IN THE SUPREME COURT OF THE
STATE OF MONTANA

Case No. DA 21-0605

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

Petitioner and Appellee,

vs.

THE STATE OF MONTANA, BY AND THROUGH AUSTIN KNUDSEN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MONTANA,

Respondent and Appellant.

FRIEND OF THE COURT BRIEF OF MONTANA SHOOTING SPORTS ASSOCIATION

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STATEMENT OF THE ISSUE

The questions MSSA poses, on behalf of the citizens of Montana who happen to live and work on campuses of higher education: do they benefit from fundamental right stated in Mont. Const. art. II, § 12? And if so, was it prejudicial legal error to forbid the parties or amici from discussing the issue? Should the District Court's summary judgment order be reversed and remanded with instructions to fully consider whether the Board of Regents' Policy 1006 illegally infringes upon the fundamental right reserved by the people in Mont. Const. art. II, § 12?

STATEMENT OF THE CASE

Friend of the Court Montana Shooting Sports Association (MSSA) relies on the Appellant's Statement of the Case.

STATEMENT OF THE FACTS

MSSA relies on the Appellant's Statement of the Facts.

STANDARD OF REVIEW

The Court reviews "de novo" the District Court's determination of whether a right asserted is a "constitutionally protected right," and if constitutionally protected, whether "it is a fundamental right," and if it

is a fundamental right, whether the government has provided a "compelling interest" for infringing upon it. *Wadsworth v. State*, 275 Mont. 287, 298, 911 P.2d 1165, 1171 (1996). De novo review of the District Court's Summary Judgment Order "'affords no deference to the district court's decision' and demands that we conduct an inquiry 'identical' to that of the district court." See *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 52, 345 Mont. 12, 192 P.3d 186.

SUMMARY OF THE ARGUMENT

MSSA's chief interest, on behalf of its broad constituency of Montana citizens and electors from all walks of life, is asserting the fundamental right to keep or bear arms that is memorialized and reserved to the people in the Montana Constitution. In pursuit of this chief interest, MSSA crafted HB 102 and brought it to the 2021 session of the Montana Legislature. Yet, an Order by the District Court dated July 16, 2021 rejects MSSA's focus on the fundamental right. The District Court prohibited MSSA from arguing or discussing its chief interest in HB 102 and this case, i.e., Montana's fundamental right to keep or bear arms. "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***." (AR 0001–0015 (emphasis added.))

MSSA agrees with the holding of the Montana Supreme Court in *Regents v. Judge*, that Article X of the Montana Constitution may not be considered in isolation but must be understood in relation to the rest of the Constitution, including the rights the people have reserved to themselves specifically from government interference in Article II. "It is the opinion of this Court that these provisions of the 1972 Montana Constitution and Article X, Section 9, should stand together. To be sure, that constitutional provision, like most, is couched in broad language, but it must not be read or construed in isolation." *Board of Regents v. Judge*, 168 Mont. 433, 443 (Mont. 1975). In other words, whatever the Board of Regents' other powers, it has no authority to

violate and ignore the fundamental rights of Montanan's ensconced by the 1972 Constitution's Declaration of Rights.

ARGUMENT

1. Montanans reserved for themselves the right of self-defense with deadly force in Mont. Const. art. II, § 12.

The District Court ruled that one of the fundamental rights ensconced in Article II of the Montana Constitution does not apply on the Montana college campus. The implication is that the Board of Regents can force citizens to surrender fundamental constitutional rights as a condition of attending a public institution of higher learning. MSSA's purpose, as a friend of the Court, is to resist this deeply flawed proposition. The troubling idea defies the classically liberal philosophical underpinnings of the need and function of public education in a democratic society. Tradeoffs on human rights in exchange for public services are made only in totalitarian regimes.

