IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0109

NETZER LAW OFFICE, P.C. and DONALD L. NETZER,

Plaintiffs and Appellants,

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 and Appellees,

APPELLANTS' OPENING BRIEF

On appeal from the Montana Seventh Judicial District Court, Richland County, Cause No. DV-21-89. The Honorable Oliva Rieger, Presiding

---

Jared R. Wigginton
GOOD STEWARD LEGAL, PLLC
P.O. Box 5443
Whitefish, MT 59937
Phone: (406) 607-9940
jared@goodstewardlegal.com

Joel G. Krautter
NETZER LAW OFFICE, P.C.
1060 S. Central Ave. Ste. 2
Sidney, MT 59270
Phone: (406) 433-5511
joelkrautternlo@midrivers.com

COUNSEL FOR PLAINTIFFS AND APPELLANTS

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
BRENT MEAD
Assistant Solicitors General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
brent.mead2@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Counsel for Defendants and Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Montana Constitution

Montana Session Laws

STATEMENT OF ISSUES

1. Did the district court err by summarily rejecting the claim that HB 702 violated Article V, §11, Cl. 3 of the Montana Constitution given that HB 702 embraces subjects not clearly expressed in its title?

2. Did the district court manifestly abuse its discretion by determining that HB 702 does not infringe on Montana business owners' and employers' fundamental rights to: (i) a clean and healthful indoor environment, (ii) pursue life's basic necessities by safely operating a business, (iii) defend one's life against a deadly disease, (iv) fully possess and protect one's business and office space by managing this property safely amid the ongoing pandemic, and (v) seek safety and health?

3. Did the district court err by failing to identify, apply, and address arguments related to the proper level of judicial scrutiny for assessing the prima facie constitutionality of HB 702?[1]

[1] This appeal does not raise all claims presented below. This fact, however, does not constitute a concession as to those claims.

STATEMENT OF THE CASE

This case arises from the Montana Legislature's enactment of House Bill 702 ("HB 702"), MCA § 49-2-312. Enacted during the pandemic, HB 702 broadly prohibits employers from treating persons differently in any way based on their vaccination or immunity status. The practical effect of HB 702's prohibitions is that business owners and employers may not implement the best health and safety measures to protect themselves, their employees, and their businesses from the harms of the ongoing COVID-19 pandemic or any other infectious disease. Specifically, businesses and employers may not require their employees to provide proof of active vaccination or immunity protection.

Plaintiffs Donald L. Netzer and Netzer Law Office, P.C. (collectively, "Netzer Law") filed a lawsuit challenging HB 702 and an application to preliminarily enjoin the law from being implemented because it violates Montana Constitution art. II, § 3; art. II, § 4; art. II, § 34; art. V, § 11, Cl. 3; and art. IX, § 1. The district court denied Netzer Law's application, and Netzer Law now challenges that denial in this appeal.

STATEMENT OF FACTS

I. The Pandemic and COVID-19 Vaccines

The COVID-19 pandemic has had, and continues to have, a devastating impact on Montana, the United States, and the world. In response to this deadly pandemic, governments have fought to reduce the spread of COVID-19 through numerous actions, including border closures and travel restrictions, stay-at-home orders, quarantine and social-distancing directives, mask requirements, limits on public gatherings, contact tracing, funding vaccine development, establishing drive-through testing and vaccination stations, and requiring vaccinations for certain employees. Concurrently, businesses have expended resources and adopted measures to keep their employees and customers safe, including remote-work policies and mask and social-distancing requirements.

Despite these unprecedented collective efforts to curb the spread and harm from this highly transmissible disease, over one million[2]

[2] Johnson, C., "US deaths from COVID hit 1 million, less than 2 ½ years in," Associated Press, https://apnews.com/article/us-covid-death-toll-one-million-7cefbd8c3185fd970fd073386e442317 (May 16, 2022). While one million deaths is not yet reflected in App. M, APP0406, the Associated Press reports that the U.S. has had one million COVID related deaths.

Americans have died from COVID-19 complications, including 3,385 Montanans. App. M at APP0406 and App. R at APP0448. In 2020 and 2021, COVID-19 has been the third leading cause of death in the United States. App. L at APP0405; App. P at APP0436. In addition to this massive loss of life, there also have been over 4.5 million hospitalizations due to COVID-19 nationwide,[3] including nearly 12,000 hospitalizations in Montana. App. M at APP0406 and App. R at APP0448. As a result, in parts of the United States and Montana, hospitals have reached capacity and had to turn patients away. COVID-19 also has harmed the economy at all levels and has, at points, led to soaring unemployment rates and caused many businesses to close (some permanently).

An initial turning point in the fight against the pandemic occurred with the development, mass production, and distribution of COVID-19 vaccines. As the district court recognized in citing a report from the Centers for Disease Control and Prevention ("CDC"), "[v]accines are the best defense we have against infectious diseases." App. A at APP0009, n.5; App. O at APP0431. That same CDC report confirms that "[v]accines

[3] CDC, *COVID Data Tracker Weekly Review*, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html (May 20, 2022).

are one of the greatest success stories in public health" because through their use "we have eradicated smallpox and nearly eliminated [the] wild polio virus" while also reducing cases of "measles, diphtheria, and whooping cough" to "an all-time low." App. O at APP0431.

