



# Legislative Council

## 67th Montana Legislature

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SUSAN FOX, Executive Director  
TODD EVERTS, Legal Division Director  
FONG HOM, Secretary

Sept 20, 2021

TO: Legislative Council  
FR: Todd M. Everts, Chief Legal Counsel & Legislative Attorneys  
RE: Litigation Concerning 2021 Legislation and Legislative Actions

This memorandum was prepared as background information at the request of the Legislative Council and it does not represent any opinion or action on the part of the Council.

## I. Election & Campaign Finance Laws

### A. *Barrett v. State I*

Plaintiffs: 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 Honea, Dr. Annjeanette Belcourt, Dr. Franke Wilmer, Montana Public Interest Research Group, Ashley Phelan, Joseph Knappenberger, Nicole Bondurant

Defendants: State of Montana, Governor Greg Gianforte

Venue: Montana Supreme Court

Docket No.: OP 21-0247

Legislation Challenged:

SB 319: 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.

HB 102: AN ACT GENERALLY REVISING GUN LAWS; PROVIDING A LEGISLATIVE PURPOSE, INTENT, AND FINDINGS; PROVIDING LOCATIONS WHERE CONCEALED WEAPONS MAY BE CARRIED AND EXCEPTIONS; PROHIBITING THE MONTANA UNIVERSITY SYSTEM AND BOARD OF REGENTS FROM INFRINGING ON CONSTITUTIONAL RIGHTS AND PROVIDING EXCEPTIONS; PROVIDING A SEPARATE CIVIL CAUSE OF ACTION FOR VIOLATIONS OF THIS ACT; AMENDING SECTIONS 45-3-111, 45-8-316, 45-8-328, AND 45-8-351, MCA; REPEALING SECTIONS 45-8-317 AND 45-8-339, MCA; AND PROVIDING EFFECTIVE DATES.

HB 112: 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.

HB 349: 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.

Overview: Plaintiffs alleged that the Legislature unconstitutionally infringed upon the constitutional authority of the Montana Board of Regents under Article X, section 9 of the Montana Constitution. The plaintiffs requested that the Montana Supreme Court accept original jurisdiction, ultimately declare the bills unconstitutional, and award attorney's fees. The Montana Supreme Court declined to invoke its original jurisdiction, finding that there were no urgent factors that suggested litigation in the district court and the normal appeal process would be inadequate, and the Court dismissed the petition for original jurisdiction. The plaintiffs have re-filed in district court, as outlined in the following case.

**B. *Barrett v. State II***

Plaintiffs: 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 Honea, Dr. Annjeanette Belcourt, Dr. Franke Wilmer, Montana Public Interest Research Group, Associated Students of Montana State University, Ashley Phelan, Joseph Knappenberger, Nicole Bondurant, Mae Nan Ellingston

Defendants: State of Montana, Governor Greg Gianforte, Austin Knudsen

Venue: Montana Eighteenth Judicial District Court, Gallatin County, Judge Rienne H. McElyea

Docket No.: DV-21-581 B

Legislation Challenged:

SB 319: 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.

HB 102: AN ACT GENERALLY REVISING GUN LAWS; PROVIDING A LEGISLATIVE PURPOSE, INTENT, AND FINDINGS; PROVIDING LOCATIONS WHERE CONCEALED WEAPONS MAY BE CARRIED AND EXCEPTIONS; PROHIBITING THE MONTANA UNIVERSITY SYSTEM AND BOARD OF REGENTS FROM INFRINGING ON CONSTITUTIONAL RIGHTS AND PROVIDING EXCEPTIONS; PROVIDING A SEPARATE CIVIL CAUSE OF ACTION FOR VIOLATIONS OF THIS ACT; AMENDING SECTIONS 45-3-111, 45-8-316, 45-8-328, AND 45-8-351, MCA; REPEALING SECTIONS 45-8-317 AND 45-8-339, MCA; AND PROVIDING EFFECTIVE DATES.

HB 112: 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.

HB 349: 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.

Overview: Plaintiffs allege that SB 319, HB 102, HB 112, and HB 349 are facially unconstitutional as violative of Article X, section 9 of the Montana Constitution which provides the powers and responsibilities of the Board of Regents.

Specifically, with respect to laws related to the topic areas related to the purview of the State Administration and Interim Affairs Interim Committee, the plaintiffs allege that sections 2 and 21 of SB 319 infringe Section 2 of SB 319 requires that fees by a student organizations required to register as a political committee are opt-in fee only. Section 21 of SB 319 provides that a "political committee may not direct, coordinate, manage, or conduct any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts for a federal, state, local, or school election inside a residence hall, dining facility, or athletic facility operated by a public postsecondary institution."

Plaintiffs further allege that HB 2's conditional appropriation of \$1,000,000 for use in implementing HB 102 which is void "[i]f the Montana University System file a lawsuit contesting the legality of HB 102" is unconstitutional because it prevents the Regents and the Montana University System from seeking judicial recourse and it prevents the Montana University System of its authority to manage and control the Montana University System.

