

Alex Rate  
**ACLU of Montana**  
P.O. Box 1968  
Missoula, MT 59806-1968  
(406) 224-1447  
ratea@aclumontana.org

Terry Ding\*  
**ACLU Foundation**  
125 Broad Street, 17<sup>th</sup> Floor  
New York, NY 10004  
(212) 549-2500  
ttding@aclu.org

Wendy Heipt\*  
**Legal Voice**  
907 Pine St Ste 500  
Seattle WA 98101  
(206) 682-9552  
wheipt@legalvoice.org

Julie Murray\*  
**ACLU Foundation**  
915 15th Street, NW  
Washington, DC 20005  
(202) 675-2326  
jmurray@aclu.org

Robin Turner  
**Legal Voice**  
P.O. Box 582  
Missoula, MT 59806  
(206) 682-9552 x 110  
rtturner@legalvoice.org

*\*Pro Hac Vice applications  
forthcoming*

**MONTANA FOURTH JUDICIAL DISTRICT COURT,  
MISSOULA COUNTY**

CASEY PERKINS, an individual;  
SPENCER MCDONALD, an  
individual; KASANDRA  
REDDINGTON, an individual; JANE  
DOE, an individual; and JOHN DOE,  
an individual,

Plaintiffs,

vs.

STATE OF MONTANA; GREGORY  
GIANFORTE, in his official capacity as  
Governor of the State of Montana; and

Cause No. DV 25-282

Hon. Shane Vannatta

**MEMORANDUM OF LAW  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

AUSTIN KNUDSEN, in his official  
capacity as Attorney General of the  
State of Montana,

Defendants.

## TABLE OF CONTENTS

|   |    |
|---|----|
| TABLE OF CONTENTS .....   | i  |
| INTRODUCTION .....  | 1  |
| FACTUAL BACKGROUND .....  | 3  |
| I. Gender Identity, Gender Dysphoria, and Intersex Identity .....   | 3  |
| II. The Act.....  | 5  |
| III. The Act’s Effect on Plaintiffs .....   | 10 |
| A. Casey Perkins .....  | 10 |
| B. Spencer McDonald.....  | 11 |
| C. Kasandra Reddington .....  | 13 |
| D. Jane Doe .....   | 15 |
| E. John Doe.....  | 16 |
| ARGUMENT .....  | 18 |
| I. Legal Standard .....   | 18 |
| II. Plaintiffs Have More Than Shown Serious Questions Going to the Merits.....  | 20 |
| A. The Act violates Plaintiffs’ fundamental right to equal protection .....   | 20 |
| 1. The Act discriminates on the basis of transgender and intersex status and sex.....   | 21 |
| 2. The Act is subject to strict scrutiny because it targets a suspect class and infringes upon numerous fundamental rights..... | 25 |
| a. Transgender status is a suspect classification.....  | 27 |
| b. The Act burdens the fundamental right to equal treatment based on sex and sex is a suspect classification .....              | 33 |

|      |   |    |
|------|---|----|
| c.   | The Act burdens the fundamental rights to privacy and to pursue life’s basic necessities .....  | 35 |
| 3.   | The Act cannot survive any level of scrutiny.....   | 36 |
| a.   | Animus against transgender people is not a legitimate state interest, much less a compelling one .....  | 36 |
| b.   | Even assuming there is a legitimate or compelling state interest implicated, the Act does not advance it, and, in fact, does the opposite ..... | 38 |
| B.   | The Act violates Plaintiffs’ fundamental right to privacy .....   | 43 |
| C.   | The Act burdens Plaintiffs’ right to pursue life’s basic necessities .....  | 49 |
| D.   | The Act burdens Plaintiffs’ right to due process .....  | 52 |
| III. | Plaintiffs Will Suffer Irreparable Harm Absent Preliminary Relief .....   | 55 |
| IV.  | The Balance of Equities and the Public Interest Weigh Decisively in Favor of an Injunction .....  | 56 |
| V.   | Plaintiffs Should Not Be Required to Post a Bond.....   | 58 |
|      | CONCLUSION .....  | 59 |

## **INTRODUCTION**

Again and again in recent years, the Montana Legislature and Executive have sought to leverage the power of the State to attack some of its most vulnerable citizens: transgender and intersex Montanans. The Legislature has enacted laws prohibiting transgender youth from receiving gender-affirming medical care, barring transgender women from participating in women’s sports, and requiring Montanans to be classified as male or female based on their reproductive capabilities. The Executive has further implemented rules and policies preventing transgender people from amending their birth certificates and driver’s licenses to reflect their gender identities. Montana courts have found each of these actions to be unconstitutional or likely unconstitutional. But now the Legislature has passed and the Governor has signed yet another law, House Bill 121 (“HB 121” or the “Act”), singling out transgender and intersex Montanans for discriminatory and dehumanizing treatment. So, yet again, these Montanans ask the courts to vindicate their constitutional rights.

