IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0150

STATE OF MONTANA,

Petitioner and Appellee,

-vs-

PAMELA JO POLEJEWSKI,

Respondent and Appellant.

APPELLEE'S RESPONSE BRIEF

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STATEMENT OF THE ISSUES

Appellee Cascade County (hereinafter "County"), through the State of Montana, provides the following alternative statement of issues pursuant to M.R.App.P. 12(2). Appellant Pam Polejewski ("Polejewski") has described what appear to be sixteen individual issues on appeal, many of which overlap or are incoherent. *See* Appellant's Br. at 4-6.

1. Whether Polejewski has met her burden to prove that Montana's Animal Welfare Statute is unconstitutionally[1] vague?
2. Whether Polejewski has met her burden to prove that Montana's Animal Welfare Statute violates the double jeopardy provisions of the Montana and Federal Constitutions.
3. Whether Polejewski has met her burden to prove that Montana's Animal Welfare Statute and/or the May 26, 2020, evidentiary hearing violated her right to free speech under the Montana and Federal Constitutions?
4. Whether Polejewski waived any challenges to the May 26, 2020, hearing alleging illegal searches or seizures or violation of the privilege against self-

[1] The County maintains that Polejewski never complied with M.R.App.P. 27 regarding notice of her constitutional challenge to the Montana Attorney General. Because this Court indicated that it will take the County's Motion to Strike under consideration upon completion of the parties' briefing, the County stands on its prior argument regarding M.R.App.P. 27.

incrimination by failing to make any objections on these bases to the District Court?

STATEMENT OF THE CASE

This is Polejewski's **second** appeal arising from a civil animal welfare petition ("the Petition") that the State of Montana, through Cascade County, filed against Polejewski on May 18, 2020, under § 27-1-434, MCA ("Animal Welfare Statute"). *See State v. Polejewski*, 2020 MT 287N, ¶1, 402 Mont. 427, 474 P.3d 1289 ("*Polejewski I*").[2] In an effort to avoid unnecessary duplication, the County directs the Court to the prior briefing in that appeal, which considered the **same** constitutional arguments at issue here and recounted relevant procedural and legislative background. *See, e.g.*, Appellee Br. (August 31, 2020); Br. Amicus Curiae Animal Legal Defense Fund (August 31, 2020); *Amicus Curiae* Br. State Bar of Montana Animal Law Section (August 31, 2020) in *Polejewski I* (DA 20-0306). The County fully adopts and incorporates herein the prior summaries and arguments by the State and *amici* in *Polejewski I*.

Polejewski I considered the District Court's June 5, 2020, order requiring Polejewski to post a $31,019.60 bond each month to cover Cascade County's costs

[2] The Petition was originally filed in the Eighth Judicial District Court under cause number BDV-20-276. Polejewski simultaneously filed a civil complaint against Cascade County in the Eighth Judicial District Court under cause number ADV-20-274. D.C. Doc. ("Dkt.") at 1. The cases were consolidated under ADV-20-274. Dkt. 9 at 1. Polejewski's separate civil claims against Cascade County are awaiting adjudication and are **not** on appeal here.

for caring for 172 animals seized from her property "or face forfeiture of the animals pursuant to § 27-1-434, MCA." *Polejewski I*, ¶2.

While Polejewski was represented by counsel in both the District Court and Supreme Court proceedings relevant to *Polejewski I*, Polejewski elected not to raise factual, evidentiary, privilege, or procedural issues specific to the May 26, 2020, hearing or the June 5, 2020, Order in her first appeal. *See* Opening Br. Challenging the Constitutionality of § 27-1-434 (August 10, 2020) in *Polejewski I* (DA 20-0306). Polejewski instead only raised vagueness and double jeopardy claims that were not first raised at the District Court. *See Polejewski I*, ¶¶2, 4. This Court declined to address Polejewski's constitutional arguments first raised on appeal and affirmed the District Court's June 5, 2020, Order. *Polejewski I*, ¶¶5-6.

Polejewski subsequently sought "reconsideration" by the District Court of, among other things, the constitutional arguments that this Court declined to hear in *Polejewski I*. *See* Dkt. 15 & 17. Polejewski's District Court filings in support of her "reconsideration" request of her constitutional arguments most clearly focused on the vagueness and double jeopardy arguments that she advanced before this Court in *Polejewski I*. Dkt. 15 at 4 (arguing § 27-1-434, MCA, is "vague and overly broad" and "constitutes double jeopardy."); Dkt. 17 at 13-22 (incorporating prior appellant brief from *Polejewski I*, which raised vagueness and double jeopardy arguments). The District Court held a hearing on Polejewski's "reconsideration" motions, and

Polejewski's related request for an injunction, on February 28, 2021. Dkt. 28; *see also generally* Feb. 18, 2021, Tr.

The District Court subsequently issued a March 26, 2021, Findings of Fact, Conclusions of Law, and Order. Dkt. 31 (hereinafter "the March 26, 2021, Order"). The March 26, 2021, Order considered constitutional arguments regarding double jeopardy, vagueness, and free speech. Dkt. 31 at 4, ¶15. The March 26, 2021, Order denied Polejewski's constitutional arguments, concluding with regards to the double jeopardy argument that the bond was akin to civil restitution with the possibility of reimbursement, not a criminal punishment; with regards to the vagueness argument that the statute ensures proceedings are based upon the testimony of experts; and with regards to the free speech argument that Polejewski "has been heard at every juncture." *Id.* at 5-7. The March 26, 2021, Order also determined that Polejewski's attempt to seek "reconsideration" of the District Court's June 5, 2020, order was barred by *res judicata* and that, after the Supreme Court's affirmation of this order in *Polejewski I*, the County validly exercised its authority to forfeit and dispose of the seized animals, rendering the request for an injunction moot. *Id.* at 5. Polejewski appeals from the March 26, 2021, Order. *See* Dkt. 32.

STATEMENT OF THE FACTS[3]

I. *POLEJEWSKI I.*

Polejewski was represented by counsel at the May 26, 2020, hearing but did not present either witness testimony or exhibits, while the County presented a range of witnesses and exhibits. Dkt. 9 at 2; *see also* May 26, 2020, Tr. (excerpts attached at Appendix 1 ("Appx.")) at 2:4-16 (generally showing seven witnesses offered by the County), 24:19-23, 25:25-26:12, 27:5-9, 48:22-49:2, 50:8-12, 75:2-75:8, 85:17-21, 89:14-18, 90:2-6, 96:23-97:19 (Polejewski declining to object to introduction of exhibits). Polejewski, through counsel, declined to call **any** witnesses or introduce **any** evidence at the May 26, 2020, evidentiary hearing, despite being afforded the opportunity to do so. *Id.* at 2:4-16 (generally showing no witnesses called by Polejewski), 107:20-22. Polejewski's argument at the May 26, 2020, evidentiary hearing centered upon a request that a portion of the animals be returned to Polejewski after Polejewski had been afforded a week to improve the conditions of her property. *Id.* at 110:7-25. Polejewski did not raise **any** constitutional arguments at the May 26, 2020, hearing, whether as applied or facial, regarding vagueness, double jeopardy, illegal searches or seizures, free speech, takings, or the privilege against self-incrimination. *See generally*, May 26, 2020, Tr.

[3] The County also directs the Supreme Court to the Appellee's Statement of Facts in *Polejewski I*.

