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ORIGINAL

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK, Plaintiffs, vs. THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor, Defendant.	Cause No. ADV-2021-611 Hon. Mike Menahan **STATE OF MONTANA'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

Montana courts are not open to parties who disagree with a law and muse that it might implicate their vague interests at some point in the uncertain future. These Plaintiffs bring precisely that type of challenge. Because they assert injuries that are utterly speculative and hypothetical, Plaintiffs lack standing to challenge SB 319. And standing is an essential prerequisite for justiciability. If the court could opine on the constitutionality of statutes in cases—like this one—where the plaintiffs lack standing, then Montana's lawmaking system would be entirely superfluous. *See* Mont. Const. Art. III, § 1; *Plan Helena Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567 ("When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.") (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968)). For these reasons, this case must be dismissed.

But additionally, this case should be dismissed because Plaintiffs failed to state a claim upon which relief can be granted.

BACKGROUND

Senate Bill (SB) 319 involves a general revision of campaign finance laws. Plaintiffs filed a Complaint challenging the constitutionality of Sections 21 and 22 of SB 319, alleging they violate the single-subject rule and the requirement that amendments be consistent with a bill's original purpose. (Doc. 5.) Section 21 prohibits "political committees" from performing certain specific political activities in some locations on college campuses—"inside a residence hall, dining facility, or athletic facility operated by a public postsecondary institution." (Doc 5, Exh. A, § 21(1).) Section 22 requires judicial recusal in proceedings where the judge has received more than $90 in electoral support from a lawyer or party to the proceeding. *Id.* § 22(A).

With their Complaint, Plaintiffs also filed a motion for a preliminary injunction. Over the State of Montana's objection and after a hearing, this Court granted Plaintiffs' motion "to preserve the status quo and prevent irreparable injury to Plaintiffs." (Doc. 28 at 5.) Although the State argued in briefing and at the preliminary injunction hearing that Plaintiffs lack standing, the Court informed the parties that it did not need to address the standing argument to rule on the preliminary

injunction motion. The Court likewise avoided assessing the merits of Plaintiffs' claims when he granted the preliminary injunction. (*Id.* at 4). It should now address these dispositive issues.

LEGAL STANDARD

Montana Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint if the plaintiff "fail[s] to state a claim upon which relief can be granted." The plaintiff carries the burden to plead adequately a cause of action. *See Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247. A plaintiff fails to meet this burden "if [the plaintiff] either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under the claim." *In re Estate of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165.

The "complaint must state something more than facts which, at the most, would breed only a suspicion that the plaintiffs have a right to relief." *Maney v. Louisiana Pacific Corp.*, 2000 MT 366, ¶ 28, 303 Mont. 398, 15 P.3d 962. The complaint must, in other words "state[] a cognizable claim for relief," which "generally consists of a recognized legal right or duty; infringement or breach of that right or duty; resulting injury or

harm; and, upon proof of requisite facts, an available remedy at law or in equity." *Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241. "Whether a complaint states a cognizable claim for relief is a question of substantive law on the merits rather than a threshold jurisdictional issue." *Id.*

Additionally, a court has no obligation to take as true legal conclusions that have no factual basis. *See Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6. But a court does have an affirmative obligation to "avoid an unconstitutional [statutory] interpretation if possible," and to resolve any doubt about the constitutionality of a statute in favor of the statute. *See Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548; *State v. Davison*, 2003 MT 64, ¶ 8, 314 Mont. 427, 67 P.3d 203 ("Every possible presumption must be indulged in favor of the constitutionality of a legislative act."); *GBN, Inc. v. Mont. Dep't of Revenue*, 249 Mont. 261, 265, 815 P.2d 595, 597 (1991) ("If a doubt exists, it is to be resolved in favor of the legislation"); *State v. Stark*, 100 Mont. 365, 52 P.2d 890, 891 (1935) ("[T]he constitutionality of any act shall be upheld if it is possible to do so.").

Courts may look only within the four corners of the complaint when reviewing a Rule 12(b)(6) motion. *See Stufft v. Stufft*, 276 Mont. 310, 313, 916 P.2d 104, 106 (1996). In other words, "the court is limited to an examination of the contents of the complaint in making its determination [under a motion to dismiss]." *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552.

