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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. 6:14-cv-00002-DLC-RKS **Preliminary Injunction Memorandum** **Oral Argument Requested**

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Introduction

This is a free speech and association case arising under the First and Fourteenth Amendments to the United States Constitution. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. The First Amendment protects not only speech, but also association. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). And the Fourteenth Amendment incorporates the First Amendment, making it applicable to State and local governments. *See, e.g.*, *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925).

Plaintiff Monforton wants to engage in political speech at the end of February 2014 that is unconstitutionally regulated under Montana's election and campaign finance law § 13-35-225(3).

As the U.S. Supreme Court recognizes, "[t]here are short timeframes in which [election-related] speech can have influence." *Citizens United v. FEC*, 558 U.S. 310, 334 (2010). If Candidate Monforton must wait to speak until the Court permanently declares Montana's laws unconstitutional, the 2014 election may have passed and his First Amendment activity will have been "stifled." *Id*. A preliminary injunction is therefore required so Candidate Monforton may engage in his constitutionally-protected political speech in a timely fashion, when it can make a difference for the 2014 primary election.

Facts

The facts of this case, as verified in Candidate Monforton's Complaint (Doc. 1), are stated here for the Court's convienence.

Chapters 35 and 37 of the Montana Code Annotated impose campaign finance restrictions and bans on political speakers, including political candidates. (Verified Compl., Doc. 1, at ¶ 11.) MCA§ 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. (Verified Compl., Doc. 1, at ¶ 12.)

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). (Verified Compl., Doc. 1, at ¶ 13.)

Those accused of violating or attempting to violate the Compelled-Vote-Reporting Provision are subject to civil prosecution. MCA § 13-37-128. 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).

Plaintiff Matthew Monforton is a Gallatin County resident. On 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. (Verified Compl., Doc. 1, at ¶ 15; *id.,* at Ex. 1.)

During his campaign, Candidate Monforton intends to run ads concerning Rep. Washburn's voting record. (*Id.* ¶ 16.) 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. (*Id.* ¶ 17.) 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. (*Id.* ¶ 18.)

Rep. Washburn has cast a number of conflicting votes regarding Obamacare during the 2011 and 2013 sessions of the Montana Legislature. For example, 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. (*Id.* ¶ 19.a.) But 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. (*Id.* ¶ 19.b.)

Similarly, he 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, and voted "Yes" on April 8, 2013, to approve Senate amendments to HB 250 regarding navigator training. These were votes FOR Obamacare. (*Id.* ¶¶ 19.d. and 19.e.) But 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. (*Id.* ¶ 19.g.)

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. (*Id.* ¶ 20.) Moreover, 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. (*Id.* ¶ 21.) And meaningfully disclosing all of these these flip-flops on a billboard would be impossible.

Crucially, 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 Candidate Monforton to disclose all of Rep. Washburn's contrasting votes during the previous 6 years regarding the "the same issue." MCA § 13-35-225(3)(a)(ii). (*Id.* ¶ 22.) 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. (*Id.* ¶ 23.)

Candidate Monforton intends to run as a candidate in future legislative races and intends to publish similar materials regarding other candidates' voting records. (*Id.* ¶ 24.) He has no adequate remedy at law. (*Id.* ¶ 25.)

Standard of Review

Plaintiffs seeking preliminary injunctions must demonstrate (1) likely merits success; (2) irreparable harm; (3) favorable equitable balance; and (4) public interest service. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011) (*quoting Winter v. Natural Res. Def. Council,* 555 U.S. 7, 24–25 (2008)). In First Amendment challenges, once likely merits success is established the other elements follow. *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973-74 (9th Cir. 2002).

For preliminary injunctions "[i]n the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Thalheimer*, 645 F.3d at 1116. Unsupported opinions and "hypothetical situations not derived from any record evidence or governmental findings" are not sufficient to support laws depriving citizens of First Amendment rights. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653-54 (9th Cir. 2007) ("*Citizens*"). Rather, the government must prove with evidence that its laws are necessary and satisfy scrutiny. *Id*; *Jacobus v. Alaska*, 338 F.3d 1095, 1109 (9th Cir. 2003). It is reversible error for district courts to find the government meets its burden when it does not present evidence of its interest in its law. *Citizens*, 474 F.3d at 653.

Argument

I. Candidate Monforton Is Likely To Succeed On The Merits.

Montana law 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." MCA § 13-35-225(3)(a) (hereinafter the Compelled-Vote-Reporting Provision").

