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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JERRY O'NEIL, GENE KIRSCHBAUM, RUSSELL SIAS, BARBARA LEVITT (Assembled Voter), DARELL LEVIT (Assembled Voter), and OTHER ASSEMBLED VOTERS,

Plaintiffs,

v.

THE MONTANA SUPREME COURT, THE STATE BAR OF MONTANA, and THE MONTANA SUPREME COURT AND THE STATE BAR OF MONTANA, JOINED TOGETHER AS THE INTEGRATED BAR OF MONTANA, and MONTANA SECRETARY OF STATE CHRISTI JACOBSEN,

Defendants.

Cause No. CV 23-161-M-DLC-KLD

DEFENDANT THE MONTANA SUPREME COURT'S BRIEF IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

State Cases

Federal Statutes

State Statutes

Rules

Other

INTRODUCTION

Plaintiffs ask this Court for nothing less than to "abolish" a provision of the Montana Constitution. (Doc. 14 at 1-2.) That provision requires a candidate for Montana Supreme Court Justice, or District Judge, to have been admitted to practice law in the state for 5 years. Mont. Const. art. VII, § 9. Plaintiffs also ask the Court to effectively strip the Montana Supreme Court of its constitutional authority to "make rules governing . . . admission to the bar. . . ." Mont. Const. art. VII, § 2(3). This would allow two of the Plaintiffs—Jerry O'Neil ("O'Neil") and Gene Kirschbaum ("Kirschbaum")—to run for judicial office in Montana, despite not being admitted to practice here, and would allow the remaining Plaintiffs ("Voter Plaintiffs") to cast votes for them. For a host of reasons set forth below, Plaintiffs' claims fail to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6)(1), and also fail for want of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1). The Montana Supreme Court's Motion to Dismiss should be granted.

BACKGROUND

Plaintiffs' Amended Complaint confirms neither O'Neil nor Kirschbaum are admitted to practice law in Montana. (Doc. 14 at 3.) They argue this should not matter. O'Neil claims he is "well versed in the legal system," having represented himself on multiple occasions and "having earned the equivalent of a JD degree

from the 'School of Hard Knocks.'" (Doc. 14, ¶ 2.) He also claims to be licensed "on the attorney level" in Blackfeet Tribal Court. (Doc. 14-1, ¶ 22.) O'Neil's years-long refusal to respect Montana's admission requirements has led to him being found in contempt and permanently enjoined from practicing law in the state "until such time as he becomes duly authorized." *Mont. Supreme Court Comm'n on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, ¶¶ 9, 91, 334 Mont. 311, 147 P.3d 200.

According to the Amended Complaint, Kirschbaum previously practiced law in the Air Force and in Wisconsin, but has never been admitted in Montana. (Doc. 14, ¶ 3.) He retired from the practice of law and moved to Montana about five years ago. (*Id.*)

Plaintiffs filed this lawsuit against the Montana Supreme Court, the State Bar of Montana, the "Integrated Bar of Montana," and Montana Secretary of State on December 29, 2023. (Doc. 1.) They filed their Amended Complaint on February 2, 2024. (Doc. 14.) Plaintiffs allege numerous civil rights violations they claim are actionable under 42 U.S.C. § 1983, as well as federal antitrust claims presumably brought under the Sherman and Clayton Acts. (Doc. 14.) Plaintiffs request (1) a declaration that Kirschbaum and O'Neil, and others similarly situated, are eligible to run for Supreme Court Justice and District Judge, (2) an injunction directing they be allowed to run for judicial office, and (3) court costs and

"attorney fees." (Doc. 14, Request for Relief.) These claims fail on multiple grounds.

MOTION TO DISMISS STANDARD

Dismissal under Rule 12(b)(6) is required where a complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). Factual allegations "must be enough to raise a right to relief above the speculative level" to state a plausible claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Dismissal under Rule 12(b)(1) is required where the court lacks subject matter jurisdiction, such as when the claims alleged are not justiciable. Fed. R. Civ. P. 12(b)(1); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

DISCUSSION

I. THE MONTANA SUPREME COURT IS IMMUNE FROM SUIT IN FEDERAL COURT.

Absent consent to suit, "a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *see also Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999) ("In the absence of a waiver by the state or a valid congressional override, [u]nder the eleventh amendment, agencies of the state are immune from private

damage actions or suits for injunctive relief brought in federal court."). Eleventh Amendment immunity extends to governmental entities which are considered "arms of the state," including the Montana Supreme Court. *Gold v. Mont. Supreme Court*, CV 09-16-M-DWM-JCL, 2009 U.S. Dist. LEXIS 10957, *8-9 (D. Mont. Feb. 12, 2009), *findings and recommendation adopted by* No. CV 09-16-M-DWM-JCL, 2009 U.S. Dist. LEXIS 18131, at *2 (D. Mont. Mar. 6, 2009).

