



MEMORANDUM

To: The Office of the Montana Secretary of State (Filed by email)
From: The Office of the Montana Attorney General
Date: June 5, 2023
Re: Legal sufficiency review of Proposed Ballot Measure No. 2

Ballot Measure #2 is legally insufficient because it violates the separate vote requirement of the Montana Constitution, and is ambiguous in its terms, and its application, thereby making it impossible for voters to understand the Measure, and what they are voting for or against.

Attorney General's Authority

The Attorney General's office and authority are created and bounded by the Montana Constitution. Mont. Const. art. VI, § 4(4) ("The attorney general is the legal officer of the state and shall have the duties and powers provided by law."). The Constitutional phrase 'provided by law' delegates the matter to the Legislature. See *Brown v. Gianforte*, 2021 MT 149, ¶ 41. The Montana Legislature, by law, granted the Attorney General authority to conduct legal sufficiency reviews for proposed ballot measures. Mont. Code Ann. § 13-27-312 (2021).

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 13-27-211." MCA § 13-27-312(8). The sufficiency review can be thought of as two buckets: (1) a procedural review if the issue complies with the statutory and constitutional provisions governing submission of the issue to the electorate; and (2) a substantive review of the measure for lawfulness if passed. The Montana Supreme Court recognized the Attorney General's historic authority regarding procedural legal sufficiency issues. See *Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, ¶ 6 ("[T]he Attorney General's review for legal sufficiency is limited by law to determining whether the petition for a ballot issue complies with the statutory and constitutional requirements governing submission of the proposed issue to the electors."). The Attorney General's legal sufficiency review remains subject to judicial review pursuant to MCA § 13-27-316.

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Legal sufficiency also requires that a Ballot Issue be written in a manner, and with words which allow it to be understood so that the voters know what they are voting for or against.

Further, the Montana Supreme Court has found that due process requires constitutional initiatives be expressed in sufficiently clear terms so as not to mislead voters:

[T]he ballot issue should clearly state the substance of the proposition. *Board of Education of the City of Eldorado v. Powers* (1935), 142 Kan. 664, 51 P.2d 421. It is elementary that voters may not be misled to the extent they do not know what they are voting for or against. *Burger v. Judge* (U.S.D.C. Mont. 1973), 364 F.Supp. 504, *affd.* 414 U.S. 1058, 94 S.Ct. 563, 38 L.Ed.2d 465. Due process is satisfied if the voters are informed by or with the ballot of the subject of the amendment, are given a fair opportunity by publication to consider its full text, and are not deceived by the ballot's words.

State ex rel. Montana Citizens for Preservation of Citizen's Rights v. Waltmire, 227 Mont. 85, ¶ 90, 738 P.2d 1255 (1987).

The Court has also made clear that “the ballot language must identify the measure on the ballot so that a Montana voter, drawing on both official and unofficial sources of information and education, will [be able to] exercise his or her political judgment.” *Hoffman v. State*, 2014 MT 90, ¶ 16, 374 Mont. 405, 328 P.3d 604, (quoting *MEA-MFT*, 2014 MT 33, ¶ 11, 374 Mont. 1, 318 P. 3d 702; *Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650, 657 (1998)).

Article XIV, Section 11

Article XIV, Section 11 of the Montana Constitution provides, “[i]f more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately.” Article XIV, section 11’s separate vote requirement provides a check on the power of Montanans to amend their Constitution. See *Mont. Ass’n of Counties v. State*, 2017 MT 267, ¶ 14, 389 Mont. 183, 404 P.3d 733. “The separate-vote requirement was designed to aid voters in casting their votes on Constitutional issues, and as a check on the possible action of grouping several issues under one innocuous title.” *Id.*, ¶ 15 (internal citation and quotation omitted). The separate-vote requirement ensures “Montana voters always have the option to independently select or reject each constitutional amendment, guaranteeing the people have complete control over Montana's fundamental law.” *Id.*, ¶ 18 (internal citation omitted).

The separate vote requirement for constitutional initiatives prohibits a proposal that makes two or more changes to the Montana Constitution that are substantive and not closely related. *Id.*, ¶ 28. Substantive means, “an essential part of constituent or relating to what is essential.” *Id.*, ¶ 29 (quoting *Black's Law Dictionary* 1429 (6th ed. 1990)). Closely related generally means looking to “whether various provisions are facially related, whether all the matters addressed ... concern a single section of the constitution, whether the voters or the legislature historically has treated the matters addressed as one subject, and whether the various provisions are qualitatively similar in their effect on either procedural or substantive law.” *Id.*, ¶ 29 (quoting *McLaughlin v. Bennett*, 225 Ariz. 351, 238 P.3d 619, 622 (Ariz. 2010)).

