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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

REPRESENTATIVE ZOOEY ZEPHYR,  
ANN WONG, DEAN CHOU, BRADY  
SCHWERTFEGER, and SARAH VELK,

Plaintiffs,

v.

STATE OF MONTANA,  
REPRESENTATIVE MATT REGIER,  
in his official capacity as Speaker of the  
Montana House of Representatives;  
BRADLEY MURFITT, in his official  
capacity as Sergeant at Arms for the  
Montana House of Representatives,

Defendants.

Cause No. ADV-2023-300

**ORDER - STATE'S MOTION  
TO DISMISS**

Before the Court is Defendants' motion to dismiss. John Amsden, Justin Stalpes, Sydney Best, Connor Bottomly, and Michael G. Black represent Plaintiff Representative Zooley Zephyr (Zephyr). Alex Rate and Akilah Deernose represent Plaintiffs Anna Wong, Dean Chou, Brady Schwertfeger, and Sarah

1 Velk (collectively Constituent Plaintiffs). Montana Attorney General Austin  
2 Knudsen, Christian B. Corrigan, Brent Mead, Thane Johnson, Michael Russell,  
3 and Emily Jones represent Defendants State of Montana (State), Representative  
4 Matt Regier (Regier) in his official capacity as Speaker of the Montana House of  
5 Representatives, and Bradley Murfitt (Murfitt) in his official capacity as Sergeant  
6 at Arms for the Montana House of Representatives.

### 7 **STATEMENT OF FACTS**

8 In November 2022, voters in Montana House District 100 elected  
9 Zephyr to serve as their representative in the Montana State House of  
10 Representatives for the 68th Montana Legislative Session. The duties of a  
11 Representative include sponsoring legislation, shepherding bills through the  
12 legislative process, voting on legislation, and participating in committee hearings  
13 and proceedings/debates on the House floor. Plaintiffs Wong, Chou,  
14 Schwertfeger, and Velk are Missoula County voters and Zephyr's constituents.

15 The House of Representatives is part of the State's legislative  
16 branch of government. At all times relevant to this suit, Regier served as Speaker  
17 of the House of Representatives. The Speaker of the House is responsible for  
18 presiding over sessions on the floor and administering and enforcing House rules.  
19 Regier is sued in his official capacity. At all times relevant to this suit, Murfitt  
20 served as the Sergeant at Arms for the House. The Sergeant at Arms, under the  
21 direction of the Speaker, is responsible for monitoring and controlling access to  
22 all areas of the House and for the physical removal of individuals from the  
23 House. Murfitt is sued in his official capacity.

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1           On April 18, 2023, during the final floor debate on Senate Bill 99,  
2 Zephyr rose to speak in opposition to the legislation. Zephyr argued the bill,  
3 which banned gender affirming healthcare for transgender youth, would result in  
4 severe, possibly life-threatening consequences for transgender Montanans. She  
5 stated, “If you vote yes on this bill and yes on these amendments, I hope the next  
6 time there’s an invocation, when you bow your heads in prayer, you see the  
7 blood on your hands.”

8           The next day, April 19, 2023, Regier asked Zephyr to apologize for  
9 her statement. This request was accomplished by a message relayed by House  
10 Minority Leader Kim Abbott (Abbott) to Zephyr. Zephyr did not apologize but  
11 agreed to be silent on all bills that day in order to give Regier time to decide how  
12 to proceed. Following the House floor session on April 19, Zephyr met with  
13 Regier, Speaker Pro Tempore Rhonda Knudsen, and Majority Leader Sue  
14 Vinton. Regier told Zephyr that her comments had broken decorum, and he  
15 would no longer recognize her to speak until he believed she could “maintain  
16 decorum” in future proceedings.

17           On April 20, 2023, Zephyr asked to be recognized to speak on  
18 another bill, Senate Bill 458, which created a legal definition of “sex” as a binary  
19 concept determined by “the organization of the body parts and gametes for  
20 reproduction in human beings.” Regier refused to recognize her. Abbott  
21 objected to Regier’s refusal to recognize Zephyr, which led to a Rules Committee  
22 meeting. The Rules Committee voted to uphold Regier’s decision. This series of  
23 events continued for the next several days. Regier refused to recognize Zephyr  
24 during floor debates, Abbott objected, and the House voted to uphold Regier’s  
25 decision.

