

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. _____

MATTHEW G. MONFORTON,

Petitioner,

v.

MONTANA FIRST JUDICIAL DISTRICT
COURT, LEWIS AND CLARK COUNTY,
THE HONORABLE MICHAEL F. McMAHON,
DISTRICT JUDGE,

Respondent.

**PETITION FOR WRIT OF SUPERVISORY CONTROL
AND EMERGENCY REQUEST TO STAY DISTRICT COURT'S
ORDER ENJOINING SIGNATURE GATHERING FOR CI-121**

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Bozeman, Montana 59718
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Appearing Pro Se

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TABLE OF AUTHORITIES

Cases:

Elrod v. Burns,
427 U.S. 347 (1976)6

Stokes v. Montana Thirteenth Judicial Dist. Ct.,
2011 MT 182, 361 Mont. 279, 259 P.3d 7545

Thalheimer v. City of San Diego,
645 F.3d 1109 (9th Cir. 2011)6

Constitutional and Statutory Provisions:

Mont. Const. Art VII, § 2(2)5

Mont. Const. Art. XIV, § (9)(1)6

Mont. Code Ann. § 3-2-202(3)(a) 1, 4

Mont. Code Ann. § 13-27-1048

Mont. Code Ann. §13-27-3088

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Mont. Code Ann. §13-27-316(5).....1, 4, 8

INTRODUCTION

On January 7, 2022, the Secretary of State approved CI-121 for circulation. This initiative would cap the rate of growth of property taxes imposed upon Montana residential property.

Petitioner Matthew Monforton, one of the sponsors of CI-121, placed copies of the text of CI-121, the petition form approved by the Secretary, and an instruction sheet on a website. Hundreds of Montanans have downloaded the petition since then and are circulating it.

On January 12, 2022, several plaintiffs filed a complaint and a motion for temporary restraining order (TRO) in the First Judicial District Court. Their motion requested a TRO to prevent the Secretary, Attorney General, Monforton, and Troy Downing (the co-sponsor of CI-121) from gathering and collecting signatures in support of CI-121. Plaintiffs allege that the ballot statement and legal sufficiency determination made by the Attorney General and Secretary of State are deficient.

The following day, the District Court issued an order granting the TRO, and did so *ex parte*. That order has four glaring errors:

- 1) This Court, not the District Court, has original and *exclusive* jurisdiction to review challenges to ballot statements and legal sufficiency determinations concerning ballot initiatives. Mont. Code Ann. § 3-2-202(3)(a), Mont. Code Ann. §13-27-316(5).

- 2) Opponents of a ballot initiative cannot challenge a ballot statement or legal sufficiency determination until and unless the Secretary of State certifies the ballot initiative to the Governor, an event that will not occur until July 15, 2022 (if at all). Mont. Code Ann. § 13-27-316(2).
- 3) The District Court ordered Petitioner and the other defendants to indefinitely cease gathering and collecting signatures in support of CI-121. The District Court had absolutely no authority to issue this order. As a result, thousands of Montanans are being denied an opportunity to exercise their constitutional right to petition their government for redress of grievances. That right will vanish altogether on June 17, 2022, the deadline for submitting signatures in support of CI-121.
- 4) The District Court gave Monforton absolutely no notice before issuing its sweeping TRO. This was a direct violation of Rule 2.6(a) of the Montana Code of Judicial Conduct, which requires that a judge “shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”

This case satisfies the requirements for supervisory control by this Court.

Mont. App. P. Rule 14(3). Monforton therefore requests immediate relief from this Court.

STATEMENT OF FACTS

On or about August 31, 2021, Troy Downing and Petitioner Matthew Monforton submitted a proposed constitutional initiative to the Secretary of State’s Office. Monforton Declaration, ¶ 3.¹ That initiative, designated by the Secretary as Ballot Issue # 9, seeks to cap the rate of growth of property taxes imposed upon Montana residences. Monforton Decl, ¶ 4. After Downing and Monforton made

¹ Monforton’s declaration and supporting exhibits are attached to this Petition.

several revisions, the Secretary of State approved the initiative for signature gathering on January 7, 2022, and redesignated it as CI-121. Monforton Decl, ¶ 5. A copy of the petition for CI-121 approved by the Secretary of State and its full text is attached as **Exhibit 1** to Monforton’s Declaration.

During the past week, hundreds of Montanans have downloaded petitions from www.CapPropertyTaxes.com, a website Monforton and others designed to support CI-121. Monforton Decl, ¶ 7.

On January 12, 2022, the Montana Federation of Public Employees, the Montana Farmer’s Union, and several individuals (hereinafter, “Plaintiffs”) filed a complaint in the District Court seeking, *inter alia*, to enjoin all collecting and gathering of signatures for CI-121. Monforton Decl, **Exhibit 2**. They named as defendants the Secretary of State, the Attorney General, Downing, and Petitioner Monforton. Monforton Decl, **Exhibit 2**. Plaintiffs also filed a motion for a temporary restraining order. Monforton Decl, **Exhibit 3**. Plaintiffs caused these documents to be served upon Monforton on the afternoon of January 13, 2022. Monforton Decl, ¶ 11.

On that same day, January 13, 2022, Judge Michael McMahon issued a temporary restraining order against all Defendants, including Monforton, which states as follows:

Accordingly IT IS HEREBY ORDERED that Respondents and their officers, agents, employees and attorneys are jointly and severally temporarily restrained and enjoined from gathering and/or accepting signatures in support of placing CI-121 on any 2020 ballot until further order of this Court.

Monforton Decl, **Exhibit 4**. The District Court also ordered Monforton and the other Defendants to appear at a hearing on January 24, 2022, to show cause as to why a preliminary injunction should not issue. Monforton Decl, **Exhibit 4**.

Judge McMahon did not give any notice to Monforton whatsoever prior to issuing the order. Monforton Decl, ¶ 14. Monforton is informed, believes, and therefore alleges that Judge McMahon did not give notice to any of the other Defendants, either, before issuing his ruling. Monforton Decl, ¶ 15.

ISSUES PRESENTED

1. Does Mont. Code Ann. § 3-2-202(3)(a), which states that this Court has original jurisdiction to review challenges to ballot statements and the Attorney General’s legal sufficiency determinations, permit a *district court* to enjoin signature gathering for an initiative due to an allegedly deficient ballot statement or legal sufficiency determination?

2. Does Mont. Code Ann. § 13-27-316(5), which states that an original proceeding in this Court is the “exclusive remedy” for challenges to ballot statements and the Attorney General’s legal sufficiency determinations, permit a

district court to enjoin signature gathering for an initiative due to an allegedly deficient ballot statement or legal sufficiency determination?

3. Does Mont. Code Ann. § 13-27-316(2), which states that opponents of a ballot issue may challenge s ballot statement or the Attorney General’s legal sufficiency determination within 10 days of the date of the Secretary of State’s certification to the Governor that the completed petition has been officially filed (which will occur, if at all, on July 15, 2022), permit opponents to file such a challenge in January 2022?

ARGUMENT

I THIS PETITION SATISFIES THE REQUIREMENTS OF RULE 14(3)

The Montana Constitution provides this Court with “general supervisory control over all other courts.” Mont. Const. Art VII, § 2(2). This Court will assume supervisory control over a district court “if the court is proceeding based on a mistake of law, which if uncorrected, would cause significant injustice for which appeal is an inadequate remedy.” *Stokes v. Montana Thirteenth Judicial Dist. Ct.*, 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754. Rule 14(3) of the Montana Rules of Appellate Procedure allows this Court to take supervisory control over an action pending in district court when: (1) urgency or emergency factors exist making the normal appeal process inadequate, (2) the case involves

purely legal questions, and (3) the other court is proceeding under a mistake of law and is causing a gross injustice. This petition satisfies each of these three requirements.

A. The Normal Appeal Process is Inadequate Because of the Short Window For Petitioner and Like-Minded Montanans to Obtain Over 60,000 Signatures By June 17, 2022

The loss of First Amendment freedoms, such as signature gathering for petitions, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Such “harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and delay of even a day or two may be intolerable.” *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir.2011).

