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Case Number: DA 22-0109

IN THE SUPREME COURT OF THE STATE OF MONTANA
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.

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

DEFENDANTS AND APPELLEES' ANSWER BRIEF

[ORAL ARGUMENT REQUESTED]

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Statement of Issues

1. Did the district court reach the correct conclusion that HB 702's title clearly expresses the bill's purpose of prohibiting discrimination based on vaccination status or possession of an immunity passport?

2. Did the district court manifestly abuse its discretion by determining that Plaintiffs Donald L. Netzer and Netzer Law Office, P.C. (collectively "Netzer") failed to establish a prima facie case that HB 702 infringes on any enumerated right found in Article II, Section 3?

3. Did the district court correctly deny a preliminary injunction because Netzer failed to establish that HB 702 violates any constitutional right or provision and therefore survives any level of review?

Netzer fails to clearly raise and address its Claims III and IV.[1] For the purposes of appeal, this Court should consider those claims forfeited. *See*

[1] Netzer states, "[t]his appeal does not raise all claims presented below." Netzer.Br. at 8 n.1. Netzer doesn't specify which claims. Based on submitted briefing, the State believes Netzer only submits Claims I, II, and V for appeal. *See* Netzer.Br. at 22–28 (Claim V); *id.* at 29–34 (Claims I and II); *id.* at 34–43 (Claim I). Netzer doesn't present Claim III (equal protection) and Claim IV (unenumerated rights) for appeal. *But see* Netzer.Br. at 42 n.11 (referencing unenumerated rights in a single footnote without any further development or citation).

Pengra v. State, 2000 MT 291, ¶ 13, 302 Mont. 276, 14 P.3d 499 (citing Mont. R. App. P. 23(c) (appellants may not raise new issues on reply)).

Statement of the Case

The Montana Legislature last year created a new protected class within the Montana Human Rights Act to broadly prohibit discrimination based on vaccination status or possession of an immunity passport. *See* MCA § 49-2-312; *see also* APP0205–0206 n.7. This case arose because of Netzer's desire to deny services and employment opportunities to individuals based on those individuals' vaccination status. *See* APP0395; APP0215, ¶ 16.

Plaintiffs filed this action on October 26, 2021, and simultaneously moved for a preliminary injunction seeking to enjoin the State from enforcing MCA § 49-2-312 against any business or employer in Montana. APP.I; APP.J; APP.K. On November 15, 2021, the State responded by opposing the application for a preliminary injunction and moving to dismiss the case. APP.G. Plaintiffs filed their reply in support of the preliminary injunction motion on December 2, 2021, and the district court held a hearing on the motion on December 14, 2021. APP.B; APP.E.

The district court denied the application on February 1, 2022. APP.A. The district court stated, "Plaintiffs' have not satisfied the burden of establishing a prima facie case they will suffer irreparable harm caused by the implementation Mont. Code Ann. § 49-2-312 thus failing to meet the requirement for a preliminary injunction." APP0012–0013.

Plaintiffs filed their Notice of Appeal on March 3, 2022.

STATEMENT OF FACTS

While other states considered implementing 'vaccine passports,' the State of Montana acted to protect Montanans from discrimination based on vaccination status and from involuntary disclosure of their private health care information as a condition of everyday life. *See* House Floor Session, 67th Reg. Leg. Sess., April 21, 2022.[2] As Representative Carlson, the bill's sponsor, stated, "you should never be discriminated against because you opt-out of a vaccine." *Id.* at 14:20:48. The State acted

[2] 14:17:39 to 14:28:02. http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41087?agendaId=212771#agenda_.

presciently. *See* APP0206 n.7 (collecting news reports of vaccine mandates in other jurisdictions).[3]

Netzer's challenge focuses on one disease: COVID-19. *See* Netzer.Br. 10–14; *id.* at 14–17.

The State filed a declaration from Dr. Jayanta Bhattacharya, Professor of Health Policy at Stanford University School of Medicine and the Director of Stanford's Center for Demography and Economics of Health and Aging, summarizing that COVID-19 vaccines provide "only short-lasting and limited protection versus infection and disease transmission." APP0144–0180, at 0147. Dr. Bhattacharya testified that one study showed "vaccine mediated protection against infection … declines to 0%,

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[3] See J.R. Stone, "SF recommends suspension without pay for first responders who don't report vaccine status," ABC 7 News (Aug. 20, 2021) (available at https://abc7news.com/san-francisco-vaccine-mandate-coronavirus-covid/10963299/ (accessed July 25, 2022)); Meredith Deliso, "Where LA County's employee vaccine mandate stands a month after initial deadline," ABC 7 (Nov. 3, 2021) (Over 20% of the Los Angeles County Sheriff's Department has not submitted vaccination status, and the Sheriff warns that the department could lose a "substantial" number of employees over the vaccine mandate) (available at https://abc7news.com/where-la-countys-employee-vaccine-mandate-stands-a-monthafter-ini/11194336/ (accessed July 25, 2022)); Bob Van Voris, "NYC Denies That Vaccine-Proof Requirement Is Racially Discriminatory," Bloomberg (Oct. 6, 2021) (available at https://www.bloomberg.com/news/articles/2021-10-06/nyc-denies-vaccine-proof-requirement-is-racially-discriminatory (accessed July 25, 2022)).

20 weeks after the second dose." APP0163. A different study found that vaccine efficacy against infection dropped to 50% by five months after the second dose. APP0165. A third study found protection against infection varied by the specific vaccine, from 10% efficacy to 65%, after five months. APP0166. Even pre-Omicron, relevant scientific and medical evidence pointed to the fact that vaccinated individuals can shed infectious COVID-19 particles—i.e., transmit the disease to other individuals. APP0167. While not considered by the district court, subsequent CDC guidance acknowledges this reality. *See* APP0463 ("CDC expects that anyone with Omicron infection, regardless of vaccination status or whether or not they have symptoms, can spread the virus to others."); APP0464. The State demonstrated that vaccination status doesn't determine the likelihood of infection or disease transmission. APP0164–0167. These facts are common knowledge today.[4]

[4] *See* Zeke Miller and Chris Megerian, "Biden tests positive for COVID-19, has 'very mild symptoms," Associated Press (July 21, 2022) (available online at https://apnews.com/article/biden-covid-health-karine-jean-pierre-government-and-politics-d9dbee6cc390f648396c46dd504c31c3 (accessed on July 25, 2022). *See State v. Rensvold*, 2006 MT 146, ¶ 30 n.2, 332 Mont. 392, 139 P.3d 154 (this Court may take judicial notice of facts pursuant to M.R. Evid. 201(b)).

