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.	Cause No.: BDV-2021-598 **ORDER DENYING INTERVENTION MOTIONS AND BRIEFING SCHEDULE**

Before the Court are Montana Shooting Sports Association (MSSA) and David W. Diacon's (Diacon) respective intervention motions. The Board of Regents (Regents) opposes both motions. The State supports both motions. The motions are fully briefed. No party requested oral argument. For the reasons stated below, Diacon and MSSA's intervention motions are **DENIED**.

DISCUSSION

MSSA and Diacon both claim that they have a right to intervene in this case. Diacon argues he "has an intervention of right and must be allowed to intervene." MSSA contends it has "a right to intervene in a civil action 'of right' [sic]").

A. Permissive Intervention

Although neither MSSA nor Diacon relied upon permissive intervention, the State supports their permissive intervention because they "bring valuable perspectives to the litigation," citing *Kitzmiller v. Dover Area Sch. Dist.*, 229 F.R.D. 463, 471 (M.D. Pa. 2005). That case involved permissive intervention. Since MSSA and Diacon do not rely upon permissive intervention, it is inapposite, as is the State's brief.

The standard for having a *right* to intervene in litigation is not the mere possession of "valuable perspectives to the litigation." If it were, a virtually limitless number of individuals and organizations would have an absolute right to intervene in this proceeding: local and national groups both supporting and opposing guns, law enforcement, community organizations, students, parents of students, visiting collegiate athletes, staff, faculty, employee unions, public or private partners in any University project, vendors, customers, and more. Rule 24 "is a discretionary judicial efficiency rule used to avoid delay, circuity and multiplicity of suits," *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982). Therefore, any conclusion that Rule 24 binds a Court to accept virtually unlimited intervenors on the basis of "valuable perspectives to the litigation" would not only vitiate the rule but flip it on its head.

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Accordingly, this Court shall not consider the State's permissive intervention position.

B. Intervention by Right

Mont. R. Civ. P. 24(a) governs intervention by right. It provides, in relevant part:

> (a) *Intervention of Right.* On timely motion, the court must permit anyone to intervene who: [...]
> (2) claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest.

Mont. R. Civ. P. 24(a) (emphasis added).

> [I]n order to intervene as a matter of right under M. R. Civ. P. 24(a), an applicant must satisfy the following four criteria: (1) the application must be timely; (2) it must show an interest in the subject matter of the action; (3) it must show that the protection of that interest may be impaired by the disposition of the action; and (4) it must show that that interest is not adequately represented by an existing party.

Loftis v. Loftis, 2010 MT 49, ¶ 9, 355 Mont. 316, 227 P.3d 1030.

There should be no dispute that MSSA and Diacon's respective motions are timely.

"an interest in the subject matter of the action"

"[O]ne of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498, 64 S. Ct. 731, 735 (1944). A prospective intervenor "is not permitted to inject new, unrelated

issues into the pending litigation." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

The Regents' petition asserts that "the Legislature exercised control over the MUS and impermissibly infringed on [the Regents]' authority under the constitutional directive of Article X, Section 9." The Regents seek a determination on the "pure legal question of whether the enactment of HB102 'conformed to Montana's constitutional requirements, and directives regarding the authority of [the Regents]." The Regents claim "HB102 is unenforceable against [the Regents] and [Montana University System]" and "requests a judicial declaration that HB102 is unconstitutional as applied to [the Regents], [Montana University System], and [Montana University System] campuses and locations."

