IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. OP 22-0076

COTTONWOOD ENVIRONMENTAL LAW CENTER; MONTANA RIVERS; GALLATIN WILDLIFE ASSOCIATION; JOHN MEYER,

Petitioners

v.

AUSTIN KNUDSEN, IN HIS OFFICIAL CAPACITY AS MONTANA ATTORNEY GENERAL,

Respondent.

ORIGINAL PROCEEDING

AMICUS CURIAE BRIEF OF

THE ASSOCIATION OF GALLATIN VALLEY IRRIGATORS; SENIOR WATER RIGHTS COALITION; THE MONTANA WATER RESOURCES ASSOCIATION; THE BIG SKY COMMUNITY HOUSING TRUST; THE MONTANA CHAMBER OF COMMERCE; THE BIG SKY CHAMBER OF COMMERCE; THE BOZEMAN CHAMBER OF COMMERCE; BIG SKY RESORT; LONE MOUNTAIN LAND COMPANY, LLC; THE MONTANA PETROLEUM ASSOCIATION; CLEARH2O SOLUTIONS; FIRE LOOKOUT, LLC; MN FAIRWAY PARTNERS, LLC; MN YELLOWTAIL PARTNERS, LLC; DICK ANDERSON CONSTRUCTION; THE MONTANA CONTRACTORS ASSOCIATION; HILLSDALE HOME SLC LLC DBA ALDER & TWEED; HOUSER ENGINEERING; THE MONTANA BUILDING INDUSTRY ASSOCIATION; THE MONTANA WOOD PRODUCTS ASSOCIATION; THE MONTANA ASSOCIATION OF REALTORS; THE MONTANA FARM BUREAU FEDERATION; THE MONTANA OUTFITTERS AND GUIDES ASSOCIATION; THE HOSPITALITY AND DEVELOPMENT ASSOCIATION OF MONTANA; THE MONTANA MINING ASSOCIATION; CITIZENS FOR BALANCED USE; TREASURE STATE RESOURCES ASSOCIATION; THE MONTANA STOCKGROWERS ASSOCIATION, AND VARIOUS OTHER PARTIES ALL WITH SIMILAR INTERESTS.

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SUMMARY OF THE ARGUMENT

The Attorney General correctly determined that Initiative 24 is legally deficient. Petitioner's challenge to that conclusion comes too late because it was filed more than ten days after the Attorney General's legal sufficiency determination. § 13-27-312, MCA. Even if the petition is considered, Initiative 24 is an unconstitutional "local or special law" and so defective on its face. Initiative 24 improperly bypasses the provisions of § 75-5-316 for designating any stretch of river an Outstanding Resource Water (ORW). Passage of the initiative would constitute an impermissible regulatory taking without just compensation. Passage of the initiative would cause a massive detrimental impact to Montana agriculture, tourism, construction, and overall business and those negative consequences are not adequately reflected in the Attorney General's fiscal impact statement. Finally, if allowed to proceed, the Attorney General's summary of the Initiative should be accepted.

DISCUSSION

The 2021 amendments to § 13-27-312, MCA, vested the Attorney General with a "gatekeeper" role in reviewing proposed ballot initiatives. Section 13-27-312(8) now requires the Attorney General to consider "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." Section 13-27-312(9) now

requires an assessment of whether the initiative "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." The Attorney General appropriately exercised his gatekeeping responsibility and correctly found that Initiative 24 was legally deficient, would constitute a regulatory taking without just compensation, and would materially harm Montana business interests.

A. The Petition Questioning the Attorney General's Determination Comes too Late.

The procedures for challenging the Attorney General's legal sufficiency determination are set forth in § 13-27-316. Subpart 1 provides a short timeframe in which to file any petition. "If the proponents of a ballot issue….believe that the attorney general was incorrect in determining that the petition was legally deficient, they may, *within 10 days of the attorney general's determination* regarding legal sufficiency provided for in Section 13-27-202, file an original proceeding in the supreme court challenging the adequacy of the statement or the attorney general's determination and requesting the court to alter the statement or modify the attorney general's determination." § 13-27-316(1) (emphasis added). The Attorney General's legal deficiency finding was dated January 28, 2022. See Petitioner's Exhibit 1. Petitioner acknowledged that the Secretary of State provided Petitioner with the Attorney General's determination on January 31, 2022. Petitioner's brief at 3. Ten days from the date of the Attorney General's

determination is February 7. Petitioner did not file with this Court until February 10. Montana Rule of Appellate Procedure 3 provides that "All time limits set forth in these rules for filing documents or performing any act are actual time limits." Ten days is ten days.

