

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP _____

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

Petitioner,

v.

THE STATE OF MONTANA, BY AND THROUGH AUSTIN KNUDSEN, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MONTANA,

Respondent.

**PETITION FOR DECLARATORY RELIEF ON ORIGINAL
JURISDICTION**

**IMMEDIATE STAY AND EXPEDITED CONSIDERATION
REQUESTED**

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Exhibit 4 – *MACo* Stay Order

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Exhibit 6 – Suicide Prevention and Student Mental Health Task Force Report

I. RELIEF REQUESTED

This is an original proceeding challenging the constitutionality of House Bill 102, An Act Generally Revising Gun Laws (“HB102,” Ex. 1). HB102 invades the sole and full authority of the Board of Regents (“BOR” or “Board”) to “supervise, coordinate, manage and control the Montana university system” (hereafter “the MUS”). Mont. Const., art. X, §9(2)(a). By enacting HB102, the 2021 Montana Legislature (“Legislature”) has impermissibly curtailed BOR’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, 458 P.3d 309 (“COPP”), citing Mont. Const., art. X, § 9, and § 20-25-301, MCA. Petitioner seeks a judicial declaration that the offending sections of HB102 are unconstitutional.

In conjunction with the original proceeding, BOR seeks expedited process to stay implementation of HB102, Section 6, pursuant to this Court’s power under Article VII, Sections 1 and 2 of the Constitution “to hear and determine such original and remedial writs as may be necessary or proper to complete exercise of its jurisdiction.” Rule 14(1), M.R.App.P. A stay of implementation of Section 6 of HB102 is necessary to the meaningful exercise of this Court’s jurisdiction, and to the safe and effective management of the entire MUS.

The Constitutional delegates carefully crafted a framework for determining the policies and programs of the MUS, free of political interference. *COPP*, ¶ 35 (McKinnon, J. specially concurring). BOR has exercised its authority to ensure the health and stability of its institutions by adopting a policy regarding firearms on campuses decades ago, and has revised it numerous times. (Ex.2, BOR Policy 1006). HB102 eliminates the existing policy governing firearms on campuses, and directs BOR to take specific actions in replacing Policy 1006. When, as here, “the legislature attempts to exercise control of the MUS by legislative enactment, this Court must engage in a case-by-case analysis to determine whether the legislature's action impermissibly infringes on the Board's authority.” *Id.*, ¶ 36.

Petitioner requests that this Court accept original jurisdiction, enjoin and stay implementation of Section 6 of HB102 pending consideration by this Court, and direct such briefing as it deems suitable. Petitioner further requests that after due consideration, this Court declare that Sections 4, 5, 6, 7, and 8 of HB102 violate Article X, § 9 of the Montana Constitution, and are therefore void.

II. PARTIES

A. **Petitioner.**

As an independent Board mandated and established by Article X of Montana’s Constitution, Petitioner BOR consists of seven Regents appointed by the Governor and confirmed by the Senate to seven-year overlapping terms. Mont.

Const., art. X, § 9(2)(b). The governance of the MUS “is vested” in BOR, which has “full power, responsibility, and authority to supervise, coordinate, manage, and control” the MUS, including “the power to do all things necessary and proper” to the exercise of these “broad powers.” Mont. Const., art. X, § 9(2)(a); *COPP*, ¶ 29. As the entity with constitutional authority to control the MUS, BOR has case-or-controversy standing to petition this Court for declaratory relief to determine whether the Legislature violated BOR’s constitutional authority in enacting HB102. *See Bullock v. Fox*, 2019 MT 50, ¶¶ 31-35, 435 P.3d 1187.

B. Respondent.

Respondent State of Montana (“State”) is one of the 50 sovereign states that make up the United States of America. Respondent Austin Knudsen (“Knudsen”), Montana’s Attorney General, is “the legal officer of the state” charged, *inter alia*, to “defend all causes in the supreme court in which the state is a party,” and is vested with the authority and duty “after judgment” in such causes to do what is “necessary to carry the judgment into execution.” Mont. Const., art. VI, § 4(4); § 2-15-501(1), (3), MCA. Respondent Knudsen is named in his official capacity only.

III. FACTS

As in other disputes in which this Court has exercised its original jurisdiction, “[t]he merits of [HB102] and the policy choices behind it are not at

issue in this case.” *Montana Association of Counties v. State by and through Fox*, 2017 MT 267, ¶ 1, 404 P.3d 733 (“*MACo*”). Rather, Petitioner asks the Court to declare sections of HB102 unconstitutional, thereby enforcing the boundaries imposed on the Legislature by Montana’s Constitution and this Court’s prior precedent. With respect to the merits of this Petition, no facts other than the contents of the legislation are at issue.

