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ATTORNEYS FOR PLAINTIFFS

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 **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Plaintiffs brought a facial constitutional challenge to four bills:

- HB 102, which, in pertinent part, purports to allow concealed carry of firearms on campus;
- HB 349, which purports to excuse certain kinds of student discrimination and harassment and dictate the regulation and supervision of student organizations and their use of campus facilities;
- HB 112, which purports to forbid university athletic teams from allowing transgender athletes to participate in women's sports; and
- Sections 2 and 21 of SB 319 which purport to prohibit student organizations from engaging in certain political organization activities and undercuts funding for such groups.

The first challenged bill, HB 102, has already been held unconstitutional. In a parallel case, Judge McMahon concluded that HB 102 improperly intrudes upon the authority of the Board of Regents of Higher Education under Article X, § 9 of the Montana Constitution. *See* Summary Judgment Order, *Bd. of Regents of Higher Ed. v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct. Nov. 30, 2021), Doc. 29, Ex. A ("McMahon Order").

Judge Menahan recently found SB 319, § 21 unconstitutional in a separate case but on different grounds. *See* Summary Judgment Order, *Forward Montana, et al. v. State of Montana*, ADV 2021-611 (Mont. 1st Jud. Dist. Ct., Feb. 3, 2022).

The remaining items—HB 349, HB 112, and SB 319, § 2—share the same constitutional defect as HB 102. Each targets the university system and attempts to directly dictate internal affairs and policy including oversight of student groups and activities, their membership and funding, and use of campus facilities and resources. This is contrary to constitutional directive and renders the bills facially unconstitutional under Article X, § 9. The Court should grant summary judgment and award Plaintiffs their fees under the Private Attorney General Doctrine.

DISCUSSION

I. LEGAL STANDARDS

The purpose of summary judgment "is to eliminate unnecessary trial, delay and expense." *Fleming v. Fleming Farms*, 221 Mont. 237, 240, 717 P.2d 1103, 1105–06 (1986). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law . . . ." Rule 56(c)(3), M.R.Civ.P.

Facial constitutional challenges are "paradigmatically called for when the Court has before it something of a 'First Principle,' a 'basic question' about whether Congress has to power at all to enact what it has enacted." Roger Pilon, Foreword, *Facial v. As Applied Challenges: Does It Matter?*, Cato Sup. Ct. Rev. (2008–2009) (explaining that in such cases, the "traditional preference for as-applied challenges ought to give way").[1]

"Facial challenges do not depend on the facts of a particular case[,]" *City of Missoula v. Mountain Water Co.*, ¶ 21, and so are well-suited for summary judgment. *Adv's for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825; *see also Inst. of Gov'l Adv.'s v. Fair Pol. Prac's Comm'n*, 164 F.Supp.2d 1183, 1188 (E.D. Cal. 2001) ("In particular, a facial challenge to the constitutionality of a statute is ripe for resolution by summary judgment." (citing *Bullfrog Films, Inc. v. Wick,* 847 F.2d 502, 505–06 (9th Cir. 1988)); *Brady v. PPL Montana, Inc.*, 478 F.2d

[1] Constitutional claims that do not turn on a particular person or set of facts, but that address a "subset of applications" of a challenged statute, are generally treated as facial challenges. *U.S. v. Sup. Ct. of N.M.*, 839 F.3d 888, 915 (10th Cir. 2016) (citing *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010)). *Reed*, for example, was a constitutional challenge to a public records statute that arguably had characteristics of both a facial and as-applied challenge. The claim did not challenge all potential applications of the statute but only addressed certain categories of records. However, the claim was not limited to the plaintiffs or their circumstances and challenged the law "more broadly," so it was properly viewed as a facial challenge. *Id.* at 194.

1015, 1015 n.1 (9th Cir. 2007) (fact disputes did not preclude summary judgment because the facts were "immaterial to resolving the facial challenge to the constitutionality of [the challenged statute]."); McMahon Order, pp. 2, 12 (holding HB 102 unconstitutional and declining to consider the merits of the bill because "the controlling issue before this Court is strictly a legal question" about relative constitutional authority).

Statutes that are contrary to "constitutional directive" are unconstitutional under any level of scrutiny. *Mountain Water*, ¶ 31; McMahon Order, p. 3.

II. STATEMENT OF UNDISPUTED FACTS

This motion presents a purely legal issue related to a facial constitutional challenge, so the material facts are few:

1. During the 2021 legislative session, the Montana State Legislature passed HB 349, a copy of which is attached as Ex. A. HB 349 was enacted into law and codified at §§ 20-25-518 and 519, MCA.

2. During the 2021 legislative session, the Montana State Legislature passed HB 112, a copy of which is attached as Ex. B. HB 112 was enacted into law and is codified at §§ 20-7-1305 through 1307, MCA.

3. During the 2021 legislative session, the Montana State Legislature passed SB 319, a copy of which is attached as Ex. C. SB 319 was enacted into law and the challenged Section 2 is codified at § 20-25-452, MCA.

III. THE CHALLENGED MEASURES ARE UNCONSITUTIONAL.

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) (emphasis added). "Inherent" in this provision is "the realization that the Board of Regents is the competent body for determining priorities in higher education." *Bd. of Regents of Higher Ed. v. Judge*, 168 Mont. 433, 454, 543 P.3d 1323, 1334 (1975). The Board has both the "power" and the "duty" to ensure the "health and stability of the MUS" and is empowered "to do all things necessary and proper to the exercise of [the Board's] general powers . . . ." *Sheehy v. COPP*, 2020 MT 37, ¶ 29, 399 Mont. 26, 458 P.3d 309; *see also id.* ¶ 41 (McKinnon, J., concurring) ("The Board may exercise all powers connected with the proper and efficient internal governance of the MUS . . . ."); McMahon Order, p. 13.

A. Article X, § 9 reflects the will of the framers of the 1972 Constitution to insulate public institutions of higher education against legislative interference and "political changes of fortune."

Institutional autonomy in higher education was not always the law of the land. Under the original Montana Constitution of 1889, the control and supervision of the State's public educational institutions was vested in the State Board of Education, "whose powers and duties shall be prescribed and regulated by law." Mont. Const. (1889), art. XI, § 11. This language "contemplate[d] and authorize[d]" the legislature to dictate how the Board functioned. *Means v. State Bd. of Ed.*., 127 Mont. 515, 518, 267 P.2d 981, 982 (1954). In other words, the Board's authority was subordinate to legislative will. *Judge*, 168 Mont. at 442, 543 P.3d at 1325; McMahon Order, pp. 4–5; Hugh V. Shaefer, *The Legal Status of The Montana University System Under the New Montana Constitution*, 35 Mont. L. Rev. 189, 191 (1974) (the 1889 Constitution

recognized an "absolute legislative prerogative" over public education).

That all changed in 1972.

Mirroring an "ongoing national debate over the structure of higher education in America," the delegates to the 1972 Montana Constitutional Convention considered various proposals to address public education in the new state constitution. Schaefer, *supra*, p. 190. These ranged from the proposal of the Montana Legislative Council, urging the *deletion* of the education article so as to leave the matter entirely to the legislature, to various proposals to insulate higher education from the legislative process. *Id.* at 193–194; *see, e.g.*, Laurence R. Waldoch, *Constitutional Control of the Montana University System: A Proposed Revision*, 33 Mont. L. Rev. 76, 76–77 (1972) (condemning the "failure of the present [1889] Montana Constitution to provide sufficient authority to the regents").

