



MONTANA RECOVERY AGENDA



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By cracking down on warrantless searches and mass surveillance, Montana lawmakers can rebuild public trust, making public health efforts more effective and economic recovery more stable.

EXECUTIVE SUMMARY

INTRODUCTION

The Frontier Institute's Montana Recovery Agenda charts the pathway to a thriving economic recovery in 2021.

The Frontier Institute offers the following three policy pillars to recovery, with eight specific proposals:

PILLAR #1: LIMITING GOVERNMENT GROWTH

Montana faces a fiscal crisis at all levels of government after COVID-19 due to severe revenue losses and suppressed economic productivity. By reducing regulations and limiting the growth of spending, Montana lawmakers can unleash economic growth.

- **Proposal 1:** Pass a Conservative Montana Budget
- **Proposal 2:** Amend the Montana Administrative Procedure Act

PILLAR #2: REFORMING OUR BROKEN HEALTHCARE SYSTEM

The pandemic made clear that the biggest barrier in the way of affordable, quality health care for our communities is our broken healthcare system. By removing government

barriers to free choice and empowering patients with control of their health decisions, Montana lawmakers can help lower costs and increase access to health care.

- **Proposal 3:** Repeal Certificate of Need (CON) laws
- **Proposal 4:** Authorize direct care
- **Proposal 5:** Expand telemedicine
- **Proposal 6:** Allow physicians to dispense medicine
- **Proposal 7:** Authorize an 1115 waiver to expand Medicaid health care options

PILLAR #3 PROTECTING INDIVIDUAL RIGHTS

Montana's economic recovery depends on the success of public health efforts like contact tracing to control the spread of COVID-19, yet research shows many won't cooperate because they fear for their privacy. By cracking down on warrantless searches and mass surveillance, Montana lawmakers can rebuild public trust, making public health efforts more effective and economic recovery more stable.

- **Proposal 8:** Require a warrant for Montanans' digital data.



PILLAR 1: **LIMITING GOVERNMENT GROWTH**





LIMITING GOVERNMENT GROWTH

INTRODUCTION

Montana faces a fiscal crisis at all levels of government after COVID-19 due to severe revenue losses and suppressed economic productivity. By reducing regulations and limiting the growth of spending, Montana lawmakers can unleash economic growth. The Frontier Institute offers the following two specific proposals.

PROPOSAL 1:

Pass a Conservative Montana Budget

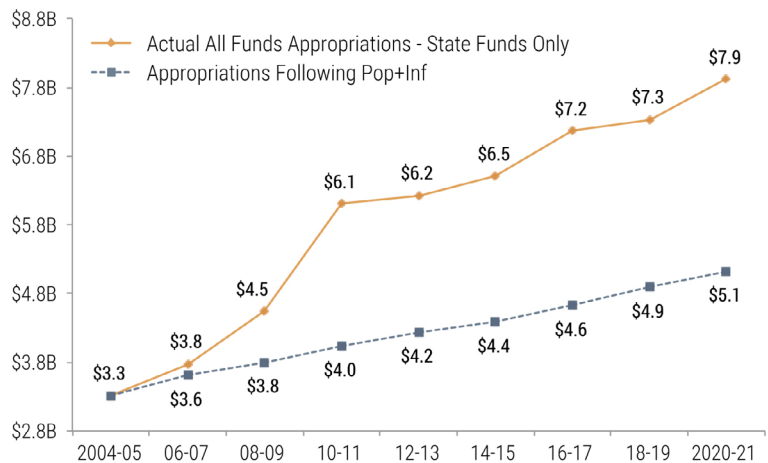
BACKGROUND

Montana's state government budget has often grown considerably faster than Montanans' ability to pay for it over the last 20 years.

The growth of population plus inflation provides a measuring stick for fiscal responsibility by accounting for potential changes in demand for government services and in the cost of providing them.

