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,

PLAINTIFFS AND APPELLANTS' REPLY BRIEF

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

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INTRODUCTION

This facial and as-applied challenge to HB 702 addresses whether the law's title is unconstitutional and whether the law infringes on fundamental rights. The answer to both is an affirmative.[1]

STATEMENT OF FACTS

The State suggests vaccination and immunity do not reduce the risk of infection or spread of COVID-19. Br. at 6. The district court found the opposite:

- Vaccines "are the best defense we have against infectious diseases." APP0009 n.5.
- "[T]he best way to prevent the spread of COVID-19 [is] vaccination." APP0011.
- COVID-19 vaccines "have proven to be effective against hospitalization and even death." APP0009.

[1] As allowed by MRAP 12(5), Netzer provided a supplemental appendix with documents to "assist[]" the Court. If necessary, that submission constitutes an implied request for judicial notice. *McGill v. Superior Ct.*, 195 Cal. App. 4th 1454, 1490 n.19 (2011). Netzer hereby expressly requests that the Court judicially notice all new information presented in its appellate briefs and supporting materials per MRE 201.

Furthermore, the district court took judicial notice of, and relied on, CDC reports finding (1) "COVID-19 vaccines also reduce asymptomatic infection and transmission"; (2) "[s]ubstantial reductions" in infections "will reduce overall levels of disease, and therefore, SARS-CoV-2 virus transmission"; (3) "infections in fully vaccinated persons (e.g. breakthrough infections)" occur "at much lower rates than infections among unvaccinated persons"; and (4) findings "suggest that any associated transmission risk is substantially reduced in vaccinated people," and the "COVID-19 vaccination program has substantially reduced the burden of disease" by, *inter alia*, "interrupting chains of transmission." *See* APP0002 n.1, 7 n.3, 410-420; *see also* APP0159-160, 253 (COVID-19 vaccines are "playing a critical role in limiting the spread of the virus" and are "the best way to protect yourself, your family, and your community"), 464 (vaccination is the "best way to protect yourself and others against the Omicron variant"), 456-467.[2] *But see* Br. at 5-6, 33

[2] USDHHS, "Biden-Harris Administration Secures 66 Million Doses of Moderna's Variant-Specific COVID-19 Vaccine Booster for Potential Use in Fall and Winter 2022" https://www.hhs.gov/about/news/2022/07/29/biden-harris-administration-secures-66-million-doses-modernas-variant-specific-covid-19-vaccine-booster-for-potential-use-in-fall-winter-2022.html (accessed Aug. 22, 2022) (new vaccine targets Omicron subvariants).

(arguing that Netzer's desired measures are based on his "subjective view of safety").

The declaration submitted by the State confirms that COVID-19 vaccines and immunity offer "protection [against] infection and disease transmission."[3,4] APP0147, 157-59, 166, 170, 172, 177. That COVID-19 vaccination and immunity are not 100%-effective at preventing infection and transmission does not eliminate their massive benefits.[5]

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[3] Dr. Bhattacharya did not "testify." *Compare* Br. at 4, *with* APP0019. Instead, the State recycled his declaration from federal OSHA litigation. APP0173-179.

[4] For the first time on appeal, the State seeks to limit Netzer's challenge to COVID-19 and active vaccine protection. Br. at 4, 29 n.11. Even if not waived, the district-court decision and record disprove these assertions. *Paulson v. Flathead Conservation Dist.*, 2004 MT 136, ¶ 37, 321 Mont. 364, 377; APP0003, ¶ 7 (HB 702 covers all vaccines), 5 (Netzer wants to "bar those unvaccinated or without immunity to infectious diseases"), 7-8 ("Netzer Law alleges that requiring [proof of active] COVID-19 vaccination or immunity status…would best protect the health and safety of" persons), 22, 27, 57, 60; Op. Br. at 14.

[5] The harms of HB 702 will not be limited to the COVID-19 pandemic. It will impact future outbreaks involving new and old diseases. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1190–91, 1222 (9th Cir. 2008) (recognizing connection between climate change and human health, "including the spread of infectious and respiratory disease"); Intergovernmental Panel on Climate Change, Sixth Assessment Report, Technical Summary (2022), at 57, 63 https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_TechnicalSummary.pdf (acknowledging that "[c]limate change will increase the number of deaths and the global burden of non-communicable and infectious diseases (high confidence)" and will

ARGUMENT

An injunction is warranted because the district court clearly erred in summarily dismissing Netzer Law's claim that HB 702's title is unconstitutional and in concluding that HB 702 does not infringe on fundamental rights.

I. HB 702's Title Is Constitutionally Deficient.

Contrary to the State's position, the district court's clear error was not harmless. Br. at 21, n.10 (conceding "[t]he district court incorrectly found this issue extinguished upon codification"). The differences in HB 702's title, text, and effects render the law's title unconstitutional.

Trying to escape "strict construction" cases, the State newly argues for bifurcating this constitutional requirement. Br. at 15-17. Even if reviewable (*Paulson*, ¶ 37), this argument fails.

