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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 SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs Forward Montana, Leo Gallagher, Montana Association of Criminal Defense Lawyers, and Gary Zadick, through counsel of record, hereby submit this Brief in Support of the concurrently filed Application for Preliminary Injunction.

As enacted, Senate Bill 319 ("SB 319") plainly violates two of the Montana Constitution's only rules for lawmaking: it fails to conform to the "single subject rule" and, separately, it violates the prohibition against amending bills such that they fail to retain their original purpose. Mont. Const. art. V, §§ 11(3), (1). The Montana Constitution allows private enforcement against bills that contravene these requirements. Mont. Const. art. V, §§ 11(6). To preserve the status quo during the pendency of this litigation, the Court should issue a preliminary injunction.

First, Plaintiffs have established a prima facie case that SB319 violates Article V, Section 11 of the Montana Constitution and are likely to succeed on the merits. The Montana Constitution forbids the legislature from passing bills that contain more than one subject, and from so modifying bills as they pass into law that their original purpose is changed. SB319 contains three separate subjects: joint fundraising committees, judicial recusal, and a ban on certain organizing activities on public university campuses. And when the free conference committee added the provisions on judicial recusal and campus organizing, the bill's original purpose was fundamentally altered. This showing alone entitles Plaintiffs to a preliminary injunction.

Second, Plaintiffs have also established that if SB319 takes effect during the pendency of this litigation, it will cause grave or irreparable injury to Plaintiffs. It is well established that constitutional violations give rise to irreparable injury. SB319's very structure and enactment reflect a judicially-cognizable constitutional harm under Article V, Section 11 of the Montana Constitution. Further, SB319 violates Plaintiffs' constitutional rights in myriad other ways, including rights related to court access and free speech and free association rights, among others. SB319 will cause grave or irreparable injury to Plaintiffs in a very tangible sense as well. On

July 1, 2021—SB319's effective date—judges across the state will be required to recuse themselves if any attorney or party in any case before them has donated more than $90 in the last six years to their campaigns for judicial office. Judges must also recuse if a party or attorney donated any amount of money to a political committee that makes an expenditure on the judge's behalf of more than $90—even if the judge is unaware of the individual's donation. As detailed in the supporting affidavit of Colin Stephens, the *en masse* recusals required under SB319 will substantially disrupt the administration of justice in Montana and effect grave and irreparable harm on Plaintiffs. This harm is particularly acute with respect to pending criminal cases.

For these reasons, Plaintiffs are entitled to a preliminary injunction to prevent SB319 from taking effect during the pendency of this case. Plaintiffs have established a prima facie case, showing both a likelihood of success on the merits and demonstrating the grave or irreparable injury Plaintiffs will suffer if SB319's provisions come into effect on July 1, 2021. Accordingly, Plaintiffs respectfully request that the Court issue an order to show cause why a preliminary injunction should not be issued and, after a hearing, enter a preliminary injunction.

BACKGROUND – SB319

Senator Greg Herz introduced Senate Bill 319 on February 19, 2021. Verified Am. Compl. ¶ 21 (*hereinafter* VAC). In its original form, SB319 was introduced to revise Montana campaign finance law governing joint fundraising committees. VAC ¶ 22; Ex. A, SB319, § 1(1)(a) ("One or more candidates for a statewide office and political committees may join together to establish a joint fundraising committee to act as a fundraising representative for all participants."). SB319 at first proceeded normally, being presented to the Senate State Administration Committee, considered in a hearing, advanced to the Senate Floor and passed through second and third readings before following the same progression through the House of

Representatives. VAC ¶ 23. Because legislators made minor amendments to bill during this process, the two chambers passed slightly different versions of SB319. VAC ¶¶ 24–25.

