MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND 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. THE 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 **OPINION AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs, a collection of current and former teachers, parents, and two nonprofit organizations, move this Court for a preliminary injunction *pendente lite* to enjoin enforcement of House Bill 562, the Community Choice Schools Act, pending final decision on the merits. The plaintiffs are represented by Rylee K. Sommers-Flanagan (argued) and Constance Van Kley. Defendants the State of Montana, Governor Greg Gianforte, and Superintendent of Public Instruction Elsie Arntzen (collectively, the State), represented by Alwyn Lansing (argued), Thane Johnson, and Emily Jones, oppose the motion.

The motion is fully briefed. A hearing on the motion was held on August 11, 2023, at which the Court heard oral argument. For the reasons that follow, the motion will be granted in part and denied in part.

BACKGROUND[1]

The 2023 legislative session was a busy one regarding the subject of charter schools. After several procedural ups and downs, two bills survived that paved the way for expanded charter schools in Montana: House Bill 549, 2023 Mont. Laws 510 [HB 549], and House Bill 562, 2023 Mont. Laws 513 [HB 562]. [2] This lawsuit is a challenge to only one of these bills, HB 562.

A. House Bill 562

House Bill 562 authorizes the creation of charter schools—termed "community choice schools" in the bill—and establishes a system for the creation and supervision of such schools that in many ways run parallel to the existing hierarchy of local school boards and the Montana Board of Public Education ("the Board"). At the top of this new structure is a statewide "school choice

[1] The following, based on the Complaint constitutes the Court's findings of fact. Mont. R. Civ. P. 52(a)(2).
[2] https://montanafreepress.org/2023/05/19/montana-legislature-charter-school-bills-signed/.

commission" ("the Commission" or "the School Choice Commission") that is paradoxically described as both "autonomous" and "under the general supervision of the board of public education as set forth in this section." HB 562, § 4(1). The Commission has the authority to directly authorize charter schools, to approve local school boards to act as authorizers, to conduct oversight over the effectiveness and performance of school boards approved as authorizers, and to calculate an "oversight fee" to provide funding to authorizers. *Id.* §§ 3(2), 2(2), 7. The Commission must report annually to the Board, *id.* § 7(10), but the statute is silent on how—if at all—the Board may supervise, review, or direct the commission in these duties.

The second tier of governance created by HB 562 consists of the choice school authorizers. Authorizers can be either the Commission itself, *id.* § 5(1), or local school boards of trustees, *id.* § 5(2). If a school board seeks to become an authorizer, it must fill out an application that the Commission must review within 60 days. *Id.* § 5(3), (4). After a review of the supporting documentation and "the quality of the application," the Commission either confirms or denies acceptance of the school board as an authorizer. *Id.* § 5(4). Among other things, this process requires the applicant school board to submit "a statement of assurance that the local school board commits to serving as a choice school authorizer in fulfillment of the expectations, spirit, and intent of [HB 562]." *Id.* § 5(3)(c)(vii). Upon approval, authorizers must then execute a renewable "authorizing contract" with the Commission. *Id.* § 5(4)(b), 5(5).

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The third tier consists of the choice schools themselves. Choice schools are defined as follows:

> "Community choice school" or "choice school" means a public school that:
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> (a) has autonomy over decisions, including but not limited to matters concerning finance, board governance, personnel, scheduling, curriculum, and instruction;
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> (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;
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> (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.

Id. § 3(5). Choice schools must be approved by the respective authorizer and operate according to the terms of a charter contract between its governing board

and the authorizer. *See id.* § 10. Choice schools must be run by a "governing board," meaning "an independent volunteer board of trustees of a community choice school that is a party to the charter contract with the authorizer." *Id.* § 3(7). The governing board's members are elected only by "the parents and guardians of students enrolled in the school and the choice school's employees." *Id.* § 14(1)(f)(i).

The statute defines choice schools as public. *Id.* § 3(5). That said, the actual structure of choice schools has characteristics of both private and public bodies. On one side of the ledger, choice schools must be open to any student residing in the state of Montana. *See id.* § 11(a). They may not charge tuition. *Id.* § 15(6)(a). Their employees must enjoy "the same rights and privileges as other public-school employees except as otherwise provided in" HB 562. *Id.* § 14(8)(b). Choice schools must provide special education services. *Id.* § 14(4). They may not "engage in any sectarian practices" with respect to education, admissions, employment, or operations. *Id.* § 14(6)(a). Their corporate structure is regulated in the sense that they must have a governing board, the governing board's election of members is regulated, and the governing board is subject to open meeting laws. *Id.* § 14(1)(f), (7)(c).

At the same time, choice schools are independent "nonprofit education organizations. *Id.* § 14(1)(a). Some choice schools may be former "traditional" public schools converted by the authorizer into choice schools. *See id.* § 9(7). But choice schools may also result from independent private nonprofit organizations responding to a request for proposal. *See id.* § 9 (describing RFP process). For instance, choice schools may be operated by entities that "currently operate[] one or more schools in any state or nation." *See id.* § 9(10). Governing

boards may hold multiple charter contracts. *See id.* § 14(e). And choice schools may "contract with an education service provider for the management and operation of the choice school" provided "the school's governing board retains oversight authority over the school." *Id.* § 14(4)(c).

Choice schools are not generally subject to the requirements of Title 20, Mont. Code Ann., which means they are generally exempt from the certification, curriculum, and student health and safety requirements attendant to a "traditional" public school except to the extent those requirements are imposed by federal law. Similarly, except as otherwise provided in HB 562, choice schools are not subject to the rules promulgated by BPE. Teachers are not required to be certified, *id.* § 14(8)(a), they are not employees of the school district, and employees do not participate in the State-managed teachers' retirement system and public employee retirement system, *id.* § 14(d). A choice school's debts are its own responsibility and are not assumed by the authorizer. *Id.* § 15(7).

Although choice schools are generally independent nonprofit entities, they are funded primarily with funds from each choice school student's resident school district. *Id.* § 15(1). Each school district in which a choice school is physically located must allocate from its general fund a basic entitlement to the choice school. *Id.* § 15(2)(b). The Superintendent of Public Instruction reduces the monthly BASE aid payment to each resident school district of a choice school's students in proportion to the number of full-time students enrolled in that choice school and ultimately transfers that amount to the choice school. *Id.* § 15(4). The Superintendent also reduces the monthly BASSE aid payment to each school district physically containing a choice school in proportion to the

choice school's established entitlement from that district. *Id.* § 15(5). Choice schools may not charge tuition. *Id.* § 15(6)(a). They may, however, raise funds privately and retain those proceeds for use by the school. *Id.* § 15(8), (9).

