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MONTANA SEVENTH JUDICIAL DISTRICT COURT
 RICHLAND COUNTY

<p>NETZER LAW OFFICE, and DONALD L. NETZER,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>THE STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, and LAURIE ESAU, Montana Commissioner of Labor and Industry,</p> <p style="text-align: center;">Defendants.</p>	<p>Cause No. DV-21-89</p> <p>STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER</p>
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In accordance with the Court's December 15, 2021, Order the State hereby submits is proposed Findings of Fact and Conclusions of Law. The Court heard

FINDINGS OF FACT

I. The COVID-19 Pandemic

1. The United States continues to experience significant hardships from the deadly COVID-19 pandemic.
2. The State of Montana has not been spared from these hardships, including loss of lives, disruptions to businesses, and an unprecedented strain on Montana's healthcare system and facilities.
3. Of those documented, over 730,368 Americans have lost their lives to complications from COVID-19, including 2,259 Montanans. Additionally, over 8,601 Montanans had been hospitalized as of the time Plaintiffs filed their Application for Preliminary Injunction. The State Defendants have not disputed these realities.
4. Uncontroverted by the State Defendants regarding the way COVID-19 spreads is data from the Centers for Disease Control and Prevention ("CDC") presented through exhibits to Donald L. Netzer's Affidavit:

The principal mode by which people are infected with SARS-CoV-2 (the virus that causes COVID-19) is through exposure to respiratory fluids carrying infectious virus. Exposure occurs in three principal ways: (1) inhalation of very fine respiratory droplets and aerosol particles, (2) deposition of respiratory droplets and particles on exposed mucous membranes in the mouth, nose, or eye by direct splashes and sprays, and (3) touching mucous membranes with hands that have been soiled either directly by virus-containing respiratory fluids or indirectly by touching surfaces with virus on them.¹

Ex. 4 of Netzer Aff., CDC, "Scientific Brief: SARS-CoV-2 Transmission," 1, May 7, 2021.

5. Information from the CDC provides that:

¹ To the extent necessary, the Court is taking Judicial Notice of government agency information, reports and statements.

COVID-19 vaccines approved or authorized in the United States are highly effective at preventing severe disease and death, including against the Delta variant. But they are not 100% effective, and some fully vaccinated people will become infected (called a breakthrough infection) and experience illness. For all people, the vaccine provides the best protection against serious illness and death. Vaccines are playing a crucial role in limiting spread of the virus and minimizing severe disease.... High vaccination coverage will reduce spread of the virus and help prevent new variants from emerging. CDC recommends that everyone aged 12 years and older get vaccinated as soon as possible.

Ex. 6 of Netzer Aff., CDC, “Delta Variant: What We Know About the Science,” 2, Aug. 26, 2021.

6. The State Defendants’ own declarant confirms the efficacy of vaccinations and has stated, “[t]he COVID-19 vaccines approved for use in the U.S. are very effective in substantially reducing the infection fatality rate.” Bhattacharya Decl., ¶ 11.
7. Uncontroverted by the State Defendants is information from the CDC that, “Older adults are more likely to get severely ill from COVID-19. More than 81% of COVID-19 deaths occur in people over aged 65. The number of deaths among people over age 65 is 80 times higher than the number of deaths among people aged 18-29.” Ex. 7 of Netzer Aff., CDC, “People with Certain Medical Conditions,” 1, Oct. 14, 2021.
8. The State Defendants’ own declarant corroborates this fact, “...for older people – especially those with severe comorbid chronic conditions – COVID-19 infection poses a high risk of mortality, on the order of a 5% infection fatality rate.” Bhattacharya Decl., ¶ 2.
9. There are numerous medical conditions, other than age that can cause a person to be more at risk of becoming severely ill from COVID-19 and be at risk of hospitalization and even death, such as cancer, chronic kidney disease, chronic liver disease, chronic lung diseases, dementia or other neurological conditions, diabetes (type 1 or 2), Down syndrome, HIV infection, an immunocompromised state, mental health conditions, overweight and obesity, pregnancy, sickle cell disease or thalassemia, smoking, solid organ or blood stem cell

transplant, stroke or cerebrovascular disease, substance use disorders and tuberculosis. Ex. 7 of Netzer Aff., CDC, “People with Certain Medical Conditions,” 2-6, Oct. 14, 2021. Some of these common medical conditions would be found in an average cross section of Montanans. There are many post-COVID conditions and symptoms that can continue to impact a person’s health who has been infected by COVID and recovered, for weeks or months thereafter. Ex. 25 of Netzer Suppl. Aff., CDC, “Post-COVID Conditions,” Sept. 16, 2021.

10. There is currently a new COVID-19 variant of concern called “Omicron” which has seen an increase of people testing positive in areas where it has been identified as being present. Ex. 24 of Netzer Suppl. Aff., World Health Organization, “Update on Omicron,” 1, Nov. 28, 2021.

11. While there are still many unknowns about the Omicron variant, the CDC emphasizes that, “[c]urrent vaccines are expected to protect against severe illness, hospitalizations, and deaths due to infection with the Omicron variant.”²

12. The parties agree that both vaccines and natural active immunity can provide protection against severe infection from COVID-19 and should be treated the same for health and safety purposes. Netzer Suppl. Aff. ¶ 7; Bhattacharya Decl., ¶¶ 12, 35.

13. Currently, there are COVID-19 vaccines available that have full FDA approval and others allowed only through Emergency Use Authorization, although they all continue to undergo safety monitoring.

