

Hon. Shane A. Vannatta
District Court Judge, Dept. 5
Missoula County Courthouse
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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

SHAWN REAGOR, et al,

Plaintiffs,

vs.

THE STATE OF MONTANA, et al,

Defendants.

Dept. 5

Cause No.: DV-23-1245

OPINION & ORDER GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT ON
COUNT I

This matter comes before the Court upon *Motion for Summary Judgment on Count 1* and brief in support (“Motion”) (Dkt #s 4, 5) filed by Plaintiffs on December 19, 2023. On April 17, 2024, Defendants filed their Response. (Dkt # 21). On May 3, 2024, Plaintiffs filed their Reply. (Dkt # 23). On June 18, 2024, the Court heard oral argument on the Motion. This matter has been fully briefed. The Court has considered the record before it and deems the matter submitted for ruling.

ORDER

Based on the following Opinion, IT IS HEREBY ORDERED that the Motion is GRANTED.

OPINION

I. Procedural Background.

On December 18, 2023, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief. (Dkt # 1). Relevant to this Motion, therein Plaintiffs allege in Count I that Senate Bill 458 (2023) (“SB 458” or “the Bill”) is facially unconstitutional pursuant to Mont. Const. art. V, § 11(3). On December 19, 2024, Plaintiffs filed the Motion seeking summary judgment on Count I. On April 3, 2024, the parties stipulated to the State’s withdrawal of its Rule 56(f) motion and brief (Dkt # 19) and on April 13, 2024 the Court granted the unopposed motion for the withdrawal of the Rule 56(f) motion (Dkt # 20).

II. Undisputed Facts.

SB 458 was adopted by the 2023 Montana Legislature, signed by Governor Gianforte on May 19, 2023, and became effective October 1, 2023, by operation of Montana law (Mont. Code Ann. § 1-2-201). The title of SB 458 is:

AN ACT GENERALLY REVISING THE LAWS TO PROVIDE A COMMON DEFINITION FOR THE WORD SEX WHEN REFERRING TO A HUMAN; AND AMENDING SECTIONS 1-1-201, 2-18-208, 7-15-4207, 7-34-2123, 13-27-408, 13-35-301, 13-38-201, 20-7-1306, 20-9-327, 20-25-501, 20-25-707, 22-2-306, 33-1-201, 35-20-209, 39-2-912, 40-1-107, 40-1-401, 40-5-907, 40-5-1031, 41-5-103, 42-2-204, 45-5-625, 46-19-301, 46-19-401, 46-32-105, 49-1-102, 49-2-101, 49-3-101, 50-5-105, 50-5-602, 50-11-101, 50-15-101, 50-19-103, 50-60-214, 53-20-142, 53-21-121, 53-21-142, 60-5-514, 60-5-522, 61-5-107, AND 72-1-103, MCA.

(Dkt # 1, Ex. 1). The title of SB 458 does not state that it is a general appropriation bill, and it carried a fiscal note of \$0.00. The body of SB 458 provides the definitions for the words ‘female,’ ‘male,’ and ‘sex.’ (Id.)

III. Summary Judgment Standard.

A Rule 56 analysis requires that judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.” [Mont. R. Civ. P. 56\(c\)\(3\)](#). “A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact.” [Roe v. City of Missoula, 2009 MT 417, ¶ 14, 354 Mont. 1, 6, 221 P.3d 1200, 1204](#) (citations omitted). “The party moving for summary judgment bears the initial burden of establishing both the absence of any genuine issue of material fact and entitlement to judgment as a matter of law.” [Id.](#) (citations omitted). “If the moving party meets this burden, then the ‘burden . . . shifts to the nonmoving party to establish that a genuine issue of material fact does exist.’” [Id.](#) (citations omitted). “If no genuine issues of material fact exist, the district court ‘then determines whether the moving party is entitled to judgment as a matter of law.’” [Id.](#) (citations omitted).

IV. Legal Analysis.

Plaintiffs argue that SB 458 violates Mont. Const. art. V, § 11(3) in that it does not contain a single subject clearly expressed in the title. They contend that SB 458 is therefore facially unconstitutional and void.

The State argues that SB 458 is exempt from Mont. Const. art. V, § 11(3)’s Single Subject Rule and even if it was not exempt, the title and purpose of SB 458 is clearly stated. The State contends that no issues of material fact exist and that the

Motion fails as a matter of law.

