Logan P. Olson
O'Toole Law Firm
209 North Main Street
PO Box 529
Plentywood, MT 59254
Ph: 406.487.2641
Em: lolson@danielscomt.us

Attorney for County of Daniels, appearing Amicus Curiae

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA Petitioner, v. 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 **COUNTY OF DANIELS AMICUS CURIAE BRIEF**

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Introduction

The Board of Regent's (hereinafter "BOR") unfettered disallowance of the rights of citizens on Montana University System (hereinafter "MUS") property to keep and bear arms is subject to prior restraint analysis, for such restrictions place unbridled discretion in the hands of a government agency and serve as an unconstitutional prior restraint. A number of courts across the nation have readily applied prior restraint analysis to issues involving the right to keep and bear arms and this Court should take the opportunity to do the same. The invocation of the BOR's alleged Article X duty and authority to "ensure the health and stability of the Montana University System" does not include a duty nor an authority to restrict Article II, § 12 of the Montana Constitution. The duly elected 67th Montana Legislature clearly articulated the will of the people to remove provisions of law which restrict with prior restraint the right of citizens to keep or bear arms, and in so doing the Legislature has not usurped the powers of the BOR granted under the Montana Constitution.

1. The Unfettered Disallowance of the Exercise of Rights Articulated in Article II, § 12 of the Montana Constitution on Montana University System Property is Subject to Prior Restraint Analysis.

Prior restraints on fundamental rights that predate government, while not unconstitutional per se, bear a heavy presumption against constitutional validity. *Clark v. City of Lakewood*, 259 F.3d 996, 1005 (9th Cir. 2001). In *Staub v. City of*

Baxley, 355 U.S. 313 (1958), the Supreme Court struck down an ordinance vesting a mayor and city council "uncontrolled discretion" to grant or refuse a permit required for soliciting organizational memberships. *Staub*, 355 U.S. at 325. Such a permit, held the Court:

> "makes enjoyment of speech contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from invasion by state action. For these reasons, the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment of First Amendment freedoms and lays "a forbidden burden upon the exercise of liberty protected by the Constitution."

Staub, 355 U.S. at 325 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)); *see also Largent v. Texas*, 318 U.S. 418, 422 (1943) (striking down ordinance allowing speech permit where mayor "deems it proper or advisable"); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws ... which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar."); *Charette v. Town of Oyster Bay*, 159 F.3d 749, 754 (2d Cir. 1998) (rejecting licensing officer's assessment of what inures to "welfare and benefit of the people of and visitors to the city") (citation omitted).

In line with the cases cited above, to allow the Board of Regents the uncontrolled discretion to grant or refuse individuals the right "to keep or bear arms in defense of his own home, person, and property..." on MUS property

imposes an unconstitutional prior restraint upon the enjoyment of Article II, § 12 freedoms, and lays a forbidden burden upon the exercise of liberty protected by the Montana Constitution.

A. The Board of Regents' disallowance of enjoyment of Article II, § 12 on MUS property, ostensibly as a means to "ensure the health and stability of the Montana University System," places unbridled discretion in the hands of a government agency and serves as an unconstitutional prior restraint.

"Traditionally, unconstitutional prior restraints are found in the context of judicial injunctions or a licensing scheme that places 'unbridled discretion in the hands of a government official or agency.'" *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 350 n.8 (4th Cir. 2005) (quoting *FW/PBS*, 493 U.S. at 225-26); *754 Orange Ave., Inc. v. West Haven*, 761 F.2d 105, 114 (2d Cir. 1985) ("discretion given the police department (presumably the Chief of Police) ... sets forth no standards for the issuance or revocation of a license"). However:

> "[t]he existence of standards does not in itself preclude a finding of unbridled discretion, for the existence of discretion may turn on the looseness of the standards or the existence of a condition that effectively renders the standards meaningless as to some or all persons subject to the prior restraint."

Beal v. Stern, 184 F.3d 117, 126 n.6 (2d Cir. 1999). "Unbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor's discretion." *Id.* (quoting *Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005, 1009 (4th Cir. 1995) (en banc)).

Here, the BOR are not licensors in the sense that they grant or deny physical licenses to individual citizens on MUS property pertaining to their ability to exercise the rights detailed in Article II, § 12 of the Montana Constitution, but the BOR have occupied the role of licensor insofar as they decide whether individuals on MUS property as a whole are allowed, or "licensed," to exercise their Article II, § 12 rights. In so doing, the BOR exercise unbridled discretion as they arbitrarily seek to "ensure the health and stability of the Montana University System" with no adequate standards imposed to guide the BOR's discretion in pursuing this end.

Standards governing prior restraints must be "narrow, objective, and definite." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). Standards involving "appraisal of facts, the exercise of judgment, [or] the formation of an opinion" are unacceptable. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Cantwell*, 310 U.S. at 305).

Here, the BOR's prior restraint on individuals' rights detailed in Article II, § 12 of the Montana Constitution while present on MUS property are not narrow, objective, or definite, and the imposition of the BOR's prior restraint on the enjoyment of the constitutional rights detailed in Article II, § 12 rely on the unacceptable appraisal of facts, exercise of judgment, and formation of opinions by the BOR.