MSSA argues that its members "have a right to keep and bear arms under the challenged statutory scheme, which, if implemented as drafted, they intend to exercise." Diacon argues extensively regarding his Second Amendment rights and claims in his unsolicited "Petition of Intervenor" that the Court should "dissolve the temporary [sic] injunction" and "stay and enjoin enforcement" of Regents Policy 1006. Such arguments reiterate the Legislature's majority's "partisan political stripe, agenda, [and] divide" stance while ignoring the "existence and integrity of rule of law under the supreme law of this State for the mutual benefit of all and posterity." *McLaughlin v. Montana Legislature et al.*, 2021 MT 178, ¶ 81, __ Mont. __, __ P.3d __ (J. Sandefur, concurring.) This case is merely about whether the Legislature or the Executive[1] branch, via the Regents, has the exclusive constitutional authority to regulate firearms on MUS campuses and other locations.

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[1] "The Board of Regents and its members, as well as the entire MUS, is an independent board within the executive branch." *Sheehy v. Commissioner of Political Practices*, 2020 MT 37, ¶ 11, 399 Mont. 26, 458 P.3d 309 (fn 1).

Even if MSSA and/or Diacon were permitted to intervene, they may not "enlarge those issues or compel an alteration of the nature of the proceeding" from one about which governmental branch decides MUS campus firearm policy to a fundamentally unrelated question of whether Regents' Policy 1006 is constitutional. Neither MSSA nor Diacon shall be permitted to inject these new, unrelated issues into this declaratory relief proceeding, or redefine the "subject matter of the action" to fit their respective legal theories or claims. Despite their vociferous briefing to the contrary, this is not a case about the constitutionality of Regents' Policy 1006 or the right to bear arms under the Montana or United States Constitutions.

A lawsuit is not a general clearinghouse for all collateral and tangential issues, but rather a determination of specific raised claims. It would be improper for this Court to allow either MSSA or Diacon to inject new, unrelated issues into the pending litigation or alter the nature of the proceeding. The Court must, and shall, analyze MSSA and Diacon's purported interest in the subject matter of the action *as it stands*, and in respect to the *pending* issues.

"the subject matter of the action"

It is clear from the Regents' petition that the subject of this lawsuit, as it stands, is whether the Legislature or the Executive Branch, by and through the Regents, hold general police power to regulate firearms on MUS property. It is a suit between two equal governmental branches where the third equal branch will determine which of them has the exclusive constitutional authority to regulate firearms on MUS campuses and other locations.

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"a direct, substantial, legally-protectable interest"

"A party seeking intervention as a matter of right 'must make a prima facie showing of a direct, substantial, legally-protectable interest in the proceedings' as a 'mere claim of interest is insufficient to support intervention as a matter of right.'" *Loftis v. Loftis*, 2010 MT 49, ¶ 13, 355 Mont. 316, 319, 227 P.3d 1030, 1032.

Diacon argues that his "rights guaranteed under the federal and State constitutions are a direct, substantial, legally protectable interest in this matter...." Diacon's federal and state gun rights have nothing whatsoever to do with the subject matter of this declaratory relief proceeding.

Diacon misunderstands the nature of the "interest" he must possess to intervene by right. A prospective intervenor must show more than an interest in the broad colloquial use of the term to indicate one's preference or even a "stake" in the outcome (e.g., I am interested in the Yankees prevailing tonight, I've bet $50 on them.) with the much narrower term of art: "*legally-protectable* interest" (e.g., The Steinbrenner family has a [legally protectable ownership] interest in the Yankees.)

> [T]he inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way. So, an intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological, economic, or precedential reasons; that would-be intervenor merely prefers one outcome to the other. For example, in NOPSI, a private utility company filed suit against a seller of natural gas in a contractual dispute concerning fuel prices. Officials from the city of New Orleans attempted to intervene on the ground that the electricity rates paid by the city would increase if the fuel-pricing dispute was decided against the utility company. Sitting *en* banc, we held that the

> officials' generalized, "purely economic interest" was insufficient to justify intervention. "After all, every electricity consumer . . . and every person who does business with any electricity consumer yearns for lower electric rates." Similarly, a Sixth Circuit panel determined that an advocacy organization opposing abortion was not entitled to intervene in an action challenging the constitutionality of Michigan's Legal Birth Definition Act because the organization had "only an ideological interest in the litigation, and the lawsuit does not involve the regulation of [the organization's] conduct in any respect.