The State acknowledged the personal protective aspects of COVID-19 vaccination. *See* APP0179; APP0042. But Netzer's claims depend on the idea that COVID-19 vaccination reduces disease transmission. *E.g.*, APP0215. On that point, the record, based on both Netzer's submissions and the State's evidence, demonstrates that COVID-19 vaccinations don't prevent infection or transmission. *See* APP0007 n.3; APP0009 n.5; APP0010 n.6; APP0167; APP0463.

The district court found Netzer's alleged injuries premised on "whether individuals are vaccinated against infectious disease or not." APP0007; *see also* APP0214–0215, ¶¶ 14–16. According to the district court and the record, that premise fails. *See e.g.*, APP0008–0011, ¶ 18. The district court cited Netzer's current health and safety precautions as evidence of how it can reduce their risk. *E.g.*, APP0010–0011 (citing face coverings, social distancing, remote work, and cleaning protocols as examples); *see also* APP0214, ¶ 11 (Netzer averring it implements these and other examples). Based on the clear evidence in the record and Netzer's tenuous legal arguments, the district court denied Netzer's application for preliminary injunction. *See* APP0007 n.3; APP0009 n.5; APP0010 n.6. "Plaintiffs' have not satisfied the burden of establishing a

prima facie case they will suffer irreparable harm caused by the implementation of Mont. Code Ann. § 49-2-312 thus failing to meet the requirement for a preliminary injunction." APP0012–0013. "There is no basis for the relief Plaintiffs' request." APP0013. [5]

STANDARD OF REVIEW

The Court reviews a "district court's grant or denial of a preliminary injunction for a manifest abuse of discretion." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386. The Court reviews "findings of fact for clear error." *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241. "A finding of fact is clearly erroneous only if not supported by substantial evidence, the [district] court misapprehended the effect of

[5] Netzer submits over 60 pages of documents for the first time on appeal. *See* APP0405–0469. The district court didn't abuse its discretion in failing to consider any such evidence. *Cf. State v. Anderson*, 2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850 ("it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider."). Even if Netzer asked the Court to notice these new materials—it hasn't and can't on reply—the Court should reject them. Netzer thinks these materials support its flawed argument that COVID-19 vaccination affects disease transmissibility in some appreciable way. *See* M.R. Evid. 201(b). In fact, it does not; Netzer's documents support the key finding by the district court that an individual's COVID-19 vaccination status doesn't prevent disease transmission. *See* APP0010 n.6; APP0464 ("Current vaccines protect against severe illness, hospitalizations, and deaths due to infection with the Omicron variant. However, breakthrough infections in people who are vaccinated can occur.").

the evidence, or [the Court is] convinced upon our review of the record that the district court was mistaken." *Id.* Conclusions of law are reviewed for correctness. *Id.* The district court abuses its discretion only when it acts "on a mistake of law, clearly erroneous finding of fact, other otherwise acts arbitrarily … resulting in substantial injustice." *Id.*

The Court will affirm the district court "when it reaches the right result, even if it reaches the right result for the wrong reason." *Mont. Democratic Party v. State*, 2020 MT 244, ¶ 6, 401 Mont. 390, 472 P.3d 1195 (internal citation and quotation omitted).

SUMMARY OF ARGUMENT

HB 702 directly responded to other jurisdictions imposing vaccination requirements to participate in daily life. Montana made a different choice—individuals should not and will not be targeted for discrimination based on vaccination status or immunity documentation.

HB 702 protects Montanans from involuntary disclosure of their private medical information and from being forced to choose between their job or an involuntary medical procedure. Netzer calls these purposes 'pretext' motivated by politics. Netzer.Br. 43. But that's wrong. These legislative purposes were prescient. Since HB 702's enactment,

the federal government tried and failed to impose a COVID-19 vaccine mandate on all large employers. *See generally Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S.Ct. 661 (2022). Courts around the country, finally catching up to Montana, now increasingly view with skepticism efforts to remain in a permanent state of emergency. *See Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.*, 594 U.S. __ (2021); *see also Health Freedom Def. Fund, Inc. v. Biden*, 2022 U.S. Dist. LEXIS 71206 (M.D. Fla. Apr. 18, 2022). Netzer would stand against the tide and reimpose the policies rejected by Montana.

Netzer resurrects an incorrect theory that the constitution confers a private right to discriminate. *See Hamm v. Rock Hill*, 379 U.S. 306, 308 (1964); *see also generally* Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. Rev. 1283, 1321 (1996) (reviewing American and English treatises, case law, and custom); *id.* at 1290 (States may abrogate the common law right to exclude through civil rights statutes).

But the State possesses a general police power to protect public welfare, safety, or health. *See State v. Skurdal*, 235 Mont. 291, 294, 767 P.2d 304, 306 (1988). Nondiscrimination laws like HB 702 advance the public

welfare and morals. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984). Any desire to discriminate by Netzer must give way to the State's anti-discrimination interests. *See id.* at 628 ("acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent").

The district court recognized, correctly, that the State may enact anti-discrimination laws pursuant to the police power. APP0011. HB 702 doesn't violate any of Netzer's enumerated (or unenumerated) rights and Netzer isn't entitled to a preliminary injunction. APP0012–0013.

This Court should affirm the district court's recognition that Netzer fails to establish a prima facie case HB 702 violates any of its rights under Article II, Section 3. Each of Netzer's theories requires this Court to adopt new meanings of existing rights or create new rights altogether. At bottom, however, Netzer's novel theories reduce to a claim of a constitutional right to discriminate in contravention of the law. No such right exists. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

ARGUMENT

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. They 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 (affirming denial of preliminary injunction); *Smith v. Ravalli Cnty. Bd. of Health*, 209 Mont. 292, 295, 679 P.2d 1249, 1251 (1984) (affirming denial of preliminary injunction when "appellants had not shown irreparable harm would occur if the injunctions were not issued"). Courts must "balance the equities and minimize potential damage when considering an application for a preliminary injunction." *See Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342.

Courts may issue preliminary injunctions under five disjunctive circumstances. MCA § 27-19-201. Netzer argues two are present here and entitle it to an injunction: (1) "it appears that the applicant is entitled to relief," and (2) "it appears the commission or continuance of some act

during litigation would produce a great or irreparable injury to the applicant." *Id.* Netzer's wrong on both counts.

The district court correctly concluded Netzer failed to establish "a prima facie case [he] will suffer irreparable harm…." APP0012; *see also* APP0007, ¶ 12 ("An applicant for a preliminary injunction must establish a prima facie case or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.") (internal quotation and citation omitted); *id.* ("A prima facie case requires a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.") (internal citation and quotation omitted).

