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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

REPRESENTATIVE ZOOEY ZEPHYR, ET AL., *Plaintiffs*, v. STATE OF MONTANA, ET AL., *Defendants*.	Cause No. BDV 2023-300 **BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

Plaintiffs failed in their unconstitutional attempt to thwart the democratic process and inject this Court into purely legislative affairs. (Doc. 24). As the Court stated, "[s]eparation of powers is fundamental to the United States' system of government." *Id.* at 4. The Montana Constitution "explicitly grants each house of the Montana legislature the authority to 'expel or punish a member for good cause.'" *Id.* (quoting Mont. Const. Art. V, § 10). Because the Constitution entrusts this matter to the Legislature, not the courts, the "ultimate relief [Plaintiffs] seek includes broad permanent injunctions clearly outside the scope of this Court's authority." *Id.*

Undeterred by the Court's clear guidance, Plaintiffs seek to continue this litigation. But, as the Court stated, the Montana Constitution entrusts this dispute to the Legislative Branch. *Id.* Nor do Plaintiffs possess a First Amendment right to disrupt government proceedings. *White v. Norwalk*, 900 F.2d 1421, 1425–26 (9th Cir. 1990). And even if Plaintiffs could make out a viable legal claim this dispute became moot upon *sine die*. This Court must dismiss this case with prejudice.

BACKGROUND

Plaintiffs' claims originate from the disruption of House business on April 24, 2023. (Doc. 27, ¶ 53); *see also* (Doc. 22 at 3 n.4) (video recording of April 24, 2023, floor session). On April 18, 2023, Rep. Zephyr stated, "I hope the next time there's an invocation, when you bow your heads in prayer, you see the blood on your hands." (Doc. 27, ¶–36). The Representative's comments were subject to an immediate point of order. (Doc. 22 at 2 n.1). Pursuant to the House Rules, Speaker Regier requested Representative Zephyr formally apologize to the body for the remarks. (Doc. 27, ¶ 44). On April 20, 2023, Speaker Regier cited House Rule 20-20 for declining to recognize Rep. Zephyr due to prior breeches of decorum. (Doc. 22 at 2 n.3). The Montana House of Representatives upheld the Speaker's decision to withhold recognition. *Id.* at n.4. On April 24, 2023, the Montana House of Representatives again voted to uphold the ruling of the Speaker under Rule 20-20 to withhold recognition. (Doc. 27, ¶ 49). Following the vote, protests from the gallery, encouraged by Representative Zephyr, disrupted House business until the Sergeant at Arms cleared the gallery. (Doc. 27, ¶¶ 51–52); *see also* (Doc. 22 at 3 n.4). On April 26, 2023, the first floor session following the disruption, Majority Leader Vinton moved to discipline Rep. Zephyr for the Representative's role in April 24's disruption of floor proceedings pursuant to

Article V, Section 10 of the Montana Constitution. (Doc. 27, ¶ 53). The motion carried with the constitutionally required two-thirds majority. (Doc. 27, ¶ 54).

On May 1, 2023, Plaintiffs filed a Complaint and Petition for Declaratory Relief, Permanent Injunction, and Temporary Restraining Order. (Docs. 1, 6, 7). The State filed its opposition to the temporary restraining order the next day. (Doc. 22). The district court denied Plaintiffs' request for a TRO as unlikely to succeed on the merits one day later, (Doc. 24), which Plaintiffs didn't appeal. Representative Zephyr's punishment expired upon *sine die*. (Doc. 27, ¶ 53).[1] Plaintiffs filed an amended complaint, which the Court granted leave to file on July 10, 2023. (Doc. 26); (Doc. 27) (First Amended Complaint). Defendants now file the instant motion to dismiss the First Amended Complaint.

LEGAL STANDARDS

"When considering a motion to dismiss under Mont. R. Civ. P. 12(b)(6), all well-pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable to the plaintiff." *Sinclair v. BN & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 200 P.3d 46 (citation omitted). "Courts are not required, however, to accept allegations of law and legal conclusions in a complaint as true." *Threkeld v. Colorado*, 2000 MT 369, ¶ 33, 303 Mont. 432, 16 P.3d 359; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (A complaint must offer more than "naked assertions devoid of further factual enhancement.") (internal citation and quotations omitted). "[A] court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Video recordings of the House floor sessions constitute matters subject to judicial notice because their authenticity and accuracy cannot

[1] Plaintiffs withdrew key factual allegations in their First Amended Complaint. *E.g.* (Doc. 1, ¶ 100) (the House "expelled Rep. Zephyr from the State Capitol) to (Doc. 27, ¶ 100) (the House "expelled Representative Zephyr from the House Floor, House anteroom, [and] House gallery"); *see also* (Doc. 1, ¶ 3) ("Representative Zephyr – elected to represent 11,000 constituents in House District 100 – is physically barred from entering the Montana State Capitol"); (Doc. 27, ¶ 3) ("Representative Zephyr – elected to represent 11,000 constituents in House District 100 – was barred from entering the House Floor, House anteroom, or House gallery"). The original assertions were demonstrably false the day they were made. Plaintiffs relied on these false assertions in their briefing requesting extraordinary and unconstitutional relief in an emergency posture. *E.g.* (Doc. 7 at 11) (saying this case is "factually on all fours" with *Boquist*, which did entail physically barring an elected legislator from the Oregon State Capitol).

