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MONTANA SEVENTH JUDICIAL DISTRICT COURT
RICHLAND COUNTY

NETZER LAW OFFICE, and DONALD L. NETZER,

Plaintiffs,

v.

STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, and LAURIE ESAU, Montana Commissioner of Labor and Industry,

Defendants.

Cause No. DV-21-89

STATE OF MONTANA'S COMBINED BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS PURSUANT TO MONT. R. CIV. P. 12(b)

Plaintiffs' Preliminary Injunction Reply/Motion to Dismiss Response Due: Dec. 2, 2021

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INTRODUCTION

While other states considered implementing 'vaccine passports,' the State of Montana acted to protect Montanans from discrimination based on vaccination status and to protect Montanans from the involuntary disclosure of their private health care information as a condition of everyday life. HB 702 created a new protected class in Montana's Human Rights Act, Mont. Code Ann. Title 49. The law works within the existing antidiscrimination and public health law structure. *See* MCA § 50-1-105 ("It is the policy of the state of Montana that the health of the public be protected and promoted to the extent practicable through the public health system while respecting individual rights to dignity, privacy, and nondiscrimination."). Antidiscrimination laws are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley v. Irish-American Gay*, 515 U.S. 557, 572 (1995). On a hotly contested contemporary social question, the Legislature has spoken clearly: in Montana, HB 702 prohibits discrimination based on vaccination status and protects medical privacy.

Plaintiffs, however, earnestly wish to discriminate. In fact, Plaintiffs claim that HB 702 discriminates against them because it prohibits them from discriminating. Amended Compl. ¶¶ 66-67. Plaintiffs' open wish to discriminate evinces a troubling desire by parts of Montana's community to violate the fundamental rights of Montanans. *See Wadsworth v. Montana*, 275 Mont. 287, 911 P.2d 1165, 1176 (1996) (The right "to pursue employment" is a fundamental right.). The State of Montana put forward a clear policy that Montanans cannot be denied their fundamental right to pursue employment based on vaccination status. Plaintiffs disagree, and that is fine and normal in a democratic society. The social compact requires that citizens must sometimes forebear laws with which they disagree. Such differing policy preferences, however, do not grant objectors standing or legitimate legal grounds to challenge laws they do not like. Such is the case here. Despite Plaintiffs' alleged need and desire to discriminate against fellow Montanans, they lack standing and have failed to state a claim upon which relief may be granted.

Each of Plaintiffs' claims would require this Court to either greatly expand the scope of existing rights or create new rights. Statutes enacted by the legislature are presumed constitutional as a matter of law. *See Duane C. Kohoutek, Inc. v. Mont. Dep't of Revenue*, 2018 MT 123, ¶ 14, 391 Mont. 345, 417 P.3d 1105. Plaintiffs lack standing because they fail to demonstrate a redressable injury-in-fact, they fail to present a prima facie case that their constitutional rights have been violated, and they fail to show that HB 702 will cause—or *has* caused—any irreparable (or even de minimis) harm.

This Court should therefore deny the application for a preliminary injunction and dismiss Plaintiffs' Amended Complaint.

ARGUMENT

I. Applicable Standards

Preliminary injunctions are an "extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794. They should issue only to "prevent[] further injury or irreparable harm." *Yockey v. Kearns Props. LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185 (affirming denial of preliminary injunction); *Smith v. Ravalli Cnty. Bd. of Health*, 209 Mont. 292, 295, 679 P.2d 1249, 1251 (1984) (affirming denial of preliminary injunction when "appellants had not shown irreparable harm would occur if the injunctions were not issued"). "If a preliminary injunction will not accomplish its limited purposes, then it should not issue." *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73.

Courts may issue preliminary injunctions under five disjunctive circumstances. MCA § 27–19–201. Plaintiffs argue two are present here and entitle them to an injunction: (1) "it appears that the applicant is entitled to relief," and (2) "it appears the commission or continuance of some act during litigation would produce a great or irreparable injury to the applicant." *Id.* Plaintiffs are wrong.

An applicant seeking injunctive relief under § 27-19-201(1) must make a prima facie showing of a "likelihood of success on the merits" and that "the applicant would

suffer harm which could not be adequately remedied after a trial on the merits." *M.H. v. Montana High Sch. Ass'n*, 280 Mont. 123, 135, 929 P.2d 239, 247 (1996); *see also Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386 ("Prima facie is defined as at first sight or on first appearance but subject to further evidence or information") (internal citation and quotations omitted).

As for § 27-19-201(2), simply alleging harm is not enough. Plaintiffs must show there is a likelihood of irreparable injury. *See Driscoll*, ¶ 33 (Sandefur, J. dissenting) ("A prima facie showing is no more than a legal and factual showing that would satisfy the claimant's burden of proof or persuasion if unrebutted."). Applicants in constitutional cases must establish the act in question will "substantially burden or interfere" with recognized constitutional rights. *Id.*, ¶ 57 (Sandefur, J. dissenting); *see also Weems v. State*, 2019 MT 98, ¶¶ 18–19, 25, 395 Mont. 350, 440 P.3d 4 ("not every constitutional infringement may support a finding of irreparable harm.").