When bills require reconciliation, the introducing chamber "may ask a conference committee to resolve the differences." VAC ¶ 26 (quoting Leg. Servs. Division, *Conference Committees: A Legislator's Guide to Reconciling Bill Differences Between Chambers*, 1 (March 2011) available at https://leg.mt.gov/content/For-Legislators/Publications/conference-committees.pdf). But where the conference committee is unable to agree, "either chamber may request a free conference committee," which "can propose amendments to a bill in its entirety and is not confined to debating a particular amendment." *Id.* (quoting Leg. Servs. Division at 1). Consistent with the Constitution, the 67th Legislature's Join Rules expressly limit this amendment process "to consideration of amendments that are **within the scope of the title of the introduced bill.**" VAC ¶ 27 (quoting Senate Joint Resolution No. 1, Joint Rule 30-30-(3)(a), at 12–13 (67th Leg.)) (emphasis added). Rather than requesting a conference committee, however, the chambers proceeded directly to appointing a free conference committee. VAC ¶ 28.

The free conference committee meeting that radically transformed SB319 lasted just 16 minutes. VAC ¶ 29 (citing Mont. Leg., Senate Free Conf. Comm. on SB319, Hrg. Video (April 27, 2021) available at http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/43496?agendaId=215509#agenda_).

In commandeering the bill, the committee adopted four amendments, including two that introduced entirely new subject matter. *Id.* The first—now SB319, Section 21—bans election-related speech and political activities in college dorm rooms and across university dining and athletic facilities. VAC ¶ 30. As the amendment sponsor put it, "I have no problem if kids vote,

but I think . . . we got to quit treating . . . our university students like they're some kind of [*inaudible*] to be exploited for, you know, really activist causes. . . . If you want to go run your 'get out the vote' plan, do it . . . like we did in the old days, where you set up a booth in the student union building." VAC ¶ 31 (quoting Senate Free Conf. Comm. on SB319, Hrg. Video at 15:03:34). Section 21 prohibits "any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts for a federal, state, local, or school election inside a residence hall, dining facility, or athletic facility operated by a public postsecondary institution." VAC ¶ 30 (quoting Ex. A, § 21(1)). These terms are not defined. The provision includes a private cause of action. *Id.* (quoting Ex. A, § 21(3)). The term "voter turnout efforts" is undefined. Violators may face penalties of $1,000 per day. *Id.*

The second unrelated amendment, appearing as SB319, Section 22, requires that judges recuse themselves if, in the last six years, any party or attorney appearing before them contributed more than half of a maximum donation—$91 or more—to their election, or donated to any political committee that in aggregate made expenditures amounting $91 or more in support of the judge. VAC ¶ 32; Ex. A, § 22(1).

Neither amendment relates to SB319's original subject matter of "revising campaign finance laws; creating joint fundraising committees; [and] providing for certain reporting." VAC ¶¶ 33, 37. The committee heard no public comment on the amendments. VAC ¶ 34. Both chambers passed the new, multi-subject SB319 on April 28. VAC ¶ 36.

As passed, SB319's title is as follows:

> AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; ESTABLISHING THAT IF STUDENT ORGANIZATIONS THAT ARE REQUIRED TO REGISTER AS POLITICAL COMMITTEES ARE FUNDED THROUGH ADDITIONAL OPTIONAL STUDENT FEES, THOSE FEES MUST BE OPT-IN;

PROHIBITING CERTAIN POLITICAL ACTIVITIES IN CERTAIN PLACES OPERATED BY A PUBLIC POSTSECONDARY INSTITUTION; PROVIDING FOR JUDICIAL RECUSALS UNDER CERTAIN CIRCUMSTANCES; PROVIDING PENALTIES; AMENDING SECTIONS 13-1-101, 13-35-225, 13-35-237, 13-37-201, 13-37-202, 13-37-203, 13-37-204, 13-37-205, 13-37-207, 13-37-208, 13-37-216, 13-37-217, 13-37-218, 13-37-225, 13-37-226, 13-37-227, 13-37-228, AND 13-37-229, MCA; AND PROVIDING AN EFFECTIVE DATE.

VAC ¶ 37; Ex. A, at 1. The Governor signed SB 319 into law on May 12, 2021. VAC ¶ 38.

