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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 Hon. Mike Menahan **STATE OF MONTANA'S REPLY IN SUPPORT OF MOTION TO DISMISS**

Plaintiffs continue to miss the mark on standing. It is their burden to adequately plead a cause of action. *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155, P.3d 1247 ("[A] complaint must state something more than facts which, at the most, would breed only a suspicion that plaintiffs have a right to relief."); *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6 ("Facts must be viewed in a light most favorable to the plaintiff, however, the court is under no duty to take as true legal conclusions or allegations that have no factual basis or are contrary to what has already been adjudicated."). They have not done so. Plaintiffs' Amended Complaint does not demonstrate a "past, present or threatened injury to a property or civil right" or that "the alleged injury ... would be alleviated by successfully maintaining the action." *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430. And Plaintiffs certainly have not alleged an injury that is "concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally." *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187. All they allege is "a general or abstract interest in the constitutionality of a statute," which is "insufficient for standing." *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241. The State's motion to dismiss, therefore, must be granted.

I. Plaintiffs have not demonstrated that they have a concrete, particularized injury.

At the outset, Article V, Section 11(6) of the Montana Constitution does not permit Plaintiffs to avoid Montana's stringent standing requirements. Plaintiffs rest much of their argument on a misleading citation to a portion of this provision, portending that it confers standing while removing essential language that demonstrates it does not. (Doc. 34 at 2.) Rather, Article V, Section 11(6) operates as a statute of limitations. It provides, in its entirety: "A law may be challenged on the ground of noncompliance with this section *only within two years after its effective date.*" Mont. Const. Art. V, § 11(6) (emphasis added). By bringing their action within two years of SB 319's passage, Plaintiffs cleared this minimal timing bar. *See Huber v. Groff*, 171 Mont. 442, 456, 558 P.2d 1124, 1131 (1976) ("Art. V, Section 11(6) allows challenge on the ground of noncompliance with the section only within two years of a statute's effective date. This challenge is within that time period."). But clearing that hurdle does not automatically confer standing. *See Grossman v. Department of Natural Resources*, 209 Mont. 427, 437–38 (1984) (applying the ordinary rules of standing to plaintiffs bringing a constitutional challenge under Article V, Section 11); *Schweitzer v. Montana Legislative Assembly*, No. CDV-2010-886, 2010 Mont. Dist. LEXIS 300, *16 (Mont. First Jud. Dist., Dec. 29, 2010)

(holding governor lacked a distinct legal injury sufficient to establish standing to bring challenge under Mont. Const. Art. V, § 11(3)).

Plaintiffs' reliance on *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548, likewise is misplaced. In *Brown*, the Montana Supreme Court determined that taxpayer, voter, and resident status was sufficient to confer standing to challenge the process for appointing judges under Article VII, Section 8 of the Montana Constitution. *Brown*, ¶¶ 3, 11, 19. The Court's decision to accept original jurisdiction (which is not at issue here) was based on a concern that judges who were unconstitutionally appointed could potentially preside over many cases before a challenge to their constitutional authority was decided. *Id.* ¶ 16. By contrast, here, there is no risk of an unconstitutionally appointed judge presiding over a case; rather, the statute requires recusal at the outset of litigation where a judge is aware that an attorney or party appearing before them has contributed more than $90 to their campaign or the campaign of their opponent. *See* Doc. 26 at 11 (noting SB 319 is not retroactive).

Neither *Brown*, nor any Montana case, supports Plaintiffs' conjured theory of standing. Plaintiffs' citation to out-of-state cases and the statement that "suits brought pursuant to Article V, Section 11(6) likely do not operate according to traditional standing principles" admits their inability to demonstrate standing under Montana law. (Doc. 34 at 4.) Adopting Plaintiffs' argument

would expand Montana's standing doctrine to cover hypothetical, abstract injuries, in direct contradiction to Montana's controlling case law. *See Larson*, ¶ 46. If Plaintiffs can maintain this challenge without any concrete injuries (or risks of injuries), then what is to stop uninjured nonparties in other lawsuits from challenging judicial substitutions and recusals? *See, e.g.*, Mont. Code Ann. § 3-1-804 (allowing parties to substitute a district judge); Mont. Code of Jud. Conduct 2.12(A)(5)(a) (requiring recusal when a judge has personal knowledge of disputed facts). That obviously would inject chaos and confusion into the legal system—the very things standing doctrine seeks to prevent.

This Court looks to the face of the Complaint to determine standing. *See Maney v. Louisiana Pacific Corp.*, 2000 MT 366, 28, 303 Mont. 398, 15 P.3d 962. Rather than moving to *once again* amend their complaint, Plaintiffs buckle down, alleging they have established standing when a review of the plain language of their Amended Complaint demonstrates the opposite. For example, citing Paragraph 1 of their Amended Complaint, Plaintiffs state: "Forward Montana conducts exactly the work that Section 21 prohibits in the places that Section 21 prohibits it." (Doc. 34 at 3.) But as the State already pointed out, the cited paragraph states only that "Forward Montana plans to engage in voter identification, get out the vote, and other efforts prohibited by SB319 on and around public university campuses ...." (Doc. 5, ¶ 1.) This

allegation is far too general to establish standing given that SB 319's effect is limited to "inside a residence hall, dining facility, or athletic facility." (Doc. 5 at Exh. A, § 21.) There is no indication in Plaintiffs' Amended Complaint—or in any of the documents filed in this case—that they have operated, currently operate, or even intend to operate in those specific areas. It would have been quite easy for Forward Montana to plead with sufficient particularity that it operates in the newly proscribed campus areas. But it did not, and that is telling. The Amended Complaint must contain sufficient allegations. Adding a gloss of specificity in briefing is not enough.

Similarly, in the Amended Complaint, Forward Montana alleges that it "has at times registered as a political committee" but there is no language indicating it intends to do so in the future. (Doc. 5, ¶ 1.) Section 21 of SB 319 only applies to "political committee[s]." (Doc. 5, Exh. A, § 21(1).) Plaintiffs' hypothetical statement that Forward Montana "will be required" to register in the future "if it continues its work as planned" is insufficient to establish standing, and a response to a motion to dismiss cannot serve to amend a complaint. (Doc. 34 at 3); *see* Mont. R. Civ. P. 15 (setting forth requirements for amending pleadings). This Court should not consider any attempt by the Plaintiffs to bolster their deficient Amended Complaint through their responsive briefing. On the face of the Amended Complaint, Forward Montana does not clearly

state it will register as a political committee in the future, nor does Forward Montana clearly allege SB 319 will apply to them. *See generally* Doc. 5.

Plaintiffs likewise have failed to demonstrate standing with respect to Section 22 of SB 319. Their response brief barely touches on this issue and does nothing to rebut the State's demonstration that Plaintiffs' allegations are based on unfounded assertions of potential judicial substitutions in "pending cases," which relies on a statutory misinterpretation, and that Plaintiffs fail to cite a single case that will be affected. (Doc. 34 at 10–12.). Mere recitation of their pleadings only highlights that Plaintiffs have failed to undertake efforts necessary to identify a cognizable injury. *See e.g.*, *id.* at 4 (referring to the Affidavit of Collin Stephens), *but see* Doc. 7-1, ¶¶ 29–31 ("I [Collin Stephens] am unaware ... " of whether his clients or opposing counsel would be subject to SB 319). It is not that the State ignores Plaintiffs' pleadings and affidavits, as Plaintiffs suggest, it is that Plaintiffs have abjectly failed to plead the facts necessary to establish their alleged injuries. Neither the State nor the Court can do it for them. *See Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 391 Mont. 156, 415 P.3d 486 (noting even a "liberal application of the rules does not excuse omission of facts necessary to entitle relief").

Plaintiffs were required to demonstrate standing at the outset of the litigation. *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 30, 360 Mont. 207, 255 P.3d 80. Their failure to move to amend their Amended Complaint to

allege the requisite facts demonstrates more than pleading deficiencies. It shows there is no real injury at all. Despite their blanket assertions in response to the State's motion to dismiss, Plaintiffs have not established that "Sections 21 and 22 would ... regulate their conduct, causing them injury distinct from the constitutional violation suffered by the public at large." (Doc. 34 at 5.) Plaintiffs—as much as Defendants—have demonstrated they lack standing. This Court should therefore dismiss.