Texas v. United States, 805 F.3d 653, 657-58 (5th Cir. 2015).

In *Donaldson v. United States*, 400 U.S. 517, 530-31 (1971), the United States Supreme Court affirmed denial of a motion to intervene filed by a taxpayer seeking to participate in a suit by tax authorities seeking records from the taxpayer's employer and accountant.

> Donaldson's only interest -- and of course it looms large in his eyes -- lies in the fact that those records presumably contain details of Acme-to-Donaldson payments possessing significance for federal income tax purposes. This asserted interest, however, is nothing more than a desire by Donaldson to counter and overcome Mercurio's and Acme's willingness, under summons, to comply and to produce records. .... This 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.' What is obviously meant there is a significantly protectable interest.

Donaldson v. United States, 400 U.S. 517, 530-31 (1971).

Donaldson preferred that those entities not release his records, but he held no legally protectable interest in the records. MSSA and Diacon prefer that the Montana Constitution reserves campus firearm policy to the Legislature,

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but they have no legally protectable interest in that question, only the Executive branch via the Regents does in this declaratory relief proceeding.

A particularly instructive case on the limits of private party intervention in intergovernmental cases is *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982):

> None of the actions taken, nor the statutory authority called into question in this case, involves the proposed intervenors who seek to intervene as defendants. The only interest involved is of the named defendants, governmental bodies. As we emphasized in Part II the only focus that the ongoing litigation in the district court can have is whether the governmental bodies charged with compliance, defendants, have satisfied the federal statutory procedural requirements in making the administrative decisions regarding the construction which would directly affect plaintiffs' property. In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in this suit, all other entities have no right to intervene as defendants. Thus we hold that the proposed intervenors' interests do not relate 'to the property or transaction which is the subject of the action' and they have therefore failed to assert an interest in the lawsuit sufficient to warrant intervention as of right.

Id.

The constitutional authority in question in this case (art. X, § 9) involves only the Executive and the Legislative branches, it does not involve the prospective intervenors. Since this declaratory relief proceeding was brought to compel the Legislature's compliance with art. X, § 9, only governmental bodies limited by that provision (i.e., the Legislature) can be proper defendants.

Finally, Rule 24 seeks to prevent, among other things, "multiplicity of suits." It functions as a sort of preemptive joinder. Implicit in this is a

requirement that the prospective intervenor has standing to bring this suit on their own. If not, there would be no concern for a multiplicity of suits. Neither Diacon nor MSSA have explained how they would have standing, as private individual and group, to file a constitutional claim on behalf of one part of the government against another. In this dispute between equal governmental branches, neither Diacon nor MSSA can even show standing under the subject matter of the action as it stands.

Because this lawsuit concerns the delineation of power between two equal governmental branches, Diacon and MSSA's respective purported interest is already suspect. The subject of this action is who is constitutionally empowered to determine firearm policy on MUS campus and other locations. It might be the Legislature; it might be the Executive branch via the Regents. Most certainly, however, it is not MSSA or Diacon. While they may have an interest (i.e., prefer) one outcome in this lawsuit to another, that is not a *legally protectable* interest. Neither Diacon nor MSSA have a legally protected interest in the scope of Mont. Const., art. X, § 9(2)(a) which is the subject matter of this case.

MSSA additionally argues that it has a right to intervene "[d]ue to MSSA's extensive involvement as an HB102 proponent," citing *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court*, 2002 MT 18, 308 Mont. 189, 40 P.3d 400. MSSA's reliance on *Sportsmen* is misplaced.

