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

Kyle A. Gray
Brianne C. McClafferty
Emily J. Cross
HOLLAND & HART LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
Telephone: 406.252.2166
Facsimile: 406.252.1669
kgray@hollandhart.com
ejcross@hollandhart.com
bcmcclafferty@hollandhart.com

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

ATTORNEYS FOR PETITIONER BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA

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.	No. BDV 2021-598 Judge Michael McMahon **PETITIONER'S COMBINED BRIEF IN OPPOSITION TO MOTIONS TO INTERVENE OF MONTANA SHOOTING SPORTS ASSOCIATION AND DAVID W. DIACON**

Petitioner Board of Regents of Higher Education of the State of Montana ("BOR" or "the Board") responds to the Motions to Intervene of both Montana Shooting Sports Association ("MSSA"), and David W. Diacon ("Diacon") (jointly "Movants"), as follows:

I. INTRODUCTION

This action presents a single question of constitutional law: whether BOR or the Legislature has the authority to determine the nature and extent of access to firearms on the campuses of the Montana University System ("MUS").[1] BOR has named the proper, and only necessary, parties to this dispute. Nonetheless, MSSA and Diacon seek to intervene "as of right" under Rule 24(a)(2), Mont. R. Civ. P. Both acknowledge that this action questioning the constitutionality of Montana House Bill 102 ("HB102") as applied to BOR is a legal dispute between BOR and the State of Montana ("State") regarding whether, under Montana's Constitution, it is "the Legislature or the Board of Regents [that] has the authority" to determine if so-called "campus carry" of firearms on MUS property is permissible, and if so, where, when, and by whom. *See* David Diacon's Br. in Support [hereinafter Diacon Br.] at 2; MSSA's Principal Br. in Support [hereinafter MSSA Br.] at 17. While MSSA and Diacon both proffer their interest as firearms enthusiasts in HB102 surviving constitutional challenge generally, neither has shown, as required under Rule 24(a)(2), a legally protectable interest in the specific "property or transaction" – *i.e.,* the *res* – "which is the subject of the action" that will be adjudicated by this Court, namely *the authority* over campus carry on MUS property.

[1] Under Montana's Constitution, "[t]he Board has the 'full power, responsibility and authority to supervise, coordinate, manage and control the Montana university system[.]" *Sheehy v. Commissioner of Political Practices for State*, 2020 MT 37, ¶ 1, 399 Mont. 26, 458 P.3d 309 (quoting Mont. Const. art. X, § 9).

As explained in the Court's Preliminary Injunction Order, that *res* – which the Court itself described as "the constitutional authority to regulate firearms on MUS campuses and other [MUS] locations" – is within the constitutional remit of "either the Legislature or the Board," Prelim. Inj. Order [hereinafter PI Order] at 10, not MSSA or Diacon. Because neither Movant has a "legally protectable interest" in this *res*, their motions fail. Moreover, because Movants' pro-HB102 interests are adequately protected by the Attorney General's representation of the State against BOR, there are simply no grounds on which this Court could grant their motions. Rather, both motions should be denied.

II. ARGUMENT

In our legal system, the plaintiff/petitioner generally controls what parties will dispute an issue put before a court for resolution. One exception to this general rule is intervention under Rule 24, Mont. R. Civ. P., which "is a discretionary, judicial efficiency rule." *In re Marriage of Grass*, 215 Mont. 248, 253, 697 P.2d 96, 99 (1985) (citing *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982)). The rule "is used to avoid delay, circuity and multiplicity of actions," not to satisfy the preferences of an intervening applicant to become part of a dispute or change the character of the action as filed by the plaintiff. *Id.* Rather, a legal action "is a limited affair, and not everyone with an opinion is invited to attend." *Curry v. Regents of the Univ.*, 167 F.3d 420, 423 (8th Cir. 1999) (quoting *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996));[2] *see also Donaldson v. United States*, 400 U.S. 517, 531 (1971) (holding that a taxpayer's interest

[2] Rule 24 of the Montana Rules of Civil Procedure is modeled upon and identical to Rule 24 of the Federal Rules of Civil Procedure. *See Aniballi v. Aniballi*, 255 Mont. 384, 387, 842 P.2d 342, 344 (1992). Because these rules are identical, federal case law interpreting Rule 24, Fed. R. Civ. P., can be persuasive for determining the requirements for satisfying Rule 24, Mont. R. Civ. P. *Id.* As such, this brief uses the term "Rule 24" to refer to both interchangeably.

in attempting to prevent tax documents owned by others from being produced to the IRS did not satisfy Rule 24(a)'s "interest in the property or transaction" requirement).

MSSA and Diacon (a law student who appears *pro se*) both move to intervene "as of right" under Rule 24(a)(2), not for permissive intervention under Rule 24(b), nor by claiming a statutory right to intervene under Rule 24(a)(1). MSSA Br. at 11-18; Diacon Br. at 3-6. Accordingly, this brief addresses solely the Rule 24(a)(2) "as of right" criteria. *See, e.g., Loftis v. Loftis*, 2010 MT 49, ¶ 11, 355 Mont. 316, 227 P.3d. 1030 (when a party has "moved to intervene as a matter of right," the criteria "for permissive intervention" are not relevant).[3]

The burden lies on MSSA and Diacon to prove their claimed "right" to intervene, and to meet that burden each "must show" a *prima facie* case meeting three[4] criteria: 1) "an interest relating to the property or transaction which is the subject of the action;" 2) that their absence from the action would "impair or impede [their] ability to protect [their] interest;" and 3) that the "existing parties [do not] adequately represent that interest." Rule 24(a)(2); *Loftis*, ¶¶ 9, 13. "[T]he applicant *must satisfy*" all these criteria, or has no right to intervene. *Loftis*, ¶¶ 9, 13; *Enz v. Raelund*, 2018 MT 134, ¶ 57, 391 Mont. 406, 419 P.3d 674 (emphasis added). Because

