AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Fax: (406) 444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov

Emily Jones
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: (406) 384-7990
emily@joneslawmt.com

Attorneys for Defendants

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

STEVE BARRETT, ET AL.

Plaintiffs,

V.

STATE OF MONTANA, ET AL.,

Defendants.

Cause No. DV-21-581 B
Honorable Rienne H. McElyea

STATE OF MONTANA'S COMBINED BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case is nothing more than an airing of grievances by individuals who disagree with HB 102, HB 112, HB 349, and SB 319. In response to the State's discovery requests, Plaintiffs hurl insults, calling the Legislature's actions "childish," describing the Legislature's "incredible overreach" in enacting these laws, and decrying the laws as "unethical" and "immoral." Ex. A, 28, 38, 42, 45, 53. These are personal opinions, not legal arguments. Plaintiffs do this while simultaneously refusing to engage in meaningful discovery, objecting to nearly every single interrogatory and displaying

email 7/1/22 4:45 pm CA

their inability to produce any facts or evidence that support their claims. *See generally* Ex. A.

From what little the State can glean from Plaintiffs' responses, though, there exists no genuine dispute of any material fact and this Court should enter summary judgment in favor of the State. Plaintiffs—a large, diverse mix—seemingly brought everyone to the party except the one entity that might have standing to challenge the laws as usurpations of the authority vested in the Board of Regents: the Board of Regents. Before a Court may pass on the merits of a claim, it must ensure that it has jurisdiction to entertain the claim. Standing, and each of its jurisdictional compatriots derived from the Constitution, is nonnegotiable. Plaintiffs' responses—or non-responses—to the State's discovery requests confirm that Plaintiffs lack standing to bring this challenge. And their claims fail as a matter of law. The State will first address the most important issue—standing—before explaining why Plaintiffs' claims fail.

I. Summary Judgment Standard

Summary judgment is only 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). "When there are cross-motions for summary judgment, a district court must evaluate each party's motion on its own merits." *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, 403 P.3d 664. The district court "is not called to resolve factual disputes," and this Court reviews the "conclusions of law to determine whether they are correct." *Id.*

Because this case involves the validity of a statute, Plaintiffs must overcome the presumption of constitutionality afforded to each of the challenged laws. *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. Plaintiffs must show that the statute's unconstitutionality appears beyond a reasonable doubt. *State v. Dixon,* 66

Mont. 76, 213 P. 227 (1923), *overruled on other grounds, State v. Bd. of Exam'rs*, 125 Mont. 419, 239 P.2d 283 (1952). Thus, Plaintiffs' burden of proof is high.

At the summary judgment stage, courts do not accept "[u]nsupported conclusory or speculative statements," and the court "has no duty to anticipate possible proof." *Gentry v. Douglas Hereford Ranch, Inc.*, 1998 MT 182, ¶ 31; *see also, e.g., Pomranky v. Peterson*, CV-08-1064C, 2010 Mont. Dist. LEXIS 245, *34 (Mont. Eighteenth Jud. Dist. July 9, 2010). Courts only consider questions of law and do not act as finders of fact. *See, e.g., Wurl v. Polson Sch. Dist. No. 23,* 2006 MT 8, ¶ 11, 330 Mont. 282, 286, 127 P.3d 436, 441 (noting that the district court does not make "findings of fact" at summary judgment); *Gliko v. Permann*, 2006 MT 30, ¶ 22 (noting that questions of fact are not appropriate at summary judgment).

The evidence presented by the parties must be admissible, or the party must explain the admissible form that the evidence would take at trial. *See Brown v. Merrill Lynch, Pierce, Fenner & Smith*, 197 Mont. 1, 7–8, 640 P.2d 453, 456 (1982) ("On a motion for summary judgment only admissible evidence can be considered"); *see also Carelli v. Hall*, 279 Mont. 202, 207, 926 P.2d 756, 760 (1996) ("[O]nly admissible evidence can be considered in determining whether genuine issues of material fact exist"); *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 80, 345 Mont. 12, 34, 192 P.3d 186, 203; Fed. R. Civ. P. 56(c)(2) advisory committee's note to 2010 amendment; 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2722 (4th ed. 2021). Because none of the evidence in Plaintiffs' discovery responses constitutes admissible evidence—or establishes standing—there are no genuine issues of material facts and Plaintiffs cannot rely on this evidence to bolster their claims. *See Brown*, 197 at 7–8, 640 P.2d at 456.

II. Plaintiffs Lack Standing to Bring These Claims.

From the outset of this lawsuit, the State has argued that Plaintiffs lack standing to bring their claims. Plaintiffs first claim HB 349, SB 112, and SB 319 are "unconstitutional because each arrogates to the Legislature powers that are reserved

to the Montana Board of Regents." Compl. ¶ 44.[1] They do not assert that the bills infringe upon *their own* constitutional rights, but rather that the bills infringe on the *Board's* constitutional rights. They next claim that HB 2 "strips the MUS, under the direction and control of the Regents, of its authority to manage and control the MUS and because it strips the fundamental right of the MUS and the Regents to seek judicial recourse." Compl. ¶ 47. Again, they do not assert that HB 2 strips Plaintiffs of *their own* rights. Instead, they assert that HB 2 strips the Board of its authority to manage the MUS. The Board of Regents, however, is not a party to this action.

Courts treat standing as a threshold jurisdictional requirement, "especially ... where a ... constitutional violation is claimed ...." *Olson v. Dep't of Rev.*, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986). It rests on two principles. The first, constitutional standing, comes from Article VII, § 4 of the Montana Constitution. *Id.* Courts interpret this provision to "embod[y] the same limitations as ... Article III." *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 144 226 P.3d 567, 568. The second principle, prudential standing, provides an additional "judicial self-restraint imposed for reasons of policy." *Olson*, 223 Mont. 464 at 470, 726 P.2d at 1167. Under prudential standing, "a party may generally assert only his or her own constitutional rights and immunities." *Bullock v. Fox*, 2019 MT 50, ¶ 45, 395 Mont. 35, 435 P.3d 1187. The alleged injury must "be distinguishable from the injury to the public generally, though not necessarily exclusive to the plaintiff." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 50, 360 Mont. 207, 255 P.3d 80. If Article III standing falls short, the analysis should stop before reaching prudential standing. *See id.* ¶ 34. ("[I]n all events, the standing requirements imposed by the Constitution must always be met.").

This Court determined that Plaintiffs had both constitutional and prudential standing to survive the motion to dismiss stage. But—as demonstrated by Plaintiffs' discovery responses—they do not have standing to survive summary judgment. *See*

---

[1] The Montana Supreme Court permanently enjoined HB 102 in *Board of Regents v. State*, 2022 MT 128, ___, ____Mont. ____, ____ P.3d ___ (Ex. B) ("*Board of Regents*"). Because HB 102 is no longer enforceable, there is no need for further briefing on this issue.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (standing required at every successive stage of litigation). In the Court's order denying the State's motion to dismiss ("Order"), the Court found that Plaintiffs met their "minimal burden" to survive the motion to dismiss stage because they alleged a personal stake in the controversy's outcome. Order, 8. But their summary judgment burden of proof is much higher. Given Plaintiffs' responses to the State's discovery requests, they fail to meet this burden.

At the motion to dismiss stage, the district court must view the Complaint in a light most favorable to the Plaintiffs and accept as true all well-pleaded facts. *Devoe v. Missoula Cnty.*, 226 Mont. 372, 374, 735 P.2d 1115, 1116 (1987). But just because a plaintiff established standing to survive the motion to dismiss stage does not mean they have standing to survive summary judgment. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs .... That point is irrelevant now, however, for we are beyond the pleading stage."); *see also Lujan*, 504 U.S. at 561 (At summary judgment, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.'"). Standing can be raised at any time throughout the proceeding and must be considered "when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009); *see Thompson v. State*, 2007 MT 185, ¶ 28, 338 Mont. 511, 520, 167 P.3d 867, 874.

In their responses, Plaintiffs provide nothing more than additional legal conclusions and unsupported opinions from non-experts with no personal knowledge about the issues in this case. Plaintiffs, therefore, fail to show that they have standing to bring either claim. In short, they cannot assert authority on behalf of the Board of Regents. Plaintiffs can challenge the laws in a myriad of other ways—just like they have in other lawsuits against the State. But they cannot bring *these* claims.

A. Plaintiffs' admissions alone are sufficient to show that they lack standing to bring *these* claims.

Standing "turns on the source of the plaintiff's claim." *Heffernan* ¶ 35. Because Plaintiffs bring an Article X, § 9 claim, Plaintiffs' admissions show that they lack standing to bring these claims. Plaintiffs admit that no Plaintiff is the Board of Regents or a current member of the Board of Regents. *See* Ex. A. Plaintiffs admit that no Plaintiff can exercise the power granted to the Board of Regents in Article IX, § 9 of the Montana Constitution. *Id.* Accordingly, Plaintiffs cannot defend the Board's authority under this provision of the Constitution. Only the Board can do that.

Plaintiffs do not bring any individual rights' claims under Article II of the Montana Constitution. They do not claim that the challenged laws violate their rights of free speech, expression, or press. MONT. CONST. ART. II, § 7. They do not claim the challenged laws violate their right to due process of law. MONT. CONST. ART. II, § 17. They do not argue that the laws violate equal protection. MONT. CONST. ART. II, § 4. They instead bring a claim under Article X, Section 9, which establishes the state board of education and vests the Board of Regents with limited authority. But because Plaintiffs are not the Board, they cannot seek to vindicate this constitutional authority.

This case is distinct from other standing cases because, again, the individuals bring this challenge under a constitutional provision that explicitly and exclusively protects a non-party. Plaintiffs could not similarly bring a claim to protect the Governor's authority, an agency's authority, or this court's authority. Article X, § 9 establishes the Board's authority in context of the tripartite system of government, and only the Board can enforce this authority. In *Bullock v. Fox*, for example, the Governor and Director of the Department of Fish, Wildlife, and Parks alleged that the Attorney General encroached on the Governor's authority to "sign the papers closing the real estate transaction." *Bullock,* ¶ 35. Similarly, in *Schoof v. Nesbit*, the individuals asserted a violation of their individual right to know under the Montana Constitution. *Schoof,* ¶ 15. And in *Heffernan v. Missoula City Council*, the plaintiffs brought a challenge under a specific statutory provision giving covered individuals

the right to appeal a decision about a plat of land. *Heffernan*, ¶ 36. Here, Plaintiffs don't assert their own constitutional authority like in *Bullock* or *Schoof*. And no statute authorizes them to bring this type of action like in *Heffernan*. Instead, they assert a claim belonging exclusively to the Board of Regents'. No party—besides the Board itself—has brought a challenge asserting the Board of Regents' constitutional authority.

B. Plaintiffs' answers to the State's interrogatories also show that they lack standing.

Plaintiffs' answers to the State's interrogatories confirm what the State already noted—they lack constitutional and prudential standing to bring their claims. Although the district court held that they met their "minimal burden" at the motion to dismiss stage of the proceedings, they cannot succeed at this stage of litigation.[2] Order, 8.

1. Constitutional Standing

Constitutional standing functions as an "absolute" requirement, essential to a court's exercise of subject matter jurisdiction and therefore not subject to exception or waiver. Order, 4; *see also Schoof*, ¶ 15; *Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 45, n. 18, 394 Mont. 167, 434 P.3d 241. To establish constitutional standing, the plaintiff must show that (1) they have been personally injured or have been threatened with immediate injury as a direct result of the statute's enforcement, (2) that this injury is fairly traceable to the alleged violation, and (3) that it's likely a redressable injury by a favorable decision. *See Bullock*, ¶ 28; *Olson*, 223 Mont. 464 at 470, 726 P.2d at 1166. "A plaintiff's basis for standing must affirmatively appear

[2] The State anticipates Plaintiffs will accuse the State of trying to relitigate settled issues or raising these arguments in bad faith. *See* Reply in Support of Plaintiffs' Motion for Summary Judgment, *Forward Montana v. State*, BDV-2021-611 (Jan. 3, 2022); Brief in Support of Motion for Attorney's Fees, *Forward Montana v. State*, ADV-2021-611 (May 18, 2022). But courts require the parties to have standing at every successive stage of litigation. *See Lujan*, 504 U.S. at 561. And at each successive stage, Plaintiffs must meet the required burden. At the summary judgment stage, Plaintiffs cannot simply rely on generalized claims in their pleadings. *See Lujan*, 504 U.S. at 561; *Gentry*, ¶ 31.

in the record." *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1228 n.5 (9th Cir. 2008) (internal quotations omitted). Plaintiffs fail to meet this standard.

a. HB 349

With respect to HB 349, Plaintiffs provide no evidence showing that HB 349 causes an injury in fact fairly traceable to the alleged infringement on the Board's authority. As an initial matter, the Court must ignore Plaintiffs' legal conclusions and unsupported statements. *See Gentry*, ¶ 31. Plaintiff Steve Barrett glibly asserts that HB 349 "was designed intentionally to allow discrimination by groups favored by the legislative majority." Ex. A, 41. Plaintiff Dr. Larry Pettit adds his own legal conclusion that HB 349 "intrudes on regental management and control" and that "[r]egulation and supervision of student organizations and use of facilities fall within the scope of management and control." Ex. A, 49. Plaintiffs' lawyers respond to their own legal arguments, purporting to interpret HB 349 and its provisions. Ex. A, 7. They conclude that HB 349 "clearly undercuts" the Board's policies, "undermine[s] the constitutional authority" of the Board, and "reduce[s] the self-governance of ASMSU over the distribution of student activity fees." Ex. A, 8–10. But these are legal arguments, not evidence, that support standing. *See also* Ex. A, 11 (concluding without any factual support that "HB-349 allows, if not tacitly encourages, strategic flagrant behavior from student groups"). The court must reject unsupported arguments of counsel. *See Gentry*, ¶ 31; *see also Fouts v. Mont. Eight Jud. Dist. Ct.*, 2022 MT 9, ¶ 14, 407 Mont. 166, 502 P.3d 689 ("Unsupported arguments of counsel are not evidence and do not establish the existence of the matters that are argued") (quotation omitted).

The only *evidence* Plaintiffs include in their responses are the existing university policies and a list of "protected class student organizations." Ex. A, 7–15. The State does not dispute that these policies exist. But the existence of the policies

doesn't show how HB 349 will harm Plaintiffs.[3] Again, Plaintiffs make general assertions that "[d]iscriminating against students opens MSU and other Montana campuses to lawsuits." Ex. A at 14. They provide no admissible support for this statement. Plaintiffs also fail to cite any example of student harassment or evidence that HB 349 will lead to such harassment and instead rest on conclusory statements. *See, e.g.* Ex. A, 10 (concluding this constitutes "legislative overreach" and will "undermine ASMSU's ability to uphold anti-discrimination practices"). They just reiterate Plaintiffs' *legal* arguments about HB 349.

Accordingly, Plaintiffs provide no evidence showing they have standing to challenge HB 349 on the grounds that it infringes on the Board's constitutional authority. Thus, there exists no genuine dispute of any material fact, and the Court must find in favor of the State.

b. HB 112

The court previously found that Plaintiffs alleged enough of a "stake in the constitutionality of HB 112" to survive the motion to dismiss stage. Order, 6. But months later, after the State attempted to obtain discovery from Plaintiffs, Plaintiffs have offered no evidence that supports standing to challenge HB 112. The Court no longer accepts as true Plaintiffs' broad assertions of harm. *See* Mont. R. Civ. P. 56(c).

In support of their claims, Plaintiffs provide a statement from Plaintiff Steve Barrett who has "significant involvement in MUS affairs" and who states that the "legislation potentially puts the MUS institutions at odds with the various governing bodies." Ex. A, 51–52. As an initial matter, Plaintiff Barrett is not an expert on

[3] Plaintiffs provide the link to an Instagram post from "dobetter_younglife" about Elliott Hobaugh, who is not a party to this action. This post describes how YoungLife allegedly allowed Elliott to be a club member but would not permit Elliott to become a leader. Not only does this post have nothing to do with any Plaintiffs in this case, it is devoid of any helpful facts for purposes of this lawsuit. To the extent Elliott takes issue with YoungLife's leadership requirements, that is an issue not before this Court. *See, e.g.*, Kennedy v. Bremerton School Dist., No. 21-418, slip op. at 12 (U.S. June 27, 2022); *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Thomas v. Review Bd. Of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

intercollegiate athletics or the NCAA. His statement provides nothing more than an opinion loosely based on general experience with "MUS affairs." *Id.* Courts reject this type of testimony evidence as Plaintiff Barrett is neither an expert, *see* Mont. R. Evid. 702, nor basing his opinion based on personal knowledge of the facts themselves, *see* Mont. R. Evid. 701. Experience "in MUS affairs" does not confer upon Plaintiff Barrett personal knowledge of how HB 112 and NCAA policies might conflict or impact students. And Plaintiff reveals this by his own admissions—he admits he doesn't know whether HB 112 will conflict with the NCAA policies. Ex. A at 55. Courts squarely reject this exact type of hypothetical injury. *See Lujan*, 504 U.S. at 583; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

Plaintiffs also provide statements from Plaintiff Annie Belcourt, which she provides as "a clinical psychologist and as a parent." Ex. A, 45. Plaintiff Belcourt makes general statements about how transgender individuals experience discrimination and how Montana has a high suicide rate. *Id.* She also concludes that "[a]ny legislation that supports discrimination based on a difference between biological sex and gender identification ... is inherently unethical, immoral, and a violation of [sic] individual's right to live in this country free from systematic discrimination." *Id.* Plaintiff Belcourt's statements merely express Plaintiff Belcourt's opinion about this legislation and are inadmissible. *Brown*, 197 at 7–8, 640 P.2d at 456. She offers no evidence of actual, specific discrimination against any party in this case. Plaintiff Belcourt, moreover, cannot provide expert testimony on issues related to transgender issues or suicide rates because she is not an expert in this case. *See* Mont. R. Evid. 702; Mont. R. Civ. P. 26(b)(4). And it isn't clear what statements Plaintiff Belcourt makes based on personal knowledge or experience. *See* Mont. R. Evid. 701. The Court cannot consider these unqualified and unsupported statements.

