IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0586

STEVE BARRETT, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Eighteenth Judicial District Court,
Gallatin County, Cause No. DV-21-581-B
The Hon. Rienne H. McElyea, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Montana Code Annotated

Montana Rules of Evidence

Montana Constitution

Montana Rules of Civil Procedure

2021 Session Laws

Publications

United States Code

Federal Rules of Civil Procedure

STATEMENT OF ISSUES

1. Whether Plaintiffs have standing to assert that, in enacting HB 112 (2021), HB 349 (2021), and SB 319 (2021), the Legislature violated the Board of Regents' authority under Article X, § 9 of the Montana Constitution.[1]

2. Whether HB 112, requiring public schools to designate athletic teams based on biological sex infringes on the Board of Regents' authority under Article X, § 9 of the Montana Constitution.

STATEMENT OF THE CASE

Plaintiffs challenge three laws under the theory that these laws violate the Board of Regents' (the "Board") constitutional authority under Article X, § 9 of the Montana Constitution. Defendants State of Montana, Greg Gianforte, and Austin Knudsen (collectively, "the State") immediately moved to dismiss because Plaintiffs do not have standing to bring a claim under Article X, § 9. The district court denied the State's motion, determining that Plaintiffs had met their "minimal burden" to satisfy standing at the motion to dismiss stage to proceed with their claims. (Doc. 34 at 8.)

[1] Plaintiffs challenged HB 102 and the "conditional appropriation" in HB 2 associated with HB 102. This Court permanently enjoined HB 102. *See Board of Regents v. State*, 2022 MT 128, 409 Mont. 96, 512 P.3d 748. As a result, Plaintiffs' challenge to HB 2 and HB 102 are no longer at issue in this case.

After discovery, the State once again sought to toss the lawsuit on the grounds that Plaintiffs failed to meet both constitutional and prudential standing requirements at summary judgment. The district court rested on its prior finding that Plaintiffs had standing and moved to the merits of the case, determining that each of the challenged laws violated the Board's constitutional authority.

The State timely filed this appeal, asking this Court to reverse the district court's summary judgment order and final judgment (attached as App. A).

STATEMENT OF THE FACTS

Plaintiffs challenge three laws: HB 112, HB 349, and SB 319. (*See generally* Doc.1.) HB 112 protects equal opportunity rights of women in sports, requiring that all public school athletic teams be designated based on biological sex. (Doc. 50 at Ex. B.) It states that every team must be designated as male, female, or coed, and it expressly forbids males from participating on teams designated for females. (*Id.*)

HB 349 prohibits discrimination against student organizations based on that organization's expressive activity. (Doc. 50 at Ex. A.) Section 1 specifically permits student organizations to institute leadership requirements consistent with the organization's sincerely held beliefs or standard of conduct. (*Id.*) Section 2 instructs public postsecondary institutions to adopt a policy prohibiting student-on-student discriminatory harassments and sets forth guidance for those policies. (*Id.*)

Finally, SB 319 levels the playing field for all student organizations by universally prohibiting opt-out fees for qualifying student organizations. (Doc. 50 at Ex. C.) Section 2—the sole section at issue in this lawsuit—requires that any optional student fees that fund student organizations be opt-in. (*Id.*)

The Board of Regents is not a party to this case, nor is any Plaintiff a current member of the Board of Regents. Plaintiffs admit they cannot exercise the power granted to the Board of Regents under Article X, § 9. Yet they press forward with their claims to vindicate a power that does not belong to them.

STANDARD OF REVIEW

This Court reviews summary judgment orders de novo. *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704. Summary judgment is only proper where "no genuine issue as to any material fact" exists and the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). "When there are cross-motions for summary judgment, a district court must evaluate each party's motion on its own merits." *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, 403 P.3d 664. Because the district court "is not called to resolve factual disputes," this Court reviews the "conclusions of law to determine whether they are correct." *Id.*

Where a party challenges a duly enacted law, courts must also apply the presumption of constitutionality. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73,

312 Mont. 198, 60 P.3d 357. "The constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* ¶¶ 73–74. This means that Plaintiffs have to overcome the presumption of constitutionality afforded to HB 112, HB 349, and SB 319 and show that Article X, Section 9 restricts the Legislature's authority to pass these laws *beyond a reasonable doubt*. *Id.* ¶ 74.

SUMMARY OF ARGUMENT

Plaintiffs claim the three laws violate the Board's constitutional authority under Article X, § 9. But in doing so, Plaintiffs brought everyone to the party except the entity whose power they seek to vindicate: the Board of Regents. Plaintiffs, therefore, fail to satisfy both constitutional and prudential standing because they cannot (1) identify a direct injury in fact that is (2) fairly traceable to the claim that the Legislature infringed on the Board's authority and (3) redressable by a favorable judgment.

Beyond these threshold jurisdictional deficiencies, the district court erred when in permanently enjoined HB 112 on the merits. As this Court recently held, the Board is not a "fourth branch of government," nor does the Board have "veto power over state laws it disagrees with." *Bd. of Regents v. State*, 2022 MT 128, ¶¶ 14, 24, 409 Mont. 96, 512 P.3d 748. But the district court's decision improperly elevates the Board's authority over the Legislature's authority simply because HB

112 has some impact on university athletics. The district court ignored this Court's directive in *Board of Regents* to consider whether the subject matter falls exclusively within the Board's mission; whether the Board has an express policy directly on point; and whether the challenged law is "aimed directly at the Board." *Id.* ¶ 17. This Court should correct course and clarify that a law designating all public school athletic teams based on biological sex does not implicate the Board's core authority and is valid under Article X, § 9 of the Montana Constitution.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO BRING THESE CLAIMS.