As one of the sponsors of CI-121, Monforton is required to gather signatures from at least 10 percent of qualified electors (for a total of 60,359 signatures) by June 17, 2022, in order to qualify CI-121 for the November ballot. Mont. Const. Art. XIV, § (9)(1). This is a high hurdle. The District Court’s *ex parte* order is not only interfering with State officials, but also interfering in Monforton’s ability to satisfy the 10 percent hurdle established by the Montana Constitution by prohibiting him from gathering and collecting signatures in support of CI-121. Every day that passes while the District Court’s unlawful injunction remains in

effect is a day that Monforton, the sponsor of CI-121, cannot enlist the aid of Montana voters to petition their government to redress the unjust property tax system that is threatening many of them from being able to remain in their homes. Each day that goes by without signature gathering is a day that cannot be reclaimed. Requiring this matter to drag on indefinitely in the district court will likely prove fatal to Monforton's efforts to successfully obtain an adequate number of signatures to qualify CI-121 for the ballot. An appeal is therefore an inadequate remedy.

B. This Case Involves Pure Issues of Law

Simply put, the questions in this case are (1) whether this Court or the District Court has original jurisdiction to hear challenges to ballot issue statements and legal sufficiency determinations and (2) whether opponents of ballot issues may bring such challenges prior to July 15, 2022. These are pure issues of law and can be quickly and easily resolved by this Court.

C. The District Court is Acting Under a Mistake of Law and Causing a Gross Injustice

The District Court has no jurisdiction to hear a challenge to ballot issue statements or the Attorney General's legal sufficiency determinations. Rather, *this*

Court has original and exclusive jurisdiction to hear such challenges. Mont. Code Ann. § 3-2-202(3)(a); Mont. Code Ann. § 13-27-316(5).

Not only did Plaintiffs file their action in the wrong court, they filed it at the wrong time. Under Mont. Code Ann. § 13-27-316(2), opponents of a ballot initiative challenging ballot statements or the Attorney General’s legal sufficiency determinations must do so “within 10 days of the date of certification to the governor that the completed petition has been officially filed.” For this election cycle, that date is July 15, 2022. Mont. Code Ann. §§ 13-27-104; 13-27-308.² Plaintiffs’ complaint should have been filed between July 15 and July 25.

The reason for this timing rule is obvious. The vast majority of ballot initiatives fail to receive a sufficient number of signatures to qualify for the general election ballot.³ Review by this Court of ballot issue statements or legal sufficiency determinations *before* an initiative qualifies for the ballot would be entirely unnecessary in the vast majority of cases. The District Court’s interference in this matter has tossed judicial economy to the wind.

The District Court should never have ruled on Plaintiffs’ motion. Moreover, the District Court’s issuance of such a sweeping *ex parte* order without any notice to Monforton or the other Defendants was an outrageous violation of Rule 2.6(a) of

² See also <https://sosmt.gov/wp-content/uploads/2022-Ballot-Issue-Calendar.pdf>

³ See, e.g., https://sosmt.gov/elections/ballot_issues/proposed-2022-ballot-issues/

the Montana Code of Judicial Conduct, which requires that a judge “shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”

The District Court’s numerous mistakes of law are causing a gross injustice. Not only did the District Court agree to hear a case in which it has no jurisdiction, and did so on an *ex parte* basis, it also enjoined Monforton and the State officials from collecting and gathering signatures. This not only harms their rights but also those of thousands of Montana voters who desire to petition their government to change the state’s unfair property tax system.

There is absolutely no reason for the District Court’s injunction. Montana law expressly contemplates challenges by opponents to ballot issue statements and legal sufficiency reviews occurring *after* the deadline for gathering signatures and after the deadline for the Secretary of State to certify an initiative to the Governor on July 15, 2022. Mont. Code Ann. § 13-27-316(2). The remedy for a violation of this statute is the removal of the initiative from the general election ballot subsequent to the July 2022 certification, not an injunction directed against signature gatherers in January 2022. The District Court’s baseless injunction is entirely without merit and is interfering with the constitutional rights of thousands of Montanans. This Court must end this gross injustice.

CONCLUSION

For all of the foregoing reasons, Petitioner Matthew Monforton respectfully requests that this Court:

- 1) Assert supervisory control over this case;
- 2) Immediately order the District Court to dissolve its unlawful temporary restraining order or, alternatively, stay the order so that thousands of Montanans may exercise their right to petition their government for redress of grievances during the pendency of this action.

DATED: January 14, 2022

Respectfully submitted,



Matthew G. Monforton
Appearing pro se

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(9)(b) of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word is exactly 2087 words, excluding caption page, Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED: January 14, 2022

Respectfully submitted,



Matthew G. Monforton
Appearing pro se

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing

Petition for Writ of Supervisory

Hon. Michael McMahon
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Troy Downing
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Helena, MT 59601

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew G. Monforton". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Matthew G. Monforton
Appearing pro se

INDEX OF EXHIBITS

Text and Petition Form for CI-121 Exhibit 1

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Motion for TRO filed in District Court, January 12, 2022..... Exhibit 3

TRO issued by District Court, January 13, 2022..... Exhibit 4

DECLARATION OF MATTHEW MONFORTON

I, Matthew Monforton, do solemnly state as follows:

1. I am a resident of Gallatin County, Montana.
2. If called to testify, I could and would testify truthfully, from first-hand knowledge, about the following facts contained in this declaration.
 3. On or about August 31, 2021, Troy Downing and I submitted a proposed constitutional initiative to the Secretary of State's Office.
 4. That initiative, designated at that time by the Secretary as Ballot Issue # 9, seeks to cap the rate of growth of property taxes imposed upon Montana residences.
 5. After Downing and I made several revisions, the Secretary of State approved the initiative on January 7, 2022, for signature gathering and redesignated it as CI-121.
 6. A copy of the petition for CI-121 approved by the Secretary of State, as well as its full text, is attached as **Exhibit 1** to this Declaration.
 7. During the past week, hundreds of Montanans have downloaded petitions from www.CapPropertyTaxes.com, a website Monforton and others designed to support CI-121.
 8. On January 12, 2022, the Montana Federation of Public Employees, the

Montana Farmer's Union, and several individuals (hereinafter, "Plaintiffs") filed a complaint in District Court seeking, *inter alia*, to enjoin all collecting and gathering of signatures for CI-121. See **Exhibit 2**.

9. They named as defendants the Secretary of State, the Attorney General, Downing, and me.

10. Plaintiffs also filed a motion for a temporary restraining order. See **Exhibit 3**.

11. These documents were served on me on the afternoon of January 13, 2022.

12. On that same day, Judge Michael McMahon issued a temporary restraining order against all Defendants, including me, which states as follows:

Accordingly, IT IS HEREBY ORDERED that Respondents and their officers, agents, employees and attorneys are jointly and severally temporarily restrained and enjoined from gathering and/or accepting signatures in support of placing CI-121 on any 2020 ballot until further order of this Court.

See **Exhibit 4**.

13. The District Court also ordered us to appear on January 24, 2022, to show cause as to why a preliminary injunction should not issue. **Exhibit 4**.

14. Judge McMahon did not give any notice to me whatsoever prior to issuing his order.

15. I am informed, believe, and therefore allege that Judge McMahon did not give notice to any of the other Defendants, either, before issuing his ruling.

Executed in Bozeman, Montana, on January 14, 2022.

A handwritten signature in black ink, appearing to read "Matthew G. Monforton". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Matthew G. Monforton

EXHIBIT 1

PETITION TO PLACE CONSTITUTIONAL AMENDMENT NO. CI-121 ON THE ELECTION BALLOT

Subject to applicable laws and deadlines, if 10% of the voters in each of 40 legislative representative districts sign this petition and the total number of voters signing the petition is 60,359, this constitutional amendment will appear on the next general election ballot. If a majority of voters vote for this amendment at that election, it will become part of the constitution.

We, the undersigned Montana voters, propose that the Secretary of State place the following constitutional amendment on the November 8, 2022, general election ballot:

Statement of Purpose and Implication:

CI-121 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. CI-121 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.

Fiscal Statement:

CI-121 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. CI-121 will also have an undetermined impact on local government and school district tax revenue, subject to legislative action.

YES on Constitutional Initiative CI-121

NO on Constitutional Initiative CI-121

Voters are urged to read the complete text of the constitutional amendment, which appears with this sheet. A signature on this petition is only to put the constitutional amendment on the ballot and does not necessarily mean the signer agrees with the amendment.

