

## IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0605

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**BOARD OF REGENTS OF HIGHER EDUCATION  
OF THE STATE OF MONTANA,**

PETITIONER AND APPELLEE,

v.

**STATE OF MONTANA, by and through Austin Knudsen, Attorney  
General of the State of Montana in his official capacity,**

RESPONDENT AND APPELLANT.

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**BRIEF OF *AMICUS CURIAE* WESTERN MONTANA FISH & GAME  
ASSOCIATION, INC.**

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**ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,  
LEWIS AND CLARK COUNTY, THE HONORABLE MIKE MCMAHON, PRESIDING**

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## INTRODUCTION

The proceedings held in the District Court below included the *Declaration of Brianne Rogers*, a member of the Board of Regents, in which she predicted that mayhem and mass exodus (health and safety concerns causing students and staff to leave the Montana University system) would follow if the campus carry feature of House Bill 102 were to become effective. See, *Decl. Brianne Rogers*, ¶¶ 7, 13, 15, 16, 17, 18, and 20; Dkt. No. 6. Relying upon that evidence, the Board of Regents made arguments to the District Court relative to the “safety and health of students on campus,” including “crime; available security services; dormitory safety; impact on enrollment; recruitment and retention of faculty and staff.” See, *BOR’s Brief in Support of Motion for Summary Judgment and in Opposition to State’s Motion for Summary Judgment*, Dkt. 82, pp. 13-15. Based in part upon Rogers’ declaration and the Board’s authority to prioritize “protection, safety and well-being on MUS campuses and locations,” the District Court entered a preliminary injunction as it related to carrying firearms on Montana University campuses and locations. Dkt. 19, p. 11, lines 14-16. The District Court



then granted the Board's motion for summary judgment and made permanent the preliminary injunction that it had previously entered. Dkt. Nos. 89, 96.

At issue in this case is the right to keep and/or bear arms. The federal constitutional imperative on the Board is "to not infringe" that right. Montana's constitution requires that it "not be called into question" by the Board. Notwithstanding these constitutional prohibitions, the Board seeks to ban the lawful possession of firearms on Montana's university campuses commonly held by law-abiding citizens for lawful purposes. Utilizing facts, statistics, and peer-reviewed studies, this brief refutes Rogers' and the Board of Regents' frantic predictions of mayhem and mass exodus, as well as the District Court's reliance upon those emotionally-charged reasons.

## **ARGUMENT**

### **1. The Board of Regents did not meet its evidentiary burden, whereas the State did.**

The Second Amendment provides in pertinent part that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Second Amendment "elevates above all other

interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783 (2008); see also, *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (“[I]n *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.”) It is clear today, in the year 2022, that individuals have a right to keep and possess dangerous common arms. *Caetano v. Massachusetts*, 577 U.S. 411, 418, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016) (Alito, J., and Thomas, J., concurring) (citing *Heller*, 554 U.S., at 627, 636 (“If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous.”))

Montana’s Constitution also guarantees “[t]he right of any person to keep or bear arms in defense of his home, person, and property.” Art. II, § 12, Mont. Const. The Montana Legislature has further made it appropriate to use force for self-defense, the defense of others, and the defense of property. See generally, Title 45, chapter 3, part 1; § 49-1-103, MCA.

HB 102 reinforces this right when its stated purpose “is to

enhance the safety of people by expanding their legal ability to provide for their own defense by reducing or eliminating government mandated places where only criminals are armed and where citizens are prevented from exercising their fundamental right to defend themselves and others.” HB 102, § 1.

The Board of Regents actively participated in the legislative process resulting in HB 102 and the Legislature’s intent is clear and unambiguous. However, the Board of Regents’ Policy 1006 prohibits all firearms on MUS campuses except for those carried by police and security officers. But it is not clear why the Board of Regents’ Policy 1006 was enacted as there is no rulemaking history in the district court record. As an independent board within the executive branch (*Sheehy v. Commissioner of Political Practices*, 2020 MT 37, ¶ 11, fn. 3, 399 Mont. 26,458 P.3d 309), the Board had the statutory obligation to adopt rules and to keep a record of its rulemaking proceedings. § 20-25-301, MCA; *Sheehy*, 2020 MT 37, ¶ 17. Yet there is no history or findings about the societal dangers of firearm possession on college campuses in the district court record. There are no studies recounted of either

criminal or lawful gun usage. There are no firearm experiences of other states or cities recited. There is one public hearing described, but the comments made at the hearing are largely unintelligible. Where there are agency findings, they may assist a court in evaluating the legislative judgment. Here, however, there are none. The record consists only of the unsupported and speculative concerns of students, parents, and campus leaders about HB 102's implementation. There is no data showing that the presence of firearms on campuses, concealed or otherwise, will lead to increased danger, increased suicides, or mass exodus.

