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MONTANA SEVENTH JUDICIAL DISTRICT COURT, RICHLAND COUNTY

NETZER LAW OFFICE, P.C. and DONALD L. NETZER, Plaintiffs, vs. STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General and LAURIE ESAU, Montana Commissioner of Labor and Industry, Defendants.	Cause No. DV-21-89 **FINDING OF FACTS, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION** Hon. Olivia Rieger

THIS MATTER is before the Court on Plaintiffs' Application for Preliminary Injunction. The State Defendants filed a response and Plaintiffs filed a reply. On December 14th, 2021, the Court heard Oral Argument from the Parties on the Application. Present by video were Brent Mead, Assistant Solicitor General representing the State Defendants; Joel G. Krautter of Netzer Law Office, P.C. and Jared Wigginton of Good Steward Legal, PLLC, attorneys for the Plaintiffs; and Plaintiff Donald L. Netzer. Based on the evidence the parties presented—including the Affidavit and Supplemental Affidavit of Donald L. Netzer, with Exhibits 1 – 25; the Declaration of Dr. Jayanta Bhattacharya; and the briefs submitted—the Court now makes the following:

arguments on the Plaintiffs' application for a preliminary injunction on December 14, 2021.

FINDINGS OF FACT[1]

1. During the 2021 Legislative session, the State of Montana enacted House Bill 702, now codified as MCA § 49-2-312, to protect Montanans from discrimination based on vaccination status and to protect Montanans from the involuntary disclosure of their private healthcare information as a condition of everyday life. *See State's BIO PI* at 1. HB 702 went into effect May 7, 2021.[2]

PARTIES TO THE PROCEEDING

2. Plaintiff Netzer Law Office P.C. ("Netzer Law") is a Montana Professional Corporation with offices in Sidney and Billings, Montana. Netzer Law Office employs five individuals, consisting of three attorneys and two legal assistants. *Netzer Aff.*, ¶ 4. Netzer law consists of a general law practice. *Id.*

3. Plaintiff Donald Netzer is an employee and majority shareholder of Netzer Law Office. *Id.*

4. Neither plaintiff is a school under Title 20, chapter 5, part 4 of the MCA.

5. Neither plaintiff is a day-care facility under Title 52, chapter 2, part 7 of the MCA.

6. Neither plaintiff is a health care facility under Title 50, chapter 5, part 1 of the MCA, nor is either plaintiff a nursing home, assisted living facility, or long-term care facility under the same.

7. Plaintiffs have complied with MCA 49-2-312 at all times since its effective date.

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[1] The Court uses the following acronyms to refer to documents in the record: *Pls.' RIS PI* refers to Plaintiffs' Reply to State's Brief in Opposition to the Preliminary Injunction (Dec. 2, 2021); *Pls.' BIS PI* refers to Plaintiffs' Brief in Support of the Preliminary Injunction (Oct. 26, 2021); *State's BIO PI* refers to the State's Brief in Opposition to the Preliminary Injunction (Nov. 15, 2021).

[2] The Court takes judicial notice of this fact. 2021 Mont. Sess. L. Ch. 418 (Sections 1, 2, and 4–6 had an effective date of May 7, 2021).

8. Defendant State of Montana is the sovereign entity representing the people of Montana.

9. Defendant Austin Knudsen is the Montana Attorney General and generally charged with the enforcement of the laws of the State of Montana. Attorney General Knudsen is named in his official capacity.

10. Defendant Laurie Esau is the Montana Commissioner of Labor and Industry and is charged with the enforcement of HB 702 through the Montana Human Rights Commission. Commissioner Esau is named in her official capacity.

HB 702

11. HB 702's title reads: "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."

12. The text of HB 702, as codified in MCA, § 49-2-312, reads:

> Discrimination based on vaccination status or possession of immunity passport prohibited -- definitions. (1) Except as provided in subsection (2), it is an unlawful discriminatory practice for:
>
> (a) a person or a governmental entity to refuse, withhold from, or deny to a person any local or state services, goods, facilities, advantages, privileges, licensing, educational opportunities, health care access, or employment opportunities based on the person's vaccination status or whether the person has an immunity passport;
>
> (b) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport; or
>
> (c) a public accommodation to exclude, limit, segregate, refuse to serve, or otherwise discriminate against a person based on the person's vaccination status or whether the person has an immunity passport.
>
> (2) This section does not apply to vaccination requirements set forth for schools pursuant to Title 20, chapter 5, part 4, or day-care facilities pursuant to Title 52, chapter 2, part 7.

(3) (a) A person, governmental entity, or an employer does not unlawfully discriminate under this section if they recommend that an employee receive a vaccine.

(b) A health care facility, as defined in 50-5-101, does not unlawfully discriminate under this section if it complies with both of the following:

(i) asks an employee to volunteer the employee's vaccination or immunization status for the purpose of determining whether the health care facility should implement reasonable accommodation measures to protect the safety and health of employees, patients, visitors, and other persons from communicable diseases. A health care facility may consider an employee to be nonvaccinated or nonimmune if the employee declines to provide the employee's vaccination or immunization status to the health care facility for purposes of determining whether reasonable accommodation measures should be implemented.

