Rylee Sommers-Flanagan
Constance Van Kley
UPPER SEVEN LAW
P.O. Box 31
Helena, MT 59624
(406) 396-3373
rylee@uppersevenlaw.com
constance@uppersevenlaw.com

Attorneys for Plaintiffs

**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.: DDV-2023-425 **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, III, & IV**

INTRODUCTION

The Montana Constitution guarantees equality of educational opportunity to all Montana children. In service of that guarantee, the framers crafted a system of public education governed by a single Board of Public Education (the "Board") with general supervision over Montana's primary and secondary public schools and other institutions the legislature establishes. House Bill 562 ("HB 562") contravenes this deliberate constitutional framework, creating a system of privatized schools that circumvents the Board's constitutionally vested authority, replaces Boards of Trustees ("local school boards") with unaccountable "governing boards," and excludes qualified voters from participating in governing board elections.

First, HB 562 creates an "autonomous" "community choice school commission" (the "Commission") that usurps the Board's constitutionally vested supervisory authority over public schools. Mont. Const. art. X, § 9.

Second, HB 562 wrests supervision and control over local schools from local school boards in favor of the Commission and a parallel system of "governing boards." Thus, these bodies exercise powers that Article X, Section 8 exclusively vested in local school boards.

Finally, HB 562 excludes qualified voters from participating in governing board elections, violating the rights to suffrage and equal protection guaranteed by Article II, Sections 4 and 13, and the federal Fourteenth Amendment. Because it interferes with Montanans' fundamental rights, HB 562 must survive strict scrutiny, which it cannot. HB 562 must be permanently enjoined.

BACKGROUND

HB 562 euphemistically describes its system of unregulated schools as "community choice schools." In fact, it creates an extraconstitutional privatized school system that mimics the existing public school system's structure, uses public dollars to subsidize unaccountable private education, and excludes community members from exerting any influence at the ballot box.

At the top of HB 562's separate private school system, the Commission is, by definition and in substance, a self-regulated body with exclusive authority over HB 562-authorized schools. HB 562, §§ 3(4), 4(1). While purporting to place the Commission under the Board's "general supervision," HB 562 defines the Commission as "autonomous," empowering it to directly authorize privatized schools, approve or disapprove local school boards to act as authorizers, conduct oversight over the effectiveness and performance of authorizer school boards, and impose an "oversight fee" to provide authorizer funding. *Id.* §§ 3(2), 4(1)–(2), 5(1), 6(1)(a)–(c), (e)–(f), (7). The Board's only identifiable role in HB 562's parallel system is limited to receiving the Commission's annual report. *Id.* §§ 4(12), 7(10). Nor does HB 562 require the Commission to defer to or even involve local school boards in the process of creating privatized schools. *Id.* §§ 4(1)–(2), 7(2).

To form and incorporate privatized schools in its separate system, HB 562 creates "authorizers." *Id.* §§ 5, 14. "Authorizers" include (1) the Commission itself and (2) any local school board approved by the Commission. *Id.* §§ 3(2), 5(1)–(2). The Commission alone establishes selection criteria for potential authorizers, *id.* § 5(3)(a),

and has sole discretion to approve and supervise them, *id.* § 5(4)—again without oversight or input from existing public school entities, *id.* §§ 4(1)–(2), 7(2). And although the Commission may, in its discretion, approve local school boards as authorizers, *id.* § 5(2)(a)–(b), (4)(a), the Commission retains exclusive power to supervise, renew, and dismantle any privatized school authorized by a local school board, *id.* §§ 5(5)–(6), 6(6), 7(2). A local school board that wishes to act as an authorizer must promise to fulfill "the expectations, spirit, and intent" of HB 562. *Id.* § 5(3)(c)(viii). The Commission is "responsible for overseeing the performance and effectiveness of all" authorizers. *Id.* § 7(2).

