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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA MEDICAL ASSOCIATION, FIVE VALLEYS UROLOGY, PLLC, PROVIDENCE HEALTH & SERVICES – MT, WESTERN MONTANA CLINIC, PC, PAT APPLEBY, MARK CARPENTER, LOIS FITZPATRICK, JOEL PEDEN, DIANA JO PAGE, WALLACE L. PAGE, and CHEYENNE SMITH, Plaintiffs,	CV 21-108-M-DWM **DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12**

v.

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

Defendants.

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Defendants Austin Knudsen and Laurie Esau (hereafter "the State") submit this brief in support of their motion to dismiss.

INTRODUCTION

> Montanans should not face the threat of discrimination rooted in whether they decide to receive a vaccine. Furthermore, employers must not discriminate or take punitive action against employees who opt out of immunizations, but instead should work to provide well established, reasonable accommodations that protect the health and safety of all involved.

Governor Greg Gianforte, Amendatory Veto Message HB 702 (April 28, 2021) ("Veto Message").[1]

Anti-discrimination laws are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley v. Irish-American Gay*, 515 U.S. 557, 572 (1995). While other states considered implementing 'vaccine passports,'[2] the State of Montana acted to protect Montanans from discrimination based on vaccination status and to protect Montanans from the involuntary disclosure of their private health care information as a condition of everyday life. HB 702 created a new protected class in

[1] Available at https://bit.ly/3FWbuhb (accessed October 21, 2021).

[2] *See, e.g.*, Mark Scolforo, Vaccine Passports are Latest Flash Point in COVID Politics, Associated Press (April 3, 2021), *available at* https://bit.ly/3lTZxk6 (accessed October 21, 2021).

Montana's Human Rights Act, M.C.A. Title 49. The law works within the existing anti-discrimination and public health law structure. *See* M.C.A. § 50-1-105 ("It is the policy of the state of Montana that the health of the public be protected and promoted to the extent practicable through the public health system while respecting individual rights to dignity, privacy, and nondiscrimination."). On a hotly contested contemporary social question, the Legislature has spoken clearly: in Montana, HB 702 prohibits discrimination based on vaccination status and protects medical privacy.

Plaintiffs, however, earnestly wish to discriminate. In fact, they claim that HB 702 discriminates against them because it prohibits them from discriminating. Compl. ¶¶ 70–71, 78–79. Plaintiffs' open wish to discriminate evinces a troubling desire by parts of Montana's medical community to violate the fundamental rights of Montanans. *See Wadsworth v. Montana*, 911 P.2d 1165, 1176 (Mont. 1996) (The right "to pursue employment" is a fundamental right.). The State of Montana put forward a clear policy that Montanans cannot be denied their fundamental right to pursue employment based on vaccination status. Plaintiffs disagree, and that is fine and normal in a democratic society. The social

compact requires that citizens must sometimes forebear laws with which they disagree. Such differing policy preferences, however, do not grant objectors standing or legitimate legal grounds to challenge laws they do not like. Such is the case here. Despite Plaintiffs' alleged need and desire to discriminate against fellow Montanans, they lack standing and have failed to state a claim upon which relief may be granted.

This Court should therefore dismiss Plaintiffs' Complaint.

MOTION TO DISMISS STANDARD

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

Under Rule 12(b)(6), a complaint must be dismissed for failure to state a claim. "Dismissal under Rule 12(b)(6) is proper only when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). While courts accept as true all well-

pleaded factual allegations, assertions that "are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Nor are courts "bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 678. A complaint should be dismissed it offers only '"naked assertion[s]' devoid of 'further factual enhancement.'" *Id.*

The Complaint suffers from each of these defects.

In considering a 12(b)(6) motion, the court may properly consider matters of public record without converting the motion to dismiss to a motion for summary judgment. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("a court may take judicial notice of matters of public record.").

ARGUMENT

I. Plaintiffs' Failure to Demonstrate Standing Deprives this Court of Jurisdiction.

Plaintiffs' Complaint should be dismissed for lack of standing. There are three elements of standing:

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant… Third, it must

> be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560–61 (citations and quotations omitted). And Plaintiffs must "clearly allege facts demonstrating each element" in their pleading. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Injury in fact requires that the injury be concrete, particularized, as well as actual or imminent. *Spokeo*, 136 S. Ct. at 1548. A concrete injury "must actually exist," that is be "real and not abstract." *Id*. Similarly, imminence requires that the injury have actually occurred or be certain to occur and not be merely hypothetical. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("threatened injury must be certainly impending to constitute injury in fact" and "allegations of possible future injury are not sufficient"). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (citation and quotations omitted); *see also Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 477 (1982) (The plaintiff must show "not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.").

