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MONTANA SEVENTH JUDICIAL DISTRICT COURT
RICHLAND COUNTY

NETZER LAW OFFICE, and DONALD L. NETZER,

Plaintiff,

v.

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

Defendants.

Cause No. DV-21-89

STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

The State Defendants (hereafter "the State") submit this reply in support of their motion to dismiss.

INTRODUCTION[1]

HB 702 protects Montanans from involuntary disclosure of their private medical information and from being forced to choose between their job or an involuntary medical procedure. The Plaintiffs call such purposes 'pretext' motivated by politics. *Pls.' BIO MTD* at 23. But they're wrong. These legislative purposes were prescient. Since HB 702's enactment, the federal government has attempted to impose three separate COVID-19 vaccination requirements. *See Louisiana and Montana, et al v. Becerra et al,* No. 3:21-CV-03970, Doc. 28 (W.D. La. Nov. 30, 2021); *BST Holdings, L.L.C. v. OSHA*, 2021 U.S. App. LEXIS 33698 (5th Cir. Nov. 12, 2021); *Georgia v. Biden*, 2021 U.S. Dist. LEXIS 234032 (S.D. Ga. Dec. 7, 2021) (all preliminarily enjoining the federal vaccine mandates). Courts around the country have struck those down, and none are now effective in Montana. HB 702 set a clear policy that, in Montana, individuals cannot be discriminated against based on vaccination status. MCA, § 49-2-312. Montanans will not have to choose between their job or an involuntary medical procedure.

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[1] For the Court's clarity, the State cites to prior briefing as follows: *Plaintiffs' Brief in Support of Application for Preliminary Injunction* (Oct. 26, 2021) (hereafter "*Pls.' BIS PI*"); *Plaintiffs' Reply in Support of Application for Preliminary Injunction* (Dec. 12, 2021) (hereafter "*Pls.' RIS PI*"); *Plaintiffs' Brief in Opposition to Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment* (Dec. 12, 2021) (hereafter "*Pls.' BIO MTD*"); *State's Brief in Opposition of Application for Preliminary Injunction and in Support of Motion to Dismiss* (Nov. 15, 2021) (hereafter "*State's Br.*").

Plaintiffs disagree with Montana's policy. They wish this State permitted vaccination-based discrimination that would allow businesses like Netzer Law to fire its handful of employees. *See* First Amended Compl., ¶ 30. Such policy disagreements are the stuff of dinner conversation. They do nothing to undermine Montana's sovereign interests—interests "of the highest order"—in prohibiting discrimination. *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984).

Montana's antidiscrimination statutes, including HB 702, rest on sound constitutional footing. Plaintiffs fail to raise *any* viable legal argument challenging HB 702's constitutionality. And they also fail to raise any concrete injury and thus lack standing. For both reasons, this Court should dismiss Plaintiff's Complaint.

ARGUMENT

I. Motion to dismiss standard

Courts look to the four corners of the complaint when reviewing a Rule 12(b)(6) motion. *See Stufft v. Stufft*, 276 Mont. 310, 313 (1996). In other words, the court should "exclude matters presented to it that are outside of the pleadings when considering a motion to dismiss." *Meagher v. Butte-Silver Bow City-County,* 2007 MT 129, ¶ 16, 337 Mont. 339, 160 P.3d 552.[2]

[2] Briefing at the preliminary injunction stage included matters raised outside of the pleadings. *See e.g. Bhattacharya Decl.*; *Pls.' BIS PI* at 6 n.4. In disposition of this Rule 12(b)(6) motion, however, this Court should only consider facts raised in the pleadings and not matters raised outside of the pleadings, including judicially noticed facts. *See Plouffe v. State*, 2003 MT 62, ¶¶ 15–16. This means the Court may properly consider outside matters related to the 12(b)(1) motion to dismiss for lack of jurisdiction, but not for the 12(b)(6) motion to dismiss for failure to state a claim.

