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.	(amail) Cause No. BDV-2021-611 **BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

"A party may move for summary judgment at any time." Mont. R. Civ. P. 56(c)(1)(A). Through its motion, however, the State contends that the order of business in this case "belong[s]

to the State"[1]—not the rules of civil procedure—and asks the Court to enter a stay so the State may raise identical standing arguments for a third time.

The Court should reject the State's stalling tactic. Plaintiffs' motion for summary judgment raises exclusively legal issues under Article V, § 11 of the Montana Constitution. The claims rise or fall *only* on this Court's interpretation of (1) the text of Senate Bill 319 and (2) the text of Article V, § 11 of the Montana Constitution. The facts the State now asks to discover can have no effect on this Court's resolution of the motion.

Courts routinely resolve motions to dismiss at the same time as motions for summary judgment, particularly in cases like this one that tee up legal issues. The Court is well acquainted with the State's standing and merits arguments. These arguments have not evolved from the preliminary injunction stage. There is no reason to believe that this Court cannot resolve the motion to dismiss and the motion for partial summary judgment at the same time. Moreover, judicial economy is not served by delaying resolution of these claims and ordering multiple hearings, just to accommodate the State's request for discovery it has conceded is unnecessary.

The State's Rule 56(f) motion frustrates "the just, speedy, and inexpensive determination" of this action, Mont. R. Civ. P. 1, and should be denied.

LEGAL STANDARD

A motion for summary judgment should be granted when "there is no genuine issue as to any material fact[,] and . . . the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). When, due to incomplete discovery, a party is unable to present *facts* that would create a genuine issue, the party may "show[] by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition." Mont. R. Civ. P. 56(f). The decision of whether

[1] State's Brief in Support of Motion to Stay at 3.

to grant a Rule 56(f) motion is discretionary. *See Hinderman v. Krivor*, 2010 MT 230, ¶ 16, 358 Mont. 111, 244 P.3d 306. "A district court does not abuse its discretion in denying a Rule 56(f) motion if the party moving for additional discovery fails to establish how the proposed additional discovery will prevent summary judgment." *Id.*

PROCEDURAL HISTORY

Plaintiffs filed their Verified Amended Complaint on June 4, 2021. Over the State's arguments on standing and the merits, the Court entered a preliminary injunction on July 7. The State moved to dismiss on August 4, renewing its arguments on standing and the merits. The State did not seek jurisdictional discovery before filing its motion. Plaintiffs timely filed their motion for partial summary judgment on August 18, the same day they responded to the State's motion to dismiss. *See* Mont. R. Civ. P. 56(c)(A). Plaintiffs' motion for summary judgment only seeks declaratory relief on Counts One and Two of the Verified Amended Complaint, which are Plaintiffs' claims under Article V, § 11 of the Montana Constitution, and which turn on the text of SB319.

ARGUMENT

The State makes two arguments in support of its motion to stay. First, the State asks for relief from the burden of responding to Plaintiffs' pending motion for summary judgment until this Court decides its motion to dismiss. Rule 56(f) does not support this request. That standing is a threshold consideration is no basis for delaying the presentation of purely legal issues, such as those presented in Plaintiffs' motion for summary judgment. *See* Mont. R. Civ. P. 56(c)(A) ("A party may move for summary judgment at any time."). There is every reason to believe the Court, already familiar with the State's arguments on both standing and the merits, can resolve these issues in a single order following a single hearing.

Second, the State asks the Court to stay resolution of Plaintiffs' motion for summary judgment because it would like to conduct jurisdictional discovery as well as discovery on claims Plaintiffs do not raise in their motion for summary judgment. This argument at least appears guided by Rule 56(f), but still falls far short of the Rule's requirements. Indeed, the State fails entirely to explain the relationship between the pending motion for summary judgment and the facts it seeks to discover—and there is no relationship to explain.

Ultimately, the State's motion and the arguments presented in its supporting brief lack any principled support. The State does not explain *why* it would be prejudiced by having to file a brief responding to the merits of Plaintiffs' purely legal motion. The reason cannot be conservation of resources, as the State has now filed a new motion and created a new issue that must be resolved. If the purpose is simply to delay the deadline for a response without requesting an extension, the strategy has proven successful.[2] No other purpose is presented in the motion and supporting documents. Rule 56(f) is not a tool to effect needless delay. The motion to stay should be denied.

