

IN THE SUPREME COURT OF THE
STATE OF MONTANA

Case No. DA 21-0605

On Appeal from the Montana First Judicial District Court, Lewis and Clark County
No. BDV 2021-598, the Honorable Michael McMahon, Presiding

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

Petitioner,

vs.

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

Respondent.

AMICUS CURIAE BRIEF OF REP. SETH BERGLEE

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This amicus curiae brief makes two main points. First, the District Court’s ruling allows “constitution-free” zones on Montana University System (“MUS”) campuses. Second, MONT. CONST. art. X, § 9, which has been interpreted to give the Board of Regents (“Board”) authority over the “academic, administrative and financial matters of substantial importance to the [university] system[,]” *Bd. of Regents v. Judge*, 168 Mont. 433, 454, 543 P.2d 1323, 1333 (1975), does not allow the Board to pick and choose which laws on other topics it will follow. Yet that is exactly what it is doing with HB 102. This will be demonstrated by the description in this brief of the statutes the Board readily follows. There is just one law – just one – the Board refuses to follow: HB 102. The multitude of statutes the Board routinely follows belies the notion implied by the District Court’s ruling that the Board can ignore a statute with which the Board disagrees.

II. ARGUMENT

A. Amicus Rep. Berglee Wholeheartedly Agrees with the Arguments in Appellant’s Opening Brief

In the interest of judicial economy – and in recognition of the fact that courts disfavor an amicus repeating the arguments of a party – Amicus Rep. Berglee notes that he, as the prime sponsor of HB 102, agrees with the analysis of the State contained in Appellant’s Opening Brief.

B. The Campus Carry Provisions of HB 102 Were Specifically Passed to Counter the Board’s Ban on Concealed Carry

Amicus Rep. Berglee was the prime sponsor of HB 102 so he knows why the campus carry provisions of the bill were passed. They were to enforce Montanans’ constitutional right to lawfully carry firearms on MUS campuses.

C. By Enjoining the Enforcement of Section 5 of HB 102, the District Court’s Ruling Effectively Creates a “Constitution-Free” Zone on MUS Campuses

Section 5 of HB 102 provides that MUS is “prohibited from enforcing or coercing compliance with any rule or regulation that restricts the rights of the people ... reserved in Article II, sections 4 through 12[.]” These are the rights of individual dignity, freedom of religion, freedom of assembly, freedom of speech, expression, and press, the right of participation in government, the right to know, the right of privacy, the right against unreasonable searches and seizures, and the right to bear arms.

However, the District Court shockingly enjoined the enforcement of Section 5 of HB 102. *See* Summary Judgment Order at 28 (contained in Appellant’s Opening Brief, Appendix E 028). That is, the District Court prevented the prohibition on the Board restricting the rights of individual dignity, freedom of religion, freedom of assembly, freedom of speech, expression, and press, the right of participation in government, the right to know, the right of privacy, the right

against unreasonable searches and seizures, and the right to bear arms. Stated another way, the District Court allowed the Board to restrict these rights. This is allowing a “constitution-free” zone on MUS campuses. This Court must reverse the District Court.

D. The Board Willingly Follows Hundreds of Laws of General Applicability

To show that the Board does not have wide-ranging autonomy to declare itself exempt from state statutes, it is instructive to note the hundreds of state statutes of general applicability the Board routinely follows:

- Title 2, Chapter 3 (open meetings)
- Title 2, Chapter 4 (Administrative Procedure Act)
- Title 2, Chapter 6 (public records)
- Title 2, Chapter 7, Part 5 (state audits)
- Mont. Code Ann. § 2-15-1505 (executive branch officers – Board of Regents)
- Title 2, Chapter 18 (state employees)
- Title 16 (regulation of alcohol, tobacco, and marijuana)
- Title 17, Chapter 6 (state deposits and investments)
- Title 17, Chapter 8 (disbursements and expenditures of state funds)

- Title 18 (public contracts)
- Title 19 (public retirement systems)
- Title 30 (labor)
- Title 44 (law enforcement (applicable to campus police departments))
- Title 45 (crimes (enforced by campus police departments))
- Title 46 (criminal procedure (applicable to criminal investigations by campus police departments and resulting prosecutions))
- Title 49 (anti-discrimination laws)
- Title 50, Chapter 4 (smoking in public places)
- Title 50, Chapter 50 (regulation of retail food establishments (applicable to MUS food service facilities))
- Title 50, Chapter 60 (building construction standards (applicable to MUS buildings))
- Title 50, Chapter 61 (fire safety in public buildings)
- Title 50, Chapter 71 (occupational safety and health)
- Title 50, Chapter 77 (construction site health and safety (applicable to MUS construction projects))
- Title 61 (motor vehicles (applicable to vehicles on MUS campuses))
- Title 75 (environmental protection)

- Title 76 (land use)
- Title 77 (state lands)

E. The Board Follows a Multitude of Statutes That Specifically Apply to It

Except when it comes to one law – HB 102 – the Board routinely follows the many statutes that specifically apply to it and MUS. They include:

- Mont. Code Ann. § 20-1-202 (Board of Regents oaths of office)
- Mont. Code Ann. § 20-1-225 (no financial aid unless student complies with Selective Service requirements)
- Mont. Code Ann. § 20-1-501 (recognition of native American cultural heritage)
- Mont. Code Ann. § 20-1-604 (prohibiting denial of admission based on military reserve or National Guard status)
- Mont. Code Ann. § 20-2-111 (Board of Regents may select a presiding officer)
- Mont. Code Ann. § 20-2-112 (Board of Regents meetings)
- Mont. Code Ann. § 20-32-102(1)(c) (Montana Educational Telecommunications Network)
- Title 20, Chapter 25 (statutes governing MUS)

- Mont. Code Ann. § 50-3-102(1)(a) (annual fire inspections of MUS facilities)

F. The Board’s Argument That It Can Pick and Choose Which State Statutes It Feels Like Following Has Logical Flaws

With the exception of the Board’s narrow autonomy over “academic, administrative and financial matters of substantial importance to the [university] system,” *Judge*, 168 Mont. at 454, 543 P.2d at 1333, the Board cannot have unbridled autonomy to decide which statutes it will follow. Allowing it to do so, as the District Court did, would lead to two logical problems. And as amicus Rep. Berglee, the prime sponsor of HB 102, can attest, avoiding these two logical problems is one of the reasons the statutory scheme of the law cannot be what the District Court decided.