STANDARD

A preliminary injunction is appropriate under § 27-19-201, MCA, on any one of "several enumerated grounds." *Weems v. State*, 2019 MT 98, ¶ 17, 440 P.3d 4, 395 Mont. 350. As relevant here, § 27-19-201, MCA, identifies either of the following sets of circumstances as justifying issuance of a preliminary injunction:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant.

When considering a preliminary injunction motion, "the trial court 'should restrict itself to determining whether the applicant has made a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had.'" *Weems*, ¶ 18 (quoting *Knudson v. McCunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995)). To make a sufficient showing, applicants need "only establish a prima facie case, not entitlement to final judgment." *Id.* This includes in the context of a bringing constitutional challenge. *Id.* "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Id.* (quoting *Prima facie*, Black's Law Dictionary (10th ed. 2014)). Thus, when resolving a request for a preliminary injunction, courts do "not determine the underlying merits of the case." *Id.*

The "loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 296 P.3d 1161, 1165, 366 Mont. 224, 229 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see City of Billings v. Cty. Water Dist. of Billings Heights*, 935 P.2d 246, 251, 281 Mont. 219, 227 (1997) ("[R]equiring [plaintiff] to prove the statutes unconstitutional beyond a reasonable doubt would be directly at odds with this Court's holdings that a successful applicant for a preliminary injunction need only establish a prima facie case.").

ARGUMENT

I. Plaintiffs are likely to succeed on the merits

A. Constitutional Framework

The Montana Constitution reflects the framers' considered judgment that transparency and public participation improve the legislative process. *See, e.g.*, Mont. Const. art. II, §§ 1, 2, 8 and 9. Bills must therefore be prepared in the bright light of day, where the public can both scrutinize and contribute. Mont. Const. art. V, § 11. The Montana Constitution protects these values by imposing constitutional requirements on the lawmaking process to ensure that the public can meaningfully participate, and that eleventh-hour, backroom deals do not become law.

Within this framework, Article V, Section 11 of the Montana Constitution provides,

> (1) **A law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose.** No bill shall become law except by a vote of the majority of all members present and voting.
>
> (2) Every vote of each member of the legislature on each substantive question in the legislature, in any committee, or in committee of the whole shall be recorded and made public. On final passage, the vote shall be taken by ayes and noes and the names entered on the journal.
>
> (3) **Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.**

> (4) A general appropriation bill shall contain only appropriations for the ordinary expenses of the legislative, executive, and judicial branches, for interest on the public debt, and for public schools. Every other appropriation shall be made by a separate bill, containing but one subject.
>
> (5) No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.
>
> **(6) A law may be challenged on the ground of noncompliance with this section only within two years after its effective date.**

(emphasis added).

The same principles of orderly, transparent lawmaking are repeated throughout the Montana Constitution. For example, the provisions governing constitutional amendment by initiative require that distinct amendments to the Constitution be presented to voters separately to allow consideration of each by separate vote. Mont. Const. art. XIV, § 11 ("If more than one amendment [to the Constitution] is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately.").

Courts are unwavering in voiding lawmaking that fails to conform with these requirements. In 2017, for example, the Montana Supreme Court threw out a constitutional initiative that would have amended multiple parts of the Montana Constitution because it violated the single vote requirement. Justice McKinnon wrote on behalf of the Court, holding that the initiative "violates the separate-vote requirement and for that reason is void in its entirety" and explaining that,

> a constitutional amendment submitted to the electorate in violation of the separate-vote requirement is void 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.

MACo v. State, 2017 MT 267, ¶ 51, 389 Mont. 183, 205, 404 P.3d 733, 747 (quotation marks omitted).

The Court has described the purposes for the single subject rule and a closely related

rule—which requires that bills' titles accurately describe their contents—as they appeared in the 1889 Constitution this way:

> Stated briefly, those purposes are to restrict the Legislature to the enactment of laws the subjects of which are made known to the lawmakers and to the public, to the end that any one interested may follow intelligently the course of pending bills to prevent the legislators and the people generally being misled by false or deceptive titles, and to guard against the fraud which might result from incorporating in the body of a bill provisions foreign to its general purpose and concerning which no information is given by the title.

