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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

STEVE BARRETT, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. DV-21-581B Hon. Rienne H. McElyea **ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Before the Court are Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment. The motions were fully briefed and a hearing was held on September 7, 2022. From the oral arguments and its review of the briefs, the Court is fully advised.

DISCUSSION

Summary judgment is only proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(3), Mont. R. Civ. P. Summary judgment is an extreme remedy which should not replace a trial on the merits where there are material factual disputes. The party moving for summary judgment has the initial burden of establishing the absence of genuine issues of material fact. The burden then shifts to the party opposing summary judgment to show, by more than mere denial or speculation, that there are genuine issues of material fact to be resolved. "[A]ll reasonable inferences which can be drawn

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from the evidence presented should be drawn in favor of the non-moving party." *Lee v. Great Divide Ins. Co.*, 2008 MT 80, ¶ 10, 342 Mont. 147, 182 P.3d 41.

I. STANDING

The Court previously determined that Plaintiffs have constitutional and prudential standing. *See* March 7, 2022 Order Denying Motion to Dismiss ("Ord."). In its Cross-Motion, the State again argues the Plaintiffs do not have standing and urge the Court to reevaluate the issue on summary judgment.

Because nothing has changed since the Court's prior Order, and because the legal arguments do not depend on factual development in the case, the Court declines to revisit its prior order on standing. The Court reiterates its finding that Plaintiffs have prudential standing and, to the extent there are any considerations that would ordinarily weigh against hearing this case, they are properly relaxed due to the importance of the issues. *See Lee*, 195 Mont. at 6, 635 P.2d at 1284 (taking a broad view of prudential standing when the issues are "of such overriding public moment as to constitute the legal equivalent of all of them."); CJS. Decl. Juds. § 27 (any doubts about justiciability in declaratory judgment actions should be resolved in favor of adjudication and justiciability rules "are relaxed in matters of great public interest."); *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80.

The State also challenges the factual basis for Plaintiffs' constitutional standing, arguing that Plaintiffs have not placed sufficient evidence into the record to demonstrate a connection between themselves and the challenged legislation. However, the State appears to misapprehend the nature of Plaintiffs' claimed constitutional injuries. Plaintiffs do not advance individual discrimination or equal protection claims. Rather, Plaintiffs contend that Article X, § 9 of the Montana Constitution gives them a legally protected interest in the independence of the public

higher-education system, and that the challenged legislation invades that interest. As to this constitutional injury, Plaintiffs have carried their burden. Plaintiffs are members of the university community in Montana and are the intended beneficiaries of Article X, § 9. The Court has already held that Plaintiffs have a protectable interest in the independence of the higher education system. Thus, to the extent the challenged legislation undercuts that independence, Plaintiffs have suffered an injury in fact sufficient to establish standing.

II. THE CHALLENGED LEGISLATION VIOLATES ART. X, § 9.

The facial constitutional challenges to HB 349, HB 112 (as it pertains to post-secondary institutions), and SB 319, § 2 are purely legal questions appropriate for resolution on summary judgment. The Montana Supreme Court recently issued its decision in *Board of Regents of Higher Education v. State* ("*Regents*"), 2022 MT 128, 409 Mont. 96, 512 P.3d 748. *Regents* and Article X, § 9 of the Montana Constitution control and are dispositive in this matter.

The Montana Constitution vests the Board of Regents of Higher Education with broad authority to govern the Montana University System:

> The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

Mont. Const. art. X, § 9(2)(a) (1972). "Inherent" in this provision is "the realization that the Board of Regents is the competent body for determining priorities in higher education." *Regents*, ¶ 14 (citing *Bd. of Regents of Higher Ed. v. Judge*, 168 Mont. 433, 454, 543 P.3d 1323 (1975)). Article X, § 9 establishes the Board as a "constitutional department" with a commensurate "need for reasonable constitutional autonomy" and freedom from "political changes of fortune." *Sheehy v. Comm'r of Pol. Prac.'s*, 2020 MT 37, ¶ 11, n.1, 399 Mont. 26, 458 P.3d 309; *Regents*, ¶ 13.

