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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' RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

This Court already held that Plaintiffs have standing to challenge each of the bills at issue in this litigation. *See* March 7, 2022 Order Denying State's Motion to Dismiss ("Order"). Since that time, the Montana Supreme Court invalidated HB102 on the same grounds that Plaintiffs seek declaratory relief against HB112, HB349, and SB319. To avoid summary judgment on the merits and preserve facially unconstitutional legislation, the State now cross-moves—insisting that the Court should revisit its Order on standing and reach a different conclusion on the same questions.[1] State's Response and Brief in Support of Cross-Motion for Summary Judgment ("Def's Br.") at 3-14. The cross-motion should be denied.

First, most of the State's arguments are exact retreads of the same legal theories this Court reviewed and rejected in its March Order. Though they are repackaged in a motion for summary judgment, these arguments should properly be construed as a motion for reconsideration and rejected for the same reasons as before.

Second, the remainder of the State's arguments on standing are loose sound bites from a single round of discovery responses. They fail utterly to establish that Plaintiffs are not proper parties to this litigation. To the contrary, portions of the same discovery responses the State ignores establish conclusively that Plaintiffs have standing for their claims.

The Court should deny the cross-motion and resolve this dispute on the merits by granting Plaintiffs' concurrently pending motion for summary judgment.

I. PROCEDURAL HISTORY

[1] Plaintiffs' Reply in Support of Motion for Summary Judgment addresses the State's treatment of the merits. This brief addresses the standing issues that form the lion's share of the State's cross-motion.

The State moved to dismiss Plaintiffs' Complaint over a year ago, arguing that Plaintiffs fail to state a cognizable legal theory and that they lack standing. After briefing and oral argument, the Court denied the State's motion and issued a detailed order holding that Plaintiffs have standing to bring their claims. The Court carefully analyzed each challenged bill and held that Plaintiffs have standing. Order at 4-7. The Court also determined that certain of the Plaintiffs have standing as to all the bills at issue, given their representative functions for large cohorts of the university community (students; faculty; staff). *Id.* at 7-8. Finally, the Court roundly rejected the State's argument that only the Board of Regents can seek declaratory relief on the theories in this case. *Id.* at 8-12.

The State answered and the case advanced. In discovery, the State issued a single round of written discovery requests. The State did not challenge any of Plaintiffs' objections or contest the sufficiency of the responses and sought no additional written discovery. The State has not noticed a single deposition. The discovery deadline is months away, in November.

Plaintiffs moved for summary judgment on each of their claims. During briefing on Plaintiffs' motion for summary judgment, the Montana Supreme Court issued its decision in *Board of Regents v. State*, 2022 MT 128, invalidating HB102 on the same grounds that Plaintiffs seek declaratory relief against the remaining bills. This cross-motion for summary judgment on standing followed.

II. STANDARD

"In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences that might be drawn from

the offered evidence should be drawn in favor of the party opposing summary judgment." *Hughes v. Lynch*, 2007 MT 177, ¶ 7, 338 Mont. 214, 164 P.3d 913 (citation omitted).

"In a multi-plaintiff case, the standing of 'any one' plaintiff is sufficient for a claim to proceed and, upon finding that one plaintiff has standing, 'the standing of the other parties [does] not merit further inquiry.'" Order at 3 (quoting *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 45, 356 Mont. 41, 230 P.3d 808).

III. PLAINTIFFS STILL HAVE STANDING

A. The State's rehashed legal arguments should be treated as a motion for reconsideration and denied.

As the State concedes, this Court has already determined that Plaintiffs have standing. *E.g.*, Def's Br. at 4-5. The Court should construe the portions the State's request that merely recycle previously rejected legal arguments as a motion for reconsideration. That motion should be denied, both because reconsideration of a prior motion on the merits, without leave, is categorically disallowed and because the State did not even attempt to meet any potentially applicable standard. *See, e.g.*, *Jonas v. Jonas*, 2010 MT 240N, ¶ 10, 359 Mont. 443, 249 P.3d 80 ("[S]eeking to relitigate old matters, or raising arguments that could or should have been raised before judgment issued, should not be the subject of a Rule 59 motion. Reconsideration of an earlier motion on its merits cannot be the subject of a Rule 60(b) motion.").

