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 Appellees,

v.

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

Respondent and Appellant.

Appeal from the Montana First Judicial District Court
Lewis and Clark County
The Honorable Michael F. McMahon, Presiding
District Court Cause No.: BDV-2021-598

MOTION FOR PROVISIONAL *PRO HAC VICE* ADMISSION OF AMICUS COUNSEL TO FILE AMICUS BRIEF AND MOTION FOR LEAVE TO FILE AMICUS BRIEF

Quentin M. Rhoades
State Bar No. 3969
RHOADES & ERICKSON PLLC
430 Ryman Street
Missoula, Montana 59802
Telephone: (406) 721-9700
qmr@montanalawyer.com
courtdocs@montanalawyer.com
Sponsoring Attorney for Pro Hac Vice Applicants

Motion for Provisional Pro Hac Vice Admission by Court Pending Administrative Process by Montana State Bar.

As Montana Counsel for applicants seeking *pro hac vice* admission for the purpose of filing an amicus brief (attached), I hereby seek provisional *pro hac vice* admission to this court for Donald Kilmer and Alexandria Kincaid, or the purpose of lodging with this Court the brief they are seeking leave to file. Both counsels have completed the forms mandated by the Montana State Bar and are prepared to tender the funds for *pro hac vice* admission but are still awaiting copies of their certificates of good standing from the states where they are currently licensed to practice law. (See their declarations below.)

Once the certificates of good standing are received, they will be immediately transmitted with forms and fees to the Montana State Bar.

Good cause exists for this provisional *pro hac vice* admission because BOARD OF REGENTS, would only consent to these amici filing a brief, if said brief was filed on or before February 17, 2022, and counsel are not yet in possession of their certificates of good standing. If, for some reason, the Montana Bar Association does not grant *pro hac vice* admission, this amicus brief will be withdrawn.

Declaration: Donald Kilmer -- Provisional Pro Hac Admission

I, Donald Kilmer, declare as follows:

1. I am attorney licensed to practice law in Idaho. My state bar number is 11429. My offices are in Caldwell, Idaho 83601. My street address is 14085 Silver Ridge Road. I am a member in good standing of the Idaho Bar and have no disciplinary proceeding pending against me. I have requested and I am awaiting a copy of my certificate of good standing.
2. I am also licensed in the State of California. My state bar number is 179986. I am a member in good standing of the California Bar and have no disciplinary proceedings pending against me. I have requested and I am awaiting a copy of my certificate of good standing.
3. I am also licensed in the State of Washington. My state bar number is 56598. I am a member in good standing of the Washington Bar and have no disciplinary proceedings pending against me. I have requested and I am awaiting a copy of my certificate of good standing.

4. I will tender my application, fee, and certificates to the Montana State Bar Association as soon as the certificates become available.
5. I do not maintain a residence in Montana.
6. I am not regularly employed in Montana.
7. I am not regularly engaged in the practice of law, nor am I engaged in substantial business or professional activities in Montana.
8. I do not have an application for admission to the Montana Bar pending.
9. I have never been admitted as pro hac vice counsel in any Montana Court prior to this case.
10. I agree to be bound by the disciplinary authority of the Montana State Bar for this provisional admission.

The forgoing is true of my own personal knowledge and belief, and this declaration is executed under penalty of perjury under the laws of Montana and the United States.

Date: February 17, 2022.

/s/ Donald Kilmer
Donald Kilmer, Attorney for Amicus Curiae

Declaration: Alex Kincaid -- Provisional Pro Hac Admission

I, Alex Kincaid, declare as follows:

1. I am attorney licensed to practice law in Idaho. My state bar number is 8817. My offices are in Emmett, Idaho 83617. My street address is 709 S. Washington Ave., Suite B. I am a member in good standing of the Idaho Bar and have no disciplinary proceeding pending against me. I have requested and I am awaiting a copy of my certificate of good standing.
2. I am also licensed in the State of Oregon. My state bar number is 984101. I am a member in good standing of the Oregon Bar and have no disciplinary proceedings pending against me. I have requested and I am awaiting a copy of my certificate of good standing.
3. I will tender my application, fee, and certificates to the Montana State Bar Association as soon as the certificates become available.
4. I do not maintain a residence in Montana.
5. I am not regularly employed in Montana.

6. I am not regularly engaged in the practice of law, nor am I engaged in substantial business or professional activities in Montana.
7. I do not have an application for admission to the Montana Bar pending.
8. I have never been admitted as pro hac vice counsel in any Montana Court prior to this case.
9. I agree to be bound by the disciplinary authority of the Montana State Bar for this provisional admission.

