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**Legal Services Office**

TO: State Administration and Veterans' Affairs Interim Committee

FROM: K. Virginia Aldrich, Staff Attorney

RE: Litigation Concerning 2021 Legislation Relating to Topics Under SAVA's Jurisdiction

DATE: July 27, 2021

This memorandum was prepared as background information for the State Administration and Veterans' Affairs Interim Committee, and it does not represent any opinion or action on the part of the committee.

**I. Election & Campaign Finance Laws**

**A. *Barrett v. State I***

Plaintiffs: Steve Barrett, Robert Knight, Montana Federation of Public Employees, Dr. Lawrence Pettit, Montana University System Faculty Association Representatives, Faculty Senate of Montana State University, Dr. Joy Honea, Dr. Annjeanette Belcourt, Dr. Franke Wilmer, Montana Public Interest Research Group, Ashley Phelan, Joseph Knappenberger, Nicole Bondurant

Defendants: State of Montana, Governor Greg Gianforte

Venue: Montana Supreme Court

Docket No.: OP 21-0247

Legislation Challenged:

SB 319: AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; ESTABLISHING THAT IF STUDENT ORGANIZATIONS THAT ARE REQUIRED TO REGISTER AS POLITICAL COMMITTEES ARE FUNDED THROUGH ADDITIONAL OPTIONAL STUDENT FEES, THOSE FEES MUST BE OPT-IN; PROHIBITING CERTAIN POLITICAL ACTIVITIES IN CERTAIN PLACES OPERATED BY A PUBLIC POSTSECONDARY INSTITUTION; PROVIDING FOR JUDICIAL RECUSALS UNDER CERTAIN CIRCUMSTANCES; PROVIDING PENALTIES; AMENDING SECTIONS 13-1-101, 13-35-225, 13-35-237, 13-37-201, 13-37-202, 13-37-203, 13-37-204, 13-37-205, 13-37-207, 13-37-208, 13-37-216, 13-37-217, 13-37-218, 13-37-225, 13-37-226, 13-37-227, 13-37-228, AND 13-37-229, MCA; AND PROVIDING AN EFFECTIVE DATE.

HB 102: AN ACT GENERALLY REVISING GUN LAWS; PROVIDING A LEGISLATIVE PURPOSE, INTENT, AND FINDINGS; PROVIDING LOCATIONS WHERE CONCEALED WEAPONS MAY BE CARRIED AND EXCEPTIONS; PROHIBITING THE MONTANA UNIVERSITY SYSTEM AND BOARD OF REGENTS FROM INFRINGING ON

CONSTITUTIONAL RIGHTS AND PROVIDING EXCEPTIONS; PROVIDING A SEPARATE CIVIL CAUSE OF ACTION FOR VIOLATIONS OF THIS ACT; AMENDING SECTIONS 45-3-111, 45-8-316, 45-8-328, AND 45-8-351, MCA; REPEALING SECTIONS 45-8-317 AND 45-8-339, MCA; AND PROVIDING EFFECTIVE DATES.

HB 112: AN ACT CREATING THE SAVE WOMEN'S SPORTS ACT; REQUIRING PUBLIC SCHOOL ATHLETIC TEAMS TO BE DESIGNATED BASED ON BIOLOGICAL SEX; PROVIDING A CAUSE OF ACTION FOR CERTAIN VIOLATIONS OF THE ACT; PROVIDING FOR CONTINGENT VOIDNESS; AND PROVIDING AN EFFECTIVE DATE.

