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## *Elaine Mitchell v. Glacier County*: Standing in the Face of Government Accountability

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**PRECAP; Elaine Mitchell v. Glacier County: Standing in the Face of Government Accountability**

**Abbey Eckstein**

Oral argument is set for Wednesday, August 9, 2017, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana.

**I. QUESTION PRESENTED**

Under Montana Law, does Mitchell have standing against Glacier County and the State of Montana when she alleged a foreseeable injury? Is a foreseeable injury enough to constitute a concrete injury required in order to have standing?

**II. INTRODUCTION**

Appellant Elaine Mitchell, a taxpayer in Glacier County, brought suit against Glacier County for its mismanagement of finances.<sup>1</sup> Mitchell moved for partial summary judgment and class certification, and the District Court dismissed all of Mitchell's claims for lack of standing.<sup>2</sup>

On appeal, Mitchell argues that she has standing because she has a foreseeable injury in the form of an increase in her property tax.<sup>3</sup> She seeks declaratory and injunctive relief for violations of Montana law as well as private attorney general status.<sup>4</sup> Mitchell also argues that she has standing due to Article VIII Section 12 of the Montana Constitution, which requires that governmental entities have strict accountability of monies and revenue.<sup>5</sup>

Glacier County contends that Mitchell does not have a concrete injury, as she only claimed that it was "foreseeable."<sup>6</sup> Additionally, Glacier County argues that her claims are now moot because she did not file for a stay or supersedeas bond.<sup>7</sup> The State of Montana argues that Mitchell does not have standing under the Single Audit Act (SAA) because the Legislature did not intend for it to confer individual rights upon plaintiffs, and the SAA is discretionary, not mandatory, for the Department of Administration to enforce.<sup>8</sup> The State also argues that

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<sup>1</sup> Appellants' Opening Brief at 2, *Mitchell v. Glacier County*, <https://perma.cc/F9E6-BLV7> (Mont. Feb. 9, 2017) (No. DA 16-0716).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 12.

<sup>6</sup> Appellee Glacier County's Response Brief at 10, *Mitchell v. Glacier County*, <https://perma.cc/BZ73-NPCP> (Mont. Apr. 10, 2017) (No. DA 16-0716).

<sup>7</sup> *Id.* at 12.

<sup>8</sup> Appellee State of Montana's Answering Brief at 9–10, *Mitchell v. Glacier County*, <https://perma.cc/23T3-GDKB> (Mont. Apr. 10, 2017) (No. DA 16-0716).

Article VIII Section 12 of the Montana Constitution is not a self-executing clause, thus Mitchell lacks standing.<sup>9</sup>

### III. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Elaine Mitchell, an accountant and tax preparer who practices in Glacier County, paid her property taxes under protest due to the County violating budgeting and accounting standards.<sup>10</sup> This violation was discovered through a fiscal year (FY) audit of the years 2013 and 2014.<sup>11</sup> The audit, published in March 2015, covered the two past years and noted several weaknesses, imbalances, and deficiencies in Glacier County's budget.<sup>12</sup> The deficit fund balance due totaled \$752,901 for 2013 and \$1,526,925 for 2014. The report also listed the specific violations of Montana statutes.<sup>13</sup> The report showed that 29 separate County funds contained over \$5 million in deficits.<sup>14</sup> Other taxpayers in Glacier County, in addition to Mitchell, paid the entirety of their taxes under protest.<sup>15</sup> Mitchell brought her claims as a Glacier County property taxpayer and on behalf of the putative class of property taxpayers in Glacier County who paid their taxes under protest.<sup>16</sup> The total combined taxpayers' protested taxes was over \$1 million dollars, which Glacier County placed in a separate protest fund.<sup>17</sup>

Mitchell and the other plaintiffs brought six claims against Glacier County and the State: (1) a declaration stating that they can pay taxes under protest until the County complies with its statutory duties; (2) a declaration that the County is violating the "strict accountability" provision of the Montana Constitution; (3) an order requiring the State to withhold public funds under the SAA until the County complies; (4) an order that the State hold accountable County officials who have not performed their duties properly; (5) an order for a receiver to be appointed, who would ensure compliance by the County; and (6) a declaration that the County violated the Right to Know provisions of the State Constitution.<sup>18</sup> In response, Glacier County and the State alleged that the Plaintiff and putative class had no standing to bring their action.<sup>19</sup> The District Court ruled that the Plaintiffs lacked standing because they had not suffered a concrete injury to property and did not

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<sup>9</sup> *Id.* at 32–33.

<sup>10</sup> Appellants' Opening Brief, *supra* note 1, at 3.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 4–6.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 1; Appellee Glacier County's Response Brief, *supra* note 6, at 7.

<sup>16</sup> Appellants' Opening Brief, *supra* note 1, at 2.

<sup>17</sup> Appellee Glacier County's Response Brief, *supra* note 6, at 7–9.

<sup>18</sup> Appellants' Opening Brief, *supra* note 1, at 2.

