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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Matthew Monforton, *Plaintiff*, v. **Jonathan Motl**, in his official capacity as Commissioner of Political Practices, **Tim Fox**, in his official capacity as Attorney General of the State of Montana, **Leo Gallagher,** in his official capacity as Lewis and Clark County Attorney, and **Marty Lambert**, in his official capacity as Gallatin County Attorney, *Defendants*.	Case No. _____ **Verified Complaint For Declaratory and Injunctive Relief**

Plaintiff Matthew Monforton complains against Defendants as follows:

Introduction

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. It

concerns the constitutionality of Montana election law § 13-35-225(3)(a), which imposes a Compelled-Vote-Reporting Provision on political speech (the "Compelled-Vote-Reporting Provision").

2. Those who violate, or attempt to violate, the Compelled-Vote-Reporting Provision are subject to civil prosecution and, if convicted, they are subject to fines, MCA §13-37-128, and removal from office, MCA §13-35-106(3).

3. Plaintiff Monforton, a 2014 House candidate, complains that the Compelled-Vote-Reporting Provision burdens and chills his speech and association and that it is unconstitutional under the First and Fourteenth Amendments to the United States Constitution because it facially vague, is a form of prior restraint, and fails strict scrutiny.

Jurisdiction and Venue

4. Because this case arises under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States, this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a). It also has jurisdiction pursuant to the Declaratory Judgment Act, codified at 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper under 28 U.S.C. § 1391(b) because events giving rise to the claim occurred, and Defendants reside, in this District.

Parties

6. Candidate Matthew Monforton is a resident of Gallatin County. He is running as a Republican candidate in the 2014 contested primary for House District 69. During his campaign, he plans to run printed ads against his opponent, Rep. Ted Washburn.

7. As Commissioner of Political Practices, Defendant Jon Motl has the authority to investigate violations of, enforce the provisions of, and hire attorneys to prosecute violations of, Montana Code Chapters 35 and 37 and the rules adopted to carry out these provisions. MCA §§ 13-37-111, 13-37-113, 13-37-114, and 13-37-124. The Commissioner acts under color of law and is sued in his official capacity.

8. As Montana Attorney General, Defendant Tim Fox has the power to investigate and prosecute violations of Montana Code Chapters 35 and 37 by and through the county attorneys under his supervision. MCA §§ 2-15-501(5), 13-37-124, 13-37-125, and 13-37-128. The Attorney General acts under color of law and is sued in his official capacity.

9. As Lewis and Clark County Attorney, Defendant Leo Gallagher has the power to investigate and prosecute violations of Montana Code Chapters 35 and 37. *See* MCA §§ 7-4-2716, 13-37-124, 13-37-125, 13-37-128 (granting investigative and prosecutorial power to Montana's county attorneys). The county

attorney acts under color of law and is sued in his official capacity.

10. As Gallatin County Attorney, Defendant Marty Lambert has the power to investigate and prosecute violations of Montana Code Chapters 35 and 37. *See* MCA §§ 7-4-2716, 13-37-124, 13-37-125, 13-37-128 (granting investigative and prosecutorial power to Montana's county attorneys). The county attorney acts under color of law and is sued in his official capacity.

Facts

11. Chapters 35 and 37 of the Montana Code Annotated impose campaign finance restrictions and bans on political speakers, including political candidates.

12. MCA Section 13-35-225(3)(a) (hereinafter the "Compelled-Vote-Reporting Provision") requires that all "printed election material" that includes information about a candidate's voting record must also include:

> (i) a reference to the particular vote or votes upon which the information is based;
>
> (ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if the contrasting votes were made in any of the previous 6 years; and
>
> (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

Id.

13. This Court held the prior version of the Compelled-Vote-Reporting Provision unconstitutional on May 16, 2012, because the phrases "on the same issue" and "closely related in time" were facially vague. *Lair v. Murry,* 871 F. Supp.2d 1058, 1063-64 (D. Mont. 2012). The revised Compelled-Vote-Reporting Provision retains the "on the same issue" language. *See* MCA § 13-35-225(3)(a)(ii).