MSSA states that "the Court held: '[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.'" The language quoted by MSSA is not a *Sportsmen* Court holding, but rather a quotation from *Idaho Farm Bureau Fed'n v. Babbitt*,

58 F.3d 1392, 1397 (9th Cir. 1995). Indeed, the *Sportsmen* Court introduced the quote saying "[o]n this issue, the Ninth Circuit has stated..." The Court's quotation of Ninth Circuit persuasive language in that case does not incorporate into Montana law a blackletter rule that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported" as MSSA argues.

Furthermore, MSSA ignores the preceding two paragraphs of analysis on the validity of the claimed legal interest. The district court denied intervention because the prospective intervenors "did not have a legally protectable interest in either the property (alternative livestock) or the lawful business transactions between two alternative livestock owners." *Sportsmen*, ¶ 10. There, however, the prospective intervenors were not merely interested in the outcome. Indeed, they had argued that they "as Montana citizens, are the beneficiaries of the State's obligations as trustee for the management and protection of game animals." *Sportsmen*, ¶ 11; See *Hughes v. Oklahoma*, 441 U.S. 322, 341-42, 99 S. Ct. 1727, 1739 (1979) (affirming long recognition of states' interest "in preserving and regulating the exploitation of the fish and game and other natural resources within its boundaries for the benefit of its citizens.") Neither MSSA nor Diacon have pointed to no such legally protectable interests especially since the Legislature has already admitted, and the Court agrees, Second Amendment rights are not unlimited.

MSSA argues that it "played identical roles" to the prospective *Sportsmen* intervenors. The *Sportsmen* Court allowed intervention of those prospective intervenors as "the authors, sponsors, active supporters and defenders of I-143," the issue was "intervention by ballot supporters." *Sportsmen*, ¶ 12.

(emphasis added). Ballot initiatives like I-143 are constitutionally unique in that they allow the people to directly enact law outside the normal legislative process. *See* Mont. Const.art. III, § 4; art. V., §§ 1, 11. When the Legislature passes a bill that is subsequently challenged in court, it makes sense for the Legislature to defend a law that it created through its legislative powers. Mont. Const. art. V, §§ 1, 11. But a citizen initiative, on the other hand, has nothing to do with the Legislature, as the people have reserved this power for themselves. Mont. Const. art. V, § 1. Therefore, when citizens pass an initiative that is subsequently challenged in court, it makes no sense for the Legislature—and perfect sense for those citizens—to defend that law because the normal defendant Legislature had no role, constitutional or otherwise, in its enactment. Mont. Const. art. V, §§ 1, 11. MSSA's support of HB 102 does not give it an absolute right to intervene in this matter.

The Court concludes that neither Diacon nor MSSA have "a direct, substantial, *legally-protectable* interest in," "the subject of [this declaratory relief] action," namely whether the Legislature or the Executive branch via the Regents are the constitutionally proper promulgator of MUS campus firearm policy. While prospective intervenors may have legally protectable interests in firearm ownership and possession, they do not have a legally protectable interest in a suit determining which governmental branch makes MUS campus firearm policy.

"protection of that interest may be impaired by the disposition of the action"

Because neither MSSA nor Diacon have a legally protectable interest in the subject of this lawsuit, neither's rights will be impaired by the disposition of this action. Nevertheless, they focus on the collateral issue of

whether firearms may be carried on MUS campuses, even though this declaratory proceeding is about who decides MUS property firearm policy, not whether such policy is constitutional.

MSSA argues that "BOR's petition seeks to strip MSSA members who attend [the Montana University System] of their statutory rights." This is a mischaracterization at best. The Regents contend it, not the Legislature, has sole authority to "supervise, coordinate, manage and control [MUS]." Mont. Const., art. X, §9(2)(a) ("the Legislature exercised control over the MUS and impermissibly infringed on [the Regents]'s authority under the constitutional directive of Article X, Section 9," and Regent seek an "injunction precluding application of HB 102" to places controlled by the Regents.) The Regents have not sought enforcement of anything against university attendees.