“The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt.” [Satterlee v. Lumberman's Mut. Cas. Co.](#), 2009 MT 368, ¶ 10, 353 Mont. 265, 269, 222 P.3d 566, 570 (citation omitted). Statutes enjoy a presumption of constitutionality. [Bd. of Regents of Higher Educ. of Mont. v. State](#), 2022 MT 128, ¶ 10, 409 Mont. 96, 102, 512 P.3d 748, 751.

The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.

[Satterlee](#), ¶ 10 (citation omitted).

A. Whether SB 458 is exempt from Mont. Const. art. V, § 11(3), the Single Subject Rule.

“Each bill, *except general appropriation bills and bills for the codification and general revision of the laws*, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.” [Mont. Const art. V, § 11\(3\)](#) (*emphasis added*).

The parties agree that SB 458 is not a general appropriation bill. The parties dispute whether the title expresses that it is a bill for the codification and general revision of laws exempting it from the Single Subject Rule. The State argues that the title of SB 458 directly states it is an act “GENERALLY REVISING THE

LAWS” as is consistent with its substantive provisions, and therefore SB 458 is exempt from the Single Subject Rule according to Mont. Const. art. V, § 11(3)’s own explicit terms. In its brief, the State provides no other legal support or argument on this issue. In oral argument, the State contends that the language of this constitutional provision must be interpreted as providing three different exceptions to the single subject requirement: general appropriation bills, bills for the codification of the laws, and bills for the general revision of the laws.

Plaintiffs argue that SB 458 is not a bill “for the codification *and* general revision of the laws” as those terms are used in Article V, § 11(3). Plaintiffs argue that the language is conjunctive, not disjunctive, so for a bill to be exempt from the Single Subject Rule, at a minimum, its title must state the bill is intended to both revise *and codify* Montana law.

“The legislature’s use of the conjunctive ‘and’ clearly indicates an intent to establish two mandatory prerequisites.” [*State v. Miller*, 231 Mont. 497, 517, 757 P.2d 1275, 1288 \(1988\)](#). The court in *State ex rel. Cotter* squarely addressed the statutory interpretation of the exceptions in this constitutional provision.

The obvious reason for the exception of *appropriation bills* and bills for the codification and general revision of the laws is that *the first are necessary for the maintenance of the government*, and hence their validity ought not to be open to question for informality; and the latter are so extraordinary in their character that both the members of the legislative body and the public are presumed to know what is being done.

[*State ex rel. Cotter v. Dist. Court*, 49 Mont. 146, 151, 140 P. 732, 734 \(1914\)](#)
(*emphasis* added).

For a bill to be exempt from Mont. Const. art. V, § 11(3) requirements it must be for both the codification and general revision of the laws. The title does not also state the Bill is “for the codification” of the law.

Furthermore, simply adding “for the codification” of the law language to the title does not exempt the Bill from the Single Subject Rule requirements. Plaintiffs’ legal analysis on this point is persuasive. Past ‘codifications of the law’ have included the creation of a new code on a particular subject or a recodification of the Mont. Code Ann. In *Nelson*, the court noted that the title of the act creating section 95-507 contained in the Laws of 1967 stated, “An Act Creating a Montana Code of Criminal Procedure, to Codify and Generally Revise the Statutes Which Govern Court Procedures in Criminal Matters.” [*State ex rel. Nelson v. Dist. Court*, 173 Mont. 221, 229, 566 P.2d 1382, 1386 \(1977\)](#). The court further noted that when section 95-507 was amended by the Laws of 1974 the title stated, “AN ACT FOR THE CODIFICATION AND GENERAL REVISION OF THE LAWS RELATING TO THE DEPARTMENT OF INSTITUTIONS.” *Id.* The court concluded, “Patently these acts were codifications and general revisions and possessed adequate titles.” *Id.* Plaintiffs have shown that SB 458 is not a codification of the laws within the meaning of Article V, § 11(3) and the State has not shown otherwise.

SB 458 is not a bill for the “codification and general revision of the laws” of Montana, and its title does not indicate such. Therefore, SB 458 is not exempt from the requirements of Mont. Const. art. V, §11(3).