This Court should, at this stage, decline Plaintiffs' invitation to convert the State's motion to dismiss into a motion for summary judgment. *Pls.' BIO MTD* at 10. While the State contests many of their factual allegations, the veracity of those allegations isn't at issue in this motion. This motion concerns the deficiencies of their pleadings.

The Court should grant the State's motion to dismiss under both Mont. R. Civ. P. 12(b)(1) and 12(b)(6) because based on the pleadings Plaintiffs failed to establish a concrete injury and they fail to establish a viable legal claim.

II. Plaintiffs lack standing

The State set forth the applicable rules governing standing in its brief. *State's Br.* at 5. Plaintiffs' assertion that this court "must assume that the plaintiff will prevail on the merits" has no merit. *Pls.' BIO MTD* at 6. Plaintiffs bear the burden of establishing the elements of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

A. Plaintiffs' 'Object of an Action' test does not grant them standing.

Plaintiffs conclude because HB 702 governs their activities, they necessarily have standing. *Pls.' BIO MTD* at 6–7. This 'object of the action' test ignores the requirement that they still must "clearly allege past, present, or threatened injury to a property or civil right" "distinguishable from the injury to the public generally." *Bryan v. Yellowstone Cty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 20, 312 Mont. 257, 60 P.3d 381. It remains their burden to establish standing, and repetition of the same

deficient allegations must fail for the reasons previously argued.[3] *See State's Br.* at 5–7.

B. Donald L. Netzer lacks a cognizable injury.

Plaintiff Donald L. Netzer's asserted 'anxiety, worry, and stress' fails to establish a concrete injury. Plaintiffs cite *Gryczan v. State*, 283 Mont. 433 (1997); *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, 383 Mont. 318, 371 P.3d 430; and *Matter of S.L.M.*, 287 Mont. 23 (1997), for the proposition that such subjective assertions of worry and fear, alone, suffice for standing. *Pls.' BIO MTD* at 7. Not so. Those cases all involve the threat of, or actual, enforcement of a statute against the party. That is not what Netzer alleges.

Here, Netzer's purported psychological harms relate to a generalized fear that Nezter Law cannot take "actions necessary to ensure a clean, safe, and healthy office environment." *See Netzer Aff.*, ¶¶ 18, 20. Netzer doesn't allege fear of enforcement actions under HB 702. As previously argued, Netzer's anxiety, in this regard, cannot be traced to HB 702. *See State's Br.* at 6; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) ("highly speculative fear" does not confer Article III standing); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (Complaints must offer more than "naked

[3] Plaintiffs, through a new affidavit, allege "[t]o the extent it was unclear" they would "treat persons with proof [sic] active vaccination or immunity the same." *Netzer Supp. Aff.*, ¶ 7. It's not that Plaintiffs were unclear originally, it's that their complaint focused solely on vaccination status. *See Netzer Aff.*, ¶¶ 13, 15–17, 23; First Amended Compl., ¶¶ 27, 30–31. That is a material change in the theory of their case, and the Court may not consider it. Regardless, this change does not confer standing and does not cure any of the fatal defects in their legal theories.

assertions devoid of further factual enhancement.") (internal citation and quotations omitted).

Netzer's other worry relates to "the economic and general well-being of Netzer Law as a business." *Pls.' BIO MTD* at 7; *Netzer Aff.*, ¶ 20. This economic impact is "not clearly quantifiable in dollars and cents." *Netzer Aff.*, ¶ 9. Something 'not clearly quantifiable' falls short of clearly alleging an actual, concrete injury. *See Bryan.* 2002 MT 264, ¶ 20.

C. Netzer Law does not possess a constitutional right to discriminate.

The State previously argued "the desire to discriminate on the basis of a statutorily prescribed category is not a right" and does not confer standing. *State's Br.* at 6. Plaintiffs disagree and state the Montana Constitution protects their purported right to discriminate. *Pls.' BIO MTD* at 8 (citing a 3d Cir. case); *but see Norwood v. Harrison*, 413 U.S. 455, 470 (1973) ("Invidious private discrimination … has never been accorded affirmative constitutional protections.").

