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MONTANA FIRST JUDICIAL DISTRICT COURT,
BROADWATER COUNTY

RIKKI HELD, et al., Plaintiffs, vs. STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as Governor of the State of Montana; and MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendants, and BRANDON LER, in his official capacity as Speaker of the Montana House of Representatives and Sponsor of House Bill 285, Intervenor.	DV-4-2026-7-OC Hon. Michael Menahan **MOTION FOR LEAVE OF THE AMERICAN CIVIL LIBERTIES UNION OF MONTANA, THE AMERICAN CIVIL LIBERTIES UNION, DISABILITY RIGHTS MONTANA, THE MONTANA PUBLIC INTEREST RESEARCH GROUP, PLANNED PARENTHOOD OF MONTANA, AND THE MONTANA ENVIRONMENTAL INFORMATION CENTER TO PARTICIPATE AS *AMICI CURIAE***

The American Civil Liberties Union of Montana, the American Civil Liberties Union, Disability Rights Montana, the Montana Public Interest Research Group, Planned Parenthood of Montana, and the Montana Environmental Information Center respectfully request leave to submit a brief as *amici curiae* in the above-captioned matter.

Statement of Interest of *Amici Curiae*

The American Civil Liberties Union (ACLU) of Montana is a non-profit, non-partisan organization dedicated to defending the principles embodied in the federal and Montana constitutions and civil rights laws. It is the local affiliate of the **ACLU**. Both entities frequently appear before courts, including this one, to advocate for Americans' constitutional rights both as direct counsel and as *amici curiae*. The ACLU of Montana and ACLU are interested in this matter because they regularly represent clients challenging the constitutionality of state statutes and state actions. *See, e.g.*, *Empower MT v. State*, DDV-24-230 (Mont. First Judicial Dist. Ct. filed Apr. 9, 2024); *Perkins v. State*, DV-25-282 (Mont. Fourth Judicial Dist. Ct. filed Mar. 27, 2025). Those clients include individuals who, due to indigency or other challenges, face litigation barriers that would be exacerbated by having to litigate their claims in far-flung regions in Montana as a result of Senate Bill 97. Thus, the ACLU of Montana and ACLU have grave concerns that SB 97 will impede Montanans' access to justice.

The ACLU of Montana and ACLU are also interested in this matter because they work to advance state constitutionalism and have expertise on issues of state constitutional law. The ACLU has submitted amicus briefs in other state supreme courts addressing separation-of-powers issues under state constitutions, including in a Kentucky case concerning a statute similar to SB 97. *See, e.g.*, Brief of Amici Curiae, *Ark Properties, LLC v. Cameron*, No. 2023-SC-0196 (Ky. S. Ct. filed May 23, 2023); Brief of Amici Curiae, *Michigan Immigrant Rights Center v. Whitmer*, Nos.

167300, 167301 (Mich. S. Ct. filed Oct. 8, 2024).

Disability Rights Montana (DRM) is the state's federally mandated, and governor designated, civil rights protection and advocacy system (P&A). DRM protects and advocates for the human, legal, and civil rights of Montanans with disabilities while advancing dignity, equality, and self-determination. P&As are authorized under multiple federal laws and are required to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for [individuals with disabilities]." 42 U.S.C. § 15043(a)(2)(A)(i). DRM routinely challenges government action as a party and on behalf of its constituents, including the constitutionality of recent legislation. *See, e.g.*, *Montana Quality Education Coalition and Disability Rights Montana v. State*, BDV-24-44 (Mont. First Judicial Dist. Ct. filed Jan. 23, 2024) (challenge to HB 393 (2023)); *Disability Rights Montana v. State*, DV-25-293 (Mont. First Judicial Dist. Ct. filed June 27, 2025) (challenge to HB 719 (2025)).

DRM maintains its staff and offices in Helena and would face significant financial and administrative burdens if it were forced to litigate constitutional challenges in courts hundreds of miles from the seat of government. Ultimately, this harms DRM's mission and constituents.

The Montana Public Interest Research Group (MontPIRG) is a non-partisan, non-profit organization that works to advance the public interest of Montanans through research, advocacy, and civic engagement. A core component of MontPIRG's work is empowering Montanans to engage in the democratic process—including, when necessary, by challenging legislation that violates the constitutional rights of MontPIRG's members. MontPIRG has frequently been involved in the types of legal challenges that will be impacted by SB 97. *See, e.g.*, *Montana Public Interest Research Group v. State*, No. DV-25-419 (Mont. Fourth Jud. Dist. Ct. 2025) (challenge to HB 413 (2025)); *Montana Democratic Party v. Jacobsen*, 2024 MT 66, 416

Mont. 44, 545 P.3d 1074 (challenge to suite of 2021 voter registration and ID laws).

MontPIRG and its members have a strong interest in ensuring that courts remain accessible, neutral forums for resolving disputes concerning the legality of state action. SB 97's unique and burdensome restrictions directly threaten those interests by arbitrarily transferring cases to potentially distant venues with no connection to the conduct at issue or the claimants, like MontPIRG and its members, seeking to vindicate their rights.

Planned Parenthood of Montana (PPMT) is a non-profit healthcare provider and advocacy organization that has served Montanans for more than 50 years. PPMT provides essential healthcare in health centers across the state. When necessary, PPMT engages in litigation to protect the constitutional rights of its patients. It has participated in numerous cases before Montana courts challenging the constitutionality of state laws affecting bodily autonomy, privacy, and access to healthcare.