Netzer failed to carry its threshold burden to establish a prima facie case. Its fundamental rights claims find no support in Montana law. *See* Netzer.Br. 29 (stating, but not supporting, that the environmental rights apply to infectious diseases); *but see* APP0371 (Netzer acknowledging below that this Court has not "delineated the contours" of the right to clearly encompass indoor environments); Netzer.Br. 34 (stating, but not supporting, that the right to pursue life's basic necessities includes the right to operate free of "health and economic risks"); Netzer.Br. 39

(stating a "penumbra" of the right to self-defense includes forcing others to undergo involuntary medical treatment); Netzer.Br. 41 (stating anti-discrimination laws are "unreasonable" restrictions on private property); Netzer.Br. 42 (calling for, contrary to controlling case law, an unqualified right to seek health). Netzer's other claim also fails to establish any entitlement to a preliminary injunction. *See* Netzer.Br. 22–27 (asking this Court to void HB 702 by inserting words that don't appear in the bill's title or text).

Netzer advances the same arguments using the same thin authority as it did below. The district court considered the factual record and denied the application for preliminary injunction. Netzer doesn't put

forward sufficient facts or legal authority to warrant enjoining an important anti-discrimination law that has protected Montanans for over a year. [6]

[6] Netzer inappropriately argues by incorporation and fails develop multiple arguments adequately. *See* Netzer.Br. 29 (incorporating prior arguments on environmental rights); 42 n.11 (same for unenumerated rights). "Montana's Rules of Appellate Procedure do not allow for 'shortcut tactics' such as referring to authority in other briefs." *State v. Whalen*, 2013 MT 26, ¶ 35, 368 Mont. 354, 295 P.3d 1055 (quoting *State v. Ferguson*, 2005 MT 343, ¶ 40, 330 Mont. 103, 126 P.3d 463). "[M]ere reference to arguments and authorities presented in district court proceedings is not substitute for developing and presenting appellate arguments." *Ferguson*, ¶ 41. Relatedly, Netzer fails to adequately develop multiple arguments with sufficient citation to authority. *See* Mont. R. App. P. 12(1)(f); *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 42, 358 Mont. 193, 244 P.3d 321; APP0012 (the court below noted Netzer failed to adequately articulate the right at issue for Claim IV). Specifically, the State objects to the underdeveloped arguments at Netzer.Br. 34, 37, 41 (failing to cite authority linking the right to pursue life's basic necessities to a constitutional right to force unwanted medical procedures on employees); *id.* 40 (claiming, without citation to authority, that requiring proof of COVID-19 vaccination is the single most effective and constitutionally required health and safety measure); *id.* 46 (cites one authority in a single paragraph and states a legal conclusion without developing his legal analysis to support that position). These and other ephemeral passages prejudice the State's ability to defend its laws because Netzer fails to properly identify the source of its facts and legal claims.

I. HB 702's title clearly expresses its purpose: to prohibit discrimination based on vaccination status or possession of an immunity passport.

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) "prevent[s] the enactment of laws surreptitiously[,] … give[s] notice to the legislature and to the people that they may not be misled[,] … [and] guard[s] 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.* The "Legislature has discretion in determining what matters are in furtherance of or necessary to accomplish the general objects of a Bill." MEA-MFT, ¶ 10 (internal citations and quotations omitted).

Netzer conflates the "single-subject rule" with the distinct "clear expression rule." *See* Netzer.Br. 22 (citing *Mont. Auto Ass'n v. Greely*, 193 Mont. 378, 397–99, 632 P.2d 300, 310–11 (1981); *State ex rel. Replogle v.*

Joyland Club, 124 Mont. 122, 143, 220 P.2d 988, 998 (1950)). Yet, those cases involve single-subject challenges. *See Mont. Auto Ass'n*, 193 Mont. at 398 ("The constitutional requirement that a law should contain only one subject has been strictly construed."); *Replogle*, 124 Mont. at 143 ("all of said Chapter 142 would be void as containing within its purview more than one subject …."). By contrast, the legislature complies with the clear expression rule when "the body of the Act treats only, directly or indirectly, of the subjects mentioned in the title, and of other subjects germane thereto, or of matters in furtherance of or necessary to accomplish the general objects of the Bill, as mentioned in the title." *MEA-MFT*, ¶ 8 (quoting *State v. McKinney*, 29 Mont. 375, 381–82, 74 P. 1095, 1096 (1904)); *see also Rosebud County v. Flinn*, 109 Mont. 537, 544, 98 P.2d 330, 334 (1940) ("Sound policy and legislative convenience dictate a liberal construction of the title and subject-matter of statutes to maintain their validity."). Under the clear expression rule, a court "has no right to hold a title void because, in its opinion, a better one might have been used." *Harper v. Greely*, 234 Mont. 259, 266, 763 P.2d 650, 655 (1988).

In this case, Netzer challenges only the clear expression rule. *See* Netzer.Br. 23–24 ("…by not clearly expressing in the title…"). *MEA-*

MFT, therefore, applies and counsels towards a "liberal construction" of HB 702's title. *Id.*, ¶ 8.

HB 702's title clearly conveys what the bill accomplishes. *See* APP0403 ("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 prohibits discrimination based on vaccination status or possession of an immunity passport. The title says as much. Netzer understands as much. *See e.g.*, APP0394, ¶ 25 (Netzer acknowledges HB 702 prohibits it from discriminating based on vaccination status or possessing an immunity passport).

Importantly, legislators understood the bill and intelligently debated HB 702's merits.[7] Legislators understood the scope of the law—it applies to all vaccines—and that the law prohibits employment discrimination and discrimination in the provision of public accommodations.

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[7] *E.g.*, Debate on Governor's Amendment to House Bill 702, House Floor Session (April 29, 2021). Video at 16:53:20 to 17:16:50, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/43552?agendaId=224049#agenda_

Everyone—Netzer, legislative proponents, and legislative opponents—understands and has understood the purpose and policy of HB 702.

As codified, HB 702 contains six operative parts. *See* MCA §§ 49-2-312 to -313. First, § 49-2-312(1) broadly makes it "an unlawful discriminatory practice" for a person or government entity to deny goods or services, § 49-2-312(1)(a), an employer to refuse employment or discriminate in terms of employment, § 49-2-312(1)(b), and for a public accommodation to exclude, limit, refuse to serve, or otherwise discriminate, § 49-2-312(1)(c), based on a person's vaccination status or possession of an immunity passport. Second, § 49-2-312(2) exempts existing vaccination requirements for schools and day-cares from § 49-2-312(1)'s unlawful discrimination provisions. Third, § 49-2-312(3)(a) clarifies that employers like Netzer do not unlawfully discriminate if they recommend vaccinations. Fourth, § 49-2-312(3)(b) provides an exception for health care facilities subject to certain conditions. Fifth, § 49-2-312(4) provides an exception to the exception that government entities, employers, and public accommodations, who may otherwise qualify for an exception, cannot discriminate based on a person's vaccination status related to emergency use authorization vaccines. Sixth, § 49-2-313 provides a limited

exemption for three specific kinds of health care facilities if compliance with § 49-2-312 would result in a violation of regulations or guidance issued by certain federal agencies. Each of these provisions falls within HB 702's title—"[a]n act prohibiting discrimination based on a person's vaccination status or possession of an immunity passport; providing an exception and an exemption…." APP0403.