Contrary to Plaintiffs' claims, the State doesn't argue this case poses a non-justiciable political question. *See Pls.' BIO MTD* at 8–9. If Plaintiffs alleged concrete harm traceable to HB 702, this Court would have jurisdiction, but Plaintiffs allege a policy disagreement about the State's response to COVID-19 and that does not confer standing. *See State's Br.* at 5–7; *see also Pls.' BIO MTD* at 5 (hyperbolically calling HB 702 "one of the greatest abdications by any state legislature.").

D. Plaintiffs fail to allege an economic injury.

Plaintiffs fail to buttress their deficient pleadings regarding Netzer Law's purported economic injury. *Pls.' BIO MTD* at 8–9. Economic injury requires, at a minimum, a clear statement of likely costs or additional economic burdens. *See Missoula City-Cty. Air Pollution Control Bd. v. Bd. of Envtl. Review*, 282 Mont. 255, 262, 937 P.2d 463 (1997). Netzer Law's ill-defined, threadbare allegations fail to clearly state a concrete injury. *See Pls.' BIO MTD* at 9. Nothing in the supplemental affidavit offers a requisite level of specificity to overcome Netzer's own prior statement that COVID-19 impacts cannot be "clearly quantifi[ed] in dollars and cents." *Compare Netzer Aff.*, ¶ 9 to *Netzer Supp. Aff.*, ¶¶ 2–6. Such vague, unsubstantiated allegations do not confer standing.

Further, Plaintiffs fail to address how terminating existing unvaccinated employees alleviates economic harm, or how excluding large portions of their client base serves their economic interest. *See State's Br.* at 7.

Plaintiffs' traceability and redressability problem comes into focus with their new allegations regarding the costs of masks. *See Netzer Supp. Aff.*, ¶¶ 4–5. Netzer previously asserted Netzer Law complies with CDC guidance. *See Netzer Aff.*, ¶ 10. Current CDC guidance recommends indoor masking regardless of vaccination status in areas of high transmission, which includes Richland and Yellowstone County. *See Pls.' RIS PI* at 5 (discussing current CDC guidelines). Plaintiffs, if their allegations are true, will incur such costs regardless of HB 702. This gets back to the point the State previously argued that the Plaintiffs fail to plead any concrete injury attributable to HB 702. *See State's Br.* at 5–7.

For these reasons, and those previously argued, this Court should dismiss this case because Plaintiffs lack standing.

III. Plaintiffs fail to state a viable legal claim

Unsupported legal assertions can't survive a motion to dismiss. *See Cowan v. Cowan*, 2004 MT 97, ¶ 14. Plaintiffs offer numerous legal theories but fail to ground those theories in existing law, factual allegations, or persuasive authority demonstrating their newfound legal rights exist within the Montana Constitution.

A. HB 702's title clearly states its purpose

Article V, section 11(3) of the Montana Constitution exists to prohibit surreptitious or misleading legislation. *See State ex rel. Boone v. Tullock*, 72 Mont. 482, 488, 234 P. 277, 279 (1925). Plaintiffs don't plausibly claim that HB 702 misleads them, or anyone else because HB 702 says what it does and does what it says. *See State's Br.* at 20.[4]

Plaintiffs' sole argument involves inserting words into the title that appear nowhere in the statute, because according to them, those unused words evince HB 702's true purpose. *Pls.' BIO MTD* at 12–13. The State already responded to this argument. *See State's Br.* at 20.

