

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0672

TIMOTHY C. FOX, in his official capacity as the
Attorney General for the State of Montana,

Defendant and Appellant,

v.

CITY OF MISSOULA,

Plaintiff and Appellee.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Robert L. Deschamps, III, Presiding

APPEARANCES:

TIMOTHY C. FOX
Montana Attorney General
MATTHEW T. COCHENOUR
Solicitor General
PATRICK M. RISKEN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
prisken@mt.gov
mcochenour2@mt.gov

ATTORNEYS FOR DEFENDANT
AND APPELLANT

SCOTT M. STEARNS
ZACH A. FRANZ
Boone Karlberg, P.C.
201 West Main, Suite 300
Missoula, MT 59807-9919
sstearns@boonekarlberg.com
zfanf@boonekarlberg.com

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

ERIC TIRSCHWELL
Everytown for Gun Safety Support Fund
132 E. 43rd Street, # 657
New York, NY 10017
etirschwell@everytown.org

ATTORNEY FOR AMICUS CURIAE
EVERYTOWN FOR GUN SAFETY
SUPPORT FUND

F. PETER LANDSIEDEL
Schulte Law Firm, P.C.
2425 Mullan Rd.
Missoula, MT 59808
peter@schultelaw.com

ATTORNEY FOR AMICUS
CURIAE NATIONAL RIFLE
ASSOCIATION

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

ATTORNEY FOR AMICUS
CURIAE MONTANA
SHOOTING SPORTS
ASSOCIATION

WILLIAM J. TAYLOR
Everytown Law
450 Lexington Ave., # 4184
New York, NY 10017
wtaylor@everytown.org

ATTORNEY FOR AMICUS CURIAE
EVERYTOWN FOR GUN SAFETY
SUPPORT FUND

JAMES H. GOETZ
Goetz, Baldwin and Geddes, P.C.
Ketterer Building
35 North Grand Avenue
P.O. Box 6580
Bozeman, MT 59711
jim@goetzlawfirm.com

ATTORNEY FOR AMICUS CURIAE
THOMAS PLATT, MARK GRIMES,
HEIDI KENDALL AND JOHN
MOFFATT

IAN M. FEINBERG
Hogan Lovells US, LLP
875 Third Avenue
New York, NY 10022
ian.feinberg@hoganlovells.com

ATTORNEY FOR AMICUS CURIAE
THOMAS PLATT, MARK GRIMES,
HEIDI KENDALL AND JOHN
MOFFATT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION1

REPLY ARGUMENT2

I. Justiciability is a threshold determination.2

II. Statutes cannot be selectively conscripted to achieve a policy goal.3

III. The “broad power” Missoula claims results in conflict, ignores
express prohibitions and infers authority where none exists.....5

CONCLUSION.....9

CERTIFICATE OF COMPLIANCE.....9

TABLE OF AUTHORITIES

CASES

<i>American Cancer Society v. State</i> , 2004 MT 376, 325 Mont. 70, 103 P.3d 1085	7
<i>Bullock v. Fox</i> , 2019 MT 30, 394 Mont. 390, 432 P.3d 704	2
<i>City of Bozeman v. Racicot</i> , 253 Mont. 204, 832 P.2d 767 (1992).....	2-3
<i>City of Missoula v. Armitage</i> , 2014 MT 74, 376 Mont. 448, 335 P.3d 736	5
<i>D&F Sanitation Service v. City of Billings</i> , 219 Mont. 437, 713 P.2d 977 (1986).....	6
<i>Houston Lakeshore Tract Owners Against Annexation, Inc. v. City of Whitefish</i> , 2017 MT 62, 387 Mont. 83, 391 P.3d 86	6
<i>Hughes v. State Bd. of Land Comm'rs</i> , 137 Mont. 510, 353 P.2d 331 (1960).....	8
<i>Medical Marijuana Growers Ass'n v. Corrigan</i> , 2012 MT 146, 365 Mont. 346, 281 P.3d 201	2
<i>Mitchell v. University of Montana</i> , 240 Mont. 261, 783 P.2d 1337 (1989).....	6
<i>Missoula v. Franklin</i> , 2018 MT 218, 392 Mont. 440, 425 P.3d 1285	5
<i>Montana Trout Unlimited v. Mont. Dept. of Natural Res. & Conservation</i> , 2006 MT 72, 331 Mont. 483, 133 P.3d 224	3
<i>Omimex Can., Ltd. v. State</i> , 2008 MT 403, 347 Mont. 176, 201 P.3d 3	8
<i>Pederson v. Dawson County</i> , 2000 MT 339, 303 Mont. 158, 17 P.3d 393	5

