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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 **BRIEF IN OPPOSITION TO STATE'S MOTION TO STRIKE AFFIDAVIT OR VACATE HEARING**

At the preliminary injunction stage, the State argued that Plaintiffs lack standing. Without reaching standing, the Court granted Plaintiffs' preliminary injunction, holding that they had made a prima facie case of entitlement to relief or a prima facie case of irreparable injury resulting from the loss of a constitutional right. Prelim. Inj. Order at 5 (July 1, 2021). In its

motion to dismiss, the State again argued that Plaintiffs lack standing. The Court denied the motion to dismiss and determined that Plaintiffs had established standing. Order on Mot. to Dismiss at 4–6 (Oct. 6, 2021). In response to Plaintiffs' motion for summary judgment, the State filed a Rule 56(f) motion, arguing that Plaintiffs lack standing. The Court ordered the State to respond to the summary judgment motion. Ex. A to Ps.' Br. in Supp. of Mot. for Protective Order, Hrg. Tr., 12:6, 9–10 (Oct. 25, 2021). The State then sought discovery related to Plaintiffs' standing. Plaintiffs filed a motion for a protective order because the requested discovery was burdensome, invasive, and unnecessary. The Court granted Plaintiffs' protective order. Order on Mot. for Protective Order at 2 (Dec. 7, 2021). Most recently, the State used its opposition to Plaintiffs' motion for summary judgment to argue for the fifth time that Plaintiffs failed to establish standing, in what can only be viewed as a buried cross-motion for summary judgment on standing or an ill-conceived motion to reconsider the Court's rulings on standing.

In response to that apparent motion to reconsider, Plaintiffs filed an affidavit, which only affirms allegations in Plaintiffs' Verified Amended Complaint ("VAC"). The affidavit is proper, but it is not necessary to consider it to resolve Plaintiffs' motion for summary judgment, as the affidavit responds solely to the State's fifth challenge to standing. Thus, Plaintiffs submit that the affidavit only bears consideration should the Court wish to entertain the State's standing arguments. Other arguments to delay resolution of the summary judgment motion by vacating the hearing next week are just that: more delay.

ARGUMENT

As Plaintiffs' reply in support of their motion for summary judgment makes clear, the affidavit of Amara Reese-Hansell has been proffered only should the Court be "inclined to reopen consideration of the standing issue." Ps.' Reply in Supp. of Ps.' Mot. for Summ. J., at 11

(Jan. 3, 2022) (hereinafter "Ps.' Reply"). Indeed, Plaintiffs' primary argument is that the Court should deny the State's improper motion for reconsideration and need not consider the Reese-Hansell affidavit to do so. Ps.' Reply at 10. Regardless, the affidavit's inclusion is itself proper.

First, the Reese-Hansell Affidavit establishes standing without adding facts related to the motion for summary judgment to the record. *See, e.g., Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 n.15 (1976) ("The affidavits submitted by respondents merely supported the allegations of the complaint relative to establishing standing, rather than going beyond them. Thus, the standing analysis is no different, as a result of the case having proceeded to summary judgment, than it would have been at the pleading stage.") (citing *Warth v. Seldin*, 422 U.S. 490, 501–02 (1975)).

Second, whether construed as an improper motion to reconsider, a cross-motion for summary judgment, or something else, the State's opposition to Plaintiffs' motion for summary judgment re-raises an issue this Court has resolved (multiple times). The State claims Plaintiffs should have predicted it would raise the same standing arguments—referencing facts long at their disposal but never previously mentioned—for the fifth time in response to Plaintiffs' motion for summary judgment. But these arguments do not relate to Plaintiffs' motion for summary judgment, and so Plaintiffs may respond to them with an affidavit that addresses the issues raised for the first time in the State's brief. *See, e.g., Wash. State Dairy Fed'n v. U.S. Envtl. Prot. Agency*, 855 F. App'x 376, 377 (9th Cir. May 14, 2021) (unpublished) ("The addendum to petitioners' reply brief contains a declaration . . . that addresses [petitioner's] interest in this litigation. . . . We conclude petitioners have alleged facts sufficient to show [organizational standing]."). The affidavit was an appropriate filing in response to the State's buried motion.

