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*Pro Querente*

**MONTANA FOURTH JUDICIAL DISTRICT COURT  
MISSOULA COUNTY**

<p><b>CITY OF MISSOULA,</b></p> <p>Plaintiff,</p> <p>v.</p> <p><b>TIMOTHY C. FOX, in his official capacity as the Attorney General for the State of Montana,</b></p> <p>Defendant.</p>	<p>Cause No.: DV-18-429</p> <p><b><i>PRINCIPAL BRIEF IN SUPPORT OF INTERVENOR MONTANA SHOOTING SPORTS ASSOCIATION'S RULE 24(a) MOTION</i></b></p>
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Intervenor Montana Shooting Sports Association (MSSA), through  
counsel, submits in support of its Rule P. 24 (a) motion the following:

***PRINCIPAL BRIEF***

**ISSUE**

Intervenor Montana Shooting Sports Association (MSSA), should be  
allowed to intervene in this action, on behalf of its members who live in  
Missoula, on grounds Defendant Montana Attorney General Timothy C.  
Fox (AG) has failed to raise MSSA members' individual rights defenses

under the Montana Constitution, the Montana Human Rights Act and the U.S. Constitution. MSSA should be allowed to intervene and do so.

### **FACTUAL AND PROCEDURAL BACKGROUND**

1. On April 11, 2018, Plaintiff City of Missoula (the City) filed this action. It seeks to limit the ability of citizens of Missoula, including members of MSSA, to keep or bear firearms by imposing on them criminal penalties for failing to obtain background checks prior to the transfer of firearms in non-retail settings such as gun shows and private citizen to private citizen transactions. Specifically, it seeks endorsement of Ordinance 3581 (the Bloomberg Ordinance) requiring (with certain exceptions) citizens of Missoula, including members of MSSA, who wish to transfer firearms in private transactions within the City of Missoula to successfully complete a background check conducted through a federally licensed firearms dealer.

2. Ordinance 3581 is a “Bloomberg Law.” David B. Kopel, “Background Checks for Firearms Sales and Loans: Law, History, and Policy,” 53 Harv. J. on Legis. 303, 313 (2016). It is the creation of former New York City Mayor Michael Bloomberg, whose lobby is called Everytown for Gun Safety in America (“Everytown”). Everytown nevertheless gave

the City of Missoula extensive legal advice in the drafting of the Missoula Bloomberg Ordinance. (See Ex. A, attached.)

3. On June 7, 2018, the AG filed his Answer and Affirmative Defenses. (Doc. 5.) It lists the following affirmative defenses and no others: failure to state a claim upon which relief may be granted; laches; no case or controversy; ripeness; failure to join necessary parties; lack of standing by Plaintiff; unclean hands; and waiver or estoppel. (*Id.*, p. 7.)

4. The AG's defense thus does not invoke as an affirmative defense MSSA members' respective individual rights to keep or bear arms set forth in the Declaration of Rights of the Montana Constitution:

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.

Mont. Const. art. II, § 12 (emphasis added). Furthermore, the AG's answer makes no reference to MSSA members' respective individual rights under the Montana Human Rights Act, which states: "Any necessary force may be used to protect from wrongful injury the person or property of one's self, of a wife, husband, child, parent, or other relative or member of one's family, or of a ward, servant, master, or guest." MONT. CODE ANN. § 49-1-103. Finally, the AG's answer makes no mention of MSSA members'

respective individual rights under the Second Amendment to the U.S. Constitution, which reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

5. On June 18, 2018, the Court entered a Rule 16 order directing the parties to stipulate to a pretrial schedule or the Court would impose one within 30 days of the Rule 16 order. To date, no Scheduling Order has been entered on the record.

6. Plaintiff Montana Shooting Sports Association (“MSSA”) is a non-profit corporation organized under the laws of the State of Montana.

7. The purpose of MSSA is to “support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms, to provide education to its members concerning shooting, firearms, safety, hunting and the right to keep and bear arms, to own and or manage one or more shooting facilities for the use of its members and or others, to conduct such other activities as serves the needs of its members.” MSSA regularly lobbies the Montana Legislature, and its efforts were instrumental in the passage of the Montana preemption statutes at issue in this civil action. MSSA members have a genuine and viable interest in this case, as its goals and its existence depend upon the

protection of the rights and interests of its members, and the enforcement of Montana law.