Plaintiffs challenge three laws, asserting that HB 349, SB 112, and SB 319 are "unconstitutional because each arrogates to the Legislature powers that are reserved to the Montana Board of Regents." (Doc. 1 at ¶ 44.) Said differently, Plaintiffs claim these laws violate the Board of Regents' constitutional authority. Importantly, they do not claim that these laws violate their own individual rights. (*See generally id.*)

Whether Plaintiffs are the proper parties to challenge these laws "turns on the source of [their] claim." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 35, 360 Mont. 207, 255 P.3d 80. Here, Plaintiffs do not claim the challenged laws violate their rights of free speech, expression or press. Mont. Const. art. II, § 7. They do not claim the challenged laws violate their right to due process of law.

Mont. Const. art. II, § 17. They do not argue that the laws violate equal protection. Mont. Const. art. II, § 4. Instead, they only claim that these laws violate Article X, Section 9, which vests the Board of Regents with limited authority. That is, these laws violate the constitutional provision that establishes the contours for the Board of Regents' rights, not the rights of students, faculty, or general members of the community. (*See generally* Doc. 1.)

This question—whether Plaintiffs are the proper parties before the Court—is a threshold jurisdictional question made all the more important because of the claimed "constitutional violation." *Olson v. Dep't of Revenue*, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986). Standing rests on two principles. The first, constitutional standing, comes from Article VII, § 4 of the Montana Constitution. *Id*. Courts interpret this provision to "embod[y] the same limitations as … Article III." *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.,* 2010 MT 26, ¶ 6, 355 Mont. 142, 144 226 P.3d 567, 568. The second principle, prudential standing, provides an additional "judicial self-restraint imposed for reasons of policy." *Olson*, 223 Mont. at 470, 726 P.2d at 1167. A court need only reach prudential standing, though, if the court finds that the party has constitutional standing. *Heffernan*, ¶ 34 ("[I]n all events, the standing requirements imposed by the Constitution must always be met."). If the parties cannot establish constitutional standing, the analysis ceases, and the court cannot adjudicate the dispute.

At the motion to dismiss stage, the district court concluded that Plaintiffs had standing, and the court "decline[d] to revisit its prior order on standing" at summary judgment. (Doc. 77 at 2.) This conclusion was wrong for two reasons. First, a court has the express obligation to evaluate standing at every stage of litigation. *See Lujan v. Def's of Wildlife*, 504 U.S. 555, 561 (1992); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990).[2] Second, the district court ignored the "source" of Plaintiffs' claims, instead finding that because they simply claimed general injuries stemming from the challenged laws, they had "demonstrate[d] a connection between themselves and the challenged legislation." (Doc. 77 at 2.) But standing does not turn on merely identifying a "connection" between the parties and the challenged legislation. This Court should reverse.

A. PLAINTIFFS FAIL TO SATISFY CONSTITUTIONAL STANDING REQUIREMENTS.

To establish constitutional standing, the plaintiff must show that (1) they have been personally injured or have been threatened with immediate injury as a direct result of the statute's enforcement, (2) that this injury is fairly traceable to the alleged

[2] Plaintiffs highlighted their fundamental misunderstanding of standing at the summary judgment hearing when they asserted that "[t]he key point here made in our Brief is not that the Court cannot look at standing again … it's that the Court has already held that the Plaintiffs have standing." (S.J. Hrg. Tr., 20:18–22. *But see* Doc. 70 at 5–6, 5 n.3, 7 n.5) (explaining extensively how a court must look at standing at every stage of the litigation regardless of whether that same court already held that a plaintiff had standing at a previous stage). That's precisely what it means to "look at standing again."

violation, and (3) that it's likely a redressable injury by a favorable decision. *See Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187; *Olson,* 223 Mont. 464 at 470, 726 P.2d at 1166. Standing serves as an "indispensable part of the plaintiff's case," and a plaintiff must support each of these elements of standing with the same "manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Even accepting all of Plaintiffs' factual allegations as true, they fail to meet the standard necessary to show standing at summary judgment. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs …. That point is irrelevant now, however, for we are beyond the pleading stage."); *see also Lujan*, 504 U.S. at 561 (At summary judgment, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts[.]").

The district court concluded that because "Plaintiffs are members of the university community in Montana and are the intended beneficiaries of Article X, § 9," they have constitutional standing to bring this claim. (Doc. 77 at 3.) Neither the district court, nor Plaintiffs, provided any support for such a broad generalization. In fact, both case law and the history of Article X, § 9 mandate a stricter analysis of constitutional standing.

1. Plaintiffs fail to show an injury in fact.

To satisfy the injury in fact requirement, a plaintiff must show that the alleged injury is "concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical." *Bullock*, ¶ 31. Because Plaintiffs seek an injunction, they must further show that they are "likely to suffer future injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). And when, like here, a plaintiff challenges the government's "allegedly unlawful regulation … of *someone else*," standing is "substantially more difficult" to establish. *Lujan*, 504 U.S. at 562.

