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**MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY**

JESSICA FELCHLE; BEAU WRIGHT; the MONTANA QUALITY EDUCATION COALITION; the LEAGUE OF WOMEN VOTERS OF MONTANA; SHARON CARROLL; SUZANNE MCKIERNAN; LINDA ROST; PENELOPE COPPS; LANCE EDWARD; and CORINNE DAY, *Plaintiffs*, v. STATE OF MONTANA; GREG GIANFORTE, in his official capacity as GOVERNOR OF THE STATE OF MONTANA; and ELSIE ARNTZEN, in her official capacity as SUPERINTENDENT OF PUBLIC INSTRUCTION, *Defendants*.	Cause No.: **MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, TEMPORARY RESTRAINING ORDER**

Pursuant to § 27-19-201, MCA and § 27-19-315, MCA, as amended by Senate Bill 191, Plaintiffs Jessica Felchle, Beau Wright, the Montana Quality Education Coalition, the League of Women Voters of Montana, Sharon Carroll, Suzanne McKiernan, Linda Rost, Penelope Copps, Lance Edward, and Corinne Day ("Public School Plaintiffs") move for a preliminary injunction or temporary restraining order to prevent Defendants—the State of Montana, Governor Greg Gianforte, and Superintendent of Public Instruction Elsie Arntzen—from enforcing any aspect of House Bill 562 ("HB 562"). The effective date for HB 562 is July 1, 2023, and Public School Plaintiffs request preliminary relief prior to that date.

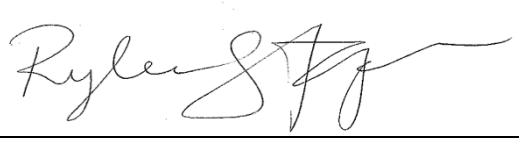
If implemented, HB 562 will plainly violate the Montana and United States Constitutions in at least six separate but interrelated ways. Preliminary relief is appropriate because: (a) Public School Plaintiffs are "likely to succeed on the merits"; (b) Public School Plaintiffs are "likely to suffer irreparable harm in the absence of preliminary relief"; (c) "the balance of equities tips in the applicant's favor"; and (d) "the order is in the public interest." Section 27-19-201, MCA (as amended); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (applying the four-part, federal preliminary injunction test). Constitutional harm is likely in the absence of preliminary relief, and Public School Plaintiffs therefore respectfully ask the Court enjoin Defendants State of Montana, Governor Gianforte, and Superintendent of Public Instruction Arntzen from enforcing any provisions of HB 562 pending a final determination of this matter.

In the absence of a preliminary injunction on or before July 1, 2023, Public School Plaintiffs ask this Court for an *ex parte* Temporary Restraining Order as permitted by § 27-19-315, MCA, enjoining the Defendants from enforcing HB 562 until further order of this Court, on the ground that immediate and irreparable injury will result to Public School Plaintiffs before notice can be given and Defendants can be heard in opposition.

Finally, Public School Plaintiffs request an Order setting a hearing on their application for a preliminary injunction at a date and time specified by the Court.

This motion is based upon the Verified Complaint and supported by a brief and declaration in support, filed contemporaneously.

Respectfully submitted this 14th day of June, 2023.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 14th day of June, 2023, by email and by process server.

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**MONTANA FIRST JUDICIAL DISTRICT COURT,
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JESSICA FELCHLE; BEAU WRIGHT; the MONTANA QUALITY EDUCATION COALITION; the LEAGUE OF WOMEN VOTERS OF MONTANA; SHARON CARROLL; SUZANNE MCKIERNAN; LINDA ROST; PENELOPE COPPS; LANCE EDWARD; and CORINNE DAY, *Plaintiffs*, v. STATE OF MONTANA; GREG GIANFORTE, in his official capacity as GOVERNOR OF THE STATE OF MONTANA; and ELSIE ARNTZEN, in her official capacity as SUPERINTENDENT OF PUBLIC INSTRUCTION, *Defendants*.	Cause No.: **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Plaintiffs Jessica Felchle, Beau Wright, the Montana Quality Education Coalition, the League of Women Voters of Montana, Sharon Carroll, Suzanne

McKiernan, Linda Rost, Penelope Copps, Lance Edward, and Corinne Day ("Public School Plaintiffs") submit this Brief in Support of their Motion for Preliminary Injunction or, in the Alternative, Temporary Restraining Order. Public School Plaintiffs seek to preliminarily enjoin or temporarily restrain Defendants State of Montana, Governor Greg Gianforte, and Superintendent of Public Instruction Elsie Arntzen ("the State") from enforcing and implementing House Bill 562 ("HB 562") during the pendency of this litigation.