Netzer rests its argument on the proposition that HB 702's title misleads because the title omits words that don't appear in the statute. *See* Netzer.Br. 23–25 (namely 'vaccine-mandate bans').[8] But as stated, HB 702's body and title form a cohesive, congruous whole. This Court doesn't void legislative enactments because the legislature failed to use a plaintiffs' preferred nomenclature. *See MEA-MFT*, ¶ 8.

Finally, Netzer cites a series of cases involving legislation with incongruous titles and bodies. *See* Netzer.Br. 24–25 (citing *Helena v. Omholt*, 155 Mont. 212, 221, 468 P.2d 764, 768–69 (1970) (the body of the act "proceed[ed] to nullify and defeat" the existing statutory appropriation

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[8] Netzer mischaracterizes the State's position as being that HB 702 has an "unstated legal effect." *See* Netzer.Br. at 23; *but see* APP0207. The State's position in briefing below and here remains that HB 702's title and body accurately convey the act's purpose and effect.

the title purported to carry out); *Sigety v. State Bd. of Health*, 157 Mont. 48, 53, 482 P.2d 574, 578 (1971) (the body of the act regulated specific mining activities expressly omitted from the title); *Coolidge v. Meagher*, 100 Mont. 172, 182, 46 P.2d 684, 687 (1935) (the bill's title purportedly changed mileage reimbursement only for "All Officers," but the body specifically changed mileage reimbursement for jurors, witnesses, and other persons entitled to mileage reimbursement); *State ex rel. Foot v. Burr*, 73 Mont. 586, 589, 238 P. 585, 585 (1925) (the bill's title omitted reference to the elimination of Petroleum County);[9] *State ex rel. Holliday v. O'Leary*, 43 Mont. 157, 165, 115 P. 204, 206 (1911) (the title of the act authorized nonpartisan judicial nominations, which was already law, but the body of the act prohibited partisan judicial nominations). In each case, the act in question contained an incongruous relationship between the act's title and the act's body. HB 702, by contrast, expresses its

[9] In *Burr*, the act's body also hid mention of any changes to Petroleum County. 238 P. at 585. The constitutional issue arose precisely because even "a skilled engineer" would have to use a map and township plats and critically examine the geographic lines in the act to discern the act's effects. *Id.* HB 702 contains no such hidden purpose. Instead, HB 702 announces its intent to prohibit discrimination based on vaccination status or possessing an immunity passport through its title and accomplishes that purpose by its text.

cohesive purpose in both title and body and complies with Article V, section 11(3) of the Montana Constitution.

The district court confirmed the plain reading of HB 702's title and purpose. *See* APP0021. "The Court's reading of 702 indicates the inability to discriminate against someone who either does not have a vaccine or does have a vaccine." *Id.* That's correct. HB 702 simply prohibits discrimination based on vaccination status or possession of an immunity passport.

This Court should affirm the denial of the preliminary injunction.[10]

II. The district court properly denied the preliminary injunction because the law does not infringe upon any constitutional right.

The district court correctly concluded Netzer failed to establish that HB 702 violates any enumerated right found in Article II, Section 3 of the Montana Constitution. *See* APP0008–0011, ¶ 18.

Article II, Section 3 of the Montana Constitution reads:

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and

[10] The district court incorrectly found this issue extinguished upon codification. *See* APP003, ¶ 6. This amounts to harmless error for the reasons stated. *See Mont. Democratic Party*, ¶ 6.

> protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

When reviewing constitutional provisions, this Court applies ordinary rules of statutory construction. *See Brown v. Gianforte*, 2021 MT 149, ¶ 33, 404 Mont. 269, 488 P.3d 548. It first looks at the plain meaning of the constitutional text. *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. In doing so, the Court construes the constitutional text as a whole, avoiding isolating specific terms from the context in which they appear. *See Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. "[C]onstitutional construction should not lead to absurd results, if reasonable construction will avoid it." *Brown*, ¶ 33 (internal citation and quotation omitted). This Court, furthermore, has long held that it "must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Id.* (quoting N*elson,* ¶ 14).

The United States Supreme Court recently reaffirmed the proper history and tradition inquiry. *See Dobbs v. Jackson Whole Women's*

Health, 597 U.S. __, 12 (2022). Courts "must guard against the natural human tendency" to supplant historical understandings with the courts' own views. *Id.* at 14. Of course, the text comes first, and historical arguments cannot alter or undermine the meaning derived from the Constitution's plain language.

The plain text of Article II, Section 3 qualifies many of the rights to "all lawful ways." *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 19, 366 Mont. 224, 286 P.3d 1161 ("*MCIA*") (right to pursue life's basic necessities); *id.*, ¶ 22 (right to seek health). This Court recognized similar limits to other rights. *See Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 41, 371 Mont. 356, 308 P.3d 88 (right to possess and protect property); *State v. Bradford*, 210 Mont. 130, 137–38, 683 P.2d 924, 928 (1984) (right to self-defense).

This Court should affirm the district court because, as both a factual and legal matter, Netzer fails to establish any basis by which HB 702 infringes upon rights enumerated under Article II, Section 3 of the Montana Constitution.

A. The district court rightly held that HB 702 doesn't infringe upon one's right to a clean and healthful environment.

The Montana Constitution guarantees the right to a clean and healthful environment and directs the Legislature to safeguard that right. *See* MONT. CONST. art. II, § 3, art. IX, § 1; *see also Montana Envtl. Info. Ctr. v. Department of Envtl. Quality*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 ("*MEIC*") (discussing how MONT. CONST. art. II, § 3 and art. IX § 1 "must be read together"). The environmental rights provisions apply to the natural environment, not office cleaning or infectious disease control. *See MEIC*, ¶¶ 63–77 (discussing the intentions of the 1972 Constitutional Convention, specifically, the intentions of the Natural Resources Committee, which drafted Article IX).

The Framers intended Article II, Section 3's "clean and healthful" language "to give force to the language of the preamble to the constitution." *MEIC*, ¶ 76. The Bill of Rights Committee Majority Proposal fleshed out what the Preamble meant. "The 'quiet beauty of our state' includes considerations of the land, air, and water of our state…." Montana Constitutional Convention Verbatim Transcripts, Vol. 2 at 625. The "grandeur of our mountains" and the "vastness of our rolling plains" refers to an idyllic description of western and eastern Montana's natural geography. *Id.* As Delegate James put it, the preamble "expresses a

reverence for our land." Montana Constitutional Convention Verbatim Transcripts, Vol. 5 at 1635 (March 7, 1972). Each reference ties the "clean and healthful" language to Montana's natural environment.