Not only did Plaintiffs not plead direct injury to themselves, opting instead to base their legal theory on a constitutional violation of the Board's authority, but they also failed to provide admissible evidence of any injury at the summary judgment stage. The evidence required to show standing must be commensurate with the evidentiary standard at that stage of litigation. At summary judgment, Plaintiffs must support their claims of injury with admissible evidence. *See Brown v. Merrill Lynch, Pierce, Fenner & Smith*, 197 Mont. 1, 7–8, 640 P.2d 453, 456 (1982) ("On a motion for summary judgment only admissible evidence can be considered"); *see also Carelli v. Hall*, 279 Mont. 202, 207, 926 P.2d 756, 760 (1996) ("[O]nly admissible evidence can be considered in determining whether genuine issues of material fact exist"); *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 80, 345 Mont. 12, 34, 192 P.3d 186, 203; Fed. R. Civ. P. 56(c)(2) advisory committee's note to 2010

amendment; 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2722 (4th ed. 2021). The evidence must show that Plaintiffs will suffer an injury personal to them and that they have a "direct stake" in the claims raised. *See Carney v. Adams*, 141 S. Ct. 493, 499 (2020); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). The inadmissible evidence Plaintiffs rely on to support their claims of injury fails to establish an injury in fact.[3]

a. HB 112

To support Plaintiffs' claim that they have standing to challenge HB 112 under Article X, § 9, Plaintiffs rely on several inadmissible statements about general harms to transgender individuals. But these statements fail to establish that these Plaintiffs will suffer a harm from the alleged encroachment on the Board's constitutional authority.

Plaintiff Annie Belcourt provides general statements that transgender individuals experience discrimination and concludes that any law distinguishing between individuals based on biological sex is "inherently unethical, immoral, and a violation of [sic] individual's right to live in this country free from systematic

[3] The statements Plaintiffs rely on to establish standing are inadmissible. (*See generally* Doc. 55 at Section II.B.) The district court did not address the admissibility issue. For purposes of the issues before this Court, though, the Court need not reach the question of admissibility. Failure to consider standing at summary judgment, and instead relying on the district court's prior finding at the motion to dismiss stage, constitutes an error of law. *See Lujan*, 504 U.S. at 561.

discrimination." (Doc. 55 at Ex. A, 45; *id.* at 10 (explaining why such a statement is inadmissible).) While this may be Ms. Belcourt's opinion, it is not evidence, much less evidence of actual, specific discrimination against any party in this case. *See Lujan*, 504 U.S. at 563 ("'[T]he 'injury in fact' test requires more than an injury to a cognizable interest.'") (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)). Plaintiff Belcourt then speculates that her child and her sister's child will be prohibited from participating in sports on campuses because they are transgender. (Doc. 55 at Ex. A.) But neither of these two transgender individuals is a party to this case, nor is there any record evidence that these children attend schools subject to HB 112 or that they even play sports. In fact, nothing in the pleadings or discovery demonstrates that any party in this case (1) identifies as transgender or (2) participates in student athletics subject to HB 112.

Plaintiff Steve Barrett also provided the statement that HB 112 "potentially puts the MUS institutions at odds with the various governing bodies." (Doc. 55 at Ex. A, 51–52.) Again, this is simply speculative opinion based on experience with "MUS affairs." At most, it outlines a vague hypothetical: MUS might have inconsistent regulations with other, unidentified "governing bodies." Courts squarely reject such hypothetical conjecture as injury. *See Lujan*, 504 U.S. at 564.

Finally, Plaintiffs assert that HB 112 impacts ASMSU's "values." (*See* Doc. 55 at Ex. A, 10.)[4] But Plaintiffs provide no explanation—or proof—for *how* HB 112 impacts these values. The fact that ASMSU has passed resolutions founded on Diversity and Inclusion might establish that ASMSU has a general interest in issues related to Diversity and Inclusion, but they fail to show how HB 112 injures that interest. A general interest in Diversity and Inclusion does not create a particularized or personal injury to ASMSU as a result of HB 112. *See Carney*, 141 S. Ct. at 499. This general interest, moreover, does not establish that Plaintiff ASMSU has a "direct stake" in either the organization of university athletics or the scope of the Board's constitutional authority—the sole claim at issue in this case. *Hollingsworth*, 570 U.S. at 705.

The district court's failure to consider Plaintiffs' speculative arguments through the lens of the summary judgment standard constitutes legal error. *See*

[4] ASMSU brings this lawsuit on behalf of itself as an organization, not on behalf of its members. To do so, the organization must meet the same requirements for standing that applies to individuals. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–379 (1982) (noting that whether an organization has standing in its own right requires "the same inquiry as in the case of an individual: Has the plaintiff alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction?" (internal quotations omitted)). Although the district court seemed to suggest that its conclusion was based on representative standing (*see* Doc. 34 at 6) ("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"), Plaintiffs make no arguments with respect to organizational and associational standing based on this theory.

