IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 21-0605

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

Petitioner and Appellee,

v.

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

Respondent and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Michael McMahon, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
KRISTIN HANSEN
Lieutenant General
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov

Attorneys for Respondent and Appellant

Martha Sheehy
Sheehy Law Firm
P.O. Box 584
Billings, MT 59103-0584
Phone: 406-252-2004

Kyle A. Gray
Brianne C. McClafferty
Emily J. Cross
Holland & Hart, LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
Phone: 406-252-2166
kgray@hollandhart.com
ejcross@hollandhart.com
bcmcclafferty@hollandhart.com

Quentin M. Rhoades
Rhoades & Erickson PLLC
430 Ryman Street
Missoula, MT 59802
Telephone: (406) 721-9700
qmr@montanalawyer.com
courtdocs@montanalawyer.com

Attorney for Amicus Curiae

Ali Bovingdon
MUS Chief Legal Counsel
Office of Higher Education
P.O. Box 203201
Helena, MT 59620-3201
Phone: 406-449-9166
abovingdon@montana.edu

Attorneys for Petitioner and Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OTHER AUTHORITIES

STATEMENT OF ISSUES

Whether the Board of Regents, in exercising its limited authority over university academic, financial, and administrative matters under Article X, Section 9 of the Montana Constitution can act to the exclusion of the Legislature on matters—like statewide public safety laws—that are neither financial, academic, nor administrative.

STATEMENT OF THE CASE

On February 18, 2021, the Governor signed HB 102, An Act Generally Revising Gun Laws, into law. Immediately, the Office of the Commissioner of Higher Education and the University of Montana Police Department—both who report to the Board of Regents—took action to implement HB 102's directives.[1] The Board was perhaps the most prominent participant in the legislative process. HB 102's final form was shaped—in large part—in response to the Board's feedback. Despite all this, and days before the law's effective date (which the Board had asked for) the Board filed suit against the State, alleging that HB 102 was

[1] The Office of the Commissioner of Higher Education published a draft policy for the Board of Regents to consider. *Draft Policy Recommendation*, Montana University System (last visited Feb. 3, 2022), https://www.mus.edu/board/draft-policy-recommendation.html. The University of Montana Police Department also published campus firearms rules, acknowledging the changes set forth in HB 102. *See* D.C. Doc. 10, 5 n. 2.

unconstitutional. The Board requested and, on June 7, 2021, obtained a preliminary injunction. *See* D.C. Doc. 19, 12.

The parties both moved for summary judgment, asserting that there were no genuine issues of material facts and that each was entitled to judgment as a matter of law. The parties presented arguments to the district court on November 30, 2021. At the hearing, the district court granted the Board's motion and denied the State's motion. The district court then issued an order not only giving the Board the injunctive relief it requested but also ruling on the right to keep and bear arms. Most troubling to the State was the district court's conclusion that the Board possesses its own police power on Montana University System ("MUS") campuses, to the complete exclusion of the rest of state government. D.C. Doc. 89, 24, 28.

The State timely filed this appeal, asking this Court to reverse the district court's order and final judgment.

STATEMENT OF THE FACTS

HB 102 was the culmination of extensive deliberation by Legislature. The Legislature heard significant public comment from both proponents and opponents of the bill. And the Board itself actively

participated in the legislative process. As a result of the Board's participation, the law's complexion changed significantly. For example, the Board sought to push back the effective implementation date, HB 102, § 15, restrict firearms in specific campus facilities, HB 102, § 6, and work with the Legislature to establish a fund for implementation costs, HB 2 (providing $1 million in funding for implementation). *See* D.C. Doc. 21, Ex. 2-1.

HB 102 removes existing regulations of firearms and makes the right to "bear arms" the rule rather than the exception statewide, including on MUS campuses. Its stated purpose "is to enhance the safety of people by expanding their legal ability to provide for their own defense by reducing or eliminating government-mandated places where only criminals are armed and where citizens are prevented from exercising their fundamental right to defend themselves and others." HB 102, § 1.

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

exceptions—on MUS campuses. HB 102, § 4. Section 10 removes the penalties previously associated with carrying concealed weapons on the state properties listed in Section 4.

Section 5 prohibits the Board from taking any actions more restrictive than those set forth in the law—any that "diminish[] or restrict[] the rights of the people to keep or bear arms." HB 102, § 5. This, of course, relates to its stated purpose, which is to allow all individuals—regardless of where they are located in the state—to exercise their "right to defend themselves and others." HB 102, § 1.

Section 6 authorizes the Board to regulate firearms in certain facilities on campus, including places where alcohol will be consumed and large entertainment events with controlled access and armed security. This section also allows the Board to prohibit the carrying of a firearm outside a case or holster as well as the discharge of firearms except in self-defense. Again, Section 6 memorializes the Board's substantial involvement in the legislative process and the Legislature's willingness to afford the Board enhanced regulatory flexibility.

