IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. OP_____

MONTANANS SECURING REPRODUCTIVE RIGHTS and SAMUEL DICKMAN, M.D.,

Petitioners,

v.

AUSTIN KNUDSEN, in his official capacity as MONTANA ATTORNEY GENERAL; and CHRISTI JACOBSEN, in her official capacity as MONTANA SECRETARY OF STATE,

Respondents.

PETITION FOR DECLARATORY RELIEF ON ORIGINAL JURISDICTION

EXPEDITED CONSIDERATION REQUESTED

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RELIEF REQUESTED

Montanans Securing Reproductive Rights and Samuel Dickman, M.D. (together, "MSRR") seek this Court's declaration that (1) Constitutional Initiative 14 ("CI-14") proposes a single constitutional amendment under Article XIV, § 11 of the Montana Constitution; (2) the Attorney General ("A.G.") did not have authority to append a fiscal statement to CI-14 under § 13-27-226(4), MCA because CI-14 has no determinable fiscal impact; and (3) MSRR's proposed ballot statements comply with §§ 13-27-212 and -213, MCA. MSRR asks that the Court direct the A.G. to forward MSRR's ballot statements to the Montana Secretary of State ("Secretary") within five days of this Court's decision.

FACTS

1. Dr. Dickman is the Chief Medical Officer of Planned Parenthood of Montana.
2. Montanans Securing Reproductive Rights is registered with the Montana Commissioner of Political Practices as a ballot issue committee in support of CI-14.
3. On November 22, 2023, Dr. Dickman submitted to the Secretary (1) the text of a proposed constitutional initiative for the 2024 ballot, which the Secretary designated as CI-14; and (2) proposed ballot statements. (Ex. 4).

4. On December 6, 2023, after responding to minor suggested changes by the Legislative Services Division, (Ex. 5), Dr. Dickman submitted finalized initiative text and ballot statements for CI-14 to the Secretary. (Ex. 1).

5. The same day, the Secretary referred CI-14 to the A.G. and the Governor's Office of Budget and Program Planning ("OBPP"). (Ex. 6).

6. On December 15, 2023, OBPP determined that CI-14 will have $0 fiscal impact in the next biennium, and that no fiscal impact can be determined beyond that period. (Ex. 3).

7. MSRR provided comments notifying the A.G. of defects and improper agency advocacy in the fiscal note. (Ex. 7).

8. On January 16, 2023, the A.G. held that CI-14 is legally insufficient under the separate vote requirement of the Montana Constitution because it "creates an express right to abortion but denies voters the ability to express their views on the nuance of the right." (Ex. 2 at 3).

9. The A.G. declined to address the sponsor's ballot statements, but he drafted a fiscal statement that claims CI-14 "may require Montana Medicaid to cover broader categories of abortion than it currently covers." (Ex. 2 at 4).

ANTICIPATED LEGAL ISSUES

This Petition raises the following legal issues:

- Whether CI-14 would make two or more changes to the Constitution that are substantive and not closely related;
- Whether the A.G. has authority to include a fiscal statement under § 13-27-226(4), MCA, if the fiscal note does not "indicate[] a fiscal impact";
- Whether, in the alternative, the fiscal note should conform to OBPP's conclusion and omit misleading agency commentary; and
- Whether, under § 13-27-226(3)(c), MCA, MSRR's ballot statements "clearly do[] not comply with the relevant requirements" for clarity and neutrality.

JURISDICTION

This Court "has original jurisdiction to review the petitioner's ballot statements for initiated measures . . . and the attorney general's legal sufficiency determination." Section 3-2-202(3)(a), MCA. MSRR certifies the absence of any factual issues.

The Court also has jurisdiction to review the A.G.'s decision to include a fiscal statement, as well as whether the contents of any such statement are, based on the record, "untrue . . . confusing or misleading." *Stop Over Spending Mont. v. State*, 2006 MT 178, ¶ 29, 333 Mont. 42, 139 P.3d 788.

PURPOSE OF CI-14

CI-14 affirms, through an express textual provision in the Montana Constitution, the right to make and carry out decisions about one's own pregnancy, including the right to abortion. Central and essential to this right are CI-14's provisions that prohibit the government from denying or burdening the right before fetal viability, or when an abortion is necessary to protect the life or health of a pregnant patient. Integral to the right, CI-14 prohibits the government from punishing those who exercise the right and providers who assist.

