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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA MEDICAL ASSOCIATION, FIVE VALLEYS UROLOGY, PLLC, PROVIDENCE HEALTH & SERVICES – MT, WESTERN MONTANA CLINIC, PC, PAT APPLEBY, MARK CARPENTER, LOIS FITZPATRICK, JOEL PEDEN, DIANA JO PAGE, WALLACE L. PAGE, and CHEYENNE SMITH, Plaintiffs, v. AUSTIN KNUDSEN, Montana Attorney General, and LAURIE ESAU, Montana Commissioner of Labor and Industry, Defendants.	Cause No. 9:21-cv-108 Hon. Donald W. Molloy **BRIEF IN SUPPORT OF MOTION TO INTERVENE**

The Court should grant the Montana Nurses Association's ("MNA" or "the Nurses") motion to intervene. The Nurses meet each of the requirements for

intervention as of right under Fed. R. Civ. P. 24(a). In the alternative, the Court should grant the Nurses' motion under Fed. R. Civ. P. 24(b).

BACKGROUND

The Complaint filed by the Montana Medical Association, et al. (collectively "MMA") seeks relief from workplace restrictions imposed by Montana House Bill 702 ("HB702") in two very specific contexts: hospitals and the offices of private physicians. Doc. 1 (Complaint) at 23-25.

HB702 exposes Montana nurses to the same workplace risks as the MMA doctor plaintiffs. And HB702 denies Montana nurses the same protections secured by federal workplace safety laws, federal disability laws, and the Montana Constitution. But where the MMA plaintiffs appropriately limit the scope of their requested relief to the places where MMA members largely work—hospitals and physician offices—the limited relief sought by MMA's complaint does not cover all of the environments in which Montana nurses provide care (and, therefore, face the attendant risks created by HB702).

Beyond hospitals and private physician offices, the Nurses provide direct patient care in a wide range of healthcare settings in Montana, including "health care facilit[ies]," as defined in Mont. Code Ann. § 50-5-101(26)(a),[1] "state and

[1] "'Health care facility' or 'facility' means all or a portion of an institution, building, or agency, private or public, excluding federal facilities, whether

local public health agencies and their public and private sector partners," Mont. Code Ann. § 50-1-101(12), federally qualified health centers, federal health facilities, state and local institutional settings like jails and correctional facilities, school settings, and others (collectively, "healthcare settings"). Success by MMA on its complaint will provide relief for the Nurses in only some of these settings, but will not afford relief in many of the places the Nurses work and in which they are equally entitled to the protections of federal law and the Montana Constitution. For this reason, the Nurses' proposed complaint seeks relief from HB702 in all healthcare settings where Montana nurses work—not simply hospitals or private physician offices. The Court should grant the Nurses' motion and permit intervention.

ARGUMENT

I. The Nurses may intervene as of right

The Court should grant the Nurses' motion to intervene under Fed. R. Civ.

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organized for profit or not, that is used, operated, or designed to provide health services, medical treatment, or nursing, rehabilitative, or preventive care to any individual. The term includes chemical dependency facilities, critical access hospitals, eating disorder centers, end-stage renal dialysis facilities, home health agencies, home infusion therapy agencies, hospices, hospitals, infirmaries, long-term care facilities, intermediate care facilities for the developmentally disabled, medical assistance facilities, mental health centers, outpatient centers for primary care, outpatient centers for surgical services, rehabilitation facilities, residential care facilities, and residential treatment facilities."

P. 24(a) because the Nurses have a clear interest in the outcome of this litigation, but their interests are not fully represented by the current parties. This Court has provided that,

> An applicant seeking to intervene as of right under Rule 24 must demonstrate that four requirements are met: (1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest.

Ctr. for Biological Diversity v. Haaland, No. CV 20-181-M-DWM, 2021 WL 4197426, at *1 (D. Mont. Sept. 15, 2021) (quoting *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011)). The Nurses' proposed intervention satisfies each of these requirements.

