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MONTANA EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF CASCADE

ELLIOTT HOBAUGH, EZERAE COATES, ROBERTA ZENKER, MICAH HARTUNG, JANE and JOHN DOE on behalf of their minor child, J.D., ACTON SIEBEL, SHAWN REAGOR, KASANDRA REDDINGTON, the CITY OF MISSOULA, and the CITY OF BOZEMAN, Plaintiffs, vs. THE STATE OF MONTANA, by and through Corey Stapleton, in his official capacity as Secretary of State, Defendant.	Cause No. CDV-17-0673 Hon. John A. Kutzman **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) M.R.Civ.P.**

COME NOW THE PLAINTIFFS, by and through counsel, and hereby file and serve their brief in opposition to Defendant's Motion to Dismiss. The Defendant has re-submitted its original Motion to Dismiss and Brief in Support as responsive pleadings to Plaintiffs' First Amended Complaint. Likewise, Plaintiff's Brief in Opposition mirrors their original Opposition Brief. For the Court's convenience, Plaintiffs have updated the factual citations in this brief to reflect the allegations contained in the First Amended Complaint. Plaintiffs' First Amended

Complaint also contains additional allegations related to ongoing harms to transgender individuals as a result of the campaign for and against I-183.[1]

INTRODUCTION

> "Where a [ballot] 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." *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 59, 365 Mont. 92, ¶ 59, 278 P.3d 455, ¶ 59.

Plaintiffs – seven individually named transgender Montanans, the parents of a transgender child, and two Cities that recently passed nondiscrimination ordinances – have filed a pre-election challenge to the Montana Family Foundation's anti-transgender ballot initiative, I-183. The measure is destined for the November, 2018 ballot. I-183, and the campaign and lobbying efforts surrounding it, will harass, humiliate, and harm transgender Montanans. The initiative codifies discrimination against transgender people, and mirrors anti-transgender legislation pursued in other states that has uniformly led to public outcry, financial calamity, and constitutional challenges.

The State has filed a Rule 12(b)(6) Motion to Dismiss on very narrow grounds. It argues that because the initiative has not yet been qualified for the ballot, and because the voters have not yet weighed in on the measure, the case is not ripe for review. The State's Motion is

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[1] Specifically, ¶ 134 of the First Amended Complaint alleges that: Campaigns designed to restrict access to public facilities by transgender individuals have harmed the transgender communities. Even before North Carolina's transgender bathroom bill, HB 2, was signed into law, calls to a suicide hotline for transgender individuals doubled. *See, https://www.thedailybeast.com/after-north-carolinas-law-trans-suicide-hotline-calls-double.* Transgender Montanans will not only be harmed if I-183 becomes law, they also suffer harm as a result of the campaign currently underway in support of I-183. *C.f.* Amy L. Stone, Rethinking the Tyranny of the Majority: The Extra-Legal Consequences of Anti-Gay Ballot Measures, 19 Chap. L. Rev. 219, 239 (2016) (arguing for more stringent pre-election judicial review of ballot measures affecting civil rights because of the high level of monetary drain, minority stress, and negative psychological impacts of anti-gay ballot campaigns on LGBT people, even where those campaigns do not succeed); Jacquelyn H. Flaskerud, *The Current Socio-Political Climate and Psychological Distress among Transgender People*, Issues in Mental Health Nursing (2017), http://dx.doi.org/10.1080/01612840.2017.1368751 (reviewing literature and commenting on likely link between anti-trans "bathroom bills," social stigma, minority stress, and harm to mental health of transgender people).

grounded in neither facts nor applicable law. Plaintiffs' Complaint sets forth facts demonstrating concrete harms, both ongoing and in the future. Moreover, the Montana Supreme Court has clearly stated that pre-election challenges to facially unconstitutional ballot initiatives – and in particular, where there are harms to the civil rights of a vulnerable population – are ripe for review.

STANDARD OF REVIEW

Under "Rule 12(b)(6), M.R.Civ.P., motions to dismiss are viewed with disfavor and a complaint should be dismissed only if the allegations in the complaint clearly demonstrate that the plaintiff does not have a claim." *Kleinhesselink v. Chevron, U.S.A.* (1996), 277 Mont. 158, 161, 920 P.2d 108, 110 (emphasis added) (citations omitted). For purposes of a Rule 12(b)(6) motion, the facts as recited in Plaintiffs' Complaint must be deemed admitted. "A court should not dismiss a complaint for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts' in support of the claim that would entitle the plaintiff to relief. We must construe the complaint in the light most favorable to the plaintiff when reviewing a motion to dismiss under M.R. Civ. P. 12(b)(6) and take as admitted all well-pleaded factual allegations." *Western Security Bank v. Eide Bailly, LLP,* 2010 MT 291, ¶ 55, 359 Mont. 34, ¶ 55, 249 P.3d 35, ¶ 55 (citations omitted).