HB102 generally revises gun laws and provides locations where concealed weapons may be carried. HB102, Section 5 precludes BOR 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, § 9. HB102, Section 6 precludes BOR from “regulat[ing], restrict[ing], or plac[ing] 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 who meets minimum safety training requirements, except it allows BOR to restrict some campus gun use in limited ways. HB102, Section 7 provides that any person suffering a deprivation of rights defined by HB102 “has a cause of action against any governmental entity[.]” Section 8 removes the prior MUS exception in the open carry law, and Section 4 does not exclude MUS property from its “anywhere in the state” reach for concealed carry. All sections of the Act, except Section 6 — the section directing

BOR policymaking — became effective upon passage and approval on February 18, 2021. HB102, Section 15. Absent a stay, Section 6 becomes effective on June 1, 2021. *Id.*

HB2 provides funding of \$1,000,000 for implementation of HB102. A single provision of HB2 conditions that funding on BOR’s acquiescence to the Legislature’s passage of HB102, providing: “If the Montana University System files a lawsuit contesting the legality of HB102, Implementation of HB102 is void.” (Excerpt of HB2, attached as Ex. 3).

IV. LEGAL QUESTION EXPECTED TO BE RAISED

Whether the Legislature violated Article X, Section 9 of the Montana Constitution in enacting HB102 when the Constitution clearly vests in BOR, not the Legislature, the “full power, responsibility and authority to supervise, coordinate, manage, and control” the MUS and its institutions.

V. ARGUMENT

A. Jurisdiction.

This Court has jurisdiction over declaratory actions “when urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of state-wide importance.” Mont. R. App. P. 14(4); *see also* Mont. Const., art. VII, § 2(1), (2); §§ 3-2-201, 202(1), MCA; *MACo*, ¶ 2. When a law is repugnant to the Constitution, this Court has the

power – and the duty – to declare it so. *Montana AFL-CIO v. McCulloch*, 2016 MT 200, ¶ 7, 380 P.3d 728.

1. Pure question of law.

This case presents a pure question of constitutional interpretation: whether the Legislature exceeded the bounds of authority in enacting HB102, which infringes on BOR’s constitutional authority set forth in Article X, Section 9. This Court previously addressed this question of the constitutional balance of authority between the Legislature and BOR in *Board of Regents v. Judge*, 168 Mont. 433, 436, 543 P.2d 1323, 1325 (1975) (“*Judge*”). In *Judge*, this Court exercised original jurisdiction to determine the constitutionality of legislative appropriations to the MUS which were contingent on the BOR’s certificate of compliance with certain prerequisite conditions.

Similarly, in *MACo* this Court accepted original jurisdiction to determine the propriety of a constitutional initiative’s adoption because “what [was] in issue and what this Court must adjudge is not directed by a factual record or inquiry, but rather is directed to the legality” of the constitutional initiative process at issue. *MACo*, ¶ 2. The Court noted: “Indeed, it is precisely because we are addressing only the enactment process and whether that process survives constitutional scrutiny that a factual record evidencing a dispute or conflict surrounding the numerous provisions of CI116 is unnecessary.” *Id.* See also *Montanans for Coal*

Trust v. State, 2000 MT 13, ¶ 29, 996 P.3d 856 (exercising original jurisdiction where issues presented were “of purely statutory and constitutional construction”). As in *Judge* and *MACo*, this challenge to HB102 presents a pure question of constitutional interpretation, without the need for a factual record.

2. Statewide importance.

Whether the Legislature has the authority to intervene in the supervision, coordination, management, and control of the MUS is a matter of statewide importance. HB102 affects the operation of sixteen campuses; the educational opportunities available to every Montanan in every county of the state; and the day-to-day lives of 40,000 students.¹ See *Hernandez v. Board of County Comm'rs*, 2008 MT 251, ¶ 10, 189 P.3d 638 (holding “the issue of whether the creation of justice's courts of record violates certain provisions of the Montana Constitution is of statewide importance” because it will affect multiple counties).

The importance of BOR’s challenge to HB102 is demonstrated by the large number of Montanans from every corner of the state who have exercised their constitutional right to participate in BOR’s deliberations. Mont. Const., art. II, § 8. Regents have received over 4,700 written comments on this issue. Over 900 people – including students, parents, professors, employees, and campus neighbors

¹ “The sixteen universities and colleges of the Montana University System (MUS) collectively enroll over 40,000 students.” <https://mus.edu/Universities>

– attended BOR’s virtual listening sessions. Scores of those in attendance provided public comment. Rogers Declaration, Ex. 5.

