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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA Petitioner, vs. THE STATE OF MONTANA, by and through Austin Knudsen, Attorney General of the State of Montana in his official capacity, Respondent.	Cause No. BDV-2021-598 Hon. Michael F. McMahon **STATE OF MONTANA'S SUPPLEMENTAL RESPONSE TO MOTIONS TO INTERVENE**

On June 24, 2021, Petitioner Board of Regents of Higher Education of the State of Montana ("the Board") responded to the Motions to Intervene of both Montana Shooting Sports Association ("MSSA"), and David W. Diacon ("Diacon") (jointly "Proposed Intervenors"). The State files this supplemental brief to address some of the claims made by the Board about the State's position.

The State, through the Attorney General, cannot fully represent Proposed Intervenors' interests, which will be affected by the outcome of this litigation. This is because the Attorney General's authority is limited to specific "duties and powers provided by law." Mont. Const. Art. VI, § 4(4). Although the Proposed Intervenors and the Attorney General are on the same side of the dispute, the Attorney General *cannot* assert individual rights on behalf of citizens or represent citizens in their individual capacities. *See* Mont. Code Ann. §§ 2-15-501 to -504 (providing limited general duties to the Attorney General). Because the Board's request to enjoin Section 5 of HB 102 directly implicates Proposed Intervenors' interests, intervention is the only means by which they can protect these interests.

The standard for showing a legally protectable interest is not as burdensome as the Board suggests. *See United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (noting the courts follow "practical and equitable considerations" and construe Rule 24 (a)(2) "broadly in favor of proposed intervenors"). The protectable interest "need not be protected by the statute under which the litigation is brought"—it is enough that the interest is protected by "some law" and there is a "relationship between the legally protected interest and the claims at issue." *Wilderness Soc'y v. United States Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011).

The constitutional right to keep and bear arms is, it goes without saying, more than "some law." And the rights guaranteed by both the Montana and United States constitutions are more than a policy preference, as the Board suggests. *See* Petitioner's Combined Brief in Opposition at 4–5. If the Board succeeds in this litigation, then Proposed Intervenors' constitutional rights will be impacted—Diacon and MSSA's members will be unable to carry firearms on campus. Their constitutional interests are thus dependent on the resolution of the claims at issue in this case. *See Wilderness Soc'y*, 630 F.3d at 1179. Even

compartmentalizing the primary issue in this case—the Legislature's superseding constitutional authority to regulate firearms on campuses—does not detract from the real-world consequences this case poses for an individual's right to carry a firearm for self-defense.

And this Court apparently agrees that the right to bear arms is front-and-center in this case. In its June 7 Order, the Court stated that the "Second Amendment d[oes] not protect the right to carry a concealed weapon." Order at 8. This Court also noted that it "has not been presented with any controlling legal authority that the right to keep or bear arms on MUS campuses and other locations under either the United States Constitution or the Montana Constitution is an absolute right." *Id.* at 10.[1] Even at this early stage, therefore, the Court has made clear that the resolution of the principal question in this case—whether the Legislature (and Governor) had the authority to adopt and enact HB 102—will directly implicate the *individual* right to bear arms. While both the Board and the State should always exercise their respective authorities in a manner consistent with the state and federal

[1] That is of course because no party—to the State's knowledge—is making that argument.

constitutions—and both may present argument as to how HB 102 or the existing Board policy may implicate those rights—neither may directly vindicate those individual rights in court.[2]

The Attorney General cannot directly represent the individual interests articulated by Diacon and MSSA. Proposed Intervenors accordingly have the right to join the litigation and protect those important interests.

The State respectfully asks this Court to grant Proposed Intervenors' motions to intervene.

Respectfully submitted June 30, 2021.

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[2] This is doubly true because HB 102 is not generally enforceable by the State. By design, it is intended to be enforced through Section 7 by individuals. This makes the proposed intervenors' right to participate even clearer. Enjoining HB 102 not only impacts the individuals' underlying constitutional rights, but it also impacts their ability under Section 7 to bring a private cause of action against the Board to enforce these constitutional rights.

CERTIFICATE OF SERVICE

Pursuant to the parties' Stipulation of Electronic Service (Doc. 26), I certify a true and correct copy of the foregoing was delivered by email to the following:

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