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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.

AUSTEN KNUDSEN, Montana Attorney General, and LAURIE ESAU, Montana Commissioner of Labor and Industry,

Defendants.

Case No. CV 21-00108-DWM

PLAINTIFFS' BRIEF IN OPPOSITION TO SECOND MOTION TO DISMISS UNDER FED. R. CIV. P. 12

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Plaintiffs, Montana Medical Association ("MMA"), Five Valleys Urology, PLLC ("FVU"), Providence Health & Services – MT ("PH&S"), Western Montana Clinic, PC ("WMC") (collectively "Providers"), Pat Appleby, Mark Carpenter, Lois Fitzpatrick, Joel Peden, Diana Jo Page, Wallace L. Page, and Cheyenne Smith (collectively "Patients"), respectfully file this Brief in Opposition to Defendants' Second Motion to Dismiss ("Motion").

Defendants' Motion presents the same grounds and, but for minor changes, the exact same arguments as their first motion. For purposes of a clean record, Plaintiffs reiterate a complete response to the Motion, though substantially repetitive of Plaintiffs' prior response.

## I. INTRODUCTION

Health care providers put themselves in harm's way, opening up their doors to the most vulnerable, and sickest, members of our community. Patients with communicable diseases seek out physicians and hospitals for treatment—exposing providers, staff, and other patients to the risk of contracting disease. To first do no harm in treating their patients, physicians must take reasonable and appropriate steps to protect patients from unnecessary exposure to additional harm, including protecting patients from vaccine-preventable infectious diseases. Physician offices and hospitals also have an obligation to implement reasonable safety measures to protect themselves and their staff. This is not "misguided groupthink;" it is the

product of evidence-based practices to provide health care in a safe and prudent manner. Defendants' unsupported rhetoric that this case is based upon health care providers' desire to discriminate not only obfuscates the issues, it is offensive to those who put themselves and their families at risk to provide health care to our communities.

Plaintiffs' Amended Complaint is narrowly crafted to challenge specific provisions of Montana Code Annotated § 49-2-312 ("MCA 49-2-312") – as those provisions apply to themselves and to others with identical interests. This case is not brought as a wholesale challenge to a legislative determination with which the Plaintiffs may disagree. It is a pinpoint claim based on well-grounded and well-articulated legal theories and supported by science.

Defendants' Motion outright fails to acknowledge the breadth and scope of MCA 49-2-312 and its impact on the health care community. Defendants continue to focus only on COVID-19 and fail to recognize that MCA 49-2-312 applies to all vaccines and, therefore, all vaccine-preventable illnesses. Defendants' Motion fundamentally misconstrues the basis and nature of Plaintiffs' claims. This lawsuit is about Plaintiffs' challenge to Defendants' ability to usurp the independent medical judgment of physicians in treating their patients and protecting themselves and their staff.

Plaintiffs have standing to assert these claims and assert valid and sufficient claims for relief. Defendants' Motion should be denied.

## II. LEGAL STANDARDS

"[S]tanding typically requires three elements—injury-in-fact, traceability, and redressability." *Suda v. United States Customs & Border Prot.,* No. CV-19-10-GF-BMM, 2020 U.S. Dist. LEXIS 33143, at *10-11 (D. Mont. Feb. 26, 2020) (citations omitted). Plaintiffs who seek injunctive relief must also show "'a sufficient likelihood that [they] will be wronged again in a similar way.'" *Suda,* at 11 (citing *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004)).

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must state "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" On a motion to dismiss, the factual allegations are to be taken as true and all reasonable factual inferences are drawn in the Plaintiffs' favor. *Estate of Gould v. United States*, No. CV 20-177-M-DWM, 2021 U.S. Dist. LEXIS 104712, at *2 (D. Mont. June 3, 2021) (citing *Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1144 (9th Cir. 2021). A claim survives a Rule 12(b)(6) challenge if it pleads "'sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.''" *Gould*, at *2 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Defendants continue to reply upon unsupported allegations from material outside of the pleadings, without any proper foundation. Defendants have not properly presented affidavits or otherwise complied with the Federal Rules of Evidence, and such information should not be considered by the Court. *See* Fed. R. Civ. P. 12(b)(6); Fed. R. Evid. 602, 701, 702, 802, 901. This extraneous material fails the judicial notice standard required by Federal Rule of Evidence 201(b). "Just because [a] document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018).