reasonably be questioned. M.R. Evid. 201. "The liberal notice pleading requirements of Mont. R. Civ. P. 8(a) and 12(b)(6) do not go so far as to excuse omission of that which is material and necessary in order to entitle relief, and the complaint must state something more than facts which, at most, would breed only a suspicion that the claimant may be entitled to relief." *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692. The complaint must, in other words "state[] a cognizable claim for relief," which "generally consists of a recognized legal right or duty; infringement or breach of that right or duty; resulting injury or harm; and, upon proof of requisite facts, an available remedy at law or in equity." *Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241.

"The judicial power of the courts of Montana is limited to justiciable controversies." *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 7, 405 Mont. 259, 494 P.3d 892. "Where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department[,] or a lack of judicially discoverable and manageable standards for resolving' the issue, the issue is not properly before the judiciary." *Bullock v. Fox*, 2019 MT 50, ¶ 44, 395 Mont. 35, 52, 435 P.3d 1187, 1196 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)) (alteration in original).

"Mootness is a concept of justiciability; when an issue presented at an action's outset ceases to exist or is no longer 'live,' or if, due to a change in circumstances or some intervening event, the court cannot grant effective relief, the issue is moot." *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 10, 408 Mont. 187, 507 P.3d 169. "The fundamental question to be answered in any review of possible mootness is whether it is possible to grant some form of effective relief to the appellant." *Id.*, ¶ 10. "If no relief is possible, [a]ny further ruling … would constitute an impermissible advisory opinion, i.e., one advising what the law would be upon a hypothetical state of facts or upon an abstract proposition." *Id.*, ¶ 10 (quoting *Wilkie*, ¶ 8) (cleaned up); *see also Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 19, 293 Mont. 188, 974 P.2d 1150 ("If the parties cannot be restored to their original position, the appeal becomes moot.").

ARGUMENT

I. This Court lacks jurisdiction to hear Plaintiffs' claims.

The political question doctrine, legislative immunity, and Montana's separation of powers caselaw all prohibit this Court from adjudicating Plaintiffs' claims. First, Plaintiffs present this Court with the quintessential political question by asking it to weigh in on internal matters of

legislative discipline. The Montana Constitution vests the discretion to discipline representatives for "good cause" with the Legislature, not the courts. This Court has no jurisdiction to override the Legislature's determination here.

Even if this Court could overturn the Legislature's good cause determination, any injunction would run headlong into legislative immunity. Montana's Constitution grants immunity for legislators in its Speech and Debate Clause and analogous federal caselaw reads this protection to cover internal legislative actions as well.

Finally, Plaintiffs' requested relief goes too far, asking this Court to grant broad injunctions that would upend the internal operations of the Montana House. This Court must dismiss Plaintiffs' Complaint.

A. Plaintiffs present this Court with a non-justiciable political question.

This Court may not hear Plaintiffs' claims because they present political issues beyond the jurisdiction of this Court. An issue is not properly before the judiciary when "'there is a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving' the issue." *Brown v. Gianforte*, 2021 MT 149, ¶ 21, 404 Mont. 269, 488 P.3d 548 (quoting *Nixon*, 506 U.S. at 228). The heart of this principle, known as the "political question doctrine," protects the rights of legislatures to discipline their members free from judicial intervention. *See, e.g.*, *Rangel v. Boehner*, 20 F. Supp. 3d 148, 170 (D.D.C. 2013), *aff'd,* 785 F.3d 19 (D.C. Cir. 2015) ("the scope of the House's unreviewable discretion under the Discipline Clause is similarly broad").

i. The Montana Constitution textually commits to the Legislature the power to discipline its members.

The Montana Constitution vests exclusive power to each legislative chamber for the governance of its internal affairs. "Each house shall choose its officers from among its members, keep a journal, and make rules for its proceedings. Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members." Mont. Const. art. V, § 10(1).

The Framers of the Montana Constitution weren't writing on a blank slate, and the provision they adopted mirrors the federal constitution, which likewise grants exclusive power to the Legislature to discipline its members. *See, e.g.*, *In re Chapman*, 166 U.S. 661, 669 (1897) ("The right to expel extends to all cases where the offence is such as in the judgment of the senate is

inconsistent with the trust and duty of a member.") (citing 1 STORY ON CONST. § 838); *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880) ("[T]he Constitution expressly empowers each House to punish its own members for disorderly behavior.").