"increase the risk of emergence of novel human infectious diseases, as has occurred with SARS, MERS and SARS-CoV-2 (medium confidence)"); https://www.health.ny.gov/diseases/communicable/polio/wastewater.htm (addressing recent reappearance of dangerous polio strain); https://www.washingtonpost.com/world/interactive/2022/polio-vaccine-history-photo-video/; https://www.cdc.gov/poxvirus/monkeypox/response/2022/us-map.html (mapping current monkeypox infections in U.S).

The State cites no case showing the Court divides the "single subject, clearly expressed" requirement into two parts and applies polar-opposite canons to each. Br. at 16 (incorrectly claiming Netzer's cases support this). *But see State v. Joyland Club*, 124 Mont. 122, 143, 220 P.2d 988, 998 (1950) ("Section 23 of Article V of our Constitution"—*i.e.*, the provision in its entirety—"has been strictly construed by this court"). That the Court colloquially has referred to this provision as the "single-subject" or "one-subject" rule is legally irrelevant. *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 398, 632 P.2d 300, 311 (1981) (calling for strict construction of "one subject" rule but voiding provision "not embraced in the title" (*i.e.*, not clearly expressed)).

Strict construction is appropriate here because fulfilling this constitutional requirement was "not a hardship" for the Legislature. *See State v. O'Leary*, 43 Mont. 157, 166, 115 P. 204, 206 (1911). Further, HB 702's title was unfair by not directing public attention to the law's significant, unstated effects and for otherwise being misleading. *State v. McKinney*, 29 Mont. 375, 74 P. 1095, 1096 (1904) (indicating liberal construction only appropriate if "fair"); *W. Ranches v. Custer Cnty.*, 28 Mont. 278, 72 P. 659, 661 (1903).

Next, the State argues the title is constitutional because it "clearly expresses its purpose" and "what the bill accomplishes." Br. at 15, 17. But titles must clearly express the law's "*subject*." art. 5, § 11(3) (Every law "shall contain only one *subject*, clearly expressed in its title. If any *subject* is embraced in any act and is not expressed in the title," it "is void." (emphasis added)).

The State concedes HB 702 embraces two subjects,[6] and the title does not address them: (1) an express ban of emergency-use-authorization-vaccine requirements, and (2) an implied (unstated) general ban on vaccine-and-proof-of-immunity requirements. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object").

The State also claims that *all* Legislators understood that HB 702 would prohibit discrimination based on vaccine or immunity status. Br. at 17-18. Even assuming the State had declarations from each legislator

[6] The State expressly and impliedly conceded this point below. *See, e.g.*, APP0041 ("I would say yes" when asked if law "bans vaccine[] [mandates]"), 57; *Compare In re Est. of Snyder* ("*Snyder*"), 2009 MT 291, ¶ 9, 352 Mont. 264, 267-68, 217 P.3d 1027, 1030, *with* APP0379-81, *and* APP0207-208.

confirming this individual knowledge, the State does not claim that all legislators understood HB 702's ban of vaccine-and-proof-of-immunity requirements.[7] And while Netzer—an experienced lawyer—presently understands this, the State has not asserted (and thereby forfeited) any argument that the public did. *Hagerty v. Hall*, 135 Mont. 276, 283, 340 P.2d 147, 151 (1959); *McKinney*, 29 Mont. 375, 74 P. at 1096 (explaining this requirement is to "give to the people general notice of the character of proposed legislation" and ensure "all interested an opportunity to appear before committees of the Legislature and be heard upon the advisability of the proposed legislation").[8] Regardless, the average Montanan would not read HB 702's title of "prohibition of discrimination

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[7] The State's assertion that all "legislators understood" HB 702 also is belied by, *inter alia*, comments from Representatives Buttrey and Garner expressing concerns about the law's effects but relying on "assurances" from the "the second floor" (*i.e.*, the Governor's office). *See* Debate on Governor's Amendment to House Bill 702, House Floor Session (April 28, 2021). Video at 16:57:25-16:57:50, 16:59:50-17:00:16, 17:03:00-17:04:21, https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210428/-1/41104#agenda .

[8] Considering the April 28th, 2021 amendments (*supra* at 17 n. 7) and that HB 702 was signed into law and effective nine days later (APP0002 n.2), it is unreasonable to believe that interested members of the public were afforded a meaningful opportunity to appear before the Legislature as *McKinney* contemplates.

based on a person's vaccination status or possession of an immunity passport" and understand that the law bans vaccine and proof-of-immunity requirements. *W. Ranches*, 28 Mont. 278, 72 P. at 661; Br. at 20 n.9 (conceding title not expressing law's non-obvious effects is unconstitutional); APP0021-22, 41 (showing the district court judge was confused about the effects of HB 702).

Additionally, the State cannot shoehorn MCA § 49-2-312(4) into HB 702's title. That provision—disconnected from discrimination—expressly bans emergency-use-vaccine requirements: "An individual may not be required to receive any [emergency-use] vaccine." HB 702's title does not convey that ban, and the State's longwinded "triple exception" portrayal of this provision cannot remedy this deficiency. Br. at 18.