## III. ARGUMENT

### A. Plaintiffs have standing to assert the claims pled in the Amended Complaint.

Defendants' standing argument is unchanged and focuses solely on whether Plaintiffs have suffered an "injury in fact." (Doc. 21 at 11-22). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted).

Plaintiffs have established all elements necessary for standing. Plaintiffs have suffered an injury in fact; such injury is directly and causally related to

Defendants' enforcement of MCA 49-2-312; the injury will be redressed by injunctive relief preventing Defendants from enforcing MCA 49-2-312 against physician offices and hospitals; and there is a real and imminent threat of repeated injury if Defendants are allowed to enforce MCA 49-2-312 against hospitals and physician offices.

Defendants concede sufficient injury in fact by citing the CDC for the proposition that: "Available evidence shows that fully vaccinated individuals and those previously infected with SARS-CoV-2 each have a low risk of subsequent infection for at least 6 months." (Doc. 21 at 17, n. 7) (emphasis added). Defendants seemingly ignore that MCA 49-2-312's prohibitions apply both to "vaccination status" and "immunity passports," defining immunity passport as "a document, digital record, or software application indicating that a person is immune to a disease, either through vaccination or infection and recovery." MCA 49-2-312(5)(a) (emphasis added). Based on the cited CDC Science Brief,[1] Plaintiffs should be able to know whether and to what extent an individual has immunity to COVID-19 and take reasonable precautions accordingly. The need for these precautions goes beyond COVID-19, and applies to all infectious

[1] Which also concluded: "vaccination after infection significantly enhances protection and further reduces risk of reinfection . . . ." While not properly presented, the CDC Science Briefs only further support Plaintiffs' standing and substantive bases of Plaintiffs claims.

diseases. MCA 49-2-312 prohibits implementing these precautions based upon vaccination status *or* immunity status, thus injuring Plaintiffs.

Providers' standing is established by the fact they are statutorily barred from taking steps to protect their patients and staff against the spread of communicable diseases. The Patients are individuals in special danger of contracting communicable diseases, and are constrained from using health care facilities that could cause them to be infected. Plaintiffs are not merely part of the Montana population at large. They are the individuals most directly affected by the portions of MCA 49-2-312 at issue and preventing enforcement of MCA 49-2-312 will redress the harm. *See Lujan*, 504 U.S. at 561-62 (when a plaintiff is the object of the challenged governmental action, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it").

Even if this Court should find some Plaintiffs lack standing to assert some of the claims, Plaintiffs as a group have standing to sue. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977)).

Defendants' assertion that Plaintiffs' injury is somehow conjectural or hypothetical is off base. Similar arguments were recently rejected by the Western District of Texas, finding immunocompromised students were actually and sufficiently injured by an executive order banning mask mandates in schools, and thereby had standing. Memo. Op., *E.T., et al. v. Morath, et al.*, No. 1:21-CV-717-LY, Doc. 82 at 14 (W.D. Tex. Nov. 10, 2021) (finding students did not need to show enforcement of the ban on mask mandates would actually cause any of them to contract COVID; increased risk of harm was sufficient). This reasoning applies to all Plaintiffs in this case.

Every day, COVID-19 puts Montanans in the hospital and kills Montanans. But, again, MCA 49-2-312 is not limited to COVID-19. Montana has, in recent years, experienced localized outbreaks of pertussis and there have been outbreaks of other vaccine-preventable infectious diseases, i.e., measles, on a national level. Vaccine-preventable infectious diseases pose a direct threat to immunocompromised individuals and health care workers. The direct harm posed by communicable diseases is so tangible that students are required to have certain vaccinations in order to attend public school. The Providers have an interest in protecting their patients and staff from illness and death. The Patients have an interest in life and health. The harms – sufficiently pled in the Amended Complaint – presented by contracting or spreading vaccine-preventable illnesses

are real, present, and continuing while MCA 49-2-312 remains in effect. Plaintiffs need not "await the consummation of threatened injury to obtain preventive relief." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979).

**1. MMA has organizational standing.**

"[A]n organization may sue to redress its members' injuries, even without a showing of injury to the association itself" because "the association and its members are in every practical sense identical." *United Food & Commer. Workers Union Local 751 v. Brown Grp*., 517 U.S. 544, 552 (1996) (citations and internal quotation marks omitted). The MMA has sufficiently alleged standing, namely: (a) the organization's members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; (c) based on the MMA's membership, neither the claim asserted, nor the relief requested requires, the participation of individual members in the lawsuit; and (d) in any event, MMA has within its membership physicians employed with FVU, WMC, and PH&S. (Doc. 14 at ¶¶ 12-13); *United Food*, 517 U.S. at 553. This Court has recognized that plaintiff organizations need not identify specific members by name at the pleading stage to satisfy standing requirements. *Mont. Envtl. Info. Ctr. v. Bernhardt*, No. 1:19-cv-00130-SPW-TJC, 2020 U.S. Dist. LEXIS 189477, at *8 (D. Mont. Oct. 13, 2020).

