
IN THE SUPREME COURT
FOR THE STATE OF MONTANA

JOHN MEYER,
Petitioner,

v.

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

ORIGINAL PROCEEDING

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INTRODUCTION

Petitioner John Meyer (“Meyer”) files this Original Proceeding to review the Attorney General’s determination that Citizen Initiative I-33 (“I-33”) cannot amend the Montana Constitution to include prekindergarten in the system of free public schools. Meyer seeks to review the legality of MCA § 13-27-312(8), which allows the Montana Attorney General to substitute his determination of the legality of citizen initiatives for that of this Court. Meyer seeks review of the residency requirement for signature gatherers, which has been struck down as unconstitutional in several other states. Finally, Meyer requests the equitable remedy of enlarging the timeframe to gather signatures to account for the Attorney General’s unlawful delay.

“An action brought pursuant to this section takes precedence over other cases and matters in the Supreme Court. The Court shall examine the proposed issue and the challenged statement or determination of the attorney general and shall as soon as possible render a decision as to the adequacy of the ballot statements or the correctness of the attorney general's determination.” § 13-27-316(c)(i), MCA; *see also* Article III, Section 1, Article IV, Section 7(2).

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I. LANGUAGE OF I-33

Amended Article X, Section 1(3), Montana Constitution

(3) The legislature shall provide a basic system of free quality public prekindergarten, elementary and second schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic prekindergarten, elementary and secondary school system.

__ YES on Constitutional Amendment __.

__ NO on Constitutional Amendment __.

II. PARTICULAR LEGAL QUESTIONS AND ISSUES TO BE DECIDED.

Pursuant to Montana Constitution Article III, Section 1; Article IV, Section 7(2); and Montana Code Annotated § 13-27-312(8), Meyer respectfully requests that this Court answer the following legal questions:

1. Whether the substantive provisions of Mont. Code Ann. § 13-27-312(8) violate the separation of powers doctrine?
2. Whether the Attorney General violated the separation of powers doctrine by determining Montana Citizens cannot amend the Montana Constitution via initiative to include prekindergarten in the system of free public education?
3. Whether the residency requirement for signature gatherers is unconstitutional?
4. Whether Petitioners should be provided more time to collect signatures given the Attorney General's unlawful delay?

III. FACTUAL BASIS FOR ESTABLISHING JURISDICTION

This Court has jurisdiction to review the Montana Attorney General's determination (Exhibit 1) that I-33 is unconstitutional pursuant to Montana Code Annotated § 13-27-316(c)(i). The Montana Secretary of State provided Petitioners with the Attorney General's determination on April 19, 2022.

IV. CONSTITUTIONAL AND STATUTORY BACKGROUND

This Court has expressed its “firm conviction of the value and importance of the rights of Initiative which is retained by the people of Montana.” *State ex rel. Mont. School Bd. Ass'n v. Waltermire*, 224 Mont. 296, 301, 729 P.2d 1297, 1300 (1986).

The first substantive provision of the Montana Constitution provides:

Popular sovereignty. All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.

Mont. Const. art. II, § 1. The right of Montana citizens to enact laws through the initiative process derives from Art. III, Section 4 of the Montana Constitution. “[T]he Initiative process enables the people to peacefully accomplish the goal of this section of our constitution by allowing important issues to be placed before the people for a popular vote.” *Harper v. Greeley*, 234 Mont. 259, 267–68, 763 P.2d 650, 655 (1988). The Montana legislature has referred to the citizen initiative provision as the “right of the people.” § 13-27-101, MCA.

“The state has an important interest in seeing that its young citizens receive a basic quality education under Article X, Section 1, Mont. Const. (1972): ‘It is the goal of the people to establish a system of education which will develop the full educational potential of each person.’” *State ex rel. Bartmess v. Board of Trustees*, 223 Mont. 269, 274, 726 P.2d 269 (1986). “The state's compelling interest in educating its citizens is reflected in Article X, Section 1, Mont. Const. (1972)[.]” *Id.* at 279. A “thorough system” of public education “is not actuated by motives of philanthropy or charity, but for the good of the state, and, for what it expends on education, it expects substantial returns in good citizenship.” *Granger v. Cascade County Sch. Dist.*, 159 MT 516, 523-24, 1972 Mont. 467, 499 P.2d 780.