Johnson v. Meagher Cty., 116 Mont. 565, 155 P.2d 750, 752 (1945) (citing *State ex rel. Foot v. Burr*, 73 Mont. 586, 238 P. 585 (1925)).

During the 1972 Constitutional Convention, the framers revisited and strengthened these rules, adding a cause of action that allows bills to be challenged within two years of their passage. Delegate Nutting reiterated that the single subject rule would guard against "additional material" being "slipped in" to bills. Mont. Const. Conv., IV Verbatim Trans., at 647 (Feb. 22, 1972).

B. SB319 plainly violates the single subject rule

SB319 combines at least three disparate subjects. To start, SB319 contains at least three different subjects on its own terms. The text of the statute is plain, describing and regulating joint fundraising committees, judicial recusal, and a ban on specific political speech. The inherently discordant nature of these subjects is clear from the plain text of the statute. *See United States v. Gonzales*, 520 U.S. 1, 4 (1997) ("Our analysis begins, as always, with the statutory text.").

There are structural indicators that show SB319 violates the single subject rule as well. *Cf. Lamie v. U.S. Trustee*, 540 U.S. 526, 533 (2004) (finding the court of appeals correctly held to statute's plain language where "application of that plain language supports a reasonable

interpretation of the Bankruptcy Code"). SB319, Section 23 provides codification instructions for only four sections of the lengthy, multi-section bill. Two of those instructions are aimed squarely at the new—and discordant—Sections 21 and 22. That's because the vast majority of statutory changes set forth in SB319 revise Title 13, chapter 37, which governs "Control of Campaign Practices"—a sensible place for regulating the creation of joint fundraising committees. By contrast, Section 21 makes changes to Title 13, chapter 35, which governs "Election and Campaign Practices and Criminal Provisions," and Section 22 makes changes to Title 3, which pertains to the "Judiciary, Courts." In other words, SB319's impact on the overall statutory scheme is exceptionally broad—clear structural evidence that it contains multiple subjects because its provisions amend vastly different provisions of the code. *Cf. Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The stated intent of SB319 is to revise disparate parts of Montana state law, which are organized in different chapters according to varying subject matter. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 439 (1935) ("[T]he meaning of a statute is to be looked for, not in any single section, but in all parts together and in their relation to the end in view.").

Along similar lines, these three areas of regulation do not easily fit within a cohesive, single statutory scheme. The U.S. Supreme Court has explained that "a fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016). Again, it is SB319's own content and organization that demonstrates that SB319

pertains to different subjects. Under the Montana Constitution, these may not be "logrolled" into a single bill.

None of the single subject rule's exceptions apply. SB319 is not a bill of codification, appropriation, or general revision. To the extent SB319 purports to generally revise, its own title limits the scope of its revisions to campaign finance regulation. But Section 21 regulates campus organizing, and Section 22 regulates judicial recusal. Neither is "campaign finance regulation" even under the most strained, liberal construction of the term. The fact that SB319 sets out substantive regulation in disparate subject areas means that it cannot be a general revision bill by definition. A general revision bill hews to one subject while amending different sections of the code.[1]

The legislative history, discussed at length above, also supports the conclusion that SB319 contains three different subjects. Had the legislature intended to regulate all three areas of substantive law from the outset, it would have done so in three separate bills, open to deliberation and public comment and separate votes. Instead, the legislature added its extraneous amendments to SB319 less than 24 hours before the session ended and after SB319 had already passed both houses a first time—*as a bill about campaign finance*. The rationale offered by sponsors in the free conference committee leaves little doubt that the legislature knew what it was doing: commandeering SB319 through the free conference committee mechanism to pass

[1] General revision bills are an important lawmaking tool when used appropriately. For example, Lieutenant Governor Kristen Juras authored an excellent example of a bona fide general revision in the form of Senate Bill 325 ("SB325") during the 2019 legislative session, when she was a law professor in Missoula, MT. SB325 overhauled Montana's corporations code to conform with the latest model law. It was 228 pages long, with a title that covered two full pages. Though it amended many sections, the amendments were premised on a tightly-bound core of subject matter as part of a single, uniform plan.

these provisions because other opportunities in the normal course of the session were not available.

