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MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

REPRESENTATIVE ZOOEY ZEPHYR, ANNA WONG, DEAN CHOU, BRADY SCHWERTFEGER, and SARAH VELK, Plaintiffs, vs. STATE OF MONTANA, REPRESENTATIVE MATT REGIER, in his official capacity as Speaker of the Montana House of Representatives; BRADLEY MURFITT, in this official capacity as Sergeant at Arms for the Montana House of Representatives, Defendants.	Cause No. ADV-2-23-300 Hon. Mike Menahan **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

This case challenges the unconstitutional silencing, censure, and expulsion of an elected representative from the Montana House of Representatives on account of her speech, expression, and political ideas. This case is justiciable and of great consequence. No branch of government may exercise its powers in conflict with the Constitution, and it is the province and duty of the judicial branch to review the constitutional propriety of legislative acts. Our government is one of separate branches; it is also one of checks and balances. Because Plaintiffs have adequately pled violations of their constitutional rights, and because this Court has the power to—in fact, must—adjudicate those claims, Defendants' motion should be denied.

FACTS

Plaintiff Zooey Zephyr is the elected Representative of House District 100 and represents approximately 11,000 constituents in and around Missoula, Montana. In her bid for election and throughout the 2023 legislative session, Rep. Zephyr was a strong advocate for transgender equality and a voice of dissent against various anti-transgender bills, including SB 99. SB 99—now law—bans gender-affirming medical care for minors, including minors who are transgender. In the final floor debate over the bill, on April 18, 2023, Rep. Zephyr spoke in opposition to the legislation, arguing that it would have severe, even life-threatening, consequences for transgender Montanans. Among her comments, Rep. Zephyr expressed her view that her colleagues would have "blood on [their] hands" for passing a bill targeting transgender youth, reflecting the tremendous challenges transgender youth face, including a heightened risk of suicide due to stigma and discrimination.[1]

Immediately following Rep. Zephyr's comments, the Montana Freedom Caucus, a far-right bloc, issued a statement calling for her censure. Defendant Regier, House Speaker, demanded Rep. Zephyr apologize for her comments made during debate. Rep. Zephyr declined. She nonetheless collegially agreed to be silent on all bills that day to give the Speaker additional time to consider the situation. The next day, at the end of the floor session, Speaker Regier, Speaker Pro Tem Rhonda Knudsen, and Majority Leader Sue Vinton called a meeting with Rep. Zephyr. Speaker Regier informed Rep. Zephyr that her comments had broken "decorum," and that he would not recognize her to speak until he believed she could "maintain decorum."

[1] *Facts About LGBTQ Youth Suicide*, The Trevor Project (Dec. 15, 2021), https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/

Two days later, the House took up debate of HB 458, a bill—now law—that misdefines transgender people and many people with intersex conditions. In keeping with her longstanding political views and lived experience, Rep. Zephyr asked to be recognized to speak on the bill. Speaker Regier refused to permit her to speak, silencing both Rep. Zephyr and her constituents in HD 100. The House Minority Leader objected, and the Rules Committee held a meeting. The Rules Committee voted to uphold the Speaker's decision not to allow Rep. Zephyr to speak. Later that day, and in the days that followed, Rep. Zephyr was denied the ability to debate bills during the legislative process. She repeatedly asked to be recognized, and Speaker Regier and other leaders in the House repeatedly refused to let her speak. Both the House Rules Committee and the conservative majority of the House ratified the Speaker's decision to silence Rep. Zephyr.

Meanwhile, public frustration over Rep. Zephyr's silencing and the deprivation of representation for HD 100 began to mount. When the House reconvened the following Monday, April 24, some of Rep. Zephyr's constituents and other Montanans gathered at the Capitol. Some of these individuals entered the House gallery, lawfully. The House took up SB 518, a bill—now law—that, among other things, may require teachers to misgender transgender students. Rep. Zephyr asked to speak regarding the bill. Speaker Regier again refused to recognize her. The House Minority Leader again appealed the Speaker's refusal, the Speaker again put the matter to a vote, and the majority of Rep. Zephyr's colleagues again voted, along party lines, to silence her. At that point, some of the members of the public watching the proceedings from the House gallery began to chant, "Let her speak." Rep. Zephyr rose from her seat and silently held her microphone, which was unamplified because she had not been acknowledged to speak, over her head to express that her voice and the voices of her constituents were being silenced in the People's House. The Sergeant of Arms then cleared the gallery.

Two days later, on April 26, the House took up a motion to censure Rep. Zephyr for the events of April 24. The censure states that Rep. Zephyr "violated the rules, collective rights, safety, dignity, integrity, and decorum of the House." Its passage barred Rep. Zephyr from entering the House Floor, antechamber, and gallery, and effectively blocked her ability to testify, debate, or otherwise voice her opinions and views on pending legislation. By expelling the elected representative for HD 100, the censure also effectively prohibited constituents of that district from participating in debate over bills in the Montana House of Representatives.

Plaintiffs filed this suit one week later, alleging that Defendants' actions violated their constitutional rights to free expression and to equal protection under the law. The Court denied Plaintiffs' request for a temporary restraining order. Defendants have now moved to dismiss.

STANDARD OF REVIEW

Montana is a notice pleading state and requires only that a complaint set forth a "short, plain statement of the claim." M. R. Civ. P. 8. The court must "take all well-pled factual assertions as true in the light most favorable to the claimant and then dismiss only if the claim, as pled, is not of a type or within a class of claims the court has threshold authority to consider and adjudicate." *Gottlob v. DesRosier*, 2020 MT 210, ¶ 7, 401 Mont. 50, 470 P.3d 188. Rule 12(b)(6) motions are disfavored and rarely granted. *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250. A court should not grant dismissal unless it appears beyond doubt that a plaintiff can prove no set of facts that would entitle them to relief. *Poeppel v. Flathead Cnty.*, 1999 MT 30, ¶ 17, 294 Mont. 487, 982 P.2d 1007.

