

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

BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA,
Plaintiffs-Appellees,

v.

STATE OF MONTANA, BY AND THROUGH AUSTIN KNUDSEN, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MONTANA,
Defendant-Appellant.

THE STATE OF MONTANA'S REPLY BRIEF

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

AUSTIN KNUDSEN
Montana Attorney General

DAVID M.S. DEWHIRST
Solicitor General

KRISTIN HANSEN
Lieutenant General

KATHLEEN L. SMITHGALL
Assistant Solicitor General

MONTANA DEPARTMENT
OF JUSTICE
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 Defendant-Appellant

Additional Counsel on next page

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

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

Kyle A. Gray
Brienne 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
bcmclafferty@hollandhart.com
ejcross@hollandhart.com

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	
INTRODUCTION	1
I. The Board’s authority is limited to academic, financial, and administrative decisionmaking	3
A. The Constitution and the Convention debates support a limited grant of authority to the Board.....	3
B. Binding precedent supports a limited grant of authority to the Board	6
C. The Board’s policy arguments are unpersuasive.....	12
II. Firearm regulation does not fall within the Board’s academic, financial, or administrative authority	13
III. HB 102 is the law of the land, including on MUS campuses	15
CONCLUSION	17
CERTIFICATE OF COMPLIANCE	19

TABLE OF AUTHORITIES

Cases

<i>Board of Regents v. Judge</i> , 168 Mont. 433, 543 P.2d 1323 (1975)	<i>passim</i>
<i>Duck Inn v. Mont. State University-Northern</i> , 285 Mont. 519, 949 P.2d 1179 (1997)	<i>passim</i>
<i>Koch v. Yellowstone Cnty.</i> , 243 Mont. 447, 795 P.2d 454 (1990)	5
<i>Sheehy v. Comm’r of Political Practices for Mont.</i> , 2020 MT 37, 399 Mont. 26, 458 P.3d 309	<i>passim</i>
<i>State v. Andre</i> , 101 Mont. 366, 54 P.2d 566 (1936)	4, 10, 15, 16

Other Authorities

Montana Constitution

Art. III, § 1	4
Art. X, § 9	3, 16

INTRODUCTION

The Board of Regents disagrees with HB 102 and would prefer to keep its own policy—Policy 1006—in place. But the Board’s preferences play no role in questions of constitutional interpretation. This Court must consider the constitutional text, structure, and history as well as its own case law interpreting the Board’s authority. Each of these considerations supports a limited grant of authority to the Board over academic, administrative, and financial decisionmaking in the MUS. Those areas of exclusive Board power simply don’t capture the policymaking set forth in HB 102.

Despite protests to the contrary, the Board’s arguments—which Judge McMahon rubber-stamped—elevate the Board to a fourth branch of government, giving it a share of power equal to the police power entrusted to the Legislature. *See* Board Br. 17–18. The Board claims that under its “narrow” interpretation, it is the ultimate authority over anything that “affect[s] the MUS and its campuses.” Board Br. 11. And if that sounds shocking, it is because it is shocking. This interpretation gives the Board the power to ignore or override any legislative act that impacts MUS campuses. At a minimum, this makes the Board a fourth

branch of government, and at a maximum, makes the Board an entire government unto itself. There's no way around it: under the reasoning adopted below, the MUS is now something of a principality, divorced from the rest of the Montana body politic, and ungoverned by the State's democratically elected leaders. Logically, the Board's arguments lead to no other result. Yet while the Board attempts to soft-peddle its arguments' jarring implications, Judge McMahon said all the quiet parts out loud. Luckily for everyone, this Court has rejected such an extreme interpretation. *See Sheehy v. Comm'r of Political Practices for Mont.*, 2020 MT 37, 399 Mont. 26, 458 P.3d 309; *Duck Inn v. Mont. State University-Northern*, 285 Mont. 519, 949 P.2d 1179 (1997); *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975).

The Board's authority is not unlimited on MUS campuses. Its authority is limited to academic, financial, and administrative management of the MUS. HB 102 falls outside that limited authoritative ambit. Therefore, the Board's contrary policy must yield to HB 102, a duly enacted law passed by the Legislature and signed into law by the Governor.