Finally, it bears noting that traditional severability doctrine does not apply to laws that violate the single subject rule. Rather, where an enacted bill contains multiple subjects, the defect is in the enactment of the bill itself and the law is void in its entirety. *Evers v. Hudson*, 36 Mont. 135, 92 P. 462, 465–66 (1907) (holding that the act "transgress[ed] the constitutional provision, and [was] void by reason thereof."); *see MACo v. State*, 2017 MT 267, ¶ 51, 389 Mont. 183, 205, 404 P.3d 733, 747 (holding that "violation of the separate-vote requirement . . . 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"). Ultimately, if "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*, 36 Mont. 135, 92 P. 462, 465–66.

Plaintiffs are likely to succeed on the merits of their claim and are therefore entitled to a preliminary injunction to prevent the bill from taking effect while this matter is pending.

C. SB319 violates the rule on amendments

When the Legislature added "two or more independent and incongruous subjects" to the provisions of SB319, *see Evers*, 36 Mont. 135, 92 P. 462, 465–66, it necessarily violated the rule on amendments as well. SB319 as passed failed to retain its original purpose because it covers two areas of extraneous substantive ground that it did not include when first introduced. *See* Mont. Const., art. V, § 11(1); *cf. State ex rel. Griffin v. Greene*, 104 Mont. 460, 67 P.2d 995, 996 (1937) (finding the original purpose of a bill preserved where the only change from its original introduction was "the amount of tax and the time when payable").

Even in this session, the Governor has vetoed other bills for contravening exactly these requirements after undergoing contortions in the amendment process. For example, in a recent veto letter the Governor commented that such an amendment process results in "poorly drafted" amendments and "in inconsistent and unpredictable applications amongst counties and unintended harmful consequences," which "require litigation to interpret." Letter fr. Governor Gianforte to President Blasdel and Speaker Galt re Senate Bill 231 Veto, at 1 (May 14, 2021), available at https://leg.mt.gov/bills/2021/AmdHtmS/SB0231GovVeto.pdf.

Under Article V, Section 11, Paragraph (3), Plaintiffs are likely to succeed on the merits of their claim that the extraneous provisions covering judicial recusals and campus organizing are void.

Plaintiffs have thus established a prima facie case that SB319 violates Article V, Section 11 of the Montana Constitution in at least two ways and are likely to succeed on the merits. Accordingly, the Court should issue a preliminary injunction.

II. SB319 will cause grave or irreparable harm if implemented on July 1

A preliminary injunction is intended "to prevent 'further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.'" *City of Billings*, 281 Mont. at 226, 935 P.2d at 250 (*quoting Knudsen*, 894 P.2d at 297–98). The status quo is "the last actual, peaceable noncontested condition which preceded the pending controversy." *Weems*, ¶ 26. While statutes enjoy a presumption of constitutionality, where plaintiffs are able to make "a prima facie showing [they] will suffer a harm or injury—'whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA," they are entitled to a preliminary injunction. *Driscoll v. Stapleton*, 2020 MT 247, ¶15–16, 401 Mont. 405, 414, 473 P.3d 386, 392.

Plaintiffs have established a prima facie case that absent a preliminary injunction, they will suffer irreparable harm.

First, SB319 gives rise to a constitutional harm under Article V, Section 11 of the Montana Constitution. When the injury alleged at the time of a motion for preliminary injunction is a constitutional violation, it "unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. Ongoing constitutional violations produce injuries that "cannot effectively be remedied by a legal judgment." *City of Billings*, 281 Mont. at 231, 935 P.2d at 253.

