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MEMORANDUM

To: Jeff Laszloffy, Montana Family Foundation
From: Rob Natelson[1]
Re: CI-128
Date: September 5, 2024

INTRODUCTION

You have asked me to review Constitutional Initiative 128 ("CI-128") and explain the meaning and implications of that measure. This memorandum is my response.

We both understand that I have no ties to the Montana Family Foundation and have neither requested nor received compensation for this memorandum. It is written at your request solely as a service to the people of Montana.

As is true in other walks of life, there are some basic professional standards with which state constitutional amendments should comply. For example, the style and wording should fit well with the existing state constitution. The amendment should define important words and phrases. It should focus on the issue at hand, and not venture into other areas. The wording should be crafted to avoid hidden or unintended consequences.

In assessing an amendment, one must also consider the state's specific legal and judicial environment. Language that is well-defined and without unintended consequences in another state, may not be so in Montana—and vice versa. Accordingly, my assessment also considers Montana's unique legal and judicial environment.

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[1]Professor Natelson is among the nation's most-relied-on scholars by U.S. Supreme Court justices. His work has been cited by Chief Justice Roberts and Justices Kagan, Alito, Thomas, Scalia, and Gorsuch. He is Senior Fellow in Constitutional Jurisprudence at the Independence Institute in Denver. From 1987 to 2010, he was Professor of Law at the University of Montana. The conclusions reached in this memorandum are his own and have not been reviewed by the Independence Institute.

The text of CI-128 is set forth in the footnote.[2] If approved at the 2024 general election, it would amend the Montana Constitution—purportedly to protect abortion rights. However, while abortion rights generally are thought of as women's rights, CI-128 nowhere mentions women. Instead the text speaks of the prerogative of a "pregnant patient" or "person" to abort "their" child. The implications of that unusual language are discussed below.

THE "SEPARATE VOTE" ISSUE

Before examining the text in detail, we must discuss a legal and election issue that pertains to the initiative as a whole.

Since 1999, the Montana Supreme Court has imposed a "separate vote" requirement on proposed constitutional initiatives. *Marshall v. Montana*, 293 Mont.

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[2]CI-128 reads as follows:

Section 36. Right to make decisions about pregnancy.

(1) There is a right to make and carry out decisions about one's own pregnancy, including the right to abortion. This right shall not be denied or burdened unless justified by a compelling government interest achieved by the least restrictive means.

(2) The government may regulate the provision of abortion care after fetal viability provided that in no circumstance shall the government deny or burden access to an abortion that, in the good faith judgment of a treating health care professional, is medically indicated to protect the life or health of the pregnant patient.

(3) The government shall not penalize, prosecute, or otherwise take adverse action against a person based on the person's actual, potential, perceived, or alleged pregnancy outcomes. The government shall not penalize, prosecute, or otherwise take adverse action against a person for aiding or assisting another person in exercising their right to make and carry out decisions about their pregnancy with their voluntary consent.

(4) For purposes of this section:

(a) A government interest is "compelling" only if it clearly and convincingly addresses a medically acknowledged, bona fide health risk to a pregnant patient and does not infringe on the patient's autonomous decision making.

(b) "Fetal viability" means the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

274, 975 P.2d 325 (1999).[3] The stated reason for this requirement is to allow the people to vote on separate issues separately, rather than requiring them to vote "yes" or "no" on a bundle of proposals.

Based on the court's recent precedents, it is clear that CI-128 does not comply with the "separate vote" rule. Less than a year ago, the Montana Supreme Court ruled on the constitutionality of a tax relief initiative that would have amended a single section of the state constitution. The court held that the proposal was invalid because it altered the functions of different units of government. *Monforton v. Knudsen*, 413 Mont. 367, 539 P.3d 1078 (2023).

CI-128 not only would add a new section to the Montana Constitution, but like the proposal in the *Monforton* case, it would impact different government functions exercised by different agencies: health care regulations, criminal law, and the standards by which courts review legislation.

