IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0501

NETZER, KRAUTTER & BROWN, P.C. and DONALD L. NETZER,

Plaintiffs, Appellants, and Cross-Appellees

v.

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

Defendants, Appellees, and Cross-Appellants.

APPELLANTS/CROSS-APPELLEES' REPLY/ANSWERING BRIEF

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

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I. HB 702's Title Is Unconstitutionally Misleading.[1]

The Court should reject the State's arguments because they mischaracterize relevant law, misstate critical facts, and improperly present executive post-hoc rationalizations as original legislative intent.[2]

A. The State Mischaracterizes the Applicable Law.

1. This Court Considers the Significant Effects of a Law to Determine Whether a Title Violates Article V, § 11(3).

Contrary to well-established law (AOB[3] at 22-38), the State builds its arguments on the false premise that this Court cannot consider the significant effects of a law to determine whether a bill's title is unconstitutional. RAB at 16-24. The State fixates on one case to support its argument—*MEA-MFT*. But this case does not preclude the Court from relying on significant effects in title analyses. *See generally MEA-MFT v. State*, 2014 MT 33, 374 Mont. 1, 318 P.3d 704.

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[1] The State's reply brief is limited to whether HB 702's title violated Article V, § 11(3) as to subsection (4) of MCA § 49-2-312. MRAP 12(3).

[2] *See, e.g.*, Respondents' Answering Brief ("RAB") at 20, 22 (speculating about what "the Legislature concluded" and why it adopted MCA § 49-2-312(4)); *id.* at 21 (claiming for the first time on appeal and without support that the Legislature adopted subsection (4) "to prevent disparate impacts").

[3] Appellants' Opening Brief ("AOB").

First, the State incorrectly asserts that *MEA-MFT* creates an absolute rule (*i.e.*, no exceptions) that controls all title questions. To do this, the State selectively omits key language contradicting its position. *Compare* RAB at 12, *with MEA-MFT*, ¶ 8 ("[T]he title is generally sufficient" (*i.e.*, not always sufficient) (emphasis added)). Additionally, in betting its position on *MEA-MFT*, the State overlooks that this Court has not once cited *MEA-MFT* for its allegedly absolute rule, despite having considered multiple title cases since.

Second, to distract the Court, the State complains about Netzer "fail[ing] to even acknowledge" *MEA-MFT*, dubbing it "striking" because the Court referenced the case in *Netzer*. RAB 16-18, n.7. But the State misleads again, omitting that *Netzer*'s citation to *MEA-MFT* was in a footnote and wholly unrelated to the State's proffered rule.[4]

Third, the State concedes that a title silent about a bill's significant effects is unconstitutional. RAB at 13 (conceding that Article V, § 11(3)

[4] Despite relying on *Forward Montana* (2024), the State does not explain why that decision does not reference or replicate the *MEA-MFT* approach. 2024 MT 75, ¶ 26, 416 Mont. 175, 188, 546 P.3d 778, 786 (stating instead that if "two or more independent and incongruous subjects are embraced in its provisions, the Act will be held unconstitutional").

prohibits "false or deceptive titles.").[5] Indeed, if a title says one thing but does something else in effect, the bill's title was false or deceptive. It would be illogical and contrary to the purposes of Article V to assert that a bill's contents—but not the unstated effects of those contents—could make a title deceptive.

Regardless, a preeminent treatise—relying on Montana precedent—supports the exact proposition the State disputes. 1A Sutherland Statutory Construction § 18:6 (7th ed.) ("A statute will also be invalid if its title completely fails to apprise a legislator or the public of the nature, scope, or consequences of its operation" (emphasis added) (citing *Sigety v. State Bd. of Health*, 157 Mont. 48, 49, 482 P.2d 574, 575 (1971));[6] *cf. State ex rel. Foot v. Burr*, 73 Mont. 586, 238 P. 585, 585-86 (1925) (invalidating law because neither its title nor contents provided adequate notice to the public of the law's effects altering a county boundary); *Coolidge v. Meagher*, 100 Mont. 172, 46 P.2d 684, 687 (1935) (striking a law because its restrictive title addressing "mileage of officers"

[5] Before its block quote, the State suggests that title violations cannot exist without legislative malfeasance (*i.e.*, "absent deception"). RAB at 13. This is wrong. Misleading ("false") titles are unconstitutional regardless of legislative intentions.