The District Court issued its oral findings and conclusions at the end of the May 26, 2020, evidentiary hearing. *Id.* at 111:1-115:8. A subsequent June 5, 2020, order followed. Dkt. 9. The June 5, 2020, Order made several findings of fact and conclusions of law related to the County's Petition. For example, it held that an initial search of the property was conducted because Cascade County Sheriff's Office ("CCSO") deputies responded to a call regarding a structure fire on Polejewski's property May 6, 2020, and observed a range of animals in dilapidated conditions while responding to the fire. *Id.* at 2-6, ¶¶8-15. The Order then found that a search warrant was obtained on May 7, 2020, whereafter a CCSO deputy and a veterinarian examined the 172 animals at Polejewski's property and found animals to be in various states of neglect. *Id.* at 7-8, ¶¶17-23. The June 5, 2020, Order also held that "[t]here is no evidence" that Polejewski could care for the 172 animals and that the uncontested 30-day cost of $31,019.60 for the care of the 172 animals was "reasonable and likely understated." *Id.* at 8-9, ¶¶26-31. The District Court found the evidence presented at the hearing to be "compelling and strong with many of the animals in extraordinarily poor health." *Id.* at 8, ¶25.

Based upon these findings, among others, the District Court concluded that "[b]y a preponderance of the evidence, the animals were subjected to cruelty as defined under § 45-8-211, MCA, and therefore cannot be released to Respondent," that there was no reasonable basis for the court to conclude that Polejewski could

provide the animals' needed care, that the animals "shall be held and cared for by the County pending disposition of the criminal proceeding, under § 27-1-434, MCA," and that a renewable bond in the amount of $31,019.60 reflected "the reasonable expenses expected to be incurred in caring for the animals for a period of 30 days as provided for in § 27-1-434(6)(a), MCA." Dkt. 9 at 10, ¶3. The court directed that if Polejewski failed to post the bond within five days of the payment dates, ownership of the animals would be forfeited to the County. *Id.* at 10, ¶6.

Polejewski's appeal in *Polejewski I* specifically concerned the May 26, 2020, evidentiary hearing and June 5, 2020, order. *Polejewski I*, ¶2. However, Polejewski's appellate brief in *Polejewski I*—drafted by appellate counsel that Polejewski retained—did not raise **any** procedural, evidentiary, or factual issues regarding the May 26, 2020, evidentiary hearing or the June 5, 2020, order. *See generally* Opening Br. Challenging Constitutionality of § 27-1-434 (August 10, 2020) in *Polejewski I* (DA 20-0306). Because Polejewski's appeal failed to raise any properly preserved issues, this Court affirmed the District Court's June 5, 2020, order. *Polejewski I*, ¶¶2-6. The *Polejewski I* opinion indicates that Michael Klinkhammer appeared as counsel of record for Polejewski and that this Court's opinion was distributed to Polejewski, through counsel, on November 11, 2020. *See Polejewski 1* at 1.

II. PROCEEDINGS DURING THE APPEAL AND FOLLOWING REMITTITUR.

Polejewski failed to deposit the renewable bond within the ordered time, instead choosing to file a Notice of Appeal on June 1, 2020. *See* Dkt. 10; *see also* Notice of Appeal (June 1, 2020) in *Polejewski I* (DA 20-0306). The County filed a June 10, 2020, notice with the District Court regarding the failure and requesting forfeiture pursuant to a detailed plan of disposal, as required by § 27-1-434(6)(e), MCA. Dkt. 10. The District Court ordered forfeiture of the animals to the County on June 11, 2020, and approved the County's plans. Dkt. 11. This Court stayed forfeiture and disposal on June 11, 2020. *See* Order (June 11, 2020) in *Polejewski I* (DA 20-0306). The County did not object to a stay pending resolution of the constitutional challenges. *See* Appellee's Notice Re: Stay (June 25, 2020) in *Polejewski I* (DA 20-0306).

Resolution of *Polejewski I* necessarily extinguished the stay ordered during the pendency of that appeal. The County thereafter exercised the discretion over and ownership of the animals that the District Court granted to it and disposed of the seized animals pursuant to the provided plan, primarily through adoption. Dkt. 20 at 10; *see also* Dkt. 10, Exhibit A; Dkt. 11.

One day after remittitur was filed, Polejewski filed what she termed a "Motion for Reconsideration Reestablishment of Stay of Judgment Pending Appeals Rule 62

MRCivP" on December 4, 2020, in the District Court.[4] Dkt. 15. This "Motion for Reconsideration" initially requested "reconsideration" of the June 5, 2020, order, despite *Polejewski I* affirming that order. Dkt. 15 at 1. In support, the "Motion for Reconsideration" argued, among other things, that § 27-1-434, MCA, was "constitutionally [*sic*] vague and overly broad, gives the prosecution too much power resulting in overreach of authority and constitutes double jeopardy[.]" *Id.* at 4. The "Motion for Reconsideration" otherwise appeared to argue that Polejewski "was never allowed to present my case" in the May 26, 2020, evidentiary hearing, despite the transcript's demonstration that Polejewski, through counsel, engaged in cross-examination of the State's witnesses but otherwise voluntarily declined to present witnesses or evidence at that hearing. *Compare* Dkt. 15 at 3-4, *with* Appx. 1 at 2:4-16 (generally showing Polejewski's cross-examination of County witnesses); 107:20-22 (declining to present any witness testimony).

Polejewski filed what she denominated as an "Emergent Plea for Preliminary Injunction ASAP" on December 7, 2020. Dkt. 16. The "Emergent Plea" requested an injunction prohibiting the dispersal, transfer, ownership, adoption, or euthanizing

[4] Polejewski filed a Writ of Supervisory Control on October 26, 2020, seeking supervisory control over the State and the Cascade County Attorney regarding the County's care and control of the seized animals. *See* Dkt. 14. This Court denied the writ, holding that it was procedurally defective because Polejewski failed to seek a writ over the Cascade County District Court *and* that, regardless, "[i]n the interim since Polejewski filed this Petition, we affirmed the District Court's forfeiture order. . . . Thus, irrespective of the procedural defect of Polejewski's petition for writ of supervisory control, the issue is now moot in light of our Opinion." *Id.* at 1-2.

of the seized animals and claimed that Polejewski was not notified of the opinion in *Polejewski I*, despite service of the opinion upon her appellate counsel. *Id.* at 5-6.

Polejewski subsequently filed a December 18, 2020, "Motion for Rehearing Brief" which repeated a range of evidentiary and factual arguments regarding the May 26, 2020, hearing but also integrated and elaborated on the constitutional arguments—vagueness and double jeopardy—first presented in *Polejewski I*. *See* Dkt. 17.

The District Court, under Judge Levine, held a hearing on Polejewski's pending post-appeal filings on February 18, 2021. Dkt. 28; *see generally*, Feb. 18, 2021, Tr. At the hearing, Polejewski initially presented a range of factual arguments regarding the events of May 6 & 7, 2020, and the May 26, 2020, evidentiary hearing, asserting that these arguments were not barred by *Polejewski I*'s affirmance of the June 5, 2020, order or by *res judicata*. *See* Feb. 18, 2021, Tr. (excerpts attached at Appx. 2) at 7:17-12:17, 22:13-15, 39:19-43:8. Polejewski then raised a range of constitutional arguments, including freedom of speech, vagueness, and double jeopardy, and also raised, for the first time and in a cursory fashion, arguments alleging the improper admission of evidence obtained via illegal searches and seizures and a violation of the constitutional privilege against self-incrimination at the May 26, 2020, hearing. *Id.* at 13:1-14:22, 15:1-17:18, 20:19-21:12.

