

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 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.

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

**BOARD OF REGENTS RESPONSE TO APPELLANT'S OPENING
BRIEF**

MARTHA SHEEHY
SHEEHY LAW FIRM
P.O. Box 584
Billings, MT 59103
Telephone: (406) 252-2004
msheehy@sheehylawfirm.com

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

KYLE ANNE GRAY
BRIANNE C. MCCLAFFERTY
EMILY J. CROSS
HOLLAND & HART LLP
401 N. 31st St., Suite 1500
P.O. Box 639
Billings, MT 59103-0639
Telephone: (406) 252-2166
Fax: (406) 252-1669
kgray@hollandhart.com
bcmclafferty@hollandhart.com
ejcross@hollandhart.com

Attorneys for Petitioner and Appellee Board of Regents

Additional Counsel on next page

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

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Board of Regents of Higher Education of the State of Montana (“BOR” or “Board”), by and through their counsel of record, Sheehy Law Firm, Holland & Hart LLP, and Montana University System (“MUS”) Chief Legal Counsel, hereby responds to Respondent/Appellant’s Opening Brief.

I. INTRODUCTION

The issue before the Court is narrow and uncomplicated. The Court must decide whether the Board or the Legislature has the exclusive constitutional authority to regulate firearms on MUS campuses and other MUS locations. Article X, Section 9 of the Montana Constitution, and controlling case authority from this Court establish that the Board is vested with the “full power” to determine policy for MUS and its institutions. The Board possesses the exclusive authority to ensure the health and stability of the MUS. Undoubtedly, this authority includes the right and duty to determine, implement, and manage firearm policies for the MUS. House Bill 102 (“HB 102”) invades the Board’s constitutional authority, and is therefore unconstitutional as applied to the Board.

II. STATEMENT OF THE ISSUES

Whether the Board of Regents, which is constitutionally vested with “full power, responsibility, and authority to supervise, coordinate, manage and control

the Montana university system,” has the authority to implement policies concerning the possession of firearms on the system’s campuses and properties.¹

III. STATEMENT OF THE CASE

On February 18, 2021, Governor Gianforte signed into law HB 102, An Act Generally Revising Gun Laws. The Board filed this action in district court, seeking to enjoin application and enforcement of HB 102 with respect to the Board and the MUS. The district court entered a temporary restraining order on May 28, 2021, barring application of HB 102, Sections 4, 5, 6, 7, and 8, to the Board, the MUS, and MUS campuses and other MUS locations. (Dkt. 4).² The district court held a show cause hearing on June 7, 2021, after which the district court converted the temporary restraining order into a preliminary injunction. (Dkt. 19).

¹ *Amici curiae* have filed briefs in this matter on issues beyond the scope of the narrow question before this Court, which the Board does not address herein. This case does not involve a challenge to Board Policy 1006, the current firearms policy applicable to the MUS. The Board filed a petition seeking a judicial declaration that HB 102 is unconstitutional as applied to the Board, MUS, and its campuses and locations. Whether the Board agrees or disagrees with HB 102 is not relevant. The issue presented in this case, as correctly defined by the district court, is “whether the Legislature or the Executive branch, via the Regents, has the exclusive constitutional authority to regulate firearms on MUS campuses and other [MUS] locations.” (Dkt. 46, p. 4).

² Citations to the district court docket not included in Appellant’s Appendix or the Board’s Supplemental Appendix are given as (“Dkt. #”); citations to Appellant’s Appendix are given as (App. __, ###).

Both the State of Montana (“the State”) and BOR moved for summary judgment. On November 30, 2021, the district court granted BOR’s motion and denied the State’s cross motion. (App. E, 001-29; App. F, 001). On November 30, 2021, the State prematurely appealed from the interlocutory ruling. Upon the State’s application, this Court ordered that it would take no further action on this appeal until final judgment. The district court entered final judgment on December 13, 2021. The State now appeals from that judgment.

IV. STATEMENT OF THE FACTS

Montana’s Constitution vests “full power, responsibility, and authority” in the Board to “supervise, coordinate, manage and control the Montana university system.” Mont. Const., Art. X, § 9(2)(a). This constitutional authority grants solely to the Board the right and the obligation to determine the best policies to “ensure the health and stability of the MUS.” *Sheehy v. COPP*, 2020 MT 37, ¶ 29, 399 Mont. 26, 458 P.3d 309 (“*Sheehy*”).

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

1. Those persons who are acting in the capacity of police or security department officers and who:

a. have successfully completed the basic course in law enforcement conducted by the Montana Law Enforcement Academy or an equivalent course conducted by another state agency and recognized as such by the Crime Control Division of the Montana Department of Justice; or

b. have passed the state approved equivalency examination by the Montana Law Enforcement Academy; and

2. Those persons who are employees of a contracted private security company and those who are registered to carry firearms pursuant to Title 37, Chapter 60, MCA.