² CDC, “Omicron Variant: What You Need to Know,” <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>, Dec. 20, 2021.

14. The State Defendants do not contest the Montana Department of Health and Human Services September 27th, 2021, report that “Unvaccinated 5 times more likely to be hospitalized and 3 times more likely to die from COVID-19.” Ex. 16 of Netzer Aff., Montana DPHHS, “New Montana Report: Unvaccinated 5 Times More Likely to be Hospitalized and 3 Times More Likely to Die from COVID-19,” Sept. 27, 2021.
15. The State Defendants also do not contest that COVID-19 infections were the third leading cause of death for Montanans in 2020. Ex. 9 of Netzer Aff., Montana DPHHS, “Provisional Leading Causes of Death and Other Select Causes in Montana, 2020 and 2015-2019,” Updated Jun. 14, 2021.

II. Montana House Bill 702 (“HB 702”)

16. House Bill 702’s title states it is, “AN ACT PROHIBITING DISCRIMINATION BASED ON A PERSON’S VACCINATION STATUS OR POSSESSION OF AN IMMUNITY PASSPORT; PROVIDING AN EXCEPTION AND AN EXEMPTION; PROVIDING AN APPROPRIATION; AND PROVIDING EFFECTIVE DATES.”
17. HB 702’s preamble states that the law was adopted to protect medical-record privacy.
18. HB 702 does not prohibit employers from inquiring about an employee’s vaccination or immunity status. Additionally, nothing in the text of HB 702 prohibits employers from requiring their employees to disclose their vaccination or immunity status.
19. HB 702’s prohibition on discrimination based on vaccination or immunity status assumes that employers know of or will discover the vaccination and immunity status of their employees, as discrimination cannot occur without such knowledge.

20. The sponsor of HB 702 indicated through her testimony that she proposed the law because she was concerned about being discriminated against based on an immunity passport requirement, rather than about her medical records becoming known.
21. House Bill 702's prohibitions on discrimination based on vaccination or immunity status is not limited to those for COVID-19, but extend to all types of vaccines and immunity status (*e.g.*, smallpox).
22. HB 702 expressly bans certain vaccine mandates: "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."
23. HB 702's title does not indicate that it bans employers and others from enforcing mandates for vaccines whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials. Persons reading and relying on the title of HB 702 thus would not be able to discern that this was a subject of the bill.
24. In addition to expressly banning mandates for the types of vaccines identified in the paragraph above, HB 702 also indirectly bans mandates for vaccines and requirements for proof of immunity of any kind. For example, if an employee fails to meet an employer's requirement to prove vaccination or immunity status for smallpox, HB 702's new prohibition against discrimination based on vaccine or immunity status prevents that employer from taking any action against the non-compliant employee.
25. Although HB 702 provides an exception for schools and daycare facilities, the vast majority of employers and businesses in Montana cannot require proof of any kind of vaccination or immunity status.

26. HB 702's title does not indicate that it broadly bans Montana employers from enforcing vaccine or proof-of-immunity requirements related to all vaccine and immunity types. Persons reading and relying on the title of HB 702 thus would not be able to discern that this was a subject of the bill.
27. Similarly, except for a few specified facilities that are exempted, HB 702 also prohibits employers from implementing any kind of reasonable accommodations for unvaccinated and non-immune individuals because such accommodations would have the effect of treating an individual differently based on their vaccination or immunity status.
28. Governor Gianforte recognized HB 702's provisions could jeopardize public health and stated the need for reasonable accommodations to be taken for unvaccinated persons in a letter to the legislature, stating that "an employer's implementation of reasonable accommodation measures for persons who are not vaccinated or not immune to protect the safety and health of employees, customers, patients, visitors, and other persons from communicable diseases is not unlawful discrimination." However, the Governor's proposed amendment calling for reasonable accommodations only ended up being extended to certain healthcare facilities.
29. The Legislature provided exceptions and exemptions to HB 702's prohibitions on discrimination based on vaccination or immunity status for schools, day-care facilities, healthcare facilities, licensed nursing home, long-term care facilities, and assisted living facilities.

III. Plaintiffs Donald L. Netzer and Netzer Law Office, P.C.

30. The Plaintiff Donald L. Netzer is 70 years old and a resident of Richland County, Montana, where he practices law and is an owner and employee of Netzer Law Office, P.C., a Montana business.
31. The Plaintiff Donald L. Netzer, because of his age, is in a category of individuals identified by the CDC as being at greater risk of becoming severely ill or dying from COVID-19.
32. Uncontested by the State Defendants is that Netzer Law Office, P.C.'s owners, employees and clients represents a cross section of Montanans.
33. As a Montana business owner and employer, HB 702 regulates Donald L. Netzer's and Netzer Law Office, P.C.'s conduct.
34. Donald L. Netzer and Netzer Law Office, P.C. ("Netzer Law") has an interest in implementing protective and preventative measures that can best protect the health and safety of their owners, employees and clients from a deadly disease like COVID-19 or another communicable disease.
35. If HB 702 were not in effect, Netzer Law would require employees to, among other things, provide proof of active COVID-19 vaccination or immunity status; take other protective measures to reduce the spread and risk of COVID-19 from unvaccinated individuals, such as requiring employees without active vaccination or immunity to regularly take COVID-19 tests, wear masks, wash their hands regularly, and other measures (*e.g.*, work from home). Netzer Aff. ¶¶ 15, 17 and Netzer Suppl. Aff. ¶ 7.
36. Due to HB 702's prohibitions preventing Netzer Law from adopting the measures identified above and others specified in Mr. Netzer's affidavits, Mr. Netzer has felt and continues to feel anxiety, worry and stress about (1) the safety, health and well-being of

himself, other owners and employees of Netzer Law Office, P.C., as well as potential clients; and (2) for the economic and general well-being of his law office.

