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IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 21-0377
BDV 2021-598

MONTANA SHOOTING SPORTS ASSOCIATION,

Petitioner,

v.

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY, THE HONORABLE MICHAEL F. MCMAHON, DISTRICT JUDGE,

Respondent.

SUMMARY RESPONSE OF BOARD OF REGENTS TO PETITION FOR WRIT OF SUPERVISORY CONTROL OF MONTANA SHOOTING SPORTS ASSOCIATION

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Board of Regents of Higher Education of the State of Montana ("BOR") provides its Summary Response to the Petition for Writ of Supervisory Control ("Petition") of Montana Shooting Sports Association ("MSSA") as follows:

I. INTRODUCTION

In response to MSSA's Petition to require the District Court to make MSSA a party in an action between two governmental entities disputing which of those two entities holds a constitutional power, BOR summarily responds that the District Court got this right: An action like this "is a limited affair, and not everyone with an opinion is invited to attend." Order Denying Intervention ("Order")(Ex.1 to MSSA's Petition ("Pet."), 13) (quoting *Curry v. Regents of the Univ.*, 167 F.3d 420, 423 (8th Cir.1999)). MSSA has only "an opinion" or "preference" about how this litigation should be resolved—the same preference advocated by Defendant State of Montana ("State")—not a claim to itself possess a right to the constitutional power in question. Order.9. Thus, MSSA's rights are fully protected by the Attorney General's representation of the State, and further by the District Court's leave for MSSA to file an amicus brief. *See, e.g., Mont. Quality Educ. Coal. v. Mont. Eleventh Judicial Dist. Court*, No. OP 16-0494, 2016 Mont. LEXIS 1121 ("*MQEC*"),*5 (Oct. 27, 2016). MSSA has failed to establish any of the requirements necessary for this Court to exercise jurisdiction under Rule

14(3), Mont.R.App.P., accordingly, MSSA's Petition for Supervisory Control must be denied.

II. FACTS

As this Court confirmed last year, BOR is an independent board, mandated and established by Montana's Constitution, which is vested with "full, power, responsibility, and authority to supervise, coordinate, manage and control" the Montana University System ("MUS"). *Sheehy v. Commiss'r of Political Practices*, 2020 MT 37, ¶29. This specific, constitutionally-granted authority to govern the MUS includes "the power to do all things necessary and proper" to the exercise of these "broad powers." *Id.* Exercising this authority, BOR limits the possession and use of firearms, in most circumstances prohibiting open or concealed carry on MUS property except by trained police or security officers. *See* Prelim. Inj. Order ("PI Order"), 2 (Ex.A, hereto).

Despite the clear constitutional grant of authority to BOR over governance of the MUS, in 2021 the Legislature enacted HB102, which requires BOR to adopt policies permitting open and concealed carry of firearms on all MUS campuses and locations, including in student dormitories. *Id.*2-3. BOR filed suit, seeking a declaration that HB102 is unconstitutional as applied to it, and requesting injunctive relief prohibiting enforcement of HB102 on MUS property. *Id.*4. Following a show cause hearing and argument by BOR and the State, the District

Court granted BOR's preliminary injunction motion. *Id.*1-2, 11-12. MSSA thereafter moved to intervene "as of right" to support the State.[1] The District Court denied the motion and scheduled the matter for merits briefing, ensuring expeditious resolution of the constitutional dispute. Order.1, 13-15. The District Court further granted MSSA leave to file an amicus brief. *Id.*

The District Court correctly determined MSSA has no right to intervene because: (1) MSSA lacks a legally-protectable interest in the subject matter of the action—"whether the Legislature or the Executive Branch, by and through the Regents, hold general police power to regulate firearms on MUS property;" (2) the rights that MSSA attempted to use to hijack BOR's case as pleaded are not "threatened whatsoever in this declaratory relief proceeding," and (3) any interests MSSA may have are adequately protected by the Attorney General's representation of the State and HB102. Order.5, 12-13.

III. LEGAL STANDARD

Supervisory control is an extraordinary remedy that may be invoked when 1) urgent or emergency factors make the normal appeal process inadequate, and 2) the case involves purely legal questions. Rule 14(3). Petitions for supervisory control in civil cases must also satisfy another criterion: (a) the other court is proceeding under a mistake of law and is causing a gross injustice, or (b) constitutional issues

[1] Permissive intervention was not argued by MSSA below, and is not an issue here.

of statewide importance are involved. Rule 14(3)(a)-(b). MSSA's Petition does not establish urgent or emergency factors making appeal inadequate, and does not present a purely legal question. The Petition does not claim MSSA's asserted "right" to intervene is a constitutional issue of statewide importance. The Petition also fails to establish that the District Court is operating under a mistake of law or that the denial caused a gross injustice. MSSA is required to have satisfied all of these requirements; having failed to do so, its Petition fails. *Campbell v. Mont. First Jud. Dist. Court*, OP20-0360, 2020 Mont. LEXIS 2089,*2 (July 15, 2020); *MQEC*,**3-6.

