

**FILED**

JUN 07 2021

ANGIE SPARKS, Clerk of District Court  
By [Signature] Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

<p>BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA,                      Petitioner,  v.  THE STATE OF MONTANA, by and through Austin Knudsen, Attorney General of the State of Montana in his official capacity,                      Respondent.</p>	<p>Cause No.: BDV-2021-598  <b>PRELIMINARY INJUNCTION ORDER</b></p>
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On June 7, 2021, a Show Cause hearing was held to determine whether this Court's May 28, 2021 Temporary Restraining Order (TRO) in favor of the Montana Higher Education Board of Regents (Board) and against Montana should be modified to a preliminary injunction or vacated. The TRO enjoined, among other things, House Bill 102's (HB 102) to the Board, the Montana

1 University System (MUS) and MUS' campuses and locations. At the hearing,  
2 the Board appeared via its counsel, Martha Sheehy and Ali Bovingdon along with  
3 Regent Brianne Rogers. Montana appeared via its Department of Justice attorney,  
4 Solicitor General David Dewhirst.

5 Without objection from Montana, Regent Rogers' May 20, 2021  
6 Declaration was admitted at the hearing subject to her cross-examination by  
7 Montana in lieu of her testimony. At the hearing, Montana elected to not cross-  
8 examine Regent Rogers. Thereafter, counsel argued their clients' respective  
9 positions.

### 10 MATERIAL FACTUAL BACKGROUND

11 Since at least 2012, firearms on MUS property have been limited  
12 by Board Policy 1006. Specifically, it provides the only individuals authorized to  
13 carry firearms are:

14 1. those persons who are acting in the capacity of policy or  
15 security department officers and who:

16 a. have successfully completed the basic course in law  
17 enforcement conducted by the Montana Law Enforcement Academy  
18 or an equivalent course conducted by another state agency and  
19 recognized as such by the Crime Control Division of the Montana  
Department of Justice; or

20 b. have passed the state approved equivalency  
21 examination by the Montana Law Enforcement Academy; and

22 2. those persons who are employees of a contracted private  
23 security company and who are registered to carry firearms pursuant  
24 to Title 37, Chapter 60, MCA.

25 Board Policy 1006 (11/18/99 and revised 5/25/12).

1                   On February 18, 2021, Governor Gianforte signed HB102. Most  
2 of its sections became immediately effective although section 6 which is  
3 applicable to the Board was to become effective on June 1, 2021. According to  
4 the Board:

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

17                   In addition to legislating firearm policies on MUS campuses, in  
18 HB102 the Legislature attempted to override [the Board’s]  
19 constitutional authority to manage, coordinate and control the MUS  
20 in numerous ways with respect to this issue. Section 5 precludes [the  
21 Board] from “enforcing or coercing compliance” with rules or  
22 regulations which restrict the right to possess or access firearms,  
23 “notwithstanding any authority of the board of regents” under Article  
24 X. Section 6 precludes [the Board] from “regulat[ing], restrict[ing],  
25 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 [the Board] 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  
[HB 2], the Legislature conditioned \$1,000,000 in funding for MUS

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1 upon the Regents surrendering BOR's right, and its duty, to  
2 challenge the law in a court of law.

3 (Dkt. 7, at 4-5 (May 27, 2021).)

4 On May 20, 2021, Governor Gianforte signed HB 2. Seven days  
5 later, the Board filed its Declaratory Relief Petition in this proceeding wherein it  
6 challenges HB 102's constitutionality as applied to it, MUS, and MUS campuses  
7 and locations.<sup>1</sup> It claims "HB102 materially alters the existing firearms policies  
8 on all [MUS] campuses by allowing open carry and concealed carry, contrary to  
9 existing policy adopted by the [Board] in 2012."

10 The Board argues, in relevant part:

11 Montana's Constitution vests sole and full authority in [it] to  
12 "supervise, coordinate, manage and control the Montana university  
13 system." Mont. Const., art. X, §9(2)(a). In enacting HB102, the 2021  
14 Montana Legislature (the "Legislature") has impermissibly curtailed [the  
15 Board's] authority to determine the best policies to "ensure the health and  
16 stability of the MUS." *Sheehy v. Commissioner of Political Practices*,  
2020 MT 37, ¶ 29 . . ., quoting Mont. Const., art. X, § 9.

17 . . .