I. The Board’s authority is limited to academic, financial, and administrative decisionmaking.

The Board’s interpretation that it has authority over anything that “affects the MUS and its campuses” is untenable. Board Br. 11. The Constitution’s text and structure—and this Court’s own cases—support a narrower grant of authority to the Board.

A. The Constitution and the Convention debates support a limited grant of authority to the Board.

The Board argues that “the plain language of Article X, Section 9 grants to the Board, and not the Legislature, authority to institute firearms policy on its campuses.” Board Br. 9. In support of this assertion, the Board makes several arguments, none of which are availing.

The Board’s primary argument is that because the Constitution grants the Board the “full power,” then only the Board can regulate any activity that will “affect the MUS and its campuses.” Board Br. 9, 11. But this phrase does not accomplish what the Board wants it to. As the State has argued, the very text of this grant of authority limits this “full power” to the power “to supervise, coordinate, manage and control the Montana university system.” MONT. CONST. art. X, § 9; *see also* State Br.

11. This is not the power over anything and everything that will affect the MUS and its campuses.

The question, then, is what the limiting language “to supervise, coordinate, manage and control” means. The Board doesn’t answer this question, instead repeating its mantra that “full power” means power over anything that will “affect the MUS and its campuses.” Board Br. 11. Nor does the Board identify a limiting principle to its “*full power*” means “*full power*” argument. But as the State explained in its opening brief, this interpretation is wrong. State Br. 11–13. “Full power” must mean something more limited given the text and structure of Montana’s constitution. The Constitution didn’t establish a governing document for two separate governments. The Board remains a constituent part of Montana Government—indeed a subsidiary of the Executive Branch. *Sheehy*, ¶ 11, n.1. Except in highly limited circumstances, it may not exercise authority belonging to another branch—it is still subject to the executive, legislative, and judicial branches. *See* MONT. CONST. art. III, § 1; *see also* State Br. 12. And only the Legislature has the power to enact statewide public health and safety laws. *See State v. Andre*, 101 Mont. 366, 371, 54 P.2d 566, 570 (1936). Both the Constitutional Convention

debates and this Court's precedent foreclose the Board's argument to the contrary.

In the State's opening brief, the State cited extensively to the debates at the 1972 Constitutional Convention. *See* State Br. 14–16. These debates do not demonstrate that the framers sought to remove any political involvement whatsoever from university management, but rather that they sought to establish a certain level of independence for the Board. *See, e.g.*, App. C, 16; App. D, 22–30. And this independence was aimed at streamlining day-to-day decisionmaking over academic, financial, and administrative affairs. *See* State Br. 14–16; *see also* App. C., 10, 14–15, 19, 34–35.

In response to this extensive evidence, the best the Board can do is cite to an Education Committee's report to the delegates, which just reiterates that the Board should be an independent entity—a proposition with which no one disagrees. *See* Board Br. 10. The correct question is *how independent* the Board ought to be. Nothing in the Convention debates suggests that the Board was intended to be completely free from state laws affecting the university system. State Br. 14–16. Instead, these debates showcase a general understanding that the Board would

exercise independence over “academic, financial, and administrative affairs.” App. D, 8; *see also* State Br. 14–16. The Board doesn’t attempt to disprove the State’s Convention evidence, because it cannot.

B. Binding precedent supports a limited grant of authority to the Board.

In another attempt to skirt the issue, the Board next argues that “this Court never attempted to narrow the scope of the Board’s authority in [*Sheehy*, *Duck Inn*, or *Judge*].” That’s simply incorrect. *See Sheehy*, ¶ 41 (McKinnon, J., concurring) (“The Board cannot abridge rights protected by the federal or state constitutions, and is subject to state legislation enforcing state-wide standards for public welfare, health, and safety.”); *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.”); *Judge*, 168 Mont. at 449, 543 P.2d at 1332 (“The Regents are a constitutional body in Montana government subject to ... the public policy of this state.”). The cases all shed some light on the constitutional contours of the Board’s authority. Board Br. 16. But the Board eschews those cases because they each affirm a limited view of its authority. The cases, therefore, directly contradict the Board’s

argument that it possesses full power over anything that affects the MUS. Board Br. 11.