ARGUMENT

I. Plaintiffs Have Adequately Pleaded Constitutional Violations

A. Plaintiffs Have Adequately Pleaded that Defendants Disciplined Plaintiff Zephyr for Her Protected Speech and Expression

Plaintiffs have adequately pleaded facts supporting their claim that Defendants violated the free speech and expression protections of the Montana Constitution. Article II, Section 7 of the Montana Constitution is similar to and interpreted consistently with the free speech protections guaranteed by the First Amendment to the United States Constitution. *See State v. Nye*, 943 P.2d 96, 96–101 (Mont. 1997). The Montana Constitution accordingly protects an elected official from "retaliation by [her] elected peers" when (1) she was "engaged in constitutionally protected activity"; (2) "as a result," she was subjected to "adverse action . . . that would chill a person of ordinary firmness from continuing to engage in the protected activity"; and (3) "there was a substantial and causal relationship between the constitutionally protected activity and the adverse action." *Boquist v. Courtney*, 32 F.4th 764, 775 (9th Cir. 2022) (*quoting Bair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010)).

Plaintiffs' Amended Complaint sets out each of these elements. Rep. Zephyr was plainly engaged in constitutionally protected activity when she stood on the Montana House Floor as an elected Representative for HD 100 and expressed her views and opinions on SB 99. *See id.* ("The first prong [of a free speech retaliation claim] is readily met when elected officials express their

views and opinions."). The words she used to express her opinion were no more inflammatory than other statements protected by free speech guarantees and common in political rhetoric. *Compare* Am. Compl. ¶ 36 (Rep. Zephyr's statement) *with, e.g.*, *id.* ¶ 40 (similar statements by a governor and state legislator); *Boquist*, 32 F.4th at 772 ("Hell's coming to visit you personally."). In direct response to Rep. Zephyr's speech, Defendants refused to recognize her to speak over the course of several days of active legislative business. *See* Am. Compl. ¶¶ 46–49; *see also Boquist*, 32 F.4th at 777 ("[A]n adverse action against an elected official is material when it prevents the elected official from doing [her] job.") (citation omitted).

The elements of free speech retaliation are also present in the events that transpired the following week. When Rep. Zephyr was again refused recognition to speak on April 24, members of the public protested her treatment, including by chanting "let her speak." Am. Compl. ¶¶ 49–51. Rep. Zephyr again expressed her views by standing on the House Floor and holding up her unamplified microphone, silently conveying her opinion that the voices of her constituents were being silenced in the People's House. *Id.* ¶¶ 49–52. Two days later, at the next floor session, Defendants voted to exclude Rep. Zephyr from the House Floor, gallery, and anteroom for this gesture. *Id.* ¶¶ 53–54. Defendants' action again targeted Rep. Zephyr's expression and prevented her "from enjoying 'the full range of rights and prerogatives that came with having been publicly elected.'" *Boquist*, 32 F.4th at 777 (quoting *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 544 & n.4 (9th Cir. 2010)). Both series of events recounted in the Complaint thus state a colorable Article II, Section 7 claim.

Defendants do not dispute that they took material, adverse action against Rep. Zephyr, nor that a substantial and causal relationship exists between Rep. Zephyr's expression and Defendants' action. Rather, they suggest that her speech and expression were undeserving of protection in the limited public forum of the House Floor. Mot. at 15–16. The case law forecloses this argument. Defendants cannot overcome Plaintiffs' free speech claims by hiding behind their legislative rules of decorum or a specious claim of "disruption." First, as discussed in detail below, Defendants may not use their internal rules as a shield when they have committed constitutional violations, and courts are empowered to remedy such violations. *See Rangel v. Boehner*, 20 F. Supp. 3d 148, 171 (D.D.C. 2013), *aff'd*, 785 F.3d 19 (D.C. Cir. 2015) ("[T]he House's wide discretion to discipline its Members is surrounded on all sides by other constitutional limitations.").

Second, Defendants' claim that Rep. Zephyr's speech and expression were "disruptive" is meritless and, in any event, is an issue that cannot be decided on a motion to dismiss. In the context of a legislative proceeding, "disruption" occurs when an individual "speak[s] too long," is "unduly repetitious," or engages in an "extended discussion of irrelevancies" and thereby "prevent[s]" the government from "accomplishing its business in a reasonably efficient manner." *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990) (affirming facial legitimacy of ordinance restricting speech that "disrupts, disturbs or otherwise impedes the orderly conduct of [a City] Council meeting"); *see also Denke v. Shoemaker*, 2008 MT 418, ¶ 50, 347 Mont. 322,198 P.3d 284 (collecting cases acknowledging governmental bodies' "legitimate interest" in confining speech "to the specified topic at hand" or to a set period of time); *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004) (affirming legality of ejection of speaker from citizens' forum where speaker was "repetitive and truculent, and . . . repeatedly interrupted the chairman of the meeting"). Abuses occur, however, "when a moderator rules speech out of order simply because he disagrees with it, or because it employs words he does not like." *White*, 900 F.2d at 1426. Thus, a "provocative gesture" is not in itself disruptive. *Norse v. City of Santa Cruz*, 629 F.3d 966, 969, 976 (9th Cir. 2010) (affirming that a "silent Nazi salute" to city counselors was protected expression). Nor are "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Denke*, ¶ 47 (affirming city council's refusal to restrict public discussion about city employee's sexual harassment and retaliation complaint against mayor); *see also Boquist*, 32 F.4th at 780–81 (holding that senator's statements, including "Hell's coming to visit you personally," were protected expression given "the wide latitude given to elected officials to express their views, even when such political expressions are vituperative, abusive, and inexact") (citations omitted).