1. If the Board Can Independently Dictate the Laws on MUS Campuses, But Does Not Enact Its Own Law on a Topic, Is There No Law on That Topic on Campus Grounds?

If the usual rule that state statutes apply within the territory of the state is discarded, the question arises about the effect of a wholly autonomous body not enacting a law on a topic. While the Board has enacted its own law on concealed carry via its Policy 1006, it has not enacted its own laws on any of the hundreds of other state statutes applicable to it. Just HB 102.

Take, for example, motor vehicle laws. If the Board really can choose to ignore state motor vehicle laws on MUS campuses, but does not pass its own motor vehicle laws, what are the applicable motor vehicle laws? There must be some law on a topic such as this, but allowing the Board to dictate its own laws, but failing to enact its own law on a topic, creates a legal vacuum where no law governs that topic. MONT. CONST. art. X, § 9 cannot be interpreted to create legal vacuums on hundreds of topics.

2. If a Wholly Autonomous Board Approves of a State Statute, Must It Formally Declare Its Agreement With the Hundreds of Statutes It Is Currently Following?

A person must be able to know what the law is on a MUS campus. If the Board agrees with a state statute – for example, Title 2, Chapter 18 on state employees – a person would not know that this state law applies on MUS campuses unless the Board formally adopted that law. Needless to say, the Board does not provide a list of the hundreds of state laws it agrees with – it just follows them because they are state laws.

Except for one.

G. The Board Picked One Law to Ignore, While Following Hundreds of Others, For Purely Political, Not Constitutional Reasons

What explains the Board's selection of HB 102 to ignore when it routinely complies with all other applicable statutes? While it is impossible to know the

exact mindset of each member of the Board, it seems obvious that the hot-button political issue of firearms is why the Board chose HB 102 as the one statute to attempt to ignore. A further inference is that protecting its limited MONT. CONST. art. X, § 9 autonomy to determine “academic, administrative and financial matters of substantial importance to the [university] system[,]” *Judge*, 168 Mont. at 454, 543 P.2d at 1333, is not the reason for the Board’s attempt to ignore a statute. If “academic, administrative and financial matters of substantial importance to the [university system]” were the driving force when the Board was deciding which statutes it would follow and which it would ignore, one would expect the Board to select statutes that actually arguably interfere with MUS’s operations. A statute interfering with MUS’s academic matters would be Mont. Code Ann. § 20-1-604, which prohibits MUS from denying admission to a prospective student based on military reserve or National Guard status – yet, the Board follows this statute. A statute arguably interfering with MUS’s administrative matters would be Mont. Code Ann. § 20-2-112, which regulates Board meetings and the dozens of other statutes in Title 20, Chapter 5 that govern numerous aspects of MUS’s operations – all of which the Board willingly follows. Finally, a statute arguably interfering with MUS’s financial matters is Mont. Code Ann. § 20-1-225, which prohibits

financial aid to a student who does not comply with Selective Service requirements – another statute the Board seems to routinely follow.

What is different between HB 102 and these other statutes affecting MUS’s “academic, administrative and financial” affairs? The answer is obvious: HB 102 involves firearms – and on this topic, the Board is willing to break its apparently otherwise perfect track record of following state statutes.

What is also obvious is that the Board is trying to accomplish via the judicial branch what it could not accomplish via the legislative branch. The Board was heavily involved in the process of passing HB 102. Yet it didn’t get what it wanted in the final version of the bill. So now it is attempting to get what it wants from this Court. That is not how it works. The legislative power squarely belongs to the Legislature. *See* MONT. CONST. art. V, § 1 (“The legislative power is vested in a legislature consisting of a senate and a house of representatives.”).

The notion that the Board is totally autonomous from state laws enacted by one branch of state government (the Legislature) leads to a logical and inescapable corollary: the Board must then also be totally autonomous from the decisions of the judicial branch. This would allow the Board to only abide by judicial opinions with

which it agrees. If the legislative branch has no power over the Board, then neither does the judicial branch.

III. CONCLUSION

Allowing the District Court’s ruling to stand would create “constitution-free” zones on MUS campuses. The Board had obvious political motives when it singled out HB 102 as the one statute – out of several hundred – it decided not to follow. It did not file this lawsuit to defend its Article X, § 9 powers over “academic, administrative and financial” matters significantly affecting the university system. If defending its autonomy over these limited topics were the Board’s motivation, it would have picked a statute having to do with these topics instead of HB 102, which does not.

The Board has the burden of proving “beyond a reasonable doubt” that HB 102 violates MONT. CONST. art. X, § 9. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. It cannot, which means the District Court’s decision must be reversed.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11, I certify that this amicus curiae brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced (except for footnotes and block quotes), and the word count calculated by Microsoft Word is 2365 (excluding the certificates).

/s/ Greg Overstreet
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