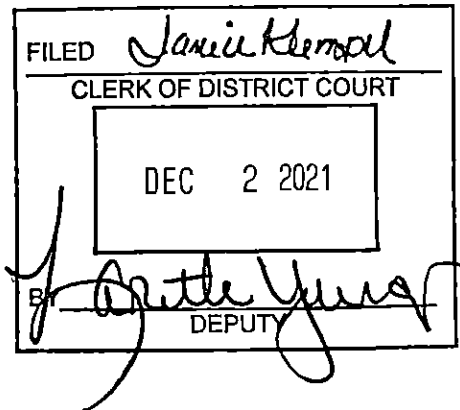


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MONTANA SEVENTH JUDICIAL DISTRICT COURT, RICHLAND COUNTY

NETZER LAW OFFICE, P.C. and DONALD L. NETZER, Plaintiffs, vs. 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 PLAINTIFFS' REPLY TO STATE DEFENDANTS BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION <i>Honorable Olivia Rieger</i>
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COME NOW Plaintiffs, Netzer Law Office, P.C. and Donald L. Netzer (collectively, "Netzer Law") and file this reply to the State Defendants Brief in Opposition to Plaintiff's Application for Preliminary Injunction. Netzer Law's reply here solely responds to State Defendants' Opposition to Plaintiffs' Application for Preliminary Injunction. With briefing completed on this matter, Netzer Law requests the Court set a hearing in accordance with MCA § 27-19-303.

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INTRODUCTION

State Defendants' arguments in opposition to Netzer Law's injunction application lack merit. Their opposition—founded on hyperbole, incorrect legal standards, circular arguments, and inflammatory mischaracterizations—fails to rebut Netzer Law's prima-facie or irreparable-harm showings. Netzer Law's requested preliminary injunction should therefore be granted.

In their opposition, State Defendants do not dispute any material facts underlying Netzer Law's claims. They do not dispute the severity of the current COVID-19 pandemic in Montana, the substantial protections afforded by vaccines and immunity, or that HB 702's prohibitions that affect Netzer Law apply to all vaccinations. Instead, State Defendants bet their defense on contending that an injunction cannot issue because *some* of Netzer Law's claims involve matters of first impression and that the facts Plaintiffs have presented are insufficient. That a claim arising from the novel COVID-19 pandemic constitutes a matter of first impression has no bearing on Netzer Law's injunction application. It merely calls on this Court to do what it always does for constitutional claims—interpret provisions of the Montana Constitution; consider the Framers' intent; and, where case law on a constitutional provision exists, apply the relevant rationales to new facts to reach a decision. Moreover, State Defendants' blanket argument omits the fact that Netzer Law also makes prima facie showings on its non-first-impression claims.

Tellingly, State Defendants have conceded that HB 702 cannot survive strict scrutiny review. First, they have not rebutted Netzer Law's position that the Legislature's stated purpose of "privacy" is a pretext. Second, State Defendants have not disputed Netzer Law's assertions that HB 702 is neither closely tailored to, nor the least onerous path possible to achieve, the Legislature's purported privacy purpose. In other words, State Defendants have conceded that if this Court concludes that HB 702 substantially interferes with a fundamental right, the law must

be struck down because it fails strict scrutiny review.

For these reasons, those set forth in Netzer Law's initial brief, and those stated below, Netzer Law's application for a preliminary injunction should be granted.

BACKGROUND

The COVID-19 pandemic continues to impact daily life in Montana, the United States, and abroad. Even since the filing of this matter, a new COVID-19 variant of concern called "Omicron" has emerged and is causing new travel restrictions.¹ While little is known about the Omicron variant, the Centers for Disease Control and Prevention has reemphasized its guidance on combating COVID-19:

We know what it takes to prevent the spread of COVID-19. CDC recommends people follow prevention strategies such as wearing a mask in public indoor settings in areas of substantial or high community transmission, washing your hands frequently, and physically distancing from others. CDC also recommends that everyone 5 years and older protect themselves from COVID-19 by getting fully vaccinated. CDC encourages a COVID-19 vaccine booster dose for those who are eligible.²

Furthermore, the World Health Organization in addressing the new Omicron variant and associated unknowns also stressed the efficacy of vaccines stating, "Vaccines remain critical to reducing severe disease and death, including against the dominant circulating variant, Delta. Current vaccines remain effective against severe disease and death."³ The highly transmissible Delta variant has previously been identified as being the dominant variant present in Montana and

¹ NPR, *The U.S. restricts travel from 8 countries as omicron variant spreads*, <https://www.npr.org/2021/11/29/1059772335/us-restricts-international-travel-over-omicron-variant> (accessed Nov. 30, 2021).

² Centers for Disease Control and Prevention, *CDC Statement on B.1.1.529 (Omicron variant)*, <https://www.cdc.gov/media/releases/2021/s1126-B11-529-omicron.html> (Nov. 26th, 2021).

³ World Health Organization, *Update on Omicron*, <https://www.who.int/news/item/28-11-2021-update-on-omicron> (Nov. 28th, 2021).

is more than twice as contagious as previous variants, with the risk of transmission greatest among unvaccinated individuals.⁴

Despite vaccines having become freely available to the public in the spring of 2021, Montana has continued to feel the effects of COVID-19 and experienced lagging vaccination rates, especially in Richland County.⁵ A September report from the Montana Department of Public Health and Human Services confirmed, “Unvaccinated 5 Times More Likely to be Hospitalized and 3 Times More Likely to Die from COVID-19.”⁶ In October, newspapers heralded that, “Montana leads country in COVID cases per 100k” and “Montana reaches record COVID-19 hospitalizations at 510.”⁷

The CDC recommends “COVID-19 vaccination, along with layered prevention strategies, continues to be our best defense against severe disease.”⁸ State Defendants’ Dr. Bhattacharya in his Declaration cites a U.K. study that concluded in relevant part, “Vaccination reduces the risk of delta variant infection and accelerates viral clearance.” ¶ 28.

Individuals who are immunocompromised, have an underlying medical condition, or older adults age 65 and over are most at risk of becoming severely ill from COVID-19.⁹ For instance, for individuals who are 65 and older (as Donald L. Netzer, one of the Plaintiffs in this matter is), the chance of death from COVID-19 is 80 times higher than among people aged 18-29. *Id.*

⁴ Ex. 6 of Netzer Aff., “*Delta Variant: What we Know About the Science*”; Ex. 5 of Netzer Aff., “*COVID-19 Variants Identified in Montana*.”

⁵ Ex. 2 of Netzer Aff., “With low vaccination rates, Montana’s COVID hospitalizations have continued to rise”; *See also* Ex. 17 of Netzer Aff.

⁶ Ex. 16 of Netzer Aff.

⁷ Ex. 20 and 21 of Netzer Aff.

⁸ Ex. 8 of Netzer Aff., “*Prevention is the Best Defense*.”

⁹ Ex. 7 of Netzer Aff., “*People with Certain Medical Conditions*.”

Additionally, people who have had a severe illness with COVID-19 may also experience multiorgan effects or autoimmune conditions for weeks or months after a COVID-19 illness.¹⁰

HB 702 substantially interferes with Netzer Law's ability to take measures to protect its owners, employees, clients, and potential clients, because it makes it 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.

Section 1, Montana HB 702, 67th Montana Legislature (2021).

While schools largely are excepted and health care facilities are allowed under HB 702 to implement reasonable accommodation health and safety measures to protect those in their offices, no such exceptions or exemptions exist for employers like Netzer Law who have owners, employees, and clients who represent a broad cross section of Montanans (including immunocompromised and elderly) and are also living with the threats of the COVID-19 pandemic and other transmissible diseases for which vaccines exist.