ARGUMENT

I. CI-14 Is A Single Constitutional Amendment

A. MSRR has met the standard repeatedly affirmed by this Court

CI-14 proposes a single constitutional amendment fully complying with the separate vote requirement of Article XIV, § 11. It does not "make two or more changes to the Constitution that are substantive and not closely related"; rather, its provisions are closely related and present voters with a binary choice about a single proposal. *See Montanans for Election Reform Action Fund v. Knudsen* ("*MER*"), 2023 MT 226, ¶ 7, __ Mont. __, __ P.3d __ (quoting *Monforton v. Knudsen*, 2023 MT 179, ¶ 12, 413 Mont. 367, 539 P.3d 1078).

Article XIV, § 11 of the Montana Constitution provides, "[i]f more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately." The provision

> has two objectives: (1) to avoid voter confusion by ensuring that proposals are not misleading, conceal their effects, or are not readily understandable; and (2) to avoid "logrolling," or combining unrelated amendments into a single measure that might not otherwise obtain majority support.

MER, ¶ 12 (citing *MACo v. State*, 2017 MT 267, ¶ 15, 389 Mont. 183, 404 P.3d 733). This Court has enunciated the test for whether a proposed amendment satisfies the separate vote requirement:

> [t]he proper inquiry is whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and not closely related. We have employed a definition of substantive as "an essential part or constituent or relating to what is essential." Then, numerous factors may be considered in determining whether the provisions of a proposed constitutional amendment are closely related, including: whether 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. In summary, if a proposal would effect two or more changes that are substantive and not closely related, the proposal violates the separate-vote requirement because it would prevent the voters from expressing their opinions as to each proposed change separately.

Id., ¶ 7 (quoting *Monforton*, ¶ 12).

CI-14 satisfies the separate vote requirement. First, CI-14 is a single substantive proposal to establish the right to make and carry out decisions about

pregnancy. Each part is essential to the policy CI-14 proposes. *See id.* Subsection (1) sets forth the general right and provides the test under which the government may burden or deny it. Subsection (2) sets forth a fetal viability limitation, after which the government may regulate abortion except where medically indicated to protect the pregnant patient's life or health. Subsections (1) and (2) constitute the core proposal, which turns on fetal viability for the government's ability to burden or interfere with the right to abortion. Both are essential; together, they *are* the proposal. *See MER*, ¶ 7. Subsection (3) then secures the right established by prohibiting the government from punishing persons who exercise the right or those who assist others in their exercise of the right. Subsection (4) defines essential terms and limits the application of those definitions to the amendment itself.

The subsections operate in unison to establish, outline, and secure the right. They comprise a single proposal. Subsections (1) and (2) define the scope of the right established. Subsection (3) secures it against penalty, prosecution, and other adverse action by the government. It is no secret that CI-14 is, in part, a response to the sustained attack on abortion rights in Montana by the government, under laws that purport to do exactly what Subsection (3) prohibits: penalize, prosecute, and adversely affect those who exercise their rights or those, like healthcare providers, who assist. The terms defined in Subsection (4) are necessary to secure the right established in Subsections (1) and (2) against legislative or judicial

encroachment: specifying which interests are sufficiently "compelling" to justify government interference, and providing a definition of fetal viability. In sum, CI-14 is a single, coherent, and specific amendment. None of its parts amounts to a separate proposal requiring a separate vote.

Second, not only does CI-14 comprise a single proposal, there is *no* doubt that its provisions are "closely related." *MER*, ¶ 7. Under the factors detailed by this Court, all four components of CI-14 are "facially related" to the right to make decisions about pregnancy. *Id.* The matters addressed by the subsections of CI-14 "concern a single section of the constitution." *Id.* The voters and the legislature "historically ha[ve] treated the matters addressed as one subject." *Id.* For example, in 2021 and 2023, the Montana Legislature passed a bevy of laws that purport to redefine the nature of individual rights related to pregnancy, effect penalties or punishments, define what interests the government may rely upon to invade rights, and modify the definition or role of fetal viability. *E.g.*, 2021 House Bill 136 (purporting to prohibit pre-viability abortion at 20 weeks, providing felony criminal penalties, and providing a list of "compelling" state interests supporting the bill); *see also Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 10, 409 Mont. 378, 515 P.3d 301. Finally, the various subsections "are qualitatively similar in their effect on either procedural or substantive law." *Id.*

CI-14 plainly affects one topic and does so in a single, comprehensive way: establishing and outlining the right, then securing it from government interference.

