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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

BOARD OF REGENTS OF HIGHER  
EDUCATION OF THE STATE OF MONTANA,  
Petitioner,

-vs-

THE STATE OF MONTANA, by and through  
Austin Knudsen, Attorney General of the State of  
Montana in his official capacity.  
Respondent.

**FILED**

MAY 27 2021

ANGIE SPARKS, Clerk of District Court  
By  Deputy Clerk

Cause No. BVD 2021-598  
Judge Michael McMahon

**PETITIONER'S BRIEF IN SUPPORT  
OF EX PARTE MOTION FOR  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION AND MOTION TO  
SHOW CAUSE**

Petitioner Board of Regents of Higher Education of the State of Montana (“Board” or “BOR”) files this brief in support of its *ex parte* Motion for Temporary Restraining Order (“TRO”), Preliminary Injunction and Motion to Show Cause.

## INTRODUCTION

In this declaratory action, BOR challenges the constitutionality of House Bill 102, An Act Generally Revising Gun Laws (“HB102,” Ex. 1). HB102 materially alters the existing firearms policies on all campuses of the Montana University System (“MUS”) by allowing open carry and concealed carry, contrary to existing policy adopted by the Board of Regents (“BOR”) in 2012. HB102 was signed into law on February 18, 2021, with most of its sections effective on that day. Section 6, which governs BOR implementation of HB102, becomes effective on Tuesday, June 1, 2021.

Montana’s Constitution vests sole and full authority in BOR to “supervise, coordinate, manage and control the Montana university system.” Mont. Const., art. X, §9(2)(a) (hereafter “MUS”). In enacting HB102, the 2021 Montana Legislature (the “Legislature”) has impermissibly curtailed BOR’s authority to determine the best policies to “ensure the health and stability of the MUS.” *Sheehy v. Commissioner of Political Practices*, 2020 MT 37, ¶ 29 (“COPP”), quoting Mont. Const., art. X, § 9.

Absent the grant of a TRO, on June 1 thousands of students and employees will be uncertain as to whether the unconstitutionally enacted HB102 policies apply, or whether current, contrary BOR policy applies. Safety concerns abound for students, employees, and security officers. (Ex. 4A). No harm comes from enjoining application of HB102 to BOR, MUS and MUS campuses and locations during the pendency of this litigation or until the preliminary injunction motion is heard. On the other hand, serious harm is threatened by applying the law, without adequate time for BOR to consider all aspects of this sea change in the management and control of the MUS's sixteen institutions.

This Court should grant BOR an *ex parte* TRO pending a preliminary injunction hearing and should ultimately grant the preliminary injunction to enjoin the State from applying HB102 to BOR, MUS, or MUS campuses and locations.

#### **I. LEGAL BASIS OF REQUEST FOR DECLARATORY RELIEF**

Whether considering the TRO or the preliminary injunction, this Court will assess the nature and strength of BOR's request for declaratory relief. Importantly, the merits of HB102 and the policy choices behind it are not at issue in the declaratory action. *See Montana Association of Counties v. State by and through Fox*, 2017 MT 267, ¶1 ("MACo"). Rather, the Petition presents a single – and purely legal – question: Whether HB102 is unconstitutional as applied to BOR, MUS and MUS campuses, given that the Constitution grants sole authority

to BOR, not the Legislature, to control, manage, supervise, and coordinate MUS.

Equally important, BOR's Petition is narrow in scope. BOR challenges the constitutionality of HB102 as applied to BOR, MUS, and MUS campuses and locations only. BOR does not challenge the facial constitutionality of HB102, or take any stance regarding the statute's constitutionality and enforceability except as it is applied to BOR, MUS, and MUS property contrary to the constitutional directive of Article X, Section 9. Given the clear constitutional language granting broad and full authority to BOR, and given controlling authority enforcing BOR autonomy over legislative policymaking – *i.e.*, *COPP, supra*, and *Duck Inn and Judge, infra*, BOR's Petition has a strong probability of success.

