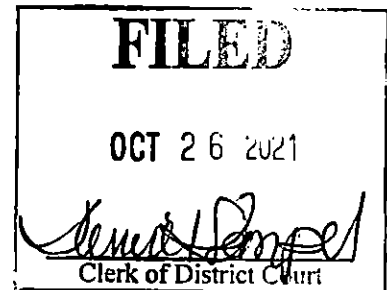


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MONTANA SEVENTH JUDICIAL DISTRICT COURT, RICHLAND COUNTY

<p>NETZER LAW OFFICE, P.C. and DONALD L. NETZER,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>AUSTIN KNUDSEN, Montana Attorney General and LAURIE ESAU, Montana Commissioner of Labor and Industry,</p> <p>Defendants.</p>	<p>Cause No. DV-21-89</p> <p>BRIEF IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION</p> <p>Hon. Katherine M. Bidegaray</p>
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Plaintiffs Netzer Law Office, P.C., and Donald L. Netzer, (collectively, "Netzer Law"), through undersigned counsel of record, respectfully submits this brief in support of its application for a preliminary injunction.

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INTRODUCTION

The world is in the middle of an unprecedented global pandemic. Neither our Nation nor our great State has been spared from the crippling and continuing public health and economic harms caused by COVID-19 and the recent surge of the Delta variant. Nor will we be spared from related future surges, some of which may include new variants.

Montana has been uniquely harmed on a per capita basis due to, among other things, low vaccination rates.¹ Furthermore, State health care resources have been and presently are exhausted.² Recent reports indicate that some parts of Montana are very close to rationing health care through implementing “Crisis Standards of Care.”³

COVID-19 has caused a global public health crisis and has disrupted Americans’ and Montanans’ lives in many other profound ways, including economically and socially. Although many businesses had been reopening going into this past summer, the surge in cases from the Delta variant threatens to reduce business capacity and potentially cause Montana businesses to close their doors yet again. To be sure, businesses do not want to close their doors or limit their capacity, but, for many, like Netzer Law, the balance tips heavily in favor of protecting the well-being of their employees and customers over protecting their bottom line.

¹ Mayo Clinic, *U.S. COVID-19 vaccine tracker: See your state’s progress*, <https://www.mayoclinic.org/coronavirus-covid-19/vaccine-tracker>.

² Aaron Bolton, *NPR, With low vaccination rates, Montana’s COVID hospitalizations have continued to rise*, <https://www.npr.org/2021/10/13/1045746585/with-low-vaccination-rates-montanas-covid-hospitalizations-have-continued-to-rise> (Oct. 13, 2021).

³ *Id.* and see also Billings Clinic, *Billings Clinic preparing for Crisis Standards of Care*, <https://www.billingsclinic.com/about-us/news-press-releases/2021/billings-clinic-preparing-for-crisis-standards-of-care/> (Sept. 15, 2021). For more information on Crisis Standards of Care see DPHHS, *Scarce Resource Management & Crisis Care Guidance*, Pg. 4, <https://dphhs.mt.gov/publichealth/cdepi/diseases/coronavirusmt/MontanaCrisisCareGuidanceFrontMatter.pdf>.

Despite these commonly understood and indisputable facts establishing that COVID-19 presents an existing and growing danger to the public health and economic well-being of Montanans, the Montana Legislature adopted Montana House Bill 702 (“HB 702”)—a reckless law that unconstitutionally restricts individuals’, employers’, and governmental entities’ abilities to protect themselves, their businesses, and their constituents, respectively. HB 702 not only broadly prohibits discriminating against someone based on their vaccine status (a prohibition not limited to their COVID-19 vaccine status), but also prohibits vaccine mandates.

Purportedly, HB 702 was passed to protect medical-record privacy, but its design fails to advance that interest. What HB 702 does do, however, is violate multiple provisions of the Montana Constitution, including the fundamental rights of individuals, businesses, employers, and others. To uphold these fundamental rights and allow individuals and employers the freedoms to protect their lives, property, and businesses, Netzer Law respectfully requests that this Honorable Court issue a preliminary injunction to immediately nullify the ongoing harms caused by HB 702.⁴

SUMMARY OF THE ARGUMENT

As enacted, HB 702 violates numerous rights and requirements set forth by the Montana Constitution. First, HB 702 violates Netzer Law’s, its owners’, and its employees’ inalienable rights to a clean and healthful environment; to pursuing life’s basic necessities; to enjoying and defending their lives and existence; to fully possessing and protecting property; to seeking safety, health, and happiness; and to other unenumerated rights that protect the interests asserted by Netzer Law. Mont. Const. art. II, §§ 3, 34. HB 702 also unlawfully interferes with Netzer Law’s ability

⁴ Pursuant to Mont. R. Evid. 201, Netzer Law respectfully requests that this Honorable Court take judicial notice of relevant facts concerning COVID-19. *See, e.g., Santa Cruz Homeless Union v. Bernal*, 514 F. Supp. 3d 1136, 1138 (N.D. Cal. 2021) (taking judicial notice of the “public health emergency created due to COVID-19”). Additionally, Mr. Donald L. Netzer’s affidavit includes exhibits establishing relevant facts related to COVID-19 and vaccines.

