IN THE SUPREME COURT OF THE
STATE OF MONTANA

Case No. _____

MONTANA SHOOTING SPORTS ASSOCIATION,

Petitioner/Intervenor

v.

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

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL

From the Montana First Judicial District Court
Lewis & Clark County, Cause No. DV-21-598
Before Hon. Michael F. McMahon

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PETITION

Petitioner and Intervenor below, Montana Shooting Sports Association (MSSA) hereby applies, pursuant to MONT. R. APP. P. 14(3), for an extraordinary writ of supervisory control directing the Respondent, the Honorable Michael F. McMahon, Judge of the Montana First Judicial District, Lewis & Clark County, to grant MSSAs' petition for intervention. The application seeks review and control over the District Court's ruling dated July 16, 2021 (Dkt. No. 46, attached hereto as "Exhibit 1"), under which it denied MSSA's motion to intervene.

Facts Which Make It Appropriate for The Supreme Court to Assume Jurisdiction

1. The Montana Legislature passed an act generally revising gun laws during the 2021 legislative session commonly referred to as HB102. HB102 was so politically popular that it was the second bill to

clear both houses of the Legislature in the 2021 session, and with much ceremony, it was the second bill signed by the newly sworn-in Governor Greg Gianforte.[1]

2. HB102, *inter alia*, includes sections that allows students on Montana University System ("MUS") campuses to keep or bear arms, commonly known as "campus carry". (*See* Decl. of Gary Marbut, ¶ 11, attached hereto as "Exhibit 2.")

3. The Board of Regents of Higher Education of The State of Montana ("BoR") filed a petition for declaratory relief seeking to have the campus carry sections of HB102 declared void as an unconstitutional infringement on their authority.

4. Intervenor Montana Shooting Sports Association (MSSA) is a non-profit corporation organized under the laws of the State of Montana. (Ex. 2, ¶ 4.)

5. The purpose of MSSA is to support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms, to provide education to its members

[1] See, e.g., https://montanafreepress.org/2021/02/18/gianforte-signs-constitutional-carry-gun-bill/

concerning shooting, firearms, safety, hunting and the right to keep and bear arms, to own and or manage one or more shooting facilities for the use of its members and or others, and to conduct such other activities as serves the needs of its members. (Ex. 2, ¶¶ 8–9.)

6. MSSA regularly lobbies the Montana Legislature, and its efforts were instrumental in the passage of the Montana preemption statutes at issue in this civil action. MSSA members have a genuine and viable interest in this case, as its goals and its existence depend upon the protection of the rights and interests of its members, and the enforcement of Montana law. (*Id.*)

7. MSSA's membership includes, without limitation, students and MUS employees from across the MUS. (Ex. 2, ¶ 7.)

8. The chief features of HB102 include permit-less carry of firearms (no government permit needed to put on a coat), campus carry, bar and restaurant carry, and enhancement of existing concealed weapon permits ("CWP"). All of this was included under the general title and purpose of eliminating alleged "gun free zones." (Ex. 2, ¶ 11.)

9. The history of HB102 begins in the 1989 session of the Legislature. Gary Marbut, current president of MSSA (then president

of the Montana Rifle and Pistol Association—MSSA was founded in 1990) arranged for introduction of a bill to move Montana to a "shall issue" CWP system. In 1989 and before, permits were only issued by district court judges. Over half of the counties in Montana did not even have application forms. In only one county, Butte-Silver Bow, were permits routinely issued to law-abiding citizens. Montanans from across the state would travel to Butte to obtain a CWP. (*Id.*, ¶¶ 12–13.)

10. The 1989 "shall issue" bill sought CWP issuance by elected sheriffs with limited discretion for permit application denial. That bill was carried by Rep. Jerry Driscoll (D-Billings) but died with a 49-51 vote in the House upon Third Reading. It had been opposed by various law enforcement entities. (*Id*, ¶ 14.)

11. Between the 1989 and 1991 sessions, MSSA met with law enforcement entities multiple times to negotiate a CWP bill acceptable to gun owners and law enforcement. A compromise bill was agreed upon and was introduced in the 1991 legislative session as HB90 by Rep. Dave Brown (D-Butte). Notwithstanding the agreement between gun owners and law enforcement, the lobbyist for the Montana Sheriffs and Peace Officers Association offered an amendment to HB90 in the

House Judiciary Committee to create a list of "prohibited places" (bars, banks, college campuses, and public buildings) where CWPs could not be used. That amendment was successful, created what became Mont. Code Ann. § 45-8-328, and kicked off a long public policy debate that was ultimately resolved with HB102 in 2021. (*Id.*, ¶ 15.)

12. Between 1991 and 2021 MSSA brought numerous bills before the Legislature to eliminate or modify the prohibited places prohibitions enacted as a part of HB90 in 1991. One successful bill clarified that the prohibition on CWP usage in places with a liquor licenses only applied where the license allowed consumption on the premises, but not places that were carry-out only such as liquor stores. Another change clarified that the prohibition in banks did not include ATMs and drive-up tellers, but only in bank lobbies. Yet another change clarified that the prohibition on CWP exercise in public buildings did not include unstaffed structures such as parking garages and highway rest stops. (*Id.*, ¶ 16.)

13. One of the most debated issues surrounding concealed carry of firearms has long been about bars, defined as places that have a liquor license that allows serving of alcohol for consumption on the

premises. This longstanding definition includes many restaurants. The prohibitory scheme that has been in effect since 1991 has some very odd consequences that result in awkward public policy. (*Id.*, ¶ 17.)

14. Under this scheme, if a person were having dinner with family members at a restaurant with a liquor license and the person had a CWP and was not drinking anything alcoholic, the person was still prohibited from using his CWP. However, the law did not prohibit the same conduct by a person wearing a firearm unconcealed. In a genuine bar, for customers overtly drinking alcohol, the law did not prohibit patrons from carrying openly, but only prohibited people with CWPs from using their permits there. (*Id.*, ¶ 18.)

15. The "prohibited places" prohibition, Mont. Code Ann. § 45-8-328, long fraught with conceptual and interpretation problems, and always a bone of public policy contention, was finally all but eliminated with HB102 in 2021. (*Id.*, ¶ 19.)

16. The permit-less carry feature of HB102 was also the end result of a long public policy evolution, buoyed by ever-increasing public support for the right to keep or bear arms, and much debate in which MSSA was closely involved for nearly two decades. (*Id.*, ¶¶ 20–21.)

17. MSSA was heavily involved with the passage of HB102, in fact, Mr. Marbut drafted the version of the bill which was originally introduced to the legislature. (*Id.*, ¶ 25.)

18. As the legislative session progressed, HB102's sponsor, Representative Seth Berglee, MSSA, and representatives from the MUS engaged in numerous negotiations which resulted in amendments to the bill. (*Id.*, ¶¶ 25–26.)

19. On January 8, 2021, Helen C. Thigpen, Deputy Chief Legal Counsel for MUS sent an email to Representative Seth Berglee with a copy to House Judiciary Committee's staff attorney Rachel Weiss. (*Id.*, ¶ 27.)

20. Thigpen was the staff attorney for House Judiciary in the 2013, 2015, and 2017 legislative sessions. This email also copied Tyler Trevor Deputy Commissioner for Budget and Planning, and Chief of Staff for the Montana Commissioner of Higher Education. Declared in the email to be acting on behalf of the Commissioner of Higher Education, Clayton Christian, Thigpen officially asks Berglee to make amendments to HB102 to accomplish three specified changes. (*Id.*, ¶ 28.)

21. The three changes to HB102 requested in this email from Thigpen to Berglee were:

> a. That HB102 be amended to require that the campus carry element of HB102 be "limited to those individuals who possess a current and valid CWP." The concern expressed by MUS officials in separate communication with Berglee was to insure that people exercising prerogatives under HB102 on campus have some firearms safety training. Berglee subsequently satisfied this request with an amendment requiring that anyone possessing a firearm on campus must, at a minimum, have satisfied the firearms safety training detailed in law to apply for a CWP.
>
> b. That HB102 be amended "to allow restrictions at campus events, including athletics, commencements, and live performances/concerts." Berglee and I discussed this request and in response crafted amendatory language for HB102 to allow MUS restrictions for " the possession of a firearm at an athletic or entertainment event open to the public with controlled access and armed security on site."
>
> c. That "the bill also be revised to allow restrictions in dormitories and other student housing facilities." Berglee and I discussed this request but could not accommodate it because to do so would be counter to the core holding of *District of Columbia v. Heller,* 554 U.S. 570 (2008) concerning persons being prohibited by a government entity from possessing a firearm in the person's domicile.

(*Id.*, ¶ 29.)

22. Amendment HB102.001.002, made in the House Judiciary Committee to Section 6 of HB102 on January 11, 2021, limited campus carry to persons who had completed any one of the firearms safety

training options listed in Montana law to qualify a person to apply for a CWP.[2] (*Id.*, ¶ 30.)

23. Amendment HB102.002.002 was done in the Senate Judiciary Committee on January 26, 2021, and made to Section 6 of the bill. This amendment expanded on a list of regulations appropriate for the MUS to implement and added that the campuses could prohibit the possession of firearms at "an athletic or entertainment event open to the public with controlled access and armed security on site."[3] (*Id.*, ¶ 31.)

24. The third change made on January 26, 2021, to accommodate the MUS was also contained in amendment HB102.002.008. This amendment was to Section 15 and established a delayed effective date for the campus carry portion of HB102. The MUS had asked that they be given a reasonable amount of time to implement HB102, so a delayed effective date of June 1, 2021, was amended into HB102 by the Senate Judiciary Committee. (*Id.,* ¶ 32.)

[2] See, https://leg.mt.gov/bills/2021/AmdPublicWeb/HB0102.001.002.pdf
[3] See: https://leg.mt.gov/bills/2021/AmdPublicWeb/HB0102.002.008.pdf

25. Also, during the legislative session, the Legislative Services Division recycled and reissued a Legal Note that had previously been issued for campus carry bills before the Legislature. This Legal Note raised some of the same questions posed by BoR in its Petition. The final version of this Legal Note includes the Requester Comments that address questions raised by the Legal Note. This complete Legal Note is a prime part of the legislative history of HB102. (*Id.*, ¶ 33.)

26. All of this is history that culminated with the enactment of HB102. (*Id.*, ¶ 34.)

27. MSSA sought intervention *Montana Board of Regents v. Montana*, Cause No.: BDV-2021-598, Montana First Judicial District Court, Lewis and Clark County (the "underlying action") on June 8, 2021.

28. The District Court denied MSSA's motion to intervene on July 16, 2021. (Ex. 1.)

The Particular Legal Questions and Issues Anticipated or Expected to Be Raised in the Proceeding

MSSA should be allowed to intervene in the underlying action on behalf of its members who live, work, and attended classes on Montana

University System premises throughout the state of Montana, on grounds that MSSA was a key proponent in the adoption of HB102, having sought such reform over the course of decades. MSSA is in the best position to vigorously defend the rights of its members.

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Arguments and Authorities for Accepting Jurisdiction and Pertaining to the Merits of the Particular Questions and Issues Anticipated or Expected to Be Raised

LEGAL STANDARD

A non-party has, under certain circumstances, a right to intervene in a civil action "of right" per M. R. Civ. P. 24(a)(2). Intervention is allowed "of right" when an applicant claims an interest merely "relating" to the property or transaction which is the subject of the action and "the applicant is so situated that the disposition of the action ***may*** as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. *Id.* (emphasis added). "Rule 24 is designed to protect nonparties from having their interest adversely affect by litigation conducted without their participation." *Clark Fork*

Coalition v. Montana Dept. of Environmental Quality, 2007 MT 176, ¶ 10, 338 Mont. 205, 14 P.3d 902 (quoting *Gruman v. Hendrickson*, 416 N.W. 2d 497, 500 (Minn. App. 1987)). "Montana's rule is essentially identical to the federal rule which is interpreted liberally." *Sportsmen for I-143 v. Montana Fifteenth Judicial Dist. Court, Sheridan Cnty.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)).

In *Estate of Schwenke v. Becktold*, 252 Mont. 127, 827 P.2d 808 (1992), the Court promulgated four criteria which an intervenor must meet in moving for intervention as a matter of right. These criteria include:

> (1) The motion must be timely;
>
> (2) The intervenor must have an interest in the subject matter at issue;
>
> (3) The intervenor must have an interest which ***may*** be impaired by the disposition of the case; and
>
> (4) The intervenor must have an interest which was not adequately represented by an existing party.

Schwenke, 252 Mont. at 131, 827 P.2d at 811 (emphasis added). In addition, a determining factor in a motion for intervention is

whether the motion seeks to relitigate or reopen issues already decided. *In re Marriage of Glass*, 215 Mont. 248, 253, 697 P.2d 96, 99 (1985). See, *Pengra v. State*, 2000 MT 291, ¶1, ¶ 4, 302 Mont. 276, 14 P.3d 499.

DISCUSSION

1. This Court should issue a writ of supervisory control because the District Court is proceeding under a mistake of law and the normal appeal process is inadequate.

This Court has supervisory control over all other courts and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. M. R. App. P. 14(3). Supervisory control is utilized by this Court when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when the district court is proceeding under a mistake of law and is causing gross injustice or constitutional issues of state-wide importance are involved. *Sportsmen for I-143,* ¶ 4; M. R. App. P. 14(3)(a) and (b). The determination of whether to exercise supervisory control is based on the presence of extraordinary circumstances and a particular need to prevent an injustice form occurring. *Id.* (citing *Park*

v. Montana Sixth Judicial Dist. Cout, 1998 MT 164, ¶ 13, 289 Mont. 367, 961 P.2d 1267 (citation omitted)).

While an order denying a motion to intervene is not separately appealable under M. R. App. P. 1, the proper appeal from such an interlocutory order lies after entry of final judgment. *Id.*, ¶ 5 (citations omitted). Supervisory control, however, may be used to immediately review an interlocutory order where there is no remedy by appeal or other remedial procedure and where extraordinary circumstances are present. *Id.* This Court has also allowed supervisory control when an appeal from a final judgment would impose undue hardship on an applicant and be wholly inadequate as a remedy or cause extended and needless litigation. *Id.*

Here, MSSA played a nearly identical role to the interest group in *Sportsmen*. MSSA was not only involved in the drafting of HB102 but was also a party to negotiations between state representatives and agents of the MUS. (See, Ex. 2.) At all steps of the legislative process, MSSA was actively supporting HB102's passage.