8. Certain of MSSA's members are citizens of Montana who reside within the political boundaries of the City of Missoula. (Ex. B, C, D.) The Bloomberg Ordinance forbids them to buy or sell firearms at gun shows or by private sale; to obtain firearms for self-defense; to lend firearms; and to return of loaned firearms unless the transaction is first processed at a gun store following the same procedure as if the gun store were selling a firearm from its own inventory. These impairments, if implemented, would consist of actual harm to MSSA's members who live within the City of Missoula.

9. MSSA's members would have standing to sue in their own right; MSSA's interests seeks to protect are germane to its purpose; and neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit

### **LEGAL STANDARD**

A non-party has, under certain circumstances, a right to intervene in a civil action per MONT. R. CIV. P. 24(a). Intervention is allowed "of right" when an applicant claims an interest merely "relating" to the property or transaction which is the subject of the action and "the applicant is so

situated that the disposition of the action *may* as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *Id.* (emphasis added). "Montana's rule is essentially identical to the federal rule which is interpreted liberally." *Sportsmen for I-143 v. Montana Fifteenth Judicial Dist. Court, Sheridan Cnty.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400.

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

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

*Schwenke*, 252 Mont. at 131, 827 P.2d at 811 (emphasis added). In addition, a determining factor in a motion for intervention is whether the motion seeks to relitigate or reopen issues already decided. *In re Marriage of Glass*, 215 Mont. 248, 253, 697 P.2d 96, 99 (1985). See, *Pengra v. State*, 2000 MT 291, ¶1, ¶ 4, 302 Mont. 276, 14 P.3d 499.

In this case as discussed in detail below, MSSA meets fully all four criteria of Mont. R. Civ. P. 24(a).

## DISCUSSION

### **1. The motion to intervene is timely because the answer was only recently filed and no scheduling order has been entered.**

The threshold factor on a motion to intervene is timeliness. *In re Adoption of C.C.L.B.*, 2001 MT 66, ¶ 22, 305 Mont. 22, 22 P.3d 646. Timeliness turns on a functional analysis and is a product of the circumstances of each individual case. *Schwenke*, 252 Mont. at 131, 827 P.2d at 811. Employing the functional analysis, the Montana Supreme Court has ruled that even a post-judgment intervention for purposes solely of appeal is not untimely. *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 35, 356 Mont. 41, 230 P.3d 808. In *Aspen Trails*, the intervenors sat on the sidelines while the underlying case proceeded to final judgment. After a government agency, whose regulatory decision was overruled by a district court, declined to appeal, certain of its constituents sought to intervene, on a permissive basis, post-judgment. The district court allowed for the “late” intervention, even though the intervention was not “of right” under Rule 24(a). The Montana Supreme Court affirmed, reasoning:

We agree with Aspen Trails that its intervention has not caused any delay in this matter, and that its interests are substantial and no longer adequately represented since the Commission has declined to appeal. We also agree that the Landowners cannot claim prejudice simply because they are now required to defend the District Court's decision on appeal. While it may be inconvenient for the Landowners to have to defend their successful judgment on appeal, we cannot say it has caused them prejudice to defend against Aspen Trails, as opposed to the Commission.

*Id.*

Similarly, here, MSSA's intervention would not cause a delay in this matter or any other prejudice to either original party. See, *In re Adoption of C.C.L.B.*, 2001 MT 66, 305 Mont. 22, ¶ 22, 22 P.3d 646. The litigation is in a nascent stage. No scheduling order has been entered, the deadline to amend pleadings has not even been set, let alone expired, and no discovery had been conducted. The timeliness element is therefore satisfied.

**2. MSSA members have a fundamental constitutional right to keep and bear arms under both the Montana Constitution and the U.S. Constitution.**

**A. Under the Montana Constitution, the right to keep or bear arms "shall not be called in question."**

A court must determine whether the party seeking intervention has made a merely *prima facie* showing of a "direct, substantial, legally protectable interest in the proceedings." *Sportsmen for I-143*, ¶ 9



(quoting *DeVoe v. State*, 281 Mont. 356, 363, 935 P.2d 256, 260 (1997)).

Such a determination is a conclusion of law. *Id.* Here, MSSA members have a “fundamental” Montana Constitutional right at stake under the Montana Declaration of Rights:

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.