The Act bars transgender people from using restrooms, changing rooms, and sleeping quarters that correspond to their gender identity in a sweeping range of public spaces, including schools, offices, libraries, courthouses, state parks, and interstate rest stops. It does not appear to allow intersex people to use such sex-separated facilities at all. The Act applies even in hospital settings—compromising

transgender and intersex Montanans' access to healthcare that could be the difference between life and death. The Act defines each Montanan's "sex" by reference to "sex chromosomes," "gonads," and "genitalia present at birth," and expressly rejects "an individual's psychological, behavioral, social, chosen, or subjective experience of gender." The Act further authorizes any person to sue for merely "encounter[ing] another individual of the opposite sex" in a restroom or changing room. The sponsor of HB 121 made clear the bill was animated by the belief that transgender people's gender identities are illusory, and the bill's plain text reveals a lack of recognition that intersex people even exist.

Plaintiffs are transgender and intersex Montanans who, no different than anyone else, seek to live their lives in safety and dignity. Plaintiffs attend public schools, spend time in public libraries, and engage in all the countless professional and personal activities that people do in public spaces. No different than anyone else, Plaintiffs need to use restrooms and other sex-separated facilities when they are in public spaces. But whereas, under the Act, cisgender people, whose gender identity aligns with the sex they were assigned at birth, can use such facilities consistent with their gender identity, transgender people cannot. Meanwhile, intersex people, who are born with sex traits and reproductive anatomies that are neither only "male" nor only "female" as defined by the Act, are excluded entirely and it is unclear which sex-separated facilities they are permitted to use. In so

targeting transgender and intersex people, the Act demeans their personhood, obstructs their ability to participate equally in public life, and exposes them to heightened risks of harassment and violence.

The Montana Constitution does not countenance this discrimination and a temporary restraining order, followed by a preliminary injunction, is necessary to prevent it. Because the Act violates Plaintiffs' fundamental rights to equal protection, privacy, to pursue life's basic necessities, and due process, Plaintiffs have more than met their burden of showing serious questions going to the merits. Plaintiffs also meet all the other requirements for obtaining preliminary relief: They will be irreparably harmed by the Act, the balance of equities weighs heavily in their favor, and an injunction would further the public interest. This Court should therefore grant Plaintiffs' motion for a temporary restraining order and a preliminary injunction.

### **FACTUAL BACKGROUND**

#### **I. Gender Identity, Gender Dysphoria, and Intersex Identity**

A person's gender identity is their deeply felt, internal sense of belonging to a particular gender, which can differ from the sex they were assigned at birth.

*Cross by & through Cross v. State*, 2024 MT 303, ¶ 5, 560 P.3d 637; *see Hecox v. Little*, 104 F.4th 1061, 1068 (9th Cir. 2024), *as amended* (June 14, 2024).

Transgender people have a gender identity that does not correspond to their birth-

assigned sex, and cisgender people have a gender identity that aligns with their birth-assigned sex. *Cross*, ¶ 5. “The medical consensus in the United States is that gender identity is innate and that efforts to change a person’s gender identity are [not only] harmful to [their] health and well-being, but also . . . unethical.” *Marquez v. State*, Cause No. DV 21-873, 2022 WL 4486283, at \*4 (Mont. Dist. Ct. Apr. 21, 2022).

The incongruence between a person’s gender identity and their birth-assigned sex can cause clinically significant distress or impairment of functioning known as gender dysphoria. *Cross*, ¶ 5. Gender dysphoria is a serious medical condition that is associated with intense and persistent pain and discomfort from the incongruity between a person’s gender identity and their assigned sex. *See Marquez*, Cause No. DV 21-873, 2022 WL 4486283, at \*4. “[U]ntreated gender dysphoria can lead to significant lifelong distress, clinically significant anxiety and depression, self-harming behaviors, and an increased risk of suicidality.” *Cross*, ¶ 7. Treatment for gender dysphoria involves bringing a patient’s body and gender expression into alignment with their gender identity to eliminate their distress. *Doe v. Horne*, 115 F.4th 1083, 1107 n.13 (9th Cir. 2024). An aspect of this treatment is “social transition,” which is the process through which transgender people live and become socially recognized in accordance with their gender identity. *Id.* Social



transition includes allowing transgender people to dress and use names, restrooms, and other sex-separated facilities consistent with their gender identity. *See id.*

