PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Revenue and Transportation Interim Committee

64th Montana Legislature

TO: Committee Members

FROM: Jaret Coles, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

DATE: September 22, 2015

Department of Revenue

Proposal and Adoption Notices are available on the Internet:

Department of Revenue notices can be found on the Secretary of State's website at http://www.mtrules.org/. Under the Montana Administrative Register heading, type the number "42" in the “Search by Notice No.” box and click on the "Go" icon.

Notice of Proposed Rules:

Income Tax -- Fiduciaries, Estates, and Trusts. MAR 42-2-931. A public hearing was held on August 10, 2015, and the public comment period ended on August 24, 2015. The Department proposes to adopt 11 new rules, amend two rules, and repeal two rules regarding fiduciaries, estates, and trusts. The new rules provide multiple definitions, some of which are in the Uniform Trust Code. Additionally, the new rules provide filing requirements, detail when extensions are allowed, detail the additions and subtractions that are allowed in determining Montana adjusted total income, provide guidance on how to characterize distributions to beneficiaries, detail when penalties and interest are assessed, and cover a variety of other trust topics. The new rules address highly complex subject matter, and the Department proposes to place the new rules in a single chapter. The amendments strike outdated references to a repealed rule and move language to a new rule. The repeals delete material that is now contained in the new rules.

Note: Sections 15-30-2151 through 15-30-2153, MCA, set forward the taxation of income of estates and trusts. In general, the income of an estate or trust is taxed as if it were the income of an individual. *See* section 15-30-2153, MCA. However, if income is required to be distributed to

a beneficiary, then an estate or trust receives a deduction. *See* section 15-30-2152(3)(a), MCA. The rules provide much greater detail than the statutes.

Unclaimed Property. MAR 42-2-933. A public hearing was held on September 21, 2015, and the public comment period ends on October 5, 2015. The Department proposes to adopt two new rules, amend two rules, transfer three rules, and repeal one rule regarding unclaimed property. The new rules provide that certain unclaimed patronage refunds and unclaimed shares from rural electric or telephone cooperatives and nonutility cooperatives are not presumed abandoned in all situations (see section 35-18-316, MCA). The amendments move the definition of "holder", "finder", and "memorandum" from the amended and repealed rules. The transfers are located in the same chapter as the original rules.

Liquor -- Prices -- Vendor Product Representatives and Permits -- Samples -- Advertising -- Unlawful Acts -- Inventory Policy (Powdered/Crystalline Liquor Products) -- Product Availability -- Product Listing - Bailment -- State Liquor Warehouse Management -- House Bill Nos. 350 and 506 -- Senate Bill No. 193. MAR 42-2-934. A public hearing was held on September 21, 2015, and the public comment period ends on October 5, 2015. The Department proposes to amend 15 rules regarding liquor and liquor administration. One amendment changes the calculation of the posted price on liquor (other than fortified or sacramental wine) from 40 percent to 40.5 percent based on Senate Bill No. 193. A second amendment provides that a vendor of alcohol must be 21 years of age based on House Bill No. 350. A third amendment allows microsdistillers to deliver samples directly to agency liquor stores based on House Bill No. 506. A fourth amendment provides that the Department has the discretion to deny the sale of a liquor product in Montana that "is in powdered or crystalline form". The remainder of the amendments generally cover the topics of how the department manages liquor products.

Property Tax -- Property Valuation Periods -- Property Appraiser Certification Requirements -- Senate Bill No. 157. MAR 42-2-935. A public hearing will be held on October 15, 2015, at 9 a.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on October 28, 2015. The Department proposes to amend five rules and repeal one rule regarding the reappraisal plan. The amendments provide that the reappraisal cycle for class four property is two years, while allowing a supervising manager to reduce the one year of on-the-job training requirement (currently in existing rules for residential, agricultural, and commercial appraisers) for situations in which an appraiser gains experience in less than one year. According to the statements of reasonable necessity, the waiver of the one year requirement of on-the-job training will "streamline the process for appropriately experienced employees working through the certification process."

Property Tax -- Property Tax Assistance Programs -- Senate Bill No. 157. MAR 42-2-936. MAR 42-2-936. A public hearing will be held on October 15, 2015, at 10:30 a.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on October 28, 2015. The Department proposes to amend seven rules and repeal one rule regarding property tax assistance programs. The amendments and the repeal restructure the prior rules regarding the Property Tax Assistance Program (PTAP) and the Montana Disabled Veteran (MDV) program, as both of these programs were repealed and reenacted in a new part of the Montana Code Annotated by Senate Bill No. 157.

Notice of Adopted Rules

Liquor Administration -- Responsible Alcohol Sales and Service Act Server Training Programs. MAR 42-2-928. Adopted August 13, 2015. A public hearing was held, and no testimony or comments were received. The Department adopted four new rules, amended two rules, and repealed one rule as proposed regarding alcohol server training programs. The new rules provide definitions, state trainer qualification requirements, private training program requirements, curriculum requirements for all programs, and loss of approval status if the department revokes or suspends certification or program approval. The amendments establish the duties of the department, a state trainer, and a private trainer. The repeal eliminates a rule that restates portions of the Montana Code Annotated.

Urban Renewal and Tax Increment Financing -- Targeted Economic Development Districts. MAR 42-2-929. Adopted August 27, 2015. A public hearing was held, and multiple comments were received. The Department adopted one rule that provides definitions for the administration of targeted economic development districts. The rule was amended based on public comment received by allowing a nationally recognized business classification manual to be utilized (it was utilized in the old rule) and by clarifying that the rule does not prevent service-based industries from being in a district, so long as the primary purpose of the district "is the development of infrastructure to encourage the location and retention of value-added projects."

Housekeeping -- Outdated Reference to Form. MAR 42-2-932. Adoption date September 24, 2015. No public comments were received. The Department amended a rule by removing reference to a form that is no longer utilized. No further substantive changes occured.

