

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
First Judicial District**

A. PERSONAL INFORMATION

1. Full Name: Christopher David Abbott
a. What name do you commonly go by? Chris

2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes

3. Home Address: [REDACTED]

Phone: [REDACTED]

4. Office Address:

Montana Department of Justice
Agency Legal Services Bureau
1712 Ninth Avenue
PO Box 201440
Helena, MT 59620-1440
Phone: (406) 444-5779

5. Length of residence in Montana: 31 years

6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
Aug. 2007 - present	Helena	MT

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Capital High School	Helena, MT	1999	Diploma
University of Puget Sound	Tacoma, WA	2003	B.S., <i>magna cum laude</i> , Economics (with honors in major)
University of Washington School of Law	Seattle, WA	2006	J.D., with high honors

8. List any scholarships, awards, honors and citations that you have received:

High School: Valedictorian; Outstanding Student in Science (1999), Presidential Scholar Semi-Finalist (1999); Tandy-Radio Shack Scholar (1999); Montana Policy Debate State Championship, Second Place (1999); National Honor Society.

College: Coolidge Otis Chapman Honors Scholar; Phi Beta Kappa (honor society), Omicron Delta Epsilon (economics honor society), and Phi Kappa Phi (honor society); Outstanding Graduate in Economics (2003); elected student body Vice President (2002-2003); elected student Senator (1999-2002) and Senate Chair (2001-2002); won various merit-based scholarships and student leadership awards.

Law School: Order of the Coif (graduated in top 5% of class); Thesis Editor, Washington Law Review; Student member, William L. Dwyer Inn of Court; elected to Student Bar Association and Graduate and Professional Student Senate.

Professional: Montana Office of the State Public Defender (OPD) Public Defender of the Year (2009); OPD peer recognition award (2012); OPD Outstanding Criminal Advocate (2013); selected for participation in the Northern Rockies Capital Litigation Training Program (2011-2013).

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

I was a member of the Washington Law Review from 2004-2006.

Comment, *Stealing the Public Purse: Why Washington's Collective Bargaining Law for State Employees Violates the State Constitution*, 81 Wash. L. Rev. 159 (2006) (arguing that a statutory provision preventing the legislature from proposing amendments to certain negotiated agreements violated separation of powers principles)

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
State Bar of Montana	2007
United States Court of Appeals for the Ninth Circuit	2007
United States District Court for the District of Montana	2017

11. Indicate your present employment. (List professional partners or associates, if any).

I am employed as an assistant attorney general with the Montana Department of Justice, Agency Legal Services Bureau. The other attorneys in the bureau are John Melcher (bureau chief), Sarah Clerget, Rob Stutz, Jeffrey Doud, Kirsten Madsen, Kyle Chenoweth, Lindsey Simon, Benjamin Eckstein, and Aurora Goddard.

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Montana Department of Justice Agency Legal Services Bureau 1712 Ninth Avenue Helena, MT 59601	Assistant Attorney General	2017 – present
Office of the State Public Defender Region Four (Helena) 139 N. Last Chance Gulch Helena, MT 59601	Assistant Public Defender	2007-2009 2012-2017
	Attorney III	2013-2017
Office of the State Public Defender Major Crimes Unit 139 N. Last Chance Gulch Helena, MT 59601	Assistant Public Defender	2009-2012
Hon. James R. Browning U.S. Court of Appeals for the Ninth Circuit James R. Browning Federal Courthouse 95 Seventh Street San Francisco, CA 94103	Law Clerk	2006-2007

Pre-Admission

Student Legal Services University of Washington Hub 306, Box 352236 Seattle, WA 98195	Rule 9 Intern	2005-2006
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Washington Attorney General Transportation & Public Construction Division PO Box 40113 Olympia, WA 98504-0113	Summer Law Clerk	2005
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Washington House of Representatives Office of Program Research 245 John L. O'Brien Bldg. PO Box 40600 Olympia, WA 98504-0600	Legal Extern	2004-2005
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13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

I generally did not work during the summer of 2006 while I studied for the bar exam. I assisted a Seattle-based solo practitioner, Miles Yanick, with a few research projects, for which I received a small amount of compensation during that period.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

I represent many different state agencies on a broad array of legal matters. I frequently defend civil rights, negligence, employment, and professional malpractice cases for the Department of Administration, Risk Management and Tort Defense Division (RMTD). I have successfully represented the Department of Corrections (DOC) in employment and prisoner civil rights cases, and the Office of Public Defender (OPD) in a breach of contract action. I have also represented the Governor's office in several constitutional challenges to executive orders and directives and in an environmental case regarding the State's management of bison near Yellowstone National Park. I am also part of DOJ's trial team in its ongoing multimillion-dollar litigation over Montana's 1998 settlement with the nation's largest tobacco companies.

Because of my substantial experience with criminal law, I am often asked to assist on matters implicating that knowledge base. As such, I have successfully represented the Department of Justice, Appellate Services Bureau, in several criminal appeals. I am currently prosecuting cases for the Commissioner of Securities and Insurance as a special deputy county attorney. And in 2019, I successfully defended OPD in a professional malpractice action. Agencies have also consulted with me for my opinion on various criminal law and correctional issues.

Although most of my practice is litigation-oriented, I also advise agencies on human resources matters and assist with drafting and reviewing regulations and executive directives. Additionally, I receive appointments to serve as a hearing examiner on MAPA contested cases and state employee “step III” grievances.

In percentage terms, approximately 55% of my practice is tort defense, another 30% is comprised of miscellaneous other forms of civil litigation, 10% consists of client advice and non-litigation practice, and approximately 5% of my time is spent serving as a hearing examiner.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

Prior to 2017, criminal defense constituted more than 90% of my practice. My focus was on defense of indigent persons accused of serious and complex felony matters. I represented more than 15 clients facing deliberate or attempted homicide charges, and I was one of the few public defenders in the state qualified to litigate capital cases. Over the course of my career with OPD, I successfully represented two capital-eligible clients in cases where the State either filed or contemplated filing a notice of intent to seek the death penalty. I was the only designated “Attorney III” in my region—in that capacity, I was responsible for handling the most serious and complex matters in the office while serving as a mentor to junior attorneys. I also spent three years in OPD’s Major Crimes Unit, travelling to courts all over the state to defend clients accused of serious offenses.

Less frequently, I represented clients in civil matters for which OPD provides counsel, including juvenile delinquency petitions, involuntary civil commitments, and child abuse or neglect cases.

Although I have not lobbied, I have testified before the legislature during multiple sessions between 2011 and 2017 on behalf of the public defender attorney’s union on funding for the office and the attorney career ladder; I participated in a State Bar-facilitated forum, representing public defenders, with district court judges and various other stakeholders on amendments to the judicial substitution rule; I spoke in 2016 to the interim Task Force on State Public Defender Operations and in 2014 to the State Bar Board of Trustees, each time as an invited panelist on public defender funding issues; and I have occasionally testified as a private citizen on a handful of bills over the years.

16. If you specialize in any field of law, what is your specialty?

My legal experience is diverse, but to the extent I have any specialties, they would be in criminal law, public law, and general civil litigation.

