

**FILED**

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**IN THE MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

<p>FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor,</p> <p style="text-align: right;">Defendant.</p>	<p style="text-align: center;">Cause No. <u>ADV-2021-611</u></p> <p style="text-align: center;"><b>PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY PURSUANT TO RULE 26(c)(1)</b></p>
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## INTRODUCTION

On Monday, this Court orally denied as moot the State's Rule 56(f) motion seeking jurisdictional discovery and provided a generous eight weeks for the State to respond to Plaintiffs' motion for summary judgment. Later that same day, the State requested 25 hours of depositions.

Plaintiffs submit this Brief in Support of Plaintiffs' Motion for Protective Order to Stay Discovery Pursuant to Rule 26(c)(1). This Court should stay discovery pending resolution of Plaintiffs' summary judgment motion. As courts routinely recognize, staying discovery when a dispositive motion is pending supports judicial economy, efficiency, and the just and speedy resolution of the case.

Here, there is no harm in staying depositions and other discovery pending resolution of Plaintiffs' motion for summary judgment because the information the State seeks does not relate to the motion and will not aid it in answering the exclusively legal questions presented. Standing—the issue that the State seeks to challenge by gathering new information—has already been decided. Moreover, if the Court grants Plaintiffs' motion for summary judgment, Plaintiffs will move to certify the judgment as final and appealable. The State has preserved its standing objections and may take them up on appeal. If instead the Court were to deny Plaintiffs' motion, litigation would proceed and the parties would engage in reciprocal discovery.

Because the State seeks to conduct 25 hours of depositions beginning in three weeks, Plaintiffs present their motion as an emergency motion and request the Court's decision as soon as practicable.<sup>1</sup>

### LEGAL STANDARD

A district court has “inherent discretionary power to control discovery under its authority to control trial administration.” *Bartlett v. Allstate Ins.*, 280 Mont. 63, 72, 929 P.2d 227, 232 (Mont. 1996). The stated objective of “controlling and regulating discovery is to ensure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other at a disadvantage.” *Id.*<sup>2</sup>

Rule 26(c) expressly authorizes courts to, “for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Mont. R. Civ. Proc. 26(c)(1). To this end, courts may forbid discovery, specify terms of discovery, including time and place, and limit the scope of discovery, among other things. Mont. R. Civ. Proc. 26(c)(1)(A)–(D); *cf. Rosenthal v. Cty. of Madison*, 2007 MT 277, ¶ 42, 339 Mont. 419, 170 P.3d 493 (“A court need not force a party to undergo more discovery when ‘the only reason to

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<sup>1</sup> As indicated in Plaintiffs' Motion, Plaintiffs' counsel met and conferred with counsel for the State regarding its request for discovery and the present motion. *See* Ex. E, full reproduction of counsel correspondence (week of Oct. 25, 2021).

<sup>2</sup> Montana's Rule 26(c) mirrors the Federal Rule of Civil Procedure 26(c), making federal cases instructive here as well. *See Bates v. Anderson*, 2014 MT 7, ¶ 19, 373 Mont. 252, 316 P.3d 857 (relying on the Federal Rules for guidance in interpreting a Montana rule modeled on its federal counterpart); Mont. R. Civ. P. 26, Advisory Committee Notes (2011) (Montana's “Rule 26 is adopted from Rule 26 of the Federal Rules of Civil Procedure.”).

believe that additional, relevant evidence would materialize . . . is the [defendant's] apparent hope of finding a proverbial "smoking gun." (quoting *Davis v. G.N. Mortg. Corp.*, 396 F.2d 869, 885 (7th Cir. 2005)); *Env't Contractors, LLC v. Moon*, 1999 MT 178, ¶¶ 19, 21, 295 Mont. 268, 983 P.2d 390 ("A district court does not abuse its discretion in denying a Rule 56(f) motion where the party opposing a motion for summary judgment does not establish how the proposed discovery could preclude summary judgment.").

## **ARGUMENT**

The Rules of Civil Procedure are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Mont. R. Civ. P. 1. The State's request for unnecessary discovery to relitigate Plaintiffs' standing—after the issue has been directly challenged and decided—is costly, time wasting, and unjust. Thus, Plaintiffs request that the Court grant a protective order to prevent the "oppression, undue burden or expense" that will result if the State conducts 25 hours of unnecessary and burdensome depositions.

### **I. The Court has ruled that Plaintiffs have standing.**

The State seeks to depose Plaintiffs relating to standing because the State does "not agree that the Order denying the Rule 12(b)(6) motion satisfied the standing issue." Ex. B, Letter from P. Risken to R. Graybill & R. Sommers-Flanagan, 1 (Oct. 25, 2021). But the Court considered the State's motion to dismiss for lack of

standing and decided that Plaintiffs “have met the threshold to establish standing.” Order on Mot. to Dismiss, ADV-2021-611, 6 (Oct. 6, 2021). The Court reiterated that ruling in the status conference that occurred on Monday morning. *See, e.g.*, Ex. A, Hrg. Tr., 12:6, 9–10 (Oct. 25, 2021) (“[T]he testimony that we had at the hearing on the preliminary injunction from [Colin Stephens] established standing.”).

Regardless of the State’s disagreement with this result, disagreement is no basis to bully Plaintiffs by imposing on them the undue burden and expense of sitting for 25 hours of depositions so that the State can immediately relitigate an issue it lost. Accordingly, Plaintiffs ask the Court to issue a protective order and stay discovery.

