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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA, Petitioner, vs. THE 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 (email) **STATE OF MONTANA'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Legislature passed HB 102 "to enhance the safety of people" by preserving "the ability of citizens to defend themselves." HB 102, §§ 1–2. The Board of Regents (the "Board") doesn't like this. So the Board has brought this challenge, camouflaging a policy disagreement as a constitutional dispute.

The Board rests its argument on the premise that "[t]he plain language of Article X, § 9 grants to the Board 'full' authority to institute firearms policy on its campuses" and that this power is exclusive. Petitioner's Brief in Support of Motion for Summary Judgment and in Opposition to State's Motion for Summary Judgment (Dkt. 82) at 5, 15. But the Board provides no limiting principle to its authority. The Board simply repeats that it has "full authority," which—if taken literally—would lead to absurd results. *See Grossman v. Mont. Dep't of Nat. Res.*, 209 Mont. 427, 451, 682 P.2d 1319, 1331 (1984) (interpretation of constitutional provisions should not lead to "absurd results, if reasonable construction will avoid it"). The Board's argument—despite its assurances to the contrary—would elevate the Board to a fourth branch of government, allowing it to check the Legislature's power in the same manner as another co-equal branch of government. The Montana Supreme Court has squarely rejected this interpretation. *See Sheehy v. Comm'r of Political Practices for Mont.*, 2020 MT 37, 399 Mont. 26, 458 P.3d 309; *Duck Inn v. Mont. State University-Northern*, 285 Mont. 519, 949 P.2d 1179 (1997); *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975). This constitutional theory not only violates the plain text of Article III, § 1, which establishes "three distinct branches—legislative, executive, and judicial," but it also strips the power from the people. By giving this power to the

Board, the people lose their sovereign authority over these important issues. The people do not elect the Board—they elect the Legislature. And they elect the Legislature to determine the policy of the State through legislative enactments like HB 102.

The Board's premise that it has the "full authority to institute firearms policy on its campuses," Dkt. 82 at 5, is flawed for three reasons. And if the Court rejects this premise—as it must—the Board's subsidiary arguments fail. Accordingly, the Court should grant summary judgment in favor of the State.

I. The Board does not have absolute authority over every aspect of campus life.

The Board argues that it has "'full authority' to make and enforce policies which affect the MUS and its campuses." Dkt. 82 at 7. This interpretation, however, is incorrect in light of the text of Article X, § 9, the other provisions in the Montana Constitution, and the intent of the framers as expressed in the Constitutional Convention.

A. The text of the Constitution does not support the Board's interpretation of its own authority.

First, the Constitution says the Board has full authority "to supervise, coordinate, manage and control the Montana university system." MONT. CONST. art X, § 9. This does not mean it has the power over any and all matters that "affect" the university system. Dkt. 82 at 7. *Judge* explained that there is "not always a clear distinction" between the Legislature's and the Board's respective constitutional authorities. 168 Mont. at 444, 543 P.2d at 1330. While *Judge* was decided in the context of legislative appropriations, the court sought to balance Board autonomy with

legislative power. *Id.*, 168 Mont. at 449, 543 P.2d at 1332. In other words, the Board's power is not absolute.

The Board's argument also fails because it reads Article X, § 9 in isolation from other constitutional provisions. The Board's grant of authority in Article X, § 9 must be read in context of the text of other provisions in the Constitution and with the intent of the framers in mind. *See Judge*, 168 Mont. at 443, 543 P.2d 1329; *see also Sheehy*, ¶ 43 (McKinnon, J., concurring) ("Constitutional provisions must not be read or construed in isolation ...."); *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058; *see also State v. Dixon*, 66 Mont. 76, 84, 213 P. 227, 229 (1923) ("[T]he constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt."). The Board's interpretation would only be plausible if Article X, § 9 was the only provision in the Montana Constitution. *See Judge*, 168 Mont. at 443, 543 P.2d at 1329 (explaining that the court must harmonize the Legislature's and Board's authority). But the Board's power under this provision must be read to be consistent with the Constitution's core structural mechanisms: the Legislature's power under Article V, the Executive's power under Article VI, and the Judiciary's power under Article VII. *See* MONT. CONST. art. III, § 1 (identifying three branches of government). The Court cannot square the Board's broad interpretation of its own authority with these even broader authorities given to the three branches of government.