The plaintiffs have asked the Court to declare SB 319, HB 108, HB 112, and HB 349 unconstitutional and unenforceable and to declare void the conditionality of the \$1,000,000 appropriation earmarked for campus safety. The plaintiffs have further asked that the Court grant appropriate injunctive relief,

including preliminary injunctive relief if necessary, preventing the defendants from enforcing the challenged measures. Plaintiffs have also requested attorneys' fees and costs.

This litigation is in its preliminary stages.

**C. *Forward Montana v. State***

Plaintiffs: Forward Montana, Leo Gallagher, Montana Association of Criminal Defense Lawyers, Alexander Blewett III, Larry Anderson, Maxon Davis, Gary Zadick

Defendants: State of Montana

Venue: Montana First Judicial District Court, Lewis and Clark County, Judge Michael F. McMahon

Docket No.: 1-DV-21-0611

Legislation Challenged:

SB 319: 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.

Overview: Overview: Plaintiffs have challenged provisions in SB 319 that require judges to recuse themselves in certain situations and prohibit certain voter registration activities on public university campuses. Plaintiffs have challenged the provisions under Article V, section 11, of the Montana Constitution, which provides a single subject requirement for legislative bills. Plaintiffs allege that the challenged provisions were inserted later in the legislative process in a bill concerning joint fundraising committees, thereby violating the single subject rule and the requirement that a bill not be so amended as to change its original purpose. Plaintiffs further allege that section 21 of SB 319 violates Article II, sections 6 and 7, of the Montana Constitution, which provide for freedom of assembly and freedom of speech, as well as the First Amendment under the United States Constitution. Plaintiffs also allege that the judicial recusal provision in section 22 of SB 319 violates Article II, sections 16, 17, and 24, of the Montana Constitution, which provide for the administration of justice for every injury of person, property, or character, due process requirements, and rights of the accused, as well as the First Amendment under the United States Constitution.

The plaintiffs have requested a declaratory judgment stating that SB 319 is unconstitutional and enjoining the state from enforcing "any aspects of SB 319." The plaintiffs have requested attorney fees and costs. The plaintiffs argue that the bill is not severable, and therefore the entirety of the bill should be enjoined.

The plaintiffs applied to the court for a preliminary injunction, and the court granted the preliminary

injunction, preventing the state from enforcing two sections of SB 319 pending the outcome of the court case. Section 21 has been enjoined, which provides that a "political committee may not direct, coordinate, manage, or conduct any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts for a federal, state, local, or school election inside a residence hall, dining facility, or athletic facility operated by a public postsecondary institution." The court also enjoined section 22, which provides that a judicial officer must disqualify himself or herself if the judicial officer directly or indirectly received or benefitted from certain campaign contributions from a party or a lawyer to the proceeding. Although the preliminary injunction prevents the state from enforcing the two enjoined sections while the court case is pending, it is not a ruling on the merits of the case. The preliminary injunction preserves the *status quo* until the court issues a substantive ruling on the merits of the case.

The defendant filed a motion to dismiss the proceeding, arguing that the plaintiffs lack standing and have failed to state a claim upon which relief may be based. The plaintiffs have filed a motion for summary judgment that SB 319 violated Article V, section 11, of the Montana Constitution by violating the single subject rule and changing the bill's original purpose. Both motions are pending before the court.

#### **D. *McDonald v. Jacobsen***

Plaintiffs: Sister Mary Jo McDonald, Lori Maloney, Fritz Daily, Bob Brown, Dorothy Bradley, Vernon Finley, Mae Nan Ellingson, League of Women Voters

Defendant: Secretary of State

Venue: Montana Second Judicial District Court, Butte-Silver Bow County, Judge Kurt Kreuger

Docket No.: 2-DV-21-0120

Legislation Challenged: HB 325: AN ACT ESTABLISHING SUPREME COURT DISTRICTS; PROVIDING FOR THE SELECTION OF THE CHIEF JUSTICE; PROVIDING THAT THE PROPOSED ACT BE SUBMITTED TO THE ELECTORATE AT THE 2022 GENERAL ELECTION; AMENDING SECTION 3-2-101, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE.

Overview: Plaintiffs allege that HB 325, a legislative referendum establishing election districts for Supreme Court justices, would, if approved by voters, violate the language and intent of the Montana Constitution that Supreme Court justices be selected on a statewide basis rather than a district-wide basis. It further alleges that because the change conflicts with the Montana Constitution, it violates the constitutional procedures for amendments to the Montana Constitution by enacting a statutory referendum. Plaintiffs further allege that HB 325 infringes on the right to vote under Article I, section 13, of the Montana Constitution.

Plaintiffs have requested that the court declare HB 325 unconstitutional and enjoin the Secretary of State from certifying the referendum, as well as preventing it from appearing on the ballot.

Defendants filed to substitute the judge overseeing the matter, Judge Kurt Kreuger, but the motion was denied because it had not been timely filed. Defendants have appealed the substitution order to the Montana Supreme Court.

