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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 **REPLY IN SUPPORT OF MOTION TO INTERVENE**

Even if the Montana Medical Association ("MMA") plaintiffs are entirely successful in litigating their complaint to judgment, the relief obtained will not

protect Montana nurses who work outside of hospitals or the offices of private physicians from HB702. *See* Doc. 14, Amended Complaint, at 23-26. The Court should grant the Motion to Intervene.

MMA's requested relief in the operative complaint is appropriately modest and tailored to where MMA's members are found. But it is insufficient to protect members of the Montana Nurses Association ("MNA" or "the Nurses"), who work in healthcare settings beyond hospitals and the offices of private physicians. The individual rights held by MNA members 1) to enjoy a safe workplace, 2) to be free from discrimination, and 3) to equal protection, for example, are "protectable under some law and [] there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). In assenting to the Nurses' intervention, MMA does not dispute that the Nurses' interests in vindicating these rights beyond hospitals and the offices of private physicians are not adequately represented. Accordingly, the Nurses' proposed complaint meets each of the requirements for intervention as of right under Fed. R. Civ. P. 24(a), as well as the requirements for permissible intervention under Fed. R. Civ. P. 24(b). The Court should grant the motion.

Only the State opposes. It offers several arguments to avoid intervention and force the Nurses to litigate these issues in a separate proceeding. Each turns on a misapprehension of law or a misreading of the Nurses' proposed complaint.

I. The Nurses may intervene as of right because they have significant protectable interests not adequately represented in the litigation.

The Nurses have significant protectable interests in the action. ""Whether an applicant for intervention as of right demonstrates sufficient interest in an action is a 'practical, threshold inquiry,' and '[n]o specific legal or equitable interest need be established.'" *Citizens for Balanced Use*, 647 F.3d at 897 (quoting *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir.1996)). "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.*

In *Citizens for Balanced Use*, the applicants for intervention had a significant protectable interest in "conserving and enjoying the wilderness character of the Study Area" implicated by the case. *Id.* Here, the Nurses allege that they have significant protectable interests in safe work environments, in being free from discrimination, in a clean and healthful environment, and in enjoying equal protection of the laws. A state statute, HB702, purports to limit these individual rights that the Nurses are entitled to under federal law and the Montana Constitution. The rights at issue—or interests—therefore, are significant, are protectable under some law, and have a relationship to the claims at issue in this litigation. *Id.* The Nurses satisfy the "practical, threshold inquiry" of showing a

significant protectable interest. *Id.*

Opposing intervention, the State first argues that HB702 only affects employers so only employers can have a significant protectable interest in the litigation. The State also insists that HB702 presents no conflict with federal law or the Montana Constitution and that "this litigation will not alter existing health protocols at the health care facilities employing MNA members." Doc. 22, State's Brief at ECF page 8. Thus, the State says, any invasion of the Nurses' interests must be contingent on employer conduct and not HB702. But these arguments presuppose the outcome of the ultimate merits questions of this case. For example, the State insists it "must be so" that HB702 does not conflict with federal law or the Montana Constitution because "[n]othing in the text or intent of HB702 evinces any such purpose." *Id.* at ECF page 6 n.1. That is a question that this case will answer. The Nurses plainly allege otherwise. The State may not defeat intervention through conclusory assertions that it will win the case eventually. Likewise, the Nurses plainly allege throughout their proposed complaint that HB702 affects MNA members directly and that its harms are neither hypothetical nor contingent. Litigation on the merits—even Rule 12 practice—will test the sufficiency and validity of the Nurses' allegations. In this posture, however, the Nurses have clearly satisfied the "practical, threshold inquiry" of showing a significant protectable interest in the case.

The State's second argument against intervention as of right is that the Nurses' interests are adequately represented by MMA. The test for adequacy of representation is well-established:

> 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."