Seeking a constitutionally sufficient title is not about a "preferred nomenclature." Br. at 19. It is about ensuring the public—those who the Legislature serves, is subject to, and has a duty to protect—had clear notice *before* HB 702 was enacted that, in effect, it broadly bans vaccination and proof-of-immunity requirements. Given the ongoing deadly pandemic, this notice was critically important.

Finally, even liberally construing this requirement, HB 702's title violates the Constitution. Its omission of critical and material provisions and effects constitutes a "plain and obvious" infraction. *Rosebud Cnty. v. Flinn*, 109 Mont. 537 (1940).

II. HB 702 Infringes on Fundamental Rights.

The Montana Constitution—especially its provisions addressing inalienable rights—"serves as a limitation on the Legislature, not a grant of power." *Bd. of Regents of Higher Educ. v. State by & through Knudsen* ("*Regents*"), 2022 MT 128, ¶¶ 11, 19, 409 Mont. 96, 106, 108, 512 P.3d 748, 753-754; *Powder River Cnty. v. State*, 2002 MT 259, ¶ 40 (In assessing whether a statute is constitutional, "it is not necessary to seek the source of the power to enact it.").

When determining whether a fundamental right exists, "the intent of the framers of the Constitution is controlling and [] must first be determined from the plain language of the words used." *Cross v. VanDyke*, 2014 MT 193, ¶ 10, 375 Mont. 535, 539, 332 P.3d 215, 217. The Court "may resort to extrinsic aids only if the express language is vague or ambiguous." *Regents*, ¶ 11. Nevertheless, the Court also "consider[s] the circumstances under which the Constitution was drafted, the nature

of the subject matter the Framers faced, and the objective they sought to achieve." *Id.* As explained below, these factors show that HB 702 infringes on numerous fundamental rights.

A. HB 702 Infringes on Montanans' Right to a Clean and Healthful Environment.

Montana business owners' and employers' right to a clean and healthful environment includes the right to adopt measures proven to reduce the risks of exposure to, harm from, and spread of diseases within office/indoor environments. APP0009. By making it unlawful for these persons to, *inter alia*, require proof of active vaccine or immunity protection, HB 702 infringes on their fundamental rights.

1. This Right Encompasses Indoor Environments and Transmissible Diseases.

The plain-meaning rule, convention transcripts, and historical context refute the State's new (and waived) arguments challenging the district court's conclusion that this right covers indoor environments and transmissible diseases. *Compare* Br. at 23-28 (invoking for the first time on appeal the Preamble, handpicked delegate statements, and subsequent legislative acts), *with* APP0196-198, *and Larson v. Larson*, 2017 MT 299, ¶¶ 28-29, 389 Mont. 458, 465-66, 406 P.3d 925, 931.

a. The Ordinary Definitions of "Environment" and "Healthful" Cover Indoor Environments and Transmissible Diseases.

In constitutional inquiries, the plain meaning of the operative text is paramount. *Regents*, ¶ 11; *Cross*, ¶ 10-11; Br. at 23 (conceding same). Here, that plain meaning unequivocally supports the district court's conclusion. Mont. Const. art. II, § 3; art. IX, § 1; APP0140 ("[E]nvironment" is "the aggregate of surrounding things, conditions, or influences"); APP0143 ("[E]nvironment" is "[t]he total of circumstances surrounding an organism or group of organisms"). These capacious definitions do not limit "environment" to the outdoors.

Similarly broad is the definition of "healthful." *American College Dictionary* (1969) ("healthful" means "conducive to health" and "health" means "soundness of body; freedom from disease or ailment"); *American Heritage Dictionary* (1973) ("healthful" means "conducive to good health" and "health" means "[t]he state of an organism functioning normally without disease or abnormality"). These definitions do not limit healthful and health to non-transmissible diseases. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 38, 360 Mont. 207, 223, 255 P.3d 80, 93.

Tellingly, the State entirely disregards the plain meaning of the operative constitutional text. Instead, it fixates on the Preamble, which consists of two parts—the "gratitude clause" (italicized) and the "desires clause" (not italicized):

> *We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains*, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

The State incorrectly argues that the Preamble limits this right to the outdoors. Br. at 24-25.

First, the Framers intended "to give force to" the desires clause only. *Compare Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, ("*MEIC*") 1999 MT 248, ¶ 76, 296 Mont. 207, 229-30, 988 P.2d 1236, 1248 (containing truncated delegate quote), *with* Vol. 5 at 1638 ("[W]hat we are talking about here is *the goal* toward which we try to grow as a society." (emphasis added)).[9] Importantly, the Preamble's goals are exclusively contained in the desires clause.[10] Vol. 2 at 625 (identifying

[9] "Vol." refers to Montana Constitutional Convention of 1972 transcripts and records.

[10] *See* https://www.supremecourt.gov/DocketPDF/18/18-1195/122418/20191114132808604_Montana%20Delegate%20Amicus.pdf

final Preamble phrases as Constitution's goal). *Second*, there is nothing "to give force to" in the gratitude clause, which, while "beautiful" and "poetic" (Vol. 7, 2761), contains no goal or charge.

