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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 **STATE OF MONTANA'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

INTRODUCTION

Defendants moved to dismiss Plaintiffs' Complaint, which challenges House Bill (HB) 349, HB 112, HB 102, and Senate Bill (SB) 319 as well as a provision of HB 2. Plaintiffs raise two claims. First, they assert the bills are unconstitutional "because each arrogates to the Legislature powers that are reserved to the Montana Board of Regents." Complaint, ¶ 44. Second, they assert HB 2 is an unconstitutional conditional appropriation to the Board of Regents. Complaint, ¶ 47. But despite their best arguments, Plaintiffs are not the Board of Regents and therefore lack standing. For that reason, and because Plaintiffs failed to plead necessary facts to state a claim upon which relief can be granted, both claims should be dismissed pursuant to Rule 12.

I. Plaintiffs Lack Article III Standing

Under Plaintiffs' theory of standing, a showing that Plaintiffs have suffered redressable injuries "is all that is required to demonstrate constitutional standing." Plaintiffs' Brief in Opposition at 11. But Plaintiffs fail to show how the harms alleged in the Complaint meet even this "modest" standard. *See Bennett v. Spear*, 520 U.S. 154, 170–71 (1997). Plaintiffs allege the challenged bills threaten "their interest in campus safety, freedom of speech, and non-discrimination." Complaint, ¶ 37. But these alleged harms are insufficient to establish standing.

While Plaintiffs assert there is "injury to fundamental rights," Plaintiffs' alleged injuries do not follow from their two claims. Plaintiffs' Brief in Opposition at 13. First, they claim that "[e]ach of [sic] bills challenged, HB 349, HB 112, HB 102, and SB 319 is unconstitutional because each arrogates to the Legislature powers that are reserved to the Montana Board of Regents." Complaint, ¶ 44. This, however, is not an injury to a "fundamental right." Plaintiffs do not have a fundamental right to protect or possess the powers "reserved to the Montana Board of Regents." *Id.* Second, Plaintiffs claim that "[t]he purported conditional appropriation of HB 2 is unconstitutional because it strips the MUS ... of its authority to manage and control the MUS and because it strips the fundamental right of the MUS and the Regents to seek judicial recourse." Complaint, ¶ 47. Again, no plaintiff possesses a fundamental right to manage and control the MUS. And to the extent the Regents' constitutional authority is a "fundamental right" that they could vindicate in a lawsuit, neither MUS nor the Regents are parties to this lawsuit. Plaintiffs fail to show how these claims—claims purporting to protect the Regents' power—cause injury to Plaintiffs' fundamental rights.

To the extent they assert that these harms are "economic harms," Plaintiffs fail to plead any facts that move these harms beyond the purely speculative and hypothetical. To show that Plaintiffs have suffered redressable injuries, Plaintiffs must show the injury is "actual or imminent" and

"distinguishable from injury to the public generally"[1] and is not "abstract, conjectural, or hypothetical." *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187.

Plaintiffs have not alleged that any harm has yet happened. *See* Complaint, ¶¶ 37–40 (describing "threatened injury"). This is not to say that intangible, future harms can *never* satisfy standing. But neither history nor the judgment of the Legislature suggest that the alleged harms asserted by Plaintiffs satisfy the standing requirement. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Unlike in *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 35, 360 Mont. 207, 255 P.3d 80, where the Legislature created an appeal process for the type of threatened injury at issue, the Legislature has not created a private right of action for this specific "harm." *See* Mont. Code Ann. § 76-3-625; *see also Spokeo*, 136 S. Ct. at 1549–50 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992), and discussing where Congress elevates certain injuries to the status of legally cognizable through statute).

[1] As Plaintiffs suggest, courts have not always clearly distinguished between constitutional and prudential standing. Whether an injury is distinguishable from an injury to the public generally has been considered in both context of constitutional and prudential standing. *Compare Bullock*, ¶ 31 (constitutional standing) *with Heffernan*, ¶ 33 (prudential). But regardless of *when* the court conducts this analysis, Plaintiffs have still failed to show how the alleged harms in this case are personal to the litigants.

