IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP _____

ACLU OF MONTANA FOUNDATION, INC.,

Petitioner,

V.

THE STATE OF MONTANA, BY AND THROUGH TIMOTHY C. FOX, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, AND COREY STAPLETON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE,

Respondents.

PETITION OF THE ACLU OF MONTANA FOUNDATION, INC., PURSUANT TO MONT. CODE ANN. § 13-27-316

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I. RELIEF REQUESTED

ACLU of Montana respectfully petitions this Court, pursuant to Mont. Code Ann. § 13-27-316, and requests the Court find that the "Montana Locker Room Privacy Act" ballot statement is legally insufficient under Mont. Code Ann. § 13-27-312. ACLU further requests that the Court declare any petitions supporting the issue are void and that the issue may not appear on the ballot, or, in the alternative, order the Attorney General to revise the statement pursuant to the Court's order.

II. PARTIES

A. Petitioner.

Petitioner ACLU of Montana Foundation is a non-profit, non-partisan corporation whose mission is to support civil liberties in the State of Montana. Petitioner has more than 4400 members. ACLU of Montana filed comments with the AG in opposition to the proposed ballot initiative.

B. Respondents.

Respondent Timothy C. Fox is Attorney General ("AG") of the State of Montana, who is charged, *inter alia*, with determining the legal sufficiency of proposed ballot initiatives. Respondent is named in his official capacity only.

Respondent Corey Stapleton is the Secretary of State of Montana, who is charged, *inter alia*, with overseeing and certifying the election process in Montana. Respondent is named in his official capacity only.

III. FACTS

On May 10, 2017, the Montana Family Foundation (MFF) submitted proposed text for the "Montana Locker Room Privacy Act" to the Montana Secretary of State for review. *Exhibit A.* The initiative is intended for the 2018 ballot. *Id.* The initiative is designed to exclude transgender individuals from locker rooms, restrooms, and other public facilities that correspond to their gender identity. The initiative also authorizes lawsuits against government entities that do not strictly comply with the text of the statute. *Id.*

The Secretary of State referred the initiative language to the Montana AG for a legal sufficiency review pursuant to Mont. Code Ann. § 27-13-312. Interested parties, including the Petitioner, provided comments on the initiative. *Exhibit B.* On June 26, 2017, the Office of Budget and Program Planning provided a "fiscal note" for the proposed initiative. *Exhibit C.* On July 20, 2017, the AG revised the proposed initiative text and provided notice that the "petition is legally sufficient." *Exhibit D.*

IV. ARGUMENT

A. The requirements for original jurisdiction are satisfied.

Petitioner brings this action pursuant to Mont. Code Ann. § 13-27-316(2).

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

The ballot statement approved by the AG will prevent Montana voters from casting intelligent, informed ballots. A ballot statement must use "plain, easily understood language" and give a "true and impartial explanation of the proposed ballot issue." Mont. Code Ann. § 13-27-312(4). It must avoid argument, and may not be written "so as to create prejudice for or against the issue." *Id.* While courts "do not sit as some kind of literary editorial board," *Citizens Right to Recall v. McGrath*, 2006 MT 192, ¶ 16, 333 Mont. 153, 157, 142 P.3d 764, 767 *(quoting Schulte v. Long*, 687 N.W.2d 495, 498 (S.D. 2004)), they must intervene when a ballot statement's language would "prevent a voter from casting an intelligent and informed ballot." *Id.* (quoting *Advisory Opinion re Term Limits Pledge* (Fla.1998), 718 So.2d 798, 803). Here, the ballot statement masks the true intent of the initiative – to prevent transgender individuals from using public facilities that correspond with their gender identity.

Transgender people have a gender identity different from their assigned sex at birth. Gender identity is a deeply-felt, inherent sense of oneself as male, female, or another gender. Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 834 (2015). Transgender men were assigned female at birth, and live and identify as men. Transgender women were assigned male at birth, and live and identify as

women. At least 1.4 million transgender adults live in the United States. Brief of Amici Curiae American Academy of Pediatrics, American Psychiatric Association, American College of Physicians, and 17 Additional Medical and Mental Health Organizations in Support of Respondent, *Gloucester County School Board v. G.G.*, No. 16-27, 2017 WL 1057281 at 3 (U.S.). *Exhibit E.* A 2013 article estimated that between 2,500 and 10,000 transgender individuals live in Montana. Wesley Parks, *Removal of the Impediment: The State of Transgender Marriage in Montana*, 74 Mont. L. Rev. 309, 309 (2013).