The Compelled-Vote-Reporting Provision is unconstitutional on numerous grounds. As held in May 16, 2012, it is unconstitutionally vague. *Lair v. Murry,* 871 F. Supp.2d 1058, 1063-64 (D. Mont. 2012). Additionally, the Vote-Reporting Requirement has the effect of imposing an unconstitutional prior restraint on political speakers. And it is a content-based regulation of speech that fails strict scrutiny review. Each of these unconstitutional failings will be addressed in turn.

A. The Compelled-Vote-Reporting Provision Is Unconstitutionally Vague.

Laws regulating speech must sufficiently define their terms that the boundary between permissible and impermissible speech is clearly marked. *Buckley v. Valeo*, 424 U.S. 1, 41 (1976). Consequently, a statute is void for vagueness when it is not "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). *See also In re Doser*, 412 F.3d 1056, 1062 (9th Cir. 2005) (ruling that "[a] statute is vague if men of common intelligence must necessarily guess at its meaning and differ as to its application.").

Vague statutes are void for three reasons. First, "to avoid punishing people

for behavior that they could not have known was illegal[.]" *Foti*, 146 F.3d at 638. Second, "to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers[.]" *Id*. And third, "to avoid any chilling effect on the exercise of First Amendment freedoms." *Id*.

The Compelled-Vote-Reporting Provision mandates that all "printed election material" that includes information about a candidate's voting record must also include "a disclosure of contrasting votes known to have been made by the candidate on the *same issue* . . . ." MCA § 13-35-225(3)(a) (emphasis added). "Printed election material" is defined as including "[a]ll communications advocating the success or defeat of a candidate[.]" MCA § 13-35-225(1).

As this Court stated in *Lair v. Murry,* 871 F. Supp. 2d 1058 (D. Mont. 2012), the Compelled-Vote-Reporting Provision does not define "the same issue" with sufficient specificity. *Id.* at 1064. Neither Candidate Monforton nor anyone else can know precisely what "issues" trigger the Compelled-Vote-Reporting Provision. And the qualifier "same" offers little guidance. Must the issue be broadly the same (e.g., tax reform or parental rights) or must it be specifically the same (e.g., tax reform on small businesses, or parental rights of children seeking abortions)? Nobody knows which votes must be included, and yet failure to comply would subject Candidate Monforton and others similarly situated to penalties and even forfeiture of the nomination should he be successful in the

primary. *See* MCA Section 13-35-106.

The Compelled-Vote-Reporting Provision creates the possibility that law will be subjectively enforced based on "arbitrary and discriminatory enforcement." *Foti,* 146 F.3d at 638. It allows Candidate Monforton and others to be punished for "behavior that they could not have known was illegal." *Id.* And as a result, it may well cause some to forego speaking because of the uncertainty of how to comply with the law. *Id.*

The Vote-Reporting Requirement is unconstitutionally vague. *Lair,* 871 F. Supp. 2d at 1063-64.[1]

B. Montana's Compelled-Vote-Reporting Provision Is an Impermissible Prior Restraint on Speech.

Montana's Compelled-Vote-Reporting Provision compels those who want to discuss a candidate and his or her vote on a particular issue in a printed communication to include a statement identifying the vote on which the statement is based, *as well as* "a disclosure of contrasting votes known to have been made by

[1]Because of the ruling in *Lair,* Defendants are collaterally estopped from relitigating the vagueness of the Compelled-Vote-Reporting Provision. *See Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 775 (9th Cir. 2003) ("Offensive non-mutual collateral estoppel applies where (1) the issue sought to be litigated is sufficiently similar to the issue presented in an earlier proceeding and sufficiently material in both actions to justify invoking the doctrine, (2) the issue was actually litigated in the first case, and (3) the issue was necessarily decided in the first case.").

the candidate on the same issue . . .” MCA § 13-35-225(3)(a)(ii). This “affirmative duty to research in order to speak” functions as a prior restraint on speech.

“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). However, 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. The *Citizens United* Court pointed to the difficulties created for would-be speakers by the complexity of the Federal Election Commission’s regulatory scheme as an example of this type of prior restraint. 558 U.S. 310, 335 (2008). As the Court explained, federal law did not mandate that speakers seek and receive an advisory opinion from the FEC prior to speaking. *Id*. Still, because of the complexity of the regulatory scheme, speakers could only speak with assurance that their speech was lawful by first seeking an advisory opinion. *Id*. Though “not [] a prior restraint on speech in the strict sense of that term,” the practical effect was the same. *Id*. Speakers who wanted to “avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior

permission to speak." *Id*.

