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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 **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Defendants moved to dismiss this case because Plaintiffs should have voluntarily dismissed long ago. (Doc. 29); (Doc. 24) (denying preliminary relief because

"the ultimate relief [Plaintiffs] seek includes broad permanent injunctions clearly outside the scope of this Court's authority."). Plaintiffs respond, in essence, by asserting that a mere allegation of constitutional injury overcomes ordinary limitations on this Court's authority to hear a case. (Doc. 32). That's incorrect. *350 Mont. v. State*, 2023 MT 87, ¶ 25, 412 Mont. 273, 529 P.3d 847. Ordinary rules of justiciability, in concert with the doctrine of constitutional avoidance, require rejecting Plaintiffs' arguments and claims. *Id.*

STATEMENT OF FACTS

The facts, as alleged by Plaintiffs, firmly establish disruption of House floor proceedings on April 24, 2023. (Doc. 27, ¶¶ 51–52); (Doc. 13, ¶ 12). Plaintiffs allege the House was in session conducting business that day. (Doc. 27, ¶ 49). They allege individuals in the House gallery began chanting after the vote to uphold the ruling of the Speaker. (Doc. 27, ¶ 51). That chanting lasted 20 minutes. (Doc. 13, ¶ 12). Izzy Milch's characterization of the events makes clear that yelling and chanting did disrupt proceedings. (Doc. 13, ¶ 11). Similarly, no one disputes what is plainly obvious from the video recordings: House business halted to clear demonstrators from the gallery. (Doc. 13, ¶ 13); (Doc. 22 at 3 n.4).[1] This disruption prompted the disciplinary motion. (Doc. 27, ¶ 53).

STANDARD OF REVIEW

Plaintiffs bear the burden of adequately pleading a cause of action. *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692. The Court mustn't accept as true Plaintiffs' legal conclusions related to retaliation or similarly situated classes. *Threkeld v. Colorado*, 2000 MT 369, ¶ 33, 303 Mont. 432, 16 P.3d 359. Nor does the Court need to apply blinders to the fact that House proceedings were actually disrupted on April 24, 2023. (Doc. 27, ¶¶51–52); (Doc. 13, ¶ 12); (Doc. 22 at 3 n.4). *See Harmon v. City of Arlington*, 16 F.4th 1159, 1163 (5th Cir. 2021) (Even at the motion to dismiss stage, when video evidence is properly before the court,

[1] It strains the boundaries of legitimate argument for Plaintiffs to deny these alleged facts constitute disruption of House proceedings. (Doc. 32 at 6 n.3).

video depictions of events "should be adopted over the factual allegations in the complaint if the video blatantly contradicts those allegations.") (cleaned up).[2]

ARGUMENT

I. The Court lacks jurisdiction to hear this case.

Multiple jurisdictional bars prevent this Court from reaching the merits. The order in which the Court decides the jurisdictional issue doesn't matter because the outcome will be the same. This case must be dismissed.

A. This case is a non-justiciable political question.

Plaintiffs misread Article III, Section 1 and ignore the constitutional limits on judicial authority. (Doc. 32 at 9–10).[3] The punishment clause in Article V, Section 10(1) speaks to the Legislature, not the courts, and comprises a quintessential political question. *See Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 488 P.3d 548 ("non-self-executing clauses of constitutions are non-justiciable political questions").

As Defendants argued, and Plaintiffs failed to respond to, Article V, Section 10(1) and Article VII, Section 11 of the Montana Constitution prohibit other branches from interfering in intra-branch discipline. (Doc. 29 at 7) (citing *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 45, 405 Mont. 1, 493 P.3d 980). That constitutional structure preserves the independence of the separate branches of government and the intent of Article III, Section 1.

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[2] Plaintiffs raise no objection to consideration of the video recordings for the Floor sessions at issue. *See* (Doc. 29 at 3–4) (Defendants asserting the Court can consider these recordings under M.R. Evid. 201).

[3] *License Revocation of Gildersleeve*, 283 Mont. 479, 942 P.2d 705 (1997) has no relevance to this case. (Doc. 32 at 10). The point seems to be that a party may challenge the constitutionality of a statute. *Gildersleeve*, 283 Mont. at 484, 942 P.2d at 708–09. But that's not at issue here. If Plaintiffs instead mean to assert that *all* legislative acts are subject to judicial review, that's not correct. *E.g. Nixon v. United States*, 506 U.S. 224, 238 (1993) (committing to the United States Senate, not the courts, the meaning of "try" in the Impeachment Clause).

Plaintiffs attempt to circumvent this clear jurisdictional bar by inventing an exception for constitutional questions. (Doc. 32 at 10–11). That fails because the Montana Constitution textually commits the matter of determining "good cause" for punishment to each house of the Legislature. Mont. Const. art. V, § 10(1); *Nixon v. United States*, 506 U.S. 224, 238 (1993). Representative Zephyr's argument also fails because expressive rights don't attach to individual legislators involved in the legislative process. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011) (rejecting a First Amendment challenge to Nevada's ethics rules requiring recusal from debating and voting on issues in which a Member has a personal interest); *see also infra* Part III.A.

