

IN THE SUPREME COURT OF THE
STATE OF MONTANA

Case No. DA 21-0605

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

Petitioner and Appellee,

vs.

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

Respondent and Appellant.

COUNTY OF DANIELS *AMICUS CURIAE* BRIEF

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Introduction

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

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

Prior restraints on fundamental rights that predate government, while not unconstitutional per se, bear a heavy presumption against constitutional validity. *Clark v. City of Lakewood*, 259 F.3d 996, 1005 (9th Cir. 2001). In *Staub v. City of Baxley*, 355 U.S. 313 (1958), the Supreme Court struck down an ordinance vesting

a mayor and city council “uncontrolled discretion” to grant or refuse a permit required for soliciting organizational memberships. *Staub*, 355 U.S. at 325. Such a permit, held the Court:

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

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

In line with the above-cited cases, to allow the Board of Regents the uncontrolled discretion to grant or refuse a student or university employee the right “to keep or bear arms in defense of his own home, person, and property...” imposes an unconstitutional prior restraint upon the enjoyment of Article II, § 12

freedoms, and lays a forbidden burden upon the exercise of liberty protected by the Montana Constitution.

A. The Board of Regents’ disallowance of exercising Article II, § 12 liberties on Montana universities, ostensibly as a means to “ensure the health and stability of the Montana University System,” places unbridled discretion in the hands of a government agency and serves as an unconstitutional prior restraint.

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

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

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

Here, the Board of Regents are not licensors in the sense that they grant or deny physical licenses to individual students, employees, and visitors of the Montana University System as it relates to their ability to exercise the rights detailed in Article II, § 12 of the Montana Constitution, but the Board of Regents have occupied the role of “licensor” insofar as they decide whether students and employees of the Montana University System as a whole are allowed, or “licensed,” to exercise their Article II, § 12 rights. In so doing, the Board of Regents exercise unbridled discretion as they arbitrarily seek to “ensure the health and stability of the Montana University System” with no adequate standards imposed to guide the Board of Regents' discretion in pursuing this end.

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

Here, the Board of Regents’ prior restraint on students’, employees’, and visitors’ of the Montana University System constitutional rights detailed in Article II, § 12 of the Montana Constitution are not narrow, objective, or definite, and the imposition of the Board of Regents’ prior restraint on the enjoyment of the constitutional rights detailed in Article II, § 12 rely on the unacceptable appraisal

of facts, exercise of judgment, and formation of opinions by the seven unelected members of the Board of Regents.

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

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

Kunz v. New York, 340 U.S. 290, 294 (1951); *Shuttlesworth*, 394 U.S. at 153.

“[U]ncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.” *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 516 (1937) (plurality opinion).

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

Shuttlesworth, 394 U.S. at 153.

Here, the Board of Regents invokes public safety to justify their disallowance of the exercise of individuals on MUS campuses’ Article II, § 12 rights, as they claim the legislature has curtailed their ability to determine the best

policies to ensure the health and stability of the Montana University System. As the court in *Kunz* articulates, the mere incantation of public safety rationale does not save arbitrary licensing, or in this case regulatory, schemes. Similarly to the party in *Kunz*, the Board of Regents, an administrative body made up of seven unelected members, is exercising discretion to grant or withhold a constitutional right based on broad criteria unrelated to proper regulation of public places. Moreover, as in *Kunz*, there exists in the immediate case more appropriate public remedies to protect the peace and order of the community than the blanket disallowance, through prior restraint, of a constitutional right.

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

The BOR’s duty to “ensure the health and stability of the MUS” as articulated in *Sheehy*, if extended to allow prior restraint restrictions on Article II, Sec. 12 of the Montana Constitution, requires an appraisal of facts, the exercise of judgment, and the formation of an opinion on behalf of the BOR. *Sheehy v. Com’r of Political Practices for Mont.*, 2020 MT 37, ¶ 29 (Mont. 2020). “The health and stability of the MUS” is a vague phrase that can only be defined within the eye of the beholding official, and an extension of that phrase to include prior restraints on

Montanan’s right to keep and bear arms was not contemplated by the Court in *Sheehy*. *Id.*

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

As prescribed by Article X, Section 9(2)(a), of the Montana Constitution, and § 20-25-301, MCA, a Board of Regents member has not only the power, but also the constitutional and statutory duty to ensure the health and stability of the MUS. Obviously included in such duties is *ensuring the financial stability of the MUS*. *Sheehy* at ¶ 29 (Mont. 2020) (emphasis added).