APPLICATION OF THE CORRECT LEGAL STANDARD FOR PRELIMINARY INJUNCTIONS

State Defendants misstate applicable injunction standards, incorrectly contending that Netzer Law must make a greater showing than the correct preliminary-injunction standard stated

¹⁰ CDC, *Post-COVID Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html> (Sept. 16, 2021).

in Netzer Law’s opening brief. *Pl. Br.* at 13. Contrary to State Defendants’ misstatements, (1) an applicant is *not* required to “defeat the presumptive constitutionality of a statute” for a preliminary injunction to issue (*Compare Def. Br.* at 4, *with Weems*. ¶ 18 n.4); and (2) the federal preliminary-injunction test *does not* apply, including its stricter standard for irreparable harm and its consideration of the public interest (*Compare Def. Br.* at 21, *with Pl. Br.* at 13).¹¹ Instead, “an applicant for a preliminary injunction must establish a prima facie case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.” *Mack v. Anderson*, 2016 MT 204, ¶ 15, 384 Mont. 368, 373, 380 P.3d 730, 733. Additionally, although not every “constitutional infringement” necessarily supports a finding of irreparable harm (*Def. Br.* at 3), infringements of fundamental rights unquestionably do. *See Weems v. State by & through Fox*, 2019 MT 98, ¶ 26, 395 Mont. 350, 364, 440 P.3d 4, 13; *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶ 15.¹²

ARGUMENT

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

HB 702 violates Netzer Law’s inalienable rights and fundamental right to equal protection, as well as the single-subject rule. For these reasons, Netzer Law’s claims are likely to succeed on the merits and an injunction should issue.

¹¹ Netzer Law notes that if Montana’s statute required the Court to consider the public interest, it would weigh heavily in Netzer Law’s favor. State Defendants do not dispute the seriousness of the ongoing pandemic or the health, safety, and economic harms it continues to cause. Allowing governments, employers, and businesses to implement measures to mitigate the unique risks posed by unvaccinated and non-immune persons would greatly serve the public interest.

¹² Although a small handful of cases characterize a preliminary injunction as an “extraordinary remedy,” that characterization comes from the federal standard. Notably, nothing in MCA § 27-19-201 suggests that a preliminary injunction is an “extraordinary remedy”—it simply provides that an injunction issues whenever one of the standards is met.

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

State Defendants incorrectly suggest that the legislature's "plenary power" (*In re Sonsteng*, 175 Mont. 307, has never been cited by the Montana Supreme Court for this proposition) to adopt laws protecting public health, safety, and welfare insulates all legislative actions from constitutional scrutiny. *Defs. Br.* at 10-11. Accepting this proposition would render the Montana Constitution's fundamental-rights and inalienable-rights provisions entirely meaningless. *See Armstrong v. State*, 1999 MT 261, ¶ 61, 296 Mont. 361, 384–85, 989 P.2d 364, 380 ("Long ago, this Court declared that 'the State Constitution is a limitation upon the power of the legislature and not a grant of power to that body.'" (citation omitted)); *Gryczan v. State*, 283 Mont. 433, 454, 942 P.2d 112, 125 (1997) ("[I]t is axiomatic that under our system of laws, the parameters of the legislature's policy-making power are defined by the Constitution and that its ability to regulate . . . is not without limits."); *Garden Spot Mkt., Inc. v. Byrne*, 141 Mont. 382, 396. But even accepting State Defendants' anti-constitutionalist interpretation, HB 702 would not be insulated because it unequivocally harms public health, safety, and welfare as explained above. *See supra* Background.

1. The Constitutional Right to a Clean and Healthful Environment Applies to Indoor Office Environments.

State Defendants contend that the expansive constitutional right to a clean and healthful environment is limited to the (outdoor) "natural environment" and does not protect against "infectious diseases." *Defs. Br.* at 9-10. State Defendants assert the cases cited by Plaintiffs apply this right only to the natural environment and that such a right was meant to "prevent unreasonable depletion and degradation of natural resources" and therefore, "'environment' doesn't include, 'Netzer's law office.'" *Defs. Br.* at 9. State Defendants incorrectly suggest that *Park Cty. Envtl. Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 62 limits this constitutional protection

to “air, water, and soil.” *Id.* Even if that were the case, State Defendants fail to explain why natural elements like air, water and soil (that exist in both indoor and outdoor environments) should be treated differently under the law depending on where they are found. *Defs. Br.* at 9.

Adopting State Defendants’ position would rewrite Montana’s Constitution by adding limiting language that does not exist and that the Framers expressly refused to include in the first instance. Furthermore, Montanans would lose their inalienable right to a clean and healthful environment (including clean air, water, etc.) the moment they enter a building. Such a limiting interpretation would contradict the unqualified plain language of Article II, Section 3. Indeed, the Framers specifically did not include any limiting or qualifying language to “environment,” a term that unambiguously encompasses both outdoor and indoor environments.¹³ State Defendants unreasonably ask the Court to find that the Framers cared only about human health and safety in the natural outdoor environment and not the indoor environment—*i.e.*, that Netzer Law would have the rights it seeks if holding meetings or working on a patio or in a park, but not within its office. *Brown v. Gianforte*, 2021 MT 149, ¶ 33, 404 Mont. 1, 185 P.3d 1003 (stating “constitutional construction should not lead to absurd results, if reasonable construction will avoid it”).

State Defendants erroneously assert that because Netzer Law has cited no case showing the right to a clean and healthful environment applies to indoor environments, no such right could exist. *Defs. Br.* at 9-10. But State Defendants cite no case limiting the right to a clean and healthful environment to “outdoor environments.” As Netzer Law stated, the scope of “environment” is an

¹³ See *American College Dictionary* (1969) (defining “environment” as “the aggregate of surrounding things, conditions, or influences”); *American Heritage Dictionary* (1973) (defining “environment” as “[t]he total of circumstances surrounding an organism or group of organisms”) (courtesy copies of above noted definitions enclosed herein); *Dictionary.com*, www.dictionary.com/environment (defining “environment” as “the aggregate of surrounding things, conditions, or influences” or “the air, water, minerals, organisms, and all other external factors surrounding and affecting a given organism at any time”).

issue of first impression, *Pl. Br.* at 15, and the absence of a prior court ruling does not preclude the existence of the right Netzer Law asserts.

State Defendants assert that because vaccinated people can also carry and transmit the COVID-19 disease that Netzer Law's proposed course of action, but for the prohibitions of HB 702, would not eliminate COVID-19. *Defs. Br.* at 11. This is a strawman argument. Netzer Law has not asserted that instituting the common-sense measures HB 702 prohibits would entirely eliminate the spread of COVID-19 or other diseases. *Netzer Aff.* at ¶ 15 and 17. However, it is known that vaccinated and immune individuals have a substantially lower chance of transmission and of contracting COVID-19. *See* Ex. 6 of *Netzer Aff.*; *Bhattacharya Dec.* at ¶¶ 28-29; *supra* Background.

Furthermore, vaccines or immunity against COVID-19, like Netzer Law would like to require proof of, have been proven to reduce the risk of fatal infections, and State Defendants concede this. *Bhattacharya Decl.*, ¶ 11 ("The COVID-19 vaccines approved for use in the U.S. are very effective in substantially reducing the infection fatality rate."); *id.* at ¶ 35 ("The CDC's main concern in this FAQ seems to be to help people understand that it is safer to attain immunity against SARS-CoV-2 infection via vaccination rather than via infection. This is a point not in dispute."). Furthermore, State Defendants' declarant also states, "Both vaccine-mediated immunity and natural immunity after recovery from COVID infection provide extensive protection against severe disease from subsequent SARS-CoV-2 infection." *Id.* at ¶ 12. Yet, because of HB 702's prohibitions, Netzer Law cannot require either proof of vaccination or immunity if someone has recovered from COVID-19. Dr. Bhattacharya's sworn statements illustrate the egregiousness of HB 702 and State Defendants' position that the law is somehow in the public interest. That in the middle of a pandemic that has now caused the deaths of thousands of Montanans and hundreds of

thousands of Americans since 2020 (numbers which are uncontroverted by State Defendants), Montana businesses like Netzer Law have had government-imposed blinders put on them preventing them from mitigating risk and protecting the health and safety of their owners, employees, and clients.

HB 702's prohibitions substantially interfere with Netzer Law's inalienable constitutional right to a clean and healthful environment because those prohibitions restrain Netzer Law's freedoms to implement proven and effective health and safety measures to protect its owners, employees, and clients during a pandemic.

2. Netzer Law Has a Constitutional Right to Pursue Life's Basic Necessities Without Being Subject to Serious Health Threats.

