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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

STEVE BARRETT, et al., Plaintiffs, vs. STATE OF MONTANA, et al., Defendants.	Case No. DV-21-581 B Hon. Rienne H. McElyea **BRIEF IN SUPPORT OF STATE OF MONTANA'S MOTION TO DISMISS**

Email 7/16/21 @ 4:50pm mg

INTRODUCTION

Pursuant to Montana Rule of Civil Procedure 12(b)(6), Defendants move to dismiss the Complaint. Plaintiffs allege that four measures recently passed by the Montana legislature are unconstitutional: House Bill (HB) 349, HB 112, HB 102, and Senate Bill (SB) 319. They also challenge a provision of HB 2, the appropriations law. But Plaintiffs don't challenge these laws on the merits; they instead allege that these bills impermissibly invade the constitutional prerogatives of a nonparty—the Board of Regents ("the Board" or "Regents"). Dismissal is therefore required because Plaintiffs clearly lack standing and are seeking an improper advisory opinion.

In addition, Plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs' claims are insufficiently pled and lack the necessary supporting allegations. Even adopting their implied arguments that the Board's authority is either exclusive or superior to the Legislature's authority in the areas regulated by the new laws—which they lack standing to assert—those arguments must fail because they are legally meritless.

Should the Court decline to dismiss the Complaint in its entirety, then Defendants alternatively request that this case be stayed as to the claims against HB 102 and SB 319. Both are being challenged and have been preliminarily enjoined in the First Judicial District Court, and those cases' outcomes will likely resolve the related claims here.

DISCUSSION

I. Applicable Standards

"When considering a motion to dismiss under M. R. Civ. P. 12(b)(6), all well-pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable to the plaintiff." *Sinclair v. BN & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 200 P.3d 46 (citation omitted). "Courts are not required, however, to accept allegations of law and legal conclusions in a complaint as true." *Threkeld v. Colorado*, 2000 MT 369, ¶ 33, 303 Mont. 432, 16 P.3d 359. A "complaint must state something more than facts which, at the most, would breed only a suspicion that the claimant may be entitled to relief." *Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 319 Mont. 156, 415 P.3d 486 (quotation and internal quotation marks omitted). Courts may dismiss a complaint if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Id.*

II. Plaintiffs' Complaint is not justiciable.

"[T]he judicial power of Montana's courts is limited to 'justiciable controversies.'" *BNSF Ry. Co. v. Asbestos Claims Court*, 2020 MT 59, ¶ 54, 399 Mont. 180, 459 P.3d 857 (citation omitted). "A justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion." *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 8, 355 Mont. 142, 226 P.3d 567 (internal quotation and quotation marks omitted). "[A]bstract differences of opinion" do not render a controversy justiciable. *Id.* ¶ 9 (quotation omitted).

Application of the justiciability doctrine is especially crucial in constitutional challenges because of the "'deeply rooted' commitment 'not to pass on questions of constitutionality' unless ... necessary." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004). In Montana, that "commitment" is embodied in the rule that laws are presumably constitutional. *See State v. Davison*, 2003 MT 64, ¶ 8, 314 Mont. 427, 67 P.3d 203 ("Every possible presumption must be indulged in favor of the constitutionality of a legislative act."); *GBN, Inc. v. Mont. Dep't of Revenue*, 249 Mont. 261, 265, 815 P.2d 595, 597 (1991) ("If a doubt exists, it is to be resolved in favor of the legislation"); *State v. Stark*, 100 Mont. 365, 368, 52 P.2d 890, 891 (1935) ("[T]he constitutionality of any Act shall be upheld if it is possible to do so.").

Due to fatal justiciability defects here, this Court need not and should not decide whether HB 349, HB 112, HB 102, and SB 319 are constitutional. The Court should instead dismiss the case.

A. Plaintiffs' speculative, unspecific allegations fail to demonstrate a concrete injury sufficient to confer standing.

Standing is a threshold jurisdictional question, "especially ... where a ... constitutional violation is claimed." *Olson v. Dep't of Rev.*, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986). Standing rests on two distinct bases. First, Article VII, § 4 of the Montana Constitution extends original jurisdiction of the district court to "cases at law and in equity." *Olson*, 223 Mont. at 469–70, 726 P.2d at 1166 (quoting Art. VII, § 4). "This provision has been interpreted as embodying the same limitations as are imposed by federal courts under the Article 3 'case or controversy' provision of the