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[3] The State filed a short brief supporting movants' intervention motions, relying on a decision the State concedes addresses *permissive* intervention (*see* State of Montana's Response to Motions to Intervene at 2), a separate path to intervention under Rule 24 ***(b)*** that for several reasons is not open to Movants, and which they chose not to invoke. Under *Loftis*, the State's briefing is inapposite. *Id.*, ¶ 11. In any event, the State's brief does not suggest the Attorney General cannot, or will not, adequately represent any interests movants may have in this action. As with intervention as of right – *see* Section II.C, below – an inability to establish that representation by an existing party would be inadequate is also fatal to permissive intervention. *See, e.g., Kane County v. United States*, 597 F.3d 1129, 1136 (10th Cir. 2012) (affirming denial of permissive intervention, *inter alia*, because movant did not show it would not be "adequately represented by the United States"); *6 Moore's Federal Practice – Civil*, § 24.10 (2021) (permissive intervention will generally not be granted "[i]f one of the existing parties is the government and that party is aggressively representing the interests of the proposed intervenor").

[4] Timeliness a fourth criterion. BOR concedes both intervention motions were timely filed.

neither Movant has satisfied any of the three pertinent Rule 24(a)(2) criteria, neither has a "right" to intervene in this matter. *Id.*

A. Movants Have Failed to Establish a Legally Protectable Interest.

1. Neither MSSA nor Diacon have made out a *prima facie* case of a legally protectable interest related to the property that is the subject of the action.

Movants argue that the interests of (some of) MSSA's members and of Diacon himself "to exercise their campus carry rights under [HB102]" on MUS property are sufficient to allow them to intervene to join the State in arguing HB102 is constitutional under Article X, § 9 of Montana's Constitution. Diacon Br. at 2-3; MSSA Br. at 15-16.[5] They proffer the "right to keep and bear arms," "permit-less carry of firearms (no government permit needed to put on a coat)," "eliminating so-called 'gun free zones,'" and "self-protection" as further "interests" related to the survival of HB102 against BOR's constitutional challenge. MSSA Br. at 4, 15; Diacon Br. at 6. With these arguments, Movants show a fundamental misunderstanding of the nature of the "interest" an applicant for intervention must establish in an action like this one. An interest in the outcome of the litigation is not enough. *See, e.g., Donaldson*, 400 U.S. at 530-31 (although the outcome of who got custody of the property at issue "loom[ed] large in [movant's] eyes,"

[5] MSSA's brief states that its "membership includes, without limitation, students and MUS employees from across the MUS," citing to paragraph 7 of the declaration of its president, Gary Marbut, MSSA Br. at 4, Ex. 2, ¶ 7. However, at paragraph 7, Marbut's declaration provides only that "MSSA has members in all Montana communities," but asserts that "a privacy provision in MSSA Bylaws" prevents MSSA from disclosing anything about its members, apparently even where necessary to support MSSA's burden of proof in a court of law. This failure to identify any MSSA member with a current and direct purported interest to carry a firearm *on MUS property* is a standalone failure of MSSA to "establish" the necessary *prima facie* case for intervention under Rule 24(a)(2). *See., e.g., Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("[A]n intervenor of right must have [case or controversy] standing in order to pursue relief that is different from that which is sought by a party with standing."). Here, MSSA seeks an award of attorney fees, relief not sought by the Board or the State. *See* MSSA's Answer, MSSA Br., Ex. 1, at 3.

that is not "the kind [of interest] contemplated" by Rule 24(a)(2); *Texas v. United States* , 805 F.3d 653, 658-59 (5th Cir. 2015) (holding that a "would-be intervenor [who] merely *prefers* one outcome to the other" has no right to intervene) (emphasis in original).

Of course, this must be true else, for example, the thousands of commenters to BOR regarding this litigation could intervene "as of right" on the side of either BOR or the Legislature because all of them strongly prefer one outcome of the action over the other. *See* May 27, 2021 Brianne Rogers Declaration [hereafter, Rogers Decl.], ¶ 10 (thousands of comments from MUS students, parents, faculty, staff and neighbors addressed personal safety and health concerns both for and against HB102); *see also Donald J. Trump For President, Inc. v. Bullock*, 2020 Dist. Lexis 167715, *6 (D. Mont., Sept. 14, 2020) (Judge Christensen denied both "as of right" and "permissive" intervention to League of Women Voters of Montana, *inter alia*, because if the court recognized the type of political interests proffered by movant there (and here) as sufficient for intervention, "it would be hard pressed to deny future motions seeking intervention from any number of the hundreds of organizations who engage in such efforts from a partisan or non-partisan standpoint").

Instead, a Rule 24(a)(2) movant must show, *inter alia*, a direct, legally protectable interest "relating to *the property* which is the subject of the action[.]" *Enz*, ¶ 57 (emphasis added); *Donaldson*, 400 U.S. at 531. As in *Enz* and *Donaldson*, here there is "property" that is the subject of these proceedings, namely "the constitutional authority to regulate firearms on MUS campuses and other [MUS] locations," which *res* is held either by the Board or the Legislature, not MSSA or Diacon. PI Order at 10. Intervention motions in specific *res* cases like this one are "the easiest" to resolve because in this context "the existence of a sufficient interest is apparent," which is not true "in other types of actions" where "the movant's interest is less

obvious, and the court's determination is more difficult." 6 *Moore's Federal Practice – Civil* [hereinafter *Moore's*] § 24.03 (2021).