House Bill 562 is now in effect. *Id.* § 21. Nevertheless, the creation of the structure envisioned by HB 562 will take time to implement. The first step—appointment of the members of the School Choice Commission—is underway[3], as the statute requires that it be accomplished by August 30, 2023. *See id.* § 4(5)(b) (appointment of initial commissioners must be made within sixty days of HB 562's effective date).

B. House Bill 549

Although it is not part of this litigation, HB 549, the Public Charter Schools Act, establishes contrasts with HB 562 that are useful in understanding HB 562's conformity with the Montana Constitution and in evaluating the propriety of preliminary injunctive relief.

House Bill 549 was signed the same day as HB 562 and also took effect July 1, 2023. Like HB 562, HB 549 promises the creation of schools—termed "charter schools" or "charter school districts"—with autonomy over curriculum, personnel, finances, and other matters. Unlike HB 562, however, there is no parallel structure: instead, charters are negotiated between governing boards—consisting either of an elected school board of trustees or the board of trustees of a charter school district (elected in the same manner as traditional trustees)—and the Board of Public Education. HB 549, §§ 3(2) – (5), (9), 4(1)(d).

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[3] *See* State of Montana Newsroom, "Governor Gianforte Makes Appointments to Community Choice School Commission," Available: https://news.mt.gov/Governors-Office/Governor_Gianforte_Makes_Appointments_to_Community_Choice_School_Commission.

In the case of a public charter school district, the governing board's members are elected by all qualified electors of the county in which the charter school is located. *Id.* § 7(2). Moreover, unlike HB 562, there is no general exception from the provisions of Title 20 and implementing regulations. *Id.* § 11(1)(c). Teachers must be certified, *see id.* § 11(1)(c), (8), and they have no exclusion from the state retirement systems. Only "public charter school districts"—that is, those governing boards contracting directly with BPE that are not traditional public school district boards of trustees—are solely responsible for their debts. *Id.* § 12(7).

C. Plaintiffs

Plaintiffs consist of a coalition of teachers, parents, and organizations. According to the Complaint, individual Plaintiffs Jessica Felchle, Beau Wright, Linda Rost, Lance Edward, and Corinne Day are all public school teachers. Plaintiff Sharon Carroll is a retired teacher and former BPE member. Suzanne McKiernan is a former local school board member, and Penelope Copps is a retired teacher and former local school board member. Many individual plaintiffs have children currently or formerly enrolled in Montana public schools. All appear to be Montana residents, property owners, registered voters, and qualified electors of the school districts in which they reside. Corinne Day has substantial experience teaching on Indian reservations and has a professional focus on Indian Education for All.

The organizational plaintiffs are the Montana Quality Education Coalition, an organization that describes itself as "advocat[ing] for adequate and equitable public school funding and to defend the Montana Constitution's guarantee of free quality public education" and avers that it represents the

interests of more than one-hundred school districts and "innumerable teachers, trustees, and administrators." (Comp., ¶ 16.) The League of Women Voters, the final plaintiff, asserts an interest in defending the protections of the 1972 Montana Constitution. It is comprised of members who must be Montanans aged sixteen or older, and whose mission includes advocacy around voter rights.

D. Implementation of HB 562

House Bill 562 was signed into law on May 18, 2023. According to the affidavit of Plaintiff Suzanne McKiernan, on May 30, a prominent advocate of HB 562 gave an interview indicating that various individuals were focused on establishing choice schools in Billings. An organization named Community Choice Charter Schools for Montana has established a website with events around implementing HB 562. By statute, the Commission's by-laws and officers must be approved by December 28, 2023. *See* HB 562, § 4(10). The legislature has indicated its intention that the first-choice schools begin operating by the 2024-2025 school year. *Id.* § 18.

STANDARDS

A preliminary injunction is governed by the following standard:

> (1) A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that:
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> (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.

Mont. Code Ann. § 27-19-201(1) (2023). The statute is intended to mirror the standard for preliminary injunctions found in federal law as established by *Winter*

v. Natural Res. Defense Council, Inc., 555 U.S. 7, 20 (2008), and its progeny. *See* Mont. Code Ann. § 27-19-201(4). The applicant for a preliminary injunction bears the burden of establishing the foregoing factors are met. *Id.* § 27-19-201(3).

The Montana Constitution is construed according to well-established principles that parallel those used for construing statutes. First, just as statutory construction is aimed at discerning the legislature's intent, the "intent of the Framers controls the Court's interpretation of a constitutional provision." *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. Second, the Framers' intent is ordinarily discerned "from the plain meaning of the language used" except where the language is ambiguous. *Nelson*, ¶ 14. Third, the Framers' intent must be evaluated "in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Nelson*, ¶ 14. Stated differently, courts interpret the Montana Constitution by examining the text, history, and purpose of the relevant portions of the Montana Constitution as well as the Supreme Court's subsequent opinions construing the Constitution. *McDonald v. Jacobsen*, 2022 MT 160, ¶ 57, 409 Mont. 405, 515 P.3d 777.

DISCUSSION[4]

To resolve the Plaintiffs' motion, the Court must first consider whether this case is justiciable, and then whether the Plaintiffs have met their burden of establishing a preliminary injunction is warranted under Mont. Code Ann. § 27-19-201(1).

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[4] The following constitutes the Court's conclusions of law. Mont. R. Civ. P. 52(a)(2).

A. Justiciability

Justiciability—an umbrella term embracing, among other things, concepts of standing and ripeness—is a threshold issue in every case. *State v. Whalen*, 2013 MT 26, ¶ 40, 368 Mont. 354, 295 P.3d 1055. The State claims Plaintiffs lack standing because HB 562's implementation "will be far from immediate, but rather an intricate process involving many parties," and the Plaintiffs' injuries are speculative. (Defs.' Br. in Opp'n to Mot. for Prelim. Inj., Dkt. 10 at 6.) Though labeled a standing challenge, the State's argument can be alternatively classified as a contention that the Plaintiffs' claims are unripe. *See Twitter, Inc. v. Paxton*, 56 F. 4th 1170, 1174 (9th Cir. 2022) (in pre-enforcement challenges, the standing and ripeness factors are substantively similar).