Lujan, 504 U.S. at 561; *see also Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002). Instead, the district court relied on its prior finding at the Motion to Dismiss stage—applying a lower evidentiary standard—that Plaintiffs have a general interest in these matters. (*See* Doc. 77 at 2; *see also* Doc. 34 at 6 (describing the general interests of the plaintiffs).) The conclusion that unsubstantiated general interests in the subject matter of the challenged laws establish standing at summary judgment fails constitutional muster.

In *Lujan*, the Supreme Court rejected the plaintiffs' speculative injuries based on generalized interests in observing endangered species. *See Lujan*, 504 U.S. at 563. The Supreme Court determined that an "intent" to return to places where the endangered species resided was not concrete enough to establish that the plaintiffs would likely suffer an injury. *Id.* Here, Plaintiffs have alleged far less. Not only are their alleged injuries entirely speculative, but they have failed to even explain how their general interests are threatened by HB 112. In *Lujan*, the plaintiffs alleged that the government action would increase the rate of extinction of certain endangered species, which would harm their interests in observing those species. *Id.* at 562–63.

Here, Plaintiffs fail to explain how the alleged threat to the Board's constitutional authority harms their general interests in anti-discrimination,

diversity, and inclusion. Concluding that these speculative claims of injury establish standing violates the jurisdictional requirements set forth in Article III. *See Morton*, 405 U.S. at 739 (("[I]f a 'special interest' in this subject were enough to entitle the [organization] to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization…."). Plaintiffs, therefore, lack standing to challenge HB 112 under Article X, § 9.

b. HB 349

For many of the same reasons, Plaintiffs also lack standing to challenge HB 349 under Article X, § 9. Plaintiff Barrett postulates the law "was designed intentionally to allow discrimination by groups favored by the legislative majority." (Doc. 55 at Ex. A, 41.) Plaintiff Dr. Larry Pettit opines that HB 349 "intrudes on regental management and control" and that "[r]egulation and supervision of student organizations and use of facilities fall within the scope of management and control." (Doc. 55 at Ex. A, 49.) Putting aside the obvious inadmissibility of these conclusory remarks, they utterly fail to show that *these* plaintiffs will suffer harm. Neither Plaintiff Barrett nor Plaintiff Pettit claim to be part of a group not "favored by the legislative majority," nor do they claim to have suffered any discrimination as a result of HB 349. They don't even allege a hypothetical scenario in which they would suffer discrimination as a result of HB 349. And Plaintiff Pettit's claim that

the law intrudes on the Board's authority simply mirrors Plaintiffs' legal theory without providing any factual support for that claim.

The only "evidence" Plaintiffs provide in support of their challenge to HB 349 is a list of "protected class student organizations." (Doc. 55 at Ex. A, 7–15.) Specifically, Plaintiff ASMSU asserts a general interest in anti-discrimination and claims—without foundation—that HB 349 will expose the university system to lawsuits. (*Id.* at 12–14.) Neither of these claims is sufficient to establish standing.

As an initial matter, it is not within ASMSU's purview to defend the university system from lawsuits or to determine the scope of the university's legal obligations. Such an assertion highlights the reason the Board's absence from this litigation is problematic. Student organizations, faculty groups, and individual community members don't litigate on behalf of the university system—doing so would allow these groups to define the university system's interests, analyze its legal obligations, and assess the associated risks. Whether or not HB 349 exposes the university system to additional lawsuits (it does not) does not impact ASMSU's claimed interests in anti-discrimination. ASMSU has no direct stake in, nor will it suffer any personal injury from, this hypothetical litigation. *See Carney*, 141 S. Ct. at 499; *Hollingsworth*, 570 U.S. at 705.

With respect to Plaintiffs' claimed interest in anti-discrimination, this, too, fails to establish constitutional standing. *See Lujan*, 504 U.S. at 575; *see also*

Advocates for Individuals with Disabilities LLC v. WSA Props. LLC, 210 F. Supp. 3d 1213, 1222 (D. Ariz. 2016) ("[A] mere interest in ensuring compliance with anti-discrimination laws is not sufficient."). Plaintiffs fail to identify specific instances of harassment or discrimination that have happened during the entire school year in which the law was in effect.[5] They also fail to identify future harassment or discrimination that is "likely" to occur. *Lyons*, 461 U.S. at 105; *see also* MSJ Reply, 9. (*See also* Doc. 70 at 9.)

Again, Plaintiffs fail to even provide hypothetical scenarios to demonstrate the harm that HB 349 will inflict. Thus, they fail to even allege facts comparable to the plaintiffs in *Lujan*, where the plaintiffs at least explained that they had previously visited the habitat of the endangered species and intended to do so in the future. *Lujan*, 504 U.S. at 563. The *Lujan* Court swiftly rejected these claims as insufficient.

[5] Plaintiffs provide the link to an Instagram post from "dobetter_younglife" about Elliott Hobaugh, who is not a party to this action. This post describes how YoungLife allegedly allowed Elliott to be a club member but would not permit Elliott to become a leader. Aside from the fact that this post is inadmissible hearsay, it also has nothing to do with any Plaintiffs in this case and is devoid of any helpful facts for purposes of this lawsuit—the post merely says this individual "ended up going to Montana for college." To the extent Elliott takes issue with YoungLife's leadership requirements, that is an issue not before this Court. *See, e.g.*, *Kennedy v. Bremerton School Dist.*, No. 21-418, slip op. at 12 (U.S. June 27, 2022)*; Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

A fortiori, Plaintiffs here have failed to meet the bare minimum for establishing constitutional standing.

c. SB 319

Finally, Plaintiffs fail to establish the basic facts necessary for standing to challenge SB 319. Plaintiffs merely state that MontPIRG has a $5 opt-out fee and that it is the only student organization that has the privilege of using this unique fee structure. These facts, alone, do not establish standing.