Donaldson was just such an "easy" case. There, a taxpayer (Donaldson) under investigation for potential tax fraud discovered that the IRS had served subpoenas for records owned by Donaldson's former employer, Acme. Donaldson attempted to intervene under Rule 24(a)(2) to prevent production of Acme's records to the IRS. Resolving a split in the federal circuit courts regarding the interpretation of Rule 24(a)(2)'s language, the U.S. Supreme Court affirmed the lower courts' denial of Donaldson's motion to intervene. 400 U.S. at 530. The Court conceded that Donaldson's interest in preventing production of the records – potentially avoiding a tax fraud indictment – "loom[ed] large in his eyes," but decided in the context of that specific property dispute that such a "[non]proprietary interest . . . cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of 'an interest relating to *the property* or transaction which is the subject of the action.'" *Id.* at 531 (emphasis added). Instead, the Court held that "what is obviously meant there is a significantly protectable interest" related to the subject property, an interest Donaldson was unable to show in "*Acme's* routine business records," no matter how much the disposition of that property otherwise mattered to him. *Id.* at 530-31 (emphasis added). The same is true for Movants here. No matter how large in their eyes looms the determination of whether the Board or the Legislature "owns" the authority to regulate firearms on the MUS, MSSA and Diacon do not themselves claim any proprietary or similar interest related to that subject *res*.

Since *Donaldson*, the Montana Supreme Court has decided several specific-*res* cases, and has consistently required that under Montana's Rule 24(a), a movant for intervention must "make a prima facie showing of a direct, substantial, legally-protectable interest," *Loftis*, ¶ 13, related to

the subject property of the type required in *Donaldson*. *See, e.g.*, *Enz*, ¶¶ 58-60 (affirming denial of intervention by movant (Weeks), who alleged he had signed a lease in the disputed property on behalf of his son, "because if Weeks signed the Lease on behalf of another, he was merely acting as an agent and has no interest in the property"); *Loftis*, ¶ 18 (affirming denial of intervention by former husband (Wolf) in proceeding to invalidate wife's subsequent marriage because Wolf established no "direct, substantial, legally protected interest" in former wife's marital status (the subject *res*) despite wife's earlier agreement to accept substantially-reduced maintenance payments if she remarried); *In re Heidema*, 2007 MT 20, ¶ 11, 335 Mont. 362, 152 P.3d 112 (opining that injured worker with lawsuit (but no judgment) against marital property of Heidemas had "not made a prima facie showing of an actual interest in the Heidemas' property" as required for intervention in their dissolution proceeding); *DeVoe v. State*, 281 Mont. 356, 360, 364, 935 P.2d 256, 259, 261 (1997) (affirming order allowing City to intervene in DeVoe's declaratory judgment action against State Highway Commission for "net acreage [he claimed] had reverted to him" because "the City established an interest relating to the property" sufficient for Rule 24(a)(2) purposes by showing it had "annexed the area" in question); *Gammon v. Gammon*, 210 Mont. 463, 469, 684 P.2d 1081, 1084 (1984) (reversing denial of intervention to corporation that provided "a quitclaim deed and assignment" establishing "an interest relating to the property" (mining claims) that were the subject of the action); *Grenfell*, 198 Mont. at 94 (affirming the denial of stockholder's intervention motion as untimely, but opining "as a 50 percent stockholder in the corporation" he had established "a substantial property interest at stake" in the subject matter – corporate debts – of the action).

Under this long line of precedent, like the movants in *Enz*, *Loftis*, *Heidema*, and *Donaldson*, MSSA and Diacon have failed to make the necessary *prima facie* case establishing a

direct, legally protectable interest in the subject *res*. In fact, neither Movant even claims that type of interest related to the authority that this Court will adjudicate. Instead, as in *Curry v. Regents*, this action between two competing governmental claimants is the type of "limited affair [that] not everyone with an opinion is invited to attend." 167 F.3d at 423.

In sum, the Board would not object to appropriate amicus participation by MSSA or Diacon. *See, e.g.*, *Atl. Mut. Ins. Co. v. Northwest Airlines, Inc.*, 24 F.3d 958, 961 (7th Circ. 1994) ("Persons who care about the legal principles that apply to a dispute may appear as amici curiae; they are not entitled to intervene"); *Donald J. Trump Campaign*, 2020 Dist. Lexis 167715, *7 (denying intervention; allowing "filing [of] an amicus brief"). But because both Movants lack the necessary direct, legally protectable interest in the *res* that is the subject of this action, the Board does object to their intervention.

2. A movant's status as a group that lobbied for passage of a statute does not give it a legally protectable interest supporting intervention.

MSSA (but not Diacon) proffers a further "interest" it says allows it to intervene, namely its status as a major proponent of HB102 in the legislative proceedings that led to the statute's passage. MSSA Br. at 15-16. Relying on *Sportsmen for I-143 v. Montana Fifteenth Judicial District Court*, 2002 MT 18, 308 Mont. 189, 40 P.3d 400 ("*Sportsmen*"), MSSA argues because it lobbied the Montana legislature for "campus carry" and was "involved every step of the way" in passage of HB102, that by virtue of that status it has established the type of legally protectable interest that "entitle[s] [it] to intervene ***as a matter of right*** in an action challenging the legality of a measure it has supported." MSSA Br. at 15 (quoting *Sportsmen*, ¶ 12) (emphasis in MSSA's brief).