1. The Montana Constitution commits this question to the House of Representatives not the judiciary.

"An issue is not properly before the judiciary when there is a textually demonstrable constitutional commitment of the issue to a coordinate political department…." *Brown*, ¶ 21. "[N]on-self-executing clauses of constitutions are non-justiciable political questions." *Id.*, ¶ 23. "If addressed to the Legislature, the provision is non-self-executing; if addressed to the courts, it is self-executing." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 16, 326 Mont. 304, 109 P.3d 257. Article V, Section 10(1) unambiguously commits the determination of "good cause" to each house legislature "shown with the concurrence of two-thirds of all its members." Mont. Const. art. V, § 10(1). This provision, therefore, is non-self-executing and non-justiciable. *Brown*, ¶ 23.

This provision contains a clear constitutional limitation, the concurrence of two-thirds of all members. *See Powell v. McCormack*, 395 U.S. 486, 553 (1969) (Douglas, J., concurring) ("[I]f this were an expulsion case I would think that no justiciable controversy would be presented, the vote of the House being two-thirds or more."). This Court, like the court in *Nixon*, lacks the ability to determine what constitutes "good cause" because that is committed to the House. 506 U.S. at 228–29 (concluding the U.S. Constitution commits to the Senate the meaning of "try" in the Impeachment Clause). *Nixon* makes little sense if other constitutional standards, like Due Process,

come into play. 506 U.S. at 229 (rejecting argument that "try" connotes "proceedings … in the nature of a judicial trial."). So it is here. Constitutional standards that apply in other contexts don't apply in this context. Article II, Section 7 rights don't attach. *Carrigan*, 564 U.S. at 126.

Finally, the "familiar" parade of horribles trotted out by Plaintiffs has been rejected by courts time after time. *Compare* (Doc. 32 at 11) with *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015) (collecting cases). The Framers made a "conscious choice" to insulate legislators knowing the "potential for abuse[.]" *Rangel*, 785 F.3d at 24 (citation and quotation omitted).

In sum, the Montana Constitution commits to the Legislature operation of its own rules and punishment for disorderly behavior. This is a non-justiciable political question.

2. This Court lacks judicially manageable standards to interpret "good cause" under Article V, Section 10 of the Montana Constitution.

Plaintiffs misunderstand who may interpret "good cause" under Article V, Section 10 of the Montana Constitution. (Doc. 27, ¶ 56). The Constitution provides the *only* relevant standard and commits it *solely* to the Legislature. 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.") (emphasis added). Federal courts consistently acknowledge Congress's "unbridled discretion" under similar federal constitutional language. *United States v. Brewster*, 408 U.S. 501, 519 (1972); *see also Massie v. Pelosi*, 72 F.4th 319, 323 (D.C. Cir. 2023) ("Fining members for the violation of a House rule is an aspect of Congress' power to punish its Members…[and that] act may not be questioned in this court.") (internal citation and quotation omitted).

The *Brewster* Court acknowledged that "[a]n accused Member is judged by no specifically articulated standards…." 408 U.S. at 519; *see also id.* at n.13 (quoting *In re Chapman*, 166 U.S. 661, 669–70 (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.")). That statement accurately reflects the nature of

internal legislative discipline. It doesn't open the door to judicial intervention. *See Powell*, 395 U.S. at 553 (Douglas, J., concurring) (questions over a congressman's "qualifications" present a justiciable controversy while questions over "expulsion for misconduct" do not). In disciplinary matters, the sole constitutional standard lies in the concurrence of two-thirds of a chamber's members. Mont. Const. art. V, § 10(1). What constitutes "good cause," *id.*, is left to the Legislature with no judicially discoverable standards. *Brewster*, 408 U.S. at 519 (the matter is left to the "unbridled discretion" of the charging body); *see also Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880) ("the Constitution expressly empowers each House to punish its own members for disorderly behavior").

Brewster's limitation on the jurisdiction of the Legislature to punish its own Members simply has no applicability here. 408 U.S. at 520 (questioning, but not deciding, the jurisdiction of Congress to punish a Member's illegal acts occurring outside the chamber that were discovered after the Member left office); (Doc. 27, ¶ 53) (the discipline motion punished Representative Zephyr for actions occurring on the House floor). The jurisdictional line sits in distinguishing legislative and non-legislative acts. *Rangel*, 785 F.3d at 23. And disciplinary acts against members are legislative acts. *Id.* at 23–24; *see also Massie*, 72 F.4th at 324 (quoting *Kilbourn*, 103 U.S. at 202) ("[W]hatever is done within the walls of either assembly must pass without question in any other place.").[4]

Plaintiffs cite a panoply of inapposite cases.[5] None is persuasive.

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[4] The Supreme Court distinguished Congress's power to discipline its own members from punishment aimed at private individuals. *Kilbourn*, 103 U.S. at 189–90. The discipline is aimed at Representative Zephyr, not private individuals. (Doc. 27, ¶ 53).

