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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*.	No. CV-21-108-M-DWM **DEFENDANTS' MOTION IN LIMINE TO EXCLUDE DR. LAUREN WILSON**

Defendants move the Court in limine to exclude, in toto, the opinions of Plaintiff-Intervenor's expert Dr. Lauren Wilson. Her opinions are either unreliable, so vague and generic as to be unhelpful, or both.

This motion is supported by the accompanying brief, the Foundational Declaration of Brent Mead, and that declaration's exhibit 1.

Counsel for Plaintiffs and Plaintiff-Intervenor have been contacted and they oppose this motion.

DATED this 2nd day of September, 2022.

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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: September 2, 2022

/s/ *Brent Mead*
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INTRODUCTION

This Court should exclude, in toto, the opinions of Plaintiff-Intervenor's expert Dr. Lauren Wilson. Her opinions are either unreliable, so vague and generic as to be unhelpful, or both.[1]

Wilson's opinions analyze all vaccines in the aggregate. And she does this even though she concedes that different vaccines protect against infectious disease with different degrees of efficacy. Wilson, however, is not testifying as a vaccine efficacy expert.

Wilson also opines about the relative costs and benefits of "vaccination" despite conceding she's not an expert in virology, vaccines, or public health. Wilson never identified an objective scientific method or data set she analyzed in reaching these broad conclusions. She only cited to her experience as a pediatrician. Wilson is unquestionably a practicing pediatrician. But that experience doesn't justify her broad "vaccination" opinions in this case. *See United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002) ("It is well settled that bare qualifications

[1] Plaintiffs filed a copy of Wilson's Expert Report as an exhibit to their brief in support of Plaintiffs' motion for summary judgment. (Doc. 86.7). Defendants point the Court to that filing rather than duplicating the report as an exhibit to this motion.

alone cannot establish the admissibility of … expert testimony.").

Federal Rule of Evidence 702 allows expert opinion testimony only if that opinion will assist the trier of fact and if the opinion is reliable. That requirement applies to bench trials too, even though the Court's gatekeeping function changes when there's no jury involved. Wilson isn't an objectively reliable expert witness, and her testimony won't assist the Court in understanding the evidence. Her conclusory statements masquerade as "expert opinions," but they aren't admissible as expert opinions within the meaning of Rule 702. Because they fall well short of Rule 702's threshold requirements of reliability and assisting the trier of fact, the Court should exclude Wilson's opinions, and prevent her from

testifying at trial.[2]

LEGAL STANDARDS

Federal Rule of Evidence 702 governs the admission of expert testimony. It provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if"

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods;
> and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

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[2] A district court possesses broad authority to exclude expert witness testimony based on public policy principles such as "preventing conflicts of interest." *Perfect 10 v. Giganews, Inc.*, 2014 U.S. Dist. LEXIS 185066, at * 12 (C.D. Cal., Oct. 31, 2014). These conflicts include contingency fee arrangements as well as situations where an expert possesses a relationship with a party such that the expert testifies for the party itself. *Id.* at * 10-14. Here, Wilson sits on the Montana Medical Association board of trustees. (Wilson Dep. at 17:9–18:10). Her testimony amounts to the testimony of a party itself. Even if this conflict doesn't result in exclusion of Wilson's testimony, the obvious conflict should undermine the credibility of her purportedly expert evidence. *Id.* at 14 (quoting *Tagatz v. Marquette University*, 861 F.2d 1040, 1042 (7th Cir. 1988) ("the 'trier of fact should be able to discount for so obvious a conflict of interest'").

The Rule 702 inquiry boils down to assessing (1) reliability—"whether the reasoning or methodology underlying the testimony is scientifically valid"—and (2) relevance—"whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993); *see also Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 860 (9th Cir. 2014) ("[W]e have interpreted Rule 702 to require that expert testimony … be both relevant and reliable.") (internal alterations and quotations omitted); *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (quoting *Lee v. Weisman,* 505 U.S. 577, 597 (1992) ("[T]he trial court must assure that the expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'"). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565 (citation and internal quotation marks omitted). It's not "the correctness of the expert's conclusions" that matters, but "the soundness of his methodology." *Ollier*, 768 F.3d at 860.

For expert testimony to be admissible, the expert must be qualified.

Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998, 1015 (9th Cir. 2004). Yet "[i]t is well settled that bare qualifications alone cannot establish the admissibility of … expert testimony." *Hermanek*, 289 F.3d at 1093; *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999).

Several other guideposts direct the Rule 702 analysis. First, "personal opinion testimony is inadmissible as a matter of law under Rule 702." *Ollier*, 768 F.3d at 860 (citing *Daubert II*, 43 F.3d at 1319). Second, "speculative testimony is inherently unreliable" and, therefore, inadmissible. *Id.* (citing *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997)); *see also Daubert*, 509 U.S. at 590 (noting that expert testimony based on mere "subjective belief or unsupported speculation" is inadmissible). And third, experts may not express any opinion regarding "an ultimate issue of law" at trial. *Hangarter*, 373 F.3d at 1016. Courts must exclude "ultimate issue legal conclusion" testimony because it "invades the province of the trial judge." *Nationwide Transp. Fin. v. Cass. Info. Sys.*, 523 F.3d 1051, 1059 (9th Cir. 2008).

In a jury trial setting district courts act as "gatekeepers" for expert testimony—they protect the jury from misleading testimony shrouded in the mystique of "expertise." *See United States v. Ruvalcaba-Garcia*, 923

F.3d 1183, 1188 (9th Cir. 2019). The court's "gatekeeper" role becomes less rigid before a bench trial, in which a Court itself will act as factfinder. *See United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018). Still, pretrial admissibility requirements don't vanish in a bench trial. *Daubert*, 509 U.S. at 597.

Trial courts possess wide latitude when deciding whether to admit or exclude expert testimony. *Kumho Tire Co.*, 526 U.S. at 153; *Ollier*, 768 F.3d at 859. District courts within the Ninth Circuit can, and do, exclude expert testimony that isn't reliable or relevant to the issues at trial. *See Ollier*, 768 F.3d at 859–61 (affirming exclusion of unreliable and speculative expert testimony before a bench trial).

The party presenting the expert testimony bears the burden of showing that the expert's opinions are reliable and relevant. *See Lust v. Merrell Dow Pharm.*, 89 F.3d 594, 598 (9th Cir. 1996); *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1316 (9th Cir. 1995) ("*Daubert II*").

ARGUMENT

I. The Court should exclude Wilson's report because she fails to submit a reliable methodology for her opinions.

Most—if not all—of Wilson's opinions referred to the general effects of "vaccination," not to the efficacy of a specific vaccine or vaccines. *See,*

e.g. (Wilson Dep. 68:4–10);[3] (Wilson Dep. 69:11–14) ("Vaccines differ in their efficacy, but what I'm saying here is that the technique of vaccination or priming the immune system prevents transmission of disease *generally*, yes.").

As an initial matter, Wilson cites to only three datasets in the entirety of her expert report. (Doc. 86.7, ¶¶ 10, 13, 16). The first dataset relates to morbidity and mortality for vaccine preventable diseases over time. (Doc. 86.7, ¶ 10). The second refers to the Centers for Disease Control's summary for precautions and duration of precautions for various diseases. (Doc. 86.7, ¶ 13). The final dataset contains summary information for possible complications and outcomes associated with various diseases. (Doc. 86.7, ¶ 14). These datasets simply don't form a reliable methodology justifying the opinions reached by Wilson. *E.g.* (Doc. 86.7, ¶¶ 17–23).

Wilson offers generalizations such as a "health care worker who is unvaccinated against measles, pertussis, varicella, influenza, COVID-19 or hepatitis B presents an increased risk to patients and to other co-

[3] Excerpts of the deposition of Dr. Lauren Wilson taken on August 3, 2022 are attached as Exhibit 1 to the Declaration of Brent Mead (September 2, 2022).

workers." (Doc. 86.7, ¶ 19). Her generalization fails to present any data quantifying increased risk, or a scientific basis that each listed disease carries a similar risk. Further, by limiting her opinion to "unvaccinated" healthcare workers, she fails to account for otherwise immune individuals. She again presents no data or methodology for how unvaccinated, but immune, individuals pose a heightened risk.

The failure to present some reliable methodology as the basis for opinion infects other opinions. *E.g.* (Doc. 86.7, ¶ 20 ("There are no adjunctive measures (hand washing, mask wearing) that can completely mitigate the risk an unvaccinated caregiver could present to patients or co-workers")); *id.*, ¶ 22 ("it is my opinion that healthcare settings must have actual knowledge of the immunity status of their workers … [i]t is also my opinion that healthcare settings must be able to condition and treat healthcare workers differently based on actual knowledge of their immunity status in order to secure a safe work environment …."); *id.*, ¶ 23. Wilson fails to provide any research, studies, or methodology to reach these conclusions. This failure renders her report unreliable. *See Ollier*, 768 F.3d at 859–61; *see also Grodzitsky v. Am. Honda Motor Co., Inc.*, 2015 U.S. Dist. LEXIS 64683, at *25 (C.D. Cal. Apr. 22, 2015) (expert's

opinion based primarily on personal opinion and speculation regarding consumers' expectations and was inadmissible because it provided no methodology); *Doyle v. Chrysler Grp. LLC*, 2015 U.S. Dist. LEXIS 12858, at *18 (C.D. Cal. Jan. 21, 2015) (excluding expert opinion because it "appear[ed] to be based more on Dr. Batzer's personal experience and/or speculation than it is based on data and analysis.").

"[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *GE v. Joiner*, 522 U.S. 136, 146 (1997).

Wilson's opinions on vaccination sweep far too broadly and she fails to connect those opinions to a reliable scientific methodology.[4]

[4] The Centers for Disease Control recently "streamlined" its COVID-19 guidance. Guidance now calls for similar treatment of vaccinated and unvaccinated individuals for measures like isolation, quarantine, and possible exposures. *See* CDC Streamlines COVID-19 guidance to help the public better protect themselves and understand their risk, Centers for Disease Control and Prevention, Press Release (August 11, 2022) (available at https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html (accessed on September 2, 2022)).