**II. The State seeks oppressive, resource-intensive, and burdensome depositions unrelated to Plaintiffs’ pending motion for summary judgment.**

The contemplated depositions sweep extraordinarily broadly. Even so, none of the information sought relates in any way to Plaintiffs’ motion for summary judgment. The Court should impose a protective order.

Rule 26(c) protects “parties and persons where the discovery sought subjects the party or person to undue burden or expense.” *McAtee v. Whitefish Credit Union*, 2015 WL 13776538, \*1 (Mont. 11th Dist. Ct. Dec. 10, 2015) (citing Mont. R. Civ. P. 26(c)). “It is appropriate for courts to delay costly and time-consuming litigation activities when a motion to dismiss or for summary judgment is pending” on a

dispositive issue. *Boese v. McKinnon*, 2010 MT 209N, ¶ 13 (unpublished) (concluding that district court “correctly stayed discovery” pending ruling on summary judgment motion); *see also Heggem v. Capitol Indem. Corp.*, 2007 MT 74, ¶ 19, 336 Mont. 429, 154 P.3d 1189 (affirming grant of protective order where defendant moved for summary judgment on a legal interpretation issue and the requested “discovery would be irrelevant at that time”).

The Court should grant Plaintiffs’ motion for three reasons. First, the State openly acknowledges that the information it seeks is not for purposes of responding to Plaintiffs’ potentially dispositive summary judgment motion. *See generally* Ex. B; Ex. C, Defs.’ Notice of Intent to Depose Pl. Forward Mont. (Oct. 26, 2021); Ex. D, Defs.’ Notice of Intent to Depose Pl. MACDL (Oct. 26, 2021).

Second, the information the State seeks is extremely unlikely to produce a viable defense and alter the outcome of the case because its inquiry hinges on the belief that Plaintiffs have somehow misrepresented information about their activities. *See Bretz v. Brusett*, 899 F.2d 18 (Table) (9th Cir. 1990) (unpublished) (“A district court may limit discovery ‘for good cause,’ . . . and may continue to stay discovery when it is convinced that the plaintiff [defendant] will be unable to state a claim for relief [make out a defense].”) (quoting *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981)). Forward Montana conducts campus organizing in areas barred

by SB319. The attorney Plaintiffs have made, and plan to make, political contributions to non-partisan judicial candidates.

Third, the “areas of inquiry” the State describes are oppressive and unduly burdensome in that they are extremely overbroad and encompass far more information than would be needed to establish—or, under the State’s theory, prove a lack of—standing. *See, e.g.*, Ex. C, at 2 (seeking, among other topics, discovery of the “names and duties of Forward Montana related activities of any employees or volunteers” and “[s]ources of funding for Forward Montana, either for operations or for the pursuit of its activities”); Ex. D, at 2 (same areas for MACDL, as well as “[j]oint or coordinated efforts or projects between MACDL and any other similarly interested persons or organizations,” among other topics); *cf. Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 140, 144 (E.D.N.Y. 2013) (affirming magistrate’s grant of protective order when defendants failed to show any need for discovery that would invade members’ privacy to disclose their names).

To the extent the State claims that it is merely seeking discovery on other claims—not raised in Plaintiffs’ pending motion for summary judgment—this discovery should be stayed in the interests of judicial economy. The State sought and received an extended timeline to respond to the pending motion; not to backdoor 25 hours of depositions on matters that pertain to facts not at issue in the

pending motion. If Plaintiffs are successful on their motion for summary judgment, it will obviate the need to resolve the other claims because the Single Subject Rule and Amendment Rule claims invalidate the injurious portions of the law. It serves no parties' interests to incur the substantial costs of conducting 25 hours of depositions under these circumstances.

Ultimately, the State's attempt to seek depositions is misguided and qualifies Plaintiffs for protection from "oppression, or undue burden or expense" pursuant to Rule 26(c)(1).

### CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request this Court grant their Motion for Plaintiffs' Motion for Protective Order to Stay Discovery Pursuant to Rule 26(c)(1).

Respectfully submitted this 29th day of October, 2021.

*/s/ Raphael Graybill*  
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*/s/ Rylee Sommers-Flanagan*  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 29th day of October, 2021, by email.

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# Exhibit A

MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

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FORWARD MONTANA, et al.,	)	
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Plaintiffs,	)	
	)	
vs.	)	Cause No. ADV-2021-611
	)	
STATE OF MONTANA,	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Mike Menahan, Judge Presiding,  
via Zoom

Date and time: 9:00 a.m., Monday, October 25, 2021

Place: Lewis and Clark County Courthouse  
228 Broadway  
Helena, MT 59601

Holly E. Fox  
Official Reporter

## A P P E A R A N C E S

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1           The following proceedings were had and testimony  
2 taken:

3                           \* \* \* \* \*

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6           THE COURT: Well, thanks, everybody, for  
7 accommodating me from home. Much appreciated.

8           So this is Cause Number ADV-2021-611. It's Forward  
9 Montana, Leo Gallagher, Montana Association of Criminal  
10 Defense Lawyers, and Gary Zadick are the plaintiffs. And  
11 Raph Graybill and Rylee Sommers-Flanagan represent the  
12 plaintiffs. I think Constance Van Kley does, but I've not  
13 met her. I'm not sure that she's in court.