[5] The statutory subject matter in *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) wasn't constitutionally committed to either of the political branches. *See also id.* at 208 (Ginsburg, J. concurring) (same); *Id.* at 210–11 (Alito, J., concurring) (same). *Baker v. Carr*, 369 U.S. 186 (1962) involved a one-person, one-vote equal protection claim, not the type of rejected equal protection theories here. *See Davids v. Akers*, 549 F.2d 120, 125 (9th Cir. 1977) (rejecting constituent equal protection theory in legislative committee representation because no "judicially discoverable and manageable standard"

Instead, this Court cannot answer Plaintiffs' request to find an additional "good cause" standard, (Doc. 27, ¶¶ 56–57). *Nixon*, 506 U.S. at 237–38. As the Supreme Court held in *Nixon*, absent a separate constitutional provision giving meaning to the term, the judgment of the legislative body must be final. *Id.* at 238 (the Supreme Court lacked judicial manageable standards to define the work "try" in the impeachment clause). The Montana Constitution's 2/3 vote requirement consists of the only relevant standard and that standard has been met. (Doc. 27, ¶ 54).

B. Speech or debate immunity bars all claims.

When it applies, the speech or debate clause confers "absolute" immunity from suit for legislators and staff. Mont. Const. art. V, § 8; *Cooper v. Glaser*, 2010 MT 55, ¶¶ 10–14, 355 Mont. 342, 228 P.3d 443 (adopting the federal absolute immunity standard for the performance of legislative functions); *Rangel*, 785 F.3d at 24 ("[A]bsolute immunity" … "is—in a word—absolute.").

Plaintiffs recycle the "familiar" and rejected argument "made in almost every Speech or Debate Clause case." *Rangel*, 785 F.3d at 24; (Doc. 32 at 16–17) (contrary to *Rangel*, Plaintiffs argue immunity depends on the underlying constitutionality of the act or that legislators possessed a proper motive for the act). At bottom, Plaintiffs present a policy argument that speech or debate immunity might lead to abuse. (Doc. 32 at 16). But that grievance finds no place in the "language, purposes, or history of the Clause." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 510 (1975). Courts reject it every time. *Id.* ("the familiar argument that the broad protection granted by the Clause creates a potential for abuse" ignores the "risk of such abuse was the conscious choice of the Framers buttressed and justified by history") (quotation omitted); *Massie*, 72 F.4th at 323–24 (same); *Rangel*, 785 F.3d at 24 (same).

Legislative immunity turns on the "nature of the act" not "motive or intent," or any other purported unlawfulness. *Rangel*, 785 F.3d at 24. Immunity attaches to "matters generally done in a session of the House by one of its members in relation to

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exists). *Bullock v. Fox*, 2019 MT 50, ¶¶ 44, 46, 395 Mont. 35, 435 P.3d 1187, involved a dispute between separate executive officers interpretation of a statutory provision, not the constitutional commitment of an issue to one branch of government.

the business before it." *Massie*, 72 F.4th at 322 (citation and quotation omitted). "[O]ther matters which the Constitution places within the jurisdiction of either House" are legislative acts. *Id.* (quoting *Gravel v. United States*, 408 U.S 606, 625 (1972)). Discipline of "members for the violation of a House rule is an aspect of Congress' power to punish its Members for disorderly Behavior." *Id.* at 323 (citation and quotation omitted). The "adoption and execution" of disciplinary resolutions are therefore "protected by the Speech or Debate Clause." *Id.*

In other words, black letter law precludes any examination as to the constitutionality of such legislative acts. *Eastland*, 421 U.S. at 510; *Kilbourn*, 103 U.S. at 202; *Massie*, 72 F.4th at 324; *Rangel*, 785 F.3d at 24. In *Kilbourn*, for example, the U.S. Supreme Court dismissed false imprisonment claims against House Members brought by a private citizen on speech or debate immunity grounds. 103 U.S. at 201–05. Courts cannot investigate further due to separation of powers concerns and the constitutional importance placed on the independence of the Legislature and preventing "intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel*, 408 U.S. at 617. Moreover, "[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Eastland*, 421 U.S. at 508–09. For that reason, when the Clause covers the "adoption and enforcement" of a disciplinary resolution, then courts "cannot pass on their constitutionality." *Massie*, 72 F.4th at 324; *see also Rangel*, 785 F.3d at 23–24.

The analysis also precludes investigation of allegedly improper motives. *United States v. Johnson*, 383 U.S. 169, 180 (1966); *Rangel*, 785 F.3d at 24. The Framers recognized the Clause immunizes "reckless men to slander and even destroy others with impunity" but still afforded legislators its "sweeping safeguards." *Brewster*, 408 U.S. at 516–17. These safeguards prevent the Court from inquiring into motive. *Johnson*, 383 U.S. at 180. Yet Plaintiffs ask this Court to read discriminatory intent into the disciplinary motion. *E.g.* (Doc. 32 at 18 n. 9). No matter the allegations, the Court cannot make that inquiry.