The challenged provision—Section 2—applies to student organizations that (1) must register as political committees and (2) are regularly active. (Doc. 50 at Ex. C, § 2(1).) To qualify as a political committee, the organization must fall within the definition set forth in MCA § 13-1-101(32)(a). (*Id.* at § 2(3)(b).) An organization is regularly active if it has "expended more than $10,000 in each of two or more statewide elections in the preceding 10 years." (*Id.* at § 2(3)(d).) If a student organization meets these two requirements, then the question is whether the student organization is funded by an additional optional student fee. (*Id.* at § 2.) If so, the fee must be an opt-in fee. (*Id.*)

Nowhere do Plaintiffs assert that MontPIRG must register as a political committee under MCA § 13-1-101(32)(a) or that it has expended over $10,000 "in each of two or more statewide elections in the preceding 10 years." (Doc. 50 at Ex.

C, § 2.) Based on the evidence, then, Plaintiffs fail to show that MontPIRG is actually subject to SB 319.[6]

Even assuming that MontPIRG provided a sufficient factual basis, MontPIRG provides no evidence that SB 319 will hamper MontPIRG's ability to engage in ballot issues or other political activity. Simply because MontPIRG's funding mechanism will change does not mean MontPIRG suffers an injury in fact. Plaintiffs admit that MontPIRG is the *only* organization in the state of its kind. (*See* Doc. 68 at 11.) MontPIRG does not provide any evidence that without the $5 opt-out fee, MontPIRG's operating budget will be significantly impacted, or that it is somehow precluded from receiving funding in the same manner as other student organizations. (*See id.* at 14–17) (listing student organizations).

2. Plaintiffs fail to establish a causal link.

Even if Plaintiffs succeeded in showing an injury in fact (they don't), they fail to show that the injury is fairly traceable to their claim that the laws violate the *Board's* constitutional authority. *Lujan*, 504 U.S. at 560 (requiring a "causal connection between the injury and the conduct complained of"). When a plaintiff is not the object of the government's action, causation and redressability become

[6] Whether MontPIRG registers as a political committee and has expended over $10,000 "in each of two or more statewide elections in the preceding 10 years" is not so obvious as to permit the Court to take judicial notice. *See* Mont. R. Evid. 201 (articulating standard for judicial notice).

significantly more important to establish. *Id.* at 562. In these cases, the causal connection depends, in part, on the decisions of third parties—here, that is the Board. *See Allen v. Wright*, 468 U.S. 737, 759 (1984).

In this case, Plaintiffs challenge the three discrete laws on the basis that they violate the Board's Article X, § 9 authority. In relevant part, this provision vests "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system." Mont. Const. art. X, § 9. Plaintiffs' purported harms, therefore, must flow from the violation of the Board's constitutional authority, not a violation of the Plaintiffs' individual rights to speech, due process, or equal protection.

With respect to HB 112, the injuries alleged are general discrimination and harm to "values." And the conduct complained of is that the Board can no longer exercise the full extent of its constitutional authority. Under *Lujan*, Plaintiffs must show that because the Board isn't exercising the full extent of its constitutional authority, Plaintiffs with suffer from discrimination and harm to their "values." 504 U.S. at 560.

Here, the causal connection is too attenuated. Even if HB 112 did not exist, and the Board could exercise the full extent of its authority (as defined by Plaintiffs), not all transgender athletes would be able to participate in the athletic team of their choosing. The university system would have to either establish an explicit policy

that transgender individuals could join the athletic team of their choosing and/or adopt the policies set forth by the National Collegiate Athletic Association ("NCAA") and National Association of Intercollegiate Athletics ("NAIA"). And even if the Board chooses to adopt those policies—as it has presently in Board Policy 1202.1—it could also choose not to adopt those policies at any time. The NAIA and NCAA policies, moreover, ultimately may still prohibit certain transgender individuals from participating on the team of their choosing. And, again, these policies are subject to change at any time—the NCAA and the NAIA could update the policies that athletic teams must be designated based on biological sex. Even during this litigation, these policies have changed significantly. *See Transgender Student-Athlete Participation Policy*, NCAA, https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx (last accessed Feb. 1, 2023); NAIA Official & Policy Handbook, https://issuu.com/playnaia/docs/naia_2019official_handbook?e=29648729/76190403 (August 2022). These policy changes have nothing to do with whether the Board can exercise the full extent of its authority under the Montana Constitution. Because of the numerous third parties involved, the causal chain is too attenuated to support Plaintiffs' standing. *Allen*, 468 U.S. at 759.