Rep. Zephyr's acts fall within the realm of protected expression, not disruption—especially at this stage of proceedings, when Plaintiffs' allegations must be taken in the light most favorable to Plaintiffs. As recounted in the Amended Complaint, Rep. Zephyr spoke 22 words during the final Floor debate on SB 99, expressing her view about the harm that SB 99 would cause. *See* Am. Compl. ¶¶ 35–39; *see also* Mot. at 2 (repeating allegation). Her speech was not extended, repetitious, or irrelevant. Indeed, she was silenced not for disruption, but for a supposed breach of "decorum." *See* Am. Compl. ¶ 46; Mot. at 2. Days later, when observers in the House gallery protested Defendants' treatment of their representative, Rep. Zephyr's silent posture, holding her

microphone aloft, was not itself disruptive, even if the citizen protests might have been.[2] Plaintiffs' challenge is not to Defendants' decision to clear the gallery of protestors. Rather, Plaintiffs' free expression claims relate to the actions Defendants took before that point, silencing and expelling Rep. Zephyr purportedly for having "violated the rules, collective rights, safety, dignity, integrity and decorum of the House" by commenting on SB 99. *Id.* ¶ 53. That censure retaliated against the content of Rep. Zephyr's speech, expression, and political viewpoint; it was not an attempt to restore "safety" or "order" to the House. Indeed, by the time the censure issued, the House Floor was sufficiently in order for Defendants to vote on the motion—in other words, to "accomplish[] its business in a reasonably efficient manner." *White*, 900 F.2d at 1426.

There is similarly no merit to Defendants' suggestion that, because *Defendants* now claim Rep. Zephyr's speech and expression was "disruptive,"[3] *this Court* is powerless to find otherwise. The law is clear that Defendants cannot define disruption "in any way they choose," including as "any violation of its decorum rules." *Norse*, 629 F.3d at 976. This Court has a fundamental role to play in determining whether the restrictions placed on Rep. Zephyr's speech and expression, even in the limited public forum of the House Floor, were "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). But the Court need not—and cannot—decide that issue on the merits at this time. The Court may only determine the adequacy of the Complaint. *Gottlob*, ¶ 7; *Poeppel*, ¶ 17. Plaintiffs' allegations are more than sufficient to support a claim that Defendants exceeded their authority and violated the Montana Constitution when they silenced, censured, and expelled Rep. Zephyr for her expression in support of the rights and dignity of transgender people and against her treatment by the House.

B. Plaintiffs Have Adequately Pleaded that Defendants Violated the Equal Protection Clause

Plaintiffs have also pleaded a viable Equal Protection claim. Montana's Equal Protection Clause "embod[ies] a fundamental principle of fairness: that the law must treat similarly-situated

[2] The Lewis and Clark County Attorney's Office recently dismissed all criminal charges against the seven protestors arrested in connection with the April 24 demonstration in the House gallery. *See* Nicole Girten, *Attorney for Lewis and Clark County dismisses charges for arrested Montana Capitol protestors*, Daily Montanan (Aug. 22, 2023 5:56 PM), https://dailymontanan.com/2023/08/22/attorney-for-lewis-and-clark-county-dismisses-charges-for-arrested-montana-capitol-protesters/.

[3] Only in their briefs before this Court have Defendants labeled Rep. Zephyr's acts "disruptive," thereby engaging in "doublespeak" to "define disruption so as to include non-disruption to invoke the aid of [*White v. City of*] *Norwalk*" and other inapposite cases. *Norse*, 629 F.3d at 976.

individuals in a similar manner." *McDermott v. Montana Dep't of Corr.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992. This guarantee "provides for even more individual protection than the comparable Fourteenth Amendment, § 1 to the United States Constitution." *Cottrill v. Cottrill Sodding Serv.* (1987), 299 Mont. 40, 744 P.2d 895, 897. Even when the government is entitled to make "time, place, and manner restrictions" on the exercise of fundamental rights, the restrictions must be "reasonable and viewpoint neutral." *Denke v. Shoemaker*, ¶ 50. Dismissal of Plaintiffs' equal protection claims is unwarranted because Plaintiffs have, at a minimum, adequately pleaded that Defendants restricted their fundamental rights in a discriminatory fashion.

1. Plaintiffs Have Identified a Class of Similarly Situated Individuals

Plaintiffs ask this Court to compare Defendants' treatment of Rep. Zephyr to the treatment of other elected legislators who have expressed their political views in heated language or during public protests. Plaintiffs have cited several instances of Montana legislators who used inflammatory language or supported protests held at the State Capitol but who were not disciplined for either. BIS TRO at 13–14; Am. Compl. ¶ 58. For example, Rep. Mary Ann Dunwell was not punished after speaking at a June 2022 reproductive rights protest, where she asked protesters: "Are we ready to take our fight into the halls and galleries and committee rooms of the state Capitol?"[4] Nor was Sen. Theresa Manzella punished for supporting a rally to protest school mask mandates, telling the crowd: "My whole psyche is demented by this mask, this face diaper."[5] Neither Rep. Eric Matthews nor Sen. Shannon O'Brien was punished after joining a teachers' union's rally just ten days before the protest that led to Rep. Zephyr's censure.[6]

Defendants insist that these legislators and their constituents were not similarly situated to Plaintiffs because the other legislators did not "engage[] in similar conduct encouraging disruptive protests." Mot. at 18. As discussed above, Rep. Zephyr's conduct was not itself disruptive, and was limited to speech and expression in support of a political view, for which other Montana legislators have not been disciplined. Moreover, what conduct is "similar" is at least a fact question for a jury to decide, not a matter that can be determined at the pleading stage when Plaintiffs have

[4] Jonathon Ambarian, et al., *More Than a Thousand March on Montana Capitol Opposing Roe v. Wade Overturn*, KTVH (June 26, 2022), https://www.ktvh.com/news/hundreds-march-on-montana-capitol-opposing-roe-v-wade-overturn.

[5] Alex Sakariassen, *Dozens Rally for Parental Rights, and Against Mask Mandates*, Montana Free Press (Oct. 1, 2021), https://montanafreepress.org/2021/10/01/montana-parental-rights-masking-rally/.

[6] *MFPE Holds State Capitol Rally, Says Legislature Shows Teachers Disrespect*, WT Local (Apr. 14, 2023), https://wtlocal.com/2023/04/mfpe-holds-state-capitol-rally-says-legislature-shows-teachers-disrespect/.

adequately alleged differential treatment. Accordingly, there is no basis for distinguishing Plaintiffs' actions from those of the similarly situated representatives Plaintiffs have identified.

