

FILED

NOV 30 2021

ANGIE SPARKS, Clerk of District Court
By [Signature] Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

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

Petitioner,

v.

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

Respondent.

Cause No.: BDV-2021-598

**SUMMARY JUDGMENT
ORDER**

Pending before the Court are the Montana Higher Education Board of Regents (BOR) and the State of Montana's (Montana) respective summary judgment motions relative to BOR's May 27, 2021 Judicial Review Petition seeking, among other things, an order from this Court declaring "HB 102 ... unconstitutional as applied to BOR, MUS and MUS campuses and locations."

1 David Diacon and Daniels County timely submitted their respective *amicus*
2 briefs. The motions are fully briefed.

3 On November 30, 2021, at Montana's request, oral argument was
4 held. It was represented by David Dewhirst and Kathleen L. Smithgall. BOR
5 was represented by Martha Sheehy and Ali Bovingdon.

6 For the reasons stated below, BOR's summary judgment motion is
7 **GRANTED**, and Montana's summary judgment motion is **DENIED**.

8 REVIEW STANDARDS

9 Summary Judgment

10 Summary judgment is proper when no genuine issues of material
11 fact exist, and the moving party is entitled to judgment as a matter of law. Mont.
12 R. Civ. P. 56(c)(3). Since the controlling issue before this Court is strictly a legal
13 question, summary judgment is appropriate at this juncture as a matter of law.
14 See *Lingscheit v. Cascade County*, 249 Mont. 526, 531, 817 P.2d 682 (1991).

15 Constitutional Issue

16 "Statutes are presumed to be constitutional, and it is the duty of this
17 Court to avoid an unconstitutional interpretation if possible." *Hernandez*, ¶ 15 (citing *Montanans for the Responsible Use of the*
18 *School Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶
19 11, 296 Mont. 402, 989 P.2d 800; *State v. Nye*, 283 Mont. 505, 510,
20 943 P.2d 96, 99 (1997)). The party challenging a statute's
21 constitutionality bears the heavy burden of proving the statute is
22 unconstitutional "beyond a reasonable doubt." *Molnar v. Fox*, 2013
23 MT 132, ¶ 49, 370 Mont. 238, 301 P.3d 824.

24 When interpreting constitutional provisions, we apply the same rules
25 as those used in construing statutes. *Nelson v. City of Billings*, 2018
MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. But just as with
statutory interpretation, constitutional construction should not "lead
to absurd results, if reasonable construction will avoid it." *Nelson*, ¶

1 16 (citing *Grossman v. Mont. Dep't of Natural Res.*, 209 Mont. 427,
2 451, 682 P.2d 1319, 1332 (1984)). "The principle of reasonable
3 construction 'allows courts to fulfill their adjudicatory mandate and
4 preserve the [Framers'] objective.'" *Nelson*, ¶ 16 (citation omitted).
Thus:

5 Even in the context of clear and unambiguous language . . . we
6 have long held that we must determine constitutional intent not
7 only from the plain meaning of the language used, but also in
8 light of the historical and surrounding circumstances under
9 which the Framers drafted the Constitution, the nature of the
subject matter they faced, and the objective they sought to
achieve.

10 *Brown v. Gianforte*, 2021 MT 149, ¶¶ 32-33, 404 Mont. 269, 488 P.3d 548
11 (citing authority). Moreover, statutes conflicting with the Montana Constitution
12 are subordinate to the constitution but, if possible, must be interpreted to
13 harmonize with it. See *Pengra v. State*, 2000 MT 291, ¶ 14, 302 Mont. 276, 14
14 P.3d 499. In addition, a statute's constitutionality "is prima facie presumed, and
15 every intendment in its favor will be made unless its unconstitutionality appears
16 beyond a reasonable doubt." *Judge*, 168 Mont. at 444 (citing authority).
17 Notwithstanding, however, statutory application that is contrary to a
18 "constitutional directive" is unconstitutional "under any level of scrutiny." *City*
19 *of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 31, 419 P.3d 685. Whether
20 a statute is constitutional is a legal question. *Id.*

21 **UNDISPUTED BACKGROUND**

22 "The Board of Regents and its members, as well as the entire
23 MUS, is an independent board within the executive branch." *Sheehy v.*
24 *Commissioner of Political Practices*, 2020 MT 37, ¶ 11, 399 Mont. 26, 458 P.3d
25 309 (fn. 1).

1 Montana's 1889 Constitution provided, in relevant part, that:
2 The general control and supervision of the state university and the
3 various other state educational institutions shall be vested in a state
4 board of education, whose powers and duties shall be prescribed and
5 regulated by law.
6 Mont. Const. (1889), art. XI, § 11 (emphasis added). "This provision of the
7 Constitution contemplates and authorizes the legislature to prescribe powers and
8 duties of the state board of education." *Means v. State Bd. of Educ.*, 127 Mont.,
9 515, 518, 267 P.2d 981 (1954); see also, *Board of Regents v. Judge*, 168 Mont.
10 433, 442, 543 P.2d 1323, 1325 (1975) (Mont. Const. (1889) art. XI, § 11 gave
11 BOR general control and supervision but limited its powers to those which 'shall
be prescribed and regulated by law.'" (emphasis added).