Like previous vaccines, COVID-19 vaccines have provided immense benefits in fighting the spread and risks of COVID-19. As confirmed by the CDC, COVID-19 vaccines "are highly effective at preventing severe disease and death" and provide "the best protection against serious illness and death." App. H at APP0253. COVID-19 vaccines also have been "playing a crucial role in limiting spread of the virus and minimizing severe disease." *Id.* Indeed, a CDC report cited by the district court confirms:

> [A] growing body of evidence suggests that COVID-19 vaccines also reduce asymptomatic infection and transmission. Substantial reductions in SARS-CoV-2 infections (both symptomatic and asymptomatic) will reduce overall levels of disease, and therefore, SARS-CoV-2 virus transmission in the United States.

App. N at APP0411; App. A at APP0007, n.3.

Although "not perfect" and "breakthrough infections" are possible, "[v]accination is the best way to protect yourself, your family, and your community" and "[h]igh vaccination coverage will reduce spread of the

virus and help prevent new variants from emerging." App. H at APP0253, APP0265 (stating that "incidence of COVID-19 infection, hospitalization, and death is higher among people who are unvaccinated compared to people who are fully vaccinated" and that COVID-19 vaccination is the "best defense against severe disease"); *id.* at APP0311 (Montana Department of Health and Human Services Report ("DPHHS") showing that from June 5th to July 30th, 2021, 89 percent of Montanans that were hospitalized due to COVID-19 had not received the COVID-19 vaccine); *id.* at APP0317 (DPHHS report stating "from February to September 2021, ... 89.5% of the cases, 88.6% of hospitalizations and 83.5% of the deaths were among persons not fully vaccinated").

COVID-19 vaccines also provide protection against variants. Since the beginning of the COVID-19 pandemic there have been multiple variants of the virus (*e.g.*, Delta and Omicron) that have exhibited different characteristics in their levels of deadliness and transmissibility. App. U at APP0456-APP0457. Even related to these variants, experts have found that existing COVID-19 vaccines offer significant protections. *See, e.g.*, App. H at APP0253 ("Vaccination is the best way to protect yourself, your family, and your community. High vaccination coverage

will reduce spread of the virus and help prevent new variants from emerging."); *id.* (stating COVID-19 vaccines "are highly effective at preventing severe disease and death, including against the Delta variant"); App. V at APP0464 (COVID-19 vaccines "protect against severe illness, hospitalizations, and deaths due to infection with the Omicron variant.").

The future inevitably will bring additional COVID-19 variants and other infectious diseases that will present unique public health risks. Indeed, even now, leading infectious disease expert Anthony Fauci is predicting a coronavirus surge in the fall of 2022 due to a new and highly transmissible BA.2 variant. App. T at APP0452. In the face of these new variants, existing and improved COVID-19 vaccines will play an invaluable role in reducing the spread and minimizing the harms of these diseases.

II. HB 702 and Its Harm to Public Health

During the 2021 legislative session, convened amid the COVID-19 pandemic, Montana State Representative and bill sponsor Jennifer Carlson introduced HB 702. In explaining her motivation for introducing this bill, Representative Carlson candidly expressed her fear that the

federal government would require "vaccine passports" or other "papers" to attend social events in the future and that she hoped others like her would "not accept another Zoom wedding as the new normal."[4] On May 7, 2021—weeks after COVID-19 vaccines were made available to the public—Governor Gianforte signed HB 702 into law, and it immediately became effective.

HB 702's title was: "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." App. H at APP0320. In substance, HB 702 generally deems it "an unlawful discriminatory practice for: ... 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." HB 702, Sec. 1(b); Mont. Code Ann. § 49-2-312(1)(b). Although not conveyed

[4] House Floor Session on HB 702, Video at 14:18:30, Apr. 1, 2021, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41087?agendaId=212771.

in its title, HB 702 also absolutely prohibits employers from requiring "any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials" (*e.g.*, the Moderna COVID-19 vaccine from the time of HB 702's adoption until January 31, 2022). App. S at APP0449.

Most problematic, however, are the latent implications of HB 702's prohibitions. By prohibiting employers from treating employees differently based on their vaccination or immunity status, HB 702 prevents employers from implementing a critically important health and safety measure necessary to reduce the spread and harm of COVID-19 in their businesses, communities, and generally. Specifically, employers like Netzer Law cannot implement a health and safety measure requiring employees to provide proof of active vaccination or immunity protection—*i.e.*, the best health and safety measure to reduce risks associated with the spread and harm of COVID-19. App. H at APP0253; App. F at APP0178.

In the face of the COVID-19 pandemic, Netzer Law, like other responsible Montana businesses and employers, implemented health and safety measures to reduce the risks of their owners, employees, and

customers contracting COVID-19 in their office spaces. App. H at APP0214, ¶ 11. If HB 702 did not prohibit it, Netzer Law would implement a health and safety measure requiring its employees and prospective employees to provide proof of active vaccination or immunity protection. *Id.* at APP0215-APP0216, ¶¶ 17-19.

III. The District Court's Denial Decision

The district court denied Netzer Law's application for a preliminary injunction. This decision, which selectively omits relevant information from the record and cited CDC reports, was driven by the district court's findings that vaccines are not 100 percent effective (*i.e.*, breakthrough infections are possible) and that businesses and employers like Netzer Law can adopt other less-effective health and safety measures to fight against COVID-19.