IV. ARGUMENT

A. MSSA Failed to Establish that Appeal is Not an Adequate Remedy.

The Petition mostly ignores the requirements to obtain the writ MSSA seeks. It discusses the "inadequacy of appeal" requirement in two sentences, which aver that without intervention, "MSSA and its members will be denied the opportunity to participate in the defense of the bill they have actively supported. If MSSA was successful in appealing the denial of its motion to intervene, extended and needless litigation would result." Pet.16. This is entirely inadequate to meet MSSA's burden to prove appeal is not an adequate remedy.

First, in strikingly similar circumstances, this Court has held that the opportunity to submit an amicus brief *is* participation in the defense of a statute

against constitutional challenge. *Campbell*,*2 (lack of "object[ion] to Petitioners' participation as amicus curiae" precludes "extraordinary jurisdiction to review the District Court's interlocutory ruling" denying intervention); *MQEC*,*5 ("amicus filing" in action challenging statute's constitutionality, along with representation by the State, is sufficient participation; petition seeking intervention denied); *Seven Montana Legislators v. Montana First Jud. Dist. Court*, OP 12-0171 ("*Seven*")(March 16, 2012), 9 (denying intervention and affirming "participat[ion] in the action as amicus curiae" by legislators, including chief sponsor of challenged bill, was adequate).

Moreover, if MSSA were correct that the District Court needs to hear MSSA's purportedly important evidence regarding the background and passage of HB102, then reversal after a successful appeal would be an adequate remedy for MSSA, which at that time would become a party to the litigation on remand. Here, the District Court has granted a preliminary injunction precisely to "preserve the *status quo*" as it was prior to enactment of HB102, meaning there is, *per force*, no urgency or emergency. PI Order.11. Instead, this is a typical case where the right to appeal precludes this Court from exercising its extraordinary, emergency jurisdiction. Having failed to establish the "urgency or emergency factors" Rule 14(3) mandates for this Court to exercise jurisdiction, MSSA's Petition must be denied.

B. MSSA's Purported "Right" to Intervene Is Not a "Purely Legal Question."

Equally problematic is MSSA's failure to establish that the District Court's decision to deny its motion for intervention as of right "involves purely legal questions[.]" Rule 14(3). *MQEC* is on all fours, but MSSA entirely ignores it. In *MQEC*, a public advocacy group like MSSA petitioned this Court to reverse a lower court's order denying intervention to defend the constitutionality of a statute and related administrative rule alongside the State. The lower court had denied the motion, finding *as a matter of fact* (as here) that the group's interests were adequately represented by the State and would not be "impaired or impeded" by disposition of the case. *MQEC*,*4. Thus, here, as in *MQEC*, "[t]he absence of a pure legal question and the presence of factual issues is demonstrated in [the] petition" itself, where MSSA argues its "interests and those of [its] members are not adequately protected by [the State] [and] that [it has] interest[s] in the case that may be impaired or impeded by its disposition." *Id.*; Pet.17-18. These are conceded factual issues that preclude jurisdiction under Rule 14(3). *MQEC*,**3-4.

Like MSSA here (Pet.13-20), the *MQEC* petitioner tried to rely on *Sportsmen for I-143 v. Fifteenth Jud. Dist. Ct.*, 2002 MT 18 ("*Sportsmen*"). *MQEC*,*4. This Court rejected that reliance because in *Sportsmen* the sole ruling challenged by the petition was a purely legal one, namely whether (contrary to the lower court's decision there) "the primary proponent of a ballot initiative" has a

legal right to intervene to address legislation arising out of that initiative. *Id.* But in *MQEC*, as here, the rulings of "adequacy of representation" by the State and "no impairment" of interests are *fact-based* and "discretionary," precluding supervisory control. *Id.* In short, this Court's *MQEC* decision mandates denial because MSSA's Petition presents factual questions, not the "purely legal questions" required by Rule 14(3).

C. MSSA Failed to Establish the Necessary Requirements of Either Rule 14(3)(a) or 14(3)(b).

1. MSSA's Request to Intervene is Not A Constitutional Issue of Statewide Importance.

MSSA seems to rely only on 14(3)(a), not (b). Pet.14. However, the Petition is not entirely clear, arguing that issues in the underlying action "are of statewide importance" (*Id.*16), and that MSSA's members have "an individual right to keep and bear arms" under both "the Federal and Montana Constitutions," rights that "the State cannot assert[.]" *Id.*21. But as the District Court properly concluded, these asserted rights are *not* at issue in the action filed by BOR and thus are not "interests" that are "the subject matter of the action." Order.3-5 (citing *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.2003).

