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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 REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE***

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

REPLY BRIEF

INTRODUCTION

In this action to have HB102 declared unconstitutional, MSSA filed a motion to intervene, arguing, on behalf of its members, that as a key proponent of getting HB102 passed in the legislature over the course of decades, it is in the best position to vigorously defend the rights of its members. The argument is grounded on the controlling authority of Sportsmen *for I-143 v. Montana Fifteenth Judicial Dist. Court, Sheridan Cnty.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400, which holds Montana's intervention rule "is interpreted liberally." In *Sportsmen for I-143*, the Montana Supreme Court overruled a district court which refused intervention by two advocacy groups who had been heavily involved in promoting passage of I-143. In doing so, the Court recognized the advocacy groups "may be in the best position to defend their interpretation of the resulting legislation." *Sportsmen for I-143*, ¶ 17.

Plaintiff Board of Regents of Higher Education for the State of Montana (BoR) filed an answer brief urging the Court to take a narrow, crabbed interpretation of *Sportsmen for I-143*. They argue unpersuasively

that, on the standard promulgated in *Sportsmen for I-143*, MSSA has no interest in the outcome of this action, and it played little role in the passage of HB102. This characterization, however, is simply false, and it offers no principled analysis upon which to distinguish this case from the controlling authority of *Sportsmen for I-143*. Defendant State of Montana, meanwhile, filed a response recognizing and arguing trenchantly for the need and appropriateness of MSSA's (and the other intervenor's) intervention. For the reasons stated herein, BoR's opposition to intervention is without merit, the State's support for intervention is well-founded, and the motion to intervene should be allowed.

ARGUMENT

1. MSSA's constitutional standing to bring an action against BoR concerning HB102 satisfies the "interest in the property" requirements of intervention.

A. MSSA's interest as a beneficiary of a public trust over which BoR serves as mere steward establishes MSSA member interest for purposes of intervention.

BoR does not dispute the motion to intervene is timely and fully satisfies the first element of the intervention test. It argues instead that MSSA members have no demonstrable interest in BoR's "property," so-

called, at issue here. Thus, BoR seeks to distinguish the interest of the successful associational interveners in *Sportsmen for I-143* from MSSA in this case. The distinction BoR attempts to draw, however, is too fine to withstand scrutiny.

BoR points out, accurately, the plaintiffs in *Sportsmen for I-143* were "beneficiaries" of a public trust, the *res* of which is the wildlife of Montana. (Pl. Br. at 10.) Thus, BoRs' major premise is true. But, its minor premise is simply false. It does not own the property, which consists of the Montana University System (MUS), at issue in this case. In other words, the MUS is not, despite BoR's contentions, the property of BoR. As § 9, Art. X, Mont. Const. states: "The government and control of the Montana university system is vested in a board of regents of higher education . . ." Rather, the MUS is property intended to benefit the public to which MSSA members belong. The MUS is the *res* and MSSA members, along with the rest of the public, are its beneficiaries. This is especially true for MSSA members who go to college, live and work at MUS facilities. These MSSA members are, like the members of the associational intervenors in *Sportsmen for I-143*, intended to benefit from the MUS *res*. Thus, the BoR is a mere steward, whose duty it is to manage the *res* in the best interest of the public,

including MSSA members. Indeed, BoR's inability to recognize the true nature of its role as mere steward makes a compelling argument for MSSA intervention. As the associational representative of beneficiaries of the *res* at issue here, MSSA has sufficient interest to satisfy the requirements of intervention. *Sportsmen for I-143*, ¶¶ 11-13.

B. MSSA has constitutional standing, which is also sufficient to satisfy the "interest" element of standing.

BoR also fails to recognize, however, that MSSA members are not on the sidelines of this controversy, merely rooting, as for an athletic team, for the outcome they prefer. MSSA members include both employees and students whose are granted rights under HB102, which rights rise or fall on whether HB102 is constitutional. (See Second Declaration of Marbut, attached hereto has Ex. 3.) In other words, it represents individuals with Constitutional standing to file their own declaratory judgment action against BoR with respect to its present refusal to abide by HB102 and to enjoin it, for example, from interfering with the rights conveyed to them under HB102. As BoR acknowledges, such standing is sufficient to sustain

intervention. (BoR Br. at 4, fn. 5, citing cases.)[1]

To establish case-or-controversy standing, a party must "'clearly allege past, present, ***or*** threatened injury to a property ***or*** civil right.'" *Brown v. Gianforte*, 2021 MT 149, ¶ 10, ____ Mont. ____, ____ P.3d ____ (quoting precedent, emphasis added). "The question is not whether the issue itself is justiciable, but whether the Petitioners are the proper party to seek redress in this controversy." *Id.* A party must allege a "'concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally.'" *Id.* The future "threatened injury" here is BoR's intention to strip MSSA members who live, work, and seek an education on MUS facilities of the rights conferred upon them by HB102. BoR's effort to deprive MSSA members of this right confers upon them standing to challenge, in a civil action, BoR's plan.

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[1] BoR argues in a footnote that MSSA's privacy commitment deprives its members of their right to intervene. Non-profit privacy, as has been recently recognized, is protected under the First Amendment. Just a few days ago, the U.S. Supreme Court struck down California's law requiring nonprofits to file a list of their large donors with the state. The court said the law subjected donors to potential harassment, chilling their speech in violation of the First Amendment. *Americans for Prosperity Found. v. Bonta, No. 19-251*, 2021 WL 2690268, at *12 (U.S. July 1, 2021).