Intersex people are born with reproductive anatomy or other sex traits that do not uniformly correspond with what is usually deemed “female” or “male.” InterACT, *Intersex Variations Glossary*, <https://interactadvocates.org/intersex-definitions/> (last visited March 16, 2025); *see Edwards v. State of Montana*, Cause No. DV-23-1026, Order on Cross Motions for Summary Judgment at 11 (Mont. Fourth Jud. Dist. Ct., Missoula Cnty., Feb. 18, 2025). For example, some intersex people have both ovarian and testicular tissue. *Intersex Variations Glossary, supra.* Others have combinations of chromosomes, such as XXY, that are different than XY, which is usually associated with the male category, and XX, which is usually associated with the female category. *Id.* Being intersex is a naturally occurring variation in humans and typically does not require any medical treatment or care. InterACT, *What is intersex?*, <https://interactadvocates.org/faq/> (last visited March 16, 2025). Although doctors may assign intersex babies a legal sex of “female” or “male,” that individual’s gender identity may not align with their birth-assigned sex. *See Intersex Variations Glossary, supra.*

## **II. The Act**

On March 27, 2025, Governor Gianforte signed HB 121 (the “Act”) into law. HB 121, 2025 Leg., 69th Sess. (Mont. 2025). The Act bars transgender and

intersex people from using restrooms and other sex-separated facilities that correspond to their gender identity. It provides: “A covered entity shall designate each multi-occupancy restroom, changing room, or sleeping quarters for the exclusive use of females or males.” HB 121 § 3(1). Such facilities “may be used only by members of that sex.” *Id.* § 3(2).

The Act narrowly defines “female” and “male” in terms of certain physical characteristics and genetics, allegedly identifiable at birth. It proclaims that “[i]n human beings, there are exactly two sexes, male and female, . . . . determined by the biological and genetic indication of male or female, including sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth.” *Id.* § 2(12). The Act then defines “female” and “male” in terms of a person’s “XX” or “XY chromosomes” and the type of “gametes” the person’s “reproductive and endocrine system” produces. *Id.* § 2(4), 2(7). These definitions expressly disregard “an individual’s psychological, behavioral, social, chosen, or subjective experience of gender.” *Id.* § 2(12). They also have no place for people, like intersex individuals, whose sex traits are not exclusively “female” or “male.”

The Act’s restrictions apply to any “covered entity,” which “means a correctional center, a juvenile detention facility, a local domestic violence program, a public building, or a public school.” *Id.* § 2(3). A “public building,” in turn,

encompasses any “building that is owned or leased by a public agency” and “open to the public, including but not limited to . . . a building that is used for educational, office, or institutional purposes; or a library, museum, school, hospital, auditorium, dormitory, or university building.” *Id.* § 2(9).

The Act provides a “private cause of action” against a covered entity for any “individual who, while accessing a restroom or changing room designated for use by the individual’s sex, encounters another individual of the opposite sex in the restroom or changing room.” *Id.* § 4(1). Similarly, any “individual who is required by a covered entity to share sleeping quarters with an individual of the opposite sex has a private cause of action” against the covered entity. *Id.* § 4(2). In excluding transgender people from accessing public facilities consistent with their gender identity and intersex people from using sex-separated facilities altogether, the Act purports to protect women “from acts of abuse, harassment, sexual assault, and violence committed by men.” *Id.* § 1(2)].

During the legislative process, the Act’s proponents made repeated statements denigrating transgender people and suggesting that the mere presence of transgender people in spaces with cisgender people who share the same gender identity poses a threat to cisgender people. Representative Kerri Seekins-Crowe, the sponsor of HB 121, stated: “Men do not belong in women[’s] spaces, and ignoring the biological differences creates real victims and jeopardizes the dignity

and safety of girls.”<sup>1</sup> Attempting to justify the bill, she insisted that “[w]omen should not have to sacrifice their privacy or their safety because of political agendas or cultural trends.”<sup>2</sup> Similarly, Lieutenant Governor Kristen Juras testified that “[a]cknowledging biological realities should not be complicated or controversial,” and touted HB 121 as part of the Legislature and Governor’s “shared record of defending Montanans from the far left’s ideological crusade.”<sup>3</sup>

