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THE STATE OF MONTANA

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

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

Petitioner,

v.

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

Respondent.

) No. BVD 2021-598
)
) Judge Michael McMahon
)

) **PETITIONER'S BRIEF IN SUPPORT**
) **OF MOTION FOR SUMMARY**
) **JUDGMENT AND IN OPPOSITION TO**
) **STATE'S MOTION FOR SUMMARY**
) **JUDGMENT**
)
)

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I. INTRODUCTION

The State of Montana (“State”) has moved for summary judgment on the declaratory judgment claim contained in Count I of the Petition. (Dkt. 63; Dkt. 1). Petitioner Board of Regents of Higher Education of the State of Montana (“the Board”) now cross-moves for summary judgment on Count I. The Board alleges that it, and not the Legislature, is constitutionally authorized to manage, control, supervise, and coordinate the Montana University System (“MUS”) pursuant to the constitutional directive of Article X, Section 9. (Petition, Dkt. 1, ¶ 34). The Board seeks a judicial declaration that House Bill 102 (“HB 102”), which imposes firearm policy upon MUS, is unconstitutional as applied to the Board, MUS, and its campuses and locations. (Petition, Dkt. 1, ¶ 32).

This Court already has established that the individual rights guaranteed by the Second Amendment of the United States Constitution and Article II, § 12 of the Montana Constitution are not at issue in this case and are not “unlimited.” The United State Supreme Court has identified a non-exhaustive list of “presumptively lawful regulatory measures treated as exceptions to the right to bear arms,” and these exceptions include “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” (Order, Dkt. 19, p. 8) (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 626-27, n. 26; *State v. Fadness*, 2012 MT 12, ¶ 31, 353 Mont. 322, 268 P.3d 17). In the cross-motions for summary judgment, neither the State nor the Board asserts that regulation of firearm policy is precluded by the Second Amendment or its Montana Constitution counterpart. (State’s Brief, Dkt. 64). Rather, the cross-motions present a binary legal question already identified by this Court: “whether the Legislature or the Executive branch, via the Regents, has the exclusive constitutional authority to regulate

firearms on MUS campuses and other locations.” (Montana Supreme Court Order, OP 21-0377, September 28, 2021, p.4) (quoting Order, Dkt. 46, p. 4).

The Montana Constitution, state statutes, and controlling case law overwhelming establish that the Board has the “full power” to determine policy for MUS and its institutions, and that “full power” necessarily includes the right and duty to determine firearm policy for campuses. HB 102 invades the Board’s constitutional and statutory authority and is therefore unconstitutional.

II. STANDARDS OF REVIEW

The declaratory action is the proper method for the Board to challenge the validity of the legislative enactment because the Board is prevented by HB 102 from exercising its “full” powers and duties authorized by the Constitution. *Bullock v. Fox*, 2019 MT 50, ¶ 49, 395 Mont. 35, 435 P.3d 1187. When, as here, “the legislature attempts to exercise control of the MUS by legislative enactment,” the court “must engage in a case-by-case analysis to determine whether the legislature’s action impermissibly infringes on the Board’s authority.” *Sheehy v. COPP*, 2020 MT 37, ¶ 37, 399 Mont. 26, 458 P.3d 309 (J. McKinnon, concurring) (citing *Board of Regents v. Judge*, 168 Mont. 433, 451, 543 P.2d 1323, 1333-34 (1975)).

Statutes enjoy a presumption of constitutionality, and the person challenging a statute’s constitutionality bears the burden of proving it unconstitutional. *City of Billings v. Albert*, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828 (citing *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469). Application of a statute contrary to a “constitutional directive” is unconstitutional “under any level of scrutiny.” *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 31, 419 P.3d 685.

The constitutionality of a statute is a question of law. *Id.* Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3); *Bird v. Cascade County*, 2016 MT 345, ¶ 9, 386 Mont. 69, 386 P.3d 602.

III. UNDISPUTED FACTS

Montana's Constitution vests "full power, responsibility and authority in BOR to "supervise, coordinate, manage and control the Montana university system." Mont. Const., Art. X, § 9(2)(a). This "full" constitutional authority provides that the Board has the right and the obligation to determine the best policies to "ensure the health and stability of the MUS." *Sheehy*, ¶ 29 (quoting *Judge*, 543 P.2d at 1325).