(Supp. App. 027).³

In 2021, the Legislature enacted HB 102. (Supp. App. 018-26). HB 102 generally revises gun laws with respect to open carry and concealed carry. In Section 4, the Act allows concealed carry “anywhere in the state” except at specific locations designated by the Legislature. Those excepted locations include primary and secondary schools, courtrooms, federal property, and airports, but the Legislature did not extend the exception to the MUS or its campuses and locations. In Section 8, the Legislature revised the existing “open carry law,” § 45-3-111, MCA in only one way; the Legislature deleted the prior MUS exception in the open carry law. Thus, by purposeful omission in Section 4 and by a focused

³ Citations to the Board’s Appendix are given as (Supp. App. __, ###)

deletion in Section 8, HB 102 extends both open carry and concealed carry to MUS's campuses and locations.

In Section 5, HB 102 precludes the Board from “enforcing or coercing compliance” with rules or regulations which restrict the right to possess or access firearms, “notwithstanding any authority of the board of regents” under Article X. Section 6 precludes the Board from “regulat[ing], restrict[ing], or plac[ing] an undue burden on the possession, transportation, or storage of firearms on or within the university system property by a person eligible to possess a firearm under state or federal law” and who meets minimum safety training requirements, except that it allows the Board to restrict campus gun use only in limited ways. Section 7 provides that any person suffering a deprivation of rights defined by HB 102 “has a cause of action against any governmental entity[.]” Finally, HB 102 conditioned \$1,000,000 in funding for MUS upon the Board's waiver of its right to challenge HB 102 in court. (Supp. App. 018-26).

Governor Gianforte signed HB 102 into law on May 20, 2021. Seven days later, the Board filed its Petition challenging the constitutionality of HB 102 as applied to the BOR, MUS, and MUS campuses and locations. The Board does not assert a facial challenge to the constitutionality of HB 102.

V. STANDARD OF REVIEW

The Court reviews grants and denials of summary judgment *de novo*. *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704. When, as here, “the legislature attempts to exercise control of the MUS by legislative enactment, the court “must engage in a case-by-case analysis to determine whether the legislature’s action impermissibly infringes on the Board’s authority.” *Sheehy* ¶ 36 (J. McKinnon, concurring) (*citing Board of Regents v. Judge*, 168 Mont. 433, 451, 543 P.2d 1323, 1333-34 (1975) (“*Judge*”). Statutes enjoy a presumption of constitutionality, and the person challenging a statute’s constitutionality bears the burden of proving it unconstitutional. *City of Billings v. Albert*, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828 (*citing State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469). Application of a statute contrary to a “constitutional directive” is unconstitutional “under any level of scrutiny.” *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 25, ¶ 31, 419 P.3d 685. The constitutionality of a statute is a question of law. *Id.*

VI. SUMMARY OF ARGUMENT

HB 102, which imposes firearm policy upon MUS, is unconstitutional as applied to the Board, MUS, and its campuses and locations because it violates Article X, Section 9 of the Montana Constitution. This is made clear by the Montana Constitution’s plain text, the historical context, and the surrounding

circumstances under which the Framers drafted the Constitution and the Legislatures' own statutory enactments. The plain text of the Montana Constitution grants to the Board “full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system” Mont. Const. Art. X, § 9. While the constitutional intent is perfectly clear from the plain language of Article X, Section 9, the historical context also establishes that the Framers vested the Board with this “full authority” over the policies which affect MUS and its campuses in order to insulate the Board and the MUS from the kind of politically charged legislation the State now seeks to impose on the MUS through HB 102.

The Legislature codified the Constitution's compulsory power to the Board for general control and supervision of the units of the MUS, which is consistent with the Montana Constitution. § 20-25-301, MCA. Indeed, § 20-25-324, MCA recognizes that the Board, not the Legislature, is the appropriate body to determine firearm policy after consultation with the student body government, a task the Legislature is not positioned to carry out. The Court has enforced the Board's authority and determined that “full power” includes all things necessary and proper to exercise that authority. *Sheehy*, ¶¶ 11, 29; *Judge*, 168 Mont. at 451; *The Duck Inn v. Mont. State Univ.-Northern*, 285 Mont. 519, 525, 949 P.2d 1179, 1182 (1997) (“*Duck Inn*”).

The district court’s holding that HB 102 is unconstitutional, as applied to the Board, is correct and should be upheld.

VII. ARGUMENT

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

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

Montana’s constitutional structure as it applies to the MUS is clearly and plainly stated: “The government and control of the Montana university system is *vested in a board of regents,*” not in the Legislature. Mont. Const. Art. X, § 9(2)(a) (emphasis added). As with any other constitutional provision, the meaning of Article X, Section 9 of the Montana Constitution must be determined “from the plain meaning of the language used.” *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058 (citing *Cross v. VanDyke*, 2014 MT 193, ¶ 10, 375 Mont. 535, 332 P.3d 215); *State ex rel. Racicot v. Dist. Court of the First Judicial Dist.*, 243 Mont. 379, 386-88, 794 P.2d 1180, 1184-86 (1990); *Butte-Silver Bow Local Gov’t v. State*, 235 Mont. 398, 403, 768 P.2d 327, 330 (1989). The constitutional provision must be viewed “in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.” *Nelson*, ¶ 36. If the language is vague or ambiguous, the Court “may resort to extrinsic aids.” *Id.*

