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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 (email) **REPLY BRIEF IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

The Court should grant Plaintiffs' application for a preliminary injunction. Plaintiffs have demonstrated their entitlement to a preliminary injunction on two separate grounds—likely success on the merits and grave or irreparable harm certain to occur on July 1, 2021. Senate Bill 319 plainly contravenes the Single Subject Rule and the Amendment Rule contained in

Article V, Section 11 of the Montana Constitution. These constitutional violations constitute irreparable harm sufficient to support a preliminary injunction. *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)); Preliminary Inj. Or., *Bd. of Regents of Higher Educ. of Mont. v. Montana*, No. BDV-2021-598, (Mont. First Jud. Dist. Ct. June 7, 2021) (granting application for preliminary injunction where plaintiff alleged irreparable harm through constitutional injury). And, as a practical matter, if the SB319 goes into effect during the pendency of this litigation, it will create chaos in the judicial system in ways that cannot readily be undone.

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 v. Cty. Water Dist. of Billings Heights*, 935 P.2d 246, 250, 281 Mont. 219, 226 (1997). It is well-established that a constitutional violation is "irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *Mont. Cannabis Indus.*, ¶ 15. "In the context of a constitutional challenge, an applicant for preliminary injunction need not demonstrate that the statute is unconstitutional beyond a reasonable doubt, but 'must establish a prima facie case of a violation of its rights under' the constitution." *Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, 395 Mont. 350, 359, 440 P.3d 4, 10. "Prima facie is defined as 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 414, 473 P.3d 386, 392 (citing *Weems*, ¶ 18 (quoting *prima facie*, Black's Law Dictionary (10th ed. 2014))).

The Montana Constitution identifies a constitutional harm where the legislature enacts a law containing multiple subjects, or where a bill is so transformed during the legislative process that it loses its original purpose. Mont. Const. Art. V., §§ 11(3), (1). The Constitution commits

enforcement of these simple rules for lawmaking to the courts, providing a cause of action within the constitution itself. Mont. Const. Art. V., § 11(6).

Senate Bill 319 contains at least three distinct subjects: joint fundraising committees, judicial conflicts of interest, and content-based restrictions on undefined First Amendment activities like "voter identification." The three subjects advance three distinct purposes. In grafting the conflict of interest and First Amendment restrictions onto the bill in a 16-minute hearing closed to public comment—just 24 hours before the end of the session—the legislature violated the Single Subject Rule and the Amendment Rule. A preliminary injunction should issue until the Court decides the merits of the case.

I. Plaintiffs have established a prima facie case that SB319 contravenes the requirements of Article V, Section 11 of the Montana Constitution.

A. SB319 plainly violates the Single Subject Rule.

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 of that claim.

The Single Subject Rule and the Rule on Amendments are not especially demanding. That alone makes the violations in SB319 so striking. Typically, the legislature can satisfy the requirements of the Single Subject Rule by affixing a "generally revise" title to a law—provided the subject named for general revision truly encompasses the bill's subject matter. *But see State ex rel. Wagner v. Evnen*, 307 Neb. 142, 153, 948 N.W.2d 244, 254 (2020) ("As two other jurisdictions have stated in a similar context, 'the single subject requirement may not be circumvented by selecting a [general subject] so broad that the rule is evaded as a meaningful constitutional check.'").

While SB319's lengthy title begins with the phrase "GENERALLY REVISING CAMPAIGN FINANCE LAWS," its later-added provisions are not campaign finance laws—

under even the most charitable reading. As the State explains, "[c]ampaign finance regulation generally involves regulating campaign funding, spending, and disclosures in elections." State's Response ("Response") at 14. "By requiring certain disclosures, campaign finance regulation also lets the public know who is speaking during an election cycle." *Id.* (emphasis added).

Sections 21 and 22 of SB319 don't do any of that. Section 21—banning selected First Amendment activities—has no effect whatsoever on campaign contributions, campaign spending, or disclosures. It does not regulate money in politics. Rather, it conditions who may engage in activities like "voter identification"—an undefined term within SB319—in on-campus residential, dining, and athletic facilities based on the identity of the person or organization engaging in the conduct. Section 21 is not a campaign finance regulation.