MSSA is wrong. In short, it misreads *Sportsmen*. First, unlike MSSA here, the public interest group in *Sportsmen* actually *did* establish the type of legally protectable interest in

property discussed above, which supported Rule 24(a)(2) intervention. The district court in *Sportsmen* held that the movant there – the chief proponent of the ballot measure (I-143) from which the statute before the court was derived – "did *not* have a legally protectable interest" in "the property (alternative livestock)" that was the subject matter of that particular litigation. *Sportsmen*, ¶ 10 (emphasis added). On application for a writ of supervisory control, the Sportsmen's Groups showed that "their members, as Montana citizens" *did* have the necessary interest in the subject property (game animals as purported alternative livestock) as "*beneficiaries* of the State's obligations as trustee for the management and protection of Montana's game animals." *Id.* at ¶ 11 (emphasis added). It was that beneficiary status that the movants in *Sportsmen* proffered as the rationale for why their having served as "the authors, sponsors, active supporters and defenders of I-143" mattered, and the Montana Supreme Court identified this beneficial "interest in the management and protection of Montana's game animals" – the subject property – as the legally protectable interest the Sportsmen's Groups were entitled to protect against impairment. *Id.* at ¶¶ 12, 13 (emphasis added). MSSA has proffered no comparable interest here in the subject *res*, the authority to regulate firearms on the MUS. Thus, on a proper reading, *Sportsmen* does not support MSSA's status-based, non-*res*-focused argument.

Second, even if *Sportsmen* could be given the broad reading MSSA suggests, the Supreme Court plainly limited its decision to primary supporters of *ballot initiatives* like I-143. *Id.* at ¶ 6 ("The case presents the purely legal issue of whether the primary proponent *of a ballot initiative* has a legally protectable interest sufficient to allow it to intervene in a case challenging the resulting statute") (emphasis added). This limitation makes good sense because in Montana, by its nature a ballot initiative has no legislative sponsors or other involvement of the State in its

enactment, so it is the sponsors who have "ownership" of such a measure in a manner that is not true for a bill – like HB102 – which passes into law via the normal legislative process. *Compare* Mont. Const., art. III, § 4 ("*the people* may enact laws by initiative") (emphasis added) *with* Mont. Const., art. V, §§ 1, 11 (*a law shall be passed by bill [by] a vote of the majority of all members [of the Legislature]* present and voting") (emphasis added).

Here, by its own admission MSSA is not the supporter of a ballot initiative, but instead "lobbie[d] the Montana Legislature" for passage of HB102, a legislative bill enacted via Article V, § 11. MSSA Br at 3. Unlike for proponents of ballot measures, courts have recognized that an "interest as chief lobbyist in [a state's legislature] in favor of [a bill] *is not* a direct and substantial interest sufficient to support intervention" as of right under Rule 24(a)(2). *Keith v. Daley,* 764 F.2d 1265, 1269-70 (7th Cir. 1985) (emphasis added) (affirming denial of intervention and explaining that even "a 30 year commitment" to enactment of a statute protecting property does not give the public interest group that lobbied for passage of that bill in the state legislature the "direct, substantial or legally protectable" interest necessary for intervention as of right under Rule 24(a)(2); *Mt. Envtl. Info. Center v. Mt. Dept. of Envtl. Quality* (*MEIC*), 2001 ML 3473, 2001 Mont. Dist. Lexis 3418, at *31 (First Jud. Dist. Ct., Oct. 5, 2001) (Judge Honzel denied intervention to lobbyist, citing and agreeing with *Keith* decision that the "status of lobbyist" does not constitute a legally protectable interest under Rule 24(a)(2)).

The movant in *Sportsmen* had the very different status of "primary proponent" of a ballot initiative, and was not, like MSSA, a group that lobbied the Montana legislature. *Id.*, ¶ 6. As such, the holdings in *Sportsmen* are inapposite and do not support MSSA's assertion (MSSA Br. at 15) that its status of having lobbied for HB102's passage is sufficient to establish a "legally protectable" interest related to the subject *res* here. MSSA offers no authority for that

proposition, which would be contrary to such cases as *Enz*, *Loftis*, *MEIC*, *Donaldson* and *Keith*. Again, the Board would not object to movants appearing as amici, but disagrees that lobbying *the legislature* creates a legally protectable interest sufficient for intervention as of right, particularly in a specific-*res* action as here.

B. MSSA and Diacon Have Failed to Establish Impairment of Any Interest they Might Have in the Subject of this Action.

Assuming, *arguendo*, MSSA or Diacon have established the necessary legally protectable interest – which they have not – their intervention motions would still fail because they have not made out the necessary *prima facie* case for the next Rule 24(a)(2) criterion, *i.e.*, that "protection of [their] interest may be impaired by the disposition of the action." *Loftis*, ¶ 9. Diacon does not directly address this impairment criterion, but states he is against BOR having "the authority . . . to establish and enforce policy which categorically denies his right to carry a firearm for self-defense" on the MUS. Diacon Br. at 3. Like Diacon, MSSA proffers potential impairment of its members' "campus carry rights" by focusing on "BOR Policy 1006," which MSSA asserts the Board intends to "continue to enforce" if it prevails in this action. MSSA Br. at 16-17. This proffered "impairment" based in "continuation" of BOR Policy 1006 will not suffice.

It is undisputed that BOR is undertaking a review of BOR Policy 1006. *See* Rogers Decl., ¶ 3. The review will provide opportunities for public participation, and Movants will be free to take part in that process. Simply put, Movants cannot, at this point, know whether their purported "campus carry" rights will be impaired once the review of BOR Policy 1006 is completed, but only assume they will be. Such "theoretical" impairment is insufficient for Rule 24(a)(2) intervention. *See United States v. Texas E. Transmission Corp.*, 923 F.2d 410, 414 (5th Cir. 1991); *see also Moore's* § 24.03 ("[T]he impairment must be practical and not merely theoretical.").

The courts have recognized that such other avenues for potential relief are a serious "obstacle" to establishing the impairment requirement. *Flying J., Inc. v. Van Hullen*, 578 F.3d 569, 572-73 (7th Cir. 2009); *see also United States v. City of New York*, 198 F.3d 360, 366 (2d Cir. 1999) (denying intervention because movant "has not shown that its members' interests will be impaired by the disposition of this action in its absence. The proposed intervenors have or will have had at least three opportunities to raise their concerns independent of this enforcement action."). This action is not about the constitutionality of BOR Policy 1006. Indeed, that question is not the subject of the action before this Court. Rather, it is the type of "collateral issue" – assuming, *arguendo*, it is even ripe for adjudication – that this Court need not, and should not, review because Movants have other remedies. *City of New York*, 198 F.3d at 365-66.