II. Plaintiffs have not stated a violation of Article V, Section 11 of the Montana Constitution.

The State previously explained that Plaintiffs' failure to establish standing is only further exacerbated by their failure to identify any injury resulting from the alleged violation of Article V, Section 11. (Doc. 30 at 13–16.) SB 319—including Sections 21 and 22—generally revises campaign finance law. (Doc. 26 at 12–18; Doc. 30 at 13.) Plaintiffs' response incorrectly applies statutory interpretation rules and fails to demonstrate that SB 319 contains multiple subjects or changed its purpose during the legislative process. (Doc. 34 at 5–9.)

Plaintiffs' argument relies on reading Sections 21 and 22 in isolation, contrary to controlling rules of statutory interpretation. *See State v. DeMers*, 192 Mont. 367, 370, 628 P.2d 676, 678 (1981) (Montana courts "construe and interpret the Code as a homogenous whole giving effect to each provision

thereof rather than interpreting a specific statute in isolation without reference to other related statutes."). Considering Montana's campaign finance regulatory scheme as a whole, it is clear that Section 21 regulates "election communications," "electioneering communications," and "political committees" as defined in Mont. Code Ann. § 13-1-101(14), (16), and (31). There can be no serious question that regulating "political committees" and their expenditures is within the realm of campaign finance.

Similarly, Section 22 of SB 319 clearly falls within campaign finance regulation because it seeks to combat the appearance of judicial partiality *based on campaign contributions*. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888–89 (2009).

Plaintiffs also fail to demonstrate why this Court should diverge from "giv[ing] to [Article V, § 11] a liberal construction, so as not to interfere with or impede proper legislative functions." *State ex rel. Boone v. Tullock*, 72 Mont. 482, 488, 234 P. 277, 279 (1925).[1] The Legislature complied with Article V, Section 11. Sections 21 and 22 are "germane to the general subject expressed in the title"—both generally revise campaign finance laws. *Id.* at 490.

[1] *Tullock* referenced Article V, Section 23 of the 1889 Montana Constitution. Article V, Section 11(3) "is substantively identical to its predecessor, Article V, Section 23 of the 1889 Constitution. This Court has long given liberal construction to this provision of the Constitution in granting deference to the Legislature ...." *MEA-MFT v. State*, 2014 MT 33, ¶ 8, 374 Mont. 1, 318 P.3d 702 (internal citation and quotation marks omitted).

Plaintiffs, therefore, cannot demonstrate a constitutional injury, and their Amended Complaint must be dismissed.

CONCLUSION

Plaintiffs have failed to plead facts necessary to demonstrate standing and have also failed to articulate any cognizable harm. Their failure to move to amend their Amended Complaint, or otherwise bolster their tenuous allegations, only further demonstrates their inability to allege a concrete harm. Therefore, their Amended Complaint must be dismissed pursuant to Mont. R. Civ. P. 12(b)(6).

DATED this 7th day of September, 2021.

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By: _____
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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 Hon. Michael F. McMahon **DEFENDANTS' MOTION TO STAY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT – Mont. R. Civ. P. 56(f)**

Defendants State of Montana and Governor Gianforte, through their undersigned counsel, move for an order staying proceedings relating to Plaintiffs' Motion for Summary Judgment and related pleadings (Ct. Docs. 35 – 39) until such time as this Court can consider and decide the Defendants' fully briefed Motion to

Dismiss (Ct. Docs. 31-32) and, alternatively, to allow discovery into the facts of the Plaintiffs, their claims, injuries and other relevant information before the Defendants are required to respond to that summary judgment motion.

This Motion is made pursuant to Mont. R. Civ. P. 56(f) and is based upon the Brief and the Affidavit of Patrick M. Risken in support filed herewith, and the remainder of the records and files herein.

DATED this 7th day of September, 2021.

Greg Gianforte
GOVERNOR OF MONTANA

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STATE OF MONTANA)
:
County of Lewis & Clark)

PATRICK M. RISKEN, sworn upon oath, deposes and states:

1. I am co-counsel for Defendant in the above action, am over the age of 18 years, am competent to testify as to the matters set forth herein, and make this Affidavit based upon my own personal knowledge and/or belief. I am generally familiar with the claims, materials, documents and pleadings regarding this matter.

2. One of my roles in defending this case is to conduct discovery into the Plaintiffs' claims, including the specific factual allegations made in the Verified Amended Complaint.

3. The Amended Verified Complaint was filed on June 4, 2021, in tandem with the Plaintiffs' Application for Preliminary Injunction and supporting pleadings. That hearing was held before this Court on June 28, 2021 and the Preliminary Injunction Order was entered on July 1, 2021. The application of SB 319 was stayed pending the ultimate outcome of the case, preserving the status quo "during the pendency of this action." Ct. Doc. 28.

4. Defendants then filed a Motion to Dismiss under Mont. R. Civ. P. 12 in a timely manner and briefing on that motion will close today.

5. By filing the Motion to Dismiss under Rule 12 the Defendants challenged the entirety of the Plaintiffs' case, in large part for lack of subject matter jurisdiction due to lack of standing. Defendants made the same argument during the preliminary injunction proceedings but that issue was not resolved at that time. Defendants did not waive the issue, either. The Defendants' pending Rule 12 motion is intended to resolve that issue before an Answer to the Verified Amended Complaint is filed.

6. On August 18, 2021, Plaintiffs responded to Defendants' Rule 12 motion. Ct. Doc. 34. Defendants' Rule 12 motion was not fully briefed at that point. Yet Plaintiffs filed a summary judgment motion and brief on that date, seeking a dispositive ruling in this case. Ct. Docs. 35-37.

7. At this stage of the litigation no discovery has occurred.

8. It appears that Plaintiffs' strategy is to bypass Defendants' Rule 12 motion, deny Defendants discovery into facts relevant to Plaintiffs' standing, and therefore jurisdiction, and proceed directly to dispositive decision without the development of any defense available to Defendants.

9. If the Defendants' Rule 12 motion is denied the Defendants must be allowed to put this case at issue through the admissions and denials of an Answer to the Verified Amended Complaint. Permitting discovery into the facts specific to the allegations made in that Complaint and the Affidavit of Colin M. Stephens, both filed under oath, would allow a full defense of those claims and facts, data or admissible opinions supporting allegations of:

a. The organization, purpose, and activities of Forward Montana under Rule 30(b)(6), including its previous or historical activities that might be affected by SB 319; *Verified Amended Complaint ("VAC")* ¶ 1, Ct. Doc. 5;

b. Plaintiff Leo Gallagher's knowledge of all facts alleged in the Amended Verified Complaint, including facts specific to other plaintiffs, upon his verification signature thereto, *VAC* at page 23;

c. That Plaintiffs Gallagher and/or Gary Zadick have or will be injured by the recusal of any judge before whom any of them are appearing or will appear going forward and the underlying facts, data or other admissible information that support that allegation; *VAC*, ¶¶ 2, 4;

d. The organization, purpose, and activities of the Montana Association of Criminal Defense Lawyers (MACDL) under Rule 30(b)(6), *VAC* ¶ 3;

e. The specific facts upon which the MACDL (or its members) contend that SB 319 will "require potentially hundreds of substitutions" and the underlying facts, data or other admissible information that support that allegation;

f. Forward Montana's status as a "political committee;"

g. Forward Montana's history as a "political committee;"

h. Forward Montana's electioneering activities in relation to SB 319;

i. What if any specific political activities Forward Montana pursues or performs;

i. How Forward Montana's political activities will be hindered by SB 319;

j. The factual bases of any perceived threats to any person, organization or entity from the enforcement of SB 319;

k. Facts specific to any injury claimed by any Plaintiff for an alleged violation of Mont. Const. art. V, § 11;

l. Factual bases of claims that SB 319 "prohibits political committees in election-related speech and assembly" and the underlying facts, data or other admissible information that support that allegation, *VAC* ¶ 58;

m. Harms claimed on behalf of "young Montanans" and the underlying facts, data or other admissible information that support that allegation, *VAC* ¶ 61;

n. Facts supporting the contention that SB 319 "will fundamentally alter the administration of justice in Montana" and the underlying facts, data or other admissible information that support that allegation, *VAC* ¶ 73;

o. Facts specific to the interpretation of SB 319 by judges and the underlying facts, data or other admissible information that support that allegation, *VAC* ¶¶ 74-75;

p. Facts specifically supporting the "extreme delays" and "legal forum shopping" and the underlying data, reports, analyses or other admissible information that support that allegation claimed in *VAC* ¶¶ 76-77;

q. Any facts supporting the contentions of *VAC* ¶¶ 83-85 regarding actual obstacles to litigants and attorneys who wish to participate in electing judicial officials; and/or