18 If HB102 becomes effective immediately, the MUS will suffer significant  
19 and irreversible financial injury. Immediate implementation of HB102  
20 requires funds to create training programs, hire new employees, and other  
21 functions. (Rogers Declaration, ¶ 8). The Legislature allotted \$1,000,000  
22 to the MUS to fund implementation, but that funding was contingent  
23 upon BOR's acquiescing to constitutionality of HB102. (Ex. 3). BOR  
24 will still incur expense dealing with the fallout from any perceived  
25 applicability of HB102, even if it is declared unconstitutional at a later  
date. (Rogers Declaration, ¶ 7).

(Dkt. 7, at 2; 12 (May 27, 2021).)

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<sup>1</sup> With all due respect to Montana, the Court respectfully disagrees with it that the Board substantially delayed its request for judicial declaratory relief.

1 DISCUSSION

2 A. Preliminary Injunction Standard

3 A district court may issue a preliminary injunction in any of the  
4 following cases:

5 (1) when it appears that the applicant is entitled to the  
6 relief demanded and the relief or any part of the relief consists in  
7 restraining the commission or continuance of the act complained  
8 of, either for a limited period or perpetually;

9 (2) when it appears that the commission or continuance of  
10 some act during the litigation would produce a great or irreparable  
11 injury to the applicant;

12 (3) when it appears during the litigation that the adverse  
13 party is doing or threatens or is about to do or is procuring or  
14 suffering to be done some act in violation of the applicant's rights,  
15 respecting the subject of the action, and tending to render the  
16 judgment ineffectual;

17 (4) when it appears that the adverse party, during the  
18 pendency of the action, threatens or is about to remove or to dispose  
19 of the adverse party's property with intent to defraud the applicant,  
20 an injunction order may be granted to restrain the removal or  
21 disposition; [or]

22 (5) when it appears that the applicant has applied for an order  
23 under the provisions of [Section] 40-4-121 or an order of protection  
24 under Title 40, chapter 15.

25 Mont. Code Ann. § 27-19-201 (2019).

The Board only needs to meet the criteria in one of these subsections  
for a preliminary injunction order. *Sweet Grass Farms, Ltd. v. Bd. of Co.  
Comm'rs*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825. A preliminary  
injunction does not resolve the merits of the case, but rather prevents further  
injury or irreparable harm by preserving the status quo of the subject in  
controversy pending adjudication on its merits. See *Four Rivers Seed Co. v.*

1 *Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342 (citing  
2 *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995)). When  
3 considering an application for a preliminary injunction, a district court has the  
4 duty to balance the equities and minimize potential damage. *Id.* It is error for a  
5 district court to determine the ultimate merits of the case at the preliminary  
6 injunction stage.

7           In determining the merits of a preliminary injunction, it is not  
8 the province of either the District Court or this Court on appeal to  
9 determine finally matters that may arise upon a trial on the merits.  
10 The limited function of a preliminary injunction is to preserve the  
11 *status quo* and to minimize the harm to all parties pending full trial;  
12 findings and conclusions directed toward the resolution of the  
13 ultimate issues are properly reserved for trial on the merits. In  
14 determining whether to grant a preliminary injunction, a court should  
15 not anticipate the ultimate determination of the issues involved, but  
16 should decide merely whether a sufficient case has been made out to  
17 warrant the preservation of the *status quo* until trial. A preliminary  
18 injunction does not determine the merits of the case, but rather,  
19 prevents further injury or irreparable harm by preserving the *status*  
20 *quo* of the subject in controversy pending an adjudication on the  
21 merits.

18 *Yockey v. Kearns Props., LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185.  
19 (citations omitted).

20           Here, the Board seeks preliminary injunction relief under Mont. Code  
21 Ann. § 27-19-201(1) and/or Mont. Code Ann. § 27-19-201(2).

22           Section 27-19-201(1), MCA, provides that a preliminary injunction may  
23 issue when an applicant has demonstrated that he is entitled to the  
24 injunctive relief he has requested. To prevail under Section 27-19-201(1),  
25 MCA, an applicant must establish that he has a legitimate cause of action,  
and that he is likely to succeed on the merits of that claim.

1 *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 15, 348 Mont. 68, 72, 199 P.3d  
2 810, 814 (citing *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶  
3 22, 334 Mont. 86, 146 P.3d 714; *M.H. v. Mont. High Sch. Assn.*, 280 Mont. 123,  
4 135, 929 P.2d 239 (1996)).

5 As to section 27-19-201(2), the Board must make “some  
6 demonstration of threatened harm or injury, whether under the ‘great or  
7 irreparable injury’ standard of subsection (2), or the lesser degree of harm  
8 implied within the other subsections of § 27-19-201, MCA.” *Weemis v. State*,  
9 2019 MT 98, ¶ 17, 395 Mont. 350, 440 P.3d 4 (citing authority).