Mont. Const. art. II, § 12 (emphasis added). In Montana, rights ensconced in Article II of the Montana constitution, its “Declaration of Rights,” are deemed “fundamental” rights. E.g., *Yellowstone County v. Billings Gazette*, 2006 MT, 333 Mont. 390, 401, ¶ 37, 143 P.3d 135; *Jones v. County of Missoula*, 2006 MT, 330 Mont. 205, ¶ 50, 127 P.3d 406.

In addition, MSSA members who live in Missoula benefit from the Montana Human Rights Act. Title 49, MONT. CODE ANN. Under the MRHA, MSSA member enjoy have a “basic personal right” to use force for purposes of self-defense and for defense of others and even property. MONT. CODE ANN. § 49-1-103.

Finally, it has been recognized that public interest groups have broad rights of intervention in matters that effect their members. *Sportsmen for I-143*, ¶ 12. For example, in *Sportsmen for I-143*, it was held that a public

interest group has a right to intervene in an action merely because its members had supported a challenged ballot initiative. No basic individual rights were at stake, let alone fundamental constitutional rights. Yet, it was held: “[a] public interest group is entitled *as a matter of right* to intervene in an action challenging the legality of a measure it has supported.” *Id.* (emphasis added). In this case, MSSA supported the preemption statute at issue in the Legislature, making instrumental lobbying efforts to see that it passed and was signed into law. Thus, MSSA and its members have a state law interest in the subject matter. See, *Schwenke*, 252 Mont. at 131, 827 P.2d at 811.

**B. The Second Amendment to the U.S. Constitution protects MSSA members’ rights to keep and bear arms.**

The Second Amendment to the U.S. Constitution protects the “individual right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). *Heller* holds that the complete prohibition on possessing loaded handguns within a residence precluded citizens from using guns “for the core lawful purpose of self-defence and [was] hence unconstitutional.” *Id.* at 630. Meanwhile, *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010), holds “that the Second Amendment right is fully applicable to the States.” *McDonald* stated that the “central holding” of *Heller* was “that the Second Amendment

protects a personal right to keep and bear arms *for lawful purposes*, ....”

*Id.* at 780 (emphasis added). MSSA members therefore also have a federal law interest in the subject matter of the action.

**3. The interests of MSSA members who live in or near the City of Missoula “may be impaired” if the Bloomberg Ordinance is implemented.**

**A. MSSA Members’ state law rights may be impaired by the Bloomberg Ordinance.**

The Bloomberg Ordinance may “call in question” the fundamental right to bear arms of MSSA members who live in Missoula. Because this case involves a “fundamental right,” the Bloomberg Ordinance must pass a test of “strict scrutiny.” *Davis v. Union Pacific R. Co.*, 282 Mont. 233, 241, 937 P.2d 27, 31 (1997)). This is the highest level of constitutional review, and is the standard used in Montana only when the action complained of involves either a fundamental right or a suspect class. *Gulbrandson v. Carey*, 272 Mont. 494, 502, 901 P.2d 573, 579 (1995). “Under this 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). The Montana Supreme Court has said that “to demonstrate that its interest 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, 296 Mont. 361, ¶ 41, fn. 6, 989 P.2d 364, 375, fn. 6 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Thomas v. Collins*, 323 U.S. 516, 530, (1945); and *Miller v. Catholic Diocese of Great Falls*, 224 Mont. 113, 117, 728 P.2d 794, 796 (1986).

Moreover, the phrase "shall not be called in question," as used in Article II, section 12, of the Montana Constitution, is defined by the Montana legislature as follows:

(1) Any impairment, restriction, or curtailment of a person's rights under Article II, section 12, of the Montana Constitution by public policy or governmental 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).

Senate Joint Resolution 11, Mont. 65th Legislature (2017).

Under either of the foregoing standards, the Bloomberg Ordinance will very likely not pass constitutional muster. Thus, if upheld, it may impair fundamental Montana constitutional rights of MSSA members.

The Bloomberg Ordinance also interferes with MSSA members basic individual right under the Montana Human Rights Act to use firearms for purposes of defense of themselves and others. On its face, the Bloomberg Ordinance does so by limiting their ability to transfer firearms through means of private transactions. It requires MSSA members to interrupt those transactions and to search out a licensed firearms dealer to aid them by performing a NICS background check. Meanwhile, licensed firearms dealers are not required under the Bloomberg Ordinance to do so, and they are allowed to charge a fee that covers only the cost of the check. They are not allowed to impose an up-charge for profit on the transaction.