And judicial precedent shows that Plaintiffs need more than broad, sweeping statements about safety, speech, and non-discrimination to establish standing. For example, in *Missoula City-Cnty Air Pollution Control Bd. v. Bd. of Envt'l Review*, 282 Mont. 255, 937 P.2d 463 (1997), the local air pollution control board faced increased expenses necessary to collect data and respond to new minimum standards. This constituted a clear "economic harm" because the harm was certain and measurable. *Id.* Similarly, in *Helena Parents Comm'n v. Lewis & Clark Cnty Comm'rs*, 277 Mont. 367, 372, 922 P.2d 1140 (1996), plaintiffs alleged an increase in property taxes and reduced government services. Again, the increased property taxes were certain and measurable. Likewise, in *Rosebud Cty. v. Dep't of Revenue*, 257 Mont. 306, 849 P.2d 177 (1993), the alleged economic harm was a change in the county's tax base after a change in the valuation of heavy equipment. Each of these harms was certain, measurable, and—most importantly—properly alleged in the respective complaints. Plaintiffs' alleged harms are not certain as they were in each of these cases, and Plaintiffs provide no facts showing *how* safety, speech, or non-discrimination will likely be impacted.

The harms alleged here are also different from the harm in *Gryczan v. State*, 283 Mont. 433, 365 Mont. 92, 287 P.3d 455 (1997), where the parties faced prosecution under a criminal statute, and *Reichert v. State*, 2012 MT 111, ¶ 58, 365 Mont. 92, 278 P.3d 455, where the parties were going to be prevented

from voting in an election in which they were previously permitted to participate. None of these statutes impose criminal penalties. And unlike in *Reichert*, where plaintiffs alleged—and it was obvious—that they would be disenfranchised, Plaintiffs here have not alleged what the actual harm will be if these statutes are implemented. Plaintiffs allege threats to campus safety, but they don't plead facts suggesting that campus carry will lead to more on-campus violence. They allege threats to free speech, but they don't allege how a statute that forbids discrimination against religious, political, or ideological student organizations is going to chill speech. Plaintiffs allege "onerous and unconstitutional restrictions on voter registration," Complaint, ¶ 38, but they don't plead facts that show *how* voter registration will change with the implementation of the new laws. And they do not assert a single harm stemming from the bill that protects women's participation in sports.

Plaintiffs' conclusory response is that the "facts are not hypothetical and the issues are not abstract." But Plaintiffs do not explain how an interest in "academic freedom, safe working conditions, free speech and assembly, organization funding, and threat of civil liability," Plaintiffs' Brief in Opposition at 13, are comparable to the harms in the cases they cite. These broad assertions are not enough to establish standing.

Courts can look to federal precedent interpreting Article III standing as further evidence that standing has to mean something more than what

Plaintiffs assert. *Bullock*, ¶ 30 (citing *Heffernan*). Risk of future harm alone is not sufficient. This risk must be "substantial" or "significant." *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) ("substantial risk"); *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020) ("substantially increased risk"); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("a substantial risk that the harm will occur"); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153, 155 (2010) ("substantial risk" or "significant risk"); *Pennell v. San Jose*, 485 U.S. 1, 8 (1988) ("realistic danger of sustaining a direct injury"); *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982) (a "sufficiently substantial" threat). Plaintiffs have not alleged any facts that would suggest that there is a substantial or significant risk of the harms alleged. Even after the State moved to dismiss, Plaintiffs continue to rely on the faulty premise that because the statutes may *affect* these individuals, they must also *harm* these individuals. That doesn't cut it. Without more, Plaintiffs fail to establish standing.

II. Plaintiffs Lack So-Called Prudential Standing

Even if Plaintiffs established "constitutional standing," they fail to establish "prudential standing." *But see Sprint Comm'ns Co., L.P. v. APCC Servs.*, 554 U.S. 269, 288 (2008) ("[T]he general 'personal stake' requirement and the more specific standing requirements (injury in fact, redressability, and causation) are flip sides of the same coin."). If a party establishes Article III standing, then there might be other, prudential concerns that prohibit a court

from hearing a case. *See, e.g.*, *Heffernan*, ¶ 33 (discussing the constitutional case-or-controversy requirement and "prudential restrictions"). But prudential standing is a limitation on a court's authority to hear cases, not a workaround for those who were unsuccessful in the legislative process to reverse their fortunes in the courts. Prudential standing without Article III standing is meaningless. *See Heffernan*, ¶ 34 ("[I]n all events, the standing requirements imposed by the Constitution must always be met."). As discussed above, Plaintiffs have not satisfied Article III's case-and-controversy requirement, so the court need not reach prudential standing. But even when examining Plaintiffs' theoretical prudential standing alternative in isolation, they fail to meet that standard, too.