The forgoing is true of my own personal knowledge and belief, and this declaration is executed under penalty of perjury under the laws of Montana and the United States.

Date: February 17, 2022.

s/ Alexandria Kincaid
Alexandria Kincaid, Attorney for Amicus Curiae

Motion / Application for Leave to File Brief Amicus Curiae

1. Introduction. Mont. R. App. P. 1(2) states: "These rules shall govern proceedings before the supreme court." A motion for leave to file a brief as a friend of the Court "shall identify the interest of the applicant, state the reasons why a brief of an amicus curiae is desirable, identify the party whose position amicus supports, provide the date upon which the brief can be filed, and indicate whether the other party consents to the request." Mont. R. App. P. 12(7). Such briefs may be filed upon leave of the Supreme Court. *Id.*

2. Interest of Amici Applicant. (See also proposed Amicus Brief.)

Amicus Second Amendment Foundation (SAF) is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including Montana. The purposes of SAF include education, research, publishing, and legal action focusing on the constitutional right to possess and carry firearms, as well as the consequences of gun control. SAF tenders this amicus brief on behalf of itself and its members to limit gun control that is

repugnant to the right of self-defense, wherever such transgressions arise. SAF is not a publicly traded corporation.

Idaho Second Amendment Alliance, Inc., (ISAA) is a non-profit advocacy organization registered with the Idaho Secretary of State. ISAA is a membership organization that is organized around the principle that law-abiding citizens have an inalienable right to keep and bear arms for the defense of themselves, their family, their community, their state, and their nation. ISAA also advocates for the right to keep and bear arms for sporting purposes such as hunting and target practice. ISAA lobbies for changes in Idaho's gun laws to enhance those rights, clarify those rights, and ensure that the political foundation for those rights remain intact. To that end, ISAA is committed to educating the public through various media on how, when, and where they may exercise their right to keep and bear arms. As a neighboring state, Montana's gun policies might influence policies in Idaho, therefore ISAA and its members seek to monitor and influence policy and litigation in Montana that may impact Idahoans. ISAA is not a publicly traded corporation.

The Madison Society Foundation, Inc., (MSF) is a not-for-profit 501(c)(3) corporation based in California. It promotes and preserves the purposes of the Constitution of the United States, in particular the right to keep and bear arms. MSF provides the general public and its members with education and training on this important right. MSF contends that this right includes the right to carry firearms in public (subject only to constitutionally valid regulation) for self-defense. MSF and its members are highly motivated in their efforts to seek limitations on constitutionally invalid forms of regulation in other states – in part – because such unlawful regulations plague California residents, and the effects are detrimental to Californians, and the nation. MSF is not a publicly traded corporation.

3. Reasons why a brief of the amicus curiae is desirable.

The decision of the trial court conflicts with public safety policies and decisions of Supreme Courts in other states. Should the Board of Regents prevail in this matter, the policy of disarming law-abiding adults on university campuses could spread to other jurisdictions, making statutory and/or constitutional amendments in those other

jurisdictions necessary. And open and robust debate on this issue before the Montana Supreme Court will facilitate better policy making decisions in those other jurisdictions.

4. The party whose position amicus supports. The State of Montana.

5. Date upon which the brief can be filed. The brief is ready to be filed now. A copy is attached to this motion.

6. Whether the parties consent.

The State of Montana consented in an email from the Montana Solicitor General David Dewhirst received on February 15, 2022. The Board of Regents consented in an email received from Martha Sheehy on February 16, 2022, but only on condition that the brief is filed within one-week of the State of Montana's brief. (Thus, making the motion for provisional *pro hac vice* admission necessary.)

Date: February 17, 2022.

/s/ Quentin M. Rhoades

Quentin M. Rhoades, State Bar No. 3969
RHOADES & ERICKSON PLLC
430 Ryman Street
Missoula, Montana 59802
Telephone: (406) 721-9700
qmr@montanalawyer.com

CERTIFICATE OF SERVICE

I, Quentin M. Rhoades, hereby certify that I have served true and accurate copies of the foregoing MOTION FOR PROVISIONAL PRO HAC VICE ADMISSION OF AMICUS COUNSEL TO FILE AMICUS BRIEF and MOTION FOR LEAVE TO FILE AMICUS BRIEF

to the following on 02-17-2022:

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

David M.S. Dewhirst (Montana Solicitor Attorney)
215 N Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

AUSTIN KNUDSEN (Montana Attorney General)
Montana Attorney General
KRISTIN HANSEN (Montana Lieutenant General)
Lieutenant General
P.O. Box 201401
Helena, MT 59620-1401
Service Method: eService

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

Stephen H.G. ('Greg') Overstreet (Attorney)
300 Main Street, Suite 203
Stevensville MT 59870
Representing: Seth Berglee
Service Method: eService

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: E-mail Delivery

Electronically signed by Quentin Rhoades.

