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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

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

Petitioner,

v.

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

Hon. Michael F. McMahon

**STATE OF MONTANA'S BRIEF
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

(email)

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INTRODUCTION

The Montana Legislature passed HB 102, An Act Generally Revising Gun Laws (“HB 102”), which the Governor signed into law on February 18, 2021. HB 102’s 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 Legislature intended 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” including on Montana University System (“MUS”) campuses. *Id.* § 2. With only a few exceptions, *see id.* §§ 4 and 6(2), the Legislature removed existing regulations and made the right to “bear arms”—guaranteed in Article II, § 12 of the Montana Constitution—the rule. So HB 102 is unique. It doesn’t create new rights. It eliminates state and local regulations that inhibit the full exercise of a constitutional right. And while the Legislature acknowledged the authority of the Board of Regents (the “Board”) under Article X, § 9, it noted rightly that this authority does not grant the Board power “to affect or interfere with the rights the people have reserved to themselves.” HB 102, § 3.

Section 4 of HB 102 addresses concealed weapons and allows any person with a valid permit to carry a concealed weapon anywhere in the state except in locations expressly noted in Section 4. MUS facilities are no longer included in this list, meaning individuals who are lawfully permitted to carry a concealed weapon may do so on MUS campuses. HB 102, § 4. Section 8 of HB 102 addresses open carry and

removes statutory language that previously authorized the Board and other postsecondary institutions to regulate or prohibit it on MUS property. Together, these provisions invalidate the Board’s policy, which prohibited the open or concealed carrying of any firearms on all MUS campuses. Montana Board of Regents of Higher Education, Policy 1006: Security and Law Enforcement Operations (revised May 25, 2012) (“Policy 1006”).

Contrary to what the Board suggests in its Petition, *see* Petition ¶¶ 31–34, HB 102 does not divest or invade the Board’s authority to “supervise, coordinate, manage and control the Montana university system.” MONT. CONST. ART. X, § 9. Consistent with caselaw, the Board may exercise control over the financial, academic, and administrative direction of the MUS. And in the absence of contrary state law, the Board may presumably regulate—within constitutional limits—firearms on MUS campuses. But the Board’s authority to regulate firearms is limited and non-exclusive; when the Legislature, by statute, regulates the same subject matter—as it did with HB 102—the Board’s regulations must give way. It is well settled that the Montana Constitution and state laws constrain the Board’s authority. *See Board of Regents v. Judge*, 168 Mont. 433, 449, 543 P.2d 1323, 1332 (1975) (“The Regents are a constitutional body in Montana government subject to ... the public policy of this state.”); *Sheehy v. Comm’r of Political Practices for Montana*, 2020 MT 37, ¶ 41, 399 Mont. 26, 458 P.3d 309 (McKinnon, J., concurring) (“The Board cannot abridge rights protected by the federal or state constitutions, and is subject to state legislation enforcing state-wide standards for public welfare, health, and safety.”). HB 102—which regulates firearm possession for self-defense on public property—is a

quintessential exercise of the State’s police power to make laws for the public welfare, health, and safety. The Legislature wields that power, not the Board. *See State v. Andre*, 101 Mont. 366, 371, 54 P.2d 566, 570 (1936).

Even so, HB 102 still empowers the Board to regulate firearms under certain circumstances, including prohibiting possession at campus events where alcohol is being served or at athletic and entertainment events that are open to the public and have armed security on site. *See* HB 102, § 6 (but noting that any regulation must still be consistent with the Montana Constitution).

The Legislature was well within its constitutional authority to enact HB 102, and the Board—like any other subsidiary of the Executive Branch—must yield to this exercise of power. Accordingly, the State is entitled to summary judgment.

I. Background

After the Legislature passed HB 102, the Office of the Commissioner of Higher Education and the University of Montana Police Department took action to implement its new directives.¹ But the Board did not take action for three months until it met on May 19, 2021, to consider challenging HB 102. The following day, the Board filed a last-minute request with this Court to preliminarily enjoin HB 102 during the pendency of this litigation, and the Court obliged.

¹ The Office of the Commissioner of Higher Education published a draft policy for the Board of Regents to consider. *Draft Policy Recommendation*, Montana University System (last visited Sept. 15, 2021), <https://www.mus.edu/board/draft-policy-recommendation.html>. The University of Montana Police Department also published campus firearms rules, acknowledging the changes set forth in HB 102. *UM Campus Carry Information*, University of Montana (last visited Sept. 15, 2021), <https://www.umt.edu/police/campus-carry/default.php>.