The normal appeal process will likewise be inadequate in this case. 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. The issues in this case are purely legal and are of statewide importance as they concern the ability of law-abiding citizens to exercise campus carry throughout Montana. Accordingly, this case is appropriate for this Court's exercise of supervisory control.

2. MSSA members include MUS students and employees whose HB102 campus carry rights are jeopardized by the relief sought in the BoR's petition.

The threshold factor on a motion to intervene is timeliness, which has been conceded in this case. Next, a court must determine whether the party seeking intervention has made a merely *prima facie* showing of a direct, substantial, legally protectable interest in the proceedings." *Sportsmen for I-143,* ¶ 9 (quoting *DeVoe v. State*, 281 Mont. 356, 363, 935 P.2d 26, 260 (1997)). Such a determination is a conclusion of law. *Id.* Here, MSSA Members have a right to keep and bear arms under the challenged statutory scheme, which, if implemented as drafted, they intend to exercise. It has been recognized that public interest groups have broad rights of intervention in matters that effect their members.

Sportsmen for I-143, ¶ 12. For example, in *Sportsmen for I-143*, it was held that a public interest group has a right to intervene in an action merely because its members had supported a challenged ballot initiative. Significantly, in that case, no individual statutory rights were at stake. Still, 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." *Id.* (emphasis added). In this case, MSSA has a long history of drafting and supporting gun rights legislation in Montana, HB102 being no exception. (*See* Ex. 2.) The history behind HB102 spans back decades, and MSSA and its predecessors have been involved every step of the way. (*Id.*) Now that MSSA has emerged victorious in a hard-fought legislative battle, its members intend to exercise their campus carry rights under the statute. BoR seeks to strip them of those rights. Thus, MSSA and its members have a state law interest in the subject matter. *See*, *Schwenke*, 252 Mont. at 131, 827 P.2d at 811.

3. The interest of MSSA members on university campuses across Montana "may be impaired" if the challenged sections of HB102 are deemed unconstitutional.

BoR's petition seeks to strip MSSA members who attend MUS of their statutory rights. BoR has brought an "as-applied" challenge to HB102, arguing the statute unconstitutionally limits its power promulgated by Article X, Section 9 of the Montana Constitution. (Dkt. 1, ¶ 6, attached hereto as "Exhibit 3.") An as-applied challenge alleges that a particular application of a statute is unconstitutional and depends on the facts of a particular case. *City of Missoula v. Mountain Water Company*, 2018 MT 139, ¶ 25, 391 Mont. 422, 419 P.3d 685. BoR, as the challenging party, must prove HB102 is unconstitutional beyond a reasonable doubt. *State v. Walker*, 2001 MT 170, ¶ 7, 306 Mont. 159, 3 P.3d 1099. Statutes are presumed to be constitutional, and any doubt is to be resolved in favor of the statute. *Id.* It is not for the courts to say whether the provisions of a statute or wise or not; the duty of the courts is to require enforcement thereof as they find it, whether the statutory provisions constitute an exercise of sound discretion is not at issue. *School Dist. No. 12, Phillips County v. Hughes*, 170 Mont.267, 276, 552 P.2d 328, 333 (1976).

Here, BoR alleges the Legislature has infringed upon its authority to "supervise, coordinate, manage and control the Montana university

system" as set forth in Mont. Const. Art. X, Sec. 9(2)(a). (*See*, Ex. 3.) BoR currently has a policy addressing use and access to firearms on MUS campuses referred to as BOR Policy 1006. (*Id.,* ¶ 16.) As a basis for requesting preliminary injunctive relief, BoR argued the enactment of HB102 would cause confusion amongst citizens on MUS campuses on whether they are allowed to exercise their campus carry rights or must still abide by policy 1006. (Dkt. 7, p. 12, attached hereto as "Exhibit 4.") Should HB102 be declared unconstitutional as applied to BoR, it will continue to enforce the existing policy and disrupt the statutory rights granted by HB102. Therefore, the relief sought in this case, if granted, would impair the rights of MSSA members.

4. As a primary proponent of campus carry legislative reforms, MSSA members' interest in HB102 is not adequately protected.

As did the successful intervenors in *Sportsmen for I-143*, ¶¶ 16–17, MSSA wants to ensure that the interests of its members "are vigorously represented at all times." In that case, the Sportsmen's Groups were the authors, sponsors, active supporters, and defenders of a legislative initiative. *Id.*, ¶12. MSSA played identical roles in the drafting, support, and ultimate enactment of HB102. (*See* Ex. 2.)

MSSA was a key grassroots supporter which promoted HB102 in the legislature, for years, before it was finally adopted and signed into law in 2021. (*Id.*) Like the successful intervenors in *Sportsmen for I-143*, MSSA actively drafted and supported HB102. (*Id.*) MSSA therefore "may be in the best position to defend their interpretation of the resulting legislation." *Sportsmen for I-143*, ¶ 17.

In fact, in *Sportsmen for I-143*, the Court found the principle to be so compelling, it granted extraordinary relief, in the form of a writ of supervisory control, in allowing the interest groups to intervene "as of right." MSSA seeks to be involved as early as possible in this case for the purpose of defending the rights of its members and the legislation it has labored to see passed. As the State admits, this interest is not adequately represented by an existing party.

The State never opposed MSSA's motion to intervene. (*See*, Dkt. 35 and 37, attached respectively as "Exhibit 5" and "Exhibit 6.") In fact, the State correctly believes MSSA offers valuable perspective to the underlying action. This perspective is important considering the BoR seeks to enjoin the section of HB102 which prohibits it from enforcing rules that restrict a person's right to keep and bear arms. The State

cannot assert individual rights on behalf of citizens. Mont. Code Ann. § 2-15-501 (prescribing limited duties to the office of the Attorney General). Both the Federal and Montana Constitutions confer an individual right to keep and bear arms. *D.C. v. Heller*, 544 U.S. 570, 595 (2008); Mont. Const. Art. II, Sec. 12. As the State cannot assert individual rights, MSSA should be allowed to intervene and do so.

Federal courts consider, *inter alia*, the following in determining whether an interest is represented by an existing party: (1) whether the interest of a present party is such that it will undoubtedly make all of the intervenor's arguments: and (2) whether the present party is capable and willing to make such arguments. United States v. Los Angeles, 288 F. 3d at 398. Here, the State is prohibited from making a key argument to be proffered by MSSA, namely that HB102 protects the right of individuals to keep and bear arms on MUS campuses. While the State and MSSA may seek the same outcome, they offer different perspectives and arguments to equally important issues.

The State has acknowledged that it cannot adequately represent the interest of MSSA and its members, and accordingly MSSA should be allowed to intervene. Due to MSSA's extensive involvement as an

HB102 proponent, and the State's acknowledgement that it cannot adequately represent the interest of MSSA and its members, MSSA should be allowed to intervene in this action as of right.

CONCLUSION

Accordingly, the Court is asked to issue an order of supervisory control directing the District Court to allow MSSA to intervene in the underlying action for the purposes of protecting its members individual rights under applicable constitutional and statutory law; and grant such other relief as may be warranted in the circumstances.

DATED this 3rd day of August 2021.

Respectfully Submitted,
RHOADES SIEFERT & ERICKSON PLLC

By: */s/ Quentin M. Rhoades*
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CERTIFICATE OF COMPLIANCE

This Petition complies with the type-volume limitation of Mont. R. App. P. 14(9) because, according to the word count function of Microsoft Word, this petition contains less than 4,000 words, exclusive of the caption, certificate of service, and certificate of compliance.

DATED this 3rd day of August 2021.

/s/ Quentin M. Rhoades
Quentin M. Rhoades

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August 2021, I served upon the following a true and correct copy of the foregoing by depositing said copy in the U.S. mail, postage prepaid, and addressed as follows:

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/s/ Quentin M. Rhoades
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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA, Petitioner, 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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EXHIBIT 1

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

EXHIBIT 1

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).

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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

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> 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

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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*,

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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.

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(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

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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).

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"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.*

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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

cc: David Dewhirst, (via email to: david.dewhirst@mt.gov)
J. Stuart Segrest (via email to: ssegrest@mt.gov)
Hannah Tokerud (via email to: hannah.tokerud@mt.gov)
Ali Bovingdon, (via email to: abovingdon@montana.edu)
Martha Sheehy, (via email to: msheehy@sheehylawfirm.com)
Kyle A. Gray, (via email to: kgray@hollandhart.com)
David W. Diacon, (via email to: dwdiacon@diacon.us.com)
Quentin M. Rhodes, (via email to: qmr@montanalawyer.com)

MFM/tm/BDV-2021-598 Board of Regents v. State of Montana, et al - Order Denying Intervention Motions and Briefing Schedule.doc

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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 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.

THE MONTANA SHOOTING SPORTS ASSOCIATION

2. I am the president of the Montana Shooting Sports Association (MSSA) and have served in that capacity since 1990.

3. MSSA is established as the primary political advocate for Montana gun owners, of which there are many, hailing from every quarter of Montana society.

4. MSSA is a nonprofit corporation under Montana law and the Secretary of State's Website shows it was first incorporated on July 5, 1990. The Registered Agent listed is me, Gary Marbut, also current MSSA President. MSSA was founded specifically to be the political advocate for Montana gun owners and the Right to Keep or Bear Arms (RKBA). (Note: The U.S. Constitution says "keep and bear" but the Montana Constitution says "keep or bear".) MSSA is not an IRS tax exempt organization.

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5. MSSA is affiliated or associated with the National Rifle Association, Gun Owners of America, the Second Amendment Foundation, and Citizens Committee for the Right to Keep and Bear Arms. MSSA has a working relationship with Jews for the Preservation of Firearms Ownership, the Firearms Policy Coalition, and many other national and state-level organizations.

6. Policy is set for MSSA by a nine-member Board of Directors who are geographically dispersed - Missoula, Kalispell, Great Falls (2), Butte, Billings, Helena (2), and Sidney. MSSA business is conducted at its Annual Meeting in Helena each March, or by phone and email among officers and Directors.

7. While MSSA membership and numbers is protected from disclosure by a privacy provision in MSSA Bylaws, MSSA has members in all Montana communities.

8. Although MSSA is involved in firearms safety education, litigation of RKBA-related issues, and local and federal issues, MSSA is most well known as being the most successful such entity in the U.S. for getting pro-gun legislation enacted at the state level. Since its founding, MSSA has gotten 70 pro-gun bills enacted into law in Montana. This does

not include various measures that have failed in process in one way or another, most commonly because of vetoes by various governors.

9. MSSA has been named by a national entity as a champion of the RKBA, and MSSA's president has twice been named as national grassroots activist of the year for the RKBA. MSSA and I, as its president, have been featured in the Wall Street Journal, on National Public Television in a documentary series concerning the Constitution, on live national cable television, and in too many other national and Montana publications to mention.

10. I am the author of *Gun Laws of Montana*, a trade paperback now in its Fifth Printing, and I am accepted as an expert in state and federal courts concerning firearm safety, self-defense, and related topics. I have been published in *The Defender*, the publication of the National Association of Criminal Defense Lawyers. I was also named as a champion of individual liberty by the delegates to the 1972 Montana Constitutional Convention.

MSSA AND HOUSE BILL 102

11. The chief features of HB102 include permit-less carry of firearms (no government permit needed to put on a coat), campus carry, bar and restaurant carry, and enhancement of existing concealed weapon

permits (CWP). All of this was included under the general title and purpose of eliminating alleged "gun free zones."

12. The history of HB102 really begins in the 1989 session of the Legislature. As president of the Montana Rifle and Pistol Association, I arranged for introduction of a bill to move Montana to a "shall issue" CWP system.

13. In 1989 and before, permits were only issued by district court judges. Over half of the counties in Montana did not even have application forms. In only one county, Butte-Silver Bow, were permits routinely issued to law-abiding citizens. Montanans from across the state would travel to Butte to obtain a CWP.

14. The 1989 "shall issue" bill sought CWP issuance by elected sheriffs with limited discretion for permit application denial. That bill was carried by Rep. Jerry Driscoll (D-Billings) but died with a 49-51 vote in the House upon Third Reading. It had been opposed by various law enforcement entities.

15. Between the 1989 and 1991 sessions, MSSA met with law enforcement entities multiple times to negotiate a CWP bill acceptable to gun owners and law enforcement. A compromise bill was agreed upon and was introduced in the 1991 legislative session as HB90 by Rep. Dave Brown

(D-Butte). Notwithstanding the agreement between gun owners and law enforcement, the lobbyist for the Montana Sheriffs and Peace Officers Association offered an amendment to HB90 in the House Judiciary Committee to create a list of "prohibited places" (bars, banks, and public buildings) where CWPs could not be used. That amendment was successful, created what became Mont. Code Ann. § 45-8-32, and kicked off a long public policy debate that was ultimately resolved with HB102 in 2021.

16. Between 1991 and 2021 MSSA brought numerous bills before the Legislature to eliminate or modify the prohibited places prohibitions enacted as a part of HB90 in 1991. One successful bill clarified that the prohibition on CWP usage in places with a liquor licenses only applied where the license allowed consumption on the premises, but not places that were carry-out only such as liquor stores. Another change clarified that the prohibition in banks did not include ATMs and drive-up tellers, but only in bank lobbies. Yet another change clarified that the prohibition on CWP exercise in public buildings did not include unstaffed structures such as parking garages and highway rest stops.

17. One of the most debated issues surrounding concealed carry of firearms has long been about bars, defined as places that have a liquor

license that allows serving of alcohol for consumption on the premises. This longstanding definition includes many restaurants. The prohibitory scheme that has been in effect since 1991 has some very odd consequences that result in awkward public policy.

18. Under this scheme, if a person were having dinner with family members at a restaurant with a liquor license and the person had a CWP and was not drinking anything alcoholic, the person was still prohibited from using his CWP. However, the law did not the prohibit same conduct by a person wearing a firearm unconcealed. In a genuine bar, for customers overtly drinking alcohol, the law did not prohibit patrons from carrying openly, but only prohibited people with CWPs from using their permits there.

19. Section 45-8-328, M.C.A., the "prohibited places" prohibition, long fraught with conceptual and interpretation problems, and always a bone of public policy contention, was finally all but eliminated with HB102 in 2021.

