MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

STEVE BARRETT; ROBERT KNIGHT; MONTANA FEDERATION OF PUBLIC EMPLOYEES; Dr. LAWRENCE PETTIT; MONTANA UNIVERSITY SYSTEM FACULTY ASSOCIATION REPRESENTATIVES; FACULTY SENATE OF MONTANA STATE UNIVERSITY; Dr. JOY C. HONEA; Dr. ANNJEANETTE BELCOURT; Dr. FRANKE WILMER; MONTANA PUBLIC INTEREST RESEARCH GROUP; ASSOCIATED STUDENTS OF MONTANA STATE UNIVERSITY; ASHLEY PHELAN; JOSEPH KNAPPENBERGER; NICOLE BONDURANT; and MAE NAN ELLINGSON, Plaintiffs, v. STATE OF MONTANA; GREG GIANFORTE; and AUSTIN KNUDSEN, Defendants.	Cause No. DV-21-581B Hon. Rienne H. McElyea **ORDER DENYING STATE'S MOTION TO DISMISS**

This case presents a constitutional challenge to four legislative measures (HB 349, HB 112, HB 102, and SB 319) and a related conditional appropriation (HB 2, tied to HB 102) passed during the 2021 legislative session. As to each, Plaintiffs challenge the State Legislature's constitutional authority to legislate university system affairs and intra-campus activities.

Pending before the Court is the State of Montana's Motion to Dismiss. The State's motion is fully briefed and the Court heard argument on December 15, 2021. The State asks this

Court to dismiss this case on two grounds: (1) because the Plaintiffs' Complaint failed to state a legally cognizable claim for relief; or, alternatively, (2) because Plaintiffs lack standing and their claims are otherwise not justiciable. The Court separately denied the State's motion as to the first issue. The second issue, whether Plaintiffs have standing and have otherwise brought justiciable claims, is now ripe for decision.

I. RULE 12(b)(6) STANDARDS

"A claim is subject to dismissal under Rule 12(b)(6) if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under the claim." *In re Estate of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim that would entitle the plaintiff to relief." *Wise v. CNH America, LLC*, 2006 MT 194, ¶ 6, 333 Mont. 181, 142 P.3d 774.

In considering a motion to dismiss made pursuant to Rule 12(b)(6), Mont. R. Civ. P., the Court will consider only the allegations made within the complaint, together with exhibits attached to the complaint. *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 230-231, 883 P.2d 121, 122-123 (1997). All well pleaded facts must be taken as true and viewed in a light most favorable to the plaintiff. *Wise*, ¶ 6. However, the Court has no obligation "to take as true legal conclusions or allegations that lack factual basis." *Western Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 55, 359 Mont. 34, 249 P.3d 35.

Rule 12(b)(6), Mont. R. Civ. P., must also be read in conjunction with Rule 8, Mont. R. Civ. P., which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Anderson v. ReconTrust Co, N.A.*, 2017 MT 313, ¶ 8, 407 P.3d 692, 390 Mont.

12 (quoting Rule 8(a), Mont. R. Civ. P.). A complaint must contain sufficient facts to provide fair notice of the nature of the claim, but Montana embraces a "liberal notice pleading" system and does not require detailed fact pleading. *Id.*

II. STANDING

"[S]tanding is a threshold, jurisdictional requirement in every case." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80. "Standing requires the plaintiff to have a personal stake in the outcome of the controversy at the commencement of the litigation..." *Id.*, ¶ 30. In a multi-plaintiff case, the standing of "any one" plaintiff is sufficient for a claim to proceed and, upon finding that one plaintiff has standing, "the standing of the other parties [does] not merit further inquiry." *Aspen Trails Ranch*, 2010 MT 79, ¶ 45, 356 Mont. 41, 230 P.3d 808. Thus, the Court's task is to discern whether the Plaintiffs' allegations, taken as true and drawing all reasonable inferences in their favor, are sufficient to show that at least one Plaintiff has standing to bring each claim.

