

PRELIMINARY INJUNCTIONS AND THE 2025 MONTANA LEGISLATURE'S (MOSTLY UNSUCCESSFUL) ATTEMPT TO RESHAPE THE JUDICIARY

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I. INTRODUCTION

During the 2025 Montana Legislative Session, a group of legislators attempted to reshape the balance of power among the state branches of government. At least thirty-nine bills were introduced to change how judges are elected, reduce the courts' powers, create new courts, and increase legislative oversight and control over Montana judges and courts. This unprecedented legislative agenda regarding state courts made national news during the session, the New York Times reporting that

[n]o state [] has had the sheer volume — more than 30, by one count — or degree of urgency as Montana. . . . And to detractors such as retired judges and a bipartisan slate of current and former lawmakers, the legislative package now on the table represents an existential threat to judicial independence and the separation of powers.¹

This short essay has two goals. Its primary goal is to discuss the changes to the preliminary injunction standard from the 2025 session. Although preliminary injunctions have become a political hot potato in constitutional cases, the ever-shifting preliminary injunction standard impacts civil practitioners in all areas of law. Second, this essay catalogs the bills introduced in the last session aimed at the judiciary to begin a conversation regarding the Legislature's attempt to upend the existing power balance between the courts and the Legislature.

II. BILLS RELATING TO THE JUDICIARY

At least 40 bills involving the Montana judiciary were introduced in the 2025 Legislative Session. Out of these, 31 failed and nine passed. These bills can roughly be broken out into the following categories: (1) changing judicial elections; (2) increasing the Legislature's oversight and authority over the courts; (3) changing the standards applicable to sitting judges;

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1. David W. Chen, *'Buckle Up': In Montana, Republican Lawmakers Target the Judiciary*, N.Y. TIMES (Mar. 24, 2025), <https://perma.cc/SC9E-8NL4>.

(4) creating non-Article VII courts; and (5) changing the standards and processes in civil cases, in particular constitutional cases, challenging legislative acts. Additionally, a handful of miscellaneous bills sought to regulate the judiciary, but do not fit neatly into any of these categories. This section sets forth the bills introduced in each category and identifies those bills that were signed into law and those that were not.

A. *Bills Regarding Judicial Elections*

At least eight bills were introduced regarding judicial elections. The majority of these sought to make judicial elections partisan or allow judicial candidates to declare a party affiliation.² Senate Bill 543 and House Bill 838 sought to allow Montana Supreme Court candidates to declare a party affiliation, and House Bill 295 sought to allow all judicial candidates to declare a party affiliation.³ House Bill 751 sought to require Montana Supreme Court justices to declare a party affiliation, and Senate Bill 42 sought to require all judicial candidates to declare a party affiliation.⁴

Several bills attempted to introduce other changes to judicial elections. For example, House Bill 646 sought to replace statewide Montana Supreme Court justice races with separate voting districts for each justice's seat.⁵ House Bill 506 sought to submit a ballot initiative to voters amending the Montana Constitution to appoint, rather than elect, Montana Supreme Court justices.⁶ House Bill 39 was the only one of these eight bills signed into law, which allows political party contributions to judicial candidates.⁷

B. *Bills Regarding Legislative Oversight of the Courts*

The Legislature attempted to increase its oversight and authority over the courts in several ways. One bill, Senate Bill 21, would have given the speaker of either legislative house, together with the governor or the attorney general, the authority to veto judicial writs of mandamus directed at elected officials.⁸

2. H.R. 295, 69th Leg., Reg. Sess. (Mont. 2025); S. 543, 69th Leg., Reg. Sess. (Mont. 2025); H.R. 751, 69th Leg., Reg. Sess. (Mont. 2025); S. 42, 69th Leg., Reg. Sess. (Mont. 2025); H.R. 838, 69th Leg., Reg. Sess. (Mont. 2025). Bills discussed herein can be reviewed at legiscan.com.