The Board long has exercised the power granted – and mandated – by the Constitution with respect to firearms policy. Since at least 2012 the Board has limited the use of and access to firearms on MUS property through Board Policy 1006. That policy provides that the only individuals authorized to carry firearms on campus locations are:

1. Those persons who are acting in the capacity of police or security department officers and who:
 - a. have successfully completed the basic course in law enforcement conducted by the Montana Law Enforcement Academy or an equivalent course conducted by another state agency and recognized as such by the Crime Control Division of the Montana Department of Justice; or
 - b. have passed the state approved equivalency examination by the Montana Law Enforcement Academy; and
2. Those persons who are employees of a contracted private security company and those who are registered to carry firearms pursuant to Title 37, Chapter 60, MCA.

(Petition, Dkt. 1, Ex. 2).

Neither the propriety of Policy 1006 nor its constitutionality is at issue here. (Order, Dkt. 46, p. 14).

In 2021, the Legislature enacted HB 102. (Petition, Dkt. 1, Ex. 1). HB 102 generally revises gun laws with respect to open carry and concealed carry. In Section 4, the Act allows concealed carry “anywhere in the state” except at specific locations designated by the Legislature. Those excepted locations include primary and secondary schools, courtrooms, federal property, and airports, but the Legislature did not extend the exception to the MUS or its campuses and locations. In Section 8, the Legislature revised the existing “open carry law,” § 45-3-111, MCA, in only one way; the Legislature deleted the prior exception in the open carry law acknowledging the Board’s authority to regulate the presence of weapons on campus. Thus, by purposeful omission in Section 4 and by a focused deletion in Section 8, HB 102 extends both open carry and concealed carry to MUS’s campuses and locations.

In Section 5, HB 102 precludes the Board 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. Section 6 precludes the Board from “regulat[ing], restrict[ing], or plac[ing] an undue burden on the possession, transportation, or storage of firearms on or within the university system property by a person eligible to possess a firearm under state or federal law” and who meets minimum safety training requirements, except that it allows the Board to restrict campus gun use only in limited ways. Section 7 provides that any person suffering a deprivation of rights defined by HB 102 “has a cause of action against any governmental entity[.]” Finally, HB 102 conditioned \$1,000,000 in funding for MUS upon the Board’s waiver of its right to challenge HB 102 in court. (Ex. 1 to Petition).

Governor Gianforte signed HB 102 into law on May 20, 2021. . Seven days later, the Board filed its Petition challenging the constitutionality of HB 102 as applied to the Board,

MUS, and MUS campuses and property. The Board does not assert a facial challenge to the constitutionality of HB 102.

IV. ARGUMENT

A. **THE BOARD HAS FULL AUTHORITY TO DETERMINE FIREARM POLICIES FOR MUS AND MUS CAMPUSES AND PROPERTIES.**

1. **The Constitution Authorizes the Board to Create and Enforce Firearm Policy within the MUS and its Campuses.**

The meaning of Article X, § 9 of the Montana Constitution must be determined “from the plain meaning of the language used.” *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058 (citing *Cross v. VanDyke*, 2014 MT 193, ¶ 10, 375 Mont. 535, 332 P.3d 215); *State ex rel. Racicot v. Dist. Court of the First Judicial Dist.*, 243 Mont. 379, 386-88, 794 P.2d 1180, 1184-86 (1990); *Butte-Silver Bow Local Gov’t v. State*, 235 Mont. 398, 403, 768 P.2d 327, 330 (1989). While the Court may only “resort to extrinsic aids[] if the express language is vague or ambiguous,” the Court must view the constitutional provision “in light of 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*, ¶ 36.

The plain language of Article X, § 9 grants to the Board “full” authority to institute firearms policy on its campuses. The Board is vested with the “government and control of the Montana university system” and is “responsible for long-range planning, and for coordinating and evaluating policies and programs for the state’s educational systems.” Mont. Const. Art. X, § 9. The Board has the “full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system” Mont. Const. Art. X, § 9; *Sheehy*, ¶ 11. “Full control” means just that; the Board is vested with “full” authority to supervise,

coordinate, manage, and control MUS and its campuses, which necessarily includes the creation and implementation of firearm policy.