The MFF proposed this initiative in the midst of national controversy over the participation of transgender people in public life, focusing particularly on the presence of transgender people in public restrooms and schools. *See Understanding Transgender Access Laws*, NY Times (Feb. 24, 2017), *available at* https://www.nytimes.com/2017/02/24/us/transgender-bathroom-law.html. The initiative would stake out a position in this controversy, banning transgender people from using public facilities that accord with their gender identity. The statement is insufficient because it obscures, favorably frames, and misstates the impact of the initiative.

At the heart of the controversy are questions about the meaning of sex and whether transgender people, like others, should be permitted to use the facilities that correspond with their gender identity. The initiative provides the MFF's

answers to these questions: First, a person's sex is defined by what was recorded on an original birth certificate based on "anatomy and genetics" at the time of birth. Second, transgender people should never be allowed to use any restroom, locker room, shower room, or changing facility under government control that does not match their assigned sex at birth.

The ballot statement, however, does not hint at the initiative's true effect. It does not even make clear to Montana voters that they would be weighing in on these fundamental questions. It is misleading and prejudicial for four reasons. First, it prevents voters from understanding how the initiative defines sex, and how it would apply to transgender and intersex people. Second, it creates prejudice in favor of the initiative by stating that it protects privacy, rather than explaining its concrete provisions. Third, it is inaccurate in that it mistakenly states that the initiative only applies to one facility at any government entity, rather than all of them. Fourth, it fails to convey the liability the initiative would create for government entities, some of which have already passed local nondiscrimination ordinances.

1. The ballot statement obscures the primary and most controversial function of the initiative: the exclusion of transgender people from gender-appropriate facilities.

The ballot statement's omission of the initiative's definition of sex makes the statement misleading. To be legally sufficient, a ballot statement must give a

"true and impartial explanation of the proposed ballot issue." Mont. Code Ann. § 13-27-312(4). Given the word limit, not every detail of the initiative can be explained. *See Montana Consumer Fin. Ass'n v. State ex rel. Bullock*, 2010 MT 185, ¶ 12, 357 Mont. 237, 243, 238 P.3d 765, 768. However, "if the information would give the elector 'serious grounds for reflection' it is not a mere detail, and it must be disclosed." *Pebble P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1082 (Alaska 2009) (internal citations omitted); *see also Montana Consumer Finance Ass'n*, 2010 MT 185, ¶ 18 (ordering revision of ballot statement). This ballot statement creates a prejudicial omission that would make the initiative appear more favorable to all voters regardless of their position on the issue.

In the initiative, "sex" is a defined term of art consisting of a two-part test based on anatomy and genetics. Specifically, the initiative defines sex as "a person's immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth." *Exhibit A*, Section 3(7). A protected facility may only be used by those with the "sex" designated for that facility. *Id.*, Section (4)(1). Therefore, to be permitted to enter a public restroom, locker room, shower room, or changing facility under the proposal, one's "sex" must have been determined by the two-part test. Extremely few people presently alive had a birth sex assigned on the basis of both anatomy and genetics. Parents and doctors simply look at the baby's genitals and announce it's a boy or a girl; that is the "sex" of the

baby assigned on the birth certificate. Virtually no one in Montana would qualify to go to the bathroom in a public school if this initiative passes—something no voter in Montana would be able to ascertain from the ballot statement.

Instead, the ballot statement uses the terms "sex" and "opposite sex" as if they are self-explanatory. That would be sufficient if the ballot statement offered no definition or a non-controversial one. But here, the definition is inconsistent with common lay perceptions, legal documentation, and scientific understandings, and is designed to exclude and discriminate against transgender people and people with intersex conditions.

Common lay perceptions of the term "sex" are not consistent with the proposed definition. Most people attribute sex to newborns based on the appearance of external genitals; the definition in the initiative, on the other hand, requires determinations based on both genetics and anatomy. Most people attribute sex to everyone else they meet based on characteristics like name, dress, hair, mannerisms, voice, and body shape. In everyday interactions, it is impossible to observe someone's genes, internal anatomy, or previous genitals. Increasingly, many people also accept the gender identity of their transgender peers, family members, neighbors, co-workers, classmates, colleagues, and clients, even if some aspect of their appearance could have led to different assumptions. Thus, none of

the characteristics people typically use in identifying an individual's sex in protected facilities could be taken into consideration under the ballot initiative.