WARNING

A person who purposefully signs a name other than the person's own to this petition, who signs more than once for the same issue at one election, or who signs when not a legally registered Montana voter is subject to a \$500 fine, 6 months in jail, or both.

Each person is required to sign the person's name and list the person's address or telephone number in substantially the same manner as on the person's voter registration form or the signature will not be counted.

Signature	Date Signed	Residence Address or Post-Office Address or Home Telephone Number	Printed Last Name And First and Middle Initials	Co. Election Ofc Use Only	
				Leg. Rep. Dist #	Rsvd
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					

PETITION # _____ COUNTY: _____ Initials of Petitioner for Signatures on This Page: _____

Sponsor's Instructions to Signature Gatherers: (1) You must be a Montana resident. (2) Only Montana voters can sign. (3) Sign your own petition sheet if you're a Montana voter. (4) Each petition sheet must have signatures from the same county. (5) Show copies of CI-121's text to those wishing to review it. (6) You must personally witness each signature. (7) **You MUST fasten an Unsworn Declaration to your petition sheet(s).** (8) For more than 25 sheets, use a separate Unsworn Declaration. (9) Do not add signatures after signing your Unsworn Declaration – use a new petition sheet & Unsworn Declaration for subsequent signatures. (10) Deliver (or mail soon enough to ensure timely arrival) original petition sheet(s) plus your Unsworn Declaration to the county election administrator where the signers live by **6/17/22**. See: <bit.ly/3JpP6i3> for county administrator addresses. (11) Please visit www.CapPropertyTaxes.com for more information.

THE COMPLETE TEXT OF CONSTITUTIONAL INITIATIVE NO. 121 (CI-121)

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA:

Section 1. Article VIII, section 3, of The Constitution of the State of Montana is amended to read:

“Section 3. Property tax administration -- limitation. (1) ~~The~~ Subject to this section, the state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law.

(2) Except as provided in this section, the assessed valuation of residential property shall be the amount determined by the state in 2019.

(3) The value of residential property may be reassessed annually on January 1 of each year. If residential property is not newly constructed or significantly improved or did not have a change of ownership since January 1, 2019, the change in revised assessed valuation for a year may not exceed the lower of the following:

(a) two percent of the valuation for the prior year; or

(b) the percent change in the consumer price index, U.S. city average, all urban consumers, using the 1982-84 base of 100, as published by the bureau of labor statistics of the United States department of labor.

(4) After January 1, 2019, whenever residential property is newly constructed or significantly improved or has a change of ownership, it must be assessed by the state at its fair market value with subsequent changes to that assessment made in accordance with the limits in subsections (3)(a), (3)(b), and this subsection (4).

(5) The legislature shall limit the total amount of ad valorem taxes assessed against residential property and such limit shall not exceed one percent of the valuation established by this section.

(6) The legislature shall define “residential property” and provide for the application and implementation of subsections (2) through (5), and it may provide for acquisition valuation of other real property.

NEW SECTION. Section 2. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 3. Applicability. [This act] applies to property tax years beginning after December 31, 2023.

- END -

EXHIBIT 2

COPY

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Attorneys for Plaintiffs

FILED

JAN 12 2022

ANGIE SPARKS, Clerk of District Court
By ~~MARY M GOYINS~~ Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

MONTANA FEDERATION OF
PUBLIC EMPLOYEES; MONTANA
FARMER'S UNION; DENNIS
MCDONALD; RON OSTBERG;
JEFF BARBER; and BARBER
REALTY, LLC,

Plaintiffs,

v.

STATE OF MONTANA by and
through the MONTANA
SECRETARY OF STATE and
MONTANA ATTORNEY
GENERAL; TROY DOWNING; and
MATTHEW MONFORTON.

Defendants.

Cause No: BDV 2022-29

**COMPLAINT AND DEMAND
FOR JURY TRIAL**

Comes Now, Plaintiff Montana Federation of Public Employees (“MFPE”), through counsel, and for its Complaint against the State of Montana by and through the Montana Secretary of State (“Secretary of State”) and the Montana Attorney General (“Attorney General”) states and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. MFPE is a public-sector union representing tens of thousands of public employee members spread across the state, many of whom own residential property and pay property taxes. The vast majority are also voters, who may be contacted to support or oppose Constitutional Initiative 121 (“CI-121”). In particular, they may be asked sign the petition to place CI-121 on the 2022 ballot. And, if CI-121 makes it onto the ballot, they are entitled to understand its contents to make an informed vote.

2. The Montana Farmer’s Union is Montana’s only farm organization that represents family farmers. It is over 100 years old and has nearly 12,000 members. It supports the concept that taxes are levied to provide services people cannot provide efficiently for themselves based on, *inter alia*, the fact that property taxes are a stable source of revenue and should be based on equitable appraisals. The passage of CI-121 will affect the Montana Farmer’s Union members, who will also likely be requested to sign the petition supporting CI-121.

3. Dennis McDonald is landowner and rancher in Melville, Sweet Grass County, Montana.

4. Ron Ostberg is a landowner, rancher and farmer in Teton County, Montana.

5. Jeff Barber is a realtor in Helena, Lewis and Clark County, Montana. He owns and operates Barber Realty, LLC. If CI-121 is passed, it will likely affect his profession.

6. The Office of Secretary of State is the state agency responsible for overseeing the submission of ballot issues, including initiatives for constitutional amendments, before they are placed on the ballot.
7. The Attorney General is responsible for conducting legal sufficiency reviews of proposed ballot issues, including initiatives for constitutional amendments, and evaluating if there is any regulatory impact on businesses.
8. Troy Downing is the Montana State Auditor, and Matthew Monforton is a Montana resident. Together, they submitted CI-121 to the Secretary of State for placement on the 2022 ballot. They will be responsible for obtaining signatures in support of CI-121.
9. This Court has jurisdiction over this matter.
10. Venue is proper in Lewis and Clark County pursuant to § 25-2-126, MCA.

GENERAL ALLEGATIONS

11. On August 31, 2021, the Montana State Auditor, Troy Downing, and attorney Matthew Monforton submitted Ballot Issue No. 9 to the Secretary of State for review.
12. Ballot Issue No. 9 is a constitutional initiative that fundamentally changes the way property taxes are established by amending Article VIII, Section 3, of the Montana Constitution by stripping the power of the legislature to establish taxable values and methods of appraisal, and instead constitutionally creates a method to limit taxes.
13. The proposal changes the existing language of Article VIII, Section 3, and replaces it with:

Property tax administration -- limitation. (1) Subject to this section, the state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law.

(2) Except as provided in this section, the assessed valuation of residential property shall be the amount determined by the state in 2019.

(3) The value of residential property may be reassessed annually on January 1 of each year. If residential property is not newly constructed or significantly improved or did not have a change of ownership since January 1, 2019, the change in revised assessed valuation for a year may not exceed the lower of the following:

(a) two percent of the valuation for the prior year; or

(b) the percent change in the consumer price index, U.S. city average, all urban consumers, using the 1982-84 base of 100, as published by the bureau of labor statistics of the United States department of labor.

(4) After January 1, 2019, whenever residential property is newly constructed or significantly improved or has a change of ownership, it must be assessed by the state at its fair market value with subsequent changes to that assessment made in accordance with the limits in subsections (3)(a), (3)(b), and this subsection (4).

(5) The legislature shall limit the total amount of ad valorem taxes assessed against residential property not to exceed one percent of the valuation established by this section.

- (6) The legislature shall define "residential property" and provide for the application and implementation of subsections (2) through (5), and it may provide for acquisition valuation of other real property.
14. On November 22, 2021, the Secretary of State referred the ballot issue to the Attorney General for its legal sufficiency review.
 15. On December 7, 2021, the Attorney General opened public comment on the legal sufficiency of the proposed ballot language.
 16. MFPE submitted comments regarding the language of CI-121. Its comments suggested, *inter alia*, that the Attorney General needed to undertake the analysis required under the recently passed House Bill 651 (HB 651) and to apply the requisite warning that it constituted a regulatory taking.
 17. Five additional organizations also requested that the Attorney General review CI-121 under HB 651 and provide the required warning.
 18. HB 651 was a bill passed in the 2021 Legislative Session. It was signed into law by the Governor on May 14, 2021, with an immediate effective date.
 19. HB 651 amended two important sections of the Montana Code Annotated related to ballot issues. It created a system whereby the Attorney General must undertake an analysis of the impacts on businesses (amending § 13-27-312, MCA) and the Secretary of State must refer a ballot issue to a legislative interim committee for review (amending § 13-27-202, MCA).
 20. With respect to the Attorney General requirements, HB 651 expanded the requirements for review. Now, once the Attorney General receives a proposed "ballot issue"

and statement from the Secretary of State, they not only must evaluate the legal sufficiency of the proposed issue, but also the potential impacts on Montana businesses.