The District Court's March 26 Order reviewed the history of the case and found that Polejewski "has been afforded the right to be heard at every juncture so far in this process," as she "has attended every hearing and been afforded the right to make her record at both the District Court and Supreme Court levels." *See* Dkt. 31 at 2-4. The March 26 Order concluded that Polejewski's Motion for Reconsideration was barred by *res judicata* because the Petition had been fully adjudicated and affirmed by the Supreme Court. *Id*. at 5. Further, because the Supreme Court had affirmed the June 5, 2020, forfeiture order, the District Court concluded that "the State legally exercised its authority to forfeit and dispose of the subject animals," rendering Polejewski's request for an injunction moot. *Id.* Considering Polejewski's constitutional claims, the court determined that the civil remedies in § 27-1-434, MCA, did not amount to criminal penalties. *Id.* at 6. Because of this, and because § 27-1-434, MCA, provided for reimbursement upon acquittal and was intended to protect seized animals by providing the reasonable cost of care, the District Court concluded that Polejewski's double jeopardy argument "must fail." *Id*. at 7. The District Court similarly found that § 27-1-434, MCA, was not unconstitutionally vague because the statute "ensures that complaints would go forward based on the testimony of experts and through the judicial process." *Id.* Last, the District Court concluded that Polejewski was not denied her alleged constitutional right to "free speech" in the Petition proceedings because Polejewski

"has been heard at every juncture." *Id*. The District Court accordingly denied Polejewski's pending Motion for Reconsideration, Emergent Plea for an injunction, and constitutional challenges to § 27-1-434, MCA. *Id*. at 8. Polejewski appeals from this order.

SUMMARY OF THE ARGUMENT

Polejewski cannot demonstrate that § 27-1-434, MCA, is unconstitutionally vague, if she even intends to make that constitutional claim. The statute plainly apprises respondents of its reach and operation, and Polejewski appears to direct her "vagueness" argument at factual findings that have already been affirmed by this Court and that cannot be continually thereafter attacked.

Polejewski cannot show that § 27-1-434, MCA, violates prohibitions against double jeopardy because the statute serves a plainly civil purpose: providing temporary reimbursement of animal care costs to counties, with the potential for compensation to respondents for the value of the animals seized and forfeited. Necessary animals care costs must be borne by someone or some entity, and § 27-1-434, MCA, provides a civil mechanism for ensuring that temporary care costs borne by taxpayers are mitigated. And this Court views similar bond forfeitures as civil in nature.

Polejewski cannot show any free speech violation because § 27-1-434, MCA, contains no restriction on speech, the District Court never restricted Polejewski's speech, and Polejewski otherwise fails to develop the argument.

Last, Polejewski waived any arguments regarding illegal searches and seizures or violation of the privilege against self-incrimination by clearly failing to make objections preserving these claims to the District Court at the May 26, 2020, hearing. Polejewski never objected to any evidence, on any basis, before the District Court, and never raised any privilege.

STANDARD OF REVIEW

The Court's review of constitutional questions is plenary. *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶23, 371 Mont. 356, 308 P.3d 88. Legislative enactments are presumed to be constitutional, and the party challenging the provision has the burden of proving beyond a reasonable doubt that it is unconstitutional. *Id.*, ¶23. This Court has recognized that "[i]t is the duty of courts, if possible, to construe statutes in a manner that avoids unconstitutional interpretation." *State v. Stanko*, 1998 MT 321, ¶15, 292 Mont. 192, 974 P.2d 1132.

Findings of fact are review for clear error. *Roland v. Davis*, 2013 MT 148, ¶21, 370 Mont. 327, 302 P.3d 91.

Conclusions of law are reviewed for correctness. *Baltrusch v. Baltrusch*, 2006 MT 51, ¶11, 331 Mont. 281, 130 P.3d 1267.

ARGUMENT

I. POLEJEWSKI FAILS TO SHOW BEYOND A REASONABLE DOUBT THAT THE ANIMAL WELFARE STATUTE IS UNCONSTITUTIONALLY VAGUE.

The County reiterates the prior substantive constitutional arguments advanced by both the State and by *amici* in *Polejewski I*: the Animal Welfare Statute is not unconstitutionally vague or arbitrary because the statute was enacted with clear standards, triggers, and procedures specifically intended to avoid subjective or arbitrary enforcement. Polejewski's vagueness argument is not actually a legal argument regarding the constitutionality of the language or operation of § 27-1-434, MCA. Instead, Polejewski most clearly argues that the May 26, 2020, evidentiary hearing and related June 5, 2020, Order made "vague" factual findings based upon contradictory evidence. This argument is foreclosed according to either *res judicata*, the law of the case, or collateral estoppel due to Polejewski's failure to raise issues with the June 5, 2020, Order's findings of fact in *Polejewski I* and by the Supreme Court's affirmance of that Order in *Polejewski I*. *See Polejewski I*, ¶¶5-6. Even if Polejewski could make a constitutional "vagueness" claim here, Polejewski fails to carry her burden of proving beyond a reasonable doubt that § 27-1-434, MCA, is unconstitutionally vague.

A. Polejewski's "Vagueness" Argument Implicates the Factual Basis for the June 5, 2020, Order, but that Argument is Foreclosed.

Polejewski's "vagueness" claim in *Polejewski I* did not implicate the language of § 27-1-434, MCA, but instead argued that the May 26, 2020, evidentiary hearing improperly resulted in the removal of animals despite alleged testimony that some animals were in good condition or that Polejewski had assistance from veterinarians. Polejewski argued that these evidentiary concerns rendered § 27-1-434, MCA, "so vague as to invite arbitrary and discriminatory enforcement." Opening Br. Challenging Constitutionality of § 27-1-434 at 9 (August 10, 2020) in *Polejewski I* (DA 20-0306). Polejewski failed to support this argument with any citations to the record. *Id*. More fundamentally, Polejewski failed to raise **any** appeal issues regarding the sufficiency of the evidence or the District Court's June 5, 2020, findings of fact in *Polejewski I*. *See generally id*. This Court affirmed the June 5, 2020, Order due to Polejewski's failure to raise appellate issues that were properly preserved and first presented to the District Court. *Polejewski I*, ¶¶3-6.

Polejewski's arguments on constitutional "vagueness" at the February 18, 2021, hearing clarified that Polejewski was attacking the allegations and evidence supporting the County's Petition and June 5, 2020, Order. For example, Polejewski argued that "well, basically they charged me with a bunch of allegations and vague language, arbitrary enforcement, which started with the law enforcement officers of makeshift -- all the animals, she's a hoarder. Her place is a landfill. Dilapidated

conditions. I mean, the insanity of – like, I don't know what they meant by that. How is that a crime?" Appx. 2 at 11:5-10. Or, Polejewski argued that: "So it's a bunch of smoke and mirrors, gas-lighting, trying to cram this narrative of me being a hoarder down everybody's throat with their vague language and arbitrary enforcement." *Id*. at 15:15-17. These arguments most clearly align with Polejewski's claim that she disagreed with the *factual basis* for the County's petition, i.e., that "I asked for clarity, like, Why are you enacting on this? What animal can you point out is in jeopardy, in danger, being neglected. And I was given nothing other than, I don't know." *Id*. at 9:3-5; *see also id*. at 12:3-5 (arguing that "It wasn't supposed to be in the eye of the beholder. It was supposed to be about expert witnesses. And the expert witnesses were contradictory.").