There are two types of standing: constitutional and prudential. *Schoof v. Nesbit*, 2014 MT 6, ¶ 15, 373 Mont. 226, 316 P.3d 831; *Heffernan*, ¶¶ 31-32. Taking heed of the Montana Supreme Court's admonition that it is "important to distinguish" between these two concepts, but that not all of the Court's decisions have made the distinction explicit, this Court addresses each in turn. *Heffernan*, ¶ 31.

A. Constitutional Standing

The jurisdiction of the courts is constitutionally limited to cases where a plaintiff has suffered a past, present, or threatened injury (the "injury-in-fact" requirement) that can be alleviated by a judgment (the "redressability" requirement). *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 55, 265 Mont. 92, 278 P.3d 455 ("Standing may rest not only on past or present

injury, but also on *threatened* injury" (emphasis in original)); *Heffernan*, ¶¶ 32–33. Constitutional standing is an "absolute" requirement, essential to the courts' exercise of subject matter jurisdiction and therefore not subject to exception or waiver. *Schoof*, ¶ 15; *Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 45, n. 18, 394 Mont. 167, 434 P.3d 241.

However, the showing required to establish redressable injury is "modest." *Bennett v. Spear*, 520 U.S. 154, 170–71 (1997). To establish constitutional standing on a Rule 12 motion to dismiss, the plaintiff is merely "required to allege 'a personal stake in the outcome of the controversy.'" *Helena Parents Commission v. Lewis & Clark County Commissioners*, 277 Mont. 367, 371, 922 P.2d 1140, 1143 (1996) (citations omitted).

1. HB 349

Plaintiffs characterize HB 349 as a bill "which purports to regulate the manner in which universities may regulate and supervise student organizations and the use of facilities." Complaint, ¶ 1(a). Plaintiffs allege that, although it has been styled by the Legislature and by the State in this case as an anti-discrimination measure, HB 349 actually promotes and excuses some kinds of student-on-student discrimination by preventing universities from responding to or disciplining discriminatory and harassing speech. *Id.*, ¶ 4. Plaintiffs further allege that HB 349 is contrary to and purports to supersede existing policies developed and implemented by the Board of Regents to protect students. *Id.*, ¶ 5. Plaintiffs contend that HB 349 undercuts these protections and invites discrimination on campuses and in university-affiliated groups and organizations. *Id.*, ¶¶ 5 and 37.

Among the Plaintiffs are several students and representative groups that are subject to and have an interest in being free from discrimination on campus and in the Regents' anti-discrimination policy which is impacted by HB 349. *See* Complaint, ¶ 21 (Plaintiff Associated

Students of Montana State University, "ASMSU," noting in particular the student government's associational interest in extracurricular activities and student wellness and safety); *Id.*, ¶ 22 (Plaintiff Ashley Phelan, student); *Id.*, ¶ 23 (Plaintiff Joey Knappenberger, student); *Id.* at 12, ¶ 24 (Plaintiff Nicole Bondurant, student); *see also Id.*, ¶ 37 (asserting that each of the Plaintiffs stands to suffer injuries to their interest in free speech and non-discrimination and that the plaintiff groups are suing both on their own behalf and on an associational basis on behalf of their individual members and constituents, i.e. the students in Montana State University).

The Court finds that each of these Plaintiffs has sufficiently alleged a stake in the constitutionality of HB 349 and has credibly articulated an injury-in-fact insofar as they allege HB 349 undercuts the policies and procedures that define their rights and govern their conduct as students. The Plaintiffs also allege a credible threat of ongoing and future injury due to actual discrimination and lack of recourse. Because Plaintiffs allege that HB 349 may have the effect of excusing discriminatory conduct, or depriving students directly of protections of the system developed and implemented by the Regents so far, this is not an abstract hypothetical or an unlikely future contingency. At this stage of the litigation, Plaintiffs have met their minimal burden "to allege 'a personal stake in the outcome of the controversy'" sufficient to support the injury prong of constitutional standing. *See Helena Parents Comm'n*, 277 Mont. at 371, 922 P.2d at 1143 (citations omitted).

