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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

**COTTONWOOD ENVIRONMENTAL  
LAW CENTER; LIZ AMETSBOSCHLER;  
DANNY CHORIKI; JEREMY DRAKE;  
AVIV GUSCIO; KATIE HARRISON;  
YOUPA STEIN; MARY STRANAHAN;  
JANS SWANSON; TOMAS WALDORF,**

Plaintiffs,

v.

**STATE OF MONTANA,**

Defendant.

Cause No.: BDV-2023-754

**PARTIAL SUMMARY  
JUDGMENT MOTION  
ORDER**

Before the Court is Plaintiffs’ February 15, 2024 partial summary judgment motion. The State opposes the motion, but agrees it is appropriate for summary judgment as it does not turn on any question of fact. The motion is fully briefed. No party requested oral argument.

For the reasons stated below, Plaintiffs’ motion is **GRANTED**.

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1 **BACKGROUND**

2 The 2021 Legislature passed, and Governor Gianforte signed HB 407, the  
3 purpose of which was “to preempt any local ordinance, resolution, initiative, or  
4 referendum regulating” what it refers to as “auxiliary containers.” The bill  
5 defines the term as “a bag, cup, bottle, can, device, eating or drinking utensil or  
6 tool, or other packaging, whether reusable or single use,” made of various  
7 materials and designed to holding food or beverages from various establishments.  
8 The bill provides that “a local unit of government may not adopt or enforce any  
9 local ordinance, resolution, initiative, or referendum that” prohibits, regulates, of  
10 imposes fees on auxiliary containers. The bill also amended Mont. Code Ann. §  
11 7-1-111, which limits self-government powers of local governments units, to add  
12 a prohibition on exercising any power “affecting, applying to, or regulating the  
13 use, disposition, sale, prohibitions, fees, charges, or taxes on auxiliary  
14 containers.” Finally, the bill amended Mont. Code Ann. § 7-5-131, *Right of*  
15 *initiative and referendum*, as follows:

16 (1) ~~The~~ Except as provided in subsection (2), the powers of initiative and  
17 referendum are reserved to the electors of each local government.  
18 Resolutions and ordinances within the legislative jurisdiction and power  
19 of the governing body of the local government, ~~except those set out in~~  
20 ~~subsection (2),~~ may be proposed or amended and prior resolutions and  
21 ordinances may be repealed in the manner provided in 7-5-132 through  
22 7-5-135 and 7-5-137.

- 23 (2) The powers of initiative do not extend to the following:
- 24 (a) the annual budget;
  - 25 (b) bond proceedings, except for ordinances authorizing bonds;
  - (c) the establishment and collection of charges pledged for the  
payment of principal and interest on bonds;
  - (d) the levy of special assessments pledged for the payment of  
principal and interest on bonds; or

1 (e) the prioritization of the enforcement of any state law by a unit of  
2 local government; or  
3 (f) the regulation of auxiliary containers, defined in [section 1(5)], as  
4 prohibited by [section 1(2)].

5 On October 12, 2023, Cottonwood member Isaac Cheek  
6 “submitted a local ballot initiative to the Gallatin County Election Office that  
7 would regulate single-use plastics (auxiliary containers) in Bozeman.”

8 Gallatin County Election Administrator Eric Semerad responded  
9 that “the Petition is outside the powers of initiative,” citing the legal opinion of  
10 the Bozeman City Attorney Greg Sullivan, who determined that the language that  
11 was added to Mont. Code Ann. § 7-5-131 by HB 407 “denied the power of  
12 citizen initiative related to auxiliary containers.” The Court notes that County  
13 Attorney Sullivan made clear that his assessment was based on the presumption  
14 that enacted statutes are constitutional.

## 15 **CONTROLLING AUTHORITY**

### 16 **Montana Constitution Provisions**

17 “All political power is vested in and derived from the people. All  
18 government of right originates with the people, is founded upon their will  
19 only....” Mont. Const., Art. 2, § 1.

20 “The legislative power is vested in a legislature consisting of a  
21 senate and a house of representatives. The people reserve to themselves the  
22 powers of initiative and referendum.” Mont. Const., Art. 5, § 1.

23 “The people may enact laws by initiative on all matters except  
24 appropriations of money and local or special laws.” Mont. Const., Art. 3, § 4(1).