SB319 violates the single subject rule by regulating conduct in three different subject areas: 1) the creation of joint fundraising committees; 2) the content of certain election-related communications on public college and university campuses; 3) the circumstances in which judicial recusal is required. This alone is a cognizable constitutional injury under Article V, Section 11 of the Montana Constitution. *See Evers*, 36 Mont. 135, 92 P. 462, 465–66 (Where "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 by reason thereof."). In addition, SB319's passage through the lawmaking process separately violated the Constitution as the bill was profoundly altered from its original purpose through the addition of disparate unrelated measures. *See* Mont. Const., art. V, § 11(1); *cf. Greene*, 104 Mont. 460, 67 P.2d 995, 996 (finding the original purpose of a bill preserved where the only change from its original introduction was "the amount of tax and the time when payable").

Second, if SB319 is allowed to become effective on July 1, it will precipitate several clear and ongoing constitutional violations that are certain to cause Plaintiffs immediate, grave, and ongoing irreparable harm. Specifically, the judicial recusal requirements and campus organizing ban violate Plaintiffs' fundamental rights under the Montana and United States

Constitutions. The campus organizing ban, for example, prohibits political committees from engaging in election-related speech and assembly in certain campus environments and violates both the First Amendment and Montanans' fundamental free speech and assembly rights. Mont. Const. art. II, §§ 6 and 7. In no uncertain terms, this provision imposes a content-based restriction—banning a wide array of political activities in college dorm rooms and university dining and athletic facilities, including voter identification and registration drives, signature or ballot collection efforts, or "voter turnout efforts for a federal, state, local or school election," VAC ¶ 30; Ex. A, § 21(1)—on a class of individuals organized into a political committee. It was passed without reference to any compelling or substantial state interest. As the amendment sponsor put it, "I have no problem if kids vote, but I think . . . we got to quit treating . . . our university students like they're some kind of [*inaudible*] to be exploited for, you know, really activist causes. . . . If you want to go run your 'get out the vote' plan, do it . . . like we did in the old days, where you set up a booth in the student union building."[2] Senate Free Conf. Comm. on SB319, Hrg. Video at 15:03:34. An unreasoned preference for election-related speech to occur outside of dormitories is a far cry from a compelling or substantial state interest. Meanwhile it substantially injures Plaintiffs' rights to engage in constitutionally projected activity.

The judicial recusal requirements violate provisions of the Montana Constitution that secure access to the courts. *See, e.g.*, Mont. Const., art. II, §§ 16, 17, and 24. The requirements are vague, overbroad, and likely to impinge particularly on Montana's guarantees to redress and court access. Mont. Const. art. II, §§ 16, 17, and 24. The recusal provision also imposes a penalty on litigants and attorneys who have made or will make political contributions by rendering them unable to appear potentially before a whole array of judges whom they

[2] Ironically, this, too would likely be banned for political committees under SB319.

supported, even indirectly. *See Davis v. Fed. Elec. Com'n*, 554 U.S. 724, 737 (2008) (explaining that limits on expenditures "cannot stand unless they are 'closely drawn' to serve a 'sufficiently important interest,' such as preventing corruption and the appearance of corruption"). Such a penalty deters litigants and attorneys from participating in electing judicial officials—and "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *See McCutcheon v. Fed. Elec. Com'n*, 572 U.S. 185, 191 (2014).

Finally, as a practical matter, SB319's judicial recusal provisions will create chaos in the judicial system if they are allowed to take effect, and will gravely or irreparably injure Plaintiffs. If SB319's conflict of interest provisions take effect, there will be an *en masse* substitution of judges in every one of the cases in which the attorney Plaintiffs have contributed either more than $90 to the judge's campaign or any amount to an independent committee that spent more than $90 on the judge's behalf. Under SB319, the removals and substitution will occur all at the same time and without regard to how long each of the sitting judges has worked on a case. Affidavit of Colin Stephens ("Stephens Aff.") ¶ 24. The *en masse* substitution in these cases will require other judges in those districts (or, if necessary, substitute judges from other districts) to fit these cases into their existing caseloads. *Id.* ¶ 25.