Even if voters somehow intuited that the definition of sex used in the initiative might not correspond with their own everyday perceptions, they might assume that it would relate to legal documents. But in fact the initiative explicitly clarifies that government-issued identification is evidence of sex *only* if it is consistent with the sex assigned on the *original* birth certificate. *Exhibit A,* Section 3(7). Montana law provides that transgender people may amend the sex on their birth certificate. Mont. Admin. R. 37.8.311(5). So does almost every other state in the country. *See*, Lambda Legal, *Changing Birth Certificate Sex Designations: State-by-State* Guidelines (Feb. 3, 2015), www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations.

If instead voters imagined that the definition of sex used in the initiative were consistent with scientific expertise and medical practice, they would be wrong again. The proposed definition of sex is empirically inaccurate for three reasons: it requires genetic analysis; it assumes objective alignment between anatomical and genetic sex-related characteristics; and it excludes gender identity.

First, the initiative insists on a genetic sexual determination, which rarely occurs. Read literally, the initiative suggests that virtually *no one* would be

permitted to use *any* restroom, locker room, shower room, or changing room in a government building without first undergoing genetic testing.

Second, it insists that anatomy and genetics at birth will yield an "objective" determination of binary sex for everyone. In fact, around two percent of children are born with intersex conditions, making sex classification on this basis difficult and uncertain. *See* Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 Am. J. Human Biol. 151 (2000). The initiative would preclude many, if not all, intersex people from using any restroom or other facilities at all in public schools and other government buildings.

Third, it forces a determination based solely on anatomy and genetics, excluding other factors, such as gender identity. The consensus among medical experts shows that living according to one's gender identity is critical to the health and well-being of transgender people, and recommends that transgender people use single-sex facilities consistent with gender identity rather than assigned sex at birth. Brief of Amici Curiae American Academy of Pediatrics et al., *Exhibit E.*

The ballot statement does nothing to indicate its definition rests on an unscientific and inaccurate definition of sex that is both virtually impossible to comply with for anyone and uniquely harmful to transgender and intersex people. This information would give voters "serious cause for reflection," and thus it must be included in the ballot statement.

2. The ballot statement creates prejudice in favor of the initiative by describing it as protective of privacy.

"[T]he statement of purpose must 'eschew advocacy—argument—for or against the proposal's adoption.'" *Citizens Right to Recall*, 2006 MT 192, ¶ 20 (quoting *Fairness and Acct. in Ins. Reform v. Greene* (1994), 180 Ariz. 582, 886 P.2d 1338, 1346).

The ballot statement claims that the initiative requires government entities to provide "privacy," a vague term describing something most people want. But given the actual text and consequences, voters may or may not agree that the initiative would protect privacy. It is unlikely that voters will consider it protective of their privacy for government entities to require someone with a male gender identity, masculine legal name, "male" on his birth certificate, deep voice, beard, and male-pattern baldness to use a women's restroom if he is transgender. It is similarly unlikely that voters will think that it is protective of their privacy for government entities to request evidence of an individual's genetic code and genital configuration at birth in order to use covered facilities—something the initiative encourages to minimize liability risk. Voters may not think that it is protective of their privacy for the government to eliminate unisex facilities, as the initiative requires.

These are the real effects of the initiative. The ballot statement impermissibly describes these effects as protecting privacy. Instead, the statement

must remain neutral. It may neither say that the initiative will protect privacy, the MFF's preferred framing, nor that it requires government entities to destroy the safety, health, and dignity of transgender and intersex people by excluding them from public life, the framing that transgender advocates may prefer. The ballot statement must instead describe the actual operation of the proposed initiative, neither obscuring nor weighing in on its most controversial aspects.

3. The first sentence of the ballot statement inaccurately implies that the proposal's requirements would only apply to one facility in each government building.

The first sentence of the ballot statement states that government entities must designate "a protected facility in a government building or public school for use only by members of one sex." The singular article "a" indicates that government entities would only need to designate one facility in one building or public school to comply with the measure's requirements, while in fact, the measure requires government entities to designate all covered facilities in all government buildings and public schools according to the measure's requirements. *Exhibit A,* Section 4(1). This violates Mont. Code Ann. § 13-27-312(4), which requires that the statement must be accurate and not misleading. *See Citizens Right to Recall*, 2006 MT 192, ¶ 27; *Alaskans for Efficient Gov't, Inc. v. State*, 52 P.3d 732, 735-36 (Alaska 2002).