Moreover, the timeline of events makes clear that Defendants' claim of "disruption" to legislative proceedings is merely a pretext for discrimination against Plaintiffs based on their political ideas—namely, support for transgender rights. Rep. Zephyr spoke out against SB 99 on April 18. Am. Compl. ¶¶ 35–36. By the time of the Capitol protest on April 24, Defendants had already been silencing Rep. Zephyr for days. Am. Compl. ¶¶ 46–48. It was not until after the House voted to continue silencing Rep. Zephyr that protestors began to chant and Rep. Zephyr silently raised the microphone above her head. Am. Compl. ¶¶ 49–52. Defendants then waited another two days to formally censure Rep. Zephyr. Am. Compl. ¶¶ 53–54. It is clear that the Legislature began its discrimination against Plaintiffs in response to Rep. Zephyr's voiced opposition to SB 99 *before* any supposed disruption to legislative proceedings, and *continued* their discrimination after any possible disruption was resolved. Thus, even if Plaintiffs' actions had been disruptive—which they were not—the Complaint states facts demonstrating that the disruption was not the basis of Defendants' discrimination against them.

2. The Discrimination Threatens Plaintiffs' Fundamental Rights

Defendants also suggest that Plaintiffs' claims are inadequate because Montana guarantees no "equal protection right to effective representation in the Legislature." Mot. at 18. Plaintiffs' argument does not require the existence of any such right. Defendants' exercise of discriminatory legislative discipline threatens several fundamental rights that Montana explicitly guarantees in its Constitution: freedom of speech and expression (Mont. Const. Art. II § 7), popular sovereignty (*id.* § 1), self-government (*id.* § 2), suffrage (*id.* § 13), and freedom of assembly (*id.* § 6). *See Kloss v. Edward D. Jones Co.*, 2002 MT 129, ¶ 60, 310 Mont. 123, 54 P.3d 1 (collecting cases) ("[A] right is fundamental under Montana's Constitution if the right is either found in the Declaration of Rights or is a right without which other constitutionally guaranteed rights would have little meaning.").

The discipline directly restricted Plaintiffs' freedom of speech and expression, which is guaranteed by the Declaration of Rights. *See* Mont. Const. Art. II § 7. In addition, the rights of Rep. Zephyr's constituents to popular sovereignty, self-government, and suffrage "have little meaning" if their elected representative is stripped of the ability to speak in legislative proceedings. "These provisions establish that government originates from the people and is founded on their

will only." *Montana Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 36, 410 Mont. 114, 518 P.3d 58. Legislators "serve in representative capacities, as agents of the people" in expressing this will. *Reichert v. State*, 2012 MT 111, ¶ 65, 365 Mont. 92, 278 P.3d 455. This service includes, critically, participating in committee discussions, engaging in speech and debate on behalf of constituents, and lobbying legislative colleagues. Defendants deprived Rep. Zephyr of her ability to perform these core representative functions and thus deprived the constituent Plaintiffs of their fundamental rights related to that representation. *See Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [actions] that fall short of a direct prohibition against the exercise of First Amendment rights."). Because similar speech, expression, and even active participation in protests by other members of the State Legislature have not drawn similar retaliation, Plaintiffs have sufficiently alleged that Defendants have discriminated against them in contravention of Montana's Equal Protection Clause.

II. The Court Has Jurisdiction Over Plaintiffs' Claims

Defendants suggest that this Court is powerless to adjudicate Plaintiffs' constitutional claims because it was the Legislature that allegedly violated their constitutional rights. That theory ignores the well-settled principle that there are three *coequal* branches of government, each of which is designed to check and balance the others. The "organization and procedure" clause (Mont. Const. Art. V, § 10(1)) does not give the Legislature unfettered discretion to violate the rights of legislators and anyone else who enters the Capitol. Rather, the Legislature must abide by the Constitution, like everyone else, and when it is accused of a violation, it is the exclusive province of the judiciary to say what the law is. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 111, 312 Mont. 198, 60 P.3d 357 ("Each branch of government is made equal, coordinate, and independent.").

A. Plaintiffs' Claims are Justiciable and Do Not Present Political Questions Beyond the Jurisdiction of the Court

No branch of government can exercise its powers in conflict with the Constitution. Defendants cite *Brown v. Gianforte* for the proposition that the political question doctrine bars judicial review 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." 2021 MT 149, ¶ 20, 404 Mont. 269, 488 P.3d 548 (Mont. 2021). In fact, *Brown* is explicit that checks and balances require the judicial branch to adjudicate other branches' violations of individuals' constitutional rights: "The Montana Constitution provides that '[n]o

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, *except as in this constitution expressly directed or permitted.*'" *Id.* (quoting Mont. Const. Art. III, § 1) (emphasis added). Thus, the primary case on which Defendants rely recognizes that even when an exercise of power properly belongs to a coordinate branch of government, that exercise must still comply with constitutional requirements.

1. The Legislature's Power to Discipline Members Does Not Eviscerate Those Members' Constitutional Rights

Defendants argue that, provided two thirds of the Legislature concurs, any member can be disciplined, in any way, for any reason. *See* Mot. at 6 ("That's as simple as this case is."). Not so. Plaintiffs may bring a challenge to Legislative discipline when it runs afoul of fundamental constitutional rights that all citizens—including legislators—enjoy. Courts routinely review whether the imposition of discipline was consistent with constitutional principles. *See, e.g.*, *License Revocation of Gildersleeve* (1997), 283 Mont. 479, 942 P.2d 705, 708–09. Indeed, contrary to Defendants' argument, there is "no absolute prohibition of judicial review in the [censure] clause." *Morgan v. United States*, 801 F.2d 445, 449 (D.C. Cir. 1986) (citing Art. I, § 5, cl. 2.).

