MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA FEDERATION OF PUBLIC EMPLOYEES; MONTANA FARMER'S UNION; DENNIS McDONALD; RON OSTBERG; JEFF BARBER; BARBER REALTY, LLC; and MONTANA CATTLEMEN'S ASSOCIATION, Plaintiffs, v. THE STATE OF MONTANA, by and through the MONTANA SECRETARY OF STATE and MONTANA ATTORNEY GENERAL; TROY DOWNING; and MATTHEW MONFORTON, Defendants.	Cause No.: DDV-2022-29 **OPINION AND ORDER**

This case concerns the meaning of a recently enacted law, House Bill 651 (HB 651). HB 651 modifies the process for qualifying proposed ballot measures for the ballot by, among other things, providing that before the proposed measure is cleared for signature gathering, the Attorney General must review whether a proposed measure "will likely cause significant material harm to. . . business interest in Montana" and a legislative interim committee must take a non-binding vote on whether to support the measure's placement on the ballot. The question before the Court is whether HB 651 applies to proposed initiatives to amend the Montana Constitution.

This issue comes before the Court on cross motions for summary judgment. Plaintiffs Montana Federation of Public Employees (MFPE), Montana Farmer's Union, Dennis McDonald, Ron Ostberg, Jeff Barber, Barber Realty, LLC, and the Montana Cattlemen's Association, all represented by Robert Farris-Olsen, John M. Morrison, and Jonathan Motl, seek to enjoin the State and the proponents of Constitutional Initiative No. 121 (CI-121) from gathering or accepting signatures to place CI-121 on the ballot. They contend that because the Attorney General did not render an opinion on significant material harm and the Revenue Interim Committee did not vote on the measure until well after the Secretary of State approved the petition for signature gathering, the signature-gathering efforts that have taken place are void. They also ask the Court to hold Defendant Matthew G. Monforton in contempt of court for violating the Court's temporary restraining order (TRO) and to invalidate any signatures gathered while the TRO was in effect.

Defendant the State of Montana, represented by David M.S. Dewhirst, Derek Oestreicher, Timothy J. Longfield, and Emily Jones, and

Monforton, representing himself, seek summary judgment in their favor, arguing that the significant material harm review and interim committee review provisions of HB 651 were intended only to apply to initiatives to enact or amend statutes. Defendant Troy Downing was served, but he has neither appeared nor answered the complaint.

These motions are fully briefed and ready for decision. For the reasons that follow, the Court holds that the significant material harm and interim committee review provisions of HB 651 apply only to initiatives to amend or enact statutory law. The Court also holds that it lacks authority to hold Monforton in contempt at this juncture. Accordingly, Defendants' motions for summary judgment will be granted, and all other motions will be denied.

BACKGROUND

This case involves the application of House Bill 651 (HB 651), 2021 Mont. Laws 554, to proposed Constitutional Initiative 121 (CI-121), formerly designated Ballot Measure 9. A detailed discussion of each is therefore instructive.

1. House Bill 651

House Bill 651, entitled "An act generally revising ballot initiatives," and principally sponsored by Representative Marta Bertoglio (House District 75), was enacted into law on May 14, 2021. Among other things, it modifies the procedure for qualifying ballot measures for the ballot in several respects relevant to this case.

First, HB 651 modifies the scope of the Attorney General's review of a ballot issue. When the proponents of a ballot issue submit the final text of the proposed issue and proposed ballot statements to the Secretary of State, the

Secretary refers a copy of the text and ballot statements to the Attorney General for a legal sufficiency review. Mont. Code Ann. § 13-27-202(4). Previously, the Attorney General's review was confined to a review of the ballot statements, the preparation of a fiscal statement if appropriate, and a review for legal sufficiency, which expressly excluded "consideration of the substantive legality of the issue if approved by voters." Mont. Code Ann. § 13-27-312(7) (2019).

HB 651 expands the scope of the Attorney General's review of proposed ballot measures in several respects. Under HB 651, the Attorney General now has authority to review the measure for "substantive legality." Mont. Code Ann. § 13-27-312(8) (2021). An opinion that the measure is not legally sufficient prevents the Secretary from approving the measure for signature gathering unless the legal sufficiency opinion is challenged and reversed by the Montana Supreme Court. *Id.* §§ 13-27-312(10)(c), 13-27-316. Additionally, the Attorney General must review the proposed measure for whether the "proposed issue could cause a regulatory taking under Montana law or otherwise will likely cause a significant material harm to one or more business interests in Montana if approved by the voters. *Id.* § 13-27-312(9)(a). At least for some ballot issues—and this is one of the matters in dispute—the Attorney General's significant material harm finding is to be placed on the petition for signature gathering. *Id.* § 13-27-312(9)(b).

The second relevant change made by HB 651 is its inclusion of a role for legislative interim committees. Previously, once the Attorney General had approved ballot statements and offered an opinion that a measure was legally sufficient, the Secretary of State would provide the proponents a sample petition

/////

form, which authorizes the proponents to begin gathering signatures. Mont. Code Ann. § 13-27-202(5)(b) (2019).