Plaintiffs rely on inapplicable caselaw, *Boquist v. Courtney*, 32 F.4th 764 (9th Cir. 2022), in response. (Doc. 32 at 16). First, Representative Zephyr doesn't allege a violation of any federal right. (Doc. 27, 15, 17, 19, 23). *Boquist*, therefore, doesn't apply because this case involves purely state law claims. As a comparison, First Amendment challenges to the U.S. Const. art. I, § 5, cl.2 fail because of the speech or debate clause. *Consumers Union of the United States, Inc. v. Periodical Correspondents' Assoc.*, 515 F.2d 1341, 1351 (D.C. Cir. 1975). In a like fashion, an Article II, § 7 challenge to Mont. Const. art. V, § 10(1) fails. *Cooper*, ¶¶ 10–14. *Boquist* relies on the First and Fourteenth Amendments to overcome state law. 32 F.4th at 774. Plaintiffs don't raise that claim and they cannot smuggle it in through briefing. *E.g.* (Doc. 32 at 16) (claiming a violation of "First Amendment" rights). Second, the defendants in *Boquist* didn't raise a speech or debate immunity defense and instead argued Senator Boquist's statements constituted a true threat, not protected speech. *Id.* at 784–85. Here, the Defendants claim speech or debate immunity, which rests on entirely different legal authority. *See*, *e.g. Massie*, 72 F.4th at 323–24; *see also infra* at 18 (further distinguishing *Boquist* on factual grounds). And even if Plaintiffs had pled a First Amendment claim, Defendants' core claim of immunity survives as a matter of prudential considerations. *See Davids*, 549 F.2d at 127 (citing *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976) (the Tenth Amendment prohibits federal interference regarding the conduct of integral State functions like internal legislative processes).

Next, Plaintiffs fail to distinguish *Rangel*, because they ignore the D.C. Circuit's analysis entirely. (Doc. 32 at 16) (citing to the district court in *Rangel*); *see also* (Doc. 29 at 10) (Defendant's brief in support citing to circuit court opinion). The circuit court affirmed dismissal on speech or debate grounds and did so without reservation. *Rangel*, 785 F.3d at 23–24. The court held disciplinary matters fall under speech or debate. *Id.* at 24 ("Even at the atomic level, the specific conduct that Rangel challenges is also legislative."); *Massie*, 72 F.4th at 322 citing *Rangel*, 785 F.3d at 23–24 (regulating conduct of Members on the House floor is a protected legislative act). Finally, both *Rangel* and *Massie* reject the "familiar argument" that "immunity does

not extend to the enactment and enforcement of House rules that are allegedly unconstitutional." *Massie*, 72 F.4th at 323 citing *Rangel*, 785 F.3d at 24; *see also Eastland*, 421 U.S. at 510 (immunity attaches to conduct "if performed in other than legislative contexts, would in itself be unconstitutional…."). In other words, *Rangel* supports absolute immunity for all legislative acts—including discipline against Members. *Rangel*, 785 F.3d at 23–24.

As to *Cooper*, Plaintiffs ignore that the Court favorably relied on broad interpretations of the Clause's meaning. *Cooper*, ¶¶ 11–12. "Many of these jurisdictions do not limit the scope of the immunity given to legislators." *Id.*, ¶ 12 (collecting cases). Plaintiffs seek to limit the clause to "ordinary tort[s]." (Doc. 32 at 16). But that's inconsistent with the broad meaning the Montana Supreme Court has afforded the Clause. *Cooper*, ¶¶ 10–12. Here, like in *Cooper*, the Clause applies to actions occurring "on the floor of the House of Representatives while it was in session." *Id.*, ¶ 14.

Disciplinary resolutions constitute "matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625; Mont. Const. art. V, § 10(1). Because such resolutions are legislative acts, Defendants are entitled to Speech or Debate immunity. Mont. Const. art. V, § 8; *Cooper*, ¶¶ 11–12; *Massie*, 72 F.4th at 322–23; *Rangel*, 785 F.3d at 24.[6]

C. Plaintiffs requested relief violates the separation of powers.

This Court properly determined that the relief requested falls "clearly outside the scope of this Court's authority." (Doc. 24 at 4). Plaintiffs decline to defend their requested injunctive relief and instead focus solely on the Uniform Declaratory Judgment Act ("UDJA"). (Doc. 32 at 13–14). But the UDJA doesn't authorize "litigants to fish in judicial ponds for legal advice." *Broad Reach Power, LLC v. Mont. Dep't. of Pub. Serv. Regul., Pub, Serv. Comm'n.*, 2022 MT 227, ¶ 10, 410 Mont. 450, 520 P.3d 301.

[6] Plaintiffs don't challenge this immunity, if it applies, properly extends to Defendant Bradley Murfitt. (Doc. 32 at 14–17). Still, the protection extends to those enforcing disciplinary resolutions. *Rangel*, 785 F.3d at 24–25 (rejecting argument to the contrary); *see also Massie*, 72 F.4th at 323 (same).

The UDJA still follows ordinary justiciability principles. *Broad Reach*, ¶ 10. And the Montana Supreme Court recently confirmed, these principles apply even in the context of a constitutional challenge. *350 Mont.*, ¶ 25.