SB 97 poses a direct threat to PPMT's work to vindicate the constitutional rights of its patients. By singling out litigants who challenge the constitutionality of recently enacted laws and forcing those claims into far-flung districts, SB 97 serves as a barrier to the timely and neutral adjudication of these claims in venues that have the strongest actual connection to the conduct at issue and its effect on PPMT's patients and their constitutional rights.

The Montana Environmental Information Center (MEIC) is a non-profit environmental advocacy organization dedicated to protecting and preserving the natural environment. MEIC regularly engages in litigation challenging laws passed by the Montana Legislature. Because SB 97 impedes access to justice by making it potentially burdensome and expensive to challenge newly adopted laws, MEIC is concerned that the law will interfere with its ability to pursue such challenges.

The Issues on Which *Amici* Wish to Submit a Brief

Amici seek this opportunity to submit a brief detailing the constitutional infirmities with SB 97. In particular, *amici's* brief will focus on the ways in which SB 97 violates the separation-of-powers doctrine, freedom of expression, equal protection of the laws, and the prohibition on special legislation.

Reasons Why the Brief of *Amici Curiae* Will Be Helpful to the Court

Amici have a strong interest in the constitutionality of SB 97 and can assist the Court in the resolution of the significant issues of public importance that the law raises. Their proposed brief expands upon the arguments made by the Plaintiffs regarding separation of powers and provides additional arguments regarding SB 97's violation of freedom of expression, equal protection, and the prohibition on special legislation.

Identity of the Party Whose Position *Amici* Support

Amici's proposed brief supports the Plaintiffs' position.

The Proposed Date for Filing the Brief of *Amici Curiae*

If this Motion for Leave to Participate is granted, *amici* propose to file a Brief of *Amicus Curiae* on March 20, 2026, or within 48 hours of the date that this Court grants *amici*'s motion, whichever is later. *Amici* will conform to any schedule adopted by the Court.

Contact with the Parties

Amici have contacted all parties in this action regarding this motion. Counsel for Plaintiffs do not oppose this motion. Counsel for Defendants and for Intervenor oppose this motion. No party's counsel authored the brief in whole or in part, and no person other than *amici* and their counsel contributed money that was intended to fund the preparation or submission of the brief. A proposed order is attached.

DATED this 20th day of March, 2026.

/s/ Alex Rate
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CERTIFICATE OF SERVICE

I, Alex Rate, hereby certify that I have served true and accurate copies of the foregoing document via the e-filing system to the following on March 20, 2026.

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INTRODUCTION

SB 97 is the rare statute that creates the very problems it purports to solve. Though styled as a venue statute, supposedly to curb forum shopping, it in fact promotes forum shopping. SB 97 empowers the State and certain legislators to unilaterally shop certain lawsuits—those challenging recent legislation—directly into the sponsor's district, thereby removing the judge originally assigned to the case. Its aim is not subtle. It seeks to give private plaintiffs a burdensome and expensive climb when they challenge a new law, while seeking to give government defendants and legislative intervenors favorable terrain on which to defend against such a challenge. This is the opposite of a law that promotes the appearance of neutral adjudication.[1]

As Plaintiffs argue, SB 97 violates the Montana Constitution in myriad ways. *Amici* write to provide additional explanation as to why the law violates the separation of powers, the right to free speech and expression, equal protection, and Montana's prohibition on special legislation.

First, SB 97 violates the separation-of-powers doctrine by allowing the Legislature to co-opt the judiciary's power to manage recusals. The Montana Constitution vests in the courts the authority to determine when a judge's recusal is warranted. But, in effect, SB 97 treats *all* judges—except those in the bill sponsor's district—as biased in cases challenging legislative action, requiring their removal without any showing of cause and circumventing the procedural safeguards that govern existing recusal and venue-transfer laws. The Montana Supreme Court has disapproved of statutes that deem judges biased by legislative fiat, recognizing that they are a direct threat to the judiciary's independence.

[1] In noting the Legislature's apparent view that judges in the same district as the sponsoring legislator will be more likely than other judges to uphold recent legislation, *amici* do not, in any way, endorse that view.

Second, SB 97 violates Montanans' fundamental right to free expression because it discriminates based on viewpoint. It subjects litigants who express the viewpoint that a law is unconstitutional to unfavorable treatment in court, but not litigants expressing the opposite view. By making it onerous and expensive to sue the State, SB 97 unduly punishes and chills constitutionally protected expression.

Third, and relatedly, SB 97 violates Montana's guarantee of equal protection and prohibition on special legislation by discriminating against litigants who challenge recent legislation. They alone must litigate their claims in the home district of the sponsor of the bill they are challenging. All other plaintiffs—even those challenging non-recent legislation—can avail themselves of the venue options provided by longstanding Montana law. The sole conceivable reason for the Legislature to disfavor only litigants challenging *new* legislation is to put a thumb on the scale for sitting legislators seeking to prevent courts from striking down their bills. This discrimination is irrational and, therefore, unconstitutional under any level of scrutiny.

SB 97 is not a fairness-advancing law; it is an anti-fairness law. Accordingly, this Court should declare it unconstitutional and enjoin its enforcement.