The cases on which Defendants rely (Mot. at 6) either do not implicate fundamental constitutional rights,[7] or actually undercut Defendants' position. For example, in *United States v. Smith*, the United States Supreme Court held that while "[t]he constitution empowers each house to determine its rules of proceedings… [i]t may not by its rules *ignore constitutional restraints or violate fundamental rights*, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." 286 U.S. 6, 33 (1932) (emphasis added). Only "*within these limitations*" are "matters of method . . . open to the determination of the house." *Id.* (emphasis added). And the D.C. District Court held in *Common Cause v. Biden* that "*absent a clear constitutional restraint*," separation of powers principles left it a matter "for the Senate, and not this Court, to determine the rules governing debate." 909 F.

[7] See, e.g., *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), (limiting courts from interpreting "ambiguous" House Rules in the context of a criminal proceeding against a House member accused of fraud and embezzlement.); Hughes, 876 A.2d 736, 748 (N.H. 2005) (challenge to a legislative compromise that was "privately negotiated," on the basis that the public had a right to know the bases for the deal.).

Supp. 2d at 31 (emphasis added). The very cases on which Defendants rely stand for the proposition that courts may review legislative rules for constitutionality.

Moreover, there are more analogous cases that this Court should rely upon. For example, in *Boquist*, the court adjudicated a rule—adopted by a state legislature pursuant to its rulemaking authority—requiring a legislator to provide 12 hours advance notice to the majority party before entering the Oregon State Capitol. 32 F.4th at 783. The court held that this rule plausibly violated the First Amendment. While the defendants raised numerous challenges to Senator Boquist's claims, there was no question that the court had the authority to review the constitutionality of the legislature's disciplinary action. Thus, no matter the discretion that a legislature has to enact rules governing conduct, those rules are still subject to constitutional protections.

That maxim makes sense. If any disciplinary action the Legislature undertakes is immune from judicial review, what is next? Discipline for opposing a piece of legislation? Discipline for advocating that other legislators vote in opposition of legislation? Defendants invite such an absurd result by making outlandish arguments that a constitutional provision *granting* them authority to regulate conduct also *immunizes* them from any oversight by a coequal branch of government that is specifically—and constitutionally—tasked with undertaking judicial review. In *United States v. Ballin*, the U.S. Supreme Court rejected a similar hypothetical based on unbridled legislative discretion: "To take defendants' argument to its logical extreme, imagine the House locking a Member in the basement of the Capitol for one year based only on an internal disciplinary vote…. [T]he Constitution empowers each House to discipline its Members, but it may not by doing so 'ignore constitutional restraints or violate fundamental rights.'" 20 F. Supp. 3d at 171 (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)).

Judicial review of the constitutional propriety of legislative actions has been "the province and the duty of the judicial department" since *Marbury v. Madison*. "[T]he courts, as final interpreters of the Constitution, have the final 'obligation to guard, enforce, and protect every right granted or secured by the Constitution . . . .'" *Columbia Falls Elementary Sch. Dist. No. 6. v. Montana*, 2005 MT 69, ¶ 18, 326 Mont. 304, 109 P.3d 257.

2. There Are Judicially Discoverable and Manageable Standards for Adjudicating Violations of Individual Rights

"Not every matter touching on politics is a political question." *Brown*, ¶ 20 (citations omitted). Such is the case here. Sufficient judicially manageable standards exist to permit adjudication by the Court. *See Bullock v. Fox*, 2019 MT 50, ¶ 44, 395 Mont. 35, 435 P.3d 1187

(only "[w]here there is … a lack of judicially discoverable and manageable standards for resolving" an issue, the issue is not properly before the judiciary). If a court has "the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions,'" then sufficient judicially discoverable and manageable standards exist to confer prudential standing. *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). Defendants cite no cases dismissed for lack of judicially discoverable and manageable standards. *See, e.g. Brown*, ¶ 24 (finding Plaintiffs had standing to challenge a law changing the process for judicial appointments); *Bullock*, ¶ 45 (Plaintiffs had standing based in part on the "importance of the question to the public" and where denying standing would effectively immunize the issue from judicial review); *Baker v. Carr*, 369 U.S. 186, 232 (1962) (Plaintiffs had standing because an equal protection claim did not "require decision of any political question").

All that is required is that legal tools or guideposts are available to reach a principled decision, and in fact there is a robust body of law defining the parameters of rights to Freedom of Speech and Equal Protection. Plaintiffs do not ask this Court to debate decorum with the Legislature. Plaintiffs only ask this Court to enforce the protections afforded by the Constitution, because Rep. Zephyr's only alleged impropriety involves protected speech.

Defendants rely heavily on *United States v. Brewster*, which involved discipline for accepting bribes. 408 U.S. 501 (1972). *Brewster* holds that the Constitution's speech and debate clause *did not* shield a member from prosecution for accepting bribes. Here, Plaintiffs have adequately pled that Rep. Zephyr was engaged in protected speech and expression when Defendants disciplined her. *Brewster* warned of that very circumstance:

> The process of disciplining a Member in the Congress is not without countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case . . . . Moreover, it would be somewhat naïve to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment.

Id. at 519–20. Consequently, "[t]he jurisdiction of Congress to punish its Members is not all-embracing." *Id.* at 520. *Rangel* makes a similar point, that rulemaking and disciplinary authority is circumscribed by constitutional protections: "The Constitution empowers each house to determine its rules of proceedings. *It may not by its rules ignore constitutional restraints or violate fundamental rights*." 20 F. Supp. 3d at 168 (citing *Ballin*, 144 U.S. at 5) (emphasis added).

These cases illustrate that this Court is empowered—indeed, required—to accept jurisdiction of this case. "This is what courts do." *See Zivotofsky v. Clinton*, 566 U.S. 189, 201

(2012) (rejecting political question lack-of-judicial-standards argument and finding that resolution of claims merely entails careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute at issue).