The prevailing sentiment among the constitutional delegates, concisely expressed by Mr. Waldoch's proposal, was that state universities are "fundamentally different from other state agencies" and require a greater degree of autonomy:

> Highways can be changed (although it is an expensive proposition) if mistakes are made; it is even possible to restock lakes and woods if conservation programs lack effective and continuing leadership and support, but it is virtually impossible to re-educate a generation or several generations of citizens who have been deprived of their rights through an educational system that is cramped or given imbalance by a state government that does not recognize the necessity of giving freedom to colleges and universities.

Waldoch, *supra*, p. 76 (quoting Malcolm Moos and Francis E. Rourke, The Campus and the State 315 (1960)). The Constitutional Convention Education Committee shared Mr. Waldoch's concern about the crucial importance and unique needs of university system, urging that:

> Higher education is not simply another state service; the administrative structure of higher education cannot be considered an ordinary state agency. The unique character of the college and university stands apart from the business-as-usual of the state. Higher learning and research is a sensitive area which requires a particular kind of protection not matched in other administrative function of the state.

McMahon Order, p. 20 (citing 2 Montana Const. Conv., p. 736).

In this spirit, the Education Committee proposed language that would vest in the Board of Regents broad authority to govern and administer the university system, while conspicuously omitting the language from the 1889 Constitution that reserved for the legislature the authority to "prescribe and regulate" the Board's powers and duties. Schaefer, *supra*, p. 194; *see also Judge*, 168 Mont. at 451, 543 P.2d at 1333 ("the legislature is not mentioned" in Art. X, § 9).

There were dissenting voices, to be sure. Various amendments were offered to try to "narrow, limit or change" the Board's powers, or to otherwise allow the legislature to retain a degree of direct control over the operation of Montana's colleges and universities, but those proposals were all rebuffed. *Id.* at 195–198; *see also* McMahon Order, p. 20 (the delegates "rejected various proposed floor amendments aimed at weakening the Montana Board's autonomous powers" (citations omitted)). It was clearly the "will of the convention" to overhaul the system of governance for higher education and afford "a new degree of independence for the board of regents so as to free the board from excessive legislative control." Schaefer, *supra*, pp. 195, 198; McMahon Order, p. 20 (the drafters of the 1972 Constitution sought to "insulate the public campuses from Montana political officials" (citations omitted)).

The result of the delegates' labor, Article X, § 9, is among the most robust safeguards of academic freedom and institutional autonomy for higher education in all the nation. *See*

McMahon Order, pp. 15–18 (surveying other state constitutions).

The Board's status was thus "transformed from one of legislative devise to a constitutional department" with a commensurate "need for reasonable constitutional autonomy" and freedom from "political changes of fortune." *Sheehy*, ¶ 11, n.1; *see also id.* ¶ 36, n.2 (McKinnon, J., concurring); *Duck Inn v. MSU Northern*, 285 Mont. 519, 526, 949 P.2d 1179 (1997); McMahon Order, pp. 14–19 ("the 1972 constitutional delegation had the intent, foresight, and wisdom to ensure that in Montana, the BOR would be 'free from excessive legislative control' and political bureaucracy . . . ." to "reduce the risk of tyranny and abuse from the Legislature").

B. The challenged measures improperly infringe upon the Board's constitutional authority under Article X, § 9.

Notwithstanding the above, the Board's autonomy is not without limits.

The legislature can still provide for the public welfare through laws of general application which may, in appropriate cases, incidentally impact university affairs without running afoul of Article X, § 9. *See Sheehy*, ¶¶ 39–41 (McKinnon, J., concurring) (explaining that the MUS remains subject to "neutral law[s] of state-wide concern" and "state-wide standards for public welfare, health and safety"). Plaintiffs do not contend, for example, that MUS campuses are lawless islands, exempt from the operation of Montana's criminal code.

Moreover, the executive and legislative branches retain indirect checks on the operations of the system, including through the gubernatorial power of appointment and legislative power of confirmation, through which the composition of the Board of Regents can be guided, and by the further legislative powers of appropriation and audit. *See* Schaefer, *supra*, pp. 195, 198; *Judge*, 166 Mont. at 450, 543 P.2d at 1333 (the Board's power is checked by the legislative power of appropriation, so long as that power is not misused to try to usurp the Board's authority and "do

indirectly . . . what is impermissible for [the legislature] to do directly.").

Justice McKinnon's concurrence in *Sheehy* is also undoubtedly correct that the Board's autonomy cannot be stretched so far as to "abridge rights protected by the federal or state constitutions." *Id.* ¶ 41. Like any governmental body, the Board's actions are checked by the courts and any constitutional incursions are subject to judicial review. *See, e.g., Duck Inn, supra.*

So far as the legislature is concerned, the task of the courts is to attempt to "harmonize in a practical manner" the separate (and sometimes conflicting) constitutional prerogatives of the legislature and the Board of Regents. *Judge*, 168 Mont. at 444, 543 P.2d at 1330. When "the legislature attempts to exercise control of the MUS by legislative enactment," the 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); McMahon Order, p. 12.

1. HB 349 impermissibly infringes upon the Board's constitutionally guaranteed authority.

While styled as an anti-discrimination bill, House Bill 349 is, on its face, just the opposite. It requires adoption of anti-discrimination policies—something the Board and the constituent units of the MUS had already done—but the bill's operative provisions actually limit those policies. HB 349 purports to *forbid* disciplining students for harassing and discriminatory speech (incredibly) unless it is "unwelcome and so severe, pervasive, and subjectively and objectively offensive that a student is effectively denied equal access to educational opportunities or benefits . . . ." Ex. A, § 2(a); § 20-25-519, MCA. The bill further directs that "religious, political or ideological student organization[s]" may not, based on their expressive activity or "sincerely held beliefs," be denied any "benefit or privilege" available to other student organizations.

Ex. A, § 1; § 20-25-518, MCA. A separate enactment authorizes a new cause of action against a public postsecondary institution by student and student organizations for perceived offenses against protected expressive activity. *See* HB 218 (2021), codified at § 20-25-1507, MCA

In other words, HB 349 mandates that the MUS and its member schools must tolerate "sincere" discrimination, as long as it doesn't go too far. Any attempt to respond to harassment or discrimination invites litigation based on nebulous, subjective standards, i.e. whether the disciplined conduct was "severe" and "offensive."

