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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. BDV-2021-611 **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs have moved for summary judgment on two counts—Count One (violation of the Single Subject Rule) and Count Two (violation of the Rule on Amendments)—of the Verified Amended Complaint. Resolution of these two counts in Plaintiffs' favor would be dispositive of the case. Senate Bill 319 ("SB319") plainly violates two of the Montana Constitution's

enumerated rules on lawmaking because it contains more than one subject and because its original purpose was altered during its passage through the legislature. *See* Mont. Const. art. V, §§ 11(1), 11(3).

Resisting summary judgment, the State again mischaracterizes Plaintiffs' arguments and fails to raise any dispute of material fact. On the merits, the State's central argument comes as a wish: would that SB319's title were written differently to omit the word "finance" from "campaign finance" so that the legislature could permissibly enact regulations on anything tangentially related to elections or civic life. But this was not the statute the legislature passed—and even if it were, the constitutional violations would remain. At bottom, no rhetorical parrying can change the inescapable conclusion that SB319 contains at least three distinct subjects and lost its original purpose during the free conference committee. If ever a bill violated the single subject rule and the amendment rule, this is it. SB319 violates the Montana Constitution, and the Court should grant Plaintiffs' Motion for Summary Judgment.

ARGUMENT

I. SB319 violates Article V, Section 11 because it contains multiple subjects and because its purpose was fundamentally changed as it passed through the legislature.

In its response, the State argues at several points that SB319's title adequately expresses the bill's subject matter. Def.'s Br. in Opp. to Ps.' Mot. for Summ. J., at 10–14 ("Def.'s Opp."). Plaintiffs agree. The free conference committee amended SB319's title and contents to include multiple subjects. Counts One and Two do not challenge SB319 under the Title Rule, which provides a separate restraint on lawmaking provided in the Montana Constitution. SB319 violates the Montana Constitution because it contains multiple subjects, which were introduced—at the last

minute—to a bill that began with only one subject.[1] As legislators themselves describe it, SB319 was hijacked.

A. The term "campaign finance" means what it says.

In effect, the State's proposed interpretation of SB319 reads the word "finance" out of the phrase "campaign finance" in the bill's title. This contravenes the most basic principles of statutory interpretation in Montana. Section 1-2-101, MCA. Still, the State makes several attempts at explaining how SB319's title, which begins with the phrase, "An act generally revising campaign finance laws," was all along intended to encompass the disparate subject matter presented in Sections 21 and 22 (just hours before the session concluded). No such creative reading can save the bill. *See Comm'r of Pol. Pracs. v. Mont. Republican Party*, 2021 MT 99, ¶ 12, 404 Mont. 80, 485 P.3d 741 ("[W]hen statutory language is clear and unambiguous, we must discern and effect legislative intent from the plain meaning of the language used without further resort to means of statutory construction.") (cleaned up).

To begin, the State argues the term "campaign finance" is defined broadly because the term "political committee" is defined broadly. Def.'s Opp. at 11 ("The breadth of campaign finance regulation is inherent in the definition of our laws.") (citing § 13-1-101(32), MCA, defining the

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[1] The State conflates deficient titles with single subject violations and relies on several cases that deal exclusively with title deficiencies, apparently in defense of SB319's title. *See, e.g., MEA-MFT v. State*, 2014 MT 33, ¶ 11 (agreeing that a legislative referendum title was confusing and directing the Attorney General to revise the ballot statement); *Sigety v. State Bd. of Health*, 157 Mont. 48, 50–54 (1971) (discussing whether a bill regulated more than "dredge mining" when only "dredge mining" appeared in the title and holding that it did not); *Helena v. Omholt*, 155 Mont. 212, 219–222 (1970) (finding an appropriations bill title deceptive and misleading).

But title deficiencies and single subject violations, while sometimes related, are not one and the same. *See, e.g., State v. Anaconda Copper-Min. Co.*, 23 Mont. 498, 59 P. 854, 855 (1900) (acknowledging a distinction between bills that "embraced more than one object, or, if [embracing] but one object," suffered an insufficient title) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 155 (1883)).

term "political committee"). But the definitions of other words and phrases cannot give different meaning to "campaign finance." *See Comm'r of Pol. Pracs*, ¶ 12 (rejecting party's plea to interpret statute by reference to others where statutory language was unambiguous). The State's reading violates the principle that where "the language is clear and unambiguous, no further interpretation is required." *Rausch v. State Comp. Ins. Fund*, 2002 MT 203, ¶ 33, 311 Mont. 210, 54 P.3d 25. *See also Bullock v. Fox*, 2019 MT 50, ¶ 52, 395 Mont. 35, 435 P.3d 1187. The term "campaign finance" is clear on its own terms and requires no assistance from other phrases.