The second element of standing, redressability, is also met. If the Court deems HB 349 unconstitutional and enjoins its implementation in the Montana University System as requested, the alleged harm will necessarily cease, affording complete redress.

2. HB 112

Plaintiffs characterize HB 112 as a bill "which purports to forbid university athletic teams

from allowing transgender athletes to participate in women's sports." Complaint, ¶ 1(b). Plaintiffs allege that HB 112 is discriminatory and interferes with the professional responsibilities of university system employees (i.e. athletic directors) who must ensure compliance with intercollegiate rules and regulations regarding student participation and non-discrimination. *Id.*, ¶¶ 6, 13-24, and 37.

Among the Plaintiffs are representative groups with an interest in these matters and whose constituent members have suffered or will suffer harm as a result of HB 112. *Id.*, ¶ 13 (Plaintiff Montana Federation of Public Employees, "MFPE") and ¶ 21 (ASMSU, noting the student government's associational interest in student athletics, extracurricular activities, and student wellness and safety); *Id.*, ¶ 37 (associational standing).

The Court finds that each of these Plaintiffs has sufficiently alleged a stake in the constitutionality of HB 112 and Plaintiffs have articulated credible present injuries (i.e. interference with administration of university athletic programs and compliance with intercollegiate rules and regulations) as well as reasonably concrete and foreseeable threatened injury (i.e. actual exclusion from participation). The forecasted injury, i.e. exclusion of transgender athletes, is not an abstract or remote contingency. It is the expressly stated purpose and function of the challenged legislation.

The redressability element is also met as to HB 112. If the Court deems it unconstitutional and enjoins its implementation in the Montana University System, the alleged harm will necessarily cease, affording complete redress.

3. HB 102

On November 30, 2021, Judge Michael F. McMahon of the First Judicial District Court, Helena, Montana, issued an order finding sections 3, 4, 5, 6, 7, and 8 of HB 102 unconstitutional

as applied to the Board of Regents and permanently enjoined application and enforcement of these section on or at MUS campuses and locations. As a result, the issues raised by Plaintiffs in this matter relating to HB 102 are now moot. Summary Judgment Order, *Board of Regents v. State*, Cause No. 18 BDV-2021-598 (1st Jud. Dist.).

4. SB 319

Plaintiffs challenge portions of SB 319 that they allege, "purport to restrict the ability of student organizations to register students to vote in student dormitories and dining facilities...." Complaint, ¶1(d). SB 319 further prohibits the funding of such organizations though "opt-out" student fee assessments and recognizes a private cause of action and imposes civil fines on groups that violate these restrictions. *Id.*, ¶ 7.

Plaintiff Montana Public Interest Research Group ("MontPIRG") conducts the kinds of activities that SB 319 targets and its operations have been traditionally funded by an opt-out fee, approved by the Regents, of the type SB 319 prohibits. *Id.*, ¶¶ 7, 20, and 38. MontPIRG has a stake in the constitutionality of SB 319 and has credibly alleged that the challenged measure is presently injurious to its organizational interests and its operations.

The redressability element is also met as to the challenged portions of SB 319. If the Court deems them unconstitutional and enjoins their implementation, the alleged harm will necessarily cease, affording complete redress.

5. All Contested Bills

With regard to all bills challenged in this action, the faculty and student organizations have sufficiently alleged an injury in fact relating to their engagement with the Board of Regents. Plaintiff ASMSU alleges it "serves as the representative voice of students attending Montana State University by engaging with university administration and the Board of Regents on behalf

of the student body regarding matters affecting education, athletics and extracurricular activities, student wellness, and other issues germane to the student population and campus life." Complaint, ¶ 21. Plaintiff MUSFAR alleges it "represents the Faculty Senates and individual faculty members by engaging with the Board of Regents in matters pertaining to academic affairs and campus administration that broadly affect the MUS and faculty statewide." *Id.*, ¶ 15.