The State of Montana has not consented to suit in federal court. *Gold*, at *9. Nor has Congress abrogated immunity for the federal claims asserted by Plaintiffs. *O'Connor v. Nevada*, 686 F.2d 749, 750 (9th Cir.1982) ("The Supreme Court has made it clear that section 1983 does not constitute an abrogation of the eleventh amendment immunity of the states."). Likewise, the narrow *Ex parte Young* exception has no application to the claims asserted by Plaintiffs. *See Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1036 (9th Cir. 1999). The Montana Supreme Court is thus immune under the Eleventh Amendment both to Plaintiffs' federal and state law claims. *Pennhurst*, 465 U.S. at 120; *Stanley v. Trustees of Cal. State Univ.*, 433 F.3d 1129, 1134 (9th Cir. 2006).

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE SUBJECT MATTER JURISDICTION.

Plaintiffs bear the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Article III's "case or controversy" requirement limits a court's subject

matter jurisdiction to justiciable disputes. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27, 127 S. Ct. 764, 770-71, 166 L. Ed. 2d 604, 608 (2007); *Taxpayers of United States v. Bush*, 2004 U.S. Dist. LEXIS 26467, *7-8 (N.D. Cal. Dec. 30, 2004). "The justiciability doctrines—standing, ripeness, mootness, and the political question doctrine—present a threshold question in every federal case because they determine the power of the court to entertain a suit." *Bush*, at *8. Plaintiffs have failed to satisfy this threshold showing.

A. Plaintiffs' lawsuit presents a non-justiciable political question.

Amending the Montana Constitution presents a political question constitutionally committed to Montana's electorate and legislature. Mont. Const. art. XIV, §§ 1, 2, 8, 9. The political question doctrine rests on the principle that "certain political questions are by their nature committed to the political branches to the exclusion of the judiciary." *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990). In determining whether a case presents a political question, courts consider, among other factors, "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663, 668 (1962); *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 821-22 (9th Cir. 2017).

Employing the political question doctrine, a federal district court recently dismissed a challenge brought by California voters to that state's constitutional cap on the number of legislators. *Citizens for Fair Representation v. Padilla*, 2018 U.S. Dist. LEXIS 202623, *15-18 (E.D. Cal. Nov. 28, 2018). The voters argued the cap violated the U.S. Constitution by encumbering their rights to self-governance and adequate representation. *Id*. In addition to their lack of standing, the court dismissed the case on grounds that it presented a nonjusticiable political question "susceptible to constitutional amendment . . . a task committed to the legislative branch." *Id*.

The same is true here. Plaintiffs are "effectively asking the court to usurp the electorate and unilaterally alter the state constitution." *Id*. They ask the Court to "abolish" Montana's constitutional requirements precluding them from running for judicial office, but granting that relief would require the Court to unilaterally amend the Montana Constitution and nullify the constitutional authority explicitly granted to Montana's electorate and legislative branch. Mont. Const. art. XIV, §§ 1, 2, 8, 9; *see also Reichert v. State*, 2012 MT 111, ¶ 68, 365 Mont. 92, 278 P.3d 455 ("The Constitution prescribes the specific methods for making amendments."). The political question doctrine renders Plaintiffs' request nonjusticiable.

B. Plaintiffs lack standing.

To establish Article III standing, the claimed injury must be "concrete and particularized and (b) actual or imminent, not conjectural or hypothetical[.]" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610, 621 (2000).

1. O'Neil and Kirchbaum

Where a plaintiff seeks prospective relief, as here, the mere declaration of "'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. . . ." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564, 112 S. Ct. 2130, 2138, 119 L. Ed. 2d 351, 366 (1992). As such, where one professes an intention to run for office at some point in the future, even after having done so in the past, there is no threat of imminent injury sufficient to confer Article III standing. *Virden v. City of Austin*, 1:21-CV-271-RP, 2023 U.S. Dist. LEXIS 153064, 16-*18 (W.D. Tex. Aug. 30, 2023) (finding that with no concrete plans to run for office beyond stating intention "to be a candidate for City office again in future elections[,]" there was no threat of imminent injury); *Liu v. N.Y. City Campaign Fin. Bd.*, 2016 U.S. Dist. LEXIS 135687, *13-15, 2016 WL 5719773 (S.D.N.Y. Sept. 29, 2016) (finding that "absent a more concrete description of [the plaintiff's] plans to run for office," the fact that the plaintiff had run in the past and

may run in the future was insufficient to establish standing for prospective relief). *See also McConnell v. FED*, 540 U.S. 92, 225-26, 124 S. Ct. 619, 708, 157 L. Ed. 2d 461, 470 (2003) (notwithstanding senator's testimony that he had run negative campaign advertisements in the past and planned to do so in future campaigns, injury in fact was "too remote temporally" to pursue injunction against enforcement of statute regulating negative campaign ads), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 752 (2010).

