RAPH GRAYBILL
Graybill Law Firm, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403
Phone: (406) 452-8566
Email: rgraybill@silverstatelaw.net

RYLEE SOMMERS-FLANAGAN
CONSTANCE VAN KLEY
Upper Seven Law
P.O. Box 31
Helena, MT 59624
Phone: (406) 396-3373
Email: rylee@uppersevenlaw.com
constance@uppersevenlaw.com

Attorneys for Plaintiffs

IN THE 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 **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY PURSUANT TO RULE 26(c)(1)**

Plaintiffs seek a protective order precluding discovery, including depositions, until the pending dispositive motion for summary judgment has been resolved. The State seeks to depose Plaintiffs for 25 hours about topics unrelated to the motion for summary judgment, which may resolve this case on the merits entirely. The State has issued no written discovery requests. The

discovery sought is irrelevant to the pending motion, wasteful, unduly burdensome, and oppressive. The Court should grant Plaintiffs' motion.

ARGUMENT

I. Plaintiffs should be protected from the State's request for irrelevant, unduly burdensome, and oppressive depositions.

The State first claims that Plaintiffs have failed to establish that good cause requires the Court to issue an order protecting Plaintiffs from depositions, arguing that Plaintiffs "must specifically state how each contested discovery request is objectionable." Def's Opp. to Ps' Mot. for Protective Order at 2 (citing *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 72, 392 Mont. 139, 424 P.3d 571). But as Plaintiffs have explained, the State seeks discovery that is irrelevant to the pending dispositive motion. *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2019) ("To justify restricting discovery, the harassment or oppression should be unreasonable, but 'discovery has limits and . . . these limits grow more formidable as the showing of need decreases.'") (quoting 8A Charles Alan Wright & Arthur R. Miller et al., Federal Practice and Procedure § 2036 (3d ed. 2012) (emphasis added)); *see also Lomax v. Sears, Roebuck & Co.*, 238 F.3d 422 (6th Cir. 2000) (unpublished) (Rule 26(c) affords district courts "wide discretion to limit discovery to prevent 'annoyance, embarrassment, oppression, or undue burden or expense,' including with regard to the designation of the time and place of depositions.").

Here, the discovery sought is irrelevant for two reasons: First, the Court has determined that Plaintiffs have properly alleged standing; and second, the pending motion for summary judgment presents exclusively legal issues that require no additional factual development. *Ruff*, ¶ 72 (A party may request "discovery of any non-privileged information that is relevant to any claim or defense at issue.") (emphasis added) (citing Mont. R. Civ. P. 26(b)(1)); *cf. Smith v.*

Downson, 158 F.R.D. 138, 140 (D. Minn. 1994) ("[A] showing of irrelevancy of proposed discovery can satisfy the 'good case' requirement of Rule 26(c).").

Next, the State argues without authority that "annoyance, embarrassment or oppression are absent since Plaintiffs initiated the lawsuit." Opp. at 3. But the Rules of Civil Procedure governing discovery do not treat plaintiffs and defendants differently. *See, e.g.*, *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 705 F. App'x 10, *11–12 (2d Cir. 2017) (unpublished) (under corollary federal rules, no prejudice to defendant town where protective order precluded discovery the town claimed was needed to prove plaintiffs lacked standing); *Oregon ex rel. Worden v. Drinkwalter*, 216 Mont. 9, 13, 700 P.2d 150, 152 (1985) (Rule 26(c) allows protective orders to prevent parties from harassing one another, including where "necessary to protect a party from unjustifiably repetitious demands").

The State's nearly feverish pursuit of the opportunity to "test" Plaintiffs' allegations is odd given the procedural history of this case. These allegations have already been deemed sufficient to support standing—not at the preliminary injunction stage as the State argues, Opp. at 9–10, but in the order denying the State's motion to dismiss, Order on Mot. to Dismiss, ADV-2021-611, 6 (Oct. 6, 2021). In its motion to dismiss, the State dedicated seven pages of a 16-page brief, Def's Br. in Supp. of Mot. to Dismiss, 5–13 (Aug. 4, 2021), to arguing that Plaintiffs lack standing and now claims that "[t]he standing question . . . has never been decided by this Court," Opp. at 11. It is hard to know what the State would deem a decision.

Moreover, were the State sincerely concerned about Plaintiffs' allegations, it could have sought information through a set of tailored interrogatories. Instead, the State elected the most invasive form of discovery and requested more than half of a work week in deposition time, distributed seemingly arbitrarily between Plaintiffs and affiant Colin Stephens. Because the State

seeks information related to a decided issue and that is irrelevant to the pending dispositive motion, the genuine inconvenience, expense, and undue burden of the depositions outweigh the negligible value of the requested depositions at this time. *Serrano*, 699 F.3d at 901 ("[E]ven very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it."). Beyond bizarrely claiming to "not even know who the Plaintiffs are," Opp. at 5–6, and claiming that Plaintiffs are lying, Opp. at 8–10, the State does not explain how new information could alter the conclusion that Plaintiffs will suffer an imminent and concrete injury if SB319 is implemented. *See Malott v. N.M. Educ. Ret. Bd.*, No. CV 12-1146, 2013 WL 12328853, at *5 (D.N.M. Nov. 27, 2013) ("[T]he concept of relevance should not be stretched to encourage a 'fishing expedition.'") (quoting *Munoz v. St. Mary Corwin Hosp.*, 221 F.3d 1160, 1169 (10th Cir. 2000)).[1]