The State's standing arguments proceed in three parts, two of which offer the exact same arguments and analysis this Court already rejected in its Order. The first part, Section II.A of the State's brief, argues that Plaintiffs do not have standing because "Plaintiffs cannot defend the Board's authority under" Article X, Section 9 of the Montana Constitution; "Only the Board can do that." Def's Br. at 6. The Court has already addressed, and rejected, this very argument:

> The Court rejects the State's premise that because the Board of Regents is undoubtedly a proper plaintiff to raise concerns about legislative encroachments on university affairs and the Board's constitutionally delegated authority, it is the only proper plaintiff. Montana law rejects this notion. The Montana Supreme Court has recognized that there may be more than one party affected by a given issue with a sufficient interest in the subject matter to have standing to litigate it.
> . . .
>
> Plaintiffs are not random citizens or interlopers with an abstract, academic interest in university system governance . . . They are university students, faculty, employees and representative groups with a distinct interest in the challenged litigation that is different than the public at large.
> . . .
>
> The Court concludes that Plaintiffs are proper parties in their own right. Even if the Board of Regents were the better plaintiff, these are issues of significant public importance that have not otherwise been raised and might avoid judicial review

Order at 9-12; *id.* at 11 (citing *Comm. for an Effective Judiciary v. State*, 209 Mont. 105, 110, 679 P.2d 1223, 1226 (1984) ("the importance of the question to the public 'surely is an important factor'" and in general, "private parties should be granted standing to contest important public issues")).

In its cross-motion, State insists again that only the Board of Regents has standing to enforce the constitutional independence of the higher education system. The Montana Supreme Court faced a similar argument in *Committee for an Effective Judiciary v. State*—that only judges could enforce the judicial article of the Montana Constitution. 209 Mont. at 109-111, 679 P.2d at 1225-27. The Court rejected that argument, holding that,

> The concern of the delegates was not to confer benefits on the judiciary nor on individual members of the judiciary. Rather, their concern was for the health of the judicial system itself—for the public interest.

Id., 209 Mont. at 109, 679 P.2d at 1225. The same is true here—the concern in Article X, Section 9 is not to confer benefits on the Regents for their own sake, but to benefit the students,

professors, and other members of the university community the Regents serve. Consistent with *Committee for an Effective Judiciary*, this Court already held that the Plaintiffs have standing to challenge infringements on the independence of the higher education system that directly affect them. The cross-motion presents no grounds on which to revisit that conclusion.

The State makes a half-hearted attempt to justify its request for reconsideration by asserting that, through discovery, "Plaintiffs admit that no Plaintiff is the Board of Regents or a current member of the Board of Regents." Def's Br. at 6. This is nothing new. Plaintiffs have never claimed to represent the current Board of Regents or to exercise the Board's authority. That was the case when the Court rejected the State's argument the first time—indeed, it was the crux of the State's argument—and nothing has changed.

The State also suggests the Court should revisit its original conclusion because the case is further along—that the legal conclusion the Court rendered at the pleading stage should be different now on summary judgment. But nothing about the factual and legal background to the State's argument has changed since the pleading stage. The State's argument is a legal one: that no one other than the Regents has a legally protectable interest in the independence of the higher education system. It does not depend on factual development by the Plaintiffs. Plaintiffs admitted then, and admit now, that they are not the Regents. The Court properly addressed this legal theory the first time the State raised it. Nothing has changed since the Court's prior determination.

The State makes essentially the same argument in Section II.B.2 of its brief ("Prudential Standing"), which is the third part of its renewed attack on standing.[2] Def's Br. at 12-14. There, the State re-lodges its preferred readings of the *Lee* and *Air Pollution Control Board* cases—cases this Court already addressed at length in the Order. *Compare* Def's Br. at 12-14 *and* Order at 8-12 (discussing *Lee v. State*, 195 Mont. 1, 635 P.2d 1281 (1981) and *Missoula City-Cnty. Air Pollution Control Bd. v. Bd. of Env't Review*, 282 Mont. 255, 937 P.2d 463 (1997)). The State's only justification for having another go at the Court's Order is the same as above: through discovery, "Plaintiffs admit that no Plaintiff is the Board of Regents or a current member of the Board of Regents . . . They admit that they cannot exercise the power of the Board of Regents." Def's Br. at 14. As before, none of these issues were in dispute when the Court rejected the State's theory in March, and the Court's ruling did not turn on these facts. The State presented a legal theory about the meaning of these cases and the Court rejected it, concluding that Plaintiffs could establish standing as people affected by the exercise of the Board's authority, even if they do not claim to be able to wield that authority directly. Nothing has changed since the Court's prior determination.