37. Donald L. Netzer, as an owner of Netzer Law Office, P.C. has invested time seeking to identify potential HB-702-compliant methods for protecting fellow owners, employees, and clients from the spread, risks, and harms of COVID-19. In doing so, Mr. Netzer lost time that otherwise would have been spent working for and billing his clients.
38. Netzer Law Office P.C. has incurred further expenses due to HB 702 by requiring masking of all individuals who enter their offices, rather than just those individuals who are unvaccinated or do not have active natural immunity.
39. Netzer Law also has identified concerns about the potential for legal liability that could arise by complying with HB 702.
40. As described above, HB 702 prevents Netzer Law from taking reasonable actions to protect the health and safety of their owners, employees, and clients during the ongoing and deadly COVID-19 pandemic. These actions would also reduce the risk of a business disaster due to an outbreak in Netzer Law's two offices.
41. HB 702's prohibitions apply to Netzer Law Office, P.C. as it is a Montana business and employer.
42. Donald L. Netzer, the employees and owners of Netzer Law Office, and Netzer Law Office, P.C. have inalienable rights under the Montana Constitution, including, "the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Art. II, § 3.

43. The Montana Constitution requires that each legislative act, “except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title.” Art. V., §11, Cl. 3.
44. Donald L. Netzer, the employees and owners of Netzer Law Office, and Netzer Law Office, P.C. have a constitutional right that, “[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” Art. IX, § 1.
45. Donald L. Netzer, the employees and owners of Netzer Law Office, and Netzer Law Office, P.C. have the constitutional right to not being denied, “equal protection of the laws.” Art. II, § 4.
46. Donald L. Netzer, the employees and owners of Netzer Law Office, and Netzer Law Office P.C. have unenumerated constitutional rights, which are those rights reserved to the people. Art. II, § 34.

From the foregoing Findings of Fact, the Court reaches the following:

CONCLUSIONS OF LAW

NETZER LAW HAS STANDING TO BRING THIS LAWSUIT

1. Standing exists where one of the plaintiffs alleges “a past, present, or threatened injury to a property or civil right” (*i.e.*, an invasion of a legally protected interest) “that would be alleviated by successfully maintaining the action.” *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 33, 35, 360 Mont. 207, 220–21, 255 P.3d 80, 91–92; *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 45, 356 Mont. 41, 56, 230 P.3d 808, 819.
2. “[I]t is axiomatic that if a court can interpret a statute, it also can review its constitutionality.” *Brown v. Gianforte*, 2021 MT 149, ¶ 14, 488 P.3d 548, 553–54.

3. It is well-established that when a plaintiff is “an object of the [governmental] action” being challenged, “there is ordinarily little question that the action [] has caused him injury, and that a judgment preventing [] the action will redress it.” *Lujan*, 504 U.S. at 561–62 (challenge to agency regulation); *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (relying on *Lujan*’s “object of the action” rationale to find standing in plaintiffs’ constitutional challenge to statute).
4. “[P]otential economic injury is sufficient to establish standing.” *Missoula City-Cty. Air Pollution Control Bd. v. Bd. of Env’t Rev.*, 282 Mont. 255, 262, 937 P.2d 463, 468 (1997) (alleged potential economic harm from additional expenses to monitor, collect, and analyze data sufficient for standing); *Montana Human Rights Div. v. City of Billings* (1982), 199 Mont. 434, 443, 649 P.2d 1283, 1288 (potential economic harm from possible lawsuit sufficient for standing); *Rosebud Cty. v. Dept. of Rev.* (1993), 257 Mont. 306, 849 P.2d 177 (potential economic harm from change in valuation of heavy equipment in a county and related tax implications sufficient for standing).
5. “To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.” *Helena Parents Comm’n v. Lewis & Clark Cty. Comm’rs*, 277 Mont. 367, 373, 922 P.2d 1140, 1144 (1996) (quotation marks and citation omitted).
6. Psychological injuries arising from an unenforced statute are sufficient to constitute injury for standing. *Gryczan v. State*, 283 Mont. 433, 446, 942 P.2d 112, 120 (1997)
7. Netzer Law indisputably is “an object of the action” being challenged because that action (HB 702) regulates and restricts Netzer Law’s desired conduct. HB 702 is preventing

Netzer Law from implementing health and safety measures proven to be effective in fighting COVID-19, and HB 702's invalidation would remedy these injuries.

Accordingly, Netzer Law has standing.

8. Even were this not enough, Netzer Law has established its standing based on continuing economic injuries (*e.g.*, supplying masks to all entering its offices as opposed to only those who lack active protection from vaccines or immunity, and lost billing time spent on internal consultations) as well as potential economic injuries from office closures and reduced business development opportunities, possible outbreaks, required non-discriminatory remote work policies, and potential liability. Furthermore, Donald L. Netzer has experienced anxiety, worry and stress, due to HB 702's prohibiting Netzer Law from implementing CDC-recommended health-and-safety measures to protect himself, other owners, employees, and clients from the threats of COVID-19. Each of these injuries, and threatened injuries, established through the affidavits of Mr. Netzer, constitutes an independent and sufficient injury for purposes of standing under Montana law.
9. During oral argument, the State Defendants did not dispute any of the above injuries. Instead, they argued that these injuries would persist even absent HB 702 and therefore Netzer Law's injuries would not be redressable. The Court disagrees. HB 702 regulates Netzer Law's conduct and prohibits Netzer Law from adopting desired (and CDC-recommended) health-and-safety measures. If the Court invalidates HB 702, Netzer Law's injuries will be redressed because Netzer Law will be able to adopt those desired measures.
10. Netzer Law therefore has established standing to bring this lawsuit and assert its claims.