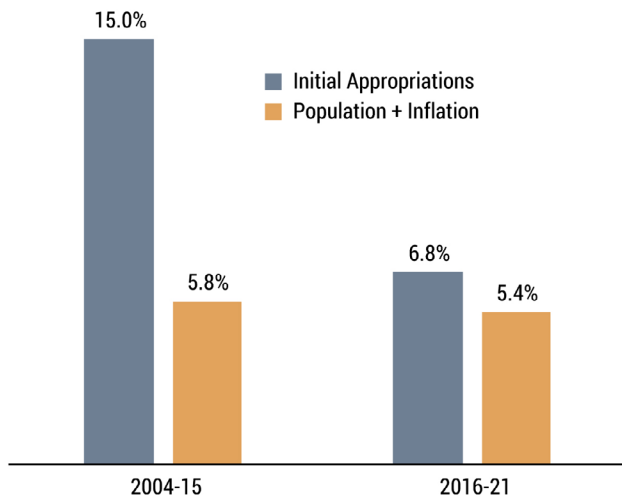
Figure 1 shows how Montanans are footing the bill for **a cumulative \$14.9 billion more** in spending than if the Legislature had increased the budget each period by this key metric. **Figure 1 includes local-state program transfers and entitlement share payments.*

MONTANA'S STATE BUDGET EXCEEDS POPULATION GROWTH PLUS INFLATION SINCE 2004-05 (STATE-FUNDS ONLY)



Source: Montana state budget publications

MONTANA'S BUDGET GROWTH HAS SLOWED SINCE 2015 (STATE-FUNDS ONLY)



On average, budget growth has slowed considerably over the last five years compared to the preceding ten years – but still tracks above the growth of the economy, as measured by population plus inflation.

Some of Montana's past increases in spending are due to the state assuming control of local programs, such as Public Defenders and District Courts, and increases in transfers to local governments, called the "Entitlement Share."¹ While this sort of spending may not represent "new" appropriations spent by the state, rather transfers of responsibility and revenue, it still represents government spending that will eventually burden the taxpayer.

| YEAR | STATE FUNDS (GAA) |
|---------------|-------------------|
| 2020-21 Base | \$7,914,000 |
| 2022-23 Limit | \$8,265,920 |
| Change | \$351,920 |
| Increase | 4.4% |

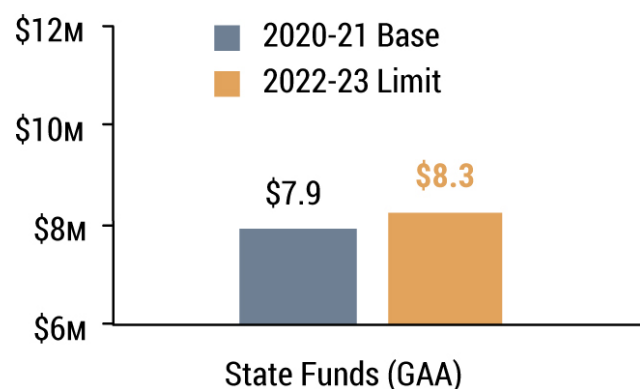
CHANGES NEEDED

Montana's budget has grown faster than Montanans' ability to pay for it over the last 20 years. Placing conservative limits on Montana's budget growth, and even reducing it as Montana families have done with their budgets during the recession, will give Montanans more opportunities to flourish.

OUR PROPOSAL: PASS A CONSERVATIVE MONTANA BUDGET

The Conservative Montana Budget (CMB) sets a maximum threshold for Montana's state budget based on taxpayers' ability to fund it instead of how much an appropriator should appropriate. This results in a 2022-23 CMB spending limit of a little over \$8.2 billion, which is an increase of 4.4 percent.

These limits represent maximum amounts for the Legislature to use when determining the cumulative amount of state funds appropriated for each government agency. The Frontier Institute believes that the Legislature could easily spend less than this and still ensure provision of basic public necessities, based on how fast spending has grown over time.



If the Legislature at least stays within these bounds in *The Conservative Montana Budget*, it will have taken a substantial step towards reining in the growth of Montana government. Furthermore, similar conservative spending limits for local governments will help reduce the overall growth of government spending that burdens the taxpayer.