**2. Providers have standing.**

Without citation to legal authority, Defendants argue medical clinics and hospitals do not have standing unless they admit they are providing subpar medical care. Defendants' argument misconstrues the standard for standing and, if anything, supports the foundation of Plaintiffs' claims. The Providers will continue to provide appropriate medical care within established standards of care, but when doing so runs afoul of the prohibitions of MCA 49-2-312, these clinics and hospitals are exposed to real and tangible legal liability. *See* MCA 49-2-312 (creating an "unlawful discriminatory practice" that, in certain contexts, infringes on physicians' independent medical judgment and potentially violates national standards of care). Providers are not required to allege they currently employ unvaccinated workers. The Amended Complaint alleges the Providers employ and hire employees, yet MCA 49-2-312 forecloses an ability to inquire into vaccination status and properly address it.

Defendants appear to argue that the injury necessary to confer standing can only arise under legal obligations *other than* MCA 49-2-312. This argument is nonsensical. It is the existence of MCA 49-2-312 that creates the real and nonconjectural injury and exposure to legal liability when providers are prohibited from engaging in reasonable steps to protect vulnerable patients and staff from infectious, vaccine-preventable diseases.

Defendants cite professional licensure statutes to argue it is unprofessional conduct for a licensed physician to engage in conduct not meeting "generally accepted standards of practice." (Doc. 21 at 16, n. 5) (citing Mont. Code Ann. § 37-1-316(18)). This only highlights that MCA 49-2-312's infringement on physicians' independent medical judgment and ability to meet generally accepted standards of practice is inconsistent with a host of other federal and state statutes, causing real injury to these licensed physicians. Defendants' argument emphasizes that, in certain circumstances as alleged in the Amended Complaint, medical providers can either comply with established standards of care to deliver safe health care or comply with MCA 49-2-312; they cannot do both.

Defendants fault Plaintiffs for failing to cite medical experts in the Amended Complaint, misconstruing the applicable pleading standard. Nothing in Rule 8(a) or the case law decided thereunder requires a plaintiff to cite expert authority for its factual allegations. *See* Fed. R. Civ. P. 8(a); *Iqbal*, 556 U.S. at 677-79. While Plaintiffs intend to present expert testimony establishing the facts alleged are true, that is not required at the initial pleading phase. *Gould*, at *2 (factual allegations in the complaint are taken as true and the pleadings are construed in the light most favorable to plaintiffs).

**3. Patients have standing.**

Defendants advance the baseless argument that the Patients are not harmed by MCA 49-2-312 because they are already required to take steps to protect themselves during the current COVID-19 pandemic. This slim argument not only improperly minimizes the very real threat these vulnerable individuals face, it flatly ignores that the Patients are also exposed to vaccine-preventable diseases other than COVID-19. Patients need to be treated by physicians and staff who are vaccinated against COVID-19 *and* other infectious diseases. (*See* Doc. 14 at ¶¶ 23-26). The Patients are harmed by MCA 49-2-312 because they need to seek health care from vaccinated providers or from clinic spaces that otherwise reduce the risk of contraction of a disease – similar to the students in *E.T.* who needed to attend school in an environment that reduced risk of COVID-19 transmission through masking policies.

**B. All claims state viable causes of action and are sufficiently pled.**

Defendants' arguments against the substance of Plaintiffs' claims systemically fail in several fundamental ways. First, Defendants fail to acknowledge MCA 49-2-312 provides no exception or exemption for physician offices. The statute draws a limited – and insufficient – exception for a "health care facility," which is defined to specifically exclude "offices of private physicians, dentists, or other physical or mental health care workers regulated

under Title 37, including licensed addiction counselors." Mont. Code Ann. § 50-5-101(26)(b). To the extent Defendants argue Plaintiffs' claims are usurped by the exception expressed in MCA 49-2-312(3)(b), Defendants' position unequivocally fails.