The Montana Supreme Court is in accord with these federal decisions. It, too, has held that the existence of "other avenues . . . for protecting [a Rule 24 movant's] alleged interest in the property" at issue prevents the movant from establishing the required "impairment" criterion. *Heidema*, ¶ 11; *see also Loftis*, ¶ 18 (denying intervention to movant in former wife's dissolution, *inter alia*, because "adjudication of [movant's] maintenance obligation" could occur in a different forum). As such, because they failed to make a *prima facie* case of impairment, Movants' motions also fail on this "impairment" criterion.

C. MSSA and Diacon Have Failed to Establish Inadequate Representation by Montana's Attorney General of Any Interest they Might Have in the Subject of this Action.

As a final, fatal flaw in both motions, assuming *arguendo* that Diacon or MSSA have established both the necessary "interest" and "impairment" criteria, their intervention motions still fail under Rule 24(a)(2)'s requirement that their interest "is not adequately represented" by "existing party" State of Montana. *Loftis*, ¶ 9.

Diacon concedes that "the State's assertion of authority aligns with [his]," but argues that because the Attorney General "is not 'charged by law' to represent [his] individual interests, [Diacon] must be allowed to intervene." Diacon Br. at 3-4. Diacon ignores that this action is not a challenge to individual interests, but rather seeks clarification of which body – the Board or the Legislature – has the authority to regulate the use of and access to guns on MUS campuses. As such, it is critical that Diacon concedes that, as to the subject "authority" which *is* at issue in this action, he is "align[ed]" with the Attorney General's representation of the State against the Board, and proffers no special expertise or experience related to this constitutional "authority" question. Diacon Br. at 4.

The same is true for MSSA. In its brief, MSSA announces its alignment with the State, proclaiming that "HB102 was so politically popular that it was the second bill to clear both houses of the Legislature," and that "with much ceremony, it was the second bill signed by the newly sworn-in Governor Greg Gianforte." MSSA Br. at 2. In its argument regarding how – despite conceding alignment of MSSA's interests with the State – it has somehow established the "inadequate representation" criterion, MSSA proffers no special knowledge or expertise regarding the "authority" question in dispute, but instead falls back on its misreading of *Sportsmen.* MSSA Br. at 18. Incorrectly asserting that "MSSA played identical roles" *vis a vis* HB102 as the Sportsmen's Groups that helped usher I-143 through the initiative process, MSSA concludes that it, like the Sportsmen's Groups, "therefore 'may be in the best position to defend their interpretation of the resulting legislation.'" MSSA Br. at 18 (quoting *Sportsmen*, ¶ 17). Here again, MSSA is simply wrong about what *Sportsmen* holds.

First, the "resulting legislation" at issue in *Sportsmen*, ¶ 17, was a bill promulgated by a post-initiative legislature which was not involved in the initiative process, so the initiative

supporters likely did bring to the case relevant insights and information from *outside* the legislative process, whereas here, MSSA "lobbi[ed] the Montana Legislature" for passage of HB102 *inside* that process. MSSA Br. at 3. Thus, the Sportsmen's Groups were able to establish that they brought "something to the litigation that otherwise would be ignored or overlooked if the matter were left to the already existing parties," which is part of what a movant "must show" to make out the necessary *prima facie* case of inadequate representation when, as here, the movants' interests align with those of an existing party. *Moore's* § 24.03.

Neither MSSA nor Diacon bring anything of that nature to this action, which, unlike in *Sportsmen*, does not even involve "interpretation" of any legislation, much less "resulting legislation" following a successful citizens' imitative process. *Sportsmen*, ¶ 17. Instead, the subject of this action is *whether* the Board or the Legislature has the constitutional authority to regulate firearms on the MUS, not *what* HB102 means. Unlike in *Sportsmen*, Movants here are not seeking "to defend *their* interpretation" of a post-initiative statute. Movants and the State are all on the same page regarding the *meaning* of HB102. It is the bill's constitutionality that is in dispute here, not what it does. As such, MSSA and Diacon are nothing like the movants allowed to intervene in *Sportsmen*, and they err to argue otherwise.

Second, the "existing party" in *Sportsmen* was Montana's Department of Fish, Wildlife & Parks ("FWP"), which was not itself involved in the initiative process, so was not an avid supporter of I-143 like the Sportsmen's Groups were. *Sportsmen*, ¶ 14. Moreover, there was "ongoing political controversy surrounding the game farm issue," which allowed the Sportsmen's Groups to adequately question whether the FWP director – as "a political appointee" of an administration uninvolved in the initiative process – would vigorously defend "*their* interpretation" of the legislation at issue. ¶¶ 16-17. Likewise, in the case the Montana

Supreme Court relied on for its decision on the "inadequacy" requirement – *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) – the Ninth Circuit ruled the movant Audubon Society had established enough to meet the criterion by showing the defendant, Secretary of Interior James Watt, on whose side Audobon wanted to intervene had only recently headed "the organization which [was] representing the plaintiff Sagebrush Rebellion in this action." *Sportsmen*, ¶ 14. Nothing of the kind exists here.

Rather, as MSSA itself trumpets, both the current Montana Legislature and the Governor are strong proponents of HB102. MSSA Br. at 2. Most important for this inquiry, the Attorney General – whose office represents the existing party State of Montana in these proceedings – will vigorously defend this lawsuit against BOR. The Attorney General personally testified in support of HB102, and in a recent speech said the following about this litigation and his unwavering support for defending HB102:

> Have no fear. My office is aggressively defending this one. We're going to win this one, we're going to take this one to the mat.