As regards Mont. Const. art. II, § 12—Montana's right to keep and bear arms—the District Court held:

> Here, under art. X, § 9(2), this Court has determined that the BOR, not the Legislature, has the power to determine whom may carry firearms on MUS property. ***Furthermore,***

> *there is no controlling legal authority that a member of the general public has the right to carry, openly or concealed, a firearm under . . . the Montana Constitution.* Thus, it appears, in harmonizing art. X, § 9(2) with the identified constitutional provisions, the policy that Montana argues it is entitled to police and protect, as it relates to HB 102, simply does not exist under the current law. As such, to the extent HB 102 impermissibly infringes and interferes with BOR's constitutional authority it is unconstitutional.

(*Summary J. Order*, App. E 027-28 (emphasis added.)[1] The District Court's legal conclusion, however, is simply without merit. The "controlling legal authority" is obvious. It consists of § 12 of the Declaration of Rights, placed there by Montana electors through their ratification of the 1972 Montana Constitution.

The language adopted by the Legislature in HB 102 makes clear that its primary purpose is to execute, on behalf of the electorate, rights set forth in Montana's Constitutional Declaration of Rights, specifically, § 12. See, HB 102, §§ 1, 2, 3, and 5. (App. E 08-10.) As § 12 of the Declaration of Rights reads:

> The right of *any* person to *keep or bear arms in defense of his own home, person, and property*, or in aid of the civil power when thereto legally summoned, *shall not be called in*

[1] This ruling it issued despite its order of directing that it would not "tolerate" any party or amici raising the issue of the right to keep and bear arms under art. II, § 12 (See D.C. Doc. 19, 4; D.C. Doc. 46, 5, 14.)

> ***question***, but nothing herein contained shall be held to permit the carrying of concealed weapons.

Mont. Const. art. II, § 12. This narrow language does not purport to reserve for Montanans an "absolute right" to use firearms for all peaceful purposes, as the District Court recognized. The rights reserved by the people under § 12 does not include, for example, the right to use firearms for hunting, status symbols, or shooting sports. Where the District Court lost its way, however, is in ruling that since art. II, § 12 does not reserve any absolute rights, it is a legal nullity.

Instead, the people reserved the right to keep close at hand and in their possession firearms for the narrow purpose of self-defense. This natural right to defend one's home, one's person, and one's property, with proportionate deadly force, if necessary, is all the people have reserved for themselves within the carefully cabined ambit of Mont. Const. art. II, § 12. This notion has been reiterated most recently in the Legislature's adoption in 2017 of SJ-11,[2] which reads, in part:

> That the phrase "shall not be called in question," as used in Article II, Section 12, of the Montana Constitution, is defined as follows:

[2] https://leg.mt.gov/bills/2017/billpdf/SJ0011.pdf

(1) Any impairment, restriction, or curtailment of a person's rights under Article II, Section 12, of the Montana Constitution by public policy or government all actors may not be done unless such impairment, restriction, or curtailment survives an examination more restrictive than strict scrutiny, a level of restraint identified as maximum scrutiny and that meets the criteria provided in subsection (2).

(2) To survive maximum scrutiny requires the following:

(a) A government interest is actually proven and so complete that without impairment, restriction, or curtailment human lives will actually and imminently be at serious risk, or be lost, as demonstrated by current facts in evidence and by clear articulation;

(b) any impairment, restriction, or curtailment is accomplished by a means that cannot be more narrowly limited to achieve its objective as to geography, polity, objects, topics, time frame, societal or political conditions, or class of people affected;

(c) there is convincing evidence that the impairment, restriction, or curtailment will accomplish the intended purpose;

(d) there is convincing evidence that the impairment, restriction, or curtailment will have no consequence in restricting the free action of citizens beyond its intended purpose;

(e) any impairment, restriction, or curtailment is not a prior restraint; and

(f) the impairment, restriction, or curtailment is permissible even though in conformance with subsections (a) through (e).

Thus, the Montana Legislature recognizes that the rights the people have reserved to themselves from government interference at Article II, Section 12, are of the highest possible order.

Contrary to the District Court's ruling, the language employed in art. II, § 12, is "controlling legal authority" and the people have reserved it for themselves in their Declaration of Rights. The District Court's holding is, therefore, a legally erroneous conclusion that should be reversed.