O'Neil proclaims an intention to run for judicial office at some point in the future, and further alleges he tried to run for such office in the past. (Doc. 14-1, ¶¶ 32, 33.) Kirschbaum does not even go that far—he simply asks the Court to declare him qualified to run. (Doc. 14, ¶¶ 3, 4, 7, 22.) In either case, these speculative allegations are insufficient to establish an injury that is concrete, particularized, and "actual or imminent," rather than "conjectural or hypothetical." *Friends of the Earth,* 528 U.S. at 181.[1]

[1] Just this morning, O'Neil and Kirschbaum filed a "Verified Motion for Expedited Order," indicating for the first time that they seek to "file our applications for Chief Justice and/or Justice of the Montana Supreme Court prior to, or on, March 11, 2024." (Doc. 15 at 2.) The motion has no bearing on the Rule 12(b)(6) analysis, which is necessarily limited to the allegations of the complaint. E.g., *Balistreri*, 901 F.2d at 699.

2. Voter Plaintiffs

Courts in the Ninth Circuit and across the country have concluded voters do not have standing to challenge qualifications for public office absent a particularized injury that would not extend to all voters. *E.g. Clark v. Weber*, 2023 U.S. Dist. LEXIS 189172, *4-6 (C.D. Cal. Oct. 20, 2023) ("Plaintiff here has not pointed to any connection between himself, on the one hand, and Defendant or Mr. Trump, on the other, that transforms the general harm he alleges into a particularized one."); *Berg v. Obama*, 586 F.3d 234, 237-39 (3d Cir. 2009) (dismissing claim that then-candidate Barack Obama was ineligible to serve as President because the plaintiff voter "suffered no injury particularized to him"). Here too, because any Montana voter could claim the same injury—the inability to cast a vote for O'Neil or Kirschbaum to serve on the Montana Supreme Court—the harm is not particularized. Accordingly, the Voter Plaintiffs lack standing.

III. PLAINTIFFS HAVE FAILED TO STATE A § 1983 CLAIM.

Plaintiffs request relief under 42 U.S.C. § 1983 for a number of alleged constitutional violations. The claim fails for several reasons.

A. The Montana Supreme Court is not subject to suit under § 1983.

The Supreme Court has held that states and governmental entities considered "arms of the state" are not "persons" within the meaning of § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 70, 109 S. Ct. 2304, 105 L. Ed. 2d 45

(1989). The Montana Supreme Court is an arm of the state. *See* Mont. Const. art. VII, § 1. As such, it is not a "person" subject to suit under § 1983.

B. Plaintiffs fail to plausibly allege an underlying civil rights violation.

Even if the Montana Supreme Court was not immune under the Eleventh Amendment (it is), and even if it could be sued under § 1983 (it cannot), Plaintiffs fail to state a claim for violations of their federal rights.

1. Privileges and Immunities Clause

The Privileges and Immunities Clause prevents "a State from discriminating against citizens of other States in favor of its own." *Hague v. Committee of Indus. Org.*, 307 U.S. 496, 511, 59 S. Ct. 954, 962, 83 L. Ed. 1423, 1434 (1939). It has no application where, as here, a resident complains about a law applicable to the residents of his own State. *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 217, 104 S. Ct. 1020, 1027, 79 L. Ed. 2d 249, 257(1984); *Darkins v. Snowden*, No. CV 13-3831-JST (MAN), 2013 U.S. Dist. LEXIS 145021, *17-19 (C.D. Cal. Aug. 15, 2013).

Moreover, the "privileges and immunities clause includes those rights and privileges incident to citizenship of the United States, but does not include rights pertaining to state citizenship derived solely from the relationship of the citizen and his state established by state laws." *Snowden v. Hughes*, 321 U.S. 1, 6-7, 64 S. Ct. 397, 400, 88 L. Ed. 497, 502 (1944). Because the "right to become a candidate

for state office, like the right to vote for the election of state officers . . . is a right or privilege of state citizenship, not of national citizenship," it is not protected by the privileges and immunities clause. *Id.*; *Edwards-Flynn v. Yara*, No. CIV 08-0186 JB/ACT, 2009 U.S. Dist. LEXIS 52745, *12 (D.N.M. May 18, 2009).