Here, both MSSA and the Attorney General's office have tried to hijack BOR's action and turn it into something it is not—namely, a defense of BOR

Policy 1006 against "right to bear arms" claims of individual Montana citizens. That is improper. Order.5. The U.S. Supreme Court so held in *Vinson*, and this Court concurred in *Seven Montana Legislators*. *Seven*, 9 ("[T]he plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of necessary parties."). The constitutionality of Policy 1006 is simply not at issue. Order.5 ("A lawsuit is not a general clearinghouse for all collateral and tangential issues, but rather a determination of specific raised claims"). BOR did not sue MSSA, and the issues MSSA wants to raise beyond those BOR pled are irrelevant to BOR's action. *Id.*

Moreover, whether MSSA participates as an intervenor or amicus is of import only to it, and does not raise an issue of constitutional statewide importance. This Court has never suggested otherwise, focusing always on the intervention issue put before it by a petitioner, not on the fact that the underlying litigation itself involves constitutional questions. *See, e.g., Campbell*,**1-2; *MQEC*,**4-5; *Seven*, 4, 8-10 (holding question of whether *Legislators* have "a right to intervene [regarding bills they voted on] involves constitutional issues of statewide importance," but stating no such constitutional concerns for intervention rights argued as private citizens). In short, because a private party's desire to intervene does not raise a constitutional concern, MSSA cannot rely on Rule 14(3)(b).

2. The District Court Properly Denied Intervention and Is Thus Not Operating Under a Mistake of Law.

The District Court followed Montana law, so Rule 14(3)(a) also does not apply. MSSA does not dispute that the District Court set forth the correct requirements for non-statutory intervention "as of right," nor that it correctly stated the elements for intervention as of right adopted by this Court, which require an intervention-applicant to "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." Order.3 (quoting Mont.R.Civ.P. 24(a), *Loftis v. Loftis*, 2010 MT 49,¶9); Pet.12-13. Nor does MSSA contest that the "applicant *must satisfy* [all] four criteria[.]" *Loftis*,¶9 (emphasis added); *Id.* BOR agrees the motion was timely, however, as the District Court correctly concluded below, MSSA failed to establish the other three Rule 24(a) elements, something MSSA must do here to establish "mistake of law" under Mont.R.App.14(3)(a). It has not done so. Once again, the District Court–not MSSA–got this right.

a. MSSA failed to establish a legally-protectable interest related to the property that is the subject of BOR's lawsuit.

MSSA argues the interests of its members "to exercise their campus carry rights under [HB102]" on MUS property are sufficient to allow MSSA to intervene

and join the State in arguing HB102 is constitutional. Pet.14-16. MSSA's proffered interest shows it fundamentally "misunderstands" the nature of the "interest" a movant "as of right" must establish; mere interest in the outcome of litigation is not enough. Order.6-8; *See Donaldson v. United States*, 400 U.S. 517, 530-31 (1971). Instead, a movant must show a direct, legally-protectable interest "relating to *the property* which is the subject of the action[.]" *Enz v. Raelund*, 2018 MT 134, ¶57 (emphasis added).

The "property" that is the subject of BOR's lawsuit is "the constitutional authority to regulate firearms on MUS campuses and other [MUS] locations." Order.4. The question in the underlying case is whether BOR or the Legislature possesses that authority. There is no circumstance in which MSSA possesses that authority; therefore, it does not have an interest in the property that is the subject of this case. Order.9. Precedent fully supports the District Court's conclusion that MSSA lacks the requisite interest to intervene as of right.

In *Donaldson*, the U.S. Supreme Court determined that Donaldson, under investigation for potential tax fraud, had no right to intervene in an action subpoenaing records owned by Donaldson's former employer. The Court recognized that Donaldson's interest in preventing production of the records—potentially avoiding a tax fraud indictment—"loom[ed] large in his eyes," but determined that such a "[non]proprietary interest . . . cannot be the kind

contemplated by Rule 24(a)(2) when it speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action.'" *Donaldson*, 531. The same is true for MSSA here. No matter how large in its members' eyes looms the determination of whether BOR or the Legislature "owns" the authority to regulate firearms on MUS locations, MSSA does not itself claim any proprietary or similar interest related to that authority. Since *Donaldson*, this Court has decided several specific-*res* type cases and consistently required, under Montana's Rule 24(a), that a movant for intervention must "make a prima facie showing of a direct, substantial, legally-protectable interest" related to the subject property of the type required in *Donaldson*. *Loftis*,¶13; *see also Enz*,¶¶58-60; *In re Heidema*, 2007 MT 20, ¶11; *DeVoe v. State*, 281 Mont. 356, 360 (1997).

Under this precedent, the District Court properly concluded that MSSA failed to make the necessary *prima facie* case establishing a direct, legally-protectable interest in the subject *res*: the constitutional authority to regulate firearms on MUS properties. Order.6-11. Instead, MSSA attempted to "inject new, unrelated issues into the pending litigation," which a prospective intervenor is not permitted to do. Order.3-5 (quoting *Arakaki* at 1086).