Generalized grievance over the legislative process does not confer standing. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction … [w]ithout such limitations … the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the question."). Where, as here, a party seeks to overturn the valid policy choice of the political branches the court must decline jurisdiction because those policy choices are best entrusted to the legislature and executive branches. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (State legislatures enjoy broad latitude in balancing individual liberties and public health during pandemics); *see also* M.C.A. § 50-1-105 (expressly considering anti-discrimination interests are part of Montana's public health laws).

A. Plaintiff Montana Medical Association

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

Plaintiff Montana Medical Association's ("MMA") mere recital of the elements of associational standing, Compl. ¶ 13, does not suffice to confer standing. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient pleadings.). The Plaintiffs' statements that some MMA members are employed in various medical settings is similarly insufficient. Compl. ¶¶ 14–15. MMA must make some factual showing that specific members are harmed by HB 702. *See Summers*, 555 U.S. at 498–99 (The requirement of naming affected members may only be dispensed with "where all the members of the organization are affected by the

challenged activity." (emphasis in original)). *Summers*'s requirement that all organization members be affected by the action is especially pertinent in this case because the Plaintiffs seek to evade Montana HB 702 in order to terminate medical workers, including some who are presumably MMA members. *See* Compl. ¶¶ 18(e), 22(e).

Plaintiffs' remark that the "desired relief is consistent with the MMA mission" ignores that MMA must demonstrate that the desired relief will redress the complained-of injury. Compl. ¶ 13. MMA merely states it is injured—but not *how* it is injured or how its requested relief would redress its injuries. MMA's purely hypothetical injury to unnamed and unknown members cannot establish standing.

B. Plaintiff Five Valleys Urology and Western Montana Clinic

Plaintiffs cannot demonstrate injury because—presumably—they are currently practicing medicine in an ethical and effective manner. If the unsupported allegations in their Complaint were true, that could not be the case. Plaintiffs Five Valleys Urology, PLLC and Western Montana Clinic, PC, collectively "Clinics," complain of purely hypothetical injuries. *See* Compl. ¶ 18. The Clinics despair that HB 702 prohibits them from

practicing "ethical and effective medicine."[3] *Id*. The Clinics vague assertions fall short of a legal claim and they don't plead any facts as to how HB 702 prohibits the effective or ethical treatment of patients.

HB 702 went into effect on May 7, 2021 and has remained in effect for the previous 167 days; yet Plaintiffs do not argue that they have been providing ineffective and unethical medical care during that time.[4] If they can provide effective and ethical medical care now—while HB 702 is in effect—they cannot seriously contend that HB 702 prevents them (and likely will prevent them) from providing effective and ethical care going forward.

Plaintiff Clinics also fail to plead sufficient facts demonstrating injury. Clinics complain "unvaccinated medical workers" pose a disease transmission risk that vaccinated medical workers do not. Compl. ¶18(a)–(b). Such a sweeping statement would be easy to support if the

[3] Additionally, Clinics complain that HB 702 harms their credibility. Compl. ¶ 7(e). It is not the duty of the State to use its powers to confer credibility on the Plaintiffs.

[4] If Clinics are continuing to practice medicine in a setting that violates generally accepted standards of practice, then they are in violation of M.C.A. § 37-1-316(18). Given that the Clinics and PHS continue to treat patients, this must not be the case. This Court should treat their claimed injury for what it is, a policy disagreement, not a legal injury.

data supported it.[5] Yet Plaintiffs cite no medical authority and provide no elaboration to support these claims. The CDC concedes that both vaccinated and unvaccinated individuals can spread COVID-19,[6] making Plaintiffs' assertions in their Complaint wholly unsupported. And unless Plaintiffs are telling the Court that they are currently providing subpar healthcare services their claims cannot be valid. Plaintiffs do not state they employ unvaccinated medical workers or that any hypothetical unvaccinated medical workers have led to, or are certainly going lead to, an infectious disease outbreak. To the contrary, current law limits licensed medical workers from practicing "while suffering from a contagious or infectious disease." M.C.A. § 37-1-316(12). The Clinics further do not explain why their current COVID-19 practices such as patient screening, staff isolation, cleaning practices, as well as pre-appointment check-ups

[5] S.V. Subramanian & Akhil Kumar, Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States [published online ahead of print] Eur J Epidemiol, 2021, *available at* https://bit.ly/3jglRCV (last accessed October 21, 2021).