Standing derives from the requirement that the judicial power extends only to cases or controversies, and it requires the plaintiff to "clearly allege a past, present, *or threatened* injury to a property or civil right, and the injury must be one that would be alleviated by successfully maintaining the action." *Reichert v. State*, 2012 MT 111, ¶ 55, 365 Mont. 92, 278 P.3d 455 (emphasis added). Ripeness addresses the "or threatened injury" category: it asks, "whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication." *Reichert*, ¶ 55. Ripeness doctrine derives both from the constitutional limits of the judicial power and prudential self-imposed judicial restraints on the exercise of jurisdiction. *Reichert*, ¶ 56. The constitutional aspect of ripeness review focuses on "whether the issues presented are definite and concrete, not hypothetical or abstract." *Reichert*, ¶ 56. The prudential aspect focuses on "weighing the fitness

of the issues for judicial decision and the hardship of the parties of withholding court consideration." *Reichert*, ¶ 56.

The Court agrees with the State that the impacts of HB 562 on the State's treasury and on public school districts are likely to be minor in the very short term.[5] By statute, however, the School Choice Commission has already begun to form as of August 30, 2023. It will have adopted by-laws by the end of the year, and it can start exercising its statutory functions of receiving, reviewing, and approving requests both for authorizers and for direct-authorized choice schools. Plaintiffs allege that this itself represents constitutional injury to them because the School Choice Commission—and not the Board of Public Education or their elected local boards of trustees constitutionally charged with supervising public education—will be undertaking these duties.

Additionally, Plaintiffs have produced affidavits and other evidence demonstrating that there is indeed interest in establishing and operating choice schools, including in Yellowstone County, the county of residence for many of the individual Plaintiffs. The legislature has further adopted "a goal of having operating choice schools for the school year beginning July 1, 2024." HB 562 § 18. Thus, school districts stand to have their BASE aid funding reduced by August 2024. *See id.* § 15(4). Whether this is outweighed by the beneficial effects of choice schools or not—a matter of dispute—it nevertheless represents an "injury" to the teachers and parents of children enrolled in traditional public schools for the purposes of standing analysis. *See E. Bay Sanctuary Covenant v.*

[5] The Court takes judicial notice of the legislative fiscal note for HB 562, which estimated that the general fund would be impacted by only $59,338 in FYE 2024 to over the cost of a single FTE. HB 562 Fiscal Note (Apr. 17, 2023). Available: https://leg.mt.gov/bills/2023/FNPDF//HB0562_2.pdf.

Trump, 932 F.3d 742, 767 (9th Cir. 2018) (a loss of even a small amount of funding to an organization constitutes an injury for standing purposes).

Thus, this is not a case where the ultimate implementation of HB 562 is uncertain or contingent. Rather, Plaintiffs have established that choice schools are likely to begin operation by the next school year. Indeed, the Supreme Court has found ripe claims in circumstances more contingent than the ones at issue here. In *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997), plaintiffs in same-sex relationships could challenge a law criminalizing same-sex adult consensual sexual conduct even absent any evidence of past or impending prosecutions under the law. In *Reichert*, a challenge to a referendum was ripe even though the harm would not accrue unless the referendum was adopted by the voters. *Reichert*, ¶ 58.

Likewise, the exercise of jurisdiction is appropriate on prudential grounds. Although choice schools are a year out from beginning operations, the next year will involve substantial work by school districts seeking to become authorizers, by entities seeking to be approved to operate a choice school, and by school districts trying to anticipate the effects on their local budgets. To require Plaintiffs to put their lawsuit on ice until that day is closer at hand would be to court chaos: in particular, any decision in favor of Plaintiffs at that time would lay waste to the investments of time and money by prospective choice schools, by parents seeking to enroll their children in such schools, and by school districts trying to forecast their own budgets. Finally, many of the Plaintiffs' challenges are based on the structure of the law itself, a structure that is known today and can be assessed without waiting to see how the State chooses to implement choice schools. The Court concludes Plaintiffs' claims are ripe.

Plaintiffs have adequately pled—and are likely to show at trial—that they have standing, and their claims are ripe. The Court therefore turns to the merits of the application for a preliminary injunction.

B. Likelihood of Success on the Merits

To obtain a preliminary injunction, Plaintiffs must first demonstrate that they are likely to succeed on the merits of at least some of their claims. Plaintiffs have challenged the statute on multiple grounds. For the reasons that follow, the Plaintiffs have met their burden of demonstrating they will likely succeed on the merits of the following claims:

(1) that the School Choice Commission's powers and duties invade the general supervisory authority vested in the Board of Public Education by Article X, Section 9(3) of the Constitution;

(2) that to the extent the School Choice Commission may directly authorize and enter into charters with choice schools, it invades the authority vested in local school boards of trustees by Article X, Section 8 of the Montana Constitution; and

(3) that the limited franchise of choice school governing boards violates the equal protection rights guaranteed by Article II, Section 4 of the Montana Constitution to other qualified electors in the school district where the school is located.

1. Will Plaintiffs likely demonstrate that the School Choice Commission improperly exercises power constitutionally delegated to the Board of Public Education?

Plaintiffs contend in Count II of the Complaint that the School Choice Commission improperly exercises authority given to the Board of Public

Education by Article X, Section 9 of the Montana Constitution. The relevant portion of that section provides:

> There is a board of public education to exercise general supervision over the public school system and such other public educational institutions as may be assigned by law. Other duties of the board shall be provided by law.

Mont. Const. art. X, § 9(3)(a).

The term "general supervision" originates in the 1889 Constitution, which provided: "The general control and supervision of the state university system and the various other state educational institutions shall be vested in a State Board of Education, whose powers and duties shall be prescribed and regulated by law." 1889 Mont. Const. art. XI, § 11. The Montana Supreme Court later held that this provision conferred "general control over and supervision of all state educational matters, including district and high schools." *State ex rel. Sch. Dist. No. 29, Flathead County v. Cooney*, 102 Mont. 521, 525–527, 59 P.2d 48, 51–52 (1936). The Supreme Court's examples of this authority included authority (also found in statute) to prescribe and enforce accreditation standards and to adopt administrative rules. *Id.* at 525, 59 P.2d at 51. This Court has previously held that "general supervision" means the BPE has self-executing rulemaking authority to implement the statutes it oversees. *Mont. Bd. of Pub. Educ. v. Mont. Admin. Code Ctte.*, Cause No. BDV-91-1072, 1992 Mont. Dist. LEXIS 204 (1st Jud. Dist. Ct., Mar. 1, 1992).