Lawsuits Linger Long After Session, Billings Gazette, June 20, 2021, pp. A1, A3. (Ex. 1, hereto).

Here, then, unlike in *Sportsmen* and *Sagebrush*, there is simply no question that the Attorney General *will* "vigorously" represent the aligned interests of the Movants and the defendant State against the plaintiff Board. *Sportsmen*, ¶ 16. As such, Movants have simply failed to establish the necessary "inadequacy" of representation by an existing party as required by Rule 24(a)(2). *Loftis*, ¶ 9; *cf. Gammon*, 210 Mont. at 469 ("because [respondent] did not appear to defend the action and was defaulted, no party adequately represent[ed] [movant's] position," thereby allowing movant to "me[e]t the intervention requirements of Rule 24(1)(2), M.R.Civ.P.").

Third, the Montana Supreme Court relied on *Sagebrush* for its decision regarding "inadequacy" in *Sportsmen*. *Sportsmen*, ¶ 14. After *Sagebrush* and *Sportsmen*, the Ninth Circuit clarified that when (as here) the proposed intervenor and an existing party "share the same ultimate objective . . . a presumption of adequacy of representation arises." *Arakaki v. Cayetano*, 324 F.3d 1078, 1087 (9th Cir. 2003). Further, this presumption of adequacy becomes even stronger when (again, as here) "the government and the applicant are on the same side." *Id.* Thus, the accepted interpretation of Rule 24(a)(2) now is "that in the absence of *a very compelling showing* to the contrary, it will be presumed that [a state's] government adequately represents the interests" of intervention applicants who share the same objective of upholding a measure or bill. *Prete*, 438 F.3d at 957 (emphasis added). *See also Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) (affirming denial of intervention based on presumption of adequate representation by government, ruling presumption holds "unless there is a showing of gross negligence or bad faith"); *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013) (holding that "a more exacting showing of inadequacy should be required where the proposed intervenor shares the same objective as a government party; every circuit to rule on the matter has held in the affirmative," further explaining that "when a statute comes under attack, it is difficult to conceive of an entity better suited to defend it than the government").[6]

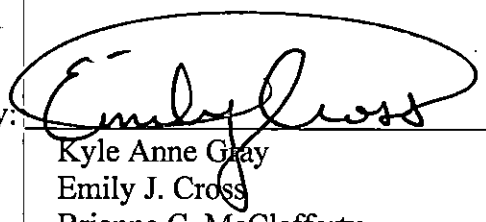
[6] *State ex rel. Palmer v. Dist. Ct.*, 190 Mont. 185, 619 P.2d 1201 (1980) – cited by Diacon (Br. at 3) – is in accord with *Prete*, *et al.* In *Palmer*, the Montana Supreme Court denied intervention to an heir, citing with favor a decision holding that when an individual designated by statute to represent the proposed intervenor (like a special estate administrator) is already a party, the proposed intervenor's motion must be denied in the absence of "a compelling showing" by the movant why this representation is not adequate. *Id.* at 189, 1204. This is a private litigation corollary of the rule in *Prete* and the other governmental representation cases cited above, wherein governmental representation is presumed adequate absent "a very compelling showing" to the contrary, a rule that finds support in the concept of "*parens patriae*," *i.e.*, a "government serv[ing] in a representative capacity of its people." *Stuart*, 706 F.3d at 351; *Moore's* § 24.03.

Finally, Movants present no evidence at all – not even minimal evidence – to rebut the strong presumption of adequacy of the Attorney General's representation, much less to make the "very compelling showing to the contrary" required under current law. *Prete*, 438 F.3d at 957. Movants and the State share "the same ultimate objective" to uphold HB102 against the authority granted to the Board under Article X, § 9 of Montana's Constitution. On these undisputed facts, movants can "[h]ave no fear." Ex. 1. The Attorney General's office will "aggressively defend" HB102 and Movants' aligned interests to have that bill survive BOR's constitutional challenge. *Id.* Having offered no evidence to the contrary, and instead conceding their alignment with the State on the subject of this action, movants have failed to meet their burden of establishing a *prima facie* case of inadequate representation by existing party the State of Montana. That failure alone requires denial of their motions. *Loftis*, ¶ 9 (intervention "applicant *must satisfy* [all] four criteria," including that its interest "is not adequately represented by an existing party") (emphasis added).

III. CONCLUSION

Neither MSSA nor Diacon have established a *prima facie* case 1) that either has a legally protectable interest in the *res* to be adjudicated in this action, 2) that their proffered interests would be impaired by not allowing them to intervene, or 3) made a compelling showing (or any showing at all) that representation by existing party State of Montana, via the Office of the Attorney General, of any interest they might have would be inadequate. Thus, neither movant is entitled to intervene as of right under Rule 24(a)(2). Accordingly, Montana law requires that both motions be denied.

Dated this 24th day of June, 2021.

By: 

Kyle Anne Gray
Emily J. Cross
Brianne C. McClafferty
HOLLAND & HART LLP
401 North 31st Street, Suite 1500
Billings, MT 59101

/s/ Martha Sheehy
Martha Sheehy
Sheehy Law Firm

/s/ Ali Bovingdon
Ali Bovingdon
MUS Chief Legal Counsel

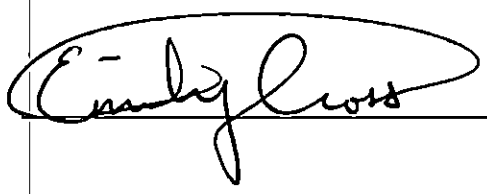
ATTORNEYS FOR PETITIONER BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was duly served upon the following as indicated below.