<i>Pioneer Motors v. State Highway Comm’n</i> , 118 Mont. 333, 165 P.2d 796 (1946).....	8
<i>State v. Fadness</i> , 2012 MT 12, 363 Mont. 322, 268 P.3d 17	8
<i>State v. Holt</i> , 121 Mont. 459, 194 P.2d 651 (1948).....	8
<i>State v. Lagerquist</i> , 152 Mont. 21, 445 P.2d 910 (1968).....	8

OTHER AUTHORITIES

Montana Code Annotated

Title 7.....	6
Title 15, chapter 6.....	8
Title 37.....	7
Title 61.....	6
§ 1-3-232.....	5
§ 2-15-501(7).....	2
§ 7-1-101.....	7
§ 7-1-103.....	7
§ 7-1-106.....	5
§ 7-1-111.....	7
§ 7-1-111(9).....	3, 5, 6, 8, 9
§ 7-1-112.....	7
§ 7-1-113.....	6
§ 7-2-4736.....	6
§ 7-5-4101.....	7
§§ 27-8-101 through -313.....	2
§ 30-11-101.....	4
§ 45-2-101(59).....	4
§ 45-8-351.....	1
§ 45-8-351(1).....	3, 4, 5, 7, 9
§ 45-8-351(1)(a)	3
§ 45-8-351(2).....	4
§ 45-8-351(2)(a)	3, 4, 5, 8

Montana Constitution	
Art. II, § 12.....	8
Art. XI, § 1	7
Art. XI, § 3	7
Opinions of the Attorney General	
39 Op. Att’y Gen. No. 60 (1982)	7
43 Op. Att’y Gen. No. 53 (1990)	6
Colorado Revised Statutes	
§ 18-12-112.....	1
§ 18-12-501 to -508	1
District of Columbia Code	
D.C. Code §1.206-01	1
Florida Constitution	
Art. VIII, § 5(b)	1
Ohio Revised Code	
§ 9.68	1
United States Constitution	
Art. I, § 8, cl. 17.....	1
Amend. II.....	8

INTRODUCTION

This case is a statutory interpretation case. It is not about firearms policy. To be sure, Missoula and *amici* present differing views on firearms policy which are certainly important in the appropriate forum. However, policy concerns are not at issue in this case. This case is strictly limited to a local government's authority to act under Montana statutes which provide and limit that authority.

Missoula describes the catalyst for its action as a need to close a "loophole" in the *federal* law.¹ Yet Montana statutes withhold authority to regulate firearms in the manner that Missoula employed. The history surrounding passage of Mont. Code Ann. § 45-8-351² shows the Legislature affirmatively acted to preempt local governments from enacting ordinances regulating the sale or transfer of firearms. A self-governing municipality's avenue to reverse that preemption policy is through the legislature,³ not the courts.

¹ Appellee's Br. at iii, 1, 2, 4 and 6.

² Appellant's Br. at 12-13.

³ Missoula claims that 21 states, the District of Columbia and "numerous counties in Florida . . . have acted to close this background check loophole on private gun sales." Appellee's Br. at 1, 5-6, 26-27, citing only an allegation in the Complaint and cases from Colorado and Ohio. These examples confirm that local authority is provided through state constitutions and legislatures. *See* Fla. Const. art. VIII, § 5(b); Colo. Rev. Stat. § 18-12-112 and §§ 18-12-501 through -508; and Ohio Rev. Code § 9.68. Congress retains ultimate authority over the District of Columbia. D.C. Code § 1.206-01, U.S. Const. art. I, § 8, cl. 17.