BACKGROUND

Until last year, Montana law permitted "an action against the state" to be filed in three places: "the county in which the claim arose," "Lewis and Clark County," or "the county of the plaintiff's residence." § 25-2-126, MCA. This rule reflected the constitutional designation of Helena as "[t]he seat of government," Mont. Const. art. III, § 2, and considered judgments about how to balance the needs of litigants and witnesses, as well as the accessibility of evidence in suits against the State.

But, in May 2025, the Legislature selectively rewrote the rules. In enacting SB 97, the Legislature dictated that whenever a plaintiff challenges recent legislation, the State can force that case to be litigated in one specific forum: the district of the legislation's primary sponsor. If the case is filed in any other district, and the State prefers not to litigate there, SB 97 empowers the State to transfer the case to the sponsor's district. That transfer is mandatory, removing the case from the original judge without the showing of cause otherwise required by Montana's judicial disqualification rules.

SB 97 accomplishes this judicial removal through two mechanisms. The first is codified at §§ 25-2-127 and 25-2-201(4), MCA. Section 25-2-127 provides:

> The proper place of trial for an action that challenges a statute or session law enacted or amended within the legislative biennium[2] is in a county that is wholly or partially within the legislative district of the primary sponsor[3] of the bill that enacted or amended the statute or session law.

§ 25-2-127(1), MCA. "Challenge" is defined to mean "plead[ing] that a statute or session law is unconstitutional" or "seek[ing] an injunction against the execution of a statute." *Id.* § 25-2-127(2)(a). If such an action is not filed in the bill sponsor's district, Section 25-2-201(4) dictates that "[t]he court or judge *shall*, on motion," transfer it there. § 25-2-201(4), MCA (emphasis added). All the motion needs to establish is that the action is one "defined in 25-2-127." *Id.*

The second mechanism is codified at § 25-2-201(5), MCA. It builds on another recent law, § 5-2-107, MCA, which gives "officers of the legislature" and "the primary sponsor of legislation" the unqualified "right" to intervene in "actions involving alleged constitutional or statutory

[2] "Legislative biennium" means "a 2-year period beginning on the first Monday of January of an odd-numbered year and ending the day before the first Monday of January of the next odd-numbered year." § 25-2-127(2)(b), MCA.

[3] When the sponsor's legislative district encompasses more than one judicial district, SB 97 gives the State the additional power to pick its most preferred district out of the set.

violations of state law."[4] § 5-2-107(2), MCA. "[W]hen a primary bill sponsor intervenes pursuant to 5-2-107," Section 25-2-201(5) provides that "[t]he court or judge *shall*, on motion, change the place of trial." § 25-2-201(5), MCA (emphasis added).

In combination with each other and with § 5-2-107, MCA, the two mechanisms of SB 97 thus guarantee that the State can choose to defend new legislation on the turf of its legislative sponsor. The instant motion, which invokes SB 97 to seek the transfer of this case to Richland County, illustrates the point. Ironically, the State and Intervenor say that "[t]he Legislature enacted [SB 97] to prevent forum shopping," Mot. to Transfer at 3, even as they wield SB 97 to shop this case to a district selected for its proximity to a legislator who opposes the plaintiffs.

The Legislature made no secret that it intended SB 97 to give the State and legislators an advantage in defeating certain legal challenges. Representative Greg Overstreet, who sponsored SB 97 in the House, asserted that "[t]his bill seeks to curb" a specific issue: "This court in this particular county"—Lewis and Clark—"has an uncanny record of striking down controversial statutes." Hearing on SB 97, House Floor Session, 2025 Leg. Res. 69th Sess., 14:04:25–14:04:47 (Mont. Apr. 10, 2025).[5] Senator John Fuller, the bill's primary sponsor, stated bluntly that it targets cases "in the areas of so-called social agendas or cultural agendas. That's where the constitutionality issues arise." Hearing on SB 97, House Judiciary Committee, 2025 Leg. Res. 69th Sess., 8:50:24–8:51:44 (Mont. Apr. 7, 2025).[6] Neither sponsor identified any basis for concluding

[4] Although the constitutionality of Section 5-2-107 is not at issue here, to the extent the Montana Constitution imposes standing requirements for defendants, it is dubious whether Section 5-2-107 meets them. *See Johnson v. Booth*, 2008 MT 155, ¶ 22, 343 Mont. 268, 275, 184 P.3d 289 (holding that an individual defendant "does not have standing to defend any claims properly belonging to [certain corporate entities]").

[5] *Available at* https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250410/-1/55526.

[6] *Available at* https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250407/-1/52853

that courts were engaging in any impropriety when "striking down" statutes; instead, they candidly conceded that their aim, in enacting SB 97, was to move these cases to districts where legislation would be more likely to be upheld.

Equally revealing is Senator Fuller's explanation for selecting the bill sponsor's district as the exclusive forum for constitutional challenges: "[T]hat primary sponsor probably has a very strong constituency that believes in what was accomplished." Hearing on SB 97, Senate Floor Session, 2025 Leg. Res. 69th Sess., 13:38:26–44 (Mont. Jan. 30, 2025).[7] He implied, in other words, that judges in a legislative sponsor's district would be particularly likely to uphold the sponsor's legislation because those judges would share the sponsor's "constituency," which presumably "believes in" the policy aims of the challenged statute. When pressed by Senator Andrea Olsen on why "sponsors have these special privileges" under SB 97, Senator Fuller could only say: "[I]t is no more correct or morally just or legally justifiable to require the court of original jurisdiction to be . . . one district over another." Hearing on SB 97, Senate Judiciary Committee, 2025 Leg. Res. 69th Sess., 11:12:43–11:17:04 (Mont. Jan. 16, 2025).[8]

ARGUMENT

I. SB 97 violates Montana's separation-of-powers doctrine.

The Legislature violated separation of powers and undermined judicial independence by codifying in SB 97 a right for the State to forum shop and remove judges without cause.

