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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

MONTANA MEDICAL  
ASSOCIATION, et al.,  
Plaintiffs,  
and  
MONTANA NURSES  
ASSOCIATION,  
Plaintiff-Intervenors,  
v.  
AUSTIN KNUDSEN, et al.,  
Defendants.

CV 21-108-M-DWM

**DEFENDANTS' BRIEF  
IN SUPPORT OF MOTION  
TO DISMISS PLAINTIFF-  
INTERVENOR'S COMPLAINT  
UNDER FED. R. CIV. P. 12**

Defendants Attorney General Austin Knudsen and Commissioner of Labor and Industry Laurie Esau (collectively the “State”) hereby submit this brief in support of its motion to dismiss Plaintiff-Intervenor Montana Nurses Association Complaint.

### INTRODUCTION

Plaintiff-Intervenor Montana Nurses Association (“MNA”) submits a Complaint that is nearly identical to Plaintiffs’ First Amended Complaint. Pursuant to this Court’s Order on November 30, 2021, the State incorporates by reference prior arguments made in its motion to dismiss Plaintiff’s First Amended Complaint. (Doc. 26 at 3) (Order granting MNA’s motion to intervene) (“If Defendants seek to dismiss the Nurses’ complaint on grounds previously raised in response to Plaintiffs’ complaint, the parties need not submit additional briefing on arguments previously addressed as those arguments shall be deemed incorporated by reference.”); (Doc. 21) (State’s Brief in Support of Second Motion to Dismiss). Under the plain language of the November 30 Order, no State response was required at all. MNA’s Complaint parrots the Plaintiffs’, and it should be dismissed for the reasons the State has already briefed. But at the December 29, 2021, invitation of the Court, the State

is pleased to provide additional reasons why MNA's Complaint runs aground under Rule 12.

### **I. Motion to dismiss standard**

Complaints should be dismissed when the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The plaintiff bears the burden of proving subject matter jurisdiction. *See Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). Standing is "an essential and unchanging" requirement to invoke the court's subject matter jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Under Rule 12(b)(6), a complaint must be dismissed if it fails to state a claim. Courts can dismiss a complaint under Rule 12(b)(6) "when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). While courts accept as true all well-pleaded factual allegations, assertions that "are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Nor are courts "bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 678. A complaint

should be dismissed if it offers only “‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.*

Plaintiff-Intervenor MNA’s Complaint suffers from each of these defects.

## **II. Plaintiff-Intervenor lacks standing.**

Plaintiff-Intervenor’s Complaint must be dismissed for lack of standing. There are three elements of standing:

First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Lujan*, 504 U.S. at 560—61 (citations and quotations omitted). And Plaintiffs must “clearly ... allege facts demonstrating each element” in their pleading. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see also* (Doc. 21 at 12—13). “[A]n intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

Plaintiff-Intervenor Montana Nurses Association lacks standing. In addition to the traditional rules of associational standing, *see Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977), plaintiff-organizations must make “specific allegations establishing that at least one identified member had suffered or would suffer harm.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Associational standing “pleadings must be something more than an ingenious academic exercise in the conceivable.” *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973).

MNA’s mere recital of the elements of associational standing, (Doc. 11-1, ¶ 14), does not suffice to confer standing. *See Ashcroft*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” are insufficient pleadings.). MNA’s statement that its members are employed and provide direct nursing care in various medical settings is similarly insufficient. *See* (Doc. 11-1, ¶15). MNA must make a factual showing that specific members are harmed by HB 702. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (The requirement of naming affected members may only be dispensed with “where all the members of the organization are affected by the challenged

activity.” (emphasis in original)). MNA offers legal conclusions as to its members’ status, but fails to name any alleged harm to an individual member and fails to proffer sufficient facts to establish that the *Summers* exemption applies. (Doc. 11-1, ¶¶ 14-19). This is not enough for standing.

Plaintiff-Intervenor’s assertion that the “desired relief is consistent with the MNA mission” ignores that MNA must demonstrate that the desired relief will redress the complained-of injury. (Doc. 11-1, ¶ 14). MNA merely states it is injured—but not *how* it is injured or how its requested relief would redress its injuries. (Doc. 11-1, ¶ 20). MNA’s requested relief applies to all “healthcare settings” where “Montana nurses” work. (Doc. 11-1, ¶6). This relief is not limited to healthcare settings where MNA members work. So, first, MNA fails to link its requested relief to MNA members. Next, MNA lists locations such as “federal health facilities,” “state and local institutional settings,” “school settings,” and “elsewhere.” *Id.* Terms like ‘elsewhere’ when combined with seeking relief beyond MNA’s members push the complaint into the hypothetical realm by failing to define the universe of relief sought.

Next, by listing facilities entirely outside of MNA’s managerial control, e.g. “state” or “federal” facilities, MNA cannot plausibly state a

redressable claim because the choice of requiring vaccinations lies outside of MNA. This is the exact “academic exercise in the conceivable” that the courts have rejected as a basis for standing. *See Students Challenging Regulating Agency Procedures*, 412 U.S. at 688. MNA’s requested relief generally asks that its members be permitted (or required) to work in facilities that 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 such as mandatory vaccination regimes in all of the “healthcare settings” in which nurses (MNA members or not) are employed. *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 in all healthcare settings. 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).

As the State previously argued, this litigation will not alter existing health protocols at the healthcare settings 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).<sup>1</sup> MNA doesn’t seek to require (much less allege) that *all individuals* entering health care facilities—e.g., patients—

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<sup>1</sup> In considering a 12(b)(6) motion, the court may properly consider matters of public record without converting the motion to dismiss to a motion for summary judgment. See *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) (“a court may take judicial notice of ‘matters of public record.’”).



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). MNA's allegations attempt to connect vaccination status to “a healthy environment” but because exposure may occur regardless of HB 702, MNA cannot state a traceable injury to HB 702.

Plaintiff-Intervenor cannot demonstrate traceability of its alleged injury to HB 702 or redressability by a favorable decision. Even if Plaintiff-Intervenor succeeded in getting its claimed relief, it is not in a position where it could mandate a vaccine to its members. It is a voluntary association that does not have the power to mandate a medical treatment, or force medical employers to mandate a medical treatment in environments where MNA's members might work. And MNA and these employers would continue to have to take precautions against the spread of COVID-19, as the vaccine does not stop transmission. Plaintiff-Intervenor fails to demonstrate standing. This deficiency deprives this Court of jurisdiction.

### **III. Plaintiff-Intervenor fails to state a claim.**

Plaintiff-Intervenor's claims are identical to Plaintiffs' claims, and Defendants move to dismiss Plaintiff-Intervenor's claims on the same bases. As permitted by the Court's November 30, 2021 Order, Defendants' arguments in the November 10, 2021 Second Motion to Dismiss are hereby incorporated by reference. *See Docs. 21, 26.*

### **CONCLUSION**

Plaintiffs and Plaintiff-Intervenor wish to discriminate in violation of the Montana Human Rights Act. For the reasons previously stated, and for the reasons stated above, Plaintiff-Intervenor doesn't possess a right to discriminate. Because Plaintiff-Intervenor failed to adequately plead any injury or any viable legal claim, this Court should dismiss Plaintiff-Intervenor's Complaint and continue to leave in place Montana's anti-discrimination protections.

DATED this 5th day of January, 2022.

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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 1,706 words, excluding tables of content and authority, certificate of service, certificate of compliance, and exhibit index.

*/s/ Brent Mead*

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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: January 5, 2022

*/s/ Brent Mead*

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BRENT MEAD