In any case, the State's feigned ignorance of Plaintiffs' activities stretches the imagination. For example, the State itself has registered and monitored Forward Montana as a political committee under state law. *See* Mont. Comm'r of Political Pract., Campaign Electronic Reporting System, "Committee Search," *available at* https://cers-ext.mt.gov/CampaignTracker/public/search. The State maintains this information online for any member of the public to view. The State likewise maintains and publishes records reflecting reportable donations to candidates for judicial office in Montana, whether made by Plaintiffs Zadick and Gallagher or members of the larger public. *See* Mont. Comm'r of Political Practices, Campaign Electronic Reporting System, "Contribution Search" and "Expenditure Search,"

[1] The State claims it will pay for the expense of depositions, Opp. at 3, but makes no attempt to justify the time and expense imposed on busy Plaintiffs if forced to answer questions that do not bear on the pending dispositive motion. Time is money. Preparing for and attending depositions will cost Plaintiffs for no other reason than that the State disbelieves Plaintiffs' allegations.

available at https://cers-ext.mt.gov/CampaignTracker/public/search. Again, it is the State's own records that show SB319 Sections 21 and 22 would, in fact, affect Plaintiffs if implemented. Discerning what purpose 25 hours of depositions could serve is challenging when the only information relevant to standing not already in the State's possession is whether routine contributors to judicial candidates' campaigns intend to contribute in the future, as affirmed in the Verified Amended Complaint.

But what raises the most concern about the State's intense pursuit of dozens of hours of depositions is that it looks retributive. Plaintiffs have adequately alleged standing. They challenge a law passed in a process that straightforwardly violated Article V, Section 11 of the Montana Constitution. The questions now at issue are legal, but the State insists on returning to the standing issue and has several times repeated versions of the suspicion that these Plaintiffs who regularly interact on an official and professional basis with the State might simply be "strawmen for the purposes of challenge the statutes (sic)." Opp. at 9. Impugning Plaintiffs' reputation without evidence or cause is an abusive tactic that could well chill legitimate claims from being brought. The Court should grant Plaintiffs' motion.

II. Plaintiffs' motion is procedurally proper, as is their motion for summary judgment on two counts in the Complaint.

The State also argues that Plaintiffs' motion for a protective order is somehow procedurally inappropriate and will result in prejudice. Opp. at 5, 7–8. But Plaintiffs have followed the usual course of litigation. *See, e.g., Ruff*, ¶ 72 ("In response to a formal request for production, the responding party must make reasonable inquiry and then either produce the information requested,

state an objection including the particular reasons for the objection, or file a motion for a protective order.").

And, contrary to the State's contention that Plaintiffs' approach is "piecemeal litigation for strategic advantage," fundamental principles of judicial economy and efficiency counsel against permitting them to litigate a question already answered. *Cf. Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 30, 360 Mont. 207, 255 P.3d 80 ("Standing requires the plaintiff to have a personal stake in the outcome of the controversy at the commencement of the litigation, whereas mootness doctrine requires this personal stake to continue throughout the litigation."). No matter the reason, should the Court declare Sections 21 and 22 unconstitutional and permanently enjoin them, the relief sought will have been granted and remaining claims rendered moot. *See id.* ¶ 2 (listing several issues and stating "[r]esolution of these questions moots other issues raised by the parties"). This is true whether Plaintiffs prevail on their summary judgment motion or if parties in another case challenging SB319 for entirely distinct reasons cause the law's invalidation.

III. The State has not established a need for the information it seeks through overbroad and unduly burdensome depositions.

The State continues to acknowledge that the information it seeks is not relevant to its response to the pending dispositive summary judgment motion. Opp. at 8–9. It is extremely unlikely that the information sought could produce a viable defense for the State when the State's inquiry hinges on its belief that Plaintiffs have misrepresented their activities to the Court. *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)).[2] Finally, the "areas of inquiry" the State describes encompass huge amounts of information irrelevant even to their standing inquiry, including, among other extraneous topics: the "names and duties of Forward Montana related activities of any employees or volunteers," "[s]ources of funding for Forward Montana, either for operations or for the pursuit of its activities," the "annual budget and expenses for Forward Montana and bookkeeping and/or accounting system or principles utilized," similar information from MACDL, as well as "[j]oint or coordinated efforts or projects between MACDL and any other similarly interested persons or organizations."

Despite complaining that Plaintiffs were not specific enough in identifying concerns, the State does not attempt to explain why these details—relating to Plaintiff organizations' funding sources, employee and volunteer names, annual budget and expenses and bookkeeping systems, or external relationships and associations—is needed for any purpose. It is unclear what possible theory of standing could implicate this information. The State offers no explanation.

CONCLUSION

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

[2] The State again inaccurately argues that "[i]f either or both of the organizations are not proper parties . . . the court must dismiss." Opp. at 9. While all Plaintiffs meet the standing requirements, it is well-established in Montana that only one need have standing for the case to remain live. *See Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 45 ("[T]he District Court, Landowners, and the Commission were correct in agreeing that if standing was established for one of the Landowners the suit could go forward, because the Landowners both sought to void the preliminary plat.") (adopting *Clinton v. New York*, 524 U.S. 417, 431 n.19 (1998)).

Respectfully submitted this 2nd day of December, 2021.

/s/ Raphael Graybill
Raphael J.C. Graybill
Graybill Law Firm, PC

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 2nd day of December, 2021, by email.

Patrick Risken
PRisken@mt.gov
Brent Mead
Brent.Mead2@mt.gov
David Dewhirst
David.Dewhirst@mt.gov
Office of the Attorney General
Justice Building, Third Floor
215 North Sanders Street
PO Box 201401
Helena, MT 59620-1401

Anita Milanovich
Anita.Milanovich@mt.gov
Office of the Governor
PO Box 200801
Helena, MT 59620-0801

/s/ Rylee Sommers-Flanagan
Upper Seven Law