HB 349: AN ACT GENERALLY REVISING LAWS RELATED TO FREEDOM OF ASSOCIATION AND FREEDOM OF SPEECH ON CAMPUSES OF PUBLIC POSTSECONDARY INSTITUTIONS; PROVIDING PROTECTIONS FOR FREE ASSOCIATION ON PUBLIC POSTSECONDARY INSTITUTION CAMPUSES; PROHIBITING DISCRIMINATION AGAINST STUDENT ORGANIZATIONS; REQUIRING PUBLIC POSTSECONDARY INSTITUTIONS TO ADOPT ANTI-HARASSMENT POLICIES; PROVIDING RESTRICTIONS ON POLICIES PERTAINING TO THE EXPULSION OF A STUDENT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview: Plaintiffs alleged that the Legislature unconstitutionally infringed on the constitutional authority of the Montana Board of Regents under Article X, section 9, of the Montana Constitution. The plaintiffs requested that the Montana Supreme Court accept original jurisdiction, ultimately declare the bills unconstitutional, and award attorney fees. The Montana Supreme Court declined to invoke its original jurisdiction, finding that there were no urgent factors that suggested litigation in the district court and the normal appeal process would be inadequate, and the Montana Supreme Court dismissed the petition. The plaintiffs have refiled in district court, as outlined in the following case.

**B. *Barrett v. State II***

Plaintiffs: Steve Barrett, Robert Knight, Montana Federation of Public Employees, Dr. Lawrence Pettit, Montana University System Faculty Association Representatives, Faculty Senate of Montana State University, Dr. Joy Honea, Dr. Annjeanette Belcourt, Dr. Franke Wilmer, Montana Public Interest Research Group, Associated Students of Montana State University, Ashley Phelan, Joseph Knappenberger, Nicole Bondurant, Mae Nan Ellingston

Defendants: State of Montana, Governor Greg Gianforte, Austin Knudsen

Venue: Montana Eighteenth Judicial District Court, Gallatin County, Judge Rienne H. McElyea

Docket No.: DV-21-581 B

Legislation Challenged:

SB 319: AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; ESTABLISHING THAT IF STUDENT ORGANIZATIONS THAT ARE REQUIRED TO REGISTER AS POLITICAL COMMITTEES ARE FUNDED THROUGH ADDITIONAL OPTIONAL STUDENT FEES, THOSE FEES MUST BE OPT-IN; PROHIBITING CERTAIN POLITICAL ACTIVITIES IN CERTAIN PLACES OPERATED BY A PUBLIC POSTSECONDARY INSTITUTION; PROVIDING FOR JUDICIAL RECUSALS UNDER CERTAIN CIRCUMSTANCES; PROVIDING PENALTIES; AMENDING SECTIONS 13-1-101, 13-35-225, 13-35-237, 13-37-201, 13-37-202, 13-37-203, 13-37-204, 13-37-205, 13-37-207, 13-37-208, 13-37-216, 13-37-217, 13-37-218, 13-37-225, 13-37-226, 13-37-227, 13-37-228, AND 13-37-229, MCA; AND PROVIDING AN EFFECTIVE DATE.

HB 102: AN ACT GENERALLY REVISING GUN LAWS; PROVIDING A LEGISLATIVE PURPOSE, INTENT, AND FINDINGS; PROVIDING LOCATIONS WHERE CONCEALED WEAPONS MAY BE CARRIED AND EXCEPTIONS; PROHIBITING THE MONTANA UNIVERSITY SYSTEM AND BOARD OF REGENTS FROM INFRINGING ON CONSTITUTIONAL RIGHTS AND PROVIDING EXCEPTIONS; PROVIDING A SEPARATE CIVIL CAUSE OF ACTION FOR VIOLATIONS OF THIS ACT; AMENDING SECTIONS 45-3-111, 45-8-316, 45-8-328, AND 45-8-351, MCA; REPEALING SECTIONS 45-8-317 AND 45-8-339, MCA; AND PROVIDING EFFECTIVE DATES.

HB 112: AN ACT CREATING THE SAVE WOMEN'S SPORTS ACT; REQUIRING PUBLIC SCHOOL ATHLETIC TEAMS TO BE DESIGNATED BASED ON BIOLOGICAL SEX; PROVIDING A CAUSE OF ACTION FOR CERTAIN VIOLATIONS OF THE ACT; PROVIDING FOR CONTINGENT VOIDNESS; AND PROVIDING AN EFFECTIVE DATE.

