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FILED <i>Jamie Kempel</i>
CLERK OF DISTRICT COURT
DEC 13 2021
BY <i>Samuel Warden</i> DEPUTY

MONTANA SEVENTH JUDICIAL DISTRICT COURT, RICHLAND COUNTY

<p>NETZER LAW OFFICE, P.C. and DONALD L. NETZER,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>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>Defendants.</p>	<p>Cause No. DV-21-89</p> <p>RESPONSE TO STATE OF MONTANA'S NOTICE OF SUPPLEMENTAL AUTHORITY</p> <p><i>Honorable Olivia Rieger</i></p>
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COME NOW the Plaintiffs, Netzer Law Office, P.C. and Donald L. Netzer (collectively, "Netzer Law") and file this response to State Defendants Notice of Supplemental Authority.

The Court should disregard State Defendants' improper submission a three-page "Notice"¹ incorrectly arguing that *Louisiana v. Becerra*, No. 3:21-CV-03970, Doc. 28 (W.D. La. Nov. 30,

¹ Although the Montana Rules of Civil Procedure are silent on the protocols for submitting a notice of supplemental authority, the Montana Rules of Appellate Procedure (which State Defendants are

2021) has any bearing on Netzer Law’s pending application for a preliminary injunction. Netzer Law provides this short, non-exhaustive response to explain why the *Becerra* decision is irrelevant.

Becerra is inapposite because it involves unique federal legal standards not implicated in this case. First, the federal standard for a preliminary injunction does not apply under Montana law. Second, the legal issue in *Becerra* is whether a federal agency’s (CMS’s) rulemaking complies with the Administrative Procedure Act (“APA”), not whether a Montana law like HB 702 violates unique provisions of the Montana Constitution. Third, to the extent that constitutional issues are touched on in *Becerra*, those matters relate purely to provisions of the U.S. Constitution governing the relationship between the Federal and State governments (*e.g.*, the Tenth Amendment) and have no bearing on the legal issues before the Court in this case.

State Defendants’ Notice also improperly attempts to bootstrap into this case factual findings from *Becerra* based on the unique evidentiary record of that case. Accepting State Defendants’ invitation would amount to reversible error because, among other things, such facts are not subject to judicial notice (Montana Rule of Evidence 201(b)); those facts arose from evidence that is not before the Court in this case (*e.g.*, statements from a Dr. McCullough); and *Becerra* was an APA case, meaning it was reviewed based on the fixed administrative record underlying the agency’s action (5 U.S.C. § 706).

In short, State Defendants’ “Notice” was procedurally improper and should be stricken. Regardless, as briefly explained above, *Becerra* has no bearing on the resolution of Netzer Law’s pending application for a preliminary injunction. *But see* Notice at 3 (incorrectly claiming that

familiar with) provides that such notices should only be used “[w]hen pertinent and significant authorities” are involved and then only should “set[] forth the citation(s)” and cannot provide “argument.” *See* Mont. R. of App. Proc. 12(6). The State’s Notice contravenes both requirements.

“the issues in [*Becerra*] and this one are similar” and arguing that “its findings should help inform this Court’s disposition of this matter”).

Dated this 13th day of December, 2021.

NETZER LAW OFFICE, P.C.

/s/ Joel G. Krautter
Joel G. Krautter

GOOD STEWARD LEGAL, PLLC

/s/ Jared R. Wigginton
Jared R. Wigginton
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 13th day of December, 2021, by email and by first class mail in a sealed, postage paid envelope.

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