State Defendants' claim that Netzer Law's asserted rights to pursue life's basic necessities without being subject to a serious threat would somehow jeopardize Montanans' ability to earn a living is an unsupported red herring. *Defs. Br.* at 13. Notably, State Defendants do not dispute that HB 702 creates less safe work environments for Montanans. Other courts have recognized a common-law duty on employers to provide a safe and healthy working environment. *Shimp v. N.J. Bell Tel. Co.*, 145 N.J. Super. 516, 521-22, 368 A.2d 408, 410-11 (Super. Ct. 1976) ("This right to safe and healthful working conditions is protected not only by the duty imposed by common law upon employers, but has also been the subject of federal legislation."). State actions like HB 702 that clearly creates serious health and safety threats in work environments across the State substantially interfere with the fundamental right to pursue life's basic necessities.

State Defendants disingenuously claim that because Netzer Law has taken precautions in the past that have been supposedly working, Netzer Law can continue taking these precautions and that "[n]othing has changed" from the time this law was passed until this lawsuit was filed. *Defs. Br.* at 12. That claim ignores the multiple real-world developments surrounding COVID-19 that

have happened in Montana and more broadly, since HB 702 was passed in May of 2021 (e.g., a shortage of healthcare workers and hospital beds, the ongoing Delta surge, the new Omnicron variant, etc.).¹⁴ State Defendants cite no law supporting their proposition that Netzer Law's and other employers' fundamental rights are not violated simply because they indefinitely can close their doors and abandon in-person work.

3. Netzer Law Has An Inalienable Right to Take Actions for Self-Preservation Against a Deadly Disease.

State Defendants incorrectly contend that the right to self-defense is limited to “a reasonable response to an unlawful use of force.” *Def's. Br.* at 13. The well-understood and commonly invoked case *Jacobson v. Massachusetts* concluded that, “Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” 197 U.S. 11, 27, 25 S. Ct. 358, 362 (1905) (upholding a law mandating vaccines against smallpox). Relying on *Jacobson*, numerous courts across the country have upheld State laws and executive orders adopted to protect their residents from the deadly COVID-19 pandemic. *See, e.g., Forbes v. Cnty. of San Diego*, No. 20-cv-00998-BAS-JLB, 2021 U.S. Dist. LEXIS 41687, at *1 (S.D. Cal. Mar. 4, 2021) (denying challenge to

¹⁴ *See* Ex. 2 to Netzer Aff., “With low vaccination rates, Montana’s COVID hospitalizations have continued to rise”; Ex. 3, “Billings Clinic preparing for Crisis Standards of Care”; Ex. 6, “Delta Variant: What We Know About the Science”; Ex. 10, “FDA Approves First COVID-19 Vaccine”; Ex. 14, “Trend Continues of COVID-19 Related Hospitalizations of Unvaccinated Individuals”; Ex. 16, “New Montana Report: Unvaccinated 5 Times More Likely to be Hospitalized and 3 Times More Likely to Die from COVID-19”; Ex. 20, “Montana reaches record COVID-19 hospitalizations at 510”; and Ex. 21, “Montana leads country in COVID cases per 100k”; A review of the State of Montana’s COVID-19 Dashboard located at: <https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b> (accessed Dec. 1, 2021) shows that from approximately the time Plaintiffs filed their *Application for Preliminary Injunction* on October 26th, 2021, until this reply is submitted, 463 more Montanans have died from complications of COVID-19 and 1,404 more Montanans have been hospitalized for COVID-19. *See also* Ex. 12 of Netzer Aff.

face-mask requirements imposed during COVID-19 pandemic); *Tandon v. Newsom*, 517 F. Supp. 3d 922, 932 (N.D. Cal. 2021) (denying challenge to COVID-related restrictions on businesses because restrictions bore a real and substantial relation to public health and compelling government interest in slowing spread of COVID-19 and preventing healthcare system from being overwhelmed); *Doe v. Mills*, 29 Fla. L. Weekly Fed. S. 29 (U.S. 2021) (denying emergency injunction request from healthcare workers in Maine from COVID-19 vaccine mandates); *see also*, e.g., *People of State of Ill. v. Gen. Elec. Co.*, 683 F.2d 206, 214 (7th Cir. 1982) (recognizing “quarantine cases” upheld State bans on importation of “persons afflicted by contagious or infectious diseases” under “the sacred law of self-defense” (internal quotation marks and citations omitted)).

Predating *Jacobson*, the writings of Samuel Adams and William Blackstone shed further light on the importance of this natural right of self-defense and self-preservation.¹⁵ “Although the concept of self-defense is most often thought of in terms of the response to an assault by another human being, its premise compels the same response in the face of other forms of aggression against life and limb, whether the aggressor be an animal or a diseased cell within one’s body.”

¹⁵ Samuel Adams referred to “the duty of self-preservation” as “the first law of nature.” Samuel Adams, *The Rights of the Colonists: Report of the Committee of Correspondence to the Boston Town Meeting*, 7 Old South Leaflets 417 (No. 173) (Burt Franklin 1970) (1772). Legal commentator Sir William Blackstone wrote of “three principal or primary articles” that historically comprise “the rights of all mankind.” William Blackstone, *1 Commentaries on the Laws of England* (1765-1769), 129, “Absolute Rights of Individuals.” First among these rights was the “Right of Personal Security.” *Id.* “The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, [and] his health....” *Id.* at 129. Blackstone also wrote that this right consisted of, “[t]he preservation of a man’s health from such practices as may prejudice or annoy it. *Id.* at 134. This right also included the right to self-defense and self-preservation, “For whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion.” *Id.* at 130.

Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 378 U.S. App. D.C. 33, 55-56, 495 F.3d 695, 717-18 (2007), (Rogers, J. dissenting).

These cases support Netzer Law's assertion that its inalienable right to defend its life includes being able to adopt proven and effective health and safety measures during a pandemic to protect its owners, employees, clients, and business from a deadly disease. HB 702 substantially interferes with this right by prohibiting Netzer Law under the threat of prosecution from being able to adopt these measures.

4. HB 702's Prohibitions Substantially Interfere with Netzer Law's Constitutional Right to Fully Possess and Protect Its Property.

Both State Defendants and Netzer Law cite the case of *Freeman v. Bd. of Adjustment*, 97 Mont. 342, 355, 34 P.2d 534, 538 (1934). *Freeman* outlines that, "Under the guise of protecting the public or advancing its interest, the state may not unduly interfere with private business or prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them. Any law or regulation which imposes unjust limitations upon the full use and enjoyment of property, or destroys property value or use, deprives the owner of property rights." *Id.* Netzer Law is a law office with employees and owners, and HB 702 has placed constraints on the health and safety policies Netzer Law may adopt to protect their physical workplaces and broader business. Netzer Aff., at ¶¶ 14-19. Netzer Law has asserted these constraints are unlawful and serve no legitimate purpose and in fact do the opposite of protecting the public. *Pl. Br.* at 14-16.

Although State Defendants undoubtedly take great pleasure in inaptly (and irreverently) comparing Netzer Law to Jim-Crow South Carolina and Arkansas, *Hamm v. Rock Hill*, has no bearing here. In this case, State action (HB 702) prohibits Netzer Law from exercising its inalienable rights to implement health and safety measures to protect its property interests against serious threats from an ongoing and deadly pandemic. In contrast, South Carolina and Arkansas

sought to uphold their trespass-statute prosecution of Black Americans who staged sit-ins in protest of Jim Crow laws. 379 U.S. 306 (1964). *Hamm* did not invoke or involve constitutional property rights and, even if it did, they would not have been those unique rights arising from the Montana Constitution at issue here. Instead, *Hamm* involved a straightforward application of the United States Constitution's Supremacy Clause, concluding that the Civil Rights Act of 1964 superseded South Carolina's and Arkansas's trespass statutes. *Id.*

Contrary to State Defendants' frivolous insinuations, Netzer Law's desire to adopt health and safety measures deemed the best methods by the CDC to protect lives and its property *is light years apart* from Jim-Crow States abusing their laws and enforcement powers to subjugate Black Americans and deny them equal access to public accommodations because of the immutable characteristic of race. *See* Ex. 6 to Netzer Aff. State Defendants thus fail to rebut Netzer Law's assertion that HB 702 substantially interferes with its inalienable right to fully possess and protect its property.

