

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 21-0533

STAND UP MONTANA, a Montana non-profit Corporation; CLINTON DECKER; MORGEN HUNT; GABRIEL EARLE; ERICK PRATHER; BRADFORD CAMPBELL; MEAGAN CAMPBELL; and JARED ORR,

Plaintiffs and Appellants,

v.

MISSOULA COUNTY PUBLIC SCHOOLS, ELEMENTARY DISTRICT NO. 1, HIGH SCHOOL DISTRICT NO. 1, MISSOULA COUNTY, STATE OF MONTANA; TARGET RANGE SCHOOL DISTRICT NO. 23; and HELLGATE ELEMENTARY SCHOOL DISTRICT NO. 4,

Defendants and Appellees.

STAND UP MONTANA, a Montana non-profit corporation; JASMINE ALBERINO, TIMOTHY ALBERINO, VICTORIA BENTLEY, DAVID DICKEY, WESLEY GILBERT, KATIE GILBERT, KIERSTEN GLOVER, RICHARD JORGENSEN, STEPHEN PRUIETT, LINDSEY PRUIETT, ANGELA MARSHALL, SEAN LITTLEJOHN, and KENTON SAWDY,

Plaintiffs and Appellants,

v.

BOZEMAN SCHOOL DISTRICT NO. 7, MONFORTON SCHOOL DISTRICT NO. 27, and BIG SKY SCHOOL DISTRICT NO. 72,

Defendants and Appellees.

MONTANA LEGISLATORS' AMICUS BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County, Cause No. DV-21-1031
Before Hon. Jason Marks

On Appeal from the Montana Eighteenth Judicial District Court
Gallatin County, Cause No. DV-21-975B

Before Hon. Rienne H. McElyea

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STATEMENT OF THE ISSUES

Montana Legislators address the single issue of the District Court’s interpretation of Mont. Code Ann. § 40-6-701¹, and its ruling to the effect that the statute does nothing more than “create a cause of action and create an appeals process for a parent in a situation where their rights have been terminated as a parent.” (Findings of Fact, Conclusions of Law and Order (Oct. 20, 2021), pp. 13-14, *Stand-Up Montana, et al., v. Bozeman School District No. 7, et al.*, Cause No. DV-21-975B, Montana 18th Judicial District, Gallatin County (hereinafter “Gallatin County Order”)).

STATEMENT OF THE CASE

Montana Legislators relies on Appellants’ statement of the case.

STATEMENT OF FACTS

Montana Legislators relies on Appellants’ statement of the facts.

¹ The parties and the district court referred to § 40-6-701 with reference to its legislative designation, “SB 400,” in the underlying litigation because it was not yet codified.

STANDARD OF REVIEW

Montana Legislators understand that “[t]he interpretation of a statute is a question of law that [courts] review for correctness.” *Boyne USA, Inc. v. Dep’t of Revenue*, 2021 MT 155, ¶ 12, 404 Mont. 347, 490 P.3d 1240. They also rely on this Court to review a district court’s grant or denial of a preliminary injunction, if it is based on “legal conclusions,” to determine “if the district court’s interpretation of the law is correct.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386. After reviewing the Gallatin County Order, nearly every Montana Legislator who passed Mont. Code Ann. § 40-6-701 now asks this Court to reverse the District Court’s interpretation as incorrect as a matter of law.

SUMMARY OF THE ARGUMENT

Montana Legislators who voted for Mont. Code Ann. § 40-6-701 now urge this Court to reverse the Gallatin County District Court’s denial of the preliminary injunction. The Montana Legislators who have now joined this brief include: Sen. Kenneth Bogner, SD 19; Senator Bob