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[7] *Available at* https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250130/-1/51610#agenda.

[8] *Available at* https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250116/-1/54331#agenda.

A. The Montana Constitution forbids the Legislature from interfering with certain judicial functions.

"A fundamental principle of our system of government is the separation of powers of the three branches of government." *Kradolfer v. Smith* (1990), 246 Mont. 210, 213, 805 P.2d 1266, 1268. This principle is enshrined in Article III, Section 1 of the Montana Constitution. Under that provision, "[a]ny attempt by another branch of government to interfere with [one branch's] constitutional prerogative interferes with the doctrine of separation of powers." *Kradolfer*, 246 Mont. at 214, 805 P.2d at 1268. Thus, "[a]ny legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional." *State ex rel. Grant v. Eaton* (1943), 114 Mont. 199, 133 P.2d 588, 594 (1943) (citation omitted).

The judicial power, vested in the courts by Article VII of the Montana Constitution, is the judiciary's "constitutional prerogative." *Kradolfer*, 246 Mont. at 214, 805 at 1268. It encompasses "general supervisory control over all other courts," such that the judiciary "may make rules governing appellate procedure, practice and procedure for all other courts," Mont. Const. art. VII, § 2. As a result, "it is from the supreme court of this state rather than from [another branch] that relief is to be had where a district court or a district judge is in error or in need of superintending guidance or correction."[9] *State ex rel. Bennett v. Bonner* (1950), 123 Mont. 414, 434–35, 214 P.2d 747, 758.

Two Montana Supreme Court decisions illustrate the limits of the Legislature's power to interfere with judicial functions, including recusal. In *State ex rel. Peery v. District Court of Fourth Judicial District* (1965), 145 Mont. 287, 400 P.2d 648, the Court analyzed the constitutionality of

[9] For example, the Supreme Court can "[c]ensure, suspend, or remove any justice or judge for willful misconduct in office, willful and persistent failure to perform his duties," or "violation of canons of judicial ethics." Mont. Const. art. VII, § 11.

statutes that, like SB 97, remove judges from cases. The Court distinguished between two types of such statutes: those that provide for removal when a "party or attorney could establish prejudice by motion supported by affidavit," and those in which the Legislature authorized the removal of judges with "no showing of bias or prejudice." *Id.* at 299–300, 302, 400 P.2d at 656. The first type is permissible to ensure that "courts shall be free from any question of bias or prejudice." *Id.* at 301, 400 P.2d at 655 (citation omitted). But the second type is constitutionally suspect. The Court expressed concern with "[t]he legislature . . . invest[ing] litigants and their attorneys with the power to remove duly appointed or elected and qualified judges from the bench in particular cases at will—for good cause, [b]ad cause, or no cause at all." *Id.* at 304, 400 P.2d at 656 (quoting *State ex rel. Bushman v. Vandenberg*, 203 Or. 326, 337 (1955)).

Peery also explained why it drew a distinction between statutes that authorize removing judges for cause and those in which the legislature authorizes litigants to remove judges without cause. The Court warned that if the legislature "put[s] in the hands of a litigant uncontrolled power to dislodge without reason . . . an admittedly qualified judge," that law becomes "a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department." *Id.* at 306, 400 P.2d at 658 (quoting *Austin v. Lambert*, 11 Cal. 2d 73, 79 (1938)). Such laws impose "unlawful interference with the constitutional and orderly processes of the courts." *Id.* at 306–07, 400 P.2d at 658 (quoting *Austin*, 11 Cal. 2d at 79).[10]

[10] The separation-of-powers concerns are absent when courts, rather than the Legislature, craft removal rules. For example, the Montana Supreme Court exercised its own authority, under Article VII, Section 2 of the Montana Constitution, to adopt the judicial substitution provision at § 3-1-804, MCA. *Mattson v. Montana Power Co.*, 2002 MT 113, ¶ 20–21, 309 Mont. 506, 48 P.3d 34. Section 3-1-804 also avoids SB 97's other infirmities; it does not asymmetrically empower State and legislative defendants to shop cases to their favored districts, and it applies to all cases without regard to subject matter (with narrow exceptions) or recency.

Similarly, in *State ex rel. Bennett v. Bonner*, the Court held that, "[w]hile present in his district and qualified and capable, [a judge] may not be divested of his authority and jurisdiction by an executive order of the governor and be forced to abdicate and stand aside." 123 Mont. at 432, 214 P.2d at 758. The Court invalidated executive orders directing out-of-district judges to preside over cases in a district where parties had sought the disqualification of one judge in multiple cases. *See id.* at 417–18, 422, 214 P.2d at 749, 752. The Court noted that a statute cannot "empower the *governor* to exclude or remove from office the duly elected, qualified and acting judge of the district," because "judicial power cannot be taken away by legislative action." *Id.* at 428–29, 214 P.2d at 755 (emphasis added). And the Court cautioned that "the judiciary should [not] permit the courts to be pursued by . . . a *legislative department* with what Madison termed an 'enterprising ambition' to extend its power." *Id.* at 432, 214 P.2d at 756–57 (emphasis added).