Next, HB 562 creates governing boards, defined as "independent volunteer board[s] of trustees." HB 562, § 3(7). Authorizers contract with governing boards to control privatized schools. *Id.* § 10(2). Governing boards supplant local school boards, determining school location and capacity, *id.* §§ 14(9), 11(7); setting graduation requirements, *id.* § 14(7)(b); and awarding degrees and issuing diplomas, *id.* Only "the parents and guardians of students enrolled in the school and the choice school's employees" may participate in governing board elections. *Id.* § 14(1)(f)(i).

Finally, HB 562 creates privatized schools that are "not subject to the provisions of Title 20 or any state or local rule, regulation, policy, or procedure relating to traditional public schools." *Id.* § 14(1)(c). Defined as "public school[s]" that are "governed by a governing board," privatized schools and their governing boards have "autonomy over decisions" concerning "finance, board governance, personnel, scheduling, curriculum, and instruction." *Id.* § 3(5). HB 562 also exempts

privatized schools from teacher certification requirements. *Id.* § 14(8)(a). Thus, privatized schools come into being outside of the public school system the Montana Constitution designed and the Legislature implemented through Title 20. Yet they receive state funding and enjoy a degree of autonomy otherwise unmatched in the public system.

Public School Plaintiffs are a coalition of Montanans invested in public education through their roles as teachers, parents, community members, and public school and voting rights advocates. Compl. ¶¶ 9–35. They are united in their recognition that, by creating an unaccountable but publicly funded system of schools, HB 562 reduces public school funding, compromises all forms of diversity—but especially socioeconomic and political diversity—and creates unequal educational opportunities and outcomes and lost protections for students with disabilities, among others. HB 562 also deprives each individual plaintiff—and members of both organizational plaintiffs—of their right to vote in governing board elections. *Id.*

For example, lead plaintiff Jessica Felchle is a Billings public school teacher raising her family in Laurel, a school district that borders Billings. *Id.* ¶ 10. HB 562's schools receive funding on a per-pupil basis from the BASE funding allocation and may pull students from any Montana districts. HB 562 §§ 11(1)(a), 15(4). Reduced funding is particularly devastating in less populous and rural school districts. *See* Compl. ¶ 29. With Billings in the sights of HB 562's supporters, Decl. of Suzanne McKiernan, ¶¶ 7–8 (June 14, 2023), Felchle worries that a privatized school in Billings poses an imminent threat to both her professional and personal life, Compl.

¶¶ 9–10, 38–39. Whitefish parent and Kalispell public school teacher Beau Wright fears HB 562 will reduce special education funding and increase discrimination against students with learning disabilities. *Id.* ¶¶ 11–12. Schoolteacher plaintiffs Linda Rost, Lance Edward, and Corinne Day share these worries. *Id.* ¶¶ 28–30, 33–38. All five are parents of children who attend public schools. *Id.* ¶ 39.

Other individual plaintiffs are taxpayers and voters committed to the equal provision of quality public education in their communities. Retired teacher Sharon Carroll was on the Board of Public Education from 2007 to 2017 and completed a vacant term in 2019. *Id.* ¶ 22. She votes and pays property taxes in Ekalaka. *Id.* ¶¶ 23–24. Billings taxpayer and voter Suzanne McKiernan served for years as a classroom volunteer and local school board member. *Id.* ¶¶ 25–26. Penelope Copps is a career educator who served on the National School Board and the Montana High School Association Board. *Id.* ¶¶ 31–32. She votes in Helena. *Id.*

HB 562 also directly harms the missions of organizational plaintiffs League of Women Voters, which seeks to protect voting rights; and Montana Quality Education Coalition, which seeks to advocate for Article X constitutional guarantees, including adequate and equitable public school funding. *Id.* ¶¶ 15, 20.