5. HB 702 Substantially Interferes with Netzer Law's Constitutional Right to Seek Safety, Health and Happiness.

Although this issue has never been before a court, the plain language of Article II, Section 3 providing an inalienable right to seek safety, health, and happiness is clearly burdened by HB 702. This is self-evident as, above all else, HB 702's restrictions cripple Netzer Law's and other employers' ability to protect the safety and health of its owners, employees, clients, and business. Despite this, and that Netzer Law had already asserted related arguments and facts in its opening brief, State Defendants claim the issue was insufficiently briefed.

Having no plain-language defense to Netzer Law's asserted right under this provision, State Defendants default to their position that any right would be circumscribed by the State's police powers. *Defs. Br.* at 15. State Defendants do not explain, however, how such circumscription

eviscerates Netzer Law's asserted right. Netzer Law's asserted right to implement proven health and safety measures to protect lives and properties during an ongoing pandemic is not remotely comparable to the facts in *Wiser*, where the Montana Supreme Court held that no fundamental rights were implicated for denturists related to a regulation requiring dentist referrals before certain work could occur or in *Montana Cannabis Industries Association* for a trade association whose members wanted to sell an illegal drug. The stakes here are significantly higher, and State Defendants proffer no persuasive argument that Netzer Law's asserted right does not fit within the plain language or that HB 702 does not substantially interfere with that right.

6. Unenumerated Rights.

State Defendants erroneously claim that "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." *Def's. Br.* at 15. Netzer Law clearly stated that, "[e]ven 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")." *Pl. Br.* at 19. Netzer Law has clearly delineated those rights and Article II, Section 34 may be used to protect them.

Such visionary forward looking reasoning by Montana's constitutional framers recognized the flexibility that may be needed for situations that could arise but were beyond someone in 1972 to foresee.

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

State Defendants largely ignore and fail to rebut Netzer Law's assertions on strict scrutiny. For example, State Defendants have completely failed to argue that HB 702 is narrowly tailored or the least onerous path to accomplish its sole purported purpose of privacy. *See generally Def's.*

Br. Instead, State Defendants merely conclude that “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.” *Defs. Br.* at 17. But fundamental rights are implicated here, State Defendants have no compelling interest, and they have conceded the law is not narrowly tailored. Independently, State Defendants have not rebutted Netzer Law’s showing that the purported purpose of privacy was a pretext, which renders HB 702 unconstitutional even under rational-basis review. *See Pl. Br.* at 14, 19, 21 and 23.

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

Instead of rebutting Netzer Law’s showing that HB 702’s purported privacy purpose was a pretext, State Defendants acknowledge and praise HB 702’s sponsor’s for being right about her fears of federal mandates (the real purpose of the law). *Compare Defs. Br.* at 19; *id.* at 1 (recognizing that HB 702 was not about privacy issues but merely was a “hotly contested contemporary social question”), *with Pls. Br.* at 20. State Defendants further fail to rebut Netzer Law’s assertion that HB 702 fails to protect privacy because by its design purporting to prevent discrimination, it impliedly assumes a person’s vaccination status is known (otherwise they could not be treated differently based on that status).

In the absence of a legitimate legislative privacy purpose, State Defendants attempt to manufacture and shoehorn one—to protect against the denial of the fundamental right of Montanans to pursue employment based on vaccination status. *Defs. Br.* at 1, 17. No law allows the State Defendants to rewrite legislation or legislative history as they are trying to do here.

Because State Defendants cannot add a new purpose to the bill that the Legislature did not have and the privacy purpose was a pretext and is not advanced by HB 702, HB 702 lacks a legitimate purpose and fails strict scrutiny, intermediate scrutiny, and the rational-basis test.

Thus, HB 702 should be enjoined.

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

While State Defendants assert numerous times that HB 702 serves a “compelling interest,” they have not explained how it is closely tailored to supposedly advancing the alleged compelling government interest. *Defs. Br.* at 17. Netzer Law highlighted that HB 702’s broad prohibition of vaccine status discrimination was not closely tailored to its purported interest in protecting medical-record privacy. *Pls. Br.* at 21. Netzer Law further highlighted how HB 702 by its very design implicitly contemplates an individual’s vaccination status being known, such that they cannot be treated differently based on that vaccination status. *Id.* Because State Defendants fail to rebut these assertions, HB 702 fails the strict scrutiny test.

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

State Defendants call Netzer Law’s comparison of being similarly situated to healthcare facilities in Montana as going too far because it, “ignores the common-sense distinctions.” *Defs. Br.* at 12-13. Nevertheless, State Defendants fail to articulate what common sense distinctions it is referring to, while ignoring that Netzer Law has owners, employees, and clients which represent a broad cross section of Montanans, including those who are elderly and immune-compromised, similar to individuals found working and residing in health care facilities. *See Pl. Br.* at 23 and *Aff. of Donald L. Netzer* at ¶¶ 5-10. State Defendants, however, fail to dispute Netzer Law’s assertion that it is similarly situated to schools. *See id.* at 12-13, 16-17.

Nevertheless, State Defendants contend that HB 702 does not violate equal protection because Netzer Law is not similarly situated to health care facilities and because HB 702 does not involve a fundamental right. *Defs. Br.* at 16-17. State Defendants go on to quote *Gazelka v. St. Peter’s Hosp.* 2018 MT 152, ¶ 16, that a, “statute does not violate the right to equal protection

simply because it benefits a particular class.” *Id.* at 16. Importantly, the sentence before the one quoted by State Defendants from *Gazelka*, which was omitted, provides, “Statutes may treat certain people differently, but may not base the disparate treatment on “a classification that is wholly unrelated to some legitimate state purpose.”” *Id.* quoting *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 30. Missing in State Defendants’ arguments, is any statement of what “legitimate state purpose” there is to allow the purported “discrimination” HB 702 seeks to prohibit, in schools and health care facilities verses other employers. Netzer Law Office has an owner and employee in Donald L. Netzer who is 70 years old, putting him in the higher risk category for COVID-19, similar to individuals that may be found working or even residing in one of the exempted facilities. *See* Ex. 7 of Netzer Aff.; Netzer Aff. ¶ at 3.

State Defendants fail to articulate what legitimate state purpose is accomplished because HB 702’s exemption scheme has no clear rhyme, reason, or discernable logic. If the State Defendants position were that these facilities were exempted because individuals in schools, nursing homes, long-term care facilities, assisted living facilities and health care facilities deserve greater protections from COVID-19 and other transmissible diseases for which vaccines exist, and thus they should be able to require unvaccinated people to be treated differently (discriminated against), this would be a tacit admission by the State Defendants that HB 702 in fact creates greater health risk of harm to individuals in these facilities and undermines public health and safety – as Netzer Law has asserted. *Pl. Br.* at 20. It would also be an admission by the State Defendants that discrimination based on vaccination or immunity status is acceptable. Rather than attempt to explain the exemption scheme in a coherent way, State Defendants sidestep the discussion altogether.

The State Defendants attempt to draw a distinction between Netzer Law and health care facilities because health care facilities are licensed and regulated. Similarly, Netzer Law is also subject to licensing requirements in order to provide legal services. *See* MCA § 37-61-210. Governor Bullock’s Stay-at-Home Directive, even if it has now been repealed, is nevertheless illustrative that when an unprecedented decision had to be made in the midst of the pandemic about shutting down businesses and ordering Montanans to stay at home, businesses that provided legal services like Netzer Law were treated as “essential businesses” the same as health care facilities and educational facilities.

Based on the foregoing, strict scrutiny applies under the equal protection analysis because fundamental rights are implicated, and Netzer Law is similarly situated to HB 702’s excepted and exempted entities. Strict scrutiny therefore applies, and HB 702 must be invalidated. *Supra* Part I.B.