B. Whether SB 458 violates Article V, § 11(3)'s "clearly expressed in its title" requirement.

Plaintiffs assert that 'sex' is a word in the English language that has multiple definitions depending on context, and that context is not clearly expressed in the title of SB 458. Plaintiffs allege:

50. The English-language noun "sex" has several meanings when referring to humans, depending on context, the most common of which are the following:

1. (chiefly with reference to people) sexual activity, including specifically sexual intercourse. "they enjoyed talking about sex"

Similar: sexual intercourse, intercourse, lovemaking ***

2. either of the two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions. "adults of both sexes"

Similar: gender.

(Dkt # 1, ¶ 50). The relevant section of the Bill's title reads, "AN ACT GENERALLY REVISING THE LAWS TO PROVIDE A COMMON DEFINITION FOR THE WORD SEX WHEN REFERRING TO A HUMAN."

The State does not address the fact that 'sex' has more than one definition (generally as alleged at Dkt # 1, ¶ 50, sexual intercourse or gender). The title does not indicate that the body of the Bill provides a common definition for 'sex,' meaning 'gender,' and not 'sex' meaning 'sexual intercourse.' The meaning for the word 'sex' is not clearly expressed in the title.

Furthermore, the title of SB 458 does not indicate that the body of the Bill provides definitions for the words ‘female’ and ‘male.’ The State acknowledges that the Bill defines male and female for purposes of several statutes under the Montana Code. (Dkt # 15, ¶ 3, February 28, 2024, Affidavit of Thane Johnson).

The State cites to *State v. McKinney* for the applicable standard of construction of titles. The court in *State v. McKinney* set forth the following five principles of the construction of titles for Montana courts to determine whether they meet the constitutional standard provided for in Mont. Const. art. V, § 11(3). [*Harper v. Greely*, 234 Mont. 259, 266, 763 P.2d 650, 654 \(1988\)](#).

First. The purposes of this constitutional provision are to prevent the legislature from the enactment of laws surreptitiously; to prevent 'logrolling' legislation; to give to the people general notice of the character of proposed legislation, so they may not be misled; to give all interested an opportunity to appear before committees of the legislature and be heard upon the advisability of the proposed legislation; to advise members of the legislature of the character of the proposed legislation, and give each an opportunity to intelligently watch the course of the proposed Bill; to guard against fraud in legislation, and against false and deceptive titles. These purposes have been so plainly announced by this court in numerous opinions that a statement of the rule and a citation of cases would seem sufficient.

Second. While all the provisions of the constitution are 'mandatory and prohibitory' (Article III, Section 29), yet the courts, bearing in mind that the legislature is a co-ordinate [sic] branch of the government and that its action, if fair, should be sustained, have given this section of the constitution a liberal construction, so as to not interfere with or impede proper legislative functions.

Third. The legislature is the judge, to a great extent, at least, of

the title which it will prefix to a Bill; and the court has no right to hold a title void because, in its opinion, a better one might have been used.

Fourth. The title is generally sufficient if the body of the Act treats only, directly or indirectly, of the subjects mentioned in the title, and of other subjects germane thereto, or of matters in furtherance of or necessary to accomplish the general objects of the Bill, as mentioned in the title. Details need not be mentioned. The title need not contain a complete list of all matters covered by the Act.

Fifth. If the court, after an application of all these principles, is still in doubt as to the constitutionality of the Bill, it should sustain the Act.

[*Harper v. Greely*, 234 Mont. 259, 266-67, 763 P.2d 650, 654-55 \(1988\)](#) (citing *State v. McKinney*, 29 Mont. 375, 380-382, 74 P. 1095, 1096 (1904)) (internal citations omitted).

The Court addresses each of these principles in turn.

1. The following are included in the above identified purposes of Mont. Const. art. V, § 11(3): to give to the people general notice of the character of proposed legislation, so they may not be misled; to advise members of the legislature of the character of the proposed legislation; to guard against false and deceptive titles. The title of SB 458 does not clarify what meaning of ‘sex’ is intended and does not indicate that the words ‘female’ and ‘male’ are defined in the body of the Bill. The title does not give general notice of the character of the legislation in a way that guards against deceptive or misleading titles. The title does not meet the purposes identified in the first principle of *McKinney*.

2. The Court must give liberal construction to this section of the Montana Constitution, so as to not interfere with or impede proper legislative functions. With this decision, the Court does not direct the Legislature to engage in or refrain from particular actions within the purview of its legislative functions. Rather, the Court must adhere to the consideration of the requirements of Mont. Const. art. V, § 11(3) and all the principles identified in *McKinney*. The Court has given liberal construction to this section of the Montana Constitution as further described in numbers 3 and 4 below.