Draft Rule Information

Implementation of Senate Bill No. 410 -- Tax Credits for Contributions to Student Scholarship Organizations. The Department is in the process of adopting rules for the purpose of implementing Senate Bill No. 410, which was sponsored by Senator Llew Jones. Senate Bill No. 410 created two new tax credits, one for contributing to a new educational improvement special

revenue account for distribution to school districts for new programs, and one for making donations to student scholarship organizations that give scholarships to students in private schools. The tax credits are not available until tax year 2016, and the effective date of the legislation is January 1, 2016 (the legislation also has a termination date of December 31, 2023).

Timing: Staff reviewed a September 3, 2015, **draft** rule (see Appendix A for full draft) that was sent to Senator Llew Jones, as the sponsor of the legislation. *At this stage the rule has yet to be proposed, and it could change without notice*, but a proposal is likely to be issued before this committee meets again in late November or early December. However, pursuant to section 2-4-309, MCA, a rule "may not become effective prior to the effective date of the statute", which in this case is January 1, 2016.

Overview: Section 14 (codified in section 15-30-3111, MCA) of Senate Bill No. 410 provides for a $150 nonrefundable tax credit for donations made to a student scholarship organization. Section 8 (codified in section 15-30-3102, MCA) defines a "student scholarship organization", and provides that it allocates revenue for scholarships to eligible students to enroll with "any qualified education provider". Section 8 defines a "qualified education provider" as follows:

> (7) "Qualified education provider" means an education provider that:
>
> (a) is not a public school;
>
> (b) (i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or
>
> (ii) is a nonaccredited provider or tutor and has informed the child's parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;
>
> (c) is not a home school as referred to in 20-5-102(2)(e);
>
> (d) administers a nationally recognized standardized assessment test or criterion-referenced test and:
>
> (i) makes the results available to the child's parents or legal guardian; and
>
> (ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;
>
> (e) satisfies the health and safety requirements prescribed by law for private schools in this state; and
>
> (f) qualifies for an exemption from compulsory enrollment under 20-5-102(2)(e) and 20-5-109.

The Department's draft rule further defines a "qualified education provider" in "NEW RULE I" as follows:

> NEW RULE I QUALIFIED EDUCATION PROVIDER: (1) A "qualified education provider," has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, may not be:
>
> (a) a church, school, academy, seminary, college, university, literary, or scientific institution or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination; or
>
> (b) an individual who is employed by a church, school, academy, seminary, college, university, literary, or scientific institution or any other sectarian institution owned, controlled in whole or in part by any church, religious sect, or denomination when providing those services.
>
> (2) For the purposes of (1) "controlled in whole or in part by a church, religious sect or denomination" includes accreditation by a faith based organization.
>
> AUTH: 15-1-201, 15-30-3114, MCA
>
> IMP: Montana Constitution, Art. V, Section 11, Montana Constitution, Art. X Section 6, 15-30-3101, MCA
>
> REASON: The department proposes adopting New Rule I based on the passage of Senate Bill 410, L. 2015, which generally revised laws related to tax credits for elementary and secondary education.
>
> As proposed, New Rule I will conform with the requirements of 15-30-3101, MCA, which requires the department to administer the tax credit for taxpayer donation in accordance with Art. V, Section 11(5) and Art. X, Section 6(1) of the Montana Constitution, which prohibits the direct or indirect appropriations or payment from any public fund to any sectarian or religious purpose.

Staff Comment: If the draft rule is proposed, there is a potential issue that it exceeds the scope of the statute by further defining the term "qualified education provider".

The draft rule proposal cites Art. V, Section 11(5), and Art. X, Section 6(1), of the Montana Constitution as authority, reasoning that it is impermissible to provide for a direct or indirect appropriation or payment from a public fund to any sectarian or religious purpose. (see Appendix B for full text of constitutional provisions). However, staff is unaware of a Montana District Court or Supreme Court case that: (1) labels a payment from an entity that is not under the control of the state (*i.e.*, a student scholarship organization) an appropriation of public funds, or

(2) declares money derived from donors that received a tax credit is an indirect appropriation from a public fund for a sectarian or religious purpose.

Additionally, staff is aware of a Montana District Court that analyzed whether a tax credit is an appropriation, and the court ultimately held that a tax credit is not an appropriation. *MEA-MFT v. McCulloch*, 2012 Mont. Dist. LEXIS 20 (2012) (Appendix C). The Montana Supreme Court did not rule on this issue since it was able to rule on another issue. *See MEA-MFT v. McCulloch*, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075 (Appendix D). As such, the Montana Supreme Court can still rule on this issue in another case.

Given the lack of a Montana Supreme Court case on this issue, staff is unable to affirmatively conclude that the draft rule is within the scope of the statute.

Department of Transportation

Proposal and Adoption Notices are available on the Internet:

Department of Transportation notices can be found on the Secretary of State's website at http://www.mtrules.org/. Under the Montana Administrative Register heading, type the number "18" in the "Search by Notice No." box and click on the "Go" icon.

Notice of Proposed Rules:

Motor Carrier Services Out-of-Service Criteria -- Usage of Newer Manual. MAR 18-156. A public hearing is not contemplated, and the public comment period ended September 10, 2015. The Department of Transportation proposed to amend one rule to change the date of a manual that the Department follows as part of the safety inspection program (*i.e.*, inspection of commercial vehicles and drivers). The Department of Transportation proposes to use the April 1, 2015, manual instead of the April 1, 2014, manual.

Notice of Adopted Rules

None.

Cl0425 5265jcna.

APPENDIX A

September 3, 2015 Letter from Department of Revenue to Senator Llew Jones
RE: Rules to Implement SB 410, L. 2015 - School Contribution Tax Credits

Montana Department of Revenue

Mike Kadas
Director

Steve Bullock
Governor

September 3, 2015

Senator Llew Jones
1102 4th Ave SW
Conrad, Montana 59425-1919

Subject: Rules to Implement SB 410, L. 2015 - School Contribution Tax Credits

Dear Senator Jones:

As indicated in my June 22, 2015, initial sponsor notification letter, I am providing you with a preview copy of the department's draft new rules to implement Senate Bill 410. Please let me know if you have any questions, concerns, or comments to offer on them.