Of particular importance here is the fact that the Constitution gives the Legislature plenary policy power limited only by the Constitution. *Powder River Cty. v. State*, 2002 MT 259, ¶ 40, 312 Mont. 198, 60 P.3d 357 ("The legislature, therefore, by the enactment of statute, possesses all powers of law-making in this state except only in so far as those powers are curtailed in the Constitution."); *see also* State of Montana's Brief in Support of Motion for Summary Judgment (Dkt. 64) at 6–7. The Board's constitutional grant is a general limitation on some exercises of the Legislature's police power. If the Legislature could control and manage every part of MUS campuses, the Board's explicit grant of authority would be meaningless. But in this context—broad firearm regulation on state-owned properties—the Board's grant of authority in the Constitution does not clearly limit the Legislature's power. *See Judge*, 168 Mont. at 449, 543 P.2d at 1332 (noting the Board is still subject to the public policy of this state); *see also Sheehy*, ¶ 41 (same). To read the Board's constitutional authority as a limitation of the Legislature's power to manage firearms as it relates to MUS campuses would allow the Board to override the Legislature in any context based on policy disagreements. *See Judge*, 168 Mont. at 449, 543 P.2d at 1332. There would be no limiting principle to the Board's authority over legislative acts, which would make it a fourth branch of government.[1] This interpretation has been expressly rejected. *See id.*; *see also Sheehy*, ¶ 36 (McKinnon, J., concurring). While the grant of authority reads somewhat broadly, Montana courts have

[1] In fact, this actually elevates it above the three branches of government that are subject to clear checks and balances.

recognized its limitations by interpreting it to mean *financial and academic stewardship* rather than unlimited authority over all aspects of the MUS. *See Sheehy*, ¶ 29; *Judge*, 168 Mont. at 454, 543 P.2d at 1335; *Duck Inn*, 285 Mont. at 524, 949 P.2d at 1182.

The fact that the Board cannot override a legislative act simply because it "affects" MUS campuses unremarkably reflects its station within Montana government. For example, the Board could not ignore a ruling of the Montana Supreme Court as it applies to MUS campuses just because it "affects" the university system. *See, e.g.*, *Sheehy*, ¶ 18 (holding a Board of Regents member was a public employee); *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445 (declaring a university policy unconstitutional). And the Board could not ignore an Executive Order as it applies to MUS campuses just because it "affects" the university system. *See, e.g.*, Executive Order No. 2-2020 (March 12, 2020) (declaring a state of emergency); Office of the Governor, Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures to stay at home and designating certain essential functions (March 26, 2020) (specifically covering all "educational entities," including colleges and universities and ordering individuals to stay at home). Likewise, the Board cannot ignore or override a legislative act simply because it affects MUS campuses and the university systems. The Board could not, for example, change the age of consent on college campuses, M.C.A. § 45-5-501, or change the legal drinking age, M.C.A. § 45-5-624. Each branch of government plays *some* role in managing and controlling MUS campuses. *See Judge* 168 Mont. at 443, 543 P.2d at 1329.

B. The Constitutional Convention intended to limit the Board's power.

Finally—beyond the text of Article X and Article V—the Constitutional Convention instructs courts how to interpret the Board's authority. Courts infer constitutional intent not only from the text "but also 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*, ¶ 14. The transcript helps show why the framers created the Board in the manner they did. And it makes clear the objective the framers sought to achieve was not such a broad sweeping grant of authority as the Board argues.

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). Although the Board does not argue directly that it is a fourth branch, its interpretation of its own authority would lead to such a result. If the Board can do this—prevent the Legislature from regulating firearms on state-owned property—then the Board can do anything that "affects" campuses. Dkt. 82 at 7.

This broad authority was obviously not what the framers had in mind. The framers made clear the *types* of things they thought the Board could do. They sought to give the Board clear authority over "academic, financial, and administrative affairs." 6 Montana Constitutional Convention, at 2110 (1981). They contemplated giving the Board power over hiring, acquiring classroom equipment, and entering into certain contracts—the "day-by-day" decisionmaking attendant to the unique

character of the university. *Id.* at 2127–28, 2134, 2138–39; *see also* Dkt. 64 at 19. They did this to protect the Board from unnecessary outside influence. *See* Brief of Amicus Curiae David W. Diacon (Dkt. 70) at 5–11 (explaining the specific types of interference the Legislature sought to protect the Board from). Even with the broad grant of power, though, this power was never intended to be absolute. If they intended this power to be absolute, they would have created the Board as a co-equal fourth branch. Instead, they envisioned the Board as a separate executive branch agency with some power but still subject to the laws of the State. *Verbatim Transcript of March 11, 1972*, 6 Montana Constitutional Convention, at 2124–32 (1979).