Boquist doesn't save Plaintiffs' claims. (Doc. 32 at 14). The Ninth Circuit considered whether the Defendants' "fighting words" affirmative defense was apparent from the complaint. 32 F.4th at 784–85. Because that factual issue was "not apparent as a matter of law" the complaint could move past the pleading stage. *Id.* at 785. Here, the Montana Constitution itself contains Defendants' affirmative defenses. Mont. Const. art. V, §§ 8, 10. The events in question concern speech or debate on the House Floor, (Doc. 27, ¶¶ 49, 52–54, 77, 79–80). The events in question also relate directly to the House's ability to discipline its own Members under Article V, Section 10(1). (Doc. 27, ¶¶ 53–54). The UDJA doesn't circumvent the separation of powers. *Broad Reach*, ¶ 10 (the underlying controversy must be justiciable).

The UDJA claim, like the injunctive claims for relief, violates bedrock separation of powers principles. *Johnson*, 383 U.S. at 180. A declaratory judgment endorses the unconstitutional view that the judiciary may exercise "directly or indirectly, an overruling influence over the [Montana Legislature] in the administration of [its] respective powers." *Id.* Because the Montana Constitution commits this case to the Montana Legislature—not the courts—the UDJA claim cannot survive.

II. Any viable claims became moot on sine die.

Plaintiffs fail to advance an argument for this case presenting a live controversy. (Doc. 32 at 17).[7] Instead, they argue two exceptions to mootness apply. *Id.*

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[7] Plaintiffs also misunderstand the Defendant's argument as to Claim I. (Doc. 32 at 17 n.8). Plaintiffs must separately establish standing as to each claim and each form of relief. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352-53 (2006) ("standing is not dispensed in gross"). The plain language of the complaint contemplates a hypothetical future injury by a future Speaker warranting a preemptive injunction. (Doc. 27, ¶ 92) (seeking an injunction in "future House proceedings"); (Doc. 27 at 27) (applying this injunction to the Speaker's successors in office). That claim fails to allege a sufficiently concrete injury at the time of pleading because it relies on an underdeveloped causal chain that may not come to pass. The "threatened injury must

(arguing for the public interest and capable of repetition, yet evading review exceptions).[8] Neither exception applies for the reasons the Defendants previously argued. (Doc. 29 at 13–15).

Plaintiffs appear to put the cart before the horse in construing the Uniform Declaratory Judgment Act as itself providing a mootness exception. (Doc. 32 at 13–14, 17). But the UDJA, like any cause of action, requires a live case or controversy. *See Broad Reach Power, LLC*, ¶ 10. The UDJA doesn't authorize courts to "answer moot questions" or authorize "litigants to fish in judicial ponds for legal advice." *Id.* Any case or controversy ended on *sine die* and Plaintiffs now fish for an advisory opinion to guide "public officers … on these issues." (Doc. 32 at 19). The lack of an "authoritative Montana court ruling that squarely resolves the issues," (Doc. 32 at 19), doesn't authorize an advisory opinion. *Broad Reach*, ¶ 10; *see also 350 Mont.*, ¶ 25 (principles of justiciability must align, not conflict, with the doctrine of constitutional avoidance). This case is moot.

A. The public interest exception doesn't evade justiciability requirements.

The public interest exception exists as a category of capable of repetition, yet evading review. *Ramon v. Short*, 2020 MT 69, ¶ 26, 399 Mont. 254, 460 P.3d 867. This is clear in the exception's elements. *Ramon*, ¶ 21 ("the issue is *likely* to recur") (emphasis added). The exception doesn't open the door to advisory opinions simply because plaintiffs allege a constitutional question. *See Chovanak v. Matthews*, 120 Mont. 520, 525–26, 188 P.2d 582, 585 (1948). Instead, courts "adhere to the principle that courts should avoid constitutional issues whenever possible." *350 Mont.*, ¶ 25.

Ramon demonstrates the necessary facts to invoke the doctrines. *Id.*, ¶ 25. There, the State saw an unquestioned increase in the number of civil detainers at

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be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original). This failure stands apart from the mootness issues infecting all claims for relief.

[8] Plaintiffs fail to argue that the voluntary cessation doctrine applies, and so Defendants' arguments on that theory are well-taken. (Doc. 29 at 12–13).

issue. *Id.* (one-third of all detainers—state law enforcement holding individuals on federal immigration grounds—in the prior fifteen years occurred in the three years before the case). And at least three cases had been filed on the same point of law. *Id.* Finally, given the "transitory 48-hour period of immigration detainer requests" the issue likely evaded judicial review. *Id.*, ¶ 26. Thus, the facts of that case showed the issue would likely recur and evade judicial review—because there were other cases in the pipeline and a demonstrated rise in the exact type of claims at issue. *Id.*, ¶ 25.

No such facts exist here. (Doc. 32 at 18 n. 9) (citing *executive* orders in two other states and ordinary litigation against enacted state laws).