Next, the State would prefer the Court to understand the phrase "campaign finance" to incorporate the phrases "campaign practices" or "election practices." *Id.* at 12–13. Because these terms are sometimes paired together in other contexts, the State suggests that the phrase "election practices" is implicitly included. *Id.* at 13. But SB319 does not regulate "election practices," and neither banning political committees from engaging in selected First Amendment activities based on location nor imposing new criteria for judicial recusals are campaign *finance* regulations. It is axiomatic that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA.

The plain language of SB319's title—particularly when compared with the language in its title when first introduced, Affidavit of Brent Mead, Ex. E—provides the best evidence that SB319 contains at least three subjects and was fundamentally altered during the free conference committee's amendment process. *See Matter of N.A.*, 2021 MT 228, ¶ 11 ("If the intent can be determined from the plain language of the statute, a court may not go further and apply any other means of interpretation."). The plain language refutes the State's argument: SB319's title says that it is about "campaign finance laws," but its text includes regulations unrelated to campaign

finance. *Cf. Yegen v. Bd. of Com'rs of Yellowstone Cty.*, 34 Mont. 79, 85 P. 740 (1906) (invalidating certain code sections not contemplated in an act's narrower title and commenting that if "the act had been entitled 'An act to protect the public health,' then it might have included local and county boards as subsidiary instrumentalities to accomplish the general purpose so declared").

B. Section 21 regulates activities, not contributions and expenditures.

The State claims that "section 21 plainly governs political committee expenditures and contributions." *Id.* (citing §§ 13-1-101(9), (19), MCA). But the code sections the State cites, which define the terms "contribution" and "expenditure," bear no relationship to Section 21—not least because neither term appears in its text. Section 13-1-101(9)(a) defines "contribution" to mean the receipt "by a candidate or a political committee of . . . anything of value to support or oppose a candidate or a ballot issue" or "an expenditure . . . reportable . . . as a contribution," or "the receipt by a political committee of funds transferred from another political committee," or "the payment by a person other than a candidate or political committee" to compensate for another person's services "to a candidate or political committee." Sections 13-1-101(9)(a)(i)–(iii), MCA. Subsection (9)(b) expressly states that the term contribution *does not* refer to "services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee," among other specific items. *Id.* § 13-1-101(9)(b)(i). Subsection (19) defines "expenditure" to mean "anything of value" made by a political committee "to support or oppose a candidate or a ballot issue," or used "in making independent expenditures or in producing electioneering communications." *Id.* §§ 13-1-101(19)(a)(i)–(iii).

By contrast, Section 21 has nothing to do with money and elections. It bars political committees from engaging in specific activities in specific locations—that is, it prohibits "voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts,

or voter turnout efforts" for any and all elections inside residential, dining, and athletic facilities on campus. SB319 § 21(1), Ex. B to Affidavit of Raphael Graybill (Aug. 18, 2021). Section 21 regulates First Amendment *conduct* and applies to voting-related activities, not contributions or expenditures. It is difficult to leap with the State to the conclusion that Section 21 governs "expenditures and contributions" because the State offers no explanation to connect these activities and definitions. If Section 21 does regulate political committees' permissible contributions and expenditures, it does so not only without saying what it's doing, but while simultaneously ignoring applicable definitions and exclusions, like volunteer time. *See* § 13-1-101(9)(b)(i), MCA. Fatal to the State's reading, Section 21 makes no mention of money. That tracks, because Section 21 is not about spending, but is instead about regulating First Amendment conduct and the content of speech.

C. Section 22 imposes a new judicial recusal standard.

Regarding Section 22, the State claims that judicial recusal standards are necessarily campaign finance regulations. Def.'s Opp. at 13–14. But just as with Section 21, Section 22 regulates conduct—not campaign finance.

Section 22 has no effect on campaign finance law in Montana. At most, it references contribution limits as the antecedent condition for requiring judges to recuse themselves from cases. Sections 21 and 22 do not change Montana's campaign finance laws. Attempting to recast these provisions as "campaign finance" provisions cannot alter their substance, which does not regulate money in politics—and which bears no relationship to SB319's original purpose of creating and regulating joint fundraising committees.

The State's principal case, *Caperton v. A.T. Massey Coal Co.*, reinforces that point. 556 U.S. 868 (2009). There, the Supreme Court was faced with an extreme case in which a

defendant had donated $3 million to a West Virginia Supreme Court Justice who then voted to reverse a $50 million verdict. *Id.* at 890. The Court found that the Justice's failure to recuse violated the Due Process Clause, which "demarks only the outer boundaries of judicial disqualifications." *Id.* at 889. Thus, some states require recusal based on campaign contributions, "to maintain the integrity of the judiciary and the rule of law." *Id.* Recusal laws generally regulate judicial conduct and provide definitions of bias and prejudice, which may or may not be premised on financial contributions. *See, e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821–22 (1986) ("[N]o judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.'") (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Section 22 is a confusing, last-minute attempt to regulate recusal. It makes no changes to existing laws on campaign contributions, instead transforming a prior contribution into a per se conflict of interest. Fundamentally, Section 22 is about judges and what requires their recusal.