PROPOSAL 2:

Reduce the burden of harmful regulations

BACKGROUND

While regulation is necessary in some cases to protect health, safety and the environment, the accumulation of thousands of regulations together has been shown to stifle economic growth and substantially increase the cost of doing business.²

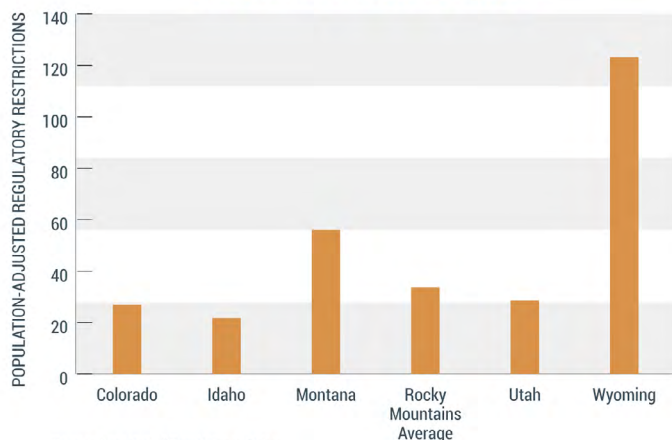
In particular, regulations with words and phrases such as *shall*, *must*, *may not*, *prohibited*, and *required*, can signify legal constraints and red tape obligations for businesses and residents.

Montana's 2019 Administrative Rules of Montana (ARM) contains 60,086 of these such restrictions and 4.7 million words. It would take an individual about 263 hours—or nearly seven weeks—to read the entire ARM.³

On a population-adjusted basis, Montana has the second-most regulatory restrictions among its regional neighbors, trailing only Wyoming and well ahead of Colorado, Idaho and Utah.⁴

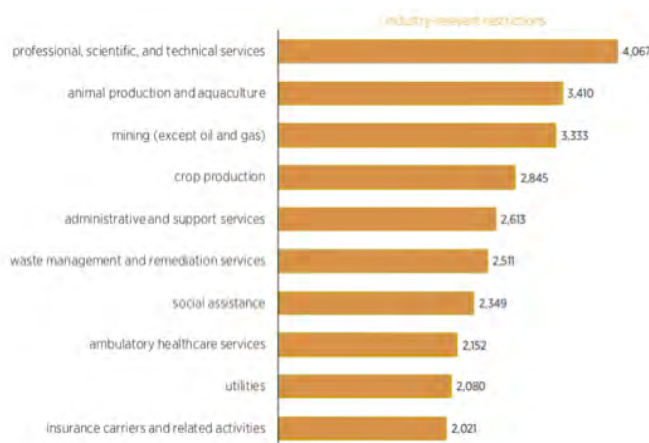
Some of the industries most heavily burdened by regulation in Montana are also among the most important to the state's economy, like animal production and mining. It's surprising, for example, that the home of the country's "golden triangle" of wheat farming regulates crop production more than any other neighbor in the Mountain West.⁵

POPULATION-ADJUSTED REGULATORY RESTRICTIONS FOR ROCKY MOUNTAIN STATES



Source: Snapshot of Regulation in Rocky Mountain States, Mercatus Center

Top 10 Industries Targeted by Montana State Regulation in 2019



Source: State RegData (Montana data), <https://quantgov.org/state-regdata/>.

CHANGES NEEDED

Montana's current process for managing the accumulation of harmful regulations lacks teeth. While state agencies are required by law to review their rules every two years, the identification of regulations to be repealed or simplified is done ad hoc.⁶

Additionally, Montana imposes no statutory limit on the total amount of regulations, further removing any incentive for a state agency to utilize reviews to actively restrain regulatory accumulation.

Montana's current process for managing regulations lacks teeth

In order to reduce Montana's current regulatory burden and prevent the accumulation of harmful regulations in the future, the legislature needs to add accountability to Montana's regulatory review process.

OUR PROPOSAL: AMEND THE MONTANA ADMINISTRATIVE PROCEDURE ACT

In order to create an accountable process for reducing and managing Montana's burden of regulations, lawmakers should amend state law to:

- 1. Establish a target reduction of regulatory restrictions over the following three years, requiring at least two restrictions be removed for every new proposed until the target is met.**
- 2. Empower the Governor to appoint a regulatory management officer and establish a stakeholder council to oversee an accountable process of state agencies reviewing and reducing restrictions.**
- 3. Establish a budget for regulatory restrictions once the target reduction is met. (For every new restriction proposed, an agency has to propose one to be removed).**



PILLAR 2: **REFORMING OUR BROKEN HEALTHCARE SYSTEM**





REFORMING OUR BROKEN HEALTHCARE SYSTEM

INTRODUCTION

The pandemic made clear that the biggest barrier in the way of affordable, quality health care for our communities is our broken healthcare system. By removing government barriers to free choice and empowering patients with control of their health decisions, Montana lawmakers can help lower costs and increase access to health care. The Frontier Institute offers the following five specific proposals.