(ii) implements reasonable accommodation measures for employees, patients, visitors, and other persons who are not vaccinated or not immune to protect the safety and health of employees, patients, visitors, and other persons from communicable diseases.

(4) 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.

(5) As used in this section, the following definitions apply:

(a) "Immunity passport" means a document, digital record, or software application indicating that a person is immune to a disease, either through vaccination or infection and recovery.

(b) "Vaccination status" means an indication of whether a person has received one or more doses of a vaccine.

13. HB 702's legislative findings state:

WHEREAS, as stated in section 50-16-502, MCA, the Legislature finds that "health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy and health care or other interests"; and

WHEREAS, the Montana Supreme Court in State v. Nelson, 283 Mont. 231, 941 P.2d 441 (1997), concluded that "medical records fall within the zone of privacy protected by Article II, section 10, of the

Montana Constitution" and "are quintessentially private and deserve the utmost constitutional protection".

14. HB 702's sponsor cited concerns that COVID-19 vaccinations, and "vaccination passports," would soon be required as part of engaging in day-to-day life. After HB 702's enactment, other jurisdictions have imposed COVID-19 vaccination requirements as a condition of employment. *See State's BIO* at 19 n.7.

15. HB 702's purpose is to prohibit discrimination in employment and in public accommodations based on vaccination status or an immunity passport.

16. Plaintiffs are subject to HB 702 and are not among the exempted facilities.

SCIENTIFIC EVIDENCE: COVID-19

17. SARS-CoV-2, the virus that causes COVID-19 infection, entered human circulation some time in 2019 in China. The virus itself is a member of the coronavirus family of viruses, several of which cause typically mild respiratory symptoms upon infection. The SARS-CoV-2 virus, by contrast, induces a wide range of clinical responses upon infection. These presentations range from entirely asymptomatic infection to mild upper respiratory disease with unusual symptoms like loss of sense of taste and smell, hypoxia, or a deadly viral pneumonia that is the primary cause of death due to SARS-CoV-2 infection. *Dr. Bhattacharya Decl.*, Opinions, ¶ 1.

18. The mortality danger from COVID-19 infection varies substantially by age and chronic disease indicators. *Id.*, ¶ 2. According to a meta-analysis by Dr. John Ioannidis of every seroprevalence study conducted to date with a supporting scientific paper, the median infection survival rate—the inverse of the infection fatality rate—from COVID infection is 99.77%. For COVID patients under 70, the meta-analysis finds an infection survival rate of 99.95%. *Id.*, Opinions, ¶¶ 5-6.

19. Three vaccines are in use in the United States for COVID-19. These include two mRNA-technology vaccines (manufactured by Pfizer-BioNTech and Moderna) and an adenovirus-vector vaccine technology (manufactured by Johnson & Johnson). Of those, the Pfizer vaccine, also known as Comirnaty, has full FDA approval. *Id.*, Experience and Credentials, ¶ 4.

20. The scientific evidence strongly indicates that the recovery from COVID disease provides strong and lasting protection against severe disease if reinfected, at least as good and likely better than the protection offered by the COVID vaccines. While the COVID vaccines are effective at protecting vaccinated individuals against severe disease, they provide only short-lasting and limited protection versus infection and disease transmission. *Id.*, Experience and Credentials, ¶ 7.

21. The scientific evidence presented demonstrates that vaccinated and unvaccinated individuals can transmit COVID-19. *Id.*, Opinions, ¶ 27. Scientific evidence entered into the record demonstrated no statistical difference in vaccinated versus unvaccinated persons transmitting COVID-19. *Id.*, Opinions, ¶ 28. The cited study concluded "Vaccination reduces the risk of delta variant infection and accelerates viral clearance. Nonetheless, fully vaccinated individuals with breakthrough infections have peak viral load similar to unvaccinated cases and can efficiently transmit infection in household settings, including to fully vaccinated contacts." *Id.*

22. Vaccine efficacy vs. infection drops very substantially after a few months. A vaccinated individual has almost as high a probability of being infected as an unvaccinated individual in the population at any given point in time a few months after vaccination. *Id.*, Opinions, ¶ 36. In summary, the evidence to date strongly suggests that while vaccines—like natural immunity—protect against severe disease, they, unlike natural immunity, provide only short-lasting protection against subsequent infection and disease spread. *Id.*, Opinions, ¶ 31.

23. Since vaccines already protect the vulnerable population, the unvaccinated—especially recovered COVID patients—pose a vanishingly small threat to the vaccinated. *Id.*, Opinions, ¶ 47.

COVID-19 IN MONTANA

24. While COVID-19 case numbers will rise and fall, since the commencement of this lawsuit, COVID-19 case numbers in Montana have declined. On October 25, 2021, Montana had 10,739 active COVID-19 cases, including 2,092 active cases in Yellowstone County and 42 active cases in Richland County, per the State of Montana

COVID-19 data dashboard. On December 23, 2021, Montana had 1,652 active cases, including 353 cases in Yellowstone County and 26 in Richland County, per the State of Montana COVID-19 data dashboard.[3]

25. As of December 23, 2021, 39% of Richland County residents are fully vaccinated and 52% of Yellowstone County residents are fully vaccinated per the State of Montana COVID-19 data dashboard.