But more importantly, even if the State does not offer any evidence disputing that Montana has a high suicide rate or that transgender individuals experience discrimination, those assertions do not confer standing for *these* claims. No Plaintiff participates in collegiate athletics. Ex. A, 58. Plaintiffs fail to provide a single example of an individual who will be excluded from participating on the team of their

choosing under HB 112. While their initial claims might be sufficient to survive the motion to dismiss stage, they fail to survive summary judgment. No record evidence shows that HB 112 will confer any personal harm on these Plaintiffs. *See Lujan*, 504 U.S. at 583–84; *Bullock*, ¶ 35.

Plaintiffs, moreover, do not challenge HB 112 on equal protection or due process grounds. Rather, they assert that HB 112 encroaches on the Board's constitutional authority. If the Court finds that HB 112 does, in fact, violate the Board's authority, then Plaintiffs' claims of injury are still not redressable. *See Lujan*, 504 U.S. at 584–85. Enjoining HB 112 does not permit transgender individuals to play on the team of their choosing. The NCAA calls for "transgender student-athlete participation for each sport to be determined by the policy for the national governing body of that sport." *Transgender Student-Athlete Participation Policy*, NCAA, https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx. Similarly, the NAIA establishes specific conditions for transgender athletes to participate. Transgender and Non-Binary Student Athlete Competition Policy, NAIA, https://www.naia.org/legislative/2021-22/files/NAIA-2021-Official-Handbook.pdf?page=164. The Board of Regents plays *no* role in determining whether a transgender athlete can participate in their chosen sports team. *Id.* Plaintiffs, therefore, lack standing to challenge HB 112 on the grounds that it infringes on the Board's authority to regulate transgender athletes.

c. SB 319

From Plaintiffs' briefing, it appears they only challenge Section 2 of SB 319.[4] Like the other responses to the State's interrogatories, Plaintiffs fail to provide any evidence showing harm. Plaintiff Steve Barrett opines that it "in [sic] another incredible overreach into management of MUS by the legislature." Ex. A at 54.

[4] As the State argued at the motion to dismiss hearing, though, Plaintiffs' Complaint purports to challenge the entirety of SB 319. For purposes of this briefing, the State will focus on Section 2, but the State briefly notes that Plaintiffs lack standing to challenge any other provision in SB 319. The State, therefore, reserves any argument with respect to other sections of SB 319.

Plaintiff Barrett simply presents his opinion about the Legislature, which does not constitute evidence that SB 319 will cause harm.

Plaintiffs describe the process by which students approve the optional fee at issue. Plaintiffs then explain that the Board of Regents votes on authorizing the fee. After authorization, MontPIRG enters into a contract with ASUM to administer the fee. Ex. A 19–20. Plaintiffs then conclude that SB 319 "upends" this system and "thwart[s] the governing authority of the Montana BOR." *Id.* This conclusion, of course, constitutes a legal conclusion, not evidence. *See Brown*, 197 at 7–8, 640 P.2d at 456. As for the process by which the fees are authorized and distributed to MontPIRG, Plaintiffs admit that the purported harm stemming from SB 319 is harm to the "Montana BOR." Ex. A at 20. But as Plaintiffs admit, they are not the Board of Regents—limits to the Board's constitutional authority are not harms personal to Plaintiffs. *See Lujan*, 504 U.S. at 583–84; *Bullock*, ¶ 35.

2. Prudential Standing

Plaintiffs, likewise, fail to establish prudential standing at summary judgment. As the district court noted, the Plaintiffs' injuries must be "distinguishable from the public at large" and Plaintiffs must "assert [their] own legal rights and interests." Order, 8–9 (quoting *Heffernan*, ¶ 33).[5] Prudential standing exists in addition to constitutional standing. *Heffernan*, ¶ 33; *Bullock*, ¶¶ 43–46. The State does not dispute this Court's findings at the motion to dismiss stage. But based on the lack of record evidence, Plaintiffs' abstract and generalized claims don't confer constitutional standing at summary judgment, which means these claims cannot independently confer prudential standing at summary judgment.

Both *Air Pollution Control Board* and *Lee*, which the district court relies on at the motion to dismiss stage, support a finding that Plaintiffs lack prudential standing now at the summary judgment stage. In *Air Pollution Control Board*, the Court held

[5] The State does not assert that "if the Regents do not challenge a particular legislative measure, it is not reviewable." Order, 9. The State asserts that *these* parties cannot bring *these* claims. Plaintiffs only claim that these laws violate the Board's authority under Article X, § 9, not that they violate Plaintiffs' individual rights under the Montana Constitution.

that the Local Board and private citizens would have standing to challenge environmental regulations. *Missoula City-Cnty. Air Pollution Control Bd. v. Bd. of Env't Review,* 282 Mont. 255, 262, 937 P.2d 463, 467 (1997). The Local Board was interested in "protecting its ability to discharge its legal obligations." Order, 10. This would be the same for the Board of Regents in this case. Neither party disputes that the Board of Regents would have standing to bring an Article X, § 9 claim because it has an interest in protecting its ability to discharge its constitutional duties. Although *Air Pollution Control Board,* which the Montana Supreme Court decided at the motion to dismiss stage, did not involve individual citizens, the Court noted that citizens would also have standing because they would breathe in the pollutants. Unlike the claimed injuries here, though, the air pollutants were certain and measurable. *Id.*, 282 Mont. at 262, 937 P.2d at 467. As discussed above, Plaintiffs here fail to provide evidence of certain and measurable harm. Instead, they couch their injuries in hypotheticals and speculation. While this court found that Plaintiffs alleged enough to survive the motion to dismiss stage, Plaintiffs' lack of evidence cannot support standing at summary judgment.

Air Pollution Control Board also differs because the hypothetical citizens the Court discusses would challenge the environmental regulation under the Montana Administrative Procedure Act ("MAPA") as arbitrary and capricious. *Id.*, 282 Mont. at 262, 937 P.2d at 467. Bringing an administrative action for failure to abide by the administrative process properly differs from bringing a constitutional challenge to protect the Board of Regents' authority. MAPA explicitly authorizes courts to declare invalid rules that impair individual rights or fail to conform with the authorizing statute. MCA § 2-4-506. Article X, § 9 does not similarly authorize any individual to bring a challenge. Instead, it articulates the Board of Regents' constitutional authority—an authority that only the Board of Regents can seek to protect.

Lee similarly supports a finding that Plaintiffs lack prudential standing at the summary judgment stage. The key to the Court's holding in *Lee* was that the citizen's injury was personal to him and directly affected him. *Lee v. State,* 195 Mont. 1, 7, 635 P.2d 1281, 1285 (1981). Here, this Court held that based on Plaintiffs' initial

allegations, they had an interest in the challenged legislation. Order, 10. But Plaintiffs must do more at the summary judgment stage, and they provided no additional evidence satisfying their burden. *See generally supra* Section II.

Finally, Plaintiffs also fail to show any close relationship to the Board of Regents that would establish prudential standing. Plaintiffs admit that no Plaintiff is the Board of Regents or a current member of the Board of Regents. Ex. A, 58. They admit that they cannot exercise the power of the Board of Regents. *Id.* They admit that they cannot use the funds appropriated by HB 2. *Id.* Each of these admissions demonstrates the disconnect between the Plaintiffs and the Board. Plaintiffs provide no other evidence on the record to support their claim that their interests are so intertwined with the Board's interests that it rises to the level of the well-established doctor-patient relationship in *Armstrong v. State*, 1999 MT 261, ¶¶ 11–13, 296 Mont. 361, 989 P.2d 364.

Again, prudential standing requires that a party assert its own constitutional rights and claim a harm personal to that party. *Bullock*, ¶ 45. Based on Plaintiffs' admissions and interrogatory responses, this Court must conclude that they lack prudential standing.

III. None of the Challenged Bills Infringe on the Board's authority.

The State first moves for summary judgment on Plaintiffs' claim that each of the challenged bills "arrogates to the Legislature powers that are reserved to the Montana Board of Regents." Compl. ¶ 44. While the Montana Supreme Court permanently enjoined HB 102, Plaintiffs' claim with respect to HB 349, HB 112 and SB 319 fails as a matter of law.

In *Board of Regents v. Judge* ("*Judge*"), the Court "prescribe[d] case-by-case consideration of the impact of legislative actions upon the Board's constitutional authority." *Board of Regents*, ¶ 14 (citing *Judge*, 168 Mont. 433, 454, 543 P.2d 1323, 1335). The Court must, therefore, evaluate each bill individually to determine whether the Board has exclusive authority over that subject matter.

A. HB 349

HB 349 works "in tandem" with the Board's authority. *Board of Regents*, ¶ 16. As Plaintiffs noted, the Board of Regents has a policy prohibiting discrimination on MUS campuses "unless based on reasonable grounds." Board of Regents Policy 703; *see also* Plt's BIS MSJ, 10. In this instance, the Board determined that such anti-discrimination policies are a priority of the university system. *See Board of Regents*, ¶ 23. Rather than contradict this Board policy—like HB 102 unquestionably contradicted Board Policy 1006—HB 349 amplifies the Board's anti-discrimination policy by forbidding university officials from denying benefits to organizations simply because the officials find specific organizations disagreeable.

Plaintiffs take particular issue with how HB 349 will protect religious groups. Plt's BIS MSJ, 10. But this is precisely why HB 349 enhances existing anti-discrimination policies—individuals like Plaintiffs, who disagree with a religious organization's viewpoints, cannot exclude that religious group from organizing on campus. *See, e.g., Fulton,* 141 S. Ct. at 1877 (finding that a law discriminates when the government entity "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature"); *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 546 (1993) (holding that the Free Exercise Clause bars even "subtle departures from neutrality"); *Thomas,* 450 U.S. at 714 (holding that government entities don't get to decide whether exercises of religion are "acceptable, logical, consistent, or comprehensible").

Plaintiffs' concerns display either religious animosity or a misunderstanding of the Establishment Clause. If the former, then Plaintiffs contend that the Board's existing non-discrimination policy appropriately *disfavors* religion. HB 349, therefore, corrects this discriminatory policy by eliminating hostility toward religious groups and beliefs. If the latter, then Plaintiffs are wrong under Kennedy v. Bremerton School Dist., No. 21-418, slip op. (U.S. June 27, 2022). A government entity's concerns about theoretical Establishment Clause violations never "justify actual violations of an individual's First Amendment rights." Slip op. at 31.

Board of Regents involved a scenario in which the legislative act directly conflicted with the Board's preexisting firearms policy. The Court held that because the legislative act "proscrib[ed]" the Board from regulating firearms, the legislature encroached on the authority of the Board. *Board of Regents*, ¶ 23. Here, though, HB 349 does not prevent the Board from regulating in this space. Rather, HB 349 complements the Board's stated goals of prohibiting discrimination on the basis of "race, color, religion, creed, political ideas, sex, gender identity, sexual orientation, age, marital status, physical or mental disability, national origin, or ancestry." Board of Regents Policy 703. Because the law works in "tandem" with the Board's policies, the law does not infringe on the Board's authority.

B. SB 319

Plaintiffs' argument concerning SB 319 likewise fails. Again, Plaintiffs claim that SB 319 arrogates to the Legislature power that belongs the Board. But Plaintiffs merely assert that Section 2 "specifically targets Plaintiff [MontPIRG]" and prohibits "longstanding and Board-approved funding measures." Plt's BIS MSJ, 13–14. The Board does not have any policy that conflicts with SB 319, nor does the Board regulate in this area. *See Board of Regents*, ¶ 23. Plaintiffs' responses to the State's interrogatories confirm this. Plaintiffs describe a process whereby the students approve an optional $5 fee, which the Board approves after the fact. Ex. A at 19. But this fails to show how the Board has exclusive authority in the space. In fact, it shows the contrary is true—the Board only gets involved after the students approve the fee, and the Board is not responsible for managing or distributing the funds collected through this fee. Plaintiffs' claim that SB 319 infringes on the Board's authority under Article X, § 9, therefore, fails because unlike in *Board of Regents*, the Board does not possess authority, let alone exclusive authority, to manage the optional student fee process.

C. HB 112

HB 112 is a "neutral statewide law" focused on sports *at every level of competition*, not just on university campuses. *Board of Regents*, ¶ 17. It does not target the Board or the MUS as HB 102 did. *Id.* The law requires that *any* athletic team "be expressly designated" on the basis of biological sex. HB 112, § 2. Simply because

universities happen to have athletic teams does not mean this law infringes on the Board's authority under Article X, § 9. *Board of Regents*, ¶ 17.[6]

And unlike in *Board of Regents*, the Board has no existing policy in place addressing transgender athletes' participation in sports. Plaintiffs—and the Board for that matter—say that the NCAA and NAIA govern these university athletic teams. Compl. ¶ 6; *see also* Plt's BIS MSJ, 12–13; Montana Board of Regents Policy 1202.1 (requiring compliance with the NCAA and NAIA, which establish the rules for participation). Plaintiffs' argument, then, is that because the Board decided to subject itself to the governance of national, nongovernmental, nonprofit associations, only those groups—and not the State's elected representatives—can determine matters of policies in those areas on campus. In other words, the Legislature must not only yield to the Board, but the Legislature must also yield to the NCAA and NAIA, and any law that touches on these associations' existing policies somehow violates the *Board's* constitutional authority. But whatever else might be said about it, the Montana Constitution does not create a check on legislative power in the form of the NCAA or the NAIA. *See Board of Regents*, ¶ 19 (neither the NCAA nor NAIA is mentioned in Article V or Article X of the Montana Constitution). The issue of transgender athletes' participation in sports is an incredibly fraught sociopolitical issue. It would be absurd to think the Montana Constitution outsourced the state policymaking on this issue to a national nonprofit.

***

Courts must afford Montana laws a strong presumption of constitutionality, and this is a facial challenge. Plaintiffs must prove, beyond a reasonable doubt, that there is "no set of circumstances" under which the challenged laws would be valid.

---

[6] It is also worth briefly noting that Plaintiffs do not limit their request for relief to only MUS campuses. *See* Compl., *Prayer for Relief*. They ask this Court to declare the entire law "unconstitutional and unenforceable." *Id.* But as discussed above, this law covers athletic teams at every level of competition. *See* HB 112, § 2. The Board—even if it were party to this suit—lacks exclusive authority over every athletic or extracurricular activity in the State. *See Board of Regents*, ¶¶ 19–20 (limiting the Board's authority to MUS campuses).

Mont. Cannabis Indus. Ass'n v. State, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131; *Powder River Cnty.*, ¶ 74. After discovery, the Plaintiffs have put forth no evidence to legitimize their claims. The Court should, therefore, grant the State's cross-motion for summary judgment on Plaintiffs' claim that HB 349, SB 319, and HB 112 violate the Board's constitutional authority.

IV. The Conditional Appropriation Passes Constitutional Muster.

The State also moves for summary judgment on Plaintiffs' second claim regarding the so-called conditional appropriation in HB 2. Plaintiffs do not seek summary judgment on this claim, suggesting there may be genuine disputes of material fact. But based on Plaintiffs' responses to the State's discovery requests and Plaintiffs' failure to brief this issue, Plaintiffs' claims fail as a matter of law.[7]

Plaintiffs assert that the appropriation tied to HB 102 in HB2 "strips the fundamental right of the MUS and the Regents to seek judicial recourse." Compl. ¶ 47. Plaintiffs' claim fails as both a matter of law and fact. As a matter of law, *Judge*, explicitly permits conditional appropriations. *Judge*, 168 Mont. at 453, 543 P.2d at 1334 ("the legislature can within reason attach conditions to its university appropriations"). And as a matter of fact (and common sense), the Board can seek judicial recourse, just as it did in *Board of Regents*. The conditional appropriation clearly didn't deprive or dissuade the Board from exercising its right to seek judicial recourse.

Plaintiffs admit that none of the funds from the alleged conditional appropriation belong to Plaintiffs. Ex. A at 58. Thus, Plaintiffs cannot challenge this conditional appropriation. Their failure to brief the issue or provide supporting facts dooms this claim. This Court should grant summary judgment in favor of the State.

V. Plaintiffs are not Entitled to Attorneys' Fees.

Finally, this Court must deny Plaintiffs' fees under the private attorney general doctrine. As Plaintiffs admit, courts only impose these fees when the "State's defense is frivolous or in bad faith." *See W. Trad. P'ship v. Mont. Att'y Gen.*, 2012 MT 271, ¶ 18, 367 Mont. 112, 291 P.3d 545; *see also* Plt's BIS MSJ, 15 n.3. Despite clear

[7] This Court made no factual findings or conclusions of law with respect to HB 2.

case law to the contrary, Plaintiffs' attorneys argue here and elsewhere, that the district court should feel free to disregard this requirement. *See* Plt's BIS MSJ, 15 n.3; *see also* Brief in Support of Motion for Attorney's Fees, *Forward Montana v. State*, ADV-2021-611 (1st Jud. Dist. May 18, 2022).

The only time a court applied this doctrine against the State was in *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, 296 Mont. 402, 89 P.2d 800 ("Montrust"), which involved "unique issues raising the State's breach of fiduciary duties ...." *Western Tradition P'ship*, ¶ 19. But the Montana Supreme Court has repeatedly and consistently limited this holding. *See Bitterroot River Protective Ass'n v. Bitterroot Conserv. Dist.*, 2011 MT 51, ¶ 22, 359 Mont. 393, 251 P.3d 131. In *Western Tradition Partnership* and *Finke*, the Supreme Court held that courts could not leverage fees against the State simply because the Legislature enacts an unconstitutional bill. *W. Tradition P'ship*, ¶ 19; *Finke v. State*, 2003 MT 48, ¶ 34, 314 Mont. 314, 65 P.3d 576. This case is no different, and the Court must reject Plaintiffs' attempt to circumvent established law and collect fees from the State.