This Court has consistently held that the procedures set forth in § 13-27-316 must be followed. See *State ex rel. Boese v. Waltermire*, 224 Mont. 230, 730 P.2d 375, 378 (1986) ("We hold that the petitioner has failed to demonstrate any reason to allow him to sidestep the procedural requirements of Section 13-27-316(2), MCA."); *State ex rel. Montana Citizens for Preservation of Citizens' Rights et al v. Waltermire*, 224 Mont. 273, 729 P.2d 1283, 1286 (1986) ("We therefore declined to accept jurisdiction where the procedure in Section 13-27-316(2), MCA, could have been, but was not followed.") Cottonwood knew on January 31, 2022 that the Attorney General had determined on January 28, 2022 that the Ballot Initiative was legally deficient. Any challenge to that determination, according to the plain language of the statute, had to have been filed by February 7, 2022. "This court cannot dispense with statutory formalities." *Sawyer Stores v. Mitchell*, 103 Mont. 148, 62 P.2d 342, 348 (1936). The February 10, 2022 Petition comes too late and should be dismissed.

B. Initiative 24 is an Unconstitutional "Local or Special law."

Article III, Section 4 of the Montana Constitution provides, "The people may enact laws by initiative on all matters except appropriations of money and local or special laws." Similarly, Article V, Section 12 provides, "The legislature shall not pass a special or local act when a general act is, or can be made, applicable." Section 75-5-316 is a general law providing for the potential designation of any Montana river as an ORW. Initiative 24, on the other hand, expressly declares only two discrete stretches of the Madison and Gallatin Rivers as ORWs. A ballot initiative with such a local focus is facially unconstitutional. An initiative cannot accomplish something that the legislature could not. "We have also held that the people exercising the initiative are subject to the same rules as the Legislature." *State ex rel. Steen v. Murray*, 144 Mont. 61, 394 P.2d 761, 763 (1964).

The prohibition against "local or special" laws has been a part of Montana's Constitution, and that of many other States, for decades. "The purpose of this requirement was to prohibit the enactment of a law affecting a particular locality which the Legislative Assembly was unwilling to give general application." *Weber v. City of Helena*, 89 Mont. 109, 297 P. 455, 468 (1931). In determining whether a law is "local and special" or "general," courts look "to its substance and practical operation, rather than to its title, form and phraseology[.]" *Sjostrum v.*

State Highway Commission, 124 Mont. 562, 228 P.2d 238, 241 (1951) (quoting 50 Am. Jur., Statutes, § 5). "A law is a 'local law' if it applies to any division or subdivision of a state less than whole." 73 Am. Jur. 2d Statutes, § 5. Numerous courts have articulated what makes a law "special or local." "In the strictest sense, special or local laws would comprise all such laws as are confined in their application to a limited number of localities or subjects, and a general law be one universal in its application." *Rutgers v. City of New Brunswick*, 42 N.J.L. 51, 53, 13 Vroom 51 (1880).

The Supreme Court of Louisiana explained the reasoning for the prohibition on "special or local" laws in *Polk v. Edwards*,

> Many states have adopted constitutional provisions prohibiting special or local laws under certain circumstances. (citations omitted). These restrictions have been adopted to promote uniform legislation and to prevent the use of legislative influence to obtain special privileges for private individuals or groups. *Id*. These prohibitions further reflect the policy decision that the legislature should concentrate on matters of a general interest to the state, while local governments should address matters of local concern.

626 So. 2d 1128, 1134 (La. 1993). Initiative 24, by focusing on only a portion of the Gallatin and Madison Rivers, is exactly the type of local law the Constitution prohibits. It addresses a particular locality. Every citizen in the State of Montana should not be voting on the classification of a portion of two rivers, scenic as they are, in only Madison and Gallatin Counties.

Nevada faced a similar issue with a statute designed to enable only the cities of Reno and Sparks to develop and finance certain public improvements. The Nevada Constitution, like Montana's, prohibited special and local legislation. The Nevada Supreme Court found, "The Revitalization and Redevelopment Law is applicable only to Reno and Sparks. It is, therefore, local legislation which operates over a particular locality instead over the whole territory of the state…. Because the Act applies specifically to Reno and Sparks, it comes within the prohibition of Article 4, Section 21, and is void." *Goodwin v. City of Sparks*, 93 Nev. 400, 402, 566 P.2d 415, 416 (1977). The same conclusion applies to Initiative 24. It is applicable only to small stretches of the Gallatin and Madison Rivers, not the whole State, which makes it unconstitutional.