PROPOSAL 3:

Repeal Certificate of Need (CON) laws

BACKGROUND

Montana's Certificate of Need (CON) program has been a disaster during the pandemic – driving prices higher, limiting access and even costing lives.⁷

Montana requires a “certificate of need” for home health, outpatient surgery centers, nursing homes and drug rehabilitation facilities.⁸ Under the program, the government gets to determine if a new health care business is “needed” in a process that lasts at least six months and charges a fee of \$500, or 0.3 percent of the intended expenditure.

The effect is to limit competition that could give residents more choices and lower costs.

For example, Montana's CON program has denied⁹ new applications for home health agencies, despite estimates of over 4,000 patients with an unmet need for those services.¹⁰

Montana could be increasing its COVID-19 death rate by continuing to enforce the certification laws

A recent paper even found Montana could be increasing its COVID-19 death rate by continuing to enforce the certification laws, preventing health care providers from

expanding the availability of needed services, beds or facilities.¹¹

Research by the Mercatus Center at George Mason University shows abolishing certificate of need laws could help boost competition and reduce health care costs, potentially saving each Montanan \$214 in healthcare spending per year.¹²

By allowing more competition, Montana could also attract more healthcare businesses and boost the capacity of our healthcare system.

The 2019 legislature passed a measure to repeal Montana's CON program, but it was vetoed by Gov. Steve Bullock, who said the certification laws "prevent the creation of excess capacity in health care facilities."¹³

OUR PROPOSAL: REPEAL CERTIFICATE OF NEED (CON) LAWS

With health care capacity at critical levels for many Montana counties, state lawmakers should repeal harmful and anti-competitive certificate of need laws.

PROPOSAL 4:

Authorize Direct Care

BACKGROUND

Montana's seventh Direct Primary Care (DPC) clinic recently opened in Whitefish, representing a growing trend of Montana doctors opting

out of insurance to help give their patients more choice and lower the cost of health care.¹⁴

DPC is a direct care model where patients bypass insurance entirely to pay doctors, in the form of a membership, in exchange for unlimited access to primary care services for as little as \$70 per month.

By eliminating the middlemen and bureaucracy involved in billing insurance, patients in direct care save on overall healthcare costs.¹⁵

Patients in direct care practices have the opportunity to form a stronger relationship with their doctor, which has been shown to prevent expensive conditions and save costs over the long run.

Another benefit of eliminating the insurance middleman is transparent prices. Without the documentation, coding and billing of insurance, direct care practices are able to regularly post the real cost of services on their website, and not just estimates.

Direct care also appeals to many doctors. By taking insurance out of the equation, providers are able to save money and focus on their patients.

The Montana Legislature has passed several proposals to authorize DPC, but all were vetoed.

In 2017, Insurance Commissioner Rosendale allowed DPC by issuing regulatory guidance¹⁶ which clarified DPC is not insurance and cannot be regulated as such. Since then, seven

The 2019 legislature passed a measure to repeal Montana's CON program, but it was vetoed by Gov. Steve Bullock

DPC clinics have opened in Montana, providing care to thousands of patients.

CHANGES NEEDED

Despite the growing popularity of DPC with both patients and doctors, government roadblocks still prevent the widespread adoption of direct care in Montana.

Montana is one of the few states that has not yet authorized Direct Care in state law, creating uncertainty for patients and for employers who want to offer DPC as a benefit to their employees.

OUR PROPOSAL: AUTHORIZE DIRECT CARE

By authorizing DPC and other direct care arrangements in law, direct care will continue to be another tool in developing a better doctor-patient relationship and a supplement for Montanans who face healthcare plans with higher and higher deductibles.