3. Mont. S. 543, §§ 1–2, 4, 6–7; Mont. H.R. 838, §§ 1–3, 5, 6; Mont. H.R. 295, §§ 1–3, 6–7.

4. Mont. H.R. 751, §§ 1, 3; Mont. S. 42, §§ 1–3.

5. H.R. 646, 69th Leg., Reg. Sess. §§ 1–2, 4 (Mont. 2025). It is worth noting a proposed legislative referendum creating such districts has already been found unconstitutional. *See Reichert v. State*, 278 P.3d 455, 477–78 (Mont. 2012).

6. H.R. 506, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

7. H.R. 39, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

8. S. 21, 69th Leg., Reg. Sess. § 1(3) (Mont. 2025).

House Bill 840 would have created a “[j]udicial branch independence investigation committee” made up of nine legislators,⁹ and Senate Bill 158 proposed requiring the Judicial Standards Commission to provide reports to the Montana House of Representatives regarding investigations into judicial officers.¹⁰ Another bill, Senate Bill 40, which would have required the Montana Supreme Court to record its judicial deliberations, passed both houses but was vetoed by the Governor.¹¹ All of these bills failed.

Two bills relating to oversight of the judiciary, Senate Bill 45 (“SB 45”) and Senate Bill (“SB 48”), passed. SB 45 creates a new body entitled the Judicial Performance Evaluation Commission, made up of 11 appointees: four from members from the Legislature, with one appointment each by the president and minority leader of both the Montana House of Representatives and Senate; four members appointed by the governor, only one of whom can be a Montana attorney; and three members appointed by the Montana Supreme Court chief justice, also limited to one Montana attorney.¹² No current judge or legislator may serve on the Judicial Performance Evaluation Commission, which conducts “midterm performance evaluation[s]” of each Montana district court judge and Montana Supreme Court justice three years into the judge’s term, and a “final performance evaluation” five years into each term.¹³ The bill goes into significant detail regarding the process and metrics of such evaluations. SB 48 states that “[a] citizen has the right to make public the citizen’s complaints concerning a judicial officer at any time” to the Judicial Standards Commission, a separate and previously existing body.¹⁴

C. Bills Relating to Judicial Conduct Standards

At least five bills changing the standards that apply to judicial conduct were introduced. Unsuccessful bills included Senate Bill 15, which attempted to revise the grounds for impeachment;¹⁵ House Bill 169, which attempted to prohibit judges from acting as leaders or holding office in a

9. H.R. 840, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

10. S. 158, 69th Leg., Reg. Sess. § 2(c)(3) (Mont. 2025). House Bill 35, which did not pass, allocated the Judicial Standards Commission to the Department of Justice “for administrative purposes only.” H.R. 35, 69th Leg., Reg. Sess. § 1(c)(3) (Mont. 2025). House Bill 36, which also did not pass, prohibited a district court judge from serving as the presiding officer of the Judicial Standards Commission. H.R. 36, 69th Leg., Reg. Sess. § 1(c)(3) (Mont. 2025).

11. S. 40, 69th Leg., Reg. Sess. § 1(5) (Mont. 2025).

12. S. 45, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

13. *Id.* § 4(1).

14. S. 48, 69th Leg., Reg. Sess. § 1(a) (Mont. 2025). For statutes regarding the Judicial Standards Commission, see MONT. CODE ANN. §§ 3-1-1101 to 3-1-1125 (2023).

15. S. 15, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

political organization;¹⁶ and Senate Bill 66, which would have revised definitions relating to the judiciary to include various terms, including “open-mindedness.”¹⁷ Two bills relating to judicial conduct standards were signed into law. Senate Bill 30 prohibits a judicial officer from using the “rule of necessity” to avoid recusal,¹⁸ and Senate Bill 41 requires random selection of a judge when a substitute judge is needed.¹⁹

*D. Bills Creating Non-Article VII Courts and Stripping
Article VII Courts’ Jurisdiction*