HB 562 creates what it euphemistically refers to as a "community choice" school system. Far from reflecting the needs of Montana communities or giving choices to stakeholders, HB 562 designs a separate and unequal system of state-subsidized private schools ("privatized schools") in direct conflict with the system of equal, free, and quality public education that the Montana Constitution guarantees.

The bill violates the Montana Constitution in myriad ways. It authorizes the creation of unaccountable, state-funded educational institutions—privatized schools, governing boards, and a statewide commission—that operate without regard for state standards on, *inter alia*, accreditation, teacher qualifications, curriculum, and student protections. In direct contravention of Article X, each of these entities is created in parallel to existing, constitutionally designed public education institutions. Each is exempt from supervision by Montana's Board of Public Education—the statewide commission is essentially parallel to the Board of Public Education, a constitutional body. At the local level, HB 562 creates "governing boards," which usurp the powers delegated by the Constitution to local school boards. Further, voter

eligibility in governing board elections is limited to privatized school parents and employees, violating Montanans' rights of suffrage and to equal protection. Meanwhile, privatized schools are exempt from nearly all state laws that govern public schools, including the laws that implement the constitutional commitment to Indian Education for All.

In addition to outsourcing public education, HB 562 diverts public school tax dollars to privatized schools, with disregard for how these funding losses will impact the existing public school system. And it allows the creation of virtual schools that students from any Montana school district can attend. Because dollars follow students, rural schools will be devastated.

These are merely a sampling of HB 562's constitutional problems. The bill is an outgrowth of a national privatization movement—and it shows exactly why one size does not fit all. Montana is not the venue for school privatization activists to experiment with ideas that endanger Montanans' access to equal, free, and quality public education.

HB 562 goes into effect July 1, 2023. Absent preliminary injunctive relief, Public School Plaintiffs will suffer irreparable harm because HB 562 will begin appropriating their public school tax dollars to set up its *ultra vires* entities. Accordingly, Public School Plaintiffs ask the Court to grant their Motion.

BACKGROUND – HB 562

According to legislative services, HB 562 was the second most opposed bill proposed during the 2023 legislative session. Verified Compl. ¶ 58 ("Compl."). The

Legislature received 2,030 messages in opposition to HB 562 compared to 574 in support. *Id.* Governor Gianforte signed HB 562 into law on May 18, 2023. *Id.* ¶ 59. It will go into effect on July 1, 2023. *Id.*

HB 562 defines a "community choice school" as a "public school" that:

> (a) has autonomy over decisions, including but not limited to matters concerning finance, board governance, personnel, scheduling, curriculum and instruction;
> (b) is governed by a governing board;
> (c) is established and operated under the terms of a charter contract between the school's governing board and its authorizer;
> (d) is a school in which parents choose to enroll their children;
> (e) is a school that admits students based on capacity and then on the basis of a lottery if more students apply for admission than can be accommodated;
> (f) provides a program of education that may include any or all grades from kindergarten through grade 12 and vocational education programs;
> (g) operates in pursuit of a specific set of educational objectives as defined in its charter contract;
> (h) operates under the oversight of its authorizer in accordance with its charter contract; and
> (i) establishes graduation requirements and has authority to award degrees and issue diplomas.

Ex. A to Compl., HB 562, § 3(5) (emphasis added) ("HB 562").

The "authorizer" is defined as "the commission or a local school board approved as an authorizer by the commission." HB 562, § 3(3). The "commission," in turn, is "an autonomous state community choice school commission with statewide authorizing jurisdiction and authority." *Id.* § 4(1). While HB 562 gives lip service to the idea that the commission is to be "under the general supervision of the board of public education," *id.*, supervision extends only so far as the bill itself requires. And that is not very far; in full, the bill requires the commission to make only a single

annual report to the Board of Public Education about "the academic performance and financial reports of each choice school authorized within the state." *Id.* § 4(12). The Board is otherwise uninvolved, except that it may provide the commission with publicly funded resources—support staff "for centralized services, including payroll, human resources, accounting, information, technology, or other services, if those services are determined by the commission and the board to be more efficiently provided by the board." *Id.* § 4(9) (emphasis added).