HB 562 was enjoined in part on September 6, 2023. *Felchle v. State*, No. DDV-2023-425, at 38–39 (Mont. 1st Jud. Dist. Ct. Sept. 6, 2023) (Op. & Ord. on Mot. for Prelim. Injunction) (Sept. 6, 2023) ("PI Order"). Outside of the provision setting up the Commission itself—HB 562, § 4—the Court preliminarily enjoined the State from enforcing and executing HB 562. *Id.* Since then, Commission members have been

appointed and met monthly since October 2023. *Community Choice Schools*, Bd. of Pub. Educ., mbpe.mt.gov (last visited Nov. 12, 2023).[1]

LEGAL STANDARD

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). Summary judgment eliminates "the burden and expense of unnecessary trials." *Klock v. Town of Cascade*, 284 Mont. 167, 173, 943 P.2d 1262, 1266 (1997). "[M]ere denial, speculation, or conclusory statements" will not defeat summary judgment. *Id.* at 174, 943 P.2d at 1266.

ARGUMENT

HB 562 is unconstitutional on its face. Public School Plaintiffs are entitled to summary judgment on several dispositive claims because no material fact is genuinely in dispute. First, HB 562 violates Article X, Section 9 by creating an autonomous Commission that circumvents the Board's constitutionally delegated authority. Second, it violates Article X, Section 8 by subverting local school boards' constitutional role. And third, HB 562 excludes Public School Plaintiffs from governing board elections, violating Article II, Sections 4 and 14. These provisions are not severable.

Accordingly, Public School Plaintiffs ask the Court to (1) grant their motion for summary judgment on Counts I, II, III, and IV of their Verified Complaint, (2) declare HB 562 unconstitutional, and (3) permanently enjoin its enforcement.

[1] *Available at* https://bpe.mt.gov/community.

I. HB 562's statewide Commission usurps the Board's role.

Autonomous by definition and unregulated by design, HB 562's Commission commandeers authority that Article X, Section 9 expressly delegates to the Board. The Commission is fundamentally at odds with the Montana Constitution.

"[G]uided by the desire to insure a solid foundation for public education in Montana and to allow for the flexibility essential to the educational process," the Education and Public Lands Committee unanimously recommended its proposal for Article X's provisions related to the state boards structure. *See* Mont. Const. Conv., II Verbatim Tr., Majority Prop'l Comments: Educ. & Pub. Lands Comm. at 716 (Feb. 22, 1972). The nature of elementary and secondary education—understood to involve "greatly expanded activities, personnel, and funding,"—would "require that this crucial sector of education have its own administrative board." *Id.* at 733. Against a fluctuating national landscape, the framers predicted "increasing centralization in education" and a significantly larger "role in educational financing by state and federal governments." *Id.* at 734. Given that "the kinds of education needed and offered are constantly changing and expanding," they wanted specialized board members with high levels of expertise who could devote "sufficient time to become knowledgeable about the particular problems and issues of public education." *Id.* at 733–34.

Thus, Article X, Section 9 provides that "[t]here is a state board of education composed of the board of regents of higher education and the board of public education." Mont. Const. art. X, § 9(1). While the Board of Regents governs

and controls the Montana university system, the Board of Public Education "exercise[s] general supervision over the public school system." Mont. Const. art. X, § 9(2)(a), (3)(a). "It was clearly the intent of the [1972 Constitutional] Convention to maintain a two-board system." *Bd. of Pub. Educ. v. Judge*, 167 Mont. 261, 267, 538 P.2d 11, 14 (1975).

The Board's structure is the careful product of constitutional design and, for primary and secondary education, the Board is the only agency at its level and of its kind. Mont. Const. art. X, § 9; *see* Mont. Const. Conv., VI Verbatim Tr. at 2049–53 (Mar. 11, 1972) (Del. Champoux). The legislature cannot delegate away its constitutional authority. *Cf. Bd. of Regents of Higher Educ. v. State*, 2022 MT 128, ¶ 19, 409 Mont. 96, 512 P.3d 748. While forecasting that "other public educational institutions" might be established, the framers clearly intended that those institutions—like HB 562's schools—would remain subject to the Board's supervision: "One major reason, therefore, for the creation of a two-board structure is the establishment of a board that will be specifically qualified for and concerned with the problems of elementary and secondary education and other institutions." Mont. Const. Conv., VI Verbatim Tr. at 2050 (Del. Champoux) (emphasis added); *see Judge*, 167 Mont. at 263, 266–69, 538 P.2d at 12, 14–15. Their intent carries through to the text of Article X, Section 9.