ARGUMENT

Montana law compels denial of Defendant's motion. The present and threatened injury to transgender Montanans and local governments, including dignitary, financial, physical, and psychological harm to the Plaintiffs, more than satisfies constitutional requirements for ripeness.

No prudential or other factor justifies delay in adjudicating the constitutional claims before the Court.

I. PLAINTIFFS' CHALLENGE IS CONSTITUTIONALLY RIPE FOR REVIEW BASED ON BINDING MONTANA AUTHORITY

Plaintiffs' challenge to I-183 is ripe for review. Plaintiffs face definite and concrete injuries to their civil rights, including constitutional guarantees of equality, privacy, autonomy, dignity, due process, and pursuit of safety, health, happiness, and life's basic necessities. As alleged in the First Amended Complaint, some Plaintiffs have already begun suffering harm, and more is likely to occur. Compl.[2] ¶¶ 9, 10, 16, 26, 27, 53, 54, 63, 64, 70, 71, 90, 114, 134, 149, 185, 189. These facts must be deemed admitted for purposes of Defendant's Motion to Dismiss. *Western Security Bank*, ¶ 55. Indeed, Plaintiffs have alleged the "denial of access to college bathrooms is associated with higher risk of suicidality for transgender adults…" and "calls to a transgender suicide hotline nearly doubled in the month following the passage of a law similar to I-183 in North Carolina." Compl. ¶ 133. The purpose of this lawsuit is to save lives.

Under Montana law, pre-election challenges to ballot initiatives are justiciable. *See MEA-MFT v. McCullough*, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075 (finding pre-election challenge to tax refund ballot initiative ripe); *Reichert* (finding pre-election challenge to judicial recall ballot initiative ripe). When an initiative is facially unconstitutional, it may not be placed on the ballot. *MEA-MFT* (enjoining vote on referendum because of substantive constitutional defect in proposed measure), *Reichert* (same); *Cobb v. State* (1996), 278 Mont. 307, 310, 924 P.2d 268, 270 (same); *Harper v. Waltermire* (1984), 213 Mont. 425, 691 P.2d 826 (same); *Steen v. Murray* (1964), 144 Mont. 61, 394 P.2d 761 (same); *Livingstone v. Murray* (1960), 137 Mont. 557, 354 P.2d 552 (same); *Burgan & Walker, Inc. v. State* (1943), 114 Mont. 459, 137 P.2d 663

(same). "[P]lacing a facially invalid measure on the ballot would be a waste of time and money for all involved, including State and local voting officials, the proponents and opponents of the measure, the voters, and the taxpayers who bear the expense of the election." *MEA-MFT*, ¶ 18. Especially where, as here, an initiative is "almost designedly drafted to be unquestionably and palpably unconstitutional on its face," a pre-election challenge is justiciable. *Steen*, 144 Mont. at 69, 394 P.2d at 765.

Plaintiffs need not wait for a threatened injury to occur before obtaining declaratory and injunctive relief. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) ("When an individual is subject to [threatened enforcement of a law], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law"); *Helling v. McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 2481 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them"); *Reichert*, ¶ 55 ("Note that standing may rest not only on past or present injury, but also on threatened injury") (emphasis in original). A claim may only be dismissed as unripe if it is "hypothetical" or "merely speculative." *Montana Power Co. v. Montana Pub. Serv. Comm'n*, 2001 MT 102, ¶ 32, 305 Mont. 260, 267, ¶ 32, 26 P.3d 91, 95, ¶ 32.

Defendant seeks to avoid the well-settled law on justiciability of ballot initiatives by arguing that this Court should overturn decisions of the Montana Supreme Court. This Court, however, lacks that power.[3] In the absence of binding law supporting its position, Defendant

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[2] "Compl." refers to Plaintiffs' First Amended Complaint.