1                   On April 24, 2023, members of the public held a rally at the  
2 Montana State Capitol. Several attendees of the rally entered the House gallery  
3 to observe the legislative proceedings. During this time, Zephyr requested to be  
4 heard on Senate Bill 518. As in previous days, Regier declined to recognize her,  
5 Abbott objected, and the House voted to uphold Regier’s decision. Following the  
6 House vote, some of the rally attendees watching the proceedings began  
7 chanting, “Let her speak.” Zephyr responded by standing up and silently holding  
8 her disconnected microphone over her head.

9                   On April 26, 2023, the House took up a motion to censure Zephyr.  
10 The motion, sponsored by Vinton, read:

11                   “Mr. Speaker, I move that pursuant to Article V, section 10(1), of the  
12 Montana Constitution, the House of Representatives finds that the  
13 Representative from House District No. 100, clearly violated the  
14 rules, collective rights, safety, dignity, integrity and decorum of the  
15 House of Representatives on the Floor of the House on April 24,  
16 2023. Based upon this finding, the Representative shall be  
17 disciplined and the terms of this discipline are as follows: the  
18 Representative from House District No. 100 will no longer be  
19 admitted to this Floor, House anteroom, or House gallery. The  
20 Representative has the option to continue to vote remotely in floor  
21 proceedings via the process currently in place, for the duration of the  
22 session, until the 68th legislature adjourns sine die.”

23                   The House approved the motion 68-32. On April 27, 2023, Murfitt and Regier  
24 told Zephyr she was not allowed to work on a public bench outside the House  
25 anteroom. That same day, Zephyr’s key card to access Capitol entrances,  
bathrooms, and party workspaces was deactivated. The censure limited Zephyr  
to voting remotely on pending legislation for the remainder of the legislative  
session.

1 Plaintiffs’ suit challenges the constitutionality of Zephyr’s censure.  
2 Specifically, Plaintiffs seek a declaratory order finding the House of  
3 Representative’s censure of Zephyr violated Plaintiffs’ constitutional rights to  
4 free speech, equal protection of law, self-government, freedom of assembly and  
5 right to petition for redress. Plaintiffs also seek injunctions preventing  
6 Defendants from refusing to recognize Zephyr in House floor debates and  
7 restoring Zephyr’s legislative privileges by preventing enforcement of the  
8 censure. Defendants have moved to dismiss on the grounds Plaintiffs have failed  
9 to state a claim upon which relief can be granted.

#### 10 PRINCIPLES OF LAW

11 In reviewing a motion to dismiss pursuant to Montana Rule of  
12 Civil Procedure 12(b)(6), courts must consider the complaint in the light most  
13 favorable to the plaintiff and accept the allegations in the complaint as true.  
14 *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994).  
15 An asserted claim is subject to dismissal if, as pled, it is insufficient to state a  
16 cognizable claim entitling the claimant to relief. Mont. R. Civ. P. 12(b)(6). A  
17 complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond  
18 a doubt that the plaintiff can prove no set of facts to support his claim which  
19 would entitle him to relief. *McKinnon v. W. Sugar Coop. Corp.*, 2010 MT 24,  
20 ¶ 12, 355 Mont. 120, 225 P.3d 1221.

21 “The judicial power of Montana courts is limited to justiciable  
22 controversies—in other words, a controversy that can be disposed of and  
23 resolved in the courts.” *Gateway Opencut Mining Action Group v. Bd. of County*  
24 *Comm’rs*, 2011 MT 198, ¶ 16, 361 Mont. 398, 403-404, 260 P.3d 133, 137 (citing  
25 *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc.*,

1 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881). The Montana Supreme Court  
2 has consistently used a three-part test for determining whether a judiciable  
3 controversy exists:

4 First, a justiciable controversy requires that parties have existing and  
5 genuine, as distinguished from theoretical, rights or interest. Second,  
6 the controversy must be one upon which the judgment of the court  
7 may effectively operate, as distinguished from a debate or argument  
8 invoking a purely political, administrative, philosophical or  
9 academic conclusion. Third, [it] must be a controversy the judicial  
10 determination of which will have the effect of a final judgment in  
11 law or decree in equity upon the rights, status or legal relationships  
of one or more of the real parties in interest, or lacking these  
qualities be of such overriding public moment as to constitute the  
legal equivalent of all of them.

