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ATTORNEYS FOR PLAINTIFFS

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

STEVE BARRETT; ROBERT KNIGHT; MONTANA FEDERATION OF PUBLIC EMPLOYEES; Dr. LAWRENCE PETTIT; MONTANA UNIVERSITY SYSTEM FACULTY ASSOCIATION REPRESENTATIVES; FACULTY SENATE OF MONTANA STATE UNIVERSITY; Dr. JOY C. HONEA; Dr. ANNJEANETTE BELCOURT; Dr. FRANKE WILMER; MONTANA PUBLIC INTEREST RESEARCH GROUP; ASSOCIATED STUDENTS OF MONTANA STATE UNIVERSITY; ASHLEY PHELAN; JOSEPH KNAPPENBERGER; NICOLE BONDURANT; and MAE NAN ELLINGSON, Plaintiffs, v. STATE OF MONTANA; GREG GIANFORTE; and AUSTIN KNUDSEN, Defendants.	Cause No. DV-21-581B Hon. Rienne H. McElyea **PLAINTIFFS BRIEF IN OPPOSITION TO THE STATE'S MOTION TO DISMISS**

Plaintiffs—a broad coalition of Montana students, faculty, administrators, other public employees, and representative groups—have suffered direct harm as a consequence of four unconstitutional legislative measures and a conditional appropriation, each of which violates Article X, § 9 of the Montana Constitution:

- HB 349, which purports to regulate the manner in which universities may regulate and supervise student organizations and the use of facilities;
- HB 112, which purports to forbid university athletic teams from allowing transgender athletes to participate in women's sports;
- HB 102, which purports to require the Board of Regents and the universities to allow concealed carrying of weapons on campus, and a related conditional appropriation in HB 2; and
- Those aspects of SB 319 which purport to restrict the ability of student organizations to register students to vote in student dormitories and dining facilities and which undercut the funding for student organizations such as MontPIRG, specifically Sections 2 and 21 of SB 319.

As the State observes, the Montana University System Board of Regents has filed a separate lawsuit, *Board of Regents v. State*, Cause No. 18 BDV-2021-598 (1st Jud. Dist.), which is currently pending before Judge McMahon in Lewis and Clark County. The Lewis and Clark County case raises overlapping concerns about legislative encroachment into university affairs, but it seeks a substantive ruling *only* as to the constitutionality of HB 102. Plaintiffs in this case seek a ruling about this and other legislation that impacts Plaintiffs' interests in campus safety, preventing discrimination, and protecting fundamental rights of speech and assembly, among other issues.

On the merits, the State's motion repeats substantially the same arguments it has been unsuccessfully advancing in the Regents' case. Judge McMahon has made preliminary findings that HB 102, for reasons common to the measures challenged here,

overreaches the legislature's authority and invades the Regents' autonomy to dictate university policy. The Court should reject the State's merits arguments for similar reasons and find that Plaintiffs have stated a claim upon which relief can be granted.

With respect to the State's justiciability arguments, the central question posed by the State's motion is whether the Regents have the *exclusive* right to enforce the Constitution. Undoubtedly, the Board of Regents has standing but it is not the only proper plaintiff. The other challenged legislation, i.e. other than HB 102, does not become constitutional if the Regents fail to challenge it. What the State is suggesting instead is that the Court should decline to hear these claims so they will avoid judicial review, even if unconstitutional. The Court should decline this invitation. Plaintiffs have a concrete interest in seeing these important issues decided and are proper plaintiffs.

The State's motion should be denied. The Court should also deny the State's request for a stay but, to the extent it is inclined to grant a stay, the Court should stay the entire case to avoid piecemeal litigation of related issues.

I. RULE 12(b)(6) STANDARDS

A Rule 12(b)(6) motion to dismiss tests only whether a claim has been adequately stated in the complaint. *Gebhardt v. D.A. Davidson & Co.*, 1983, 203 Mont. 384, 661 P.2d 855 (1983). The effect of the motion is that all the well-pleaded allegations in the complaint are admitted as true; therefore, it should not be dismissed unless it appears beyond reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Meagher v. Butte-Silver Bow City-County*, 160 P.3d 552, 337 Mont. 339 (2007); *see also Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 33 P.3d 1250 (such motions are "viewed with disfavor and rarely granted);

Kleinhesselink v. Chevron, USA, 277 Mont. 158, 161, 920 P.2d 108, 110 (1996) (the court should dismiss only if "appears certain" that the plaintiff cannot prevail); *Varco-Pruden v. Nelson*, 181 Mont. 252, 254, 593 P.2d 48, 49 (1979) (dismissal is proper "only in the unusual case" where there is an "insuperable bar to relief.").

II. PLAINTIFFS HAVE STATED A CLAIM.

The State's array of legal arguments both fail to meet the demanding standard under Rule 12(b)(6) *and* are substantively incorrect.