Plaintiffs read the exception far too broadly. (Doc. 32 at 18). So broadly, in fact, it would cover any constitutional claim. (Doc. 32 at 18). But the Montana Supreme Court made clear this year that "preference for efficiency" in "considering constitutional claims" doesn't circumvent ordinary justiciability rules or overcome the doctrine of constitutional avoidance. *350 Mont.*, ¶ 25.

The exception also requires Plaintiffs demonstrate the issue "will repeat" itself. (Doc. 32 at 18) (quoting *Ramon*, ¶ 25). That requires some showing the same parties, or similar parties, will find themselves in a functionally identical position. *Ramon*, ¶ 25. Saying that "public debate and polarization" exists doesn't conjure a live case. (Doc. 32 at 18). Nor does laying claim to the rights of the "minority party" as a whole. *Id.*, *but see* (Doc. 29 at 8 n.2) (Minority Leader Abbott agreed that the discipline complied with the Montana Constitution and House Rules). Instead, as the Defendants argued, Plaintiffs must show Representative Zephyr will likely be re-elected, that a future composition of the House will likely adopt similar rules, and that future legislative body will treat conduct like what occurred on April 24, 2023, similarly—with the requisite 2/3 vote. (Doc. 29 at 13). Plaintiffs assert Representative Zephyr will likely win re-election and end there. (Doc. 32 at 20). That fails to carry their burden of showing likely repetition. Absent that showing, any opinion would be purely advisory and the public interest exception doesn't require or allow this Court to issue such an opinion. *Broad Reach Power, LLC*, ¶ 10; *350 Mont.*, ¶ 25.

B. The capable of repetition, yet evading review exception doesn't apply here.

Courts will have ample time to review any similar case arising again. *See Havre Daily News, LLC v. City of Havre*, 2006 MT 2015, ¶ 33, 333 Mont. 331, 142 P.3d 864 (quoting *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)) (party asserting the exception must show the nature of the case "is *always* so short as to evade review.") (emphasis in original). The procedural history of this case demonstrates that courts can act quickly when required. (Doc. 24) (denying temporary restraining order roughly 24-hours after filing).

Plaintiffs complain this matter is "slow-moving" and the parties are only now briefing the motion to dismiss "months" after the expiration of the disciplinary motion. (Doc. 32 at 19). The procedural history tells a different story. Plaintiffs filed their complaint and application for a temporary restraining order on May 1, 2023. (Doc. 1); (Doc. 6). They moved to substitute Judge McMahon on the same day. (Doc. 5). Defendants responded the next day. (Doc. 22). And the Court denied the temporary restraining order on May 2, 2023. (Doc. 24). Even after a motion to substitute, the district court acted within 24 hours of filing on preliminary issues.

Plaintiffs elected not to appeal that order. *See* MRAP 6(3)(e) (appeals can be taken from denial of an injunction). That litigation choice cannot fairly be twisted into creating a durational issue under mootness. *Cf. Turner v. Mountain Eng'g & Constr.*, 276 Mont. 55, 60, 915 P.2d 799, 803 (1996) ("A party may not claim an exception to the mootness doctrine where the case has become moot through that party's own failure to seek a stay of the judgment.").

As to the timing of the present motion: Plaintiffs effected service on June 9, 2023, and moved to amend their complaint on June 19, 2023. (Doc. 25). The Court granted that amendment on July 10, 2023. (Doc. 26). Defendants moved to dismiss on July 24, 2023. (Doc. 28). Plaintiffs, on July 25, 2023, moved for an extension to respond up to September 1, 2023. (Doc. 30). Defendants requested a 14-day extension to reply. (Doc. 33). Of the "months" long delay Plaintiffs complain of, they delayed proceedings over a month by failing to immediately effect service. (Doc. 25).

They also requested a month-long extension to respond to the motion to dismiss. (Doc. 30). This isn't to say such requests or delays were unreasonable, but that these delays undermine the claim that a disciplinary motion will "invariably cease" before adjudication. (Doc. 32 at 19). As previously argued, Plaintiffs will have an opportunity "in the future to seek judicial review" of preliminary and final orders. (Doc. 29 at 13). As shown by the expedited consideration of the temporary restraining order, the courts can act as circumstances require. Nothing in the nature of the claims precludes timely consideration by the court. *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 10, 408 Mont. 187, 507 P.3d 169.

Plaintiffs also fail to satisfy the second requirement that "the same complaining party would be subject to the same action again." *Gateway Opencut Mining Action Grp. v. Bd. of Cty. Comm'rs*, 2011 MT 198, ¶ 22, 361 Mont. 398, 260 P.3d 133. Plaintiffs cite executive orders and challenges to legislation in other states doesn't relate to the facts here. (Doc. 32 at 18 n.9). Irrelevant. Rather, Plaintiffs bear the burden of demonstrating that Representative Zephyr will be re-elected, similar disruptive conduct will occur in the House chamber, and that a future House will take similar disciplinary action under similar rules. Plaintiffs rest on the allegation that Representative Zephyr will seek re-election. (Doc. 32 at 20).[9] That isn't good enough. It fails to allege with any degree of concreteness that a future House will operate under similar rules, muster the required 2/3 vote to treat events like April 24, 2023, the same going forward. As argued elsewhere, that is the nature of Article V, Section 10(1), that each chamber is allowed to adopt rules, procedure, and discipline to fit the circumstances of how that chamber in that legislative session wants to govern itself. *See supra* Part I; (Doc. 29 at 4–11).

