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July 12, 2017

Attorney General Tim Fox
Office of the Attorney General
Justice Building, Third Floor
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

SENT VIA EMAIL AND U.S. MAIL

Re: Comments on Proposed "Montana Locker Room Privacy Act"

Dear Attorney General Fox:

On behalf of the ACLU of Montana, the Montana Human Rights Network, Montana Women Vote, Forward Montana, the Montana Coalition Against Domestic and Sexual Violence, Planned Parenthood of Montana, and the Pride Foundation, and pursuant to Mont. Code Ann. § 13-27-312, please find the following comments on the proposed ballot initiative misleadingly entitled, "The Montana Locker Room Privacy Act."

As you know, your office is charged with reviewing proposed ballot issues for legal sufficiency. That means that a petition must comply "with statutory and constitutional requirements governing submission of the proposed issue to the electors." Mont. Code Ann. § 13-27-312(7) (emphasis added). Although the legal sufficiency review "does not include consideration of the substantive legality of the issue if approved by the voters," nevertheless we are including comments demonstrating the substantive deficiencies of the Montana Locker Room Privacy Act (hereinafter, "MLRPA").

The seemingly innocuous language of the MLRPA is designed to confuse the voters. Despite the reference to locker rooms and privacy, and the lack of any reference to transgender people in the ballot statement, Montana voters must be made aware that the sole purpose of this initiative is to ban transgender people from accessing public facilities.

As such, the MLRPA is legally deficient, facially unconstitutional, would threaten fundamental notions of fairness, equality and dignity of all Montanans, and would have devastating financial consequences for the State. This damaging and discriminatory initiative should be rejected by the Attorney General.

If your office does not reject the ballot initiative outright, it must revise the ballot statement to ensure impartiality, and craft an accurate fiscal statement.

I. The ballot statement is misleading and does not express a true, impartial explanation of the proposed ballot issue.

The "Montana Locker Room Privacy Act" covers more much more than simply locker rooms, and actually jeopardizes the privacy of ordinary Montanans. It uses the term "sex" in a misleading way to single out transgender people, and it does not "provide" for "accommodations" as stated. Taken as a whole, the ballot statement would not permit a voter to understand the nature of the measure, and would create prejudice in favor of the measure. As such, the proposed ballot statement, including its title, is misleading and is legally insufficient. Mont. Code Ann. § 13-27-312(4) ("The ballot statements must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language.").

The Attorney General must review a proposed ballot statement for legal sufficiency, and revise the statement to cure any deficiency. Mont. Code Ann. § 13-27-312(8)(b). A ballot statement that makes an argument or is written in a way that creates prejudice for or against the issue is deficient. Mont. Code Ann. § 13-27-312(4). While a thorough description of every aspect of a proposed measure is not necessary, an omission may mislead voters and require revision. *See, Montana Consumer Fin. Ass'n v. State, ex rel. Bullock*, 2010 MT 185, ¶ 13, 357 Mont. 237, 243, 238 P.3d 765, 769 (requiring Attorney General to revise ballot statement that listed only two types of loans to which a proposed cap on interest rates would apply).

While the initiative tile purports to cover locker rooms, in fact the MLRPA covers "locker rooms, changing rooms, restrooms and shower rooms" in any "government building or public school." Section 3(1) defines "changing facility" as any "facility in which a person may be in a state of undress in the presence of others, including, but not limited to, a locker room,

changing room, or shower room." "State of undress" is not defined. Any number of physical locations or facilities would fall under the MLRPA, including a university hallway where a student is removing his button up shirt to prepare for a soccer game, a government dining area where an employee is changing her socks, the school nurse's office, or a classroom where children are removing winter clothes. The application of the MLRPA is potentially limitless. As such, "locker room" is a misleading element of the title that could prevent a voter from casting an "intelligent and informed" ballot. *Citizens Right to Recall v. State ex rel. McGrath*, 2006 MT 192, ¶ 16, 333 Mont. 153, 157, 142 P.3d 764, 767. It would be more accurate to omit the term; replace it with a more inclusive and general term, such as "facilities" or "government building," or retain it as one item in a list, such as "restroom, locker room, and other facilities."