At the same time, the Board of Public Education lacks the same robust autonomy over public schools that the Board of Regents has over the university system. The Board of Regents—whose authority is described in the

Constitution as not just "general supervision" but "full power, responsibility, and authority to supervise, coordinate, manage, and control" public universities—has near-plenary authority over the university system. *See Bd. of Regents of Higher Educ. v. State*, 2022 MT 128, ¶¶ 12–18, 409 Mont. 96, 512 P.3d 748. By contrast, the Board of Public Education's authority is described only as the same "general supervision" that the pre-1972 State Board of Education exerted over the university and public school systems alike.[6] Notably, the Supreme Court has described the pre-1972 regime as one of "absolute [legislative] authority over the Board [of Education]." *Bd. of Regents*, ¶ 12. Moreover, the Framers of the 1972 Constitution anticipated that the Board of Public Education would retain substantially the same authority over public schools that the old State Board of Education possessed. *See* Mont. Const. Conv., Committee Proposals, vol. II 735 (Feb. 22, 1972) (explaining that "the powers granted the state board [of public education] would be almost identical to the powers now granted the [state] board [of education]"). And before and since, the legislature has often directly legislated on matters of primary and secondary education. *See generally* tit. 20, Mont. Code Ann.

Nevertheless, despite the legislature's authority to legislate in the field of education, the Board remains the arm of the executive branch charged with executing and administering the laws regarding public primary and

[6] Before 1972, the old State Board of Education had "general *control* and supervision" over the public school system. 1889 Const. art. XI, § 11. The delegates to the Convention removed the term "control" when they transferred this power to the Board of Public Education, but they did so only to ensure that the authority of local boards of trustees over the public schools they administer was preserved. *See* Mont. Const. Convention proceedings, Committee Proposals, v. II 735 (Feb. 22, 1972) ("Indeed, the committee has actually deleted the word 'control' from the powers granted the board. . . . It would be difficult to argue that this grants any additional powers to the state board at the expense of local school boards.").

secondary education. *See Sheehy v. Comm'r of Political Practices*, 2020 MT 37, ¶ 47, 399 Mont. 26, 458 P.3d 309. Indeed, the legislature's authority to circumscribe that grant of executive power has been curtailed by the 1972 Constitution. While the 1889 Constitution provided that the State Board of Education's authority was subject to "powers and duties. . . prescribed and regulated by law," 1889 Const. art. XI, § 11, the 1972 Constitution removed that language. Under the current Constitution, the legislature can "assign[]" authority over "other public educational institutions" to the Board of Public Education, and it can "provide[]" for "[o]ther duties" of the Board. By contrast, nothing in the Constitution allows the legislature to regulate or limit the scope of the executive authority vested in the Board. Indeed, in one of the few cases addressing the scope of the Board of Public Education's power, the Supreme Court rebuffed efforts to transfer authority away from the Board. *Board of Public Education v. Judge*, 167 Mont. 261, 538 P.2d 11 (1975) (holding the legislature could not constitutionally transfer oversight over vocational education from the Board of Public Education to the umbrella State Board of Education).

The foregoing demonstrates that while the legislature may *add* to the scope of the Board's responsibilities, it may not *subtract* from them. Indeed, the legislature can no more transfer the Board's constitutionally sanctioned executive powers to another body than it could transfer the duties and powers of the Governor or the Attorney General to a new office of the legislature's creation.

House Bill 562 takes some of this authority away from the Board of Public Education. It creates the School Choice Commission and gives it authority to supervise part of the public school system. Specifically, the Commission—and not the Board—is charged with implementing HB 562 by

approving local school boards as authorizers and overseeing those local school boards in their exercise of authorizer duties. The Commission can also act directly as an authorizer, approving and negotiating charters with choice schools.

By design, choice schools are intended to provide the same general instruction and education to K-12 students that a traditional public school would do. Indeed, the legislature has declared choice schools to be public institutions. HB 562, § 3(5) ("'Community choice school' or 'choice school' means a *public* school"). Thus, choice schools are indeed part of the "public school system," the supervision of which can be vested only in the Board of Public Education (albeit supervision shared with local school boards of trustees). Under Article X, Section 9(3), the general supervision of a public choice school system cannot be given to another body.

To be sure, the Commission is nominally placed under the "general supervision" of the Board of Public Education with the proviso that this general supervision is "as set forth in this section." HB 562, § 4(1). "This section," however, provides for only limited involvement by the Board of Public Education: (1) the Board may provide support staff and certain centralized services to the Commission "if those services are determined by the commission and the board to be more efficiently provided by the board"; and (2) the Commission must submit an annual report to the Board. *Id.* § 4(9), (12). Section 4 also provides for the Commission to be attached to the Board for administrative purposes, but this is a limited relationship: administratively attached agencies "function[] independently" of the attached department. Mont. Code Ann. § 2-15-121(1)(a). The attached department only has authority over ministerial and

internal administrative matters—e.g., office space, budgeting, accounting, staffing, printing, and reporting. *Id.* § 2-15-121(2).

With respect to choice schools, the Commission has authority under HB 562 to act directly as a choice school authorizer, HB 562 § 5(1); to approve or deny applications by local school boards to act as choice school authorizers, *id.* § 4(2); to enter into authorizing contracts with local school boards, *id.* § 4(5); to establish a mechanism for authorizer funding, *id.* § 7(1)(a); to engage in oversight over local school boards in their capacity as authorizers, *id.* § 7(2); to receive annual reports from each authorizer, *id.* § 12(4)(b), and when necessary, to revoke a participating school district's authorizing authority, *id.* § 7(8). HB 562 does not give the Board a role in supervising or regulating any of these functions of the Commission. It also does not provide a role for the Board in reviewing or hearing appeals of decisions made by the Commission. Any attempted rulemaking by the Board on these matters would inevitably clash with Section 4's admonition that the Commission be "autonomous", and that the Board's general supervision only exists "as set forth in" Section 4 of HB 562. *Id.* § 4(1).

The State argues that Article X, Section 9(3)(a) allows the legislature to give the Board oversight over "such other public educational institutions as may be allowed by law." Indeed, if the Commission were indeed functionally subordinate to the Board, the legislature could constitutionally create a school commission under the supervision of the Board. But here, the legislature appears to have placed the Commission under the general supervision of the Board in name only. *See* Mont. Code Ann. § 1-3-219 ("The law respects form less than substance."). Because Plaintiffs are likely to show the Commission is

functionally independent of the Board and because the Commission likely exercises general supervision over the public school system as the regulator of school boards seeking to be or serving as choice school authorizers, Plaintiffs are likely to demonstrate that HB 562 unconstitutionally deprives the Board of its general supervision authority in violation of Article X, Section 9(3) of the Montana Constitution.