While the language of the Constitution – and the grant of “full authority” to the Board – is perfectly clear, this Court also must review Article X, § 9 “in light of 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.” *Id.* “The exact legal status with which to clothe higher education in Montana was debated extensively and thoroughly in the sessions of the . . . [1972] Convention.” Schaefer, Hugh. *The Legal Status of the Montana University System Under the New Montana Constitution*, 35 Mont. L. Rev. 189, 190 (1974). Without question, the debates at the constitutional convention establish the Framers’ intention to place the MUS beyond the political influence of the legislature by creating a Board directly responsible and answerable to the people. *Sheehy*, ¶ 36 (conurrence). At the Constitutional Convention, the Education Committee reported to the delegates:

Higher education is not simply another state service; the administrative structure of higher education cannot be considered an ordinary state agency. The unique character of the college and university stands apart from the business-as-usual of the state. Higher learning and research is a sensitive area which requires a particular kind of protection not matched in other administrative functions of the state.

2 Montana Constitutional Convention at 736.

The 1972 Constitution created the Board as an autonomous, independent body, “effectively insulat[ing] the public campuses from Montana political officials in lieu of giving those political officials more direct control over public campuses.” Aronofsky, David. *Voters Wisely Reject Proposed Const. Amendment 30 to Eliminate the Montana Board of Regents*, 58 Mont. L. Rev. 333, 333 (1997) (“Aronofsky”). “[T]he principle of regent independence was

definitely intended by the drafters of the 1972 Montana Constitution.” *Judge*, 543 P.2d at 1332. The delegates “rejected various proposed floor amendments aimed at weakening the Montana Board’s autonomous powers, including amendments which would have restored legislative control over university system finances and administrative decision-making.” Aronofsky at 365 (citing IX Montana Constitutional Convention Transcripts at 6532).

Here, constitutional intent is readily ascertainable from the plain language of Article X, § 9, which explicitly gives the Board full control over MUS functions and campuses. In addition, historical context establishes that the Framers intended to authorize the Board with “full authority” to make and enforce policies which affect the MUS and its campuses, free from the vagaries of politics and the influence of the Legislature.

2. Statutory Law Also Establishes the Board’s Authority to Govern MUS Campuses.

The Legislature’s own statutory enactments mandate that the Board, and not the Legislature, govern MUS and its campuses. Section 20-25-301, MCA provides:

Regents’ powers and duties. The board of regents of higher education shall serve as regents of the Montana university system, shall use and adopt this style in all its dealings with the university system, and:

- (1) must have general control and supervision of the units of the Montana university system, which is considered for all purposes one university;
- (2) shall adopt rules for its own government that are consistent with the constitution and the laws of the state and that are proper and necessary for the execution of the powers and duties conferred upon it by law;
- (3) shall provide, subject to the laws of the state, rules for the government of the system. . . .

The statutory grant of power to the Board, like the constitutional grant, is compulsory, not permissive. The Board “must have” general control and supervision and “shall adopt rules for its own government,” which are consistent with the Montana Constitution. § 20-25-301,

MCA. Indeed, the Legislature has long recognized that the Board is the appropriate body to determine firearms policy on campuses. Decades ago, the Legislature enacted § 20-25-324, MCA, which provides:

Firearms. Security guards who have successfully completed the basic course in law enforcement conducted by the Montana law enforcement academy may carry firearms *in accordance with policies established by the board of regents after consulting with the student body government* at the unit of the university system affected by the regents' policy.

(Emphasis added). In this statute, the Legislature acknowledged not only the Board's primary authority to regulate firearms on campus, but also acknowledged that the processes used by the Board – which include student input – are necessary in the unique setting of higher education.

Until the enactment of HB 102, the Legislature also recognized the Board's authority to regulate firearms on its campuses by excepting MUS campuses from open carry laws. § 45-3-111, MCA. In fact, in that statute enacted in 2009, the Legislature acknowledged “the authority of the board of regents or other post-secondary institutions to regulate the carrying of weapons . . . on their campuses.” § 45-3-111(3), MCA. A decade later, the Legislature has changed its position regarding the Board's authority over regulation of firearms. In HB 102, the Legislature declares in a “finding” that the Constitution does not vest such authority in the Board. (Petition, Dkt. 1, Ex. 1, Section 3(1)). The Framers of the Constitution insulated the Board from exactly this type of political vagary – the political change of views regarding the established lines of authority.