17. Do you regularly appear in court?

Since October 2017, I have not frequently appeared in court. Prior to 2017, I appeared regularly in court.

What percentage of your appearance in the last five years was in:

Federal court	50 %
State or local courts of record	45 %
Administrative bodies	5 %

Other 0 %

18. During the last five years, what percentage of your practice has been trial practice? 90 %

19. How frequently have you appeared in court?

Since 2017, less than 1 time per month on average.
Prior to 2017, 15-20 times per month on average.

20. How frequently have you appeared at administrative hearings?

Less than 1 time per month on average.

21. What percentage of your practice involving litigation has been:

Civil	90 % (2017 – present)	10 % (2007 – 2017)
Criminal	5 % (2017 – present)	90 % (2007 – 2017)
Other	5 % (2017 – present)	0 % (2007 – 2017)

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

I have appeared in seven matters before the Montana Supreme Court within the last five years, representing the State in both civil and criminal appeals. (I have also appeared in four cases before the U.S. Court of Appeals for the Ninth Circuit during that time, and I was named on the briefs in one opposition to a certiorari petition.) The following are the five most recent cases in which I have appeared before the Supreme Court:

State ex rel. Fox v. Phillip Morris, Inc., et al., DA 20-0340

Disposition: Pending.

Subject Matter: Appeal of denial of motion to compel arbitration.

Opposing counsel: This case involves numerous defendants represented by 17 counsel of record. The principal attorneys for the Defendants are the counsel for R.J. Reynolds Tobacco Company, Charles Hansberry and Jenny Jourdonnais ((406)203-1730), Hansberry & Jourdonnais, PLLC, 3819 Stephens Ave., Ste. 200, Missoula, MT 59801; and Elli Leibenstein, Gregory Ostfeld, and Thomas Dutton ((312)456-8420), Greenberg Traurig, LLP, 77 West Wacker Dr., Ste. 3100, Chicago, IL 60601.

Nick Brooke, et al., v. State, et al., DA 19-0506

Disposition: Affirmed, 2020 MT 187

Subject matter: Appeal of grant of summary judgment for the State in breach of contract case.

Opposing Counsel: Jesse C. Kodadek and Sean Morris, Worden Thane, Worden Thane PC, 321 W. Broadway, Ste. 300, Missoula, MT 59802, (406)721-3400.

Disability Rights Mont. v. Mont. Jud. Dists. 1-22, et al., OP 20-0189

Disposition: Petition denied (Apr. 14, 2020).
Subject Matter: Original proceeding challenging district courts' and DOC's COVID-19 response.
Opposing counsel: Alex Rate, ACLU of Montana, PO Box 1968, Missoula, MT 59806, (406)224-1447, Justin Stalpes, Beck, Amsden, and Stalpes PLLC, 1946 Stadium Dr., Ste. 1, Bozeman, MT 59715, (406)586-8700.

In re R.B., DA 18-0688

Disposition: Affirmed, 2020 MT 169N (June 30, 2020)
Subject Matter: Appeal of order involuntarily committing appellant to the Montana State Hospital.
Opposing Counsel: Michael Marchesini, Office of the State Public Defender, Appellate Defender Division, PO Box 200147, Helena, MT 59620-0147, (406)444-9505.

State v. Fowler, DA 17-0511

Disposition: Affirmed, 2019 MT 185N (Aug. 6, 2019)
Subject matter: Appeal of denial of motion to suppress in a criminal prosecution.
Opposing counsel: Shannon Sweeney, Sweeney Law PLLC, PO Box 645, Anaconda, MT 59711, (406)404-6541.

23. State the number of jury trials that you have tried to conclusion in the last ten years. Approx. 15.
24. State the number of non-jury trials that you have tried in the last ten years. Approx. 10-20.
25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

State v. Biegler, ADC 2020-330 (1st Jud. Dist. Ct.)

State v. O'Reilly, ADC 2020-329 (1st Jud. Dist. Ct.)

Presiding Judge: Hon. Mike Menahan ((406)447-8208)
Trial: Dec. 7, 2020 (*Biegler*); Nov. 16, 2020 (*O'Reilly*)
Subject matter: criminal prosecution – insurance fraud
Opposing Counsel: (for *Biegler*) Kathleen Jensen, Office of the Public Defender, 139 N. Last Chance Gulch, Helena, MT 59601 ((406)444-0104); (for *O'Reilly*) Mathew Johnson (406)442-3625, Law Office of Mathew Johnson, 1085 Helena Avenue, Helena, MT 59601

G&N Enterprises, Inc. v. State, DV-2020-533 (4th Jud. Dist. Ct.)

Presiding Judge: Hon. Jason Marks ((406)258-4774)
Trial: None (voluntarily dismissed after Defendants filed 12(b)(6) motions)
Subject Matter: constitutional challenge to COVID-19 stay-at-home directive
Opposing Counsel: Ronald Bender ((406)721-3400), Worden Thane, P.C., 321 W. Broadway, Ste. 300, Missoula, MT 59802

Anderson v. Dep't of Pub. Health & Human Svcs., CV-20-77-BLG-SPW-TJC (D. Mont., Billings Div.)

Presiding Judge: Hon. Timothy J. Cavan ((406)247-7025)/Hon. Susan P. Watters ((406)247-2350)

Trial: Not yet set.
Subject matter: 42 U.S.C. § 1983 and state-law tort claims against DPHHS and a former DPHHS employee
Opposing Counsel: Ross T. Johnson ((406)761-5595), Odegaard Kovacich Snipes, P.C., 21 3rd St. N, Ste. 301, Great Falls, MT 59401; Daniel T. Jones & Gale Gustafson ((406)278-7521), Gustafson Law Offices, 400 S. Main St. #101, Conrad, MT 59425

Cottonwood Environmental Law Center v. Bernhardt, CV-18-12-BU-SEH (D. Mont., Butte Div.)

Presiding Judge: Hon. Sam E. Haddon ((406)457-4910)
Trial: N/A
Subject matter: NEPA/APA challenge to the Interagency Bison Management Plan.
Opposing Counsel: John Meyer ((406)546-0149), Cottonwood Environmental Law Center, PO Box 412, Bozeman, MT 59771

Illinois Opportunity Project v. Bullock, CV-19-56-H-CCL (D. Mont., Helena Div.)

Presiding Judge: Hon. Charles C. Lovell ((406) 441-1350)
Trial: None anticipated. Cross-motions for summary judgment pending.
Subject matter: First Amendment challenge to executive order requiring disclosure of certain political contributions by prospective state contractors
Opposing Counsel: Daniel Suhr and Brian Kelsey ((312)263-7668), Liberty Justice Center, 190 S. LaSalle St., Ste. 1500, Chicago, IL 60603; Anita Y. Milanovich ((406)589-6856), Milanovich Law, PLLC, 100 E. Broadway St., The Berkeley Room, Butte, MT 59701

Brooke v. State, CDV 2018-448 (1st Jud. Dist. Ct.)

