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FILED

AUG 26 2021

ANGIE SPARKS, Clerk of District Court  
By: *Angie Sparks* Clerk

INDEXED

ORIGINAL

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

STATE OF MONTANA'S  
BRIEF IN SUPPORT OF ITS  
MOTION FOR RULE 60  
RELIEF

On July 16, 2021, the trial court issued an Order which denied two motions to intervene and established a briefing schedule for the parties. The State seeks relief from this Order under Montana Rules of Civil Procedure 60(a) and 60(b). This Order incorrectly identifies the Legislature as a party to the action and incorrectly characterizes the Board of Regents as an “equal governmental branch.” This Order also sets a briefing schedule that does not account for the State filing a motion for summary judgment.

**I. THE STATE SEEKS RELIEF PURSUANT TO RULE 60(A)**

Rule 60(a) allows a party to request relief from an order for a “mistake arising from oversight.” *See Davenport v. Odlin*, 2014 MT 109, ¶ 15, 374 Mont. 503, 327 P.3d 478 (“Rule 60(a) ... grants district courts the power to correct clerical errors in judgments at any time”). The Order included two such errors from which the State seeks relief under Rule 60(a).

**A. The Order Inaccurately Identifies the Legislature as a Party**

First, the Order incorrectly identifies the Legislature as a party. *See* Order at 10, 14–15. The defendant is the State of Montana. While the Legislature’s power is at issue in this case, the Legislature is not a

party. The State requests this Court amend its previous Order to the following:

1. On page 10, line 20: "... since the [~~Legislature~~ State] has already admitted ...."
2. On page 14, line 14: "The [~~Montana State Legislature's~~ State's] response brief ..."
3. On page 15, line 4: "... the [~~Legislature's~~ State's] respective counsel'..."
4. On page 15, line 6: "...Regents and the [~~Legislature~~ State] ..."

**B. The Order Incorrectly Characterizes the Board of Regents as "the executive branch"**

Second, and relatedly, the Order states that "this lawsuit concerns the delineation of power between two equal governmental branches." Order at 9. The Board of Regents is not a branch of government; it is a subsidiary of the executive branch, *Sheehy v. Comm'r of Political Practices*, 2020 MT 37, ¶ 11 n.1, 399 Mont. 26, 458 P.3d 309, and therefore does not exercise the full power of that branch. See MONT. CONST. art. X, § 9. On several other occasions, the Court uses the phrase (or some variation of the phrase), "the Executive branch, via the Regents." See, e.g.,

Order at 4, 8, 9, 11. Considering the Court’s statement about “two equal governmental branches,” this suggests that this case is about the full scope of the executive branch’s authority.

“[T]he delineation of power between two equal governmental branches” doesn’t accurately describe this case. This case is about the Legislature’s authority and the Board of Regents’ authority. *See* Petition for Declaratory Relief, ¶¶ 1, 23–35. Nowhere in the Board’s Petition for Declaratory Relief does it assert the full scope of the executive branch’s authority, and for good reason. It doesn’t possess *that* authority. “The executive power is vested in the Governor,” *see* MONT. CONST. art. VI § 4(1), and he obviously disagrees with the Board’s legal position since he signed HB 102 into law.<sup>1</sup> The State must therefore presume the statement that this case is about “two equal governmental branches of government” was a mistake or oversight. Otherwise, this would suggest that either that the Board possesses the full measure of executive authority, or that the Board is a co-equal branch of government. Neither of these statements can be true. *See* MONT. CONST. art. III, § 1 (“The power

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<sup>1</sup> If this case is about the scope of the executive branch’s authority, then the Governor is a required party under Montana Rule of Civil Procedure 19 because the Board lacks the authority to defend the executive branch’s authority.

of the government of this state is divided into three distinct branches—legislative, executive, and judicial”); art. V, § 1 (“The legislative power is vested in a legislature ...”); art. VI, § 4 (“The executive power is vested in the governor who shall see that the laws are faithfully executed.”); art. X, § 9(2)(a) (“The government and control of the Montana university system is vested in a board of regents of higher education ...”); *Sheehy*, ¶ 11 n.1; *see also Board of Regents v. Judge*, 168 Mont. 433, 442-43, 543 P.2d 1323 (1975).