21. Specifically, the Attorney General “*shall review the proposed ballot issue* as to whether the proposed *ballot issue* could cause a regulatory taking under Montana law or otherwise will likely cause significant material harm to one or more business interest in Montana if approved by the voters.” § 13-27-312(9)(a), MCA (2021) (emphasis added). The Attorney General then must notify the Secretary of State if there is a likelihood of harm, so that this information may be placed on the petition. § 13-27-312(9)(b), MCA (2021). This ensures that Montana residents and voters can make an informed decision when deciding whether to sign the petition.

22. On December 22, 2021, after reviewing the comments from MFPE and others, the Attorney General issued his legal sufficiency review and determined the ballot issue was legally sufficient.

23. In his legal sufficiency review, the Attorney General determined that CI-121 was constitutional. He analyzed whether the proposed initiative implicated the single vote requirement, which essentially prohibits amending more than one section of the constitution at a time. In doing so, he specifically looked at *Roosevelt v. Montana Dept. of Revenue*, 1999 MT 30, 293 Mont. 240, 975, P.2d 295, wherein the Montana Supreme Court found that law similar to CI-121 violated the equal protection clause, the takings clause, and the due process clause of the Montana Constitution.

24. Despite the clearly implied amendments to those constitutional provisions, the Attorney General stated that CI-121 was legally sufficient.

25. The Attorney General, however, refused to evaluate any potential takings issues or whether CI-121 would cause any significant harm to Montana businesses. In justifying this refusal, the Attorney General explained that he believed the significant harm evaluation only applied to statutory initiatives and not constitutional amendments.

26. The Attorney General's conclusion was in error as the plain language of § 13-27-312(9), MCA, is clear. By use of the word "shall" it mandates his review of all "proposed ballot issue".

27. A "ballot issue" or "issue" under § 13-27-312(9), MCA means "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." § 13-1-101(6), MCA.

28. So, the Attorney General is required to undertake an analysis of the impacts on Montana business prior to forwarding his legal sufficiency review to the Secretary of State. The Attorney General must forward their review within 30 days of receiving the proposed ballot issue.

29. Here, the Attorney General forwarded his review to the Secretary of State on December 22, 2021, without any analysis of the impact on businesses.

30. Once the Secretary of State received the ballot issue, they are required to review the Attorney General's legal sufficiency opinion and ballot statements. § 13-27-202(5)(a), MCA.

31. Additionally, under the new requirements imposed by HB 651, the Secretary of State "*shall provide* the executive director of the legislative services division a copy of the final text of the *proposed issue* and ballot statements." § 13-27-202(5)(b), MCA (2021). The Executive

Director of the Legislative Services Division then sends the information to the appropriate legislative interim committee for review. *Id.*

32. Once an interim committee receives the information, it has 14 days in which to meet, hold a public hearing and vote on whether to support or not support the proposed issue. *Id.* The Executive Director of the Legislative Services Division then must send the vote information to the Secretary of State. *Id.* Like the regulatory takings analysis, the interim committee vote must be placed on the ballot to ensure Montanans can make an informed decision in signing or refusing to sign the petition.

33. Only “[a]fter the executive director provides the information to the secretary of state” may the Secretary of State send the sample petition to the submitter and allow signature gathering. In other words, without the review by an interim committee, no signatures can be gathered.

34. The term “ballot issue” or “issue” in § 13-27-202(5) (2021), MCA, includes proposed constitutional amendments. § 13-27-101(6), MCA.

35. Here, the Secretary of State failed to send the ballot issue to the Executive Director of the Legislative Services Division, and so no interim committee review took place.

36. Because both the Attorney General and Secretary of State failed to complete their statutory obligation, the Secretary of State has no authority to authorize signature gathering in support of placing the ballot issue on the official ballot.

COUNT ONE – TEMPORARY RESTRAINING ORDER

37. The preceding paragraphs are realleged as though set forth herein.

38. MFPE is entitled to a temporary restraining order prohibiting the signatures from being gathered in support of Ballot Issue No. 9.

a. The language of the petition is was generated using a deficient process.

Procedurally, the Attorney General failed their his duty to consider and address the impact of the initiative on business activity and the Secretary of State failed their duty to refer the initiative for required legislative committee review. Without these reviews, the language on the petition could not be sent to the submitters for signature gathering; or

b. The language is also deficient because the Secretary of State and Attorney General failed to include the results of the significant harm analysis and the vote of the interim committee on the petition; or,

c. The language of the petition is constitutionally invalid because its constitutes multiple changes to the constitution in violation of the single-vote requirement.

39. The restraining order should last until this Court holds a hearing and a decision is made on a preliminary and/or permanent injunction.

COUNT TWO – INJUNCTIVE RELIEF

40. The preceding paragraphs are realleged as though set forth herein.

41. MFPE is entitled to a preliminary injunction enjoining the Defendants from gathering signatures in support of the proposed Ballot Issue No. 9 until such a time as the Attorney General and Secretary of State have met their obligations under §§ 13-27-202(5) and -312(9),

MCA, and the petition provides the results of the Attorney General and interim committee reviews of CI-121.

COUNT THREE – DECLARATORY JUDGMENT

42. The preceding paragraphs are re-alleged as though set forth in full hereunder.

43. MFPE is entitled to declaratory judgment under §§ 27-8-201 et seq., MCA, wherein the Court declare that requirements of HB 651 apply to proposed constitutional amendments as well as proposed statutory initiatives.

44. MFPE also seeks a declaration that the Attorney General’s review of Ballot Issue No. 9 was defective for failing to evaluate its impacts on businesses and that he must conduct that review. Further, the outcome of that review must be placed on the petition prior to signature gathering.

45. MFPE further requests a declaration that the Secretary of State must send the Ballot Issue No. 9 to the Executive Director of the Legislative Services Division for its review by an appropriate interim committee pursuant to § 13-27-202(5), MCA. Further, the outcome of the vote by the interim committee must be placed on the petition prior to signature gathering.

46. MFPE also requests that the Court That the Court find, pursuant to §13-27-316(3)(c)(iii), MCA, that the Attorney General's legal sufficiency determination was incorrect and that the proposed issue does not comply with statutory and constitutional requirements governing submission of the issue to the electors, that the issue is void and that it may not appear on the ballot.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for Judgment all Defendants by the Court or Jury:

1. That the Defendants be temporarily restrained from collecting signatures in support placing of Ballot Issue No. 9 on the 2022 Ballot until the Court holds a hearing on the temporary restraining order;
2. That the Defendants be enjoined from collecting signatures in support of placing of Ballot Issue No. 9 on the 2022 Ballot until such a time as the Attorney General and Secretary of State have fulfilled their obligations under §§ 13-27-202(5) and – 312(9), MCA;
3. A declaration that the requirements of §§ 13-27-202(5) and – 312(9), MCA, apply equally to proposed constitutional amendments, such as Ballot Issue No. 9, and statutory initiatives.
4. A declaration that the Attorney General’s review of Ballot Issue No. 9 was deficient for failing to evaluate the impacts on Montana businesses, and that the Attorney General must conduct this review prior to any signatures being gathered in support placing of Ballot Issue No. 9 on the 2022 Ballot, and that the results of the review must be sent to the Secretary of State and placed on the petition for signatures.
5. A declaration that the Secretary of State must send the Ballot Issue No. 9 to the Executive Director of the Legislative Services Division for its review by an appropriate interim committee pursuant to § 13-27-202(5), MCA, prior to any signatures being gathered in support placing of Ballot Issue No. 9 on the 2022 Ballot and the results of such interim committee review be placed on the petition for signatures.
6. A declaration that that the Attorney General's legal sufficiency determination was incorrect, that the proposed issue does not comply with statutory and constitutional requirements

governing submission of the issue to the electors, that the issue is void, and that it may not appear on the ballot.

7. For any other relief this court deems just and equitable.

DATED this 12th day of January, 2022.

