**IN THE SUPREME COURT OF THE STATE OF MONTANA**
**No. DA-25-0293**

ZAYNE HERT; AMBER HERT AND KELLY HERT,
LEGAL PARENTS TO ZAYNE HERT,
*Appellants,*

v.

EXECUTIVE BOARD OF THE MHSA; BRIAN MICHELLOTTI –
EXECUTIVE DIRECTOR OF THE MHSA
*Appellees.*

# APPELLANTS' OPENING BRIEF

*On Appeal From Montana's Sixteenth Judicial District, Rosebud County, Hon. Nickolas C. Murnion (Retired) and Honorable Rennie L. Wittman*

Appearances:
NICK LETANG
Passamani & LeTang, PLLC
40 W. 14th St., Ste. 2A
Helena, MT 59601
nick@plmontana.com
*Attorney for Appellants*

ELIZABETH O'HALLORAN
Kaleva Law Office
P.O. Box 9312
Missoula, MT 59807
bohalloran@kalevalaw.com
*Attorney for Appellee MHSA/Director Michelotti*

ANDREW VIGELAND
DEBRA A. SILK
Montana School Board Association
863 Great Northern Blvd., Ste. 301
Helena, MT 59601
dsilk@mtsba.org
avigeland@mtsba.org
*Attorney for Principal Nansel Robin*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional and statutory provisions**

## STATEMENT OF LEGAL ISSUES

1. **Procedural due process.** Whether the District Court erred when it denied Plaintiffs' motion for summary judgment on the merits of their constitutional claim and instead granted the MHSA's motion for summary judgment?

3. **Mootness.** Whether the District Court erred when it granted Defendants' motion for summary judgment on grounds of mootness?

## STATEMENT OF THE CASE

Zayne Hert (hereinafter "Zayne") was formerly a high school student at Colstrip High School in Colstrip, Montana from fall 2019 to spring of 2024. During high school, Zayne treasured playing basketball with his fellow students. The undersigned attorney grew up in Colstrip, Montana and understands the importance of high school activities in small town Montana—including social development, mental maturation, and keeping otherwise idle rural kids out of mischief. The framers of the Montana Constitution also understood the importance of public education for Montana's youth, having enshrined participation in public education into Article X of the Montana Constitution. *See* Mont. Const. art. X, § 1. This non-fundamental constitutional right to public education

extends to participation in extracurricular activities—which is of equal importance to child development as classroom learning is. *State ex re. Bartmess v. Board of Trustees*, 223 Mont. 269, 275, 726 P.2d 801.

In 2020-2021, Montana students were navigating the COVID-19 pandemic. This included Zayne, who struggled with remote learning and failed several classes. During such year, Zayne was academically ineligible to participate in high school activities. Resultingly, Zayne's parents determined that it was in Zayne's best interest to do a second sophomore year so as to not overload Zayne's courseload. As part of their due diligence, Zayne's parents received confirmation from the athletics director at Colstrip High School (hereinafter "CHS") that Zayne could participate in high school activities for four years.

In the spring of 2023, CHS principal Robin Nansel informed Zayne that the MHSA determined that he would be ineligible to participate in school activities during his senior year (2023-2024). The MHSA did not give notice to Zayne of its determination directly, instead only informing Principal Nansel.

Upon appeal to the MHSA board—which was in substance an evidentiary hearing—the MHSA board voted to uphold the MHSA's prior

determination to deprive Zayne from participating in high school activities during his senior year. Both before and during the hearing, the MHSA did not provide Zayne with documents that the MHSA would rely upon. Upon conclusion of the hearing and upon taking a vote, the MHSA board gave no oral reason for its decision. In the weeks following the hearing, the MHSA issued no written basis for its decision to deprive Zayne from participating in high school activities—even upon request.

In October of 2023, Zayne filed for judicial review in Rosebud County district court seeking a preliminary injunction. After significant delay requested by the MHSA, the District Court held a hearing in January of 2024. Subsequently, the District Court denied Zayne's request for an injunction after adopting the MHSA's erroneous findings that Montana students neither have a constitutional right to extracurricular school activities nor a right to judicial review of the MHSA's decisions.

After denying preliminary relief to Zayne, the District Court proceeded to the merits of Zayne's claims.[1] (Doc. 41.) However, at this point—i.e., after adopting findings that denied the existence of constitutional protections safeguarding Montana students' right to their

[1] By this time, Zayne had graduated from Colstrip High School ("CHS").

school activities—the District Court had all but shut and locked the door to any serious inquiry about whether the MHSA's actions violated Zayne's rights under the Montana Constitution. Therefore, upon cross-motions for summary judgment, the District Court continued down the path the MHSA had let it: denying the substantive and procedural rights Zayne and Montana students enjoy under the Montana Constitution. Doc. 71 at 4. ("This Court incorporates all conclusions previously made in its January 2024 Order to this Order and applies the same.") The District Court's order also determined the merits of Zayne's case was moot while not addressing the several exceptions to the mootness doctrine briefed by Zayne. *Id.* at 5.

Zayne now appeals to this Court to vindicate the constitutional rights owed to him and all Montana students under the Montana Constitution. Zayne argues upon appeal that the District Court's orders—having adopted the MHSA's erroneous findings—erred when denying that Montana students have a constitutional interest in their extracurricular school activities that is subject to judicial review. And that the procedure afforded by the MHSA when depriving Zayne of his constitutional rights was not adequate under the Montana Constitution.

This case is important to vindicate the substantive and procedural constitutional rights that are enjoyed by Zayne and all Montana students. Currently, the MHSA denies that Montana students have a constitutional right in their extracurricular school activities. Doc 19; Doc. 34 at 12, ¶ 7. Also, the MHSA currently denies that Montana students can seek judicial review of the MHSA's decisions. Doc. 19; Doc. 34 at 10, ¶2. This is neither just nor does it comport with the Montana Constitution and this Court's case law. What happened to Zayne is capable of repetition. Without this Court's guidance here, Montana students risk decisions from the MHSA that deprive their constitutional rights—decisions that are reached upon inadequate procedure and are incapable of meaningful judicial review.

## STATEMENT OF THE FACTS

### I. Background Facts

Zayne Hert was formerly a student at Colstrip High School in Rosebud County, Montana. Due to the COVID-19 pandemic and interruption of classroom learning, Zayne finished high school in five years (fall 2019 to spring 2024). Zayne's school years are summarized as follows.