[6] *See also* 1A Sutherland Statutory Construction § 18:5 (8th ed.).

did not provide sufficient notice where the section and body of the law amended addressed the mileage of non-officers); *White v. State,* 233 Mont. 81, 92, 759 P.2d 971, 974 977-78 (1988) (invalidating law because the title was incongruent with what its contents "in effect" accomplished).

Tellingly, the State ignores the treatise and fails to explain why Netzer's cited cases do not apply here. *See* RAB at 17-18, 24. Instead, the State tries (but fails) to delegitimize Netzer's cases by reframing them as "turn[ing] on the failure to include a subject." RAB at 17. But that is consistent with Netzer's position—the significant effects of the law implicate a subject inadequately noticed by the law's title. The State's inability to meaningfully distinguish *Burr*, *White*, *Sigety*, and *Coolidge* from this situation proves Netzer's position.

Unable to distinguish Netzer's cases, the State meanders, claiming that considering the significant effects of a bill here would create a "grab-bag" and "unpredictable" approach. RAB at 16-20. Most obviously, the State's claim fails because the Court did just this in Netzer's cited cases. In those decisions, the Court thoughtfully conducted case-by-case analyses that examined the relevant facts and context to determine

whether a law's significant effects were unconstitutionally incongruent with their respective titles. AOB at 27-34.

2. Courts Afford No Deference to (*i.e.*, Strictly Construe) Restrictive Titles.

Instead of supporting this Court's well-established, fact-specific, searching review, the State repeatedly calls for rubber-stamp deference. RAB at 12, 13, 19, 23. But such deference would be impermissible, and no law requires it. *See, e.g.*, *Mayfield v. United States Dep't of Lab.*, 117 F.4th 611, 621 (5th Cir. 2024) (stating the "rubber-stamp[ing]" of legislative actions amounts to "shy[ing] away from [the Court's] judicial duty to invalidate unconstitutional" actions).

Some Montana cases have afforded the Legislature "deference" by giving non-restrictive titles "liberal construction."[7] *See, e.g.*, *MEA-MFT*, ¶ 8. *But see, e.g.*, *Mont. Auto Ass'n v. Greely,* 193 Mont. at 397-399, 632 P.2d at 310-311 (1981) (recognizing strict construction); *State ex rel. Replogle v. Joyland Club,* 124 Mont. at 143, 220 P.2d at 998 (1950) (same).

[7] "Deference" here only means liberal construction. *MEA-MFT*, ¶ 8.

Here, this "deference" is inappropriate because HB 702's title is restrictive. *See* 1A Sutherland Statutory Construction § 18:4 (7th ed.) (stating that "[i]f the title of the bill is restrictive, it will not be regarded [] liberally…."). [8] "A restrictive title is one where a particular part or branch of a subject"—here, prohibiting discrimination based on vaccine status and possession of an immunity passport—"is carved out and selected as the subject of the legislation." *See Charron v. Miyahara,* 90 Wash. App. 324, 330, 950 P.2d 532, 535 (1998); *Sigety*, 482 P.2d at 577 ("The language of the title restricts it strictly"); *see also Amalgamated Transit Union Loc. 587 v. State*, 142 Wash. 2d 183, 210, 11 P.3d 762, 783 (2000) (Wash. 2001) (en banc) (citing examples of restrictive titles). The State's attempt (RAB at 8, 15) to broaden the law's title using a legal dictionary's technical definition and a New York contract case cannot transform HB 702's plainly restrictive title into an expansive one.[9] *Hale*

[8] *See also* 1A Sutherland Statutory Construction § 18:5 (8th ed.); *id.* § 18.13 ("If the title is particular, the act must conform, even though provisions that are invalid under a restrictive title could have been valid under a more general caption.").

[9] The State cites an inapposite case interpreting a contract to argue that "based on" is read broadly and therefore the title is not restrictive. RAB at 19, 23. *But see* 1A Sutherland Statutory Construction § 18:8 (8th ed.) (explaining that such words "have little or no effect" and do "not validate the inclusion of incongruous provisions").

v. Belgrade Co., 74 Mont. 308, 240 P. 371, 373–74 (1925) (recognizing that "the court has no power" to "read into the title…some declaration to the effect.").

Accordingly, contrary to the State's position, deference (*i.e.*, liberal construction) is not guaranteed in Article V, § 11(3) challenges, not applicable in this case given HB 702's restrictive title, and, regardless, not dispositive. Based on the foregoing, Netzer respectfully requests that this Court reject the State's incomplete "one size fits all" test, meaningfully scrutinize whether HB 702's title is incongruent with its contents and significant effects, and strictly construe the law's restrictive title.