2. Will Plaintiffs likely demonstrate that HB 56 unconstitutionally undermines the authority of local school boards of trustees?

Plaintiffs contend in Count I of the Complaint that HB 562 undermines the constitutional authority of school boards of trustees. The 1972 Constitution provides:

> The supervision and control of schools in each district shall be vested in a board of trustees to be elected as provided by law.

Mont. Const. art. X, § 8. As with Article X, Section 9(3), the Court must first identify the scope of school boards' "supervision and control" to determine whether HB 562 contravenes it.

The current language of Article X, Section 8 resulted from a floor amendment at the Constitutional Convention. The amendment sponsor, Delegate George Heliker, explained that he proposed this language because he was concerned that as school funding became increasingly a matter of state control, local school boards would lose their autonomy. Mont. Const. Convention proceedings, Verbatim Tr. 2046 (Mar. 11, 1972). He likened his proposal to the autonomy conferred on the Board of Regents:

> I became aware. . . that there are grounds for concern of. . . the autonomy of the local control, the local school boards, as financing of the schools gravitates toward the state more and more and as we see in the future the increasing likelihood that it—there will be a continuation of that trend. And the fear has been expressed here. . . that the local school boards would lose autonomy as they lost their control over the funds if they do.
>
> Now, this committee has not provided, I notice, for autonomy in the Constitution for local school boards, although that autonomy is provided in the statutes which make the local school boards bodies corporate. At the same time, however, the committee proposal in Section 11 provides for autonomy to a certain extent for the Board of Regents, which they propose to establish as a constitutional board. And I feel, therefore, that we should give constitutional recognition and status of the local boards to—first of all, to allay the fears which have been expressed, which I think are well founded, 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.

Id. The chair of the Education and Public Lands Committee, Delegate Rick Champoux, voiced his support: "By this amendment, the intent is shown, I think, that this. . . body does want local control to remain with the local school districts, and I heartily support it." *Id.* at 2047. Delegate Heliker's floor amendment was adopted by voice vote, and it ultimately made its way to the Constitution as enacted.

The foregoing, however, has not been interpreted to mean school boards are as insulated from legislative oversight as the Board of Regents. In *School Dist. No. 12 v. Hughes*, 170 Mont. 267, 552 P.2d 328 (1976), the Supreme Court held that the purpose of Article X, Section 8 was to preserve the local

control that school boards traditionally possessed, not to expand their authority. *Hughes*, 170 Mont. at 273, 552 P.2d at 331. The court observed that the board's powers had always been subject to legislative control, with the board possessing inherent authority to act on its own on those subjects that have not been legislated. *Id.* at 274, 552 P.2d at 332. Thus, the court refused to invalidate a law allowing teacher dismissals to be appealed to the county superintendent and then the superintendent of public instruction, reasoning that the Convention delegates must have approved of the practice because these statutes had long been in effect at the time of the Convention. *See id.*

Moreover, a school board can choose to delegate some of its control, at least for finite periods of time. In *Grabow v. Mont. High School Ass'n*, 2002 MT 242, 312 Mont. 92, 59 P.3d 14, a Park High School student was denied eligibility to play interscholastic basketball under the rules of the Montana High School Association (MHSA). *Grabow*, ¶ 6. MHSA was not itself a state agency or part of any school district; rather, it was a private nonprofit association that regulated interscholastic activities among its member high schools. *Grabow*, ¶ 7. In *Grabow*, the board of trustees for Park High School's school district had voluntarily agreed to join MHSA and be bound by its rules, a status that the board ratified annually. *See Grabow*, ¶¶ 8–9. The Supreme Court affirmed the denial of Grabow's contention that the board of trustees had unconstitutionally delegated its authority to MHSA. Emphasizing that membership in MHSA was a voluntary choice of a school district, the court declined to find a delegation in derogation of Article X, Section 8. *Grabow*, ¶¶ 27–30.

Grabow is good law and binding on this Court. Its implications here are clear: with one exception (to be addressed momentarily), choice schools

will only operate in those school districts where the school board of trustees has opted to apply to be a choice school authorizer. Moreover, authorizer status is not permanent, but rather is assessed first on a six-month and then on a year-to-year basis. *See* HB 562 § 5(4) – (6). Likewise, HB 562 provides for a process for charter contracts to be terminated or nonrenewed. *See id.* § 13. Because it is a voluntary arrangement that can be periodically revisited, *Grabow* suggests that Plaintiffs are not likely to succeed in their claim that local boards unconstitutionally delegate their authority under Article X, Section 8 by choosing to become authorizers or enter into charters with choice schools.

There is a separate and more difficult question whether HB 562 invades the constitutional authority of boards of trustees to the extent it permits the Commission to directly authorize choice schools, bypassing the local school boards. One might suggest this is fine under *Hughes. Hughes*, however, addressed a far more limited regulation on a school board's authority: it merely upheld a longstanding administrative appeals process for teacher dismissal decisions made in the first instance by the school board. And importantly, the court in *Hughes* expressly declined to address whether it would have reached the same conclusion had the appeals process there challenged not been in place in 1972: "Whether or not the statutes would have been constitutional if enacted after the Constitution was adopted is a question not decided here." *Hughes*, 170 Mont. at 275, 552 P.2d at 332. This Court therefore confronts a different situation than in *Hughes* when faced with a novel statute that allows a body not recognized in the Constitution to effectively create choice schools that a local school board has decided not to establish.

Although school boards are generally subject to legislative control, the fact remains that the Framers consciously sought to enshrine the principle of local control in the Constitution. As Delegate Champoux, explaining the removal of the word "control" from the description of the Board of Public Education's authority, stated, "Again, we want to emphasize that we want the local public school boards to have as much power as possible." Mont. Const. Convention proceedings, Verbatim Tr. 2050 (Mar. 11, 1972). Indeed, school boards are granted such autonomy precisely because their members are democratically accountable to the voters in their district:

> A wide discretion is necessarily reposed in the trustees who composed the board. They are elected by popular vote, and, presumably, are chosen by reason of their standing in the community, sound judgment, and their interest in the educational development of the young generation which is so soon to take the place of the old.

Kelsey v. Sch. Dist. No. 25, 84 Mont. 453, 457, 276 P.2d 26 (1929).