[3] The cases of which the defendant particularly disapproves, and which compel a decision for Plaintiffs on this motion, are not only good law, but have been cited favorably in the short years since they were decided, align with well-established constitutional and prudential principles, and rely on sound reasoning. *See e.g. Carbon Cty. Res. Council v. Montana Bd. of Oil & Gas Conservation*, 2016 MT 240, ¶ 12, 385 Mont. 51, ¶ 12, 380 P.3d 798, ¶ 12 (quoting *Reichert* extensively in describing the standard for ripeness); *Montana Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 20, 383 Mont. 318, ¶ 20, 371 P.3d 430, ¶ 20 (same).

selectively offers out-of-state cases, disregarding those contradicting its position. *Compare Herbst Gaming Inc. v. Heller*, 122 Nev. 877, 141 P.3d 1224 (Nev. 2006) *with Whitson v. Anchorage*, 608 P.2d 759, 762 (Alaska 1980) ("it would be useless 'to allow the voters to give their time, thought and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain because of the reasons herein set forth.'"); *Utz v. City of Newport*, 252 S.W.2d 434, 437 (Ky. Ct. of Appeals 1952) ("There is no right to obtain a vote of the people upon the enactment of legislation that would be invalid if approved by them. The court ought not to compel the doing of a vain thing and the useless spending of public money."); *Hessey v. Burden*, 615 A.2d 562, 574 (D.C. Ct. of Appeals 1992) ("An initiative proposing to establish an official religion in the District of Columbia, for example, would be patently unconstitutional. If someone proposed such a measure for submission to the voters, the Board and the Superior Court might well decide to classify it as an improper subject before public funds are spent on an election. Thus we are not willing to say that the Superior Court lacks jurisdiction to consider pre-election constitutional objections to an initiative."); *Dulaney v. City of Miami Beach*, 96 So.2d 550, 551 (Fla. Dist. Ct. App. 1957) ("An election should not be held if the ordinance proposed was clearly invalid on its face.").

Binding precedent dictates a ruling for the Plaintiffs. This case presents an actual and present controversy. Plaintiffs are suffering present and future harms. This matter is ripe, and the Court should DENY Defendant's Motion to Dismiss.

A. The Present and Threatened Injuries to Plaintiffs are Definite and Concrete

For constitutional purposes, an issue is justiciable when it is "definite and concrete, not hypothetical or abstract." *MEA-MFT*, ¶ 18. "Ripeness asks whether an injury that has not yet

happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication" *Reichert,* ¶ 55. Here, the present and threatened injuries to the Plaintiffs are anything but hypothetical or abstract. The severe harm that will occur if I-183 becomes law is sufficiently likely for adjudication, and significant harm will — and, in fact, has already begun to — occur before that point.

1. Plaintiffs' claims are ripe for review because of the harms they would suffer to their safety, livelihood, health, wellbeing, and constitutional rights should I-183 become law

In *Reichert*, the plaintiffs faced an urgent issue: if the ballot initiative were enacted, their rights would be impaired in an election to be held five months after the vote on the ballot initiative. In *MEA-MFT*, the plaintiffs faced another time-sensitive concern: the effects of the challenged aspect of the ballot measure would have occurred less than nine months after the election. Here, Plaintiffs face a more pressing threat than in either of those two cases: if this ballot initiative were enacted, they would be effectively excluded from public spaces throughout Montana on its effective date less than two months later. Compl. Exh. A., Section 9 ("If approved by the electorate, this act is effective January 1, 2019.").

On that date, transgender people will lose access to restrooms and locker rooms in any government-owned or controlled property, which will push them out of public life. Because attending to bodily functions cannot be avoided altogether, when transgender people are denied access to a restroom, they must minimize going out in public. Compl. ¶ 193. Another common strategy for transgender people who do not have access to a restroom is to "hold it" for long periods of time or severely limit liquid intake, resulting in illness, dehydration, and other negative health effects. Compl. ¶¶ 128, 132(f).

For women who are transgender, using men's rooms is not a viable option; neither are women's rooms for men who are transgender. And being forced to use a single-occupancy facility, if one even exists, is no solution. *See Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (finding irreparable harm where girls who are transgender were marginalized through being prohibited from using girls' rooms, "causing them genuine distress, anxiety, discomfort and humiliation"); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 878 (S.D. Ohio 2016) (finding irreparable harm where girl who is transgender was not permitted to use a girl's room, singling her out and exacerbating her mental health challenges); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1041 (7th Cir. 2017) (describing harm to boy who is transgender from not being permitted to use boys' rooms, including fainting due to dehydration, stress-related migraines, and suicidal thinking).

With I-183 in effect, transgender lawyers like Plaintiff Roberta Zenker will no longer be able to do their work in courthouses and other government buildings. Compl. ¶ 64. Transgender government employees like Plaintiff Ezerae Coates will face loss of their employment. Compl. ¶¶ 51-54. Transgender sports enthusiasts like Plaintiff Micah Hartung will face danger if they ever need to use a restroom while attending a local athletic event. Compl. ¶¶ 69-71. Transgender leaders like Plaintiff Shawn Reagor will lose their opportunity to participate in civic life through voting, running for office, and testifying at public hearings. Compl. ¶¶ 103-106. Transgender students, like Plaintiffs J.D. and Elliot Hobaugh, will lose their opportunity to receive an education. Compl. ¶¶ 46, 88. Transgender people seeking to enjoy the natural beauty of Montana, like Plaintiffs Acton Siebel and Kasandra Reddington, will find themselves forced out of state and county parks. Compl. ¶¶ 95, 113.