The Board asserts that the Constitutional Convention rejected amendments "aimed at weakening the Montana Board's autonomous powers." Dkt. 82 at 7 (quoting David Aronofsky, *Voters Wisely Reject Proposed Constitutional Amendment 30 to Eliminate the Montana Board of Regents*, 58 Mont. L. Rev. 333, 365 (1997)). But as Aronofsky notes, the amendments aimed at weakening the Board's powers sought to "restore[] legislative control over university system finances and administrative decision-making." *Id.* In other words, exactly the State's position throughout this litigation. Finances and administrative decisionmaking are the *exact* type of powers the Board exclusively possesses. But this does not support the Board's broader argument that the Convention's intent to give the Board power separate from the Legislature means that the Board has absolute power over every issue that might impact student life. This is reflected in the Convention debates and the words the framers chose to include in the Constitution. Paper clip requisition is a far cry from

self-defense firearm regulation on state-owned property. *See* 6 Montana Constitutional Convention, at 2127 (1981).

II. The Board and the Legislature have concurrent authority with respect to certain issues on college campuses.

As stated previously, *see* Dkt. 64 at 2–3, the Legislature has broad police power to make laws for public welfare, health, and safety. *See State v. Andre*, 101 Mont. 366, 371, 54 P.2d 566, 570 (1936). In response, the Board states it is "obvious" that "[o]nly one party can have 'full power'" and the State's police power is therefore limited. Dkt. 82 at 19. But if the Board has "full power" to the extent it claims, the Legislature would *always* be precluded from regulating *any* aspect of MUS campuses. These campuses would become a special enclave, free from any legislative control, and the Board could effectively exercise veto power over the Legislature. This would allow the Board to function as a fourth branch of government. *See supra* Section I.A (the Board couldn't alter the age of consent or legal drinking age). The Board's authority is not this broad, and this Court must consider where the Board's authority and the Legislature's authority overlap.

The Legislature has the power to protect constitutional rights—here, the right to keep or bear arms, which appears in both the federal and state constitutions. The Board agrees it "may not adopt a policy that abridges a right protected by the federal or state constitution." Dkt. 82 at 19. The Board, therefore, agrees that its power is

limited in this respect—it cannot violate constitutional rights. [2] Yet the Board still claims that "full authority" means "full authority." There must be some qualifiers to this claim. The Constitution limits the Board's authority, *see id.* at 19, and the State's public policy limits the Board's authority, *see Judge*, 168 Mont. at 443, 543 P.2d at 1329. This shows that "full authority" does not mean "full authority" absent *any* limitations. *Id.*

The Board argues that the Legislature alone does not dictate public policy, and in this case public policy is determined by the Constitution's grant of "full" authority to supervise, control, and manage MUS campuses. Dkt. 82 at 20. But repeating the phrase "full power," *see* Dkt. 82 at 19–20, in service of a faulty constitutional argument, does not answer the question of whether the Board's authority is superior to the Legislature's authority *in this case*. As stated previously, this Court considers the Board's authority in context of other constitutional provisions and the Constitutional Convention. *See supra* Section I. This Court must also consider prior judicial decisions discussing the respective authority of the Legislature and the Board. As these cases show, the authority of the Board and the Legislature is concurrent.

In *Duck Inn*, for example, the court considered the permissibility of the Legislature's loose delegation to the Board. 285 Mont. at 526, 949 P.2d at 1183. The court ultimately concluded that given the constitutional character of the Board—it possessed independent authority over MUS campuses—the Legislature had properly

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[2] Despite the Board's acknowledgement that it is constrained by the federal and state constitutions, they have asked to enjoin Section 5 of HB 102, which specifically prohibits the Board from violating students' constitutional rights. *See* Dkt. 64 at 15 n.6.

limited the Board's discretion. *Id.* In *Duck Inn*, the analysis did not stop simply because the Board had "full power" over MUS campuses. The court considered the nature of the action and the nature of the Board. This case is a prime example of concurrent authority—the Legislature did not deny that the Board had certain authority, but the Legislature sought to augment this authority. The court considered legislative enactments in addition to constitutional provisions to determine whether the Board's authority was properly limited.