Prudential standing addresses whether the court is properly exercising its power to resolve the dispute. Often, this doctrine is raised when there is concern that the court may be resolving a political question. *See Bullock*, ¶¶ 43–46. The Montana Supreme Court has recognized that under prudential standing "a party may generally assert only his or her own constitutional rights and immunities." *Id.* ¶ 45. Of course, this is very closely related to constitutional standing, which requires an injury in fact to show that the party is the proper party before the court. *Id.* ¶ 31. No matter which way Plaintiffs slice it, the standing question—both constitutional and prudential—comes down to whether Plaintiffs have alleged a harm to *themselves* and are therefore

the proper party before the court. Plaintiffs have not done so here. They assert harms to the Regents' authority, and don't plead any facts sufficient to show how the new laws' supposed arrogation of the Regents' authority harms them in any nonspeculative way.

Plaintiffs cite *Committee for an Effective Judiciary v. State*, 209 Mont. 105, 112, 679 P.2d 1223, 1227 (1984) in support of their prudential standing arguments. In *Committee for an Effective Judiciary*, the challenged statutes made it a "virtual certainty that judges would not run for other judicial office," which "effectively" denied the right to vote for a broader selection of judicial candidates. *Id.* There, the registered voters brought an action claiming that the statutes violated each individual's right to vote for judicial candidates. *Id.* But here, Plaintiffs have brought an action claiming that the statutes violate the Regents' right to control and manage MUS campuses, which in turn, they claim, might cause harm to Plaintiffs. Unlike in *Committee for an Effective Judiciary*, the party allegedly harmed in Plaintiffs' claims is a third party—the Regents—not the Plaintiffs themselves. The alleged harm to Plaintiffs doesn't directly flow from their two claims in the Complaint.

The "virtual certainty" requirement in *Committee for an Effective Judiciary* is significant as it relates to both prudential and constitutional standing. As discussed above, *supra* Section I, the risk of future harm must be significant or "virtual[ly] certain[]." Plaintiffs have not met this burden. They talk

broadly about injuries "to their interest in campus safety, freedom of speech, and non-discrimination." Complaint, ¶ 37. They claim that HB 349 gives an "apparent open invitation to harass and discriminate" and that HB 102 causes them to be "concerned about the negative effect on enrollment." *Id.* The individual students "fear[] what will happen on the MSU campus if guns are allowed." Complaint, ¶¶ 22–24. None of these harms directly relate to their claims, which assert that the statutes in question infringe on the Regents' authority. *See Committee for an Effective Judiciary*, 209 Mont. at 112, P.2d at 1227. And none of these concerns and fears arise to a "virtual certainty"—or even a "substantial risk"—that is required to establish standing. *See Spokeo, Inc.*, 136 S. Ct. at 1549; *Committee for an Effective Judiciary*, 209 Mont. at 112, P.2d at 1227.

Plaintiffs cite *Lee v. State* as further evidence that private citizens have standing to raise constitutional claims. But in *Lee*, the statute "directly affect[ed]" him, and the plaintiff had a "direct interest" in the litigation. 195 Mont. 1, 7, 635 P.2d 1282, 1285 (1981). As established in his complaint, he frequently drove a motor vehicle over 55 miles per hour on Montana highways, including Montana State Highway No. 200 and Interstate Highway No. 15. *Id.* at 5, 635 P.2d at 1284. After the Attorney General's proclamation limiting speed to 55 miles per hour, Lee was no longer able to drive the same speed

he did before the proclamation. His alleged harm was that he had to drive a different speed limit, and if he violated the speed limit, he could be arrested.

Here, though, Plaintiffs have not pleaded facts that establish a similar harm. They do not make any assertions as to what their respective activities were like before the implementation of the statutes at issue, and they do not make assertions as to how these activities will change after the implementation of the statutes. Instead, they rest on vague fears and concerns. *See* Complaint, ¶¶ 22–24, 37 (describing "fear" and "concern"). In *Lee*, Lee was able to articulate that he drove over 55 miles per hour before the speed limit was imposed, and because of the speed limit, he would no longer be able to drive over 55 miles per hour. Plaintiffs do not make similar arguments in their Complaint. They instead claim injuries "to their interest in campus safety, freedom of speech, and non-discrimination." Complaint, ¶ 37. But what injuries specifically? The Legislature says these bills actually promote campus safety by protecting the right of self-defense, preserve freedom of speech by protecting unpopular groups, and eliminate discrimination by allowing women to participate equally on athletic teams. Plaintiffs provide no facts to the contrary to support their claims of harm. The fact of the matter is that a motion to dismiss reviews the face of the Complaint. Here, the Complaint is deficient.

Plaintiffs suggest that this Court should further relax "prudential standing rules for closely related parties." Plaintiffs' Brief in Opposition at 17.