A. Rule 12(b)(6) bars dismissal.

To succeed on its Rule 12(b)(6) arguments, the State must show that there is no cognizable legal theory in the Complaint on which Plaintiffs can succeed. Yet the State has already lost on *identical* arguments in the companion case in Lewis and Clark County—a clear showing that there is, at minimum, a cognizable legal theory stated in the Complaint.

In the Lewis & Clark County case, Judge McMahon rejected the same arguments leveled by the State here, first granting the Regent Plaintiffs in that case a temporary restraining order and then issuing a preliminary injunction following extended briefing and a hearing. Surveying the Montana Constitution and applicable case law, Judge McMahon determined that for the purposes of the substantial remedy of a preliminary injunction, "it appears HB102 interferes with the Board's constitutional authority to control, manage, supervise, and coordinate the MUS." McMahon Preliminary Injunction Order at 11, *Regents v. State* (June 7, 2021) (attached hereto as Exhibit A). His determination contained an extensive analysis of the very same arguments the State clings to in this case. Judge McMahon held that, in the context of a preliminary injunction,

> The Board has sole authority to "supervise, coordinate, manage and control [MUS]." Mont. Const., art. X, §9(2)(a). In this regard, the

> Board has broad constitutional and statutory authority to determine the best policies to "ensure the health and stability of the MUS." *Sheehy v. Commissioner of Political Practices*, 2020 MT 37.
>
> Since 1975, the Montana Supreme Court has steadfastly recognized and upheld the Board's constitutional authority when the Legislature has placed policymaking limitations on the Board. See *Board of Regents v. Judge,* 168 Mont. 433,543 P.2d 1323, 1325 (1975) (Legislature's policy making limitations placed on Board "specifically den[y] the [Board] the power to function effectively by setting its own [] policies and determining its own priorities." *Judge,* at 454. "Inherent in the constitutional provision granting the [Board its] power is the realization that the Board of Regents is the competent body for determining priorities in higher education." *Id.*

Though the State disagrees with Judge McMahon's initial determination, it cannot seriously assert that there is *no* cognizable legal theory under which Plaintiffs can recover when the same or similar theory has already defeated the State, first to support a TRO and again to support a preliminary injunction.

Notably, in that case, the State answered and did not file a motion to dismiss on the merits of the Regents' claims—an implicit concession that such claims at a bare minimum carry Plaintiffs beyond the Rule 12 stage.

The State's briefing on these issues essentially amounts to a "dry run" at summary judgment. It fails utterly to meet the demanding Rule 12(b)(6) standard. At best, the State casts a disagreement about the proper interpretation of the Montana Constitution's internal separation of powers between the legislature (with broad powers) and the Montana Board of Regents (with specific powers over the domain at issue in this case). The State presents nothing that comes close to *foreclosing* Plaintiffs' claims as a matter of law in the Rule 12(b)(6) posture. By the State's own description, there are "few cases" in the area. And the only case law that interprets the Montana Constitution and these cases in the context of the challenged legislation *rejects* the exact

same arguments the State recycles for this case. *See* Ex. A. Where, as here, Plaintiffs state a cognizable legal theory and provable facts to support it, Rule 12(b)(6) bars dismissal.

Apart from advancing its own "version of constitutional reality," State's Brief at 15, the State also asserts that Plaintiffs' claims are insufficiently stated. The State quotes several paragraphs from the Complaint in isolation, while omitting the preceding paragraphs that incorporate by reference all of the Complaint's general allegation. Setting aside this analytical sleight of hand, the set of pleading-based objections is as unavailing under Rule 12(b)(6) as the State's merits arguments. Plaintiffs are required to provide in their complaint a "short and plain statement of the claim." M.R.Civ.P. 8(a)(1). The purpose is to give the State sufficient notice as to Plaintiffs' claims. In this case, as alleged in the Complaint, the injuries are factual—but the legal claims are *facial* challenges to the legislation. On review of the Complaint (and the State's responsive briefing here), there is little question that the State clearly understands the nature of Plaintiffs' claims. The State understands them so well it offers an extensive, if legally incorrect, "version of constitutional reality," State's Brief at 15, to refute Plaintiffs' claims. The State confuses insufficient pleading with substantive disagreement with the contents of a pleading. In this posture, mere disagreement about the proper interpretation of the Montana Constitution does not support dismissal under Rule 12(b)(6).

The balance of the State's merits arguments fall into two categories: (1) vague or unsupported observations about the Montana legislature and the Montana Constitution, and (2) misapprehension of the Complaint.

In the former category, for example, the State's Brief devotes considerable time to a description of the legislature's police power. But absent any citations to how this power directly

abrogates the Regents' authority *on the matters at issue in this complaint*, this ode to legislative "expression[]," State's Brief at 12, has no relevance under the demanding Rule 12 standard.