Third, CI-14 does not contravene the objectives of the separate vote requirement. *MER*, ¶ 12. Its content is straightforward. The language of the proposed amendment does not conceal its effects. And it does not "combin[e] unrelated amendments into a single measure that might not otherwise obtain majority support." *Id.* (citing *MACo*, ¶ 15). To the contrary, it requires a feat of rhetorical fancy—or results-oriented logical trivializing—to conceive of CI-14 as anything other than a single, coherent proposal that presents voters with a binary choice.

In sum, CI-14 is plainly a single amendment with four subsections, each of which is essential and closely related to a single purpose—fully complying with the requirements of Article XIV, § 11. Under Article XIV, § 9, the People have reserved to themselves the power to define, author, and propose individual constitutional amendments. CI-14 is an exercise of that power, consistent with the procedural requirements of § 11.

B. The A.G. has failed to establish a violation of the separate vote requirement

The A.G.'s contrary legal sufficiency determination—less than two months after this Court's unanimous decision in *MER*—stretches the bounds of credulity. Ignoring *MER*, the A.G. invites this Court to adopt a new, lawless standard that

permits the A.G. to block virtually any constitutional amendment that, in his own subjective determination, could benefit from more "nuance." Neither the text of Article XIV, § 11 nor the decisions of this Court support such an expansive role for the A.G.

The A.G.'s first argument is that CI-14 "amends Article II, Section 10" of the Montana Constitution because the A.G. believes that the proposal "amends the *Armstrong* framework." Ex. 3 at 2. Setting aside the A.G.'s convoluted editorialization of how CI-14's subsections operate, the A.G. does not—and cannot—establish that amending one section of the Montana Constitution poses a *separate vote* problem. Were CI-14 to amend different substantive provisions of the constitution, with substantively different proposals that are not closely related, the A.G. might have a point. But that is not how CI-14 operates. Even taking at face value the A.G.'s baseless argument that CI-14 affects Article II, Section 10, amending one section of the constitution in a single way is a *feature* of constitutional amendments—not a procedural defect under Article XIV, § 11. Unripe theories about the relationship between CI-14 and the *Armstrong* case are not the same as a separate vote problem. The A.G.'s arguments on this score are not a basis to keep CI-14 from Montana voters, and the Court should decline the A.G.'s implicit invitation to weigh in on whether and how CI-14 would interact with the *Armstrong* decision or the pending cases in Montana that rely on it.

The A.G. next argues that Subsections (1) and (2) should be cleaved from one another and presented as "independent political choices." Ex. 3 at 2-3. The A.G. gets it backwards. It is an initiative's sponsor who is empowered under Article XIV, § 9 to define, author, and propose a single constitutional amendment. Provided the amendment meets the procedural requirements for submission—including separate vote—it is an initiative's sponsors who decide the substance, or the contours of a particular proposal. Nothing in Article XIV, statute, or the decisions of this Court empower the A.G. to block an initiative simply because he would prefer a different policy, write the proposal differently, or subjectively prefer more discrete sub-choices.

Here, the policy in CI-14 draws a line at fetal viability, before which the government is limited in its ability to regulate decisions about abortion, and after which the government enjoys enhanced regulatory powers except in the case of the patient's life or health. There is nothing strange, unfamiliar, or unfair about presenting this policy to voters, which contains a limit based on fetal viability. Indeed, this basic policy configuration is well known to Montana voters as a result of *Roe* and *Armstrong*. The A.G.'s argument that CI-14's policy could be subdivided or configured differently does not itself demonstrate a violation of Article XIV, § 11. As shown above, CI-14 as drafted proposes a single

amendment with essential and closely related components for the voters' consideration.

Tellingly, the A.G. does not even attempt to conform this argument—or any of his others—to the test reiterated by this Court in *MER*, which reversed a similarly standardless determination by the A.G. just two months ago. The A.G. does not analyze whether the two subsections the A.G. wishes to cleave are essential to the policy of CI-14, or closely related to one another. Instead, the A.G. makes bald assertions that Subsections (1) and (2) should be separated because statutes in Florida and Nevada adopt different policies. Ex. 3 at 3 n2, n3. The A.G.'s subjective preference to subdivide Subsections (1) and (2) is not a basis under Article XIV, § 11 to withhold CI-14 from Montana voters.