14. Those accused of violating or attempting to violate the Compelled-Vote-Reporting Provision are subject to civil prosecution. MCA § 13-37-128.[1] If convicted of violating or attempting to violate the Compelled-Vote-Reporting Provision, they are subject to fines. *Id.* They also "must be removed from nomination or office, as the case may be, even though the individual was regularly nominated or elected." MCA § 13-35-106(3).

15. Plaintiff Matthew Monforton is a Gallatin County resident. On

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[1]**MCA Section 13-37-128** provides that:

> (1) A person who intentionally or negligently violates any of the reporting provisions of this chapter, a provision of 13-35-225, or a provision of Title 13, chapter 35, part 4, is liable in a civil action brought by the commissioner or a county attorney pursuant to the provisions outlined in 13-37-124 and 13-37-125 for an amount up to $500 or three times the amount of the unlawful contributions or expenditures, whichever is greater.

MCA § 13-37-128(1).

December 12, 2013, he filed his "Statement of Candidate" with the Commission on Political Practices to run in the GOP primary race in House District 69. *See Statement of Candidate*, *Form C-1,* attached as Ex. 1.

16. During his campaign, Candidate Monforton intends to run ads concerning Rep. Washburn's voting record.

17. Specifically, Candidate Monforton intends to mail letters to voters in House District 69, which encompasses the northern part of Gallatin County. These letters will contrast Candidate Monforton's steadfast opposition to the Patient Protection and Affordable Care Act, commonly referred to as "Obamacare," and Rep. Washburn's votes in the House in support of Obamacare.

18. Candidate Monforton has also rented a billboard facing westbound traffic on I-90 just west of Belgrade to convey the same message as the letters. His billboard advertisement will be posted beginning on February 26, 2014.

19. Rep. Washburn opposed Obamacare in the 2011 session of the Legislature by voting against establishing a state-based exchange but later cast several votes in favor of Obamacare in the 2013 session, including the following:

a. Rep. Washburn voted "Yes" on January 31, 2013 on HB 250 on second reading, a bill establishing state training and certification of "navigators" to encourage registration for Obamacare. While the bill requires navigator applicants to submit to a background check, it contains no provision excluding persons with

criminal convictions from serving as navigators, nor does it contain provisions allowing a consumer to ascertain the criminal history of a navigator to whom the consumer's most private financial and medical information is provided. This was a vote FOR Obamacare.

b. Rep. Washburn voted "Yes" on February 1, 2013, on HB 250 on third reading. This was a vote FOR Obamacare.

c. Rep. Washburn voted "No" on March 27, 2013, on a motion to remove HB 590 from the House Human Services Committee, where it had been tabled and therefore unlikely to be voted on, and place it on "Second Reading," where it would be voted upon by the full House. Had it been enacted, HB 590 would have increased the number of persons qualifying for Medicaid in accordance with Obamacare's provisions. *See* Public Law 111-148, http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf. This was a vote AGAINST Obamacare.

d. Rep. Washburn voted "Yes" on April 2, 2013, on a motion to "blast" HB 590 out of the Human Services Committee and on to the floor of the House. This was a vote FOR Obamacare.

e. Rep. Washburn voted "Yes" on April 8, 2013, to approve Senate amendments to HB 250 regarding navigator training. This was a vote FOR Obamacare.

f. Rep. Washburn voted "Yes" on April 9, 2013, on HB 250 on third

reading as amended by the Senate. This was a vote FOR Obamacare.

g. Rep. Washburn voted "No" on April 16, 2013, on a motion to take SB 395 from the House Human Services Committee and place it on second reading for a vote by the full House. This bill was essentially the Senate's version of HB 590. This was a vote AGAINST Obamacare.

h. Rep. Washburn voted "No" on April 19, 2013, on an appeal of the Chair to send HB 623 back to committee after the Senate amended the bill to include Obamacare's Medicaid expansion. A "No" vote went against the House Speaker's actions and would have kept the bill alive for action by the full House. This was a vote FOR Obamacare.

i. Rep. Washburn voted "No" on March 23, 2011, on HB 620, a bill that would have established a Montana-operated insurance exchange. This was a vote AGAINST Obamacare.