Notably, Lieutenant Governor Juras “tied HB 121 to several other pieces of legislation” targeting the transgender community “that the Gianforte administration has supported in previous sessions”: 2023’s Senate Bill 99 (“SB 99”), which “prohibited gender-affirming health care for transgender youth”; Senate Bill 458 (“SB 458”), which required Montanans to be classified by “exactly two sexes, male and female,” as defined by their reproductive capabilities; and 2021’s House Bill 112 (“HB 112”), which “restricted transgender female athletes from competing

---

<sup>1</sup> Michael Santoscoy, *Montana House Committee Hears Testimony on Controversial Gender Privacy Bill*, NBC Montana (Jan. 10, 2025), available at <https://nbcmontana.com/news/local/montana-house-committee-hears-testimony-on-controversial-gender-privacy-bill>.

<sup>2</sup> Matti Olson, *House Bill 121 Passes Second Reading in Montana Legislature*, NonStop Local KULR-8 Television (Jan. 15, 2025), available at [https://www.montanarightnow.com/legislature/house-bill-121-passes-second-reading-in-montana-legislature/article\\_239fc534-d3a6-11ef-8a85-a3f59685c4d1.html](https://www.montanarightnow.com/legislature/house-bill-121-passes-second-reading-in-montana-legislature/article_239fc534-d3a6-11ef-8a85-a3f59685c4d1.html).

<sup>3</sup> Jonathon Ambarian, *Montana Bill Would Tie Bathrooms to Biological Sex, Allow Lawsuits for Noncompliance*, KTVH (Jan. 10, 2025), available at <https://www.ktvh.com/news/montana-bill-would-tie-bathrooms-to-biological-sex-allow-lawsuits-for-noncompliance>.

in girls' sports.”<sup>4</sup> Montana courts have found each of these laws to be unconstitutional or likely unconstitutional. In particular, SB 458—which sought to impose definitions of “sex,” “male,” and “female” identical to those in the Act—was permanently enjoined because it violated the Montana Constitution’s guarantees of equal protection and the right to privacy. *See generally Edwards*, Cause No. DV-23-1026.

And just a few months ago, a court preliminarily enjoined as likely unconstitutional a Montana Administrative Rule preventing the Department of Public Health and Human Services from amending birth certificates to reflect gender transitions (“DPHHS Rule”), as well as a Montana Motor Vehicle Division policy permitting amendment of driver’s licenses to reflect the holder’s gender identity only if the holder provides an amended birth certificate (“MVD Policy”). *See Kalarchik v. State*, Cause No. ADV-2024-261, Order Granting Plaintiffs’ Motion for Preliminary Injunction at 12–13 (Mont. First Jud. Dist. Ct., Lewis and Clark Cnty., Dec. 16, 2024) (concluding the DPHHS Rule and MVD Policy likely violate equal protection).

---

<sup>4</sup> Ambarian, *supra* n.4.; *see* S.B. 99, 2023 Leg., 68th Sess. (Mont. 2023) (“SB 99”); S.B. 280, Leg., 67th Sess. (Mont. 2021) (“SB 280”); H.B. 112, 2021 Leg., 6th Sess. (Mont. 2021) (“HB 112”).

### III. The Act's Effect on Plaintiffs

Unless it is enjoined, the Act will make it difficult, if not impossible, for Plaintiffs to participate in public life.<sup>5</sup>

#### A. Casey Perkins

Casey Perkins is a license examiner in the Employment Relations Division at the Montana Department of Labor and Industry (“DLI”), where she has worked since 2015. Decl. of Casey Perkins in Supp. of Pls.’ Mot. For Prelim. Inj. (“Perkins Decl.”) ¶ 3. DLI is a public agency regulated by the Act. *Id.*

Casey is a transgender woman and a mother. *Id.* ¶¶ 1–2, 4. She was assigned the sex designation of male at birth but identifies as a woman and lives as a woman in all aspects of her life. *Id.* ¶ 4. Casey began living and presenting as the woman she knows herself to be during the COVID-19 pandemic. *Id.*

In the DLI building where Casey works, the only single-occupancy restroom is five floors away from her office. *Id.* ¶ 6. There are two multi-occupancy, gender-designated restrooms on the fourth floor, where Casey is based. *Id.* ¶ 7. Casey uses the multi-occupancy women’s restroom on her floor only when the floor is empty or in emergencies. *Id.* ¶ 7. Otherwise, she does not use the restroom at work; she usually works half days and “holds it” until she can go home. *Id.*

---

<sup>5</sup> Two Plaintiffs seek to proceed under pseudonym in this case as “Jane Doe” and “John Doe.” Their motion for leave for proceed under pseudonym is forthcoming.