HB 349: AN ACT GENERALLY REVISING LAWS RELATED TO FREEDOM OF ASSOCIATION AND FREEDOM OF SPEECH ON CAMPUSES OF PUBLIC POSTSECONDARY INSTITUTIONS; PROVIDING PROTECTIONS FOR FREE ASSOCIATION ON PUBLIC POSTSECONDARY INSTITUTION CAMPUSES; PROHIBITING DISCRIMINATION AGAINST STUDENT ORGANIZATIONS; REQUIRING PUBLIC POSTSECONDARY INSTITUTIONS TO ADOPT ANTI-HARASSMENT POLICIES; PROVIDING RESTRICTIONS ON POLICIES PERTAINING TO THE EXPULSION OF A STUDENT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview: Plaintiffs allege that SB 319, HB 102, HB 112, and HB 349 are facially unconstitutional as violative of Article X, section 9, of the Montana Constitution, which provides the powers and responsibilities of the Board of Regents. Plaintiffs also allege that HB 2's conditional appropriation of \$1 million for use in implementing HB 102, which is void "[i]f the Montana University System files a lawsuit contesting the legality of HB 102," is unconstitutional because it prevents the regents and the Montana University System from seeking judicial recourse, and it prevents the Montana University System from using its authority to manage and control the Montana University System.

Specifically, with respect to laws related to the purview of the State Administration and Veterans' Affairs Interim Committee, the plaintiffs allege that sections 2 and 21 of SB 319 infringe on the authority of the Board of Regents. Section 2 of SB 319 provides that fees by a student organization that to register as a political committee may only be opt-in. Section 21 of SB 319 provides that a "political committee may not direct, coordinate, manage, or conduct any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts for a federal, state, local, or school election inside a residence hall, dining facility, or athletic facility operated by a public postsecondary institution."

The plaintiffs have asked the court to declare SB 319, HB 108, HB 112, and HB 349 unconstitutional and unenforceable and to declare void the conditionality of the \$1 million appropriation earmarked for campus safety. The plaintiffs have further asked that the court grant appropriate injunctive relief, including preliminary injunctive relief if necessary, preventing the defendants from enforcing the challenged measures. Plaintiffs have also requested attorney fees and costs.

This litigation is in its preliminary stages.

**C. *Forward Montana v. State***

Plaintiffs: Forward Montana, Leo Gallagher, Montana Association of Criminal Defense Lawyers, Alexander Blewett III, Larry Anderson, Maxon Davis, Gary Zadick

Defendants: State of Montana

Venue: Montana First Judicial District Court, Lewis and Clark County, Judge Michael F. McMahon

Docket No.: 1-DV-21-0611

Legislation Challenged:

SB 319: AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; ESTABLISHING THAT IF STUDENT ORGANIZATIONS THAT ARE REQUIRED TO REGISTER AS POLITICAL COMMITTEES ARE FUNDED THROUGH ADDITIONAL OPTIONAL STUDENT FEES, THOSE FEES MUST BE OPT-IN; PROHIBITING CERTAIN POLITICAL ACTIVITIES IN CERTAIN PLACES OPERATED BY A PUBLIC POSTSECONDARY INSTITUTION; PROVIDING FOR JUDICIAL RECUSALS UNDER CERTAIN CIRCUMSTANCES; PROVIDING PENALTIES; AMENDING SECTIONS 13-1-101, 13-35-225, 13-35-237, 13-37-201, 13-37-202, 13-37-203, 13-37-204, 13-37-205, 13-37-207, 13-37-208, 13-37-216, 13-37-217, 13-37-218, 13-37-225, 13-37-226, 13-37-227, 13-37-228, AND 13-37-229, MCA; AND PROVIDING AN EFFECTIVE DATE.

Overview: Plaintiffs have challenged provisions in SB 319 that require judges to recuse themselves in certain situations and prohibit certain voter registration activities on public university campuses. Plaintiffs have challenged the provisions under Article V, section 11, of the Montana Constitution, which provides a single subject requirement for legislative bills. Plaintiffs allege that the challenged provisions were inserted later in the legislative process in a bill concerning joint fundraising committees, thereby violating the single subject rule and the requirement that a bill not be so amended as to change its original purpose. Plaintiffs further allege that section 21 of SB 319 violates Article II, sections 6 and 7, of the Montana Constitution, which provide for freedom of assembly and freedom of speech, as well as the First Amendment under the United States Constitution. Plaintiffs also allege that the judicial recusal provision in section 22 of SB 319 violates Article II, sections 16, 17, and 24, of the Montana Constitution, which provide for the administration of justice for every injury of person, property, or character, due process requirements, and rights of the accused, as well as the First Amendment under the United States Constitution.

