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**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

CITY OF MISSOULA,

Plaintiff,

v.

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

Defendant.

Cause No. DV-18-429

Dept. No. 2

Judge Robert L. Deschamps, III

**CITY OF MISSOULA'S
COMPLAINT FOR DECLARATORY
JUDGMENT**

Plaintiff City of Missoula, for its Complaint for Declaratory Judgment,
alleges as follows:

INTRODUCTION

1. The City of Missoula enacted an ordinance on September 26, 2016 (Ordinance #3581), requiring background checks prior to most gun purchases from private unlicensed sellers, just like the background checks already required by federal law for traditional gun store purchases (“the Background Check Ordinance” or “the Ordinance”).

2. Like similar legislation in many states, the City of Missoula’s Ordinance closed a loophole in federal law that allowed convicted felons and other categories of people prohibited from owning firearms to obtain guns without a background check.

3. A State Representative from Culbertson, Montana, requested a formal opinion from Attorney General Timothy C. Fox (“the Attorney General”) regarding the enforceability of the Ordinance under state law.

4. On January 26, 2017, the Attorney General issued an opinion (AG Opinion #1, Volume No. 57) that the Background Check Ordinance is not enforceable under Montana law.

5. The Attorney General’s opinion is erroneous, because the Ordinance was properly enacted and within the authority of the City of Missoula under Montana law.

6. The City of Missoula seeks a declaratory judgment overturning the erroneous Attorney General opinion, so the Background Check Ordinance can be enforced within the borders of the City of Missoula, as a means of preventing individuals who cannot legally possess firearms from obtaining them through private purchases.

PARTIES

7. Plaintiff, the City of Missoula, is a duly-organized local government unit with self-governing powers as defined by Article XI, § 6 of the Montana State Constitution and Title 7, Chapter 1 of the Montana Code Annotated.

8. Defendant, Attorney General Timothy C. Fox, is the Attorney General of the State of Montana, exercising powers defined by Article VI of the Montana State Constitution and Title 2, Chapter 15 of the Montana Code Annotated. Defendant is a party to this case solely in his official capacity.

JURISDICTION AND VENUE

9. This Court has jurisdiction of this matter pursuant to the Uniform Declaratory Judgments Act (Mont. Code Ann. § 27-8-101, *et seq.*). An actual controversy exists between the parties as to the authority of the

City of Missoula to implement and enforce a duly-enacted ordinance under state constitutional and statutory law.

10. Venue is proper in Missoula County because Defendant is a public officer who was acting in the course of the duties of his office, and the cause of action, or some part of the cause of action, arose in Missoula County, as the Ordinance was enacted and is applicable in the City of Missoula, which is located in Missoula County, and the direct effect of the Attorney General's opinion is within Missoula County. Mont. Code Ann. §§ 25-2-125 and 25-2-126.

CLAIM FOR DECLARATORY RELIEF

11. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 10, above, as if fully set forth herein.

12. There is a real, substantial, and justiciable controversy between the parties concerning the authority of the City of Missoula, as a local government unit with self-governing powers, to implement and enforce a duly-enacted ordinance requiring individuals who wish to receive a firearm within city limits to pass a background check prior to the transfer.

The Background Check Loophole

13. Under federal law, anyone purchasing a firearm from a federally licensed firearms dealer must complete a background check through the

National Instant Criminal Background Check System prior to receiving a firearm. Federal law does not require individuals who purchase a firearm from an unlicensed private party to complete a background check.

14. Nineteen states and the District of Columbia have closed this loophole by requiring those purchasing firearms in private sales from unlicensed individuals to complete a background check prior to receiving the firearm.

15. Between 1994 and 2015, nearly 197 million applications for firearm transfers or permits were subject to background checks, and more than 3 million applications were denied nationwide. Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2015 - Statistical Tables, 2017*.¹

16. According to a national survey, 22% of gun owners who acquired a gun during a recent two-year window did so without a background check. Matthew Miller, *et al.*, *Firearm Acquisition Without Background Checks: Results of a National Survey*, 166 *Annals Internal Med.* 233 (2017). The survey also showed that in states that required background checks for private purchases, fewer than half as many private firearm transactions were completed without a background check during

¹See <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6126>

that same time period (26%, compared to 57% in states without the requirement). *Id.* at 238.

17. The United States Department of Justice, through the Bureau of Alcohol, Tobacco, Firearms and Explosives, encourages background checks on firearms sold in private unlicensed sales, and has long recognized that such private-sale checks “can enhance public safety, assist law enforcement, and help ensure that firearms end up only in the hands of those who are legally allowed to possess them.” Bureau of Alcohol, Tobacco, Firearms and Explosives, *Facilitating Private Sales: A Federal Firearm Licensee Guide*, at 2.

