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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK,	Cause No. BDV-2021-611
Plaintiffs,	Hon. Michael F. McMahon
vs.	DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO STAY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT TO ALLOW DISCOVERY – Mont. R. Civ. P. 56(f)
THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor,	
Defendant.	

INTRODUCTION

Plaintiffs (hereinafter "Forward Montana") were granted a preliminary injunction within weeks of filing this lawsuit, but in that process were fully advised of the Defendant's (hereinafter "State") defense that Forward Montana lacked standing.

The State then timely filed a Rule 12(b)(6) motion to dismiss before answering based upon the Verified Complaint's ("Complaint") failure to allege facts sufficient to support standing or a cognizable claim under Mont. Const. art. V, § 11. That motion is pending. If any part of the Complaint survives the Rule 12 motion the State will be required to answer and state its affirmative defenses. Forward Montana jumped the line by filing a summary judgment motion in addition to its response to Montana's Rule 12 motion, effectively short-circuiting Montana's ability to defend. The State therefore moves for an order (1) staying Forward Montana's motion for summary judgment; and (2) allowing discovery into the allegations of Forward Montana's Complaint and their alleged claims.

If considered at this time the summary judgment motion would deprive the State of its pending Rule 12(b) motion. Before this Court considers any Rule 56 motion it must determine whether the four corners of the Complaint state facts conferring subject matter jurisdiction or whether the allegations, if taken as true for the purposes of the Rule 12 motion, state any valid cause of action. If Forward Montana's Complaint survives that test, the State must be allowed discovery into Forward Montana's standing and the factual bases of its claims.

The State cannot be forced to abandon any valid defense simply because Forward Montana chose to file a dispositive motion while the State's Rule 12 motion is pending and before a scheduling order is even entered. A stay pending this Court's ruling on the State's Rule 12 motion and allowing discovery (should that motion fail) will not prejudice Forward Montana since the Court has already awarded a

preliminary injunction. The status quo is preserved. On the other hand, the prejudice visited upon the State is obvious: a valid jurisdictional defense—standing—would be forcibly waived if the State is required to respond to the summary judgment under the timing set forth in Rule 56(c)(1). Then, the State would be forced to defend the summary judgment without discovery.

For these and the following reasons the State's Motion to Stay consideration of Forward Montana's summary judgment should be granted.

ARGUMENT

A. A stay of Forward Montana's summary judgment motion pending the decision on the State's Rule 12 motion will not prejudice the plaintiffs.

Forward Montana filed the Complaint and application for preliminary injunction on June 4, 2021. Ct. Docs. 5, 6. Montana defended the preliminary injunction motion in part by contesting Forward Montana's standing to bring the claims stated. Ct. Doc. 26 at 3-9. After a hearing on June 28, 2021, the Court issued a preliminary injunction on July 1, 2021, but did not address the State's standing concerns at that time. Ct. Doc. 28. The Order recognized the purpose of a preliminary injunction to preserve the *status quo* pending adjudication of the ultimate issues on the merits. *Id.* at 4. The next step belonged to the State.

The State timely filed a Motion to Dismiss under Mont. R. Civ. P. 12, and a supporting brief, on August 9, 2021. Ct. Docs. 31, 32. By doing so the State contested the case. Forward Montana responded. Ct. Doc. 34. When the State's Reply is filed on September 7, 2021 (the date this motion is filed) the Rule 12 motion will be fully briefed, will be deemed submitted and will be ready for a hearing or this Court's

decision. Mont. Unif. Dist. Ct. R. 2(d). Should the Court rule against the State an answer to the Complaint will be due. A pre-trial conference would then be required. Mont. Uniform Rule 5(a). The pre-trial order from that conference would set a schedule, including discovery, in an orderly manner. *Id.* All parties benefit from the orderly processing of a disputed case.

Considering Forward Montana's summary judgment before any of the above-described procedures would deprive the State of a valid defense and result in a waste of time. The Preliminary Injunction Order (Ct. Doc. 28) continues to operate, protecting Forward Montana's concerns for the time being. Forward Montana will suffer absolutely no prejudice if its summary judgment motion is stayed until the Court determines the State's Rule 12 motion and, beyond that if necessary, allows discovery in the normal course.

B. The State is entitled to discovery of Forward Montana's claims and standing in order to fully defend this case.

Forward Montana's strategy to avoid discovery by jumping to the ultimate hearing is obvious. Mont. R. Civ. P. 56(f) states that if a party opposing a motion for summary judgment shows, for specified reasons, that it cannot present facts essential to justify its opposition, the court may order a continuance to allow additional discovery. The timing of Forward Montana's motion virtually satisfies that requirement by itself. By filing a motion for summary judgment at breakneck speed Forward Montana seeks to avoid further discovery into whether they even have standing to bring this case and the threat of Rule 12(h)(3).

Forward Montana pleaded specific “standing,” claims, and injury facts in the Complaint. When briefly addressed during the preliminary injunction hearing it was revealed that, in large part, the claims made are based largely upon unknown persons’ speculative reactions to SB 319 and hypothetical harm. Forward Montana’s witness could not factually support contentions that SB 319’s judicial recusal provision “will cause grave or irreparable injury” to defense lawyers by causing “*en masse*” recusals and case transfers amongst District Court Judges (*Stephens Decl.* ¶¶ 21-28, 30-31; Ct. Doc. 7-1) or harm to members of the Montana Association of Criminal Defense Lawyers (MACDL). *Id.* at ¶ 33. The State must be allowed to depose Mr. Stephens or any other witness identified by Forward Montana having any evidence supporting these blanket statements of injury.¹ Forward Montana must establish jurisdiction, through standing, to even enter the courtroom.