If the challenged legislation unconstitutionally interferes with the Board of Regents' constitutionally granted independence and authority as alleged by Plaintiffs, then ASMSU and MUSFAR's role in engaging with the Board to establish policies is also disrupted resulting in a direct injury to these organizations and those they serve and represent. The Court finds the alleged interference with the normal functioning of the relationship between the Board of Regents and these organizations is sufficient to confer standing upon ASMSU and MUSFAR. *See Armstrong v. State*, 1999 MT 261, ¶¶ 11-13, 296 Mont. 361, 989 P.2d 364.

In conclusion, as to all claims, the Court finds that the required "modest" showing that Plaintiffs have alleged a "personal stake in the outcome," is satisfied. Plaintiffs' allegations are sufficient to put the State on notice about the nature of their claims and why Plaintiffs are proper parties. For each claim, Plaintiffs have alleged actual and threatened injuries-in-fact that would be fully redressed by the requested declaratory judgment. The Court therefore holds that Plaintiffs have constitutional standing and the Court has subject matter jurisdiction to allow Plaintiffs claims to proceed.

B. Prudential Standing

The doctrine of prudential standing involves a body of "judicially created prudential limitations imposed for reasons of policy." *Schoof*, ¶ 15. Recognized prudential rules, relevant to this case, include that a plaintiff's injury should be distinguishable from the public at large (the "generalized grievance" doctrine) and that they will "assert [their] own legal rights and interests"

(the "real party in interest" rule). *Heffernan*, ¶ 33. While constitutional standing requirements are "absolute," prudential rules are "malleable." *Schoof*, ¶ 15 (quoting *United Food & Com. Workers v. Brown Grp.*, 517 U.S. 544 (1996)). They are not jurisdictional prerequisites but "discretionary limits on the exercise of judicial power that 'cannot be defined by hard and fast rules.'" *Flathead Joint Bd. of Ctrl. v. State*, 2017 MT 277, ¶ 27 389 Mont. 270, 405 P.3d 88 (McKinnon, J., concurring) (citing *Missoula City-Cnty. Air Poll. Control Bd. v. Bd. of Env. Rev.*, 282 Mont. 255, 937 P.2d 463 (1997)); *see also Heffernan*, ¶ 31 (distinguishing mandatory constitutional standing from "self-imposed" rules that are matters of "judicial self-governance" and "subject to exceptions").

The Board of Regents has brought a separate challenge, against HB 102 only, based on a substantially identical theory premised on Article X, § 9(2)(a) of the Montana Constitution. *See Board of Regents v. State*, Cause No. 18 BDV-2021-598 (1st Jud. Dist.). The State did not challenge the Regents' standing and argues here that Regents are the only proper Plaintiff to raise such concerns about legislative overreach. Thus, the State reasons, if the Regents do not challenge a particular legislative measure, it is not reviewable.

The Court rejects the State's premise that because the Board of Regents is undoubtedly a proper plaintiff to raise concerns about legislative encroachments on university affairs and the Board's constitutionally delegated authority, it is the only proper plaintiff. Montana law rejects this notion. The Montana Supreme Court has recognized that there may be more than one party affected by a given issue with a sufficient interest in the subject matter to have standing to litigate it. In *Air Pollution Control Board*, the Court explained that "possessing regulatory authority" over the subject matter of an action is not the *sine qua non* of standing and an "injury need not be exclusive to the complaining party." *Id.*, 282 Mont. at 262, 937 P.2d at 467. Thus,

the Missoula Air Pollution Control Board had standing, vis-à-vis its interest in protecting its ability to discharge its legal obligations as a quasi-judicial governmental body, as well as a private citizen "who breathes the air" would have standing based on the end results of the disputed regulations. *Id.* These were not the claims of a random citizen with an abstract interest. The local Missoula board had a particular interest, "distinguishable and greater than" the interest of the public generally, "[i]n the same way as a citizen of the Missoula airshed is more particularly affected by the State Board's act than is a citizen of another area...." *Id.*; *see also Aspen Trails Ranch*, ¶ 43.