Plaintiffs fall far short of this standard. Plaintiffs' fundamental rights claims find no support in Montana law. *See e.g. Pls.' Brief* at 15 (noting the Montana Supreme Court has "not delineated" and "not yet" held the right to a clean and healthful environment encompasses their claim), 17 (citing no authority that the right to pursue employment necessarily includes the right to discriminate), 18 (citing no authority that antidiscrimination laws infringe upon the rights to self-defense or the right to possess and protect property), 19 (citing no authority that antidiscrimination laws infringe upon the right to pursue health, or violate unspecified, unenumerated rights). Plaintiffs' other claims likewise fail to demonstrate any injury because they fail to clearly establish the elements of their claims with sufficient legal or factual authority. *See e.g. Pls.' Brief* at 21-23 (asserting without evidence that law offices and certain health care facilities are similarly situated), 23 (asking this Court to insert words in HB 702's title that do not appear in the text of the bill). Plaintiffs utterly fail to adequately state any injury resulting from HB 702, or that their numerous creative—to be polite—claims are likely to succeed.

Not only are Plaintiffs not entitled to a preliminary injunction, but this action must also be dismissed pursuant to Rule 12. "When considering a motion to dismiss underMont. R. Civ. P. 12(b)(6), all well-pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable to the plaintiff." *Sinclair v. BN & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 200 P.3d 46 (citation omitted). "Courts are not required, however, to accept allegations of law and legal conclusions in a complaint as true." *Threkeld v. Colorado*, 2000 MT 369, ¶ 33, 303 Mont. 432, 16 P.3d 359; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (A complaint must offer more than "naked assertions devoid of further factual enhancement.") (internal citation and quotations omitted). "The liberal notice pleading requirements of Mont. R. Civ. P. 8(a) and 12(b)(6) do not go so far as to excuse omission of that which is material and necessary in order to entitle relief, and the complaint must state something more than facts which, at most, would breed only a suspicion that the claimant may be entitled to relief." *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692. The complaint must, in other words "state[] a cognizable claim for relief," which "generally consists of a recognized legal right or duty; infringement or breach of that right or duty; resulting injury or harm; and, upon proof of requisite facts, an available remedy at law or in equity." *Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241.

Plaintiffs' Amended Complaint and subsequent briefing are nothing more than a journey into hypothetical injuries and untrod legal theories. The Amended Complaint should be dismissed pursuant toMont. R. Civ. P. 12.

Finally, in Montana, laws are presumptively constitutional.*See State v. Davison*, 2003 MT 64, ¶ 8, 314 Mont. 427, 67 P.3d 203. "Every possible presumption must be indulged in favor of the constitutionality of a legislative act."*Id. ; see also GBN, Inc. v. Mont. Dep't of Revenue*, 249 Mont. 261, 265, 815 P.2d 595, 597 (1991) ("If a doubt exists, it is to be resolved in favor of the legislation");*State v. Stark*, 100 Mont. 365, 368, 52 P.2d 890, 891 (1935) ("[T]he constitutionality of any Act shall be upheld if it is possible to do so."). In resolving Plaintiffs' legal claims, the Court must give due weight to the policy-making branch, the Legislature, and its enactments.

II. Plaintiffs Lack Standing

Standing requires: "(1) the party must clearly allege past, present, or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party." *Bryan v. Yellowstone County Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 20, 312 Mont. 257, 60 P.3d 381; *see also Mitchell v. Glacier City*, 2017 MT 258, ¶ 9, 389 Mont. 122, 406 P.3d 427 ("The alleged injury must be concrete rather than abstract. To qualify as concrete, an injury must be actual or imminent, not conjectural or hypothetical.") (citations and quotations omitted). "[A] general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing[.]" *Larson*, ¶ 46.

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

Plaintiffs repeatedly state HB 702 prohibits them from discriminating against Montanans based on vaccination status. *See e.g. Pls.' Brief* at 17 citing Netzer Aff., ¶¶ 17-19. Among other things, Netzer Law would like to adopt a COVID-19 vaccine mandate, refuse to employ individuals unvaccinated for COVID-19, exclude individuals unvaccinated for COVID-19 from their offices, and require unvaccinated individuals do things such as "wash their hands" that would not be required of

vaccinated individuals. The desire to discriminate on the basis of a statutorily proscribed category is not a right—property, civil, or otherwise—and it doesn't impart standing.

And Plaintiffs don't plead sufficient facts to link HB 702 to the health and safety harms they allege. *See e.g.* Amended Compl., ¶¶ 25–26 (failing to state any facts to support Plaintiffs' legal conclusion that a "clean, safe, and healthy" office environment is only possible through the exclusion of unvaccinated individuals); *but see* Bhattacharya Decl., Opinion ¶¶ 2, 12–21, 25–28, 31, 36–37 (Danger from COVID-19 depends on numerous factors; age, chronic disease condition, prior infection, immunity status (both natural immunity and through vaccines), and date of vaccination, to name a few. Plaintiffs isolate one factor to the exclusion of all else.); *Bst Holdings v. OSHA*, 2021 U.S. App. LEXIS 33698, * 16 (5th Cir. Nov. 12, 2021) ("COVID-19 is more dangerous to *some* employees than to *other* employees" and factors such as natural immunity must be considered) (emphasis in original). Plaintiffs' Amended Complaint really only catalogues unsupported fears that unvaccinated individuals pose an existential threat to Netzer Law. *See e.g.* Amended Compl., ¶ 29 (HB 702 prevents Netzer Law from protecting its "economic viability").