This authority, adopted by both the Montana and federal constitutions, respects the separation of power between coequal branches of government—ensuring that no one branch subsumes the others. Because the provisions and doctrines so closely mirror one another, Montana courts often look to federal caselaw to guide their analysis on separation of powers and political question cases. *See, e.g.*, *Brown*, ¶ 21 (citing *Nixon*, 506 U.S. at 228). Under federal law, there is no doubt that Plaintiffs' claims are foreclosed. Legislatures enjoy exclusive and plenary authority over their proceedings and the conduct of their members. *See, e.g.*, *Ins v. Chadha*, 462 U.S. 919, 955 n.21 (1983); *United States v. Smith*, 286 U.S. 6, 48 (1932); *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995); *Gray v. Gienapp*, 727 N.W. 2d 808, 813 (S.D. 2007); *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 285 (N.H. 2005) (citing *Paisner v. Attorney General*, 458 N.E. 2d 734, 739 (Mass. 1983)); *Des Moines Register & Tribunal Co. v. Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996); *cf. Common Cause v. Biden*, 909 F. Supp. 2d 9, 31 (D.D.C. 2012) (finding legislators' suit over Senate filibuster rule was a political question).

Plaintiffs invite this Court to supersede the decision of the Legislature under the veneer of constitutional interpretation. Plaintiffs' theory of their case centers on their reading of "good cause" in the Montana Constitution. (Doc. 27, ¶¶ 56–57) (arguing that the Legislature did not have "good cause" to censure Representative Zephyr). But that argument is foreclosed by the plain constitutional text—and common sense.

First, the Montana Constitution vests the Legislature with finding good cause for disciplining its members. *See* Mont. Const. art. V, § 10(1) ("Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members."). Plaintiffs conveniently ignore the phrase "shown with the concurrence of two-thirds" because it explicitly forecloses their case. Here, it is undisputed that two-thirds of Representative Zephyr's colleagues voted in favor of disciplining the representative. (Doc. 27, ¶ 54). That's as simple as this case is. The Constitution vests the Legislature, not the judiciary, with exclusive authority to discipline its own members.

Plaintiffs, importantly, do not allege that the Legislature violated its own rules in disciplining Representative Zephyr (nor can they). Under its Article V, Section 10(1) power, the Montana

House of Representatives properly established its internal rules for the 2023 session. *See* House Resolution 1 (House rules resolution); Senate Joint Resolution 1 (Senate Joint Resolution on the joint rules). Joint Rule 60-20 states that "Mason's Manual of Legislative Procedure (2020) governs the proceedings of the Senate and House of Representatives in all cases not covered by these rules." Mason's, in turn, states that "[a] legislative body has the right to regulate the conduct of its members and may discipline a member as it deems appropriate, including reprimand, censure, or expulsion." Mason's Manual of Legislative Procedure, at § 561(1) (2020) [hereinafter "Mason's"]. So too under the duly adopted rules, the Speak has discretion to determine whether a member is recognized to speak. House Rule 20-10. And Mason's clarifies that "the judicial branch has no power to revise even the most arbitrary and unfair action of the legislative branch taken in pursuance of the power committed exclusively thereto by the constitution." *Id*. at § 563(1). Representative Zephyr was on notice of the Legislature's powers to discipline representatives and that discipline is not subject to judicial override.

Montana's Constitution generally insulates the internal affairs of each branch from the others. Mont. Const. art. III, § 1. For example, the Montana Constitution limits the ability of the Executive and Legislative branches to impose discipline on members of the judiciary. *See, e.g.*, Mont. Const. art. VII, § 11; *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 45, 405 Mont. 1, 493 P.3d 980 (investigation of judicial misconduct is "constitutionally committed to the oversight of the Judicial Standards Commission"). Article V, § 10, acts as the constitutional safeguard ensuring that legislative affairs will be free of interference from the other branches.

Plaintiffs requested relief also intrudes into the exclusive authority of the Legislature. Under the duly adopted rules, the Speaker determines is a member is recognized to speak on any given subject. House Rule 20-10. When a representative requests to be recognized, the Speaker "may then decide if recognition is to be granted." House Rule 20-10(2). In the event of "disorderly words" the Speaker may demand an apology and explanation from the member. Mason's at § 121(4) (2020). If the member refuses to apologize, then the Speak and body may take further action. *Id*.