PRELIMINARY INJUNCTION STANDARD

11. An applicant for a Preliminary Injunction, "...must establish a prima facie case, or show that it is at least doubtful whether or not [the applicant] will suffer irreparable injury before [the applicant's] rights can be fully litigated." *Mack v. Anderson*, 2016 MT 204, ¶ 15, 384 Mont. 368, 373, 380 P.3d 730, 733; *see also* MCA 27-19-201(1)-(2).
12. When assessing an application for a preliminary injunction, "the trial court 'should restrict itself to determining whether the applicant has made a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had.'" *Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, 395 Mont. 350, 359, 440 P.3d 4, 10 (citation omitted).
13. Status quo means "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Weems v. State*, 2019 MT 98, ¶ 26 quoting *Porter v. K & S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 840 (1981). In this case, therefore, the status quo refers to the period of time preceding HB 702's effective date.
14. Contrary to the State Defendants' position at oral argument, "[t]hat a statute has been on the books for some time is not the relevant inquiry when entertaining a request to enjoin it." *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 350, 364, 440 P.3d 4, 13.
15. A determination to issue a Preliminary Injunction does not decide the ultimate merits of the case or depend on evidence sufficient to do so, but instead only assesses whether an applicant establishes a prima facie (*i.e.*, "at first sight") violation of its rights. *Driscoll v. Stapleton*, 2020 MT 247, ¶¶ 15-16, 401 Mont. 405, 414, 473 P.3d 386, 392 (citations omitted); *Weems*, ¶ 18 (citation omitted).
16. In determining whether to issue a preliminary injunction to prevent alleged constitutional violations, an applicant "is not required" to "defeat the presumptive constitutionality of a

statute,” a requirement which only “arises in litigating the merits of the complaint.”
Weems, ¶ 18 n.4.

17. The “loss of a constitutional right constitutes irreparable harm.” *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶ 15, 296 P.3d 1161, 1165, 366 Mont. 224, 229 (citation omitted).

18. The Plaintiffs, Netzer Law, have “demonstrated either a prima facie case that they will suffer some degree of harm and are entitled to relief (§ 27-19-201(1), MCA) or a prima facie case that they will suffer an ‘irreparable injury’ through the loss of a constitutional right (§ 27-19-201(2), MCA).” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 17, 401 Mont. 405, 414, 473 P.3d 386, 392.

19. Plaintiffs have made a prima facie showing that HB 702 violates its constitutional rights under Montana Constitution article II, sections 3, 4, 34 and article IX, section 1 of the Montana Constitution; and that the bill violates article V, section 11, clause 3. HB 702 infringes on Netzer Law’s inalienable rights to a clean and healthful environment; to enjoying and defending its and its employees’ existence; to fully possessing and protecting its property; to seeking safety and health for its owner, its employees, and its clients; and to its other unenumerated rights. Mont. Const. art. II, §§ 3, 34.

20. For the reasons stated herein, the Court concludes that Netzer Law has made the requisite showing for a preliminary injunction to issue and enjoin HB 702.

NETZER LAW HAS MADE A PRIMA FACIE SHOWING THAT HB 702 INFRINGES UPON ITS CONSTITUTIONAL RIGHTS

21. The rights found in article II, sections 3 and 34 and article IX, section 1 of the Montana Constitution are fundamental rights and therefore trigger strict scrutiny when governmental action substantially burdens any of those rights. *Park Cty. Env’t Council*, ¶ 79. When

triggered, strict scrutiny places the burden on the State to prove that its action was adopted to advance “a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.”

Montana Env'tl. Info. Ctr. v. Dept. of Env'tl. Quality, 1999 MT 248, ¶ 63.

I. ARTICLE II, SECTION 3; ARTICLE IX, SECTION 1 (FUNDAMENTAL RIGHTS)

22. Article II, Section 3 of the Montana Constitution provides:

Inalienable Rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

A. RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT; DUTY TO MAINTAIN AND IMPROVE A CLEAN AND HEALTHFUL ENVIRONMENT

23. I conclude that the right to a clean and healthful environment in Article II, Section 3 of the Montana Constitution includes an employer’s right to (1) require its employees to provide proof of active vaccination or immunity against diseases that pose a present threat of serious illness or death (*e.g.*, COVID-19); and (2) require persons seeking to enter their businesses who fail to prove active vaccination or immunity against diseases that pose a present threat of serious illness or death to adhere to health-and-safety measures (*e.g.*, engage with the business remotely or wear masks indoors) that do not apply to persons who have proved active vaccination or immunity.

24. I also conclude that Netzer Law has made a prima facie showing that HB 702 substantially burdens these rights of Netzer Law and employers across the State of Montana by making it unlawful for them to exercise these rights. For the same reasons provided below, I conclude that HB 702 substantially burdens Netzer Law’s and other employers’ duty to

maintain and improve a clean and healthful environment under Article IX, Section 1 of the Montana Constitution.