The department anticipates filing a Notice of Public Hearing regarding the proposed new rules soon. The following is an estimated timeline of events:

9/14/15*	File the proposal notice with the Secretary of State
10/15/15	Public hearing date
10/29/15	Close of public comment period
11/16/15*	File the adoption notice with the Secretary of State
11/27/15	Effective date of the new rules

**If either notice is filed at a later date, this estimated timeline will shift accordingly.*

I will subsequently provide you with copies of the proposal and adoption notices as they are filed with the Secretary of State.

Sincerely,

Laurie Logan
Rule Reviewer
PO Box 7701
Helena, Montana 59604-7701
lalogan@mt.gov
406-444-7905

c. Lee Baerlocher, Administrator, Business and Income Taxes Division

NEW RULE I QUALIFIED EDUCATION PROVIDER: (1) A "qualified education provider," has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, may not be:

(a) a church, school, academy, seminary, college, university, literary, or scientific institution or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination; or

(b) an individual who is employed by a church, school, academy, seminary, college, university, literary, or scientific institution or any other sectarian institution owned, controlled in whole or in part by any church, religious sect, or denomination when providing those services.

(2) For the purposes of (1) "controlled in whole or in part by a church, religious sect or denomination" includes accreditation by a faith based organization.

AUTH: 15-1-201, 15-30-3114, MCA
IMP: Montana Constitution, Art. V, Section 11, Montana Constitution, Art. X Section 6, 15-30-3101, MCA

REASON: The department proposes adopting New Rule I based on the passage of Senate Bill 410, L. 2015, which generally revised laws related to tax credits for elementary and secondary education.

As proposed, New Rule I will conform with the requirements of 15-30-3101, MCA, which requires the department to administer the tax credit for taxpayer donation in accordance with Art. V, Section 11(5) and Art. X, Section 6(1) of the Montana Constitution, which prohibits the direct or indirect appropriations or payment from any public fund to any sectarian or religious purpose.

NEW RULE II STUDENT SCHOLARSHIP ORGANIZATION REQUIREMENTS

(1) A Student Scholarship Organization (SSO) may provide scholarships only to an eligible student who attends a Montana school or is taught by a qualified education provider in Montana.

(2) Pursuant to 15-30-3103, MCA, a minimum of 90 percent of all contributions received by a student scholarship organization, after the cost of the fiscal review in 15-30-3105, MCA, must be awarded as scholarships within the three calendar years following the year of the contributions. For example, if an SSO received $105,000 in contributions in 2017 and the cost of the fiscal review is $5,000, the SSO must award at least $90,000 of those contributions as scholarships before the end of 2020.

AUTH: 15-1-201, 15-30-3114, MCA
IMP: 15-30-3102, 15-30-3103, 15-30-3105, MCA

REASON: The department proposes adopting New Rule II based on the passage of Senate Bill 410, L. 2015, which generally revised laws related to tax credits for elementary and secondary education.

As proposed, New Rule II will clarify that the scholarships from which the credits originate can only be awarded to Montana students. Section (2) provides an example

for the deadline for when a student scholarship organization must award scholarships relative to its receipt of contributions.

NEW RULE III CREDIT LIMITATIONS AND CLAIMS (1) A taxpayer may claim a credit for contributions to an innovative educational program provided for in 20-9-901, MCA, and/or a Student Scholarship Organizations provided for in 15-30-3101, MCA.

(2) The maximum credit that may be claimed in a tax year by a taxpayer for allowable contributions to:

(a) innovative education programs is $150; and

(b) Student Scholarship Organizations is $150.

(3) In the case of a married couple that makes a joint contribution, unless specifically allocated by the taxpayers, the contribution will be split equally between each spouse. If each spouse makes a separate contribution, each may be allowed a credit up to the maximum amount.

(4) An allowable contribution from:

(a) an S corporation passes to its shareholders based on their ownership percentage; and

(b) a partnership or limited liability company taxed as a partnership passes to their partners and owners based on their share of profits and losses as reported for Montana income tax purposes.

AUTH: 15-1-201, 15-30-3114, MCA
IMP: 15-30-3101, 15-30-3111, MCA

REASON: The department proposes adopting New Rule III based on the passage of Senate Bill 410, L. 2015, which generally revised laws related to tax credits for elementary and secondary education.

As proposed, New Rule III outlines that the maximum credit amount applies to each taxpayer rather than each contribution. The proposed rule further provides that the tax credit is available to each partner, shareholder, or other owner of a pass-through entity based on allowable contributions made by the entity.

APPENDIX B

Article V, Section 11. Bills. (1) A law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose. No bill shall become law except by a vote of the majority of all members present and voting.

(2) Every vote of each member of the legislature on each substantive question in the legislature, in any committee, or in committee of the whole shall be recorded and made public. On final passage, the vote shall be taken by ayes and noes and the names entered on the journal.

(3) Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.

(4) A general appropriation bill shall contain only appropriations for the ordinary expenses of the legislative, executive, and judicial branches, for interest on the public debt, and for public schools. Every other appropriation shall be made by a separate bill, containing but one subject.

(5) No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.

(6) A law may be challenged on the ground of noncompliance with this section only within two years after its effective date.

Article X, Section 6. Aid prohibited to sectarian schools. (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

APPENDIX C

MEA-MFT v. McCulloch, 2012 Mont. Dist. LEXIS 20 (2012)

MEA-MFT, the Montana State AFL-CIO, the Montana Public Employees Association, the Montana Association of Area Agencies on Aging, and the American Federation of State, County and Municipal Employees, Montana Council 9, Plaintiffs, v. LINDA McCULLOCH, Secretary of State for the State of Montana, Defendant.

Cause No. BDV-2011-961

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

2012 Mont. Dist. LEXIS 20

March 14, 2012, Decided

SUBSEQUENT HISTORY: Subsequent appeal at, Decision reached on appeal by *MEA-MFT v. McCulloch, 2012 MT 211, 2012 Mont. LEXIS 289 (Aug. 10, 2012)*

JUDGES: [*1] JEFFREY M. SHERLOCK, District Court Judge.