HB 102 protects the right of people to protect themselves. HB 102 § 1; *see also* HB 102: Hearing Before the House Judiciary Committee, 67th Leg. (2021) (Statement of Rep. Seth Berglee). The need for self-defense is not hypothetical. *Id.* From 2017 to 2019, Montana State University-Bozeman and University of Montana-Missoula reported a combined 49 rapes, 4 robberies, and 20 aggravated assaults on their campuses.² *Campus Safety and Security*, U.S. Dep't of Educ. (last visited Sept. 10, 2021), <https://ope.ed.gov/campussafety/#/institution/details> (compiling data reported by individual universities). 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. Petition of Intervenor David Diacon [Dkt. 13] at 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.* at 5.

So far in this case, the Board has only discussed the unsupported concerns of students, parents, and campus leaders about HB 102's implementation. Brief for

² In fact, just this week, the University of Montana opened an investigation into an aggravated assault that occurred in a campus residence hall over the weekend. Zoe Buchli, *University of Montana police investigating assault in campus residence hall*, Helena Independent Record (Sept. 14, 2021), https://helenair.com/news/state-and-regional/university-of-montana-police-investigating-assault-in-campus-residence-hall/article_ef973769-6348-5398-911a-2d8580d5efcd.html.

TRO Show Cause [Dkt. 7] at 11. But these harms are entirely speculative.³ The Board provides no data to show that the presence of concealed firearms on campuses will lead to increased danger or increased suicides. It does not point to this data because no such data exists. In fact, 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. *What Is The Danger To Allowing Concealed Handguns On University Property?: Shootings By Permit Holders From 2012 To May 2021*, Crime Prevention Res. Ctr. (June 14, 2021), <https://crimeresearch.org/2021/06/what-is-the-danger-to-allowing-concealed-handguns-on-university-property-shootings-by-permit-holders-from-2012-to-now/>; see also HB 102: Hearing Before the Senate Judiciary Committee, 67th Leg. (2021) (Statement of Rep. Seth Berglee).

Utah—one of the states in which concealed carry is permitted on campuses—has never reported a problem where a student committed a violation or had to be stripped of her concealed permit. HB 102: Hearing Before the Senate Judiciary Committee, 67th Leg. (2021) (Statement of Rep. Seth Berglee). From 2012 to May 2021, on college campuses across the country that allow the permitted carry of firearms, there were only forty-six cases where someone fired a gun. *What is the*

³ The State notes that its choice to decline to cross-examine Plaintiffs' declarant at the preliminary injunction hearing doesn't make her statements any less speculative or hypothetical. Even if her statements were taken as true, they would remain the very type of conjecture that cannot demonstrate cognizable injuries and establish standing. See *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187 ("The alleged injury must be: concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical[.]").

Danger to Allowing Concealed Handguns on University Property?: Shootings By Permit Holders From 2012 to May 2021, Crime Prevention Research Center (June 14, 2021), <https://crimeresearch.org/2021/06/what-is-the-danger-to-allowing-concealed-handguns-on-university-property-shootings-by-permit-holders-from-2012-to-now/>. And only seven of those involved individuals with concealed handgun permits. *Id.*

The Legislature considered all this in its deliberations over HB 102. And the Board actively participated in these deliberations, receiving multiple concessions from the Legislature in the final version of HB 102. Now, the Board seeks to destroy what it helped build. The Court should grant summary judgment in favor of the State because HB 102 was a valid exercise of the Legislature’s authority and does not improperly infringe on the Board’s authority.

II. Argument

A. Applicable Standards

Summary judgment is proper where “no genuine issue as to any material fact” exists and the movant is entitled to judgment as a matter of law.” Mont. R. Civ. P. 56(c)(3). The moving party bears the initial burden of showing the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. *McDaniel v. State*, 2009 MT 159, ¶ 13, 350 Mont. 422, 208 P.3d 817.

Because this case involves the validity of a statute, the Board must overcome the presumption of constitutionality afforded to HB 102. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a toothless presumption. “The constitutionality of a legislative enactment is prima facie presumed,” and “[e]very possible presumption must be indulged in favor of the constitutionality of a

legislative act.” *Id.* ¶¶ 73–74. The Board must show that the unconstitutionality of the statute appears beyond a reasonable doubt. *State v. Dixon*, 66 Mont. 76, 213 P. 227 (1923), *overruled on other grounds*, *State v. Bd. of Examiners*, 125 Mont. 419, 239 P.2d 283 (1952).