Should I-183 pass, transgender people and people who do not conform with traditional gender norms will be subjected to increased levels of violence and harassment. Even without restrictive measures like I-183, transgender people already face high levels of harassment and violence in public restrooms. Compl. ¶¶ 132, 133. Following implementation of similar measures in other states, harassment against transgender people in restrooms increased as general members of the public sought to enforce the new restrictions. *See* Equality Federation Institute, et. al, The Facts: Bathroom Safety, Nondiscrimination Laws, and Bathroom Ban Laws 10-11 (2016), https://www.lgbtmap.org/file/bathroom-ban-laws.pdf (noting that "bounty" provisions offering money damages to those who encounter transgender people in restrooms—like the one in I-183--particularly increase this threat).

Finally, with the effective date arriving mere weeks after the election, Government entities, like Plaintiffs the City of Missoula and the City of Bozeman, would immediately begin incurring the significant financial burden of bringing restroom facilities into compliance with the initiative. Compl. ¶ 31(g).

2. The present and escalating harm to individual Plaintiffs from the ballot campaign make their claims ripe for review.

Defendant ignores the allegations of present harm contained in Plaintiffs' Complaint. In *Reichert* and *MEA-MFT*, where the challenges were nonetheless ripe, no harm was likely to occur before the election. That is not the case here, where Plaintiffs allege that the ballot campaign itself will cause injury. Compl. ¶¶ 10, 70, 71, 134. I-183 would affect the civil rights of a group that already faces high levels of stigma, discrimination, and violence. *Whitaker By Whitaker*, 858 F.3d at 1051 ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity"); *Evancho*, 237 F. Supp. 3d at 288 ("transgender people as a class have historically been subject to

discrimination"); *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 874 (same); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (same); *Doe 1 v. Trump*, No. CV 17-1597 (CKK), 2017 WL 4873042, at *7 (D.D.C. Oct. 30, 2017) (same).

Plaintiffs' allegations, which are deemed admitted for purposes of a Motion to Dismiss, set forth numerous facts supporting allegations of present harm. Moreover, similar campaigns targeting members of racial and sexual minorities have caused significant negative health outcomes, prompting legal scholars to call for greater judicial scrutiny of such ballot measures well in advance of elections. *See* Amy L. Stone, *Rethinking the Tyranny of the Majority: The Extra-Legal Consequences of Anti-Gay Ballot Measures*, 19 Chap. L. Rev. 219, 239 (2016) (explaining "the need for more stringent judicial review of ballot measures affecting civil rights before these referendums and initiatives go before voters," given the "extreme extra-legal consequences of these ballot measures for LGBT individuals, communities, and movements"); Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 Calif. L. Rev. 1259, 1292 (2008) ("[R]ather than affording a high degree of deference to the voters, courts should exercise meaningful judicial review of initiatives that adversely affect racial minorities.").

Scientific literature indicates that, regardless of the outcome of a ballot campaign targeting a stigmatized group, the campaign itself repeatedly exposes members of the group to devaluing messages in the months leading up to the vote.[4] This messaging often disparages the stigmatized group, and at the very least treats the rights of group members as up for debate. *See*

[4] These harms may emerge even during legislative debates over bills. Anna Ochoa O'Leary & Andrea J. Romero, *Chicana/o Students Respond to Arizona's Anti-Ethnic Studies Bill, SB 1108: Civic Engagement, Ethnic Identity, and Well-Being*, 36 Aztlan: A J. of Chicano Stud. 9, 25-26 (2011) (finding more depressive symptoms and lower self-esteem associated with stress related to anti-ethnic studies bill in students of Mexican descent); Samantha Allen, *After North Carolina's Law, Trans Suicide Hotline Calls Double*, Daily Beast, Apr. 20, 2016, https://www.thedailybeast.com/after-north-carolinas-law-trans-suicide-hotline-calls-double (reporting spike in calls