"Montana's Constitution serves as a limitation on the Legislature, not a grant of power." *Bd. of Regents*, ¶ 19. Just as the legislature "cannot pass laws which directly infringe upon the [Board of Regents'] authority to supervise, coordinate,

manage and control the [Montana University System]," *Sheehy v. Comm'r of Pol. Pracs.*, 2020 MT 37, ¶ 47, 399 Mont. 26, 458 P.3d 309 (Baker, J., concurring), neither can it usurp the Board's "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); *see Bd. of Regents*, ¶ 19 (invalidating law that invaded the province of the Board of Regents to enforce firearms restrictions on Montana university campuses).

Thus, in *Judge*, the Court invalidated a law that transferred vocational education supervision from the Board to the State Board of Education and created an administrative committee to oversee it. 167 Mont. at 263–64, 268, 538 P.2d at 12, 15. Because Article X, Section 9 expressly committed supervision to the Board, the law was unconstitutional; the legislature cannot reorganize the constitutional structure of our education system. *Id.*, 167 Mont. at 268, 538 P.2d at 15; *see* App. A, *Mont. Bd. of Pub. Educ. v. Mont. Admin. Code Comm.*, No. BDV-91-1072, 10–11 (First Jud. Dist. March 31, 1992) (declaring invalid and enjoining enforcement of a law that negated one of the Board's administrative rules precisely because the rulemaking was "within the purview of the Board's constitutional power of general supervision pursuant to Article X, Section 9(3)").

Consistent with its constitutional role, the Board is assigned "responsibilities by statute including the establishment of policies for: the accreditation of schools, teacher certification, distribution of state equalization aid, special education, school bus standards and regulations, and designation of school days and hours." Mont. Admin. R. 10.51.104 (summarizing duties codified in § 20-2-121, MCA) (emphasis

added). Among other things, the Board "adopt[s] rules for student assessment in the public schools" and "approve[s] or disapprove[s] educational media selected by the superintendent of public instruction." Section 20-2-121(7), (9), MCA.

HB 562's Commission supplants the Board's general supervision of public schools—taking control of privatized schools' creation, administration, renewal, and revocation. HB 562 §§ 4, 5, 6. The Commission exercises complete discretion over whether to allow local school boards to become authorizers, oversees authorizers' performance, and monitors privatized schools' performance and legal compliance with charter contracts. *Id.* §§ 4(2), 5(1), 5(3)–(4), 6(1)(a)–(c), (e)–(f), 7(2). Thus, HB 562 transfers to the Commission responsibilities, such as accreditation and teacher certification, that fall directly and intentionally within the Board's purview. Mont. Const. art. X, § 9(3)(a). But "[t]he Board is a constitutionally recognized and created agency . . . not subject to the usual administrative and legislative constraints." App. A, *Mont. Bd. of Pub. Educ.*, No. BDV-91-1072, at 9. Indeed, "the legislature cannot interfere with other constitutionally created bodies that are properly conducting their business." *Id.*

Like the statutes in *Judge* and in *Montana Board of Public Education*, HB 562 transfers the Board's constitutionally delegated powers to a new body and tramples on the Board's authority. But HB 562 is worse: it invents a privatized school Commission and vests it with power to oversee schools that receive public money but are subject to almost no other state law. HB 562's redelegation of the Board's supervisory authority is flatly unconstitutional. Plaintiffs' motion should be granted.

II. HB 562 subverts local school boards' constitutional role.

In addition to giving the Commission authority already committed to the Board, HB 562 empowers both the Commission and governing boards to undermine local school board control preserved under Article X, Section 8. HB 562 again violates the Montana Constitution.