[6] CDC Science Brief: Covid-19 Vaccines and Vaccination (September 15, 2021) ("[M]ore data are needed to understand how viral shedding and transmission from fully vaccinated persons..."), *available at* https://bit.ly/2XyfumG (accessed October 21, 2021). CDC's statement is relevant because (1) it acknowledges some risk of vaccinated individuals transmitting COVID-19 meaning that Plaintiffs will likely need to continue current practices to mitigate transmission regardless of HB 702, *see infra* n.7, and (2) the scientific uncertainty surrounding transmission means that Plaintiffs' alleged injuries are likewise too speculative and hypothetical.

are insufficient.[7] Instead, the Clinics assert—without any further factual development—that HB 702 harms them. Their bare allegations are not enough. *See generally Iqbal*, 556 U.S. 662.

The litany of abstract, hypothetical scenarios does not substitute for well pleaded facts. *See, e.g.*, Compl. ¶ 18(f) ("*From time to time*, physicians who practice at the Clinics refer their patients to other OPPs or to Hospitals. Care for these patients *may* be jeopardized *if* the receiving institution has unvaccinated employees and/or is otherwise restrained in its ability to safely treat these patients." (emphases added)); *see also* Compl. ¶ 17 (Clinics "employ individuals who *may* have compromised immune systems" (emphasis added)). *Hypothetical injuries that may happen from time to time if an unidentified office theoretically employs unvaccinated workers who might transmit* pathogens or infectious diseases to patients and co-workers clearly fail to meet the requirements for standing. Such abstract thought experiments amount to legislative disagreements. They don't confer Article III standing.

[7] Plaintiff Five Valleys Urology "Coronavirus (COVID-19)" patient information available at https://bit.ly/3aRloSQ (accessed October 21, 2021).

C. Plaintiff Providence Health Services

Plaintiff Providence Health Services ("PHS"), echoes the same alleged injuries as the Clinics. *Compare* Compl. ¶ 18 *with* ¶ 22. For the same reasons stated above, PHS does not allege concrete injuries to any legally recognized right, nor does PHS plead sufficient facts to support any allegation of injury.

D. Plaintiffs Appleby Individuals

Plaintiffs Pat Appleby, Mark Carpenter, Lois Fitzpatrick, Joel Peden, Diana Jo Page, Wallace L. Page, and Cheyenne Smith (collectively, "Appleby individuals") claim—without supporting allegations—that they are harmed on the basis of their immunocompromised status and presence of unvaccinated individuals at "commercial and professional establishments." Compl. ¶ 25. The Appleby individuals also state they must avoid certain activities including, "meeting with people in crowded settings, engaging in close contact with other people, and engaging in even casual contact with a likely carrier of the COVID-19 virus or other infectious agent." Compl. ¶ 24. The Appleby individuals' source of harm is far too conjectural to support standing and cannot reasonably be traced to the implementation of HB 702.

The Appleby individuals fail to plead an injury attributable to HB 702. Indeed, the need for these Plaintiffs to avoid some activities and interactions preexisted HB 702. Both vaccinated and unvaccinated alike may carry and transmit infectious diseases such as COVID-19. *See, e.g.*, supra n.5 (Scientific studies indicate that both vaccinated and unvaccinated individuals spread COVID-19). And HB 702 does not affect who is a "likely carrier" of disease. Further, the same precautions that medical offices already undertake would need to continue to accommodate the Appleby individuals, regardless of whether medical facilities mandate employee vaccinations. Vaccination does not end the risk of COVID-19 transmission *by vaccinated individuals*. The risks the Appleby individuals complain of exist regardless of HB 702.