2. The Montana Constitutional right to keep and bear arms is "fundamental" and any infringement thereon can survive only by satisfying the rigors of "strict scrutiny."

In Montana, rights the people listed in Article II of the Montana Constitution—their "Declaration of Rights"—are accorded the high priority of "fundamental" rights. E.g., *Yellowstone County v. Billings Gazette*, 2006 MT, 333 Mont. 390, 401, ¶ 37, 143 P.3d 135, 142-43; *Jones v. County of Missoula*, 2006 MT, 330 Mont. 205, ¶ 50, 127 P.3d 406. For example:

> Applying the preceding rules to the facts in this case, we conclude that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of

> Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.

Montana Env't Info. Ctr. v. Dept. of Env't Quality, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236. The Court has "repeatedly recognized the rights found in Montana's Declaration of Rights as being 'fundamental,' *Butte Community Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986), meaning that these rights are significant components of liberty, ***any*** infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts." *Dorwart v. Caraway*, 2002 MT 240, ¶ 96, 312 Mont. 1, 58 P.3d 128 (emphasis added).

Courts in Montana shoulder their task of protecting the people's fundamental rights by applying the rigorous standard of "strict scrutiny." *Gulbrandson v. Carey*, 272 Mont. 494, 502, 901 P.2d 573, 579 (1995). To take fundamental rights seriously, any temptation to water down the exacting nature of the test must be avoided. Unfortunately, the District Court's petty rationale fell prey to this temptation. It

analyzed the right to keep and bear arms as it might a mere privilege, ruling that students and others on campus have no right of any kind to keep and bear arms for their own protection. It held this claim of right to be subject to the plenary discretion of an unelected board, which is wholly insulated from electoral discipline. The District Court's analysis amounts to an error of law. Because the Board of Regents does not answer to the electorate, only the judicial branch can protect the people from the Board's impulse to ignore their rights. In this task, the District Court wholly failed.

Under the applicable standard, "***the State*** has the burden of showing the law is narrowly tailored to serve a compelling government interest." *Reesor v. Montana State Fund*, 2004 MT, 325 Mont. 1 ¶ 13, 103 P.3d 1019, 1022 (emphasis added). To demonstrate that its interest in justifying infringement of a fundamental constitutional right is "compelling," the state must show, "at a minimum, some interest 'of the highest order and ... not otherwise served' " or " 'the gravest abuse[ ], endangering [a] paramount [government] interest [ ]'." *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, at fn. 6 (citing

Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972); *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1945); and *Miller v. Catholic Diocese of Great Falls*, 224 Mont. 113, 117, 728 P.2d 794, 796 (1986)).

Some inkling of the Constitutional Convention's view of how serious a situation must exist before the government has a "compelling" interest for infringing the right of individual privacy can be gleaned from delegate comment of electronic surveillance. There, Delegate Dahood noted that, if it should ever be allowed at all, "electronic surveillance shall be justified only in matters involving ***national security, perhaps*** in matters involving certain ***heinous federal crimes*** where the situation is such that in those instances, we must risk the right of individual privacy because there is a greater purpose to be served." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1687. (emphasis added). Thus, only concerns over the survival of the government, free and fair elections, life and death, or other fundamental rights of Montanans, and the like, fit the definition

of an interest of the "highest order." Otherwise, a state interest is not "compelling."

In considering how to apply this standard, it is well to reflect on the fact Montanans reserved for themselves constitutional guarantees purposely designed to be greater than those found in the U.S. Constitution. The people of Montana designed their Constitution's Declaration of Rights "to stand on its own footing and to provide individuals with fundamental rights and protections far ***broader*** than those available through the federal system." *Dorwart*, ¶ 94 (Nelson, J., concurring) (emphasis added). "In presenting this proposed Declaration of Rights, the committee [of the Constitutional Convention] notes that the guidelines and protections for the exercise of liberty in a free society come ***not from government but from the people who create that government***." *Id.* (quoting Montana Constitutional Convention, Bill of Rights Committee Proposal, Vol. II, 619, emphasis the Court's).