Under HB 651, upon completion of the Attorney General's review and approval, the Secretary of State is to provide the text and ballot statements to the executive director of the Legislative Services Division (LSD), who then refers the matter to the legislative interim committee with jurisdiction over the matter. Mont. Code Ann. § 13-27-202(5)(b) (2021). The interim committee is to hold a public hearing, to vote on whether it supports or opposes placement of the proposed initiative on the ballot, and to report the vote to the Secretary within 14 days of its receipt of the text and ballot statements. *Id.* § 13-27-202(5)(c). Once the interim committee review is completed, the Secretary of State may submit the sample petition form and allow the gathering of signatures. *Id.* § 13-27-202(5)(e). The petition for statutory initiatives must report the outcome of the vote with the following language:

> Voters are advised that either an interim committee or an administrative committee of the legislature in accordance with 5-5-215 or 5-11-105 reviewed the contents of this initiative and [did] or [did not] support the placement of the proposed text of this initiative on the ballot. The outcome of the vote was [x] in favor of placing the measure on the ballot and [x] against placing the measure on the ballot.

Mont. Code Ann. § 13-27-204(1)(d).

Finally, in what is the primary source of controversy over the meaning of HB 651, the bill expressly modifies the form of the petition for statutory initiatives, but not the form of the petition for constitutional initiatives. Once the Secretary has provided the proponents of a measure with the sample petition form, the petition that is circulated must conform in substance to that

sample form. *Id.* §§ 13-27-201(1), -202(5)(e). The form of the petition is dictated in large part by statute.

Under HB 651, the statutory petition form for statutory initiatives is amended to require the petition contain a statement of the interim committee's vote and, in the event that the Attorney General made a significant material harm finding, the petition contains the following text:

> **WARNING**
>
> The Attorney General of Montana has determined the proposed ballot issue will likely cause significant material harm to one or more business interests in Montana.

Id. § 13-27-204(2)(b). Significantly, HB 651 does not amend the statute governing the petition form for constitutional initiatives, *id.* § 13-27-207 (or the petition forms for referenda and constitutional convention calls, *id.* §§ 13-27-205, -206) to require the inclusion of similar language.

2. Constitutional Initiative 121

CI-121 is a proposed initiative to amend the Montana Constitution to impose certain limitations on the valuation, assessment, and taxation of residential property. Defendants Matthew Monforton and Troy Downing submitted the proposed initiative to the Secretary of State on August 31, 2021. After several revisions, the Secretary referred CI-121 to the Attorney General for review on November 22, 2021. During his review, the Attorney General received input from, among others, Plaintiff Montana Federation of Public Employees (MFPE), the Montana Chamber of Commerce, Montana Budget and Policy Center, the Montana Farm Bureau Federation, the Montana Infrastructure Coalition, and the Montana Association of Realtors, all of whom suggested that

the Attorney General undertake the significant material harm and takings analysis called for in Mont. Code Ann. § 13-27-312(9)(a).

The Attorney General concluded his legal sufficiency review on December 22, 2021. The Attorney General conducted a substantive legal analysis of the measure and found it legally sufficient, rejecting several constitutional objections lodged by commenters. The Attorney General, however, declined to make a determination of significant material harm, concluding that HB 651's imposition of this requirement applied solely to statutory initiatives.

The Secretary of State received the Attorney General's review that same day, but she did not immediately provide it to the LSD executive director, Susan Fox. Instead, on January 7, 2022, the Secretary approved the sample petition form for signature gathering.

This action was filed January 12, 2022. On January 24, 2022, the Secretary's office emailed Fox and attached a copy of the final text and ballot statements for CI-121. The Secretary made clear that by doing so it did not concede that HB 651 applies to constitutional initiatives. Four days earlier, on January 20, 2021, the legislature's Revenue Interim Committee had conducted a hearing on CI-121. The following day, on January 21, 2022, the committee briefly discussed CI-121 but, it did not hold a vote. It was not until months later, on April 19, 2022—long after the 14-day voting window envisioned by HB 651—that the Revenue Interim Committee unanimously voted to oppose placement of CI-121 on the ballot.[1]

/////

[1] A video recording of the vote can be found at approximately 11:50 a.m. at https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20220419/-1/43888#agenda. The Court takes judicial notice of the Revenue Interim Committee's proceedings and its vote.

3. Signature Gathering

The proponents began gathering signatures almost as soon as they were cleared to do so on January 7, 2022. On January 13, 2022, however, this Court issued a temporary restraining order (TRO) that enjoined "Respondents and their officers, agents, employees and attorneys" from "gathering and/or accepting signatures in support of placing CI-121 on any 2022 ballot." Following a January 24, 2022, hearing, the Court on January 25, 2022, entered an order denying a preliminary injunction and dissolving the TRO.