The “separate-vote requirement for constitutional amendments is a different and narrower requirement than is a single-subject requirement” for legislation found in Article V, Section 11 of the Montana Constitution. *Marshall v. State*, 1999 MT 33, ¶ 22. The separate vote requirement ensures “voters have complete control over each and every constitutional change.” *MaCO*, ¶ 50. If a proposed constitutional amendment adds new matter to the Constitution, that proposition is at least one change in and of itself. *Id.* at ¶ 28. Modifying an existing constitutional provision is considered at least one change, whether that effect is express or implicit. *Id.*

The Montana Supreme Court favorably cited *Oregon v. Rogers* to flesh out the closely related prong. 352 Ore. 510, 288 P.3d 544 (Ore. 2012). *Rogers* interprets “closely related” to mean whether it is possible for voters to “separately decide” the component parts of a constitutional initiative. 228 P.3d at 552 (collecting and discussing decisions under the separate vote provision).

The Attorney General is also mindful that “intervention in referenda or initiatives prior to an election is not encouraged.” *Cobb v. State*, 924 P.2d 268, 269 (Mont. 1996). Even in cases where the Attorney General finds a measure legally sufficient, the people vote on, and pass a constitutional amendment, the Montana Supreme Court may later find that provision violative of Article XIV. *See generally Mont. Ass'n of Counties v. State*, 2017 MT 267.

Ballot Measure No. 2 proposes an amendment to Article VIII, Section 3 of the Montana Constitution. The proposed amendment limits changes in assessed values for real property for tax purposes and limits the amount of ad valorem taxes that may be assessed against real property. *See Proposed Article VIII, section 3(2)–(8)*.

Ballot Measure No. 2 proposes multiple changes to accomplish its overriding goal of limiting property tax burdens. First, the measure resets valuations to 2019 levels. Second, the measure imposes a 2% cap on annual valuation increases if the property is not newly constructed or significantly improved, or did not have a change in ownership since January 1, 2020. Third, the measure creates a constitutional mechanism for property owners to request a valuation be reduced to reflect

substantial damage, destruction, market conditions, or other factors causing a decrease in value. Fourth, the measure limits the level of ad valorem taxes that may be assessed against a property to 1 % of the property's valuation. The measure also includes minor definitions and exemptions.

At a minimum, the annual valuation cap and limitation on ad valorem tax assessments implicate the separate vote requirement. In simple terms, a property owner's tax bill is the product of the property's value, tax rate, and mill rate. The annual valuation cap limits a property's value for tax purposes. The ad valorem assessment cap limits the other two factors so that in combination they cannot result in a tax assessment exceeding 1% of the property's value. As reflected in the fiscal note, the ad valorem assessment limitation results in substantially more property tax reductions than the 2% cap on property valuations. These provisions clearly impose multiple substantive changes.

It is a close question whether these changes are closely related and thus survive separate vote scrutiny. The fact that the proposed measure amends a single section of the Montana Constitution and relates to a single purpose of limiting property tax increases tilts towards finding legal sufficiency. *See Mont. Ass'n of Counties*, ¶ 29 (listing factors for consideration). If the proposed measure applied to only one variable in the property tax equation, it likely would fail in its goal of property tax limitation. Instead, the measure affects multiple variables within the equation, but this doesn't equate to a violation of the separate vote requirement because it retains a singular purpose within a single section of the Montana Constitution. However, voters cannot express support for limiting increase in annual property valuations, while also opposing an overall cap on the level of taxes levied against a property. This tilts against finding the changes closely related. The staggering fiscal difference between the two changes further supports finding the changes are not closely related.