Tellingly, Plaintiffs do not allege that the Legislature violated any of these rules. That failure to do so precludes even the slimmest reed of justiciability. *See Rangel v. Boehner*, 20 F. Supp. at 168 ("Normally, judicial intervention in this context is only 'appropriate where rights of persons other than members of Congress are jeopardized by Congressional failure to follow its

own procedures.'") (quoting *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982)). But no reasonable argument exists that the Legislature didn't follow its own procedure in disciplining Representative Zephyr. In the words of Representative Zephyr's party leader, "I agree that you absolutely can do this. By rule, by the Constitution, by Mason's, but just because you can do it does not mean that's the right choice. I think it's the wrong choice."[2]

The Montana House of Representatives found good cause to discipline Representative Zephyr through a two-thirds vote of its members. In doing so, it followed its own procedure and acted pursuant to its exclusive authority under the Montana Constitution. There's no justiciable controversy for this Court to decide.

ii. *Plaintiffs' claims lack judicially manageable standards.*

Even if the Montana Constitution didn't vest the Legislature with exclusive authority to discipline its members, Plaintiffs' claims are still non-justiciable because they lack judicially manageable standards. That's because courts have long held that they may not decide a claim that suffers from "a lack of judicially discoverable and manageable standards for resolving it." *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1331 (2006) ("If a judicially manageable standard cannot be devised, the political question doctrine applies, and cases must be dismissed as nonjusticiable."). At bottom, Plaintiffs allege that the House censured Representative Zephyr for transgender advocacy and not for "good cause." (Doc. 27, ¶ 57). But what constitutes good cause? Plaintiffs don't say and neither does the Montana Constitution—beyond its requirement that good cause be shown with the concurrence of two-thirds of the House. In the absence of a judicially discoverable standard, the House determines what satisfies the good cause standard, not the courts. *See Coleman v. Miller*, 307 U.S. 433, 453–54 (1939) (finding political question based on the absence of any acceptable criteria for making a judicial determination). Plaintiffs, however, would have this Court engage in a pernicious search for an alternative answer simply because they didn't like the outcome.

[2] Remarks by Minority Leader Kim Abbott, House Floor Session April 26, 2023, available at https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowser V2/20230426/-1/49784# (timestamp at 13:49:15).

As the U.S. Supreme Court explained in this very context, "[a]n accused Member is judged by no specifically articulated standards and is at the mercy of an almost unbridled discretion of the charging body that functions at once as accuser, prosecutor, judge, and jury from whose decision there is no established right to review." *United States v. Brewster*, 408 U.S. 501, 519 (1972). What constitutes disorderly words in debate is a matter for the presiding officer to decide in the first instance, subject to an appeal of the ruling of the Speaker. Mason's, § 121 (2020). The two-thirds vote requirement provides the necessary safeguard from abuse. Mont. Const. art. V, § 10(1); *Rangel*, 20 F. Supp. 3d at 173 (due process guarantees do not attach to the discipline clause); Mason's, at § 563 (2020) (a two-thirds vote satisfies any due process concerns); *cf. Common Cause v. Biden*, 909 F. Supp. at 30 (ruling challenge to Senate filibuster rules lacked judicially manageable standards).

These cases rightfully steer the courts away from entanglement in day-to-day legislative operations. Plaintiffs' theories would suddenly inject the courts into all manners of process disputes: the medium of public testimony (House Rule 30-60(1)); permissible limitations on public testimony (House Rule 30-60(3)); permissible limitations on floor debates (House Rule 40-170); or recognition of members to speak (House Rule 20-10), (House Rule 20-20). Disagree with a time limits on public testimony—go seek a TRO; disagree with the ruling of the chair—seek an injunction. Neither the courts, nor the people are served by that state of affairs. Instead, as the Montana Constitution dictates, the Legislature must enjoy freedom to govern itself so that the House and Senate can complete the people's business in a timely and orderly fashion.

In short, the Montana House—and only the Montana House—can establish the standard by which a member may be disciplined. This Court, on the other hand, lacks "the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion)). The only manageable constitutional standard lies in a two-thirds vote. Plaintiffs' express call for additional standards, (Doc. 7 at 12–14), invokes a non-justiciable political question. *Brewster*, 408 U.S. at 519.

B. Legislative functions enjoy absolute immunity under the Montana Constitution.

Plaintiffs are likewise barred from bringing this suit by Article V, Section 8 of the Montana Constitution, which confers absolute immunity upon members of the Montana House of

Representatives for actions taken during their legislative duties. *Cooper v. Glaser*, 2010 MT 55, ¶ 14, 355 Mont. 342, 228 P.3d 443. Once again, the Montana Constitution mirrors its federal counterpart here and the U.S. Supreme Court "has consistently read the [federal] Speech or Debate Clause broadly to achieve its purpose" and extends its protection to all "legislative acts." *Rangel*, 785 F.3d at 23 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975)). And internal disciplinary proceedings are among the quintessential legislative acts. *See Gravel v. United States*, 408 U.S. 606, 625 (1972) (legislative acts concern those matters "integral" to the "deliberative and communicative processes" of the legislative body); *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1351 (D.C. Cir. 1975) (Congress's "execution of internal rules" is "legislative").

Litigation concerning these internal legislative actions "undermines the separation of powers." *Rangel*, 785 F.3d at 23. Even hearing Plaintiffs' suit endorses the view that the Montana Judiciary has the authority to "possess directly or indirectly, an overruling influence over the [Montana Legislature] in the administration of [its] respective powers." *United States v. Johnson*, 383 U.S. 169, 178 (1966) (quoting The Federalist No. 48 (James Madison)); *but see* Mont. Const. art. III, § 1 ("No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others ….").