3. The Court has no right to hold a title void because, in its opinion, a better one might have been used. The Court does not insert its opinion in this Order as to what title should have been used or should be used. Rather, the Court has concluded that the word ‘sex’ in the title has not been clearly distinguished (i.e., intercourse or gender) and that the subject in the body of the Bill (providing a definition for ‘female and ‘male’)) has not been identified in the title.

4. This principle indicates that the title is generally sufficient if the body of the Act treats only, directly or indirectly, of the subjects mentioned in the title, and of other subjects germane thereto, or of matters in furtherance of or necessary to accomplish the general objects of the Bill, as mentioned in the title. Here, the body of the Bill does not treat only the subject in the title (definition of the word ‘sex’) – the body of the Bill also addresses the definition for the words ‘female’ and ‘male.’ While the definitions of ‘female’ and ‘male’ in the body of the Bill is germane to the definition of ‘sex’ which the title mentions, the Court has already described

how the word ‘sex’ in the title is not clearly distinguished (i.e. intercourse or gender). A person must read the text of the body of the Bill to learn which meaning of ‘sex’ is intended in the title.

This principle also indicates that details need not be mentioned in the title and the title need not contain a complete list of all matters covered by the Act. The Court has not indicated that the title is deficient for failing to contain a complete list of all matters covered by the Bill or that the details of the body of the Bill must be included in the title. The definition of the words ‘female’ and ‘male’ are more than details of the Bill, they are (as acknowledged by the State) the subject of the Bill.

5. After an application of all these principles, if the Court is still in doubt as to the constitutionality of the Bill, the Court should sustain the Act. After the application of all these principles, the Court is not in doubt of the constitutionality (pursuant to Mont. Const. art V, § 11(3)) of SB 458. The subject of the Bill is not clearly expressed in its title.

The State contends that the simple test is ‘whether the title is such a character as to mislead the public as to the subjects embraced.’ (Dkt # 21, p. 6, citing *Mont. Automobile Assn v. Greely.*, 193 Mont. 378, 398, 632 P.2d 300, 311 (1981)). This is part of the first principle in *McKinney*. Here, the title is of such a character as to mislead the public. The title does not distinguish which word ‘sex’ is intended and the title does not include the additional subjects of the body of the bill the definition of ‘female’ and ‘male.’ A person must read the text of the body

of the Bill to learn which meaning of ‘sex’ is intended in the title and to learn that the Bill includes a definition of ‘female’ and ‘male.’

The State contends that the title of SB 458 provides a “common definition” to the word “sex” when referring to a “human” and that the Act does exactly that—it defines the word “sex” as applied to all the listed statutes. However, regarding the title, the phrase ‘to provide a common definition’ is not problematic. Rather, the title is not clear as to what version of the word ‘sex’ the legislature is intending ‘to provide a common definition.’ It is from the body of SB 458 that we learn that the version of the word ‘sex’ is the one related to gender. However, the title does not reflect this as is required. The subject of SB 458 is not clearly stated in the title.

C. Whether SB 458 violates Article V, § 11(3)’s “shall contain only one subject” requirement the Single Subject Rule.

The Court having concluded that SB 458 violates Mont. Const. art. V, § 11(3) for failing to clearly state the subject of the Bill in its title, does not further address here whether the Bill contains only one subject.

V. Conclusion.

Plaintiffs bear the burden of proving SB 458 unconstitutional beyond a reasonable doubt. ([Satterlee](#), ¶ 10). It is not possible for the Court to uphold the constitutionality of SB 458 because Plaintiffs have shown beyond a reasonable doubt that the subject of the Bill is not clearly expressed in its title as is required by Mont. Const. art. V, § 11(3). (*Id.*). Plaintiffs are entitled to judgment as a matter of law on Count I of the Complaint.

ELECTRONICALLY SIGNED AND DATED BELOW.

- c. Kyle A. Gray/Brianne C. McClafferty/Katy M. Brautigam/Beiley M. Nickoloff
Alex Rate/Marthe Y. VanSickle
Austin Knudsen/Michael Russel/Thane Johnson/Alwyn Lansing/Michael Noonan
Emily Jones