Presiding Judge: Hon. Kathy Seeley ((406)447-8209)
Trial: N/A: Court granted summary judgment for the State.
Subject matter: breach of contract and Contracts Clause claims against OPD
Opposing Counsel: Jesse C. Kodadek and Sean Morris ((406)721-3400), Worden Thane, P.C., 321 W. Broadway, Ste. 300, Missoula, MT 59802

Ondoua v. Mont. State Univ., CV-18-5-H-BMM-JTJ (D. Mont., Great Falls Div.)

Presiding Judge: Hon. John Johnston ((406)727-0028)/Hon. Brian Morris ((406)454-7800)
Trial: approx. Nov. 2020; summary judgment motions pending.
Subject matter: Title VII and employment-related tort claims against MSU and several current and former MSU employees
Opposing Counsel: Daniel T. Jones & Gale Gustafson ((406)278-7521), Gustafson Law Offices, 400 S. Main St. #101, Conrad, MT 59425

State ex rel. Fox v. Phillip Morris USA, BDV 1997-306 (1st Jud. Dist. Ct.)

Presiding Judge: Hon. Mike McMahon ((406)447-8208)
Trial: Not yet set.
Subject matter: False Claims Act and breach-of-contract claims against various tobacco companies
Opposing counsel: This case involves numerous defendants represented by 17 counsel of record. The principal attorneys for the Defendants are the counsel for R.J. Reynolds Tobacco

Company, Charles Hansberry and Jenny Jourdonnais ((406)203-1730), Hansberry & Jourdonnais, PLLC, 3819 Stephens Ave., Ste. 200, Missoula, MT 59801; and Elli Leibenstein, Gregory Ostfeld, and Thomas Dutton ((312)456-8420), Greenberg Traurig, LLP, 77 West Wacker Dr., Ste. 3100, Chicago, IL 60601.

Mumm v. State, DV 12-068 (13th Jud. Dist. Ct.)

Presiding Judge: Hon. Mary Jane Knisely
Trial: None – vacated pending tentative settlement
Subject matter: negligence claim against DOC
Opposing Counsel: Shane Colton & Tanis Holm ((406)259-9986), Edmiston & Colton Law Firm, 310 Grand Ave., Billings, MT 59101

McClammy v. Halloran, CV-18-68-GF-BMM (D. Mont., Great Falls Div.)

Presiding Judge: Hon. Brian Morris ((406)454-7800)
Trial: N/A (State dismissed as defendant after pretrial motions briefed).
Subject matter: professional malpractice claim against OPD attorney (and various tort claims against City of Great Falls and several police officers)
Opposing Counsel: Andrew Huppert and David Lighthall ((406)552-4804), Carey Law Firm, P.C., 225 W. Broadway, Missoula, MT 59802

Langford v. Bullock, CV-93-46-H-JCL (D. Mont. Helena Div.)

Presiding Judge: Hon. Jeremiah Lynch
Trial: N/A – parties settled.
Subject matter: attorney fee dispute in long-running prisoner class action case against DOC
Opposing counsel: Amy F. Robertson ((303)757-7901), Civil Rights Education and Enforcement Center, 1245 E. Colfax St., Ste. 400, Denver, CO 80218; Eric Balaban ((202)393-4930), ACLU National Prisons Project, 915 15th St., 7th Floor, Washington, DC 20005; Alex Rate ((406)224-1447), ACLU of Montana, PO Box 9138, Missoula, MT 59806

Murphy v. State, DV-16-49 (3rd Jud. Dist. Ct.)

Presiding Judge: Hon. Ray J. Dayton ((406)563-4044)
Trial: None – parties settled.
Subject matter: employment discrimination lawsuit against DOC
Opposing counsel: Wade J. DaHood & Jeffrey W. DaHood ((406)563-3424), Knight & Dahood, 113 E. 3rd St., Anaconda, MT 59711

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

My primary experience before administrative boards or commissions is in my capacity as a hearing examiner. I have presided over contested cases involving state employee grievances for multiple agencies, the DPHHS medical marijuana program, and the Teachers' Retirement System.

I also appeared as counsel for OPI before the Board of Public Education in a teacher licensure suspension matter in 2019. The teacher agreed to surrender their license, however, before the scheduled hearing took place.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

<u>Topic</u>	<u>Group</u>	<u>Date</u>
Domestic and Sexual Violence Advocate Trial Training	MCADSV	2018
Trial Skills Training Boot Camp	OPD	2018
“Law Day” presentation to high school students	Capital High School	2018
Presentation to students, forensic psychology class	Carroll College	2014-2017
Litigating Rule 404(b)	OPD	2016
Mental Health in Criminal Cases	OPD	2016
Cross-Examining the Child Sexual Abuse Expert	OPD	2015
DNA Alphabet Soup	OPD	2014
A Step-by-Step Approach to Challenging Venue	OPD	2013
Colorado Method of Voir Dire (small group instructor)	OPD	2012
Criminal Case Law Update – <i>State v. 18th Jud. Dist. Ct.</i>	OPD	2011

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

Public Law and Federal Practice Sections, State Bar of Montana	2020
First Judicial District Bar Association	2018-2019
Montana Association of Criminal Defense Lawyers	2016-2017
National Association of Public Defense	2014-2017
National Association of Criminal Defense Lawyers	2012-2014

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

Since 2017, I have served on the Board of Directors of Helena Area Habitat for Humanity, serving on the Board’s Resource Development Committee.

From 2007 to 2017, I was an executive board member for AFSCME Council 9, Local 3448. I was Vice President of the executive board from 2009 to 2017, and the Labor Co-Chair of the Labor-Management Committee from 2012 to 2017. I participated in contract negotiations and grievance deliberations, testified before the legislature, represented the union in discussions around the judicial substitution rule, and helped establish the first comprehensive case-weighting system for Montana public defenders.

30. Have you ever run for or held public office or sought a judicial appointment? If so, provide the details.

While in college, from 2000 to 2002, I was an elected precinct committeeperson in Lewis and Clark County, and briefly served as the county central committee treasurer.

In 2015, I sought an appointment to the First Judicial District Court, to replace the Hon. Jeffrey Sherlock. The Judicial Nomination Commission nominated me to be forwarded to the Governor for his consideration.

31. Explain your philosophy of public involvement and practice of giving your time to community service.

My family is built around a strong ethic of public involvement and public service. I have spent my entire career in public service, and my wife is the current executive director of YWCA Helena and has spent her career working for charitable nonprofit organizations. We both have chosen to forego more financially lucrative employment in exchange for opportunities to directly improve our community. We are both active on boards—I have served as a Habitat for Humanity board member, volunteering on builds, assisting with setting up the organization’s fundraising strategy, and recruiting potential donors to events. I have volunteered many hours supporting my wife’s work at YWCA and other organizations. I mention my wife’s work because we have made public service a cooperative venture deeply intertwined in our marriage—in fact, our wedding vows were based on the Charter for Compassion.

Similarly, I became a lawyer precisely because it was a way to channel my particular strengths into bettering my community. I’ve put in many evenings, weekends, and long hours because I value the importance of the public service I perform with my work. I also have spoken to students about my work as a lawyer, I regularly volunteer to judge high school debate tournaments and to assist with the YMCA Youth & Government program, and this year I volunteered as a judge for the State Bar’s first Mock Trial Competition.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No.