Applying separation-of-powers principles similar to those the Montana Supreme Court articulated in *Peery* and *Bennett*, the Kentucky Supreme Court recently struck down a law just like SB 97. In Kentucky, SB 126 "grant[ed] a party or the intervening Attorney General in any action that challenges the constitutionality of a statute . . . the unilateral authority, without a showing of cause, to transfer the case to another [court]." *Arkk Properties, LLC v. Cameron*, 681 S.W.3d 133, 138 (Ky. 2023). And, like SB 97, Kentucky's SB 126 was styled as a law "related to venue." *Id.* at 141. But the Kentucky Supreme Court saw right through that labeling. It explained that SB 126 "actually concern[ed] judicial recusal." *Id.* Further, the court held that "S.B. 126 dishonors the principle of separation of powers by[] granting unchecked power to a litigant to remove a judge from a case under the guise of a 'transfer,' thereby circumventing our well-established judicial recusal process." *Id.* at 140–41. As the court observed, although the law's stated purpose was to dispel "any concern of bias," in operation it "vest[ed] a certain class of litigants with the unfettered

right to forum shop, without having to show any bias on the part of the presiding judge." *Id.* at 141. The same is true of SB 97.

B. SB 97 interferes with judicial functions by giving the State unfettered power to remove judges in cases challenging state action.

Peery, *Bennett*, and *Arkk Properties* establish that "a fair-minded judge cannot be transformed into a biased or prejudiced one merely by legislative fiat." *Peery*, 145 Mont. at 302, 400 P.2d at 655. Yet that is exactly what SB 97 attempts to do. Although branded as a venue provision, SB 97 in effect "grant[s] unchecked power to [the State] to remove a judge from a case" without any showing that the forum is improper or the judge is biased. *Arkk Properties*, 681 S.W.3d at 140–41.

When a lawsuit challenging recent legislation is filed in accordance with Montana's pre-existing forum rules, SB 97 forces transfer to the sponsor's district, removing the originally assigned judge.[11] § 25-2-201(4), MCA. In doing so, SB 97 "circumvent[s]" Montana's "well-established judicial recusal process." *Arkk Properties*, 681 S.W.3d at 140–41; *see, e.g.*, §§ 3-1-610, 3-1-803, 3-1-805, 3-1-814, MCA (setting forth detailed recusal procedures). Otherwise, SB 97 mandates that such lawsuits be filed directly in the sponsor's district. § 25-2-127(1), MCA. By citing "forum shopping" as the categorical justification for this rule, the Legislature effectively assumes that *every* judge in *every* other district is incapable of fairly adjudicating the case. That is the definition of transforming "a fair-minded judge . . . into a biased or prejudiced one merely by legislative fiat." *Peery*, 145 Mont. at 302, 400 P.2d at 655.

[11] Even when plaintiffs file suit in a district specified by SB 97, that may not be good enough for the State. In this case, Plaintiffs challenged laws enacted through three different bills and, in compliance with SB 97, filed their complaint in the district of the sponsor of one of the bills. *See* Pls.' Opp. to Mot. to Transfer at 4–5. Yet the State and Intervenor argue they have the right to transfer the case to their most preferred district of the three sponsors' districts. *See* Mot. to Transfer at 2–3. That is, they understand SB 97 to allow forum shopping on top of forum shopping.

In fact, by directing transfers to the sponsor's district, Montana's SB 97 tilts the scales even more than Kentucky's SB 126. While the Kentucky statute sent cases to an "arbitrarily-selected circuit court," *Arkk Properties*, 681 S.W.3d at 138, the Montana statute sends them to the one place where the Legislature believed constitutional challenges would be most likely to fail: the district of the legislator who sponsored the challenged law. In Senator Fuller's own words, the Legislature chose this district because it is home to "a very strong constituency that believes in" the challenged law. Hearing on SB 97, Senate Floor Session, 2025 Leg. Res. 69th Sess., 13:38:26–44 (Mont. Jan. 30, 2025). The Legislature apparently saw an advantage in litigating before a judge who must answer, in future elections, to the bill sponsor's "very strong constituency." Whether or not the Legislature is right, this gives the litigation the appearance of non-neutrality. *See May v. First Nat. Pawn Brokers, Ltd.* (1994), 269 Mont. 19, 24, 887 P.2d 185, 188 ("[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.").

At bottom, SB 97 is "a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department." *Peery*, 145 Mont. at 306, 400 P.2d at 658 (quoting *Austin*, 11 Cal. 2d at 79). It undermines judicial independence, invades the courts' constitutional prerogative to manage the recusal of judges, and accordingly violates the separation of powers. *See* Mont. Const. art. III, § 1; art. VII, §§ 1, 2.

II. SB 97 violates Montanans' right to free speech and expression.

SB 97 also violates the right to freedom of speech and expression by penalizing specific viewpoints. Plaintiffs who dare express the view that a recently enacted law is unconstitutional are subjected to greater litigation restrictions than plaintiffs who do not express that view.

A. The Montana Constitution guarantees the People a robust right to speak and express themselves against their government.

Free speech is "a fundamental personal right and essential to the common quest for truth and the vitality of society as a whole." *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 303 P.3d 755 (citations omitted). The text, history, and structure of the Montana Constitution indicate that its free speech guarantee should be interpreted more broadly than the First Amendment to the U.S. Constitution. *See Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 18, 416 Mont. 44, 545 P.3d 1074 (constitutional interpretation looks to text, history, and structure).