B. The Court's Declaratory Judgment Authority is an Established Check on Legislative Overreach and Does Not Disturb Separation of Powers

"When a party raises a bona fide constitutional claim, [that party] has right to seek declaratory judgment." *Brisendine v. State, Dept. of Commerce, Bd. of Dentistry* (1992), 253 Mont. 361, 833 P.2d 1019, 1022. To this end, the Montana Supreme Court has repeatedly held that declaratory relief is particularly appropriate when one branch of government oversteps its constitutional authority or violates fundamental constitutional rights. *State ex rel. Judge v. Legis. Fin. Comm. & Its Members* (1975), 168 Mont. 470, 543 P.2d 1317 (granting governor's requested declaratory relief that legislature's delegation of power was unconstitutional); *MEA-MFT v. McCulloch*, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075 (granting requested declaratory relief that referendum constituted an unlawful delegation of legislative power); *McKamey v. State* (1994), 268 Mont. 137, 885 P.2d 515 (considering claims for declaratory, injunctive, and equitable relief as to constitutionality of State's firefighter requirements and holding requirements violated Equal Protection Clause).

Separation of powers principles do not bar this Court from awarding Plaintiffs the relief requested. The separation of powers doctrine is concerned with arbitrary and unchecked authority—exactly what Defendants seek to wield here. As the Montana Supreme Court has stated:

> The doctrine of the separation of powers was adopted… to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

State ex rel. Judge, 543 P.2d at 1322 (quoting *Myers v. United States*, 272 U.S. 52 (1926)). Contrary to Defendants' position, "constitutional questions are properly decided by a judicial body…under the constitutional principle of separation of powers." *Jarussi v. Board of Trustees* (1983), 204 Mont. 131, 664 P.2d 316, 318 (citing Mont. Const. Art. III, § 1). Because Plaintiffs' constitutional rights are at stake, this Court can and should weigh in to declare that silencing a legislator violates those rights.

Declaratory relief is abundantly proper here in light of the clear "uncertainty and insecurity with respect to rights, status, and other legal relations" of the parties (§ 27-8-201, MCA), particularly given Defendants' position that they can freely continue such conduct in the future

with absolute immunity. In *Boquist*, the Ninth Circuit held the plaintiff-legislator could proceed with his claim for declaratory relief in his First Amendment retaliation claim against the majority party legislators. *See* 32 F.4th at 785 (holding claim was adequately pled and noting factual circumstances in which declaratory relief would and would not be appropriate). A similar ruling from this Court will protect Rep. Zephyr, her constituents, and all Montanans from similar arbitrary future actions by the Legislature to censure, silence, or oust an elected representative based on the majority's political disagreement with the representative. Regardless of what further relief is appropriate, the Court clearly has the power under the Uniform Declaratory Judgments Act to declare such rights and legal relations. § 27-8-201, MCA.

C. The Legislature is Not Immune from Plaintiffs' First Amendment Claims

Defendants' immunity challenges based on Montana's Speech or Debate clause also lack merit. Motion at 10–11. The Montana Constitution provides that legislators "shall not be questioned in any place for any *speech or debate* in the legislature" (emphasis added). Art. V, § 8. Like its federal counterpart, this Clause "was designed to assure a co-equal branch of the government wide freedom of *speech*, *debate*, and *deliberation* without intimidation or threats from the Executive Branch." *Gravel v. United States*, 408 U.S. 606, 616, 620 (1972) (emphasis added) (confirming the "judicial power to determine the validity of legislative actions impinging on individual rights" and holding that legislators are not immune for, among other things, executing invalid resolutions).

1. The Speech or Debate Clause Does Not Immunize Defendants

Defendants ironically rely upon the Speech or Debate clause to immunize their decision to disallow Rep. Zephyr from engaging in speech or debate as a consequence of her speech and debate. But in this case, just as in *Rangel*, "the House's wide discretion to discipline its Members is surrounded on all sides by other constitutional limitations." 20 F. Supp. 3d at 171.

Whether speech or debate immunity applies depends on "whether the legislator was engaged in a legislative function." *Cooper v. Glaser*, 2010 MT 55, ¶ 13, 355 Mont. 342, 228 P.3d 443, 445. Montana's Speech or Debate clause has never been extended to actions like those taken by Defendants. Further, federal Speech or Debate immunity has been extended beyond pure speech and applied to other legislative functions only in very limited circumstances:

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and

> House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House…[*T]he courts have extended the privilege to matters beyond pure speech or debate in either House, but only when necessary to prevent indirect impairment of such deliberations.*

Gravel, 408 U.S. at 625 (emphasis added and quotations omitted).

Defendants' actions are not afforded the privilege and protection of the Speech or Debate clause. It was hardly "necessary" to prevent impairment of deliberations to silence Rep. Zephyr. Defendants can point to no similar act of discipline in which a member was expelled simply for expressing a view contrary to the majority position. In *Boquist*, the Ninth Circuit allowed the plaintiff-legislator's claim to proceed, finding that the "materially adverse action" the majority imposed on him was not "traditionally a part of legislative action." *Boquist*, 32 F.4th at 782. Likewise, Defendants' decision to "bar [Rep. Zephyr] from the legislative chamber" was "not a 'long exercised' means of responding to protected speech." *Id.*

Defendants rely upon *Consumers Union v. Periodical Correspondents' Association* to claim that the "execution of internal rules" is "legislative." Mot. at 10 (citing *Consumers Union*, 515 F.2d 1341, 1349 (D.C. Cir. 1975)). *Consumers Union* concerned a facial challenge to the United States House's rules for regulation of the press gallery after a membership and accreditation was denied to a consumer organization. *Consumers Union*, 515 F.2d at 1347–50. Here, Plaintiffs do not mount a facial challenge to the Montana House rules, but to the weaponized enforcement of a rule to unconstitutionally silence and expel a minority party member. Other courts have readily distinguished *Consumers Union* under analogous facts. For example, in *Seum v. Osborne*, a citizen brought a claim against the Speaker of the Kentucky House of Representatives after having been individually barred from entering the Kentucky Capital. 348 F. Supp. 3d 616, 626 (E.D. Ky. 2018). The court denied the defendants' motion to dismiss and held legislative immunity did not bar the claim, distinguishing *Consumers Union* because the plaintiff "[did] not challenge the constitutionality of the Rule under which the Defendants claim the ban is appropriate, rather he challenges the ban itself." *Id.* at 627.