II. Wilson is not an expert on vaccination or public health.

Wilson also fails to establish her opinions through the "relevant knowledge and experience of [her] discipline." *Kumho Tire Co.*, 526 U.S. at 148. Wilson is a pediatrician. (Doc. 86.7, ¶¶ 3–4). She is not a basic researcher, vaccine scientist, or virologist. (Wilson Dep. 43:1–43:10 ("[W]hen you ask if I'm a vaccine expert, I am not a basic researcher, I'm not a vaccine scientist, I'm not a virologist."). Wilson also conceded that she is not a public health expert. *See* (Wilson Dep. at 15:12—16:2). Wilson further testified that in her experience she "assumed" the vaccination status of other healthcare workers and she is "not really in a supervisory role for other employees." (Wilson Dep. at 105:1–107:16). She has "not been involved" in making decisions about unvaccinated healthcare workers as it relates to those workers interacting with patients. (Wilson Dep. at 105:1–09).

Wilson's report, according to her, concerns her "experience as a pediatrician in a hospital and [her] knowledge of patient safety and the impact of vaccinations on keeping patients safe and keeping my colleagues and coworkers safe." (Wilson Dep. 67:22–68:10). She purports to analyze the efficacy, risk, and benefits of all vaccines in the aggregate.

See, e.g., Wilson Rep. at ¶ 10 ("Vaccination is an effective way of preventing the transmission of disease and preventing death from disease."); *id.* ¶ 11 ("[s]erious adverse effects from vaccines are rare"); *id.* ¶ 19 ("A health care worker who is unvaccinated against measles, pertussis, varicella, influenza, COVID-19, or hepatitis B presents an increased risk to patients and to other co-workers."); *id.* ¶ 20 ("There are no adjunctive measures (hand washing, mask wearing) that can completely mitigate the risk an unvaccinated caregiver could present to patients or co-workers in the course of his or her usual clinical duties in a hospital."); *id.* ¶ 23 ("It is my opinion that in order to secure a safe work environment and a safe environment for patients in this setting, the healthcare setting must have actual knowledge of a worker's immunization status and must have the flexibility to condition the worker's employment in ways that respond to their actual immunity status."). These opinions don't track from her experience.

First, she testified to vaccination efficacy at a general level. (Wilson Dep. 69:11-14) ("Vaccines differ in their efficacy, but what I'm saying here is that the technique of vaccination or priming the immune system prevents transmission of disease *generally*, yes."). She acknowledges

that specific vaccines for specific diseases differ in their efficacy at preventing transmission and infection, as well as reducing severity of disease. (Wilson Dep. 69:1–74:2). In response to a question, "you were not asked to give any expert opinion on whether vaccination is an effective way of preventing the transmission of disease," Wilson answered "correct." (Wilson Dep. 74:15–22); *but see* (Doc. 86.7, ¶ 10). As Wilson testified, and as Plaintiff-Intervenor's Counsel made clear, she "wasn't disclosed as a vaccine efficacy expert." (Wilson Dep. 73:16).

Based on the statements of Wilson and Plaintiff-Intervenor's counsel, this Court should exclude Wilson's opinions because—as they acknowledge—she isn't an expert on vaccines or vaccine efficacy. *Kumho Tire*, 526 U.S. at 149 (quoting *Daubert*, 509 U.S. at 592 ("[W]here [an expert's] testimony's factual basis, data, principles, methods, or their application are sufficiently called into question … the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.")).

Next, the Court should exclude those opinions related to steps healthcare settings should take to mitigate risks from unvaccinated or nonimmune caregivers. *E.g.* (Doc. 86.7, ¶¶ 18–23). Wilson acknowledged

she doesn't inquire into other caregivers' vaccination status, nor does she work in a supervisory role over other employees. (Wilson Dep. at 105:1–107:16). In short, assuming these opinions could justifiably rest entirely and only on Wilson's training and experience, she still lacks the requisite experience in how hospitals (or other healthcare settings) treat or should treat unvaccinated or nonimmune employees. This renders her opinions unsupported personal views as to what healthcare settings should do. That falls short of Rule 702's standard. *See Daubert*, 509 U.S. at 590; *see also Ollier*, 768 F.3d at 860 ("[S]peculative testimony is inherently unreliable.") (internal citation omitted).

CONCLUSION

This Court should exclude Wilson's opinions in toto.

DATED this 2nd day of September, 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 2,557 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: September 2, 2022

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MONTANA MEDICAL ASSOCIATION, ET. AL., *Plaintiffs*, and MONTANA NURSES ASSOCIATION, *Plaintiff-Intervenors*, v. AUSTIN KNUDSEN, ET AL., *Defendants*.	No. CV-21-108-M-DWM **DEFENDANTS' MOTION IN LIMINE TO EXCLUDE DR. BONNIE STEPHENS**

Defendants move the Court in limine to exclude the opinions of Plaintiffs' expert Dr. Bonnie Stephens in their entirety. This motion is supported by the accompanying brief, the Foundational Declaration of Brent Mead, and that declaration's exhibit 2.

Counsel for Plaintiffs and Plaintiff-Intervenor have been contacted and they oppose this motion.

DATED this 2nd day of September, 2022.

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INTRODUCTION

This Court should exclude the opinions of Plaintiffs' expert Dr. Bonnie Stephens in their entirety.[1] Stephens acknowledges she "didn't cite any research," and "was not using research … to formulate [her] opinion." (Stephens Dep. at 14:14–23).[2] That absence of supporting facts or data *per se* precludes her testimony as a scientific expert.

Stephens' experience as a clinician doesn't encompass any research or publications related to the efficacy of any vaccine. (Stephens Dep. at 16:16–17:23). Yet the gravamen of Stephens' expert opinion inexplicably concerns the efficacy of vaccines and need for vaccinations among healthcare workers. (Doc. 86.4, ¶¶ 6–8, 10–13, 15–17).

Finally, Stephens resorts to legal conclusions couched as opinion. See, *e.g.* (Doc. 86.4, ¶ 18 ("If the current injunction is lifted, Montana HB 702 directly conflicts with the CMS conditions of participation.")). Such

[1] Plaintiffs filed a copy of Stephen's Expert Report as an exhibit to their brief in support of Plaintiffs' motion for summary judgment. (Doc. 86.4). Defendants point the Court to that filing rather than duplicating the report as an exhibit to this motion.

[2] Excerpts of the deposition of Dr. Bonnie Stephens taken on August 15, 2022 are attached as Exhibit 2 to the Declaration of Brent Mead (September 2, 2022).

testimony invades the province of the Court and must be excluded.

Federal Rule of Evidence 702 allows expert opinion testimony only if that opinion will assist the trier of fact and if the opinion is reliable. That requirement applies to bench trials too, even though the Court's gatekeeping function changes when there's no jury involved. Stephens isn't an objectively reliable expert witness, and her testimony won't assist the Court in understanding the evidence. Her conclusory statements masquerade as "expert opinions," but they aren't admissible as expert opinions within the meaning of Rule 702.

Put frankly, Stephens is unqualified to offer her purportedly expert opinions under Rule 702. Because they fall well short of Rule 702's threshold requirements of reliability and assisting the trier of fact, the Court should exclude Stephen's opinions *in toto*, and prevent her from testifying at trial.

LEGAL STANDARDS

Federal Rule of Evidence 702 governs the admission of expert testimony. It provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if"

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (c) the testimony is the product of reliable principles and methods;
> and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The Rule 702 inquiry boils down to assessing (1) reliability—"whether the reasoning or methodology underlying the testimony is scientifically valid"—and (2) relevance—"whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993); *see also Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 860 (9th Cir. 2014) ("[W]e have interpreted Rule 702 to require that expert testimony … be both relevant and reliable.") (internal alterations and quotations omitted); *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (quoting *Daubert*, 505 U.S. at 597) ("[T]he trial court must assure that the expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'"). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the

knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565 (citation and internal quotation marks omitted). It's not "the correctness of the expert's conclusions" that matters, but "the soundness of his methodology." *Ollier*, 768 F.3d at 860.

For expert testimony to be admissible, the expert must be qualified. *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1015 (9th Cir. 2004). Yet "[i]t is well settled that bare qualifications alone cannot establish the admissibility of … expert testimony." *United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 154 (1999) (the district court correctly excluded an expert even though no one doubted the expert's qualifications).

Several other guideposts direct the Rule 702 analysis. First, "personal opinion testimony is inadmissible as a matter of law under Rule 702." *Ollier*, 768 F.3d at 860 (citing *Daubert II*, 43 F.3d at 1319). Second, "speculative testimony is inherently unreliable" and, therefore, inadmissible. *Id.* (citing *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997)); *see also Daubert*, 509 U.S. at 590 (noting that expert testimony based on mere "subjective belief or unsupported

speculation" is inadmissible). And third, experts may not express any opinion regarding "an ultimate issue of law" at trial. *Hangarter*, 373 F.3d at 1016. Courts must exclude "ultimate issue legal conclusion" testimony because it "invades the province of the trial judge." *Nationwide Transp. Fin. v. Cass. Info. Sys.*, 523 F.3d 1051, 1059 (9th Cir. 2008); *see also Bona Fide Conglomerate, Inc. v. SourceAmerica*, 2019 U.S. Dist. LEXIS 50949, at *45 (S.D. Cal. March 26, 2019) ("Courts routinely exclude experts from testifying on compliance with regulatory or industry standards—i.e., legal explanations and conclusions.").

In a jury trial setting district courts act as "gatekeepers" for expert testimony—they protect the jury from misleading testimony shrouded in the mystique of "expertise." *See United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019). The court's "gatekeeper" role becomes less rigid before a bench trial, in which a Court itself will act as factfinder. *See United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018). Still, pretrial admissibility requirements don't vanish in a bench trial. *Daubert*, 509 U.S. at 597.

Trial courts possess wide latitude when deciding whether to admit or exclude expert testimony. *Kumho Tire Co.*, 526 U.S. at 153; *Ollier*, 768

F.3d at 859. District courts within the Ninth Circuit can, and do, exclude expert testimony that isn't reliable or relevant to the issues at trial. *See Ollier*, 768 F.3d at 859–61 (affirming exclusion of unreliable and speculative expert testimony before a bench trial).

The party presenting the expert testimony bears the burden of showing that the expert's opinions are reliable and relevant. *See Lust v. Merrell Dow. Pharm.*, 89 F.3d 594, 598 (9th Cir. 1996); *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1316 (9th Cir. 1995) ("*Daubert II*").