Plaintiffs allege that Defendants Monforton and Downing violated the TRO by gathering signatures during this time period. According to Plaintiffs, Cap Montana Property Taxes, a political committee organized to support CI-121 and in which Monforton is an "additional officer," kept their CI-121 campaign website, cappropertytaxes.com, up during this time. The website included a direct link, labeled "SIGN INITIATIVE TODAY" that directed visitors to a page where they can receive a printable copy of the petition and signature materials. During his January 21, 2022, testimony to the Revenue Interim Committee, Monforton stated that "hundreds of Montanans in just the last few weeks have downloaded petitions, copies of the petition form from our website" and that once the petitions are downloaded, those individuals are "hitting the doors, they're hitting the streets, to gather signatures." They also produced evidence of at least one individual gathering signatures in Helena while the TRO was in effect.

Monforton acknowledges his involvement in Cap Montana Property Taxes, but he points to the January 14, 2022, post he put on the website stating that the Court had "issued an order halting the gathering and collecting of signatures for CI-121." He also asked visitors to "Please continue registering

with our website and downloading petitions. We'll let you know when we are allowed to resume gathering and collecting them." The same information was posted on the committee's Facebook page the next day. Monforton also directed the webmaster on January 14 to send an email "blast" to the residents who had registered with the committee's website.

APPLICABLE LEGAL STANDARD

Summary judgment should be granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). Constitutional questions "should be avoided whenever possible." *Alexander v. Bozeman Motors, Inc.*, 2012 MT 301, ¶ 27, 367 Mont. 401, 291 P.3d 1120.

A motion to dismiss for failure to state a claim for which relief may be granted brought pursuant to Mont. R. Civ. P. 12(b)(6) may not be granted "unless, taking all well-pleaded allegations of fact as true, it appears beyond doubt that the plaintiff can prove no set of facts in support of their claim which would entitle them to relief." *Buckles v. Cont'l Res., Inc.*, 2017 MT 235, ¶ 9, 388 Mont. 517, 402 P.3d 1213.

DISCUSSION

The primary issue in this case turns on a deceptively simple-seeming question of statutory interpretation: whether HB 651's amendments to the process of qualifying initiatives for the ballot apply to constitutional initiatives. Plaintiffs urge an interpretation of HB 651 that applies to constitutional initiatives, noting that the statute repeatedly uses the phrase "ballot issue," a term defined elsewhere in the elections code to include all forms of

initiative. Defendants, by contrast, point out that the two major new provisions of HB 651 at issue here—the interim committee vote and significant material harm review—are reported only on the petition form for statutory initiatives under HB 651. *See* 2021 Mont. Laws ch. 554, § 5 (amending only Mont. Code Ann. § 13-27-204 but not § 13-27-207). Because the legislature is presumed not to engage in meaningless acts, the Defendants argue, this must mean the statute was never intended to apply to constitutional initiatives, the petition forms for which are left untouched by HB 651. On their face, neither argument is unreasonable.

Ultimately, the Court concludes that the two aspects of HB 651 at issue here—the significant material harm review and the interim committee review—do not in fact apply to anything other than statutory initiatives. The Court reaches this conclusion because, after a careful review of the text, structure, context, and purpose of the statutes at issue, it concludes that there is little reason for the legislature to include the interim committee vote outcome and the attorney general's significant material harm finding on the petition for statutory initiatives—but not other forms of ballot issues—unless the legislature never intended those provisions to apply to other forms of ballot issues. Because this means there are no defects in the CI-121 petition form, there is no need to invalidate signatures at this juncture or to reach Monforton's constitutional claims.

Finally, it bears repeating what this case is *not*: It is not an invitation to usurp the right of initiative retained by the people: that is, to make the decision whether, as a policy matter, CI-121 should be placed on the ballot or enacted into law. The Court's role is not to make that decision for the people or to decide what the law *should* be. Rather, the Court's role is only to determine

what the law currently *is*, which requires the Court to determine the legislature's intention in enacting HB 651 as near as can be done by applying well-established methods of statutory construction. The Court expresses no opinion on the wisdom of CI-121 or even whether other legal challenges to the initiative on other grounds should succeed or fail.

Specifically, the issues the Court must address are as follows:

1. Do Plaintiffs have standing to challenge the placement of CI-121 on the ballot?

2. Do the significant material harm review and interim committee review provisions of House Bill 651 apply to proposed initiatives to amend the Montana Constitution?

3. Should this Court find Monforton in contempt of court?

Each of these issues is addressed in turn.

1. Do Plaintiffs have standing to challenge the placement of CI-121 on the ballot?

The State contends that Plaintiffs have not established standing because they allege only that CI-121, if enacted, would "affect them" and that there is no live case-or-controversy. The Court disagrees.

A plaintiff has standing only if "(1) the claim is based on an alleged wrong or illegality that has in fact caused, or is likely to cause, the plaintiff to personally suffer specific, definite, and direct harm to person, property, or exercise of right, and (2) the alleged harm is of a type that available legal relief can effectively alleviate, remedy, or prevent." *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241.