There are two possible outcomes to this case: (1) the Legislature prevails at the expense of alleged Regent power, or (2) the Regents prevail at the expense of alleged Legislature power. No part of this lawsuit will decide the scope of Diacon or MSSA members' respective rights. Consequently, neither Diacon nor MSSA's members alleged legally enforceable right are threatened whatsoever in this declaratory relief proceeding.

"that interest is not adequately represented by an existing party"

Because neither MSSA nor Diacon possess a legally protectable interest in this dueling governmental branch dispute, they cannot claim inadequate representation. The Legislature cannot be said to be an inadequate representative in a dispute solely about the extent of that Legislature's power. "There is also an assumption of adequacy when the government and the applicant are on the same side." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

"When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.*

Finally, the Montana Attorney General has publicly indicated his commitment to precisely seeking the outcome prospective intervenors desire: successfully defending the statute. "Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Id.*

CONCLUSION

Neither MSSA nor Diacon have established that they possess legally protectable interests in this intra-governmental dispute about the scope of art. X, § 9. None of their respective interests can be impaired because none are at issue. Moreover, the Legislature adequately represents the only such interests at stake, the Legislature's. A lawsuit "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). Accordingly, MSSA and Diacon's respective intervention motions must, and shall be, **DENIED**.

Finally, Diacon did not seek leave of the Court to file his June 7, 2021 Petition, and none has or shall be given. His request that this Court dissolve its temporary injunction is nothing more than "a 'motion for reconsideration' [which] does not exist under the Montana Rules of Civil Procedure." *Horton v. Horton*, 2007 MT 181, ¶ 14, 338 Mont. 236, 165 P.3d 1076 (citing *Jones v. Montana University System*, 2007 MT 82, ¶ 13, 337 Mont. 1, 155 P.3d 1247; *ABC Collectors, Inc. v. Birnel*, 2006 MT 148, ¶14, 332 Mont. 410, 138 P.3d 802; *Martz v. Beneficial Montana, Inc.*, 2006 MT 94, ¶ 24, 332 Mont. 93, 135 P.3d 790; *Nelson v. Driscoll*, 285 Mont. 355, 359, 948 P.2d 256 (1997); *Shields v.*

Helena School Dist. No. 1, 284 Mont. 138, 143, 943 P.2d 999 (1997); *Taylor v. Honnerlaw*, 242 Mont. 365, 367, 790 P.2d 996 (1990); *Anderson v. Bashey*, 241 Mont. 252, 787 P.2d 304 (1990).) Consequently, Diacon's Petition must be **STRICKEN** from the record.

ORDER

Based on the above, the Court hereby **ORDERS, ADJUDGES, AND DECREES** as follows:

1. MSSA's intervention motion is **DENIED**;

2. Diacon's intervention motion is **DENIED**;

3. The Lewis and Clark County Clerk of Court shall strike and remove Diacon's June 7, 2021 Petition from the court record;

4. The Regent's initial brief shall be filed on or before **September 30, 2021**;

5. The Montana State Legislature's response brief shall be filed on or before **November 1, 2021**;

6. MSSA and Diacon's respective *amicus* briefs, if any, shall be filed on or before **November 1, 2021**. In this regard, however, any *amicus* brief shall be strictly limited to the scope of Article X, Section 9 as it relates to HB 102. Argument seeking to redefine or enlarge the issues of this declaratory relief proceeding, arguing the breadth of federal or state firearm rights, or arguing the validity of Regents Policy 1006 will not be considered or tolerated by this Court;

7. The Regents reply brief shall be filed on or **before December 3, 2021**;

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8. The Regents shall file a submittal notice when it files its reply brief or upon the expiration of this briefing schedule;

9. Oral argument will only be set at the request the Regents or the Legislature's respective counsel and must be included in their opening briefs; and

10. If oral argument is held, Regents and the Legislature shall be allowed thirty minutes to argue their respective positions.

DATED this 16th day of July 2021.

MICHAEL F. McMAHON
District Court Judge

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