The Court need not reach the three factors outlined in *Montrust* because the State's defense is neither "frivolous" nor in "bad faith." *Western Tradition P'ship*, ¶ 18. If the Court analyzes these factors, though, they overwhelmingly weigh in favor of the State. The State agrees these are important public issues that impact *all Montanans*, which is precisely why the State "zealously defend[s]" these laws.[8] Plt's BIS MSJ, 16. Plaintiffs seem to suggest that because the Board of Regents chose only to challenge HB 102 (a law Plaintiffs challenge on identical grounds), the State is somehow *more* responsible for fees because Plaintiffs had to do the work that the Board wouldn't. *Id.* But this is a gripe against the Board, not the State. And importantly, one of the Plaintiffs in this very case—MontPIRG—brought an entirely separate action against the State over SB 319. *See Montana Public Interest Research Group v.*

[8] This factor, ironically, bolsters the State's claims that each of these laws are generally applicable, and therefore apply statewide, including on university campuses.

State, BDV-2022-462 (filed June 16, 2022). Plaintiffs are not entitled to fees simply because the State defended its duly enacted laws. *See Finke*, ¶34. The only "significant burden" Plaintiffs "shouldered" is the burden of participating in a lawsuit they chose to bring. Plt's BIS MSJ, 16.

CONCLUSION

Plaintiffs lack standing to bring a claim asserting the Board's authority under Article X, § 9. Although the district court permitted Plaintiffs to survive the motion to dismiss stage, Plaintiffs' failure to provide any evidence of harm caused by the Legislature's alleged violation of Article X, § 9 dooms their claims from the start. And even if they met the heightened requirements at the summary judgment stage, their claims fail as a matter of law. Accordingly, the State is entitled to summary judgment.

The State requests oral argument on the parties' cross-motions for summary judgment.

DATED this 1st day of July, 2022.

AUSTIN KNUDSEN
Montana Attorney General

DAVID M.S. DEWHIRST
Solicitor General

KATHLEEN L. SMITHGALL
Assistant Solicitor General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
kathleen.smithgall@mt.gov

Attorneys for Defendants

Exhibit A

James H. Goetz
Jeffrey J. Tierney
GOETZ, GEDDES & GARDNER, P.C.
35 North Grand
P.O. Box 6580
Bozeman, MT 59771-6580
Ph: 406-587-0618
Fax: 406-587-5144
Email: jim@goetzlawfirm.com
jtierney@goetzlawfirm.com

Raphael Graybill
GRAYBILL LAW FIRM, PC
300 4th Street North
P.O. Box 3586
Great Falls, MT 59403
Ph: 406-452-8566
Fax: 406-727-3225
Email: rgraybill@silverstatelaw.net

ATTORNEYS FOR PLAINTIFFS

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

STEVE BARRETT, et al. Plaintiffs, v. STATE OF MONTANA; GREG GIANFORTE; and AUSTIN KNUDSEN, Defendants.	Cause No. DV-21-581B Hon. Rienne H. McElyea **Plaintiffs' Response to State of Montana's First Discovery Request**

Plaintiffs Steve Barrett, et al., response to the Defendant's First Discovery Requests as follows:

INTERROGATORY NO. 1: Please identify each and every person who prepared or assisted in the preparation of answering these discovery requests.

ANSWER: In addition to counsel, Bradford Watson, Joy Honea, Dr. Larry Pettitt, Steve Barrett, Charlie Cromwell, Lucas Oelkers, Amanda Habb, Marianne Brough, Audrey Cromwell, Annie Belcourt, Frankie Wilmer, Ashley Phelan, Joseph Knappenberger.

INTERROGATORY NO. 2: Please identify each and every person known by you to have knowledge of the facts, events, and circumstances related to this action, including a brief

summary of the facts, events, and circumstances known by each person.

ANSWER: Plaintiffs cannot speak for the Defendants or the Legislators who passed the challenged measures. All Plaintiff organizations and each of the individual Plaintiffs have knowledge of facts, events and circumstances related to this action, as set forth in the ensuing answers.

INTERROGATORY NO. 3: Please identify each and every person you have interviewed concerning any of the facts, events, or circumstances and for each person identified, please stated who conducted the interview and the date of the interview.

ANSWER: Objection: any "interviews" thus far are limited to those undertaken by Counsel. These are protected from the discovery by the attorney-client privilege and the work product doctrine. *See, e.g., Laxalt v. McClatchy*, 116 F.R.D. 438, 443 (D. Nev. 1987) (identities of persons with knowledge are discoverable, but whether counsel has sought out and interviewed them in the course of investigating discloses strategy and implicates work product concerns); *accord Plumbers & Pipefitters Loc. 572 Pension Fund v. Cisco Sys., Inc.*, C01-20418JW, 2005 WL 1459555, at *5 (N.D. Cal. June 21, 2005).

INTERROGATORY NO. 4: Please identify all expert witnesses you intend to call to testify at the trial of this matter and for each expert, please state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

ANSWER: Plaintiffs brought a facial constitutional challenge to the contested measures. Plaintiffs do not believe there are any triable fact issues and contend that this case presents strictly legal questions which should be resolved through Plaintiffs' pending motion for summary

judgment. Accordingly, at this time Plaintiffs have not identified any witnesses or exhibits or procured experts. If the Court concludes otherwise, Plaintiffs will supplement this answer as such decisions are made.

REQUEST FOR PRODUCTION NO. 1: Please produce the complete file of each expert witness identified in your Answer to Interrogatory No. 4.

RESPONSE: None, as yet.

REQUEST FOR PRODUCTION NO. 2: Please produce all data, photographs, videos, and other documents or information upon which the opinions of each expert identified in your Answer to Interrogatory No. 4 are based.

RESPONSE: None, as yet.

INTERROGATORY NO. 5: Regarding the allegations in Paragraph 4 that HB 349 (2021) invites student harassment, please identify all facts which support these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: Objection: overly broad, unduly burdensome, disproportionate to the needs of the case, not reasonably calculated to lead to the discovery of admissible evidence, and invades attorney work product.

This case presents a facial constitutional challenge and facial challenges do not depend on the facts of a particular case. *Adv's for School Trust Lands v. State of Montana*, 2022 MT 46, ¶ 29, ___ Mont. ___, ___ P.3d ___; *see also* Summary Judgment Order, *Bd. of Regents of Higher Ed. v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct. 2021).

Moreover, this interrogatory is overly broad and unduly burdensome because it seeks "all" information (documents, witnesses, facts, etc.) that support the stated contention. While contention interrogatories are generally permitted by the rules, they cannot be deployed to force another party to exhaustively detail every fact which may support a particular claim or contention:

> [T]here is substantial reason to believe that the early knee jerk filing of sets of contention interrogatories that systematically track all the allegations in an opposing party's pleadings is a serious form of discovery abuse. Such comprehensive sets of contention interrogatories can be almost mindlessly generated, can be used to impose great burdens on opponents, and can generate a great deal of counterproductive friction between parties and counsel.

In re Convergent Tech's Sec's Litig., 108 F.R.D. 328, 337-38 (N.D. Cal. 1985); *see also FTC v. American Evoice, Ltd.*, 2017 WL 476617 (D. Mont. Feb. 3, 2017) (a dozen "blockbuster" contention interrogatories, seeking all of the facts and evidence and the contents of supporting documents related to a number of contentions, the "equivalent of a narrative of [the responding party's] case," were overly burdensome and improper).

Contention interrogatories are properly limited to seeking the material and principal facts necessary to elucidate the given contention:

> To the extent [the challenged interrogatories] ask for every fact and every application of law to fact which supports the identified allegations, the court finds them overly broad and unduly burdensome. **An interrogatory may reasonably ask for the material or principal facts which support a contention.** . . . To require specifically "each and every" fact and application of law to fact, however, would too often require a laborious, time-consuming analysis, search, and description of incidental, secondary, and perhaps irrelevant and trivial details. The burden to answer then outweighs the benefit to be gained.

IBP, Inc. v. Merc. Bank of Topeka, 179 F.R.D. 316, 321 (D. Kan. 1998) (emphasis added) (criticizing 'indiscriminate use" of such requests); *see also Fischer and Porter Co. v. Tolson*, 143

F.R.D. 93 (E.D. Penn. 1992); *Mancini v. Ins. Corp. of N.Y.*, 2009 WL 1765295, at *3 (S.D. Cal. Jun. 18, 2009) (requests for "every fact" or "all facts" supporting an allegation is improper and duty to respond was limited to "the material or principal facts"); *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 445, 447 (D. Kan. 2000) (an interrogatory "may reasonably ask for the *material or principal* facts which support a party's contentions in the case" but may not demand greater specificity that would be laborious, require time-consuming analysis, or require description of incidental details); *D.R.A. Serv.'s, Inc. v. Hallmark Ins. Co.*, 2014 WL 11498163, at *4 (D. Wyo. 2014) (requests which go beyond the "principal facts" and seek "each and every fact" or a "narrative of [a party's] contentions are improper); *Comm. Voice Line, LLC v. Great Lake Comm. Corp.*, 2013 WL 4048495, at *8 (N.D. Iowa Aug. 1, 2013) ("blockbuster" contention interrogatories demanding broad disclosure of a party's theories and supporting facts are abusive and improper, as opposed to interrogatories merely seeking the "material" or "principal" facts supporting a given allegation or defense).

Given the enormous burden of responding to such requests, they are particularly improper and disproportional in this case which involves a facial constitutional challenge. *See Adv's for School Trust Lands, supra.*

Finally, requests to identify all documents supporting an allegation or contention are improper on work product grounds "[b]ecause identification of the documents as a group will reveal [counsel's] selection process, and thus its mental impressions . . . ." *Sporck v. Peil*, 759 F.2d 312, 315-16 (3d Cir. 1985). "[T]he selection and compilation of documents by counsel . . . in preparation for pretrial discovery falls within the highly protected category of opinion work product." *Id.* at 316. "[E]ven if the individual documents sought are not attorney work product,

the selection process itself represents [counsel's] mental impressions and legal opinions as to how the evidence and the documents relate to the issues and defenses in the litigation." *Smith v. Fla. Power & Light Co.*, 632 So.2d 696, 698 (Fla. App. 1994); *see also Marshall v. D.C. Water & Sewage Auth.*, 218 F.R.D. 4, 6 (D.D.C. 2003) (such requests are designed not to understand the facts but to learn "what documents counsel thought she needed to answer the interrogatories. That necessarily discloses her theory of how to answer them as surely as asking her what information she thought was important to collect to answer the interrogatories. Such insight obviously invades the mental process counsel would use to perform a legal task, and thus cannot permit disclosure."); *Aguinaga v. John Morell & Co.*, 112 F.R.D. 671, 683 (D. Kan. 1986) (discovery about an "attorneys' process of selection and distillation of documents" in order to determine "what documents the attorneys thought were relevant" is improper); *NUFIC of Pittsburg v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993) (quoting *Hickman v. Taylor*, 329 U.S. 493 (1947)); *In re Allen*, 106 F.3d 582 (4th Cir. 1997)). Rather than ask the opposing party to produce documents supporting a given contention, the requester can and must do their own research, undertake their own document review, and reach and argue their own conclusions. *Lewis v. Chica Housing Auth.*, No. 91-C-1478, 1991 WL 222167 (N.D. Ill. Oct. 21, 1991)

In summary, while a party may inquire as to the basis for a claim or contention, Rule 33 cannot be used to force the responding party to parade before the requesting party a narrative of their case, nor require them to identify and assemble all of the documents that they believe may support or refute a particular claim or contention.

As for the request to identify "any person who will testify" on this matter, the answer is the same. The overarching purpose of this complaint is not to challenge the specifics of the

contested bills. Rather, the purpose is to vindicate the Regents' authority. HB 349 plainly intrudes on the constitutional autonomy of the Regents.

Without waiving the foregoing objections, and reiterating that HB 349 is unconstitutional on its face and the resolution of Plaintiffs' claims needs no testimony or exhibits, Plaintiffs will provide the principal facts and evidence supporting the referenced allegation, as follows:

HB 349 purports to be an act "generally revising laws related to freedom of association and freedom of speech on campuses of public post-secondary institutions...." Among other things, this act purports to prohibit "student-on-student discriminatory harassment." But it does the opposite—it actually forbids a university from discipling a student for harassing another student unless "the speech...is unwelcome and so severe, pervasive, and subjectively and objectively offensive that a student is effectively denied equal access to educational opportunities or benefits...." *Id.* § 2(a). This measure invites student harassment as long as it doesn't go too far.

With respect to non-discrimination and harassment, areas that are impacted by the newly-enacted HB 349, the Regents already have a policy in place which provides:

Each campus of the Montana University System shall insure that no employment or educational policy is discriminatory on the basis of race, color, religion, creed, political ideas, sex, gender identity, sexual orientation, age, marital status, physical or mental disability, national origin, or ancestry unless based on reasonable grounds.

Montana Board of Regents Policy 703—Non-discrimination, Montana University System (effective June 76, 1976, revised July 15, 2013). (https://mus.edu/borpol/bor700/703.pdf). That policy then provides for procedures directed at the president or chancellor of each campus. Each unit has implemented this policy. For example, at UM, there is an extensive policy titled

"DISCRIMINATION, HARASSMENT, AND RETALIATION [INTERIM]." *See* Policy 735 (adopted 8/14/2020). (https://www.umt.edu/policies/browse/personnel/discrimination-harassment-and-retaliation) MSU also has such a policy, titled "Discrimination, Harassment, and Retaliation Policy."(http://www.montana.edu/equity/policies/) Both are extensive and detailed, providing for reporting on the responsible officers, prohibited conduct, adjudication, supportive and protective measures, protection of confidentiality, emergency removal, free expression and academic freedom, and prevention of discrimination and discriminatory harassment. For example, MSU's policy on discriminatory harassment provides:

> Discriminatory Harassment is unwanted conduct that is: (a) based upon an individual's race, color, religion, national origin, creed, service in the uniformed services (as defined in state and federal law), veteran status, sex, gender, age, political ideas, marital or family status, pregnancy, physical or mental disability, genetic information, gender identity, gender expression, or sexual orientation; and (b) that has the purpose or effect of unreasonably interfering with a reasonable person's participation in a University Program or Activity.

MSU Discrimination, Harassment, and Retaliation Policy, § X(B)(1). HB 349 clearly undercuts these carefully-drafted and detailed policies of the units and Regents.

In addition, the Associated Students of Montana State University (ASMSU) add the following:

The Associated Students of Montana State University (ASMSU) have held a historic and continuing regard for non-discrimination and inclusion of all students on campus. ASMSU's dedication to inclusion are founded in the Student Bill of Rights in The ASMSU Constitution. The first point reads, "ASMSU shall not discriminate against any person or other entity on the basis of sex, gender identity, gender expression, sexual orientation, pregnancy, race, color,

ethnicity, national origin, citizenship, religion, creed, socioeconomic status, literacy, marital or family status, age, ability (mental, physical, developmental, learning), genetic information, political ideas, military or veteran status, or first generation status in the implementation of any of its policies," (ASMSU Constitution- Student Bill of Rights). The policies mentioned can be extrapolated to mean funding which HB-349 directly infringes.

ASMSU also ensures freedom of expression "Students shall be free to express opinions and support causes by orderly means," (ASMSU Constitution- Student Bill of Rights). ASMSU already has measures in place to ensure protection of the First Amendment while defending and including protected classes. The inclusion of these points on the first two pages of ASMSU's foundational governing document are not accidental. These were intentionally placed at the forefront of The ASMSU Constitution because they are issues the Associated Students of Montana State regard as highly important.

Beyond foundational documents, 8% of all new resolutions passed by the Senate since September 8th, 2016, were founded on Diversity and Inclusion (ASMSU Resolution Summary). Over six years, ASMSU passed only 80 resolutions. These documents are regarded highly by students and faculty alike, and ASMSU is strategic, specific, and conservative when passing resolutions.

The resolutions of the last six years varied in inclusivity topics from supporting the creation of the American Indian Hall (2018-R-16), to modernizing homecoming language to be inclusive to all people (2018-R-10), to promoting the creation of an Africana Studies program (2020-R-06), to encouraging professor's use of open educational resources to increase literature

accessibility to all students (2022-R-01), and most notably in opposition to HB-349 upholding stringent Anti-Discrimination policy (2021-R-05).

The Associated Students of Montana State are elected proportionally by colleges and programs and in At-Large positions to represent the voice of the entire student body. ASMSU upholds these values of Diversity and Inclusion which is reflective of a large portion of the student body's view on these issues. "ASMSU is the voice of the students, dedicated to enhancing the college experience at Montana State University with leadership and employment opportunities, diverse student-oriented programs and services, and responsible fiscal management of student activity fees," (ASMSU Mission Statement). ASMSU holds worked tirelessly to develop this mission statement that encompasses and reflects the values of our campus.

HB-349 stands to not only undermine the constitutional authority of governing institutions of higher education to The Board of Regents but would also reduce the self-governance of ASMSU over the distribution of student activity fees. Not only does ASMSU hold standards, compliance with Constitution and Bylaws, for fee allocation, but must also comply with MSU's student organizational policy which explicitly prohibits denial of membership, voting rights or officer positions on the basis of race, color, religion, national origin, creed, service in the uniformed services (as defined in state and federal law), veteran's status, sex, age, political ideas, marital or family status, pregnancy, physical or mental disability, genetic information, gender identity, gender expression, or sexual orientation (Registered student Organization manual & policies). This legislative overreach removes the ability for ASMSU to withhold funds from student organizations that are non-compliant with MSU student organization policy and

would undermine ASMSU's ability to uphold anti-discrimination practices outlined in the ASMSU constitution (2021-R-05).

HB-349 allows, if not tacitly encourages, strategic flagrant behavior from students groups. ASMSU and MSU as a community has worked on creating a culture of inclusion on campus. While ASMSU strongly upholds with right of speech and assembly to students. We do not guarantee funding for organizations that discriminate against protected classes. HB-349 directly infringes on the Board of Regents constitutionally delegated power and is in direct opposition to the standards of inclusion established by ASMSU.

