AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
J. STUART SEGREST
Chief, Civil Bureau
HANNAH E. TOKERUD
Assistant Attorney General
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
david.dewhirst@mt.gov
ssegrest@mt.gov
hannah.tokerud@mt.gov

Attorneys for Respondent

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND 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.	Cause No. BDV-2021-598 Hon. Michael F. McMahon (email) **RESPONDENT'S BRIEF IN OPPOSITION TO PRELIMINARY INJUNCTION**

The Montana Board of Regent's (the "Board") eleventh-hour request to disrupt the implementation of Montana House Bill 102, An Act Generally Revising Gun Laws ("HB 102"), should be denied. The Legislature—in a valid exercise of its authority—passed HB 102, which was signed into law by the Governor on February 18, 2021. Despite waiting to file until months after HB 102 was signed into law, the Board now seeks extraordinary relief to disrupt this legislative process by stalling the implementation of HB 102. Injunctive relief at this late date undermines Montana students' constitutional rights and encourages litigation by ambush. The Board fails to meet their burden under the standard for a temporary restraining order or preliminary injunction. And in any case, the Board's challenge to HB 102 fails on the merits.

HB 102 was a proper exercise of the Legislature's authority, and the Board cannot thwart the public policy of the people of Montana. The Court should allow the TRO to expire and decline to enter a preliminary injunction. The Board of Regents should simply get to the business of developing a policy that respects the fundamental rights of students and faculty.

I. BACKGROUND

A. The Legislature's Enactment of HB 102

HB 102 protects Montanans' constitutional right to keep and bear arms.[1] The bill aims to increase the safety of Montana residents by safeguarding their fundamental right to defend themselves and others. HB 102, § 1. HB 102 was a valid exercise of the legislative power, which is vested solely in the Legislature. Mont. Const. art. V, § 1. The Legislature, "representing the sovereign power of the state, may exercise such power to any extent it may choose, except to the extent it is restrained or limited by the State or Federal Constitutions." *State ex rel. Du Fresne v. Leslie*, 100 Mont. 449, 454, 50 P.2d 959 (1935). Thus, bills that go through the proper legislative process are presumed to be constitutional. *State v. Michaud*, 2008 MT 88, ¶ 49, 342 Mont. 244, 180 P.3d 636; *see also People ex rel. Robertson v. Van Gaskin*, 5 Mont. 352, 363, 6 P. 30, 31 (1885) ("An act of the legislature should not be adjudged to be in violation of the constitution except where plainly repugnant thereto.").

[1] The United States Constitution declares the right to "keep and bear arms," U.S. Const. amend. II, while the Montana Constitution declares the right to "keep or bear arms," Mont. Const. Art. II, §12. For purposes of this litigation, we will refer to the right to "keep and bear arms."

Whereas "[p]lenary power in the [L]egislature is the rule," and restrictions on this power are the exception, *see Van Gaskin*, 5 Mont. at 363, 6 P. at 32, the Board's authority is clearly spelled out in the Montana Constitution. *See* Mont. Const. art. X, § 9; *Sheehy v. Comm'r of Political Practices for Montana*, 2020 MT 37, ¶¶ 43, 55, 399 Mont. 26, 458 P.3d 309 (McKinnon, J., concurring). As such, the Board's power "is not so broad as to destroy or limit the general power of the legislature to enact laws mandated by other constitutional provisions." *Sheehy*, ¶ 47 (McKinnon, J., concurring). This grant of power only permits the Board to "supervise, coordinate, manage and control the MUS." *Id.*

B. The Board of Regents Seeks Injunctive Relief

In this case, the Board asserts that the Legislature has somehow overstepped its authority by passing HB 102, which protects the right to keep and bear arms as guaranteed by both the United States and Montana constitutions. The Board argues this legislation encroaches on the Board's ability to exercise its supervisory power over the MUS and harms its interests. Specifically, the Board states that it is worried about "housing," "safety," and "recruitment." Motion at 11. Presumably, these vague statements of harm mean that the Board believes an increased number

of firearms on campus will lead to violence in student housing and the campus at large, and fewer students will be interested in attending one of the MUS campuses. The Board also expresses concerns about financial damages resulting from the costs of implementing training programs associated with HB 102.