Neither is Section 22. Section 22 establishes a new form of judicial conflict of interest. It is squarely aimed at the judiciary, dictating who may preside over cases. Section 22 makes no changes to campaign finance law: it does not limit contribution size nor how contributions are reported or made. It makes no change to disclosure requirements or anything else in the regulatory framework surrounding finance in judicial elections. Instead, Section 22 directs how judges must respond to facts about parties and attorneys in cases they oversee. Section 22 makes a contribution into an antecedent fact that generates a conflict under Section 22, but Section 22 does not change, regulate, alter, or otherwise affect the contribution process. Section 22 is not a campaign finance law. It is a recusal law.

The legislature's inclusion of the phrase "campaign finance" in the title must be given effect. Section 1-2-101, MCA ("In 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."). Even if the legislature had omitted the word

"finance," it is difficult to conceive of a unified subject that wholly encompasses (1) the campaign finance activities covered by the bill's original joint fundraising provisions, (2) its sweeping changes to judicial conflict of interest laws, and (3) its ban on certain First Amendment activities. "Generally revising campaign laws" would still fail to encompass the recusal provision because it makes no changes to campaign laws. "Generally revising laws related to public institutions" might cover all subjects—but this is not the bill's title, and such a title would clearly render Article V, Section 11 a nullity. *See Wagner*, 307 Neb. at 153.

The State asks the Court to insert provisions into the bill that do not exist, arguing that "Section 21 regulates permissible 'election communications,' 'electioneering communications,' and 'political committees.'" Response at 15. But the text of Section 21 contains no such requirements. Section 21 bans select conduct in certain on-campus spaces without regard to whether it is reportable under Montana campaign finance law. "Voter identification," for example, is not defined as a reportable activity in campaign finance law. Targeting political committees—a certain kind of entity—does not make Section 21 a campaign finance law.

The State also argues that Section 21 must be a campaign finance law because it is to be codified in Title 13, chapter 35, part 2. But this part of the code, titled "Election and Campaign Practices and Criminal Provisions, Specific Provisions" is not exclusive to campaign finance. In fact, very few of the provisions in that part directly regulate campaign finance as opposed to other aspects of Montana's broader compilation of rules that govern elections, campaigning, and a wide range of other conduct. *See, e.g.*, §§ 13-35-210, MCA ("Limits on voting rights"); -213 ("Preventing public meetings of electors"); -221 ("Improper nominations").

Moreover, the State takes precisely the opposite position with respect to Section 22, which SB319 directs to be codified in Title 3, chapter 1. The State argues that Section 22's

placement in Title 3 is simply an example of "legislative discretion," not evidence that the bill does not regulate campaign finance. Response at 17. But the codification instructions are evidence of exactly that. Section 21 properly belongs in Title 13, chapter 35, part 2 because it regulates political practices. Section 22 is rightfully at home in Title 3 because it regulates when judges can preside over cases. Neither provision regulates campaign finance.

The balance of the State's arguments on Sections 21 and 22 ask the Court to suspend disbelief. The Single Subject Rule is accommodating. But it cannot accommodate everything, or it would be pointless. No principled reading of SB319 finds fewer than three subjects.

B. SB319 violates the Rule on Amendment.

Senate Bill 319 separately violates the Rule on Amendment contained in Article V, Section 11(1) which provides that a bill "shall not be so altered or amended on its passage through the legislature as to change its original purpose."[1] Senate Bill 319, as enacted, plainly advances at least three distinct purposes; only one is original to the bill as introduced. Thus, even if joint fundraising, judicial conflicts of interest, and the ban on certain First Amendment activities could somehow be maneuvered into one "subject," they plainly advance disparate and unrelated policies with disparate and unrelated purposes. There is no common design between the bill's original purpose and its multitude of purposes as amended and passed. The joint fundraising provisions make it easier for candidates and parties to raise money in elections together. That is the "original purpose" of the original bill. The purpose of the recusal provision is to create new conditions requiring the recusal of judges. This plainly diverges from the bill's "original purpose." The purpose of the campus organizing ban is to "prohibit[] certain political

[1] The Single Subject Rule and the Amendment Rule are distinct requirements with distinct textual bases in the Montana Constitution. So, too, is a third requirement in Article V, Section 11 not at issue in this case: the Title Rule (that a bill's title must describe its contents; SB319 meets this requirement).

activities in certain places." This, too, is not within the bill's "original purpose" under Article V, Section 11(1). When the legislature bolted on these provisions in the 16-minute free conference committee hearing on the penultimate day of the session, it so amended the bill that it lost its original purpose. SB319 is a textbook case of what Article V, Section 11 prohibits.