14           Representing the defendant, State of Montana, by and  
15 through the Governor's Office, is the Attorney General's  
16 Office, and I believe that we have -- is it -- is it David  
17 Dewhirst?

18           MR. RISKEN: That's the solicitor general, your  
19 Honor. He is not here today.

20           THE COURT: Okay. Okay. I know that he recently  
21 filed a notice of appearance.

22           But we have Patrick Risken, and -- and I don't  
23 recognize the gentleman to your left.

24           MR. RISKEN: Brent Mead, your Honor.

25           THE COURT: Oh, welcome. So this was the time set

1 for a status -- a motion for a status conference. And the  
2 motion for the status conference was filed while briefing  
3 was undergoing on a couple matters. There was the state's  
4 motion to dismiss for lack of standing, and then there were  
5 motions for summary judgment that the state had filed.

6 And so I was prepared to take up the motion for -- the  
7 56(f) motion along with the -- in my order on the motion to  
8 dismiss, but I didn't because this motion for a status  
9 order kind of threw a wrench into it for me a bit. I  
10 didn't want to issue an order on the 56(f) issue because I  
11 wanted the state to be able to perhaps make more of an  
12 argument.

13 To me, I'll just tell you at the outset, this does  
14 seem to be a legal issue. The state has not filed a motion  
15 for summary judgment limiting the Court's ruling to, I  
16 believe, a ruling on the single subject rule. If that's  
17 the way that I rule, I don't want to take up whether or not  
18 Section 21 and Section 22 of the -- of the bill are  
19 constitutional. If I grant summary judgment, I would  
20 prefer that my ruling be limited only to the extent that  
21 the legislature violated the single subject rule by  
22 amending Senate Bill 319 to include non-germane matters.

23 So with that, I think this was the plaintiff's --  
24 plaintiff's motion, so your pleasure. And you're welcome  
25 to testify or speak from counsel table, you're welcome to

1 use the microphone at the podium. I can hear everybody  
2 just perfectly well.

3 MR. GRAYBILL: Thank you, your Honor.

4 Can you hear me okay? This is Raph.

5 THE COURT: Yes, I can. Thank you.

6 MR. GRAYBILL: Okay. Your Honor, I think your  
7 read of the situation basically tracks the plaintiff's  
8 read. As you know, the plaintiffs moved for summary  
9 judgment only on two claims; on the single subject rule  
10 claim and on the amendment rule claim. It's our view that  
11 those claims turn entirely on the text of the law itself  
12 and on, perhaps, the legislative history, but not on things  
13 that would need to come out in depositions. There would be  
14 no need for discovery to resolve those claims.

15 And it's our view that if those claims are resolved  
16 either for or against plaintiffs, I think either party  
17 would seek to certify, because I think those are the --  
18 those are the central claims at issue in this case. And I  
19 think that it -- it would really serve judicial economy to  
20 get an answer on those two core claims before engaging in  
21 extensive discovery, which largely, based on the state's  
22 representations, appears to be focused on standing  
23 questions yet again.

24 Standing was raised at the preliminary injunction  
25 stage. It was raised and then rejected by the Court at the

1 motion to dismiss stage. And it's my understanding that  
2 standing is really the focus of what the state wants to do  
3 more discovery on, and I don't know how many times you can  
4 take a run at that question.

5 The -- I guess the other thing that we would add is,  
6 you know, the prejudice here really runs against  
7 plaintiffs. We're ready to go. We're making  
8 constitutional claims. There is always prejudice where  
9 there is something that delays the speedy vindication of  
10 constitutional rights. And we moved on these two claims  
11 for summary judgment 10 weeks ago. Seven weeks ago the  
12 state said it needed discovery, absolutely needed it, to  
13 respond adequately to our motion on these legal claims.  
14 And for seven weeks there have been zero requests for  
15 depositions, zero requests for interrogatories, RFAs. If  
16 the discovery was so important to resolving this motion,  
17 the state has had ample time to initiate that discovery and  
18 has not. We're ready to go. We're ready to answer these  
19 questions. We think that they're well-developed by both  
20 parties and that it's -- you know, it's time for the state  
21 to respond to the summary judgment motion.

22 If the Court would like, Ms. Sommers-Flanagan is  
23 prepared to offer, I suppose, sort of a pocketbook argument  
24 on the 56(f) motion. We would, of course, let the state go  
25 first as it's their motion. We're prepared to do that



1 today, if you want. But my comments just now, I think,  
2 summarize where we're at. We're ready to go on this  
3 motion, it raises legal questions only, and ordering an  
4 unlimited period of discovery doesn't help anybody in  
5 resolving these key questions.

6 THE COURT: Okay. All right.

7 Mr. Risken?

8 MR. RISKEN: Yes, sir.

9 I don't think I've ever had to defend a case in this  
10 manner, your Honor, where it just seems to be -- kept just  
11 charging ahead without any control. I've always operated  
12 under scheduling orders. I've always operated under the  
13 discretion of the Court. And that's what we're asking is  
14 that the Court issue a scheduling order and get some  
15 control over this thing. We can't defend this case without  
16 discovery. The -- I would -- I'd like to -- to note that  
17 the issue of standing and ripeness have not yet been  
18 joined. We brought them up at the preliminary injunction  
19 hearing. Contrary to what was just represented, it was not  
20 decided at that time. The plaintiffs had made out a prima  
21 facie case, which is, as we all know, means just a case,  
22 you know, on first impression. But there's nothing backing  
23 it. We watched Mr. Stephens on the stand try to testify to  
24 his affidavit he submitted, and he didn't really know -- he  
25 didn't have any basis for any of it. He admitted that it

1 was speculation. So we don't know anything about that.