Plaintiffs speculate about hypothetical scenarios where they imagine grievous, nonexistent harm. *See* Amended Compl., ¶ 26 ("HB 702 thus limits Netzer Law's ability to exercise its professional judgment in determining employment conditions when necessary to, among other things, ensure a clean, safe, and healthy office environment for Netzer Law's owners, employees, *potential employees*, clients, *potential clients, and other third parties that may interact* within or around Netzer

Law's various offices.") (emphasis added);[1] *see also* Netzer Aff., ¶ 17(D) (Plaintiffs complain HB 702 prohibits them from directing "others" to "take other appropriate steps" to reduce the risk of COVID-19 transmission without explaining who these 'others' are or what 'other' steps should be taken.).

Plaintiffs also fail to allege—even in their Amended Complaint—that they have unvaccinated employees. That is fatal. But even if they had, Netzer Law also failed to plead sufficient facts showing that vaccination alone mitigates risks of COVID-19 infection. That's because no such facts exist.[2] *See* Bhattacharya Decl., Opinion ¶¶ 12–37 (For example, a Wisconsin study confirmed that vaccinated individuals can shed infectious SARS-CoV-2 viral particles). Netzer Law instead expresses disagreement with HB 702; but mere policy disagreements aren't injuries that can sustain a lawsuit. Standing requires more.

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[1] To be clear, should Netzer succeed in enjoining Montana's newest nondiscrimination law, it will not allow the firm to regulate vaccination policy for his clients, the public, or anyone else. The only real issue in this case is whether Netzer and his partner can terminate their employees who have made a personal healthcare decision their bosses don't like. And when it comes to the alleged economic harm HB 702 hath wrought, Plaintiffs fail to state how excluding 59% of individuals in Richland County and 46% of individuals in Yellowstone County from their customer base would protect Netzer Law's economic viability. *See* Amended Compl., ¶ 39. If Netzer tried to impose vaccine requirements on clients, they would almost certainly turn elsewhere for legal services.

[2] CDC, Science Brief: SARS-CoV-2 Infection-Induced and Vaccine-Induced Immunity (updated Oct. 29, 2021), *available at* https://bit.ly/301lzZS. ("Available evidence shows that fully vaccinated individuals and those previously infected with SARS-CoV-2 each have a low risk of subsequent infection for at least 6 months."); CDC Science Brief: Covid-19 Vaccines and Vaccination (September 15, 2021) ("[M]ore data are needed to understand how viral shedding and transmission from fully vaccinated persons..."), *available at* https://bit.ly/2XyfumG (accessed October 21, 2021). CDC's statement is relevant because (1) it acknowledges some risk of vaccinated individuals transmitting COVID-19 meaning that Plaintiffs will likely need to continue current practices to mitigate transmission regardless of HB 702, and (2) the scientific uncertainty surrounding transmission means that Plaintiffs' alleged injuries are likewise too speculative and hypothetical.

III. Plaintiffs fail to establish they are entitled to a preliminary injunction.

A. Plaintiffs' threadbare allegations fail to make out any prima facie violation of any constitutional right.

Plaintiffs' claims fail as a matter of law and are therefore unlikely to succeed on the merits. Bare and baseless legal assertations can't survive a motion to dismiss. *See Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6. Plaintiffs take a spaghetti-on-the-wall approach, claiming that HB 702's antidiscrimination provisions violate the Plaintiffs' right to a clean and healthful environment, right to pursue basic necessities, right to self-defense, right to possess and protect property, and right to seek safety, health, and happiness. Then, just to be sure, they say HB 702 violates other unspecified rights that this Court should create for the first time.

To obtain a preliminary injunction, Plaintiffs "must establish a prima facie case of a violation of [their constitutional] rights." *City of Billings v. Cty. Water Dist.*, 281 Mont. 219, 227, 935 P.2d 246, 250 (1997). "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence and information." *Prima facie*, Black's Law Dictionary (10th ed. 2014). At first glance, the challenged antidiscrimination statute furthers the State's compelling interest in protecting its citizens from discrimination and protecting the fundamental right to privacy. *See Hurley*, 515 U.S. at 572; *State ex rel. Bartmess v. Board of Trustees*, 223 Mont. 269, 279–80, 726 P.2d 801, 807 (1986) (Morrison, J. concurring) (The State has a compelling interest in protecting fundamental rights). Plaintiffs acknowledge that HB 702 accomplishes those goals, because what Netzer Law would really like to do is inquire into its employees' medical information and discriminate against them based upon that information, but cannot because of the law. By contrast, at first glance, Plaintiffs fail to articulate any basis in Montana Law for their claims and instead resort to asking this Court to engage in "innovative judicial activity." *Pls.' Brief* at 19.

1. Montana's constitutional environmental protections do not apply to antidiscrimination laws such as HB 702.

Plaintiffs baselessly assert HB 702 violates their rights to a clean and healthful environment under the Montana Constitution, Article II, section 3 and Article IX, section 1, because they cannot discriminate against Montanans based on vaccination status. Amended Compl. ¶¶ 40–63; *Pls.' Brief* at 14–17. These claims should be dismissed because they lack any foundation in Montana law, are entirely conclusory, and lack any supporting allegations.