The Board took no timely steps to mitigate this purported harm, despite HB 102 being signed into law three and a half months ago. Both when before the Montana Supreme Court and now, the Board—which lobbied for and obtained the June 1 implementation date—created the present timing constraint. While other entities took action to start implementing its new directives,[2] the Board did not act until May 19, 2021, when it met to consider challenging HB 102. The following day, the Board filed a petition for original jurisdiction in the Montana Supreme Court, which the Court denied summarily on May 26. The Board then filed this ex parte motion for a temporary restraining order and a

[2] The Office of the Commissioner of Higher Education published a draft policy for the Board of Regents to consider. *Draft Policy Recommendation,* Montana University System (last visited June 4, 2021), https://www.mus.edu/board/draft-policy-recommendation.html. The University of Montana Police Department also published campus firearms rules, acknowledging the changes set forth in HB 102. *UM Campus Carry Information,* University of Montana (last visited June 4, 2021), https://www.umt.edu/police/campus-carry/default.php.

preliminary injunction, even though the Board's counsel was in dialogue with the State's attorneys during its unsuccessful bid for original proceedings. The motion was filed after hours on May 27—the Thursday before a long, holiday weekend, mere days before HB 102 was to go into effect on June 1, 2021.

On the same day, hours after the Board's filing and without providing the State an opportunity to respond, the Court entered a temporary restraining order. *See* Order at 2.[3]

C. Legal Standard for Injunctive Relief

A preliminary injunction is only appropriate under limited circumstances, including when a continuation of litigation would "produce a great or irreparable injury to the applicant." Mont. Code Ann. § 27-19-201(2). Injunctive relief may also be appropriate when it appears "the applicant is entitled to the relief," and the relief sought includes enjoining

[3] This Court enjoined § 5 of HB 102, which broadly prohibits the Board from violating students' constitutional rights—specifically students' right to keep or bear arms. It is unclear how this provision could harm the Board, unless it plans to violate students' constitutional rights. But at any rate, because the Board's obligation *not* to violate constitutional rights exists apart from HB 102 or any other statutory enactment, the State is skeptical that any court order can effectively relieve that obligation.

the act complained of. § 27-19-201(1). The Board fails under both standards.

II. ANALYSIS

Preliminary injunctive relief is "an extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794. An applicant seeking injunctive relief must (1) establish a prima facie case; (2) demonstrate that the status quo will be preserved; and (3) minimize potential injuries to all parties involved. *Porter v. K & S P'ship*, 192 Mont. 175, 182, 627 P.2d 836 (1981).

"In deciding whether an applicant has established a prima facie case, a court should determine whether a sufficient case has been made out to warrant the preservation of the ... rights ...." *Sweet Grass Farms, Ltd. v. Bd. of Cty. Comm'rs*, 2000 MT 147, ¶ 28, 300 Mont. 66, 2 P.3d 825. In other words, an applicant must be likely to succeed on the merits. *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123. Here, the Board has failed to show it is likely to succeed on the merits. It also has failed to establish that it will suffer some "irreparable injury" *or* that it is otherwise entitled to relief. Mont. Code Ann. § 27-19-201(1)–

(2); *see also Driscoll v. Stapleton*, 2020 MT 247, ¶ 17, 401 Mont. 405, 473 P.3d 386.

A. The Board is Unlikely to Succeed on the Merits

This case is about more than the scope of the Board's and Legislature's respective authorities under the Montana Constitution. The gravamen of this case is about the Board's authority to restrict students' individual, constitutional rights under both the United States and Montana constitutions. U.S. Const. amend. II; *see also* Mont. Const. art. II, § 12. This right cannot "be infringed"—not by the federal government, not by the State, and not by the Board of Regents.