Montana's 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 sanctions. The Compelled-Vote-Reporting Provision requires those who want to publish a printed communication that talks about (or even mentions) a candidate's vote on a particular issue to research whether the candidate has voted on that issue previously, and how the candidate voted. The one who wants to speak must also research the effect of previous votes in order to determine whether the vote is truly one that contrasts with the vote the speaker wants to talk about, since speakers must identify all "contrasting votes." If they are unwilling (or unable) to expend the expense, time, and effort to perform this research, they must seek an advisory opinion or risk violating the law. Even if they do perform the research, speakers still run the risk that they will violate the law by failing to identify votes that the Commissioner will judge to be "contrasting." *See* MCA § 13-35-225(3)(a). In order to speak with assurance, 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.

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). Montana seeks to skirt this presumption by framing its law not as a prior restraint but as a punishment for those engaging in unacceptable speech. The reality, though, remains: those wishing to publish printed communications about candidates' votes lawfully must first engage in extensive research regarding those candidates' previous votes, and determine the precise meaning of those votes so they may satisfy the Compelled-Vote-Reporting Provision. And even then they cannot speak with assurance that their speech is lawful without first submitting their speech to the Commissioner for an advisory opinion as to whether it satisfies the Compelled-Vote-Reporting Provision. As the Supreme Court reiterated in *FEC v. Wisconsin Right to Life*, "'[t]he freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern *without previous restraint or fear of subsequent punishment*.'" 551 U.S. 449, 469 (2007) (*quoting First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978)) (emphasis added). The Vote-Reporting Requirement does not allow this. It is therefore unconstitutional.

C. Montana's Compelled-Vote-Reporting Provision Fails the Required Strict Scrutiny Review.

Even if Montana's Vote-Reporting Requirement were not vague nor a prior

restraint, it would still be unconstitutional because it is a content-based regulation of speech that cannot satisfy the required strict scrutiny review. *See ACLU v. Heller*, 378 F.3d 979 (9th Cir. 2004).

1. The Compelled-Vote-Reporting Provision Is A Content-Based Restriction on Speech With Heavy Burdens.

The Ninth Circuit's *Heller* decision is instructive for evaluating content-based restrictions on speech. *Heller* concerned a challenge to a Nevada provision that required those "publishing 'any material or information relating to an election, candidate or any question on a ballot' to reveal *on the publication* the names and addresses of the publications' financial sponsors." *Id*. at 981 (emphasis in original). The Ninth Circuit recognized that this regulation went "beyond requiring the reporting of funds used to finance speech to affect the *content of the communication itself*." *Id*. at 987 (emphasis in original). The Nevada provision proscribed political speech unless it conformed to the "prescribed criteria." *Id*. It was thus a content-based regulation of speech subject to strict scrutiny. *Id*. To satisfy such scrutiny, the regulation must be "narrowly tailored to serve an overriding state interest." *Id*. at 993. And regulations will only survive strict scrutiny when they "use the least restrictive means to further the articulated interest." *Id*. (*quoting Foti*, 146 F.3d at 636). Applying this scrutiny, the court held Nevada's Vote-Reporting Requirement unconstitutional. *Heller,* 378 F.3d at 1002.

Montana's Compelled-Vote-Reporting Provision is regulates even more speech content than Nevada's. Not only does it require speakers to identify who paid for the speech,[2] it also requires speech mentioning a candidate and discussing her voting record to include a statement identifying the vote on which the statement is based, *as well as* "a disclosure of contrasting votes known to have been made by the candidate on the same issue . . . ." MCA § 13-35-225(3)(a). This requirement places a heavy burden on speech in at least three ways.

First and most obvious, it is a content-based restriction on speech. "If certain content appears on the communication, it may be circulated; if the content is absent, the communication is illegal and may not be circulated." *Heller*, 378 F.3d at 992.

Second, it imposes an affirmative "duty to research" upon those who want to speak about candidates' voting records. *See supra* Part I.B. Even if this is not a prior restraint, *see id*., it remains a burdensome duty to research and investigate. The Supreme Court recognized, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient

[2]Because Candidate Monforton does not want to engage in anonymous speech, he does not challenge the Compelled-Vote-Reporting Provision insofar as it requires speakers to identify themselves.

political issues of our day." *Citizens United*, 558 U.S. at 324. Surely the First Amendment does not permit laws that force speakers to retain legislative research assistants before speaking, either.