Because, at a minimum, voters cannot support or oppose each change embodied within the Measure, it fails to satisfy the separate vote requirement. Failure to comply with Mont. Const. art. XIV, § 11 renders the Measure a nullity and it cannot be placed on the ballot due to this legal insufficiency. *See generally Mont. Ass'n of Counties v. State*, 2017 MT 267

Legal Insufficiency Due To Ambiguity

At least one interested party raised compliance with the Montana Supreme Court's decision in *State ex rel. Montana Citizens for Preservation of Citizen's Rights v. Waltermire*, 738 P.2d 1255 (1987). Montana voters passed CI-30, 56% to 43%, in 1986. CI-30 amended Article II, § 16, to grant the Legislature authority to determine the rights and remedies for injury or damage to person, property or character. Opponents to the measure sued to nullify the results because voters were misled as to the substance of the measure. *Waltermire*, 738 P.2d at 1257–58. The Court agreed. *Id.* "It is elementary that voters may not be misled to the extent they do not know what

they are voting for or against.” *Id.* at 1258. And the proper remedy was to invalidate the voter-passed amendment. *Id.*

The Measure isn't legally sufficient under *Waltermire*. Because the Measure substantially changes Article VIII which governs “the valuation of all property” by including the limiting language contained in subsections (2), (3), and (4) it is ambiguous as to its application and limitations. The application ambiguity is compounded by the failure to clearly define operative words such as “real property,” “ad valorem taxes,” and “significantly improved.” Section (7) of the Measure provides for a 1% cap on “Total ad valorem taxes . . .” Absent a clear definition of that phrase, it is impossible for a voter to discern whether value based special assessments are included in the cap. The lack of discernable definitions and scope deprives voters of the ability to “know what they are voting for or against.” *Waltermire*, 738 P.2d at 1258. The lack of information runs afoul of the Montana Constitution itself and must be legally insufficient. *Id.*

Significant Material Harm Statement

The Attorney General lacks authority to make a determination of significant material harm regarding Ballot Measure No. 2. *See MFPE, et al. v. State et al.*, DDV 2022-22 (1st Jud. Dist. Mont.) (Apr. 27, 2022) (the requirements of MCA § 13-27-312(9) apply only to statutory initiatives).

Senate Bill 93 (2023) does not apply to Ballot Measure No. 2. First, the Attorney General received the proposed measure on May 4, 2023, from the Secretary of State. That started the Attorney General's 30-day clock to complete the legal sufficiency review. At that time, Senate Bill 93 (2023) had not yet been transmitted to the Governor or signed into law. As such, MCA § 13-27-312(9) (2021) controls. Further, Senate Bill 93, § 58 contains an express savings clause—again, meaning that because this measure was submitted prior to Senate Bill 93's effective date, MCA § 13-27-312(9) (2021) applies.

Conclusion

Because Ballot Measure #2 violates Article XIV, Section 11 of the Montana Constitution, and contains substantive ambiguities it is legally insufficient and may not be placed on the ballot.

The Attorney General recognizes the separate-vote requirement presents a close question of law, but the Attorney General finds that because the valuation cap and ad valorem tax cap impose such differing fiscal impacts, the changes are not closely related and thus do not comply with Article XIV, Section 11 of the Montana Constitution.

Ballot Statements

The Attorney General shall ensure the ballot statements “express the true and impartial explanation of the proposed ballot issue in plain, easily understood language and may not be arguments or written so as to create prejudice for or against the issue.” The statement of purpose and implication must be 135 words or less. MCA, § 13-27-312(2)(a).

Ballot Measure #2's proponent submitted the following 78-word statement:

CI-___ limits annual increases and in valuations of residential property to 2% when assessing property taxes if the property is not newly constructed, significantly improved, or had a change of ownership since January 1, 2019. CI-___ establishes 2019 state valuations as the base year for the valuations of residential property and permits annual reassessment. It requires valuations to be reduced to reflect substantial damage, destruction, market conditions, or other factors causing decreases in value if requested by the owner.

☐ YES on Constitutional Initiative CI-___

☐ NO on Constitutional Initiative CI-___


The Attorney General has determined that the Measure is not legally sufficient, and therefore has not endeavored to prepare a Ballot Statement which remedies the ambiguous language of the Measure.

The Attorney General requested a fiscal note for Ballot Measure #2. The fiscal note shows no impact to state revenue, expenditures, or liabilities in FY 2026. In FY 2027 a reduction in total revenue of \$459,415,000, FY 2028 a reduction in total revenue of \$509,567,000, and in FY 2029 a reduction in total revenue of \$519,702,000. The fiscal note reflects technical notes and significant long-term impacts. Because the measure is legally insufficient, the Attorney General declines to forward a statement of fiscal impact at this time. MCA, § 13-27-312(10)(c) (2021).

Conflicting Ballot Measures

The Attorney General is not aware of any other ballot measures which conflict with Ballot Measure #2.

June 5, 2023



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