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 & CLARK COUNTY, THE HONORABLE MICHAEL F. McMAHON, DISTRICT JUDGE,

Respondent.

STATE OF MONTANA'S RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov

ATTORNEYS FOR THE STATE OF MONTANA

QUENTIN M. RHOADES
Rhoades, Siefert & Erickson PLLC
430 Ryman Street
Missoula, MT 59802

ATTORNEY FOR PETITIONER

HON. MICHAEL F. MCMAHON
First Judicial District Court
Lewis and Clark County
228 Broadway, 3rd Floor
Helena, MT 59601

PRO SE RESPONDENT

MARTHA SHEEHY
Sheehy Law Firm
PO Box 584
Billings, MT 59103-0584

Kyle A. Gray
Brianne C. McClafferty
Emily J. Cross
Holland & Hart LLP
PO Box 639
Billings, MT 59103

ATTORNEYS FOR PETITIONERS
IN UNDERLYING ACTION

Pursuant to this Court's August 9, 2021 Order, the State of Montana hereby responds to Montana Shooting Sports Association's (MSSA's or Proposed Intervenor's) petition for writ of supervisory control. The State agrees with MSSA that this Court should issue a writ of supervisory control over the district court with respect to its Order Denying Intervention Motions and Briefing Schedule ("Intervention Order").

ARGUMENT

I. Supervisory Control is Justified

Supervisory control is "justified when urgency or emergency factors" render a direct appeal inadequate, when a case presents purely legal questions, and—relevant here—when "[t]he other court is proceeding under a mistake of law and is causing a gross injustice; or Constitutional issues of state-wide importance are involved." Mont. R. App. P. 14(3).

Both circumstances are present here. The district court erred when it denied MSSA's motion to intervene, and if not corrected, the district court's order will cause "significant injustice" to those who helped draft HB 102 and seek to vindicate individual rights implicated by this litigation. *See Stokes v. Mont. Thirteenth Judicial Dist. Court*, 2011 MT 182,

¶ 5, 361 Mont. 279, 259 P.3d 754. Supervisory control is appropriate when there is "a particular need to prevent an injustice from occurring." *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Ct.*, 2002 MT 18, ¶ 4, 308 Mont. 189, 40 P.3d 400.

The district court's error causes such an injustice—MSSA played an active role in the development and passage of HB 102 and must be afforded the chance to participate in its defense. Its motion to intervene is not separately appealable, and an appeal after final judgment is entirely inadequate for the intervenors. *See Sportsmen for I-143*, ¶ 4.

The Montana Supreme Court has exercised supervisory control in similar cases. For example, the Court has repeatedly held that such power can be exercised over denials of motions to intervene because no remedy by appeal exists. *See, e.g.*, *Sportsmen for I-143*, ¶ 6; *In re Custody of R.R.K.*, 260 Mont. 191, 202 (1993); *State v. District Court*, 190 Mont. 185, 187 (1980). Potential intervenors—like MSSA—have no ability to participate in the litigation if their motions are denied. Although the district court will allow MSSA to file an amicus brief, the district court has prohibited any discussion of "federal or state firearm rights," which is the issue MSSA seeks to discuss on behalf of its members. Intervention

Order at 14. An appeal of a denial of intervention following a final judgment is simply a day late and a dollar short. The best outcome at that late stage is that the appellate court would agree with the potential intervenors that intervention should have been appropriate. But at that point, the very litigation in which they sought to participate will have been resolved, leaving them with nothing more than a feel-good order validating their position that they should have been allowed to participate. *See District Court*, 190 Mont. at 187 ("If we were not to review this decision immediately … the intervenor would be left at the end of the suit without a proper remedy at law.").

Whether the Board of Regents can restrict the carrying of firearms on MUS campuses is also an issue of "both first impression and statewide importance" that warrants participation by groups like the MSSA. *Id.* This case implicates a novel question about the scope of the Board of Regents' limited authority with respect to firearms and campus safety. And because this case is ultimately about the authority to regulate the carrying of firearms, the individual right to keep or bear arms is clearly at issue, even if indirectly. On this basis, supervisory control is appropriate.