10 Moreover, contrary to Montana’s hearing arguments:

11 In the context of a constitutional challenge, an applicant for  
12 preliminary injunction need not demonstrate that the statute is  
13 unconstitutional beyond a reasonable doubt, but “must establish a  
14 prima facie case of a violation of its rights under” the constitution.  
15 *City of Billings v. Cty. Water Dist. of Billings Heights*, 281 Mont.  
16 219, 227, 935 P.2d 246, 251 (1997). “Prima facie” means literally “at  
17 first sight” or “on first appearance but subject to further evidence or  
18 information.” *Prima facie*, Black’s Law Dictionary (10th ed. 2014).

17 *Weemis*, at ¶18.

18 **B. To Maintain the Status Quo, the Board is Entitled to a**  
19 **Preliminary Injunction**

20 **The right to keep or bear arms’ scope is limited**

21 Montana argues “HB 102 protects Montanans’ constitutional right  
22 to keep and bear arms. The bill aims to increase the safety of Montana residents  
23 by safe-guarding their fundamental right to defend themselves and others.”

24 Montana contends that the Board may not infringe on Second Amendment rights.

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1 The Second Amendment provides:

2 A well regulated Militia, being necessary to the security of a free  
3 State, the right of the people to keep and bear Arms, shall not be  
4 infringed.

U.S. Const. amend. II.

5 The United States Supreme Court has held that the Second  
6 Amendment protects an individual's right to possess a firearm "unconnected with  
7 militia service." *District of Columbia v. Heller*, 554 U.S. 570, 5825 (2008). At its  
8 "core," the Second Amendment is the right of "law-abiding, responsible citizens  
9 to use arms in defense of hearth and home." *Heller*, at 634-35. Notwithstanding,  
10 however, the individual rights guaranteed by the Second Amendment, are "not  
11 unlimited." *Heller*, at 626. In this regard, the *Heller* Court identified a non-  
12 exhaustive list of "presumptively lawful regulatory measures" that have  
13 historically been treated as exceptions to the right to bear arms. *Heller*, at 626-27  
14 & n.26. They include, but are not limited to, "longstanding prohibitions on the  
15 possession of firearms by felons and the mentally ill, [] laws forbidding  
16 the carrying of firearms in sensitive places such as schools and government  
17 buildings, [and] laws imposing conditions and qualifications on the commercial  
18 sale of arms." *Heller*, at 626-27 (emphasis added).

19 Moreover, in *Robertson v. Baldwin*, 165 U.S. 275 (1897), the  
20 United States Supreme Court made clear that the Second Amendment did not  
21 protect the right to carry a concealed weapon. The *Robertson* Court stated:

22 [T]he first 10 amendments to the constitution, commonly known as  
23 the "Bill of Rights," were not intended to lay down any novel  
24 principles of government, but simply to embody certain guaranties  
25 and immunities which we had inherited from our English ancestors,  
and which had, from time immemorial, been subject to certain well-



1 recognized exceptions, arising from the necessities of the case. In  
2 incorporating these principles into the fundamental law, there was no  
3 intention of disregarding the exceptions, which continued to be  
4 recognized as if they had been formally expressed. Thus . . . the right  
5 of the people to keep and bear arms (article 2) is not infringed by  
6 laws prohibiting the carrying of concealed weapons[.]

6 *Id.*, at 281-82.

7 In Montana:

8 The right of any person to keep or bear arms in defense of his  
9 own home, person, and property, or in aid of the civil power when  
10 thereto legally summoned, shall not be called in question, but  
11 nothing herein contained shall be held to permit the carrying of  
concealed weapons.

12 Art. II, sec. 12, Mont. Const. (emphasis added). This right is also not unlimited.  
13 *State v. Fadness*, 2012 MT 12, ¶ 31, 363 Mont. 322, 268 P.3d 17 (citing *State v.*  
14 *Maine*, 2011 MT 90, ¶ 29, 360 Mont. 182, 255 P.3d 64). The *Fadness* Court  
15 noted that:

16 In fact, in proposing Article II, Section 12 at the 1972  
17 Constitutional Convention, the Bill of Rights Committee noted “that  
18 the statutory efforts to regulate the possession of firearms have been  
19 at the federal level and are, therefore, not subject to state  
20 Constitutional provisions. In addition, it is urged—and requires no  
21 citation—that the right to bear arms is subject to the police power of  
22 the state.” Montana Constitutional Convention, Comments on the  
23 Bill of Rights Committee Proposal, Feb. 22, 1972, vol. II, p. 634; see  
24 also Montana Constitutional Convention, Verbatim Transcript, Mar.  
25 8, 1972, pp. 1725-42, Mar. 9, 1972, pp. 1832-42 (twice rejecting a  
proposal to add nor shall any person’s firearms be registered or  
licensed” to Article II, Section 12, with several opponents of this

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1 language arguing that the decision to adopt registration and licensing  
2 requirements is a legislative, rather than constitutional, matter).

