



Montana Legislative Services Division

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TO: State Administration and Veterans' Affairs Interim Committee

FROM: Andria Hardin, Staff Attorney

DATE: March 8, 2024

RE: Litigation Update Concerning Recent Legislation

This memorandum was prepared as background information at the request of the State Administration and Veterans' Affairs Interim Committee and does not represent any opinion or action on the part of the committee.

I. Montana Public Interest Research Group v. Jacobsen

Plaintiffs: Montana Public Interest Research Group; and Montana Federation of Public Employees.

Defendants: Montana Secretary of State Christi Jacobsen; Attorney General Austin Knudsen; and Montana Commissioner of Political Practices Chris Gallus.

Venue: United States District Court for the District of Montana, Helena Division

Docket No.: 6:23-cv-00070-DVM

Legislation Challenged:

HB 892: AN ACT REVISING VOTING LIMITS; PROHIBITING DOUBLE VOTING; PROVIDING A PENALTY; PROVIDING A DEFINITION; PROVIDING AN APPROPRIATION; AMENDING SECTION 13-35-210, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview: Plaintiffs allege that HB 892 violates the Fourteenth Amendment due process clause under the U.S. Constitution by using vague and unclear standards in a criminal statute seeking to prohibit double voting, violates the First and Fourteenth Amendments of the U.S. Constitution by criminalizing and chilling protected political expression beyond its intended purpose thereby making it overbroad, and also violates the First and Fourteenth Amendments of the U.S. Constitution by unjustifiably burdening fundamental voting rights.

Plaintiffs have asked the court to find the provision of HB 892 codified at section 13-35-210(5) unconstitutional and enjoin the Defendants from enforcing that subsection. The Plaintiffs have requested attorneys' fees and costs.

This case is in the early stages of litigation. Plaintiffs filed for a preliminary injunction on November 6, 2023.

Update: On January 18, 2024, the Republican National Committee and Montana Republican Party's Motion to Intervene was granted. A Preliminary Pretrial Conference and hearing on Motion for Preliminary Injunction is currently scheduled for March 20, 2024.

II. League of Women Voters of Montana v. Knudsen

Plaintiffs: League of Women Voters of Montana.

Defendants: Attorney General Austin Knudsen; Montana Secretary of State Christi Jacobsen; and Montana Commissioner of Political Practices Chris Gallus.

Venue: Montana 18th Judicial District Court, Gallatin County

Docket No.: DV-16-2023-0001073D

Legislation Challenged:

HB 892: AN ACT REVISING VOTING LIMITS; PROHIBITING DOUBLE VOTING; PROVIDING A PENALTY; PROVIDING A DEFINITION; PROVIDING AN APPROPRIATION; AMENDING SECTION 13-35-210, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview: Plaintiffs allege HB 892 violates the Montana Constitution's guarantees of the rights to vote, free speech, free association, and due process. The allegations of this case mirror the above-mentioned case, *Montana Public Interest Research Group v. Jacobsen*, which was filed in U.S. District Court alleging violation of the U.S. Constitution, while this suit alleges violation of the Montana Constitution. Plaintiffs requested the court preliminarily and permanently enjoin Defendants from enforcing the challenged provisions of HB 892 – specifically the “Deregistration Requirement” and the “Omission Provision” under section 13-35-210(5), MCA – and award attorneys' fees.

On November 16, 2023, Plaintiffs filed a motion for a preliminary injunction against HB 892. No order has been issued in this case as of the date of this memorandum.

Update: None.

III. Ellingson v. State

Plaintiffs: Mae Nan Ellingson; Jerome Loendorf; Arlyne Reichert; Hal Harper; Bob Brown; Evan Barrett; C.B. Pearson; Carole Mackin; Mark Mackin; and Jonathan Motl.

Defendants: State of Montana; Governor Greg Gianforte; Montana Secretary of State Christi Jacobsen; and Attorney General Austin Knudsen.

Venue: Montana First Judicial District Court, Lewis and Clark County, Judge Kathy Seeley

Docket No.: DV-25-2023-0000388-DK

Legislation Challenged:

SB 93: AN ACT GENERALLY REVISING BALLOT ISSUE LAWS; PROVIDING AND REVISING SUBMISSION AND PROCESSING TIMELINES FOR STATEWIDE BALLOT ISSUES; CLARIFYING SUBSTANTIVE AND PROCEDURAL PROVISIONS APPLICABLE TO BALLOT ISSUES; REORGANIZING STATUTORY PROVISIONS RELATED TO BALLOT ISSUES; PROVIDING DEFINITIONS; ESTABLISHING A FEE FOR FILING BALLOT ISSUES; PROVIDING A PENALTY; PROHIBITING FILING A BALLOT ISSUE SUBSTANTIALLY SIMILAR TO A DEFEATED BALLOT ISSUE OF THE PAST 4 YEARS; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTIONS 5-5-215, 5-11-105, 7-5-132, 7-7-2224, 7-14-204, 13-27- 102, 13-27-103, 13-27-105, 13-27-112, 13-27-201, 13-27-204, 13-27-205, 13-27-206, 13-27-207, 13-27-209, 13-27-210, 13-27-211, 13-27-301, 13-27-303, 13-27-304, 13-27-308, 13-27-311, 13-27-316, 13-27-317, 13-27- 401, 13-27-402, 13-27-403, 13-27-406, 13-27-407, 13-27-409, 13-27-410, 13-27-501, 13-27-502, 13-27-503, 13-27-504, 13-37-126, 13-37-201, 13-37-228, AND 30-18-103, MCA; REPEALING SECTIONS 13-27-111, 13- 27-113, 13-27-202, 13-27-208, 13-27-312, AND 13-27-315, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE.