First, the Nurses' proposed intervention is timely. In *Citizens for Balanced Use*, the Ninth Circuit held that "Applicants [for intervention] filed their motion to intervene in a timely manner, less than three months after the complaint was filed and less than two weeks after the Forest Service filed its answer to the complaint." 647 F.3d at 897. Here, MNA seeks to intervene just five weeks after MMA's complaint was filed, and before Defendants have answered. Accordingly, the motion comes "at an early stage of the proceedings, the parties would not have suffered prejudice from the grant of intervention at that early stage, and

intervention would not cause disruption or delay in the proceedings." *Id.*

Second, the Nurses have a significant protectable interest. "To demonstrate a significant protectable interest, an applicant must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Id.* The Nurses plainly have a significant protectable interest in their ability to receive the protections of federal workplace safety laws, federal disability laws, and the Montana Constitution. HB702 purports to displace federal law and state constitutional protections that secure the Nurses' rights to equal protection, to a clean and healthful environment, to a safe workplace, and to be free from discrimination on the basis of disabilities. The conflict between these protections and HB702 affects the Nurses' legal interests directly and substantially.

Third, the disposition of this action may, as a practical matter, impair or impede the Nurses' ability to protect their interest. "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene . . ." *Id.* at 898 (quoting Fed. R. Civ. P. 24 advisory committee's note). "Having found that appellants have a significant protectable interest, [this court had] little difficulty concluding that the disposition of th[e] case may, as a practical matter, affect it." *Id.* (alteration in original) (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442

(9th Cir. 2006)). If Defendants prevail in this case, the Nurses' interest in receiving the protections of federal workplace safety laws, federal disability laws, and the Montana Constitution will, as a practical matter, be impaired.

Fourth, the existing parties may not adequately represent the Nurses' interest. The Ninth Circuit explained that,

> The burden of showing inadequacy of representation is "minimal" and satisfied if the applicant can demonstrate that representation of its interests "may be" inadequate. In evaluating adequacy of representation, we examine three factors: "(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." The "most important factor" in assessing the adequacy of representation is "how the interest compares with the interests of existing parties."

Id. (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citations omitted)). Crucial to each of the three factors, the MMA plaintiffs only seek relief from HB702 in two settings: hospitals and private physician offices. The Nurses seek broader relief from HB702: in all the healthcare settings in which the Nurses are found, and in which they face risks generated by HB702. Thus, MMA and the Nurses do not share a common objective because their requested relief is different. The Nurses' intervention satisfies each of the factors in *Citizens for Balanced Use*: (1) MMA will not "undoubtedly make all of" the Nurses' arguments; (2) MMA is not the right party—and not "capable or willing"—to make arguments on behalf of

the Nurses because nurses are not among its plaintiffs, and (3) for the same reason, the Nurses "offer . . . necessary elements to the proceedings that the other parties would neglect." For these reasons, the Nurses may not be adequately represented by the existing parties and should be permitted to intervene as of right.

II. Alternatively, the Court should grant permissive intervention

The Nurses meet the requirements for intervention as of right under Fed. R. Civ. P. 24(a). But if the Court does not grant intervention as of right, it should, in the alternative, allow permissive intervention because the Nurses' proposed complaint "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). "[P]ermissive intervention requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Ctr. for Biological Diversity*, 2021 WL 4197426, at *2 (quoting *Freedom from Religion Found, Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011)). Here, the Nurses' proposed complaint provides independent bases for jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1367 (supplemental jurisdiction for the state constitutional claims), and 42 U.S.C. § 1983 (federal civil rights). The motion is timely—Defendants have not yet answered. And the Nurses' complaint shares common questions of law and fact with the main action.

CONCLUSION

For the foregoing reasons, the Court should grant the motion and allow the Nurses to intervene as of right. In the alternative, the Court should grant leave for permissive intervention.

DATED this 29th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the requirements of Rule 1.5 and 7.1 USDCR, is double spaced, except for footnotes, quoted, and indented material, and it is proportionately spaced utilizing a 14 point Times New Roman type face. The total word count for this document does not exceed 6,500 words, as calculated by the undersigned's word processing program.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2021, I mailed the foregoing brief in support of motion by certified mail to the following:

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