See:

ASMSU. "2018-R-10 Inclusive Homecoming Language." *Montana State University: Mountains and Minds*, 12 Apr. 2018, https://www.montana.edu/asmsu/2018r10inclusivehomecominglanguage.html.

ASMSU. "2018-R-16-Native American Cultural Center." *Montana State University: Mountains and Minds*, 4 Oct. 2018, https://www.montana.edu/asmsu/2018r16nativeamericanculturalcenter.html.

ASMSU. "2020 R 6 Africana Studies Resolution." *Montana State University: Mountains and Minds*, 27 Feb. 2020, https://www.montana.edu/asmsu/2020r6.html.

ASMSU. "2021-R-05 Uphold Anti-Discrimination Policy." *Montana State University: Mountains and Minds*, Pushya Krishna, https://www.montana.edu/asmsu/2021r05upholdantidiscriminationpolicy.html.

ASMSU. "2022-R-01 Increasing Access to Open Education Resources for MSU Students." *Montana State University: Mountains and Minds*, Ellie Jackson, 10 Feb. 2022, https://www.montana.edu/asmsu/2022r01.html.

ASMU. "2019-R-10 Support for MSU Bookstore's Inclusive Access Pilot Program." *Montana State University: Mountains and Minds*, 11 Apr. 2019, https://www.montana.edu/asmsu/2019r10.html.

Statistics on Resolutions Passed
https://www.montana.edu/asmsu/asmsusenateresolutionssummary.html

Registered student Organization manual & policies. (2018, July). Retrieved February 23, 2021, from https://www.montana.edu/engagement/organizations/policies.html

Historical examples of student groups attempting to discriminate against other students:

Student organizations at Montana State University are funded through an ASMSU student activity fee. Among the currently registered 213 student clubs, 56 have missions associated with identity groups with protected class status. A list of these organizations is provided below.

New student organizations are easy to initiate requiring only 7 enrolled student members and an advisor to register. Policies and procedures for how to register a new student organization can be found here: https://www.montana.edu/catsconnect/registerstudentorganization.html

This policy states that clubs must,

> Agree your organization does not deny membership, voting rights or officer positions on the race, color, religion, national origin, creed, service in the uniformed services (as defined in state and federal law), veteran's status, sex, age, political ideas, marital or family status, pregnancy, physical or mental disability, genetic information, gender identity, gender expression, or sexual orientation. Except an organization may restrict membership based on the provisions of Title IX of the Education Amendments of 1972, such as fraternities and sororities, in regard to gender, for membership criteria.

Student organization are managed by professional staff in the Office of Student Engagement and students work directly with club advisors who ensure compliance. It is common for student organization leaders to be meet with professional staff for advice, guidance, and strategies to accomplish their goals while staying in compliance. Professional staff prevent potential discrimination issues with dialogue and education. Any student complaints of discrimination are reported to the Office of Institutional Equity, whose policy states:

> Montana State University commits to a learning and working environment that emphasizes the dignity and worth of every member of its community and that is free from unlawful discrimination and harassment based upon race, color, religion, national origin, creed, service in the uniformed services (as defined in state and federal law), veteran status, sex, gender, age, political ideas, marital or family status, pregnancy, physical or mental disability, genetic information, gender identity, gender expression, or sexual orientation (taken together, generally, "protected-class harm"). An inclusive environment is necessary for a healthy and productive University community.
>
> Consistent with MSU's commitment, and with all applicable law, the University prohibits unlawful discrimination or harassment, including sexual misconduct prohibited by Title IX of the Education Amendments of 1972, and will take appropriate action to prevent, resolve, and remediate the effects of protected-class harm.
>
> The Discrimination, Harassment, and Retaliation Policy defines and prohibits protected-class misconduct, and the Discrimination Grievance Procedures set forth the University's processes for addressing and resolving such reports. The Policy and Procedures apply to all University programs and activities, including, but not limited to, admissions, athletics, instruction, grading, University housing, and University employment. In addition, the law prohibits retaliation against an individual for opposing any practices prohibited by this Policy, for bringing or responding to a complaint of discrimination or harassment, for assisting someone with such a complaint, for attempting to stop such discrimination or harassment, or for participating in resolution of a complaint of discrimination or harassment.

Elliott Hobaugh is a transgendered student who was discriminated against by a student organization. See https://www.instagram.com/p/CGAwdywAoqN/.

Concerns about what would happen if ASMSU were forced to recognize student groups that did discriminate:

Many new clubs with exclusivity as their mission may be started. It is common for 25 or more new clubs to be initiated each year. Currently, new student organizations must be officially recognized by the university and they must agree to follow the governing policies and practices,

which can be found here:

https://www.montana.edu/engagement/organizations/policies.html#Student%20Org%20Policies%20&%20Responsibilities

ASMSU's protected class policy mirrors federal law, peer institutions policies, and industry national standards organizations like NASPA Student Affairs Administrators in Higher Education: https://naspa.org/about/equity-and-justice

Discriminating against students opens MSU and other Montana campuses to lawsuits from students, parents, and civil rights advocacy organizations. National laws, professional membership guidelines, national club chapters, and accreditation regulations may be violated and penalized with revoked membership status, legal penalties, and loss of certifications. Potential damages from loss of funding eligibility, grant compliance, and donors is possible. Student engagement contributes to MSU's institutional mission by supporting student enrollment, retention, and graduation, which may all be affected by this law.

List of protected class student organizations:

Alpha Gamma Delta	Fraternity and Sorority Life
Alpha Gamma Rho	Fraternity and Sorority Life
Alpha Omicron Pi Women's Fraternity	Fraternity and Sorority Life
Alpha Sigma Phi	Fraternity and Sorority Life
Chi Omega Fraternity	Fraternity and Sorority Life
College Panhellenic Council	Fraternity and Sorority Life
Delta Gamma Fraternity	Fraternity and Sorority Life
Interfraternity Council	Fraternity and Sorority Life

Kappa Sigma Fraternity	Fraternity and Sorority Life
Pi Beta Phi	Fraternity and Sorority Life
Pi Kappa Alpha	Fraternity and Sorority Life
Sigma Alpha	Fraternity and Sorority Life
Sigma Alpha Epsilon	Fraternity and Sorority Life
Sigma Chi	Fraternity and Sorority Life
Sigma Nu Fraternity	Fraternity and Sorority Life
Sigma Phi Epsilon Fraternity	Fraternity and Sorority Life
Cats for Christ	New Organizations
Coats for Cats	New Organizations
Latter-Day Saints Student Association	New Organizations
Reformed University Fellowship	New Organizations
Revive Dance Crew	New Organizations
Student Veterans Club at Montana State University	New Organizations
Women in Business	New Organizations
Young Progressive Federation at Montana State University	New Organizations
African Student Association	Student Orgs
AirCats	Student Orgs
American Indian Council	Student Orgs
Asian Student Interracial Association	Student Orgs
Association for Women in Computing	Student Orgs

Black Student Union	Student Orgs
Chi Alpha Christian Fellowship	Student Orgs
Chinese Culture Club	Student Orgs
College Republicans at Montana State University	Student Orgs
CrossLife	Student Orgs
Cru	Student Orgs
Fuerza Latinx at MSU	Student Orgs
Graduate Women In Science and Engineering	Student Orgs
Indian Student Association	Student Orgs
Lutheran Campus Ministry	Student Orgs
Lutheran Student Fellowship	Student Orgs
Missing and Murdered Indigenous Peoples Student Association	Student Orgs
oSTEM at Montana State University	Student Orgs
Queer Straight Alliance	Student Orgs
Resonate Church	Student Orgs
Resurrection Catholic Campus Ministry	Student Orgs
Society of Hispanic Professional Engineers	Student Orgs
Society of Indigenous Educators	Student Orgs
Society of Women Engineers	Student Orgs
Sri Lankan Student Association at Montana State University	Student Orgs
Students for Choice	Student Orgs

Students For Life At MSU	Student Orgs
Turning Point USA at Montana State University	Student Orgs
Women+ in Physics	Student Orgs
Women's Outdoor Adventure Club: Backcountry Squatters	Student Orgs
Young Americans for Liberty	Has not registered since 2019, but still somewhat active

Because Plaintiffs have brought a facial constitutional challenge and have filed for summary judgment, they anticipate no testimony on this issue and no documents.

REQUEST FOR PRODUCTION NO. 3: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 5.

RESPONSE: Objection: vague, overly broad, unduly burdensome, disproportionate to the needs of the case, not reasonably calculated to lead to the discovery of admissible evidence, and invades attorney work product.

In addition to all of the problems posed by "blockbuster" contention interrogatories (see objections to Interrogatory No. 5, the objections to which are incorporated hereby), contention-based requests productions seeking all documents supporting a given claim or contention are not authorized by the rules, *compare* Rule 34 *with* Rule 33(a)(2), M.R.Civ.P.; *Rutherford v. PaloVerde Health Care Dist.*, No. CV13-1247, 2014 WL 12633523, at *5 (C.D. Cal. Apr. 25, 2014) (there is no obligation on the part of the responding party to organize documents by contention).

Such requests are also objectionable because they are impermissibly vague. Rule 34 requires that the requesting party "describe with reasonable particularity" the materials sought. Contention-based requests are vague and lack reasonable particularity because they "do not set reasonable boundaries" and render it "impossible for [the responding party] to determine which

of the documents in their control [the requesting party] expects them to produce, or to know when they have completed searching for documents in response to the requests." *K'napp v. Adams*, No. 1:06-cv-01701, 2014 WL 950353, at *6 (E.D. Cal. Mar. 11, 2014); *accord Estate of Shelton v. U.S. Postal Serv.*, No. 4:07-cv-00483, 2008 WL 11336473 (S.D. Iowa Aug. 4, 2008) (such requests are more "a trap for the responding party than a source of information for the requesting party."); *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 650 (10th Cir. 2008) (contention RFPs take "little account" of the reasonable particularity rule); *Kidwiler v. Prog. Paloverde Ins. Co.*, 192 F.R.D. 193, 202 (N.D.W.V. 2000); *Lopez v. Chertoff*, No. CV 08-1566-LEW, 2009 WL 1575214 at *2 (E.D. Cal. Jun. 2, 2009); *Devore v. City of Phil.*, No. Civ.A. 00-3598, 2002 WL 32341801 at *2 (E.D. Penn. Nov. 14, 2002); *Gen. Steel Dom. Sales v. Steelwise*, No. 07-cv-01145, 2008 WL 5101341 at *6 (D. Colo. Nov. 26, 2008). Although a request for "all" responsive documents may be appropriate in conjunction with a request for a clearly-defined set of documents, there is no way for Plaintiffs to reliably determine whether they have produced "all" documents which may be responsive because the request is not defined by any reasonable objective boundaries.

Without waiving these objections, see the documents cited in response to Interrogatory No. 5. *See also* Montana Board of Regents Policy 703—Non-Discrimination (https://mus.edu/borpol/bor700/703.pdf);UM Discrimination, Harassment and Retaliation Policy (https://www.umt.edu/policies/browse/personnel/discrimination-harassment-and-retaliation); MSU Discrimination, Harassment, and Retaliation Policy (https://www.montana.edu/equity/policies/).

INTERROGATORY NO. 6: Regarding the allegations in Paragraph 7 of your Complaint that "certain features of SB 319 trammel on the authority of the Regents" and the specific examples provided in Paragraph 7 of your Complaint, please identify all facts which support these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory No. 5, which are incorporated hereby. Plaintiffs additionally object that this request is not reasonably calculated to lead to the discovery of admissible evidence insofar as it relates to Section 21 of Senate Bill 319. Section 21 was ruled unconstitutional in the matter of *Forward Montana, et al. v. State of* Montana, ADV 2021-611 (Mont. 1st Jud. Dist. Ct.). Plaintiffs therefore believe that issue is moot.

Without waiving the foregoing objection, HB 349 is unconstitutional on its face and the resolution of Plaintiffs' claims needs no testimony or exhibits, but Plaintiffs will provide the principal facts and evidence supporting the referenced allegation, as follows. Plaintiffs address both Sections 2 and 21 in this answer in an abundance of caution and for purposes of completeness.

As to the question of whether "certain features of SB 319 trampling on the authority of the Regents," see Plaintiff's answer to Interrogatory No. 21.

Senate Bill 319 harms Regent authority by interfering with the governance of campus groups and campus activities in a number of unique ways. First, students at the University of Montana voting in the Associated Students of the University of Montana elections have time and time again approved an optional $5 fee to support funding the student-run Montana Public Interest Research Group. Most recently, in 2021, students voting in the ASUM election approved the $5 per semester fee with over 80% support. Because fees associated with the

University fall under the responsibility of the Board of Regents, the Regents vote on authorizing the optional fee after students vote to approve the fee. After authorization by the Montana Board of Regents, MontPIRG enters into a contract with ASUM to administer the fee each semester. Section 2 of SB 319 upends that entire system by thwarting the governing authority of the Montana BOR as well as the authority of the student government.

By prohibiting students at the University of Montana from engaging in ballot issue work through MontPIRG, SB 319 also directly limits student political participation and speech. Students vote to place a fee on themselves to support a student-led organization and the students leading the organization, from time-to-time, vote to engage in important issues that may be on the ballot. In order to get involved in supporting or opposing a ballot measure, MontPIRG must register with the Montana Commissioner of Political Practices. Under Section 2 of SB 319, by registering as a political committee to engage in that work, MontPIRG would lose its optional $5 fee which already had BOR approval as well as approval from students voting in the ASUM election. SB 319 hampers students at MontPIRG's ability to engage in important ballot issue work through the threat of losing student approved funding—all contrary to the prior system that subjected students and student organizations to governance by the Regents not the Legislature.

Additionally, SB 319 includes provisions to further limit speech on campus by prohibiting MontPIRG, when registered as a political committee, from engaging in voter registration, signature gathering, or turnout efforts in specific areas on campus. Students deserve to be part of the political process and limiting the way that groups and organizations attempt to reach them and engage them in that process only harms their ability to get and stay engaged as citizens.

Again, determining where and how groups can engage with students falls under the authority of the Board of Regents and SB 319 subverts that.

Because Plaintiffs have brought a facial constitutional challenge and have filed for summary judgment, they anticipate no testimony on this issue and no documents.

REQUEST FOR PRODUCTION NO. 4: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 6.

RESPONSE: See objections Interrogatory No. 5 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, *see* UM Policy No. 250 -Free Speech (https://www.umt.edu/policies/browse/governance-organization/free-speech); MSU Freedom of Expression Policy, (https://www.montana.edu/policy/freedom_expression/); UM-Western Policy 600.4, Political Campaign Solicitation (https://www.umwestern.edu/section/600-4-political-campaign-solicitation/) and Policy No. 600.5, Student Political Groups and Campaigning (https://www.umwestern.edu/section/600-5-student-political-groups-campaigning/).

INTERROGATORY NO. 7: Regarding the allegations in Paragraph 22 that Plaintiff Ashley Phelan "fears what will happen on the MSU campus if guns are allowed, as provided in HB 102," please identify all facts which support these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory No. 5, which are incorporated hereby. In addition, this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of *Board of Regents of Higher*

Education v. State of Montana, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7. Without waiving these objections, Plaintiff Ashley Phelan provides the principal facts and evidence supporting the referenced contention, as follows:

As a third-year student at MSU, I would be very uncomfortable with allowing guns to be carried on campus. Personally, I did not grow up around guns and certainly don't feel that they are necessary in an educational setting. If this were to proceed, I would feel less comfortable and safe going to campus in person. I feel that a lot more problems may arise as an outcome of this decision.

Because Plaintiffs have brought a facial constitutional challenge and have filed for summary judgment, they anticipate no testimony on this issue and no documents.

REQUEST FOR PRODUCTION NO. 5: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 7.

RESPONSE: *See* objections to Interrogatory No. 5 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, Plaintiff answers as follows: None.

INTERROGATORY NO. 8: Regarding the allegations in Paragraph 23 that Plaintiff Joseph Knappenberger "fears what will happen on the MSU campus if guns are allowed, as provided in HB 102," please identify all facts which support these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory No. 5, which are incorporated hereby. In

addition, this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of *Board of Regents of Higher Education v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7.

Without waiving these objections, Plaintiff Joseph Knappenberger provides the principal facts and evidence supporting the referenced contention, as follows:

Gun violence is increasingly prevalent across the country, specifically in academic contexts, and I fear that limiting the ability of campus police and authorities to address potential incidents before they occur by disallowing the removal of armed individuals from campus is only going to increase the risk of gun violence on campus.

On top of concerns of intentional violence, there is also the real issue of accidental injury as a result of firearms, and the disturbance of the campus learning environment. There will be a large number of students who will be more apprehensive about being on campus as a result of carried firearms, which will be disruptive to learning.

Because Plaintiffs have brought a facial constitutional challenge and have filed for summary judgment, they anticipate no testimony on this issue and no documents.

REQUEST FOR PRODUCTION NO. 6: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 8.

RESPONSE: *See* objections to Interrogatory No. 5 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, Plaintiff answers as follows: None.

INTERROGATORY NO. 9: Regarding the allegations in Paragraph 24 that Plaintiff Nicole Bondurant "fears what will happen on the MSU campus if guns are allowed, as provided in HB 102," please identify all facts which support these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory No. 5, which are incorporated hereby. In addition, this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of ***Board of Regents of Higher Education v. State of Montana***, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7.

Without waiving these objection, Plaintiffs answer as follows:

During the months of April and May of 2022, Counsel has repeatedly tried to contact Nicole Bondurant for her input in answering this interrogatory. Just recently, through a third party, Plaintiffs and their counsel learned that Nicole Bondurant is experiencing health issues and wishes not to participate in this case further. Accordingly, Counsel will move to drop Ms. Bondurant from this suit.

REQUEST FOR PRODUCTION NO. 7: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 9.

RESPONSE: None.

