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FILED

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ANGIE PARSONS, Clerk of District Court
By: *[Signature]* Deputy Clerk

Attorneys for Intervener MSSA

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & 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,**

Respondents.

Cause No.: BDV-2021-598

***MONTANA SHOOTING SPORTS
ASSOCIATION'S
PRINCIPAL BRIEF IN
SUPPORT OF MOTION TO
INTERVENE***

Intervenor Montana Shooting Sports Association (MSSA), through
counsel, and in support of its Motion to Intervene, hereby respectfully
submits the following:

///

PRINCIPAL BRIEF

ISSUE

MSSA should be allowed to intervene in this action, on behalf of its members who live throughout the state of Montana, on grounds that MSSA was a key proponent of getting HB102 passed in the legislature over the course of decades. MSSA is also in the best position to vigorously defend the rights of its members. MSSA's proposed Answer to the Petition for Declaratory Relief is attached hereto as "Exhibit 1."

FACTUAL AND PROCEDURAL BACKGROUND

1. The Montana Legislature passed an act generally revising gun laws during the 2021 legislative session commonly referred to as HB102. HB102 was so politically popular that it was the second bill to clear both houses of the Legislature in the 2021 session, and with much ceremony, it was the second bill signed by the newly sworn-in Governor Greg Gianforte.¹

2. HB102, *inter alia*, includes sections that allows students on Montana University System (MUS) campuses to keep or bear arms,

¹ See, e.g., <https://montanafreepress.org/2021/02/18/gianforte-signs-constitutional-carry-gun-bill/>

commonly known as “campus carry”. (See Decl. of Gary Marbut, ¶ 11, attached hereto as “Exhibit 2.”)

3. The Board of Regents of Higher Education of The State of Montana (BoR) has filed the petition in this case seeking to have the campus carry sections of HB102 declared void as an unconstitutional infringement on their authority. (Doc. 1.)

4. Intervenor Montana Shooting Sports Association (MSSA) is a non-profit corporation organized under the laws of the State of Montana. (Ex. 2, ¶ 4.)

5. The purpose of MSSA is to support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms, to provide education to its members concerning shooting, firearms, safety, hunting and the right to keep and bear arms, to own and or manage one or more shooting facilities for the use of its members and or others, to conduct such other activities as serves the needs of its members. (Ex. 2, ¶¶ 8-9.)

6. MSSA regularly lobbies the Montana Legislature, and its efforts were instrumental in the passage of the Montana preemption statutes at issue in this civil action. MSSA members have a genuine and viable interest

in this case, as its goals and its existence depend upon the protection of the rights and interests of its members, and the enforcement of Montana law.

(Id.)

7. MSSA's membership includes, without limitation, students and MUS employees from across the MUS. (Ex. 2, ¶ 7.)

8. The chief features of HB102 include permit-less carry of firearms (no government permit needed to put on a coat), campus carry, bar and restaurant carry, and enhancement of existing concealed weapon permits (CWP). All of this was included under the general title and purpose of eliminating alleged "gun free zones." (Ex. 2, ¶ 11.)

9. The history of HB102 begins in the 1989 session of the Legislature. Gary Marbut, current president of MSSA (then president of the Montana Rifle and Pistol Association - MSSA was founded in 1990) arranged for introduction of a bill to move Montana to a "shall issue" CWP system. In 1989 and before, permits were only issued by district court judges. Over half of the counties in Montana did not even have application forms. In only one county, Butte-Silver Bow, were permits routinely issued to law-abiding citizens. Montanans from across the state would travel to Butte to obtain a CWP. (*Id.*, ¶¶ 12-13.)

10. The 1989 “shall issue” bill sought CWP issuance by elected sheriffs with limited discretion for permit application denial. That bill was carried by Rep. Jerry Driscoll (D-Billings) but died with a 49-51 vote in the House upon Third Reading. It had been opposed by various law enforcement entities. (*Id.*, ¶ 14.)

11. Between the 1989 and 1991 sessions, MSSA met with law enforcement entities multiple times to negotiate a CWP bill acceptable to gun owners and law enforcement. A compromise bill was agreed upon and was introduced in the 1991 legislative session as HB90 by Rep. Dave Brown (D-Butte). Notwithstanding the agreement between gun owners and law enforcement, the lobbyist for the Montana Sheriffs and Peace Officers Association offered an amendment to HB90 in the House Judiciary Committee to create a list of “prohibited places” (bars, banks, college campuses and public buildings) where CWPs could not be used. That amendment was successful, created what became Mont. Code Ann. § 45-8-328, and kicked off a long public policy debate that was ultimately resolved with HB102 in 2021. (*Id.*, ¶ 15.)

12. Between 1991 and 2021 MSSA brought numerous bills before the Legislature to eliminate or modify the prohibited places prohibitions

enacted as a part of HB90 in 1991. One successful bill clarified that the prohibition on CWP usage in places with a liquor licenses only applied where the license allowed consumption on the premises, but not places that were carry-out only such as liquor stores. Another change clarified that the prohibition in banks did not include ATMs and drive-up tellers, but only in bank lobbies. Yet another change clarified that the prohibition on CWP exercise in public buildings did not include unstaffed structures such as parking garages and highway rest stops. (*Id.*, ¶ 16.)

13. One of the most debated issues surrounding concealed carry of firearms has long been about bars, defined as places that have a liquor license that allows serving of alcohol for consumption on the premises. This longstanding definition includes many restaurants. The prohibitory scheme that has been in effect since 1991 has some very odd consequences that result in awkward public policy. (*Id.*, ¶ 17.)