ARGUMENT

Stephens' expert report is devoid of any facts or data supporting her opinions. (Doc. 86.4, ¶¶ 5–18). Further, none of her previous publications relate to vaccine efficacy—the paramount issue addressed in her expert report. (Stephens Dep. at 16:16–17:23). Finally, many of her statements constitute legal opinions on live issues in this case. (Doc. 86.4, ¶¶ 5 (standard of care), 11 (requirements of the Americans with Disabilities Act), 12 (standard of care), 17 (requirements of conditions of participation in Medicare and Medicaid), 18 (preemptive effect of conditions of participation)).

Stephens acknowledged she "didn't cite any research," and "was not

using research … to formulate [her] opinion." (Stephens Dep. at 14:14–23). Much of her expert report, however, presents conclusions that could only be grounded in scientific facts, research, and data—that she didn't supply. (Doc. 86.4, ¶ 5 (vulnerability of individuals to infectious disease), ¶ 6 (remaining current on all vaccines is crucial for patient safety), ¶ 7 ("[c]urrent vaccination also protects fellow staff members from contracting infectious disease …."), ¶ 8 (pertussis is highly contagious and measles poses a "direct threat" to infants), ¶ 9 (infants cannot receive vaccinations until certain ages), ¶ 10 (importance of infection control in certain settings), ¶ 11 (risk to certain patients in NICU and cancer care settings), ¶ 15 (safety and efficacy of vaccines), and ¶ 16 (risk based on COVID-19 vaccination status)).

Such opinions, regardless of conclusion, must be supported by a sound methodology. *Ollier*, 768 F.3d at 860; *see also Grodzitsky v. Am. Honda Motor Co., Inc.*, 2015 U.S. Dist. LEXIS 64683, at *25 (C.D. Cal. Apr. 22, 2015) (expert's opinion based primarily on personal opinion and speculation regarding consumers' expectations and was inadmissible because it provided no methodology); *Doyle v. Chrysler Grp. LLC*, 2015 U.S. Dist. LEXIS 12858, at *18 (C.D. Cal. Jan. 21, 2015) (excluding expert

opinion because it "appear[ed] to be based more on Dr. Batzer's personal experience and/or speculation than it is based on data and analysis.").

Stephens' lack of any methodology decimates the reliability of her proffered opinions. *Compare* (Doc. 86.4, ¶¶ 7–8 (opinions expressing the importance of current vaccinations for pertussis)) to (Stephens Dep. at 41:21–42:21) (Stephens has not looked at any recent studies concerning waning efficacy of the pertussis vaccine). Her opinion on COVID relies on "general knowledge," not any specific study. (Stephens Dep. at 28:9–22); *see also* (Stephens Dep. 26:18–22). She doesn't believe breakthrough cases—i.e. immunized individuals becoming reinfected with COVID-19—are relevant to the discussion of "vaccine-preventable diseases in general." (Stephens Dep. at 20:16–21:14); *but see* (Doc. 86.4, ¶ 16 ("Staff who contract COVID are required to quarantine, exacerbating the shortage of needed healthcare workers."). When questioned about the assertions in her report, Stephens retreated to her personal knowledge. *See, e.g.,* (Stephens Dep. at 27:17–28:8 (COVID-19 exemption rates across all of Montana are based on her personal knowledge of the vaccination status of employees at her institution)). Such subjective and nigh-untestable assertions fall *far* short of Rule 702's strictures. *See*

Ollier, 768 F.3d at 860.

Even these personal opinions fall outside Stephens' experience. Stephens' experience as a clinician doesn't encompass any research or publications related to the efficacy of any vaccine. (Stephens Dep. at 16:16–17:23).

Stephens also proffers multiple opinions that contain legal conclusions. (Doc. 86.4, ¶¶ 5, 11–12, 17–18). Her testimony as to the standard of care unquestionably contains a legal conclusion. *See Bona Fide Conglomerate, Inc.*, 2019 U.S. Dist. LEXIS 50949, at *45 (S.D. Cal. March 26, 2019). Plaintiffs, in fact, argue HB 702 conflicts with an obligation to provide an "appropriate standard of care." (Doc. 82 at 39). Stephens also gives an opinion as to what the Americans with Disabilities Act requires of healthcare settings in providing reasonable accommodations. (Doc. 86.4, ¶ 11). That opinion is laced with legal terms of art like "individualized assessment," "undue hardship," "direct threat," and, of course, "reasonable accommodation." *Id.* She continues that all patient requests to be treated by vaccinated staff should be honored. (Doc. 86.4, ¶ 14). That opinion contains no facts as to any specific situation, or why such requests should be honored. And, finally,

Stephens offers an opinion that HB 702 "directly conflicts" with the Centers for Medicare and Medicaid Services conditions of participation. (Doc. 86.4, ¶¶ 17–18). That is a central *legal* issue in this case. *E.g.* (Doc. 85 at 33). That Stephens' expert report contains legal conclusions is both obvious and admitted by Plaintiffs. *See* (Stephens Dep. at 35:2–15) (Plaintiffs' counsel objected as calling for a legal conclusion what documents were consulted to reach the opinion that there is a direct conflict between HB 702 and Centers for Medicare and Medicaid conditions of participation).

CONCLUSION

In sum, this Court should exclude Dr. Stephens' expert report and testimony because it presents unreliable opinions lacking any foundation in facts or data all while smuggling in legal conclusions as "expert opinion."

DATED this 2nd day of September, 2022.

Austin Knudsen
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/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: September 2, 2022

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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*.	No. CV-21-108-M-DWM **DEFENDANTS' MOTION IN LIMINE TO EXCLUDE DR. DAVID KING, OR ALTERNATIVELY LIMIT DR. KING'S TESTIMONY**

Defendants move the Court in limine to exclude the opinions of Plaintiffs' expert Dr. David King. In the alternative, Defendants move the Court in limine to exclude at least (Doc. 86.1, ¶¶ 5, 22–25, 32–33, 35–42, 44, 46–48, 50–53). Portions of his opinion are unreliable and unhelpful to this case. Other parts improperly offer conclusions of law.

This motion is supported by the accompanying brief, the Foundational Declaration of Brent Mead, and that declaration's exhibit 3.

Counsel for Plaintiffs and Plaintiff-Intervenor have been contacted and they oppose this motion.

DATED this 2nd day of September, 2022.

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INTRODUCTION

This Court should exclude parts of the opinions of Plaintiffs' expert Dr. David King.[1] Portions of his opinion are unreliable and unhelpful to this case. Other parts improperly offer conclusions of law. This Court should exclude at least (Doc. 86.1, ¶¶ 5, 22–25, 32–33, 35–42, 44, 46–48, 50–53).

Federal Rule of Evidence 702 allows expert opinion testimony only if that opinion will assist the trier of fact and if the opinion is reliable. That requirement applies to bench trials too. King doesn't supply objectively reliable expert testimony and his testimony won't assist the Court in understanding the evidence. Elsewhere, his testimony consists of conclusory statements couched as "expert opinions," but those statements recycle legal elements that Plaintiffs believe necessary to their case. Such opinions fall outside Rule 702.

[1] Plaintiffs filed a copy of King's Expert Report as an exhibit to their brief in support of Plaintiffs' motion for summary judgment. (Doc. 86.1). Defendants point the Court to that filing rather than duplicating the report as an exhibit to this motion.

LEGAL STANDARDS

Federal Rule of Evidence 702 governs the admission of expert testimony. It provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if"

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods;
> and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The Rule 702 inquiry boils down to assessing (1) reliability—"whether the reasoning or methodology underlying the testimony is scientifically valid"—and (2) relevance—"whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993); *see also Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 860 (9th Cir. 2014) ("[W]e have interpreted Rule 702 to require that expert testimony … be both relevant and reliable.") (internal alterations and quotations omitted); *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (quoting

Lee v. Weisman 505 U.S. 577, 597 (1992) ("[T]he trial court must assure that the expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'"). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565 (citation and internal quotation marks omitted; accord *Kumho Tire v. Carmichael*, 526 U.S. 137, 148 (1999). It's not "the correctness of the expert's conclusions" that matters, but "the soundness of his methodology." *Ollier*, 768 F.3d at 860.

Several other guideposts direct the Rule 702 analysis. First, "personal opinion testimony is inadmissible as a matter of law under Rule 702." *Ollier*, 768 F.3d at 860 (citing *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("*Daubert II*")). Second, "speculative testimony is inherently unreliable" and, therefore, inadmissible. *Id.* (citing *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997)); *see also Daubert*, 509 U.S. at 590 (noting that expert testimony based on mere "subjective belief or unsupported speculation" is inadmissible). And third, experts may not express any opinion regarding

"an ultimate issue of law" at trial. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004). Courts must exclude "ultimate issue legal conclusion" testimony because it "invades the province of the trial judge." *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1059 (9th Cir. 2008).

In a jury trial setting district courts act as "gatekeepers" for expert testimony—they protect the jury from misleading testimony shrouded in the mystique of "expertise." *See United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019). The court's "gatekeeper" role becomes less rigid before a bench trial, in which a Court itself will act as factfinder. *See United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018). Still, pretrial admissibility requirements don't vanish in a bench trial. *Daubert*, 509 U.S. at 597.

Trial courts possess wide latitude when deciding whether to admit or exclude expert testimony. *Kumho Tire*, 526 U.S. at 153; *Ollier*, 768 F.3d at 859. District courts in the Ninth Circuit can, and do, exclude expert testimony that isn't reliable or relevant to the issues at trial. *See Ollier*, 768 F.3d at 859–61 (affirming exclusion of unreliable and speculative expert testimony before a bench trial).

The party presenting the expert testimony bears the burden of showing that the expert's opinions are reliable and relevant. *See Lust v. Merrell Dow. Pharm.*, 89 F.3d 594, 598 (9th Cir. 1996); *Daubert II*, 43 F.3d at 1316.

ARGUMENT

I. The Court should limit or exclude King's expert report

King's report offers unreliable, unsupported conclusions related to non-COVID-19 diseases (Doc. 86.1, ¶¶ 22–25, 32–33, 42, 44, 46–47, 50). It also improperly offers numerous legal conclusions (Doc. 86.1, ¶¶ 5, 35–41, 48, 51–53). Rule 702 requires relevant and reliable testimony and King largely provides neither.