Section 8 of HB 102 addresses open carry and removes statutory language that previously authorized the Board and other postsecondary

institutions to regulate or prohibit it on MUS property. This section also establishes the circumstances under which an individual may use force against an aggressor.

Each section works together to achieve the bill's stated purpose, which is to promote self-defense and protect the constitutional rights of the citizens of Montana. Those who live and work on MUS campuses possess the same fundamental rights as everyone else in Montana. And HB 102 protects them just as it does individuals on other state property.

The Board's current policy ("Policy 1006") prohibits all firearms on MUS campuses except for those carried by police and security officers. *See* App. B. While the parties may disagree on the prudence of Policy 1006 and HB 102, the parties agree that—absent the district court's injunction—Policy 1006 and HB 102 cannot coexist as written. One must yield.

STANDARD OF REVIEW

This Court reviews summary judgment orders de novo. *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704. 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. Because the district court "is not called to resolve factual disputes," this Court reviews the "conclusions of law to determine whether they are correct." *Id.* [2]

The Board's burden at summary judgment requires it to push a much larger rock up a much larger hill. Where a party challenges a duly enacted law, courts must also apply the presumption of constitutionality. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. "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. This means that the Board has to overcome the presumption of constitutionality afforded

[2] The State disputed the Board's allegations of harm resulting from the implementation of HB 102. *See* D.C. Doc. 10, 13–14; D.C. Doc. 64, 4–6. At the hearing on the cross motions for summary judgment, the State sought to make the point that by filing the cross motions, both parties implicitly agreed that resolution of this case does not depend on resolution of this factual dispute. The district court, however, abruptly interjected and refused to allow the State to make this argument. *See* App. A, 17–18. So the State notes here that the Board's allegations about potential harm to individuals on MUS campuses are not part of this appeal and cannot be considered by this Court.

to HB 102 and show that Article X, Section 9 restricts the Legislature's authority to pass statewide public safety laws *beyond a reasonable doubt*. *Id.* ¶ 74.

As the State will explain below, the State has the authority to regulate firearms on state property—including MUS campuses. But even assuming *arguendo* that this authority is unclear, the best the Board can do is suggest that—in the absence contrary state law—it could enact policies of its own related to firearms on campus. That, respectfully, doesn't matter. The question instead is whether, in an area of quintessential public safety policymaking—firearm regulation—the Board has *exclusive* constitutional power to regulate firearms on MUS campuses. As discussed below, that notion finds no support in the constitutional structure and text, the Constitutional Convention evidence, or the interpretative caselaw. And if the Board can only show that the powers of the Legislature and the Board generally overlap when it comes to campus firearm regulation, then the presumption of constitutionality controls the outcome: HB 102 prevails. *Powder River Cnty.*, ¶ 73–74 ("[I]f any doubt exists, it must be resolved in favor of the statute.").

The district court's failure to faithfully apply these standards led to a bollixed legal result that effectively rearranged Montana's constitutional system. But the standards exist precisely to uphold our institutions—not to denigrate them. This Court should reverse.

SUMMARY OF ARGUMENT

HB 102 is a quintessential exercise of the State's police power to make laws for the public welfare, health, and safety. It is the law of Montana, and it governs the Board, like any other executive branch entity. The Board claims HB 102 infringes on its authority to manage, control, supervise, and coordinate the MUS under Article X, Section 9. Its argument, however, depends principally on absolutist readings of constitutional provisions and caselaw passages plucked from their respective contexts. But that's not how Montana courts interpret constitutional text.

The district court nevertheless accepted the Board's invitation to read Article X, Section 9 in isolation and concluded that the Board possesses the authority—the *exclusive* authority—to regulate firearms on MUS campuses. The district court's ruling effectively transforms the Board into a fourth branch of Montana government—a branch possessed of both legislative and executive powers. But it gets worse. According to

the district court, this new, fourth branch need submit to public policy of the State only to the extent the Board agrees with those policy judgments. For *any* law that affects any MUS interest, the district court has ruled that the Board has unlimited veto authority.

That's obviously incorrect. Whatever the Board's powers are, they aren't equivalent to the State's police power. Under the 1972 Constitution, the Legislature has consistently regulated a multitude of issues that affect the MUS. And no one seriously contests that the Legislature has the power and duty to enact statewide health and safety laws. Both the Constitution's text and history support this conclusion.

And so do this Court's decisions. On only three occasions has this Court addressed the scope of the Board's constitutional authority. *See Sheehy v. Comm'r of Political Practices for Mont*, 2020 MT 37, ¶ 29, 399 Mont. 26, 458 P.3d 309; *Duck Inn v. Mont. State Univ.-Northern*, 285 Mont. 519, 523, 949 P.2d 1179, 1182 (1997); *Board of Regents v. Judge*, 168 Mont. 433, 449, 543 P.2d 1323, 1332 (1975). Each case makes clear that the Board's Article X, Section 9 authority over the MUS is limited to academic, financial, and administrative matters and remains subject to the police power of the State. Only one of these three cases—*Judge*—

arises from a dispute pitting the Legislature's constitutional powers against the Board's. And *Judge* reaffirms the same: the Board has robust—in some cases exclusive—constitutional authority over the limited subject matter within its domain. But that is not a free-wheeling power to exempt the MUS from a generally applicable state law the Board thinks disagreeable.