14. Under this scheme, if a person were having dinner with family members at a restaurant with a liquor license and the person had a CWP and was not drinking anything alcoholic, the person was still prohibited from using his CWP. However, the law did not prohibit the same conduct by a person wearing a firearm unconcealed. In a genuine bar, for

customers overtly drinking alcohol, the law did not prohibit patrons from carrying openly, but only prohibited people with CWPs from using their permits there. (*Id.*, ¶ 18.)

15. The “prohibited places” prohibition, Mont. Code Ann. § 45-8-328, long fraught with conceptual and interpretation problems, and always a bone of public policy contention, was finally all but eliminated with HB102 in 2021. (*Id.*, ¶ 19.)

16. The permit-less carry feature of HB102 was also the end result of a long public policy evolution, buoyed by ever-increasing public support for the right to keep or bear arms, and much debate in which MSSA was closely involved for nearly two decades. (*Id.*, ¶¶ 20-21.)

17. MSSA was heavily involved with the passage of HB102, in fact, Mr. Marbut drafted the version of the bill which was originally introduced to the legislature. (*Id.*, ¶ 25.)

18. As the legislative session progressed, HB102’s sponsor, Representative Seth Berglee, MSSA, and representatives from the MUS engaged in numerous negotiations which resulted in amendments to the bill. (*Id.*, ¶¶ 25-26.)

19. On January 8, 2021, Helen C. Thigpen, Deputy Chief Legal Counsel for MUS sent an email to Representative Seth Berglee with a copy to House Judiciary Committee's staff attorney Rachel Weiss. (*Id.*, ¶ 27.)

20. Thigpen was the staff attorney for House Judiciary in the 2013, 2015, and 2017 legislative sessions. This email also copied Tyler Trevor Deputy Commissioner for Budget and Planning, and Chief of Staff for the Montana Commissioner of Higher Education. Declared in the email to be acting on behalf of the Commissioner of Higher Education, Clayton Christian, Thigpen officially asks Berglee to make amendments to HB 102 to accomplish three specified changes. (*Id.*, ¶ 28.)

21. The three changes to HB102 requested in this email from Thigpen to Berglee were:

a. That HB102 be amended to require that the campus carry element of HB102 be "limited to those individuals who possess a current and valid CWP." The concern expressed by MUS officials in separate communication with Berglee was to insure that people exercising prerogatives under HB102 on campus have some firearms safety training. Berglee subsequently satisfied this request with an amendment requiring that anyone possessing a firearm on campus must, at a minimum, have satisfied the firearms safety training detailed in law to apply for a CWP.

b. That HB102 be amended "to allow restrictions at campus events, including athletics, commencement, and live performances/concerts." Berglee and I discussed this request and in

response crafted amendatory language for HB102 to allow MUS restrictions for “ the possession of a firearm at an athletic or entertainment event open to the public with controlled access and armed security on site.”

c. That “the bill also be revised to allow restrictions in dormitories and other student housing facilities.” Berglee and I discussed this request but could not accommodate it because to do so would be counter to the core holding of *District of Columbia v. Heller*, 554 U.S. 570 (2008) concerning persons being prohibited by a government entity from possessing a firearm in the person’s domicile.

(*Id.*, ¶ 29.)

22. Amendment HB0102.001.002, made in the House Judiciary Committee to Section 6 of HB102 on January 11, 2021, limited campus carry to persons who had completed any one of the firearms safety training options listed in Montana law to qualify a person to apply for a CWP.² (*Id.*, ¶ 30.)

23. Amendment HB0102.002.002 was done in the Senate Judiciary Committee on January 26, 2021, and made to Section 6 of the bill. This amendment expanded on a list of regulations appropriate for the MUS to implement and added that the campuses could prohibit the possession of

² See, <https://leg.mt.gov/bills/2021/AmdPublicWeb/HB0102.001.002.pdf>

firearms at “an athletic or entertainment event open to the public with controlled access and armed security on site.”³ (*Id.*, ¶ 31.)

24. The third change made on January 26, 2021, to accommodate the MUS was also contained in amendment HB0102.002.008. This amendment was to Section 15 and established a delayed effective date for the campus carry portion of HB102. The MUS had asked that they be given a reasonable amount of time to implement HB102, so a delayed effective date of June 1, 2021, was amended into HB102 by the Senate Judiciary Committee. (*Id.*, ¶ 32.)

25. Also, during the legislative session, the Legislative Services Division recycled and reissued a Legal Note that had previously been issued for campus carry bills before the Legislature. This Legal Note raised some of the same questions posed by BoR in its Petition. The final version of this Legal Note includes the Requester Comments that address questions raised by the Legal Note. This complete Legal Note is a prime part of the legislative history of HB 102 and is attached as Intervenor’s Ex. 1. (*Id.*, ¶ 33.)

³ See: <https://leg.mt.gov/bills/2021/AmdPublicWeb/HB0102.002.008.pdf>

26. All of this is history that culminated with the enactment of HB 102. (*Id.*, ¶ 34.)

LEGAL STANDARD

A non-party has, under certain circumstances, a right to intervene in a civil action “of right” per M. R. Civ. P. 24(a)(2). Intervention is allowed “of right” when an applicant claims an interest merely “relating” to the property or transaction which is the subject of the action and “the applicant is so situated that the disposition of the action *may* as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties. *Id.* (emphasis added). “Rule 24 is designed to protect nonparties from having their interest adversely affect by litigation conducted without their participation.” *Clark Fork Coalition v. Montana Dept. of Environmental Quality*, 2007 MT 176, ¶ 10, 338 Mont. 205, 14 P.3d 902 (quoting *Gruman v. Hendrickson*, 416 N.W. 2d 497, 500 (Minn. App. 1987)). “Montana’s rule is essentially identical to the federal rule which is interpreted liberally.” *Sportsmen for I-143 v. Montana Fifteenth Judicial Dist. Court, Sheridan Cnty.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400.