The State fails to engage substantively with the Amendment Rule. Its only response is to repeat its arguments under the Single Subject Rule and to appeal for deference to the "compromise and amendments" of the legislative process. Response at 18. But the Constitution employs different terms and requires different analysis for a bill's "subject" and its "original purpose." Senate Bill 319 advances at least three purposes, two of which were added a day before its passage. Legislators call this process "hijacking" for a reason: it fundamentally alters the original purpose of a bill. While Courts usually defer to the Legislature on the wisdom of its policy enactments, in the context of Article V, Section 11 "the merits of [the bill] and the policy choices behind it are not at issue." *Cf. Mont. Ass'n of Ctys. v. State by & through Fox*, 2017 MT 267, ¶ 1, 389 Mont. 183, 185, 404 P.3d 733, 735 (review for conformity with single vote requirement focuses on the process of enactment, not the merits of the policies enacted). At issue in this case is whether SB319 conforms with the few rules the Montana Constitution places on the lawmaking process. The Constitution specifically assigns enforcement of these rules to the courts. Mont. Const., Art. V, § 11(6).

C. Enactments with multiple subjects are not severable.

Plaintiffs apply for a preliminary injunction on two bases: (1) irreparable injury and (2) likelihood of success on the merits of the Single Subject and Amendment Rule claims. On the Amendment Rule claims, the State's analysis of severability may make sense: the constitutional

violation is the addition of new provisions that cause the bill to lose its original purpose. A bill could regain its "original purpose" through severing the latter-added provisions.

But the analysis on the Single Subject Rule violation is different. "Allowing for severability with regard to single subject violations would be contrary to the purposes behind the single subject rule." *People v. Olender*, 222 Ill. 2d 123, 146, 854 N.E.2d 593, 607 (2005). The Single Subject Rule, like the related Single Vote Rule for Constitutional Amendments, identifies a constitutional defect in a law's enactment without regard to whether the bill was introduced with multiple subjects or additional subjects were amended into a bill during the legislative process. The multitude of subjects is what counts in this analysis; the time at which a second or third subject is added does not. The cause of action provided in Article V, Section 11(6) permits private enforcement against an entire law for noncompliance. Only violations of the Title Rule (not at issue here) are exempt from this rule. *See* Mont. Const., Art. V, Sec. 11(3).

In a core single subject challenge where the title is not an issue, the remedy is to set aside the entire enactment. There is no "original purpose" to salvage: the defect is in the enactment itself. In *MACo v. State*, 2017 MT 267, ¶ 51, 389 Mont. 183, 205, 404 P.3d 733, 747, the Supreme Court threw out a constitutional initiative in its entirety on the separate, but related, separate vote requirement for constitutional revision. In that case, the initiative "violates the separate-vote requirement and for that reason 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" (emphasis added) (quotation marks omitted). While the Single Vote Rule for Constitutional Amendments is substantively more demanding to invoke than the Single Subject Rule, its remedial provisions function the same way. If a bill has multiple subjects, the entire bill as enacted is invalid. There is simply no other principled way to

determine which subjects should remain and which are void if a bill complies with the title rule but contains multiple subjects, as is the case with SB319.

D. The State misapprehends Plaintiffs' preliminary injunction motion.

Sections II and III of the State's brief argue against claims that Plaintiffs do not make. Response at 9–12. Plaintiffs request that the Court preliminarily enjoin SB319 in full because it was passed in violation of the Montana Constitution's Single Subject Rule and Amendment Rule. *See* Mont. Const. Art. V, §§ 11(3), (1). Plaintiffs are likely to succeed on the merits of these claims. Plaintiffs do argue that implementing Sections 21 and 22 will give rise to tangible irreparable harms, which derive from separate violations of Plaintiffs' constitutional rights. But the likelihood of success on merits of the two sections' constitutionality outside the context of the Single Subject Rule and Amendment Rule is not at issue in this motion.[2] The point is rather that Section 22 will violate the constitutional rights of Plaintiff lawyers and their clients on July 1 by causing unpredictable, widespread disruption within Montana's judicial system. The ensuing confusion and delay constitute irreparable harms that Plaintiffs will suffer. The same is true for Section 21, which would put Plaintiff Forward Montana in fear of civil prosecution by anyone who views its voter identification and registration activities as unlawful under SB319. In addressing the merits of the two code sections each alone, the State argues against phantoms.