The federal constitutional imperative on the Board is “to not infringe” that right. Montana’s constitution requires that it “not be called into question” by the Board. It was therefore the Board’s burden to prove beyond a reasonable doubt why Policy 1006 may lawfully infringe upon or call into question the rights of countless law-abiding Montanans who quietly desire to possess firearms on Montana’s campuses for lawful purposes. *Board of Regents v. Judge*, 168 Mont. 433, 444, 543 P.2d 1323 (1975). The Board did not carry its burden by pointing to data in the proceedings below because no such data exists.

On the other hand, there *is* data showing that there are no reported instances where a person lawfully carrying a gun has fired the gun while trying to commit a crime or threatening someone else and it was provided to the District Court.<sup>1</sup> See, App. 1; HB 102: Hearing Before the Senate Judiciary Committee, 67th Leg. (2021) (Statement of Rep. Seth Berglee); Dkt. 64, pp. 4-6.

On its face Policy 1006 is simply not concerned with maintaining room for a citizen's constitutional right to keep and/or bear arms as a means of self-defense since the policy says nothing about self-defense. Nor did the state or federal right to keep and/or bear arms appear to have been any part of its consideration. And if it did, that evidence is not in the record. It reasonably follows then that the only reason for its enactment was a nervous response to reports of gun violence perpetrated by criminals.

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<sup>1</sup> See, <https://crimeresearch.org/2021/06/what-is-the-danger-to-allowing-concealedhandguns-on-university-property-shootings-by-permit-holders-from-2012-to-now/>

**2. The studies and statistics.**

- a. The vast majority of firearms are possessed by law-abiding citizens who use their firearms only for lawful purposes.**

The news media today is awash with emotionally-charged stories of gun violence unlawfully committed by criminals. Proponents of gun control are particularly vocal after a story of illegal gun violence somewhere in the country appears in the media. That appears to be the underlying basis for Brianne Rogers' declaration, as well as the comments made in the BOR Listening Session Transcript attached to her declaration. Significantly, none of the statements are under oath and much of the transcript is garbled and unintelligible. The statements do not support the Board of Regents' concern nor the District Court's finding of unconstitutionality beyond a reasonable doubt in this case in any event. There is simply little to no evidence regarding the Board's intent behind Policy 1006. In contrast, there is sufficient proof of the Legislature's intent behind the passage of HB 102, i.e., the possession of firearms by law-abiding citizens for lawful purposes like self-defense.

Firearms are extremely popular in America, particularly in Montana. They are legal to build, buy, and own under federal law and the laws of forty-five states. They are quietly owned by millions of law-abiding American citizens for lawful purposes ranging from home defense to sporting competitions.

In April 2020, the RAND Corporation published a long-term study tracking gun ownership in all 50 states, from 1980 to 2016. They combined survey-based estimates with other data indicative of gun ownership — shooting death records, gun-related magazine subscriptions, background check submissions and more — to determine the percentage of adults in each state who live in a household with at least one gun. According to the study, 66.3% of adults living in Montana live in homes with guns. Montana is the highest-ranking state in the study.<sup>2</sup> See, App. 2, pp. 21 and 46. Based on the lack of evidence in the proceedings below, it is reasonable to infer from these statistics that the vast majority of the 66.3 percent of Montana adults referred to in the study are law-abiding citizens who use their firearms

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<sup>2</sup> See, <https://www.rand.org/research/gun-policy/gun-ownership.html>.

only for lawful purposes.