In addition, the statewide importance of BOR autonomy was noted by the delegates to the Constitutional Convention. In 1972, the Education Committee reported to the convention that “higher education is not simply another state service The unique character of the college and university stands apart from the business-as-usual of the state.” *COPP*, ¶ 36 (McKinnon, J., specially concurring), *quoting* 2 Montana Constitutional Convention at 736. As noted by Justice McKinnon: “The 1972 constitutional convention debate on Article X, Section 9, reveals the delegates’ intention to place the [MUS] beyond the political influence of the Legislature, entrusting it instead to a Board which should be directly responsible and answerable to the people.” *Id.* Critically, “[t]he principle of regent independence was definitely intended by the drafters of the 1972 Montana Constitution.” *Judge*, 168 Mont. at 449, 543 P.2d at 1332.

The Legislature’s enactment of HB102 directly conflicts with Regent independence, and instead renders BOR subject to legislative directives. Given the direct attack that HB102 presents to BOR autonomy in the management and coordination of the MUS, prompt resolution of the issue of whether the Legislature can act in areas reserved to BOR is a matter of statewide importance. *See also Coal Trust*, ¶ 28; *In re Best*, 2010 MT 59, ¶¶ 18, 19, 229 P.3d 1201.

3. Normal appeal process inadequate.

The normal appeal process is inadequate to address whether the Legislature has the constitutional authority to enact HB102. In *MACo*, this Court held the normal process was inadequate when implementation of a constitutional initiative was “imminent.” *Id.*, ¶ 2. Here, the bulk of HB102 became effective upon signing, and the implementation section applicable specifically to BOR is effective on June 1, 2021.²

In *Hernandez*, this Court found the normal litigation process inadequate when “[b]efore an appeal from a justice court judgment presenting this issue could reach this Court, potentially hundreds of misdemeanor criminal cases would be resolved in the justice’s courts of record throughout Montana.” *Id.*, ¶ 10. In this case, as of June 1, tens of thousands of students will be attending institutions subject to constitutionally infirm firearms legislation. The normal process through the district courts – which could leave this matter unresolved and in dispute for as long as four college semesters – is inadequate to safeguard the BOR’s authority, and to allow the BOR to exercise its constitutional authority in the manner it determines necessary for the health and stability of the MUS.

² At the time of this filing, HB2 – including the MUS funding condition – had not been signed by the governor. In this petition, Petitioners seek a declaration and stay only as to HB102, not HB2.

As discussed in more detail below, HB102 creates a constitutional crisis of great urgency. Section 6 of HB102 requires BOR to adopt policies consistent with the new law by June 1, 2021. BOR meets next on **May 26, 2021**. Unless this Court stays the implementation of Section 6, on that date Regents will be forced to choose between obeying their constitutional duty to control, manage and supervise the campuses of the MUS, or complying with a law enacted by the Legislature which subjects the MUS to liability and threatens the health and safety of the MUS. Even more importantly, on June 1, thousands of students and employees will be uncertain as to whether the unconstitutionally enacted HB102 policies apply, or whether the current, contrary BOR policy applies. Under these circumstances, an appeal from final judgment is a wholly inadequate remedy.

B. The Merits.

1. The Plain Language of the Constitution Precludes Legislative Encroachment on BOR's Authority.

Article X, Section 9 of the Montana Constitution expressly creates the Board of Regents as a constitutionally authorized, independent entity. This Court holds that “the regents are given ‘full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system’” *Duck Inn, Inc. v. Montana State University - Northern*, 285 Mont. 519, 526, 949 P.2d 1179, 1183 (1997).

In *Judge*, the Legislature made appropriations to the MUS contingent upon the Board's certification of compliance with prerequisite conditions for the funding. 168 Mont. at 449 50, 543 P.2d at 1332-33. “Inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education.” *Id.* at 454, 543 P.2d at 1335. This Court declared unconstitutional the legislative enactments limiting the amounts MUS could pay college presidents. The Court noted: “The limitation set forth in [the legislation] specifically denies the Regents the power to function effectively by setting its own personnel policies and determining its own priorities. The condition is, therefore, unconstitutional.” *Id.*

In HB102, the Legislature purports to regulate the presence of guns on campuses, directly interfering with BOR’s constitutional authority to “ensure the health and stability of MUS.” *COPP*, ¶ 29. BOR has already determined its priorities in this area by reviewing, considering public comment, and adopting policies regarding whether and how firearms shall be possessed, transported, and stored on university campuses. (Ex. 2, BOR Policy 1006). Pursuant to this policy, “[e]xcept as provided in subsection C,” the persons who can carry firearms on campuses are limited to “those persons who are acting in the capacity of police or security department officers and who have successfully completed the basic course in law enforcement . . . or have passed the state approved equivalency examination