The district court's conclusion defies law and logic. And it breezily reshuffles the constitutional deck, declaring the Board completely free from any law it doesn't like. It granted the Board its own, full police power, something no other branch of government—let alone a constitutional sub-entity—possesses. This Court must reverse.

ARGUMENT

I. The district court erred by granting summary judgment to the Board of Regents.

State law applies on MUS campuses. The question in this case is whether the Board of Regents possesses independent, constitutional authority giving it the exclusive power to regulate firearms on MUS campuses. The text, structure, and history of the Constitution say no. This Court's precedent confirms this. And all this is further bolstered by

decades of experience in which the Legislature has regulated the MUS directly.

A. The Constitution's text and structure reject that the Board may exercise exclusive regulatory power equal to that of the Legislature.

HB 102 is a statewide health and safety law, rooted in the Legislature's police power, and it applies equally on all state-owned property—even MUS property. The Montana Constitution states that "[t]he 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." MONT. CONST. art. X, § 9. The Board rests its argument on the use of the phrase "full power." App. A, 5. But this phrase cannot be read in isolation. This Court must give effect to the whole text. *State ex. rel. Corry v. Cooney*, 70 Mont. 355, 374–75, 225 P. 1007, 1014–15 (1924); *see also Judge*, 168 Mont. at 443, 543 P.2d at 1329.

The phrase "full power" refers, of course, to the power "to supervise, coordinate, manage and control the Montana university system." MONT. CONST. art. X, § 9. It is not "full power" that, for instance, would be vested in a separate sovereign. Article X, Section 9 didn't create a separate,

sovereign government—or even a separate branch of government. *Sheehy*, ¶ 11 n.1 ("The Board of Regents and its members, as well as the entire MUS, is an independent board within the executive branch."). The Board is a subsidiary of the Executive Branch, tasked with specific duties, and this Court has consistently interpreted those powers to encompass the academic, administrative, and financial management of the MUS. *See Judge*, 168 Mont. at 443–44, 543 P.2d at 1329–30; *Duck Inn*, 285 Mont. at 524–25, 949 P.2d at 1182–83; *see also supra* Section I.B.

To interpret "full power" in a vacuum elevates the Board to a fourth branch of government, that exercises both exclusive executive and legislative authority over the MUS. *But see* MONT. CONST. art. X, § 9(2)(b) (requiring appointment of members by the Governor). The Constitution, however, clearly prohibits a branch of government from exercising the power belonging to another branch. *See* MONT. CONST. art. III, § 1 ("No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."). It follows, then, that it also prohibits *a sub-entity within* the executive branch from exercising the power belonging to another branch. *Id.* The

structure of the Constitution, therefore, forecloses the Board's non-contextual reading of "full power."

But that's just what the district court did. At oral argument, the district court pressed the State to "[s]how me in Article X, Section 9, where the Legislature has any authority." App. A, 20. But this was the wrong question for numerous reasons. First, the Legislature need not be mentioned in Article X, Section 9 to have power over the MUS. That's not how constitutions are written or interpreted.

Second, the district court's question and myopic constitutional reading flips the burden to the State to show that the Legislature, in fact, has the power to regulate on MUS campuses. But this is the Board's burden. *It* must show that the law is unconstitutional beyond a reasonable doubt. *Powder River Cnty*, ¶ 74. This means showing beyond a reasonable doubt that the Board can regulate firearms to the exclusion of the Legislature and the chief executive, acting in concert to create state law. *See id*; *see also* MONT. CONST. art. III, § 1. This Court has previously read Article X, Section 9, and Article V in harmony, and it must do so again here. *See Duck Inn*, 285 Mont. at 524–25, 949 P.2d at 1182–83; *Judge*, 168 Mont. at 443–44, 543 P.2d at 1329–30; *see also supra* Section I.B. "Full

power"—which this court held meant academic, administrative, and financial managerial power—is not an express limitation on the legislative power to enact statewide public safety laws. *Judge*, 168 Mont. at 449, 452–53, 543 P.2d at 1332, 1334.

The debates at the Constitutional Convention also support the conclusion that the Board's power is subject to the Legislature's police power on matters like firearm regulation. *See Nelson v. Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058 (requiring the Court to consider the "historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve"). The district court failed to contend with the extensive discussions in the convention transcript about the Board's authority. D.C. Doc. 89, 19; *see also* D.C. Doc. 64, 18–19; D.C. Doc. 84, 6–8. The framers clearly intended to give the Board authority over the MUS's "academic, financial, and administrative affairs." App. D, 8. They sought to give the Board power over hiring, acquiring classroom equipment, and entering into certain contracts—all decisions attendant to the unique character of the university. App. D, 25–26.