MORRISON SHERWOOD WILSON & DEOLA PLLP

By:



Robert Farris-Olsen
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2022, a true copy of the foregoing document was served upon the following:

Montana Attorney General
Justice Building – Third Floor
215 North Sanders
PO Box 201401
Helena MT 59601

Montana Secretary of State
1301 E 6th Ave
Helena MT 59601

Troy Downing
c/o Office of the Commissioner of Securities and Insurance
840 Helena Ave
Helena MT 59601

Matthew Monforton
36 Kelly Court
Bozeman MT 59718



ALISELINA STRONG

EXHIBIT 3

COPY

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FILED

JAN 12 2022

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Attorneys for Plaintiffs

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

<p>MONTANA FEDERATION OF PUBLIC EMPLOYEES; MONTANA FARMER'S UNION; DENNIS MCDONALD; RON OSTBERG; JEFF BARBER; and BARBER REALTY, LLC,</p>	
<p>Plaintiffs,</p>	
<p>v.</p>	
<p>STATE OF MONTANA by and through the MONTANA SECRETARY OF STATE and MONTANA ATTORNEY GENERAL; TROY DOWNING; and MATTHEW MONFORTON.</p>	
<p>Defendants.</p>	

Cause No: BOV2022-29

**MOTION FOR TEMPORARY
RESTRAINING ORDER
PENDING SHOW CAUSE
HEARING**

through counsel, and submit this brief in support of their motion for a temporary restraining order enjoining the Defendants from gathering signatures in support of Constitutional Initiative 121.

INTRODUCTION

During the 2021 Legislative Session, the Legislature passed, and the Governor signed, House Bill 651 (HB 651), which requires the Attorney General to review a ballot issue for its impacts on businesses. It also requires an interim legislative committee to review the issue and either vote to support or not support the issue. The conclusions of the Attorney General and vote of the interim committee must be placed on the petition before any person may gather signatures in support of placing an issue on the ballot.

At issue here is Constitutional Initiative 121 (CI-121), which fundamentally changes the State's property tax structure and reduces state revenue over the next three years by more than \$80 million. Despite this substantial impact on Montana revenue, the Attorney General refused to consider the impacts on Montana businesses, and the Secretary of State short-circuited public comment by refusing to send CI-121 to an interim committee for review. Not only do these errors violate the plain language HB 651, they undermine the very purpose of HB 651 – which was to increase public participation and awareness of ballot issues. By refusing to comply with their statutory obligations, the Attorney General and Secretary of State were without authority allow the submitters to proceed with gathering signatures in support of placing CI-121 on the 2022 ballot. So signature gathering must stop.

BACKGROUND

A. House Bill 651 significantly changed the method for reviewing ballot issues prior to signature gathering.

On December 13, 2020, Representative Wendy McKamey requested the bill draft that ultimately became HB 651. *See* Ex. 1, MSWD 51-53¹. The first draft of the bill only required interim committees to review proposed ballot issues and vote to either support or not support the placement of the issue on the ballot in accordance with § 13-27-202, MCA. *See* Ex. 1, MSWD 54-62. To do this, the bill draft amended § 5-5-215, MCA, to include this review as an interim committee duty. *Id.* On March 18, 2021, HB 651 was introduced and on the following day was referred to the House Committee on State Administration. Rep. Marta Bertoglio carried HB 651. *See* Ex. 1, MSWD 51-53.

On March 25, 2021, the State Administration committee heard the bill. In her opening remarks, Rep. Bertoglio noted that the purpose of the bill was to require “ballot measures” to be reported to the appropriate interim committee for review, and the vote must be included on the petition for signatures. *See* House State Admin. Hrg., at 9:02:15-9:55:34, <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210325/-1/40993#agenda> (last accessed Jan. 12, 2022). As part of her presentation, Rep. Bertoglio also provided a handout, which outlined the changes. *Id.*; Ex. 1, MSWD 70-71. The main arguments Rep. Bertoglio identified were: “SOS shall send AG-approved ballot statements and text to Executive Director of [Legislative Services Division]. Executive Director sends the issue to the appropriate interim committee. Within 14 days, interim committee must hear the

¹ The exhibits are attached to the Declaration of Robert Farris-Olsen

issue and vote whether it should appear on the ballot or not, and Executive Director must provide this information to SOS in writing.” *Id.*

Continuing, Rep. Bertoglio included the following change: “SOS sends proponent a signature gathering petition containing text of the initiative, ballot statements, and the vote of the legislative interim committee as to whether it believes the initiative should (or should not appear on the ballot. Once approved by SOS, this is the only petition that may be circulated ((13-27-202)(5)).” *Id.* (emphasis in original). Importantly, Rep. Bertoglio included in her exhibit that a proposed ballot issue must still comply with all remaining provisions in § 13-27-202, MCA. *Id.*

The proponents agreed that these were the changes created by HB 651, and noted that the purpose was specifically to create more public comment from both proponent and opponents, and the allow legislators to ask questions. *See* House State Admin. Hrg., at 9:05:57-9:20:20. And based on this public involvement, then the vote would appear on the petition for signatures. *Id.* They also noted that it was important that this information be relayed to the public before millions of dollars were spent in support or opposition to the measure. *Id.* This is also consistent with the suggestions made in drafting HB 651, which refer to “ballot measures” and not statutory initiatives. *See* Ex. 5, MSWD 207-211; *See also* Ex. 8, MSWD 214-16 (staff attorney applying HB 651 to all “ballot issues”).

After HB 651 passed the House, it went to the Senate where it was heard by the Senate Committee on State Administration. There, it was amended to include a process for the Attorney General to review the proposed ballot issue for its impact on Montana businesses. Ex.1 MSWD, 51-53, 109-129. In particular, the Attorney General is required to evaluate

whether the ballot issue could cause a regulatory taking, or otherwise cause significant harm to Montana's businesses. *Id.*

The Senate passed the bill as amended, the House concurred in the amendments, and on May 14, 2021, the Governor signed HB 651 into law. Ex. 1, MSWD 51-54. The final version had an immediate effective date and, relevant here, amended §§ 13-27-202 and 13-27-312 as follows (underlined language is new):

13-27-202. Recommendations -- registration by paid signature gatherers -- approval of form required. (1) (a) A proponent of a ballot issue shall submit the text of the proposed ballot issue to the secretary of state together with draft ballot issue statements intended to comply with 13-27-312. Petitions may not be circulated for the purpose of signature gathering more than 1 year prior to the final date for filing the signed petition with the county election administrator. The secretary of state shall forward a copy of the text of the proposed issue and statements to the legislative services division for review.

...

(4) Before a petition may be circulated for signatures, the final text of the proposed issue and ballot statements must be submitted to the secretary of state. The secretary of state shall reject the proposed issue if the text or a ballot statement contains material not submitted to the legislative services division that is a substantive change not recommended by the legislative services division. If accepted, the secretary of state shall refer a copy of the proposed issue and statements to the attorney general for a determination as to the legal sufficiency of the issue and for approval of the petitioner's ballot statements and for a determination pursuant to 13-27-312 as to whether a fiscal note is necessary.

(5) (a) The secretary of state shall review the legal sufficiency opinion and ballot statements of the petitioner, as approved by the attorney general and received pursuant to 13-27-312.

(b) If the attorney general approves the proposed issue, the secretary of state shall provide the executive director of the legislative services division a copy of the final text of the proposed issue and ballot statements. The executive director shall provide the information to the appropriate interim committee for review in accordance with 5-5-215. If questions arise regarding which interim committee has jurisdiction over the matter, the executive director shall direct the review to the legislative council in accordance with 5-11-105.

(c) The appropriate interim committee or legislative council shall meet and hold a public hearing after receiving the information and vote to either support or not support the placement of the proposed initiative text on the ballot. The outcome of the vote must be submitted to the secretary of state no later than 14 days after receipt of the final text of the proposed issue and ballot statements. Nothing in this section prevents the interim committee from meeting remotely or via conference call. Proxies must be allowed for legislators unable to participate if a quorum of the committee or council meets to fulfill the requirements of this section.

(d) The executive director shall provide written correspondence to the secretary of state providing the name of the interim committee or the administrative committee that voted on the proposal, the date of the vote, and the outcome of the vote conducted in accordance with subsection (5)(c).