D. Until the last-minute amendments, SB319 was a law about campaign finance.

When first introduced, SB319 was not about political speech or judicial recusal. Rather, SB319 was introduced as an act "GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING," and amending related code sections, which appeared exclusively in Title 13 and largely in Title 13, Chapter 37. *See* Mead Aff. Ex. E, at 1. Two provisions amended Title 13, Chapter 35 by inserting the phrase "or a joint fundraising committee" in two code sections related to anonymity in election materials. *Id.* at 13, 14. The bill included only one substantive new section, which created the concept of a "joint fundraising committee" in the code. *Id.* at 1–5. Section 20 provided a codification instruction that Section 1 would be "codified as an integral part of Title 13, chapter 37, part 2." *Id.* at 27.

The State claims that where Sections 21 and 22 are codified is irrelevant to understanding whether they are consistent with the rest of SB319. Def.'s Opp. at 14–15. For comparison, the State turns to a bill passed in 1995 that amended five titles across the code. Def.'s Opp. at 15. But bills that comply with the single subject rule and the rule on amendments are not helpful interpretive tools for understanding bills, like SB319, that obviously do not. The question is not whether a bill amends different code sections but 1) whether the different code sections amended treat the same subject matter and 2) whether the amendments across code sections are consistent with the bill's original purpose. If the State's example were like this case, the 1995 legislature would have set out to adjust state employee salaries only to have a free conference committee amend the bill to impose new ethical obligations on county employees making over a certain amount and to require supervisors to engage in different reporting practices. Despite having some relationship to state employees and their salaries, those changes would be, as here, of a different kind than what was contemplated in the original legislation. And the titles and chapters to be amended might still be helpful evidence of new subject matter and a change in purpose, but the point would be to compare what the bill first contemplated with what it later became.

Certainly, Plaintiffs refer to the codification as evidence of the larger point—that Sections 21 and 22 are unlike the rest of SB319. *Cf. Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute."). Before the free conference committee met, SB319 was a dramatically different bill.

The State also argues that because the Governor vetoed Senate Bill 231 for violating Article V, Section 11, and did not veto SB319, the latter must be constitutional. Def.'s Opp. at 16. Of course, the Governor's vetoes are—by constitutional design—exercises of executive discretion.

They establish no legal precedent, nor could they under Montana's separation of powers. Mont. Const. art. III, § 1 ("No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others"); *Bullock*, ¶ 63 (executive branch legal opinion not binding on court interpretating issue of statutory construction).

As the State points out, there are scant examples of courts striking down laws for single subject violations, *see* Def.'s Opp at 15–16, but this only goes to show how easy it is to comply with the Montana Constitution's modest rules on lawmaking—and SB231's veto provides a helpful, on-point example.

E. Single subject violations are not normally severable.

Sections 21 and 22 could have been passed as separate laws, but they were not. If the three subjects—at minimum—in SB319 do not violate the single subject requirement, then it is a requirement so accommodating that it can serve no purpose. On its face, SB319 violates the Montana Constitution, Article V, Sections 11(1) and 11(3).

"[I]f, after giving the act the benefit of all reasonable doubt, it is apparent that two or more independent and incongruous subjects are embraced in its provisions, the act will be held to transgress the constitutional provision, and to be void." *Evers v. Hudson*, 36 Mont. 135, 92 P. 462, 465–66 (1907). The legislature passed a bill that intertwined three or more subjects. The bill's defect is in its passage. Thus, there is no principled basis on which to sever one section over another. The constitutional infirmity affects the whole bill, and thus the whole bill is void. *Cf. MACo v. State*, 2017 MT 267, ¶ 51, 389 Mont. 183, 404 P.3d 733 (holding, in the analogous context of the Constitution's separate vote requirement, that if violated, it "void[s the constitutional initiative] in its entirety because the constitutional defect lies in the submission of [the proposed amendment] to the voters of Montana with more than one constitutional amendment").