**E. *Montana Democratic Party v. Jacobsen***

Plaintiffs: Montana Democratic Party and Mitch Bohn

Defendant: Secretary of State

Venue: Montana Thirteenth Judicial District Court, Yellowstone County, Judge Michael G. Moses

Docket No.: 13-DV-21-0451

Legislation Challenged: HB 176: AN ACT REVISING LATE VOTER REGISTRATION; CLOSING LATE VOTER REGISTRATION AT NOON THE DAY BEFORE THE ELECTION; PROVIDING AN EXCEPTION SO MILITARY AND OVERSEAS ELECTORS MAY CONTINUE TO REGISTER THROUGH THE DAY OF THE ELECTION; AMENDING SECTIONS 13-2-301, 13-2-304, 13-13-301, 13-19-207, AND 13-21-104, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

HB 530: AN ACT REQUIRING THE SECRETARY OF STATE TO ADOPT RULES DEFINING AND GOVERNING ELECTION SECURITY; REQUIRING ELECTION SECURITY ASSESSMENTS BY THE SECRETARY OF STATE AND COUNTY ELECTION ADMINISTRATIONS; ESTABLISHING THAT SECURITY ASSESSMENTS ARE CONFIDENTIAL INFORMATION; ESTABLISHING REPORTING REQUIREMENTS; DIRECTING THE SECRETARY OF STATE TO ADOPT A RULE PROHIBITING CERTAIN PERSONS FROM RECEIVING PECUNIARY BENEFITS WITH RESPECT TO CERTAIN BALLOT ACTIVITIES; PROVIDING PENALTIES; PROVIDING RULEMAKING AUTHORITY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

SB 169: AN ACT GENERALLY REVISING VOTER IDENTIFICATION LAWS; REVISING CERTAIN IDENTIFICATION REQUIREMENTS FOR VOTER REGISTRATION, VOTING, AND PROVISIONAL VOTING; AMENDING SECTIONS 13-2-110, 13-13-114, 13-13-602, AND 13-15-107, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview: Plaintiffs allege that provisions in HB 176, HB 530, and SB 169, including the revision of which IDs are accepted for certain voter identification purposes, the revision of late voter registration to close the day before the election, and prohibitions on providing, offering to provide, or accepting a pecuniary benefit for collecting or delivering ballots violate the following provisions of the Montana Constitution: Article II, section 4, which provides for the equal protection of the laws, Article II, sections 6 and 7, which provide freedom of assembly and freedom of speech, Article II, section 13, which provides the right of suffrage, Article II, section 17, which provides due process requirements, and Article V, section 1, which provides for legislative power. Plaintiffs have requested that the bills in question be declared in violation of the Montana Constitution and be permanently enjoined.

Plaintiffs have requested that this litigation be consolidated with *Western Native Voice v. Jacobsen*. The defendant has objected to this motion while the defendant's motion to dismiss several counts is pending. The defendant has further moved the court for a protective order to stay discovery in the litigation until the defendant's motion to dismiss has been resolved by the district court.

**F. *Western Native Voice v. Jacobsen***

Plaintiffs: Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe

Defendants: Secretary of State

Venue: Montana Thirteenth Judicial District Court, Yellowstone County, Judge Gregory Todd

Docket No.: 13-DV-21-0560

Legislation Challenged:

HB 176: AN ACT REVISING LATE VOTER REGISTRATION; CLOSING LATE VOTER REGISTRATION AT NOON THE DAY BEFORE THE ELECTION; PROVIDING AN EXCEPTION SO MILITARY AND OVERSEAS ELECTORS MAY CONTINUE TO REGISTER THROUGH THE DAY OF THE ELECTION; AMENDING SECTIONS 13-2-301, 13-2-304, 13-13-301, 13-19-207, AND 13-21-104, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

HB 530: AN ACT REQUIRING THE SECRETARY OF STATE TO ADOPT RULES DEFINING AND GOVERNING ELECTION SECURITY; REQUIRING ELECTION SECURITY ASSESSMENTS BY THE SECRETARY OF STATE AND COUNTY ELECTION ADMINISTRATIONS; ESTABLISHING THAT SECURITY ASSESSMENTS ARE CONFIDENTIAL INFORMATION; ESTABLISHING REPORTING REQUIREMENTS; DIRECTING THE SECRETARY OF STATE TO ADOPT A RULE PROHIBITING CERTAIN PERSONS FROM RECEIVING PECUNIARY BENEFITS WITH RESPECT TO CERTAIN BALLOT ACTIVITIES; PROVIDING PENALTIES; PROVIDING RULEMAKING AUTHORITY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview:

Plaintiffs have challenged HB 176, which revises late voter registration to close at noon the day before the election for most voters. Plaintiffs assert that HB 176 violates the right to vote and the right to equal protection of the law under the Montana Constitution.

Plaintiffs have also challenged section 2 of HB 530, which directs the Secretary of State to adopt an administrative rule that prohibits a person from providing or offering to provide or accepting a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots and subjecting violators to a civil penalty. Plaintiffs assert that section 2 of HB 530 violates the right to vote, the right to freedom of speech, and due process under the Montana Constitution.

Plaintiffs have requested interim and permanent injunctions of both HB 176 and section 2 of HB 530 and attorney fees and costs.