The framers noted that these day-to-day decisions did not warrant interference from "state budget officers, state auditors, comptrollers, purchasing departments, personnel offices, [and] central building agencies." App. C, 10. Absent Board authority to manage academic, financial, and administrative matters, state government's bureaucratic controls made it difficult to advance the educational missions of the universities. For example, prior to the Convention, the music department in Missoula could not purchase the pianos of its choosing, the university could not utilize its own accounting system, department chairs were wasting hours of professional time requisitioning typewriters and paperclips, and the library was inaccessible because of disruptions in the contracts for book binding. App. C, 14–15, 19, 34–35. The MUS needed a way to operate free from this bureaucratic rattrap, and the framers concluded that Article X, Section 9 would grant the Board this freedom. *See generally* D.C. Doc. 66 (discussing the Constitutional Convention debates about the Board's authority).

And while the framers also sought to insulate the Board from political pressure, the political pressures they sought to avoid were not general statewide health and safety laws. In one instance, the Legislature

attempted to cut the salary of a single professor who made a controversial speech. *See* App. C, 16. The framers wanted to protect MUS campuses from this type of targeted interference. Yet the framers explicitly rejected making the Board a fourth branch of government. *See* App. D, 22–30. The framers, therefore, understood that the Board could still be subject to the other branches of government while maintaining a measure of independence. The framers understood that the Board would remain subject to state laws, even when those affect university campuses. *See Judge*, 168 Mont. at 449, 543 P.2d at 1332.

Both the constitutional text and the Convention history establish that the Board's authority is limited to academic, administrative, and financial matters. In comparison, the State (via the Legislature and Governor) exercises the police power, limited only by clear constitutional restraints. *See Powder River Cnty.*, ¶ 74. HB 102 is a public safety law situated within the broad police power. The framers never intended the Board to have plenary authority over this type of regulation, to the extent it impacted university life. It doesn't regulate in the areas the Montana Constitution affords to the Board's exclusive discretion, so HB 102 must prevail—even on MUS campuses.

B. This Court's decisions also show that the Board's authority is limited to academic, financial, and administrative decision making.

As mentioned above, this Court has addressed the scope of the Board's authority on only three occasions. The first case—*Judge*—involved the Legislature's appropriation of monies to the MUS that were contingent upon salary restrictions for university administrators and contained line-item appropriations of general fund monies. *Judge*, 168 Mont. at 441, 543 P.2d at 1328. Like here, the Regents argued that the Legislature's actions infringed on the authority of the Board under Article X, Section 9. In response to the Board's arguments, this Court explained that the Board is not a fourth branch of government and is still subject to the "public policy of this state" as set by the Legislature. *Judge*,

168 Mont. at 449, 543 P.2d at 1332; *see also Duck Inn*, 285 Mont. at 523, 949 P.2d at 1182.[3]

The Court further explained that the Constitution's grant of authority to the Legislature and other branches limits the scope of the Board's authority. *Judge*, 168 Mont. at 443, 543 P.2d at 1329–30. The question, then, is not whether the legislative act impacts management of the MUS at all, but whether the act affects "academic, administrative and financial matters of substantial importance to the system." *Id.* at 454, 543 P.2d at 1333. Priorities in higher education—like the "hiring and keeping of competent personnel" at issue in *Judge*—fall squarely within the Board's power. *Id.* at 454, 543 P.2d at 1333. Here, the

[3] The Legislature determines the public policy of the state. In briefing before the district court, the Board argued that the Constitution also determines the public policy of the state. *See* D.C. Doc. 80, 20. While that may be true, that is not helpful here. First, the "public policy" referred to in *Judge* clearly refers to the policy set by the Legislature. *Judge*, 168 Mont. at 443–44, 543 P.2d at 1329–30. And *Duck Inn* makes that explicit. *See Duck Inn*, 285 Mont. at 523, 949 P.2d at 1182 ("[T]he public policy of the State of Montana is set by the Montana Legislature through its enactment of statutes ...."). Second, the Board's reliance on the Constitution as the basis for "public policy" is circular. This case is about the scope of the Board's authority under the constitution. As discussed in *Judge* and *Duck Inn*, the public policy of the state limits the Board's authority. But the Board doesn't like that formulation. So it argues instead that the courts look to the Constitution to determine public policy. By "constitution," of course, the Board means *its* own non-contextual interpretation of Article X, Section 9—and *its* resulting understanding of *its* own powers. But the whole enterprise here is to determine the scope of the Board's constitutional authority. And the Board must do more than reason backward from its desired conclusion.

Legislature's public safety law is not an academic, administrative, or financial matter. It is the Legislature's statewide determination of public policy. Under *Judge*, this law must be upheld.

