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Appearing Pro Se

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

MONTANA FEDERATION OF)	
PUBLIC EMPLOYEES;)	Case No. BDV 2022-29
MONTANA FARMER’S UNION;)	
DENNIS McDONALD; RON)	DEFENDANT MONFORTON’S
OSTBERG; JEFF BARBER; and)	RESPONSE TO ORDER TO
BARBER REALTY, LLC,)	SHOW CAUSE AND BRIEF IN
)	SUPPORT OF MOTION TO
Plaintiffs,)	DISMISS
)	
v.)	
STATE OF MONTANA by and)	
through the MONTANA)	
SECRETARY OF STATE and)	
MONTANA ATTORNEY)	
GENERAL; TROY DOWNING; and)	
MATTHEW MONFORTON,)	
)	
Defendants.)	

INTRODUCTION

On January 13, 2022, this Court ordered Defendants to show cause as to why a preliminary injunction should not be issued during the pendency of this action. Defendant Matthew Monforton hereby responds to the order to show cause by

demonstrating that Plaintiffs' Complaint should be dismissed under Mont. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief may be granted.

ARGUMENT

Plaintiffs' arguments are based upon blatant misrepresentations of statutory provisions contained in the Title 13. In reviewing Plaintiffs' statutory arguments, this Court's "role is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Comm'r of Political Practices for Mont. v. Mont. Republican Party*, 2021 MT 99, ¶ 7, 404 Mont. 80, 485 P.3d 741. None of Plaintiffs' arguments hold up under even the most cursory review. The Court should therefore (1) dismiss the Complaint and (2) discharge its order to show cause.¹

I. The Petition Form That Has Been Circulated to Hundreds of Montanans Fully Complies With Montana Law

A. The State Had No Duty to Place a Business-Impact Statement on the Petition Form for CI-121

The placement of business-impact statements on petition forms for ballot initiatives is governed by Mont. Code Ann. § 13-37-312(9)(b), which states as follows:

¹ The Court should also dismiss the Complaint for lack of jurisdiction as explained by the State in its Motion to Dismiss, which Monforton joins.

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.

(emphasis added). This language makes clear that the Legislature intended business-impact statements to be applied only to *statutory* initiatives, not *constitutional* initiatives, because Mont. Code Ann. § 13-27-204 applies to the former, not the latter. Subsection (1)(a) of that provision requires that the following statement be placed upon petition forms for statutory initiatives:

“If 5% of the voters in each of one-half of the counties sign this petition and the total number of voters signing this petition is ____, this initiative will appear on the next general election ballot.”

Mont. Code Ann. § 13-37-204(1)(a); see also Mont. Const. Art. III, § 4(2) (requiring statutory initiatives to be signed by 5% of electors). Subsection (2) expressly requires that any business-impact statement prepared by the Attorney General must be placed on the front page of the petition forms for statutory initiatives. Mont. Code Ann. § 13-37-204(2).

By contrast, *constitutional* initiatives are governed by Mont. Code Ann. § 13-27-207. That provision requires petition forms to include the following statement:

If 10% of the voters in each of one-half of the counties sign this petition and the total number of voters signing the petition is ____, this constitutional amendment will appear on the next general election ballot.

Mont. Code Ann. § 13-37-207(1)(a); see also Mont. Const. Art. § XIV, sec. 9(1) (requiring constitutional initiatives to be signed by 10% of electors). Unlike Mont. Code Ann. § 13-37-204, which governs statutory initiatives, there is no provision whatsoever in Mont. Code Ann. § 13-37-207 requiring the placement of business-impact statements on petition forms for constitutional initiatives.

The language in Mont. Code Ann. § 13-37-204 applies exclusively to *statutory* amendments while the language in Mont. Code Ann. § 13-37-207 applies exclusively to *constitutional* amendments. The State's duty to include a business-impact statement on petition forms applies to the former but not the latter. Mont. Code Ann. § 13-37-312(9)(b).