United States Constitution." *Id.* Second, the doctrine is based on "judicial self-restraint imposed for reasons of policy." *Id.*

To establish standing, a plaintiff must demonstrate a "past, present, or threatened injury to a property or civil right ... that ... would be alleviated by successfully maintaining the action." *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187 (citation and internal quotation marks omitted). "The alleged injury must be: concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally." *Id.* (citations omitted). Standing requires that a party assert *its own* legal rights and interests—not the legal rights or interests of others. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

1. Plaintiffs inappropriately rely on the interests of nonparties.

For the many plaintiffs here, the stated "overarching purpose" of their Complaint is to "vindicate the Regents' authority." Complaint, ¶ 4. But no Regent is a plaintiff. Nor is the Board. These plaintiffs cannot assert interests or rights on behalf of the nonparty Board of Regents. [1] The Complaint discusses policies adopted by the "Regents and/or the individual institutions of higher learning" regarding the subject matter of the challenged laws. Complaint, ¶ 3. And they apparently rely upon the existence of these Board *policies* to establish the "constitutional autonomy *of the*

[1] This is especially true here, where the Board of Regents is representing its interests by actively challenging HB 102. *See Board of Regents v. State*, Cause No. BVD 2021-598 (1st Jud. Dist.).

Regents" with regard to the subject matter of the challenged laws. They moreover claim that HB 2 is unconstitutional "because it strips *the fundamental right of the [Montana University System (MUS)] and the Regents* to seek judicial recourse." Complaint, ¶ 47 (emphasis added). Plaintiffs claim "a particular interest in assuring the continued constitutional autonomy *of the Board of Regents*." Complaint, ¶ 37 (emphasis added). Plaintiffs fail, however, to assert *their own* "legal rights and interests." *Kowalski*, 543 U.S. at 129 (internal quotation and citation omitted); *see also Olson*, 223 Mont. at 469–70, 726 P.2d at 1168 (noting a party must have a "personal stake in the outcome of the controversy" (internal quotation and citation omitted)).

No "real and substantial" dispute arises, moreover, simply because the Regents' policies—which are not laws—may have to be rewritten to comply with current Montana law. *See California v. Texas*, 2021 U.S. LEXIS 3119 at *16, 539 U.S. ___ (2021) (stating a "dispute must be real and substantial ... as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (internal citation and quotation marks omitted). Because the entirety of their primary alleged injury stems from a supposed legislative encroachment on the Board's authority, Plaintiffs have failed to establish a personal, particularized, concrete, or otherwise judicially cognizable injury.

2. Plaintiffs' other asserted injuries are speculative, hypothetical, and vague.

Plaintiffs assert other alleged injuries—due again to the alleged encroachment on the Regents' authority—but those cannot support standing because they are speculative, hypothetical, and vague. For example, Plaintiffs assert that they "will suffer

injury in fact as a consequence of the challenged legislation" and that they "stand[] to suffer harm as a consequence of the implementation of the challenged bills, including actual and prospective injuries to their interest in campus safety, freedom of speech, and non-discrimination." Complaint, ¶ 37. Plaintiffs further opine that they are "apprehensive" about HB 349's and HB 102's possible consequences, and they are "*concerned* about the negative effect on enrollment due to concerns of prospective students and their parents over student safety on the campuses." *Id.* (Emphasis added). And *if* Plaintiff MontPIRG chooses to participate in activity similar to what it has done in the past, "SB 319 would have onerous and unconstitutional restrictions on voter registration and other political activities." Complaint, ¶ 38.

But these are not "injur[ies] in fact." Complaint, ¶ 37. They are disagreements with the policy decisions made by the State's democratically elected ultimate policymaker: the Legislature. Mere subjective beliefs that the challenged laws contain constitutional infirmities, or were poor political decisions, or might inhibit *some* behavior at *some* point, cannot support standing. *See Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2099 (2019) (Thomas, J., concurring) ("If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited constitutional mandate and infringing on powers committed to other branches of government."); *Gilligan v. Morgan*, 413 U.S. 1, 14 (1973) (Blackmun, J.,

concurring) ("[U]nspecified, speculative threats of uncertain harm that might occur at some indefinite time in the future" cannot support standing).