The same attenuation problem exists for HB 349 and SB 319. Under Plaintiffs' theory of harm stemming from HB 349, Plaintiffs assume that absent HB

349, the university system could and would take action against certain student organizations. Not only is this unsupported by the record, but this, again, involves the action of third parties. If the university official took no action against a student organization that these Plaintiffs found discriminatory, then the same alleged harm would exist. This shows the lack of causal connection between the alleged unlawful conduct (the Legislature encroaching on the Board's authority) and the alleged injury (Plaintiffs experiencing discrimination).[7] *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (rejecting attenuated causal "chain[s] of possibilities").

Under Plaintiffs' theory of harm stemming from SB 319, again, Plaintiffs fail to explain how changing the manner in which MontPIRG collects fees will hamper MontPIRG's ability to engage in ballot issues or engage in political activity. Plaintiffs seem to assume—without proof—that by not being able to use the university's payment platform to collect the $5 opt-out fee, students will not support MontPIRG financially, MontPIRG will have less funding, and MontPIRG will not be able to engage in its expressive activity. This, of course, is not supported by the

[7] It is also important to note that HB 349 simply establishes a state statutory cause of action for conduct already prohibited by the First Amendment. The university system quite simply cannot discriminate against student organizations based on that student organization's expressive activity. Although Plaintiffs seek to allow the Board to discriminate against these student organizations, the Board could not do so even if it wanted to.

record and relies on the donation decisions made by third party students. This breaks the causal chain.

3. Plaintiffs' claims are not redressable.

Finally, for many of the same reasons noted above, Plaintiffs' claim is not redressable. Rather than challenge how the laws allegedly violate their individual rights and cause harm, Plaintiffs chose to bring a more general challenge that the Legislature is violating the law by infringing on the Board's constitutional authority. But Plaintiffs' generalized concerns about discrimination in athletics and among other campus organizations, as well as their concerns about the funding of MontPIRG, depend largely on whether the Board or other university officials adopt identical views. In other words, if these laws are enjoined, transgender athletes still cannot always participate in the team of their choosing, the university still cannot discipline student groups based on their expressive activity, and the university system could choose to require MontPIRG to seek funding in a different manner. The redressability of Plaintiffs' alleged injuries "depend[] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989).

B. PLAINTIFFS FAIL TO SATISFY PRUDENTIAL STANDING REQUIREMENTS.

Because Plaintiffs have failed to demonstrate constitutional standing to challenge these laws under Article X, § 9, this Court need not reach the question of prudential standing. *Heffernan*, ¶ 34. But if the Court finds Plaintiffs have constitutional standing, Plaintiffs have failed to show prudential standing and the Court should exercise "judicial self-restraint." *Olson*, 223 Mont. 470, 726 P.2d at 1167.

As the district court noted, Plaintiffs' injuries must be "distinguishable from the public at large," and they must "assert [their] own legal rights and interests." (Doc. 34 at 8 (quoting *Heffernan*, ¶ 33).)[8] The district court, though, concluded that Plaintiffs have prudential standing because, simply, these are really important issues. The importance of the issues before the Court, though, do not obviate the prudential standing requirements.

As this Court noted in *Bullock*, prudential standing "discretionarily *limits* the exercise of judicial authority consistent with the separation of powers." *Bullock*, ¶ 43 (emphasis added). Whereas in *Bullock*, the Governor and the Fish, Wildlife, and Parks Director asserted "injuries specific to their individual abilities to perform the

[8] Again, the State only appeals the district court's summary judgment order, which states that the court "reiterates its finding [in its motion to dismiss order] that Plaintiffs have prudential standing." (Doc. 77 at 2.)

duties of their positions," Plaintiffs here assert speculative injuries not specific to them. *Id.* ¶ 45.

Here, Plaintiffs seek to vindicate the Board's constitutional authority and limit the Legislature's authority to regulate in this space. But courts reject these types of claims of standing because this is an injury to the general public. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 482–83 (1982) ("This Court repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law …." (internal quotations omitted)); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (rejecting general interests "in constitutional governance" as the basis for standing); *see also Heffernan*, ¶ 33. Again, Plaintiffs do not assert their "own constitutional rights" but rather the constitutional authority of the Board of Regents. *Heffernan*, ¶ 33

Plaintiffs' other alleged injuries, moreover, would be the same injuries to the public generally. With respect to HB 112, no Plaintiff is transgender or an athlete. Thus, any concern about alleged discrimination or harm to an individual's "values" as a result of the law is not unique to *these* Plaintiffs. Rather, any other member of the public could assert the identical harms. For HB 349, Plaintiffs only allege hypothetical discrimination. But no Plaintiff is a student who has been discriminated against by a student group or are likely to be discriminated against by a student group

(based on the facts provided). Again, the claim of injury, then, applies to all members of the public generally who have a broad interest in purported anti-discrimination.

This Court's own cases support this conclusion. Plaintiffs and the district court rely on *Missoula City-Cnty. Air Pollution Control Bd. v. Bd. of Env't Review,* 282 Mont. 255, 262, 937 P.2d 463, 467 (1997), *Lee v. State*, 195 Mont. 1, 7, 635 P.2d 1281, 1285 (1981), and *Comm. for an Effective Judiciary v. State*, 209 Mont. 105, 112, 679 P.2d 1223, 1227 (1984). Each of these cases highlights the many ways in which Plaintiffs' claims fail to satisfy prudential standing.