The putative prohibition on discriminating *against* student organizations is thus a cover for endorsing discrimination *by* student organizations against individual students. For example, a religious group would have license to exclude students based on their sexuality and the university would still be required to recognize the group and give it support in the form of funding, use of campus facilities and resources, etc.[2]

This system is contrary to established policies that prohibit the kinds of discrimination

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[2] This example is, transparently, the primary purpose of the bill, which employs language drafted by the American Legislative Exchange Council, a controversial "bill mill" and lobbying group with a long track-record of anti-LGBTQ activity. *See* FORUM Act (https://alec.org/model-policy/forming-open-and-robust-university-minds-forum-act/). The background of the bill is collateral to this motion, but it is no secret that HB 349 attempts to supply a legislative "fix" following failed attempts to secure the same right to discriminate in court. *See Christian Legal Society v. Eck*, 625 F.Supp.2d 1026 (D. Mont. 2009) (rejecting a claim to compel the University of Montana Law School to recognize and fund a student religious group with membership requirements that violated school anti-discrimination policies). A compromise was reached in *Eck* and the appeal was dropped after the Ninth Circuit and the United States Supreme Court rejected identical arguments in a parallel case out of California, both holding that non-discrimination policies with neutral open-membership requirements are valid and it does not violate the First Amendment to refuse to recognize or fund student religious organizations that openly discriminate against a subset of students based on their beliefs or sexual orientation. *See Christian Legal Society v. Kane*, No. 04-4484, 2006 WL 997217 (N.D. Cal. 2006), *aff'd* No. 06-15956, 2009 WL 693391 (9th Cir. 2009), *aff'd sub nom Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); *on remand sub nom Christian Legal Society v. Wu*, 626 F.2d 483 (9th Cir. 2010).

that HB 349 selectively encourages and facilitates. *See* Montana Board of Regents Policy 703—Non-Discrimination (https://mus.edu/borpol/bor700/703.pdf). Pursuant to and consistent with the Board's overarching policy, MUS schools have implemented their own policies that balance the interests of free expression with safety and inclusion, define prohibited conduct, and lay out procedures for making and adjudicating complaints. *See, e.g.*, UM Discrimination, Harassment and Retaliation Policy (https://www.umt.edu/policies/browse/personnel/discrimination-harassment-and-retaliation); MSU Discrimination, Harassment, and Retaliation Policy (https://www.montana.edu/equity/policies/).

Importantly, this Court does not need to adjudicate the merits of HB 349 or make any findings about its actual purpose. The pertinent and dispositive point is that oversight of student organizations, funding, student discipline, and use of campus facilities and university resources are matters of internal governance under the purview of the Board of Regents. Indeed, the legislature has long recognized that the Board is the proper body to oversee and manage campus facilities. It committed that responsibility to the Board prior to the ratification of the 1972 Constitution, when the decision was still the legislature's to make. *See* § 20-25-301(4), MCA (1971) (the Board may "exercise full control and complete management of the facilities" of the university system, including residence halls, dormitories, student union buildings, etc.).

HB 349 is not a neutral law of statewide concern. It does not promulgate statewide standards for public welfare, health, or safety. Neither is it an exercise of any legitimate, legislative check on the Board's broad authority, i.e. appropriation or audit. It is an attempt to directly control the internal affairs of the MUS and supplant the Board's authority. This is a facial violation of Article X, § 9 of the Montana Constitution.

2. HB 112 impermissibly infringes upon the Board's constitutionally guaranteed authority.

House Bill 112, the so-called "Save Women's Sports Act," 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. *See* Ex. B; §§ 20-7-1305 through 1307, MCA. In short, HB 112 seeks to prohibit transgender women from participating in college athletics.

Extracurricular activities are a well-recognized part of the educational experience, within the ambit of the education article and the Board's constitutional authority. *See State ex rel. Bartmess v. Bd. of Trustees of Sch. Dist. No. 1*, 223 Mont. 269, 274–75, 726 P.3d 801, 804 (1986) (extracurricular activities, including athletics, are "aspects of education under our Montana Constitution"); *see also Moran v. School Dist. No. 7*, 350 F. Supp. 1180, 1184 (D. Mont. 1972) (the "Montana Supreme Court has recognized the importance of extracurricular activities as an integral part of the total education process."). For decades, the Board of Regents, and its predecessor the State Board of Education, have overseen college athletics programs and promulgated policies to ensure fairness and equal opportunity. *See* Montana Board of Regents Policy 1202.1—Program Guidelines (https://mus.edu/borpol/bor1200/1202-1.pdf).

The Board's policy requires most MUS sports programs to comply with NCAA regulations which generally permit transgender student athletes to participate. The NCAA follows a "sport-by-sport approach" designed to "preserve[] opportunity for transgender student-athletes while balancing fairness, inclusion and safety for all who compete." It takes guidance, in turn, from national and international governing bodies for affected sports to help identify and address any risk of unfair competitive advantage, akin to—and deliberately

mirroring—policies developed for the Olympic Games. *See* NCAA Transgender Participation Policy (https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx).

A few MUS schools (MSU-Northern, Montana Tech, and UM-Western) are instead members of the NAIA and, per the Board's policy, required to comply with its rules. The NAIA does not restrict transgender athlete participation at all during the regular season and permits participation in postseason competition subject to certain conditions. *See* NAIA Transgender and Non-Binary Student Athlete Competition Policy (https://www.naia.org/legislative/2021-22/files/NAIA-2021-Official-Handbook.pdf?page=164).

HB 112 is not a neutral public safety law of general application. Nor does it promulgate state-wide standards for public welfare, health, and safety. It is not an exercise of the retained legislative powers of appropriation or audit. It is another attempt to directly control internal university affairs, contrary to the letter and intent of the Montana Constitution. HB 112 specifically targets a subset of Montana students and contravenes established MUS policy, purporting to categorically disqualify student athletes who are otherwise compliant with NCAA/NAIA guidelines and eligible to participate. This is a brazen intrusion into a sphere of campus life that is traditionally and constitutionally committed to the Board's oversight. It facially violates Article X, § 9 of the Montana Constitution.

3. Section 2 of SB 319 impermissibly infringes upon the Board's constitutionally guaranteed authority.

Senate Bill 319 addresses various campaign finance and electioneering matters. Parts of the bill target MUS student organizations, their activities on campus, use of campus facilities, funding, and related student fee assessments. Relevant to this motion, Section 2, codified at § 20-25-452, MCA, purports to prohibit longstanding and Board-approved funding measures for

"student organizations functioning as political committees." Section 2 specifically targets Plaintiff Montana Public Interest Research Group ("MontPIRG"), a student-directed, non-partisan public advocacy group that has operated out of the University of Montana for more than forty years.

Again, it is not necessary for the Court to make findings about the real purpose of the law or assess its merit to rule on its constitutionality. Much like HB 349, the challenged part of SB 319 invades the Board's authority to oversee university finances and to manage student organizations and their funding. These are not neutral public safety laws of general application nor state-wide standards for public welfare, health, or safety. This is not an exercise of the legislative powers of appropriation or audit. It is an impermissible direct invasion into university affairs in derogation of the Board's constitutional authority, facially violating Article X, § 9.

IV. THE COURT SHOULD AWARD PLAINTIFFS THEIR FEES.

In the event the Court grants this motion, Plaintiffs respectfully ask the Court to award Plaintiffs their fees and costs pursuant to the private attorney general doctrine ("PAGD").