<sup>19</sup> Appellee Glacier County's Response Brief, *supra* note 6, at 10; Appellee State of Montana's Answering Brief, *supra* note 8, at 10–11.

have concrete rights under the Montana Constitution and statutes to confer standing.<sup>20</sup> The Plaintiffs appealed.<sup>21</sup>

#### IV. SUMMARY OF ARGUMENTS

##### A. Appellants Mitchell and Putative Class

1. *Glacier County and the State violated their fiduciary duty to the Plaintiffs by not following the “strict accountability” clause in the Montana Constitution.*

Mitchell argues that the “strict accountability” clause in Article VIII of the Montana Constitution puts the government in the position of a trustee to taxpayers.<sup>22</sup> As a trustee, the government owes a fiduciary duty to properly manage public monies.<sup>23</sup> Article VIII Section 12 of the Montana Constitution states, “The legislature shall by law insure strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local governmental entities.”<sup>24</sup> Mitchell argues that the Legislature enacted statutes, such as the Montana Local Government Accounting and Budgeting Laws and the Local Government Budget Act, to implement the “strict accountability” clause in the Montana Constitution.<sup>25</sup>

Additionally, Mitchell argues that Glacier County and the State violated the SAA, which states that local units of government have to annually file audit reports with the Department of Administration.<sup>26</sup> Mitchell specifically points to the purpose of the SAA, listed in § 2–7–502(2)(e), which states that the SAA is supposed to “ensure that the stewardship of local government entities is conducted in a manner to preserve and protect the public trust.”<sup>27</sup> Mitchell argues that Glacier County and the State, in particular, violated their duty to preserve and protect the public trust by mismanaging the county funds.<sup>28</sup>

2. *Mitchell has met the three elements required to have a justiciable controversy.*

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<sup>20</sup> *Id.* at 5.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> Appellants’ Opening Brief, *supra* note 1, at 12.

<sup>23</sup> *Id.*

<sup>24</sup> Mont. CONST. art. VIII, § 12.

<sup>25</sup> Appellants’ Opening Brief, *supra* note 1, at 13; *see* MONT. CODE ANN. §§ 7–6–609 to 7–6–611 (2017) for the statutes in the Montana Local Government Accounting and Budgeting Laws, and MONT. CODE ANN. §§ 7–6–4001 to 7–6–4603 (2017) for the Local Government Budget Act.

<sup>26</sup> Appellants’ Opening Brief, *supra* note 1, at 13; *see* MONT. CODE ANN. §§ 2–7–501 to 2–7–522 (2017).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 12.

Mitchell argues that the District Court erred when it held she did not have a “sufficiently concrete injury for standing purposes.”<sup>29</sup> There is a three-part analysis to determine whether there is a justiciable controversy: (1) the parties must have existing and genuine rights or interests, not theoretical; (2) the controversy must not merely be a debate or argument about a purely political, administrative, philosophical, or academic conclusion, but a controversy on which the court may effectively operate judgment; and (3) the judicial determination of the controversy will have the effect of a final judgment in law or in equity upon the rights, status or legal relationships of the parties.<sup>30</sup> Mitchell argues that those three elements are met for the following reasons.

First, Mitchell argues that her interest is “existing and genuine” and is not theoretical, as she lives and pays taxes in Glacier County.<sup>31</sup> Glacier County violated laws “designed to insure strict accountability of public revenue,” thus directly impacting Mitchell as a taxpayer.<sup>32</sup> Additionally, the State did not enforce the laws that the County violated and is also at fault.<sup>33</sup> Second, Mitchell argues that this controversy is not an academic or political debate, and that the Court could operate judgment by granting declaratory and injunctive relief.<sup>34</sup> Third, the judicial determination of this controversy would have the effect of a final judgment of law.<sup>35</sup>

Mitchell argues that the clause in Article VIII Section 12 of the Montana Constitution, which states “the legislature shall by law insure strict accountability of all revenue,” is a “directive to the Legislature,” and “is non-self-executing.”<sup>36</sup> Because the Legislature enacted laws to implement “strict accountability” through the SAA and other laws listed above, this issue is justiciable; however, if the Legislature did not act, the failure to act would be a non-justiciable political question.<sup>37</sup> Mitchell cites *Columbia School District v. State*,<sup>38</sup> where the Court ruled that, once the legislature acted or “executed” a provision, courts could determine whether “that enactment fulfills the Legislature’s constitutional responsibility.” Therefore, the courts would assure that the “system enacted by the Legislature enforces, protects, and fulfills the right” that has been granted by the Constitution.<sup>39</sup> Mitchell argues that, once the Legislature implements the Constitution’s provisions, the Court

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<sup>29</sup> *Id.* at 14.

<sup>30</sup> *Id.* at 14–15 (*see* *Chipman v. Northwest Healthcare Corp.*, 288 P.3d 193, 200 (Mont. 2012)).