In *Estate of Schwenke v. Bechtold*, 252 Mont. 127, 827 P.2d 808 (1992), the Court promulgated four criteria which an intervenor must meet in moving for intervention as a matter of right. These criteria include:

- (1) The motion must be timely;
- (2) The intervenor must have an interest in the subject matter at issue;
- (3) The intervenor must have an interest which *may* be impaired by the disposition of the case; and
- (4) The intervenor must have an interest which was not adequately represented by an existing party.

Schwenke, 252 Mont. at 131, 827 P.2d at 811 (emphasis added). In addition, a determining factor in a motion for intervention is whether the motion seeks to relitigate or reopen issues already decided. *In re Marriage of Glass*, 215 Mont. 248, 253, 697 P.2d 96, 99 (1985). See, *Pengra v. State*, 2000 MT 291, ¶1, ¶ 4, 302 Mont. 276, 14 P.3d 499.

In this case as discussed in detail below, MSSA meets fully all four criteria set forth by the Court and M. R. Civ. P. 24(a)(2). The question of the constitutionality of HB102 as applied to MUS is also a matter of first impression, and therefore does not seek to relitigate or reopen any issues already decided.

DISCUSSION

1. **The motion to intervene is timely because it has been filed at the outset of the litigation.**

The threshold factor on a motion to intervene is timeliness. *In re Adoption of C.C.L.B.*, 2001 MT 66, ¶ 22, 305 Mont. 22, 22 P.3d 646.

Timeliness turns on a functional analysis and is a product of the circumstances of each individual case. *Schwenke*, 252 Mont. at 131, 827 P.2d at 811. Employing the functional analysis, the Montana Supreme Court has ruled that even a post-judgment intervention for purposes solely of appeal is not untimely. *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 35, 356 Mont. 41, 230 P.3d 808. In *Aspen Trails*, the intervenors sat on the sidelines while the underlying case proceeded to final judgment. After a government agency, whose regulatory decision was overruled by a district court, declined to appeal, certain of its constituents sought to intervene, on a permissive basis, post-judgment. The district court allowed for the “late” intervention, even though the intervention was not “of right” under Rule 24(a). The Montana Supreme Court affirmed, reasoning:

We agree with *Aspen Trails* that its intervention has not caused any delay in this matter, and that its interests are substantial and no longer adequately represented since the Commission has declined to appeal. We also agree that the Landowners cannot

claim prejudice simply because they are now required to defend the District Court's decision on appeal. While it may be inconvenient for the Landowners to have to defend their successful judgment on appeal, we cannot say it has caused them prejudice to defend against Aspen Trails, as opposed to the Commission.

Id.

Here, MSSA's intervention would not cause a delay in this matter or any other prejudice to either original party. *See, In re Adoption of C.C.L.B.*, 2001 MT 66, 305 Mont. 22, ¶ 22, 22 P.3d 646. The BoR filed its Petition for Declaratory Relief on May 27, 2021. (Doc. 1.) MSSA's motion is being filed at the onset of litigation. The Court has yet to issue a scheduling order or set any other deadlines other than a show cause hearing for June 7, 2021. MSSA seeks to intervene in order to assert the constitutional and statutory rights of its members and to argue the constitutionality of HB102 and does not seek to delay that hearing. Accordingly, MSSA's intervention will not cause delay in any proceedings or prejudice any party. MSSA's motion is timely. *See, Schwenke*, 252 Mont. at 131, 827 P.2d at 811.

- 2. MSSA members include MUS students and employees whose HB102 campus carry rights are jeopardized by the relief sought in the BoR's petition.**

A court must determine whether the party seeking intervention has made a merely *prima facie* showing of a direct, substantial, legally protectable interest in the proceedings.” *Sportsmen for I-143*, ¶ 9 (quoting *DeVoe v. State*, 281 Mont. 356, 363, 935 P.2d 26, 260 (1997)). Such a determination is a conclusion of law. *Id.* Here, MSSA Members have a right to keep and bear arms under the challenged statutory scheme, which, if implemented as drafted, they intend to exercise. It has been recognized that public interest groups have broad rights of intervention in matters that effect their members. *Sportsmen for I-143*, ¶ 12. For example, in *Sportsmen for I-143*, it was held that a public interest group has a right to intervene in an action merely because its members had supported a challenged ballot initiative. Significantly, in that case, no individual statutory rights were at stake. Still, the Court held: “[a] public interest group is entitled ***as a matter of right*** to intervene in an action challenging the legality of a measure it has supported.” *Id.* (emphasis added). In this case, MSSA has a long history of drafting and supporting gun rights legislation in Montana, HB102 being no exception. (See Ex. 2.) The history behind HB102 spans back decades, and MSSA and its predecessors have been involved every step of the way. (*Id.*) Now that

MSSA has emerged victorious in a hard-fought legislative battle, its members intend to exercise their campus carry rights under the statute. BoR seeks to strip them of those rights. Thus, MSSA and its members have a state law interest in the subject matter. *See, Schwenke*, 252 Mont. at 131, 827 P.2d at 811.