I. The State's pending motion to dismiss is no basis for a stay of Plaintiffs' pending motion for summary judgment.

The State asks the Court to stay Plaintiffs' motion for summary judgment until the State's motion to dismiss has been resolved—essentially, it argues that the Court should revisit these overlapping issues in multiple hearings, rather than resolving them at once. The State appears to argue that, because it has "contested the case," everything else goes on the back burner. Br. in Supp. of Mot. to Stay at 3. But the Montana Rules of Civil Procedure expressly authorize a party

[2] To avoid further unwarranted delay, Plaintiffs file this response well before their deadline. If the Court denies the State's motion to stay, Plaintiffs request that the Court account for the delay occasioned by the State's motion when it sets a deadline for the State's response to Plaintiffs' pending motion.

to seek summary judgment "at any time." Mont. R. Civ. P. 56(c)(1)(A). The Court's docket and the rules of civil procedure drive a case's progress, not the tactical preferences of a single litigant (even when that litigant is the State). The State has failed to present legal authority for this argument, which is itself adequate grounds for its rejection.

Setting aside the lack of legal support for the State's position, a stay does not serve the interests of fairness or judicial economy. The Court will not be confused by having Plaintiffs' motion for summary judgment fully briefed when it decides the State's motion to dismiss. Indeed, it may be more expedient for the Court to consider and resolve the motions on the same timeline. Although Plaintiffs vigorously dispute the State's standing arguments, they do not dispute that standing can and should be resolved first. Still, a series of hearings and orders are unnecessary because all fully presented issues can be argued in one hearing—as they were at the preliminary injunction stage. And if the Court agrees with Plaintiffs on the issue of standing, it may dispose of the State's standing arguments in one section of an order, and then proceed to resolve the pending motion for summary judgment in another. The order in which these questions are resolved is a matter of the Court's discretion.

The State contends that it is entitled to file an answer, attend a pre-trial conference, and engage in discovery before the Court can resolve Plaintiffs' motion. Plaintiffs address the necessity of discovery (an appropriate basis for a Rule 56(f) motion) below. Regardless, the State's reasoning quickly hits a dead end: If the Court grants Plaintiffs' motion for summary judgment, it will have decided that the legal issues are determinative—i.e., that there is no need for further proceedings and that the State has no "valid defense" of which it may be "deprive[d]." Br. in Supp. of Mot. to Stay at 4.

Ultimately, Rule 56(c)(1)(A) could not be clearer: "a party may move for summary judgment at any time." Under Rule 56, there is precisely one exception to the rule that "a party opposing the motion *must* file a response, and any opposing affidavits, within 21 days after the motion is served or a responsive pleading is due, whichever is later." Mont. R. Civ. P. 56(c)(1)(B) (emphasis added). That exception, provided under Rule 56(f), authorizes relief when the opposing party demonstrates that it "cannot present facts essential to justify its opposition." A pending motion to dismiss is not a "fact essential to justify its opposition" cognizable under Rule 56(f)—a point ostensibly conceded given that Rule 56(f) appears nowhere in Section I of the State's brief. Br. in Supp. of Mot. to Stay at 3–4. This argument amounts to little more than an articulation of one party's preferences about the order of litigation. It is not authority. Further, as explained immediately below, the exception does not apply even to the degree the State properly invokes it.

II. The State fails to "show[] by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition" to Plaintiffs' pending motion for summary judgment, which presents purely legal questions. Mont. R. Civ. P. 56(f).

The State next argues that it is "entitled to discovery of Forward Montana's claims and standing to fully defend this case." Br. in Supp. of Mot. to Stay at 4. Fatally, the State identifies no facts that would have any effect on the pending motion for summary judgment. The motion for summary judgment hinges on the Court's interpretation of the *text* of SB319 and the *text* of Article V, § 11 of the Montana Constitution.

The point of filing an early motion for summary judgment is not, as the State argues, to hoodwink the Court. The standard for summary judgment authorizes relief in the absence of a "genuine issue as to any material fact." Mont. R. Civ. P. 56(c)(3). Where, as here, the issues

presented are purely legal, early summary judgment is not only permissible but serves the interests of judicial economy and efficiency.

Rule 56(f) creates no exception to the rule that summary "judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). Instead, it operates to further the general rule by providing a mechanism for an opposing party to show why further discovery will provide that party with the "facts essential to justify its opposition." Mont. R. Civ. P. 56(f).