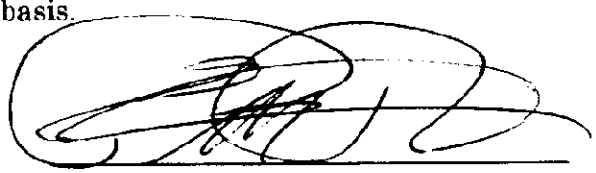
r. Any facts, data, surveys, reports, complaints or other relevant information supporting allegations of the *en masse* substitution of judges claimed in *VAC* ¶ 91.

10. The Defendants have identified a significant number of "facts" that the Plaintiffs have alleged supporting their legal status, activities, and claimed harms or injuries to which the Defendants must be permitted discovery in order to defend this case. Many of those claims directly involve the Plaintiffs' standing to bring this case, collectively or individually, including their respective organization, activities, predictions, perceived harms, concerns or speculated injuries. If proof of those allegations is unavailable to the Plaintiffs the claims affected should be dismissed in a later round of summary judgment.

11. The Plaintiffs cannot be prejudiced by the stay of their pending summary judgment motion in order to allow Defendants appropriate discovery pursuant to a scheduling order issued by the Court in the normal course. The Preliminary Injunction Order entered on July 1, 2021 has put SB 319 on hold so the Plaintiffs concerns have been met. No emergency exists justifying the breakneck processing of this case outside the normal course of civil litigation.

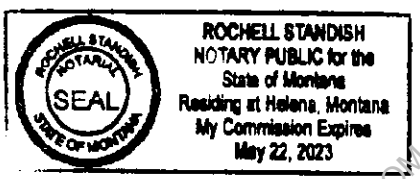
12. Conversely, proceeding with the Plaintiffs' Motion for Summary Judgment at this time will significantly (if not completely) prejudice the Defendants by denying discovery into the claims made by the Plaintiffs specific to jurisdictional issues, including perceived harm, which must be supported by more than unproven allegations. Discovery may demonstrate a lack of jurisdiction over the any or all claims made by Plaintiffs, or that the perceived harm is not supported by sufficient admissible facts. Those facts and defenses must be fleshed out before any dispositive motion is entertained.

13. Defendants submit that this case should proceed in the normal course of civil litigation. Plaintiffs' pending summary judgment motion should be stayed, Defendants' Motion to Dismiss should be decided and, if that motion is denied, the Defendants should be allowed to Answer the Amended Verified Complaint, request a scheduling order and proceed with discovery as is the practice in all civil cases that are not processed on an emergency basis.



PATRICK M. RISKEN

SUBSCRIBED AND SWORN TO before me this 1st day of September, 2021.



Notary Public in and for the State of Montana
Residing at: Helena MT
My Commission Expires: May 22, 2023

CERTIFICATE OF SERVICE

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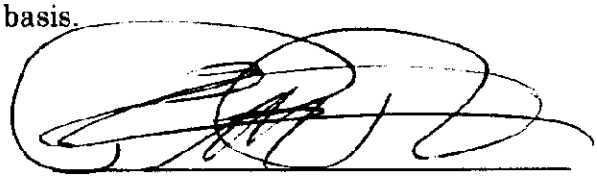
10. The Defendants have identified a significant number of "facts" that the Plaintiffs have alleged supporting their legal status, activities, and claimed harms or injuries to which the Defendants must be permitted discovery in order to defend this case. Many of those claims directly involve the Plaintiffs' standing to bring this case, collectively or individually, including their respective organization, activities, predictions, perceived harms, concerns or speculated injuries. If proof of those allegations is unavailable to the Plaintiffs the claims affected should be dismissed in a later round of summary judgment.

11. The Plaintiffs cannot be prejudiced by the stay of their pending summary judgment motion in order to allow Defendants appropriate discovery pursuant to a scheduling order issued by the Court in the normal course. The Preliminary Injunction Order entered on July 1, 2021 has put SB 319 on hold so the Plaintiffs concerns have been met. No emergency exists justifying the breakneck processing of this case outside the normal course of civil litigation.

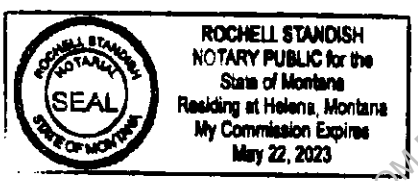
12. Conversely, proceeding with the Plaintiffs' Motion for Summary Judgment at this time will significantly (if not completely) prejudice the Defendants by denying discovery into the claims made by the Plaintiffs specific to jurisdictional issues, including perceived harm, which must be supported by more than unproven allegations. Discovery may demonstrate a lack of jurisdiction over the any or all claims made by Plaintiffs, or that the perceived harm is not supported by sufficient admissible facts. Those facts and defenses must be fleshed out before any dispositive motion is entertained.

13. Defendants submit that this case should proceed in the normal course of civil litigation. Plaintiffs' pending summary judgment motion should be stayed, Defendants' Motion to Dismiss should be decided and, if that motion is denied, the Defendants should be allowed to Answer the Amended Verified Complaint, request a scheduling order and proceed with discovery as is the practice in all civil cases that are not processed on an emergency basis.



PATRICK M. RISKEN

SUBSCRIBED AND SWORN TO before me this 1th day of September, 2021.



Notary Public in and for the State of Montana
Residing at: Helena MT
My Commission Expires: May 22, 2023

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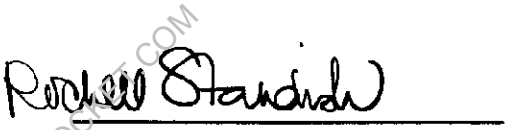

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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 Hon. Michael F. McMahon **DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO STAY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT TO ALLOW DISCOVERY – Mont. R. Civ. P. 56(f)**

INTRODUCTION

Plaintiffs (hereinafter "Forward Montana") were granted a preliminary injunction within weeks of filing this lawsuit, but in that process were fully advised of the Defendant's (hereinafter "State") defense that Forward Montana lacked standing.

The State then timely filed a Rule 12(b)(6) motion to dismiss before answering based upon the Verified Complaint's ("Complaint") failure to allege facts sufficient to support standing or a cognizable claim under Mont. Const. art. V, § 11. That motion is pending. If any part of the Complaint survives the Rule 12 motion the State will be required to answer and state its affirmative defenses. Forward Montana jumped the line by filing a summary judgment motion in addition to its response to Montana's Rule 12 motion, effectively short-circuiting Montana's ability to defend. The State therefore moves for an order (1) staying Forward Montana's motion for summary judgment; and (2) allowing discovery into the allegations of Forward Montana's Complaint and their alleged claims.

If considered at this time the summary judgment motion would deprive the State of its pending Rule 12(b) motion. Before this Court considers any Rule 56 motion it must determine whether the four corners of the Complaint state facts conferring subject matter jurisdiction or whether the allegations, if taken as true for the purposes of the Rule 12 motion, state any valid cause of action. If Forward Montana's Complaint survives that test, the State must be allowed discovery into Forward Montana's standing and the factual bases of its claims.

The State cannot be forced to abandon any valid defense simply because Forward Montana chose to file a dispositive motion while the State's Rule 12 motion is pending and before a scheduling order is even entered. A stay pending this Court's ruling on the State's Rule 12 motion and allowing discovery (should that motion fail) will not prejudice Forward Montana since the Court has already awarded a

preliminary injunction. The status quo is preserved. On the other hand, the prejudice visited upon the State is obvious: a valid jurisdictional defense—standing—would be forcibly waived if the State is required to respond to the summary judgment under the timing set forth in Rule 56(c)(1). Then, the State would be forced to defend the summary judgment without discovery.