PROPOSAL 5:

Expand Telemedicine

BACKGROUND

While high-speed internet and cellphone coverage miss large portions of Montana, very few people are without telephone service. Despite this, Montana prohibits doctors from picking up the telephone and caring for their patients.¹⁷

The Trump administration realized this, and on March 17 expanded telemedicine delivery to increase access to care amid the COVID-19 pandemic. Among the changes was permission for doctors to use “any non-public facing remote communication product that is available to communicate with patients,” including audio-only telephones.¹⁸

Montana Gov. Steve Bullock followed their lead on March 20, using his emergency authority to temporarily

waive numerous Montana regulations of telemedicine,¹⁹ including:

- **The prohibition on telemedicine via audio-only telephone.**
- **Requirements that a provider/patient relationship be established prior to providing telemedicine.**
- **Rules requiring face-to-face interactions with healthcare professionals.**

During the following months, 27 percent of Montana seniors²⁰ on Medicare used telemedicine to talk with their primary care providers, with almost 12,000 Montana seniors using audio-only telephones.²¹ Many used telemedicine to receive needed mental health care.²² This was all a direct result of reducing government regulations that were a barrier to health care.

Montana prohibits doctors from picking up the telephone and caring for their patients.

CHANGES NEEDED

Montana's actions to waive government restrictions on telemedicine will expire when the emergency ends, once again putting up roadblocks between patients and their doctors.

OUR PROPOSAL: EXPAND TELEMEDICINE

Lawmakers should permanently remove all restrictions on telemedicine that were waived during COVID-19,²³ including:

- **Eliminating the prohibition on audio-only telemedicine, or the use of any other secure Audio/Visual equipment to deliver care.**
- **Ensuring a pre-existing provider/patient relationship is not required to provide telemedicine.**
- **Removing any requirements for face-to-face interactions with healthcare professionals.**

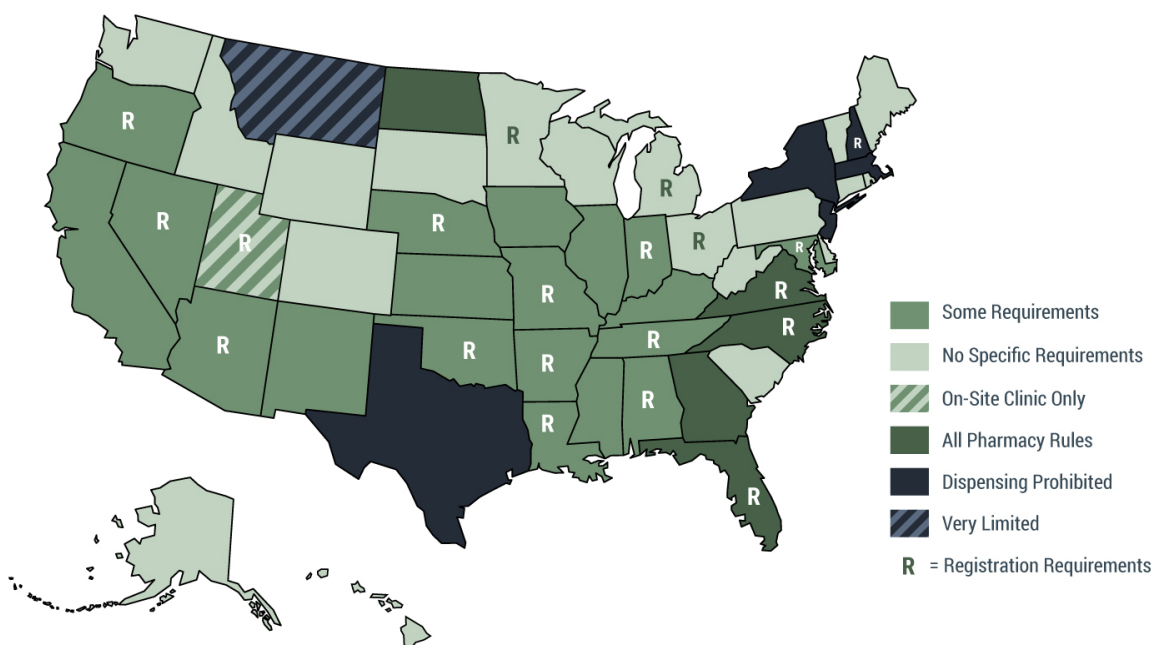
Telemedicine offers a convenient and safe alternative to traveling long distances to see a doctor. Montana should permanently eliminate regulations waived during the coronavirus outbreak that increased telemedicine access and helped lower costs.

