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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.

FILED	<i>Janie Kempel</i>
CLERK OF DISTRICT COURT	
DEC 2 2021	
<i>J. Agathe Young</i>	DEPUTY

Cause No. DV-21-89

STATE OF MONTANA'S NOTICE  
OF SUPPLEMENTAL AUTHORITY

Defendants Austin Knudsen and Laurie Esau (hereafter “the State”) submit this notice of supplemental authority in the above captioned matter.

Plaintiffs’ briefing relies heavily on the notion that they may discriminate on the basis of vaccination status contrary to HB 702. *See e.g. Pls.’ Brief* at 17.

After the State’s briefing in opposition to the Preliminary Injunction and in support of the Motion to Dismiss was filed, a preliminary injunction was issued in *Louisiana and Montana, et al v. Becerra et al*, No. 3:21-CV-03970, Doc. 28 (W.D. La. Nov. 30, 2021). The Court enjoined enforcement of the CMS vaccine mandate for Medicare and Medicaid healthcare providers, including providers in Montana.

The Louisiana Court’s order addresses issues raised in briefing in this case.

As noted by the Fifth Circuit in *BST Holdings*:

A person’s choice to remain unvaccinated and forego regular testing is noneconomic inactivity. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 522 (2012) (Roberts, C.J. concurring); *see also Id.* at 652-53 (Scalia, J., dissenting). And to mandate that a person receive a vaccine or undergo testing falls squarely within the States’ police power. *Zucht v. King*, 260 U.S. 174, 176 (1922) (noting that precedent had long “settled that it is within the police power of a state to provide for compulsory vaccination”); *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905) (Similar). No. 21-60845 at 16- 17.

*Id.* The State raised similar arguments as to the primacy of the State’s police power in this space. *See e.g. Defs.’ Brief in Opposition to Preliminary Injunction* at 11, 12, 14, 15. The State raised numerous times that HB 702 is an exercise of the police power.

The Court additionally entered findings such as “even if you are fully vaccinated, you still may become infected with the COVID-19 virus” and “that mandatory COVID-19 vaccines for hospitals do not increase safety for employees or

hospital patients.” *Louisiana and Montana et al*, Doc. 28 at 26. The State raised similar points in its briefing. *See e.g. Defs.’ Brief in Opposition to Preliminary Injunction* at 6, 7, 11.

The Court favorably cited the State’s declarant in this case, Dr. Jay Bhattacharya.

The “evidence” CMS relied upon in rejecting that alternative is not provided. The Declaration of Dr. Jay Bhattacharya [sic], Director of Stanford University’s Center for Demography and Economics of Health and Aging disputes CMS’s assertion that natural immunity is not equivalent to receiving a COVID-19 vaccine. Citing studies from *Qatar* (which tracked 927,321 individuals for six months after COVID-19 vaccinations), California (which tracked the infection rates from over 5 million patients vaccinated with two Pfizer doses), and U.S. Veterans (which tracked 620,000 vaccinated U.S. Veterans), Plaintiff States assert these studies overwhelmingly conclude that natural immunity provides equivalent or greater protection against severe infection than immunity generated by COVID-19 vaccines.

*Id* at 25-26. The State cited Dr. Bhattacharya both in briefing and as a witness. *See e.g. Defs.’ Brief in Opposition to Preliminary Injunction* at 6, 7, *Declaration of Dr. Jayanta Bhattacharya*.

The Court further stated, citing the Declaration of Dr. Peter A. McCullough, “that the COVID-19 vaccines do not prevent transmission of the disease among the vaccinated or mixed vaccinated/unvaccinated populations, and that mandatory COVID-19 vaccines for hospitals do not increase safety for employees or hospital patients.” *Louisiana and Montana et al*, Doc. 28 at 26. The State raised similar points in its briefing. *See e.g. Defs.’ Brief in Opposition to Preliminary Injunction* at 7, 11.

The Court further stated, “[i]f human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.” *Louisiana and Montana et al*, Doc. 28 at 33. The State raised similar arguments in its briefings. *See e.g. Defs.’ Brief in Opposition to Preliminary Injunction* at 19 (“Constitutional rights are not forfeit, even during pandemics.”)

The federal Court concluded that public interest supported the issuance of the injunction: “The public interest is served by maintaining the constitutional structure and maintaining the liberty of individuals who do not want to take the COVID-19 vaccine.” *Louisiana and Montana et al*, Doc. 28 at 32. “The liberty interests of the unvaccinated requires nothing less.” *Id* at 33. The State raised these liberty interests in its briefing. *See e.g. Defs.’ Brief in Opposition to Preliminary Injunction* at 21-22.

For the aforementioned reasons, this Court should take notice of *Louisiana and Montana, et al v. Becerra et al*, No. 3:21-CV-03970, Doc. 28 (W.D. La. Nov. 30, 2021). Because the issues in that case and this one are similar, its findings should help inform this Court’s disposition of this matter.

DATED this 2nd day of December, 2021.

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### CERTIFICATE OF SERVICE

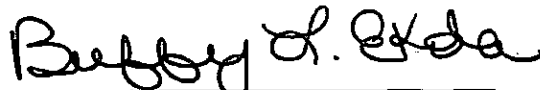
I certify a true and correct copy of the foregoing was delivered by first class, postage paid mail and email to the following:

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Date: December 2, 2021



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BUFFY EKOLA