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FILED

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

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

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| <p>BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA,</p> <p>Petitioner,</p> <p>v.</p> <p>THE STATE OF MONTANA, by and through Austin Knudsen, Attorney General of the State of Montana in his official capacity,</p> <p>Respondent.</p> | <p>Cause No. BDV-2021-598</p> <p>DAVID W. DIACON'S REPLY BRIEF TO PETITIONER'S COMBINED BRIEF IN OPPOSITION TO MOTIONS TO INTERVENE</p> |
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COMES NOW David W. Diacon (hereinafter David), *pro se*, and hereby
replies to Petitioner's Combined Brief in Opposition to Motions to Intervene.

I. INTRODUCTION

The Board of Regents (hereinafter Board) describes the sole issue in this
action as a single question of constitutional law, to wit, "whether [the Board] 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")."

Petitioner's Combined Brief in Opposition to Motions to Intervene of Montana Shooting Sports Association and David W. Diacon (hereinafter Response Brief), at 4, June 24, 2021. In addition, the Board describes David's interest in this action is as a "gun enthusiast" and the Board then invites him to appear as amici curie because he "cares about the principles that apply to [this] dispute." Resp. Br., at 1, 8.

The Board concludes that David has not established a prima facie case that he 1) has a legally protectable interest to be adjudicated at this action, 2) that David's proffered interests would be impaired by not allowing him to intervene, or 3) made a compelling showing that the existing parties will not adequately represent his interests. Resp. Br., at 17.

It appears that the Board ignored the prayers for relief in David's Motion to Intervene and the required proposed pleading that he filed in this action. David submitted an emergency filing on June 7, 2021, at approximately 8:20 a.m., immediately prior to the Show Cause-hearing in the hope that the Court would review and consider his claim to intervene prior to ruling on the preliminary injunction. David's request for relief is for termination of the injunctive relief requested and obtained by the Board, and in the alternative, David seeks injunctive relief from enforcement of Part B of Board of Regents Policy 1006.

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II. ARGUMENT

A. David has established a legally protectable interests under the United States and Montana Constitutions.

David's right to "keep and bear arms" under the federal constitution and "keep or bear arms" under the state constitution are incontrovertible. However, such rights may be regulated under certain circumstances, but a law or policy that categorically denies a constitutional right is invalid. *District of Columbia v. Heller*, 554 U.S. 570, 629, 128 S. Ct. 2783, 2818 (2008). The United States Supreme Court has held that a law which **completely** prevents the carrying of a pistol (even if it allows the carrying of long guns) is violative of constitutional rights. *Id.* "A statute which, under the pretence [sic] of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence [sic], would clearly be unconstitutional." *Id.* (parenthetically quoting *State v. Reid*, 1 Ala. 612, 616-617 (1840)).

Board of Regents Policy 1006 **completely** bans the carrying of firearms on all Montana University System (hereinafter MUS) property except by security or law enforcement agents of MUS. Regardless of whether the ability to **regulate** the carrying of firearms on MUS campuses falls to the Board or to the State, Policy 1006, as a **complete denial** of David's constitutional rights is repugnant to those rights and this injury is existing and ongoing. Because the complete denial of a

right is a constitutional violation, David has a right to seek an injunction to enjoin the Board from enforcing Policy 1006.

The Board has further argued that David merely has an interest in the outcome of this action and that he has no right to intervene in alignment with the State's interests. However, in *Associated Press v. Crofts*, 2004 MT 120, 321 Mont. 193, 89 P.3d 971, the plaintiff/respondent news organizations vindicated their constitutional rights under Montana Constitution article II, § 9 when the Montana Supreme Court held that meetings conducted by Crofts, the Commissioner of Higher Education and the Board of Regent's representative, were subject to the statutes implementing article II, § 9. The news organizations sought declaratory relief that the meetings held by Crofts were subject to Montana's open meeting laws. Those laws, Montana Code Annotated §§ 201-221 (2001), were created by the Legislature "with the intent that the deliberation of the public agencies of this State be conducted openly." *Crofts* at ¶ 15 (internal citation omitted). Crofts asserted that the open meeting statutes did not apply to meetings that he conducted. Contrary to Crofts' assertion, the Montana Supreme Court held that Crofts' meetings, that were conducted on behalf of the Board of Regents, were subject to the requirements of the open meeting laws and article II, § 9, of the Montana Constitution. *Id.* at ¶ 32.

As can be seen in *Crofts*, even in the absence of the State as a party, a private party can seek a determination that a law enacted to implement the individual rights guaranteed under the Montana Constitution applies to the Board of Regents. The *Crofts* court makes clear that **Acts of the Montana Legislature implementing individual rights guaranteed by the Montana Constitution apply to the Board of Regents**, and an individual has the right to enforce compliance thereto in court. David has the right to seek dissolution of the injunction restraining enforcement of HB 102 that has been issued by this Court so that the Board will be subject to the provisions of the law.

B. David has established that denial of his motion to intervene may impair his legally protected interests in the subject action.