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No.

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

No.

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

Not applicable.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

Not applicable.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

My wife's leadership role at the Helena YWCA could require me to consider recusal in a small number of adversary proceedings in which she or her staff are potential witnesses, although I do not anticipate those circumstances will arise very often.

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes.

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities?

Yes.

If not, please explain. N/A

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

No.

If yes, please explain. N/A

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No.

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

My practice heavily emphasizes legal research and writing. A large proportion of my cases involve substantial legal issues that are litigated through motions to dismiss, motions for summary judgment, or on appeal. Accordingly, I spend much of my time researching authority and writing briefs. I enjoy the challenge of condensing complex legal and factual issues into a readable and persuasive final product. And I think I am good at it: my clients have praised my legal writing abilities. Because I enjoy writing and I have my own particular writing style, I generally prefer to do my own research and write my own briefs. On some of my more recent significant cases—e.g., *Disability Rights Montana v. Mont. Jud. Dist. 1-22*—I have worked on briefs that were a collaborative effort with multiple authors.

My practice as a public defender did not carry the same emphasis on writing. However, I had a reputation among prosecutors, OPD, and the criminal defense bar for prolifically and effectively engaging in pretrial motions practice. I achieved many good results for clients through well-written briefs and an aggressive motions practice. When I left OPD, I passed on my decade of amassed briefs, and I am told that OPD attorneys continue to rely heavily on my brief bank to this day.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

As an assistant attorney general, I have drafted a wide range of documents, including regulations and directives, settlement agreements and releases of claims, subpoenas duces tecum, discovery requests and responses, pretrial statements, final pretrial orders, correspondence with opposing counsel, and mediation brochures. In the cases I have prosecuted, I have drafted criminal informations, probable

cause affidavits, search warrants, and investigative subpoenas. I also drafted legislation for a state agency prior to the 2019 session.

As a hearing examiner, I have drafted scheduling orders, findings of fact and conclusions of law, and substantive orders.

As a public defender, I drafted plea agreements, various discovery-related notices, proposed findings of fact and conclusions of law, sentencing memoranda, proposed jury instructions, and other miscellaneous documents too varied to identify concisely.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable. The writing sample should be as recent as possible.

An excerpt of the State's brief supporting its motion to dismiss in *G&N Enterprises, Inc., d/b/a Westside Lanes & Fun Center v. State of Montana, et al.*, DV-20-533 (4th Jud. Dist. Ct.) is attached. The brief is co-authored, but I wrote the excerpted portions myself.

48. What percentage of your practice for the last five years has involved research and legal writing?
80 %

49. Are you competent in the use of Westlaw and/or Lexis?

I am proficient in the use of Lexis (more recently Lexis Advance), and I used Westlaw last when I was clerking.

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

My primary interest these days is in spending as much time as possible with my wife and our precocious three-year old daughter, Parker. In the limited spare time that remains, I am an avid fan of escapist fiction (usually mystery novels) and nonfiction works about history as well as an aficionado of both modern and classic movies. I enjoy learning about as many topics as possible, getting lost in podcasts as often as I get lost down Wikipedia trails. During the too-short summer months, I hike local trails and spend as much time on the water as possible. To keep my stress manageable, I play piano when I can. I am a football (Seahawks) and baseball (Mariners) fan. I enjoy good arguments, spending time with my friends, and enjoying everything Montana has to offer.

51. Describe the jobs that you have held during your lifetime.

I grew up in Helena in a working family: my father was a nurse, and my mother held various jobs from sales to state government employment. In high school, when I wasn't involved in debate practice, I earned side money as a soccer referee. During the summers, I took a job with the then-fledgling Youth Forest Monitoring Program, a collaborative project of the Montana Science Institute and the Helena National Forest. We researched, collected, and analyzed forest health monitoring information for use by the Forest Service. As one of the first student-employees, and later the youth project director, I helped develop the monitoring protocol the program used, and I supervised other employees in the lab and the field. More than two decades later, YFMP is still going strong.

In college, I continued to work a variety of jobs. In summers, I did data entry for several state agencies and private businesses; and I worked one summer as a temporary accounting technician for the Department of Military Affairs budget office. During the academic year, I was at various times an Economics Department teaching assistant and a part-time filing clerk for the local probation office. I also received a stipend for my service as the student body Vice President, a full-time job unto itself. Finally, between college and law school, I worked at Helena's Staggering Ox sandwich shop. Since then, I've worked in the legal jobs listed above.

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I have not spent nearly as much time as I would like providing civil pro bono services, but I have chosen to spend my career foregoing a higher salary in the interest of public service. Particularly as a public defender, I typically worked more than 50-60 hours, including many evenings and weekends spent meeting with clients in jail, drafting motions outside the normal work day (which were spent mostly in court, client meetings, and telephone calls), listening to hours of body-camera footage and recorded interviews, and preparing for trials. I recouped few of the "comp time" hours I nominally earned for those efforts. Even now, I maintain a heavy caseload, and as a consequence, work many long hours drafting briefs, reviewing discovery, preparing for depositions, and investigating my cases. Both as a public defender and as an assistant attorney general, I work hard for my clients and sacrifice my leisure time to put their interests first.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

My ten years spent representing the indigent—most of whom led lives shaped by significant adversity, whether from deep poverty, childhood abuse or neglect, intergenerational trauma, substance abuse, mental illness or disability—unquestionably shaped how I view our justice system. The justice system is far from perfect, particularly for those who do not share the socioeconomic and racial profile of most lawyers and judges. But I have also learned that at its very best, the justice system upholds the rules of law and ensures timely and equal justice for everyone before it, no matter who they are, what they believe, or where they come from. When it works well, victims get justice; the injured get recompense; the accused get due process; and the innocent get vindication. But equally importantly, the justice system succeeds when it treats people fairly and with dignity and provides a process that allows people to leave the courtroom, whatever the outcome, *believing* they have been treated fairly and they have been heard.

Often, as a public defender I accomplished the most in those cases where I could do the least. For example, several years ago I represented a client charged with several serious violent offenses. The client confessed to the offenses within hours of their occurrence, lacked any apparent defenses, and because of the gravity of his crimes, faced a near-guaranteed life sentence. And indeed, the client ultimately pleaded guilty and received a life sentence, albeit with some opportunity to seek parole.

Nevertheless, I spent hours talking to him, learning that despite his crimes, he was a kind and hardworking person who had lived a fascinating life and, until recently, overcome a great deal of adversity. I consulted with experts, rallied support from his coworkers and friends, futilely attempted to secure his pretrial release, and told his story at sentencing. Importantly, my client saw that I treated him as a human being, witnessed me fight for him, and despite the result, left the courtroom at peace because he had been heard. I “won” the case, not because I helped him achieve a favorable outcome—I did not—but because I preserved his dignity.

