Friends of Raph Graybill
PO Box 2728
Great Falls, MT 59403

February 3, 2019

Commissioner of Political Practices
1209 Eighth Avenue
Helena, MT 59620

Dear Commissioner Mangan:

This letter responds to the complaint by Mr. David Wanzenried.

I. Parties

Raph Graybill is Chief Legal Counsel to the Governor and a candidate for Attorney General. An addendum describing his legal experience is attached as Attachment A.

Former State Rep. David Wanzenried is a fundraiser and prominent endorser for Rep. Dudik in her campaign for Attorney General.[1] Dudik is running against Graybill.

II. Graybill meets the requirements

The facts are plain and speak for themselves. To assume the office of Attorney General, a successful candidate must be "an attorney in good standing admitted to practice law in Montana who has engaged in the active practice thereof for at least five years before election." Mont. Const., art. VI, sec. 3.[2]

Graybill was admitted as an active member of the Montana Bar on September 22, 2015. The 2020 election will be held on November 3, 2020, more than five years after Graybill's admission to active status. Graybill has been engaged in "active practice" the entire time.

Graybill plainly meets the requirements. Nonetheless, the Dudik fundraiser's Complaint advances several meritless theories to attempt to shave years off Graybill's qualifications. First, the memo asserts that Graybill's service as a federal law clerk for the United States Court of Appeals does not count toward the "active practice" requirement. The Montana Supreme Court has already answered this question. Under its rules, an admitted attorney's service as a judicial law clerk is "active practice."[3]

[1] Wanznreid hosted a fundraiser Sept. 9, 2019 and is featured on Dudik material. *See* Attachments B and C.
[2] Stated more clearly, this section provides that the Attorney General must be "an attorney in good standing to practice law in Montana who has engaged in the active practice [of law] for at least five years before election."
[3] Rule V(D)(1)(e), Rules for Admission to the Bar of Montana (Updated Oct. 30, 2018). The American Bar Association uses the same definition.

The Complaint points to rules that prevent judicial law clerks from bringing on private clients while serving the federal judiciary. A prohibition on taking on private clients as a government attorney is separate from whether that attorney is, for the purposes of bar membership, engaged in "active practice." The Montana Supreme Court and the ABA have defined "active practice" to include service as a law clerk. Eligibility is a state law question that the Montana Supreme Court has definitively answered.

Second, the Complaint argues that Graybill's time in private practice for the leading law firm Susman Godfrey in Seattle, WA does not count toward the "active practice" requirement. This was *literally* the "active practice" of law as defined by the Montana Supreme Court: the "representation of one of more clients in the practice of law."[4] Graybill maintained his legal practice as an active member of the Montana Bar the entire time that he worked for Susman Godfrey.

The Constitution's requirements are (1) Admission to the Montana Bar and (2) five years of active Montana bar status. Contrary to the Complaint's analysis, there is no hidden, additional test for how many of an attorney's cases are in Montana, or whether an attorney is a litigator at all. Had the framers intended something else, they would have included those requirements.

Finally, the Complaint mistakenly focuses on the date of the primary election. There is only one election that entitles the successful candidate to serve as Montana's Attorney General—the general election. Had the Constitution's framers wished to limit who a party may *nominate* to run for Attorney General, they would have said so.

This is not a question. Graybill was admitted to active practice more than five years before the date of the general election, and has engaged in the active practice of law continuously since then. He meets all requirements to run for Attorney General.

III. The Commissioner should weigh in to deter future frivolous campaign conduct via the COPP process

Eligibility attacks rarely succeed. Instead, their purpose is to cast an extended period of doubt around a candidate's campaign until resolution. The appropriate response is to give the requester exactly what he asks for: a prompt opinion on the matter.

The Commissioner has broad discretion to issue opinions and has previously determined whether candidates meet eligibility requirements.[5] This makes sense, as the Commissioner has an interest in preventing facially-ineligible candidates from engaging in the campaign activities he regulates. The Commissioner has also previously considered misuse of the COPP process as a factor in disposing of complaints and requests.

[4] *Id.* at V(D)(1)(a).
[5] *E.g.*, *In the matter of the Complaint Against Russell L. Doty* (determining candidate met eligibility requirements); *In the matter of the Complaint Against David Mihalic et. al* (determining that candidate did not meet eligibility requirements).

The request before the Commissioner now represents the worst of whisper-campaign politics. A campaign's surrogate asks COPP to do the work the campaign is unwilling or unable to do itself—using public resources to accomplish purely political objectives. Indeed, courts rejected an *identical* attack on a candidate for Attorney General in Kentucky late last year based on his service as a federal law clerk—but not before it created exactly the "buzz" the candidate's opponents sought.[6]

To deter future political misuse of the COPP process, the Commissioner should promptly issue a decision consistent with the law and the facts: Graybill meets all the requirements to run for Attorney General.

We look forward to your resolution of this matter and are happy to answer any further questions.

– Graybill Campaign

P.S.: Reference to case law is neither necessary nor instructive in resolving the Complaint. The nearest case is *Shapiro v. Jefferson County*, 278 Mont. 109, 923 P.2d 543 (Mont. 1996), which construed the five-year active practice requirement for County Attorneys in Montana, not the Attorney General. It established a broad standard, holding that an attorney who had been admitted to the bar four years prior to assuming office could credit her practice as a law student toward the five-year requirement. It is inapplicable here because Graybill meets the five year requirement. A more recent case, *Cross v. Van Dyke*, is likewise inapplicable because it dealt with a substantively different requirement for Supreme Court Justices. 2014 MT 193. At most, the *Van Dyke* decision stands for the basic presumption of eligibility in Montana, and highlighted the Court's prior decision in *Shapiro* as "instructive for the Court's broad interpretation of minimum eligibility requirements." *Id.* at ¶¶ 30-31.

[6] *See, e.g.*, Judge rejects claim that Kentucky AG candidate not qualified, Louisville Courier Journal, Oct. 10, 2019. A copy of this on-point decision is on file with the campaign and can be provided on request.