12 Under the 1889 Constitution, BOR's was statutorily required,
13 among other things, to:

14 (1) have general control and supervision of the units of the
15 Montana university system, which shall be considered for all
16 purposes one university;

17 (2) adopt rules, not inconsistent with the constitution and the
18 laws of the state for its own government which are proper and
19 necessary for the execution of the powers and duties conferred upon
20 it by law;

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

21 Rev. Code Mont.1947, 75-8501 (1947); codified at Mont. Code Ann. § 20-25-
22 301 (1971).

23 Under the 1889 Constitution, BOR was statutorily authorized to
24 "exercise full control and complete management" of MUS:

25 /////

- 1 (a) land;
2 (b) residence halls, dormitories, houses, apartments, and other
housing facilities;
3 (c) dining rooms and halls, restaurants, cafeterias, and other
4 food service facilities;
5 (d) student union buildings and facilities; and
6 (e) those other facilities specifically authorized by joint
resolution of the legislature

7 Rev. Code Mont.1947, 75-8503 (1947); codified at Mont. Code Ann. § 20-25-
8 302 (1971).

9 Under the 1889 Constitution, the Legislature authorized that:
10 Security guards shall be authorized to carry firearms between sunset
11 and sunrise and at any time when acting as guards for transportation
12 of money or other valuables.

13 Rev. Code Mont.1947, 75-8516 (1947); codified at Mont. Code Ann.
14 § 20-25-324 (1971).

15 In 1972, BOR's constitutional power and authority substantially
16 increased:

17 The government and control of the Montana university system is
18 vested in a board of regents of higher education which shall have full
19 power, responsibility, and authority to supervise, coordinate, manage
20 and control the Montana university system and shall supervise and
coordinate other public educational institutions assigned by law.

21 Mont. Const., art. X, §9(2)(a) (emphasis added). "[U]nder the 1972 Montana
22 Constitution, [BOR] was given 'full power, responsibility, and authority to
23 supervise, coordinate, manage and control the Montana university system.'"

24 *Judge*, at 442.

25 /////

1 In 1981, Mont. Code Ann. § 20-25-324 was amended to read:
2 Security guards who have successfully completed the basic course in
3 law enforcement conducted by the Montana law enforcement
4 academy may carry firearms in accordance with policies established
by the [BOR]:

- 5 (1) between 5 p.m. and 8 a.m.; and
6 (2) whenever guarding money or other valuables.

7 Mont. Code Ann. § 20-25-324 (1981).

8 In 1991, Mont. Code Ann. § 20-25-324 was amended to read:
9 Security guards who have successfully completed the basic course in
10 law enforcement conducted by the Montana law enforcement
11 academy may carry firearms in accordance with policies established
12 by the board of regents after consulting with the student body
13 government at the unit of the university system affected by the
regents' policy.

14 Mont. Code Ann. § 20-25-324 (1991).¹

15 BOR Policy 1006 closely mirrors Mont. Code Ann. § 20-25-324 in
16 that the only individuals authorized to carry firearms on MUS properties are:

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

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

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

¹ See also Mont. Code Ann. § 20-25-324 (2021). The 2021 Legislature did not amend, alter or repeal Mont. Code Ann. § 20-25-324.

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

4 BOR Policy 1006 (11/18/99 and revised 5/25/12).

5 Today, Mont. Code Ann. § 20-25-301² provides, in relevant part,
6 that:

7 The board of regents of higher education shall serve as regents of the
8 Montana university system, shall use and adopt this style in all its
9 dealings with the university system, and:

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

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

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

19 . . .

20 (6) must have, when not otherwise provided by law, control
21 of all books, records, buildings, grounds, and other property of the
22 system;

23 Mont. Code Ann. § 20-25-301 (2021).

24 Today, the BOR may “exercise full control and complete
25 management of [revenue producing] facilities.” Mont. Code Ann. § 20-25-302
(4) (2021)³.

 On February 18, Governor Gianforte signed HB102⁴. Most of HB
102’s sections became immediately effective although section 6 which is

² The 2021 Legislature did not amend, alter or repeal Mont. Code Ann. § 20-25-301.

³ The 2021 Legislature did not alter, amend or repeal Mont. Code Ann. § 20-25-302.

⁴ Codified at Mont. Code Ann. § 45-8-353 through 45-8-359, and Mont. Code Ann. § 45-3-311.

1 applicable to the BOR was to become effective on June 1, 2021⁵. HB 102
2 provides, in relevant part, that:

3 **Section 1. Purpose.** The purpose of [sections 1 through 11] is to
4 enhance the safety of people by expanding their legal ability to
5 provide for their own defense by reducing or eliminating
6 government-mandated places where only criminals are armed and
7 where citizens are prevented from exercising their fundamental right
8 to defend themselves and others.

9 **Section 2. Legislative intent.** It is the intent of the legislature to
10 reduce or remove provisions of law that limit or prohibit the ability
11 of citizens to defend themselves by restricting with prior restraint the
12 right to keep or bear arms that the people have reserved to
13 themselves in the Montana constitution, and to further establish that
14 the right to defense of a person's life, liberty, or property is a
15 fundamental right.

16 **Section 3. Legislative findings.** The legislature declares and finds as
17 follows:

18 (1) Nowhere in Article X, section 9(2)(a), of the Montana
19 constitution is any power granted to amend, suspend, alter, or
20 abolish the Montana constitution, nor is any power granted to
21 affect or interfere with the rights the people have reserved to
22 themselves specifically from interference by government
23 entities and government actors in Article II of the Montana
24 constitution.

25 (2) The Montana university system was created and is
controlled by the Montana constitution and the land and
buildings occupied by the university system are public property
and not private property and are therefore clearly government
entities.

(3) Any significant prohibition upon the possession of firearms
at or on the various campuses of the Montana university system

⁵ On May 28, 2021, this Court temporarily stayed and enjoined sections 4, 5, 6, 7 and 8. On June 7, 2021, this Court converted the temporary injunction to a preliminary injunction.

1 calls into question the rights that the people have reserved to
2 protect themselves from government interference under Article
II, section 12, of the Montana constitution.