By adding new judges "midstream" in these cases, the benefits of existing judges' knowledge and experience in each case will be lost. *Id.* ¶ 26. This will result in prejudice to both parties and additional burdens for the new substitute judges. *Id.* The *en masse* substitution of judges will hinder the attorney Plaintiffs' ability to represent their clients effectively. *Id.* ¶ 27. And it takes on an additional, constitutional dimension of harm in the criminal realm because so many substitutions will injure MACDL's clients' rights to a speedy trial, to due process, to access to the courts, and to be represented by counsel. *Id.* ¶ 28.

The attorney Plaintiffs are generally unaware of whether any of their clients have contributed to judicial campaigns in Montana. *E.g.*, *id.* ¶ 29. If they have, this will result in additional *en masse* substitutions and disruption of the judicial system. Plaintiffs are also generally unaware of whether any of the opposing counsel in any of their pending cases have contributed to judicial campaigns in Montana. *E.g.*, *id.* ¶ 30. If they have, this will result in additional *en masse* substitutions and disruption of the judicial system. *Id.* Plaintiffs are further generally unaware of whether their clients or opposing counsel in any of their pending cases have contributed to an organization that, in turn, conducted more than $90 in independent spending on behalf of a judge in any of my cases. *E.g.*, *id.* ¶ 31. If any of them have, this will result in additional *en masse* substitutions and disruption of the judicial system. *Id.* The grave or irreparable harm that Plaintiffs will experience if SB319 takes effect on July 1, 2021, will be similar to the harm other parties to litigation or attorneys across Montana who have supported candidates for non-partisan judicial office in Montana will experience.

Because of the sweeping effects on the administration of Montana's judicial system—including its harm specific to Plaintiffs—the Court should enjoin SB319's enforcement until able to reach the merits of the law's constitutionality.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request this Court issue an order to show cause why a preliminary injunction should not be granted and, following a hearing, enter a preliminary injunction.

Respectfully submitted this 4th day of June, 2021.

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 4th day of June, 2021, by U.S. certified mail in a sealed, postage paid envelope.

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK,	)	CAUSE NO. BDV-2021-611
Plaintiffs,	)	
v.	)	
THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor,	)	AFFIDAVIT OF COLIN M. STEPHENS
Defendants.	)	

I, COLIN M. STEPHENS, declare under penalty of perjury that the following is true and correct:

1. I am a resident of Missoula, Montana.

2. I practice law in Missoula, Montana at Smith & Stephens P.C., where I have worked with my partner John E. Smith since 2007.

3. My practice is solely focused on criminal defense and criminal appeals. I represent people accused of crimes in proceedings in state and federal district courts across

Montana, as well as before the Montana Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States.

4. I also serve as President of the Montana Association of Criminal Defense Lawyers ("MTACDL").

5. MTACDL was formed in 1997 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence, and expertise of those who represent persons accused of crimes; and to promote the proper and fair administration of justice. MTACDL believes that continued recognition and adherence to the rule of law by the judicial, legislative, and executive branches of government is necessary to sustain the quality of the American system of justice.

6. Consistent with these objectives, MTACDL appears before legislative, executive, and judicial bodies to advocate for policies by state and federal government that preserve, protect, and defend the adversary system of justice provided in the Montana and United States Constitutions.

7. MTACDL and its members have a strong interest in an independent, experienced, and non-partisan judiciary in Montana.

8. I am personally aware that, consistent with this interest, MTACDL members have contributed amounts greater than $90 to non-partisan judicial campaigns to promote independence and experience in the judiciary.

9. I am personally aware that MTACDL members have contributed amounts greater than $90 to non-partisan judicial campaigns that are successful as well as those that are unsuccessful.

10. I have personally supported non-partisan judicial campaigns in the past six years.

11. My support is motivated by my belief in the importance of an independent, experienced, and non-partisan judiciary.

12. In 2018, I donated $180 to the campaign for the Honorable Judge Matthew Wald in the 22nd Judicial District.

13. In 2018, I donated $100 to the campaign for the Honorable Judge Ashley Harada in the 13th Judicial District.

14. In 2020, I donated $180 to the campaign for the Honorable Judge Jason Marks in the Fourth Judicial District.

15. I have observed no partiality or favoritism in any way by these judges.

16. I am personally aware that attorneys from across the spectrum—prosecutors and criminal defense lawyers, as well as civil practitioners who generally represent plaintiffs and those who generally represent defendants—have also supported these judges.