V. PROCEDURAL BACKGROUND

Meyer submitted language for a proposed citizen initiative that would amend the Montana Constitution to include prekindergarten in the system of free public education on February 28, 2022. Exhibit 1. The Secretary of State accepted the language, numbered the initiative I-33, and forwarded it to the Attorney General for legal review on March 3, 2022. Exhibit 2. The Secretary of State’s office informed Meyer the Attorney General had until April 18, 2022 to determine the legality of the initiative. Exhibit 2. On April 19, 2022, the Secretary of State’s office forwarded the Attorney General’s determination that I-33 cannot move forward because it “seeks to place an appropriation on the ballot.” Exhibit 1 at 2.

VI. STANDARD OF REVIEW

“No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.” Mont. Const. art. 3, § 1. “[T]he office of interpreting legislative and constitutional provisions lies exclusively in the courts.” *Cottonwood Environmental Law Center, et al. v. Knudsen, in his official capacity as Montana Attorney General*, 2022 MT 49, ¶ 30, 408 Mont. 57 (citation omitted) (J. McGrath, concurring). “Any future determination by the Attorney General that bases legal deficiency on a matter of constitutional interpretation cannot stand.” *Id.*, ¶ 36. “[T]he courts, as final interpreters of the Constitution, have the final ‘obligation to guard, enforce, and protect every right granted or secured by the Constitution.’” *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 18, 326 Mont. 304, 109 P.3d 257.

“[I]ntervention in referenda or initiatives prior to an election is not encouraged.” *Cobb v. State*, 278 Mont. 307, 310, 924 P.2d 268, 269 (1996). Citizen initiatives “should be broadly construed to maintain the maximum power in the people.” *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 429, 691 P.2d 826, 829 (1984). “Just as under the separation of powers doctrine the courts are powerless to predetermine the constitutionality of the substance of legislation, so also they are powerless to predetermine the validity of the substance of an initiated measure.” *Wyo. Nat’l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 286 (Wyo. 1994) (citation omitted). The one exception is when a citizen initiative “seems almost designedly drafted to be

unquestionably and palpably unconstitutional on its face.” *State ex rel. Steen v. Murray*, 144 Mont. 61, 69, 394 P.2d 761, 765 (1964).

“[T]he majority of courts have ruled that a controversy over the constitutionality of an initiative is justiciable only after it has been enacted.” *Wyo. Nat’l Abortion Rights Action League*, 881 P.2d at 286. “[T]he statutes now reflect a clear preference to defer ruling on the constitutionality of a proposed initiative petition until *after* the results of the election at which it is submitted to the voters.” *Montanans Opposed to I-166 v. Bullock*, 2012 Mont. 168, ¶ 14, 365 Mont. 520, 285 P.3d 435 (emphasis in original). “It is not the function of the courts to second-guess and substitute their judgment at every turn of the road for the judgment of the legislature in matters of legislation, and the same is true in the case of direct legislation by the people via the initiative process.” *State Bar of Mont. v. Krivec*, 193 Mont. 477, 481, 632 P.2d 707, 710 (1981) (citation omitted). To effectively protect and preserve the rights which Montanans have reserved to themselves to change the laws through the initiative process, pre-election judicial review of a ballot initiative should not be conducted unless the challenged initiative is “facially defective.” *Reichert v. State*, 2012 MT 111, ¶ 59, 365 Mont. 92, 278 P.3d 455. A facial challenge must “establish that no set of circumstances exists under which the law would be valid, or show that the law lacks a plainly legitimate sweep.” *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (internal citations and quotations omitted).