MSSA relies on *Sportsmen* – virtually the sole authority it proffers to support its arguments – to argue that because it lobbied the Montana legislature for "campus carry" and was "involved every step of the way" in passage of HB102, it

has established a legally-protectable interest that "entitle[s] [it] to intervene ***as a matter of right*** in an action challenging the legality of a measure it has supported." Pet.14-15 (emphasis original). The District Court concluded MSSA's reliance on *Sportsmen* "is misplaced." Order.9-11. In its Petition, MSSA gives no argument why the District Court was wrong, but merely recites its briefing from below. Pet.16-22. The District Court was right.

First, unlike MSSA, the movants in *Sportsmen* (the "Sportsmen") actually established the type of legally-protectable interest in property discussed above, which supported their Rule 24(a)(2) intervention. The Sportsmen showed in their petition that "their members, as Montana citizens" had the necessary interest in the subject property—the game animals that I-143 sought to protect—as "beneficiaries of the State's obligations as trustee for the management and protection of Montana's game animals." Order.10 (quoting *Sportsmen*,¶11). The Sportsmen's beneficiary status was why their having served as "the authors, sponsors, active supporters and defenders of I-143" mattered, and this Court identified this beneficial "interest in the management and protection of Montana's game animals"—the subject property—as the legally-protectable interest the Sportsmen were entitled to protect against impairment. Order.10 (citing *Id.*¶12). The District Court correctly found MSSA has proffered no comparable interest here. Order.11.

Second, even if *Sportsmen* could be given the broad reading MSSA suggests, this Court plainly limited its decision to primary supporters of *ballot measures* like I-143, not legislation. *Sportsmen*,¶6. This limitation properly applied by the District Court is appropriate because the sponsors of a ballot initiative have a different ownership-type interest in the outcome than do mere lobbyists seeking passage of laws through the normal legislative process. *Compare* Mont. Const., art. III, §4 ("*the people* may enact laws by initiative") with Mont. Const., art. V, §§1, 11 ("members of the legislature" pass bills to make laws). Here, MSSA is not the sponsor of a ballot measure, but instead "lobbie[d] the Montana Legislature" for passage of HB102, a legislative bill enacted via Article V, §11. Pet.5-11.

Courts have recognized that an "interest as chief lobbyist in [a state's legislature] in favor of [a bill] is not a direct and substantial interest sufficient to support intervention" as of right under Rule 24(a)(2). *Keith v. Daley,* 764 F.2d 1265, 1269-70 (7th Cir.1985); *see also Mt. Envtl. Info. Center v. Mt. Dept. of Envtl. Quality*, 2001 Mont. Dist. Lexis 3418,*31 (First Jud. Dist. Ct., Oct. 5, 2001) (denying intervention to lobbyist, citing *Keith*). This Court ruled similarly in *Seven Montana Legislators*, holding that once legislation has been enacted, not even the chief legislative sponsor has a right to intervene in a case challenging the constitutionality of the statute, either as a legislator or a private citizen. *Seven*, 6-8.

As such, the District Court was correct that *Sportsmen* does not give MSSA, a group that by its own admission merely lobbied the Montana legislature, a right to intervene in this litigation. Pet.3-10. Rather, because MSSA lacks a legally-protectable interest related to the property that is the subject of this action—the constitutional authority to regulate firearms on MUS locations—the District Court correctly ruled that *Sportsmen* gives MSSA no right to intervene under Rule 24(a).

b. MSSA failed to establish impairment of any interest it might have in the subject of this action.

The District Court also correctly held MSSA failed to establish that "protection of [any interest it may have] may be impaired by the disposition of the action." Order.12; *Loftis*, ¶9. MSSA argues that its "campus carry rights" will be impaired because BOR will continue to enforce its Policy 1006 if HB102 is declared unconstitutional, thereby "disrupt[ing] the statutory rights granted by HB102." Pet.18-19. Again, this proffered impairment based on the continued enforcement of Policy 1006 will not suffice because the constitutionality of Policy 1006 is *not* at issue in this litigation. Order.4-5.

c. MSSA failed to establish inadequate representation by the State of any interest it might have in the subject of this action.

As the District Court properly concluded, when a proposed intervenor and existing party "share the same ultimate objective . . . a presumption of adequacy of representation arises," which becomes even stronger when "*the government* and

the applicant are on the same side." Order.12-13 (quoting *Arakaki* at 1087)(emphasis added). It cannot be disputed that the State and MSSA are on the same side. The defense of constitutional challenges, like BOR's to HB102, is "committed to the Attorney General." *Seven*,**9-10. The Attorney General here testified in support of HB102, and publicly vowed to defend HB102's constitutionality:

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

Lawsuits Linger Long After Session, Billings Gazette, June 20, 2021, pp.A1,A3. (Ex.B, hereto). Indeed, MSSA concedes that it and the State share the same ultimate objective in this case. Pet.19-22.