The justice system exists to resolve disputes justly, not to insulate people from harm. Whether it’s a parenting plan, easement dispute, or criminal sentencing, judges inevitably make decisions that will frequently harm the interests of at least one party to the case. My experience with my client—and many others like him—taught me the importance that fair process—both in fact and appearance—is just as important as a good outcome.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

A good district court judge must be many things. That a good judge must possess strong research, writing, and analytical skills should go without saying. A judge, however, is no mere academic, but a public servant entrusted with the responsibility of resolving disputes fairly. As the judge I clerked for, the Hon. James R. Browning, often said, the judge’s duty is to “do justice as far as the law allows.”

To do justice, however, a judge must first be fair. The integrity of the institution requires that the public have confidence they can bring their disputes to the court and obtain fair treatment. This requires more

than merely eschewing overt favoritism. Good judges must possess sufficient self-reflection to recognize their own biases and prejudices. They must be able to apply the law faithfully even where doing so leads to an outcome contrary to the judge's personal views. They must be able to assess whether they would exercise discretion or judge credibility differently if the witnesses or parties came from a different background, race, genders, religion, socioeconomic class, or even if they simply looked differently. Good judges try not to project their own experiences and beliefs onto those before them.

To do justice, a judge must also be patient, compassionate, and courteous. A judge should place a premium on affording litigants a meaningful opportunity to be heard and to feel heard, and in ruling on procedural matters be governed by an evenhanded application of procedural rules and a preference for resolving cases on their merits. And this should be done no matter how seemingly minor the case: what might seem trivial or routine to the judge may be anything but to the parties themselves.

To do justice, judges must exhibit efficiency, consistency, and firmness. Parties deserve prompt decisions so they can move on with their lives, no matter the outcome. Judges must be good managers of their time, of their cases, and of the courtroom. And while judges—recognizing human fallibility—should be flexible when addressing procedural error, judges should also be firm and consistent in their expectations, their communication of those expectations, and the consequences of significant or repeated failures to conform to those expectations. Judges must guard against abuses of process.

Finally, to do justice, a judge must be intellectually inquisitive, open-minded, and humble. Adaptability is essential: judges are not specialists, but generalists. They must be capable of quickly developing proficiency across many different areas of the law, setting aside ego, acknowledging the limits of their knowledge, and listening and learning from others. And judges must understand that the job is not a nine-to-five proposition: they must be willing to invest the time to learn, to read, and to carefully and dispassionately consider the parties' arguments.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

Above all, judges are servants of the law, not masters over it. The judiciary is by design a passive institution. Unlike the legislative or executive branches, the judicial branch chooses neither the issues before it nor the principles by which those questions are to be resolved. Those constraints comprise the fundamental checks on the power of the judicial branch, and as such must always be given the respect they are due. This is particularly so for the district court, where *stare decisis* is not merely an important principle of law, but an inexorable command: precedent of higher courts must be obeyed.

Additionally, a court system is not fair if it is not predictable. Parties and their lawyers are entitled to rely on a foundation of settled law when charting their own course of conduct. Thus, judicial decisions should always exhibit fidelity to the letter and spirit of past precedent, whatever the judge thinks about that precedent. A judge should not apply precedents more broadly or narrowly than a faithful application permits simply because the judge sympathizes with or despises a particular litigant or their cause. A judge's decision must be capable of standing up under different but parallel circumstances, perhaps with a very different lineup of parties or positions.

That said, much of the law is not settled. Many decisions—parenting plan disputes, criminal sentencing, and a host of procedural and evidentiary decisions—are committed to the district court’s discretion. And many more questions of law cannot find clear answers in precedent where the ideal of law meets the reality of litigation. Indeed, the diversity of possible fact presentations far outstrips the ability of legislators, governors, and judges to foresee them. Where the law is not settled, the judge should try to decide the case in the manner that best comports with the purposes of the underlying law, the equities of the situation and the parties before the court, and foundational democratic values of justice, liberty, and equality.

Moreover, judges should never forget that court cases involve real people facing actual consequences. Judges are not automatons in whom facts are inputted, applied to an algorithm of precedent, and ejected in the form of a ruling. Many legal and equitable doctrines recognize that mechanistic rules should not be applied where they will work an injustice. As such, a judge should always be conscious of the impact of their decisions on the parties. Judges are human beings precisely so they can—consistent with the rule of law—temper the sometimes-harsh operation of the law with common sense and humanity. The judge’s role as public servant demands nothing less.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

I am seeking this office because I want to further a justice system that reflects the values I’ve outlined above—a system that resolves disputes efficiently and fairly, faithfully applies the law, and treats the people before it with dignity, no matter who they are. And I am seeking this office not only because I want that vision achieved, but because I think I have the experience, work ethic, skill, temperament, and judgment to achieve it.

Many people with my educational and clerkship background go on to make good private-sector salaries in big cities. I chose to come back to Montana and be a public servant. And in my career, I’ve accomplished much for the public. I left the Office of the Public Defender as one of the most experienced and respected attorneys not only in that office, but in the criminal defense bar generally. And as an assistant attorney general, I’ve been honored to be retained to represent the State in numerous important cases, including several complex tort claims, the State’s ongoing lawsuit against the nation’s largest tobacco companies; defense of various executive orders and directives from constitutional challenges; and defense of the State’s COVID-19 response in several recent cases. I remain in public service because I believe in the important work that DOJ (and before that, OPD) does to protect and serve the public.

My broad experience in both civil and criminal law will also make me able to more quickly master the steep learning curve that comes with being a new judge. I have defended those accused of crimes; parents facing removal of children; and state agencies in civil litigation. I have prosecuted criminal defendants, and I have defended the State in criminal appeals. I have had to master new areas of the law in short periods of time to represent diverse state agencies. Finally, I have experience acting as an administrative law judge, presiding over cases and hearings and ruling on motions.

I have a strong work ethic. Even now, I maintain a heavy caseload and spend many hours working on behalf of my clients while balancing that with devoting time to my family and raising a three-year-old. I do not intend to slow down if I am appointed.

As my academic and professional records demonstrate, I am also a careful, rigorous, and analytical thinker. I possess strong research and writing skills. I have pride in my work, and I would take seriously the responsibilities of a district court judge.

Finally, I think I have the values and judgment necessary to be a good judge. I spent ten years working with, talking with, and advocating for clients whose life experiences are very different from my own. I understand the importance of even routine cases to the parties involved. And, I have long experience dealing with difficult personalities and I can remain patient even when that patience is tested.

57. What items or events in your career have distinguished you or of which you are most proud?

I have been proud of all of my work serving the public, whether as a public defender or an assistant attorney general. It has been a great privilege to represent the people of the State of Montana in civil litigation, advancing the public interest and protecting taxpayer funds. I am particularly proud of my work on the tobacco litigation team, defending Montana's entitlement to money the largest tobacco companies promised to pay as part of their 1998 settlement with Montana and 45 other states. I have also been honored to be retained by agencies to defend certain aspects of the State's response to COVID-19, being on the team of attorneys who successfully defended DOC's efforts to protect COVID-19 spread in its facilities in a manner consonant with public safety; and then to lead the defense to a separate legal challenge to the stay-at-home directive.