Dated: 02-17-2022

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 Appellees,

v.

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

Respondent and Appellant.

Appeal from the Montana First Judicial District Court
Lewis and Clark County
The Honorable Michael F. McMahon, Presiding
District Court Cause No.: BDV-2021-598

BRIEF OF AMICUS CURIAE: SECOND AMENDMENT FOUNDATION, IDAHO SECOND AMENDMENT ALLIANCE, and MADISON SOCIETY FOUNDATION, INC.

Alexandria C. Kincaid*
ID State Bar No.: 8817
OR State Bar No.: 984101
709 S. Washington Ave., Suite B
Emmett, Idaho 83617
Ph. (208) 365-4411
Alex@AlexKincaidLaw.com

Donald E. J. Kilmer, Jr.*
ID State Bar No.: 11429
CA State Bar No.: 179986
WA State Bar No.: 56598
14085 Silver Ridge Road
Caldwell, Idaho. 83607
Ph. (408) 264-8489
Don@DKLawOffice.com

**Pro Hac Vice for Amicus Pending*

CORPORATE DISCLOSURE STATEMENTS

Amicus SECOND AMENDMENT FOUNDATION states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus IDAHO SECOND AMENDMENT ALLIANCE states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus MADISON SOCIETY FONDATION, INC., states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respectfully submitted this 17th Day of February 2022.

/s/ Donald Kilmer
Donald E. J. Kilmer, Jr.*
ID State Bar No.: 11429
CA State Bar No.: 179986
WA State Bar No.: 56598
14085 Silver Ridge Road
Caldwell, Idaho. 83607
Ph. (408) 264-8489
Don@DKLawOffice.com

**Pro Hac Vice for Amicus Pending*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Montana Cases

Colorado Cases

Montana Statutes

Secondary Materials

Interests of Amici

Amicus Second Amendment Foundation (SAF) is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including Montana. The purposes of SAF include education, research, publishing, and legal action focusing on the constitutional right to possess and carry firearms, as well as the consequences of gun control. SAF tenders this amicus brief on behalf of itself and its members to limit gun control that is repugnant to the right of self-defense, wherever such transgressions arise. SAF is not a publicly traded corporation.

Idaho Second Amendment Alliance, Inc., (ISAA) is a non-profit advocacy organization registered with the Idaho Secretary of State. ISAA is a membership organization that is organized around the principle that law-abiding citizens have an inalienable right to keep and bear arms for the defense of themselves, their family, their community, their state, and their nation. ISAA also advocates for the right to keep and bear arms for sporting purposes such as hunting and target practice. ISAA lobbies for changes in Idaho's gun laws to enhance those rights, clarify those rights, and ensure that the political foundation for

those rights remain intact. To that end, ISAA is committed to educating the public through various media on how, when, and where they may exercise their right to keep and bear arms. As a neighboring state, Montana's gun policies might influence policies in Idaho, therefore ISAA and its members seek to monitor and influence policy and litigation in Montana that may impact Idahoans. ISAA is not a publicly traded corporation.

The Madison Society Foundation, Inc., (MSF) is a not-for-profit 501(c)(3) corporation based in California. It promotes and preserves the purposes of the Constitution of the United States, in particular the right to keep and bear arms. MSF provides the general public and its members with education and training on this important right. MSF contends that this right includes the right to carry firearms in public (subject only to constitutionally valid regulation) for self-defense. MSF and its members are highly motivated in their efforts to seek limitations on constitutionally invalid forms of regulation in other states – in part – because such unlawful regulations plague California residents, and the effects are detrimental to Californians, and the nation. MSF is not a publicly traded corporation.

Amici Relationship to Parties

No counsel for any party in this matter has authored this brief in whole or in part. No party or counsel for any party has contributed money intended to fund the preparation of this brief. No person(s), other than amicus curiae and its members have funded the preparation of the brief.

This *Amicus Curiae* Brief is filed in support of Appellant State of Montana.

Status of This Filing

This brief was filed concurrently with a motion for leave to file a friend of the court brief, along with applications to appear *pro hac vice* by amici's counsel.

Date: February 17, 2022.