The Appleby individuals' alleged harm offers no more than hypotheticals and abstractions. *See* Compl. ¶ 25 ("They have to avoid commercial and professional establishments" that "fail to take steps to minimize the spread" of "common viruses and germs" and will have to avoid such establishments that "fail to take steps to minimize the spread of" "new pathogens.") Their assertions underscore that these plaintiffs have in the past mitigated and continue to mitigate risk of infectious

disease—including common viruses[8]—regardless of HB 702. Even this acknowledgement fails to state what steps would be sufficient to ameliorate their concerns, or why current procedures such as those by the Clinics are insufficient. *See, e.g.*, supra n.7 (detailing current COVID-19 procedures employed by Plaintiffs). Further, by stating they must avoid establishments that fail to take unspecified steps to mitigate the risk of currently unknown pathogens, these plaintiffs detach their Complaint from any reasonable connection to HB 702.

Plaintiffs Clinics and PHS would cause the injury they complain of if they are allowed to discriminate in violation of HB 702. The workforce shortage in medical offices will get increasingly worse if many employees quit or are terminated.[9] PHS already requested Montana National Guard assistance to alleviate its staff shortage.[10] Without sufficient staffing, medical facilities risk reducing their standard of care to

[8] Plaintiffs do not state what they mean by common viruses and germs. The risk of exposure to common germs cannot serve as the basis to undermine the State's interest in preventing discrimination.

[9] "Missouri Hospital CEO Issues Warning About Staffing Shortages Over Biden Vaccine Mandate," CLG News, *available at* https://bit.ly/3vonR0E (accessed October 21, 2021).

[10] Dennis Bragg, "National Guard to aid Missoula COVID-19 response," KPAX (September 21, 2021) *available at* https://bit.ly/3jqgQHY (accessed October 21, 2021).

patients. Self-inflicted staff shortages pose a real and substantial risk to medical facilities' ability to provide effective and ethical medical care to their patients.

In sum, the Plaintiffs, collectively, fail to plead any injury traceable to HB 702. And even if there was an injury, the path to get there is attenuated and shrouded in conjecture. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (Such theories of injury carry the Court "into the area of speculation and conjecture and beyond the bounds of [the Court's] jurisdiction."). This Court should decline to follow this path and instead apply the straightforward rule that Plaintiffs carry the burden of clearly articulating facts necessary to establish standing. Because Plaintiffs lack standing, their claims must be dismissed.

II. Plaintiffs Failed to State any Valid Claim

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face; that is, plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable. The court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Khoja*

v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1008 (9th Cir. 2018). Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678. A "court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. After removing such pleadings, the Court should dismiss the complaint when the remaining allegations do not give rise to a plausible claim for relief. *Id.*

Plaintiffs' complaint is nothing more than unfounded conclusions and should be dismissed.

A. HB 702 is not preempted by the ADA or the OSHA.

Plaintiffs' first four claims revolve around a purported inability to comply with the Americans with Disabilities Act (ADA) and Occupational Health and Safety Act (OSHA) in the face of HB 702. *See* Compl. ¶¶ 36, 44, 50, 55.[11]

Preemption of state law is strongly disfavored. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (Courts "start with the

[11] Plaintiffs concede HB 702 is not expressly preempted by federal law or that Congress intended to occupy the field of antidiscrimination law. Thus, they raise only conflict preemption claims.

assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress."). Conflict preemption requires that: (1) state law conflicts with federal to make compliance with both an impossibility, or (2) that the state law poses an obstacle to the full purposes and objectives of federal law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements."); *Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011) (Kennedy, J. concurring) (Obstacle preemption is a "high threshold" that does not justify a "freewheeling judicial inquiry" into whether state laws are "in tension" with federal objectives, as such a standard would undermine the principle that "it is Congress rather than the courts that preempts state law."). The lodestar of preemption inquiry is that Congress must have clearly and unambiguously preempted the state law. *See Rice*, 331 U.S. at 230.

1. Plaintiffs Can and Do Comply with Both the ADA and HB 702

Under Claims 1 and 2, Plaintiffs have not and cannot allege that it is impossible to comply with both HB 702 and the ADA. Nor do they offer

any facts as to why their current practices—while both HB 702 and the ADA are in effect—violate the ADA.

