



MEMORANDUM

To: The Office of the Montana Secretary of State
From: The Office of the Montana Attorney General
Date: October 13, 2023
Re: Legal sufficiency review of Proposed Ballot Measure No. 12

Ballot Measure #12, a constitutional initiative, creates a new Section 9 in Article IV, to change Montana's primary election system to allow the top four vote getters to advance to the general election, define the offices the new top four system applies to, prohibit political party endorsements or nominations from appearing on the ballot, and limiting the number of signatures that may be required to qualify a candidate for the ballot.

The proposed measure is legally insufficient pursuant to Section 11(1)–(2), Chapter 647, Laws of 2023 (SB 93).

Further, pursuant to Section 11(3), the Attorney General determines that the sponsor's proposed ballot statements do not comply with Section 2 and Section 3. As such, the Attorney General has enclosed ballot statements that comply with statutory requirements.

The budget director determined that Ballot Measure 11 will not have an impact on State revenue or expenditures, therefore, a fiscal statement under Section 11(4) is unnecessary.

Finally, pursuant to Section 11(5), the Attorney General determines Ballot Measure 12 does not conflict with any other proposed Ballot Measures.

Ballot Measure 12 is legally insufficient because it violates Article XIV, Section 11 of the Montana Constitution.

“If more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately.” Mont. Const. art. XIV, § 11. “The plain language of the provision conveys an anticipatory, pre-election purpose—to ensure that constitutional ballot issues are prepared and submitted so they ‘can be voted upon’ separately.” *Monforton v. Knudsen*, 2023 MT 179, ¶ 10.

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“The separate-vote requirement has two well-recognized objectives. The first is to avoid voter confusion and deceit of the public by ensuring proposals are not misleading or the effects of which are concealed or not readily understandable. The second is to avoid ‘logrolling’ or combining unrelated amendments into a single measure which might not otherwise command majority support. By combining unrelated amendments, approval of the measure may be secured by different groups, each of which will support the entire proposal in order to secure some part, even though not approving all parts of a multifarious amendment.” *Monforton v. Knudsen*, 2023 MT 179, ¶ 10.

“[T]o determine compliance with Article XIV, Section 11 separate-vote provision ‘the proper inquiry is whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and not closely related.’” *Monforton v. Knudsen*, 2023 MT 179, ¶ 12; *see also Mont. Ass’n of Counties* (“MACo”) v. State, 2017 MT 267, ¶ 50 (the separate-vote provision is narrower than the single subject rule for legislation in Article V, § 11(3)). Voters must be able to “express their opinions as to each proposed constitutional change” separately. *MACo*, ¶ 52.

Ballot Measure 12 fails this test.

Ballot Measure 12’s primary purpose is to constitutionally mandate a top-four primary for specified offices. Ballot Measure 12, Section 1(2).

Section 1(3) then adds numerous provisions that are not closely related to the creation of a top four primary. Ballot Measure 12, Section 1(3). Multiple provisions in Section 1(3) effectively ban Montana’s current system of political party nominations. Section 1(3)(a) moves to an all-party primary. Section 1(3)(g) prohibits requiring political party endorsements or nominations to appear on the primary ballot. Section 1(3)(j) goes further and prohibits the placement of any political party endorsements or nominations on the ballot. Collectively, these provisions represent a choice separate from the creation of the top-four primary—namely, whether Montana should allow political parties to nominate or endorse candidates on the ballot.

Section 1(1) also defines the officers covered by Ballot Measure 12. That Section omits; for example, Montana Supreme Court Justices, District Court Judges, Public Service Commissioners, and local offices. The choice of which offices to include constitutes another separate decision point for voters. *See e.g.*, SB 566 (2023) (failed legislation that would have created a top two primary for only the office of United States Senator).

Section 1(3)(h) imposes a limitation on signatures that the Legislature may require for candidates to qualify for the ballot. The limitation impliedly amends the Legislature's authority to regulate the administration of elections. Mont. Const. art. IV, § 3. It also presents another matter apart from the top four system. Voters cannot, for example, vote for a top four system that prohibits any signature requirement, or that imposes a higher signature requirement. *Cf. compare* Mont. Const. art. XIV, § 9(1) to Mont. Const. art. III, § 4(2) to Mont. Const. art. III, § 5(2) (imposing different signature requirements to different types of ballot measures).

Taken as a whole Ballot Measure 12 regulates a matter traditionally entrusted to the Legislature. Mont. Const. art. IV, § 3. ("The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process.") Ballot Measure 12 clearly and unmistakably limits the constitutional authority of the Legislature to regulate elections. *See MACo*, ¶¶ 41, 44 (a ballot measure that—in addition to its own effects—adds or subtracts from pre-existing constitutional provisions violates Article XIV, § 11).

Finally, Article VI, Section 2 further demonstrates Ballot Measure 12's problems. That section says that the constitutional executive officers "shall be elected by the qualified electors at a general election provided by law." Mont. Const. art. VI, § 2(1). The general language of that section fits nicely with Article IV, § 3's provisions that the Legislature "shall provide by law the ... administration of elections." Ballot Measure 12 goes further and attempts to provide for the rules governing the elections set forth in its Section 1(2) and that amends the Legislature's authority.

Because Ballot Measure 12 proposes multiple amendments it violates Article XIV, Section 11 of the Montana Constitution.

Ballot Statements

As submitted, the sponsor's proposed statements failed to describe Ballot Measure 12's full purpose. "A statement of purpose and implication expresses the true and impartial explanation of the proposal in plain, easily understood language." SB 93, Section 2(1). The statement "may not exceed 135 words." SB 93, Section 2(2).

The sponsor's proposed 134-word statement reads:

"CI-*** amends the Montana Constitution to provide a top-four primary election open to all voters and candidates followed by a general election. All candidates appear on a single primary election ballot, and the four

candidates receiving the most votes advance to the general election. The ballot may list a candidate's political party preference, but a candidate is not required to be nominated by a political party to qualify for the ballot. If candidates are required to gather signatures, the number required may not exceed five percent of the votes received by the winning candidate in the last election. CI-*** applies to elections for governor and lieutenant governor, secretary of state, auditor, attorney general, superintendent of public instruction, state representative, state senator, United States representative, United States senator, and other offices as provided by law.”

This statement omits reference to Ballot Measure 12 Section 1(3)(c) and Section 1(3)(k). Therefore, the Attorney General modifies the proposed statement as follows:

CI-*** amends the Montana Constitution to provide a top-four primary election. All candidates, regardless of political party, appear on one ballot. The four candidates receiving the most votes advance to the general election. A candidate may list a political party preference, but a candidate isn't required to be nominated by a political party. A candidate's political party preference isn't an endorsement by the political party. The legislature may require candidates gather signatures up to five percent of the votes received by the winning candidate in the last election to appear on the ballot. All voters may vote for one candidate for each covered office. CI-*** applies to elections for governor and lieutenant governor, secretary of state, auditor, attorney general, superintendent of public instruction, state representative, state senator, United States representative, and United States senator.

Sincerely,



Brent Mead

Deputy Solicitor General