HB102 generally revises gun laws with respect to open carry and concealed carry. In Section 4, the Act allows concealed carry "anywhere in the state" except at specific locations designated by the Legislature. Those excepted locations include primary and secondary schools; courtrooms, federal property, and airports, but the Legislature did not extend the exception to the MUS or its campuses and locations. In Section 8, the Legislature revised the existing "open carry law," § 45-3-111, MCA in only one way; the Legislature deleted the prior MUS exception in the open carry law. Thus, by a purposeful omission in Section 4 and by a focused deletion in Section 8, contrary to the status quo ante, HB102 extends both open carry and concealed carry to MUS's campuses.

In addition to legislating firearm policies on MUS campuses, in HB102 the Legislature attempted to override BOR's constitutional authority to manage, coordinate and control the MUS in numerous ways with respect to this issue. Section 5 precludes BOR from "enforcing or coercing compliance" with rules or regulations which restrict the right to possess or access firearms, "notwithstanding any authority of the board of regents" under Article X. Section 6 precludes BOR from "regulat[ing], restrict[ing], or plac[ing] an undue burden on the possession, transportation, or storage of firearms on or within the university system property by a person eligible to possess a firearm under state or federal law" and who meets minimum safety training requirements, except that it allows BOR to restrict campus gun use only in limited ways. Section 7 provides that any person suffering a deprivation of rights defined by the Act "has a cause of action against any governmental entity[.]" Finally, in House Bill 2, the Legislature conditioned \$1,000,000 in funding for MUS upon the Regents surrendering BOR's right, and its duty, to challenge the law in a court of law. (Ex. 3); *COPP*, ¶ 29 ("a Board of Regents member has not only the power, but also the constitutional and statutory duty to ensure the health and stability of the MUS"); *Duck Inn v. Montana State Univ. - Northern*, 285 Mont. 519, 526, 949 P.2d 1179, 1183.

In enacting HB102, the Legislature impermissibly infringed on the authority granted solely to BOR to control, manage, supervise and coordinate the MUS.

The Montana Supreme Court has addressed the question of the constitutional balance of authority between the Legislature and BOR in *Board of Regents v. Judge*, 168 Mont. 433, 436, 543 P.2d 1323, 1325 (1975). In *Judge*, the Legislature made appropriations to the MUS, contingent upon the Board's certification of compliance with prerequisite conditions for the funding. 168 Mont. at 449-50, 543 P.2d at 1332-33. "Inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education." *Id.* at 454, 543 P.2d at 1335. This Supreme Court declared unconstitutional, in contravention of the directives of Article X, Section 9, the legislative enactments limiting the amounts MUS could pay college presidents. The Court noted: "The limitation set forth in [the legislation] specifically denies the Regents the power to function effectively by setting its own personnel policies and determining its own priorities. The condition is, therefore, unconstitutional." *Id.*

Pursuant to controlling Montana law, BOR – not the Legislature – is the competent body to determine priorities in higher education, including those related to the safety of students, professors, staff, and any other person on MUS campuses. *Judge*, 543 P.2d at 1333; *COPP*, ¶ 29. The Montana Supreme Court has already determined that when the Legislature places limitations on the Regents' choices in policymaking, such limitations "specifically den[y] the

Regents the power to function effectively by setting its own [] policies and determining its own priorities.” *Judge*, 543 P.2d at 1335. Because the Legislature has dictated BOR policy changes and conditioned funding on BOR adopting those changes (Ex. 3), HB102 is unconstitutional.

## **II. A TRO AND PRELIMINARY INJUNCTION ARE APPROPRIATE RELIEF.**

Injunctive relief is appropriate to maintain the status quo while this single legal issue is adjudicated. Indeed, when confronted with this constitutional challenge as an original proceeding, the Montana Supreme Court held that because a stay or injunction “may be obtained to maintain the status quo or on other appropriate basis through the District Court,” litigation in the trial courts and normal appeal process were not inadequate. (Order, Ex. 5).

