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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA MEDICAL ASSOCIATION, et al.,

Plaintiffs,

v.

AUSTIN KNUDSEN, et al.,

Defendants.

CV 21-108-M-DWM

DEFENDANTS' BRIEF IN OPPOSITION TO MONTANA NURSES ASSOCIATION'S MOTION TO INTERVENE

Defendants Austin Knudsen and Laurie Esau (hereafter "the State") submit this brief in opposition to Montana Nurses Association's ("MNA") motion to intervene.

INTRODUCTION

On October 29, 2021, MNA moved to intervene in this matter. The State objected until it could review MNA's arguments supporting its motion. Having now reviewed MNA's proposed complaint and supporting brief, the State renews its objection.

HB 702 protects Montanans from discrimination based on vaccination status and protects Montanans from compulsory disclosure of their private health care information as a condition of everyday life, including employment. The law works within the existing anti-discrimination and public health law structure. *See* MCA § 50-1-105 (1) ("It is the policy of the state of Montana that the health of the public be protected and promoted to the extent practicable through the public health system while respecting individual rights to dignity, privacy, and nondiscrimination.").

MNA, like the Plaintiffs, disagrees with the State's antidiscriminatory public policy. *See* Doc. 11-1, ¶ 20. But fortunately for Montanans, MNA does not possess the ability to discriminate in the context of HB

702. MNA's entire theory for relief rests on the supposition that individuals and entities *other than MNA* will impose vaccine requirements. That is so because MNA—an association of nonmanagerial Montana nurses—cannot impose such a mandate on their workplaces. Nothing in their proposed pleadings suggests otherwise. Because MNA's requested relief is contingent on third-party action that may or may not occur, it does not satisfy the requirements for intervention as a matter of right. *See Dilks v. Aloha Airlines Inc.*, 642 F.2d 1155, 1156–57 (9th Cir. 1987) (Applicants must establish an interest "that is direct, non-contingent, substantial and legally protectable.").

The Court should likewise deny permissive intervention at this time. The State filed a Second Motion to Dismiss, briefing on that motion will conclude this month, and the questions will be ripe for decision. *See* Doc. 15 (Order denying State's first motion to dismiss as moot and setting a response schedule). Because this Court has previously stated that this matter "must be resolved promptly," Doc. 19 at 1, intervention—which will delay resolution of the matter—should be denied.

ARGUMENT

I. MNA fails to establish intervention as a matter of right.

An applicant may move for intervention as a matter of right, Fed. R. Civ. P. 24(a)(2), or permissively under Fed. R. Civ. P. 24(b). When seeking to intervene by right, an applicant must show that:

> (1) it has a "significant protectable interest" relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998). "Failure to satisfy any one of the requirements is fatal to the application." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011).

To demonstrate a 'significant protectable interest,' "a prospective intervenor must establish that (1) 'the interest [asserted] is protectable under some law,' and (2) there is a 'relationship between the legally protected interest and the claims at issue.'" *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). The interest must be "direct, non-contingent, substantial[,] and legally protectable." *Dilks*, 642 F.2d 1155, 1157 (9th Cir. 1981).

Courts must weigh three factors to determine adequacy of representation:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003). "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.* . That presumption is sustained here because MNA asserts claims identical to Plaintiffs, Plaintiffs have already indicated they are capable and willing to argue those claims, and MNA proffers no "necessary elements" Plaintiffs will neglect. *Id.* .

MNA fails state a 'significant protectable interest' in this matter or explain why Plaintiffs will not adequately represent its interests.

A. MNA lacks a protectable interest that will be impaired in this matter.

Applicants must demonstrate a causal link between their supposed protectable interests and the litigation. *See Arakaki*, 324 F.3d at 1084 (denying intervention because possessing standing for an independent

lawsuit "does not alone justify a Rule 24(a) right to intervene in any … equal protection litigation"); *Mishewal Wappo Tribe of Alexander Valley v. Salazar*, 534 Fed. App'x. 665, 667 (9th Cir. 2013) (denying intervention because a county's taxation, sovereignty, and regulatory interests were too speculative in a case involving restoring Indian Country lands in the affected counties); *Dilks*, 642 F.2d at 1557 (denying intervention because an interest in collective bargaining, potential liability, and hypothetical benefits conferred on members of applicant association do not constitute a direct and non-contingent interest).

MNA's claimed 'significant protectable interest' lies "in their [sic] ability to receive the protections of federal workplace safety laws, federal disability laws, and the Montana Constitution." Doc. 12 at 5. These stated interests are perfunctory and unsupported. They rely on an incorrect inference that HB 702 displaces federal and state workplace protections.[1]

[1] MNA's statement that "HB 702 purports to displace federal and state constitutional protections," of course, lacks authority. Nothing in the text or intent of HB 702 evinces any such purpose. Instead, as the State argues elsewhere, HB 702 exists in harmony with the ADA and OSHA and protects Montanan's right to informational privacy and to be free from discrimination. *See* Doc. 21 at 15–33. This must be so. Otherwise, the Plaintiffs' legal theories would be admitting that they are actively violating the ADA and OSHA right now.