Polejewski's proposed findings of fact and conclusions of law, submitted March 18, 2021, similarly argue that the County's Petition:

> [is] Based on the 'eye of the beholder' and 'look tough for people who doesn't know better' [which] is a selection, arbitrary, vague enforcement of Senate Bill 320. Defendants of the bill state enforcement is not to fall upon law enforcement, Judges, neighbors but 'expert witnesses' by way of veterinarians and livestock Inspectors. FACT defenders of the Bill state Complaints are not to go forward based on 'eye of the beholder' AG Cochenour. Veterinarians opinions that are contradictory, biased and lacking in credibility are not strong evidence. Opinions are weak in the eyes of the courts and it is questionable if it is to be used solely as evidence.
>
> [. . .]

> AG Cochenour states SB 320 takes away from 'the eye of the beholder' claim because it puts it in the real of 'experts' which is a hypothesis that has been proven to be False as it was not DR Manzer in her summary report stated on page 2 the dogs were given food but were not interested. . . . Expert veterinarians stated they were unable to 'assess' and need further evaluations so removed the animals that no explanation, citation, petition was ever given for the justification of seizing rabbits, goats, pigs and poultry.
>
> [. . .]
>
> Judge Pinski supplemented the record with his vague and arbitrary language 'all the animals are unhealthy' that is not substantiated by any State evidence.
>
> [. . .]
>
> CONSTITUTIONAL PROHIBITS VAGUE AND ARBITRARY language the common person would not know the meaning of such as; 'makeshift' 'all the animals' 'appears' 'used tarps'[.]
>
> [. . .]
>
> CONSTITUTION PROHIBITS VAGUE AND ARBITRARY ENFORCEMENT Attorney General in defense of the Bill gave a scenario as to how the bill is to be applied by not relying on the 'eye of the beholder' which was to remove authority away from law enforcement, Judges and neighbors but relied on the opinions of State paid Veterinarians and Livestock Inspectors.

Dkt. 29 at 10-19.

Polejewski's vagueness argument to the District Court most clearly amounted to an improper, overdue challenge to the June 5, 2020, Order's factual findings, not a constitutional challenge to § 27-1-434, MCA. The Supreme Court will ordinarily review a properly preserved challenge to a district court's findings of fact by

determining whether the findings of fact were clearly erroneous. *Roland v. Davis*, 2013 MT 148, ¶21, 370 Mont. 327, 302 P.3d 91. Moreover, this Court recognizes that "it is the duty of the trial judge" to resolve conflicting evidence, and "this Court's function is not to substitute its judgment for the trier of fact." *Interstate Prod. Credit Ass'n of Great Falls v. DeSaye*, 250 Mont. 320, 324, 820 P.2d 1285, 1287-1288 (1991).

Res judicata or the law of the case doctrine prohibits Polejewski from belatedly attacking factual findings in the June 5, 2020, Order, or May 26, 2020, evidentiary hearing, as Polejewski declined to raise **any** challenge to the June 5, 2020, Order's factual findings in her prior appeal and *Polejewski I* affirmed the Order regardless. *See* Dkt. 31 at 5, 8 (concluding that *res judicata* barred further consideration of the May 26, 2020, hearing or June 5, 2020, Order). These doctrines fundamentally stop Polejewski from waging incessant attacks upon the June 5, 2020, Order's factual findings. Polejewski already had an opportunity to raise those issues in her prior appeal, declined to do so, and this Court affirmed the June 5, 2020, Order as a result.

Both *res judicata* and collateral estoppel "seek to prevent parties from incessantly waging piecemeal, collateral attacks against judgments[.]" *Baltrusch*, ¶15. *Res judicata* bars the relitigation of a claim that a party "has already had the opportunity to litigate," while collateral estoppel "bars the reopening of an issue that

has been litigated and determined in a prior suit." *Id*. *Res judicata*'s bar "includes claims that were or *could have been* litigated in the first action." *Poplar Elementary Sch. Dist. No. 9 v. Froid Elementary Sch. Dist. No. 65*, 2020 MT 216, ¶32, 401 Mont. 152, 471 P.3d 57 (emphasis in original) ("*Poplar Elementary*"); *Brishka v. Dep't of Transportation*, 2021 MT 129, ¶21, --- Mont. ---, 487 P.3d 771.

Res judicata applies if "(1) the parties or their privies are the same; (2) the subject matter of the present and past actions is the same; (3) the issues are the same and relate to the same subject matter; (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them; and (5) a final judgment has been entered on the merits in the first action." *Adams v. Two Rivers Apartments, LLLP*, 2019 MT 157, ¶8, 396 Mont. 315, 444 P.3d 415. Collateral estoppel applies if: "(1) the identical issue raised was previously decided in a prior adjudication; (2) a final judgment on the merits was issued in the prior adjudication; (3) the party against whom the plea is now asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom preclusion is now asserted was afforded a full and fair opportunity to litigate the issue." *Adams*, ¶9.

Under the related law of the case doctrine, "a legal decision made at one stage of litigation which is **not appealed when the opportunity to do so exists, becomes the law of the case for the future course of that litigation** and the party that does not appeal is deemed to have **waived** the right to attack that decision at future points

in the same litigation." *McCormick v. Brevig*, 2007 MT 195, ¶38, 338 Mont. 370, 169 P.3d 352 (emphasis added).

All five elements of *res judicata* are present here regarding Polejewski's belated attack upon the factual bases for the June 5, 2020, Order. The parties are self-evidently the same. The subject matter of the June 5, 2020, Order and Polejewski's present appeal is the same—the factual bases supporting the County's removal of Polejewski's animals under § 27-1-434, MCA. The more specific issue is the same: the evidentiary basis for the animals' removal and the June 5, 2020, Order. The parties' capacities are the same: Polejewski stands as the respondent challenging the evidentiary and legal bases for the Petition under § 27-1-434, MCA. The issues, parties, and capacities are identical because Polejewski continues to improperly attack the factual basis for the Petition and the District Court's June 5, 2020, order, despite previously failing to overturn that order on appeal.

And, crucially, the June 5, 2020, Order rendered a final judgment on the merits regarding the County's Petition. Polejewski, through appellate counsel, specifically appealed from the June 5, 2020, Order. *See Polejewski I*, ¶2. Polejewski was afforded the opportunity to raise the June 5, 2020, Order's factual findings in *Polejewski I*, but she declined to do so. As recognized in *Poplar*, possessing the opportunity to appeal a decision but declining to do so "for whatever reason" renders that prior adjudication final. *Poplar Elementary*, ¶¶37-38. Polejewski bears the

burden of establishing the absence of a full and fair opportunity to litigate her claims regarding alleged factual deficiencies in the Petition and June 5, 2020, order, *Adams*, ¶17, and Polejewski cannot escape the fact that she previously specifically appealed that order but failed to raise any of the presently alleged factual deficiencies in that appeal. *Res judicata* applies.