20. The permit-less carry feature of HB102 was also the end result of a long public policy evolution and much debate. The original "shall issue" CWP bill in 1991, HB 90, allowed concealed carry of a firearm without a government permit outside the limits of a city or town. According

to the Montana League of Cities and Towns, this condition prevailed in 99.6% of Montana. Thus, since 1991, a permit has been required to cover a firearm with "clothing or wearing apparel" in only 6/10ths of 1% of Montana, inside city limits. Even inside city limits, a permit has not been required since 1991 for a person to conceal a firearm inside the person's home or place of business. Finally, a permit has not been required since 1991 for a person to conceal a firearm, even inside city limits, if the person were engaged in activity for which firearms are normally carried, such as hunting, fishing, hiking, or jogging.

21. Since 1991, there have been several bills introduced to allow people inside city limits, not in their homes or businesses, and not fishing or hiking, to carry a concealed firearm without a permit. More than one such bill passed the Legislature but was vetoed by the Governor. The argument has been made that since 1991 permit-less concealed carry for people in 99.4% of Montana has not resulted in any evidence of abuse or problems. That policy view finally prevailed in 2021 with HB102.

22. There has long been a question of whether or not the university system has the authority to deny or interfere with the RKBA the people have reserved to themselves in Article II, Section 12 of the Montana Constitution. That policy debate occurred with HB240 in 2013, which

passed House and Senate but was vetoed by Governor Bullock. It continued in 2015 with SB143 which passed the Senate but failed in the House on Second reading with a vote of 49-51. This debate was finally resolved in 2021 when the Legislature passed and the Governor signed HB102 on February 18, 2021.

23. Finally, it has long been known that citizens who will undergo required training and apply for a CWP and a criminal background check are the most problem-free, law-abiding segment of the population that can be identified. There is good reason to argue that CWP-holders should be allowed, as a matter of public policy, to exercise their permits anywhere.

24. For example, MSSA members and officers believe correctly that law enforcement personnel are very law-abiding. Statistics support this view. For every law enforcement officer convicted of a crime, there are between 43 and 57 (depending on which set of numbers one uses) members of the general public convicted of crimes. By comparison, for every CWP-holder convicted of a crime there are seven law enforcement officers convicted of crimes. This reality was finally recognized in 2021 by the Legislature and the Governor with HB102 and its enhanced ability for CWP-holders to use their permits.

MUS'S NEGOTIATED CHANGES TO THE ORIGINAL HB102

25. Not only was there considerable evolution leading up to the drafting of the introduced version of HB102—which I drafted—there were also negotiations that happened during the session that resulted in significant changes to HB102.

26. These included negotiations between the sponsor, Rep. Seth Berglee and agents of the Montana University System (MUS). I was constantly collaborating with the sponsor as proposed changes were suggested, revised, and made. There were several significant changes made to the campus carry feature of HB102 to accommodate requests made by the MUS.

27. On January 8, 2021, Helen C. Thigpen, Deputy Chief Legal Counsel for the Montana University System sent an email to HB102 sponsor Rep. Seth Berglee with a copy to House Judiciary Committee's staff attorney Rachel Weiss. A copy of this email is attached as "Exhibit 2.1."

28. Thigpen was the staff attorney for House Judiciary in the 2013, 2015, and 2017 legislative sessions. This email also copied Tyler Trevor Deputy Commissioner for Budget and Planning, and Chief of Staff for the Montana Commissioner of Higher Education. Declared in the email to be

acting on behalf of the Commissioner of Higher Education, Clayton Christian, Thigpen officially asks Berglee to make amendments to HB102 to accomplish three specified changes.

29. The three changes to HB102 requested in this email from Thigpen to Berglee were:

a. That HB102 be amended to require that the campus carry element of HB102 be "limited to those individuals who possess a current and valid CWP." The concern expressed by MUS officials in separate communication with Berglee was to insure that people exercising prerogatives under HB102 on campus have some firearms safety training. Berglee subsequently satisfied this request with an amendment requiring that anyone possessing a firearm on campus must, at a minimum, have satisfied the firearms safety training detailed in law to apply for a CWP.

b. That HB102 be amended "to allow restrictions at campus events, including athletics, commencement, and live performances/concerts." Berglee and I discussed this request and in response crafted amendatory language for HB102 to allow MUS restrictions for " the possession of a firearm at an athletic or entertainment event open to the public with controlled access and armed security on site."

c. That "the bill also be revised to allow restrictions in dormitories and other student housing facilities." Berglee and I discussed this request but could not accommodate it because to do so would be counter to the core holding of D.C. v. Heller concerning persons being prohibited by a government entity from possessing a firearm in the person's domicile.

30. Amendment HB0102.001.002, made in the House Judiciary Committee to Section 6 of HB102 on January 11, 2021, limited campus

carry to persons who had completed any one of the firearms safety training options listed in Montana law to qualify a person to apply for a CWP.[1]

31. Amendment HB0102.002.002 was done in the Senate Judiciary Committee on January 26, 2021, and made to Section 6 of the bill. This amendment expanded on a list of regulations appropriate for the MUS to implement and added that the campuses could prohibit the possession of firearms at "an athletic or entertainment event open to the public with controlled access and armed security on site."[2]

32. The third change made on January 26, 2021, to accommodate the MUS was also contained in amendment HB0102.002.008. This amendment was to Section 15 and established a delayed effective date for the campus carry portion of HB102. The MUS had asked that they be given a reasonable amount of time to implement HB 102, so a delayed effective date of June 1, 2021 was amended into HB102 by the Senate Judiciary Committee.

33. Also, during the legislative session, the Legislative Services Division recycled and reissued a Legal Note that had previously been issued

[1] See, https://leg.mt.gov/bills/2021/AmdPublicWeb/HB0102.001.002.pdf

[2] See: https://leg.mt.gov/bills/2021/AmdPublicWeb/HB0102.002.008.pdf

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for campus carry bills before the Legislature. This Legal Note raised some of the same questions posed by BoR in its Petition. The final version of this Legal Note includes the Requester Comments that address questions raised by the Legal Note. This complete Legal Note is a prime part of the legislative history of HB102 and is attached as Intervenor's Ex. 1.

34. All of this is history that culminated with the enactment of HB 102.

MUS IMPLEMENTATION OF HB 102

35. HB102 was signed into law by Governor Gianforte on February 18, 2021. Beginning in late March, the OCHE began a process of developing policy to implement HB102 on MUS campuses. Since then, I have sent informative emails to OCHE on four separate occasions: April 7, 2021, May 8, 2021, May 12, 2021, and May 17, 2021.

36. On or about March 25, 2021, Brock Tessman, Deputy Commissioner, Office of the Commissioner of Higher Education, announced in an email to the MUS that the MUS was soliciting comment on the implementation of HB102. In response to that solicitation, on May 31, 2021, I emailed comment as indicated to the OCHE email address specified. That comment email is attached as "Exhibit 2.2."

37. On or about May 6, 2021, the OCHE published Online a draft policy set for implementation of HB102. On May 8, 2021, I emailed comment concerning that policy set to the OCHE. That comment is attached as "Exhibit 2.3."

38. On or about April 29, 2021, Brock Tessman announced in an email to the MUS that the BoR would conduct a listening session concerning HB102 implementation on May 12, 2021. I listened to that entire listening session Online. Following that session and also on May 12, I submitted comment to the OCHE and BoR concerning that session. That email is attached as "Exhibit 2.4."

39. Also following that May 12, 2021, listening session, and on May 17, 2021, I sent a follow up comment to the BoR and OCHE concerning the question raised in the listening session about whether or not to litigate in attempt to block implementation of HB102. That email is attached as "Exhibit 2.5."

40. On May 29, 2021, the Missoulian published a Guest Column that I wrote examining the BoR lawsuit to block implementation of the campus carry portion of HB102. This column was written when the BoR lawsuit was pending before the Montana Supreme Court, but was published after the MSC had rejected the lawsuit and the suit was refiled in state

District Court. Other than the venue of the suit, all of the issues addressed in this Guest Column are relevant to the case in District Court. This Guest Column is attached as "Exhibit 2.6."

41. Before the BoR filed its initial lawsuit directly in the Montana Supreme Court, which is also before that dismissal and the subsequent refiling in District Court, the MUS published at least two sets of new regulations to implement and manage campus carry under the guidelines of HB102.

42. One of these was a draft polity set published by the OCHE for BoR consideration that is attached as "Exhibit 2.7." The other was a set of campus firearms rules published by the U. of M. Police Department. That publication is attached "Exhibit 2.8.[3]"

43. These two MUS publications suggest that the MUS and BoR were prepared to implement the campus carry features of HB102 before the BoR embarked on litigation to block campus carry. This preparedness is notwithstanding the claim in litigation that the MUS lacks time to implement campus carry by the June 1, 2021, delayed effective date previously negotiated between the MUS and the Legislature.

[3] Exhibit 2.8 is a screenshot of the policy due to technological issues. The full webpage can be found at: https://www.umt.edu/police/campus-carry/default.php.

MSSA HISTORY, POLITICAL REACH AND POPULAR SUCCESS STORIES

44. One of MSSA's successes was to amend the Montana Constitution to put the right to hunt, fish, and trap into the Constitution as recognized and protected activities. When the people of Montana voted on this constitutional referendum, it received the highest percentage of voter approval of any constitutional change in Montana's history.

> *Montana has the best gun laws in the U.S., probably the World, primarily because of the effective pro-gun and pro-hunting political work MSSA has done in Montana.*

~ David Kopel, legal scholar, Independence Institute. Following are some of the political and legal successes MSSA has achieved for Montana gun owners and hunters.

45. 1985 – Local governments preemption. Even prior to founding MSSA, the founding members worked hard for your gun rights. These founders backed law preventing local governments from passing arbitrary gun control ordinances, except for regulating the discharge of firearms inside city limits, and regulating the carrying of firearms into public parks and public buildings.

46. 1987 – Prevention of non-defective firearm liability. MSSA-backed law protects firearm manufactures and sellers from damages caused by firearms that are not defective.

47. 1989 – Sporting goods stores may exceed fire codes for storage of smokeless powder and primers. The Unified Fire Code used to specify that stores could not exceed 20 pounds of smokeless powder or 1,000 primers on premises at any time. This MSSA-backed law supersedes the UFC and allows stores to stock up to 400 pounds of smokeless powder and up to 125,000 small arms primers.

48. 1991 – Mandatory Issue Concealed Weapon Permits. MSSA-backed law states that law abiding residents can now get a permit issued within 60 days of application. Although many law enforcement agencies fought against the right to carry, MSSA prevailed.

49. 1991 – Montana Shooting Range Protection Act. MSSA-backed law prevents range closures due to contamination of soils by lead, copper, & other claims. Anti-gun groups use this to shut down ranges all over the USA. Not in Montana!

50. 1991 – Right to Keep and Bear Arms Week. This MSSA bill establishes law where the first week of March is an official period for Montanans to celebrate their cherished right to keep and bear arms.

51. 1991 – Hunting Heritage Week. This MSSA bill establishes law where the third week of September is set aside to celebrate Montana's heritage and culture of hunting game animals.

52. 1991 – Gun safety in schools. This MSSA Senate Joint Resolution encourages gun safety training in the elementary schools of Montana and directs schools to adopt a gun safety program for kids.

53. 1991 – Shooting sports in schools. This MSSA Senate Joint Resolution encourages the adoption of rimfire competition as an intramural and interscholastic sport in the high schools of Montana. In shooting sports, small, rural schools can compete on an equal footing with larger, urban schools.

54. 1993 – Easements to secure a safety zone around a shooting range. Owners and operators of a shooting range need to secure a safety zone of property adjacent to the range, but often do not have the financial resources to buy the necessary land. This MSSA-authored law allows range operators to use easements to secure safety zones around ranges.

55. 1993 – Handgun hunting districts. MSSA-backed law helped establish allowing big game hunting with handguns in special districts restricted to shotguns and muzzleloaders.

56. 1993 – Game Lawfully Taken Becomes the Personal Property of the Hunter. Prior to this law, all game was the property of the State. Even if it was in the freezer. MSSA-backed law states game (lawfully taken and tagged) is now personal property.

57. 1993 – Second Conviction of Hunter Harassment is a Felony. Formerly, conviction of hunter harassment was only misdemeanor crime. MSSA-backed law makes second conviction a felony, with hard time in state prison. Since passage of this law, Montana hunters have incurred no second hunter harassment incidents by protesters!

58. 1995 – Firearm Safety Instructors Exempt from Liability. It has become more and more difficult to recruit firearm instructors because of possible exposure of instructors' personal assets to lawsuits over gun accidents by an instructor's student. This law by MSSA exempts firearm safety instructors from acts or omissions of students as long as the instructor did not use gross negligence in training the student.

59. 1995 – Repeal the Brady Law. MSSA successfully lobbied through the Legislature a Joint Resolution of the House and Senate calling upon Congress to repeal the unwanted and unneeded federal Brady Law.

60. 1995 – Gun buys for CWP-holders under the Brady Law. MSSA-backed law specifies that if a person has a Montana Concealed Weapon Permit for which they have already had a background check pursuant to the federal Brady Law, they may buy guns from federally licensed dealers without submitting to or waiting for a background check.

61. 1997 – Gun owners not liable for criminal acts committed with stolen firearms. The 1997 Legislature passed an MSSA-backed law clarifying that a gun owner is not responsible for the misuse of a stolen firearm. Prior to this, a person could be charged with the crime committed with a stolen firearm.

62. 1997 – Over-zealous federal officers. Many people are concerned about the actions of over-zealous federal officers. MSSA believes the county sheriff should be able to protect us from federal police who exceed their authority. This MSSA-authored resolution passed in 1997:

a) asks all federal officers to notify the county sheriff prior to any arrest, search or seizure in the sheriff's county,

b) requires the Montana Department of Justice to maintain a log of federal operations in Montana and note which ones happened with the advance notice to the sheriff

c) requires the Montana Secretary of State to send copies of this resolution to a long list of federal agencies.

63. 1997 – Montana exempted from the federal "gun-free school zones". Federal law makes it a Federal crime to travel within 1,000 feet of a school grounds if you have a firearm in your vehicle that is not both unloaded and locked away. Since Montana schools are on the main streets,

this federal law makes criminals of a majority of Montana citizens over the course of the year. Thanks to MSSA, state law is now in place that exempts anyone in Montana who is protected by Montana's constitutional right to keep and bear arms (all non-criminal adults) from this Federal law.