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

State Defendants do not assert a single argument as to why HB 702’s (MCA § 49-2-312 and 313) title fails to mention the subject of the express and absolute ban on certain vaccine mandates in-use against the COVID-19 pandemic, which would have notified the public while the bill was in process and public comment could still be given that not only does HB 702 prohibit people being treated differently based on vaccine status, (the purported, “discrimination”) but that it also explicitly banned vaccines during an active pandemic. The title also failed to notify the public of the significance that HB 702, through its text, implicitly acts as an all-encompassing blanket ban on employers and businesses being able to require proof of vaccination or proof of immunity for *any* disease for which a vaccine exists. State Defendants’ only argument is the conclusory “the title says the bill does what it does.” *Defs. Br.* at 20; *id.* (incorrectly suggesting

that Netzer Law's argument is wrong because the bill does not use Netzer Law's exact shorthand "vaccine-mandate ban").

Netzer Law has established a prima facie violation of the single-subject constitutional requirement. In the middle of a pandemic, HB 702 expressly bars all mandates of vaccines authorized under emergency-use provisions and generally bars all other vaccine mandates (with limited exceptions). But the bill's title says nothing of these bans of generally applicable vaccine mandates. For these reasons, MCA 49-2-312 (1) and (4) are void. *See State ex rel. Replogle v. Joyland Club*, 124 Mont. 122, 143 (strictly construing the constitutional requirement that a bill "contain only one subject" that must be "clearly expressed in its title"). HB 702 is not simply about preventing discrimination because if it was, there would be no need to insert specific language explicitly prohibiting certain kinds of vaccines, such as was done in subsection 4 that, "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." Ex. 17 to Netzer Aff. "Enrolled Version of HB 702."

The text of HB 702 specifically prohibits Netzer Law from taking any action in response to an owner, employee, or client, based on their vaccination or immunity status for COVID-19 or other disease, even by providing a reasonable accommodation to that individual, because to do so would cause that individual to then have been treated differently. The text of HB 702 misleadingly functions as an implicit ban on Montana employers like Netzer Law being able to require proof of vaccines or proof of immunity, regardless of whether the word "ban" is specifically used.

State Defendants seem to believe that by simply rehashing what the bill's title says and what the law does, after it has already been enacted, that somehow makes the omission from the

bill's title of what all the act's text implicitly and explicitly accomplishes less misleading or unconstitutional. It does not.

Plaintiffs have established a prima facie case HB 702 violates Article V, Section 11(3) single subject rule and as such the Act should be enjoined.

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

State Defendants assert Plaintiffs have failed to demonstrate they will suffer some “irreparable injury” while again trying to change the standard of when a preliminary injunction should issue to the federal standard, citing Federal Practice and Procedure. *Def's. Br.* at 21. State Defendants also failed to address how the current threats to health and safety, exacerbated by HB 702, are different from the situation found in *Cf. Sausalito/Marin Cty. Chapter of California Homeless Union v. City of Sausalito*, where the court found irreparable harm and issued an injunction to enjoin a law that threatened to increase the spread of COVID-19. 522 F. Supp. 3d 648, 654 (N.D. Cal. 2021).

Netzer Law has made the requisite prima facie showing that fundamental constitutional rights are infringed upon by HB 702 and where a constitutional right is lost, a plaintiff is entitled to a preliminary injunction. *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 296 P.3d 1161, 1165, 366 Mont. 224, 229.

Furthermore, Netzer Law has cited data showing the deadly nature of the COVID-19 pandemic both nationally and in Montana, facts State Defendants have failed to contest. Dr. Bacherettya acknowledges the dangers and seriousness of the COVID-19 pandemic, such that he is willing to give his opinion as to forms of immunity that should be recognized. He does not question the efficacy of vaccines, but simply asserts that immunity from someone having COVID-19 should also be acknowledged. Dec. of Bacherettya at ¶ 15. The State Defendants' position

seems to suggest that unless an employee or owner of Netzer Law Office is actively hospitalized, hooked up to a ventilator, or worse, they will not suffer an irreparable injury during the pendency of this action. It is uncontroverted by the State Defendants that a report from the State of Montana's own Department of Public Health and Human Services has stated COVID-19 was in fact the third leading cause of death in Montana in 2020 and based on reported numbers it appears it will again be one of the top leading causes of death in 2021. *See* Ex. 9 and 12 of Netzer Aff. The uncontroverted data shows the risks posed by COVID-19 to Netzer Law's owners, employees and clients are not wild and speculative hypotheticals, but are real, tangible and can strike at nearly any moment.

Furthermore, even Dr. Bacharettya's Declaration on behalf of State Defendants, provides a chart showing case-significant fatality rates for other infectious disease for which vaccines exist, but which Netzer Law is also prohibited from requiring proof of vaccination for due to HB 702's broad blanket prohibitions. *Dec. of Dr. Bacharettya*, at ¶ 9. Dr. Bacharettya's declaration only further illustrates the dangerous threats to public health in Montana posed by HB 702's prohibitions on all vaccines and proof of immunity and the reason why it is imperative for this law to be enjoined until this Court can make a final ruling on the merits.

CONCLUSION

For all of the reasons stated herein, as well as those in Plaintiffs' brief in support of motion for a preliminary injunction, Netzer Law respectfully requests that this Court issue the requested preliminary injunction.

Dated this 2nd day of December, 2021.

NETZER LAW OFFICE, P.C.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 2nd day of December, 2021, by email and by first class mail in a sealed, postage paid envelope.

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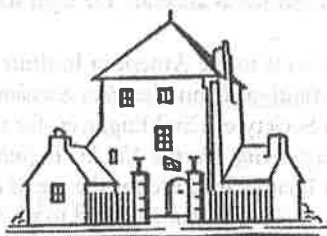
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entremets (än'trämät; Fr. änt'rämät), *n.*, *pl.* -mets (-mäz; Fr. -mät). *French.* a dish served at dinner between the principal courses or with the roast; a side dish. [F: lit., between-dish]

entrench (än'trench'), *v.t.* 1. to dig trenches for defensive purposes around (oneself, a military position, etc.). 2. to establish in a strong position: *safely entrenched behind undeniable facts.* —*v.i.* 3. to trench or encroach; trespass; infringe (fol. by *on* or *upon*): *to entrench on the domain or rights of another.* 4. to verge (fol. by *on* or *upon*): *proceedings entrenching on impiety.* Also, *intrench.* —**entrench'er**, *n.*

entrenchment (än'trench'mant), *n.* 1. act of entrenching. 2. an entrenched position. 3. (usually *pl.*) an earth breastwork or ditch for protection against enemy fire. Also, **intrenchment**.

entre nous (än'tra nōō'), *French.* between ourselves; confidentially.

entre-pôt (än'trapōt; Fr. änt'rāpōt'), *n.* 1. a warehouse. 2. a commercial center to which goods are sent for distribution. [t. F, der. OF *entreposer* store up, f. *entre-* *inter-* + *poser* place (g. L *pausare* rest)]

entrepreneur (än'traprənūr; Fr. änt'rāprənūr'), *n.* 1. an employer of productive labor; a contractor. 2. one who undertakes to carry out any enterprise. [t. F, der. *entreprendre* undertake. See **ENTERPRISE**]

entre-sol (än'trāsōl; Fr. änt'rāsōl'), *n.* *Archit.* a low story between two other stories of greater height, usually one immediately above the chief or ground floor; a mezzanine. [t. F: between-floor]

entropy (än'trap), *n.* *Physics.* a measure of the unavailable energy in a thermodynamic system, commonly expressed in terms of its changes on an arbitrary scale, being zero for water at 32° F. [t. Gk.: m.s. *entropia* transformation]

entrust (än'trust'), *v.t.* 1. to invest with a trust or responsibility; charge with a specified office or duty involving trust. 2. to commit (something) in trust (to); confide, as for care, use, or performance: *to entrust a secret, money, powers, or work to another.* 3. to commit as if with trust or confidence: *to entrust one's life to a frayed rope.* Also, **intrust**.

entry (än'tri), *n.*, *pl.* -tries. 1. act of entering; entrance. 2. a place of ingress or entrance, esp. an entrance hall or vestibule. 3. act of entering or recording something in a book, register, list, etc. 4. the statement, etc., so entered or recorded. 5. one entered in a contest or competition. 6. *Law.* act of taking possession of lands or tenements by entering or setting foot on them. 7. the giving of an account of a ship's cargo at a custom house, to obtain permission to land the goods. 8. *Bookkeeping.* a. See **double entry**. b. See **single entry**. [ME *entree*, t. F, der. *entrer* ENTER]

entryway (än'triwā'), *n.* a passage for affording entrance.