II. Plaintiffs have standing; the State's new contentions are irrelevant.

As the State concedes, the Court has determined that Plaintiffs have standing. Def.'s Opp. at 2, 4. Accordingly, Plaintiffs did not present further evidence of their standing when they filed their brief in support of their motion for summary judgment. The State now asks the Court to reopen the issue of standing. The Court should construe the State's request as a motion for reconsideration, which should be denied, both because reconsideration of a prior motion on the merits is categorically disallowed and because the State did not even attempt to meet any potentially applicable standard. *See, e.g., Jonas v. Jonas*, 2010 MT 240N, ¶ 10, 359 Mont. 443, 249 P.3d 80 ("[S]eeking to relitigate old matters, or raising arguments that could or should have been raised before judgment issued, should not be the subject of a Rule 59 motion. Reconsideration of an earlier motion on its merits cannot be the subject of a Rule 60(b) motion).") (citations omitted).

But even if it were appropriate to consider new evidence on this issue at this stage, the State's argument is without merit. Plaintiffs have standing because if enforced, SB319 will concretely harm them.

As to Plaintiff Forward Montana, the State asserts that "existing campus policy demonstrates the inadequacy of Forward Montana's 'mere allegations.'" Def.'s Opp. at 4. In support, the State introduces four campus policy documents that limit certain types of speech on various campuses. *See* Mead Aff. Exs. A–D. Aware that this evidence does not speak to anywhere near all public universities in Montana—and that Plaintiffs' allegations in the Verified Amended Complaint refute the assertion that Forward Montana is already precluded from engaging in voter registration activities in residential, dining, and athletic facilities, VAC ¶¶ 1, 91—the State argues

that the Court should construe the documents to mean that Plaintiff Forward Montana lied in the Verified Amended Complaint. Def.'s Opp. at 6.

But it is unclear how these documents can undermine Plaintiffs' allegations. Not one references voting or voter registration or get out the vote efforts or any similar term as they appear in Section 21. Nor does the State offer even a hint as to what qualifies as "political campaign activity." *See* Mead Aff., Ex. C, at 1–2. Even assuming these policies apply to voter registration efforts, Plaintiffs are still able to work within the parameters of each campus policy to engage in appropriate nonpartisan voter registration. And Plaintiffs have repeatedly stated that SB319 will impact their planned activities. *See* VAC ¶ 1, 91; Ps.' Br. in Opp. to Def.'s Mot. to Dismiss, at 3 (Aug. 18, 2021).

If, however, the Court is inclined to reopen consideration of the standing issue, Plaintiffs offer the Affidavit of Amara Reese-Hansell, Ex. 1, in direct response to the State's re-raised standing arguments. As Reese-Hansell explains, Forward Montana regularly conducts voter registration activities in dining facilities and in or near athletic facilities on the Montana State University campus. Ex. 1, Reese-Hansell Aff. ¶¶ 5, 8, 9. Reese-Hansell considers tabling indoors "crucial" in a "state where weather can be extreme and unpredictable for significant portions of the year." *Id.* ¶ 8. In no uncertain terms, Reese-Hansell reports that "[i]f SB319 were implemented, it would severely alter the impact of [Forward Montana's] work," *id.* ¶ 11, because "[b]eing prohibited from registering voters in residential, dining, and athletic facilities across the board would hugely reduce our availability to students," *id.* ¶ 12. In other words, Plaintiff Forward Montana obviously has standing to pursue the claims as set forth in the Verified Amended Complaint.

As to the attorney Plaintiffs' standing, the State recycles arguments for a third time, based on the view that Plaintiffs' assert a right to appear before particular judges. Def.'s Opp. at 6–9. But this is not the injury Plaintiffs allege, no matter how many times the State characterizes it as such. Rather, attorney Plaintiffs' injury arises from prior contributions made to nonpartisan judicial campaigns that will trigger judicial recusals, slowing cases before judges who must now recuse, implicating Plaintiffs' business interests and Plaintiffs' professional duties to clients.

Finally, Plaintiffs again note that while they have established standing under the most demanding standard, suits brought pursuant to Article V, Section 11(6) are unlikely to operate according to traditional standing principles because the cause of action arises in the Constitution itself and provides no special standing requirements. *See, e.g.*, *Schoof v. Nesbitt*, 2014 MT 6, ¶ 21, 373 Mont. 226, 316 P.3d 831 ("Since the alleged injury is premised on the violation of constitutional and statutory rights, standing depends on whether the constitutional or statutory provision . . . can be understood as granting persons in the plaintiff's position a right to judicial relief.") (citation and internal quotation marks omitted). Plaintiffs have established standing.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request this Court grant their Motion for Summary Judgment on Counts One and Two of the Verified Amended Complaint and issue a declaration that SB319 violates Article V, Sections 11(1) and 11(3) of the Montana Constitution and is therefore void in its entirety, or, in the alternative, that Sections 21 and 22 are void.

Respectfully submitted this 3rd day of January, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 3rd day of January, 2022, by email.

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