On the second category, the State fares no better. For example, the State makes much of the Complaint's citation to Regent policies purportedly superseded by the challenged legislation—then the State misconstrues Plaintiffs as asserting that these policies are the source of the Regents' authority. Not so. Plaintiffs' theory is not complicated: Article X, Section 9 reserves most aspects involved in management of the University System to the Regents. It is the Constitution that is the source of Regent authority. The cited policies are results of that authority, not its source. Under the Rule 12 standard, discordant observations that misconstrue the Complaint do not entitle the State to dismissal. Plaintiffs state a legally cognizable claim supported by provable facts; nothing argued by the State comes close to suggesting that Plaintiffs are totally foreclosed from relief. The Motion should be denied.

B. The State's interpretation of the Constitution is substantively incorrect.

While Rule 12 is not the posture in which to resolve the merits of Plaintiffs' claims, the State's reading of the pertinent constitutional authorities is also substantively incorrect. Judge McMahon's initial read of the Montana Constitution and case law is the correct one.

The Constitution plainly and by its own text assigns broad authority to the Board of Regents within the limited domain of the Montana University System. Mont. Const. Art. X, Sec. 9. The Montana cases that interpret the depth and breadth of the authority of the University System to govern itself have "steadfastly recognized and upheld the Board's constitutional authority when the Legislature has placed policymaking limitations on the Board." Ex. A at 11 (citing *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323, 1325 (1975)). The cases reject

arguments identical to the State's in this case. For good reason: this reading of Montana's separation of powers between the legislature and the University System is supported by both common sense and elementary principles of constitutional interpretation. While the legislature's defined powers in the Constitution are broad, the Regents' powers over the university domain are *specific*. The specific controls the general, and serves to limit—in this domain only—the general power of the legislature. Surely, the State must concede that the Legislature cannot do just anything. It cannot, for example, exercise the powers of the judiciary or the executive. The separation of the University System's governance is, by constitutional design, no different.

The State's reading is driven by leaps of inference, built on an elaborate architecture of concurring opinions and "it must be so" assertions. But here's the rub: on the State's reading, the Regents' authority to govern the University System under Article X, Section 9 is reduced to "mere surplusage." The text of the Constitution speaks for itself; but the State would rather paper over it with broad, nonspecific assertions about legislative prerogative.

The cases the State cites are not much help, either. For example, the State suggests that because certain cases held the Regents to have authority in the areas *at issue in those cases*, the cases must stand for the proposition that the Regents have no authority on the issues present in this case. This conclusion does not track. At best for the State, these cases simply mean that the issues here have just not yet been litigated. That makes sense: there has never been such an open and adverse attack on the constitutional independence of the University System as in the 2021 legislative session, which was not coy about its intentions to move into areas previously occupied by Regent governance. At worst for the State, though, these cases mean what Judge McMahon reads them to mean: the Regents' specific constitutional authority within the domain of the

challenged bills trumps the legislature's authority in the area—as specifically provided for in the text of the Montana Constitution, Article X, Section 9.

At bottom, the legislature has mounted an open attack on the constitutional independence of the University System. Now it attempts to hide behind the presumption of constitutionality and secure the dismissal of valid claims at the Rule 12 stage. The presumption of constitutionality, however, does not cover for outwardly unconstitutional conduct.

Plaintiffs have stated a claim and the State's motion should be denied.

III. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

The State offers a scattershot justiciability argument, blending together the constitutional case-or-controversy requirement with court-made prudential standing rules and other justiciability doctrines. It principally argues that Plaintiffs lack standing because, it contends, the rights encroached by the challenged legislation belong to the Regents. Plaintiffs' personal interests in the subject matter of the legislation, the State continues, are too attenuated and the potential harm too speculative, inviting an advisory opinion. The State is wrong on both counts.

A. The State's argument conflates constitutional and prudential standing.

There are two types of standing: *constitutional* and *prudential*. *Schoof v. Nesbit*, 2014 MT 6, ¶ 15, 373 Mont. 226, 316 P.3d 831; *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 32, 360 Mont. 207, 255 P.3d 80. Constitutional standing requires, at an "irreducible...minimum," a redressable past or threatened injury. *Heffernan*, ¶¶ 32–33. The doctrine of prudential standing, in contrast, involves a body of "judicially created prudential limitations imposed for reasons of policy[,]" *Schoof*, ¶ 15, including that a "plaintiff generally must assert her own legal rights and interests," *Heffernan*, ¶ 33; *Williamson v. MPSC*, 2012 MT 32, ¶ 28, 364 Mont. 128, 272 P.3d 71.