Ultimately, the private transactions contemplated by the Bloomberg Ordinance are in direct competition with the dealers' own businesses, and since they can make no money from facilitating the transaction, they will have no incentive to participate in these transactions and a strong incentive to refuse. The practical effect—and the clear legislative intent of the City Council—will be the prevention of private firearms transfers by individuals and at gun shows in the City of Missoula. These results “call in question” the right of MSSA members to acquire, keep or bear arms in the City of Missoula.

Furthermore, although the Bloomberg Ordinance has an exception for self-defense, it is a tenuous and temporary one, of little practical effect. This illusory exception interferes with the basic human right of self-defense and therefore may not comply with the Montana Human Rights Act. Finally, the Bloomberg Ordinance includes no exception to provide for the defense of others. This too violates the Montana Human Right Act. Thus, the rights of MSSA members who live in the City of Missoula may be impaired if the Bloomberg Ordinance is allowed to stand.

**B. The Bloomberg Ordinance may impair MSSA members' federal constitutional right to keep and bear arms.**

The Ninth Circuit has “adopted a two-step inquiry in deciding Second Amendment cases: first, the court asks whether the challenged law burdens conduct protected by the Second Amendment; and if so, the court must then apply the appropriate level of scrutiny.” *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016). This two-step analysis “flows from *Heller*’s identification of the Amendment’s core purpose of self-defense in the home and *Heller*’s charge to the lower courts to evaluate the appropriate level of review, as well as the scope of the Amendment’s protections.” *Id.* at 821; see also *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013) (“We believe this two-step inquiry reflects the Supreme Court’s holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited.”).

Under the first step of this inquiry, courts ask “if the challenged law burdens conduct protected by the Second Amendment, based on a ‘historical understanding of the scope of that right.’” *Silvester*, 843 F.3d at 821 (quoting *Heller*, 554 U.S. at 625). The Ninth Circuit observed that whether the challenged law falls outside the scope of the Amendment involves examining whether there is persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it

was historically understood. Laws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis. A challenged law may also fall within the limited category of presumptively lawful regulatory measures identified in *Heller*. *Id.* (internal citations and quotation marks omitted).

In the second step of the inquiry, courts must determine the appropriate level of scrutiny. The Ninth Circuit has offered the following guidance on making this determination:

[i]n ascertaining the proper level of scrutiny, the court must consider: (1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right. The result is a sliding scale. A law that imposes such a severe restriction on the fundamental right of self-defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny. That is what was involved in *Heller*. A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate.

*Id.* (internal citations omitted).

In this case, the Bloomberg Ordinance places a severe restriction on obtaining firearms for the purpose of self-defense. Only "temporary" transfers are allowed for self-defense. So only if the need is anticipated well in advance does the exception have any practical application. If the



need is on an emergency basis, the self-defense exception will be of no practical effect. Thus, MSSA members' fundamental right of self-defense enshrined in the Second Amendment may be impinged upon if the Bloomberg Ordinance is enacted as law.

Because the Bloomberg Ordinance may impair MSSA member rights under both state and federal law, the third element of intervention as of right is satisfied.

**4. MSSA members' interest is not adequately protected because the AG's Answer neither invokes nor seeks to protect MSSA members' individual constitutional or basic human rights in his Answer to the Complaint.**

The AG's Answer makes no mention of the Montana Constitution, the Montana Human Rights Act or the U.S. Constitution. (See Doc. 5.) Its defense is based solely on collective rights under the AG's statutory interpretation of the general preemption issue. It is not based on the protection or vindication of any individual rights, constitutional, statutory or otherwise. As a result, the AG will not adequately protect MSSA member individual or basic human rights guaranteed under applicable constitutional and statutory law. In short, the AG makes no effort whatsoever to protect MSSA members individual rights—none. The lack of all effort to do so eliminates any idea that the AG will do so in an adequate manner. In other

words, if the City of Missoula of Missoula's complaint is sustained, and the preemption statute at issue does not preclude implementation of the Bloomberg Ordinance, then a second lawsuit will be necessary to raise and resolve the individual rights issues discussed above. Yet, the very purpose of intervention is "to avoid delay, circuitry and multiplicity of suits." *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982) (citing *State ex rel. Westlake v. District Court*, 119 Mont. 222, 173 P.2d 896 (1946)). Denying intervention would just be waste of scarce judicial and party resources. The final element for intervention as of right is therefore fully satisfied.