Likewise, in *Judge*, the court held that the Board is "subject to the [legislative] power to appropriate and the public policy of this state." 168 Mont. at 449, 543 P.2d at 1332. In other words, the Board's authority is limited with respect to some areas where the Legislature chooses to regulate. Where—as here—the Constitution doesn't clearly answer the question about the Board's authority, courts must turn to legislative acts to determine the public policy of the state. *See, e.g., id.*; *Sheehy*, ¶ 47 (McKinnon, J., concurring); *Duck Inn*, 285 Mont. at 523–24, 949 P.2d at 1182 ("[T]he public policy of the State of Montana is set by the Montana Legislature through its enactment of statutes, and this Court may not concern itself with the wisdom of such statutes."). And because the Board is subject to the public policy of the state, then it follows that the Legislature has some authority over MUS campuses to the extent it sets public policy. The Board selectively quotes from cases for the proposition that the public policy is determined by the Constitution. Dkt. 82 at 20. When fully quoted, however, these cases reaffirm that the Legislature determines the public policy of the state.

Here, like in *Duck Inn* and *Judge*, the Constitution alone does not answer the question of whether the Board has the authority to regulate firearms on campus. The Board, after all, is subject to duly enacted public policy.[3] The Court, therefore, must turn to legislative acts to evaluate the scope of the Board's authority. And in this case, the Legislature—not the Board—has made the state's policy on concealed and open carry on state-owned properties, and the Board is subject to this policy like every other functionary of government.[4]

The Board acknowledges that the Legislature already regulates other aspects of campus life but fails to offer a response. Dkt. 82 at 19 (citing Dkt. 64 at 9). Each of these cited regulations demonstrates that there are circumstances in which the Legislature can exercise its authority over on-campus activities like retirement contributions, students' privacy rights, university search power, and student government funding. *Id.* The Constitution does not speak directly to whether these

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[3] It doesn't matter that the Legislature meets once every two years instead of six times a year like the Board. Dkt. 82 at 9–10. This has no bearing on constitutional authority. If this Court accepted the Board's argument, the Court would be questioning the people's decision—via the Constitution—to mandate the Legislature meets every two years. And this would mean that any official statewide entity could ignore the Legislature's mandates because the Legislature only meets every two years.

[4] The Board states that the Legislature concedes the point that the Board controls and supervises campus firearm policies because it left supervision, implementation, and management of HB 102's policy directives to MUS. Dkt. 82 at9. This misses the point. The State has never argued that the Board plays *no* role in firearm management. And the State agrees that if the State had not acted, the Board would have the authority to regulate in this space, *see* M.C.A. § 45-3-111 (2009). But the Legislature gets to decide the broad policy of the state, and the Board is tasked with implementing this policy. Being told to implement a pre-determined policy is not the same as getting to make the policy itself, as the Board suggests.

subject matters fall within the scope of the Board's authority. So the courts must consider the nature of the action itself. *See, e.g.*, *Judge*, 168 Mont. at 444, 543 P.2d at 1330; *Sheehy*, ¶ 37 (McKinnon, J., concurring). Again, this demonstrates that "full power" does not mean "full power" in the way the Board wants it to mean "full power."

A. Firearm regulation is not the same as financial decisionmaking.

Rather than addressing the Board and the Legislature's concurrent authority, the Board sidesteps and tries to cabin its authority into categories the State agrees are clearly within its power: financial and administrative decisionmaking. The Board first argues the power to regulate campus carry relates to the financial stability of MUS, which is within the Board's power. Dkt. 82 at 11–12 (citing *Sheehy*, ¶ 29). In support of this, the Board cites to alleged statements of parents who have stated they may dis-enroll their students if HB 102 goes into effect. The Board asserts this will cause significant loss in tuition. Dkt. 82 at 12. But despite the passage of HB 102 and the uncertainty of this litigation, enrollment within the university system is up.[5] These speculative concerns about tuition losses have been proven decisively wrong.

[5] *See, e.g., Editorial: MSU enrollments records a boon for Bozeman*, Bozeman Daily Chronicle (Oct. 3, 2021), shorturl.at/dnCES; *University of Montana seeing enrollment increase for the first time in a decade*, KULR8.com (Sept. 28, 2021), shorturl.at/fvwP7; Liz Weber, *Montana State University's fall freshman enrollment breaks record*, Bozeman Daily Chronicle (Sept. 23, 2021), shorturl.at/kGJN1; Liz Weber, *Montana State enrollment dips, but still fifth highest on record*, Bozeman Daily Chronicle (Sept. 15, 2021), shorturl.at/anGS6

The Board, moreover, squandered the $1,000,000 implementation monies provided by the Legislature in HB 2.[6] After participating in the legislative development of HB 102, including securing accommodations and implementation funds, the Board violated the condition it agreed to. The Board now states that the consequences of its own actions—financial loss—is the basis for the Board exercising its authority. This cannot be correct.