REPLY ARGUMENT

I. Justiciability is a threshold determination.

Missoula's argument under *Bullock v. Fox*, 2019 MT 30, 394 Mont. 390, 432 P.3d 704, ignores critical distinctions. While *Bullock* involved conflicting legal opinions between two executive state agencies regarding whether the Governor could finalize an easement without Land Board approval, the approval action itself had not yet occurred. Here, Missoula enacted the Ordinance *before* the House Speaker requested an Attorney General Opinion (AGO) directly related to his 2017 legislative duties. Mont. Code Ann. § 2-15-501(7).⁴

Missoula's reliance on *Medical Marijuana Growers Ass'n v. Corrigan*, 2012 MT 146, 365 Mont. 346, 281 P.3d 201, is misplaced. There, caregivers and couriers were uncertain of their rights and obligations under the first version of the Medical Marijuana Act (now repealed) and were unable to operate until clarity was provided under the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-101 through -313. *Corrigan*, ¶¶ 8-9. Here, Missoula triggered a declaratory judgment action as an appeal mechanism.

Unlike the facts in *Bullock* and *Corrigan*, the Attorney General simply opined that Missoula's Ordinance was not enforceable. In *City of Bozeman v.*

⁴ Missoula admits that the Speaker sought guidance only with regard to the enforceability of the Ordinance. Appellee's Br. at 7.

Racicot, 253 Mont. 204, 832 P.2d 767 (1992), both Bozeman and Gallatin County requested an AGO regarding final authority within a joint planning area. When Bozeman disagreed with the AGO it sued both Gallatin County and the Attorney General. The dispute involved statutory interpretation affecting two local governments; the justiciability of the AGO was neither raised nor argued.

Unlike the alignment of parties Bozeman and Gallatin County, Missoula has no defendant contesting its “loophole-closing” Ordinance. To follow Missoula’s lead, every AGO on the books is subject to direct “appeal” to the District Court. Since Missoula waited 16 months to initiate this litigation one may assume any Attorney General Opinion over the years could draw a challenge.

II. Statutes cannot be selectively conscripted to achieve a policy goal.

Missoula’s exclusive application of Mont. Code Ann. § 45-8-351(1)(a) (Appellee’s Br. at 18-21) results in blatant conflict between subsection (2)(a), subsection (1) and § 7-1-111(9). Missoula has never explained how Mont. Code Ann. § 45-8-351(2)(a) overrides either subsection (1) or § 7-1-111(9) without specific reference to either statute.

It is a bedrock principle of statutory construction that provisions addressing the same subject must be harmonized. *Mont. Trout Unlimited v. Montana Dept. of Natural Res. & Conservation*, 2006 MT 72, ¶¶ 23-24, 43, 331 Mont. 483, 133 P.3d 224. Selective citation of one subsection of a statute, excluding the rest, must be

avoided. *Id.* ¶¶ 23, 43. If local government regulation of firearms “sale or transfer” was the legislature’s intent it either would have included that language in Mont. Code Ann. § 45-8-351(2)(a) or it would not have enacted subsection (1).

Only by confusing the noun “possession” with the verb “transfer” does Missoula’s subsection (2)(a) argument work. “Sale” is defined as a contract by which one *transfers* an interest in property to another. Mont. Code Ann. § 30-11-101. “Possession” is the “knowing control of anything for a sufficient time to be able to terminate control.” Mont. Code Ann. § 45-2-101(59) (within the Criminal Code, directly defining Mont. Code Ann. § 45-8-351(2)). Therefore, “possession” is a state of custody requiring only one person, while “sale or transfer” is an active endeavor requiring at least two.

Even Missoula’s isolation of Mont. Code Ann. § 45-8-351(2)(a) contains conflict, presenting different “prevent and suppress” applications within two fields of weapons possession. Missoula claims authority to passively post notice to “prevent and suppress” weapons possession in public spaces while also adopting active measures to “prevent and suppress” possession by only four specific target groups by subjecting everyone *transferring* a firearm to a background check.

In contrast, under the Attorney General’s reading local ordinances allow posting public spaces and confiscation from specific groups that legally cannot possess weapons once possession is found. A confiscation and repossession

process is neither preempted by nor in not conflict with any statute. *See Missoula v. Franklin*, 2018 MT 218, ¶ 7, 392 Mont. 440, 425 P.3d 1285; and *City of Missoula v. Armitage*, 2014 MT 74, ¶¶ 16-17, 376 Mont. 448, 335 P.3d 736.

Favoring the “liberal construction” of Mont. Code Ann. § 45-8-351(2)(a) cannot expressly preempt Mont. Code Ann. §§ 7-1-111(9), -113 and 45-8-351(1). Rather, since the Montana Code does not so provide, local governments may regulate confiscated illegally possessed weapons, providing a process for their return or forfeiture. *Franklin*, ¶ 7; *Armitage*, ¶¶ 16-17.