3. The Constitutional Grant of Authority to the Board Necessarily Includes the Regulation of Firearms Within the MUS and on its Campuses.

The State does not argue that the Board lacks any authority to regulate firearms on campuses, nor does it argue that Board policy 1006 abridges rights protected by the State or

Federal Constitution. The State argues that the “Legislature’s authority is superior to the Board’s authority with respect to regulating firearms.” (State’s Brief, Dkt. 64, p. 13). The State’s argument fails because HB 102 – and the legislative change in position regarding the Board’s authority over firearm policy on campuses – is contrary to the “constitutional directive” contained in Article X, § 9. *Mountain Water*, ¶ 25. The Constitution directs the Board, not the Legislature, to exercise “full power, responsibility and authority” to “supervise, coordinate, manage, and control” MUS and its campuses.

a. Supervision, Coordination, Management, and Control Include the Regulation of Firearms by the MUS and on its Campuses.

“Implied in the Board of Regents’ broad powers to ‘supervise, coordinate, manage, and control the [MUS],’ is the power to do all things necessary and proper to the exercise of its general powers. . . .” *Sheehy*, ¶ 29 (citing *State ex rel. Veeder v. State Bd. of Educ.*, 97 Mont. 121, 133-34, 33 P.2d 516, 522 (1934)). Montana statutory law recognizes and requires that the Board must “control and supervise” the units of the system. § 20-25-301, MCA. Control and supervision of college campuses necessarily requires the Board to control and supervise campus firearm policies. In drafting HB 102, the Legislature impliedly conceded this point, leaving supervision, implementation, and management of HB 102’s policy directives to the MUS and its campuses. HB 102 even allocated funds to the MUS to undertake its supervisory role. (Petition, Dkt. 1, Ex. 3).

In addition to control and supervision, the Board is constitutionally directed to administer policies which affect MUS and its campuses. Mont. Const. Art. X, § 9. The Board, and not the Legislature, has established practices for administration of firearm policy, including the constitutionally required management. While the Legislature meets every other year, the Board meets six times a year, rotating among various campuses. The Board hires the Commissioner of

Higher Education, who is charged with “execut[ing], administer[ing] and assur[ing] implementation of [Board policies]. (Board Policy 204.3). The Commissioner also must supervise and direct university presidents “with regard to the execution, administration, interpretation and implementation” of board policies. (Board Policy 204.3(2)). Presidents and chancellors, in turn, are vested with the responsibility of administering Board policies on each campus. (Board Policy 205.2). This established system of management allows the Board to administer policies on an ongoing basis – a duty necessarily included in the Board’s constitutional and statutory direction to manage the units of MUS.

The State contends that permitting guns on campuses would allow students, faculty, and staff to protect themselves in light of crimes committed on campus. (State’s Brief, pp. 4, 7). The State also proffers unsworn factual assertions insinuating that gun-carriers on campuses rarely fire guns. (State’s Brief, p. 5). Whether these “facts” are true or not, and whether such facts support a policy allowing open and concealed carry on college campuses, are issues in the Board’s purview, not the Legislature’s. More importantly, these are issues necessarily encompassed by the Montana Constitution’s directive that the Board, and not the Legislature, supervise and control MUS and its campuses.

Finally, the Constitution requires the Board to coordinate the units of the system. Firearm policy, like most Board policies, is not “one size fits all,” but requires coordination among all the units of MUS – a responsibility specifically directed to the Board, not the Legislature. The MUS encompasses fourteen separate and disparate campuses. The size of each campus, the number of students residing on each campus, the amount of security available at each campus require overall coordination by the Board through its well-established system of management. The presidents, chancellors, and deans have “general control and direction of the

police or security department of [the campuses] in accordance with the policies of the [Board].” (Board Policy 1006A). In administering firearm policy, the Board is able – and constitutionally directed – to coordinate the policies at the various campuses. Flexibility is allowed, with each campus empowered to “establish regulations governing the transportation and storage of firearms on campus.” (Policy 1006C).

b. The Board Must Manage and Control the Effect of Firearms Policy on the Financial Stability of MUS.