The plain language of Article X, Section 9 grants to the Board, and not the Legislature, authority to institute firearms policy on its campuses. The Board is vested with the “government and control of the Montana university system,” and is “responsible for long-range planning, and for coordinating and evaluating policies and programs for the state’s educational systems.” Mont. Const. Art. X, § 9. The Board has the “full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system” Mont. Const. Art. X, § 9; *Sheehy*, ¶ 11. “Full control” means just that; the Board is vested with “full” authority to supervise, coordinate, manage, and control MUS and its campuses, which necessarily includes the creation and implementation of firearm policy.⁴

While the language of the Constitution – and the grant of “full authority” to the Board – is perfectly clear, this Court also must review Article X, Section 9 “in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.” *Id.* “The exact legal status with which to clothe higher education in Montana was debated extensively and thoroughly in the

⁴ *Amici curiae* Second Amendment Foundation, Idaho Second Amendment Alliance and Madison Society Foundation, Inc., seemingly suggest that the Board’s “full power” is somehow limited by the fact that the majority of students, faculty, staff and visitors of MUS campuses are adults. These *amici* ignore entirely the issue in this case – the authority granted to the Board by Article X, Section 9. That authority is not contingent upon the ages of people present on MUS campuses.

sessions of the . . . [1972] Convention.” Schaefer, Hugh. *The Legal Status of the Montana University System Under the New Montana Constitution*, 35 Mont. L. Rev. 189, 190 (1974) (Supp. App. 101-121). Without question, the debates at the Constitutional Convention establish the Framers’ intention to place the MUS beyond the political influence of the legislature by creating a Board directly responsible and answerable to the people. *Sheehy*, ¶ 36 (conurrence). At the Constitutional Convention, the Education Committee reported to the delegates:

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

App. C 007.

The 1972 Constitution created the Board as an autonomous, independent body, “effectively insulat[ing] the public campuses from Montana political officials in lieu of giving those political officials more direct control over public campuses.” Aronofsky, David. *Voters Wisely Reject Proposed Const. Amendment 30 to Eliminate the Montana Board of Regents*, 58 Mont. L. Rev. 333, 333 (1997) (Supp. App. 112-196) (“Aronofsky”). Indeed, this Court has long recognized that “the principle of regent independence was definitely intended by the drafters of the 1972 Montana Constitution.” *Judge*, 543 P.2d at 1332. The delegates “rejected

various proposed floor amendments aimed at weakening the Montana Board’s autonomous powers, including amendments which would have restored legislative control over university system finances and administrative decision-making.” Aronofsky at 365 (*citing* IX Montana Constitutional Convention Transcripts at 6532) (Supp. App. 155).⁵

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

2. Earlier Statutory Law Recognized the Board’s Authority to Govern MUS Campuses.

Before the latest legislative session convened, the Legislature’s own statutory enactments plainly show that branch’s understanding that the Board, and not the Legislature, governs MUS and its campuses. For example, Section 20-25-301, MCA provides:

⁵ The *amicus curiae* briefs filed by the Western Montana Fish & Game Association, Inc., the County of Daniels, the Montana Shooting Sports Association, the Second Amendment Foundation, Idaho Second Amendment Alliance, Madison Society Foundation, Inc., and Representative Seth Berglee (which was later endorsed by 80 legislators) illustrate the precise political influence from which the Constitution was designed to shield the Board.

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

(1) must have general control and supervision of the units of the Montana university system, which is considered for all purposes one university;

(2) shall adopt rules for its own government that are consistent with the constitution and the laws of the state and that are proper and necessary for the execution of the powers and duties conferred upon it by law;

(3) shall provide, subject to the laws of the state, rules for the government of the system. . . .

This statutory recognition of the Board's power, like the constitutional grant, is compulsory, not permissive. The Board "must have" general control and supervision and "shall adopt rules for its own government," which are consistent with the Montana Constitution. § 20-25-301, MCA. Indeed, the Legislature has long recognized that the Board is the appropriate body to determine firearms policy on campuses. Decades ago, the Legislature enacted § 20-25-324, MCA, which provides:

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

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

Until the enactment of HB 102, the Legislature also recognized the Board’s authority to regulate firearms on its campuses by excepting MUS campuses from open carry laws. § 45-3-111, MCA. In fact, in that statute enacted in 2009, the Legislature acknowledged “the authority of the board of regents or other post-secondary institutions to regulate the carrying of weapons . . . on their campuses.” § 45-3-111(3), MCA.⁶ A decade later, the Legislature has changed its position regarding the Board’s authority over regulation of firearms. In HB 102, the Legislature declares in a “finding” that the Constitution does not vest such authority in the Board. (Supp. App. 018-19). The Framers of the Constitution insulated the Board from exactly this type of political vagary – the political change of views regarding the established lines of authority.