/////

The manifest purpose of the relevant HB 651 provisions is to inform voters who are contemplating signing an initiative petition about both the measure's potential impact on business interests and the views of the relevant legislative interim committee on the measure. The interest conferred by HB 651, in other words, is an "informational" interest enjoyed by the voters.

Montana law has not squarely tackled the question of "informational injury," but federal courts[2] have recognized that an "informational injury" can satisfy constitutional case-or-controversy requirements when a person establishes that they "lack access to information to which he is legally entitled and. . . the denial of that information creates a 'real' harm with an adverse effect." *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–341 (2016)); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (finding that injury consisting of inability to obtain information that statute requires to be made public was a sufficiently concrete and particular injury to convey standing); *Campaign Legal Ctr. v. Fed. Election Comm'n*, __ F. 4th __, 2022 U.S. App. LEXIS 10457, at *18–*20 (D.C. Cir. Apr. 19, 2022) (informational injury establishes standing if there is a statutory right to the information "related to [the plaintiff's] informed participation in the political process" and the plaintiff lacks access to the information sought). The Ninth Circuit has required that an informational injury be tied to information that can support a cause of action. *Wilderness Soc'y v. Rey*, 622 F.3d 1251, 1259 (9th Cir. 2010).

---

[2] Because of the similarity in the federal and state constitutional requirements that there be a live case-or-controversy, "federal precedent. . . is persuasive authority for interpreting the justiciability requirements of" the Montana Constitution. *Bullock v. Fox*, 2019 MT 50, ¶ 30, 395 Mont. 35, 435 P.3d 1187.

HB 651 confers on voters a right to know the views of the appropriate legislative interim committee and the Attorney General's opinion on whether the measure could be a regulatory takings or would cause significant material harm to business interests before deciding whether to sign a petition to place the measure on the ballot. Plaintiffs and their members thus have a statutorily confirmed interest in this information that relates to informed participation in the political process. Moreover, as Plaintiffs point out, there is a statutory cause of action to enforce it: Mont. Code Ann. § 13-35-108 gives district courts broad injunctive powers to enforce the election laws of the state.

This form of standing is reminiscent of the voter standing recognized in *Committee for an Effective Judiciary v. State*, 209 Mont. 105, 679 P.2d 1223 (1984). In that case, voters had standing to challenge a law prohibiting sitting district court judges from running for the Supreme Court without first resigning their office. Rejecting arguments that such standing was too speculative, the court held that the deprivation of voters' rights to vote for a class of candidates running for Supreme Court—judges who would have run but for the required resignation of their current seats—constituted a sufficient injury to confer standing. *Committee for an Effective Judiciary*, 209 Mont. at 112, 679 P.2d at 1227. This was so even absent a showing that there were any district court judges who would have run for office at the time but for the effect of the automatic resignation statute. *See id.* at 108, 679 P.2d at 1225. Compared to that case, HB 651 has an even more direct effect on voters, for HB 651 directly affects the information available to voters who are asked to sign the petition.

The informational injury at issue here is also no less concrete than the interest sufficient to confer standing in *Brown v. Gianforte*, 2021 MT 149,

404 Mont. 269, 488 P.3d 548. There, the court held that individual voters and taxpayers had standing to challenge a law modifying the method of appointment of judges. Even though the law did not concern judicial elections, the Court held that all Montanans "are integral to the process of determining how judicial nominees are selected" and that there was the potential that the appointment of judges contrary to the Constitution could void the acts of those judges, causing "great expense in time and money to the county, the judicial system, and the individual litigants." *Brown*, ¶¶ 13–16. The "seriousness of" an improperly appointed judge "unlawfully wielding authority that may affect the Petitioners is a sufficiently clear threat to Petitioners' property or civil rights" that the case-or-controversy requirement was satisfied. *Brown*, ¶ 19. The Plaintiffs' claim of informational injury here is much more direct than the showing the Court found sufficient in *Brown*.

The State's only response to the claim of informational standing is to argue that the Plaintiffs are conflating the merits and the standing inquiry because the Plaintiffs assume that HB 651's provisions apply to constitutional initiatives. It seems to the Court that the State has this argument exactly backwards: if Plaintiffs prevail on their claim that HB 651 was intended to apply to constitutional initiatives, then they do indeed have an entitlement to be informed on the views of the interim committee and the opinion of the Attorney General on significant material harm. This is a not-uncommon scenario in public law litigation. If standing is inextricably bound up in the very merits question to be decided, that is not a reason to dismiss the suit; it is a reason to proceed to the merits. Moreover, for the purposes of summary judgment, the record is construed in the light most favorable to the non-movant. *Speer v. State*, 2020 MT 45, ¶ 17,

399 Mont. 67, 458 P.3d 1016. Accordingly, the Court must assume for purposes of the State's motion that Plaintiffs will prevail on their substantive claim, in which case the injury necessarily follows.

Because Plaintiffs have met their burden of demonstrating a specific, definite, and direct harm to their informational interests that could be redressed by relief in their favor, the Plaintiffs have standing.