...” BOR Policy 1006. Subsection C allows each campus to “establish regulations governing the transportation and storage of firearms on campus.” *Id.*

In enacting HB102, the Legislature purports to eliminate existing BOR Policy 1006 and usurp BOR’s constitutional authority to determine safety and health policies. *COPP*, ¶ 29. HB102 sets forth specific actions BOR can and cannot take in policymaking. *See* HB102, Section 6(2). Indeed, the Legislature’s directive to control BOR policy could not be more explicit; in HB2, the Legislature appropriated \$1,000,000 to MUS for the implementation of HB102, on the condition that the MUS not “file a lawsuit contesting the legality of HB102.” HB2, Ex. 3.

BOR, not the Legislature, is the competent body to determine priorities in higher education, including those related to the safety of students, professors, staff, and any other person on MUS campuses. *Judge*, 168 Mont. at 449-50, 543 P.2d at 1333; *COPP*, ¶ 29. This Court has already determined that when the Legislature places limitations on the Regents’ choices in policymaking, such limitations “specifically den[y] the Regents the power to function effectively by setting its own personnel policies and determining its own priorities.” *Judge*, 168 Mont. at 454, 543 P.2d at 1335. Because the Legislature has dictated BOR policy changes, constrained what the Board may restrict or regulate regarding firearms on

campuses, and conditioned funding on BOR adopting those changes, HB102 is unconstitutional.

2. Sections of HB102 Restricting BOR Autonomy Are Unconstitutional.

Section 13 of HB102 contains a severability clause, “an indication that the drafters desired a policy of judicial severability to apply to the enactment.” *Williams v. Board of County Comm’rs of Missoula County*, 2013 MT 243, ¶ 64, 308 P.3d 88. Sections 5 and 6 specifically preclude BOR from adopting policies regarding firearms and specifically direct BOR to limit its authority, and are therefore unconstitutional. If Sections 5 and 6 are excised from HB102, Section 4 still infringes on BOR authority by providing “a person with a current and valid permit. . . may not be prohibited or restricted from exercising that permit anywhere in the state.” Section 4 specifically does not exclude MUS from this prohibition, although primary and high schools are excluded. Likewise, even if Sections 5 and 6 are excised, Section 7's liability remedies would apply against MUS as “any governmental entity,” and are unconstitutional. Finally, Section 8 amends § 45-3-111 to eliminate an exception to the open carry law which – prior to HB102 – explicitly allowed BOR “to regulate the carrying of weapons. . . on their campuses.” Section 8 is therefore unconstitutional.

“The severability of an unconstitutional provision from a statute is a matter of statutory interpretation.” *Williams*, ¶ 24. HB102 Sections 4, 5, 6, 7 and 8 should

be declared unconstitutional as impermissible infringements on BOR's constitutional authority.

VI. EMERGENCY MOTION TO STAY

A. Staying Implementation of HB 102, Section 6, is the Proper Procedure.

Petitioner seeks a stay of implementation of Section 6 of HB102 while this Court considers this Petition for declaratory relief. This Court routinely grants stays of judgments or orders pending appeal. *See* Rule 22, M.R.App.P. This Court has applied the same process when exercising original jurisdiction of matters involving the constitutionality of legislation. In *Judge*, this Court accepted original jurisdiction and “stay[ed] further actions or proceedings by any party hereto or [its] agent[s].” 168 Mont. at 455, 543 P.2d at 1335. Upon “accept[ing] original jurisdiction,” the Court directed that the parties or agents thereof “refrain from withholding payments” under the legislative directives “until further Order of this Court” regarding whether the Legislature had invaded the “management prerogatives granted to [BOR] by Article X, Section 9 of the Montana Constitution.” *Id.*, 168 Mont. at 436-37, 543 P.2d at 1326. Similarly, in *MACo*, this Court entered a stipulated stay of application of CI-116. (Stay Order, Ex. 4).

Prior to filing this Petition, BOR requested that the parties stipulate to a temporary stay. Respondent rejected that request. BOR requests that this Court grant the stay over objection. Given the imminent implementation of Section 6 of

HB102 on June 1, a stay promotes judicial economy, reduces uncertainty, and preserves the status quo while this constitutional issue is adjudicated.

B. Absent a Stay, Implementation of HB102 Creates a Crisis in the Orderly Management of the MUS.

HB102 was signed into law on February 18, 2021, with most sections of the law going into effect upon passage. Section 6, addressing implementation of the legislation by BOR, becomes effective June 1.