The Board could make this same, speculative financial loss argument about any legislative proposal. There's no limiting principle to the way the Board tethers firearm regulation to financial stewardship. For example, if the Legislature set the tax rate at a level the university system didn't like, the Board might want to allow professors who live on campus to pay a lower tax rate. This would conceivably increase revenue by attracting better faculty, which would attract more students and would reduce the need for the school to pay more to offset the tax losses of these professors. But this *obviously* wouldn't be permissible. Only the Legislature can set the tax rate. *See Koch v. Yellowstone Cnty.*, 243 Mont. 447, 451, 795 P.2d 454, 457 (1990).

Here, the Board cannot rest its authority over firearms on its authority over financial stability. Financial stability means something like what it meant in *Sheehy*, where the court affirmed the Board's authority over financial interests when the

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[6] The Board states that HB 102 conditions $1,000,000 in funding for MUS on the Board not challenging HB 102. Dkt. 82 at4. This appropriation is in HB 2, not HB 102, which is not being challenged by the Board. HB 2 was signed into law on May 20, 2021. HB 102 was signed into law on February 19, 2021.

Regents sought to participate in the 6-Mill Levy initiative. *Sheehy*, ¶ 29. The court held that the individual Regents could make public statements about this legislative initiative given to the people. *Id.* *Sheehy* upheld the Board's participation in the legislative process (the people acting as the Legislature) and determined this public participation in the 6-Mill Levy initiative was no different than going directly to the Legislature for funding.

Unlike the issue in *Sheehy*, the issue here is not so closely tied to financial stability. The financial concerns asserted by the Board are nothing more than hypothetical fears, and they do not outweigh the fact that the power to regulate firearms—like tax rates—belongs to the Legislature.

B. Firearm regulation is also not the same as ensuring university health and stability.

The Board also tries to fit its authority to regulate firearms into its power to ensure health and stability. Dkt. 82 at 13–14. In fact, both Sheehy and Judge refer specifically to *financial* health and stability, not health and stability generally. *See* Dkt. 64 at 10. But even if this Court reads health and stability broadly, this does not mean the Board has authority over anything conceivably related to health and stability. For example, the Legislature prohibits smoking in enclosed public places, which includes "facilities of the Montana university system." M.C.A. §§ 50-40-103, -104. Smoking—and tobacco use generally—is a health concern for students. Yet the Legislature has exercised its authority to broadly regulate smoking indoors, including indoors on university property. The Board may separately regulate tobacco use, *see, e.g.*, Tobacco Free Campus Policy, Montana State University (Aug. 1, 2012),

but these policies must be consistent with the Legislature's general prohibition. The Board could not permit smoking in an enclosed public place while § 50-40-104 is in effect. Likewise, the Board is free to regulate on-campus firearm policy—as long as it is consistent with HB 102. Health and stability is not a catch-all to extend the Board's power beyond what the framers intended and the constitution allows.

Ultimately, the Board fails to address the fact that the Board and the Legislature have concurrent authority over certain issues. The Board cites *Judge*, *Duck Inn*, and *Sheehy* to establish a proposition each case denied—that the Board's power is plenary and exclusive on MUS campuses. Dkt. 82 at 16. In *Judge*, the court—consistent with Constitutional Convention—noted that "hiring and keeping of competent personnel" is within the Board's power. *Judge*, 168 Mont. at 443–44, 454, 543 P.2d at 1329–30, 1335 (limiting its "ruling here to these specific legislative enactments"). And in *Duck Inn*, the court upheld the Board's power to lease and manage campus facilities. This was not itself an independent constitutional power but rather a power the Legislature delegated to the Board. The court determined the statute's underlying policy was constitutional and the delegation was legitimate. *Duck Inn*, 285 Mont. at 525, 949 P.2d at 1183. Finally, in *Sheehy*, the court held the Board could actively support the 6-Mill Levy ballot initiative because this was just like supporting other budget requests. *Sheehy*, ¶ 29. HB 102 regulates a subject matter that falls outside the subject matter *Judge*, *Sheehy*, and *Duck Inn* addressed, which is financial stewardship of universities. None of these cases give the Board broad authority over anything it deems related to health and stability of the university system.