Second, Defendants' entire argument relates only to COVID-19, failing to acknowledge MCA 49-2-312's prohibitions apply to all diseases and vaccines, both known and unknown. While Plaintiffs are undoubtedly harmed by MCA 49-2-312's prohibitions against addressing COVID-19, Plaintiffs are additionally harmed by its application to all diseases, including pertussis, measles, mumps, rubella, shingles, hepatitis, and more. Despite Plaintiffs raising this fundamental flaw in a prior filing, Defendants offer no argument countering the very real and detrimental impact MCA 49-2-312 has on the prevention of these other diseases.

Third, throughout Defendants' brief, Defendants argue that a vaccinated individual is just as likely to carry and spread COVID-19 as an unvaccinated individual – insinuating the COVID-19 vaccine is meaningless and therefore MCA 49-2-312 does not harm the medical community. This argument is belied by Defendants' reliance on CDC Science Briefs, which establish the effectiveness of the COVID vaccine. The degree to which an unvaccinated individual is more likely to both contract and spread disease and the standards of care applicable to a clinical environment are matters appropriately addressed through expert testimony.

Defendants' argument not only fails to address all of the other vaccine-preventable diseases implicated in a clinical environment, it is based upon snippets of articles, taken out of context, without considering the scientific data as a whole or the source of the information. As such, it is wholly insufficient to defeat Plaintiffs' claims on a motion to dismiss.

Fourth, Defendants repeatedly argue the public health policies of Montana support their argument. But MCA 50-1-105 expresses the policy of the state of Montana to protect and promote the health of the public. MCA 50-1-105(1). Montana's public health system does this by, among other things, (1) "promoting conditions in which people can be healthy;" (2) "investigating and diagnosing health problems and health hazards in the community;" (3) "implementing and enforcing laws and regulations that protect health and ensure safety;" (4) seeking "innovative solutions to health problems;" and (5) "striving to ensure that public health services and functions are provided and public health powers are used based upon the best available scientific evidence[.]" MCA 50-1-105(2). Defendants do not, and cannot, contend that MCA 49-2-312 promotes and protects public health – by its very nature this statute is antagonistic to public health.

**1. Plaintiffs' claims pertaining to preemption by the Americans with Disabilities Act's ("ADA") are legally viable.**

The Supremacy Clause "invalidates state laws that 'interfere with, or are

contrary to,' federal law." *Hillsborough Cty. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (citation omitted). "Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law." *Id.* Such a conflict arises when "'compliance with both federal and state regulations is a physical impossibility,'" or when state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]'" *Id.* (citations omitted). State laws may be preempted by federal regulations as well as by federal statutes. *Id.*; *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011).

"'[T]he ADA must be construed broadly in order to effectively implement the ADA's fundamental purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *McGary v. City of Portland*, 386 F.3d 1259, 1268 (9th Cir. 2004) (citation omitted). The ADA provides that no individual may be discriminated against on the basis of a disability in employment or "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation[.]" 42 U.S.C. §§ 12182(a), 12112 (2021).

MCA 49-2-312 conflicts with the ADA. First, patients with compromised immune systems, comorbidities, or extraordinary sensitivity to vaccine-preventable

diseases require individualized treatment from vaccinated individuals. As a public accommodation, physician offices and hospitals are required to reasonably accommodate these types of patients with disabilities under the ADA.

Contrary to Defendants' mischaracterizations, Plaintiffs are not claiming that the ADA compels termination of unvaccinated staff members. Instead, the ADA requires physician offices and hospitals to provide reasonable accommodations to disabled patients, which can include disclosing vaccination status, altering terms or conditions of employment such that a disabled patient is not treated by an unvaccinated individual, requiring unvaccinated individuals to wear additional personal protective equipment ("PPE"), or other appropriate measures to provide reasonable accommodation. To provide a safe environment for disabled individuals to receive care, a provider needs to be able to screen and reasonably require vaccination of staff for vaccine-preventable infectious diseases or alter the conditions of the nonvaccinated individuals' employment to appropriately mitigate the risk they pose to patients. This requires providers identifying and distinguishing between vaccinated and unvaccinated employees or risk excluding individuals with disabilities from receiving care. MCA 49-2-312 prevents physician offices from employing these accommodations to disabled patients who should not be treated by unvaccinated individuals, thus directly conflicting with the ADA.

Similarly, as an employer, physician offices and hospitals are required to reasonably accommodate employees with disabilities. An employee with a compromised immune system likewise may require – as a reasonable accommodation – identification of and separation from coworkers who are not vaccinated against certain diseases. MCA 49-2-312 offers no liability exception for physician offices, and prohibits segregation of employees or any other changes in working conditions based upon vaccination/immunity status.