Even if *res judicata* did not apply, collateral estoppel prohibits Polejewski's attempt to reopen consideration of the factual bases for the Petition and June 5, 2020, order. Polejewski continues to raise the precise issue considered in the May 26, 2020, hearing and June 5, 2020, order—whether the County's Petition stated a sufficient factual basis for removal and imposition of a cost of care bond. This satisfies the first element. *Poplar Elementary*, ¶34. The second element requires an issue to be litigated and adjudged. *Id*., ¶26. That occurred here: the District Court "adequately deliberated" the factual bases for the County's Petition in the May 26, 2020, hearing and June 5, 2020, order, which considered Polejewski's cross-examination of the State's witnesses and failure to provide rebuttal or contrary evidence. Dkt. 9. Polejewski specifically appealed this order but failed to raise any evidentiary or factual issue, and this Court affirmed the order. *Polejewski I*, ¶¶2-6. Polejewski had the opportunity to raise these issues on appeal, and her voluntary failure to seize upon this opportunity satisfies the second collateral estoppel factor. *Poplar Elementary*, ¶37. The third and fourth elements are likewise satisfied,

because Polejewski was the respondent/appellant in *Polejewski I*, was afforded a full and fair opportunity to challenge the factual bases for the Petition and June 5, 2020, order in that appeal, but "chose for whatever reason" not to do so. *Id.* at ¶38. Collateral estoppel independently bars Polejewski's repeated efforts to attack the factual bases for the County's Petition, the June 5, 2020, order, or *Polejewski I*'s affirmance of that order.

Regardless, the time for proper reconsideration of *Polejewski I* ran long ago, *see* M.R.App.P. 20, and Montana law does not permit a litigant to endlessly attack orders previously affirmed on appeal. *Scott v. Scott*, 283 Mont. 169, 175-76, 939 P.2d 998, 1002 (1997); *State ex rel. Dep't of Health & Env't Scis. v. Reese*, 260 Mont. 24, 27, 858 P.2d 357, 359 (1993). The related law of the case doctrine independently bars Polejewski's belated effort to attack the factual findings of an order that this Court already affirmed.

Ultimately, Polejewski, through counsel, was afforded the opportunity to cross-examine the State's witnesses and test the State's evidence at the May 26, 2020, evidentiary hearing. Appx. 1 at 32:16-39:1, 55:21-59:24, 66:23-67:20, 71:3-72:6. The State's witnesses included law enforcement officers, veterinarians, and animal shelter workers. *Id*. Polejewski was offered, but declined, the opportunity to present her own witnesses and evidence. *See id.* at 107:20-22. Polejewski, through counsel, declined to object to the numerous photographs and exhibits that

the County presented demonstrating the condition of the animals and property. *Id*. at 24:19-23, 25:25-26:12, 27:5-9, 48:22-49:2, 50:8-12, 75:2-75:8, 85:17-21, 89:14-18, 90:2-6, 96:23-97:19. Polejewski, through counsel, failed to contest the County's evidence that she lacked the necessary resources to provide care for the animals. The District Court's June 5, 2020, Order validly weighed the uncontroverted, "compelling" evidence presented by the County to find that Polejewski lacked any present ability to provide for the seized animals. Dkt. 9 at 8-9, ¶¶26-31. Polejewski appealed this Order but, through appellate counsel, declined to raise *any* issues with the Order's factual findings on appeal. The Supreme Court affirmed the Order as a result. *See Polejewski I*, ¶¶2-6. Polejewski now improperly asks this Court to overturn these factual findings, and effectively overturn *Polejewski I*, after Polejewski failed to challenge the June 5, 2020, Order's factual findings in her prior appeal of that Order and *long after* the deadline for rehearing of the Supreme Court's opinion affirming that Order has run. *See* M.R.App.P. 20. This is improper.

B. Polejewski Has Failed to Prove Beyond a Reasonable Doubt that § 27-1-434, MCA, is Unconstitutionally Vague, Regardless.

Even if Polejewski's "vagueness" argument is interpreted to assert a constitutional claim regarding § 27-1-434, MCA, Polejewski has failed to carry her burden to demonstrate unconstitutional vagueness.

Generally, a statute may be unconstitutionally vague in two situations: "(1) because the statute or ordinance is so vague that it is rendered void on its face; or (2) because it is vague as applied in a particular situation." *Stanko*, ¶17.

On appeal, the most Polejewski argues regarding vagueness is that "THE STATUTE DOES NOT HAVE PLAIN LANGUAGE THEREFORE THE STATUTE IS TOO BROAD AND VAGUE TO BO CONSTITUTIONAL." Opening Br. at 14 of 60.[5] Polejewski then claims that "SUBJECTED TO CRUELTY IS NOT DEFINED IN THE STATUTE so a person would understand 'makeshift' 'all' 'appears'[.]" *Id*., at 14. At the District Court, Polejewski cited two cases discussing vagueness—*Grayned v. City of Rockford*, 408 U.S. 104 (1972), and *State v. Stanko*, 1998 MT 321, 292 Mont. 192, 974 P.2d 1132—without elaboration and elsewhere claimed that "[t]he Legislature did not provide sufficient standard to guide private delegates in its statute Legislative authority to a private entity" or that "It is not even clear what the purpose of Senate Bill 320 is since there are OTHER STATUTES that address and even oppose the vague arbitrary low standards of SB320[.]" Dkt. 29 at 13-15. Polejewski essentially claimed that the statute used language like "makeshift"[6] or "all the animals" that "the common person would not

[5] Polejewski's Opening Brief does not have consistent internal page numbering. To prevent confusion, the County cites to the specific page number out of the total 60 pages in the .pdf of the document.

[6] The phrases "makeshift," "all the animals," or "used tarps" do not appear in § 27-1-434, MCA. The phrases "makeshift," "tarp[s]," and "all the animals" do appear in the June 5, 2020,

know the meaning of," or that the statute "does not convey sufficient definite warning as to proscribed conduct when measured by common understanding and practices[.]" Dkt. 29 at 19.

It is unclear from the above whether Polejewski asserts a facial or as-applied vagueness challenge. However, the most that Polejewski could argue here is that § 27-1-434, MCA, is facially vague. This is because Polejewski directs her as-applied challenge to the findings in the June 5, 2020, order, but Polejewski failed to preserve or raise any as-applied vagueness challenge in the relevant district court proceedings. Opening Br. at 14 of 60; Dkt. 29 at 19. This Court requires that as-applied challenges be preserved with the district court, not first raised on appeal. *See State v. Yang*, 2019 MT 266, ¶12, 397 Mont. 486, 452 P.3d 897. Polejewski's as-applied claims pertain to a district court proceeding and order—the May 26, 2020, hearing and June 5 Order—where Polejewski *never* made as-applied vagueness claims. This Court's precedent directs that Polejewski cannot now raise an as-applied vagueness challenge regarding the May 26, 2020, hearing or June 5, 2020, order if she failed to present any as-applied vagueness challenge to the District Court at the May 26, 2020, hearing, and where the June 5, 2020, order has been affirmed by the Supreme Court. *See Polejewski I*, ¶¶4-6 (holding that Polejewski failed to raise "any" constitutional

order. This adds to the above-noted uncertainty regarding whether Polejewski challenges the alleged vagueness of § 27-1-434, MCA, or the factual findings in the June 5, 2020, Order.

challenge to § 27-1-434, MCA, which necessarily includes an as-applied challenge); *see also State v. Fleming*, 2019 MT 237, ¶40, 397 Mont. 345, 449 P.3d 1234. Any as-applied vagueness challenge was waived.

Polejewski otherwise fails to demonstrate beyond a reasonable doubt that § 27-1-434, MCA, is facially vague. The most that Polejewski argued either in the present appeal or before Judge Levine regarding facial vagueness is that "the statute does not have plain language" or "does not convey sufficient definite warning as to proscribed conduct[.]" Opening Br. at 14 of 60; Dkt. 29 at 19.