In *Air Pollution Control Board*, the Court determined that both the Local Board and private citizens would have standing to challenge the environmental regulations at issue. The Local Board sought to protect its ability to discharge its legal obligations. *Air Pollution Control Board*, 282 Mont. at 262, 937 P.2d at 467. Analogous here would be the Board of Regents seeking to protect its ability to discharge its obligations under Article X, § 9. But the Board is not a party here, and no Plaintiff has a similar legal obligation arising from Article X, § 9. Importantly, in *Air Pollution Control Board*, no individual citizen participated in the lawsuit. The Court only hypothesized that citizens could have standing because the air pollutants were certain and measurable. *Id*. But this would ultimately depend on the factual record presented to a court. Here, the alleged injuries are merely hypothetical and

generic. And Plaintiffs have failed to provide any evidentiary support for their claims.[9]

In *Lee*, the statute "directly affect[ed]" the plaintiff. 195 Mont. at 7, 635 P.2d at 1285. As established in his complaint, the plaintiff frequently drove a motor vehicle at speeds exceeding 55 miles per hour on Montana State Highway No. 200 and Interstate Highway No. 15. *Id.* The Attorney General's proclamation then limited speeds to 55 miles per hour on these roads. *Id.* Therefore, the plaintiff could no longer drive the same speed on the same roads as he could before the proclamation. *Id.* His claimed injury was that if he drove the same speeds he did before, he could be arrested. *Id.* In other words, he either had to change his behavior or risk arrest. In comparison, here, Plaintiffs don't allege that they will have to change their behavior or that they will likely suffer harm. Rather, they erroneously insist that because these laws might generally increase discrimination or impact Diversity and Inclusion efforts, they have suffered a harm personal to them.

Finally, in *Committee for an Effective Judiciary*, the plaintiffs were registered voters who asserted that the challenged statutes violated each individual's right to vote. 209 Mont. at 112, 679 P.2d at 1227. The court determined that the challenged

[9] This case also differs because a hypothetical citizen plaintiff would challenge the regulation under MAPA, which permits individuals to bring a challenge to a rule. Article X, § 9 does not similarly provide a cause of action for individuals.

statutes made it a "virtual certainty that judges would not run for other judicial office," which "effectively" denied the right to vote for a broader selection of judicial candidates. *Id.* The constitutional right to vote is an individual right, and the plaintiffs' claimed injury stemmed directly from that individual right.

This case differs from *Committee for an Effective Judiciary* for two important reasons. First, unlike the "virtual certainty" that the plaintiffs would be denied the right to vote for a broad selection of judicial candidates, there is not "virtual certainty" that Plaintiffs will suffer injury. Again, they claim without evidence that the laws might prevent hypothetical individuals from participating in the sports team of their choosing, impact ASMSU's Diversity and Inclusion resolutions, might allow student organizations to discriminate, and impede MontPIRG's ability to engage in expressive activities. But Plaintiffs have failed to explain how these harms are likely to happen to these plaintiffs. Unlike in *Committee for an Effective Judiciary*, these alleged injuries don't flow directly from an alleged violation of an individual right. Rather, Plaintiffs claim injury from an alleged violation of the Board of Regents' constitutional authority.

The cases cited by Plaintiffs and the district court do not support such an expansive view of prudential standing. This Court should reverse the district court's decision to the contrary.

II. THE LEGISLATURE CAN REGULATE THE SEX DESIGNATIONS OF PUBLIC SCHOOL ATHLETIC TEAMS.

Even if the Court finds that this assortment of plaintiffs can vindicate the Board of Regents' constitutional authority, HB 112 survives constitutional muster, and this Court must reverse the district court.

The district court first determined that the Board has "full" power and responsibility over university athletics. (Doc. 77 at 6.) In reaching this conclusion, the court relies on *State v. Board of Trustees of School District No. 1*, but this case merely noted in passing that "physical and moral development are important aspects of education." 223 Mont. 269, 274, 276, 726 P.3d 801, 804, 805 (1986). This case does not support the conclusion that the Board has full and exclusive authority over university athletics. *See Bd. of Regents*, ¶ 21 ("[T]he mission of the MUS remains teaching, research, and public service.").[10]

In fact, this conclusion is undermined by Plaintiffs' arguments that the NCAA and the NAIA actually have the authority—to the exclusion of the Legislature—over university athletics. The district court points to the legislative history of HB 112 where the MUS opposed the bill out of concern that it *might* force member schools

[10] And it certainly doesn't support the conclusion that the Board has any authority over other public school athletics at the elementary, middle school, or high school levels. Although the district court enjoined the law as applied to university athletics, Plaintiffs still sought an injunction for the law in its entirety. (Doc. 1 at 17.)

out of compliance with national organization requirements. (Doc. 77 at 6.) But this, again, goes back to the fundamental problem with this lawsuit: only the Board of Regents itself can say whether it believes it is out of compliance with the NCAA and NAIA. In fact, since the initiation of this lawsuit, these organizations have updated their policies. The court was, therefore, incorrect to say that a hypothetical conflict between HB 112 and old NCAA/NAIA policies is outcome determinative in a lawsuit brought by a party other than the Board.