The Montana Supreme Court has previously interpreted the Uniform Declaratory Judgment Act (UDJA) as granting Montana courts the power to issue declaratory judgments when an employee, such as MUS members, suffers a threatened injury. *McKamey v. State*, 268 Mont. 137, 885 P.2d 515 (1994) (overruled on other grounds by *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, 315 Mont. 210, 69 P.3d 663). In *McKamey*, a firefighter who worked for the state of Montana filed an action seeking declaratory, injunctive, and equitable relief from the State's requirement that the firefighter must be a member of the Montana Air National Guard as a condition of employment. *McKamey*, 268 Mont. at 141, 885 P.2d at 518. The firefighter wanted to retire from the Montana Air National Guard and remain employed by the State. The State argued that a declaratory judgment would constitute an improper advisory opinion based on a possible future occurrence because the firefighter had not yet retired or resigned from the Montana Air National Guard. *McKamey*, 268 Mont. at 141, 885 P.2d at 518. The firefighter felt his right to retire from the Montana Air National Guard was threatened, and that if the State fired him, his family would have no income, insurance, or other benefits and his pension would be reduced. *McKamey*, 268 Mont. at 142, 885 P.2d at 519. The Court

held that the firefighter met the requirement of alleging a "threatened injury" and the case was therefore justiciable. *McKamey*, 268 Mont. at 142, 885 P.2d at 519. BoR threatens future harm here, just as the State did in *McKamey*. The future threat confers standing on MSSA members who live, work, and go to college on MUS campuses just as it did in *McKamey*.

Other decisions similarly support a plaintiff's standing to sue when faced with a threatened injury. In *Gryczan*, six homosexual Montanans brought a declaratory judgment action against the State seeking a determination as to whether a criminal statute proscribing deviate sexual conduct was unconstitutional. *Gryczan v. State*, 283 Mont. 433, 441-446, 942 P.2d 112, 117-120 (1997). The State challenged the standing of the petitioners on the grounds that they had suffered no "injury in fact" because they had never been arrested or prosecuted for violating the statute and there was no evidence of a credible threat of prosecution. *Gryczan*, 283 Mont. at 441, 942 P.2d at 117. The Court determined that the petitioners suffered legitimate and realistic fears of prosecution along with other psychological harms. *Gryczan*, 283 Mont. at 446, 942 P.2d at 120. The Court held that petitioners had standing to challenge the statute, and it was not necessary to wait until one of them was prosecuted before an action

could be maintained. *Gryczan*, 283 Mont. at 446, 942 P.2d at 120. The same goes here for MUS students and personnel who may wish to arm themselves against sexual predators or other vicious attackers on campus. They would do so, if BoR is successful, at the risk of arrest and prosecution. This threat of future harm confers on them constitutional standing.

Finally, Associations have standing to assert the rights of their members: "when (a) at least one of its members would have standing to sue in his or her own right, (b) the interests the association seeks to protect are germane to its purpose, and (c) neither the claim asserted, nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit." *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430. "Associational standing 'recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.'" *Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty.*, 2019 MT 147, ¶ 20, 396 Mont. 194, 207, 445 P.3d 1195, 1203, reh'g denied (Aug. 20, 2019) (quoting *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 44, 360 Mont. 207, 255 P.3d 80). Here, MSSA easily meets all criteria for associational standing on the claim's plead in BoR's action.

MSSA has alleged a specific injury to both its members civil rights and to their rights as a citizen of this state. Thus, its claim to standing is similar that asserted in *Mont. Envtl. Information Centr. v. Dept. of Envtl. Qual.*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (*MEIC*). In *MEIC*, a group of plaintiffs sought to challenge the constitutionality of a statute which allowed certain discharges of water from watering or monitoring well tests, contending that the discharge was degrading the water quality in the Blackfoot River. The standing of the plaintiffs was challenged. The Montana Supreme Court held that allegations of arguably adverse impacts to the headwaters of the Blackfoot River were sufficient to confer standing upon plaintiffs who fished, recreated, and relied upon the Blackfoot River as a source of potable water. *MEIC*, ¶ 45. The Court noted, for clarification, that whether the plaintiffs had demonstrated sufficient harm to ultimately prevail on their claims was a "separate issue." *Id.* Here, MSSA's allegations of harm to its members are similar to those of the plaintiffs in *MEIC* and BoR offers no reason why MSSA should not similarly have constitutional standing, as an association, with respect to HB102.

MSSA's constitutional standing is sufficient to meet the "interest in the property" requirements of intervention. *Aspen Trails Ranch, LLC v.*

Simmons, 2010 MT 79, ¶ 33, 356 Mont. 41, 230 P.3d 808. As the Montana Supreme Court did in *Aspen Trails Ranch*, ¶ 35, the Court should conclude that MSSA, due to its associational standing, has an interest in the subject matter of this action.

2. BoR's claim that it "may" comply with HB102 in its new firearms regulations means this action is not ripe; if the action is ripe, however, then MSSA's interests could be impaired by its outcome.

BoR suggests that it may decide to comply with HB102 in its impending adoption of new firearms regulations, and any concerns that, should it prevail in this action, that it could adopt regulations not in compliance with HB102 is "theoretical." (BoR Br. at 11.) If that argument is meritorious, however, this action is not ripe, and the Court lacks power to adjudicate it. *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 53, 365 Mont. 92, 278 P.3d 455. "The central concepts of justiciability have been elaborated into more specific doctrines—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and ***administrative questions***—each of which is governed by its own set of substantive rules." *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d

881 (emphasis added). Ripeness is concerned with whether the case presents an "actual, present" controversy. *Mont. Power Co. v. Mont. Pub. Serv. Commn.*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91. The ripeness doctrine is "a principle of law, grounded in the federal constitution as well as in judicial prudence, that requires an actual, present controversy, and therefore, a court will not act when the legal issue raised is only hypothetical or the existence of a controversy merely speculative." *Id.* (citing *Pearson v. Virginia City Ranches Ass'n*, 2000 MT 12, ¶ 30, 298 Mont. 52, 993 P.2d 688; *Portman v. County of Santa Clara*, 995 F.2d 898, 902–03 (9th Cir.1993)). "[T]he ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' (Quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967)).