I. Plaintiffs' affidavit properly goes to establishing standing.

The State confuses standing at the time the complaint was filed with a fictional requirement that standing may only be established through the complaint itself. But courts routinely rely on supplemental declarations, affidavits, and other evidence developed and submitted in the course of litigation to establish a plaintiff's standing. *Cmtys. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 685 (D.C. Cir. 2004) (holding that a belated declaration made "it patently obvious that . . . [a member plaintiff] will suffer a cognizable 'injury in fact' as a result of the disputed [law]. Because this conclusion is irrefutable, [defendant] was not prejudiced by its inability to respond to the supplemental declarations."); *cf. Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170–71 (11th Cir. 2006) (choosing to consider supplemental declarations when standing was raised for the first time on appeal and where declarations "resolve[d] the standing issue and illuminate[d] the mootness issue").

There is a difference between facial and factual standing challenges. *Mont. Envtl. Info. Ctr. v. Bernhardt*, 2020 WL 6042291, at *1–2 (D. Mont. Oct. 13, 2020). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face. . . . By contrast, in a factual attack, the challenger disputes the truth of the allegations." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Factual attacks are generally resolved "under the same evidentiary standard that governs in the summary judgment context." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Safe Air*, 373 F.3d at 1039. But the State's confusing presentation of this issue makes it difficult to decipher its

intent. The State did not actually move for summary judgment on standing, but instead repackaged its arguments to reiterate its claim that "Plaintiff Forward Montana should be dismissed for lack of standing because of their continued failure to state an injury resulting from SB 319." Opp. at 6.

The Court should reject this as an improper motion for reconsideration. It need not consider the Reese-Hansell affidavit to do so, but could, in its discretion, determine that the Reese-Hansell affidavit irrefutably suffices to dispel any lingering concerns relating to injury-in-fact. *See Cmtys.' Against Runway Expansion*, 355 F.3d at 685.

II. Plaintiffs' affidavit responds to the State's request to reconsider standing.

The State dedicates Section I of its opposition to Plaintiffs' summary judgment motion to again disputing whether Plaintiffs have established standing. State's Br. in Opp. to Mot. for Summ. J., 4–9 (Dec. 20, 2021) (hereinafter "Opp."). While Plaintiffs vigorously dispute the contention that they failed to adequately allege standing in their VAC, the State introduced for the first time what it described as "clear evidence" that Plaintiff Forward Montana lacked standing. *Id.* at 4. Understanding Section I as a request for reconsideration, *cf. Jonas v. Jonas*, 2010 MT 240N, ¶ 10, 359 Mont. 443, 249 P.3d 80,[1] Plaintiffs responded with evidence that unassailably establishes their standing and responds directly to the newly cited but not newly available evidence that the State introduced, *see* Opp. at 4–6.

The only statement the State makes in support of its request to vacate the hearing in favor of seeking discovery is that the affidavit presents a factual dispute. Opp. at 4. But it doesn't. The State has repeatedly claimed that Plaintiffs lack standing, although they have established

[1] "[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.)

injury concretely and clearly. The affidavit responds to the only factual claims the State has ever made about standing, which were raised in opposition to Plaintiffs' motion for summary judgment despite the State's many previous attempts to cast doubt on Plaintiffs' standing. Plaintiffs are amenable to the Court disregarding the Reese-Hansell affidavit if it is not helpful, as Plaintiffs contend that the State's opposition was an improper motion for reconsideration or a buried cross-motion for summary judgment. *Cf. Cramer v. Skinner*, 931 F.2d 1020, 1025 (5th Cir. 1991) (applying the summary judgment standard and considering only "admissible summary judgment evidence" to conclude that plaintiff had established standing). Indeed, had Plaintiffs viewed the Reese-Hansell affidavit as necessary to their motion for summary judgment, they would have filed it with their opening brief. Whatever the status of the Reese-Hansell affidavit, both Plaintiffs and the State are prepared for the summary judgment hearing because with or without it, Plaintiffs have properly alleged and established standing in the normal course and the summary judgment motion is about purely legal questions going to the merits of the case.

CONCLUSION

The Court should deny the motion to vacate the hearing and the motion to strike.

Respectfully submitted this 21st 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 21st day of January, 2022, by email.

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