School year 2019-2020 was Zayne's freshman year of high school. This was Zayne's first year of participating in high school activities.

School year 2020-2021 was Zayne's sophomore year of high school. During this school year, students participated in remote learning due to the Covid-19 pandemic. Zayne had difficultly adapting to remote learning. *Hearing Tr.* at 34. His grades suffered, he failed certain classes, and he was unable to participate in high school activities due to academic ineligibility. *Id.* At this time, Zayne's parents decided an additional fifth school year would benefit Zayne by lessening the need to overload classes. *Id.* at 35. Accordingly, Zayne's father, Kelly Hert, met with then-Colstrip High School athletic director, Andrew Torgerson, about Zayne's eligibility to participate in high school activities during a fifth year of high school. *Id.* at 49. During this meeting Mr. Torgerson assured Zayne's father that Zayne could participate in high school activities during Zayne's fifth year of high school. *Id.*

School year 2021-2022 was Zayne's second sophomore year of high school (and third year of high school). During this year, Zayne participated in high school activities. This was Zayne's second year of participating in high school activities.

School year 2022-2023 was Zayne's junior year of high school (and fourth year of high school). During this year, Zayne participated in high school activities. This was Zayne's third year of participating in high school activities.

School year 2023-2024 was Zayne's senior year of high school (and fifth year of high school). This would have been Zayne's fourth year of participating in high school activities; however, the MHSA denied Zayne from participation in high school activities. This deprivation—specifically the lack of procedure used by the MHSA—is the subject of Zayne's lawsuit and appeal.

A summary of the school years is:

| *School Year* | *Grade Status* | *Participation in extracurricular activities?* |
|---|---|---|
| 2019-2020 | Freshman Year | Participated |
| 2020-2021 | Sophomore Year | Did not participate due to academic ineligibility |
| 2021-2022 | Second Sophomore Year | Participated |
| 2022-2023 | Junior Year | Participated |
| 2023-2024 | Senior Year | Was deprived of participating by the MHSA |

### A. The MHSA's first action was to deprive Zayne of his right to participate in extracurricular activities without issuing notice to Zayne or informing Zayne of his right to appeal.

The MHSA did not inform Zayne that it would deprive him of his constitutional interest in participating in high school activities; instead, the MHSA abdicated its responsibility to Principal Nansel. *Hearing Tr.* at 36, 38. In the spring of 2023, CHS Principal Robin Nansel informed Zayne that the MHSA would deprive Zayne of his right to participate in high school activities during the 2023-2024 school year. *Id.* At this time, the MHSA issued neither an oral nor written notice to Zayne of its decision to deprive Zayne of his senior year of high school activities. *Id.* Nor did the MHSA provide any basis for its decision. *Id.* In addition to not providing any basis for its decision, the MHSA did not inform Zayne of his right to appeal the MHSA's decision to the MHSA board. *Id.*

### B. The MHSA's second action was to hold a hearing while depriving Zayne of: (1) information that would be used against Zayne during the hearing; (2) any deliberation prior to voting; (3) any oral or written basis for its decision; or (4) a record that can be examined upon judicial review.

After Principal Nansel filed Zayne's appeal to the MHSA, the MHSA scheduled a Zoom hearing for August 17, 2023. Though described as an

"appeal" in its Handbook, the hearing was an evidentiary hearing before the MHSA Board of Directors, the members of which sat as factfinders and decisionmakers.

The MHSA deprived Zayne of information that would be used at the hearing. Prior to the hearing, the MHSA did not provide Zayne with a copy of the materials that the MHSA procured prior to the hearing, which included Zayne's attendance records. *Id.* at 52. The MHSA did not inform Zayne which of the MHSA Handbook rules would be examined as part of the hearing. Instead, Zayne was left to assume what the MHSA desired to adjudicate based upon word of mouth from Principal Nansel. Additionally, the MHSA did not inform Zayne that he could submit materials to the Board for its consideration prior to the hearing.

On August 17, 2023, an evidentiary hearing was held via Zoom. During the hearing and while taking evidence, the MHSA board examined documents concerning Zayne's rights that were not provided to Zayne either before or during the hearing. *Id.* at 52. Upon reviewing Zayne's attendance records, the MHSA board erroneously concluded that Zayne had missed more classes than he had.

After the presentation of evidence, the MHSA board proceed to an up-down vote, wherein the MHSA board upheld the MHSA's decision to deprive Zayne of his senior year of school activities. Prior to taking such vote, the MHSA board neither deliberated publicly nor privately. Resultingly, the MHSA deprived Zayne of any basis for its decision during the hearing.

In addition to depriving Zayne of its reason at the August 17, 2023 hearing, the MHSA neither created nor preserved any semblance of an electronic or written record of the hearing that could be reviewed by Montana courts upon judicial review. As a result of its failure to document its proceedings in a meaningful way, the MHSA deprived Zayne the procedural safeguard of allowing Montana courts to review any record—including any semblance of a record of evidence taken, rules applied, and application of facts and rules—to determine that the MHSA's decision to deprive Zayne of his constitutional rights were based upon evidence, was neither arbitrary nor capricious, not inconsistent with prior application of the rules, and was not determined by whim, impulse, or chance rather than reason or necessity.

### C. The MHSA's third action was to deprive Zayne of any written basis for its decision (even upon request) and

**instead issued a letter only to Principal Nansel that provided no basis for its decision that could be examined upon judicial review.**

After the August 17, 2023 hearing, the MHSA continued to deny Zayne a reason for depriving Zayne of his senior year of high school activities.[2] At no time did the MHSA issue to Zayne any oral or written communication that articulated the basis for its decision that could be scrutinized upon judicial review—even when requested. *Id.* at 52-53. Instead, the MHSA sent a letter only to Principal Nansel. This failure to issue a written determination of its decision was a violation of the MHSA's own internal rules.