Third, not one of the State's proffered delegate statements about the Preamble "ties the 'clean and healthful' language to Montana's natural environment." Br. at 24-25. Regardless, the Preamble cannot displace the operative text's plain meaning. *Connell v. Lima Corp.*, 988 F.3d 1089, 1103 (9th Cir. 2021) ("The preamble cannot control" where the operative text "is expressed in clear and unambiguous terms" (citation omitted)); *Clark Fork Coal. v. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 43, 403 Mont. 225, 262, 481 P.3d 198, 216 (same).

b. The Framers Intended This Right to Be Expansive and Cover Unforeseeable Issues.

In the Constitution, the Framers intended to craft a "forward-looking," "future-oriented" "blueprint for Montana's future" to solve "problems not presently foreseeable." Vol. 2 at 581; Vol. 3 at 111; Vol. 4 at 1062; Vol. 5 at 1240, 1376. This included a "very progressive and forward-looking" Bill of Rights and a "broad and flexible" right to a clean

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, at 9-10 (living delegates defining Montana Constitution's goals with exclusive reference to desires clause).

and healthful environment. Vol. 2 at 619; Vol. 5 at 1229, 1725; *cf. MEIC*, ¶ 77 (recognizing this right as providing "farsighted environmental protections"); *Park Cnty. Env't Council v. Montana Dep't of Env't Quality* ("*Park County*"), 2020 MT 303, ¶ 69, 402 Mont. 168, 197, 477 P.3d 288, 305-06. Indeed, finding all other States' environmental-rights provisions inadequate, the Framers adopted the strongest-ever provisions. *MEIC*, ¶¶ 66, 73; Vol. 2 at 554; Vol. 4 at 1200.

The Framers also intended this right to apply to human-health concerns in work settings. The State glaringly omits reference to Delegate Brazier's proposed-and-rejected attempt to limit "environment" to the "physical environment." Vol. 4 at 1211-1213.[11] This rejection and other delegate statements confirm this right applies indoors and otherwise broadly. Vol. 4 at 1201 (Natural Resources Committee "intentionally avoided definitions, to preclude being restrictive," and "environmental life-support system" is an "all-encompassing" term); *MEIC*, ¶ 67.

[11] Notably, indoor environments would have been covered even under Delegate Brazier's proposed change. *See* Vol. 4 at 1212.

Additionally, the Framers were concerned about and deeply committed to anticipatorily protecting public health, including from work-environment-induced diseases. *MEIC*, ¶¶ 77-78 (explaining "constitutional right to a clean and healthy environment" is "anticipatory and preventative," its application does not require showing that "public health is threatened," and it is concerned with "ill health" and "physical endangerment"). For instance, the Framers understood this right would address diseases like cancer and respiratory-system illnesses like emphysema (Vol. 4 at 1204; Vol. 5 at 1236); "health hazards and pollutants" (Vol. 4 at 1208); indoor odors created by cattle ranches (Vol. 4 at 1207-08); health risks arising in indoor "working environment[s]" like smelters (Vol. 5 at 1236); and against unknown health dangers (*id.* at 1229).

The Court, too—albeit less directly—has recognized that this right encompasses indoor-environment-human-health concerns. *See MEIC*, ¶¶ 19-22, 45, 79 (finding infringement from activities adding any amount of disease-causing arsenic above the baseline level of plaintiffs' indoor-drinking-water source); *Cape-France Enterprises v. Est. of Peed*, 2001 MT 139, ¶¶ 33-37, 305 Mont. 513, 520, 29 P.3d 1011, 1017 (deeming

subdivision-development contract in violation of this right, and therefore rescindable, because substantial evidence supported a finding that requisite well drilling "may" taint aquifers "and pose serious public health risks").[12]

The Framers also were aware of and considered the bipartisan Montana Environmental Policy Act ("MEPA"), designed to "prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." *Park County*, ¶¶ 65, 69; *Montana Wilderness Ass'n v. Bd. of Health & Env't Scis.*, 171 Mont. 477, 483, 559 P.2d 1157, 1160 (1976). In effectuating this purpose, MEPA identifies "environmental impacts that must be assessed" for government "decisions having a significant impact on the *human environment*." *Id.* (emphasis added); APP0046 (conceding connection between MEPA and right to a clean and healthful environment).