David M. Frost & Adam W. Fingerhut, *Daily Exposure to Negative Campaign Messages Decreases Same-Sex Couples' Psychological and Relational Well-Being*, 19 Group Processes & Intergroup Rel. 477 (2016). These messages may come in the form of billboards; yard signs; bumper stickers; news stories; Facebook posts; tweets; casual conversations at home, school, work, or social occasions; advertisements; and talk radio or television shows. *Id.,* Sharon Scales Rostosky et. al, *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. Counseling Psychol. 56, 62 (2009) (finding exposure to negative media messages and negative conversations increased significantly around the election period in states that had an anti-LGB initiative on the ballot and not in others); Frost & Fingerhut (finding exposure to anti-LGB campaign-related messages were associated with higher levels of negative affect, lower levels of positive affect, and lower relationship satisfaction among same-sex couples); Natalya C. Maisel & Adam W. Fingerhut, *California's Ban on Same-Sex Marriage: The Campaign and its Effects on Gay, Lesbian, and Bisexual Individuals,* 67 J. Soc. Issues 242, 251 (2011) (finding that LGB people reported high levels of anger, sadness, and fear, with some feeling "unwelcome in [their] neighborhood," "discriminated against," and "like a second class citizen" because of campaign-related advertisements and yard signs).

Exposure to these messages contributes to minority stress, which is "the chronic social stress that individuals with stigmatized identities experience as a direct result of prejudice and discrimination over and above the stresses of daily living." Rostosky at 56. Minority stress has been linked to negative health outcomes, such as higher levels of depression, anxiety, and substance use. *See id.* at 57. The connections between minority stress and psychological distress have already been established for transgender people, and experts have commented on the likely

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to trans suicide hotline coinciding with North Carolina's anti-trans bill HB2). But ballot campaigns pose greater risks because of pervasive messaging targeting the general voting public leading up to the election.

contribution of so-called "bathroom bills" to minority stress for transgender people. *See* Jacquelyn H. Flaskerud, *The Current Socio-Political Climate and Psychological Distress Among Transgender People*, Issues in Mental Health Nursing (2017), http://dx.doi.org/10.1080/01612840.2017.1368751.

With I-183, these harms have already begun. Jeff Laszloffy, the President of the Montana Family Foundation, states: "[W]e have an issue that's really front burner.... And that issue is what to do with transgender students when it comes to public spaces, that would be restrooms, locker rooms, showers, and even hotel rooms." Compl. ¶ 30. Montanans for Locker Room Privacy asserts: "Beginning with Barack Obama while he was President, some have argued that if a man feels like he's a woman, he should be allowed to use the women's locker room. That treats women as if their privacy, safety, and dignity don't matter. Montana needs a locker room privacy act to protect both men and women from people of the opposite sex coming in while they're changing clothes." Montanans for Locker Room Privacy, *Frequently Asked Questions (FAQ)*, lockerroomprivacy.com, http://lockerroomprivacy.com/faq/ (last visited Dec. 20, 2017) [hereinafter Montanans for Locker Room Privacy, *FAQ*]. The same organization utilizes a symbol of a man peering over the edge of a restroom stall occupied by a woman. Montanans for Locker Room Privacy, *Letters to the Editor*, lockerroomprivacy.com, http://bit.ly/2Dfix4f (last visited Dec. 20, 2017). These messages portray women who are transgender as if they were male sexual predators.

Plaintiff Micah Hartung, a retired pastor, already lives in fear because of I-183. Compl. ¶¶ 70-71. He is afraid people will attack him for going to the restroom, and the transgender community—including him—will be further isolated, marginalized, and targeted for violence through the campaign. *Id.* Plaintiff Elliot Hobaugh, a college student, worries he might have no

choice but to transfer to a university in another state to complete his education. Compl. ¶ 46. The harms will intensify as the date of the election approaches and lobbying over I-183 escalates.

Transgender people are already a vulnerable group in Montana. *See* Keila Szpaller, *Community Mourns Loss of 2 Missoula Transgender People Who Struggled with Depression*, Missoulian (Feb. 24, 2016), http://bit.ly/1UsbPMb (describing the suicide of two transgender people in the same week in Missoula, one of whom had recently alleged discrimination against her university); Nick Ehli, *Accepting Sam*, Bozeman Daily Chronicle (Dec. 3, 2017), http://bit.ly/2B8uUha (describing the suicide of another transgender person in Montana); Megan Marolf, *Breaking Ground: Missoula's Transgender Community Faces High Suicide Rate, but Transition Offers Promise*, Montana Kaimin (Mar. 14, 2014), http://bit.ly/2kQrhFq (discussing high rates of suicide attempts among transgender Montanans, as well as the bullying and discrimination that can contribute to those rates); Gwen Florio, *Transgender UM Student Wins Restraining Order Against Sexual Assault Suspect*, Missoulian (Sept. 27, 2012), http://bit.ly/1eN2Deo (describing an assault of a Montana woman for being transgender); John S. Adams, *Trans* in Montana: An In-Depth Look at the People and Issues Behind the 'T' in LGBT*, Great Falls Tribune (Feb. 15) http://gftrib.com/2z6b0Bw (describing a man who lost his housing in Billings when others learned that he was transgender); Christy Mallory & Brad Sears, *Discrimination Based on Sexual Orientation and Gender Identity in Montana*, Williams Institute (2017), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/Montana-ND-September-2017.pdf (documenting evidence of socioeconomic disparities and discrimination on the basis of sexual orientation and gender identity in Montana). Where the initiative itself is facially unconstitutional, it is both unnecessary and unconscionable to subject this vulnerable

