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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. ADV-2021-611 Hon. Mike Menahan **STATE OF MONTANA'S REPLY BRIEF IN SUPPORT OF MOTION TO STAY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT—** Mont. R. Civ. P. 56(f)

I. INTRODUCTION

Under the Plaintiffs' unique brand of trial practice a defendant would never have an opportunity to challenge any allegation of a Verified Amended Complaint (in this case Ct. Doc. 5), the "facts" presented in a testimonial Affidavit of a plaintiff organization's speaking agent (Colin Stephens for Plaintiff Montana Association of Criminal Defense Lawyers (MACDL)) or any "facts" that agent admitted under oath were speculation during a preliminary hearing. This is particularly troubling here, where the person who signed the verification for the amended complaint, swearing in the form of an affidavit to every fact stated in that complaint (Leo Gallagher, Ct. Doc. 5 at 23), is an elected official with no known ties to any of the other plaintiffs, each of whom alleges unique claims. Specifically, Mr. Gallagher has sworn to the accuracy of every fact alleged by all the Plaintiffs regarding status, activities and claimed harm. All trigger questions of justiciability.

The Plaintiffs' Brief In Opposition to Defendants' Motion To Stay Plaintiffs' Motion For Summary Judgment (hereinafter "Brief In Opposition") is a dodge. Desperate to avoid discovery into the critical standing issue raised by the State, the Plaintiffs prematurely filed their Motion For Summary Judgment (Ct. Docs. 35–37) to reshape the case into a "purely legal" analysis—the theme of their opposition to discovery. The Plaintiffs misstate the purpose of Mont. R. Civ. P. 56(f) under these circumstances. Charging ahead with a dispositive motion when the Plaintiffs' standing is unknown and untested skips the cornerstone inquiry of whether the Court can even entertain any claim by any Plaintiff in the first place.

The Plaintiffs are protected by a preliminary injunction order maintaining the status quo. At this stage, fairness to all parties requires a stay of the Plaintiffs' Motion For Summary Judgment until (1) after this Court decides the State's timely Rule 12 motion and, if denied, (2) after a scheduling conference with a resulting scheduling order that (3) allows all parties fair discovery, including an opportunity for the State to test the allegations of the Plaintiffs' Verified Amended Complaint through the normal course of discovery.

II. ARGUMENT

A. The Plaintiffs' position eliminates any inquiry into standing.

Standing is a threshold jurisdictional question that "is determined as of the time the action is brought." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 30, 360 Mont. 207, 255 P.3d 80. Under Plaintiffs' approach standing or any other jurisdictional inquiry is shuffled off for consideration some other time, or perhaps never. Those facts should be subject to discovery now. Clearly there is no way to test and determine the facts alleged in the Plaintiffs' Amended Verified (sworn) Complaint without it.

The entirety of Plaintiffs' Section B[1] contends that, if "purely legal" questions are presented, proof of standing is superfluous. The Plaintiffs' suggestion that the State's jurisdictional defense has been thrice-litigated (and thus somehow tedious) speaks volumes of their zeal to avoid any relevant discovery. The State first raised Plaintiffs' lack of standing at the time of the preliminary injunction hearing

[1] *Brief In Opposition To Defendants' Motion To Stay, etc.*, beginning at 10.

(Ct. Doc. 24) but the Preliminary Injunction Order (Ct. Doc. 28) did not resolve the issue. The State then timely filed its Rule 12 motion to dismiss based on standing, which is undecided. When slammed with a summary judgment motion obviously intended to avoid both discovery and the Rule 12 jurisdiction motion, the State requested a Rule 56(f) stay to conduct discovery, avoid prejudice and wrangle this case back into a normal, predictable schedule.

The Plaintiffs' argument concerning discovery[2] conflates Rule 12 and Rule 56 motions. Each has its place and each serves a particular purpose. The Rule 12 motion contests the Plaintiffs' claims based solely upon the pleading that is the complaint. At this stage, if the State's Rule 12 motion is successful, the Plaintiffs' partial summary judgment motion will be mooted. The Court's consideration of the State's Rule 12 motion can confirm a lack of standing based upon the allegations of the complaint but does not waive, limit, or prohibit the State from presenting its standing defense through competent evidence in the future. If discovery thereafter discloses a lack of standing by *any* plaintiff the State will most certainly move for summary judgment under Rule 56, presenting that evidence pursuant to that rule.