Likewise, in *Lee v. State*, 195 Mont. 1, 635 P.2d 1282 (1981), the Montana Supreme Court entertained a declaratory judgment action, brought by an affected citizen, concerning the proper allocation of constitutional authority to regulate speed limits. The Court found that a citizen motorist had an interest in the constitutionality of a speed limit, and therefore also an interest in whether the attorney general had constitutional authority to impose such limits. Lee had standing not because he was claiming to hold the constitutional power to dictate speed limits, but because he was among the class of persons (i.e. motorists) affected by the speed limit and potentially subject to consequences if he violated the arguably unconstitutional law.

These binding authorities are analogous to the present case. Plaintiffs are not random citizens or interlopers with an abstract, academic interest in university system governance. Compare *Olson v. Department of Revenue*, 223 Mont 464, 726 P.2d 1162 (1986) (finding a lack of standing where the plaintiffs had never engaged in the activities that were the subject of the dispute and had no intention to do so). They are university students, faculty, employees and representative groups with a distinct interest in the challenged litigation that is different than the public at large. On Plaintiffs' allegations, the laws at issue in this case are aimed squarely at

regulating the Plaintiffs' conduct.

Moreover, the Montana Supreme Court has found standing in cases where the plaintiff is not the most directly affected potential plaintiff, but nonetheless has a concrete interest in the subject matter and a close relationship with other affected parties. *See Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (affording standing to a doctor to litigate patient privacy laws that would "directly interdict" the normal functioning of the doctor-patient relationship); *see also Singleton v. Wulff*, 428 U.S. 106, 114–15 (1976) (prudential rules should not be applied "where [the rule's] underlying justifications are absent[,]" such as where the plaintiff's interests are "inextricably bound up" in a related party's rights and the court finds that the plaintiff is capable of being an effective advocate (cited by *Armstrong*)). The Court concludes the Plaintiffs have a concrete interest in how university system affairs are governed and are therefore proper plaintiffs in this action. *See, e.g.*, Complaint, p. 11, ¶ 21 (ASMSU, the student government body, engages with the Board of Regents on behalf of the student body regarding matters of student interest including education, athletics, extracurricular activities and student safety).

Finally, the Court may relax prudential standing rules—to the extent necessary—in order to hear claims of significant public concern that have not otherwise been presented for judicial review. *See Comm. for an Effective Jud'y*, 209 Mont. at 110, 679 P.2d at 1226 ("the importance of the question to the public 'surely is an important factor'" and in general, "private parties should be granted standing to contest important public issues"); *see also Lee*, 195 Mont. at 6, 635 P.2d at 1284 (the expectation that the court will decide the rights of the real parties in interest may be satisfied where 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*, ¶ 33 (the court should consider "the importance of the question to the public" and whether the challenged conduct might evade judicial review if standing is denied on prudential grounds).

The Court concludes that Plaintiffs are proper parties in their own right. Even if the Board of Regents were the better plaintiff, these are issues of significant public importance that have not otherwise been raised and might avoid judicial review. Considerations of judicial prudence do not warrant dismissal here, where Plaintiffs have a close relationship with the Regents, a strong interest in the ultimate constitutional issue (how university affairs are governed) and stand to be directly affected by the challenged legislation.

III. CONCLUSION

In summary, taking Plaintiffs' allegations as true, the Court concludes that Plaintiffs have made plausible allegations that are sufficient to establish their standing and the existence of a justiciable controversy.

IT IS HEREBY ORDERED that the State's Motion to Dismiss is **DENIED**. The State shall file a responsive pleading, in answer to the Plaintiffs' Complaint, within fourteen (14) days of the date of this Order.

Dated this 4 day of March 2022.

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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