community to the heightened levels of minority stress and harm that will occur in the course of the campaign.

B. With Signature Gathering Well Underway, I-183 Is Ripe For Review

Defendant makes much of the fact that I-183 has not yet been approved for the ballot, but can point to no law making such approval a criterion for judicial review. Defendant likens a ballot initiative approved for signature gathering to a bill that is still in committee. But that analogy is not apt for several reasons.

Perhaps most importantly, the language of I-183 is already final and incapable of amendment before the election; all of the information needed to determine its facial constitutionality is already available, and its injury to Plaintiffs is already clear. "[R]ipeness of the initiative issue is not the same problem for purposes of judicial review as ripeness of a legislative measure might be. The latter can be amended at any point in the legislative process up until its final enactment. This is not true regarding an initiative." *Wyoming Nat. Abortion Rights Action League*, 881 P.2d at 289 (Wyo. 1994).[5]

As described above, a ballot initiative also varies from a bill because of the nature of the campaign to pass it. While bills may stir controversy in a community, the effect does not approach the pervasiveness or intensity of a ballot campaign, where lobbyists and interest groups must target voters directly.

Also, the likelihood of a ballot initiative reaching the ballot is far greater than that of a bill in committee. Defendant suggests the injury here is speculative because, according to its

[5] The out-of-jurisdiction cases on which the Defendant relies are readily distinguishable. *City of Boise v. Keep the Commandments Coalition,* 143 Idaho 254, 141 P.3d 1123 (Idaho 2006); *Winkle v. City of Tucson*, 190 Ariz. 413, 949 P.2d 502 (Ariz. 1997). Given the more limited right granted to Montanan's to enact legislation by ballot initiative than the right to pass legislation in Arizona and Idaho, the Montana Courts are not held to the same standard of deference that prevent the Arizona and Idaho courts from addressing substantive issues in a proposed ballot initiative.

calculations, only 21% of ballot initiatives filed with the Attorney General reached the ballot in the last ten years. In fact, since 1974, 144 constitutional initiatives have been circulated for signatures. *See,* Montana Secretary of State, http://sos.mt.gov/Portals/142/Elections/Documents/Constitutional-Ballot-Issues-1972-Current.pdf?dt=1510876800033 (last visited, December 20, 2017).[6] Of those, 60, or 42%, have qualified for the ballot. *Id.* Moreover, most of the initiatives filed with the Attorney General are never approved for signature gathering. Using Defendant's information, it appears that 22 ballot initiatives were filed with the Attorney General in 2016, only 10 of which were approved for signature gathering. Of those 10, 4 qualified for the ballot. *See,* Montana Secretary of State, http://sos.mt.gov/elections/ballot_issues (last visited, December 20, 2017). Thus, a less misleading statistic might be that 40% of the ballot initiatives approved for signature gathering in the most recent year reached the ballot. And that figure does not take into account key variables, such as the amount of money invested in the campaign, the number of signatures already collected at this point in the election cycle, the nature of the initiative, or polling data. Only 25,468 signatures, in a state with a population of over one million, are needed to qualify the measure for the ballot. Def. Brief. P. 3.

According to counsel for Montanans for Locker Room Privacy, thousands of signatures had already been collected in August. Compl. ¶ 36. The organization also claims that it has conducted polling indicating that 62% of Montanans would vote for the measure. *See*, Montanans for Locker Room Privacy, *FAQ, supra.*

More to the point, no court has ever dictated a percentage floor necessary to find a threatened injury sufficiently concrete. The key inquiry is whether the injury is so remote as to be merely theoretical, or sufficiently concrete to lend itself to judicial determination. *See Havre*

[6] Statistics for non-constitutional initiatives are unavailable.