<sup>31</sup> Appellants’ Opening Brief, *supra* note 1, at 15.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Appellants’ Opening Brief, *supra* note 1, at 15–16.

<sup>38</sup> 109 P.3d 257, 260–61 (Mont. 2005).

<sup>39</sup> *Id.* at 16 (*quoting Columbia School District*, 109 P.3d at 261).

can find justiciable issues.<sup>40</sup> Once the Legislature implements mandates in statutes, Courts have an obligation to guard the rights of that mandate.<sup>41</sup>

3. *Mitchell has standing, as a taxpayer, to challenge government entities for fiscal mismanagement, and it is foreseeable that she will suffer additional property tax burdens, thus showing that a foreseeable injury has the same effect as a threatened injury.*

Standing concerns whether “the litigant is entitled to have the court decide the merits of the dispute.”<sup>42</sup> There are two strands to standing. First is the case or controversy requirement, where the plaintiff must “clearly allege a past, present, or threatened injury to a property or civil right.”<sup>43</sup> Additionally, the injury “must be one that would be alleviated by successfully maintaining the action.”<sup>44</sup> The second strand to standing is prudential limitations.<sup>45</sup>

a. *Mitchell has standing as a taxpayer according to Grossman, which relaxed the standing requirements for taxpayers by allowing them to question the constitutional validity of tax use.*

Mitchell argues that the Court has recognized the standing of taxpayers in prior cases, such as *Grossman v. State Dept. of Natural Resources*.<sup>46</sup> In *Grossman*, the Court stated, “We will recognize the standing of a taxpayer, without more, to question the state constitutional validity of a tax or use of tax monies” in regard to issues that directly affect the “constitutional validity of the state or its political subdivision action to collect the tax, issue bonds, or use the proceeds thereof.”<sup>47</sup> The Appellants contend that the District Court incorrectly applied strict standing requirements, whereas *Grossman* correctly relaxed the standing requirements for taxpayers, stating, “[t]he rule that a taxpayer must be directly adversely affected to bring an action contesting the validity of state bonds or the use of tax monies is not as unbendable as our pronouncements in [other sorts of standing cases].”<sup>48</sup> The Court in *Grossman* added an exception to taxpayer standing by allowing taxpayers to question the constitutional validity of taxes that directly affect the state or its political subdivision with collecting the tax.<sup>49</sup>

<sup>40</sup> Appellants’ Opening Brief, *supra* note 1, at 16.

<sup>41</sup> *Id.* at 17.

<sup>42</sup> *Heffernan v. Missoula City Council*, 255 P.3d 80, 91 (Mont. 2011).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Appellants’ Opening Brief, *supra* note 1, at 17; *Heffernan*, 255 P.3d at 91.

<sup>46</sup> *Grossman v. State Dept. of Natural Resources*, 682 P.2d 1319 (Mont. 1984).

<sup>47</sup> *Id.* 682 P.2d at 1325.

<sup>48</sup> Appellants’ Opening Brief, *supra* note 1, at 20 (see *Grossman*, 682 P.2d at 1325).

<sup>49</sup> Appellants’ Opening Brief, *supra* note 1, at 20.

b. *It is foreseeable that Mitchell will suffer an injury, which is analytically akin to a “threatened” injury.*

In order to have standing, the complaining party must allege a past, present, or threatened injury to property or civil rights, and the injury must “be one that would be alleviated by successfully maintaining the action.”<sup>50</sup> If a plaintiff alleges either a direct economic injury or is faced with criminal prosecution, the injury requirement of standing is more easily satisfied.<sup>51</sup> To show an injury for standing purposes, the injury must be a “concrete harm that is actual or imminent, not conjectural or hypothetical.”<sup>52</sup> In *Helena Parents Commission v. Lewis and Clark County Commissioners*,<sup>53</sup> the Court held that the plaintiffs had standing because they would incur additional tax burdens, and therefore had an economic injury. Mitchell contends that, similar to *Helena Parents*, she will suffer additional property tax burdens because of the County’s mismanagement of funds.<sup>54</sup>

Mitchell also notes that a threatened injury is sufficient for standing. She claims that a threatened injury is “no different than the ‘foreseeable’ injury.”<sup>55</sup> Mitchell urges that, similar to *Helena Parents*, the imposed tax burden was prospective and constituted a concrete injury.<sup>56</sup> The mismanagement of funds makes it foreseeable that Mitchell and the other Plaintiffs would suffer an economic injury at some point in the future, and that is sufficient to meet the standing requirement.<sup>57</sup>

4. *The two countervailing factors against prudential limitations to standing apply to the Appellants’ circumstances.*

Mitchell argues that the prudential limitations defined in *Hefferman* do not apply to her claims. The two prudential limitations from *Hefferman* that Mitchell is focusing on are: “a litigant may only assert her own constitutional rights or immunities,” and “the alleged injury must be distinguishable from the injury to the public, though not necessarily exclusive to the plaintiff.”<sup>58</sup> Mitchell cites *Lee v. State*,<sup>59</sup> where the Court, when faced with a standing issue about challenging a speed limit, stated, “The acts of the legislature which directly concern

<sup>50</sup> *Id.* (see *Schoof v. Nesbit*, 316 P.3d 831, 836, (Mont. 2014)).