The text is paramount. Unlike the First Amendment, Article II, Section 7 expressly protects speech, expression, and an affirmative right to be "free to speak or publish":

> No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty.

Mont. Const. art. II, § 7. History supports a broad reading of that text. In 1972, when delegates added "or expression" after the word "speech," they stated that this change was meant to "extend[]" "[t]he freedom of speech." 2 Montana Constitutional Convention Proceedings, 1971–1972, at 629–30 (1979).[12] Likewise, the official voter information pamphlet for the 1972 Constitution told voters that amending Section 7 would "[r]evise[] [the] 1889 constitution by enlarging a citizen's freedom to express himself." *Montana Constitutional Convention* (1971–1972), Proposed 1972 Constitution for the State of Montana, Official Text with Explanation.[13]

Structurally, two additional features of the Montana Constitution amplify Section 7's broad, general right to free speech and expression. First, the right to "petition for redress . . . government action" under Article II, Section 6, reflects a "commitment to the principle that debate

[12] *Available at* https://perma.cc/FHD9-Z75A.
[13] *Available at* https://perma.cc/CG29-UC9K.

on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement . . . attacks on government and public officials." *Skinner v. Pistoria* (1981), 194 Mont. 257, 261, 633 P.2d 672, 674–75 (citation omitted). Second, the open-courts provision in Article II, Section 16, requires that "courts must be accessible to all persons alike, without discrimination," and "afford a speedy remedy for every wrong recognized by law as being remedial." *Meech v. Hillhaven W., Inc.* (1989), 238 Mont. 21, 30, 776 P.2d 488, 493 (citation omitted). Together, Article II, Sections 6, 7, and 16 confer on Montanans robust rights to express themselves freely, including to challenge their government.

B. SB 97 violates the right to free speech and expression by selectively imposing onerous burdens on Montanans challenging state action.

SB 97 violates those rights. Litigation against the government is "constitutionally protected expression." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548, 121 S. Ct. 1043, 1052 (2001). SB 97 disfavors that protected expression by imposing unique litigation burdens only on plaintiffs challenging the constitutionality of recent legislation. This is impermissible viewpoint discrimination—a particularly "egregious form of content discrimination." *Planned Parenthood of Montana v. State by & through Knudsen*, 2025 MT 10, ¶ 97, 422 Mont. 241, 570 P.3d 51.

A law is a content-based restriction on speech if, "on its face," it "draws distinctions based on the message a speaker conveys." *Id.* (citation omitted). "Such laws are presumptively invalid." *Id.* When a law goes even further and "favors one speaker over another" based on "the specific motivating ideology or the opinion or perspective of the speaker," it becomes viewpoint discrimination. *Id.* (citation omitted). For example, in *Planned Parenthood*, the Montana Supreme Court held unconstitutional a law that required abortion providers to give patients information that promoted "the possibility of abortion reversal." *Id.* at ¶ 88. The law impermissibly discriminated based on viewpoint because it favored "the viewpoint that abortion reversal is safe and possible

over the judgments and viewpoints of providers that it is unsafe, ineffective, and undermines informed consent." *Id.* at ¶ 99.

So too here. SB 97 regulates expression not only based on its content, because it applies only to cases concerning recent legislation, but also its viewpoint, because it applies only to cases arguing that "a statute or session law is *un*constitutional" or seeking "an injunction *against* the execution of a statute." § 25-2-127(1)–(2), MCA (emphases added). Worse still, this viewpoint discrimination expressly disfavors "constitutionally protected expression" challenging state action. *Legal Servs. Corp.*, 531 U.S. at 548, 121 S. Ct. at 1052. A Montanan who does not dispute the constitutionality of a statute, or who challenges the constitutionality of a non-recent law, has "the right [of all plaintiffs], within certain limits, to choose the venue when filing an action." *Davis v. Union Pac. R. Co.* (1997), 282 Mont. 233, 245, 937 P.2d 27, 34. But a Montanan who argues that a recent statute is unconstitutional must anticipate having to prosecute their case in a distant district hundreds of miles away,[14] without any of the procedural guardrails governing recusals or typical venue transfers. *See, e.g.*, § 25-2-201, MCA (requiring judges considering transfer motions to assess, among other things, whether "an impartial trial cannot be had in the current place of trial" and whether "the convenience of witnesses and the ends of justice would be promoted by the change"). They may need to take time off from work, pay for childcare, and find lawyers willing to litigate in far-flung forums. The result is that many Montanans, confronted with these significant obstacles, will be deterred from suing at all. This is, of course, why SB 97 designates the sponsor's district as the only permissible forum: to make it easier for the State to defend legislative action, and more difficult and expensive for Montanans to challenge it. *See supra* Part I.B.

[14] Applying SB 97 in this case, for example, would move proceedings from Helena, where the state government sits, to Richland County, approximately 450 miles away.

C. SB 97 cannot survive any level of scrutiny.

Because SB 97 discriminates based on content and viewpoint, it is subject to strict scrutiny. *See Planned Parenthood*, ¶ 97. To survive strict scrutiny, the State must demonstrate that SB 97 is "narrowly tailored to serve a compelling government interest and only that interest." *Cross by & through Cross v. State*, 2024 MT 303, ¶ 22, 419 Mont. 290, 560 P.3d 637. This means the law must be "the least onerous path" to achieve the State's asserted interest. *Jacobsen*, ¶ 75. The State cannot make this showing. Indeed, SB 97 does not even survive rational-basis review, under which a classification "must be rationally related to a legitimate government interest." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 19, 325 Mont. 148, 104 P.3d 445.