Plaintiffs' Complaint runs headlong into the Speech or Debate Clause bar. (Doc. 27, ¶ 53). The Complaint centers on actions taken by Speaker Regier and the Montana House of Representatives while exercising authority under Article V, Section 10(1) of the Montana Constitution. Majority Leader Vinton's motion to censure Representative Zephyr concerns the disruption of proceedings on April 24, 2023. (Doc. 27, ¶ 53). Disruptive speech or conduct lies at the heart of the "deliberative and communicative process" of the House. *Gravel*, 408 U.S. at 625. If the House cannot establish for itself rules governing orderly and civil debate, then it cannot operate as an independent branch of government. *Rangel*, 785 F.3d at 23. The same legislative immunity that protects Representative Zephyr from civil liability for statements made on the floor of the House likewise shields Defendants in this matter. *See United States v. Johnson*, 383 U.S. 169, 180 (1966).

C. Granting the requested relief would violate the Montana Constitution's separation of powers.

Even if this Court entertained any part of Plaintiffs' non-justiciable suit, the requested relief far outpaces this Court's constitutional limits. In their prayer for relief, Plaintiffs ask this Court

for an injunction prohibiting the Legislature form "refusing to recognize" or "applying the Censure" against Representative Zephyr and asks the Court to "restor[e] all of Representative Zephyr's legislative privileges." (Doc. 27, at 27–28 ¶¶ 2–7).

But this upends the legislative process, even absent the disciplinary action. Take, for example, the House debate over the disciplinary action itself. During that debate, Speaker Regier recognized seven representatives to speak for and against the motion, which included three representatives in favor, three against, and Representative Zephyr. That discretion to selectively recognize representatives flows from the House rules and allows the Legislature to balance recognizing opposing viewpoints and efficiently conducting its business. *See* House Rule 20-10(2) (explaining that the Speaker may decide when recognition to speak is granted).

But Plaintiffs' Prayer for Relief would override these normal operating procedures. *See* Doc. 27, at 26–27, ¶¶ 2–7 (asking for injunctive relief to prevent the Speaker "from refusing to recognize Representative Zephyr in House floor debate"). Instead, Representative Zephyr seeks a privilege no representative enjoys—recognition every time the Representative seeks it regardless of rules governing debate.

Any attempt by the courts to direct the authority of the Legislature related to legislative rules, proceedings, or disciplinary actions is an attempt to exercise the legislative function. *See Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1351 (D.C. Cir. 1975) (Congress's "execution of internal rules" is "legislative"); *French v. Senate of California*, 80 P. 1031, 1032–33 (Cal. 1905) ("An attempt by this court to direct or control the Legislature, or either house thereof, in the exercise of the power thus committed to it …. would be an attempt to exercise legislative functions, which it is expressly forbidden to do."); see also Mason's, at § 563 (2020).

The Legislature must have discretion to recognize or not recognize representatives as it sees fit. This Court lacks any authority to encroach upon the Legislature's right of self-governance.

II. Plaintiffs' Claims are moot.

Justiciability requires that a "case or controversy" exists throughout the entire matter for a court to retain jurisdiction. *Wilkie*, ¶ 7. Where an issue "has ceased to exist or is no longer 'live', or if the court is unable due to an intervening event or change in circumstances to grant effective relief or to restore the parties to their original position, then the issue before the court is moot." *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶17, 364 Mont. 390, 276 P.3d 867(citing

Greater Missoula Area Fedn. Of Early Childhood Educators v. Child Start, Inc., 2009 MT 362, ¶ 16, 353 Mont. 201, 219 P.3d 881). If the Court lacks an ability to fashion appropriate relief, then "[a]ny further ruling ... would constitute an impermissible advisory opinion, 'i.e., one advising what the law would be upon a hypothetical state of facts or upon an abstract proposition ….'" *Wilkie*, ¶ 8 (quoting *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 12, 355 Mont. 142, 226 P.3d 567). Once a party demonstrates a case has become moot, the burden shifts to the opposing party to demonstrate an exception applies. *Gateway Opencut Mining Action Group v. Bd. of County Comm'rs*, 2011 MT 198, ¶ 22, 361 Mont. 398, 260 P.3d 133.

Here, Plaintiffs acknowledge the disciplinary action against Representative Zephyr expired on *sine die*. (Doc. 27, ¶ 53). This moots each claim. Plaintiffs tie three of their four claims directly to the expired motion. (Doc. 27, ¶¶ 108, 137, 148) (Claims II, III, IV). Claim I likewise became moot post-*sine die* because there are no "future House proceedings" for this Court to consider. (Doc. 27, ¶ 92).[3] The Legislature adjourned and this case, to the extent it ever was a case, became moot.