<sup>51</sup> Appellants’ Opening Brief, *supra* note 1, at 21.

<sup>52</sup> *Hefferman*, 255 P.3d 80 at 91.

<sup>53</sup> 992 P.2d 1140, 1143 (Mont. 1996).

<sup>54</sup> Appellants’ Opening Brief, *supra* note 1, at 22.

<sup>55</sup> *Id.* at 23.

<sup>56</sup> Appellants’ Reply Brief at 10, *Mitchell v. Glacier County*, <https://perma.cc/RV6B-X44N> (Mont. May 22, 2017) (No. DA 16-0716).

<sup>57</sup> Appellant’s Opening Brief, *supra* note 1, at 23.

<sup>58</sup> *Id.* at 24 (citing *Hefferman*, 255 P.3d at 92).

<sup>59</sup> 635 P.2d 1282, 1285 (Mont. 1981).

large segments of the public, or all the public, are not thereby insulated from judicial attack.” Otherwise, if a plaintiff wished to test the constitutional validity of a statute, the “Uniform Declaratory Judgment Act would become largely useless.”<sup>60</sup> Mitchell argues that the District Court’s holding would render the Declaratory Judgment Act largely useless, and both Glacier County and the State would be insulated from judicial scrutiny.<sup>61</sup>

There are two countervailing factors that weigh against prudential limitations to standing. First is the “importance of the question to the public,” and second is “whether the statute at issue would effectively be immunized from review if the plaintiff were denied standing.”<sup>62</sup> Mitchell argues that those factors apply here. The relationship between citizens and their government is of great importance, which satisfies the first factor.<sup>63</sup> The second factor is also satisfied, as it is vital that citizens have recourse when government fails to enforce the law—especially when government officials fail to comply with a constitutional mandate.<sup>64</sup>

5. *The Private Attorney General Doctrine applies.*

Mitchell argues that the Private Attorney General Doctrine applies, as the State’s Department of Administration and its Attorney General have not enforced the laws in question, including the “strict accountability” issue.<sup>65</sup> The Court stated that the Private Attorney General Doctrine is “normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens.”<sup>66</sup> Mitchell argues that, because the State has failed to enforce the laws at issue, this Doctrine applies.<sup>67</sup>

6. *The District Court erred when it held that the “Private Right of Action” Paradigm applied to Appellants.*

The District Court held that the SAA and budgeting laws did not allow the Plaintiffs a “private right to petition for judicial relief.”<sup>68</sup> Mitchell contends that the District Court incorrectly confused federal rules with state rules of decision.<sup>69</sup> Mitchell argues that, because federal courts are courts of limited jurisdiction, federal courts cannot develop

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<sup>60</sup> *Id.*

<sup>61</sup> Appellants’ Opening Brief, *supra* note 1, at 25.

<sup>62</sup> *Id.* at 25–26.

<sup>63</sup> *Id.* at 26.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 27.

<sup>66</sup> *In re Dearborn Drainage Area*, 782 P.2d 898, 900 (Mont. 1989).

<sup>67</sup> Appellants’ Opening Brief, *supra* note 1, at 27.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 28.



substantive common law rules of decision, unless Congress otherwise directs.<sup>70</sup> Montana is a court of general jurisdiction, which Article VII Section 4 of the Montana Constitution states that the court has original jurisdiction over “all civil matter and cases at law and in equity.”<sup>71</sup> The Montana Constitution also states, “Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.”<sup>72</sup> Because Montana has general jurisdiction, Montana courts are able to “reform common law as justice requires.”<sup>73</sup> Mitchell argues that the “private right of action” paradigm is inapplicable here, as the Montana general jurisdiction applies and does not affect the status of her justiciability or standing issues.<sup>74</sup>

7. *This appeal is not moot, as the law does not require a stay or a supersedeas bond and the County improperly disbursed the protest tax fund.*

Mitchell argues that her appeal is not moot because the tax protest claim did not require a stay pending appeal. Additionally, Mitchell argues that she can challenge the County’s conduct whether she pays under protest or not, so seeking declaratory judgment would not be moot in that matter. Because Mitchell claims that the County’s deficit spending will increase her tax burden in the future, her appeal is not moot.<sup>75</sup> Furthermore, Mitchell contends that the County knew of the Plaintiff’s appeal—which was filed four days after the District Court’s order—and had no right to disburse the protest funds.<sup>76</sup> Section 15–1–402(4)(a) states that taxes that are placed in a protest fund must be retained in that fund “until the final determination of any action or suit.”<sup>77</sup> Mitchell argues that “final determination” means a final appellate decision, as that would end uncertainty.<sup>78</sup> Mitchell states that the County should “not be allowed to evade appellate review by unlawfully disbursing the funds and declaring its violations as ‘moot.’”<sup>79</sup>

### *B. Appellee Glacier County*

1. *Mitchell does not have standing because she lacks a personal stake in the outcome of the case and has not presented an actual case.*

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<sup>70</sup> *Id.* at 28–29.