64. 1997 – Terrorist-free America Act. MSSA successfully lobbied in the House and Senate to pass a declaration that citizens must remain armed for national security against terrorism. Congress is now asked to pass a federal law to implement this determination.

65. 1999 – Funding shooting range development. MSSA-backed bill establishes the Shooting Range Development Act creating a program for matching grants for shooting range establishment and improvement using money from hunting license fees and administered by the Department of Fish, Wildlife and Parks. Every two years MSSA must fight for legislative appropriation to fund the SRDA. Since establishment of this program by MSSA, over $20 million in improvements to Montana shooting ranges have occurred under the SRDA.

66. 1999 – Preventing cities from suing gunmakers. MSSA-backed bill now prevents Montana cities from filing harassment lawsuits against gunmakers.

67. 1999 – Machine guns and silencers – removal of old laws. MSSA-written law wipes old laws off the books. As a holdover from the Prohibition era, Montana had laws making it illegal to possess full auto firearms using pistol-caliber ammo, or silencers, both in conflict with current federal law.

68. 1999 – Concealed Carry in "prohibited places". Because of some under-the-table deal-making in 1991, the Montana law about concealed weapons permits had provisions preventing the exercise of CWPs in "prohibited places"; bars, banks and public buildings. MSSA successfully advanced two bills in 1999 to roll back the "prohibited places" restrictions.

69. 1999 – Concealed Carry Reciprocity. MSSA-backed bill recognizes the permits of any states which do a criminal background check before issuing a CWP, and where the permittee has the permit and an official ID (e.g. drivers license) in possession. Many states have "we'll recognize yours if you recognize ours"-type laws. Montana will gain immediate reciprocity with these states. Montana now recognizes the permits from most other states.

70. 2001 – Prevention of Victim's liability for injuries to a criminal. MSSA-backed law prevents a criminal injured by his intended victim from

collecting damages from the victim for injuries sustained in the attempted crime.

71. 2001 – Wolf delisting. MSSA-backed resolution specifies the state must negotiate terms of wolf delisting favorable to Montana.

72. 2003 – Right to Hunt. MSSA-initiated measure creates a Right to Hunt, Fish, and Trap fully reserved in the Montana Constitution.

73. 2003 – Large predator management. MSSA-backed law requires the Montana Department of Fish, Wildlife and Parks to manage wolves, lions and bears for the preservation of hunting opportunities, protection of livestock and pets, and the safety of people in outdoor activities.

74. 2003 – Lautenberg warning. MSSA-backed law passed requiring judges to warn a person if an action is pending before a court that might have the effect of triggering a firearm possession disability under the federal Lautenberg law, such as a firearms-debarring divorce-action restraining order, or a guilty plea or conviction for a domestic disturbance.

75. 2005 – Non-resident minor children of Montana residents may hunt as residents. Some children of split homes have a parent who resides in Montana. Such parents have asked why their kids can't come to Montana and hunt with them using resident licenses. This MSSA-authored

law clarifies the non-resident minor children of Montana residents can hunt in Montana as residents.

76. 2003 – Game counts and methods made public. MSSA-backed law requires FWP to publish annually both game counts and game count methods, so the public may see if FWP is repairing faulty game-counting methods in the performance audit done by the Legislative Auditor.

77. 2007 – Be Safe, MSSA gun safety program for kids. This MSSA Senate Joint Resolution recognizes MSSA's Be Safe as the most suitable firearm safety program for kids in all Montana schools.

78. 2007 – No confiscation of firearms in a declared emergency. MSSA-fostered law outlaws confiscation of firearms in a declared emergency. After Hurricane Katrina, many Louisiana residents were forcibly disarmed by law enforcement authorities.

79. 2007 – Increased shooting range funding by 683%. The amount of money from hunting licenses to fund shooting range development was increased from $180,000 to $1,000,000 for the 2007 biennium. This money taken from hunter licenses would otherwise end up in the state general fund.

80. 2009 – Montana Firearms Freedom Act. MSSA-written law declares that any firearms, firearm accessories or ammunition made and

retained in Montana are not subject to any federal authority to regulate commerce "among the states." Clones of our MFFA are now enacted in eight other states and introduced in 25 other states.

81. 2009 – Self-defense. MSSA's landmark HB 228, passed in 2009 makes many important changes in Montana law about when and how a person may possess or use a firearm for self-defense without fear of prosecution for doing so. This bill does the following:

– Creates clear policy statement by the Legislature that self-defense is a natural right and that self-defense by citizens reduces crime

– Makes clear policy statement by the Legislature that the right to bear arms in Montana is a fundamental (important legal term) and individual right

– Reverses guilty-until-proven-innocent for people defending themselves

– Previously, defenders must have proven that they were justified in using force

– Legislative declaration of policy that a defender has no duty to summon help or flee before using force to defend in any place the defender has a lawful right to be

– Declares that open carry is legal in Montana

– Clarifies that a defender may announce "I have a gun," with no more fear of prosecution under Montana's overbroad felony "Intimidation" statute

– Clarifies that a person may show an attacker that the defender is armed, and may even draw the gun if the defender genuinely fears attack

– Requires that when police investigate an incident where self-defense is claimed investigators must collect evidence that may support a claim of self-defense as well as any other evidence

– Improves conditions for a defender to use force in any occupied structure. This applies to all occupied structures, not just a dwelling.

– Requires that police may not destroy any firearms seized – any firearms seized must either be returned to the rightful owner or sold back into the marketplace

– Specifies that landlords may not prevent tenants from possessing firearms. This not only protects travelers staying in motels, but also protects those who cannot afford to own their own homes.

– Allows restoration of the right to bear arms for people convicted of non-violent crimes who have done their time and been released from state supervision – this will not apply to a person who committed a violent crime or a crime where a weapon was used

– Creates the ability to use reasonable force to affect the citizen's arrest of a person believed to have committed a crime – to be able to hold the person until law enforcement can be summoned.

82. 2009 – Guns in National Parks. MSSA-backed bill urged Congress to permit visitors to National Parks to be able to carry firearms for self-defense (Congress subsequently passed a law to this effect.).

83. 2009 – Recruiting and retaining young hunters. MSSA-backed law allows full-time, non-resident college students, and Montana kids going to college out-of-state to purchase hunting licenses for the same cost as resident licenses.

84. 2011 – Preventing FWP from banning lead in ammunition. An MSSA-sourced bill prohibits the Department of Fish Wildlife and Parks from regulating the type of ammunition that may be used for hunting.

85. 2011 – Shooting ranges are not "nuisances". An MSSA bill to clarify that shooting ranges may not be considered to be "nuisances" to be attacked by lawsuits.

86. 2013 – Concealed Weapon Permit info confidential. An MSSA-supported bill to require that information submitted by applicants for concealed weapon permits may not be released publicly by sheriffs or MT DoJ.

87. 2013 – Medical privacy for gun owners. Health care providers may not inquire about patients' ownership or use of firearms.

88. 2013 – "Discharging firearms" not disorderly conduct. The act of "discharging firearms" is no longer a crime of disorderly conduct.

Note: 2012 through 2020 were the "dry years" for gun rights in Montana. Steve Bullock (D) was elected Governor and vetoed most significant pieces of pro-gun legislation for eight years. This legacy left him without much support outside the Democratic Party and he failed in his Senate bid against solidly pro-gun Steve Daines.

89. 2015 - Montana Ammunition Availability Act. This law provides tax breaks, liability protection, and access to all Montana economic development programs for any qualifying business that would manufacture small arms cartridge cases, smokeless powder, or small arms primers in Montana. If is both an economic development measure and an attempt to assure availability of ammunition components.

90. 2015 - Suppressors made legal for hunting.

91. 2017 - Montana Constitution. Defining, for the first time ever, the phrase "shall not be called in question" by which the Right to Keep and Bear Arms is reserved to the people in the Montana Constitution.

92. 2019 - HB 357, a legislative referendum to create LR-130, to restrict the powers of local governments to regulate firearms.

93. 2020 - LR-130, a referendum to change state law to curtail abuses by local governments in relation to firearm regulation.

94. 2021 - HB 102, to eliminate alleged "gun free zones," including permit-less carry, campus carry, restaurant and bar carry, and enhancement of concealed weapon permits.

95. 2021 - HB 258, to prohibit enforcement of new federal gun laws by state and local public employees.

96. 2021 - SB 283, to clarify the authority of school boards concerning firearms in schools.

97. 2021 - HB 504 was supported by MSSA but not introduced at the request of MSSA. This bill expanded on a law created by an MSSA bill in a previous session to prohibit the confiscation of ammunition, firearms accessories, and ammunition reloading equipment and supplies in a declared emergency, and prohibit the closure of businesses that sell firearms and these items and of shooting ranges.

98. 2021 - SB 370. Similar to HB 504, SB 370 was supported by MSSA but not introduced at the request of MSSA. This bill expanded on a law created by an MSSA bill in a previous session to prohibit the confiscation of ammunition, firearms accessories, and ammunition reloading equipment and supplies in a declared emergency, and prohibit the closure of businesses that sell firearms and these items and of shooting ranges.

MORE SUCCESS AND MORE SWAY

99. These are not all of MSSA's political successes, just many of them. It may also be worth note that this list of successes was achieved both when Republicans and when Democrats controlled the Legislature and the Governor's office.

100. One recent string of related successes may be worth detailing. A local government in Montana attempted to assert a form of gun control popular in coastal areas of the U.S. MSSA warned the relevant city council that this was a bad idea, unsuitable for Montana, and would be a violation of Montana preemption law at Mont. Code Ann. § 45-8-351. The city passed the proposed ordinance despite that warning.

101. MSSA arranged for an Attorney General's Opinion that informed the city that their gun control ordinance was unenforceable because it violated the Montana preemption law, just as MSSA had advised the city. The city sued to overturn the AG's Opinion, only to have the Montana Supreme Court ultimately agree with the AG in a terse decision. Then, MSSA got HB 357 passed by the Legislature to put a referendum on the ballot to tighten up the state preemption law and to prevent further such abuse of the law by local governments. That bill passed and created LR-130.

102. LR-130 was scheduled to be on the ballot for the General Election of 2020. MSSA mounted an entirely grassroots campaign to inform Montana voters about LR-130 and urge their support. MSSA spent exactly zero on this campaign. Opponents of LR-130 (mostly public employee unions) spent over $2 million in a failed campaign to defeat LR-

130. LR-130 was approved by the voters despite the $2 million spent by opponents and because of the effective, zero-dollar grassroots campaign mounted by MSSA.

103. In the past ten years, there have been two bills addressing campus carry. In 2013 HB 240 passed the House and Senate, but vetoed by Governor Bullock.

104. In 2015 SB 143, passed Senate, but failed failed House Second Reading by a vote of 49-51.

TEACHING EXPERIENCE

105. I was first employed as a teacher by the University of Montana in 1965. During my time as a lifelong teacher, I have instructed hundreds of people in skiing and hundreds more in first aid.

106. I have instructed many score people in fire science and in emergency medicine, both in a formal higher education setting such as university and college, as well as privately. I have also taught both in the United States and Europe.

107. The Board of Regents argue that campus carry will usher in a parade of horrible and mayhem amongst the collegiate populace. One such predicted problem relates to instructors interacting with armed students. The implication seems to be such students may cause harm while

discussing controversial ideas or when receiving bad news such as a failing grade. The Board of Regents apparently base this worry off of nothing more than speculation.

108. I have taught hundreds of classes in which all of my students were armed with firearms. I have graduated over six thousand students from these classes with students ranging in age from seven to eighty-five years old. In all of these classes, my students were armed with firearms and held loaded firearms in their hands.

109. Despite having to fail students for cause and having to ask they leave the class, there has never been an instance during my career where a student threatened me or where I felt my safety was in jeopardy because of a dangerous student.

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

_____

Gary Marbut

Date of Signature:_____

City and State of: Missoula Montana

EXHIBIT 2

---------- Forwarded message ---------
From: **Thigpen, Helen** <hthigpen@montana.edu>
Date: Fri, Jan 8, 2021 at 14:41
Subject: HB 102 - Amendments
To: Rep.seth.berglee@gmail.com <Rep.seth.berglee@gmail.com>, Seth.Berglee@mtleg.gov <Seth.Berglee@mtleg.gov>
CC: Weiss, Rachel <RWeiss@mt.gov>, Trevor, Tyler <ttrevor@montana.edu>

Representative Berglee,

On behalf of Commissioner Christian, I'm writing to share the attached amendments for House Bill 102. Our highest priority for the amendments is to ensure that if House Bill 102 is passed and approved, it is limited to those individuals who possess a current and valid CWP. The second priority is to allow restrictions at campus events, including athletics, commencement, and live performances/concerts. We would also ask that the bill also be revised to allow restrictions in dormitories and other student housing facilities.

Please do not hesitate to contact myself or Tyler Trevor with any questions. I can be reached this weekend at 406-546-4593. We understand that House Judiciary plans to take action on Monday.

Sincerely,

Helen

Helen C. Thigpen

Deputy Chief Legal Counsel

Montana University System

PO Box 203201

Helena, MT 59620-3201

406.449.9167 | hthigpen@montana.edu

EXHIBIT 2.1

Subject: Comment on BoR HB 102 policy
From: MSSA <mssa@mtssa.org>
Date: 4/7/21, 2:07 PM
To: oche@montana.edu, "Unsworth, Amy" <AUnsworth@montana.edu>
CC: cchristian@montana.edu, Seth Berglee <sethberglee@gmail.com>
BCC: Quentin Rhoades <qmr@montanalawyer.com>, Stephanie Dwyer <stephanie.m.dwyer@gmail.com>

Dear Regents,

This message is official comment concerning the Board's pending implementation of House Bill 102 of the 2021 Montana legislative session.

First, an introduction is in order. The Montana Shooting Sports Association (MSSA) is the primary political advocate for Montana firearm owners. MSSA was also the lead proponent for HB 102 before the Legislature. MSSA is a nonprofit corporation and has members in all Montana communities.

I wrote HB 102, as well as the campus carry bills introduced in previous sessions of the Legislature. I am also the author of *Gun Laws of Montana*, a trade paperback book now in its Fifth Printing and the accepted reference on that subject. Further, I am a veteran firearms safety instructor and accepted as an expert in state and federal courts concerning firearm safety, self defense, and related topics.