The grant of a TRO and preliminary injunction are governed by §§ 27-19-201 and 27-19-314, MCA respectively. The Court may issue an injunction:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce great or irreparable injury to the applicant . . . .

§ 27-19-201, MCA.

The subsections in 27-19-201 are disjunctive, meaning the applicant need only meet one of the criteria for an injunction. *Stark v. Borner*, 226 Mont. 356, 359-360, 735 P.2d 314, 316 (1987). “If either showing is made, then courts are inclined to issue the preliminary injunction to preserve the status quo pending trial.” *Porter v. K&S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). The status quo is “the last actual, peaceable noncontested condition which preceded the pending controversy.” *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123. It is the court’s duty to minimize the injury or damage to all parties to the controversy. *Id.* “An applicant for a preliminary injunction must establish a prima facie case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.” *Mack v. Anderson*, 2016 MT 204, ¶ 15, 384 Mont. 368.

The Court can issue a TRO pending decision on an injunction:

Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order.

§ 27-19-314, MCA. The purpose of a TRO is to preserve the status quo until a hearing and decision on application for the preliminary injunction. *Boyer v. Karagacin*, 178 Mont. 26, 528 P.2d 1173 (1978) (overruled on other grounds by *Shammel v. Canyon Resources Corp*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912);



*Montana Tavern Ass'n v. State*, 224 Mont. 258, 729 P.2d 1310, 1315 (1986). A TRO and an injunction are not equivalents. To obtain a TRO, it is sufficient that an applicant present a prima facie case with a “probable right” and a “probable danger that such right will be defeated without the special interposition of the court.” *Boyer*, 178 Mont. at 33. The applicant need not present a case which would entitle the applicant to certain relief on the merits of the cause of action.

The Court may issue a TRO without written or oral notice to the adverse party or the party’s attorney when: “(1) it clearly appears from the specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or the party’s attorney could be heard in opposition; and (2) the applicant or the applicant’s attorney certifies to the court in writing the efforts, if any, that have been made to give notice and the reasons supporting the applicant’s claim that notice should not be required.” § 27-19-315, MCA.

### **III. BOR IS ENTITLED TO A TRO AND PRELIMINARY INJUNCTION.**

A preliminary injunction should be granted “if the record shows that [Petitioner] demonstrated either a prima facie case that [BOR] will suffer some degree of harm and [is] entitled to relief (§ 27-19-201(1), MCA) or a prima facie case that [BOR] will suffer an ‘irreparable injury’ through the loss of a constitutional right (§ 27-19-201(2), MCA).” *Driscoll v. Stapleton*, 2020 MT 247,

¶ 17, 473 P.3d 386. Here, BOR is entitled to a TRO and preliminary injunction pursuant to either subsection 1 or 2 of § 27-19-201, MCA.

**A. BOR Will Suffer Harm and is Entitled to Relief pursuant to § 27-19-201(1).**

Pursuant to § 27-19-201(1), this Court may issue an injunction if it “appears that [BOR] is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.” As shown above in Section I, BOR is entitled to the relief demanded – a declaration that HB102 is unconstitutional as applied to BOR, MUS, and MUS campuses and locations. The unconstitutionality is established by Article X, Section 9’s direct grant of authority to BOR to manage, supervise, coordinate and control the MUS, and by the Montana Supreme Court’s controlling decision interpreting the scope of that authority: “the Board of Regents is the competent body for determining priorities in higher education.” *Judge*, at 454, 543 P.2d at 1335. BOR is entitled to relief which allows BOR, not the Legislature, to manage, coordinate and control the firearms policies on the campuses of the MUS.

Part of that relief requires restraining the application of HB102 to BOR and MUS during the pendency of this litigation. Absent a TRO and injunction, on June 1, HB102’s regulation of open and concealed carry ostensibly apply on

Montana's campuses, in direct contradiction to the existing BOR Policy 1006.