For these and the following reasons the State's Motion to Stay consideration of Forward Montana's summary judgment should be granted.

ARGUMENT

A. A stay of Forward Montana's summary judgment motion pending the decision on the State's Rule 12 motion will not prejudice the plaintiffs.

Forward Montana filed the Complaint and application for preliminary injunction on June 4, 2021. Ct. Docs. 5, 6. Montana defended the preliminary injunction motion in part by contesting Forward Montana's standing to bring the claims stated. Ct. Doc. 26 at 3-9. After a hearing on June 28, 2021, the Court issued a preliminary injunction on July 1, 2021, but did not address the State's standing concerns at that time. Ct. Doc. 28. The Order recognized the purpose of a preliminary injunction to preserve the *status quo* pending adjudication of the ultimate issues on the merits. *Id.* at 4. The next step belonged to the State.

The State timely filed a Motion to Dismiss under Mont. R. Civ. P. 12, and a supporting brief, on August 9, 2021. Ct. Docs. 31, 32. By doing so the State contested the case. Forward Montana responded. Ct. Doc. 34. When the State's Reply is filed on September 7, 2021 (the date this motion is filed) the Rule 12 motion will be fully briefed, will be deemed submitted and will be ready for a hearing or this Court's

decision. Mont. Unif. Dist. Ct. R. 2(d). Should the Court rule against the State an answer to the Complaint will be due. A pre-trial conference would then be required. Mont. Uniform Rule 5(a). The pre-trial order from that conference would set a schedule, including discovery, in an orderly manner. *Id.* All parties benefit from the orderly processing of a disputed case.

Considering Forward Montana's summary judgment before any of the above-described procedures would deprive the State of a valid defense and result in a waste of time. The Preliminary Injunction Order (Ct. Doc. 28) continues to operate, protecting Forward Montana's concerns for the time being. Forward Montana will suffer absolutely no prejudice if its summary judgment motion is stayed until the Court determines the State's Rule 12 motion and, beyond that if necessary, allows discovery in the normal course.

B. The State is entitled to discovery of Forward Montana's claims and standing in order to fully defend this case.

Forward Montana's strategy to avoid discovery by jumping to the ultimate hearing is obvious. Mont. R. Civ. P. 56(f) states that if a party opposing a motion for summary judgment shows, for specified reasons, that it cannot present facts essential to justify its opposition, the court may order a continuance to allow additional discovery. The timing of Forward Montana's motion virtually satisfies that requirement by itself. By filing a motion for summary judgment at breakneck speed Forward Montana seeks to avoid further discovery into whether they even have standing to bring this case and the threat of Rule 12(h)(3).

Forward Montana pleaded specific "standing," claims, and injury facts in the Complaint. When briefly addressed during the preliminary injunction hearing it was revealed that, in large part, the claims made are based largely upon unknown persons' speculative reactions to SB 319 and hypothetical harm. Forward Montana's witness could not factually support contentions that SB 319's judicial recusal provision "will cause grave or irreparable injury" to defense lawyers by causing "*en* masse" recusals and case transfers amongst District Court Judges (*Stephens Decl.* ¶¶ 21-28, 30-31; Ct. Doc. 7-1) or harm to members of the Montana Association of Criminal Defense Lawyers (MACDL). *Id.* at ¶ 33. The State must be allowed to depose Mr. Stephens or any other witness identified by Forward Montana having any evidence supporting these blanket statements of injury.[1] Forward Montana must establish jurisdiction, through standing, to even enter the courtroom.

Further, if Forward Montana survives standing, the State should be allowed to test and challenge the allegations of the Complaint through discovery. Forward Montana must also factually support allegations including but not limited to:

- The organization, purpose, and activities of Forward Montana under Rule 30(b)(6), *Verified Amended Complaint ("VAC")* ¶ 1, Ct. Doc. 5;

[1] Further, as argued in the State's motion to dismiss (Ct. Docs. 31, 32), Forward Montana has not established standing as to its Section 21 claims either. As is discussed below, if this matter proceeds, then the State must be allowed to test the jurisdictional basis for all Forward Montana's claims.

- That Plaintiffs Gallagher and/or Gary Zadick have or will suffer the recusal of any judge before whom any of them are appearing or will appear going forward, *VAC*, ¶¶ 2, 4;
- The organization, purpose, and activities of the MACDL under Rule 30(b)(6), *VAC* ¶ 3;
- The specific facts upon which the MACDL (or its members) contend that SB 319 will "require potentially hundreds of substitutions;"
- Forward Montana's status as a "political committee;"
- Forward Montana's history as a "political committee;"
- Forward Montana's electioneering activities in relation to SB 319;
- What if any specific political activities Forward Montana pursues or performs;
- How Forward Montana's political activities will be hindered by SB 319;
- The factual bases of any perceived threats from the enforcement of SB 319;
- Facts specific to any injury claimed by any Plaintiff for an alleged violation of Mont. Const. art. V, § 11;
- Factual bases of claims that SB 319 "prohibits political committees in election-related speech and assembly," *VAC* ¶ 58;
- Harms claimed on behalf of "young Montanans," *VAC* ¶ 61;
- Facts supporting the contention that SB 319 "will fundamentally alter the administration of justice in Montana," *VAC* ¶ 73;

- Facts specific to the interpretation of SB 319 by judges, *VAC* ¶¶ 74-75;
- Facts specifically supporting the "extreme delays" and "legal forum shopping" claimed in *VAC* ¶¶ 76-77;
- Any facts supporting the contentions of *VAC* ¶¶ 83-85 regarding actual obstacles to litigants and attorneys who wish to participate in electing judicial officials; and/or
- Any facts, data, surveys or other information supporting allegations of the *en masse* substitution of judges claimed in *VAC* ¶ 91.

This Court has the inherent discretionary power to control discovery. *J.L. v. Kienenberger*, 257 Mont. 113, 119, 848 P.2d 472, 476 (1993). That discretionary power extends to deciding whether to continue a motion for summary judgment pursuant to Mont. R. Civ. P. 56(f). *Howell v. Glacier General Assur. Co.*, 240 Mont. 383, 386, 785 P.2d 1018, 1019 (1989). Here, a stay of Forward Montana's summary judgment motion to allow discovery into a jurisdictional issue is entirely appropriate. Under the federal court's similar Fed. R. Civ. P. 56(d): "Where . . . a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any [Rule 56(f)] motion fairly freely." *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003).

Issues of justiciability—including standing—are threshold questions. *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶¶ 16, 19, 366 Mont. 450, 288 P.3d 193. Establishing standing is necessary to avoid the issuance of advisory opinions. *Plan*

Helena, Inc. v. Helena Regional Airport Auth. Bd., 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567. It is the first decision in any litigation and must be sufficiently demonstrated before considering a party's actual claims. *Id.* at ¶ 19. Standing resolves the issue of whether the litigant is the proper party to seek adjudication of a particular issue and is determined at the time the action is brought. *Id.* at ¶ 25. Beyond that initial inquiry a defendant should be allowed to discover facts necessary to evaluate and defend the plaintiff's claims. By filing the instant summary judgment motion Forward Montana goes the distance, cutting off any discovery into the very basis of their lawsuit.

As described above and based upon the allegations in the Complaint there are significant questions regarding the status and activities of named plaintiff organizations, the activities of individual plaintiffs, the injuries or harm claimed by plaintiffs for themselves and on behalf of others (whether theoretical or factual), the reactions of judges to the new law (whether speculative or supported) and the actual effect of the new laws on litigants, attorneys, and the courts. Each of those allegations requires proof by admissible evidence as opposed to the relaxed nature of proof allowed during a preliminary injunction hearing.