The State also contends that the action is unripe, contending that it remains an abstract and hypothetical dispute where the measure has not yet even qualified for the ballot, let alone been adopted by the voters. Pre-election challenges to ballot measures are appropriate, however, when the claim is that "the initiative was not properly submitted under the election laws." *State ex rel. Montana Citizens for Preservation of Citizens' Rights v. Waltermire*, 224 Mont. 273, 276, 729 P.2d 1283, 1285 (1986) (citing *State ex rel. Livingston v. Murray*, 137 Mont. 557, 354 P.2d 552 (1960)). That is precisely what Plaintiffs claim here. Moreover, the claimed injury at issue occurs every time a signature is solicited using a form that lacks the allegedly required warnings. Thus, the injury is not contingent on an uncertain future event like certification of the measure for the ballot or its ultimate adoption. Plaintiffs' claims are justiciable.

2. Do the significant material harm review and interim committee review provisions of House Bill 651 apply to proposed initiatives to amend the Montana Constitution?

As Plaintiffs have standing, the Court must now tackle the heart of the matter: whether the provisions of HB 651 apply to proposed initiatives to amend the Montana Constitution. In addressing this question, the Court must apply several familiar principles of statutory construction.

"Statutory construction is a holistic endeavor and must account for the statute's text, language, structure, and object." *City of Missoula v. Pope*, 2021 MT 4, ¶ 9, 402 Mont. 416, 478 P3d 815. Nevertheless, it is driven by two overarching principles. The first principle is that the Court's job is not to decide what the *Court* thinks the law *ought* to mean, but rather to determine (as best as the Court is able) what the *legislature* intended the statute to mean when it passed it. Mont. Code Ann. § 1-2-102 (In the construction of a statute, the intention of the legislature is to be pursued if possible); *Pope*, ¶ 9 (holding that "the overarching goal of [statutory construction] is ascertaining and giving effect to legislative intent."). Second is the principle that statutory construction is always grounded in the text of the statute, which is presumptively the best evidence of the legislature's intent. No construction can be upheld that requires the Court to contravene the plain text of the statute. *See* Mont. Code Ann. § 1-2-101 ("In the construction of a statute, the office of the judge 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."). Most of the time, statutory construction begins—and ends—with the text.

Considered together, these principles mean the Court "must, to the extent possible, effect the manifest intent of the Legislature in accordance with the clear and unambiguous language of its enactments in context, without resort to other means of construction." *Babcock v. Casey's Mgmt., LLC*, 2021 MT 215, ¶ 6, 405 Mont. 237, 494 P.3d 322. To do this, the Court "first attempt[s] to construe the subject term or provision in accordance with the plain meaning of its express language, in context of the statute as a whole, and in furtherance of the manifest purpose of the statutory provision and the larger statutory scheme in

which it is included." *Babcock*, ¶ 6.[3] Because the courts "must presume that the Legislature would not pass useless or meaningless legislation," *Mont. Shooting Sports Ass'n v. State*, 2008 MT 190, ¶ 15, 344 Mont. 1, 185 P.3d 1003, the Court must avoid superfluity whenever possible: "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all," Mont. Code Ann. § 1-2-101.

Words and phrases must be construed in context and according to their "plain meaning in ordinary usage," unless they are "technical" words or phrases or they have a "peculiar" or special legal meaning. *Babcock*, ¶ 6; Mont. Code Ann. § 1-2-106. If a word is defined anywhere in statute, "such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears." Mont. Code Ann. § 1-2-107. Thus, a textual analysis is not a literalist analysis: The Court does not discern meaning by mechanically stringing the words of the statute together, applying to each its dictionary or statutory definition. Rather, the Court must read the statute naturally, as an ordinary human being would, applying common sense and context to its reading.

With these principles in mind, the Court turns to each of the two provisions of HB 651 at issue here: the "significant material harm" review provisions, and the interim committee review provisions.

/////

/////

---

[3] Legislative history is only consulted when, after exhausting other means of interpretation, the statutory language remains "ambiguous or subject to more than one reasonable interpretation." *See Pope*, ¶ 10. Moreover, the Court agrees with the State that post-enactment statements by legislators should not be considered. *Kiely Constr. LLC v. City of Red Lodge*, 2002 MT 241, ¶ 97, 312 Mont. 52, 57 P.3d 836.

a. Significant Material Harm Review

HB 651 modifies the attorney general's review of proposed ballot initiatives as follows:

> ~~(7)~~(8) The attorney general shall review the proposed ballot issue for legal sufficiency. As used in this part, "legal 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 as set forth in [Mont. Code Ann. § 13-27-211]. ~~Review of the petition for legal sufficiency does not include consideration of the substantive legality of the issue if approved by the voters.~~ The attorney general shall also determine if the proposed issue conflicts with one or more issues that may appear on the ballot at the same election.
>
> (9)(a) 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.
>
> (b) 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.