Similarly, in *Duck Inn*, the Court considered a law allowing the Board to rent campus facilities in a manner "consistent with the full use thereof for academic purposes and [that] will add to the revenues available for capital costs and debt service[.]" *Duck Inn*, 285 Mont. at 523, 949 P.2d at 1181 (quoting MCA § 20-25-302(5)). Montana State University-Northern in Havre did what the statute permitted—it rented its facilities for various events and catered those events. *Id.* 285 Mont. at 521, 949 P.2d at 1180. This created direct competition with the offerings of The Duck Inn, which sued. *Id.* 285 Mont. at 521–23, 949 P.2d at 1180–81. The discussion about the Board's independent constitutional authority arose from The Duck Inn's argument that the delegation in MCA § 20-25-302(5) "provide[d] insufficient limits on the legislative delegation of power." *Duck Inn*, 285 Mont. at 526, 949 P.2d at 1183. This Court rejected that argument, finding that the delegation "[wa]s sufficiently limited by the statutory requirements …." *Id.*

But the Court further noted that the nondelegation inquiry is relaxed when the Legislature delegates to another "constitutional entity" like the Board. *Duck Inn*, 285 Mont. at 526, 949 P.2d at 1183. "[L]imitations on legislative delegation are 'less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975)).

Duck Inn categorically rejects the either-or approach advanced by the Board and adopted by the district court in this case. The Court found no particular tension in the fact that the Legislature could delegate responsibilities to the Board related to subject matter over which the Board already had independent, constitutional authority—renting university facilities to raise revenue. *See Duck Inn*, 285 Mont. at 526, 949 P.2d at 1183 ("Indeed, the regents are given 'full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system ….'" (quoting MONT. CONST. art. X, § 9)). In fact, unlike HB 102, the law at issue in *Duck Inn* implicated the Board's authority over the MUS's *financial* and *administrative* interests (revenues from rent), as well as its *academic* interests (using the facilities for academic

purposes). *See Duck Inn*, 285 Mont. at 524, 949 P.2d at 1182. But despite the categorical-sounding language in Article X, Section 9, the Court undertook the nondelegation analysis. *See Duck Inn*, 285 Mont. at 525–26, 949 P.2d at 1182–83. It didn't sidestep that question and rule that the Board could do what it was doing irrespective of the statute. Quite the opposite—it felt it had to do the nondelegation analysis because the Legislature could play in that sandbox, too: "the public policy of the State of Montana is set by the Montana Legislature through its enactment of statutes …." *Duck Inn*, 285 Mont. at 523, 949 P.2d at 1182.

Duck Inn stands for the proposition that the Legislature may still act and direct action related to MUS property (which is, after all, the State's property), even when the Board has independent constitutional authority over the subject matter. *See Duck Inn*, 285 Mont. at 524–26, 949 P.2d at 1182–83 (affirming that MCA § 20-25-302(5) lawfully *authorizes* the Board to rent facilities).

This Court most recently addressed the Board's authority in *Sheehy*, where the Court considered the Board's authority to manage the financial health of the MUS. *Sheehy*, ¶ 29. Like *Duck Inn*, this case did not involve a dispute between the Legislature and the Board but rather

an issue of financial stewardship. This Court considered Regent Sheehy's vocal support for the 6-Mill Levy ballot initiative, which this Court noted was functionally equivalent to an ordinary budget request to the Legislature. *Id.* Sheehy's support of this initiative, therefore, was no different from support offered to other budget requests. The Board's request of funds from the Legislature—or the voting public—is clearly within the Board's duties to promote the "health and stability of the MUS." *Id.*

The Board urges the Court to read the "health and stability" language in *Sheehy* broadly. D.C. Doc. 86, 5; App. A, 6. But this language must be read in the context of the decision itself—this Court ultimately held that Regent Sheehy's actions were included within the Board's duty to ensure *financial* stability. *Sheehy*, ¶ 29. And this is consistent with this Court's holdings in *Judge* and *Duck Inn* where the Court only discussed the health and stability of the MUS in the context of academic, *financial*, and administrative matters. *See Judge*, 168 Mont. at 454, 543 P.2d at 1335; *Duck Inn*, 285 Mont. 526–27, 949 P.2d at 1183. *Sheehy* does not broadly stand for the proposition that any policies affecting the MUS must fall exclusively within the Board's authority.

Together, these cases explain that "[t]he Board may exercise all powers connected with the proper and efficient internal governance of the MUS," but that "there are limitations and checks on the Board's power," including constitutional rights and "state legislation enforcing statewide standards for public welfare, health, and safety." *Sheehy*, ¶ 41 (McKinnon, J., concurring); *see Judge*, 168 Mont. at 449, 543 P.2d at 1332. Here, the Board is not attempting to exercise a power related to the financial, academic, or administrative stability of the MUS as explained by this Court or the framers. *See supra* Section I.A. HB 102 is a public safety law, and the Board wants to declare it void on MUS campuses. Disagree though it may, however, the Board and the MUS remain subject to statewide standards for public welfare, health, and safety, *id.*, and those standards are set by the Legislature. *See infra* Section I.A.

