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

RYLEE SOMMERS-FLANAGAN
CONSTANCE VAN KLEY
Upper Seven Law
1008 Breckenridge St.
Helena, MT 59601
Phone: (406) 396-3373
Email: rylee@uppersevenlaw.com
constance@uppersevenlaw.com

Attorneys for Plaintiffs

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK, Plaintiffs, vs. THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor, Defendant.	Cause No. BDV-2021-611 **PLAINTIFFS' BRIEF IN OPPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

INTRODUCTION

Plaintiffs Forward Montana, Leo Gallagher, Montana Association of Criminal Defense Lawyers, and Gary Zadick, through counsel of record, hereby submit this Brief in Opposition to Defendant's Motion to Dismiss, filed August 4, 2021.

The State makes two arguments in its motion to dismiss, claiming that Plaintiffs lack standing and fail to state a claim upon which relief can be granted. Both arguments miss the mark.

LEGAL STANDARD

Courts construe complaints "in the light most favorable to the plaintiffs when reviewing an order dismissing a complaint under Rule 12(b)(6)." *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 15, 155 P.3d 1247. "A district court may dismiss a complaint for failure to state a claim if it appears 'beyond doubt' the plaintiff can 'prove no set of facts in support of his claim that would intitle him to relief.'" *Cossitt v. Flathead Indus., Inc.*, 2018 MT 82, ¶ 9, 415 P.3d 486 (quoting *Jones*, ¶ 15).

ARGUMENT

I. Plaintiffs have established standing by showing concrete, redressable injuries that would result if SB319 were enforced.

Each Plaintiff has established standing to challenge SB319 as a multi-subject bill passed into law in violation of Article V, Section 11 of the Montana Constitution—which expressly provides a private cause of action "on the ground of noncompliance with this section." Mont. Const. art. V, § 11(6).

To establish standing, plaintiffs "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, 230 P.3d 808 (quoting *Fleenor v. Darby Sch. Dist.*, 2006 MT 31, ¶ 9, 331 Mont. 124, 128 P.3d 1048). "The 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, 488 P.3d 548. If any one

of the plaintiffs has standing, the suit may "go forward." *Aspen Trails*, ¶ 45 (applying *Clinton v. City of N.Y.*, 524 U.S. 417, 431 (1998) (one party's standing sufficient for case to proceed)).

Here, each Plaintiff has a right not to be subject to legislation passed through unconstitutional processes. The source of this right, and the source of Plaintiffs' cause of action, is the Montana Constitution itself. Mont. Const., Art. V., §§ 11(1), (3), (6). And each Plaintiff has alleged an injury distinguishable from injury to the public generally. As described in the Verified Amended Complaint ("VAC"), Forward Montana conducts exactly the work that Section 21 prohibits in the places that Section 21 prohibits it. VAC ¶ 1. 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 its work as planned.[1] *Id.* Section 22 likewise affects attorney Plaintiffs distinctly. These Plaintiffs' prior contributions to nonpartisan judicial campaigns will trigger judicial recusals, preventing attorney Plaintiffs from appearing in front of certain judges and removing judges from active cases. For both Forward Montana and attorney Plaintiffs, "the impacts from the [bill] have a more particular effect on [them] than on the public at large." *See Aspen Trails*, ¶ 43. Plaintiffs here are exactly "the proper part[ies] to seek redress in this controversy." *Brown*, ¶ 10.

In its Motion to Dismiss, the State recycles the same arguments it leveled against Plaintiffs' application for a preliminary injunction, again misreading specific allegations of harm raised in the VAC, ignoring the Affidavit of Colin Stephens, and failing even to acknowledge the constitutionally provided private right of action for challenging violations of Article V, Section 11. The State's argument that the harm alleged is conjectural is pure boilerplate, failing

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

to take into account the particulars of the Plaintiffs' case upon which the Court entered the preliminary injunction.