**b. One is more likely to be killed by an attack by knife, hands, feet, or other weapon, than by a firearm.**

Federal Bureau of Investigation murder statistics also show that killing by an attack with a knife, fists, feet, or other weapon is far more common than murder by any kind of rifle or shotgun. In Montana, murder by knife occurs four times more often than murder by rifle or shotgun. For example, according to F.B.I. statistics for 2019, Montana saw four people murdered with a knife, while only one person was killed with some type of rifle or shotgun. A Montanan is three times more likely to be murdered by an attacker's bare hands, fists, or feet, than by his rifle. A Montanan is just as likely to be murdered by an assailant's knife, bare hands, fists, or feet, or other weapon, as by a handgun.<sup>3</sup> In 2018, the statistics show that homicide by handgun was even less, as Montana saw nine murders by some type of handgun, whereas seventeen murders occurred by knives, other weapons, and

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<sup>3</sup> See, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-20>.



bare hands, fists, or feet.<sup>4</sup> The same pattern can be observed across the nation.<sup>5</sup>

**c. The need for self-defense is not hypothetical.**

Between 2017 and 2019 there were reported a combined 49 rapes, 4 robberies, and 20 aggravated assaults on the campuses of the Montana State University-Bozeman and University of Montana-Missoula.<sup>6</sup> See, Dkt. 64; App. 3. And these were only the incidents the universities self-reported. One of these incidents involved an individual who assaulted two separate parties hiking near the University of Montana's campus in the middle of the afternoon. See, Dkt. 13, pp. 2-3. The attacker was known to Missoula Probation and Parole, Missoula Police Department, Missoula mental health professionals, and university police, yet none of these entities were able to prevent the attacks. *Id.*, p. 5.

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<sup>4</sup> See, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-20>.

<sup>5</sup> See, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-20>.

<sup>6</sup> See, Campus Safety and Security, U.S. Dep't of Educ.; <https://ope.ed.gov/campussafety/#/institution/details> (compiling data reported by individual universities).

According to the United States Department of Justice, it is estimated that 3,700,000 burglaries occur each year in the United States.<sup>7</sup> See, App. 5. A household member is present during approximately 1,000,000 of those burglaries. Of the 1,000,000 household members present in their homes when burglars enter, approximately 266,560 end up victims of violent crime. Seventy-seven hundred women are raped in their own homes. Each of the 1,000,000 burglaries each year where a household member is present is a potential circumstance for defensive gun use.

A firearm is surely a powerful psychological criminal deterrent. Simply brandishing such a weapon may cause an intruder or aggressor to flee precisely because it appears to be dangerous. *Cf.*, § 45-3-111, MCA (“any person may openly carry a weapon and may communicate to another person the fact that the person has a weapon. . . . If a person reasonably believes that the person or another person is threatened with bodily harm, the person may warn or threaten the use of force, including deadly force, against the aggressor, including drawing or

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<sup>7</sup> See, U.S. Department of Justice, Bureau of Justice Statistics, *Victimization During Household Burglary* (Sept. 2010), at 1 & 9.

presenting a weapon.”) For some citizens, a firearm is their first choice to prepare for self-defense when this year’s 3,700,000 burglaries take place. For the future 266,560 new victims of violent crime during a home burglary this year and the future 49 rapes, 4 robberies, and 20 aggravated assaults that could happen on Montana campuses in the next two or three years, a firearm may be the thing they regret not having. Indeed, a policy that prohibits seat belts or smoke detectors on Montana’s campuses would impose a minimal burden much of the time. One could drive 100,000 miles around the campuses of Montana’s universities without ever needing seat belts. But when the unexpected collision occurs, seat belts are extremely necessary. One could live 100 years in a dorm without needing a fire alarm, but when fire starts in the middle of the night, a fire alarm is really important. A person may not need to use a firearm to defend herself in the average situation. Yet, sometimes a firearm is needed. That is when the burden on the core right of self-defense on Montana’s university campuses becomes extraordinarily severe.

**d. There is no increased gun violence.**

No state has seen a resulting increase in gun violence as a result

of legalizing concealed carry (all 50 states now allow some form of concealed carry),<sup>8</sup> despite the fact that licensed citizens regularly carry concealed handguns in places like office buildings, movie theaters, grocery stores, shopping malls, restaurants, churches, and banks.

Virtually every peer-reviewed study on the subject, including studies by the National Academy of Sciences and the Crime Prevention Research Center, has concluded that there is no evidence that licensed concealed carry leads to an increase in either violent crime or gun deaths.<sup>9</sup> Apps. 9 and 10.

