaintiffs' unrecognized legal theory should be rejected.

C. Plaintiffs' Challenge Consumes State Resources at a Time When These Resources Should be Devoted to Efforts Allowing People to Exercise Their Constitutional Right to Make Law.

The very first part of Montana's State Constitution establishes that "[a]ll political power is vested in and derived from the people." That political power is often exercised within the context of the law-making process. The State Constitution does not grant plenary law-making solely to the Montana Legislature. Instead, in drafting and enacting the State Constitution, the people reserved for themselves the ability to make laws through the ballot initiative process. Art. III, §4(1). This legislative power of regular citizens is not lesser than that of the actual legislative branch except for appropriations of money and local or special laws. *Id.*

It would be hard to know anything about this extraordinary power by reading Plaintiffs' First Amended Complaint and Response Brief because it is never mentioned. Plaintiffs hope the Court completely ignores this part of the State Constitution. This right has been recognized repeatedly in Montana Supreme Court Opinions. *See Nicholson v. Cooney*, 265 Mont. 406, 411, 877

P.2d 486, 488 (1994) ("Montana courts have been reluctant to consider pre-election challenges to initiatives and referenda, guided by the principle that the initiative and referenda provisions of the Constitution should be broadly construed to maintain the power of the people."); *MEA-MFT*, ¶38 ("It is the Court's unflagging obligation to protect the rights guaranteed by the Montana Constitution, including its provisions governing initiative and referendum." (J. Baker, dissenting)).

In analyzing pre-election challenges since 2007, the Court has looked at several factors to determine whether a ballot measure should be thrown out. One complicating factor for Plaintiffs' case, especially in this *pre-qualification* phase, is the *Reichert* Court's focus on the consumption of state resources in throwing out LR-119. The Majority said leaving the referendum on the ballot would "consume[] resources with no corresponding benefits." In other words, the Court reasoned the waste of taxpayer dollars on the process can be a factor in determining whether to strike an initiative from the ballot. This does little to help Plaintiffs and should rather be a barrier to allowing a pre-qualification challenge to proceed.

To allow Plaintiffs' pre-qualification challenges of ballot measures to move forward, the judiciary would be inviting a new class of constitutional challenges it has never previously allowed. If this waste of limited judicial

resources was not enough, the Attorney General's Office would then have to waste taxpayer money for pre-qualification of constitutional cases where it has not been involved before. And as already mentioned in the State's Opening Brief, since I-183 is only a proposed law without the presumption of constitutionality, the State normally has no obligation to defend it. *See Ravalli Co. v. Erickson*, 2004 MT 35, ¶ 15, 320 Mont. 31, 85 P.3d 772. So, under Plaintiffs' suggested course of action, the taxpayers would have to foot the bill for the Court to entertain an unprecedented pre-qualification challenge of a constitutional initiative and for the Attorney General's Office to participate in a matter it has no duty to defend. All of this at the expense of citizens exercising their right to participate in law-making per article III, section 4(1).

The State suggests a more prudent course of action grounded in precedent. Just like every other ballot measure, Plaintiffs should have to wait, at the very least, until I-183 has actually qualified for the ballot with enough valid signatures from Montana electors. And since I-183 could still not pass even if it qualifies, the Court should require Plaintiffs to use normal post-election legal avenues to advance their case at a time when their claims are ripe. At that point in time, the Attorney General will have the duty to defend the law because it will carry a presumption of validity. Whatever

"consumption of resources" occurs between now and the election should instead be put towards preserving the voters' constitutional right to vote on ballot measures and avoid situations where the court is essentially providing an advisory opinion on a proposed law. *See Reichert,* ¶ 99. To do anything else is to render that crucial constitutional right meaningless.

CONCLUSION

For the foregoing reasons, the State of Montana respectfully requests the Court to dismiss this case.

DATED this 19th day of January, 2018.

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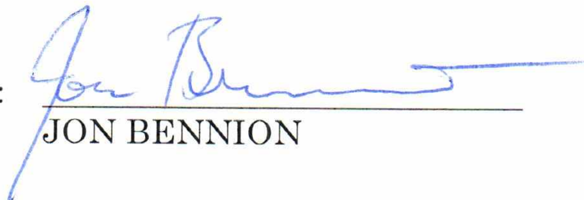
BY: 
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing STATE OF MONTANA'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT to counsel for the Plaintiffs via email.

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