to fulfill its constitutional responsibility to maintain and improve a clean and healthful environment for “this and future generations.” Mont. Const. art. IX, § 1. Additionally, HB 702 denies Netzer Law equal protection of the law by treating it differently than other similarly situated entities (*e.g.*, exempted schools, day-cares, nursing homes, long-term care providers, and assisted living providers) without adequate justification. Mont. Const. art. II, § 4. Finally, HB 702 violates the requirement that a bill “shall contain only one subject, clearly expressed in its title” and cannot embrace a subject that is not included in the title. Mont. Const. art. V, § 11, cl. 3.

To protect these fundamental constitutional rights and requirements as well as prevent irreparable injury during the pendency of this litigation, Netzer Law respectfully requests that the Court issue a preliminary injunction prohibiting Attorney General Knudsen and Commissioner Esau (collectively, “State Defendants”) from enforcing the provisions of HB 702.

BACKGROUND

I. The COVID-19 Pandemic

The COVID-19 pandemic has had a devastating impact on the world, United States, and Montana. Since early 2020, when known cases first began to be reported, people have had to dramatically change their lives and social interactions in response to the pandemic.

COVID-19 is highly transmissible, and the principal mode of infection is through exposure to respiratory fluids carrying the infectious virus.⁵ Exposure to COVID-19 occurs in three main ways:

- (1) inhalation of very fine respiratory droplets and aerosol particles, (2) deposition of respiratory droplets and particles on exposed mucous membranes in the mouth, nose, or eye by direct splashes and sprays, and (3) touching mucous membranes with hands that

⁵ CDC, *Scientific Brief: SARS-COV-2 Transmission*, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html> (May 7, 2021).

have been soiled either directly by virus-containing respiratory fluids or indirectly by touching surfaces with virus on them.^{6]}

The Montana Department of Public Health and Human Services (“DPHHS”) reported on September 7th, 2021, that the Delta variant continues to be the most dominant COVID-19 variant in Montana.⁷ The CDC reports the Delta variant is more than twice as contagious as previous variants of COVID-19 and that data suggests Delta may cause more severe illness than prior variants in unvaccinated individuals.⁸

Individuals who contract the COVID-19 virus can experience a wide range of symptoms, from none (asymptomatic) to experiencing severe illness and even death.⁹ People with certain medical conditions and who are immunocompromised or who are older adults are more susceptible to serious health complications from COVID-19. *Id.*

Since the beginning of the COVID-19 pandemic and through October 22nd, 2021, there have been 730,368 known deaths attributed to COVID-19 in the United States and 3,185,778 hospitalizations due to COVID-19.¹⁰ In Montana, there have been 2,259 known deaths attributed

⁶ *Id.*

⁷ DPHHS, *COVID-19 Variants Identified in Montana*, <https://dphhs.mt.gov/publichealth/cdepi/diseases/coronavirusmt/VariantWebUpdate090721.pdf> (Sept. 7, 2021).

⁸ CDC, *Delta Variant: What We Know About the Science*, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>, (Aug. 26, 2021).

⁹ CDC, *People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (Aug. 20, 2021).

¹⁰ CDC’s Covid Data Tracker Weekly Review, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (Oct. 22, 2021).

to COVID-19, per Montana’s COVID-19 Data Dashboard through October 25th, 2021.¹¹ COVID-19 infections were the third leading cause of death in Montana in 2020 with 1,104 deaths.¹²

Despite other aggressive measures taken to prevent the spread of COVID-19, vaccines were needed, and the pharmaceutical industry and federal government mobilized to create them. The first COVID-19 approved vaccines in the United States were administered in December 2020, and through October 18, 2021, 408 million doses of COVID-19 vaccine have been administered.¹³ COVID-19 vaccines have been evaluated in tens of thousands of participants in clinical trials and the vaccines have met the Food and Drug Administration’s (“FDA’s”) rigorous scientific standards, prior to approval and authorization. *Id.* In the beginning, COVID-19 vaccines received Emergency Use Approval but on August 23rd, 2021, the FDA granted full approval to the Pfizer-BioNTech COVID-19 vaccine.¹⁴ These vaccines have been proven to be medically safe and effective.¹⁵ Indeed, shortly after being administered, there had been a substantial decline in COVID-19 infections, with Montana only having 35 new daily cases of COVID-19 reported on June 12, 2021.¹⁶

¹¹ Montana COVID-19 Data Dashboard, *COVID-19 Cases*, <https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>.

¹² Todd M. Koch, MPH, DPHHS, *Provisional Leading Causes of Death and Other Select Causes in Montana, 2020 and 2015-2019*, <https://dphhs.mt.gov/assets/publichealth/Epidemiology/VSU/MTLeadingCausesOfDeaths2015-2020.pdf>, (Mar. 15, 2021).