The cases cited by Plaintiffs all involve readily apparent disagreement between a bill's title and the body of that bill. *See Pls.' BIO MTD* at 13–14 citing *Helena v. Omholt*, 155 Mont. 212, 221 (1970) (the body of the act "proceed[ed] to nullify and

[4] Plaintiffs also argue that the Montana Supreme Court wrongly decided *MEA-MFT v. State*, 2014 MT 33. *Pls.' BIO MTD* at 12 n.8. They don't present an argument to this Court as to why *MEA-MFT*'s holding that courts provide a liberal construction to article V, section 11(3) shouldn't apply in this case.

defeat" the existing statutory appropriation the title purported to carry out); *Sigety v. State Bd. of Health*, 157 Mont. 48, 53 (1971) (the body of the act regulated specific mining activities expressly omitted from the title); *State ex rel. Holliday v. O'Leary*, 43 Mont. 157, 165, 115 P. 204, 206 (1911) (the title of the act authorized nonpartisan judicial nominations, which was already law, but the body of the act prohibited partisan judicial nominations). In each case, the act in question contained an incongruous relationship between the title of the act and the body of the act. HB 702, by contrast, expresses its cohesive purpose in both title and body and complies with Article V, section 11(3) of the Montana Constitution. *See State's Br.* at 20.

B. Montana's environmental rights don't apply to HB 702 or workplace infectious diseases.

The State previously argued that the environmental rights found in article II, section 3, and article IX, section 1 of the Montana Constitution, don't support Plaintiffs' novel legal theory. *State's Br.* at 9–11. Plaintiffs' response bolsters the State's argument. Plaintiffs violate basic canons of constitutional construction to reach their erroneous conclusion.

As an initial matter, Plaintiffs acknowledge no case supports their new reading of these provisions. *See Pls.' BIS PI* at 15; *Pls.' BIO MTD* at 17. Plaintiffs fail to support their new-found theory with sufficient authority to create a viable legal claim.

Courts interpret the Montana Constitution the same way they interpret statutes. *Shockley v. Cascade Cnty.*, 2014 MT 281, ¶ 19. Montana courts consider constitutional provisions holistically, "without isolating specific terms from the context in which they are used." *City of Missoula v. Pope*, 2021 MT 4, ¶ 9. "[C]onstitutional

construction should not lead to absurd results, if reasonable construction will avoid it. The principle of reasonable construction allows courts to fulfill their adjudicatory mandate and preserve the Framers' objective." *Brown v. Gianforte*, 2021 MT 149, ¶ 33 (internal citations and quotations omitted).

Plaintiffs pluck a dictionary meaning of 'environment' divorced from any context, history, or circumstance in which the word appears in article IX, section 1, and article II, section 3 of the Montana Constitution. *Pls.' BIO MTD* at 15. The cases cited by Plaintiffs demonstrate why courts apply a more holistic approach.

The Framers sought to protect the natural environment from degradation. *See Montana Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 1999 MT 248, ¶¶ 66–77, 296 Mont. 207, 988 P.2d 1236 ("MEIC") (Discussing the Framers' debates about the proposal of the Natural Resources and Agricultural Committee which forms Article IX.). The Montana Supreme Court linked passage of the Montana Environmental Policy Act ("MEPA") in 1971 to the language found in the environmental rights provisions. *See Park Cty. Envtl. Council v. Mont. Dep't. of Envtl. Quality*, 2020 MT 303, ¶ 65. This comparison reflects the similarities in language between MEPA's 1971 statement of purpose and the language found in article IX, section 1. *Id.*; compare MCA, 71-1-103(2) (1971) ("The legislature recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.") to 1889 MMont. Const. art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."). The Framers sought

to stop environmental harm before the "air has been polluted or because the stream has been polluted." *MEIC*, ¶ 71 (quoting Delegate Mae Nan Robinson); *see also* Montana Constitutional Convention, Verbatim Transcript, March 1, 1972, Vol. V, 1229 (Delegate Robinson sought to protect the environment's "*natural* beauty and *natural* resources." (emphasis added)).

