

**MEMORANDUM**

To: The Office of the Montana Secretary of State
From: The Office of the Montana Attorney General
Date: December 22, 2021
Re: Legal sufficiency review of Proposed Ballot Measure No. 9

Legal Sufficiency

The Attorney General determines that Proposed Ballot Measure No.9 is legally sufficient.

Montana law grants the Attorney General authority to conduct substantive legal review of proposed ballot measures to determine their legal sufficiency. *See* Mont. Code Ann. § 13-27-312(8) (“[L]egal sufficiency’ means that the petition complies with statutory and constitutional requirements governing submission of the proposed issue to the electors, the substantive legality of the proposed issue if approved by the voters, and whether the proposed issue constitutes an appropriation.”).

“[I]ntervention in referenda or initiatives prior to an election is not encouraged.” *Cobb v. State*, 924 P.2d 268, 269 (Mont. 1996). To protect the rights of initiative and referenda enshrined in the constitution pre-election review should not be routinely conducted. *See Reichert v. State*, 2012 MT 111, ¶ 59. Measures that are “unquestionably and palpably unconstitutional on [their] face,” however, may be withheld as allowing them to go forward does not protect the right of initiative and referenda, and instead is “a waste of time and money for all involved.” *Id.*

Ballot Measure No. 9 proposes an amendment to article VIII, section 3 of the Montana Constitution. The proposed amendment limits changes in assessed values for residential property for tax purposes. *See* Proposed Article VIII, Section 3(2)–(5). Generally speaking, the effect of the proposed amendment limits changes in assessed value to the lesser of two percent or the percent change in the consumer price index.

Interested parties raised potential equal protection issues created by Ballot Measure No. 9. *See* views of Montana Association of REALTORS at 4 citing *Roosevelt v. Montana Dep’t of Revenue*, 1999 MT 30, 293 Mont. 240, 975 P.2d 295. *Roosevelt* concerned the 2% phase-in of the changes in valuation under MCA, § 15-7-111(1)

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(1997). The 2% phase-in limited the reduction in Roosevelt's property's assessed value to \$3,235 even though the appraised value declined by \$161,757. *Roosevelt*, ¶ 5. The Montana Supreme Court recognized a state interest in "avoiding further property tax increases." *Id.*, ¶ 38. But, because the statute:

Create[ed] a class of property owners whose taxes are assessed on a basis greater than the market values of their property while other property owners are assessed based on the actual, or less than the actual market values of their property, ... the property owners in the first class [] pay a disproportionate share of this state's property taxes, in violation of the Equal Protection Clause found at Article II, Section 4, of the Montana Constitution.

Id. Ballot Measure No. 9 shares similarities with the old phase-in provision in that both measures limit annual downward changes in assessed values to 2% of the change in value.

But, Ballot Measure No. 9 differs from the statutory scheme in *Roosevelt* in that it amends the Montana Constitution. The Montana Supreme Court invalidated MCA, § 15-7-111(1) on purely state constitutional grounds. *See Roosevelt*, ¶¶ 38, 51. If passed, Ballot Measure No. 9's amendment must be harmonized with other constitutional provisions. *See Board of Regents v. Judge*, 168 Mont. 433, 444, 543 P.2d 1323 (1975) (Harmonizing the "power of the legislature to appropriate" and the "power of the Regents to supervise, coordinate, manage and control the university system."). In other words, a constitutional amendment cannot be facially unconstitutional because of the duty to harmonize. Because Ballot Measure No. 9 is a constitutional amendment, it differs from the prior phase-in scheme in such a way that Ballot Measure No. 9 is not unquestionably and palpably unconstitutional.

The overriding presumption must be that Montanans enjoy the ability to amend their constitution. *See Mont. Const. art. II, § 2* ("The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary."). Ballot Measure No. 9 is legally sufficient.¹

¹ No interested parties raised procedural concerns affecting Ballot Measure No. 9's legal sufficiency. Further, no interested parties raised concerns under the "separate-vote" requirement for constitutional amendments. *See generally Mont. Assoc. of Counties v. State*, 2017 MT 267, 389 Mont. 183, 404 P.3d 733. The Attorney General, likewise, does not find any facial defects under either theory that render the proposed measure legally insufficient.

Significant Material Harm Statement

The Attorney General lacks authority to make a determination of significant material harm regarding Ballot Measure No. 9.