MNA's requested relief generally asks that its members be permitted (or required) to work in facilities that do discriminate against employees based on vaccination status. *See* Doc. 11-1, ¶ 13. But MNA does not allege its members control, or otherwise may impose, workplace policies requiring all healthcare employees (MNA members or not) to get vaccinated. *See e.g.* Doc. 11-1, ¶ 15 ("MNA members *are employed* and provide direct nursing care), ¶¶ 28–30 (Alleging employers of MNA members may violate the ADA if they adhere to HB 702), ¶¶ 35–37 (Same), ¶ 42 ("MNA members *employed* in healthcare settings …), ¶ 48 (Distinguishing employers, who take actions under OSHA, from OSHA's intended beneficiaries—MNA members), ¶ 63 ("MNA members in certain healthcare settings, are treated more stringently than those *employed* [in] nursing homes, long term care facilities, or assisted living facilities.") (emphases added). MNA, in other public statements, acknowledges that the present litigation will not require employers to mandate vaccines. *See* Montana Nurses Association, *Commentary: Montana Nurses Association backing challenge to 'intrusive' legislation*, Missoula Current (Sept. 29, 2021) ("Will the lawsuit require providers to mandate vaccines? No!"). Neither MNA nor its members may impose vaccination requirements on

all healthcare employees. But that is what would be necessary for *them* to alleviate *their* purported injury in *this* case. Instead, MNA's interests are hypothetical—that in the absence of HB 702, third party healthcare managers might choose to impose discriminatory vaccine requirements. *See* Doc. 11-1, ¶ 15 (listing all such employers). Rule 24(a)(2) prohibits such contingent and speculative interests from forming the basis of intervention as a matter or right.

As the State previously argued, this litigation will not alter existing health protocols at the health care facilities employing MNA members. *See e.g.* Doc. 21 at 10 n.8 (The CDC acknowledges some risk of vaccinated and unvaccinated individuals alike transmitting infectious diseases such as COVID-19). MNA doesn't seek to require (much less allege) that *all individuals* entering health care facilities—e.g., patients—be vaccinated. Irrespective of HB 702, MNA members will continue to be exposed to vaccinated and unvaccinated individuals in their workplaces; those workplaces will therefore certainly continue to impose the same health and safety protocols they're using right now. *See* Doc. 21 at 13–14 (Plaintiffs will likely need to continue to current protocols to mitigate risk of infectious diseases). In short, because the present litigation does not

affect MNA members' worksites health and safety protocols, MNA does not possess a 'direct, non-contingent' interest in this case.

Similar to *Dilks*, if the Court denies MNA's intervention it will in no way impair MNA's interests. 642 F.2d. at 1157 (The applicant's "right to litigate the matter will in no way be foreclosed by the present action."). MNA will remain free to pursue valid ADA and OSHA claims related to MNA members' worksite conditions.

MNA's hypothetical interests fail to satisfy Fed. R. Civ. P. 24(a)(2). *See Ctr. for Biological Diversity v. Haaland*, 2021 U.S. Dist. LEXIS 175662 *4–5 (D. Mont. 2021) (Mere "possibility" is not enough to equate to a direct, non-contingent, substantial, and legally protected interest); *see also Mishewal Wappo Tribe of Alexander Valley*, 534 F. App'x. at 667 (The applicant's relationship requirement to the lawsuit mandates that "resolution of the plaintiff's claims actually will affect the applicant."). Because MNA and its members must rely on third-party actions that will only hypothetically occur if HB 702 is enjoined, MNA fails to articulate a protectable interest in the matter.

B. Alternatively, existing parties adequately represent MNA's interests.

Alternatively, if the Court finds MNA possesses a protectable interest in this matter, then existing parties will adequately represent that interest. After all, "MNA seeks relief under similar legal theories as the complaint filed by the Montana Medical Association" ("MMA"). Doc. 11-1, ¶ 6.