And, while the Court need not reach the issue because Plaintiffs have established standing under the most demanding requirements, suits brought pursuant to Article V, Section 11(6) likely do not operate according to traditional standing principles. The cause of action is contained 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). Other states with similar provisions have relaxed traditional standing principles in single subject cases. The Utah Supreme Court, for example, holds:

> 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.

This treatment is similar to the standing analysis in *Brown v. Gianforte*, recently decided by the Montana Supreme Court. There, petitioners challenged a legislative change to the judicial appointments process. Although no petitioner lived in Cascade County, the site of the only judicial vacancy, the Court had no trouble rejecting the State's argument that "individual Petitioners' status as Montana residents, voters, and taxpayers [was] insufficient to confer standing." *Brown*, ¶¶ 12, 20. The Court held that, if true, the "seriousness" of Petitioners' allegations of an improper judicial appointments process presented "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." *Id.* at ¶ 19. In concluding that Petitioners had standing, the Court examined the "practical aspects" as well as "the constitutional and due process implications" of a court system thrown into chaos—each and every judge issues "rulings . . . impact[ing] hundreds of litigants, criminal defendants, and third parties." *Id.* at ¶¶ 16–17.

Finally, the State continues to misunderstand Plaintiffs' case. While Sections 21 and 22 are likely each unconstitutional as standalone provisions, Plaintiffs challenge their inclusion together in a single bill that professes to regulate campaign finance. The State insists that Plaintiffs are separately challenging Sections 21 and 22, but Plaintiffs' discussions of these provisions serve two purposes, both in service of the claim that SB319 is a multi-subject law whose original purpose changed as it became law. First, Plaintiffs demonstrate that Sections 21 and 22 regulate subjects that are distinct not only from the rest of SB319's provisions, but also from each other. And second, Plaintiffs establish that they will be harmed by SB319's enforcement because Sections 21 and 22 would surely regulate their conduct, causing them injury distinct from the constitutional violation suffered by the public at large.

II. Plaintiffs plainly state a claim under Article V, Section 11 of the Montana Constitution that SB319 violates the both the single subject rule and the rule on amendments.

The Montana Constitution expressly authorizes Plaintiffs' claim by providing for a cause of action for private enforcement. Mont. Const. art. V, § 11(6). Still, the State asserts that Plaintiffs fail even to meet the modest bar for stating a claim under Rule 12, leaping headlong into merits arguments that highlight the State's tortured position on what SB319 is, says, and purports to do. The State's arguments fail under both the demanding Rule 12(b)(6) standard and

the more relaxed summary judgment standard. *See* Ps' Mot. for Partial Summary Judgment (concurrently filed).

The State first claims that Section 21 regulates campaign finance by defining terms at "the heart of Montana's campaign-finance scheme," and that "Section 22 regulates campaign finance by acting to eliminate even the appearance of partiality in the judicial system." Def's Br. in Supp. of Mot. to Dismiss ("MTD") at 14. In fact, Section 21 defines no terms at all. And, Section 22 has no connection to campaign finance law in Montana. At most, it simply references contribution limits as the basis—or antecedent condition—for requiring judges to recuse themselves from cases. Sections 21 and 22 make no change to 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.

At times, the legislature can satisfy the requirements of the single subject rule by including the phrase "generally revise" in a law's title—but, only when the subject named for general revision truly encompasses the bill's actual subject matter. *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.'"). SB319's lengthy title begins with the phrase "GENERALLY REVISING CAMPAIGN FINANCE LAWS," but its later-added provisions are not campaign *finance* laws—under even the most charitable reading. Grasping, the State again asks the Court to read Section 21 to include language and meaning that does not appear on the face of the law, stating that Section 21 "further define[s] permissible "'election communications,' 'electioneering communications,' and

'political committees.'" MTD at 14. The State essentially asks the Court to perform the work of the legislature.[2] *But see* § 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.").