2. Dormant Commerce Clause

Courts have inferred from the Commerce Clause a prohibition on state action limiting interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13, 20 (1994). The "central rationale" behind this inference is that states should not enact laws whose object is local economic protectionism. *LensCrafters, Inc. v. Brown*, 567 F.3d 521, 523-24 (9th Cir. 2009). To determine whether the dormant Commerce Clause applies, a court must assess whether (1) the law or ordinance "regulate[s] an activity that 'has a substantial effect on interstate commerce such that Congress could regulate the activity,'" and (2) whether the challenged ordinance discriminates against out-of-state entities. *Id.*; *Lear v. Seattle Hous. Auth.*, No. C13-0347JLR, 2014 U.S. Dist. LEXIS 35471, at *31-32 (W.D. Wash. Mar. 17, 2014).

Here, there are no allegations the restrictions placed on Montana residents to run for judicial office in his state have any effect on interstate commerce. As a matter of law, the dormant Commerce Clause is not implicated.

3. Titles of Nobility

The Titles of Nobility Clauses, found in U.S. Const. art. I, § 9, cl. 8 and art. I, § 10, cl. 1, reflect America's historic aversion to aristocracy and rejection of dispositions based on blood. *Zobel v. Williams*, 457 U.S. 55, 69, n. 3, 102 S. Ct. 2309, 2318, 72 L. Ed. 2d 672, 683 (1982); *Adarand Constructors v. Pena*, 515 U.S. 200, 239, 115 S. Ct. 2097, 2118, 132 L. Ed. 2d 158, 189 (1995) (Scalia, J., concurring in part). Plaintiffs allege "requiring admission to the Bar as a prerequisite for service as an Officer of . . . the judiciary[] constitutes an analogous title of nobility." (Doc. 14 at ¶ 34.) They are mistaken.

First, these clauses are not judicially enforceable. *In re Trump*, 958 F.3d 274, 306 (4th Cir. 2020) (finding Title of Nobility Clauses "are exemplars of constitutional provisions that are not self-executing, and are instead best left to the political branches and the electorate."), *vacated as moot by Trump v. D.C.*, 141 S. Ct. 1262 (2021).

Second, courts have considered and summarily rejected the very argument advanced by Plaintiffs multiple times, uniformly concluding that membership in a state bar association is not a distinction based on nobility (i.e., blood). *See, e.g. People v. Ward*, No. 348475, 2020 Mich. App. LEXIS 7270, *36-37 (1st Mich. Dist. Ct. App. Oct. 29, 2020) (system for accreditation of lawyers and judges did not provide for titles of nobility); *McIndoo v. Broward Cty.*, 750 Fed. Appx. 816,

819 (11th Cir. 2018) (title of judge is not a title of nobility); *Williams v. Florida*, 2:18-cv-389-FtM-29(UAM), 2019 U.S. Dist. LEXIS 28070, *4 (M.D. Fla. Feb. 22, 2019) ("Defendant Smith's 'title' as 'Esquire' does not implicate" Art. I, § 9, cl. 8); *Radabaugh v. Corp. Trust Co.*, No. 17-1559 (JRT/BRT), 2017 U.S. Dist. LEXIS 149302, *9-10 (D. Minn. May 22, 2017) (claim that the Minnesota State Bar and ABA award the title of nobility "esquire" in contravention of the Constitution "is so unsupported legally as to be frivolous").

4. Due Process

Plaintiffs have failed to state a claim under the Fourteenth Amendment's Due Process Clause because the right to hold a particular state political office is not a constitutionally protected property or liberty interest. *Snowden*, 321 U.S. at 8, 64 S. Ct. at 401; *Edwards-Flynn*, at *12-13. This is true even when a state actor unlawfully denies the right to state political office. *Snowden*, 321 U.S. at 7, 64 S. Ct. at 401.

5. Equal Protection

Plaintiffs have failed to state a claim under the Fourteenth Amendment's Equal Protection Clause. Although equal protection protects the right to fairly run for political office without being discriminated against based upon political beliefs or associations, no such allegations are made by Plaintiffs. *See Ill. State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S. Ct. 983, 59 L. Ed.

2d 230 (1979); *Tavizon v. Villanueva*, No. 16-293 GBW/LAM, 2017 U.S. Dist. LEXIS 25441, at *25 (D.N.M. Feb. 23, 2017).