Citizens for Balanced Use, 647 F.3d at 898 (internal citations omitted) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). In this case, MMA and the Nurses do not "share the same ultimate objective" because they ask the Court for different relief from HB702. *Id.* MMA only seeks relief from HB702 in the employment context in hospitals and the offices of private physicians. The Nurses seek relief in all healthcare settings in which Montana nurses are found and are affected by HB702. Thus, complete success on MMA's complaint will still only provide partial relief to the Nurses. MMA has not "undoubtedly ma[d]e all of a proposed intervenor's arguments," and in assenting to the Nurses' intervention, MMA does not dispute that it will not in the future. The difference in requested relief clearly demonstrates that MMA does not adequately represent the Nurses' interests.

Courts look to differences in the scope of relief requested when determining that an intervenor's interests are not adequately represented by existing parties. In *United States v. State of Michigan*, for example, the district court granted intervention where the intervenor sought "broader relief than advocated by the plaintiff" even though the intervenor's and the plaintiff's "interests are the same in many respects." 680 F. Supp. 928, 942 (W.D. Mich. 1987) (citing Ninth Circuit's test for adequacy of representation in *Fresno Cty. v. Andrus*, 622 F.2d 436, 438–39 (9th Cir. 1980)). *See Lighthouse Res. Inc. v. Inslee*, No. 3:18-CV-050040-RJB, 2018 WL 1470839 at *3-4 (W.D. Wash. Mar. 26, 2018) (granting BNSF railway's motion to intervene where BNSF demonstrated that it had "different, albeit overlapping, interests" with the plaintiff and where BNSF had "broader interests" and sought broader relief). Here, the Nurses seek broader relief than MMA. The State's response is a plea that the Court ignore these differences. The contents of the operative complaint and the Nurses' proposed complaint clearly spell out different requested relief and speak for themselves. *Compare* Doc. 14, Amended Complaint, at 23-26 *with* Doc. 11-1, Proposed Complaint, at 21-22.

MNA's members who do not work in a hospital or the office of a private physician cannot obtain relief from MMA's suit because MMA does not ask for it. The Court should grant the motion to intervene rather than requiring the Nurses to relitigate the same issues in another proceeding to obtain the relief necessary to

protect its members.

II. The Nurses satisfy the requirements for permissive intervention.

The State appears to concede that the Nurses meet the requirements for permissive intervention under Fed. R. Civ. P. 24(b). Nonetheless, the State opposes permissive intervention through several conclusory statements regarding standing and by suggesting that logistical considerations counsel against intervention.

On standing, the Nurses' proposed complaint sufficiently alleges the invasion of a legally protected interest, fairly traceable to the Defendants' conduct, that is redressable through a favorable decision by the Court. *See, e.g.*, Doc 11-1, Proposed Complaint, ¶¶ 12-20. The proposed complaint also sufficiently alleges MNA's associational standing on behalf of its members. *Id.* at ¶ 14.

On the practical considerations, the Nurses' intervention will serve—not burden—judicial economy by eliminating the need for a separate proceeding to decide the same or similar questions applied to broader requested relief. The Nurses' undersigned counsel enjoys a collaborative working relationship with MMA's counsel, and the Nurses will work with all parties to minimize any duplicative filings and streamline other matters to the maximum extent possible. The Nurses will abide by any schedule and conditions set by the Court.

At bottom, the relief requested in MMA's operative complaint is insufficient

to protect MNA members who work in healthcare settings beyond hospitals and the offices of private physicians. The Nurses have significant protectable interests in the litigation, and MMA assents to the Nurses' intervention because MMA's own suit does not adequately represent the Nurses' interests. The "just, speedy, and inexpensive determination of every action and proceeding" is better served by intervention here than by litigation of the Nurses' claims in a separate proceeding. *See* Fed. R. Civ. P. 1. The Court should grant the motion to intervene.

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 23rd day of November, 2021.

/s/ Raph Graybill
Raph Graybill

Attorney for Plaintiff-Intervenor

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 3,250 words, as calculated by the undersigned's word processing program.

/s/ Raph Graybill
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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

/s/ Raph Graybill
Raph Graybill

Attorney for Plaintiff-Intervenor