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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA IMMIGRANT JUSTICE ALLIANCE; MEA-MFT, and ALISHA BLAIR, Plaintiffs, v. GOVERNOR STEVE BULLOCK, in his official capacity, ATTORNEY GENERAL TIMOTHY C. FOX; in his official capacity, MONTANA BOARD OF REGENTS OF HIGHER EDUCATION, COMMISSIONER OF HIGHER EDUCATION CLAYTON CHRISTIAN, in his official capacity, and the STATE OF MONTANA, Defendants.	)	Cause No. BDV 2012-1042 **BRIEF IN SUPPORT OF STATE'S MOTION TO DISMISS**

COME NOW Defendants Governor Steve Bullock, Attorney General Timothy C. Fox, and the State of Montana (collectively, the State), by and through the undersigned counsel, and submit this brief in support of their Motion to Dismiss:

INTRODUCTION AND LEGAL STANDARD

As the Montana Supreme Court has recently reiterated, Montana courts "do not function, even under the Declaratory Judgments Act, to determine speculative matters. . . to give advisory opinions, or to give abstract opinions." *Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont. 228, 292 P.3d 364. This is not merely a matter of preference—it is jurisdictional. "The courts have no jurisdiction to determine matters purely speculative, . . . deal with theoretical problems, give advisory opinions, . . . provide for contingencies which may hereafter arise, or give abstract opinions." *Marbut v. Secretary of State*, 231 Mont. 131, 135, 752 P.2d 148 (1988).

That is why "[s]tanding is a threshold jurisdictional question, especially in cases where a statutory or constitutional violation is claimed to have occurred." *Lohmeier v. Gallatin County*, 2006 MT 88, ¶ 16, 332 Mont. 39, 135 P.3d 775 (citing *Fleenor v. Darby Sch. Dist.*, 2006 MT 31, ¶ 7, 331 Mont. 124, 128 P.3d 1048). To demonstrate standing, plaintiffs must show a "past, present, or threatened injury" concrete enough to satisfy Montana's "constitutional case-or-controversy requirement." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80. Specifically, "to invoke judicial power to disregard a statute as unconstitutional, the party who assails it must show, not only that the statute is invalid, but that he has sustained, or is in immediate danger of sustaining some direct injury as a result of its enforcement." *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582 (1948). Moreover, a "litigant may assert only her own rights." *Chipman v. Northwest Healthcare*, 2012 MT 242, ¶ 26, 366 Mont. 450, 288 P.3d 193. Only then can the court be assured that plaintiffs "have

'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens presentation of issues.'" *District No. 55 v. Musselshell County*, 245 Mont. 525, 528, 802 P.2d 1252 (1990) (citations omitted).

Ripeness, which "can be viewed as the time dimension of standing," is likewise one of the "central concepts of justiciability" that must be satisfied before addressing the merits in any case. *Chipman*, ¶¶ 25, 27. A court must ask "whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication." *Id.* ¶ 27. This ripeness inquiry is especially important in protecting courts from "determining purely speculative or academic matters, entering anticipatory judgments, providing for contingencies which may arise later, [or] dealing with theoretical problems." *Northfield Ins. v. Montana Ass'n of Counties*, 2000 MT 256, ¶ 12, 301 Mont. 472, 10 P.3d 813.

Nothing that Plaintiffs have filed or presented in this case—including their unverified complaint, Ms. Blair's affidavit and testimony, Mr. Chambers's affidavit, and Ms. Carlson's testimony—suggests they have standing to challenge LR-121. Nor are their claims ripe. At most, Plaintiffs have demonstrated that they strongly disagree with LR-121 and are "worried" it might someday affect them. *See, e.g.*, Blair Aff. ¶ 8 (Dec. 6, 2012). But neither disagreement nor worry has ever been sufficient to meet "'the irreducible constitutional minimum of standing.'" *Id.* ¶ 32 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "[W]hether plaintiffs have standing" does not turn on "how much the prospect of enforcement worries them." *American Library Ass'n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992). And courts "are not permitted to

decide mere differences of opinion between citizens, or between citizens and the state, . . . as to the validity of statutes. Particularly is it true where a statute, regular enacted by the law making branch of the government, is attacked by the citizen as being in violation of some provision or provisions of the Constitution." *Chovanak*, 120 Mont. at 526. Accordingly, the State respectfully requests that the Court dismiss Plaintiffs' Complaint.

ARGUMENT

I. PLAINTIFF BLAIR LACKS STANDING AND HER CHALLENGE IS NOT RIPE.

With their Complaint, Plaintiffs filed an affidavit by Alisha Blair, the only individual plaintiff in this case. Ms. Blair's affidavit contains one short paragraph explaining how she believes LR-121 might affect her. It reads:

> I do plan to go to college to study early childhood development, and one day I would like to open my own daycare. I am worried that under this new law, I would not be allowed admission to college. I am also worried about how it will affect me in other ways, like if I am ever the victim of a crime, need to apply for unemployment insurance, or want to apply for a license to practice a trade. I am worried about being denied my rights.