The State is correct that its strategy in cross-moving for summary judgment on standing evokes a similar failed strategy the State employed in *Forward Montana v. State*, ADV 2021-611 (*"Forward Montana"*) (Mont. 1st. Jud. Dist.), cited in footnote 2 of the State's brief. There, the State repeatedly attacked the plaintiffs' standing long after Judge Menahan held that plaintiffs established it. First, the State opposed the entry of a preliminary injunction on Sections 21 and

[2] Sandwiched between these two sections is the State's selective analysis of Plaintiffs' discovery responses, discussed below.

22 of SB319, largely on standing-related grounds. *See* Defendant's Response to Plaintiffs' Motion for Preliminary Injunction, *Forward Montana*, ADV-2021-611 (June 21, 2021). Judge Menahan issued the preliminary injunction over the State's objections. Preliminary Injunction Order, *Forward Montana*, ADV-2021-611 (July 1, 2021). The State then moved to dismiss the plaintiffs' complaint, again on standing grounds. Defendant's Motion to Dismiss, *Forward Montana*, ADV-2021-611 (Aug. 4, 2021). Judge Menahan rejected the argument again and issued a written order on standing. Order Denying Motion to Dismiss, *Forward Montana*, ADV-2021-611 (Oct. 6, 2021). The plaintiffs moved for summary judgment on their purely legal claims, and the State defended against the motion *again* on standing grounds. *See* Defendant's Response in Opposition to Motion for Summary Judgment, *Forward Montana*, ADV-2021-611 (Dec. 22, 2021). Judge Menahan declined the State's pleas to take up the recycled standing argument a third time; the standing issue was preserved for appeal, rendering the State's serial motions for reconsideration inappropriate. Judge Menahan issued a permanent injunction in the case and is now considering whether to assess fees against the State, in part because of the State's role in needlessly multiplying the proceedings by raising, and re-raising, the settled issue of standing again and again. *See* Order on Motion for Summary Judgment, *Forward Montana*, ADV 2021-611 (Feb. 3, 2022); Plaintiffs' Motion for Attorney's Fees, *Forward Montana*, ADV 2021-611 (May 18, 2022).

Like *Forward Montana*, the Court in this case has already held that Plaintiffs have standing and has rejected the State's legal theories on the same. Like *Forward Montana*, the State has preserved the issue for a future appeal. But unlike *Forward Montana*, this case presents an even stronger candidate for denying the State's reconsideration motion because Plaintiffs here have

actually undergone discovery and articulated facts that substantiate the basis of the Court's Order on standing.

In sum, the arguments in Sections II.A and II.B.2 of the State's cross-motion do not depend on discovery, and the State does not show that anything has changed since the first time the Court rejected these theories. These portions of the cross-motion should be denied.

B. Plaintiffs Establish They Have Standing

The balance of the State's attack on standing, Section II.B.1 of the brief, trades heavily on selective descriptions of Plaintiffs' discovery responses. The exercise is self-defeating, however, because non-excerpted portions of the same discovery responses establish that Plaintiffs clearly have standing to bring their claims.

1. HB349

In its Order, the Court determined that with respect to HB349,

> Among the Plaintiffs are several students and representative groups that are subject to and have an interest in being free from discrimination on campus and in the Regents' anti-discrimination policy which is impacted by HB 349.

Order at 4. The Court specifically noted ASMSU's "associational interest in extracurricular activities and student wellness and safety." *Id.* at 4-5. In response to the State's interrogatory regarding HB349, ASMSU provides a *nine page* detailed explanation about the harm to ASMSU's representational and associational interests as a result of HB349. Def's Br., Ex. A at 8-17. ASMSU's response substantiates the harms related to HB349 in detail, exactly as the Court's Order contemplates. *See, e.g., id.* at 8-10 (ASMSU response to Def's Interrogatory No. 5 providing that "[t]he Associated Students of Montana State University (ASMSU) have held a historic and continuing regard for non-discrimination and inclusion of all students on campus,"

that "ASMSU is the voice of the students, dedicated to enhancing the college experience at Montana State University with leadership and employment opportunities, diverse student-oriented programs and services, and responsible fiscal management of student activity fees," and that "HB-349 . . . would . . . reduce the self-governance of ASMSU over the distribution of student activity fees" and "removes the ability for ASMSU to withhold funds from student organizations that are non-compliant with MSU student organization policy and would undermine ASMSU's ability to uphold anti-discrimination practices outlined in the ASMSU constitution.").

