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

MONTANA SHOOTING SPORTS ASSOCIATION,

Petitioner,

v.

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

Respondent.

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

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

I. INTRODUCTION

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

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

II. FACTS

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

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

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

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

III. LEGAL STANDARD

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

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

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

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The District Court followed Montana law, so Rule 14(3)(a) also does not apply. MSSA does not dispute that the District Court set forth the correct requirements for non-statutory intervention "as of right," nor that it correctly stated the elements for intervention as of right adopted by this Court, which require an intervention-applicant to "satisfy the following four criteria: (1) the application must be timely; (2) it must show an interest in the subject matter of the action; (3) it must show that the protection of that interest may be impaired by the disposition of the action; and (4) it must show that that interest is not adequately represented by an existing party." Order.3 (quoting Mont.R.Civ.P. 24(a), *Loftis v. Loftis*, 2010 MT 49,¶9); Pet.12-13. Nor does MSSA contest that the "applicant *must satisfy* [all] four criteria[.]" *Loftis*,¶9 (emphasis added); *Id.* BOR agrees the motion was timely, however, as the District Court correctly concluded below, MSSA failed to establish the other three Rule 24(a) elements, something MSSA must do here to establish "mistake of law" under Mont.R.App.14(3)(a). It has not done so. Once again, the District Court–not MSSA–got this right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

Dated this 8th day of September, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

/s/ Kyle A. Gray
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CERTIFICATE OF SERVICE

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

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