Overview: Plaintiffs allege that SB 93 is unconstitutional because it impairs, inhibits, makes more expensive, infringes, prevents, and effectively denies the people of Montana their reserved power to enact laws using the initiative and/or referendum process under Article III, sections 4, 5, and 6, Article IV, section 7, Article V, section 1, and Article XIV sections 2 and 9 of Montana's Constitution. Plaintiffs aver that SB 93 imposes requirements and obstacles to the initiative and referendum process not found within the Montana Constitution, including the filing fee, prohibition on filing, and time limitation on filing. Plaintiffs further aver that SB 93 grants agencies unconstitutional authority over the proposed initiative by subjecting it to review and rejection by the Secretary of State and Attorney General. Plaintiffs also state that the policy review process by multiple government entities, and those entities' ability to insert language on the face of the ballot petition (e.g., statements on harm to business interests, fiscal impact, and committee votes) is an unconstitutional interference with the sponsor's right to control the language that appears on the petition and adds additional time to the process. Plaintiffs further allege that SB 93 unconstitutionally impairs the People's power to gather signatures for the initiative petition.

Plaintiffs seek a declaratory judgment that SB 93 and/or specific statutory provisions are unconstitutional and an order enjoining Defendants from enforcing any aspects of SB 93. The Plaintiffs also seek attorney's fees.

On October 20, 2023, Plaintiffs filed a Motion for Partial Summary Judgment.

Update: On February 5, 2024, Plaintiff's Motion for Partial Summary Judgment was granted. The order voids the provisions of SB 93 requiring a filing fee and allowing the Attorney General to engage in substantive legal review. The Court found the filing fee was an impairment on the people's constitutional powers of initiative and referendum under Article III, sections 4 and 5. The Court also found that the Attorney General may only review proposed ballot issues for legal sufficiency – whether the ballot statements comply with statutory requirements – not the constitutionality of proposed ballot issues.

CASES STILL PENDING FROM LAST INTERIM (Last Update July 12, 2022)

These updates are provided in an abbreviated version. The full litigation update on these cases can be accessed at: <https://leg.mt.gov/content/Committees/Interim/2021-2022/State-Administration-and-Veterans-Affairs/Studies-Topics/August22-Litigation-Update-Final.pdf>

I. Montana Democratic Party v. Jacobsen

2021 Legislation Challenged: HB 176; HB 506; HB 530; SB 169

Overview: The plaintiffs allege that provisions in HB 176, HB 530, and SB 169, including the revision of which IDs are accepted for certain voter identification purposes, the revision of late voter registration to close the day before the election, and prohibitions on providing, offering to provide, or accepting a pecuniary benefit for collecting or delivering ballots violate the following provisions of the Montana Constitution: Article II, section 4, which provides for the equal protection of the laws, Article II, sections 6 and 7, which provide freedom of assembly and freedom of speech, Article II, section 13, which provides the right of suffrage, Article II, section 17, which provides due process requirements, and Article V, section 1, which provides for legislative power. The plaintiffs have requested that the bills in question be declared in violation of the Montana Constitution and be permanently enjoined.

The District Court granted a preliminary injunction on section 2 of HB 506, section 2 of HB 530, section 2 of SB 169, and the entirety of HB 176. The Secretary of State appealed the District Court's preliminary injunction as it applies to HB 176 and section 2 of SB 169. The Montana Supreme Court affirmed the preliminary injunction.

Update: The proceeding on the underlying merits of the case continues in the district court.

II. McDonald v. Jacobsen

2021 Legislation Challenged: HB 325

Overview: The plaintiffs allege that HB 325, a legislative referendum establishing election districts for Supreme Court justices, would, if approved by voters, violate the language and intent of the Montana Constitution that Supreme Court justices be selected on a statewide basis rather than a districtwide basis. It further alleges that because the change conflicts with the Montana Constitution, it violates the constitutional procedures for amendments to the Montana Constitution by enacting a statutory referendum. The plaintiffs further allege that HB 325 infringes on the right to vote under Article II, section 13, of the Montana Constitution.

Citing *Reichert v. St. ex rel. McCulloch*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455, the Court found that Montana Supreme Court precedent had found that the Montana Constitution intended that Supreme Court justices be elected and serve on a statewide basis. Therefore, the Court held that HB 325 was unconstitutional, and the Secretary of State was enjoined from placing HB 325 on the state's 2022 general election ballot.

The Secretary of State appealed the order to the Montana Supreme Court.

Update: The Montana Supreme Court affirmed the District Court's ruling.

III. Barrett v. State

2021 Legislation Challenged: SB 319; HB 102; HB 112; HB 349

Overview: Plaintiffs allege that SB 319, HB 102, HB 112, and HB 349 are facially unconstitutional as violative of Article X, section 9 of the Montana Constitution which provides the powers and responsibilities of the Board of Regents.

Plaintiffs and Defendants both requested summary judgment.

Update: on September 14, 2022, the Court granted Plaintiff's Motion for Summary Judgment and denied the State's Cross-Motion for Summary Judgment. The Court held that HB 349, HB 112 (as it pertains to post-secondary institutions), and section 2 of SB 319 are unconstitutional as they infringe on the authority of the Board of Regents granted under Article X, section 9 of the Montana Constitution. The Court permanently enjoined any application or enforcement of these unconstitutional enactments. The Court denied the Plaintiff's request for Attorney's fees under the private attorney general doctrine.

The Defendants have appealed to the Montana Supreme Court.