Casey enjoys taking her child to Memorial Park in Helena, where there is a playground, events for children and families, and ice skating in the winter. *Id.* ¶ 9. The restrooms at Memorial Park, a public park that is a covered entity under the Act, are multi-occupancy and designated by gender. *Id.* Casey uses the women’s restroom at the park in accordance with her gender identity. *Id.*

As a woman, Casey would not feel safe using the men’s restroom at work, in parks, or in any other space governed by the Act. *Id.* ¶ 8. But that is exactly what the Act requires Casey to do. What is more, having to use the men’s restroom would “out” Casey as transgender, and she fears she could be subjected to harassment and violence. *Id.* Casey may not be able to continue working at DLI if she cannot use a restroom that aligns with her gender identity. *Id.* ¶¶ 8, 12. The Act would also make it very difficult for Casey and her child to spend time in Memorial Park or other public spaces. *Id.* ¶ 11.

**B. Spencer McDonald**

Spencer McDonald is a pre-law student at Carroll College and works as a legislative session intern for the Montana Democratic Party. Decl. of Spencer McDonald in Supp. of Pls.’ Mot. For Prelim. Inj. (“McDonald Decl.”) ¶¶ 4, 7. His work as a legislative session intern requires him to be in the Montana State Capitol for three days a week, four hours a day. *Id.* ¶ 7. The Capitol is a public building regulated by the Act. *Id.* ¶ 8.

Spencer is a transgender man. *Id.* ¶ 5. He was assigned the sex designation of female at birth, but he identifies as a man and lives as a man in all aspects of his life. *Id.* Living his life and presenting himself to the world in accordance with his gender identity has made Spencer immeasurably happier. *Id.*

At work, Spencer's desk is in the basement of the Capitol building. *Id.* ¶ 9. There are two single-occupancy, unisex restrooms in the basement. *Id.* ¶ 10. These restrooms are used by legislators, staff members, and members of the public, and are in high demand. *Id.* Although there is an additional set of single-occupancy bathrooms in the Capitol, they are in the Senate Leadership Offices and Spencer would not feel comfortable using them. *Id.* ¶ 11. The remainder of the public restrooms in the building are multi-occupancy and designated by gender. *Id.* ¶ 12.

When Spencer is at his desk, he typically uses the single-occupancy restrooms in the basement. *Id.* ¶ 13. But because those restrooms are often in use, Spencer also uses the multi-occupancy men's restrooms. *Id.* And when Spencer's duties require him to be elsewhere in the Capitol, he also uses other men's restrooms. *Id.* ¶ 14. Spencer has not encountered any problems using the restrooms that align with his gender identity. *Id.* ¶ 13.

Under the Act, however, Spencer is required to use the women's restroom. *Id.* ¶ 15. He does not feel safe doing so because other patrons may perceive him as a man, exposing him to harassment and violence. *Id.* If Spencer cannot access the



single-occupancy restrooms in the Capitol basement, he would likely avoid using the restroom at all, making it very difficult for him to do his job. *Id.* ¶ 17.

The Act would also make it very difficult for Spencer to continue enjoying Canyon Ferry Lake State Park, where he camps during summers. *Id.* ¶ 18. The restrooms at his favorite campsite at the park, which is a covered entity under the Act, are multi-occupancy and designated by gender. *Id.* Spencer previously used the men’s restroom and would not feel safe or comfortable using the women’s restroom. *Id.* In short, the Act could force Spencer to make the painful decision to leave his job and withdraw from public spaces that he loves. *Id.* ¶ 19.

### **C. Kasandra Reddington**

Kasandra Reddington, or “Kas,” is an accessibility coordinator at Helena College, a public community college regulated by the Act. Decl. of Kasandra Reddington in Supp. of Pls.’ Mot. For Prelim. Inj. (“Reddington Decl.”) ¶¶ 6–7. In that role, Kas supports students with disabilities. *Id.* ¶ 9.

Kas is agender and transfeminine, which means that although she was assigned the sex designation of male at birth, she identifies as more feminine than masculine, without identifying as a specific gender. *Id.* ¶ 5.