Fees are properly awarded under the PAGD, an equitable exception to the American Rule, "when the government, for some reason, fails to properly enforce interests which are significant to its citizens." *Western Trad. P'ship v. Mont. Attny. Gen.*, 2012 MT 271, ¶ 13, 367 Mont. 112, 291 P.3d 545 (citations omitted). The PAGD recognizes that "privately initiated lawsuits often are essential to effectuate fundamental public policies embodied in constitutional or statutory provisions, and that without some mechanism authorizing a fee award, such private actions often will as a practical matter be infeasible. 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) (cited with approval by *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 91, 338 Mont. 259, 165 P.3d 1079).

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 magnitude of the resulting burden; and (3) the number of people who stand to benefit. *Western Trad. P'ship*, ¶ 14 (citing *Montrust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶ 66, 296 Mont. 402, 989 P.2d 800; *Sunburst, supra*).[3]

The first PAGD factor requires "that constitutional interests be vindicated to demonstrate the societal importance of the litigation." *Tubbs*, ¶ 18 (citing *Bitterroot River Prot. Ass'n v. Bitterroot Conserv. Dist.*, 2011 MT 51, 359 Mont. 393, 251 P.3d 131). This requirement is met in disputes over government action that turn on "constitutionally-based arguments" and when "constitutional concerns [are] integrated into the rationale underlying the decision," in

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[3] In the past, the Montana Supreme Court has suggested an additional gloss on this analysis, i.e. that a trial court's authority to award fees under the PAGD is cabined by statute and requires a further finding that the government's defense was frivolous or in bad faith under § 25-10-711, MCA. *See Western Trad. P'ship*, ¶ 18. Justice Nelson sharply criticized the majority's reasoning in this case, characterizing it as an attempt to blend independent doctrines and fee-shifting mechanisms into a "procedural 'smoothie.'" *Id.* ¶¶ 23–29.

More recent decisions have implicitly overturned this aspect of *Western Tradition Partnership* and retreated from the notion that § 711 controls all fee claims against the State. In *Clark Fork Coalition v. Tubbs*, 2017 MT 184, 388 Mont. 205, 399 P.3d 295, the Court analyzed an appeal from a PAGD fee award without considering § 711, over the State's objection. Justice McKinnon's concurrence observed a "tension" between *Western Tradition Partnership* and other Montana Supreme Court cases, such as *Montrust, supra*, where sanctions were denied under § 711 but fees were nonetheless awarded under the PAGD. *See Tubbs*, ¶ 28, n. 1. Justice McKinnon deemed the majority's refusal to consider or discuss frivolousness and bad faith an "accept[ance]" that § 711 does not control a fee claim brought under a separate authority such as the PADG. *Id.* ¶ 28; *see also, e.g., Burns v. Musselshell Cnty.*, 2019 MT 291, 398 Mont. 140, 454 P.3d 685 (reversing the trial court for failing to award fees and directing a fee award under the PAGD, without any finding of bad faith, frivolousness, or any discussion of § 25-10-711, MCA).

contrast with mundane matters of statutory interpretation or self-interested claims brought for pecuniary gain. *Id.*; *see also Western Trad. P'ship*, ¶ 14. The public interest factor is undoubtedly satisfied here. This case is about fundamental separation-of-powers issues and public education, both matters of statewide importance. All of the issues are constitutional in nature and seek to safeguard public rights and the integrity of essential public institutions. Plaintiffs have not asserted any monetary claims and have nothing to gain personally or financially.

The second factor, necessity of private enforcement and the magnitude of the resulting burden, is also satisfied. When a statute is challenged, "the Attorney General has discretion to decide whether or not to defend its constitutionality," which discretion is cabined by the courts' power to award fees. *Western Trad. P'ship*, ¶¶ 17–18 (citing cases where the AG's office conceded the unconstitutionality of a challenged statute). The Attorney General's Office has chosen to zealously defend the legislature's assault on Article X, § 9. And, as the Court is aware, the Board of Regents brought a separate legal challenge to HB 102 but the Board's claim was not broad enough to sweep in the other challenged measures, creating a risk that the important issues raised by this motion might have evaded judicial review but for Plaintiffs' initiative. *See* Doc. 34, Order Denying State's Motion to Dismiss, pp. 11–12. Consequently, Plaintiffs have shouldered a significant burden to make sure these matters are not overlooked.

The third factor, the size of the group who stands to benefit, also favors fee shifting under the PAGD. 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 untold generations of future students and many thousands of MUS faculty, employees, and the public at large.

CONCLUSION

The challenged measures are unconstitutional as a matter of law and beyond a reasonable doubt. Each is a targeted intrusion into the internal affairs of the Montana University System and amounts to an impermissible attempt by the legislature to arrogate unto itself the traditional and constitutionally guaranteed authority of the Board of Regents of Higher Education. These are matters of internal university governance and outside the domain the legislature. The Court should conclude that HB 349, HB 112 and SB 319 § 2 each violate Montana Constitution Article X, § 9 and are therefore void, unenforceable, and should be permanently enjoined.

Submitted this 27th day of May, 2022

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and

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following counsel of record, by the means designated below, this 27th day of May, 2022.

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/s/ Jeffrey J. Tierney
Jeffrey J. Tierney

AN ACT GENERALLY REVISING LAWS RELATED TO FREEDOM OF ASSOCIATION AND FREEDOM OF SPEECH ON CAMPUSES OF PUBLIC POSTSECONDARY INSTITUTIONS; PROVIDING PROTECTIONS FOR FREE ASSOCIATION ON PUBLIC POSTSECONDARY INSTITUTION CAMPUSES; PROHIBITING DISCRIMINATION AGAINST STUDENT ORGANIZATIONS; REQUIRING PUBLIC POSTSECONDARY INSTITUTIONS TO ADOPT ANTI-HARASSMENT POLICIES; PROVIDING RESTRICTIONS ON POLICIES PERTAINING TO THE EXPULSION OF A STUDENT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Discrimination against student organizations prohibited. (1) A public postsecondary institution may not deny a religious, political, or ideological student organization a benefit or privilege available to other student organizations or otherwise discriminate against a student organization based on the student organization's expressive activity, including any requirement of the student organization that a leader or member:

(a) affirm and adhere to the student organization's sincerely held beliefs;

(b) comply with the student organization's standards of conduct; or

(c) further the student organization's mission or purpose, as defined by the student organization.

(2) As used in [section 2] and this section, the following definitions apply:

(a) "Benefit or privilege" means any type of advantage, including but not limited to:

(i) recognition;

(ii) registration;

(iii) the use of facilities of the public postsecondary institution for meetings or speaking purposes;

(iv) the use of channels of communication; and

(v) funding sources that are otherwise available to other student organizations at the public

postsecondary institution.

(b) "Public postsecondary institution" means:

(i) a unit of the Montana university system as defined in 20-25-201; or

(ii) a Montana community college, defined and organized as provided in 20-15-101.

(c) "Student organization" means an officially recognized group or a group seeking official recognition at a public postsecondary institution that is comprised of students who receive or are seeking to receive a benefit through the public postsecondary institution.

Section 2. Anti-harassment and freedom of speech protections for students. (1) A public postsecondary institution shall adopt a policy prohibiting student-on-student discriminatory harassment. A public postsecondary institution may not enforce the policy by disciplining a student for a behavioral violation of harassment or a similar charge stemming from an alleged violation of the policy for speech or expression unless:

(a) the speech or expression 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; or

(b) the speech or expression explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances or requests for sexual favors.