Plaintiffs have requested that this litigation be consolidated with the *Montana Democratic Party v. Jacobsen*.

The Secretary of State has filed an answer to the plaintiff's claims responding to the allegations. The Secretary of State has denied plaintiffs' claims that the challenged bills violate due process, equal protection, free speech, or the right to vote under either the United States Constitution or the Constitution of the State of Montana.

## II. Other Litigation

### A. A. Marquez v. Gianforte et al. -- Challenging law setting transgender requirements

Plaintiffs: Amelia Marquez and John Doe

Defendants: State of Montana, Greg Gianforte in his capacity as Governor, Department of Public Health and Human Services (DPHHS), and Adam Meier in his capacity as DPHHS Director

Venue: Yellowstone County District Court

Docket No.: DV21-00873

Legislation Challenged: SB 280: AN ACT REVISING VITAL STATISTICS LAWS REGARDING THE AMENDMENT OF BIRTH CERTIFICATE SEX DESIGNATIONS AND THE ISSUANCE OF REPLACEMENT BIRTH CERTIFICATES; PROVIDING THAT THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES MAY AMEND A BIRTH CERTIFICATE SEX DESIGNATION ONLY ON RECEIPT OF A COURT ORDER INDICATING THAT THE SEX OF A PERSON HAS BEEN CHANGED BY SURGICAL PROCEDURE; DIRECTING THE DEPARTMENT OF HEALTH AND HUMAN SERVICES TO AMEND ADMINISTRATIVE RULES IN CONFORMITY WITH THIS ACT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE.

Overview:

SB 280 requires that to amend the designated sex on a person's birth certificate, DPHHS must receive a court order indicating that the person's sex has been changed by surgical procedure.

The plaintiffs are asking the district court to find SB 280 facially unconstitutional on the basis that SB 280 violates:

- equal protection because it treats transgender people seeking to amend their birth certificates differently from cisgender people seeking to amend their birth certificates, and is not narrowly tailored to further a compelling state interest or substantially related to an important government interest;
- the right to privacy by requiring public disclosure of private medical information without either a compelling state interest that justifies the breach of privacy or being related to a substantial or important government interest;
- the right to privacy as a government intrusion in a private medical decision without a compelling state interest or important government interest justifying the intrusion; and
- substantive due process by being unconstitutionally vague in not defining what surgery a transgender person must undergo or identifying who determines what surgery is sufficient to comply with SB 280.

The defendants are asking the district court to dismiss the case on the basis that:

- plaintiffs lack standing because they do not allege concrete, actual, or imminent injuries sufficient to establish standing; and
- plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs are additionally asking for a preliminary injunction against enforcement of SB 280. Defendants oppose that motion.

A hearing is not yet scheduled.



**B. Associated Press, et al. v. Barry Usher - Challenging public access to legislative proceedings**

Plaintiffs: Associated Press, Billings Gazette, Bozeman Daily Chronicle, Helena Independent Record, Missoulian, Montana Standard, Montana Free Press, Ravalli Republic, Lee Enterprises, Hagadone Media Montana, Montana Broadcasters Association, Montana Newspaper Association

Defendants: House Judiciary Committee Chair Barry Usher

Venue: Lewis and Clark County District Court, Judge Mike Menahan

Docket Number: 1-DV-21-0124

Legislation Challenged: None; this lawsuit was brought under Montana's constitutional right-to-know provision and the state's open meetings laws.

Overview: On July 8, the district court filed an order denying the plaintiffs' request for relief and granted the defendant's request by dismissing the case.

The 2021 House Judiciary committee was composed of 19 legislators, including 12 Republicans and 7 Democrats. In January 2021, the chair of the House Judiciary committee, Rep. Barry Usher, recessed a committee meeting for members to discuss administrative action on several controversial bills. A reporter attempted to observe the discussion among several Republican members of the committee, but was informed by Rep. Usher that she wasn't allowed to stay. He informed her that he had told 3 Republican committee members to stay out of the discussion to comply with open meeting laws and prevent a quorum of the committee from assembling.

The plaintiffs filed suit against the chair, alleging that the discussion among 9 of the Republican members of the committee constituted a "controlling majority of House Judiciary members"<sup>1</sup> on the committee, meaning the outcome of any discussion regarding executive action on bills in committee would control the outcome of the entire committee's vote on the bills. They asked the district court to declare that the conduct of the discussion at issue was a violation of the plaintiffs' right to know under Montana Constitution Article II, sec. 9 and to order the chair to refrain from conducting future meetings in closed sessions, and additionally asked the court to set aside any decisions made during the closed discussion at issue. The plaintiffs requested the court to grant judgment on the pleadings.

The defendant responded with a motion for the district court to dismiss the plaintiffs' case for failing to state a claim upon which relief may be granted. The defendant pointed to the admission of the plaintiffs that there was not a quorum present at the discussion between Republican committee members, and therefore the chair did not violate any provisions of Montana's open meeting laws. As stated in the plaintiffs' own submissions, the 19-member committee required 10 members to constitute a quorum, and only 9 members participated in the discussion; to adopt the argument of the plaintiffs would "lead to the absurd result of a minority of Committee members constituting a quorum, contrary to statutory language."<sup>2</sup>

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<sup>1</sup> Petitioners' Memorandum in Support of Motion for Judgment on the Pleadings, page 2.