Notably, environmental impacts addressed by MEPA and its federal predecessor—the National Environmental Policy Act ("NEPA")—

[12] The EPA regulates indoor environments to protect human health from disease risks (*e.g.*, from asbestos, radon, and lead). USEPA, "Asbestos Laws and Regulations," https://www.epa.gov/asbestos/ asbestos-laws-and-regulations (accessed on Aug. 23, 2022).

include increased risks to human and animal health arising from transmissible diseases. *See, e.g.*, *Ravalli Cnty. Fish & Game Ass'n, Inc. v. Montana Dep't of State Lands*, 273 Mont. 371, 376, 382 (1995) (transmissible disease from sheep to bighorn); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400–02 (9th Cir. 1992) (addressing spread and harm from brucellosis—"a serious disease" that threatens health of cattle and humans); *Food & Water Watch v. United States Dep't of Agric.*, 451 F. Supp. 3d 11, 50 (D.D.C. 2020) (addressing human health impacts from exposure to "contaminants produced by CAFOS," including "the spread of infectious diseases…"), *vacated and remanded on other grounds*, 1 F.4th 1112 (D.C. Cir. 2021); *W. Watersheds Project v. Christiansen*, 348 F. Supp. 3d 1204, 1220-21 (D. Wyo. 2018) (addressing risks of transmission related to chronic wasting disease); *Allen v. Nat'l Institutes of Health*, 974 F. Supp. 2d 18, 21, 26, 38-41 (D. Mass. 2013) (addressing increased risk of "secondary transmission rates for outbreaks of 1918 H1N1 influenza virus and SARS-associated Coronavirus in urban areas" and risks from more "extremely dangerous pathogens" that would arise from proposed new laboratory).

That the Framers did not specifically contemplate the present COVID-19 pandemic does not mean this fundamental right does not exist. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1749 (2020) (citing A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 101 (2012)).

c. The Legislature Cannot Limit Constitutional Rights.

The State's assertion that HB 702 cannot implicate environmental rights because the Legislature has not said it does is unsupported and should be dismissed. *State v. Cybulski*, 2009 MT 70, ¶ 13, 349 Mont. 429, 431, 204 P.3d 7, 10; Br. at 26-29; *id.* 27 (claiming legislative categorization of "health and safety" statutes in Title 50 "puts such infectious disease rules outside the" right to a "clean and healthful environment").

First, the Legislature cannot define constitutional rights. Indeed, it is the Court's "exclusive constitutional duty…to adjudicate the nature, meaning, and extent of applicable constitutional…law and to render appropriate judgments thereon." *McLaughlin v. Montana State Legislature*, 2021 MT 178, ¶¶ 5, 16, 405 Mont. 1, 9, 12-13, 493 P.3d 980, 984, 986-987; *McLaughlin*, ¶ 81 (Concurring, J. Sandefur) ("dispelling

the infantile notion that one coequal branch of constitutional government can legally divest another of its constitutional authority and duty"); *Regents*, ¶ 19. *Second*, deferring to self-interested, post-Constitution legislative characterizations to cabin inalienable rights would be unsupportable. *See Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history…should not be taken seriously, not even in a footnote."); *see also Lukumi*, 508 U.S. at 535 (looking at effects of law, not just legislative characterization); *Gill v. United States Dep't of Just.*, 913 F.3d 1179, 1184 (9th Cir. 2019) (ignoring agency's characterization and focusing on "the actual effects of the action"); *N. Plains Res. Council, Inc. v. Montana Bd. of Land Comm'rs* ("*NPRC*"), 2012 MT 234, ¶ 7, 366 Mont. 399, 402, 288 P.3d 169, 172 (considering "effect of the statute" in assessing its constitutionality under environmental rights provisions).[13]

2. HB 702 Infringes on this Right.

The State argues no infringement because other health-and-safety measures exist, vaccinated/immune persons can transmit COVID-19, the

[13] *Park County* is inapposite—¶¶, 68, 84 (invalidating legislative MEPA amendments)—and MCA § 50-1-105's policy is superseded by constitutional rights, though it supports Netzer's claims. MCA § 50-1-105(2); *supra* at 17 n.7 (17:01:43-17:02:05).

right cannot be implicated by vaccination/immunity status, and it would "confer a right to force others to undergo unwanted medical treatments." Br. at 29-30, 38.

The State provides no support for its arguments, allowing for their summary dismissal. *Cybulski*, ¶ 13. Regardless, the State's arguments fail. HB 702 causes individual and cumulative harm by broadly preventing private business owners and employers from adopting the best health-and-safety measures available that are proven to reduce the health risks and spread of COVID-19. *Biden v. Missouri*, 142 S. Ct. 647, 651-54 (2022) (recognizing "COVID-19 vaccine mandate will substantially reduce the likelihood" of "contract[ing] the virus and transmit[ting] it"); *Sausalito/Marin COI. Chapter of California Homeless Union v. City of Sausalito*, 522 F. Supp. 3d 648, 654 (N.D. Cal. 2021) (finding increased risk of spreading COVID-19 constituted irreparable harm); *Santa Cruz Homeless Union v. Bernal*, 514 F. Supp. 3d 1136, 1143, 1145 (N.D. Cal. 2021) (finding government action increasing exposure to COVID-19 likely violates substantive due process rights); *MEIC*, ¶¶ 19-22, 45, 79; *Cape-France Enterprises*, ¶¶ 33-37; *supra* Statement of Facts; Br. at 49-50. No legal authority precludes this right

here and recognizing it will not, as the State incorrectly claims, force employees to vaccinate—they can provide proof of immunity, work remotely, or seek new employment.

Based on the district court's findings, undisputed facts, and indisputable facts in the record, the district court manifestly abused its discretion when determining that HB 702 does not infringe on this right.