Without saying so directly, the State requests the Court conflate "campaign-related laws" with "campaign finance" laws, a narrower category that does not encompass what Section 21 regulates. For example, Section 21 refers to "[a] political committee," but the activities and speech that Section 21 prohibits—voter identification efforts, voter registration drives, etc.—fall outside the definition of "electioneering communications" or "election communications," which specifically exclude "an activity or communication for the purpose of encouraging individuals to register to vote or to vote, if that activity or communication does not mention or depict a clearly identified candidate or ballot issue." SB319, § 3(14)(b)(i). Section 21 bans voting-related speech in certain on-campus spaces *without regard to whether it is reportable* under Montana campaign finance law. Targeting political committees—a certain kind of entity—for new speech-related legal liabilities and restrictions does not make Section 21 a campaign *finance* law.

The State's case against Section 22 is even more attenuated. The State argues only that states may regulate contributions to judicial candidates. MTD 14–15. Plaintiffs have no quarrel with this elementary proposition, but it has no bearing on whether Plaintiffs state a claim to challenge Section 22 under Article V, § 11. States' general authority to regulate judicial contributions says nothing about whether a law forcing judicial recusal is a campaign finance

[2] This argument is particularly confusing in light of the State's vague suggestion that courts violate separation-of-powers principles by striking legislation on constitutional grounds. MTD at 15–16.

law. The State's mischaracterization of the issue highlights its inability to present a reasonable argument that Section 22 falls within the same subject matter as the rest of SB319.

Through its response to Plaintiffs' application for a preliminary injunction, which the State incorporates in its Brief in Support of Motion to Dismiss, the State also claims that Section 21 must be a campaign finance law because it will 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 contained therein directly regulate campaign finance. Part 2 broadly governs various aspects of elections, campaigning, and a wide range of other election-related conduct. *See, e.g.*, §§ 13-35-210, MCA ("Limits on voting rights"); -213 ("Preventing public meetings of electors"); -221 ("Improper nominations"). Section 21 is no more a campaign finance law than are these other provisions.

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: it is not a campaign *finance* law. 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, which is largely codified in Title 13, Chapter 37.

Finally, the State appears to stroll past Article V, Section 11 entirely by suggesting that its provisions have no practical effect on the conduct of the legislature—in order to effect "compromise," the State suggests, the legislature may ignore the Montana Constitution. Not so.

The State's position that "legislating necessarily involves compromise and amendments," MTD at 15, belies the reality of SB319's passage through the legislature. There were no significant disputes documented between the two chambers as to the original content of SB319, only minor differences. The purpose of the single subject rule is to prevent lawmaking on the sly. If these amendments were necessary to ensure passage of SB319 in its original form, that should be apparent from the legislative history, and should have been subject to public comment.

There is no way around the fact that the free conference committee added two completely unrelated provisions 24 hours from the end of the legislative session—provisions that were not features of other bills and that received neither public comment, nor full legislative debate, nor the regular vetting of a legislative committee in its normal course. Yet even in the State's fantasy scenario where these surprise provisions were actually part and parcel of the bill's course through the legislature, SB319 would violate the single subject rule and the rule on amendments and remain unconstitutional. The bill's content speaks for itself. The State prays for this Court to defer to the legislature, but misses something fundamental: the Montana Constitution, whose content and requirements bear on the conduct of the legislature in *precisely this situation*. The legislature does not exist without the Constitution, and vague gestures to political compromise do not free the legislature from the foundational document to which it owes its existence.

Plaintiffs agree that the single subject rule can be accommodating. That's what makes SB319 so striking. If Article V, Section 11 could accommodate everything, it would be empty of purpose. No principled reading of SB319 finds fewer than three subjects. No principled recitation of SB319's passage through the legislature finds anything less than a fundamental change in purpose.

CONCLUSION

Plaintiffs respectfully request this Court deny Defendant's Motion to Dismiss, grant Plaintiffs' Motion for Summary Judgment filed concurrently with this Brief in Opposition, and issue a declaration that SB319 violates Article V, Section 11, Subsections (1) and (3) of the Montana Constitution and is void in its entirety, or, in the alternative, a declaration that Sections 21 and 22 are void.

Respectfully submitted this 18th day of August, 2021.

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

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 18th day of August, 2021, by email.

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

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

/s/ Raphael Graybill
Graybill Law Firm, PC