INTERROGATORY NO. 10: Regarding the allegations of Paragraph 37 of your Complaint that "All of the Plaintiffs and Plaintiff organizations are concretely and adversely affected" by HB 349, HB 112, HB 102, and SB 319, please identify all facts supporting these

allegations for each Plaintiff and Plaintiff organization, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory No. 5, which are incorporated hereby. In addition, this request is not reasonably calculated to lead to the discovery of admissible evidence with respect to HB 102 since it has been deemed unconstitutional in the matter of *Board of Regents of Higher Education v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7. The same is true of SB 319, § 21 which was found unconstitutional in the matter of *Forward Montana, et al. v. State of* Montana, ADV 2021-611 (Mont. 1st Jud. Dist. Ct.). Plaintiffs further object because this question and many that follow are completely repetitive, asking, and re-asking, essentially the same questions in slightly different ways. The purpose of civil discovery is to avoid unfair surprise and facilitate a fair trial of disputed factual issues. However, it is not appropriate to pose written discovery solely for the purpose of harassment and to force the opposing party into make-work exercises. Accordingly, Plaintiffs object to this Interrogatory and others below on the grounds that they are not calculated in good faith to elicit information that may be useful at trial. Instead, they are calculated to vex, annoy and oppress.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced allegation as follows:

Please see Plaintiffs' answers to Interrogatory Nos. 5– 8, 12–18, 21, and 23–25.

REQUEST FOR PRODUCTION NO. 8: Please produce documents in your possession, custody, or control identified in your Answer to Interrogatory No. 10.

RESPONSE: *See* objections to Interrogatory No. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiffs' answers to Interrogatory Nos. 6–8, 12–18, 21, 23–25 and documents reference therein.

INTERROGATORY NO. 11: Regarding the allegations of paragraph 37 of your Complaint that the Plaintiff organizations each "have an interest in the subject matter of this litigation, which is germane to their organizational purposes," please identify all facts supporting these allegations for each Plaintiff organization, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory No. 5 and 10, which are incorporated hereby.

Without waiving these objections, please see Plaintiffs' answers to Interrogatory Nos. 5–8, 12–18, 21, and 23–25.

REQUEST FOR PRODUCTION NO. 9: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 11.

RESPONSE: *See* objections Interrogatory Nos. 5, 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see the documents identified and referenced in response to Interrogatory Nos. 5–8, 11–18, 21, and 23–25.

INTERROGATORY NO. 12: Regarding the allegations of Paragraph 37 of your Complaint that "each of the Plaintiffs stands to suffer "actual and prospective injuries to their interest in campus safety, freedom of speech, and non-discrimination," please identify all facts

supporting these allegations for each Plaintiff, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory Nos. 5 and 10, which are incorporated hereby.

Without waiving these objections, Plaintiffs provides the principal facts and evidence supporting the referenced contention, as follows:

Please see Plaintiffs' answers to Interrogatory Nos. 5–8, 13–18, 21, and 23– 25.

Plaintiff Steve Barrett additionally states:

I am a graduate of MSU and taught there as an adjunct in the early 1980's. I served seven years on the Montana Board of Regents, one year as vice chair and two years as chair. My term ended in 2012. I currently serve on the MSU Honors Scholars Advisory Board, as chair of the MSU Hilleman Scholars program, as vice chair of Montana State University Innovation Campus Board (MSUIC) and am a Board member of the Max S. Baucus Institute Advisory board, which operates out of the Zander Blewett III Law School at the University of Montana.

As a result of these experiences and positions I spend a fair amount of time on university grounds and have a long and continuing interest in the operations of the Montana University System (MUS). Based on my experience as a Regent HB349, HB102, HB112 and SB 319 (collectively the Bills) raise a high likelihood of actual and prospective injuries to the interests of campus safety, freedom of speech, and non-discrimination. I am personally apprehensive about the apparent open invitation to harass and discriminate under HB349 and about the risk of injury and death presented by HB102, the presence of guns on campus, their individual safety and the safety of the students, and erosion of the learning environment. I am also concerned about the

negative effect on enrollment due to concerns of prospective students and their parents over student safety on the campuses.

One only needs look at the childish actions of the Montana legislature in these areas to see the potential for harm. Multiply their actions by almost 40,000 students and the potential for unintended consequences is apparent. HB349 was specifically designed to allow individual organizations to discriminate in their membership while utilizing university property. Property paid for by all the taxpayers of our state.

MUS and its various institutions have policies developed over time governing the handling of guns and other weapons on MUS grounds. There has been no challenge to the propriety of these regulations. Rather, HB102 attempts to substitute a one size fits all policy in place of the carefully crafted policies now in place. There have been numerous incidents, including deaths, in the MUS over the years. HB102 would increase the possibility of more such tragic events by replacing policies that have never been legally challenged. Another childish act of overreach by the legislature.

SB319 in another incredible overreach into management of MUS by the legislature. For the legislature to try and control something as minor as whether a student fee is opt in or out tramples on the MUS ability to manage the MUS.

Plaintiffs Bradford Watson and Joy Honea provide the following response:

- Of particular concern is the fact that the timeframe between the decision to end one's life and a suicide attempt is frequently only a few minutes. One study found that nearly three quarters of patients deliberated for only 10 minutes before attempting suicide and another found that 70 percent of participants who attempted suicide considered it for less than

three hours and most for less than 20 minutes. Paashaus et al (2021) conclude that "This finding indicates that rapid enactment does not seem to be the exception, but the norm" (1432). Quick and easy access to firearms can turn a fleeting thought of suicide into a rapid death. Maintaining a system of safe and controlled storage of firearms away from student residences is a simple way to reduce campus suicide.

References:

1. Deisenhammer, E. A., Ing, C. M., Strauss, R., Kemmler, G., Hinterhuber, H., & Weiss, E. M. (2009). The duration of the suicidal process: How much time is left for intervention between consideration and accomplishment of a suicide attempt? *Journal of Clinical Psychiatry*, **70**, 19–24. https://doi.org/10.4088/JCP.07m03904

2. Paashaus, L., Forkmann, T., Glaesmer, H., Juckel, G., Rath, D., Schönfelder, A., & Teismann, T. (2021). From decision to action: Suicidal history and time between decision to die and actual suicide attempt. *Clinical Psychology & Psychotherapy*, 28(6), 1427– 1434. https://doi.org/10.1002/cpp.2580

House Bill 102 creates a clear safety issue for everyone on the campuses of the Montana University System. The best practices for safety related to firearms is that they are secured to protect lives. Statistically, a person's safety goes up when on a campus in this country. In campuses that do allow for firearms, they have seen an increase in misfires, accidental shootings and other dangerous mishaps. Dixie State, Idaho State and the University of Colorado have all had accidental discharging of firearms on campus resulting in injury. Research shows that the presence of guns decreases safety and increases risk to people.[1]

The presence of firearms on campus will also impact the metal health of the university community. The Journal of American College Health found in a study of 15 colleges that 79% of students would not feel safe if firearms were allowed on campus. A safe environment is critical to conducive learning environment to support student success. Furthermore, there is a clear link

between access to firearms and the rate of suicide in our state. 62% of suicides in Montana are a result of a firearm.[2] The prevention of suicide relies on both support for mental health and reducing the access to a lethal means of committing the act.[3] Montana State University has greatly invested in support of mental for the entire University community and has a critical role in addressing the alarmingly high suicide rate in Montana. Increasing access to firearms, especially for students who are struggling with the many challenges they face during their time at the University, will adversely impact those that may be experiencing a mental health crisis as they will have easier access to a lethal means..

[1] Daniel W. Webster et al., "Firearms on College Campuses: Research Evidence and Policy Implications," Johns Hopkins Bloomberg School of Public Health, October 15, 2016, https://bit.ly/2WmmWNm.

[2] Daphne Herling, "Youth Suicide in Montana," Montana Business Quarterly, July 1, 2019, https://www.montanabusinessquarterly.com/youth-suicide-in-montana/'

[3] "Means Matter," Harvard T.H. Chan School of Public Health, (n.d.) https://www.hsph.harvard.edu/means-matter/

REQUEST FOR PRODUCTION NO. 10: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 12.

RESPONSE: *See* objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiffs' responses to Interrogatory Nos. 5-8, 12-18, 21, 23-25 and documents referenced therein.

INTERROGATORY NO. 13: Regarding the allegations of Paragraph 37 of your Complaint that each of the Plaintiffs is "personally apprehensive about the risk of injury and death presented by HB 102," please identify all facts supporting these allegations for each

Plaintiff, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory Nos. 5 and 10, which are incorporated hereby. In addition, this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of *Board of Regents of Higher Education v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention, as follows:

Please see the answers to Interrogatory Nos. 7–8, 12, 14–15, 21 and 24, which are incorporated hereby.

Plaintiff Annie Belcourt additionally states:

- My younger sister (Elena Kate Belcourt) was murdered in 2001 in Billings, Montana by individuals who were provided access to handguns. The individuals responsible for her death were both convicted of numerous felony crimes and currently serving multiple life sentences in the Montana Department of Corrections (Case law is publicly available for all cases including the federal case regarding illegal provision of hand guns made by the convicted former prison guard who provided the weapons and other aid to the individual who shot and killed my sister. The murder of my sister was devastating to our entire family. The impact of her murder by gun violence has been profound across many domains for me and my entire family. I have been diagnosed with PTSD as a result and I

have reasonable fears about risk of injury and death due to legislation allowing guns on campus. As an American Indian Professor, I have received harassment and threats from individuals in both personal and professional settings. Increasing access to firearms to individuals on our campuses will not create a safer environment and will create unreasonable suffering for gun violence survivors and family members.

- I am also a survivor of domestic violence. My former partner had access to firearms and was a severe alcoholic. He threatened to end my life on multiple occasions and I have had to work actively to minimize the lethal threats he has made to my life. He was convicted of partner family member assault in 2021 and has violated court orders of protection and legal orders of protection for myself and my child multiple times. Creating more access to firearms on our campus will create clear risk for injury and death for myself and for other survivors of domestic violence.
- As a clinical psychologist, I can also attest to the very real risk of severe violence if firearms are allowed to be carried more frequently and openly on our campuses in Montana and the nation. Gun violence is driven by many factors including mental illness and substance abuse. The literature on early adulthood provides evidence that it can be a time of increased risk of both mental illness and substance abuse. There is documented evidence on Montana campuses that substance abuse is highly prevalent in the state and among young adults. We know that each of these factors can correspond to both increased risk of violence and suicide.
- Suicide is in fact an epidemic problem in Montana and gun use is a commonly used method for completion. Montana consistently ranks highest in the nation for suicide

completions. Suicidal ideation and risk is highest among Native Americans. A recent tragic incident occurred in Missoula where a Native American male killed himself with a gun. As a mom and an aunt to a young man who died by suicide this is a very important public health crisis. Increasing access to and reducing restrictions to firearms would increase risk of death and injury on our campuses in Montana.

- Hate crimes are also on the rise in Montana and as a Native American I have experienced racial discrimination and hate-based discrimination. Increasing access to firearms would increase risk of hate and race-based violence in our state.

Plaintiff Frankie Wilmer additionally states:

As a professor at MSU for over 30 years and as Department head for 6 years (and I will continue to teach as an adjunct in the 2022-23 academic year), I have at times had to confront students whose academic work raises concerns about academic dishonesty. My course syllabi typically include a restatement of the university's policy on plagiarism and reference to the Conduct Guidelines and Grievance Procedures for Students" sections 340, 400, 410, 420, and 430 found on the MSU website. Sanctions described in sections 433 and 434 of the Guidelines range from oral and written reprimands to removal of the student from the course, major, college, or program, with the most severe sanction being withdrawal of a degree or academic credit previous bestowed. The process and circumstances surrounding concerns raised about academic dishonesty are both consequential and often, emotionally unsettling. Although there are other circumstances - such as the discussion of controversial topics from multiple perspectives in the classroom - that can create an emotionally unsettling situation, accusations and sanctions arising from work turned in by a student suspected of academic dishonesty is the most volatile

circumstance. These issues raise the same concerns associated with the prohibition of firearms in Montana courtrooms.

I would like to add, as an educator who has worked with hundreds of young people each year for 30 years, and who served on our university's mental health task force, my concern for increasing students' risk of violent behavior or suffering from the violent behavior of others is well-supported by research. The National Institute for Mental Health lists suicide and homicide as the second and third leading causes of death among both the 15-24 and 25-34 year-old age groups with "unintentional injury" being the first in all age groups under 45 (for 45 and over the leading cause is "malignant neoplasms" with suicide and homicide dropping dramatically in contrast to the younger age groups).

In 1990 two MSU students were killed by another student with a firearm in Langford Hall, an MSU dormitory. Document attached. That suicides are much more likely to result in death when firearms are available is also well-supported by research. Reuters report on the research attached.

Plaintiff Steve Barrett additionally states:

While fulfilling my obligations to the various boards on which I serve, I spend a fair amount of time on MUS property. The unfettered right for anyone and everyone to carry weapons on campus creates an increased likelihood of harm to me and others. Such harm has occurred in the past when access to weapons was limited, and HB102 increases that possibility.

REQUEST FOR PRODUCTION NO. 11: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 13.

RESPONSE: *See* objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiffs' answers to Interrogatory Nos. 7–8, 12–15, 21, 24 and documents referenced therein.

INTERROGATORY NO. 14: Regarding the allegations of Paragraph 37 of your Complaint that HB 102 presents a risk of injury and death, risk to the Plaintiffs' individual safety and the safety of students, and erosion of the learning environment, please identify all facts supporting these allegations for each Plaintiff, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: Please see objections to Interrogatory Nos. 5 and 10, which are incorporated hereby. Plaintiffs additionally object that this request is entirely redundant and repetitive. Moreover, this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of *Board of Regents of Higher Education v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7. Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention, as follows:

Please see Plaintiffs' answers to Interrogatory Nos. 7–8, 12–13, 15, 21, and 24, which are incorporated hereby.

Plaintiff Annie Belcourt additionally states:

I described the risk of injury and death in the answer to Interrogatory No. 13. The erosion of the learning environment is a serious factor for students, staff, and faculty at Montana's

campuses. Learning is a dynamic process that requires full engagement by the entire campus including students, faculty, and staff. When fears for safety arise it is simply more difficult to attend to informational material or to engage with others. Increasing firearm access and reducing restrictions will create very realistic fears for safety to everyone on campus. This will also impact our law enforcement's abilities to maintain a safe and orderly campus. We have active shooter drills on our campus to help assist faculty and staff response to future campus shootings. It is hard to imagine how faculty, staff, and students can plan to prevent future fatalities associated with campus shootings when legislation is aimed at reducing firearm restrictions and increasing access to firearms for everyone on campus.

Many of our students are veteran or active-duty military members some of them may have been diagnosed with Post Traumatic Stress Disorder or other psychiatric conditions due to their military service. Women and men who have served in the military also have higher rates of military sexual trauma and this can translate to increased risk for psychiatric illness. Having a learning environment that is providing increased access to firearms to fellow students, staff, or faculty will increase triggers for a variety of mental illness symptoms. The clinical evidence is clear that reducing environmental triggers for symptom management is good for mental health.

This is all also true for more vulnerable communities including Native Americans, survivors of violence, and individuals with various disabilities. Gun violence is increasing in many communities and has long-term devastating consequences for all communities and individuals who have coped with such losses.

In addition, Plaintiff Frankie Wilmer provides the following:

I described the risk of injury and death in the answer to Interrogatory No. 13. The erosion

of the learning environment is something I am concerned about, and my colleague and present Department Head and full professor David Parker has also expressed concerns about to me for the same reasons. Both Professor Parker and I believe strongly that holding all students equally accountable is a critical component of maintaining an effective learning environment. This means, for example, if we have a policy of not accepting late papers and recording a missed assignment with a grade of "0" then we must apply to policy to all students. Professor Parker shared an experience with me in which he personally felt threatened when he refused to accept a late paper and the student's response was openly angry and hostile, and in Professor Parker's words, "he started yelling at me and said he was going to call his congressman and complain about me." The student in this case returned to Bozeman too late, according to the student, to turn in the paper on time because he had gone hunting, bagged an elk, and could not field dress it before dark the previous evening. Professor Parker declined the student's request for an excused absence. "He was a big guy," said Professor Parker, "and he got very angry. Things might have gone different if guns had been on campus." Incidentally, Professor Parker recently told me that "guns on campus" is one of the reasons he has decided to look for another academic position in another state. Professor Parker is willing to testify if needed.

Plaintiff Steve Barrett additionally states:

MUS and the various institutions have policies developed over time governing the handling of guns and other weapons on MUS grounds. There has been no challenge to the propriety of these regulations. Rather, HB102 attempts to substitute a one size fits all policy in place of the carefully crafted policies now in place. There have been numerous incidents, including deaths, in the MUS over the years. HB102 would increase the possibility of more such

tragic events by replacing policies that have never been legally challenged. Another childish act of overreach by the legislature.

While fulfilling my obligations to the various boards on which I serve, I spend a fair amount of time on MUS property. The unfettered right for anyone and everyone to carry weapons on campus creates an increased likelihood of harm to me and others. Such harm has occurred in the past when access to weapons was limited, and HB102 increases that possibility.

REQUEST FOR PRODUCTION NO. 12: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 14.

RESPONSE: See objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby. Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 7–8, 12–15, 21, 24 and documents identified therein.

INTERROGATORY NO. 15: Regarding the allegations of Paragraph 37 of your Complaint that all the Plaintiffs are concerned about the negative effect on enrollment, please identify all facts supporting these allegations for each Plaintiff, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory Nos. 5 and 10, which are incorporated hereby. Insofar as the referenced allegation related to safety concerns based on HB 102, Plaintiffs additionally object that this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of *Board of Regents of Higher Education v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

Plaintiff Annie Belcourt states:

As a parent to three, I can attest that I would be very concerned for my children's safety at a campus that had reduced restrictions to firearms and allowed for greater access to firearms for students, staff, and faculty. It will make recruitment and retention of future students more difficult if students, staff, and faculty members of our campus are armed with firearms. Please consult with the statistics on the declining enrollment patterns on our MUS campuses over the last decade, it is a trend for many campuses nationwide to experience serious enrollment challenges and it will cause students to feel unsafe on our campuses.