No exception to the mootness doctrine applies to these facts either. *See In re Big Foot Dumpsters & Containers, LLC*, ¶ 15 (a Court may hear a case that is no longer live when (1) mootness is caused by the voluntary cessation of the challenged conduct, (2) the case involves conduct capable of repetition, yet evading review, or (3) when the public interest demands review).

Voluntary cessation applies only to defendants who seek to "manipulate the litigation process" by ending unlawful conduct after Plaintiffs' challenge an action. *Wilkie*, ¶ 10 (citing *Heringer*, ¶ 20). "[L]egislative actions should not be treated the same as voluntary cessation of challenged acts by a private party, and that we should assume that a legislative body is acting in good faith in repealing or amending a challenged legislative provision, or in allowing it to expire." *Bd. of Trs. of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc).

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[3] Claim I raises additional standing problems. First, it assumes that Representative Zephyr will run for and win election to the House in some future election. Second, it assumes future House rules governing debate—including decorum and cloture—will be enforced by a future Speaker against Representative Zephyr. This delves deep into hypotheticals. (*Broad Reach Power, LLC v. Mont. Dept. of Pub. Serv. Regulation, Pub, Serv. Commn.*, 2022 MT 227, ¶ 10, 410 Mont. 450, 520 P.3d 301 (internal quotations and citations omitted); *see also Clinton v. City of New York*, 524 U.S. 417).

Here, the disciplinary motion expired on its own terms, irrespective of any challenge by Plaintiffs. (Doc. 27, ¶ 53). First, the House established the terms of the motion, including its expiration, prior to any challenge by Plaintiffs. *Id.* Second, the expiration date relates directly to the House's own authority to discipline current members, but not bind a future House. Joint Rule 60-05(2) ("Legislative rules passed by one legislature or statutory provisions governing the legislative process are not binding on a subsequent legislature."); *Ohio Life Ins. & Tr. Co. v. Debolt*, 57 U.S. (16 How.) 416, 431(1854). In other words, even if the House had wanted to impose discipline beyond *sine die* it couldn't. This Court must presume that the House acted in good faith by recognizing the limits of its authority. *Chambers*, 941 F.3d at 1199. Voluntary cessation simply doesn't apply.

The second exception allows a Court to review a case or controversy that ceases to be "live" where a wrong is "capable of repetition, yet evading review." *Havre Daily News*, ¶ 34 (citation omitted). The Plaintiff invoking such an exception must demonstrate that "the challenged conduct inherently is of limited duration, so as to evade review, and that there is a reasonable expectation that the same complaining party will be subject to the same action again." *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶17, (citing *Havre Daily News*, ¶ 34). It's not enough to satisfy such exception if the conduct is perpetual such that Plaintiff "will have various opportunities in the future to seek judicial review of any preliminary orders, actions, or rulings and final judgments." *Id.* Rather the challenged conduct must be so limited that failing to review the case or controversy deprives the Plaintiff of adequate relief. *Id.*

Here, as previously stated, Plaintiffs cannot plausibly establish a reasonable likelihood of this case reoccurring and evading review. First, this exception would require the Court to speculate as to Representative Zephyr's re-election, future composition of the House, future House rules, and how that future legislative body would treat conduct occurring during future debates under its rules. None of those facts are known or can be reasonably known at this time. There is no basis for this Court to assume "the same complaining party will be subject to the same action again." *In re Big Foot Dumpsters & Containers, LLC*, ¶17.

Finally, the public interest exception doesn't apply. *See Ramon v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867 (The public interest exception applies when "(1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer to the issue will guide public officers in the performance of their duties."). A failure to meet any of the three prongs

renders the case moot. *See Gateway Opencut Mining Action Grp.*, ¶ 25 (affirming district court on mootness grounds because no constitutional violation capable of repetition occurred).

The public interest exception cannot serve as a vehicle to exceed the limitations on judicial power. At a minimum, "[t]he courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Marbut v. Sec'y of State*, 231 Mont. 131, 752 P.2d 148 (1988).

This case fails to satisfy all three prongs. First, Plaintiffs fail to establish the violation of any constitutional right. *See Infra* Part III; *Ramon*, ¶ 22 (the exception applies only to violations of fundamental constitutional rights). Second, as previously stated, Plaintiffs cannot plausibly establish that "the same complaining party will be subject to the same action again." *In re Big Foot Dumpsters & Containers, LLC*, ¶17. Finally, the Montana Constitution itself bars the courts from entering an advisory opinion to "guide" the House on an issue textually committed to the House itself. *See* Mont. Const. art. V, § 10(1); *supra* Part I.

This Court recognized its inherent limitations in this matter. (Doc. 24). "[T]he Montana Constitution explicitly grants each house of the Montana legislature the authority to 'expel or punish a member for good cause.'" (Doc. 24 at 4); *see also* Mont. Const. art. V, § 10. Because the Montana Constitution grants the Legislature this independent power, "the Court's powers are conversely limited." *Id*. In this case, considering the case under the public interest exception would do what Article III, § 1 forbids. *See Johnson*, 383 U.S. at 178 (even hearing case concerning internal legislative deliberations would unconstitutionally assert judicial influence over legislative affairs).