PROPOSAL 6:

Allow Physicians to Dispense Medicine

BACKGROUND

The majority of Montanans get their prescriptions from their physician then travel to a pharmacy to fill their prescriptions. Yet 45 other states allow physicians to both prescribe and dispense medications, known as "physician dispense". Montana is one of only five states which effectively ban doctors from dispensing medications in most instances.



There are some very limited exceptions to the ban. For example, Montana allows doctors who practice over ten miles from any pharmacy to dispense medication. However, under the rule only 28 doctors would qualify to dispense medicine in Montana, a state with over 1 million residents.²⁴

Montana's law may also be unconstitutional. Three Montana family medicine doctors teamed up with the Institute for Justice earlier this year to challenge the law, asking for the right to dispense medications to their patients at-cost.²⁵

The case focuses on the unfair, anti-competitive effects of the law restricting dispensing within ten miles of a pharmacy. According to the plaintiffs, "The Montana Constitution forbids government from imposing unreasonable and protectionist restrictions on the right to pursue a chosen business and these protections are no less applicable to licensed doctors than anyone else."

Research shows that physician dispensing is equally as safe as when prescriptions are filled at the pharmacy. Physician dispensing can also be more convenient for patients, making it easier for patients to keep up with prescriptions, which can lead to better health outcomes and savings on healthcare costs long-term.

There is also a potential for savings when physicians bypass the middlemen involved in complicated insurance billing to dispense medications for cash. By the time a drug is sold

at a retail pharmacy the cost of a medication can have increased by up to 200 percent.²⁶ Sometimes a patient's insurance arrangement

covers the cost of the prescription, but other times purchasing a drug for cash can be much cheaper than a patient's insurance copay.²⁷

Savings can grow even larger when doctors dispense at-cost, as the three Montana doctors in the Institute for Justice lawsuit would like to do, providing

medication for near-wholesale prices and skipping the markup a patient might find through a pharmacy.

CHANGES NEEDED

Physician dispense does not require patients to purchase their drugs at their physician's office, but merely makes the option available to them, allowing them to shop for the best price and make tradeoffs between price and convenience.

Especially during a pandemic, it's important that Montana leaders reduce barriers for doctors to treat patients. Research shows that physician dispensing is a safe and effective practice that makes sense for Montana.²⁸

OUR PROPOSAL: ALLOW PHYSICIANS TO DISPENSE MEDICINE

Authorize Physician Dispense by repealing the prohibitions in Montana Code Annotated. Title 37, Ch. 2.

According to the plaintiffs, "The Montana Constitution forbids government from imposing unreasonable and protectionist restrictions on the right to pursue a chosen business and these protections are no less applicable to licensed doctors than anyone else."

PROPOSAL 7:

Authorize an 1115 waiver to expand Medicaid health care options

BACKGROUND

Despite the growing popularity of Direct Care models like Direct Primary Care, with both patients and doctors, government roadblocks prevent Medicaid patients from taking advantage of the benefits of direct care in Montana.

Complicated Medicaid rules prevent DPC providers from billing Medicaid for membership payments, despite the potential health benefits and cost savings of the model.²⁹

Medicaid patients who value the benefits of the doctor-patient relationship they receive through DPC may still contract privately for a membership, but must do so out-of-pocket.

Several other states have proposed Medicaid pilot programs for DPC. Oklahoma in particular has received positive reviews from the Direct Primary Care advocacy community for its proposed pilot program design.³⁰

CHANGES NEEDED

Montana should try experimenting with DPC in innovative ways by offering DPC as an option for Medicaid beneficiaries or state employees.

OUR PROPOSAL: AUTHORIZE AN 1115 WAIVER TO EXPAND MEDICAID HEALTH CARE OPTIONS

Montana should authorize a waiver to use Medicaid funds for expanding the number of choices patients have for receiving care, such as direct primary care. This would directly relieve stress and crowding at hospitals that contribute to the spread of disease, helping to lower healthcare costs.