This Court should initially decline to develop or formulate Polejewski's cursory facial vagueness arguments. *Bonnie M. Combs-DeMaio Living Tr. v. Kilby Butte Colony*, Corp., 2005 MT 71, ¶17, 326 Mont. 334, 109 P.3d 252; *Baltrusch*, ¶29.

More substantively, a facial vagueness challenge to a civil statute will succeed "only if the enactment is impermissibly vague in all its applications." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 (1982). This Court will uphold a law over a facial vagueness challenge if **some** potential individual within its reach could understand the prohibitions of the statute. *Monroe v. State*, 265 Mont. 1, 5, 873 P.2d 230, 232 (1994). Fundamentally, "noncriminal statutes are unconstitutionally vague if persons of common intelligence must necessarily guess

at their meaning." *Broers v. Montana Dep't of Revenue*, 237 Mont. 367, 371, 773 P.2d 320, 323 (1989).

The Animal Welfare Statute is **not** facially vague. The statute provides clear notice to the respondent, and clear direction to the judiciary, of the reach, factors, and consequences relevant to its operation. To this end, and contrary to Polejewski's assertion, the statute explicitly states the bases upon which a prosecutor may file a cost of care petition—alleged violation of § 45-8-210, -211, or -217, MCA. *See* § 27-1-434(1), MCA. It is accordingly incorrect as Polejewski argues that "subjected to cruelty is not defined in the statute." *See* Opening Br. at 6. The referenced criminal statutes provide clear definition and notice of what acts maybe be considered criminal animal cruelty and support a § 27-1-434, MCA, petition. *See, e.g.*, § 45-8-211(1)(c), MCA. The terms in these referenced statutes—such as a lack of sufficient food, water, or minimum protection from adverse weather—are plainly within the understanding of persons of common intelligence. *See* § 45-8-210, -211, or -217, MCA. And, of course, Polejewski does not actually develop her argument that the basis for application of § 27-1-434, MCA is wholly incomprehensible in all situations.

The statute likewise provides respondents with detailed notice of the bases for removal and cost of care bonds, the potential for adjustment of cost of care bonds, the consequences for failure to post a bond, alternatives to bonds, and procedures for

the return of remaining funds, animals, and of potential fair market value compensation to the respondent if the respondent is subsequently found not guilty of the related criminal cruelty charges. § 27-1-434(3)-(7), MCA.

While the statute predicates removal and a bond upon discretionary judicial findings, statutes that rely upon subsequent investigation to determine whether certain standards are met are not unconstitutionally vague because they involve some exercise of discretion. *See Broers*, 237 Mont. at 371, 773 P.2d at 323. And, importantly, § 27-1-434, MCA, constrains and directs judicial discretion by requiring that it be based upon the presentation of objective expert testimony and statutory factors and by requiring detailed prior notice to the respondent of the alleged bases for the removal and bond. §§ 27-1-434(2)(d) & (3) through (6).

Like in *Village of Hoffman*, there is no uncertainty here about which alleged criminal conduct may trigger application of § 27-1-434, MCA. *See Village of Hoffman* 455 U.S. at 500; § 27-1-434(1), MCA. There is no uncertainty about the required contents of the petition, or whether a respondent will be provided a hearing to test the bases for the petition. § 27-1-434(2) & (4), MCA. There is no uncertainty about the bases for determining whether an animal will be released or held. § 27-1-434(5), MCA. There is no uncertainty about the basis for the bond or the consequences for failure to pay the bond. § 27-1-434(6) & (9), MCA.

Section 27-1-434, MCA, provides clear notice that alleged violations of criminal animal cruelty statutes may support a petition for removal of the subject animals for a particular period of time and upon particular bases, and may support a bond covering particularly defined reasonable expenses that a county incurs to care for the animals during this time. These petitions may not rest upon the vague observations of law enforcement or neighbors but must instead provide detailed descriptions of the bases for the removal and be supported by evaluations from licensed veterinarians. § 27-1-434(2), MCA. And, § 27-1-434(4), MCA, expressly permits the respondent to test and rebut the bases for the petition, the opinions of the veterinarians, and the requested bond at a hearing before a neutral judge.

Respondents are not left to "guess" at the meaning, reach, procedure, or impact of § 27-1-434, MCA, and Polejewski's unsupported assertions of vagueness are plainly insufficient. *Montana Media, Inc. v. Flathead Cty.*, 2003 MT 23, ¶60, 314 Mont. 121, 63 P.3d 1129. Section 27-1-434, MCA, "is not vague simply because it can be dissected or subject to different interpretations," *Montana Media, Inc.*, ¶58, and understandability to at least some respondents, even if not Polejewski, is sufficient to rebut a vagueness challenge. *Monroe*, 265 Mont. at 5, 873 P.2d at 232.

"[W]e can never expect mathematical certainty from our language," *Grayned*, 408 U.S. at 110, but § 27-1-434, MCA, provides eminently clearer language than the

noise ordinance at issue in that case. *See Grayned*, 408 U.S. at 112 (holding that ordinance prohibiting "any noise or diversion which disturbs or tends to disturb the peace or good order" of a school was not unconstitutionally vague because it gave fair notice of its application in a particular context). Polejewski's unsupported vagueness challenge cannot demonstrate beyond a reasonable doubt that § 27-1-434, MCA, is unknowable in all cases and to all respondents.

II. POLEJEWSKI FAILS TO PROVE BEYOND A REASONABLE DOUBT THAT § 27-1-434, MCA, VIOLATES CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY.

Polejewski previously (and improperly) argued that § 27-1-434, MCA, violated Fifth Amendment prohibitions against double jeopardy in *Polejewski I*. The crux of her argument there was that application of § 27-1-434, MCA, resulted in a quasi-criminal punishment by needlessly removing all her animals and by imposing an excessively punitive cost of care bond. Opening Br. at 8 (August 10, 2020) in *Polejewski I* (DA 20-0306). Here, Polejewski similarly argues that forfeiture of animals, as well as imposition of an excessive cost of care bond, wrongly levied criminal punishments prior to any criminal conviction. Opening Br. at 13-14. Polejewski intermixes this argument with complaints that § 27-1-434, MCA, imposes a wrongful civil asset forfeiture. *See id.* at 18.

The County initially refers the Court to the exhaustive briefing regarding Polejewski's identical double jeopardy challenge in *Polejewski I*. The State and both

amici thoroughly demonstrated that § 27-1-434, MCA, does not violate double jeopardy prohibitions when facing Polejewski's identical prior arguments. Appellee Br. at 15-21 (August 31, 2020); Br. Amicus Curiae Animal Legal Defense Fund at 8-19 (August 31, 2020); *Amicus Curiae* Br. State Bar of Montana Animal Law Section at 11-18 (August 31, 2020) in *Polejewski I* (DA 20-0306). These arguments stand and are fully incorporated here.