/s/ Alexandria Kincaid
Alexandria C. Kincaid*
ID State Bar No.: 8817
OR State Bar No.: 984101
709 S. Washington Ave., Suite B
Emmett, Idaho 83617
Ph. (208) 365-4411
Alex@AlexKincaidLaw.com

/s/ Donald Kilmer
Donald E. J. Kilmer, Jr.*
ID State Bar No.: 11429
CA State Bar No.: 179986
WA State Bar No.: 56598
14085 Silver Ridge Road
Caldwell, Idaho. 83607
Ph. (408) 264-8489
Don@DKLawOffice.com

**Pro Hac Vice for Amicus Pending*

Introduction

Almost like completing relatives seeking guardianship over a child unable to exercise rights in their own name, the BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA (hereafter "Board of Regents") has come to this court with the claim that they are the better entity to regulate bearing arms by individuals while on university campuses than the sovereign STATE OF MONTANA (hereafter "Montana".)

The Board of Regents claims a power that more closely resembles the doctrine of *parens patriae* over minors under Montana Law. *In re S.L.M.*, 287 Mont. 23, 951 P.2d 1365 (1997). But the Board of Regents is not restricting the right of self-defense for minors on its campuses. It is suspending the fundamental right of adult members of the faculty, staff, visitors, and student body to choose the means of providing for their own safety. Indeed, § 45-8-344 of the Montana Code legislates 14 years of age as the lower limit in Montana for regulating the right to carry or use firearms in public without supervision by a guardian or parent. Without a finding that the Board has a valid claim to such power or is conceding it has a "special" relationship with all who tread

upon any Montana University System (MUS) campus, this Court must defer to the policies of Montana.

The reason Montana has the better argument, is that its light-handed paternalism (which consists of complying with state law) rests on the foundations of: (1) a presumption of liberty, (2) a law voted on by the legislature and signed by the governor, and (3) a constitutionally valid separation of powers doctrine. The hidden premise of the heavy-handed paternalism advanced by the Board of Regents (and the trial court's error), is that Montana's jurisdiction over public safety and its duty to guarantee the fundamental rights of all citizens, is somehow null and void on Montana's state campuses.

But the Board of Regents is not a sovereign, or even a fourth branch of government. Without an evidentiary showing, that meets the strictest judicial scrutiny that attends fundamental rights, that higher education itself will be diminished, or that academic freedom will be compromised, if adults on MUS campuses are treated like adults everywhere else in Montana – the Board of Regents is wrong.

The decision below must be reversed, and judgment entered for the State of Montana.

Statement of the Case

Amici herein rely upon the statement of the case in Montana's opening brief filed February 10, 2022.

Statement of Facts

Amici herein rely upon the statement of facts set forth in Montana's opening brief filed February 10, 2022, set forth here verbatim for the convenience of the Court:

> HB 102 was the culmination of extensive deliberation by Legislature. The Legislature heard significant public comment from both proponents and opponents of the bill. And the Board itself actively participated in the legislative process. As a result of the Board's participation, the law's complexion changed significantly. For example, the Board sought to push back the effective implementation date, HB 102, § 15, restrict firearms in specific campus facilities, HB 102, § 6, and work with the Legislature to establish a fund for implementation costs, HB 2 (providing $1 million in funding for implementation). See D.C. Doc. 21, Ex. 2-1.
>
> HB 102 removes existing regulations of firearms and makes the right to "bear arms" the rule rather than the exception statewide, including on MUS campuses. Its stated purpose "is to enhance the safety of people by expanding their legal ability to provide for their own defense by reducing or eliminating government-mandated places where only criminals are armed and where citizens are prevented from exercising their fundamental right to defend themselves and others." HB 102, § 1.

Section 4 of HB 102 addresses concealed weapons and allows any person with a valid permit to carry a concealed weapon anywhere in the state except in locations expressly noted in Section 4. The MUS facilities are no longer included in this list, meaning individuals who are lawfully permitted to carry a concealed weapon may do so—with some statutory exceptions—on MUS campuses. HB 102, § 4. Section 10 removes the penalties previously associated with carrying concealed weapons on the state properties listed in Section 4.

Section 5 prohibits the Board from taking any actions more restrictive than those set forth in the law—any that "diminish[] or restrict[] the rights of the people to keep or bear arms." HB 102, § 5. This, of course, relates to its stated purpose, which is to allow all individuals—regardless of where they are located in the state—to exercise their "right to defend themselves and others." HB 102, § 1.

Section 6 authorizes the Board to regulate firearms in certain facilities on campus, including places where alcohol will be consumed and large entertainment events with controlled access and armed security. This section also allows the Board to prohibit the carrying of a firearm outside a case or holster as well as the discharge of firearms except in self-defense. Again, Section 6 memorializes the Board's substantial involvement in the legislative process and the Legislature's willingness to afford the Board enhanced regulatory flexibility.