The State, by way of Supplemental Response, argued below that it cannot fully represent Proposed Intervenor's legally-protectable interests, apparently the proffered *individual* right to bear arms championed by MSSA. Pet. Ex.6. Importantly, the State does not say it cannot, and will not, fully support HB102. That is all that matters. This Court's ruling in *Seven* controls. There, the Court determined legislators, including the chief sponsor of a challenged bill, *are* adequately represented by the Attorney General in a constitutional challenge to a bill they vote on or actively support, whether as legislators or private citizens. *Seven*,**7-8. Under Montana's constitution and statutes, "the defense of

constitutional challenges [to a bill passed by the legislature] is committed to the Attorney General," who must "defend all causes in which the State is a party." *Id.**7. The District Court correctly determined that because the Attorney General has so "publicly indicated his commitment to precisely seeking the outcome [MSSA] desire[s]," MSSA failed to prove the State will not adequately represent its pertinent interest, "successful[l] defen[se] [of] the statute." Order.13.

MSSA again cites only to *Sportsmen* in support of its "inadequacy" argument, and again flat out ignores why the District Court correctly found that decision is inapposite in a matter not involving a ballot measure. Pet.19-22; Order.9-11. Incorrectly stating "MSSA played identical roles" as the Sportsmen, MSSA baldly asserts that it "therefore 'may be in the best position to defend their interpretation of the resulting legislation.'" Pet.19-20. Not only is a lobbyist different from a ballot measure supporter, but unlike the Sportsmen, MSSA is not seeking to "defend its interpretation" of any legislation; it and the State *agree* on what HB102 means. Also, the "existing party" in *Sportsmen*—Montana's Department of Fish, Wildlife & Parks ("FWP")—was not involved in the initiative process and "ongoing political controversy surrounding the game farm issue" allowed the Sportsmen to adequately question whether the politically-appointed FWP director would vigorously defend the Sportsmen's interpretation of the legislation. *Sportsmen*,¶¶14,16-17; *citing Sagebrush Rebellion, Inc. v. Watt*, 713

F.2d 525, 528 (9th Cir.1983).[2] Nothing of the kind exists here. Thus, the District Court properly concluded *Sportsmen* is inapplicable to MSSA's intervention arguments, and that MSSA failed to establish the necessary "inadequacy" of representation by an existing party required by Rule 24(a)(2). *Loftis* ¶9; Order.9-11, 13.

3. MSSA Will Suffer No "Gross Injustice" When Participating as Amicus Curiae.

MSSA does not address how the District Court's denial of intervention but allowing of amicus participation causes a "gross injustice," seemingly conceding it does not. As amicus curiae, MSSA has ample opportunity to participate, voice its position on relevant legal issues, and offer its perspective as a proponent of HB102. As was true in *MQEC*, MSSA here "has not demonstrated that its interests in the constitutional issues could not be adequately represented by [the State] and through its own amicus filing," and simply failed to demonstrate a "gross injustice" warranting supervisory control. *MQEC*,*4; *see also Seven*,**9-10; *Campbell*,*2 (no "gross injustice will result" where Plaintiff "did not object to Petitioners' participation as amicus curiae").

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[2] MSSA also ignores that since *Sportsmen*, the Ninth Circuit changed its precedent, even in a ballot measure context now requiring proposed intervenors to make "a very compelling showing" against the presumption of adequate representation by the State, a standard MSSA makes no pretense it could meet here. *Prete v. Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006).

V. CONCLUSION

MSSA relies entirely on *Sportsmen*, but as both this Court (in *MQEC*) and the District Court have correctly ruled, that *ballot measure* case is inapposite in this action involving a challenge to the constitutionality of *legislation*. Because MSSA has failed to establish any of the necessary requirements for this Court to exercise jurisdiction under Rule 14(3), much less all of them—including inadequacy of appeal, purely legal questions only, and inadequate representation by the State—the Petition must be denied.

Dated this 8th day of September, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, Kyle A. Gray, certifies that the foregoing complies with the requirements of Rules 11 and 14(9)(b), Mont. R. App. P. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 4000 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Kyle A. Gray
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CERTIFICATE OF SERVICE

I, Kyle Anne Gray, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 09-08-2021:

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FILED

JUN 07 2021

ANGIE SPARKS, Clerk of District Court
By JREIGERS Deputy Clerk

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 **PRELIMINARY INJUNCTION ORDER**

On June 7, 2021, a Show Cause hearing was held to determine whether this Court's May 28, 2021 Temporary Restraining Order (TRO) in favor of the Montana Higher Education Board of Regents (Board) and against Montana should be modified to a preliminary injunction or vacated. The TRO enjoined, among other things, House Bill 102's (HB 102) to the Board, the Montana

University System (MUS) and MUS' campuses and locations. At the hearing, the Board appeared via its counsel, Martha Sheehy and Ali Bovingdon along with Regent Brianne Rogers. Montana appeared via its Department of Justice attorney, Solicitor General David Dewhirst.