First, his non-COVID-19 opinions are unreliable and irrelevant to the case. King fails to support contentions like "vaccination remains critically important" for infectious disease prevention in healthcare settings. (Doc. 86.1, ¶ 23). Simply stating a generalization like this fails to establish the relevance of the opinion to HB 702. For example, King fails to analyze whether vaccination rates are up or down among healthcare workers, or even provide an estimation of vaccination and immunity rates generally.

These unhelpful generalizations plague his key conclusions. King subsequently states "unvaccinated individuals are more likely than vaccinated individuals to contract vaccine-preventable diseases and are also more likely to transmit those diseases to others." (Doc. 86.1, ¶ 32); *see also* (Doc. 86.1, ¶ 33). The failure to specify what disease, or vaccine, is at issue and support the opinion with relevant data demonstrating the efficacy of a given vaccine renders the opinion unreliable.

King also espouses that it is "well-known" that individuals with certain conditions are more susceptible to severe illness and more likely to become infected. (Doc. 86.1, ¶ 42). Simply stating it is well-known doesn't establish the opinion.[2] *See Ollier*, 768 F.3d at 860.

King offers an opinion that HB 702 "stands in the way of health care providers providing a safe environment for their patients and staff." (Doc. 86.1, ¶ 46). King's testimony makes clear he refers to unvaccinated healthcare workers. (King Dep. at 93:11–96:23).[3] But King also testified

[2] Of course, if something resides in common knowledge, then expert testimony isn't needed. *See* Fed. R. Evid. 702.

[3] Excerpts of the deposition of Dr. David King taken on August 2, 2022 are attached as Exhibit 3 to the Declaration of Brent Mead (September 2, 2022).

this opinion is a "personal opinion" and that this supposed anti-vaccine attitude among healthcare workers pre-exists COVID and HB 702. (King Dep. at 95:14–97:5). Such personal opinions are not expert opinion. *See Ollier*, 768 F.3d at 860. Finally, he again states without supporting facts or data, that other forms of disease prevention cannot serve as a substitute for vaccination. (Doc. 86.1, ¶ 47).

The common thread throughout all his assertions is that they lack any semblance of the sound methodology required by Rule 702. *See Ollier*, 768 F.3d at 860. The correctness of the opinion doesn't matter. The only relevant inquiry is whether the opinion is backed by a reliable methodology and not merely the expression of personal or speculative opinion. *Id.*

For the rare instances where King's report cites to research to back his contentions, his testimony exposed a troubling flaw in his purported methodology. In response to a question about how he determined the relevancy of studies, King answered "I'm actually an English major, and I guess my answer is I have a story to tell. And if it fit, then it got it, and if it didn't fit in the story I was trying to tell, then I didn't cite it." (King Dep. at 112:11–21). Elsewhere, King acknowledged letters to the editor

informed his opinion that people are putting off care due to the presence of unvaccinated workers. (King Dep. at 120:1–13). Letters to the editor and undergraduate creative writing fall short of Rule 702's sound methodology standard. *See Ollier*, 768 F.3d at 860.

If the Court doesn't outright exclude King's expert report, then it should limit his opinions to those relating to COVID-19. King's only citations to supporting data and studies relate to COVID-19. He does not cite any relevant data related to other vaccines or other vaccine-preventable diseases.[4] King's opinions must necessarily be limited to the methodology in his report. As such, applying his opinions to non-COVID-19 diseases would violate Rule 702. *See Ollier*, 768 F.3d at 860.

Finally, King improperly offers opinions reaching the ultimate legal issues in this case. *E.g.* (Doc. 86.1, ¶¶ 39, 48, 52). This Court should exclude such opinions. *Nationwide Transp. Fin. v. Cass. Info. Sys.*, 523 F.3d 1051, 1059 (9th Cir. 2008). This includes opinions reaching a

[4] The only non-COVID-19 study concerns case rates in Texas following adoption of that State's 1971 school-age vaccination law. (Doc. 86.1, ¶ 8). That study bears no relevance to the facts of this case because (1) HB 702 expressly leaves in place Montana's school-age vaccination requirements and (2) King makes no attempt to demonstrate the relevance of a 50-year old law in Texas to current case rates in Montana.

conclusion as to the operative standard of care. *E.g.* (Doc. 86.1, ¶¶35–41); *see Bona Fide Conglomerate, Inc. v. SourceAmerica,* 2019 U.S. Dist. LEXIS 50949, 2019 WL 1369007 at * 45 (S.D. Cal., Mar. 26, 2019) ("Courts routinely exclude expert reports from testifying on compliance with regulatory or industry standards—i.e. legal explanations and conclusions.").

II. King's social and political invectives cast doubt as to his objectivity.

King's deposition revealed deep-seeded animosity toward others' personal medical choices with which he disagrees. *E.g.* (King Dep. at 65:5–66:4) ("Antivaxxing has become more and more common, and the – the argument that personal rights supersede public safety, I think we can look at the world around us and understand that – that there's been a shift towards personal rights other than for people who have a uterus."); (King Dep. at 66:5–20) ("I mean, the political arena does not allow us to separate things. Right now you've got to be -- if you're a certain identified political person, you got to be anti-abortion. You've got to be for unlimited weaponry in the hands of everyone. This is a -- a – it's become confused -- and you've got to be against immunizations. It's gotten confused and conflated, and so it's very difficult to talk about personal rights in a way

that doesn't offend somebody's pet peeve."); (King Dep. at 88:8–90:14) ("[T]his goes to personal experience. I've been told that I'm -- because I'm pro vaccine, I'm a minion of Satan … Medically speaking, there's a lot of irrelevant, inappropriate stuff called religious exemption. I have yet to hear a bona fide one that I really understand the science behind."). When asked whether the animosity expressed toward King shaded his views on the validity of religious exemptions, King answered "[a]bsolutely." (King Dep. at 90:1–4).

King's opinion on religious exemptions is that they "should not be honored in cases where the scientific explanation shows that the religious exemption request is falsified. … If the science falsifies the claim, then that should not be allowed." (Dep. King. at 97:19–98:7).

King's opinions aren't grounded in an objective methodology. Rather they reveal personal disdain for unvaccinated healthcare workers. (Dep. King at 95:14–97:5) (it is King's "personal opinion" that unvaccinated healthcare workers violate their ethical obligations). It's clear that King's opinions are informed by factors that stretch beyond science, the practice of medicine, or public health. King clearly harbors personal hostility toward those that disagree with his opinions. As a

citizen, he is free to hold those personal views. But experts are held to a different standard. Such testimony cannot be entered as a matter of law. *See Ollier*, 768 F.3d at 860 (citing *Daubert II*, 43 F.3d at 1319).

CONCLUSION

For the reasons stated, this Court should exclude (Doc. 86.1, ¶¶ 5, 22–25, 32–33, 35–42, 44, 46–48, 50–53).

DATED this 2nd day of September, 2022.

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/s/ Brent Mead
BRENT MEAD

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Dated: September 2, 2022

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA,
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MONTANA MEDICAL ASSOCIATION, ET. AL., *Plaintiffs*, and MONTANA NURSES ASSOCIATION, *Plaintiff-Intervenors*, v. AUSTIN KNUDSEN, ET AL., *Defendants*.	No. CV-21-108-M-DWM **DEFENDANTS' MOTION IN LIMINE TO LIMIT THE TESTIMONY OF DR. DAVID TAYLOR**

Defendants move the Court in limine to exclude parts of the opinions of Plaintiffs' expert Dr. David Taylor. Portions of his opinion are unreliable and unhelpful to this case. Other parts improperly offer conclusions of law. Defendants request the Court exclude limit Taylor's testimony and exclude at least paragraphs 23, 24, 55, and 56 of his expert report. Additionally, the Court should either exclude or limit testimony as to the opinion expressed in paragraph 49 of his expert report.

This motion is supported by the accompanying brief, the Foundational Declaration of Brent Mead, and that declaration's exhibit 4.

Counsel for Plaintiffs and Plaintiff-Intervenor have been contacted and they oppose this motion.

DATED this 2nd day of September, 2022.

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INTRODUCTION

This Court should exclude parts of the opinions of Plaintiffs' expert Dr. David Taylor.[1] Portions of his opinion are unreliable and unhelpful to this case. Other parts improperly offer conclusions of law. Defendants request the Court exclude limit Taylor's testimony and exclude at least paragraphs 23, 24, 55, and 56 of his expert report. Additionally, the Court should either exclude or limit testimony as to the opinion expressed in paragraph 49 of his expert report.

Federal Rule of Evidence 702 allows expert opinion testimony only if that opinion will assist the trier of fact and if the opinion is reliable. That requirement applies to bench trials too. Taylor doesn't supply objectively reliable expert testimony and his testimony won't assist the Court in understanding the evidence. Elsewhere, his testimony consists of conclusory statements couched as "expert opinions," but those statements recycle legal elements that Plaintiffs' believe necessary to their case. Such opinions fall outside Rule 702.

[1] Plaintiffs filed a copy of Taylor's Expert Report as an exhibit to their brief in support of Plaintiffs' motion for summary judgment. (Doc. 86.2). Defendants point the Court to that filing rather than duplicating the report as an exhibit to this motion.

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Lee v. Weisman, 505 U.S. 577, 597 (1992) ("[T]he trial court must assure that the expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'"). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565 (citation and internal quotation marks omitted; accord *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999). It's not "the correctness of the expert's conclusions" that matters, but "the soundness of his methodology." *Ollier*, 768 F.3d at 860.

Several other guideposts direct the Rule 702 analysis. First, "personal opinion testimony is inadmissible as a matter of law under Rule 702." *Ollier*, 768 F.3d at 860 (citing *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("*Daubert II*")). Second, "speculative testimony is inherently unreliable" and, therefore, inadmissible. *Id.* (citing *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997)); *see also Daubert*, 509 U.S. at 590 (noting that expert testimony based on mere "subjective belief or unsupported speculation" is inadmissible). And third, experts may not express any opinion regarding

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The party presenting the expert testimony bears the burden of showing that the expert's opinions are reliable and relevant. *See Lust v. Merrell Dow. Pharm.*, 89 F.3d 594, 598 (9th Cir. 1996); *Daubert II*, 43 F.3d at 1316.