The Montana Supreme Court has made this clear. In *Olson v. Department of Revenue*, for example, the plaintiffs challenged the constitutionality of statutes requiring county residency to obtain a hunting license or run for county office. 223 Mont. at 469–71, 726 P.2d at 1166–67. But the Court concluded the plaintiffs failed to establish sufficient personal injury because they did not allege that they requested and were denied a license or that they sought to run for a county office and were prohibited from doing so. *Id.* Likewise, here, Plaintiffs do not allege that the challenged laws have affected them in any concrete, specific way. Nor have they alleged a concrete—or even a *threatened*—injury. They have instead asserted entirely speculative, hypothetical, vague injuries—injuries that could arise only if other hypothetical events occur.[2] But standing requires far more—more concrete, particularized, and personal injuries. And Plaintiffs have not and cannot allege those.

B. Plaintiffs ask for an improper advisory opinion.

Because Plaintiffs lack standing, granting their relief would require this Court to issue an advisory opinion. *See Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881. But this Court cannot do what Plaintiffs request and speculate about what may happen if

[2] These claimed injuries are caused not by the individual laws but by the fact that the Legislature, in passing them, allegedly encroached upon the Regents' authority.

their hypothetical injuries happened to occur, because Montana courts do not render advisory opinions. *Plan Helena*, ¶ 9. An action for declaratory judgment is no exception to this general rule. *Northfield Ins. v. Mont. Ass'n of Counties*, 2000 MT 256, ¶¶ 13–14, 301 Mont. 472, 10 P.3d 813 ("While it is true that § 27-8-202, MCA, specifically affords ... the right to have any question of construction or validity of such a [statute] determined under the Act, a justiciable controversy cannot exist based on hypothetical facts and abstract propositions.") (citation omitted). Plaintiffs' controversy is based on hypothetical facts and abstract propositions, *see id.*, and their claims are therefore nonjusticiable.

III. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

Plaintiffs assert two causes of action: first, that the Legislature exceeded its constitutional authority in enacting HB 349, HB 112, HB 102, and SB 319; and second, that the purported conditional appropriation of HB 2 is unconstitutional because it prohibits the Board from seeking judicial recourse in certain circumstances. Again, they assert the "purpose [of the Complaint] is to vindicate the Regents' authority." Complaint, ¶ 4. But Plaintiffs' claims have not been "adequately stated in the complaint." *Gebhardt v. D.A. Davidson & Co.*, 203 Mont. 384, 389, 661 P.2d 855, 857 (1983). They recite bare (and defective) legal conclusions and omit facts that are "material and necessary in order to entitle to relief." *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247. On this basis, too, the case should be dismissed.

A. As relevant to HB 349, HB 112, HB 102, and SB 319, the Legislature's power supersedes the limited authority of the Board of Regents.

To succeed on the merits of their first claim, Plaintiffs must establish one of two things: either that the Board's authority is exclusive—the Board *alone* has the authority to regulate policies like those enacted in the challenged laws; or, if the Legislature and the Board possess concurrent policymaking authority over the MUS, then Plaintiffs must show that the Board's policymaking power over the subject matter touched by the challenged laws is superior to the Legislature's policymaking power.[3] Plaintiffs can establish neither.

1. As a matter of law, Plaintiffs fail to state a claim.

The Legislature is a branch of government and has a broad grant of authority under the Montana Constitution. Mont. Const. art. III, §1; V, § 1. "[R]epresenting the sovereign power of the state, [the Legislature] may exercise such power to any extent it may choose, except to the extent it is restrained or limited by the State or Federal Constitutions." *State ex rel. Du Fresne v. Leslie*, 100 Mont. 449, 454, 50 P.2d 959, 961 (1935); *see also Yellowstone Valley Elec. Coop. v. Ostermiller*, 187 Mont. 8, 14, 608 P.2d 491, 495 (1980) (noting the police power is "aimed at protecting the public health, safety and general welfare"); *State v. Andre*, 101 Mont. 366, 371, 54 P.2d 566, 568 (1936) (describing police power as "a power of which the legislature cannot divest itself; and such body is the exclusive judge of the manner in which such police power

[3] As discussed below, Plaintiffs do not adequately support this claim in their Complaint. To better facilitate that discussion, however, the State starts with this legal discussion.

shall be exercised, and its action should be liberally construed"); *Hilger v. Moore*, 56 Mont. 146, 163, 182 P. 477, 479 (1919) (Those "who seek[] to limit the power of the [legislature] must be able to point out the particular provision of the Constitution which contains the limitation expressed in no uncertain terms").

