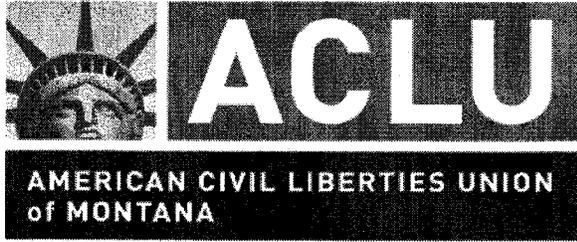


EXHIBIT #15  
DATE 2/18/2011  
HB 516



American Civil Liberties Union  
of Montana  
Power Block, Level 3  
PO Box 1317  
Helena, Montana 59624  
406.443.8590  
www.aclumontana.org

**RE: HB 516 – Limiting local ordinances to state protected classes**

Dear Chairman Peterson and members of the House Judiciary Committee:

The American Civil Liberties Union of Montana strongly opposes HB 516. This bill raises serious federal and state constitutional concerns by repealing a validly enacted local ordinance, broadly and severely limiting local governments' ability to respond to local needs in the future, and singling out a group of Montanans for different treatment than others in the state. This bill creates a prohibition on local authority where one did not previously exist, unfairly changing the rules after the fact, and violating the concept of "shared powers" that exists under our state constitution.

**HB 516 substantially undermines the balance of power shared between the state and local governments.** As a general rule, local government units with self-government powers, such as the charter city of Missoula, may generally exercise any power not expressly prohibited by state law. Article XI, Sec. 6, of the Montana State Constitution allows any local government unit with a self-governing charter to exercise any power not prohibited by the constitution, state law or the city's charter. This provision grants a presumption to the people that they can govern themselves at the local level, unless expressly prohibited from doing so. *See also* MCA 7-1-101. This "shared powers" concept requires the legislature to clearly, expressly and specifically state that certain powers are denied to the local government. Furthermore, even in an area that is subject to state regulation, **a local government may still provide broader protections than those imposed by state law.** MCA 7-1-113 (2).

As discussed more thoroughly in the attached analysis that we provided to Rep. Hansen prior to her introduction of this bill, under Montana law, "the assumption is that local government possesses the power, unless it has been specifically denied." *American Cancer Society v. State*, 2004 MT 376, ¶9. In *American Cancer Society*, the State Supreme Court upheld the local ordinances of four charter cities that limited or prohibited smoking in buildings open to the public. At issue was a state

law that generally exempted casinos from local smoking ordinances. The court determined that the state law, while containing an exemption, did not prospectively forbid local governments from regulating smoking in casinos altogether. The court explained that if the Legislature wants to prohibit a local government from exercising a particular power, then it must do so expressly. *Id.* at ¶10

**Montana is filled with examples of local governments responding to local desires by enacting ordinances that go beyond state law.** In addition to the smoking ordinances discussed above, cities across the state have enacted ordinances to create new crimes for refusing a DUI test and using a cellular phone while driving, among others. Yet, HB 516 does not target any of these other ordinances that create a statutory and enforcement scheme outside of what the state law has provided, indicating that uniformity is not the only purpose behind this bill. In fact, if uniformity was all that was desired, then the bill could simply require local governments to use the existing enforcement scheme (i.e., contract with the state human right bureau for investigation and refer cases to the district court), rather than strip local governments of their constitutional authority to enact regulations entirely.

Instead, HB 516 goes much further, and unconstitutionally interferes with local control by broadly prohibiting local actions, without furthering a legitimate state interest. First, the bill would retroactively prohibit any local ordinance, resolution, or policy that included a class of people not recognized in the MHRA. Such policies would include the internal hiring and employee benefit practices of cities across the state, and may include school anti-bullying policies<sup>1</sup> that include students who are not included in the MHRA.

Many of these employment policies were enacted in order to comply with the holding of *Snetsinger v. State*, 2004 MT 390, which held that the state must treat same-sex couples on the same basis as unmarried opposite sex couples for the purposes of employee benefits. HB 516 would now put local governments in the untenable position of having to decide between complying with the court or with this bill.

Furthermore, **this bill says that what is good for the state is not good enough for local governments.** The state already has an employment policy that recognizes protections beyond the MHRA. Administrative Rules of Montana 2.21.4005.<sup>2</sup>

---

<sup>1</sup> The term "local government" is not defined in the bill or the MHRA, so in addition to cities, towns and counties, the bill might also apply to school districts.

<sup>2</sup> 2.21.4005 EQUAL EMPLOYMENT OPPORTUNITY

The state's policy even notes that the enforcement mechanism varies for some of the protections afforded by it. If this variation is good enough for the state's policy, it should not be used as an argument to strike down a local government's policies.

Additionally, the bill's use of the term "protected classes" is unclear. That phrase is not used anywhere else in the Montana Code, much less defined in the MHRA. While the MHRA contains a list of characteristics that may not be used to discriminate, the Act also allows for certain benefits for other people, including veterans. It is unclear how this bill's prohibition on additional "protected classes" would impact local nondiscrimination provisions or hiring preferences for veterans and others.