While giving lip service to this distinction, the State's argument conflates these concepts, giving the false impression that all of its arguments raise mandatory, jurisdictional issues.[1]

The distinction is, however, important. While constitutional standing requirements are "absolute," prudential rules are "malleable." *Schoof*, ¶ 15 (quoting *United Food. Com. Workers v. Brown Grp.*, 517 U.S. 544 (1996)). They are mere "discretionary limits on the exercise of judicial power that 'cannot be defined by hard and fast rules.'" *Flathead Joint Bd. of Control v. State*, 2017 MT 277, ¶ 27 389 Mont. 270, 405 P.3d 88 (McKinnon, J., concurring) (citing *Missoula City-County Air Pollution Control Bd. v. Bd. of Env. Rev.*, 282 Mont. 255, 937 P.2d 463 (1997)); *see also Heffernan*, ¶ 31 (distinguishing mandatory constitutional standing from "self-imposed" rules that are matters of "judicial self-governance" and "subject to exceptions"); *Williamson*, ¶ 28 (same); *Comm. for an Effective Jud'y v. State*, 209 Mont. 105, 110, 679 P.2d 1223, 1226 (1984) ("discretionary doctrines aimed at prudently managing judicial review of the legality of public acts..." are not "decisive factors" in deciding standing).[2]

Taking the issues in the correct order, Plaintiffs' claims satisfy both constitutional standing requirements and "malleable" and discretionary prudential standing rules.

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[1] In fairness, the Montana Supreme Court has acknowledged that it has not always made this distinction explicit, *see Heffernan*, ¶ 31, as is apparent in many of the State's cited authorities. And, in fact, standing is not jurisdictional at all. Contrary to earlier cases cited by the State, *see Ballas v. Missoula City Bd. of Adj.*, 2007 MT 299, 340 Mont. 56, 172 P.3d 1232 (standing is a justiciability issue but does not implicate the court's jurisdiction); *DeShields v. State*, 2006 MT 58, ¶ 10, 331 Mont. 329, 132 P.3d 540 (explaining that the Court was once "profligate" in its use of the term "jurisdiction," which it has more recently sought to rein in).

[2] The U.S. Supreme Court has gone a step further, calling into question the entire concept of prudential standing and suggesting the threshold standing inquiry should be *only* whether the plaintiff has constitutional standing and is afforded a right to sue under the applicable substantive law. *See Lexmark Int'l, Inc. v. Static Control Components,* 134 S.Ct. 1377 (2014) (cautioning that historical adversion to prudential doctrines to decline to hear disputes is in tension with the courts' "unflagging" obligation to hear cases within their jurisdiction).

B. Plaintiffs have constitutional standing.

Plaintiffs have suffered and will continue to suffer redressable injuries, which is all that is required to demonstrate constitutional standing. *Heffernan*, ¶¶ 32–33; *see Bennett v. Spear*, 520 U.S. 154, 170–71 (1997) (the required showing of a redressable injury is "modest").

The State argues that Plaintiffs have not suffered any injury because they merely disagree with the challenged legislation which has not "affected them in any concrete, specific way," so any judgment would amount to an advisory opinion. They liken this case to *Olson v. Department of Revenue*, 223 Mont 464, 726 P.2d 1162 (1986), where the plaintiffs challenged statutes that might have prevented them from obtaining a hunting license or running for office, even though they had no apparent intention to engage in either activity. *Compare, e.g., Western Litho. v. Yellowstone Cnty. Cmm'rs*, 174 Mont. 245, 570 P.2d 891 (1977) (subcontractor had standing to seek a declaratory judgment regarding a public contract in which it had an interest; contrasting cases where the plaintiff's only interest was that of a citizen or taxpayer, generally).

First, it is not clear that *Olson* was concerned with constitutional standing at all. Much like the State's argument here, *Olson* cited constitutional standing principles then launched into a discussion of prudential considerations about, not whether there was an injury in fact, but whether the injury was sufficiently personal and unique to distinguish the plaintiffs from "the community in general." *Id.* at 470, 726 P.2d at 1166; *see Heffernan*, ¶ 33 (injury "distinguishable from the public generally" is a prudential issue). This brings to bear the Court's caution that not all of its prior decisions clearly distinguish between the two concepts. *See id.* ¶ 31; note 1, *supra.*

Olson is also distinguishable. Plaintiffs are not random people, pursuing a political agenda about matters in which they only have an abstract interest. They are university students and

employees with personal and direct interests in student and faculty affairs, campus administration and safety. *See Helena Parents Comm'n v. Lewis and Clark Cnty. Cmm'rs*, 277 Mont. 367, 373–74, 922 P.2d 1140, 1144 (1996) (finding a sufficiently direct and substantial injury, even though the injuries were in some ways non-unique or shared; "Not everyone who claims they will be injured claims to have been injured in the same way, and while each plaintiff claims a form of harm in common with other members of a larger class of people, the harm each claims is not common to all members of the general public.").