But perhaps the greatest privilege was the decade I spent advocating for those who often lack an advocate. There were many cases where I was able to protect a client's rights, get them a second chance, or divert their case from incarceration into treatment.

One example, however, has long stood out, not only because it was a favorable verdict in a big case, but because of the reminder of the humanity behind these cases. In 2011, I co-counseled the defense of a homeless Native American man on a deliberate homicide charge in Missoula stemming from an altercation with another homeless man. At trial we demonstrated that our client—who threw only a single punch in this altercation—had no intention or expectation of seriously harming the deceased, and that what caused the death was an unforeseen and accidental chain of events. The jury acquitted our client of deliberate homicide and convicted of a single count of misdemeanor assault. What made this case stand out was being able to go over to the jail after trial and watch our client—who had spent over a year in jail awaiting trial—be released into the arms of his family. It remains one of the most emotional and affirming experiences of my career.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

Judge Reynolds, who as a judge and lawyer has long been an advocate for ordinary people in the justice system, pioneered two treatment courts in the First Judicial District: a drug treatment court and a family treatment court. Both are innovations meant to use the legal system to combat substance abuse and reunite families outside the traditional adversarial model. Judge Reynolds deserves the highest praise and appreciation for his leadership in creating these programs.

Although there is no question on this application about it, many of the people I have talked to have expressed concern that Judge Reynolds’s legacy could be undone by the next district court judge. It is vital that the work of these courts and other alternatives to incarceration continue, and if appointed I fully support their continuation and, hopefully, perhaps their expansion. I intend to spend time learning about the various treatment court models both in Montana and around the nation to identify how best to reach and help the most people and how to structure these programs to keep them effective and sustainable. I have devoted most of my career to thinking about how the criminal justice service can improve the outcomes it produces, and I hope to put that experience to use both in maintaining these important alternatives and exploring other ways within the court system to encourage rehabilitation and reduced recidivism while protecting the public and holding people accountable for their actions.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

In addition to my “technical” skills—trial advocacy, researching, writing, and reasoning—what may set me apart from other applicants are two things: (1) my experience; and (2) my perspective.

First, my experience. Unlike most attorneys, I have both civil and criminal experience. From my civil litigation background, I know how case management decisions can inadvertently drive outcomes. I have seen many different models—in administrative hearings, state trial courts, and federal district courts—for how to manage a case effectively, and I can take the best of those procedures to promote the efficient and fair disposition of cases; to address discovery issues firmly, effectively, and fairly; and to get cases to trial as quickly as possible within the limitations of the overworked First Judicial District. The First Judicial District has a unique role in reviewing the actions of administrative agencies, and I have both an understanding of the Montana Administrative Procedure Act and how state government works. Moreover, I have tried over 25 cases, most of them serious felonies, and as a Major Crimes Unit attorney I defended cases all over the State of Montana. I have even prosecuted a few cases. I have a command of both evidence law and criminal law. I understand the importance of prompt decisions and decisive action. And I am prepared to make the tough sentencing decisions that district court judges are called upon to make.

Second, my perspective. There’s a public perception that judges spend their days thinking deep thoughts about the law while ruling on the exciting hot-button political issues of the day. In reality, the daily work of the courts is dealing with people—ordinary people injured in car accidents or fired from their jobs; applications for restraining orders; neighbors engaged in property disputes; businesses engaged in contract disputes; the breakup of families; and the pain wrought by crime. These cases are neither political nor “glamorous” in the popular sense, but they are important. My broad experience and my decade working with the indigent has taught me unique lessons about understanding how the discretionary decisions of a judge may impact the lives of ordinary people and businesses. I am not seeking this position for the prestige or to be called “Your Honor”; I am seeking it because district court judges are entrusted with deciding cases essential to the community’s wellbeing. And I believe that, if appointed, I would uphold that public trust with distinction.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 1st Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.



8/24/2020

(Date)

(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Thursday, August 27, 2020.

Mail the signed original to:

**Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005**

Send the electronic copy to: mtsupremecourt@mt.gov

In a public health crisis, the State's first duty is to its citizens' lives and wellbeing. Accordingly, federal courts, the Montana Supreme Court, and statute all recognize the State's authority to make quick, tough decisions amidst uncertain and rapidly changing facts. As Chief Justice John Roberts recently explained:

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, at 1613–14 (May 29, 2020) (Roberts, C.J., concurring in the denial of certiorari) (internal alterations, quotation marks, and citations omitted). Indeed, in such crises, the State's interest in protecting public health "is at its zenith." *In re Abbott*, 954 F.3d 772, 795 (5th Cir. 2020).

COVID-19 presents no ordinary public health crisis; it is a once-in-a-century global pandemic. *See Altman v. Cty. of Santa Clara*, 2020 U.S. Dist. LEXIS 97535, at *3 (N.D. Cal. June 2, 2020) ("Experts consider this outbreak the worst public health epidemic since the influenza outbreak of 1918."). Only one week before Governor Bullock issued the Stay-at-Home Directive prompting this litigation, German Chancellor Angela Merkel declared that "since the Second World War, there has been no challenge to [the] nation that has demanded such a degree of

common and united action” as the COVID-19 pandemic.¹ So too here. More than 2.5 million Americans have been infected with COVID-19; over 125,000 have died.² Montana has fared better, but still, nearly 1,000 Montanans have been diagnosed, dozens have been hospitalized, and more than 20 have died.³

To protect Montanans, the Governor made the difficult policy choice to join many other states in directing non-essential operations to close and telling Montanans to stay home to slow COVID-19’s spread. As the State seeks to safely reopen, it must navigate between its imperatives to minimize the contagion and to safeguard Montanans’ livelihoods as much as possible. Like many states, the State has opted for a phased reopening, testing the waters before plunging in.

The State does not doubt this pandemic has caused Plaintiff Westside Lanes & Fun Center (Westside) economic pain. That, however, does not mean Westside may seize the tiller of the State’s COVID-19 response, enlist this Court in that effort, or demand a new course that better suits Westside’s pecuniary interests. Westside’s dissatisfaction with the State’s public health response does not amount to a constitutional injury.

A lawsuit is not the means to vindicate unavoidable harm incidental to the State’s crisis management efforts. And a court is not the forum to dictate the State’s COVID-19 response policy. Westside has not—and cannot—plead facts that, if true, would entitle it to relief. Accordingly, this matter should be dismissed with prejudice.

¹ DW.com, *Merkel: Coronavirus is Germany’s greatest challenge since World War II* (Mar. 18, 2020), <https://www.dw.com/en/merkel-coronavirus-is-germanys-greatest-challenge-since-world-war-ii/a-52830797>.