Moreover, the ballot statement suggests that the statute is intended to provide "privacy," "safety" and "maintain order and dignity." There is no evidence that the "safety" and "order and dignity" of Montanans is in jeopardy under existing law. In addition, the term "privacy" is vague and misleading. A reader could assume that the requirement referred to prohibiting people from revealing their genitals to others without consent (something already largely prohibited under Montana law), requiring people to announce themselves when they enter sensitive areas, compelling the government to add privacy screens, shower curtains, or floor-to-ceiling stall doors in facilities, or guaranteeing that transgender people cannot be forced to use facilities inconsistent with their gender identity. Of course, the initiative accomplishes exactly the opposite. Thus, the word "privacy" tells voters nothing about what the proposed measure would actually do, but predisposes them favorably to it. As such, "privacy" must be omitted. Instead, concrete descriptions of the bill's actual requirements should be added.

Furthermore, the ballot statement uses the term sex twice without any indication of the controversial, contradictory and conjunctive definition contained in the ballot measure. The measure improperly defines "sex" as "a person's immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth." Section 3(7) (emphasis added). Verifying sex via genetics is truly bizarre. Indeed, neither hospitals nor parents determine the sex of a child using genetics. Many people do not know their own karyotype, much less that of the people they encounter in government buildings.

In addition, the use of the conjunctive "and" renders the definition of sex meaningless. There are at least 6 different karyotype sexes. Genetics may determine a child to be one

karyotype when anatomically the child may be another or atypical. *See,* Sally Lehrman, *When a Person Is Neither XX nor XY: A Q&A with Geneticist Eric Vilain,* Scientific American (May 30, 2007), https://www.scientificamerican.com/article/q-a-mixed-sex-biology/; Intersex Society of North America, Frequently Asked Questions (2008), http://www.isna.org/faq/; Joshua Kennon, *The 6 Most Common Biological Sexes in Humans* (June 7, 2013), https://www.joshuakennon.com/the-six-common-biological-sexes-in-humans/. Anatomy, furthermore, is not immutable—it may change in various ways through maturing and aging, injury and illness, and medical intervention.

Most importantly, this definition deliberately excludes gender identity. *C.f. Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1051 (7th Cir. 2017) (finding that not permitting transgender boy to access bathroom consistent with gender identity is discrimination on the basis of sex). In fact, the deliberate and controversial exclusion of transgender people from public facilities based on their gender identity appears to be at the core of the bill's purpose—something the ballot statement obscures. The statement that sex is immutable, biological, and based on anatomy and genetics is factually wrong, and a voter would have no way to know that the measure employs this definition. The ballot statement must clarify the impact of the measure on transgender people.

The ballot statement also asserts that the "proposal provides for accommodations such as single stall facilities based upon special circumstances." It does not. "Provides" suggests that the measure would require or encourage single-occupancy facilities in special circumstances. In fact, at most, it does not make government entities liable for having single-occupancy facilities where there are "special circumstances." However, it seems that the measure would still require government entities to label these single-occupancy facilities as "women's" or "men's," prohibit transgender men from using those labeled for men, and prohibit transgender women from using those for women. The relevant subsection states only that "[n]othing in this section may be construed to prohibit a governmental entity from providing an accommodation such as a single occupancy restroom or changing facility upon a person's request due to a special circumstance." The term "protected facility" as defined in the measure makes no exceptions for a single-occupancy facility. The measure does not protect a government entity from liability in the event that someone of the "opposite sex" encountered someone going into or out of a single-occupancy restroom. Thus, the measure not only does not "provide for" single-stall facility, but such a

facility would not be an "accommodation." This sentence must be omitted from the ballot statement, or replaced with a more accurate statement, such as, "While single-occupancy facilities are allowed under special circumstances, unisex facilities are not permitted, and transgender people may never use restrooms consistent with their gender identity."

The ballot statement also does not give any information about the current state of the law that would permit a voter to better understand the context. Accurate statements of relevant existing law are impartial, even if they take more space than a description of the proposed measure itself. *See Citizens Right to Recall v. State ex rel. McGrath*, 2006 MT 192, ¶ 14, 333 Mont. 153, 157, 142 P.3d 764, 767. The ballot statement might usefully include language such as "Montana law already makes assault and indecent exposure a crime" or "government entities would have to follow I-*** even if it conflicted with local anti-discrimination law."