B. HB 702's Title Did Not Provide Adequate Notice that it Prohibited Employers from Requiring All Employees to Provide Either Proof of Vaccination or Immunity.

As a threshold matter, the State does not dispute that (1) Article 5, Section 11(3) was designed to ensure fair and accurate notice to the public and legislators of what a law does; (2) MCA § 49-2-312(4) expressly prohibits certain vaccine requirements; and (3) MCA § 49-2-312(1)'s hidden effect is to broadly prohibit employers from requiring all employees to provide either proof of vaccination or immunity for any

vaccine or infectious disease. *Compare* RAB at 18, 20, *with* AOB at 25-27.[10]

Based on the above, the remaining question is whether the title of HB 702—"An Act Prohibiting Discrimination Based on a Person's Vaccination Status or Possession of an Immunity Passport"—provides fair and accurate notice to the public and legislators that the law criminalizes an employer from universally requiring employees to provide either proof of vaccination or immunity. The title falls short.

First, the district court correctly concluded that "there is no correlation between" subsection 4 and HB 702's title. Ex. A, APP0009. Tellingly, the State spends pages to try to shoehorn subsection (4)'s vaccine-requirement ban into antidiscrimination. In doing so, the best the State can offer are unsubstantiated, post-hoc characterizations of legislative intention and presenting the contingent (and waived) disparate-impacts argument for the first time on appeal. RAB 20-23 (surmising that the Legislature adopted subsection (4) because not having it "could lead to disparate treatment"). Regardless, referencing an

[10] The State's litigation-driven hypotheticals about how it might enforce this law by purporting what employers may do are irrelevant to this Court's legal analysis. RAB at 18.

inapposite case unrelated to the title issue or the constitutionality of an antidiscrimination law cannot carry the argument.

With no discernible basis, the State summarily concludes that HB 702's title put the public "on notice"—not of MCA § 49-2-312(4)'s contents or even the possibility of its contents—but merely "to inquire further about what the legislature was prohibiting." RAB at 16 (emphasis added), 23 (same). But the title said the law only prohibited "discrimination," and said nothing about universal vaccine or proof-of-immunity requirements. Regardless, the State cites no legal authority or rationale to support its "inquiry notice" standard, and this Court "will not consider [such] unsupported issues or arguments." *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 42, 358 Mont. 193, 206, 244 P.3d 321, 332; MRAP 12(f). Further, such a broad standard would nullify the purposes of Article V, Section 11(3) and conflict with the holdings in *Sigety*, *White*, *Burr*, and *Coolidge*. AOB at 27-38.

As explained above, the State glosses over Netzer's cases. The State says nothing to meaningfully distinguish *Sigety*, *White*, *Burr*, or *Coolidge* from the situation here. And all these cases support Netzer's arguments. Instead, the State peddles its annotated version of *MEA-MFT*, ignoring

its exception language and that HB 702's title is restrictive. The Court should therefore affirm the district court's holding that subsection (4) violates Article V, § 11(3).

Second, and for similar reasons, the title failed to adequately notice the same criminal prohibitions under MCA § 49-2-312(1). But the notice problem with subsection (1) is worse because its problematic prohibitions are cached, whereas subsection (4)'s prohibition is expressly stated. Recognizing that subsection (1) does not expressly prohibit employers from universally requiring employees to provide either proof of vaccination or immunity, the State stretches subsection (1) to include all "adverse actions" and "withholdings of benefits." RAB 9, 15-16. Of course, that stretching is unsupported by the plain meaning, and the State cannot rewrite subsection (1) through its brief. Additionally, even under the State's unsupported "inquiry notice" theory, it would not be apparent to a lay person who went on to read the bill's contents that subsection (1) imposed this prohibition.

Ultimately, the Court must determine whether HB 702's narrow title adequately informed the public and legislators of its contents and effects, especially during a deadly pandemic—a unique moment in

history when clear notice was critical. *See, e.g.*, *White*, 233 Mont. at 92 (stating law "in effect" did something significant involving "a subject of importance not embraced in the title" (emphasis added)). Regardless of intentionality, the Legislature wrapped HB 702 in a novel "antidiscrimination" package that did not adequately convey the law's contents or significant effects. It would have posed no hardship to the Legislature to err on the side of caution by using an appropriate title. Based on the foregoing, MCA §§ 49-2-312(1), (4) are void.

