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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 JREIDGERS Deputy Clerk

Cause No. BDV-2021-598

**PETITION FOR DECLARATORY
RELIEF**

MICHAEL F. McMAHON
Presiding Judge

Petitioner Board of Regents of Higher Education of the State of Montana (“Board” or “BOR”), pursuant to § 27-8-101 through 27-8-313, MCA, for its Petition against Defendant State of Montana, by and through Austin Knudsen, Attorney General (“the State”), states and alleges as follows:

PARTIES AND VENUE

1. Petitioner Board consists of seven Regents appointed by the Governor and confirmed by the Senate to seven-year overlapping terms. Mont. Const., art X, § 9(2)(b). As such, Petitioner is an independent Board mandated and established by the Constitution. The Constitution vests governance of the Montana University System in the Board, with “full power, responsibility, and authority to supervise, coordinate, manage, and control” the MUS, including “the power to do all things necessary and proper” to the exercise of these “broad powers.” *Sheehy v. Commissioner of Political Practices*, 2020 MT 37, ¶ 29, 458 P.3d 309 (“*COPP*”), *citing* Mont. Const., art. X, § 9, and § 20-25-301, MCA.
2. The Montana Constitution authorizes the Board to appoint a Commissioner of Higher Education, and the Office of the Commissioner of Higher Education (“OCHE”) is the central administrative unit of the Montana University System (“MUS”). Mont. Const., art. X, § 9 (c). OCHE is located in Helena, Lewis & Clark County, Montana. Thus, Petitioner

“resides” in Helena, Montana.

3. Respondent is one of the 50 sovereign states that make up the United States of America. Respondent Austin Knudsen (“Knudsen”), Montana’s Attorney General, is “the legal officer of the state” charged, *inter alia*, as public service requires, to “defend appropriate cases in which the state . . . is a party or in which the state has an interest,” and is the legal officer who must be notified and given opportunity to appear in any action challenging the constitutionality of a state statute. § 2-15-501(6), MCA; Rule 5.1 M.R.Civ.P.
4. It is the duty of the Attorney General – whose office is located in Helena, Montana – to defend the constitutionality of a state statute like HB102, or exercise the discretion of his office to concede the law’s unconstitutionality or otherwise decide not to defend it. *See, e.g., Western Traditions Partnership, Inc. v. Attorney General of State*, 2012 MT271, ¶ 17 (the Attorney General has “discretion to decide whether or not to defend [a state statute’s] constitutionality,” including whether to make a “concession that [the] challenged statute [is] unconstitutional”); *Finke v. State, ex rel. McGrath, Attorney General*, 2003 MT 48, ¶ 8 (“The State, through the Attorney General, has the duty to defend the constitutionality of the statute”).

5. Venue is proper in the First Judicial District, Lewis & Clark County, pursuant to § 25-2-126, MCA.

GENERAL ALLEGATIONS

6. BOR petitions this Court to declare section of House Bill 102 (“HB102” or “the Act”) unconstitutional as applied to BOR, the MUS, and the campuses of the MUS.
7. HB102 generally revises gun laws, with several sections of HB102 directly regulating, managing, and controlling the use of and access to firearms on MUS campuses. (HB102 is attached as Ex. 1).
8. HB102 Section 4 precludes restriction of concealed carry of firearms with a permit “anywhere in the state” unless excepted. Section 4 creates exceptions for detention facilities, airports, federal properties, courtrooms, and school buildings controlled by school boards, but Section 4 specifically does not exclude application of the concealed carry provision to MUS buildings, campuses, or locations.
9. HB102 Section 5 provides that BOR and its employees “are prohibited from enforcing or coercing compliance with any rule or regulation that diminishes or restricts the rights of the people to keep or bear arms . . . notwithstanding any authority of the board of regents under Article X, section 9(2) (a) of the Montana Constitution.”

10. HB102 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 set forth by the law
11. HB102 Section 7 imposes liability against BOR and MUS for any violation of HB102.
12. HB102 Section 8 revises § 45-3-111, MCA, Montana’s Open Carry Statute, removing the BOR’s exemption from the Open Carry law by deleting subsection (3), which provided: “This section does not limit the authority of the board of regents or other postsecondary institutions to regulate the carrying of weapons, as defined in 45–8-361(5)(b), on their campuses.”
13. HB102 was passed by the Legislature and became law on February 18, 2021 when it was signed by the Governor. All sections of the Act, except Section 6 — the section addressing BOR authority — became effective upon passage and approval. Ex. 1, HB102, Section 15. Section 6 becomes effective on June 1, 2021. *Id.*
14. House Bill 2 provides funding of \$1,000,000 for implementation of HB102. A provision of HB2 conditions that funding, referred to as line item

“Implementation of HB102,” on BOR’s acquiescence to the Legislature’s unconstitutional overreach, stating:

Implementation of HB102 is restricted to the provision of full implementation of open and concealed carry of firearms on the Montana University System campuses, including but not limited to firearms training, metal detectors for events, gun safes for campus residential housing, or awareness campaigns. If the Montana University System files a lawsuit contesting the legality of HB102, Implementation of HB102 is void.