[2] Broadly speaking, Plaintiffs agree that the legislature has a compelling interest in regulating campaign contributions and judicial recusal, although the cases the State relies on for this proposition involved 1) a judge personally soliciting donations, *Williams-Yulee v. Fla. Bar*, 575 U.S.433, 445 (2015), and 2) contributions of around $3 million to a West Virginia Supreme Court Justice who then voted to reverse a $50 million verdict against the contributor, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Were this argument relevant to Plaintiffs' preliminary injunction motion, it would be worth noting that the law at issue here mandates recusal when an individual before a judge has contributed $90.01 or more directly to the judge's campaign or any amount to a political committee that expends $90.01 or more on the judge's campaign, whether the judge is aware of that attenuated contribution or not.

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

A. Constitutional harm is irreparable harm and supports the issuance of a preliminary injunction.

Nowhere in its 20-page brief does the State address that violations of Article V, Section 11 of the Montana Constitution necessarily give rise to irreparable harm. *See, e.g.*, *Mont. Cannabis Indus. Ass'n v. State*, 2012 Mont. 201, ¶ 15, 366 Mont. 224, 296 P.3d 1161 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (The "loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued."). The State cabins its arguments to standing and the merits, arguing that SB319 contains only one subject, Response at 12–18, and that the bill underwent no significant changes in its passage through the legislature, which, in the State's view, is also proven by the fact that the two sections bolted on by the free conference committee in a 16-minute meeting that doubled the length of SB319's title are related "to the general subject of generally revising campaign finance laws." Response at 18.

But SB319 twice violates the Montana Constitution's limited requirements for the lawmaking process; Plaintiffs have applied to this Court for a preliminary injunction on that basis. "A preliminary injunction does not resolve the merits of the case, but rather prevents further injury or irreparable harm by preserving the status quo of the subject in controversy pending adjudication on the merits." Preliminary Inj. Or., *Bd. of Regents of Higher Educ. of Mont. v. Montana*, No. BDV-2021-598, at 5 (Mont. First Jud. Dist. Ct. June 7, 2021) (citing *Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342). Establishing "a prima facie case that [they] will suffer an 'irreparable injury' through the loss of a constitutional right" is enough. *See id.* at 11–12 (quoting *Driscoll v. Stapleton*, 2020 Mont. 247, ¶ 17, 401 Mont. 405, 473 P.3d 386). Plaintiffs have so established. The State appears to

concede that if Plaintiffs establish constitutional harm, they also establish irreparable harm sufficient to support a preliminary injunction under well-established principles of Montana law.

B. Hopeful interpretations of Section 22 will not prevent irreparable injury to Plaintiffs.

i. Section 22 will cause irreparable harm whether or not it is retroactive.

Plaintiffs will suffer irreparable harm if Section 22 takes effect on July 1, 2021, whether or not the bill applies retroactively. The existence of a dispute about how SB319 operates is itself evidence of the chaos the bill will create if it takes effect before the Court decides the case on the merits. Judges and parties across the state will apply Section 22 differently, causing divergent outcomes, confusion, and disruption—in other words, irreparable harm.

The first, most obvious plain text reading of SB319 is that prior contributions are an antecedent fact that prospectively condition whether a judge may preside over a case. As the State itself notes in its brief, "[a] statute is not retroactive merely because it draws upon antecedent facts for its operation." Response at 5 (quoting *Mordja v. Mont. Eleventh Judicial Dist. Court*, 2008 MT 24, ¶ 18, 341 Mont. 219, 177 P.3d 439). Under the plain text of SB319, whether "the judicial officer has received one or more combined contributions totaling at least one-half of the maximum amount allowable amount under 13-37-216 from a lawyer or party to the proceeding in an election within the previous 6 years" is an antecedent fact. Beginning on July 1, 2021, that antecedent fact will create a conflict of interest requiring recusal. In other words, SB319 applies prospectively and draws on antecedent facts.

Another reading of Section 22 with textual support in the bill itself is that it creates "a new disability"—recusal based on a contribution—that comes into effect only for contributions made after the effective date. *See Mordja*, ¶ 18. In other words, it would apply in all pending cases to new contributions made after July 1, 2021—not to cases filed after July 1. Such an

interpretation still would still chill constitutionally protected speech in the form of campaign contributions. See VAC ¶ 84; Stephens Aff. ¶ 18 ("I would like to contribute to his upcoming judicial campaign but will not if SB319's provisions enter into effect.").