Such allegations are missing for good reason. State officials are entitled to "draw distinctions between candidates for office who are clearly ineligible [] and those who aren't . . . ." *Lindsay v. Bowen*, 750 F.3d 1061, 1064 (9th Cir. 2014) (affirming dismissal of claim that secretary of state violated equal protection by failing to list ineligible candidate on presidential primary ballot). Because "[t]hose who can't legally assume office . . . are undeniably different from those who can," they can be treated differently without violating equal protection. *Id.* at 1064-65.

6. Freedom of speech, press, association

Like the Equal Protection Clause, the First Amendment protects the right to run for political office free of discrimination for one's political beliefs or associations. *Ill. State Bd. of Elections,* 440 U.S. at 184; *Anderson v. Celebrezze*, 460 U.S. 780, 786-87 n.7, 103 S. Ct. 1564, 75 L. Ed. 2d 547 & n.8 (1983). Again, no such allegations are levied here. Furthermore, distinctions based on ineligibility due to lack of membership in the state bar does not "limit political participation by an identifiable political group whose members share a particular viewpoint, associational preference or economic status." *Lindsay*, 750 F.3d at 1063 (citations omitted).

7. Unenumerated Rights

The Ninth Amendment "has never been recognized as independently securing any constitutional right for purposes of pursuing a civil rights claim." *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986); *Williams v. Brown*, No. 6:21-cv-01332-AA, 2023 U.S. Dist. LEXIS 176499, at *4-5 (D. Or. Sep. 30, 2023). To the extent the Amended Complaint alleges a violation of the Ninth Amendment, the claim must be dismissed.

IV. PLAINTIFFS HAVE FAILED TO STATE AN ANTITRUST CLAIM.

Plaintiffs allege the requirements imposed on admission to the bar—and, by extension, their ability to run for state judicial office—violate federal antitrust laws. (Doc. 14, ¶¶ 8-23.) This claim fails for at least two reasons: (1) Plaintiffs' lack "antitrust standing," and (2) the Montana Supreme Court is immune from antitrust liability.

A. Plaintiffs lack antitrust standing.

The Sherman Act prohibits certain conduct "in restraint of trade or commerce" for the purpose of promoting free market competition. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 985-86 (9th Cir. 2000). The Clayton Act authorizes private suits to enforce the Sherman Act, including suits for

injunctive relief. *Id.*; 15 U.S.C. §§ 15(a), 26. However, the Clayton Act requires "antitrust standing"—a showing Plaintiffs cannot make.[2]

To establish "antitrust standing," a plaintiff must show an "antitrust injury," which, among other things, requires the injury be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487, 97 S. Ct. 690, 696, 50 L.Ed.2d 701, 711 (1977); *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013); *Weik v. Goldberg*, No. CV 14-182-M-DLC-JCL, 2014 U.S. Dist. LEXIS 128831, at *16-17 (D. Mont. Sep. 12, 2014).

No antitrust injury is alleged here. "[N]either the business of conducting the government nor the holding of a political office constitutes 'trade or commerce' within the meaning of the Sherman Act." *Sheppard v. Lee*, 929 F.2d 496, 498 (9th Cir. 1991) (dismissing claim by county employee who was fired after declaring his intention to run for County Board of Supervisors). The operation of the government is neither a commercial nor competitive activity. *Id.* at 499. Rather:

> Government operations may only be carried out by the government, and no rival, would-be government may compete for the opportunity to perform the governmental function. Governing is by its very nature a non-

[2] Plaintiffs reference only the Federal Trade Commission Act in their Amended Complaint (Doc. 14, ¶ 19), but that legislation does not provide a private right of action. *Hunt v. Spectrum Charter Communs.*, No. CV 22-1843-DMG (Ex), 2022 U.S. Dist. LEXIS 209169, at *5 (C.D. Cal. Nov. 17, 2022); *Rojas v. Ygrene Energy Fund, Inc.*, No. 18-CV-579 CAB KSC, 2018 U.S. Dist. LEXIS 60945, at *1-2 (S.D. Cal. Apr. 10, 2018). Accordingly, this Motion assumes Plaintiffs are attempting to state a claim under the Sherman and Clayton Acts.

> competitive act. Thus, monopolistic practices with respect to the conduct of government do not violate the Sherman Act.

Id.; *see also Yates v. Money Source, Inc.*, 2023 U.S. Dist. LEXIS 113359, *9, 2023 WL 4305059 (E.D. Cal. June 29, 2023) ("Government action cannot 'restrain trade' under the Sherman Act[.]"). In sum, antitrust laws "seek to promote competition in the market for goods and services, not to afford every person a fair opportunity to achieve a particular position or office." *Sheppard*, 929 F.2d at 499 n.6.