Kas’s office is on Helena College’s Donaldson Campus. *Id.* ¶ 10. The restrooms closest to her office are multi-occupancy and designated by gender. *Id.* ¶ 11. Those restrooms are used by employees, students, and members of the public.

*Id.* Kas uses the women’s restroom as it aligns with her gender identity. Although there is one single-occupancy restroom in Kas’s office building, it is farther from her office than the multi-occupancy restroom. *Id.* ¶ 12. Due to a medical issue, Kas often must use the restroom urgently. *Id.* Because of the distance from her office to the single-occupancy restroom, Kas may not be able to reach it in time to use it. *Id.*

As part of her job, Kas occasionally goes to Helena College’s Airport campus and the University of Montana’s Missoula campus, both of which are regulated by the Act. *Id.* ¶¶ 13–14. On those campuses, the only restrooms available to Kas are multi-occupancy and designated by gender. *Id.* ¶¶ 13, 15. Kas uses the women’s restrooms on these campuses and has never encountered any problems doing so. *Id.* ¶ 16.

Outside of work, Kas enjoys spending time in Montana’s state parks, which are regulated by the Act. *Id.* ¶ 17. Kas’s favorite park is Spring Meadow Lake State Park, which she visits several times each month. *Id.* The restrooms there are multi-occupancy and designated by gender, and Kas uses the women’s restroom. *Id.*

The Act forces Kas into an impossible choice. *Id.* ¶ 22. She can either use men’s restrooms, as the law commands, which would “out” her as a transgender woman and subject her to intrusive questioning, harassment, and possibly violence. *Id.* ¶¶ 23, 27. Or she can continue using the women’s restroom, which would violate the Act and expose the college she loves to legal liability, jeopardizing its

ability to serve its students. *Id.* ¶ 24. In other words, the Act turns the simple act of using the restroom—a mundane task that most people do not think twice about—into a source of constant stress and discomfort for Kas. *Id.* ¶ 30.

#### **D. Jane Doe**

Jane Doe is a graphic designer in the Montana State Print & Mail Department (“PMD”). Decl. of Jane Doe in Supp. of Pls.’ Mot. For Prelim. Inj. (“Jane Doe Decl.”) ¶ 7. The PMD is a public agency regulated by the Act. *Id.* ¶ 8.

Jane is a transgender woman. *Id.* ¶ 5. She transitioned and began living as the woman she knew herself to be approximately three years ago. *Id.* ¶ 6.

Jane works in a PMD building that is split between a shop floor and an office. *Id.* ¶ 9. Her cubicle is in the office portion of the building, which has only gender-designated restrooms. *Id.* ¶¶ 9–10. Jane uses women’s restrooms in the office because they correspond with her gender identity. *Id.* ¶¶ 11–12.

In her free time, Jane enjoys visiting parks operated by the State of Montana and parks operated by municipalities. *Id.* ¶¶ 14–15. The Act applies to all these public parks. *Id.* ¶ 16. Jane uses the women’s restrooms at the parks and has never had any issues doing so. *Id.* ¶ 17.

Jane, like the other transgender Plaintiffs, is forced into a bind by the Act. *Id.* ¶ 22. It would not only be humiliating but also dangerous for her to use men’s restrooms, as the Act requires her to do. Jane would be “outed” as a transgender

woman to any stranger who sees her in the men’s restroom, dramatically increasing the risk that she will be subjected to harassment and violence. *Id.* ¶ 23. On the other hand, using women’s restrooms would violate the Act and jeopardize Jane’s employment. Her employer could be sued by anyone using a women’s restroom in the office at the same time as Jane, making it risky for the PMD to employ her. *Id.* ¶ 24. Jane now faces the prospect of not being able to maintain her job or visit public parks. *Id.* ¶¶ 25–27.

#### **E. John Doe**

John Doe is a long-time Montana resident and lives in Missoula. Decl. of John Doe in Supp. of Pls.’ Mot. For Prelim. Inj. (“John Doe Decl.”) ¶ 3. Because of his hobbies, he spends a lot of time at the public library and on the University of Montana campus, which are both entities regulated by the Act. *Id.* ¶¶ 13, 18.

John is intersex and identifies as male. *Id.* ¶¶ 4, 9. His birth-assigned sex is male but he was born with a combination of male and female sex traits and reproductive anatomy. *Id.* ¶ 4. For example, John has two X chromosomes but no Y chromosome, which would classify him as female. *Id.* But he also has the SRY chromosome, which is typically located on the Y chromosome. *Id.* John also has both male genitalia and breast tissue. *Id.* ¶ 5.