Plaintiffs ignore this distinction. Their contention that CI-121 petition forms must include a business-impact statement, if accepted, would require this Court to insert "13-27-207" next to "13-27-204(2)" into Mont. Code Ann. § 13-37-312(9)(b), which states as follows:

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.

It would also require the Court to insert language into Mont. Code Ann. § 13-27-207 (the provision governing petition forms for constitutional initiatives) similar to

the language in Mont. Code Ann. § 13-27-204(2) requiring business-impact statements on the petition forms for statutory initiatives.

Needless to say, the Court may “not insert what has been omitted” from a statutory provision. Mont. Code Ann. § 1-2-101. Plaintiffs’ attempt to shoehorn a requirement for a business-impact statement into Mont. Code Ann. § 13-37-312(9)(b) is precluded by the plain language in both that provision as well as Mont. Code Ann. § 13-27-204 and 207. Plaintiffs are being disingenuous with this Court in failing to analyze this issue – or even address it. Their argument that the petition form for CI-121 is somehow deficient due to its lack of a business-impact statement is completely meritless.

B. The State Was Not Required To Place the Result of Any Interim Committee Vote on the CI-121 Petition Form

Plaintiff insists that the petition form for CI-121 is defective because it does not include the results of a vote taken by an interim committee of the Legislature. Complaint, ¶ 32 (“the interim committee vote must be placed on the ballot to ensure Montanans make an informed decision in signing or refusing to sign the petition.”); *id.*, ¶ 38(b) (“the language is also deficient because the Secretary of State and Attorney General failed to include the results of the...vote of the interim committee on the petition”); *id.*, ¶ 45 (“the outcome of the vote by the interim committee must be placed on the petition prior to signature gathering.”).

Plaintiffs cite no authority for this proposition – and for good reason.

Montana law directly contradicts their argument:

The outcome of the vote by an interim committee or an administrative committee required in 13-27-202(5)(c) ***does not*** need to be reflected in the statement of purpose and implication, the petition title, or the ballot title if the issue is placed on the ballot.

Mont. Code Ann. § 13-37-312(7) (emphasis added). Plaintiffs’ argument concerning the insertion of the result of an interim committee vote on petition forms for CI-121 is a non-starter.

II. Plaintiffs Are Challenging the Attorney General’s Legal Sufficiency Determination in the Wrong Court at the Wrong Time

Plaintiffs insist they are entitled to relief because the Attorney General erred in preparing his legal sufficiency determination. Complaint, ¶ 46 (“the Attorney General’s legal sufficiency determination was incorrect...”). This Court has no jurisdiction to hear this claim. Rather, the Montana Supreme Court has exclusive jurisdiction over this claim:

An original proceeding in the Supreme Court under this section is the ***exclusive*** remedy for a challenge to ... the Attorney General’s legal sufficiency determination.

Mont. Code Ann. § 13-27-316(5) (emphasis added); see also Mont. Code Ann. § 3-2-202(3)(a).

Not only have Plaintiffs challenged the Attorney General’s legal sufficiency determination in the wrong court, they have done so at the wrong time. Under

Mont. Code Ann. § 13-27-316(2), opponents who challenge a ballot statement or legal sufficiency determination 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’ challenge should have been filed between July 15 and July 25.

Plaintiffs contend in their latest filing that “HB 651 completely reversed the timing of consideration of the constitutionality of the law proposed by the ballot issue sponsor.” Pltfs’ Brf in Opp. To Mtn to Lift TRO, p. 10. They do not explain to the Court how HB 651 does this because their claim is patently false. HB 651 did not modify Mont. Code Ann. § 13-27-316(2) whatsoever and, therefore, Plaintiffs cannot bring constitutional challenges to CI-121 until July 15, 2022, at the very earliest.