“[A]ll provisions of the Constitution bearing upon the same subject matter are to receive appropriate attention and be construed together.” *Board of Regents v. Judge*, 168 Mont. 433, 444, 543 P.2d 1323, 1330 (1975). Here, the Board represents the constitutional provision granting the Board authority to control the MUS and its level of autonomy from the government gained therefrom; the State represents the constitutional provision granting the Legislature the authority to set public policy and enact laws of the State and to what extent they apply to the MUS; and, David represents the individual rights guaranteed under the federal and

state constitutions and what constraints they place on the Board, whether the Board is implementing the laws of the State or its own policy.

Three competing constitutional interests are at play in this litigation and all three must be considered.

As demonstrated in *Crofts*, a party has the individual right to challenge the Board's denial that a law implementing a constitutional right applies to the MUS. Additionally, David has the right to challenge an existing and continuing violation of his liberty interests that are maintained by an Order of this Court granting a preliminary injunction to the Board. An aggrieved party may seek a preliminary injunction "(1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant; (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual; Mont. Code Ann. § 27-19-201. A party need only meet one subsection for an injunction to be issued. *Bitterrooters for Planning v. Bd. of Cnty. Comm'rs*, 2008 MT 249, ¶ 15, 344 Mont. 529, 189 P.3d 624. The Board continues to deny

that it is subject to HB 102 and continues to implement Policy 1006, both in violation of David's rights. David demonstrates that he meets at least one requirement needed to obtain injunctive relief.

Exclusion of David from this litigation denies him the ability to challenge the injunctive relief obtained by the Board and the ongoing denial of his constitutional rights thereunder, and to assert his individual rights to compel the Board to implement HB 102 and thereby remove the ongoing constitutional violation under Policy 1006. Thus, denial of David's motion to intervene will impair his interests in the litigation.

C. David has inadequate representation by State of Montana of his legally protected interest in the subject of the action.

The Montana Constitution vests powers and places limits on the Legislature and the Board of Regents as already argued by the existing parties. The Montana Constitution also guarantees to David certain rights as an individual. Article II, § 1 of the Montana Constitution reads, "All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole." Article II, § 3 reads, "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring,

possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.” Article II, § 12 reads, “The right of any person to keep or bear arms in defense of his own home, person, and property shall not be called in question.” These rights are self-executing and apply to limiting the power of the government and require no further legislative action. *City of Missoula v. Mt. Water Co.*, 2018 MT 139, ¶ 11 (A provision is self-executing when it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated in order to render it operative. (internal citation omitted)). Even with self-executing provisions, the Legislature is not prevented from enacting legislation “for the better protection of the right secured, or legislation in furtherance of the purpose, or of the enforcement, of the provision.” *Id.* ¶ 13 (internal citation omitted). However, the interpretation and restrictions of such laws will not be elevated over the protections found within the Constitution. *Id.* Clearly, the Legislature has the authority to enact legislation in furtherance of the enumerated rights, above. Even if, *arguendo*, the Board has authority equivalent to the Legislature and the Board’s policies are equivalent to law, it does not have the authority to maintain a policy that is interpreted in a manner that elevates its restrictions over the protections in the rights guaranteed in article II of the Montana Constitution.

With these rights in view, it is clear that the State has been unable at this point in this litigation to adequately represent David's interests. The harm to the State is not a violation of individual rights but is rather to the authority of the Legislature and because of this the State has sought to protect that authority. Although the State sought a denial of the injunctive relief requested by the Board, its argument to achieve the desired result was not centered on the harm that David suffers by violation of his individual rights. Because the State is limited to defending the constitutional authority of the Legislature, David's interests remain inadequately represented by it.

III. Conclusion

David has a legally protectable interest in this litigation. The Board's complete denial of his rights under Board Policy 1006 is unconstitutional, and per *Crofts*, David has a right to individually pursue implementation of HB 102 by the Board. David's interests may be impaired by the outcome of this litigation because his interests are individual constitutional rights, not the level of authority held by the Board or the State under the relevant constitutional provisions. Although David's desired outcome may align with the State's, his interests and the injury for violation thereof are distinctly different. Therefore, David's interests may be impaired even if the State achieves its desired outcome. Finally, because the

nature of the injury to the State is significantly different and the remedy equally so, the State does not adequately represent David's interests.

For the foregoing reasons, David has established a *prima facie* case that he has legally protected interests in this action, that those interests may be impaired by the outcome of this case if he is not allowed to intervene, and that the existing party State of Montana does not adequately protect his interests. Therefore, David has the right to intervene and his motion to that end should be granted.

Respectfully submitted this 28th day of June, 2021.



David W. Diacon

Pro se

Certificate of Service

I, the undersigned, hereby certify that I served a true and correct copy of the foregoing *David W. Diacon's Reply Brief to Petitioner's Combined Brief in Opposition to Motions to Intervene* via email, as stipulated to by the parties, upon the following:

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Signed this 28th day of June, 2021.


David W. Diacon