The Montana Supreme Court specifically has held that “[a]s prescribed by Article X, Section 9(2)(a), of the Montana Constitution, and § 20-25-301, MCA, [the Board] has not only the power, but also the constitutional and statutory duty to ensure the health and stability of the MUS.” *Sheehy*, ¶ 29. This controlling authority establishes that “[o]bviously included in such duties is ensuring the financial stability of the MUS.” *Id.* The State concedes that the Board has the power to regulate policy “related to the financial, academic, or administrative stability of the MUS,” but claims that firearm policy is not related to finances, academics, or administration. (State’s Brief, Dkt. 64, p. 11). To the contrary, because firearm policies have significant financial impact on MUS, creating those policies falls within the “full authority” granted to the Board by the Constitution and statute.

In enacting HB 102, the Legislature acknowledged that the new law would have significant financial implications for the MUS; the Legislature allocated \$1,000,000 to the MUS to fund the initial implementation of the Act. (Petition, Dkt. 1, Ex. 3, p. 4, 6(b)). At the outset, HB 102 would require funds to create training programs, hire new employees, and other functions. (Petition, Dkt. 1, Ex. 5 (Rogers Declaration), ¶ 8). On an ongoing basis, HB 102’s costs are unknown but would require continuing programs, employees, and performance of other

functions, all of which demonstrate the regulation of firearms on campus necessarily fall to the Board's supervision, coordination, management, and control.

In addition to the cost of administering HB 102, the Board is constitutionally directed to consider the policy's effect on tuition revenue. Numerous public commenters, particularly parents, indicated that they will dis-enroll their students from MUS campuses if HB 102 is immediately implicated. (Petition, Dkt. 1, Ex. 4 (MACo Stay Order), Ex. A). Each student who withdraws represents a loss of up to four to five years of tuition to the institution and threatens the financial stability of MUS. Likewise, each student who because of HB 102 chooses to pursue higher education elsewhere implicates MUS financial stability.

The legislative record establishes that the initial financial consequences to MUS of HB 102 starts at implementation costs of \$1,000,000. The actual financial costs, which likely include loss of tuition revenue, are unknown. The Legislature has no process to ascertain the financial effect of HB 102 on MUS and its institutions. Moreover, the Legislature, which meets every two years, is not aptly designed to accommodate the public's right to know and right to participate regarding campus issues. The Board, pursuant to its constitutional and statutory obligation to govern the MUS, has an established process, which includes input from students, parents, student governments, faculty senates, employee organizations, and the public. The Board is thus intentionally and uniquely positioned to determine, with the benefit of public comment, issues related to the health and safety of MUS campuses. Controlling authority establishes that the Board, and not the Legislature, shoulders the responsibility for the financial health of the MUS. "Implied in the Board of Regents' broad powers to 'supervise, coordinate, manage, and control the [MUS],' is the power to do all things necessary and proper to the exercise of its general powers. . . ." *Sheehy*, ¶ 29. Because firearm policies impact the financial

health of the MUS and its institutions, the Board has “full authority” to create firearm policy for MUS and its campuses. Indeed, the State concedes as much. (State’s Brief, Dkt. 64, pp. 2, 10, 11) (admitting the Board has authority to manage financial interests and the financial health of MUS).

c. Safety and Health of Students on Campus.

The State recognizes that the Board has the constitutional authority to “ensure the ‘health and stability of the MUS.’” (State’s Brief, Dkt. 64, p. 11) (citing *Sheehy*, ¶ 29). Student safety is an integral part of the Board’s constitutional directive to create a safe and healthful learning environment. Moreover, the Montana Supreme Court has recognized, in the wake of a shooting on non-MUS Carroll College’s campus, that colleges owe “a duty to provide reasonable security and a reasonably safe place to work. . . which may include the duty to warn.” *Peschke v. Carroll College*, 280 Mont. 331, 337-38, 929 P.2d 874, 878 (1996). While the Legislature claims the right to create firearm policy, the Legislature does not and cannot relieve the Board of its responsibility to provide the safest and most healthful learning environment available on MUS campuses on a day-to-day basis.