The challenged conduct of the Montana Supreme Court—exercising its constitutional authority to adopt rules to govern admission to the bar—is unquestionably governmental. As a matter of law, it cannot violate antitrust laws creates no "antitrust injury" sufficient to confer "antitrust standing." *Id.*[3]

B. The Montana Supreme Court is immune from antitrust liability.

Even if Plaintiffs had antitrust standing, the Montana Supreme Court is immune under the state-action immunity doctrine. *See Parker v. Brown*, 317 U.S.

[3] In their Amended Complaint, Plaintiffs make a single reference to Montana's Unfair Trade Practices Act, Mont. Code Ann. 30-14-101, *et seq*. ("MUTPA"). (Doc. 14 at 4.) To the extent they seek to assert an antitrust claim under the MUTPA, it fails for the same reasons as their federal antitrust claim. Moreover, state agencies are not "persons" under the MUTPA. *Wiser v. State*, 2006 MT 20, ¶ 33, 331 Mont. 28, 129 P.3d 133. Also, because "the government acts as a market regulator and not a competitor . . . the plain and ordinary interpretation of Mont. Code Ann. § 30-14-201 is that the MUTPA was created to apply to *businesses*, not government." *Mont Vending, Inc. v. Coca-Cola Bottling Co*., 2003 MT 282, ¶ 34, 318 Mont. 1, 78 P.3d 499 (emphasis original).

341, 350, 63 S. Ct. 307, 313, 87 L. Ed. 315, 325 (1943). "[B]ecause 'nothing in the language of the Sherman Act . . . or in its history' suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints 'as an act of government.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43, 53 (2013). The Supreme Court has further explained this rationale:

> The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. For these reasons, the Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity.

N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 503, 135 S. Ct. 1101, 1109, 191 L.Ed.2d 35, 47 (2015).

The Montana Supreme Court is entitled to state-action immunity because it enacted the subject restrictions pursuant to its exclusive constitutional authority to "make rules governing . . . admission to the bar and the conduct of its members." Mont. Const. art. VII, § 2(3); *Steele v. McGregor*, 1998 MT 85, ¶ 28, 288 Mont.

238, 956 P.2d 1364. In other words, it is "the ultimate body wielding the State's power over the practice of law" and, thus, the challenged restraints on running for judicial office are "compelled by direction of the State acting as a sovereign." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360, 97 S. Ct. 2691, 2697, 53 L.Ed.2d 810, 821 (1977) (applying state-action immunity to Arizona's Supreme Court and bar).

Plaintiffs' attempt to circumvent state action immunity is found in their legal conclusion that "the Integrated Bar of Montana does not receive the active supervision of the State, and thus is not cloaked with *Parker* immunity." (Doc. 14, ¶ 19.) Apart from the "Integrated Bar" being a nonexistent entity (discussed more fully below), Plaintiffs' conclusion that there is no "active supervision of the State" is unsupported by any factual allegations. Regardless, the alleged antitrust violations are, as a matter of law, those of the State acting as a sovereign. Mont. Const. art. VII, § 2(3).

The Supreme Court's decision in *Hoover v. Ronwin*, 466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984) provides guidance. There, an applicant was denied admission to the Arizona State Bar after failing the bar exam. *Id.* He sued Arizona's Committee on Examinations and Admissions, alleging conspiracy to restrain trade in violation of the Sherman Act. *Id.* at 565. The Supreme Court found the Committee was immune under *Parker*, concluding that although the

Arizona Supreme Court "delegated administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona." *Id.* at 573.

Here too, "Article VII, Section 2(3) of the Montana Constitution vests the Montana Supreme Court 'with the exclusive authority to make such rules regulating attorneys, who are officers of the court.'" *Steele*, ¶ 28. "The Montana Supreme Court is the final authority as to whether an applicant may be admitted to practice law in Montana." MT St. Bar Adm. Rule XI(A). The Montana Supreme established the requirements that a member of the bar must graduate from an ABA accredited law school, be certified by the Commission on Character and Fitness, attend the Montana Law Seminar, and submit a qualifying MPRE and UBE score. *See* MT St. Bar Adm. Rules I, III. Because these restrictions were imposed by the State as sovereign, state-action immunity bars Plaintiffs' antitrust claim.

V. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE MONTANA CONSTITUTION.

Plaintiffs' request for declaratory and injunctive relief is made exclusively under federal law. (Doc. 14 at 1-3, 23-24.) Although there are references to the Montana Constitution in the Amended Complaint, it is unclear whether Plaintiffs are attempting to assert state constitutional claims. To the extent they are, such claims should be dismissed, first, because there is no supplemental jurisdiction.