OPINION BY: JEFFREY M. SHERLOCK

OPINION

ORDER ON MOTION TO DISMISS

Pending before the Court is Defendant's motion to dismiss. At issue is Senate Bill 426, which is now known as Legislative Referendum 123 (LR-123). This legislative referendum is a result of the 2011 Montana Legislature and is scheduled for a vote in the November 2012 general election. The proposed ballot language of LR-123 reads as follows:

> (1) LR-123 creates a contingent income tax credit for individual taxpayers. The credit is triggered if the unaudited ending state general fund balance exceeds 125% of the projected fund balance and this excess balance over 125% is at least $5 million. Each taxpayer's credit is determined by multiplying the amount they paid in property and income taxes the previous tax year by a percentage as set out in LR-123. The resulting amount is then deducted from the current year's income taxes. If the credit exceeds the tax liability of the claimant, the excess must be refunded to the claimant.

Concerning the payment of credits, subsection (2) of LR-123 would allow the taxpayer to claim a credit from the taxes owed for the current year. This money, thus, would never had been [*2] collected and never entered into the State's general fund. Subsection (5) of LR-123 requires a refund if the credit to which the taxpayer is entitled exceeds the taxpayer's tax liability for the year.

Plaintiffs assert in count I that LR-123 violates *Article III, section 5(1), of the Montana Constitution*. According to that section, an appropriation cannot be approved by referendum. The complaint further asserts in counts II, III and IV that LR-123 constitutes an illegal

delegation of power. According to the complaint, none of the amounts mentioned in LR-123, such as the unaudited general fund ending balance and the projected fund balance, are mathematically easily determined.

STANDARD OF REVIEW

In reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Montana Rules of Civil Procedure, courts must consider the complaint in the light most favorable to the plaintiff and accept the allegations in the complaint as true. *Goodman Realty, Inc. v. Monson, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994)*. A complaint should not be dismissed under Rule 12(b)(6) unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Wheeler v. Moe, 163 Mont. 154, 161, 515 P.2d 679, 683 (1973)*. [*3] In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim. *Id. at 161, 515 P.2d at 683*; see also *Buttrell v. McBride Land & Livestock Co., 170 Mont. 296, 298, 553 P.2d 407, 408 (1976)*. For these reasons, a trial court rarely grants a motion to dismiss for failure to state a claim upon which relief can be granted.

DISCUSSION

The Montana Supreme Court has looked with disfavor on pre-election attempts to invalidate ballot issues. *Nicholson v. Cooney, 265 Mont. 406, 416, 877 P.2d 486, 492 (1994)* (Nelson, J., dissenting). In general, the supreme court has held that a court should accept jurisdiction over pre-election initiative challenges only where the challenged initiative was not properly submitted under the election laws or where it was unconstitutional on its face. *State ex rel. Mont. Sch. Bds. Ass'n v. Waltermire, 224 Mont. 296, 299, 729 P.2d 1297, 1298 (1986)*. It is not the function of this Court to intervene in the initiative process prior to the people's vote absent extraordinary cause, and its discretionary jurisdiction should not be exercised unless it is absolutely essential. *Id. at 299, 729 P.2d 1299*.

As [*4] has been noted, the initiative and referendum provisions of the Montana Constitution should be broadly construed to maintain the maximum power in the people. *Nicholson, at 411, 877 P.2d at 488*. *Article II, section 1, of the Montana Constitution* provides: "**Popular sovereignty.** All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."

It is with the above guidelines in mind that the Court will examine the motion to dismiss.

Count I

As noted above, *Article III, section 5(1), of the Montana Constitution* prohibits the appropriation of money by a referendum. Thus, if LR-123 is an appropriation, then it must declared unconstitutional. This Court determines that no further amount of legal proceedings will further illuminate this question. The Montana Supreme Court has defined an appropriation as:

> [A]n authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against the state. It means the setting apart of a portion of the public funds for a public purpose, [*5] and there must be money in the fund applicable to the designated purpose to constitute an appropriation.

State ex rel. Bonner v. Dixon, 59 Mont. 58, 78, 195 P. 841, 845 (1921) (citations omitted); see also *Nicholson, at 415, 877 P.2d at 491*.

For a number of reasons, this Court concludes that LR-123 does not constitute an appropriation of money. First, the money, whether it is in the form of a tax credit or tax refund, is not set aside for a "public purpose." Further, it is not set aside for "specified objects or demands against the state." Rather, the money is a tax refund or credit that a taxpayer may or may not claim. In the case of the credit, it is money that was never in the general fund, and in the case of a refund, it would be money that the state is not entitled to keep.

While it may be easy to define what an appropriation is, it is proven more difficult over the years to see whether any particular actions is actually an appropriation. No Montana cases seem to be on point. However, a similar situation was addressed by the Supreme Judicial Court of Massachusetts in *Tax Equity Alliance for Mass., Inc., v. Comm'r of Rev., 401 Mass. 310, 516 N.E.2d 152 (1987)*. In that case, Massachusetts

had passed [*6] an initiative providing for tax credits and refunds under a formula not unlike the one in LR-123. Like Montana, Massachusetts had a constitutional provision prohibiting an initiative from making an appropriation of money. The Massachusetts court held that the tax credit/refund process enacted by the initiative did not make an appropriation of money stating:

> The granting of an income tax credit is not an appropriation according to any commonly understood sense of the word. An appropriation designates a sum of money to be devoted to some object. Even accepting that a "specific" appropriation under [the initiative] does not mean a definite dollar amount, we see nothing in the proposed measure that designated that any money in the treasury of the Commonwealth be devoted to any purpose.

Id. at 155 (citation omitted). In addressing the fact that the initiative dealt with refunds as well as credits, the court held:

> The fact that, in certain instances, 1987 income taxpayers will receive refunds reflecting the consequences of [the legislative action] makes no substantive difference. The return of funds to which a taxpayer is entitled does not involve the appropriation of funds although the amounts [*7] refunded are taken from the State treasury. The funds are there contingently . . . and it has never been suggested that an appropriation is necessary to refund income tax overpayments. . . .

Id. at 156.