Plaintiffs fail to cite to any supporting text, caselaw, or history that would demonstrate the Framers intended the environmental rights to apply to infectious diseases. They attempt to expand 'environment' beyond its meaning in the constitution to apply to "any amount of carcinogenic, disease-causing" agent. *Pls.' BIO MTD* at 17 citing *MEIC*. What they miss is the agent in question, arsenic, occurred at higher levels in the Landers Fork and Blackfoot River, which are part of the natural environment. *MEIC*, 1999 MT 248, ¶¶ 78–79. The clear line of case law points to the environmental rights applying to cases of outdoor pollution, resource degradation, and other harms to the natural environment, not to infectious diseases in legal offices. *See State's Br.* at 9–11.

Finally, Plaintiffs' analogy to asbestos proves the State's point. Montana regulates private sector occupational health and safety apart from how it regulates environmental concerns. *See* MCA, § 50-71-201 to -204. The Montana Supreme Court in *Orr v. State*, 2004 MT 354, ¶¶ 13–21, traced the history of Montana's Occupational Health and Safety Act, which regulates, among other things, occupational diseases including asbestos exposure. The Court noted that the Act went through revisions in 1971. *Id.*, ¶ 18. Unlike MEPA, Montana's OSHA omits reference to the

'environment,' and instead adopts a policy "to achieve and maintain such conditions at the workplace as will protect human health and safety." *Id*; *compare* 29 U.S.C. § 651(b) (Federal OSHA's purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."). Notably, federal courts rejected reading this purpose so far as to require COVID-19 vaccinations. *See BST Holdings, L.L.C. v. OSHA, No. 21-60845* 2021 U.S. App. LEXIS 33698 (5th Cir. Nov. 12, 2021). In any case, workplace health and safety remain apart from the environmental rights. *See State's Br.* at 9–11.

Plaintiffs' argument departs from established legal precedent by enormous leaps, not steps. They would transform the environmental rights into super-rights that apply in all settings, since according to them, the rights are all encompassing. Before making such a leap, the departure from existing law must be supported by something in the context, history, or structure of the Montana Constitution, but Plaintiffs fail to clearly articulate any such supporting authority. This Court should reject Plaintiffs' attempt to expand the meaning of 'environment' beyond its constitutional meaning.

C. HB 702 protects, not infringes upon, the right to pursue life's basic necessities.

As the State previously argued, the right to pursue life's basic necessities does not include a right to run your business free from regulation. *State's Br.* at 11–13; citing *Wiser v. State*, 2006 MT 20, ¶ 24. Plaintiffs acknowledge their claim does not fall within the "express holding" of their sole citation to authority. *Pls.' BIO MTD* at

19. They ask this Court to read *Wadsworth* in ways the Montana Supreme Court rejected in *Wiser*.

The express holding of *Wiser* already rejected Plaintiffs misreading of *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996). *Wiser*, ¶ 24 (The notion that "the right to pursue employment and life's other basic necessities is limited by the State's police power is imbedded in the plain language of the Constitution."); *see also Montana Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶¶ 19, 21, 366 Mont. 224, 286 P.3d 1161. The logical extension of *Wadsworth, Wiser*, and *Montana Cannabis* means that Netzer Law must comply with antidiscrimination statutes such as HB 702.

Plaintiffs' argument perverts these precedents because they seek to deny employment and employment opportunity to unvaccinated individuals. *See e.g. Netzer Aff.*, ¶ 16. They incredulously assert that they can pursue life's basic necessities by denying that right to their employees.[5] But constitutionally, Montana may enact statutory regimes to protect the rights of Montanans from those who would discriminate against them.