2021 Mont. Laws 554, § 6 (amending Mont. Code Ann. § 13-27-312).

Plaintiffs focus on the use of the term "ballot issue" in this section. The term "ballot issue" is a term with special legal meaning, defined in the general provisions of Title 13 as "a proposal submitted to the people at an election for their approval or rejection, including but not limited to an initiative,

referendum, proposed constitutional amendment, recall question, school levy question, bond issue question, or ballot question." Mont. Code Ann. § 13-1-101(6)(a). Nevertheless, despite this broad definition that encompasses recall petitions and ballot measures in local elections, the procedures of title 13, chapter 27 apply only to statutory and constitutional initiatives, referenda, and calls for a constitutional convention. *Id.* § 13-27-101. Thus, the definition of "ballot issue" is already narrowed by context to those four forms of ballot measures.

Importantly, there is no further limitation on the term "ballot issue" in § 13-27-312. On its face, the Attorney General's review of the ballot statements and legal sufficiency review appears to apply to all four forms of "ballot issue." And indeed, prior to HB 651, the Attorney General conducted a review of both constitutional initiatives and referenda. *See Not in Montana: Citizens Against CI-97 v. State*, 2006 MT 278, 334 Mont. 265, 147 P.3d 174 (appeal of district court rejection of Attorney General's legal sufficiency review of a constitutional initiative); *MEA-MFT v. State*, 2014 MT 76, 374 Mont. 296, 323 P.3d 198 (challenge to Attorney General's review of a legislative referendum). House Bill 651 amends the legal sufficiency review provision to embrace substantive legality, but nothing in the text of the amendment does anything to modify the use of the term "ballot issue" or otherwise to manifest any intention that the scope of measures subject to the Attorney General's legal sufficiency review has shrunk. Indeed, to infer such an intention would be to run counter to the overall purpose of HB 651, which is to increase the degree of regulation over proposed ballot issues. The plain and unambiguous language of Mont. Code Ann. § 13-27-312(8) applies to all four forms of "ballot issues" subject to the procedures of title 13, chapter 27. Thus, at least in this respect, the

expanded legal sufficiency review in subsection (8) applies to statutory initiatives, constitutional initiatives, and referenda alike.

This conclusion carries two important implications: (1) at least in some respects, House Bill 651 modifies procedures applicable to more than just statutory initiatives; and (2) if Defendant's interpretation of "ballot issue" in the context of the new significant material harm review were correct, there would be the unusual circumstance where "ballot issue" would mean one thing in subsections (1), (2), (3), (4), (5), (6), (8), and (10) of Mont. Code Ann. § 13-27-312, but that same phrase would have a different, and narrower, meaning in subsections (7) and (9). As the Supreme Court has previously observed:

> Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and where its meaning in one instance is clear, this meaning will be attached to it elsewhere, unless it clearly appears from the whole statute that it was the intention of the legislature to use it in different senses.

State ex rel. Bitter Root Valley Irrigation Co. v. Dist. Ct., 51 Mont. 305, 306, 152 P. 745, 747 (1915); *see also Kottel v. State*, 2002 MT 278, ¶ 43, 312 Mont. 387, 60 P.3d 403 ("[L]anguage is presumed to have the same meaning throughout a document."); *Sullivan v. Stroop*, 496 U.S. 478, 484 (the "normal rule of statutory construction [is] that 'identical words used in different parts of the same act are intended to have the same meaning.'" (quoting *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986)).

That said, the new "significant material harm" review provision is not an amendment to the subsection on legal sufficiency review (subsection (8)), but rather, it is its own new subsection (subsection (9)). *See Cottonwood Env.*

Law Center v. Knudsen, 2022 MT 49, ¶ 22, 408 Mont. 57, __ P.3d __ (recognizing that the subsection (9) review for regulatory takings or significant material harm is separate and distinct from the subsection (8) legal sufficiency review). The Court must therefore determine whether "it clearly appears. . . that it was the intention of the legislature" to use the term "ballot issue" in "different senses." *See Bitter Root Valley Irrigation Co.*, 51 Mont. at 306, 152 P. at 747. And indeed, this appears to be one of the rare cases where that is true.

The language of subsection (9)(b) contains an important limitation: if the Attorney General finds significant material harm, he "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." Mont. Code Ann. § 13-27-312(9)(b) (emphasis added). Section 13-27-204, however, specifies the petition form for statutory initiatives. No mention is made of the statutory petition forms for referenda (§ 13-27-205), initiatives calling for a constitutional convention (§ 13-27-206), or initiatives to amend the constitution (§ 13-27-207). Indeed, HB 651 does not amend any of the statutory petition forms *except for* the statutory form petition for statutory initiatives. *See generally* 2021 Mont. Laws 554.

To read subsection (9)(b) to include anything other than statutory initiatives would be to render the statute nonsensical and to violate the dictate that the Court not insert what has been omitted. The plain command of subsection (9)(b) is to place the finding on the petition form, but the only petition form that includes or allows for that finding is the form for statutory initiative. Nor can the Secretary simply add language to the other petition forms on its own, for "[a] petition for the initiative, for the referendum, or to call a constitutional convention *must be substantially in the form provided by this chapter*." Mont.