The Framers' statements on Article IX likewise link the "clean and healthful" language to Montana's natural environment. Delegate Robinson said, "it does very little good to pay someone monetary damages because the air has been polluted or because the stream has been polluted if you can't change the condition of the environment once it has been destroyed." Montana Constitutional Convention Verbatim Transcripts, Vol. 5 at 1230. Delegate Burkhardt, supporting Article IX and its environmental protections, expressed his concern for Eastern Montana's sagebrush country and Western Montana's high country. *Id*. at 1236. And Delegate Siderius spoke in support of Article IX, discussing how his concern for the environment started after seeing dead fish floating down a river in the Flathead area. *Id*. at 1238. These examples all clearly evince a purpose to protect the natural environment. *See MEIC*, ¶¶ 63–77 (discussing the intentions of the 1972 Constitutional Convention, specifically, the intentions of the Natural Resources Committee, which drafted Article IX).

This Court's caselaw interpreting the environmental rights clauses likewise concerns degradation or pollution of the natural environment. *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 Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288 (mining permit); *Cape-France Enterprises v. Est. of Peed*, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011 (drilling of a water well and water quality). As this Court said in *Park County*, the environmental provisions apply to the "air, water, and soil of Montana." *Id.*, ¶ 62. Absent from that case, or any other case, is any discussion, inference, or application of the environmental rights to infectious disease control or vaccination policies.

If any ambiguity persists as to the scope of the right, this Court should look to the Montana Legislature's statements as to its duty under Article IX, Section 1. *See Park Cnty. Envtl.. Council*, ¶ 68 (distinguishing prior cases based on subsequent legislative findings that "shaped MEPA as a vehicle for pursuing" the constitutional mandate in Article IX). The Montana Legislature clearly enunciates findings when a statute furthers Article IX, Section 1's mandate. *See e.g.*, MCA, § 75-1-102(1) ("The

legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act"); § 75-2-102(1) (Clean Air Act of Montana); § 75-5-102(1) (water quality); § 75-8-102(1) (Coal-Fired Generating Unit Remediation Act); § 75-20-102(1) (Major Facility Siting Act); *compare e.g.,* MCA, § 50-50-101 et. seq (retail food establishment regulations, omitting any reference to Article IX, Section 1); § 75-3-601 et. seq. (Montana Radon Control Act, omitting any reference to Article IX, Section 1). Regulations governing retail food establishments, for example, prohibit persons infected with communicable diseases from handling or processing foods, but the Legislature correctly puts such infectious disease rules outside the environmental rights. *See* MCA, § 50-50-105. When a statutory framework furthers the mandate of Article IX, the Legislature speaks clearly.

Here, HB 702, codified in Title 49, quite obviously omits any reference to the legislature's duties under Article IX. Even those statutes that might conceivably be affected by MCA § 49-2-312 within Title 50 omit any such references. *See* MCA § 50-71-201. That makes sense since Title 50's public health and safety laws operate in concert with Title 49's

human rights laws. *See* MCA § 50-1-105(1) ("It is the policy of the state of Montana that the health of the public be protected and promoted to the extent practicable through the public health system while respecting individual rights to dignity, privacy, and nondiscrimination."). That is because the State's authority to enact laws under either title flows from the same fount of authority—the police power. *See In re Sonsteng*, 175 Mont. 307, 314, 573 P.2d 1149, 1153 (1977) ("[L]aws and regulations for the protection of public health, safety, welfare and morals" derive from the state's plenary police power."). These types of generalized public health, safety, and welfare laws lie outside the environmental rights. In other words, not all legislative enactments affecting public health implicate a clean and healthful environment.

Netzer's argument transforms large swaths of Title 50 into environmental statutes. Netzer.Br. 29 (the right should apply to "indoor environments and to protecting individuals from all manner of diseases"). This sweep undermines the Framers' intent to confine environmental rights to protecting Montana's natural environment and natural resources. The district court erred by finding otherwise, and this Court

should determine that, as a matter of law, the environmental rights don't apply in the context of vaccinations and infectious disease control.

In any case, even if the environmental rights apply here, not every infringement of a right creates a constitutional violation. *See Wiser v. State, Dep't of Com.*, 2006 MT 20, ¶ 15, 331 Mont. 28, 129 P.3d 133 ("[I]t does not necessarily follow from the existence of the right to privacy that every restriction … impermissibly infringes that right."). The district court correctly noted that Netzer can still implement health and safety measures short of forcing unwanted medical procedures on employees.[11] *See* APP0009. The record, furthermore, supports what we know to be accurate, that COVID-19 vaccination status doesn't determine transmissibility. *See* APP0194 n.2 (studies pointing to vaccinated and unvaccinated individuals spreading COVID-19).

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[11] The district court correctly characterized Netzer's desired health and safety measure by saying it is to "treat vaccinated and unvaccinated individuals differently"—because the record shows that Netzer repeatedly talked about vaccinated/unvaccinated individuals and not immunity. *See* APP0214, ¶ 14; *id.*, ¶ 16; *id.*, ¶ 17; *see also* APP0390, ¶ 10 (Netzer's intention is clear that he is only talking about vaccine mandates); APP0392, ¶ 15; APP0393–94, ¶¶ 20–22 (focused on vaccination rates and not immunity); APP0394–95, ¶ 27a; APP0395, ¶¶ 30–31 (discussing vaccinating his employees and describing how "Netzer Law is also prohibited from treating unvaccinated persons differently from []vaccinated persons").

The district court, furthermore, correctly noted that the environmental rights provisions can't depend on the vaccination status of a third party. *See* APP0009. Netzer's theory, however, would confer a right to force others to undergo unwanted medical treatments in the name of environmental protection. *See* Netzer.Br. 33 n.7. That travels too far. *See MCIA*, ¶ 23 (Montanans possess a fundamental right to reject medical treatment).

The environmental rights protect Montana's natural beauty—the grandeur of our mountains and the vastness of our rolling plains. They do not, however, constitutionalize intra-office COVID-19 vaccine mandates.

In the end, the district court rightly denied the preliminary injunction. *See* APP0009. The record evidence supports that finding. *See* APP0163–0167. This Court should clarify that while the evidence supports that finding, it is unnecessary to assess that evidence because HB 702 doesn't implicate the environmental rights at all.

B. The district court rightly held that HB 702 doesn't substantially burden one's right to pursue life's basic necessities.