Daily News, LLC v. City of Havre, 2006 MT 215, ¶¶ 19-20, 333 Mont. 331, ¶¶ 19-20, 142 P.3d 864, ¶¶ 19-20. Nothing is "hypothetical" about the injuries here. The language of I-183 makes them plain. Plaintiff Ezerae Coates has safely used the women's room at her place of work for years; I-183 would prevent her from doing so. *See* Compl. ¶ 51-54. The health of Plaintiffs John and Jane Doe's child has improved since she has been able to be herself and use the girls' restrooms at school; I-183 would end that. *See* Compl. ¶¶ 81, 86, 88, 89. For Plaintiffs the City of Missoula and the City of Bozeman, I-183 would compromise their ability to protect their citizens from discrimination, strain their budgets, and impose impossible compliance and enforcement requirements. Compl. ¶ 31(g).

Defendant implies that I-183's posture as citizen-referred, rather than legislature-referred, somehow reduces its ripeness for review. If anything, the opposite is true. In her dissent in *Reichert*, Justice Baker notes that courts should exercise greater judicial restraint for measures referred by the legislature than for citizen-initiated measures. *Reichert*, ¶ 94. Here, when the legislature reviewed the measure, it chose to reject it. Compl. ¶ 7. Deferring matters of constitutionality poses especially high risks in the context of a citizen-referred initiative. Unlike members of both the legislature and the judiciary, ordinary citizens have sworn no oath to "support, protect, and defend" the constitution, nor can they be expected to have any particular access to expertise in constitutional law. Mont. Const. art. III, § 3.

Indeed, no other timing for bringing this case would work. The Supreme Court does not have original jurisdiction over substantive challenges to ballot initiatives, and has admonished plaintiffs about bringing important constitutional issues before the court so late that it would need to rush to hasty judgment. *See Montana AFL-CIO*, ¶ 7 (noting that petitioners had filed only four weeks *before* the deadline for the Secretary of State to certify ballot measures).

Waiting until after July 20—the last day when proponents of the initiative may file their signatures—would mean not only exposing the transgender community to the harms of the campaign itself, but also crunching crucial constitutional litigation into an unrealistic timetable, even if expedited. The alternative—waiting until the equality, privacy, autonomy, dignity, and other constitutional rights of plaintiffs have already been infringed, perhaps until Plaintiffs John and Jane Doe's child has relapsed into anxiety and self-harm, or until Plaintiffs Ezerae Coates or Kasandra Reddington have experienced another gender-based attack—is both unacceptable as a matter of equity and clearly unnecessary under the law.

II. THE CHALLENGE TO I-183 PRESENTS NO PRUDENTIAL, STATUTORY, OR OTHER BARRIERS TO RIPENESS

In addition to the constitutional inquiry, ripeness involves a prudential dimension that weighs "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," with a focus on "whether there is a factually adequate record upon which to base effective review." *Reichert*, ¶ 56. Thus, "the more the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe." *Id.* In *MEA-MFT*, the court found no prudential reasons for allowing an election on an initiative to occur before resolving the issues. ¶19.

This case presents no need for further factual development. Because the Plaintiffs challenge the facial constitutionality of the initiative, the case presents a purely legal question. *See Reichert*, ¶ 56. Defendant does not argue otherwise. The arguments regarding the constitutional deficiencies inherent in I-183 are no different today than they would be in July, once the initiative is certified for the ballot, or in November, once it is voted on. Further, the hardships of withholding court consideration would be severe, in part because of the impacts on the transgender community as explained above, and in part because a delay in judicial review

until after the initiative qualifies for the ballot would make it difficult, if not impossible, for the Court to conduct a proper review. Assuming signatures are submitted on July 20, 2018, the Court would have only 105 days to consider a challenge prior to the November 2 election.[7] Such a challenge would most likely require an application for temporary restraining order and preliminary injunction. Unlike here, where the Court has time to judiciously review the facts and arguments submitted by the parties, waiting for the initiative to qualify for the ballot would require rapid-fire briefing and argument that do not lend themselves to the orderly administration of justice.

To the extent Defendant suggests the legislature has limited the justiciability of this issue by statute, its argument fails. Defendant states "new language was added implying that a court should defer ruling on the constitutionality of a proposed initiative until after the results of the election." (emphasis added). Mont. Code Ann. § 13-27-316 applies only to the procedure for "Court review of Attorney General Opinion or Approved Petitioner Statements." The Court need not infer any extraneous meaning from the 2007 amendments where the statutory language and intent was clear – the purpose of the amendments was to limit the original jurisdiction of the Montana Supreme Court while solidifying, and in fact broadening, the jurisdiction of District Courts to consider pre-election challenges.