III. The “broad power” Missoula claims results in conflict, ignores express prohibitions and infers authority where none exists.

Montana Code Annotated § 45-8-351(2)(a) does not “expressly” nullify Mont. Code Ann. § 7-1-111(9). *See* Appellee’s Br., section III.A at 22-23. An interpretation of statutes which gives effect is preferred to one which makes void. Mont. Code Ann. § 1-3-232. Missoula’s primary argument of “liberal construction” of self-governing authority in a local government’s favor (Mont. Code Ann. § 7-1-106) does not extinguish that black-letter rule of construction. And, Missoula acknowledges its powers are not limitless. Appellee’s Br. at 17.

Cherry-picking from other Montana Code titles does not alter the controlling nature of local government statutes. *See Pederson v. Dawson County*, 2000 MT 339, ¶¶ 12, 17-19, 303 Mont. 158, 17 P.3d 393, recognizing that “the controlling

law [for county authority] was found in Title 7.” *Id.* ¶ 12. As noted in *Houston Lakeshore Tract Owners Against Annexation, Inc. v. City of Whitefish*, 2017 MT 62, ¶ 15, 387 Mont. 83, 391 P.3d 86, this Court need not rely on any title other than Title 7 to understand the intent of local government statutes. *See also Mitchell v. University of Montana*, 240 Mont. 261, 264-65, 783 P.2d 1337 (1989).

Missoula’s authorities are misconstrued. In *D&F Sanitation Service v. City of Billings*, 219 Mont. 437, 445-46, 713 P.2d 977 (1986), Billings merely offered garbage hauling services consistent with Mont. Code Ann. § 7-2-4736. Private garbage haulers were free to serve any customer they could sign up. Express preemption (*i.e.*, Mont. Code Ann. § 7-1-111(9)) was not an issue.

43 Op. Att’y Gen. No. 53 (1990) actually supports the Attorney General’s position here. There, the designation of “authorized emergency vehicles” was within Department of Justice jurisdiction and emergency vehicle equipment laws, not Title 61 “Motor Vehicles.” Billings’ proposed ordinance regarding funeral processions violated Mont. Code Ann. § 7-1-113.⁵ 43 Op. Att’y Gen. No. 53 at 4.

⁵ Missoula incorrectly contends that the AG did not raise or “adequately develop” argument concerning Mont. Code Ann. § 7-1-113 in its opening brief, or during proceedings before the District Court. Appellee’s Br. at 40 n.21. To the contrary, *see* Appellant’s Opening Br. at 10-11; D.C. Doc. 28 at 11, 15; and D.C. Doc. 37 at 2, 4, 5, 8 and 19. Also, Mont. Code Ann. § 7-1-113 is central to both AGO’s cited by Missoula in its response argument. *See* Appellee’s Br. at 32-33.

Likewise, in 39 Op. Att’y Gen. No. 60 (1982), the Attorney General opined that Title 37 statutes *standing alone* could not prohibit “home rule” governments from exercising powers not specifically denied. Mont. Code Ann. § 7-1-101. That AGO was limited because Title 37 licensing statutes existed prior to the 1972 Constitution and § 7-1-103. 39 Op. Att’y Gen. No. 60 at 5.

A local ordinance must be consistent with, and not “repugnant to” local government statutes. Mont. Code Ann. § 7-5-4101. The legislature very clearly delineated fourteen powers that self-governing municipalities are "prohibited" from exercising (Mont. Code Ann. § 7-1-111) and five specific powers that such governments are “prohibited” from exercising unless the power is delegated by law. Mont. Code Ann. § 7-1-112. *American Cancer Society v. State*, 2004 MT 376, ¶ 16, 325 Mont. 70, 103 P.3d 1085.⁶ Together, those two statutes constitute express statutory prohibition. *Id.* . The prohibition of exercising “*any* power that applies to

⁶ Missoula’s position that all forms of local government are mutually exclusive, limiting Mont. Code Ann. § 45-8-351(1) only to *general* government units (Appellee’s Br. § IV.A) is not consistent with the Montana Constitution. *See* Mont. Const. art. XI, § 1. Indeed, local governments are provided “such optional or alternative forms of government that each unit or combination of units may adopt, amend, or abandon . . .” *Id.* § 3.

or affects the right to keep or bear arms”⁷ in Mont. Code Ann. § 7-1-111(9) could not be more clearly stated.