Without evidence beyond mere speculation a plaintiff cannot claim to suffer some injury that would be irremediable. *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 26, 334 Mont. 86, 146 P.3d 714. Courts do not have jurisdiction to determine matters purely speculative or anticipatory. *Brisendine v. Dept. of Commerce*, 253 Mont. 361, 365, 833 P.2d 1019, 1021 (Mont. 1992). The State has

justifiable concerns, and a valid defense, that the jurisdictional allegations contained in the Amended Verified Complaint are not supported by credible, admissible evidence. Beyond that, the State is unwilling to concede the facts and injuries alleged. If the Court disagrees with the State's Rule 12 position that Forward Montana's has inadequately alleged its standing and claims, then there will be genuine disputes of material fact. The State should be allowed to test those allegations through the course of regular discovery. Taking up Forward Montana's summary judgment motion before the State has even filed an answer eliminates the State's ability to fully and completely defend. Forward Montana would obviously like to skip that part of the case.

CONCLUSION

Defendants submit that the Court should stay proceedings on the Plaintiffs' Motion for Summary Judgment pending decision on the Defendants' Rule 12 Motion to Dismiss. If the Motion to Dismiss is not successful the summary judgment should be stayed and Defendants should be allowed discovery into the allegations of the Verified Amended Complaint, as described above.

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//

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DATED this 7th day of September, 2021.

Greg Gianforte
GOVERNOR OF MONTANA

/s/ Anita Milanovich
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Date: September 7, 2021

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. _____

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Attorneys for Defendant – Appellant

WILLIAM SCOTT ROGERS, individually and on behalf of all others similarly situated, Plaintiffs – Appellees, v. LEWIS & CLARK COUNTY, Defendant – Appellant.	**NOTICE OF APPEAL**

NOTICE is given that Lewis & Clark County, the Appellant above-named and Defendant filed Cause No. BDV 2018-1332 in the First Judicial District, in and for the County of Lewis & Clark, pursuant to Montana Rule of Civil Procedure 23(f) hereby appeals to the Supreme Court of the State of Montana from the judgment or order granting class certification in such action on the 5th day of August 2021.

THE APPELLANT FURTHER CERTIFIES:

1. That this appeal is not subject to the mediation process required by M. R. App. P. 7.
2. That this appeal is not an appeal from an order certified as final under M. R. Civ. P. 54(b
3. That the notice required by M. R. App. P. 27 has been or will be given, within 11 days of the date hereof, to the Supreme Court and to the Montana Attorney General with respect to a challenge to the constitutionality of any act of the Montana Legislature.
4. That there was no hearing held and, therefore, no available transcripts to be ordered from the court reporter.
5. That Appellant is exempt from the requirement of providing a filing fee, pursuant to § 25-10-405, MCA.

DATED this 7th day of September 2021.

MACo Defense Services

/s/ Mitchell A. Young
Mitchell A. Young

CERTIFICATE OF SERVICE

I, Mitchell A. Young, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 09-07-2021:

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Dated: 09-07-2021

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

WILLIAM SCOTT ROGERS, et al., Plaintiffs and Appellants, v. LEWIS & CLARK COUNTY, Defendant and Appellee.	Cause No. DDV-2018-1332 **ORDER ON PLAINTIFF'S MOTION TO CERTIFY CLASS ACTION**

Plaintiffs, ninety-six former detainees of the Lewis and Clark County Detention Center (collectively, the "Detainees") represented by Keif Storrar and Lawrence A. Anderson, have moved to certify a class pursuant to Mont. R. Civ. P. 23(b)(2) and (b)(3). Defendant Lewis & Clark County (the "County"), represented by Mitchell A. Young, opposes. The motion is fully briefed and ready for decision. For the reasons that follow, the motion will be granted.

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FACTUAL AND PROCEDURAL BACKGROUND

The Detainees initiated this action alleging constitutional and statutory violations and various torts and seeking injunctive relief and compensatory and punitive damages against Lewis and Clark County. The Detainees all allege they were subjected to suspicionless strip searches[1] at the Lewis & Clark County Detention Center ("Detention Center") pursuant to a uniform policy or practice requiring a strip search of every inmate eligible for placement in general custody. The Detainees claim they were subjected to these searches after being arrested for traffic offenses or misdemeanors. Ninety-two of the Detainees were searched before being placed in general custody; four, however, claim to have been strip searched without ever being placed in general custody.

The Detainees allege that the Detention Center conducted approximately 3,572 strip searches of persons detained for non-felony offenses pursuant to its uniform policy or practice during the three years preceding this lawsuit. The Detainees estimate an additional 977 such searches have occurred since the date of filing.

On August 23, 2019, the Detainees moved for class certification. (Dkt. 21.) This Court subsequently stayed proceedings on the class certification motion pending the Supreme Court's review of the Court's prior order dismissing all but four of the Detainees from the action. On interlocutory appeal, the Supreme Court reversed the Court's dismissal of the Detainees' claims brought under Mont. Code Ann. § 46-5-105 and remanded for further proceedings. *Rogers v. Lewis and Clark County*, 2020 MT 230, 401 Mont. 228, 472 P.3d 171.

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[1] For purposes of the statute, "strip search" includes both "a visual inspection of a naked individual" and a "visual inspection of the anal and genital areas" of an individual. *Rogers*, ¶ 1 n.1.

The Detainees then filed on January 27, 2021, a supplemental motion for class certification. (Dkt. 99.)

APPLICABLE LEGAL STANDARDS

Trial courts "have the broadest discretion when deciding whether to certify a class." *Houser v. City of Billings*, 2020 MT 51, ¶ 4, 399 Mont. 140, 458 P.3d 1031; *Sieglock v. Burlington N. & Santa Fe Ry. Co.*, 2003 MT 355, ¶ 8, 319 Mont. 8, 81 P.3d 495 ("The judgment of the trial court should be accorded the greatest respect because it is in the best position to consider the most fair and efficient procedure for conducting any given litigation."). The burden of proving that the proposed class meets the requirements of Rule 23 is on the party seeking certification. *Houser*, ¶ 4.

Montana Rule of Civil Procedure 23 governs certification of class action litigation in Montana. Because Federal Rules 23(a) and 23(b) are substantively similar to Montana Rule 23(a) and 23(b), federal case law is persuasive when determining whether to certify a class action under Montana Rule 23. *Sieglock*, ¶ 10; *McDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150, 1154 (1993).

DISCUSSION

A class action is an exception to the general rule "that litigation is conducted by and on behalf of the individual named parties." *Mattson v. Mont. Power Co. (Mattson III)*, 2012 MT 318, ¶ 18, 368 Mont. 1, 291 P.3d 1209; *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 155 (1982). The purpose of a class action is to promote "efficiency and economy of litigation" by conserving the "resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion." *Am. Pipe*

& Constr. Co. v. Utah, 414 U.S. 538, 553 (1974). A class action is appropriate where "a multiplicity of small individual suits for damages" cannot provide effective and "economically feasible" legal redress. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

The Court engages in a two-part inquiry when evaluating a request to certify a class. First, the Court determines whether the four prerequisites for a class action set forth in Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—have been satisfied. *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, ¶ 16, 342 Mont. 380, 180 P.3d 1164. Although courts must avoid determinations on the merits at this preliminary stage, *Mattson v. Montana Power Co. (Mattson II)*, 2009 MT 286, ¶¶ 64–67, 352 Mont. 212, 215 P.3d 675, the Court must nevertheless engage in a "rigorous analysis" to determine whether the Rule 23(a) elements have been met, an analysis that "will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (quoting *Falcon*, 457 U.S. at 161). A "rigorous" analysis requires specific findings by the Court that each Rule 23(a) requirement has actually been satisfied, and it may require the Court to "probe beyond the pleadings and touch aspects of the merits to make this determination." *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 37, 371 Mont. 393, 310 P.3d 452 (citing *Wal-Mart*, 538 U.S. at 350).

Next, if the four Rule 23(a) criteria have been met, the Court then applies Rule 23(b). Rule 23(b) provides three independent routes to class certification, including classes certified for seeking common injunctive or declaratory relief under Rule 23(b)(2), and classes certified for damages actions under Rule 23(b)(3).

If the class can be certified under any one of the three forms of class action described in Rule 23(b), then the Court may certify the class.

