Justin D. Kingsolver*
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: (202) 624-2500
JKingsolver@crowell.com

Derick D. Dailey*
CROWELL & MORING LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
Telephone: (212) 224-4000
DDailey@crowell.com

Robert Farris-Olsen
MORRISON SHERWOOD WILSON DEOLA PLLP
401 North Last Chance Gulch
P.O. Box 557
Helena, MT 59624
Telephone: (406) 442-3261
rfolsen@mswdlaw.com

***** *Pro Hac Vice* Application In Process

IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

STATE OF MONTANA, *et. al.*,

Defendants,

v.

WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH,

Third-Party Defendant.

Case No. ADV-25-2024-0000261-CR

Hon. Mike Menahan

THIRD-PARTY DEFENDANT WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH'S BRIEF IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

This case is a transparent attempt to force a non-profit organization to incur hundreds of thousands of dollars in legal fees to defend against baseless, bizarre, and legally-unsupportable claims. It is a thinly-veiled effort to chill speech and to extract an economic toll from an organization the Attorney General's political party wishes didn't exist. The Attorney General's

Third-Party Complaint ("TPC"), which flies in the face of well-settled case law, should be dismissed under Montana Rule of Civil Procedure 12(b)(2) and 12(b)(6) for lack of jurisdiction and its failure to meet even the most basic pleading requirements to state a claim upon which relief can be granted. Moreover, the State's indemnification claim infringes the First Amendment speech and association rights of the World Professional Association for Transgender Health ("WPATH"), an international 501(c)(3) non-profit organization that, among other things, maintains the Standards of Care for the Health of Transgender and Gender Diverse People ("Standards of Care"), so failure to dismiss this case would set a dangerous and unconstitutional precedent. For those reasons, and the reasons described herein, the law requires the Attorney General's ludicrous third-party "indemnification" complaint to be dismissed.

WPATH's Standards of Care "were developed by experts in the field, including clinicians and researchers, who used systematic processes for collecting and reviewing scientific evidence." *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 889 (E.D. Ark. 2023). WPATH's Standards of Care "are widely followed by well-trained clinicians," "are used by insurers," and "have been endorsed by the United States Department of Health and Human Services." *Doe v. Ladapo*, No. 4:23CV114-RH-MAF, 2024 WL 2947123, at *5 (N.D. Fla. June 11, 2024).

Despite the science, dozens of state legislatures (including Montana's) have targeted transgender people in recent years. This legislation spawned substantial litigation as legal services organizations representing the rights of those targeted by these bills have challenged them in court. For LGBTQ+ advocates, that "anti-LGBTQ-state-law-then-litigation" story is a familiar one. What is unfamiliar are the dangerous and unlawful tactics employed here by the Attorney General.

For the first time in the recent history of the LGBTQ+ litigation movement, the Montana Attorney General has chosen to use his prosecutorial discretion to punish his ideological opponent. His complaint purports to ask the Court to order WPATH to indemnify him for costs he incurred

litigating a case that has nothing to do with WPATH and in which WPATH is not a party. In reality, the Attorney General's third-party complaint has nothing to do with indemnity.

The Attorney General claims WPATH should pay the State's litigation costs in a suit the ACLU brought to challenge state laws about gender-marker changes on government documents. The skeletal third-party complaint does not and cannot actually plead causation. Indeed, all the Attorney General pleads is the conclusory allegation that "WPATH has created the factual basis for the suit" against the State by the plaintiffs in the underlying litigation. *See* TPC ¶ 21. But the Attorney General appears to be suggesting that WPATH invented the concept of "gender dysphoria," and that but-for the scientific consensus that has evolved around gender dysphoria and the treatments for it, the State would not have needed to enact laws on gender-marker changes and thus not bear any litigation costs in suits challenging those laws. To do so, he offensively alleges that WPATH "made misrepresentations to Montana medical providers" about the legitimacy of gender dysphoria and the medical treatments for it, despite the scientific community's consensus around it. While the Attorney General may wish transgender and gender-diverse people (and the healthcare they need) did not exist, his erasure efforts cannot – and will not – succeed.

But the (de)merits of the Attorney General's complaint are an issue for another day. That is because his third-party complaint should be dismissed under Montana Rule of Civil Procedure 12(b)(2) and 12(b)(6) for lack of jurisdiction and its complete failure to state a claim upon which relief can be granted.

II. BACKGROUND

A. The Underlying Litigation

On April 30, 2021, Montana Governor Greg Gianforte signed Senate Bill 280 ("SB 280") into law. It prohibits anyone from changing their sex designation on their birth certificate without first presenting a court order showing that a surgical procedure changed that person's sex. A year

later, a state court enjoined SB 280's enforcement and ordered the State to reinstate less restrictive pre-SB 280 procedures for processing applications to change sex designations on Montanans' birth certificates. But while the injunction was in place, the State's Department of Public Health and Human Services ("DPHHS") issued an emergency rule, and later a permanent rule, implementing a total ban on changes to sex designations on birth certificates. *See* Mont. Admin. R. 37.8.311(5) (the "2022 Rule"). On June 26, 2023, a court permanently enjoined the enforcement of SB 280 and found DPHHS in contempt for defying the court's preliminary injunction order.