2 We would like to pursue the discovery to find out who  
3 these people are, what their organization is, what they  
4 plan to do, and how it is that they have alleged these --  
5 these perceived injuries. We don't have any of that  
6 information.

7 There was a 12(b)(6) motion that was made, which, as  
8 we all know, is based upon the four corners of the  
9 complaint. There's no evidence that comes in a 12(b)(6).  
10 We made the argument that the complaint itself had not  
11 stated a cause of action. The Court disagreed. The motion  
12 was vague. But once again, it was just upon the pleading  
13 itself that the plaintiffs got past that argument on  
14 standing. We still haven't developed the record on that.  
15 And in order to -- to fairly try this case, the Court --  
16 or, excuse me, the defense has got to have an opportunity  
17 to take some depositions and find out who these people are.  
18 Because if there is no standing, if there is no ripeness,  
19 then any ruling on summary judgment could later be vacated  
20 if this case goes on beyond this initial summary judgment  
21 on these purely legal issues.

22 I find it fascinating that what we're proposing here  
23 is literally the service of a complaint in the morning and  
24 the service of a summary judgment in the afternoon. We  
25 don't know if these people have -- have -- have the ability

1 to bring these cases, these claims. I mean, to me it's  
2 really interesting that, for example, we haven't heard  
3 anything from Forward Montana. We haven't heard anything  
4 from Mr. Zadick. The complaint was an amended but verified  
5 complaint that was signed by an elected official in Lewis  
6 and Clark County, and I have no idea what his affiliation  
7 is with the defense trial lawyers or with Forward Montana.  
8 It's interesting to me that he could verify the facts of  
9 the complaint on behalf of all of these people, and I'd  
10 like to ask him how he can do that.

11 So, your Honor, there's a lot of work that has to be  
12 done before we even -- I would submit to you, your Honor,  
13 there's a lot of work that has to be done before we even  
14 get into these -- these later arguments.

15 I mean, you know, we're -- I was scolded because I  
16 didn't understand the rules during the briefing process.  
17 But I would like to point out to the Court that Rule 1 says  
18 the court rules control for a just, speedy, and inexpensive  
19 resolution or determination of a case. The first  
20 consideration is a just determination of the case. Then  
21 there's Rule 8 -- or, excuse me, Rule 3 on filing a  
22 complaint starts the action. Rule 8 is a short, plain  
23 statement. The complaint is very interesting in that  
24 regard. Rule 12 is the answer. But you can see that  
25 there's a progression through the court rules as to how a

1 case is presented. And right there in the middle is  
2 Rule -- the 20s and 30s, which are discovery, and the 40s  
3 and 50s are the trial. And it's only after you get through  
4 all those processes that we get to Rule 56.

5 All the state is asking, your Honor, is an opportunity  
6 to defend this case in the normal course. And I think  
7 that's an appropriate and fair process of -- a fair process  
8 to follow in a case like this instead of just immediately  
9 jumping from plaintiff summary judgment -- we're done.

10 THE COURT: Okay. So, Ms. Sommers-Flanagan -- so  
11 Mr. Risken is essentially making a 56 motion.

12 Do you want to respond to that, Raph, briefly?

13 MR. GRAYBILL: I think we could, your Honor. I  
14 just want to add one comment -- a couple comments in  
15 response to my friend and colleague's comments.

16 When we're talking about the normal course, it has  
17 always been the rule in Montana that parties can move for  
18 summary judgment at any time. And I think that reflects  
19 the reality that on summary judgment or partial summary  
20 judgment, there are claims that are purely legal. And I  
21 think what you don't hear from the state today is any  
22 argument that to resolve the merits of those claims there's  
23 any need for discovery. The state wants to take another  
24 run at standing, something that's been addressed by this  
25 Court substantively in the Rule 12 motion.

1           And on timing, on the idea that this is some immediate  
2 charge forward, I mean, this case was filed June 1st. This  
3 case was filed many months ago. The state could have, but  
4 never did, seek jurisdictional discovery before filing its  
5 Rule 12 motion. The state could have, in the past 10  
6 weeks, have sought any of the discovery it now insists that  
7 it needs. And the discovery it's seeking are things like,  
8 Is Forward Montana a group that organizes on campus?  
9 That's the kind of information you can ascertain by going  
10 to the COPP website and seeing they have, in fact,  
11 registered as a political committee. I mean, this is not a  
12 particularly illusive or complex series of facts here that  
13 we're talking about, and now is the time to move on these  
14 legal claims. We can answer these questions now. Setting  
15 a period of unlimited factual discovery to take a third run  
16 at standing I don't think serves the Court's resources well  
17 or the just, speedy resolution of this case well.