Courts apply ordinary rules of statutory construction to constitutional provisions. *See Brown v. Gianforte*, 2021 MT 149, ¶ 33, 404 Mont. 269, 488 P.3d 548. They first look to the plain meaning of the language used. *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. Constitutional text must be construed as a whole, avoiding isolating specific terms from the context in which they appear. *See Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. "[C]onstitutional construction should not lead to absurd results, if reasonable construction will avoid it." *Brown*, ¶ 33.

The Montana Constitution guarantees the right to a clean and healthful environment and requires the Legislature to maintain and improve the environment. *See* Mont. Const. art. II, § 3, art. IX, § 1; *see also Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 ("MEIC"). "Environment" doesn't include Netzer's law office.

The clear purpose of these constitutional rights is to prevent degradation of the natural environment. *See MEIC*, ¶¶ 63-77 (discussing the intentions of the 1972 Constitutional Convention, specifically, the intentions of the Natural Resources Committee which drafted Article IX);*see also* Mont. Const. art. IX, § 1(3) ("The legislature shall provide … adequate remedies to prevent unreasonable depletion and degradation of natural resources." (emphasis added)). The "constitutional text" applies to the "air, water, and soil." *Park Cty. Envtl. Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 59, 402 Mont. 168, 477 P.3d 288, 304 (2020) (The environmental rights apply to "protection of the environmental life support system

from degradation and prevention of unreasonable depletion and degradation of the state's natural resources."). That was certainly the position of the framers. Nothing in the text of the Montana Constitution, the intent of the convention delegates, or subsequent caselaw understands these environmental protections to apply to the great indoors.

Plaintiffs know this, so they argue that "'environment' should be interpreted expansively to include indoor environments." *Pls.' Brief* at 15. Again, no authority supports this position. So Plaintiffs invite this Court to radically transform the meaning of these provisions by spiting the Constitution's text, history, and caselaw. The Court should respectfully decline.

Plaintiffs likewise cite no authority—because none exists—that supports their arguments that the clean and healthful provisions (a) enshrine a personal freedom from infectious diseases or (b) require the State to affirmatively eliminate all potentially harmful pathogens. *See* Amended Compl. ¶¶ 56–66.

The cases cited by Plaintiffs do not support Plaintiffs' interpretation of the right to a clean and healthful environment applying indoors. *See generally MEIC*, 1999 MT 248 (involving water quality); *Clark Fork Coal. V. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 44, 403 Mont. 225, 481 P.3d 198 (water quality); *Park Cty. Env't Council*, 2020 MT 303 (mining permit). As the Court said in *Park County*, the goal of the environmental provisions is to "provide adequate remedies to prevent unreasonable depletion and degradation of *natural resources*." ¶ 63 (emphasis added). The "environmental life support system" refers to the natural environment and natural resources, not a law office. *Id.*, ¶ 63

Plaintiffs concede based on existing case law that the Montana Supreme Court has not recognized their theory that environment means law offices. *See Pls.' Brief* at 15 (Stating that the Montana Supreme Court has "not delineated" what is meant by environment). Plaintiffs' fundamental confusion may stem from an ignorance that public health and antidiscrimination laws flow from the State's police powers, not its obligations under Article IX, Section 1. *See In re Sonsteng*, 175 Mont. 307, 312, 573 P.2d 1149, 1153 (1977) ("[L]aws and regulations for the protection of public health,

safety, welfare and morals" derive from the state's plenary police power."). But whatever the source, Plaintiffs' argument is confused.

In any case, even if the law recognized Plaintiffs' claim, they have not pleaded facts sufficient to demonstrate that HB 702 impermissibly infringes upon this right. *See* Amended Compl. ¶¶ 42–44, 60-63; *infra* Part II (Plaintiffs' claims in this regard are conjectural, hypothetical, and do not address how other remedial measures short of blatant discrimination would fail to alleviate their purported injury). And Plaintiffs' proposed course of action wouldn't eliminate COVID-19 anyway because *vaccinated people also carry and transmit the* disease. *See e.g. supra*, n.2 (studies point to vaccinated and unvaccinated individuals alike spreading COVID-19).

The right to a clean and healthful environment applies to the natural environment. It doesn't give Plaintiffs the right to discriminate against their employees based on vaccination status.

2. Plaintiffs would be violating Montanans' right to pursue life's basic necessities if allowed to discriminate based on vaccination status.

Montanans enjoy a fundamental right to pursue life's basic necessities. *See Wadsworth*, 911 P.2d at 1172. The right to pursue employment is a "necessary incident of the fundamental right to pursue life's basic necessities." *Id.*, 911 P.2d at 1173.[3] "[T]he right to pursue employment and life's other basic necessities is limited by the State's police power is imbedded in the plain language of the Constitution." *Wiser v. State*, 2006 MT 20, ¶ 24, 331 Mont. 28, 129 P.3d 133. "Accordingly, while one does have the fundamental right to pursue employment, one does not have the fundamental right to practice his or her profession free of state regulation promulgated to protect the public's welfare." *Id.* .