<sup>2</sup> Respondent's Brief in Support of Motion to Dismiss Pursuant to Mont. R. Civ. P. 12(b)(6), page 5.

The district court agreed with the defendant's arguments. In dismissing the plaintiffs' request for judgment in their favor, the court determined that a "gathering of a minority of committee members during a recess does not constitute a public meeting..." and noted that the court was "unwilling to redefine 'quorum' as 'a majority of a majority.'"<sup>3</sup> While the court found that 8 or 9 committee members gathered outside of the committee meeting, these members "did not constitute a quorum of the committee, hence no 'meeting' occurred."<sup>4</sup> The court denied the plaintiffs' motion for judgment on the pleadings and granted the defendant's motion to dismiss the case.

### **C. Board of Regents v. A. Knudsen - Challenging campus carry laws**

**Plaintiffs:** Montana Board of Regents

**Defendants:** State of Montana, via Attorney General Austin Knudsen

**Venue:** Lewis and Clark County District Court, Judge Michael McMahon

**Docket Number:** 1-DV-21-0598<sup>1</sup>

#### **Legislation Challenged:**

**HB 102:** AN ACT GENERALLY REVISING GUN LAWS; PROVIDING A LEGISLATIVE PURPOSE, INTENT, AND FINDINGS; PROVIDING LOCATIONS WHERE CONCEALED WEAPONS MAY BE CARRIED AND EXCEPTIONS; PROHIBITING THE MONTANA UNIVERSITY SYSTEM AND BOARD OF REGENTS FROM INFRINGING ON CONSTITUTIONAL RIGHTS AND PROVIDING EXCEPTIONS; PROVIDING A SEPARATE CIVIL CAUSE OF ACTION FOR VIOLATIONS OF THIS ACT; AMENDING SECTIONS 45-3-111, 45-8-316, 45- 8-328, AND 45-8-351, MCA; REPEALING SECTIONS 45-8-317 AND 45-8-339, MCA; AND PROVIDING EFFECTIVE DATES

**Overview:** As of August 3, the district court has issued a preliminary injunction as requested by the plaintiffs, preventing the provisions of HB 102 at issue from being implemented and preserving the status quo until the district court issues a substantive ruling on the merits of the case. In its order denying 2 motions to intervene, the court also established upcoming briefing deadlines.

The Board of Regents filed suit challenging the constitutionality of certain provisions of HB 102 that would preclude the Regents from regulating, restricting, or placing an undue burden on the possession, transportation, or storage of firearms on or within university property by a person eligible to possess a firearm under state or federal law, with certain exceptions. The Regents argue that the bill as applied is an unconstitutional infringement of the Regents' authority under Art. X, sec. 9(2)(a) of the Montana Constitution, which grants the Regents the "full power, responsibility, and authority to supervise,

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<sup>3</sup> Order on Petitioner's Motion for Judgment on the Pleadings and Respondent's Motion to Dismiss, page 5.

<sup>4</sup> Id.

<sup>1</sup> The Board of Regents first filed a complaint with the Montana Supreme Court, asking the Court to accept original jurisdiction over the lawsuit in case no. OP-21-0246. The Court declined to exercise original jurisdiction, however, and dismissed the case for the plaintiffs to refile their lawsuit in district court, now case no. 1-DV-21-0598.

coordinate, manage, and control" the university system.

For relief, the Regents in their complaint requested a temporary restraining order, a preliminary injunction during the pendency of the litigation, and a permanent injunction to prevent HB 102 from being applied following a declaration that HB 102 is unconstitutional as applied.

In response, the State argues that the relief sought by the Regents should be denied, and that the fundamental individual right to keep and bear arms found in the United States and Montana Constitutions trumps the authority granted to the Regents in the Montana Constitution to control the university system. The State further argues that the Montana Constitution merely articulates the scope of the authority given to the Board of Regents, and does not supersede other fundamental rights.

The district court granted the plaintiffs' initial request for a temporary restraining order, preventing the enforcement of certain provisions in HB 102. Following a hearing in early June to allow the State to show cause why a preliminary injunction should not be issued during the pendency of the litigation, the district court converted the temporary restraining order into a preliminary injunction.

Most recently, the district court has also denied motions to intervene by two attempted intervenors: David Diacon, a current law student at the Alexander Blewett II School of Law at the University of Montana, and the Montana Shooting Sports Association (MSSA), a key proponent of HB 102 during the session and a defender of the rights of its association members. In denying both motions to intervene, the district court determined that the question raised by the Regents is "whether the Legislature or the Executive Branch, by and through the Regents, hold general police power to regulate firearms on [Montana University System] property."<sup>2</sup> The district court found that the attempted intervenors' arguments regarding their individual right to keep and bear arms under the federal and state constitutions were outside the scope of the question raised by the Regents, namely which body has the authority to regulate firearms within the university system. The court also authorized the would-be intervenors to instead submit amicus briefs to the court, so long as the briefs are strictly limited to the scope of Art. X, sec. 9 as it relates to HB 102.