ARGUMENT

I. The Court should exclude speculative and unsupported testimony related to vaccine hesitancy.

The Court should exclude Taylor's conclusions regarding vaccine hesitancy and HB 702. Taylor testified that "concerns about coronavirus vaccines are now reflected in attitudes towards routine immunizations." (Doc. 86.2, ¶ 23). In his opinion, it should be "an important duty of the state to educate the – the population in the state on the importance of vaccines …." (Taylor Dep. at 35:5–36:12).[2] HB 702 presents a problem—in his view—because the law increases vaccine hesitancy based upon "a personal freedom issue here -- that that's abdicating our duty to the community." *Id.*

[2] Excerpts of the deposition of Dr. David Taylor taken on August 4, 2022 are attached as Exhibit 4 to the Declaration of Brent Mead (September 2, 2022).

Taylor admits these opinions are his personal opinions, not opinions grounded in studies, data, or clinical experience. (Taylor Dep. at 50:14–51:4; 52:1–53:9; 56:19–57:5). That alone disqualifies them. *Ollier*, 768 F.3d at 861.

Beyond that, Taylor's opinion is contradicted elsewhere in his own report. Taylor cites a nationwide report on kindergartner vaccination rates. (Doc. 86.2, ¶ 23); *see also* (Doc. 93, ¶¶ 3–6) (Defendants undisputed facts cite the same study in paragraph 6). That study shows the percentage of Montana kindergartners with a medical or religious exemption to required vaccinations *decreased* between the 2019–20 and 2020–21 school years. (Doc. 93, ¶ 6). Taylor acknowledged that this fact does not support his opinion regarding attitudes towards immunizations. (Taylor Dep. at 86:19–87:10).

Finally, Taylor's testimony that HB 702 negatively affects attitudes toward immunizations should be excluded because it is based on personal opinion. *Ollier*, 768 F.3d at 860. Likewise, the Court should exclude any testimony by Taylor related to speculative harms derived from his unsupported opinion on vaccine hesitancy and the effects of HB 702. *Id.*; *see also Grodzitsky v. Am. Honda Motor Co., Inc.*, 2015 U.S. Dist. LEXIS

64683, at *25 (C.D. Cal. Apr. 22, 2015) (expert's opinion based primarily on personal opinion and speculation regarding consumers' expectations and was inadmissible); *Doyle v. Chrysler Grp. LLC*, 2015 U.S. Dist. LEXIS 12858, at *18 (C.D. Cal. Jan. 21, 2015) (excluding expert opinion because it "appear[ed] to be based more on Dr. Batzer's personal experience and/or speculation than it is based on data and analysis.").

II. The Court should exclude speculative and unsupported testimony related to the risk unvaccinated individuals pose to others.

Taylor further testifies that unvaccinated, or nonimmune, individuals pose an increased risk to others. (Doc. 86.2, ¶¶ 24, 49, 55, 56). Taylor issues an opinion as to all vaccine preventable diseases—not just COVID-19—but cites only pre-Omicron COVID-19 studies. He also bootstraps COVID-19 vaccine efficacy related to severity of illness to support conclusions on disease transmission. But these are separate concepts. Upon examination, he offers conclusory opinions related to non-COVID-19 diseases and to disease transmission that lack sufficient foundation. *Ollier*, 768 F.3d at 860–61. *Grodzitsky*, 2015 U.S. Dist. LEXIS 64683, at *25; *Doyle*, 2015 U.S. Dist. LEXIS 12858, at *18.

First, in paragraph 24, Taylor cites to declining vaccination rates for why healthcare providers must have knowledge of an individual's (both patients and employees) immunization status to reduce disease transmission. (Doc. 86.2, ¶ 24). But Taylor fails to cite or substantiate his claim that Covid exemption rates in healthcare facilities are twice as high as the national average. *Id.* Further, for reasons already stated, reliance on kindergarten-age vaccinations is misplaced. *See supra* at Part I. In short, Taylor fails to provide the necessary data to make the analytical leap that 1% drop in kindergarten vaccination rates nationally equates to an impending danger in healthcare settings. *See GE v. Joiner*, 522 U.S. 136, 146 (1997) ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

Even if Taylor had provided the relevant data, nothing in his report links vaccination exemption rates to rates of disease transmission. (Doc. 86.2). His conclusion, that "a safe care" environment requires knowledge of immunization status bears no relationship to the data cited and instead operates as an impermissible legal conclusion. *Nationwide Transp. Fin. v. Cass. Info. Sys.*, 523 F.3d 1051, 1059 (9th Cir. 2008).

Elsewhere, Taylor testifies that the "unvaccinated are … a risk to others." (Doc. 86.2, ¶ 49); *see also id.*, ¶¶55–56. Taylor's opinion apparently applies to all diseases—not just COVID-19. (Doc. 86.2, ¶¶ 49, 55–56). Taylor's report, however, cites studies related solely to COVID-19. (Doc. 86.2, ¶¶ 40–48, 50–54, 57–64). Moreover, Taylor's report acknowledges that after the Delta variant, "it was no longer possible to create herd immunity." (Doc. 86.2, ¶ 46). Further, post-Delta, breakthrough cases emerged in those immunized for COVID-19. (Doc. 86.2, ¶¶46, 58). Taylor acknowledged the now-dominant strain, Omicron, evades prior immunity—either vaccination or natural immunity. (Taylor Dep. at 29:15–33:6; 80:14—23). He further acknowledged his report didn't consider any data or studies related to Omicron. (Taylor Dep. at 79:18–24). His report barely looks at transmissibility. (Doc. 86.2, ¶¶60, 62). The single study he does rely on dates to Delta, not Omicron, and certainly doesn't relate to any non-COVID-19 disease. (Doc. 86.2, ¶ 60). Even within that study, it clearly demonstrates both vaccinated and unvaccinated individuals are capable of transmitting COVID-19. (Doc. 86.2, ¶ 60).

Taylor's report focuses on severity of disease, not transmission. (Doc. 86.2, ¶¶ 40–48, 50–54, 61). That issue is separate from transmissibility, the only issue that could be relevant to this case. And on transmissibility, Taylor acknowledges individuals can transmit COVID-19 regardless of vaccination status. (Doc. 86.2, ¶ 60); *see also* (Taylor Dep. at 29:15–33:6; 80:14–23).

Taylor's opinion that "immunized individuals" are "less likely to transmit the diseases," therefore lacks any reliable foundation. (Doc. 86.2, ¶ 56). Without that link, his broader opinion that non-immune individuals pose a heightened risk to others likewise lacks a reliable foundation. (Doc. 86.2, ¶¶49, 55–56).

The Court should therefore exclude Taylor's testimony related to his conclusion related to the risk non-immune individuals pose to others. If the Court doesn't exclude those opinions entirely, then it should limit the applicability to only COVID-19, the only disease for which he presented data and analysis.

CONCLUSION

For the aforementioned reasons, this Court should exclude (Doc. 86.2, ¶¶ 23–24, 49, 55–56).

DATED this 2nd day of September, 2022.

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/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: September 2, 2022

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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*.	No. CV-21-108-M-DWM **DEFENDANTS' MOTION IN LIMINE TO LIMIT THE TESTIMONY OF DR. GREGORY HOLZMAN**

Defendants move the Court in limine exclude parts of the opinions of Plaintiff-Intervenor's expert Dr. Gregory Holzman. Portions of his opinion are unreliable and unhelpful to this case. Other parts improperly offer conclusions of law. For these reasons, the Court should exclude (Doc. 86.3, ¶¶ 15–21).

This motion is supported by the accompanying brief, the Foundational Declaration of Brent Mead, and that declaration's exhibit 5.

Counsel for Plaintiffs and Plaintiff-Intervenor have been contacted and they oppose this motion.

DATED this 2nd day of September, 2022.

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MONTANA MEDICAL ASSOCIATION, ET. AL., *Plaintiffs*, and MONTANA NURSES ASSOCIATION, *Plaintiff-Intervenors*, v. AUSTIN KNUDSEN, ET AL., *Defendants*.	No. CV-21-108-M-DWM **DEFENDANTS' BRIEF IN SUPPORT OF MOTION IN LIMINE TO LIMIT THE TESTIMONY OF DR. GREGORY HOLZMAN**

INTRODUCTION

This Court should exclude parts of the opinions of Plaintiff-Intervenor's expert Dr. Gregory Holzman.[1] Portions of his opinion are unreliable and unhelpful to this case. Other parts improperly offer conclusions of law. For these reasons, the Court should exclude (Doc. 86.3, ¶¶ 15–21).

Federal Rule of Evidence 702 allows expert opinion testimony only if that opinion will assist the trier of fact and if the opinion is reliable. That requirement applies to bench trials too. Holzman doesn't supply objectively reliable expert testimony and his testimony won't assist the Court in understanding the evidence. Elsewhere, his testimony consists of conclusory statements couched as "expert opinions," but those statements recycle legal elements that Plaintiffs' believe necessary to their case. Such opinions fall outside Rule 702.

[1] Plaintiffs filed a copy of Holzman's Expert Report as an exhibit to their brief in support of Plaintiffs' motion for summary judgment. (Doc. 86.3). Defendants point the Court to that filing rather than duplicating the report as an exhibit to this motion.

LEGAL STANDARDS

Federal Rule of Evidence 702 governs the admission of expert testimony. It provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if"

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods;
> and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The Rule 702 inquiry boils down to assessing (1) reliability—"whether the reasoning or methodology underlying the testimony is scientifically valid"—and (2) relevance—"whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993); *see also Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 860 (9th Cir. 2014) ("[W]e have interpreted Rule 702 to require that expert testimony … be both relevant and reliable.") (internal alterations and quotations omitted); *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (quoting

Lee v. Weisman, 505 U.S. 577, 597 (1992) ("[T]he trial court must assure that the expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'"). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565 (citation and internal quotation marks omitted; accord *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999). It's not "the correctness of the expert's conclusions" that matters, but "the soundness of his methodology." *Ollier*, 768 F.3d at 860.