Rather than engaging with the parties' arguments on this question of constitutional law, the district court simply recited (copied-and-pasted) the parties' own briefs into its Order. Its lone analysis performed no analysis at all: "As to whom may carry firearms, whether open or concealed carry, on MUS property, this Court finds that Mont. Const. art. X,

§ 9's plain language grants this authority to BOR, not the Legislature."[4] D.C. Doc. 89, 23. But this conclusion is wrong. Even if the Board may—absent contrary law—regulate the carrying of firearms on campus, the Board does not possess this power to the exclusion of the rest of state government. When the Legislature acts within its police power to enact a generally applicable public safety law, the Board—like any other executive agency—must give way.

C. The Legislature has the authority to pass public health and safety laws that apply on all state-owned property, including the MUS campuses.

The legislative power exists in the Legislature. *See* MONT. CONST. art. V, § 1. This is the power to pass laws. *See Meech v. Hillhaven W.*, 238 Mont. 21, 30–31, 776 P.2d 488, 493–94 (1989) (citing *Missouri River Power Co. v. Steele*, 32 Mont. 433, 438–39, 80 P. 1093 (1905)); *see also Duck Inn*, 285 Mont. at 523, 949 P.2d at 1182 ("[T]he public policy of the State of Montana is set by the Montana Legislature through its enactment of the statutes ...."). Within this power is the police power of the State to make laws for the public welfare, health, and safety of the State.

[4] The State assumes the district court meant the BOR has the authority *to decide* who gets to open or concealed carry on MUS property.

See State v. Andre, 101 Mont. 366, 371, 54 P.2d 566, 570 (1936); *see also Sheehy*, ¶ 41 (McKinnon, J., concurring). Notwithstanding the implications of the district court's decision, the MUS is a part of the State of Montana. The Board cannot demonstrate that it has the constitutional power to spurn and disregard duly enacted laws of statewide application, stemming from the police power, that it finds disagreeable.

And this is the crux of the case. The Board argues that Article X, Section 9 is an explicit and unambiguous grant of authority that restricts the Legislature's authority. *See* App. A, 5; *see also* D.C. Doc. 80, 19. But this cannot be right—at least not in the ways the Board argues.

No party contests that the legislative power includes the power to regulate firearms. In Montana, laws long in effect do just that. And the same is true in other states. *See Univ. of Utah v. Shurtleff*, 144 P.3d 1109, 1114 (Utah 2006) (noting that the Utah Constitution vests the Legislature with the "legislative power," which includes the power to regulate firearms); *State v. City of Tucson*, 399 P.3d 663, 676 (Ariz. 2017) (regulation of firearms is within the state's police power). The Legislature, moreover, routinely regulates firearms without carving out exceptions for MUS properties. For example, the Legislature establishes the age at

which a person can carry or use a firearm, *see* MCA § 45-8-321, it regulates shooting ranges, § 76-9-105(1)–(2), it restricts felons from possessing firearms, § 45-8-313, it controls the marketing of firearms, § 30-20-106, and it prohibits forced disclosure of firearm ownership in healthcare settings, § 50-16-108. These are laws that fall squarely within the Legislature's exclusive authority to enact statewide health, safety, and welfare regulations.

The police power enables the State to regulate the MUS in many ways. *See, e.g.*, MCA §§ 19-20-621 (requiring university employers to contribute to the teachers' retirement system), 20-25-515 (establishing rules for releasing student records), 20-25-511 (protecting students' privacy rights), 20-25-513 (prohibiting university officials from entering student rooms absent consent or an emergency), 20-25-451 (regulating student government funding), 20-25-603 (regulating required courses for students). The Legislature, again, does not forfeit its legislative power at the campus boundary line. *See, e.g.*, MCA §§ 45-5-501 (establishing statewide age of consent), 45-5-624 (establishing statewide legal drinking age).

The district court called these statutory citations "misleading at best" because these laws were enacted under the 1889 constitution, when the Board was subject to "legislative devise." D.C. Doc. 89, 17. It is not clear whether the district court was suggesting that these laws cited by the State are unconstitutional themselves or just that the State cannot rely on them because they are old. But either way, the district court was plainly wrong. As an initial matter, the district court's assertion is unmistakably incorrect: many of these laws were enacted for the first time *after* the 1972 Constitutional Convention, and the ones that weren't have since been updated and amended. *See, e.g.*, MCA §§ 19-20-621 (enacted in 1997 and amended in 2013), 20-25-511 (amended in 2009); 20-25-513 (same), 20-25-451 (enacted in 1987), 20-25-603 (amended in 2009). More importantly, the new Constitution did not wipe old statutes off the books. *See* MCA § 1-11-103(3) ("The Montana Code Annotated must be given effect as a continuation of the Revised Codes of Montana and not as a new enactment"). These statutes—regardless of when they were passed—exemplify the way the State and the Board have long operated under the Montana Constitution. This statutory history defies the notion that the Board may act as a fourth branch of government and exempt the

MUS from state laws it doesn't like. The district court's ruling threatens to upend the accommodative balance struck by the Legislature and the Board over the last fifty years.