entwine (än'twīn'), *v.t.*, *v.i.*, -twined, -twining. to twine with, about, around, or together. Also, **intwine**. —**entwine'ment**, *n.*

entwist (än'twīst'), *v.t.* to twist together or about. Also, **intwist**.

e-nu-cle-ate (ə. Ynū'klyāt', Ynūō'-; *adj.* Ynū'klyāt, -āt', Ynūō'-), *v.t.* -ated, -ating, *adj.* —*v.t.* 1. *Biol.* to deprive of the nucleus. 2. to remove (a kernel, tumor, eyeball, etc.) from its enveloping cover. 3. to bring out; disclose. —*adj.* 4. having no nucleus. [t. L: m.s. *enucleatus*, pp.] —**e-nu-cle-a-tion**, *n.*

e-nu-mer-ate (Ynū'marāt', Ynūō'-), *v.t.*, -ated, -ating. 1. to mention separately as if in counting; name one by one; specify as in a list. 2. to ascertain the number of; count. [t. L: m.s. *enumeratus*, pp., counted out] —**e-nu-mer-a-tive**, *adj.* —**e-nu-mer-a-tor**, *n.* —*Syn.* 1. recapitulate, recount, rehearse.

e-nu-mer-a-tion (Ynū'marā'shan, Ynūō'-), *n.* 1. act of enumerating. 2. a catalogue or list.

e-nun-ci-ate (Ynū'nshāt', -shy-), *v.t.*, *v.i.*, -ated, -ating. 1. to utter or pronounce (words, etc.), esp. in a particular manner: *he enunciates his words distinctly.* 2. to state or declare definitely, as a theory. 3. to announce or proclaim. [t. L: m.s. *enuntiatus*, pp.] —**e-nun-ci-a-tive**, *adj.* —**e-nun-ci-a-to-ry**, *adj.* —**e-nun-ci-a-tive-ly**, *adv.* —**e-nun-ci-a-tor**, *n.*

e-nun-ci-a-tion (Ynū'nshā'shan, -shy-), *n.* 1. act or the manner of enunciating. 2. utterance or pronunciation. 3. announcement; statement.

enure (än'yūr'), *v.t.*, *v.i.*, -ured, -uring. *Inure.*

en-u-re-sis (än'yārē'sis), *n.* *Pathol.* incontinence or involuntary discharge of urine; bed-wetting. [NL, der. Gk. *enouretz* make water in]

envel-op (än'vēl'ap), *v.*, -oped, -oping, *n.* —*v.t.* 1. to wrap up in or as in a covering. 2. to serve as a wrapping or covering for. 3. to surround entirely. —*n.* 4. envelope. [ME *envolupen*(n), t. OF: m. *envoluper*, f. *en-* *en-* + *voluper* wrap. Cf. **DEVELOP**] —**envel-op-er**, *n.* —*Syn.* 1. enfold, cover, hide, conceal. 3. encompass, enclose.

enve-lope (än'vēl'ap, än'-), *n.* 1. a cover for a letter or the like, usually so made that it can be sealed or fastened. 2. that which envelops; a wrapper, integument, or surrounding cover. 3. *Bot.* a surrounding or enclosing part, as of leaves. 4. *Geom.* a curve or surface tangent to each member of a family of curves or surfaces. 5. the fabric structure enclosing the gasbag of an aerostat. 6. the gasbag itself. [t. F: m. *enveloppe*]

en-vel-op-ment (än'vēl'ap'mant), *n.* 1. act of enveloping. 2. state of being enveloped. 3. a wrapping or covering.

en-ven-om (än'ven'əm), *v.t.* 1. to impregnate with venom; make poisonous. 2. to embitter. [ME *envenimer*(n), t. OF: m. *envenimer*, der. *en-* *en-* + *venim* VENOM]

en-vi-a-ble (än'vī'əbəl), *adj.* that is to be envied; worthy to be envied. —**en-vi-a-ble-ness**, *n.* —**en-vi-a-bly**, *adv.*

en-vi-ous (än'vī'əs), *adj.* 1. full of, feeling, or expressing envy: *envious of a person's success, an envious attack.* 2. *Obs.* emulous. [ME, t. AF, var. of OF *envieux*, der. *envie* ENVY] —**en-vi-ous-ly**, *adv.* —**en-vi-ous-ness**, *n.*

en-vi-ron (än'vī'ran), *v.t.* to form a circle or ring round; surround; envelop. [ME *environ*(en), t. F: m. *environner*, der. *environ* around]

en-vi-ron-ment (än'vī'ran'ment), *n.* 1. the aggregate of surrounding things, conditions, or influences. 2. act of environing. 3. state of being environed. 4. that which environs. —**en-vi-ron-men-tal**, *adj.*

en-vi-rons (än'vī'ranz, än'varanz), *n.pl.* surrounding parts or districts, as of a city; outskirts; suburbs. [t. F]

en-vis-age (än'vīz'ij), *v.t.*, -aged, -aging. 1. to contemplate; visualize. 2. to look in the face of; face. [t. F: m.s. *envisager*, der. *en-* *en-* + *visage* VISAGE]

en-vi-sion (än'vīzh'ən), *v.t.* to picture mentally, esp. some future event or events.

en-voy (än'voi), *n.* 1. a diplomatic agent of the second rank, next in dignity after an ambassador; commonly called minister (title in full: *envoy extraordinary and minister plenipotentiary*). 2. a diplomatic agent. 3. any accredited messenger or representative. [t. F: m. *envoyé*, prop. pp. of *envoyer* send. See **ENVOY**]

en-voy (än'voi), *n.* 1. *Pros.* a short stanza concluding a poem in certain archaic metrical forms. 2. a postscript to a poetical or prose composition, sometimes serving as a dedication. Also, **en'voi**. [ME *envoye*, t. OF: m. *envoyer* send, der. *en* *en-* on the way]

en-vy (än'vi), *n.*, *pl.* -vies, *v.*, -vied, -vying. —*n.* 1. a feeling of discontent or morification, usually with ill will, at seeing another's superiority, advantages, or success. 2. desire for some advantage possessed by another. 3. an object of envious feeling. 4. *Obs.* ill will. —*v.t.* 5. to regard with envy; be envious of. —*v.i.* 6. *Obs.* to be affected with envy. [ME *envie*, t. OF: m. *invidia*] —**en-vi-er**, *n.* —**en-vy-ing-ly**, *adv.*

—*Syn.* 5. **ENVY**, **NEIGHBOR**, **COVER** refer to one's attitude concerning the possessions or attainments of others. **ENVY** is to feel resentful, spiteful, and unhappy because someone else possesses, or has achieved, what one wishes oneself to possess, or to have achieved: *to envy the wealth a girl's beauty, an honest man's reputation.* To **NEIGHBOR** simply to be unwilling that another should have the possessions, honors, or credit he deserves: *to begrudge a man's reward for heroism.* To **COVER** is to long jealously to possess what someone else possesses: *I covet your silverware.*

en-weave (än'wēv'), *v.t.* *inweave.*

en-wind (än'wīnd'), *v.t.* -wound, -winding. to wind or coil about; encircle. Also, **inwind**.

en-womb (än'wōm'), *v.t.* to enclose in or as in the womb.

en-wrap (än'rāp'), *v.t.*, -wrapped, -wrapping. 1. to wrap or envelop in something: *enwrapped in leaves.* 2. to wrap in slumber, etc.: *enwrapped in fond desire.* 3. to absorb or engross in thought, etc. Also, **inwrap**.

en-wreath-e (än'rēth'), *v.t.*, -wreathed, -wreathing. to surround with or as if with a wreath: *peace enwreathed thy brow.* Also, **inwreath-e**.

en-zo-ot-ic (än'zōō'tik), *adj.* 1. (of diseases) prevailing among or afflicting animals in a particular locality. Cf. **endemic**. —*n.* 2. an enzootic disease. [t. *rs* + *zo* (o) + -otic, modeled on **ERIZOOTIC**]

en-zy-ma-tic (än'zīmāt'ik, -zī-), *adj.* of or pertaining to an enzyme.

en-zyme (än'zīm, -zīm), *n.* any of various complex organic substances, as pepsin, originating from living cells and capable of producing by catalytic action certain chemical changes, as digestion, in organic substance; unorganized ferment. Also, **enzym** (än'zīm). [t. MGK: m.s. *enzymos* leavened, f. *en-* *en-* + Gk. *zyme* leaven]

eo-, a word element meaning "early," "primeval," "dawn." *Eocene*. [t. Gk., comb. form of *ēōs* dawn]

Eo-cene (ēō'sēn'), *adj.* 1. pertaining to the second principal subdivision of the Tertiary period or system. —*n.* 2. an early Tertiary epoch or series succeeding Paleocene and preceding Oligocene.