Based on the 2022 Rule, in February 2024, DPHHS announced it would only amend sex designations on birth certificates if the sex identified on the applicant's birth certificate was a result of a scriveners' error, incorrect data entry, or if the sex was misidentified on the original certification. DPHSS declared it would not amend birth certificates based on "gender transition, gender identity, or change of gender." *See* Mont. Admin. Reg. Notice 37-1002, No. 11 (Jun. 10, 2022). DPHHS announced that its amendment process would be subject to provisions in Senate Bill 458 ("SB 458"), signed into law in May 2023, which provides:

> In human beings there are exactly two sexes, male and female, with two corresponding types of gametes. The sexes are determined by the biological and genetic indication of male and female without regard to an individuals' psychological, behavioral, social, or chosen or subjective experience of gender.

Around the same time, the Motor Vehicle Division ("MVD"), via the Montana Department of Justice, adopted a new policy to only issue an amended driver's license with a sex designation reflecting a person's gender identity if the person provided an amended birth certificate. Such an amended birth certificate was made impossible by the 2022 Rule.

On April 18, 2024, Plaintiffs in the underlying litigation filed a class action in Montana state court seeking to block enforcement of the 2022 Rule, the new MVD policy, and SB 458 as unconstitutional. *See Kalarchik, et al., v. State of Montana, et al*., Case No. DV-25-2024-

0000261-CR (Lewis & Clark Cnty. Dist. Ct. Apr. 18, 2024) (hereinafter "Underlying Litigation").

B. The Third-Party Complaint

On June 12, 2024, Defendants in the Underlying Litigation (hereinafter "the State") filed an Answer to the Plaintiffs' complaint. Beyond its Answer, the State filed the instant TPC against WPATH. Through its TPC, the State raises a novel (and preposterous) theory that WPATH should indemnify the State for its defense in the Underlying Litigation, including for any "potential liability" to the plaintiffs in the Underlying Litigation "in the form of reimbursement of their attorneys' fees and costs" under the private attorney general doctrine. *See* TPC ¶¶ 17, 20.

III. LEGAL STANDARD

Montana Rule of Civil Procedure 12(b)(2) requires a defendant to be dismissed if the plaintiff does not establish personal jurisdiction over that defendant. Plaintiffs bear the burden to establish personal jurisdiction over non-resident defendants. *Buckles by & through Buckles v. Cont'l Res., Inc.*, 2017 MT 235, ¶ 11, 388 Mont. 517, 520, 402 P.3d 1213, 1216.

Montana Rule of Civil Procedure 12(b)(6) mandates dismissal of a complaint if the plaintiff "fail[s] to state a claim upon which relief can be granted." The plaintiff carries the burden of adequately pleading a cause of action. *See Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 12, 155 P.3d 1247, 1256. A plaintiff fails to meet this burden if it "either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under the claim." *In re Estate of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 251, 465 P.3d 1165, 1167. The complaint must state more than facts that "would breed only a suspicion" of entitlement to relief. *Lundeen v. Lake Cnty.*, 2024 MT 120, ¶ 11, 416 Mont. 539, 544 (quoting *Jones*, ¶ 42). "Whether a complaint states a cognizable

claim for relief is a question of substantive law on the merits." *Id*. "Dismissal is proper under 12(b)(6) if the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim." *Id.* ¶ 11 (quoting *Puryer v. HSBC Bank USA, N.A.*, 2018 MT 124, ¶ 10, 391 Mont. 361, 366, 419 P.3d 105, 109); *see also Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 309, 32 P.3d 1250, 1252. "When considering such a motion, the District Court must consider only the sufficiency of matters raised in the complaint. It must not go beyond the four corners of the complaint, nor may it engage in any fact finding." *Irving v. Sch. Dist. No. 1-1A, Valley Cnty.*, 248 Mont. 460, 464, 813 P.2d 417, 419 (1991) (*quoting Nordlund v. School Distr. No. 14*, 227 Mont. 402, 738 P.2d 1299 (1987)).

IV. ARGUMENT

A. The State Cannot Meet Its Burden on Personal Jurisdiction.

The TPC must be dismissed pursuant to Montana Rule 12(b)(2) because the State cannot meet its burden to show that this Court has personal jurisdiction over WPATH. *See Bunch v. Lancair Int'l, Inc*., No. DV-05-674, 2006 WL 2423267, at *16 (Mont. Dist. July 25, 2006) (explaining "the burden of establishing jurisdiction rests with the Plaintiffs"). In conducting this analysis, the court first determines whether personal jurisdiction (either general or specific) exists pursuant to Rule 4(b)(1) (*Tackett v. Duncan*, 2014 MT 253, ¶ 22, 376 Mont. 348, 354, 334 P.3d 920, 926 (citation omitted)); then, if personal jurisdiction exists, the court applies constitutional due process principles (*id.*), which would require nonresident WPATH to have "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* ¶ 17 (quoting *Walden v. Fiore*, 571 U.S. 277, 282 (2014)). There is no personal jurisdiction in Montana over WPATH, either general or specific, and WPATH has no minimum contacts.