<sup>71</sup> Mont. CONST. art. VII, § 4.

<sup>72</sup> Mont. CONST. art. II, § 16.

<sup>73</sup> Appellants’ Opening Brief, *supra* note 1, at 29 (quoting *Mountain West Bureau Ins. Co. v. Brewer*, 69 P.3d 652, 657 (Mont. 2003)).

<sup>74</sup> Appellants’ Opening Brief, *supra* note 1, at 30.

<sup>75</sup> Appellants’ Reply Brief, *supra* note 58, at 17.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 18.

<sup>79</sup> *Id.*

Glacier County contends that Mitchell has not alleged any personal stake, such as a personal injury to a property or civil right, in her claims.<sup>80</sup> According to *Heffernan*, a “personal stake in the outcome of the controversy at the commencement of the litigation” is required in order to have standing.<sup>81</sup> Glacier County argues that Mitchell’s allegation of a “foreseeable injury” is abstract, and is not sufficient to meet the standing requirement of having a “concrete” injury.<sup>82</sup> Glacier County argues that Mitchell has not suffered a past, present, or threatened injury.<sup>83</sup>

Glacier County contends that Mitchell has not objected to the use of tax monies or to the validity of a tax, but instead has claimed that an injury to her is foreseeable.<sup>84</sup> Glacier County agrees with the District Court, which found that Mitchell did not plead any loss of public funds, higher taxes, or reduced services.<sup>85</sup> The District Court stated that “Mitchell’s disapproval” of Glacier County’s accounting and fiscal management skills is not enough for standing.<sup>86</sup> Glacier County argues that, although there may have been mistakes in fiscal management which may be of concern to taxpayers, “generalized grievances” do not constitute a judicial controversy.<sup>87</sup>

Glacier County further argues that Mitchell does not have a concrete injury because of the manner in which she protested her taxes. According to the Montana Code Annotated, § 15–1–402(1)(a), the person protesting a property tax may contest “that portion of the property tax or fee protested.”<sup>88</sup> Additionally, § 15–1–401(1)(b)(iii) states that the protested payment must “not exceed the difference between the payment for the immediately preceding tax year and the amount owing in the tax year protested unless a different amount results from the specified grounds of protest . . . .”<sup>89</sup> Although Mitchell relied upon the “unless” portion of the statute, Mitchell did not specify what amount of tax was being protested, and for what reason other than that an injury to the taxpayers was foreseeable.<sup>90</sup>

Lastly, Glacier County argues that Mitchell is essentially requesting the Court grant injunctive relief for the County to better manage its finances.<sup>91</sup> Glacier County contends that injunctive relief is

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<sup>80</sup> Appellee Glacier County’s Response Brief, *supra* note 6, at 14.

<sup>81</sup> *Heffernan*, 255 P.3d at 90.

<sup>82</sup> Appellee Glacier County’s Response Brief, *supra* note 6, at 14 (see *Schoof*, 316 P.3d at 836).

<sup>83</sup> Appellee Glacier County’s Response Brief, *supra* note 6, at 14.

<sup>84</sup> *Id.* at 16.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 17.

<sup>87</sup> *Id.* at 18.

<sup>88</sup> MONT. CODE ANN. § 15–1–402(1)(a) (2017).

<sup>89</sup> MONT. CODE ANN. § 15–1–402(1)(b)(iii) (2017).

<sup>90</sup> Appellee Glacier County’s Response Brief, *supra* note 6, at 8.

<sup>91</sup> *Id.* at 22.

not available for protestation of taxes, and that Mitchell's cause of action "has nothing to do with protestation of taxes."<sup>92</sup> Glacier County states that the Appellants are "demanding the Glacier County officials comply with their personal wishes as taxpayers," and that "[s]uch actions are reserved for the voting booth."<sup>93</sup>

2. *Mitchell cannot point to any individual concrete injury for her other claims.*

Glacier County contends that, with regard to the Montana Local Government Accounting Laws, Local Government Budget Act, and SAA, Mitchell did not allege any concrete injury.<sup>94</sup> For the SAA, Glacier County contends that there is no actual evidence in the record that the County violated the public trust, and therefore there is no concrete injury. In response to Mitchell's claim concerning the Private Attorney General Doctrine, Glacier County states that the Doctrine does not apply against the County, as it is not a cause of action but is a claim for relief.<sup>95</sup> As for justiciability, Glacier County argues that the Plaintiffs have no standing because their alleged claims are theoretical. Glacier County contends that Mitchell does not meet the three requirements for having a justiciable controversy. Mitchell's claim of having a foreseeable injury is speculative and is not enough to have a justiciable controversy.<sup>96</sup>