The due process clause of the Montana constitution requires that a statute enacted under the state's police power must be reasonably related to a permissible legislative objective. *See, e.g., State v. Egdorf*, 2003 MT 264. Here, HB 516 arbitrarily takes away from individuals the right to participate and govern at the local level as encouraged in the "shared powers" concept of local government law.

**Furthermore, the bill possibly violates the equal protection provisions of the federal constitution.** In the case of *Romer v. Evans*, 517 U.S. 620 (1996), the United States Supreme Court struck down a constitutional amendment enacted in Colorado that similarly sought to restrict the ability of local governments to provide protections to members of the LGBT community. Colorado's Amendment 2 precluded all legislative, executive, judicial action at any level of state or local government designed to protect a person based on their sexual orientation.

The main constitutional infirmity of the amendment at issue in *Romer* was that it expressly targeted a specific group of individuals and imposed a "broad disability upon those individuals and no others" to seek legal protections against discrimination. The Court held that the amendment imposed a "broad and

---

(1) The state of Montana is an equal employment opportunity employer and prohibits discrimination based on race, color, national origin, age, physical or mental disability, marital status, religion, creed, sex, sexual orientation or political beliefs unless based on a bona fide occupational qualification (BFOQ). The state of Montana's prohibition of discrimination includes discrimination in hiring, firing, promotions, compensation, job assignments and other terms, conditions or privileges of employment.

(2) Any employee or applicant for employment with the state of Montana who believes he or she has been subjected to discrimination based upon any of these factors may contact the department EEO officer and also may contact the Montana human rights bureau and/or the federal equal employment opportunity commission (EEOC). Jurisdiction to address any one of the above types of discrimination complaints varies. For example, neither the EEOC nor the Montana human rights bureau considers discrimination complaints based on sexual orientation.

undifferentiated disability on a single named group” through invalid legislation and that the measure’s sheer breadth was so “discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but an animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”

The Court further stated that a “law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in its most literal sense.” “[G]overnment and each of its parts [must] remain open on impartial terms to all who seek assistance.”

HB 516 is similar to the amendment struck down in *Romer*, in that is a clear attempt to prohibit local protections for members of the LGBT community. The sponsor and the proponents focused almost exclusively on their desire to repeal Missoula Ordinance Number 3428, enacted in April 2010, which provides nondiscrimination protections on several bases, including sexual orientation. While the sponsor professes that this bill is merely an attempt to provide uniformity in the creation and enforcement of discrimination law, the history of the bill and the proponents’ testimony prove otherwise.

This bill arose only after the City of Missoula responded to a local need to address discrimination against LGBT community members – a need that the state has consistently refused to meet. As the committee heard during public testimony on this bill, many opponents to the Missoula ordinance frequently engage in personal attacks against LGBT individuals and adamantly oppose any attempt to include sexual orientation in discrimination protections. HB 516 is rooted in the same animus observed by the Court in *Romer*, and like Colorado’s Amendment 2, unconstitutionally singles out the LGBT community for unequal treatment by repealing Missoula’s ordinance.

We respectfully urge you to reject this attempt to eviscerate local control, strip LGBT Montanans of existing local protections, and deny local governments the ability to respond to local needs. Please vote “no” on HB 516.

Submitted by:  
Niki Zupanic  
Public Policy Director  
ACLU of Montana

## Niki Zupanic

---

**From:** niki zupanic [niki.zupanic@gmail.com]  
**Sent:** Friday, February 11, 2011 11:45 AM  
**To:** krishansen33@gmail.com  
**Cc:** Niki Zupanic  
**Subject:** LC 1865 creating state preemption

Dear Rep. Hansen,

Thank you for your time this morning and for the opportunity to share our preemption analysis with you. As I mentioned, before we drafted the Missoula ordinance, we researched the limits of a self governing charter city's local authority to prohibit discrimination based upon sexual orientation and gender identity in the areas of employment, housing, public accommodations, and education. Specifically, we looked into the concern that state law prohibits local governments from regulating in the areas of employment, rental housing, or public education, or that the Montana Human Rights Act (MHRA) would bar local governments from enacting non-discrimination provisions that are different from the MHRA's. Based upon our reading of case law and statute, we feel confident that the Missoula ordinance is not currently preempted by state law.

As a general rule, local government units with self-government powers, such as the charter city of Missoula, may generally exercise any power not expressly prohibited by state law. Article XI, Sec. 6, of the Montana State Constitution allows any local government unit with a self-governing charter to exercise any power not prohibited by the constitution, state law or the city's charter. *See also* MCA 7-1-101. Missoula is a local government unit with self-government powers, as it operates under a self-government city charter that was adopted pursuant to Article XI, Section 5, of the Montana State Constitution.

