

Marsy's Law (CI-116) Supreme Court Litigation

Effective Date of CI-116

Nov 8 CI-116 passed by the voters
Dec 2 Petition filed seeking declaration of effective date
Jan 3 MSC rules that July 1, 2017 is the effective date

Constitutionality of CI-116

June 20 Petition for Declaratory and Expedited Consideration
June 26 Motion to participate as *Amicus* by Lee newspapers
June 27 Order permitting *Amicus* (Lee newspapers)
June 29 Motion to stay implementation
June 30 Order granting stay
July 24 Motion to participate as *Amicus* by GFT and BDC
July 25 Order permitting *Amicus* (GF Tribune, Bozeman Daily Chronicle)
July 27 *Amicus* brief of Montana newspapers filed
July 27 Motion to participate as *Amicus* by National Crime Victim Law Institute (NCVLI)
July 27 Motion to participate as *Amicus* by Marsy's Law for Montana (MLM)
July 27 AG's Response to Petition filed
July 27 Motion to participate as *Amicus* filed by "Constitutional Convention Delegates, Retire Montana Supreme Court Justices, and Law Professors"
July 27 *Amicus* brief of Delegates, retired justices and law professors filed
July 27 *Amicus* brief of MLM filed
July 27 *Amicus* brief of NCVLI filed
July 28 Order permitting *amicus* Delegates, retired justices and law professors
July 28 Order permitting *amicus* MLM

July 28

Order permitting *amicus* NCVLI

Aug 10

State files joint response to *Amicus*

Aug 10

Petitioner's file their response to *Amicus*

Petition for Declaratory and Injunctive Relief

Plaintiffs are MACo

Leo Gallagher, L & C County Atty

Adrian Miller, attorney who represents victims of domestic violence

Montana Association of Criminal Defense Attorneys

ACLU of Montana

It is alleged in the Petition that CI-116 violates the “single amendment, separate vote” provision of Art. XIV, §11 by amending 8 different sections of the Montana constitution. In addition, it was alleged that the “single subject” under Art V, §11(3) is violated by CI-116.

Attorney General’s Response

Denied that CI-116 expressly “amended” any of the 8 section identified by the Petitioners. Claimed that the *Marshall* decision (the tax limitation initiative) specifically rejected the notion of “implied amendment” which underlie the Petitioner’s allegations. Distinguishes *Marshall* in several respects. Also, states that “affecting” a section of the constitution is not tantamount to “amending” a section.

Also, the AG distinguishes the Oregon Supreme Court case of *Armatta*, in which it struck down the Oregon victim’s rights law. It is claimed that the Oregon law was broader in scope than CI-116.

AG addressed each of the sections the Petitioner’s highlighted, alleging that the Petition is flawed in three respects: (1) *Marshall* is distinguishable; (2) CI -116 does not add, delete, or revise any of the text of the 8 highlighted sections; and (3) The Petition “overstates, exaggerates, and distorts” the effect of CI-116 to “fabricate” amendments which do not exist.

Further, the AG claims that Petitioner’s interpretation of the Initiative process and separate vote requirement would create a “virtually insurmountable barrier” to future voter initiatives.

In response to the single subject rule since it allegedly pertains only to “bills” of the legislature and not to constitutional initiatives.

Montana Newspapers

Not surprisingly, their *amicus* brief is focused on the public’s right to know and freedom of the press. They claim that CI-116 will impair their ability to gather and report facts in criminal actions. Concurred with the Petitioner’s claim that CI-116 violates the single-subject rule.

National Crime Victim's Law Institute

In its *amicus* brief, the NCVLI points to the experience of 34 other states that have enacted victim's rights law in some respects. It claims that experience shows that the dire warnings ("parade of horrors") identified by the Petitioner has not been borne out in actual practice. They claim that the criminal justice system in those states have not been burdened by enforcement of victim's rights while continuing to preserve the constitutional rights of the accused.

Finally, they looked specifically at the Oregon victim's rights law which was struck down in *Armatta* and highlighted the differences between CI-116 and that law.

Marsy's Law of Montana

Agrees with the AG's response suggesting *Marshall* rejects the notion of implied amendment. Points out different standards applied to "separate vote" requirements and the "single subject" rule.

Also, claimed that the speculative impacts of CI-116 should not be relied upon as a basis for invalidating the law. They argue that existing prosecution practice already affords victims many of the services that the Petitioners caution against, such as conferring with them during the process of prosecution and in pretrial and post-trial hearings.

Con-Con Delegates, Retired Justices, and Law Professors

Easily, this is the most interesting *amicus* brief. A well-written and well-reasoned brief, it was signed by Lawrence Anderson of Great Falls and James Goetz of Bozeman. Unlike the other *amici*, the focus of their argument is not directed at the merits of CI-116 itself. In fact, they state in plain terms that they take no position. Rather, it is directed at the constitutional initiative process itself and whether CI-116 complies with the letter and spirit of the process as envisioned by the drafters of the state constitution.

They argue that during the debate that occurred during the constitutional convention, it was their intention to make the initiative process intentionally difficult. This was the idea behind the "single-amendment, separate vote" requirement. They did not want the state constitution to be burdened by a "flood of amendments" which would be better addressed through the legislative process. As the *Marshall* case states, the "separate vote" requirement is narrower than the "single subject" rule. The writers concluded that the Petitioners are correct in their assertion that CI-116 violates the separate vote requirement and therefore, they did not even address the single subject rule.

They point out that the entire state bill of rights consists of 482 words. Marsy's Law itself contains 859 words. Wouldn't it seem self-evident that CI-116 must amend some pre-existing constitutional text?