Some commenters may urge the Board to litigate the constitutionality of the campus carry provision of HB 102, based on the authority allowed the Board in Article X of the Montana Constitution to manage the affairs of the university system. This issue is addressed in Section 3(1) of HB 102 which says: " (1) Nowhere in Article X, section 9(2)(a), of the Montana constitution is any power granted to amend, suspend, alter, or abolish the Montana constitution, nor is any power granted to affect or interfere with the rights the people have reserved to themselves specifically from interference by government entities and government actors in Article II of the Montana constitution." This issue is also addressed by Section 5 of HB 102.

In addition, the HB 102 Sponsor addressed this question in his response to a Legal Review Note about HB 102 by the Legislative Services Division. That Sponsor's response is a part of the legislative history of HB 102 and is attached as a part of this comment.

This leads to the question, "What conduct may the Board regulate under the law created by HB 102?"

First, it is useful to note that the Board has no authority to create criminal sanctions or restrictions that

EXHIBIT 2.2

apply to the general public. The Board does have authority to adopt policies that apply to two classes of people, university system employees and university system students. These authorities will necessarily only apply when people of these two classes are on campus - present on property that is under the authority of the Board.

Then, the refined question posed to the Board becomes, "In what ways may the Board apply its authority to regulate employees and students on campus?"

The answer to this question is specifically detailed in Section 6 of HB 102.

It may be useful to note that the limitations on Board authority in HB 102 apply specifically to a "person eligible to possess a firearm under state or federal law." Thus, persons not eligible to possess firearms are subject to more restrictive policy adopted by the Board. Further, for a person to be subject to the policy limitations in Section 6 of HB 102, the person must also meet the minimum safety and training requirements of 45-8-321(3) (attached).

In the final distillation of the authority allowed the Board under HB 102, the Board may adopt policies that apply to employees and students on campus, any such policies are strictly limited to the list contained in Section 6(2), but only if the employee or student is eligible to possess firearms and meets the minimum safety training requirements specified in law.

HB 102's Section 6(2) is very specific about what conduct the Board may regulate for these two classes of qualified people on campus.

This dramatically narrows and focuses the task the Board has to fashion a policy consistent with HB 102.

Here is the list in Section 6(2) of HB 102, which is the limit of what the Board is allowed regulate for qualified employees and students on campus:

(a) the discharge of a firearm on or within university system property unless the discharge is done in self-defense;
(b) the removal of a firearm from a gun case or holster unless the removal is done in self-defense or within the domicile on campus of the lawful possessor of the firearm;
(c) the pointing of a firearm at another person unless the lawful possessor is acting in self-defense;
(d) the carrying of a firearm outside of a domicile on campus unless the firearm is within a case or holster;
(e) the failure to secure a firearm with a locking device whenever the firearm is not in the possession of or under the immediate control of the lawful possessor of the firearm;
(f) the possession or storage of a firearm in an on-campus dormitory or housing unit without the express permission of any roommate of the lawful possessor of the firearm;
(g) the possession or storage of a firearm by any individual who has a history of adjudicated university system discipline arising out of the individual's interpersonal violence or substance abuse;
(h) the possession of a firearm at an event on campus where campus authorities have authorized alcohol to be served and consumed; and
(i) the possession of a firearm at an athletic or entertainment event open to the public with controlled access and armed security on site.

EXHIBIT 2.2

The Board's new firearm policy, to be consistent with HB 102, will contain no provisions limiting qualified persons that are more restrictive than what is on this list. It will likely be a simple restatement of this list, although the Board is allowed to adopt a policy less restrictive than this list.

A restatement of this list with some comment and explanation is attached for the Board's consideration and use.

Please feel free to contact me at 549-1252 or mssa@mtssa.org to discuss any of this.

Sincerely,

--
Gary Marbut, president
Montana Shooting Sports Association
http://www.mtssa.org
Author, Gun Laws of Montana
http://www.MtPublish.com

Attachments:

HB102LRN Sponsor comment.doc	33.5 KB
Safety_Training.doc	20.5 KB
Campus policies v1.doc	25.5 KB

EXHIBIT 2.2

Subject: Comment, DRAFT HB 102 MUS policy

From: MSSA <mssa@mtssa.org>
Date: 5/8/21, 5:03 PM
To: oche@montana.edu
CC: "Unsworth, Amy" <AUnsworth@montana.edu>, cchristian@montana.edu, Quentin Rhoades <qmr@montanalawyer.com>, Seth Berglee <sethberglee@gmail.com>, abovingdon@montana.edu

Dear Sirs,

This is comment on the recently posted and proposed MUS policy for implementing HB 102.

https://www.mus.edu/board/draft-policy-recommendation.html

1. Section A. Applicability. MUS authority over employees and students is assumed. Authority over affiliates, contractors, vendors may be debatable, but the MUS has no authority whatsoever over visitors on this public property who are not within the previous categories.

2. Section C. Certification process. Under Montana law (45-8-322(7), M.C.A.), the information contained on a Montana concealed weapon permit is "confidential criminal justice information." Therefore, retaining copies of concealed weapon permits or compiling any list of people who have a valid concealed weapon permit will be a violation of both statute and the right to privacy at Article II, Section 10 of the Montana Constitution. Further, subsection (7) of 45-8-322 was added to the law specifically to prevent disclosure of names of and information about individuals who have concealed weapon permits. If the MUS were to compile and retain such information, that compilation would become subject to disclosure under right to know, which would then be in conflict with 45-8-322(7) and the right of privacy.

Section D. Campus Housing. The proposed policy mostly refers to firearms correctly as firearms, except when using terms of legal art, such as referring to a "concealed weapon permit." However, Section D uses the word "weapon" as if it were synonymous with the word "firearm." It is not synonymous. When used as an alternative to "firearm", the word "weapon" is pejorative in that it implies an offensive purpose. Many things may be used as a weapon, including a fist, a baseball bat, or an automobile. They are not correctly called "weapons" unless they are used as a weapon. Nearly all firearms use is not as a weapon. This comment also applies to other occurrences of the word "weapon" in the draft policy.

Section E. Restricted areas. All of subsections 2 and 3 are beyond the authority of the MUS under a plain reading of state law enacted by HB 102. Certainly it will be argued that there are allegedly good reasons for including the prohibitions in subsections 2 and 3, but these will be the same reasons as for

EXHIBIT 2.3

the previous total denial of campus carry altogether, reasons that have been rejected by the Legislature and that are now invalid under prevailing law. Adding these prohibited places to those limited few contained in statute has the pretense of amending HB 102, of creating state law, and is without authority.

Section F. Rules and Restrictions Governing Firearm Possession. Concerning subsection 4, the Montana Operations Manual is inferior to the Montana Code Annotated. The M.C.A. as revised by HB 102, simply does not allow the restrictions contained in this subsection.

Section G. Penalty for Violation. Please specify what state statutes may be relied upon and what crimes may be alleged for subsection 1.

Section H. Enforcement. This section should include mention of and consequences for false reporting, reporting done to harass any person, or reporting done only out of irrational and unjustified fear.

Section I. Liability. The MUS may disclaim liability for itself and its agents, but it may not attribute or assign liability to others.

Section K. Definitions. Locking device. Trigger locks and cable locks are also commonly used and generally accepted as security devices for firearms.

Sincerely yours,

--
Gary Marbut, president
Montana Shooting Sports Association
http://www.mtssa.org
Author, Gun Laws of Montana
http://www.MtPublish.com

EXHIBIT 2.3

Subject: Comment on HB 102 listening session
From: MSSA <mssa@mtssa.org>
Date: 5/12/21, 7:40 PM
To: regentrogers@montana.edu, oche@montana.edu
CC: abovingdon@montana.edu, cchristian@montana.edu
BCC: Stephanie Dwyer <stephanie.m.dwyer@gmail.com>, Quentin Rhoades <qmr@montanalawyer.com>

Dear Regent Rogers and others,

This is comment about two dominant themes from the May 12th listening session about HB 102 implementation. One comment is legal, and one is philosophical.

I trust you have seen my comment for MSSA on the current OCHE DRAFT proposal. If you have, you know of me as the author of HB 102 and the author of *Gun Laws of Montana*, a book now in its Fifth Printing. I hope those credentials cause my comments to be credible.

1. Litigation. Many commenters urged the BoR to not comply with HB 102, but to pursue litigation in attempt to rebuff HB 102. Before you make any decision about that, you should review the Requestor Comments to the Legal Review Note by the Legislative Services Division. I do not find that Legal Review Note available on the Legislature's Website, so I am attaching a .pdf file copy of it for your review. This *is* a part of the legislative record for HB 102, so it would become a part of any litigation over HB 102 and campus carry. The information contained in the Requestor Comment to this Legal Review Note will be critical to any decision you may make about litigation over HB 102.

2. Young adults are simply not competent. Several commenters mentioned, in one way or another, that young people in college have brains that are not fully formed, and that these young people are just not competent. I am not a psychologist or neurologist, so I cannot advise you about that. However, I must note a certain hypocrisy for those who are eager to register these same young people to vote. If these young adults are not competent to safely possess firearms, then they are also not competent to marry, to make personal health care choices, to vote, or to join the military. If they are competent to do all those other things, then they must also be competent to possess firearms.

As an addendum, many people commenting today declared various credentials associated with education. I should do the same. My first employment as an instructor was by the University of Montana in 1965. I taught mountain rescue and other subjects for the U.S. Army in the late 1960s. I taught first aid for the

EXHIBIT 2.4

American Red Cross and emergency cardiac care for the American Heart Association in the 1960s and 70s. I taught emergency medicine for the Tanana Valley Community College and Fire Science for the University of Alaska in the 1970s. Since then I have been a private instructor and have graduated over 6,000 students from curricula about firearms safety, Montana gun laws, and self defense. My primary calling is as an educator. I have a lot of experience in education, including curricula development.

That reminds me to say that many of the complaints voiced by HB 102 opponents today can well be addressed through education. Since education is the business of the MUS, it would seem natural to use that expertise to address susceptible issues. I would be glad to collaborate about that, as needed.

Best wishes,

--
Gary Marbut, president
Montana Shooting Sports Association
http://www.mtssa.org
Author, Gun Laws of Montana
http://www.MtPublish.com

Attachments:

HB0102LRN.pdf 88.6 KB

EXHIBIT 2.4

Subject: To litigate or not? Ask the right question.
From: MSSA <mssa@mtssa.org>
Date: 5/17/21, 6:31 PM
To: regentrogers@montana.edu, oche@montana.edu, cchristian@montana.edu, abovingdon@montana.edu
BCC: Quentin Rhoades <qmr@montanalawyer.com>, Stephanie Dwyer <stephanie.m.dwyer@gmail.com>

Dear Regents,

Greetings from Missoula.

The media reports, “The Board of Regents directs the commissioner of higher education to request, on behalf of the board, judicial review of HB 102 to determine whether the law improperly encroaches upon the constitutional role and autonomy of the board.”

If this media report is correct, then you unfortunately have asked the wrong question. If you ask the wrong question, you are bound to get a wrong answer.

You see, HB 102 only announces that the Regents are controlled by the Constitution, just as all other elements of state and local government in Montana are. HB 102 is not so much the Legislature telling the Regents what to do as it is the Legislature reminding the Regents that there is more to the Montana Constitution than just Article X.

First, the Board of Regents is created by the Constitution, so it is subservient to the Constitution, just as are all other governmental elements in Montana.

Second, the Constitution contains both authorities and restrictions. For the Regents to look only at the authority offered in Article X and refuse to recognize the restrictions contained in Article II is an error of legal thinking - an error of basic Civics 101. This was discussed briefly by the Montana Supreme Court in *Board of Regents v. Judge*.

A more germane question would be, "Is the power of Board of Regents constrained by Article II as well as created and empowered by Article X?" Only if you ask the right question will you get an answer that is useful to you in the context of HB 102.

You may deliberately wish to ask the wrong question in order to get an answer you want and are predetermined to obtain. However, to do the people's business

EXHIBIT 2.5

honestly, you should really ask the right question so that valid policy can be formulated on a correct answer.

I hope this is helpful.

Best wishes,

--
Gary Marbut, president
Montana Shooting Sports Association
http://www.mtssa.org
Author, Gun Laws of Montana
http://www.MtPublish.com

EXHIBIT 2.5

https://missoulian.com/opinion/columnists/online-opinion-regents-v-montana-the-philosophical-argument/article_014407de-4d09-5ea3-b965-1a496f6920c4.html

EDITOR'S PICK

Guest column

Online opinion: Regents v Montana, the philosophical argument

GARY MARBUT
May 29, 2021

Marbut

Provided photo

GARY MARBUT

The Montana Board of Regents has sued in the Supreme Court in attempt to block and disallow the campus carry feature of House Bill 102. In this lawsuit, the regents sweep in for undoing much more than just the campus carry sections of HB 102.

Regents argue that because they are given authority to manage the affairs of the university system in Article X of the Montana Constitution, then they are exempt from the restraints of Article II, the Declaration of Rights, in anything that has to do with their university management authority.

EXHIBIT 2.6

They do not declare this directly, but it is implicit in their argument for their own authority and for their assertion that the Legislature is unconstitutionally attempting to usurp their constitutional authority with HB 102.

First, when the regents seek to paint the Legislature as the usurping bully, they conveniently ignore that the governor also approved HB 102. So, it is not just the legislative branch involved in this alleged usurpation, it is also the executive branch. The regents should know that the governor and the Legislature are properly representing the will of the people in this contest.

Second, HB 102 is not a matter of the Legislature improperly assuming powers belonging to the regents. Rather, it is a matter of both the Legislature and the governor reminding the regents that all state governmental entities are subject to the restraints in Article II, including the regents.

Third, looking from the 10,000-foot view, all political power is vested in the people, as is overtly declared in Article II, Section 1. The people delegate a measured amount of their personal political power to governmental entities in a contract called the Montana Constitution. As a part of that contract, the people also spell out what powers are *not* delegated to governmental entities, restrictions primarily memorialized in Article II.

While the regents may be delegated some limited powers in Article X, that simply does not include the power to ignore the firm limitations of power for all governmental entities detailed in Article II. The people simply do not consent to any governmental exercise of power that they reserve to themselves specifically from government interference in Article II. The people declare this very overtly and clearly in Montana's Declaration of Rights, Article II of the Montana Constitution. These reservations of authority include freedom of the press, religion, speech, assembly, right to know, right to privacy, due process, trial by jury, right to keep and bear arms, and much more.