Despite this, the Montana Supreme Court upheld CI-128 against a "separate vote" challenge. *Montanans Securing Reproductive Rights v. Knudsen*, 415 Mont. 416, 545 P.3d 45 (2024). However, this decision seems to have been based on political rather than legal factors. *See Montanans Securing Reproductive Rights v. Knudsen*, 416 Mont. 138, 546 P.3d 183 (2024) (a later case involving the same parties, in which the justices short-circuited normal procedures and wrote their own ballot language to advance CI-128 to the ballot more quickly).

Yet "single issue" concerns do persist. As explained below, CI-128 contains multiple issues in a single "bundle"—and some of these issues extend well beyond merely protecting the right to abortion. Those who vote "yes" on this measure thinking it impacts only abortion may unwittingly be voting for policies they oppose.

STYLISTIC ISSUES

Writing style may not directly affect the substance of a measure, but it may provide clues as to what that substance is. A discordant, awkward, or otherwise poor style may trigger alarm bells warning of deeper problems.

The Montana Constitution (like every manmade document) has shortcomings. But one of its great strengths is the grace and beauty of its composition. By contrast, the language of CI-128 is discordant, even ugly. Its verb tense is radically different from that used in the rest of the Montana Declaration of Rights. MONT. CONST. art. II. CI-128 introduces a new and different generic pronoun, and employs transitory

[3]This decision was based on a misunderstanding of Mont. Const. art. XIV, § 11. *See* ROBERT G. NATELSON, THE MONTANA SUPREME COURT: AN INSTITUTION IN NEED OF REFORM 61 n. 168 (2024).

"woke" language foreign to the rest of the document—and inappropriate for any constitution. If placed in the Montana Constitution, CI-128 would look like a festering sore on an otherwise healthy body.

The implications of CI-128's poor style are explored further below.

SPECIFIC LEGAL AND DRAFTING DEFECTS

Although CI-128 is only four paragraphs long, those four paragraphs contain an unusual number of serious drafting defects. This section identifies and explains five of them. There may be others.

First Defect

The first defect appears in the first sentence of the first paragraph:

> "There is a right to make and carry out decisions about one's own pregnancy, including the right to abortion."

This passage contains no limits on who may make such decisions. The wording seems to include children in parental custody as well as mentally-incompetent people with legally-appointed guardians.

In some states, this wording would not be of particular concern because normal judicial practice is for the courts to limit the language to adults with full capacity. In Montana, however, this language almost certainly would be read to include children of any age, without parental consent. *Planned Parenthood v. State*, 2024 WL 3804250 (Mont. 2024). Thus, the implications of this wording range beyond the abortion decision. This wording threatens the integrity of Montana families and exposes children to abusive practices by people outside the family.

Second Defect

This defect begins in the first paragraph and extends into the fourth:

> "This right shall not be denied or burdened unless justified by a compelling government interest achieved by the least restrictive means. . . . A government interest is "compelling" only if it clearly and convincingly addresses a medically acknowledged, bona fide health risk to a pregnant patient and does not infringe on the patient's autonomous decision making."

This passage creates a novel and experimental legal "test" previously unknown to either federal or Montana law. Moreover, when reduced to its essence, the "test" turns out to be entirely meaningless.

The "compelling governmental interest" (or "compelling state interest") test was developed by the U.S. Supreme Court to mark the limits of a constitutional right. It helps explain when the exercise of a right becomes so broad that it infringes on democratic governance and on the rights of others. For example, government may ban falsely shouting "fire" in a crowded theater because in this case government has a "compelling interest" in protecting the public safety against malicious and false claims.

The Montana Constitution also uses the compelling interest test, and does so in somewhat the same way: It provides that government may curb the constitutional right to privacy upon "the showing of a compelling state interest." MONT. CONST. art. II, § 10. Similarly, the Montana Supreme Court applies the same test to define and limit some other constitutional rights.

But the version of the "compelling interest" test in CI-128 is entirely different. There, a compelling interest applies only to "the health risk of *the pregnant patient*." The public interest doesn't count and health risks to others don't count. And to emphasize that a "compelling interest" does not actually limit the abortion right, CI-128 states that the interest must not infringe on the "pregnant patient's" choice in any way. In other words, CI-128 privileges abortion above everything else.