Regarding the MHSA's post-hearing letter to Principal Nansel, this letter was addressed to Principal Nansel only. *Id.* at 95-96, 114; Hearing Ex. 4. The MHSA did not send a copy to Zayne. *Id.* The MHSA's letter did not give any basis for its decision, instead stating only that Zayne was ineligible to participate in basketball during his senior year. *Id.* The MHSA's letter included no indicia of evidence considered, no citation to rules applied, and no basis for its decision to deprive Zayne of his non-

[2] During the hearing, the MHSA, the MHSA conceded that it did not issue a written decision to Plaintiffs concerning its decision. MHSA Director Michelotti conceded that since Plaintiffs' lawsuit here, the MHSA has corrected its error in depriving Plaintiffs of any notice of its decision by ensuring that the MHSA follows procedures in the future that would ensure that its decisions are delivered to students/parents.

fundamental constitutional right to participate in high school activities. *Id.* Additionally, the letter did not state that Zayne had a right to judicial review of the MHSA's decision. *Id.*

Due to the absence of any oral or written basis for its decision, Mrs. Hert emailed MHSA Director Michelotti on August 17, 2023 requesting a reasoning for the MHSA's decision. *Id.* at 38-39; Doc. 2. Ms. Hert's email requested a reasoning for the MHSA's decision and asked if Zayne had exhausted all appeals with the MHSA. *Id.* Initially, Director Michelotti wholly ignored Mrs. Hert's efforts to have the MHSA explain the basis for its decision. Doc. 50. After receiving no response, Mrs. Hert emailed Director Michelotti again on August 28, 2023 asking for a response. Later, Director Michelotti responded to Mrs. Hert in an email, wherein he referenced MHSA Handbook Article I. Section 5.3 (a review standard). Doc. 50. However, Director Michelotti's email neither stated a basis for the MHSA's decision nor did it state whether Zayne had exhausted all appeals with the MHSA. At this point, Zayne obtained legal counsel and proceeded to action in Rosebud County district court. Doc. 2 and 50.

In summary, when adjudicating Zayne's rights under the Montana Constitution, the MHSA: (1) did not create a cognizable record concerning

its adjudication of Zayne's constitutional interests under Article X of the Montana Constitution nor did the MHSA provide any record to the District Court; (2) deprived Zayne of documents that were used against him by the MHSA Board; (3) did not issue any oral or written decision for denying Zayne his rights under the Montana Constitution—even when requested by Zayne; (4) issued no document upon which Montana courts can satisfy their constitutional role upon judicial review; and (5) issued no final determination notice that informed Zayne of his right to seek judicial review.

## II. Procedural History

Petitioners filed for temporary injunctive relief on November 1, 2023, seeking to enjoin the MHSA and Colstrip Public Schools officials from denying Zayne his final year of extracurricular school activities. Doc. 1. Subsequently, defendants filed two motions to dismiss pursuant to M.R.Civ.P. Rule 12. Doc. 11 and 19. After considerable delay, an evidentiary hearing was held on January 17, 2024. Doc. 32. After the hearing, the parties submitted proposed findings. Doc. 34 through 35.

On January 25, 2024, the District Court issued its *Findings of Facts, Conclusions of Law and Order Denying Motion for Preliminary*

*Injunction, Denying MHSA's Motion to Dismiss and Granting Nansel's Motion to Dismiss* (hereinafter "*Order Denying Preliminary Injunction*"). Doc. 36. The District Court's order denied Zayne injunctive relief but did not dismiss Zayne's claim for declaratory judgment.

On February 5, 2024, Plaintiffs filed a petition for writ of supervisory control. *Hert, et al. v. 16th Judicial Dist. Ct.*, OP 24-0070. This Court issued its order denying Plaintiff's petition on February 6, 2024.

On May 6, 2024, the District Court issued a second scheduling order to address Zayne's remaining claim for declaratory judgment. Doc. 41. Thereafter, the parties submitted cross-motions for summary judgment. Doc. 43 and 48.

On February 25, 2025, the District Court issued its *Order on Cross-Motions for Summary Judgment*, which (1) adopted all findings and conclusions from its January 25, 2024 order, (2) denied Plaintiff's motion for summary judgment, and (3) granted the MHSA's motion for summary judgment. Doc. 71. NOTE: Because the District Court's February 25, 2025 order incorporated all findings and conclusions from its January 26, 2024 order, necessary citations included herein reflect an appeal from both orders. Doc. 71 at 4, ¶1.

## STANDARD OF REVIEW

The Montana Supreme Court reviews a district court's ruling on cross-motions for summary judgment de novo, applying the same criteria as the district court. *Sieben v. Voderberg*, 2012 MT 291, ¶16, 291 P.3d 572.

## SUMMARY OF ARGUMENT

**The District Court erred when it issued premature, detailed findings of fact and conclusions of law on the ultimate merits of Zayne's case.**

When applying Montana's statute on preliminary injunctions, Montana courts must not reach a final determination on the merits of a case without allowing for discovery and appropriate procedural due process. In this case, the District Court held an evidentiary hearing on Zayne's request for a preliminary injunction, then denied such request while issuing detailed findings and (erroneous) conclusions that prematurely adjudicated and foreclosed the relief requested in Zayne's pleading. Subsequently, after the retirement of Judge Murnion, the District Court's *Order on Cross-Motions for Summary Judgment* adopted the entire contents of Judge Murnion's *Order Denying Preliminary Injunction.* Doc. 71.

**Montana students have a constitutionally significant interest in their education and associated extracurricular activities, which both the MHSA and District Court erringly deny.**

Though not a fundamental right, the Montana Constitution nonetheless provides Montana students a right to an education. This right to education includes participation in extracurricular activities. Though not a fundamental right, this right is described as a "constitutionally significant interest." The MHSA adjudicates these constitutionally significant interests; therefore, this Court has previously determined that the MHSA's actions must comport with the Montana Constitution. The MHSA denies that it adjudicates constitutional rights of Montana students, and the District Court has erringly agreed to the same.

**The MHSA's decision to deprive Montana students of extracurricular school activities is subject to judicial review, which both the MHSA and District Court erringly deny.**

While denying Montana students' interests under the Montana Constitution, the District Court's order also denied that Zayne has a right to judicial review. Pursuant to Montana Supreme Court case law, Montana students have a right to ". . . immediately seek judicial review after the MHSA has reached a final conclusion." *Grabow v. Mont. High*

*Sch. Ass'n*, 2002 MT 242, ¶¶ 34 – 37, 59 P.3d 14. This right to immediate judicial review exists because the MHSA is not accountable to the OPI nor do the procedural safeguards of Montana Administrative Procedures Act apply. The MHSA denies that Montana students have a right to judicial review of its decisions, and the District Court has erringly agreed.