25 “The legislature shall extend the initiative and referendum powers  
reserved to the people by the constitution to the qualified electors of each local

1 government unit.” Mont. Const., Art. 11, § 8.

2 “[I]nitiative and referendum provisions of the Constitution should  
3 be broadly construed to maintain the maximum power in the people....”

4 *Chouteau Cnty. v. Grossman*, 172 Mont. 373, 378, 563 P.2d 1125, 1128 (1977).

### 5 **Summary Judgment**

6 Summary judgment is proper when no genuine issues of material  
7 fact exist, and the moving party is entitled to judgment as a matter of law. Mont.  
8 R. Civ. P. 56(c)(3). Since the controlling issue before this Court is strictly a legal  
9 question, partial summary judgment is appropriate at this juncture as a matter of  
10 law. See *Lingscheit v. Cascade County*, 249 Mont. 526, 531, 817 P.2d 682  
11 (1991).

### 12 **Constitutional Issue**

13 “Statutes are presumed to be constitutional, and it is the duty of this  
14 Court to avoid an unconstitutional interpretation if possible.”  
15 *Hernandez*, ¶ 15 (citing *Montanans for the Responsible Use of the*  
16 *School Trust v. State ex rel. Bd. of Land Comm’rs*, 1999 MT 263, ¶  
17 11, 296 Mont. 402, 989 P.2d 800; *State v. Nye*, 283 Mont. 505, 510,  
18 943 P.2d 96, 99 (1997)). The party challenging a statute’s  
19 constitutionality bears the heavy burden of proving the statute is  
20 unconstitutional “beyond a reasonable doubt.” *Molnar v. Fox*, 2013  
21 MT 132, ¶ 49, 370 Mont. 238, 301 P.3d 824.

22 When interpreting constitutional provisions, we apply the same rules  
23 as those used in construing statutes. *Nelson v. City of Billings*, 2018  
24 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. But just as with  
25 statutory interpretation, constitutional construction should not “lead  
to absurd results, if reasonable construction will avoid it.” *Nelson*, ¶  
16 (citing *Grossman v. Mont. Dep’t of Natural Res.*, 209 Mont. 427,  
451, 682 P.2d 1319, 1332 (1984)). “The principle of reasonable  
construction ‘allows courts to fulfill their adjudicatory mandate and  
preserve the [Framers’] objective.’” *Nelson*, ¶ 16 (citation omitted).



1 or special if it operates in the same manner upon all persons in like  
2 circumstances. If a law operates uniformly and equally upon all brought within  
3 the circumstances for which it provides, it is not a local or special law.” *Rohlfs v.*  
4 *Klemenhausen, LLC*, 2009 MT 440, ¶ 12, 354 Mont. 133, 136, 227 P.3d 42, 46.  
5 The proposed initiative in this case is not a local law under Art. 3, § 4.

6 Plaintiffs contend HB 407 “is facially unconstitutional because it  
7 infringes upon their expressly reserved and constitutionally protected powers of  
8 initiative under Article III, section 4; Article V, section 1; and Article XI, section  
9 8 of the Montana Constitution.” The State counters:

10 Local governments derive their limited power from Article XI, §§ 4 and  
11 6 of the Montana Constitution. A local government cannot exercise any  
12 legislative power that is prohibited by the Constitution, statute or its own  
13 charter. Article XI, § 8, Initiative and Referendum for Local Government  
14 Citizens, is co-extensive with their local government legislative power.  
15 Because the local government initiative and referendum is co-extensive  
16 with the local government power, state statute providing a state-wide  
17 policy can restrict Article XI, § 8, Local Government Initiative and  
18 Referendum. As a result, House Bill 407 (“HB407”), codified primarily  
19 in Mont. Code Ann. § 7-1-121, is constitutional.

20 It appears that the State misunderstands the Montana  
21 Constitution’s structure and content. The State characterizes local government  
22 power and initiative power as “co-extensive,” even though the State first  
23 characterized the local government power as “limited,” which is quite obviously  
24 not ‘co-extensive’ with the citizenry’s initiative power that was reserved in toto  
25 from the outset. Local governments have been granted some powers; the  
citizenry never relinquished any initiative powers. The State’s argument that  
“state statute providing a state-wide policy can restrict Article XI, § 8, Local  
Government Initiative and Referendum” is equivalent to stating that one can

1 amend the Constitution with statute. This is a patently absurd inversion of  
2 elementary principles of constitutional supremacy. *Bd. of Regents of Higher*  
3 *Educ. of Mont. v. State*, 2022 MT 128, ¶ 24, 409 Mont. 96, 109-10, 512 P.3d 748,  
4 755. (“[W]here legislative action infringes upon the constitutionally granted  
5 powers ... the legislative power must yield.”)