The Board's authority is not strictly limited to "academic, financial and administrative affairs." *Regents*, ¶¶ 18–21. The Board has broad, implied power "to do all things necessary and proper to the exercise of its general powers" and to ensure the "health and stability of the MUS." *Id.* ¶ 17 (quoting *Sheehy*, ¶ 29).

When "the legislature attempts to exercise control of the MUS by legislative enactment," courts "must engage in a case-by-case analysis to determine whether the legislature's action impermissibly infringes on the Board's authority." *Sheehy*, ¶ 37 (McKinnon, J., concurring) (citing *Judge*, 168 Mont. at 451, 543 P.3d at 1333–34). "[W]here legislative action infringes upon the constitutionally granted powers of the Board to supervise, coordinate, manage, and control the MUS, the legislative power must yield." *Regents*, ¶ 24.

While duly enacted statutes are entitled to a presumption of constitutionality, the challenged legislation clearly amounts to an impermissible attempt "to exercise control of the MUS by legislative enactment." The Court concludes that HB 349, HB 112 (as it pertains to post-secondary institutions), and SB 319, § 2 each violate Article X, § 9 and are unconstitutional beyond a reasonable doubt.

A. HB 349 (2021) is unconstitutional.

House Bill 349, codified at § 20-25-518 and -519, MCA, is styled as an anti-discrimination and free speech bill. HB 349 purports to limit discipline for certain kinds of speech (*i.e.*, unless the speech "is unwelcome and is so severe, pervasive, and subjectively and objectively offensive that a student is effectively denied equal access to educational opportunities or benefits provided by the public postsecondary institution") and dictates whether certain student groups are entitled to the benefit of university recognition, funding, services, and support. While the parties disagree about the actual purpose and effect of the bill, it intrudes into

internal MUS governance and impacts matters constitutionally committed to the Board's oversight.

The Court rejects the State's argument that the legislature is constitutionally authorized to act in this realm because HB 349 works "in tandem" with and furthers existing Board anti-discrimination policies. This argument does not comport with the recent *Regents* decision or the plain language of Article X, § 9, which commits to the Board the "full power, responsibility, and authority" to supervise, coordinate, manage and control the MUS. As *Regents* explained, the only prior case where the Court has found concurrent legislative authority involved a statute promulgated under the 1889 State Constitution, before Article X, § 9 was established in the 1972 Constitution. *Regents*, ¶ 16 (discussing *Duck Inn v. MSU Northern*, 285 Mont. 519, 526, 949 P.2d 1179 (1997)).

Regardless, the Court is not persuaded by the State's argument that HB 349 works in tandem with and enhances the Board's authority, as the Montana Supreme Court found in *Duck Inn*. HB 349 expressly restricts the Board's authority to enforce its existing anti-discrimination policy (BOR Policy 703). It would interfere with the relationships between and among the Board, the MUS member schools, and the students, and it impermissibly directs the allocation of university system resources. The Court concludes that HB 349 unconstitutionally infringes upon the Board's authority to oversee student groups and to administer university finances and facilities.

B. HB 112 (2021) is unconstitutional.

House Bill 112, cited as the "Save Women's Sports Act" and codified at § 20-7-1305 through 1307, MCA, purports to require public schools to designate athletic teams based on biological sex, bars "students of the male sex" from participating in women's sports, and affords

a cause of action against the sponsoring school for violation of these requirements. In effect, HB 112 would prohibit transgender women from participating in athletics.

The Court rejects the State's argument that this is an appropriate subject for legislation due to the lack of an existing Board policy specifically addressing transgender athletes. The State offers no authority that the legislature has any concurrent power with MUS relating to student athletics. Extracurricular activities are a well-recognized part of the educational experience, within the Board's constitutional authority. *State ex rel. Bartmess v. Bd. of Trustees of Sch. Dist. No. 1*, 223 Mont. 269, 274–75, 726 P.3d 801, 804 (1986). The Board has overseen athletics programs and promulgated related policies governing participation and non-discrimination since the Board's inception. *See* BOR Policies 1201–1203 and associated history notes. The Board has "full" power and responsibility in this realm.