3. *Mitchell's Declaratory Judgment Action is not applicable to this case, and, for the most part, injunctive relief is not available for protestation of taxes.*

Glacier County argues that Montana's Uniform Declaratory Judgments Act is not applicable because of the taxation statutes in Montana.<sup>97</sup> According to § 15-1-406 in the Montana Code Annotated, the remedy authorized for tax issues is "the exclusive method of obtaining a declaratory judgment concerning a tax authorized by the state . . . . The remedy authorized by this section supersedes the Uniform Declaratory Judgments Act established in Title 27, chapter 8."<sup>98</sup> Section 15-1-406(1) states that a taxpayer may bring a declaratory judgment action in the District Court, but for (a) "illegal or improper" use by the department, or (b) if the tax was "illegally or unlawfully imposed or exceeded the taxing authority of the entity imposing the tax."<sup>99</sup> Glacier

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 23.

<sup>94</sup> *Id.* at 24-25.

<sup>95</sup> Appellee Glacier County's Response Brief, *supra* note 6, at 25.

<sup>96</sup> *Id.* at 26-27.

<sup>97</sup> *Id.* at 28.

<sup>98</sup> MONT. CODE ANN. § 15-1-406 (2017).

<sup>99</sup> MONT. CODE ANN. § 15-1-406(1) (2017).

County argues that the “**only** reason you can protest taxes to a County” is if the tax was illegally or unlawfully imposed, or if it exceeded the County’s taxing authority.<sup>100</sup> Glacier County states that Mitchell did not allege illegal or unlawful tax usage, and that she merely wanted Glacier County to do “a better job of governance.”<sup>101</sup>

Glacier County believes that Mitchell is essentially asking for injunctive relief.<sup>102</sup> However, under § 15–1–405(1), a court must not grant an injunction to restrain the collection of any tax except “where the tax or the part thereof sought to be enjoined is illegal or not authorized by law.”<sup>103</sup> Glacier County argues that Mitchell did not raise a protestation of taxes claim, and that injunctive relief, as well as declaratory judgement, is not an available remedy.

4. *Because Mitchell did not file for a stay, the case is moot.*

Glacier County argues that, even if Mitchell’s claims were ripe when they were made, her claims are now moot because she did not file for a stay or supersedeas bond. According to *Reichert v. State, ex. rel., McCulloch*,<sup>104</sup> ripeness examines whether a non-existing injury will become an injury, or is too remote to support present adjudication; whereas mootness, on the other hand, asks if “an injury that has happened is too far beyond a useful remedy.” The personal interest requirement of standing, which occurs at the commencement of litigation, must continue throughout the case.<sup>105</sup>

Glacier County argues that Mitchell’s claims became moot because she did not file for a stay or supersedeas bond, according to Montana Rules of Appellate Procedure, Rule 22.<sup>106</sup> Glacier County contends that, even though it is not required, under Rule 22(1)(a)(i) Mitchell needed to file a motion to stay the District Court’s *Order*, or needed to suspend its *Order* pending appeal under Rule 22(1)(a)(iii). Because Mitchell did neither, Glacier County distributed the tax dollars held in the protest tax fund.<sup>107</sup> Although it is not required to file for a stay, a party that does not seek a stay runs the risk of its appeal becoming moot.<sup>108</sup> Glacier County contends that is the case for Mitchell. Additionally, § 15–1–402(4)(a) requires that protested taxes be put in the tax protest fund until there is a final determination of any suit. Glacier

<sup>100</sup> Appellee Glacier County’s Response Brief, *supra* note 6, at 29 (emphasis in original).

<sup>101</sup> *Id.* at 30.

<sup>102</sup> *Id.* at 30.

<sup>103</sup> MONT. CODE ANN. § 15–1–405(1) (2017).

<sup>104</sup> 278 P.3d 455, 472 (Mont. 2012).

<sup>105</sup> Appellant Glacier County’s Response Brief, *supra* note 6, at 32 (see *Greater Missoula Area Fedn. of Early Childhood Educators v. Childstart, Inc.*, 219 P.3d 888, 889 (Mont. 2009)).

<sup>106</sup> Appellant Glacier County’s Response Brief, *supra* note 6, at 32.

<sup>107</sup> *Id.* at 34.

<sup>108</sup> *Id.* at 36 (see *Kennedy v. Dawson*, 989 P.2d 390, 395 (Mont. 1999)).