25. The State Defendants assert that the above-identified rights cannot exist because the Montana Supreme Court has not issued a decision holding that they apply to indoor environments or to protecting against infectious diseases. The plain language of the Constitution, the Framers' intent, and existing case law confirm otherwise. Furthermore, that Netzer Law raises questions of first impression has no bearing on the Court's analysis—we are living in unprecedented circumstances.

26. "Environment" is a broad term—"the aggregate of surrounding things, conditions, or influence."³ Even a narrower ecological definition of that term includes "the air, water, minerals, organisms, and all other external factors surrounding and affecting a given organism at any time."⁴ Notably, the plain meaning of "environment" when the Framers adopted the relevant constitutional text was equally broad. *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"). Contrary to the State Defendants' position, nothing in the plain meaning of this term would limit it to the outdoors. *See* Mont. Code Ann. § 1-2-101 (observing that judges are "not to insert what has been omitted or to omit what has been inserted" when construing statutes).

27. Furthermore, the Framers expressed no intention to limit "environment" and related concerns to outdoor spaces. Instead, they sought the opposite and "intentionally avoided

³ Dictionary.com, <https://www.dictionary.com/browse/environment>.

⁴ *Id.* (emphasis added).

definitions, to preclude being restrictive.” *MEIC*, 1999 MT 248, ¶ 67, 296 Mont. 207, 226, 988 P.2d 1236, 1246–47. Additionally, the Framers indicated that the term “‘environmental life support system’ is all-encompassing, including but not limited to air, water, and land.” *Id.*, ¶ 67; *id.*, ¶ 70 (stating constitutional provisions “include[] private property”); *id.*, ¶ 66 (“The provision, as introduced, was thought by members of the committee to be the strongest environmental protection provision found in any state constitution.”); *id.*, ¶ 76 (stating “fundamental purpose” of “construing constitutional provision [] is to ascertain and to give effect to the intent of the framers”); *Heffernan*, 2011 MT 91, ¶ 38 (requiring “liberal construction” of provisions enacted to promote public health and safety). The Framers’ broad language, stated intent, and refusal to define and limit terms confirms that these provisions should be construed to provide broad constitutional protection of the environment and human health.

28. Relevant historical context supports this reading. For example, in 1971—preceding the Framers’ adoption of these constitutional provisions—a Republican-led Montana House in a 99-0 vote proposed the adoption of the Montana Environmental Policy Act (“MEPA”);⁵ *MEIC*, 1999 MT, ¶ 80 n.1 (recognizing that “the delegates to the 1972 Constitutional Convention were very much aware of legislation passed during the previous year”). As enacted, MEPA provided:

The purpose of this act is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; *to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man*; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council.

⁵ A Guide to the Montana Environmental Policy Act, at v, 5 <https://leg.mt.gov/content/Publications/Environmental/2013-mepa-handbook.pdf>.

29. *Montana Wilderness Ass'n v. Bd. of Health & Env't Scis.*, 171 Mont. 477, 483, 559 P.2d 1157, 1160 (1976) (emphasis added). In effectuating this purpose, MEPA set forth “the environmental impacts that must be assessed when agencies of the state make major decisions having a significant impact on the *human environment*.” *Id.* (emphasis added).

30. As Representative George Darrow, Republican 1971 MEPA Sponsor, stated:

With its enactment a year earlier than the 1972 Montana Constitutional Convention, MEPA acted as a precursor to the strong environmental stance asserted in the new constitution. This constitutional declaration of environmental rights and duties now undergirds and reinforces the provisions of the Montana Environmental Policy Act.⁶

31. In other words, the Framers were aware of MEPA and its broad conception of protecting the “human environment” and the “health and welfare of man.”

32. It also makes sense that the right to a clean and healthful environment would apply to indoor environments as air, water, and land reach and impact those environments and implicate human health. *See, e.g., MEIC*, ¶¶ 19-22, 45, 79 (finding environmental constitutional rights implicated by activities adding any amount of carcinogenic, disease-causing arsenic above baseline level of waters that are source of plaintiffs’ indoor drinking water). Indeed, as cited in Netzer Law’s briefing in this case, the Environmental Protection Agency regulates asbestos (a naturally occurring mineral that presents a serious health risk to persons and has been proven to cause diseases like lung, larynx, and ovary cancer, to name a few) in indoor environments to mitigate risks of diseases in humans under

⁶ *Supra* n. 11 at v.

numerous statutes.⁷ Indoor human health threats arising from lead and radon are similarly regulated under environmental laws.

33. The Montana Constitution's concerns about human health are neither expressly or impliedly limited based on whether a deadly disease is infectious in nature or not. From a constitutional perspective, there is no legally relevant difference between potentially fatal cancer cases contracted from indoor exposure to arsenic, lead, asbestos, or radon, and potentially fatal COVID-19 cases contracted from indoor environments.

34. As explained above, the Court's determination that Netzer Law's asserted rights exist flows naturally from the Montana Constitution's capacious plain language, the Framers' intent, and Montana Supreme Court precedent; it does not, as the State Defendants claim, "radically transform" the right to a clean and healthful environment. For these reasons, and based upon the findings above, I conclude that Netzer Law has made a prima facie showing that HB 702 substantially burdens Netzer Law's fundamental right to a clean and healthful environment.

35. Furthermore, for similar reasons, HB 702 also substantially burdens Plaintiffs' ability to fulfill its constitutional duty to maintain and improve a clean and healthful environment for "this and future generations." Mont. Const. art. IX, § 1.