The only reading of Section 22 without any textual support is the State's contention that it somehow hinges on a case's filing date—that Section 22 will only apply to cases filed after July 1, 2021. There is no support for this argument in the text of the bill itself, which makes no reference to filing dates. And the argument betrays common sense: conflicts arise from facts about attorneys, parties, and judges. A conflict is not limited by filing deadlines or other events within the four corners of a case. If a judge developed a material conflict of interest with an attorney in a case, for example, it would likely require immediate recusal. There would be no defense that the conflict cannot obtain because the case is ongoing—that the conflict will only become an issue next time the attorney has a case in front of the judge.

The simplest, plain text reading of Section 22 is that beginning on July 1, 2021, the antecedent fact of a contribution in the past six years will prospectively require recusal—without regard to a case's filing date or anything else not mentioned in the bill.[3]

ii. Even on the State's own terms, Section 22 will cause irreparable injury.

As argued, the State appears to calculate its retroactivity argument to cherry-pick Plaintiffs' irreparable harm argument that the State perceived as most powerful. But the State fails to take its argument to its logical conclusion. Even if the State's interpretation of Section 22 were correct and conclusive, which it is not, lawyers and their clients would nonetheless face

[3] The State also suggests that Plaintiffs should have surveyed their clients to identify who has contributed to judicial campaigns in the last six years. Response at 7. Plaintiffs' own contributions are enough to prove injury. Stephens Aff. ¶¶ 12–14; 16–18; VAC ¶ 2. Client contributions in any number compound that injury.

disruption and delay. If the court system is required to impose the recusal provision in cases filed after July 1, the administrative burden and disruption will be immense.

Considering contribution patterns described in the Stephens Affidavit, it is quite possible that because some prosecutors and defense attorneys will have donated more than $90 to several judges even within a single district, certain combinations of lawyers may be precluded from litigating cases against one another in the districts where they practice most often. *See* Stephens Aff. ¶¶ 12–14; 16–18; VAC ¶ 2. Parties—especially criminal defendants—will in turn face difficulties, including foreseeable delays related to the administrative burden on courts and increased pressures on attorneys that complicate their ability to effectively represent their clients. *See* Stephens Aff. ¶ 21. Even without the sheer chaos that would ensue if all pending cases were also subject to Section 22, any delays in the provision of justice are a formidable, irreparable injury.

Further, it is not readily apparent how the "conflict" manufactured by Section 22 interacts with Montana Rule of Professional Conduct 1.10 and the general principle imputing conflicts across firms and organizations. These principles have the capacity to magnify the disruption caused by Section 22 many times over. If one prosecutor donates to a judge, the entire County Attorney's office may be disqualified from criminal practice before that judge, for example. It undoubtedly will cause chaos and delay of a constitutional magnitude if any judicial district in Montana loses the ability of one of its judges to preside over criminal cases altogether.

III. The Plaintiffs have standing and relief against the State will redress Plaintiffs' injuries.

The Plaintiffs plainly have standing to challenge SB319 under the cause of action provided in Article V, Section 11(6) ("A law may be challenged on the ground of noncompliance with this section only within two years after its effective date."). "To establish standing to bring

suit, the complaining party must (1) clearly allege past, present, or threatened injury to a property right or a civil right, and (2) allege an injury that is distinguishable from the injury to the public generally, though the injury need not be exclusive to the complaining party." *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 37, 356 Mont. 41, 53–54, 230 P.3d 808, 817 (quoting *Fleenor v. Darby Sch. Dist.*, 2006 MT 31, ¶ 9, 331 Mont. 124, 128 P.3d 1048). In "case-or-controversy standing," "[t]he question is not whether the issue itself is justiciable, but whether the Petitioners are the proper party to seek redress in this controversy." *Brown v. Gianforte*, 2021 MT 149, ¶ 10. "[T]he standing of any one of the [parties] would permit the suit to go forward." *Aspen Trails Ranch*, 2010 MT 79, ¶ 45, 356 Mont. at 56, 230 P.3d at 819 (extending *Clinton v. City of New York*, 524 U.S. 417, 431 (1998) (one party's standing sufficient for case to proceed)).