Judge, Duck Inn, and *Sheehy* are each consistent with the framers' understanding of the Board's powers. *Judge*—the only case arising from a dispute between the Legislature's constitutional powers and the Board's—reaffirms that the Board has significant constitutional authority over the limited subject matter within its domain. *See Judge*, 168 Mont. at 443–44, 543 P.2d at 1329–30; *see also* State Br. 17–19. But this Court also explained that the Constitution's grant of authority to the Legislature and other branches still serve as a limitation on the scope of the Board's authority—that is, what is included in the Board's domain. *Judge*, 168 Mont. at 443, 543 P.2d at 1329–30. The Board's authority is limited to “academic, administrative and financial matters of substantial importance to the system.” *Id.* at 454, 543 P.2d at 1333. Although *Sheehy* and *Duck Inn* did not squarely address a conflict between the Legislature and the Board, the issues in both cases involved the MUS's financial, administrative, and academic interests. *See Sheehy*, ¶ 29; *Duck Inn*, 285 Mont. at 524, 949 P.2d at 1182; *see also* State Br. 17–22. This, of course, is consistent with both *Judge* and the Convention debates.

The Board responds that, although these disputes each related to funding for the MUS, the Court never stated or implied that the Board's power was limited to only funding issues. Board Br. 15. But in each of these cases, the issues fell squarely within these well-established powers. *Judge*, the only case with a direct conflict, held that the Legislature could not commandeer the pay decisions for university presidents because these decisions are quintessentially academic, financial, and administrative. *Judge*, 168 Mont. at 454, 543 P.2d at 1335.

The Board claims that “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 ... provided an opportunity to do so.” The cases don't support this conclusion. *See* State Br. 17–22. This Court did limit the Board's authority. For example, in *Judge*, this Court considered the appropriation in light of the Board's authority over “academic, administrative and financial matters.” *Judge*, 168 Mont. at 454, 543 P.2d at 1335. In that case, the Legislature appropriated monies to the MUS that were contingent upon salary restrictions. *Id.* at 441, 543 P.2d at 1328. Even though these were “seemingly minor conditions,” it was significant that they were still related to the “academic, administrative

and financial matters” of the university system. *Id.* at 454, 543 P.2d at 1335.

In *Duck Inn*, the challenged law allowed the Board to rent campus facilities. *Duck Inn*, 285 Mont. at 523, 949 P.2d at 1181. This Court held that because the Board already had independent authority over renting its facilities—an academic, administrative, *and* financial matter—the Legislature could delegate specific responsibilities within this authority to the Board. *See Duck Inn*, 285 Mont. at 526, 949 P.2d at 1183. While the Board seeks to disregard the factual circumstances of these cases, this Court’s analysis of the Board’s authority over academic, administrative, and financial matters was critical to each of its decisions.

The Board seems to compare the previous grant of authority—which was repealed by HB 102—over firearm regulation to the delegation in *Duck Inn*. It argues—without citation—that the Legislature’s previous grant of authority to the Board to regulate firearms was simply an “acknowledge[ment]” of the Board’s existing authority. Board Br. 13 n.6. But unlike in *Duck Inn*, this legislative grant of authority over firearm regulation does not fall within the Board’s independent authority over academic, administrative, or financial matters—unless those terms

are so capacious they cover virtually every matter. The framers envisioned the Board managing MUS campus facilities and managing capital costs or debts. *See* State Br. 15–16. Thus, in *Duck Inn*, the Board’s power to manage MUS facilities fell within its existing authority. Here, though, the Legislature’s previous grant of authority was more than an acknowledgment of existing authority. It was a delegation of entirely new authority to the Board because the power to regulate firearms belongs to the State. *See* State Br. 30; *see also Andre*, 101 Mont. at 371, 54 P.2d at 570; *see also Sheehy*, ¶ 41 (McKinnon, J., concurring). And because the Legislature gave the Board this new authority, it can take it away. *Id.*

Finally, and most recently, in *Sheehy*, this Court determined that the challenged actions fell under the Board’s duty to ensure the financial health and stability of the MUS. *Sheehy*, ¶ 29. As Justice McKinnon stated in her *Sheehy* concurrence, “[t]he Board may exercise all powers connected with the proper and efficient internal governance of the MUS,” but “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. Like in *Duck Inn*, this Court did not need to address the Board’s authority outside the context of academic, administrative, and financial decisionmaking.