B. RIGHT TO PURSUE LIFE'S BASIC NECESSITIES

36. I conclude that the right to pursue life's basic necessities in Article II, Section 3 of the Montana Constitution necessarily includes the rights to engage in employment, including

⁷ https://www.atsdr.cdc.gov/asbestos/health_effects_asbestos.html;
<https://www.epa.gov/asbestos/asbestos-laws-and-regulations>.

to own and operate a business, and to do these things without being subjected to serious health threats (or having to assume potential legal liability) created by government action.

37. I conclude that Netzer Law has made a prima facie showing that HB 702 substantially burdens these rights by, *inter alia*, prohibiting Netzer Law from requiring its employees to provide proof of active vaccination or immunity to COVID-19.

38. The Montana Constitution establishes the right to “pursue life’s basic necessities.” Art. II, § 3. This includes the right to pursue employment because “[a]s a practical matter, employment serves [] to provide income for the most basic of life’s necessities” and, without this right, “the right to pursue life’s basic necessities would have little meaning.” *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172.

39. The right to pursue life’s basic necessities “would have little meaning” if doing so required persons to unnecessarily jeopardize their health, livelihoods, and potentially lives due to government regulation. *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172. Acknowledging these rights, Netzer Law has made a prima facie showing that HB 702’s prohibitions described above substantially burden Netzer Law’s, its owners’, and its employees’ fundamental rights.

40. Relying on *Wiser*, the State Defendants assert that this fundamental right cannot exist because Montana’s Constitution “circumscribed that right by subjecting it to the State’s police power to protect the public’s health and welfare.” *Wiser v. State, Dep’t of Com.*, 2006 MT 20, ¶ 24, 331 Mont. 28, 36, 129 P.3d 133, 139. But *Wiser* does not stand for the proposition that fundamental rights cease to exist when the Legislature exercises its police power. Instead, that decision merely held that denturists had no fundamental right not to have to refer partial denture patients to dentists before providing partial denture services.

See id. ¶¶ 22-23. The alleged fundamental right asserted by the denturists is a far cry away from the fundamental rights Netzer Law asserts exist in this case.

C. RIGHT TO DEFEND LIFE

41. I conclude that the right to defend one's life in Article II, Section 3 of the Montana Constitution necessarily includes the right to defend one's life against deadly diseases and government actions that unnecessarily or seriously threaten one's life by increasing exposure to such diseases.
42. I conclude that Netzer Law has made a prima facie showing that HB 702 substantially burdens these rights by, *inter alia*, prohibiting Netzer Law from requiring its employees to provide proof of active vaccination or immunity to COVID-19.
43. The State Defendants contend that the right to self-defense is limited to traditional situations where a person is defending themselves from a physical attack by another person. To be sure, many cases related to principles of self-defense involve such circumstances. But the Montana Constitution's plain language is unqualified and not so limited. Importantly, for purposes here, reliance on principles of self-defense in the face of a deadly disease is not new. In *Jacobson v. Massachusetts*, the U.S. Supreme court concluded that "[u]pon 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 (1905) (upholding a law mandating vaccines against smallpox). Relying on *Jacobson* and its rationale, courts across the country have upheld actions 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 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 because compelling government interest in slowing spread of COVID-19 and preventing healthcare system from being overwhelmed); *see also, e.g., People of State of Ill. V. Gen. Elec. Co.*, 683 F.2d 206, 214 (7th Cir. 1982) (recognizing “quarantine cases” that allowed States to ban importation of “persons afflicted by contagious or infectious diseases” under “the sacred law of self-defense”).

44. Accordingly, I conclude that Article II, Section 3 of the Montana Constitution guarantees the right to defend one’s life against deadly diseases and government actions that unnecessarily or seriously threaten one’s life by increasing exposure to such diseases. *Cf. Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172. If contracted, COVID-19 and multiple other diseases (*e.g.*, smallpox) present a serious risk of death, hospitalization, or even lingering symptoms and health conditions long after an individual has recovered from a COVID-19 infection. HB 702’s broad prohibition on discrimination based on vaccination status, including banning vaccine mandates of any kind, unnecessarily and seriously threatens lives by precluding businesses and employers like Netzer Law and its owners from adopting and implementing common-sense measures to protect its business, owners, employees, clients, and others entering its offices against the worsening COVID-19 pandemic and future outbreaks of new and old diseases. For these reasons, and based upon the other findings in this order, I conclude that Netzer Law has made a prima facie showing that HB 702 substantially burdens Netzer Law’s and its owners’ right to defend their lives.

D. RIGHT TO FULLY POSSESS AND PROTECT PROPERTY

45. I conclude that Netzer Law has made a prima facie showing that HB 702 substantially burdens Netzer Law’s right to possess and protect property in Article II, Section 3 of the

Montana Constitution by prohibiting the adoption of the health-and-safety measures Netzer Law wishes to adopt, including those that would treat employees, clients, potential clients, and others differently should they not be able to provide proof of active vaccination or immunity against COVID-19.

46. The Montana Constitution establishes a right to possess and protect property. Art. II, § 3. The case of *Freeman v. Bd. of Adjustment*, 97 Mont. 342, 355, 34 P.2d 534, 538 (1934) provides 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.*

47. 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 ¶¶ 7-23. Based on this and the findings and analysis above, I conclude that HB 702 substantially burdens Netzer Law’s right to fully possess and protect its property. Netzer Law has made a prima facie showing that HB 702’s constraints serve no legitimate purpose and in fact do the opposite of protecting public health, while interfering with the right to possess and protect property.