Concluding that the Board has full authority—exclusive of the Legislature—to regulate firearms on campus is tantamount to treating the Board as a fourth branch of government, which has been expressly rejected.

III. Statutory law establishes that the Legislature can adjust the scope of the Board's authority.

The Legislature's own statutory enactments show that the Legislature has power over the Board in certain circumstances. The Board argues that M.C.A. § 20-25-301—the Legislature's enactments regarding the Board's authority—bolsters their authority over and against the Legislature because the statutory grant of authority is compulsory. Dkt. 82 at 7. In fact, the opposite is true. The grant of authority may be compulsory, but the Board ignores the fact that it was the Legislature that had the power to grant the Board this authority. The fact that a statute—which is enacted by the Legislature—grants the Board certain authority shows that the Legislature has power over the Board. Statutory law establishes that the Legislature can adjust aspects of the Board's authority, as it did in § 20-25-301 and as it did in § 45-3-111, just like it would adjust aspects of any executive branch agency's authority. *See Judge*, 168 Mont. at 454, 543 P.2d at 1335.

Section 20-25-301, which the Board relies on for their argument, supports this. The Board focuses on the fact that this statutory grant of authority is compulsory. But the Board ignores the fact that the Legislature chose to make this grant of authority compulsory, and it could have just as easily made the grant of authority permissive. The power to adjust the Board's authority rests with the Legislature so long as any grant of authority is consistent with the Board's constitutional grant of

authority. *See Duck Inn*, 285 Mont. at 526, 949 P.2d at 1183. Section 20-25-301 still emphasizes that the compulsory power of the Board is not unlimited. It says the Board shall "adopt rules for its own government that *are consistent with the constitution and the laws of the state.*" § 20-25-301 (emphasis added). The Board "shall provide, *subject to the laws of the state*, rules for the government of the system." *Id.* (emphasis added). And the Board must have, "*when not otherwise provided by law*, control of all books, records, buildings, grounds, and other property of the system." *Id.* (emphasis added). When it comes to firearm possession on all state-owned property, including MUS, the Legislature has "otherwise provided by law." *Id.*

As the Board noted, the Legislature enacted § 20-25-324, which gave power to the Board to regulate security guards' firearms. And § 45-3-111 gave authority to the Board to regulate carrying of weapons. The State's position is not that the Board can *never* regulate firearms. In those statutes, the Legislature granted the Board the authority to make decisions about firearm management on MUS campuses. The act of delegation is an acknowledgement that the Legislature could have exercised the same authority itself. But what the Legislature giveth, it can taketh away. Just like it granted the Board's authority over firearms in statute, it can "modify or withdraw the power so granted." *Stephens v. Great Falls*, 119 Mont. 368, 371, 175 P.2d 408, 410 (1946); *see also Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (where a state constitution permits delegation of power, the state may also withdraw that same power); *Guam v. Olsen*, 431 U.S 195, 207 (1977) (Marshall, J., dissenting) (if a

legislature has the power to grant appellate jurisdiction, it has the "converse power to withdraw it").

The Board's argument that it must have "general control and supervision of the units of the Montana university system" in § 20-25-301 is not persuasive because this power is a general power, not a specific one. Other concurrent provisions require the Board to be subject to the laws of the state. *See* § 20-25-301(2)–(3). To the extent this provision, like § 45-3-111, gave the Board the power to regulate firearms, the Legislature can reclaim this power. *See Judge*, 168 Mont. at 448, 543 P.2d at 1332; *see also Sheehy*, ¶¶ 40–41 (McKinnon, J., concurring) (describing as informative a California case noting that "the power vested under the constitution in the Regents is not so broad as to destroy or limit the general power of the legislature to enact laws for the general welfare of the public").

CONCLUSION

The Board has made clear that it disagrees with the Legislature's policy determination. But this policy disagreement is not a basis for this Court to declare HB 102 unconstitutional. Because there are no genuine issues of material fact, the State asks this Court to grant the State's motion for summary judgment and deny the Board's motion for summary judgment. The State requests 20 minutes for oral argument. *See* Dkt. 64 at 20.

DATED this 29th day of October, 2021.

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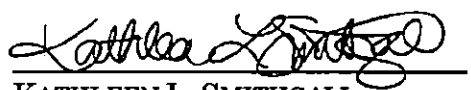

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