II. MSSA is Entitled to Intervene in This Case Because the Existing Parties do not Adequately Represent its Interest.

After determining that supervisory control is appropriate in this case, the Court must address the question of whether intervention as of right is appropriate in this case. This is a purely legal question, and there are no factual questions in dispute. MSSA has made clear that it seeks to discuss individual rights that will be implicated by the court's decision, and the Attorney General has made clear that it cannot directly represent those interests in court. *See Mont. Quality Educ. Coalition v. Mont. Eleventh Judicial Dist. Court*, OP 16-0494, 2016 Mont. LEXIS 1121 (Mont. Oct. 27, 2016) (denying a motion to intervene because the factual record was not developed as to the question of whether the intervenor's interests were adequately represented).

Mont. R. Civ. P. 24(a) sets out the requirements for intervention of right. The application must "(1) be timely; (2) show an interest in the subject matter of the action; (3) show that the protection of the interest may be impaired by the disposition of the action; and (4) show that the interest is not adequately represented by an existing party." *Sportsmen for I-143*, ¶ 6.

Rather than duplicate the arguments made by MSSA, the State focuses on the issue of whether the existing parties adequately represent MSSA's interest. 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. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 451 ("The principal object of the statute, it is true, was not to enhance the [branch's] power to reward one group and punish another …. Yet these are its undeniable effects."); *INS v. Chadha*, 462 U.S. 919, 935–36 (1983) (finding that the separation-of-powers dispute would directly impact an individual's interest). If the Board wins, MSSA members will be governed by the old Board policy, which doesn't allow anyone to carry a firearm for self-defense on MUS property. *See* Montana Board of Regents of Higher Education, Policy 1006 (May 25, 2012).

And one section of HB 102 that the Board challenges below and the district court already preliminarily enjoined—Section 5—prohibits the Board from "diminish[ing] or restrict[ing] the rights of people to keep or bear arms" under the Montana Constitution. HB 102(5). Even if the old policy didn't impermissibly violate MSSA's members' rights—which the

State doesn't concede—it certainly diminishes those rights. Otherwise, why would the Board seek to enjoin Section 5? MSSA's interests are clearly wrapped up in this dispute, even if the central question is about legislative power.

While both the Board and the State should always exercise their respective authorities in a manner consistent with the state and federal 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.[1]

The State, through the Attorney General, cannot fully represent MSSA's 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 MSSA and the Attorney General are on the same side of the dispute, the Attorney General *cannot* assert private parties' individual rights. *See* MCA §§ 2-15-501 to -504 (setting forth the Attorney General's general

[1] 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 intervenor's 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.

duties and powers). A public indication that the State seeks to defend HB 102 is not the same as stating that the State can and will vindicate individual rights. *See* Intervention Order at 13 (finding the MSSA's and State's objectives to be identical because the Attorney General has stated that he wants to win this case). Unlike in *Montana Quality Education Coalition*, where there was a factual dispute as to whether the Department of Revenue could adequately represent the potential intervenor's interests, the Attorney General cannot—by law—represent individual interests. He can only represent the State's interest, which in this case is defending the Legislature's plenary power. Because the Board's request to enjoin Section 5 of HB 102 directly implicates MSSA's interests, intervention is the only means by which they can protect these interests.

The standard for showing a legally protectable interest is not overly burdensome. *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"); *see also Sportsmen for I-143*, ¶ 14 (noting that this burden is "minimal"). 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).

If the Board succeeds in this litigation, then MSSA's constitutional rights will be impacted—its members will be unable to carry firearms on campus. MSSA's members' 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; *compare Sportsmen for I-143*, ¶¶ 14–17 *with Mont. Quality Educ. Coalition*, at *5. 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. The answer to the separation of powers question here will impact MSSA's members' rights.

While the district court has stated that this case is limited to a pure question of constitutional authority, the district court's actions have suggested otherwise. In the Intervention Order, the district court made clear that this is an "intra-governmental dispute about the scope of art. X, § 9." Intervention Order at 13. It is on this basis that the district court denied

the motions to intervene. *See* Intervention Order at 4 ("This case is merely about whether the Legislature or the Executive Branch[2] has the exclusive constitutional authority to regulate firearms on MUS campuses and other locations."). Elsewhere the district court stated that "[n]o part of this lawsuit will decide the scope of Diacon or MSSA members' respective rights." Intervention Order at 12. That is plainly wrong, given that the Board challenges Section 5 and Judge McMahon has already enjoined it.