The district court's decision also recognizes that HB 702 (MCA § 49-2-312) applies to all vaccines and immunity statuses. App. A, at APP0003, ¶ 7. In other words, in the event of new pandemics, HB 702's prohibitions will remain in full effect.

STANDARD OF REVIEW

The Court generally "review[s] a district court's granting or denying a preliminary injunction for a manifest abuse of discretion"—*i.e.*, an obvious or evident "mistake of law, clearly erroneous finding of fact, or arbitrary reasoning, lacking conscientious judgment or exceeding the bounds of reason, resulting in substantial injustice." *Weems v. State*, 2019 MT 98, ¶ 7, 440 P.3d 4 (quotation marks and citation omitted); *Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 15, 426 P.3d 541, 548; *Montana Cannabis Indus. Ass'n v. State ("MCIA")*, 2012 MT 201, ¶ 12, 286 P.3d 1161, 1164. "If the decision on a preliminary injunction was based on legal conclusions, however, [the Court] review[s] those conclusions to determine if the district court's interpretation of the law is correct." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 413, 473 P.3d 386, 391. Similarly, where "the grant or denial of the injunction is based solely upon conclusions of law ... no discretion is involved." *City of Whitefish v. Bd. of Cty. Comm'rs of Flathead Cty. ex rel. Brenneman*, 2008 MT 436, ¶ 7, 199 P.3d 201, 204; *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 11, 146 P.3d 714, 716–17 (stating that "where the district court denies injunctive

relief based on conclusions of law, no discretion is involved, and we review the conclusions of the law to determine whether they are correct"); Black's Law Dictionary (11th ed. 2019) (defining "conclusion of law" as "[a]n inference on a question of law, made as a result of a factual showing, no further evidence being required; a legal inference").

SUMMARY OF ARGUMENT

The enactment of HB 702 during the COVID-19 pandemic constitutes one of the greatest abdications by any State legislature of its constitutional duties to protect the public health, safety, and welfare of its people. In an ongoing fight against a deadly disease, HB 702 unjustifiably strips employers and others of their ability to implement the best available health and safety measures to protect their lives and businesses. In doing so, HB 702 violates Montanans' fundamental rights and otherwise contravenes the Montana Constitution.

In denying Netzer Law's application for a preliminary injunction, the district court committed multiple errors justifying reversal and remand with an order to preliminarily enjoin HB 702. *First*, the district court, without providing a cogent reason or reference to any legal authority, summarily dismissed (in its factual findings) Netzer Law's

legal claim that HB 702 violated Montana Constitution Article V, section 11, clause 3, which requires a bill to contain only one subject clearly expressed in its title. *Second*, the district court manifestly abused its discretion in determining whether HB 702 impermissibly infringes on Donald L. Netzer's and other business owners' fundamental rights by arbitrarily ignoring HB 702's practical effects, employing all-or-nothing reasoning, and discounting harm in the form of increased risk. The district court also erred in its fundamental rights analysis by systematically applying an incorrect legal principle that summarily foreclosed Donald L. Netzer's ability to show that HB 702 impermissibly infringed on his fundamental rights. *Third*, the district court erred by failing to apply any level of constitutional scrutiny to HB 702 and by not addressing Netzer Law's related arguments.

In short, the district court committed serious legal errors and otherwise manifestly abused its discretion in denying Netzer Law's application for a preliminary injunction. Had the district court applied the correct legal standards, considered all of Netzer Law's arguments, and engaged in reasoned decision-making, it should have granted Netzer Law's application. Accordingly, Netzer Law respectfully requests that

this Court reverse and remand the district court's decision with an order for the district court to preliminarily enjoin HB 702.

ARGUMENT

Courts may issue a preliminary injunction when an applicant "establish[es] a prima facie case" (*i.e.*, likelihood of success on the merits) or "show[s] 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, 380 P.3d 730, 733; *see also* MCA 27-19-201(1)-(2). In determining whether an applicant "has made a sufficient case," courts do not decide the ultimate merits. *Driscoll*, ¶¶ 15-16 (citations omitted); *Weems*, ¶ 18 (citation omitted). When an application seeks 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. Equally important, 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, (citation omitted).

The district court improperly denied Netzer Law's application for a preliminary injunction because that court misapprehended and misapplied the law, engaged in arbitrary reasoning, and otherwise exceeded the bounds of reason. Netzer Law therefore respectfully requests that this Court reverse and remand the district court's decision with instructions to preliminarily enjoin HB 702.

I. The District Court Erred By Summarily Rejecting Netzer Law's Claim That HB 702 Violates Montana Constitution Article V, §11, Cl. 3.

For over 130 years, the Montana Constitution unambiguously has required courts to void bill provisions that embrace subjects not identified in that bill's title. art. V, § 11, cl. 3 (stating bills are to "contain only one subject" that must be "clearly expressed in its title," and that a provision on "any subject [] embraced in any act [that] is not expressed in the title" is "void"). This provision has been strictly construed by this Court. *See, e.g.*, *Mont. Auto Ass'n v. Greely*, 193 Mont. at 397-399, 632 P.2d at 310-311 (1981); *State ex rel. Replogle v. Joyland Club*, 124 Mont. at 143, 220 P.2d at 998 (1950). *But see Rosebud Cnty. v. Flinn*, 109 Mont. at 543-44, 98 P.2d at 334 (1940). 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. at 221, 468 P.2d at 768 (1970) (explaining purpose of protecting the Legislature and public from "being misled by false or deceptive titles").