3 (4) Zones where guns are prohibited provide an increased risk
4 to the health and safety of citizens because these zones create
5 an unreasonable expectation of government-provided safety,
while that safety cannot be provided or ensured.

6 (5) In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and
7 *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the United
8 States supreme court affirmed that the second amendment to the
9 United States constitution reserves to individuals the
10 fundamental right to keep and bear arms for self-defense and is
11 applicable as a restriction upon state and local governments and
all political subdivisions of state and local government through
the 14th amendment to the United States constitution.

12 **Section 4. Where concealed weapon may be carried -- exceptions.**

13 A person with a current and valid permit issued pursuant to 45-8-321
14 or recognized pursuant to 45-8-329 may not be prohibited or
15 restricted from exercising that permit anywhere in the state, except:

16 (1) in a correctional, detention, or treatment facility operated by
17 or contracted with the department of corrections or a secure
18 treatment facility operated by the department of public health
and human services;

19 (2) in a detention facility or secure area of a law enforcement
20 facility owned and operated by a city or county;

21 (3) at or beyond a security screening checkpoint regulated by
22 the transportation security administration in a publicly owned,
23 commercial airport;

24 (4) in a building owned and occupied by the United States;

25 (5) on a military reservation owned and managed by the United
States;

1 (6) on private property where the owner of the property or the
2 person who possesses or is in control of the property, including
3 a tenant or lessee of the property, expressly prohibits firearms;

4 (7) within a courtroom or an area of a courthouse in use by
5 court personnel pursuant to an order of a justice of the peace or
6 judge; or

7 (8) in a school building as determined by a school board
8 pursuant to 45-8-361.

9 **Section 5. Prohibition on infringement of constitutional rights.**

10 The board of regents and all university system employees subject to
11 the authority of the board of regents are prohibited from enforcing or
12 coercing compliance with any rule or regulation that diminishes or
13 restricts the rights of the people to keep or bear arms as reserved to
14 them in Article II of the Montana constitution, especially those rights
15 reserved in Article II, sections 4 through 12, notwithstanding any
16 authority of the board of regents under Article X, section 9(2)(a), of
17 the Montana constitution.

18 **Section 6. Regulation of firearms prohibited for certain people --**
19 **exceptions.**

20 (1) Except as provided in subsection (2), the board of regents
21 and any unit of the university system may not regulate, restrict,
22 or place an undue burden on the possession, transportation, or
23 storage of firearms on or within university system property by a
24 person eligible to possess a firearm under state or federal law
25 and meeting the minimum safety and training requirements in
45-8-321(3).

(2) The board of regents or a unit of the university system may
prohibit or regulate the following:

(a) the discharge of a firearm on or within university system
property unless the discharge is done in self-defense;

1 (b) the removal of a firearm from a gun case or holster
2 unless the removal is done in self-defense or within the
3 domicile on campus of the lawful possessor of the firearm;

4 (c) the pointing of a firearm at another person unless the
5 lawful possessor is acting in self-defense;

6 (d) the carrying of a firearm outside of a domicile on campus
7 unless the firearm is within a case or holster;

8 (e) the failure to secure a firearm with a locking device
9 whenever the firearm is not in the possession of or under the
10 immediate control of the lawful possessor of the firearm;

11 (f) the possession or storage of a firearm in an on-campus
12 dormitory or housing unit without the express permission of
13 any roommate of the lawful possessor of the firearm;

14 (g) the possession or storage of a firearm by any individual
15 who has a history of adjudicated university system discipline
16 arising out of the individual's interpersonal violence or
17 substance abuse;

18 (h) the possession of a firearm at an event on campus where
19 campus authorities have authorized alcohol to be served and
20 consumed; and

21 (i) the possession of a firearm at an athletic or entertainment
22 event open to the public with controlled access and armed
23 security on site.

24 **Section 7. Remedy for violations.** Any person that suffers
25 deprivation of rights enumerated under [sections 1 through 6] has a
cause of action against any governmental entity, as defined in 2-9-
101. The cause of action must be filed in district court. If a person
asserting a deprivation of rights prevails, the person may be awarded
reasonable costs, attorney fees, and damages.

1 **Section 8. Section 45-3-111, MCA, is amended to read:**

2 “45-3-111. Openly carrying weapon -- display -- exemption. (1) Any
3 person who is not otherwise prohibited from doing so by federal or
4 state law may openly carry a weapon and may communicate to
5 another person the fact that the person has a weapon.

6 (2) If a person reasonably believes that the person or another
7 person is threatened with bodily harm, the person may warn or
8 threaten the use of force, including deadly force, against the
9 aggressor, including drawing or presenting a weapon.

10 ~~(3) This section does not limit the authority of the board of regents~~
11 ~~or other postsecondary institutions to regulate the carrying of~~
12 ~~weapons, as defined in 45-8-361(5)(b), on their campuses.”~~

12 HB 102, §§ 1-8.

13 **DISCUSSION**

14 The sole issue in this proceeding is whether the Legislature or the
15 Executive branch, via the BOR, has the exclusive constitutional authority to
16 regulate firearms on MUS campuses and other locations.⁶ BOR and Montana’s
17 respective positions center on their interpretations of Article X, Section 9, 1972
18 Montana Constitution. BOR has the burden to establish HB 102 is
19 unconstitutional “beyond a reasonable doubt.” *Judge*, 168 Mont. at 444 (citing
20 authority). Moreover, as Justice McKinnon recognized, a court “must
21 engage in a case-by-case analysis to determine whether the legislature’s action
22 impermissibly infringes on [BOR’s] Board’s authority.” *Sheehy v. Commissioner*
23 *of Political Practices*, 2020 MT 37, ¶ 38, 399 Mont. 26, 458 P.3d 309 (J.
24 McKinnon, specially concurring)) (citing *Judge*, 168 Mont. at 451).