The Board, conversely, is one entity within the executive branch and has a more limited grant of authority. Mont. Const. art. X, § 9 (vesting in the Board the "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system"). "That constitutional provision, like most, is couched in broad language, but it must not be read or construed in isolation." *Bd. of Regents v. Judge*, 168 Mont. 433, 443–44, 543 P.2d 1323, 1329–30 (1975) ("[T]here is not always a clear distinction between [the Legislature's and the Board's] powers"). The Board's power is subject to "checks by the executive and legislative branches," and it is limited to the "powers connected with the proper and efficient internal governance of the MUS." *Sheehy v. Comm'r of Political Practices for Mont.*, 2020 MT 37, ¶¶ 37, 41 (McKinnon, J., concurring).

Judge and Justice McKinnon's concurrence in *Sheehy* explain the obvious: there are areas in which both the Legislature and Board may have concurrent authority to regulate MUS policy. The question is, what happens when those conflict? In the case of HB 349, HB 112, HB 102, and SB 319, the enacted laws clearly prevail over any contrary Board or MUS policies.

The few cases addressing the tension between legislative and Board policy-making power show there are some limited areas in which only the Board can

exclusively regulate—namely, the financial stewardship and academic management of Montana universities. *See Judge*, 168 Mont. at 454, 543 P.2d at 1335 ("the Board ... is the competent body for determining priorities in higher education"). *Judge* invalidated the Legislature's attempt to interpose its priorities on the Board's prerogative to regulate "the hiring and keeping of competent personnel." *Id.* (declaring unconstitutional a law limiting salary increases for college presidents). In addition to these personnel decisions—which obviously serve academic and educational ends—the Regents may (and should) "ensure the [financial] health and stability of the MUS." *Sheehy*, 2020 MT 37, ¶ 29 (remarking that the Board's constitutional duties "necessarily include support of a major financing source for the MUS").[4]

[4] *Sheehy* comes with two important caveats. First, the case involves a Regent's public statements supporting a major source of MUS funding, and therefore its broad language about the Board's responsibility over the "health and stability of the MUS" must be read within the confines of financial stewardship. 2020 MT 37, ¶ 29. And that is very different from the State's police power, aimed at "protecting the public health, safety and general welfare." *See Ostermiller*, 187 Mont. at 14, 608 P.2d at 495. Second, *Sheehy* decided that the Regent could lawfully engage in particular behavior under state law; it did *not* conclude that the Legislature encroached upon the Board's authority. To the contrary, the entire case involved whether the COPP and district court correctly interpreted state law. 2020 MT 37, ¶ 31. This of course advances the State's point: in areas of concurrent authority (e.g. personnel ethics), Board and MUS policies must generally yield to contrary legislative enactments. *See also The Duck Inn v. Mont. State Univ.-Northern*, 285 Mont. 519, 526, 949 P.2d 1179, 1183 (1997) (remarking that while the Board has independent constitutional authority, the Legislature may nevertheless, through enactment, limit the Board's discretion); *see id.* at 524–25, 949 P.2d at 1182 ("As a general rule, however, the public policy of the State of Montana is set by the Montana Legislature through its enactment of statutes, and this Court may not concern itself with the wisdom of such statutes.").

But this power to "determin[e] priorities in higher education" does not make the Board a separate body politic, empowered to disregard at its leisure all legislative enactments touching the MUS. *Judge* firmly and finally rejected that argument decades ago: "The Regents are a constitutional body in Montana government subject to the power to appropriate and the public policy of this state." 168 Mont. at 449, 543 P.2d at 1332. Justice McKinnon in *Sheehy* put an even finer point on it:

> The Board may exercise all powers connected with the proper and efficient internal governance of the MUS; however, the constitutional grant of authority does not inhere the absolute power of self-government, and there are limitations and checks on the Board's power. The Board cannot abridge rights protected by the federal or state constitutions, *and is subject to state legislation enforcing state-wide standards for public welfare, health, and safety.*

Sheehy, 2020 MT 37, ¶ 41 (McKinnon, J., concurring) (emphasis added). And as discussed above, the Legislature ultimately determines the State's public policy. Absent legislative action, the Board arguably possesses some authority to address certain issues, but this may not preempt contrary legislative action. *See, e.g., Hilger*, 56 Mont. at 163, 182 P. at 479. But if the Legislature chooses to exercise its plenary power in an area outside the Board's limited exclusive authority, the Board—like any other Executive Branch entity—must yield.