PLAINTIFFS' CLAIMS

26. Plaintiffs assert they implement best practices recommended by the Centers for Disease Control and Prevention, including ""closing and/or locking office doors to individuals to reduce walk-in traffic to our offices; to suspending in-person office consultations; to requiring individuals who enter our offices to wear masks in areas where social distancing cannot be maintained; to allowing and promoting remote work from home; and to requiring negative COVID-19 tests for employees who have felt or were sick, before they can return to the office." *Netzer Aff.*, ¶ 11.

27. If allowed, Plaintiffs would "require proof of a COVID-19 vaccination from its employees, clients, or others before allowing them to enter and interact with its office space." *Id.*, ¶ 15. Further, Plaintiffs would "like to be selective in hiring vaccinated persons." *Id.*, ¶ 16. Plaintiffs would also require proof of vaccinations, require unvaccinated individuals to take COVID-19 tests, wear masks, and wash their hands regularly, require unvaccinated employees to work from home, and direct owners, employees, clients and other to shelter themselves from COVID-19 risk when interacting with unvaccinated persons. *Id.*, ¶ 17.

28. Plaintiffs state: "Like other small Montana businesses, Netzer Law has been and continues to be impacted by the COVID-19 pandemic. Although these impacts are not clearly quantifiable in dollars and cents, the pandemic has prevented

[3] The Court takes judicial notice of these facts based on numbers from Montana's COVID-19 data dashboard available at: https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b

Netzer Law from continuing its business as usual." *Id.*, ¶ 9. "If even a single Netzer Law employee contracts COVID, it would disrupt Netzer Law's small but busy office. If there is an office outbreak at Netzer Law's office, that would significantly impair Netzer Law's health, business, and other interests." *First Amended Compl.*, ¶ 32.

GENERAL ALLEGATIONS

29. HB 702 currently applies to all Montana businesses and employees, other than those exempted facilities who have exercised their option to require vaccinations. HB 702's provisions have been in effect since May 7, 2021.

30. Plaintiffs filed their Original Complaint on October 5, 2021 and First Amended Complaint and Application for Preliminary Injunction on October 26, 2021.

31. The last non-contested, peaceable condition comprises the period of time between May 7, 2021 and October 5, 2021, when HB 702 was in effect and Plaintiffs complied with its provisions prior to their challenge.

CONCLUSIONS OF LAW

VENUE

1. Venue is proper in this Court because this is a suit against the State and Plaintiffs reside in Richland County, Montana. Mont. Code Ann. § 25-2-126(1).

APPLICABLE STANDARDS

Standing

2. "Standing is a threshold requirement of justiciability applicable to all claims for relief as a matter of constitutional law and related prudential policy considerations." *Larson v. State*, 2019 MT 28, ¶ 45, 394 Mont. 167, 434 P.3d 241.

3. Standing requires: "(1) the party must clearly allege past, present, or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party." *Bryan v. Yellowstone County Elem. Sch. Dist. No. 2,* 2002 MT 264, ¶ 20, 312 Mont. 257, 60 P.3d 381; *see also Mitchell v. Glacier City,* 2017

MT 258, ¶ 9, 389 Mont. 122, 406 P.3d 427 ("The alleged injury must be concrete rather than abstract. To qualify as concrete, an injury must be actual or imminent, not conjectural or hypothetical.") (citations and quotations omitted). "[A] general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be personally suffered by the plaintiff." *Larson*, ¶ 46.

Preliminary Injunction

4. Preliminary injunctions are an "extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794.

5. Preliminary injunctions should issue only to "prevent[] further injury or irreparable harm." *Yockey v. Kearns Props. LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185. "If a preliminary injunction will not accomplish its limited purposes, then it should not issue." *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73. In other words, a preliminary injunction may only issue "to preserve the status quo and minimize the harm to all parties pending final resolution on the merits." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 401 Mont. 405, 473 P.3d 386. "The court has a duty to balance the equities and minimize potential damage when considering an application for a preliminary injunction." *Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342

6. A preliminary injunction may issue under any of five disjunctive tests. MCA, § 27-19-201. Only two of the five are at issue in this case.

7. An applicant seeking injunctive relief under § 27-19-201(1) must demonstrate they are "entitled to the relief demanded." This prong is tantamount to a prima facie showing of a "likelihood of success on the merits" and that "the applicant would suffer harm which could not be adequately remedied after a trial on the merits." *M.H. v. Montana High Sch. Ass'n*, 280 Mont. 123, 135, 929 P.2d 239, 247 (1996); *see also Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386 ("Prima facie is defined as at first sight or on first appearance but subject to further evidence or

information") (internal citation and quotations omitted). Because this prong requires the Court to investigate—at first glance—whether the applicant's claim will ultimately succeed, it incorporates the presumption of constitutionality afforded to duly-enacted laws. *See State v. Davison*, 2003 MT 64, ¶ 8, 314 Mont. 427, 67 P.3d 203. While Plaintiffs at this stage do not need to prove beyond all reasonable doubt the statute is unconstitutional, they must make a prima face showing the statute is unconstitutional beyond a reasonable doubt. *See Weems v. State*, 2019 MT 98, ¶ 35, 395 Mont. 350, 440 P.3d 4 (Rice, J. dissenting) ("The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action.").