Plaintiffs make no attempt to show that the reasonable accommodations mandated by the ADA require them to fire employees. Instead, Plaintiffs broadly assert that HB 702 prevents Clinics and PHS "from taking the steps necessary to accommodate immune system compromised applicants or employees." Compl. ¶¶ 33–34. Absent from this perfunctory conclusion is any discussion of current reasonable accommodations, allegations explaining why HB 702 § 1(3)(b) does not allow for compliance with the ADA,[12] or indications that they have faced ADA enforcement actions on these grounds. Because they are presumably complying *right now* and have been complying since July 1, their unsupported assertion that HB 702 makes ADA compliance impossible cannot state a valid claim.

Similarly, Plaintiffs fail to allege any facts demonstrating that they are excluding or denying service to immunocompromised patients due to

[12] HB 702 § 1(3)(b) allows for health care facilities to inquire into their employees' vaccination status and implement "reasonable accommodation measures for employees, patients, visitors, and other persons who are not vaccinated or not immune to protect the safety and health of employees, patients, visitors, and other persons from communicable diseases."

HB 702. The very nature of the Appleby individuals' immunocompromised status means they cannot utilize health care in the same way other patients do because they cannot be exposed to "common viruses or germs" or "crowded settings," and they cannot "engage in close contact," or "casual contact" with a likely carrier of infectious disease. *See* Compl. ¶¶ 24–25. This means that regardless of HB 702, additional steps must be taken to care for these patients. And HB 702 § 1(3)(b) already allows for health care facilities to accommodate these patients. Unless Plaintiffs are complaining that they are currently—right now—violating the ADA, then they can't plausibly claim that HB 702 and the ADA are incompatible.

Plaintiffs' other assertions likewise delve into the hypothetical. *See, e.g.*, Compl. ¶ 32 ("*If* applicants or employees … ") (emphasis added); ¶ 35 ("OPPs and Hospitals that adhere to Montana HB 702 § 1 risk violating the ADA § 12112(b)(5)(A)."); *id*. ("HB 702 discourages immune-compromised workers … from accepting *potential* employment.") (emphasis added). These indefinite words—'if,' 'risk,' 'discourages,' and 'potential'—lack the concreteness necessary to show that Plaintiffs' compliance with both HB 702 and the ADA is impossible.

2. HB 702 does not Frustrate any Clear and Unambiguous Objective of the ADA.

Plaintiffs state that HB 702 "undercuts the purposes of the ADA." Compl. ¶ 36. They fail to articulate those purposes or point to where Congress clearly and unambiguously did so. Plaintiffs' vague sentence fragment tacked onto the end of a claim, with no further factual development, is insufficient to preempt a duly enacted state law. It's also a fair bet that Congress didn't clearly intend the ADA—a nondiscrimination statute—to require inverse discrimination against medical workers.

3. Plaintiffs Can and Do Comply with Both the OSHA and HB 702.

Neither OSHA, nor its regulations, conflict with the anti-discrimination provisions of HB 702. Plaintiffs' claims—such as they are—lack merit and factual support.

To start, Plaintiffs plead no facts, nor any allegations, that it is impossible to comply with both the Act and HB 702. They instead hedge that HB 702 may "at least impede[] [them] from complying" with OSHA. *See* Compl. ¶ 48. To state the obvious, an "impediment" is not an impossibility; Plaintiffs' language merely reaffirms that they are currently complying with OSHA. And Plaintiffs' statement that HB 702 "impedes

them from identifying or controlling the placement of employees based on vaccination status," Compl. ¶ 48, is clearly and unequivocally contradicted by the text of the law itself. *See* HB 702 § 1(3)(b) (Health care facilities may "ask[] an employee to volunteer the employee's vaccination or immunization … [and] [a] health care facility may consider an employee to be nonvaccinated or nonimmune if the employee declines to provide the employee's vaccination or immunization status."). Perhaps most importantly, as discussed below, the OSHA regulation cited by Plaintiffs makes clear that vaccination—specifically the COVID-19 vaccination—is not required for OSHA compliance. Plaintiffs grossly misread the statute to manufacture a conflict that doesn't exist.