Section 8 of HB 102 addresses open carry and removes statutory language that previously authorized the Board and other postsecondary institutions to regulate or prohibit it on MUS property. This section also establishes the circumstances under which an individual may use force against an aggressor.

Each section works together to achieve the bill's stated purpose, which is to promote self-defense and protect the constitutional rights of the citizens of Montana. Those who live and work on MUS campuses possess the same fundamental

> rights as everyone else in Montana. And HB 102 protects them just as it does individuals on other state property.
>
> The Board's current policy ("Policy 1006") prohibits all firearms on MUS campuses except for those carried by police and security officers. See App. B. While the parties may disagree on the prudence of Policy 1006 and HB 102, the parties agree that—absent the district court's injunction—Policy 1006 and HB 102 cannot coexist as written. […]

Standard of Review

The standard of review is set forth in the opening brief of Montana.

Summary of Argument

Affirming the trial court would erode the foundation of constitutional governance in Montana. It is without question that the right to keep and bear arms set forth in the Second Amendment (and its analog in the Montana constitution) may be regulated to some extent without infringement. The question presented by this case is: Who gets to make those regulations?

The public carry component of "bearing arms" found in the Second Amendment is currently pending in the U.S. Supreme Court. *See: New York Rifle & Pistol Ass'n, Inc., et al. v. Bruen, et al.* No. 20-843. The matter was argued to that Court on November 3, 2021. If the U.S. Supreme Court upholds a public carry component of this fundamental right, does the Board of Regents – as a state actor – claim it is exempt

from such a holding? Can the Board be both a special place (like a school) and a sovereign state-like actor?

The trial court made too much of the dictum and footnote 26 in *District of Columbia v. Heller,* 554 U.S. 570, 626-27[1] (2008). The point that the trial court missed, is that the Supreme Court's holdings on the Second Amendment represent the absolute minimum of the guarantees afforded by that right. States retain the power to go beyond that bare minimum through their own legislatures and other law-making processes as they seek to define, codify, and enforce fundamental rights. *See* Amendment 10. *See also: Schuette v. Coal. to Defend Affirmative Action,* 572 U.S. 291 (2014). (There was no authority in the United States Constitution, or judicial precedent, for the judiciary to set aside state laws that overrode policy determinations made by state universities regarding racial preferences for admission.)

Affirming the trial court would turn the hierarchy of government and the separation of powers upside down, thus defeating bedrock principles of self-government.

[1] "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Argument

I. Montana Should have the Exclusive Power to Regulate Public Safety and the Right Of Self-Defense.

If the Board of Regents offered to guarantee the safety of every person entering its campuses, the complete ban on firearms for self-defense on those campuses still usurps the power of Montana (and law-abiding people) to make the public policy (and personal) choices of the best means of exercising the right of self-defense in public.

As circumstances stand today, a guarantee of such a "special relationship" to ensure safety would be a lie. Students are not in the custody of the Board of Regents when they step foot on campus. They are MUS's clients for the purpose of education. As adults they do not shed other fundamental rights on campus. *Cf., Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503 (1969). They should not be compelled to shed the right of self-defense. Nor should the Board of Regents be permitted to make empty promises of safety.

In the alternative, if this Court upholds the trial court, it should also make a finding that should the Board of Regents maintain Policy 1006, that it has established a special relationship of protection of everyone entering an MCU campus – with all the consequences that entails.

A. Violent Crime is a Known Hazard on all MUS Campuses.

The Board of Regents and the University of Montana in conjunction with the University Police Department, publishes an Annual Campus Security & Fire Safety Report.[2] (ACSFSR) The 179-page report has chapter headings that include "Disclosure of Crime Statistics and Availability of Report" (Ch. 2), "Reporting Crimes and Other Emergencies" (Ch. 4), "Campus Alert Types" (Ch. 5), "Emergency Communication System & Evacuation Procedures" (Ch. 6).

Sub-headings within Chapter 6 include protocols for dealing with an active shooter [pg. 28 of ACSFSR] which is defined as "an individual actively engaged in killing or attempting to kill people in a confined and populated area; in most cases, active shooters use firearms(s) and there is no pattern or method to their selection of victims." The link[3] for emergency preparedness in dealing with an active shooter is found at the link on page 28. The guide goes on to explain that:

> Because active shooter situations are often over before law enforcement arrives on the scene, individuals must be ready to respond to an active shooter situation.