For hospitals, the limited exception for licensed facilities is insufficient. The exception requires hospitals to accommodate an unvaccinated individual in a manner that protects others from communicable diseases. Mont. Code Ann. § 39-2-312(3)(b).[2] But it is the unvaccinated individual that poses the threat to a disabled/immunocompromised patient/employee, who is the individual entitled to accommodation under the ADA. Moreover, given certain vaccine-preventable diseases are not airborne, simple masking would be ineffective in protecting employees exposed to bloodborne or contact-communicable diseases. Thus, there would not be any reasonable accommodation available to provide to an unvaccinated employee for bloodborne diseases and the limited exception would not apply. Additionally, masking may not be a reasonable accommodation for

[2] It should be noted that this exception impliedly recognizes the threat nonvaccinated people present to the safety and health of others.

airborne illnesses as it is not, necessarily, equally effective to vaccination and may not eliminate the direct threat posed to disabled employees/patients. *See* Mont. Admin. R. § 24.9.613(1). Moreover, requiring full or additional PPE or segregating employees whose vaccination status has not been volunteered (whether the employee is unvaccinated, or vaccinated and immunocompromised) would constitute "discrimination" in terms and conditions of employment, again running afoul of MCA 49-2-312. Appropriately incentivizing vaccination through bonuses would likewise constitute "discrimination." The perfunctory exception articulated in MCA 49-2-312(3)(b) does not save the statute from ADA preemption.

Observance of MCA 49-2-312's prohibitions requires providers to ignore their mandate to reasonably accommodate immunocompromised patients and employees with disabilities in direct violation of the ADA. MCA 49-2-312 requires these vulnerable patients/employees to risk their safety or forego employment or care by otherwise available and capable Montana providers. "Even where an individual 'is not wholly precluded from participating in [a] service, if he is at risk of incurring serious injuries each time he attempts to take advantage of [the service], surely he is being denied the *benefits* of this service." *E.T.*, Doc. 82 at 26-27 (citation omitted).

For these reasons, MCA 49-2-312 is in direct, irreconcilable conflict with the ADA, rendering compliance with both impossible. *See Mary Jo C. v. N.Y.*

*State & Local Ret. Sys.*, 707 F.3d 144, 164 (2d Cir. 2013) (The ADA preempts inconsistent state law when appropriate and necessary to effectuate a reasonable accommodation); *E.T.*, Doc. 82 at 18 (ADA preempts Texas ban on mask mandates in schools because the ban conflicts with school's obligation under the ADA to reasonably accommodate immunocompromised students). At a minimum, MCA 49-2-312 stands as a direct obstacle to the accomplishment of the full objectives of the ADA. *See Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (finding enforcement of a facially-neutral Hawaii quarantine requirement for individuals with dogs improperly burdened visually-impaired persons, further discussing the court's role in enforcing the anti-discrimination application of the ADA).

**2. Plaintiffs' claims pertaining to preemption by Occupational Safety and Health Administration ("OSHA") regulations are legally viable.**

Through OSHA, "Congress endeavored 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (quoting 29 U.S.C. § 651(b)). "To that end, Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce[.]" *Id.* (citing 29 U.S.C. § 651(b)(3)). When a federal standard has been implemented, OSHA conflict preemption applies to state

statutes that stand as an obstacle to the accomplishment and execution of OSHA's full purposes and objectives. *Gade*, 505 U.S. at 98.

OSHA requires employers to furnish all employees a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" 29 U.S.C. § 654(a). OSHA may implement Emergency Temporary Standards ("ETS") when it determines that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and that such emergency standard "is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1).

Plaintiffs sufficiently pled the COVID-19 virus, Hepatitis B, pertussis and other communicable diseases are "recognized hazards" that are causing, or likely to cause, death or serious physical harm. (Doc. 14 at ¶ 47). Health care providers are particularly exposed to these recognized hazards, with increased risk in certain clinical settings and when performing certain medical procedures. MCA 49-2-312 prohibits health care providers from mandating certain infectious disease protocols (including vaccination programs and other alterations to terms and conditions of employment) to address these hazards.