Finally, Section 4(1) mandates that governmental entities (which include all governmental subdivisions, school districts, and higher education) "shall ensure that each protected facility provides privacy from persons of the opposite sex." There is no explanation or guidance with regard to how the government will actually "ensure" that a transgender man is not using the men's locker room or a transgender woman is not using the women's restroom. Section 4(4) provides that the governmental entity need only provide signage. However, Section 5(1)(a) attaches liability where the same governmental entity fails "to take reasonable steps to prohibit the member of the opposite sex from using the protected facility."

Even the savviest voter would have no idea what the MLRPA actually intends to do. One could reasonably read it to mean that the measure would create new laws against indecent exposure or assault, that it would create affirmative protections for transgender people to access bathrooms consistent with their gender identity, or that it would ensure shower curtains, high stall walls, and partitions in locker rooms.

We would respectfully suggest that a truly accurate ballot statement would read: "The Transgender Discrimination Act would bar transgender people from using any public facilities (such as restrooms or locker rooms) that match their gender identity. It would prevent schools and other government entities from allowing transgender people to use these restrooms at all times, regardless of state laws, local non-discrimination ordinances, or individual circumstances. It would further allow individuals to sue the government for emotional distress

and attorney fees if they come in contact with a transgender person of the same gender identity in any such facility.

The proposed ballot statement is false, misleading and is legally insufficient. As such, we respectfully request that you revise the language substantially pursuant to Mont. Code Ann. § 13-27-312(8)(b).

II. The MLRPA would have devastating financial consequences for Montana, which must be reflected in the fiscal statement.

Mont. Code Ann. § 13-27-312(3) provides that "if the proposed ballot issue has an effect on the revenue, expenditures, or fiscal liability of the state, the attorney general shall order a fiscal note… [T]he [fiscal] statement must be used on the petition and ballot if the issue is placed on the ballot." *Id.* (emphasis added).

The Office of Budget and Program Planning has prepared a fiscal statement for the MLRPA. If you determine that the proposed initiative is legally sufficient, you must prepare a fiscal statement which includes the following information: In addition to a "net impact-general fund balance" of $545,699 over the next four years, the fiscal note provides that the MLRPA "constitutes an unfunded mandate on local governments, and creates a new civil action against local governments." Furthermore, the fiscal note indicates that "federal funding at the Department of Health and Human Services could be at risk if federal requirements for Title IX are not complied with… Total federal funds received and expended by the department in a fiscal year exceed $1 billion per year… This legislation would be costly, as schools and colleges face significant Title IX litigation and potential loss of federal funding for financial aid, research and programs. All federal grants require compliance with federal laws and the Montana University System receives federal funding that could be jeopardized. At a minimum, this amount could exceed $250 million per year.

In short, the MLRPA potentially jeopardizes over $1 billion in federal funding that benefits Montana students. Indeed, the Associated Press calculated that a similar piece of legislation cost North Carolina more than $3.76 billion in lost business over a dozen years. *See: https://apnews.com/fa4528580f3e4a01bb68bcb272f1f0f8/ap-exclusive-bathroom-bill-cost-north-carolina-376b.* Not only is the MLRPA legally insufficient, it would have devastating financial consequences for Montana.