Several other guideposts direct the Rule 702 analysis. First, "personal opinion testimony is inadmissible as a matter of law under Rule 702." *Ollier*, 768 F.3d at 860 (citing *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("*Daubert II*")). Second, "speculative testimony is inherently unreliable" and, therefore, inadmissible. *Id.* (citing *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997)); *see also Daubert*, 509 U.S. at 590 (noting that expert testimony based on mere "subjective belief or unsupported speculation" is inadmissible). And third, experts may not express any opinion regarding

"an ultimate issue of law" at trial. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004). Courts must exclude "ultimate issue legal conclusion" testimony because it "invades the province of the trial judge." *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1059 (9th Cir. 2008).

In a jury trial setting district courts act as "gatekeepers" for expert testimony—they protect the jury from misleading testimony shrouded in the mystique of "expertise." *See United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019). The court's "gatekeeper" role becomes less rigid before a bench trial, in which a Court itself will act as factfinder. *See United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018). Still, pretrial admissibility requirements don't vanish in a bench trial. *Daubert*, 509 U.S. at 597.

Trial courts possess wide latitude when deciding whether to admit or exclude expert testimony. *Kumho Tire Co.*, 526 U.S. at 153; *Ollier*, 768 F.3d at 859. District courts in the Ninth Circuit can, and do, exclude expert testimony that isn't reliable or relevant to the issues at trial. *See Ollier*, 768 F.3d at 859–61 (affirming exclusion of unreliable and speculative expert testimony before a bench trial).

The party presenting the expert testimony bears the burden of showing that the expert's opinions are reliable and relevant. *See Lust v. Merrell Dow. Pharm.*, 89 F.3d 594, 598 (9th Cir. 1996); *Daubert II*, 43 F.3d 1311 at 1316.

ARGUMENT

Holzman's expert report fails to cite any meaningful or relevant facts, data, or methodology for analyzing the transmission or control of infectious diseases. (Doc. 86.3).

Holzman's expert report relies on three data points. The first and second are simply reports extolling the virtues of vaccines as "one of the Ten Great Public Health Achievements of the 20th Century." (Doc. 86.3, ¶ 6). That proclamation is neither contested nor relevant to understanding the facts of this case. The third and final report contains the Advisory Committee on Immunization Practices recommendations for healthcare personnel. (Doc. 86.3, ¶ 14). That report has no binding regulatory effect on healthcare providers. (Holzman Dep. at 38:5–11); *see also* (Holzman Dep. at 38:12–19) (Plaintiff-Intervenor counsel objecting that it was outside the scope of Holzman's disclosure whether such

recommendations were ever required by the Centers for Medicare and Medicaid Services).[2]

The lack of a sound methodology taints and impairs his opinions on other preventative measures (Doc. 86.3, ¶ 15), need for actual knowledge of immunity status (Doc. 86.3, ¶ 16), and the need to treat individuals differently based on immunity status (Doc. 86.3, ¶ 17). For example, regarding the alleged need to treat individuals differently based on immunity status, Holzman fails to narrow what individuals are at issue—patients, healthcare workers, or the public generally. (Doc. 86.3, ¶ 17). When, as here, it's unclear what facts the expert is considering, his opinions can't assist the Court in understanding the facts of the case. Rule 702 demands experts offer analysis that goes beyond rudimentary scientific platitudes.

Elsewhere, Holzman's testimony offers unsupported testimony that lacks necessary foundation. (Doc. 86.3, ¶ 20) ("Healthcare workers have an increased risk of exposure to vaccine-preventable diseases. Healthcare workers also pose the risk of transmitting vaccine-

[2] Excerpts of the deposition of Dr. Gregory Holzman taken on August 16, 2022 are attached as Exhibit 5 to the Declaration of Brent Mead (September 2, 2022).

preventable diseases to vulnerable patients, and other healthcare workers."). Holzman fails to quantify the risk of exposure, or even state what specific diseases are at issue. He also fails to quantify the risk of transmission, including the effect other preventative measures have on transmission. This amounts to nothing more than unsupported opinion and as such is not admissible. Without a basis in sound methodology, Holzman's testimony should be excluded. *See Ollier*, 768 F.3d at 859–61.

Holzman's report about alludes to what hospitals should do in (ironically-titled) 'specific scenarios' … that he never identifies. *See* (Doc. 86.3, ¶ 18) ("it is my opinion that in specific scenarios, healthcare settings must be able to treat employees differently in the conditions of their work and employment based on their vaccination status to secure a work environment free from known hazards for healthcare workers and their patients."). He fails to specify the specific scenarios he refers to. He fails to specify what he means by healthcare settings. He fails to discuss or analyze what differential treatment might be appropriate in this universe of "specific scenarios." Holzman simply fails to provide any factual support for his opinion.

Another critical flaw in Holzman's report is that it is infested with legal conclusions. (Doc. 86.3, ¶ 18). "Known hazards," for example, is a term of art within the Occupational Health and Safety Act. *See* 29 U.S.C. § 654(a)(1); *see also* (Doc. 86.3, ¶¶ 19–20) (offering further opinion on workplace hazards). He also states, without support, that "long term care settings face the same or similar workplace risks" as non-long term care settings. (Doc. 86.3, ¶ 21). This strikes directly at Plaintiffs' equal protection claims. *See* (Doc. 82 at 26–30). Holzman fails to lay out a factual assertion as to the specific risks at long term care facilities and the specific risks at non-long term care facilities. He instead, offers only a shortcut to the legal conclusion that the risks are the same.

CONCLUSION

The Court should exclude the parts of Holzman's testimony that offer legal conclusions and should limit the remainder of his testimony to that which is adequately supported by a reliable methodology. The Defendants request the Court exclude at least (Doc. 86.3, ¶¶ 15–21).

DATED this 2nd day of September, 2022.

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/s/ Brent Mead
BRENT MEAD

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Dated: September 2, 2022

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MISSOULA DIVISION

MONTANA MEDICAL ASSOCIATION, ET. AL., *Plaintiffs*, and MONTANA NURSES ASSOCIATION, *Plaintiff-Intervenors*, v. AUSTIN KNUDSEN, ET AL., *Defendants*.	No. CV-21-108-M-DWM **DEFENDANTS' MOTION IN LIMINE TO EXCLUDE PORTIONS OF MONTANA DEPARTMENT OF JUSTICE'S, MONTANA DEPARTMENT OF LABOR AND INDUSTRY'S, MONTANA HUMAN RIGHTS BUREAU'S, AND MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES' 30(b)(6) TESTIMONY**

Defendants move the Court in limine to exclude improper legal contention testimony from Defendants' and third-party's Rule 30(b)(6) deponents. Such testimony is outside the scope of Rule 30(b)(6). This Court should prevent the use of such improper testimony by Plaintiffs and exclude the testimony of Montana Department of Justice, Montana Department of Labor and Industry, Montana Human Rights Bureau, and Montana Department of Public Health and Human Services referenced in paragraphs 9, 20, 45, 69, 70, 71, 78, 81, 82, 85, 86, 87, 92, and 93 of Plaintiffs' Statement of Undisputed Facts (Doc. 83).

This motion is supported by the accompanying brief and the Foundational Declaration of Brent Mead and that declaration's exhibits 7–10.

Counsel for Plaintiffs were contacted but provided no position on this motion for want of additional information. Defendants assume they will oppose. Plaintiff-Intervenor was likewise contacted and they oppose this motion.

DATED this 2nd day of September, 2022.

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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*.	No. CV-21-108-M-DWM **DEFENDANTS' BRIEF IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE RULE 30(B)(6) TESTIMONY OF MONTANA DEPARTMENT OF JUSTICE, MONTANA DEPARTMENT OF LABOR AND INDUSTRY, MONTANA HUMAN RIGHTS BUREAU,**

AND MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

INTRODUCTION

Despite repeated warnings, Plaintiffs elicited improper legal contention testimony from Defendants' and third-party's Rule 30(b)(6) deponents. Such testimony is outside the scope of Rule 30(b)(6). This Court should prevent the use of such improper testimony by Plaintiffs and exclude the testimony of Montana Department of Justice, Montana Department of Labor and Industry, Montana Human Rights Bureau, and Montana Department of Public Health and Human Services referenced in paragraphs 9, 20, 45, 69, 70, 71, 78, 81, 82, 85, 86, 87, 92, and 93 of Plaintiffs' Statement of Undisputed Facts (Doc. 83).[1]

[1] Plaintiffs previously filed the relevant excerpts of each deposition. *See* (Doc. 86.15) (Montana Department of Justice); (Doc. 86.10) (Montana Department of Labor and Industry); (Doc. 86.14) (Montana Human Rights Bureau); (Doc. 86.9) (Montana Department of Public Health and Human Services). Defendants point the Court to the previously filed transcripts rather than duplicating their production as exhibits for this motion.

Defendants objected to Plaintiffs' improper 30(b)(6) topics prior to the depositions. *See* Mead Decl., Exhibits 7–10. Defendants objected during the depositions. Defendants object now to the improper use of 30(b)(6) testimony. Plaintiffs cannot use such testimony as foundation for "undisputed facts," because these contentions are legal, not factual, and such testimony cannot bind a party's legal position.

LEGAL STANDARD

While a party may ask a deponent questions which call for legal conclusions, "a Rule 30(b)(6) deponent's own interpretation of the facts or legal conclusions do not bind the entity." *Snapp v. United Transp. Union*, 889 F.3d 1088, 1104 (9th Cir. 2018) (quoting 7 James Wm. Moore, et al., Moore's Federal Practice § 30.25[3] (3d ed. 2016)), *cert. denied sub nom. Snapp v. Burlington Northern Santa Fe Ry. Co.*, 139 S. Ct. 817, 202 L. Ed. 2d 577 (2019)); *accord Mankins Family Ltd. Liab. Co. v. Tillamook Cty.*, 2022 U.S. Dist. LEXIS 91592, at *9 (D. Or. Feb. 7, 2022) (citing *Snapp*, 889 F.3d at 1104); *Sharp Mem'l Hosp. v. Regence Bluecross Blueshield of Utah*, 2018 U.S. Dist. LEXIS 231593, at *7 (S.D. Cal. June 26, 2018) (citing *Snapp*, 889 F.3d at 1104).