The State further argues that any substantive harms are too speculative and remote to confer standing. Although they do not use the term expressly, the State effectively argues ripeness. *See Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 56, 265 Mont. 92, 278 P.3d 455 ("Ripeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication...."). The State's suggestion is, apparently, that students, educators, and campus police can only challenge a campus gun law once someone is shot. This is an extreme example, but the point is that Plaintiffs' injuries are not confined to possible future events. With respect to HB 102, Plaintiffs' alleged fear, concern for personal safety, and desire to peacefully live, work and learn are substantial interests that are presently impacted by the challenged law. MFPE members who are campus police officers, for example, bear the brunt of increased firearms on campus and are the first who suffer the "defunding" as a result of the conditional appropriation. It is nonsensical that the Court's ability to address these concerns would not mature unless and until the conflict blossoms into violence.

The other challenged laws do not depend on any remote future contingencies, either. Plaintiffs have raised concerns about matters in which they have a particular and vital interest

including academic freedom, safe working conditions, free speech and assembly, organizational funding, and threat of civil liability. *See* Complaint, ¶¶ 37-40. The challenged legislation purports to restrict regular, previously conducted and anticipated future activities. Such restrictions are, in and of themselves, present injuries. And, with respect to future activities, there is a concrete threat of continuing harm. *See Reichert*, ¶ 55 ("Standing may rest not only on past or present injury, but also on *threatened* injury." (emphasis in original)). For example, the State argues that MontPIRG's challenge to SB 319's restraint on political organizing activities will not mature unless MontPIRG chooses to violate the statute by carrying on the kind of non-partisan political organization and advocacy work that it has done for the past forty years. This is not a mere remote possibility of some new and unanticipated activity that might give rise to a conflict, like in *Olson*. It is a concrete, present and threatened injury.

As summarized by *Helena Parents Commission*, to demonstrate a qualifying "past, present or threatened injury" the plaintiff "is required to allege 'a personal stake in the outcome of the controversy.'" 277 Mont. at 371, 922 P.2d at 1143 (citations omitted). The Court in *Helena Parents* credited the plaintiffs' allegations that alleged improper public investments posed a risk of increasing tax burdens and lessening governmental services. These were future but reasonably concrete economic injuries in which they had an interest as taxpayers. The fact that some potential impacts had not manifested yet was not a barrier to justiciability. Plaintiffs' alleged harms in this case—both present and future, procedural and substantive, and involving both economic harm and injury to fundamental rights—are at least as concrete.

Because there is a ripe, concrete dispute about specific legislation, it also follows that the requested declaration would not be advisory in nature. Court will generally not render opinions

merely "advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition." *Plan Helena, Inc. v. Helena Reg. Airport Auth. Bd.*, 2010 MT26, ¶ 9, 355 Mont. 142, 226 P.3d 567. This concern can arise when an otherwise justiciable case is unripe or becomes moot, implicating the constitutional requirement of an actual case or controversy. *Id.* ¶ 11. Here, there is specific legislation being challenged. The facts are not hypothetical and the issues are not abstract. The alleged injuries are also redressable. The Court can afford actual relief by deciding the constitutionality of and enjoining the challenged legislation.

Finally, the State's argument, that there is no "real and substantial" dispute because the legislature is entitled to supersede the Regents' authority and legislate intra-campus affairs, is fallacious. The argument begs the question, assuming as its premise the ultimate issue of legislative supremacy. This is, of course, the crux of the dispute which has yet to be decided. *See Brown v. Gianforte*, 2021 MT 149, ¶ 24, ___ Mont. ___, ___ 488 P.3d 548 (it is "circular" and contrary to fundamental legal principles to suggest that the constitutionality of a statute can escape review because the constitution forecloses such consideration).

In summary, Plaintiffs have suffered and will suffer actual injuries that are concrete and certain, not speculative and remote. Their complaints are entirely redressable by the requested judgment which would eliminate the source of the conflict and restore the *status quo ante.*

C. Plaintiffs have prudential standing.

The State's concerns about whether Plaintiffs are asserting their own rights, or whether they are the proper parties to assert these claims, also lack merit. These are also flexible, requirements that can be excused by exception or competing considerations of public policy.

First, as explained above, Plaintiffs *are* asserting their own rights. They have substantial

individual interests in the subject matter of the litigation, which impacts not only the Regents' constitutional autonomy but also Plaintiffs' personal and professional interests.

Second, the State's suggestion that there is only one proper plaintiff, i.e. the Regents, is erroneous. In cases involving "important public issues" of a constitutional dimension, it is the policy of the law to take a broad view of standing. *Comm. for an Effective Jud'y v. State*, 209 Mont. 105, 111, 679 P.2d 1223, 1226 (1984). Indeed, such challenges are part of the fundamental fabric of our legal system. Montana courts will not "ignore the rights of citizens to assert the public interest in challenging the legality of legislative action that allegedly flies in the face of our state constitution." *Id.* This is "particularly so where the constitutional provision is intended to benefit the public as a whole." *Id.* Thus, because Montana voters were broadly intended to benefit from constitutional protections relating to the elective process, they were broadly imbued with standing to bring a constitutional challenge. Likewise, the students, faculty and employees of the Montana University System are beneficiaries of the constitutionally mandated system at issue here, which is designed to maintain the integrity of public universities by ensuring academic and institutional independence. In short, the Board of Regents is undoubtedly a proper plaintiff, but that is no bar to Plaintiffs' right to raise important issues beyond the Regents' case.