The State accordingly asks this Court to amend its Order as follows:

1. On page 9, lines 8–9: “Because this lawsuit concerns [~~the delineation of power between two equal governmental branches~~ the Legislature’s authority and the Board of Regent’s authority] ...”
2. On page 4, lines 21–23: “This case is merely about whether the Legislature or the [~~Executive branch, via the Board of Regents~~ Board of Regents] has the exclusive constitutional authority to regulate firearms on MUS campuses and other locations.”
3. On page 5, lines 19–20: “... is whether the Legislature or the

~~[Executive Branch, by and through the Regents Board of Regents]~~ hold general police power ....”

4. On page 8, lines 1–2: “... only the ~~[Executive branch via the Regents Board of Regents]~~ does in this declaratory relief proceeding.”
5. On page 8, lines 19–20: “The constitutional authority in question in this case (art. X, §9) involves only the ~~[Executive and the Legislative branches Board of Regents and the Legislature]~~ ....”
6. On page 9, lines 11–12: “It might be the Legislature; it might be the ~~[Executive branch via the Regents Board of Regents].~~”
7. On page 11, lines 16–17: “... namely whether the Legislature or ~~[the Executive branch via the Regents Board of Regents]~~ are the constitutionally proper promulgator of MUS campus firearm policy.”

As written, the Order reframes this litigation by suggesting that the *executive branch’s* authority is at issue. This would prejudice the State, which has so far only addressed the constitutional power of *the Board of Regents*. The Court may have only intended to note that the

Board of Regents is a body within the executive branch and thus part of the executive branch. *Sheehy*, ¶ 11 n.1. But if the Court's statements in the Order are to be understood at face value, it would significantly alter the scope and nature of this action.

The State accordingly asks the Court to correct these mistakes and omissions pursuant to Rule 60(a).

## II. THE STATE SEEKS RELIEF PURSUANT TO RULE 60(B)

Under Rule 60(b), the State first seeks relief from the Order's briefing schedule. Rule 60(b)(6) allows relief from an order upon "any other reason that justifies relief." The Rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *In re Marriage of Waters*, 223 Mont. 183, 187, 724 P.2d 726, 729 (1986) (quoting *Klapprott v. United States*, 335 U.S. 601, 614–15 (1949)).

Relief may be granted under Rule 60(b)(6) if none of the other five grounds are present. *Waters*, 223 Mont. at 187, 724 P.2d at 729. Relief under Rule 60(b)(6) applies when (1) there are extraordinary circumstances; (2) the movant acted within a reasonable time period; and (3) the movant was blameless. *Bahm v. Southworth*, 2000 MT 244, ¶ 15, 301

Mont. 434, 10 P.3d 99 (2000). All three factors are met.

The Order only contemplates that the Board will file a summary judgment motion. The State, however, intends to move for summary judgment too. Both parties will need to file an initial brief, a response brief, and a reply brief. The parties are still six weeks away from the initial deadline set by the Court, and the State's proposed briefing schedule will give Plaintiff an additional two weeks to file its initial brief. The State therefore seeks relief from the briefing schedule imposed in the Court's Order and proposes the following briefing schedule:

1. The State's initial brief shall be filed on or before September 15, 2021;
2. The Regents' initial brief and response to the State's brief shall be filed on or before October 15, 2021;
3. The State's response to the Regents' brief and the State's reply brief shall be filed on or before October 29, 2021;
4. The Regents' reply brief shall be filed on or before November 12, 2021;
5. Any amicus briefs shall be filed no later than seven (7) days after the initial brief of the party being supported is filed.




## CONCLUSION

For the foregoing reasons, the State requests relief from the Order pursuant to Rules 60(a) and 60(b).

DATED this 20th day of August, 2021.

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## CERTIFICATE OF SERVICE

Pursuant to the parties' Stipulation of Electronic Service (Doc. 26),

I certify a true and correct copy of the foregoing was delivered by email

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Date: August 20, 2021

  
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