Ultimately, the Court should allow MSSA to intervene on behalf of its members who live in the City of Missoula. (See Declarations attached as Ex. B, C and D.) MSSA meets all four criteria for doing so. Its motion is timely. Its members have an interest in and standing to litigate the subject matter at issue. Those interests "may be impaired" by the disposition of the case. And MSSA member interest in their individual constitutional rights which have not been either invoked or otherwise protected by the AG's defenses. The Court should therefore allow MSSA to intervene.

## **CONCLUSION**

Accordingly, MSSA requests:

1. That it be allowed to intervene in this case for the purposes of protecting its members individual rights under applicable constitutional and statutory law;

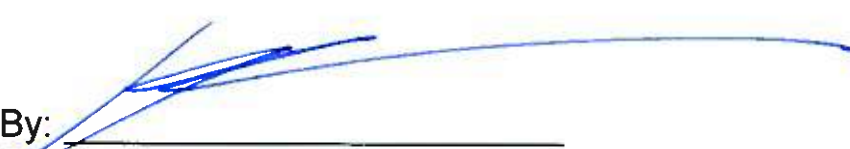
2. That the Court enter a declaratory judgment ruling that the Bloomberg Ordinance violates MSSA's members' individual right to keep or bear arms and to self-defense and the defense of others under applicable state and federal law;

3. That MSSA be awarded its attorney fees and costs under the Montana Private Attorney General Doctrine; and

4. That the Court grant such other relief as may be warranted in the circumstances.

DATED this 13th day of July, 2018.

Respectfully Submitted,  
RHOADES SIEFERT & ERICKSON PLLC

By:   
Quentin M. Rhoades  
Attorneys for Intervenor

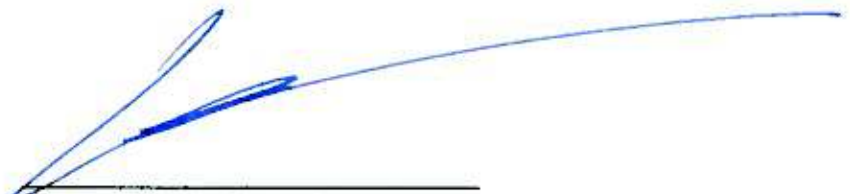
## CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2018, I served upon the following a true and correct copy of the foregoing by depositing said copy in the U.S. mail, postage prepaid, and addressed as follows:

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Quentin M. Rhoades

## Susan Firth

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**From:** Jonas Oransky <joransky@everytown.org>  
**Sent:** Thursday, September 10, 2015 4:00 PM  
**To:** Bryan von Lossberg; Nancy de Pastino  
**Cc:** Heidi Kendall; Pedro Morillas  
**Subject:** RE: MCA question  
**Attachments:** Missoula BGC Ord - Text - 9.10.15.docx

Thanks, Bryan. These are good and thoughtful edits from Jim. See my comments below and revised text (both a clean and a tracked-changes version) attached. Please feel free to forward to Jim and anyone else who might need to see this.

We are well aware of the 45-8-351 provision, and believe that Missoula is empowered to legislate in this fashion; we are also aware that the ordinance could lead to litigation (as many gun violence prevention laws do), and believe that Missoula would prevail.

Best,  
Jonas

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**From:** Bryan von Lossberg [<mailto:BvonLossberg@ci.missoula.mt.us>]  
**Sent:** Thursday, September 10, 2015 4:11 PM  
**To:** [joransky@everytown.org](mailto:joransky@everytown.org); Nancy de Pastino  
**Cc:** Heidi Kendall  
**Subject:** MCA question

Hello Jonas and Nancy,

Please see Jim Nugent's comments regarding the draft ordinance. I'm most concerned about MCA 45-8-351 (<http://leg.mt.gov/BILLS/mca/45/8/45-8-351.htm>)

My plain reading of 45-8-351 causes me concern, but I'm guessing this was looked into previously? Interested in your feedback.

Thanks,  
Bryan

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