Code Ann. § 13-27-201(1) (emphasis added). There is no basis for reading § 13-27-312(9)(b) to allow for inclusion of the significant material harm finding on any petition form other than the one for statutory initiatives.

This conclusion drives the interpretation of subsection (9)(a). As discussed earlier, the manifest purpose of the statute is to inform voters considering whether to sign the petition about the impact of the measure on "business interests." Given this purpose, it makes very little sense to require the Attorney General to make this finding for all forms of ballot issues regulated by title 13, chapter 27, Mont. Code Ann., but then only to print the results of that finding on the petition for a statutory initiative. The only reasonable conclusion is that the legislature wrote subsection (9) this way because they never intended it to apply to ballot measures other than statutory initiatives. Accordingly, this is a case where the context, structure, and purpose of the statute suggest that "ballot issue" indeed bears a different and narrower meaning in subsection (9) than it does for the remainder of § 13-27-312.

Plaintiffs point out that even if the petition form for constitutional initiatives does not contain the "warning label," the public will nevertheless be informed by the publicity occasioned by the Attorney General's significant material harm finding regardless of whether it is on the petition form. Even so, why not include this information on the petition form as well? Ultimately, this argument does not explain why the legislature would include the "warning label" on one form of petition but not the others unless the legislature did so because it did not intend for the significant material harm review to apply to those other forms of ballot issues.

Accordingly, the Court holds that the Attorney General's obligation to review ballot issues for "significant material harm" and the Secretary of State's obligation to place adverse findings on the sample petition form is an obligation that applies only to statutory initiatives and no other form of ballot issue.

c. Interim Committee Review

The Court reaches the same conclusion with respect to the interim committee review, which is also a distinct subsection (subsection (7)) of Mont. Code Ann. § 13-27-312. Unlike the provisions pertaining to the Attorney General's review, the portions of HB 651 pertaining to interim committee review refer not only to "ballot issues," but also sometimes to "ballot initiatives." *Compare* Mont. Code Ann. § 13-27-202(5)(b) (the secretary of state shall forward to LSD the final test of the "proposed issue") *with* §§ 13-27-202(5)(c) (providing for interim committee vote on the "proposed initiative text") *and* § 5-5-215(1)(g) (adding to interim committees' obligations the duty to "review proposed ballot initiatives").

Moreover, House Bill 651 only provides for one place where the vote of the interim committee will be reported: the petition form for statutory initiatives. Mont. Code Ann. § 13-27-204(1)(d) (providing for the petition to include an advisory of the interim committee vote). Inclusion of this language is mandatory on statutory initiatives. *See id.* §§ 13-27-204(1) ("The following. . . is substantially the form for a petition calling for a vote to enact a law by initiative"), 13-27-201(1) ("A petition for the initiative. . . must be substantially in the form provided by this chapter"), 13-27-202(5)(e) ("A signature gatherer may circulate the petition only in the form of the sample prepared by the

secretary of state."). Plaintiffs contend that this sets up an ambiguity with § 13-27-312(7), but they misread that statute. Section 13-27-312(7) provides that "The outcome of the vote by an interim committee. . . required in 13-27-202(5)(c) does not need to be reflected in the statement of purpose and implication, the petition **title**, or the ballot title if the issue is placed on the ballot." (emphasis added.) The petition title is the statement of purpose and implication. *Id.* § 13-27-312(5). Section 13-27-312(7) does not excuse inclusion of the interim committee vote on statutory petitions.

As with the significant material harm provisions of HB 651, it is difficult to conceive of a reason why the legislature would structure the statutes this way unless the legislature intended the interim committee vote provision to apply only to statutory initiatives. Accordingly, the Court is compelled to reach the same conclusion: the legislature did not intend for the interim committee vote provisions of HB 651 to apply to anything other than statutory initiatives.

Because the Court can reach a definitive construction of the statute through resort to ordinary tools of statutory construction, the Court does not find any material ambiguity or any need to consult legislative history. There are no genuine disputes of material fact in this case, and the dispositive issue before the Court is a pure question of law. The only claims Plaintiffs have raised that this Court can adjudicate[4] are its contentions that CI-121 was improperly approved for signature gathering without a significant material harm review by the Attorney General or a vote by an interim committee. Because the Court holds that those provisions of HB 651 do not apply to constitutional initiatives, there is

[4] As the Court held in its January 25, 2022, Order on Preliminary Injunction (Dkt. 38), the Court lacks jurisdiction over Plaintiffs' challenge to the Attorney General's legal sufficiency review of CI-121. A challenge to that issue is governed by the provisions of Mont. Code Ann. § 13-27-316.

no need to reach Monforton's constitutional arguments. Defendants are entitled to judgment as a matter of law.