The facts of this case are straightforward. The Board’s current policy prohibits firearms on MUS campuses—except for police and security officers. Policy 1006. It is notable that these armed security offices were unable to prevent the 49 rapes, 4 robberies, and 20 aggravated assaults that plagued MUS campuses from 2017 to 2019. *Campus Safety and Security*, U.S. Dep’t of Educ. (last visited Sept. 10, 2021), <https://ope.ed.gov/campussafety#/institution/details> (compiling data reported by individual universities). In the 2021 legislative session, the Legislature passed HB 102 which prohibits the Board from restricting the possession and carrying of firearms on MUS campuses. While the parties may disagree on the prudence of Policy 1006 and HB 102, the parties agree that Policy 1006 and HB 102 cannot coexist as written. One must yield to the other.

The Board alleges that the Legislature’s action infringes on the Board’s authority and restricts the Board’s ability to regulate firearms on MUS campuses. Petition ¶¶ 25–31. To succeed on the merits of this constitutional claim, the Board must establish either that its authority to regulate firearms on campus is exclusive *or*, if the Board and the Legislature possess concurrent policymaking authority, that the Board’s policymaking power with respect to firearms is superior to the Legislature’s policymaking power.

The Board can establish neither.

B. The Board Does Not Have Exclusive Authority to Regulate Firearms on Campus

Because the Legislature possesses plenary power to pass laws, it has the authority to pass laws about firearms.⁴ See *Meech v. Hillhaven W.*, 238 Mont. 21, 30–31, 776 P.2d 488, 493–94 (1989) (citing *Missouri River Power Co. v. Steele*, 32 Mont. 433, 438–39, 80 P. 1093 (1905)); see also *The Duck Inn v. Mont. State University-Northern*, 285 Mont. 519, 523, 949 P.2d 1179, 1182 (1997) (“[T]he public policy of the State of Montana is set by the Montana Legislature through its enactment of the statutes.”). The limitation on this authority to regulate firearms is, of course, the Second Amendment of the United States Constitution and Article II, § 12 of the Montana Constitution. The Legislature has exercised its power to regulate firearms on numerous occasions. Among other things, the Legislature establishes the age at which a person can carry or use a firearm, see Mont. Code Ann. § 45-8-344, it regulates shooting ranges, § 76-9-105(1)–(2), it restricts felons from possessing firearms, § 45-8-313, it controls the marketing of firearms, § 30-20-106, and it prohibits forced disclosure of firearm ownership in healthcare settings. § 50-16-108. And the Board doesn’t challenge these regulations, which clearly apply on MUS property. To the contrary, it is well accepted that the Legislature can regulate firearms everywhere in Montana (save federal property). It is also well accepted that the Legislature can restrict other governmental entities from regulating firearms in a more restrictive

⁴ “Plenary” is defined as “full and complete” and “unabridged.” Plenary, Ballentine’s Law Dictionary (3rd ed. 1969). “Plenary Power” is defined as “[p]ower as broad as equity and justice require.” Plenary Power, Ballentine’s Law Dictionary (3rd ed. 1969).

manner than the Legislature. *See, e.g., Missoula v. Fox*, 2019 MT 250, ¶ 23, 397 Mont. 388, 450 P.3d 898 (upholding the Legislature’s restriction on local government regulation of firearms).

The Legislature can also regulate certain on-campus activities. For example:

- The Legislature requires university employers to contribute to the teachers’ retirement system. Mont. Code. Ann. § 19-20-621.
- The Legislature has established rules for releasing student records. § 20-25-515.
- The Legislature protects students’ privacy rights. § 20-25-511.
- The Legislature prohibits university officials from entering student rooms unless they have written permission or there is an emergency. §20-25-513.
- The Legislature regulates student government funding. § 20-25-451.
- The Legislature regulates required courses for students. § 20-25-603.

Each of these laws govern and control the MUS, notwithstanding Article X, § 9’s clear language that “[t]he government and control of the [MUS] is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the [MUS].”