8. An applicant seeking injunctive relief under § 27-19-201(2) must make a prima facie showing that "it appears the commission or continuance of some act during litigation would produce a great or irreparable injury to the applicant." Applicants in constitutional cases must establish the act in question will substantially burden or interfere with recognized constitutional rights. *See Weems*, ¶¶ 18–19, 25 ("not every constitutional infringement may support a finding of irreparable harm.").

PLAINTIFFS' LACK OF STANDING

9. Plaintiffs' alleged injuries can be separated into two groups: economic–related claims and health–related claims. *Netzer Aff.*, ¶ 10. Plaintiff Netzer Law's alleged injuries consist of being legally prohibited from adopting measures it would otherwise implement to prevent COVID-19 transmission and because Netzer Law cannot implement these measures: (1) its owners, employees, clients, and others suffer health related injuries, and (2) its business, business interests, economic viability, and property are jeopardized. *First Amended Compl.*, ¶ 29. Plaintiff Netzer alleges no independent injury from Netzer Law and his alleged injuries arise from his status as majority shareholder of Netzer Law. *Id.*, ¶¶ 2, 26–32 (Discussing injuries to Netzer Law only).

10. Netzer Law states that but for HB 702 it would "require its employees to be vaccinated against the COVID-19 virus, or any other known or unknown viruses

or communicable diseases" and "treat[] unvaccinated persons different from []vaccinated persons within its office." *First Amended Compl.*, ¶¶ 30–31; *see also Netzer Aff.*, ¶¶ 15–17 (Stating various actions Netzer Law would take conditioned on a person's vaccination status). Netzer Law's theory of health–related injury relies on its assertion that "[u]nvaccinated employees are more likely to spread and transmit infectious diseases." *First Amended Compl.*, ¶ 27(A).

11. Netzer Law's alleged economic injuries claim a single COVID-19 infection would disrupt the law office, and an outbreak would significantly impair its business interests. *First Amended Compl.*, ¶ 32. But Netzer admits that COVID-19 related impacts "are not clearly quantifiable in dollars and cents." *Netzer Aff.*, ¶ 7. Plaintiffs fail to address how excluding 61% of Richland County residents and 48% of Yellowstone County residents from their law offices, FOF, ¶ 25, delivers less economic harm than their proposed remedy.

12. The State entered competent evidence that COVID-19 risk depends on a multitude of factors. *Dr. Bhattacharya Decl.*, Opinions ¶¶ 2, 12–21, 25–28, 31, 36–37 (factors include: age, chronic disease condition, prior infection, and immunity status (both natural immunity and through vaccines)). Further, the State put forward numerous scientific studies that vaccination status does not preclude COVID-19 transmission or infection. *Id.*, Opinions ¶¶ 12–37 (citing a Wisconsin study confirmed that vaccinated individuals can shed infectious SARS-CoV-2 viral particles); *see also* CDC Science Brief: Covid-19 Vaccines and Vaccination (September 15, 2021) ("[M]ore data are needed to understand how viral shedding and transmission from fully vaccinated persons ....").

13. Netzer Law's alleged health–related injuries fail to state a concrete injury. Netzer Law's alleged injuries depend on a causal link between vaccination status and likelihood of transmission or infection. But Plaintiffs failed to offer sufficient evidence establishing this link considering the State's evidence that vaccination status does not prevent COVID-19 transmission or infection. *See* FOF, ¶¶ 21–22. The weight of scientific evidence placed into the record demonstrates that both vaccinated and unvaccinated individuals may transmit or become infected with COVID-19. *See*

FOF, ¶¶ 21–22. Plaintiffs, therefore, rely on an unsupported assumption that vaccination status determines likelihood of infection or transmission. Further, many of the harms complained of are self-evidently hypothetical. *See First Amended Compl.*, ¶ 26 ("HB 702 thus limits Netzer Law's ability to exercise its professional judgment in determining employment conditions when necessary to, among other things, ensure a clean, safe, and healthy office environment for Netzer Law's owners, employees*, potential employees,* clients*, potential clients, and other third parties that may interact* within or around Netzer Law's various offices.") (emphasis added); *see also* Netzer Aff., ¶ 17(D) (Plaintiffs complain HB 702 prohibits them from directing "others" to "take other appropriate steps" to reduce the risk of COVID-19 transmission without explaining who these 'others' are or what 'other' steps should be taken.). Plaintiffs' injuries, on this point, are therefore hypothetical and speculative, not concrete.

14. Similarly, Netzer Law's health injuries aren't redressable through this action. Based on Plaintiffs' allegations, COVID-19 exists and many individuals are unvaccinated in Yellowstone and Richland counties. *First Amended Compl.*, ¶¶ 33–34, 39; FOF, ¶¶ 24–25. Plaintiffs fail to address how maintaining this action successfully isolates them from the possibility of COVID-19 transmission. In other words, because COVID-19 exists, and because vaccination status does not prevent infection or transmission, Netzer Law's injuries will not be alleviated by this case.

15. Netzer Law's alleged health injuries are not traceable to HB 702. Plaintiffs fail to link their claims regarding vaccination status and transmission or infection to HB 702. Even if they could compel their employees to obtain the COVID-19 vaccine, those employees—as well as Netzer himself—could contract and transmit COVID-19 at a statistically similar rate. *See* FOF, ¶¶ 21–22. For the same reasons outlined in COL, ¶ 13, Plaintiffs failed to overcome the credible evidence put on by the State. For those reasons, Plaintiffs failed to establish the necessary causal link between their alleged injuries and HB 702.