ARGUMENT

"[T]he judicial power of Montana courts is limited to justiciable controversies—in other words, a controversy that can be disposed of and resolved in the courts." *Gateway Opencut Mining Action Grp. v. Bd of Cty. Comm'rs*, 2011 MT 198, ¶ 16, 361 Mont. 398, 260 P.3d 133. Standing is a threshold jurisdictional question that "is determined as of the time the action is brought." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 30, 360 Mont. 207, 255 P.3d 80. It "limits Montana courts to deciding only ... actual, redressable controvers[ies]." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187.

To establish standing, Plaintiffs must demonstrate a "past, present, or threatened injury to a property or civil right, and the alleged injury would be alleviated by successfully maintaining the action." *Mont.*

Immigrant Justice All. v. Bullock, 2016 MT 104, ¶19, 383 Mont. 318, 371 P.3d 430. "The alleged injury must be: concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally." *Bullock,* ¶ 31 (citations omitted). Importantly, "a general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing[.]" *Larson,* ¶ 46.

Plaintiffs carry the burden of pleading sufficient facts that do more than "breed only a suspicion" that the plaintiff has a right to relief. *See Maney,* ¶ 28. In other words, Plaintiffs have a duty to plead the facts necessary to establish their injury; it is not the duty of the courts or the State to do that for them. *See Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 391 Mont. 156, 415 P.3d 486 (even a "liberal application of the rules does not excuse omission of facts necessary to entitle relief").

Plaintiffs have failed to demonstrate they have a concrete, particularized injury with respect to SB 319.[1] Forward Montana has specifically failed with respect to Section 21, because it has failed to allege that it is a "political committee" or that it conducts electioneering activities in the few places specifically identified in the new law. Similarly, Plaintiffs Leo Gallagher, the Montana Association of Criminal Defense Lawyers (MACDL), and Gary Zadick fail to allege facts establishing that any particular judge they will appear before will have to recuse pursuant to Section 22. None of the Plaintiffs, moreover, have articulated any cognizable injury with respect to their claim that SB 319 violates Article V, § 11 of the Montana Constitution.

I. Forward Montana's unspecific allegations regarding Section 21 fail to demonstrate a concrete injury.

Forward Montana is the only Plaintiff that challenges Section 21 of SB 319. *See* generally Doc. 5. But it fails to demonstrate a concrete, particularized injury because it has not alleged that it is a "political

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[1] Of note, this Court's remark in its preliminary injunction order that "it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant" (Doc. 28 at 3), is of no moment here. For the Court also declined at that time to address the State's arguments that the Plaintiffs lack standing, which means it necessarily inferred—for purposes of that order only—that they did possess standing. Now the standing issue is squarely presented, and the standard is different from the preliminary injunction standard.

committee" subject to Section 21, or even that it performs the specified political activities in the particular areas identified in the new law.

In its Amended Complaint, Forward Montana states that much of its work "occurs on and around public university campuses" and that it "plans to engage in voter identification, get out the vote, and other efforts prohibited by SB 319 on and around public university campuses ...." Doc. 5, ¶ 1. But SB 319 doesn't prevent Forward Montana from engaging in these activities "on and around" university campuses; Section 21 only prevents political committees from doing so "inside a residence hall, dining facility, or athletic facility." Doc. 5 at Exh. A, § 21. Forward Montana doesn't allege that it has or intends to engage in the specified activities on the statutorily proscribed areas, or that Section 21 would hamper its activities in any meaningful way. It has therefore failed to allege a concrete injury. *See Cossitt*, ¶ 9.

Nor does Forward Montana allege that it currently is a "political committee" subject to Section 21. Doc. 5, ¶ 1. Its statement that it "has at times registered as a political committee in Montana" in the past is insufficient to demonstrate that it will be affected by SB 319 in the future. *See Cossitt*, ¶ 9.