Moreover, as with the Board of Public Education, while the legislature can dictate educational policy through legislation, the legislature cannot transfer the executive power to enforce those policies to a body not vested with that authority by the Constitution. Under HB 562, however, the Commission can establish a choice school in a district even if the school board opts not to become an authorizer. Moreover, because the charter is with the Commission and not the school board, the school board has no say in the oversight of those choice schools. In these instances, the boards of trustees lack "supervision and control of" directly authorized choice schools in their district, in seeming contravention of both the plain text of Article X, Section 8 and the principle of local control it

embodies. Thus, in the case of direct authorization, Plaintiffs are likely to succeed on the merits of their Article X, Section 8 claim.

3. Will Plaintiffs likely show that the election method for governing boards violates equal protection or the right to suffrage?

Plaintiffs contend in Count III that by limiting elections for governing boards to parents and guardians of enrolled choice schools and school employees, HB 562 violates the right of suffrage held by other qualified electors excluded from the vote. They contend in Count IV that the limitation on the electorate for governing boards violates their equal protection rights regarding the exercise of their fundamental right of suffrage.

Unlike the federal constitution, Montana has an express provision in the Constitution conferring on all Montanans aged eighteen or older (other than incarcerated felons and those found by a court to be "of unsound mind") a fundamental right of suffrage. Mont. Const. art. II, § 13; Mont. Const. art. IV, § 2; *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 19, 410 Mont. 114, 518 P.3d 58. Montanans are also guaranteed equal protection of the laws. Mont. Const. art. II, § 4; *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 14, 314 Mont. 314, 65 P.3d 576. Because the right to vote is fundamental, laws creating classifications that burden the right to vote for one class but not another are subject to strict scrutiny. *Finke*, ¶ 15.

An argument can be made that the legislature did not need to make choice school governing boards democratically elected at all. Article X, Section 8 provides only that each school district has a board of trustees "to be elected as provided by law." Except in the case of choice schools authorized directly by the Commission, the board of trustees is charged with seeking authorizer status,

approving choice schools, negotiating, and executing charters, and maintaining oversight. In all these decisions, the trustees are democratically accountable to all of the qualified electors of their school district. An unelected governing board would be little different from the many different appointed boards and commissions that state and local governments administer.

Nevertheless, whether governing boards need to be elected or not in the first instance, the legislature here chose to subject governing boards to membership elections. As a general matter, once it has created a right to vote for a particular office, the legislature cannot allow some voters but not others to participate without satisfying the rigors of strict scrutiny.

In *Finke*, for instance, the Supreme Court invalidated a statute creating limiting municipal building code jurisdiction to city limits and creating a special county jurisdictional area that could be adopted by a vote of the "record owners of property" in the area rather than the general population. *Finke*, ¶ 5. The Supreme Court rejected an argument that these were "special interest" elections permissibly limited to interested citizens because building codes are relevant to the public safety of everyone living in the area. *Finke*, ¶ 21. It then found the State had failed to demonstrate a compelling state interest in denying non-property owners a right to vote. *Finke*, ¶ 21. Notably, *Finke* involved a challenge to an election process that existed only because the legislature created it.

Finke relied on *Kramer v. Union School District*, 395 U.S. 621 (1969), which explained:

> 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 affects their lives.

> Therefore, if a challenged statute grants the right to vote to some [citizens] and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Kramer, 395 U.S. at 626–627. *Kramer* invalidated a statute that limited school board elections only to property owners.

These cases are functionally indistinguishable from the situation created by HB 562. The existence of a choice school within the boundaries of a school district affects everyone residing within a given school district. It creates an enrollment opportunity most readily exercised by students attending public schools in the district. Every qualified elector in the district has an interest in the education of the next generation. Also, the competition generated by a choice school directly affects the traditional public schools in the district, giving every parent, teacher, and employee of those schools an interest in having a say in how the governing body manages its choice schools in the district. Also, by operation of law the Superintendent diverts BASE aid funding to the district where the choice school is located to the coffers of the choice school. Thus, all the taxpayers of the jurisdiction have an interest in how their tax dollars are used. There is no compelling interest in excluding electors merely because they are not employed or enrolled in the school. Accordingly, Plaintiffs are likely to succeed in their claim that HB 562 violates the equal protection rights of qualified electors of the school district where a choice school is located.

4. Will Plaintiffs Likely Show that HB 562 Deprives Students of a Basic System of Quality Education?

In Count V of the Verified Complaint, Plaintiffs argue that HB 562 deprives students of equality of educational opportunity and deprives them of a quality education. The Montana Constitution provides:

> (1) 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.
>
> (2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.
>
> (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. 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 basic elementary and secondary school system.

Mont. Const. art. X, § 1.

The Court concludes that the Plaintiffs have not demonstrated a likelihood of success on the merits. This conclusion is driven by the allocation of the burden of proof: in a preliminary injunction, it is on the applicant. Mont. Code Ann. § 27-19-201(3). The Montana Supreme Court has twice found the legislature's fulfillment of this guarantee lacking. *See Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257; *Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989). Both decisions,

however, followed extensive multi-week trials evaluating many facets of the then-existing school funding regimes and the resulting impact on educational quality. *See Columbia Falls*, ¶¶ 10, 28–30; *Helena Elem.*, 236 Mont. at 48–51, 769 P.2d at 686–688. The record here is comparatively bare and this case remains in its earliest stages. Plaintiffs may yet establish a violation of Article X, Section 1, but they have the burden of convincing the Court that they are likely to prevail, and the Court cannot assess their likelihood of success on the limited record now before it.

5. Will Plaintiffs likely establish that HB 562 unlawfully diverts school funding from the public school fund?

Plaintiffs contend in Count VI that HB 562 unconstitutionally, diverts money from the public school fund. The State maintains that no improper diversion occurs because choice schools are public entities and part of the public school system. The Court agrees that the State is likely correct.

The relevant provision of the Constitution states:

> The public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion.

Mont. Const. art. X, § 3. The public school fund is a permanent fund established by the Constitution and includes revenues derived from state trust lands, escheated property and dividends, federal grants, and gifts to the state for general educational purposes. Mont. Const. art. X, § 2. All distributable revenue from the public school fund is deposited in a guaranteed account that is statutorily appropriated for distribution to school districts as school equalization aid. Mont. Code Ann. § 20-9-622(1)(b). State equalization aid is distributed to public schools as part of their BASE aid distribution. *Id.* §§ 20-9-308(a); 20-9-343(1).

Plaintiffs contend that by diverting BASE aid to what they label "privatized schools," the State is unconstitutionally diverting the public school fund.