The district court has also established the following deadlines for briefs to be filed with the court:

- The Regents must file their initial brief by September 30.
- The State's response brief is due November 1.
- Mr. Diacon and MSSA may submit amicus briefs by November 1.
- The Regents' reply brief is due December 3.

#### **D. Barrett et al. v. Montana - Challenges campus carry law and others.**

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<sup>2</sup> District Court Order Denying Intervention Motions and Briefing Schedule, page 5.

**Plaintiffs:** Steve Barrett<sup>1</sup>, Robert Knight<sup>2</sup>, Montana Federation of Public Employees, Lawrence Pettit<sup>3</sup>, Montana State University System Faculty Association Representatives, Montana State University Faculty Senate, Joy Honea, Annjeanette Belcourt, Franke Wilmer<sup>4</sup>, Montana Public Interest Research Group, Associated Students of Montana State University, Ashley Phelan, Joseph Knappenberger, Nicole Bondurant<sup>5</sup>, Mae Nan Ellingson<sup>6</sup>

**Defendants:** State of Montana, Governor Greg Gianforte, Attorney General Austin Knudsen

**Venue:** Gallatin County District Court, Judge Rienne McElyea

**Docket Number:** 18-DV-21-0581

**Legislation Challenged:**

**HB 102:** AN ACT GENERALLY REVISING GUN LAWS; PROVIDING A LEGISLATIVE PURPOSE, INTENT, AND FINDINGS; PROVIDING LOCATIONS WHERE CONCEALED WEAPONS MAY BE CARRIED AND EXCEPTIONS; PROHIBITING THE MONTANA UNIVERSITY SYSTEM AND BOARD OF REGENTS FROM INFRINGING ON CONSTITUTIONAL RIGHTS AND PROVIDING EXCEPTIONS; PROVIDING A SEPARATE CIVIL CAUSE OF ACTION FOR VIOLATIONS OF THIS ACT; AMENDING SECTIONS 45-3-111, 45-8-316, 45- 8-328, AND 45-8-351, MCA; REPEALING SECTIONS 45-8-317 AND 45-8-339, MCA; AND PROVIDING EFFECTIVE DATES

**HB 112:** 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.

**HB 349:** 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.

**SB 319:** 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

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<sup>1</sup> Former Regent

<sup>2</sup> Former Regent

<sup>3</sup> First Commissioner of Higher Education

<sup>4</sup> Honea, Belcourt, and Wilmer are professors in the MUS

<sup>5</sup> Phelan, Knappenberger, and Bondurant are current students at Montana State University

<sup>6</sup> Delegate to the 1972 Montana Constitutional Convention

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.

**Overview:** As of August 3, the only documents filed in this lawsuit have been the complaint from the plaintiffs, which was filed June 3, and the motion to dismiss and supporting brief from the defendants, filed on July 16.

A group of stakeholders, including former Board of Regent members, Montana's first Commissioner of Higher Education, current professors and faculty associations, and current students and a student organization, have filed a complaint against the State, the Governor, and the Attorney General, alleging that 4 bills passed by the 2021 Legislature are unconstitutional violations of the Montana Constitution's grant of authority to the Board of Regents under Article X, sec. 9(2)(a).

The complaint alleges that each of the bills being challenged, HB 102, HB 112, HB 349, and SB 319, are infringements by the Legislature on the "full power, responsibility, and authority" of the Regents to "supervise, coordinate, manage, and control" the state's university system.

The complaint also addresses HB 2, which contained a \$1 million appropriation to the university system to implement the requirements of HB 102; however, the appropriation was made contingent on the Montana University System not challenging the legality of HB 102. The complaint alleges that this conditional appropriation is also an unconstitutional infringement on the Regents' authority to manage and control the university system and the fundamental right of the Regents to seek judicial recourse.

The complaint asks the district court:

- for a declaratory judgment that HB 102, HB 112, HB 349 and SB 319 are unconstitutional and unenforceable;
- to void the conditional appropriation of \$1 million and declaring that money to be allocated for campus safety at the Regents' discretion;
- to temporarily, and then permanently, enjoin the defendants from implementing any of the challenged measures; and
- to award the plaintiffs their costs and attorney fees.

The State has made a motion asking the court to dismiss the case because the plaintiffs lack standing and because they seek an advisory opinion. In the alternative, the State has asked the court to stay this proceeding with regard to HB 102 and SB 319, as each of those bills are already being challenged and have been enjoined in the First Judicial District Court. The State asserts that the plaintiffs seek to vindicate the rights of the Board of Regents, rather than their own, and therefore they have failed to plead an concrete injury to themselves that would be sufficient to confer standing in the case.