¹³ CDC, *Safety of COVID-19 Vaccines*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html>, (Oct. 18, 2021).

¹⁴ FDA, *FDA Approves First COVID-19 Vaccine*, <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>, (Aug. 23, 2021).

¹⁵ CDC, *Safety of COVID-19 Vaccines*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html> (Updated Oct. 12, 2021).

¹⁶ Montana COVID-19 Data Dashboard, *COVID-19 Cases*, <https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>.

This initial decline of new daily cases of COVID-19 in Montana was short-lived. Presently, Montana is experiencing a resurgence of COVID-19 cases, connected with the Delta variant. Montana currently has 10,739 active COVID-19 cases across the state and 447 active hospitalizations, as of October 25th, 2021. *Id.* In an interview from late last summer, United States Chief Medical Officer Anthony Fauci stated “...it is really a pandemic among the unvaccinated, so this is an issue predominantly among the unvaccinated, which is the reason why we’re out there, practically pleading with the unvaccinated people to go out and get vaccinated.”¹⁷ On August 5th, 2021, in a DPHHS Report, Director Adam Meier said COVID-19 related hospitalization data from June 5th to July 30th, 2021, showed 89 percent of Montanans that were hospitalized had not received the COVID-19 vaccine.¹⁸ As of October 25th, 2021, Montana had an overall vaccination rate of 55 percent, with a vaccination rate of 54 percent in Yellowstone County and 41 percent in Richland County.¹⁹

On September 27th, 2021, DPHHS released a report that showed, “from February to September 2021...89.5% of the cases, 88.6% of hospitalizations and 83.5% of the deaths were among persons not fully vaccinated, including those not yet eligible for vaccination” (*i.e.*, kids).²⁰

¹⁷ CNN, <https://transcripts.cnn.com/show/sotu/date/2021-07-25/segment/01>.

¹⁸ DPHHS, *Trend Continues of COVID-19 Related Hospitalizations of Unvaccinated Individuals*, <https://dphhs.mt.gov/News/2021/08/TrendContinuesofCOVID-19RelatedHospitalizationsofUnvaccinatedIndividuals> (Aug. 5, 2021).

¹⁹ Montana COVID-19 Data Dashboard, *Covid-19 Vaccine*, <https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>.

²⁰ DPHHS, *New Montana Report: Unvaccinated 5 Times More Likely to be Hospitalized and 3 Times More Likely to Die from COVID-19: DPHHS officials urge Montanans to get vaccinated*, <https://dphhs.mt.gov/News/2021/09/NewMontanaReportUnvaccinated5timesmorelikelytobehospitalizedand3timesmorelikelytodiefromCOVID-19> (Sept. 27, 2021).

II. The 2021 Montana Legislature and Passage of HB 702

In January 2021, the 67th Montana Legislature convened amid the COVID-19 pandemic. During the legislative session, Montana State Representative and bill sponsor Jennifer Carlson introduced HB 702 entitled, “AN ACT PROHIBITING DISCRIMINATION BASED ON A PERSON’S VACCINATION STATUS OR POSSESSION OF AN IMMUNITY PASSPORT; PROVIDING AN APPROPRIATION; AND PROVIDING EFFECTIVE DATES.” In her April 1, 2021, testimony, Representative Carlson explained the purpose of HB 702: she cited fears that the federal government would require “vaccine passports” in order to attend events in the future.²¹

III. Enacted Version of HB 702

The final version of HB 702—which was codified in the Montana Human Rights Act at Mont. Code Ann. §§ 49-2-312, 49-2-313—provides in relevant part as follows:

Section 1. Discrimination based on vaccination status or possession of immunity passport prohibited -- definitions. (1) Except as provided in subsection (2), it is an unlawful discriminatory practice for:

(a) a person or a governmental entity to refuse, withhold from, or deny to a person any local or state services, goods, facilities, advantages, privileges, licensing, educational opportunities, health care access, or employment opportunities based on the person's vaccination status or whether the person has an immunity passport;

(b) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport; or

(c) a public accommodation to exclude, limit, segregate, refuse to serve, or otherwise discriminate against a person based on the person's vaccination status or whether the person has an immunity passport.

²¹ House Floor Session on HB 702, Video at 14:18:30, <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41087?agendaId=212771>.

(2) This section does not apply to vaccination requirements set forth for schools pursuant to Title 20, chapter 5, part 4, or day-care facilities pursuant to Title 52, chapter 2, part 7.

(3) (a) A person, governmental entity, or an employer does not unlawfully discriminate under this section if they recommend that an employee receive a vaccine.

(b) A health care facility, as defined in 50-5-101, does not unlawfully discriminate under this section if it complies with both of the following:

(i) asks an employee to volunteer the employee's vaccination or immunization status for the purpose of determining whether the health care facility should implement reasonable accommodation measures to protect the safety and health of employees, patients, visitors, and other persons from communicable diseases. 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 to the health care facility for purposes of determining whether reasonable accommodation measures should be implemented.