The State attempts to characterize HB 102’s coercive campus firearm policy as “state legislation enforcing statewide standards for public welfare, health, and safety.” (State’s Brief, Dkt. 64, p. 11, citing *Sheehy* at ¶ 41). The State ignores two unrefutable facts. First, HB 102, by the State’s own admission, “displace[s] [Board] Policy 1006.” (State’s Brief, Dkt. 64, p. 12). Second, Policy 1006 does not attempt to impose statewide standards, but instead is narrowly focused to address only MUS and its campuses. The safety issues addressed by the Board in creating Policy 1006 are unique to MUS and fall directly within the constitutional directive to the Board to create a safe and healthful learning environment.

Suicide presents a specific safety risk which is unique to college campus populations. Regent Rogers testified to the many commenters who “raised concerns about how the presence of firearms on campus could impact suicide rates and expressed fear that young adults, already a high-risk population for suicide, would now have easier access to lethal firearms.” (Rogers Declaration, Dkt. 6, ¶ 20). Suicide remains the second leading cause of death for 15- to 24-year-olds. (BOR Prelim. Inj. Reply, Dkt. 14, Ex. 6, p. 1). Over 40% of the students accessing Counseling and Psychological Services at MSU-Bozeman have seriously considered suicide. *Id.*

Years ago, the Board initiated a suicide prevention initiative, and formed a Suicide Prevention Task Force to protect students in the MUS. The work of the Task Force and its campus affiliates is summarized in public comment provided Betsy Asserson, Director of Counseling and Psychological Services at Montana State University, and Brian Kassar, Suicide Prevention Coordinator. (BOR Prelim. Inj. Reply, Dkt. 14, Ex. 6). They report that “reducing access to lethal means is a supported best practice for suicide prevention. . . .” (BOR Prelim. Inj. Reply, Dkt. 14, Ex. 6, p. 1). This best practice for college campuses is based on concrete data:

Over the last five years, firearms have been the most used means for completed suicides by students on our campus. A key component of the MUS suicide prevention plan is to reduce access to lethal means . . . for the majority of people who attempt suicide, the time that passes between decision to attempt suicide and suicidal action is brief: 24% move from decision to action in 5 minutes or less and 46% in one our hour less. Most people who use a firearm during a suicide attempt die because of the lethality of firearms. In Montana, 86% of gun deaths are suicides, and Montana’s firearm mortality rate is 2-5X higher than states with enhanced firearm safety laws.

(BOR Prelim. Inj. Reply, Dkt. 14, Ex. 6, p. 1).

Suicide is a serious safety risk on campuses and addressing that risk in firearm policy is part of the Board's constitutional directive to provide a healthful learning environment. It is only one of the safety concerns which the Board must address in crafting firearm policy in furtherance of its constitutional direction to manage the units of the MUS. The Board also must consider crime; available security services; dormitory safety; impact on enrollment; recruitment and retention of faculty and staff; and a myriad of other interrelated issues that impact the constitutionally recognized "unique character of the college and university" system. 2 Montana Constitutional Convention at 736.

B. THE BOARD'S "FULL POWER" OVERRIDES ANY AUTHORITY RETAINED BY THE LEGISLATURE WITH RESPECT TO THE MANAGEMENT, SUPERVISIONS, AND CONTROL OF THE MUS.

1. Montana Law Makes Clear the Board has "Full" and Exclusive Power to Control MUS.

Contrary to the State's contentions, Board Policy 1006 need not "give way" to HB 102; indeed, the opposite is true. (State's Brief, Dkt. 64, p. 18). Pursuant to controlling Montana law, the Board -- 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*, 543 P.2d at 1333; *Sheehy*, ¶ 29. The Montana Supreme Court already has 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 [] policies and determining its own priorities." *Judge*, 543 P.2d at 1335. Because the Legislature has dictated changes in existing Board policy and conditioned funding on the Board adopting those changes (Petition, Dkt. 1, Ex. 3), HB 102 is unconstitutional.