16. Plaintiffs fail to establish a concrete economic injury. *See Netzer Aff.*, ¶ 7. Plaintiffs further fail to articulate how terminating unvaccinated employees

protects Netzer Law's economic interests. This is especially pertinent since Netzer Law alleges a single COVID-19 infection will disrupt the office. Surely, terminating employees will also cause similar if not greater economic disruption. Finally, Netzer Law fails to substantiate how excluding large percentages of its client base would alleviate its economic injury. *See* FOF, ¶ 25.

17. Plaintiffs failed to allege a concrete injury. *See* COL, ¶¶ 13, 16. Further, Netzer Law's injuries are not traceable to HB 702, nor are they redressable through this action. *See* COL, ¶¶ 14–16.

18. Because Plaintiffs failed to demonstrate injury, they lack standing in this case.

PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

19. HB 702 constitutes an exercise of the state's police power. *See 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."); *Hurley v. Irish-American Gay*, 515 U.S. 557, 572 (1995) (Antidiscrimination laws are "well within the State's usual power to enact …."); *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (States have an interest "of the highest order" in prohibiting discrimination).

Clean and healthful environment

20. The Montana Constitution guarantees the right to a clean and healthful environment and requires the Legislature to maintain and improve the environment. *See* Mont. Const. art. II, § 3, art. IX, § 1; *see also Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 ("MEIC"); *Park Cty. Env't Council v. Montana Dep't of Env't Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288.

21. Courts interpret the Montana Constitution the same way they interpret statutes. *Shockley v. Cascade Cnty.*, 2014 MT 281, ¶ 19, 376 Mont. 493, 336 P.3d 375. 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. 402 Mont. 416, 478 P.3d 815. "[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, 404 Mont. 269, 488 P.3d 548 (internal citations and quotations omitted).

22. The Framers endeavored to protect the natural environment from degradation. *See MEIC*, ¶¶ 66–77 (Discussing the Framers' debates about the proposal of the Natural Resources and Agricultural Committee which forms Article IX.). The purpose was 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."). The Framers clearly intended Article II, § 3 and Article IX, § 1 to apply the outdoor—not the indoor—environment.

23. Occupational disease and workplace infectious diseases are historically regulated through statutes outside the ambit of environmental rights. *See Orr v. State,* 2004 MT 354, ¶¶ 13–21, 324 Mont. 391, 106 P.3d 100.

24. Plaintiffs acknowledge their claim consists of a matter of first impression. *Pls.' RIS PI* at 10. But this is not a matter of first impression. They ask this Court to cut again the clear grain of the Framers' intent to double the reach of these constitutional environmental provisions. Yet they have not provided authority or argument sufficient to induce this Court to disregard the Framers and instead read Article II, § 3 and Article IX, § 1 "expansively to include indoor environments." *Pls.' BIS PI* at 15. This Court declines to reinterpret the Framers' intent without evidence or arguments justifying that leap.

25. Case authority and the statements of the delegates make clear that the "environment" refers to the natural environment. *See MEIC*, ¶ 63-77; *see also* Mont. Const. art. IX, § 1(3) ("The legislature shall provide … adequate remedies to prevent unreasonable depletion and degradation of natural resources." (emphasis added)), *Park Cty. Envtl. Council*, ¶ 59 (The environmental rights apply to "protection of the

environmental life support system from degradation and prevention of unreasonable depletion and degradation of the state's natural resources."). Further, Plaintiffs' claims involve workplace infectious diseases. As stated, such claims don't fall under the environmental rights provisions. *See generally MEIC,* 1999 MT 248 (involving water quality); *Clark Fork Coal. v. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 44, 403 Mont. 225, 481 P.3d 198 (water quality); *Park Cty. Env't Council*, 2020 MT 303 (mining permit). In short, this case doesn't implicate the constitutional environmental rights.

26. Because Plaintiffs' claims fall outside the scope of the environmental rights, the Plaintiffs failed to establish a prima facie claim or that they will suffer irreparable harm. Indeed, the very fact that they admit this Court—to rule for them—must take an unprecedented tack and read the provisions "expansively to include outdoor environments" demonstrates that they have not demonstrated a prima facie entitlement to relief. *See* MCA, § 27-19-201.

27. Plaintiffs are not entitled to a preliminary injunction on this claim.

Right to pursue life's basic necessities

28. Article II, section 3 of the Montana Constitution recognizes the right "of pursuing life's basic necessities … in all lawful ways." Mont. Const. art. II, § 3; *see also Wadsworth v. Montana*, 275 Mont. 287, 911 P.2d 1165, 1172 (1996). The right to pursue employment is a "necessary incident of the fundamental right to pursue life's basic necessities." *Id.*, 911 P.2d at 1173.