1. No General Personal Jurisdiction Exists Over WPATH.

To be subjected to general personal jurisdiction in Montana courts, a person must be "found" within the state of Montana. *Milky Whey, Inc. v. Dairy Partners, LLC,* 2015 MT 18, ¶ 18, 378 Mont. 75, 80, 342 P.3d 13, 17. "To be 'found' within Montana for general jurisdiction purposes, 'it is necessary that the defendants' activities are 'substantial' or 'systematic and continuous.'" *Id*. at 81 (quoting *Edsall Constr. Co. v. Robinson,* 246 Mont. 378, 382, 804 P.2d 1039, 1042 (Mont. 1991)); *see also Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) ("With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'" (citation omitted)).

The general personal jurisdiction inquiry is simple: WPATH is incorporated in Texas and headquartered in Illinois, not Montana.[1] Moreover, as detailed below, WPATH is not physically present in Montana, nor does the TPC allege it has ever been. Aside from thirteen Montanans being some of WPATH's thousands of nationwide members, WPATH has no connection *at all* to Montana. There is no general personal jurisdiction over WPATH.

2. No Specific Personal Jurisdiction Exists Over WPATH.

There is also no specific jurisdiction over WPATH. A Montana court will not exercise specific personal jurisdiction over an out-of-state defendant unless: (1) "the nonresident defendant purposefully availed itself of the privilege of conducting activities in Montana, thereby invoking Montana's laws"; **and** (2) "the plaintiff's claim arises out of or relates to the defendant's forum-related activities"; **and** (3) "the exercise of personal jurisdiction is reasonable." *Groo v. Montana Eleventh Jud. Dist. Ct.*, 2023 MT 193, ¶ 42, 413 Mont. 415, 428, 537 P.3d 111, 121, *cert. denied sub nom. Groo v. Eddy*, 144 S. Ct. 1062 (2024) (quotation

[1] WPATH is incorporated in Texas and headquartered in Illinois. Texas is not Montana, no general jurisdiction exists.

omitted). This analysis focuses on the "'relationship among the [third-party] defendant, the forum, and the litigation.'" *Tackett*, ¶ 19 (quoting *Daimler*, 571 U.S. at 133).

The Complaint makes no allegations sufficient to establish any, much less all three personal jurisdictional requirements. The State's scant jurisdictional allegations are that WPATH allows Montanans (like citizens of every other state) to become WPATH members or obtain a WPATH certification, that WPATH "contracts with" Montanans to provide gender-affirming services and materials to Montana residents, and that WPATH has "made misrepresentations" (at undisclosed times, in undisclosed places, and via undisclosed means) to Montanan medical providers, patients, and parents. *See* TPC ¶¶ 4–6; 15. Putting the falseness of these allegations aside for now given the procedural posture, none of them can warrant the exercise of jurisdiction.

i. WPATH is Not Subject to Personal Jurisdiction Merely Because Some of Its Members Live in Montana.

WPATH is a global 501(c)(3) non-profit professional and educational organization that promotes evidence-based care, education, research, public policy and respect in transgender health. Under well-settled law, the State's claim that WPATH "transacts business in Montana" because there are "thirteen members of WPATH who are medical providers within Montana" (TPC ¶ 4) simply does not justify the exercise of jurisdiction.

Courts consistently hold that national organizations are not subject to personal jurisdiction simply because a few of their members reside in a specific state. *See O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1200 (N.D. Cal. 2022) ("National organizations are not subject to jurisdiction in every state where their members live."); *Farrell v. United States Olympic & Paralympic Comm.*, 567 F. Supp. 3d 378, 385 (N.D.N.Y. 2021) (holding that the district court did not have jurisdiction over national nonprofit organization even though the organization maintained dues-paying members and sponsored events in New York); *Mehr v. Fed'n Internationale de Football Ass'n*, 115 F. Supp. 3d 1035, 1052 (N.D. Cal. 2015) (granting motion

to dismiss for lack of personal jurisdiction despite the organization having California members); *see also Friends of Animals, Inc. v. Am. Veterinary Med. Ass'n*, 310 F. Supp. 620, 624 (S.D.N.Y. 1970) ("A professional association does not 'transact business' in a judicial district merely because some of its members reside in the district and receive the association's publications there."). To hold otherwise would subject WPATH, and every other membership organization, to personal jurisdiction in every state in the country. That is not the law.