3. The interest of MSSA members on university campuses across Montana “may be impaired” if the challenged sections of HB102 are deemed unconstitutional.

BoR’s petition seeks to strip MSSA members who attend MUS of their statutory rights. BoR has brought an “as-applied” challenge to HB102, arguing the statute unconstitutionally limits its power promulgated by Article X, Section 9 of the Montana Constitution. (Doc. 1.) An as-applied challenge alleges that a particular application of a statute is unconstitutional and depends on the facts of a particular case. *City of Missoula v. Mountain Water Company*, 2018 MT 139, ¶ 25, 391 Mont. 422, 419 P.3d 685. BoR, as the challenging party, must prove HB102 is unconstitutional beyond a reasonable doubt. *State v. Walker*, 2001 MT 170, ¶ 7, 306 Mont. 159, 3 P.3d 1099. Statutes are presumed to be constitutional, and any doubt is to be resolved in favor of the statute. *Id.* It

is not for the courts to say whether the provisions of a statute or wise or not; the duty of the courts is to require enforcement thereof as they find it, whether the statutory provisions constitute an exercise of sound discretion is not at issue. *School Dist. No. 12, Phillips County v. Hughes*, 170 Mont.267, 276, 552 P.2d 328, 333 (1976).

Here, BoR alleges the Legislature has infringed upon its authority to “supervise, coordinate, manage and control the Montana university system” as set forth in Mont. Const. Art. X, Sec. 9(2)(a). (Doc. 1.) BoR currently has a policy addressing use and access to firearms on MUS campuses referred to as BOR Policy 1006. (*Id.*, ¶ 16.) As a basis for requesting preliminary injunctive relief, BoR argued the enactment of HB102 would cause confusion amongst citizens on MUS campuses on whether they are allowed to exercise their campus carry rights or must still abide by policy 1006. (Doc. 7, p. 12.) Should HB102 be declared unconstitutional as applied to BoR, it will continue to enforce the existing policy and disrupt the statutory rights granted by HB102. Therefore, the relief sought in this case, if granted, would impair the rights of MSSA members.

4. As a primary proponent of campus carry legislative reforms, MSSA members’ interest in HB102 is not adequately protected.

As did the successful intervenors in *Sportsmen for I-143*, ¶¶ 16-17, MSSA wants to ensure that the interests of its members “are vigorously represented at all times.” *Id.*, ¶ 16. In that case, the Sportsmen’s Groups were the authors, sponsors, active supporters, and defenders of a legislative initiative. *Id.*, ¶12. MSSA played identical roles in the drafting, support, and ultimate enactment of HB102. (See Ex. 2.) MSSA was a key grassroots supporter which promoted HB102 in the legislature, for years, before it was finally adopted and signed into law in 2021. (*Id.*) Like the successful intervenors in *Sportsmen for I-143*, MSSA actively drafted and supported HB102. (*Id.*) MSSA therefore “may be in the best position to defend their interpretation of the resulting legislation.” *Sportsmen for I-143*, ¶ 17.

In fact, in *Sportsmen for I-143*, the Court found the principle to be so compelling, it granted extraordinary relief, in the form of a writ of supervisory control, in allowing the interest groups to intervene “as of right.” MSSA seeks to be involved as early as possible in this case for the purpose of defending the rights of its members and the legislation it has labored to see passed. Due to MSSA’s extensive involvement as an HB102 proponent, it should be allowed to intervene in this action as of right.

CONCLUSION

Accordingly, MSSA requests:

1. That it be allowed to intervene in this case for the purposes of protecting its members individual rights under applicable constitutional and statutory law;
2. That the Court grant leave for MSSA to file its proposed Answer attached hereto as Ex. A;
3. That MSSA be awarded its attorney fees and costs under applicable law; and
4. That the Court grant such other relief as may be warranted in the circumstances.

DATED this 3rd day of June 2021.

Respectfully Submitted,
RHOADES SIEFERT & ERICKSON PLLC

By: 

Quentin M. Rhoades
Attorneys for Intervener MSSA

CERTIFICATE OF SERVICE


I hereby certify that on the 3rd day of June, 2021, I served upon the following a true and correct copy of the foregoing by depositing said copy in the U.S. mail, postage prepaid, and internet email addressed as follows:

David Dewhirst
Solicitor General
Office of Montana Attorney
General Austin Knudsen
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Ali Bovingdon
MUS Chief Legal Counsel
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Pro Respondent

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

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**THE STATE OF MONTANA, by
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SHOOTING ASSOCIATION,
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Respondents.

Cause No.: BDV-2021-598

**INTERVENER MONTANA
SHOOTING SPORTS
ASSOCIATION'S ANSWER TO
PETITION FOR DECLARATORY
RELIEF**

Respondent Montana Sports Shooting Association, Inc.

("Respondent"), through counsel, hereby answers the Petition in this
matter as follows:

///

EXHIBIT 1

ANSWER

1. Respondent admits the allegations of ¶¶ 5, 9, 13, 21, 36, 46, and 48.
2. Respondent denies the allegations of ¶¶ 1 - 4, 7, 8, 10 - 14, 19, 20, 22 - 35, 37 - 43, 47, and 49 - 57.
3. Respondent lacks sufficient knowledge to confirm or deny the allegations of ¶¶ 6, 15, 16, 17, 18, 28, 44, 45, and therefore denies same.
5. Respondent denies all allegations of the Petition not specifically admitted.
6. Respondent denies that the Petition states a claim for which relief may be granted.