In Montana, it has never been held that an income tax refund to which a taxpayer is entitled is an appropriation requiring an act of the legislature. *Section 15-30-2602(4), MCA*, provides for income tax refunds, and *Section 17-8-101(4), MCA*, provides that money paid into the state treasury under circumstances such that the state is not legally entitled to retain it, may be refunded upon submission of a verified claim.

Therefore, since the Court concludes that no appropriation is involved, count I of the complaint will be dismissed.

Counts II, III, and IV

A more murky question, however, is presented when analyzing the balance of the complaint. Count II suggests that LR-123 constitutes an improper delegation of legislative authority to the legislative fiscal analyst. Count III suggests that the delegation of authority to the Department of Administration leaves too much discretion to that administrative agency concerning determinations such as accrual adjustments. Finally, count IV suggests [*8] an improper delegation of discretion to the Department of Revenue by failing to properly define terms that the department is to use -- for example, are protested tax funds and local mills to be included in the department's calculations?

The Montana Supreme Court has held:

> The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid. . . . [T]he legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision in the performance of its function; and, if the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.

Bacus v. Lake County, 138 Mont. 69, 78-79, 354 P.2d 1056, 1061 (1960).

Here, [*9] using the rules applicable to a motion to dismiss, it is impossible for this Court to determine whether proper guidance has been given to the administrative agencies mentioned in counts II, III, and IV. Therefore, the motion to dismiss those counts is not

appropriate and will be denied.

ORDER

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Count I is DISMISSED, and Counts II, III, and IV are not.

The Court realizes that Plaintiffs filed a motion for summary judgment, and a hearing on that motion will be held at a later date.

DATED this day of March 2012.

JEFFREY M. SHERLOCK

District Court Judge

APPENDIX D

MEA-MFT v. McCulloch, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075

1 of 100 DOCUMENTS

MEA-MFT, the Montana State AFL-CIO, the Montana Public Employees Association, the Montana Association of Area Agencies on Aging, and the American Federation of State, County and Municipal Employees, Montana Council 9, Plaintiffs, Appellees and Cross-Appellants, v. LINDA McCULLOCH, Secretary of State for the State of Montana, Defendant and Appellant.

DA 12-0358

SUPREME COURT OF MONTANA

2012 MT 211*; *366 Mont. 266*; *2012 Mont. LEXIS 289

August 10, 2012, Submitted on Briefs
August 10, 2012, Decision Rendered
September 25, 2012, Opinion, Analysis and Rationale Issued

SUBSEQUENT HISTORY: Released for Publication October 11, 2012.

PRIOR HISTORY: [***1]

APPEAL FROM: District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. BDV-2011-961, Honorable Jeffrey M. Sherlock, Presiding Judge.
MEA-MFT v. McCulloch, 2012 Mont. Dist. LEXIS 20 (2012)

COUNSEL: For Appellant: Steve Bullock, Montana Attorney General; Andrew I. Huff, Assistant Attorney General, Helena, Montana.

For Appellees and Cross-Appellants: John M. Morrison, Frederick F. Sherwood; Morrison, Motl & Sherwood, Helena, Montana.

JUDGES: MIKE McGRATH. We concur: JAMES C. NELSON, MICHAEL E WHEAT, BRIAN MORRIS. Chief Justice Mike McGrath delivered the Opinion of the Court. Justice Jim Rice and Justice Patricia O. Cotter join in the dissenting Opinion of Justice Baker.

OPINION BY: Mike McGrath

OPINION

[**267] Chief Justice Mike McGrath delivered the Opinion of the Court.

[*P1] Secretary of State Linda McCulloch appeals from the District Court's Opinion and Order granting summary judgment to the plaintiffs and declaring Legislative Referendum 123 (LR-123) unconstitutional. On August 10, 2012 this Court entered a summary order affirming the District Court, with an opinion to follow in due course.

[*P2] McCulloch presents the following issues for review:

[*P3] Issue One: Whether the challenge to LR-123 is ripe and justiciable.

[*P4] [***2] Issue Two: Whether LR-123 is unconstitutional.

[*P5] The plaintiffs, collectively referred to as the MEA-MFT, cross-appeal from the District Court's order dismissing Count 1 of the complaint. MEA-MFT contend

in the cross-appeal that LR-123 was an unconstitutional appropriation.

PROCEDURAL AND FACTUAL BACKGROUND

[*P6] LR-123 was enacted by the Montana Legislature in 2011 as Senate Bill 426. It proposed a vote in the November 2012 general election on whether to provide a tax credit and potential tax refund, or outright State payment, to individuals in years in which there is a certain level of projected surplus revenue. LR-123 provides that if the [**268] unaudited ending State general fund balance exceeds 125% of the projected fund balance and this excess balance over 125% is at least $5 million, then a taxpayer could claim the tax credit as to taxes owed for the current year, and could receive a payment from the State if the credit exceeds tax liability and even if the individual had no tax liability.

[*P7] The dispute in this case arises from the calculations required to determine whether the credit-refund threshold is reached. While LR-123 assigns various duties to the Department of Administration, the primary [***3] dispute is over the role assigned to the Legislative Fiscal Analyst. The Legislative Fiscal Analyst (LFA) is an individual employed by the Legislative Finance Committee and serves at its pleasure, *§ 5-12-205, MCA*. The Finance Committee is a permanent joint committee of the Montana Legislature, *§ 5-12-201, MCA*. Section 1(7)(a) of LR-123 requires the LFA to calculate a projected general fund balance by August 1 for the end of the current fiscal year.[1] This calculation involves a projection to be determined by a consideration of anticipated revenues and transfers, the impacts of enacted legislation, anticipated supplemental appropriations and anticipated reversions. The LFA is directed to calculate the projected general fund balance by adding the unassigned fund balance from the most recent completed fiscal year to the anticipated revenues and transfers, less the level of appropriations and transfers, supplemental appropriations and anticipated reversions for the most recent completed fiscal year. The constitutional issue in this case turns upon whether LR-123 impermissibly delegates legislative power to an employee (the LFA) of one of the Legislature's committees (the LFC).