18           Ms. Sommers-Flanagan, any additional comments on  
19 56(f)?

20           MS. SOMMERS-FLANAGAN: Judge Menahan, I'd like to  
21 take your lead if you would prefer that I -- I can -- I can  
22 talk a little bit about this. I think there are  
23 essentially two arguments in the Rule 56(f) motion. I  
24 think we have sort of covered what the problems with --  
25 with them are, but I'm also happy to just take a moment to

1. discuss --

2           The COURT: I cited a couple cases in my order:  
3 The Nesbit case, the Schoof case, and then the Mitchell  
4 versus Glacier County case. That happened to be my case.  
5 I wrote in that order that, as a threshold issue, the  
6 plaintiffs have established standing. It's not a  
7 particularly high standard, but it has to have a concrete  
8 or specific injury. And I think just the testimony that we  
9 had at the hearing on the preliminary injunction from Brian  
10 Smith established standing. And I'll just remind folks  
11 that Brian Smith said that he represented criminal  
12 defendants who have cases pending, and if a judge -- and he  
13 continues to want to participate in, I guess, the political  
14 process by donating to judges. And he said if a judge has  
15 to recuse himself or herself, that will have a negative  
16 impact on his clients because they'll be in an Hobson's  
17 choice where they have to decide whether or not to give up  
18 a speedy trial right or -- by having a new judge assigned,  
19 or proceeding to trial with counsel who's ill-prepared.

20           So I've issued an order holding here that the  
21 plaintiffs have standing, so I think that this issue is  
22 moot. Really, I think that the issue that needs to be  
23 resolved is when the state is going to file a reply to this  
24 plaintiff's motion for summary judgment.

25           Typically I don't issue scheduling orders in matters

1 like this. When a matter -- when a party files a motion to  
2 dismiss or a motion for summary judgment, our rules of  
3 civil procedure and local court rules apply. You know, for  
4 your edification, I typically only issue a scheduling order  
5 in civil cases after an answer has been filed, discovery  
6 has been -- and parties are beginning discovery. In  
7 motions -- in actions for declaratory judgment I don't  
8 typically issue a scheduling order.

9 And I think that, you know, the state certainly has  
10 preserved this as an issue that they may wish to address on  
11 appeal as to whether or not the plaintiffs have standing,  
12 but I've already issued my order that they do.

13 MR. RISKEN: Which order, your Honor?

14 THE COURT: What's that?

15 MR. RISKEN: I'm sorry, your Honor. It's Pat  
16 Risken. Which order establishes standing? Because I  
17 didn't see it.

18 THE COURT: On my -- in my order on the motion to  
19 dismiss --

20 MR. RISKEN: Okay.

21 THE COURT: -- I wrote that the plaintiffs have  
22 standing. It essentially begins on Page 4 of my order and  
23 thereafter.

24 MR. RISKEN: Well, I can look at that later, your  
25 Honor. Thank you.

1 THE COURT: Yeah.

2 MR. GRAYBILL: Your Honor, this is Mr. Graybill.  
3 We would -- I mean, I think we agree with where the Court  
4 is on -- on proceeding, and we're willing to be  
5 accommodating on giving the state time to file its -- its  
6 response. But we do -- you know, the purpose of this --  
7 the reason we asked for this conference is we do want to  
8 get this case moving and answer these two questions.

9 THE COURT: Yeah. So I would give the state four  
10 to six weeks, however long they need to file a reply.

11 MR. RISKEN: May we have six weeks, your Honor?

12 THE COURT: Of course.

13 MR. RISKEN: Let's me think about that for a  
14 second, because that's going to come crashing in on  
15 Thanksgiving.

16 THE COURT: You can have eight weeks. That's  
17 fine.

18 MR. RISKEN: Eight? Thank you.

19 THE COURT: Yeah.

20 MR. RISKEN: Okay. Thank you, your Honor.

21 THE CLERK: I'll give you a date in just a second.

22 THE COURT: Again, I appreciate everybody, you  
23 know, willing to have me -- allow me to appear from home.  
24 Thank you.

25 THE CLERK: So eight weeks from now would be



1 December 20th.

2 Judge, did you say you were gone that week?

3 THE COURT: It doesn't matter. They'll just  
4 have -- that gives the state two months to file their  
5 reply, and then the plaintiffs can have two more weeks, if  
6 that's okay.

7 MR. RISKEN: That's right over Christmas.

8 MR. GRAYBILL: Your Honor, we're ready to go. I  
9 mean, this -- these arguments have been developed since the  
10 PI stage. I don't think there are new theories or ideas.  
11 We're happy to write a reply brief very quickly after the  
12 20th date. That's no problem for us.

13 THE COURT: Okay. And then because I think the  
14 parties may wish to have oral argument on the motion for  
15 summary judgment -- no one has asked for it, but I suspect  
16 that may be the case; I don't know -- we can tentatively  
17 just schedule an oral argument sometime in January.

18 MR. GRAYBILL: We'd be happy to do that shortly  
19 after the reply is turned in, giving the Court enough time  
20 to review it. But early January is fine for us.

21 THE COURT: Of course.

22 THE CLERK: Do you need a half-day, full day,  
23 couple hours?

24 MR. GRAYBILL: I would estimate a couple hours at  
25 most.

1 MR. RISKEN: That's an easy motion.

2 THE COURT: So, Katie, I know that we have that  
3 three-week homicide trial that's starting in January, but  
4 that's been moved to September.

5 THE CLERK: Oh, okay. Right.

6 THE COURT: The Crites murder.

7 THE CLERK: Yep.

8 THE COURT: So maybe -- I know that I'm trying to  
9 backfill into those dates, but that starts sometime in the  
10 latter part of January. I can't remember.