(ii) implements 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.

(4) An individual may not be required to receive any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials.

(5) As used in this section, the following definitions apply:

(a) "Immunity passport" means a document, digital record, or software application indicating that a person is immune to a disease, either through vaccination or infection and recovery.

(b) "Vaccination status" means an indication of whether a person has received one or more doses of a vaccine.

Section 2. Exemption. A licensed nursing home, long-term care facility, or assisted living facility is exempt from compliance with [section 1] during any period of time that compliance with [section 1] would result in a violation of regulations or guidance issued by the centers for medicare and medicaid services or the centers for disease control and prevention.^[22]

²² HB 702 Enrolled Bill, <https://leg.mt.gov/bills/2021/billpdf/HB0702.pdf>.

LEGAL STANDARD

In order for a Court to issue a preliminary injunction, “an applicant... must establish a prima facie case, or show that it is at least doubtful whether or not [the applicant] will suffer irreparable injury before [the applicant’s] rights can be fully litigated.” *Mack v. Anderson*, 2016 MT 204, ¶ 15, 384 Mont. 368, 373, 380 P.3d 730, 733; *see also* MCA 27-19-201(1)-(2).

When assessing an application for a preliminary injunction, “the trial court ‘should restrict itself to determining whether the applicant has made a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had.’” *Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, 395 Mont. 350, 359, 440 P.3d 4, 10 (citation omitted). This determination does not decide the ultimate merits of the case or depend on evidence sufficient to do so, but instead only assesses whether an applicant establishes a prima facie (*i.e.*, “at first sight”) violation of its rights. *Driscoll v. Stapleton*, 2020 MT 247, ¶¶ 15-16, 401 Mont. 405, 414, 473 P.3d 386, 392 (citations omitted); *Weems*, ¶ 18 (citation omitted).

Importantly, when determining whether to issue a preliminary injunction to prevent alleged constitutional violations, an applicant “is not required” to “defeat the presumptive constitutionality of a statute,” a requirement which only “arises in litigating the merits of the complaint.” *Weems*, ¶ 18 n.4. Equally important, the “loss of a constitutional right constitutes irreparable harm.” *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶ 15, 296 P.3d 1161, 1165, 366 Mont. 224, 229 (citation omitted).

ARGUMENT

I. Netzer Law’s Claims Are Likely to Succeed on the Merits.

Netzer Law is likely to succeed on the merits of its claims because HB 702 violates its fundamental rights and other provisions of the Montana Constitution. By imposing a broad

prohibition on vaccine-status discrimination, HB 702 unconstitutionally violates Netzer Law’s, its owners’, and its employees’ fundamental rights, and impermissibly prevents Netzer Law and its owners from fulfilling their constitutional duties. By exempting similarly situated entities, HB 702 also denies Netzer Law equal protection under the law. Finally, by including a ban on vaccine mandates and omitting the subject of this ban from its title, HB 702 violates article V, section 11, clause 3 of the Montana Constitution. For each of these reasons, an injunction is warranted.

A. HB 702 Substantially Burdens Netzer Law’s Fundamental Rights.

Article II, section 3 of the Montana Constitution enumerates and establishes several fundamental rights. In addition to these enumerated rights, the Montana Constitution acknowledges and protects unenumerated rights. Each of these inalienable rights—rights that are “incapable of being alienated, surrendered, or transferred”²³—constitute “constitutional inhibitions upon the police power of the State of Montana.” *Garden Spot Mkt., Inc. v. Byrne*, 141 Mont. 382, 396, 378 P.2d 220, 228 (1963). A law that substantially burdens any of these rights is unconstitutional unless it withstands strict constitutional scrutiny.

1. The Constitutional Right to, and Duty to Maintain and Improve, a Clean and Healthful Environment Applies to Indoor Office Environments.

The Montana Constitution establishes an inalienable right “to a clean and healthful environment” and requires that the “[t]he [S]tate and each person shall maintain and improve a clean and healthful environment in Montana.” Art. II, § 3; art IX, § 1; *Clark Fork Coal. v. Montana Dep’t of Nat. Res. & Conservation*, 2021 MT 44, ¶ 47, 403 Mont. 225, 264, 481 P.3d 198, 217–18 (acknowledging that both these constitutional provisions involve fundamental rights).

²³ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/inalienable>.

Although the Montana Supreme Court has not delineated the contours of what is encompassed within the term “environment,” existing precedent and the history of the 1972 Constitutional Convention support Netzer Law’s assertion that the term includes indoor environments, like Netzer Law’s business offices. First, in adopting these constitutional provisions, the drafters intended to establish “the strongest environmental protection provision found in any state constitution.” *Montana Env’t Info. Ctr. v. Dep’t of Env’t Quality* (“MEIC”), 1999 MT 248, ¶ 66, 296 Mont. 207, 226, 988 P.2d 1236, 1246 (citation omitted). Second, the drafters “intentionally avoided definitions, to preclude being restrictive” and ensure the broadest possible protection under these provisions. *MEIC*, ¶ 70 (citation omitted). For example, the drafters indicated that “the term ‘environmental life support system’ is *all-encompassing*, including but not limited to air, water, and land.” *Id.* (citation omitted) (emphasis added). Third, these constitutional provisions “include[] private property.” *Id.* Respecting the drafters’ intent, “environment” should be interpreted expansively to include indoor environments.