The A.G. goes on to argue that Subsection (3) sweeps more broadly than Subsections (1) and (2), and then provides a litany of *what-could-happen* hypotheticals about various ways Subsection (3) might affect different activities of the State, like the enforcement of health and safety regulations. This argument also flounders. As above, the A.G. fails to levy any argument, whatsoever, about how a broader sweep for Subsection (3) would "make two or more changes to the Constitution that are substantive and not closely related." *MER*, ¶ 7. To the contrary, barring penalty, prosecution, or other adverse government action for

individual pregnancy outcomes is essential and closely related to securing the right to make and carry out decisions about pregnancy.

Even if conjecturing about potential *policy* effects of a *constitutional* initiative were cognizable separate vote analysis—and to be clear, it is not—the A.G.'s catalogue of absurd hypotheticals ignores the plain text of CI-14 and basic rules of construction that would govern enforcement. *See Carlson v. City of Bozeman*, 2001 MT 46, ¶ 15, 304 Mont. 277, 20 P.3d 792 (citation omitted) ("The whole act must be read together and where possible, full effect will be given to all statutes involved."). For example, CI-14 does not bar policies related to prenatal drug use; rather, it bars punishment for an individual's perceived, alleged, or actual pregnancy outcome. Likewise, the last sentence of Section 3 does not provide *blanket* immunity for all conduct. It is, rather, a narrow provision that clearly only impacts the State's punishment of those who aid others exercising the rights established in CI-14. Thus, it is incorrect and inapposite to argue, as the A.G. does, that Subsection (3) would override the functions of licensing boards or bar medical negligence actions. Any effect on those activities would only arise to the extent a medical licensing board, for example, sought to pursue or enforce policies contrary to the right provided under Subsections (1) and (2). Further, the government would not be prohibited from enforcing "valid health and safety regulations" if they are, indeed, *valid* under the protections secured by Subsections

(1) and (2). Neither *Roe* nor *Armstrong* created such outcomes; there is no reason to believe CI-14 would.

In any event, the A.G.'s role is to determine whether there is a single constitutional amendment in play, not to index its potential policy effects. It is the province of the courts to answer the A.G.'s *what-could-happen* questions, when—and if—they happen. In speculating at all the ways CI-14 could be interpreted, the A.G. does not establish a separate vote violation.

Finally, across each of his arguments, the A.G. invites the Court to bless a standardless, results-first practice that would allow the A.G. to stymie virtually all constitutional change with which he disagrees. But the People, not the A.G., have the power of initiative, through which the People can fashion a proposal—a "binary" political choice—and present it to voters. The A.G.'s role is to prevent logrolling, confusion, and trickery, none of which exist here. The A.G.'s standardless process finds no support in the Constitution and would "unduly restrict constitutional change." *MER*, ¶ 11 (citing *MACo* ¶ 30). The Court should reject it and hold that CI-14 proposes a single constitutional amendment.

II. There Should Be No Fiscal Statement; If There Is, It Should Be Accurate

The Court should strike the fiscal statement proposed by the A.G. because there is no statutory authority for its inclusion. Once again, the A.G. oversteps his authority and responsibility.

Under § 13-27-226(4), MCA, the Attorney General may only draft a fiscal statement if "the fiscal note indicates a fiscal impact." The existence of a fiscal note alone is not a basis to draft a fiscal statement. Rather, the fiscal note itself must "indicate[] a fiscal impact." *Id.* And, under 2023 revisions to the ballot issue process, at § 13-27-227(2), MCA, "[t]he fiscal note *must* incorporate an estimate of the proposal's effect on the revenue, expenditures, or fiscal liability of the state." (emphasis added).

Within its role and authority, OBPP determined there would be $0 fiscal impact during the next two fiscal years. It did not determine a fiscal impact beyond that period. Ex. 2 ("$0" for the next biennium, and thereafter, "[t]he fiscal impact of Ballot Issue #14 cannot be determined"). Accordingly, the fiscal note did not "indicate[] a fiscal impact," within the plain meaning of § 13-27-226(4), MCA. There is no authority to include a fiscal statement drafted by the A.G. under the limitations imposed by statute. The Court should strike it.

Second, even if the OBPP had indicated a fiscal impact, the note cannot serve as the basis for a fiscal statement because the fiscal note fails to satisfy the relevant statutory requirements that (1) mandate an actual fiscal estimate; and (2) bar advocacy. OBPP is "unable to determine" the proposal's effects on "revenue, expenditures, or fiscal liability of the state" in fiscal years 2026 and 2027—despite the clear statutory requirement to do so.

The fiscal note also fails the requirements of §§ 13-27-227(2) and 5-4-205(2), MCA, that "a fiscal note be prepared as an objective analysis of the fiscal impact of legislation . . . and may not in any way reflect the views or opinions of the preparing agencies, the sponsor, or other interested parties." Instead, the fiscal note is rife with selective or misleading analysis that runs counter to these requirements.