Plainly unconstitutional ballot initiatives should not proceed. "A law may be enacted by the people exercising the initiative or by the people acting through the Legislature. In either case the power to enact a law is illimitable, *except as restrained by the Constitution*." *State ex rel. Public Service Comm'n of Montana v. Brannon*, 86 Mont. 200, 213, 283 P. 202, 208 (1929) (emphasis added). An initiative "designedly drafted to be unquestionably and palpably unconstitutional on its face" should not go forward. *State ex rel. Steen v. Murray*, 144 Mont. 61, 394 P.2d 761, 765 (1964). See also *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826 (1984).

Before the Legislature amended § 13-27-312, the Attorney General's legal sufficiency review was largely limited to whether an initiative was procedurally proper. *Montana Mining Association v. State by and through Fox*, 2018 MT 151, ¶ 12, 391 Mont. 529, 420 P.3d 523, 534 (2018). The petition's substantive legality was determined only after it passed. *Montanans Opposed to I-166 v. Bullock*, 2021 MT 168, ¶ 3, 365 Mont. 520, 285 P.3d 435, 436 (2012). The 2021 amendments completely changed the law and makes these previous decisions largely irrelevant.

Section 13-27-312(8) now specifically directs the Attorney General to evaluate the substantive legality of an initiative if approved by the voters, including its constitutionality. Initiative 24 suffers from an unconstitutional defect, and there is no reason to invest the time and resources into its possible passage if it is plainly unconstitutional. This Court has held as much even before the 2021 statutory amendments.

> Where a measure is facially defective, placing it on the ballot does nothing to protect voters' rights. It instead creates a sham out of the voting process by conveying the false appearance that a vote on the measure counts for something, when in fact the measure is invalid regardless of how the electors vote. Placing it on the ballot would also be a waste of time and money for all involved—putting the Secretary of State, local election officials, and ultimately taxpayers to the expense of the election; putting proponents and opponents to the expense of needless campaigning; and putting voters to the task of deciding a ballot issue which this Court already knows cannot stand even if passed. Deferring decision to a later date so the measure can go forward is senseless. It consumes resources with no corresponding benefit.

Reichert v. State ex rel. McCulloch, 2012 MT 111, ¶ 24, 365 Mont. 92, 278 P.3d 455, 474 (2012). Ballot Initiative 24 presents precisely such a case.

C. Ballot Initiative 24 Improperly Circumvents the Consultative Process.

Section 75-5-316 is a general law applicable statewide and it sets forth a detailed and comprehensive process for public and private consultation before any local ORW designation. Such a designation is only to take place upon a showing of necessity, after thorough examination, and when practicable. The 1995 Statement of Intent for § 75-5-315 provides:

> It is the further intent of the legislature that surface and ground water in Montana be designated as outstanding resource waters only if there is no other reasonable means of protecting the water. The legislature intends that because this designation may severely limit future use of the designated water, the designation should be accomplished only after a very thorough examination of the environmental, social, and economic impacts.

A "very thorough examination of the environmental, social, and economic impacts" of any ORW designation cannot be accomplished through a statewide ballot initiative. The legislature established prerequisites for such a designation. To adhere to these requirements, § 75-5-316 sets forth a series of procedural safeguards and opportunities for extensive public involvement. None of these steps or safeguards or processes are honored by Initiative 24. Instead, they are entirely bypassed.

It was precisely these procedures and the consultation and careful review they require that led the Montana Department of Environmental Quality and the Montana Board of Environmental Review to decide *not* to designate the same stretch of the Gallatin River as an ORW. The local review process worked as intended. Initiative 24 improperly bypasses that local step and seeks to take advantage of the ORW designation without adherence to the ORW process.

In addition, § 75-5-316(8) provides that even if the criteria for ORW designation are met, the DEQ still has the discretion to deny the request, *after* completing an environmental impact statement and *after* the public notice and participation steps have been taken, if "approving the outstanding resource waters classification petition would cause significant adverse environmental, social, or economic impacts." *Amici* represent only a fraction of the entities who would suffer adverse social and economic impacts following the Initiative 24 ORW designation. Critically needed affordable housing would be precluded. Construction designed to improve the safety one of the most dangerous roads in the State would be curtailed. The ongoing local efforts of the Gallatin River Task Force would be precluded. The right to exercise constitutionally protected water rights would be impinged. And, as set forth more fully below, the economic impact of a prohibition on even a temporary change in water quality would be massive. Initiative 24 would entirely remove the opportunity for the oversight

vested in the regulatory agencies to consider such impacts and reject an ORW designation if appropriate.