Absent a stay, on May 26, 2021, BOR faces a legal and ethical dilemma. Each Regent “has not only the power, but also the constitutional and statutory duty to ensure the health and stability of the MUS.” *COPP*, ¶ 29. Each Regent must “take and subscribe to the constitutional oath of office” before serving as a member of the Board. § 2-15-1508(2), MCA. Yet on May 26, the Regents must choose whether to fulfill their constitutional duty to coordinate, control, manage, and supervise the campuses of the MUS, or whether to abdicate that duty and adopt policies directed by the Legislature in HB102.

This type of coerced policymaking is not only unconstitutional, it is unwise. BOR Policy 1006 does not exist in a vacuum, but is one part of the overall management of the MUS. The existing policy has been revised six times over five decades. (Ex. 2). Policy 1006 allows flexibility among the campuses’ needs and sizes by authorizing campuses “to establish regulations governing the transportation and storage of firearms on campus.” Moreover, many BOR

initiatives – including Suicide Prevention – depend upon the existing policy in planning for overall health and safety of the MUS. *See, e.g.*, Ex. 6 at 9. Regents are charged by the Constitution with the duty to “coordinate” the MUS, and coordination requires contemplation of the firearms policy in relation to other BOR policies and initiatives.

Similarly, the open-meeting framework which governs BOR decision-making does not exist in a vacuum. BOR conducts two-day meetings at different campuses five times a year. At those meetings, BOR gathers information from all interested parties – university presidents, chancellors, deans, professors, students, community members. The constant and consistent exchange of information is critical to the BOR’s management, coordination, and control of the MUS. Indeed, “[a] Regent must engage in meaningful and public deliberations as part of her public function as a member of the Board.” *COPP*, ¶ 70 (McKinnon, J. specially concurring). Any constraint on BOR’s “deliberations, inquiries, or exchange of information and ideas is in direct conflict with Montana's guarantee of the public's right to know.” *Id.* Here, Regents have received over 4,700 public comments concerning this issue (Ex. 5), but the Legislature has constrained deliberations to its own directives. Such a process relegates the public’s constitutional right to participate to a meaningless exercise which occurs prior to, but has no impact on, BOR deliberations. “Given the tenor of the delegates’

insistence upon open government and citizen participation, [this Court] find[s] it improbable that they envisioned and subsequently memorialized such a hollow right.” *Bryan v. Yellowstone County Elementary School District 2*, 2002 MT 264, ¶ 44, 60 P.3d 381.

Absent a stay, the Regents will be curtailed in considering the issues raised by the public and MUS participants regarding the interplay of Policy 1006 and other issues critical to management of the MUS. These knotty issues identified in public comment to assist BOR’s deliberation include suicide prevention (Ex. 5, Ex. A, pp. 9, 13, 33, 43), housing requirements (*Id.*, pp. 9, 22, 27, 29, 48), enrollment and retention of students (*Id.*, pp. 36, 39, 42, 54), recruitment and retention of faculty (*Id.*, pp. 7, 12, 16, 18, 21), and safety (*Id.*, pp. 9, 10, 17, 21, 52). All these issues, in turn, have substantial potential to affect the MUS’s financial viability.

Absent a stay, the Regents are forced to alter existing policy under penalty of liability and funding loss in the course of a single meeting on May 26. The coerced process violates BOR’s constitutional authority, the public’s right to participate, and common sense.

C. Absent a Stay, the Campuses are Less Safe.

The current policy has been in place since 2012. Individual campuses have created security plans and protocols based on Policy 1006. HB102 simply provides too little time to implement widespread, coerced changes to the existing

systems. Moreover, until this challenge is resolved, the constitutionality of any policy adopted pursuant to legislative directive is questionable. Inconsistency in safety protocols creates unnecessary safety risks to students, faculty, security personnel, and other campus constituencies.

No harm comes from staying implementation of Section 6 of HB102 while the Court considers the constitutionality of the law. On the other hand, serious harm is threatened by implementing a law on short notice, without adequate time to consider all aspects of this sea change in the management and control of the MUS's sixteen institutions.

VII. CONCLUSION

For the foregoing reasons, the Court should accept original jurisdiction, stay the effective date of Section 6 of HB102 during the pendency of this action, and direct such briefing as the Court deems suitable. After due consideration, the Court should determine and declare Sections 4, 5, 6, 7 and 8 of HB102 to be unconstitutional.

Dated this 20th day of May, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, Kyle A. Gray, certifies that the foregoing complies with the requirements of Rules 11 and 14(9)(b), Mont. R. App. P. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 4000 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

 /s/ Kyle A. Gray
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CERTIFICATE OF SERVICE

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