III. The MLRPA violates the Montana Constitution's "single subject" requirement.

The MLRPA addresses multiple subject areas, and therefore violates the constitution's requirement that, ""A law shall be passed by bill … [and] each … shall contain only one subject, clearly expressed in its title." Mont. Const. Art. V, § 11(3). *See, State v. Morgan*, 1998 MT 268, ¶ 20, 291 Mont. 347, 968 P.2d 1120, 55 Mont. St. Rep. 1112, 1998 Mont. LEXIS 260 (Mont. 1998); *Marshall v. State ex rel. Cooney*, 1999 MT 33, ¶ 23, n. 1, 293 Mont. 274, 975 P.2d 325 (citing *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 P. 210 (1914). Other states employ similar tests, such as whether there are subjects with "separate and unconnected purposes" included in the initiative (Colorado); whether the initiative contains "unduly diverse" subjects (California); whether the initiative involves subjects "which affect separate, distinct functions" of government (Florida); and whether the measure involves "dissimilar and discordant subjects" (Wyoming). *See In re Title, Ballot Title and Submission Clause for Proposed Initiative*, 46 P.3d 438, 442 (Colo. 2002); *California Trial Lawyers Assn. v. Eu*, 200 Cal.App.3d 351, 358 (Cal.App. 1988); *Fine v. Firestone*, 448 So.2d 984, 990 (Fla. 1984); *State ex rel. Fire Fighters Local No. 946 v. City of Laramie*, 437 P.2d 295, 303 (Wyo. 1968).

The MLRPA embraces at least three separate subjects. First, the law provides for the "protection of physical privacy" by requiring that the "governmental entity that controls the protected facility shall ensure that each protected facility provides privacy from persons of the opposite sex." Section 4. This subject addresses the requirement that transgender individuals must use the public facility associated with their "immutable biological sex as objectively determined by anatomy and genetics existing at the time of the birth." Section 3(7).

Second, the law empowers any Montana citizen "who encounters a person of the opposite sex in the protected facility" to sue the governmental entity for emotional distress damages. Section 5(1). This separate subject creates the distinct possibility that an individual may be required to provide an original birth certificate, or even disrobe, to prove that (s)he is utilizing the "appropriate" public facility.

Third, the MLRPA amends Mont. Code Ann. § 7-1-111 to prohibit a local government from exercising "any power that applies to or affects provisions in the Montana Locker Room Privacy Act…" Section 6. Bozeman, Missoula, Helena and Whitefish have adopted

nondiscrimination ordinances ("NDO"). These NDOs prohibit discrimination against the LGBTQ community in the form of public accommodations. The MLRPA effectively eviscerates these community-based NDOs. This is a separate subject addressed by the MLRPA.

The MLRPA addresses multiple separate subjects and is therefore legally insufficient.

IV. The MLRPA is facially unconstitutional.

Although the legal sufficiency review "does not include consideration of the substantive legality of the issue if approved by the voters," nevertheless we urge you to take a deeper look at the proposed initiative in order to better understand its fundamental constitutional defects. In recent years, Circuit Courts reviewing similar "locker room" or "bathroom" bills have repeatedly found the stated government interest to be speculative and illusory. In *Glenn v. Brumby*, the 11th Circuit found that the employer's purported concern that other women might object to the transgender employee's use of the bathroom was not supported by evidence, hypothetical and did not survive heightened scrutiny. 663 F.3d 1312, 1321 (11th Cir. 2011). In *Whitaker*, the 7th Circuit found that the "privacy argument was based upon "sheer conjecture and abstraction" and therefore insufficient to support its position that its policy is required to protect the privacy rights of each and every student." *Whitaker*, 2017 U.S. App. LEXIS 9362, 37 (7th Cir. May 30, 2017). In its reasoning, the 7th Circuit found that "a transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time." *Id.* at 38. The MLRPA is facially unconstitutional for the following reasons:

A. The MLRPA violates Montana's Constitutional right to individual privacy - Mont. Const. Art. II, § 10.

The MLRPA violates Montanans' right to individual privacy, one of the most important and fundamental rights afforded by the Montana Constitution. The right to privacy protects the personal and private matters of Montanans against public disclosure and government infringement on personal autonomy that attempts to "dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular." *Armstrong v. State*, 1999 MT 261, ¶ 38, 296 Mont. 361, 989 P.2d. *Gryczan v. State* held that

while "it is not the judiciary's prerogative to condone or condemn a particular lifestyle and the behaviors associated therewith upon the basis of moral belief" it must uphold the freedom and rights guaranteed in constitution. *Gryczan v. State,* 283 Mont. 433, 452, 455, 942 P.2d 112, 123, 125 (1997).

The MLRPA intrudes on the individual privacy rights of Montanans by requiring the State to ensure citizens use facilities that corresponds with the biological sex assigned on their original birth certificate. Enforcement of the MLRPA would reveal personal and private information about transgender Montanans by publicly 'outing ' them every time they use a public facility.