D. Initiative 24 Imposes a Regulatory Taking.

Section 13-27-312(9) requires the Attorney General to review whether the proposed ballot initiative would effectuate a regulatory taking. The Attorney General correctly concluded that Initiative 24 would constitute such a taking. In response, Petitioner misstates the applicable law and the ultimate conclusion.

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use without just compensation." The Montana Constitution similarly provides, "Private property shall not be taken or damaged for public use without just compensation." Article II, Section 29. Each property owner impacted by Initiative 24 has a justifiable expectation that they can use their property without its value being destroyed by government regulation or citizen initiative. In response, Petitioner contends that the Initiative "does not control or regulate land use and no property right exists in navigable waters." Petitioner goes on to state, "No one has a right to pollute," citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 333 (1982). Petitioner's brief at 1, 9. Petitioner is wrong on both counts. Initiative 24 surely does regulate land use and it improperly burdens private property.

Petitioner initially misstates the law by failing to disclose that the *Weinberger* quote in question is in a footnote from the dissent. The quote originates in the legislative history of the 1972 Clean Water Act. The Senate Committee stated, "But the Committee recognizes the impracticality of any effort to halt all pollution immediately. Therefore, this section provides an exception if the discharge meets the requirements of this section[.]" *Weinberger*, 456 U.S. at 333, n.18 (J., Stevens, dissenting) (quoting S.Rep. No. 92-414).

Weinberger overturned an injunction of all pollutant discharges that did not comply with the Act's permit requirements. Justice White, writing for the seven-justice majority, held that the Clean Water Act permitting scheme "as a whole contemplates the exercise of discretion and balancing of equities militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute." *Weinberger*, 456 U.S. at 316. Petitioner misrepresents the Court's holding.

Petitioner then suggests that because Initiative 24 addresses discharges into "navigable waters" as defined by the Clean Water Act, there can be no regulatory taking. Petitioner is again incorrect. The Supreme Court did conclude in *U.S. v. Chandler-Dunbar Water Power Co*. that an individual who previously had revocable at will permits to place dams, dykes, and forebays in the St. Mary's river had no right to "maintain these constructions in the river longer than the

government should continue the license….They were placed in the river under a permit which the company knew was likely to be revoked at any time." 229 U.S. 53, 68 (1913). The Court went on to remark "that the running water in a great navigable stream is capable of private ownership is inconceivable." *Id*. at 68-69. The Attorney General never concluded that the various property owners impacted by Initiative 24 *own* all of the water in the Gallatin or Madison Rivers. Many do, however, have vested senior water rights. In addition, they all have the right to use and develop their property, which includes the right to exercise their rights and discharge from their property in accordance with Montana law and Montana's administration of the Clean Water Act. The Montana Legislature recognized that "the inalienable rights to pursue life's basic necessities and possess and use property in lawful ways" must be balanced "with the policy of preventing, abating, and controlling water pollution." § 75-5-101(3), MCA. That balance is the genesis of the discharge permit program implicit in the Clean Water Act and the Montana Department of Environmental Quality's administration of that Act.

If Petitioner were correct, there could never be a taking based on the denial of a discharge permit because no one would ever have any right to discharge. In fact, cases finding a regulatory taking following denial of Clean Water Act permits are legion. "Taking jurisprudence has acknowledged that a regulatory process, such as that developed under the Clean Water Act, can effect a taking." *Forest*

Properties Inc. v. US, 39 Fed. Cl. 56, 72, 45 ERC 1679 (Fed. Cl. 1997). In *Florida Rock Industries Inc. v. US,* 45 Fed. Cl. 21, 49 ERC 1292 (Fed. Cl. 1999), the Court awarded a landowner just compensation after the Army Corps of Engineers denied a discharge permit under Section 404 of the Clean Water Act.

> Plaintiff has been made the unwilling custodian of the wetlands on its property for the benefit of the public at large, at plaintiff's own risk and expense. Having analyzed the economic impact of the regulation, plaintiff's reasonable, distinct investment-backed expectations, and the character of the governmental action, the court concludes that the denial of plaintiff's section 404 permit application by the Army Corps of Engineers effected a compensable partial regulatory taking of plaintiff's 98 acre property.