There is nothing in the legislative history of SB 96, the bill amending Mont. Code Ann. § 13-27-316, that suggests it was intended to limit substantive challenges to a constitutionally defective ballot initiative. *See,* http://billingsgazette.com/news/state-and-regional/montana/compromise-reached-on-bill-to-reform-initiative-process/article_c3b717cb-f69c-593a-8085-ab7cfaf3dae5.html (last visited Dec. 20, 2017). The legislature was concerned

[7] Indeed, Defendants have raised the affirmative defense of *laches* in response to other pre-election challenges filed at a late stage. *See, e.g. Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, 334 Mont. 237, 146 P.3d 759.

about a flood of original actions before the Montana Supreme Court resulting from out-of-state financed ballot initiatives in the early 2000s. *Id.* Accordingly, it limited the original jurisdiction of the Montana Supreme Court.

Nothing in Mont. Code Ann. § 13-27-316 limits the justiciability of pre-election substantive constitutional challenges brought to the District Court. *See Hoffman v. State,* 2014 MT 90, ¶ 10, 374 Mont. 405, ¶ 10, 328 P.3d 604, ¶ 10. Indeed, the 2007 amendments actually broadened the jurisdiction of the district courts by eliminating certain time limitations on pre-election challenges to ballot initiatives. Of course, the District Courts are courts of general jurisdiction that should be open to all comers. The statute providing for a District Court's jurisdiction contains no language limiting its ability to entertain a pre-election challenge. Mont. Code Ann. § 3-5-302 ("The district court has original jurisdiction in: ...(b) all civil and probate matters; (c) all cases at law and in equity... and (e) all special actions and proceedings that are not otherwise provided for.").

Had the 2007 amendments curtailed the jurisdiction of the district court, the outcomes of *Reichert* and *MEA-MFT*, which were rendered after 2007, would have been very different. In fact, when, as here, a case has originated in the District Court, the Supreme Court of Montana has never ruled against a challenge to the facial constitutionality of a proposed ballot initiative on ripeness grounds, before or after 2007.

No other considerations prevent justiciability. This controversy is one upon which the judgment of the Court may effectively operate, and a judicial determination will have the force and effect of a final judgment. *See Sorenson v. City of Bellingham*, 80 Wash. 2d 547, 556-57, 496 P.2d 512, 517 (1972). The Plaintiffs have requested that the Court declare I-183 unconstitutional on its face, and enjoin the Defendant from placing the measure on the ballot.

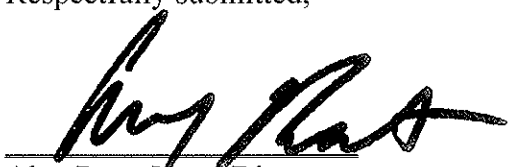
Compl. Prayer for Relief, ¶¶ 1-2. This relief is within the court's power, and would resolve the dispute with finality.[8] The dispute is also sufficiently adversarial. *See Sorenson*, 80 Wash 2d 556-57. It is the role of the state to defend ballot initiatives, as it has done in past cases. *See e.g. Reichert, MEA-MFT, Cobb.* Additionally, other interested parties may intervene at the Court's discretion. M. R. Civ. P. 24.

Thus, no prudential, statutory, or other barriers to this case's ripeness exist. The Court should DENY Defendant's Motion to Dismiss.

CONCLUSION

Plaintiffs' claims are ripe for review. For the foregoing reasons, the Court should DENY Defendant's Motion to Dismiss.

Respectfully submitted,



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[8] Moreover, courts have held that judicial scrutiny of ballot initiatives is appropriate even where this criterion is not met where "a matter concerning a great and overriding public moment" is implicated. *Sorenson*, 80 Wash. 2d at 556; See also *Wyoming Nat'l Abortion Rights Action League v. Karpan,* 881 P. 2d 281, 285 (Wyo. 1994). Indeed, in her *Reichert* dissent, Justice Baker opined: "We should decline to interfere with the initiative and referendum process "unless it appears to be absolutely essential." *Reichert*, ¶ 100. Plaintiffs' challenge to I-183 is "a matter concerning a great and overriding public moment," and pre-election review is "absolutely essential" because of past and present marginalization of the transgender community, and the significant threats to the health and safety of transgender individuals.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2018, a true and correct copy of the above and foregoing document was duly served upon counsel of record and interested parties by:

_____	CM/ECF
_____	Hand Delivery
_____	U.S. Mail
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X	Email
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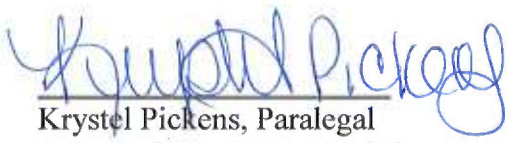

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