AFFIRMATIVE DEFENSES

7. Respondent realleges and incorporates by this reference all admitted allegations of the Petition.
8. Respondent alleges that the Petition is barred by the doctrines of estoppel; laches; and waiver and grounds that Petitioner received consideration in the form of negotiated changes to HB102 during the legislative session when it was adopted which would not included in HB102 absent Petitioner's requests for changes.

REQUEST FOR RELIEF

Accordingly, Respondent request dismissal of the Petition; an award of its attorney fees and costs incurred defending the Petition to the extent allowed by law; and such other relief as may be warranted in the circumstances.

DATED this 3rd day of June, 2021.

Respectfully Submitted,
RHOADES SIEFERT & ERICKSON PLLC

By: _____
Quentin M. Rhoades
Pro Respondent

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I hereby certify that on the 3rd day of June, 2021, I served upon the following a true and correct copy of the foregoing by depositing said copy in the U.S. mail, postage prepaid, and internet email addressed as follows:

David Dewhirst
Solicitor General
Office of Montana Attorney
General Austin Knudsen
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Ali Bovingdon
MUS Chief Legal Counsel
Office of Commissioner of Higher
Education
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Quentin M. Rhoades

DECLARATION OF GARY MARBUT

I, Gary Marbut, pursuant to Mont. Code Ann. § 1-6-105, hereby declare, under penalty of perjury, the following to be true and correct:

1. I am over eighteen (18) years of age, and resident of Missoula County, Montana. I am mentally sound and competent to attest to the matters set forth herein. The matters set forth in this Declaration are based upon my own personal knowledge, unless otherwise stated.

THE MONTANA SHOOTING SPORTS ASSOCIATION

2. I am the president of the Montana Shooting Sports Association (MSSA) and have served in that capacity since 1990.

3. MSSA is established as the primary political advocate for Montana gun owners, of which there are many, hailing from every quarter of Montana society.

4. MSSA is a nonprofit corporation under Montana law and the Secretary of State's Website shows it was first incorporated on July 5, 1990. The Registered Agent listed is me, Gary Marbut, also current MSSA President. MSSA was founded specifically to be the political advocate for Montana gun owners and the Right to Keep or Bear Arms (RKBA). (Note: The U.S. Constitution says "keep and bear" but the Montana Constitution says "keep or bear".) MSSA is not an IRS tax exempt organization.

5. MSSA is affiliated or associated with the National Rifle Association, Gun Owners of America, the Second Amendment Foundation, and Citizens Committee for the Right to Keep and Bear Arms. MSSA has a working relationship with Jews for the Preservation of Firearms Ownership, the Firearms Policy Coalition, and many other national and state-level organizations.

6. Policy is set for MSSA by a nine-member Board of Directors who are geographically dispersed - Missoula, Kalispell, Great Falls (2), Butte, Billings, Helena (2), and Sidney. MSSA business is conducted at its Annual Meeting in Helena each March, or by phone and email among officers and Directors.

7. While MSSA membership and numbers is protected from disclosure by a privacy provision in MSSA Bylaws, MSSA has members in all Montana communities.

8. Although MSSA is involved in firearms safety education, litigation of RKBA-related issues, and local and federal issues, MSSA is most well known as being the most successful such entity in the U.S. for getting pro-gun legislation enacted at the state level. Since its founding, MSSA has gotten 70 pro-gun bills enacted into law in Montana. This does

not include various measures that have failed in process in one way or another, most commonly because of vetoes by various governors.

9. MSSA has been named by a national entity as a champion of the RKBA, and MSSA's president has twice been named as national grassroots activist of the year for the RKBA. MSSA and I, as its president, have been featured in the Wall Street Journal, on National Public Television in a documentary series concerning the Constitution, on live national cable television, and in too many other national and Montana publications to mention.

10. I am the author of *Gun Laws of Montana*, a trade paperback now in its Fifth Printing, and I am accepted as an expert in state and federal courts concerning firearm safety, self-defense, and related topics. I have been published in *The Defender*, the publication of the National Association of Criminal Defense Lawyers. I was also named as a champion of individual liberty by the delegates to the 1972 Montana Constitutional Convention.

MSSA AND HOUSE BILL 102

11. The chief features of HB102 include permit-less carry of firearms (no government permit needed to put on a coat), campus carry, bar and restaurant carry, and enhancement of existing concealed weapon

permits (CWP). All of this was included under the general title and purpose of eliminating alleged “gun free zones.”

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17. One of the most debated issues surrounding concealed carry of firearms has long been about bars, defined as places that have a liquor

license that allows serving of alcohol for consumption on the premises. This longstanding definition includes many restaurants. The prohibitory scheme that has been in effect since 1991 has some very odd consequences that result in awkward public policy.

18. Under this scheme, if a person were having dinner with family members at a restaurant with a liquor license and the person had a CWP and was not drinking anything alcoholic, the person was still prohibited from using his CWP. However, the law did not the prohibit same conduct by a person wearing a firearm unconcealed. In a genuine bar, for customers overtly drinking alcohol, the law did not prohibit patrons from carrying openly, but only prohibited people with CWPs from using their permits there.

19. Section 45-8-328, M.C.A., the “prohibited places” prohibition, long fraught with conceptual and interpretation problems, and always a bone of public policy contention, was finally all but eliminated with HB102 in 2021.