Generally, the concept of double jeopardy applies to the imposition of multiple *criminal* punishments for the same offense. *State v. Haagenson*, 2010 MT 95, ¶14, 356 Mont. 177, 232 P.3d 367; *Hudson v. U.S.*, 522 U.S. 93, 99 (1997). However, courts may look behind an initial statutory intent to establish a civil penalty to inquire whether the civil statute is "so punitive either in purpose or effect" so as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99. Seven factors guide the U.S. Supreme Court's analysis:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter* "; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Id. Importantly, "'only the clearest proof' will suffice to override legislative intent" and transform a civil scheme into a criminal penalty. *Id.*

To briefly reiterate the exhaustive application of the seven *Hudson* factors by the State and *amici* in *Polejewksi I*, Polejewski lacks the requisite "clearest proof" here because § 27-1-434, MCA, self-evidently imposes a civil remedy intended to cover necessary costs of care with the possibility of full market value reimbursement or return of the animals upon acquittal. The statute, in the civil Title 27, plainly intended to cover the costs of (potentially temporary) removal of animals during the pendency of criminal proceedings with concurrent provision for a cost of care bond narrowly tailored to relieve taxpayers of only the necessary, actual costs of care for the animals. § 27-1-434(6)-(7), MCA. The statutory restrictions on the cost of care bond belie any punitive intent or effect. The bond may only represent reasonable costs that the respondent **would have incurred even if the animals were not removed**, reimbursement must issue for unused portions, and costs for conditions that arise while the animals are in the care and possession of the county are excluded. § 27-1-434(6), (7), & (9), MCA. The goal is (potentially temporary) compensation for necessary costs of care that the owner would have incurred regardless of removal, not punishment, and these costs are specifically tailored to reflect only amounts needed for the animals' welfare. *See U.S. v. Brooks*, 872 F.3d 78, 91 (2nd Cir. 2017) ("We agree that restitution's goal is victim compensation, not punishment.").

Importantly, this Court has specifically rejected prior arguments that bond forfeitures are criminal punishments that implicate double jeopardy. *State v. Toth*, 2008 MT 404, ¶22, 347 Mont. 184, 197 P.3d 1013 ("Bond forfeiture is essentially a civil action."); *see also Brooks*, 872 F.3d at 93 ("The forfeiture of a bail bond functions as damages for breach of the civil contract, not as a punishment for the commission of a criminal offense."); *U.S. v. Barger*, 458 F.2d 396, 396 (9th Cir. 1972). In this comparable circumstance, respondents face forfeiture in the event of breach of a civil contract, wherein respondents are required to compensate for the actual care of their animals, a cost that they would have faced regardless. If respondents breach this civil contract, a county is permitted to take steps to relieve itself of the cost of care, but a county will remain potentially responsible for full reimbursement of the fair market value of the seized animals. § 27-1-434(6)(e) & (7)(a)(ii), MCA.

It must be emphasized that because the cost of care bond is tailored to the actual costs of caring for seized animals, larger bond amounts will necessarily mirror amounts reasonably required to care for larger amounts of seized animals. Larger bond amounts are plainly not permitted to be untethered to actual costs of care to impose a punishment. § 27-1-434(6), (7), & (9), MCA.

The statute does not intend or operate to effect punishment or retribution, as it is tailored to provide for fundamentally civil purposes—covering necessary care

costs—and otherwise lacks criminal hallmarks like requiring a finding of scienter. *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997). That **some** deterrence may result does not by itself transform a civil scheme into a criminal punishment. *Hudson*, 522 U.S. at 102. Because § 27-1-434, MCA, does not intend or effect a criminal punishment, double jeopardy is inapplicable. *Hendricks*, 521 U.S. at 369; *Rivera v. Pugh*, 194 F.3d 1064, 1068 (9th Cir. 1999). An evaluation of § 27-1-434, MCA, "'on its face'" shows that the statute provides a civil scheme for defraying necessary animal care costs, not a criminal sanction. *Hudson*, 522 U.S. at 101; *see also State v. Alirez*, No. A-1-CA-37387, 2020 WL 1820019, at *6 (N.M. Ct. App. Mar. 31, 2020); *State v. Almendarez*, 301 S.W.3d 886, 895 (Tex. App. 2009).

Polejewski's citations to § 45-6-328, MCA, or § 44-12-207, MCA, in support of her double jeopardy argument are unavailing. First, § 45-6-328, MCA, concerns forfeiture of items used to steal livestock or illegally altered the brands of livestock. There is no intersection between the forfeiture of Polejewski's animals under a civil statute for failure to meet a bonding obligation and criminal forfeiture of items used to steal cattle. Polejewski does not elaborate on the alleged connection, regardless, and this Court may not elaborate for her. *Baltrusch*, ¶29.

Second, § 44-12-207, MCA, is not relevant. Section 44-12-207, MCA, is a criminal forfeiture statute that applies *only* following a criminal conviction, where the particular criminal offense provides for forfeiture of property upon conviction,

and where the property was used in connection with or is the proceeds of the crime. § 44-12-207(1), MCA; *see, e.g.*, § 45-9-206(3), MCA. The County's Petition plainly did not proceed under this statute, but the separate § 27-1-434, MCA. Further, the intended operation of § 44-12-207, MCA, and § 27-1-434, MCA, are plainly distinct. Montana's criminal forfeiture statutes permit the state to seek permanent forfeiture of property in certain circumstances after certain criminal convictions *without* tailoring the size of the forfeiture to the costs imposed upon government. *See* § 45-9-206(3), MCA (permitting criminal forfeiture of "property of any kind" used in connection with dangerous drugs).

This is fundamentally distinct from the operation of § 27-1-434, MCA, which only permits forfeiture *if* a respondent cannot pay costs of care to avoid the imposition of those costs on a county. Imposing and defraying potentially temporary storage and care costs, with the possibility of reimbursement, for animals that the respondent would have cared for regardless is not comparable to a criminal asset forfeiture. A county does not profit from or retain the forfeited animals under § 27-1-434(6), MCA, as the statute specifically directs the county to develop a plan of disposal and holds the county potentially responsible for full reimbursement of the animals' value to the respondent. *See* § 27-1-434(6)(e) & (7)(ii)(b), MCA. This is an important distinction. Where **civil** asset forfeiture statutes, as Polejewski notes, have been criticized for encouraging forfeitures to enrich governments (*see Bennis*

v. Michigan, 516 U.S. 442, 464 (1996) (Stevens, J., dissenting)), § 27-1-434, MCA, was intended to defray the actual costs that counties **assumed** when seizing large numbers of animals during the pendency of animal cruelty cases. Temporarily seizing animals, as Cascade County has repeatedly learned, imposes extraordinary taxpayer costs. Appx. 1 at 94:9-103:13. Section 27-1-434, MCA, represents a civil mechanism for maintaining the respondent's responsibility for those costs while animals are in the county's care and for mitigating taxpayer costs if the respondent cannot assume that responsibility. The reach of the cost of care bond in § 27-1-434, MCA, was properly made directly proportionate to the reasonable costs of actually caring for the animals—costs the respondent would face regardless. *See U.S. v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding a *punitive* forfeiture is excessive if it is grossly disproportionate to the offense). Polejewski's arguments regarding the alleged perils of civil or criminal asset forfeiture statutes imposing excessive fines or forfeitures untethered to the scale of the crime are not relevant.

III. POLEJEWSKI'S "FREE SPEECH" CLAIM IS UNSUPPORTED AND BASELESS.

At the February 18, 2021, hearing, Polejewski vaguely claimed that her right to free speech was violated at the May 26, 2020, evidentiary hearing because "[t]he owner has no say, no input," so "[m]y freedom of speech is jeopardized, and that was all closed down." Appx. 2 at 10:15-16, 13:1-2. On appeal, Polejewski appears to claim that her right to free speech was violated because the District Court

determined that the respondent could not separately petition for a hearing. Opening Br. at 12. These arguments are baseless and contradicted by the record.