25

⁶ *Amici Daniels’ County* “prior restraint” argument is not applicable in this proceeding. Such a challenge relative to BOR Policy 1006 is for another day, if at all. In this regard, this Court agrees with BOR that “[n]either the propriety of Policy 1006 nor its constitutionality is at issue here.”

1 **BOR's Constitutional Authority to Regulate Firearms on MUS Property**

2 "It has . . . frequently been stated that the Montana Constitution,
3 unlike the Constitution of our United States, is a prohibition upon legislative
4 power, rather than a grant of power." *Judge*, 168 Mont. at 444 (citing authority)
5 (emphasis added). The *Judge* Court noted that "the legislature is not mentioned
6 in Article X, Section 9(2), which entrusts the government and control of the
7 university system to the [BOR]." *Id.*, at 451. It also noted that "[i]nherent in the
8 constitutional provision granting the [BOR its] power is the realization that the
9 [BOR] is the competent body for determining priorities in higher education." *Id.*,
10 at 454.

11 The *Duck Inn* Court established that the BOR has:
12 authority over the Montana university system which is independent
13 of that delegated by the legislature. Article X, Section 9 of the
14 Montana Constitution expressly creates the [BOR] as a constitutional
15 entity and vests the government and control of the Montana
16 university system therein. Indeed, the [BOR] is given "full power,
17 responsibility, and authority to supervise, coordinate, manage and
18 control the Montana university system" Art. X, Sec. 9, Mont.
19 Const.

20 *The Duck Inn v. Montana State University-Northern*, 285 Mont. 519, 526, 949
21 P.2d 1179 (1997).

22 The *Sheehy* Court reiterated that BOR has sole authority to
23 "supervise, coordinate, manage and control [MUS]." Mont. Const., art. X,
24 §9(2)(a). In this regard, [BOR] has broad constitutional and statutory authority to
25 determine the best policies to "ensure the health and stability of the MUS."
Sheehy, at ¶ 29.

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1 Montana argues that BOR has no authority to regulate firearms on
2 MUS' property or other locations. It contends that *Judge*, *Duck Inn*, and *Sheehy*:
3 clearly explain that "[t]he Board may exercise all powers connected
4 with the proper and efficient internal governance of the MUS," but
5 that "there are limitations and checks on the Board's power"
6 including constitutional rights and "state legislation enforcing
7 statewide standards for public welfare, health, and safety." *Sheehy*, ¶
8 41 (McKinnon, J., concurring).

9 (Brief, p. 11).

10 Here, though, the Board is not trying to exercise a power related to
11 the financial, academic, or administrative stability of the MUS. It is
12 trying to commandeer the Legislature's prerogative to enforce
13 "statewide standards for public welfare, health, and safety" on MUS
14 campuses. *Id.* But it cannot be the rule that the Legislature's police
15 power extends everywhere throughout the State but falters at the
16 campus threshold. The Board is not, after all, a separate branch of
17 government in Montana. See *Sheehy*, ¶ 11 n.1; *Judge*, 168 Mont. at
18 449–451, 543 P.2d at 1332–33. The bottom line is that the
19 Legislature is the Legislature, even on MUS campuses. And in
20 many instances, the Board's policy preferences must yield to the
21 policy of the State—which the Legislature determines and
22 articulates. Such is the case with HB 102.

23 The Legislature has the power to regulate firearms within the
24 confines of the state and federal constitutions. And the Legislature
25 has the power to regulate certain on-campus activity. See, e.g.,
Mont. Code Ann. §§ 19-20-621; 20-25-515; 20-25-511; 20-25-513;
20-25-451; 20-25-603. The Board may have the power to regulate—
and indeed has regulated—firearms, self-defense, and student safety
matters on campus. But that does not preempt the Legislature from
regulating those same issues on campus. The opposite is true; HB
102 has displaced Policy 1006.

Id., pp. 11-12.

1 Like in Colorado, the Montana Legislature has the authority to
2 regulate firearms on campus. Although the Board possesses broad
3 power to supervise and control MUS campuses, this doesn't mean
4 that the Legislature can never act with respect to campus activity and
5 property. HB 102 regulates important health, welfare, and safety
6 concerns within the police power of the State as exercised by the
7 Legislature. Duck Inn, 285 Mont. at 523, 949 P.2d at 1181; Judge,
8 168 Mont. at 449, 543 P.2d at 1332.

9 *Id.*, p. 13.

10 Montana's reliance on Colorado, Texas, Utah and Georgia
11 concealed campus carry laws is not persuasive. Neither Texas nor Utah has
12 similar constitutionally created, delegated and empowered higher education
13 boards so their campus conceal carry laws are not applicable. As to Colorado, its
14 constitutionally created Board of Regents' power is subject to implicit legislative
15 oversight ("unless otherwise provided by law"). Moreover, in regard to Georgia,
16 its constitutionally created board apparently ceded⁷ its authority to the legislature
17 which paved the way for Georgia's concealed campus carry law. OCGA § 16-11-
18 127.1(c)(20)(A)–(C) (2017).

19 As this Court understands, there are only nine such
20 constitutionally created bodies that have been expressly delegated substantial
21 governance powers. See Cal. Const., art. IX, § 9(a) ("The University of
22 California shall constitute a public trust, to be administered by the existing
23 corporation known as 'The Regents of the University of California,' with *full*
24 *powers of organization and government, subject only to such legislative control*
25 *as may be necessary* to insure the security of its funds and compliance with the
terms of the endowments of the university and such competitive bidding
procedures as may be made applicable to the university by statute for the letting

⁷ Montana neither contradicts nor disputes BOR's argument in this regard.