20. The permit-less carry feature of HB102 was also the end result of a long public policy evolution and much debate. The original “shall issue” CWP bill in 1991, HB 90, allowed concealed carry of a firearm without a government permit outside the limits of a city or town. According

to the Montana League of Cities and Towns, this condition prevailed in 99.6% of Montana. Thus, since 1991, a permit has been required to cover a firearm with “clothing or wearing apparel” in only 6/10ths of 1% of Montana, inside city limits. Even inside city limits, a permit has not been required since 1991 for a person to conceal a firearm inside the person’s home or place of business. Finally, a permit has not been required since 1991 for a person to conceal a firearm, even inside city limits, if the person were engaged in activity for which firearms are normally carried, such as hunting, fishing, hiking, or jogging.

21. Since 1991, there have been several bills introduced to allow people inside city limits, not in their homes or businesses, and not fishing or hiking, to carry a concealed firearm without a permit. More than one such bill passed the Legislature but was vetoed by the Governor. The argument has been made that since 1991 permit-less concealed carry for people in 99.4% of Montana has not resulted in any evidence of abuse or problems. That policy view finally prevailed in 2021 with HB102.

22. There has long been a question of whether or not the university system has the authority to deny or interfere with the RKBA the people have reserved to themselves in Article II, Section 12 of the Montana Constitution. That policy debate occurred with HB240 in 2013, which

passed House and Senate but was vetoed by Governor Bullock. It continued in 2015 with SB143 which passed the Senate but failed in the House on Second reading with a vote of 49-51. This debate was finally resolved in 2021 when the Legislature passed and the Governor signed HB102 on February 18, 2021.

23. Finally, it has long been known that citizens who will undergo required training and apply for a CWP and a criminal background check are the most problem-free, law-abiding segment of the population that can be identified. There is good reason to argue that CWP-holders should be allowed, as a matter of public policy, to exercise their permits anywhere.

24. For example, MSSA members and officers believe correctly that law enforcement personnel are very law-abiding. Statistics support this view. For every law enforcement officer convicted of a crime, there are between 43 and 57 (depending on which set of numbers one uses) members of the general public convicted of crimes. By comparison, for every CWP-holder convicted of a crime there are seven law enforcement officers convicted of crimes. This reality was finally recognized in 2021 by the Legislature and the Governor with HB102 and its enhanced ability for CWP-holders to use their permits.

MUS'S NEGOTIATED CHANGES TO THE ORIGINAL HB102

25. Not only was there considerable evolution leading up to the drafting of the introduced version of HB102—which I drafted—there were also negotiations that happened during the session that resulted in significant changes to HB102.

26. These included negotiations between the sponsor, Rep. Seth Berglee and agents of the Montana University System (MUS). I was constantly collaborating with the sponsor as proposed changes were suggested, revised, and made. There were several significant changes made to the campus carry feature of HB102 to accommodate requests made by the MUS.

27. On January 8, 2021, Helen C. Thigpen, Deputy Chief Legal Counsel for the Montana University System sent an email to HB102 sponsor Rep. Seth Berglee with a copy to House Judiciary Committee's staff attorney Rachel Weiss. A copy of this email is attached as "Exhibit 2.1."

28. Thigpen was the staff attorney for House Judiciary in the 2013, 2015, and 2017 legislative sessions. This email also copied Tyler Trevor Deputy Commissioner for Budget and Planning, and Chief of Staff for the Montana Commissioner of Higher Education. Declared in the email to be

acting on behalf of the Commissioner of Higher Education, Clayton Christian, Thigpen officially asks Berglee to make amendments to HB102 to accomplish three specified changes.

29. The three changes to HB102 requested in this email from Thigpen to Berglee were:

- a. That HB102 be amended to require that the campus carry element of HB102 be "limited to those individuals who possess a current and valid CWP." The concern expressed by MUS officials in separate communication with Berglee was to insure that people exercising prerogatives under HB102 on campus have some firearms safety training. Berglee subsequently satisfied this request with an amendment requiring that anyone possessing a firearm on campus must, at a minimum, have satisfied the firearms safety training detailed in law to apply for a CWP.
- b. That HB102 be amended "to allow restrictions at campus events, including athletics, commencement, and live performances/concerts." Berglee and I discussed this request and in response crafted amendatory language for HB102 to allow MUS restrictions for " the possession of a firearm at an athletic or entertainment event open to the public with controlled access and armed security on site."
- c. That "the bill also be revised to allow restrictions in dormitories and other student housing facilities." Berglee and I discussed this request but could not accommodate it because to do so would be counter to the core holding of D.C. v. Heller concerning persons being prohibited by a government entity from possessing a firearm in the person's domicile.

30. Amendment HBO102.001.002, made in the House Judiciary Committee to Section 6 of HB102 on January 11, 2021, limited campus

carry to persons who had completed any one of the firearms safety training options listed in Montana law to qualify a person to apply for a CWP.¹

31. Amendment HB0102.002.002 was done in the Senate Judiciary Committee on January 26, 2021, and made to Section 6 of the bill. This amendment expanded on a list of regulations appropriate for the MUS to implement and added that the campuses could prohibit the possession of firearms at "an athletic or entertainment event open to the public with controlled access and armed security on site."²

32. The third change made on January 26, 2021, to accommodate the MUS was also contained in amendment HB0102.002.008. This amendment was to Section 15 and established a delayed effective date for the campus carry portion of HB102. The MUS had asked that they be given a reasonable amount of time to implement HB 102, so a delayed effective date of June 1, 2021 was amended into HB102 by the Senate Judiciary Committee.