For example, commentary by the Montana Department of Public Health and Human Services ("DPHHS") adopted by the A.G. incorrectly describes the current state of the law to argue for a fiscal impact. Since 1995, the Medicaid program has been required to cover certain abortion care services as a matter of privacy and equal protection under the Montana Constitution. DPHHS's recent efforts to, as it says, "restrict[]" this coverage were preliminarily enjoined. Accordingly, it is highly misleading for DPHHS to argue that CI-14 will have a fiscal impact—however indeterminable—that is different from the status quo under Montana law today.

But the A.G. adopted DPHHS's Medicaid coverage argument wholesale, impermissibly including it in the fiscal statement while blatantly ignoring the commentary and assumptions by all other departments. The result is a proposed fiscal statement that is inaccurate about CI-14's effect on the Medicaid program—or, at a minimum, is unduly speculative about the relationship between CI-14 and a

set of Medicaid statutes and regulations that are presently enjoined for reasons that have nothing to do with CI-14. Clearly, the A.G.'s selective inclusion of a statement about taxpayer-funded abortion—from a fiscal note with $0 above-the-line impact—is advocacy.

The fiscal note also contains other defects and questionable advocacy, like the upside-down assertion that CI-14 would *increase* litigation about abortion restrictions—when it is just as likely to do the opposite. MSRR provided the A.G. notice of these defects, and was ignored. Ex. 7.

The Court should strike the fiscal statement. If the Court allows a fiscal statement, it should author a statement that conforms to the fiscal note's actual conclusion and omits below-the-line agency commentary: "CI-14 has $0 fiscal impact in the next two years. Its fiscal impact beyond that period cannot be determined." Under any circumstances, the Court should strike the misleading statement regarding Medicaid coverage.

III. MSRR's Ballot Statements Are Clear And Nonargumentative

Finally, the Court should provide declaratory relief that MSRR's ballot statements, Ex. 1, comply with the relevant requirements for clarity and neutrality in §§ 13-27-212 and -213, MCA.

The A.G. may only disturb the sponsor's ballot statements if, as proposed, they "*clearly* do[] not comply with the relevant requirements" in §§ 13-27-212 and

-213, MCA. Section 13-27-226(3)(c), MCA (emphasis added). Otherwise, "the attorney general *shall* approve the ballot statements and forward them to the secretary of state." *Id.* (emphasis added).

Though the A.G. declined to address the ballot statements in his legal sufficiency determination, this Court has "original jurisdiction to review the petitioner's ballot statements for initiated measures." Section 3-2-202(3)(a), MCA. It serves judicial economy to determine now that MSRR's ballot statements do not "*clearly*" fail to comply with the relevant requirements. Such declaratory relief now would prohibit the A.G. from rewriting the statements on remand and requiring MSRR to initiate another proceeding before this Court.

The ballot statements, as proposed, comply with the relevant requirements. The statements use straightforward lay terms to describe what CI-14 does. They fairly and objectively summarize CI-14 without employing confusing language, and without use of the charged or emotional language of a political appeal. They contain fewer than 135 words. Section 13-27-212, MCA.

Because there is simply no reading of the proposed statements under which they "*clearly* do[] not comply with the relevant requirements" in §§ 13-27-212 and -213, MCA, the Court should affirm the same in its declaratory relief. The Court should further direct the A.G. to forward ballot statements that are consistent with

its holding to the Secretary within five days of the Court's decision, to avoid any undue delay.

CONCLUSION

The Court should declare that (1) CI-14 does not violate the separate vote requirement; (2) there is no authority for the A.G.'s fiscal statement or, in the alternative, the statement must conform to the actual above-the-line conclusion of the fiscal note and omit agency commentary; and (3) Petitioners' ballot statements comply with the relevant statutory requirements. The Court should direct the A.G. to forward MSRR's ballot statements to the Secretary within five days of this Court's decision.

DATED: January 26, 2024

Raph Graybill
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

The undersigned, Raph Graybill, certifies that the foregoing complies with the requirements of Rules 11 and 12, Mont. R. App. P. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 3948 words, excluding the caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

Raph Graybill
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of January, 2024, a copy of the foregoing document was served on the following persons by the following means:

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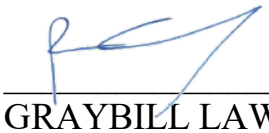

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