And finally, if Forward Montana pins its alleged injury on the fact that *if* it violates Section 21, it *may* then be subject to investigation and enforcement by the Commissioner of Political Practices (COPP), that's far too speculative to constitute an injury. *See Montanans for Cmty. Dev. v. Motl*, 216 F. Supp. 3d 1128, 1139–40 (D. Mont. 2016) (holding a pre-enforcement challenge to Montana's campaign finance laws must demonstrate a "credible threat" of enforcement; otherwise such challenges are "too conjectural" to support standing), *aff'd in part, rev'd in part on other grounds, Montanans for Cmty. Dev. v. Mangan*, 735 F. App'x. 280, 282 (9th Cir. 2018) (unpublished). Courts shouldn't deal in hypotheticals. *Plan Helena*, ¶ 9, ("[A] 'controversy'...is 'a real and substantial controversy'...'as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.'") (quoting *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948)).

Forward Montana's generic allegations are insufficient to demonstrate "a past, present, or threatened injury." *Bullock*, ¶ 31; *see also Cossitt*, ¶ 9. Forward Montana accordingly lacks standing and must be

dismissed from this case. And because Forward Montana is the only Plaintiff challenging Section 21, those claims must likewise be dismissed.

II. Plaintiffs Gallagher, MACDL, and Zadick have failed to establish a concrete injury as to Section 22.

The Section 22 Plaintiffs similarly don't articulate any injury sufficient to establish standing. They base their allegations entirely on potential judicial substitutions in "pending cases." (Doc. 5, ¶¶ 2, 3, 4.) But SB 319 is not retroactive, and thus applies only to cases filed on or after July 1, 2021, and cannot affect any "pending" cases. Furthermore, Plaintiffs have not alleged that Section 22 will cause the presiding judge in *any of their current legal proceedings* to immediately recuse. Thus, they cannot show that they are or will be imminently affected by Section 22, an essential standing prerequisite. *See Olson v. Dep't of Revenue*, 223 Mont. 464, 469–71, 726 P.2d 1162, 1166–67 (1986) (concluding that plaintiffs who were not denied a hunting license or prohibited from running for office lacked standing to challenge a county residence requirement).

Each Section 22 Plaintiff suffers from this defect. First, Gallagher states he "routinely appears before all four judges of the First Judicial District as well as on appeals to the Montana Supreme Court" and "has donated to nonpartisan candidates for judicial office in the past six

years." Doc. 5, ¶ 2. Gallagher fails to state a concrete, particularized injury because his alleged injuries apply only to pending cases, he fails to identify any particular judge in any particular case who is or will imminently be subject to recusal, and he fails to link any of his donations to a particular judge in a particular case that would necessitate recusal. MACDL similarly states that Section 22's recusal provision "will injure MACDL's members by requiring potentially hundreds of substitutions," but MACDL identifies no specific cases that would be affected. *Id.* ¶ 3. And finally, Zadick only asserts that he "contributes to nonpartisan judicial elections" and will be injured "by requiring substitutions in pending cases across the State of Montana and before the Montana Supreme Court anytime an attorney or party on either side of the case has made a donation in the past six years covered by the bill." *Id.* ¶ 4.

These harm allegations are far too attenuated to be actual, concrete injuries. Plaintiffs' general assertions that they donate to some judges and that all judges will be subject to Section 22's limitations do not sufficient demonstrate that they have donated or plan to donate to a judge before whom they will appear in a future case.

In addition to relying on hypothetical allegations of harms that *might* occur to them and other, unnamed individuals, Plaintiffs' harm relies on a statutory misinterpretation. As the State pointed out in its preliminary injunction briefing, SB 319 does not apply retroactively and therefore will not affect the already-existing rights of any litigants when it goes into effect. *See* Doc. 26 at 5–8.[2] Because SB 319 does not apply to litigation pending on July 1, Plaintiffs lack standing based on their unsubstantiated statement that "SB 319's judicial recusal provisions will injure [them] ... by requiring potentially hundreds of substitutions in *pending* cases ...." Doc. 5, ¶¶ 2–4 (emphasis added); *Bullock*, ¶ 31 ("[T]he complaining party must *clearly allege* past, present, or threatened injury to a property or civil right.") (citation and internal quotation marks omitted) (emphasis added).