Netzer Law clearly showed that HB 702's title violated this constitutional requirement because the bill's title said nothing about its provisions broadly banning vaccine mandates. App. I at APP0379-APP0381. This disconnection between HB 702's title and its substance requires voiding the offending provisions.

First, it was undisputed below that HB 702 broadly bans vaccine mandates. Indeed, the parties agreed that HB 702 (1) bans all mandates for "vaccine[s] whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials," and (2) has the unstated legal effect of generally banning vaccine mandates for all types of vaccines, except where an entity is exempted. MCA §§ 49-2-312(1)-(2), (4); 49-2-313; App. I at APP0379-APP0381; App. G at APP0207.

Second, it was undisputed below that HB 702's title says nothing about banning vaccine mandates. App. I at APP0379-APP0381; App. G

at APP0207. Instead, HB 702's title was, "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." App. H at APP0320.

Third, by not clearly expressing in the title that HB 702 bans vaccine and proof-of-immunity requirements, the bill was of "such a character as to mislead the public or members of the legislature as to the subjects [it] embraced." *See Omholt*, 155 Mont. at 221; *see also Sigety v. State Bd. of Health*, 157 Mont. at 51–52, 482 P.2d at 566-67, 576–78 (1971) (voiding statutory provisions because title mentioned "dredge" but not "sluice-washing" mining methods, and effect of provisions was to regulate both methods); *Coolidge v. Meagher,* 100 Mont. at 182-83, 46 P.2d at 687 (1935) (finding constitutional violation where title only conveyed that law "related to the mileage of officers" but provisions "deal[t] with the mileage of persons other than 'officers'"); *State ex rel. Foot v. Burr*, 73 Mont. at 588-590, 238 P. at 585-586 (1925) (voiding act with title only referencing "changing the boundaries of Fergus and Judith Basin Counties" but new county boundaries would have practical effect

of swallowing up Petroleum County); *State ex rel. Holliday v. O'Leary*, 43 Mont. at 165-166, 115 P. at 206 (1911) (holding that an act entitled "An Act to provide for nonpartisan nominations for judicial offices" violated art V., § 23 because the purpose and effect of the act was "to prohibit judicial nominations by partisan political organizations").

HB 702's title was particularly egregious because it sugarcoated the bill's substance by invoking a facially neutral principle—antidiscrimination—and acted as a smokescreen for the bill's true purpose of banning vaccine and proof-of-immunity requirements needed to fight an ongoing deadly pandemic.[5]

This constitutional violation not only requires voiding MCA § 49-2-312(4), which expressly includes a vaccine-mandate ban applicable to the ongoing and future pandemics, but also requires voiding the entire statute because of the bill's broad ban on employers requiring their employees to provide proof of active vaccine or immunity protection,

[5] *O'Leary*, 43 Mont. at 165, 115 P. at 206 ("It was early discovered that ambitious or designing legislators, prompted by selfish motives or motives of less merit, procured the enactments of measures by reason of their high-sounding or popular titles, when in fact the title merely cloaked a purpose contrary to that expressed; and it was to prevent the members of the legislature and the people generally from being thus imposed upon that these provisions have been adopted.").

which implicates the law's core provision: MCA § 49-2-312(1). *Sigety*, 157 Mont. at 51–52, 482 P.2d at 576–77 (stating that the "'Framers of our Constitution wisely held that it is not a hardship to require that every title shall clearly express the single purpose of the bill; but, even if it should prove a hardship, that it is better that an act be held inoperative, than that it be passed under a title which might deceive the unwary'" (quoting *O'Leary*, 43 Mont. 157, 115 P. at 206)).

Despite the parties fully briefing the issue, and Netzer Law establishing its entitlement to relief on this timely claim, the district court summarily rejected the argument in a single sentence contained in the findings of fact: "As codified, Mont. Code Ann. § 49-2-312 no longer contains HB 702's title [sic] therefore claims on this point are redundant." App. A at APP0003, ¶ 6. This cursory dismissal, which is unsupported by any legal authority, epitomizes legal error and arbitrary decision-making.

Notably, no party raised any argument about "redundancy" before the district court. This makes sense because that principle relates to claim preclusion and has no application here. *See Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 17, 286 P.3d at 244.

Additionally, if followed, the district court's approach would nullify Article V, section 11, clause 3 of the Montana Constitution and over a century of related legal precedent. Specifically, under that approach, a violation of this constitutional requirement absurdly would be insulated from judicial scrutiny the moment it was enacted and codified, which would be the first moment someone could challenge the violation. This approach also would be inconsistent with the underlying concerns of this constitutional provision—*i.e.*, protecting the public and legislators from being misled or confused during the legislative process—something that could not be assessed until after a final bill is enacted and codified. Stated another way, removing the misleading title from a bill when the law is codified is legally irrelevant and does not preclude a remedy for this constitutional violation.

The district court clearly misapprehended the nature of this claim, the law governing it, and the legal meaning of "redundant." For these reasons, and because Netzer Law is entitled to relief on this claim, the district court's ruling should be reversed and remanded with instructions to preliminarily enjoin HB 702.