Fourth, for there to be any concurrence that the regents, having been created by Article X, are somehow therefore exempt from Article II restrictions, at least when operating in their own sphere, would logically require that any other entity created and given power by the Constitution would also be exempt from Article II restraint. This would include, at a minimum, the executive, the legislative, and judicial branches, and all state officers such as the governor,

EXHIBIT 2.6

the secretary of state, the attorney general, the state auditor, the superintendent of public instruction, the Public Service Commission and even local governments. All of these are created by the Constitution, just as the Board of Regents is.

Under the Regents' argument, any or all of these entities are free to conduct trials without juries, impose a death penalty regardless of state law, eradicate freedom of the press, ban religion, foul the environment, ban firearms, and much more.

This construction, of course, would be absurd. But, this construction is what would be logically required if it is held that the regents, just because they are created and offered limited power by the Constitution, are somehow thereby exempt from the constraints on government overtly and purposefully put into the Constitution by the people at Article II.

The regents ask the Montana Supreme Court to support and enforce all of this. And, the Montana Supreme Court is unpredictable enough to concoct some convoluted rationale that supports the regents. Have no confusion about this. This is a bare power struggle between the education industry and the people of Montana.

The education establishment presumes the power to do whatever it wants, regardless of what the people of Montana want or any constraints on government power the people have built into the Montana Constitution. The Legislature and the governor have come down on the side of the people. It remains to be seen which side the Montana Supreme Court will take.

Gary Marbut has been observing and participating in Montana public policy formulation for a half century. Marbut drafted the introduced version of House Bill 102 on behalf of the Montana Shooting Sports Association, of which he is president. Marbut has drafted scores of bills for legislative consideration over the years. More than 50 of those have ultimately been enacted into law.

EXHIBIT 2.6

Draft Policy Recommendation

DRAFT LANGUAGE FOR BOARD OF REGENTS CONSIDERATION

UPDATING POLICY 1006 GOVERNING FIREARMS, SECURITY AND LAW ENFORCEMENT OPERATIONS

EXHIBIT 2.7

Section A. Applicability. This policy applies to all members of the MUS community including students, employees, affiliates, contractors, vendors, and visitors.

Section B. Eligibility. A person who 18 years of age or older is eligible to possess a firearm under state or federal law and who meets the minimum safety and training requirements in § 45-8-321(3), MCA, may possess a firearm on a MUS campus and in campus housing unless otherwise prohibited by state or federal law or this policy.

Section C. Certification Process. In order to establish that a person meets the minimum safety measures and training required to possess a firearm a person must provide documentation to the entity designated by the campus president of:

1. A valid Montana concealed weapons permit or a valid permit of another state having reciprocity with Montana;
2. If the person does not possess a valid Montana concealed weapons permit or permit of another state having reciprocity with Montana, they must provide:
    a. Certification of:
        i. completion of a hunter education or safety course approved or conducted by the department of fish, wildlife, and parks or a similar agency of another state;
        ii. completion of a firearms safety or training course approved or conducted by the department of fish, wildlife, and parks, a similar agency of another state, a national firearms association, a law enforcement agency, an institution of higher education, or an organization that uses instructors certified by a national firearms association;
        iii. completion of a law enforcement firearms safety or training course offered to or required of public or private law enforcement personnel and conducted or approved by a law enforcement agency;
        iv. completion of a license from another state to carry a firearm, concealed or otherwise, that is granted by that state upon completion of a course described in subsections (a)(i) through (a)(iii); or
        v. evidence of military service, during which the person was found to be qualified to operate firearms, including handguns.
3. A person living in campus housing must also complete a Campus Life Safety course offered by the MUS.
4. Certification under this part may be denied to a person who has a history of adjudicated university system discipline arising out of the individual's interpersonal violence or substance abuse.
5. A person must complete the certification process set forth in this policy in order to be eligible to be carry a firearm on a MUS campus.

Section D. Campus Housing. (1) Residents in campus housing shall notify the campus, whether they intend to store a firearm in their housing unit and whether they expressly consent to be assigned a roommate who intends to possess a firearm within their housing unit. Residents must be notified if they are assigned to a roommate who is certified to possess a weapon pursuant to this policy. A resident who wishes to withdraw their consent must notify campus housing in writing and campus housing must make alternative housing arrangements within a reasonable time after receiving written notice.

Section E. Restricted Areas.

1. Possession of a firearm is not allowed in the following areas:
    a. any event on campus where campus authorities have authorized alcohol to be served and consumed; or
    b. any event on campus open to the public with controlled access and armed security on site.
2. The campus may restrict the possession of a firearm in the following areas:
    a. campus child care centers;
    b. activities or events on campus serving k-12 youth groups, including in campus housing for overnight activities or events;

EXHIBIT 2.7

c. any health care facility where licensed health care professionals or individual under their supervision receive or treat patients;
d. high hazard research areas, laboratories, or studios where the presence of high hazard materials or operations creates a significant risk of catastrophic harm due to a negligent discharge, for example, BioSafety Level 3 laboratories, animal care/use facilities, and areas having high magnetic fields, such as MRI research facilities; or
e. research areas and laboratories in which research subjects are high risk (e.g., subjects with diagnosed psychological disorders, subjects diagnosed with Post-Traumatic Stress Disorder), or where the integrity of psychological research could be compromised.

3. A campus may establish a limited number of secure hearing rooms where firearms and ammunition are restricted as needed to conduct hearings or disciplinary proceedings. The restriction of firearms, ammunition, or dangerous weapons in the secure hearing room may be in effect only during the time the room is in use for hearings or disciplinary proceedings and for a reasonable time before and after.
4. The owner of private property, including a tenant or lessee, may expressly prohibit firearms.

Section F. Rules and Restrictions Governing Firearm Possession.

1. A person who has established eligibility to possess a weapon pursuant to this policy must secure the firearm with a locking device whenever the firearm is not in the person's possession.
2. Any firearm carried pursuant to this policy should be kept concealed on or about the eligible person at all times.
3. A person may not:
   a. discharge a firearm on or within campus or campus housing unless the discharge is done in self-defense;
   b. remove a firearm from a gun case or holster while on campus unless the removal is done in self-defense or within the domicile of the lawful possessor of the firearm;
   c. point a firearm at another person unless the lawful possessor is acting in self-defense; or
   d. carry a firearm outside of a domicile on campus unless the firearm is within a case or holster.
4. Consistent with the Montana Operations Manual, a person may not carry a concealed firearm without a valid permit issued pursuant § 45-8-321, MCA or recognized pursuant to § 45-8-329, MCA, or open carry a firearm in a state building in areas where classes are taught.

Section G. Penalty for Violation.

1. Violation of this policy may also constitute a criminal offense and be referred to campus police or a local law enforcement agency for investigation and prosecution.
2. A student who violates the terms of this policy will be subject to disciplinary action pursuant to the student code of conduct up to and including expulsion.
3. An employee who violates the terms of this policy will be subject to employee discipline up to and including termination.

Section H. Enforcement.

1. Any person who observes a violation of this policy should report it to campus law enforcement or the entity designated by the President.
2. Faculty and staff are not responsible for enforcement of this policy.

Section I. Liability. A person who carries a firearm pursuant to this policy is solely responsible for any injury or property damage involving the firearm. The MUS is not liable for any wrongful or negligent act or omission related to actions of a person who carries a firearm.

Section J. Security and Law Enforcement Operations. The CEO of each campus shall have general control and direction of the police or security department of his or her campus in accordance with the policies of the Board of Regents. A campus may contract with private security companies for the provision of security services.

EXHIBIT 2.7

Section K. Definitions.

Campus Housing means Montana University System campus-owned or -leased buildings or facilities for the purpose of student, employee, or affiliate residence. A unit in campus housing may be a single room or multi-room space.

Gun Case means a covering made for the purpose of protecting a gun that is generally hard-sided or made of cloth or leather that may be locked and sometimes including a handle for carrying the gun when it is not being used. Backpacks, duffel bags, purses or similar items are not gun cases under this policy.

Holster means a holder made for a firearm attached to the body by a belt or shoulder harness. A holster must completely cover the trigger and the entire trigger guard area and have sufficient tension or grip on the handgun to retain it, even when subjected to unexpected jostling.

Locking Device means a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.

Roommate means residents assigned or approved (e.g. the spouse of a student) to live in the same campus housing unit by the university residence life or housing office.

Resident means a person residing for any length of time in campus housing. The term includes individuals on campus for non-MUS events such as summer youth camps, athletic events, or other community events utilizing campus housing.

Self Defense as defined by Montana law means the use of force or threat to use force against another when and to the extent that the person reasonably believes that the conduct is necessary for self-defense or the defense of another against the other person's imminent use of unlawful force. However, the person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person or another or to prevent the commission of a forcible felony.

- **Helpful Links**

- Privacy & Security
- Accessibility
- State Authorization
- Careers
- Public Meetings

- Campus Directories
- Tuition & Fees
- Enrollment Data
- Site Index
- MUS Compliance Hotline

- **Quick Contact**

- General Info: (406) 449-9124
- Scholarships: (800) 537-7508

EXHIBIT 2.7

- **Montana University System**

  Office of the Commissioner
  of Higher Education

  560 N. Park Ave, PO Box 203201
  Helena, MT 59620-3201

edit

EXHIBIT 2.7

UM Campus Carry Information

Statement of Individual Rights and Responsibilities

The University of Montana recognizes the law supporting an individual's right to carry firearms on campus. It is every individual's duty to understand that with that right, there are also inherent responsibilities. Just like a person with a driver's license is expected to know the rules of the road in each state he or she drives through, it is the responsibility of the firearms carrier to understand the laws, rules, and regulations associated with their carrying of a firearm on the university campus.

A person who chooses to lawfully carry a firearm on campus is personally responsible for any death, injury, or damage, as a result of the unlawful or negligent use of their firearm or weapon. Any person who violates the laws or rules while on campus may be subject to criminal prosecution and/or discipline by the University, up to and including expulsion or termination. If you observe someone displaying a handgun or other weapon on campus, which is not in a holster or case, you should immediately report it to the University of Montana Police Department by dialing 911 or (406) 243-4000.

All persons carrying firearms on campus must always adhere to the universal firearm safety rules whenever the firearm is legally out of the holster or case. Any violation of these rules or the other prohibited actions listed here are considered a rule violation or law violation and is subject to disciplinary action up to and including expulsion or termination and/or criminal charges.

Rule #1: Treat every gun as if it is loaded. Even if you know the gun is unloaded, treat it with the same level of respect as you would a loaded gun.

Rule #2: Never let the muzzle cover anything you're not willing to destroy. The fact that the gun is unloaded is not an excuse to violate this rule (see rule #1).

Rule #3: Keep your finger off the trigger and outside the trigger guard until you are ready to shoot. The only time your finger goes on the trigger is when you are pointing the gun at a target and prepared to shoot.

Rule #4: Be sure of your target, what is in line with your target and what is beyond your target. You must be certain that what you are about to shoot is a valid target, and there is nothing in front of or behind it that you are not willing to shoot.

- The discharge of a firearm on or within university system property unless the discharge is done in self-defense is expressly prohibited.

- The removal of a firearm from a holster or gun case on university property and outside the possessors domicile, is expressly prohibited except: In circumstances reasonably requiring legitimate self defense
- the removal of a firearm from a holster or case, by a person who is not the lawful possessor of said firearm, is expressly prohibited.
- removal of a firearm from a holster or case while in domicile is allowed for legitimate purposes such as storage.
- The pointing of a firearm at another person unless the lawful possessor is acting in self-defense is is strictly prohibited and is a violation of Montana Law.
- When carrying a firearm outside of a domicile on campus the firearm MUST be within a case or holster at all times.

The university strongly encourages those who wish to bring firearms to campus to store them with the University of Montana Police Department. UMPD has a secure vault for storing firearms free of charge, and allows access to those stored firearms 24 hours a day, 7 days a week, 365 days a year. Storing firearms in this location eliminates the possibility of theft and provides for a safer campus.

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Attorneys for Petitioner Board of Regents

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA,
Petitioner,

-vs-

THE STATE OF MONTANA, by and through Austin Knudsen, Attorney General of the State of Montana in his official capacity.
Respondent.

Cause No. BDV-2021-598

PETITION FOR DECLARATORY RELIEF

MICHAEL F. McMAHON
Presiding Judge

EXHIBIT 3

Petitioner Board of Regents of Higher Education of the State of Montana ("Board" or "BOR"), pursuant to § 27-8-101 through 27-8-313, MCA, for its Petition against Defendant State of Montana, by and through Austin Knudsen, Attorney General ("the State"), states and alleges as follows:

PARTIES AND VENUE

1. Petitioner Board consists of seven Regents appointed by the Governor and confirmed by the Senate to seven-year overlapping terms. Mont. Const., art X, § 9(2)(b). As such, Petitioner is an independent Board mandated and established by the Constitution. The Constitution vests governance of the Montana University System in the Board, with "full power, responsibility, and authority to supervise, coordinate, manage, and control" the MUS, including "the power to do all things necessary and proper" to the exercise of these "broad powers." *Sheehy v. Commissioner of Political Practices*, 2020 MT 37, ¶ 29, 458 P.3d 309 ("*COPP*"), *citing* Mont. Const., art. X, § 9, and § 20-25-301, MCA.

2. The Montana Constitution authorizes the Board to appoint a Commissioner of Higher Education, and the Office of the Commissioner of Higher Education ("OCHE") is the central administrative unit of the Montana University System ("MUS"). Mont. Const., art. X, § 9 (c). OCHE is located in Helena, Lewis & Clark County, Montana. Thus, Petitioner

EXHIBIT 3

"resides" in Helena, Montana.

3. Respondent is one of the 50 sovereign states that make up the United States of America. Respondent Austin Knudsen ("Knudsen"), Montana's Attorney General, is "the legal officer of the state" charged, *inter alia*, as public service requires, to "defend appropriate cases in which the state . . . is a party or in which the state has an interest," and is the legal officer who must be notified and given opportunity to appear in any action challenging the constitutionality of a state statute. § 2-15-501(6), MCA; Rule 5.1 M.R.Civ.P.