Plaintiffs' claim that they cannot comply with 29 C.F.R. § 1910.502 and HB 702 is belied by the text of the regulation, itself. Plaintiffs read only part of the rule, § 1910.502(c)(1) and (c)(7), which requires the development of plans and policies to reduce COVID-19 transmission rates, but they ignore the remainder of the rule which set the boundaries of those plans and policies. Compl. ¶ 53; *see* 29 C.F.R. § 1910.502(c)(7)(i) (The COVID-19 plan must "minimize the risk of transmission of COVID-19 … as required by paragraphs (d) through (n)"). Regarding vaccination,

the rule states: "The employer must support COVID-19 vaccination for each employee by providing reasonable time and paid leave (e.g., paid sick leave, administrative leave) to each employee for vaccination and any side effects experienced following vaccination." 29 C.F.R. § 1910.502(m). HB 702 § 1(3)(a) states, "A person, governmental entity, or an employer does not unlawfully discriminate under this section if they recommend that an employee receive a vaccine." These two provisions harmonize; they don't conflict. Indeed, Plaintiffs' regulatory misreading is further emphasized by the fact that OSHA doesn't require full work-force vaccinations: the regulation exempts healthcare facilities "where all employees are fully vaccinated." *See* 29 C.F.R. § 1910.502(a)(2)(iv)–(v). If 29 C.F.R. § 1910.502 mandated vaccinations, there would be no reason for the exemption in § 1910.502(a)(2)(iv)–(v), and the regulation would simply state that vaccines are mandatory.

Even if some Plaintiffs might not qualify for this exemption based on their employees' autonomous medical decisions, that fact merely requires them to comply with 29 C.F.R. § 1910.502(m). It doesn't make compliance impossible.

Finally, Plaintiffs do not really plead that HB 702 prevents them from complying 29 C.F.R. § 1910.502, only that it "at least impedes" compliance. Compl. ¶ 55. They fail to explain why or how.

Just like their attempts with the ADA, Plaintiffs fail to outline their current practices, explain why they are insufficient, or identify any pending or imminent noncompliance enforcement actions they face. Such deficiencies in the pleadings are fatal.

4. HB 702 does not Frustrate any of OSHA's Clear and Unambiguous Objectives.

Plaintiffs add a single sentence alleging HB 702 undercuts OSHA's purpose. Compl. ¶ 50. They neither articulate that purpose nor explain how HB 702 undercuts it. The Court doesn't have to do that work for them. And indeed, it shouldn't. *Cf. Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 (1984) (allowing dismissal without any requirement that the district court rehabilitate deficient pleadings).

B. Montana's constitutional environmental protections do not apply to anti-discrimination laws such as HB 702

Plaintiffs baselessly assert their rights to a clean and healthful environment under the Montana Constitution, Article II, section 3 and Article IX, section 1, are violated because they cannot discriminate

against Montanans on the basis of vaccination status. Compl. ¶¶ 56–66. These claims should be dismissed as they lack any foundation in Montana law and are entirely conclusory and unsupported in the Complaint.

The Montana Constitution guarantees the right to a clean and healthful environment and requires the Legislature to maintain and improve the environment. *See* Mont. Const. art. II, § 3, art. IX, § 1. These two provisions, collectively the clean and healthful provisions, operate in tandem. *See Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 988 P.2d 1236, 1249 (Mont. 1999).

These provisions apply to the natural environment: air, water, and land pollution, as well as resource depletion, but not public healthcare and nondiscrimination. *See id*. at 1246–48 (discussing the intentions of the 1972 Constitutional Convention, specifically, the intentions of the Natural Resources Committee which drafted Article IX); *see also* MONT. CONST. art. IX, § 1(3) ("The legislature shall provide … adequate remedies to prevent unreasonable depletion and degradation of *natural resources*." (emphasis added)). The Legislature has met its obligations under the clean and healthful provisions through environmental statutes such as the Montana Environmental Procedure Act ("MEPA"). *See* Title

75, chapter one, M.C.A. "The Montana Constitution's framers likely saw MEPA as an essential element of Legislative efforts to meet the government's newly-enshrined constitutional obligations." *Park Cty. Envtl. Council v. Mont. Dep't of Env't Quality*, 477 P.3d 288, 305–06 (Mont. 2020). This is to say, the framers of the 1972 Constitution were concerned about preserving and improving the conditions of the natural environment and required the Legislature to take actions to address those concerns, but there is no authority from the text of the Montana Constitution, intent of the convention delegations, or Montana caselaw to apply the clean and healthful provisions beyond harms to the natural environment.