[3] Plaintiffs incorrectly characterize *Wadsworth* as creating an unenumerated fundamental right. *Pls.' Brief* at 16. It did not. The Montana Supreme Court properly characterized the right as a necessary incident to an enumerated right.

The Montana Legislature enacted HB 702 to protect individuals from discrimination by actors such as Netzer Law. Montana enacted HB 702 in harmony with existing antidiscrimination law and public health laws. *See* MCA § 50-1-105.

Plaintiffs make no showing in their conclusory arguments as to why they should be exempt from this basic exercise of the State's police powers. *See Pls.' Brief* at 17–18. Nor do they offer any argument as to why the plain language of Article II, Section 3 does not apply. *See* Mont. Const. art. II, § 3 (The listed rights are to be exercised in "all lawful ways"); *see also Wiser*, ¶ 24. Netzer Law fails to demonstrate why telework, pre-appointment screening, or other precautions—which are currently in use—fail to secure a safe and healthy workplace. HB 702 went into effect on May 7, 2021 and has remained in effect for the previous six months, but now Netzer Law says something has changed. Nothing has changed. If Netzer Law can operate now, while HB 702 is in effect, then there is no reason to believe that Netzer Law will cease to operate in the future because of HB 702. *Cf Bst Holdings*, 2021 U.S. App. LEXIS 33698 *9 (OSHA's "impetus - a purported 'emergency' that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two *months* responding to – is unavailing." Likewise, Netzer Law does not face any new threat, it can and has complied with HB 702 even while taking precautions against COVID-19.).

Plaintiffs butcher their analysis of *Wadsworth*. They argue that *Wadsworth* necessarily includes a right to employment and to own and operate a business, while also being able to ignore State antidiscrimination laws in favor of the Plaintiffs' subjective 'professional judgment' as to necessary workplace health precautions. *See Pls.' Brief* at 17; Amended Compl., ¶ 26. *Wadsworth* guarantees the right to opportunity to pursue employment, not to any particular job or employment. 911 P.2d at 1173. *Wiser* made clear the State's plenary police power circumscribes the right to employment. ¶ 24.

Plaintiffs' misuse of *Wadsworth* is perverse. First, Netzer Law purports to compare itself, and all Montana employers, to certain Montana healthcare providers. *See Pls.' Brief* at 23, *see also infra*. Part III(b). Such a comparison goes too far and

ignores the common-sense distinctions between nursing homes and law offices. Second, the effect of this overbroad classification is to subject all Montana workers to the discriminatory whims of employers such as Netzer Law. *See infra* Part V. Netzer Law's request, therefore, undercuts *Wadsworth* by effectively denying Montana workers the right to pursue employment. *Wadsworth* stands as a shield to protect Montanans' rights, not as a sword to deny Montanans the opportunity to earn a living.

In short, the State may constitutionally create antidiscrimination statutes to protect other Montanans from discrimination.

3. The right to self-defense does not entitle Plaintiffs to discriminate based on vaccination status.

Plaintiffs' only citation to authority for their claim that HB 702 violates their right to self-defense is an unexplained analogy to *Wadsworth*. *Pls.' Brief* at 18. The State cannot adequately respond to such underdeveloped and perfunctory arguments and this Court should not consider them. *See Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 42, 358 Mont. 193, 244 P.3d 321 ("Parties must present a reasoned argument to advance their positions, supported by citations to appropriate authority. … It is not this Court's job to conduct legal research on [a party's] behalf, to guess as to [a party's] precise position, or to develop legal analysis that may lend support to that position") (citations and quotations omitted).

Traditionally, the right to self-defense involves a reasonable response to an unlawful use of force. *See State v. Courville*, 2002 MT 330, ¶ 29, 313 Mont. 218, 61 P.3d 749 ("A person is justified in the use of force or threat to use force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force."). Plaintiffs obviously pursue a bold expansion of that right but develop the facts and the contours of their theory no further. And because the remaining inference—that the employees of this small law firm are threatening to batter or assault management with some form of weaponized COVID—seems remote, the Court should reject this claim, too.

4. The right to possess and protect property does not entitle Plaintiffs to discriminate based on vaccination status.

Plaintiffs devote two conclusory sentences to this argument. *Pls. Brief* at 18. But it's not worth even that humble investment. HB 702 does not unconstitutionally infringe on the right to protect and possess property. *See generally Freeman v. Bd. of Adjustment*, 97 Mont. 342, 34 P.2d 534, 355 (1934) (Exercises of the State police power to promote health, safety, morals and provide for the general welfare do not unconstitutionally encumber the right) *accord Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 41, 371 Mont. 356, 308 P.3d 88; *see also City of Missoula v. Mt. Water Co.*, 2016 MT 183, ¶ 110, 384 Mont. 193, 378 P.3d 1113 (the right most commonly arises in cases of condemnation).