Finally, Plaintiffs also fail to explain how HB 702 "completely bars Netzer Law from adopting necessary health and safety measures." *Pls.' BIO MTD* at 20. Plaintiffs admit Netzer Law "implemented many of these best practices" regarding COVID-19 mitigation. *Netzer Aff.*, ¶¶ 10–11. Plaintiffs do not offer any explanation or

[5] Plaintiffs seek to deny employment to 59% of Richland County residents and 46% of Yellowstone County residents. *See* First Amended Compl., ¶ 39.

argument as to why discrimination based on vaccination status alone cures their issues rather than current practices such as social-distancing, masking, regular cleaning, remote work, and voluntary vaccination. They also fail to allege that they will cease any of these "best practices" once they are permitted to fire their unvaccinated employees.

For these reasons and those previously argued, *State's Br.* at 11–13, this Court should dismiss this claim.

D. The right to self-defense does not incorporate a right to discriminate.

As the State previously argued, the right to self-defense involves justifiable use of force in response to the use of unlawful force. *State's Br.* at 13; citing *State v. Courville*, 2002 MT 330, ¶ 29.

Plaintiffs supplied very limited authority in their initial briefing. *See Pls.' BIS PI* at 18 (citing only a single unexplained analogy to *Wadsworth*). In response, Plaintiffs now cite a string of cases all involving a state entity using its police power on behalf of that entity's constituents. *See Pls.' BIO MTD* at 21.[6] Plaintiffs offer no explanation or argument as to why these cases vest the Plaintiffs with the State's authority. Further, Plaintiffs offer no rationale explaining how those other states' public-policy choices implicate the individual right to self-defense.

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[6] Citing *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905); *Forbes v. Cnty. Of San Diego*, U.S. Dist. LEXIS 41687 (S.D. Cal. 2021); *Tandon v. Newsom*, 517 F. Supp. 3d 922 (N.D. Cal. 2021); *Doe v. Mills*, 29 Fla. L. Weekly Fed. S. 29 (U.S. 2021); *People of State Ill. v. Gen. Elec. Co.*, 683 F.2d 206 (7th Cir. 1982). Plaintiffs also analogize to *Griswold v. Connecticut*, 381 U.S. 479 (1965), but fail to explain how *Griswold*, a case concerning the right to privacy, applies to the right to self-defense.

Moreover, HB 702 exercises the same general police power as those states used in their cases. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order -- these are some of the more conspicuous examples of the traditional application of the police power …. "); *accord In re Sonsteng,* 175 Mont. 307, 314 (1977) ("[T]he state also possesses plenary power to make laws and regulations for the protection of public health, safety, welfare and morals, commonly referred to as police power.") citing *Jacobsen,* 197 U.S. at 24; *see also Hurley v. Irish-American Gay*, 515 U.S. 557, 572 (1995) (Antidiscrimination laws are "well within the State's usual power to enact ….). Plaintiffs offer no legal rationale invalidating Montana's choice to balance the public interest differently than those other states.

But at a more basic level, Plaintiffs offer no legal rationale linking HB 702's nondiscrimination provisions to the right to self-defense. For that reason, and those previously stated, this Court should dismiss this claim.

E. The right to protect and possess property does not authorize discrimination.

Plaintiffs fail to support their thin argument with sufficient authority and what authority they do cite only proves the State's argument that property rights may be subject to the State's police power. *Pls.' BIO MTD* at 22.

Both the State and Plaintiffs cite *Freeman v. Bd. of Adjustment*, 97 Mont. 342 (1934). That case held, the "[p]olice power embraces a regulation designed to promote the public convenience and the peace and good order of society." *Id.* at 356. The

zoning law in question "is constitutional, and that the Great Falls ordinance enacted under the authority of that Act constitutes a legal grant of power." *Id.*

Antidiscrimination laws derive from the same general police power. *See Hurley*, 515 U.S. at 572; *see also Roberts v. United States Jaycess*, 468 U.S. 609, 628 (1984). Places of public accommodation, like Netzer Law, cannot hide behind vague property rights claims to discriminate. *See Lombard v. Louisiana*, 373 U.S. 267, 281 (1963) (Douglas, J. concurring) ("When the doors of a business are open to the public, they must be open to all [] if apartheid is not to become engrained in our public places."); *see also Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ("There is no constitutional right [] to discriminate" by excluding undesired individuals in violation of the law.); *Hamm v. Rock Hill,* 379 U.S. 306, 316 (1964) ("The convictions were based on the theory that the rights of a property owner had been violated. However, the supposed right to discriminate [] was nullified by the statute.").