**The District Court erred when it determined that the MHSA did not violate Zayne's procedural due process rights, instead adopting several erroneous conclusions of law from the MHSA's proposed findings.**

The MHSA denies that Montana students have any constitutional due process protections because (as the MHSA argues) the MHSA is not a state actor and there is no protected life, liberty, or property interest that triggers a due process analysis. Therefore, the MHSA argues that in need only follow its own operational rules (and not the Montana Constitution) as any other private board might, and the District Court has erringly agreed.

There is no serious debate that the Montana Constitution affords Montana students due process protections over school activities. In 1994, this Court stated that "[O]nce interscholastic sports are offered, they acquire the protection from an unconstitutional deprivation." *J.M. v. Montana High Sch. Ass'n*, 265 Mont. 230, 237, 875 P.2d 1026 (emphasis

added). Again, in 2002, this Court stated that, "Students clearly have the right to participate in extracurricular activities. That right to participate is subject to constitutional protection" and that "While the MHSA may not be accountable to the OPI, any decision made by the MHSA still must comply with the constitution." *Grabow v. Mont. High Sch. Ass'n*, 2002 MT 242, ¶ 26, 34 – 37, 59 P.3d 14 (emphasis added).

**The District Court erred when it dismissed Zayne's claims as moot after not analyzing any of the recognized exceptions to the Mootness Doctrine.**

The District Court's *Order on Cross-Motions for Summary Judgment* dismissed Zayne's claims as "completely moot." Doc. 71. The District Court's order gives no reason for its conclusion. While it is true that Zayne's senior season has passed, Zayne briefed the District Court that two exceptions to the Mootness Doctrine applied—including the "capable of repetition yet evading review exception" and the "public interest exception." The District Court erred when not recognizing these exceptions, including stating no reasoning for why these exceptions do not apply that can be reviewed by this Court now.

## ARGUMENT

### I. The District court erred when it denied Plaintiffs' motion for summary judgment on the merits of their constitutional claim and instead granted the MHSA's motion for summary judgment.

#### A. How we got here: The District Court's orders adopted, largely verbatim, the MHSA's proposed findings.

The District Court's orders (*Order Denying Preliminary Injunction* and *Order on Cross-Motions for Summary Judgment*) copied verbatim the first sixteen paragraphs of the MHSA's *Proposed Findings of Fact and Conclusions of Law*. Doc. 34, 46; 36 and 71 at 4, ¶1. Though a court adopting a party's proposed findings is not—in itself—erroneous, doing so has its pitfalls. Attorneys draft proposed findings with the intent to persuade the decisionmaker; such findings often are not neutral statements of law that neatly fit the factual and procedural posture of a case. Instead, a party's proposed statements of fact and law reside on a spectrum that is: (1) at best, faithful to law and fact; (2) misleading on fact and/or law; or (3) at worst, an incorrect statement of facts in the record or a misapplication of the law.

Here, the District Court's orders adopted the MHSA's misapplications of Montana law. Doc. 36 and 71. The District Court's first

sixteen conclusions of law—taken verbatim from the MHSA's proposed findings—include clear misapplications of this Court's case law, including: (1) denying that Montana students have a constitutional right in their extracurricular school activities, *Id.* at 12, ¶ 7; (2) subjugating Zayne's constitutional rights to the MHSA's bylaws, *Id.* at 11, ¶3; and (3) denying that Montana students have a right to judicial review after the MHSA has reached its final conclusion *Id.* at 10, ¶ 1.

### B. The District Court erred when it concluded that Zayne and Montana students do not receive constitutional protection over their participation in extracurricular school activities.

#### 1. Public education and associated extracurricular activities are constitutionally significant interests that are protected by heightened scrutiny under the Montana Constitution.

Montana students have a constitutional right in their education. Though not a fundamental right under Article II, Article X § 1 of the Montana Constitution nonetheless grants Montana students a constitutional right in their education. Mont. Const., Art. X § 1; *see also State ex rel. Bartmess v. Board of Trustees*, 223 Mont. 269, 275, 726 P.2d 801. The Montana Supreme Court has described Article X, Section 1 as guaranteeing a right to education. ("In this case, the requirement that

the Legislature shall provide a basic system of free quality public school, must be read in conjunction with Section 1 of Article X, which guarantees a right to education.") *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 19, 109 P.3d 257.

The right to public education under Article X includes the right to participate in extracurricular school activities. *State ex re. Bartmess v. Board of Trustees*, 223 Mont. 269, 273, 726 P.2d 801. In *Grabow v. Mont. High Sch. Ass'n*, this Court stated that "Students clearly have the right to participate in extracurricular activities. That right to participate is subject to constitutional protection." 2002 MT 242, ¶ 26, 312 Mont. 92. The Montana Constitution does not distinguish between a student's right to participate in the classroom and a student's right to participate in extracurricular activities, as both are vital to the development of Montana's youth. *Id.* Educational activities are part of the educational process. *Barrett v. State*, 2024 MT 86, ¶45, 527 P.3d 630, citing *State ex re. Bartmess v. Board of Trustees*, 223 Mont. 269, 272-73, 726 P.2d 801.

Montana students' right to participate in their education and school activities constitutes a constitutionally significant interest. *State ex re. Bartmess v. Board of Trustees*, 223 Mont. 269, 275, 726 P.2d 801;

*Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 19, 109 P.3d 257; *Butte Community Union v. Lewis*, 219 Mont. 426, 430 and 434, 712 P.2d 1309. A "constitutionally significant interest" is an interest that, while not explicitly listed in Article II of the Montana Constitution's Declaration of Rights, is nonetheless referenced within the Montana Constitution. *Kottel v. State*, 2002 MT 278, ¶ 50, 60 P.3d 403. Here, Zayne's public education at CHS and corresponding school activities constitute a constitutionally significant interest because such interest, while not in Article II, is nonetheless sufficiently significant for inclusion in Montana's constitution. *Butte Community Union v. Lewis*, 219 Mont. 426, 434, 712 P.2d 1309.

The implication of recognizing a right as a constitutionally significant interest is meaningful. Montana courts apply a heightened scrutiny standard to constitutionally significant interests. *State ex re. Bartmess v. Board of Trustees*, 223 Mont. 269, 275, 726 P.2d 801. Governmental action affecting constitutionally significant interests must be justified by more than mere rational basis. *Id.* Likewise, such interests are subject to greater procedural due process than interests not protected under the Montana Constitution. *Id.* This heighted constitutional

protection is necessary to protect interests that while not fundamental, are deemed important enough for inclusion in the Montana Constitution. *Id.*

### 2. The District Court's orders erred when it denied that Montana students have a constitutional right to their school activities.