Jurisdiction—the right to determine and hear an issue—transcends procedural considerations and involves the fundamental power and authority of the court itself. *Corban v. Corban*, 161 Mont. 93, 96, 504 P.2d 985, 987 (1972); *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 11, 355 Mont. 142, 226 P.3d 567; *Heffernan*, ¶ 29; *Havre Daily News, LLC v. City of Havre,*

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[2] *Brief In Opposition To Defendants' Motion To Stay, etc.*, at 8–10.

2006 MT 215, ¶¶ 18, 31, 333 Mont. 331, 142 P.3d 864. It is well settled that the issue of subject matter jurisdiction may be invoked at any time in the course of a proceeding, and that once a court determines that it lacks subject matter jurisdiction, it can take no further action in the case other than to dismiss it. Mont. R. Civ. P. 12(h)(3); *In re Marriage of Lance*, 213 Mont. 182, 186-87, 690 P.2d 979, 981 (1984); *Plan Helena* at ¶ 11.

Furthermore, the Plaintiffs' contention "[t]hat standing is a threshold consideration is no basis for delaying the presentation of purely legal issues . . . ."[3] translates to allowance of "purely" advisory litigation and opinions. To follow the Plaintiffs' argument, if an issue is framed as "exclusively legal"[4] *anyone* could bring the issue before the court regardless of standing—in other words, litigation as sport. Artfully drafted complaints would supplant discovery of facts showing the party seeking relief has no business being a plaintiff. All cases would automatically be justiciable simply upon paying the filing fee with the Court Clerk. The only thing before the Court would be a difference of opinion among lawyers. *See Hardy v. Krutzfeldt,* 206 Mont. 521, 525, 672 P.2d 274, 276 (1983) (contract interpretation dispute). That, of course, is ridiculous.

The Plaintiffs' generous suggestion that the Court entertain the *partial* summary judgment *and* the Rule 12 motions together in the same hearing[5] belies

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[3] *Brief In Opposition To Defendants' Motion To Stay, etc.*, at 3.

[4] *Brief In Opposition To Defendants' Motion To Stay, etc.*, at 2.

[5] *Brief In Opposition To Defendants' Motion To Stay, etc.*, at 4–6.

their desire to eliminate any discovery of facts regarding standing, reconfiguring the State's Rule 12 motion into a competing summary judgment motion (without supporting evidence) thereby eliminating discovery into standing (or any other defense) altogether. The State has a right to conduct discovery, and this Court should not accept the Plaintiffs' invitation to abrogate that right by jumping straight into a "purely legal" partial summary judgment. Standing cannot be assumed to fast-forward a case to dispositive proceedings.

B. The Court, not the Plaintiffs, controls how this case is processed.

There is no exception to Rule 56(f)'s application in this case for immediate and ultimate determination of "purely" or "exclusively legal" issues. The State's timely Rule 12 motion contests the Verified Amended Complaint as failing to state any claim that will lead to relief due to its reliance on legal conclusions and speculative assertions. Plaintiffs filed a motion for *partial* summary judgment in response,[6] in effect conceding the need for further proceedings before the final appealable judgment required by Mont. R. Civ. P. 54(a) and (b). Discovery will be a significant part of those proceedings. Plaintiffs' insistence on hearing their dispositive motion now would not just kick the jurisdiction question down the road but would eliminate it altogether.[7]

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[6] The *Verified Amended Complaint* sets forth seven "counts," or claims for relief, on behalf of various plaintiffs. The summary judgment motion (Ct. Doc. 35) seeks a determination only under the first two claims.

[7] The State also anticipates that, if successful on their *partial* summary judgment motion the Plaintiffs would immediately try to voluntarily dismiss the remaining counts, claim victory and forever foreclose the State's ability to contest standing.