² Centers for Disease Control & Prevention, *Cases in the U.S.* (June 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

³ Montana-specific statistics are available at <https://covid19.mt.gov/>.

and theaters could reopen May 15, subject to strict conditions. (Exhibit F (May 8 Directive).) Then, on May 19, the Governor issued a Directive allowing Montana to progress to Phase II on June 1. (Exhibit G (Phase II Directive).) All indoor places of assembly, including bowling alleys, could reopen on that date. (*Id.*)

APPLICABLE LEGAL STANDARD

The absence of a justiciable case or controversy may be raised through a Mont. R. Civ. P. 12(b)(1) motion to dismiss for lack of jurisdiction. *See Kulko v. Davail*, 2015 MT 340, ¶¶18–20, 363 P.3d 430. A 12(b)(1) motion can be resolved on the complaint’s face—*i.e.*, whether it states facts “that, if true, would vest the court with subject matter jurisdiction,” or the Court may consider matters outside the pleadings, receive evidence, or hold an evidentiary hearing to determine whether there is jurisdiction as a factual matter. *Harrington v. Energy W., Inc.*, 2015 MT 233, ¶¶9–10, 356 P.3d 441.

Under Mont. R. Civ. P. 12(b)(6), a claim may be dismissed if it “either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim.” *Puryer v. HSBC Bank USA, N.A.*, 2018 MT 124, ¶12, 419 P.3d 105.

ARGUMENT

I. Westside has not stated a claim for violation of its equal protection or due process rights.

Westside claims the Governor’s directives violated its equal protection and due process rights. Though Westside has cast these claims as constitutional claims, its arguments are little more than disagreement with the State’s policy decisions.

During an epidemic, judicial review is confined to regulations that bear “no real or substantial relation to” the State’s interest in limiting the spread of disease or are “beyond all question, a plain, palpable invasion of rights secured by

fundamental law.” *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). These directives, economic regulations implemented pursuant to the police power, do not implicate a fundamental right. Moreover, nobody could reasonably question their “real and substantial relation” to the COVID-19 pandemic response.

As the Directives do not burden a fundamental right, they are presumed constitutional, and Westside’s burden is to negate “every conceivable basis that might support” them. *HSH, Inc. v. City of El Cajon*, 44 F. Supp. 3d 996, 1008 (S.D. Cal. 2014) (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)). Thus, Westside cannot survive this motion to dismiss unless it can “allege facts sufficient to overcome the presumption of rationality that applies to government classifications.” *Id.* (quoting *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992)). Westside cannot meet that burden. Taken as true, Westside’s factual allegations establish only that (a) it could not reopen its bowling lanes even though other businesses were allowed to remain open; and (b) Westside could implement infection control measures similar to other businesses that reopened before it. This does not overcome the presumption of rationality, let alone establish a “plain [and] palpable” violation of fundamental rights.

A. The directives are constitutional under the controlling *Jacobson v. Massachusetts* standard of review.

Courts have long recognized the importance of the State’s authority and responsibility to defend its citizens from contagion. *E.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 205 (1824) (discussing the “acknowledged power of a State, to provide for the health of its citizens” through quarantine and health regulations); *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380 (1902); *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (“Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”).

Montana is no exception. *See Guyer v. Eighth Jud. Dist. Ct.*, OP 20-0233 (Mont. June 30, 2020) (executive branch authority to limit inmate transfers during pandemic); *Ruona v. City of Billings*, 136 Mont. 554, 557-58, 323 P.2d 29, 30-31 (1958) (destruction of rabid dogs pursuant to police power); *In re Caselli*, 62 Mont. 201, 204 P. 364 (1922) (Brantley, J., in chambers) (authority to quarantine “persons affected with contagious diseases dangerous to the public health”).

Indeed, epidemics of serious diseases are so dangerous to the public welfare that “the traditional tiers of constitutional scrutiny do not apply” to temporary measures adopted during an outbreak. *Calvary Chapel v. Mills*, 2020 U.S. Dist. LEXIS 81962, at *16 (D. Me. May 9, 2020) (quoting *Cassell v. Snyders*, 2020 U.S. Dist. LEXIS 77512, at *17 (N.D. Ill. May 3, 2020)). The applicable standard is instead found in *Jacobson*.⁶ *See In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020) (holding *Jacobson* to be “the controlling Supreme Court precedent that squarely governs judicial review of rights-challenges to emergency public health measures”); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 910, 925–26 (6th Cir. 2020); *Altman v. Cty. of Santa Clara*, 2020 U.S. Dist. LEXIS 97535, at *21 (N.D. Cal. June 2, 2020) (collecting cases relying on *Jacobson* as the framework for assessing constitutionality of COVID-19 response measures). In *Jacobson*, the Court, upholding a compulsory vaccination order instituted during a smallpox outbreak, held:

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights

⁶ Due process challenges brought under the Montana Constitution are evaluated using the same rubric employed for challenges brought under federal law. *See Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶¶28–31, 15 P.3d 877.

secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Jacobson, 197 U.S. at 31 (emphasis added). The *Jacobson* framework applies regardless of the constitutional claim at issue. *Abbott*, 954 F.3d at 786; *see also Calvary Chapel*, at *16–18 (applying *Jacobson* to free exercise challenge).

Westside has alleged no facts permitting the conclusion that the directives at issue lack “real or substantial relation” to the State’s COVID-19 response efforts. As the Governor found, COVID-19 is highly contagious both through contact with contaminated surfaces and close contact with infected individuals. (Ex. D at 1); *Accord Talleywhacker, Inc. v. Cooper*, 2020 U.S. Dist. LEXIS 99905, at *17 (E.D.N.C. June 8, 2020). In consultation with public health experts, the Governor concluded that enforced social and physical distancing was necessary to limit these modes of transmission. (*Id.* at 1.) Business closures are not novel; to the contrary, they have been used during past pandemics to control disease transmission. (*Id.* at 2 (citing closures during the 1918 pandemic).)

For these very reasons, numerous courts have declined to enjoin stay-at-home and business closure measures, finding they substantially relate to fighting the COVID-19 pandemic. *E.g.*, *McCarthy v. Cuomo*, 2020 U.S. Dist. LEXIS 107195, at *10 (E.D.N.Y. June 18, 2020) (collecting cases upholding COVID-19 response measures under *Jacobson*); *Prof’l Beauty Fed’n of Cal. v. Newsom*, 2020 U.S. Dist. LEXIS 102019, at *16–19 (C.D. Cal. June 8, 2020) (closure of cosmetology businesses under a stay-at-home order); *Antietam Battlefield KOA v. Hogan*, CCB-20-1130, 2020 U.S. Dist. LEXIS 88883 (D. Md. May 22, 2020) (challenge by individuals, businesses, and religious groups to stay-at-home directive); *Best Supplement Guide, LLC v. Newsom*, 2020 U.S. Dist. LEXIS 90608, at *8–10 (E.D. Cal. May 22, 2020) (gym closure); *Benner v. Wolf*, 2020 U.S. Dist. LEXIS 89425, at *14–18 (M.D. Penn. May 21, 2020) (business owners, real estate

agents, and political candidates’ challenge to stay-at-home directive); *Givens v. Newsom*, 2020 U.S. Dist. LEXIS 81760, at *8–12 (E.D. Cal. May 8, 2020) (denial of protest permit). Nothing Westside alleges suggests it should succeed where other challenges have failed. *McCarthy*, at *10.