Montanans enjoy a fundamental right to pursue life's basic necessities in all lawful ways. *See* MONT. CONST. art. II, § 3; *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1171-72 (1996). This Court has held that the right to pursue employment is a "necessary incident of the fundamental right to pursue life's basic necessities." *Wadsworth*, 911 P.2d at 1173. The idea that "[t]he 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.*

Montanans, furthermore, are guaranteed the right to the opportunity to pursue employment, not to any particular job or employment. *Wadsworth*, 911 P.2d at 1173. This Court, in *Wiser* made clear that the State's plenary police power circumscribes the right to employment. *Id.*, ¶ 24. Also, this Court clarified in *MCIA*, ¶ 22, that "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." *Wadsworth*, *Wiser*, and *MCIA*, thus stand as a shield to protect Montanan's rights.

HB 702 strengthens that shield by protecting Montanans from workplace discrimination based on vaccination status.

Further, as the district court noted, Montana law provides for occupational safety and health. *See* APP0007 (citing MCA § 50-71-201). The law simply requires that an employer must "adopt and use practices, means, methods, operations, and processes that are reasonably adequate to render place of employment safe." MCA § 50-71-201. And Netzer currently undertakes reasonable health and safety precautions under that section. APP0007. What MCA § 50-71-201 doesn't require, however, is a mandatory vaccination regime.

Montanans possess a fundamental right to refuse medical treatment. *See MCIA*, ¶ 23. No reasonable precaution requires waiving that right. Indeed, the United States Supreme Court called the now-defunct federal attempt to impose a COVID-19 vaccine mandate under an analogous statute a "significant encroachment into the lives—and health—of a vast number of employees." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665

Netzer, however, disagrees and seeks to constitutionalize its subjective view of safety. *See* Netzer.Br. 34–35. But again, the relevant health and safety standards find their basis in the State's power to provide for public health, safety, and morals. MCA § 50-71-201 operates alongside § 49-2-312 to allow employers to *recommend* vaccinations and take other reasonable precautions necessary. This, of course, includes allowing business owners and employees to receive vaccinations. *See MCIA*, ¶ 23; APP0042. That is the point of HB 702—to protect individual medical choice from discrimination.

Netzer's factual assertions on appeal run counter to the evidence in this case. *See* Netzer.Br. 37–38. Netzer continually cites COVID-19 vaccinations as "the single most effective health and safety measure." *Id.* Netzer.Br. 37–38. The record demonstrates that COVID-19 vaccination status doesn't determine the likelihood of infection or transmission. *See* APP0007 n.3; APP0009 n.5; APP0010 n.6; APP0166–0167, ¶¶ 26–28; APP0463 ("The Omicron variant spreads more easily than earlier variants of the virus that cause COVID-19, including the Delta variant. CDC expects that anyone with Omicron infection, regardless of vaccination status or whether or not they have symptoms, can spread the virus to

others.”). That unrebutted finding—that vaccinated individuals can transmit COVID-19—undermines Netzer’s central factual claim that the vaccination status of clients, employees, or members of the public implicates its right to pursue life’s basic necessities.

Even if Netzer factually supported its assertion, the Legislature need not enact the most efficient or effective measure. *See Roschen v. Ward*, 279 U.S. 337, 339 (1929) (“A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce”). As the district court noted, HB 702 allows Netzer and all Montana businesses to adopt and implement reasonable measures to protect the health and safety of their employees without discriminating based on vaccine status. *See* APP0011.

Finally, Netzer’s contention that the district court misapplied *MCIA* and *Wiser* fail. *See* Netzer.Br. 35. The district court simply followed the plain text of the Constitution and this Court’s decision in *MCIA*. *See MCIA*, ¶ 22. The district court went further and based its

denial on Netzer's failure to make out a prima facie case given the evidence submitted. *See* APP0010.[12]

At this stage, this Court need not speculate as to when an anti-discrimination statute *could* infringe on fundamental rights. Certainly, examples exist elsewhere where anti-discrimination laws infringe on the freedom of association, free exercise of religion, or freedom of speech. *See e.g.*, *Hurley v. Irish-American Gay*, 515 U.S. 557, 581. Those examples don't exist in this case. But Article II, Section 3's "all lawful ways" limitation does and must apply to Netzer's claim.

In the end, the district court rightly denied the preliminary injunction on this claim, *see* APP0009-APP0010, and this Court should affirm.

C. The district court rightly held that HB 702 doesn't substantially burden one's fundamental right to defend their life.

Montanans enjoy a fundamental right to defend their lives in all lawful ways. *See* MONT. CONST. art. II, § 3. Contrary to what Netzer

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[12] Netzer also attempts to distinguish *Wiser* and *MCIA* on the grounds they are "economic" in nature. Netzer.Br. at 36 n.8. Below, Netzer alleged economic injury. *E.g.*, APP0216–0217, ¶¶20–21; *see also* APP0005 (the district court finding standing based on "potential economic harm"). Even in this section of his brief, Netzer argues economic risk caused by government action inflicts constitutional injury. *See* Netzer.Br. at 34.

argues and the district court concluded, the right to self-defense involves a reasonable response to unlawful use of force. *See State v. Courville*, 2002 MT 330, ¶ 29, 313 Mont. 218, 61 P.3d 749 ("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. Marquez*, 2021 MT 263, ¶ 16, 406 Mont. 9, 496 P.3d 963 (same); *State v. Lackman*, 2017 MT 127, ¶ 27, 387 Mont. 459, 395 P.3d 477 (same); *State v. Archambault*, 2007 MT 26, ¶ 17, 336 Mont. 6, 152 P.3d 698 (same); *State v. Kaarma*, 2017 MT 24, ¶ 18, 386 Mont. 243, 390 P.3d 609 (same); *State v. Erickson*, 2014 MT 304, ¶ 24, 377 Mont. 84, 338 P.3d 598 (same); *State v. King*, 2013 MT 139, ¶ 25, 370 Mont. 277, 304 P.3d 1 (same); *State v. Hauer*, 2012 MT 120, ¶ 26, 365 Mont. 184, 279 P.3d 149 (same); *State v. Branham*, 2012 MT 1, ¶ 10, 363 Mont. 281, 269 P.3d 891 (same).

Montana law limits the lawful use of force. *See* MCA § 45-3-102 ("[a]ny necessary force may be used to protect from wrongful injury" to the person); MCA § 45-3-104 (reasonable force may be used to "prevent or terminate" "trespass on or other tortious or criminal interference" with property); *see also Bradford*, 210 Mont. at 137–38, 683 P.2d at

928. Netzer fails to allege sufficient facts to establish "wrongful injury" against his person, "trespass," or "tortious or criminal interference" with its property. Nor could Netzer. Montanans enjoy "a fundamental right to … reject medical treatment," and HB 702 simply protects that lawful choice. *MCIA*, ¶ 23. The qualified right to self-defense doesn't apply in this case.