David Dewhirst J. Stuart Segrest Hannah Tokerud Montana Attorney General Justice Building, Third Floor 315 N. Sanders Helena, MT 59601 *Email: David.dewhirst@mt.gov* *ssegrest@mt.gov* *hannah.tokerud@mt.gov*	☐ U. S. Mail, postage prepaid ☑ Electronic Mail ☐ Facsimile Transmission ☐ Personal Delivery
Quentin M. Rhoades Rhoades Siefert & Erickson PLLC 430 Ryman Street Missoula, MT 59802 *Email: qmr@montanalawyer.com*	☐ U. S. Mail, postage prepaid ☑ Electronic Mail ☐ Facsimile Transmission ☐ Personal Delivery
David W. Diacon 2319 Livingston Ave. Missoula, MT 59801 *Email: dwdiacon@diacon.us.com*	☐ U. S. Mail, postage prepaid ☑ Electronic Mail ☐ Facsimile Transmission ☐ Personal Delivery

Dated this 24th day of June, 2021.



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65TH MONTANA LEGISLATURE

Lawsuits linger long after session

MOLLY K. MICHELS
holly.michels@lee.net

Promise of future litigation was a common refrain from opponents to bills passed by the Republican-majority Legislature this winter and signed into law by the state's first GOP governor in 16 years.

Two and a half months after the end of the 80-day session, the chickens are coming home to roost.

"I think this bill's unconstitutional. It's probably going to die by fiscal note or the fact it goes to court," said Rep. Geraldine Custer, a Republican from Forsyth, back in late January when the state House first debated a bill that bars transgender women from playing on women's sports teams.

That bill, now a law, is now part of litigation filed by more than a dozen plaintiffs, representing both groups and individuals, that object to three other newly minted statutes as well.

To date, a dozen lawsuits have been filed stemming from this

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Lawsuits

From A1

year's Legislature, with 10 filings challenging 11 new laws. One has been decided, with the Supreme Court upholding the governor's new power to directly appoint judges to fill vacancies. Two others were dismissed by the high court to be filed in lower courts, where they and the other challenges are working through the legal process.

Neither the Legislature nor the Attorney General's Office formally keep track of the amount of litigation filed after each session. But most political observers, with the exception of the new solicitor general, agree it's more than seen in recent memory.

Many link the bumper crop to the new landscape in Helena: that two branches of government – the Legislature and the executive – are both held by the same party for the first time in a decade and a half.

At the Montana Republican Party Convention in Helena on Friday, Republican Attorney General Austin Knudsen hammered on that point in a lunchtime speech to party members. Knudsen is a central player in the legal fight, representing the state in what's been filed so far.

"I can personally attest to how absolutely frustrating it has been for the last several decades to be in the Legislature with a Democrat in the second floor in the governor's office," the former Speaker of the House said. " ... And that's why this session was so fun to watch. We had Democrat heads exploding because they no longer have the backstop of the governor's veto."

Anecdotally, Lee Banville, a political analyst at the University of Montana, said the amount of litigation was up.

"I do think we see more lawsuits being waged this year than we have seen in any year I remember, or at least lawsuits being discussed and being weighed," Banville said.

While litigation stemming from the session isn't tallied, the number of bills vetoed is. This year Republican Gov. Greg Gianforte vetoed just 17. In his first term in 2013, former Democratic Gov. Steve Bullock used his pen to kill 71 bills from the GOP-majority Legislature. He vetoed 58 the next session, 56 in the following and 36 his final year in office.

Bills Bullock vetoed, like this session's House Bill 102 to broadly expand where guns can be carried, became law this winter and are among those being challenged in the courts.

Is any publicity good publicity?

The new law expanding where firearms can be carried also applies to college campuses. This spring the Montana Board of Regents, which oversees the university system, voted 7-0 to pursue what it was careful to characterize as "judicial review" of the new statute.

Chair Casey Lozar said in the May meeting there was a large number of public comments about the new law and an "overwhelming" amount were against it, which led the Regents to take action. Still, he and other Regents emphasized the Legislature as a "key partner" and wanted to continue to work together "in good faith."

"But at the same time it's our right if not our obligation for us to seek this judicial review," Lozar said then.

But Knudsen last week characterized it as "the colleges and Board of Regents have gone apoplectic."

Knudsen told the crowd at the GOP convention the Regents were arguing they had the authority to tell students "when and what constitutional rights they can exercise on a college campus."

"Have no fear. My office is aggressively defending this one. We're going to win this one, we're going to take this one to the mat. And we're going to defend Montanans' right to exercise their constitutional rights, even once they step across this little imaginary line onto college campus," Knudsen said to applause from the crowd.

In some ways, regardless of the outcome, just having the fight — along with the press coverage and public awareness — is valuable for politicians like Knudsen, Banville said.

"Obviously everybody is going to use these legal fights for their campaigns, their fundraising, their messages to constituents and supporters," Banville said. "Whether HB 102 goes down or is made law, Republicans are going to claim victory for fighting for Second Amendment rights. Liberals and progressive groups are going to claim victory for fighting to protect student safety from more gun violence. And even if they lose, either side, they're going to use it to raise money. They're going to use it to message the campaign in a year and a half."

At the convention, Knudsen called the firearms law "The most important, significant piece of pro-Second Amendment legislation this state has seen in over 25 years."

He plowed ahead, telling fellow party members "If you follow the news at all, you know that my office has leaned in a little bit, and we have picked a few fights."

Judicial attacks

Another layer to the litigation landscape is Republican lawmakers' open season on judges.

This session, GOP legislators brought years of frustrations against the judiciary to fruition. They passed new laws that expand the executive's power to pick judges, which triggered a lawsuit within 24 hours of the bill becoming law. While the state Supreme Court upheld the law (Senate Bill 140), Justice Jim Rice issued a scathing opinion that excoriated lawmakers and Knudsen for their actions that included saying, on behalf of the Legislature, they'd ignore a court order blocking subpoenas.