The Montana Constitution safeguards a specific, important role for local school boards: "[t]he supervision and control of schools in each school district." Mont. Const. art. X, § 8. The framers "want[ed] local control to remain with the local school districts" and "acted to preserve the existing power of the local boards of trustees," *Sch. Dist. No. 12 v. Hughes*, 170 Mont. 267, 272, 275, 552 P.2d 328, 331, 332 (1976), "wish[ing] to insure that the state legislature would not strip the local boards of their powers," *Hughes*, 170 Mont. at 273, 552 P.2d at 331. *See also* Mont. Const. Conv., VI Verbatim Tr. at 2046 ("[W]e should give constitutional recognition and status to the local boards.") (Del. Heliker); *id.* at 2051 ("what we have just done is to guarantee the control by the local board at the local level") (Del. Champoux).

The framers did not act on a blank slate. Rather, in 1971, the legislature had authorized local school boards to, *inter alia*, "establish and maintain the instructional services" of district schools; "employ or dismiss" teachers, principals, or superintendents; "administer the attendance . . . and otherwise govern the pupils of the district"; and "call, conduct, and certify the elections of the district." Section 75-5933(1)–(3), (16), RCM (1971).[2] The framers incorporated this existing

[2] Amendments since have left these powers unchanged. *See* § 20-3-324, MCA.

statutory backdrop into the Constitution. *Hughes*, 170 Mont. at 274, 552 P.2d at 332. The legislature cannot transfer "the authority local boards possessed at the time of the convention." *See id.* at 273, 552 P.2d at 331–32.

Under HB 562, however, governing boards exercise quintessential local school board authority. HB 562, §§ 3(2), 5(1)–(2). Either the Commission or a local school board—subject to the Commission's approval—can authorize a privatized school. *Id.* In both circumstances, the governing board controls the privatized school. *See, e.g.*, HB 562, §§ 10(2) (governing board sets academic and operational performance expectations), 11(7) (determines capacity), 14(1)(f) (conducts elections), 14(5)(c) (oversees privatized school), 14(7)(b) (establishes graduation requirements and awards degrees); *see also* HB 562, § 3(5) (governing board oversees privatized school, which has autonomy over "personnel, scheduling, curriculum, and instruction"). Where the Commission acts as an authorizer, and thus prevents any form of local school board involvement, the constitutional violation is straightforward: HB 562 takes local control from the constitutionally designated body and gives it to a newly created body. *See Bd. of Regents*, ¶ 19; *Sheehy*, ¶ 47 (Baker, J., concurring); *Grabow v. Mont. High Sch. Ass'n*, 2002 MT 242, ¶ 22, 312 Mont. 92, 59 P.3d 14 ("The Montana Constitution vests school board trustees with the power to supervise and control the schools in their district."); *Judge*, 167 Mont. at 268, 538 P.2d at 15; *Hughes*, 170 Mont. at 273, 552 P.2d at 331–32.

But even involving local school boards as authorizers cannot cure HB 562's violation of Article X, Section 8. *Grabow* is instructive. There, the Court considered

whether "voluntary membership in a high school athletic association ["MHSA"] is an unlawful delegation of authority." *Grabow*, ¶ 28. Reasoning that the nature of interscholastic athletics required an "independent entity [to] serve[] as a neutral arbiter to establish and monitor eligibility rules and the ground rules for play," *id.* ¶ 30, that "[s]chool boards have no power of supervision or control over schools outside their own school district," *id.* ¶ 31, and that MHSA was "exercising a power over students that individual school boards never had," *id.* ¶ 32, the Court concluded that participating in MHSA was not "an unlawful delegation of a governmental power," *id.* ¶ 28. HB 562's privatized schools are nothing like MHSA; they are not "neutral arbiter[s]" operating to promote universal, fair standards that individual local schools would be unable to implement on their own. And privatized schools' governing boards do not spring up, as MHSA did, to fill a gap.