(2) This section may not be construed to prevent a public postsecondary institution from prohibiting, limiting, or restricting speech or expression that is not protected by the first amendment of the United States constitution or Article II, section 7, of the Montana constitution.

Section 3. Codification instruction. [Sections 1 and 2] are intended to be codified as an integral part of Title 20, chapter 25, part 5, and the provisions of Title 20, chapter 25, part 5, apply to [sections 1 and 2].

Section 4. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in

effect in all valid applications that are severable from the invalid applications.

Section 5. Effective date. [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,

HB 349, originated in the House.

_____

Chief Clerk of the House

_____

Speaker of the House

Signed this _____day

of_____, 2021.

_____

President of the Senate

Signed this _____day

of_____, 2021.

HOUSE BILL NO. 349

INTRODUCED BY M. HOPKINS, D. BEDEY, J. FULLER, J. READ

AN ACT GENERALLY REVISING LAWS RELATED TO FREEDOM OF ASSOCIATION AND FREEDOM OF SPEECH ON CAMPUSES OF PUBLIC POSTSECONDARY INSTITUTIONS; PROVIDING PROTECTIONS FOR FREE ASSOCIATION ON PUBLIC POSTSECONDARY INSTITUTION CAMPUSES; PROHIBITING DISCRIMINATION AGAINST STUDENT ORGANIZATIONS; REQUIRING PUBLIC POSTSECONDARY INSTITUTIONS TO ADOPT ANTI-HARASSMENT POLICIES; PROVIDING RESTRICTIONS ON POLICIES PERTAINING TO THE EXPULSION OF A STUDENT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

AN ACT CREATING THE SAVE WOMEN'S SPORTS ACT; REQUIRING PUBLIC SCHOOL ATHLETIC TEAMS TO BE DESIGNATED BASED ON BIOLOGICAL SEX; PROVIDING A CAUSE OF ACTION FOR CERTAIN VIOLATIONS OF THE ACT; PROVIDING FOR CONTINGENT VOIDNESS; AND PROVIDING AN EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. [Sections 1 through 3] may be cited as the "Save Women's Sports Act".

Section 2. Designation of athletic teams. (1) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public elementary or high school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education must be expressly designated as one of the following based on biological sex:

(a) males, men, or boys;

(b) females, women, or girls; or

(c) coed or mixed.

(2) Athletic teams or sports designated for females, women, or girls may not be open to students of the male sex.

Section 3. Cause of action. (1) A student who is deprived of an athletic opportunity or who suffers any direct or indirect harm as a result of a violation of [sections 1 through 3] may bring a cause of action for injunctive relief, damages, and any other relief available under law against the school or institution of higher education.

(2) A student who is subject to retaliation or other adverse action by a school, institution of higher

education, or athletic association or organization as a result of reporting a violation of [sections 1 through 3] to an employee or representative of the school, institution, or athletic association or organization, or to any state or federal agency with oversight of schools or institutions of higher education in Montana may bring a cause of action for injunctive relief, damages, and any other relief available under law against the school, institution, or athletic association or organization.

(3) A school or institution of higher education that suffers any direct or indirect harm as a result of a violation of [sections 1 through 3] may bring a cause of action for injunctive relief, damages, and any other relief available under law against the government entity, licensing or accrediting organization, or athletic association or organization.

Section 4. Codification instruction. [Sections 1 through 3] are intended to be codified as an integral part of Title 20, chapter 7, and the provisions of Title 20, chapter 7, apply to [sections 1 through 3].

Section 5. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 6. Contingent voidness. [This act] is void 21 days after the date the United States secretary of education files a written report with the proper committees of the United States house of representatives and the United States senate as required by 34 CFR 100.8(c) due to the enforcement of [this act].

Section 7. Effective date. [This act] is effective July 1, 2021.

- END -

I hereby certify that the within bill,

HB 112, originated in the House.

_____

Chief Clerk of the House

_____

Speaker of the House

Signed this _____ day

of _____, 2021.

_____

President of the Senate

Signed this _____ day

of _____, 2021.

HOUSE BILL NO. 112

INTRODUCED BY J. FULLER

AN ACT CREATING THE SAVE WOMEN'S SPORTS ACT; REQUIRING PUBLIC SCHOOL ATHLETIC TEAMS TO BE DESIGNATED BASED ON BIOLOGICAL SEX; PROVIDING A CAUSE OF ACTION FOR CERTAIN VIOLATIONS OF THE ACT; PROVIDING FOR CONTINGENT VOIDNESS; AND PROVIDING AN EFFECTIVE DATE.

AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; ESTABLISHING THAT IF STUDENT ORGANIZATIONS THAT ARE REQUIRED TO REGISTER AS POLITICAL COMMITTEES ARE FUNDED THROUGH ADDITIONAL OPTIONAL STUDENT FEES, THOSE FEES MUST BE OPT-IN; PROHIBITING CERTAIN POLITICAL ACTIVITIES IN CERTAIN PLACES OPERATED BY A PUBLIC POSTSECONDARY INSTITUTION; PROVIDING FOR JUDICIAL RECUSALS UNDER CERTAIN CIRCUMSTANCES; PROVIDING PENALTIES; AMENDING SECTIONS 13-1-101, 13-35-225, 13-35-237, 13-37-201, 13-37-202, 13-37-203, 13-37-204, 13-37-205, 13-37-207, 13-37-208, 13-37-216, 13-37-217, 13-37-218, 13-37-225, 13-37-226, 13-37-227, 13-37-228, AND 13-37-229, MCA; AND PROVIDING AN EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Joint fundraising committee. (1) (a) One or more candidates for a statewide office and political committees may join together to establish a joint fundraising committee to act as a fundraising representative for all participants. A joint fundraising committee may not be construed to be a political committee.

(b) The participants in a joint fundraising committee may only include a candidate for statewide office, an independent committee, or a political party committee. Any combination of these entities may form a joint fundraising committee.

(c) The participants in a joint fundraising committee may not include an incidental committee, a ballot issue committee, a judicial candidate, or a political committee that is a corporation or a union.

(d) The joint fundraising committee may not be a participant in any other joint fundraising effort.

(e) A participant may participate in an unlimited amount of concurrent joint fundraising committees.

(f) A joint fundraising committee may not amend its list of participants after filing its certification and

organizational statement as provided by 13-37-201.

(2) A joint fundraising committee shall:

(a) appoint a campaign treasurer and certify an organization statement pursuant to 13-37-201;

(b) designate one separate campaign depository as provided in 13-37-205 to be used solely for the receipt of all contributions received and the disbursement of all expenditures made by the joint fundraising committee; and

(c) keep records as provided by 13-37-207 and 13-37-208.

(3) The participants in a joint fundraising committee shall enter into a written agreement that states a formula for the allocation of fundraising proceeds. The formula must be stated as the amount or percentage of each contribution received to be allocated to each participant. The joint fundraising committee shall retain the written agreement for the same amount of time the campaign treasurer is required to retain accounts under 13-37-208(3) and shall make it available to the commissioner on request.