(e) After the executive director provides the information to the secretary of state in accordance with subsection (5)(d), the secretary of state shall immediately send to the person submitting the proposed issue a sample petition form, including the text of the proposed issue, the statement of purpose and implication, and the yes and no statements, as prepared by the petitioner, reviewed by the legislative services division, and approved by the attorney general and in the form provided by this part. A signature gatherer may circulate the petition only in the form of the sample prepared by the secretary of state. The secretary of state shall immediately provide a copy of the sample petition form to any interested parties who have made a request to be informed of an approved petition.

And,

13-27-312. Review of proposed ballot issue and statements by attorney general – preparation of fiscal note. (1) Upon receipt of a proposed ballot issue and statements from the office of the secretary of state pursuant to 13-27-202, the attorney general shall examine the proposed ballot issue for legal sufficiency as provided in this section and shall determine whether the ballot statements comply with the requirements of this section.

(2) The attorney general shall, in reviewing the ballot statements, endeavor to seek out parties on both sides of the issue and obtain their advice.

...

(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 13-27-211. 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.

(10) (a) Within 30 days after receipt of the proposed issue from the secretary of state, the attorney general shall forward to the secretary of state an opinion as to the issue's legal sufficiency.

(b) If the attorney general determines that the proposed ballot issue is legally sufficient, the attorney general shall also forward to the secretary of state the petitioner's ballot statements that comply with the requirements of this section. If the attorney general determines in writing that a ballot statement clearly does not comply with the requirements of this section, the attorney general shall prepare a statement that complies with the requirements of this section, forward that statement to the secretary of state as the approved statement, and provide a copy to the petitioner. The attorney general shall give the secretary of state notice of whether the proposed issue conflicts with one or more issues that may appear on the ballot at the same election.

...

The above amendments are clear: the Attorney General must review a proposed ballot issue for its impacts on businesses, and an interim legislative committee must vote to support or not support the bill. This information must be placed on the petition to gather signatures. Without the information, no signatures may be gathered.

B. Constitutional Initiative 121 did not follow the requirements imposed by House Bill 651.

CI-121 is the first ballot issue to be approved for signature gathering. It was approved on January 7, 2022. *See, Montana Secretary of State, Submitted Ballot Issues for the 2022 General Election Ballot*, https://sosmt.gov/elections/ballot_issues/proposed-2022-ballot-issues/(last

accessed Jan. 12, 2022). However, CI-121 was never reviewed for its impacts on business or by an interim committee as required by HB 651. *Id.* CI-121 Amends Article VIII, Section 3, of the Montana Constitution as follows:

Section 3. Property tax administration -- limitation. (1) Subject to this section, the state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law.

(2) Except as provided in this section, the assessed valuation of residential property shall be the amount determined by the state in 2019.

(3) The value of residential property may be reassessed annually on January 1 of each year. If residential property is not newly constructed or significantly improved or did not have a change of ownership since January 1, 2019, the change in revised assessed valuation for a year may not exceed the lower of the following:

(a) two percent of the valuation for the prior year; or

(b) the percent change in the consumer price index, U.S. city average, all urban consumers, using the 1982-84 base of 100, as published by the bureau of labor statistics of the United States department of labor.

(4) After January 1, 2019, whenever residential property is newly constructed or significantly improved or has a change of ownership, it must be assessed by the state at its fair market value with subsequent changes to that assessment made in accordance with the limits in subsections (3)(a), (3)(b), and this subsection (4).

(5) The legislature shall limit the total amount of ad valorem taxes assessed against residential property and such limit shall not exceed one percent of the valuation established by this section.

(6) The legislature shall define "residential property" and provide for the application and implementation of subsections (2) through (5), and it may provide for acquisition valuation of other real property.

Id.; Ex. 2, MSWD 0001.

CI-121 was first submitted on August 31, 2021, and after several iterations was referred to the Attorney General for review on November 22, 2021. During the review process, the several groups, including 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 suggested that the Attorney General needed to

undertake the takings analysis provided in HB 651. *See* Ex. 1, MSWD 12, 17-18, 19-20, 22, 24-25, 43-50. The Attorney General refused, and on December 22, 2021, he issued his legal sufficiency opinion. *See* Ex. 4, MSWD 2-6.

In his opinion, the Attorney General found CI-121 to be constitutionally sound and that he did not need to undertake any regulatory analysis. *Id.* With respect to his legal sufficiency opinion, he opined that there were no equal protection issues and cited to *Roosevelt v. Montana Dept. of Revenue*, 1999 MT 30, 293 Mont. 240, 975, P.2d 295. He distinguished *Roosevelt*, even though it concerned an almost identical change, because it concerned a statutory limitation on taxes and not a constitutional amendment. *Id.* Interestingly, he ignored the language of *Roosevelt* holding that the change also violated Article II, §§ 17 and 29 of the Montana Constitution. *Id.* He also observed, in a footnote, that he did not find any facial defects under the “separate vote requirement” of the Montana Constitution. *Id.* Yet, he provided no analysis. *Id.*

In addition to his legal sufficiency argument, the Attorney General determined he was not required to undertake an evaluation of the impacts to business. *Id.* He opined that § 13-27-312(9)(b), MCA (the significant harm analysis), only applies to statutory initiatives. *Id.* The Attorney General also provided a fiscal note explaining CI-121 would cost the State over \$80 million from 2025-2027. *See* Ex. 6, MSWD 7-11.

The Attorney General notified the Secretary of State of these filings. *Id.* Subsequently, the Secretary of State did not refer the matter to the executive director of Legislative Services Division (LSD). *See* Ex. 7, MSWD 212-13. As a result, no interim committee reviewed the proposal, and no information regarding an interim committee vote is on the petition approved

for signature gathering. Instead, the Secretary of State simply approved the petition for signature gathering. *Id.*

INJUNCTIVE STANDARDS

Temporary restraining orders (TROs) are a form of injunctive relief “made upon notice or an order to show cause, either before or after answer, . . . [and] may enjoin the adverse party until the hearing and decision of the application.” Section 27-19-314, MCA. TROs generally precede an injunction, and are intended to last only until a hearing is held and a decision is made on the injunction application. *Marketing Specialists v. Service Mktg of MT, Inc.*, 214 Mont. 377, 388, 693 P.2d 540, 546 (1985) A district court has a high degree of discretion in maintaining the status quo, *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 136-37, 82 P.3d 912, 916, but must minimize the injury to all parties in the controversy, *Benefis Healthcare v. Great Falls Clinic, Ltd. Liab. P’ship*, 2006 MT 254, ¶ 14, 334 Mont. 86, 90, 146 P.3d 714, 717.

A preliminary injunction may be granted pursuant to § 27-19-201, MCA, in the following circumstances:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

See also, Four Rivers Seed Co. v. Circle K Farms, 2000 MT 360, ¶ 13, 303 Mont. 342, 345-46, 16 P.3d 342, 344. These sections are in the disjunctive, and the district court is not required to make a finding that each circumstance exists. *Four Rivers Seed Co.*, ¶ 13. In other words, “An applicant for a preliminary injunction must establish a prima facie case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.” *Porter v. K & S P’ship*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). Once the applicant meets this burden, courts are “inclined to issue a preliminary injunction to preserve the status quo.” *Id.*; *Boyer v. Karagacin*, 178 Mont. 26, 33, 582 P.2d 1173, 1177 (1978) (“the court should be inclined to issue a temporary injunction applied for where the plaintiff has made out a prima facie case.”)

An injunction may also be granted “enjoin any person to prevent the doing of any prohibited act or to enjoin any person to compel the performance of any act required by the election laws” of Montana. Section 13-35-108, MCA. This provision is “a broadly applicable remedy expressly provided by the legislature for enforcement of the provision of Title 13, MCA.” *Larson v. State*, 2019 MT 28, ¶ 32, 394 Mont. 167, 192, 434 P.3d 241, 257. And § 13-35-108, MCA, unquestionably applies to claims arising under §§ 13-27-202 or -312 because those sections “impose duties, restrictions, and requirements on . . . administrative officials.” *Id.*

Similarly, the Montana Uniform Declaratory Judgment Act applies to disputes arising under Title 13, and provides a remedy for any party whose rights or status “are affected by a statute.” *Id.*, ¶ 33 *citing* 27-8-202, MCA.