If privatized schools are—as the State contends—public schools, local school boards must supervise their essential operations. They do not. *State ex rel. Sch. Dist. No. 29, Flathead Cty., v. Cooney*, 102 Mont. 521, 59 P.2d 48, 52 (1936) (a "school board cannot act except through its board of directors, and in a formal meeting"). In fact, a local school district will lose authority to supervise a privatized school if it does not "fulfill[] all authorizing duties and expectations" under HB 562 or if the Commission decides it is no longer in good standing. HB 562 § 5(6). Authorizers must approve any privatized school proposals that fall within HB 562's policy goals, *id.* § 6(1)(b), and submit an annual report to include "the authorizer's strategic vision for authorizing and progress toward achieving that vision," *id.* § 6(a), and "the

authorizer's choice school portfolio," *id.* § 6(d). Thus, if local school boards and the voters who elect them believe a privatized school is draining public resources or otherwise harming the district's best interests, the Commission will simply revoke what limited control the local school board has under HB 562.

The legislature cannot displace local school boards' constitutional authority to supervise and control local school operations, except in areas of traditional, contemplated regulatory authority. *See Hughes*, 170 Mont. at 273–74, 552 P.2d at 331–32 (the legislature may authorize teachers to appeal from dismissal without invading the province of local school boards because the power to discipline school employees "had already been limited by" statute prior to the Constitution's ratification). The framers never contemplated that the legislature would infiltrate local school board authority as HB 562 does—precisely the opposite: they preserved local school boards' special local control.

The legislature cannot authorize local school boards to delegate their core constitutional powers or abdicate their core constitutional duties to entities outside the structure set forth in Article X. HB 562 goes further than that—providing that local school boards may be involved only insofar as they agree with the legislature's policy goals. HB 562 is unconstitutional, and Plaintiffs' motion should be granted.

III. HB 562 excludes Public School Plaintiffs from governing board elections.

By insulating governing board elections from the voting public at large, HB 562 deprives Public School Plaintiffs of the right to vote, in violation of their rights to both suffrage and equal protection under the Montana and United States Constitutions.

"All elections shall 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. "Qualified electors" are "[a]ny citizen[s] of the United States 18 years of age or older who meet[] the registration and residence requirements provided by law." Mont. Const. art. IV, § 2. Federal and state equal protection clauses guarantee the right to an equal vote. Mont. Const. art. II, § 4; U.S. Const. amend. XIV.

"[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628–29 (1969) (cleaned up). All school district electors have a "constitutionally protected right to participate on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *see also Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 55 (1970) (one person, one vote requirement applicable to school board elections); *Kramer*, 395 U.S. at 632 n.15 ("appellant resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions"); *see also Finke v. State ex rel. McGrath*, 2003 MT 48, ¶¶ 4–6, 19–23, 314 Mont. 314, 65 P.3d 576 (limiting eligible voters to real property owners unconstitutional when elected officeholders' work affected all area residents, regardless of status as renter or owner).

Consistent with federal constitutional requirements, Montana local school boards are elected by all qualified electors living in a district. Mont. Const. art. X, § 8; §§ 20-3-306, 20-20-301, 13-1-111, MCA. As the framers put it, "[e]ducation occupies a place of cardinal importance in the public realm" and "shap[es] and

cultivat[es] the mind of each succeeding generation." Mont. Const. Conv., II Verbatim Tr., Majority Prop'l Comments: Educ. & Pub. Lands Comm. at 721; *see also id.* at 731 (describing local control as "vital[ly] important" and local school elections as "an essential and irreplaceable part of the education system"). Moreover, local school boards oversee the expenditure of taxpayer dollars on public education. *See, e.g.*, §§ 20-3-324 (powers and duties of local school boards); § 20-9-203, MCA (requiring annual audits from local school boards); *cf. Kramer*, 395 U.S. at 626–27 ("Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.").

HB 562 denies qualified voters the right to participate in governing board elections simply because they lack status as a privatized school parent or employee. But the governing board entity HB 562 contemplates will impact all district residents, not only privatized schools' staff and students. The governing boards set, *inter alia*, "academic and operational performance expectations" and "graduation requirements." HB 562, §§ 10(2), 14(7)(b). They also oversee privatized schools' receipt of public funding, including local taxpayer money. *Id.* §§ 15 (providing for privatized school funding through existing public school sources), 3(5)(a) (providing that privatized schools are defined by "autonomy over decisions, including . . . matters concerning finance" and requiring governance by governing board). Whether authorized by the Commission or a local school board, privatized schools are governed by a governing board that only a limited subset of qualified voters elects, *id.* § 14(f)(1).