Article VII of the Montana Constitution vests the judicial power in Montana courts, including the Montana Supreme Court, district courts, and justice courts.²⁰ Several unsuccessful bills were introduced attempting to strip these Article VII courts of jurisdiction, including bills to create non-Article VII courts. One bill, Senate Bill 52, would have created a “Court of Chancery,” staffed with judges appointed by the governor and confirmed by the Senate, to hear constitutional challenges to legislation or ballot initiatives, land permitting and zoning cases, damages claims in excess of \$80,000, breach of contract claims, and claims involving corporations.²¹ Another, Senate Bill 385, proposed a “Government Claims Court” with judges appointed by the governor and jurisdiction over all claims alleging unconstitutional state action and related claims.²²

Additionally, Senate Bill 13 would have stripped the Montana Supreme Court’s original jurisdiction over ballot review.²³ A study bill, Senate Joint Resolution 39, was proposed to study specialty courts that could focus on constitutional claims, claims involving the state, and business claims, and ultimately failed.²⁴ Related bills included Senate Bill 20, which sought to prohibit retired judges from hearing constitutional cases,²⁵ and House Bill 322, which would have reduced the number of Montana Supreme Court justices from seven to five.²⁶ None of these jurisdiction-stripping bills passed.

16. H.R. 169, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

17. S. 66, 69th Leg., Reg. Sess. § 1(7) (Mont. 2025).

18. S. 30, 69th Leg., Reg. Sess. § 1(4) (Mont. 2025).

19. S. 41, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

20. MONT. CONST. art. VII.

21. S. 52, 69th Leg., Reg. Sess. §§ 1–2, 7 (Mont. 2025).

22. S. 385, 69th Leg., Reg. Sess. §§ 1, 9 (Mont. 2025).

23. S. 13, 69th Leg., Reg. Sess. §§ 1–2 (Mont. 2025).

24. S.J. Res. 39, 69th Leg., Reg. Sess. (Mont. 2025).

25. S. 20, 69th Leg., Reg. Sess. §§ 1(3), 2(2) (Mont. 2025).

26. H.R. 322, 69th Leg., Reg. Sess. § 2 (Mont. 2025).

E. Bills Changing Applicable Standards and Processes in Civil Cases

This category of bills met the most success, with three out of seven bills signed into law. The four bills that did not pass or were vetoed include: (1) House Bill 30, which would have changed the applicable standard for constitutional challenges to legislative acts as unconstitutional “beyond a reasonable doubt;”²⁷ (2) House Bill 772, which would have required parties who file writs of mandamus to appear before the court and establish that the preliminary injunction elements are met;²⁸ (3) House Bill 715, which would have created two different standards for mandatory and prohibitory injunctions;²⁹ and (4) Senate Bill 43, which would have prohibited statewide injunctions by Montana district court judges.³⁰

Two bills that passed and will impact constitutional litigation are Senate Bill 97 (“SB 97”) and House Bill 480 (“HB 480”). SB 97 changes existing venue statutory provisions to state

[t]he proper place of trial for an action that challenges a statute or session law enacted or amended within the legislative biennium is in a county that is wholly or partially within the legislative district of the primary sponsor of the bill that enacted or amended the statute or session law.³¹

This essentially creates a new rule that moves the venue for constitutional challenges to recently enacted legislation to the primary sponsor’s district.³² HB 480 will also impact litigants in constitutional cases.³³ This bill provides a right to a jury trial for cases, including declaratory judgment actions, challenging the constitutionality or legality of a legislative act or ballot issue, where the proceeding involves the determination of an issue of fact.³⁴

These two new laws, read together, attempt to steer constitutional challenges to bills to the sponsoring legislator’s community. For example, if a plaintiff in Missoula is challenging the constitutionality of a recent statute passed during the legislative session in Helena, and the sponsoring legislator is from Plentywood representing House District 29, then the Fifteenth Judicial District Court, as opposed to the Fourth or First Judicial Districts, would be

27. H.R. 30, 69th Leg., Reg. Sess. § 1(2) (Mont. 2025).

28. H.R. 772, 69th Leg., Reg. Sess. §§ 1–2 (Mont. 2025).

29. H.R. 715, 69th Leg., Reg. Sess. §§ 1, 3 (Mont. 2025).

30. S. 43, 69th Leg., Reg. Sess. §§ 1–2 (Mont. 2025). For a useful discussion of statewide injunctions by state courts, see generally Constance Van Kley, *The Statewide Injunction: State Judicial Power and Meaningful Remedies*, 60 HARV. C.R.-C.L. L. REV. 865 (2025).

