VOLUME NO. 51 OPINION NO. 2

INITIATIVE AND REFERENDUM - An unconstitutional amendment to a law by initiative or referendum leaves the section intact as it had been before the attempted amendment;
STATUTORY CONSTRUCTION - A statutory provision may not be severed if such provision is necessary to the integrity of the statute or was the inducement to its enactment;
STATUTORY CONSTRUCTION - Severance of an unconstitutional provision must leave the resulting statute capable of being executed in accordance with the intention of the people of Montana;
MONTANA CODE ANNOTATED - Sections 13-27-204, -207, -308;
MONTANA CONSTITUTION - Article II, sections 16, 18; article III, section 4, (2); article VI, section 10; article VIII; article XIV, section 9, (1);
UNITED STATES CONSTITUTION - Amendment XIV;
UTAH LAWS OF 1917 - Chapter 56, section 1.

HELD: A judicial decision invalidating the county distribution requirements for signatures to qualify an initiative petition for the ballot, as approved in Constitutional Amendments 37 and 38 and enacted in their implementing legislation, restores the language of the constitution and statutes as they existed before the approval of the invalid amendments.

April 7, 2005

Representative Gary Matthews
Speaker of the House
Montana House of Representatives
P.O. Box 201706
Helena, MT 59620-1706

Dear Mr. Speaker:

You have requested my opinion concerning the following question:

> What will be required to qualify a proposed initiative and amendment by initiative as a result of the United States District Court's ruling in Montana PIRG v. Johnson?

In 2002, Montana's voters approved two constitutional amendments referred to them by the 2001 Legislature. The first ballot issue, Constitutional Amendment No. 37 ("C-37"), amended the distribution requirements for constitutional initiative petitions in article XIV, section 9(1):

> **Section 9. Amendment by initiative.** (1) The people may also propose constitutional amendments by initiative. Petitions including the full text of the proposed amendment shall be signed by at least ten percent of the qualified electors of the state. That number shall include at least ten percent of the qualified electors in each of ~~two-fifths~~ at least one-half of the ~~legislative districts~~ counties.

The second ballot issue, Constitutional Amendment No. 38 ("C-38"), amended the distribution requirements for statutory initiative petitions in Article III, Section 4(2):

> **Section 4. Initiative.** . . . (2) Initiative petitions must contain the full text of the proposed measure, shall be signed by at least five percent of the qualified electors in each of at least ~~one-third~~ one-half of the ~~legislative representative districts~~ counties and the total number of signers must be at least five percent of the total qualified electors of the state. Petitions shall be filed with the secretary of state at least three months prior to the election at which the measure will be voted upon.

The 2003 Legislature then amended the statutory petition forms to reflect the amended distribution requirements. Mont. Code Ann. § 13-27-204, -207. The statute governing the actual certification of petitions as "containing a sufficient number of signatures" was not amended because it simply incorporates the constitutional requirements for petition signatures. Mont. Code Ann. § 13-27-308.

On November 10, 2003, individuals and organizations interested in the initiative process sued the Secretary of State and the Attorney General for a declaration that the amended distribution requirements of C-37 and C-38 were unconstitutional, and for an injunction against their enforcement. Montana PIRG v. Johnson, CV 03-183-M-DWM (D. Mont.). Following the plaintiffs' motion for summary judgment and subsequent briefing, the United States District Court for Montana granted the motion in part, holding that "Montana's county distribution requirement results in unequal treatment of qualified

electors in different counties," and that "it is unconstitutional on its face under the Fourteenth Amendment's Equal Protection Clause and therefore invalid." Montana PIRG v. Johnson, CV 03-183-M-DWM, Order at 17 (D. Mont., Mar. 28, 2005). The court indicated that it would enter judgment "declaring that the Montana constitutional and statutory provisions comprising the county distribution requirement violate the Fourteenth Amendment of the United States Constitution," and "permanently enjoining Montana from enforcing those provisions." Id. While the court has not yet entered a final judgment, it is expected to do so before the 2006 elections.

"Constitutional Provisions are interpreted by use of the same rules as those used to interpret statutes." Kottel v. State, 2002 MT 278, ¶ 9, 60 P.3d 403. An unconstitutional amendment to a law "leav[es] the section intact as it had been before the attempted amendment." State ex rel. Woodahl v. District Court, 162 Mont. 283, 290, 511 P.2d 318, 322 (1973). In this instance, the nullification of CI-37 and CI-38 as unconstitutional results in a return to the distribution requirements "intact as [they] had been before the attempted amendment." Therefore, the original legislative district distribution requirements fill the void left by the county distribution requirements' unconstitutionality. Moreover, as the District Court noted, distribution requirements based on legislative districts "do[] not violate equal protection." Montana PIRG, Order at 16; see also Idaho Coalition United for Bears v. Cenarussa, 342 F.3d 1073, 1078 (9th Cir. 2003) ("Idaho could achieve the same end through a geographic distribution requirement that does not violate equal protection, for example, by basing any such requirement on existing state legislative districts.").