No "penumbra" of that right authorizes Netzer to discriminate in violation of HB 702. *See* Netzer.Br. 39. Netzer fundamentally confuses its operation of a law firm with the State's police power. *See id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905)). In *Jacobsen*, Massachusetts exercised its police power to authorize compulsory vaccinations; individuals who refused had to pay a five-dollar fine. 197 U.S. at 26. Nothing in Massachusetts' exercise of its police power confers on private citizens a constitutional right to require other individuals receive vaccinations as a matter of self-defense. Netzer fails to support that leap from state to private authority and from the state's exercise of its police power to an individual right to self-defense.

Finally, the legislature balanced public safety, health, and welfare in enacting HB 702. This Court previously noted such laws promote "the

peace and good order of society." *Freeman v. Bd. of Adjustment*, 97 Mont. 342, 356, 34 P.2d 534, 539 (1934). Netzer seeks to upset this peace by forcing unwanted medical procedures on its employees and authorizing all Montana employers to do the same. *See* Netzer.Br. 37 n.9. The legislature struck a balance on a contentious issue, using its general police powers, and this Court should defer to that decision rather than expose Montanans to discrimination.

The constitution's text and Montana statute appropriately limit the use of self-defense to those situations where the use of force against another is warranted and reasonable. *See* MONT. CONST. art. II, § 3; MCA § 45-3-102. The right to self-defense doesn't authorize forcing an unwanted medical treatment on another. *See MCIA*, ¶ 23.

In the end, the district court rightly denied the preliminary injunction on these grounds, *see* APP0010-APP0011, and this Court should follow by affirming the denial of the preliminary injunction.

D. The district court rightly held that HB 702 doesn't substantially burden one's fundamental right to possess and protect property.

Montanans enjoy a fundamental right to possess and protect property in all lawful ways. *See* MONT. CONST. art. II, § 3; *Freeman,* 97 Mont.

at 355, 34 P.2d at 538 (Exercises of the State police power to promote health, safety, morals and provide for the general welfare do not unconstitutionally encumber the right) *accord Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 41, 371 Mont. 356, 308 P.3d 88.

In *Freeman*, this Court held the State reasonably exercised its police power to enact zoning regulations to promote public health, safety, and welfare. *Freeman*, 97 Mont. 342, 356, 534 P.2d at 538–39. The "[p]olice power embraces a regulation designed to promote the public convenience and the peace and good order of society." *Id.*

Public accommodation laws embody a different no less reasonable, exercise of the State's police power. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). Discrimination in public accommodations pose a "unique evil" States may intervene to prohibit. *See Roberts*, 468 U.S. at 628–29. Further, discriminatory business practices enjoy "no constitutional protection." *Id.*

Netzer, like other public accommodations, must abide by the Montana Human Rights Act. The United States Supreme Court long ago rejected the notion that property rights confer a right to discriminate. *See 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."). In *Hamm*, the Court backed civil rights protesters' ability to hold "sit ins" at lunch counters without being subject to discriminatory enforcement of trespass statutes. *Id.* at 316 ("The convictions were based on the theory that the rights of a property owner had been violated. However, the supposed right to discriminate [] was nullified by the statute."). The Montana Human Rights Act, like the Civil Rights Act, forbids places of public accommodation from engaging in unlawful discrimination. *See e.g.*, MCA § 49-2-312(1)(c) (making it an unlawful discriminatory practice for "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"). This Court should reject Netzer's attempt to use property rights to discriminate.

In the end, the district court rightly denied the preliminary injunction on these grounds. *See* APP0011. This Court should affirm that conclusion.

E. The district court rightly held that HB 702 doesn't substantially burden one's fundamental right to seek health and safety.

Montanans enjoy a fundamental right to seek health and safety in all lawful ways. *See* MONT. CONST. art. II, § 3. The State's police powers bound Montanans' right to seek health. *See MCIA*, ¶ 22 ("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). The district court correctly concluded that Netzer cannot substitute its own discriminatory policy preference for the policy set forth in a duly enacted public welfare law. *See* APP0011.

Notably, HB 702 allows Netzer to implement health and safety measures. *See* APP0011 (Netzer and all Montana businesses "can still implement measures such as face coverings, social distancing, remote work policies, and hygiene requirements designed to reduce the disease risk and protect its safety and health."). Netzer can encourage staff to get vaccinated. *See* MCA § 49-2-312(3)(a). Netzer, and all Montanans, can make the personal medical choice to get vaccinated. *See* APP0042.

HB 702 simply circumscribes Netzer's ability to force others to undergo an unwanted medical procedure as a condition of employment or a precondition of service. *See* MCA § 49-2-312(1).

The district court correctly ruled that *MCIA*, ¶ 22, controls based on this record and, Netzer failed to establish a prima facie case. *See* APP0011. This Court should affirm the denial of the preliminary injunction.

In sum, the district court correctly ruled that Netzer failed to meet its burden and establish a prima facie case for any of its Article II, Section 3 claims. *See* APP0012. This Court should affirm the denial.

III. The District Court properly denied the preliminary injunction based on Netzer's failure to make out a prima facie case.

The trial court's inquiry examines whether the movant established "a prima facie case of a violation of its rights under the constitution." *Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4 (internal citations and quotations omitted). Only if the movant makes out a prima facie case of a constitutional violation does the burden shift to the government to demonstrate the law survives the appropriate level of scrutiny. *See Driscoll*, ¶¶ 39, 57 (Sandefur, J., dissenting). In cases such as

this—where the movant failed to make its prima facie showing—the court can dispose of the preliminary injunction dispute without reaching the appropriate level of scrutiny. *See id.*, ¶ 20.

The district court correctly concluded that Netzer failed to establish "a prima facie case they will suffer irreparable harm caused by the implementation of Mont. Code Ann. § 49-2-312 thus failing to meet the requirement for a preliminary injunction." APP0011–0012. Based on that threshold conclusion, the district court didn't need to examine the statute under strict, middle-tier, or rational basis review because the result would be the same. Netzer failed to meet its initial burden, and based on that, the district court correctly determined "[t]here is no basis for the relief Plaintiffs' request." APP0012.

For the reasons previously stated, the district court reached the right result in denying the preliminary injunction. *See supra* Parts I–II. This Court should affirm the district court and deny Netzer's application for a preliminary injunction.

If this Court analyzes the law under a tier of scrutiny, it must apply rational basis. And HB 702 unquestionably passes that low constitutional hurdle.