County argues that the District Court's decision was a final determination in this current suit.<sup>109</sup>

*C. Appellee State of Montana*

*1. Mitchell lacks standing to sue the State under the SAA and Article VIII.*

*a. The Legislature, after enacting the SAA, did not intend to confer individual rights sufficient enough to provide Mitchell standing.*

The State contends that the SAA determines whether Mitchell has standing to sue the State for failing to enforce the law. Mitchell must allege a concrete injury to a legally protected interest established by the SAA, like a property or civil right.<sup>110</sup> According to *Schoof*, standing depends on whether the constitutional or statutory provision “can be understood as granting persons in the plaintiff’s position a right to judicial relief.”<sup>111</sup> The State contends that if a statute does not provide any individual rights “susceptible to injury or amenable to judicial relief,” then there is no standing to sue.<sup>112</sup>

The State also argues that Montana’s constitutional “case or controversy” requirement aligns with the case or controversy requirements set forth in Article III of the United States Constitution.<sup>113</sup> Article III of the United States Constitution states an actual or threatened injury may exist through statutes creating legal rights, which, when invaded, would create standing.<sup>114</sup> The State argues that the District Court correctly held that there were no provisions within the SAA to establish individual civil rights.<sup>115</sup>

Furthermore, the State contends that the SAA is discretionary and does not grant individual rights to Mitchell. The State points to the language in certain sections of the Montana Code Annotated, such as § 2–7–517(1), which states that the Department “may issue an order stopping payment of any state financial assistance.”<sup>116</sup> The State also cites § 2–7–503(5), which “allows, but does not require,” the Department to audit or review local government entities.<sup>117</sup> The State believes that the decision to withhold financial assistance is determined “in accordance

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<sup>109</sup> Appellee Glacier County’s Response Brief, *supra* note 6, at 36.

<sup>110</sup> Appellee State of Montana’s Answering Brief, *supra* note 8, at 16.

<sup>111</sup> *Id.* at 17 (citing *Schoof*, 316 P.3d at 837).

<sup>112</sup> Appellee State of Montana’s Answering Brief, *supra* note 8, at 17.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 20.

<sup>117</sup> *Id.* at 21.

with rules adopted by the department,” according to § 2–7–515(3).<sup>118</sup> From there, the Department has the discretion to request the withholding of financial assistance. The State argues that the language of the rules is permissive; therefore, enforcement of the rules is not mandatory.<sup>119</sup>

*b. The SAA does not provide a basis for Mitchell to bring a private action against the State.*

The State argues that the SAA does not provide any private right of action or citizen enforcement mechanism, and that only the Department has regulatory and enforcement provisions.<sup>120</sup> The State distinguishes this situation from *Wombold v. Associates Financial Services Company of Montana, Inc.*,<sup>121</sup> where the legislature granted certain rights to borrowers regarding the structure of their loans. In *Wombold*, the Court held that the legislative intent was to protect the borrowers, which allowed an implied private right of action.<sup>122</sup> In comparison, the State argues that the SAA does not provide any “beneficial or remedial provisions aimed at a certain class of citizens,” and the SAA is enforced solely by the State.<sup>123</sup> Additionally, the SAA does not provide attorney fees by a prevailing party, whereas in *Wombold* the Consumer Loan Act provided attorney fees.<sup>124</sup> These differences illustrate that the SAA does not give Mitchell a private right of action.

*c. Mitchell does not have standing under Article VIII Section 12 of the Montana Constitution because it is not a self-executing clause.*

The State contends that Mitchell is not challenging the constitutionality of the SAA under Article VIII Section 12 of the Montana Constitution. Instead, Mitchell argues that the State breached its duties directly under the SAA and the duties owed under Article VIII.<sup>125</sup> The State agrees with the District Court that Article VIII Section 12 does not “grant an individual the right to be free of municipal fiscal mismanagement.”<sup>126</sup> The State argues that Article VIII Section 12 does not grant Mitchell an individual right to strict accountability of government monies; instead, the Legislature intended it to protect the

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<sup>118</sup> Appellee State of Montana’s Answering Brief, *supra* note 8, at 21.

<sup>119</sup> *Id.* at 22.

<sup>120</sup> *Id.* at 25.

<sup>121</sup> 104 P.3d 1080, 1085 (Mont. 2004).

<sup>122</sup> *Id.* 104 P.3d at 1086.

<sup>123</sup> Appellee State of Montana’s Answering Brief, *supra* note 8, at 26.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 33.

<sup>126</sup> *Id.* at 34.

public by adopting the proper statutes. Mitchell did not challenge whether the SAA fulfills the “strict accountability” requirements of Article VIII Section 12, and therefore does not have standing against the State.<sup>127</sup>

2. *Mitchell does not have standing with either the Private Attorney General Doctrine or the Declaratory Judgment Act.*

The State argues that the Private Attorney General Doctrine does not confer standing because it is not a cause of action and does not “create a private right of action where none exists.”<sup>128</sup> Additionally, the State contends that Mitchell does not have standing under the Declaratory Judgment Act because it is not a “freestanding source of standing” for a plaintiff who does not show an injury or threatened injury to himself through the act of a public official.<sup>129</sup> The State argues that the Declaratory Judgment Act is about declaring rights, and Mitchell does not have standing because the statutes in question do not confer any rights capable of being taken away.<sup>130</sup> The State contends that “Declaratory claims cannot bootstrap or manufacture standing if no individual rights are at issue in the statute that underlies the claims.”<sup>131</sup> Because the SAA does not confer to Mitchell’s rights capable of being taken away, their declaratory judgment claims are not judicially cognizable.<sup>132</sup>