Due Process Clause:

Amends the due process clause by elevating the rights of victims to that of an accused who faces the danger of "losing life, liberty, or property at the hands of the state.

What of the presumption of innocence? Are victims entitled to the presumption of guilt?

Will the State be required to grant right to counsel for victims?

If the estimated costs of compliance had been disclosed "more openly and honestly" in a fiscal note attached to Marsy's Law, would the vote have been affected?

Right of Privacy and Right to Know:

CI-116 extends the right of privacy to corporations, a contention that had been specifically debated and rejected by the con-con.

CI-116 amends the right to know provisions of the constitution by granting privacy rights to corporations, which are now entitled to a balancing determination by the court.

Regulation of Attorney Conduct:

Constitution gives the supreme court the right to regulate attorney conduct.

Under CI-116, the prosecutor must also represent the rights of victims placing the prosecutor in a conflict situation by having to reconcile protecting the rights of the accused who is presumed innocent while at the same time representing victims whose interests differ from those of the accused.

In all cases, *amici* concluded that voters were entitled to a separate votes on these issues and determined that CI-116 is fatally flawed.

Alternatively, they suggest that the matter should be set for full briefing and oral argument on the issues raised.

State's Joint Response to *Amicus*

Claim that *amici* apply the incorrect legal standard for reviewing constitutional challenges to initiatives. Argue that the court has traditionally taken a more deferential view of the separate vote rule for initiatives than that advocated by the opponents.

Response to the newspapers

By anticipating the impacts that CI-116, the opponents asking the court to rule on issues that have not yet arisen. They argue that this would result in a shift of power to amend the constitution away from the people and move it to the courts. They argue that the opponents' views are based on the merits of CI-116 rather than on its legality.

Continued to argue their view that the *Marshall* case rejected the idea of "amendment by implication" and that unless an initiative expressly amends multiple sections of the constitution, it is valid. This standard, they argue, would effectively eliminate the voter initiative process. They point out prior initiatives that were not subject to challenge but that would have been declared unconstitutional under the opposition's "extreme reading" of the separate vote rule.

Pointed out that reports of names being withheld from the media by a couple law enforcement agencies (as stated by the newspapers) were inadmissible hearsay and should be disregarded. Suggested that any practical problems associated with implementation of the law may be better handled through AG's advisories and opinions. The AG concluded that concerns raised by the newspapers may be addressed through application of the standard balancing test weighing the right of individual privacy against the public's right to know. Alleges that this test is regularly employed by courts and that because it is fact-specific, it may only be determined in an actual case or controversy.

In addressing the right of privacy argument, the AG points out the obvious fact that that right of privacy already exists and therefore CI-116 changes nothing in that regard. The AG disputes the claim that CI-116 amended the right of privacy to extend to corporations, correctly noting that newspapers cited no supporting authority for that contention.

Response to the Delegates

CI-116 is only 825 words, not 859! The "flood" of constitutional amendments which the delegates warn of has not been borne out in actual practice. Argues that the due process clause does nothing to alter due process guarantees. Claims the rhetorical questions raised by the delegates are speculative statements that are "ungrounded" in the language of CI-116 and that due process must be always be followed in accordance with established principles.

Claimed that the voter information packet did warn of the increase costs associated with compliance. The AG uses the opponent's statement to show that the voters were aware of costs and that the voters decided it was worthwhile.

Finally, the AG claims that CI-116 will not change the prosecutor's ethical role in the criminal justice process. He points to MCA 46-24-104 to show that the statutory victim's rights law has not interfered with the prosecutor's independence.

Petitioner's response to *Amici*

Hyperbolic quote

“Under the rules CI-116’s proponents urge this Court to adopt, Montana’s unique, concise and brilliant Constitution would disappear, washed away in a flood of partisan amendments purchased by out-of-state millionaires in a manner contrary to the intent of the Framers, and contrary to the rules for constitutional initiatives adopted by the people themselves, and enforced by this Court in *Marshall*.”

Express v. implied amendment

Argue that the constitutional rules governing the submission of constitutional initiatives is being subverted by the proponents of CI-116. To adopt the state’s position would mean that simply because one does not expressly amend a specific provision of the constitution that amendment should stand. This, they argue is contrary to what the Oregon Supreme Court ruled in *Armatta*. They distinguish *Marshall* in this regard by stating that since it explicitly amended multiple sections of the constitution, it did not need to rule on the issue of whether it also included implicit amendments.

While the state claimed that the “separate vote-single subject” rule will make amendment by initiative much more difficult, this is precisely what the framers intended. They preferred the “deliberative process” to the initiative process to avoid “whimsical and problematic amendments.”

Concurred with the briefs submitted by the delegates and the newspapers regarding the number of constitutional provisions amended. Further, they point out how the state completely ignored the argument regarding the extension of privacy rights to corporations.

Impact of HB 600

Cited the legislative response to CI-116 (HB 600) as an example of how the law has created unintended problems for local governments. They state that HB 600 itself is unconstitutional since it purports to amend Art. II, §36. They quote Jon Bennion who stated that HB 600 was drafted “to create a framework that law enforcement could reasonably work with.” Used multiple provisions of HB 600 to show how CI-116 created issues that needed to be addressed legislatively-e.g., definition of primary victim, prosecutorial immunity.

“But, the legislature has no authority to revise a constitutional amendment. Thus, this Court alone can protect the people against the violation of Article V, §11(3)’s “single subject/clearly expressed title” rules worked out by the unconstitutional submission of CI-116.”