31. S. 97, 69th Leg., Reg. Sess. § 1(1) (Mont. 2025).

32. *Id.* § 5. Where a plaintiff does not file within the bill sponsor’s home district, if the bill sponsor intervenes, this bill amends the test for when a judge must transfer the case. The test now requires transfer of venue when a party files a pleading challenging the constitutionality of a recent statute, the primary bill sponsor intervenes, there is reason to believe an impartial trial cannot be had in the current judge’s district, and the convenience of witnesses and ends of justice favor transfer.

33. H.R. 480, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

34. *Id.*

the proper venue. Even if no damages are sought, the State could demand a jury in the Fifteenth Judicial District Court if any facts are in dispute. That jury would be pulled from the community that elected the bill's sponsor.

A third bill in this category that will impact litigants in all civil cases is House Bill 409 ("HB 409"), which prohibits Montana courts from applying variations of the U.S. Supreme Court's four-factor preliminary injunction test.³⁵ Given this bill's impact on all civil practitioners, it is discussed separately in Section III.

F. *Miscellaneous Bills Impacting the Judiciary*

To complete this essay's goal of cataloging judiciary bills from the 2025 Montana Legislative Session, a few additional bills should be noted. The failed bills include Senate Bill 44, which attempted to define the separation of powers across Montana government branches.³⁶ Also included is Senate Joint Resolution 2, which would have stated "the 69th Legislature disapproves" of multiple rules adopted by the Montana Supreme Court in 2024,³⁷ and Senate Bill 239, which proposed requiring judges to invite amicus and allow intervention by the governing body when interpreting subdivision regulation challenges.³⁸ Bills seeking to audit the Office of Disciplinary Counsel and the State Bar of Montana, Senate Bill 14 and House Bill 65, also failed.³⁹

One bill in this category that (perhaps unnecessarily) became law is Senate Bill 286, which clarified that "[t]he precedential value of a court decision interpreting a statute yields to subsequent legislative action on the interpreted statutory provisions."⁴⁰

III. THE PRELIMINARY INJUNCTION STANDARD UNDER HB 409

In 2025, the Legislature revisited the preliminary injunction standard for the second consecutive session. Given the importance of this standard in many types of civil actions, this section provides additional detail regarding recent changes. For background, in 2023, the Montana Legislature amended Montana Code Annotated § 27-19-201 to mirror the four-factor preliminary injunction test established by the U.S. Supreme Court in *Winter v. Natural*

35. H.R. 409, 69th Leg., Reg. Sess. § 1(4)(b) (Mont. 2025).

36. S. 44, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

37. S.J. Res. 2, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

38. S. 239, 69th Leg., Reg. Sess. §§ 1–2 (Mont. 2025).

39. S. 14, 69th Leg., Reg. Sess. (Mont. 2025); H.R. 65, 69th Leg., Reg. Sess. (Mont. 2025).

40. S. 286, 69th Leg., Reg. Sess. § 1 (Mont. 2025).

Resources Defense Council.⁴¹ The 2023 amendments to § 27-19-201 directed Montana courts to “mirror the federal preliminary injunction standard” and to “closely follow United States supreme court case law” when interpreting § 27-19-201.⁴² The four-factor *Winter* test requires a plaintiff to establish that “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”⁴³

Some federal circuits use variations of this test in which “a stronger showing of one element can offset a weaker showing of another.”⁴⁴ After *Winter*, the Ninth Circuit adopted the “serious questions” variation in which “‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.”⁴⁵ After the 2023 legislative changes to the preliminary injunction standard in Montana, it was an open question whether these sliding scale variations would apply in Montana courts. In 2024, the Montana Supreme Court answered this question in the affirmative by adopting the serious questions test in *Stensvad v. Newman Ayers Ranch, Inc.*⁴⁶ In that case, the Montana Supreme Court discussed the equitable roots of injunctive relief, the 2023 amendments to § 27-19-201, the *Winter* test, and the various sliding scale tests adopted by the federal circuits.⁴⁷ Ultimately, the Court held “the serious questions test is the most appropriate means of applying the federal preliminary injunction standard,” and provided several reasons justifying adoption of the serious questions test.⁴⁸