Further, if Forward Montana survives standing, the State should be allowed to test and challenge the allegations of the Complaint through discovery. Forward Montana must also factually support allegations including but not limited to:

- The organization, purpose, and activities of Forward Montana under Rule 30(b)(6), *Verified Amended Complaint (“VAC”)* ¶ 1, Ct. Doc. 5;

¹ Further, as argued in the State’s motion to dismiss (Ct. Docs. 31, 32), Forward Montana has not established standing as to its Section 21 claims either. As is discussed below, if this matter proceeds, then the State must be allowed to test the jurisdictional basis for all Forward Montana’s claims.

- That Plaintiffs Gallagher and/or Gary Zadick have or will suffer the recusal of any judge before whom any of them are appearing or will appear going forward, VAC, ¶¶ 2, 4;
- The organization, purpose, and activities of the MACDL under Rule 30(b)(6), VAC ¶ 3;
- The specific facts upon which the MACDL (or its members) contend that SB 319 will “require potentially hundreds of substitutions;”
- Forward Montana’s status as a “political committee;”
- Forward Montana’s history as a “political committee;”
- Forward Montana’s electioneering activities in relation to SB 319;
- What if any specific political activities Forward Montana pursues or performs;
- How Forward Montana’s political activities will be hindered by SB 319;
- The factual bases of any perceived threats from the enforcement of SB 319;
- Facts specific to any injury claimed by any Plaintiff for an alleged violation of Mont. Const. art. V, § 11;
- Factual bases of claims that SB 319 “prohibits political committees in election-related speech and assembly,” VAC ¶ 58;
- Harms claimed on behalf of “young Montanans,” VAC ¶ 61;
- Facts supporting the contention that SB 319 “will fundamentally alter the administration of justice in Montana,” VAC ¶ 73;

- Facts specific to the interpretation of SB 319 by judges, VAC ¶¶ 74-75;
- Facts specifically supporting the “extreme delays” and “legal forum shopping” claimed in VAC ¶¶ 76-77;
- Any facts supporting the contentions of VAC ¶¶ 83-85 regarding actual obstacles to litigants and attorneys who wish to participate in electing judicial officials; and/or
- Any facts, data, surveys or other information supporting allegations of the *en masse* substitution of judges claimed in VAC ¶ 91.

This Court has the inherent discretionary power to control discovery. *J.L. v. Kienenberger*, 257 Mont. 113, 119, 848 P.2d 472, 476 (1993). That discretionary power extends to deciding whether to continue a motion for summary judgment pursuant to Mont. R. Civ. P. 56(f). *Howell v. Glacier General Assur. Co.*, 240 Mont. 383, 386, 785 P.2d 1018, 1019 (1989). Here, a stay of Forward Montana’s summary judgment motion to allow discovery into a jurisdictional issue is entirely appropriate. Under the federal court’s similar Fed. R. Civ. P. 56(d): “Where . . . a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any [Rule 56(f)] motion fairly freely.” *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003).

Issues of justiciability—including standing—are threshold questions. *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶¶ 16, 19, 366 Mont. 450, 288 P.3d 193. Establishing standing is necessary to avoid the issuance of advisory opinions. *Plan*

Helena, Inc. v. Helena Regional Airport Auth. Bd., 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567. It is the first decision in any litigation and must be sufficiently demonstrated before considering a party's actual claims. *Id.* at ¶ 19. Standing resolves the issue of whether the litigant is the proper party to seek adjudication of a particular issue and is determined at the time the action is brought. *Id.* at ¶ 25. Beyond that initial inquiry a defendant should be allowed to discover facts necessary to evaluate and defend the plaintiff's claims. By filing the instant summary judgment motion Forward Montana goes the distance, cutting off any discovery into the very basis of their lawsuit.

As described above and based upon the allegations in the Complaint there are significant questions regarding the status and activities of named plaintiff organizations, the activities of individual plaintiffs, the injuries or harm claimed by plaintiffs for themselves and on behalf of others (whether theoretical or factual), the reactions of judges to the new law (whether speculative or supported) and the actual effect of the new laws on litigants, attorneys, and the courts. Each of those allegations requires proof by admissible evidence as opposed to the relaxed nature of proof allowed during a preliminary injunction hearing.

Without evidence beyond mere speculation a plaintiff cannot claim to suffer some injury that would be irremediable. *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 26, 334 Mont. 86, 146 P.3d 714. Courts do not have jurisdiction to determine matters purely speculative or anticipatory. *Brisendine v. Dept. of Commerce*, 253 Mont. 361, 365, 833 P.2d 1019, 1021 (Mont. 1992). The State has

justifiable concerns, and a valid defense, that the jurisdictional allegations contained in the Amended Verified Complaint are not supported by credible, admissible evidence. Beyond that, the State is unwilling to concede the facts and injuries alleged. If the Court disagrees with the State's Rule 12 position that Forward Montana's has inadequately alleged its standing and claims, then there will be genuine disputes of material fact. The State should be allowed to test those allegations through the course of regular discovery. Taking up Forward Montana's summary judgment motion before the State has even filed an answer eliminates the State's ability to fully and completely defend. Forward Montana would obviously like to skip that part of the case.

CONCLUSION

Defendants submit that the Court should stay proceedings on the Plaintiffs' Motion for Summary Judgment pending decision on the Defendants' Rule 12 Motion to Dismiss. If the Motion to Dismiss is not successful the summary judgment should be stayed and Defendants should be allowed discovery into the allegations of the Verified Amended Complaint, as described above.

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DATED this 7th day of September, 2021.

Greg Gianforte
GOVERNOR OF MONTANA

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document by email to the following addresses:

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