In other words, Rule 56(f) relief is appropriate only where discoverable facts could affect the resolution of the pending motion. *See Davidson v. Barstad*, 2019 MT 48, ¶ 30, 395 Mont. 1, 13, 435 P.3d 640, 648 ("[T]he moving party has the burden of making a non-speculative affidavit showing of particular facts or types of fact sought and how, if found, those facts will preclude adverse judgment."). There must be a reasonable argument, supported by factual affidavit, that a genuine dispute of material fact will develop through the discovery process. Mont. R. Civ. P. 56(f). The standard cannot be met where, as here, the proposed discovery would have no bearing on the outcome of the motion for summary judgment. *Rosenthal v. Cty. of Madison*, 2007 MT 277, ¶ 38, 339 Mont. 419, 170 P.3d 493 ("A district court does not abuse its discretion in denying a [Rule] 56(f) motion where the party opposing a motion for summary judgment does not establish how the proposed discovery could preclude summary judgment.").

The State claims entitlement to two categories of factual discovery: (1) jurisdictional facts that it theorizes affect standing; and (2) facts arguably relevant to counts in the Complaint *not raised* in Plaintiffs' motion for summary judgment. Neither category warrants further discovery. The State's motion and supporting documents do not point to a "genuine dispute of

material fact" that could affect the purely legal arguments presented in Plaintiffs' motion for summary judgment on Counts One and Two of the Verified Amended Complaint. *BNSF Ry. Co. v. Eddy*, 2020 MT 59, ¶ 7, 399 Mont. 180, 459 P.3d 857.

A. The State offers no support for its argument that it is entitled to discover facts related to standing after filing a motion to dismiss for lack of standing.

The State already has filed its motion to dismiss related to standing. Its reply brief, filed concurrently with the motion to stay, fails even to mention the motion to stay or suggest in any way that jurisdictional discovery is warranted. Nor does its opening brief in support of the motion to dismiss hint that it will later seek discovery relevant to the motion to dismiss.

From one side of its mouth, in its reply brief in support of its motion to dismiss, the State (correctly) argues that standing depends on the allegations of the Complaint. *See* Reply in Supp. of Mot. to Dismiss at 4 ("This Court looks to the face of the Complaint to determine standing."); *see, e.g.*, *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 37, 356 Mont. 41, 230 P.3d 808. From the other, in supporting its motion to stay, the State claims that it has an open-ended right to continue to dispute Plaintiffs' standing throughout the pendency of this lawsuit such that the Court may not resolve the purely legal questions presented in Plaintiffs' summary judgment motion. Br. in Supp. of Mot. to Stay at 8.

There are a couple of ways to understand the State's arguments regarding discovery related to Plaintiffs' standing. The first is that the State is looking for an opportunity to rehash the arguments presented in its motion to dismiss—to take a *third* run at standing, after the same arguments failed to prevent the issuance of a preliminary injunction, and even as they have been raised again in its motion to dismiss. But the State's claim that the alleged injuries are too speculative to give rise to standing goes nowhere, regardless of where it is presented. *See generally* Pl.'s Br. in Opp. to Mot. to Dismiss.

Alternatively, the State believes that there is simply no limit to discovery related to standing—even when it already has moved for dismissal on that basis. None of the cases cited support that proposition. *See Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶¶ 16, 19, 366 Mont. 450, 288 P.3d 193 (discussing standing, generally); *Plan Helena, Inc. v. Helena Regional Airport Auth. Bd.*, 2010 MT 26, ¶¶ 9, 19, 25, 355 Mont. 142, 226 P.3d 567 (same); *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 26, 334 Mont. 86, 146 P.3d 714 (same); *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 365, 833 P.2d 1019, 1021 (Mont. 1992) (same); *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) (federal rule 56(f) applies liberally when "non-moving party has not had the opportunity to discover information *that is essential to its opposition*").

Further, none of the facts listed in bullet point in the brief and substantively identical Affidavit are identified as relevant to standing. *See* Br. in Supp. of Mot. to Stay at 5 (listing facts that Plaintiffs must establish "if [they] survive[] standing"); *accord* Aff. of Patrick Risken ¶ 9 (listing facts to be discovered "[i]f the Defendants' Rule 12 motion is denied").[3] Just as the brief provides no legal support for the State's motion, the Affidavit in support of the motion does not identify any facts which, if established, would alter the argument framed by the State in its own motion to dismiss. Ultimately, "[t]he State's standing argument is circular": it argues that Plaintiffs lack standing because it believes they will not prevail on their ultimate claims. *See Weems v. State ex rel. Fox*, 2019 MT 48, ¶ 14, 395 Mont. 350, 40 P.3d 4.