With these principles in mind, the Court applies this framework to the Detainees' request for class certification:

1. Rule 23(a) Threshold Prerequisites

The threshold inquiry into whether a class action is appropriate requires analysis of Rule 23(a)'s four prerequisites:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Mont. R. Civ. P. Rule 23(a). Failure of any one of Rule 23(a)'s prerequisites is fatal to class certification. *Murer v. Mont. St. Comp. Mut. Ins. Fund*, 257 Mont. 434, 437, 849 P.2d 1036, 1037 (1993). Each is discussed in turn.

A. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impractical." *McDonald*, 261 Mont. at 400, 862 P.2d at 1155. "Mere speculation as to satisfaction of the numerosity requirement is not sufficient. Rather, plaintiffs must present some evidence of, or reasonably estimate, the number of class members." *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶ 31, 363 Mont. 151, 267 P.3d 756 (quoting *Polich v. Burlington Northern, Inc.*, 116 F.R.D. 258, 261 (D. Mont. 1987)). In *Diaz*, for example, the

class satisfied the numerosity requirement where testimony established that hundreds of State insureds had been in car crashes over a period of eight years. *Id.*

The Detainees allege that the County engaged in a systematic practice that affected a very large number of people, making joinder impractical. They have supported this claim with evidence drawn from Detention Center records suggesting that the Detention Center conducted over 3,500 suspicionless strip searches of persons detained for non-felony offenses between October 31, 2015, and the date this action was filed, October 31, 2018. Based on Detention Center records, the Detainees estimate over 950 suspicionless strip searches have occurred since the lawsuit was filed.

The County quibbles with the size of the proposed class, arguing that the class of individuals who were subjected to suspicionless searches is likely less than the number stated because at least some searches were supported by reasonable suspicion. That is undoubtedly true, but the Detainees have sufficiently established that a large proportion of these individuals were indeed subjected to suspicionless searches. For instance, Sergeant Scott Ferguson, a supervisor in the Detention Center, appears to have agreed in his deposition that for misdemeanants without past criminal history, violent crime, or weapons or drug offenses, a suspicionless search for facility security was the "go-to" stated basis for the search in Detention Center records. (Dkt. 44, Pls. Statement Undisputed Facts ¶ 137.) Other testimony in the record similarly suggests that searches of misdemeanants on a suspicionless basis were widespread, if not universal. (*E.g.*, Pls. Statement Undisputed Facts ¶ 141–145.) Although the Detainees' estimate is not perfect, they have nevertheless met their burden of

"reasonably estimat[ing]" the number of class members. *See, e.g., Sangwin v. State*, 2013 MT 373, ¶ 17, 373 Mont. 131, 315 P.3d 279 (dispute over size of class did not defeat numerosity where evidence was that the benefit denial at issue had been exercised well over 100 times).

B. Commonality

The commonality requirement does not mandate that the class members claims be identical; rather, it is satisfied if there is either *a* question of fact *or* of law common to all class members. *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 31, 371 Mont. 393, 310 P.3d 452; *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, ¶ 16, 342 Mont. 380, 180 P.3d 1164 ("We have previously held that, regardless of differences among class members, this element [commonality] is met if a single issue is common to all.").

While commonality has historically placed a relatively low burden on plaintiffs, *Jacobsen*, ¶ 31, the United States Supreme Court significantly tightened the commonality requirement in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *Sangwin*, ¶ 18. Under the more stringent *Wal-Mart* standard, the claims of class members and class representatives "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution," meaning "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Sangwin*, ¶ 18 (quoting *Wal-Mart*, 564 U.S. at 350). While the Montana Supreme Court has not yet decided whether to follow the *Wal-Mart* standard, *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 26, 385 Mont. 396, 384 P.3d 455, that question need not be decided today because, here, the proposed class meets the *Wal-Mart* commonality standard.

Importantly, there is no necessity that the common issue of law or fact dispose of the case: rather, it is enough that the class-action will provide "common answers" to questions of law or fact that will "efficiently drive the resolution of the litigation." *Jacobsen*, ¶ 40. The County indisputably engaged in a uniform practice affecting all class members: a policy or practice of conducting strip-searches of newly booked misdemeanor detainees before they could be placed in general population. The alleged injury suffered by each class member—invasion of their statutory privacy rights—is the same. *See Wal-Mart*, 564 U.S. at 350 (requiring plaintiffs "to demonstrate that the class members have suffered the same injury" (internal quotations and citations omitted)). Each class member's challenge to the validity to their search uniformly implicates Mont. Code Ann. § 46-5-105's prohibition on suspicionless strip searches of misdemeanor detainees. Thus, a finding that the Detention Center engaged in a policy or practice that violated § 46-5-105 will "efficiently drive the resolution of the litigation." *Jacobsen*, ¶ 40. Even if some cases within the class will require individualized determinations regarding whether the search was supported by reasonable suspicion, or if individualized determinations of damages will be necessary, "at least it [will not] be necessary in each of those [individualized hearings] to determine whether the challenged practices were unlawful." *Jacobsen*, ¶ 42 (quoting *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012)). Moreover, even if there may be individual variation in circumstance, there will likely be broad themes in the fact patterns behind individual searches and the damages suffered, obviating the need to hold individual hearings for each class member.

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As the core of the Detainees' claims—whether the Detention Center's policy or practice of conducting suspicionless searches of misdemeanor arrestees—will be resolved "in one stroke," there are common issues of law or fact even under the more stringent *Wal-Mart* standard. *See Sangwin*, ¶ 18.

C. Typicality

Next is typicality. The claims or defenses of the representative parties must be "typical of the claims or defenses of the class." Mont. R. Civ. P. 23(a)(3). The typicality requirement ensures the named class members' interests align with the interests of absent class members. *Byorth*, ¶ 33. The "difference between typicality and commonality is a matter of perspective: commonality looks to the questions of law or fact common to the class as a whole, while typicality focuses more closely on the named representatives' relationship to the rest of the class." *Byorth*, ¶ 34.

Typicality is met where the named plaintiffs' claim stems from the "same event, practice, or course of conduct" that forms the basis of the class claims and is based upon "the same legal or remedial theory." *Byorth*, ¶ 33. As the Montana Supreme Court has observed:

> The typicality requirement is designed to assure that the named representative's interests are aligned with those of the class. Where there is such an alignment of interests, a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class....
>
> The named plaintiff's claim will be typical of the class where there is a nexus between the injury suffered by the plaintiff and the injury suffered by the class. Thus, a named plaintiff's claim is typical if it stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory.

McDonald, 261 Mont. at 402, 862 P.2d at 1156 (quoting *Jordan v. County of Los Angeles*, 669 F.2d 1311 (9th Cir. 1982)). The typicality requirement is not demanding, and the relevant event, practice or course of conduct need not be identical. *Diaz*, ¶¶ 35, 36; *Sangwin*, ¶ 21.

The Detainees are all alleged to be individuals arrested for non-felony offenses who were subjected to a strip search without reasonable suspicion to believe that the person was concealing a weapon, contraband, or evidence of a crime. Their claims for relief all stem from the same event, practice, or course of conduct that forms the basis of the class claims.[2]

D. Adequacy of Representation

The final requirement under Rule 23(a) allows certification only where the representative parties will fairly and adequately protect the interests of the class. M. R. Civ. P. 23(a)(4). The named representatives' attorneys must be qualified, competent, able to conduct the litigation, and "the named representative's interests [may] not be antagonistic to the interests of the class," *Diaz*, ¶ 38.

The County does not challenge the competency of the Detainees' counsel. Class counsel attest to experience in complex class action litigation, including multi-district litigation, and to extensive trial experience. The

[2] The County asserts that during discovery they identified at least two named plaintiffs who were not strip searched in the three years prior to the filing of the Complaint, although they did not cite any record evidence or even supply the names of the two plaintiffs. Named plaintiffs whose claims are time-barred are excluded from the class, and their claims are not typical of the claims of the class; however, the Court currently lacks any basis other than counsel's assertion to conclude that any representatives have failed that standard. As the Court retains discretion to amend its class certification order, claims that one or more individual named plaintiffs are not appropriate class representatives are better addressed in subsequent proceedings. The Court will note that ninety-six plaintiffs are likely more than are necessary to adequately represent the class, and the Detainees may wish to consider reducing the number of class representatives.