Here, Defendants barred Rep. Zephyr from entering House's legislative chambers. Doc. 27, ¶ 3. Defendants claim that immunity must attach because their conduct constitutes "legislative action." Mot. at 10. Defendants' radical and unnecessary punishment of Rep. Zephyr is not "traditionally a part of legislative action" at all. *Boquist*, 32 F.4th at 782. Thus, their actions are in no way an "integral part of the deliberative and communicative processes." *Gravel v. United*

States, 408 U.S. 606, 625 (1972). Defendants' actions represent the antithesis of "speech or debate" and the immunity afforded to these activities does not immunize Defendants' decision to expel Rep. Zephyr for expressing constitutionally protected speech.

2. The Speech or Debate Clause Does Not Preclude Constitutional Review of Legislative Action

Notwithstanding the Speech or Debate Clause, courts have previously reviewed claims by elected legislators against their peers for violations of the First Amendment. *See, e.g.*, *Boquist*, 32 F.4th at 771. *Boquist* notes at the outset that, "[a]s a general matter, the First Amendment prohibits government officials from subjecting individuals to retaliatory actions after the fact for having engaged in protected speech." *Boquist*, 32 F.4th at 774 (quoting *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022)). Further, this protection extends to "retaliatory acts of elected officials against their own." *Boquist*, 32 F.4th at 774 (quoting *Blair*, 608 F.3d at 542–43).

Defendants fail to address *Boquist*'s conclusion that, although legislators have latitude to enforce House rules generally, they are not "absolutely immune" for violating other legislators' First Amendment rights. In support of their assertion that Montana's Speech and Debate clause confers "absolute immunity" for any actions "taken during [Defendants'] legislative duties," Defendants cite two cases, both of which are readily distinguishable.

First, in *Cooper v. Glaser*, the defendant allegedly defamed the plaintiff in his comments during a legislative session. The Montana Supreme Court affirmed the district court's dismissal, holding that "Article V, Section 8 protects any statements made by legislators on the House floor." *Cooper*, ¶¶ 9, 18. This result is unsurprising: the court applied legislative immunity to pure speech arguably giving rise to an ordinary tort. It is also a far cry from the violations of fundamental constitutional rights alleged here.

Second, in *Rangel*, the U.S. House of Representatives censured Representative Rangel for alleged financial ethical violations, not for constitutionally protected activities. Moreover, Representative Rangel did not challenge the censure on grounds that it violated any fundamental right belonging to him or his constituents. *Id.* Accordingly, the court's decision was based on the fact that Rangel had "not even alleged a viable constitutional claim." *Id*. at 171. *Rangel* hardly supports Defendants' argument that they enjoy "absolute immunity" for "all legislative acts," even those that violate constitutional rights. Mot. at 9–10.

Moreover, Defendants' contention that the Speech or Debate Clause confers carte blanche upon the House to violate constitutional rights is both absurd and dangerous. "The constitution

empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights." *Ballin*, 144 U.S. at 5. Under Defendants' conception of the Speech or Debate Clause, a majority party could decide minority party membership constitutes "good cause" for expulsion, categorically disenfranchising those members' constituents for their political affiliation. Absolute immunity would leave the minority legislators and citizens without redress for obvious constitutional violations. Because the Legislature's authority is subject to constitutional limits, it follows that the Montana Judiciary may review the Legislature's actions for constitutionality.

D. Plaintiffs' Claims are Not Moot

Plaintiffs' claims are not moot.[8] Mootness deprives a court of jurisdiction only when "it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added). Two exceptions to the mootness doctrine apply to this case. First, Plaintiffs' claims are justiciable under the public interest exception to mootness, "which applies where the case presents a question of public importance that will likely recur and whose answer will guide public officers in the performance of their duties." *Gateway Opencut Mining Action Grp. v. Bd. of Cnty. Comm'rs*, 260 P.3d 133, 137 (Mont. 2011). Second, Plaintiffs' claims fall within the mootness exception "for cases involving events of short duration that are capable of repetition, yet evading review." *Id.*

1. This Case Presents a Question of Public Importance

The public interest exception to mootness applies because this case presents "constitutional issues that involve broad public concerns," and its resolution will "avoid future litigation on a point of law." *Ramon v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867. The three required elements of the public interest exception to mootness are present here: (1) the case presents a question of public importance; (2) the issue is likely to recur; and (3) an authoritative determination of the issues will guide public officers in the performance of their duties. *Id.* (citing *Gateway*

[8] Defendants argue that Plaintiffs' first claim lacks standing because it "delves deep into hypotheticals." Mot. at 12 n.3. This argument conflates standing with mootness. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (explaining the distinction: "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."). Defendants do not argue that Plaintiffs lacked a personal interest in the dispute at the commencement of this litigation. Rather, it is undisputed that, at the time Plaintiffs filed the Complaint, Rep. Zephyr had been elected to the House and House rules were being enforced against her. Mot. at 3.

Opencut Mining Action Grp. v. Bd. of Cnty. Comm'rs, 2011 MT 198, 361 Mont. 398, 260 P.3d 133).

First, whether the Montana Legislature may deprive an elected representative of the powers of her office on account of her political views, thereby curtailing the rights of both the representative and her constituents, is an issue of public importance. The Montana Supreme Court has "consistently held that where questions implicate fundamental constitutional rights or where the legal power of a public official is in question, the issue is one of public importance." *Ramon*, ¶ 22. This case involves both: Plaintiffs' claims implicate the free expression and equal protection guarantees of the Montana Constitution, and seek to clarify the scope of the Montana Legislature's legal power. Defendants do not sincerely argue otherwise; they suggest that Plaintiffs "fail to establish the violation of any constitutional right." Mot. at 14. But at this stage of proceedings, Plaintiffs need not "establish the violation." They need only adequately plead one, and they have. *See id.*; *Walker v. State*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872.