The plaintiffs have requested a declaratory judgment stating that SB 319 is unconstitutional and enjoining the state from enforcing "any aspects of SB 319." The plaintiffs have requested attorney fees and costs. The plaintiffs argue that the bill is not severable, and therefore the entirety of the bill should be enjoined.

The plaintiffs applied to the court for a preliminary injunction, and the court granted the preliminary injunction, preventing the state from enforcing two sections of SB 319 pending the outcome of the court case. Section 21 has been enjoined, which provides that a "political committee may not direct, coordinate, manage, or conduct any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts for a federal, state, local, or school election inside a residence hall, dining facility, or athletic facility operated by a public postsecondary

institution." The court also enjoined section 22, which provides that a judicial officer must disqualify himself or herself if the judicial officer directly or indirectly received or benefitted from certain campaign contributions from a party or a lawyer to the proceeding. Although the preliminary injunction prevents the state from enforcing the two enjoined sections while the court case is pending, it is not a ruling on the merits of the case. The preliminary injunction preserves the *status quo* until the court issues a substantive ruling on the merits of the case.

**D. *McDonald v. Jacobsen***

Plaintiffs: Sister Mary Jo McDonald, Lori Maloney, Fritz Daily, Bob Brown, Dorothy Bradley, Vernon Finley, Mae Nan Ellingson, League of Women Voters

Defendant: Secretary of State

Venue: Montana Second Judicial District Court, Butte-Silver Bow County, Judge Kurt Kreuger

Docket No.: 2-DV-21-0120

Legislation Challenged:

HB 325: AN ACT ESTABLISHING SUPREME COURT DISTRICTS; PROVIDING FOR THE SELECTION OF THE CHIEF JUSTICE; PROVIDING THAT THE PROPOSED ACT BE SUBMITTED TO THE ELECTORATE AT THE 2022 GENERAL ELECTION; AMENDING SECTION 3-2-101, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE.

Overview: Plaintiffs allege that HB 325, a legislative referendum establishing election districts for Supreme Court justices, would, if approved by voters, violate the language and intent of the Montana Constitution that Supreme Court justices be selected on a statewide basis rather than a district-wide basis. It further alleges that because the change conflicts with the Montana Constitution, it violates the constitutional procedures for amendments to the Montana Constitution by enacting a statutory referendum. Plaintiffs further allege that HB 325 infringes on the right to vote under Article I, section 13, of the Montana Constitution.

Plaintiffs have requested that the court declare HB 325 unconstitutional and enjoin the Secretary of State from certifying the referendum, as well as preventing it from appearing on the ballot.

This litigation is in its preliminary stages.

**E. *Montana Democratic Party v. Jacobsen***

Plaintiffs: Montana Democratic Party and Mitch Bohn

Defendant: Secretary of State

Venue: Montana Thirteenth Judicial District Court, Yellowstone County, Judge Michael G. Moses

Docket No.: 13-DV-21-0451

Legislation Challenged:

HB 176: AN ACT REVISING LATE VOTER REGISTRATION; CLOSING LATE VOTER REGISTRATION AT NOON THE DAY BEFORE THE ELECTION; PROVIDING AN EXCEPTION SO MILITARY AND OVERSEAS ELECTORS

MAY CONTINUE TO REGISTER THROUGH THE DAY OF THE ELECTION; AMENDING SECTIONS 13-2-301, 13-2-304, 13-13-301, 13-19-207, AND 13-21-104, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