Public safety is invoked to justify most laws, but where a fundamental right is concerned, the mere incantation of a public safety rationale does not save arbitrary licensing schemes.

> "[W]e have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places .... There are appropriate pubic remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence."

Kunz v. New York, 340 U.S. 290, 294 (1951); *Shuttlesworth*, 394 U.S. at 153. "[U]ncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 516 (1937) (plurality opinion).

> "Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community."

Shutllesworth, 394 U.S. at 153.

Here, the BOR invokes public safety to justify their disallowance of the exercise of Article II, § 12 rights for individuals on MUS property, as they claim the legislature has curtailed their ability to determine the best policies to ensure the health and stability of the Montana University System. As the court in *Kunz* articulates, the mere incantation of public safety rationale does not save arbitrary

licensing – or in this case regulatory – schemes. Similarly to the party in *Kunz*, the BOR, an administrative body, is exercising discretion to grant or withhold a constitutional right based on broad criteria unrelated to proper regulation of public places. Moreover, as in *Kunz*, there exists in the immediate case more appropriate public remedies to protect the peace and order of the community than the blanket disallowance, through prior restraint, of a constitutional right.

B. Extending the BOR's duty to "ensure the health and stability of the MUS" to include prior restraint restrictions on Article II, Sec. 12 of the Montana Constitution was not contemplated in *Sheehy*, the Montana Constitution, nor state statute, and vests the BOR with unbridled discretion.

The BOR's duty to "ensure the health and stability of the MUS" as articulated in *Sheehy*, if interpreted to extend to allow prior restraint restrictions on Article II, Sec. 12 of the Montana Constitution, requires an appraisal of facts, the exercise of judgment, and the formation of an opinion on behalf of the BOR. *Sheehy v. Com'r of Political Practices for Mont.*, 2020 MT 37, ¶ 29 (Mont. 2020). "The health and stability of the MUS" is a vague phrase that can only be defined within the eye of the beholding official, and an extension of that phrase to include prior restraints on individuals' right to keep and bear arms was not contemplated by the Court in *Sheehy*. *Id.*

At issue in *Sheehy* was whether Regent Sheehy's questions concerning a mill levy violated the Montana Code of Ethics. The pertinent part of *Sheehy* reads as follows:

> As prescribed by Article X, Section 9(2)(a), of the Montana Constitution, and § 20-25-301, MCA, 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. Obviously included in such duties is *ensuring the financial stability of the MUS*. *Sheehy* at ¶ 29 (Mont. 2020) (emphasis added).

In analyzing Article X, Section 9(2)(a), of the Montana Constitution, and § 20-25-301, MCA, neither of which even remotely hint at a BOR duty to regulate the possession or carrying of firearms on MUS property, the Court in *Sheehy* referenced the BOR's duty to "ensure the health and stability of the MUS" specifically as it relates to "ensuring the financial stability of the MUS." *Id.* Neither the Court, nor the drafters of Article X, Sec. 9, of the Montana Constitution, or § 20-25-301, MCA contemplated the creation of a BOR duty or BOR power to restrict, through prior restraint, the possession or carrying of firearms on college campuses. This is clearly evidenced by the fact that neither the Constitutional provision, the statute cited in *Sheehy*, nor the Court's opinion in *Sheehy* come remotely close to discussing firearms or physical safety on MUS campuses.

In fact, § 20-25-301(2), MCA, dictates that the BOR "shall adopt rules for its own government that are consistent with the constitution and the laws of the

state." By restricting through prior restraint the ability of individuals to enjoy their constitutional rights laid out in Article II, Sec. 12 of the Montana Constitution, and re-articulated by the duly elected Legislature in House Bill 102, the BOR in fact violates the obligation imposed upon them by MCA § 20-25-301(2).

The BOR cannot predict where or when crime will happen, and they cannot ensure the health of each and every individual on MUS property as it relates to violent crime because MUS properties are not controlled environments. MUS properties do not have controlled points of access. Anyone can enter an MUS campus with any weapon they so choose. Law abiding students and faculty on MUS campuses are disallowed from protecting themselves against individuals who care not what the BOR's policies are concerning firearms and other weapons on campus. Law abiding citizens who wish to protect themselves but who cannot because of BOR policy are left virtually defenseless as they are forced to rely on the BOR's inept attempt to ensure the health and safety of each and every individual on MUS property against violent crime by disarming law abiding citizens, and in so doing, ensuring the only individuals armed on MUS property are criminals.

Individuals enjoy a right to carry handguns "for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008). The right to

self-defense at the core of the Second Amendment and similarly articulated state constitutional rights is enjoyed by everyone in public spaces. Unelected officials should not be allowed to restrict, through prior restraint, law abiding individuals from protecting themselves on MUS property under the guise of "ensuring the health and stability of the MUS," for the very phrase itself as written in *Sheehy*, and pertinent constitutional provisions and statutes relied upon by the BOR to justify their prior restraint restrictions in no way impose a duty nor grant the power in the BOR to do so.