20. Notwithstanding the Compelled-Vote-Reporting Provision, Candidate Monforton does not intend to include in his letters each and every one of Rep. Washburn's flip-flops regarding his Obamacare votes. Candidate Monforton believes that doing so would improperly camouflage Rep. Washburn's overall support for Obamacare.

21. Disclosing all of Rep. Washburn's flip-flops would require Candidate Monforton to include in his letter at least one or two extra pages explaining each

of Rep. Washburn's conflicting votes, thereby distracting voters from other messages Candidate Monforton intends to include in his letters and forcing Candidate Monforton to spend more money on producing and mailing the letter than he otherwise would.

22. Even if Candidate Monforton intended to follow the Compelled-Vote-Reporting Provision, compliance would be virtually impossible given the statute's vagueness. The statute requires challengers such as Candidate Monforton to disclose all of an incumbent's contrasting votes during the previous 6 years regarding the "the same issue." MCA § 13-35-225(3)(a)(ii).

23. Candidate Monforton can only guess as to what the State would consider to be the "issue" concerning Rep. Washburn's votes. For example, the "issue" involved with HB 590, SB 395, and HB 623 could reasonably be characterized as "Medicaid," thereby requiring Candidate Monforton to publish and explain all of Rep. Washburn's votes over the past 6 concerning Medicaid and make his campaign letter far more lengthier and confusing.

24. Candidate Monforton intends to run as a candidate in future legislative races and intends to publish similar materials regarding other candidates' voting records.

25. Candidate Monforton has no adequate remedy at law.

Count I
MCA Section 13-35-225(3)(a)'s Compelled-Vote-Reporting Provision Is Unconstitutionally Vague.

26. Plaintiff Monforton realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

27. The Compelled-Vote-Reporting Provision requires that all "printed election material" that includes information about a candidate's voting record must also include:

> (i) a reference to the particular vote or votes upon which the information is based;
>
> (ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if the contrasting votes were made in any of the previous 6 years; and
>
> (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

Id.

28. "A statute must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). "A statute is vague if men of common intelligence must necessarily guess at its meaning and differ as to its application." *In re Doser*, 412 F.3d 1056, 1062 (9th Cir. 2005). "Statutes that are insufficiently clear are void for three reasons: (1) to avoid punishing people for

behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on "arbitrary and discriminatory enforcement" by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms." *Foti*, 146 F.3d at 638.

29. As this Court held in a May 16, 2012, opinion, the Compelled-Vote-Reporting Provision is void for vagueness. *Lair v. Murry,* 871 F. Supp.2d 1058, 1063-64 (D. Mont. 2012). It requires those making printed political statements that mention a candidate's voting record to guess as to what constitutes a contrasting vote on "the *same issue*" without defining what those terms mean. *Id.* at 1063.

30. Candidate Monforton can only guess as to what the State would consider to be the "issue" concerning Rep. Washburn's votes. For example, the "issue" involved with HB 590, SB 395, and HB 623 could reasonably be characterized as "Medicaid," thereby requiring Candidate Monforton to publish and explain all of Rep. Washburn's votes over the past 6 years concerning Medicaid and make his campaign letter far more lengthier and confusing.

31. The Compelled-Vote-Reporting Provision is therefore facially vague.

Count II
MCA Section 13-35-225(3)(a)'s Compelled-Vote-Reporting Provision Is An Unconstitutional Prior Restraint.

32. Plaintiff Monforton realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

33. The Compelled-Vote-Reporting Provision requires that all "printed election material" that includes information about a candidate's voting record must also include:

> (i) a reference to the particular vote or votes upon which the information is based;
>
> (ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if the contrasting votes were made in any of the previous 6 years; and
>
> (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

Id.

34. "In its simple, most blatant form, a prior restraint is a law which requires submission of speech to an official who may grant or deny permission to utter or publish it based upon its contents." *Alexander v. U.S.*, 509 U.S. 544, 566 (1993) (Kennedy, J., dissenting). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975) (identifying the "elements" of traditional prior restraints).