Starting with the government interest, the sole justification the Legislature articulated for SB 97 is to counter forum shopping. Mot. to Transfer at 3. But, under strict scrutiny, "*demonstrating* a compelling interest entails something more than simply saying it is so." *Wadsworth v. State* (1996), 275 Mont. 287, 303, 911 P.2d 1165, 1174 (emphasis in original). And the Legislature has produced no evidence that forum shopping is a problem.[15] That dooms the law out of the gate. *See id.* at 302–04, 911 P.2d at 1174–75 (conflict-of-interest rule adopted to avoid the appearance of impropriety failed strict scrutiny where evidence "established that there were no complaints about any appearance of impropriety").

Even assuming SB 97 arose from a compelling interest in curbing forum shopping, the Legislature prescribed the most illogical antidote. Instead of being narrowly tailored or even rationally related to promoting fairness, SB 97 undermines fairness by conferring on State

[15] What the Legislature apparently considered forum shopping was merely plaintiffs following longstanding Montana law requiring that "an action against the state" be filed "in the county in which the claim arose," "Lewis and Clark County," or "the county of the plaintiff's residence." § 25-2-126, MCA.

defendants "the unfettered right to forum shop." *Arkk Properties*, 681 S.W.3d at 141; *see State v. Vickers*, 1998 MT 201, ¶ 28, 290 Mont. 356, 964 P.2d 756 ("[J]udge shopping" by the government is not to be "condone[d]."). The remedy SB 97 mandates gives the game away. Rather than assigning a case to any impartial judge, the Legislature picked a specific district in which it perceived an advantage. To do so, SB 97 sidesteps the panoply of laws and procedures that already exist to address improper venue and judicial bias. *See Jacobsen*, ¶ 105 ("Montana law already criminalizes th[e] behavior" the challenged law purported to address); §§ 3-1-610, 3-1-803, 3-1-805, 3-1-814, 25-2-201, MCA.

There is, in short, no connection whatsoever between SB 97's asserted anti-forum-shopping purpose and its actual pro-forum-shopping effect. It is as though a casino announced that it was going to stamp out cheating by handing every craps dealer a pair of loaded dice.

The complete absence of any tailoring—let alone narrow tailoring—reflects that SB 97 is mere pretext for chilling Montanans from exercising their right to free speech and expression—an impermissible state interest even under rational-basis review. *See Legal Servs. Corp.*, 531 U.S. at 548–349, 121 S. Ct. at 1052 (holding that a legislature cannot "impose[] rules and conditions which in effect insulate its own laws from legitimate judicial challenge"). As SB 97's sponsor heard in legislative testimony, the law would "discourage the average person" from challenging new legislation. His response was to dismiss that testimony as "an appeal to theater." Hearing on SB 97, House Judiciary Committee, 2025 Mont. Leg., Reg. 69th Sess., 8:49:42–8:50:23 (Mont. Apr. 7, 2025). Whether pretextual or simply irrational, SB 97 fails any level of scrutiny.

III. SB 97 violates Montanans' right to equal protection and the constitutional prohibition against special legislation.

Finally, SB 97 violates the equal-treatment guarantees of the Montana Constitution's Equal Protection Clause and its clause prohibiting special legislation. It imposes discriminatory burdens on plaintiffs challenging recent legislation while granting privileges to the State defending such legislation, without any basis for singling out those classes for differential treatment.

A. The Montana Constitution protects Montanans from legislation that arbitrarily discriminates between different classes.

Montana's Equal Protection Clause and the Special Legislation Clause each limits the extent to which the Legislature can single out specific groups for unfavorable treatment.

The Equal Protection Clause commands that "[n]o person shall be denied the equal protection of the laws," Mont. Const. art. II, § 4, and "provides even more individual protection than does the Fourteenth Amendment," *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 29, 418 Mont. 253, 557 P.3d 440 (citation omitted). It guards against "arbitrary and discriminatory state action." *Hensley v. Montana State Fund*, 2020 MT 317, ¶ 18, 402 Mont. 277, 477 P.3d 1065 (citation omitted). That includes state action restricting litigants' choices of venue. *See Davis*, 282 Mont. at 246, 937 P.2d at 34 (holding that a venue-limiting statute violated equal protection). Courts evaluate equal protection claims under a three-step process: (1) "identify the classes involved and determine if they are similarly situated;" (2) "determine the appropriate level of scrutiny to apply to the challenged legislation;" and (3) "apply the appropriate level of scrutiny." *Planned Parenthood of Mont.*, ¶ 26 (citation omitted).

Similarly, Article V, Section 12 requires legislation to "operate[] uniformly and equally upon all" persons in like circumstances. *Lowery v. Garfield Cnty.* (1949), 122 Mont. 571, 586, 208 P.2d 478, 486. It provides: "The legislature shall not pass a special or local act when a general act is, or can be made, applicable." Mont. Const. art. V, § 12. Special legislation confers particular

privileges or imposes peculiar disabilities upon a class of persons. *Leuthold v. Brandjord* (1935), 100 Mont. 96, 105, 47 P.2d 41, 45. Such "legislation may be constitutional if the class is germane to the purpose of the law and is characterized by some special qualities or attributes which reasonably render the legislation necessary." *State ex rel. Fisher v. Sch. Dist. No. 1 of Silver Bow Cnty.* (1934), 97 Mont. 358, 34 P.2d 522, 525–26. But special legislation violates Article V, Section 12 when it does "not extend[] to the whole subject to which their provisions would be equally applicable." *Leuthold*, 100 Mont. at 105–06, 47 P.2d at 45 (internal quotation marks omitted).