1 The State [***4] fiscal year runs from July 1 to the following June 30.

[*P8] MEA-MFT filed a complaint seeking declaratory and other relief, contending that LR-123 was unconstitutional because it proposed an appropriation and because it unlawfully delegated legislative powers. McCulloch moved to dismiss and MEA-MFT moved for summary judgment. The District Court granted the motion to dismiss as to one count of the complaint, holding that LR-123 did not provide for an appropriation. The District Court subsequently granted summary judgment to MEA-MFT, holding that LR-123 unconstitutionally delegated legislative power to the LFA.

[*P9] A critical component of LR-123 is the requirement that the LFA determine the amount of the budgeted general fund balance. An [**269] affidavit by the LFA presented in the District Court proceedings sets out in detail the numerous separate steps, some involving other sub-steps, required to make this calculation. The calculation requires the LFA to project and anticipate fund balances, revenues, transfers, appropriations and reversions to arrive at a conclusion. That conclusion determines whether funds are paid into the State coffers or are paid out.

STANDARD OF REVIEW

[*P10] This Court reviews a district [***5] court's decision on summary judgment de novo, using the same standards of M. R. Civ. P. 56. *Reichert v. State, 2012 MT 111, ¶ 18, 365 Mont. 92, 278 P.3d 455*. This Court reviews a district court's interpretation of statutory language de novo, as a question of law, *Reichert, ¶ 19*, and we review issues of justiciability de novo, as a question of law, *Reichert, ¶ 20*.

DISCUSSION

[*P11] Issue One: Whether the challenge to LR-123 is justiciable and ripe.

[*P12] McCulloch contends that the District Court erred by refusing to reject the action by MEA-MFT on the grounds that it was not ripe and therefore not justiciable. She contends that the issues raised in this action will not be ripe for decision unless and until the voters approve LR-123 in the November, 2012 election.

[*P13] 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.

Nicholson v. Cooney, 265 Mont. 406, 411, 877 P.2d 486, 488 (1994); *Cobb v. State, 278 Mont. 307, 310, 924 P.2d 268, 270 (1996)*; *Montana School Bds. Assoc. v. Waltermire, 224 Mont. 296, 299, 729 P.2d 1297, 1298-1299 (1986)*. [***6] However, some pre-election challenges are specifically allowed by statute. *Montanans Opposed to I-166 v. State, 2012 MT 168, 365 Mont. 520, 285 P.3d 435* (parts of the initiative process may be challenged under *§ 13-27-312, MCA)*.

[*P14] This Court does not consider the constitutionality of a provision unless it is directly raised in litigation and a determination is necessary to the disposition of the case. *Potter v. Furnish, 46 Mont. 391, 395, 128 P. 542, 543 (1912)*. And, when faced with a measure properly challenged as not properly submitted under the election laws, or as facially defective, this Court has often considered the substance [**270] of the challenge. *Sawyer Stores, Inc. v. Mitchell, 103 Mont. 148, 62 P.2d 342 (1936)* (vote on initiative enjoined because the form of the ballot was defective); *Burgan & Walker, Inc. v. State, 114 Mont. 459, 137 P. 663 (1943)* (vote on legislative referendum enjoined because the measure was unconstitutional); *Steen v. Murray, 144 Mont. 61, 394 P.2d 761 (1964)* (vote on initiative enjoined because the measure was substantively unconstitutional); *Montana Citizens for the Preservation of Citizens' Rights v. Waltermire, 224 Mont. 273, 729 P.2d 1283 (1986)* (vote on initiative [***7] allowed to proceed after substantive analysis of the proposal); *Nicholson v. Cooney, 265 Mont. 406, 877 P.2d 486 (1994)* (vote allowed on referendum after Court finds the measure to be constitutional); *Livingstone v. Murray, 137 Mont. 557, 354 P.2d 552 (1960)* (vote on legislative referendum enjoined because the measure was unconstitutional); *Harper v. Waltermire, 213 Mont. 425, 691 P.2d 826 (1984)* (election on constitutional initiative enjoined because the measure was unconstitutional); *Harper v. Greely, 234 Mont. 259, 763 P.2d 650 (1988)* (Court rejected a challenge to a legislative referendum that the form of the ballot was deficient, and allowed the election to proceed); *Cobb* (election on legislative referendum enjoined based upon substantive defect); *Reichert* (election on legislative referendum enjoined because it was unconstitutional); and *Montanans Opposed to I-166* (election allowed to proceed, form of ballot initiative not defective). In each of these cases the Court considered the substantive challenge to the measure under consideration, and did not decline to act on the ground that the issues were non-justiciable until after the election.

[*P15] In the present case the MEA-MFT challenged [***8] the facial validity of LR-123 and requested injunctive and declaratory relief. This Court recently discussed the law of justiciability in this same context in *Reichert, ¶¶ 53-60*, concluding that the pre-election challenge to a referendum in that case was ripe and justiciable.

[*P16] The requirement that courts decide only justiciable controversies derives from *Article VII, Section 4 of the Montana Constitution*, which confers original jurisdiction on district courts over "cases at law and in equity." Case law has established that this language is the functional equivalent of the requirement in Article III of the United States Constitution that courts exercise jurisdiction over a "case or controversy." *Plan Helena, Inc. v. Helena Regional Airport Auth., 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567*. A justiciable controversy in this context is one in which the parties have existing and genuine rights or interests; the questions are presented in an adversary [**271] context; and the controversy is one upon which the court's judgment will effectively and conclusively operate. *Plan Helena, ¶¶ 7-8*.

[*P17] A component of justiciability is ripeness--whether there is an actual, present controversy, and not merely [***9] a hypothetical or speculative issue. *Montana Power Co. v. PSC, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91*. Ripeness has both a constitutional dimension based upon the case or controversy requirement, and a "prudential" dimension that weighs the fitness of the issues for judicial decision and the hardship to the parties of withholding a decision. *Reichert, ¶ 56*.