E. RIGHT TO SEEK SAFETY, HEALTH, AND HAPPINESS

48. Based on the provision’s plain language, I conclude that the right to seek safety, health, and happiness in Article II, Section 3 of the Montana Constitution necessarily includes the right of a business and employer to implement proven health-and-safety measures during an ongoing deadly pandemic.

49. I further conclude that Netzer Law has made a prima facie showing that HB 702 substantially burdens Netzer Law's right to seek safety, health, and happiness by prohibiting it from implementing proven health-and-safety measures during the COVID-19 pandemic.⁸

F. JUDICIAL SCRUTINY

50. "Strict scrutiny applies if a suspect class or fundamental right is affected"; middle-tier scrutiny applies "if the law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution's Declaration of Rights"; and the rational basis test applies otherwise. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶¶ 17-18. When middle-tier scrutiny applies, "the State must demonstrate the law or policy in question is reasonable and the need for the resulting classification outweighs the value of the right to an individual." *Id.* ¶ 18. The rational basis test applies if neither strict scrutiny nor middle-tier scrutiny apply. *Id.* ¶ 19. Under rational basis, the law or policy must be rationally related to a legitimate government interest. *Id.*

51. I conclude that HB 702 substantially interferes with Netzer Law's fundamental rights and as such, strict scrutiny analysis applies.

52. HB 702's broad prohibition of vaccine-status discrimination is not closely tailored to its purported interest in medical-record privacy and medical record privacy is a pretext. HB 702's title is entirely unrelated to medical-record privacy and prohibiting vaccine-status

⁸ Netzer Law contends that should this Court conclude that the other fundamental rights asserted do not exist in Article II, Section 3 the Court should invoke Article II, Section 34 ("Unenumerated Rights") to find these fundamental rights. As explained above, this Court has concluded that all the rights asserted by Netzer Law above exist under Article II, Section 3, and that HB 702 substantially burdens each of those rights. Accordingly, the Court declines to address whether these rights exist under Article II, Section 34.

discrimination does not advance medical-record privacy. Fear and negative attitudes are not legitimate, let alone compelling, interests. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 105 S. Ct. 3249, 3258–59 (1985); *Armstrong v. State*, 1999 MT 261, ¶ 60, 296 Mont. 361, 384, 989 P.2d 364, 380 (recognizing pretextual legislative action driven by “prevailing political ideology and the unrelenting pressure from individuals” is “constitutionally impermissible” and “intellectually and morally indefensible”).

53. The prohibition on discrimination inherently contemplates that a person/entity knows of another person’s vaccination status (*i.e.*, person/entity X cannot discriminate against person Y if the former does not know whether the latter is or is not vaccinated). Notably, HB 702 *does not* prohibit any person/entity from inquiring about another person’s vaccination status. Broadly prohibiting vaccine-status discrimination is therefore not closely tailored to protecting medical-record privacy. For these same reasons, HB 702’s broad prohibitions are not the least onerous way to protect medical-record privacy.
54. Keeping vaccination status private during a pandemic is not a compelling (or legitimate) State interest because, *inter alia*, it jeopardizes the lives and health of the entire State. The State’s police power exists to protect the public safety, health, and welfare—the very things HB 702 dangerously undermines.

II. ARTICLE II, SECTION 4 (EQUAL PROTECTION)

55. I conclude that Netzer Law has demonstrated a *prima facie* showing that HB 702 violates its right to equal protection under the Montana Constitution by treating it differently than other entities (*e.g.*, schools, day-cares, nursing homes, long-term care providers, assisted living providers and health care facilities) without adequate justification or a classification that serves a legitimate state purpose. Mont. Const. art. II, § 4; *Gazelka v. St. Peter’s Hosp.*

2018 MT 152, ¶ 16. Plaintiff Donald L. Netzer is an individual at 70 years of age who is at greater risk of a serious infection from COVID-19 and similarly situated to those individuals found working or residing in one of the facilities provided an exemption under the law, yet is prohibited from enjoying the same health and safety protections while at his law office as he would be at an exempted facility, without a legitimate state purpose. Furthermore, Netzer Law as a business and employer that represents a broad cross section of Montanans is similarly situated to the entities that are provided exemptions and exceptions.

56. The United States and Montana Constitutions “embody a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner.” *Snetsinger*, ¶¶ 15-16 (citation omitted); Mont. Const. art. II, § 4 (“No person shall be denied the equal protection of the laws.”). The Montana Constitution guarantees more protection than its federal counterpart. *Id.*
57. In addressing an equal protection challenge, a court will “first identify the classes involved and determine whether they are similarly situated.” *Henry v. State Compensation Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, P27, 982 P.2d 456, P27 (citation omitted). To do this, courts “isolat[e] the factor allegedly subject to impermissible discrimination” and, “if two groups are identical in all other respects, they are similarly situated.” *Hensley v. Montana State Fund*, 2020 MT 317, ¶ 19, 402 Mont. 277, 290, 477 P.3d 1065, 291 (plurality) (internal citations omitted). Second, courts determine what test applies. *Snetsinger*, ¶¶ 15-19. “Strict scrutiny applies if a suspect class or fundamental right is affected”; middle-tier scrutiny applies “if the law or policy affects a right conferred by the

Montana Constitution, but is not found in the Constitution's Declaration of Rights"; and the rational basis test applies otherwise. *Id.*, ¶¶ 17-19.