Considering the effect of granting partial summary judgment now, before a scheduling order or discovery, makes the situation even more confusing. A partial summary judgment at this time would not render a final, appealable judgment under Rule 54. If discovery undertaken after that ruling results in evidence supporting any defense to that motion, including standing, vacation of the partial summary judgment would be required. The Preliminary Injunction Order protects the Plaintiffs' claims while litigation proceeds. With that preliminary injunction in place a partial summary judgment that might later be vacated is nothing more than a redundant proceeding.

This case should be processed in an orderly manner and not by rushed, haphazard motions that could result in rulings eventually rendered moot due to the Plaintiffs' lack of standing. The Plaintiffs were allowed the benefit of the doubt on standing during the preliminary injunction hearing because the Court specifically avoided ruling on the issue. Because the preliminary injunction is in place and operating, the Court should avoid the merits until the Plaintiffs' standing to sue in the first place is settled. As demonstrated in the State's Rule 56(f) motion, that requires discovery. The State would suffer the ultimate prejudice if foreclosed from pursuing a valid defense simply because the Plaintiffs rushed a "legal" issue to the front of the line. Indeed, the Supreme Court has "repeatedly advised district courts that when granting temporary relief by injunction, it is not the province of the court to determine matters that may arise during a trial on the merits." *Virginia City v. Olsen*, 2002 MT 176, ¶ 21, 310 Mont. 527, 52 P.3d 383. That is because discovery is

"seldom completed prior to the time preliminary injunction hearings are held," *id.*, reversing a summary judgment rendered before any discovery was conducted or responsive pleadings were filed. *Id.* ¶ 24.

Plaintiffs' reliance on Mont. R. Civ. P. 56(c)(1)(A)—"a party may move for summary judgment at any time"—conceivably allows a dispositive motion to be served with the complaint if it involves "purely legal" issues. Yet summary judgment under Rule 56(c) contemplates examination of the "pleadings, depositions, answers to interrogatories, admissions on file, and affidavits." A hearing is then contemplated, from which the district court will consider not so much legal arguments, but rather whether there exist genuine issues of material fact. *Cole v. Flathead County,* 236 Mont. 412, 418, 771 P.2d 97 (1989).

The Plaintiffs' stated concerns with judicial economy or expediting the case are also available for discussion *during* a pretrial conference. Mont. R. Civ. P. 16(a). Indeed, one purpose of a pretrial conference is "establishing early and continuing control so that the case will not be protracted because of lack of management." Mont. R. Civ. P. 16(a)(2). Because the Plaintiffs have determined to hijack scheduling, a scheduling conference and order are entirely warranted. The case schedule is a matter of this Court's discretion and not that of the Plaintiffs. *See In re Kitzmiller-Kerutis,* 2015 MT 191N, ¶ 10, 353 P.3d 508. A scheduling order allows the district court to better control trial proceedings by resolving many issues during the pretrial phase of the case. *Stevenson v. Felco Indus.*, 2009 MT 299, ¶ 32, 352 Mont. 303, 216 P.3d 763. Plaintiffs' contention that "everything needs to grind

to a halt . . . until some unspecified point in the future"[8] pending discovery is completely inconsistent with the Court's scheduling discretion under Rule 16.

Given the disjointed process of this case everyone involved would benefit from a scheduling order. The Plaintiffs have the benefit of the Preliminary Injunction Order; they will suffer no prejudice if required to litigate in a normal, predictable manner. The State, on the other hand, is now racing to catch up to a dispositive motion when it has not yet even filed an Answer, issues are not yet fully framed, and the jurisdiction of the Court over the parties and claims is left to speculation. The prejudice of denying discovery to the State at this time, forcing the partial summary judgment to hearing, is obvious.