12 *Id.* at ¶ 12 (quoting *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 364,  
13 833 P.2d 1019, 1021).

14 “The remedial purpose of the Uniform Declaratory Judgments Act  
15 (Act), ‘to settle and to afford relief from uncertainty and insecurity with respect  
16 to rights, status, and other legal relations,’ is to be liberally construed.

17 Nevertheless, liberal interpretation of the Act is tempered by the necessity that a  
18 justiciable controversy exist before courts exercise jurisdiction.” *Northfield Ins.*  
19 *Co. v. Mont. Ass'n of Counties*, 2000 MT 256, ¶ 10, 301 Mont. 472, 475,  
20 10 P.3d 813, 815 (citing Mont. Code Ann. § 27-8-102; *Marbut v. Secretary of*  
21 *State* (1988), 231 Mont. 131, 135, 752 P.2d 148, 150).

## 22 ANALYSIS

23 Defendants’ motion to dismiss challenges Plaintiffs’ claims for  
24 lack of jurisdiction, lack of a justiciable controversy, and failure to state a  
25 cognizable claim. The Court finds the issue of justiciability controlling in this

1 matter and will thus limit its analysis to the determinative issue. Defendants  
2 argue Plaintiffs’ claims are nonjusticiable because the issues became moot when  
3 the legislative session ended. “Mootness is a concept of justiciability; when an  
4 issue presented at an action's outset ceases to exist or is no longer ‘live,’ or if, due  
5 to a change in circumstances or some intervening event, the court cannot grant  
6 effective relief, the issue is moot.” *In re Big Foot Dumpsters & Containers,*  
7 *LLC*, 2022 MT 67, ¶ 10, 408 Mont. 187, ¶ 10, 507 P.3d 169, ¶ 10 (citing *Ramon*  
8 *v. Short*, 2020 MT 69, ¶ 20, 399 Mont. 254, 460 P.3d 867).

9 Plaintiffs’ claims arise from the House of Representative’s censure  
10 of Zephyr during the 68th Montana Legislative Session. The House adjourned  
11 the session on May 2, 2023. Per the terms of the censure, the House’s  
12 disciplinary action, including the restrictions it placed on Zephyr, is no longer in  
13 effect. As such, Plaintiffs’ claims are moot. However, the Montana Supreme  
14 Court has recognized three exceptions to the mootness doctrine: (1) voluntary  
15 cessation, (2) capable of repetition, yet evading review, and (3) public interest.  
16 *Id.* at ¶ 15. Plaintiffs argue their claims survive under the second and third  
17 exception.

18 An otherwise moot case may proceed if it presents a wrong which  
19 is capable of repetition yet evading review. This exception applies when “the  
20 challenged conduct inherently is of limited duration, so as to evade review,  
21 and...‘there is a reasonable expectation that the same complaining party will be  
22 subject to the same action again.’” *Havre Daily News, LLC v. City of Havre*,  
23 2006 MT 215, ¶ 34, 333 Mont. 331, ¶ 34, 142 P.3d 864, ¶ 34 (quoting *Spencer v.*  
24 *Kemna*, 523 U.S. 1, 17-18, 118 S. Ct. 978, 988, 140 L. Ed. 2d 43 (1998)).  
25 Defendants argue this exception does not apply because it would require

1 speculation on required elements. The alleged wrong in this case meets the  
2 requirement of being inherently of limited duration because the censure naturally  
3 ends when Legislature adjourns. However, because the exception only applies if  
4 the same party is reasonably expected to experience the same wrong, the Court  
5 would have to assume Zephyr will be reelected and will again be censured in the  
6 same manner. Considering each legislative session is unique in members,  
7 officers, and adopted rules, there are too many unpredictable variables for  
8 Plaintiffs’ claims to meet this exception.