Furthermore, in deciding whether an agency's decision is ripe for judicial review, it is necessary to examine "both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court

consideration.'" *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 732–33, 118 S.Ct. 1665, 1670, 140 L.Ed.2d 921 (1998). Thus, a reviewing court "must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry*, 523 U.S. at 733, 118 S.Ct. at 1670.

If the BoR is serious in its claim that it is genuinely considering the promulgation of firearm regulations that comply with HB102, then this case is based on a hypothetical. BoR states in its brief:

> 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.

If BoR's can be taken at its word, then, it is possible that its "BOR Policy 1006" will comply with HB102. As a result, until the pending administrative "review" is complete, and the content of the new rules is established by mean of a final agency decision, there are no issues in this

case that the Court has power to decide. *E.g., Montana Power Co.*, ¶ 32.

Finally, it could be that BoR's decision makers have left its trial counsel with misunderstanding of its true purpose and it has absolutely no intention of complying with HB102 under any circumstances. If so, then the interests of MSSA's members is clearly at stake and the "impairment of interest" prong of the intervention test is fully satisfied.

3. Although it can defend HB102 on certain bases, the State of Montana is not in a position to adequately defend the individual Constitutional and Montana Human Rights Act rights at issue in this case.

BoR tenders federal case law to the effect that if the government is a defendant in an action, there arises "a strong presumption" that its representation is adequate to protect the interest of an intervenor who is on the "same side" as the government. (BoR Br. at 17.) This presumption has never been adopted by the Montana Supreme Court under any of the case law cited by BoR or under any discovered by MSSA's research. Rather, no such extraordinary holding was shown or required. For example, returning again to the lead and controlling case law on this issue, *Sportsmen for I-143*, the Montana Supreme Court said: "The requirement of inadequacy of representation is satisfied if an applicant shows that representation of its

interests '***may*** be' inadequate and the burden of making this showing ***is minimal.***" *Sportsmen for I-143*, ¶ 14 (emphasis added). Thus, the law in Montana is exactly the opposite of the federal law relied upon so heavily by BoR. In Montana, an association which can demonstrate affirmative activities in support of the adoption of a statute under constitutional challenge bears the burden of making only a "minimal" showing that the government's representation is inadequate. *Id.*

Here, the State has taken the extraordinary step of filing a brief in support of intervention. (State of Montana's Supplemental Resp. to Mots. to Intervene (June 30, 2021).) The State recognizes it "cannot fully represent" MSSA's interests. (*Id.*, p. 2.) As the State correctly points out, its counsel, the Montana Attorney General, is not allowed to represent the Interveners individual interests. Yet, at issue here is a statute the Legislature has enacted in execution of § 12, Art. II, Mont. Const., which states:

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

Since the right to keep and bear arms "is explicit in the Declaration of Rights in Montana's Constitution, it is a fundamental right and any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis." *Gryczan*, 283 Mont. at 449, 942 P.2d at 122 (analyzing the right to privacy). "To withstand a strict-scrutiny analysis, the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest." *Id.* HB102 is also designed to execute the "basic personal right" to use force in self-defense. As Montana's Human Rights Act provides: "Any necessary force may be used to protect from wrongful injury the person or property of one's self, of a wife, husband, child, parent, or other relative or member of one's family . . . ." Mont. Code Ann. § 49-1-103.

The State acknowledges that its counsel cannot vindicate these individual rights on behalf of MSSA's members. Its counsel is restricted to making arguments on the constitutionality of HB102 vis-a-vis Art. X of the Montana Constitution. But if fundamental rights are to come into play in this case, as the Court's order granting a preliminary injunction recognizes it will, the parties most adequate to do so are individual citizens or associations representing individual citizens. In fact, the State's counsel is

conflicted on this point because it is obligated to defend the BoR against an attack by MSSA against BoR's prerogatives if it is made, as MSSA intends to do, under the Declaration of Rights and the Human Rights Act.

Ultimately, the State and its counsel are not well-suited or even allowed to protect MSSA member individual rights at issue in this case. MSSA has therefore met its "minimal" burden and should be allowed to intervene in the case. *Sportsmen for I-143*, ¶ 14.

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 to its motion 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 12th day of July 2021.

Respectfully Submitted,
RHOADES SIEFERT & ERICKSON PLLC

By: _____
Quentin M. Rhoades
Attorneys for Intervener MSSA

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July 2021, I served upon the following a true and correct copy of the foregoing by internet email addressed as follows:

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SECOND 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 am a 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.

2. In its brief in opposition to the Montana Shooting Sports Association's (MSSA) Motion to Intervene in Regents v. Montana, Petitioner Regents make certain assertions that I personally know to be incorrect, problematic, or misconstrued and misdirected.

MSSA Members who are Employees, Students, or Alumni of the Montana University System (MUS)

3. Petitioners complain that MSSA has not identified by name any of its members who are associated with the MUS (Page 4, Footnote 5, of Petitioner's Combined Brief in Opposition). Petitioners imply that the doors to the hall of justice should be closed to MSSA and its members because MSSA has not breached the privacy of its members by naming those who are MUS employees or students.