VII. LEGAL ARGUMENT

1. Mont. Code Ann. § 13-27-312(8) violates the separation of powers doctrine.

“As an executive officer of the State of Montana, the Attorney General does not have the authority to make a declaration regarding the constitutionality of the initiative.” *Cottonwood Environmental Law Center*, 2022 MT at ¶ 34 (citation omitted) (J. McGrath, concurring). That is exactly what the Attorney General has done once again in this case. Exhibit 1 at 4 (determining I-33 “violates Article III, Section 4(1) of the Montana Constitution.”)

According to the Attorney General, “[t]he Montana Legislature, by law, granted the Attorney General authority to conduct legal sufficiency reviews for proposed ballot measures.” Exhibit 1 at 1 (citing MCA, § 13-27-312). “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.’” Exhibit 1 at 1 (citing MCA, § 13-27-312(8)).

This Court has “previously covered this separation-of-powers issue in the very same context as here. In 2014, opponents of a proposed ballot initiative argued that the Attorney General should have rejected it based on its alleged unconstitutionality.” *Cottonwood*, 2022 MT at ¶ 34 (citing *Hoffman v. State*, 2014 MT 90, ¶ 4, 374 Mont. 405, 328 P.3d 604). In *Hoffman*, the Court pointed out that “the Attorney General's legal sufficiency review does not authorize him to withhold a proposed ballot measure

from the ballot for an alleged substantive constitutional infirmity.” 2014 Mont. at ¶ 8 (collecting cases). “Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers.” *Hoffman*, ¶ 9. The same holds true here. The Attorney General “lacks the power to reject a proposed ballot initiative based on an opinion about its constitutionality.” *Cottonwood*, 2022 MT at ¶ 28. The Court should strike as unconstitutional the provisions of MCA 13-27-312 that provide substantive review of initiatives.

2. Montana voters can amend the Constitution to add prekindergarten to the system of free quality public schools.

The Attorney General determined Montana voters cannot amend the Montana Constitution to add prekindergarten to the system of free public education. Exhibit 1. To reach this result, the Attorney General relied upon Montana Code Annotated § 13-27-211(2), which purports to implement Article 3, Section 4(1) of the Montana Constitution. Exhibit 1 at 3. According to MCA § 13-27-211(2), an initiative may not increase or expand eligibility to a government program. There are several problems with the Attorney General’s interpretation as well as MCA § 13-27-211(2).

First, as explained above, the Attorney General has unlawfully interpreted the Montana Constitution (Exhibit 1 at 2-3) in violation of the separation of powers doctrine. *Cottonwood*, 2022 MT at ¶ 34 (citation omitted).¹

Second, the Attorney General has incorrectly interpreted the Montana Constitution. Article 3, Section 4 of the Montana Constitution delineates the people's ability to enact laws by initiative, while Article 14, Section 9(1) delineates the people's ability to amend the Constitution by initiative. Article 14 does not contain a prohibition on amending the Constitution via initiative to expand public programs. The Attorney General's interpretation erred by reading a prohibition into the Constitution where one does not exist. *See generally*, § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted.")

Third, expanding the public school system via a constitutional amendment to include prekindergarten education would not conflict with Article 10, Section 1(3) of the Montana Constitution because it already requires the legislature to fund a public school system.

¹ The Attorney General has sought to avoid this original proceeding by mischaracterizing his substantive review and interpretation of the Montana Constitution as "procedural." Exhibit 1 at 2-4.

Fourth, § 13-27-211(2), MCA unconstitutionally delegates the ability to expand any social program to the Montana legislature. Under the Attorney General's interpretation of the Montana Constitution and MCA § 13-27-211(2), the legislature can expand the public education system to include prekindergarten education, but the citizens cannot. Such an absurd result would violate the principle that the people can make any law via initiative that the legislature can enact via legislation. *E.g., State ex rel. Harper v. Waltermire*, 213 Mont. 425, 429 (1984) (Citizen initiatives "should be broadly construed to maintain the maximum power in the people.")