Brown, SD 7; Sen. Jason Ellsworth, SD 43 ; Sen. John Esp, SD 30; Sen. Chris Friedel, Sen. Bruce “Butch” Gillespie, SD 9; SD 26; Sen. Carl Glimm, SD 02; Sen. Greg Hertz, SD 06; Sen. Steve Hinebauch, SD 18; Sen. David Howard, SD 29; Sen. Bob Keenan, SD 5; Sen. Theresa Manzella, SD 44; Sen. Brad Molnar, SD 28; Sen. Keith; Regier, SD 03; Sen. Cary Smith, SD 27; Sen. Gordon Vance, SD 34; Rep. Dan Bartel, HD 29; Rep. Becky Beard, HD 80; Rep. Seth Berglee, HD 58; Rep. Michele Binkley, HD 85; Rep. Larry Brewster, HD 44; Rep. Jennifer Carlson, HD 69; Rep. Neil Duram, HD 02; Rep. Paul Fielder, HD 13; Rep. Frank Fleming, HD 51; Rep. John Fuller, HD 08; Rep. Steven Galloway, HD 24; Rep. Steve Gist, HD 25; Rep. Steve Gunderson, HD 01; Rep. Ed Hill, HD 28; Rep. Jedediah Hinkle, HD 67; Rep. Josh Kassmier, HD 27; Rep. Rhonda Knudsen, HD 34; Rep. Ron Marshall, HD 87; Rep. Braxton Mitchel, Rep. Terry Moore, HD 54; HD 03; Rep. Mark Noland, HD 10; Rep. Bob Phalen, HD 36; Rep. Amy Regier, HD 06; Rep. Matt Regier, HD 04; Rep. Linda Reksten, HD 12; Rep. Jerry Schillinger, HD 13; Rep. Kerri Seekins-Crowe, HD 43; Rep. Lola Sheldon-Galloway; Rep. Derek Skees, HD 11; Rep. Mallerie

Stromswold, HD 50; Rep. Brad Tschida, HD 97; Rep. Barry Usher, HD 40; Rep. Sue Vinton, HD 56; and Rep. Katie Zolnikov, HD 45. These Montana Legislators are experts of what their own legislative intent was for Mont. Code Ann. § 40-6-701. In this brief, they clarify their scope and intent as it relates to the underlying issue of whether a parent has a fundamental right to decide whether their child wears a mask in school under state law.

ARGUMENT

1. **Montana Legislators agree with Appellants that the Gallatin County Order incorrectly interpreted Mont. Code Ann. §40-6-701.**

A. Montana Legislators intended for Mont. Code Ann. §40-6-701 to be applied as written.

This Court “recognize[s] that a parent has a *fundamental right* to the care and custody of his or her child, and that fit parents are presumed to act in their child’s best interests.” *In re C.T.C.*, 2014 MT 306, ¶ 18, 377 Mont. 106, 339 P.3d 54 (citing cases, emphasis

added). In harmony with this established precedent, on Friday, October 1, 2021, Mont. Code Ann. §40-6-701, enacted by the 67th Montana Legislature and endorsed by the Montana Governor, became effective. This new statute reads, in relevant part:

(1) A governmental entity may not interfere with the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children unless the governmental entity demonstrates that the interference:

(a) furthers a compelling governmental interest; and

(b) is narrowly tailored and is the least restrictive means available for the furthering of the compelling governmental interest.

The term “governmental entity” expressly includes school districts. Mont. Code Ann. §§ 40-6-701(4) and 2-9-101(3) and (5).

Senator Manzella introduced SB 259² before re-introducing the bill as SB 400 with changes regarding strict scrutiny and determining the prevailing party, but not the scope or intent of the legislation. (Montana Legislatures request Judicial Notice of the record of the

² <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/42585?agendaId=201094#handoutFile>

legislature handout for SB 259 pursuant to Mont. Code. Ann. § 26-10-201). During a legislative hearing on the initial bill, Senator Manzella emphasized the broad intent of her proposed legislation by reciting the legislative language nearly *verbatim*.

“I believe that a parent has the right to parent their minor children and direct and guide them in their religious beliefs, their education, their health care, all aspects of their life, I believe that is part of the parenting contract.” – Legislative Sponsor, Senator Manzella, at a legislative hearing regarding the precursor Mont. Code Ann. §40-6-701³. (Legislative hearing dated February 21, 2021, from Timestamp 9:04-9:06. Montana Legislatures request Judicial Notice of the record of the legislature pursuant to Mont. Code. Ann. §26-10-201).”