Privatized schools are subject only to the very few state laws expressly referenced in the bill. HB 562, § 14(1)(c) ("Except as provided in [sections 1 through 17], a choice school is not subject to the provisions of Title 20 or any state or local rule, regulation, policy, or procedure relating to traditional public schools within an applicable traditional local school district."). HB 562 incorporates Title 20 only to refer to existing definitions related to school district size, *id.* § 14(2), and to calculate the money that privatized schools will extract from public sources, *id.* §§ 15(10)(b)(i)–(iv). Further, HB 562 expressly exempts privatized school employees from retirement benefits and employee protections under Title 19. *Id.* § 14(1)(d).

Each privatized school is to be overseen by a "governing board"—the extra-constitutional equivalent of a local school board of trustees, defined as "an independent volunteer board of trustees of a community choice school that is a party to the charter contract with the authorizer." HB 562, § 3(7). HB 562 limits who may participate in governing board elections to "parents and guardians of students enrolled in the school and the choice school's employees." *Id.* § 14(1)(f)(i). Governing

boards "shall establish graduation requirements," *id.* § 14(7)(b), and teachers in privatized schools are exempt from state teacher certification requirements found in Title 20, Chapter 4, *id.* § 14(8)(a).

Both virtual and non-virtual privatized schools may pull students from districts of any size. HB 562, § 11(1)(a). Funding follows those students. *Id.* § 15(1) ("[A] choice school receive[s] operational funding on a per-pupil basis that is equitable with the per-pupil funding within the general fund of a choice school student's resident school district."). HB 562 imposes some limits on non-virtual privatized schools within the geographic boundaries of third-class public school districts—that is, less populous school districts—but because "out-of-district attendance and tuition laws . . . do not apply," *id.* § 15(6)(b), non-virtual privatized schools are also allowed to pull students and funding from even the least populous districts.

The bill imposes no limits on funding sources for privatized schools, and funding received from non-public sources has no impact on the amount of money the privatized school may pull from taxpayer-funded sources. HB 562, § 15(8); *see also id.* § 15(9) ("Money received by a choice school from any source and remaining in the choice school's accounts at the end of a budget year must remain in the choice school's accounts for use by the choice school in subsequent years.").

HB 562 claims to incorporate the Montana Constitution's commitment to American Indian cultural preservation, Mont. Const. art. X, § 1(2). But it exempts privatized schools from Title 20, including the Indian Education for All program. HB 562 only acknowledges the Indian Education for All framework in its funding

section, wherein privatized schools draw funds from public schools based on a rate that includes Indian Education for All funding. HB 562, § 15(10)(b)(ii). Thus, privatized schools draw funding designated for Indian Education for All programming with no corollary plan to meet the constitutional obligation.

HB 562's provisions will be implemented imminently: members of the statewide commission may be appointed at any time after the effective date and must be appointed by August 30, 2023, HB 562, § 4(5)(b), and the commission must convene and approve bylaws and officers by December 28, 2023, at the latest, *id.* § 4(10). As soon as they are appointed, commission members are entitled to expense reimbursement, *id.* § 4(6), may hire staff, *id.* § 4(9), and may receive services from the Board of Public Education. *Id.* "The legislature intends that the community choice school commission established in [section 4] organize its operations, adopt bylaws, approve authorizers, and solicit choice school proposals during the fiscal year beginning July 1, 2023, with the goal of having operating choice schools for the school year beginning July 1, 2024." *Id.* § 18.

LEGAL STANDARD

"A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." Section 27-19-201(1), MCA (as amended by Senate Bill 191, effective March 2, 2023). The Montana Legislature intended this standard

to "mirror the federal preliminary injunction standard" and for its "interpretation and application" to "closely follow United States supreme court case law." Section 27-19-201(4), MCA (as amended); *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (applying the four-part federal preliminary injunction test). This revised standard applies to preliminary injunctions and temporary restraining orders. *See* §§ 27-19-201(4), 27-19-315(1), MCA (as amended).