3 *Id.*

4 In addition, the “State of Montana has a police power by which it  
5 can regulate for the health and safety of its citizens.” *Wiser v. State*, 2006 MT 20,  
6 ¶ 19, 331 Mont. 28, 129 P.3d 133 (citing *State v. Skurdal*, 235 Mont. 291, 294,  
7 767 P.2d 304, 306 (1988)). In this regard, the state’s police power is valid even  
8 when a governmental regulation infringes upon individual rights. *Skurdal*, at 294  
9 (citing authority). Here, as agreed to by Montana, a constitutional issue remains  
10 whether either the Legislature or the Board has the police power to protect the  
11 safety and well-being of those who utilize MUS campuses and location. In this  
12 regard, there should be no dispute that there are very few constitutional rights  
13 which are always absolute and inalienable. *Id.* (citing authority).

14 At this juncture in this proceeding, the Court has not been  
15 presented with any controlling legal authority that the right to keep or bear arms  
16 on MUS campuses and other locations under either the United States Constitution  
17 or the Montana Constitution is an absolute right. Furthermore, there is doubt  
18 who has the constitutional authority to regulate firearms on MUS campuses and  
19 other locations.

20 **Board authority over MUS campuses and locations**

21 The Board has sole authority to “supervise, coordinate, manage  
22 and control [MUS].” Mont. Const., art. X, §9(2)(a). In this regard, the Board has  
23 broad constitutional and statutory authority to determine the best policies to  
24 “ensure the health and stability of the MUS.” *Sheehy v. Commissioner of*  
25 *Political Practices*, 2020 MT 37, ¶ 29, 399 Mont. 26, 458 P.3d 309.

1                    Since 1975, the Montana Supreme Court has steadfastly  
2 recognized and upheld the Board’s constitutional authority when the Legislature  
3 has placed policymaking limitations on the Board. See *Board of Regents v.*  
4 *Judge*, 168 Mont. 433, 543 P.2d 1323, 1325 (1975) (Legislature’s policy making  
5 limitations placed on Board “specifically den[y] the [Board] the power to  
6 function effectively by setting its own [] policies and determining its own  
7 priorities.” *Judge*, at 454. “Inherent in the constitutional provision granting the  
8 [Board its] power is the realization that the Board of Regents is the competent  
9 body for determining priorities in higher education.” *Id.*

10                    Here, at this juncture, it appears HB 102 interferes with the  
11 Board’s constitutional authority to control, manage, supervise, and coordinate the  
12 MUS. This would include, but not limited to, the Board’s authority to prioritize  
13 and implement firearm policies on MUS campuses and locations as set forth in  
14 Policy 1006. It also appears that Policy 1006 relates to the Board’s prioritization  
15 of student, visitor, faculty, administration and staff protection, safety and well-  
16 being on MUS campuses and locations.

17                    In addition, based upon Regent Rogers’ uncontroverted  
18 Declaration, the Court agrees with the Board that it “has not just established  
19 ‘some degree’ of financial injury, but has amply demonstrated significant  
20 [financial] injury” if this Court’s vacates its May 28, 2021 TRO.

21                    **ORDER**

22                    Based on the above and to preserve the *status quo*, the Board has  
23 “demonstrated either a prima facie case that [it] will suffer some degree of harm  
24 and [is] entitled to relief [Mont. Code Ann. § 27-19-201(1)] or a prima facie case  
25 that [it] will suffer an ‘irreparable injury’ through the loss of a constitutional right

1 [(Mont. Code Ann. § 27-19-201(2)).” *Driscoll v. Stapleton*, 2020 Mont. 247, ¶  
2 17, 401 Mont. 405, 473 P.3d 386. Accordingly, the Court hereby **ORDERS**,  
3 **ADJUDGES AND DECREES** as follows:

4 1. The Board’s preliminary injunction request is **GRANTED**;  
5 and

6 2. This Court’s May 28, 2021 Temporary Restraining Order is  
7 **CONVERTED** to a Preliminary Injunction until further order of this Court in all  
8 respects.

9 **ORDERED** this 7<sup>th</sup> day of June 2021.

10  
11   
12 MICHAEL F. McMAHON  
13 District Court Judge

14 cc: David Dewhirst, (via email to: david.dewhirst@mt.gov)  
15 J. Stuart Segrest (via email to: ssegrest@mt.gov)  
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