In addition, Plaintiff Frankie Wilmer states:

I served as Department Head twice. Meeting with prospective students and their parents is one of the things Department Heads do at MSU to promote enrollment. Although I am no longer Department Head, when our current Department Head is unavailable to meet with prospective students, I now often take his place. I extoll the advantages of attending a relatively small university with research-active faculty in the classroom, among other features that I think positively distinguish MSU from other institutions students might be considering. During the period when HB 102 was under consideration by the legislature and was quite prominent in the news, I met with four prospective students and their parents - between March 18, 2022, and May 28, 2022. I do recall at least one of them asking about the "guns on campus" issue and expressing concern about attending MSU. I do not recall which of the four students/parents raised this concern and I did not want our conversation to stray from my sharing what I think are the

benefits of attending MSU so I don't recall saying much about it other than the bill would likely be challenged. I said that both because I thought it would be, and I wanted to assuage the parents' concerns. The students' names were Lauren Fox from Colorado, Jack Fanning from Washington, Raghad Kameel from Washington, and Dalina Martinez from Nevada.

In addition, Plaintiff Steve Barrett states:

Parents have a natural concern for the safety of their children. As a parent I would be, and am, concerned about the consequences of HB 102 as it relates to the safety of the campuses and the choices parents must make when they decide on a school for their children. Out of state students are financially important to the MUS, creating a campus version of the wild west could and will deter some students and parents from making the choice to attend.

REQUEST FOR PRODUCTION NO. 13: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 15.

RESPONSE: *See* objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby. Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 7–8, 12–15, 21, 24 and documents identified therein.

INTERROGATORY NO. 16: Regarding the allegations of Paragraph 37 of your Complaint that all the Plaintiffs are concerned about the "apparent open invitation to harass and discriminate under HB 349," please identify all facts supporting these allegations for each Plaintiff, every person will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory Nos. 5 and 10, which are incorporated hereby. Plaintiffs additionally object that this request is entirely redundant and repetitive.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

Please see Plaintiff's answers to Interrogatory Nos. 5, 12, 18 and 21, which are incorporated hereby.

Plaintiff Steve Barrett additionally states:

The very heart of the legislative debate on HB349 was the stated desire of certain campus organizations to be able to restrict their membership. HB349 was designed intentionally to allow discrimination by groups favored by the legislative majority.

REQUEST FOR PRODUCTION NO. 14: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 16.

RESPONSE: *See* objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 5, 12, 16, 18, 21 and documents referenced therein.

INTERROGATORY NO. 17: Regarding the allegations of Paragraph 38 of your Complaint that Plaintiff MontPIRG and the other Plaintiffs are adversely affected by SB 319 because it undercuts MontPIRG's organizational funding, voter registration, and other political activities, please identify all facts supporting these allegations for Plaintiff MontPIRG and all other Plaintiffs, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory No. 5 and 10, which are incorporated hereby. Plaintiffs additionally object that this request is not reasonably calculated to lead to the discovery

of admissible evidence insofar as it relates to Section 21 of SB 319, which was ruled unconstitutional in the matter of *Forward Montana, et al. v. State of* Montana, ADV 2021-611 (Mont. 1st Jud. Dist. Ct.). Plaintiffs therefore believe that issue is moot.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

Please see Plaintiff's answers to Interrogatory Nos. 6, 12, 21 and 25 which are incorporated hereby.

Plaintiff Steve Barrett additionally states:

SB319 in another incredible overreach into management of MUS by the legislature. For the legislature to try and control something as minor as whether a student fee is opt in or opt out tramples on the MUS ability to manage the MUS. SB319 also substitutes the legislature into the role student governments should have in managing student groups on campuses.

REQUEST FOR PRODUCTION NO. 15: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 17.

RESPONSE: *See* objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 6, 12, 17, 21, 25 and documents referenced therein.

INTERROGATORY NO. 18: Regarding the allegations of Paragraph 39 of your Complaint that each of the individual and organizational Plaintiffs suffer threatened injury in fact; each has a personal stake in the outcome of the present controversy; and each alleges injury that is unique to them, please identify all facts supporting these allegations for each individual and

organizational Plaintiff, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections to Interrogatory Nos. 5 and 10, which are incorporated hereby. Plaintiffs additionally object that this request is entirely redundant and repetitive.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

See Plaintiff's answers to Interrogatory Nos. 5-6, 12-17, 19, 21, and 23- 25 which are incorporated hereby.

Plaintiff Steve Barrett additionally states:

I am personally apprehensive about the apparent open invitation to harass and discriminate under HB349 and about the risk of injury and death presented by HB102, the presence of guns on campus, their individual safety and the safety of the students, and erosion of the learning environment. I am also concerned about the negative effect on enrollment due to concerns of prospective students and their parents over student safety on the campuses.

As a member of MSU boards fostering academics and scholarship I am personally concerned that the Bills will have a negative and dulling effect on students' effective involvement in their academic activities.

REQUEST FOR PRODUCTION NO. 16: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 18.

RESPONSE: See objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 5–8, 12–19, 21, 23–25 and documents referenced therein.

INTERROGATORY NO. 19: Regarding the allegations of Paragraph 40 of your Complaint that HB 349, HB 112, HB 102, and SB 319 threaten an imminent disruption to the operation of campuses in the MUS, please identify all facts supporting these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: See objections to Interrogatory No. 5 and 10, which are incorporated hereby. Insofar as the referenced allegation related to safety concerns based on HB 102, Plaintiffs additionally object that this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of *Board of Regents of Higher Education v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7. The same is true of SB 319, § 21 was held unconstitutional in the matter of *Forward Montana, et al. v. State of* Montana, ADV 2021-611 (Mont. 1st Jud. Dist. Ct.). Plaintiffs additionally object that this request is entirely redundant and repetitive.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

See Plaintiffs' answers to Interrogatory No. 5–8, 12–18, 21, and 23–25.

Plaintiff Annie Belcourt additionally states:

HB 112 would prohibit my child and my sister's child from ever participating in sports on our campuses because they are both transgender children. This legal discrimination is horrific for

families of transgender children and for our transgender students, faculty, and staff. As a clinical psychologist and as a parent I can assure you that formal legal actions to discriminate against vulnerable members of our society for participation in publicly funded sporting activities creates imminent harm and disruption to our campuses in the Montana University System.

- As a research scientist, I can attest that there is vast evidence (legal and clinical) that discriminating against an individual or community on the basis of biological sex is harmful. This is true for many domains including an individual's psychiatric health, physical health, and safety. Transgender people are human beings who experience discrimination and increased risk of violence and hate-crimes. Any legislation that supports discrimination based on a difference between biological sex and gender identification on behalf of participation in games and sports is inherently unethical, immoral, and a violation of individual's right to live in this country free from systematic discrimination and potential for both physical and emotional harm.
- Montana has one of the highest suicide rates in the nation. It is well-documented that LGBTQ+ communities and individuals have high rates of suicide risk. Providing legislation that establishes precedence for the legalization of systematic discrimination is establishing legal systems that promote systematic discrimination that can and will increase severe risk of harm to LGBTQ+ communities and therefore campuses of the Montana University System.

REQUEST FOR PRODUCTION NO. 17: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 19.

RESPONSE: *See* objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 5–8, 12–19, 21, 23–25.and documents referenced therein.

INTERROGATORY NO. 20: Regarding the allegations of Paragraph 40 of your Complaint that MUS campuses risk proliferation of guns during summer sessions and throughout the academic year if HB 102 is not overturned, please identify all facts supporting these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: See objections and answer to Interrogatory No. 5 and 10, which are incorporated hereby. Plaintiffs additionally object that this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of *Board of Regents of Higher Education v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

Please see Plaintiffs' answers to Interrogatory Nos. 7, 8, 12–15, 18 and 24.

REQUEST FOR PRODUCTION NO. 18: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 20.

RESPONSE: See objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 7–8, 12–15, 18, 20, 24 and documents referenced therein.

INTERROGATORY NO. 21: Regarding the allegations of Paragraph 44 of your Complaint that HB 349, HB 112, HB 102, and SB 319 arrogate to the legislature powers that are reserved to the Montana Board of Regents, please identify all facts supporting these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: See objections and answer to Interrogatory No. 5 and 10, which are incorporated hereby. Plaintiffs additionally object that this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of *Board of Regents of Higher Education v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7. The same is true of SB 319, § 21 was held unconstitutional in the matter of *Forward Montana, et al. v. State of* Montana, ADV 2021-611 (Mont. 1st Jud. Dist. Ct.). Plaintiffs further object and reiterate that this request is not reasonably calculated to lead to the discovery of admissible evidence because this is a facial constitutional challenge such that the referenced allegation is legal in nature and does not turn on any facts or evidence. Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

See Plaintiffs' answers to Interrogatory Nos. 5–8, 12–19, and 23–25 which demonstrate that each of the referenced bills concerns internal university governance and affairs including oversight of student groups and their activities, their membership and funding, use of campus

facilities and resources, recruitment and retention of personnel, teacher-student dynamics and classroom activities. See also Plaintiff's Motion for Summary Judgment and Brief in Support (Doc. 49–50).

Plaintiff Dr. Larry Pettitt additionally states:

The Montana Constitution, in Article X, section 9 (2) (a), provides: "The government and control of the Montana university system 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 Montana university system and shall supervise and coordinate other public educational institutions assigned by law."

This Article was litigated early on after the Constitution took effect in July, 1973. In *Board of Regents v. Judge*, 168 Mont. 433,543 P.2d 1323 (1975), the Board of Regents, on the urging of the Commissioner of Higher Education, asked the Montana Supreme Court to accept original jurisdiction in the regents' challenge of the constitutionality of language in the appropriations bill, passed by the legislature and signed by Governor Judge, that made the appropriations to the university system contingent on the regents certifying compliance with a list of provisions including one that limited salary increases for the university presidents and the commissioner of higher education. At issue also was a separate measure that required approval by the Legislative Finance Committee of any budget amendments. The Regents challenged that as it applied to the university system.

The Court ruled that "The Regents' challenge to budget requirement of HB 271 succeeds."

In defending the legislature's right to enact line-item appropriations bills, the Court added, "The legislature cannot do indirectly through means of line item appropriations and conditions what is impermissible for it to do directly." The Court resolved, "Inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education. An important priority is the hiring and keeping competent personnel. The limitation set forth in Sec 12(6), HB 271, specifically denies the Regents the power to function effectively by setting its own personnel policies and determining its priorities. The condition is, therefore, unconstitutional."

For several decades since that ruling, decided on December 12, 1975, the Regents, Legislature and executive branch have generally been able to function efficiently while acknowledging and following this early clarification of regental powers under the state constitution. This was the case until the 2021 Legislature, whose actions are at issue here.

The provisions of HB349, HB112, HB102 and SB319 are not consistent with Article X, Sec 9 of the Montana Constitution as written and intended by the framers, or as interpreted by the state supreme court in Regents v. Judge.

HB349 – intrudes on regental management and control under cover of a questionable reading and application of First Amendment rights affecting students. Regulation and supervision of student organizations and use of facilities fall within the scope of management and control.

HB112 – is a legislative (i.e. political) intrusion on the management of intercollegiate athletics.

HB102 – again imposes a political value on university management and control, and it ignores regental policy already in place. Its effect would be to imply legislative authority to amend managerial policies of the Board of Regents.

SB319 – is a direct partisan attack on university policy respecting student participation in the democratic process of elections through usage of campus space and university facilities, and is another tragic example of a legislative majority's trying to promote its partisan aims by interfering with carefully crafted, nonpartisan university policies and substituting its own preferences. It, like the other Acts cited, constitutes a theft of regental constitutional powers to manage and control the Montana university system.

REQUEST FOR PRODUCTION NO. 19: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 21.

RESPONSE: See objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 5–8, 12–19, 21, 23, 25 and documents referenced therein.

INTERROGATORY NO. 22: Please specifically identify how HB 349 caused or contributed to the harms, damages, or injuries alleged by each Plaintiff, including all facts supporting these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: See objections and answer to Interrogatory No. 5 and 10, which are incorporated hereby. Plaintiffs additionally object that this request is entirely redundant and repetitive.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

Please see Plaintiffs' answer to Interrogatory No. 5, 12, 16, 18, and 21 which are incorporated hereby.

REQUEST FOR PRODUCTION NO. 20: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 22.

RESPONSE: See objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, please see Plaintiff's answers to Interrogatory No. 5, 12, 16, 18, 21–22 and documents referenced therein.

INTERROGATORY NO. 23: Please specifically identify how HB 112 caused or contributed to the harms, damages, or injuries alleged by each Plaintiff, including all facts supporting these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: See objections and answer to Interrogatory No. 5 and 10, which are incorporated hereby. Plaintiffs additionally object that this request is entirely redundant and repetitive.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

Please see Plaintiffs' answers to Interrogatory No. 12, 19, 21, and 23, which are incorporated hereby.

Plaintiff Steve Barrett additionally states:

I have significant involvement in MUS affairs and a long-term interest in the success of the system. Athletics is the front porch of most universities and is often the way people and potential students first become aware of the institution. All universities and colleges engaged intercollegiate athletics are governed by various national boards. This legislation potentially puts the MUS institutions at odds with the various governing bodies for intercollegiate athletics, which may lead to a diminishment of the athletic programs. This would be harmful to the institutions and those who support them.

REQUEST FOR PRODUCTION NO. 21: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 23.

RESPONSE: See objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby. Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 12, 19, 21, 23 and documents referenced therein. See also Montana BOR Policy 1202.1—Program Guidelines (https://mus.edu/borpol/bor1200/1202-1.pdf);NCAA Transgender Participation Policy (https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx); NAIA Transgender and Non-Binary Student Athlete Competition Policy (https://www.naia.org/legislative/2021-22/files/NAIA-2021-Official-Handbook.pdf?page=164).

INTERROGATORY NO. 24: Please specifically identify how HB 102 caused or contributed to the harms, damages, or injuries alleged by each Plaintiff, including all facts supporting these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: *See* objections and answer to Interrogatory No. 5 and 10, which are incorporated hereby. Plaintiffs also object that this request is entirely redundant and repetitive. Plaintiffs additionally object that this request is not reasonably calculated to lead to the discovery of admissible evidence since HB 102 has been deemed unconstitutional in the matter of *Board of Regents of Higher Education v. State of Montana*, No. BDV-2021-598 (Mont. 1st Jud. Dist. Ct.) and the court has found that this issue is moot for purposes of this case, *see* Order Denying State's Motion to Dismiss, Doc. 34, pp. 6–7.

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

Please see Plaintiffs' answers to Interrogatory No. 7–8, 12–15, 18 and 21.

Plaintiff Steve Barrett additionally states:

MUS and the various institutions have policies developed over time governing the handling of guns and other weapons on MUS grounds. There has been no challenge to the propriety of these regulations. Rather, HB102 attempts to substitute a one size fits all policy in place of the carefully crafted policies now in place. There have been numerous incidents, including deaths, in the MUS over the years. HB102 would increase the possibility of more such tragic events by replacing policies that have never been legally challenged. Another childish act of overreach by the legislature.

While fulfilling my obligations to the various boards on which I serve, I spend a fair amount of time on MUS property. The unfettered right for anyone and everyone to carry weapons on campus creates an increased likelihood of harm to me and others. Such harm has occurred in the past when access to weapons was limited, and HB102 increases that possibility.

REQUEST FOR PRODUCTION NO. 22: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 24.

RESPONSE: *See* objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby. Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 7-8, 12–15, 18, 21, 24 and documents referenced therein.

INTERROGATORY NO. 25: Please specifically identify how SB 319 caused or contributed to the harms, damages, or injuries alleged by each Plaintiff, including all facts supporting these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

ANSWER: See objections and answer to Interrogatory No. 5 and 10, which are incorporated hereby. Plaintiffs also object that this request is entirely redundant and repetitive. Plaintiffs additionally object that this request is not reasonably calculated to lead to the discovery of admissible evidence insofar as it relates to SB 319, § 21 which was ruled unconstitutional in the matter of *Forward Montana, et al. v. State of* Montana, ADV 2021-611 (Mont. 1st Jud. Dist. Ct.).

Without waiving these objections, Plaintiffs provide the principal facts and evidence supporting the referenced contention as follows:

Please see Plaintiffs' answers to Interrogatories 6, 12, 17 and 21, which are incorporated hereby.

Plaintiff Steve Barrett additionally states:

SB319 in another incredible overreach into management of MUS by the legislature. For the legislature to try and control something as minor as whether a student fee is opt in or opt out tramples on the MUS ability to manage the MUS. SB319 also substitutes the legislature into the

role student governments should have in managing student groups on campuses.

Engaging in the democratic process is part of the civics education we hope all students get. Those involved in student government manage their own systems and create the applicable regulations. To have the student process superseded by a legislative directive clearly designed with political objectives in mind is a detriment to the education of the students, and thus a detriment to the system whose success we personally work for.

REQUEST FOR PRODUCTION NO. 23: Please produce all documents identified in your Answer to Interrogatory No. 25.

RESPONSE: *See* objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby.

Without waiving these objections, see Plaintiff's answers to Interrogatory Nos. 6, 12, 17, 21, 25 and documents identified therein. *See also* UM Policy No. 250 –Free Speech (https://www.umt.edu/policies/browse/governance-organization/free-speech); MSU Freedom of Expression Policy, (https://www.montana.edu/policy/freedom_expression/); UM-Western Policy 600.4, Political Campaign Solicitation (https://www.umwestern.edu/section/600-4-political-campaign-solicitation/) and Policy No. 600.5, Student Political Groups and Campaigning (https://www.umwestern.edu/section/600-5-student-political-groups-campaigning/).

INTERROGATORY NO. 26: Please identify the specific acts of omissions of each Defendant that have caused or contributed to the harms, damages, or injuries alleged by each Plaintiff, including all facts supporting these allegations, every person who will testify in this matter regarding these allegations, and all documents supporting these allegations.