6 It is unsurprising that there is no citation in support of this  
7 sweeping statement about the co-extensiveness of distinct constitutional  
8 provisions. If these powers are co-extensive as the State argues one might expect  
9 a constitutional provision or Montana Supreme Court opinion stating as much,  
10 but the State brought none to the Court’s attention. *See e.g.* Mont. Const. Art 2, §  
11 9 (expressly demanding weighing of public right to know against individual right  
12 to privacy). Moreover, prior to HB 407 all the initiative subjects ostensibly  
13 banned by Mont. Code Ann. § 7-5-131 were also prohibited by the Constitution.  
14 *Compare* Mont. Const. Art 3, § 4 prohibition on initiatives about “appropriations  
15 of money and local or special laws” *with* Mont. Code Ann. § 7-5-131 (2019)  
16 prohibiting initiatives about money such as “annual budget;” “bonds;” “charges  
17 pledged” for bonds; “special assessments” and special laws such as prioritizing  
18 enforcement of particular laws. All the previous subjects prohibited by Mont.  
19 Code Ann. § 7-5-131 are prohibited by the Constitution; it is, in effect, a statutory  
20 enactment of Art 3, § 4. The Constitution does not prohibit initiatives on  
21 auxiliary containers.

22 Regardless, the State’s focus on local government powers is a red  
23 herring, since the power at issue here is not being exercised by local government,  
24 but rather by the citizenry. The *City* of Bozeman isn’t trying to do anything; the  
25 *citizens* of Bozeman are. The State argues that HB 407 merely took the statute

1 limiting local government power and “added a provision limiting local  
2 government power” on auxiliary containers. But HB 407 did not only limit the  
3 power of local governments. Section 3 of the bill also limited “the powers of  
4 initiative and referendum.” Those powers have absolutely nothing to do with  
5 local government power. Initiative rights are axiomatically held by the people,  
6 not by parts of the government. “The people reserve to themselves the powers of  
7 initiative and referendum.” Mont. Const., Art. 5, § 1. HB 407 seeks to statutorily  
8 rewrite Montana citizens’ constitutional right to submit initiatives to the voters.  
9 Neither the Legislature, *Ellingson, et al. v. State of Montana*, Montana First Jud.  
10 Dist. Ct., Lewis and Clark County, Cause No. ADV-2023-388, nor the Executive,  
11 *Montanans Securing Reprod. Rights v. Knudsen*, 2024 MT 54, may interfere with  
12 the citizenry’s expressly reserved right of initiative, and the Judiciary must  
13 interpret the right “in a manner that does not encumber the right of the people to  
14 amend the Constitution,” *MACo v. State*, 2017 MT 267, ¶ 25, 389 Mont. 183,  
15 195, 404 P.3d 733, 741. To hold otherwise would be patently offensive to Art. 5,  
16 § 1 and the most fundamental tenant of Montana’s Constitution, that “All  
17 political power is vested in and derived from the people. All government of right  
18 originates with the people, is founded upon their will only....” Mont. Const., Art.  
19 2, § 1.

20                   Accordingly, the Court agrees with Plaintiffs that HB 407  
21 unconstitutionally infringes upon their “expressly reserved power of local ballot  
22 initiative” relative to (as defined) “the regulation of auxiliary containers.” As  
23 such, their partial summary judgment motion must, and shall be, **GRANTED**.

24 /////

25 /////



1 **ORDER**

2 **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that  
3 Mont. Code Ann. § 7-5-131(2)(f) (2023) is hereby stricken as facially  
4 unconstitutional.

5 **ELECTRONICALLY SIGNED AND DATED BELOW**

6 cc: John Meyer  
7 David K.W. Wilson, Jr.  
8 Robert Farris-Olsen  
9 Thane P. Johnson  
10 Hon. Austin Knudsen  
11 Alwyn T. Lansing  
12 Michael D. Russell  
13 Emily Jones

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