There are other problems with this part of the State's jurisdictional theory. First, the State's claim that "WPATH transacts business in Montana in that it solicits members in Montana" (TPC ¶ 4) does not support the exercise of personal jurisdiction. But "[i]nterstate communication does not, by itself, constitute the transaction of business in Montana." *See Threlkeld v. Colorado*, 2000 MT 369, ¶ 25, 303 Mont. 432, 439, 16 P.3d 359, 364. Montana courts actually hold *the exact opposite* of the State's argument here. *See Edsall*, 246 Mont. at 382 ("[I]nterstate communication is an almost inevitable accompaniment to doing business in the modern world, and cannot by itself be considered a 'contact' for justifying the exercise of personal jurisdiction.").

Second, the State claims WPATH conducts business in Montana via WPATH's thirteen members in Montana, and that via at least one of those members, that WPATH has provided services to Montanans. TPC ¶ 6. However, the State offers no plausible allegation to show that WPATH (a professional organization that publishes standards of care, akin to the American Medical Association) has any control over what types of services any provider has ever provided to any Montanan. Such allegations are required for this type of showing. *See Rhodes v. Tallarico*, 751 F. Supp. 277, 279 (D. Mass. 1990) (finding no personal jurisdiction over an Ohio organization without allegations that it exercised any influence over any member's decision to perform services). Moreover, in a specific jurisdictional analysis, it is the *defendant's* contacts

that matter – not the contacts of any other person or entity – so the conduct of non-party medical providers has nothing to do with this case. *See Walden*, 571 U.S. at 291 ("[I]t is *the defendant*, not the plaintiff or third parties, who must create contacts with the forum State.") (emphasis added).

ii. WPATH Does Not Contract with Montanans to Provide Services.

The State claims that through its members (who happen to reside in Montana) and the Montana providers listed on its website, WPATH "contracts with Montanans to provide services and materials to Montana residents." TPC ¶ 6. Not only is the State's claim totally unsupported by allegations of fact in the Complaint, it is also entirely untrue. Naturally, despite its claim of widespread "contracting" practices, the State does not attach, cite, or even reference *any* contract or *any* contract provision. That is because none exist. The State's claim that WPATH – as opposed to a provider who receives educational or training materials from WPATH – "contracts" with Montanans to do anything must be rejected. *See, e.g.*, *Commonwealth Edison Co. v. State*, 189 Mont. 191, 215, 615 P.2d 847, 860 (1980), *aff'd,* 453 U.S. 609 (1981) ("[a] District Court is not required to accept plaintiffs allegations of law and legal conclusions as true."); *see also Grigg v. Coil*, 2022 MT 151, ¶ 11, 513 P.3d 523 (courts are "not required to take as true any allegations in the complaint that are legal conclusions."). But even if the Court determines it must assume that WPATH did "contract" with Montanans, that fact alone, as a matter of law, could not subject WPATH to personal jurisdiction. It is black-letter law in Montana that "a non-resident does not subject himself to the jurisdiction of Montana by merely entering into a contract with a resident of Montana." *Cimmaron Corp. v. Smith*, 2003 MT 73, ¶ 14, 315 Mont. 1, 4, 67 P.3d 258, 261 (quoting *Edsall*, 246 Mont. at 382).

iii. The State Fails to Plausibly Plead that WPATH Made Any Misrepresentation, Much Less Any Misrepresentation in Montana.

The State's claims must also be dismissed because it does not adequately allege that

WPATH acted tortuously in Montana (or, for that matter, outside of Montana). Even read in the light most favorable to the State, the TPC's claim that WPATH has "conspir[ed] to commit misrepresentation and/or negligent misrepresentation with its Montana members and certified providers" is vague and conclusory. TPC ¶ 7. With a complaint that is otherwise devoid of factual allegations, that alone merits dismissal. *Threlkeld*, ¶ 33 ("a court need only take well-pled allegations of fact as true in considering a Rule 12(b) motion to dismiss."); *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

But read more realistically, the State's "misrepresentation" allegations – *i.e.*, that by publishing its Standards of Care for gender dysphoria, WPATH has "made misrepresentations" of some kind (TPC ¶ 15) – is not just patently and obviously false; it is one of the most offensive comments that could be leveled against trans people. The simple fact is the State's complaint does not identify any misrepresentations, because every statement it alleges is a "misrepresentation" ***has already been adjudicated to be true***. For example:

- The State claims WPATH "misrepresented" that minors "<u>can provide informed consent to gender dysphoria treatment</u>" (TPC ¶ 15(a)). But a federal court has already found that WPATH's recommended "informed consent process is adequate to enable minor patients and their parents to make decisions about gender-affirming medical care for adolescents." *Brandt*, 677 F. Supp. 3d at 891.
- The State also claims WPATH "misrepresented" that "<u>gender dysphoria treatment is life-saving treatment for minor/children patients</u>" (TPC ¶ 15(a)). But that same federal court found that "[g]ender dysphoria is a serious condition that, if left untreated, can result in other psychological conditions including depression, anxiety, self-harm, suicidality, and impairment in functioning." *Brandt*, 677 F. Supp. 3d at 888; *see also Doe*, 2024 WL

2947123, at *28 ("[G]ender-affirming care for minors … produces great benefit and avoids unnecessary suffering. Denying this care will cause needless suffering for a substantial number of patients and will increase anxiety, depression, and the risk of suicide.").