Florida Rock Industries, at 43. Petitioner's suggestion that simply because discharge permits are at issue there can be no regulatory taking is flat wrong.

The Supreme Court has addressed the precise problem Initiative 24 creates. In *Penn Cent. Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court discussed the history of regulatory takings and noted, "It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property." *Penn Cent*., at 127 (citations omitted). Here, the history of efforts to designate the Gallatin River as an ORW confirm that such a designation is not reasonably necessary to affect any substantial public purpose. When faced with potential ORW designation, the public, and the regulatory agencies tasked with reviewing

the question, determined that such a designation was not necessary at all. Initiative 24's prohibition of even a *temporary* discharge to the Gallatin or Madison rivers, moreover, would have an unduly harsh impact upon hundreds if not thousands of property owners. *Amici* represent diverse property owners, all of whom would see their ability to use their land and to exercise their constitutionally protected rights completely and unreasonably restricted.

The *Penn Central* Court also referenced *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and its holding that when a statute makes it so commercially impracticable to exercise one's rights as to have "nearly the same effect as the complete destruction of rights claimant had reserved," it constitutes a taking. *Penn. Central*, 438 U.S. at 127-128. Petitioners contend that Initiative 24 is intended to further the public's interest in a clean and healthful environment. That interest, while laudable and recognized in the Montana Constitution, is a uniquely public function. It cannot excuse the regulatory taking of private property without just compensation. See *Penn Central*, at 128.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) makes this point quite clearly. There, the owner of beachfront property challenged a regulation which denied all economically beneficial or productive use of his land as an unconstitutional taking without compensation. The Court initially repeated the "oft-cited maxim that, 'while property may be regulated to a certain extent, if

regulation goes too far it will be recognized as a taking.'" *Id.* at 1013 (citations omitted). The Court reiterated that "where regulation denies all economically beneficial or productive use of land" without compensation, it is an unconstitutional taking. *Id.* at 1015. "As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*." *Id.* at 1016 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)) (emphasis in original).

The *Lucas* court concluded:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. at 1019 (emphasis in original). Some regulation is expected and frequently permitted, but when "a regulation that declares 'off limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Lucas,* at 1030. A ban on all activity that would have even a temporary impact on water quality effectively declares "off limits" all economically productive or beneficial uses of *Amici* property and constitutes a taking.

This Court recognized these same principles in *Kafka v. Montana Dept. of Fish, Wildlife and Parks*, 2008 MT 460, 348 Mont. 80, 201 P.3d 8. There, the

question involved an initiative which prohibited charging a fee to shoot alternative livestock. This Court initially found that there was no protected property right in operating a licensed game farm free from excessive regulation. "Simply put, appellants possess no common law property right to the Licenses, and the State retained the power at all times to revoke or change those Licenses if it chose to do so." *Id. at* ¶ 34, 201 P.3d at 19. The Court then turned to whether passage of the initiative was a regulatory taking of appellants' real and personal property. "There is no question that a person has a compensable property interest arising out of the ownership of such real and personal property." *Id.* at ¶ 66, 201 P.3d at 26. The Court acknowledged that, "In the modern world, it is well-established that state action or regulation may go 'too far,' and constitute a taking in the absence of physical invasion or outright appropriation." *Id.* (citing *Pennsylvania Coal Co.*, 260 U.S. at 414-415).

This Court recognized that if land retains some economic value, perhaps no regulatory taking has occurred. However, just compensation may still be required if "justice and fairness" dictate that "economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Kafka,* at ¶ 69, 201 P.3d at 27 (quoting *Penn Central*, 438 U.S. at 124). Factors to consider in making this determination include: "(1) the character of the governmental action; (2) the extent to which the

regulation has interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant." *Id.*

Several *Amici* own property impacted by Initiative 24. Many owned that property before passage of the Clean Water Act and before passage of § 75-5-315. They each had a reasonable and legitimate expectation that while the Gallatin and Madison Rivers might someday be designated as wild and scenic, or even as an ORW, such a designation would only come about *after* the statutorily required process was followed. Most importantly, however, they had an expectation that discharges, and especially temporary discharges, could be permitted by the DEQ under the Clean Water Act regime. By prohibiting even temporary changes to water quality, Initiative 24 effectively forecloses all economic development of property in large portions of Gallatin and Madison Counties. Such a prohibition clearly goes "too far" and would deny *Amici* "an economically viable use" of their property.