Blair Aff. ¶ 8.

These allegations are insufficient to support standing or ripeness. Ms. Blair states that she "plan[s] to go to college," but such vaguely defined plans are the textbook example of an interest too speculative to support standing. In *Lujan*, for example, the United States Supreme Court considered a challenge to an agency interpretation of the federal Endangered Species Act. 504 U.S. at 557-58. Two individuals had offered

affidavits explaining they had previously visited parts of Africa containing animal species affected by the challenged interpretation. *Id.* at 563-64. They also stated in their affidavits, and testified in depositions, that they had plans to revisit those areas. *Id.* The Court explained, however, that

> the affiants' profession of an "intent" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.

Id.

So too here. Ms. Blair's "some day" intention to attend college is "simply not enough." *Id.* Nor are her even more speculative "worrie[s]" about being the victim of a crime, needing to apply for unemployment insurance, or wanting to apply for a license.

Even if Ms. Blair's plans to attend college were considerably more defined, she would still lack standing. As her affidavit explains, she previously applied to the University of Montana, and was accepted. Blair Aff. ¶ 7. But she did not go, because she "could not afford to pay the tuition" and "was not eligible for financial assistance since [she] did not have proof of citizenship." *Id.* Ms. Blair never explains why anything would be different next time around, even if LR-121 did not exist. Independent of LR-121, students must demonstrate that they are either a U.S. citizen or eligible alien to receive federal financial aid. *See* http://studentaid.ed.gov/eligibility. Presumably, these federal requirements for financial aid (which are not challenged in this lawsuit) would still make Ms. Blair ineligible "for financial assistance" until she has "proof of

citizenship." Blair Aff. ¶ 7. Even if Ms. Blair's worry about not being able to go to college were not so speculative, therefore, it would be caused by the federal financial aid requirements, not LR-121. Put differently, Ms. Blair cannot meet the "redressability" element of standing. *See Heffernan*, ¶ 32 (citing *Lujan*, 504 U.S. at 560-61). Because the federal requirements for financial aid are an independent barrier to her attending college, she cannot show "a likelihood that the requested relief will redress [her] alleged injury." *Id.*

Ms. Blair's hypothetical injury is also unripe for another reason. On January 22, 2013, the Montana Board of Regents and the Commissioner of Higher Education (collectively, Regents) filed a separate answer to Plaintiffs' Complaint. In their answer, the Regents argued, as an affirmative defense, that LR-121 "does not apply to" Montana's higher education system. *See* Regents' Ans. at 18-19.

Whether or not the Regents' interpretation of the law is correct, they clearly do not intend to deny admission to anyone (including Ms. Blair) or take any other action based on LR-121. That is why the Regents have taken the position there "is no actual dispute and controversy between Plaintiffs and the [Regents]." *Id.* In addition to being wholly speculative, therefore, Ms. Blair's "worr[y] that under this new law, I would not be allowed admission to college" is unripe. *See Northfield Ins.*, ¶ 18 (refusing to make a "judicial determination" of an issue "which has not yet arisen and which may, in fact, never arise" because "[a] determination of the issue . . . would constitute an advisory opinion and courts have no jurisdiction to issue such opinions").

Finally, Ms. Blair testified at the preliminary injunction hearing that she plans to reapply for federal proof of citizenship, and expects she will receive it. This makes her already hypothetical injuries even more speculative. Even if Ms. Blair is ever directly affected by LR-121, there is a significant likelihood that, by then, she will have obtained federal proof of citizenship.

In short, Ms. Blair is simply not "in immediate danger of sustaining direct injury from" LR-121. *Northfield Ins.*, ¶ 15. Thus, "[t]he 'concrete adverseness' to [Ms. Blair] resulting from the [State's] actions . . . is completely lacking." *Fleenor*, ¶ 11. This Court therefore does "not have a justiciable controversy over which the judicial power to determine real controversies may be exercised." *Northfield Ins.*, ¶ 15; *see also Marbut*, 231 Mont. at 135-36 ("we have found no case granting standing to a complainant or applicant who shows no injury or threatened injury to himself through the act of a public official").

II. THE ORGANIZATIONAL PLAINTIFFS LACK STANDING AND THEIR CHALLENGE IS NOT RIPE.

Other than Ms. Blair, the only plaintiffs in this case are the Montana Immigrant Justice Alliance and the MEA-MFT. There is nothing in the Complaint claiming that these organizations have been injured by LR-121 *as* organizations. They clearly disagree with LR-121, but as already noted, mere disagreement does not confer standing. Nor does merely having a strong interest in an issue. As the United States Supreme Court explained more than four decades ago, "a mere interest in a problem, no matter how long

standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient" to establish standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), *cited with approval in Druffel v. Board of Adjustment*, 2007 MT 220, ¶ 15, 339 Mont. 57, 168 P.3d 640, *and Armstrong v. State*, 1999 MT 261, ¶ 7, 296 Mont. 361, 989 P.2d 364.