⁶ The State contends that the Legislature can “modify or withdraw the power so granted” by § 45-3-111(3), MCA (State Brief, p. 30), but the Legislature did not grant this authority to the Board, it simply acknowledged and reiterated the Board’s constitutional grant of authority in Article X, Section 9.

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

The State asserts that “the Board’s authority is limited to academic, administrative, and financial matters.” (State Brief, p. 16). In actuality, the Board’s “full” authority extends to all things necessary and proper to the exercise of the Board’s constitutional authority. *Sheehy*, ¶ 29. Just as importantly, even if the Court were to adopt the State’s impermissibly narrow reading of “full authority,” the Board’s creation of firearm policy would still fall within the Board’s authority on academic, administrative, and financial matters – authority the State concedes the Board holds.

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

“Implied in the Board of Regents’ broad powers to ‘supervise, coordinate, manage, and control the [MUS],’ is the power to do all things necessary and proper to the exercise of its general powers. . . .” *Sheehy*, ¶ 29 (citing *State ex rel. Veeder v. State Bd. of Educ.*, 97 Mont. 121, 133-34, 33 P.2d 516, 522 (1934)). Montana statutory law recognizes and requires that the Board must “control and supervise” the units of the system. § 20-25-301, MCA. Control and supervision of college campuses necessarily requires the Board to control and supervise campus firearm policies.

This Court has acknowledged and defined the Board’s “full authority” in three cases – *Judge, Duck Inn*, and *Sheehy*. The State attempts to narrow the holdings of all three cases, arguing that the Board’s constitutional authority is limited to “academic, administrative, and financial matters.” (State’s Brief, p. 16). In doing so, the State ignores the plain language of the Constitution and the Court’s reasoning in *Judge, Duck Inn*, and *Sheehy*. Although all three cases involved disputes that related to funding for the MUS, in none of them did the Court state or imply that the Board’s constitutionally-vested “*full* power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system,” is instead a power *limited* to ensuring the “financial, academic, or administrative stability of the MUS” as the State would have it now. To the contrary, this Court in all three cases recognized that the Board is constitutionally vested with broad authority that necessarily includes, but is not limited to, ensuring financial, academic, and administrative stability. *See Sheehy*, ¶ 29 (“Implied in the Board of Regents’ broad powers to ‘supervise, coordinate, manage, and control the [MUS],’ is the power to do all things necessary and proper to the exercise of its general powers which would necessarily include support of a major financing source for the MUS” by Board members); *Duck Inn*, 285 Mont. at 525, 949 P.2d at 1182 (“Article X, Section 9 of the Montana Constitution expressly creates the board of regents as a constitutional entity and vests the government and control of

the Montana university system therein.”); *Judge*, 168 Mont. at 454 (concluding that “the Board of Regents is the competent body for determining priorities in higher education” generally, after noting that “[s]eemingly minor conditions [on funding] could ultimately affect academic, administrative and financial matters of substantial importance to the [MUS]”). Thus, this Court never attempted to narrow the scope of the Board’s authority in any of these opinions, even though the factual circumstances of each – which involved funding for the MUS – provided an opportunity to do so. Nor should it do so now at the State’s behest. The Constitutional Convention Delegates did not employ ambiguous or difficult terminology: full means full, not limited.

In addition to control and supervision, the Board is constitutionally directed to administer policies which affect MUS and its campuses. Mont. Const. Art. X, § 9. The Board, and not the Legislature, has established practices for administration of firearm policy, including the constitutionally required management. While the Legislature meets every other year, the Board meets six times a year, rotating among various campuses. The Board hires the Commissioner of Higher Education, who is charged with “execut[ing], administer[ing] and assur[ing] implementation of [Board policies]. (Board Policy 204.3). The Commissioner also must supervise and direct university presidents “with regard to the execution, administration, interpretation and implementation”

of board policies. (Board Policy 204.3(2)). Presidents and chancellors, in turn, are vested with the responsibility of administering Board policies on each campus. (Board Policy 205.2). This established system of management allows the Board to administer policies on an ongoing and timely basis – a duty necessarily included in the Board’s constitutional and statutory direction to manage the units of MUS.

The State asserts that 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.” (State Brief, p. 3). The Legislature, however, tailored the law specifically to regulate open carry and concealed carry on college campuses. Specifically, Section 4 of HB 102 removed MUS campuses from the exception to concealed carry, and Section 8 revised the existing “open carry law,” § 45-3-111, MCA, for the sole purpose of deleting the prior MUS exception in the open carry law. Quite clearly, the Board cannot control and manage its campuses without the ability to set firearm policy for those campuses – including on-campus residences, classrooms, and public areas. These day-to-day issues are necessarily encompassed by the Montana Constitution’s directive that the Board, and not the Legislature, supervises and controls MUS and its campuses. Far from claiming to be a “fourth branch” of government, as alleged by the State, the Board has not – and does not now – seek to extend its authority beyond the narrow constitutional

boundaries of the MUS and its campuses.⁷ Indeed, the Board asserts its constitutional authority to implement policy over approximately 1,695 acres constituting the MUS college campuses, and makes no attempt whatsoever to exert authority over the nearly 94 million acres inside Montana’s borders that are not within the MUS.