B. The classifications SB 97 draws are arbitrary, discriminatory, and not germane to the asserted purpose of the law.

SB 97 violates both the Equal Protection Clause and the prohibition on special legislation. At the first step of the equal protection analysis, SB 97 establishes two classifications "on its face." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 258 (citation omitted). The first classification is between lawsuits that "challenge[] a statute or session law enacted or amended within the legislative biennium" and lawsuits that challenge a statute or session law not enacted or amended within the legislative biennium. § 25-2-127(1), MCA. Or, stated simply, lawsuits challenging new laws and lawsuits challenging old laws. The former category of lawsuits is subject to SB 97's restrictions, while the latter is not. The second classification is between lawsuits that "plead that a statute or session law is unconstitutional" or "seek an injunction against the execution of a statute" and lawsuits that do not. *Id.* § 25-2-127(2)(a). Again, the former category of lawsuits is subject to SB 97's restrictions, while the latter is not.

At the second step of the analysis, strict scrutiny applies to a challenged law if it "infringes upon . . . a fundamental right or discriminates against a suspect class." *Davis*, 282 Mont. at 241, 937 P.2d at 31. That is the case here because SB 97 infringes on Montanans' fundamental rights

to free speech and expression under Article II, Section 7; to petition their government for redress under Article II, Section 6; and to open courts under Article II, Section 16. *See supra* Part II; *Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236 (A right is "fundamental" if "it is guaranteed by the Declaration of Rights found at Article II" of the Montana Constitution.).[16] Notably, for strict scrutiny to apply in the equal protection analysis, this Court need not find that SB 97 outright violates fundamental rights; it is enough that the law imposes some burden on the exercise of those rights. *See, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670, 86 S. Ct. 1079, 1083 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which *might invade or restrain them* must be closely scrutinized and carefully confined." (emphasis added)); *Special Programs, Inc. v. Courter*, 923 F. Supp. 851, 855 (E.D. Va. 1996) ("[I]t is mere impingement upon, not impermissible interference with, the exercise of a fundamental right that triggers strict scrutiny.").

At the third step of the analysis, for the reasons detailed above, SB 97 cannot survive rational basis review, let alone strict scrutiny. *See supra* Part II.C. If the Legislature had been concerned about forum shopping, why did it not bother to apply SB 97's provisions to older bills? And why pick the sponsor's district as the only permissible venue? The Legislature has supplied no legitimate answer to those questions, and the apparent answer is wholly illegitimate: SB 97 is designed to help *sitting* legislators defeat litigation challenging bills they supported.

[16] Although the Montana Supreme Court has previously opined that Article II, Section 16 "does not create a fundamental right," *Meech v. Hillhaven W., Inc.* (1989), 238 Mont. 21, 26, 776 P.2d 488, 491, Justice Nelson has pointed out that this conclusion is inconsistent with the well-established rule "that the rights enumerated in Article II . . . are fundamental constitutional rights," *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 112, 354 Mont. 133, 227 P.3d 41 (Nelson, J., dissenting).

An example illustrates SB 97's irrationality. If a plaintiff today wants to challenge a law enacted in 2023, she can file suit in Lewis and Clark County, per § 25-2-126, MCA. But if she wants to challenge SB 97, enacted in 2025, Lewis and Clark County is not a permissible venue because the sponsors of the bill she is challenging deemed that County unacceptable for its "record of striking down" similar bills. Hearing on SB 97, House Floor Session, 2025 Leg. Res. 69th Sess., 14:04:25–47 (Mont. Apr. 10, 2025). Instead, the plaintiff must prosecute her case in Flathead County, a forum Senator Fuller sees as friendly terrain because he has "a very strong constituency that believes in" the bill he sponsored. Hearing on SB 97, Senate Floor Session, 2025 Leg. Res. 69th Sess., 13:38:26–44 (Mont. Jan. 30, 2025). There is no rational basis to treat the challenge to the 2025 law so differently to the challenge to the 2023 law. *See Davis*, 282 Mont. at 244–45, 937 P.2d at 34 (finding no "rational basis to distinguish" the classifications drawn by a venue-restricting law).

The analysis is equally straightforward under the Special Legislation Clause. The same classifications mark SB 97 as special legislation—it confers particular privileges on State defendants in lawsuits challenging the new laws, while imposing peculiar burdens on the plaintiffs. *See Leuthold*, Mont. at 105–06, 47 P.2d at 45. But those differential privileges and burdens are not "germane to the purpose of" combating any bias or prejudice arising from forum shopping. *Fisher*, 97 Mont. 358, 34 P.2d at 525–26. There are no "special qualities or attributes" about the lawsuits that SB 97 singles out such that they cannot tolerate bias or prejudice while other lawsuits can. *Id.* Accordingly, SB 97 also violates Article V, Section 12.

CONCLUSION

For these reasons, the Court should hold SB 97 unconstitutional, enjoin its enforcement, and deny the State of Montana and Intervenor's Joint Motion to Transfer Venue.

DATED: March 20, 2026.

Respectfully submitted,

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