> Taking these admonitions to heart, this Court has, for example, applied the ***broader*** protections of Montana's Constitution in a number of contexts involving individual privacy . . . involving search and seizure . . . involving the environment . . . and involving the right of participation and the right to know."

Id., at ¶ 95 (string citations omitted, emphasis added).

In sum, the District Court committed legal error in failing to recognize the gravity of the rights the people reserved for themselves in Mont. Const. art. II, § 12. As set forth in the next section, this error is a prejudicial one that should be reversed.

3. The Board of Regents cannot show its alleged interest in stripping students and others on campus of their right to keep and bear arms is sufficient to satisfy strict scrutiny.

In its petition for declaratory relief, the Board of Regents acknowledges that it freely regulates the right to keep and bear arms on campus. "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)." (Pet. for Declar. Relief (May 27, 2021), ¶ 16 (see, Doc. 1).) Policy 1006 provides, in brief, that only law enforcement officers and licenses private security guards may legally be in immediate possession of firearms on campus. Those intent on committing violent crimes are prohibited from bringing guns on campus. The targets of criminal, sexual, or family violence, even if they are law-abiding citizens, are also

banned from possessing firearms on campus. The Board of Regents alleges that its infringement on campus against the right of law-abiding potential crime victims to keep and bear arms "is best for the health, safety and financial stability of the [Montana University System]." It does not claim Policy 1006 serves the best interests of those who live and work on campus. It bolsters this claim thus: "In public comment to [the Board of Regents], 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." (Pet. for Declar. Relief (May 27, 2021), p. 42 (see, Doc. 1).) Unfortunately, however, the Board of Regents cites no data upon which it would rely if it had to prove its allegations of fact. For example, it offers no evidence to sustain the factual allegation that banning violent criminals from possessing guns reduces criminal, sexual, or family violence on campus.

In its summary judgment briefing, moreover, the Board of Regents offers no proof of its allegations of fact with respect to the

good it claims Policy 1006 serves. This is fatal to any argument that it can satisfy strict scrutiny. As a board within the executive branch of government, it shoulders the burden of proof that its compelling government interest justifies its admitted infringements upon the right to keep and bear arms. It has made no such showing or any attempt to make such a showing. Similarly, it has made no effort to show how Policy 1006 is narrowly tailored to serve a compelling interest in stripping potential crime victims of the right to defend their homes, persons, and property on campus.

Of course, the Board of Regents acted upon the District Court's order forbidding all discussion of the right to keep and bear arms. It cannot be faulted for simply complying with the District Court's directives. But the District Court erred. It should not have ruled that the fundamental right the people reserved in art. II, § 12, would not be considered in resolving the petition. Given that the Constitution is the organic and supreme law of Montana, the District Court's prohibition was legal error. It

enjoyed no discretion in forbidding consideration of the fundamental rights expressed in Montana's Declaration of Rights. Its ruling was prejudicial to the rights of Montanans to keep and bear arms. Mont. Const. art. II, § 12.

CONCLUSION

Accordingly, the District Court's summary judgment ruling should be reversed. The action should be remanded to the District Court for full consideration of the fundamental rights reserved by the people in Mont. Const. art. II, § 12.

DATED this 17th day of February 2022.

Respectfully Submitted,
RHOADES & ERICKSON PLLC

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

Pursuant to Mont. R. App. P. 11(4)(d), I certify that the Friend of the Court Brief is printed with proportionately spaced Century text typeface of 14 point and double-spaced, except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is less than 5,000 words, excluding the table of contents, table of authorities, certificate of service, and this certificate of compliance.

DATED this 17th day of February 2022.

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

I hereby certify that on the 17th day of February 2022, I filed a true and correct copy of the foregoing *Friend of the Court Brief of Montana Shooting Sports Association* on the following persons by electronic service as follows:

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