Without objection from Montana, Regent Rogers' May 20, 2021 Declaration was admitted at the hearing subject to her cross-examination by Montana in lieu of her testimony. At the hearing, Montana elected to not cross-examine Regent Rogers. Thereafter, counsel argued their clients' respective positions.

MATERIAL FACTUAL BACKGROUND

Since at least 2012, firearms on MUS property have been limited by Board Policy 1006. Specifically, it provides the only individuals authorized to carry firearms are:

> 1. those persons who are acting in the capacity of policy or security department officers and who:
>
> a. have successfully completed the basic course in law enforcement conducted by the Montana Law Enforcement Academy or an equivalent course conducted by another state agency and recognized as such by the Crime Control Division of the Montana Department of Justice; or
>
> b. have passed the state approved equivalency examination by the Montana Law Enforcement Academy; and
>
> 2. those persons who are employees of a contracted private security company and who are registered to carry firearms pursuant to Title 37, Chapter 60, MCA.

Board Policy 1006 (11/18/99 and revised 5/25/12).

On February 18, 2021, Governor Gianforte signed HB102. Most of its sections became immediately effective although section 6 which is applicable to the Board was to become effective on June 1, 2021. According to the Board:

> HB102 generally revises gun laws with respect to open carry and Concealed carry. In Section 4, the Act allows concealed carry "anywhere in the state" except at specific locations designated by the Legislature. Those excepted locations include primary and secondary schools; courtrooms, federal property, and airports, but the Legislature did not extend the exception to the MUS or its campuses and locations. In Section 8, the Legislature revised the existing "open carry law," § 45-3-111, MCA in only one way; the Legislature deleted the prior MUS exception in the open carry law. Thus, by a purposeful omission in Section 4 and by a focused deletion in Section 8, contrary to the status *quo ante*, HB102 extends both open carry and concealed carry to MUS's campuses.
>
> In addition to legislating firearm policies on MUS campuses, in HB102 the Legislature attempted to override [the Board's] constitutional authority to manage, coordinate and control the MUS in numerous ways with respect to this issue. Section 5 precludes [the Board] from "enforcing or coercing compliance" with rules or regulations which restrict the right to possess or access firearms, "notwithstanding any authority of the board of regents" under Article X. Section 6 precludes [the Board] from "regulat[ing], restrict[ing], or plac[ing] an undue burden on the possession, transportation, or storage of firearms on or within the university system property by a person eligible to possess a firearm under state or federal law" and who meets minimum safety training requirements, except that it allows [the Board] to restrict campus gun use only in limited ways. Section 7 provides that any person suffering a deprivation of rights defined by the Act "has a cause of action against any governmental entity[.]" Finally, in House Bill 2 [HB 2], the Legislature conditioned $1,000,000 in funding for MUS

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upon the Regents surrendering BOR's right, and its duty, to challenge the law in a court of law.

(Dkt. 7, at 4-5 (May 27, 2021).)

On May 20, 2021, Governor Gianforte signed HB 2. Seven days later, the Board filed is Declaratory Relief Petition in this proceeding wherein it challenges HB 102's constitutionality as applied to it, MUS, and MUS campuses and locations.[1] It claims "HB102 materially alters the existing firearms policies on all [MUS] campuses by allowing open carry and concealed carry, contrary to existing policy adopted by the [Board] in 2012."

The Board argues, in relevant part:

> Montana's Constitution vests sole and full authority in [it] to "supervise, coordinate, manage and control the Montana university system." Mont. Const., art. X, §9(2)(a). In enacting HB102, the 2021 Montana Legislature (the "Legislature") has impermissibly curtailed [the Board's] authority to determine the best policies to "ensure the health and stability of the MUS." *Sheehy v. Commissioner of Political Practices*, 2020 MT 37, ¶ 29 . . ., quoting Mont. Const., art. X, § 9.
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> If HB102 becomes effective immediately, the MUS will suffer significant and irreversible financial injury. Immediate implementation of HB102 requires funds to create training programs, hire new employees, and other functions. (Rogers Declaration, ¶ 8). The Legislature allotted $1,000,000 to the MUS to fund implementation, but that funding was contingent upon BOR's acquiescing to constitutionality of HB102. (Ex. 3). BOR will still incur expense dealing with the fallout from any perceived applicability of HB102, even if it is declared unconstitutional at a later date. (Rogers Declaration, ¶ 7).

(Dkt. 7, at 2, 12 (May 27, 2021).)

[1] With all due respect to Montana, the Court respectfully disagrees with it that the Board substantially delayed its request for judicial declaratory relief.