Mootness is neither aspirational nor theoretical—it is a jurisdictional limitation on the authority of the Court to answer a hypothetical question. As the Montana Supreme Court has said,

> [C]ourts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions. The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice. Consequently, this Court has refused to entertain a declaratory judgment action on the ground that no controversy is pending which the judgment would affect.

Broad Reach Power, LLC v. Mont. Dept. of Pub. Serv. Regulation, Pub, Serv. Commn., 2022 MT 227, ¶ 10, 410 Mont. 450, 520 P.3d 301 (internal quotations and citations omitted).

Without a "live" case or controversy, and without a valid exception to mootness, no judgment from this Court would affect the controversy surrounding the challenged conduct. On the other hand, any ruling would gravely interfere with the process constitutionally entrusted to the Montana Legislature. The Court should accordingly dismiss those claims as moot.

III. Plaintiffs fail to allege a constitutional violation.

Independent of the justiciability issues with Plaintiffs' claims, the underlying theories of the Complaint are entirely meritless. Legislative chambers are limited public forums, subject to greater restrictions on speech. At minimum, the Legislature can, and must, prevent disruptive speech from occurring in this limited forum.

Plaintiffs' equal protection theory is likewise meritless. Plaintiffs fail to identify a similarly situated party as required under Montana law. Indeed, Representative Zephyr cannot identify a similarly situated party because no other representative engaged in disruptive speech—the basis for the disciplinary action.

A. The Legislature did not violate Plaintiffs' free speech rights.

Governments may impose speech restrictions on legislative proceedings that would not be permissible elsewhere. *See White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact."). In this sense, legislative proceedings are evaluated by courts similar to limited public forums. *See Reza v. Pearce*, 2015 U.S. App. LEXIS 20120, at *12 (9th Cir. 2015) (Arizona legislative hearing rooms constitute limited fora); *Act-Up v. Walp*, 755 F. Supp. 1281, 1289 (M.D. Pa. 1991) (Pennsylvania House gallery was a limited public forum). Under that analysis, legislatures may impose content-based restrictions on speech, insisting that legislative proceedings are "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2010). Governments have broad discretion to reserve public forums for certain communicative purposes so long as restrictions on speech are reasonable and do not suppress expression purely out of antipathy to their ideas. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). At a minimum, the State may disallow "actual disruption" of the limited public forum. *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010); *accord Act-Up*, 755 F. Supp. at 1289 n.6.

Disruption constitutes all forms of speech and expressive activity that delays, obstructs, or jeopardizes the ability of the public body to function. *White*, 900 F.2d at 1425–26. Disruptive activity could take the form of an actual breech of the peace or fighting words. *Id.* But it also describes overly lengthy speeches, being unduly repetitive, irrelevance, or anything else that prevents the public body from "accomplishing its business in a reasonably efficient manner." *Id.* That certainly applies to chanting, protesting from the gallery, and conduct encouraging such protests by Members of the House.

Article II, Section 7 doesn't protect a heckler's veto. *See White*, 900 F.2d at 1425 (describing speech as "disruptive" even when it doesn't amount to a breach of the peace); *accord Act-Up*, 755 F. Supp. at 1289 n.6 ("It is important to note that the status of the gallery as a limited public forum does not give those who enter carte blanche to engage in any type of demonstrative activity they wish."). Restrictions to maintain decorum and order are plainly permissible. *Klindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir. 1995).

This must be so. The Legislature can only accomplish its business by proceeding in an orderly manner. *See* (Doc. 7 at 16 (acknowledging such as a compelling interest); House Rule 10-20(1)–(3) (Speaker's duties include providing for the orderly conduct of House business). The House rules protect this interest by providing that "[s]igns, placards, visual displays, or other objects of a similar nature are not permitted in the rooms, lobby, gallery, or on the floor of the House. The Speaker may order the galleries, lobbies, or hallway cleared in case of disturbance or disorderly conduct." House Rule 10-20(3).

Plaintiffs have acknowledged that protestors disrupted House business on April 24, 2024. (Doc. 7 at 9) (citing declarations that Plaintiffs admit they halted legislative business for at least 20 minutes). Plaintiffs also acknowledge that Representative Zephyr, at a minimum, stood in support of the disruption of House business. *Id.* The April 26, 2023, motion to discipline Representative Zephyr connected directly to the actual disruption of House proceedings on April 24, 2023. (Doc. 27, ¶ 53). Very simply, freedom of speech and expression doesn't extend to disrupting government proceedings. Allowing such grants a heckler's veto over the rights of other elected officials and their constituents. *White*, 900 F.2d at 1425; *Klindt*, 67 F.3d at 271; *Act-Up*, 755 F. Supp. at 1289 n.6.