Even though the Montana Supreme Court has not yet engaged in the “difficult exercise of determining what attributes constitute a ‘clean’ or ‘healthful’ environment,” those terms clearly contemplate that such environments would be free from threats to public health such as those arising from deadly diseases like COVID-19. *See Park Cty. Env’t Council v. Montana Dep’t of Env’t Quality*, 2020 MT 303, ¶ 78, 402 Mont. 168, 200, 477 P.3d 288, 307–08. Even more, however, the right to (and duty to maintain and improve) a clean and healthful environment demands “anticipatory and preventative” measures that reduce the risks of spreading and exacerbating public health threats like deadly diseases and viruses. *MEIC*, ¶ 77 (citation omitted).

Based on the foregoing, the right to (and duty to maintain and improve) a clean and healthful environment encompass rights related to having indoor office environments that are

capable of being managed and maintained in a way that reasonably reduces the risk of individual exposure to deadly diseases and the risk of exacerbating an ongoing pandemic. Even if these rights were not expressly contemplated by drafters or plain language (which they are), they clearly are “a necessary incident” of the fundamental rights involving a clean and healthful environment. *Cf. Wadsworth v. State*, 275 Mont. 287, 301, 911 P.2d 1165, 1173 (1996) (recognizing the unenumerated fundamental right to pursue employment because it is necessary to enjoy the enumerated right of pursuing life’s basic necessities).

HB 702 substantially burdens the fundamental rights described above because it broadly prohibits any form of discrimination based on a person’s vaccination status and thereby precludes businesses and employers, like Netzer Law from taking common-sense measures to maintain a clean and healthful office environment. *See* Mont. Code Ann. § 49-2-312.

Netzer Law is a growing business with two offices, five employees, and serves many clients. Affidavit of Donald L. Netzer (“Netzer Aff.”), ¶ 4. Maintaining an open, clean, safe, and healthy office environment is imperative for the success of Netzer Law’s business, owners, employees, and clients. *Id.*, ¶ 7. Netzer Law is actively seeking to hire additional employees. *Id.*, ¶ 16.

Netzer Law’s owners, employees, clients, and others regularly frequent and interact in its offices. These in-person interactions are critically important to Netzer Law’s daily operations and success as a business. Because of this, Netzer Law is committed to ensuring that it maintains a clean, safe, and healthy office environment. To this end, Netzer Law has taken preventative measures over the course of the ongoing pandemic. *See id.*, ¶ 11 (closing its doors to walk-ins, suspending in-person office conferences, requiring masks in certain areas, using remote work, and requiring negative COVID-19 tests for symptomatic employees before they return to work).

To further ensure a clean, safe, and healthy office environment, Netzer Law desires to adopt and implement additional protective measures and would do so but for HB 702's prohibitions. For example, Netzer Law would like to require proof of vaccination against COVID-19 from all employees (*i.e.*, adopt a vaccine mandate), not hire new employees who are unvaccinated, be able to exercise its discretion based on real-time pandemic realities on whether to allow unvaccinated individuals into its office, and be able to institute other specific safety precautions for unvaccinated persons. *Id.*, ¶ 17-19. Furthermore, Netzer Law would like to have the ability to require proof of other vaccines in the event of future outbreaks of other diseases or viruses for which a vaccine exists. *Id.*, ¶ 17-19.

HB 702's general prohibition against discriminating based on vaccine status and ban on vaccine mandates preclude Netzer Law from taking these measures. HB 702 therefore substantially burdens Netzer Law's fundamental rights described above and is subject to strict scrutiny.

2. The Constitutional Right to Pursue Life's Basic Necessities Without Being Subject to Serious Health Threats.

The Montana Constitution establishes the right to "pursue life's basic necessities." Art. II, § 3. The Montana Supreme Court has broadly construed this right to include the right to pursue employment because "[a]s a practical matter, employment serves [] to provide income for the most basic of life's necessities" and, without this right, "the right to pursue life's basic necessities would have little meaning." *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172.

Applying *Wadsworth's* rationale, this Court can safely conclude that the right to pursue life's basic necessities also embraces rights to engage in employment, including to own and operate a business, and to do these things without being subjected to serious health threats (or having to assume potential legal liability) created by government action. The right to pursue life's basic necessities "would have little meaning" if doing so required persons to unnecessarily jeopardize

their health, livelihoods, and potentially lives due to government regulation. *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172. Acknowledging these rights, HB 702's prohibitions described above substantially burden Netzer Law's, its owners', and its employees' fundamental rights.