Herman Family Revocable Tr. v. Teddy Bear, 254 F.3d 802, 805 (9th Cir. 2001) ("[S]upplemental jurisdiction may only be invoked when the district court has a hook of original jurisdiction on which to hang it.").

Additionally, state constitutional claims are improper where "adequate remedies exist under statutory or common law." *Montana v. Zapata*, No. CV-21-79-GF-BMM, 2023 U.S. Dist. LEXIS 36040, at *20 (D. Mont. Mar. 3, 2023). As Plaintiffs' own Amended Complaint attests, the relief they are seeking is based on federal law, including federal antitrust statutes. Any state constitutional claims are, at best, superfluous.

VI. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE MONTANA CONSUMER PROTECTION ACT.

Plaintiffs cite the Montana Consumer Protection Act ("MCPA"), Mont. Code Ann. § 30-14-101, *et seq*., as a basis for this Court's jurisdiction. (Doc. 14 at 4.) They make no factual allegations relative to any claim under the MCPA, yet request attorney fees under Mont. Code Ann. § 30-14-133 in their prayer for relief. (Doc. 14 at 24.) If Plaintiffs are attempting to assert a MCPA claim, they do not qualify as "consumer[s]" as defined in the Act. Mont. Code Ann. § § 30-14-102(1). Nor is the Montana Supreme Court engaged in "trade or commerce" within the meaning of the MCPA. Mont. Code Ann. § 30-14-102(8)(a).

VII. O'NEIL'S CLAIMS ARE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL.

O'Neil complains the Montana Supreme Court is unlawfully preventing him from running for Supreme Court Justice. (*See* Doc. 14.) But this is not the first time he has made that claim. He sued the Montana Supreme Court over the same restrictions before, and lost. *O'Neil v. Montana State Supreme Court*, No. 90-35814, 1991 U.S. App. LEXIS 11968 (9th Cir. 1991). The mere fact that O'Neil has added additional legal arguments to the latest iteration of his case does nothing to permit circumvention of the doctrines of preclusion.

In 1991, O'Neil and several voters filed suit in federal district court against the Montana Supreme Court, Montana Attorney General, and Montana Secretary of State under § 1983, claiming the defendants violated the plaintiffs' constitutional rights by refusing to include O'Neil's name on the ballot for Supreme Court Justice. *Id*. at * 1. These claims were later summarized by the Ninth Circuit:

> The Montana constitution requires that in order to be included on the ballot for Supreme Court Justice, a candidate must have been a member of the Montana bar for 5 years. O'Neil contends that this requirement violates his constitutional rights because he is competent to practice law and be a judge, as he has demonstrated by representing himself pro se in the past. The other plaintiffs contend that this violates their right to vote for the candidate of their choice.

Id. at *3-4. As here, O'Neil sought declaratory and injunctive relief. *Id*.

Judge Charles C. Lovell dismissed the claim, finding O'Neil "failed to state a claim for violation of his constitutional rights under section 1983 when he was denied admission to the Montana bar because he was not a graduate of an accredited law school." *Id.* at *3. The Ninth Circuit affirmed. *Id.* at *5 ("[T]he district court correctly found that Montana's regulation does not violate O'Neil's constitutional right to run for elective office[]" or violate the other plaintiffs' right to vote for a candidate of their choice). With his Amended Complaint, O'Neil attempts to relitigate a matter that was conclusively decided against him.

When the underlying judgment is a federal court decision, res judicata applies if three elements are met: (1) identity of claims; (2) final judgment on the merits; and (3) identity or privity between parties. *Id.* at 713 (citation omitted); *Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996). Here, all three are satisfied. First, dismissal for failure to state a claim constitutes a final judgment on the merits. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). Second, O'Neil and the Montana Supreme Court were parties to the prior suit, just as they are to the instant suit. Third, there is a clear identity of claims: Just as he did in the prior suit, O'Neil claims the Montana Supreme Court's implementation of the Montana Constitution's mandate that a candidate be member of the Montana bar for 5 years "violates his constitutional rights because he is competent to practice law and be a judge." *See O'Neil*, at *3-4.

O'Neil may argue that because the prior action was premised on an alleged equal rights violation, he may prosecute the current suit because it raises new theories. However, "[r]es judicata, also known as claims preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (emphasis added) (citation omitted); *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998) ("It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought."). Because O'Neil is making the same claim—that he is wrongly prevented from running for the Montana Supreme Court by the state's constitution and associated admission requirements—there is nothing to suggest he was precluded or prevented from presenting the very same legal theories in his prior suit. His claims unquestionably arise out of "the same alleged wrongs [he] unsuccessfully protested before." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003).[4]

[4] O'Neil also could have raised these theories in the 2006 action—another case in which the restrictions on his admission to the bar were squarely at issue—wherein O'Neil brought a counterclaim against the Montana Supreme Court Commission on Unauthorized Practice of Law and a third-party complaint against the State Bar. *Mont. Supreme Court Comm'n*, ¶ 1. That action, too, resulted in a final judgment on the merits against O'Neil that precludes his current suit. *Id.*, ¶ 91.