1 of construction contracts, sales of real property, and purchasing of materials,
2 goods, and services.”) (emphasis added); Colo. Const., art. VIII, § 5 (2) (“The
3 governing boards of the state institutions of higher education, whether established
4 by this constitution or by law, shall have the general supervision of their
5 respective institutions and the exclusive control and direction of all funds of and
6 appropriations to their respective institutions, unless otherwise provided by
7 law.”) (emphasis added); Ga. Const., art. VIII, § 4, ¶ 1(b) (“The government,
8 control, and management of the University System of Georgia and all of the
9 institutions in said system shall be vested in the Board of Regents of the
10 University System of Georgia.”); Idaho Const., art IX, § 10 (“The regents shall
11 have the general supervision of the university, and the control and direction of all
12 the funds of, and appropriations to, the university, under such regulations as may
13 be prescribed by law. The regents may impose rates of tuition and fees on all
14 students enrolled in the university as authorized by law.”) (emphasis added);
15 MCLS Const., art. VIII, § 5 (“Each board shall have general supervision of its
16 institution and the control and direction of all expenditures from the institution’s
17 funds.”) (emphasis added); Minn. Const., art. XIII, § 3 (“All the rights,
18 immunities, franchises and endowments heretofore granted or conferred upon the
19 University of Minnesota are perpetuated unto the university.”); Mont. Const., art.
20 X, § 9, §9(2)(a) (“The *government and control* of the Montana university system
21 *is vested* in a board of regents of higher education *which shall have full power,*
22 *responsibility, and authority to supervise, coordinate, manage and control* the
23 Montana university system and shall supervise and coordinate other public
24 educational institutions assigned by law.”) (emphasis added); Ne. Const., art. VII,
25 § 10 (The general government of the University of Nebraska shall, under the

1 direction of the Legislature, be vested in a board of not less than six nor more
2 than eight regents to be designated the Board of Regents of the University of
3 Nebraska, who shall be elected from and by districts as herein provided and three
4 students of the University of Nebraska who shall serve as nonvoting members ...
5 Their duties and powers shall be prescribed by law; and they shall receive no
6 compensation, but may be reimbursed their actual expenses incurred in the
7 discharge of their duties.”) (emphasis added); and Okla. Const., art. XIII, § 8
8 (“*The government of the University of Oklahoma shall be vested in a Board of*
9 *Regents consisting of seven members to be appointed by the Governor by and*
10 *with the advice and consent of the Senate.*”)

11 Furthermore, Montana’s arguments relative to BOR’s
12 constitutional authority ignores that the Legislature’s former implicit authority
13 over the BOR under Montana’s 1889 constitution (art. XI, § 11 “shall be
14 prescribed and regulated by law”) was eradicated in the 1972 constitution.

15 under the 1972 Montana Constitution, the Board’s status was
16 transformed from one of legislative devise to a constitutional
17 department with the authority to “supervise, coordinate, manage and
18 control the Montana university system.” See Mont. Const. art. X, §
19 9(2)(a). This Court has previously confirmed the Board’s need for
20 reasonable constitutional autonomy, free from excessive legislative
21 control, in *Duck Inn v. Mont. State Univ.-N.*, 285 Mont 519, 526, 949
P.2d 1179, 1183 (1997), and *Bd. of Regents v. Judge*, 168 Mont. 433,
449, 543 P.2d 1323, 1332 (1975).

22 *Sheehy*, ¶35 (J. McKinnon, specifically concurring). In this regard, Montana’s
23 argument that the Legislature can regulate campus activity is misleading at best.
24 It cites, for example, Mont. Code Ann. §§ 20-25-511 (student privacy), 20-25-
25 513 (student room entry), 20-25-515 (student records) and 20-25-603 (teacher

1 instruction) for the proposition that despite “Article X, § 9’s clear language,”
2 these laws govern and control MUS. These laws as well as those set forth in
3 Mont. Code Ann. §§ 20-25-301 (BOR’s powers and duties), 20-25-302 (BOR’s
4 powers regarding revenue producing facilities) and 20-25-324 (firearms), were
5 originally enacted under the 1889 Montana constitution when BOR was subject
6 “legislative devise.” In 2021, however, when the Legislature enacted HB 102,
7 art. X, § 9 Montanans had long freed BOR from the state’s “bureaucratic
8 [politics]” and “political changes of fortune” so it could comply with its
9 constitutional rights, duties and obligations owed to the public. *Sheehy*, 36, fn. 2
10 (J. McKinnon, specifically concurring).

11 A review of the 1972 constitutional convention debate over Mont.
12 Const. art. X, § 9, is helpful in determining the intent of the framers
13 regarding the bounds of the Board’s authority. The 1972
14 constitutional convention debate on Article X, Section 9, reveals the
15 delegates’ intention to place the Montana University System (MUS)
16 beyond the political influence of the legislature, entrusting it instead
to a Board which should be directly responsible and answerable to
the people.

17 *Sheehy*, ¶ 36 (J. McKinnon, specifically concurring). Thus, Montana is,
18 respectfully, incorrect when it boldly argues “[t]he bottom line is that the
19 Legislature is the Legislature, even on MUS campuses.” While that position may
20 be true in Texas, Colorado, Utah and Georgia, the 1972 constitution delegation
21 had the intent, foresight, and wisdom to ensure that in Montana, the BOR would
22 be “free from excessive legislative control” and political bureaucracy when it
23 drafted Mont. Const., Art. X, § 9(2)(a)’s text. *Sheehy*, ¶ 35 (J. McKinnon,
24 specifically concurring). In this regard, Mont. Const., art. X, § 9 represents a
25 ////

1 necessary and proper power balance between Montana's Executive and
2 Legislative branches in order to reduce the risk of tyranny and abuse from the
3 Legislature.