/

ANSWER: See objections and answer to Interrogatory No. 5 and 10, which are incorporated hereby. Plaintiff additionally objects that this request is entirely redundant and repetitive. Without waiving these objections, Plaintiffs answer as follows: Plaintiffs make no distinction between the acts of "each" defendant. They all have violated the Constitution through implementation of the challenged bills.

REQUEST FOR PRODUCTION NO. 24: Please produce all documents identified in your Answer to Interrogatory No. 26.

RESPONSE: See objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby. Without waiving these objections, please see Plaintiff's answers to Interrogatory Nos. 5–8, 12–19, 21, 23–26 and documents identified therein.

REQUEST FOR PRODUCTION NO. 25: Please produce all exhibits you intend to introduce into evidence at the trial of this matter.

RESPONSE: Plaintiffs have asserted a facial constitutional challenge and have filed for summary judgment. Plaintiffs do not believe there are any triable issues and do not presently intend to offer any exhibits. To the extent the Court concludes there are triable issues, Plaintiffs may offer some or all of the documents identified in response to these discovery requests and will otherwise supplement as may be appropriate and necessary.

REQUEST FOR PRODUCTION NO. 26: To the extent not already produced, please produce all documents, memoranda, correspondence or other tangible evidence in your possession, custody, or control which support your Answers to the above Interrogatories or the allegations of your Complaint.

RESPONSE: *See* objections to Interrogatory Nos. 5 and 10 and Request for Production No. 3, which are incorporated hereby. This request is exceedingly vague, overbroad and redundant.

REQUEST FOR PRODUCTION NO. 27: Please produce medical, counseling, therapy, or mental health records for all treatment of Plaintiffs related to the harm, damages, or injuries alleged by you.

RESPONSE: Objection: this request improperly intrudes upon the privacy and confidentiality interests of all of the Plaintiffs. Further, it is not reasonably calculated to lead to admissible evidence. Plaintiffs do not intend to introduce any medical, counseling, therapy or mental health records of any of the Plaintiffs.

REQUEST FOR PRODUCTION NO. 28: Please produce all documents, including permits, communications with school officials, or written permission, that show Plaintiffs are allowed to use MUS facilities for directing, coordinating, managing, or conducting any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts from January 1, 2016 through the present.

RESPONSE: See UM Policy No. 250 –Free Speech (https://www.umt.edu/policies/browse/governance-organization/free-speech); MSU Freedom of Expression Policy, (https://www.montana.edu/policy/freedom_expression/); UM-Western Policy 600.4, Political Campaign Solicitation (https://www.umwestern.edu/section/600-4-political-campaign-solicitation/) and Policy No. 600.5, Student Political Groups and Campaigning (https://www.umwestern.edu/section/600-5-student-political-groups-campaigning/).

REQUEST FOR PRODUCTION NO. 30: Please produce a privilege log for all documents withheld or redacted on the basis of any claimed privilege.

RESPONSE: Not applicable.

INTERROGATORY NO. 27: Please identify all lay witnesses you intend to call to testify in any capacity in this matter.

ANSWER: Plaintiffs have asserted a facial constitutional challenge and have filed for summary judgment. Plaintiffs do not believe there are any triable issues and do not presently intend to offer any witnesses. To the extent the Court concludes there are triable issues, Plaintiffs may testify and will otherwise supplement as may be appropriate and necessary.

REQUEST FOR ADMISSION NO. 1: Please admit that no Plaintiff is the Board of Regents or a current member of the Board of Regents.

ANSWER: Admit.

REQUEST FOR ADMISSION NO. 2: Please admit that no Plaintiff can exercise the power granted to the Board of Regents in Article IX, Section 8 of the Montana Constitution.

ANSWER: Admit.

REQUEST FOR ADMISSION NO. 3: Please admit that none of the funds from the alleged conditional appropriation are funds belonging to Plaintiffs.

ANSWER: Admit.

REQUEST FOR ADMISSION NO. 4: Please admit that none of the Plaintiffs are on a university athletic team.

ANSWER: Admit.

REQUEST FOR ADMISSION NO. 5: Please admit that none of the Plaintiffs are a university or an athletic director as identified in Paragraph 6 of Plaintiffs' Complaint.

ANSWER: Admit.

REQUEST FOR ADMISSION NO. 6: Please admit that the National Collegiate Athletic Association is a non-profit organization without any authority granted under the Montana Constitution.

ANSWER: Objection, compound, garbled, incapable of a clear denial or admission.

REQUEST FOR ADMISSION NO. 7: Please admit that no Plaintiff is a competing college athlete in interscholastic, intercollegiate, intramural, or club athletic teams or sports in the MUS who is currently being prevented from competing.

ANSWER: Objection, compound, garbled, incapable of a clear denial or admission.

REQUEST FOR ADMISSION NO. 8: Please admit that Plaintiff MontPIRG is the only Plaintiff required to register as a political committee under SB 319.

ANSWER: Deny.

REQUEST FOR ADMISSION NO. 9: Please admit that current University of Montana policy prohibits Plaintiffs from directing, coordinating, managing, or conducting any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts in residence halls.

ANSWER: Objection, compound. As stated, deny.

REQUEST FOR ADMISSION NO. 10: Please admit that current University of Montana-Western policy prohibits Plaintiffs from directing, coordinating, managing, or

conducting any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts in residence halls.

ANSWER: Objection, compound. As stated, deny.

REQUEST FOR ADMISSION NO. 11: Please admit that current Montana State University policy prohibits Plaintiffs from directing, coordinating, managing, or conducting any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts in residence halls.

ANSWER: Objection, compound. As stated, deny.

INTERROGATORY NO. 28: If your Answer to any Request for Admission propounded on you by Defendants is anything other than an unqualified "admit," please state the factual basis for your Answer, identify every witness who will testify in this matter in support of your Answer, and identify all documents supporting your Answer.

ANSWER: Objection, this is a compound interrogatory with numerous multiple discrete subparts. Because the total number of interrogatories including each discrete subpart is less than the 50 allowed, Plaintiffs answer without waiving this objection as follows:

- Regarding RFA No. 6:

Plaintiffs did not provide an answer but objected to the form of the request.

- Regarding RFA No. 7:

Plaintiffs did not provide an answer but objected to the form of the request.

- Regarding RFA No. 8:

SB 319 does not require any organization to register as a political committee. That is a separate requirement that is a predicate condition for SB 319 to apply.

- Regarding RFA No. 9:

The factual basis for Plaintiffs' denial of this Request for Admission is that it does not accurately characterize the referenced policy. UM policy bans political campaigning in residence halls but not voter registration or the other identified activities. *See* UM Housing Student Handbook, p. 22, ¶ 15 https://www.umt.edu/housing/rh/policies/residence-halls-handbook-2021-2022.pdf. ; *see also* UM Policy No. 250 – Free Speech (https://www.umt.edu/policies/browse/governance-organization/free-speech)

- Regarding RFA No. 10:

The factual basis for Plaintiffs' denial of this Request for Admission is that it does not accurately characterize the referenced policy. UM-Western policy bans political campaigning in residence halls but not voter registration or the other identified activities. *See* UM-Western Policy 600.4, Political Campaign Solicitation (https://www.umwestern.edu/section/600-4-political-campaign-solicitation/) and Policy No. 600.5, Student Political Groups and Campaigning (https://www.umwestern.edu/section/600-5-student-political-groups-campaigning/).

- Regarding RFA No. 11:

The factual basis for Plaintiffs' denial of this Request for Admission is that it does not accurately characterize what the various policies are. For example, MSU's policy that applies to this is the University's Freedom of Expression Policy (https://www.montana.edu/policy/freedom_expression/), and the applicable language is as follows:

Political activity on campus:

- In Family & Graduate Housing, political campaign activities may be conducted door-to-door.

- In all other areas of campus, no political campaign activities are allowed inside any MSU buildings, facilities or stadiums, or temporary facilities such as tents, except where space is reserved in accordance with facility use policies. (emphasis added)

The facility use policies allow reservation of space within the residence hall common areas, but only in connection with a University affiliated group.

Space Reservations: A Space Reservation Request must be made via the University Student Housing Main Office in order to reserve an available space in the hall for sponsored event.

- Sponsors must be recognized as a University-affiliated group.

- Additional rules & regulations for events and reservations may be provided during the reservation request process

REQUEST FOR PRODUCTION NO. 31: Please produce all documents in your possession, custody, or control identified in your Answer to Interrogatory No. 28.

RESPONSE: The referenced policies are linked above.

INTERROGATORY NO. 29: Please state whether Plaintiff Ashley Phelan is Montana resident for purposes of eligibility for in-state tuition at MSU.

ANSWER: Plaintiffs object to this interrogatory on the basis that it unduly intrudes into the personal information of the student and because it is not relevant and not reasonably calculated to lead to admissible evidence. This interrogatory is unduly intrusive and not reasonably calculated to lead to relevant or admissible evidence. In a "meet and confer" letter, Plaintiffs' Counsel raised objection to this interrogatory. In a letter of April 29, 2022, defense counsel Emily Jones responded:

> As you note, the three interrogatories which seek information about Plaintiff students' respective residencies. It is not our intent to be intrusive, however this information is probative of a couple issues in this case. First, Plaintiff students challenge SB 319, which Plaintiffs claim "restrict[s] the ability of student organizations to register students to vote in student dormitories." Compl. ¶1(d). The information sought by Interrogatories 29, 30, and 31 probative of whether the Plaintiff students may have been registered to vote in a state other than Montana and to verify whether their voter registration in Montana is valid. As you know, students who are not considered residents for tuition purposes may still be eligible to register to vote in Montana. Such registration is valid is important to issue such a standing in harm.

This is specious. Whether or not a particular Plaintiff is registered to vote in Montana is not relevant to whether that student may or any not register students to vote in student dormitories. In any event, the Interrogatory is directed to "eligibility for in-state tuition of MSU", not whether the student is registered to vote in Montana. Thus, Ms. Jones is off point.

Rather than waste more time arguing about this, however, for what it's worth, Ashley Phelan is not a Montana resident for purposes of eligibility of in-state tuition at MSU.

REQUEST FOR PRODUCTION NO. 32: Please produce all documents in your possession, custody, or control supporting your Answer to Interrogatory No. 29.

RESPONSE: See objection to interrogatory No. 29. This request for production is doubly objectionable because it essentially asked for all documents supporting the proposition that Ms. Phelan is not a Montana resident for purposes of Montana in-state tuition. This request is unduly burdensome and disproportionate to the needs of this case and totally irrelevant.

INTERROGATORY NO. 30: Please state whether Plaintiff Joseph Knappenberger is a Montana resident for purposes of eligibility for in-state tuition at MSU.

ANSWER: Plaintiffs object to this interrogatory on the basis that it unduly intrudes into the personal information of the student and because it is not relevant and not reasonably calculated to lead to admissible evidence. See objection to Interrogatory No. 29, which is

incorporated hereby. Again, this is not worth spending more time fighting about. Joseph Knappenberger is a Montana resident for purposes of eligibility of in-state tuition at MSU.

REQUEST FOR PRODUCTION NO. 33: Please produce all documents in your possession, custody, or control supporting your Answer to Interrogatory No. 30.

RESPONSE: See objection to Request for Production No. 30, which is incorporated hereby.

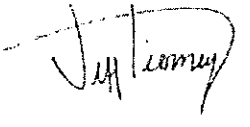
INTERROGATORY NO. 31: Please state whether Plaintiff Nicole Bondurant is a Montana resident for purposes of eligibility for in-state tuition at MSU.

ANSWER: See answer to Interrogatory No. 9.

REQUEST FOR PRODUCTION NO. 34: Please produce all documents in your possession, custody, or control supporting your Answer to Interrogatory No. 31.

RESPONSE: Not applicable.

DATED this 6th day of June, 2022.



James H. Goetz
Jeffrey J. Tierney
GOETZ, GEDDES AND GARDNER, P.C.

Raphael Graybill
GRAYBILL LAW FIRM, P.C.

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following counsel of record, by the means designated below, this 6th day of June, 2022.

■ U.S. Mail ☐ Federal Express ☐ Hand-Delivery ☐ Via fax: ■ E-mail: david.dewhirst@montana.gov kathleen.smithgall@montana.gov	Austin Knudsen, Montana Attorney General David M.S. Dewhirst, Solicitor General Kathleen L. Smithgall, Assistant Solicitor General PO Box 201401 Helena, MT 59620-1401
☐ U.S. Mail ☐ Federal Express ☐ Hand-Delivery ☐ Via fax: ■ E-mail: emily@joneslawmt.com	Emily Jones Special Assistant Attorney General Jones Law Firm, PLLC 115 N. Broadway, Suite 410 Billings, MT 59101

Jeffrey J. Tierney

Exhibit B

DA 21-0605

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 128

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

Petitioner and Appellee,

v.

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

Respondent and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDV-2021-598
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Austin Knudsen, Montana Attorney General, Kristin Hansen, Lieutenant General, David M.S. Dewhirst, Solicitor General, Kathleen L. Smithgall, Assistant Solicitor General, Helena, Montana

For Appellee:

Martha Sheehy, Sheehy Law Firm, Billings, Montana

Ali Bovingdon, MUS Chief Legal Counsel, Helena, Montana

Kyle A. Gray, Brianne C. McClafferty, Emily J. Cross, Holland & Hart LLP, Billings, Montana

For Amici Curiae:

Palmer A. Hoovestal, Hoovestal Law Firm, PLLC, Helena, Montana
(for Western Montana Fish & Game Association, Inc.)

Logan P. Olson, O'Toole Law Firm, Plentywood, Montana
(for Daniels County)

Quentin M. Rhoades, Rhoades & Erickson PLLC, Missoula, Montana
(for Montana Shooting Sports Association)

Alexandria C. Kincaid, Attorney at Law, Emmett, Idaho
Donald E.J. Kilmer, Jr., Attorney at Law, Caldwell, Idaho
(for Second Amendment Foundation, Idaho Second Amendment Alliance, and Madison Society Foundation, Inc.)

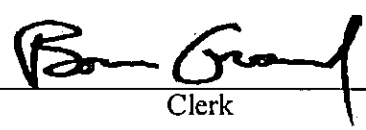
Greg Overstreet, Overstreet Law Group, Stevensville, Montana
(for Rep. Seth Berglee and 81 Legislators)

James H Goetz, Jeffrey J. Tierney, Goetz, Geddes & Gardner, P.C., Bozeman, Montana
Raph Graybill, Graybill Law Firm, P.C., Great Falls, Montana
(for Students, Faculty & University Employees)

Submitted on Briefs: May 25, 2022

Decided: June 29, 2022

Filed:



Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 The State of Montana appeals from the December 13, 2021, Judgment and Permanent Injunction issued by the First Judicial District Court, Lewis and Clark County. We restate the issue on appeal as follows:

> *Whether the Board of Regents of Higher Education possesses the exclusive authority to regulate firearms on college campuses.*

¶2 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Since at least 2012, the Board of Regents of Higher Education (Board) has limited the use of and access to firearms on Montana University System (MUS) property through Board Policy 1006. That policy provides that the only individuals who may carry firearms on MUS campuses are "those persons who are acting in the capacity of police or security department officers" and have passed the requisite training or "those persons who are employees of a contracted private security company" and registered to carry firearms under Montana law.

¶4 In 2021, the Legislature enacted HB 102, which generally revises gun laws with respect to the open and concealed carry of firearms. Section 3 of HB 102 consists of several legislative findings relating to the Board and MUS and justifies the necessity of HB 102. Section 4 allows concealed carry "anywhere in the state" except for specific locations set forth by the Legislature. The Legislature did not extend an exception to the campuses and locations of the MUS. In Section 8 of HB 102, the Legislature amended § 45-3-111, MCA, regarding open carry, and deleted the prior MUS exemption, which did "not limit the

authority of [the Board] to regulate the carrying of weapons" on MUS campuses. These sections of HB 102 effectively eliminate Board Policy 1006 and extend both open and concealed carry of firearms to MUS campuses and locations.

¶5 In Section 5, HB 102 prohibits the Board "from enforcing or coercing compliance" with any rules diminishing or restricting the right to possess or access firearms, "notwithstanding any authority of the [Board] under Article X, section 9(2)(a), of the Montana constitution." Section 6 further prohibits the Board, with a few exceptions, from "regulat[ing], restrict[ing], or plac[ing] an undue burden on the possession, transportation, or storage of firearms on or within [MUS] property" by persons eligible to possess firearms under Montana or federal law and who meet minimum safety and training requirements. Section 7 creates a cause of action "against any governmental entity" for "[a]ny person that suffers deprivation of rights enumerated under" HB 102. Finally, the Legislature conditioned $1,000,000 in the MUS budget to implement the provisions of HB 102 upon the Board's waiver of its right to challenge HB 102 in court. The Governor signed HB 102 into law on February 18, 2021. All sections of HB 102, except Section 6, became effective upon its passage and approval. Section 6 became effective on June 1, 2021.

¶6 The Board filed a Petition for Declaratory Relief on May 27, 2021. The Board sought a declaration that HB 102 was unconstitutional as applied to the Board, the MUS, and the campuses of the MUS. The Board additionally sought injunctive relief precluding the application of HB 102's provisions to the Board, the MUS, and its campuses. The District Court issued a temporary restraining order that same day. After holding a show

cause hearing, the District Court converted the temporary restraining order to a preliminary injunction on June 7, 2021.

¶7 The State filed a motion for summary judgment on September 15, 2021, arguing that the Board did not have exclusive authority to regulate firearms on campuses. The Board filed a cross-motion for summary judgment on October 18, 2021, responding that Montana's Constitution vested full authority in the Board to regulate MUS campuses. The District Court held a hearing on the dueling motions on November 30, 2021, and issued its Order that same day.