Plaintiffs cite no authority for the assertion that the clean and healthful provisions apply to infectious diseases or put an affirmative burden on the State to eliminate natural pathogens from the environment. *See* Compl. ¶¶ 56–66. And Plaintiffs' proposed course of action would not eliminate pathogens anyway because vaccinated people can carry the diseases. *See, e.g.*, supra, n.5 (studies point to vaccinated and unvaccinated individuals alike spreading COVID-19). The law simply does not support Plaintiffs' reading of these provisions.

Even if the law recognized Plaintiffs' claim, they have not pleaded any authority or facts demonstrating that an anti-discrimination law implicates the provisions. *See* Compl. ¶¶ 56–66.

The Plaintiffs have not pleaded any facts at all supporting their clean and healthful claims. They offer only unsupported legal conclusions. *See* Compl. ¶ 58 ("Montana HB 702 § 1 impedes OPPs and Hospitals…from maintaining a healthful environment"); ¶ 59 ("Montana HB 702 § 1 prevents persons with compromised immune systems, such as the Patients, from enjoying a healthy environment and securing their right to safe and healthy medical care"); ¶ 63 ("Montana HB 702 § 1 violates the legislature's obligation to maintain and improve a healthy environment by facilitating and even mandating the employment in medical offices of persons who are more likely to spread disease."); ¶ 64 ("Montana HB 702 § 1 impedes OPPs and Hospitals … from maintaining a healthful environment"); ¶ 65 ("Montana HB 702 § 1 impairs the ability of persons with compromised immune systems … from enjoying a healthy

environment.").[13] Courts should reject "naked assertions" like these. *See generally Iqbal*, 556 U.S. 662.

Public health laws derive from the State's police power, not from Montana's clean and healthful environment provisions. *See In re Sonsteng*, 573 P.2d 1149, 1153 (Mont. 1977) ("[L]aws and regulations for the protection of public health, safety, welfare and morals" derive from the state's plenary police power."); *see also Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905) (Vaccine mandates derive from the state's police power); *accord Zucht v. King*, 260 U.S. 174, 176 (1922). Plaintiffs' reading would elevate the clean and healthful provisions above the State's plenary police powers and dictate that the State exercise its power to regulate public health and safety in the way they demand. This undercuts more than a century of federal precedent and undermines the flexibility afforded legislators to balance individual rights against public health needs. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 ("Our Constitution principally entrusts the safety and the health of the

[13] The bare assertion made in paragraph 65 suffers from a further defect in that while Article II, § 3 and Article IX, § 1 work together; nothing in Article IX confers a right to enjoy a healthy environment, instead Article IX imposes a duty on the Legislature to maintain and improve the natural environment.

people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." (internal citations and quotations omitted)).

Montana law does not recognize Claims Five and Six. The clean and healthful provisions apply to the natural environment—not pro-discrimination claims such as those raised by the Plaintiffs. Even if these were recognized legal theories, Plaintiffs bare legal assertions without any factual development are insufficient to sustain the claims. Plaintiffs must do more than proffer "naked assertions," but because they do not, the Court should dismiss these claims, too.

C. Anti-discrimination statutes such as HB 702 do not violate Montana's Equal Protection Clause

Plaintiffs' Montana Equal Protection Clause argument does not state a claim, nor does it support any claim with sufficient facts. Compl. ¶¶ 67–74.

"The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same." *Powell v. State Comp. Ins. Fund*, 15 P.3d 877, 883 (Mont. 2000). A "statute does not violate the right to equal

protection simply because it benefits a particular class." *Gazelka v. St. Peter's Hosp.*, 420 P.3d 528, 535 (Mont. 2018). Plaintiffs must make some showing, beyond a bare assertion, that the chosen groups are similarly situated. *Cf. Vision Net, Inc. v. State*, 447 P.3d 1034, 1038 (Mont. 2019). Groups are similarly situated if "they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Id.*