Detainees' attorneys are competent to protect the interests of the class fairly and adequately.

2. Rule 23(b) Types of Class Actions

After a court determines the Rule 23(a) prerequisites are satisfied, its analysis shifts to Rule 23(b). The Detainees seek a class for injunctive or declaratory relief under Rule 23(b)(2), and a class for damages under Rule 23(b)(3). With respect to these two types of class actions, Rule 23(b) provides as follows:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> • • •
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to the findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

M. R. Civ. P. 23(b).

A. Rule 23(b)(3) Damages Class

A class certified under Rule 23(b)(3) may recover money damages. *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶ 17, 396 Mont. 443, 445 P.3d 834. A

class certified under Rule 23(b)(3) must satisfy two elements: (1) the questions of law or fact common to the members of the class must predominate over questions of the individual members; and (2) the class action must be superior to other methods of adjudicating the controversy. Mont. R. Civ. P. 23(b)(3). The Detainees have the burden of establishing both elements.

I. Predominance

The most substantial dispute between the parties, centers on the predominance requirement. Rule 23(b)(3) requires that questions of law or fact common to the members of the plaintiff class predominate over any questions affecting only individual members. In other words, "[c]ommon issues must. . . be more prevalent than individual issues." *Sangwin*, ¶ 37. "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 136 S. Ct. 1036, 1045 (2016) (quoting 2 W. Rubenstein, *Newberg on Class Actions* § 4:50, at 196–197 (5th ed. 2012)). A class determination under Rule 23(b)(3) "is appropriate when the class members' claims 'depend on a common contention that is capable of classwide resolution.'" *Sangwin*, ¶ 37 (quoting *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 48, 366 Mont. 450, 288 P.3d 193).

The Court is persuaded that the common issues predominate over the individual ones in this case. The core liability question is whether the Detention Center's has a policy or practice of routinely conducting suspicionless strip searches on misdemeanor arrestees that violates the arrestees' rights under

Mont. Code Ann. § 46-5-105. This legal question and the factual questions regarding the nature and scope of the Detention Center's policies and practices are common to the entire class, and answering these questions will unquestionably advance the litigation. *See Knudsen*, ¶ 20 (certifying a 23(b)(3) class where "at least one of the common questions. . . is capable of class-wide resolution and will move the litigation forward"); *Houser v. City of Billings*, 2020 MT 51, ¶ 14, 399 Mont. 140, 458 P.3d 1031 (affirming certification of class because "the same legal question common to all class members" predominated over questions affecting individual members).

To be sure, there are two primary areas of individual variation: (1) the degree of damages suffered by individual class members; and (2) whether a search in an individual case was objectively supported by reasonable suspicion, thus taking that search outside the scope of § 46-5-105. As to the former, individual variation in damages does not generally preclude certification of a class under Rule 23(b)(3) where liability can be predominately determined on a class-wide basis. *See Knudsen*, ¶ 22 (affirming class certification for alleged invasion of student privacy and charging of excessive fees despite individual issues about nature of injury to each plaintiff); *McDonald*, 261 Mont. at 403, 862 P.2d at 1157 (lawsuit raising service complaints against water company properly certified despite individual causation and damages issues); 5 Moore's Federal Practice - Civil § 23.45 (2021) ("[I]f common questions predominate over individual questions as to liability..., courts generally find the predominance standard of Rule 23(b)(3) to be satisfied, even if individual damages issues remain.").

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As to the latter—the existence of reasonable suspicion—the County correctly points out that reasonable suspicion is an individualized determination based on the totality of the circumstances and that it is an objective standard. *See City of Helena v. Brown*, 2017 MT 248, ¶¶ 9–10, 389 Mont. 63, 403 P.3d 341. Nevertheless, several factors suggest that the common liability questions predominate over individualized considerations.

First, the proper focus of the class action is on the policy or practice itself of conducting suspicionless strip searches of all misdemeanor[3] arrestees who may be going into general population. The evidence produced by the Detainees to date tends to show that the Detention Center's practice was routine, widespread, and conducted without any regard to individual circumstances in most cases. (Dkt. 44, SUF ¶¶ 54–61, 72–79, 131–148.) Indeed, the evidence produced by the Detainees suggests that prior to a 2010 federal court decision expressly authorizing suspicionless searches, misdemeanor arrestees were searched less often. (*Id.* ¶¶ 107–114.) Thus, even if there is some degree of individual variation on the question of liability, answering the common legal question regarding the validity of this policy or practice will substantially advance the litigation. As the First Circuit explained in rejecting a similar argument:

> If there was in fact a rule, custom or policy of strip searching every arrestee or a substantially overlarge category, then it is a fair guess that most arrestees so classed were strip searched on this basis. There might yet be some number as to whom defensible individual judgments to strip search were actually made or could have been made—two different situations with different legal implications; but

[3] Although the statute speaks to "traffic offense or an offense that is not a felony" all offenses (including traffic offenses) that are not felonies are, by definition, misdemeanors. Mont. Code Ann. §§ 45-2-101(42) (defining misdemeanor), 45-2-101(23) (defining felony), 61-8-711 (violations of traffic code are misdemeanors unless declared to be a felony).

> whoever has the burden of identifying such persons, they may well not be numerous.

Tardiff v. Knox County, 365 F.3d 1, 6 (1st Cir. 2004).

Second, what the County is really arguing is an issue of class definition. *See Sangwin*, ¶¶ 36–38 (remanding to district court to redefine the class because individualized determinations were necessary to determine who was a member of the class). And to be sure, the class definition must be reasonably precise, using objective criteria to establish a membership with definite boundaries. *See, e.g., Wilcox v. Swapp*, 330 F.R.D. 584, 595 (E.D. Wash. 2019). As the Detainees define the class, the Court would likely need to conduct some individualized analysis of putative class members to determine whether they belong to the class—in this case, because their strip search was objectively unsupported by reasonable suspicion. *See Sangwin*, ¶ 37. Indeed, federal courts addressing class actions over strip searches have historically split over whether individual variation over the existence of reasonable suspicion or probable cause precludes predominance or prevents the class from being sufficiently precise. *See Woodall v. County of Wayne*, 2020 U.S. Dist. LEXIS 11116, at *7–*8, 2020 WL 373073 (E.D. Mich. May 11, 2018) (collecting cases).

One solution to this problem—adopted by several courts—is to limit the definition of the class to those who were searched pursuant to the blanket search policy or practice at issue. *See, e.g., Jones v. Murphy*, 256 F.R.D. 519, 524 (D. Md. 2009). In this case, this renders the class easy to define, for the Detention Center kept records—its intake form documents whether a strip search was performed and the reason for the search:

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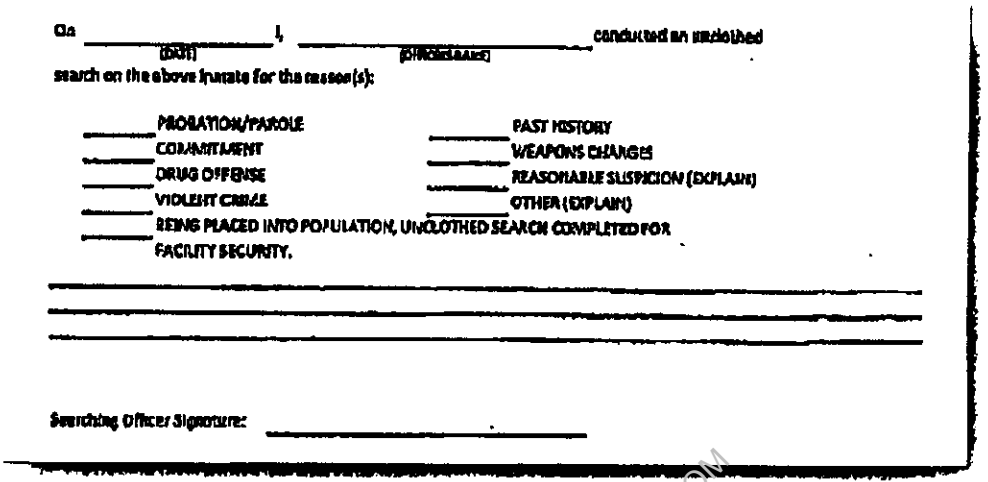