Finally, the Constitution requires the Board to coordinate the units of the system. Firearm policy is not “one size fits all,” but requires coordination among all the units of MUS – a responsibility specifically directed to the Board, not the Legislature. The MUS encompasses fourteen separate and disparate campuses. The size of each campus, the number of students residing on each campus, the amount of security available at each campus require overall coordination by the Board through its well-established system of management. The Board has delegated to the presidents, chancellors, and deans, “general control and direction of the police or security department of [the campuses] in accordance with the policies of the [Board].” (Supp. App. 027). In administering firearm policy, the Board is able – and constitutionally directed – to coordinate the policies at the

⁷ *Amicus* Seth Berglee, whose brief was joined by 80 other legislators, similarly argues the district court’s order granted the Board “unbridled autonomy.” (*Amicus Curiae* Brief of Rep. Seth Berglee, p. 7). The Board does not argue it has unbridled autonomy. It does, however, have the constitutionally-vested “full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system.”

various campuses. Flexibility is allowed, with each campus empowered to “establish regulations governing the transportation and storage of firearms on campus.” (Supp. App. 027).

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

The creation and implementation of firearm policy on campuses further falls within the Board’ authority to manage the financial stability of MUS – an area over which the State concedes the Board has constitutional authority. (State Brief, p. 16). This Court specifically has held that “[a]s prescribed by Article X, Section 9(2)(a), of the Montana Constitution, and § 20-25-301, MCA, [the Board] has not only the power, but also the constitutional duty to ensure the health and stability of the MUS.” *Sheehy*, ¶ 29. This controlling authority establishes that “[o]bviously included in such duties is ensuring the financial stability of the MUS.” *Id.* The State concedes that the Board has the power to regulate policy “related to the financial, academic, or administrative stability of the MUS,” but claims that firearm policy is not related to finances. (State Brief, p. 17). To the contrary, because firearm policy has significant financial impact on MUS, creating such policy falls within the financial authority granted to the Board by the Constitution.

In enacting HB 102, the Legislature itself acknowledged that the new law would have significant financial implications for the MUS. In clear recognition of this reality, the Legislature allocated \$1,000,000 to the MUS to fund the initial

implementation of the Act. (Supp. App. 031). Indeed, at the outset, implementation of HB 102 would require funds to create training programs, hire new employees, and other functions. (Supp. App. 199, ¶ 8). On an ongoing basis, HB 102's costs are unknown but would require continuing programs, employees, and performance of other functions, all of which demonstrate the regulation of firearms on campus necessarily fall to the Board's supervision, coordination, management, and control.

In addition to the cost of administering HB 102, the Board is constitutionally directed to consider the policy's effect on tuition revenue. Numerous public commenters, particularly parents, indicated that they will dis-enroll their students from MUS campuses if HB 102 is implemented. (Supp. App. 037-098; Supp. App. 199). Each student who withdraws represents a loss of up to four to five years of tuition to the institution and threatens the financial stability of MUS. Likewise, each prospective student who, because of HB 102, chooses to pursue higher education elsewhere implicates MUS financial stability.

Proffering yet another limitation on "full" that finds no support in the language of the Constitution or the Convention's history – much less the decisions of this Court – the State implies that only matters of the utmost financial significance are within the Board's constitutional grant of "full power, responsibility, and authority." (State Brief, p. 18). Binding precedent refutes this

argument. In *Judge*, the Legislature enacted a bill which required legislative approval of three salaries – the two presidents of the universities and the commissioner of higher education. While the amount of money at issue was relatively small, this Court noted that “seemingly minor conditions could ultimately affect academic, administrative and financial matters of substantial importance to the system.” *Id.* at 454, 543 P.2d at 1335. Through its established processes including public meetings, the Board has established that firearm policy could ultimately affect academic, administrative and financial matters of substantial importance to the system. (Supp. App. 198, ¶¶ 6-20).

The legislative record also establishes that the initial financial consequences to MUS of HB 102 starts at implementation costs of \$1,000,000. The actual financial costs, which likely include loss of tuition revenue, are unknown. The Legislature has no process to ascertain the financial effect of HB 102 on MUS and its institutions. Moreover, the Legislature, which meets every two years, is not designed to accommodate the public’s right to know and right to participate regarding campus issues. The Board, pursuant to its constitutional and statutory obligation to govern the MUS, has an established process, which includes input from students, parents, student governments, faculty senates, employee organizations, and the public. Via the constitutional grant of power, the Board is thus intentionally and uniquely positioned, as envisioned by the framers of

Montana’s Constitution, to determine, with the benefit of public comment, issues related to the health and safety of MUS campuses.