[2] The 2021 Report is found online at: https://www.umt.edu/clery/acsfsr/acsfsr_2021.pdf
[3] Found at: https://www.umt.edu/emergency/active-shooter/default.php

> The UM Police Department is dedicated to the safety of everyone at the University of Montana and the Missoula College. Officers cannot be everywhere, so we rely on you, our community, to be our eyes and ears.
>
> Trust your instincts and report anything that does not seem right. Here we provide some resources to help keep you safe.

The guide then goes on to offer the advice of "running"; "locking and hiding"; and "fighting" against an active shooter -- presumably without a firearm if a victim has complied with Policy 1006. Trusting your instincts does not apparently extend to the exercise of a normal constitutional right available off campus -- to be armed for self-defense.

The point of all this is not to suggest that MUS campuses are particularly crime-ridden. It is to point out that MUS admits that its campuses are not crime-free utopias[4] where reasonable people should be expected to shed a fundamental right of self-defense that exists beyond the imaginary boundaries of campus.

MUS's candor in anticipating violent crime and providing public access to violent crime statistics, is an admission that violent crime is a known hazard on its campuses. Why is this important?

[4] MSU Crime Logs can be found at https://www.umt.edu/police/crime-log/default.php.

B. Policy 1006 Does Not Stop Violence – It Shifts Costs.

In *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.,* 489 U.S. 180 (1989), the U.S. Supreme Court found that even where the actions of a criminal are reprehensible, that the Fourteenth Amendment did not require a state or local governmental agency to protect its citizens from private violence or other mishaps not attributable to the conducts of its employees.

There are two exceptions to this general rule: (1) the special relationship exception, and/or (2) the state-created danger exception. *Id.*

Whether MUS has a special relationship with people who enter campus property is an open question. The second exception, state-created danger, is a closer call. Outside of MUS campuses, law-abiding adults are free to see to their own personal safety by availing themselves of the right to carry a weapon (subject to Montana law) so that they can fight back if they encounter an "active shooter."

But the Board of Regents places that same adult in a more precarious situation on any MUS campus if that law-abiding adult complies with Policy 1006 and sheds their firearm at the campus border. The same cannot be said of jurisdictions like California, New York, New Jersey, and Hawaii, where campus visitors are no worse off

than any other random member of the public, because those jurisdictions have adopted universal public disarmament. *Cf., New York Rifle & Pistol Ass'n, Inc., et al. v. Bruen, et al.* No. 20-843.

Policy 1006 places MUS visitors, faculty, staff, and its student body in a worse position – vis-à-vis their right of self-defense -- than they would be anywhere else in Montana. Why should the Board of Regents have the power to treat similarly situated persons in Montana differently? Why should the Board of Regents be permitted to shift the risks and costs of their utopian gun ban schemes to the smallest minority – the individual?

A hypothetical can illustrate the point. Suppose the Montana legislature, instead of adopting HB 102, had elected tort reform in lieu of amending its firearms law? What if the legislature passed, and the governor signed, a bill making the owner/manager of any property that is open to the public – like a public university -- subject to a conclusive presumption that they create an unsafe condition by banning the right of self-defense with firearms. That way a victim of campus violence can prevail by making a showing at trial that "but for" Policy 1006, they would have carried a firearm that day to protect themselves.

In other words, for a public agency like MUS, promulgating and enforcing a regulation like Policy 1006 constitutes a waiver of the protections found in *Deshaney*. Contra-wise, repealing a regulation like Policy 1006, affords that agency the full protections of *Deshaney*.

In this hypothetical, the State of Montana would not be engaged in firearm regulation *per se*. Nor need the bill specifically address MUS properties. The sovereign State of Montana would simply be engaged in its undisputed power to enact tort reform for purposes of public health and safety. The state's motivation being to ensure that victims of unsafe conditions created on property open to the public, can be made whole after they have suffered damages. Damages that are arguably caused by the policy decisions – in the face of known dangers – by those public property owners/managers.

That way, if the Board of Regents, still insisted on enforcing Policy 1006, at least they would not be allowed to shift the external costs of that decision to innocent people. The risk managers, endowment fund managers, and insurance companies doing business with the Board of Regents could then weigh-in on wisdom of Policy 1006.

If the Board of Regents would not have standing to seek repeal of this hypothetical tort reform, then why should they have standing to

attack a more direct means of Montana seeking to achieve the same public safety policy objectives?

Montana must be the only entity to regulating the right of self-defense in Montana. The issue is preemption and uniformity of public safety policy throughout Montana. See: Montana Code § 7-1-111.