II. The District Court Wrongly Determined That HB 702 Does Not Infringe on Netzer Law's and Other Employers' Fundamental Rights.

In assessing claims under Article II, section 3 of the Montana Constitution, courts determine whether (1) the asserted fundamental right exists; (2) the State action challenged infringes upon that right; and (3) the State action challenged withstands the appropriate level of judicial scrutiny. *See Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶¶ 17-19, 104 P.3d at 449–50 (identifying the levels of judicial scrutiny); *Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 60, 988 P.2d at 1245 ("*MEIC*"); *Mack*, ¶ 15. Netzer Law's application for a preliminary injunction asserts that HB 702 infringes upon its and other Montanans' fundamental rights to (1) a clean and healthful indoor environment; (2) pursue life's basic necessities by safely operating a business; (3) defend one's life against deadly diseases; (4) fully possess and protect its business and office spaces by managing this property safely amid the ongoing pandemic; and (5) seek safety, health, and happiness. *See* Mont. Const. art. II, § 3.

For these issues, the district court's denial decision failed to identify or apply the controlling legal framework, misapprehended and

misapplied other law, and employed arbitrary reasoning. These obvious errors constitute a manifest abuse of discretion.

A. The District Court Incorrectly Concluded that HB 702 Does Not Infringe Upon Montanans' Fundamental Right to a Clean and Healthful Environment.

The Montana Constitution establishes an inalienable right "to a clean and healthful environment" and requires that "[t]he [S]tate and each person shall maintain and improve a clean and healthful environment in Montana." art. II, § 3; art IX, § 1; *Clark Fork Coal. v. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 47, 481 P.3d 198, 217–18 (acknowledging that both these constitutional provisions involve fundamental rights). In addressing the scope of this right, the district court rightly concluded that it extends to indoor environments and to protecting individuals from all manner of diseases. *See* App. A at APP0009, ¶ a. However, as explained below, the district court incorrectly concluded that HB 702 does not infringe upon fundamental rights in this regard.

First, the district court erroneously determined that HB 702 does not interfere with Netzer Law's and other employers' right to a clean and healthful environment. App. A at APP0009, ¶ a (stating that HB 702 does

not "prevent employers from implementing health and safety [measures] to ensure a clean and healthful" indoor environment).[6] The district court based this determination solely on a superficial observation of what HB 702 prohibits (*e.g.*, hiring, terminating, or treating an employee differently based on their vaccination or immunity status). But that observation arbitrarily ignores the obvious practical effects these prohibitions have on an employer's ability to ensure a clean and healthful office environment during the middle of a pandemic. The district court's selective observation and failure to account for these practical effects of HB 702's prohibitions exemplify what is a pattern of arbitrary analysis throughout its decision.

As Netzer Law asserted below, and as was undisputed by the State, HB 702 prohibits employers from implementing a health and safety measure requiring potential and existing employees to provide proof of either active COVID-19 vaccination or immunity protection. App. E at APP0122; App. G at APP0205; App. I at APP0373. Were an employer to

[6] The district court incorrectly characterizes Netzer Law's desired health and safety measure by saying it is "to treat vaccinated and unvaccinated individuals differently." In reality, it is to treat vaccinated/immune individuals differently from unvaccinated/non-immune individuals.

implement such a requirement for its offices (*e.g.*, by not hiring, terminating, or requiring someone to work remotely who did not provide such proof), that employer would be violating HB 702 and subject to an enforcement action. Despite the district court's statement to the contrary (App. A at APP0009, ¶ a), the court concedes that HB 702 prohibits employers from adopting this health and safety measure. *See* App. A at APP0011, ¶ d (HB 702 "prevents [Netzer Law] from implementing the health and safety measures" it wants).

Second, HB 702's prohibitions infringe upon Netzer Law's and other employers' right to a clean and healthful environment. The district court's findings confirm that the abovementioned health and safety measure would help reduce the spread and risks of COVID-19 in indoor office environments. For instance, the district court found that "current vaccines available to defend against infectious diseases including those vaccines for COVID-19 … have proven to be effective against hospitalization and even death," and that "the best way to prevent the spread of COVID-19 [is] by vaccination." App. A at APP0009, ¶ a; APP0011, ¶ d. Additionally, although the district court did not address this fact in its decision, it was undisputed that natural immunity to

COVID-19 provides similar benefits. *See* App. E. at APP0122. By providing owners and employees with greater protection from contracting, transmitting, and being seriously impacted by COVID-19, the desired health and safety measure would meaningfully help ensure a clean and healthful office environment.

Third, the district court's all-or-nothing logic (adopted at the State's behest) does not eliminate HB 702's infringement of Netzer Law and other employers' right to a clean and healthful environment. For instance, the district court emphasizes that "no vaccine will ever be 100% effective against a disease" and "[t]hese potential injuries could occur whether individuals are vaccinated against infectious diseases or not." App. A at APP0007, ¶ 14; APP0009, ¶¶ a and b ("even vaccinated individuals can carry and transmit the virus"). The same is true for those who have natural immunity. App. F at APP0027 (Dr. Bhattacharya states that "[w]hile it is true that I do not know how long natural immunity after recovery lasts, the immunological evidence to date suggests that protection against disease will last for years"). To be sure, each of these observations is correct—no existing health and safety measure will eliminate all risk and harm from COVID-19. But this glass-

half-empty analytical approach does not vaporize the additional protection and benefits the HB-702-prohibited health and safety measure would provide; nor does it cure HB 702 of its infringement of the right to a clean and healthful environment. *See MEIC*, ¶¶ 19-22, 45, 79 (finding environmental constitutional rights infringed by activities adding *any amount* of carcinogenic, disease-causing arsenic above baseline level of waters that are source of plaintiffs' indoor drinking water). This is especially true where businesses are owned and employed with older members of the population, who face a significantly higher risk of getting very sick and dying from COVID-19. App. H at APP0256 (referencing CDC report finding that 81% of COVID-19 deaths occur in people over age 65); App. H at APP0212 (stating Plaintiff-Appellant Donald L. Netzer is 70 years old).[7]