17. My firm and I presently have approximately five cases before Judge Marks.

18. I also have two cases pending before the Honorable Judge Peter Ohman in 18th Judicial District. I know Judge Ohman both personally and professionally. I would like to contribute to his upcoming judicial campaign but will not if SB319's provisions enter into effect. Doing so would hamper my client's interest by moving the proceedings to a new judge.

19. Neither the executive board of MTACDL nor myself were aware that the Montana Legislature was considering sweeping changes to judicial recusal provisions in Montana until SB319 was passed into law.

20. We had no opportunity to provide input or comment on the judicial recusal provisions in SB319. We would have absolutely provided input and testimony had we been afforded

the opportunity to do so.

21. If SB319's judicial recusal provisions take effect on July 1, 2021, they will cause grave or irreparable injury to me and my ability to effectively represent my clients.

22. Judge Marks will be required to recuse himself from a complex and lengthy case currently set for trial in August 2021. Should this occur, it will likely delay my client's current trial date given the complexity of the case and the pending trial schedules of the remaining judges in the Fourth Judicial District.

23. If these provisions take effect, every other of my cases before Judge Marks will also require his recusal and the substitution of a new judge.

24. Under SB319, the removals and substitution will occur all at the same time and without regard to how long each of the sitting judges has worked on a case.

25. The *en masse* substitution in these cases will require other judges in those districts (or, if necessary, substitute judges from other districts) to fit these cases into their existing caseloads.

26. By adding new judges "midstream" in these cases, the benefits of the existing judges' experience in each case will be lost. For example, in my complex case before Judge Marks, he has heard argument on certain motions had indicated that he intends to reserve ruling on complex evidentiary questions and on critical language in jury instructions. A new judge would be required to either hear argument again or read the transcripts of the prior hearings. This will result in prejudice to both parties and additional burdens for the new substitute judges.

27. The *en masse* substitution of judges will hinder my ability to represent my clients effectively as well as their constitutional right to counsel of their choice if they have the

financial means to make that choice.

28. The *en masse* substitution of judges takes on an additional, constitutional dimension of harm in the criminal realm because it will injure my clients' rights to a speedy trial, to due process, to access to the courts, and to be represented by counsel.

29. I am unaware of whether any of my clients have contributed to judicial campaigns in Montana. If they have, this will result in additional *en masse* substitutions and disruption of the judicial system.

30. I am unaware of whether any of the prosecutors or counsel for the state in any of my pending cases have contributed to judicial campaigns in Montana. If they have, this will result in additional *en masse* substitutions and disruption of the judicial system.

31. I am further unaware of whether any of my clients or whether any prosecutor or counsel for the state in any of my pending cases has contributed to an organization that, in turn, conducted more than $90 in independent spending on behalf of a judge in any of my cases. If they have, this will result in additional *en masse* substitutions and disruption of the judicial system.

32. If judicial recusal provisions of SB319 take effect on July 1, 2021, it will chill my speech by preventing me from donating judicial candidates such as Judge Ohman and the numerous individuals running for election for the three Municipal Court judge positions in Missoula while also balancing my obligations to my clients.

33. I am personally aware that the harm I will experience if SB319 takes effect on July 1, 2021, will be similar to the harm other members of MTACDL who have supported candidates for non-partisan judicial office in Montana will experience.

Signed this June 4, 2021, in Missoula, Montana.

Colin M. Stephens

State of Montana
County of Missoula

This instrument was signed and sworn to before me on June 4th, 2021 by Colin M Stephens

Notary Public

AMANDA M JOHNSON
NOTARY PUBLIC for the
State of Montana
Residing at Missoula, MT
My Commission Expires
January 09, 2024.