DISCUSSION

A. Preliminary Injunction Standard

A district court may issue a preliminary injunction in any of the following cases:

> (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;
>
> (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition; [or]
>
> (5) when it appears that the applicant has applied for an order under the provisions of [Section] 40-4-121 or an order of protection under Title 40, chapter 15.

Mont. Code Ann. § 27-19-201 (2019).

The Board only needs to meet the criteria in one of these subsections for a preliminary injunction order. *Sweet Grass Farms, Ltd. v. Bd. of Co. Comm'rs*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825. A preliminary injunction does not resolve the merits of the case, but rather prevents further injury or irreparable harm by preserving the status quo of the subject in controversy pending adjudication on its merits. *See Four Rivers Seed Co. v.*

Circle K Farms, Inc., 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342 (citing *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995)). When considering an application for a preliminary injunction, a district court has the duty to balance the equities and minimize potential damage. *Id.* It is error for a district court to determine the ultimate merits of the case at the preliminary injunction stage.

> In determining the merits of a preliminary injunction, it is not the province of either the District Court or this Court on appeal to determine finally matters that may arise upon a trial on the merits. The limited function of a preliminary injunction is to preserve the *status quo* and to minimize the harm to all parties pending full trial; findings and conclusions directed toward the resolution of the ultimate issues are properly reserved for trial on the merits. In determining whether to grant a preliminary injunction, a court should not anticipate the ultimate determination of the issues involved, but should decide merely whether a sufficient case has been made out to warrant the preservation of the *status quo* until trial. A preliminary injunction does not determine the merits of the case, but rather, prevents further injury or irreparable harm by preserving the *status quo* of the subject in controversy pending an adjudication on the merits.

Yockey v. Kearns Props., LLC, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185. (citations omitted).

Here, the Board seeks preliminary injunction relief under Mont. Code Ann. § 27-19-201(1) and/or Mont. Code Ann. § 27-19-201(2).

> Section 27-19-201(1), MCA, provides that a preliminary injunction may issue when an applicant has demonstrated that he is entitled to the injunctive relief he has requested. To prevail under Section 27-19-201(1), MCA, an applicant must establish that he has a legitimate cause of action, and that he is likely to succeed on the merits of that claim.

Cole v. St. James Healthcare, 2008 MT 453, ¶ 15, 348 Mont. 68, 72, 199 P.3d 810, 814 (citing *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 22, 334 Mont. 86, 146 P.3d 714; *M.H. v. Mont. High Sch. Assn.*, 280 Mont. 123, 135, 929 P.2d 239 (1996)).

As to section 27-19-201(2), the Board must make "some demonstration of threatened harm or injury, whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA." *Weems v. State*, 2019 MT 98, ¶ 17, 395 Mont. 350, 440 P.3d 4 (citing authority).

Moreover, contrary to Montana's hearing arguments:

> In the context of a constitutional challenge, an applicant for preliminary injunction need not demonstrate that the statute is unconstitutional beyond a reasonable doubt, but "must establish a prima facie case of a violation of its rights under" the constitution. *City of Billings v. Cty. Water Dist. of Billings Heights*, 281 Mont. 219, 227, 935 P.2d 246, 251 (1997). "Prima facie" means literally "at first sight" or "on first appearance but subject to further evidence or information." Prima facie, Black's Law Dictionary (10th ed. 2014).

Weems, at ¶18.

B. To Maintain the Status Quo, the Board is Entitled to a Preliminary Injunction

The right to keep or bear arms' scope is limited

Montana argues "HB 102 protects Montanans' constitutional right to keep and bear arms. The bill aims to increase the safety of Montana residents by safe-guarding their fundamental right to defend themselves and others." Montana contends that the Board may not infringe on Second Amendment rights.

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The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

The United States Supreme Court has held that the Second Amendment protects an individual's right to possess a firearm "unconnected with militia service." *District of Columbia v. Heller*, 554 U.S. 570, 5825 (2008). At its "core," the Second Amendment is the right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, at 634-35. Notwithstanding, however, the individual rights guaranteed by the Second Amendment, are "not unlimited." *Heller*, at 626. In this regard, the *Heller* Court identified a non-exhaustive list of "presumptively lawful regulatory measures" that have historically been treated as exceptions to the right to bear arms. *Heller*, at 626-27 & n.26. They include, but are not limited to, "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, at 626-27 (emphasis added).

Moreover, in *Robertson v. Baldwin*, 165 U.S. 275 (1897), the United States Supreme Court made clear that the Second Amendment did not protect the right to carry a concealed weapon. The *Robertson* Court stated:

> [T]he first 10 amendments to the constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-

> recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus . . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons[.]

Id., at 281-82.

In Montana:

> 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.