The Montana Supreme Court has only addressed in detail the Board of Regents’ authority under Article X, § 9 on three occasions. *See Sheehy*, 2020 MT 37; *Duck Inn*, 285 Mont. 519; *Judge*, 168 Mont. 433. Each case makes clear that the Board’s authority over the MUS—in areas subject to the police power of the State—is not plenary and exclusive.

Take *Judge*, for example. In this case, the Legislature appropriated monies to the MUS that were contingent upon salary restrictions for university administrators. The Montana Supreme Court made exceptionally clear that the Board of Regents is not a fourth branch of government and that the Board is subject to the “public policy of this state.” *Judge*, 168 Mont. at 449, 543 P.2d at 1332. While the “hiring and keeping of competent personnel” is an important priority in higher education and legislative interference is impermissible there, the Legislature can still exercise its authority in ways that may impact the MUS. *Id.* at 443–44, 543 P.2d at 1329–30.

Similarly, in *Duck Inn*, the Court considered the Board’s authority to lease and manage campus facilities. Like in *Judge*, the Board was seeking to exercise its authority to manage the *financial, academic, and administrative* interests of the MUS. Also like *Judge*, *Duck Inn* reaffirmed that the Legislature alone determines the public policy of the State and the Board’s authority is limited by this public policy. 285 Mont. at 523–24, 949 P.2d at 1181–82.

Sheehy is the Court’s most recent decision with respect to the Board’s authority, and once again, the Court only considered the Board’s authority to manage the *financial* health and safety of the MUS. See *Sheehy*, ¶ 29. In *Sheehy*, the Montana Supreme Court considered the 6-Mill Levy ballot initiative and determined that it was “hardly different” from an ordinary budget request to the Legislature. Supporting this initiative then was the same as supporting any other budget request. Requesting funds from the Legislature or the voting public falls clearly within the Board’s duties *and is not otherwise limited by the Legislature*. The Court affirmed that the Board has the authority to ensure the “financial stability of the MUS,” which

is a component of its broader—but still limited—power to ensure the “health and stability of the MUS.” *Id.*

These cases clearly explain that “[t]he Board may exercise all powers connected with the proper and efficient internal governance of the MUS,” but that “there are limitations and checks on the Board's power” including constitutional rights and “state legislation enforcing statewide standards for public welfare, health, and safety.” *Sheehy*, ¶ 41 (McKinnon, J., concurring).

Here, though, the Board is not trying to exercise a power related to the financial, academic, or administrative stability of the MUS. It is trying to commandeer the Legislature’s prerogative to enforce “statewide standards for public welfare, health, and safety” on MUS campuses. *Id.* But it cannot be the rule that the Legislature’s police power extends everywhere throughout the State but falters at the campus threshold. The Board is not, after all, a separate branch of government in Montana. See *Sheehy*, ¶ 11 n.1; *Judge*, 168 Mont. at 449–451, 543 P.2d at 1332–33. The bottom line is that the Legislature is the Legislature, even on MUS campuses. And in many instances, the Board's policy preferences must yield to the policy of the State—which the Legislature determines and articulates. Such is the case with HB 102.

The Legislature has the power to regulate firearms within the confines of the state and federal constitutions. And the Legislature has the power to regulate certain on-campus activity. See, e.g., Mont. Code Ann. §§ 19-20-621; 20-25-515; 20-25-511; 20-25-513; 20-25-451; 20-25-603. The Board may have the power to regulate—and indeed has regulated—firearms, self-defense, and student safety matters on campus.

But that does not preempt the Legislature from regulating those same issues on campus. The opposite is true; HB 102 has displaced Policy 1006.

This concurrent authority to regulate firearms on university campuses is seen in other states as well. In Colorado, the Colorado Concealed Carry Act is particularly relevant to this case. The Colorado Constitution authorizes the Colorado Board of Regents to “enact laws for the government of the university,” C.R.S. § 23-20-112(1) (2011) and to “promulgate rules and regulations for the safety and welfare of students, employees, and property. § 23-20-106(1) (2011). Prior to the Concealed Carry Act, the Board had a policy in place prohibiting the carrying of handguns on campus. The Colorado Supreme Court held that although the Board’s general powers were broad, by enacting the Colorado Concealed Carry Act, the Legislature “divested the Board of Regents of its authority to regulate concealed handgun possession on campus.” *Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, LLC*, 2012 CO 17, ¶ 30, 271 P.3d 496, 502 (Colo. 2012) (en banc). That is, the Board’s authority was limited and had to yield to the Legislature’s regulatory authority on

the issue of concealed handgun possession on university campuses.⁵

Like in Colorado, the Montana Legislature has the authority to regulate firearms on campus. Although the Board possesses broad power to supervise and control MUS campuses, this doesn't mean that the Legislature can never act with respect to campus activity and property. HB 102 regulates important health, welfare, and safety concerns within the police power of the State as exercised by the Legislature. *Duck Inn*, 285 Mont. at 523, 949 P.2d at 1181; *Judge*, 168 Mont. at 449, 543 P.2d at 1332.