Specifically, 29 C.F.R. § 1910.502 recognizes COVID-19 as a workplace hazard and requires health care employers to "develop and implement a COVID-19

plan," which must include "policies and procedures to . . . [m]inimize the risk of transmission of COVID-19 for each employee." MCA 49-2-312 effectively prohibits employers from enforcing policy or procedure that minimizes transmission of COVID-19 in the workplace – whether through appropriate vaccine mandates or other changes to terms or conditions of employment, such as quarantines, additional PPE or testing for nonvaccinated individuals, or other measures based upon vaccination status. In complying with OSHA requirements, physician offices and hospitals subject themselves to liability under MCA 49-2-312. Having a purely voluntary program that merely recommends a vaccine or other voluntary PPE protocols, without any ability to compel or incentivize compliance, does not effectively minimize transmission of COVID-19 in the workplace. Moreover, MCA 49-2-312 strips a health care provider's ability to avail itself of the exemptions applicable when the employer has a fully vaccinated staff. *See* 29 C.F.R. §§ 1910.502(a)(2)(iv), 1910.502(a)(4), 1910.502(c)(5). Under MCA 49-2-312, physician offices cannot implement policies or procedures to either achieve a fully vaccinated workforce or otherwise meaningfully reduce the transmission of COVID-19. This clearly frustrates OSHA's clear and unambiguous objective of preventing transmission of communicable diseases. *See E.T.*, Doc. 82 at 20-22 (ban on mask mandates conflicted with ARPA in that it

frustrated the ability of the school to develop its own plan to comply with the funding requirements).

Defendants' citation to the November OSHA ETS is inapplicable here, as that ETS specifically does not apply to health care providers covered by § 1910.502. 29 C.F.R. § 1910.501(b)(2)(ii).[3]

### 3. Plaintiffs' claims under Montanans' Constitutional Right to a Safe and Healthy Environment are legally viable.

Article II, section 3 of the Montana Constitution establishes the inalienable "right to a clean and healthful environment" including "seeking [] safety, health and happiness in all lawful ways." Mont. Const. art. II, § 3. MCA 49-2-312 violates Patients' right to "seek health" by jeopardizing their ability to obtain medical treatment. MCA 49-2-312 prevents the Patients from seeking medical care without placing themselves at unnecessary risk for contracting a communicable disease from an unvaccinated medical worker. The statute further obstructs the Providers' ability to maintain a healthful environment for their patients and staff.

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[3] *But see* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) ("Regardless of viral loads in vaccinated and unvaccinated individuals, the fact remains clear that unvaccinated people pose a higher risk of transmission to others than vaccinated people, simply because they are much more likely to get COVID-19 in the first place.").

Article IX, section 1 of the Montana Constitution requires the state and each person to "maintain and improve a clean and healthful environment in Montana for present and future generations" tasking the legislature to "provide for the administration and enforcement of this duty." MCA 49-2-312 does exactly the opposite, prohibiting the Providers from maintaining, and the Patients from enjoying, a clean and healthful environment to seek safe medical care.

These claims, taking the allegations as true, are sufficiently pled to survive dismissal. Infectious diseases are spread through airborne particles, blood borne pathogens, and pathogens carried through surface contact, which contaminate the environment. Vaccines slow down and help prevent the spread of these particles and pathogens, leading to a cleaner and more healthful environment. MCA 49-2-312 prevents the health care community from taking appropriate measures to promote a clean and healthful environment in a setting where infectious viruses are particularly prominent and spread through air, bodily fluids, and surfaces. For purposes of the instant claims, there is no material difference between airborne pollutants, such as asbestos or arsenic, that cause disease and airborne viruses that cause disease. Both affect the "natural environment" the framers sought to maintain.

These constitutional provisions were intended to be broad, read together in conjunction with the preamble to the Montana Constitution, and implemented in a

manner that provides "protections which are both anticipatory and preventative." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236. The Montana Supreme Court has embraced these constitutional provisions in the context of an individual's fundamental right to "seek health." *See, e.g., Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 23, 366 Mont. 224, 286 P.3d 1161 ("In pursuing one's own health, an individual has a fundamental right to obtain and reject medical treatment.") (citing *Wiser v. State*, 2006 MT 20, ¶ 17, 331 Mont. 28, 129 P.3d 133).

While the Montana Supreme Court has applied these constitutional provisions in the toxic tort and pollution contexts, Defendants cite no authority specifically limiting these constitutional protections to these types of matters. The fact that the Montana Supreme Court has not yet applied this provision in the context of vaccines does not doom Plaintiffs' claims. Rather, it reflects that, until recent attacks on evidence-based science, it was a foregone conclusion that vaccines contribute to the clean and healthful environment enjoyed by Montanans. Indeed, MCA 49-2-312 represents an unprecedented assault on the health care community's ability to address vaccine-preventable diseases.