35. When the government imposes duties that speakers must comply with in order to be allowed to lawfully engage in speech, prior restraint occurs just as surely as if the speaker has to seek the government's permission before speaking. *Citizens United v. FEC,* 558 U.S. 310, 335 (2008). When speakers can only speak

with assurance that their speech was lawful by first seeking an advisory opinion, the practical effect is one of prior restraint. *Id*. Speakers who wanted to ensure they "avoid threats of criminal liability and the heavy costs of defending against [government] enforcement must ask a governmental agency for prior permission to speak." *Id*.

36. The Compelled-Vote-Reporting Provision imposes a similar prior restraint. While the law does not require those wishing to speak about candidates' voting records to seek an advisory opinion first, the practical effect of the law is that those wishing to speak must do so or face the threat of civil fines and removal from office or nomination.

37. The Compelled-Vote-Reporting Provision requires Candidate Monforton to research whether Rep. Washburn has voted on that issue previously, how Rep. Washburn voted, and whether the vote is truly one that contrasts with the vote Candidate Monforton wants to talk about, since speakers must identify all "contrasting votes." Even if he does perform the research, he still runs the risk that he will violate the law by failing to identify votes that the Commissioner will judge to be "contrasting" on "the same issue." *See* MCA § 13-35-225(3)(a).

38. In order to assure themselves that they are not violating the Compelled-Vote-Reporting Provision, speakers must request an advisory opinion—whether they are willing and able to do their own legislative research or

not. As in *Citizens United*, this constitutes a prior restraint on speech.

39. Prior restraints on speech are presumptively invalid. *See, e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021-23 (9th Cir. 2009). The Compelled-Vote-Reporting Provision is unconstitutional.

Count III
MCA Section 13-35-225(3)(a)'s Compelled-Vote-Reporting Provision Fails Strict Scrutiny.

40. Plaintiff realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

41. The Compelled-Vote-Reporting Provision requires that all "printed election material" that includes information about a candidate's voting record must also include:

> (i) a reference to the particular vote or votes upon which the information is based;
>
> (ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if the contrasting votes were made in any of the previous 6 years; and
>
> (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

Id.

42. Compelled disclosure substantially burdens First Amendment rights.

Davis v. Fed. Election Comm'n, 128 S. Ct. 2759, 2774-75 (2008); *Buckley*, 424 U.S. at 64. Compelled reporting requirements are evaluated under "exacting scrutiny," *Davis,* 128 S.Ct. at 2774-75, which *Buckley* described as a "strict standard of scrutiny," *id*. Under exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis*, 128 S. Ct. 2775. Consequently, when compelled reporting requirements "go beyond the reporting of funds to finance speech to affect the content of the communication itself[,]" they are content-based regulations of speech and so are subject to strict scrutiny. *ACLU v. Heller*, 378 F.3d 979, 987-88 (9th Cir. 2004).

43. MCA Section 13-35-225(3)(a)'s Compelled-Vote-Reporting Provision compels those criticizing a candidate's voting record to also speak in favor of the candidate by publicizing the candidate's contrasting votes. It is unconstitutional under *ALCU v. Heller*, 378 F.3d 979, because it fails the required strict scrutiny review. *See also Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986) (ruling compelled political speech about one's political opponents unconstitutional).

Prayer for Relief

Wherefore, Plaintiff requests the following relief:

1. Declare MCA Section 13-35-225(3)(a), which imposes burdensome and onerous compelled reporting requirements on political speech, unconstitutional both facially and as applied to Plaintiff;

2. Enjoin Defendants, their agents, successors, and assigns, from enforcing MCA Section 13-35-225(3)(a);

3. Grant Plaintiff his costs and attorneys fees under 42 U.S.C. Section 1988 and any other applicable authority; and

4. Grant any and all other relief this Court deems just and equitable.

Dated: January 8, 2014

Respectfully submitted,

/s/ Anita Y. Milanovich

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