15. Montana’s Constitutional delegates carefully crafted a framework for determining the policies and programs of the MUS, free of political interference. That framework requires BOR to establish policies after providing the public (including student, faculty and staff on all the campuses) an opportunity to participate in the decision-making process through public meetings. *COPP*, 2020 MT 37, ¶41 n.5 (McKinnon, J. specially concurring).
16. BOR has a longstanding policy addressing use of and access to firearms on MUS campuses, BOR Policy 1006. (Policy 1006 is attached as Ex. 2).
17. BOR has received unprecedented public comment regarding implementation of HB102, including thousands of written comments and 900 attendees at a virtual meeting on May 12, 2021. (See Declaration, Ex. 4).
18. BOR is undertaking a review of Policy 1006 in coordination with all of its campuses to determine what, if any, changes may be appropriate to the

Policy. (<https://mus.edu/board/meetings/2021/may/video.html>, May 26, 2021 meeting at 4:27). In conducting the review, BOR exercises its authority under Article X, Section 9's constitutional directive to manage, supervise, coordinate and control MUS and its campuses.

19. The Legislature's enactment of HB102 attempts to eliminate the existing BOR policy, and directs BOR to take numerous specific actions in replacing BOR Policy 1006, despite what BOR has determined in the past, and will determine in its current review of Policy 1006, is best for the health, safety and financial stability of the MUS.
20. In HB2, the Legislature conditioned \$1,000,000 in funding to MUS on BOR's compliance with these legislative directives, including that MUS must decline to file suit to enforce BOR's constitutional authority directed by Article X, Section 9. (HB2 excerpt is attached as Ex. 3).

COUNT I: DECLARATORY RELIEF

21. Petitioner re-asserts the allegations contained in the previous paragraphs of the Petition.
22. Montana's Declaratory Judgment Act allows an entity "whose rights, status or other legal relations are affected by a statute" to "have determined any question of construction or validity" of the statute. § 27-8-202, MCA.
23. As the governmental entity constitutionally vested with "full power,

responsibility, and authority to supervise, coordinate, manage, and control” the MUS, BOR’s rights, status and legal relations are affected by the Act, and BOR may seek judicial determination of validity of the Act by declaratory judgment. *See COPP*, ¶ 36; § 27-8-202, MCA.

24. A declaratory action is the proper method for a governmental entity to challenge the validity of a legislative enactment when the governmental entity is prevented from exercising the powers and duties authorized by the Constitution. *Bullock v. Fox*, 2019 MT 50, ¶¶ 49, 435 P.3d 1187.
25. When, as here, “the legislature attempts to exercise control of the MUS by legislative enactment,” the court “must engage in a case-by-case analysis to determine whether the legislature's action impermissibly infringes on the Board's authority.” *COPP*, ¶ 36 (J. McKinnon concurring).
26. “The Regents are given ‘full power, responsibility and authority to supervise, coordinate, manage, and control the Montana university system.’” *Duck Inn, Inc. v. Montan State University - Northern*, 285 Mont. 519, 526, 949 P.2d 1179, 1183 (1997).
27. BOR is the “competent body for determining priorities in higher education.” *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975).
28. BOR has exercised, and continues to exercise, its authority with respect to supervising, coordinating, and managing the presence and use of guns on

MUS campuses, by adopting Policy 1006, which has been in place in its current form since 2012 (Ex.2), and by currently reviewing across the MUS whether that policy should continue in its current form or be amended.

29. HB102 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 set forth by the law. Exhibit 1, HB102, Section 6.
30. HB102 does not include an exemption for BOR in the new Concealed Carry Law, and eliminates the longstanding exemption of BOR from the Open Carry Statute, § 45-3-111. (HB102, Sections 4, 8).
31. In restricting BOR’s authority to supervise, coordinate, manage and control the presence and use of firearms on MUS campuses in the manner the Board determines is best to “ensure the health and stability of MUS,” (*COPP* at ¶ 29), the Legislature exercised control over the MUS and impermissibly infringed on BOR’s authority under the constitutional directive of Article X, Section 9.
32. This “as-applied” constitutional challenge is limited to the application of HB102 to BOR, MUS and MUS campuses and locations. HB102 may be

enforceable in different circumstances not infringing upon BOR authority, and in this action BOR does not challenge the facial constitutionality of HB102, or take any stance regarding that 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.

33. Challenges made under constitutional directive, such as this, “[t]he merits of [the statute] and the policy choices behind it or not at issue,” instead “the only question” is the pure legal question of whether the enactment of HB102 “conformed to Montana’s constitutional requirements” and directives regarding the authority of BOR. *Montana Association of Counties v. State by and through Fox, Attorney General*, 2017 MT 267, ¶ 1.
34. HB102 is unenforceable against BOR and MUS, and as to MUS campuses and locations, because BOR, and not the Legislature, is constitutionally authorized to manage, control, supervise and coordinate MUS and MUS campuses pursuant to the constitutional directive of Article X, Section 9. *See City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 25, ¶ 31, 419 P.3d 685 (application of a statute contrary to a “constitutional directive” is unconstitutional “under any level of scrutiny”).
35. BOR requests a judicial declaration that HB102 is unconstitutional as applied to BOR, MUS, and MUS campuses and locations.