Interestingly, Defendants continue their reliance on the police powers of the State, citing the concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020), to claim state officials are granted broad latitude

to "guard and protect" the "safety and the health of the people." (Doc. 21 at 34). *Newsom* does not support Defendants' argument. The *Newsom* Court denied injunctive relief against California's Executive Order limiting public gatherings in furtherance of public health, given the COVID-19 pandemic. The Supreme Court deferred to California's ability to guard and protect public health, even though such measures had an arguably undue impact on the religious community, allowing the Executive Order to stand.

In contrast, MCA 49-2-312 is not an instance of the state exercising its police powers to protect public health in degradation to individual liberty – it is the opposite. MCA 49-2-312 is an exercise of legislative power against public health, in the, albeit misconstrued, name of individual privacy. MCA 49-2-312 undisputedly does not protect public health. Instead, it places barriers upon physicians from protecting public health and utilizing public health tools, such as vaccines, to ensure a healthful environment. It further prevents physicians' offices from utilizing other public health protocols, such as increased PPE for nonvaccinated individuals, segregating nonvaccinated individuals from high-risk populations, and incentivizing employees to become vaccinated, by prohibiting physicians' offices from treating employees differently based upon vaccination status. Defendants' reliance on the police power of the state does nothing to defeat Plaintiffs' claims.

### 4. Plaintiffs' claims under the Equal Protection Clauses of the Montana and United States Constitutions are legally viable.

Both the Fourteenth Amendment to the United States Constitution and article II, section 4 of the Montana Constitution provide that no person shall be denied the equal protection of the laws. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018) (citation and internal quotation marks omitted). Montana's equal protection guarantee likewise embodies "a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992. Its function "'is to measure the validity of classifications created by state laws.'" *ISC Distribs. v. Trevor*, 273 Mont. 185, 195, 903 P.2d 170, 176 (1995) (citation omitted). "[T]he principal purpose of Montana's Equal Protection Clause is to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 16, 302 Mont. 518, 15 P.3d 877 (citation omitted). Equal protection claims require a showing "that the state has adopted a classification that affects two or more

similarly situated groups in an unequal manner." *Powell*, ¶ 22; *Gallinger*, 898 F.3d at 1016.

Defendants challenge the viability of Plaintiffs' equal protection claims based on whether Plaintiffs have identified similarly situated classes. Contrary to Defendants' arguments, MCA 49-2-312 draws arbitrary classifications of similarly situated groups and treats them in an unequal, unconstitutional manner.

First, the statute discriminates against offices of private physicians as compared to other, similarly situated health care providers. By affording no exception or exemption to physician offices, MCA 49-2-312 denies equal protection under the law to providers in these care settings. Physicians treat patients in clinic settings (i.e., private physician offices) in the same manner they treat patients in a licensed facility such as a hospital, nursing home, long-term care facility, or assisted living facility. Physician offices are the "front line" in both primary care and specialty services. Physicians work and treat patients in all settings – physicians with the same specialty can treat the same types of patients in a physician office, hospital, nursing home, long-term care facility, or assisted living facility. Montana Code Annotated § 50-5-101(31) requires Hospitals to provide medical care "by or under the supervision of licensed physicians." The Centers for Medicare and Medicaid Services ("CMS") Conditions of Participation require hospitals to administer care through a medical staff comprised of

physicians. 45 C.F.R. § 482.22(a). Physicians treat patient populations with similar medical conditions in a physician office in the same manner they would treat such a patient in a hospital or other clinical setting within a licensed facility. Private physician offices represent a class similarly situated to hospitals and other licensed facilities.

Despite this, physician offices are not exempted from MCA 49-2-312 like nursing homes, long-term care facilities, and assisted living facilities (*see* Montana Code Annotated § 49-2-313), nor are they afforded the – albeit insufficient – exception in MCA 49-2-312(3)(b). Immunocompromised patients and patients infected with communicable diseases seek care from physician offices in the same way they seek care in other settings; yet physician offices are afforded no relief from MCA 49-2-312's detrimental effect on infectious disease prevention.