(4) Each solicitation for contributions to the joint fundraising committee must include a notice that includes the following information:

(a) the name of each participant in the joint fundraising committee;

(b) the allocation formula to be used for distributing joint fundraising proceeds;

(c) a statement informing contributors that, despite the state allocation formula, they may designate their contributions for particular participants;

(d) a statement informing contributors that the allocation formula may change if a contributor makes a contribution that would exceed the amount that a contributor may give to a participant or if a participant is otherwise prohibited from receiving the contribution; and

(e) if one or more participants engage in the joint fundraising activity solely to satisfy outstanding debts, a statement informing contributors that the allocation formula may change if a participant receives sufficient funds to pay its outstanding debts.

(5) (a) A joint fundraising committee may accept contributions on behalf of its participants under the provisions of the fundraising formula and may make expenditures on behalf of and to its participants under the limitations provided in this section.

(b) Except as provided by subsection (8), a joint fundraising committee may not accept a contribution

that, when allocated pursuant to the joint fundraising committee's allocation formula in subsection (3), in addition to any other contributions received by the participant from that contributor, would be in excess of the contribution limits of that contributor calculated pursuant to this section. A participant may not accept contributions allocated from the joint fundraising committee that, but for the joint fundraising committee acting as an intermediary, the participant could not otherwise accept.

(c) Contributions to the joint fundraising committee may only be deposited in the joint fundraising committee depository.

(d) The joint fundraising committee shall report and maintain records concerning contributions as provided by Title 13, chapter 37. The joint fundraising committee shall make its records available to each participant.

(e) A participant shall make the participant's contributor records available to the joint fundraising committee to enable the joint fundraising committee to carry out its duty to screen contributions pursuant to subsection (6)(a).

(6) (a) The joint fundraising committee shall screen all contributions received to ensure the prohibitions provided in Title 13, chapters 35 and 37, are followed.

(b) A corporation or a union prohibited from making a contribution to a candidate under 13-35-227(1) may make a contribution to a joint fundraising committee if one or more participants are not otherwise prohibited from receiving the contribution. A joint fundraising committee may not make an expenditure in contravention of 13-35-227(1), and a participant in a joint fundraising committee prohibited from accepting or receiving a contribution under 13-35-227(1) may not accept or receive such a contribution from a joint fundraising committee.

(c) A joint fundraising committee may not make an expenditure in contravention of 13-35-231 if a participant is a political party committee.

(d) A joint fundraising committee may not act as an intermediary for contributions or expenditures by any entity, including participants, that is otherwise prohibited under Title 13, chapters 35 and 37.

(7) For reporting and limitation purposes:

(a) the joint fundraising committee shall report contributions in the reporting period in which they are received and expenditures in the reporting period in which they are made; and

(b) the date of receipt of a contribution by a participant is the date that the contribution is disbursed by the joint fundraising committee to the participant. However, the funds must be allocated to the general election or primary election cycle during which the joint fundraising committee received them.

(8) (a) Expenditures by the joint fundraising committee must be allocated to each participant in proportion to the formula in the written agreement provided for in subsection (3).

(b) If expenditures are made for fundraising costs, a participant may pay more than its proportionate share. However, the amount that is in excess of the participant's proportionate share may not exceed the amount that the participant could legally contribute to the remaining participants. A participant may only pay expenditures on behalf of another participant subject to the limits provided in 13-37-216 and 13-37-218.

(c) If distribution according to the fundraising formula extinguishes the debts of one or more participants and results in a surplus for those participants, or if distribution under the formula results in a violation of the contribution limits under 13-37-216 or 13-37-218, the joint fundraising committee may reallocate the excess funds. Reallocation must be based on the remaining participants' proportionate shares under the allocation formula. If reallocation results in a violation of a contributor's limit under 13-37-216, the joint fundraising committee shall return the amount of the contribution that exceeds the limit to the contributor. However, contributions that have been designated by a contributor may not be reallocated by the joint fundraising committee without prior written permission of the contributor. If the contributor does not give the contributor's permission for reallocation, the funds must be returned to the contributor.

(9) The joint fundraising committee shall allocate total gross contributions received by the joint fundraising committee to the participants. The joint fundraising committee shall inform each participant of the participant's gross contribution total, make the joint fundraising committee's contribution and expenditure records available to each participant, and subject to the limitations provided in 13-37-216, 13-37-218, and this section, pay fundraising expenses and distribute each participant's allocated net contributions.

(10) An independent committee may not be construed to violate the requirement that it is not controlled directly or indirectly by a candidate or that it may not coordinate with a candidate in connection with the making of expenditures as provided in 13-1-101 solely because:

(a) the independent committee participates in a joint fundraising committee; and

(b) the joint fundraising committee makes a total gross contribution to a candidate that is in excess of

an individual independent committee's limits provided in 13-37-216 but that is not in excess of the remaining combined limit, if any, of all the entities within the joint fundraising committee.

(11) A candidate may not be construed to violate the provisions of 13-37-218 solely because the joint fundraising committee receives aggregate contributions in excess of the limit on the candidate's total combined monetary contributions from political committees, as long as the gross amount allocated to the candidate by the joint fundraising committee on behalf of political committees, along with any other contributions received by the candidate from political committees, does not exceed the limits provided in 13-37-218.

(12) The joint fundraising committee is liable for its violations of the provisions of Title 13, chapters 35 and 37. In addition, each participant of a joint fundraising committee is severally liable for violations of the provisions of Title 13, chapters 35 and 37, pertaining to the contributions allocated or disbursed to the participant by the joint fundraising committee.

Section 2. Student organizations functioning as political committees -- funding. (1) A student organization that is required to register as a political committee and is regularly active may be funded in the same manner as other student organizations, except that if the organization is funded by an additional optional student fee, the fee must be an opt-in fee.

(2) The opt-in fee may only be delivered to the student organization by means of a written instrument signed by the student or through an electronic payment system that operates independently of any systems, electronic or otherwise, used by a public postsecondary institution for the purpose of collecting, receiving, or disbursing any tuition or fees.

(3) As used in this section, the following definitions apply:

(a) "Benefit" means any type of advantage, including but not limited to:

(i) recognition;

(ii) registration;

(iii) the use of facilities of the public postsecondary institution for meetings or speaking purposes;

(iv) the use of channels of communication; and

(v) funding sources that are otherwise available to other student organizations at the public postsecondary institution.

(b) "Political committee" has the meaning provided in 13-1-101.

(c) "Public postsecondary institution" means:

(i) a unit of the Montana university system as described in 20-25-201; or

(ii) a Montana community college defined and organized as provided in 20-15-101.

(d) "Regularly active" means having expended more than $10,000 in each of two or more statewide elections in the preceding 10 years.

(e) "Student organization" means an officially recognized group or a group seeking official recognition at a public postsecondary institution that is comprised of students who receive or are seeking to receive a benefit through the public postsecondary institution.

Section 3. Section 13-1-101, MCA, is amended to read:

"13-1-101. Definitions. As used in this title, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Active elector" means an elector whose name has not been placed on the inactive list due to failure to respond to confirmation notices pursuant to 13-2-220 or 13-19-313.

(2) "Active list" means a list of active electors maintained pursuant to 13-2-220.