For these reasons, Plaintiffs' claim must fail.

F. The right to seek safety, health, and happiness does not enable discrimination.

The plain language of article II, section 3 of the Montana Constitution states that the right to seek "safety, health, and happiness" is restricted to "all lawful ways." Plaintiffs offer no rebuttal, responding to the Montana Supreme Court's clear interpretation of the constitution's plain language. *See Montana Cannabis Indus. Ass'n*, ¶ 22 ("As with the right to pursue employment, the Constitution is clear that the right to seek health is circumscribed by the State's police power to protect the public's health and welfare").

Generally speaking, when raising an "issue [that] has never been before a court," parties must offer some authority for their position. *Pls.' RIS PI* at 16. Because Plaintiffs fail to offer any case or other authority beyond a bare recital of the constitutional text and offer no theory for relief across now copious pages of briefing, this unsupported and unsupportable claim—like the others—should be dismissed. *See Pls.' BIS PI* at 19; *Pls.' RIS PI* at 16–17; *Pls.' BIO MTD* at 22.

G. Plaintiffs fail to plead any unenumerated rights.

Despite Plaintiffs' retort that "Netzer Law clearly stated" what unenumerated right exists under article II, section 34, they again failed to clearly state any right. *Pls.' RIS PI* at 17; *see also Pls.' BIO MTD* at 22 n.16 (stating "Netzer Law incorporated by reference its previously asserted rights," without referencing a specific unenumerated right). At a minimum, if article II, section 34 applies, then Plaintiffs must point to a specific unenumerated right at issue and not merely ask this Court to find one for them.

The State cannot respond to such ephemeral allegations. And this Court should not be asked to create such impalpable rights.

Accordingly, and for the reasons previously stated, this claim should be dismissed. *State's Br.* at 15–16.

IV. HB 702 furthers the State's interests of the highest order and survives any level of scrutiny.

For the reasons stated, and previously argued, HB 702 doesn't implicate any of Plaintiffs' fundamental, or other, constitutional rights. *See State's Br.* at 17. And

Plaintiffs aren't a protected class. Rational basis, therefore, applies. *See Snetsinger v. Montana University System*, 2004 MT 390, ¶ 19.

Antidiscrimination statutes, applied to public accommodations, constitute quintessential commercial regulation. *See Romer v. Evans*, 517 U.S. 620, 627–29 (1996) (describing the evolution of public accommodation laws). "Economic regulation [] must be upheld if it is reasonably related to a valid legislative purpose." *Meech v. Hillhaven W.*, 238 Mont. 21, 45 (1989) (internal citation and quotation omitted). "Moreover, in applying the equal protection clause to social and economic legislation, great latitude is given to state legislatures in making classifications.'" *Id.* at 47 (internal citation and quotation omitted).

Even if strict scrutiny applies, the State possesses a compelling interest—of the highest order—in preventing invidious discrimination. *See Hurley,* 515 U.S. at 572; *Board of Dirs. Of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987) (Antidiscrimination laws "plainly serv[e] compelling state interests of the highest order."); *Roberts,* 468 U.S. at 628 ("[D]iscrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent."). Plaintiffs call Montana's compelling interest 'of the highest order' "massively mistaken." *Pls.' BIO MTD* at 24. The State's compelling interest is well-established, well-supported, and far from mistaken.