[9] Plaintiffs' allegation that legislative rules are being weaponized against transgender individuals lacks merit. (Doc. 32 at 20). Plaintiffs cite news reports in other states. (Doc. 32 at 20 n. 12). But those reports concern executive action in Oklahoma and Kansas, as well as litigation over states' ability to regulate experimental medical procedures. It stretches the bounds of legitimate argument to insinuate those actions in other states impute discriminatory intent—or relate at all to legislative procedure.

III. The Court must dismiss all claims for failure to state a claim.

A. Plaintiffs fail to state a viable free speech or free expression claim.

"[A] legislator has no right to use official powers for expressive purposes." *Carrigan*, 564 U.S. at 127. Legislators act "not as individuals but as political representatives executing the legislative process." *Id.* at 126 (quoting *Coleman v. Miller*, 307 U.S. 433, 469–70 (1939)) (opinion of Frankfurter, J.). Exclusion from "advocating," at a minimum, is "a reasonable time, place, and manner limitation." *Id.* at 122 (if a legislative body can constitutionally exclude a member from voting, it may also constitutionally limit that member from advocating for the passage or defeat of legislation); *see also* (Doc. 29 at 15–16). In any case, an individual legislator doesn't possess a personal right to a portion of the legislative power. *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

The right to free speech and expression under Article II, Section 7 of the Montana Constitution never attaches in this case. *See State v. Nye*, 283 Mont. 505, 512, 943 P.2d 96, 101 (1997) (the Montana Constitution doesn't afford any different or greater protection for free expression than the First Amendment of the United States Constitution). The conduct at issue concerns Representative Zephyr "ask[ing] to speak about HB 458," (Doc. 27, ¶ 77), HB 513, (Doc. 27, ¶ 79), and comments on HB 99 (Doc. 27, ¶¶ 76, 94). Such conduct isn't protected activity. *Carrigan*, 564 U.S. at 127. Simply put, an individual cannot lay claim to a right to use the mechanics of government to convey a message. *Id.* at 127 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362–63 (1997)).

This understanding underscores the principle that decorum and discipline protect the collective rights of the body, not the individual legislator. (Doc. 29 at 16). "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); *see also* Mont. Const. art. V, § 10(1). Rules governing decorum protect "the rights of other speakers." *White v. Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 199).

Constituents possess no vicarious right to their elected representative's advocacy. *See, e.g.,* C*ommon Cause v. Pennsylvania,* 558 F.3d 249, 268–69 (3d Cir. 2009); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982); *Davids*, 549 F.2d 120 (collecting denying relief to voters under equal protection, free speech, and right to petition theories). The *Davids* court rejected this rights by osmosis theory as "a perversion of the judicial process into a political process." 549 F.2d at 124. Plaintiffs own alleged facts show the constituent plaintiffs voted and retained an ability to petition their government for redress. *E.g.*, (Doc. 13, ¶¶ 1, 3). Their rights end there. They do not extend to "a right to use governmental mechanics to convey a message." *Carrigan*, 564 U.S. at 127.

In any case, the alleged facts show House business was disrupted on April 24, 2023. *Supra* at 2. The House may disallow and punish "actual disruption" of floor proceedings. *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010).[10]

Plaintiffs rely on *Boquist*, 32 F.4th at 764 and its predecessor case *Blair v. Bethel Sch. Dist.*, 608 F.3d 540 (9th Cir. 2010). These cases don't square with Plaintiffs' alleged facts.

In *Blair*, the Ninth Circuit rejected a First Amendment retaliation claim brought by a school board member against other school board members because "the First Amendment does not succor casualties of the regular functioning of the political process." 608 F.3d at 545; *see also Rangel v. Boehner*, 20 F. Supp. 3d 148, 168 (D.D.C. 2013) ("Normally, judicial intervention in this context is only appropriate where

[10] Plaintiffs newly injected argument of "pretext" lacks any legitimate basis. (Doc. 32 at 8). Plaintiffs now allege that the "timeline" of events, a delay of two days between the disruption on April 24, 2023, and the discipline motion on April 26, 2023, demonstrates pretextual discrimination. (Doc. 32 at 8). First, House proceedings were disrupted. *Supra* at 2. Second, the discipline motion relates directly to that disruption. (Doc. 27, ¶ 53). Third, the April 26th Floor Session was the first House floor session following the disruption. Fourth, Plaintiffs fail to allege facts showing a discriminatory motive, and even if they had, this Court cannot inquire into such motive. (Doc. 27, ¶ 53) (motion's sponsor makes clear intent of motion); *Johnson*, 383 U.S. at 180. Such baseless arguments exceed the boundaries of legitimate disagreement. *Clark Fork Coal. v. Tubbs*, 2017 MT 184, ¶ 26, 388 Mont. 205, 399 P.3d 295.

rights of persons other than members of Congress are jeopardized by Congressional failure to follow its own procedures.") (internal citation and quotation omitted). The heightened protection of speech on matters of public concerns attaches to private citizens, or government employees speaking as private citizens, not elected officials. *Id.* at 544–45 n.3. Afterall, "more is fair in electoral politics than in other contexts." *Id.* at 544.