ARGUMENT

I. HB 562 is plainly unconstitutional—Public School Plaintiffs are likely to succeed on the merits.

In passing HB 562, the State violated the Montana Constitution at least six times over. Public School Plaintiffs are likely to succeed on the merits of their claims but need only prevail on a single claim to invalidate HB 562 because its constitutional problems are not severable. In one category, the bill violates nearly all aspects of the Montana's constitutional public education system (Counts 1, 2, 5, and 6). In another, it violates Montanans' rights of suffrage and to equal protection under the law under both the federal and state constitutions (Counts 3 and 4). Public School Plaintiffs are likely to prevail on the merits, and the Court should grant the requested relief.

A. HB 562 violates the right to quality education and interferes with the inviolate nature of the public school fund (Counts 5 and 6).

The Montana Constitution sets forth an unambiguous guarantee: "It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state." Mont. Const. art. X, § 1(1). The guarantee is neither abstract

nor aspirational. *Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 52–53, 769 P.2d 684, 689 (1989). As the Montana Supreme Court has explained, in the first sentence, the framers set an ambitious objective: that is, "to establish a system of education which will develop the full educational potential of each person." *Id.* at 53. In the second sentence, the "plain meaning . . . is clear and unambiguous": each Montanan "is guaranteed equality of educational opportunity." *Id.* Indeed, the Court could find no "other instance in which the Constitution 'guarantees' a particular right." *Id.* As written, "[t]he guarantee provision of subsection (1) is not limited to any one branch of government," and is instead "binding upon all three branches of government, the legislative as well as the executive and the judicial branches . . . whether at the state, local, or school district level." *Id.*

To this end, the Constitution obligates the Legislature to "provide a basic system of free quality public elementary and secondary schools." Mont. Const. art. X, § 1(3). While the Legislature may "provide such other educational institutions, public libraries, and educational programs as it deems desirable," it "shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the . . . school system." *Id.* (emphasis added); *cf.* Mont. Const. art. V, § 11(5) (prohibiting any "appropriation . . . for religious, charitable, industrial, educational, or benevolent purposes to any . . . private association, or private corporation not under control of the state"). The Montana Supreme Court has affirmed this obligation. *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 22, 326 Mont. 304, 109 P.3d 257 (concluding "that the educational product of the current school system

is constitutionally deficient"); *Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690 ("We specifically affirm that . . . spending disparities among the State's school districts translate into a denial of equality of educational opportunity."). The Constitution also expressly prohibits diverting funds from public education: "The public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion." Mont. Const. art. X, § 3.

By disrupting the public school system and forming an entirely separate oversight structure, HB 562 directly contravenes the constitutional guarantee of equal opportunity to quality education, the related constitutional requirement of equal funding, and the constitutional prohibition against diverting public education funds. Privatized schools are exempt from Title 20 and other rules that govern public schools, ensuring <u>inconsistency</u> in accreditation, teacher quality, student safety standards, and curriculum offerings, and more. HB 562, § 14(1)(b); *see Columbia Falls Elem.*, ¶¶ 28–29 (considering "educational product" in addition to manner of funding and describing evidence of constitutional deficiency as including "growing accreditation problems; many qualified educators leaving the state to take advantage of higher salaries and benefits overed elsewhere; the cutting of programs," and so on); *Helena Elem.*, 236 Mont. at 57, 769 P.2d at 692 ("[T]he Montana School Accreditation Standards are minimum standards upon which quality education <u>must</u> be built.") (emphasis added). Among other things, Title 20 sets out protections for students' health and safety, including concussion protocols for student athletes, §§ 20-7-1303 & 1304, MCA; asthma and diabetes medication policies, §§ 20-5-412, 420, 421, and

426, MCA; and prohibitions against tobacco use, bullying, and relationships between staff and students, §§ 20-1-220, 20-5-209, and 20-7-1321, MCA. HB 562 contains no assurance that these protections will be available to privatized school students. Nor does HB 562 provide a plan for compliance with the Montana Constitution's commitment to preserve Indian cultural integrity. Mont. Const. art. X, § 1(2).