3. The Constitutional Right to Defend Life from Deadly Diseases.

The Montana Constitution establishes a right to defend one's life. Art. II, § 3. This unqualified right necessarily includes the right to defend against deadly diseases and government actions that unnecessarily or seriously threaten one's life by increasing exposure to such diseases. *Cf. Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172. If contracted, COVID-19 and multiple other diseases (*e.g.*, smallpox) present a serious risk of death. HB 702's broad prohibition on discrimination based on vaccination status, including banning vaccine mandates of any kind, unnecessarily and seriously threatens lives by precluding businesses and employers like Netzer Law and its owners from adopting and implementing common-sense measures to protect its business, owners, employees, clients, and others entering its offices against the worsening COVID-19 pandemic and future outbreaks of new and old diseases. HB 702 therefore substantially burdens Netzer Law's and its owners' right to defend their lives.

4. The Constitutional Right to Fully Possess and Protect Property.

The Montana Constitution establishes a right to possess and protect property. Art. II, § 3. Both a business and leased office space constitute property protected by the constitution. *See Freeman v. Bd. of Adjustment of City of Great Falls*, 97 Mont. 342, 34 P.2d 534, 538 (1934). HB 702 substantially burdens Netzer Law's and its owners' constitutional right to fully possess and protect its business and office spaces by preventing them from managing this property safely amid the ongoing pandemic.

5. The Constitutional Right to Seek Safety, Health, and Happiness.

The Montana Constitution establishes a right to seek safety, health, and happiness. Art. II, § 3. For the reasons stated in the sections above, HB 702 substantially burdens Netzer Law's, its owners', and its employees' rights to seek safety, health, and happiness.

6. Unenumerated Rights

Even if this Honorable Court determines that some of the above-mentioned inalienable rights do not exist as asserted under article II, section 3 or article IX, section 1, this Court may determine the existence of such fundamental rights under Montana Constitution article II, section 34 ("Unenumerated Rights"). This Section provides that "[t]he enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

In proposing Section 34, the Montana Constitutional Convention Bill of Rights Committee (1) "recognized that the rights enumerated in Montana's Constitution were not exclusive—i.e., that there are unenumerated rights or 'rights beyond those specifically listed' which are retained by the people"; and (2) "considered this section to be 'a crucial part of any effort to revitalize the state government's approach to civil liberties questions. [And that this section] may be the source of innovative judicial activity in the civil liberties field.'" *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶¶ 92-93, 325 Mont. 148, 175, 104 P.3d 445, 463 (Concurring, J. Nelson, Cotter, Leaphart) (citation omitted). Accordingly, as this Court deems appropriate, HB 702 also infringes upon and substantially burdens Netzer Law's unenumerated fundamental rights.

B. HB 702 Is Subject to and Fails the Strict Scrutiny Test.

The rights found in article II, sections 3 and 34 and article IX, section 1 of the Montana Constitution are fundamental rights and therefore subject to strict scrutiny. *Park Cty. Env't*

Council, ¶ 79. Statutes implicating these rights “must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.” *MEIC*, ¶ 63. As explained below, the State cannot meet its burden of proof.

1. The State’s Alleged Interest in Privacy Is a Pretext.

Knowing that HB 702 would be challenged and subjected to strict scrutiny review, the Legislature identified privacy rights as to medical records as the bill’s purpose. *See* HB 702, Preamble. The Legislature’s averred purpose is a pretext, illegitimate, and not compelling.

Legislative hearings show that the bill’s sponsor was not concerned about medical-record privacy, but instead feared being excluded from social events without an immunity passport and actions of the opposite-political-party U.S. President.²⁴ Fear and negative attitudes are not legitimate, let alone compelling, interests. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 105 S. Ct. 3249, 3258–59 (1985); *Armstrong v. State*, 1999 MT 261, ¶ 60, 296 Mont. 361, 384, 989 P.2d 364, 380 (recognizing pretextual legislative action driven by “prevailing political ideology and the unrelenting pressure from individuals” is “constitutionally impermissible” and “intellectually and morally indefensible”). Notably, even HB 702’s title is entirely unrelated to medical-record privacy.

Regardless, keeping vaccination status private during a pandemic is not a compelling (or legitimate) State interest because, *inter alia*, it jeopardizes the lives and health of the entire State. The State’s police power exists to protect the public safety, health, and welfare—the very things HB 702 dangerously undermines.

²⁴ *Supra* note 21.

2. The State's Action to Effectuate Its Alleged Interest Is Not Closely Tailored and Not the Least Onerous Path.

HB 702's broad prohibition of vaccine-status discrimination is not closely tailored to its purported interest in medical-record privacy. Prohibiting vaccine-status discrimination does not advance medical-record privacy. Instead, the prohibition on discrimination inherently contemplates that a person/entity knows of another person's vaccination status (*i.e.*, person/entity X cannot discriminate against person Y if the former does not know whether the latter is or is not vaccinated). Notably, HB 702 *does not* prohibit any person/entity from inquiring about another person's vaccination status. Broadly prohibiting vaccine-status discrimination is therefore not closely tailored to protecting medical-record privacy. For these same reasons, HB 702's broad prohibitions are not the least onerous way to protect medical-record privacy.