C. Other States are in Accord – State Law Preempts Subordinate Agencies with Respect to Public Safety.[5]

In *Regents of U. of Colorado v. Students of Concealed Carry on Campus, LLC*, 271 P.3d 496 (Colo. 2012), the Colorado Supreme Court reviewed a firearm preemption statute and its application on the campus of the University of Colorado. In 1994, the Board of Regents of the University of Colorado adopted a policy prohibiting "the possessions of firearms … on or within any University of Colorado campus." *Id.* at 497. Then, in 2003, the Colorado General Assembly enacted the Concealed Carry Act (CCA). *Id. at* 498. Under the act, "[a] local government does not have authority to adopt or enforce an ordinance of resolution that would conflict with the [CCA]." Colo. Rev. Stat. Ann. § 18-12-214(1)(a). Students for Concealed Carry on Campus, LLC (Students) then filed a complaint in 2008 alleging the University policy

[5] Amici are indebted to Professor George A. Mocsary of the University of Wyoming for his contribution to this section.

prohibiting firearms violated the CCA. *Regents of U. of Colorado*, 271 P.3d at 498. The district court granted the Board of Regent's motion to dismiss concluding the "CCA prohibits only local government from adopting or enforcing laws contrary to the CCA." *Id.* (internal quotations omitted). The students appealed. *Id.*

On appeal, the Colorado Supreme Court considered whether the authority granted to the Regents by the Colorado Constitution made the CCA inapplicable to the University's campus. *Id.* at 500. "The board asserts that it holds special, constitutional authority to enact policies governing the University of Colorado" and "the CCA only prohibits local governments, a phrase that would not include the University of Colorado." *Id.* The court rejected both arguments.

On the issue of University autonomy, the court held that the CCA achieved its goal of bringing about "statewide uniform standards." *Id.* at 500. As such, the substantive provisions of "the CCA divested the Board of its authority to regulate concealed handgun possession on campus." *Id.* at 502. On the issue of the CCA limiting the authority only of local governments, the court held that exclusions to the broad state policy were limited to specific locations. *Id.* at 501. In addition, the Court looked to another, unrelated statute, defining local government as "all

municipal corporations, quasi municipalities, countries, and local improvement and service districts of this state." *Id.* (citing Colo. Rev. Stat. Ann. § 24-32-102).

The Colorado case highlights that, while constitutionally autonomous universities enjoy autonomy over those areas affecting the unique competence of the university, they enjoy no right to supplant clearly established state public policy. No public policy is more clearly protected than those codified in the state and federal constitutions. Universities do not enjoy a plenary right to abrogate constitutionally protected activity via oblique reference to pedagogical interests.

Whether Montana's preemption doctrine mirrors Colorado's is beyond the scope (and word count limit) of this brief. But it is not beyond the scope of common sense.[6]

II. U.S. Supreme Court Precedent on the Second Amendment is a Constitutional Minimum, Thus the State of Montana May Offer Greater Protection Under Its Laws for the Right of Self-Defense.

Supreme Court case law already supports the proposition that the U.S. Constitution sets only the lower limit on our liberties, and that States may provide a greater degree of protection of fundamental rights.

[6] See also Montana Administrative Register Notice Volume 57, Opinion 1. Available at: https://rules.mt.gov/gateway/ShowNoticeFile.asp?TID=7698

In *Pruneyard v. Robins*, 447 U.S. 74 (1980), the U.S. Supreme Court took up the issue of free speech on private property that is open to the public. The California Court found that the free speech rights of the people entering private property open to the public, was greater than the free speech and private property rights of the mall or shopping center owner. In-other-words, states are free to provide more protection for a fundamental like free speech, than the *de minimus* protections then supported by U.S. Supreme Court case law.

Applying this concept to the Sixth Amendment right to counsel, the Court in *Florida v. Powell*, 559 U.S. 50 (2010), made a finding that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Id.,* at 59.

See also: Arizona v. Evans, 514 U.S. 1, 7-8 (1995):

> [S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution. They also are free to serve as experimental laboratories, in the sense that Justice Brandeis used that term in his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (urging that the Court not impose federal constitutional restraints on the efforts of a State to "serve as a laboratory"). Under our decision today,

> the State of Arizona remains free to seek whatever solutions it chooses to problems of law enforcement posed by the advent of computerization. Indeed, it is freer to do so because it is disabused of its erroneous view of what the United States Constitution requires.