John regularly visits his local public library to play social deduction and board games with a gaming group. *Id.* ¶ 12. He also frequents the University of

Montana campus to attend events and concerts, watch plays and movies, and visit the campus bookstore. *Id.* ¶ 18. Both the library and the University have multi-occupancy, gender-designated restrooms and John uses the men’s restrooms. *Id.* ¶¶ 14, 19. He has never had any problems doing so. *Id.* ¶ 10.

In addition, John and his spouse like to visit Splash Montana, a water park owned and operated by the City of Missoula and regulated by the Act. *Id.* ¶ 23. At Splash Montana, John uses the men’s changing room. *Id.* ¶ 24.

But John does not know whether he is considered “male” or “female” under the Act. *Id.* ¶ 31. Because he is intersex, John simply does not fit within the Act’s restrictive definitions of “male” and “female.” *Id.* ¶¶ 7–8. As a result, John is unsure which restrooms and changing rooms he is supposed to use in public. *Id.* ¶ 31. Whichever facilities he uses, he may be deemed to be violating the Act. *Id.* ¶¶ 15–17, 20–22. He worries that this would subject him to harassment and the library and University to legal liability. *Id.* Moreover, John fears that if he were to use women’s facilities, other patrons will perceive him to be a man and harass and attack him. *Id.* ¶¶ 17, 22.

Put simply, John has no idea how to comply with a law that seems not to contemplate even the existence of intersex people. *Id.* ¶¶ 8, 31. Without a way to comply with the law, John does not know how he can continue spending time in any of the spaces governed by the Act. *Id.*

\* \* \*

The Act took immediate effect upon its passage into law on March 27, 2025. *See* HB 121 § 7. Facing this latest assault by the State on their rights and personhood, Plaintiffs filed their complaint and the instant motion for a temporary restraining order and preliminary injunction on the same day.

## ARGUMENT

### **I. Legal Standard**

“A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant’s favor; and (d) the order is in the public interest.” *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 12, 418 Mont. 253, 557 P.3d 440 (quoting § 27-19-201(1), MCA). “As an equitable remedy, the hallmark of the preliminary injunction is its inherent flexibility—a court uses its discretion to do equity and to mould each decree to the necessities of the particular case.” *Stensvad v. Newman Ayers Ranch, Inc.*, 2024 MT 246, ¶ 14, 418 Mont. 378, 557 P.3d 1240 (citation omitted).

In view of the flexibility of the preliminary injunction as an equitable remedy, the Montana Supreme Court recently affirmed the “sliding scale” approach to weighing the § 27-19-201(1), MCA factors. *Stensvad*, ¶ 27.

Specifically, the likelihood-of-success factor is analyzed using the “serious questions test.” *Id.* ¶ 25. Under this test, “[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *Id.* ¶ 23 (alteration in original) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011)); see *Planned Parenthood of Mont.*, ¶ 35 (affirming a preliminary injunction where plaintiffs “presented ‘serious questions’ going to the merits”).

Plaintiffs more than meet the standard for obtaining a temporary restraining order and preliminary injunction. Plaintiffs are likely to succeed on the merits of their claims that the Act violates their rights to equal protection, privacy, to pursue life’s basic necessities, and due process, and certainly have shown at least serious questions going to the merits. They will suffer irreparable harm absent preliminary relief through the deprivation of their constitutional rights. And the balance of equities and the public interest tip sharply in Plaintiffs’ favor, as an injunction would violate the constitutional rights of Plaintiffs and other transgender and intersex Montanans, subjecting them to an increased risk of harassment and even violence. In addition, without an injunction, covered entities would face liability under the Act every time they are allegedly in non-compliance, despite being given no information on how they can comply with the Act. Because covered entities

could be forced to defend lawsuits for years before the Act is ultimately invalidated, preliminary relief is particularly appropriate to preserve the status quo.

## **II. Plaintiffs Have More Than Shown Serious Questions Going to the Merits.**

Plaintiffs are likely to succeed on the merits of their claims that the Act violates the Montana Constitution’s equal protection, privacy, basic necessities, and due process provisions. At the very least, Plaintiffs have demonstrated serious questions as to the Act’s constitutionality.