But it's also incorrect when considering the district court's prior orders in this case. In its June 7 Preliminary Injunction Order, the district court noted, "[a]t this juncture in this proceeding, the Court has not been presented with any controlling legal authority that the right to keep or bear arms on MUS campuses and other locations under either the United

[2] The State objects to the use of the term "Executive branch" in this context as it suggests that the Board of Regents wields the authority of the entire Executive branch. *See Sheehy v. Comm'r of Political Practices*, 2020 MT 37,¶ 41 399 Mont. 26, 458 P.3d 309 (McKinnon, J., concurring) ("The Board cannot abridge rights protected by the federal or state constitutions,5Link to the text of the note and is subject to state legislation enforcing state-wide standards for public welfare, health, and safety."); *see also Board of Regents v. Judge*, 168 Mont. 433, 442–43, 543 P.2d 1323 (1975) (rejecting the assertion that the Board of Regents is a fourth branch of government). The State has stated this objection in its Brief in Support of its Rule 60 Motion, which has not yet been resolved. State of Montana's Brief in Support of its Motion for Rule 60 Relief, Dkt 50 (Aug. 20, 2021) ("Exhibit B") (The parties agreed to strike Section II of this brief and enter a separate scheduling order.).

States Constitution or the Montana Constitution is an absolute right."[3] Preliminary Injunction Order ("Exhibit A"), Dkt. 19, at 10 (June 7, 2021). The district court also noted the right to carry a concealed weapon is not protected under the Second Amendment—or at least it wasn't as of the late Nineteenth Century. *Id.* at 8. In other words, the district court said this case implicated gun rights before the district court said it didn't. Because the district court made individual gun rights an issue in this case, it is patently unjust to prohibit any discussion of individual rights[4] or deny intervention on the basis that this case is not about the right to keep or bear arms under Article II, § 12 of the Montana Constitution or the Second Amendment of the United States Constitution. And because the Attorney General is limited to defending HB 102 as a legitimate exercise of legislative power, MSSA is the appropriate entity to raise arguments about individual rights at stake in this litigation.

[3] The State notes that the district court was not presented any authority suggesting the right to keep and bear arms on MUS campuses was an "absolute right" because no party—certainly not the State—made any such argument.

[4] *But see* Intervention Order at 14 ("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.").

CONCLUSION

The proposed intervenor has the right to join this litigation and protect its members' individual rights. This Court should exercise supervisory control and grant MSSA's motion to intervene.

Respectfully submitted this 8th day of September, 2021.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ David M.S. Dewhirst*
DAVID M.S. DEWHIRST
Solicitor General

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14(9)(b) of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,090 words, excluding certificate of service and certificate of compliance.

/s/ David M.S. Dewhirst
DAVID M.S. DEWHIRST

CERTIFICATE OF SERVICE

I, David M.S. Dewhirst, 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:

Martha Sheehy (Attorney)
P.O. Box 584
Billings MT 59103
Representing: Montana Board of Regents of Higher Education
Service Method: eService

Emily Jayne Cross (Attorney)
401 North 31st Street
Suite 1500
P.O. Box 639
Billings MT 59103-0639
Representing: Montana Board of Regents of Higher Education
Service Method: eService

Brianne McClafferty (Attorney)
401 North 31st Street, Suite 1500
P. O. Box 639
Billings MT 59103-0639
Representing: Montana Board of Regents of Higher Education
Service Method: eService

Kyle Anne Gray (Attorney)
P.O. Box 639
Billings MT 59103
Representing: Montana Board of Regents of Higher Education
Service Method: eService

Quentin M. Rhoades (Attorney)
430 Ryman St.
2nd Floor
Missoula MT 59802
Representing: Montana Shooting Sports Association, Inc.
Service Method: eService

Mike McMahon (Respondent)
227 Broadway, Second Floor

Helena MT 59601
Service Method: Conventional

Ali Bovingdon (Attorney)
1301 E. 6th Street
P.O. Box 200801
Helena MT 59620-0801
Representing: Montana Board of Regents of Higher Education
Service Method: Conventional

Electronically signed by Laura L. Schultz on behalf of David M.S. Dewhirst
Dated: 09-08-2021