During the same hearing, Sen. Manzella testified that the scope of Mont. Code Ann. §40-6-701 was to be broadly interpreted by *repeating* the legislative language found in today’s codified law, which provides

³ <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/42585?agendaId=201094#handoutFile>

that “This section may not be construed as invalidating the provisions of Title 41, chapter 3, or modifying the burden of proof at any stage of the proceedings under Title 41, chapter 3.⁴ (*Id. At 9:05*).

B. Montana Legislators intended for Mont. Code Ann. §40-6-701 to be applied to all aspects of upbringing, education, health care, and mental health of parenting.

The District Court, in the Gallatin County Order, noted the broad language of the statute. (Gallatin County Order, pp. 13-15.) Yet, it then construed the language very narrowly, relying on a line of legislative testimony from SB 400’s sponsor, Senator Theresa Manzella:

As [§ 40-6-701] is a new law and the language is incredibly broad, the Court reviewed the law’s legislative history to provide guidance as to its intent. Based on the legislative history of [§ 40-6-701], the purpose of SB 400 was to create a cause of action for parents who may be involved with the Department of Public Health and Human Services, Child Protective Services Division. In introducing [§ 40-6-701] to the Senate Judiciary Committee, Senator Theresa Manzella, the bill’s primary sponsor, stated the purpose of the bill was to “create a cause of action and create an appeals process for a parent in a situation where their rights have been terminated as a parent.” Mont. Sen. Jud. Comm., SB 400,

⁴ <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/42585?agendaId=201094#handoutFile>

67th Leg. (April 1, 2021, at 9:54:33). Plaintiffs’ action here is not the type of action originally contemplated by the legislature in enacting [§ 40-6-701]. (*Id.*)

The Gallatin County Order incorrectly considers legislative intent. The law is broad, but clear. Beyond that, the Gallatin County Order fails to consider other testimony and comments by Montana Legislators regarding the scope and subjective legislative intent of Mont. Code Ann. §40-6-701. For example, during a legislative hearing, Sen. Brown and Manzella expressly discussed and agreed that the proposed legislation was meant to include private causes of action against school districts for interference of parental rights.⁵ (*Id.* at 9:11-9:14).

C. Plaintiffs’ underlying action is the type of action originally contemplated by Montana Legislators.

The District Court, in the Gallatin County Order, ruled that, “Plaintiffs’ action here is not the type of action originally contemplated by the legislature in enacting [§ 40-6-701]. Montana Legislators wish to clarify their intent. First, schools are considered a “government entity”

⁵ <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/42585?agendaId=201094#handoutFile>

under Mont. Code Ann. §40-6-701. Second, in the underlying lawsuit, parents contended that the school masking policies interfered with their right to direct their children’s education, health care, and mental health. While Montana Legislators likely have different opinions about masking, all agree that the parent has a fundamental right to determine whether their child wears a mask in school under Mont. Code Ann. §40-6-701. It is a law of general applicability that the Legislature intended to govern all governmental entities in Montana that might attempt to interfere with parental rights. All governmental entities, including school boards, are expected to abide by it.

CONCLUSION

Montana Legislators agree that while Mont. Code Ann. §40-6-701 *includes* the scenario where a parent’s rights have been terminated, the legislative intent is clearly *much broader*, reaching into parental rights of all aspects of upbringing, education, health care, and mental health of their children, including the subject of masking during school hours.

DATED this 7th day of February 2022

Respectfully Submitted,
BLACKTAIL LAW GROUP, PLLC

By: /s/ Abby Jane Moscatel

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Attorney for Montana Legislators

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 14(9), I certify that Montana Legislators' Amicus Brief is printed with proportionately spaced Century text typeface of 14 point and double-spaced, except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is less than 4,000 words, excluding this certificate of compliance.

/s/ Abby Jane Moscatel

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