On _____, I, _____ conducted an unclothed
(DATE) (OFFICER'S NAME)
search on the above inmate for the reason(s):

_____ PROBATION/PAROLE
_____ COMMITMENT
_____ DRUG OFFENSE
_____ VIOLENT CRIME
_____ BEING PLACED INTO POPULATION, UNCLOTHED SEARCH COMPLETED FOR FACILITY SECURITY.
_____ PAST HISTORY
_____ WEAPONS CHARGES
_____ REASONABLE SUSPICION (EXPLAIN)
_____ OTHER (EXPLAIN)

Searching Officer Signature: _____

That final category—"BEING PLACED INTO POPULATION, UNCLOTHED SEARCH COMPLETED FOR FACILITY SECURITY"—denotes that the search was conducted not because of reasonable suspicion, but pursuant to the Detention Center's practice of searching everyone who will be placed into general custody. Thus, the form allows the class to be defined using objective criteria. The cases where the intake form does not reflect a search conducted for reasonable suspicion but for which articulable reasonable suspicion nevertheless exists are likely to be few.

Moreover, the State ordinarily bears the burden of justifying the reasonableness of a warrantless search, *see, e.g., Weer v. State*, 2010 MT 232, ¶ 10, 358 Mont. 130, 244 P.3d 311, and several federal courts confronted by similar cases have held that once the plaintiffs sufficiently demonstrate that class members were searched pursuant to a blanket policy, the defendants then have the burden of demonstrating that reasonable suspicion supported particular searches of individual class members. *See Jones*, 256 F.R.D. at 524; *Macy v.*

Suffolk County, 191 F.R.D. 16, 24 (D. Mass. 2000) ("To require Plaintiff to prove that each individual search was unsupportable, as well as indiscriminate, would be unnecessary and unfair. Given that these women were routinely strip-searched, the burden rests on Defendants to demonstrate that particular searches were reasonable."). This, too, will limit the need for individualized determinations.

Finally, many arrests look alike and will be supported by police reports and similar documentation, and there will likely be broad common thematic elements to arrests that allow grouping of individual disputes over reasonable suspicion. To that end, the Court notably retains discretion to amend the class definition or certify subclasses if further proceedings warrant doing so to preserve judicial economy. *See* Mont. R. Civ. P. 23(c); *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶¶ 27–30, 363 Mont. 151, 267 P.3d 756 (class action certification orders "are not frozen once made," and may be modified as the case proceeds). In short, the individual variation is not so great or so unmanageable that the individual issues can be said to predominate over the common ones.

II. Superiority

Finally, the Court considers whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In determining whether a class action is superior to other available methods, the Court considers the following non-exclusive factors: "(1) class members' interests in individually controlling the prosecution of separate actions; (2) the extent and nature of litigation regarding the issue already begun by class members; (3) the desirability of concentrating the litigation in a particular forum; and (4) the likely difficulties in managing a class action." *Knudsen*, ¶ 17.

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In general, class certification is the best vehicle for litigating disputes where the size of individual claims are small, such that individually litigating those claims is impractical. Thus, in *Ferguson*, the Montana Supreme Court reversed a district court's denial of class certification, concluding, "the efficient remedy of class-wide declaratory relief is appropriate because the size of the average claim is so small that relief for the average class member is not economically available outside class litigation." *Ferguson*, ¶¶ 40–41. Here, individual adjudication of each claim for relief for the average class member would not be economical, and adjudication of these smaller claims via class action is superior to depriving these litigants of the opportunity to litigate their case. As one court, addressing a certification motion in a strip search case, recently explained:

> A class action, though not without problems, is superior to dozens of individual suits that all present the same question. *See Jones*, 256 F.R.D. at 526 (acknowledging that while manageability problems can arise in a strip search class action, they will likely be outweighed by the inherent advantages of class action litigation."). It is also superior to the alternative—dozens of viable suits that are never brought. Many of the potential class members will likely have low damages and limited access to legal services. . . *See Tardiff*, 365 F.3d at 7 ("It is enough for the superiority determination here that for most strip search claimants, class status here is not only the superior means, but probably the only feasible one (one-way collateral estoppel aside), to establish liability and perhaps damages."); *see also Blihovde [v. St. Croix County]*, 219 F.R.D. [607,] 622 [W.D. Wis. 203] (recognizing that since illegal strip searches tend not to leave physical injuries, damages are often low or hard to prove, and the incentive to file suit is correspondingly diminished).

Woodall, 2020 U.S. Dist. LEXIS at *16–*17.

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Further, since all class members' claims involve identical legal issues and nearly identical facts, no factual basis exists for concluding that individual class members have great interest in controlling their own litigation. No evidence of other pending litigation of these claims has been offered. The allegations all occurred in Lewis & Clark County and can be determined under Montana law. Finally, the class is manageable—in the Court's view, given the similarity of the claims; the significant overlap of issues; and the ability to identify categories of individual claims through discovery, motions, practice, redefinition of the class, or certification of subclasses to categories through discovery and motions practice; there would be minimal value to trying each of these cases individually and significant benefits to addressing them collectively.

B. Rule 23(b)(2) Injunction Class

The Detainees also seek certification under Rule 23(b)(2). This type of class action is appropriate where the class representatives are seeking injunctive or declaratory relief because the defendant has acted "on grounds generally applicable to the class." Mont. R. Civ. P. 23(b)(2). A 23(b)(2) class is often invoked by class action litigants alleging civil rights violations. "The key to the [Rule 23](b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Diaz*, ¶ 42 (quoting *Wal-Mart*, 564 U.S. at 360).

Here, the Detainees seek certification under both Rule 23(b)(2) and 23(b)(3). It is not uncommon, however, for a class to seek injunctive relief as well as monetary damages. The court may find that "hybrid certification" is appropriate in such cases. Since the Detainees seek certification to address an

injunction prohibiting the County from continuing its suspicionless strip-search practices, certification under Rule 23(b)(2) is appropriate.

3. Constitutional Claims

Although not addressed extensively in the briefing, the four individual plaintiffs who were never placed in general custody still have live potential constitutional claims. The Court has considered whether to certify a sub-class for similarly situated individuals or whether to include the constitutional claims in the class. The Court concludes that neither is appropriate. As noted above, the Detainees have the burden of demonstrating, among other things, numerosity and typicality. The Detainees have neither alleged nor produced evidence from which the Court can reasonably estimate the size of such a subclass of plaintiffs not placed in general custody pursuing constitutional claims, let alone whether that number is sufficiently great that joinder would be impractical. Nor can the Court determine whether there is sufficient commonality in the circumstances of these individual plaintiffs that their claims are typical of a putative class of detainees searched but not placed in general custody. The Detainees have not met their burden of establishing that a class action is an appropriate vehicle for litigating these remaining constitutional claims.

Based on the foregoing considerations, the Court enters the following:

ORDER

1. The Detainees' Motion and Supplemental Motion for Class Certification (Dkts. 21 and 99) are **GRANTED**.

2. **Class definition.** The Court certifies the following class under Rules 23(b)(2) and 23(b)(3):

Each person arrested or detained for a non-felony offense from October 31, 2015, to the present who has been subjected to a strip search or visual body cavity search by a law enforcement officer or employee of the Lewis and Clark County Detention Center pursuant to a Detention Center policy or practice of conducting strip searches or visual body cavity searches of detainees who may be placed into general custody.

3. **Class claims, issues, or defenses.** The class claims include the Detainees' cause of action under Mont. Code Ann. § 46-5-105, and any defenses lodged by the County thereto.

4. **Class Counsel.** Keif Storrar and Lawrence A. Anderson are appointed as class counsel.

5. A status hearing will be set for **August 26, 2021 at 2:15 p.m.**, to establish a schedule for the provision of notice to the class and for further proceedings in this matter.

DATED this 5th day of August 2021.

CHRISTOPHER D. ABBOTT
District Court Judge

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