3. Should the Court find Monforton in contempt of court?

Finally, Plaintiffs ask the Court to find Monforton in contempt of court for violating the Court's temporary restraining order. The Court is troubled by Monforton's decision to leave the website up while the TRO was in effect, and the Court would have expected a more assiduous effort to prevent signature gathering while the TRO is in effect. The rule of law requires parties—especially parties who are experienced members of the bar—to make every effort to ensure compliance even with those court orders with which they vociferously disagree. In the future, the Court counsels Monforton to seek permission rather than ask forgiveness when in doubt about the scope of a court order. The Court, however, makes no finding whether its order was violated or whether Monforton is in contempt of court because the Court concludes it lacks authority to do so at this juncture.

There are important limitations on a Court's authority to punish past conduct occurring outside the Court's presence as a contempt of court. The contempt at issue is indirect because it was "not committed in the immediate view and presence of the court or judge." *VanSkyock v. 20th Jud. Dist. Ct.*, 2017 MT 99, ¶ 8, 387 Mont. 307, 393 P.3d 1068 (quoting Mont. Code Ann. § 3-1-518(1)). Moreover, the contempt sanction sought cannot be purged by coming back into compliance with a court order; thus, its purpose would be "to punish the contemnor for a specific act" and thereby "vindicat[e] the authority of the court." *VanSkyock*, ¶ 9. The TRO has been dissolved for several months, and

/////

there is nothing Monforton could do to purge the contempt. Thus, the nature of the contempt sought is criminal contempt.

Indirect criminal contempt is subject to "critical procedural due process" protections including "proof beyond a reasonable doubt," a "hearing before a neutral judge," advance notice of the charges against the contemnor, and an evidentiary hearing. *VanSkyock*, ¶ 10. Moreover, indirect criminal contempts can only be brought by "formal prosecution by the State of Montana." *VanSkyock*, ¶ 10. This Court therefore lacks the authority to find Monforton in criminal contempt of court.

Additionally, although couched as a motion for contempt, the Court notes that the proposed remedy is voiding of signatures gathered. There is a statutory process for contesting the manner in which ballot issue petition signatures were gathered, which may be initiated by a qualified elector "within 30 days *after* the date on which the issue was certified to the governor." Mont. Code Ann. § 13-27-317(1). Moreover, at this juncture it is unknown whether CI-121 will even qualify for the ballot, let alone whether there are enough signatures arguably gathered during the TRO period to affect the outcome. Accordingly, to the extent that the gravamen of Plaintiffs' motion is a contest to any signatures gathered because of signature gathering activities while the TRO was in effect, that challenge is not yet ripe.

Given the Court's concerns about Cap Montana Property Taxes's decision to leave its website up during the TRO period and the underwhelming efforts to put a stop to signature gathering, Plaintiffs' concerns were neither frivolous nor brought in bad faith, and the Court does not find Rule 11 sanctions

/////

to be appropriate. In any event, Rule 11 sanctions must be brought by separate motion, Mont. R. Civ. P. 11(c)(2), and Monforton did not do so.

Based on the foregoing considerations, the Court enters the following:

ORDER

1. The State's Motion for Summary Judgment (Dkt. 46), filed February 4, 2022, and Monforton's Motion for Summary Judgment (Dkt. 50), filed February 4, 2022, are **GRANTED**. The Court, however, does not reach Monforton's constitutional claims.

2. Plaintiffs' Motion for Contempt (Dkt. 31), filed January 24, 2022, and Plaintiffs' Motion for Summary Judgment (Dkt. 52), filed February 4, 2022, are **DENIED.**

3. The State's Motion to Dismiss (Dkt. 14), filed January 18, 2022, and Monforton's Motion to Dismiss (Dkt. 24), filed January 21, 2022, are **DENIED** as moot.

4. This matter is **DISMISSED with prejudice**, except for Plaintiffs' challenge to the Attorney General's legal sufficiency determination, which is **DISMISSED without prejudice.**

Judgement may be entered accordingly.

DATED this 26th day of April 2022.

CHRISTOPHER D. ABBOTT
District Court Judge

cc: Robert Farris-Olsen, Esq. / John M. Morrison, Esq.
via email to: rfolsen@mswdlaw.com / john@mswdlaw.com

Johnathan Motl, Esq.
via email to: jon@bitterrootlaw.com

Austin Knudson / Kristen Hansen / David M.S. Dewhirst / Derek Oestreicher / Timothy J. Longfield
via email to: david.dewhirst@mt.gov / derek.oestreicher@mt.gov / timothy.longfield@mt.gov

Emily Jones, Esq.
via email to: emily@joneslawmt.com

Montana Secretary of State
P.O. Box 202801, Helena, MT 59620-2801

Office of the Montana State Auditor, Commissioner of Securities and Insurance
840 Helena Avenue, Helena, MT 59601

Matthew G. Monforton, Esq.
via email to: matthewmonforton@yahoo.com

CDA/tm/DDV-2022-29 Montana Federation of Public Employees v. State of Montana - Opinion and Order.doc