11 THE CLERK: Okay. Bear with me for just a minute  
12 here.

13 THE COURT: And you don't have to set it  
14 mid-January --

15 THE CLERK: Yeah, we can do Tuesday, January 25,  
16 at 9:00 a.m.

17 THE COURT: Sounds good.

18 THE CLERK: Great. All right.

19 THE COURT: Okay. Anything else then?

20 MR. RISKEN: No, sir.

21 THE COURT: All right. Thank you very much.

22 MS. SOMMERS-FLANAGAN: Thank you, your Honor.

23 MR. GRAYBILL: Thank you, your Honor.

24 MR. RISKEN: Thank you, your Honor.

25 (Proceedings concluded at 9:21 a.m.)

C E R T I F I C A T E

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I, HOLLY FOX, Freelance Court Reporter and a Notary Public for the State of Montana, do hereby certify:

That the foregoing hearing was taken before me at the time and place herein named, that the hearing was reported by me, and that the foregoing pages contain a true record of the testimony of the witnesses to the best of my ability.

DATED this 26th day of October, 2021.

/s/ Holly E. Fox

-----

Holly E. Fox  
Notary Public for the State of Montana  
Residing at Helena, MT  
My Commission Expires: July 3, 2025

# Exhibit B

STATE OF MONTANA  
DEPARTMENT OF JUSTICE  
AGENCY LEGAL SERVICES BUREAU

Austin Knudsen  
Attorney General



1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

October 25, 2021

Raph Graybill  
Graybill Law Firm, PC  
300 4<sup>th</sup> Street North  
P.O. Box 3586  
Great Falls, MT 59403

Rylee Sommers-Flanagan  
Upper Seven Law  
1008 Breckenridge St.  
Helena, MT 59601

Re: **Forward Montana, et al. v. State of Montana and Gianforte**

Dear Mr. Graybill and Ms. Sommers-Flanagan:

Given Judge Menehan's scheduling of our response to your clients' summary judgment motion (December 20) we have time to complete most of the discovery that the State seeks. Based upon Mr. Graybill's comments this morning that the State has so far been dilatory in seeking any discovery, please make available dates for depositions in the weeks including November 15-22 and December 1-8 for the following:

Individuals:

Leo Gallagher	5 hours
Gary Zadick	3 hours
Colin Stephens	4 hours

Rule 30(b)(6) depositions:

Forward Montana	7 hours
MACDL	6 hours

I do not agree that the Order denying the Rule 12(b)(6) motion satisfied the standing issue. It dealt with allegations of the Verified Amended Complaint and not actual facts, which the State is still entitled to discover. Even if it did that defense is available throughout the case and can be brought at any time.

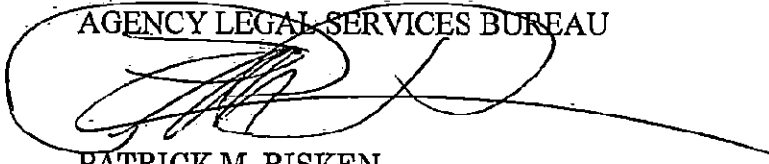
Graybill/Sommers-Flanagan  
October 25, 2021  
Page 2

Since Judge Menahan does not operate from a scheduling order in cases such as this – what he said – the State is not prohibited from filing its own summary judgment motion. If discovery reveals evidence (or a lack thereof) which would support dismissal that will be filed on or before December 20.

Thank you.

Very truly yours,

AGENCY LEGAL SERVICES BUREAU



PATRICK M. RISKEN  
Assistant Attorney General

cc: David Dewhirst  
Brent Mead

# Exhibit C

AUSTIN KNUDSEN  
Montana Attorney General  
KRISTIN HANSEN  
*Lieutenant General*  
DAVID M.S. DEWHIRST  
*Solicitor General*  
BRENT MEAD  
*Assistant Solicitor General*  
PATRICK M. RISKEN  
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Helena, MT 59620-1401  
Phone: (406) 444-2026  
david.dewhirst@mt.gov  
brent.mead2@mt.gov  
priskens@mt.gov

Attorneys for Defendant

MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

<p>FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor,</p> <p style="text-align: center;">Defendant.</p>	<p>Cause No. ADV-2021-611</p> <p>Hon. Mike Menahan</p> <p>STATE OF MONTANA'S NOTICE OF INTENT TO TAKE DEPOSITION OF PLAINTIFF FORWARD MONTANA—Mont. R. Civ. P. 30(b)(6)</p>
--	---



The State of Montana and Gianforte hereby notify Plaintiffs of the State's intent to take said Plaintiff Forward Montana's deposition pursuant to Mont. R. Civ. P. 30(b)(6). Plaintiff Forward Montana is directed to designate one or more officers, directors, or managing agents, or other persons who consent and who are authorized to testify on its behalf, regarding the following areas of inquiry:

1. Organization and historical performance/activities of Forward Montana.
2. Organization of Forward Montana preceding the filing of the Verified Amended Complaint herein, including directors, meetings and meeting minutes. *Verified Am. Complaint* ¶ 1.
3. The names and corresponding Forward Montana-related activities of each director.
4. The name and duties of Forward Montana related activities of any employees or volunteers.
5. Annual budget and expenses for Forward Montana and bookkeeping and/or accounting system or principles utilized.
6. Sources of funding for Forward Montana, either for operations or for the pursuit of its activities. *Verified Am. Complaint* ¶ 1.
7. Activities of Forward Montana either now being implemented or pursued or that are presently in the planning stage; *i.e.*, *Verified Am. Complaint* ¶¶ 1, 58, 60, 61, 66, 91.
8. Explanation of status and activities in relation to 26 U.S.C. 501(c)(3) or (4) as a "not-for-profit organization." *Verified Am. Complaint* ¶ 1.
9. Joint or coordinated efforts or projects between Forward Montana and any other similarly interested persons or organizations.
10. Explanation of facts specific to Forward Montana's concerns related to ¶¶ 1, 58, 60, 61, 66, 91, and the bases therefore.
11. The specific facts supporting Forward Montana's contentions of injury or harm alleged within the *Verified Am. Complaint*.

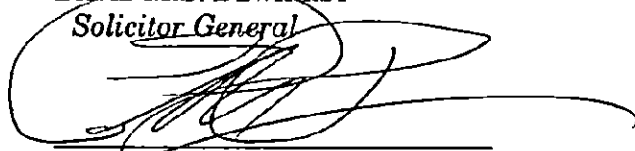
This Notice is being sent in advance of the selection of a date or dates to complete the deposition of the designated witness or witnesses. It is sent as a courtesy and is not required under the Rules. The designation of a witness or witnesses to testify on behalf of Plaintiff should be returned to the undersigned counsel no later than ten days from the date of service of this Notice, in order to facilitate expedient scheduling. If more than one person is designated, you are required to indicate which of the above-listed topics each witness is designated to testify. If a designation or designations are not made within ten days, the undersigned counsel will arrange a discovery conference under Rule 37(a)(1) and thereafter issue a deposition subpoena for a date chosen by the defense.

DATED the 26th day of October, 2021.

AUSTIN KNUDSEN  
Montana Attorney General

KRISTIN HANSEN  
*Lieutenant General*

DAVID M.S. DEWHIRST  
*Solicitor General*

A handwritten signature in black ink, appearing to read 'P. Risken', is written over a horizontal line. The signature is stylized and somewhat cursive.

PATRICK M. RISKEN  
*Assistant Attorney General*  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
p. 406.444.2026  
prisken@mt.gov

*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

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

Raph Graybill  
Graybill Law Firm, PC  
300 4th Street North  
PO Box 3586  
Great Falls, MT 59403  
rgraybill@silverstatelaw.net

Rylee Sommers-Flanagan  
Constance Van Kley  
Upper Seven Law  
1008 Breckenridge Street  
Helena, MT 59601  
rylee@uppersevenlaw.com  
constance@uppersevelaw.com

Date: October 26, 2021

  
\_\_\_\_\_

# Exhibit D

AUSTIN KNUDSEN  
Montana Attorney General  
KRISTIN HANSEN

*Lieutenant General*

DAVID M.S. DEWHIRST

*Solicitor General*

BRENT MEAD

*Assistant Solicitor General*

PATRICK M. RISKEN

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Attorneys for Defendant

MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

<p>FORWARD MONTANA; LEO GAL- LAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>THE STATE OF MONTANA, by and through GREG GIANFORTE, Gover- nor,</p> <p style="text-align: right;">Defendant.</p>	<p>Cause No. ADV-2021-611</p> <p>Hon. Mike Menahan</p> <p><b>STATE OF MONTANA'S NOTICE OF INTENT TO TAKE DEPOSITION OF PLAINTIFF MONTANA ASSOCI- ATION OF CRIMINAL DEFENSE LAWYERS—Mont. R. Civ. P. 30(b)(6)</b></p>
--	--

The State of Montana and Gianforte hereby notify Plaintiffs of the State's intent to take said Plaintiff Montana Association of Criminal Defense Lawyers' (MACDL) deposition pursuant to Mont. R. Civ. P. 30(b)(6). Plaintiff MACDL is directed to designate one or more officers, directors, or managing agents, or other persons who consent and who are authorized to testify on its behalf, regarding the following areas of inquiry:

1. Organization and historical performance/activities of MACDL.
2. Organization of MACDL preceding the filing of the Verified Amended Complaint herein, including directors, meetings and meeting minutes. *Verified Am. Complaint* ¶ 3.
3. The names and corresponding MACDL-related activities of each director.
4. The name and duties of MACDL-related activities of any employees or volunteers.
5. Annual budget and expenses for MACDL and bookkeeping and/or accounting system or principles utilized.
6. Sources of funding for MACDL, either for operations or for the pursuit of its activities. *Verified Am. Complaint* ¶ 3.
7. Explanation of status and activities in relation to 26 U.S.C. 501(c)(6) as an "unincorporated association." *Verified Am. Complaint* ¶ 3.
9. Joint or coordinated efforts or projects between MACDL and any other similarly interested persons or organizations.
10. Explanation of facts specific to MACDL's concerns related to ¶¶ 3, 70, 72, 73, 74, 75, 76, 77, 80, 81, 83, 84, 85, 91, and the bases therefor.
11. The specific facts supporting MACDL's contentions of injury or harm alleged within the *Verified Am. Complaint*.