It is black-letter law that "for a representation to be actionable[] it must … have been ***untrue*** when made." *See WLW Realty Partners, LLC v. Cont'l Partners VIII, LLC*, 2015 MT 312, ¶ 15, 381 Mont. 333, 338, 360 P.3d 1112, 1115 (emphasis added). Nothing in WPATH's Standards of Care is untrue. On the contrary, they are "widely-accepted clinical practice guidelines for the treatment of gender dysphoria" that "were developed by experts in the field, including clinicians and researchers, who used systematic processes for collecting and reviewing scientific evidence." *Brandt*, 677 F. Supp. at 888–90; *see also Doe*, 2024 WL 2947123, at *28 (describing them as "well-established professional standards of care embraced by all reputable medical associations with relevant expertise.").

The State does not meet its burden to establish personal jurisdiction, either general or specific. Nor can the State, because there is no colorable argument with any actual facts that would show that WPATH has any jurisdictional contacts with Montana. The State's third-party complaint against WPATH should therefore be dismissed for lack of personal jurisdiction.

B. The State of Montana's Third-Party Complaint Fails to State a Claim for Indemnification.

The State fails to plead a common-law indemnification claim under Montana law. Instead, it merely sets forth conclusory statements untethered to facts or law. To plead a Montana common-law indemnification claim, a plaintiff must "prove that the defendant [was] negligent and that their negligence was a proximate cause of plaintiff's injury." *Rogers v. W. Airline*, 184 Mont. 170, 176, 602 P.2d 171, 174 (Mont. 1979) (quoting *Panasuk v. Seaton*, 277 F. Supp. 979, 985 (D. Mont. 1968)). And if the indemnification plaintiff contributed in any way to the alleged injury (say, by enacting a law that is the subject of litigation for which that plaintiff then seeks

attorney fees), that action by the plaintiff will completely bar recovery. *See Metro Aviation, Inc. v. U.S.*, 2013 MT 193, ¶ 25, 371 Mont. 64, 72, 305 P.3d 832, 837 (Montana courts have "prohibited claims for indemnity between or among joint tortfeasors"). For the reasons set forth below, WPATH respectfully moves to dismiss the Complaint for failure to state a claim upon which relief can be granted.

1. The State Lacks Standing to Bring a Claim of Indemnification (or Any Claim) because It Does Not Plead It Has Suffered an Injury in Fact.

Both the U.S. and Montana Constitution impose a threshold justiciability requirement similar to that of federal Article III standing, which requires, at minimum, that there be a true case or controversy at issue between the plaintiff and defendant. *See J.C. v. Eleventh Jud. Dist. Ct.*, 2008 MT 358, ¶ 15, 346 Mont. 357, 361, 197 P.3d 907, 910, *as amended on reh'g* (Dec. 2, 2008); *Schoof v. Nesbit*, 2014 MT 6, ¶ 15, 373 Mont. 226, 230, 316 P.3d 831, 835. The U.S. Supreme Court has observed that:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976).

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982). Courts in this state have held that it is "not enough" to "allege an injury which others may have suffered." *Helena Parents Comm'n v. Lewis and Clark Cnty. Comm'rs.*, 277 Mont. 367, 371, 922 P.2d 1140, 1143 (1996). Ultimately, the plaintiff "must allege some past, present or threatened injury which would be alleviated by successfully maintaining the action." *Matter of Paternity of Vainio*, 284 Mont. 229, 235, 943 P.2d 1282, 1286 (1997). The State's TPC does not do so; it fails to plead how or when it has been injured by WPATH's research or evidence-backed publications, or what that injury actually is. The State's only allegation is that may incur

liability to the First-Party Plaintiffs as its only individual injury (TPC ¶¶ 19–20), which is not a cognizable injury-in-fact under the governing legal standards. *See Helena Parents*, 277 Mont. at 372–73. The State's allegations that "medical providers and their patients and/or parents have suffered injuries" due to alleged "misrepresentations" (TPC ¶ 15(a, f)) do not and cannot establish a case or controversy or an injury-in-fact suffered by the State that are resolvable through this litigation. The State's lack of standing is grounds enough for dismissal.

2. The State's Indemnification Claim Fails Because WPATH Is Unrelated to the Issues in the Underlying Litigation and Was Not the Proximate Cause of Any Alleged Injury.

Under Montana law, "[c]ommon law indemnity arises from the equitable principle that one compelled to pay for damages *caused by another* should be able to seek recovery from the responsible party." *State v. Butte-Silver Bow Cnty.*, 2009 MT 414, ¶ 32, 353 Mont. 497, 504, 220 P.3d 1115, 1120 (citing *Poulsen v. Treasure State Indus., Inc.*, 192 Mont. 69, 81, 626 P.2d 822, 829 (1981)) (emphasis added). The State fails entirely to allege any facts indicating that WPATH caused the State harm, let alone that WPATH *caused* the Underlying Litigation in any way.