33. Also, during the legislative session, the Legislative Services Division recycled and reissued a Legal Note that had previously been issued

¹ See, <https://leg.mt.gov/bills/2021/AmdPublicWeb/HB0102.001.002.pdf>

² See: <https://leg.mt.gov/bills/2021/AmdPublicWeb/HB0102.002.008.pdf>

for campus carry bills before the Legislature. This Legal Note raised some of the same questions posed by BoR in its Petition. The final version of this Legal Note includes the Requester Comments that address questions raised by the Legal Note. This complete Legal Note is a prime part of the legislative history of HB102 and is attached as Intervenor's Ex. 1.

34. All of this is history that culminated with the enactment of HB 102.

MUS IMPLEMENTATION OF HB 102

35. HB102 was signed into law by Governor Gianforte on February 18, 2021. Beginning in late March, the OCHE began a process of developing policy to implement HB102 on MUS campuses. Since then, I have sent informative emails to OCHE on four separate occasions: April 7, 2021, May 8, 2021, May 12, 2021, and May 17, 2021.

36. On or about March 25, 2021, Brock Tessman, Deputy Commissioner, Office of the Commissioner of Higher Education, announced in an email to the MUS that the MUS was soliciting comment on the implementation of HB102. In response to that solicitation, on May 31, 2021, I emailed comment as indicated to the OCHE email address specified. That comment email is attached as "Exhibit 2.2."

37. On or about May 6, 2021, the OCHE published Online a draft policy set for implementation of HB102. On May 8, 2021, I emailed comment concerning that policy set to the OCHE. That comment is attached as "Exhibit 2.3."

38. On or about April 29, 2021, Brock Tessman announced in an email to the MUS that the BoR would conduct a listening session concerning HB102 implementation on May 12, 2021. I listened to that entire listening session Online. Following that session and also on May 12, I submitted comment to the OCHE and BoR concerning that session. That email is attached as "Exhibit 2.4."

39. Also following that May 12, 2021, listening session, and on May 17, 2021, I sent a follow up comment to the BoR and OCHE concerning the question raised in the listening session about whether or not to litigate in attempt to block implementation of HB102. That email is attached as "Exhibit 2.5."

40. On May 29, 2021, the Missoulian published a Guest Column that I wrote examining the BoR lawsuit to block implementation of the campus carry portion of HB102. This column was written when the BoR lawsuit was pending before the Montana Supreme Court, but was published after the MSC had rejected the lawsuit and the suit was refiled in state

District Court. Other than the venue of the suit, all of the issues addressed in this Guest Column are relevant to the case in District Court. This Guest Column is attached as “Exhibit 2.6.”

41. Before the BoR filed its initial lawsuit directly in the Montana Supreme Court, which is also before that dismissal and the subsequent refile in District Court, the MUS published at least two sets of new regulations to implement and manage campus carry under the guidelines of HB102.

42. One of these was a draft polity set published by the OCHE for BoR consideration that is attached as “Exhibit 2.7.” The other was a set of campus firearms rules published by the U. of M. Police Department. That publication is attached “Exhibit 2.8.”³

43. These two MUS publications suggest that the MUS and BoR were prepared to implement the campus carry features of HB102 before the BoR embarked on litigation to block campus carry. This preparedness is notwithstanding the claim in litigation that the MUS lacks time to implement campus carry by the June 1, 2021, delayed effective date previously negotiated between the MUS and the Legislature.

³ Exhibit 2.8 is a screenshot of the policy due to technological issues. The full webpage can be found at: <https://www.umt.edu/police/campus-carry/default.php>.

MSSA HISTORY, POLITICAL REACH AND POPULAR SUCCESS STORIES

44. One of MSSA's successes was to amend the Montana Constitution to put the right to hunt, fish, and trap into the Constitution as recognized and protected activities. When the people of Montana voted on this constitutional referendum, it received the highest percentage of voter approval of any constitutional change in Montana's history.

Montana has the best gun laws in the U.S., probably the World, primarily because of the effective pro-gun and pro-hunting political work MSSA has done in Montana.

~ David Kopel, legal scholar, Independence Institute. Following are some of the political and legal successes MSSA has achieved for Montana gun owners and hunters.

45. 1985 – Local governments preemption. Even prior to founding MSSA, the founding members worked hard for your gun rights. These founders backed law preventing local governments from passing arbitrary gun control ordinances, except for regulating the discharge of firearms inside city limits, and regulating the carrying of firearms into public parks and public buildings.

46. 1987 – Prevention of non-defective firearm liability. MSSA-backed law protects firearm manufactures and sellers from damages caused by firearms that are not defective.

47. 1989 – Sporting goods stores may exceed fire codes for storage of smokeless powder and primers. The Unified Fire Code used to specify that stores could not exceed 20 pounds of smokeless powder or 1,000 primers on premises at any time. This MSSA-backed law supersedes the UFC and allows stores to stock up to 400 pounds of smokeless powder and up to 125,000 small arms primers.

48. 1991 – Mandatory Issue Concealed Weapon Permits. MSSA-backed law states that law abiding residents can now get a permit issued within 60 days of application. Although many law enforcement agencies fought against the right to carry, MSSA prevailed.

49. 1991 – Montana Shooting Range Protection Act. MSSA-backed law prevents range closures due to contamination of soils by lead, copper, & other claims. Anti-gun groups use this to shut down ranges all over the USA. Not in Montana!

50. 1991 – Right to Keep and Bear Arms Week. This MSSA bill establishes law where the first week of March is an official period for Montanans to celebrate their cherished right to keep and bear arms.