4. The ballot statement does not acknowledge the extent of government liability the initiative creates and also fails to note that the initiative eliminates local non-discrimination ordinances.

The initiative would create a new private right of action against government entities. The ballot statement only refers to "civil penalties if a governmental entity fails to provide such privacy." This language is misleading and creates prejudice in favor of the measure. A "civil penalty" is a "fine assessed for a violation of a statute or regulation." Black's Law Dictionary (Bryan A. Garner ed., 10th ed. 2014). Voters reading the ballot statement would likely assume that a fine for some set amount could be imposed administratively. Instead, the measure creates liability for money damages without cap—specifically, it authorizes damages for emotional and mental distress, reasonable attorney fees and costs, and "other relief." *Exhibit A,* Section 5(3).

Finally, the ballot statement makes no reference to the fact that the initiative 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…" *Exhibit A,* Section 6. Bozeman, Missoula, Helena, Butte and Whitefish have adopted nondiscrimination ordinances ("NDOs"). *See, https://www.aclumontana.org/en/non-discrimination-ordinances.* These NDOs prohibit discrimination against the LGBTQ community in the form of public

accommodations. The initiative effectively eviscerates these community-based NDOs, and the ballot statement must inform the voters as much.

The problem with the ballot statement is not just that it could be written better. *C.f., Citizens Right to Recall*, 2006 MT 192 at ¶ 10, 333 Mont. at 156, 142 P.3d at 766. It is that the ballot statement makes it impossible for voters to understand the purpose and effect of the proposed law. *Id.* To remedy these deficiencies, Petitioner proposes the following language:

> I-183 requires any government entity, including public schools, to prohibit people from accessing certain facilities if the facility's sex designation does not match the sex assigned to the person at birth based on genetics and anatomy. It would prohibit government entities from permitting transgender persons and those with genetic or chromosomal differences affecting sex from using facilities such as restrooms, locker rooms and changing facilities in accordance with their gender identity. It would authorize private lawsuits for money damages against government entities if an individual claims to have experienced emotional distress after having shared a facility with a transgender person. Single occupancy facilities could be provided upon request in special circumstances. I-183 would also invalidate local non-discrimination law that protects transgender people from discrimination in these spaces.

C. The Fiscal Statement is legally deficient.

The "Fiscal Statement" attached to the initiative is misleading and incomplete, and therefore the AG's legal sufficiency review should be rejected or revised. The Fiscal Statement contains the following fatal defects:

1) It fails to quantify the time period in which the initiative's "hard" fiscal impacts will result;
2) It fails to note that many fiscal impacts resulting from the initiative are indeterminate or difficult to quantify;
3) It fails to identify the long-term financial impacts of the initiative;
4) It fails to mention the initiative's significant technical defects.

Mont. Code Ann. § 13-27-312(3) provides that "[i]f the proposed ballot issue has an effect on the revenue, expenditures, or fiscal liability of the state, the AG shall order a fiscal note incorporating an estimate of the effect...." Mont. Code Ann. § 5-4-205 requires that fiscal notes, "when possible, show in dollar amounts the estimated increase or decrease in revenue or expenditures, costs that may be absorbed without additional funds, and long-range financial implications. A comment or opinion relative to the merits of the bill may not be included in the fiscal note. However, technical or mechanical defects may be noted." (emphasis added).

"If the fiscal note indicates a fiscal impact, the attorney general shall prepare a fiscal statement of no more than 50 words, and the statement must be used on the petition and ballot if the issue is placed on the ballot." Mont. Code Ann. § 13-27-312(3). That fiscal statement must comply with the general requirement that the information contained must "not prevent a voter from casting an intelligent and

informed ballot." *Montana Consumer Finance Ass'n*, 2010 MT 185, ¶ 16 (*quoting*, *Citizens Right to Recall*, 2006 MT 192, ¶ 18).

