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COUNSEL FOR DEFENDANTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MATTHEW MONFORTON,)	
)	Case No. 6:14-cv-00002-DLC-RKS
)	
Plaintiff,)	RESPONSE TO PLAINTIFF’S
v.)	MOTION FOR PRELIMINARY
)	INJUNCTION AND
JONATHAN MOTL, et al.,)	CONCESSION THAT
)	PERMANENT INJUNCTION
Defendants.)	SHOULD BE ENTERED

Defendants (State) submit this Response to Plaintiff’s Motion for Preliminary Injunction. Plaintiff Matthew Monforton (Monforton) specifically claims Mont. Code Ann. § 13-35-225(3)(a) is unconstitutional. The State agrees, and through its Answer clearly and unequivocally concedes that Mont. Code Ann.

§ 13-35-225(3)(a) (the Statute) is unconstitutionally vague, and does not oppose a permanent injunction against its enforcement. Thus, Plaintiff's Motion for Preliminary Injunction is moot.

This case is the second recent challenge to the constitutionality of the Statute. In 2012, Judge Lovell found a prior version of § 13-35-225(3)(a) unconstitutionally vague on two separate grounds. *See Lair v. Murry*, 871 F.Supp.2d 1058, 1071 (D. Mont. 2012) (specifically finding the phrases "closely related in time" and "the same issue" to be unconstitutionally vague). Counsel for Monforton here was also counsel for Plaintiffs in *Lair*. In 2013, as a direct response to the *Lair* decision cited above, the Montana Legislature amended Mont. Code Ann. § 13-35-225(3)(a) by replacing the phrase "closely related in time" with the more specific--"the contrasting votes were made in any of the previous 6 years." *See* 63rd Montana Legislature, HB 129 (2013) (copy attached as Ex. A). The Montana Legislature, however, did not change, replace, or define the phrase "the same issue" that Judge Lovell had also ruled is unconstitutionally vague. *See Lair*, 871 F.Supp.2d at 1063-64; Ex. A, at 1.

Monforton now challenges the amended Statute on the grounds that it remains unconstitutionally vague because it still includes the phrase "the same issue." Plaintiff's Preliminary Injunction Memorandum (Doc. 5) at 9-10.

Monforton also briefly mentions that Defendants should be collaterally estopped

from relitigating the constitutionality of the Statute. *Id.* at 10, n.1. The State submits that collateral estoppel does not apply here but, because the State concedes that a permanent injunction may be entered, the Court need not reach this issue. The doctrine would not apply in any event because of Ninth Circuit precedent.¹

In the Answer, which is being filed concurrently with this Response, The State admits that the Statute, as amended, remains unconstitutionally vague. *See* Answer and Concession of Defendants (Doc. 18) at 2, ¶ 2, and 6, ¶ 21. The State does not intend to enforce the Statute. As such, the State rejects the notion that Monforton has suffered, or will suffer, any harm. It is arguable whether the Statute even applies to Monforton's proposed conduct, and Monforton did not approach the State about this matter before filing suit and immediately seeking a preliminary injunction. The activities described in Plaintiff's Verified Complaint and Brief in Support of Plaintiff's Motion for Preliminary Injunction will not be subject to any potential enforcement of § 13-35-225(3)(a). As demonstrated by the Answer, the State does not, and would not, contest any request to declare the Statute

¹The Supreme Court has held that nonmutual offensive collateral estoppel based on a prior federal court adjudication may not be applied against the federal government. *See United States v. Mendoza*, 464 U.S. 154, 162 (1984). The Ninth Circuit has found the *Mendoza* decision persuasive and held that nonmutual collateral estoppel should not be applied against a state agency. *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d. 674, 689-90 (9th Cir. 2004).

unconstitutionally vague, nor any request for permanent injunctive relief against its enforcement.

Despite Judge Lovell's specific finding in 2012 that the phrase "the same issue" is unconstitutionally vague, the Montana Legislature chose not to replace, amend, or define the phrase while amending the statute. The State concedes that Mont. Code Ann. § 13-35-225(3)(a) remains unconstitutionally vague. Monforton's Motion for Preliminary Injunction is now moot because the State clearly and unequivocally concedes that the Statute is unconstitutionally vague, does not contest entry of a permanent injunction against enforcement of the statute, and would be willing to enter into an appropriate stipulation to this effect.

Monforton was informed of Defendants' position before this Response and the Answer was served.

CONCLUSION

The State respectfully requests this Court deny Plaintiff's Motion for Preliminary Injunction as moot, and does not contest entry of a permanent injunction prohibiting enforcement of Mont. Code Ann. § 13-35-225(3)(a).

Respectfully submitted this 30th day of January, 2014.

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By: /s/ Michael G. Black
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, Helena Division, by using cm/ecf system. Participants in the case who are registered cm/ecf users will be served by the cm/ecf system.

Dated: January 30, 2014 /s/ Michael G. Black
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 687 words, excluding certificate of service and certificate of compliance.

Dated: January 30, 2014 /s/ Michael G. Black
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