Plaintiffs wish to use property rights as pretext for discrimination. Fortunately, the United States Supreme Court long ago rejected such ideas. *See Hamm v. Rock Hill*, 379 U.S. 306, 308 (1964) ("The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities."). In *Hamm*, the Court backed civil rights protesters' ability to hold "sit ins" at lunch counters without being subject to discriminatory enforcement of trespass statutes. *Id.* at 316 ("The convictions were based on the theory that the rights of a property owner had been violated. However, the supposed right to discriminate [] was nullified by the statute."). The Montana Human Rights Act, like the Civil Rights Act, forbids places of public accommodation from engaging in unlawful discrimination. *See e.g.* MCA § 49-2-312(1)(c) (It is an unlawful discriminatory practice for "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."). This Court should reject Plaintiffs' attempt to use property rights as a mechanism to discriminate.

Plaintiffs cite no authority supporting their property rights argument. This claim, like the others, fails.

5. The right to seek safety, health, and happiness does not entitle Plaintiffs to discriminate based on vaccination status.

Plaintiffs claim HB 702 "substantially burdens Neter [sic] Law's" right to seek safety, health, and happiness. *Pls.' Brief* at 19. Netzer Law does not elaborate on what this right is, how it is impacted by HB 702, or meet any minimal standards for sufficient briefing.

Even if Plaintiffs adequately stated their claim, the right to seek health is bounded by the State's police powers. *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 22, 366 Mont. 224, 286 P.3d 1161 ("As with the right to pursue employment, the Constitution is clear that the right to seek health is circumscribed by the State's police power to protect the public's health and welfare") (emphasis omitted). Plaintiffs operate under the misbegotten notion that their personal preferences may constitutionally substitute for the Legislature's policy enactments. This is not the case.

6. The Court should not find any unenumerated rights when the Plaintiffs fail to put forth any such rights.

As a preliminary matter, Plaintiffs' plea to this Court to engage in "innovative judicial activity," *Pls.' Brief at 19*, is not a substitute to well-reasoned and supported argument. *See Griffith*, ¶42. Plaintiffs fail to state the unenumerated right HB 702 infringes upon or offer any support that a relevant unenumerated right even exists in this context. This is because HB 702 does not infringe on Plaintiffs' rights. Instead, Plaintiffs ask, "as this Court deems appropriate," to create an unenumerated right for them. *Pls.' Brief* at 19. It would be more appropriate for the Plaintiffs to adequately plead their claims rather than engage in such a naked attempt at begging the judiciary to do their work for them.

Plaintiffs rely on a solo concurrence to justify their plea for this Court to find an unenumerated right to discriminate. *Id.* . But Justice Nelson's *Snetsinger v. Montana University System* concurrence argues for reading Article II, Section 4 and Section 34 together to afford Montana's antidiscrimination provisions *more* teeth, not

invite additional discrimination. 2004 MT 390, ¶¶ 90, 97, 325 Mont. 148, 104 P.3d 445 (Nelson, J., concurring).[4] Still, the Montana Supreme Court has declined to transform Article II, Section 34 into a constitutional grab-bag of judicially created rights. *See id.*, ¶ 94 ("Court[s] [have] not applied Article II, Section 34 in any substantive context."); *see also*, *Buhmann v. State*, 2008 MT 465, ¶¶ 159–60, 348 Mont. 205, 201 P.3d 70 (Nelson, J. dissenting) (The majority declined to read Article II, Section 34 as expanding Montana's takings clause beyond what the Fifth Amendment protects.); *Kulstad v. Maniaci*, 2009 MT 326, ¶ 101, 352 Mont. 513, 220 P.3d 595 (Nelson, J. concurring) (Justice Nelson reiterated his position in *Snetsinger* but again failed to carry the Court). Under his construction of Article II, Section 34, Justice Nelson still asserted specific unenumerated rights at issue. *See Snetsinger*, ¶ 97 ("[C]lassifications based on gender or sexual orientation are suspect classifications in their own right."). Even under this reading of Article II, Section 34, Plaintiffs' claim fails because they fail to state what unenumerated right is at issue.

Plaintiffs' two-paragraph solicitation to this Court to go find a right for them tacitly admits that they can't find one themselves. They know HB 702 doesn't burden any right, because there is no right to unlawfully discriminate. Having failed to identify any enumerated or unenumerated right HB 702 infringes, this claim—like the others—must fail.

B. HB 702 does not violate Montana's equal protection clause.

"The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶22, 302 Mont. 518, 15 P.3d 877. A "statute does not violate the right to equal protection simply because it benefits a particular class." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 528. Plaintiffs must make some showing, beyond a bare assertion,

[4] Plaintiffs incorrectly state that Justices Cotter and Leaphart joined Justice Nelson's concurrence. *Pls.' Brief at 19.* They did not. *See Snetsinger*, ¶¶ 38, 111 (Justice Nelson signed a solo concurrence).

that the chosen groups are similarly situated. *Cf. Vision Net, Inc. v. State,* 2019 MT 205, ¶ 13, 397 Mont. 118, 447 P.3d 1034. Groups are similarly situated if "they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Id.* .

As stated, HB 702 doesn't involve any of Plaintiffs' fundamental rights, other constitutional rights, and Plaintiffs aren't a suspect class. Rational basis, therefore, applies, requiring the policy to be rationally related to a legitimate government interest. *Snetsinger*, ¶ 19.