To the extent there is an "unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). The Second Amendment guarantees "the right of the people to keep and bear Arms," and this right "shall not be infringed." U.S. Const. amend. II. Importantly, "individual self-defense is 'the *central component*' of the Second Amendment right." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (citation omitted) (emphasis in original); *see also District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (noting that the Second Amendment "guarantee[s] the

individual right to possess and carry weapons in case of confrontation"). Likewise, the Montana Constitution guarantees the "right of any person to keep or bear arms in defense of his own home, *person, and property*." Mont. Const. art. II, § 12 (emphasis added).

By comparison, the Montana Constitution vests the Board with "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system." Mont Const. art. X, § 9. The Montana Constitution does not bestow any "rights" on the Board—rather, it articulates the scope of the grant of authority given to it. And this grant of authority does not supersede individual rights. *See Reynolds*, 377 U.S. at 584.

Courts "engage in a case-by-case analysis to determine whether the legislature's action impermissibly infringes on the Board's authority." *Sheehy*, ¶ 37 (McKinnon, J., concurring). Because of the constitutional rights implicated in this case, *Judge* and *COPP* have limited applicability. Both cases involved the Board's authority to manage and control the finances of the MUS. In *COPP*, the Montana Supreme Court affirmed that the Board has the authority to ensure "health and stability of the MUS." *Sheehy*, ¶ 29. But the Court's analysis was limited to the Board's

authority over the MUS's *financial* health and stability. *Id.* Article X, § 9 is not a grant of general police powers but rather a confirmation that the Legislature cannot encroach upon the Board's financial and academic stewardship responsibilities.

Judge likewise involved monies appropriated to the MUS that were contingent upon salary restrictions for university administrators. *Bd. of Regents v. Judge*, 168 Mont 433, 454, 543 P.2d 1323 (1975). While the Board may be a "competent body for determining priorities in higher education," *Judge*, 168 Mont. at 454, it is not a discrete republic wielding complete governmental control over every aspect of life within the borders of the state properties it oversees. Neither case discusses the scope of the Board's authority as it relates to fundamental constitutional rights, the question at issue here—whether the Legislature may exercise its plenary legislative power to remove barriers to self-defense on state-owned property, including the MUS property.

While the Board has authority to manage financial, personnel, and academic issues regarding the University system, and even some safety decisions, it is not a separate legislature under Montana's Constitution. *Sheehy*, ¶ 41 ("The Board cannot abridge rights protected by the federal

or state constitutions, and is subject to state legislation enforcing statewide standards for public welfare, health, and safety"); *see also Sheehy*, ¶ 47 (noting that the Board's authority does not interfere with the Legislature's authority); *Judge*, 168 Mont. at 449, 543 P.2d 1323 (noting that the Board is "subject to the [legislative] power to appropriate and the public policy of this state"). The Legislature, on the other hand, *is* granted exclusive and plenary authority. Mont. Const. art. V, § 1; *see also Sheehy*, ¶ 47 (McKinnon, J., concurring) (describing the "general power of the legislature").

B. The Board has Failed to Show Irreparable Harm

The Board also has failed to demonstrate that it will suffer some "irreparable injury" or that it is otherwise entitled to relief. Mont. Code Ann. § 27-19-201(1)–(2). The relief sought must "minimize the injury or damage to all parties to the controversy." *Porter*, 192 Mont. at 182, 627 P.2d 836.

As an initial matter, irreparable injury does not mean some abstract logistical challenge. It means "an injury so significant it could not later be repaired even by means of the litigation." *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 15, 395 Mont. 160, 437 P.3d 142. The

Board claims that any delay in injunctive relief will cause immediate and irreparable harm, but the Board made this bed. It waited nearly 100 days after the Governor signed HB 102 before taking any action—and its first action was to challenge the law rather than evaluate ways to implement it effectively. The only "emergency" here is one created by the Board. *See Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (noting a "[p]laintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *accord Wreal, Ltd. Liab. Co. v. Amazon.com*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm."); *Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (en banc) (holding Plaintiffs' months-long delay in seeking injunction undercut claim of irreparable harm); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (holding Plaintiffs' delay of more than ten weeks to seek injunctive relief indicated no irreparable injury). As such, the Board cannot meet the requirements to obtain a preliminary injunction.