The State attempts to narrow the holdings in *Judge*, *Duck Inn*, and *Sheehy*, arguing that the Board's constitutional authority is limited to creating policies that ensure the "financial, academic, or administrative stability of the MUS." (State's Brief, Dkt. 64, p. 11). In doing so, the State ignores the plain language of the Constitution and the Court's reasoning in these cases. Although all three cases involved disputes around funding for the MUS, in none of them did the Court state or imply that the Board's constitutionally vested "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system" is actually limited to ensuring the "financial, academic, or administrative stability of the MUS." To the contrary, the Court in all three cases recognizes that the Board has been constitutionally vested with broad authority that necessarily includes, but is not limited to, ensuring financial, academic, and administrative stability. See *Sheehy*, ¶ 29 ("Implied in the Board of Regents' broad powers to 'supervise, coordinate, manage, and control the [MUS],' is the power to do all things necessary and proper to the exercise of its general powers which would necessarily include support of a major financing source for the MUS."); *The Duck Inn v. Mont. State Univ.-Northern*, 285 Mont. 519, 525, 949 P.2d 1179, 1182 (1997) ("Article X, Section 9 of the Montana Constitution expressly creates the board of regents as a constitutional entity and vests the government and control of the Montana university system therein."); *Judge*, 168 Mont. at 454 (concluding that "the Board of Regents is the competent body for determining priorities in higher education" generally, after noting that "[s]eemingly minor conditions [on funding] could ultimately affect academic, administrative and financial matters of substantial importance to the [MUS]"). Again, the Court never attempted to narrow the scope of the Board's authority in any of these opinions, even though the factual circumstances of each – centered on funding for the MUS – provided an opportunity to do so.

2. The State's Reliance on Non-Controlling, Out-of-State Authority is Unavailing.

The State looks to Colorado's constitution and case law to support its argument that the Board is limited to enacting policies concerning finances, academics, and administration. (State's Brief, Dkt. 64, p. 12). But Colorado's constitution explicitly restricts the authority of Colorado's board of regents by making it subject to the Colorado legislature. Contrary to what the State states in its Brief, the Colorado constitution vests Colorado's board of regents with the "general supervision of [its] respective institutions and the exclusive control and direction of all funds of and appropriations to their respective institutions, *unless otherwise provided by law.*" Colo. Const. Art. VIII, Section 5(2) (emphasis added). Unlike the constitutional provision governing Colorado's board of regents, there is no "unless" when it comes to the Board's authority – it has "*full power, responsibility, and authority* to supervise, coordinate, manage and control the Montana university system," period. Mont. Const., Art. X, §9(2)(a) (emphasis added). As already noted, "full" means full.

The State's citation to Texas, Utah, and Georgia law in footnote 5 of its Brief is equally unavailing. The boards of regents in Texas and Utah are statutorily—not constitutionally—created, making their very existence, let alone the extent of their powers, dependent upon those respective legislatures. *See* Tex. Educ. Code §§ 65.11, 85.11, 95.01 (creating separate boards of regents for the University of Texas System, Texas State University System, and Texas A&M University System); Utah Code Ann. § 53B-1-402 (establishing Utah board of regents); *see also* Utah Const. Art. X, § 4 ("The general control and supervision of the higher education system shall be provided for by statute."). Georgia's board of regents is constitutionally established, Ga. Const. Art. VIII, § IV, Para. I, but it purposely ceded a portion of its power to the Georgia legislature prior to the 2017 enactment of Georgia's law allowing concealed carry on university

and college campuses. OCGA § 16-11-127.1(c)(20)(A)–(C). Prior to 2017, as is true today, Georgia’s board of regents “prohibits all weapons on property owned or leased by the USG and its institutions, *except as specifically provided herein or as provided in federal or state law.*” Compare Georgia BOR Policy Manual § 6.11 with Georgia BOR Meeting Agenda, October 10, 2017, at 76-80 and Georgia BOR Committee on Organization & Law Meeting Agenda, February 13, 2018, at 4-10 (emphasis added). Thus, unlike Montana’s Board of Regents, Georgia’s board had willingly ceded to the legislature its power to regulate firearms on campuses prior to the enactment of the concealed campus carry law.

Therefore, the State fails to provide any support whatsoever for its contention that “the Board’s policy must yield to the Legislature’s policymaking power, as reflected in HB102.” (State’s Brief, Dkt. 64, p. 20). To the contrary, controlling Montana law demonstrates that the Board’s broad constitutional authority encompasses the power to regulate firearms on MUS properties. Unlike for the boards of regents in Colorado, Utah, and Texas, Montana’s constitution grants the Board a significant amount of autonomy and independence that is beyond the Legislature’s reach. And unlike Georgia’s board of regents, the Board has not ceded any of its autonomy or independence to the Legislature. Accordingly, the State’s motion for summary judgment must be denied.