4 BOR argues, in relevant part, that:

5 The plain language of Article X, § 9 grants to the Board "full"
6 authority to institute firearms policy on its campuses. The
7 Board is vested with the "government and control of the
8 Montana university system" and is "responsible for long-range
9 planning, and for coordinating and evaluating policies and
10 programs for the state's educational systems." Mont. Const.
11 Art. X, § 9. The Board has the "full power, responsibility, and
12 authority to supervise, coordinate, manage and control the
13 Montana university system" Mont. Const. Art. X, § 9;
14 *Sheehy*, ¶ 11. "Full control" means just that; the Board is
15 vested with "full" authority to supervise, coordinate, manage,
16 and control MUS and its campuses, which necessarily includes
17 the creation and implementation of firearm policy.

18 While the language of the Constitution – and the grant of "full
19 authority" to the Board – is perfectly clear, this Court also must
20 review Article X, § 9 "in light of the historical and surrounding
21 circumstances under which the Framers drafted the
22 Constitution, the nature of the subject matter they faced, and the
23 objective they sought to achieve." *Id.* "The exact legal status
24 with which to clothe higher education in Montana was debated
25 extensively and thoroughly in the 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). 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 (concurrence). At the
Constitutional Convention, the Education Committee reported
to the delegates:

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

7 2 Montana Constitutional Convention at 736.

8 The 1972 Constitution created the Board as an autonomous,
9 independent body, "effectively insulat[ing] the public campuses from
10 Montana political officials in lieu of giving those political officials
11 more direct control over public campuses." Aronofsky, David.
12 *Voters Wisely Reject Proposed Const. Amendment 30 to Eliminate*
13 *the Montana Board of Regents*, 58 Mont. L. Rev. 333, 333 (1997)
14 ("Aronofsky"). "[T]he principle of regent independence was
15 definitely intended by the drafters of the 1972 Montana
16 Constitution." *Judge*, 543 P.2d at 1332. The delegates "rejected
17 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).

18 (BOR Brief, pp. 5-7.) Like Montana, however, BOR relies upon "statutory
19 authority" of its powers and duties that were enacted under the Mont. Const.
20 (1889), art. XI, § 11. For example, BOR contends that:

21 Indeed, the Legislature has long recognized that the Board is
22 the appropriate body to determine firearms policy on campuses.
23 Decades ago, the Legislature enacted § 20-25-324, MCA,
which provides:

24 Firearms. Security guards who have successfully
25 completed the basic course in law enforcement conducted

1 by the Montana law enforcement academy may carry
2 firearms in accordance with policies established by the
3 board of regents after consulting with the student
4 body government at the unit of the university system
affected by the regents' policy.

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

9 (BOR Brief, p. 8.)

10 BOR also ignores that Mont. Code Ann. § 20-25-324 was
11 originally enacted under the 1889 Montana constitution when BOR was subject
12 “legislative devise.” “Security guards shall be authorized to carry firearms
13 between sunset and sunrise and at any time when acting as guards for
14 transportation of money or other valuables.” Rev. Code Mont.1947, 75-8516
15 (1947); codified at Mont. Code Ann. § 20-25-324 (1971). In 1981, the
16 Legislature amended section 20-25-324 to:

17 Security guards who have successfully completed the basic course in
18 law enforcement conducted by the Montana law enforcement
19 academy may carry firearms in accordance with policies established
by the [BOR]:

- 20 (1) between 5 p.m. and 8 a.m.; and
21 (2) whenever guarding money or other valuables.

22 Mont. Code Ann. § 20-25-324 (1981). Then, in 1991, the Legislature again
23 amended section 20-25-324. It appears that the BOR did not oppose the 1981 or
24 1991 amendments. In fact, BOR Policy No. 1006 closely mirrors the 1991
25 version (and present) of Mont. Code Ann. § 20-25-324. Moreover, the 2021

1 Legislature did not amend, repeal or alter, in any way, Mont. Code Ann. § 20-25-
2 324. Thus, as to whom may carry a firearm on MUS property, it seems that in
3 1981 and 1991 Montana and BOR either agreed on the issue or ignored BOR's
4 "government and control" and "full power, responsibility, and authority to
5 supervise, coordinate, manage and control the Montana university system . . ."
6 Mont. Const., art. X, § 9; *Sheehy*, ¶ 11.

7 Notwithstanding, however, BOR is unable to waive structural
8 constitutional provisions because they define the shape of government for the
9 benefit of all.

10 Where Congress exceeds its authority relative to the States,
11 therefore, the departure from the constitutional plan cannot be
12 ratified by the "consent" of state officials. An analogy to the
13 separation of powers among the branches of the Federal Government
14 clarifies this point. The Constitution's division of power among the
15 three branches is violated where one branch invades the territory of
16 another, whether or not the encroached-upon branch approves the
17 encroachment. In *Buckley v. Valeo*, 424 U.S. 1, 118-137, 46 L. Ed.
18 2d 659, 96 S. Ct. 612 (1976), for instance, the Court held that
19 Congress had infringed the President's appointment power, despite
20 the fact that the President himself had manifested his consent to the
21 statute that caused the infringement by signing it into law. See
22 *National League of Cities v. Usery*, 426 U.S. at 842, n.12. In *INS v.*
23 *Chadha*, 462 U.S. 919, 944-959, 77 L. Ed. 2d 317, 103 S. Ct. 2764
24 (1983), we held that the legislative veto violated the constitutional
25 requirement that legislation be presented to the President, despite
Presidents' approval of hundreds of statutes containing a legislative
veto provision. See *id.*, at 944-945. The constitutional authority of
Congress cannot be expanded by the "consent" of the governmental
unit whose domain is thereby narrowed, whether that unit is the
Executive Branch or the States."