4. Petitioners might be forgiven for posing this attack on MSSA members' First Amendment right to freedom of association because the

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United States Supreme Court had not yet issued its decision in *Americans for Prosperity Foundation v. Bonta*. However, that decision has now been released, clarifying that the privacy and anonymity of the individual members of nonprofit organizations such as MSSA is a protected freedom of association under the First Amendment.

5. There is no difference between the California scheme requiring disclosure of nonprofit membership that failed in *Americans for Prosperity Foundation v. Bonta*, and Petitioners' claim that MSSA may not defend the interests of its members in court because it didn't name its members who are MUS employees or students.

6. The logical bottom line of Petitioner's claim is that MSSA cannot access the courts and justice if it is unwilling to surrender its members' First Amendment right to freedom of association and the right to privacy of its members under Article II, Section 10 of the Montana Constitution.

7. MSSA has a long history of promising and delivering privacy to its members, a common feature of many firearms-oriented public interest groups. MSSA does not disclose the names of its members both because of this long and typical MSSA policy, and because MSSA respects the right to

privacy the people of Montana have reserved to themselves at Article II, Section 10 of the Montana Constitution.

8. Further, when MSSA recruits members, the membership form MSSA uses (https://mtssa.org/mssamembershipform.pdf) does not collect information about the member's employment or education status. That information is normally irrelevant to MSSA's mission. Requiring such information would be the same as the MUS demanding to know what outside or religious organizations a prospective employee or student belongs to or is associated with as a condition of employment or enrollment.

9. MSSA recently conducted a query of individuals in the MSSA orbit seeking permission to identify MSSA members who are MUS employees, students, or alumni, and asking their permission to identify them and their MUS association by name for this lawsuit only. Some MSSA members have released MSSA from its privacy constraints to list their names for this specific purpose. Others declined. These are some results of our inquiry:

10. MSSA Board of Directors (BoD) member Matt Egloff is a member of the faculty at Montana Tech.

11. Michelle Simpson is an MSSA member and an enrolled student in the MUS and has allowed MSSA to identify her as such specifically for the purpose of this litigation.

12. One MUS student responded to MSSA's inquiry as follows: "I am a Senior in the Montana University System and a proud member of the Montana Shooting Sports Association. I prefer that my name not be released for the Regents v. Montana litigation for personal reasons, including fear of retaliation by elements of the MUS that could affect my academic standing. The MSSA represents many of my values as well as the values of many of my fellow MUS students. I believe MSSA's association with myself and others in the MUS gives MSSA sufficient standing to join the Regents v. Montana lawsuit."

13. One senior campus administrator who is an MSSA member believes it might cause employment risk to become known to the MUS as an MSSA member in this lawsuit and so declines to be identified by name for this lawsuit.

MSSA Only "lobbied" for HB 102

14. In attempt to minimize and thereby dismiss MSSA's role in HB 102, Petitioners admit only that MSSA "lobbied" for HB 102 (Page 8, et. seq., of Petitioner's Combined Brief in Opposition). This tepid admission

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dramatically underreports MSSA's long term commitment to "campus carry."

15. First, MSSA's commitment to campus carry reform did not begin with HB 240 in 2013. (See, Exhibit 3.1, attached, consisting of a letter from MSSA to officials at MSU in July 2007 discussing campus carry policies; Ex. 3.2 attached, consisting of a follow up letter in November of 2007; Ex. 3.3 attached, consisting of a memo to MSU concerning campus carry; Ex. 3.4, attached, consisting of position paper about campus carry that MSSA published in February of 2008; Ex. 3.5, attached, consisting of a letter to Shiela Sterns, Commissioner of Higher Education from July of 2010 concerning campus carry; Ex. 3.6, consisting of her reply.)

16. MSSA's activity concerning campus carry is not a small turnip that just happened to fall off the turnip wagon sometime after HB 102 was introduced in the 2021 legislative session. Campus carry has been an active and ongoing endeavor for MSSA since at least 2007, albeit an effort continuously rebuffed, rejected, ignored, and opposed by Montana's higher education establishment.

17. Second, when MSSA wishes to seek a change in law, that involves a long, complex, and very active process. The MSSA BoD first selects the issue at its Annual Meeting in March. Then, MSSA will circulate

a question about that issue to all candidates for the Legislature in its Candidate Questionnaire.

18. Then MSSA drafts a bill to effect the desired law change. Bill drafting is a complicated and technical process, which includes compliance with the Legislature's Bill Drafting Manual.

19. MSSA must solicit an eligible legislator to submit a bill draft request for that subject to the Legislative Services Division (LSD) per legislative rules. MSSA provides the pre-drafted bill, which the legislator submits along with the official bill draft request. The legislator will list MSSA for contact about the bill as the bill is worked on by attorneys of the LSD. MSSA usually has extensive interaction with LSD drafters before the bill is in its final, introducible form.

20. Then, MSSA will select and recruit a suitable sponsor for the prepared bill, a legislator who may or may not be the one who submitted the bill draft request. MSSA will select a sponsor who serves on the committee to which the bill is likely to be assigned and one who has expressed interest in the topic of the bill. MSSA will inform the sponsor of all of the nuances about the bill, and all of the arguments for and against, to prepare the sponsor. Only after all of that work will the bill get introduced into the Legislature.