The claims against the State in the Underlying Litigation arise from the State's own legislative action prohibiting any alteration to sexual designation on government-issued documents. Through SB 458, the State narrowly defined male, female, and sex, and prohibited updating gender markers on government documents. In the TPC, the State entirely fails to establish how the State's own actions—which form the basis of the Underlying Litigation—are in any way related to WPATH, let alone *caused by* WPATH. The TPC fails to even tangentially connect WPATH to the State's challenged policies reflected in SB 458, the 2022 Rule, and the MVD Policy. Although the State argues that WPATH created the "factual basis" for the claims against it in the Underlying Litigation, it makes no allegations of fact to support this theory of liability. Such an allegation cannot support a common law indemnity claim. *See Cape v.*

Crossroads Corr. Ctr., 2004 MT 265, ¶ 30, 323 Mont. 140, 147, 99 P.3d 171, 177 ("unsupported, conclusory allegations are insufficient").

To establish causation, a party must show that the "conduct at issue was the cause-in-fact of that injury and/or harm." *Breuer v. State*, 2023 MT 242, ¶ 20, 414 Mont. 256, 274, 539 P.3d 1147, 1160 (citing *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶¶ 16, 20, 411 Mont. 269, 286, 290, 525 P.3d 1183, 1194, 1196). To show that a party's conduct is a cause-in-fact of an event, the State must plead facts supporting allegations that the "injury/harm/damages 'would not have occurred without it.'" *Id.* ¶ 20. Given the lack of any tenable connection between any WPATH conduct and the State laws challenged in the Underlying Litigation, the State fails to establish that WPATH's conduct has any causal link – much less in the *cause-in-fact* – of the Underlying Litigation. Thus, the State is unable to plead facts demonstrating proximate cause and cannot prove its indemnification claim. The failure to plead causation, standing alone, warrants dismissal of the State's third-party complaint.

3. The State's Indemnification Claim Fails Because WPATH Did Not Act Negligently.

To prove a claim for indemnification under Montana law, the Attorney General must establish "that the defendant [was] negligent." *Rogers*, 180 Mont. at 176 (citation omitted). The State's TPC fails to allege that WPATH acted negligently, so for this additional reason, the State's indemnification claim should be dismissed.

To plead negligence under Montana law, "the plaintiff must prove four essential elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached that duty, (3) the breach was the actual and proximate cause of an injury to the plaintiff, and (4) damages resulted." *Florea v. Werner Enters., Inc.*, 681 F. Supp. 2d 1241, 1247 (D. Mont. 2010) (quoting *Peterson v. Eichorn*, 2008 MT 250, ¶ 23, 344 Mont. 540, 546, 189 P.3d 615, 621). The State does not attempt to plead, even in a conclusory fashion, that WPATH owed the State of Montana

a legal duty, nor that WPATH breached that duty, nor that such a breach injured the State or resulted in damages.

All the State alleges is that WPATH "made misrepresentations to Montana medical providers, Montana patients, and parents of Montana patients through the medical providers" about gender-affirming care. TPC ¶ 15. To establish negligent misrepresentation under Montana law, a plaintiff must establish that "(1) the defendant made a representation as to a past or existing material fact; (2) the representation must have been untrue; (3) regardless of its actual belief, the defendant must have made the[] representation without any reasonable ground for believing it to be true; (4) the representation must have been made with the intent to induce the plaintiff to rely on it; (5) the plaintiff must have been unaware of the falsity of the representation; it must have acted in reliance upon the truth of the representation and it must have been justified in relying on the representation; [***and***] (6) the plaintiff, as a result [o]f his or her reliance, sustained damage." *Am. Trucking & Transp. Ins. Co. v. Nelson*, No. CV 16-160-M-DLC, 2017 WL 3218097, at *7 (D. Mont. July 28, 2017) (citing *Deichl v. Savage*, 2009 MT 293, ¶ 19, 352 Mont. 282, 289, 216 P.3d 749, 753). The State altogether fails to adequately plead elements two, three, four, five, and six of that long-established legal standard.

As outlined above, WPATH's Standards of Care are not misrepresentations. But even accepting *arguendo* that the State's provably false allegation that WPATH's Standards of Care were somehow true, WPATH had more-than-reasonable grounds for believing in the validity of its research and findings. *See, e.g.*, *Brandt*, 677 F. Supp. 3d at 888 (these Standards "were developed by experts in the field, including clinicians and researchers, who used systematic processes for collecting and reviewing scientific evidence."); *Doe*, 2024 WL 2947123, at *5 (these Standards "are widely followed by well-trained clinicians," "are used by insurers," and "have been endorsed by the United States Department of Health and Human Services.").