Thus, the "compelling interest" test in CI-128 is not only novel, but also meaningless. Its insertion is a sign either of drafting incompetence or of an attempt to mislead. It gulls readers into believing that CI-128 permits abortion laws designed to protect public health when it does not.

Third Defect

CI-128 gives life-and-death power to "treating health care professionals," but never defines who they are. Ideally, only physicians should have life-and-death power, but CI-128 does not say so. Some might argue that decision makers should include licenced physician's assistants, nurse practitioners, or midwives—but CI-128 doesn't say that either.

In some states, one could depend on the courts to read in a licensing requirement. But the Montana judiciary could well read CI-128 as overruling even the minimal professional requirements now existing. *Cf. Armstrong v. Montana*, 296 Mont. 361, 989 P.2d 364 (1999).

This segment of CI-128 could literally convert Montana into a cesspool of unlicensed and unscrupulous quacks who prey on unhappy women.

Fourth Defect

This defect appears in the following wording:

> "The government may regulate the provision of abortion care after fetal viability . . . 'Fetal viability' means the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures."

The effect of this language is to mislead voters into thinking CI-128 permits regulation of abortion after fetal viability. But for the following reasons, it does not do so:

- Under CI-128, any "treating health care professional" may veto any regulation according to "the particular facts of the case." If the "treating health care professional" makes money doing abortions, then he or she will have a strong incentive to deem the fetus "not viable."

- As noted above, CI-128 contains no requirement that the "treating health care professional" be competent or even licensed.

- CI-128 employs an incorrect definition of "viability." Under CI-128, a child is not viable if he or she cannot survive outside the uterus "without the application of extraordinary medical measures." Yet in the medical world, a child born at a gestational age of 24 weeks or after is considered "viable," even though he or she must be placed in intensive care to survive. CI-128's inaccurate definition of "fetal viability" will condemn to death untold thousands of perfectly viable children who otherwise would have lived.

In sum, this passage of CI-128—like the "compelling interest" portion—displays either incompetence or desire to mislead. It seems to allow regulations to protect health and safety, but it really does not.

Fifth Defect

CI-128 is not a "women's rights" measure. It refers only to "pregnant patients" and "persons," and employs the pronoun "their" instead of "her."

This language is odd. First, it is a biological fact that only women and girls become pregnant. Second, the Montana Constitution specifically distinguishes between "men" and "women," Mont. Const. art. II, § 35; art. XIII, § 7, and good drafting practice is to use pre-existing constitutional language.

So why did the drafters of CI-128 flout biology, constitutional usage, and popular understanding by including this language?

One likely goal was to leverage this language in future litigation, presumably to claim constitutional status for "gender fluidity." A recent Montana Supreme Court case certainly makes this goal feasible. *See Barrett v. Montana* 416 Mont. 226, 547 P.3d 630 (2024) (voiding law protecting women's sports from biological males).

The upshot is that those who vote for CI-128 are not voting merely for reproductive rights. They are offering constitutional support for biological males to invade women's sports, for surgical mutilation of children, and for other aspects of the "gender fluidity" program.

CONCLUSION

CI-128 is a badly-written, misleading, and risky proposal. Its style does not fit into that of the Montana Constitution. The right to abortion is supposed to be a woman's right, but CI-128 never mentions women. CI-128 also forces voters to vote "Yes" or "No" on a measure that is really not a single proposal, but a bundle of proposals.

CI-128 fails to define one of its most important terms. It defines another term in a way that—as a matter of medical fact—is flatly erroneous. It uses constitutional language in an incorrect way, rendering it almost meaningless. It makes certain health and safety laws unenforceable. It threatens to provoke endless lawsuits, from which only lawyers will benefit.

CI-128 is risky because:

- It does not protect health and safety;
- it allows children and mentally-incompetent people to make health care decisions without the consent—or even the input—of their parents and guardians;
- it threatens to convert Montana into a refuge for unscrupulous, unlicensed quacks who cannot obtain or retain licenses in other states; and

- it contains vague and unusual language that can be used to advance the "gender fluidity" program. In other words, CI-128, if enacted, could be used as a legal wedge for child mutilation and the invasion of women's sports by biological males.

Sincerely,

ROBERT G. NATELSON