The Montana House of Representatives acted in a reasonable fashion to safeguard the orderly conduct of business, free of protest, for the duration of the session. The Court should dismiss Plaintiffs Claims I, II, and IV on these grounds.

B. Plaintiffs fail to raise a cognizable equal protection claim.

Plaintiffs doom their equal protection claim by failing to identify a similarly situated party. Showing "that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner" is a perquisite to pleading a cognizable equal protection violation in Montana. *Vision Net, Inc. v. State*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d 1034. "[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Id*. "If the classes are not similarly situated, then it is not necessary for us to analyze the challenge further." *Id.* (cleaned up). Only if Plaintiffs survive that step, do courts proceed to determining the appropriate level of scrutiny. *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 15, 392 Mont. 1, 420 P.3d 528.

But Plaintiffs don't. Instead, they cursorily state they are similarly situated to all other legislators and all other Montanans. (Doc. 7 at 14) (creating a proposed class of all other constituents and all other representatives, *i.e.*, the entire State). But that must fail as an impermissibly overbroad classification.

On the facts, Plaintiffs cite four other instances of demonstrations at the Capitol. (Doc. 7 at 12–13; *see also* (Doc. 27, ¶¶ 124–26). But they fail to allege that these other demonstrations disrupted legislative proceedings. *Id.* Indeed, it's hard to imagine how they would since they did not take place in the House gallery. (Doc. 27, ¶¶ 124–26) (two occurred while the Legislature was out-of-session (Doc. 27, ¶¶ 124–25) and the other occurred on the Capitol steps (Doc. 27, ¶ 126)). These demonstrations and rallies are not remotely comparable to the disruption of an ongoing House floor session. Further, two events occurred prior to the recently adjourned session and weren't subject to the 2023 House Rules. (Doc. 27, ¶¶ 124–25); *see also* Joint Rule 60-05(2) (rules don't bind other legislative sessions). Speaker Regier, for example, wasn't speaker during these prior events, nor was the House composed of the same individuals—in other words, Plaintiffs' claims fail because House sessions aren't interchangeable. Plaintiffs aren't similarly situated to these other demonstrators.

That underlies Plaintiffs' fundamental misread of the situation. The motion to discipline Representative Zephyr came *after* House proceedings were actually disrupted. (Doc. 27, ¶ 53).

Plaintiffs fail to allege what other representatives engaged in similar conduct encouraging disruptive protests. (Doc. 27, ¶ 59) (alleging that Representative Zephyr—but failing to name any other representative—demonstrated in support of the disruptive protests). This must be fatal. The alleged point of discrimination lies in the disciplinary motion. If no other representative engaged in the activity leading to the motion, then there is no comparator class. *See Vision Net*, ¶ 16.

As for the constituent plaintiffs, their theory fails for identical and additional reasons. First, their chosen representative, and at least two of the individuals, engaged in or encouraged disruptive conduct. (Doc. 27, ¶ 52); (Doc. 13, ¶ 12); (Doc. 17, ¶ 15). Again, this disruption distinguishes them from other would-be comparators. This is fatal.

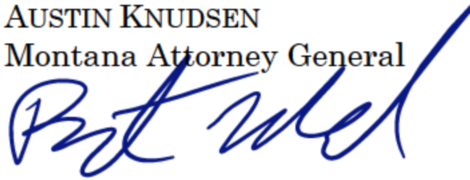
Second, Plaintiffs invent an equal protection right to effective representation in the Legislature. *See* Doc. 7, at 14 (alleging that disciplinary action has stripped constituents of equal protection). But Plaintiffs can't mean what they say. While Montanans have a right to vote for their chosen representative, they can have no vicarious right that that representative speak to a certain viewpoint on specific legislation. That view would create equal protection issues every time a legislator votes contrary to a constituent's viewpoint, fails to speak on a particular matter, cannot speak on a particular matter due to procedural rules governing debate, etc. Instead, Constituent Plaintiffs, like all Montanans, retain the ability to petition government for redress through letters, editorials, public gatherings, meetings; but that doesn't cross over into a right to disrupt legislative proceedings or insert the courts into legislative operations. Quite understandably, Plaintiffs cite no caselaw that the equal protection guarantee overrides the Legislature's inherent authority to govern itself. *See* Mont. Const. art. V, § 10(1).

Finally, even if Plaintiffs could make out a viable equal protection claim, the Court cannot adjudicate the elements without questioning the Legislature's motives and encroaching on its exclusive prerogative to set its own rules and discipline its members. That's the very essence of the political question doctrine and legislative immunity. *See Doe*, 412 U.S. at 312; *Eastland*, 421 U.S. at 508–09; *Johnson*, 383 U.S. at 180.

This Court must dismiss Claims III and IV.

DATED this 21st day of July, 2023.

AUSTIN KNUDSEN
Montana Attorney General



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