In an apparently similar case the Utah Supreme Court declared a county distribution requirement unconstitutional, but severed that requirement from the initiative enabling statute, leaving only the requirement that an initiative petition receive signatures equal to 10 percent of qualified electors. See Gallivan v. Walker, 54 P.3d 1069, 1100 (Ut. 2002). Under this analysis, it has been suggested that in the absence of the county distribution requirements, the Montana Constitution now requires only the signatures of 5 or 10 percent of qualified electors statewide to qualify statutory or constitutional initiatives, respectively. Mont. Const. art. III, § 4; art. XIV, § 9.

However, the Utah Supreme Court's analysis in Gallivan does not support severance of any distribution requirement instead of reversion to the original distribution requirement. The Gallivan court scrutinized the entire initiative enabling statute, which had contained a county distribution requirement since its initial enactment in 1917. See 54 P.3d at 1098; 1917 Utah Laws Ch. 56, § 1. Therefore, in asking "whether the legislature would have enacted the initiative enabling statute without the constitutionally infirm multi-county signature requirement," the court faced a stark choice between severing part

of the overall enactment or striking down the entire initiative process in Utah. Gallivan, 54 P.3d at 1100. Because, like the Montana Constitution, Utah's constitution compels the availability of an initiative process, the court had to assume that the legislature "would have met its constitutional responsibility by enacting the initiative enabling statute without the unconstitutional subsection." Id.

A similar severability analysis would produce a different result as applied to C-37 and C-38 because there is nothing to sever: unlike Utah's initiative enabling statute, the two amendments at issue adopted no more than the county distribution requirements held to be unconstitutional. Even in the presence of a severability clause, lacking in both C-37 and C-38, the Montana Supreme Court has refused to sever objectionable parts of a constitutional amendment when a constitutional defect pervades the entire amendment. Marshall v. State ex rel. Cooney, 1999 MT 33, ¶ 25, 975 P.2d 325, 332 (invalidating entire constitutional initiative because amendments to article VIII, article II, § 18, and article VI, § 10 violated separate-vote requirement). When a constitutional amendment fails because of a constitutional defect, it is "nugatory and of no effect." State ex rel. Montana Citizens for Preservation of Citizen's Rights v. Waltermire, 227 Mont. 85, 99, 738 P.2d 1255, 1264 (1987) (invalidating amendment to article II, section 16 because of "material constitutional defects in the manner it was presented to the electors for a vote"). Thus, following Montana Citizens, the Montana Supreme Court applied Article II, Section 16 as it existed before the amendment it had invalidated two years before. Meech v. Hillhaven West, Inc., 238 Mont. 21, 776 P.2d 488 (1989).

Moreover, a statutory provision may not be severed if "such provision is necessary to the integrity of the statute or was the inducement to its enactment." Montana Auto. Ass'n v. Greely, 193 Mont. 378, 399, 632 P.2d 300, 311 (1981), quoting Hill v. Rae 52 Mont. 378, 389-90, 158 P. 826, 831 (1916). The sole purpose of C-37 and C-38 was to ***broaden*** the distribution requirements from legislative districts to counties, and accomplishing that purpose necessarily was the inducement to its enactment. Excising the distribution requirements entirely, as the court did in Gallivan, would accomplish precisely the opposite of the result intended by the voters, ***eliminating*** rather than broadening the distribution of voter signatures required to qualify an initiative for the ballot. Therefore, in my opinion the failure of C-37 and C-38 leaves the Montana Constitution as it was before their enactment, with the original legislative district distribution requirements intact. Cf. Finke v. State ex rel. McGrath, 2003 MT 48, ¶ 28, 65 P.3d 576, 582 (striking entirety of enactment held to violate the Fourteenth Amendment, and leaving law as it was before the enactment, where severance would produce statutory result at odds with legislative purpose).

The question underlying severability analysis is whether the resulting statute is "capable of being executed in accordance with the intention of the people of Montana." Montana Auto. Ass'n, 193 Mont. at 400, 632 P.2d at 312. Twice the people of Montana have indicated their intent that initiative petitions contain a distribution requirement: first in the approval of article XIV, section 9 and article III, section 4 of the Montana Constitution, and again in broadening those requirements in C-37 and C-38. The excision of the preexisting distribution requirements from the Montana Constitution would create a law neither enacted by the legislature nor approved by the people of Montana. Indeed, it would contravene the clear purpose of C-37 and C-38 to broaden the distribution requirements, and instead would eliminate them altogether. Reversion of the distribution requirements to their original legislative district basis, on the other hand, respects both the decisions by the Montana Supreme Court in similar circumstances and--subject only to the constitutional restraints imposed by the court in Montana PIRG v. Johnson--the people's will.

THEREFORE, IT IS MY OPINION:

> A judicial decision invalidating the county distribution requirements for signatures to qualify an initiative petition for the ballot, as approved in Constitutional Amendments 37 and 38 and enacted in their implementing legislation, restores the language of the constitution and statutes as they existed before the approval of the invalid amendments.

Very truly yours,

MIKE McGRATH
Attorney General

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