Third, voiding these provisions is appropriate even if deference (*i.e.*, "liberal construction") applied. This is because any deference afforded would be narrow to avoid disrupting the constitutional balance of powers or undermining the Judiciary's constitutional role. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 387 (2024); *id.* at 414-16 (Concurring, J. Thomas). Additionally, any deference afforded could not be so great as to undermine or nullify Article V, § 11(3) from fulfilling its purpose of providing fair and accurate notice of the bill's contents and effects.

C. HB 702 Must Be Voided in Its Entirety.

Based on the foregoing, MCA 49-2-312(1), (4) are unconstitutional. Without subsection (1)—the heart and basis of HB 702's prohibitions—the

remaining provisions of HB 702 cease to function and cannot be saved. Contrary to the State's position, the mere inclusion of a severability clause does not save the dependent remainder of the law. *See, e.g.*, *McDonald v. Jacobsen*, 2022 MT 160, 409 Mont. 405, 434 n.13, 515 P.3d 777, 795; *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 86, 365 Mont. 92, 132, 278 P.3d 455, 482; *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 399, 632 P.2d 300, 311 (1981).[11]

II. The District Court's Uncured Misuse of *Netzer* Is Reversible Error.

A. The District Court's Orders Misapplied the Law.

The State admitted below, and does not dispute on appeal, that the district court misused *Netzer* to bar constitutional claims. *See* RAB at 26-33; AOB at 38-40; *see also Boyer v. Kargacin*, 202 Mont. 54, 56–57, 656 P.2d 197, 198 (1982) (reversing district court for violating party's due process by using non-merits, interlocutory TRO order to grant summary judgment). The State's silence constitutes a concession. *In re Est. of Snyder* ("*Snyder*"), 2009 MT 291, ¶ 9, 352 Mont. 264, 217 P.3d 1027.

[11] Netzer's well-supported and correct legal positions speak for themselves and are not policy disagreements. Respondents' Br. at 8, 22-23.

B. The District Court's Improper Use of a Non-Merits Decision to Dismiss Netzer's Claims Was Not Harmless.

Without describing the error, the State summarily declares it "procedural," "harmless," and cured by the supplemental order. RAB at 27-30. But misusing *Netzer* to bar claims was not harmless; it was foundational, dispositive, and uncorrected. *Compare Boyer*, 202 Mont. at 54, 56–57, *with Fenwick v. State, Dep't of Mil. Affs., Disaster & Emergency Servs. Div.*, 2016 MT 80, ¶ 35, 383 Mont. 151, 160, 369 P.3d 1011, 1018 (explaining what harmless error means in Montana).

C. The Original Dismissal Order Did Not Convert the Rule 12(b)(6) Motion into a Summary Judgment.

The State suggests the original dismissal order converted its 12(b)(6) motion into summary judgment, and that any errors (*e.g.*, lack of notice) were harmless. *See* RAB at 27-28. Not so.

A district court "must provide notice to the parties" before summary-judgment conversion to prevent unfair surprise and provide the opportunity to submit evidence to defend against adjudication on the merits. *Jones v. Montana Univ. Sys.*, 2007 MT 82, ¶ 17, 337 Mont. 1, 7, 155 P.3d 1247, 1252. Affirmative notice is required even if a party has constructive notice of Rule 12(d) and submitted extra-pleading materials

because the district court may ignore those materials. *See Gebhardt v. D.A. Davidson & Co.*, 203 Mont. 384, 390, 661 P.2d 855, 858 (1983); *see also Meagher v. Butte-Silver Bow City-Cnty.*, 2007 MT 129, ¶¶ 16-20, 20, 337 Mont. 339, 343-44, 160 P.3d 552, 556-57. Failure to provide this notice and opportunity is reversible error (*i.e.*, not harmless). *Meagher*, 2007 MT, ¶ 20.

Here, the district court provided no notice (actual or constructive) of conversion before or in its original dismissal order. Instead, it cited Rule 12(b)(6) standards and relied exclusively on *Netzer* to bar the relevant constitutional claims. APP0023-24.

The original order tracked the district court's previous statements that it would wait until "*after*" the motion to dismiss to address summary judgment issues. Dkts. 41, 51;[12] Transcripts (9/13/2023) 39:11-40:17. It also tracked Netzer's partial-summary-judgment-withdrawal "to further develop the evidentiary record…in light of relevant scientific and other developments." Dkt. 52; Transcripts (9/13/2024) 39:11-40:2.