For all the same reasons, O'Neil's claims are barred by the related doctrine of collateral estoppel, or issue preclusion. *See, e.g., Paatalo v. First Am. Title Co. of Mont., Inc.*, CV-13-128-BLG-SHE-CSO, 2014 U.S. Dist. LEXIS 49274, *12-13 (D. Mont. Mar. 20, 2014) (noting if the four elements of collateral estoppel are met, "the factual or legal issue is precluded, even if it is presented under the guise of a new legal theory . . . .") (emphasis added). Coming up with new legal theories does not afford one multiple "bites at the apple." Otherwise, "the bar on successive litigation would be seriously undermined". *Id.*, at *13 (citations omitted). O'Neil's suit is barred by res judicata and collateral estoppel.

VIII. THE VOTER PLAINTIFFS HAVE NOT APPEARED PRO SE OR THROUGH COUNSEL.

The Voter Plaintiffs must be dismissed not only because they lack standing, as discussed above, but because they have not appeared pro se and are not represented by counsel. It appears O'Neil and Kirschbaum have filed the Amended Complaint on behalf of the Voter Plaintiffs, but this constitutes an unauthorized practice of law. *Johns v. Cnty of San* Diego, 114 F.3d 874, 876 (9th Cir. 1997) ("While a non-attorney may appear pro se on his own behalf, [h]e has no authority to appear as an attorney for others than himself.")

Voter Plaintiffs must sign all pleadings and motions, including the Amended Complaint, either pro se or through admitted counsel. Fed. R. Civ. P. 11(a). They have not done so, requiring dismissal of their claims. *See, e.g., Quintero v.*

Palmer, Case No. 3:13-cv-00008-MMD-VPC, 2013 U.S. Dist. LEXIS 92831, *15 (D. Nev. July 1, 2013); *Ortega v. Santomassimo*, Case No.: 22cv1795GPC(DDL), 2023 U.S. Dist. LEXIS 9750, *3 (S.D. Cal. Jan. 19, 2023) (dismissing complaint sua sponte based on non-attorney's filing of complaint on another's behalf).

IX. THE "INTEGRATED BAR OF MONTANA" MUST BE DISMISSED.

Plaintiffs have sued "The Montana Supreme Court and the State Bar of Montana, joined together as the Integrated Bar of Montana[.]" (Doc. 14.) However, the "Integrated Bar of Montana" is not an existing legal entity. It is simply a term used to describe the State Bar of Montana, which Plaintiffs have already sued.

Plaintiffs allege "[t]he State Bar of Montana was integrated by order of the Montana Supreme Court on January 23, 1975." (Doc. 14 at ¶ 6.) That order "implement[ed] Unification of the Bar of Montana; adopt[ed] a constitution and by-laws; and, provide[d] an implementation schedule." *In re Unified Bar of Mont.*, 165 Mont. 1, 1, 530 P.2d 765, 765-76 (1975). Nothing in the order suggests the Montana Supreme Court created a new or distinct legal entity called the "Integrated Bar." *See id*. Nor have Plaintiffs forwarded any factual allegations in that regard. Rather, a unified bar, also called an integrated bar, is simply a bar organization in which membership and payment of dues is required as a condition

of practicing law in a state. *Keller v. State Bar of Cal.*, 496 U.S. 1, 4-5, 110 S. Ct. 2228, 2231, 110 L.Ed.2d 1, 8 (1990).

Allowing this lawsuit to proceed against a nonexistent defendant "would be an exercise in futility[,]" *Kyocera Communs., Inc. v. ESS Techs. Int'l, Inc.*, Case No. 12-CV-01195 YGR, 2012 U.S. Dist. LEXIS 89267, *11 (N.D. Cal. June 27, 2012), and would also be unnecessarily duplicative of Plaintiffs' claims against the Montana Supreme Court and the State Bar of Montana.

CONCLUSION

For the reasons stated, the Court should dismiss Plaintiffs' Amended Complaint, with prejudice, in its entirety.

DATED: March 4, 2024

BOONE KARLBERG P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 points, is double-spaced, and contains approximately 6,493 words, excluding the parts of the brief exempted by L.R.7.1(d)(2)(E).

DATED: March 4, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on a copy of the foregoing was duly served by upon the following persons by the following means:

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