MNA and MMA, in fact, bring *identical* legal theories. *Compare* Doc. 14 at 13 to Doc. 11-1 at 11 (First claim for relief under employer responsibility to provide reasonable accommodations under the ADA); Doc. 14 at 14 to Doc. 11-13 (Second claim for relief under public accommodation provision of the ADA); Doc. 14 at 16 to Doc. 11-1 at 14 (Third claim for relief under OSHA); Doc. 14 at 17 to Doc. 11-1 at 15 (Fourth claim for relief is violation of OSHA regulation); Doc. 14 at 18 to Doc. 11-1 at 16 (Fifth claim for relief under Montana's constitutional right to a safe and healthy environment); Doc. 14 at 19 to Doc. 11-1 at 17 (Sixth claim for relief under Montana's constitutional obligation to maintain a healthy environment); Doc. 14 at 20 to Doc. 11-1 at 18 (Seventh claim for relief under Montana's equal protection clause); Doc. 14 at 21 to Doc. 11-1 at 20 (Eighth claim for relief under the Fourteenth Amendment's equal

protection clause). Within these identical claims, they raise identical allegations. *Compare e.g.* Doc. 14, ¶ 79 to Doc. 11-1, ¶ 73. MMA and MNA bring identical claims, with identical assertions, for the same ultimate objective of enjoining HB 702.

MNA differs only in the scope of relief, not the requested relief itself, and it raises precisely the same issues as MMA. Such negligible differences don't constitute inadequate representation. *See Nw. Forest Res. Council*, 82 F.3d at 838. ("[M]inor differences in opinion … fail[] to demonstrate inadequacy of representation ….") For similar reasons, because the "ultimate objective" of both MNA and MMA is to enjoin HB 702 on precisely the same grounds, the presumption of adequate representation attaches. *Arakaki*, 324 F.3d at 1086; *Dilks*, 642 F.2d at 1157 (denying intervention because the applicant and defendant shared "precisely the [same] positions"); *see also State ex rel. Lockyer v. United States*, 450 F.3d 436, 444 (9th Cir. 2006) (granting intervention because in that case because defendant-intervenors and defendants took different positions on what the statute at issue required). Here, MNA and MMA raise the same legal claims, theories, and allegations, so MMA will adequately

represent MNA's interests. MNA frankly has nothing to add to this case as a party.[2]

MNA offers no support for its position that MMA "will not undoubtedly make all of the Nurse's arguments." That could have been easily demonstrated in MNA's proposed Complaint. But again, MNA simply lifted its legal claims from Plaintiffs' Amended Complaint. There's really no daylight between the two. *See* Doc. 14 and Doc. 11-1. MNA's attempts to create daylight are contradicted by MMA's pleadings. *See* Doc. 12 at 7 (MMA claims "nurses are not among its [MMA's] plaintiffs"), *but see* Doc. 14 at 16, 20 (MMA plaintiffs employ other health care professionals; presumably, some of these professionals are nurses). In short, Plaintiffs adequately represent MNA's interests, and MNA has made no serious argument or allegation to the contrary.

II. The Court Should Deny Permissive Intervention

Proposed intervenors must meet three threshold requirements:

> (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims.

[2] The State would not object to MNA's participation as amicus curiae. While MNA has no legal right to intervene, the State thinks MNA's members would be interested to see their organization spending their money to fight for the right to eliminate their jobs.

Donnelly, 159 F.3d 405, 412. "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Id.* (Stating "the district court must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties.").

While the Ninth Circuit does not apply an independent standing inquiry to motions to intervene, a standing-like inquiry is nevertheless implicit in Rule 24. *See Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989); *see also Perry v. Schwarzenegger*, 630 F.3d 898, 905 (9th Cir. 2011) (Court should consider, among other factors, "the nature and extent of the intervenors' interest [and] their standing to raise relevant legal issues" in resolving Rule 24(b) permissive intervention motions.).

MNA presents purely hypothetical and speculative claims. *See* supra Part I(A). MNA's alleged protected interest, to work for employers who discriminate based on vaccination status, can only be redeemed by MNA members' employers. As MNA has previously publicly stated, this lawsuit does not require those employers to mandate vaccinations. MNA can only receive relief via the indirect, voluntary choice of third parties.

If joined, MNA's stated interests fall short of what is required to invoke this Court's jurisdiction. This Court should decline permissive intervention on such grounds. *United States v. City of Arcata*, 2009 U.S. Dist. LEXIS 61595 *8–9 (N.D. Cal. 2009) (Denying permissive intervention under the court's discretion based, in part, on Article III standing concerns.).

Delay also counsels against permissive intervention. The Court has expressed a desire to resolve this case promptly. Doc. 19. Intervention will delay prompt resolution because it will likely necessitate additional briefing on the same claims Plaintiffs have already pleaded. This would cut against the Court's stated goal of prompt consideration of an urgent matter.

Further, the State has a pending dispositive motion that the Court ordered briefing on in an expedited fashion. Docs. 15, 20. At a minimum, MNA's motion to intervene should be held in abeyance pending resolution of that motion.

CONCLUSION

For the reasons stated, the Court should deny MNA's motion to intervene.

DATED this 12th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this 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 2,553 words, excluding tables of content and authority, certificate of service, certificate of compliance, and exhibit index.

/s/ *Brent Mead*
BRENT MEAD

CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: November 12, 2021

/s/ *Brent Mead*
BRENT MEAD