Third, Montana's Compelled-Vote-Reporting Provision forces speakers who wish to criticize candidates' votes on particular issues to speak in favor of those same candidates and dilute their own message by including previous, contrasting votes on the issue. And it likewise forces speakers who wish to applaud candidates' votes to criticize those candidates if they have made previous, contrasting votes. So Candidate Monforton's letters and billboard, which he intends to focus on Rep. Washburn's voting record supporting Obamacare, must also alert the public to the fact that the candidate has flip-flopped and previously voted against Obamacare. The message the public receives is not the message that the speaker desires.

"The fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Consequently, the Supreme Court has repeatedly ruled that speakers cannot be forced to communicate a message they do not want to communicate. For instance, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court ruled that newspapers making negative statements about candidates or their

records cannot be forced to provide equal space for others' positive statements about the same candidates. In so holding the Court explained that the constitutional infirmity with such "equal space" laws arises from the fact that "the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message." *Id*. at 257. Similarly, in *Hurley*, 515 U.S. 557, the Supreme Court ruled that it is unconstitutional to force a parade to include participants whose message would alter the message the parade organizers wished to convey. And in *Pacific Gas & Electric Company*, 475 U.S. 1 (1986), the Court struck a requirement that public utilities include in their billing envelopes the views of public interest groups, many of which were opposed to the utilities' views. Generally speaking, Government may not force speakers to say what they do not want to. "[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, *but equally to statements of fact the speaker would rather avoid*." *Hurley*, 515 U.S. at 573 (emphasis added).

The Vote-Reporting Requirement does just what *Hurley* said is impermissible—it forces speakers to include statements of fact about the prior votes of candidates that the speakers would rather avoid. It also forces speakers to include speech supportive of their political opponents in violation of *Pacific Gas*.

As that Court recognized, compelling one to speak for one's political opponent "both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas*, 475 U.S. at 9. And just like in *Miami Herald*, when speakers express an opinion about a candidate's voting record, they trigger an obligation to use their printed material—purchased by them—to provide an additional message about the candidate that they do not want to disseminate.

The Compelled-Vote-Reporting Provision is a content-based speech restriction.

2. The Compelled-Vote-Reporting Provision Fails Scrutiny.

Because the Compelled-Vote-Reporting Provision is a content-based speech restriction, allowing only that speech that conforms to the State's preferred content, it is subject to strict scrutiny. *Heller*, 378 F.3d at 987 and 993. But none of the recognized interests in disclosure justify Montana's Compelled-Vote-Reporting Provision. It is therefore unconstitutional.

The seminal case for electioneering disclosure is *Buckley*, 424 U.S. 1. That Court found three compelling interests that may support disclosure requirements, *id*. at 66-68, none of which are sufficient to support the Vote-Reporting Requirement. First, *Buckley* identified an informational interest in informing voters about the sources of political campaign money and how candidates spend it.

Id. at 66. Second, *Buckley* identified an anti-corruption interest in disclosure, recognizing that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id*. at 67. And third, *Buckley* identified an enforcement interest in disclosure, noting that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of . . . contribution limitations[.]" *Id*. at 67-68.

None of these interests support the Compelled-Vote-Reporting Provision. The informational interest is inapplicable because it only supports disclosure of "the identity of persons financially supporting or opposing a candidate or ballot proposition." *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009); *see also Buckley*, 424 U.S. at 66 (tying the informational interest to the sources of campaign funding and how candidates spend it). Candidate Monforton has not challenged the Compelled-Vote-Reporting Provision's command that printed material identify who paid for it, and the part they have challenged has nothing to do with campaign funding. The anticorruption interest is inapplicable for the same reason: it only supports disclosure of large contributions to campaigns. And the enforcement interest is likewise inapplicable because it only supports recordkeeping necessary to detect violations of contribution limits. In short, there is no interest in compelling speakers to submit

to the Compelled-Vote-Reporting Provision.