[3] Plaintiffs recognize that the State asks, vaguely, to discover "[f]acts specific to any injury claimed by any Plaintiff for an alleged violation of Mont. Const. art. V. § 11." Br. in Supp. of Mot. to Stay at 6; Aff. of Patrick Risken ¶ 9(k). This obscure statement cannot overcome the failure to provide legal support for such discovery or even an explanation of what such facts could be.

When the State chose to file a motion to dismiss on the basis of standing, it waived the argument that standing should not be assessed on the allegations of the Complaint. If the State is entitled to continue to investigate standing forever, so too are Plaintiffs. Indeed, assuming that this is the State's theory, standing can never be resolved on the basis of the pleadings, contrary to common practice and the State's own arguments. It is enough, says the State, to invoke the issue of standing. Once it has done so, everything needs to grind to a halt (except for the State's interest in discovery) until an unspecified point in the future when the State decides to concede or file a second motion claiming lack of standing. This theory is unsupported by law and contrary to the State's prior position in this same matter, and it should be rejected.

B. The facts the State seeks to discover have no bearing on the State's opposition to Plaintiffs' pending motion for summary judgment, which presents purely legal questions.

Plaintiffs moved solely for relief on Counts One and Two of its Complaint, both of which allege violations of Article V, § 11 of the Montana Constitution based on the text of SB319. Significantly, the State's brief does not address Article V, § 11 in any meaningful way. The State does not argue that any of the facts it seeks could bear on the resolution of the motion for summary judgment—let alone demonstrate "by affidavit that, *for specified reasons, it cannot present facts essential to its opposition*." Mont. R. Civ. P. 56(f).

A Rule 56(f) motion should be denied when the filing party "failed to establish what evidence [it] aimed to secure or how that evidence would preclude summary judgment on the basis [underlying the motion for summary judgment]." *Rosenthal*, ¶ 42; *see also Miller v. Goetz*, 2014 MT 150, ¶ 18, 375 Mont. 281, 285, 327 P.3d 483, 486 ("Because Miller failed to establish any discoverable material that would have precluded summary judgment, the District Court did not abuse its discretion in denying Miller's Rule 56(f) motion."). "A court need not force a party

to undergo more discovery when '[t]he only reason to believe that additional, relevant evidence would materialize . . . is the [opposing party's] apparent hope of finding a proverbial 'smoking gun.'" *Rosenthal*, ¶ 42 (quoting *Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 885 (7th Cir. 2005)). Here, the State has not identified relevant evidence that could alter the universe of facts (SB 319's text) upon which Plaintiffs' motion for summary judgment relies.

The State has not met the straightforward requirements for relief under Rule 56(f). It has not argued that the facts it seeks to discover could affect the outcome of Plaintiffs' motion for summary judgment—that is, that the facts it seeks are "essential to its opposition." Mont. R. Civ. P. 56(f). Nor could it. The identified facts have no bearing on whether SB 319 was "so altered or amended on its passage through the legislature as to change its original purpose." Mont. Const. art. V, § 11(1). And they do not relate to whether the bill "contain[s] only one subject, clearly expressed in its title." Mont. Const. art. V. § 11(3). These are the only issues presented in Plaintiffs' pending motion for summary judgment. The State fails to present a viable basis for Rule 56(f) relief, and its motion should be denied.

CONCLUSION

The state has already renewed its standing arguments through its motion to dismiss. In this motion, it asks the Court for a *third* bite at the apple on standing—that it should receive jurisdictional discovery it previously conceded was unnecessary. Resolution of the motion for summary judgment does not require discovery. That motion tees up purely legal issues about the text of SB319. Judicial economy will not be served by prolonging this determination until the State can take depositions on jurisdiction, or on other unrelated matters it finds interesting. The Court can, and should, resolve both the motion to dismiss and the motion for summary judgment on the record before it now.

Accordingly, Plaintiffs request this Court deny Defendant's Motion to Stay Plaintiffs' Motion for Summary Judgment to Allow Discovery and order Defendant to timely respond to Plaintiffs' pending Motion for Summary Judgment.

Respectfully submitted this 13th day of September, 2021.

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

/s/ Constance Van Kley
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 13th day of September, 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/ Constance Van Kley
Upper Seven Law