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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.	CV-21-108-M-DWM **DEFENDANTS' NOTICE OF OBJECTION**

The Defendants ("State") submit this notice to object to any decision by this Court to consolidate the March 3, 2022 preliminary injunction hearing with a trial on the merits of Claim VIII in Plaintiffs' Second Amended Complaint (ECF 38).[1] Consolidating tomorrow's hearing with a trial on the merits of Claim VIII would grievously prejudice the State for the reasons set forth below.

[1] The State will refer to both the Plaintiffs and Plaintiff-Intervenors as "Plaintiffs." Claim VIII and the attendant requested relief in Plaintiff-Intervenors' First Amended Complaint (ECF 38) is functionally identical to that in Plaintiffs' Second Amended Complaint.

First, the Court entered its notice 24 hours and nine minutes before the preliminary injunction hearing, scheduled for March 3, 2022, at 2:00pm. ECF 49. The State has forborne this Court's other accelerated calendaring decisions. But this proposed action—one day's notice to prepare for a trial on the merits of a claim far broader than the scope of the preliminary injunction request to which the State was prepared to respond—would affirmatively prejudice the State. That is especially true for the State at this time. As the Court knows, the State's primary attorney on this matter has a bench trial in another case *before this Court* on March 4, 2022. The Attorney General's office has seven attorneys who work on civil matters, all with very full caseloads and calendars. But even if the State's attorneys had wide-open schedules, preparing for a bench trial overnight would be a prejudicial ask.

Second, Claim VIII alleges that at least three different CMS regulations—42 C.F.R. §§ 482.41, 482.42, and 482.42(g)—each preempt MCA § 49-2-312. 2d.Am.Com. ¶ 86–88. Yet for purposes of preemption, Plaintiffs' preliminary injunction brief contains only argument addressing *one* of those three regulations—§ 482.42(g) ("CMS Vaccine Mandate"). The State believes neither §§ 482.41 nor 482.42 preempt MCA § 49-2-312, but

it hasn't prepared briefing or argument to that effect because Plaintiffs didn't seek preliminary injunctive relief based on those regulations. ECF 43. Preemption on those bases would require distinct arguments neither party has briefed.

Third, the State believes there are serious questions as to the validity of the CMS Vaccine Mandate which, if proven, would eliminate its ability to preempt MCA § 49-2-312. These questions include constitutional infirmities that formed grounds upon which the State obtained a preliminary injunction in the Western District of Louisiana. *See Louisiana, et al. v. Becerra, et al.*, No. 3:21-CV-03970, 2021 U.S. Dist. LEXIS 229949, at *37–46 (W.D. La. Nov. 30, 2021). Importantly, those constitutional grounds were not addressed by the Supreme Court decision on January 7 to stay that preliminary injunction. *See Biden v. Missouri*, 142 S. Ct. 647 (2022).

But the State has not prepared those arguments for its imminent response to Plaintiffs' preliminary injunction motion, because it was unnecessary to do so. As the Court knows, movants must satisfy all four *Winter* factors to obtain a preliminary injunction. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Because Plaintiffs have not satisfied the last three

Winter factors, however, the State has diligently focused its argument on those particular deficiencies. Now, of course, the Court has indicated it may consolidate the preliminary injunction hearing with a trial on the merits of Claim VIII, which includes a request for a declaratory judgment that *three different CMS regulations* preempt MCA § 49-2-312. As stated above, no party has briefed whether §§ 482.41 and 482.42 preempt MCA § 49-2-312. Receiving notice one day before the preliminary injunction hearing that the Court may enter final judgment on those unbriefed issues is deeply prejudicial to the State. And on the CMS Vaccine Mandate, receiving notice one day before the preliminary injunction hearing that the Court may enter final judgment on that issue—which the State has neither briefed nor had opportunity to develop adequate facts on—is also deeply prejudicial to the State.

Fourth, this Court could not permanently enjoin MCA § 49-2-312 simply by resolving the "purely legal" question of preemption. Plaintiffs must also prove that they will suffer irreparable harm and that a permanent injunction won't disserve the public interest. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010). Those are both fact-intensive inquires. At this point, the State doesn't believe Plaintiffs have

mustered facts and arguments sufficient to obtain even a preliminary injunction. However, the State has the right to develop additional facts regarding the public interest and the Plaintiffs' lack of irreparable harm before proceeding to the permanent injunction stage. In this way too, therefore, the State would be prejudiced by consolidating the preliminary injunction hearing with a trial on the merits of Claim VIII.

Finally, the State hasn't even responded in writing to Plaintiffs' preliminary injunction motion. The State plans to file its response tonight (it's due today per the rules). Thus, while "there do not seem to be any disputes of material facts concerning the question of preemption," the State's forthcoming filing will likely alter that perception.

Reserving the right to object to the Court's possible consolidation on other grounds, the State respectfully requests that the Court not consolidate the preliminary injunction with a trial on the merits.

DATED this 2nd day of March, 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: March 2, 2022 */s/ David M.S. Dewhirst*
DAVID DEWHIRST