Additionally, even if it somehow serves an informational interest, the Compelled-Vote-Reporting Provision fails to satisfy strict scrutiny because less restrictive means exist for voters to examine the veracity of claims made about a candidate's legislative voting record. *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals"). Specifically, the Supreme Court has held that the government's ability to create a database providing the same information as a compelled-speech statute renders the statute unnecessary and therefore unconstitutional. See, *e.g., United States v. Alvarez*, 132 S.Ct. 2537, 2551 (2013) (state's interest in honoring military bravery by criminalizing false claims of receiving a Medal of Honor could be achieved by an online database of Medal of Honor winners that could expose false claims); *Riley v. National Federation of the Blind*, 487 U.S. 781, 800 (1988) (state's interest in requiring fundraisers to disclose to all potential donors the percentage of gross receipts turned over to fundraiser's charity could be met by state publishing detailed financial disclosure forms required of fundraisers).

In this case, Montana already has an online database enabling voters to determine examine the legislative voting records of candidates. Voters therefore

can easily examine the veracity of claims made by candidates regarding their opponents' voting records. Forcing candidates to publish this information on their campaign materials is therefore unnecessary in order for the State to advance an interest in providing voters with information.

The Compelled-Vote-Reporting Provision fails scrutiny and so is unconstitutional.

II. Candidate Monforton Will Suffer Irreparable Harm.

The irreparable harm standard for preliminary injunctions is satisfied where, as here, First Amendment freedoms are impermissibly burdened. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The risk of irreparable harm is magnified when political speech and association are suppressed: "[T]iming is of the essence in politics . . . . [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) (*quoting Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring)). "A delay 'of even a day or two' may be intolerable when applied to 'political speech in which the element of

timeliness may be important.'" *N.A.A.C.P.*, 743 F.2d at 1356 (*quoting Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968)).

Candidate Monforton is a HD 69 GOP primary candidate that wants to print and publicize his opponent's voting record on Obamacare beginning on February 26, 2014. (Compl., Doc. 1, ¶ 18.) Because he has likely merits success, irreparable injury will inevitably follow. *Sammartano*, 303 F.3d at 973-74 (9th Cir. 2002); *see also Brown v. Cal. Dept. of Transp.*, 321 F.3d 1217, 1226 (9th Cir. 2003) (holding that when plaintiffs state a colorable First Amendment claim, the risk of irreparable injury is to be presumed).

III. The Balance of Hardship Favors Candidate Monforton.

"[T]he fact that a case raises serious First Amendment questions compels a finding that ... the balance of hardships tips sharply in [the plaintiffs'] favor." *Sammartano*, 303 F.3d at 973 (internal quotations and citations omitted). *See also Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (same). The only time balance of hardships should not be presumed to tip toward a plaintiff raising First Amendment questions is when the plaintiff cannot establish likely merits success. *Paramount Land Co. LP v. California Pistachio Com'n*, 491 F.3d 1003, 1012 (9th Cir. 2007).

Defendants cannot claim they suffer harm when an *unconstitutional* law is enjoined. *Joelner v. Village of Washington Park, Illinois*, 378 F.3d 613, 620 (7th

Cir. 2004). This Court has already found this law unconstitutionally vague. See *Lair,* 871 F. Supp. 2d at 1063-64. Because Candidate Monforton has demonstrated likely merits success, the balance of hardships is in his favor.

IV. The Public Interest Favors An Injunction.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano*, 303 F.3d at 974 (quoting with approval *G & V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Indeed, "[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Id*. So when plaintiffs demonstrate likely merits success on First Amendment claims, it is in the public interest to enjoin the offending statute. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

Additionally, the public has no interest in the enforcement of an unconstitutional law. *Heller*, 378 F.3d at 997. *See also KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (ruling that neither "the City nor the public" have "an interest in enforcing an unconstitutional law"); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 854 (1st Cir. 1988) (same).

Because Candidate Monforton established a likelihood of success on the merits of his First Amendment claims, an injunction is in the public interest.

Conclusion

As demonstrated above, Candidate Monforton has met the requirements for preliminary injunctive relief. He is likely to succeed on the merits of his claim. He will suffer irreparable harm absent an injunction. The balance of hardships favors him, and the public interest favors an injunction. This Court should therefore grant Candidate Monforton's motion to preliminarily enjoin Defendants from enforcing MCA Section 13-35-225(3).

Dated: January 8, 2014

Respectfully Submitted,

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Local Rule 7.1(d)(2)(E) Word Verification Certification

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I hereby certify that the foregoing document was served by first class U.S. Mail on January 8, 2014, on all defendants:

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