ARGUMENT

The Plaintiffs arguments establish a prima facie case that the Attorney General and the Secretary of State have failed in their statutory duties created by HB 651 and codified in §§ 13-27-202(5) and -312(9). Based on this failure, the submitters may not obtain signatures in support of placing CI-121 on the 2022 ballot until such a time as the Attorney General and the Secretary of State fulfill their obligations.

- A. The Secretary of State and Attorney General failed in their statutory obligations, which prevents Downing and Monforton from gathering signatures in support of CI-121. Thus, the Plaintiffs have established a prima facie case.**

MFPE is entitled to a TRO and injunction enjoining the collection of signatures on the petition for CI-121 until such a time as the Attorney General has conducted his business harm analysis; an interim committee votes on CI-121 in accordance with § 13-27-202, MCA; and the outcome of the Attorney General review and interim committee vote are placed on the petition.

The Attorney General's and Secretary of State both make the same error in evaluating HB 651. Their assumption that it only applies to statutory initiatives and not constitutional amendment initiatives is belied by the plain language of §§ 13-27-202, and -312, MCA. In evaluating the language of these statutes, the Court's objective is to implement the objectives the legislature sought to achieve. *Bullock v. Fox*, 2019 MT 50, ¶ 52, 395 Mont. 35, 54, 435 P.3d 1187, 1197 (quotations omitted). And the starting point for interpreting a statute is the language of the statute itself. *Id.* If the intent of the legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls, and the court need

not go further nor apply any other means of interpretation. *Id.* And, the court must “not insert what has been omitted or to omit what has been inserted.” Section 1-2-101, MCA.

Under these tenets, §§ 13-27-202 and -312, apply equally to constitutional amendment initiatives and statutory initiatives. In particular, both statutes explicitly apply to “ballot issues” or “proposed issues.” Section 13-27-202, MCA, sets for the process by which a proponent of a “ballot issue” may place the issue on a ballot for a vote. With respect to the interim committee review, the language specifically contemplates sending the “proposed issue” to the appropriate interim committee. Section 13-27-202(5)(b), MCA. And only after the interim committee has reviewed the “proposed issue” may the petition be forwarded to the submitting party for signatures. Section 13-27-202(5)(e), MCA.

Section 312 uses the same language. Section 13-27-312, MCA. In the new language, the Attorney General reviews the “proposed ballot issue” and determines if the “proposed ballot issue” will be a regulatory taking or cause significant harm.

Because both statutes refer to “ballot issues” or “proposed issues”, the court must look to the codified meaning of “ballot issue” or “issue”. *Bullock*, ¶¶ 52-53. Only if those terms are not defined may the court look to their plain meaning. *Id.*, ¶¶ 52-54. Here, those terms are defined in § 13-27-101(6)(a), MCA, so the court need look no further. Indeed, “Ballot issue” or “issue” means “means 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.” Section 13-27-101(6)(a), MCA (emphasis added). Accordingly, the term ballot issue or proposed issue as used in §§ 13-27-202 and -312, MCA, includes constitutional amendments.

See also § 13-27-101, MCA (“The right of the people to petition to . . . *propose constitutional amendments by initiative* as guaranteed by The Constitution of the State of Montana may be exercised through adherence to the procedures established in this chapter.” (emphasis added)).

Because the provisions of §§ 13-27-202 and -312, MCA apply to constitutional initiatives, the Attorney General and Secretary of State were required to implement those provisions. In fact, both provisions are mandatory. Section 13-27-202(5)(b), MCA, requires the Secretary of State to send a ballot issue to LSD: “the secretary of state *shall provide* the executive director of the legislative services division a copy of the final text of the proposed issue and ballot statements.” (Emphasis added.) Section 13-27-312(9)(a), MCA, similarly requires the Attorney General to undertake a review for significant harm: “The attorney general *shall review* the proposed ballot issue”. Because both statutes use the term “shall”, the Secretary of State and Attorney General were obligated to follow the requirements of §§ 13-27-202(5) and -312(9), MCA. *Swearingen v. State*, 2001 MT 10, ¶ 6, 304 Mont. 97, 99, 18 P.3d 998, 1000 (“Shall” connotes a “mandatory obligation.”); *State v. Bartlett*, 271 Mont. 429, 432, 898 P.2d 98, 100 (1997).

The failure of the Secretary of State and Attorney General to comply with the new requirements of HB 651 entitle MFPE to an injunction or declaratory relief compelling such reviews prior to signature gathering. Specifically, the right of the submitters to gather signatures may only “be exercised through adherence to the procedures established” in Title 13, Chapter 27. Section 13-27-101, MCA. So, any failure to follow those procedures prohibits an issue from being placed on the ballot.

B. The Secretary of State had no authority to send the petition to the submitters for signature gathering.

Not only did the Secretary of State ignore her obligations under § 13-27-202(5), MCA, she also returned the petition to the submitters prematurely.

Section 13-27-202(5)(e), MCA, sets forth the Secretary of State's timeline for returning the petition to the submitters for signature gathering. It provides:

(e) After the executive director provides the information to the secretary of state in accordance with subsection (5)(d), the secretary of state shall immediately send to the person submitting the proposed issue a sample petition form, including the text of the proposed issue, the statement of purpose and implication, and the yes and no statements, as prepared by the petitioner, reviewed by the legislative services division, and approved by the attorney general and in the form provided by this part. A signature gatherer may circulate the petition only in the form of the sample prepared by the secretary of state. The secretary of state shall immediately provide a copy of the sample petition form to any interested parties who have made a request to be informed of an approved petition.

Id. (emphasis added). Subsection 5(d), in turn, provides that LSD "shall provide written correspondence to the secretary of state providing the name of the interim committee or the administrative committee that voted on the proposal, the date of the vote, and the outcome of the vote conducted in accordance with subsection (5)(c)." Read together, these subsections make clear that the Secretary of State may only return the petition for signatures once an interim committee has voted on it, and LSD has provided written notification of the outcome of the vote to the Secretary of State.

Here, the Secretary of State failed to send the ballot issue to any interim committee. As such, LSD never provided her with written correspondence concerning an interim committee vote. Without that vote, the Secretary of State had no authority to return the petition to the submitters for signature gathering. Therefore, the Plaintiffs are entitled to a restraining order and injunction prohibiting signature gathering until the Secretary of State refers the issue to the Legislature and she is advised of the outcome of the vote on the ballot issue.

C. The Legal Sufficiency Review was inadequate and failed to account for the Single-Vote Requirement of the Montana Constitution.

Beyond the failure of the Attorney General to analyze the impacts on businesses, his legal sufficiency review was inadequate. In addition to the above, HB 651 also amended the legal sufficiency review. In the past, the Attorney General did not review ballot issues for “the substantive legality of the proposed issue if approved by the voters.” Section 13-27-312(8), MCA.

In his review, the Attorney General only analyzed whether CI-121 conflicts with the Supreme Court’s decision in *Roosevelt*. He found that because CI-121 is a constitutional amendment, and the Court has a duty to harmonize constitutional provisions, then CI-121 is constitutional. He also, in a footnote, explained that the separate-vote requirement of Article XIV, Section 11 of the Montana Constitution was inapplicable. Not only is his analysis flawed, but he failed to consider the other constitutional issues created by CI-121. By failing in his duties, the petition cannot be circulated.

The Attorney General’s first failure was to consider the “substantive legality” of the amendment based on the separate-vote requirement. He understood it was an issue, but provided no substantive evaluation of it. Rather, he simply said it had “no facial defects.” Without the substantive evaluation, his legal sufficiency opinion is in error. Not only is it in error, but had he done his due diligence, he should have determined that CI-121 is not constitutional as written because it violates the separate vote requirements of Art. XIV, § 11, of the Montana Constitution.

The separate-vote requirement pertains to the submission of a proposed constitutional amendment initiative. *Mont. Ass’n of Cty. (“MACo”) v. State*, 2017 MT 267, ¶ 28, 389 Mont.

183, 185, 404 P.3d 733, 735 ¶ 15. It limits a constitutional amendment to only amending one provision of the constitution per vote:

Submission. 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. IV, § 11.

To determine if a proposed constitutional initiative violates the separate vote requirement, there must be two changes to the Constitution. *MACo*, ¶ 28. The changes need not be patently obvious but can exist through implication. *Id.* In either scenario, the question is “whether, if adopted, the proposal would make two or more changes to the Montana Constitution that are substantive and not closely related.” *Id.* And, if “a proposed constitutional amendment adds new matter to the Constitution, that proposition is at least one change in and of itself.” *Id.* The same is true if the proposed amendment modifies an existing constitutional provision. *Id.* Put simply, any amendment or new provision is one change, so if the proposed amendment affects an additional separate, not closely-related provision, it violates the separate-vote requirement.