3. The residency requirement for signature gatherers is unconstitutional and has been struck down by several other states.

Montana law requires signature gatherers for a statewide ballot initiative or referendum to be residents of Montana. Mont. Code Ann. § 13-27-102(2)(a). Rules determining "residence" are defined by Mont. Code Ann. § 1-1-215. This residency requirement is unconstitutional under the 1st and 14th Amendments of the Constitution of the United States by posing a severe burden on petition gatherers and significantly inhibiting communication with voters about proposed political change. The residency requirement has been struck down by multiple states. *See Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Am. Constitutional Law Foundation*, 525 U.S. 182 (1999); *Nader v. Blackwell*, 545 F.3d 459, (6th Cir. 2008); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1026 (10th Cir. 2008); *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437 (6th Cir. 2016); *Chandler v. City of Arvada*, 292 F.3d 1236, 1244 (10th Cir. 2002).

- a. The Montana residency requirement poses a severe burden on petition gatherers by limiting the number of voices that can convey a message and therefore limiting the size of the audience reached.

Free speech and political association are protected by the 1st Amendment of the Constitution of the United States. "Political association is at the core of the First Amendment, and even practices that only potentially threaten political association are highly suspect." *McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir. 1996). The circulation of a petition involves core political speech because it "involves interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988); *Buckley v. Am. Constitutional Law Foundation*, 525 U.S. 182, 186 (1999). Severely burdening petition gatherers limits the number of voices conveying a message regarding an initiative, and therefore limits the size of the audience reached. *Meyer*, 486 U.S. at 422-423. Regulation of core political speech is subject to strict scrutiny. *Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008); *Buckley*, 525 U.S. at 192. The residency requirement violates Montanan's right to engage in political speech.

Severe burdens on regulation of core political speech are unconstitutional. The Supreme Court maintains there is no definite distinction between legitimate ballot access regulations and improper restrictions on political speech. A court must individually assess a ballot access restriction and the burden imposed. *Nader*, 545 F.3d at 475 (applying *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). In 2008, Ohio held residency requirements for petition circulators unconstitutional. *Nader*, 545 F.3d at 475. The court relied in part on *Buckley*, which held that Colorado's voter registration

requirement for ballot initiative circulators was unconstitutional. *Id.* The *Buckley* court found Colorado's registration requirement "cuts down the number of message carriers in the ballot-access arena without compelling cause[.]" and was therefore unconstitutional. 525 U.S. at 197. Voter registration is closely tied to residency. *Nader*, 545 F.3d at 474. A registration requirement drastically reduces the number of people available to circulate a petition. *McCloud*, 97 F.3d at 193. A residency requirement has the same effect, both of which threaten political association.

In addition to limiting the pool of potential signature gatherers, residency requirements strain resources by increasing the cost of recruiting, hiring, and training signature gatherers. *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1026 (10th Cir. 2008). Experienced circulators have greater productivity and are strongly incentivized to remain marketable in their field, and therefore are of greater value in the ballot-access arena. *Id.* Residency is unrelated to professional experience. For these reasons, in response to a challenge to Oklahoma's residency requirements, the Tenth Circuit struck down the requirement as unconstitutional. *Id.*

In *Pierce v. Stapleton*, Judge Lovell applied the test of whether a "reasonably diligent" initiative campaign could have secured a place on the ballot despite the residency requirement. 505 F. Supp. 3d 1059, 1067 (D. Mont. 2020). The court held there is no constitutional violation of rights if it's the plaintiff's own inaction that inhibits their ability to place an initiative on the ballot. *Id.* In this case, the Attorney

General's unlawful actions are responsible for Petitioner's inability to collect signatures.

- b. The Montana residency requirement significantly inhibits communication with voters about proposed political change, and is not supported by compelling state interests.