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21. MSSA did all of this with several bills that were introduced in and passed in previous sessions of the legislature, bills that were ultimately combined to become HB 102 in the 2021 session of the Legislature. The campus carry features of HB 102 were substantially a repeat of HB 240 introduced in the 2013 legislative session, and SB 143 in the 2015 legislative session.

https://leg.mt.gov/bills/2013/billpdf/HB0240.pdf

https://leg.mt.gov/bills/2015/billpdf/SB0143.pdf

22. HB 240 in 2013 was sponsored by Rep. Cary Smith, who was then a member of MSSA's Board of Directors. SB 143 in 2015 was sponsored by Senator Cary Smith, who was then a member of MSSA's Board of Directors.

23. So, HB 102 did not happen by accident or in a vacuum. It happened because MSSA made it happen, very deliberately, and with a lot of effort over a period of many years. See the Declaration of Gary Marbut, an Exhibit to Intervenor's Motion to Intervene. For example, it took MSSA a decade of dedicated effort, including two constitutional initiative attempts and a successful constitutional referendum, to put the right to hunt, fish, and trap into the Montana Constitution (Article IX, Sec. 7., M.C.).

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24. Third, I recruited Rep Barry Usher to submit the bill draft request for what would become HB 102 in November of 2020 (See record of HB 102 on the Montana Legislature's Website). During September, October, and November of 2020, I crafted a pre-draft of what would become HB 102. Rep. Usher submitted his bill draft request to the LSD on November 27, 2020 (See record of HB 102 on the Montana Legislature's Website). I provided Rep. Usher with the pre-draft of HB 102, which he forwarded to the LSD with the official bill draft request.

25. I worked extensively with Ms. Julianne Burkhardt, staff LSD attorney for the Senate Judiciary Committee, in refining my pre-draft to become the introduced version of HB 102.

26. Sponsor Rep. Seth Berglee was very deliberately selected and recruited to sponsor HB 102, in part because he has an extensive background with firearms, but also because he sits on the House Judiciary Committee and is Chairman of the House Education Committee. Rep. Berglee pre-introduced HB 102 for the 2021 legislative session on December 31, 2020 (See record of HB 102 on the Montana Legislature's Website).

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27. Nothing about this was casual or accidental. It all happened because MSSA made it happen. Once all of this was done and HB 102 was introduced, MSSA did support the bill in various ways.

28. To claim that MSSA "lobbied" for HB 102, besides an attempt to be dismissive, is even technically incorrect under Montana law. A lobbyist is defined as a person who is paid to influence the Legislature (5-7-102, M.C.A.). As President of MSSA, I serve in an elected but unpaid capacity. I am a volunteer. So, I am not a lobbyist as defined in Montana law. MSSA was not a "lobbyist" for HB 102 because MSSA was not paid anything concerning HB 102. MSSA did alert its grassroots network to message legislators in support of HB 102, which request did garner wide support among the citizens of Montana's vibrant firearm culture. And, I did appear as a citizen advocate and president of MSSA before the House Judiciary Committee and the Senate Judiciary Committee in support of HB 102.

29. For Petitioners to claim that MSSA "lobbied" for HB 102 dramatically underreports MSSA's years of dedicated involvement in the issue of campus carry that culminated in 2021 with HB 102.

30. As is said colloquially, it's like ham and eggs. With ham and eggs, the chicken is involved but the pig is committed. With HB 102, MSSA

is three generations of pigs. Petitioners, however, would like to dismiss MSSA as a simple chicken.

The Attorney General will Not Adequately Defend MSSA's Interests—Import of Petitioner's Opposition to MSSA Intervention as an Admission

31. Petitioners argue that the Attorney General will adequately represent MSSA's interests, so MSSA's intervention will add nothing to the case and is therefore unnecessary (Page 12, et. seq., Petitioner's Combined Brief in Opposition).

32. However, Petitioner's staunch opposition to MSSA's intervention effectively constitutes an admission by them that MSSA's intervention will be disadvantageous to Petitioners. This is likely because MSSA will bring gravitas, interest, perspective, and facts to the case that the Attorney General is not adequately prepared or informed to bring or has not considered, notwithstanding his best intentions.

33. The Attorney General simply does not have the full immersion and depth of experience in this issue that MSSA has. His primary interest and legal duty is to defend the acts of the Legislature rather than to defend individual Montanans. Plus, he has other legal duties and challenges demanding his attention. These other duties include responding to

multiple other lawsuits currently challenging other laws enacted by the 2021 Montana Legislature.

"Only About Article X"

34. Petitioners assert that this lawsuit is only and exclusively about the power of the Board of Regents under Article X of the Montana Constitution. Petitioners claim that the rights the people have reserved to themselves specifically from government interference in Article II of the Montana Constitution are simply not relevant.

35. Abraham Lincoln: "If we call a tail a leg, how many legs does a dog have? The answer is four. That's because a tail is a tail, not a leg, no matter what you call it."

36. No matter how much they may assert otherwise, Petitioners cannot escape that their quest for total and ultimate political power under Article X of the Montana Constitution necessarily runs afoul of the rights the people have reserved to themselves from interference by all government entities in Article II of the Montana Constitution.

37. If Petitioners obtain the outcome they seek with this lawsuit, then they will be approved and empowered to deny Montana citizens any of the rights the people have reserved to themselves from government interference in Article II of the Montana Constitution. Then, with

impunity, the MUS could hold "trials" and punish people with any form of punishment, including execution, without juries or legal counsel for the accused. The MUS could satisfy its workforce needs by literally enslaving people. This and much more could be done under the guise of the BoR simply "managing" the affairs of the MUS. Such is the import of this lawsuit.