The Board attempts to get around its limited power by arguing that it must be able to do “all things necessary and proper to the exercise of its general powers.” Board Br. 14. The Board explains that “[c]ontrol and supervision of college campuses necessarily requires the Board to control and supervise campus firearm policies,” Board Br. 14, and that “[q]uite clearly, the Board cannot control and manage its campuses without the ability to set firearm policy for those campuses.” Board Br. 17. But the Board bases these arguments on its premise that anything that will “affect the MUS and its campuses” falls within the Board’s general powers. Board Br. 11. And yet again, it provides no limiting principle for this view of its own authority. Without such a limitation, the Board’s premise would transform it into a fourth branch of government ... or fifty-first state.

Likewise, the Board argues that it must have general control and supervision over the MUS, which necessarily requires the Board to regulate firearms on campus. Board Br. 14. But this, again, assumes

that the Board’s general powers are unlimited and that the Board—as it argues—has authority over anything and everything that affects the MUS campuses. Board Br. 11.

As explained above, though, these argument fails because the Board’s general power is limited to academic, administrative, and financial decisionmaking. *See Sheehy*, ¶ 29; *Duck Inn*, 285 Mont. at 524, 949 P.2d at 1182; *Judge*, 168 Mont. at 443, 543 P.2d at 1329–30. The Board, therefore, can only do what is necessary and proper to exercise *these* powers. *See Sheehy*, ¶ 29. The Board’s necessary and proper argument is based on the flawed assumption that the Board’s general powers are unlimited.

C. The Board’s policy arguments are unpersuasive.

The Board also sets forth several policy arguments for why its interpretation of the Board’s authority must be correct. The Board points to the fact that it meets six times a year, Board Br. 16, and that it considers input from numerous interested parties, Board Br. 21. Like the Board, though, the Legislature also takes input from numerous interested parties—including the Board itself, which brokered several deals to shape the final version of HB 102. *See* D.C. Doc. 21, Ex. 2-1;

State Br. 3. And the fact that the Board meets more frequently than the Legislature has no legal effect on the interpretation of the Board's constitutional authority.

II. Firearm regulation does not fall within the Board's academic, financial, or administrative authority.

After the Board incorrectly reaches its absolutist reading of its own power, the Board then shifts tactics, arguing that if the Board's authority is limited to academic, financial, and administrative decisions, then firearm regulation falls within this range of authority because firearm policy impacts the financial stability of MUS. Board Br. 19. This argument, too, fails.

The Board points to the \$1 million appropriation and public comments about enrollment numbers. With respect to the appropriation that *the Board itself requested*, this funding is designated specifically for implementation of HB 102, so it does not impact the financial "stability" of MUS in the way the Board claims. If HB 102 is struck down, the Board gets no appropriation for its implementation. And if HB 102 is upheld, the appropriation goes directly towards the costs of implementing that bill. This is wholly unrelated to the financial "stability" of the MUS—it is not tied to the Board's power to manage finances but rather tied to this

specific bill. This appropriation by the Legislature cannot serve as the basis for an expansive interpretation of the Board's powers. If this is true, then again, there is no limitation to the Board's power. The Board asked for this money. And now it says that that money is the very reason why this law is unconstitutional.

With respect to the public comments about enrollment numbers, this is a disputed fact. *See* D.C. Doc. 87, 12 n.5. Because the parties both agreed—by filing motions for summary judgment—that there were no genuine disputes of material fact, the Board cannot now rely on these disputed facts as the basis for their legal argument. *See* State Br. 6 n.2.