Under Montana law, "the assumption is that local government possesses the power, unless it has been specifically denied." *American Cancer Society v. State*, 2004 MT 376, ¶9. In *American Cancer Society*, the State Supreme Court upheld the local ordinances of four charter cities that limited or prohibited smoking in buildings open to the public. At issue was a state law that generally exempted casinos from local smoking ordinances. The court determined that the state law, while containing an exemption, did not prospectively forbid local governments from regulating smoking in casinos altogether. The court explained that if the Legislature wants to prohibit a local government from exercising a particular power, then it must do so expressly. *Id.* at ¶10

The court in *American Cancer Society* goes on to give two examples of the type of express prohibition upon local government power that is required (and that it found lacking in that case): (1) express prohibitory language contained in a state statute, such as MCA 7-1-111, or (2) a direct inconsistency between a state statute and a local ordinance. *Id.* at ¶14. Regarding the first type of preemption ("express prohibitory language"), the court notes that the Legislature has delineated fourteen powers that self-governing cities may not exercise (per MCA 7-1-111), and another five that a city may exercise only if the state law specifically delegates that power to the city (per MCA 7-1-112). *Id.* at ¶16. It is important to note, however, that local ordinances that incidentally touch upon a forbidden subject do not necessarily constitute impermissible direct regulation of the forbidden subject. For example, as the *American Cancer Society* court explains, local ordinances limiting indoor smoking may incidentally impact casinos, but that does not mean that the local ordinances impermissibly regulate casinos themselves. *Id.* at ¶17.

The second type of preemption (a "direct inconsistency") exists when a local ordinance adopts lower or less stringent standards in an area that is "affirmatively subjected" to state law or regulation. MCA 7-1-113. As an example of a direct inconsistency, the court cited to a case holding that a city may not ignore a state statute that requires the city to present charges against a suspended firefighter to the entire city council for a hearing. *Id.*, citing *Billings Firefighters Local 521 v. City of Billings*, 1999 MT 6. In this second type of preemption, the state statute sets a floor, and a local authority may not adopt an ordinance that sets a lower standard than what is required by state law.

Applying these preemption rules to the Missoula ordinance, we find no express prohibitory language (and, in fact, the ordinance was drafted to avoid express prohibitions in current law) that would bar the ordinance's provisions, and we find

no direct inconsistency, since the ordinance does not relax or lower the non-discrimination provisions found in the MHRA.

Regarding express prohibitory language, there is currently no express prohibitory language contained in the MHRA (as you know, your LC 1865 would place such an express prohibition in the MHRA). As far as the exclusive remedy and exhaustion requirements of the MHRA, they only apply to violations of the MHRA or a private right of action to enforce the equal protection provisions of our state constitution. The local ordinance is creating a separate scheme, with its own violations, enforcement mechanism, and remedy, thereby not implicating the MHRA or state constitution. Similar to the state law at issue in *American Cancer Society*, the exhaustion requirement of the MHRA does not strip a local government of its power to regulate and prohibit discriminatory acts within its jurisdiction.

Additionally, the ordinance was drafted to avoid conflict with the express prohibitions found in MCA 7-1-111. For example, the prohibition in MCA 7-1-111 (2) that denies local governments from exercising a power that affects Title 39, would not extend to employment discrimination, including hiring and firing decisions, which is not expressly covered by Title 39. Title 39 limits itself to only certain aspects of the employment relationship and specifically defers to the MHRA to address acts of discrimination in the hiring and firing of employees. Therefore, a local government that regulates such discriminatory acts (as Missoula does in its ordinance) is not violating MCA 7-1-111 (2).

The Missoula ordinance also does not violate MCA 7-1-111 (13), which restricts the ability of local governments to regulate the activities of landlords. This subparagraph provides that a local government may require landlords to comply with ordinances or provisions that are applicable to all other businesses or residences in the city. In other words, while a city may not single out landlords and subject them to special regulations, a landlord must still comply with other city ordinances that generally apply to businesses and residences. Accordingly, the Missoula ordinance was drafted to regulate housing and/or real estate transactions broadly, and does not single out rental housing, by prohibiting discrimination in any real estate transaction, including sales, leases, rentals, and other transfers of both residential and commercial property.

I hope that this brief analysis is helpful to you as you decide whether or not to introduce LC 1865. Far from simply clarifying existing law regarding preemption in this arena, your bill would create an affirmative prohibition where one does not exist.

We feel strongly that the Missoula has taken a positive step in protecting its residents from unfair discrimination, and that the ability of cities and towns to enact such protections should be preserved.

Thank you for your consideration of this information. If you have any questions or concerns, please do not hesitate to contact me. I can be reached at this email address, at [nikiz@aclumontana.org](mailto:nikiz@aclumontana.org), or by cell phone at 406.461.5178. Please call or email at any time.

Best,  
Niki

**Niki Zupanic, Public Policy Director**

**American Civil Liberties Union (ACLU) of Montana**

PO Box 1317

Helena MT 59624

office: 406.443.8590

cell: 406.461.5178

fax: 406.457.5484