Finally, Missoula overstates the application of the “last-in-time” adoption of statutes. *Hughes v. State Bd. of Land Comm’rs*, 137 Mont. 510, 353 P.2d 331 (1960), which relied on *Pioneer Motors v. State Highway Comm’n*, 118 Mont. 333, 340, 165 P.2d 796, 800 (1946) and *State v. Holt*, 121 Mont. 459, 467, 194 P.2d 651, 656 (1948) all involved competing statutes within the same code title.⁸ Likewise, *Omimex Can., Ltd. v. State*, 2008 MT 403, ¶ 21, 347 Mont. 176, 201 P.3d 3 involved two competing statutes within Title 15, chapter 6 “Taxation.” None of those cases involve “competing” statutes from different titles.

If the legislature had intended local government regulation of “the sale or other transfer” of firearms in Mont. Code Ann. § 45-8-351(2)(a) it would have specifically granted that authority in that subsection. Because it did not, Missoula’s

⁷ This case does not involve policy considerations under the U.S. Constitution’s Second Amendment or Mont. Const. art. II, § 12. Missoula cites *State v. Fadness*, 2012 MT 12, ¶ 31, 363 Mont. 322, 268 P.3d 17 (Appellee’s Br. at 25-26) suggesting that this Court analyze the limits of Mont. Const. art. II, § 12 rights in order to understand Missoula’s arguments. *See also* Missoula’s “narrowly tailored” argument. Appellee’s Br. at 3, 10, 11, 38.

⁸ *See State v. Lagerquist*, 152 Mont. 21, 31, 445 P.2d 910, 915 (1968): “It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal must be clear and manifest . . .,” overruling *State v. Holt*’s “last in time” rationale as it related to criminal statutes.

authority to regulate firearms transfers is strictly limited by Mont. Code Ann. §§ 45-8-351(1) and 7-1-111(9). Additional authority cannot be inferred.

CONCLUSION

The District Court’s ruling should be reversed.

Respectfully submitted this 15th day of August, 2019.

TIMOTHY C. FOX
Montana Attorney General
PATRICK M. RISKEN
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Patrick M. Risken
Patrick M. Risken
Assistant Attorney General

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 Times New Roman 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 1,996 words, excluding certificate of service and certificate of compliance.

/s/ Patrick M. Risken
PATRICK M. RISKEN

CERTIFICATE OF SERVICE

I, Patrick Mark Risken, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-15-2019:

Scott M. Stearns (Attorney)
PO Box 9199
Missoula MT 59807
Representing: Missoula, City of
Service Method: eService

Zachary Aaron Franz (Attorney)
201 W. Main St.
Suite 300
Missoula MT 59802
Representing: Missoula, City of
Service Method: eService

James P. Nugent (Attorney)
435 Ryman St
Missoula MT 59802
Representing: Missoula, City of
Service Method: eService

James H. Goetz (Attorney)
PO Box 6580
Bozeman MT 59771-6580
Representing: T. Platt, Mark Grimes, Heidi Kendall, John Moffatt
Service Method: eService

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

Matthew Thompson Cochenour (Prosecutor)
215 North Sanders
Helena MT 59620
Representing: State of Montana

Service Method: eService

Robert T. Bell (Attorney)
PO Box 16960
2955 Stockyard Road
Missoula MT 59808
Representing: National Rifle Association of America, Inc.
Service Method: eService

Eric Anders Tirschwell (Attorney)
450 Lexington Avenue, #4184
New York NY 10017
Representing: Missoula, City of
Service Method: E-mail Delivery

Ira M. Feinberg (Attorney)
Hogan Lovell
875 Third Avenue
New York NY 10022
Representing: T. Platt, Mark Grimes, Heidi Kendall, John Moffatt
Service Method: E-mail Delivery

David H. Thompson (Attorney)
1523 New Hampshire Avenue NW
Washington DC 20036
Representing: National Rifle Association of America, Inc.
Service Method: E-mail Delivery

Frederick Peter Landsiedel (Attorney)
2425 Mullan Road
Missoula MT 59808
Service Method: eService
E-mail Address: peter@jschultelaw.com

Electronically signed by Rochell Standish on behalf of Patrick Mark Risken
Dated: 08-15-2019