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

In fact, § 20-25-301(2), MCA, dictates that the BOR “shall adopt rules for its own government that are consistent with the constitution and the laws of the state.” By restricting through prior restraint the ability of individuals to enjoy their constitutional rights laid out in Article II, Sec. 12 of the Montana Constitution, and re-articulated by the duly elected Legislature in House Bill 102, the BOR in fact violates the obligation imposed upon it by MCA § 20-25-301(2).

The BOR cannot predict where or when crime will happen, and they cannot ensure the health of each and every MUS student and faculty member on MUS campuses as it relates to violent crime because MUS campuses are not controlled environments. Put another way, MUS campuses do not have controlled points of access. Anyone can enter an MUS campus with any weapon they so choose. Law abiding students and faculty on MUS campuses are disallowed from protecting themselves against individuals who care not what the BOR’s policy is concerning firearms and other weapons on campus. Law abiding citizens who wish to protect themselves but who cannot because of the BOR’s prior restraint are left defenseless as they must rely on the BOR’s inability to ensure the health and safety of each and every MUS student and faculty member on MUS campuses as it relates to violent crime.

Individuals enjoy a right to carry handguns “for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another

person. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008). The right to self-defense at the core of the Second Amendment and similarly articulated state constitutional rights is enjoyed by everyone in public spaces. Unelected officials cannot restrict, through prior restraint, law abiding students and faculty members from protecting themselves on MUS campuses under the guise of “ensuring the health and stability of the MUS,” for this very phrase from *Sheehy*, and the constitutional provisions and statutes relied upon by the BOR to justify their prior restraint restrictions do not contemplate imposing a duty upon nor granting power in the BOR to do so.

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

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

In *Schubert v. De Bard*, 398 N.E.2d 1339 (Ind. App. 1980), the court rejected the idea that a licensing official had “the power and duty to subjectively evaluate an assignment of ‘self-defense’ as a reason for desiring a [handgun carry]

license and the ability to grant or deny the license upon the basis of whether the applicant ‘needed to defend himself.’” *Schubert* at 1341.

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

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

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

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

Woollard at 475.

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

HB 102 reads in pertinent part:

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

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

HB 102 continues in pertinent part:

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

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

Some restrictions on citizens’ right to keep and bear arms are necessary and constitutional, and the duly elected 67th Legislature recognized as much. The Legislature in HB 102 did not prohibit the BOR from restricting Montanans’ Article II, § 12 rights entirely. The language of HB 102, drafted and ratified by the Legislature, is clear in its intent to specifically prohibit the BOR from restricting *with prior restraint* Montanans’ Article II, § 12 rights on college campuses. The Legislature clearly understood the doctrine of prior restraint should be applied to regulations that effect the right to keep and bear arms and codified the same in the passage of HB 102.

Conclusion

The unfettered disallowance of the exercise of rights articulated in Article II, § 12 of the Montana Constitution on Montana University System property is subject to prior restraint analysis, for vesting the BOR with the authority to impose such regulations lends the BOR uncontrolled discretion to grant or refuse individuals on Montana University System campuses their right to keep and bear arms articulated in both the U.S. Constitution and Montana Constitution. Extending the BOR's duty to "ensure the health and stability of the MUS" to include prior restraint restrictions on Article II, Sec. 12 of the Montana Constitution was not contemplated in *Sheehy*, the Montana Constitution, nor state statute, and vests the BOR with unbridled discretion. This is evident in the fact that none of the three sources reference physical safety, firearms, security, or any topic even tangentially related to firearm possession or personal safety on Montana campuses. A number of courts across the country have adopted prior restraint analysis as it relates to the right to keep and bear arms, as shown in the numerous cases cited in Section 1.C, above. The 67th Legislature, duly elected by the citizens of Montana to execute legislation desired by the citizens of Montana, clearly articulated their intent to remove provisions of law that restricted with prior restraint the right of the citizens to keep or bear arms enshrined in the U.S. and Montana Constitutions, as shown in Sections 2 and 5 of HB 102. For these

reasons, the Court should apply the doctrine of prior restraint to the BOR's current prohibition of the right to keep and bear arms on Montana University System campuses and in doing so both find said BOR prohibitions unconstitutional and find that HB 102 does not violate the BOR's narrow constitutional powers granted under Article X of the Montana Constitution.

DATED this 15th day of February, 2022.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I, Logan P. Olson, hereby certify that the preceding County of Daniels *Amicus Curiae* Brief is proportionately spaced in a 14-point Times New Roman font, double-spaced. The word count of the brief is 3,100.

/s/ Logan P. Olson

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