[*P18] In the present case, as in *Reichert*, the issues are definite and concrete, not hypothetical and abstract. LR-123 would have a definite impact upon the State treasury and would require the LFA's predictions of surpluses and calculations of refunds and payments in August 2013. The parties have clearly articulated their positions on the issues and this Court has determined that LR-123 is constitutionally defective on its face. As in *Reichert*, allowing the defective referendum to proceed to election does nothing to protect voter rights. Placing a facially invalid measure on the ballot would be a waste of time and money for all involved, including State and local voting officials, the proponents and opponents of the measure, the voters, and the taxpayers who bear the

expense of the election.

[*P19] Therefore, it is clear that there is [***10] a present case or controversy as to LR-123 and there is no prudential reason for allowing the election on LR-123 to proceed prior to addressing the issues raised in this action.

[*P20] Issue Two: Whether LR-123 is unconstitutional.

[*P21] *Article III, section 1 of the Montana Constitution* divides the government into legislative, executive and judicial branches, and provides that "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." *Article V, section 1 of the Montana Constitution* provides that the "legislative power is vested in a legislature consisting of a senate and a house of representatives." *Article VI, section 4* provides that the "executive power is vested in the governor who shall see that the laws are faithfully executed."

[*P22] LR-123 delegates to the Legislative Fiscal Analyst, a staff person employed by a legislative committee, the power and duty to determine the projected general fund balance, which would involve two dozen separate steps or calculations, and requires discretionary projections of balances, revenues, transfers, [***11] appropriations and reversions. Based [**272] upon these calculations and projections, LR-123 empowers the LFA to determine whether money comes into the State treasury in taxes or is paid out in cash payments or refunds. The District Court held that these were functions of either the Legislature itself, or of an Executive branch official acting under responsibilities properly delegated by the Legislature. The District Court ruled that "LR-123 is unconstitutional as a violation of the separation of powers envisioned by the Montana Constitution and as an unlawful delegation of the power of the Legislature."

[*P23] This Court considered a similar issue in *Judge v. Legislative Finance Committee, 168 Mont. 470, 543 P.2d 1317 (1975)*. In that case the Legislature enacted a provision requiring the Legislative Finance Committee to approve budget amendments to allow executive branch agencies to spend money from the State treasury that was not otherwise appropriated by the Legislature itself. This Court recognized that "[t]he power to appropriate is a long established, well-recognized power of the legislature" and that the "public operating funds of state government [are] subject to the appropriation process." [***12] *Judge, 168 Mont. at 477, 543 P.2d at 1321*.

[*P24] Because of the public nature of the funds and the Legislature's role in the appropriation process, expenditure of funds to meet budget amendments could only be authorized by the entire Legislature while in session or through a duty properly delegated to an executive branch agency or officer. Since the Legislature had not appropriated the money itself and had not properly delegated that duty to an executive branch agency or officer, the budget amendment provision improperly delegated power to the Legislative Finance Committee. The "hybrid delegation" of authority to the Committee did not "pass constitutional muster." Action by the Legislative Finance Committee was not action by the Legislature, and neither was it action by the Executive branch. Therefore the provision was stricken as an unconstitutional delegation of legislative power.

[*P25] The same considerations govern our analysis of LR-123. Here the authority to determine when State funds should be paid out is not delegated to the Legislative Finance Committee, but to its individual agent, the Legislative Fiscal Analyst, who serves at the pleasure of the Committee, *§ 5-12-205(2), MCA*. This delegation [***13] is therefore yet another step removed from the Legislature itself. If action by the Legislative Finance Committee did not constitute the exercise of the legislative power in the *Judge* case then clearly neither does action by the Committee's staff, the Legislative Fiscal Analyst.

[**273] [*P26] The separation of governmental powers into equal branches is a fundamental precept of the American constitutional form of government. The drafters of the Montana Constitution, commenting on Article III, stated that "dividing the powers of government among three branches of state government is essential to any constitution." *Montana Constitutional Convention, Committee Reports*, February 19, 1972, p. 818. The separation of powers in the Montana Constitution is "designed to act as a check on an overly ambitious branch of government." *Montana Constitutional Convention, Committee Reports*, February 19, 1972, p. 818.

[*P27] The District Court's discussion regarding

separation of powers considered an act similar to LR-123 that was rejected by the United States Supreme Court. In *Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986)* the Court invalidated a law that required the Comptroller General to estimate federal revenues [***14] and expenditures and then specify the deductions in spending required to reach a balanced budget. The Comptroller General is an agent of Congress and the Court found that as such he could not exercise what the Court determined to be executive powers without running afoul of the constitutional requirement for a separation of the three branches of government.

> [W]e view these functions as plainly entailing execution of the law in constitutional terms. Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.

Bowsher, 478 U.S. at 732-733, 106 S. Ct. at 3191.

[*P28] Likewise, in Montana each branch of government is equal, coordinate and independent, in that powers belonging to one branch may not be exercised by another. *Powder River County v. State, 2002 MT 259, ¶ 112, 312 Mont. 198, 60 P.3d 357*. The District Court found [***15] that under LR-123, as in *Bowsher*, the LFA would be required to exercise "independent judgment and evaluation" with respect to the numerous estimates and projections. We agree with the District Court that such judgment and interpretation of the Act are functions plainly entailing execution of the law and are thus consistent with executive branch functions that are routinely required to implement legislative [**274] enactments. The Executive branch is ultimately the responsibility of the Governor. *State Pub. Empl. Assoc. v. Governor, 271 Mont. 450, 456-457, 898 P.2d 675, 679-680 (1995)*.

[*P29] In this case the Legislative Fiscal Analyst is clearly an employee or agent of the Legislature, serving "at the pleasure" of the Legislative Finance Committee. *Section 5-12-205(2), MCA*. Under the separation of powers established in *Article III, section 1 of the Montana Constitution*, the Legislative Fiscal Analyst may not "exercise any power properly belonging" to the Executive or Judicial branches of government. It is the exclusive power of the Legislature to enact the laws of this State, and the exclusive power of the Executive branch to implement and enforce those laws. Under *Article VI, section 4 of the Montana Constitution* [***16] it is the responsibility of the governor to see that the laws passed by the Legislature are properly executed.