The inviolate public school fund derives from Article XI, Section 3 of the 1889 Constitution. It was created in implementation of the Enabling Act, which included a land grant to the State of Montana "for the support of the common schools," with the revenues from such lands intended to "constitute a permanent school fund, the interest of which only shall be expended in the support of said schools." Act of Feb. 22, 1889, 25 Stat. 676, 679. The Enabling Act's land grant established a trust obligation in the State for the benefit of public schools and for future generations of Montanans. *Montanans for the Responsible Use of the Sch. Trust v. Darkenwald*, 2005 MT 190, ¶ 24, 328 Mont. 105, 119 P.3d 27. The question, however, is what constitutes a "public school" within the meaning of Article X, Section 3.

The term "public school" descends from "common school," which is traditionally understood to refer to a system of free, publicly funded schools open to school-age children. *See, e.g., State ex rel. Ronish v.* 136 Mont. 453, 458–459, 348 P.2d 797, 800 (1960). Likewise, the term "public school" has traditionally been understood as meaning a "school established and maintained at public expense and comprising the elementary grades, and when established, the grades of high school work." *Rankin v. Love*, 125 Mont. 184, 188, 232 P.2d 998, 1000–1001 (1951). This definition appears to have still been in use near the time of the Convention. *See State ex rel. Chambers v. Sch. Dist. No. 10*, 155 Mont. 422, 439, 472 P.2d 1013, 1022 (1970). Indeed, this definition remains embedded today in statute. *See* Mont. Code Ann. § 20-6-501(1) ("As used in this title, unless the context clearly indicates otherwise, the term "school" means an

institution for the teaching of children that is established and maintained under the laws of the state of Montana at public expense."). The 1972 Constitution was drafted against the background of pre-existing law, and therefore the terms and concepts it uses must be examined in light of well-established legal systems and principles then in use. *Nelson v. City of Billings*, 2018 MT 36, ¶ 15, 390 Mont. 290, 412 P.3d 1058. Thus, the historical understanding of what constitutes a "public school" informs the construction of Article X, Section 3.

Ultimately, this history will likely decide the matter. Given the historical background, the Framers likely understood a public school simply to be a publicly funded primary or secondary school generally open and free to all children of a district. A choice school's structure is radically different from and much less regulated than that of a traditional public school, but it does tick off these basic elements of the common understanding of "public school." First, the primary funding mechanism for choice schools is allocations of State BASE aid funding from both resident school districts and the district in which a choice school is located. *See* HB 562 § 15. Although choice schools can raise private funds as well, *id.* § 15(8) – (9), they are primarily maintained at public expense, *see id.* § 15(1) (expressing legislative intent that "choice school[s] receive 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"). Second, choice schools must be open to all students, subject only to some limitations allowing them to customize themselves to certain ages and special needs. *See id.* § 11(1), (4). Third, choice schools are free to enrollees, as they are prohibited from charging tuition or assessing fees beyond what an

ordinary public school could assess. *Id.* § 15(6). Accordingly, choice schools are likely public schools as contemplated by the Montana Constitution.

This conclusion is in line with the majority of jurisdictions who have considered similar challenges. *See, e.g., Iberville Parish Sch. Bd. v. La. State Bd. of Educ.*, 248 So. 3d 299 (La. 2018) (upholding diversion of constitutional public school funding to charter schools because they were deemed to be public schools). Caution should be exercised when relying on holdings in other jurisdictions, as these decisions turn on the sometimes idiosyncratic constitutional text and traditions of each state. Nevertheless, state courts elsewhere have nearly uniformly held that charter schools satisfy the definition of "public schools" or "common schools" within the meaning of their state constitutions. *See* Derek W. Black, *Preferencing Educational Choice: the Constitutional Limits*, 103 Cornell L. Rev. 1360, 1408–1409 (2018) (discussing cases); Nicole Stelle Garnett, *Decoupling Property and Education*, 123 Colum. L. Rev. 1367, 1409 n. 218 (2023) (collecting cases rejecting charter school challenges); *but see League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (holding that charter schools were not "common schools" for purposes of a similar non-diversion clause of the state constitution)[7]. The Fourth Circuit also recently held that charter schools are public schools for the purpose of the state action doctrine in federal civil rights litigation. *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022).

Plaintiffs raise many concerns with the lack of regulation attendant to choosing schools that may yet prove relevant to their claim that the legislature

[7] Professor Black attributes Washington's against-the-stream decision as a consequence of an idiosyncratic definition of "common schools" from prior cases. Black, *Educational Choice*, supra, at 1409.

has failed its mandate of delivering equality of educational opportunity and a basic system of free quality public education. However, the broad exemptions from regulations do not undermine the nature of a charter school as a likely "public school" given the historical meaning of that term. Accordingly, the Plaintiffs are not likely to succeed on the merits of their Article X, Section 3 claim.

C. Irreparable Injury

Plaintiffs appear likely to succeed at least in part on their claims in Counts I, II, and IV of the Verified Complaint. The Court therefore considers whether a preliminary injunction is necessary to avert irreparable injury.

First, the Court begins by noting that constitutional injury generally *is* irreparable injury. *de Jesus Ortega Melendras v. Arpaio*, 695 F.3d 990 (9th Cir. 2012); *Planned Parenthood of Mont. v. State*, 2022 MT 57, ¶ 60, 409 Mont. 378, 515 P.3d 301. Plaintiffs will likely show that they are constitutionally injured when choice school authorizer decisions are made by a body exercising *ultra vires* authority. *See Brown v. Gianforte*, *See Brown v. Gianforte*, 2021 MT 149, ¶¶ 14–19 404 Mont. 269, 488 P.3d 548 (citizens had standing to challenge amendments to judicial nomination statutes because they would be injured by the *ultra vires*, and therefore void, acts of an improperly nominated judge).

Second, once governing boards are elected, all voters who are not choice school employees and who do not have children enrolled in the choice school governed by the board will likely be disenfranchised. Disenfranchisement is an irreparable injury. *See Jacobsen*, ¶ 32.

Third, when choice schools begin operating, some money designated for traditional public schools will be transferred to them, and traditional public schools will be put in competition with choice schools for enrollment and funding. Whether this is ultimately a good, bad, or mixed phenomenon for education is not for the Court to determine here. It suffices to say that the loss of funding to traditional public schools is an "injury" for constitutional purposes, and it is irreparable because an *ex post* remedy down the road has little effect on the experience of the students enrolled today. Because children are constantly developing, there are few true opportunities for do-overs in their education.