Art. II, sec. 12, Mont. Const. (emphasis added). This right is also not unlimited. *State v. Fadness*, 2012 MT 12, ¶ 31, 363 Mont. 322, 268 P.3d 17 (citing *State v. Maine*, 2011 MT 90, ¶ 29, 360 Mont. 182, 255 P.3d 64). The *Fadness* Court noted that:

> In fact, in proposing Article II, Section 12 at the 1972 Constitutional Convention, the Bill of Rights Committee noted "that the statutory efforts to regulate the possession of firearms have been at the federal level and are, therefore, not subject to state Constitutional provisions. In addition, it is urged—and requires no citation—that the right to bear arms is subject to the police power of the state." Montana Constitutional Convention, Comments on the Bill of Rights Committee Proposal, Feb. 22, 1972, vol. II, p. 634; see also Montana Constitutional Convention, Verbatim Transcript, Mar. 8, 1972, pp. 1725-42, Mar. 9, 1972, pp. 1832-42 (twice rejecting a proposal to add nor shall any person's firearms be registered or licensed" to Article II, Section 12, with several opponents of this

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> language arguing that the decision to adopt registration and licensing requirements is a legislative, rather than constitutional, matter).

Id.

In addition, the "State of Montana has a police power by which it can regulate for the health and safety of its citizens." *Wiser v. State*, 2006 MT 20, ¶ 19, 331 Mont. 28, 129 P.3d 133 (citing *State v. Skurdal*, 235 Mont. 291, 294, 767 P.2d 304, 306 (1988)). In this regard, the state's police power is valid even when a governmental regulation infringes upon individual rights. *Skurdal*, at 294 (citing authority). Here, as agreed to by Montana, a constitutional issue remains whether either the Legislature or the Board has the police power to protect the safety and well-being of those who utilize MUS campuses and location. In this regard, there should be no dispute that there are very few constitutional rights which are always absolute and inalienable. *Id.* (citing authority).

At this juncture in this proceeding, the Court has not been presented with any controlling legal authority that the right to keep or bear arms on MUS campuses and other locations under either the United States Constitution or the Montana Constitution is an absolute right. Furthermore, there is doubt who has the constitutional authority to regulate firearms on MUS campuses and other locations.

Board authority over MUS campuses and locations

The Board has sole authority to "supervise, coordinate, manage and control [MUS]." Mont. Const., art. X, §9(2)(a). In this regard, the Board has broad constitutional and statutory authority to determine the best policies to "ensure the health and stability of the MUS." *Sheehy v. Commissioner of Political Practices*, 2020 MT 37, ¶ 29, 399 Mont. 26, 458 P.3d 309.

Since 1975, the Montana Supreme Court has steadfastly recognized and upheld the Board's constitutional authority when the Legislature has placed policymaking limitations on the Board. See *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323, 1325 (1975) (Legislature's policy making limitations placed on Board "specifically den[y] the [Board] the power to function effectively by setting its own [] policies and determining its own priorities." *Judge*, at 454. "Inherent in the constitutional provision granting the [Board its] power is the realization that the Board of Regents is the competent body for determining priorities in higher education." *Id.*

Here, at this juncture, it appears HB 102 interferes with the Board's constitutional authority to control, manage, supervise, and coordinate the MUS. This would include, but not limited to, the Board's authority to prioritize and implement firearm policies on MUS campuses and locations as set forth in Policy 1006. It also appears that Policy 1006 relates to the Board's prioritization of student, visitor, faculty, administration and staff protection, safety and well-being on MUS campuses and locations.

In addition, based upon Regent Rogers' uncontroverted Declaration, the Court agrees with the Board that it "has not just established 'some degree' of financial injury, but has amply demonstrated significant [financial] injury" if this Court's vacates its May 28, 2021 TRO.

ORDER

Based on the above and to preserve the *status quo*, the Board has "demonstrated either a prima facie case that [it] will suffer some degree of harm and [is] entitled to relief [Mont. Code Ann. § 27-19-201(1)] or a prima facie case that [it] will suffer an 'irreparable injury' through the loss of a constitutional right

[(Mont. Code Ann. § 27-19-201(2])." *Driscoll v. Stapleton*, 2020 Mont. 247, ¶ 17, 401 Mont. 405, 473 P.3d 386. Accordingly, the Court hereby **ORDERS, ADJUDGES AND DECREES** as follows:

1. The Board's preliminary injunction request is **GRANTED**; and

2. This Court's May 28, 2021 Temporary Restraining Order is **CONVERTED** to a Preliminary Injunction until further order of this Court in all respects.

ORDERED this 7th day of June 2021.

MICHAEL F. McMAHON
District Court Judge

cc: David Dewhirst, (via email to: david.dewhirst@mt.gov)
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65TH MONTANA LEGISLATURE

Lawsuits linger long after session

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

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

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

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

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

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Lawsuits

From A1

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

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

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

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

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

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

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

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

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

Is any publicity good publicity?

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

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

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

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

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

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

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

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

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

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

Judicial attacks

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

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

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

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

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

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

One last effort

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

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

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

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

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

"Maybe there's a sense