BOR and its campuses will suffer harm absent a TRO. *See Rogers Declaration.* Over 5,000 people have expressed their views to BOR. At the listening session on May 12, 2021, seventy people vocalized the harm inherent in allowing HB 102 to go into effect prior to adjudication of its constitutionality. Students are concerned about housing. Resident assistants worry about the effect on safety. Parents are considering whether their children should transfer to another state's schools. Others predict adverse effects in the recruitment and retention of faculty and students. Professionals contend that the MUS's suicide prevention program will be less effective, putting lives in danger. *See Rogers Declaration, and Section B, below.*

**B. BOR Will Suffer Irreparable Harm and is Entitled to Relief pursuant to § 27-19-201(2).**

Subsection 2 allows for the grant of a TRO "when it appears that the commission or continuance of some act during the litigation would produce great or irreparable injury to the applicant . . . ." BOR Policy 1006 does not exist in a vacuum, but is one part of the overall management of the MUS. The existing policy has been revised six times over five decades. (Ex. 2). Policy 1006 allows flexibility among the campuses' needs and sizes by authorizing campuses "to establish regulations governing the transportation and storage of firearms on

campus.” Moreover, many BOR initiatives – including Suicide Prevention – depend upon the existing policy in planning for overall health and safety of the MUS. *See Rogers Declaration.* Regents are charged by the Constitution with the duty to “coordinate” the MUS, and coordination requires contemplation of the firearms policy in relation to other BOR policies and initiatives. BOR will be irreparably damaged by its inability to coordinate its existing structure during the period of confusion created by the legislation’s effective date, June 1. *See Rogers Declaration.*

Absent a TRO, the MUS will also suffer irreparable financial damage. Immediate implementation of HB102 requires funds to create training programs, hire new employees, and other functions. The Legislature allotted \$1,000,000 to the MUS to fund implementation, but that funding was contingent upon BOR’s acquiescing to constitutionality of HB102. (Ex. 3). Absent a TRO, BOR will still incur expense dealing with the fallout from any perceived applicability of HB102, even if it is declared unconstitutional at a later date. *See Rogers Declaration.*

Finally, the public comments establish the irreparable harm implementation will cause. Thousands of students, parents, faculty, and other stakeholders have documented the harm which comes from ceding management of the MUS to the Legislature, even temporarily. (Ex. 4A). As set forth in the Declaration of Brianne Rogers:

- A faculty member express fear for her life and urged BOR to take action to provide her a safe work place “where [she] did nto have to worry about being killed.” (Petition, Ex. 4A, 18).
- Parents expressed fear for the safety of their children attending school after implementation of HB102. (Petition, Ex.4A, 18, 19, 23, 28, 29, 36, 37, 46, 54, 59). Parents even noted that they would not have students attend universities where concealed carry is allowed. (Ex. 4A, p. 59).
- Public commenters raised concerns about enrollment of students and recruitment of faculty and staff. (Petition, Ex. 4A, p. 20, 21, 39, 42).

These are just a few of the grave concerns raised by the public about the safety of Montana’s campuses if HB102 is implemented. Irreparable harm has been established

#### **IV. EX PARTE RELIEF IS JUSTIFIED..**

BOR seeks an *ex parte* TRO as contemplated by § 27-19-315, MCA. BOR has provided notice to Respondent State of Montana, but the timing does not allow meaningful time for the State to respond. A briefing schedule as contemplated by the Rules of Civil Procedure, followed by a hearing, will not conclude in time to prevent irreparable harm caused by implementation of HB102 on June 1, 2021. Irreparable injury will be caused unless the status quo is maintained until the hearing on the preliminary injunction is conducted.

## CONCLUSION

Petitioner requests that this Court grant BOR an *ex parte* TRO pending a preliminary injunction hearing; schedule briefing and hearing; and ultimately grant the preliminary injunction to enjoin the State from applying HB102 to BOR, MUS, or MUS campuses and locations.

DATED this 27<sup>th</sup> day of May, 2021.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that on the 27<sup>th</sup> day of May, 2021, a copy of the foregoing has been filed, and served upon the following by electronic means and by depositing a copy in the U.S. mail, postage prepaid, addressed to:

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