Because the right to suffrage is fundamental, HB 562 is subject to strict scrutiny. *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶¶ 18–19, 410 Mont. 114, 518 P.3d 58; *Finke*, ¶ 15. This means the "suspect legislation is unconstitutional unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest." *Finke*, ¶ 15 (cleaned up). HB 562 fails strict scrutiny. No compelling governmental interest can justify limiting the franchise in governing board elections. Similarly, HB 562 lacks narrow tailoring because it excludes all interested, qualified voters living in the school district who are neither privatized school staff nor parents. HB 562 violates Public School Plaintiffs' rights to suffrage and equal protection.

IV. None of the challenged sections is severable; HB 562 is unconstitutional.

The challenged provisions render HB 562 unconstitutional separately and together. A statute is only severable if, after severing the unconstitutional provision, "the remainder of the statute [is] . . . complete in itself and capable of being executed in accordance with the apparent legislative intent." *Williams v. Bd. of Cty. Comm'rs*, 2013 MT 243, ¶ 64, 371 Mont. 356, 308 P.3d 88 (citing *Finke*, ¶ 26).

Although HB 562 contains a severability clause, HB 562, § 20, the bill cannot be executed without the Commission—the "autonomous state community choice school commission with statewide authorizing jurisdiction and authority," *id.* § 4(1). Without the Commission, there is no mechanism for authorizing a privatized school because HB 562 allows only the Commission or Commission-approved local school boards to authorize privatized schools. *Id.* §§ 5(1), 3(2). All other provisions of the

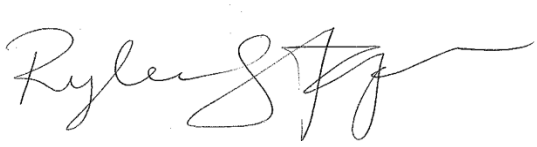
act depend on the Commission's existence. Moreover, a law that depends on commandeering an agency's constitutional authority is not severable. *See Judge*, 167 Mont. at 269, 538 P.2d at 15 ("[I]t is clear that if the State Board of Education does not have the powers contemplated by the Act, all other provisions are dependent thereon. The Act then must fall."). HB 562 attempts to redistribute Board power to the Commission. The Commission has no constitutionally permissible power and cannot stand. And without the Commission, HB 562 is meaningless.

Nor could HB 562 survive the removal of those sections that unconstitutionally subvert local school board authority or that exclude qualified electors from governing board elections. *See Finke*, ¶¶ 25–26; *Sheehy*, 262 Mont. at 141, 864 P.2d at 770. HB 562 insists that privatized schools have "autonomy over decisions, including but not limited to matters concerning finance, board governance, personnel, scheduling, curriculum, and instruction." HB 562, § 3(4)(a). They are nominally public schools that are "governed by a governing board" and "operated under the terms of a charter contract between the school's governing board and its authorizer." *Id.* §§ 3(4)(b)–(c). Even if authorizer status were not contingent on the existence of the unconstitutional Commission, HB 562 pulls the rug out from under local school boards' traditional areas of authority. And it unconstitutionally prevents qualified voters, including Public School Plaintiffs, from electing the governing boards who will oversee the use of taxpayer funds to educate the local population. The challenged provisions are inseverable. HB 562 must be enjoined in its entirety.

CONCLUSION

Public School Plaintiffs respectfully request that the Court (1) grant their Motion for Summary Judgment on Counts I, II, III, and IV of their Verified Complaint, (2) declare HB 562 unconstitutional, and (3) order HB 562 permanently enjoined. Public School Plaintiffs further request that the Court set a schedule for briefing the issue of attorney's fees.

Respectfully submitted this 6th day of February, 2024.



Rylee Sommers-Flanagan
Constance Van Kley
Upper Seven Law

Attorneys for Plaintiffs