Here, Plaintiffs broadly assert, with no support, that Netzer Law Office is similarly situated to nursing homes, long-term care facilities, assisted living facilities, and health care facilities because they are all Montana businesses. *Pls.' Brief* at 23. There are some key differences, however, between health care facilities and law offices. *See e.g.* MCA §§ 50-5-201 to -247 (health care facility licensing); Mont. Admin. R. 37.106 (regulations governing the licensing of health care facilities). And the State has an obvious interest in regulating them differently. *Cf. Vision Net*, ¶ 13 (The equal protection clause is not violated by imposing different regulations on different lines of business.). Because Plaintiffs fail to plead sufficient facts to establish they are similarly situated to assisted living facilities, long term care facilities, and nursing homes, "it is not necessary … to analyze the challenge further." *Id*, ¶ 16.[5]

Further, while HB 702 is properly subject only to rational basis review because, Plaintiffs failed to demonstrate how the law infringes on any right, fundamental or not. Nevertheless, the State has a compelling interest in preventing discrimination and protecting individual privacy.

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[5] Plaintiffs cite Directive Implementing Executive Orders 2-2020 and 3-2020 to support their notion Netzer Law is equivalent to a nursing home. *Pls.' Brief* at 23. That directive is repealed and carries no force of law. *See* Executive Order No. 2-2021 (rescinding Executive Orders 2-2020 and 3-2020). That legal services were once deemed essential, and exempt from certain onerous restrictions, does not at all equate Netzer Law to nursing homes and other health care facilities under current law.

Prohibiting discrimination and protecting fundamental rights are compelling governmental interests by any measure. The United States Supreme Court has long recognized states have a compelling interest in protecting groups from discrimination. *See Hurley*, 515 U.S. at 572. The State, moreover, possesses an unquestioned compelling interest in protecting the fundamental rights of its citizens. *See Bartmess*, 223 Mont. at 279-80, 726 P.2d at 807 (Morrison, J. concurring) (Noting the State's compelling interest in furthering the fundamental right to education).

HB 702 furthers each interest by its plain language. *See* HB 702 ("WHEREAS, the Montana Supreme Court in *State v. Nelson*, 283 Mont. 231, 941 P.2d 441 (1997), concluded that 'medical records fall within the zone of privacy protected by Article II, section 10, of the Montana Constitution' and 'are quintessentially private and deserve the utmost constitutional protection.'"); MCA § 49-2-312(1)(a)–(b) (Prohibiting discrimination "based on the person's vaccination status or whether the person has an immunity passport.").

Plaintiffs' own statements justify HB 702's prohibitions. *See e.g. Pls.' Brief* at 17 ("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."). Plaintiffs acknowledge HB 702 prevents them from engaging in such discrimination and prevents them from requiring proof of medical procedures. *See id.*

Plaintiffs do not address the State's antidiscrimination interest at all, despite HB 702 quite clearly being an antidiscrimination bill.

Plaintiffs only attack the State's interest in protecting individual privacy as pretextual. Plaintiffs ground their entire argument in a statement by HB 702's bill sponsor that she feared the federal government would impose vaccine requirements.

Pls.' Brief at 11, 20.[6] Of course, that has come to pass.[7] The Legislature had the wisdom to discern that vaccination-based discrimination existed or was approaching rapidly and acted to prevent it. That's not pretext, it's prescience.

Constitutional rights are not forfeit, even during pandemics. *See Roman Catholic Diocese v. Cuomo*, 592 U.S. ____, 5 (2020) ("But even in a pandemic, the Constitution cannot be put away and forgotten."). Plaintiffs' desire to abandon Montana's cherished privacy protections carries no weight. *Pls.' Brief* at 20 ("keeping vaccination status private during a pandemic is not a compelling (or legitimate) State interest."). The State made the choice that protection from discrimination matters—and especially so in times of emergency. *See generally Korematsu v. United States*, 323 U.S. 214 (1944).

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[6] Plaintiffs cite *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), for the proposition that any legislative enactment based upon fear and negative attitudes is illegitimate. *Pls.' Brief* at 20. In *Cleburne*, fear led to discriminatory action against handicapped individuals. Here, Plaintiffs allow their fear of COVID-19 and the unvaccinated to react discriminatorily. *See* Netzer Aff., ¶ 20. HB 702 forecloses using such fear over someone's autonomous medical choices to discriminate.

[7] *See* J.R. Stone, "SF recommends suspension without pay for first responders who don't report vaccine status," ABC 7 News (Aug. 20, 2021) (available at https://abc7news.com/san-francisco-vaccine-mandate-coronavirus-covid/10963299/ (accessed Nov. 4, 2021)); Lanie Lee Cook, "2 Denver cops, deputy fired after refusing COVID vaccine," FOX 31 (Nov. 3, 2021) (available at https://kdvr.com/news/coronavirus/covid-19-vaccine/2-denver-cops-deputy-fired-after-refusing-covid-vaccine/ (accessed Nov. 4, 2021)); Meredith Deliso, "Where LA County's employee vaccine mandate stands a month after initial deadline," ABC 7 (Nov. 3, 2021) (Over 20% of the Los Angeles County Sheriff's Department has not submitted vaccination status, and the Sheriff warns that the department could lose a "substantial" number of employees over the vaccine mandate) (available at https://abc7news.com/where-la-countys-employee-vaccine-mandate-stands-a-month-after-ini/11194336/ (accessed Nov. 4, 2021)); Bob Van Voris, "NYC Denies That Vaccine-Proof Requirement Is Racially Discriminatory," Bloomberg (Oct. 6, 2021) (available at https://www.bloomberg.com/news/articles/2021-10-06/nyc-denies-vaccine-proof-requirement-is-racially-discriminatory (accessed Nov. 4, 2021)).