¶8 The District Court concluded Sections 3 through 8 of HB 102 violated the Board's constitutional authority and thus were unconstitutional as applied to the Board. The District Court denied the State's motion for summary judgment, granted the Board's cross-motion for summary judgment, and permanently enjoined enforcement of Sections 3 through 8 of HB 102 against the Board and on MUS campuses. Judgment was entered on December 13, 2021. The State appeals.

STANDARD OF REVIEW

¶9 We review the grant of summary judgment de novo, applying the same M. R. Civ. P. 56 criteria used by the district court. *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704. Summary judgment is appropriate when the moving party demonstrates the absence of any genuine issues of material fact and stands entitled to judgment as a matter of law. *Albert*, ¶ 15. When there are cross-motions for summary judgment, a district court must evaluate each party's motion on its own merits. *Kilby Butte*

Colony, Inc. v. State Farm Mut. Auto. Ins. Co., 2017 MT 246, ¶ 7, 389 Mont. 48, 403 P.3d 664. "On cross-motions for summary judgment, where the district court is not called to resolve factual disputes and only draw conclusions of law, we review the district court's conclusions of law to determine whether they are correct." *Kilby Butte Colony*, ¶ 7.

¶10 Statutes enjoy a presumption of constitutionality, and the party challenging a statute's constitutionality bears the burden of proving it unconstitutional beyond a reasonable doubt. *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469. An as-applied challenge alleges that a particular application of a statute is unconstitutional and thus depends on the facts of a particular case. *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 25, 391 Mont. 422, 419 P.3d 685.

DISCUSSION

¶11 The intent of the Framers controls our interpretation of a constitutional provision. *Butte-Silver Bow Local Gov't v. State*, 235 Mont. 398, 403, 768 P.2d 327, 330 (1989). We must discern the Framers' intent from the plain meaning of the language used and may resort to extrinsic aids only if the express language is vague or ambiguous. *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. Even in the context of clear and unambiguous language, however, we determine constitutional intent not only from the plain language, but also by considering the circumstances under which the Constitution was drafted, the nature of the subject matter the Framers faced, and the objective they sought to achieve. *Nelson*, ¶ 14. We must also consider that Montana's Constitution is a

prohibition upon legislative power, rather than a grant of power. *Board of Regents v. Judge*, 168 Mont. 433, 444, 543 P.2d 1323, 1330 (1975) (citations omitted).

¶12 Under the 1889 Montana Constitution, the Legislature possessed absolute authority over the Board, which was vested with "general control and supervision of the State University . . . [with] powers and duties [as] prescribed by law." Mont. Const. of 1889, art. XI, § 11. The 1972 Constitution removed the language subjecting the Board's powers and duties to legislative control and instead vested the Board with the "full power, responsibility, and authority to supervise, coordinate, manage and control the [MUS] and . . . supervise and coordinate other public educational institutions assigned by law." Mont. Const. art. X, § 9(2)(a). By the plain language of Mont. Const. art. X, § 9, the Board retains full independence over the MUS. However, the Board remains subject to the legislative powers to appropriate and audit, legislatively determined terms of office, and the oversight of additional educational institutions as prescribed by law. *See* Mont. Const. art. X, § 9(2)(b) (stating Board members are "appointed by the governor, and confirmed by the senate, to overlapping terms, as provided by law"); Mont. Const. art. X, § 9(2)(d) ("The funds and appropriations under the control of the [Board] are subject to the same audit provisions as are all other state funds."). Legislative oversight likewise remained the case for the constitutionally created Board of Public Education. Mont. Const. art. X, § 9(3) (creating the Board of Public Education "to exercise general supervision over the public school system" and dictating that "[o]ther duties of the board shall be provided by law.").

¶13 The 1972 Constitutional Convention's debate over Mont. Const. art. X, § 9, further helps determine the Framers' intent regarding the Board's constitutional authority. The debate reveals the Framers intended to place the MUS outside the reach of political changes of fortune and instead in the hands of a Board which remained directly responsible and accountable to Montanans.[1] Indeed, the Framers recognized the importance of independent and unfettered academic freedom:

> [A] more subtle kind of coercion has made its appearance, and it is of the sort which is likely to become an even greater threat to the integrity of higher education in the future. This is the growing power of the centralized, bureaucratic state. Without overtly intending to curtail freedoms, the modern state has absorbed an increasing amount of power and control in the name of efficiency.

Montana Constitutional Convention, Committee Proposals, February 22, 1972, Vol. II, p. 737. The contemporary understanding at the time of the Constitution's ratification was "that the convention intended that the [Board] should be a quasi-independent state department subject only to indirect legislative control through appropriation, audit, confirmation of gubernatorial appointments and assignment of other educational

---

[1] *See* Montana Constitutional Convention, Verbatim Transcript, March 11, 1972, Vol. VI, p. 2057:

> [I]f a board is created for higher education and given the responsibility for education but not the authority to carry out such responsibility, how can they be held accountable to the people? If the real authority for carrying out the policies of higher education is dispersed among the bureaucratic political frameworks of other agencies, who then is accountable to the public? A healthy post-secondary educational system must have freedom from political changes of fortune, while still maintaining its responsibility and accountability to the state.

institutions for their supervision." Hugh V. Schaefer, *The Legal Status of the Montana University System under the New Montana Constitution*, 35 Mont. L. Rev. 189, 198 (1974).

¶14 Our jurisprudence has, to some extent, refined the boundaries of the Board's constitutional independence. Shortly after the 1972 Constitution's adoption, the Board and Legislature clashed over their respective constitutional authorities as related to conditional appropriations. In *Judge*, the Legislature set several conditions and restrictions on MUS funding. *Judge*, 168 Mont. at 437-41, 543 P.2d at 1326-29. We rejected the Board's contention that it was effectively a fourth branch of government and thus not subject to any legislative power. *Judge*, 168 Mont. at 442-43, 543 P.2d at 1329. We noted that the Board was not mentioned "in either Article III, Section 1, which creates the three branches of government, nor in Article V, which limits the powers of the legislature." *Judge*, 168 Mont. at 451, 543 P.2d at 1333. However, we also noted that "the legislature is not mentioned in Article X, Section 9(2), which entrusts the government and control of the university system to the [Board]." *Judge*, 168 Mont. at 451, 543 P.2d at 1333. We framed a restriction on salary increases for MUS presidents as "whether this condition is a direction of academic policy or administration by the legislature" and looked to the impact of the Legislature's decision "on the management and control exercised by the Regents." *Judge*, 168 Mont. at 453-54, 543 P.2d at 1334-35. We rejected the condition restricting salary increases because it "could ultimately affect academic, administrative and financial matters of substantial importance to the [MUS,]" and noted that it "specifically den[ied] the Regents the power to function effectively by setting its own personnel policies and

determining its own priorities." *Judge*, 168 Mont. at 454, 543 P.2d at 1335.[2] We deemed that "[i]nherent in the constitutional provision granting [the Board] their power is the realization that the Board of Regents is the competent body for determining priorities in higher education." *Judge*, 168 Mont. at 454, 543 P.2d at 1335. *Judge*, thus, prescribes case-by-case consideration of the impact of legislative actions upon the Board's constitutional authority.[3]

¶15 In *Duck Inn v. Montana State University-Northern*, we addressed a statute allowing the Board to lease MUS facilities for purposes of revenue production. *Duck Inn*, 285 Mont. 519, 525, 949 P.2d 1179, 1183 (1997). The issue on appeal was not whether the power to do so fell within the Board's authority, but rather whether the statute constituted an unconstitutional delegation of legislative authority because it left leasing decisions to the Board's discretion. *Duck Inn*, 285 Mont. at 525, 949 P.2d at 1182 ("The Duck Inn . . .

---

[2] *Judge* echoed the Framers' debate over whether the Board's activities would cover three general areas: academic, administrative, and financial matters as they affected the MUS. *See* Montana Constitutional Convention, Committee Proposals, February 22, 1972, Vol. II, p. 735 (original committee proposal language providing the Board "shall govern and control the academic, financial, and administrative affairs" of the MUS.). This language was subsequently deleted to "avoid certain types of objections. . . . [and] achieve a Board of Regents that has the essential powers to carry on the work of the University System." Montana Constitutional Convention, Verbatim Transcript, March 13, 1972, Vol. VI, p. 2116.

[3] Relying on *Judge*, Montana's Attorney General issued an opinion in 1984 regarding the legislative appropriation of excess bond revenue raised by the Board. 40 Op. Att'y Gen. Mont. No. 67. The Attorney General concluded that, where legislative action would effectively eliminate the Board's statutory and constitutional authority over matters concerning the MUS, the Legislature could not act. 40 Op. Att'y Gen. Mont. No. 67 at 266-67. Attorney General opinions are binding unless overruled by a state district court or the Montana Supreme Court. Section 2-15-501(7), MCA.

argu[es] that § 20-25-302, MCA (1993), constitutes an unconstitutional delegation of legislative power because it fails to prescribe a policy, standard or rule for implementing the powers delegated to an administrative agency."). Recognizing that the Board has "authority over the [MUS] which is independent of that delegated by the legislature" and adopting United States Supreme Court precedent, we concluded the delegation was permissible. *Duck Inn*, 285 Mont. at 526, 949 P.2d at 1183.

¶16 The State reads *Duck Inn* broadly, arguing our holding there supports its position that the Legislature may enact laws concerning MUS property despite the Board's inherent constitutional authority.[4] *Duck Inn*, however, does not support the State's position. The statute at issue in *Duck Inn*, § 20-25-302, MCA, predated the 1972 Constitution and thus arose under the 1889 Constitution, wherein the Board's duties were "prescribed and regulated by law." *See* Mont. Const. of 1889, art. XI, § 11; § 75-8503(5), RCM (1947). The delegation in *Duck Inn*, thus, did not infringe upon the Board's inherent constitutional authority. Rather, the delegation worked in tandem with the Board's authority, which the Court relied on to place less stringent limitations on the preexisting legislative delegation at issue. *See Duck Inn*, 285 Mont. at 526, 949 P.2d at 1183. *Duck Inn*, thus, did not address

[4] The State further points to several laws applicable on MUS campuses as evidence that the Legislature may regulate the MUS. The State's reliance on these laws presupposes conflict between the Board and the Legislature and attempts to misdirect from the issue at hand—whether the Legislature may *infringe* upon the Board's constitutional authority, not whether the Legislature may regulate MUS as a general matter.

whether the Board possessed *sole* constitutional authority to make decisions regarding its properties.

¶17 Implied in the Board's broad powers "is the power to do all things necessary and proper to the exercise of its general powers." *Sheehy v. Comm'r of Political Practices for Mont.*, 2020 MT 37, ¶ 29, 399 Mont. 26, 458 P.3d 309; *see also* § 20-25-301, MCA. Indeed, 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. *Sheehy*, our most recent case concerning the Board, addressed the applicability of the Montana Code of Ethics to the Board and whether a Board member's actions in support of an MUS mill levy violated the Ethics Code. *Sheehy*, ¶ 3. We concluded that the Commissioner of Political Practices lacked jurisdiction to enforce the Ethics Code against members of the Board because the Commissioner's jurisdiction extended to state officers, legislators, or state employees, not members of independent rulemaking bodies such as the Board. *Sheehy*, ¶¶ 23-25. We also concluded that public support of the mill levy fell within a Board member's constitutional and statutory duties and thus did not violate the Ethics Code. *Sheehy*, ¶ 29. However, we were not asked to resolve the issue of whether the Legislature possessed the power to apply the Ethics Code to the Board. Moreover, the Ethics Code is a set of neutral statewide laws prohibiting conflicts of interest by officers and employees of state government, not a set of laws specifically singling out the Board or its constitutional powers and duties. *Sheehy*,

¶¶ 16-18. Unlike *Sheehy*, HB 102 is aimed directly at the Board and squarely implicates the Board's constitutional authority. The State's reliance on *Sheehy* is unavailing. [5]

¶18 The State asserts the Board's constitutional authority is limited to academic, financial, and administrative matters and that HB 102 revoked any previously delegated power to regulate firearms. The Board counters that its constitutionally granted authority necessarily includes the power to regulate firearms on MUS campuses and that the Legislature, through HB 102, infringed upon this authority.

¶19 We agree that HB 102 unconstitutionally infringes upon the Board's responsibility to oversee the MUS. The Board and the Legislature derive their respective power from the same authority—the Montana Constitution. The Constitution defines the powers of each and imposes limitations upon those powers. Absent language to the contrary, a direct power conferred upon one necessarily excludes the existence of such power in the other. This fundamental premise lies at the very root of the constitutional system of government. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77, 2 L. Ed. 60, 73 (1803) ("The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation."). The Board, and MUS, are not mentioned in Mont. Const. art. V, which imparts the legislative power, and corresponding limitations, upon the

[5] The State's attempts to frame HB 102 as a generally applicable safety law are likewise unavailing, as the amicus brief of 81 state legislators who supported HB 102 states that the Legislature specifically aimed to counter Board Policy 1006.

Legislature. However, nor is the Legislature mentioned in Mont. Const. art. X, § 9(2), which entrusts the Board with the full governance and control of the MUS. No reasonable rule of construction permits either body to encroach upon or exercise the powers constitutionally conferred upon the other. Application of HB 102 to MUS, and the Board, would give the Legislature control and supervision over MUS campuses and render the Board ministerial officers with no true authority other than to effectuate the Legislature's will. Such application directly contradicts the constitutionally granted powers of the Board and undermines the Board's ability to govern the MUS, while expanding the Legislature's power in contravention of the express constitutional language of Mont. Const. art. X, § 9(2). Montana's Constitution serves as a limitation on the Legislature, not a grant of power. *See Judge*, 168 Mont. at 444, 543 P.2d at 1330. Exercise of the legislative power to undermine the constitutional powers of the Board cannot stand.

¶20 The State relies upon *Judge* to argue the Board's authority remains limited to academic, administrative, and financial matters concerning the MUS. The Board's constitutional authority includes those matters. However, contrary to the State's argument, Board Policy 1006 relates directly to the academic and administrative operations of the MUS. Applying, as it does, solely to individuals while they are on MUS campuses or properties, Board Policy 1006 reflects the Board's judgment on an issue undoubtedly within the scope of its constitutional authority under Mont. Const. art. X, § 9(2)(a)—the

appropriate means by which to maintain a safe, secure, and orderly educational environment in its classrooms and on its campuses and properties.[6]

¶21 While the mission of the MUS remains teaching, research, and public service, the Board has determined through Board Policy 1006 that the presence of firearms on MUS campuses presents an unacceptable risk to a safe and secure educational environment, thus undermining these goals. The Board manages instructional facilities, laboratories, recreational facilities, student residential housing, food services, and a host of other operations. Students, faculty, and support personnel rely on the Board to assess security risks and make decisions that will enhance the safety, security, and stability of the educational environment as a whole, consistent with the MUS mission. Thus, maintaining a safe and secure educational environment falls squarely within the Board's constitutional authority under Mont. Const. art. X, § 9(2)(a), affording the Board the power to protect MUS campuses so that the educational and administrative goals of the MUS are realized. Board Policy 1006 arises from this necessity and reflects the Board's assessment that firearms threaten the safety and security of the educational environment it strives to obtain. In addition to limiting the carrying of firearms on MUS campuses, Board Policy 1006 delegates the control and direction of campus police and security departments to the presidents of each MUS campus. It is particularly germane and necessary to the Board's

[6] Answering the narrow issue on appeal—the scope of the Board's authority under Mont. Const. art. X, § 9(2)(a)—does not require any further substantive assessment of Board Policy 1006, which is not at issue in this case.

constitutional authority that it can manage MUS campuses by implementing policies it believes will minimize the loss of life and thereby strengthen its educational environment. While the mission of the Board is education, the reality is that campus safety and security is an integral responsibility of the Board and its mission.

¶22 Finally, we note that Board Policy 1006 recognizes that Montana is not immune from the catastrophic loss that follows the use of firearms on school campuses. In *State v. Byers*, 261 Mont. 17, 23-24, 861 P.2d 860, 864 (1993) (overruled on other grounds by *State v. Rothacher*, 272 Mont. 303, 901 P.2d 82 (1995)), this Court affirmed Byers's deliberate homicide conviction for shooting and killing two students in their dorm room at Montana State University. We likewise have recognized, in *Peschke v. Carroll College*, 280 Mont. 331, 337-38, 929 P.2d 874, 878 (1996), that a college could breach its duty to provide a reasonably secure and safe place to work. *Peschke* involved a fatal shooting on Carroll College's campus which a jury determined did not constitute a breach of the College's duty to provide a safe and secure work environment. *Peschke*, 280 Mont. at 338-39, 929 P.2d at 878. This Court affirmed the jury's verdict that there was no breach of the College's duty. *Peschke*, 280 Mont. at 339, 929 P.2d at 878.

¶23 Conversely, with limited exceptions, HB 102 prohibits the Board from regulating the possession, transportation, or storage of firearms on MUS campuses. By expressly proscribing the Board from regulating firearms on MUS campuses, HB 102 functions as a legislative directive of MUS policy and undermines the management and control exercised by the Board to set its own policies and determine its own priorities. The Board, not the

Legislature, is constitutionally vested with full authority to determine the priorities of the MUS. *See Judge*, 168 Mont. at 454, 543 P.2d at 1335. HB 102 sought to undermine this constitutional authority and thus cannot be applied to the Board and MUS properties.

¶24 Our holding does not, as the State contends, elevate the Board and MUS to a fourth branch of government or provide the Board veto power over state laws it disagrees with. Rather, we conclude that, where legislative action infringes upon the constitutionally granted powers of the Board to supervise, coordinate, manage, and control the MUS, the legislative power must yield.

CONCLUSION

¶25 The Board is constitutionally vested with full responsibility to supervise, coordinate, manage, and control the MUS and its properties. The regulation of firearms on MUS campuses falls squarely within this authority. As applied to the Board, Sections 3 through 8 of HB 102 unconstitutionally infringe upon the Board's constitutionally derived authority. The District Court's Judgment is affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE
/S/ JOHN W. PARKER
District Judge
sitting in place of Justice Ingrid Gustafson