**Update as of Sept. 8, 2021:** In late August, the plaintiffs filed a brief opposing the defendants' motion to dismiss, arguing for their standing and arguing that a decision from the court would not be an advisory

opinion. The plaintiffs additionally argue against the State's alternative request to stay part of the proceeding. In opposing the State's request, the plaintiffs ask the court to stay the entire case if the court is inclined to grant a stay; the plaintiffs additionally request that if the court is inclined to agree with the defendants that the Board of Regents are a proper plaintiff in this case, that the court gives Regents an opportunity to join the case or ratify the plaintiffs' claims.

**E. McLaughlin v. Legislature- Challenging scope of legislative subpoena power**

Plaintiffs: Montana Supreme Court Administrator Beth McLaughlin

Defendants: Montana Legislature and the Montana Department of Administration

Venue: Montana Supreme Court

Docket Number: OP-21-0173

Legislation Challenged: None.

Overview of the Supreme Court Decision: The Supreme held that the Legislature's motion to dismiss the petition was improper. The Court held that the subpoenas issued by the Legislature did not serve a valid legislative purpose and were impermissibly over broad. The Court concluded that the information being sought by the Legislature was confidential under law and that the information had a constitutionally protected individual privacy interest.

The Attorney General's office filed a brief on August 11th requesting that the Supreme Court reconsider its July ruling. On September 1st, the Supreme Court denied the request for reconsideration.

**F. Justice Rice v. Legislature - Challenging scope of legislative subpoena power**

Plaintiffs: Justice Jim Rice

Defendants: Montana State Legislature

Venue: Lewis and Clark County District Court, Judge Michael McMahon

Docket Number: 1-DV-21-0451

Legislation Challenged: None

Overview: On April 19th, the plaintiff filed a petition and emergency request to quash legislative subpoena. The judge held an injunction hearing on May 10th and then granted Justice Rice's

preliminary injunction request on May 18th, temporarily enjoining the Legislature's April 15, 2021 Subpoena issued to Justice Rice. Motions to dismiss the case and a brief supporting a petition for declaratory judgment are currently before the Court.

**G. Portland General Electric et. al. v. Northwestern Energy, Austin Knudsen**

Plaintiffs: Portland General Electric Company, Avista Corporation, Pacificorp, and Puget Sound Energy

Defendants: Portland General Electric Company, Avista Corporation, Pacificorp, and Puget Sound Energy vs. Northwestern Corporation, Talen Energy

Venue: Federal District Court,

Docket Number: 1:21-cv-00047-SPW-KLD

Legislation Challenged: Senate Bills 265 and 266

Overview:

The litigation concerns Senate Bills 265 and 266. These bills seek to classify a Colstrip owner's failure or refusal to fund its share of the plant's operating costs as an "unfair or deceptive act." If found to have committed an "unfair or deceptive act", the entity could be subject to fines of \$100,000 per day.

Although there has been several lawsuits, removal to federal court, and motions to consolidate, the primary case is Portland General Electric Company, Avista Corporation, Pacificorp, and Puget Sound Energy vs. Northwestern Corporation, Talen Energy, and Austin Knudsen in his official capacity as the Attorney General for the State of Montana (Case No. 1:21-cv-00047-SPW-KLD).

Generally, the plaintiffs question the legality of Senate Bills 265 and 266. Generally, the contention is that both bills, either individually or collectively:

- violate the Contracts Clause because they change how disputes between Colstrip's owners are arbitrated.
- violate the Commerce Clause of the U.S. Constitution.
- are preempted under the Federal Arbitration Act.
- violate the Due Process Clause of the U.S. Constitution.

Among many things, the plaintiffs are requesting injunctive relief and to have the court declare the legislation unconstitutional. Currently, a ruling was pending as of August 9 relating to a preliminary injunction.

## **H. Brown et al. v. G. Gianfortes**

Disposition: UPHELD

Plaintiffs: Bob Brown, Dorthy Bradley, Vernon Finely, Mae nan Ellingson, and the Montana League of Women Voters

Defendants: Governor Greg Gianforte, Montana Legislature

Venue: Montana Supreme Court

Docket Number: OP-21-0125

Legislation Challenged: Senate Bill 140

Overview:

The litigation concerns Senate Bills 140 that abolishes the Judicial Nomination Commission and allows the governor to fill judicial vacancies.

Montana Supreme Court Synopsis:

The Montana Supreme Court today upheld the constitutionality of SB 140. SB 140 is a recently enacted law that abolished the Judicial Nomination Commission, the commission that was responsible for screening applicants for vacancies on the Supreme Court and District Courts and forwarding nominees to the Governor for appointment to those vacancies. SB 140 replaced the Commission with a process that allows the Governor to consider any applicant who received a letter of support from at least three adult Montana residents during a prescribed public comment period.

The Judicial Nomination Commission was created by the 1973 Legislature in response to the enactment of Article VII, Section 8(2) of the 1972 Montana Constitution, which provides that “[f]or any vacancy in the office of supreme court justice or district court judge, the governor shall appoint a replacement from nominees selected in the manner provided by law.” The Petitioners contended that Article VII, Section 8(2) required the creation of a separate commission or committee to screen applicants for judicial vacancies. The Petitioners argued that the purpose of Article VII, Section 8(2) was to ensure the appointment of quality judges who were free of political influence, and that the abolishment of the Commission violated that purpose by giving unfettered



discretion to the Governor for appointing justices and judges. Respondents argued that the plain language of Article VII, Section 8(2) gave the Legislature the discretion to prescribe the manner in which justices and judges are appointed and did not require an independent commission to screen applicants.