Further, HB 112 contradicts established Board policy. BOR Policy 1202.1 requires, among other things, that all MUS athletics programs comply with the rules and requirements of the NCAA or other governing national organization. The legislative history of HB 112 indicates that the MUS opposed the bill out of concern that it could force member schools out of compliance with national organization requirements and impede their eligibility to participate in interstate competition and host post-season events. Contrary to the State's characterization, the Board's policy is not a delegation of the Board's constitutional authority to a non-governmental body, but an exercise of the Board's authority to ensure the eligibility of Montana athletes and to protect the MUS's substantial financial investment in its athletics programs. HB 112 would interfere with that agenda which is entrusted to the Board's judgment.

The Court also rejects the State's argument that HB 112 is a "neutral law[] of state-wide concern" that remains within the legislature's domain because it also applies to public primary

and secondary schools. *See Regents*, ¶ 17. HB 112 expressly targets collegiate athletics and public "institution[s] of higher education." It is akin to HB 102, which also had applications outside of the MUS, but the campus carry provisions were "aimed directly" at the Board and implicated its constitutional authority. *Regents*, ¶ 17.

The Court concludes that, as applied to the Board, HB 112 unconstitutionally infringes upon the Board's constitutional authority to oversee student groups and activities and would otherwise invite financial and administrative consequences that firmly place this matter within the Board's exclusive domain.

C. SB 319, § 2 (2021) is unconstitutional.

Senate Bill 319 addresses various campaign finance and electioneering matters. Relevant to this case, Section 2, codified at § 20-25-452, MCA, would prohibit longstanding and Board-approved funding measures for "student organizations functioning as political committees." This provision directly affects Plaintiff MontPIRG, a student-directed, non-partisan public advocacy group that has operated out of the University of Montana for more than forty years.

The Court rejects the State's arguments that the Board has yielded its exclusive authority by failing to promulgate a relevant policy or by delegating the matter to the students. Again, the alleged absence of a specific policy does not give the legislature license to act on matters constitutionally committed to the Board, which is no less an infringement. Moreover, the process by which student fees are proposed, approved, and assessed is set forth in BOR Policies 940.12.1 and 940.31. MontPIRG's funding arrangements have been submitted to and approved by the Board on a biennial basis, with the support and approval of the affected student body, pursuant to the Board's policies and under its authority. The Court concludes that SB 319, § 2 impermissibly seeks to micromanage student groups and financial matters that are committed to the Board's

oversight. It is a further unconstitutional infringement of the Board's constitutionally guaranteed authority.

None of the bills at issue is this case can be fairly characterized as neutral laws of statewide concern. They do not involve the exercise of the retained legislative powers of appropriation or audit. Each attempts to directly control internal university affairs and inject legislative policy judgments into MUS administration, contrary to the letter and intent of the Montana Constitution. *See Regents*, ¶ 17. The challenged bills each violate Article X, § 9 and are unconstitutional.

III. ATTORNEYS' FEES

Plaintiffs seek recovery of their attorneys' fees pursuant to the private attorney general doctrine. The private attorney general doctrine is an equitable exception to the American Rule, applicable "when the government, for some reason, fails to properly enforce interests which are significant to its citizens." *W. Tradition P'ship v. Mont. A.G.*, 2012 MT 271, ¶ 13, 367 Mont. 112, 291 P.3d 545. "The basic objective of the doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases." *Flannery v. Cal. Highway Patrol,* 71 Cal.Rptr.2d 632, 635 (Cal. App. 1998); *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 91, 338 Mont. 259, 165 P.3d 1079 (citing *Flannery*).

The Court must consider three factors: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement and the resulting burden; and (3) the number of people who benefit. *W. Tradition,* ¶ 14 (citing *Montrust v. State ex rel. Bd. of Land Comm'rs,* 1999 MT 263, ¶ 66, 296 Mont. 402, 989 P.2d 800).