Finally, there is no limiting principle to the Board's argument that firearm regulation is tied to the financial stability of the MUS. Under this theory, everything the Legislature does could have a financial impact on the MUS. For example, if the Legislature set the tax rate at a level the university system didn't like, the Board could not then set a lower tax rate because the higher tax rate impacts the financial stability of the university. *See* D.C. Doc. 84, 13. The Legislature's higher tax might require the university to pay higher salaries to attract faculty members and, in turn, attract quality students—this, of course, could impact the

finances of the MUS. But the Board obviously cannot set a different tax rate. Only the Legislature can do this. *See Koch v. Yellowstone Cnty.*, 243 Mont. 447, 451, 795 P.2d 454, 457 (1990).

The Board next argues that it has the duty to protect the safety and health of students.¹ The State does not dispute that the Board plays an important role in protecting student health and safety. But it does not act alone. It acts in conjunction with the Legislature, which has the duty to enact statewide health and safety laws, including HB 102. *See Andre*, 101 Mont. at 371, 54 P.2d at 570; *see also Sheehy*, ¶ 41 (McKinnon, J., concurring). The Board cannot disregard these duly enacted laws of statewide application.

III. HB 102 is the law of the land, including on MUS campuses.

The Legislature is still the Legislature on MUS campuses. The Board's only response is that the Board has full power, and this full power serves as a limitation on the Legislature's police power. Board Br. 29.

¹ The Legislature gave the Board \$1 million to help implement HB 102, which it stated should be used for "firearms training, metal detectors for events, gun safes for campus resident housing, or awareness campaigns." HB 102, E-10. And the Board forfeited these funds when it brought this action challenging HB 102.

But the Board bases its argument on a flawed reading of the Montana Constitution. *See supra* Section I.

HB 102 is a statewide health and safety law, and it applies on all state-owned property, including the MUS. The Legislature has the constitutional authority to pass laws, including health and safety laws under its police power. *See Andre*, 101 Mont. at 371, 54 P.2d at 570; *see also Sheehy*, ¶ 41 (McKinnon, J., concurring). Contrary to the district court’s conclusion, 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—like the Governor or any other Executive Branch actor—is therefore still subject to legislative acts. *See State Br. 26*.

In comparison, the Constitution grants the Board the limited authority to manage the MUS’s academic, financial, and administrative affairs. *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. But this grant of authority does not free the Board from the constraints of state

law. *Id.*; *see also* State Br. 29–30. Accordingly, the Board must yield to the legislative enactment of HB 102.

CONCLUSION

The Board vigorously protests that its arguments necessarily elevate it to the status of a fourth branch of government. But that is exactly what its claim to exclusive authority over firearm regulation on campuses is. It allows the Board to veto a law simply because that act will “affect the MUS and its campuses” in some way it believes disagreeable. Board Br. 11. This Court—unlike the one below—should refuse to play the Board’s semantic games. What the Board requests is a substantial transformation of Montana government—one not contemplated by the Constitution or fifty years of practice. The Legislature has the authority to enact generally applicable public safety laws that apply to the MUS. HB 102 is one such law. The Board is not above the law. This Court should therefore reverse the district court’s decision.

DATED this 28th day of March, 2021.

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

Attorney for Defendant and 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 3,463 words, excluding certificate of service and certificate of compliance.

/s/ Kathleen Smithgall
KATHLEEN SMITHGALL

CERTIFICATE OF SERVICE

I, Kathleen Lynn Smithgall, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-28-2022:

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., Second Amendment Foundation, Idaho Second Amendment Alliance, Madison Society Foundation, Inc.

Service Method: eService

Stephen H.G. ('Greg') Overstreet (Attorney)

300 Main Street, Suite 203

Stevensville MT 59870

Representing: Seth Berglee, 80 Legislators

Service Method: eService

Palmer A. Hoovestall (Attorney)

608 Lincoln Rd. West

Helena MT 59602

Representing: Western Montana Fish & Game Association

Service Method: eService

Logan Paul Olson (Attorney)

9 Wilson Street

Flaxville MT 59222

Representing: Daniels County

Service Method: eService

Louis C. 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 H. 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: E-mail Delivery

Electronically signed by Dia Lang on behalf of Kathleen Lynn Smithgall
Dated: 03-28-2022