The Court agreed with Petitioners that the purpose of Article VII, Section 8(2) was to ensure the appointment of good judges, and that the intent of the Framers of the Constitution had to be properly considered in determining a provision's constitutionality. After reviewing the transcripts from the Constitutional Convention, however, the Court concluded that neither the plain language of Article VII, Section 8(2), nor the Framers' intent indicated that Article VII, Section 8(2) required an independent commission to screen applicants. Rather, the language of Article VII, Section 8(2) was a compromise among some Constitutional Convention Delegates who wanted a commission, and others who wanted to give more discretion to the Governor. The compromise delegated the process for making judicial appointments to the Legislature. Although the Court acknowledged that the Commission created by the 1973 Legislature had honored the constitutional objective of recruiting good judges to serve the citizens of Montana for the past forty-eight years, it was not the Court's function to determine whether the Commission was a better process than SB 140 for making judicial appointments—it was to determine whether SB 140 complied with the language and constitutional intent of Article VII, Section 8(2). The Court held that it does.

### **I. Winter et al. v. 1st Judicial District**

Disposition: DISMISSED

Plaintiffs: Thomas Winter, Barbara Bessette

Defendants: Montana First Judicial District Court

Venue: Montana Supreme Court

Docket Number: OP-21-0125

Legislation Challenged: Senate Bill 140

Overview:

Plaintiffs asked the Montana Supreme Court to take over the case from the District Court and declare SB 140 regarding judicial appointments unconstitutional. The Supreme Court dismissed the case.

**J. Planned Parenthood et al. v. Montana**

Plaintiffs: Planned Parenthood of Montana and Joey Banks, M.D.

Defendant: State of Montana

Venue: Yellowstone County District Court

Docket No.: DV 21-00999

Legislation Challenged:

- **HB 136:** AN ACT ADOPTING THE MONTANA PAIN-CAPABLE UNBORN CHILD PROTECTION ACT; PROHIBITING THE ABORTION OF AN UNBORN CHILD CAPABLE OF FEELING PAIN; PROVIDING EXCEPTIONS; PROVIDING DEFINITIONS; AND AMENDING SECTION 50-20-109, MCA.
- **HB 140:** AN ACT REQUIRING THAT A PREGNANT WOMAN MUST BE AFFORDED THE OPPORTUNITY TO VIEW AN ACTIVE ULTRASOUND AND ULTRASOUND IMAGES AND LISTEN TO THE FETAL HEART TONE OF THE UNBORN CHILD BEFORE UNDERGOING AN ABORTION; PROVIDING EXCEPTIONS; PROVIDING A PENALTY; AND AMENDING SECTION 50-20-105, MCA.
- **HB 171:** AN ACT ADOPTING THE MONTANA ABORTION-INDUCING DRUG RISK PROTOCOL ACT; PROVIDING REQUIREMENTS FOR PROVIDING ABORTION-INDUCING DRUGS TO PREGNANT WOMEN; PROHIBITING PROVIDING ABORTION-INDUCING DRUGS IN SCHOOLS AND ON SCHOOL GROUNDS; REQUIRING INFORMED CONSENT; PROVIDING FOR THE REPORTING OF CHEMICAL ABORTIONS AND ADVERSE EVENTS AND COMPLICATIONS; PROVIDING DEFINITIONS; AND PROVIDING PENALTIES, CIVIL REMEDIES, AND PROFESSIONAL SANCTIONS.
- **HB 229:** AN ACT PROHIBITING QUALIFIED HEALTH INSURANCE PLANS OFFERED THROUGH A HEALTH INSURANCE EXCHANGE IN MONTANA FROM COVERING ABORTION SERVICES.

Overview: Plaintiffs are asking the District Court to declare unconstitutional and preliminarily and permanently enjoin enforcement of the laws described above for the following reasons:

- the laws violate the right of privacy of women seeking pre-viability abortions in Montana and are not narrowly tailored to effectuate a compelling state interest, and, in addition, HB 171 violates the information privacy rights of plaintiffs and their patients;
- the laws violate the right to equal protection of the laws of plaintiffs and their patients because the laws discriminate against women seeking to exercise their fundamental right to seek pre-viability abortions and abortion providers without being narrowly tailored to effectuate a compelling state interest, and, HB 136 violates the right of equal protection because it targets abortion beginning at 20 weeks since the woman's last menstrual period but does not target abortion before then;
- the laws violate the rights of plaintiffs and their patients to seek their safety, health, and happiness in all lawful ways;
- the laws violate the right to individual dignity of plaintiffs and their patients; and
- HB 171 and HB 140 violate plaintiff's right to freedom of speech by requiring providers to provide false information and offer patients the opportunity to view ultrasounds or listen to fetal heart tones.

The complaint was filed on August 16, 2021. A hearing is not yet scheduled.