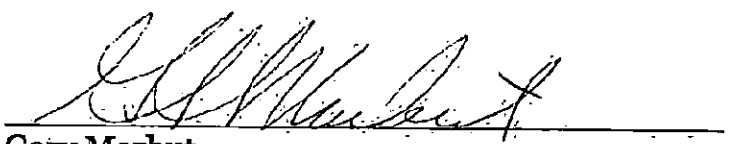
38. Any reasonable person would need extraordinary blinders on to believe that Petitioner's effort has only to do with Article X and nothing to do with Article II. Applying law in the way Petitioners seek will effectively but improperly amend the Montana Constitution to add a line in Article X, Section 9(2) that declares, "When implementing these powers, the board is subject to no other law." Without being approved by the people at a ballot, of course, such a change to the Montana Constitution would be improper and without effect.

39. In *Board of Regents v. Judge*, 168 Mont. 433 (1975), the Montana Supreme Court admitted that the board is subject to constraints other than from the Legislature when it said, "At this point we observe that if Article X, Section 9, 1972 Montana Constitution, was read literally without reference to the rest of the Constitution, the Regents' argument and position would be correct; but, as will be hereinafter developed, the

Constitution is not so read." The Court also stated that even if Article X contains broad language, "it must not be read or construed in isolation."

40. Thus, Petitioner's argument fails that *Regents v. Montana* is only about the Regents' powers under Article X.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.



Gary Marbut

Date of Signature: 7/9/21

City and State of: Missoula Montana

EXHIBIT 3

Montana Shooting Sports Association
P.O. Box 4924
Missoula, Montana 59806
mssa@mtssa.org - http://www.mtssa.org
406-549-1252

July 5, 2007

Allen Yarnell
Vice President for Student Affairs
Montana State University

Glenn Puffer
Associate Dean of Students
Montana State University

Dear Sirs;

Greetings from Missoula.

This is the comment, for the record, of the Montana Shooting Sports Association (MSSA) upon the proposed new firearms policy being considered by MSU. For introduction, MSSA is the primary organization in Montana asserting the rights and prerogatives of gun owners in Montana, is affiliated with the National Rifle association and associated with Gun Owners of America and the Citizens Committee for the Right to Keep and Bear Arms.

We wish to begin this comment by saying that we grant that the intent of MSU with this proposed policy is to make the MSU campus safer for faculty, staff and students and we commend that intent. We do agree that it is time to revisit MSU firearms policy in light of what happened at Virginia Tech. We also believe, for the reasons stated below, that the proposed policy will have the opposite effect, that the policy is short-sighted, and that the policy as proposed will actually make MSU personnel more vulnerable to malicious attack on campus.

A. Comment on proposed policy

1. **Constitutional problems -- self defense.** For good reason, the Montana Constitution reserves from government interference the right of every person to bear arms for his or her own self defense. We assert that MSU is a subdivision of Montana state government and subject to the rights the people of Montana have reserved to themselves from government interference in the Declaration of Rights at Article II of the Montana Constitution, specifically at Article II, Section 12. Just as MSU could not legitimately prevent faculty, staff or students from voting in elections, receiving a jury trial if accused of a crime, or exercising their freedom of speech, MSU may not prohibit them from

EXHIBIT 3.1

exercising their right to defend themselves, nor the tools for self defense, as reserved in Article II, Section 12.

2. **Flawed logic -- gun bans do not inhibit criminals.** It has been demonstrated beyond rebuttal that jurisdictions in which peoples' ability to defend themselves is unfettered the denizens of such jurisdictions enjoy a reduced level of victimization. See *More Guns; Less Crime* by Professor John Lott. Conversely, those places with the most severe restrictions on the ability of people to protect themselves impose on people the highest levels of victimization. Someone intent on a Virginia Tech-type incident at MSU -- a person determined to commit murder or multiple murders -- will not abandon his plans simply to avoid violating a policy MSU has adopted. To think otherwise is delusional. The only thing a gun banning policy will accomplish is to insure that this madman has a pool of defenseless victims to kill -- that he will encounter no effective resistance as he carves a swath of death through the MSU campus.

3. **Liability and responsibility for protection.** Let us assume that MSU has some level of responsibility for the safety and well being of people on campus. MSU would not, for example, allow an attractive or dangerous nuisance to exist on campus, such as a building with no fire exits. If MSU were to allow a hazard such as a lecture hall with no fire exits, and a fire were to occur where lives were lost because of the absence of fire exits, MSU would be held to have been negligent and liable because of this negligence. The same principle applies to preventing people from possessing the means to defend themselves from unlawful attack, especially when such possession is protected from MSU interference by the Montana Constitution. We believe that MSU will incur significant liability if it denies people the means to protect themselves and fails to protect them, individually and actually, to the same extent that they could protect themselves were they not disarmed.

4. **Prohibited places; 45-8-328, M.C.A.** In its proposed University Firearms Policy (at: http://www.montana.edu/legalcounsel/firearms_policy_06_07.html), MSU declares that 45-8-328 (prohibited places) applies "in MSU buildings or on the MSU campus." Yet 45-8-328 itself only applies to a much more narrow area, "(a) portions of a building used for state or local government offices and related areas in the building that have been restricted." If 45-8-328, M.C.A. applies at all (is MSU a "state or local government office"), it certainly only applies to restricted areas inside buildings, but not the asserted broader area of "on the MSU campus."

The proposed policy raises another interesting question when citing 45-8-328, M.C.A. That is, to what extent is MSU subject to (or may avail itself of) the laws passed by the Legislature? There has long been some contention about the extent to which the Legislature may or may not direct the affairs of the Montana university system, given that the Montana Constitution seems to reserve management of the university system to the Board of Regents. Thus, citing legislative authority in its proposed policy seems to acknowledge greater legislative authority over campus affairs than has previously been admitted.