C. At least four other courts have suggested prior restraint analysis is appropriately applied to issues involving the right to keep or bear arms.

In *People v. Zerillo*, 219 Mich. 635, 639, 189 N.W. 927, 928 (1922), the court held "The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the Sheriff." The court further indicated "The [provision] making it a crime for an unnaturalized, foreign-born resident to possess a revolver, unless so permitted by the sheriff, contravenes the guaranty of such right in the Constitution of the State and is void." *Id.* At 642, 189 N.W.2d at 928.

In *Schubert v. De Bard*, 398 N.E.2d 1339 (Ind. App. 1980), the court rejected the idea that a licensing official had "the power and duty to subjectively evaluate an assignment of 'self-defense' as a reason for desiring a [handgun carry] license and the ability to grant or deny the license upon the basis of whether the applicant 'needed to defend himself." *Schubert* at 1341.

In *Mosby v. Devine*, 851 A.2d 1031, 1050 (R.I. 2004), the court, in dicta, stated:

> [T]his Court will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an executive agency . . . One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon. *The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of an unreviewable unrestricted licensing scheme.*

Mosby at 1050 (R.I. 2004) (emphasis added).

In *Woollard v. Sheridan* 863 F. Supp. 2d 462 (D. Md. 2012), despite declining to explicitly employ a prior restraint analysis, the court ultimately found itself proffering analysis grounded in prior restraint when the court stated "[a] citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs." *Woollard* at 475.

This Court would not be a pioneer in choosing to apply prior restraint analysis to the BOR's policies restricting individuals' right to keep or bear arms on MUS property. This Court should follow suit with the heretofore cited courts, and apply prior restraint analysis to the BOR's policies restricting individuals' right to keep or bear arms on MUS property.

2. The intent of the duly elected legislature in ratifying House Bill 102 was to remove provisions of law that restricted with prior restraint the right of the citizens to keep or bear arms enshrined in the U.S. and Montana Constitutions.

HB 102 reads in pertinent part:

> "It is the intent of the legislature to reduce or remove provisions of law that limit or prohibit the ability of citizens to defend themselves by restricting *with prior restraint* the right to keep or bear arms that the people have reserved to themselves in the Montana constitution ..."

HB 102, 67th Legislature, § 2 (2021) (emphasis added).

HB 102 continues in pertinent part:

> Except as provided in subsection (2), the board of regents and any unit of the university system may not regulate, restrict, or place an undue burden on the possession, transportation, or storage of firearms on or within university system property by a person eligible to possess a firearm under state or federal law and meeting the minimum safety and training requirements in 45-8-321(3).

HB 102, 67th Legislature, § 5 (2021). Subsection (2) continues on to describe a number of instances wherein BOR regulation of firearms is permissible.

Some restrictions on citizens' right to keep and bear arms are necessary and constitutional, and the duly elected 67th Legislature recognized as much. The Legislature, in HB 102, did not prohibit the BOR from restricting individuals' Article II, § 12 rights entirely. The language of HB 102, drafted and ratified by the Legislature, is clear in its intent to prohibit the BOR from restricting *with prior restraint* individuals' Article II, § 12 rights on MUS property. The Legislature

clearly understood prior restraint analysis should be applied to regulations that prohibit with prior restraint the right to keep and bear arms, and codified the same as the will of the people of Montana in the passage of HB 102. Consequently, this Court should not now go against the will of the people as articulated by our duly elected Legislature.

Conclusion

The unfettered disallowance of the exercise of rights articulated in Article II, § 12 of the Montana Constitution on MUS property is subject to prior restraint analysis, for vesting the BOR with the authority to impose such regulations lends the BOR uncontrolled discretion to grant or refuse individuals on Montana University System campuses their right to keep and bear arms articulated in both the U.S. Constitution and Montana Constitution. Extending the BOR's duty to "ensure the health and stability of the MUS" to include prior restraint restrictions on Article II, Sec. 12 of the Montana Constitution was not contemplated in *Sheehy*, the Montana Constitution, nor state statute, and vests the BOR with unbridled discretion. This is evident in the fact that none of the three sources reference physical safety, firearms, individual security, or any topic even tangentially related to firearm possession or personal safety on MUS property. A number of courts across the country have adopted prior restraint analysis as it relates to the right to keep and bear arms, as shown in the numerous cases cited in Section 1.C, above.

The 67th Legislature, duly elected by the citizens of Montana to execute legislation desired by the citizenry, clearly articulated their intent to remove provisions of law that restricted with prior restraint the right of the citizens to keep or bear arms enshrined in the U.S. and Montana Constitutions, as shown in Sections 2 and 5 of HB 102. For these reasons, the Court should apply the doctrine of prior restraint to the BOR's current policies prohibiting the right to keep and bear arms on MUS property and in doing so both find said BOR policies unconstitutional and find that HB 102 does not violate the BOR's narrow constitutional powers granted under Article X of the Montana Constitution.

DATED this 21st day of September, 2021.

Attorney for Daniels County