Nor has Westside alleged anything demonstrating “beyond question” a “plain” or “palpable” invasion of its fundamental rights. Westside has not even established any fundamental right is implicated. The only “right” allegedly invaded is the claimed denial of the right to operate a business. (Comp. ¶¶31, 35, 39.) The cited right to pursue “life’s basic necessities. . . in all lawful ways,” Mont. Const. art. II, § 3, however, does not protect businesses against regulation. Rather, this right yields to the State’s “police power to regulate the health and welfare of its citizens.” *Wiser v. State*, 2006 MT 20, ¶24, 129 P.3d 133. In *Wiser*, dentists lacked a fundamental “right to practice [their] profession free of state regulation promulgated to protect the public’s welfare.” *Wiser*, ¶24. Similarly, in *Montana Cannabis Industry Association v. State* [“*Cannabis I*”], 2012 MT 201, ¶¶20–21, 286 P.3d 1161, the Supreme Court reversed a preliminary injunction, holding again that article II, § 3 does not create a fundamental right to engage in a particular business or operate that business free of regulation. *Cannabis I*, ¶21. Westside is not the first to make this claim, nor the first to have this claim rejected. *See Henry v. DeSantis*, 2020 U.S. Dist. LEXIS 86396, at *19 (S.D. Fla. May 14, 2020); *Best Supplement*, at *16; *Prof’l Beauty Fed’n*, at *22. Shutting down businesses does not implicate a fundamental constitutional right.

B. Even under traditional due process analysis, the directives are rationally related to a legitimate government interest.

Even without the epidemic-specific *Jacobson* standard, Westside has not alleged facts that, if true, would establish a due process violation. Because the directives do not implicate a fundamental right, they are subject only to rational

basis review. *Wiser*, ¶¶19, 25. This is the “most deferential standard of review.” *Mont. Cannabis Indus. Ass’n v. State* [“*Cannabis II*”], 2016 MT 44, ¶26, 368 P.3d 1131. Under rational basis scrutiny, the regulation at issue is presumed constitutional. *Cannabis II*, ¶20. This presumption is not overcome so long as the law “is related to a legitimate governmental concern” and “the means chosen by” the Governor “to accomplish [his] objective are reasonably related to the result sought to be attained.” *Cannabis II*, ¶21. The relevant governmental interest need not be expressly stated; rather, it “may be any possible purpose of which the court can conceive.” *Cannabis II*, ¶21 (quoting *Walters v. Flathead Concrete Prods.*, 2011 MT 45, ¶28, 249 P.3d 913).

Due process does not require that the law “be in every respect logically consistent with its aims to be constitutional.” *Cannabis II*, ¶26. It is not enough to show that the Governor “could have done better” in achieving his objectives. *Cannabis II*, ¶27. Particularly in the context of economic regulation, there are “good reasons for judicial self-restraint if not judicial deference” to the executive branch, which is “simply in a better position to develop the direction of economic regulation.” *See Cannabis II*, ¶31. Due process review is thus not an opportunity to debate policy: “[E]ven if a court believes that statutes aimed at achieving the State’s interest could have been implemented ‘with greater precision,’ those statutes likely still will withstand rational basis review because ‘rational distinctions may be made with substantially less than mathematical exactitude.’” *Cannabis II*, ¶31 (quoting *Ward v. Johnson*, 2012 MT 96, ¶23, 277 P.3d 1216).

The legitimacy of the State’s objective—limiting the spread of a dangerous virus—is beyond reasonable dispute. Moreover, keeping bowling alleys and other indoor places of assembly closed is rationally related to that objective. Bowling alleys place people in contact with others in an indoor space for hours. It is a tactile sport that often involves handling shared balls and shared shoes. Additionally, the

Governor may legitimately weigh the risk of transmission against other considerations. Bowling is recreational; it is not essential to society's functioning. It is not an industry of the magnitude of the gym, casino, hotel, or restaurant industries (the latter three being crucial to the state's tourism industry). One can rationally conclude that bowling is not as intimately connected to health and fitness as pools and gyms. In weighing these interests, the State can rationally find the risk of COVID-19 transmission outweighs the advantages of opening recreational indoor places of assembly.

C. Westside has not alleged a violation of its equal protection rights.

Westside's equal protection claim—also a claim echoed by litigants all over the country—fares no better than its due process claim.

Equal protection claims involve a three-step inquiry: (1) determine whether there are similarly situated classes being treated differently; (2) identify the appropriate level of scrutiny; and (3) apply the appropriate scrutiny standard. *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶15, 420 P.3d 528.

Westside cannot clear even the first hurdle: establishing businesses allowed to reopen earlier were similarly situated. Two classes are similarly situated only if “they are equivalent in all relevant respects other than the factor constituting the alleged discrimination.” *Gazelka*, ¶16. Where a single distinguishing factor is relevant to the underlying purpose of the regulation at issue, or where several factors justify the difference in treatment, the classes are not similarly situated. *Gazelka*, ¶¶18–20. In *Cannabis II*, for example, medical marijuana patients' reliance on a substance banned by federal law distinguished them from patients relying on prescription pharmaceuticals. *Cannabis II*, ¶18. In *Powell v. State Compensation Insurance Fund*, 2000 MT 321, 15 P.3d 877, multiple differences between family-member caregivers and non-family-member caregivers warranted their different treatment under worker compensation statutes and rendered the two

classes dissimilar. *Powell*, ¶¶23–26; *see also Wilkes v. Mont. State Fund*, 2008 MT 29, ¶20, 177 P.3d 483 (two classes distinguished by actual wage loss not similarly situated because actual wage loss related to the statute’s underlying justification).

Here, numerous factors distinguish Westside from businesses allowed to reopen earlier. Westside is recreation-oriented indoor place of assembly. Such businesses inherently invite groups of people to gather together indoors and share touched objects for hours, risking COVID-19 transmission. In addition, recreation-oriented indoor businesses are distinguishable from other businesses allowed to reopen earlier: restaurants and stores—providing food, goods, and supplies; gyms and pools—encouraging aerobic exercise and fitness; barbershops and salons—contributing to personal hygiene and grooming; or the construction industry—necessary to infrastructure and economic growth. Others, like hotels, restaurants, bars, and casinos, are large industries essential to the state’s tourism industry. Whether Westside agrees with how the risks and advantages of reopening businesses in each category are balanced does not alter the fact that distinctions between these businesses abound. *See Cannabis II*, ¶31.

Even if Westside were similarly situated, there would still be no equal protection violation. Because the right to operate a business is not fundamental, rational basis review applies. *Powell*, ¶21. Westside, however, has alleged no facts that, if true, would refute every conceivable justification for the difference in classification. *HSH, Inc.*, 44 F. Supp. 3d at 1008. In addition to the different considerations attendant to bowling alleys and other businesses, the State can rationally find it unwise to reopen all higher risk businesses simultaneously, and can instead employ a “dimmer switch” strategy to monitor the effects of reopening some businesses before reopening more. *See Talleywhacker*, 2020 U.S. Dist. LEXIS 99905, at *29; *Altman*, 2020 U.S. Dist. LEXIS 97535, at *52 (rational to conclude that every additional opened business increases risk of infection).