The non-exclusivity of the Regents' standing is also apparent from *Air Pollution Control Board, supra*, which recognized a "distinction" between having supervisory or regulatory power over the subject matter of an action and having standing to sue. *Id.* at 261, 937 P.2d at 467. The Court explained that injuries sufficient to confer standing need not be exclusive and there may be more than one proper plaintiff. *Id.* Thus, the local pollution control board's interest in managing air pollution issues, as a quasi-judicial government body, gave it standing to challenge changes to

air pollution rules, just as a private citizen "who breathes the air" would have standing based on their personal stake in the substantive harms flowing from the rule change. *Id.*

The Montana Supreme Court has also rejected the notion, implicit in the State's argument, that private citizens affected by unlawful government conduct can only challenge that conduct on its merits, not based on matters of procedure or constitutional authority.

Lee v. State, 195 Mont. 1, 635 P.2d 1282 (1981), is illustrative. *Lee* also involved a dispute about the proper delegation and allocation of sovereign power. Lee, a concerned private citizen, sued to challenge a statute that conferred authority on the attorney general to proclaim speed limits, in derogation of legislatively prescribed limits and the Highway Department's regulatory power. Importantly, Lee did not challenge the merits of the new speed limit but challenged the constitutional basis for the attorney general's authority. The State moved to dismiss for lack of standing, arguing that Lee did not have a sufficiently concrete and unique interest in the issue. The Court did not require the Highway Department to assert the claim, however, nor did it stumble over the sufficiency of Lee's interest.

The Court reasoned that Lee's declaratory judgment action was within the contemplation of the UDJA, which is broadly remedial and liberally construed, affording a cause of action to "any person" whose rights are affected by a disputed statute. *Id.* at 6, 635 P.2d at 1284 (citing § 27-8-102, MCA); *see also Western Litho.*, *supra* (same). Considering justiciability and standing through the lens of § 27-8-102, the Court found that Lee, a citizen-motorist, had an interest in the constitutionality of the statute because he was subject to the speed limits. In, short, Lee was a person affected by the statute and interested in the conflict about delegation of sovereign power.

Likewise, Plaintiffs have an interest in the challenged statutes and in the legislature's presumed authority to dictate intra-campus affairs.

Apart from their individual interests, Plaintiffs' interest in this case viz-à-viz their relationship with the Regents is also analogous to cases where the Court has relaxed prudential standing rules for closely related parties.

In *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, for example, the Court afforded standing to a doctor to litigate the constitutionality of a patient privacy law. Notwithstanding the general rule against asserting the rights of others, the Court found that the physician-plaintiff had standing because he had a concrete interest in the regulation of this issue, which would "directly interdict" the normal functioning of the doctor-patient relationship. *Id.* ¶ 11–12. Similarly, insofar as the Court concludes that Plaintiffs' interests are merely derivative of the Regents' rights, Plaintiffs are still proper plaintiffs because the challenged legislation interferes with the normal policymaking process, in which students and faculties (through their representatives) engage with the Regents and participate in the policymaking process.

Armstrong relied heavily on the U.S. Supreme Court's decision in *Singleton v. Wulff*, 428 U.S. 106 (1976), which emphasized that prudential rules, including the rule against raising the rights of others, "should not be applied where [the rule's] underlying justifications are absent" *Id.* at 114--15. Where the plaintiff's interests are "inextricably bound up" in a related party's rights, and there is no reason to think that the plaintiff would be an ineffective advocate, the prudential justifications for declining to hear the claim evaporate. *Id.*

This pragmatic approach is echoed in various Montana cases calling for a case-by-case analysis of prudential standing. *See Air Pollution Control Bd., supra* (there are no "hard and fast

rules"). Ultimately, the Court must weigh "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," including whether there is an adequate record to allow for effective judicial review. *See Flathead Joint Ctl. Bd.*, ¶ 27 (McKinnon, J., concurring) (citing *Reichert*, ¶ 56; *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 20, 333 Mont. 331, 142 P.3d 864; and *Air Pollution Ctrl. Bd.*, *supra*). "Stated another way[,]" the real question is whether the plaintiff has a sufficient stake in the outcome "to assure that concrete adverseness which sharpens presentation of issues.'" *Bryan v. Yellowstone Elem. Sch. Dist. No. 2*, 2002 MT 264, 312 Mont. 257, 60 P.3d 381 (quoting *District No. 55 v. Musselshell Cnty.*, 245 Mont. 525, 528, 802 P.2d 1252, 1254 (1990)); *see also U.S. v. Richardson*, 418 U.S. 166, 174 (1974) (the touchstone of the inquiry is whether there is a "logical nexus" between the party, their status, and their claims). As explained above, Plaintiffs—a coalition of representative student, faculty and employee groups—certainly have such a stake in this dispute.