B. The MLRPA violates Montana's equal protection clause - Mont. Const. Art. II, § 4.

The MLRPA violates transgender Montanans' right to equal protection. The MLRPA violates equal protection by impermissibly forcing transgender Montanans to use a public facility that does not correspond with their gender identity. The MLRPA discriminates on the basis of sex in a way designed to harm transgender Montanans, whose gender identity does not match their assigned sex. Transgender Montanans have been marginalized and stigmatized throughout Montana's history and the MLRPA is impermissibly directed at discriminating against this marginalized group. *See, Snetsinger v. Mont. Univ. Sys., 2004 MT 390, ¶¶ 15, 16, 325 Mont. 148, 153, 104 P.3d 445, 449.*

The United States Supreme Court has found that sex stereotyping, based on overbroad generalizations, constitutes impermissible grounds for discrimination. The First, Sixth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals have all recognized that discrimination against gender nonconforming or transgender individuals is also an impermissible form of sex stereotyping. *Whitaker*, at 35; *Glenn*, at 1316, 1320; *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004); *Rosa v. Parks W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000). The MLRPA relies on the unscientific premise that using a protected facility with a person who was assigned the opposite biological sex at the time of birth may somehow infringe on the privacy, safety, or dignity of a person of the opposite sex. This belief and the idea that every person fits into an apparent, static, binary category of sex at the time of birth is not supported by evidence and impermissibly relies on overbroad generalizations based on sex stereotypes.

C. The MLRPA violates Montana's Constitutional right to individual dignity - Mont. Const. Art. II, § 4.

The MLRPA violates Montanans' right to individual dignity by intruding on the basic worth and humanity of transgender individuals. By not allowing transgender Montanans to use public facilities that correspond with their gender identity, the MLRPA forces them to reveal their transgender status and delegitimizes their gender identity and transition process. The MLRPA does not allow transgender Montanans to answer "to their own consciences and convictions" as to when, where, and to what audience they make their transgender status known. *Armstrong*, ¶ 72. The MLRPA also violates individual dignity by subjecting transgender Montanans to psychological harms, health complications, and increased hostility or even violence from the public.

Finally, Section 4(4) suggests that the government facility would need to post appropriate signage. Such a sign would need to read along the following lines: "Only persons whose immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth may use this locker room." This form of non-enforcement is designed not to protect privacy and dignity, but to discriminate against and to humiliate transgender people. As such, it violates the Constitutional right to individual dignity.

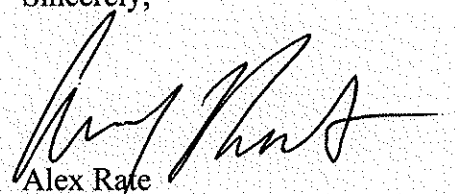
D. The MLRPA violates Montana's Constitutional right to due process of law - Mont. Const. Art. II, § 17.

The MLRPA violates transgender Montanans' right to due process by depriving transgender Montanans of constitutional liberties. The MLRPA deprives Montanans of personal autonomy, privacy, and individual dignity. The MLRPA also works to deprive transgender Montanans of the benefits of anti-discrimination laws and places a stigma on transgender people by delegitimizing their gender identity. *See U.S. v. Windsor,* 133 S.Ct. 2675, 2681 186 L.Ed.2d 808, 815 (2013). Furthermore, the MLRPA is both vague on its face and in its application. Indeed, the fiscal note accompanying the MLRPA states that, "This initiative remains vague and ambiguous as to how local governments can comply with the requirements of the proposed law."

CONCLUSION

We respectfully urge you to take a hard look at the MLRPA and determine that it is legally insufficient, and constitutionally defective. This ill-conceived, discriminatory and unnecessary initiative threatens fundamental notions of fairness, equality and dignity of all Montanans. As the 7th Circuit noted, "a transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time." *Whitaker*, at 37. The delegates to the 1972 Montana Constitutional Convention made the Attorney General an independent elected official responsible to the people of Montana, and not to the Governor or any other elected official. We urge you to exercise your powers and duties to protect all the people of Montana.

Sincerely,



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cc: Montana Human Rights Network,
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