Second, and relatedly, the statute treats physician offices and hospitals more harshly than nursing homes, assisted living facilities, and long-term care facilities. Montana Code Annotated § 49-2-313 exempts nursing homes, long-term care facilities, and assisted living facilities from compliance with MCA 49-2-312 when compliance would violate "regulations or guidance" issued by the CMS or CDC. The Court should reject Defendants' conclusory argument that these facilities "are different" and therefore this unequal treatment is legally permissible. The very definition of "health care facilities" cited by MCA 49-2-312 and Defendants in

their brief, groups hospitals and long-term care facilities together. *See* Mont. Code Ann. § 50-5-101(26) ("The term includes . . . hospitals, . . . long-term care facilities . . . ."). Hospitals and physician offices participate in Medicare and Medicaid, often receiving the majority of their reimbursement from these federal payers – in the same way as nursing homes and long-term care facilities. Hospitals and physician offices are also subject to CMS regulations.[4] Likewise, hospitals and physician offices treat patients in accordance with CDC guidance and recommendations on infectious disease prevention. Hospitals and physician offices should be allowed to follow CMS regulations and CDC recommendations in the same manner as other facilities without liability under MCA 49-3-312. Additionally, these providers treat the same high-risk patient populations as nursing homes, long-term care facilities, and assisted living facilities. MCA 49-2-312's unequal treatment of these facilities deprives hospitals and physician offices equal protection of the law.

[4] The newly-issued CMS Conditions of Participation require the implementation of vaccine mandates, impacting hospitals such as PH&S and other licensed facilities. 86 Fed. Reg. 61,555 (Nov. 5, 2021). MCA 49-2-312 discriminates against hospitals' ability to abide by these regulations, drawing the arbitrary distinction between these care settings and those of nursing homes, long-term care facilities, and assisted living facilities, further evincing the equal protection issues.

Third, MCA 49-2-312 discriminates against Montana patients seeking health care. It discriminates against those patients with compromised immune systems and it discriminates against patients treated in different care settings. Patients require frequent care from physician offices, are especially susceptible to acquiring an infectious disease, must avoid the risk of acquiring a contagious disease, and thereby must avoid establishments that employ unvaccinated workers or are unable to take necessary measures to protect against preventable diseases. (Doc. 14 at ¶¶ 23-25). Defendants acknowledge that the Patients are required to take particular precautious when seeking health care, given the pandemic and heightened risk to these patients, yet non-immunocompromised patients are not. (Doc. 21 at 20) (observing that these risks predated the current COVID-19 pandemic). Again, Defendants focus on COVID-19, but this also applies to other communicable diseases. MCA 49-2-312 infringes upon these immunocompromised patients' ability to seek safe health care from physician offices, denying them equal protection under the law. Similarly, MCA 49-2-312 allows patients receiving care in a nursing home or long-term care setting to receive care in a different, and in certain cases safer, manner as compared with similarly situated patients receiving care in a hospital or physician office.

Because these equal protection claims implicate a fundamental right to both a clean and healthful environment and to seek health under the Montana

Constitution, strict scrutiny applies. *Farrier v. Teacher's Ret. Bd.*, 2005 MT 229, ¶ 16, 328 Mont. 375, 120 P.3d 390 ("Strict scrutiny applies if a statute implicates a suspect class or fundamental right." (citation omitted)). Regardless of the applicable level of scrutiny, the classes drawn by MCA 49-2-312 and 49-2-313 fail even a rational basis test. There is no legitimate governmental interest in drawing distinctions between medical care delivered in different types of health care settings, placing patients and care givers in physician offices and hospitals at greater risk of harm. Creation of an overly broad and novel protected class based on vaccination/immunity status is not rationally related to the claimed government interest, particularly in light of the disproportionate harms caused by MCA 49-2-312. MCA 49-2-312 is internally inconsistent, recognizing the need for schools, daycare facilities, nursing homes, long-term care facilities, and assisted living facilities to be able to respond to an individual's immunity status, yet failing to treat physician offices and hospitals in a similar manner. The fact that MCA 49-2-312 creates an exception for "health care facilities" that, by its own definition, specifically excludes physician offices evidences intentional discrimination against physician offices and their patients with no rational basis for doing so.

Accordingly, Plaintiffs have sufficiently pled all of their claims and Defendants' Motion should be denied.

## IV. CONCLUSION

For the reasons set forth above, Defendants' Motion should be denied.

DATED this 17th day of November, 2021.

/s/ Justin K. Cole
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this **Plaintiffs' Brief in Opposition to Second Motion to Dismiss Under Fed. R. Civ. P. 12** is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word for Microsoft 365 MSO, is 6,490 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

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