The AG approved the following fiscal statement: "The State of Montana will spend an estimated $545,699 in general fund money to comply with the requirements of I-[Initiative Number]. The costs are related to the renovation and proper signage for protected facilities owned by the State." *Exhibit D.* Pursuant to Mont. Code Ann. § 13-27-316, Petitioners respectfully submit that the fiscal statement falls short of the legal requirements in several critical respects.[1]

On June 26, 2017, the Director of the Office of Budget and Program Planning submitted a "Fiscal note for initiative 'Montana Locker Room Privacy Act.'" *Exhibit C* (hereinafter, "fiscal note"). This fiscal note identified numerous impacts on short and long term impacts on budget and revenue. Specifically, the fiscal note indicated:

1) "Significant Local Gov Impact;"
2) "Technical Concerns;" and
3) "Significant Long-Term Impacts."

[1] Indeed, signage is only one of many possible requirements for government compliance with the initiative. The initiative requires governments to take "reasonable steps to prohibit the member of the opposite sex from using the protected facility." The initiative does not define "reasonable steps." Thus, the fiscal statement contains a technical defect insofar as it does not note that complying with the initiative may require additional employees to determine an individual's assigned sex at birth and otherwise enforce the measure.

Id.

The fiscal note indicated a "net impact general fund balance of $545,699 over the next four years." (emphasis added). The bulk of these costs are associated with renovation of "eight [government-owned] wildland fire bunkhouses," estimated at $40,000 per bunkhouse. However, the fiscal note also states that "inventories and assessments will need to be conducted on all state-owned and K-12 facilities." The Budget Office states that "there are over 2,200 buildings in the K-12 system" and "4,250 state-owned facilities." Without such an inventory, it appears virtually impossible to predict what the total general fund impact will be. The fiscal impact on local governments is similarly difficult to predict: "The fiscal impact to cities and towns cannot be quantified as the resources required to enforce the law and the monetary damages that will be awarded pursuant to the provisions of the initiative are unknown." Furthermore, the Budget Office estimates "the legal reserve needed to address" claims of discrimination brought pursuant to 42 U.S.C. § 18116 "to be $200,000 per biennium." The Budget Office characterizes these fiscal impacts as "an unfunded mandate on local governments." Perhaps most troubling of all, the Budget Office estimates that the long-term impacts of the initiative could exceed $1 billion per year. In particular, the initiative would jeopardize federal funding for the Montana University System. "At a minimum, this amount could exceed $250 million per year." *Exhibit C* (emphasis added).

The Fiscal Statement must be revised to permit Montana voters to understand the indeterminate and long-term impacts on budgets and revenues associated with the initiative. *C.f., Stop Over Spending Montana v. State, ex rel. McGrath*, 2006 MT 178, 333 Mont. 421, 39 P.3d 788 (holding that the fiscal statement was sufficient where it included "some possible long financial implications" and where the Budget Office did not identify any "technical or mechanical defects.").

With regard to "technical" defects, the Budget Office accurately points out that, "'privacy' is not defined and it is, therefore, unknown how a government entity is to ensure such a condition has been met. The arrangement of some doors, screen walls, mirrors, frosted glass, etc. relative to members of the opposite sex passing by a protected facility may or may not meet this requirement. The same may or may not be true for single-occupancy restrooms depending upon how privacy is defined." Finally, the Budget Office concludes that, "[t]he subjective nature of the proposal's requirements makes costs to taxpayers from litigation and liability unpredictable." These technical defects should be identified in the fiscal note. Mont. Code Ann. §§ 13-27-312, 5-4-205.

Petitioner requests that the AG's Fiscal Statement should be revised as follows:

"I-183 will require the State of Montana to spend at least $545,699 over the first four years. Long term impacts could include the loss in over $1 billion in federal

funding. The subjective nature of the proposal's requirements makes costs to taxpayers from lawsuits unpredictable."

Montana voters are entitled to understand the initiative's potentially devastating financial consequences. The fiscal note should be revised to reflect the real impact on state and local revenues and budgets.

V. CONCLUSION

For the foregoing reasons, Petitioner asks this Court to grant its Petition to declare any petitions supporting the issue void and order that the issue may not appear on the ballot, or, in the alternative, order the AG to revise the ballot statement and fiscal statement to cure the aforementioned deficiencies.

Respectfully submitted,

/s/ Alex Rate
Alex Rate, Legal Director
ACLU of Montana Foundation

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

The undersigned, Alex Rate, certifies that the foregoing complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 4,000 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Alex Rate
Alex Rate

CERTIFICATE OF SERVICE

I, Alex Rate, hereby certify that I have served true and accurate copies of the forgoing Petition to the following on 07-31-2017.

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