



MEMORANDUM

To: The Office of the Montana Secretary of State
From: The Office of the Montana Attorney General
Date: January 16, 2024
Re: Legal sufficiency review of Proposed Ballot Measure No. 14

Ballot Measure 14, a constitutional initiative, creates a new Section 36 in Article II, to remove many of the limitations on the right to an abortion created by *Armstrong v. State*, 1999 MT 261, ¶ 75, 296 Mont. 361, 989 P.2d 364. Ballot Measure 14 impliedly amends Article II, Section 10, logrolls multiple distinct political choices into a single initiative in violation of Article XIV, Section 11, and limits the ability of the State to provide for public health and safety.

The proposed measure is legally insufficient pursuant to Mont. Code Ann. § 13-27-226(1)–(2).

Because the Attorney General determines the measure is not legally sufficient, the Attorney General declines to forward a statement of purpose and implication and yes and no statement. Mont. Code Ann. § 13-27-226(3).

The budget director determined that Ballot Measure 14 will have an effect on the State's revenue, expenditures, and fiscal liability. The Attorney General therefore includes the attached statement of fiscal impact that complies with Mont. Code Ann. § 13-27-226(4).

Finally, pursuant to Mont. Code Ann. § 13-27-226(5), the Attorney General determines Ballot Measure 14 does not conflict with any other proposed Ballot Measures.

Ballot Measure 14 is legally insufficient because it violates Article XIV, Section 11 of the Montana Constitution.

“If more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately.” Mont. Const. art. XIV, § 11. “The plain language of the provision conveys an anticipatory, pre-election purpose—to ensure that constitutional ballot issues are prepared and submitted so they ‘can be voted upon’ separately.” *Monforton v. Knudsen*, 2023 MT 179, ¶ 10.

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“The separate-vote requirement has two well-recognized objectives. The first is to avoid voter confusion and deceit of the public by ensuring proposals are not misleading or the effects of which are concealed or not readily understandable. The second is to avoid ‘logrolling’ or combining unrelated amendments into a single measure which might not otherwise command majority support. By combining unrelated amendments, approval of the measure may be secured by different groups, each of which will support the entire proposal in order to secure some part, even though not approving all parts of a multifarious amendment.” *Monforton*, ¶ 10.

“[T]o determine compliance with Article XIV, Section 11 separate-vote provision ‘the proper inquiry is whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and not closely related.’” *Monforton*, ¶ 12; *see also Mont. Ass’n of Counties (“MACo”) v. State*, 2017 MT 267, ¶ 50 (the separate-vote provision is narrower than the single subject rule for legislation in Article V, § 11(3)). Voters must be able to “express their opinions as to each proposed constitutional change” separately. *MACo*, ¶ 52.

Ballot Measure 14 fails this test.

The Montana Supreme Court determined that Article II, Section 10, incorporates a woman’s right to a pre-viability abortion. *Armstrong v. State*, 1999 MT 261, ¶ 75. Montana Medicaid also funds “medically necessary” abortions for indigent women. Mont. Admin. R. 37.86.104(9)–(11). These regulations incorporate protections for mothers when “the life of the mother will be endangered if the fetus is carried to term,” or if the mother suffers from a physical or psychological condition that will be “significantly aggravated” by continuing the pregnancy. *Id.*

Ballot Measure 14 changes this status quo. First, Section 36(1) unmoors the right to an abortion from fetal viability. Second, Section 36(2)’s “in no circumstance” clause prohibits any regulation of abortion care if the abortion provider deems the procedure medically necessary. This clause makes it so even regulations that serve a compelling state interest and are narrowly tailored to that interest cannot survive. This amends the *Armstrong* framework. By removing current sideboards on what is medically necessary, the clause has the effect of rendering Section 36(2)’s first clause superfluous because the State can never enforce any regulations on abortion under the “in no circumstance” language. This language also elevates the right to abortion above other medical procedures so that abortion—alone—cannot be regulated. Ballot Measure 14 amends Article II, Section 10.

The changes in Section 36(1), (2) also represent independent political choices. First, voters’ views on abortion change dramatically based on the specific timeframe

of pregnancy in which the abortion occurs.¹ Second, states commonly treat physical and psychological conditions differently.² States also commonly use qualifying language to clarify when an abortion is medically necessary.³ Ballot Measure 14 creates an express right to abortion but denies voters the ability to express their views on the nuance of the right. This is classic logrolling and is prohibited by Article XIV, Section 11.

Section 36(3) encompasses policy choices divorced from Section 36(1)–(2). Section 36(3) reaches beyond abortion and pregnancy care. For example, the first sentence prohibits the State from taking an “adverse action” based on pregnancy outcomes. By not defining “adverse action,” this sentence injects significant uncertainty into areas like how Montana will be able to address prenatal drug use. *See* Final Report to the 67th Montana Legislature, HJR 32 Final Report: Prenatal Drug Use, Children Families, Health, and Human Service Interim Committee (June 2020). Further, Section 36(3)'s last sentence sweeps broadly to immunize a particular class of medical providers from any penalty, prosecution, or adverse action, so long as the provider obtains voluntary consent. This seemingly precludes ordinary functions of the State's medical licensing boards. MCA § 37-3-323. It also raises questions whether state courts could continue to be a venue for medical malpractice lawsuits for issues other than the existence of consent. *See Howard v. Replogle*, 2019 MT 244, ¶ 17 (medical malpractice cases involve a violation of a standard of care and informed consent might be part of that standard of care). Specific to abortion, the sentence protects different groups from adverse actions—medical providers, a boyfriend paying for the abortion, etc.—but voters can cast intelligible votes distinguishing among these groups.⁴

Finally, Section 36(3) would prohibit the State from enforcing any regulation that includes an adverse action against a person. The prohibition on enforcement exists even if the State passed a law that meets the requirements of Section 36(1)–(2). The choice to preclude the State from being able to enforce valid health and safety regulations is different than the choice to expand abortion rights.

¹ *See* “America's Abortion Quandry,” Pew Research Center, survey conducted March 7–13, 2022. Available online at <https://www.pewresearch.org/religion/2022/05/06/americans-views-on-whether-and-in-what-circumstances-abortion-should-be-legal/> (last accessed January 16, 2024). A plurality of survey respondents stated abortion should be generally legal at 6 weeks. A plurality of respondents also said that abortion should be generally illegal at 24 weeks.

² *E.g.* Fla. Stat. § 390.011.1(1); N.D. Cent. Code § 12.1-19.1-01(5).

³ *E.g.* N.D. Cent. Code § 12.1-19.1-01(5) (defining “serious health risk” to mean that “a condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman so that it necessitates an abortion to prevent substantial physical impairment of a major bodily function....”).

⁴ *See supra* n. 1. Voters hold different groups of people to different levels of culpability when an illegal abortion occurs.

The contradictory language in the various subsections creates a quandary over the actual decision in front of the voters. As stated, Section 36(3) sweeps broadly on issues of enforcement. Section 36(1), (2) amend the existing interpretation of Article II, Section 10. At a minimum, voters are presented with multiple amendments and because of that, Ballot Measure 14 violates Article XIV, Section 11 of the Montana Constitution.

Statement of Fiscal Impact

Ballot Measure 14's fiscal impact cannot be determined. Ballot Measure 14 may require Montana Medicaid to cover broader categories of abortion than it currently covers. The Department of Public Health and Human Services cannot quantify the extent of the fiscal impact at this time.

Sincerely,



Brent Mead
Deputy Solicitor General