The first factor requires "that constitutional interests be vindicated to demonstrate the societal importance of the litigation." *Clark Fork Coalition v. Tubbs,* 2017 MT 184, ¶ 18, 388 Mont. 205, 399 P.3d 295. This requirement is met. This case is about fundamental separation-of-

powers issues and public education, both matters of statewide importance. All the claims, issues and arguments are constitutional in nature. *See Montrust*, ¶¶ 67, 69 (awarding fees against the state because our public schools are matters of importance "to all Montanans").

The second factor, necessity of private enforcement and the resulting burden, weighs in favor of the State. The Board of Regents could have initiated an action asserting its constitutional authority and challenging the bills at issue in this case, thereby alleviating Plaintiffs' burden in this matter. While the Court has determined that Plaintiffs have standing to assert the claims at issue in this action, it may not have been necessary for Plaintiffs to initiate this action as the Board could have asserted its own authority.

The third factor, the size of the group that stands to benefit, weighs in favor of Plaintiffs. Montana's public universities are among the largest and most important public institutions in this state. This case stands to benefit the more than 40,000 students who presently make up the Montana University System as well as future students and many thousands of MUS faculty, employees, and the public at large. *See Montrust*, ¶ 67, 69.

The Court also looks to § 25-10-711(1)(b), MCA, which provides that fees should only be awarded against the State if the State's defense is frivolous or in bad faith. "While not dispositive, this standard also serves as a guidepost in analyzing a claim for fees under the private attorney general doctrine." *Western Tradition P'ship v. AG of Mont.*, 2012 MT 271, ¶ 18, 367 Mont. 112, 291 P.3d 545. Plaintiffs argue § 25-10-711(1)(b), MCA, is not applicable when fees are sought pursuant to the private attorney general doctrine and the Montana Supreme Court has not applied it in later cases addressing the private attorney general doctrine. While Justice Nelson agreed with Plaintiffs' argument in his dissent in *Western Tradition P'ship*, the majority of the Montana Supreme Court has not stated that it is improper to rely on § 25-10-711(1)(b),

MCA, in evaluating fees under the private attorney general doctrine, nor has it overruled *Western Tradition P'ship*. The Court finds the State's defense in this action was not frivolous or pursued in bad faith which weighs in favor of the State in determining whether fees are appropriate.

Based on the Court's conclusions that it may have not been necessary for Plaintiffs to privately enforce the Board's authority and that the State's defense was not frivolous or in bad faith, the Court finds that an award of Plaintiffs' attorneys' fees under the private attorney general doctrine is not appropriate.

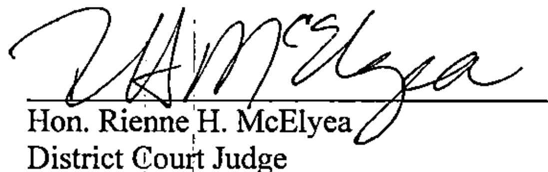
ORDER

Based on the above, the Court hereby **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** the State's Cross-Motion for Summary Judgment.

The Court **DECLARES** that **(1)** HB 349 (§ 20-25-518 and 519, MCA), **(2)** HB 112 (§ 20-7-1305 through 1307, MCA) as it pertains to institutions of higher education, and **(3)** SB 319, § 2 (§ 20-25-452, MCA) infringe upon the authority of the Board of Regents under Article X, § 9 of the Montana Constitution and **PERMANENTLY ENJOINS** any application or enforcement of these unconstitutional enactments as against the Board of Regents, the Montana University System and its constituent units, and on any MUS campus or property.

The Court **DENIES** Plaintiffs' request for their fees and costs under the private attorney general doctrine.

Dated September 14, 2022.



Hon. Rienne H. McElyea
District Court Judge

c: ✓ James H. Goetz / Jeffrey J. Tierney
✓ Raphael Graybill
✓ Austin Knudsen / Kristin Hansen / David M.S. Dewhirst / Kathleen L. Smithgall

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