An organization may have standing to litigate claims on behalf of its members who have been injured. *See Heffernan*, ¶ 43. But to claim such "associational standing," the organization must demonstrate that, *inter alia*, "at least one of its members would have standing to sue in his or her own right." *Id.* Thus, the organization must show that at least one of its members is "in immediate danger of sustaining direct injury." *Northfield Ins.*, ¶ 15.

Neither organizational plaintiff in this case has even attempted to make that showing, much less made it. Neither organization has said *anything* about its members—including who they are. We don't know, for example, whether Ms. Blair, Ms. Carlson (who testified at the preliminary injunction hearing), or Mr. Chambers (whose affidavit was included with the Complaint) are members of either organization. We do know, as explained above, that Ms. Blair does not "have standing to sue in . . . her own right." *Heffernan*, ¶ 43. And as explained below, neither do Ms. Carlson and Mr. Chambers. So even if they were members of both organizations, it would not help establish standing.

Plaintiffs also filed an affidavit by Mr. Chambers with their Complaint. Mr. Chambers's affidavit contains one sentence stating how he believes LR-121 might affect him. It reads:

> I am a taxpaying citizen, and I am concerned that if I lose my job and need to apply for unemployment benefits, or need to access other state services, I may be wrongly denied because I can't prove my citizenship.

Chambers Aff. ¶ 6 (Dec. 3, 2012).

Mr. Chambers's allegations are, if anything, even more speculative than Ms. Blair's. He has given no reason to think that it likely he will lose his job or need to access other state services that might be affected by LR-121. Mr. Chambers's vague and hypothetical "concern[]" is the type of speculation that "is too contingent or remote to support present adjudication." *Chipman*, ¶ 27; *see also Northfield Ins.*, ¶ 26 (courts do not "deal[] with theoretical problems" or "provid[e] for contingencies which may arise later").

Ms. Carlson's vague concerns at the preliminary injunction hearing were no less speculative than Mr. Chambers's and Ms. Blair's. She too has not shown that she is "in immediate danger of sustaining direct injury" from LR-121. *Northfield Ins.*, ¶ 15. Moreover, Ms. Carlson testified at the hearing that a federal judge has issued a written order determining she is a U.S. citizen. As Ms. Carlson admitted at the hearing, she has no reason to believe that state agencies implementing LR-121 would refuse to accept a copy of that order as "proof" that she is a U.S. citizen. Thus, any injury Ms. Carlson purports to fear from LR-121 is entirely speculative.

III. PLAINTIFFS' FACIAL CHALLENGE EXACERBATES THEIR STANDING AND RIPENESS PROBLEMS.

Finally, the Plaintiffs' speculation about injury from LR-121 is all the more hypothetical given the posture of this case. This case is a facial challenge to LR-121.[1] As this Court has previously recognized, "a facial challenge . . . prove[s] most difficult, since under such a facial challenge, the proponent must show that under no set of circumstances can the challenged regulation be valid." *MEIC v. Department of Envtl. Quality*, 1996 Mont. Dist. LEXIS 738, at *20 (Mont. Dist. Ct. 1996) (Sherlock, J.) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also In re Marriage of K.E.V.*, 267 Mont. 323, 336, 883 P.2d 1246 (1994) (Trieweiler, J., concurring in part and dissenting in part) ("a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

Because this is a facial challenge, it simply is not relevant how various agencies are actually implementing or intend to implement LR-121. Rather, the relevant inquiry is whether it is *possible* for an agency to implement LR-121 constitutionally or without injuring Plaintiffs. Plaintiffs' own testimony shows that it is, and thus illuminates further their lack of standing. As mentioned at the preliminary injunction hearing, one way state agencies might implement LR-121 is to simply require applicants to swear under penalty

[1] In Plaintiffs' Complaint, they purport to bring both a facial and as-applied challenge. *See, e.g.*, Complaint ¶ 92 ("Plaintiffs contend that the Act is unconstitutional on its face, or on an as-applied basis . . . ."). But Plaintiffs have not alleged a *single* instance where LR-121 has been "applied" to Ms. Blair or a member of either of the organizational plaintiffs. Thus, only a facial challenge to LR-121 is presented by this lawsuit.

of perjury that they are a U.S. citizen. Both Ms. Blair and Ms. Carlson testified at the hearing that if this option was presented to them, they would prove their citizenship this way. Under this "set of circumstances," therefore, Plaintiffs demonstrated they would not be injured by an agency's compliance with LR-121. Plaintiffs' injury claims are thus even more tenuous and speculative because this is a facial challenge.

CONCLUSION

Plaintiffs do not have standing to challenge LR-121, because they have not alleged any non-speculative injury that would be affected by this case. Nor is their challenge ripe. The State therefore respectfully requests that the Court dismiss Plaintiffs' Complaint.

Respectfully submitted this 5th day of March, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and accurate copy of the foregoing document to be emailed and mailed to:

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