Another prudential consideration underlying the rule is the general aversion to adjudicating rights that the absent party may not wish to assert. *See Hagener v. Wallace*, 2002 MT 109, ¶ 40, 309 Mont. 473, 47 P.3d 847. To the extent this consideration applies here at all where public rights and interests are at issue, Plaintiffs are not meddling interlopers, trying to raise this issue over the Regent's objection. As the State correctly observes, the Board of Regents has advanced the same legal theory with respect to a subset of the challenged legislation in a separate case. Plaintiffs merely seek to ensure that all of the similarly situated legislation that affects them is also brought before the Court and adjudicated.

As in *Singleton*, the underlying justifications for the rule are absent so strict enforcement of prudential rules is unnecessary. In other words, the Regents are not the only proper plaintiff.

Finally, courts will relax prudential standing when the questions presented are important and might otherwise escape review. *See Comm. for an Effective Jud'y*, 209 Mont. at 110, 679 P.2d at 1226 ("the importance of the question to the public 'surely is an important factor'" and in , "private parties should be granted standing to contest important public issues"); *see also Lee*, 195 Mont. at 6, 635 P.2d at 1284 (the expectation that the court will decide the rights of the real parties in interest may be satisfied where the issues are "of such overriding public moment as to constitute the legal equivalent of all of them."); CJS. Decl. Juds. § 27 (any doubts about justiciability in declaratory judgment actions should be resolved in favor of adjudication and justiciability rules "are relaxed in matters of great public interest."); *Heffernan*, ¶ 33 (the court should consider whether the challenged conduct might evade judicial review if standing is denied on prudential grounds); *Brown*, ¶ 19 (taking a broad view of standing in light of the public importance of the issues and the need for review).

It is self-evident from the subject matter of this case that these are important issues that impact essential public institutions and touch the lives of tens of thousands of students and public employees. Denying judicial review for prudential reasons, as the State urges, may allow unconstitutional government action to evade judicial review based on unreviewable political judgments or pragmatic resource allocation decisions.[3]

D. At a minimum, the Court should give the Regents a chance to join or ratify, rather than dismiss.

Although the State does not invoke Rule 17, its arguments about how the Regents would

[3] For example, the legislature attempted to dissuade the Regents from bringing a legal challenge by tying university funding to the Regents' decision to bring suit, via the challenged conditional appropriations provision in HB 2. The legislature plainly anticipated this conflict and hoped to prevent the courts from hearing it.

be the better plaintiff are, at bottom, little more than a complaint that Plaintiffs are not the real party in interest. To the extent the Court agrees that the Regents are the proper plaintiff, the Court "may not dismiss the action" without first giving the Regents the opportunity to join this case or ratify Plaintiffs' claims. Rule 17(a)(3), M.R.Civ.P.

IV. PLAINTIFFS OPPOSE THE REQUESTED STAY.

The State invites the Court to enter a partial stay. Plaintiffs oppose and observe that the Court would necessarily still have to decide the same legal questions in resolving the other claims for which a stay has not been requested. A partial stay therefore would not encourage consistency or serve the interests of judicial economy. If the Court is inclined to grant a stay, it should stay the whole case. Once a merits decision is reached in the Regents' case, it will provide useful guidance that this Court can apply here without requiring piecemeal litigation of related issues.

V. CONCLUSION

The State's motion should be denied. Plaintiffs are proper parties to assert their claims and they have stated claims upon which relief can (and should) be granted.

Submitted this 23rd day of August, 2021.

GOETZ, BALDWIN & GEDDES, P.C.

/s/ Jeffrey J. Tierney
James H. Goetz
Jeffrey J. Tierney

and

GRAYBILL LAW FIRM, P.C.

/s/ Raphael Graybill
Raphael Graybill

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following counsel of record, by the means designated below, this 23rd day of August, 2021.