[7] Following its absolutist analytic approach, the district court concludes by stating that Mr. Netzer "is entitled to a clean and healthful environment but it is an impossibility for that right to depend solely on another person's vaccination status." App. A at APP0009, ¶ a. This statement—which is disconnected with the legal question of whether HB 702 infringes on Netzer Law's right by preventing it from adopting a common-sense (and the most effective) health and safety measure for its business during a pandemic—shows that the district court failed to appreciate the legal issue before it and instead worked backwards from a fundamental misunderstanding.

For the foregoing reasons, HB 702 infringes on Netzer Law's fundamental right to a clean and healthful environment and should have been subjected to strict scrutiny.

B. The District Court Manifestly Abused Its Discretion by Concluding that HB 702 Does Not Substantially Burden Montanans' Fundamental Right to Pursue Life's Basic Necessities.

The Montana Constitution establishes the right to "pursue life's basic necessities." art. II, § 3. Netzer Law asserts that this fundamental right includes the right to safely operate a business (*i.e.*, without being forced to assume substantial health and economic risks created by government action), and that HB 702 unconstitutionally burdens that right. *See* Op. Br. at 16.

The district court incorrectly analyzed this issue because (1) it mischaracterized the right asserted by Netzer Law, (2) misinterpreted the law, and (3) otherwise engaged in arbitrary reasoning to reach its conclusion.

First, the district court erroneously truncated Netzer Law's assertion of Montanans' right to *safely* operate a business by only considering the more general right of merely "operating a business." This error skewed the district court's subsequent analysis of whether HB 702

infringed upon the fundamental right Netzer Law asserts. This alone justifies reversal.

Second, the district court misapprehended and misapplied the law in its fundamental rights analyses generally by categorically determining that the State's exercise of its police power cannot substantially burden fundamental rights. *See, e.g.*, App. A at APP0011, ¶ e (summarily rejecting asserted fundamental rights of safety, health, and happiness for this reason); *See also, e.g.*, *Id.* at APP0009-APP0010 (invoking similar concept by acknowledging right to pursue life's basic necessities but only to do so in "all lawful ways"); *Id.* at APP0010 (same regarding fundamental right to defend life against deadly disease). This legal error arose from the district court's reliance on a statement from *MCIA* providing that fundamental rights are "circumscribed by the State's police power to protect the public's health and welfare." 2012 MT 201, ¶ 22. At the behest of the State, the district court mistakenly construed this to mean that an exercise of the State's police power cannot infringe upon a fundamental right. App. G at APP0198.

The *MCIA* statement does not stand for the proposition asserted by the district court or the State. Instead, it merely means that *not every*

exercise of the State's police power will infringe upon a fundamental right (*i.e.*, just because you have a fundamental right does not mean that every regulation implicating that right is unconstitutional). *See MCIA*, ¶ 27;*Wiser v. State, Dep't of Com.*, 2006 MT 20, ¶ 24, 129 P.3d at 139; App. E at APP0127-APP0128. In *MCIA*, the Court concluded that pursuant to its decision in *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996), a law did not infringe on the fundamental right to pursue employment because that right does not encompass the right to a "particular job or employment." *MCIA*, ¶ 21. In *Wiser*—where the statement at issue was first articulated—the court merely held that a regulation impacting the bottom line of denturists did not infringe upon the right to pursue life's basic necessities and employment because these rights do not guarantee (as was asserted) the right to be "free of *all* regulation." *Wiser*, ¶ 22 (emphasis added).[8] Accordingly, the district court erred by using the "circumscribed by the State's police power" statement as an analytical trump card, and this error justifies reversal.

[8] The stakes involved in *Wiser* and *MCIA*, which were purely economic, pale in comparison the stakes involved in businesses seeking to combat the spread and harm from a deadly pandemic.

Third, the district court otherwise engaged in arbitrary decision-making. Although the district court concluded that Montanans have a fundamental right to "own and operate a business," it summarily (and incorrectly) concluded that HB 702 could not burden this right. App. A at APP0010.[9]

As explained above, the evidence in the record shows that HB 702 infringes upon Montanans' fundamental right to safely operate businesses. Montana, like the rest of the world, remains in the middle of a pandemic that continues to have serious health and economic consequences. App. Q at APP0443 ("Montana's reported COVID-19 cases have jumped in recent weeks after months of a steady downward trend."). This pandemic has included multiple surges based on new variants, and health experts believe that this will continue to be the case going forward. App. W at APP0467. HB 702 has prevented and continues to prevent Montana business owners and employers like Donald L. Netzer from implementing what would be the single most effective health and safety measure to protect their business, employment, and people (*i.e.*, the

[9] The District Court addresses this issue on an individual basis and thereby erroneously suggests that Netzer Law's application was as-applied as opposed to facial. This is incorrect. App. K at APP0404.

ability to implement a requirement of proof of active vaccination or immunity protection). In doing so, HB 702 forces business owners and employers across Montana to assume substantial risks related to their health and economic interests, including increasing exposure to liability,[10] and thereby infringes upon the fundamental right to safely operate a business.