Eo-gene (ēō'jēn'), *adj.* *Geol.* 1. pertaining to a division of the Tertiary period or system that comprises Paleocene, Eocene, and Oligocene. —*n.* 2. the time or rocks representing the earlier half of the Tertiary period or system.

eo-hip-pus (ēō'hīp'əs), *n.* a horse of a fossil genus *Eohippus*, from the Lower Eocene of the western U.S., the oldest type of the family *Equidae*, about as large as a fox, with four complete toes on each forefoot and three hoofed toes on each hindfoot. [NL, f. Gk.: *ēō-* *eo-* + *hippos* horse]

Eo-li-an (ēō'lī'an), *adj.*, *n.* *Aeolian.*

Eo-lie (ēō'lī), *n.*, *adj.* *Aeolic.*

e-o-lith (ēō'lyth), *n.* a rude stone implement characteristic of the earliest stage of human culture, shaped by rather than for, use.

b., blend of, blended; c., cognate with; d., dialect, dialectal; der., derived from; f., formed from; g., going back to; m., modification of; r., replacing; s., stem of; t., taken from; ?, perhaps. See the full key on inside cover.

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Eos
Ancient Greek vase
painting of Eos sprinkling
the earth with dew



eohippus
Above: The skeleton of
Hyacotherium resartus
Below: A reconstruction



epaulet
On an early 19th-century
U.S. Army uniform

—*en-nū-mēr-a-tīve* *adj.* —*en-nū-mēr-a-tōr* (—*mō-rā-tōr*) *n.*
en-nū-mēr-a-tion (—*nū-mō-rā-shān*, —*nyōō'*) *n.* 1. The act of enumerating. 2. A detailed list of items; a catalogue.
en-nū-ci-a-ble (—*nū-n'sē-a-bal*, —*shē-a-bal*) *adj.* Capable of being enunciated. —*en-nū-ci-a-bil'it-y* *n.*
en-nū-ci-ate (—*nū-n'sē-āt'*, —*shē-āt'*) *v.* *ated*, *-ating*, *-ates*. —*tr.* 1. To pronounce or articulate (speech sounds); especially, to pronounce with clarity or in another specified manner. 2. To state or set forth precisely or systematically: "Wordsworth enunciated an anti-democratic doctrine of leadership" (Samuel Chew). 3. To announce; proclaim. —*intr.* To pronounce words, especially distinctly. [Latin *enunciare*, *enunciare*: *ex-*, out + *nuntiāre*, to announce, from *nuncius*, *nuntius*, messenger (see *nū-* in Appendix*).] —*en-nū-ci-a-tīve*, *en-nū-ci-a-tō-ry* (—*a-tōr'ē*, —*tōr'ē*) *adj.* —*en-nū-ci-a-tīve-ly* *adv.* —*en-nū-ci-a-tōr* (—*ā-tōr*) *n.*
en-nū-ci-a-tion (—*nū-n'sē-ā-shān*, —*nū-n'shē-*) *n.* 1. The act of enunciating or the condition of being enunciated. 2. The manner in which a speaker articulates words or speech sounds. 3. An announcement, declaration, or similar official statement. —See Synonyms at *diction*.
en-urē. Variant of *inure*.
en-ur-e-sis (—*en'yo-rē'sis*) *n.* Involuntary urination. [New Latin, from Greek *enourēin*, to urinate in: *en-*, in + *ourēin*, to urinate, from *ouron*, urine (see *ur-* in Appendix*).]
env. envelope.
en-vel-op (—*en-vēl'ap*, —*in-*) *tr.v.* *-oped*, *-oping*, *-ops*. 1. To enclose or encase with or as if with a covering or wrapping. 2. To serve as a covering or wrapping for. 3. To surround; encircle. [Middle English *enveloupen*, from Old French *envelopper*: *en-*, in + *voloper*, *veloper*, to wrap up (see *develop*).] —*en-vel-op-er* *n.*
en-vel-lope (—*en'va-lōp'*, —*ān'*) *n.* *Abbr.* *env.* 1. Something that envelops; an enclosing or surrounding cover, coat, or wrapping. 2. A flat, folded paper container for a letter or similar object, usually rectangular and having a gummed sealing flap. 3. *Biology*. Any enclosing covering, membrane, or structure. 4. The bag containing the gas in a balloon. 5. *Mathematics*. A curve or surface that is tangent to all curves or surfaces of a family of curves or surfaces. [French *enveloppe*, from Old French *envelope*; from *envelopper*, *ENVELOP*.]
en-vel-op-ment (—*en-vēl'ap-mēnt*) *n.* 1. The act of enveloping or the condition of being enveloped. 2. Material that serves to cover, wrap, or surround. 3. *Military*. An attack on an enemy's flank or rear.
en-ven-om (—*en-vēn'am*, —*in-*) *tr.v.* *-omed*, *-oming*, *-oms*. 1. To put venom into or on; make poisonous or noxious. 2. To fill with malice; embitter. [Middle English *envenimen*, from Old French *envenimer*: *en-*, in + *venim*, *VENOM*.]
en-vi-a-ble (—*en'vē-a-bal*) *adj.* Arousing strong envy; highly desirable: "the enviable English quality of being able to be mute without unrest" (Henry James). —*en-vi-a-bly* *adv.*
en-vi-ous (—*en'vē-as*) *adj.* 1. Feeling, expressing, or characterized by envy. 2. *Obsolete*. Eager to emulate; emulous. —*en-vi-ously* *adv.* —*en-vi-ous-ness* *n.*
en-vi-ron (—*en-vī-ran*, —*in-*) *tr.v.* *-roned*, *-roning*, *-rons*. To encircle; surround. [Middle English *environen*, from Old French *environer*, from *environ*, around: *en-*, in + *viron*, circle, from *vire*, to turn, *VER*.]
en-vi-ron-ment (—*en-vī-ran-mānt*, —*in-*) *n.* 1. Something that surrounds; surroundings. 2. The total of circumstances surrounding an organism or group of organisms, specifically: a. The combination of external or extrinsic physical conditions that affect and influence the growth and development of organisms. b. The complex of social and cultural conditions affecting the nature of an individual or community. Compare *heredity*. —*en-vi-ron-men'tal* (—*mēnt'l*) *adj.* —*en-vi-ron-men'tal-ly* *adv.*
en-vi-rons (—*en-vī-ranz*, —*in-*) *pl.n.* 1. A surrounding area, especially of a city; suburbs; outskirts. 2. Surroundings; environment.
en-vis-age (—*en-vīz'ij*, —*in-*) *tr.v.* *-aged*, *-aging*, *-ages*. To have an image of; conceive of, especially as a future possibility or goal: "they envisaged a society ruled by a learned and therefore enlightened aristocracy" (George L. Mosse). [French *envisager*: Old French *en-*, in + *visage*, face, *VISAGE*.]
en-vi-sion (—*en-vīzh'ən*) *tr.v.* *-sioned*, *-sioning*, *-sions*. To picture in the mind; foresee. [EN- + *VISION*.]
en-voi (—*en'voi*, —*ān'*) *n.* Also *en-voy*. A short concluding stanza of certain French verse forms, such as the ballade, originally serving as a postscript dedicating the poem to a patron and later as a pithy summation of the poem. [Middle English *envoie*, from Old French *envoy*, "a sending away," conclusion, from *envoyer*, to send. See *envoy*.]
en-vo-y' (—*en'voi*, —*ān'*) *n.* 1. A messenger or other agent sent on a mission. 2. A representative of a government or faction sent on a special diplomatic mission. 3. A minister plenipotentiary assigned to a foreign embassy, ranking next below the ambassador. [From French *envoyé*, one who is sent, from past participle of *envoyer*, to send, from Old French *envoyer*, *enveier*, from Late Latin *inviare*, to put on the way: Latin *in-*, in + *via*, way (see *wei-* in Appendix*).]
en-vo-y? Variant of *envoy*.
en-vy (—*en'vē*) *n.*, *pl.* *-vies*. 1. A feeling of discontent and resentment aroused by contemplation of another's desirable possessions or qualities, with a strong desire to have them for oneself. 2. a. A possession of another that is strongly desired. b. One who possesses what another strongly desires. 3. *Obsolete*. Malevolence. —*v.* *envied*, *-vying*, *-vies*. —*tr.* To feel envy for; regard with envy. —*intr.* To be filled with envy. [Middle English *envie*, from Old French, from Latin *invidia*, from *in-*