Furthermore, the State does not plead – because it cannot – that WPATH established its Standards of Care with the intent that the State would rely upon them in any way. Nor can the State plausibly plead that it relied upon WPATH's Standards of Care in enacting the challenged laws, as those laws *directly contradict* WPATH's recommendations. Finally, the TPC makes no effort to allege how the State, its medical providers, or its patients were injured by WPATH; such an effort would be futile since WPATH did not cause any injury. Failing to meet the foregoing elements, the State's misrepresentation claim fails as the basis for a claim of indemnification. Accordingly, the TPC should be dismissed for failure to state an indemnification claim.

C. The State's Indemnification Claim Infringes WPATH's First Amendment Speech and Association Rights and Sets a Dangerous and Unconstitutional Precedent.

This Court should also dismiss the State's third-party complaint because its request for indemnification infringes WPATH's First Amendment speech and association rights. Allowing the State's request for indemnification to proceed would set a dangerous precedent.

All of WPATH's activities are constitutionally-protected. It is a bedrock constitutional principle that individuals are free to "engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The First Amendment "necessarily protects the right of those who join together to advance shared beliefs, goals, and ideas, which, if pursued individually, would be protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 22 (1976). Such shared beliefs, goals, and ideas, are often advanced by non-profit organizations,[2] and need not be political in nature to be constitutionally-protected. *See Boy*

[2] *See e.g., Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Robert v. U.S. Jaycees*, 468 U.S. 609 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

Scouts of Am., 530 U.S. at 648. The right of expressive association extends to groups, like WPATH, that take an "official stance on a subject." *See Sullivan v. Univ. of Washington*, 60 F.4th 574, 580 (9th Cir. 2023) (citing *In Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1184 n.3 (9th Cir. 2017)). "In sum, the 'Supreme Court's expressive-association jurisprudence' applies when individuals 'have associated to advance shared views,' or engaged in 'collective effort on behalf of shared goals.'" *Id*. (citing 875 F.3d at 1184).

WPATH is a 501(c)(3) non-profit professional and educational organization that promotes evidence-based care, education, research, public policy, and respect in transgender health. WPATH maintains a peer-reviewed medical journal and publishes the Standards of Care and Ethical Guidelines that "articulate a professional consensus about psychiatric, psychological, medical, and surgical management of gender dysphoria to help professionals understand the parameters within which they may offer assistance to those with these conditions."[3] WPATH's mission and activities are squarely protected by the First Amendment's rights of free speech and free expression. *See, e.g*., *Miller v. California*, 413 U.S. 15, 34 (1973) ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, *or scientific* value.") (emphasis added); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446–47 (2d Cir. 2001) ("It is settled that the First Amendment protects scientific expression and debate just as it protects political and artistic expression.") (cleaned up) (quoting *Bd. of Trs. of Leland Stanford Junior Univ. v. Sullivan*, 773 F.Supp. 472, 474 (D.D.C. 1991)). The law clearly prevents the state from imposing tort liability for statements or other conduct that is constitutionally-protected. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964).

The State's request sets a very dangerous precedent. Even though WPATH is not connected

[3] *See* "WPATH Mission and Vision," *available at* https://www.wpath.org/about/mission-and-vision (last visited August 9, 2024).

to the Underlying Litigation in any way, the State attempts to make WPATH pay for the defense of its laws simply because WPATH compiles scientific research and sets professional standards for the treatment and care of gender dysphoria, a mission the Attorney General does not support. This is exactly the kind of expression the First Amendment exists to protect. *See Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989). The Court should not allow the State's indemnification claim to proceed because doing so would open the floodgates to other politically-motivated retributive actions to chill disfavored non-profit organizations' constitutionally-protected speech and activities. In light of the significant First Amendment interests at stake, the State's third-party complaint should be dismissed.

D. The State's Allegations on the Montana Consumer Protection Act Also Fail.

The State's bizarre tag-along allegations about the Montana Consumer Protection Act ("MCPA") – that WPATH violated the MCPA by "deceptively providing services to consumers of Montana" (TPC ¶ 16) – fail to adequately plead the elements of an MCPA claim. Specifically, the State fails to plead that WPATH made deceptive statements to consumers in connection with trade or commerce, or that Montana consumers have suffered an ascertainable loss of money or property in relation to WPATH's activities – both of which are required to state an MCPA claim. *Fink v. Meadow Lake Ests. Homeowners' Ass'n*, 2016 MT 108N, ¶ 14, 384 Mont. 552; Section 30-14-102(1), 30-14-103, MCA; *Young v. Era Advantage Realty*, 2022 MT 138, ¶ 26, 409 Mont. 234, 246, 513 P.3d 505, 513 (citing *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 22, 390 Mont. 12, 23, 407 P.3d 692, 700).