It is as if the State overlooked pages 8-17 of the responses to its discovery requests. Instead, in its cross-motion, the State voices its legal disagreement with Plaintiffs' interpretation of HB349. Far from analyze any of the evidence of standing ASMSU offers, the State barely engages with ASMSU's description of its harms—even though the Court in its Order singled out ASMSU and precisely the sort of harms ASMSU details in response to Interrogatory No. 5. The State does not engage with any of the students the Court cited in its Order, either (*e.g.*, Student Plaintiffs Ashley Phelan and Joey Knappenberger), or the other groups "suing both on their own behalf and on an associational basis on behalf of their individual members and constituents," Order at 5.

Plaintiffs' discovery responses plainly substantiate and expand upon the allegations this Court held give Plaintiffs standing to challenge HB349. The cross-motion does not demonstrate otherwise.

2. SB319

The Court also held Plaintiffs have standing to challenge SB319 because SB319 puts one of the Plaintiffs, MontPIRG, directly in its crosshairs:

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

Order at 7. SB319's Section 2 was authored specifically to target MontPIRG, as MontPIRG is the only organization of its kind in the state that utilizes the unique opt-out fee structure. Thus, it should have come as no surprise to the State that in response to its discovery requests, Plaintiffs substantiated that SB319 harms MontPIRG. *See, e.g.*, Def's Br., Ex. A at 19-21 (response to Def's Interrogatory No. 6 providing that "Under Section 2 of SB 319, by registering as a political committee to engage in that work, MontPIRG would lose its optional $5 fee which already had BOR approval as well as approval from students voting in the ASUM election. SB 319 hampers students at MontPIRG's ability to engage in important ballot issue work through the threat of losing student approved funding—all contrary to the prior system that subjected students and student organizations to governance by the Regents not the Legislature. Additionally, SB 319 includes provisions to further limit speech on campus by prohibiting MontPIRG, when registered as a political committee, from engaging in voter registration, signature gathering, or turnout efforts in specific areas on campus."). This plainly substantiates the basis on which the Court first determined Plaintiffs have standing to challenge SB319.

As with HB349, the State's response with SB319 is legal and argumentative—it does not measure what this Court held would count for an injury against what Plaintiffs responded with in

discovery. There is no serious question that SB319 targets MontPIRG's funding and will injure it. That's the purpose of the bill.

Plaintiffs' discovery responses plainly substantiate and expand upon the allegations this Court already held give Plaintiffs standing to challenge SB319. The cross-motion does not demonstrate otherwise.

3. HB112

With regard to HB112, the Court held that,

> Among the Plaintiffs are representative groups with an interest in these matters and whose constituent members have suffered or will suffer harm as a result of HB 112. *Id.*, 113 (Plaintiff Montana Federation of Public Employees, "MFPE") and 121 (ASMSU, noting the student government's associational interest in student athletics, extracurricular activities, and student wellness and safety); *Id.*, 137 (associational standing).
> . . .
>
> The Court finds that each of these Plaintiffs has sufficiently alleged a stake in the constitutionality of HB 112 and Plaintiffs have articulated credible present injuries (i.e. interference with administration of university athletic programs and compliance with intercollegiate rules and regulations) as well as reasonably concrete and foreseeable threatened injury (i.e. actual exclusion from participation). The forecasted injury, i.e. exclusion of trans gender athletes, is not an abstract or remote contingency. It is the expressly stated purpose and function of the challenged legislation.

Order at 6. As discussed above, Plaintiffs' responses to Defendants' lone round of written discovery requests plainly substantiate the facts this Court already held would confer standing to challenge HB112. *E.g.*, Def's Br., Ex. A at 8 ("The Associated Students of Montana State University (ASMSU) have held a historic and continuing regard for non-discrimination and inclusion of all students on campus"); 10 ("The Associated Students of Montana State are elected proportionally by colleges and programs and in At-Large positions to represent the voice

of the entire student body. ASMSU upholds these values of Diversity and Inclusion which is reflective of a large portion of the student body's view on these issues").