HB 562 authorizes governing boards that are only internally accountable, § 3(7), preventing existing, constitutional public school authorities, discussed *infra*, from correcting inconsistencies. *Id.* § 4(12). And privatized schools can raise money from private funding sources while continuing to extract money from public sources—and without any obligation to ensure equality in funding. *Id.* §§ 8–9; 15(1); 15(6)(b); *see Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690 (spending disparities translate to denial of equal educational opportunity). Public School Plaintiffs are thus likely to succeed on Counts 5 and 6 of the Verified Complaint.

B. HB 562 subverts the constitutional roles of local boards of trustees and the Board of Public Education (Counts 1 and 2).

As part of the Constitution's public education framework, the framers established a dual system of public school oversight, forming a statewide Board of Public Education "to exercise general supervision over the public school system," Mont. Const. art. X, § 9(3)(a), and reserving for local elected school boards "[t]he supervision and control of schools in each school district," Mont. Const. art. X, § 8. By constitutional design, the Board of Public Education is the only agency at its level and of its kind for primary and secondary education. *See* Mont. Const. Conv., VI Verbatim Tr. at 2049–53 (Mar. 11, 1972); Mont. Const. art. X, § 9. It is authorized to

"exercise general supervision over the public school system and such other public educational institutions as may be assigned by law." Mont. Const. art. X, § 9(3)(a). Like the Board of Regents, the Board of Public Education is delegated self-executing and independent authority, co-equal with the legislative and executive branches of government. *See Bd. of Regents of Higher Ed. v. State*, 2022 MT 128, ¶ 107–08, 409 Mont. 96, 512 P.3d 748 ("No reasonable rule of construction permits either body [the Legislature or the Board of Regents] to encroach upon or exercise the powers constitutionally conferred upon the other. . . . Exercise of the legislative power to undermine the constitutional powers of the Board [of Regents] cannot stand."); *Bd. of Pub. Ed. v. Judge*, 167 Mont. 261, 263, 266–69, 538 P.2d 11 (1975) (rejecting a legislative attempt to transfer authority over vocational education from the Board of Public Education to the State Board of Education because the Legislature may not alter the Constitution's delegation of power to the Board of Public Education).

Local school boards play a similarly deliberate, essential constitutional role. The framers carefully delegated local "supervision and control" to "a board of trustees to be elected as provided by law." Mont. Const. art. X, § 8 (emphasis added). They explained that, given the Board of Regents' autonomy, "we should give constitutional recognition and status to the local boards[,] to[o]—first of all, to allay the fears which have been expressed . . . concerning the preservation of local autonomy; and secondly, to give parallel treatment to the governing boards of the public schools, as well as the public universities and colleges." Mont. Const. Conv., VI Verbatim Tr., at 2046 (Mar. 11, 1972) (Del. Heliker) (emphasis added); *see id.* at 2047 ("[O]ur local school boards

certainly should have constitutional status.") (Del. Johnson); *id.* at 2051 (Article X, § 8 guarantees "control by the local board at the local level"; the decision to omit "control" from the Board of Public Education's powers was intentional and meant to prevent any argument that the Constitution grants "additional powers to the state board at the expense of the local school boards") (Del. Champoux).

Accordingly, the framers used the word "control" to "emphasize that [they] want[ed] the local public school boards to have as much power as possible." Mont. Const. Conv., VI Verbatim Tr., at 2050 (Mar. 11, 1972) (Del. Champoux). Local institutions are as much the product of intentional constitutional design as the Board of Public Education and the Board of Regents, and the decision to reserve their control is unmistakably purposeful. *See, e.g.*, *id.* at 2047 (Del. Champoux) (by using only the word "supervise" in reference to the Board of Public Education, the framers intended to show that they "want local control to remain with the local school districts").

First, HB 562's commission fully seizes the Board of Public Education's powers and duties. It is flatly unconstitutional for the Legislature to redistribute the Board's powers to another entity—particularly one unsupervised by the Board and unanticipated by the Constitution. *Bd. of Pub. Educ. v. Judge*, 167 Mont. 261, 268–269 (1975) (legislature barred from transferring responsibility for vocational education from the Board of Public Education to the State Board of Education).