Based on these findings and undisputed facts, HB 702 substantially burdens Montanans' fundamental right to safely operate their businesses by completely barring them from adopting the incontrovertibly most-effective health and safety measures for reducing the risk and spread of COVID-19 to themselves, their employees, and their businesses. As such, HB 702 should have been subjected to strict scrutiny for substantially burdening this right.

---

[10] The district court unreasonably discounts as "too remote" the risk associated with increased exposure to liability due to HB 702. App. A at APP0010. This case involves a facial challenge—and thus while a risk may be more remote to Donald L. Netzer's business, the district court did not find it remote for Montana businesses generally. Additionally, the district court affirmatively found that Montana businesses have a "legal obligation ... to ensure a safe workplace." Combining this with the potential magnitude of harm from a high-stakes tort like a wrongful death, the potential for liability must be considered in the infringement calculus.

C. The District Court Manifestly Abused Its Discretion by Concluding that HB 702 Does Not Substantially Burden Montanans' Fundamental Right to Defend Their Lives from a Deadly Disease.

The Montana Constitution establishes a right to defend one's life. art. II, § 3. The plain language of this unqualified right necessarily includes the right to defend against deadly diseases and government actions that unnecessarily or seriously threaten one's life by increasing exposure to such diseases. The district court recognized this fundamental right, presumably based on Netzer Law's assertions that it is "a necessary incident" of the more general right to defend one's life. App. A at APP0010, ¶ c; *Wadsworth v. State*, 275 Mont. at 301, 911 P.2d 1165, 1173 (1996); *see also Griswold v. Connecticut*, 381 U.S. at 484 (1965) (recognizing that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance"); *Jacobson v. Massachusetts*, 197 U.S. at 27 (1905) (stating 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").

However, the district court manifestly abused its discretion when determining that HB 702 does not infringe on this right because Netzer

Law did not show "that without the prohibitions, [] exposure would decrease." App. A at APP0010, ¶ c. The basis supporting this finding was that "vaccinated individuals can still carry viruses." *Id.*

Contrary to the district court's determination, a review of the record plainly shows that Netzer Law sufficiently established that an implementable requirement of proof of active vaccination or immunity protection imposed on employees would reduce Mr. Netzer's and other Montanans' exposure to COVID-19. *See* App. H at APP0252, APP0265-APP0266, APP0311, APP0317-APP0318; App. F at APP0147; *see also supra* 10-18 and 28-29. The district court's passing observation that business owners like Mr. Netzer may implement other health and safety measures does not cure HB 702's constitutional deficiency—the law strips employers of the most effective health and safety measure to defend their lives against a deadly disease in the middle of a pandemic.

Accordingly, the district court was incorrect, HB 702 infringed upon the fundamental right to defend one's life against deadly diseases, and HB 702 should have been subjected to strict scrutiny.

D. The District Court Manifestly Abused Its Discretion by Concluding that HB 702 Does Not Substantially Burden Montanans' Fundamental Right to Possess and Protect Property.

The Montana Constitution establishes a right to possess and protect property. art. II, § 3. Both a business and leased office space constitute property protected by the constitution, and "the state may not unduly interfere with private business or prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them." *See Freeman v. Bd. of Adjustment of City of Great Falls*, 97 Mont. at 355, 34 P.2d at 538 (1934).

The district court's decision concluding that HB 702 does not infringe upon this fundamental right was incorrect because it substantially relied on the *MCIA* statement described above. *Compare supra* at 31, *with* App. A at APP0011 (arbitrarily reasoning that HB 702 does not infringe on Netzer Law's fundamental right because HB 702 does not prohibit Netzer Law from adopting health and safety measures not prohibited by HB 702). Additionally, as described above, HB 702 prevents Netzer Law from fully possessing and protecting its business and offices by preventing it from managing its property safely amid the ongoing pandemic. HB 702 therefore infringes upon this fundamental

right by interfering with and imposing unreasonable (and unsupportable) restrictions on Netzer Law's private business. Accordingly, HB 702 was subject to strict scrutiny for infringing upon this fundamental right.

E. The District Court Manifestly Abused Its Discretion by Concluding that HB 702 Does Not Substantially Burden Montanans' Fundamental Right to Seek Health and Safety.

The Montana Constitution establishes a right to seek safety, health, and happiness. art. II, § 3. Under the plain language of this provision, and for the reasons detailed above, Netzer Law has the right to seek health and safety by implementing proven health and safety measures during an ongoing deadly pandemic to protect its safety and health. The district court manifestly abused its discretion when determining that HB 702 does not infringe on this fundamental right because it relied solely on an incorrect understanding of the law. *Compare supra* at 28-30, *with* App. A at APP0011 (summarily rejecting this asserted infringement because the alleged source of infringement is a law).[11] Accordingly, HB 702 was subject to strict scrutiny for infringing upon this fundamental right.