29. "The idea 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." *Wiser v. State*, 2006 MT 20, ¶ 24, 331 Mont. 28, 129 P.3d 133. "Accordingly, while one does have the fundamental right to pursue employment, one does not have the fundamental right to practice his or her profession free of state regulation promulgated to protect the public's welfare." *Id.*

30. HB 702 constitutes an exercise of the State's police power. *See Hurley*, 515 U.S. at 572; *Roberts*, 468 U.S. at 628. Thus, under the plain language of the constitution, the right to pursue life's basic necessities doesn't exempt Netzer Law

from HB 702's anti-discriminatory reach. Like the plaintiffs in *Wiser*, Netzer fails to demonstrate its claim is protected by Article II, § 3.

31. Plaintiffs also fail to demonstrate that HB 702 precludes them from seeking employment, having employment, or otherwise operating Netzer Law. *Wiser*'s plain terms state that the fundamental right to pursue employment does not mean a right to employment free of regulation. 2006 MT 20, ¶ 24.

32. Plaintiffs thus fail to demonstrate they possess a right to pursue life's basic necessities that is burdened by HB 702. Plaintiffs, thus, fail to establish a prima facie case or that they will suffer irreparable harm.

33. Plaintiffs are thus not entitled to a preliminary injunction on this claim.

Right to self-defense

34. Article II, § 3 of the Montana Constitution provides for the right to defend one's life and liberties. The right to self-defense involves the justifiable use of force. "A person is justified in the use of force or threat to use force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force." *State v. Courville*, 2002 MT 330, ¶ 29, 313 Mont. 218, 61 P.3d 749

35. Plaintiffs' theory is that HB 702 infringes on this right because "it creates an unsupported and increased risk of exposure to COVID-19, a deadly virus. Part and parcel to that risk, is the risk to the continued life and operation of Netzer Law as a business." *First Amended Complaint* at ¶ 48.

36. But the right to self-defense involves the justifiable use of force in response to the use of imminent unlawful force. It doesn't apply to a risk of infectious disease exposure, transmission, or infection from a global pandemic. Plaintiffs also fail to cite any authority that would apply the right of self-defense to the "life and operation" of a business.

37. Plaintiffs failed to demonstrate the right to self-defense applies to Netzer Law in this case. Plaintiffs have failed to establish a prima facie case or that they are suffer irreparable harm to any constitutional right.

38. Plaintiffs are not entitled to a preliminary injunction on this claim.

Right to possess and protect property

39. Article II, § 3 of the Montana Constitution includes the right to acquire, possess and protect property. Like other rights, the right to protect property is not absolute. *See Freeman v. Bd. of Adjustment*, 97 Mont. 342, 34 P.2d 534, 355 (1934). Exercises of the State police power to promote health, safety, morals and provide for the general welfare do not unconstitutionally encumber the right. *Id.*

40. Plaintiffs argue HB 702 burdens their "constitutional right to fully possess and protect [their] business and office spaces by preventing them from managing this property safely amid the ongoing pandemic." *Pls.' BIS PI* at 18.

41. HB 702 is part of the Montana Human Rights Act, which forbids places of public accommodation from engaging in unlawful discrimination. MCA, § 49-2-312(1)(c). Netzer Law is unquestionably subject to the Montana Human Rights Act. *See* MCA § 49-2-101(11) ("Employer means an employer of one or more persons..."). The Court is unaware of any caselaw, and Plaintiffs don't present any, that support the proposition that the right to possess and protect property includes a right for places of public accommodation to discriminate in violation of a state antidiscrimination law. *Cf. Hamm v. Rock Hill*, 379 U.S. 306, 308 (1964) ("The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities."); *see also Norwood v. Harrison*, 413 U.S. 455, 470 (1973) ("Invidious private discrimination … has never been accorded affirmative constitutional protections.").

42. HB 702, like the zoning regulation in *Freeman*, constitutes a lawful exercise of the State police power for the public welfare. Plaintiffs failed to establish that HB 702 unconstitutionally encumbers the right to possess and protect property because the right does not include the ability to discriminate in violation of law.

43. Plaintiffs failed to establish a prima facie case or that they will suffer irreparable injury from complying with antidiscrimination laws such as HB 702.

44. Plaintiffs are not entitled to a preliminary injunction on this claim.

Right to seek safety, health, and happiness

45. Article II, § 3 of the Montana Constitution includes the right to "seek[] … safety, health and happiness in all lawful ways." But it is well-established that the right to seek health is not absolute and is bounded by the State's police powers. *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 22, 366 Mont. 224, 286 P.3d 1161 ("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") (emphasis omitted).

46. Plaintiffs incorporate their prior Article II, § 3 arguments to state HB 702 implicates the right. *Pls.' BIS PI* at 19. Plaintiffs also state "this issue has never been before a court." *Pls.' RIS PI* at 16.

47. As previously discussed, HB 702 constitutes an exercise of the State's police power to provide for the public welfare—by prohibiting discrimination based on vaccination status or immunity passport. The plain language of the Montana Constitution, reiterated by the Montana Supreme Court in *Montana Cannabis Industry Association*, clearly states the right to seek health is limited to all *lawful* ways. And HB 702 makes it unlawful to discriminate based on vaccination status and thus limits this right.

48. Plaintiffs fail to establish HB 702 implicates the right to seek health. As such, they fail to establish a prima facie case or that they will suffer irreparable harm.