58. "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.'" *Gazelka v. St. Peter's Hosp.* 2018 MT 152, ¶ 16 quoting *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 30.

59. As explained above, HB 702 affects Netzer Law's fundamental rights and therefore is subject to strict scrutiny review. As also explained above, HB 702 fails the strict scrutiny test.

60. Even if strict scrutiny were not implicated in this equal protection analysis, I would conclude that HB 702 fails the rational basis test because the disparate treatment towards Netzer Law Office P.C. and their owners, employees and clients' health and safety during an active pandemic is not rationally related to a legitimate government interest.

III. ARTICLE V, SECTION 11, CLAUSE 3

61. I conclude that Netzer Law has made a prima facie showing that the title of HB 702 violates Article V, Section 11, Clause 3 of the Montana Constitution because the title fails to convey that it bans vaccine mandates.

62. The Montana Constitution requires bills like HB 702 to "contain only one subject" that must be "clearly expressed in its title." Art. V, § 11, cl. 3. "If any subject is embraced in any act and is not expressed in the title," the provisions of that subject are "void." *Id.* In assessing whether a bill's title violates these provisions, courts determine whether "the title of legislation in question [is] of such character as to mislead the public or members of the legislature as to the subjects embraced." *City of Helena v. Omholt*, 155 Mont. 212, 221,

468 P.2d 764, 768 (1970) (explaining purpose of protecting the Legislature and public from “being misled by false or deceptive titles”). The State Defendants and Netzer Law dispute whether the Court should liberally or strictly construe this provision (there is case law cutting both ways). For purposes of my decision, I apply a liberal construction of this constitutional provision.

63. HB 702’s full title in the enrolled bill is, “An Act Prohibiting Discrimination Based on a Person’s Vaccination Status or Possession of an Immunity Passport; Providing an Exception and an Exemption; Providing an Appropriation; and Providing Effective Dates.” *Supra* note 19. This title says nothing about vaccine-mandate bans.

64. HB 702 expressly bans “vaccine[s] whose use is allowed under an emergency use authorization or [that is] undergoing safety trials” (*e.g.*, some COVID-19 vaccines). Mont. Code Ann. § 49-2-312(4).

65. Even more, HB 702 impliedly bans vaccine mandates of all kinds (except where an entity is excepted—*e.g.*, schools). *See generally* Mont. Code Ann. §§ 49-2-312, 49-2-313. This ban is not expressly stated in the text of HB 702. Instead, it is the indirect result of bill’s broad prohibition on discrimination based on vaccination status or possession of an immunity passport. The State Defendants have not disputed in either briefing or oral argument that HB 702’s legal effect results in the implied general ban of vaccine mandates.

66. Based on these facts, State Defendants argue that HB 702 does what the title says (prohibits discrimination based on vaccination or possession of an immunity passport). The Court is not persuaded by this conclusory argument.

67. A prohibition on discrimination based on a person’s vaccination status or possession of an immunity passport does not communicate to the public that employers are banned from

imposing vaccine mandates. If it did, there would be no need for HB 702 to include an express provision banning limited types of vaccine mandates. For purposes of this analysis, the Court finds the indirect ban on employer vaccine mandates most troublesome because of its breadth and the fact that it is not expressly stated in the bill's text.

68. By not including in the title the subject of "ban on vaccine mandates" or something similar, the bill was misleading both to the public and Legislature, especially considering the broader ban is not expressly stated in the bill's text.

69. Accordingly, I conclude that Netzer Law has made a prima facie showing that HB 702 contravenes the constitutional requirement that a bill's title embrace all subjects embraced by the law. Mont. Const. art. V, § 11, cl. 3.

70. For all the reasons articulated above, Netzer Law's requested preliminary injunction shall issue.

REAL THREAT OF IRREPARABLE INJURY DEMONSTRATED BY NETZER LAW BEYOND THE INFRINGEMENT OF CONSTITUTIONAL RIGHTS

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

72. Independently, absent an injunction, HB 702 will remain in effect and prevent Netzer Law from adopting and implementing health-and-safety measures related to persons without active vaccination or immunity protection. This creates an unnecessary and unjustifiable risk of serious, even life-threatening, harm to Netzer Law’s owners, employees, clients, and others interacting within its office space. Relatedly HB 702 also presents an equally serious risk to Netzer Law’s continued and economically viable operations. These risks are sufficient to support enjoining HB 702. *Cf. Sausalito/Marin Cty. Chapter of California Homeless Union v. City of Sausalito*, 522 F. Supp. 3d 648, 654 (N.D. Cal. 2021) (finding irreparable harm justifying injunction of action that would increase risk of spreading COVID-19); *Bernal*, 514 F. Supp. 3d at 1146 (relying on “stop[ping] the spread of COVID-19” for injunction). Based on the foregoing, an injunction is independently warranted to prevent Netzer Law and other businesses and employers like it from suffering irreparable harm.

From the foregoing Findings of Fact and Conclusions of Law, the Court orders as follows:

IT IS HEREBY ORDERED that Plaintiffs’ Application for Preliminary Injunction is GRANTED for the reasons stated herein and Defendants are enjoined from enforcing any aspect of HB 702 during the pendency of this action according to the prayer of the Plaintiffs’ Application and First Amended Complaint.

DATED this ___ day of _____, 20__.

THE HONORABLE OLIVIA RIEGER
DISTRICT COURT JUDGE