Because the Legislature can regulate firearms on MUS campuses, the next question is whether the Board's authority—like the Board in Colorado—must yield to the Legislature's authority.

C. The Legislature's Authority is Superior to the Board's Authority With Respect to Regulating Firearms

The answer is yes, the Board's policy must yield. The Legislature's plenary power is superior to the Board's limited grant of authority under Article X, § 9. The State does not challenge Policy 1006, which has been in place in its current form since 2012. But now that the Legislature has implemented a new regulatory scheme for carrying concealed firearms on MUS campuses, the Board's policy can no longer be enforced.

⁵ Other states have passed similar laws. In Texas, for example, public colleges cannot prohibit "concealed carry" on campuses. Tex. Gov't Code § 411.2031. Likewise, in Utah, the Legislature prohibits the Board from restricting the lawful possession or carrying of firearms. Utah Code Ann. § 53B-3-103. And in Georgia, the Legislature allows any weapons carry license holder to carry on campus except in limited circumstances. OCGA § 16-11-127.1(c)(20)(A)–(C).

When interpreting constitutional provisions, the Court is tasked with “giv[ing] effect to the intent of the people in adopting it.” *State ex rel. Hinz v. Moody*, 71 Mont. 473, 481, 230 P. 575, 578 (1924). This intent is “found in the instrument itself.” *Id.* The Court must first consider the text. Where the words used are plain and unambiguous, the Court must apply their “natural and ordinary meaning.” *Id.* 481–82, P. at 578–79. And these words do not “mean one thing at one time, and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable.” *Id.* at 483, P. at 579 (citations omitted). Constitutional provisions must be read to “give effect to all of the [the Constitution’s] provisions.” *State ex. rel. Corry v. Cooney*, 70 Mont. 355, 374–75, 225 P. 1007, 1014–15 (1924).

With that in mind, the Legislature is one of three branches of government and enjoys a broad grant of authority under the Montana Constitution. MONT. CONST. ART. III, § 1; V, § 1. “[R]epresenting the sovereign power of the state, [the Legislature] may exercise such power to any extent it may choose, except to the extent it is restrained or limited by the State or Federal Constitutions.” *State ex rel. Du Fresne v. Leslie*, 100 Mont. 449, 454, 50 P.2d 959, 961 (1935); *see also Yellowstone Valley Elec. Coop. v. Ostermiller*, 187 Mont. 8, 14, 608 P.2d 491, 495 (1980) (noting the police power is “aimed at protecting the public health, safety and general welfare”); *Andre*, 101 Mont. at 371, 54 P.2d at 568 (describing police power as “a power of which the legislature cannot divest itself; and such body is the exclusive judge of the manner in which such police power shall be exercised, and its action should be liberally construed”); *Hilger v. Moore*, 56 Mont. 146, 163, 182 P. 477, 479 (1919) (Those “who

seek[] to limit the power of the [legislature] must be able to point out the particular provision of the Constitution which contains the limitation expressed in no uncertain terms”).

The Board, conversely, is one entity within the executive branch that the Constitution vests with limited authority. MONT. CONST. ART. X, § 9 (VESTING IN THE BOARD THE “FULL POWER, RESPONSIBILITY, AND AUTHORITY TO SUPERVISE, COORDINATE, MANAGE AND CONTROL THE MONTANA UNIVERSITY SYSTEM”). This “provision, like most, is couched in broad language, but it must not be read or construed in isolation.” *Judge*, 168 Mont. at 443–44, 543 P.2d at 1329–30. The Constitution places “reasonable restraints” on the Board’s authority under Article X, § 9. *Sheehy*, ¶ 44 (McKinnon, J., concurring). The Board’s power is subject to “checks by the executive and legislative branches,” and is limited to the “powers connected with the proper and efficient internal governance of the MUS.” *Id.* ¶ 41.⁶