In response to *Stensvad*, the Legislature passed HB 409, which answered the open question with a “no.”⁴⁹ HB 409’s preamble directly references *Stensvad* and its adoption of the serious questions test, then states that “use of the serious questions test or any other sliding scale test is contrary to the legislative intent” of § 27-19-201.⁵⁰ The preamble then states that HB 409

41. 555 U.S. 7, 20 (2008). For a discussion of the 2023 preliminary injunction changes, as well as other legislative changes to judicial remedies in the 2023 Legislature, see generally Anna Conley, *Significant Remedies Changes in the 2023 Montana Legislature – An Overview*, 85 MONT. L. REV. 89, 90–91 (2024).

42. MONT. CODE ANN. § 27-19-201(4) (2023).

43. *Winter*, 555 U.S. at 20 (citations omitted).

44. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); see also *Citigroup Glob. Mkts., Inc. v. VCG Spec. Opportunities Master Fund, Ltd.*, 598 F.3d 30, 34–35 (2d Cir. 2010) (adopting the sliding scale variation of the *Winter* test).

45. *Fraihat v. U.S. Immigr. & Customs Enf’t*, 16 F.4th 613, 635 (9th Cir. 2021) (citations omitted).

46. 557 P.3d 1240, 1246 (Mont. 2024).

47. *Id.* at 1242–46.

48. *Id.* at 1246–47.

49. H.R. 409, 69th Leg., Reg. Sess. § 1(4)(b) (Mont. 2025).

50. *Id.* § 1.

expresses the Legislature's intent "that any applications for preliminary injunctions or temporary restraining orders must be based on United States Supreme Court precedent and not on 9th Circuit Court of Appeals decisions."⁵¹ HB 409 then adds that "[w]hen conducting the preliminary injunction analysis, the court shall examine the four criteria . . . independently. The court may not use a sliding scale test, the serious questions test, flexible interplay, or another federal circuit modification to the criteria."⁵²

So where does this new change leave us? Can Montana courts rely on federal precedent when considering requests for preliminary injunctions? The answer is yes—federal precedent may be analyzed by Montana courts within the *Winter* framework. While it is clear the Legislature rejected adoption of a sliding scale variation of the *Winter* test, there is a difference between relying on persuasive federal circuit precedent when making an argument using the *Winter* test and relying on circuit precedent to argue for a variation of the *Winter* test.

If the Ninth Circuit affirmed a preliminary injunction using the sliding scale variation of the *Winter* test in a case similar to one pending before a Montana state district court, that Ninth Circuit decision is likely relevant to the Montana case under the *Winter* test. For example, if the Ninth Circuit found a certain practice constituted irreparable harm, that finding would be instructive when considering the irreparable harm element of the *Winter* test in Montana. A reading of HB 409 prohibiting even the consideration of federal precedent would implicate separation of powers by allowing the Legislature to usurp the judiciary's power to interpret and apply the law to circumstances before the court.⁵³ Practitioners and Montana courts will need to determine whether a federal court's use of a *Winter* test variation significantly changes the relevance of federal precedent to a specific case.

IV. OPEN QUESTIONS AND CONCLUSIONS

Who do these bills benefit? What implications do these bills have on separation of powers and democracy? Why so many bills in one session? This short essay does not attempt to answer these questions but instead seeks to begin a necessary conversation about the genesis and implications of these bills. In the meantime, practitioners should be aware of new laws regarding venue and juries in constitutional challenges, as well as the changes to the preliminary injunction standard.

51. *Id.*

52. *Id.* § 1(4)(b).

53. See *Patchak v. Zinke*, 583 U.S. 244, 250 (2018) ("The separation of powers, among other things, prevents Congress from exercising the judicial power . . . One way that Congress can cross the line from legislative power to judicial power is by 'usurp[ing] a court's power to interpret and apply the law to the [circumstances] before it.'" (alterations in original) (citations omitted)).