That's precisely why "a 30(b)(6) deposition is not an appropriate vehicle for taking discovery into legal contentions." *Zeleny v. Newsom*, 2020 U.S. Dist. LEXIS 100944, at *6 (N.D. Cal. June 9, 2020) (citing *Lenz v. Universal Music Corp.*, 2010 U.S. Dist. LEXIS 47873, 2010 WL 1610074, at *3 (N.D. Cal. April 20, 2010); *3M Co. v. Kanbar*, 2007 U.S. Dist. LEXIS 47513, 2007 WL 1794936, at *2 (N.D. Cal. June 19, 2007)); *see also Shreves v. Frontier Rail Corp.*, 2021 U.S. Dist. LEXIS 54899, at *9 (E.D. Wash. Mar. 23, 2021) (granting protective order on 30(b)(6) topics covering Defendant's interpretation of federal railroad safety laws and regulations).

For example, in *Zeleny* a plaintiff sought to depose the Office of the California Attorney General (a named defendant) about its interpretation of the "authorized participant" exception to the State's ban on the open carry of firearms. 2020 U.S. Dist. LEXIS 100944, at *1–3. Denying a motion to compel a 30(b)(6) witness to testify, the court said, "oral testimony in which the witness has to answer questions on the spot about a party's legal contentions is an improper use of a deposition." *Id.* at *7.

And it's not just legal conclusions that are improper. Even deposition testimony that "do[es] not call directly for legal conclusions" is impermissible if the "facts requested would collectively amount to legal conclusions about what these constitutional standards require." *Mitchell v. Atkins*, 2019 U.S. Dist. LEXIS 203464, at *6 (W.D. Wash. Nov. 22, 2019) (granting protective order because 30(b)(6) topics sought information relevant to whether the challenged law would pass intermediate constitutional scrutiny).

Plaintiffs also cannot elicit "legislative facts" regarding the State's interest from a 30(b)(6) witness. *Id.* at *6-7. Legislative facts, indeed, may not be a proper topic for contention discovery either. *See id.* at *7 ("The question of if and when DOL may be required to answer interrogatories on these topics is not currently before the Court. However, the Court notes that the type of legislative facts Plaintiffs seek may not be proper objects of interrogatories or requests for production at all.").

ARGUMENT

This Court should reject Plaintiffs' attempt to use improper 30(b)(6) testimony to establish the elements of their claims. Defendants rightly

objected to the noticed topics in their 30(b)(6) Designations and during the 30(b)(6) depositions. *See* Mead Decl., Exhibits 7–10. Now Plaintiffs attempt to use testimony on these improper topics to satisfy their burden of proof. *See* (Doc. 83, ¶¶ 9, 20, 45, 69, 70, 71, 78, 81, 82, 85, 86, 87, 92, 93). This Court should disallow such improper tactics by excluding those portions of the relevant 30(b)(6) depositions relied on by Plaintiffs.

Statement of Fact 9 improperly uses deposition testimony to establish a legal conclusion as to what health conditions constitute a disability. Defendants' counsel properly objected that such testimony calls for a legal conclusion. (Doc. 86-14 at 92:17-93:21 (counsel objected that the question called for a legal conclusion)).

Statement of Fact 20 improperly uses deposition testimony to establish the legal interest held by a state agency in the "health and safety of healthcare workers." Defendants' counsel properly objected that such testimony calls for a legal conclusion. (Doc. 86-10 at 50:23-51:3 (counsel objected that the question called for a legal conclusion)).

Statement of Fact 45 asserts a legal conclusion as to what "constitutes discrimination under the ADA." (Doc. 83, ¶ 45). The question asked at the deposition involved facts related to the

investigatory process. (Doc. 86-14 at 90:12–91:10). Questions related to discrimination determinations were properly objected to as calling for legal conclusions. (Doc. 86-14 at 91:15–94:11).

Statement of Fact 69 improperly uses deposition testimony to reach a legal conclusion as to whether it "could be" unlawful discrimination if a physician office prevented an unvaccinated individual from caring for patients. Defendants' counsel properly objected that such testimony calls for a legal conclusion. (Doc. 86-14 at 50:21–52:17 (counsel objected that the question called for a legal conclusion)).

Statement of Fact 70 improperly uses deposition testimony to reach a legal conclusion as to whether it is unlawful discrimination to require only unvaccinated individuals to wear masks in a physician office. Defendants' counsel properly objected that such testimony calls for a legal conclusion. (Doc. 86-14 at 52:22–53:16 (counsel objected that the question called for a legal conclusion)); (Doc. 86-15 at 49:2–52:22 (same)).

Statement of Fact 71 uses deposition testimony to reach a legal conclusion that it would be unlawful to terminate an unvaccinated individual at a health care facility if no reasonable accommodations could be put in place. Defendants' counsel properly objected that such

testimony calls for a legal conclusion. (Doc. 86-14 at 58:12–59:9 (counsel objected that the question called for a legal conclusion)).

Statement of Fact 78 improperly uses deposition testimony related to the legal issue of if state and federal law are in conflict. Defendants' counsel properly objected that Statement of Fact 78 called for a legal conclusion. (Doc. 86-14 at 19:17–20:13 (counsel objected that the question called for a legal conclusion)).

Statements of Fact 81 and 82 purport to establish an "intent" to "enforce" MCA § 49-2-312 on the part of Montana Department of Justice and the Montana Department of Labor and Industry, including criminal penalties. These statements were the subject of written discovery to which Defendants denied as stated. (Doc. 86-38 at 3–4). Deposition testimony to the contrary should be excluded.

Statement of Fact 85 improperly uses deposition testimony to establish the State's interest in enacting provisions of HB 702. Defendants' counsel properly objected that Statement of Fact 85 called for a legal conclusion. (Doc. 86-15 at 92:2-95:7 (counsel objected that the question called for a legal conclusion)).

Statement of Fact 86 patently calls for a legal conclusion as to a recognized conflict between "federal vaccine mandates and the penalties imposed on employers by MCA 49-2-312." Deposition testimony on this question should be excluded as it purports to establish as fact a legal element of Plaintiffs' preemption claims. Such testimony cannot be used to establish the legal position of Defendants in this case.

Statements of Fact 92 and 93 incorrectly uses a third-party 30(b)(6) deponent to establish the legal claim that failure to comply with Centers for Medicare and Medicaid Services conditions of participation subjects a facility to termination from participation in the programs. But, even if 30(b)(6) testimony could appropriately establish this legal claim, later testimony made clear that is not a correct statement of the deficiency procedure. (Doc. 86-9 at 111:3–22).

CONCLUSION

In each case, Defendants (or the third-party deponent) objected to topics calling for legal conclusions prior to the 30(b)(6) deposition. Plaintiffs ignored those objections and elicited improper testimony.

This Court should simply exclude the improper testimony in accordance with well-established principles. *See Snapp*, 889 F.3d at 1104.

DATED this 2nd day of September, 2022.

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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 1,513 words, excluding tables of content and authority, certificate of service, certificate of compliance, and exhibit index.

/s/ Brent Mead
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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: September 2, 2022

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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*.	No. CV-21-108-M-DWM **DEFENDANTS' MOTION IN LIMINE TO EXCLUDE FURTHER TESTIMONY OR EVIDENCE ON SUBJECTS RELATED TO PLAINTIFFS INVOCATION OF THE FIFTH AMENDMENT**

Defendants move the Court in limine to exclude any testimony or evidence related to the issues leading to invocation of the privilege and draw all proper adverse inferences based on the invocation of the privilege.

This motion is supported by the accompanying brief and the Foundational Declaration of Brent Mead and that declaration's exhibits 11–13.

Counsel for Plaintiffs were contacted but provided no position on this motion for want of additional information. Defendants assume they will oppose. Plaintiff-Intervenor was likewise contacted and they oppose this motion.

DATED this 2nd day of September, 2022.

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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*.	No. CV-21-108-M-DWM **DEFENDANTS' BRIEF IN SUPPORT OF MOTION IN LIMINE TO LIMIT TESTIMONY AND EVIDENCE BASED ON PLAINTIFFS FIVE VALLEYS UROLOGY, WESTERN MONTANA CLINIC, AND PROVIDENCE INVOKING THE FIFTH AMENDMENT**

INTRODUCTION

Plaintiffs Providence, Five Valleys Urology, and Western Montana Clinic each invoked the Fifth Amendment during their respective Rule 30(b)(6) depositions and refused to answer questions on that basis. *See* (Dep. O'Connor at 23:2–22); (Dep. Morris at 68:23–69:21, 84:8–85:18); (Dep. Trainor at 28:8–31:9).[1]

Defendants respectfully request this Court exclude any testimony or evidence related to the issues leading to invocation of the privilege and draw all proper adverse inferences based on the invocation of the privilege.

ARGUMENT

The Fifth Amendment to the United States Constitution provides that "no person … shall be compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND. V. Despite the amendment's textual link to "criminal case[s]," the United States Supreme Court has

[1] Excerpts of the deposition of Five Valley Urology Rule 30(b)(6) witness John O'Connor is attached as Exhibit 11 to the Declaration of Brent Mead (Sept. 2, 2022). Excerpts of the deposition of Western Montana Clinic Rule 30(b)(6) witness Meghan Morris is attached as Exhibit 12 to the Declaration of Brent Mead (Sept. 2, 2022). Excerpts of the deposition of Providence's Rule 30(b)(6) witness Karyn Trainor is attached as Exhibit 13 to the Declaration of Brent Mead (Sept. 2, 2022).

concluded that the Fifth Amendment's protections also apply in civil proceedings. *See Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

Invoking the privilege, however, carries consequences for litigants in a civil proceeding. "[I]n civil proceedings adverse inferences can be drawn from a party's invocation of this Fifth Amendment right." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000); *see also SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir. 1994) (forbidding an adverse inference "poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth."). "[S]uch adverse inferences can only be drawn when independent evidence exists of the fact to which the party refuses to answer." *Rudy-Glanzer*, 232 F.3d at 1264 (citations omitted). "[N]o negative inference can be drawn against a civil litigant's assertion of his privilege against self-incrimination unless there is substantial need for the information and there is not another less burdensome way of obtaining the information." *Id.* at 1265. "The tension between one party's Fifth Amendment rights and the other party's right to a fair proceeding is resolved by analyzing each instance … on a case-by-case basis under the … circumstances of that particular civil litigation." *Id.*

A district court has discretion to craft the appropriate remedy in response to a civil litigant's invocation of the Fifth Amendment. *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998). These remedies are often severe. *See id.* (upholding grant of summary judgment against nominal civil fraud defendant who invoked Fifth Amendment privilege); *see also United States v. One Parcel of Real Property,* 780 F. Supp. 715, 722 (D. Or. 1991) (striking counterclaim and affirmative defense in their entirety because of defendant's use of the privilege); *SEC v. Benson,* 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987) (granting summary judgment against the silent party).