3. *The Local Government Accounting Act, the Local Government Budget Act, and the Debt Management Act do not impose any duties on the State.*

The State contends that the Local Government Accounting Act, § 7-6-612(2)(a), applies to the County, as cash reports are made to the County’s government body. The State alleges that there is no enforcement role for the State or Department in this regard. Additionally, the only role the state has in the Local Government Budget Act is that it will act as a public repository for local government budgets. There are no duties imposed on the State under the Debt Management Act, § 7-7-2101, which instead concern the county.<sup>133</sup>

4. *Mitchell cannot seek to compel discretionary acts because the SAA provides discretionary enforcement powers.*

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 35.

<sup>129</sup> Appellee State of Montana’s Answering Brief, *supra* note 8, at 35.

<sup>130</sup> *Id.* at 35–36.

<sup>131</sup> *Id.* at 36.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 37.

Lastly, the State argues that Mitchell cannot seek a writ of mandate to compel the State to enforce the SAA because the SAA does not require the Department to withhold financial assistance to local governmental entities that do not comply with the law. The Department has discretion, under the SAA, to decide whether or not to penalize local government entities, and therefore Mitchell cannot seek a writ of mandate.<sup>134</sup>

## V. ANALYSIS

This case hinges upon whether Mitchell has a concrete injury to constitute standing. If the Court holds that this case is like *Helena Parents*, *Columbia Falls*, and *Grossman*, the case could be remanded back to the District Court to litigate the other claims. Assuming Glacier County mismanaged its funds, the Court will focus on two primary questions: whether Mitchell's claim of a foreseeable injury is enough to grant her standing, and whether Mitchell raises the proper claims in order to have standing.

If the Court follows the precedent set in *Helena Parents* and finds that Mitchell's foreseeable injury is enough to confer standing, the strict standing requirements will be less restrictive for bringing claims against government fiscal mismanagement. The standing requirements for injury would be interpreted more broadly, as the Court stated in *Helena Parents*. Similar to *Helena Parents*, there would be standing for taxpayers in Glacier County with a foreseeable injury incurred by future property tax increases. This means that Mitchell would have a concrete injury by having a threatened injury in the future. On the other hand, if the Court decides that a foreseeable injury in the future is not concrete enough to confer standing, Glacier County's analysis that Mitchell's claims are too theoretical may be taken into consideration, requiring that taxpayers have to suffer an injury either to their rights or property directly before bringing a claim.

If the Court follows the precedent established in *Grossman* and holds that Mitchell has standing, then *Grossman* would allow the Court to have more relaxed standards towards taxpayers. *Grossman* would broaden standing to include claims applying to statutory violations. Conversely, the Court may hold that *Grossman* is inapplicable to Mitchell's claims if it finds she did not challenge the constitutional validity of the County taxes or argue the constitutionality of the statutes in question.

As a matter of policy, it appears the Legislative intent of the SAA was to ensure that governmental entities are held accountable. § 2–

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<sup>134</sup> *Id.* at 38.



7–502(2)(e) in the Montana Code Annotated explicitly states that the purpose of the SAA is to “ensure that the stewardship of local government entities is conducted in a manner to preserve and protect the public trust.”<sup>135</sup> If the Court holds that Mitchell has no standing with her claims involving the SAA, then the State’s interpretation—that the SAA does not give people individual rights to challenge the accountability of government and therefore have no standing—gives citizens little recourse to hold government officials responsible for their actions.

If the Court finds that Mitchell has standing and the case is remanded, the District Court will have to decide if Glacier County’s audits were in compliance with the SAA. Furthermore, the District court would likely have to clarify the SAA regarding issues such as whether it is mandatory or discretionary for the Department of Administration to enforce certain laws. Additionally, questions about whether the SAA grants individual rights to citizens concerning tax issues will need to be addressed, as well as the Legislative intent of the SAA regarding how much power the SAA has to ensure laws are enforced.

Ultimately, the Court will need to decide whether the taxpayers have standing to hold government entities accountable for their fiscal responsibility to have a balanced budget. The two countervailing factors to prudential limitations for standing<sup>136</sup> seem to directly apply to this case, as potential increased property tax burdens are of great importance to the people residing in Glacier County. Additionally, if the Court finds that Mitchell and the putative class do not have standing, then the statutes in question may be immunized from review. However, if the Court decides that Mitchell does not have a concrete injury and has no claims that can be remanded to the District Court, then the many questions about Glacier County’s budgeting, the State’s role in enforcing fiscal mismanagement, and the potential constitutional violation will be unanswered.

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<sup>135</sup> MONT. CODE ANN. § 2–7–502(2) (2017).

<sup>136</sup> Appellants’ Opening Brief, *supra* note 1, at 25–26.