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1 *New York v. United States*, 505 U.S. 144, 181-82 (1992); see also, *In Free Enter.*
2 *Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (the Court
3 overturned a provision that violated separation of powers even though the
4 Executive and Legislature overwhelmingly agreed on its passage, implicitly ruling
5 that branches cannot waive their constitutional boundaries.) Moreover, as BOR
6 correctly points out, “[t]he Legislature may not abrogate a constitutional grant of
7 authority because a constitutional directive ‘cannot be frustrated’ by statute. *City*
8 *of Missoula v. Mountain Water Company*, 2018 MT 139, ¶ 29, 391 Mont. 422,
9 419 P.3d 685.”

10 As to whom may carry firearms, whether open or concealed carry,
11 on MUS property, this Court finds that Mont. Const., art. X, § 9’s plain language
12 grants this authority to BOR, not the Legislature. In enacting HB 102, the
13 Legislature, without a reasonable doubt, interfered with BOR’s “government and
14 control of the Montana university system” and its “full power, responsibility,
15 and authority to supervise, coordinate, manage and control the Montana
16 university system.” Mont. Const., art. X, § 9(2). Accordingly, this Court
17 concludes that the BOR has established, beyond a reasonable doubt, that the
18 Article X, § 9’s plain language grants it “full authority” to institute firearms
19 policy on its campuses. While this Court is mindful that Montana has a legitimate
20 interest in protecting the public, it is equally mindful that Mont. Const., art. X.,
21 §9(2) provides the BOR with a constitutional shield from majority tyranny
22 relative to the governance and control of MUS property.

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1 **BOR's Constitutional Authority to Regulate Firearms on MUS Property**
2 **Appears not to Infringe on Other Constitutional Rights**

3 The *Judge* Court held that Mont. Const., art. X, § 9 “must not be
4 read or construed in isolation” to other constitutional provisions. *Judge*, 168
5 Mont. at 443. Here, this Court believes that the Legislature’s power under Mont.
6 Const., art. V, § 1 as well as U.S. Const. amend. II and Mont. Const., art. II, § 12
7 must be harmonized with Mont. Const., art. X, § 9(2) relative to whether the
8 Legislature or the Executive branch, via the BOR, has the exclusive
9 constitutional authority to regulate firearms on MUS campuses and other
10 locations.

11 Montana claims that

12 HB 102—which regulates firearm possession for self-defense on
13 public property—is a quintessential exercise of the State’s police
14 power to make laws for the public welfare, health, and safety. The
Legislature wields that power, not the Board.

15 It also reminds this Court of Justice McKinnon’s concurring statement that BOR
16 “cannot abridge rights protected by the federal or state constitutions, and is
17 subject to state legislation enforcing state-wide standards for public welfare,
18 health, and safety.”). *Sheehy*, ¶ 41. The Court respectfully reminds Montana that
19 art. X, § 9(2) is a prohibition upon legislative power. *Judge*, 168 Mont. at 444
20 (citing authority). As such, this Court agrees with the BOR that under Mont.
21 Const., art. X, § 9(2), the BOR is responsible for public welfare, health and safety
22 on MUS property.

23 Montana also claims that the Legislature’s ability to create public
24 policy overrides the BOR’s authority with respect to firearm policy⁸. It claims it
25 has the “power to protect constitutional rights – here, the right to keep or bear

⁸ As indicated earlier, whether BOR Policy 1006 is constitutional is not at issue in this proceeding.

1 arms. . . .” Here, the federal and state constitutions each provide constitutional
2 guarantees regarding the right to bear arms. Montana contends that the BOR may
3 not infringe on these constitutional rights under Mont. Const., art. X, § 9(2). As
4 this Court has previously held, and no party disputes, the constitutional right to
5 keep or bear arms’ scope is limited.

6 The Second Amendment provides:

7 A well regulated Militia, being necessary to the security of a free
8 State, the right of the people to keep and bear Arms, shall not be
9 infringed.

10 U.S. Const. amend. II.

11 The United States Supreme Court has held that the Second
12 Amendment protects an individual’s right to possess a firearm “unconnected with
13 militia service.” *District of Columbia v. Heller*, 554 U.S. 570, 5825 (2008). At its
14 “core,” the Second Amendment is the right of “law-abiding, responsible citizens
15 to use arms in defense of hearth and home.” *Heller*, at 634-35. Notwithstanding,
16 however, the individual rights guaranteed by the Second Amendment, are “not
17 unlimited.” *Heller*, at 626. In this regard, the *Heller* Court identified a non-
18 exhaustive list of “presumptively lawful regulatory measures” that have
19 historically been treated as exceptions to the right to bear arms. *Heller*, at 626-27
20 & n.26. They include, but are not limited to, “longstanding prohibitions on the
21 possession of firearms by felons and the mentally ill, [] laws forbidding
22 the carrying of firearms in sensitive places such as schools and government
23 buildings, [and] laws imposing conditions and qualifications on the commercial
24 sale of arms.” *Heller*, at 626-27 (emphasis added).

25 Moreover, in *Robertson v. Baldwin*, 165 U.S. 275 (1897), the
United States Supreme Court made clear that the Second Amendment did not

1 protect the right to carry a concealed weapon. The *Robertson* Court stated:

2 [T]he first 10 amendments to the constitution, commonly known as
3 the “Bill of Rights,” were not intended to lay down any novel
4 principles of government, but simply to embody certain guaranties
5 and immunities which we had inherited from our English ancestors,
6 and which had, from time immemorial, been subject to certain well-
7 recognized exceptions, arising from the necessities of the case. In
8 incorporating these principles into the fundamental law, there was no
9 intention of disregarding the exceptions, which continued to be
10 recognized as if they had been formally expressed. Thus . . . the right
11 of the people to keep and bear arms (article 2) is not infringed by
12 laws prohibiting the carrying of concealed weapons[.]