Nowhere in Plaintiffs' Complaint do Plaintiffs allege—or even suggest—that these plaintiffs are "closely related" to the Board of Regents. Nor do Plaintiffs allege or suggest in the Complaint that the "students and faculties (through their representatives) engage with the Regents." *Id.* There is no support for this in the Complaint, and this argument must fail.[2]

Plaintiffs further urge this court to "relax prudential standing" because the questions "might otherwise escape review." Plaintiffs' Brief in Opposition at 19. Plaintiffs do not establish how these questions might escape review, nor do Plaintiffs square this assertion with the fact that the Board of Regents is, in fact, asserting similar claims in other litigation. *See Board of Regents v. State*, DV-25-2021-598 (1st Jud. Dist.). And—perhaps most importantly—courts don't ignore jurisdictional requirements that otherwise obstruct their ability to opine on issues of societal interest. To the contrary, standing is a threshold inquiry. "Relaxing" standing requirements would invite advisory opinions and an aggrandizement of judicial power over and above that of the other branches of government and the people.

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[2] Plaintiffs point to *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, where the court found that under federal case law, a "special relationship" exists between a physician and patient, which affords the physician to litigate the rights of the patient. But here, there are no cases—nor are there allegations in the Complaint—supporting the idea that a similar "special relationship" exists between the Regents and the Plaintiffs.

Plaintiffs finally attempt to knock down a straw man of their own imaging. They argue that under the State's reasoning, a party can only challenge a campus gun law once someone is shot. The State obviously never makes that argument. And no court has ever held that the harm must actually occur before an otherwise proper party can properly assert standing. But Plaintiffs must assert more than purely speculative threats to "campus safety, freedom of speech, and non-discrimination." Complaint ¶ 37. They must allege there is a substantial risk of harm. They must articulate facts alleging how academic freedom will be infringed, how working conditions will be rendered less safe, how free speech and assembly will be curtailed, and how organizational funding will decrease. Simply stating these as foregone conclusions is insufficient, even at the pleadings stage of litigation.

Under any theory of standing, Plaintiffs have failed to establish or adequately plead standing.

III. Plaintiffs Fail to State a Claim for Relief

In the State's Brief in Support of its Motion to Dismiss, the State points out the deficiencies in Plaintiffs' claims. The State reasserts without repeating those arguments here.

In response to Plaintiffs' arguments, the State agrees the Legislature cannot "exercise the powers of the judiciary or the executive." Plaintiffs' Brief in Opposition at 8. This is because the judiciary and the executive are

separate, co-equal branches of government. *See* MONT. CONST. art III, § 1. The Board of Regents is not. *See Board of Regents v. Judge*, 168 Mont. 433, 442–43, 543 P.2d 1323, 1328–29 (1975) (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). The Legislature has the authority to make laws for the public welfare, health, and safety. *See State v. Andre*, 101 Mont. 366, 371, 54 P.2d 566, 570 (1936); *see also Sheehy v. Comm'r of Political Practices for Mont.*, 2020 MT 37, ¶ 41, 399 Mont. 26, 458 P.3d 309 (McKinnon, J. concurring) ("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."); *Judge*, 168 Mont. at 449, 543 P.2d at 1332 ("The Regents are a constitutional body in Montana government subject to the power to appropriate and the public policy of this state."). This includes—at times—laws that impact MUS campuses, whether directly or indirectly. *See, e.g.*, Mont. Code Ann. §§ 19-20-621; 20-25-515; 20-25-511; 20-25-513; 20-25-451; 20-25-603.

It is not the case, as Plaintiffs suggest, that the Board's "specific" grant of authority *always* limits the Legislature's grant of authority. *See Sheehy*, ¶ 44 (McKinnon, J., concurring) ("[O]ther provisions of the Montana

Constitution place reasonable restraints upon the specific grant of autonomy in Article X, § 9."). This would make the Board a fourth branch of government. The Legislature enjoys broad powers, and just because the Board may act with respect to MUS campuses does not mean the Legislature is categorically prohibited from ever regulating anything that might touch upon MUS campuses. *See id.* ¶ 47 ("The power vested in the Board under Mont. Const. art. X, § 9, is not so broad as to destroy or limit the general power of the legislature to enact laws mandated by other constitutional provisions.").

With respect to Count One, Plaintiffs only assert that the Board has existing policies in place and that the Montana Constitution "spells out the authority of the Board of Regents." Complaint, ¶ 43. This is not a sufficient statement for a claim of relief. Plaintiffs must make one of two points. Plaintiffs must allege that the authority to regulate these issues is exclusive to the Board of Regents or that when the Legislature and Board exercise concurrent authority, the Board's action supersedes any legislative action. *See* Brief in Support of State's Motion to Dismiss at 13–14. Plaintiffs allege neither.