When to Bill a Patient (ARM 37.85.406)

| SERVICE COVERAGE | PATIENT ENROLLMENT | | |
|------------------|--|--|----------------------------------|
| | Patient is Medicaid enrolled and provider accepts him/her as a Medicaid member | Patient is Medicaid enrolled and provider DOES NOT accept him/her as a Medicaid member | Patient is not Medicaid enrolled |
| COVERED | Provider can bill member only for cost sharing | Provider can bill member if the member has signed a private-pay agreement | Provider can bill member |
| NOT COVERED | Provider can bill member only if custom agreement has been made between member and provider before providing the service | Provider can bill member if the member has signed a custom agreement | Provider can bill member |



PILLAR 3: PROTECTING INDIVIDUAL RIGHTS





PROTECTING INDIVIDUAL RIGHTS

INTRODUCTION

Montana's economic recovery depends on the success of public health efforts like contact tracing to control the spread of COVID-19, yet research shows many won't cooperate because they fear for their privacy. By cracking down on warrantless searches and mass surveillance, Montana lawmakers can rebuild public trust, making public health efforts more effective and economic recovery more stable. The Frontier Institute offers the following proposal.

PROPOSAL 8:

Require a Warrant for Montanans' Digital Data

BACKGROUND

Montana previously has implemented nation-leading protections for online communications like messages and emails stored with third parties from warrantless searches by law enforcement.³¹ However, an increasing amount of things tracked and stored about people's online activity aren't necessarily communications.

By tracking your clicks, views and likes, Facebook, for example, knows incredibly personal information about you. From seemingly innocuous information like whether

you eat frozen food for dinner, to more personal information like whether you're currently away from your family.³²

This type of data can reveal incredibly sensitive, private information about individuals, but aren't necessarily "communications" that would be protected from warrantless access by law enforcement in Montana.

To address privacy concerns, Utah recently became a nationwide privacy leader by expanding their protections to include any "information or data" "of any nature transmitted or stored"³³ This covers everything stored about you with third parties like Google and Facebook, not just your communications.

Michigan also passed a measure in November of 2020 amending its constitution to put the privacy of a person's electronic communica-

tions and data at the same level as “persons, houses, papers and possessions.”³⁴

Rising concern about data collection³⁵ has also impeded the public health response to the COVID-19 pandemic, with efforts like contact tracing relying on people’s willingness to share private information with the government to effectively trace the spread of the virus. This has had dire consequences for Montana’s economy.

A Frontier Institute study found only 65 percent

Montana previously has implemented nation-leading protections for online communications

about sharing their private information with public health officials.³⁶ Montanans also overwhelmingly believed that cracking down on warrantless searches and mass surveillance could help ease their privacy concerns about contact tracing, making them more willing to cooperate.

CHANGES NEEDED

Montana’s economic recovery during this pandemic depends on the success of public health efforts, but a lot of people won’t cooperate because they fear for their privacy. By cracking down on warrantless searches

of Montanans were willing to cooperate with contact tracing efforts, with half of respondents expressing concern

and mass surveillance, lawmakers can rebuild public trust, making public health efforts like contact tracing more effective and in turn our economic recovery more stable.

OUR PROPOSAL: REQUIRE A WARRANT FOR MONTANANS’ DIGITAL DATA

Montana should expand privacy protections for all online data stored with third parties, requiring a warrant for law enforcement searches.

Montana could follow Michigan’s lead, amending our constitution to put the privacy of a person’s digital data is on the same level as “persons, houses, papers and effects” as follows:

Montana State Constitution: Section 11. Searches and seizures. The people shall be secure in their persons, papers, electronic data and communications, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

Alternatively, Montana leaders could follow Utah’s lead, broadening protections in law to specifically include all electronic data. The Libertas Institute in Utah has provided model legislation for states considering this option.³⁷

End Notes

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¹⁰ https://dphhs.mt.gov/Portals/85/qad/documents/LicensureBureau/HealthCareFacilityLicensing/CertificateofNeed/2019_CON_MonthlyReports.pdf

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¹⁹ <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>

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²⁷ <https://www.mercatus.org/publications/healthcare/improving-healthcare-access-states-after-covid-19>

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MONTANA RECOVERY

AGENDA

If you share our vision for a thriving Montana, please consider making a generous investment to the Frontier Institute:

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