9           Turning next to the public interest exception to mootness, this  
10 exception applies when: (1) the case presents an issue of public importance;  
11 (2) the issue is likely to recur; and (3) an answer to the issue will guide public  
12 officers in the performance of their duties. *Ramon* at ¶ 20 (citing *Gateway*  
13 *Opencut Mining Action Grp. v. Bd. of Cnty. Comm'rs*, 2011 MT 198, ¶ 14,  
14 361 Mont. 398, 260 P.3d 133). “An issue is of public importance where it  
15 ‘implicate[s] fundamental constitutional rights or where the legal power of a  
16 public official is in question.’” *In re Big Foot Dumpsters & Containers, LLC* at  
17 ¶ 18 (quoting *Ramon* at ¶ 20).

18           The Court finds Plaintiffs’ claims meet the first element of the  
19 public interest exception. Plaintiffs have alleged violations of their first  
20 amendment rights and the equal protection clause of the Montana Constitution.  
21 Thus, the claims implicate fundamental constitutional rights. The claims also  
22 present a question regarding the legal power of elected officials, namely  
23 members of the Legislature. *See, e.g., Ramon* at ¶ 22 (“Whether a state law  
24 enforcement officer has the authority to grant federal civil immigration detainers

25 /////



1 and deprive Montana residents of their fundamental right to liberty based on a  
2 suspected civil violation is an issue of public importance.”).

3           Next the Court turns to the question of whether the issues are likely  
4 to recur. Unlike in the prior exception, the issue of recurrence is broader under  
5 the public interest exception because it does not include the same complaining  
6 party requirement. However, the fact specific nature of Plaintiffs’ claims still  
7 weighs against finding the alleged issues are likely to recur. In previous cases  
8 where the Montana Supreme Court has applied this exception, it has identified  
9 specific policies or practices which have caused repeated constitutional rights  
10 violations. *See, e.g., Ramon* at ¶ 25 (As long as the current ad-hoc-type  
11 agreement and policies between detention centers in Montana and DHS remains  
12 in place, ‘the problems will repeat themselves.”); *see also, Walker v. State*,<sup>1</sup>  
13 2003 MT 134, ¶ 43, 316 Mont. 103, ¶ 43, 68 P.3d 872, ¶ 43 (“Both questions  
14 implicate fundamental constitutional rights and as long as the current prison  
15 policies are in place, the problems will repeat themselves”). In contrast,  
16 Plaintiffs’ equal protection claims allege Defendants’ discipline of Zephyr was  
17 inconsistent with the Legislature’s usual practice. Thus, there is nothing in  
18 Plaintiffs’ pleadings which leads the Court to believe there is a likelihood of this  
19 issue recurring.

20           Finally, the Court must ask whether an answer to the issue will  
21 guide public officers in the performance of their duties. The Court finds it would  
22 not. Article V, Section 10 of the Montana Constitution provides the Legislature  
23 the authority to discipline its members. Unlike in *Ramon* where the court found

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24 <sup>1</sup> Although *Walker* referred to the “capable of repetition but evading review” exception, the  
25 Court’s reasoning falls squarely in the standards now used in evaluating the “public interest”  
exception.

1 an answer would “benefit Montana law enforcement officers by providing  
2 authoritative guidance on an unsettled issue regarding their authority,” the  
3 Legislature’s disciplinary authority is not an unsettled issue. *Ramon* at ¶ 24.

4 Plaintiffs’ claims became moot when Zephyr’s censure ended. The  
5 Court cannot grant effective relief in this matter because there is no longer a  
6 “live” controversy. Because of the fact specific nature of Plaintiffs’ claims, no  
7 mootness exception applies. Without a justiciable issue, this Court may not hear  
8 Plaintiffs’ case.

9 Accordingly,

10 **ORDER**

11 **IT IS HEREBY ORDERED** Defendants’ motion to dismiss is  
12 **GRANTED.**

13  
14 /s/ Mike Menahan

15 MIKE MENAHAN  
16 District Court Judge

17 pc: Justin P. Staples, via email: justin@becklawyers.com  
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Electronically Signed By:  
Hon. Judge Mike Menahan  
Wed, Nov 22 2023 01:06:15 PM