The District Court's orders (Doc. 36 and 71) denied that Montana students have a constitutional right in their extracurricular school activities. Conclusion of Law #7 states:

> Participation in extracurricular sports is not a fundamental or constitutional right. Participation in interscholastic sports "is a privilege which may be withdrawn by the school or by a voluntary association whose rules the school has agreed to follow. *J.M., Jr. v. Montana High Sch. Ass'n* (1994), 265 Mont. 230, 237, 875 P.2d 1026, 1031. The constitutional implications of extra-curricular activities are triggered, when there is a deprivation of the opportunity to participate in interscholastic sports, once offered. This deprivation is scrutinized under the middle-tier constitutional analysis, which is a "balancing of the rights infringed and the government interest to be served by such infringement." *State, ex rel., Bartmess v. Bd. of Trustees of Sch. Dist. No. 1* (1986), 223 Mont. 269, 275, 726 P.2d 801, 805.

Doc. 37 at 12, ¶7; Doc 71 at 4, ¶1.

Adopting the MHSA's proposed conclusion verbatim, the District Court is wrong. Montana students have a non-fundamental constitutional right in their education and associated extracurricular school activities. ("We further hold that this right is not a fundamental right under the Montana Constitution; but that such right is clearly subject to constitutional protection and that a middle-tier analysis is to be applied for constitutional equal protection purposes.") *State ex rel. Bartmess v. Board of Trustees,* 223 Mont. 269, 275, 726 P.2d 801.

Also, the District Court's orders are internally conflicting. On the one hand, Conclusion of Law #7 states that Montana students do not have a constitutional right in their school activities. On the other hand, Conclusion of Law #7 states middle-tier scrutiny applies to any deprivation of "the rights infringed." Of course, it is axiomatic that constitutional scrutiny is applied when a constitutional right is invoked.

### 3. The District Court's orders erringly reduced the constitutional right to participate in school activities to a "privilege" that may be withdrawn at will.

In addition to erroneously stating that Montana students do not have a constitutional right in their extracurricular school activities, the District Court's orders also adopted the MHSA's red herring conclusion

that school activities are a "privilege." (*See also* below analysis on the unnecessary entanglement on right versus distinction.) Conclusion of Law 7 states in pertinent part:

> Participation in interscholastic sports "is a privilege which may be withdrawn by the school or by a voluntary association whose rules the school has agreed to follow. *J.M., Jr. v. Montana High Sch. Ass'n* (1994), 265 Mont. 230, 237, 875 P.2d 1026, 1031.

Doc. 36 at 12, ¶7; Doc 71 at 4, ¶1.

The District Court's orders fail to distinguish between a Montana student's constitutional right to participate in extracurricular activities already offered by a school *versus* extracurricular activities not existing or discontinued by a school. The District Court's orders cites *J.M., Jr. v. Montana High School Ass'n*, but fails to give this Court's full analysis acknowledging that school activities receive protection from an unconstitutional deprivation when such activity is already offered. The Court in *J.M., Jr. v. Montana High Sch. Ass'n* stated:

> As the Federal Court observed T.H., generally speaking, a student has no constitutional right to participate in interscholastic sports, it is a privilege which may be withdrawn by the school or by a voluntary association whose rules the school has agreed to follow.
> . . .

> However, once interscholastic sports are offered, they acquire the protection from an unconstitutional deprivation.

265 Mont. 230, 237, 875 P.2d 1026 (emphasis added).

Montana Supreme Court case law is clear: If an interscholastic sport is offered by a Montana school, then Montana students are protected from an unconstitutional deprivation of such. ("However, once interscholastic sports are offered, they acquire the protection from an unconstitutional deprivation.") *Id.* This makes sense: Montana students do not have the right to impose a school activity upon school districts; however, when such activity is freely offered by a school, then a constitutional right attaches. *Id.*

Here, Zayne was not arguing for the creation of a sport (or the continuance of an interscholastic sport that Colstrip Public Schools was seeking to eliminate); instead, Zayne was seeking protection from an unconstitutional deprivation of a high school activity that already existed and which Colstrip High School had not discontinued. For this reason, the District Court's conclusion of law citing *J.M. v. Montana High School Ass'n* was a misapplication of this Court's case law.

### 4. The District Court's orders erringly reduces the constitutional right to participate in school activities to a contractual interest.

The District Court's orders deny the existence of Zayne's constitutional due process rights and reduces Zayne's rights to mere a contractual interest—akin to members to a corporation, LLC, or partnership via an entity's bylaws, operating agreement, partnership agreement, etc.:

> 2. The MHSA is not a court of law or record, nor is it required under any law to issue reasoned, detailed opinions relative to the Board's vote on a petition for waiver. The MHSA Board operates in the same way as other boards might and utilizes operational rules to define the parameters of its proceedings, all of which are available to the public. Individual Due Process is defined and identified in the MHSA By-Laws under Article VII. Applicable standards and criteria for considering appeals within the Board must operate are detailed in Article I, Section 5.3.

Doc. 36 at 10-11, ¶¶2-3; Doc 71 at 4, ¶1 (emphasis added).

The constitutional right to an education and associated school activities is not a contractual interest that may be subjugated to the MHSA's Bylaws. *State ex rel. Bartmess v. Board of Trustees,* 223 Mont. 269, 275, 726 P.2d 801. Though the MHSA may indeed operate its organization pursuant to bylaws, in doing so it may not trample over the

constitutional rights of Montana students. Montana students' interests under Article X of the Montana Constitution are not contractual interests; rather, such interests are constitutional rights subject to constitutional due process protections. *State ex rel. Bartmess v. Board of Trustees*, 223 Mont. 269, 275, 725 P.2d 801 (Mt.S.Ct. 1986); *Grabow v. Mont. High Sch. Ass'n*, 2002 MT 242, ¶ 34, 59 P.3d 14; *Kottel v. State*, 2002 MT 278, ¶ 50, 60 P.3d 403; *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 19, 109 P.3d 257;

**5. The District Court's orders erred when it denied that constitutional due process protected Zayne's constitutional right to participate in school activities.**

After denying the existence of Zayne's substantive constitutional right to school activities, the District Court's orders proceeded to deny the existence of constitutional procedural rights. The District Court's orders determined that because no liberty or property interest was at stake, no due process was required. Conclusion of Law # 12 of the District Court's Order states:

> Here, there is no protected property or liberty "right" which triggers a due process analysis. The privilege of playing high school basketball had been exhausted under the rules of the MHSA and Zayne sought leave under the MHSA's appeal procedure for an exception. Even if a protected

> interest did trigger an obligation to provide due process protections, the MHSA's procedures conform to any constitutional requirements that may be applied.