[11] As asserted below, if this Court does not recognize the fundamental rights asserted by Netzer Law under art. II, § 3, Netzer Law asserts those rights should exist under art. II, § 34. *See* App. I at APP0375.

III. The District Court Erred by Failing to Constitutionally Scrutinize HB 702 at Any Level.

Applicable law required the district court to subject HB 702 to strict scrutiny because HB 702 infringes on fundamental rights. *Park Cty. Env't Council v. Montana Dep't of Env't Quality*, 2020 MT 303, ¶ 79. Even were that not the case, applicable law required the district court to subject HB 702 to rational basis review and, in doing so, to consider Netzer Law's arguments that HB 702 fails that review. The district court's failure to do either constitutes legal error requiring reversal of its decision.

A. HB 702 Fails Strict Scrutiny Review.

Statutes infringing on fundamental rights "must be strictly scrutinized and can only survive scrutiny if the State establishes 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." *MEIC*, ¶ 63. As explained below, the State cannot meet its burden of proof.

1. The State's Alleged Interest in Privacy Is a Pretext.

Knowing that HB 702 would be challenged and subjected to strict scrutiny review, the Legislature identified privacy rights as to medical

records as the bill's purpose. *See* HB 702, Preamble, App. H at APP0320. The Legislature's averred purpose was a pretext, illegitimate, and not compelling.

Legislative hearings show that the bill's sponsor was not concerned about medical-record privacy, but instead feared being excluded from social events without an immunity passport and actions of the opposite-political-party U.S. President. Fear and negative attitudes are not legitimate, let alone compelling, interests. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. at 448, 105 S. Ct. at 3258–59 (1985); *Armstrong v. State*, 1999 MT 261, ¶ 60, 989 P.2d at 380 (recognizing pretextual legislative action driven by "prevailing political ideology and the unrelenting pressure from individuals" is "constitutionally impermissible" and "intellectually and morally indefensible"). Notably, even HB 702's title is entirely unrelated to medical-record privacy.

Regardless, keeping vaccination and immunity 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 undermines.

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

HB 702's broad prohibition of vaccine- and immunity-status "discrimination" is not closely tailored to its purported interest in medical-record privacy. Prohibiting vaccine- and immunity-status discrimination does not advance medical-record privacy. Instead, 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 or immune). Notably, HB 702 *does not* prohibit any person/entity from inquiring about another person's vaccination or immunity status. Broadly prohibiting vaccine- or immunity-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. Additionally, there were other less onerous ways to accomplish the bill's purpose, including by allowing employers to require proof of vaccination or immunity but providing for medical and/or religious exemptions (as earlier versions of the bill provided for). HB 702 therefore fails strict scrutiny review, and an injunction is warranted.

B. HB 702 Also Fails Middle-Tier and Rational-Basis Review.

As stated above, HB 702 was not driven by and does not serve a legitimate purpose. Instead, it unequivocally undermines public health (and thereby public safety and welfare) by preventing persons/entities from adopting the most-effective health and safety measures to abate a global pandemic. *See Ruona v. City of Billings*, 136 Mont. 554, 323 P.2d 29 (1958) (acknowledging the primacy of protecting public health). It also fails to reasonably accomplish its purported purpose. HB 702 therefore would fail both middle-tier and rational-basis review.

CONCLUSION

For the foregoing reasons, Netzer Law respectfully requests that this Honorable Court reverse the district court's findings of fact and conclusions of law and order the district court to grant Netzer Law's application for a preliminary injunction of HB 702.

DATED this 26th day of May, 2022.

/s/ Jared R. Wigginton
Jared R. Wigginton
GOOD STEWARD LEGAL, PLLC
P.O. Box 5443
Whitefish, MT 59937
Phone: (406) 607-9940
jared@goodstewardlegal.com

/s/ Joel G. Krautter
Joel G. Krautter
NETZER LAW OFFICE, P.C.
1060 S. Central Ave. Ste. 2
Sidney, MT 59270
Phone: (406) 433-5511
joelkrautternlo@midrivers.com

COUNSEL FOR PLAINTIFFS AND APPELLANTS

CERTIFICATE OF SERVICE

I Joel G. Krautter, hereby certify that I have served true and accurate copies of the foregoing Brief of Appellants to the following on May 26th, 2022:

David M.S. Dewhirst
Office of the Attorney General
215 N. Sanders St.
PO Box 201401
Helena, MT 59620

Brent Mead
Office of the Attorney General
215 N. Sanders St.
PO Box 201401
Helena, MT 59620

Emily Jones
Jones Law Firm
115 N. Broadway, Ste. 410
Billings, MT 59101

/s/ Joel G. Krautter

JOEL G. KRAUTTER

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,299 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendix.

/s/ Joel G. Krautter
JOEL G. KRAUTTER

APPENDIX

CERTIFICATE OF SERVICE

I, Joel G. Krautter, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-26-2022:

Brent A. Mead (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: Laurie Esau, Austin Miles Knudsen, State of Montana
Service Method: eService

David M.S. Dewhirst (Govt Attorney)
215 N Sanders
Helena MT 59601
Representing: Laurie Esau, Austin Miles Knudsen, State of Montana
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Service Method: eService
E-mail Address: emily@joneslawmt.com

Electronically Signed By: Joel G. Krautter
Dated: 05-26-2022