But more alarming, the district court's reasoning renders the prior statutory exceptions allowing the Board to regulate firearms on MUS campuses mere surplusage. This Court rejects interpretations that render statutes "idle act[s]" or treat them "as mere surplusage." *State v. Cooksey*, 2012 MT 226, ¶ 67, 366 Mont. 346, 367, 286 P.3d 1174, 1187 (internal quotations omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 174 (2012). Yet that's precisely what the district court's order does—it declares the very statutes HB 102 amended or repealed idle acts. Because the surplusage canon rejects such a reading, those statutes must have meant something. They must have been meaningful delegations of power from the Legislature to the Board to regulate firearms on MUS campuses. And that, too, evidences the Legislature preeminent power to regulate in this area.

If, as discussed above, the Constitution provides only limited authority to manage the MUS's academic, financial, and administrative affairs, then that discrete power cannot operate to free the MUS from the

constraints of state law. *See Sheehy*, ¶ 29; *Duck Inn*, 285 Mont. at 524–25, 949 P.2d at 1182–83; *Judge*, 168 Mont. at 443–44, 543 P.2d at 1329–30.

Indeed, the Board's authority is far from absolute on MUS campuses. For example, the public policy of the State—expressed by the Legislature—constrains the Board's authority. *See supra* Section I.B (discussing *Duck Inn*, 285 Mont. at 523–24, 949 P.2d at 1182 and *Judge*, 168 Mont. at 442–44, 543 P.2d at 1329–30).[5] The courts can constrain this authority. *See, e.g.*, *Sheehy*, ¶ 18 (deciding that a regent was a public employee); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445 (declaring a university policy unconstitutional). And the Executive Branch can constrain this authority. *See* MONT. CONST. art. VI, §§ 8, 15; MONT. CONST. art. X, § 9(3); *see also* Executive Order No. 2-2020 (March 12, 2020) (declaring a state of emergency); Office of the Governor, *Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures to stay at home and designating certain essential*

[5] The Board even challenges Section 5 of HB 102, which prohibits the Board from violating students' constitutional rights. This suggests that the Board can exercise power without regard for state and federal constitutional constraints. But this is wrong—the Board must concede that there are *some* limitations on its constitutional authority to regulate MUS campuses.

function (March 26, 2020) (specifically covering all "educational entities," including colleges and universities and ordering individuals to stay at home).

HB 102 is an example of a state law, expressing the State's public policy, that constrains the Board authority. Prior to HB 102, the Legislature explicitly delegated to the Board the authority to regulate firearms on campus. MCA §§ 20-25-324, 45-3-111. HB 102 merely retracts that delegation, in part. *See* HB 102 § 6 (still permitting the Board to regulate firearms under certain circumstances). The Legislature's prior delegation of authority through statute doesn't expand the Board's authority under the Montana Constitution. And it makes no difference that under those old delegations, the Board adopted Policy 1006. Just like the Legislature granted the Board regulatory power over firearms, it can "modify or withdraw the power so granted." *Stephens v. Great Falls*, 119 Mont. 368, 371, 175 P.2d 408, 410 (1946).

Unquestionably, the Legislature may constitutionally enact statewide public safety laws. For decades, the Legislature has regulated firearms and many other matters that deeply affect MUS life. And even if the Board could enact measures like Policy 1006 on its own—absent a

statutory delegation and pursuant solely to its independent authority to manage the MUS's "academic, administrative and financial matters," *Judge*, 168 Mont. at 454, 543 P.2d at 1335—nothing in the decades of post-1972 legislation suggests that the Board has the power to exempt itself from a change in state health and safety law.

The implications of the district court's reasoning to the contrary are astounding. Assume HB 102 and Policy 1006 never existed. The Legislature—by statute—has set the legal age for carrying a concealed weapon at 18 years old. MCA § 45-8-321. But if the regents believe that most students can't be trusted with that responsibility, then under the district court's reasoning, the Board could simply adopt a policy that individuals must be 25, or 30, or 35, to carry firearms on campuses. The Board could alter, veto, or altogether ignore any state law that impacts MUS campuses and with which the Board disagrees. That's a wild scenario, but one the district court just brought to life.

II. The district court's conclusion sets a dangerous precedent.

The district court incorrectly concluded that the Board "is responsible for public welfare, health and safety on MUS property." Order at 24. In other words, the district court concluded that the Board possesses

its own police power as it relates to MUS campuses. *See Andre*, 101 Mont. at 371, 54 P.2d at 570; *see also Sheehy*, ¶ 41 (McKinnon, J., concurring). This is incorrect for two primary reasons.

First, the Legislature routinely regulates on-campus activities. *See supra* Section I.C. Contrary to the district court's version of the constitutional structure of Montana's government, the Legislature is still the Legislature—even on MUS campuses. [6]

Second, the district court's conclusion is patently illogical. Complete control over public welfare, health, and safety means that no other state entity can provide support to the university system without going through the Board of Regents. This Court does not even need to take this conclusion to its logical extreme; taking the district court at its word structurally upends the government of this State and makes the MUS a sovereign entity unto itself.