49. Plaintiffs are not entitled to a preliminary injunction on this claim.

Unenumerated rights

50. Article II, Section 34 of the Montana Constitution provides, "The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people." "Court[s] [have] not applied Article II, Section 34 in any substantive context." *Snetsinger v. Montana University System,* 2004 MT 390, ¶ 94, 325 Mont. 148, 104 P.3d 445 (Nelson, J. concurring).

51. In *Snetsinger*, Justice Nelson's nonprecedential concurrence read Article II, § 4 and Article II, § 34 together to find that "as a matter of Montana

constitutional law, that classifications based on gender or sexual orientation are suspect classifications in their own right." *Id.*, ¶ 97. In other words, Justice Nelson's concurrence would expand Montana's antidiscrimination protection. But that view is not the law.

52. But even using Justice Nelson's concurrence as a guide, Article II, § 34 requires a plaintiff to affirmatively indicate the specific unenumerated right at issue. Plaintiffs' argument that the specific unenumerated rights at issue consist of an amalgamation of their previously argued enumerated rights is unavailing. *Pls.' RIS PI* at 17. Article II, § 34 is not a safety net for deficient pleadings. Rights asserted under this section must be actually asserted under this section. And if the unenumerated rights were no different than the enumerated claims discussed above, then these would fail for the same reasons. If the rights are distinct from the above-discussed enumerated rights, then Plaintiffs haven't told the Court what they are. This Court can therefore not grant any relief under Article II, § 34.

53. Because Plaintiffs failed to sufficiently develop their argument, they likewise failed to establish a prima facie case or irreparable harm under Article II, § 34.

54. Plaintiffs aren't entitled to a preliminary injunction on this claim.

Equal protection

55. "No person shall be denied the equal protection of the laws." Mont. Const. art. II, § 4. "The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶22, 302 Mont. 518, 15 P.3d 877.

56. The first step in analyzing an equal protection claim is identifying the classes involved and determining whether they are similarly situated. *Snetsinger*, ¶ 16. "If the classes are not similarly situated, then it is not necessary to analyze the challenge further." *Vision Net, Inc. v. State*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d 1034. (cleaned up).

57. Next, the Court must determine the appropriate level of scrutiny. *Snetsinger*, ¶ 17. Strict scrutiny applies "if a suspect class or fundamental right is affected." *Id.* Middle-tier scrutiny applies if the law "affects a right conferred by the Montana Constitution, but is not found in the Constitution's Declaration of Rights." *Id.*, ¶ 18. Rational basis applies when neither strict scrutiny nor middle-tier scrutiny apply. *Id.*, ¶ 19.

58. 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, 776 P.2d 488, 1989 Mont. LEXIS 162 (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).

59. The Plaintiffs do not allege they are a member of a suspect class. And Plaintiffs have failed to establish that HB 702 infringes any fundamental or other constitutional right. *See* COL ¶¶ 20-27, 28-33, 34-38, 39-44, 45-49, 50-54, 55-58. Rational basis therefore applies.

60. Rational basis requires "the law or policy must be rationally related to a legitimate government interest." *Snetsinger*, ¶ 19.

Similarly situated classes

61. Groups are similarly situated if "they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Vision Net, Inc.*, ¶ 16. The equal protection clause is not violated by imposing different regulations on different lines of business. *Cf. Vision Net, Inc.*, ¶ 13.

62. Plaintiffs' chosen classes consist of HB 702's exempted entities (nursing homes, long-term care facilities, assisted living facilities, day-care providers, schools, and health care facilities) and employers like Netzer Law. *First Amended Compl.*, ¶ 66. Plaintiffs argue they are similarly situated to the exempt entities because "they are Montana businesses and employers; incorporated and licensed here; have

employees, clients, and others representing a broad cross section of Montanans…, and are facing the same deadly pandemic as exempt facilities." *Pls.' BIS PI* at 23. Plaintiffs allege HB 702 discriminates against them because unlike the exempt facilities, Plaintiffs cannot "exercis[e] its constitutional rights…to adopt and implement common-sense measures designed to reduce the risk of harm from COVID-19 and other deadly diseases." *Pls.' BIS PI* at 22.

63. Plaintiffs' generalized comparisons fail to establish "they are equivalent in all relevant respects" to the exempt facilities. First, the exempt facilities do not serve a "broad cross section of Montanans." They serve specific at-risk populations. *See e.g.* MCA, § 52-2-703(1)–(3) (defining "child," "day care," and "day-care center."); § 20-1-101(16) (defining "pupil"); § 50-5-101(7) (defining "assisted living center"), (26) (defining "health care facility"), (37) (defining "long-term care facility"). Likewise, the scope of services provided by the exempt entities differs significantly from the services of a law office. For example, assisted living facilities are required by law to provide "24-hour onsite supervision by staff." MCA, § 50-5-225. By contrast, Netzer Law "allow[s] and promot[es] remote work from home." *Netzer Aff.*, ¶ 11. More broadly, the health care facilities all have a business purpose of providing health care services. The Legislature carved out reasonable exemptions to these facilities in light of their business purpose. Netzer Law, by contrast, possesses no such health-related business purpose, it is in the business of legal services and the State has obvious interests in regulating these different kinds of businesses differently. *See Vision Net Inc.*, ¶ 13.