The laws Plaintiffs challenge here are legislative expressions of the State's public policy and clearly fall outside the Board's limited exclusive authority related to financial stewardship and academic management. HB 349 (preventing harassment of individuals and groups espousing minority or unpopular viewpoints), HB 112 (preserving the integrity of women's sports at the collegiate and noncollegiate levels),

HB 102 (enhancing self-defense for individuals on state-owned properties), and SB 319 (expanding students' choices in their financial contributions to groups and prohibiting campaign activities in some, limited areas on Montana campuses) are all laws enacted by a democratically elected body that clearly establish statewide standards for public welfare, health, and safety. *See Judge*, 168 Mont. at 449, 543 P.2d at 1332. The State doesn't take the position that absent any legislative action, the Board could never issue policies addressing the subjects in the challenged laws. But the Legislature *did* act. And Plaintiffs cannot claim that the Board's authority (which they—in any case—lack standing to vindicate) supersedes the Legislature's when it comes to these statewide standards for public welfare, health, and safety. As a matter of law, therefore, Plaintiffs' fail to state a claim as to Count One.

2. Plaintiffs' allegations are insufficient to support their claims.

Count One must also be dismissed because it is insufficiently plead. Plaintiffs allege only the following to support Count One:

1. The Board has existing policies in place "governing matters addressed by HB 349, HB 112, HB 102, and SB 319." Complaint, ¶ 3.
2. The Montana Constitution "spells out the authority of the Board of Regents to manage the university system." Complaint, ¶ 43.

Alone, these two allegations don't establish that the Board's authority of the subject matter addressed in the challenged laws is exclusive or superior to the Legislature's authority. More telling is what Plaintiffs don't say. Nowhere do Plaintiffs say that the Board's authority is exclusive, nor do they do say that the Legislature lacks the

authority to regulate the specific activity addressed by HB 349, HB 112, HB 102, and SB 319 on MUS campuses. Plaintiffs state the Montana Constitution "spells out the authority of the Montana Board of Regents." Complaint, ¶ 43. Plaintiffs then state that each of the challenged bills is "unconstitutional because each arrogates to the Legislature powers that are reserved to the Montana Board of Regents." Complaint, ¶ 44. This is a legal conclusion, *see Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6, unsupported by the caselaw discussed above. Simply because the Montana Constitution grants some authority to the Board does not mean that the Legislature cannot exercise concurrent authority.

Even accepting Plaintiffs' characterizations of HB 349, HB 112, HB 102, and SB 319, those characterizations don't pass muster.

Plaintiffs claim HB 349 "seems to invite student harassment as long as it doesn't go too far," and therefore "plainly intrudes on the constitutional autonomy of the Regents." Complaint ¶ 4. Plaintiffs then point to existing Board Policy 703 as uncontroverted evidence that the Board has the sole authority to regulate student speech. *Id.* ¶ 5. But the conclusion doesn't follow the premise. Simply because the Board has previously regulated certain conduct does not mean that *only* the Board can regulate that conduct. Plaintiffs fail to say how HB 349 exceeds the Legislature's authority or encroaches upon the Board's limited exclusive authority.

The same is true for Plaintiffs' allegations regarding HB 102 and SB 319. Complaint ¶¶ 7, 44. Existing policies regarding firearms and political campaign activities on campus plus Plaintiffs' bald declarations that the Legislature cannot regulate in

these areas don't make it so. And there's no authority supporting Plaintiffs' implicit argument that the first-in-time, first-in-right rule gives precedence to the Board's preexisting policies. The Constitution itself vests the Legislature with plenary authority. This power is not confined to just those areas where the Board has not set policy. *See Meech v. Hillhaven W.*, 238 Mont. 21, 776 P.2d 488 (1989) (describing the plenary power of the Legislature). This would unjustifiably aggrandize the Board at the Legislature's expense and hamstring the latter's ability to make laws. *See Judge*, 168 Mont. at 442–43, 543 P.2d at 1328–29 (rejecting the Board's argument that it was established as a fourth branch of government); *see also Verbatim Transcript of March 11, 1972*, 6 Montana Constitutional Convention, at 2124–32 (1981) (rejecting the idea that the Board of Regents would constitute a fourth branch of government).

As for HB 112, the Board in one breath says the Legislature arrogated the Board's authority by addressing university athletic teams, but in another concedes that these university athletic teams are ultimately governed by the NCAA. Complaint, ¶ 6. So under Plaintiffs' version of constitutional reality, the Board is the ultimate, plenary, exclusive power as it relates to MUS policy, to the exclusion of the democratically elected Legislature. Except for the NCAA, an unelected nonprofit organization to which the Board must show obeisance. That can't be right.