5. **Persons not students, faculty or staff not subject to MSU policy**. MSU has little or no authority over persons who are not faculty, staff or students. MSU may fire

employees and expel students who violate MSU policy -- not much of a threat to a madman who is determined to kill others. MSU has no real authority over persons not employed or students at MSU.

It is axiomatic that a person bent on mayhem on the MSU campus will not be deterred by a simple MSU policy. MSU has no real authority over persons not faculty, staff or students. In Virginia Tech-type incidents, the perpetrator almost always expects his own demise, either at his own hand or at the hands of others, in addition to killing however many others he may. A person determined to kill others and then die himself simply will not forego his plans because he learns that MSU has adopted a policy that would make his plan a violation of that policy, employee of MSU, student, or otherwise.

It is very unlikely that this theoretical person determined to kill others can be stopped by anyone not armed. It takes an armed person to stop an armed killer. That's exactly why we have armed police. However, the police will not arrive until this theoretical madman has already killed some, perhaps many. Meanwhile, the proposed MSU policy will guarantee that a killer will have defenseless victims.

Gentlemen, I am accepted in state and federal courts as an expert concerning self defense, firearm safety, use of force, and other related topics. If MSU were to adopt the proposed firearms policy, as is, and if there were a Virginia Tech-type incident on the MSU campus (notwithstanding the policy), and if I were engaged by the attorney for the next-of-kin of a non-survivor of the incident asserting negligence by MSU, it would be my testimony and expert opinion that MSU contributed to the demise of the victim by having prevented the victim from effectively defending himself or herself.

While this comment is critical of the proposed policy as it is drafted, this comment would be incomplete, I believe, if no improvements or alternatives were suggested. So, we offer MSU some alternatives, not to be considered complete or universal, that will help insure the safety of all persons on campus. Before offering these alternatives, some discussion is in order.

B. Discussion

1. **Concealed weapon permittees**. A majority of states, including Montana, have adopted mandatory-issue concealed weapon permit laws. There is now a vast amount of statistical data available about the various effects of this public policy direction taken by most states. Two important points become clear from examining available data. The first is that states which adopt shall-issue CWP laws confer upon their citizens a noticeable, in some cases dramatic, reduction in interpersonal, violent crime. If predators know that some of their potential victims are armed, there is less predation. Professor Lott's research determines that the rates of crimes such as murder, assault, rape and robbery fall on the order of 20% in states which adopt shall-issue CWP laws. Most important, the crime of multiple or mass murder (like at Virginia Tech) decreases on the order of 80% in states which adopt shall-issue CWP laws.

The second point established by the data is that people who have taken firearm safety training, passed a criminal records background check, offered references, photo and

fingerprints, and been screened by local law enforcement, all in order to obtain a concealed weapon permit, are statistically the most safe and law abiding group identifiable. That is, CWP-holders have a lower incidence of violence, of law-breaking, and of misadventures with firearms than nearly all other identifiable groups, including police officers, military personnel and teachers.

2. **"Gun free" zones.** As alluded to above, so-called "gun free" zones do not prevent criminals from having guns in those places. It is the chosen vocation of criminals to break or ignore laws -- that is exactly why they are and are called criminals. "Gun free" zone laws and policies only insure that law-abiding people cannot defend themselves or each other in those zones. Such zones might as well be called "guaranteed defenseless victim" zones, as these zones only increase the safety of predators and madmen, but not of other, law abiding people there. "Gun free" zones artificially create the most fertile possible ground for criminal activity. Further, "gun free" zones neutralize the societal benefit and criminal deterrence generated by shall-issue CWP laws.

3. **Police - no duty to protect.** The courts have held that police have no duty to protect any individual, but only to provide a general level of protection to the community. If police are called, they have no duty to respond or to act. If there were a Virginia Tech-type incident on the MSU campus, police might respond to the edge of campus and hold there, waiting for a madman to complete his mayhem, as Bozeman police did recently when responding to an incident at a local convenience store. This makes it practically incumbent upon every individual to be able to provide for his or her own protection, essentially a responsibility of every citizen. Police protection is a dangerous myth. The mission of police is to bring violent perpetrators to justice -- they are the cleanup crew, no matter how much individual police officers would like to be able to interdict individual crimes.

4. **Trustworthy citizens.** The Montana Constitution mandates and the Legislature has concurred that the majority of citizens are decent, law abiding people, to be trusted with possession of firearms for self-defense. One would hope and suppose that MSU selects exemplary people for faculty, staff and students, people who may even be a cut above average Montanans concerning responsible behavior. Montana law allows persons 18 years or older, and having met other statutory requirements, to obtain concealed weapon permits. In Montana's near two-decade experience with this public policy, there is no -- zero -- data to suggest that young and eligible persons with CWPs have misused their CWPs. Further, federal law allows persons between 18 and 20 to be legally in possession of handguns with parental consent. While gang related and criminally inclined youth have been known to abuse these rights, the remaining 99% of the population have not. If Montana people generally are responsible and lawful, and MSU denizens are at or above average, and if all Montana people (exempting felons and mental incompetents) are trusted to possess firearms, then it just makes no sense to distrust and disrespect MSU personnel to the extent indicated by the proposed policy.