Doc. 36 at 12, ¶12; Doc 71 at 4, ¶1 (emphasis added).

The District Court's orders include several errors of law. First, the District Court's orders do not recognize this Court's statements referencing the constitutional procedural protections of Montana students' constitutional right to school activities. ("[O]nce interscholastic sports are offered, they acquire the protection from an unconstitutional deprivation.") *J.M. v. Montana High Sch. Ass'n*, 265 Mont. 230, 237, 875 P.2d 1026. And "While the MHSA may not be accountable to the OPI, any decisions made by the MHSA still must comply with the constitution." *Grabow v. Mont. High Sch. Ass'n*, 2002 MT 242, ¶ 34, 59 P.3d 14.

Second, the District Court's order entangles itself in the unnecessary distinction between a right and a privilege. The U.S. Supreme Court has repeatedly rejected the notion that constitutional rights turn upon whether a government benefit is characters as a "right" or as a "privilege." *Graham v. Richardson*, 403 U.S. 365, 374 (1971).

Third, the District Court's orders erringly conclude that constitutional due process is unavailable to Montana students because

no life, liberty, or property interest was at stake. Doc. 36 at 12, ¶¶11-13; Doc 71 at 4, ¶1. This is a misapplication of contemporary jurisprudence on the liberty and property interests at stake in the educational process. Contemporary American jurisprudence looks to educational interests as both a property interest in educational benefits and a liberty interest:

> Education is perhaps the most important function of state and local governments, and the total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspension may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

*Goss v. Lopez*, 419 U.S. 565, 576, 95 S. Ct. 729 (1975).

If this Court must fit the Article X, § 1 into a "life, liberty, or property" interest, then American jurisprudence is clear that such interest must be a property interest. In *Goss v. Lopez*, the U.S. Supreme Court determined that students are entitled to certain due process protections before being suspended. 419 U.S. 565, 574 (1975). The U.S. Supreme Court held that because Ohio had established a public education system, students had a legitimate entitlement to it that

qualified as a property interest under the Fourteenth Amendment. *Id.* at 573-74. Accordingly, suspending or expelling a student without proper due process violates the U.S. Constitution. *Id.* at 576.

When determining whether a property interest is at stake, courts determine whether there is a genuine claim of entitlement or merely a unilateral expectation. *Id.* at 572-574. The test applied to address whether an entitlement or a unilateral expectation is at stake is: (1) whether existing law creates an expectancy interest; and (2) the degree of discretion retained by the governmental entity in providing such expectancy. *Id.*

Here, existing law in the Montana Constitution expressly creates an expectancy interest in public education by mandating ("shall provide") that the Montana Legislature provide a system of quality public schools that is not discretionary:

> (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.
>
> . . .
>
> (3) <u>The legislature shall provide a basic system of free quality public elementary and secondary</u>

> 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(1) and (3) (emphasis added). Likewise, the Montana Legislature has deemed extracurricular school activities of such importance so as to extend such legal protections to Montana homeschooled students:

> A school district or an athletic association, conference, or organization with authority over interscholastic sports may not prohibit or restrict the ability of a student attending a nonpublic or home school meeting the requirements of 20-5-109 from participating in extracurricular activities at a school in the student's resident school district solely on the student's enrollment at the public school or on the number of hours the student physically attends the public school.

Mont. Code Ann. § 20-5-112. Plainly, existing law in both the Montana Constitution and the Montana Code create an expectancy interest in Montana students' right to participate in extracurricular school activities that is not discretionary. Therefore, should this Court find it necessary to find a basis within "life, liberty, or property" prongs of due process (it

is not necessary), then the Court is well supported to find that a property (or even liberty) interest is invoked here.

### C. The procedure used by the MHSA in adjudicating Zayne's constitutional right did not comport with the requirements of the Montana Constitution.

Article II, § 17 of the Montana Constitutions provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." Due process of the law has both substantive and procedural components. *Montanans v. State*, 2006 MT 277, ¶ 29, 334 Mont. 237, 146 P.3d 759. Regarding its procedural component, although due process cannot be precisely defined,[3] the phrase expresses requirements of fundamental fairness. *City of Missoula v. Mt. Water Co.*, 2016 MT 183, ¶ 25, 378 P.3d 1113.

[3] "Although "the phrase 'due process' cannot be precisely defined[, . . .] the phrase expresses the requirements of fundamental fairness." *In re A.R.*, 2004 MT 22, ¶ 11, 319 Mont. 340, 83 P.3d 1287 (internal quotations omitted). "[T]he requirements for procedural due process are (1) notice, and (2) opportunity for a hearing appropriate to the nature of the case." *Montanans*, ¶ 30. These requirements are "flexible and are adapted by the courts to meet the procedural protections demanded by the specific situation," taking into account "the factual circumstances of the case, the nature of the interests at stake and the risk of making an erroneous decision." *Montanans*, ¶ 30 (internal quotations and citations omitted). Procedural due process "includes, among other things, the ability to discover information relevant to the case against [the Defendants] along with the identity of the witnesses who are expected to testify and the substance of the expected testimony." *Wilson v. Dep't of Pub. Serv. Regulation*, 260 Mont. 167, 172, 858 P.2d 368, 371 (1993)." *City of Missoula v. Mt. Water Co.*, 2016 MT 183, ¶ 25, 378 P.3d 1113

Under both federal and Montana jurisprudence, procedural due process's most basic requirements are (1) notice; and (2) opportunity for a hearing appropriate to the nature of the case." *Montanans*, ¶ 30. The requirements of notice and meaningful hearing are flexible and are adapted to meet the procedural protections demanded by the specific situation. *Id.* This Court has consistently stated that procedural due process is not a one-size-fits-all standard but rather a flexible concept that must be tailored to the specific rights and circumstances involved in each case. *Small v. McRae,* 200 Mont. 497, 507, 651 P.2d 982. Due process is inherently flexible and must be adapted to the specific circumstances of each case.