“When interpreting statutes, our role is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” *Comm'r of Political Practices for Mont. v. Mont. Republican Party*, 2021 MT 99, ¶ 7, 404 Mont. 80, 485 P.3d 741. The Attorney General shall “review the proposed ballot issue as to whether the proposed issue could cause a regulatory taking under Montana law or otherwise will likely cause significant material harm to one or more business interests in Montana if approved by the voters.” MCA, § 13-27-312(9)(a). “If the attorney general determines the proposed ballot issue will likely cause significant material harm to one or more business interests in Montana, the attorney general shall notify the secretary of state, which must include the finding set forth in 13-27-204(2) on the final form of the petition.” MCA, § 13-27-312(9)(b). MCA, § 13-27-204 governs the form of petitions for statutory initiatives. MCA, § 13-27-207 governs the form of petitions for constitutional initiatives.

Multiple interested parties asked the Attorney General to exercise this authority by finding Ballot Measure No. 9 causes significant material harm to one or more business interests. *See generally* views submitted by Montana Farm Bureau Federation, Montana Infrastructure Coalition, Montana Budget and Policy Center, Montana Association of REALTORS, Montana Federation of Public Employees, and Montana Chamber of Commerce. Ballot Measure No. 9 presents the first time interested parties requested such a finding.

The Attorney General cannot make such a finding because the plain language of the statute applies this provision only to statutory initiatives not constitutional initiatives. *See* MCA, § 13-27-312(9)(b) (The finding applies only to petitions under § 13-27-204, not -207). Ballot Measure No. 9 is a constitutional initiative. The Attorney General takes no position on the harm alleged by interested parties regarding Ballot Measure No. 9. Instead, the Attorney General simply recognizes the Legislature delegated limited authority to the Attorney General and that delegated authority does not include the power to make a ‘significant material harm’ determination for constitutional initiatives.

Changes to Ballot Statements

The Attorney General forwarded a proposed statement of purpose and implication that left intact the initiative sponsor’s proposed statement.

Based on the views of interested parties, the Attorney General amends the Statement of Purpose and Implication to read as follows:

[Initiative number] limits annual increases and decreases in valuations of residential property to either 2% or the inflation rate (whichever is lower) when assessing property taxes if the property is not newly constructed, significantly improved, or had a change of ownership since January 1, 2019. [Initiative number] establishes 2019 state valuations as the base year for the valuations of residential property and permits annual state reassessment. It requires the Legislature to limit total ad valorem property taxes on residential property to 1% or less of the assessed valuation. It requires the Legislature to define "residential property" and provide for the application and implementation of the initiative and permits the state to assess other real property based on acquisition value.

The final statement continues to lead with the main purpose of the initiative, which is to limit changes in assessed valuation of residential property taxes. *See* views of Montana Federation of Public Employees at 1 for a contrary position. The final statement amends the proposed statement by making clear that 'change in' value under the text of the proposed measure includes both increases and decreases to assessed value. *See* views of Montana Association of REALTORS at 1. The final statement also adopts clarifying language proposed by views of interested parties. *See id.* at 2.

The Attorney General forwarded a proposed statement of fiscal impact to interested parties. Based on feedback from those parties, the statement now reads as follows:

[Initiative number] reduces state property tax revenue by \$24 million in 2025, \$34 million in 2026, and \$29 million in 2027 by capping allowable increases in residential property valuations. [Initiative number] will also have an undetermined impact on local government and school district tax revenue, subject to legislative action.

The amended statement incorporates views submitted regarding proper terminology. *See* views of Montana Budget and Policy Center at 1–2. The Attorney General declines to insert proposed statements such as the measure will have an "unquantifiable, substantial, negative impact" on school districts and local government. *See* views of Montana Federation of Public Employees at 1–2. Ballot statements "may not be arguments or written so as to create prejudice for or against the issue." MCA, § 13-27-312(4). Modifiers such as 'negative' create prejudice by inserting argumentative language against the proposed measure. Current language reflects the uncertain effect of Ballot Measure No. 9 on local taxing jurisdictions.

The Attorney General's reliance on an 'undetermined' local impact reflects the high degree of uncertainty expressed in the fiscal note. *See* Fiscal Note Assumption #17; Effect on County or Other Local Government Revenues or Expenditures #1 ("The interaction of the reduction to the tax base (which increases mills) and the cap on mills proposed in this initiative makes the calculation [of] the true impact on local jurisdictions and taxpayers unknown.").

CONCLUSION

Proposed Ballot Measure No. 9 is legally sufficient. Further, for the reasons stated, the Attorney General cannot enter a statement of 'significant material harm' to one or more business interests.