64. Plaintiffs' argument relies on one, or a few, shared traits between Netzer Law and the exempt entities. But, as stated, the proper test is that they are identical in all respects other than the alleged point of discrimination. *See Vision Net Inc.*, ¶ 16. Plaintiffs are quite obviously not regulated the same as the exempt facilities. *See* FOF, ¶¶ 4–6. While Plaintiffs may be employers the same as the exempt facilities, they are not an education facility, a childcare facility, or a location where vulnerable populations receive medical care. Therefore, Plaintiffs are not identical in all respects to the exempt facilities.

65. Plaintiffs failed to establish similarly situated classes and so they cannot demonstrate a prima facie claim or irreparable harm on their equal protection claim.

HB 702 passes rational basis

66. While not necessary, the Court will address the second step of the equal protection analysis as well. Prohibiting discrimination is a compelling interest "of the highest order." *Roberts*, 468 U.S. at 624. States also possess a compelling interest in protecting the fundamental rights of its citizens. *See State ex rel. Bartmess v. Board of Trustees*, 223 Mont. 269, 279-80, 726 P.2d 801, 807, 1986 Mont. LEXIS 1037 (Morrison, J. concurring).

67. HB 702's purpose intertwines both of these interests. The bill's preamble expressly states its purpose of protecting medical privacy. *See* FOF, ¶ 3. HB 702's sponsor brought the bill to prevent "vaccine passports" from being required to enjoy public accommodations. *Pls.' BIS PI* at 11 n.21. Of course, other jurisdictions imposed the kinds of requirements that the sponsor sought to prohibit. *See State's BIO* at 19 n.7. HB 702's title reflects this antidiscrimination interest. *See* FOF, ¶ 11. In other words, HB 702's clear and unambiguous purpose is to prohibit discrimination based on vaccination status or an immunity passport. This prohibition necessarily protects private medical information because otherwise individuals would have to disclose their medical history and such records are "quintessentially private and deserve the utmost constitutional protection." *State v. Nelson*, 283 Mont. 231, 242, 941 P.2d 441, 1997 Mont. LEXIS 132. The State thus has a demonstrated legitimate, indeed a compelling, interest in HB 702. *See 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.").

68. Antidiscrimination laws "respond[] precisely to the substantive problem which legitimately concerns the State …." *Roberts*, 468 U.S. at 629. HB 702 responds to the state interest in combating discrimination based on vaccination status by making it unlawful to discriminate based on vaccination status. HB 702's exemptions, as mentioned, serve recognized legitimate concerns toward specific populations of

Montanans. These exemptions don't undermine HB 702's general applicability and thus, as the Supreme Court stated in *Roberts*, HB 702 is precisely tailored to address the ill which concerns the State.

69. Because the State has a compelling interest, which is narrowly tailored, HB 702 survives any level of scrutiny. Thus, Plaintiffs failed to establish a prima facie case or that they will suffer irreparable harm under this claim.

70. Because Plaintiffs failed to establish similarly situated classes, and because HB 702 likely survives rational basis review, Plaintiffs are not entitled to a preliminary injunction on their equal protection claim.

HB 702's title clearly states its purpose

71. Article V, § 11(3) of the Montana Constitution provides that each bill "shall contain only one subject, clearly expressed in its title." This section "is substantively identical" to Article V, Section 23 of the 1889 Montana Constitution. *MEA-MFT v. State*, 2014 MT 33, ¶ 8, 374 Mont. 1, 318 P.3d 702. Article V, § 11(3) is meant to "prevent the enactment of laws surreptitiously; to give notice to the legislature and to the people that they may not be misled; [and] to guard against fraud in legislation." *State ex rel. Boone v. Tullock*, 72 Mont. 482, 488, 234 P. 277, 279 (1925). But "courts should give to this provision a liberal construction, so as not to interfere with or impede proper legislative functions." *Id.*

72. HB 702's title says: "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." HB 702's body clearly furthers this purpose. Section 1(1), now codified as MCA, § 49-2-312(1), states:

> (1) Except as provided in subsection (2), it is an unlawful discriminatory practice for:
>
> (a) a person or a governmental entity to refuse, withhold from, or deny to a person any local or state services, goods, facilities, advantages, privileges, licensing, educational opportunities, health care access, or employment opportunities based on the person's vaccination status or whether the person has an immunity passport;

> (b) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport; or
>
> (c) a public accommodation to exclude, limit, segregate, refuse to serve, or otherwise discriminate against a person based on the person's vaccination status or whether the person has an immunity passport.

HB 702's title and text are clearly in perfect alignment.

73. Because HB 702's title accurately conveys the bill's purpose Plaintiffs failed to establish a prima facie claim or that they will suffer irreparable harm.

74. Plaintiffs aren't entitled to a preliminary injunction on this claim.

CONCLUSION

75. Plaintiffs failed to establish an injury caused by HB 702 and thus lack standing.

76. Plaintiffs failed to present a prima facie case that they are likely to succeed on the merits of any of their claims, or that they will suffer irreparable harm.

ORDER

1. Plaintiffs' application for a preliminary injunction is DENIED.

Dated _____, 2021.

_____
HON. OLIVIA RIEGER
DISTRICT COURT JUDGE

DATED the 23rd day of December, 2021.

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Date: December 23 , 2021