Because the Constitution grants the Legislature broad, plenary power, a party seeking “to limit the power of the [Legislature] must be able to point out the particular provision of the Constitution which contains the limitation expressed in no uncertain terms.” *Hilger*, 56 Mont. at 163, 182 P. at 479 (quoting *State ex. rel. Evans v. Stewart*, 53 Mont. 18, 25, 161 P. 309, 312 (1916)). Here, there is no provision of the

⁶ Section 5 of HB 102 prohibits the Board from violating students’ constitutional rights—specifically students’ right to keep or bear arms. The Board has challenged *even this* provision as unconstitutional. Surely the Board doesn’t seriously argue that it may exercise power without regard for state and federal constitutional constraints? If it did make that argument, it would of course be wrong. The Board—like any other government entity—must concede that there are *some* limitations on its constitutional authority to regulate MUS campuses.

Constitution that limits the Legislature’s ability to regulate firearms on state property “in no uncertain terms.”⁷ The Board points to the broad constitutional language that the Board has the power to “supervise, coordinate, manage and control the Montana university system.” MONT. CONST. ART. X, § 9. But this is not a clear limitation of the Legislature’s power—it is an affirmative grant of authority to the Board. And it is necessarily limited by other constitutional provisions. *See Judge*, 168 Mont. at 442–443, 543 P.2d at 1328–29 (noting that Article X, § 9 must be read with “reference to the rest of the Constitution”). As the State has already pointed out, the Legislature does regulate certain conduct and activity on MUS campuses. *See supra* Section II.B. The Constitution’s grant of authority to the Board does not disable the Legislature from regulating all activities on MUS campuses. So the Board must do more than invoke Article X, § 9’s broad and noncontextualized language—which the courts, the Legislature, and the Board have always acknowledged is not an exclusive grant of power to the Board—as authority for the proposition that the Legislature may not enact measures to enhance the safety of students and everyone

⁷ In Section 8 of HB 102, the Legislature removed the provision that stated:

This section does not limit the authority of the board of regents or other postsecondary institutions to regulate the carrying of weapons, as defined in 45-8-361(5)(b), on their campuses.

The Board tellingly doesn’t argue that enacting this original subsection was a violation of its constitutional authority. If the Board’s authority to regulate firearms on campus was a clear limitation of the Legislature’s power, this subsection would have been wholly unnecessary and superfluous. But the Board apparently thinks this subsection was necessary to define its authority, for the Board now challenges HB 102, § 8, which deletes it. Arguing that Section 8 is unconstitutional would mean the Legislature lacks the power to repeal what it had the power to enact. This cannot be.

else on MUS campuses.⁸ If the Board’s cursory argument was good enough, it would powerfully diminish the express text of the Constitution, which grants the Legislature the “legislative power.” MONT. CONST. ART. V, § 1. The Board relies solely on these generalized statements about its own power to argue that the Legislature is boxed out from regulating the MUS. But that is simply bad constitutional analysis and defies experience. *See Judge*, 168 Mont. at 454, 543 P.2d at 1335 (noting that “any decision with respect to appropriations affects the management of the university system to some degree”).

Judge, *Duck Inn*, and *Sheehy* all coherently define the Board’s power. *See supra* Section II.B. The Board’s authority cannot be read in isolation from other provisions in the Constitution and must be “harmonize[d] in a practical manner” with the Legislature’s authority. *Judge*, 168 Mont. at 443–444, 543 P.2d at 1329–30. These constitutional provisions “place reasonable restraints upon the specific grant of autonomy in Article X, § 9.” *Sheehy*, ¶ 44 (McKinnon, J., concurring). The Legislature—through statute—can likewise place restraints on the Board. *See Duck Inn*, 285 Mont. at 523, 949 P.2d at 1181 (The Board’s power is subject to “the public policy of the State of Montana ... through [the Legislature’s] enactment of statutes”).

⁸ Indeed, this Court has already affirmed this principle. In its preliminary injunction order, this Court noted that the unqualified language of the Second Amendment to the United States Constitution is nevertheless not absolute. *See* Preliminary Injunction Order [Dkt. 19] at 10; Order Denying Intervention Motions [Dkt. 46] at 10. That point is well taken here: broad constitutional provisions—even strictly construed—cannot be read in isolation. Yet the Board’s entire argument relies on this interpretive fallacy.