The First Amendment, as applied to states by the Fourteenth Amendment, states that "Congress....shall make no law abridging the freedom of speech." U.S. Const. amend. I. Citizens may seek political change by petition, and "their right to freely engage in discussions concerning the need for that change is guarded by the First Amendment." *Meyer*, 486 U.S. at 421.

States assumedly justify residency and registration requirements on signature gatherers to decrease fraud and increase administrative efficiency. *Buckley*, 525 U.S. at 192. However, such restrictions limit the voices of those circulating such initiatives, and therefore decrease the size of their reachable audience. *Id.* at 195. The result is limited involvement in statewide discussion, which imposes an unjustifiable burden on citizens. *Id.* Colorado argued in *Buckley* that registering to vote (or in this instance, establishing residency) is an easy burden to meet. *Id.* However, just as the choice to not register to vote implicates political thought and expression (*id.*), the choice to establish residency in a given state implicates identity and permanency, neither of which is a choice that should hinder a person's right to political participation in whatever form a person chooses.

Colorado was further concerned that unregistered circulators would be beyond the Secretary of State's subpoena powers. *Buckley*, 525 U.S. at 196. The court pointed out that circulators were already required to submit an affidavit that includes the circulator's address. *Id.* Such an attestation has "immediacy and reliability that voter registration may lack." *Id.* The 9th Circuit also rejected this argument, stating that requiring petition circulators to submit to jurisdiction for subpoena enforcement is a "far more narrowly tailored means than a residency requirement to achieve the same result." *Yes on Term Limits, Inc.*, 550 F.3d at 1029-30 (quoting *Nader*, 531 F.3d at 1037).

In considering a similar residency requirement in Colorado, the Tenth Circuit held that the "city could achieve its interest without wholly banning nonresidents from circulating petitions[.]" *Chandler v. City of Arvada*, 292 F.3d 1236, 1244 (10th Cir. 2002). Administrative concerns regarding access to signature gatherers is alleviated by a similar affidavit requirement in Montana under Mont. Code Ann. § 13-27-302. Therefore, the residency requirement is not justified by a compelling state interest.

The Tenth Circuit held that banning non-resident signature gatherers was not narrowly tailored to the compelling interest of protecting the integrity of its initiative processes. *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008). Defendants cited "questionable integrity of non-resident circulators." *Id.* at 1027. Limited evidence of a handful of fraudulent non-resident circulators is not sufficient reason to designate the entire class as fraudulent. *Id.* at 1029. There is no evidence to suggest non-resident circulators commit fraud at higher rates than resident circulators, and is

therefore not a narrowly tailored approach to protecting integrity of the initiative process. *Id.*

Like other states, Montana has no evidence of voter fraud as a compelling reason to justify a residency requirement. The legislature recently decided not to hold a special session to address the issue of voter fraud. The Court should strike as unconstitutional Mont. Code Ann. § 13-27-102(2)(a).

4. Petitioner should be provided more time to collect signatures to compensate for the Attorney General's unlawful delay.

“A court sitting in equity is empowered to determine all questions involved in the case, and to fashion an equitable result that will accomplish complete justice.” *Volk v. Goeser*, 2016 MT 61, ¶53, 382 Mont. 382, 367 P.3d 378. Petitioner requests that the Court enlarge the time for collecting and submitting signatures to correspond with the length of the unlawful delay—thirty days for the substantive review, ten days for the filing of this original petition, the time for the Attorney General to respond, and the time for the Court to issue an order.

REQUESTED RELIEF

Petitioner John Meyer respectfully requests that this Court strike as unconstitutional the substantive review sections of MCA 13-27-312(8); overrule the Attorney General's legal deficiency determination; strike as unconstitutional the residency requirement for signature gatherers; and expand the timeframe for Meyer to collect signatures.

Respectfully submitted this 29th Day of April, 2022.

/s/ John Meyer
JOHN MEYER

Attorney for Petitioner

/s/ Holly Seymour
HOLLY SEYMOUR

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 04-29-2022:

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