Besides that, the Board's claims of immediate and irreparable harm are utterly unsupported and speculative. They are the very opposite of immediate and irreparable. Mont. Code Ann. § 27-19-201. This is why the Board refuses to penetrate the stratospheric level of generality—even in its supporting declarations—with which it presents its supposed harms. These concerns, worries, and anxieties amount to nothing more than a disagreement with the Legislature's policy decision to remove barriers to effective self-defense on state-owned properties. And disagreement with legislative judgment does not create harm.

First, the Board says that it is concerned about housing—presumably, firearms in student housing—but it has not shown how the presence of firearms will impact housing, nor has it made any effort to address this concerns in preparation for the implementation of HB 102.

The Board also says it is concerned about safety. But so is HB 102. In fact, that's the law's purpose: to increase individual safety by allowing students and faculty and employees to carry firearms to protect themselves. HB 102, § 1. The Board has not shown how HB 102 will lead to less safe conditions on MUS campuses, nor has the Board taken any steps to mitigate this alleged harm.

The Board also claims that HB 102 will have adverse effects on recruitment, and it will decrease the effectiveness of MUS's suicide prevention program. The Board's only support for its claims comes in the form of statements made during the legislative debate and during a Board meeting that was open to the public. These statements, though, are purely hypothetical, and the Board cites no authority showing that HB 102 would harm recruitment or reduce the effectiveness of MUS's suicide prevention program.

Finally, the Board claims that it will suffer financial damages because any training programs associated with HB 102 will be costly. But where are these training programs? And what would they cost? The Board has no actual data to support its conjectural harms. Furthermore, the Legislature allocated funds for implementation of the program. But the Board will lose those funds because it chose to do the one thing that the Legislature forbade—challenge HB 102. These purported harms amount to little more than logistical challenges. That is, all these harms are a result of the Board not implementing a comprehensive plan to incorporate HB 102's new directives. In short, the Board has willfully pushed off any meaningful steps toward compliance with HB 102 and

instead waited for the waning days of the extended implementation deadline *it asked for* so that it could run to court with a manufactured emergency.[4]

The Board's purported harms are nothing more than policy disagreements, and the Board has failed to support its claims of potential harm with *any* evidence. These hypothetical injuries do not even merit standing, *Mitchell v. Glacier County*, 2017 MT 258, ¶10, 389 Mont. 122, 406 P.3d 427, much less injunctive relief.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court deny the Board's requests for any further injunctive relief.

Respectfully submitted June 4, 2021.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ David M.S. Dewhirst*
David M.S. Dewhirst
Solicitor General
Counsel for Respondent

[4] While the Board apparently held a "special meeting" on May 19, 2021, where it voted to challenge HB 102, it fails to explain why it didn't hold a "special meeting," or otherwise act, earlier.

CERTIFICATE OF SERVICE

I certify I served a true and correct copy of the foregoing was delivered by first class mail and email to the following:

Martha Sheehy
Sheehy Law Firm
P.O. Box 584
Billings, MT 59103-0584
msheehy@sheehylawfirm.com

Kyle A. Gray
Brianne C. McClafferty
Emily J. Cross
Holland & Hart LLP
401 N. 31st St. Suite 1500
P.O. Box 639
Billings, MT 59103
kgray@hollandhart.com
bcmclafferty@hollandhart.com
ejcross@hollandhart.com

Ali Bovingdon
MUS Chief Legal Counsel
Office of Commissioner of Higher Education
P.O. Box 203201
Helena, MT 59620-3201
abovingdon@montana.edu

Date: June 4, 2021

Rochell Standish
ROCHELL STANDISH