3. The Legislature Cannot Rely Upon its Police Power to Infringe on the Board’s Exclusive Authority to Control the MUS.

The Legislature contends it can override the “full power” granted to the Board through the exercise of its police power because the issue of firearms on campus is an “area subject to the police power of the State.” (State’s Brief, Dkt. 64, pp. 9, 14). As the State concedes, however, its police power is limited by the State and Federal Constitutions. (State’s Brief., Dkt. 64, p. 14). And, while the State readily recognizes that Article II, § 12 acts as a limit to its power, it refuses

to recognize the constraints placed on the Legislature by Article X, § 9. Instead, the State summarily deems Article X, § 9's grant of "full power" to the Board to control the MUS not enough to amount to a "limitation [on Legislative power] expressed in no certain terms." (State's Brief, Dkt. 64, pp. 15-16). The State's argument misses the obvious: Only one party can have "full power" – otherwise, the power would not be "full." With respect to the supervision, coordination, management, and control of the MUS, the Constitution vests that "full power" with the Board. Necessarily, then, Article X, § 9 limits the Legislature's power.

The State cannot explain how enacting HB 102 falls within an assertion of its police power. The State maintains that it passes laws regulating firearms generally that apply on MUS campuses (*e.g.*, felons cannot possess firearms) and that it regulates other campus activities (*e.g.*, protecting students' privacy rights). (State's Brief, Dkt. 64, pp. 8-9). The State, generally, has the authority to assert police power, and the Board may not adopt a policy that abridges a right protected by the federal or state constitution. Nevertheless, Montana's Constitution has carved out specific authority – granted solely to the Board – for regulation of the day-to-day and year-to-year supervision, control, and management of the MUS and its campuses. The constitutional directive could not be more specific; the Board has "full power, responsibility and authority" over MUS and its campuses. HB 102 is contrary to the constitutional directive and is unconstitutional "under any level of scrutiny." *Mountain Water*, ¶ 31.

Moreover, the Legislature has conceded by exempting some places from open and concealed carry that the safety issues associated with the carrying of firearms in certain locations are subject to disagreement. The Board, pursuant to its "full power" to "supervise, coordinate, manage and control" MUS, has the authority to determine whether it is in the best interest of the safety and health of MUS campuses to arm individuals on campus with firearms to defend

themselves against potential armed criminals, or whether granting increased access of firearms to young adults, a population already at high risk for suicide, presents a greater safety and health risk. It is the Board, with input from the public, not the Legislature, that must weigh and decide these issues for the MUS.

The State also argues that “the Legislature alone determines the public policy of the State and the Board’s authority is limited by this public policy,” citing *Duck Inn*. (State’s Brief, Dkt. 64, p. 10). The State is incorrect; “public policy can be enunciated by the Constitution. . . .” *Anaconda Federal Credit Union v. West*, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971). In fact, “public policy is often based on constitutional provisions,” not just statutory law. *Wadsworth v. State*, 275 Mont. 287, 306, 911 P.2d 1165, 1176 (1996); *see also Talbot v. WMK-Davis, LLC*, 2016 MT 247, ¶ 18, 385 Mont. 109, 380 P.3d 823 (1995). “In determining the public policy of this state, legislative enactments must yield to constitutional provisions. . . .” *First Bank (N.A.) - Billings v. Transamerica Ins. Co.*, 209 Mont. 93, 96, 679 P.2d 1217, 1219 (1984). The Constitution has established that the supervision, control, and management of MUS vests fully in the Board, not the Legislature. Thus, legislative enactments must yield to this constitutional directive, even in creating public policy.

V. CONCLUSION

There are no material facts in dispute in this case, which presents a discrete legal question for the Court: whether the Legislature or the Board has the exclusive constitutional authority to regulate firearms on MUS campuses and other MUS locations. That authority falls within the Board’s exclusive and “full” power to “supervise, coordinate, manage and control” the MUS. Accordingly, HB 102 invades the Board’s constitutional and statutory authority, and is therefore unconstitutional. The Board is entitled to summary judgment as a matter of law.

Dated this 15th day of October, 2021.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was e-mailed to the following persons by United States mail, postage prepaid on the date herein.

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Dated this 15th day of October, 2021.

/s/ Kyle A. Gray