Even if this Court agrees that the Board has independent authority to regulate public safety over and against the Legislature—it does not—the Court must reverse the district court on its broad conclusion that the

[6] Below, the court found this unremarkable proposition "bold[]." D.C. Doc. 89, 18.

Board possesses its own, full police power throughout the environs of the MUS, to the exclusion of the Legislature.

III. The district court erred by ruling on issues that—by its own command—were outside the scope of this case.

The district court made clear that the right to keep and bear arms was not at issue in this case.[7] *See* D.C. Doc. 19, 4; D.C. Doc. 46, 5, 14. But then the district court decided that—absent *any* briefing on the issue—it would go ahead and rule on the scope of the right to keep and bear arms, concluding that there is no constitutional right to open or concealed carry a firearm in Montana. D.C. Doc. 89, 27; *see also* D.C. Doc. 19, 8, 10. This Court must reverse the district court's ruling on the scope of the Second Amendment.[8]

---

[7] The United States Constitution declares the right to "keep and bear arms," U.S. CONST. AMEND. II, while the Montana Constitution declares the right to "keep or bear arms," MONT. CONST. art. II, § 12. For purposes of this litigation, the State refers to the right to "keep and bear arms."

[8] The district court noted that "there can be no dispute that federal and Montana law is clear" that a person does not have a right to open or concealed carry. D.C. Doc. 89, 27. But this conclusion is, in fact, hotly disputed. *See, e.g.,* D*istrict of Columbia v. Heller,* 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012); *see also Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018) (with two, lengthy dissents and a petition for writ of certiorari pending before the United States Supreme Court).

Because the district court went beyond the issues presented and ruled on the scope of this constitutional right, this Court must—at a minimum—reverse the district court's conclusion that there is no constitutional right to open or concealed carry a firearm. That is not a question in this case. The district court's ruling on that issue was advisory, and ill-advised at that.

CONCLUSION

The district court's conclusion that the Board exercises the full police power on MUS campuses was wrong as a matter of law. Article X, Section 9 does not limit the Legislature's authority to pass statewide laws that affect MUS campuses. When the Legislature exercises the State's police power and enacts a generally applicable public safety law, the Board possess no independent power to declare it null and void on MUS campuses. This Court should accordingly reverse the district court's decision.

This case raises extraordinarily important constitutional questions. How the Court settles those questions will implicate other, core fundamental rights enumerated in Montana's Bill of Rights. All these interests

would be advanced by granting the parties their day in court, so the State hereby requests oral argument.

DATED this 9th day of February, 2022.

AUSTIN KNUDSEN
Montana Attorney General

KRISTIN HANSEN
Lieutenant General

DAVID M.S. DEWHIRST
Solicitor General

/s/ Kathleen L. Smithgall
KATHLEEN L. SMITHGALL
Assistant Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
p. 406.444.2026
kathleen.smithgall@mt.gov

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,201 words, excluding certificate of service and certificate of compliance.

/s/Kathleen L. Smithgall
KATHLEEN L. SMITHGALL

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0605

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

Petitioner and Appellees,

v.

STATE OF MONTANA, by and through AUSTIN KNUDSEN, Attorney General of the State of Montana in his official capacity,

Respondent and Appellant.

APPELLANT'S APPENDIX TABLE OF CONTENTS

CERTIFICATE OF SERVICE

I, Kathleen Lynn Smithgall, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-10-2022:

Martha Sheehy (Attorney)
P.O. Box 584
Billings MT 59103
Representing: Montana Board of Regents of Higher Education
Service Method: eService

Emily Jayne Cross (Attorney)
401 North 31st Street
Suite 1500
P.O. Box 639
Billings MT 59103-0639
Representing: Montana Board of Regents of Higher Education
Service Method: eService

Brianne McClafferty (Attorney)
401 North 31st Street, Suite 1500
P. O. Box 639
Billings MT 59103-0639
Representing: Montana Board of Regents of Higher Education
Service Method: eService

Kyle Anne Gray (Attorney)
P.O. Box 639
Billings MT 59103
Representing: Montana Board of Regents of Higher Education
Service Method: eService

David M.S. Dewhirst (Govt Attorney)
215 N Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Quentin M. Rhoades (Attorney)
430 Ryman St.
2nd Floor

Missoula MT 59802
Representing: Montana Shooting Sports Association, Inc.
Service Method: eService

Stephen H.G. ('Greg') Overstreet (Attorney)
300 Main Street, Suite 203
Stevensville MT 59870
Representing: Seth Berglee
Service Method: eService

Ali Bovingdon (Attorney)
1301 E. 6th Street
P.O. Box 200801
Helena MT 59620-0801
Representing: Montana Board of Regents of Higher Education
Service Method: E-mail Delivery

Electronically signed by Buffy Ekola on behalf of Kathleen Lynn Smithgall
Dated: 02-10-2022