Plaintiffs do not even attempt to make out the elements of an equal protection claim, much less support the elements with sufficient facts. The Clinics and PHS don't proffer sufficient facts to establish that they are equivalent in "all other respects" to nursing homes, long term care facilities, or assisted living facilities. *See* Compl. ¶ 70 (HB 702 distinguishes between "OPPs and Hospitals and different types of licensed facilities that treat the same types of patients" and distinguishes between "clinics in which physicians treat patients and other licensed health care facilities."). Plaintiffs' own words acknowledge Clinics and PHS are 'different' than nursing homes, long term care facilities, and assisted living facilities. This is because they are different—they operate under different regulations and are licensed separately and differently. *See, e.g.*, M.C.A. § 50-5-101(7), (26), (31), (37), (56) (defining assisted living

facilities, long term care facilities, nursing homes, physician offices, and hospitals). Plaintiffs have not pleaded any facts showing how they are equivalent in all respects to other health care facilities in the face of the obvious proposition that regardless of HB 702 Montana regulates different kinds of facilities differently. Because Plaintiffs fail to plead sufficient facts to establish they are similarly situated to assisted living facilities, long term care facilities, and nursing homes "it is not necessary … to analyze the challenge further." *Vision Net*, 447 P.3d at 1038.

Plaintiffs' unsupported legal claims that Montana has no "state interest or rational basis," Compl. ¶¶ 72–73, supporting HB 702 ignores that states have a compelling interest in protecting groups from discrimination. *See Hurley*, 515 U.S. at 572. The Clinics and PHS validate the State's interest by repeatedly expressing their wish to fire individuals based on vaccination status. *See, e.g.*, Compl. ¶¶ 18, 22.

The Plaintiffs also misstate the effect of HB 702 as it relates to licensed nursing homes. *See* Compl. ¶ 71 ("immunocompromised patients who receive care in licensed nursing home facilities are entitled to receive treatment only from vaccinated providers"). HB 702 contains no such entitlement. To the extent that federal rules may allow for licensed

nursing home facilities to require vaccinations, those federal rules provide the State's basis for distinguishing licensed nursing homes from other medical facilities. *See* Veto Message at 2 ("[M]y amendment would ensure that provisions of HB 702 do not put licensed nursing homes, long-term care facilities, or assisted living facilities in violation of regulations or guidance issued by the U.S. Centers for Medicare and Medicaid Services.").

The Appleby individuals draw an even more muddled claim, again without factual support, that they are "disparately and adversely affected" by HB 702 as compared to some undefined group of "similarly situated Montana citizens." Compl. ¶ 71. It is unclear under what theory Plaintiffs claim discrimination because they completely fail to plead the elements of a claim and support those elements with sufficient facts. As with the other Plaintiffs, the Appleby individuals fail to establish they are equivalent to the "similarly situated Montana citizens," Compl. ¶ 71, that they do not identify or attempt to identify as a class. As with their incorrect, conclusory statement that there "is no state interest or rational basis," Compl. ¶ 72, for HB 702's anti-discrimination provisions, Plaintiffs are only offering legal conclusions devoid of a factual foundation.

Such pleadings are wholly deficient, and this Court should dismiss their Seventh Claim.

D. Anti-discrimination statutes such as HB 702 do not violate the Fourteenth Amendment's Equal Protection Clause

Plaintiffs' federal equal protection claim suffers from the same defects as their Montana equal protection claim. They offer only the same unsupported conclusions. *See, e.g.*, Compl. ¶ 78 (HB 702 "draws an unreasonable and baseless distinction between OPPs and Hospitals and different types of health care facilities."). Plaintiffs again fail to identify similarly situated comparator classes. *See generally Ala. Dep't of Revenue v. CSX Transp., Inc.*, 575 U.S. 21, 30 (2015) ("[P]icking a class is easy, but it is not easy to establish that the selected class is similarly situated"), Plaintiffs fail to provide factual evidence that they are, in fact, being discriminated against. Plaintiffs do not even establish under what legal theory they seek to bring this claim. For example, while Plaintiffs claim they are "disparately and adversely" impacted by HB 702, the Supreme Court has expressly rejected that the Fourteenth Amendment allows for disparate impact theories absent a statutory right to bring that kind of claim. *See Washington v. Davis*, 426 U.S. 229, 248 (1976) (The

Fourteenth Amendment, as compared to statutory causes of action, does not provide for disparate impact theories.).

CONCLUSION

Plaintiffs' Complaint is a morass of factually unsupported conclusory statements that requires the Court to delve deep into inference, conjecture, and hypotheticals and woefully short of what Rule 8 requires. For the reasons set forth above, this Court should grant the State's motion to dismiss.

DATED this 21st day of October, 2021.

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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 6,469 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 hereby 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: October 21, 2021

/s/ Brent Mead
BRENT MEAD