5. **Montana culture.** Montana has a long and honorable culture of safe, appropriate and effective use of firearms, beginning with the Lewis and Clark expedition and continuing today. Firearm possession is very much a part of Montana culture. MSU seeks to deny this culture for faculty, staff and students. MSU might as well insist that Jews attend only

Christian services, that Asians must eat nothing but steak and potatoes, or that no student may wear a cowboy hat or cowboy boots on campus. Such insensitivity to culture is surprising coming from MSU.

6. **Mass murder.** It is laudable for MSU to seek to prevent a Virginia Tech-type incident on campus. However, scapegoating firearms misses the mark. In the largest mass murder in U.S. history airplanes were the weapon of choice when terrorists flew them into the World Trade Center in New York. The next largest mass murder in history also happened in New York City when a vengeful person threw an ignited quart bottle of gasoline into a crowded nightclub. Firearms are not the problem. People who would kill other people are the problem. When these madmen are armed, it takes another armed person to stop them.

7. **Seat belt analogy.** People wear seat belts because it is prudent and it enhances safety for the seat belt user. As a motive for seat belt users, it is never said that they are exceptionally paranoid and unusually fearful of getting in an auto accident. It is also never said that seat belt users get into their cars in the hope of being able to crash into something. It is just prudence. Actually, very few people need seat belts. Only those very few who become involved in an accident need belts, and then, once the accident begins, it is too late to buckle up. The motivation for those who carry a firearm for personal protection is the same. Relatively few actually need a firearm. These people are not highly fearful - paranoid - of being victimized. They just choose not to be subject to victimization. Nor do these people get up in the morning hoping to find something to crash into. But, like the auto crash victim, when a person becomes victim of predatory crime, it is then too late to buckle up (or go home and get a firearm).

8. **Note about "dangerous chemicals."** The proposed MSU University Firearms Policy declares that: "Prohibited weapons may not be carried or possessed by individuals while in MSU buildings or on the MSU campus." The policy defines "prohibited weapons" to include "dangerous chemicals." It would probably be wise for the administrative and legal staff to consult the departments of Chemical Engineering and Chemistry and Biochemistry, and various other research entities on campus, before invoking this blanket ban. It is a near certainty that these departments and entities have plentiful stocks of what must fit the definition of "dangerous chemicals." Under the proposed policy, either MSU would need to engage in a comprehensive process of inventorying stocked chemicals, make determinations about which ones might be "dangerous" if misused, and destock and properly dispose of "dangerous" chemicals, or MSU would be forced to engage in selective enforcement of its policy. Selective enforcement is a slippery slope.

9. **Note about ROTC.** According to pictures posted on the MSU Website, the ROTC department uses paint ball guns, banned under the proposed policy, for training. The ROTC probably also possesses real firearms. Since the proposed policy, as is, has no exemption for ROTC, again one must imagine significant changes at MSU, or selective enforcement of the proposed policy.

C. Alternatives

It is recommended that:

1. All persons who have a concealed weapons permit valid in Montana be exempted from the proposed University Firearms Policy;

2. any student, staff or faculty under the age of 18 who wishes to be in possession of a rifle or shotgun on campus must provide MSU with written parental permission consenting to that possession;

3. any student, staff or faculty who is 18, 19, or 20 years old and who wishes to possess a handgun on campus must provide MSU with written parental permission consenting to that possession (required by federal law);

4. the MSU policy require that no student may keep a firearm in his or her dorm room unless with the consent of his or her roommate(s);

5. MSU provide secured storage in each dorm for firearms students do not wish to keep in their rooms, and that an adequate system be devised to both prevent unauthorized access to such storage and to allow students to retrieve stored firearms at any reasonable hour;

6. discharge of firearms anywhere on campus except at an approved shooting range and except for self defense be strictly prohibited (which won't inhibit a madman but will promote safety, and which is already covered under state law if MSU is within the Bozeman city limits);

7. a criminal records background check be run on all staff and faculty and that any who are not legally eligible to possess firearms be reevaluated for employment; and

8. suitable self defense instructors be recruited and engaged to offer classes on campus both about the safe and effective use of firearms, and about how affected persons can without firearms and most quickly neutralize a threat to themselves and others (not relying totally on summoning police and waiting for them to arrive to hopefully do something effective).

I would be happy to converse with either of you by phone or email, or collaborate further about how MSU can craft a reasonable and effective policy to enhance the safety of all persons on campus. Please call or email me if you care to pursue this.

Sincerely yours,

Gary Marbut
President

Cc: Senator Joe Balyeat, Bozeman
Representative Roger Koopman, Bozeman
Representative Rick Jore
MSSA Board

EXHIBIT 3.1

Montana Shooting Sports Association
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November 20, 2007

Leslie C. Taylor
Legal Counsel
211 Montana Hall
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Bozeman, Montana

Dear Ms. Taylor;

Greetings from Missoula.

This is the comment, for the record, of the Montana Shooting Sports Association (MSSA) upon the proposed new firearms policy being considered by MSU. For introduction, MSSA is the primary organization in Montana asserting the rights and prerogatives of gun owners in Montana, is affiliated with the National Rifle association and associated with Gun Owners of America and the Citizens Committee for the Right to Keep and Bear Arms.

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We note that the proposed policy, as written, effectively asserts a universal ban on handguns on campus (except, perhaps, for campus security). Although handguns are the tool of choice for self defense from sudden and life-threatening attack, the proposed MSU policy would theoretically deny everyone on campus this important tool of self defense.

We ask that MSU focus academic and scientific rigor on examination of this question, an issue that should be resolved through careful and rational thinking, avoiding false assumptions, false deductions and subsequent false conclusions. We ask you to set aside emotion and emotional arguments and instead look at the facts available, an approach that would be appropriate for an institution of higher education..

EXHIBIT 3.2