When the Board’s authority conflicts with the statutory or constitutional provisions, the Board’s authority must give way.

Justice McKinnon’s concurrence in *Sheehy* makes clear that “[t]he Board cannot abridge rights protected by the federal or state constitutions, and is subject to state legislation enforcing state-wide standards for public welfare, health, and safety.” *Sheehy*, ¶ 41 (McKinnon, J., concurring). In this case, the right to bear arms is protected by both the Montana and United States Constitutions; and while this right is not absolute, HB 102 expresses the statewide policy determination that government restraints on that right should be virtually eliminated. HB 102 is the Legislature’s determination that campus carry and the right to self-defense is in the interest of public welfare, health, and safety. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (“[I]ndividual self-defense is ‘the central component’ of the Second Amendment right.”) (emphasis in original); *see also District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (noting that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation”).

As an aid to facilitate textual interpretation, the Court may also consider the “historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.” *Nelson v. Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. The 1972 constitutional convention debate provides insight into the intent of the framers when they drafted Article X, § 9. The framers unequivocally rejected treating the Board as a fourth branch of government. *Verbatim Transcript of March 11, 1972*, 6 Montana Constitutional Convention, at 2124–32 (1979); *see also Judge*,

168 Mont. at 442, 543 P.2d at 1328; *Mitchell v. Univ. of Mont.*, 240 Mont. 261, 264–65, 783 P.2d 1337, 1339–40 (1989) (holding that the Board of Regents is not a “local governmental entity” and is not a “legislative body”). They made clear that the Board, while exercising independent authority, is still subject to the “public policy of this state.” *Judge*, 168 Mont. at 449, 543 P.2d at 1332; *see also Sheehy*, ¶ 37 (McKinnon, J., concurring).

The delegates discussed the Board overseeing “academic, financial, and administrative affairs,” which are precisely the powers at issue in *Duck Inn*, *Judge*, and *Sheehy*. 6 Montana Constitutional Convention, at 2110 (1981). They discussed the Board controlling the hiring and firing of faculty members. *Id.* at 2127, 2134. They discussed the Board managing the acquisition of equipment for classrooms, *id.* at 2128, entering into contracts for library binding services, *id.* at 2138–39, and signing requisition slips for paper clips, *id.* at 2127. The State readily concedes that the Board’s power includes more than paper clip acquisition, *see Judge* at 168 Mont. 454, 543 P.2d at 1335, but the constitutional history supports the fact that the Board’s authority is limited and subservient—in most instances—to that of the Legislature. *See Hilger*, 56 Mont. at 163, 182 P. at 479 (requiring an express limitation of the Legislature’s authority).

This interpretation of Article X, § 9 is also consistent with the statutorily enumerated powers of the Board. *See Mont. Code Ann. § 20-25-301*. These powers when exercised, must be consistent with the laws of the State. *Id.* § 20-35-301(2), (3), (6). Specifically, the power to provide “rules for the government of the [MUS] system” is still “subject to the laws of the state.” § 20-25-301(3). This is further evidence that

the Board's authority is still subject to legislative authority. *See Sheehy*, ¶ 41 (McKinnon, J., concurring); *Judge*, 168 Mont. at 449, 543 P.2d at 1332.⁹

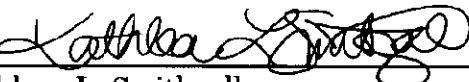
In this case, the Legislature has acted within its constitutional authority to provide for the public welfare, health, and safety by allowing individuals to carry firearms on campus for self-defense. Because there is no express limitation on the Legislature's authority to regulate this activity, and because the constitutional convention did not intend to grant the Board exclusive authority over this type of activity, the Board's policy must yield to the Legislature's policymaking power, as reflected in HB 102.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court grant summary judgment in favor of the State. The State requests 20 minutes for oral argument.

DATED this 15th day of September, 2021.

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⁹ Likewise, the Board is subject to executive controls. The executive branch appoints members to the Board of Regents, and the Governor is an ex officio member of the Board. The Governor is also given the power to request and obtain information in writing under oath from the Regents. MONT. CONST. ART. VI, §§ 8, 15; art. X, § 9(3).

CERTIFICATE OF SERVICE

Pursuant to the parties' Stipulation of Electronic Service (Doc. 26), I certify a true and correct copy of the foregoing was delivered by email to the following:

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