This Notice is being sent in advance of the selection of a date or dates to complete the deposition of the designated witness or witnesses. It is sent as a courtesy and is not required under the Rules. The designation of a witness or witnesses to testify on behalf of Plaintiff should be returned to the undersigned counsel no later than ten days from the date of service of this Notice, in order to facilitate expedient scheduling. If more than one person is designated, you are required to indicate which of the above-listed topics each witness is designated to testify. If a designation or designations are not made within ten days, the undersigned counsel will arrange a discovery conference under Rule 37(a)(1) and thereafter issue a deposition subpoena for a date chosen by the defense.

DATED the 26th day of October, 2021.

AUSTIN KNUDSEN  
Montana Attorney General

KRISTIN HANSEN  
*Lieutenant General*

DAVID M.S. DEWHIRST  
*Solicitor General*



PATRICK M. RISKEN  
*Assistant Attorney General*  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
p. 406.444.2026  
prisken@mt.gov

*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

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

Raph Graybill  
Graybill Law Firm, PC  
300 4th Street North  
PO Box 3586  
Great Falls, MT 59403  
rgraybill@silverstatelaw.net

Rylee Sommers-Flanagan  
Constance Van Kley  
Upper Seven Law  
1008 Breckenridge Street  
Helena, MT 59601  
rylee@uppersevenlaw.com  
constance@uppersevelaw.com

Date: October 26, 2021

  
\_\_\_\_\_



# Exhibit E

STATE OF MONTANA  
DEPARTMENT OF JUSTICE  
AGENCY LEGAL SERVICES BUREAU

Austin Knudsen  
Attorney General



1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

October 25, 2021

Raph Graybill  
Graybill Law Firm, PC  
300 4<sup>th</sup> Street North  
P.O. Box 3586  
Great Falls, MT 59403

Rylee Sommers-Flanagan  
Upper Seven Law  
1008 Breckenridge St.  
Helena, MT 59601

Re: **Forward Montana, et al. v. State of Montana and Gianforte**

Dear Mr. Graybill and Ms. Sommers-Flanagan:

Given Judge Menehan's scheduling of our response to your clients' summary judgment motion (December 20) we have time to complete most of the discovery that the State seeks. Based upon Mr. Graybill's comments this morning that the State has so far been dilatory in seeking any discovery, please make available dates for depositions in the weeks including November 15-22 and December 1-8 for the following:

Individuals:

Leo Gallagher	5 hours
Gary Zadick	3 hours
Colin Stephens	4 hours

Rule 30(b)(6) depositions:

Forward Montana	7 hours
MACDL	6 hours

I do not agree that the Order denying the Rule 12(b)(6) motion satisfied the standing issue. It dealt with allegations of the Verified Amended Complaint and not actual facts, which the State is still entitled to discover. Even if it did that defense is available throughout the case and can be brought at any time.


Graybill/Sommers-Flanagan  
October 25, 2021  
Page 2

Since Judge Menahan does not operate from a scheduling order in cases such as this – what he said – the State is not prohibited from filing its own summary judgment motion. If discovery reveals evidence (or a lack thereof) which would support dismissal that will be filed on or before December 20.

Thank you.

Very truly yours,

AGENCY LEGAL SERVICES BUREAU



PATRICK M. RISKEN  
Assistant Attorney General

cc: David Dewhirst  
Brent Mead

**GRAYBILL**  
LAW FIRM, PC

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Toll Free: (866) 452-8566  
Telefax: (406) 727-3225

October 26, 2021

Patrick Risken  
Assistant Attorney General  
Montana Department of Justice  
1712 Ninth Avenue  
Helena, MT 59620  
prisken@mt.gov

Re: Forward Montana, et al. v. State

Dear Mr. Risken:

We write to request a meet and confer regarding your recent correspondence about discovery, consistent with the provisions of Mont. R. Civ. P. 26(c).

We are flexible and prepared to meet by phone at your earliest convenience. Please share your availability to meet and confer today or tomorrow, October 26–27, 2021.

Thank you.

Sincerely,

/s/ Raph Graybill  
Raph Graybill  
Graybill Law Firm, PC

/s/ Rylee Sommers-Flanagan  
Rylee Sommers-Flanagan  
Constance Van Kley  
Upper Seven Law

cc: David Dewhirst  
Brent Mead

**GRAYBILL**  
LAW FIRM, PC

BENJAMIN R. GRAYBILL  
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Toll Free: (866) 452-8566  
Telefax: (406) 727-3225

October 28, 2021

Patrick Risken  
Assistant Attorney General  
Montana Department of Justice  
1712 Ninth Avenue  
Helena, MT 59620  
prisken@mt.gov

Re: Forward Montana, et al. v. State

Dear Mr. Risken:

Thank you for meeting and conferring with us this morning under the provisions of Mont. R. Civ. P. 26(c). As discussed, it is our position that the 25 hours of requested depositions are inappropriate under Rule 26(c).

You requested during our conversation that we memorialize the reasons for our position in writing. At Monday's hearing, Judge Menahan reiterated his ruling that Plaintiffs' have established standing and then set a deadline for the State to respond to Plaintiffs' pending summary judgment motion. Because this motion is potentially dispositive and requires no discovery, we intend to seek a protective order.

Thank you.

Sincerely,

/s/ Raph Graybill  
Raph Graybill  
Graybill Law Firm, PC

/s/ Rylee Sommers-Flanagan  
Rylee Sommers-Flanagan  
Constance Van Kley  
Upper Seven Law

cc: David Dewhirst  
Brent Mead