First, § 27-1-434, MCA, contains **no** restraint on the respondent's speech. Instead, it expressly requires both notice to the respondent and a hearing to permit the respondent to appear, rebut the county's evidence, and present argument. § 27-1-434(4), MCA. Because there is **no** restraint on speech in § 27-1-434, MCA, and because Polejewski does not point to any regardless, any argument that § 27-1-434, MCA, facially violates free speech rights is baseless. *See U.S. v. Williams*, 553 U.S. 285, 292 (2008) (holding "a statute is facially invalid if it prohibits a substantial amount of protected speech[.]"); *Bonnie M. Combs-DeMaio Living Tr*., ¶17.

Polejewski cannot demonstrate a valid as-applied free speech challenge, either. First, regardless of which party requested a hearing, an evidentiary hearing on the Petition was undeniably held. Polejewski appeared and argued, through counsel, at this hearing. Appx. 1 110:7-25. Polejewski fails to explain why the District Court's (correct) conclusion that § 27-1-434, MCA, did not separately allow her to petition for a duplicative hearing violated her right to free speech. *See* Dkt. 31 at 7. As-applied free speech challenges focus upon the actual speech that was regulated, but, here, there is no indication in the record that the District Court *ever* restricted Polejewski or her counsel from making any argument or presentation, and Polejewski does not point to any, regardless. *See Telescope Media Grp. v. Lucero*,

936 F.3d 740, 754 (8th Cir. 2019). Polejewski repeatedly appeared and argued without restriction, several times.

Polejewski's free speech arguments, under any construction, are unsupported and baseless.

IV. POLEJEWSKI FAILED TO PRESERVE ANY ARGUMENTS REGARDING ALLEGED FOURTH AMENDMENT SEARCH AND SEIZURE VIOLATIONS OR FIFTH AMENDMENT SELF INCRIMINATION VIOLATIONS.

Polejewski belatedly raises constitutional claims regarding allegedly illegal searches and seizures and alleged violations of her privilege against self-incrimination. Polejewski's arguments plainly refer to the evidentiary basis for the Petition and the conduct of the May 26, 2020, evidentiary hearing. These arguments were waived, however, by Polejewski's clear failure to raise them with the District Court, at the May 26, 2020, hearing.

First, Polejewski waived any illegal search and seizure claim by failing to object to *any* evidence at the May 26, 2020, hearing. Generally, "[a] defendant waives an objection and may not seek appellate review when a defendant fails to make a contemporaneous objection to an alleged error in the trial court." *State v. Paoni*, 2006 MT 26, ¶16, 331 Mont. 86, 128 P.3d 1040; M.R.Evid. 103. Here, of course, Polejewski, through counsel, did not object to **any** evidence or testimony offered by the County (Appx. 1 at 24:19-23, 25:25-26:12, 27:5-9, 48:22-49:2, 50:8-12, 75:2-75:8, 85:17-21, 89:14-18, 90:2-6, 96:23-97:19) or raise **any** Fourth

Amendment or search and seizure challenge or argument to any evidence or testimony. *Id.* at 110:7-25. In *State v. Gardner*, the defendant objected to allegedly inadmissible trial testimony two days after the testimony was offered. 2003 MT 338, ¶58, 318 Mont. 436, 80 P.3d 1262. This Court recognized that Montana law has required **timely** objections to allegedly inadmissible testimony for over 100 years and held that the defendant failed to preserve the admissibility issue for appeal. *Id*. As this Court noted, "the issue will not be deemed preserved for appellate review where counsel sits by and permits evidence to be given without objection in the first instance, and then moves to strike on grounds which were manifest and available at the time the evidence was first offered." *Id*., ¶59. Polejewski was represented by counsel at the May 26, 2020, hearing, declined to object to any evidence on any basis at the hearing, and now challenges evidence on "grounds which were manifest and available" at the May 26, 2020, hearing. Polejewski waived any improper search and seizure-based objection regarding the May 26, 2020, hearing. *See State v. Funkhouser*, 2020 MT 175, ¶13, 400 Mont. 373, 467 P.3d 574.

Next, Polejewski appears to claim that the May 26, 2020, hearing infringed upon her Fifth Amendment right to avoid self-incrimination. This is apparently because "when the Defendant was called upon to testify that would end up giving the State additional discovery the State could turn around and use against the defendant in the still impending criminal trial." Opening Br. at 33. This argument

fails for several reasons. First, Polejewski did not testify at the May 26, 2020, trial. Appx. 1 at 2:4-16 (generally showing no testimony by Polejewski offered). Second, and more importantly, Polejewski *never* invoked her Fifth Amendment rights at the May 26, 2020, hearing or presented argument regarding alleged violation of the Fifth Amendment during the proceeding. It is initially clear that "the government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it does not act in bad faith." *U.S. v. Stringer*, 535 F.3d 929, 936 (9th Cir. 2008). More specifically, while the privilege against self-incrimination may apply in a civil proceeding to protect an individual from being forced to provide "information that might establish a direct link in a chain of evidence leading to his conviction," that privilege "may be waived if it is not affirmatively invoked." *Stringer,* 535 F.3d at 938. A failure to affirmatively invoke the privilege will waive the privilege, "even if the defendant did not make a knowing an intelligent waiver," and this failure further "waives a later claim of privilege." *Id*. The Fifth Amendment privilege against self-incrimination "is not self-executing" and "can be waived by failing to invoke it in a timely fashion and by disclosure of incriminating evidence." *In re Gi Yeong Nam*, 245 B.R. 216, 227 (Bankr. E.D. Pa. 2000); *State v. Woods*, 283 Mont. 359, 368, 942 P.2d 88 (1997) ("As a general rule, the Fifth Amendment privilege must be asserted or it is waived."). Here, Polejewski **never** testified at the May 26, 2020, trial and **never** invoked the Fifth Amendment. This Court may not

consider a Fifth Amendment claim that was waived and never presented to the District Court. *Signal Perfection, Ltd. v. Rocky Mountain Bank-Billings*, 2009 MT 365, ¶13, 353 Mont. 237, 224 P.3d 604.

CONCLUSION

Polejewski has failed to establish that § 27-1-434, MCA, is unconstitutional, under any theory, beyond a reasonable doubt. The statute provides clear, comprehensible direction to potential respondents of its scope, operation, and consequences. Polejewski has not, and cannot, show that the statute is so incomprehensible that potential respondents must guess at its operation, and the statute indicates a clear intention to base removal decisions upon the testimony of experts, not arbitrary or uninformed lay opinions regarding animal health.

The civil bonding mechanism does not implicate double jeopardy. The bonding mechanism is plainly intended to further the animals' care, a cost respondents would bear regardless of removal, and is narrowly tailored towards effectuating this purpose. Civil bonding and its consequences are generally not considered criminal punishments, and the bond mechanism here serves a cost-mitigation, not punitive, purpose.

Polejewski's Fourth and Fifth Amendment arguments are an extension of her belated, improper attempts to attack the June 5, 2020, Order and *Polejewski I*. Polejewski cannot be permitted to undermine that District Court order, or this

Court's prior opinion, by raising new factual or constitutional arguments that were never timely presented to the District Court.

If this Court reaches Polejewski's constitutional arguments, it is apparent that Polejewski has failed to carry her burden. Section 27-1-434, MCA, is constitutional.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Words is 9943 words, excluding the table of contents, table of authorities, table of appendices, this certificate of compliance, and certificate of service.

DATED this 8th day of September, 2021.

UGRIN ALEXANDER ZADICK, P.C.

By: /s/ Jordan Y. Crosby
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the following by mail, Federal Express, Hand-delivery or Facsimile transmission:

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