Here, the lack of basic procedural protections used by the MHSA when depriving Zayne of his constitutional right to participate in school activities were extensive:

- In April of 2023, the MHSA did not issue Plaintiffs an oral or written correspondence of its initial determination to deprive Zayne of his constitutional interests.
- The MHSA did not inform Plaintiffs of their right to appeal the MHSA's initial determination to deprive Zayne of his constitutional interests.

- The MHSA did not provide Plaintiffs with a reference to any MHSA rule or reason for its initial determination to deprive Zayne of his constitutional interests.

- The MHSA did not inform Plaintiffs that they could submit materials for its consideration prior to appeal.

- The MHSA did not inform Plaintiffs which MHSA rules and procedures it would utilize at the August 17, 2023 hearing.

- The MHSA did not inform Plaintiffs that it would gather documents to use against Zayne and sprung such documents on Plaintiffs at the August 17, 2023 hearing.

- The MHSA did not deliberate, publicly or privately, before voting to deprive Zayne of his constitutional interests.

- The MHSA gave no reason for its decision to deprive Zayne of his constitutional interests at the August 16, 2023 hearing.

- The MHSA issued no written determination to Plaintiffs regarding the MHSA's decision to deny Zayne his constitutional rights to participate in school activities.

- The MHSA issued a letter on August 17, 2023 to Principal Nansel that the MHSA did not provide to Plaintiffs.

- The MHSA's August 17, 2023 letter to Principal Nansel provided no basis in rule or fact to support the MHSA's decision to deprive Zayne of his constitutional rights.

- The MHSA's August 17, 2023 letter to Principal Nansel did not address any other high school extracurricular activities that Zayne could be eligible to participate in.

- The MHSA issued no document addressing any facts and rules the MHSA applied before depriving Zayne of his constitutional interests.

- The MHSA issued no correspondence to Plaintiffs that Zayne had exhausted his remedies before the MHSA, even when requested.

- The MHSA did not inform Plaintiffs of Zayne's right to seek judicial review.

- The MHSA did not inform Plaintiffs of any timeline upon which Zayne could seek judicial review.

This Court has referenced the U.S. Supreme Court's flexible three-part test in *Mathew v. Eldridge* to articulate the quantum of due process necessary prior to a deprivation:

> (1) the factual circumstances, including the nature of the interests affected by official action;
>
> (2) the risk of making an erroneous deprivation of such interest through procedures used and the probable value of additional or substitute procedural safeguards;
>
> (3) the government's interests, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

*In re Mental Health of E.T.*, 2008 MT 299, ¶25, 191 P.3d 470. Here, taking the *Mathew v. Eldridge* factors recognized by Montana Supreme Court,

the "private interest" affected by the MHSA's action was Zayne's constitutional right in his extracurricular school activities.

Second, the risk of erroneous deprivation of Zayne's right to education has the effect of depriving Zayne of constitutional rights subject to heightened protections and scrutiny under the Montana Constitution. Constitutionally significant interests are substantial. Any action affecting such an interest must be justified by a more compelling rationale than would be required under the rational basis test. This ensures greater protection for constitutional rights that, while not fundamental, are still deemed important enough to warrant heightened judicial scrutiny under the Montana Constitution. *Butte Community Union v. Lewis*, 219 Mont. 426, 712 P.2d 1309; *Kottel v. State*, 2002 MT 278, 60 P.3d 403; *Montana Envtl. Info. Ctr. v. Department of Envtl. Quality*, 1999 MT 248, 988 P.2d 1236.

Third, it would have been of little fiscal or administrative burden for the MHSA to provide the requisite due process necessary to protect Zayne's constitutionally significant interest to participate in high school extracurricular activities. For example, at the outset, the MHSA could have sent Zayne written notice that it was ineligible to participate in

school activities during this senior year (as opposed to only relying solely on Principal Nansel to articulate the MHSA's position). The cost of sending this written notice would have been negligible. During its hearing, the MHSA could have created a record of their meetings. The cost is negligible to create an electronic recording of the MHSA's proceedings. The MHSA should have provided documents to Zayne that would be used against him. The cost is negligible to provide an electronic copy of the documents to Zayne that the MHSA Board would already have in its possession at a hearing. Additionally, the MHSA should have issued a written decision to Zayne that would provide a basis upon which a district court could review the MHSA's decision. The cost to providing a brief explanation of its decision that includes facts, MHSA rules applied, and a short analysis—i.e., one that could provide a district court with a basis upon which to review the MHSA's decision upon judicial review—is negligible.

In attempts to excuse its behavior, the MHSA made strawman arguments that MAPA does not apply to the MHSA (Zayne has not

argued that it does[4]) and that the MHSA need not provide Montana students with "detailed opinions" of its decisions (notwithstanding that Appellants have never argued the sufficiency of "detail" that is constitutionally necessary). However, the facts of Zayne's case are not about the legal sufficiency of MHSA's written decision since there was no written decision in Zayne's case. There was only a letter to Principal Nansel that did not state the basis for its decision.[5] Instead, the facts of

---

[4] Indeed, this Court has stated mandating that Montana students exhaust all administrative procedures under MAPA would result in Montana students missing their athletic season:

> An aggrieved student cannot seek judicial review of an administrative decision until the student has exhausted his or her administrative remedies. *See* § 2-4-702, MCA. This rule allows administrative agencies to make a factual record and to correct any errors [***15] within their specific expertise before a court interferes. *See Bitterroot River Protection Ass'n v. Bitterroot Conservation Dist.,* 2002 MT 66, P22, 309 Mont. 207, P22, 45 P.3d 24, P22. We do this in the interest of both judicial economy and agency efficiency. See Bitterroot, 22. If we required a student to navigate through additional levels of administrative review, however, the athletic season in which the student wished to play would likely pass.

*Grabow v. Mont. High Sch. Ass'n*, 2002 MT 242, ¶ 35, 59 P.3d 14. Therefore, pursuant to this Court's sound reasoning, Petitioners have never argued that the MAPA applies to the MHSA.

[5] There was also the email from Director Michelotti wherein he cited a procedural rule in the MHSA handbook, but the email does not provide any analysis, nor was Director Michelotti a voting member of the Board that made the ultimate decision to deprive Zayne of his senior year of high school activities.

Zayne's case are about the complete absence of any oral or written decision that would allow Montana courts to conduct their constitutional role upon judicial review.