C. HB 702 clearly states its purpose: that discrimination based on vaccination status is prohibited.

Article V, § 11(3) of the Montana Constitution provides that each bill "shall contain only one subject, clearly expressed in its title." This section "is substantively identical" to Article V, Section 23 of the 1889 Montana Constitution. *MEA-MFT v. State*, 2014 MT 33, ¶ 8, 374 Mont. 1, 318 P.3d 702.

Article V, § 11(3) is meant to "prevent the enactment of laws surreptitiously; to give notice to the legislature and to the people that they may not be misled; [and] to guard against fraud in legislation." *State ex rel. Boone v. Tullock*, 72 Mont. 482, 488, 234 P. 277, 279 (1925). But "courts should give to this provision a liberal construction, so as not to interfere with or impede proper legislative functions." *Id.* . The "Legislature has discretion in determining what matters are in furtherance of or necessary to accomplish the general objects of a Bill." *MEA-MFT*, ¶ 10 (internal citations and quotations omitted).

HB 702's title accurately conveys what the bill accomplishes. *See* HB 702 title ("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."). HB 702 prohibits discrimination based on vaccination status or possession of an immunity passport. The title says as much. Plaintiffs understand as much. *See e.g.* Amended Compl., ¶ 25 (Netzer Law acknowledges HB 702 prohibits it from discriminating on the basis of vaccination status or an immunity passport).

Plaintiffs apparently think the bill title is misleading because it omits words that don't appear in the statute. *See Pls.' Brief* at 24 (namely 'vaccine-mandate bans'). HB 702's title accurately conveys what the bill does and this is readily apparent because Plaintiffs' entire lawsuit aims at doing what HB 702 prohibits: discriminating based on vaccination status. The Court should dismiss this claim.

Plaintiffs have failed to make a prima facie case that any of their rights have been violated, and this Court should deny their motion for preliminary injunction. In

fact, because Plaintiffs fail to state any viable claim the Court should dismiss Plaintiffs' Amended Complaint entirely.

IV. Plaintiffs fail to demonstrate that they will suffer irreparable harm unless HB 702 is enjoined.

Plaintiffs have failed to demonstrate that they will suffer some "irreparable injury" or that they are otherwise entitled to preliminary relief. MCA § 27-19-201(1). Plaintiffs recycle their merits arguments putatively as irrebuttable proof of an irreparable injury. *See Pls.' Brief* at 25 citing *Elrod v. Burns*, 427 U.S. 327, 373 (1976) (stating that alleged constitutional injuries in a motion for preliminary injunction "unquestionably constitute irreparable injury"). Preliminary injunctions are not so easily dispensed. *Cf. Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("And what is at issue here is … plaintiff's motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher"); *see also* 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p 129 (2d ed. 1995) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."). Plaintiffs' conclusory, perfunctory allegations fail to satisfy any burden justifying enjoining a duly enacted state law. *See Valley Christian Sch. v. Mont. High Sch. Ass'n*, 2004 MT 41, ¶ 11, 320 Mont. 81, 86 P.3d 554 (affirming denial of preliminary injunction where constitutional rights allegedly infringed were not, at first glance, harmed by the challenged regulation).

V. The public interest strongly favors continued enforcement of HB 702.

An injunction in this case would also undermine the public interest. *See Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342 ("The court has a duty to balance the equities and minimize potential damage when considering an application for a preliminary injunction."). Plaintiffs request this Court invalidate HB 702 as applied to Netzer Law and similarly situated businesses. *See* Amended Complaint Prayer for Relief at B. Plaintiffs seek to affect all businesses and employers in Montana. *See Pls.' Brief* at 23. They ask for this

Court's permission for Netzer Law and every other employer in Montana to begin discriminating against Montanans based on vaccination status. The harm that acquiescing to Plaintiffs' demands will cause to Montanans will be swift and serious. Netzer Law states it has five employees. *See* Netzer Aff., ¶ 4. Two of those employees are part of this case; Don Netzer and Joel Krautter. Presumably, Netzer Law wishes to terminate any of the remaining three employees who are unvaccinated (the State doesn't know for sure because of Netzer Law's deficient allegations). If this Court grants the preliminary injunction, Netzer Law will be able to do just that. Because, during the pendency of this litigation Netzer Law can, in fact, inflict great harm on its employees the public interest tilts sharply towards protecting Montanans from workplace discrimination from the likes of Plaintiffs.

CONCLUSION

Plaintiffs' Amended Complaint and supporting briefing make numerous unsupported, bold, and conclusory claims in service of their desire to discriminate against, presumably, three-fifths of their office. But Plaintiffs lack standing and failed to state any claims upon which relief can be granted. The Court should therefore dismiss the Amended Complaint. And because Plaintiffs utterly fail to carry their burden, the Court should likewise deny their request for a preliminary injunction.

DATED this15th day of November, 2021.

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