B. HB 702 Infringes on Montanans' Fundamental Right to Pursue Life's Basic Necessities.

The State does not dispute, and therefore concedes (*Snyder*, ¶ 9), that the district court erred by mischaracterizing Netzer's asserted right—"to *safely* operate a business (*i.e.*, without being forced to assume substantial health and economic risks created by government action)." Br. at 31-35 (emphasis added).

Separately, the State also does not dispute, and therefore concedes (*Snyder*, ¶ 9), that the district court categorically determined that the State's exercise of its police power cannot violate fundamental rights. Br. at 31-32, 34, 41-42 (incorrectly suggesting that "in all lawful ways" means no exercise of the Legislature's police power can infringe on a fundamental right). Instead, the State embraces the district court's erroneous legal standard.

Accepting the district court's (and State's) erroneous position about the relationship between the Legislature's police power and Montanans' inalienable rights impermissibly would gut the latter. It also would divest this Court of massive power and transfer it to the Legislature, disrupting decades of precedent and working a separation-of-powers violation. *See Regents*, ¶¶ 11, 19; *Powder River Cnty.*, ¶40; *McLaughlin*, ¶ 81 (Concurring, J. Sandefur); *see also* Vol. 2 at 619 (Bill of Rights ensures "a more responsible government that is constitutionally commanded never to forget that government is created solely for the welfare of the people"); Vol. 2 at 627 (responsibilities statement "does not infringe or impact the rights granted").

The State predicates its position on an excised phrase that, in isolation, appears to have broad import. Br. at 31. But when placed in context, that phrase merely provides that not every asserted right is fundamental. *Wiser v. State*, 2006 MT 20, ¶ 22, 331 Mont. 28, 34-35, 129 P.3d 133, 138-39 (narrowly holding no fundamental right to be "free of all regulation"); *Mont. Cannabis Indus. Ass'n v. State*, ("*MCIA*"), 2012 MT 201, ¶ 24, 366 Mont. 224, 231-32, 286 P.3d 1161, 1166-67 (narrowly holding no fundamental right to have "access to a particular drug"); *City*

of Missoula v. Mountain Water Co., 2018 MT 139, ¶ 45, 391 Mont. 422, 439-40, 419 P.3d 685, 697-98 (concurring, J. McKinnon, McGrath, Baker) (clarifying analytical approach and confirming narrow holdings of *Wiser* and *MCIA*). The district court's repeated and incorrect use of *Wiser* and *MCIA* constitutes clear error.

Next, the State asserts a non-existent, general "fundamental right to refuse medical treatment." Br. at 32. However, this purportedly broad right exists only narrowly within the context of past cases like *Armstrong*—a case the State recently sought to overturn. *Stand Up Montana v. Missoula Cnty. Pub. Sch.* ("*SUM*"), 2022 MT 153, ¶¶ 14-15, 409 Mont. 330, 339-40. The State cites no case supporting its asserted fundamental right to refuse vaccination or proof-of-immunity requirements. Even if the State's unrecognized fundamental right existed, it would not apply to private business owners or employers. *SUM*, ¶ 12; *State v. Long*, 216 Mont. 65, 71, 700 P.2d 153, 157 (1985). Further, *NFIB*'s *ultra-vires* holding regarding an 84-million-person mandate is inapposite.[14] 142 S. Ct. 661, 664–65 (2022).

[14] Additionally, Netzer is not claiming HB 702 is unconstitutional because its prohibitions were not broad enough. *But see* Br. at 34 (inappositely citing *Roschen v. Ward*, 279 U.S. 337, 339 (1929)).

For the reasons and facts previously asserted, the district court manifestly abused its discretion when concluding that HB 702 does not infringe on this right.[15]

C. HB 702 Infringes on Montanans' Right to Defend Their Lives.

The State argues the right to defend life is limited to using force to defend against unlawful force. Br. at 35-36. Nothing the State cites precludes this Court from determining Montanans have a right to defend their lives from governmental actions that unnecessarily or substantially threaten their lives by increasing exposure to deadly diseases. Moreover, this right fits within the State's asserted parameters—HB 702 constitutes an unlawful force that threatens injury to persons. HB 702's exemptions and exceptions confirm the law's serious threat.

Further, *Jacobson* clearly connects "self-defense" to the right to protect one's person against an epidemic of disease. 197 U.S. 11, 27 (1905). It also confirms HB 702's arbitrary nature and the Legislature's abdication of its duty to protect its citizens from a deadly pandemic. *See id.* at 25; *Ruona v. City of Billings*, 136 Mont. 554, 557, 323 P.2d 29, 30-

[15] The State incorrectly claims Netzer's standing was limited to "economic injury" and vaccination. Br. at 6, 35 n.12. *But see* APP0006, ¶ 9, 88-93; *infra* at 13 n.4.

31 (1958); *SUM*, ¶ 20. Additionally, *Jacobson* demonstrates the need for this right—a basis for individuals to protect themselves against life-threatening legislative abdication. Recognizing this right would be well-reasoned and -justified, fit within the plain language, and fall within the penumbra of caselaw interpreting this right.