HB 530: AN ACT REQUIRING THE SECRETARY OF STATE TO ADOPT RULES DEFINING AND GOVERNING ELECTION SECURITY; REQUIRING ELECTION SECURITY ASSESSMENTS BY THE SECRETARY OF STATE AND COUNTY ELECTION ADMINISTRATIONS; ESTABLISHING THAT SECURITY ASSESSMENTS ARE CONFIDENTIAL INFORMATION; ESTABLISHING REPORTING REQUIREMENTS; DIRECTING THE SECRETARY OF STATE TO ADOPT A RULE PROHIBITING CERTAIN PERSONS FROM RECEIVING PECUNIARY BENEFITS WITH RESPECT TO CERTAIN BALLOT ACTIVITIES; PROVIDING PENALTIES; PROVIDING RULEMAKING AUTHORITY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

SB 169: AN ACT GENERALLY REVISING VOTER IDENTIFICATION LAWS; REVISING CERTAIN IDENTIFICATION REQUIREMENTS FOR VOTER REGISTRATION, VOTING, AND PROVISIONAL VOTING; AMENDING SECTIONS 13-2-110, 13-13-114, 13-13-602, AND 13-15-107, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview: Plaintiffs allege that provisions in HB 176, HB 530, and SB 169, including the revision of which IDs are accepted for certain voter identification purposes, the revision of late voter registration to close the day before the election, and prohibitions on providing, offering to provide, or accepting a pecuniary benefit for collecting or delivering ballots violate the following provisions of the Montana Constitution: Article II, section 4, which provides for the equal protection of the laws, Article II, sections 6 and 7, which provide freedom of assembly and freedom of speech, Article II, section 13, which provides the right of suffrage, Article II, section 17, which provides due process requirements, and Article V, section 1, which provides for legislative power. Plaintiffs have requested that the bills in question be declared in violation of the Montana Constitution and be permanently enjoined.

Plaintiffs have also requested that this litigation be consolidated with the following case, *Western Native Voice v. Jacobsen*.

**F. *Western Native Voice v. Jacobsen***

Plaintiffs: Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe

Defendants: Secretary of State

Venue: Montana Thirteenth Judicial District Court, Yellowstone County, Judge Gregory Todd

Docket No.: 13-DV-21-0560

Legislation Challenged:

HB 176: AN ACT REVISING LATE VOTER REGISTRATION; CLOSING LATE VOTER REGISTRATION AT NOON THE DAY BEFORE THE ELECTION; PROVIDING AN EXCEPTION SO MILITARY AND OVERSEAS ELECTORS MAY CONTINUE TO REGISTER THROUGH THE DAY OF THE ELECTION; AMENDING SECTIONS 13-2-301, 13-2-304, 13-13-301, 13-19-207, AND 13-21-104, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

HB 530: AN ACT REQUIRING THE SECRETARY OF STATE TO ADOPT RULES DEFINING AND GOVERNING

ELECTION SECURITY; REQUIRING ELECTION SECURITY ASSESSMENTS BY THE SECRETARY OF STATE AND COUNTY ELECTION ADMINISTRATIONS; ESTABLISHING THAT SECURITY ASSESSMENTS ARE CONFIDENTIAL INFORMATION; ESTABLISHING REPORTING REQUIREMENTS; DIRECTING THE SECRETARY OF STATE TO ADOPT A RULE PROHIBITING CERTAIN PERSONS FROM RECEIVING PECUNIARY BENEFITS WITH RESPECT TO CERTAIN BALLOT ACTIVITIES; PROVIDING PENALTIES; PROVIDING RULEMAKING AUTHORITY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview: Plaintiffs have challenged HB 176, which revises late voter registration to close at noon the day before the election for most voters. Plaintiffs assert that HB 176 violates the right to vote and the right to equal protection of the law under the Montana Constitution.

Plaintiffs have also challenged section 2 of HB 530, which directs the Secretary of State to adopt an administrative rule that prohibits a person from providing or offering to provide or accepting a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots and subjecting violators to a civil penalty. Plaintiffs assert that section 2 of HB 530 violates the right to vote, the right to freedom of speech, and due process under the Montana Constitution.

Plaintiffs have requested interim and permanent injunctions of both HB 176 and section 2 of HB 530 and attorney fees and costs.

Plaintiffs have requested that this litigation be consolidated with the previous case, *Montana Democratic Party v. Jacobsen*.