The Legislature also unearthed emails of judges weighing in on bills that would affect the judiciary. While Supreme Court justices have defended the emails, Republicans used them as a smoking gun to form a select committee to continue inquiries into the judiciary after the end of the biennial session and raise concerns about public record policies among judges and the state Supreme Court administrator.

"We haven't seen this level of politicization of the judiciary at least in the last 15-20 years," Banville said.

Knudsen told the GOP convention the judicial nominating commission that used to forward a list of judges for the governor to pick from had been "controlled by the trial lawyers" for the last three decades or longer. SB 140 eliminated the commission.

"My office along with the Legislature — we've shined a big bright light on the Montana Supreme Court and I'm here to tell you they don't like it," Knudsen said again to applause. "To say that we've uncovered some unsettling things is putting in very mildly."

One last effort

Without that veto backstop, the courts are now the last stop for opponents that didn't succeed in blocking a policy during the session.

"When you can't win at the Legislature and you can't win with the governor, you try to win at the court by arguing the law is unconstitutional or infringes on the rights of others, and this is where a lot of the progressive groups and Democratic activists are going get their fight because they really didn't get it in the session," Banville said.

David Dewhirst, the state solicitor general who defends Montana in these lawsuits, takes a dim view of legal challenges that restate concerns raised during the session. Dewhirst works for Republican Attorney General Austin Knudsen.

"It seems like a number of these legal challenges are really just regurgitated policy disagreements, and I'll say for my part I'm not overly impressed with several of them," Dewhirst said. "I think the state's on very solid footing."

Dewhirst also sees litigation as an attempt to get what couldn't be achieved during the session and is no longer an option with the GOP holding both the Legislature and governor's office.

"Maybe there's a sense

in which thes[illegible]s were passed through the Legislature and signed by the governor and there's an attempt by some of the plaintiffs and their attorneys to use the courts as a secondary veto, a super-veto, over these pretty popular measures that stem from the election in November," Dewhirst said.

But Sandi Luckey, the executive director of the Montana Democratic Party, disputes that characterization. The party is suing the Secretary of State over three new laws that would end same-day voter registration, increase voter identification requirements and set limits on who can return ballots for others.

"Democratic leaders take the responsibility of representing Montana very seriously, so certainly there would have been really careful oversight on whether something was unconstitutional or a violation of freedoms," Luckey said. "But there are checks and balances in our system of government and Republicans are just trying to invalidate them by suggesting that a process that is essential to America be exorcised."

What's the tab?

Cost is generally one of the biggest questions for any defendant in a lawsuit, but things operate differently when it's the state being sued.

Generally, the solicitor general, attorney general and their support staff in the Department of Justice's Civil Services Bureau defend Montana. Both the attorney general and governor's offices say that the cost to litigation is accounted for in employees' salaries and does not come with an additional price tag.

"We don't necessarily track our billable hours per matter and per client or however they do it in the private sector," Dewhirst said. "We don't necessarily bill it to part of a case. That's exactly why we have all of our litigators on staff, is to respond to lawsuits like these."

Kyler Nierson, spokesperson for DOJ, added "there have been no additional costs that are not covered in the legislative appropriation."

Dewhirst also insisted the amount of litigation is not a strain.

"There's an uptick (of lawsuits on new laws) right now, but that's normal and that's just a normal piece of the pie for us. It hasn't really slowed down our capacity on the federal level," Dewhirst said. "It doesn't appear to be a problem that I've identified yet, but it's something we'll keep (an eye on)."

Still, there are indications the litigation is not without any financial tally to the taxpayer.

"It's going to take a lot of time. It's going to take a lot of money and resources from state government, but it's a lot of staff time and staff resources, so I think that what we'll see or what you'll hear is they are doing their job to defend the laws that were passed by the government and are being opposed by 'special-interest groups,'" Banville said.

This session the Legislature passed a bill that allows the Speaker of the House and President of the Senate, both Republicans, to hire special counsel. Costs would be paid for from the DOJ if the special counsel is the attorney general or an employee of the office. If the lawyer isn't from the DOJ, they'd be paid "as directed" by the speaker or president from funding that includes but is not limited to interim committee operating funds.

Another indication was when, at the very end of the session, lawmakers tucked another $100,000 into the state budget for the Secretary of State for "election litigation."

The Secretary of State's office, led by Christi Jacobsen, was the only defendant in lawsuits following this session that did not answer questions for the Montana State News Bureau about how it would be represented. The governor's office is so far using the attorney general and its own counsel. The SOS has responded in court to one of the lawsuits it's a defendant in, with representation from Dewhirst, the SOS chief legal counsel and two attorneys with the Crowley Fleck law firm in Helena.

The Legislature also intervened in the judicial appointments lawsuit, represented by the same attorney former Secretary Corey Stapleton used in 2018. Any money left over from the Legislature's current fiscal year budget could be used to pay for that, and it would be accounted for when this year's budget closes. Or funding could come from the following year's budget, which starts July 1.

In one lawsuit to date, state agencies are both the plaintiff and the defendant. That's the Regents' challenge to HB 102, the firearms law. The state, via the attorney general, is the defendant.

When the Regents approved pursuing legal action, Regent Robert Nystuen asked about financial resources. Commissioner of Higher Education Clayton Christian said that his office's chief legal counsel would manage the challenge and the university system's budget had capacity to deal with that type of issue. But, Christian said, if additional costs arose, his office would bring the matter to the Regents.

Endgame

Even with all the political layers, which laws stand and which die still remains the biggest picture in the end.

"The larger part is will these laws become permanent or will they be overturned? That is the more important question," Banville said. "Still, the messaging around this, it almost doesn't matter who wins and who loses because they're going to message to their constituents."

That was, again, made clear as recently as last week, when the promise of litigation was brought against yet another law. This time it was Senate Bill 280, which directs the state health department to write rules requiring a transgender person have a surgical procedure and petition a court before being able to update their birth certificate.