18. The State of Montana – which has one of the highest gun death rates in the country² – does not require background checks on private, unlicensed firearm transfers.

Constitutional and Statutory Framework

19. As a local government unit that has adopted a self-government charter, Missoula is empowered to “exercise any power not prohibited by th[e] constitution, law or charter.” Mont. Const. art. XI, § 6; Mont. Code Ann. § 7-1-101. These powers are “liberally construed” and “[e]very reasonable doubt as to the existence of a local government power or

² See https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm

authority shall be resolved in favor of the existence of that power or authority." Mont. Const. art. XI, § 4; Mont. Code Ann. § 7-1-106.

20. A local government with self-government powers may provide any services or perform any functions not expressly prohibited, including, but not limited to, services or functions that general power government units are authorized to provide or perform. Mont. Code Ann. § 7-1-102. A self-government unit that performs a function that can also be performed by a general government unit is only restricted in the performance of that function by limitations in its charter or state laws that specifically apply to self-government units. *Id.* § 7-1-103.

The Current Controversy

21. On September 26, 2016, the City of Missoula enacted Ordinance 3581, requiring (with certain exceptions, including for family, hunting, and self defense) a party wishing to receive a firearm in the City of Missoula to successfully complete a background check conducted through a federally licensed firearms dealer. A true and correct copy of the Ordinance is attached hereto as **Exhibit A**. The Ordinance went into effect on October 26, 2016.

22. Shortly after the City of Missoula enacted the Background Check Ordinance, the Speaker of the Montana House of Representatives

requested that Defendant issue an Attorney General's opinion on the validity of the Ordinance under state law.

23. The Attorney General issued Opinion #1, Vol. #57, on January 26, 2017, asserting: "A city, town, or other local government entity with self-governing powers is prohibited by Montana state law from enforcing a local regulation or ordinance requiring background checks on firearm sales or transfers within its borders." A true and accurate copy of the Attorney General's opinion is attached hereto as **Exhibit B**.

24. The Attorney General concluded that the Background Check Ordinance is preempted by state law, focusing on two statutory provisions: Mont. Code. Ann. § 7-1-111(9), which prohibits self-governing cities from exercising "any power that applies to or affects the right to keep or bear arms," and Mont. Code Ann. § 45-8-351, which restricts certain local governments' ability to regulate firearms, with several significant exceptions.

25. By issuing an opinion finding the City of Missoula's Ordinance invalid, the Attorney General prevented the City of Missoula from enforcing the Background Check Ordinance. Mont. Code Ann. § 2-15-501(7) ("[T]he attorney general's opinion is controlling unless overruled by a state district court or the Supreme Court.").

26. The Attorney General's opinion is erroneous, because the Ordinance was properly enacted under the authority granted to the City of Missoula by the Montana Constitution and the Montana Code Annotated, directly and indirectly, to promote public safety by preventing and suppressing the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors.

27. The City of Missoula, as a local government unit with self-governing powers, is not subject to the prohibitions in Mont. Code Ann. § 45-8-351 because the statute does not specifically and expressly apply to cities with self-governing powers. Even if the City of Missoula were subject to the prohibitions in Mont. Code Ann. § 45-8-351, the City would not be preempted from enacting the Background Check Ordinance because § 45-8-351(2) expressly authorizes such an ordinance, "[f]or public safety purposes," in order "to prevent and suppress . . . the possession of firearms" by those prohibited by law from possessing them.

28. By issuing the opinion that Montana law prohibits local governments from enacting ordinances to prevent convicted felons and the mentally incompetent from obtaining firearms, the Attorney General substantially invalidated a statutory provision – § 45-8-351(2) – enacted by the Legislature for the protection of the public.

29. Mont. Code. Ann. § 7-1-111(9), which prohibits local ordinances that apply to or affect the right to keep or bear arms, is not violated by the Background Check Ordinance. The Background Check Ordinance prevents possession of firearms by people already prohibited by law from possessing firearms. It does not apply to or affect the right to keep or bear arms, much like the federal background check requirement does not implicate the right to keep and bear arms guaranteed in U.S. Const. amend. II.

WHEREFORE, the City of Missoula prays for relief as follows:

1. For a declaration that the Attorney General's opinion referenced above is overruled, that the Background Check Ordinance is a valid and enforceable enactment under the City of Missoula's constitutional and statutory powers as a local government unit with self-governing powers, and that it is not preempted by Mont. Code Ann. § 7-1-111(9), Mont. Code § 45-8-351, Mont. Code Ann. § 7-1-113, or any other provision of state law; and

2. For such other and further relief which this Court deems just and proper.

Dated this 11th day of April, 2018.

BOONE KARLBERG P.C.

A handwritten signature in cursive script, appearing to read "S.M. Stearns", written over a horizontal line.

Scott M. Stearns

Zach A. Franz

Attorneys for Plaintiff