Indeed, Plaintiffs' discovery responses go beyond the associational and representative interests the Court held support standing to challenge HB112. In response to Defendants' Interrogatory No. 23, Plaintiff Annie Belcourt describes how the discrimination enforced by HB112 impacts her own child: "HB 112 would prohibit my child and my sister's child from ever participating in sports on our campuses because they are both transgender children." She continues:

> As a clinical psychologist and as a parent I can assure you that formal legal actions to discriminate against vulnerable members of our society for participation in publicly funded sporting activities creates imminent harm and disruption to our campuses in the Montana University System
> . . .
>
> As a research scientist, I can attest that there is vast evidence (legal and clinical) that discriminating against an individual or community on the basis of biological sex is harmful. This is true for many domains including an individual's psychiatric health, physical health, and safety. Transgender people are human beings who experience discrimination and increased risk of violence and hate-crimes
> . . .
>
> Providing legislation that establishes precedence for the legalization of systematic discrimination is establishing legal systems that promote systematic discrimination that can and will increase severe risk of harm to LGBTQ+ communities and therefore campuses of the Montana University System.

Def's Br., Ex. A at 44-45. This and other responses substantiate the harms the Court held provide standing to challenge HB112. *See also id.* at 51 (discovery response to HB112 harm interrogatory incorporating and referring Defendants to Plaintiffs' responses to Def's Interrogatories Nos. 5, 10, 12, 19, 21 and 23); Plaintiffs' Reply Brief in Support of Motion for

Summary Judgment at 9-10 (detailing how HB112 adversely impacts not only transgender athletes, but the larger university community as well).

As with the other bills, the State's response to Plaintiffs' discovery responses is legal and argumentative. The State fails to measure what this Court held would be sufficient to support standing to challenge HB112 and Plaintiffs' actual responses. It does not contend with ASMSU's response at all—even though this was central to the Court's decision on standing to challenge HB112. Instead, the State argues with Belcourt's ethical views while ignoring or glossing over her factual testimony or personal family stake. The remainder of its attacks on HB112 cherry pick statements from other Plaintiffs to erect as straw men. The analysis is unmoored from this Court's Order and Plaintiffs' actual responses; those responses plainly substantiate and expand upon the allegations this Court already held give Plaintiffs standing to challenge HB112. The cross-motion does not demonstrate otherwise.

4. Standing as to all bills

Finally, the State neglects to engage with the Court's prior holding—substantiated through Plaintiffs' discovery responses—that:

> With regard to all bills challenged in this action, the faculty and student organizations have sufficiently alleged an injury in fact relating to their engagement with the Board of Regents. Plaintiff ASMSU alleges it "serves as the representative voice of students attending Montana State University by engaging with university administration and the Board of Regents on behalf of the student body regarding matters affecting education, athletics and extracurricular activities, student wellness, and other issues germane to the student population and campus life." Plaintiff MUSFAR alleges it "represents the Faculty Senates and individual faculty members by engaging with the Board of Regents in matters pertaining to academic affairs and campus administration that broadly affect the MUS and faculty statewide."
>
> If the challenged legislation unconstitutionally interferes with the Board of Regents' constitutionally granted independence and authority as alleged by

> Plaintiffs, then ASMSU and MUSFAR's role in engaging with the Board to establish policies is also disrupted resulting in a direct injury to these organizations and those they serve and represent. The Court finds the alleged interference with the normal functioning of the relationship between the Board of Regents and these organizations is sufficient to confer standing upon ASMSU and MUSFAR.

Order at 7-8 (citations omitted). Nothing about Plaintiffs' discovery responses, and nothing in the State's cross-motion, states otherwise. The Court's reasoning is undisturbed.

And, at bottom, the Court's reasoning still makes compelling sense. The independence of Montana's higher education system secured by Article X, Section 9 of the Montana Constitution does not exist simply to serve the Board of Regents for the Board's own sake. It exists to protect the actual constituents of the university system: students, faculty, and other members of the university community—i.e., the Plaintiffs in this case. The infringements on university system independence that Plaintiffs challenge here were engineered to affect that community. The laws at issue purport to determine which student organizations get funding, where political and other First Amendment activities may occur, who may play on what sports teams, and the circumstances under which community members may be protected from harassment and discrimination. Of course members of the community targeted by the bills—Plaintiffs—are proper parties to seek declaratory relief. *Comm. for an Effective Jud'y*, 209 Mont. at 110, 679 P.2d at 1226 ("the importance of the question to the public 'surely is an important factor'" and in general, "private parties should be granted standing to contest important public issues").

The Court's March Order correctly concluded that Plaintiffs have legally protected interests in the independence of the higher education system in Montana. Since that time,

Plaintiffs have detailed and substantiated the very harms the Court cited in its Order. Nothing else has changed. The cross-motion should be denied.

Submitted this 1st day of August, 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 1st day of August, 2022.

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