For the foregoing reasons, HB 702 fails the strict scrutiny test and injunction is warranted.

3. HB 702 Also Fails Middle-Tier and Rational-Basis Review.

As stated above, HB 702 was not driven by and does not serve a legitimate purpose. Instead, it unequivocally undermines public health (and thereby public safety and welfare) by preventing persons/entities from adopting common-sense safety measures to abate a global pandemic. *See Ruona v. City of Billings*, 136 Mont. 554, 323 P.2d 29 (1958) (acknowledging the primacy of protecting public health). It also fails to reasonably accomplish its purported purpose. HB 702 therefore would fail both middle-tier and rational-basis review.

C. HB 702 Infringes on Netzer Law's Constitutional Right to Equal Protection.

The United States and Montana Constitutions "embody a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *Snetsinger*, ¶¶ 15-16

(citation omitted); Mont. Const. art. II, § 4 (“No person shall be denied the equal protection of the laws.”). The Montana Constitution guarantees more protection than its federal counterpart. *Id.*

In addressing an equal protection challenge, courts “first identify the classes involved and determine whether they are similarly situated.” *Henry v. State Compensation Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, P27, 982 P.2d 456, P27 (citation omitted). To do this, courts “isolat[e] the factor allegedly subject to impermissible discrimination” and, “if two groups are identical in all other respects, they are similarly situated.” *Hensley v. Montana State Fund*, 2020 MT 317, ¶ 19, 402 Mont. 277, 290, 477 P.3d 1065, 291 (plurality) (internal citations omitted). Second, courts determine what test applies. *Snetsinger*, ¶¶ 15-19. “Strict scrutiny applies if a suspect class or fundamental right is affected”; middle-tier scrutiny applies “if the law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution’s Declaration of Rights”; and the rational basis test applies otherwise. *Id.*, ¶¶ 17-19.

Purportedly designed to prevent discrimination, HB 702 impermissibly perpetuates it through its exemptions for schools, day-care facilities, nursing homes, long-term care facilities, assisted living facilities, and health care facilities. Applying the first step, the factor allegedly subject to impermissible discrimination is HB 702 prohibiting Netzer Law from exercising its constitutional rights (described above) to adopt and implement common-sense measures designed to reduce the risk of harm from COVID-19 and other deadly diseases.²⁵ See Mont. Code Ann. §§ 49-3-312(2), (3)(b) (identifying exemptions from HB 702 prohibitions); 49-3-313 (same).

²⁵ Governor Gianforte recognized the vital health and safety need for *all employers* to be able to implement “reasonable accommodation measures for persons who are not vaccinated or not immune to protect the safety and health of employees, customers, patients, visitors, and other persons from communicable diseases.” See Letter from Governor Gianforte to Speaker Galt and President Blasdel, <https://leg.mt.gov/bills/2021/AmdHtmH/HB0702GovAmd.pdf> (Apr. 28th, 2021).

Businesses and employers like Netzer Law (and governmental entities) are similarly situated to HB-702-exempt facilities because they are Montana businesses and employers; incorporated and licensed here; have employees, clients, and others representing a broad cross section of Montanans (including immunocompromised and elderly individuals) interacting in their offices on a day-to-day basis; and are facing the same deadly pandemic as exempt facilities. Additionally, Netzer Law has been previously treated similarly to health care providers and educational institutions during the COVID-19 pandemic.²⁶

Netzer Law and many other non-exempt entities therefore are similarly situated to exempt entities under HB 702 yet are denied their fundamental rights to take common-sense measures to reduce risks from the deadly COVID-19 pandemic and other deadly diseases. Strict scrutiny thus applies, and HB 702 fails for the reasons stated above. *Supra* Argument, Part I.B. Should the Court determine that middle-tier or rational-basis review apply, HB 702 also fails those tests. *Id.*

D. HB 702 Violates the Clear-Expression-of-Bill's-Subject Rule.

The Montana Constitution requires bills like HB 702 to “contain only one subject” that must be “clearly expressed in its title.” Art. V, § 11, cl. 3. “If any subject is embraced in any act and is not expressed in the title,” the provisions of that subject are “void.” *Id.* Courts strictly construe this constitutional requirement. *State ex rel. Replogle v. Joyland Club*, 124 Mont. 122, 143, 220 P.2d 988, 998 (1950). In assessing whether a bill’s title violates these provisions, courts determine whether “the title of legislation in question [is] of such character as to mislead the public or members of the legislature as to the subjects embraced.” *City of Helena v. Omholt*, 155 Mont.

²⁶ Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures to stay at home and designating certain essential functions, <https://ewscripps.brightspotcdn.com/b2/23/45ccc257489ca1d1f41f510e733d/stay-at-home-directive.pdf> (similarly designating businesses like Netzer Law and healthcare and educational entities as “essential business operations”).