videre, to look at with malice: *in-*, in, upon + *videre*, to see (see *wid-* in Appendix*).] —*en-vi-er* *n.* —*en-vy-ing-ly* *adv.*
Synonyms: *envy*, *begrudge*, *covet*. These verbs mean to resent another's good fortune or to desire to have what is his. *Envy* is wider in range than the others, since it combines both resentment and desire. *Begrudge* stresses resentment toward the possessor and unwillingness to acknowledge his right or claim. *Covet* stresses desire for another's possession, especially when the desire is a secret or shameful longing.
en-wind (—*en-wīnd'*, —*in-*) *tr.v.* *-wound* (—*wound'*), *-winding*, *-winds*. Also *in-wind* (—*in-*). To wind around or about; encircle.
en-womb (—*en-wōm'*, —*in-*) *tr.v.* *-wombed*, *-wombing*, *-wombs*. *Archaic & Poetic*. To hold in the womb or a womblike enclosure.
en-wrap (—*en-rāp'*, —*in-*) *tr.v.* *-wrapped*, *-wrapping*, *-wraps*. Also *in-wrap* (—*in-*). 1. To wrap up; enclose; enfold. 2. To engross.
en-wreathe (—*en-rēth'*, —*in-*) *tr.v.* *-wreathed*, *-wreathing*, *-wreathes*. Also *in-wreathe* (—*in-*). To enclose or surround with or as if with a wreath.
en-zo-ot-ic (—*en'zō-ōt'ik*) *adj.* Affecting or peculiar to animals of a specific area or limited district. Said of diseases. —*n.* An enzootic disease. [EN- (within) + *zō(o)-* + *-otic*.]
en-zyme (—*en'zim'*) *n.* Any of numerous proteins or conjugated proteins produced by living organisms and functioning as biochemical catalysts in living organisms. [German *Enzym*, from Medieval Greek *enzimos*, leavened: Greek *en-*, in + *zyme*, leaven (see *yeu-* in Appendix*).] —*en'zy-mat'ic* (—*en'zō-māt'ik*) *adj.*
en-zy-mol-o-gy (—*en'zō-mōl'ō-jē*) *n.* The biochemistry of enzymes. [ENZYME + *-logy*.] —*en'zy-mol'ō-gist* *n.*
eo-. Indicates: 1. An early period of time; for example, *Eocene*. 2. An early form or representative; for example, *eohippus*. [Greek *ēō-*, from *ēōs*, dawn. See *awes-* in Appendix*.]
eo. ex officio.
Eo-cene (—*ē'ō-sēn'*) *adj.* Of, pertaining to, or designating the geologic time, rock series, sedimentary deposits, and fossils of the second oldest of the five major epochs of the Cenozoic era or Tertiary period, extending from the end of the Paleocene to the beginning of the Oligocene, and characterized by the rise of mammals. See *geology*. —*n.* *Geology*. The Eocene epoch. Preceded by the. [EO- + *-cene*.]
eo-hip-pus (—*ē'ō-hīp'əs*) *n.* An extinct, small, herbivorous mammal of the genus *Hyacotherium* (or *Eohippus*), of the Eocene epoch, having four-toed front feet and three-toed hind feet, and related ancestrally to the horse. [New Latin: EO- + Greek *hippos*, horse (see *ekwo-* in Appendix*).]
eo-li-an (—*ē'ō-lē-an*) *adj.* Also *ae-o-li-an*. Pertaining to, caused by, or carried by the wind. [From *Æolus* (god of the winds).]
eo-lith (—*ē'ō-līth'*) *n.* *Anthropology*. Any of the alleged stone artifacts characterizing the Eolithic. [EO- + *-lith*.]
Eo-lith-ic (—*ē'ō-līth'ik*) *adj.* *Anthropology*. Of or relating to the postulated earliest period of human culture preceding the Lower Paleolithic. —*n.* *Anthropology*. The Eolithic period. Preceded by the. [EO- + *-lithic*.]
eo.m. end of month.
eo-n (—*ē'ōn*, —*ē'an*) *n.* Also *ae-on*. 1. An indefinitely long period of time; an age; eternity. 2. *Geology*. The longest division of geologic time, containing two or more eras. [Late Latin *aeon*, age, from Greek *aion*. See *aiw-* in Appendix*.]
eo-ni-an (—*ē'ō-nē-an*) *adj.* Also *ae-o-ni-an*. Lasting for eons; eternal; ageless.
Eos (—*ē'ōs*). *Greek Mythology*. The goddess of the dawn, identified with the Roman goddess *Aurora*. [Greek *Eōs*, from *ēōs*, dawn. See *awes-* in Appendix*.]
eo-sin (—*ē'ō-sān*) *n.* A red crystalline powder, $C_{20}H_{16}Br_2O_4$, used in textile dyeing, ink manufacturing, and in coloring gasoline. [Greek *ēōs*, dawn (see *awes-* in Appendix*) + *-in*. (So called from its color).]
eo-sin-o-phil (—*ē'ō-sīn'ō-fīl'*) *n.* Also *eo-sin-o-phile* (—*fīl'*). 1. *Physiology*. A type of leukocyte in vertebrate blood that accepts an eosin stain. 2. *Biochemistry*. Any microorganism, cell, or histological element easily stained by eosin dye. [EOSIN + *-PHILE*.] —*eo-sīn'ō-phīl'*, *eo-sīn'ō-phīl'ic*, *eo-sīn'ō-phīl'i-cous* (—*ē'ō-sī-nōl'ō-lōs*) *adj.*
-eous. Indicates having the nature of or akin to; for example, *gaseous*, *beauteous*. [Latin *-eus*.]
EP extended play.
e-pact (—*ē'pakt'*) *n.* 1. The excess of time, about 11 days, of the solar year over the lunar year. 2. The age of the moon at the beginning of the calendar year. 3. The excess of time of a calendar month over a lunar month. [Old French *epacte*, from Late Latin *epacta*, from Greek *epaktai* (*hēmerai*), "(days) brought in," from *epaktos*, brought in from abroad, from *epagein*, to lead on, bring in: from *epi-*, on + *agein*, to lead (see *ag-* in Appendix*).]
ep-arch (—*ē'pārk'*) *n.* 1. The chief administrator of an eparchy. 2. *Greek Orthodox Church*. A bishop or metropolitan. [Greek *eparkhos*, commander, governor: *epi-*, on, over + *-arch*.] —*ep-arch'i-al* *adj.*
ep-ar-chy (—*ē'pār'kē*) *n.*, *pl.* *-chies*. 1. An administrative subdivision of Greece. 2. *Greek Orthodox Church*. An ecclesiastical district; diocese.
ep-au-let (—*ē'pā-lēt'*, —*ē'pā-lēt'*) *n.* Also *ep-au-lette*. A shoulder ornament; especially, either of two fringed straps on certain dress uniforms. [French *épaulette*, diminutive of *épaule*, shoulder, from Old French *espaule*, from Latin *spatula*. See *spatula*.]
é-pée (—*ā-pā'*) *n.* Also *e-pée*. 1. A fencing sword with a bowl-shaped guard and a long, narrow, fluted blade that has no cutting edge and tapers to a blunted point. 2. The art of fencing