Judge also establishes that the Board’s full authority extends to issues affecting the ability to recruit and retain personnel. In *Judge*, employment of key personnel was at issue, and the Court held that “control over college president salaries is not a ‘minor’ matter. It does dictate university personnel policy.” *Id.* As stated by numerous public commenters at the Board’s public meetings, firearm policy on each campus affects MUS personnel, both in day-to-day jobs and in contracting. (Supp. App. 198, ¶¶ 16, 17, 19). Given the Court’s acknowledgment in *Judge* that the Board’s full authority extends to personnel matters, it is impossible to conclude that control over of firearm policy on campuses – which affects students, personnel, and administration on a day-to-day basis – are not also within the Board’s authority.

Controlling authority establishes that the Board, and not the Legislature, shoulders the responsibility for the financial health of the MUS. “Implied in the Board of Regents’ broad powers to ‘supervise, coordinate, manage, and control the [MUS],’ is the power to do all things necessary and proper to the exercise of its general powers. . . .” *Sheehy*, ¶ 29. Because firearm policies impact the financial health of the MUS and its institutions, the Board has “full authority” to create

firearm policy for MUS and its campuses. Indeed, the State concedes as much. (State Brief, p. 16).

c. The Board Must Protect the Safety and Health of Students, Personnel, and Visitors on Campus.

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

Suicide presents a specific safety risk which is unique to college campus populations. Regent Rogers testified to the many commenters who “raised concerns about how the presence of firearms on campus could impact suicide rates and expressed fear that young adults, already a high-risk population for suicide, would now have easier access to lethal firearms.” (Supp. App., ¶ 20). Suicide remains the second leading cause of death for 15- to 24-year-olds. (BOR Prelim.

Inj. Reply, Dkt. 14, Ex. 6, p. 1). Over 40% of the students accessing Counseling and Psychological Services at MSU-Bozeman have seriously considered suicide.

Id.

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

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

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

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

B. THE BOARD’S FULL POWER OVERRIDES ANY LEGISLATIVE AUTHORITY WITH RESPECT TO THE MANAGEMENT, SUPERVISION, AND CONTROL OF THE MUS AND ITS CAMPUSES.

1. The Legislature Cannot Rely on its Police Power to Infringe upon the Board’s Exclusive Authority to Control the MUS and its Campuses.

In enacting HB 102, the Legislature announced a purpose to “enhance the safety of the 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.” (State Brief, p. 3, HB 102, ¶ 1). Based on this statutory wording, the State contends that HB 102 “is a public safety law situated within the broad police power.” (State Brief, p. 16). The police

power encompasses measures which are “appropriate or needful for the protection of the public morals, the public health, or the public safety.” *State v. Gateway Mortuaries*, (1930), 87 Mont. 225, 287 P. 156, 159 (citing *Mugler v. Kansas*, 123 U. S. 623). The State asserts that “the framers never intended the Board to have plenary authority over this type of regulation, to the extent it impacted university life.” (State Brief, p. 16). The State is wrong; the Constitution governs, even in the area of police powers. *Id.* Although the police power rests primarily with the Legislature, there are limits to the police power “beyond which legislation cannot rightfully go.” *Id.* While statutes are presumed to be valid, “the courts must obey the constitution rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed.” *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)).

Here, Montana’s constitution vests the “government and control” of the MUS in the BOR, and the Board has the “full power and responsibility” to control and manage the campuses. The Legislature may not impede the Board’s constitutional authority with respect to campuses, even in the exercise of police powers, because the Legislature must comport with the constitution. The State’s argument fails because HB 102 – and the legislative change in position regarding the Board’s authority over firearm policy on campuses – is contrary to the

“constitutional directive” contained in Article X, Section 9. *Mountain Water*, ¶ 25. The Constitution directs the Board, not the Legislature, to exercise “full power, responsibility and authority” to “supervise, coordinate, manage, and control” MUS and its campuses.

Moreover, the Legislature has conceded by exempting some places from open and concealed carry – like schools and courts – that the safety issues associated with the carrying of firearms in certain locations are subject to disagreement. The Board, pursuant to its “full power” to “supervise, coordinate, manage and control” MUS, has the authority to determine whether it is in the best interest of the safety and health of MUS campuses to arm individuals on campus with firearms to defend themselves against potential armed criminals, or whether, *inter alia*, granting increased access of firearms to young adults, a population already at high risk for suicide, presents a greater safety and health risk. Under Montana’s constitutional structure, it is the Board, with input from the public, not the Legislature, that must weigh and decide these issues for the MUS.