Plaintiffs fail to rebut the State's interest in protecting the fundamental rights of its citizens. *See State ex. rel Bartmess v. Bd. of Trs.,* 223 Mont. at 279-80, (Morrison, J. concurring). Instead, Plaintiffs revert to their same argument that protecting

privacy amounts to pretext. *Pls.' BIO MTD* at 23–24.[7] The State responded to this argument previously. *State's Br.* at 18–19. That sponsor's foresight proved accurate cannot plausibly render this interest pretextual. *Id.*

If the State is to combat discrimination, it must actually combat discrimination. HB 702 accomplishes its purposes by prohibiting discrimination based on vaccination status or immunity passports. Thus, HB 702 "responds precisely to the substantive problem which legitimately concerns the State …." *Roberts*, 468 U.S. at 629; *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (Stating employment discrimination laws are "precisely tailored" to combat employment discrimination).

In response, Plaintiffs cite another case where they agree with a government entity's policy choice. *See Pls.' BIO MTD* at 25 citing *Ruona v. City of Billings*, 136 Mont. 554 (1958) (Denying a dog owners takings claim when city officials destroyed her dog pursuant to the city's exercise of its police power to control rabies). Plaintiffs again offer no principled argument against HB 702's compelling and legitimate interests that are precisely tailored to combat discrimination based on vaccination status and immunity passports.

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[7] Plaintiffs repeat their argument that keeping medical information private "is not a compelling (or legitimate) State interest" during an emergency. *Pls.' BIO MTD* at 24. The State vigorously disagrees. *See Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting) ("The principle [that constitutional rights are forfeit in emergency] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.")

Under any level of scrutiny, HB 702 passes muster, but for the aforementioned reasons this Court should review it under rational basis.

V. Equal protection

As the State previously argued, Plaintiffs fail to properly identify similarly situated classes. *State's Br.* at 16–19. In response, Plaintiffs again assert that Netzer Law and the exempt facilities are similarly situated because "they are Montana businesses and employers …." *Pls.' BIO MTD* at 27.

Montana law requires that similarly situated classes "be equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Cf. Vision Net, Inc. v. State*, 2019 MT 205, ¶ 16 The one sentence allegations by Plaintiffs do not come close to establishing that law firms exist in the same space as nursing homes, long-term care facilities, assisted living facilities, daycares, and schools. Their assertions defy common sense as law firms do not serve the same Montanans as daycares, for example. Nor have law firms historically been subject to school vaccination requirements. *See* MCA, § 20-5-403. Finally, unlike law firms, who can "allow[] and promot[e]" remote work policies, *see Netzer Aff.*, ¶11, assisted living facilities are required by law to provide "24-hour onsite supervision by staff." MCA, § 50-5-225. That is to say, numerous historic and practical considerations separate Netzer Law from the exempt facilities. The specific populations, not 'broad cross sections,' served by the exempt facilities warranted granting them the *option* of imposing vaccination requirements not otherwise prohibited by MCA, § 49-2-312(4). Plaintiffs' failure to properly establish the similarly situated classes sinks their claim and this Court should dismiss it.

Even if Plaintiffs survive the first step of the equal protection analysis, their claim fails on its face because as stated, HB 702 is precisely tailored to serve a compelling interest of the highest order, combatting discrimination. *See supra.* Part IV. Moreover, because Plaintiffs aren't a protected class and have no fundamental right at stake, strict scrutiny doesn't apply. HB 702 easily passes muster under rational basis review, or any other level of scrutiny.

CONCLUSION

The reality is Plaintiffs will encounter unvaccinated individuals, either at work, in court, or just out in public. Those interactions will occur regardless of HB 702. HB 702 only states that Plaintiffs cannot discriminate.

Plaintiffs offer only policy disagreements, and the State does not doubt they vigorously disagree with HB 702's nondiscrimination policy. Plaintiffs' policy disagreement doesn't constitute a viable legal claim. And even if Plaintiffs approach a viable legal theory, they fail to plead sufficient facts and supporting legal authority to sustain their theories.

This Court should dismiss their Complaint in its entirety.

DATED this 16th day of December, 2021.

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