Based on this case's history, the parties' understanding, and the plain language of the district court's original order, Netzer received no

[12] "Dkt." cites are to the docket in the district court.

notice of conversion before or in the original order. Without this notice, Netzer reasonably did not view or treat the original dismissal order as a summary judgment.[13] This renders the State's non-binding federal cases inapposite because each involved original rulings on expressly noticed motions for summary judgments.[14]

The State's brief also suggests that the supplemental order is a converted summary judgment and that any related error is harmless. Upon review, the supplemental order appears to rely on matters outside of the pleadings and trigger 12(d). Ex. B, APP0010-14 (invoking and replicating the district court's order denying preliminary injunction). Nevertheless, any conversion caused by the supplemental order could not retroactively convert the original dismissal order. Regardless, in all instances, Netzer was not given adequate notice, and any summary-judgment conversion that occurred constitutes reversible error for lack of notice and opportunity. *Meagher*, 2007 MT, ¶ 20.

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[13] Had Netzer received notice, he would have sought a continuance under Rule 56(f) consistent with his need to gather more evidence (Dkt. 52).

[14] *See Luig v. N. Bay Enters., Inc.*, 817 F.3d 901, 904-05 (5th Cir. 2016); *Barney v. Internal Revenue Serv.*, 618 F.2d 1268, 1270-71 (8th Cir. 1980); *Czarnecki v. United States*, No. C15-0421JLR, 2016 WL 9526498, at *1 (W.D. Wash. Oct. 17, 2016). Curiously, the State fails to cite even one of the many Montana cases addressing this issue.

D. The Supplemental Order Expressly Maintains and Does Not Correct the Errors in the Original Dismissal Order.

The State claims that the supplemental order eliminates and cures the reversible errors in the original dismissal order. RAB at 26-33. Not so.

Courts interpret orders according to their "plain meaning." *See United States v. Pollock*, 726 F.2d 1456, 1461 (9th Cir. 1984); *see also S.E.C. v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262, 1275 (10th Cir. 2010) (same); *Citimortgage, Inc. v. Dusablon*, 2015 VT 68, ¶ 11, 199 Vt. 283, 287–88, 122 A.3d 1202, 1204–05 (2015) ("[T]he express language of the order clearly defines its scope."). Here, the plain meaning of the relevant orders contradicts the State's position.

The supplemental order does not erase or cure the reversible errors underpinning the dismissal. The district court denied Netzer's motion to alter or amend, neither acknowledging nor correcting errors in the original order. Ex. B, APP0010. Instead, the district court affirmatively maintained these errors and continued to give them weight throughout the supplemental order. *Id.* ("This Court affirms its previous rulings."); *id.*, APP0011 ("All rationale[s] in the Court's previous orders are incorporated herein."). The supplemental order, therefore, impermissibly

perpetuated the original order's legal errors, improperly tipping the scales against Netzer's constitutional rights. *See Murray v. UBS Sec., LLC*, 128 F.4th 363, 371–72 (2d Cir. 2025) (rejecting argument of harmless error where court "embed[ed its initial error] in the supplemental instruction"); *Dish Network Corp. v. Nat'l Lab. Rels. Bd.*, 953 F.3d 370, 376 (5th Cir. 2020) ("[I]t's a long- and well-settled proposition" that an adjudicatory body "cannot build its decision on a foundational error of fact" or law.).

E. The State Cannot Rewrite the District Court's Orders.

To avoid reversal, the State tries to gaslight its way to success by claiming the supplemental order properly applied Rule 12(b)(6). But the plain language of the order refutes the State's revisionist tactics. RAB at 26-33. *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1256 (11th Cir. 2015) ("[I]t is not appropriate for us to rewrite" the "trial court's order"); *Albright v. United States*, 732 F.2d 181, 186 (D.C. Cir. 1984) (stating reviewing court "cannot rewrite the district court's opinion"). Reviewing courts "do not construe district court opinions to save them from reversal" and do not rewrite them "to cure [their] errors of law and internal

inconsistencies." *MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 863 (11th Cir. 2013).

First, as explained above, the supplemental order maintains and does not correct the original order. Indeed, the supplemental order admits that it merely repeats and relies on the "determinations made in its previous Order denying [Netzer's] motion for preliminary injunction" because it was "upheld by the Montana Supreme Court." Ex. B, APP0010.

Second, the supplemental order provides no evidence that it is conducting a Rule 12(b)(6) analysis of these constitutional claims. It does not cite Netzer's allegations, accept them as true, or afford Netzer's position the benefit of the doubt. The order also does not engage with any case law, except stating its reliance on *Netzer* and providing one passing reference to a single case on its final page. Finally, despite Netzer's requests, the order provides no leave for Netzer to amend his complaint. Transcript (Sept. 13, 2023) at 22:13-17; 39:9-10.