Here, the proposed constitutional amendment encompasses more than one change. To determine if amendments are closely related, the following factors must be evaluated:

[W]hether various provisions are facially related, whether all the matters addressed by [the proposition] 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, citing *McLaughlin v. Bennett*, 238 P.3d 619, 622 (Ariz. 2010).

Relying on these factors, the proposed initiative creates an implicit amendment to the equal protection clause. The equal protection clause of the Montana Constitution, provides, “No person shall be denied the equal protection of the laws.” Mont. Const. Art. II, § 4. This right is broader than that in the U.S. Constitution. *State v. Ellis*, 2007 MT 210, ¶ 18, 339 Mont. 14, 19, 167 P.3d 896, 900

The proposed amendment affects the equal protection clause by permitting discrimination based on the time of purchase of a home or changes to an existing home. Indeed, a person who owned their home prior to 2019 will be limited in tax increases to two percent per year, or one percent of total value. The increase is unrelated to fair market value. In contrast, a person who buys their home under the new proposal would pay taxes based on the fair market value. Or, if a person makes significant changes to the home, they will pay based on the fair market value. The effect is to create two separate classes of people, who pay significantly different taxes. This discourages transfers of ownership, or improving one’s property.

In evaluating a somewhat analogous situation, the Montana Supreme Court struck down a two percent flat change in valuation. *See generally, Roosevelt*, 1999 MT 30, 293 Mont. 240, 975 P.2d 295. There, the assessed valuation of properties was set to change on December 31, 1996, and the Legislature sought to phase in the change. To do so, it capped the change at two percent per year for the total change in valuation. The taxpayer at issue saw a significant decrease in valuation of his taxes between 1996 and 1997. However, because of the two percent phase-in, the taxpayer was only allowed to reduce his tax burden by two percent per year – so he was paying taxes based on a valuation that was 124 percent of the assessed value.

In contrast, someone who's home increased in value would be paying less than the assessed value. The Court found that this change violated the equalization valuation guaranteed in Article VII, Section 3 of the Montana Constitution, as well the equal protection clause. *Roosevelt*, ¶¶ 38, 46.

Similarly, in *Dept. of Rev. v. Barron*, 245 Mont. 100 (1990), the Montana Supreme Court held that requiring property owners to pay a disproportionate share of taxes violates their rights to equal protection, due process and eminent domain provisions of the Montana Constitution. And, that it violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution.

The same is true here. CI-121 would require amending Montana's constitution to allow discrimination based on property ownership and improvements. And, it would require amending Art. II, § 29, to permit a taking without just compensation for those individuals who were paying their disproportionate share of taxes.

The amendment also constitutes separate votes because its plain language creates three substantive changes to the Montana Constitution. It first changes the base valuation of properties by setting them at their 2019 values. Second, it eliminates the ability to value property at their fair market value except in certain circumstances. Third, it limits the amount of *ad valorem* taxes that is assessed against residential property. These three changes may look interconnected, but they are not. Instead, CI-121 asks the voters to make three separate votes, i.e., changing the base appraisal value of properties, changing the method of assessment, and limiting taxes. Each of these concepts can and should be voted on separately to ensure voters are fully aware of what their vote is changing.

In the end, the Attorney General refused to engage in this substantive analysis. By failing to engage, he abdicated his responsibility, and the petition cannot be circulated for signatures until it is changed.

CONCLUSION


The Attorney General and Secretary of State misread the requirements of HB 651, and violated their statutory obligations. Because of these failures, the Plaintiffs are entitled to a temporary restraining order, and injunctive and declaratory relief prohibiting any signatures from being gathered in support of placing CI-121 until such a time as:

- (1) the Attorney General reviews the impacts on businesses and makes a determination in accordance with § 13-27-312(9), MCA;
- (2) the Attorney General completes his substantive review of the legality of CI-121 pursuant to § 13-27-312(8), MCA;
- (3) the Secretary of State fulfills the obligations required under § 13-27-202(5), MCA;
- (4) the outcome of the Attorney General review and interim committee vote are placed on the petition for signature gathering;
- (5) Order a show cause hearing to show why a preliminary injunction should not issue.

DATED this 12th day of January, 2022.

MORRISON SHERWOOD WILSON & DEOLA PLLP

By:



Robert Farris-Olsen

Attorney for Plaintiffs
CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2022, a true copy of the foregoing document was served upon the following:

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Montana Secretary of State
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Helena MT 59601

Troy Downing
c/o Office of the Commissioner of Securities and Insurance
840 Helena Ave
Helena MT 59601

Matthew Monforton
36 Kelly Court
Bozeman MT 59718


ALISELINA STRONG

FILED

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ANGIE SPARKS, Clerk of District Court
By: **K KRESGE** Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

MONTANA FEDERATION OF
PUBLIC EMPLOYEES; MONTANA
FARMER'S UNION; DENNIS
MCDONALD; RON OSTBERG; JEFF
BARBER; and BARBER REALTY,
LLC,

Petitioners,

v.

THE STATE OF MONTANA, by and
through the MONTANA SECRETARY
OF STATE, MONTANA ATTORNEY
GENERAL, TROY DOWNING, and
MATTHEW MONFORTON,

Respondents.

Cause No.: BDV-2022-29

**TEMPORARY RESTRAINING
ORDER AND
SHOW CAUSE ORDER**

On January 12, 2022, Petitioners sought, among other things, a
Temporary Restraining Order. Under controlling Montana law, a temporary

1 restraining order’s purpose is to “preserve the status quo until a hearing can be
2 held to determine whether an injunction should be granted.” *Montana Tavern*
3 *Ass’n v. State*, 224 Mont. 258, 264, 729 P.2d 1310, 1315 (Mont. 1986). In this
4 regard, a “court or judge may enjoin the adverse party, until the hearing and
5 decision of the application, by an order which is called a temporary restraining
6 order.” Mont. Code Ann. § 27-19-314 (2021) (emphasis added). Such an order,
7 however, should be issued only if the threatened injury is imminent and if delay
8 would cause immediate and irreparable injury to the applicant.

9 Having reviewed the Petitioners’ Temporary Restraining Order
10 motion, its supporting brief, and Robert Farris-Olsen’s Declaration and attached
11 exhibits, this Court concludes that the Petitioners are entitled to the temporary
12 relief requested in their Petition and in their Temporary Restraining Order motion
13 until good cause to the contrary can be shown.

14 Accordingly, **IT IS HEREBY ORDERED** that Respondents and
15 their officers, agents, employees and attorneys are jointly and severally
16 temporarily restrained and enjoined from gathering and/or accepting signatures in
17 support of placing CI-121 on any 2022 ballot until further order of this Court.

18 **SHOW CAUSE ORDER**

19 **IT IS FURTHER ORDERED** that the Respondents shall appear
20 before this Court on **January 24, 2022 at 4:00 p.m.**, or as soon thereafter as
21 counsel can be heard, at the Lewis and Clark County Courthouse (third floor
22 courtroom) in Helena, Montana, to show cause why a preliminary injunction

23 ////

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1 should not be issued during the pendency of this action as the Petitioners
2 requested in their Petition.

3 **ORDERED** this 13th day of January 2022.

4
5 

6 MICHAEL F. McMAHON
7 District Court Judge

8 cc: Robert Farris-Olsen / John M. Morrison, (via email to:
9 rfolsen@mswdlaw.com / john@mswdlaw.com)
10 Jonathon Motl, (via email to: jon@bitterrootlaw.com)
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15 Montana Secretary of State, 1301 East 6th Avenue, Helena, MT 59601
16 Montana Commissioner of Securities and Insurance, 840 Helena Avenue,
17 Helena, MT 59601
18 Matthew Monforton, 36 Kelly Court, Bozeman, MT 59718

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MFM/tm/BDV-2022-29 Montana Federation of Public Employees, et al. v. State of Montana, et al. - Temporary Restraining Order and Show Cause Order.doc

CERTIFICATE OF SERVICE

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Electronically Signed By: Matthew G. Monforton
Dated: 01-14-2022