E. The Fiscal Impact Statement is Inadequate.

While *Amici* appreciate the conclusion that Initiative 24 will likely result in significant material harm to the local, regional, and statewide economies, a sentiment Petitioner does not question, the Attorney General declined to alter the statement of fiscal impact. That statement notes only that Initiative 24 would result in increased costs to the State of approximately $60,000 and that it "may

result in local fiscal impacts from inhibited or stopped construction, maintenance, improvements, or other activities requiring a DEQ permit." *Amici* emphasize that both the ORW designation and the prohibition on all activity that might result in even a temporary discharge *will* have a dramatic and substantial impact on State revenue.

Section 13-27-312(3) provides that "if the proposed ballot issue has an effect on the revenue, expenditures, or fiscal liability of the state, the attorney general shall order a fiscal note incorporating an estimate of the effect, the substance of which must substantially comply with the provisions of 5-4-205." Section 5-4-205 requires that fiscal notes show, when possible, "in dollar amounts the estimated increase or decrease in revenue or expenditures, costs that may be absorbed without additional funds, and long-range financial implications" of proposed legislation. The Attorney General's fiscal statement focuses on "expenditures" by the State, but it does not quantify Initiative 24's effect on "revenue." Tourism, construction, recreation, real estate, and agriculture in Gallatin and Madison Counties generate billions of dollars of economic activity every year. That activity leads directly to tax revenue for the Counties in question and for the State, which Initiative 24 will substantially impact.

This situation is most akin to this Court's treatment of the revenue impacts in *ACLU of Montana Foundation, Inc. v. State by and through Fox*,

> According to the fiscal note prepared by the Budget Office, the amount the Attorney General has provided in the fiscal statement pertains only to State government, and only for the next four years. Long-term costs, and costs to local governments, K-12 and college-level educational facilities, and legal fees are uncertain and are not included. The fiscal note should reflect that. According to the Budget Office, costs for the Montana University System alone could exceed $250 million per year.

2017 WL 9532878, *3 (Mont. 2017). The fiscal impact statement suffers from an even more glaring deficiency and the negative impact on state and local revenue Initiative 24 would impose must be calculated and then presented to the voters.

F. The Attorney General Appropriately Revised the Ballot Statement.

The ballot statement for any initiative must fairly inform the voters what is proposed with the initiative. Petitioner suggests that it has offered "plain and easily understood language" for Initiative 24. Petitioner's brief at 10. Petitioner again is incorrect. This Court is statutorily empowered to review the ballot initiative statement. "Ballot statements are subject to court review for compliance with Section 13-27-312, MCA." *Citizens Right to Recall v. State ex rel. McGrath*, 2006 MT 192, ¶ 8, 333 Mont. 153, 155, 142 P.3d 764, 766. Statements of purpose should be true and impartial. *Id.* at ¶ 19. If a ballot statement fails in either regard, "The Court is authorized in a proceeding of this nature to direct the Attorney General to revise the ballot statement." *MEA-MFT v. State*, 2014 MT 33, ¶ 11, 374 Mont. 1, 318 P3d 702, 705. Nevertheless, "As long as the Attorney General's wording plainly states what is proposed, the choice of language is his." *Montana*

Against Tax Hikes v. State by and through Fox, 2018 MT 201, ¶ 15, 392 Mont. 344, 423 P.3d 1078, 1082.

The Attorney General's statement accurately reflects what Initiative 24 would do. It would prohibit permits for even temporary discharges. It would designate the Gallatin and Madison rivers ORWs without the procedures called for by the statute. And it would do so without an assessment of the social, environmental, or economic impacts of such a designation. Should the Court conclude that further revision of the Statement is required, it should remand the case to the Attorney General to redraft the Statement. Petitioner's revised suggestion suffers from the same defects as the initial proposal. It only tells half the story, and it should be rejected.

CONCLUSION

Amici represent a diverse set of individuals and organizations whose vested interests would be significantly adversely impacted by Initiative 24. Their unique perspective should be accepted. Initiative 24 is legally deficient. It is unconstitutional on its face. Its passage would take private property without just compensation. Its impact on local and state revenue would be massive. The Attorney General's Ballot Statement is accurate and within their discretion to prepare. The Attorney General appropriately exercised their statutory authority and found the initiative deficient. This Court should affirm that conclusion.

Dated this 22nd day of February, 2022

CROWLEY FLECK PLLP

By: */s/ Neil G. Westesen*

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CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word 2007 is 4,818 words including footnotes. Rule 11(4).

/s/ Neil G. Westesen
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