F. Netzer Did Not Waive Any Responsive Argument.

The State contends that Netzer waived any right to respond to the State's new arguments that the supplemental order properly conducted

a 12(b)(6) analysis. RAB at 29. *But see* AOB at 39 (citing original and supplemental order); MRAP 12(3).

Regardless, the State is judicially estopped from making this argument for opportunistically changing its position three times. *Compare* Exhibit E, APP0043, 17-20 (stating the district court could not rely on *Netzer* to dismiss Netzer's claims), *with* App. H, APP0062 (defending district court's misuse of *Netzer*, stating "the Supreme Court would never remand this case with instructions for the District Court to hear the merits"), *and* RAB at 26-33 (now claiming district court did not misuse *Netzer* but performed proper 12(b)(6) analysis).

Judicial estoppel stops counsel "from playing fast and loose with the courts" by "bind[ing] a party to her judicial declarations, and preclud[ing] her from taking a position inconsistent with them in a subsequent action or proceeding." *J.L.G. v. M.F.D.*, 2014 MT 114, ¶¶ 21-22, 375 Mont. 16, 22, 324 P.3d 355, 360–61 (setting out elements). Here, judicial estoppel applies because the State knew its previous positions, succeeded below using them, presented a new position now, and Netzer relied on the previous positions in making its arguments on appeal. For these reasons,

the State should be judicially estopped from asserting waiver and its new positions inconsistent with those argued below.[15]

III. Reassignment Is Necessary to Ensure Fairness.

Here, the district court's rulings unquestionably "could indicate bias" and create "an appearance of impropriety." The State disagrees because it incorrectly believes any error was procedural and harmless and Netzer prevailed on the title claim as to subsection (4).

The district court's error is not procedural but manifest, dispositive, unsupported by any legal authority, inconsistent with one hundred years of precedent, and contrary to this Court's unambiguous directives in *Netzer*. Despite this and Netzer spelling out these errors, the supplemental order admits no error, makes no corrections, and instead tries to bury the mistakes with a copy-and-paste job from its 2021 non-merits order. The supplemental order does not cite Netzer's allegations, let alone assume they are true. It does not give Netzer's contentions the

[15] Inasmuch as the Court accepts the State's argument that the district court properly completed a Rule 12(b)(6) analysis to dismiss Netzer's claims, Netzer respectfully requests that any remand order direct the district court to afford Netzer an opportunity to amend his complaint.

benefit of the doubt, engage with the case law or constitutional history provided, and does not afford Netzer leave to amend.

The State claims none of this matters because the district court ruled in Netzer's favor on subsection (4), an ancillary provision that leaves the constitutionally offensive heart of HB 702 standing. This is not persuasive, especially considering the district court's manifest error when denying the same claim in Netzer's preliminary injunction application—where the district court also rendered a critical decision based on a made-up legal theory ("redundancy") that failed to account for 130 years of cases Netzer briefed in addressing the title issue. All these examples show the district court has had, and will continue to have, substantial difficulty following this Court's instructions and fairly applying the law on remand.

Reassignment is imperative here. The State's claim that requiring a new judge to review a few documents constitutes impermissible waste and duplication is unpersuasive. Any extra time needed, which would be modest, clearly justifies avoiding the appearance of bias and impropriety in a case this important. However, without reassignment, Netzer's rights to relief will only be further delayed and made more costly.

CONCLUSION

For the foregoing reasons, Netzer respectfully requests that the Court reverse the district court on the title issue, hold that HB 702's title is unconstitutional, and void the law in its entirety. In the alternative, Plaintiffs respectfully request that the Court uphold the district court's holding that subsection 4 of HB 702 is void, reverse the district court's ruling as to the specified claims on the State's motion to dismiss, and reassign the case to a new judge on remand.

DATED this 18th day of May, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,303, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendix.

/s/ Jared R. Wigginton
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Representing: Donald L. Netzer, Netzer, Krautter & Brown, P.C.
Service Method: eService

/s/ Jared R. Wigginton
Jared R. Wigginton

CERTIFICATE OF SERVICE

I, Jared R Wigginton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant Reply and Answer to Cross Appeal to the following on 05-19-2025:

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Electronically Signed By: Jared R Wigginton
Dated: 05-19-2025