III. Plaintiffs’ Objections Concerning the Secretary’s Interactions with The Legislature Do Not Warrant the Continued Violation of Montanans’ Constitutional Right to Petition Their Government

Plaintiffs contend that the Secretary of State violated Mont. Code Ann. § 13-27-202(5) because “the Secretary of State failed to send the ballot issue to the Executive Director of the Legislative Services Division, and so no interim

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

committee review took place.” Complaint, ¶¶ 31, 35. Unsupported allegations in an unverified complaint are insufficient grounds for the issuance of a preliminary injunction. *Nevada v. United States*, 364 F. Supp. 3d 1146, 1152 (D. Nev. 2019) (for a preliminary injunction to issue “[a]llegations of irreparable harm must be supported with actual evidence, and not merely conclusory statements or unsupported allegations.”); compare *Cox v. McLean*, 49 F. Supp. 3d 765, 769 (D. Mont. 2014) (“[Plaintiff’s] verified complaint may be treated as an affidavit, and thus may be used as evidence to support an injunction.”). Plaintiffs provide no competent evidence to support their assertion concerning the Secretary’s interaction (or non-interaction) with the Legislature and that assertion should therefore be disregarded.

Moreover, a review of CI-121 took place yesterday (January 20, 2022) in the Legislature’s Interim Revenue Committee.³ Furthermore, the Interim Revenue Committee has scheduled a vote on CI-121 for today.⁴ Plaintiffs’ request for an

³ The Legislature has placed a video of this hearing on its website, which can be viewed at <<https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20220120/-1/43886>>. The committee’s discussion of CI-121 begins at time stamp 14:09:40. Committee discussion and public comments concerning CI-121 lasted approximately three hours.

⁴ See footnote 2, *supra*.

injunction requiring the Secretary of State to provide the text and ballot statements of CI-121 to the Legislature should be denied as moot.

IV. The TRO Prohibiting the Gathering and Collecting of Signatures in Support of CI-121 Should be Immediately Dissolved.

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).

Delays are particularly harmful for Montanans supporting CI-121. They are 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 qualify CI-121 for November ballot. Mont. Const. Art. XIV, § (9)(1). This is a high hurdle.

Because there are absolutely no defects with the petition form for CI-121, there is absolutely no reason why any Defendant should be enjoined from gathering and collecting signatures to qualify CI-121 for the ballot. Nor is there any reason for invalidating any of the signatures gathered prior to the issuance of this Court’s *ex parte* TRO on January 13, 2022.⁵ As explained in this brief, *none*

⁵ Monforton began circulation of petition forms on January 6, 2022.

of the allegations made by Plaintiffs warrant any changes whatsoever to the petition forms for CI-121.

This includes Plaintiffs' allegation that the Secretary was tardy in submitting the text of the initiative and ballot statements to the Legislature. Assuming, *arguendo*, that this allegation is true, it is now moot given that the Interim Revenue Committee held a lengthy hearing on CI-121 yesterday and will vote on it today.

More importantly, any alleged delays by the Secretary in submitting documents to the Legislature have absolutely no impact on the petition forms that Montanans have been signing since January 6, 2022. Montana law makes clear that (1) petitions may be circulated once the Secretary transmits a petition form to signature gatherers – even if the petition is under judicial review and (2) a defect in a petition form or ballot statement is the only basis for which to void signatures made in support of an initiative:

A petition for a proposed ballot issue may be circulated by a signature gatherer upon transmission of the sample petition form by the secretary of state pending review under this section. If, upon review, the attorney general or the supreme court revises the petition form or ballot statements, any petitions signed prior to the revision are void.

Mont. Code Ann. § 13-27-316(4).

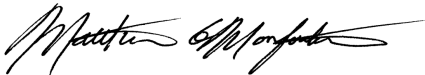
Hundreds of Montanans have already used their signatures to voice their support for CI-121. There is absolutely no reason for those signatures to be voided.

CONCLUSION

Plaintiffs are terrified that, upon reviewing CI-121 petition forms, Montana homeowners will sign them and vote to approve the initiative in November. They have filed a frivolous lawsuit and repeatedly misrepresented the law to this Court to prevent that from happening – or at least obstruct signature gathering for as long as possible. Monforton respectfully requests this Court immediately dissolve its *ex parte* TRO entered on January 13, 2022, and dismiss Plaintiffs’ Complaint in its entirety.

DATED: January 21, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served via email on January 21, 2022, to:

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