The State emphasizes this Court's reasoning in denying Plaintiffs a temporary restraining order, noting the multiple steps that must take place before choice schools begin to operate. The relevant time horizon for a preliminary injunction, however, is longer than that of a temporary restraining order. By 2024, there is every reason to expect that the Commission will be reviewing and approving authorizers, that choice schools will hold elections for governing boards, that authorizers will begin approving choice schools and negotiating charters, and that at least some such schools will be ready to open their doors in the fall of 2023. Even if this case moves swiftly in the district court—always a challenge given the many other time-sensitive demands on the Court's time—at least one party (and possibly both) will likely appeal to the Montana Supreme Court. The Court finds it unlikely that a final judgment will be rendered before schools open and the injuries claimed by Plaintiffs accrue. Accordingly, the Plaintiffs have established they will likely suffer irreparable injury should they fail to obtain preliminary relief.

D. Balance of the Equities and the Public Interest

Because this is a public law action brought against the State, the Court considers the balance of equities and the public interest together. *Porretti v. Dzurenda*, 11 F. 4th 1037, 1050 (9th Cir. 2021). Balancing the equities requires the Court to "balance the competing claims of injury and. . . consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987)). In weighing the equities, the Court also remains mindful that because preliminary injunctions are extraordinary remedies, they should be no broader than necessary to minimize harm to provide necessary relief. *See Gearhart Indus. v. Smith Int'l*, 741 F.2d 707, 715 (5th Cir. 1984).

Plaintiffs contend that if an injunction is not issued while this litigation is pending, the Commission will exercise authority it cannot have, governing boards will be formed with members in whose election Plaintiffs have no say, and traditional public schools they support will have their resources diverted to fund these new schools. As noted above, Plaintiffs have shown that these claimed injuries are irreparable in nature.

On the other side of things, there are undoubtedly parents throughout the state who are dissatisfied with their public schools, who find that their current schools do not meet their children's needs, or who otherwise want to explore alternatives for educating their children. The legislature found in enacting HB 562 that "creating options that empower parents, encourage students to develop their full educational potential, provide a variety of professional opportunities for teachers, and encourage educational entrepreneurship is vital to

the economic competitiveness of the state." HB 562, § 2(1)(c). Just as House Bill 562 stands to alter the experience of children in traditional schools who cannot get that time in their education back, the same can be said for the impact of a failure to implement HB 562 on parents who want their children to be educated in an alternative model but who currently lack the time and resources to place their children in a private or home school setting.

Ultimately, the Court concludes the balance of equities tips in favor of Plaintiffs for two primary reasons. First, Plaintiffs have not challenged HB 549 in this litigation, and it remains in effect. Regardless of HB 562's fate, HB 549 will allow school boards and the Board of Public Education to establish charter schools that can innovate in many of the ways identified by the State. The probable constitutional defects Plaintiffs have identified here seem less likely to afflict HB 549: that bill provides for the Board of Public Education, working in concert with school boards, to authorize and regulate charter schools, *see* HB 562 §§ 4, 5, and the governing boards are either the local school board itself or a charter school district board of trustees whose members are elected in the same manner as the trustees of a traditional school board, *see id.* § 7(4). Although HB 549 is not as far-reaching as HB 562, it nevertheless represents a major change in the status quo and appears to offer many of the opportunities sought by the proponents of HB 562. Also, nothing would stop a charter school organized under HB 549 from later seeking approval as a choice school under HB 562 should the State ultimately prevail.

Second, the Court is mindful of the reliance interests engendered by House Bill 562. A preliminary injunction is only the first review of a statute. The Court's decision here may well be appealed and potentially reversed.

Regardless, litigation will continue, a record will be developed, arguments will be refined, and the final decision may well not match the preliminary one. As the Court noted earlier, to enjoin choice school operations in 2024 or later will be to sow chaos and cause harm to every person who invested in creating or enrolling in choice schools, only to have the rug pulled from under their feet. By contrast, the primary effect of an injunction issued now that is reversed or dissolved later would be not to halt the creation of choice schools under HB 562—the dynamics driving interest in choice schools is unlikely to disappear in the next few years—but instead to delay their creation.

That said, the balance of the equities does persuade the Court that it should not enjoin the Commission from bringing itself to order, writing by-laws, electing officers, and developing procedures for approving authorizers and directly authorized choice schools. Should this Court later reverse itself or be reversed, this will mitigate delay in proceeding afresh with choice schools. Additionally, the claimed injury occasioned by the Commission meeting, developing procedures, and laying the groundwork for choice schools is minimal, if anything. There was no evidence presented of a significant budgetary impact stemming from the Commission's existence. Nor is there any injury if the Commission is not actually exercising its authorizing or authorizer approval authority.

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to a preliminary injunction. In so holding, the Court does not hold Plaintiffs have shown that charter schools or choice schools are themselves likely to be *per se* unconstitutional, nor does the Court offer any opinion on the policy debate over

charter schools or choice in education generally: except in those limited circumstances where they intersect with the Constitution's requirements, these are matters for the people's elected representatives in the legislature. But the Court does find that Plaintiffs are likely to show in this litigation that in establishing choice schools, the State may not take oversight authority from the bodies constitutionally charged with supervising the public school system—the Board of Public Education and locally elected school boards—and give it instead to a body of the legislature's own creation. Likewise, if elections are to be held for the bodies governing choice schools, Plaintiffs have shown that the Constitution likely requires that those elections be shared with all the qualified electors, not the narrow subset given the franchise by HB 562. Given those conclusions and the potential for injury to Plaintiffs, preliminary relief is necessary.

Accordingly,

IT IS ORDERED:

1. Plaintiffs' Motion for a Preliminary Injunction (Dkt. 3), filed June 14, 2023, is **GRANTED in part and DENIED in part** as set forth in this Order.

2. The Court preliminarily **ENJOINS and RESTRAINS** the Governor, the Superintendent of Public Instruction, the State of Montana, and its officers, employees, agents, successors, and assigns from enforcing or executing Sections 5–16 of House Bill 562, 2023 Mont. Laws 513, until further order of the Court.

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3. The Court declines to enjoin Section 4 of House Bill 562, or to prevent the Commission from meeting, hiring staff, approving by-laws, or otherwise fulfilling its duties under that section. The Commission may not, however, approve or deny applications for authorizers or choice schools while the preliminary injunction is in effect.

4. A written undertaking is waived in the interests of justice.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

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Electronically Signed By:
Hon. Judge Christopher D. Abbott
Wed, Sep 06 2023 12:38:00 PM