For the reasons previously stated, MCA § 49-2-312 doesn't involve any of Netzer's fundamental rights or other constitutional rights, and Netzer isn't a suspect class. *See supra* Part II. Rational basis, therefore, applies, requiring the policy to be rationally related to a legitimate government interest. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 19, 325 Mont. 148, 104 P.3d 445. The State nevertheless possesses compelling interests in preventing discrimination and protecting individual privacy. And the legislature narrowly tailored HB 702 to advance those interests, so the law passes any level of constitutional scrutiny.

Prohibiting discrimination and protecting fundamental rights are compelling governmental interests by any measure. The United States Supreme Court stated that anti-discrimination laws "plainly serve compelling state interests of the highest order." *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)). The State, moreover, possesses an unquestioned compelling interest in protecting the fundamental rights of its citizens. See *State ex rel. Bartmess v. Bd. of Trs.*, 223 Mont. 269, 279–80, 726 P.2d 801, 807 (1986) (Morrison, J. concurring)

(noting the State's compelling interest in furthering the right to education).

A. The State may constitutionally combat discrimination.

It is "well within the State's usual power" to enact anti-discrimination laws when a legislature has reason to believe that a given group is the target of discrimination. *Hurley*, 515 U.S. at 572; *see also District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953) ("there is no doubt that legislation which prohibits discrimination … is within the police power of the states.") Other state recognize that anti-discrimination statutes fall within the ordinary scope of the police power to provide for public health, safety, and welfare. *See City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995); *Chicago Real Estate Bd. v. Chicago,* 224 N.E.2d 793, 801–03 (Ill. 1967); *Hutchinson Human Relations Comm'n v. Midland Credit Management, Inc.*, 517 P.2d 158, 162 (Kan. 1973). Montana, likewise, recognizes that the police power extends to legislation protecting the "peace and good order" of society. *Freeman*, 97 Mont. at 356, 34 P.2d at 539.

If the State is to combat discrimination, it must actually combat discrimination. HB 702 accomplishes its purposes by prohibiting

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

Netzer, by contrast, possesses "no constitutional right … to discriminate…." *Hishon*, 467 U.S. at 78. That is because discrimination in public establishments is a "unique evil" entitled to "no constitutional protection." *Roberts*, 468 U.S. at 628–29.

Netzer doesn't hide or shy away from its desire to discriminate in ways prohibited by HB 702. *E.g.*, Netzer.Br. 36–37. Netzer cannot seriously contest the validity of the State's interest in combatting discrimination, given that Netzer wants to discriminate in employment and access to its business based on vaccination status. *See* APP0215, ¶¶ 15–16. The danger to Montanans is clear and present and justifies the State's anti-discrimination interests. *See Hurley*, 515 U.S. at 572.

Netzer, for the first time on appeal, argues that HB 702 isn't narrowly tailored because it doesn't allow employers to require vaccination

as a condition of employment so long as the employer provides for medical and religious exemptions. Netzer.Br. 45. HB 702 broadly prohibits discrimination based on vaccination status. Netzer advances no argument below, or here, why the statute constitutionally must allow for its suggestion. Netzer's rewrite of HB 702 allows for naked discrimination based on vaccination status. By contrast, the legislature passed a law to combat discrimination and precisely tailored the law to do just that. *See Roberts*, 468 U.S. at 629.

B. The State may constitutionally enhance its citizens' privacy

HB 702 advances Montana's compelling interests in protecting its citizens' fundamental right to privacy. *See Bartmess*, 223 Mont. at 279–80 (Morrison, J. concurring); *State v. Nelson*, 283 Mont. 231, 242, 941 P.2d 441, 448 (1997) ("Medical records are quintessentially 'private' and deserve the utmost constitutional protection.").

The law defines an "immunity passport" as "a document, digital record, or software application indicating that a person is immune to a disease, either through vaccination or infection and recovery." MCA § 49-2-312(5)(a). The law's unmistakable intent prohibits discrimination based

on turning over, or otherwise be required to submit, the medical information stored on an immunity passport. MCA § 49-2-312(1).

That's the protection of informational privacy Netzer omits from its arguments. *See* Netzer.Br. 45. HB 702 prevents Montanans from being discriminated against based on their willingness to expose their medical information.

Even accepting Netzer's misbegotten notion that the law presupposes knowledge of an individual's vaccination status, the law prohibits Netzer and other employers—understanding MCA § 49-2-312(3)(b) provides a limited exception—from discriminating based on any answer or *non-answer* received. The key is that employers and public accommodations cannot discriminate based on vaccination status or possessing an immunity passport.

As below, Netzer advances a theory that privacy must be forfeit in a global pandemic. *See* Netzer.Br. 46; *see also* APP0376 ("Regardless, keeping vaccination status private during a pandemic is not a compelling (or legitimate) State interest because, inter alia, it jeopardizes the lives and health of the entire State."). Constitutional rights endure, even during pandemics. *See Roman Catholic Diocese v. Cuomo*, 592 U.S. ____, 5

(2020) ("But even in a pandemic, the Constitution cannot be put away and forgotten.").

Finally, as it did below, Netzer cites *Ruona v. Billings*, 136 Mont. 554, 323 P.2d 29 (1958), and again seeks to privatize the State's police power. APP0377. In *Ruona*, the Court upheld an emergency order quarantining, vaccinating, and terminating rabid dogs. 136 Mont. at 560, 323 P.2d at 32. *Ruona*, like *Freeman*, circumscribed property rights with the State's police power. *Id.* And just as argued below, the State—as opposed to private entities—possesses the police power to advance interests in public health, safety, and morals. *See Skurdal*, 235 Mont. at 294, 767 P.2d at 306. Netzer may wish the legislature chose a different course, but that choice lies with the legislature, not him.

The Montana Legislature acted respectfully, carefully, and deliberately, weighing anti-discrimination and public health factors. *See supra* at 17 n.7 (legislative debates demonstrate a full consideration of the policy at stake). The legislature chose to elevate anti-discrimination as a general matter while also recognizing specific public health exceptions. That choice remains valid, legitimate, and compelling and protects

hundreds of thousands of Montanans from the specter of unwarranted discrimination.

CONCLUSION

The district court considered each factual and legal issue raised by Netzer on appeal. The district court rejected each claim because Netzer failed to present facts and legal theories establishing a prima facie case. The district court considered that individuals might become infected and transmit COVID-19 regardless of vaccination status. And HB 702 doesn't infringe any of Netzer's constitutional rights.[13]

This Court should affirm the preliminary injunction denial.

DATED this 25th day of July, 2022.

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[13] The State respectfully requests the Court schedule this case for oral argument pursuant to Mont. R. App. P. 17 based on the important anti-discrimination and constitutional issues at state.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 9,874 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

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