13 *Id.*, at 281-82.

14 In Montana:

15 The right of any person to keep or bear arms in defense of his
16 own home, person, and property, or in aid of the civil power when
17 thereto legally summoned, shall not be called in question, but
18 nothing herein contained shall be held to permit the carrying of
19 concealed weapons.

20 Mont. Const., art. II, sec. 12, Mont. Const. (emphasis added). This right is also
21 limited. *State v. Fadness*, 2012 MT 12, ¶ 31, 363 Mont. 322, 268 P.3d 17 (citing
22 *State v. Maine*, 2011 MT 90, ¶ 29, 360 Mont. 182, 255 P.3d 64). The *Fadness*
23 Court noted that:

24 In fact, in proposing Article II, Section 12 at the 1972 Constitutional
25 Convention, the Bill of Rights Committee noted “that the statutory
efforts to regulate the possession of firearms have been at the federal
level and are, therefore, not subject to state Constitutional provisions.
In addition, it is urged—and requires no citation—that the right to
bear arms is subject to the police power of the state.” Montana
Constitutional Convention, Comments on the Bill of Rights
Committee Proposal, Feb. 22, 1972, vol. II, p. 634; see also Montana

1 Constitutional Convention, Verbatim Transcript, Mar. 8, 1972, pp.
2 1725-42, Mar. 9, 1972, pp. 1832-42 (twice rejecting a proposal to
3 add nor shall any person's firearms be registered or licensed" to
4 Article II, Section 12, with several opponents of this language
5 arguing that the decision to adopt registration and licensing
6 requirements is a legislative, rather than constitutional, matter).

7 *Id.*

8 As this Court understands, neither the United States Supreme
9 Court⁹ nor the Montana Supreme Court have held that a member of the general
10 public has an absolute, constitutional right to openly carry a firearm in public for
11 individual self-defense. While that question is not before this Court, in 2021, the
12 Ninth Circuit Court of Appeals held, among other things, that:

13 After careful review of the history of early English and American
14 regulation of carrying arms openly in the public square, the en banc court
15 concluded that Hawai'i's restrictions on the open carrying of firearms
16 reflect longstanding prohibitions, and therefore, the conduct they regulate
17 is outside the historical scope of the Second Amendment. The en banc
18 court held that the Second Amendment does not guarantee an unfettered,
19 general right to openly carry arms in public for individual self-defense.

20 *Young v. Hawaii et al.*, 992 F.3d 765, 773 [quotation at decision summary]
21 (2021). As to concealed carry, there can be no dispute that federal and Montana
22 law is clear that there is no constitutional right for a member of the general public
23 to carry a concealed firearm in public.

24 Here, under art. X, § 9(2), this Court has determined that the BOR, not
25 the Legislature, has the power to determine whom may carry firearms on MUS
property. Furthermore, there is no controlling legal authority that a member of the
general public has the right to carry, openly or concealed, a firearm under either
the United States Constitution or the Montana Constitution. Thus, it appears, in

⁹ As of the date of this order, the United States Supreme Court had yet to issue its decision in *New York State Rifle & Pistol Ass'n, Inc., et al. v. Bruen et al.*, No. 20-843. In that case, oral argument was held on November 3, 2021.

1 harmonizing art. X, § 9(2) with the identified constitutional provisions, the policy
2 that Montana argues it is entitled to police and protect, as it relates to HB 102,
3 simply does not exist under the current law. As such, to the extent HB 102
4 impermissibly infringes and interferes with BOR's constitutional authority it is
5 unconstitutional.

6 CONCLUSION

7 The BOR is entitled to summary judgment. It has established, beyond
8 a reasonable doubt, that HB 102 sections 3, 4, 5, 6, 7 and 8, as applied to BOR,
9 are unconstitutional in that they violate Mont. Const., art. X, § 9(2). As such, to
10 the extent these identified sections impermissibly infringe and interfere with
11 BOR's constitutional authority, they are unconstitutional. Moreover, the
12 application and enforcement of these sections on or at MUS campuses and
13 locations, or against the Board, must, and shall be, permanently enjoined.

14 ORDER

15 Based on the above, this Court hereby **ORDERS, DECLARES,**
16 **ADJUDGES AND DECREES** as follows:

17 1. HB 102's sections 3¹⁰, 4¹¹, 5¹², 6¹³, 7¹⁴ and 8¹⁵, as applied to
18 BOR, are unconstitutional in that they violate BOR's authority under Mont.
19 Const., art. X, § 9(2).

20 2. This Court's May 28, 2021 Temporary Restraining Order is
21 **CONVERTED** to a Permanent Injunction; and

22
23 ////
24

25 ¹⁰ Mont. Code Ann. § 45-8-355 (2021)

¹¹ Mont. Code Ann. § 45-8-356 (2021)

¹² Mont. Code Ann. § 45-8-359 (2021)

¹³ Mont. Code Ann. § 45-8-358 (2021)

¹⁴ Mont. Code Ann. § 45-8-359 (2021)

¹⁵ Mont. Code Ann. § 45-3-111 (2021)

1 3. BOR shall prepare and submit to the Court a proposed
2 judgment consistent with this Order within ten days.

3 **ORDERED** this 30th day of November 2021.

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6 
7 MICHAEL F. McMAHON
8 District Court Judge

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