In *Benson,* the defendant invoked his Fifth Amendment right and tried to introduce evidence precluding summary judgment against him. *Benson,* 657 F. Supp. at 1129. The court, however, barred him from introducing any such evidence. The court stated that "by his initial obstruction of discovery and his subsequent assertion of the privilege, defendant has forfeited the right to offer evidence disputing the plaintiff's evidence or supporting his own denials." *Id.* At a minimum, a party can't "invoke the privilege against self-incrimination with respect to deposition

questions and then later testify about the same subject matter at trial." *Nationwide Life Ins. Cov. v. Richards*, 541 F.3d 903, 910 (9th Cir. 2008).

This principle carries even greater weight when a party's 30(b)(6) witness invokes the Fifth Amendment. It is "settled that a corporation has no Fifth Amendment privilege." *Braswell v. United States*, 487 U.S. 99, 105 (1988). A corporate entity *must* designate one or more representatives who will not invoke the Fifth Amendment. *See Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 92 n.5 (2d Cir. 2012) (noting "a corporation may not refuse to submit to a Rule 30(b)(6) deposition … on the grounds that such acts may tend to incriminate it."); *see also Chevron U.S.A. Inc. v. M&M Petroleum Servs.*, 2008 U.S. Dist. LEXIS 106045, 2008 WL 5423820, at * 12–13 (C.D. Cal., Dec. 30, 2008) ("[B]ecause a corporation does not have a Fifth Amendment right against self-incrimination, [defendant's] alternate [30(b)(6)] designee may not refuse to answer questions by invoking the Fifth."). To allow otherwise "would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents." *United States v. Kordel*, 397 U.S. 1, 8 (1970) (internal quotations and citations omitted). Entities that fail to designate non-invoking corporate representatives may be sanctioned

under Rule 37. *See Nutramax Labs., Inc. v. Twin Labs., Inc.*, 32 F.Supp. 2d 331, 338 (D. Md. 1999) (striking affidavits and testimony from Rule 30(b)(6) designee who invoked the Fifth Amendment and ordering further deposition); *In re Anthracite Coal Antitrust Litig.*, 82 F.R.D. 364, 370 (M.D. Pa. 1979) (sanctioning defendants by barring introduction of evidence).

As noted, district courts are "free to fashion whatever remedy is required to prevent unfairness" when a civil litigant invokes the Fifth Amendment. *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1089 (5th Cir. 1979). Because civil plaintiffs may attempt to use the Fifth Amendment privilege "not merely [as] a shield but also as a sword," courts may impose stricter penalties when a *plaintiff* invokes the privilege. *Schemkes v. Presidential Limousine*, 2011 U.S. Dist. LEXIS 16579 at * 14– 15 (D. Nev., Feb. 18, 2011); *see also Lyons v. Johnson*, 415 F.2d 540, 542 (9th Cir. 1969) ("The scales of justice would hardly remain equal … if a party can assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim.").

Plaintiffs Providence, Five Valleys Urology, and Western Montana Clinic each invoked the Fifth Amendment during their respective Rule 30(b)(6) depositions. *See* (Dep. O'Connor at 23:2–22); (Dep. Morris at 68:23–69:21, 84:8–85:18); (Dep. Trainor at 28:8–31:9).

I. Plaintiff Providence

Providence was asked whether the vaccination policy entered as (Doc. 95-1 at 426–431) is "currently in effect at Providence?" (Dep. Trainor at 28:13–19). Counsel instructed the witness to only answer as to prior to House Bill 702. (Trainor Dep. at 28:15–19). The witness answered "prior to House Bill 702, this would have been how we would have proceeded." (Trainor Dep. at 28:20–21).

Providence was then asked "is this policy still in effect?" (Trainor Dep. at 29:12–13). Counsel instructed the witness not to answer based on the Fifth Amendment. (Trainor Dep. at 29:14–16).

Providence was next asked "does Providence currently have a[n] immunization requirement for a physician and Allied Health professional policy that is in effect?" (Trainor Dep. at 29:21–24). Counsel again instructed the witness not to answer based on the Fifth Amendment. (Trainor Dep. at 29:25–30:2). Defendants' counsel asked the question again.

(Trainor Dep. at 30:7–10, 31:4–6). After another instruction not to answer from counsel, (Trainor Dep. at 30:12–21, 24–25), the witness ultimately invoked the Fifth Amendment. (Trainor Dep. at 31:9).

Defendants possessed "independent evidence" of the fact in question—namely Providence's vaccination policy—because the document was produced during discovery. *See Rudy-Glanzer*, 232 F.3d at 1264. Absent evidence to the contrary—which Plaintiffs refused to provide—the document plainly appears to be in effect today. The document in question has a clear effective date of "05/2022" and will next be reviewed on "05/2025." (Doc. 95-1 at 427).

It is Defendants' position that this document represents Providence's current immunization policy and should be treated as such. Further, based on Providence's testimony, this policy preexists HB 702. (Dep. Trainor at 36:25–37:6).

Plaintiffs make a variety of claims regarding the effects of HB 702 on their ability to comply with various government regulations and maintain the proper standard of care based on healthcare employees' vaccination status. *See* (Doc. 37, ¶¶ 34, 36, 42, 44, 48–49, 53–54, 58, 63–64, 71–72, 86(a)–(b), 87). But with this negative inference, the Court can and

should infer that Providence's vaccination policies have not changed since the enactment of HB 702. In other words, the harms alleged by Providence are remote, speculative, and unsubstantiated. This—of course—creates serious standing issues for Providence.

Defendants therefore request this Court exclude any testimony or evidence by Plaintiffs to the contrary.

II. Plaintiff Five Valleys Urology

Counsel for Plaintiff Five Valleys Urology instructed the Rule 30(b)(6) witness not to answer the following question based on the Fifth Amendment: "So this would be a current policy when a new patient who has not indicated on their intake form that they've received the influenza vaccine. The question is, does [Five Valleys Urology] take any special precautions when that new patient first enters into an [Five Valleys Urology] facility?" (O'Connor Dep. at 23:11–22).

Prior to the non-answer, Five Valleys Urology testified that prior to the onset of the COVID-19 pandemic, Five Valleys did not take any special precautions when a patient indicated they were unvaccinated for influenza. (O'Connor Dep. at 21:5–23).

Plaintiffs make a variety of claims regarding the effects of HB 702 on their ability to comply with various government regulations and maintain the proper standard of care. *See* (Doc. 37, ¶¶ 34, 36, 42, 44, 48–49, 53–54, 58, 63–64, 71–72, 86(a)–(b), 87). Because Five Valleys pleaded the Fifth on the precautions it currently takes when a patient indicates they are unvaccinated for influenza, the Court can and should infer that Five Valleys Urology now takes the same special precautions based on a patient's vaccination status that it did before HB 702's enactment. In other words, they don't take any special precautions. (O'Connor Dep. at 21:5–23). The harms alleged by Five Valleys Urology are, therefore remote, speculative, and unsubstantiated. This—of course—creates serious standing issues for Five Valleys Urology. Defendants' request this Court exclude any testimony or evidence from Plaintiffs to the contrary.

III. Plaintiff Western Montana Clinic

Plaintiffs' counsel instructed Western Montana Clinic's Rule 30(b)(6) witness not to answer the following question based on the Fifth Amendment: "Does [Western Montana Clinic] currently require all physicians, nurses, or other licensed healthcare professionals, as that term is defined in Section 50-5-101 subpart (36) of Montana Code, to disclose

their vaccination status for any vaccine-preventable diseases as a condition of employment? (Morris Dep. at 69:2–21).

Western Montana Clinic previously testified that prior to HB 702 it didn't require any vaccination as a condition of employment and the only vaccine the clinic regularly tracked was the influenza vaccine. (Morris Dep. at 62:6–20).

Plaintiffs make a variety of claims regarding the effects of HB 702 on their ability to comply with various government regulations and maintain the proper standard of care. *See* (Doc. 37, ¶¶ 34, 36, 42, 44, 48–49, 53–54, 58, 63–64, 71–72, 86(a)–(b), 87). But with this negative inference, the Court can and should infer that Western Montana Clinic has not, and does not, required any vaccination as a condition of employment, nor did Western Montana Clinic actively track staff vaccination beyond its annual flu shot drive. In other words, the harms alleged by Western Montana Clinic are remote, speculative, and unsubstantiated. This—of course—creates serious standing issues for them. This Court should exclude any evidence or testimony to the contrary.

Plaintiffs' counsel again instructed the witness not to answer (based on the Fifth Amendment) the question: "Has [Western Montana

Clinic] provided reasonable accommodations under the Montana Human Rights Act to employees or contractors since January 1st, 2021 due to the vaccination status of another [Western Montana Clinic] employee or employees?" (Morris Dep. at 84:12–85:18). The witness answered that from the period of January 1, 2021 to passage of HB 702 Western Montana Clinic "haven't had that circumstance arise." (Morris Dep. at 85:10–86.2).

But with this negative inference, the Court can and should infer that Western Montana Clinic has not had that circumstance arise post-HB 702. In other words, the harms alleged by Western Montana Clinic are remote, speculative, and unsubstantiated. This Court should exclude any evidence or testimony to the contrary.

CONCLUSION

The Court should exclude any attempt at introducing evidence or testimony by the Plaintiffs on topics which they chose to remain silent during discovery.

Plaintiffs brought this action. The corporate Plaintiffs cannot legitimately use the Fifth Amendment as a shield blocking valid inquiries into their existing policies. Defendants sought to understand what changes

those corporations took based on HB 702. Because Plaintiffs' invoked the Fifth Amendment, this Court should draw the inference that they did not, in fact, change any policies as a result of HB 702.

DATED this 2nd day of September, 2022.

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