Second, the issues raised here are likely to recur. "The mere fact that [Defendants] argue that their actions are lawful indicate that they plan to continue operating under the same terms leading to this very same issue recurring in the future and necessitating a judicial declaration as to its legality." *Ramon*, ¶ 25. Whether the issue will again be presented by these same exact parties, *see* Mot. at 14, is of no matter. The public interest exception exists precisely because *any* person could face the same situation, "the problems will repeat themselves," and their resolution is of "broad public concern." *Id.*; *see also Walker*, ¶ 41. Even if this Court reads Plaintiffs' claims narrowly, public debate and polarization on the rights of transgender people remain intense. And while expulsion and silencing of the minority party was inconceivable even in the recent past, of late legislatures across the country have weaponized their decorum rules to exclude minority party members.[9]

[9] *See, e.g.*, Sean Murphy, *Transgender rights targeted in executive order signed by Oklahoma governor*, Detroit News Online (Aug. 1, 2023), https://apnews.com/article/transgender-rights-oklahoma-governor-67dc0c4a9d769066ccb1b9835c71449f; John Hanna, *Kansas transgender people find Democratic allies in court bid to restore their right to alter IDs*, Assoc. Press (July 30, 2023), https://apnews.com/article/transgender-drivers-licenses-kansas-lawsuit-kobach-46bdbdea665f0e9cf8fb5771c2c45fa2; Susan Milligan, *How Fringe Arguments Over Transgender Issues Are Imperiling LGBTQ+ Rights*, U.S. News & World Rep. (July 14, 2023), https://www.msn.com/en-us/news/us/how-fringe-arguments-over-transgender-issues-are-imperiling-lgbtq-rights/ar-AA1dQRUa; *Things to know about the latest court rulings and statehouse action over transgender rights*, Assoc. Press (July 13, 2023), https://apnews.com/article/transgender-bathroom-bill-sports-genderaffirming-care-e120cede83dab3ef81eb7918a8e34604.

Third, public officers require guidance on these issues in order to perform their legislative duties in keeping with the Constitution. There is no authoritative Montana court ruling that squarely resolves the issues raised in this case. *See Ramon*, ¶ 24. If Plaintiffs' claims are meritorious, a ruling will protect Montanans from future rights violations. *See id.* And even if not, "resolution on this issue is also in the interest of Montana taxpayers, considering the legal costs associated with challenges" to the actions of Montana public officials. *Id.* These factors demonstrate that there remains effective relief that this Court has the power to grant to Plaintiffs and their fellow Montanans.

2. Unconstitutional Legislative Discipline is Short in Duration, but Reasonably Likely to Recur

This case also falls within the mootness exception for actions that are capable of repetition yet evading review. This exception applies when (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Butte-Silver Bow Local Government v. Olsen* (1987), 228 Mont. 77, 743 P.2d 564. Both elements are met here.

First, the Montana Legislature's regular session lasts only 90 days. Courts have found the first prong satisfied by much longer time periods. *See Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 33, 333 Mont. 331, 142 P.3d 864 (collecting cases). As a result of the legislative session's short duration, any legislative discipline "invariably ceases before courts can fully adjudicate the matter." *Id.* (citing *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)). Indeed, the parties are only now briefing this issue, months after the Legislature's silencing and censure of Rep. Zephyr expired. Contrary to Defendants' assertion, the situation presented by Plaintiffs is not "perpetual" such that Plaintiffs "will have various opportunities in the future to seek judicial review of any preliminary orders, actions, or rulings and final judgments." Mot. at 13. Defendants' justiciability arguments demonstrate that any "opportunities in the future to seek judicial review" will be similarly hard-fought and slow-moving. Thus, the legislative discipline was too short in duration to be fully litigated prior to its cessation, as similar disciplinary actions will necessarily be in the future.

Second, there is "a reasonable expectation that the same complaining party [will] be subject to the same action again." *Gateway Opencut*, ¶ 22. "The exception to mootness for those actions that are capable of repetition, yet evading review, usually is applied to situations involving governmental action where it is feared that the challenged action will be repeated." *Olsen*, 743

P.2d at 564, 567. On this point, two U.S. Supreme Court cases are instructive. *Master, Mates & Pilots v. Brown* held that a losing candidate's challenge to election procedures was not moot because he "has run for office before, and may well do so again." 498 U.S. 466, 474 (1991). In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, an advertiser's as-applied challenge to an FEC rule was not moot, because it "credibly claimed" that it planned to run "materially similar" ads in the future, and there was no reason to believe the FEC would refrain from prosecuting future violations. 551 U.S. 449, 463 (2007). Plaintiffs reasonably "fear[] that the challenged action will be repeated." *Olsen*, 743 P.2d at 564, 567. Rep. Zephyr won handily in 2022[10] and has already announced her 2024 reelection bid.[11] The Constituent Plaintiffs' expectation of being harmed by the same conduct is even more concrete, since they will be affected regardless of the specific identity of their representative. Furthermore, transgender rights continue to be a flash point in Montana, against a nationwide backdrop of increasingly pervasive legislative attacks on transgender rights, including increasing weaponization of rules of "decorum" to punish members holding minority political views.[12] Rep. Zephyr is committed to continued support of transgender rights, and there is no reason to believe the Legislature would refrain from attempting to silence her—or any other representative with an unpopular political view—again. To the contrary, refusing to limit the House's disciplinary powers in this case will only embolden the Legislature, making future unconstitutional censures more likely.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

Dated this 1st day of September, 2023.

/s/ Alex Rate
ALEX RATE
ACLU OF MONTANA

[10] Bradley Warren, *Montana Voters Elect First Transgender State Legislator*, Montana Right Now (Nov. 9, 2022), https://www.montanarightnow.com/news/montana-voters-elect-first-transgender-state-legislator/article_29104ca2-601a-11ed-945c-cfa3cbcc3951.html.

[11] Kaitlin Lewis, *Zooey Zephyr touts Reelection Bid as Montana Bans Med Care for Trans Youth*, Newsweek (Apr. 28, 2023), https://www.newsweek.com/zooey-zephyr-touts-reelection-bid-montana-bans-med-care-trans-youth-1797470.

[12] *See, e.g.*, *supra* note 9 and accompanying text.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 1st day of September, 2023, via the Court's electronic filing system.

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/s/ Alex Rate
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