The Montana Supreme Court is in accord:

> This Court has long embraced the principle that the rights and guarantees afforded by the United States Constitution are minimal, and that states may interpret provisions of their own constitutions to afford greater protection than the United States Constitution. *State v. Johnson* (1986), 221 Mont. 503, 512, 719 P.2d 1248, 1254 (citations omitted). In interpreting the Montana Constitution, this Court has repeatedly refused to "march lock-step" with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart.
>
> *State v. Guillaume*, 293 Mont. 224 (1999)

This invites the question: Why should the Montana Supreme Court – on the facts of this case – treat Montana's right to keep and bear arms the same way Colorado's Supreme Court did in *Regents of U. of Colorado v. Students of Concealed Carry on Campus, LLC*, 271 P.3d 496 (Colo. 2012)?

Answer: Because the language and history of both rights are virtually identical.

"In 1889, Montana adopted its statehood constitution, copying the Missouri-Colorado model. As to who enjoys the right, Montana chose the Colorado approach with rights for every "person." The next year, Mississippi wrote a new constitution and took the Missouri approach. So, in Mississippi, noncitizens were excluded from the right to arms." Article: The Right To Arms In Nineteenth Century Colorado, 95 Denv. L. Rev. 329, 434 (Kopel, D.)

The right as set forth in the Montana Constitution of 1889, Art. III, § 13 was:

> The right of any person to keep or bear arms in defense of his own home, person and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

This section was later reenacted verbatim in the 1972 Montana Constitution. Montana Constitution, Art. II, § 12.

The Colorado Constitution's right to arms provision [Art. II, § 13] remains unchanged since its adoption in 1876:

> The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

Furthermore, if Montana's Courts are not bound to the *de minimus* safeguards found in the U.S. Constitution as interpreted by the U.S. Supreme Court, then as co-equal branches of government charged with lawmaking powers, Montana's legislative policy combined with the assent and authority of Montana's governor, must be accorded equal dignity. Montana Constitution, Art. III, Part III, Sec. 1.

When it comes to protecting fundamental rights enumerated in a state's constitution and its statutory laws, in ways greater than its own decisional law, the U.S. Supreme Court has bound itself to defer to the policy choices made by a state's lawmakers. *Schuette v. Coal. to Defend Affirmative Action,* 572 U.S. 291 (2014). In other words, the judiciary's power to interpret the law, must yield to the other branches' power to make law.

The trial court's error did not merely arise from its citation to the dictum in *District of Columbia v. Heller,* 554 U.S. at 626-27, and its language purporting to create a Second Amendment dead zone for schools. The error lay in elevating U.S. Supreme Court case law (which merely sets the floor for constitutional protections) to the detriment of the greater protections for self-government and public safety policy found in the statutes and Constitution of the State of Montana.

Stated another way, the *Heller* dictum is not controlling on the Montana Supreme Court in this case, the laws passed by Montana's legislature, and signed by its governor are.

Conclusion

The decision of the trial court must be reversed, and judgment entered for the State of Montana.

Respectfully Submitted,

Date: February 17, 2022.

/s/ Alexandria Kincaid
Alexandria C. Kincaid*
ID State Bar No.: 8817
OR State Bar No.: 984101
709 S. Washington Ave., Suite B
Emmett, Idaho 83617
Ph. (208) 365-4411
Alex@AlexKincaidLaw.com

/s/ Donald Kilmer
Donald E. J. Kilmer, Jr.*
ID State Bar No.: 11429
CA State Bar No.: 179986
WA State Bar No.: 56598
14085 Silver Ridge Road
Caldwell, Idaho. 83607
Ph. (408) 264-8489
Don@DKLawOffice.com

**Pro Hac Vice for Amicus Pending*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 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 4193 words, excluding certificate of service and certificate of compliance.

/s/ *Donald Kilmer*

Donald Kilmer, Counsel for Amici

CERTIFICATE OF SERVICE

I, Quentin M. Rhoades, hereby certify that I have served true and accurate copies of the foregoing BRIEF OF AMICUS CURIAE: SECOND AMENDMENT FOUNDATION, IDAHO SECOND AMENDMENT ALLIANCE, and MADISON SOCIETY FOUNDATION, INC,

to the following on 02-17-2022:

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

David M.S. Dewhirst (Montana Solicitor Attorney)
215 N Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

AUSTIN KNUDSEN (Montana Attorney General)
Montana Attorney General
KRISTIN HANSEN (Montana Lieutenant General)
Lieutenant General

P.O. Box 201401
Helena, MT 59620-1401
Service Method: eService

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

Stephen H.G. ('Greg') Overstreet (Attorney)
300 Main Street, Suite 203
Stevensville MT 59870
Representing: Seth Berglee
Service Method: eService

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: E-mail Delivery

Electronically signed by Quentin Rhoades.

Dated: 02-17-2022