The State cites to other laws, not at issue in this proceeding, in an effort to establish that because the State may have regulated the MUS in other ways, the Board’s authority is limited here. (State Brief, p. 26). For example, the State argues that the Legislature, not the Board, regulates, *inter alia*, the age of consent on college campus, the legal drinking age, required contributions to teacher’s

retirement system, and student government funding.⁸ (State Brief p. 26). The State’s argument fails to recognize that there is a significant difference between the Board implementing safeguards on MUS campuses in coordination with general laws the Legislature has passed, and the Legislature invalidating or undermining campus-specific safety measures the Board has enacted. The Board has full authority to allow the units it governs to implement further restrictions to ensure the safety and health of the MUS units’ students, faculty, administrators, and staff. For example, contrary to the State’s argument,⁹ the Board has long allowed various units of the MUS to determine their own policies governing the use and possession of alcohol on campus. *See* BOR Policy 503.1 (“Legal consumption by students in student living quarters shall not interfere with the rights of other residents and their guests or cause the normal operation of residence halls/student housing to be disrupted.”). The University of Montana Student Housing Handbook (2020-2021) states that the residents over the age of 21 “may not consume alcohol in the presence of those under the age of 21, including roommates.” (BOR Reply Brief in Support of Motion for Summary Judgment, Dkt. 88, Ex. A, pp. 13-14).

⁸ The district court correctly pointed out that three of the statutes cited by the State in support of this argument (§ 20-25-513, MCA; § 20-25-515, MCA and § 20-25-603, MCA) were originally enacted under the 1889 Montana Constitution where the BOR was subject to “legislative devise.” (App. E, 018).

⁹ And, also contrary to the argument made by *amicus curiae* Representative Seth Berglee.

In sum, the State’s arguments about statutes not before the Court merely attempt to deflect attention away from the actual matter at issue here. Whether the Board has complied with statutory enactments it has no quarrel with is inapposite to a law like HB 102, which purports to invalidate well-established policies developed through the public processes the Board has used ever since it was vested with its powers via constitutional grant in 1972. The Court must engage in a “case-by-case analysis to determine whether the legislature’s action impermissibly infringes on the Board’s authority.” *See Sheehy*, ¶ 36. The Court must, thus, focus on the actual legislative “action” at issue in this case, not on hypotheticals.

2. Montana Public Policy Establishes that the Board has “Full” and Exclusive Power to Control MUS.

The State posits that “the Legislature alone determines the public policy of the State,” and argues that the Board’s authority is limited by HB 102 as a declaration of public policy. (State Brief, p. 18, fn 3). The State again ignores that public policy, like the police power, is not only made by, but also limited by, the constitution. “[P]ublic policy can be enunciated by the Constitution. . . .” *Anaconda Federal Credit Union v. West*, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971). In fact, “public policy is often based on constitutional provisions,” not just statutory law. *Wadsworth v. State*, 275 Mont. 287, 306, 911 P.2d 1165, 1176 (1996); *see also Talbot v. WMK-Davis, LLC*, 2016 MT 247, ¶ 18, 385 Mont. 109, 380 P.3d 823 (1995). The Constitution has established that the supervision,

control, and management of MUS vests fully in the Board, not the Legislature. Thus, legislative enactments must yield to this constitutional directive, even in creating public policy.

The State implies that the Board somehow waived its constitutional authority to adopt firearm policies for its campuses by participating in the legislative process. (State Brief, p. 4). No authority supports such an implication. The Board can and should work with the Legislature on areas of mutual concern. Hence, as in this case, the Board, through the Office of Commissioner of Higher Education, strives to communicate with the legislature not just on a single bill in a single session, but throughout the legislative biennium. In years the Legislature is not in session, the Board meets with the Interim Education Committee to try and strengthen, not weaken, the coordination between the legislature and the Board.

The legislature and the Board need not be, and generally are not, on opposite sides of any given policy concern. But controlling Montana law makes it clear that when the Board and the Legislature do disagree, it is the Board – not the Legislature – which is the competent body to determine priorities in higher education, including those related to the safety of students, professors, staff, and any other person on MUS campuses. *Judge*, 543 P.2d at 1333; *Sheehy*, ¶ 29. This Court already has determined that when the Legislature places limitations on the Regents’ choices in policymaking, such limitations “specifically den[y] the

Regents the power to function effectively by setting its own [] policies and determining its own priorities.” *Judge*, 543 P.2d at 1335. The State’s argument misses the obvious: Only one party can have “full power” – otherwise, the power would not be “full.” With respect to the supervision, coordination, management, and control of the MUS, the Constitution vests that “full power” with the Board. Necessarily, then, Article X, Section 9 limits the Legislature’s power.

C. THE DISTRICT COURT’S RULING IS CORRECT.

The State argues that the district court’s ruling “sets a dangerous precedent” that the “Board possesses its own police power as it relates to MUS campuses.” (State Brief, p. 32). The district court did not so hold, but rather held that “the BOR, not the Legislature, has the power to determine who may carry firearms on MUS property.” (App. E, 027). The determination of the Board’s authority is narrowly tailored to the issue before the Court – whether the Board or the Legislature has that authority.

The State posits that the district court erred by shifting the burden to the State to show the Legislature has the power to regulate on MUS campuses. (State Brief, p. 13). The district court did no such thing. For this argument, the State does not cite to the district court’s Order and instead relies upon a single question posed to the State during oral argument about whether anything in Article X, § 9, which grants “full” authority to the Board provides the Legislature any authority.