For other reasons, the State's MCPA "claim" fails. First, the MCPA requires a transaction with a "consumer" (*see* Section 30-14-102(1), MCA), but WPATH is a non-profit,

interdisciplinary professional and educational organization that does not engage in consumer transactions. Second, WPATH's statements related to the treatment of gender dysphoria concern the practice of medicine, rather than commercial transactions, and therefore cannot give rise to an action under the MCPA. *See Brookins v. Mote*, 2012 MT 283, ¶ 54, 367 Mont. 193, 210, 292 P.3d 347, 359 ("We also agree with the near unanimous line of authority that has exempted from the CPA conduct by health-care providers in the 'actual practice' of the profession."). The State has failed to plead a cognizable claim under the MCPA and thus the claim should be dismissed.

IV. CONCLUSION

For the reasons set forth above, WPATH repsectfully request that the Court dismiss the State's frivolous and bad-faith third-party complaint in its entirety.[4]

DATED this 9th day of August, 2024.

[4] In the event the Court grants WPATH's motion, WPATH intends to file a motion to recover the reasonable expenses incurred in preparing the instant motion pursuant to Sections 25-10-102, 25-10-201, 25-10-711, and/or any other appropriate provisions of the Montana Code.

Respectfully submitted,

By: /s/Robert Farris-Olsen

Robert Farris-Olsen
MORRISON SHERWOOD WILSON DEOLA PLLP
401 North Last Chance Gulch
P.O. Box 557
Helena, MT 59624
Telephone: (406) 442-3261
rfolsen@mswdlaw.com

Justin D. Kingsolver*
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: (202) 624-2500
JKingsolver@crowell.com

Derick D. Dailey*
CROWELL & MORING LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
Telephone: 212-224-4000
jkingsolver@crowell.com
ddailey@crowell.com

Attorneys for Third-party Defendant WPATH

* *Pro Hac Vice* Application Forthcoming

CERTIFICATE OF SERVICE

I hereby certified that on the 9th day of August, 2024, a true copy of the foregoing document was served via U.S. Mail, postage prepaid, and email upon the following:

Austin Knudsen
Montana Attorney General
Michael Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
emily@joneslawmt.com

Attorneys for Defendants

Marthe VanSickle
ACLU MONTANA
P.O. Box 1968
Missoula, MT 59806
vansicklem@aclumontana.org

Alexander H. Rate
ACLU MONTANA
713 Lock Leven Drive
Livingston, MT 59047
ratea@aclumontana.org

F. Thomas Hecht
Seth A. Horvath
Tina B. Solis
NIXON PEABODY LLP
70 West Madison St, Ste 3500
Chicago, IL 60601
FThecht@nixonpeabody.com
sahorvath@nixonpeabody.com
tbsolis@nixonpeabody.com

Malita Picasso
Jon W. Davidson
ACLU LGBTQ & HIV PROJECT
125 Broad Street
New York, NY 10004
mpicasso@aclu.org
jdavidson@aclu.org

Attorneys for Plaintiffs

By: _____
Amy Kirscher

CERTIFICATE OF SERVICE

I, Robert M. Farris-Olsen, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 08-09-2024:

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: State of Montana, Gregory Gianforte, Montana Department of Public Health and Human Services, Austin Knudsen, Montana Department Of Justice, Charles T Brererton
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana, Gregory Gianforte, Montana Department of Public Health and Human Services, Austin Knudsen, Montana Department Of Justice, Charles T Brererton
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana, Gregory Gianforte, Montana Department of Public Health and Human Services, Austin Knudsen, Montana Department Of Justice, Charles T Brererton
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana, Gregory Gianforte, Montana Department of Public Health and Human Services, Austin Knudsen, Montana Department Of Justice, Charles T Brererton
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana, Gregory Gianforte, Montana Department of Public Health and Human Services, Austin Knudsen, Montana Department Of Justice, Charles T Brererton
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: State of Montana, Gregory Gianforte, Montana Department of Public Health and Human Services, Austin Knudsen, Montana Department Of Justice, Charles T Brererton
Service Method: eService

Marthe VanSickle (Attorney)
PO Box 1968
Missoula MT 59806
Representing: Jessica Kalarchik, Jane Doe
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Jessica Kalarchik, Jane Doe
Service Method: eService

Malita Vencienzo Picasso (Attorney)
125 Broad Street, 18th Floor
New York NY 10004
Representing: Jessica Kalarchik
Service Method: eService

Jon W. Davidson (Attorney)
125 Broad Street, 18th Floor
New York NY 10004
Representing: Jessica Kalarchik
Service Method: eService

Seth A. Horvath (Attorney)
70 West Madison Street, Suite 5200
Chicago IL 60602
Representing: Jessica Kalarchik
Service Method: eService

F. Thomas Hecht (Attorney)
70 West Madison, Suite 5200
Chicago MT 60605
Representing: Jessica Kalarchik
Service Method: eService

Tina B. Solis (Attorney)
70 West Madison Street, Sutie 3500
Chicago IA 60601
Representing: Jessica Kalarchik
Service Method: First Class Mail

Electronically signed by Amy Kirscher on behalf of Robert M. Farris-Olsen
Dated: 08-09-2024