For the reasons and facts previously asserted, the district court manifestly abused its discretion when concluding that HB 702 does not infringe on this right.[16]

D. HB 702 Infringes on Montanans' Property Rights.

The State may not "[u]nder the guise of protecting the public…unduly interfere with private business[es]…or impose unreasonable or unnecessary restrictions" on them. *Freeman v. Bd. of Adjustment of City of Great Falls*, 97 Mont. 342, 355, 34 P.2d 534, 538 (1934). Not disputing Netzer's asserted right (*Snyder*, ¶ 9), the State asserts that HB 702 was lawfully enacted. But this misses the issue. *Powder River Cnty.*, ¶ 40; *Regents*, ¶ 16 n.4. Regardless, HB 702 clearly undermines public health, safety, and welfare.

[16] The State's unsupported and conclusory assertion (at 37) invoking the motion-to-dismiss standard should be discarded. *Cybulski*, ¶ 13.

Additionally, the State repeatedly claims no "constitutional right to…discriminate" exists and compares Netzer's desired health-and-safety measures to the Jim Crow South's racially motivated "invidious discrimination."[17] Br. at 9-10, 38-40, 45-47 (citing *Hishon*). But *Hishon*—like the State's other cases—speaks to "*invidious* private discrimination." 467 U.S. 69, 78 (1984) (emphasis added); *Davis v. Union Pac. R. Co.*, 282 Mont. 233, 252 937 P.2d 27, 38 (1997). "Invidious discrimination" is discrimination lacking any legitimate purpose and based on a constitutionally impermissible category tied to "an immutable characteristic" like "race and national origin." *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973); *Daniels v. MacDonald*, 2007 WL 2669292, at *4 (D. Mont. Sept. 6, 2007).

Implementing a neutral, proven health-and-safety measure is not "invidious discrimination." *See Loving v. Virginia*, 388 U.S. 1, 10-11

[17] Simultaneously, the State holds itself out as an antidiscrimination champion—*e.g.*, Br. at 40 (falsely equating HB 702 to the Federal Civil Rights Act)—despite challenging federal antidiscrimination measures that protect LGBTQ persons. *E.g.*, https://www.mtpr.org/montana-news/2022-07-26/knudsen-joins-federal-lawsuit-over-lgbtq-discrimination-policy-in-schools; https://www.courthousenews.com/tennessee-judge-suspends-bidens-guidance-on-anti-trans-discrimination/.

(1967) (recognizing that impermissible discrimination occurs through arbitrary and invidious discrimination that lacks an independent "legitimate overriding purpose").[18] Accordingly, comparing HB 702 to the Federal Civil Rights Act and Netzer's desires to the invidious discrimination referenced in the State's cited cases fails. *See infra* at 39-41.[19]

For the reasons and facts previously asserted, the district court manifestly abused its discretion when concluding that HB 702 does not infringe on this right.

E. HB 702 Infringes on Montanans' Right to Seek Health and Safety.

The State claims that Netzer "call[s] for…an unqualified right to seek health." Br. at 13. Netzer actually contends this enumerated right embraces the right to "implement[] proven health and safety measures

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[18] Even related to anti-invidious-discrimination laws, constitutional rights can "foreclose certain employment discrimination claims." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020); Br. at 35 (citing *Hurley*).

[19] Antidiscrimination laws fall within police power "when a legislature has reason to believe that a given group is the target of [invidious] discrimination." *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (providing citations); APP0106-07. The State provides no evidence that the new class was the target of such discrimination.

during an ongoing deadly pandemic." Op. Br. at 42. The undisputed "plain language of this provision" supports Netzer's position. *Id.*; *supra* at 21 (providing ordinary meaning of "healthful" and "health"); Vol. 2 at 627 ("[L]ife without health is a sorry proposition").

For the reasons and facts previously asserted, the district court manifestly abused its discretion when concluding that HB 702 does not infringe on this right, and HB 702 should have been subjected to strict scrutiny.

III. The District Court's Failure to Scrutinize HB 702 Was Clear Error.

The State concedes the district court failed to identify or apply any level of scrutiny but claims this was permissible. Br. at 42-50. Well-established law (and the State below) indicate otherwise. *Driscoll v. Stapleton*, 2020 MT 247, ¶¶ 18, 20, 401 Mont. 405, 415-416, 473 P.3d 386, 392-93; *NPRC*, ¶ 20; *MCIA*, ¶ 16; APP0204. This failure alone requires reversal.

A. HB 702 Triggered and Fails Strict Scrutiny.

Because HB 702 infringes on fundamental rights without advancing a compelling state interest narrowly tailored to effectuate that interest that is the least onerous path, the law is unconstitutional. *Ysursa*

v. Pocatello Educ. Ass'n, 555 U.S. 353, 366 (2009) (Breyer, J., Concurring) (recognizing that "strict scrutiny" is "a categorization that almost always proves fatal to the law in question").