This Court has a role in this case under the Montana Constitution. In *Morrisey v. Brewer,* the U.S. Supreme Court faced a dilemma that is similar to this case—i.e., what procedural due process requirements must be provided in the absence of legislative guidance in an issue where a non-fundamental interest was at stake (a parolee's conditional liberty interest since parole itself is not a fundamental right). In *Morrisey v. Brewer,* the U.S. Supreme Court determined that its constitutional role was to decide the minimum requirements of due process:

> We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written

> statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

*Morrissey v. Brewer*, 408 U.S. 471, 488-489 (emphasis added).

To the U.S. Supreme Court, the minimum requirements of due process included a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole. *Id.* Such reason for requiring some semblance of a written decision is axiomatic: it enables reviewing courts to determine that such decision was based upon lawful procedure, application of relevant rule or law, and that such application of rule or law is supported by the facts.

Here, to protect the constitutional rights of Montana students to participate in extracurricular activities under the Montana Constitution, the MHSA should adhere to the basic procedures articulated in *Morrissey v. Brewer,* which include: written notice of the deprivation and opportunity to "appeal" to the MHSA Board, disclosure of evidence that the MHSA Board has procured and will use against a student, and a

written statement by the MHSA Board as to the evidence relied on and reasons for depriving a student of their constitutional right. And, preferably, written notice of right to seek judicial review (which the MHSA currently denies Montana students have a right to). At the very least, the MHSA Board must provide a brief written statement that would allow Montana courts to fulfill their role upon judicial review. Without any written statement, there can be no basis to determine that the MHSA's decision to deprive a student of their constitutional right was neither arbitrary, capricious, or determined by whim, impulse, or chance.

## II. Zayne's claims are not moot under this Court's exceptions to the Mootness Doctrine.

In Montana, a claim is considered moot when the circumstances present at the outset of the action have ceased to exist, or if the court is unable to grant effective relief or restore the parties to their original positions due to an intervening event or change in circumstances. *Sudan Drilling, Inc. v. Anacker*, 2014 MT 72, ¶8, 320 P.3d 977. This Court has recognized at least three exceptions to the mootness doctrine: (1) voluntary cessation, (2) capable of repetition, yet evading review, and (3) public interest. *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct.*, 2023 MT 7, 523

P.3d 519; *In re Big Foot Dumpsters & Containers,* LLC, 2022 MT 67, 507 P.3d 169.

Here, before the trial court, Zayne argued that the "capable of repetition, yet evading review" and "public interest" exceptions applied. Despite Zayne briefing these matters below, the District Court's order provided no analysis on why these exceptions did not apply.

The "*capable of repetition, yet evading review exception*" is applicable when the challenged action is too short in duration to be fully litigated before its cessation and the constitutional questions are capable of repletion. This exception is often invoked in cases involving constitutional questions that are likely to recur but could evade effective review due to the time constraints inherent in the litigation process. *Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 329, 149 P.3d 565.

The "*public interest exception*" applies when the case presents an issue of public importance, the issue is likely to recur, and an answer to the issue will guide public officers in the performance of their duties. *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct.*, 2023 MT 7, 523 P.3d 519; *Ramon v. Short*, 2020 MT 69, 460 P.3d 867. This exception is particularly

relevant in cases involving fundamental constitutional rights or the legal power of public officials. *Ramon v. Short,* 2020 MT 69, 460 P.3d 867.

Here, both the "capable of repetition, yet evading review" and the "public interest" exceptions to the Mootness Doctrine apply. First, the "capable of repetition, yet evading review" exception applies because the challenged action by Zayne (i.e, the MHSA depriving Zayne of his constitutional right to extracurricular school activities without sufficient constitutional due process) exceeded the duration Appellants' lawsuit. The Montana Constitution does not allow the MHSA to evade judicial review merely because the duration of this lawsuit outlasted Zayne's senior year of high school. Without the "capable of repetition, yet evading review" exception, the MHSA will continue to evade scrutiny concerning how the MHSA administers the constitutional rights of Montana's youth—rights that the MHSA denies exist and for which Montana students will be unable to seek meaningful recourse.

Second, the "public interest exception" applies because Zayne's case presents constitutional issues of state-wide importance for all Montana students. Zayne's appeal addresses the due process that must be afforded by the MHSA under the Montana Constitution before depriving a

Montana student of their right under Article X of the Montana Constitution. As it stands now, the MHSA asserts—and the District Court has upheld in its legal conclusions—(1) that Montana students are not entitled to judicial review of the MHSA's decisions; (2) that the MHSA does not adjudicate the constitutional rights of Montana students; (3) that the MHSA is not constrained by constitutional due process when adjudicating Montana students' rights under Article X of the Montana Constitution; and (4) that the MHSA does not have to render a basis for its decisions that can be reviewed by Montana courts.

This case will guide the MHSA in the performance of its duties and ensure that the MHSA operates with sufficient procedure—including the creation of a written decision that would allow Montana courts to fulfill their constitutional duty of judicial review. Montana students deserve an MHSA that has an interest in both recognizing the educational interests Montana students enjoy under the Montana Constitution and safeguarding such interests by providing Montana students the procedural safeguards necessary to ensure constitutional due process.

## CONCLUSION

The District Court erred in denying Zayne summary judgment and instead granting summary judgment to Appellees. Zayne and all Montana students enjoy a constitutional right to their extracurricular school activities. The MHSA's decision to deprive a Montana student of school activities must comport with constitutional due process. The MHSA's procedure in this Zayne's case did not comport with constitutional due process. This Court should reverse and direct the District Court to enter judgment in favor of Zayne consistent with its decision.

Respectfully submitted this 24th day of July 2025.

PASSAMANI & LETANG, PLLC
40 W. 14th St., Ste 2A
Helena, MT 59601

By: /s/ Nicholas LeTang
NICHOLAS LETANG
Attorney for Appellants

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellant Procedure, I certify that this primary brief is printed with proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,270, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Nicholas LeTang
NICHOLAS LETANG

## APPENDIX INDEX

## CERTIFICATE OF SERVICE

I, Nicholas LeTang, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-24-2025:

Elizabeth O'Halloran (Attorney)
1911 S. Higgins
Missoula MT 59801
Representing: Montana High School Association, Brian Michelotti
Service Method: eService

Electronically Signed By: Nicholas LeTang
Dated: 07-24-2025