(3) "Anything of value" means any goods that have a certain utility to the recipient that is real and that is ordinarily not given away free but is purchased.

(4) "Application for voter registration" means a voter registration form prescribed by the secretary of state that is completed and signed by an elector, is submitted to the election administrator, and contains voter registration information subject to verification as provided by law.

(5) "Ballot" means a paper ballot counted manually or a paper ballot counted by a machine, such as an optical scan system or other technology that automatically tabulates votes cast by processing the paper ballots.

(6) (a) "Ballot issue" or "issue" means a proposal submitted to the people at an election for their approval or rejection, including but not limited to an initiative, referendum, proposed constitutional amendment, recall question, school levy question, bond issue question, or ballot question.

(b) For the purposes of chapters 35 and 37, an issue becomes a "ballot issue" upon certification by

the proper official that the legal procedure necessary for its qualification and placement on the ballot has been completed, except that a statewide issue becomes a "ballot issue" upon preparation and transmission by the secretary of state of the form of the petition or referral to the person who submitted the proposed issue.

(7) "Ballot issue committee" means a political committee specifically organized to support or oppose a ballot issue.

(8) "Candidate" means:

(a) an individual who has filed a declaration or petition for nomination, acceptance of nomination, or appointment as a candidate for public office as required by law;

(b) for the purposes of chapter 35, 36, or 37, an individual who has solicited or received and retained contributions, made expenditures, or given consent to an individual, organization, political party, or committee to solicit or receive and retain contributions or make expenditures on the individual's behalf to secure nomination or election to any office at any time, whether or not the office for which the individual will seek nomination or election is known when the:

(i) solicitation is made;

(ii) contribution is received and retained; or

(iii) expenditure is made; or

(c) an officeholder who is the subject of a recall election.

(9) (a) "Contribution" means:

(i) the receipt by a candidate or a political committee of an advance, gift, loan, conveyance, deposit, payment, or distribution of money or anything of value to support or oppose a candidate or a ballot issue;

(ii) an expenditure, including an in-kind expenditure, that is made in coordination with a candidate or ballot issue committee and is reportable by the candidate or ballot issue committee as a contribution;

(iii) the receipt by a political committee of funds transferred from another political committee; or

(iv) the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee.

(b) The term does not mean services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee or meals and lodging provided by individuals in their private residences for a candidate or other individual.

(c) This definition does not apply to Title 13, chapter 37, part 6.

(10) "Coordinated", including any variations of the term, means made in cooperation with, in consultation with, at the request of, or with the express prior consent of a candidate or political committee or an agent of a candidate or political committee.

(11) "De minimis act" means an action, contribution, or expenditure that is so small that it does not trigger registration, reporting, disclaimer, or disclosure obligations under Title 13, chapter 35 or 37, or warrant enforcement as a campaign practices violation under Title 13, chapter 37.

(12) "Election" means a general, special, or primary election held pursuant to the requirements of state law, regardless of the time or purpose.

(13) (a) "Election administrator" means, except as provided in subsection (13)(b), the county clerk and recorder or the individual designated by a county governing body to be responsible for all election administration duties, except that with regard to school elections not administered by the county, the term means the school district clerk.

(b) As used in chapter 2 regarding voter registration, the term means the county clerk and recorder or the individual designated by a county governing body to be responsible for all election administration duties even if the school election is administered by the school district clerk.

(14) (a) "Election communication" means the following forms of communication to support or oppose a candidate or ballot issue:

(i) a paid advertisement broadcast over radio, television, cable, or satellite;

(ii) paid placement of content on the internet or other electronic communication network;

(iii) a paid advertisement published in a newspaper or periodical or on a billboard;

(iv) a mailing; or

(v) printed materials.

(b) The term does not mean:

(i) an activity or communication for the purpose of encouraging individuals to register to vote or to vote, if that activity or communication does not mention or depict a clearly identified candidate or ballot issue;

(ii) a communication that does not support or oppose a candidate or ballot issue;

(iii) a bona fide news story, commentary, blog, or editorial distributed through the facilities of any

broadcasting station, newspaper, magazine, internet website, or other periodical publication of general circulation;

(iv) a communication by any membership organization or corporation to its members, stockholders, or employees; or

(v) a communication that the commissioner determines by rule is not an election communication.

(15) "Election judge" means a person who is appointed pursuant to Title 13, chapter 4, part 1, to perform duties as specified by law.

(16) (a) "Electioneering communication" means a paid communication that is publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials, that is made within 60 days of the initiation of voting in an election, that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue, and that:

(i) refers to one or more clearly identified candidates in that election;

(ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or

(iii) refers to a political party, ballot issue, or other question submitted to the voters in that election.

(b) The term does not mean:

(i) a bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, internet website, or other periodical publication of general circulation unless the facilities are owned or controlled by a candidate or political committee;

(ii) a communication by any membership organization or corporation to its members, stockholders, or employees;

(iii) a commercial communication that depicts a candidate's name, image, likeness, or voice only in the candidate's capacity as owner, operator, or employee of a business that existed prior to the candidacy;

(iv) a communication that constitutes a candidate debate or forum or that solely promotes a candidate debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(v) a communication that the commissioner determines by rule is not an electioneering communication.

(17) "Elector" means an individual qualified to vote under state law.

(18) (a) "Expenditure" means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value:

(i) made by a candidate or political committee to support or oppose a candidate or a ballot issue; or

(ii) used or intended for use in making independent expenditures or in producing electioneering communications.

(b) The term does not mean:

(i) services, food, or lodging provided in a manner that they are not contributions under subsection (9);

(ii) payments by a candidate for personal travel expenses, food, clothing, lodging, or personal necessities for the candidate and the candidate's family;

(iii) the cost of any bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation; or

(iv) the cost of any communication by any membership organization or corporation to its members or stockholders or employees.

(c) This definition does not apply to Title 13, chapter 37, part 6.

(19) "Federal election" means an election in even-numbered years in which an elector may vote for individuals for the office of president of the United States or for the United States congress.

(20) "General election" means an election that is held for offices that first appear on a primary election ballot, unless the primary is canceled as authorized by law, and that is held on a date specified in 13-1-104.

(21) "Inactive elector" means an individual who failed to respond to confirmation notices and whose name was placed on the inactive list pursuant to 13-2-220 or 13-19-313.

(22) "Inactive list" means a list of inactive electors maintained pursuant to 13-2-220 or 13-19-313.

(23) (a) "Incidental committee" means a political committee that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure.

(b) For the purpose of this subsection (23), the primary purpose is determined by the commissioner by rule and includes criteria such as the allocation of budget, staff, or members' activity or the statement of

purpose or goal of the person or individuals that form the committee.

(24) "Independent committee" means a political committee organized for the primary purpose of receiving contributions and making expenditures that is not controlled either directly or indirectly by a candidate and that does not coordinate with a candidate in conjunction with the making of expenditures except pursuant to the limits set forth in 13-37-216(1).

(25) "Independent expenditure" means an expenditure for an election communication to support or oppose a candidate or ballot issue made at any time that is not coordinated with a candidate or ballot issue committee.

(26) "Individual" means a human being.

(27) "Legally registered elector" means an individual whose application for voter registration was accepted, processed, and verified as provided by law.

