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Montana Legislative Services Division

Legal Services Office

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April 1, 2005

Representative Gary Matthews
Speaker of the House of Representatives
1708 Main Street
Miles City, Montana 59301

Dear Representative Matthews:

I am writing in response to your request for a legal memorandum to accompany your request to Attorney General McGrath for an opinion with regard to the result of Judge Molloy's decision in Montana Public Interest Research Group v. Johnson, CV 03-183-M-DWM (2005), on the Montana initiative process.

As you are aware, Judge Molloy enjoined the state from taking any action to enforce the county distribution of signature requirements contained in Article III, section 4, and Article XIV, section 9, of the Montana Constitution and the same requirements contained in sections 13-27-204 and 13-27-207, MCA. In his ruling, Judge Molloy relied upon Idaho Coalition United for Bears v. Cenarrussa, 342 F.3d 1073 (9th Cir. 2003), in which the Ninth Circuit Court of Appeals held unconstitutional a county distribution requirement for the qualification of voter-initiated legislation. Cenarrussa refers to the decision of the Utah Supreme Court in Gallivan v. Walker, 54 P.3d 1069 (Utah 2002). In Gallivan, the Utah Supreme Court invalidated a statutory multi-county signature requirement for placing an initiative on the ballot. The Utah Supreme Court held that the Utah Legislature can impose restrictions, such as requiring a particular form of petition, setting reasonable timeframes to ensure the efficiency of the process, or requiring signers to be registered voters, which would have the effect of making it more difficult to get initiatives on the ballot, but only to the extent that those restrictions comport with Article VI, section 1, of the Utah Constitution, do not violate other constitutional provisions, and further legitimate legislative purposes such as deterring fraud, ensuring the efficiency of the process, or ensuring a modicum of numerical support for an initiative. All of these legislative purposes could support restrictions on the initiative right that could, conceivably, have the effect of making it more difficult to place an initiative on the ballot and could be consistent with the provision of Article VI, section 1, of the Utah Constitution, that requires the Legislature to enact legislation enabling the initiative right. The Legislature may not, however, impose discriminatory restrictions on the initiative right by making it "not so easy" to get initiatives on the ballot simply for the sake of making it harder to do so and restricting the initiative power. Utah's statutory multicounty signature requirement did not pass constitutional muster under a strict scrutiny analysis. The Utah Supreme Court severed the unconstitutional portion of the statute from the unconstitutional portion of the statute and allowed the remainder of the statute to remain in effect. The Utah Supreme Court held that the statute still furthered the intended and legitimate purpose of enabling the people's initiative right.

It appears that Judge Molloy's order has the same effect as the decision in Utah. Article V, section 1, of the Montana Constitution provides:

The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.

In light of this reservation of power by the people of Montana, every conceivable effort should be made to interpret Judge Molloy's ruling in a manner that preserves the reserved power of the initiative. Until such time as the people vote to reinstate some legally permissible distribution of signatures, Article III, section 4, of the Montana Constitution should be interpreted to require only the signatures of 5% of the total qualified electors of the state to qualify a statutory initiative for the ballot and Article XIV, section 9, of the Montana Constitution should be interpreted to require only the signatures of 10% of the total qualified electors of the state to qualify a constitutional initiative for the ballot. This interpretation comports with Judge Molloy's ruling, which enjoins the state from taking any action to enforce the county distribution of signature requirements and is supported by the holding in Gallivan.



Sincerely,

A handwritten signature in cursive script that reads "Gregory J. Petesch".

Gregory J. Petesch
Director of Legal Services