With respect to Count Two, Plaintiffs assert that because the "[c]ourts of justice shall be open to every person," MONT. CONST. art. II, § 16, the Legislature's conditional appropriation in HB 2 is unconstitutional. Again, the Board has taken advantage of the fact that the courts of justice are very much open. *See Board of Regents v. State*, DV-25-2021-598 (1st Jud. Dist.). It is not enough

for Plaintiffs to conclude that this bill is unconstitutional. Conditional appropriations are not presumptively impermissible—rather, the court must look at the condition's impact on the Board's authority. *Judge*, 168 Mont. at 454, 543 P.2d at 1335. Here, neither the Board's authority nor the Board's access to the courts of justice has been restricted by the conditional appropriation contained in HB 2.

Dicta from Judge McMahon's opinion is not relevant here because it was an order granting a preliminary injunction under an entirely different standard in a case that was brought by the Board of Regents—the appropriate party to bring an action alleging infringement on its own power.[3] Plaintiffs cite no further authority to show that the claims made in their Complaint should survive a Rule 12 motion to dismiss.

IV. Rule 17 Does Not Save Plaintiffs' Complaint

Even if Plaintiffs satisfied both Article III and prudential standing requirements, they are not the real party in interest. "Generally, real parties in interest have standing, but not every party who meets the standing

[3] Plaintiffs note that because the State filed an Answer in the Regents' case, it is "an implicit concession that such claims at a bare minimum carry Plaintiffs beyond the Rule 12 stage." Plaintiffs' Brief in Opposition at 5. But a Rule 12 motion is based on the complaint filed in the case before the court, not on other complaints filed in other cases where perhaps the factual and legal claims were better developed. It is irrelevant that the State filed an Answer in the Regents' case. The parties are different. The claims are different. The court is different. And the judge is different. Commentary on litigation strategy in another case is no substitute for legal analysis in this one.

requirements is a real party in interest." 4 Moore's Federal Practice § 17.10[1] (3d ed. 2010).

Rule 17 is a rule intended to protect defendants. Its aim "is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as to res judicata." Notes of Advisory Committee on 1966 Amendments to Rule 17. The court must determine what "right" is being enforced and who is entitled to enforce that right. *See* 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1543 (3d ed. 2018). Here, the right at issue is the Board of Regents authority to control and manage MUS campuses. And only the Board may enforce this right.

Plaintiffs argue that the court "may not dismiss the action" without giving the Board of Regents the opportunity to join the case pursuant to Mont. R. Civ. P. 17(a)(3). Plaintiffs' Brief in Opposition at 19–20. Because Plaintiffs cannot satisfy Article III standing, though, they are not permitted to cure any prudential standing defects pursuant to Rule 17(a)(3).[4] *See Digizip, Inc. v. Verizon Servs. Corp.*, 139 F. Supp. 3d 670, 679 (S.D.N.Y. 2015) ("Rule 17(a)(3) does not expand the constitutional limits of standing"); *see also Rawoof v. Texor Petrol Co., Inc.*, 521 F.3d 750, 757 (7th Cir. 2008) (noting that courts have

[4] "Montana's Rule 17 is identical to the same rule in the Federal Rules of Civil Procedure." *Boehm v. Cokedale, LLC*, 2011 MT 224, ¶ 17, 362 Mont. 65, 261 P.3d 994.

described Rule 17(a)'s real party in interest requirement as a "codification" of the "nonconstitutional, prudential limitation on standing"); *Warnick v. Yassian (In re Rodeo Canon Dev. Corp.)*, 362 F.3d 603, 607–08 (9th Cir. 2004) ("The real party in interest objection is not founded on Article III standing principles, but is a prudential rule intended to ensure that the party bringing the action is the party entitled to make the claim."), *withdrawn on other grounds,* 126 F. App'x 353 (9th Cir. 2005); *Ensley v. Cody Res., Inc.*, 171 F.3d 315, 320 (5th Cir. 1999) ("[The party's] standing objection is a prudential limitation that constitutes an objection to the real party in interest under Fed. R. Civ. P. 17(a)."). Because Plaintiffs have failed to establish Article III standing, Plaintiffs' Rule 17 argument fails for the same reasons their prudential standing argument fails.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims should be dismissed.

DATED this 30th day of September, 2021.

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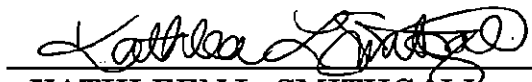
By: 
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