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/s/ Jeffrey J. Tierney
Jeffrey J. Tierney

FILED

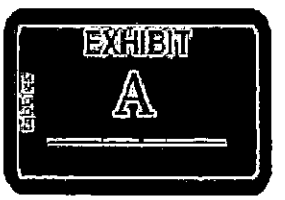
JUN 07 2021

ANGIE SPARKS, Clerk of District Court
By JREIJGERS Deputy Clerk

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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.	Cause No.: BDV-2021-598 **PRELIMINARY INJUNCTION ORDER**

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



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

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

MATERIAL FACTUAL BACKGROUND

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

> 1. those persons who are acting in the capacity of policy or security department officers and who:
>
> a. have successfully completed the basic course in law enforcement conducted by the Montana Law Enforcement Academy or an equivalent course conducted by another state agency and recognized as such by the Crime Control Division of the Montana Department of Justice; or
>
> b. have passed the state approved equivalency examination by the Montana Law Enforcement Academy; and
>
> 2. those persons who are employees of a contracted private security company and who are registered to carry firearms pursuant to Title 37, Chapter 60, MCA.

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

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

> HB102 generally revises gun laws with respect to open carry and Concealed carry. In Section 4, the Act allows concealed carry "anywhere in the state" except at specific locations designated by the Legislature. Those excepted locations include primary and secondary schools; courtrooms, federal property, and airports, but the Legislature did not extend the exception to the MUS or its campuses and locations. In Section 8, the Legislature revised the existing "open carry law," § 45-3-111, MCA in only one way; the Legislature deleted the prior MUS exception in the open carry law. Thus, by a purposeful omission in Section 4 and by a focused deletion in Section 8, contrary to the status *quo ante*, HB102 extends both open carry and concealed carry to MUS's campuses.
>
> In addition to legislating firearm policies on MUS campuses, in HB102 the Legislature attempted to override [the Board's] constitutional authority to manage, coordinate and control the MUS in numerous ways with respect to this issue. Section 5 precludes [the Board] from "enforcing or coercing compliance" with rules or regulations which restrict the right to possess or access firearms, "notwithstanding any authority of the board of regents" under Article X. Section 6 precludes [the Board] 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 [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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upon the Regents surrendering BOR's right, and its duty, to challenge the law in a court of law.

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

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

The Board argues, in relevant part:

> Montana's Constitution vests sole and full authority in [it] to "supervise, coordinate, manage and control the Montana university system." Mont. Const., art. X, §9(2)(a). In enacting HB102, the 2021 Montana Legislature (the "Legislature") has impermissibly curtailed [the Board's] authority to determine the best policies to "ensure the health and stability of the MUS." *Sheehy v. Commissioner of Political Practices*, 2020 MT 37, ¶ 29 . . ., quoting Mont. Const., art. X, § 9.
>
> • • •
>
> If HB102 becomes effective immediately, the MUS will suffer significant and irreversible financial injury. Immediate implementation of HB102 requires funds to create training programs, hire new employees, and other functions. (Rogers Declaration, ¶ 8). The Legislature allotted $1,000,000 to the MUS to fund implementation, but that funding was contingent upon BOR's acquiescing to constitutionality of HB102. (Ex. 3). BOR will still incur expense dealing with the fallout from any perceived applicability of HB102, even if it is declared unconstitutional at a later date. (Rogers Declaration, ¶ 7).

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

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

DISCUSSION

A. Preliminary Injunction Standard

A district court may issue a preliminary injunction in any of 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; [or]
>
> (5) when it appears that the applicant has applied for an order under the provisions of [Section] 40-4-121 or an order of protection under Title 40, chapter 15.

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.*

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

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

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

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

> Section 27-19-201(1), MCA, provides that a preliminary injunction may issue when an applicant has demonstrated that he is entitled to the injunctive relief he has requested. To prevail under Section 27-19-201(1), 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.

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

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

Moreover, contrary to Montana's hearing arguments:

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

Weems, at ¶18.

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

The right to keep or bear arms' scope is limited

Montana argues "HB 102 protects Montanans' constitutional right to keep and bear arms. The bill aims to increase the safety of Montana residents by safe-guarding their fundamental right to defend themselves and others." Montana contends that the Board may not infringe on Second Amendment rights.

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The Second Amendment provides:

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

U.S. Const. amend. II.

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

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

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

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

Id., at 281-82.

In Montana:

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

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

> In fact, in proposing Article II, Section 12 at the 1972 Constitutional Convention, the Bill of Rights Committee noted "that the statutory efforts to regulate the possession of firearms have been at the federal level and are, therefore, not subject to state Constitutional provisions. In addition, it is urged—and requires no citation—that the right to bear arms is subject to the police power of the state." Montana Constitutional Convention, Comments on the Bill of Rights Committee Proposal, Feb. 22, 1972, vol. II, p. 634; see also Montana Constitutional Convention, Verbatim Transcript, Mar. 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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> language arguing that the decision to adopt registration and licensing requirements is a legislative, rather than constitutional, matter).

Id.

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

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

Board authority over MUS campuses and locations

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

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

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

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

ORDER

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

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

1. The Board's preliminary injunction request is **GRANTED**; and

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

ORDERED this 7th day of June 2021.

MICHAEL F. McMAHON
District Court Judge

cc: David Dewhirst, (via email to: david.dewhirst@mt.gov)
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