C. Rules 56(f) and 16 provide predictability and fairness in an otherwise uncontrolled litigation.

The Plaintiffs' contention that the State failed to describe facts opposing a "purely legal" partial summary judgment misses the point.[9] Dodging the standing issue by filing a "purely legal" partial summary judgment does not result in blanket, unassailable jurisdiction. Rule 56(f) requires that the party opposing the summary judgment motion provide, by affidavit, facts sufficient to justify that party's opposition. Obviously, if *any* of the Plaintiffs lack standing to bring their respective claims, those parties or claims are subject to dismissal, including the pending partial summary judgment motion.

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[8] *Brief in Opposition To Defendants' Motion to Stay, etc.*, at 10

[9] *Brief In Opposition To Defendants' Motion To Stay, etc.*, at 7–8.

The State's Rule 56(f) motion and supporting affidavit explain in detail that the State has had no opportunity to conduct discovery in this case, that it has had no opportunity to discover evidence directly relevant to the standing of any plaintiff claiming in this case, that it has been unable to depose Leo Gallagher (who swore to the accuracy of every single fact and claim in the Complaint) or Mr. Stephens (who has twice submitted sworn testimony) or Mr. Zadick or anyone speaking for Forward Montana (both unknowns at this point) regarding the activities of any of the named organizations and their claimed injuries or damages, and the complete prejudice to the State's defense in this case should it be denied discovery into the myriad "facts" pleaded by the Plaintiffs. *See* Ct. Doc. 44, ¶¶ 5, 7, 9, 9.a. through 9.r, 10, 12. Indeed, if the Plaintiffs are bewildered regarding the facts the State seeks to discover[10]—after the standing arguments made during the preliminary injunction phase and the justiciability issues raised in the Rule 12 motion[11]—they need look no further than the numerous factual allegations and conclusory statements made by Plaintiffs Gallagher and MACDL's Stephens.

The Rule 56(f) issue is not whether the State can discover facts regarding SB 319.[12] The Amended Verified Complaint and Mr. Stephens' preliminary injunction testimony raise significant questions of whether the Court even has

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[10] *Brief In Opposition To Defendants' Motion To Stay, etc.*, at 4.

[11] Plaintiffs shoot this down by stating "Plaintiffs vigorously dispute the State's standing arguments . . .." *Id.* at 5. Since justiciability is the threshold determination, that issue is admittedly contested.

[12] *Brief In Opposition To Defendants' Motion To Stay, etc.*, at 11.

jurisdiction. The issue of justiciability—standing—has been joined but not developed. Whether considering only two of seven "counts" of the Complaint or the entire case during a trial, the Plaintiffs must first demonstrate jurisdiction. Rushing this case onto the motion docket does not eliminate that issue or a defendants' right to defend.

Despite the Plaintiffs' reliance on them, neither *Rosenthal v. County of Madison*, 2007 MT 277, 339 Mont. 419, 170 P.3d 493, *Miller v. Goetz*, 2014 MT 150, 375 Mont. 281, 327 P.3d 483, nor *Hinderman v. Krivor*, 2010 MT 230, 358 Mont. 111, 244 P.3d 306, apply under the facts in this case. In *Rosenthal*, the plaintiff claimed the need for *additional* discovery after being served with defendants' summary judgment motion eight months after the case was filed without having conducted any discovery during those eight months. *Id.* ¶ 41. In *Goetz*, the plaintiff's case had been pending for over three years before the defendants moved for summary judgment and the plaintiff filed the Rule 56(f) motion at issue (*Id.* ¶ 8), arguing only that the scheduling order allowed more time for discovery. *Id.* ¶ 17. In *Hinderman*, the case had been pending for three years before the Rule 56(f) motion for *additional* discovery was filed. *Id.* ¶¶ 3, 8, 15. Here, the case was barely 10 weeks old when Plaintiffs filed their partial summary judgment after having been fully versed in the State's justiciability defense. The case does not even benefit from a scheduling order. The distinctions are obvious and the prejudice to the State is clear.

III. CONCLUSION

The State submits that the Plaintiffs' pending motion for partial summary judgment should be stayed until after the Court decides the State's Rule 12 motion and, if thereafter indicated, until after the Court enters a scheduling order allowing all parties discovery and providing a briefing or trial schedule.

DATED the 24th day of September, 2021.

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