The activities addressed by these laws differ vastly from the type of MUS activity the constitutional delegates intended for the Board to manage and control. The delegates discussed the Board overseeing "academic, financial, and administrative affairs." *Verbatim Transcript of March 11, 1972*, 6 Montana Constitutional

Convention, at 2110 (1981). They discussed the Board controlling the hiring and firing of faculty members. *Id.* at 2127, 2134. They discussed the Board managing the acquisition of equipment for classrooms, *id.* at 2128, entering into contracts for library binding services, *id.* at 2138–39, and signing requisition slips for paper clips, *id.* at 2127. The State admits the Board's power extends beyond paper clip acquisition, but nothing in the constitutional history suggests the challenged laws' subject matter was entrusted to the Board's exclusive authority. It should go without saying that regulating issues of free speech, sex equality, self-defense, and campaign finance are quite different from the Board activities the delegates had in mind.

Count One should be dismissed.

B. Count Two in the Complaint fails to state a claim.

With respect to the conditional appropriation in HB 2, Plaintiffs' claim also fails. Plaintiffs allege the following facts:

1. In the Montana Supreme Court's recent decision in *McLaughlin v. Montana State Legislature*, 2021 MT 120, ¶ 10, the Supreme Court discusses the Montana Constitution's guarantee that "[c]ourts of justice shall be open to every person." Mont. Const. art. II, § 16.
2. HB 2 makes the Board's appropriation "conditional by providing that sum is forfeited if the MUS takes legal action to vindicate its authority by invalidating HB 102." Complaint, ¶ 46.

For the same reasons stated above, these two statements just don't support the claim. *The Board* is free to seek to vindicate its authority as it deems appropriate.

And it has done so. The courts of justice are open. Conditional appropriations are permitted, as *Judge* noted, *see* 168 Mont. at 453, 543 P.2d at 1334 ("the legislature can within reason attach conditions to its university appropriations"), and the Board has affirmatively decided to forego the additional appropriation. It's strange that parties other than that Board are now complaining that the conditional appropriation coerced the Board from challenging HB 102 in court, when the Board, in another case, is challenging HB 102 in court. Parties who received no appropriations—conditional or otherwise—under HB 2 may not challenge it. *See supra* Section II.A.

IV. Alternatively, this Court should stay the claims regarding HB 102 and SB 319 until resolution of two contemporaneous challenges to the statutes.

District courts have significant discretion over trial administration matters, including motions to stay. *See Wamsley v. Nodak Mut. Ins. Co.*, 2008 MT 56, ¶ 23, 341 Mont. 467, 178 P.3d 467 (classifying motions to stay as "trial administration matters"); *Konitz v. Claver*, 1998 MT 27, ¶ 32, 287 Mont. 301, 954 P.2d 1138 ("Discretionary trial court rulings include such things as trial administration issues"); *see also Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 17, 400 Mont. 1, 462 P.3d 218 (indicating it is sometimes appropriate to stay proceedings in parallel state cases).

If the Complaint is not dismissed in its totality, the Court should stay the claims as to HB 102 and SB 319 because the constitutionality of these bills is already being litigated in other proceedings and preliminary injunctions have been granted. Specifically, the Board is challenging HB 102 in *Board of Regents v. State*, Cause No.

BDV-2021-598 (1st Jud. Dist.), and obtained a preliminary injunction during the pendency of the litigation, enjoining HB 102 as it applies to the Montana University System. Likewise, in *Forward Montana v. State*, Cause No. BV-2021-611 (1st Jud. Dist.), a group of plaintiffs is challenging, and the court preliminarily enjoined, Sections 21 and 22 of SB 319. The ultimate outcome in those proceedings will likely moot or resolve the claims as to HB 102 and SB 319 in this proceeding. Staying these claims (if this Court doesn't dismiss them) is therefore an efficient use of judicial resources and prevents a race to judgment in competing jurisdictions. It will also remove the threat of inconsistent or competing judicial decisions. And because of the existing injunctions, any prejudice to Plaintiffs in staying these claims would be minimal. If not dismissed, the challenges to HB 102 and SB 319 should be stayed.

CONCLUSION

This Court should dismiss this case because Plaintiffs' claims are not justiciable and fail to state a claim upon which relief can be granted. This Court should alternatively stay the claims regarding HB 102 and SB 319 pending resolution of the cases mentioned above.

DATED this 16th day of July, 2021.

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