212, 221, 468 P.2d 764, 768 (1970) (explaining purpose of protecting the Legislature and public from “being misled by false or deceptive titles”).

HB 702’s title fails the above test because it misleadingly and deceptively does not identify that it broadly bans vaccine mandates. HB 702’s full title in the enrolled bill is, “An Act Prohibiting Discrimination Based on a Person’s Vaccination Status or Possession of an Immunity Passport; Providing an Exception and an Exemption; Providing an Appropriation; and Providing Effective Dates.” *Supra* note 19. This title says nothing about vaccine-mandate bans.

Despite the absence of information about banning vaccine mandates in its title, HB 702 expressly bans “vaccine[s] whose use is allowed under an emergency use authorization or [that is] undergoing safety trials” (*e.g.*, some COVID-19 vaccines). Mont. Code Ann. § 49-2-312(4). Even more, however, when read as a whole, HB 702 impliedly bans vaccine mandates *of all kinds* (except where an entity is exempted—*e.g.*, schools). *See generally* Mont. Code Ann. §§ 49-2-312, 49-2-313.

HB 702’s deficient title clearly violates the Montana Constitution. By not including in the title the subject of “ban on vaccine mandates” or something similar, the bill was misleading both to the public and Legislature, especially considering the broader ban is not expressly stated in the bill’s text. Furthermore, this violation is particularly egregious given that significance of the pandemic and that bans on vaccine mandates are highly controversial across the country and for many Montanans.

This violation not only requires voiding MCA § 49-2-312(4), which expressly includes a vaccine-mandate ban, it also requires voiding the entire statute because the implied broader vaccine-mandate ban implicates the law’s core provision: Mont. Code Ann. § 49-2-312(1). *Sigety v. State Bd. of Health*, 157 Mont. 48, 51–52, 482 P.2d 574, 576–77 (1971) (stating that the

“Framers of our Constitution wisely held that it is not a hardship to require that every title shall clearly express the single purpose of the bill; but, even if it should prove a hardship, that it is better that an act be held inoperative, than that it be passed under a title which might deceive the unwary”).

For this constitutional violation, too, a preliminary injunction is warranted.

II. HB 702 Will Cause Great or Irreparable Harm During the Pendency of Litigation.

Where plaintiffs make “a prima facie showing [they] will suffer a harm or injury –whether under the ‘great or irreparable injury’ standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA,” they are entitled to a preliminary injunction. *Driscoll*, ¶ 15-16 (quotation marks and citation omitted). Netzer Law has established a prima facie case that absent a preliminary injunction, it will suffer great or irreparable harm. *Elrod v. Burns*, 427 U.S. 327, 373 (stating that alleged constitutional injuries in a motion for preliminary injunction “unquestionably constitute[] irreparable injury”); *City of Billings v. Cty. Water Dist.*, 281 Mont. 219, 231, 935 P.2d 246, 253 (1997) (recognizing constitutional-rights violations produce injuries “which cannot effectively be remedied by a legal judgment”).

Independently, absent an injunction, HB 702 will remain in effect and prevent Netzer Law from adopting and implementing safety and health measures related to unvaccinated persons. This creates an unnecessary and unjustifiable risk of serious, even life-threatening, harm to Netzer Law’s owners, employees, clients, and others interacting within its office space. Relatedly HB 702 also presents an equally serious risk to Netzer Law’s continued and economically viable operations. Notably, while impossible to quantify these serious risks, Montana is currently seeing a resurgence

of COVID-19 cases across the State at levels exceeding rates when no vaccine was available.²⁷ This risk is sufficient to support enjoining HB 702. *Cf. Sausalito/Marin Cty. Chapter of California Homeless Union v. City of Sausalito*, 522 F. Supp. 3d 648, 654 (N.D. Cal. 2021) (finding irreparable harm justifying injunction of action that would increase risk of spreading COVID-19); *Bernal*, 514 F. Supp. 3d at 1146 (relying on “stop[ping] the spread of COVID-19” for injunction).

Based on the foregoing, an injunction is independently warranted to prevent Netzer Law and other businesses and employers like it from suffering irreparable harm.

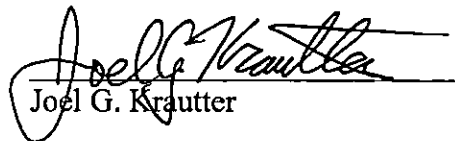
CONCLUSION

Based on the foregoing, granting Netzer Law’s motion for a preliminary injunction against State Defendants is not only appropriate as a matter of law but also imperative as a matter of public safety and health.

Respectfully Submitted.

Dated this 26 day of October, 2021.

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²⁷ Associated Press, *Montana reaches record COVID-19 hospitalizations at 510*, <https://apnews.com/article/coronavirus-pandemic-montana-united-states-health-education-5225cda25493b2f0109f3906b7888846> (Oct. 13, 2021).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 26 day of October, 2021, by U.S. certified mail in a sealed, postage paid envelope.

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