Second, privatized school governing boards usurp the authority to supervise and control local public schools that is constitutionally delegated to local school boards. *See* HB 562, § 3(7). Just like the Board of Public Education and the Board

of Regents, local public school boards are creatures of the Constitution, and the Legislature cannot disrupt, redistribute, or otherwise alter their authority. Mont. Const. Conv., VI Verbatim Tr., at 2046 (Mar. 11, 1972) (Del. Heliker) ("[W]e should give constitutional recognition and status to the local boards.").

Public School Plaintiffs are likely to succeed on the merits of Counts 1 and 2.

C. HB 562 violates the rights to public office eligibility and of suffrage.

The Montana Constitution includes the right of suffrage among citizens' fundamental rights, requiring that "[a]ll elections . . . be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13; *see Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 52, 310 Mont. 123, 54 P.3d 1 ("The rights included within this 'Declaration of Rights' are 'fundamental rights.'"). It also provides that "any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector," Mont. Const. art. IV, § 2, and "any qualified elector is eligible to any public office," Mont. Const. art. IV, § 4.

Both the Montana and United States Constitution protect against discrimination. U.S. Const. amend. XIV; Mont. Const. art. II, § 4. Because of the primacy of the right to vote, the state and federal equal protection clauses generally translate to strict scrutiny of any law denying enfranchisement to otherwise qualified voters. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *see also Sadler v. Connolly*, 175 Mont. 484, 575 P.2d 51 (1978).

HB 562 limits the qualified electors who may participate in electing governing boards—the *ultra vires* equivalent of local public school boards of trustees under Mont. Const. art. X, § 8—to "parents and guardians of students enrolled in the school and the choice school's employees." HB 562, § 14(1)(f)(i). Like unconstitutional freeholder requirements that tie voter eligibility to property ownership, this limitation is unconstitutional under both the federal and Montana Constitutions. *Cf. Sadler*, 175 Mont at 487–88, 575 P.2d at 53–54 (1978) ("[I]t seems impossible to discern any interest the [freeholder] qualification can serve. It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools . . . or a state and federal taxpayer contributing to the approximately 85% of the . . . annual school budget derived from sources other than the board of education's own [property] taxes.") (emphasis added) (quoting *Turner v. Fouche*, 396 U.S. 346 (1970)).

Local school board elections—and purportedly parallel governing boards—must be equally open to all interested, qualified voters. *See, e.g.*, *Kramer*, 395 U.S. at 632–33 (rejecting eligibility classifications excluding non-parents from school board elections); *see also Ball v. James*, 451 U.S. 355, 366 & n.11 (1981) (collecting cases and reasoning that laws "tying voter eligibility to land ownership" are often invalid in elections for bodies that "administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or

welfare services") (emphasis added). Public School Plaintiffs are likely to succeed on the merits of Counts 3 and 4.

II. Public School Plaintiffs face imminent, irreparable injury.

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Mont. Democratic Party v. Jacobsen*, 2022 MT 184, 410 Mont. 114, 518 P.3d 58 (interference with the right of suffrage sufficient to constitute irreparable injury for purposes of preliminary injunction); *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 60, 409 Mont. 378, 515 P.3d 301 (recognizing irreparable injury from interference with a constitutional right). Ongoing constitutional violations produce injuries that "cannot effectively be remedied by a legal judgment." *City of Billings v. Cty. Water Dist. of Billings Heights*, 281 Mont. 219, 231, 935 P.2d 246, 253 (1997). HB 562 violates Public School Plaintiffs' constitutional rights in several distinct but interrelated ways, each of which creates a likelihood of immediate, irreparable harm.

First, HB 562 undermines Public School Plaintiffs' right to equal educational opportunity by exempting private charter schools from all accreditation and qualification standards, consistent curriculum, and basic health and safety laws contained in Title 20. *See supra* Part I, A. As parents, teachers, and community stakeholders, Public School Plaintiffs suffer directly from the loss of equality and quality in their local schools. Jessica Felchle, for example, teaches in the Billings Public School District and has two children attending public school in Laurel. Compl.