4. It is the duty of the Attorney General – whose office is located in Helena, Montana – to defend the constitutionality of a state statute like HB102, or exercise the discretion of his office to concede the law's unconstitutionality or otherwise decide not to defend it. *See, e.g., Western Traditions Partnership, Inc. v. Attorney General of State*, 2012 MT271, ¶ 17 (the Attorney General has "discretion to decide whether or not to defend [a state statute's] constitutionality," including whether to make a "concession that [the] challenged statute [is] unconstitutional"); *Finke v. State, ex rel. McGrath, Attorney General*, 2003 MT 48, ¶ 8 ("The State, through the Attorney General, has the duty to defend the constitutionality of the statute").

EXHIBIT 3

5. Venue is proper in the First Judicial District, Lewis & Clark County, pursuant to § 25-2-126, MCA.

GENERAL ALLEGATIONS

6. BOR petitions this Court to declare section of House Bill 102 ("HB102" or "the Act") unconstitutional as applied to BOR, the MUS, and the campuses of the MUS.

7. HB102 generally revises gun laws, with several sections of HB102 directly regulating, managing, and controlling the use of and access to firearms on MUS campuses. (HB102 is attached as Ex. 1).

8. HB102 Section 4 precludes restriction of concealed carry of firearms with a permit "anywhere in the state" unless excepted. Section 4 creates exceptions for detention facilities, airports, federal properties, courtrooms, and school buildings controlled by school boards, but Section 4 specifically does not exclude application of the concealed carry provision to MUS buildings, campuses, or locations.

9. HB102 Section 5 provides that BOR and its employees "are prohibited from enforcing or coercing compliance with any rule or regulation that diminishes or restricts the rights of the people to keep or bear arms . . . notwithstanding any authority of the board of regents under Article X, section 9(2) (a) of the Montana Constitution."

EXHIBIT 3

10. HB102 Section 6 precludes BOR 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 BOR to restrict campus gun use only in limited ways set forth by the law

11. HB102 Section 7 imposes liability against BOR and MUS for any violation of HB102.

12. HB102 Section 8 revises § 45-3-111, MCA, Montana's Open Carry Statute, removing the BOR's exemption from the Open Carry law by deleting subsection (3), which provided: "This section does not limit the authority of the board of regents or other postsecondary institutions to regulate the carrying of weapons, as defined in 45–8-361(5)(b), on their campuses."

13. HB102 was passed by the Legislature and became law on February 18, 2021 when it was signed by the Governor. All sections of the Act, except Section 6 — the section addressing BOR authority — became effective upon passage and approval. Ex. 1, HB102, Section 15. Section 6 becomes effective on June 1, 2021. *Id.*

14. House Bill 2 provides funding of $1,000,000 for implementation of HB102. A provision of HB2 conditions that funding, referred to as line item

EXHIBIT 3

"Implementation of HB102," on BOR's acquiescence to the Legislature's unconstitutional overreach, stating:

> Implementation of HB102 is restricted to the provision of full implementation of open and concealed carry of firearms on the Montana University System campuses, including but not limited to firearms training, metal detectors for events, gun safes for campus residential housing, or awareness campaigns. If the Montana University System files a lawsuit contesting the legality of HB102, Implementation of HB102 is void.

15. Montana's Constitutional delegates carefully crafted a framework for determining the policies and programs of the MUS, free of political interference. That framework requires BOR to establish policies after providing the public (including student, faculty and staff on all the campuses) an opportunity to participate in the decision-making process through public meetings. *COPP*, 2020 MT 37, ¶41 n.5 (McKinnon, J. specially concurring).

16. BOR has a longstanding policy addressing use of and access to firearms on MUS campuses, BOR Policy 1006. (Policy 1006 is attached as Ex. 2).

17. BOR has received unprecedented public comment regarding implementation of HB102, including thousands of written comments and 900 attendees at a virtual meeting on May 12, 2021. (See Declaration, Ex. 4).

18. BOR is undertaking a review of Policy 1006 in coordination with all of its campuses to determine what, if any, changes may be appropriate to the

EXHIBIT 3

Policy. (https://mus.edu/board/meetings/2021/may/video.html, May 26, 2021 meeting at 4:27). In conducting the review, BOR exercises its authority under Article X, Section 9's constitutional directive to manage, supervise, coordinate and control MUS and its campuses.

19. The Legislature's enactment of HB102 attempts to eliminate the existing BOR policy, and directs BOR to take numerous specific actions in replacing BOR Policy 1006, despite what BOR has determined in the past, and will determine in its current review of Policy 1006, is best for the health, safety and financial stability of the MUS.

20. In HB2, the Legislature conditioned $1,000,000 in funding to MUS on BOR's compliance with these legislative directives, including that MUS must decline to file suit to enforce BOR's constitutional authority directed by Article X, Section 9. (HB2 excerpt is attached as Ex. 3).

COUNT I: DECLARATORY RELIEF

21. Petitioner re-asserts the allegations contained in the previous paragraphs of the Petition.

22. Montana's Declaratory Judgment Act allows an entity "whose rights, status or other legal relations are affected by a statute" to "have determined any question of construction or validity" of the statute. § 27-8-202, MCA.

23. As the governmental entity constitutionally vested with "full power,

EXHIBIT 3

responsibility, and authority to supervise, coordinate, manage, and control" the MUS, BOR's rights, status and legal relations are affected by the Act, and BOR may seek judicial determination of validity of the Act by declaratory judgment. *See COPP,* ¶ 36; § 27-8-202, MCA.

24. A declaratory action is the proper method for a governmental entity to challenge the validity of a legislative enactment when the governmental entity is prevented from exercising the powers and duties authorized by the Constitution. *Bullock v. Fox*, 2019 MT 50, ¶¶ 49, 435 P.3d 1187.

25. When, as here, "the legislature attempts to exercise control of the MUS by legislative enactment," the court "must engage in a case-by-case analysis to determine whether the legislature's action impermissibly infringes on the Board's authority." *COPP,* ¶ 36 (J. McKinnon concurring).

26. "The Regents are given 'full power, responsibility and authority to supervise, coordinate, manage, and control the Montana university system." *Duck Inn, Inc. v. Montan State University - Northern*, 285 Mont. 519, 526, 949 P.2d 1179, 1183 (1997).

27. BOR is the "competent body for determining priorities in higher education." *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975).

28. BOR has exercised, and continues to exercise, its authority with respect to supervising, coordinating, and managing the presence and use of guns on

EXHIBIT 3

MUS campuses, by adopting Policy 1006, which has been in place in its current form since 2012 (Ex.2), and by currently reviewing across the MUS whether that policy should continue in its current form or be amended.

29. HB102 precludes BOR 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 BOR to restrict campus gun use only in limited ways set forth by the law. Exhibit 1, HB102, Section 6.

30. HB102 does not include an exemption for BOR in the new Concealed Carry Law, and eliminates the longstanding exemption of BOR from the Open Carry Statute, § 45-3-111. (HB102, Sections 4, 8).

31. In restricting BOR's authority to supervise, coordinate, manage and control the presence and use of firearms on MUS campuses in the manner the Board determines is best to "ensure the health and stability of MUS," (*COPP* at ¶ 29), the Legislature exercised control over the MUS and impermissibly infringed on BOR's authority under the constitutional directive of Article X, Section 9.

32. This "as-applied" constitutional challenge is limited to the application of HB102 to BOR, MUS and MUS campuses and locations. HB102 may be

EXHIBIT 3

enforceable in different circumstances not infringing upon BOR authority, and in this action BOR does not challenge the facial constitutionality of HB102, or take any stance regarding that statute's constitutionality and enforceability except as it is applied to BOR, MUS, and MUS property contrary to the constitutional directive of Article X, Section 9.

33. Challenges made under constitutional directive, such as this, "[t]he merits of [the statute] and the policy choices behind it or not at issue," instead "the only question" is the pure legal question of whether the enactment of HB102 "conformed to Montana's constitutional requirements" and directives regarding the authority of BOR. *Montana Association of Counties v. State by and through Fox, Attorney General*, 2017 MT 267, ¶ 1.

34. HB102 is unenforceable against BOR and MUS, and as to MUS campuses and locations, because BOR, and not the Legislature, is constitutionally authorized to manage, control, supervise and coordinate MUS and MUS campuses pursuant to the constitutional directive of Article X, Section 9. *See City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 25, ¶ 31, 419 P.3d 685 (application of a statute contrary to a "constitutional directive" is unconstitutional "under any level of scrutiny").

35. BOR requests a judicial declaration that HB102 is unconstitutional as applied to BOR, MUS, and MUS campuses and locations.

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COUNT II: INJUNCTIVE RELIEF

36. Petitioner re-asserts the allegations contained in the previous paragraphs of the Petition.

37. Section 27-19-201, MCA, provides:

> An injunction order may be granted in 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;
> (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

38. The Court need only find that one subsection of § 27-19-201 applies to issue a preliminary injunction. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 473 P.3d 386.

39. The Montana Supreme Court has directed that a stay or injunction in this matter "may be obtained to maintain the status quo or on other appropriate

EXHIBIT 3

basis through the District Court." (Order, Ex. 5).

40. Pursuant to § 27-19-201(1), MCA, BOR is entitled to relief from application of HB102 to BOR, MUS and MUS campuses because BOR, and not the Legislature, has the full power to determine how to best manage, control, supervise the MUS for the health and stability of MUS pursuant to the constitutional directive of Article X, Section 9. It appears that BOR is entitled to a declaration that HB102 is unconstitutional as applied to BOR, MUS, and MUS campuses, and a preliminary injunction would restrain the effect of the impermissible infringement on the BOR's authority under the constitutional directive of Article X, Section 9.

41. Pursuant to § 27-19-201(2), MCA, it appears that an act may occur during the litigation that would produce great and irreparable injury to Petitioner. If HB102 is applied to BOR, MUS, and MUS campuses during this litigation, 40,000 MUS students will not know whether to comply with HB102 or with existing BOR Policy 1006. In public comment to BOR, students, parents, campus leaders and other constituencies have expressed grave concern about safety on campuses; enrollment and retention of students; recruitment and retention of faculty, suicide prevention. (Ex. 4, Ex. A).

42. In seeking a preliminary injunction, BOR need only establish a prima facie

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violation of its rights, but not a certainty of prevailing in the declaratory action. *Driscoll* at ¶ 16.

43. A preliminary injunction should be granted "if the record shows that [Petitioner] demonstrated either a prima facie case that [BOR] will suffer some degree of harm and [is] entitled to relief (§ 27-19-201(1), MCA) or a prima facie case that [BOR] will suffer an "irreparable injury" through the loss of a constitutional right (§ 27-19-201(2), MCA). *Driscoll* at ¶ 17.

44. BOR requests a preliminary injunction to preserve the status quo, and precluding application of HB102 to BOR, MUS, or MUS campuses and locations during the pendency of this litigation.

45. BOR requests a permanent injunction precluding application of HB102 to BOR, MUS, and MUS campuses and locations pursuant to a declaration that HB102 is unconstitutional as applied.

COUNT III: TEMPORARY RESTRAINING ORDER

46. Petitioner re-asserts the allegations contained in the previous paragraphs of the Petition.

47. Section 27-19-314, MCA, provides:

> Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order.

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48. In Count II of this Petition, BOR applies for an injunction.

49. The purpose of a temporary restraining order ("TRO") is to preserve the status quo until a hearing and decision on the application for a preliminary injunction.

50. The Montana Supreme Court has directed that a stay or injunction in this matter "may be obtained to maintain the status quo or on other appropriate basis through the District Court." (Order, Ex. 5).

51. BOR has adopted Policy 1006 to govern the presence and use of firearms on campus. HB102 effectively eliminates Policy 1006 and requires BOR to adopt a new policy based on legislative directives that are contrary to the constitutional directive of Article X, Section 9, that BOR, not the Legislature, be in charge of such policymaking and policy implementation.

52. HB102 requires BOR to adopt policies compliant with legislative directives by June 1, 2021.

53. Preserving the status quo requires a TRO precluding application of HB102 to BOR, MUS, and MUS campuses and locations pending adjudication of the preliminary injunction.

54. To obtain a TRO, it is sufficient that an applicant present a prima facie case with a "probable right" and a "probable danger that such

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right will be defeated without the special interposition of the court." *Boyer v. Karagacin*, 178 Mont. 26, 33, 528 P.2d 1173 (1978) *overruled on other grounds by Shammel v. Canyon Resources Corp.*, 2003 MT 372, 319 Mont 132, 82 P.3d 912.

55. BOR has established its full power and authority to manage, control, supervise and coordinate MUS as BOR determines is best for the health, safety and stability of MUS as directed by Article X, Section 9 of Montana's Constitution.

56. BOR's authority under Article X, Section 9's constitutional directive that BOR – not the Legislature – manage, control, supervise and coordinate MUS will be overridden absent special interposition of this Court to enjoin application of HB102 to BOR, MUS and MUS campuses and locations pending resolution of this matter.

57. BOR is entitled to a TRO, with an order to show cause, pending resolution of the request for injunctive relief.

WHEREFORE, Petitioner prays that this Court:

1. Issue a temporary restraining order precluding application of HB102 to BOR, MUS, and MUS campuses and locations pending resolution of the request for injunctive relief;

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2. Order the State to show cause at a hearing as to why injunctive relief should not be granted;

3. Issue a preliminary injunction precluding application of HB102 to BOR, MUS, and MUS campuses and locations pending resolution of this litigation;

4. Declare that HB102 is unconstitutional as applied to BOR, MUS and MUS campuses and locations; and

5. Provide such other and further relief as the Court deems just and proper.

DATED this 27th day of May, 2021.

Respectfully submitted,

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA, Petitioner, -vs- THE STATE OF MONTANA, by and through Austin Knudsen, Attorney General of the State of Montana in his official capacity. Respondent.	Cause No. BVD 2021-598 Judge Michael McMahon **PETITIONER'S BRIEF IN SUPPORT OF *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MOTION TO SHOW CAUSE**

EXHIBIT 4

Petitioner Board of Regents of Higher Education of the State of Montana ("Board" or "BOR") files this brief in support of its *ex parte* Motion for Temporary Restraining Order ("TRO"), Preliminary Injunction and Motion to Show Cause.

INTRODUCTION

In this declaratory action, BOR challenges the constitutionality of House Bill 102, An Act Generally Revising Gun Laws ("HB102," Ex. 1). HB102 materially alters the existing firearms policies on all campuses of the Montana University System ("MUS") by allowing open carry and concealed carry, contrary to existing policy adopted by the Board of Regents ("BOR") in 2012. HB102 was signed into law on February 18, 2021, with most of its sections effective on that day. Section 6, which governs BOR implementation of HB102, becomes effective on Tuesday, June 1, 2021.