51. 1991 – Hunting Heritage Week. This MSSA bill establishes law where the third week of September is set aside to celebrate Montana's heritage and culture of hunting game animals.

52. 1991 – Gun safety in schools. This MSSA Senate Joint Resolution encourages gun safety training in the elementary schools of Montana and directs schools to adopt a gun safety program for kids.

53. 1991 – Shooting sports in schools. This MSSA Senate Joint Resolution encourages the adoption of rimfire competition as an intramural and interscholastic sport in the high schools of Montana. In shooting sports, small, rural schools can compete on an equal footing with larger, urban schools.

54. 1993 – Easements to secure a safety zone around a shooting range. Owners and operators of a shooting range need to secure a safety zone of property adjacent to the range, but often do not have the financial resources to buy the necessary land. This MSSA-authored law allows range operators to use easements to secure safety zones around ranges.

55. 1993 – Handgun hunting districts. MSSA-backed law helped establish allowing big game hunting with handguns in special districts restricted to shotguns and muzzleloaders.

56. 1993 – Game Lawfully Taken Becomes the Personal Property of the Hunter. Prior to this law, all game was the property of the State. Even if it was in the freezer. MSSA-backed law states game (lawfully taken and tagged) is now personal property.

57. 1993 – Second Conviction of Hunter Harassment is a Felony. Formerly, conviction of hunter harassment was only misdemeanor crime. MSSA-backed law makes second conviction a felony, with hard time in state prison. Since passage of this law, Montana hunters have incurred no second hunter harassment incidents by protesters!

58. 1995 – Firearm Safety Instructors Exempt from Liability. It has become more and more difficult to recruit firearm instructors because of possible exposure of instructors' personal assets to lawsuits over gun accidents by an instructor's student. This law by MSSA exempts firearm safety instructors from acts or omissions of students as long as the instructor did not use gross negligence in training the student.

59. 1995 – Repeal the Brady Law. MSSA successfully lobbied through the Legislature a Joint Resolution of the House and Senate calling upon Congress to repeal the unwanted and unneeded federal Brady Law.

60. 1995 – Gun buys for CWP-holders under the Brady Law. MSSA-backed law specifies that if a person has a Montana Concealed Weapon Permit for which they have already had a background check pursuant to the federal Brady Law, they may buy guns from federally licensed dealers without submitting to or waiting for a background check.

61. 1997 – Gun owners not liable for criminal acts committed with stolen firearms. The 1997 Legislature passed an MSSA-backed law clarifying that a gun owner is not responsible for the misuse of a stolen firearm. Prior to this, a person could be charged with the crime committed with a stolen firearm.

62. 1997 – Over-zealous federal officers. Many people are concerned about the actions of over-zealous federal officers. MSSA believes the county sheriff should be able to protect us from federal police who exceed their authority. This MSSA-authored resolution passed in 1997:

a) asks all federal officers to notify the county sheriff prior to any arrest, search or seizure in the sheriff's county,

b) requires the Montana Department of Justice to maintain a log of federal operations in Montana and note which ones happened with the advance notice to the sheriff

c) requires the Montana Secretary of State to send copies of this resolution to a long list of federal agencies.

63. 1997 – Montana exempted from the federal “gun-free school zones”. Federal law makes it a Federal crime to travel within 1,000 feet of a school grounds if you have a firearm in your vehicle that is not both unloaded and locked away. Since Montana schools are on the main streets,

this federal law makes criminals of a majority of Montana citizens over the course of the year. Thanks to MSSA, state law is now in place that exempts anyone in Montana who is protected by Montana's constitutional right to keep and bear arms (all non-criminal adults) from this Federal law.

64. 1997 – Terrorist-free America Act. MSSA successfully lobbied in the House and Senate to pass a declaration that citizens must remain armed for national security against terrorism. Congress is now asked to pass a federal law to implement this determination.

65. 1999 – Funding shooting range development. MSSA-backed bill establishes the Shooting Range Development Act creating a program for matching grants for shooting range establishment and improvement using money from hunting license fees and administered by the Department of Fish, Wildlife and Parks. Every two years MSSA must fight for legislative appropriation to fund the SRDA. Since establishment of this program by MSSA, over \$20 million in improvements to Montana shooting ranges have occurred under the SRDA.

66. 1999 – Preventing cities from suing gunmakers. MSSA-backed bill now prevents Montana cities from filing harassment lawsuits against gunmakers.

67. 1999 – Machine guns and silencers – removal of old laws. MSSA-written law wipes old laws off the books. As a holdover from the Prohibition era, Montana had laws making it illegal to possess full auto firearms using pistol-caliber ammo, or silencers, both in conflict with current federal law.

68. 1999 – Concealed Carry in “prohibited places”. Because of some under-the-table deal-making in 1991, the Montana law about concealed weapons permits had provisions preventing the exercise of CWP in “prohibited places”; bars, banks and public buildings. MSSA successfully advanced two bills in 1999 to roll back the “prohibited places” restrictions.

69. 1999 – Concealed Carry Reciprocity. MSSA-backed bill recognizes the permits of any states which do a criminal background check before issuing a CWP, and where the permittee has the permit and an official ID (e.g. drivers license) in possession. Many states have “we’ll recognize yours if you recognize ours”-type laws. Montana will gain immediate reciprocity with these states. Montana now recognizes the permits from most other states.

70. 2001 – Prevention of Victim’s liability for injuries to a criminal. MSSA-backed law prevents a criminal injured by his intended victim from