In this case, each of the Plaintiffs has a civil right against defective legislative enactments. The source of this right is the Montana Constitution itself. Mont. Const., Art. V., §§ 11(1), (3), (6). And each of the Plaintiffs has alleged how they are affected by the violation of this right in ways distinguishable from injury to the public generally. Forward Montana conducts exactly the kind of work that Section 21 prohibits in the places that Section 21 prohibits it. In connection with this work, Forward Montana has registered as a political committee and will be required to do so again in the future if it continues the work.[4] The attorney plaintiffs are all affected in ways distinguishable from the general public because antecedent facts about them trigger judicial recusals, and will prevent them from appearing in front of certain judges. For both Forward Montana and the attorney plaintiffs, "the impacts from the [bill] have a more particular effect on [them] than on the public at large." *See Aspen Trails*, ¶ 43. In the analysis of

[4] *See* Montana Commissioner of Political Practices, Campaign Electronic Reporting System, "Committee Search," available at https://cers-ext.mt.gov/CampaignTracker/public/search.

case-or-controversy standing, they are exactly "the proper part[ies] to seek redress in this controversy." *Brown*, ¶ 10.

The State's response is a series of cursory allegations that the Plaintiffs have made cursory and conjectural allegations. The State appears to overlook the specific allegations of harm in the Verified Amended Complaint or in the Affidavit of Colin Stephens. The fact that SB319 has not yet wrought this harm on Plaintiffs is of little importance: the very purpose of a preliminary injunction is to preserve the status quo and prevent new harms while the Court decides the case on the merits. That is exactly the situation before the Court now.

The State also suggests that Plaintiffs have sued the wrong defendant, and perhaps should have sued the Commissioner on Political Practices instead. Of course, the defendant in this case is the State of Montana by and through its chief executive officer, who is ultimately responsible for the execution of its laws. "The executive power is vested in the governor who shall see that the laws are faithfully executed." Mont. Const. Art. VI, § 4(1); *Bullock v. Fox*, 2019 MT 50, ¶ 33, 395 Mont. 35, 48–49, 435 P.3d 1187, 1194. To the extent this is a standing argument by the State, it has little purchase: declaratory and injunctive relief against the State of Montana will plainly redress Plaintiffs' injuries.

Finally, though the Court need not reach the issue because the Plaintiffs have standing under the most demanding requirements, it is not clear that suits under Article V, Section 11(6)'s cause of action operate on traditional standing principles. The cause of action is contained in the constitution itself and provides no special requirements with respect to standing. It was added at the 1972 Convention—not present in the 1889 Constitution—and is a reflection of the Framers' considered judgments about the wisdom of private enforcement. Other states with similar

provisions have relaxed traditional standing principles in single subject cases. The Utah Supreme Court, for example, held,

> The restrictions placed on legislative activity by Article VI, Section 22 of the Utah Constitution are part of the fundamental structure of legislative power articulated in our constitution. They are accordingly of sufficient importance and general interest that claims of their violation may be brought even by plaintiffs who lack standing under the traditional criteria.

Gregory v. Shurtleff, 2013 UT 18, ¶ 27, 299 P.3d 1098, 1108. This treatment is not altogether different from the standing analysis in the Montana Supreme Court's decision earlier this month in *Brown v. Gianforte*, where it held that the "seriousness" of Petitioners allegations of an improper judicial appointments process, if true, "is a sufficiently clear threat to Petitioners' property or civil rights to meet the case-or-controversy requirement for standing and one that this Court can resolve by ruling on the merits of Petitioners' claim." 2021 MT 149, ¶ 19. In reaching its conclusion that the Petitioners there had standing, the Court examined both the "practical aspects" as well as "the constitutional and due process implications" of a court system thrown into chaos. *Id.* at ¶ 17.

The State's final argument against a preliminary injunction is that SB319 is, at worst, simply a "procedural foul"—that, ultimately, the Single Subject Rule and the Amendment Rule are parts of the Montana Constitution that courts shouldn't take too seriously. Response at 19. It is a parting note that contradicts the same cases State relies on: Article V, Section 11 is meant to "prevent the enactment of laws surreptitiously; to give notice to the legislature and to the people that they may not be misled; [and] to guard against fraud in legislation." *State ex rel. Boone v. Tullock*, 72 Mont. 482, 488, 234 P. 277, 279 (1925); Response at 13 (quoting same). These provisions are crucial procedural safeguards and are integral to Montana's system of republican

government and ordered lawmaking. They are not "mere surplusage." *Marbury v. Madison*, 5 U.S. 137, 174, 2 L. Ed. 60 (1803).

A preliminary injunction should issue until the Court may decide the case on the merits.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their application for a preliminary injunction.

Respectfully submitted this 25th day of June, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 25th day of June, 2021, by email.

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