Montana's Constitution vests sole and full authority in BOR to "supervise, coordinate, manage and control the Montana university system." Mont. Const., art. X, §9(2)(a) (hereafter "MUS"). In enacting HB102, the 2021 Montana Legislature (the "Legislature") has impermissibly curtailed BOR'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 ("*COPP*"), *quoting* Mont. Const., art. X, § 9.

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Absent the grant of a TRO, on June 1 thousands of students and employees will be uncertain as to whether the unconstitutionally enacted HB102 policies apply, or whether current, contrary BOR policy applies. Safety concerns abound for students, employees, and security officers. (Ex. 4A). No harm comes from enjoining application of HB102 to BOR, MUS and MUS campuses and locations during the pendency of this litigation or until the preliminary injunction motion is heard. On the other hand, serious harm is threatened by applying the law, without adequate time for BOR to consider all aspects of this sea change in the management and control of the MUS's sixteen institutions.

This Court should grant BOR an *ex parte* TRO pending a preliminary injunction hearing and should ultimately grant the preliminary injunction to enjoin the State from applying HB102 to BOR, MUS, or MUS campuses and locations.

I. LEGAL BASIS OF REQUEST FOR DECLARATORY RELIEF

Whether considering the TRO or the preliminary injunction, this Court will assess the nature and strength of BOR's request for declaratory relief. Importantly, the merits of HB102 and the policy choices behind it are not at issue in the declaratory action. *See Montana Association of Counties v. State by and through Fox*, 2017 MT 267, ¶1 ("*MACo*"). Rather, the Petition presents a single – and purely legal – question: Whether HB102 is unconstitutional as applied to BOR, MUS and MUS campuses, given that the Constitution grants sole authority

to BOR, not the Legislature, to control, manage, supervise, and coordinate MUS.

Equally important, BOR's Petition is narrow in scope. BOR challenges the constitutionality of HB102 as applied to BOR, MUS, and MUS campuses and locations only. BOR does not challenge the facial constitutionality of HB102, or take any stance regarding the statute's constitutionality and enforceability except as it is applied to BOR, MUS, and MUS property contrary to the constitutional directive of Article X, Section 9. Given the clear constitutional language granting broad and full authority to BOR, and given controlling authority enforcing BOR autonomy over legislative policymaking – *i.e., COPP, supra, and Duck Inn and Judge, infra*, BOR's Petition has a strong probability of success.

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 BOR's constitutional authority to manage, coordinate and control the MUS in numerous ways with respect to this issue. Section 5 precludes BOR 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 BOR 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 BOR 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, the Legislature conditioned $1,000,000 in funding for MUS upon the Regents surrendering BOR's right, and its duty, to challenge the law in a court of law. (Ex. 3); *COPP,* ¶ 29 ("a Board of Regents member has not only the power, but also the constitutional and statutory duty to ensure the health and stability of the MUS"); *Duck Inn v. Montana State Univ. - Northern*, 285 Mont. 519, 526, 949 P.2d 1179, 1183.

In enacting HB102, the Legislature impermissibly infringed on the authority granted solely to BOR to control, manage, supervise and coordinate the MUS.

The Montana Supreme Court has addressed the question of the constitutional balance of authority between the Legislature and BOR in *Board of Regents v. Judge*, 168 Mont. 433, 436, 543 P.2d 1323, 1325 (1975). In *Judge*, the Legislature made appropriations to the MUS, contingent upon the Board's certification of compliance with prerequisite conditions for the funding. 168 Mont. at 449-50, 543 P.2d at 1332-33. "Inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education." *Id.* at 454, 543 P.2d at 1335. This Supreme Court declared unconstitutional, in contravention of the directives of Article X, Section 9, the legislative enactments limiting the amounts MUS could pay college presidents. The Court noted: "The limitation set forth in [the legislation] specifically denies the Regents the power to function effectively by setting its own personnel policies and determining its own priorities. The condition is, therefore, unconstitutional." *Id.*

Pursuant to controlling Montana law, BOR – not the Legislature – is the competent body to determine priorities in higher education, including those related to the safety of students, professors, staff, and any other person on MUS campuses. *Judge*, 543 P.2d at 1333; *COPP*, ¶ 29. The Montana Supreme Court has already determined that when the Legislature places limitations on the Regents' choices in policymaking, such limitations "specifically den[y] the

Regents the power to function effectively by setting its own [] policies and determining its own priorities." *Judge*, 543 P.2d at 1335. Because the Legislature has dictated BOR policy changes and conditioned funding on BOR adopting those changes (Ex. 3), HB102 is unconstitutional.

II. A TRO AND PRELIMINARY INJUNCTION ARE APPROPRIATE RELIEF.

Injunctive relief is appropriate to maintain the status quo while this single legal issue is adjudicated. Indeed, when confronted with this constitutional challenge as an original proceeding, the Montana Supreme Court held that because a stay or injunction "may be obtained to maintain the status quo or on other appropriate basis through the District Court," litigation in the trial courts and normal appeal process were not inadequate. (Order, Ex. 5).

The grant of a TRO and preliminary injunction are governed by §§ 27-19-201 and 27-19-314, MCA respectively. The Court may issue an injunction:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce great or irreparable injury to the applicant . . . .

§ 27-19-201, MCA.

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The subsections in 27-19-201 are disjunctive, meaning the applicant need only meet one of the criteria for an injunction. *Stark v. Borner*, 226 Mont. 356, 359-360, 735 P.2d 314, 316 (1987). "If either showing is made, then courts are inclined to issue the preliminary injunction to preserve the status quo pending trial." *Porter v. K&S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). The status quo is "the last actual, peaceable noncontested condition which preceded the pending controversy." *Sandrock v. DeTienne*, 2010 MT 237,¶ 16, 358 Mont. 175, 243 P.3d 1123. It is the court's duty to minimize the injury or damage to all parties to the controversy. *Id.* "An applicant for a preliminary injunction must establish a prima facie case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated." *Mack v. Anderson*, 2016 MT 204, ? 15, 384 Mont. 368.

The Court can issue a TRO pending decision on an injunction:

> Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order.

§ 27-19-314, MCA. The purpose of a TRO is to preserve the status quo until a hearing and decision on application for the preliminary injunction. *Boyer v. Karagacin*, 178 Mont. 26, 528 P.2d 1173 (1978) (overruled on other grounds by *Shammel v. Canyon Resources Corp*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912);

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Montana Tavern Ass'n v. State, 224 Mont. 258, 729 P.2d 1310, 1315 (1986). A TRO and an injunction are not equivalents. To obtain a TRO, it is sufficient that an applicant present a prima facie case with a "probable right" and a "probable danger that such right will be defeated without the special interposition of the court." *Boyer*, 178 Mont. at 33. The applicant need not present a case which would entitle the applicant to certain relief on the merits of the cause of action.

The Court may issue a TRO without written or oral notice to the adverse party or the party's attorney when: "(1) it clearly appears from the specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or the party's attorney could be heard in opposition; and (2) the applicant or the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give notice and the reasons supporting the applicant's claim that notice should not be required." § 27-19-315, MCA.

III. BOR IS ENTITLED TO A TRO AND PRELIMINARY INJUNCTION.

A preliminary injunction should be granted "if the record shows that [Petitioner] demonstrated either a prima facie case that [BOR] will suffer some degree of harm and [is] entitled to relief (§ 27-19-201(1), MCA) or a prima facie case that [BOR] will suffer an 'irreparable injury' through the loss of a constitutional right (§ 27-19-201(2), MCA)." *Driscoll v. Stapleton*, 2020 MT 247,

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¶ 17, 473 P.3d 386. Here, BOR is entitled to a TRO and prelminary injunction pursuant to either subsection 1 or 2 of § 27-19-201, MCA.

A. BOR Will Suffer Harm and is Entitled to Relief pursuant to § 27-19-201(1).

Pursuant to § 27-19-201(1), this Court may issue an injunction if it "appears that [BOR] 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." As shown above in Section I, BOR is entitled to the relief demanded – a declaration that HB102 is unconstitutional as applied to BOR, MUS, and MUS campuses and locations. The unconstitutionality is established by Article X, Section 9's direct grant of authority to BOR to manage, supervise, coordinate and control the MUS, and by the Montana Supreme Court's controlling decision interpreting the scope of that authority: "the Board of Regents is the competent body for determining priorities in higher education." *Judge,* at 454, 543 P.2d at 1335. BOR is entitled to relief which allows BOR, not the Legislature, to manage, coordinate and control the firearms policies on the campuses of the MUS.

Part of that relief requires restraining the application of HB102 to BOR and MUS during the pendency of this litigation. Absent a TRO and injunction, on June 1, HB102's regulation of open and concealed carry ostensibly apply on

Montana's campuses, in direct contradiction to the existing BOR Policy 1006.

BOR and its campuses will suffer harm absent a TRO. *See* Rogers Declaration. Over 5,000 people have expressed their views to BOR. At the listening session on May 12, 2021, seventy people vocalized the harm inherent in allowing HB102 to go into effect prior to adjudication of its constitutionality. Students are concerned about housing. Resident assistants worry about the effect on safety. Parents are considering whether their children should transfer to another state's schools. Others predict adverse effects in the recruitment and retention of faculty and students. Professionals contend that the MUS's suicide prevention program will be less effective, putting lives in danger. *See* Rogers Declaration, and Section B, below.

B. BOR Will Suffer Irreparable Harm and is Entitled to Relief pursuant to § 27-19-201(2).

Subsection 2 allows for the grant of a TRO "when it appears that the commission or continuance of some act during the litigation would produce great or irreparable injury to the applicant . . . ." BOR Policy 1006 does not exist in a vacuum, but is one part of the overall management of the MUS. The existing policy has been revised six times over five decades. (Ex. 2). Policy 1006 allows flexibility among the campuses' needs and sizes by authorizing campuses "to establish regulations governing the transportation and storage of firearms on

campus." Moreover, many BOR initiatives – including Suicide Prevention – depend upon the existing policy in planning for overall health and safety of the MUS. *See* Rogers Declaration. Regents are charged by the Constitution with the duty to "coordinate" the MUS, and coordination requires contemplation of the firearms policy in relation to other BOR policies and initiatives. BOR will be irreparably damaged by its inability to coordinate its existing structure during the period of confusion created by the legislation's effective date, June 1. *See* Rogers Declaration.

Absent a TRO, the MUS will also suffer irreparable financial damage. Immediate implementation of HB102 requires funds to create training programs, hire new employees, and other functions. 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). Absent a TRO, 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. *See* Rogers Declaration.

Finally, the public comments establish the irreparable harm implementation will cause. Thousands of students, parents, faculty, and other stakeholders have documented the harm which comes from ceding management of the MUS to the Legislature, even temporarily. (Ex. 4A). As set forth in the Declaration of Brianne Rogers:

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- A faculty member express fear for her life and urged BOR to take action to provide her a safe work place "where [she] did nto have to worry about being killed." (Petition, Ex. 4A, 18).
- Parents expressed fear for the safety of their children attending school after implementation of HB102. (Petition, Ex.4A, 18, 19, 23, 28, 29, 36, 37, 46, 54, 59). Parents even noted that they would not have students attend universities where concealed carry is allowed. (Ex. 4A, p. 59).
- Public commenters raised concerns about enrollment of students and recruitment of faculty and staff. (Petition, Ex. 4A, p. 20, 21, 39, 42).

These are just a few of the grave concerns raised by the public about the safety of Montana's campuses if HB102 is implemented. Irreparable harm has been established

IV. EX PARTE RELIEF IS JUSTIFIED..

BOR seeks an *ex parte* TRO as contemplated by § 27-19-315, MCA. BOR has provided notice to Respondent State of Montana, but the timing does not allow meaningful time for the State to respond. A briefing schedule as contemplated by the Rules of Civil Procedure, followed by a hearing, will not conclude in time to prevent irreparable harm caused by implementation of HB102 on June 1, 2021. Irreparable injury will be caused unless the status quo is maintained until the hearing on the preliminary injunction is conducted.

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CONCLUSION

Petitioner requests that this Court grant BOR an *ex parte* TRO pending a preliminary injunction hearing; schedule briefing and hearing; and ultimately grant the preliminary injunction to enjoin the State from applying HB102 to BOR, MUS, or MUS campuses and locations.

DATED this 27th day of May, 2021.

Respectfully submitted,

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EXHIBIT 4

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of May, 2021, a copy of the foregoing has been filed, and served upon the following by electronic means and by depositing a copy in the U.S. mail, postage prepaid, addressed to:

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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

On June 7, 2021, the Montana Shooting Sports Association (MSSA) filed a motion to intervene in this case. (Doc. 20.) As noted in MSSA's

EXHIBIT 5

motion, the State consented to MSSA's intervention. On June 9, David Diacon filed a motion to intervene. (Doc. 22.) In his motion, Mr. Diacon stated that no party had indicated whether it opposed his intervention. Counsel for the State subsequently told Mr. Diacon that it does not oppose his intervention, and the State now writes in support of these motions to intervene.

As indicated by their respective filings in support of their motions, MSSA and Mr. Diacon bring valuable perspectives to the litigation. The proposed intervenors seek leave to assert the individual right to keep and bear arms in different and important ways. These perspectives are especially important because the Board of Regents seeks to enjoin, inter alia, § 5 of House Bill 102, which prohibits the Board from enforcing rules that restrict a person's right to keep or bear arms. *See Kitzmiller v. Dover Area Sch. Dist.*, 229 F.R.D. 463, 471 (M.D. Pa. 2005) (noting that permissive intervention involves consideration of "whether the proposed intervenors will add anything to the litigation"); *D.C. v. Heller*, 554 U.S. 570, 595 (2008) (stating that the Second Amendment confers an *individual* right to keep and bear arms); *see also* Mont. Const. Art. II, § 12 (stating "[t]he right of *any person* to keep or bear arms . . . shall not

be called in question") (emphasis added). Accordingly, the State asks that this Court grant these two motions to intervene.

Respectfully submitted June 22, 2021.

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EXHIBIT 5

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

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

EXHIBIT 6

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

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

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

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

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

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

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

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

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

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

Respectfully submitted June 30, 2021.

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

CERTIFICATE OF SERVICE

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

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Date: June 30 , 2021

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CERTIFICATE OF SERVICE

I, Quentin M. Rhoades, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 08-03-2021:

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