(State Brief, p. 13) (*citing* App. A, 020). The district court cited and applied the correct standard, requiring the Board to show HB 102 is unconstitutional beyond a reasonable doubt, and recognizing that a statute’s constitutionality “‘is prima facie presumed.’” (App. E, 003). After a thorough analysis, the district court properly determined that the Board “‘established, beyond a reasonable doubt, that HB 102 sections 3, 4, 5, 6, 7 and 8, as applied to BOR are unconstitutional in that they violate Mont. Const., art. X, § 9(2).” (App. E, 028).

The State also argues that the district court erred by “ruling” on the scope of the constitutional right to bear arms. (State Brief, p. 33). Any such language in the opinion is characterized as *dicta* by the district court’s own opinion. The district court stated that the “question is not before this Court,” and mused that “[a]s this Court understands, neither the United States Supreme Court nor the Montana Supreme Court have held that a member of the general public has an absolute, constitutional right to openly carry a firearm in public for individual self-defense.” (App. E, 027).

This Court is not bound by its own *dicta*, much less that of the district court. *Montana Human Rights Div. v. City of Billings* (1982); 199 Mont. 434, 441, 649 P.2d 1283, 1287. The district court’s holding is entirely correct. Even assuming for the sake of argument that the district court exceeded the briefed issues, this Court “may affirm a judgment for any reason supported by law and the record that

does not expand the relief granted by the lower court.” *Peeler v. Rocky Mt. Log Homes Can., Inc.*, 2018 MT 297, ¶ 28, 393 Mont. 396, 413, 431 P.3d 911, 922 (citing *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984)). The district court’s core holding and thoroughly researched opinion should be upheld.

VIII. CONCLUSION

For the foregoing reasons, this Court should uphold the district court’s sound ruling that the HB 102 sections 3, 4, 5, 6, 7 and 8, as applied to the Board, are unconstitutional in that they violate Article X, Section 9(2) of the Montana Constitution, and uphold the district court’s injunction of the application or enforcement of these sections on or at MUS campuses and locations or against the Board. This really is a straightforward issue that the State tries hard to complicate. The structure and wording of Montana’s constitution fully answers the issue before this Court: “Full” authority vested in the Board means just that, and allowing HB102 to stand against the Board would require this Court to declare, to the contrary, that “full” means “limited” in whatever manner the Legislature may declare in any given session. Such a subjection of “the government and control of the Montana university system” to the biennial vagaries of legislative politics is manifestly not what the framers of our constitution intended. Article X, §2(a). Instead, it is precisely what the carefully-crafted language “vest[ing] *in a board of*

regents [the] full power, responsibility, and authority” over the MUS was designed to prevent. *Id.* (emphasis added). This Court should affirm the district court.

Dated this 14th day of March, 2022.

Respectfully submitted,

/s/ Martha Sheehy

Martha Sheehy
Sheehy Law Firm

/s/ Kyle A. Gray

Kyle A. Gray
Brianna C. McClafferty
Emily J. Cross
Holland & Hart LLP

/s/ Ali Bovingdon

Ali Bovingdon
MUS Chief Legal Counsel

Counsel for Petitioner Appellee Board of Regents

CERTIFICATE OF COMPLIANCE

The undersigned, Martha Sheehy, certifies that the foregoing complies with the requirements of Rules 11 and 14(9)(b), Mont. R. App. P. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 10,000 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Martha Sheehy _____

Martha Sheehy

CERTIFICATE OF SERVICE

I, Martha Sheehy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-14-2022:

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

Kathleen Smithgall (Govt Attorney)
215 N. Sanders St.
Helena MT 59601
Representing: State of Montana
Service Method: eService

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

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

Missoula MT 59802

Representing: Montana Shooting Sports Association, Inc., Second Amendment Foundation, Idaho Second Amendment Alliance, Madison Society Foundation, Inc.

Service Method: eService

Stephen H "Greg" Overstreet (Attorney)

300 Main Street, Suite 203

Stevensville MT 59870

Representing: Seth Berglee, 80 Legislators

Service Method: eService

Palmer Hoovestall (Attorney)

608 Lincoln Rd. West

Helena MT 59602

Representing: Western Montana Fish & Game Association

Service Method: eService

Logan Olson (Attorney)

9 Wilson Street

Flaxville MT 59222

Representing: Daniels County

Service Method: eService

Louis Villemez (Attorney)

ASUM Legal Services

32 Campus Drive

University Center, RM 116

Missoula MT 59812

Representing: Associated Students of the University of Montana

Service Method: eService

James Goetz (Attorney)

PO Box 6580

Bozeman MT 59771-6580

Representing: Montana Federation of Public Employees, Montana University System Faculty Association Representatives, Associated Students of the University of Montana, Faculty Senate of Montana State University, Steve Barrett, Robert Knight, Lawrence Pettit, Joy C. Honea, Annjeanette Belcourt, Franke Wilmer, Montana Public Interest Research Group, Ashley Phelan, Joseph Knappenberger, Nicole Bondurant

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: Conventional

Electronically Signed By: Martha Sheehy
Dated: 03-14-2022