In *Boquist*, a subset of the Oregon State Senate, after the legislative session ended, imposed a 12-hour notice rule for Senator Boquist to enter the State Capitol. 32 F.4th at 773. The special committee met to decide whether Senator Boquist's comments "constitute a credible threat of violence" and whether the committee should impose restrictions on Senator Boquist based on "fear or threatened violence in the workplace." *Id.* The 12-hour rule went into effect on July 8, 2019, and remained in effect through the Ninth Circuit's decision on appeal on April 21, 2022. *Id.* Here, the Defendants rely on their constitutional prerogative to govern internal legislative affairs. *Supra* Part I. Second, the punishment occurred during the session and expired on *sine die*. (Doc. 27, ¶ 53). Third, *Boquist* concerned conduct outside of official proceedings, but that isn't the case here. (Doc. 27, ¶ 53). Fourth, unlike *Boquist*, the punishment was voted on by the body as a whole and passed with the constitutionally required two-third concurrence. (Doc. 27, ¶ 54). In other words, unlike *Boquist*, the discipline motion here relates directly to the body's authority to govern itself and ensure orderly proceedings. *White*, 900 F.2d at 1426.

Finally, unlike *Boquist* or *Blair*, this case presents matters of purely state law in state courts. (Doc. 27 at 15, 17, 19, 23) (Plaintiffs raise only state constitutional claims). The U.S. Supreme Court clarified this nuance in *Elrod v. Burns*, 427 U.S. 347 (1976), stating, "the separation-of-powers principle, like the political-question doctrine, has no applicability to the federal judiciary's relations to the States." *Id.* at 352. Here, where Plaintiffs raise only state constitutional claims—not federal—the Montana Constitution forecloses those claims. *See supra* Part I. As the *Bond* district court in noted, "the general law in this country" is that state courts "refused to take jurisdiction over controversies having to do with the qualifications of legislators."

Bond v. Floyd, 251 F. Supp. 333, 340 (N.D. Ga 1966), *rev'd on other grounds, Bond v. Floyd*, 385 U.S. 116 (1966).[11] In other words, in the absence of superseding federal claims, state law acts as an absolute bar to these claims—even under *Boquist*.[12]

B. Plaintiffs fail to state a viable equal protection claim.

Plaintiffs fail to address the key differences between their proposed comparator classes. (Doc. 32 at 7). As the Defendants previously argued, each example cited by Plaintiffs concerns conduct off the House floor. (Doc. 29 at 17); (Doc. 32 at 7) (continuing to rely on demonstrations and speeches outside of the House chambers as a comparator class). Plaintiffs fail to establish similarly situated classes and the claim fails as a matter of law. *Vision Net, Inc. v. State*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d 1034.

Nor have plaintiffs shown pretextual discrimination based on political ideas. (Doc. 32 at 8). Instead, the alleged facts show the decision to withhold recognition was based on a failure to adhere to decorum, not advocacy for a specific policy position. (Doc. 27, ¶¶ 36, 44); *see also* (Doc. 22 at 5–6) (outlining procedures under the rules for disorderly words). Representative Zephyr was not the only representative to advocate and vote against certain legislation. But the remarks at (Doc. 27, ¶ 36) were unique to the Representative and those statements led to withholding recognition. (Doc. 27, ¶¶ 44, 46). Put another way, if the decision to withhold recognition were based on political ideas, then other legislators would have been subject to similar rulings. Instead, as the alleged facts show, the decision to withhold recognition relates solely to the Representative's breach of decorum. (Doc. 27, ¶ 36).

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[11] The Supreme Court in *Bond* expressly refused to consider any state law question. *Bond*, 385 U.S. at 137 n.4.

[12] That isn't to say pleading a federal law claim cures all ills. The Tenth Amendment still protects the States' "essential decisions regarding the conduct of integral governmental functions…." *Nat'l League of Cities v. Usery*, 426 U.S. 833, 855 (1976); *accord Davids*, 549 F.2d at 127 (internal legislative processes qualify as such integral governmental functions).

Finally, as previously argued, the Constituent Plaintiffs equal protection claim fails because they don't possess any right to an elected representative's advocacy. *Supra* at 17; (Doc. 29 at 18). Contorting the equal protection clause to guarantee a right to having a particular political party or representative espouse particular views gives the clause a "meaning that it cannot bear, a burden that it cannot carry." *Davids*, 549 F.2d at 125.

CONCLUSION

Courts are "not in a position … to make a better judgment about how the [Montana] House of Representatives should go about its business than that House can make." *Id.* (denying voter equal protection claim). "Even if the court could, it ought not to." *Id.* Precisely. The Court must dismiss this case.

DATED this 29th day of September, 2023.

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