(28) "Mail ballot election" means any election that is conducted under Title 13, chapter 19, by mailing ballots to all active electors.

(29) "Person" means an individual, corporation, association, firm, partnership, cooperative, committee, including a political committee, club, union, or other organization or group of individuals or a candidate as defined in subsection (8).

(30) "Place of deposit" means a location designated by the election administrator pursuant to 13-19-307 for a mail ballot election conducted under Title 13, chapter 19.

(31) (a) "Political committee" means a combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure:

(i) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination;

(ii) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or

(iii) to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure.

(b) Political committees include ballot issue committees, incidental committees, independent committees, and political party committees.

(c) A candidate and the candidate's treasurer do not constitute a political committee.

(d) A political committee is not formed when a combination of two or more individuals or a person other than an individual makes an election communication, an electioneering communication, or an independent expenditure of $250 or less.

(e) A joint fundraising committee is not a political committee.

(32) "Political party committee" means a political committee formed by a political party organization and includes all county and city central committees.

(33) "Political party organization" means a political organization that:

(a) was represented on the official ballot in either of the two most recent statewide general elections; or

(b) has met the petition requirements provided in Title 13, chapter 10, part 5.

(34) "Political subdivision" means a county, consolidated municipal-county government, municipality, special purpose district, or any other unit of government, except school districts, having authority to hold an election.

(35) "Polling place election" means an election primarily conducted at polling places rather than by mail under the provisions of Title 13, chapter 19.

(36) "Primary" or "primary election" means an election held on a date specified in 13-1-107 to nominate candidates for offices filled at a general election.

(37) "Provisional ballot" means a ballot cast by an elector whose identity or eligibility to vote has not been verified as provided by law.

(38) "Provisionally registered elector" means an individual whose application for voter registration was accepted but whose identity or eligibility has not yet been verified as provided by law.

(39) "Public office" means a state, county, municipal, school, or other district office that is filled by the people at an election.

(40) "Random-sample audit" means an audit involving a manual count of ballots from designated races and ballot issues in precincts selected through a random process as provided in 13-17-503.

(41) "Registrar" means the county election administrator and any regularly appointed deputy or assistant election administrator.

(42) "Regular school election" means the school trustee election provided for in 20-20-105(1).

(43) "School election" has the meaning provided in 20-1-101.

(44) "School election filing officer" means the filing officer with whom the declarations for nomination for school district office were filed or with whom the school ballot issue was filed.

(45) "School recount board" means the board authorized pursuant to 20-20-420 to perform recount duties in school elections.

(46) "Signature envelope" means an envelope that contains a secrecy envelope and ballot and that is designed to:

(a) allow election officials, upon examination of the outside of the envelope, to determine that the ballot is being submitted by someone who is in fact a qualified elector and who has not already voted; and

(b) allow it to be used in the United States mail.

(47) "Special election" means an election held on a day other than the day specified for a primary election, general election, or regular school election.

(48) "Special purpose district" means an area with special boundaries created as authorized by law for a specialized and limited purpose.

(49) "Statewide voter registration list" means the voter registration list established and maintained pursuant to 13-2-107 and 13-2-108.

(50) "Support or oppose", including any variations of the term, means:

(a) using express words, including but not limited to "vote", "oppose", "support", "elect", "defeat", or "reject", that call for the nomination, election, or defeat of one or more clearly identified candidates, the election or defeat of one or more political parties, or the passage or defeat of one or more ballot issues submitted to voters in an election; or

(b) otherwise referring to or depicting one or more clearly identified candidates, political parties, or ballot issues in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election, or defeat of the candidate in an election, the election or defeat of the political party, or the passage or defeat of the ballot issue or other question submitted to the voters in an election.

(51) "Valid vote" means a vote that has been counted as valid or determined to be valid as provided in 13-15-206.

(52) "Voted ballot" means a ballot that is:

(a) deposited in the ballot box at a polling place;

(b) received at the election administrator's office; or

(c) returned to a place of deposit.

(53) "Voter interface device" means a voting system that:

(a) is accessible to electors with disabilities;

(b) communicates voting instructions and ballot information to a voter;

(c) allows the voter to select and vote for candidates and issues and to verify and change selections; and

(d) produces a paper ballot that displays electors' choices so the elector can confirm the ballot's accuracy and that may be manually counted.

(54) "Voting system" or "system" means any machine, device, technology, or equipment used to automatically record, tabulate, or process the vote of an elector cast on a paper ballot."

Section 4. Section 13-35-225, MCA, is amended to read:

"**13-35-225. Election materials not to be anonymous -- notice -- penalty.** (1) All election communications, electioneering communications, and independent expenditures must clearly and conspicuously include the attribution "paid for by" followed by the name and address of the person who made or financed the expenditure for the communication. The attribution must contain:

(a) for election communications or electioneering communications financed by a candidate or a candidate's campaign finances, the name and the address of the candidate or the candidate's campaign;

(b) for election communications, electioneering communications, or independent expenditures financed by a political committee or a joint fundraising committee, the name of the committee, the name of the committee treasurer, deputy treasurer, secretary, vice chairperson, or chairperson, as designated pursuant to 13-37-201(2)(b), and the address of the committee or the named committee officer; and

(c) for election communications, electioneering communications, or independent expenditures financed by a political committee that is a corporation or a union, the name of the corporation or union, its chief executive officer or equivalent, and the address of the principal place of business.

(2) Communications in a partisan election financed by a candidate, ~~or~~ a political committee organized

on the candidate's behalf, or a joint fundraising committee with a participant who is a candidate or a political committee organized on the candidate's behalf must state the candidate's party affiliation or include the party symbol.

(3) If a document or other article of advertising is too small for the requirements of subsections (1) and (2) to be conveniently included, the candidate responsible for the material or the person financing the communication shall file a copy of the article with the commissioner of political practices, together with the required information or statement, at the time of its public distribution.

(4) If information required in subsections (1) and (2) is omitted or not printed or if the information required by subsection (3) is not filed with the commissioner, upon discovery of or notification about the omission, the candidate responsible for the material or the person financing the communication shall:

(a) file notification of the omission with the commissioner of political practices within 2 business days of the discovery or notification;

(b) bring the material into compliance with subsections (1) and (2) or file the information required by subsection (3) with the commissioner; and

(c) withdraw any noncompliant communication from circulation as soon as reasonably possible.

(5) Whenever the commissioner receives a complaint alleging any violation of subsections (1) and (2), the commissioner shall as soon as practicable assess the merits of the complaint.

(6) (a) If the commissioner determines that the complaint has merit, the commissioner shall notify the complainant and the candidate or political committee of the commissioner's determination. The notice must state that the candidate or political committee shall bring the material into compliance as required under this section:

(i) within 2 business days after receiving the notification if the notification occurs more than 7 days prior to an election; or

(ii) within 24 hours after receiving the notification if the notification occurs 7 days or less prior to an election.

(b) When notifying the candidate or campaign committee under subsection (6)(a), the commissioner shall include a statement that if the candidate, ~~or~~ political committee, or joint fundraising committee fails to bring the material into compliance as required under this section, the candidate, ~~or~~ political committee, or joint