1. The State's Alleged Interests Are Not Compelling.

The State proffers two purported compelling interests: "prohibiting discrimination" and "protecting its citizens' fundamental right to privacy." Br. at 44, 47. Neither is compelling.

HB 702's new protected class greatly differs from traditional constitutionally protected classes. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624-25 (1984) (protecting "the civil rights of historically disadvantaged groups" defined by immutable characteristics, to prevent discrimination against "archaic and overbroad assumptions…that [are arbitrary] and deprive[] individual dignity"); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 537, 548-49 (1987) (ensuring equal treatment for women is compelling interest); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 5, 13 (1988) (upholding antidiscrimination-law protections of race, sex, creed, color, and national origin).

The State tries to hide the complete absence of caselaw addressing its novel protected class by improperly generalizing anti-invidious-discrimination laws. *See, e.g.*, *D.C. v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953) ("on the basis of race"); *City of Atlanta v. McKinney*, 265 Ga. 161, 165, 454 S.E.2d 517, 521 (1995) (on the basis of sexual orientation); *Obergefell v. Hodges*, 576 U.S. 644, 658, 661, 675 (2015) (recognizing "immutable nature" of sexual orientation); *Chicago Real Est. Bd. v. City of Chicago*, 36 Ill. 2d 530, 556, 224 N.E.2d 793, 809 (1967) (prohibiting "discrimination on grounds of race, color, religion or national origins in the sale, rental, or financing of housing"); *Hutchinson Hum. Rels. Comm'n v. Midland Credit Mgmt., Inc.*, 213 Kan. 308, 311, 517 P.2d 158, 162 (1973) ("prevent[ing] discrimination, segregation or separation because of race, sex, religion, color, national origin or ancestry." *But see* Br. at 45 (omitting any reference to these classes). Because HB 702's protected class is not a historically disadvantaged group regularly targeted arbitrarily based on immutable characteristics, no compelling antidiscrimination interest exists.[20]

[20] The State waived any claim that HB 702 contributes to the "peace and good order" of society. Br. at 45; *Paulson*, ¶ 37.

There also is no compelling interest to protect individual vaccination-and-immunity-records privacy against public *and* private entities. Br. at 47-50. *First*, the State cites no case holding laws purportedly created to advance interests related to a fundamental right automatically are "unquestioned compelling interests." Br. at 45, 47. *Second*, privacy rights are inapplicable to private action. *State v. Malkuch*, 2007 MT 60, ¶ 12, 336 Mont. 219, 222-23, 154 P.3d 558, 560; *Ivins v. Corr. Corp. of Am.*, 291 F.R.D. 517, 520, 523 (D. Mont. 2013). *Third*, this interest was pretextual and, regardless, is not compelling during a pandemic. *See SUM*, ¶ 20.

2. HB 702 Is Not Closely Tailored to or the Least Onerous Path for Effectuating the State's Purported Interests.

The State's arguments on this point are precluded because the State proffered no argument on, and thereby conceded, this issue below. *Larson*, ¶¶ 28-29; *Snyder*, ¶ 9; *Park County*, ¶ 84; *compare* APP0014-68, 181-211*, with* APP0031, 105-07, 115-16, 128-30, 375-77.

Regardless, HB 702 still fails. *SUM*, ¶ 10. Related to both averred interests, the State could have narrowed its prohibitions to State entities, expanded its exemptions (*e.g.*, including elderly or immunocompromised

small-business owners), or allowed the "discrimination" but provided for medical and religious exemptions. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 947-48 (9th Cir. 1997); *Dorn v. Bd. of Trustees of Billings Sch. Dist. No. 2*, 203 Mont. 136, 150, 661 P.2d 426, 433 (1983). Further, the State's conclusory argument that all antidiscrimination laws are precisely tailored is based on *dicta* applicable only to racial (invidious) discrimination.[21] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014).

B. HB 702 Independently Fails Both Intermediate and Rational-Basis Scrutiny.

HB 702 serves no legitimate purpose, was driven by fear and political ideology, and imposes unreasonably broad restrictions that jeopardize public health and safety.[22] *Lukumi*, 508 U.S. at 535. While the State parades its police power, it discounts its corresponding duty to "fully protect…the health and well-being of the community." *Ruona*,136

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[21] To the extent that the Court finds that the State's arguments on HB 702 being narrowly tailored are not precluded, Netzer should be free to raise new arguments. Regardless, Netzer's arguments would be reviewable under *Wicklund v. Sundheim*, 2016 MT 62, ¶ 26, 383 Mont. 1, 9, 367 P.3d 403, 409-10 or, if necessary, *Paulson*, ¶ 40.

[22] The State's new arguments (at 48), disconnected from any theory advanced below, have been waived. *Paulson*, ¶ 37; *Snyder*, ¶ 9.

Mont. at 557; *SUM*, ¶ 20. HB 702 is arbitrary for its pretextual purpose, overly broad reach, and imposition of serious and unnecessary health risks on Montanans.

CONCLUSION

Based on the foregoing, a preliminary injunction should issue.

DATED this 26th day of August, 2022.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 6,241 words, excluding Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

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