¶¶ 9–10. Proponents of HB 562 have identified Billings as a target for early privatization efforts. Decl. of Suzanne McKiernan, ¶¶ 7–8 (June 14, 2023). Felchle will personally suffer lost resources in her classroom if plans to found privatized schools in the Billings area go forward. Compl. ¶ 9. Moreover, her children will suffer similar losses in their more rural school district, which could lose students to virtual schools or to schools physically located in Billings. *Id.* ¶¶ 10, 71; HB 562, §§ 14–15. HB 562 also injures Public School Plaintiffs by allowing privatized schools to continue receiving public funding on a per-pupil basis regardless of how much private money the privatized schools raises. HB 562, § 15. These concrete, constitutional injuries also present imminent financial and substantive educational harm.

Second, HB 562 violates Public School Plaintiffs' rights of suffrage and to equal protection, as guaranteed under both the Fourteenth Amendment and Montana's Article II, § 4 by limiting eligibility to vote in governance board elections. *See supra* Part I, C; HB 562, § 14(1)(i). No plaintiff will be allowed to participate in HB 562's governing board elections because Public School Plaintiffs do not plan to participate in privatized schools. *See generally* Compl. ¶¶ 9–38. This is a separate constitutional violation that is enough on its own to show irreparable harm. *See, e.g.*, *Driscoll v. Stapleton*, 2020 MT 247, ¶ 23–24, 401 Mont. 405, 473 P.3d 386 (affirming district court's ruling that interference in the right to vote was sufficient to support issuance of a preliminary injunction).

Public School Plaintiffs' injuries are also imminent because at least one privatization activist group already has a meeting planned for June 22, 2023.

McKiernan Decl. ¶ 9, Ex. 1. Moreover, the law contemplates building state infrastructure beginning in approximately two weeks, on July 1, 2023. HB 562, § 18.

III. The balance of equities and public interest weigh in favor of Public School Plaintiffs.

The balance of the equities and the public interest "merge into one inquiry when the government opposes a preliminary injunction." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). The balance of equities "concerns the burdens or hardships to [Plaintiffs] compared with the burden on Defendants if an injunction is ordered," while the public interest "mostly concerns the injunction's impact on nonparties." *Id.* (citing *Bernhardt v. L.A. Cty.*, 339 F.3d 920, 931 (9th Cir. 2003)) (cleaned up).

These factors weigh decidedly in Public School Plaintiffs' favor. First, the balance of equities tips sharply toward Public School Plaintiffs because the State can suffer no harm from maintaining the existing, constitutional system of public education oversight and funding. Defendants, on the other hand, will not be harmed by an injunction that maintains the status quo, as the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Second, injunctive relief would serve the public interest by vindicating Montanans' constitutional rights to quality public education, suffrage, and equal protection. *Am. Beverage Co. v. City & Cty. of S.F.*, 916 F.3d 749 (9th Cir. 2019) ("It is always in the public interest to prevent the violation of a party's constitutional rights.").

Accordingly, Public School Plaintiffs are entitled to a preliminary injunction to prevent HB 562 from taking effect during the pendency of this litigation. They are likely to succeed on the merits; irreparable harm will occur if the Court does not grant the requested relief; and the balance of equities and public interest weigh in their favor. *See* § 27-19-201(4), MCA (as amended).

IV. *Ex Parte* Relief Is Justified

Public School Plaintiffs seek an *ex parte* temporary restraining order as permitted under § 27-19-315, MCA. Public School Plaintiffs provided notice to all State Defendants on June 14, 2023. The law's imminent effective date does not allow meaningful time for the State to respond before Public School Plaintiffs will begin to suffer irreparable injury on July 1, 2023—the date chosen by the State as HB 562's effective date. A hearing likely cannot proceed in time to prevent the irreparable harm that HB 562 will cause when implemented. Irreparable injury will result unless the Court grants a temporary restraining order to maintain the status quo until the Court can conduct a hearing on Public School Plaintiffs' request for a preliminary injunction.

CONCLUSION

For the reasons set forth above, Public School Plaintiffs respectfully request this Court issue a temporary restraining order enjoining enforcement of HB 562, set a hearing on Public School Plaintiffs' motion, and, following a hearing, enter a preliminary injunction.

Respectfully submitted this 14th day of June, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 14th day of June, 2023, by email and by process server.

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