COUNT II: INJUNCTIVE RELIEF

36. Petitioner re-asserts the allegations contained in the previous paragraphs of the Petition.

37. Section 27-19-201, MCA, provides:

An injunction order may be granted in the following cases:

- (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 a great or irreparable injury to the applicant;
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
- (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;
- (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

38. The Court need only find that one subsection of § 27-19-201 applies to issue a preliminary injunction. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 473 P.3d 386.

39. The Montana Supreme Court has directed that a stay or injunction in this matter “may be obtained to maintain the status quo or on other appropriate

basis through the District Court.” (Order, Ex. 5).

40. Pursuant to § 27-19-201(1), MCA, BOR is entitled to relief from application of HB102 to BOR, MUS and MUS campuses because BOR, and not the Legislature, has the full power to determine how to best manage, control, supervise the MUS for the health and stability of MUS pursuant to the constitutional directive of Article X, Section 9. It appears that BOR is entitled to a declaration that HB102 is unconstitutional as applied to BOR, MUS, and MUS campuses, and a preliminary injunction would restrain the effect of the impermissible infringement on the BOR’s authority under the constitutional directive of Article X, Section 9.
41. Pursuant to § 27-19-201(2), MCA, it appears that an act may occur during the litigation that would produce great and irreparable injury to Petitioner. If HB102 is applied to BOR, MUS, and MUS campuses during this litigation, 40,000 MUS students will not know whether to comply with HB102 or with existing BOR Policy 1006. In public comment to BOR, students, parents, campus leaders and other constituencies have expressed grave concern about safety on campuses; enrollment and retention of students; recruitment and retention of faculty, suicide prevention. (Ex. 4, Ex. A).
42. In seeking a preliminary injunction, BOR need only establish a prima facie

violation of its rights, but not a certainty of prevailing in the declaratory action. *Driscoll* at ¶ 16.

43. 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* at ¶ 17.
44. BOR requests a preliminary injunction to preserve the status quo, and precluding application of HB102 to BOR, MUS, or MUS campuses and locations during the pendency of this litigation.
45. BOR requests a permanent injunction precluding application of HB102 to BOR, MUS, and MUS campuses and locations pursuant to a declaration that HB102 is unconstitutional as applied.

COUNT III: TEMPORARY RESTRAINING ORDER

46. Petitioner re-asserts the allegations contained in the previous paragraphs of the Petition.
47. Section 27-19-314, MCA, provides:

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.

48. In Count II of this Petition, BOR applies for an injunction.
49. The purpose of a temporary restraining order (“TRO”) is to preserve the status quo until a hearing and decision on the application for a preliminary injunction.
50. The Montana Supreme Court has directed that a stay or injunction in this matter “may be obtained to maintain the status quo or on other appropriate basis through the District Court.” (Order, Ex. 5).
51. BOR has adopted Policy 1006 to govern the presence and use of firearms on campus. HB102 effectively eliminates Policy 1006 and requires BOR to adopt a new policy based on legislative directives that are contrary to the constitutional directive of Article X, Section 9, that BOR, not the Legislature, be in charge of such policymaking and policy implementation.
52. HB102 requires BOR to adopt policies compliant with legislative directives by June 1, 2021.
53. Preserving the status quo requires a TRO precluding application of HB102 to BOR, MUS, and MUS campuses and locations pending adjudication of the preliminary injunction.
54. 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 v. Karagacin, 178 Mont. 26, 33, 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.

55. BOR has established its full power and authority to manage, control, supervise and coordinate MUS as BOR determines is best for the health, safety and stability of MUS as directed by Article X, Section 9 of Montana’s Constitution.
56. BOR’s authority under Article X, Section 9's constitutional directive that BOR – not the Legislature – manage, control, supervise and coordinate MUS will be overridden absent special interposition of this Court to enjoin application of HB102 to BOR, MUS and MUS campuses and locations pending resolution of this matter.
57. BOR is entitled to a TRO, with an order to show cause, pending resolution of the request for injunctive relief.

WHEREFORE, Petitioner prays that this Court:

1. Issue a temporary restraining order precluding application of HB102 to BOR, MUS, and MUS campuses and locations pending resolution of the request for injunctive relief;

2. Order the State to show cause at a hearing as to why injunctive relief should not be granted;
3. Issue a preliminary injunction precluding application of HB102 to BOR, MUS, and MUS campuses and locations pending resolution of this litigation;
4. Declare that HB102 is unconstitutional as applied to BOR, MUS and MUS campuses and locations; and
5. Provide such other and further relief as the Court deems just and proper.

DATED this 27th day of May, 2021.

Respectfully submitted,

/s/ Martha Sheehy

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