Plaintiffs' failure to allege a concrete, particularized injuries means they lack standing to challenge Section 22. Therefore, both the Section 22 Plaintiffs and their claims should be dismissed.

That is sufficient to end the case. But there's more.

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[2] The Court did not address this issue in its preliminary injunction order. *See generally* Doc. 28.

III. Plaintiffs lack standing to challenge SB 319 under Article V, § 11 of the Montana Constitution and otherwise fail to state a cognizable claim for relief.

Plaintiffs' Article V, § 11 claims must be dismissed because they assert a constitutional violation yet state no resultant injury. Article V, § 11(3) provides:

> Each bill, except general appropriations 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.

Plaintiffs don't articulate how they are injured under this provision. "[A] general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing," *Larson*, ¶ 46, yet that is all that Plaintiffs have alleged with respect to Article V, § 11.

Plaintiffs also cannot state a cognizable claim for relief under Article V, § 11. As addressed in Defendant's preliminary injunction response (incorporated herein), SB 319 involves a general revision of campaign finance laws—as reflected in its title—and retained that purpose throughout the legislative process. (Doc. 26 at 12–18.) The "Legislature has discretion in determining what matters are in furtherance of or necessary to accomplish the general objects of [a] Bill." *MEA-MFT v. State*,

2014 MT 33, ¶ 10, 374 Mont. 1, 318 P.3d 702 (internal citations and quotations omitted). SB 319 generally revises campaign finance laws. It maintained that purpose from its earliest iteration to its ultimate enactment.

Section 21 regulates campaign finance by further defining permissible "election communications," "electioneering communications," and "political committees." *See* Mont. Code Ann. § 13-1-101(14), (16), (31). These definitions form the heart of Montana's campaign-finance scheme. *See* Senate Bill 289 (2015) ("An act generally revising campaign finance laws," creating the current definitions found in Mont. Code Ann. § 13-1-101, commonly known as the DISCLOSE Act). Section 21 adds to current law by restricting where certain, already reportable, activities may occur. *See, e.g.*, Mont. Code Ann. § 13-35-225 (requiring attributions for election and electioneering communications). SB 319 takes an area already regulated by Montana campaign finance laws and adds to those regulations, thus fitting squarely within the bill title.

Section 22 regulates campaign finance by acting to "eliminate even the appearance of partiality" in the judicial system. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009). State codes are "the principal

safeguard against *judicial campaign abuses* that threaten to imperil public confidence in the fairness and integrity of the nation's elected judges." *Id.* at 889 (internal citations and quotations omitted) (emphasis added). Obviously, the "mere *perception* of quid pro quo in judicial campaigns might undermine the public's trust in the impartiality and independence of its judiciary." *French v. Jones*, 876 F.3d 1228, 1240 (9th Cir. 2017) (emphasis in original). Recusal standards based on judicial campaign contributions are a reasonable campaign finance tool to address the appearance of judicial partiality and protect public confidence in judicial integrity.

Furthermore, legislating necessarily involves compromise and amendments, and the Constitution vests the legislative process solely in the Legislature. *See* Mont. Const. art. V, § 1. Montana courts consequently broadly defer to the Legislature when applying Article V, § 11 so as not to hinder that process. *State ex rel. Boone v. Tullock*, 72 Mont. 482, 488, 234 P. 277, 279 (1925) ("courts should give to [Article V, § 11] a liberal construction, so as not to interfere with or impede proper legislative functions"); *MEA-MFT*, ¶ 10. From inception to enactment, SB 319 contained a "generally revise campaign finance laws" title, and the free

conference committee added amendments to the bill that generally revised campaign finance laws. The amendments were properly noticed, debated, and adopted. SB 319 met Article V, § 11's requirements.

Plaintiffs' Article V, § 11 claims must be dismissed because they lack standing and have failed to state a claim upon which relief may be granted.

CONCLUSION

Plaintiffs lack standing and have not articulated cognizable harms. Therefore, this Court should dismiss their Complaint pursuant to Mont. R. Civ. P. 12(b)(6).

DATED this 4th day of August, 2021.

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