This Court's decision in *Board of Regents* further supports upholding HB 112. Relying on *Sheehy*, this Court reiterated that the Board has the "constitutional and statutory duty to ensure the health and stability of the MUS." *Bd. of Regents*, ¶ 17 (quoting *Sheehy v. Comm'r of Pol. Prac. for Mont.*, 2020 MT 37, ¶ 29, 399 Mont. 26, 458 P.3d 309). The Court determined that the "presence of firearms on MUS campuses presents an unacceptable risk to a safe and secure educational environment." *Id.* ¶ 21. And because the educational environment is core to the MUS mission, this fell within the Board's authority and HB 102 was unconstitutional.

The same cannot be said for HB 112. While this law undoubtedly affects university athletics, it does not prevent the Board from regulating athletics generally, nor does it affect whether the university system has athletic teams. Instead, the law reinforces the distinctions between male and female athletics, which is a hallmark of

university athletics. *See generally* 20 U.S.C. § 1681. The law does not present "an unacceptable risk to a safe and secure educational environment." *Bd. of Regents*, ¶ 21. It also does not prohibit the Board from "set[ting] its own policies and determin[ing] its own priorities." *Id.* ¶ 23. After all, according to these Plaintiffs, the Board is able to offload its policymaking to the NCAA and the NAIA.

Board of Regents also does not support the district court's analysis of Board Policy 1202.1. In *Board of Regents*, the Court considered Board Policy 1006, which HB 102 "effectively eliminate[d]." *Bd. of Regents*, ¶ 4. This policy directly regulated firearms on MUS campuses, and "reflect[ed] the Board's judgment" on who could possess firearms where. *Id.* ¶ 20. In other words, a direct conflict existed between the Board's policy and the law the *Board* sought to invalidate. Because the conflict existed between the Legislature and the Board, this Court held that the Legislature had to yield to the Board on the question of firearms. Here, Board Policy 1202.1 simply notes that campuses will comply with the NCAA and NAIA, both of which help establish the rules for participation. Board Policy 1202.1 does not reflect the Board's judgment on transgender athletes or how male and female athletic teams must be designated. To the extent any conflict exists, it is between the Legislature and the NCAA/NAIA. Neither Article X, § 9 or *Board of Regents* suggest that the Legislature must yield to these outside entities, which regularly change their policies

based on considerations other than the Montana Board of Regents' "policies" and "priorities." *Bd. of Regents*, ¶ 23.

Finally, this Court emphasized that HB 102 was "aimed directly at the Board" and "specifically singl[ed] out the Board." *Bd. of Regents*, ¶ 17. Unlike HB 102, HB 112 is a "neutral statewide law" that regulates sports at every level of competition. *Bd. of Regents*, ¶ 17. It does not target the university system, let alone the Board, but instead aims to protect classifications between male and female athletic teams. Simply because universities have athletic teams does not mean this law infringes on the Board's authority to manage and control the MUS pursuant to Article X, § 9. *Id.*

In addition to discussing the claim Plaintiffs did bring, it's important to highlight the claim Plaintiffs did not bring: an equal protection claim. Montana's constitution does not compel the State or the Board to classify biological males as females. And Montana's constitution does not require the Legislature, or the Board for that matter, to yield to the whims of the NCAA or the NAIA. Plaintiffs cannot seriously claim that the Legislature violated the Board's constitutional authority because people who aren't the Board of Regents think the Board can no longer comply with national, nongovernmental, nonprofit associations, and that only these organizations (not even the Board itself) can determine matters of policies in athletics on the MUS.

Plaintiffs' theory highlights the slippery slope of concluding that any issue touching on the university system falls within the exclusive authority of the Board. Unlike in *Board of Regents*, HB 112 does not inhibit the Board's ability to "supervise, coordinate, manage, and control the MUS." *Bd. of Regents*, ¶ 24. Instead, it reinforces a statewide policy that distinguishes athletic teams on the basis of sex.

CONCLUSION

Plaintiffs will predictably accuse the State of relitigating a previously decided issue and raising arguments the district court already rejected. (*See generally* Doc. 68; S.J. Hrg. Tr. 20:18–22.) (*See also* Reply in Support of Plaintiffs' Motion for Summary Judgment, *Forward Montana v. State*, BDV-2021-611 (First Jud. Dist. Jan. 3, 2022) (attached as App. B); Brief in Support of Motion for Attorney's Fees, *Forward Montana v. State*, ADV-2021-611 (First Jud. Dist. May 18, 2022) (attached as App. C.) But a court has an independent obligation to consider standing at every stage of litigation, and district court's decision to the contrary was in error. If standing means anything, it must mean that *these* Plaintiffs cannot bring *this* claim. Article X, § 9 protects the Board's independent authority, *see Bd. of Regents*, ¶ 14, and these are simply the wrong parties to assert the Board's interests.

If this Court, however, concludes that Plaintiffs satisfy both constitutional and prudential standing, the Court should still reverse the district court because HB 112

represents a valid exercise of the Legislature's authority and does not violate the Board's Article X, § 9 authority.

The State requests oral argument.

DATED this 8th day of February, 2023.

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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0586

STEVE BARRETT, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.,

Defendant and Appellant.

APPENDICES

On Appeal from the Eighteenth Judicial District Court,
Gallatin County, Cause No. DV-21-581-B
The Hon. Rienne H. McElyea, Presiding

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,874 words, excluding certificate of service and certificate of compliance.

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