Utah is a state in which concealed carry is permitted on campuses, yet it has never reported a problem where a student committed a violation or had to be stripped of a concealed permit. See, HB 102: Hearing Before the Senate Judiciary Committee, 67th Leg. (2021) (Statement of Rep. Seth Berglee). From 2012 to May 2021, on

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<sup>8</sup> See, App. 4.

<sup>9</sup> *Firearms and Violence: A Critical Review*, National Research Council/National Academy of Sciences, 2005, p. 2; see also, Lott, John R. and Wang, Rujun, *Concealed Carry Permit Holders Across the United States: 2021* (October 6, 2021). Available at SSRN: <https://ssrn.com/abstract=3937627> or <http://dx.doi.org/10.2139/ssrn.3937627>.

college campuses across the country that allow the permitted carry of firearms, there were only forty-six cases where someone fired a gun. App. 1, p. 2. And only seven of those involved individuals with concealed handgun permits. *Id.*; Dkt. 64, pp. 4-6.

Professors Duwe, Kovandzic and Moody found “at best, weak evidence that [right-to-carry] laws increase or decrease the number of mass public shootings.” App. 6, p. 290.

Professor Mark Gius reports that states with restrictions on the carrying of concealed weapons had higher gun-related murder rates than other states. Assault weapons bans did not significantly affect murder rates at the state level. These results suggest that restrictive concealed weapons laws may cause an increase in gun-related murders at the state level. App. 7, p. 265.

Statistics show that three-quarters of all suicides occur at home.<sup>10</sup> Because most college students over the age of twenty-one (the minimum age to obtain a concealed handgun license in most states) live off campus, allowing concealed carry on college campuses would have

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<sup>10</sup> See, <https://www.hsph.harvard.edu/means-matter/basic-suicide-facts/where/>.

very little impact on the ability of college students to possess firearms in their homes and, therefore, little to no impact on the overall number of suicides by college students.

**e. A ban on firearms possession would not stop illegal gun violence.**

In 1989, California's Legislature predicted an assault weapons ban would eliminate or reduce mass shootings. It did not turn out that way since mass shootings with assault weapons continued to occur at the same average rate as before the ban. Congress's 1994 national assault weapon ban also did not work. Congress passed the 1994 assault weapon ban with a ten-year sunset provision and allowed the ban to lapse on its own in 2004. Of course, that did not stop illegal gun violence, and neither will Policy 1006. It will only prevent rape and aggravated assault victims on Montana's university campuses from defending themselves.

**f. There will be no mass exodus away from Montana Universities.**

Brianne Rogers and the Board also complained that parents would not have students attend universities where concealed carried

guns were allowed, and HB 102 would impact enrollment, student recruitment, and recruitment and retention of staff and faculty. The Board asserts this will cause significant loss in tuition. Dkt. 6, ¶¶ 18, 19; Dkt. 82, pp. 11-12. But despite the passage of HB 102, enrollment within the university system is up. See, App. 8; Dkt. 87, p. 12 fn. 5.<sup>11</sup> The record is completely devoid of evidence to the contrary.

### CONCLUSION

In short, the Board presented little to no evidence of the intent behind Policy 1006, much less any evidence that a ban on open and concealed weapons carry on Montana universities would increase safety and decrease crime. Based upon the arguments and authority cited herein, the District Court's order granting summary judgment for the Board should be reversed. The matter should be remanded to the District Court for further proceedings.

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<sup>11</sup> See, e.g., Editorial: MSU enrollments records a boon for Bozeman, Bozeman Daily Chronicle (Oct. 3, 2021); University of Montana seeing enrollment increase for the first time in a decade, KULR8.com (Sept. 28, 2021); Liz Weber, Montana State University's fall freshman enrollment breaks record, Bozeman Daily Chronicle (Sept. 23, 2021); Liz Weber, Montana State enrollment dips, but still fifth highest on record, Bozeman Daily Chronicle (Sept. 15, 2021).

DATED this 17<sup>th</sup> day of February, 2022.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this amicus brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect is 2,999 and not averaging more than 280 words per page, excluding caption, table of contents, table of authorities, and certificate of compliance.

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