[*P30] For the reasons stated above, we have affirmed the decision of the District Court. LR-123 on its face violates both *Article V, section 1 of the Montana Constitution* as an unlawful delegation of legislative power, and *Article III, section 1 of the Montana Constitution* as a violation of the separation of powers of the independent branches of government.

[*P31] Because we have affirmed the decision of the District Court, it is unnecessary to address the cross-appeal of the MEA-MFT.

[*P32] LR-123 is unconstitutional on its face and therefore may not appear on the ballot in November 2012.

/s/ MIKE McGRATH

We concur:

/s/ JAMES C. NELSON
/s/ MICHAEL E WHEAT
/s/ BRIAN MORRIS

DISSENT BY: Beth Baker

DISSENT

Justice Beth Baker, dissenting.

[*P33] I would conclude that the issues raised in the Plaintiffs' complaint are not ripe for resolution, and therefore would have reversed the District Court's June 5, 2012 Opinion and Order. I now dissent from this Court's ruling on Issue One of the appeal and would not reach Issue Two absent approval of LR-123 by a majority of voters casting ballots in the general election.

[*P34] As I discussed in my [***17] dissent in

Reichert, this Court generally determines the constitutionality of legislation "only if, and after, a duly-enacted law has been challenged." *Reichert, ¶ 93* (Baker, J., dissenting). While the Court acknowledges that we use caution in entertaining pre-election challenges to ballot measures (Opinion, ¶ 13), its decision today marks the second time in the last four months--only the third since passage of the 1972 Constitution--that the Court has pre-empted a measure referred by the Legislature from reaching the [**275] ballot.[1] Current statutes express "a clear preference" for deferring consideration of constitutional issues until and unless a ballot measure becomes law. *Montanans Opposed to I-166*, ¶ 14 (Baker, J., concurring) (citing *§ 3-2-202(5), MCA* (preserving "the right to challenge a ballot issue enacted by a vote of the people"), and *§ 13-27-316(6), MCA* ("This section does not limit the right to challenge a constitutional defect in the substance of an issue approved by a vote of the people.")). Deference is particularly warranted where a measure is referred by the Legislature, since it already has been through an extensive review process by legislative staff, public hearings, and [***18] deliberation by the legislative body. *See Harper v. Greely, 234 Mont. at 268, 763 P.2d at 656*. In my view, there is a strong case here for allowing the measure to go to the voters before addressing its alleged constitutional infirmities.

> 1 The first was *Cobb v. State, 278 Mont. at 309, 924 P.2d at 269*, where we kept a legislatively-proposed constitutional amendment off the ballot because its approval by voters "would leave a defect in the constitution which could not be remedied *except by another election*." (Emphasis added.)

[*P35] First, the Court's determination in *Reichert* to decide the constitutional issues prior to a vote on LR-119 turned on its conclusion that "the disenfranchisement will occur this election cycle" because the referendum would affect judicial offices that were on the very same ballot as the referendum. *Reichert, ¶ 58*. In contrast, LR-123 would not have taken effect until January 1, 2013, and affected no one's immediate interest. Even under the principles of *Reichert*, this case is not the extraordinary one in which pre-election review should be granted.

[*P36] In addition, as the Court observes, this case comes to us on the District Court's grant of summary judgment for the plaintiffs. [***19] Opinion, ¶ 8. The District Court denied their motion to dismiss on the separation of powers issue, concluding that the question was "more murky" and could not be determined on the face of the pleadings. Only after considering the detailed affidavits of the Director of the Department of Revenue and the Principal Fiscal Analyst for the Legislative Fiscal Division did the District Court determine that LR-123 constituted an unconstitutional delegation of legislative authority. Rather than a case of palpable facial invalidity,[2] determining LR-123's constitutionality impelled the District Court to consider evidence, including factual information such as potential forest fire expenditures [**276] and the Legislature's failure to adopt the LFA's revenue estimates in previous sessions.

> 2 *State ex rel. Steen v. Murray, 144 Mont. at 69, 394 P.2d at 765*.

[*P37] "[T]he constitutional requirement of a 'case or controversy'" obligates the courts to refrain from issuing advisory opinions. *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc., 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881*. That the parties "have clearly articulated their positions" says nothing about whether the issues are [***20] either hypothetical or concrete. Opinion, ¶ 18. The Court's acknowledgment that the LFA's calculations would not be required until August 2013 undermines its conclusion that the issues require a decision before the 2012 election. Opinion, ¶ 18. The measure would "have a definite impact upon the State treasury" only if the voters approve it. If that were to occur, there would be plenty of time for this Court to consider and decide the constitutional issues before any action would be required by the new law.

[*P38] It is ironic that the constitutional defect on which the Court's decision rests is the Legislature's violation of the principle of separation of powers. Opinion, ¶ 30. While the Court faults the Legislature for attempting to short-cut the constitutional process, it too is being unfaithful to that process by deciding the validity of a *proposed* law. I do not agree that voter rights are not at stake here. Much about the electoral process could be characterized as "a waste of time and money for all involved." Opinion, ¶ 18. Nonetheless, "[c]onvenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government . . . ." *Immig. & Naturalization Serv. v. Chadha, 462 U.S. 919, 944, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983)*. [***21] It is the

Court's unflagging obligation to protect the rights guaranteed by the Montana Constitution, including its provisions governing initiative and referendum. Efficiency should not outweigh the people's constitutionally prescribed right to vote on measures referred by the Legislature. *Reichert, ¶ 99* (Baker, J., dissenting). The courts then should perform their constitutional duty to hear and decide challenges to laws that are duly enacted, even those the people have directly approved. As the Supreme Court has observed, while governmental processes "often seem clumsy, inefficient, even unworkable . . . [,] [t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President." *Chadha, 462 U.S. at 959* (citation omitted).

[*P39] The same holds true for the third branch of government. This [**277] Court should not start down the path of routinely granting pre-election review of legislative referenda, particularly where litigation timelines are so limited and comprehensive consideration of constitutional questions may [***22] be short-changed. In my opinion, we are "overly ambitious" in reaching the merits of this dispute.

Justice Jim Rice and Justice Patricia O. Cotter join in the dissenting Opinion of Justice Baker.