### **A. The Act violates Plaintiffs’ fundamental right to equal protection.**

Plaintiffs have shown at least serious questions going to the merits of their equal protection claim because the Act singles out transgender and intersex people for disfavored treatment without justification. Article II, Section 4 of the Montana Constitution guarantees that “[n]o person shall be denied the equal protection of the laws.” Mont. Const. art. II, § 4. “The principal purpose of the Equal Protection Clause is to ensure that Montana’s citizens are not subject to arbitrary and discriminatory state action.” *Hensley v. Montana State Fund*, 2020 MT 317, ¶ 18, 402 Mont. 277, 477 P.3d 1065 (citation omitted).

Montana’s Equal Protection Clause “provides even more individual protection than does the Fourteenth Amendment to the U.S. Constitution.” *Planned Parenthood of Mont.*, ¶ 29 (quoting *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct.*, 2023 MT 7, ¶ 24, 411 Mont. 201, 523 P.3d 519). This is in part because Article II,



Section 4 specifically guarantees that “[t]he dignity of the human being is inviolable,” Mont. Const. art. II, § 4—a recognition of individual dignity that “[t]he federal constitution does not expressly provide,” *Walker v. State*, 2003 MT 134, ¶ 73, 316 Mont. 103, 68 P.3d 872; *see State v. Peoples*, 2022 MT 4 ¶ 40, 407 Mont. 84, 502 P.3d 129 (noting that Montana courts “have read the dignity provision in some circumstances to provide Montana citizens greater protections than those afforded by the federal constitution” (citing *Walker*, ¶ 73)).

Courts evaluate equal protection claims “under a three-step process: (1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny.” *Planned Parenthood of Mont.*, ¶ 26 (citation omitted). Here, the Act treats similarly situated classes differently by imposing restrictions on transgender and intersex people that do not apply to cisgender people; is subject to strict scrutiny because it discriminates on the basis of transgender and intersex status as well as sex, and because it infringes on fundamental rights; and cannot withstand any level of scrutiny.

**1. The Act discriminates on the basis of transgender and intersex status and sex.**

On its face, the Act classifies people on the basis of both transgender and intersex status and sex. The Act requires covered entities to “designate each multi-occupancy restroom, changing room, or sleeping quarters for the exclusive use of

females or males,” HB 121 § 3(1), where “female” and “male” are “determined by the biological and genetic indication of male or female, including . . . genitalia present at birth,” *Id.* § 2(12). Covered facilities “may be used only by members of” the categories of “female” and “male” as defined by the Act. *Id.* § 3(2).

The Act discriminates against transgender people. It permits cisgender people, whose gender identity generally aligns with the characteristics defined by the Act as “female” or “male,” to use covered facilities that are consistent with their gender identity, while barring transgender people, whose gender identity differs from the characteristics defined by the Act as “female” or “male,” from doing the same. Put another way, a person’s ability to use a space that aligns with their gender identity turns on whether they had certain characteristics at birth that the Act attributes to “female” or “male”—someone who had the “male” characteristics at birth cannot use a women’s restroom, even if she identifies and lives as a woman.

Leaving no doubt as to its differential treatment of transgender people, the Act commands disregard of “an individual’s psychological, behavioral, social, chosen, or subjective experience of gender.” *Id.* § 2(12). Accordingly, the similarly situated classes for evaluating the equal protection claims of the transgender Plaintiffs are cisgender people and transgender people. *See Cross v. State*, Cause No. DV-23-541, 2023 WL 6392607, Order Granting Plaintiffs’ Motion for

Preliminary Injunction at \*8 (Mont. Fourth Jud. Dist. Ct., Missoula Cnty., Sept. 27, 2023), *aff'd*, *Cross*, 2024 MT 303.

Three Montana district courts have reached the same conclusion when evaluating laws like the Act. In *Edwards*, the court held that SB 458, by defining “sex” restrictively as the Act does, “treats cisgender individuals . . . different[ly] from transgender[ and] intersex” individuals. Cause No. DV-23-1026, at 27–28. In *Cross*, the court held that “SB 99 classifies based directly on transgender status” because it “bars the provision of certain medical treatments only” to minors “whose gender identity is not congruent with their sex assigned at birth.” Cause No. DV-23-541, at \*8. And in *Kalarchik*, the court ruled that “the challenged state actions affect cisgender and transgender Montanans in an unequal manner” because “cisgender Montanans can obtain amended birth certificates and drivers licenses with a sex marker accurately reflecting their gender identity, [whereas] transgender Montanans cannot.” *Kalarchik*, Cause No. ADV-2024-261, at 7–8.

As for intersex people, the Act excludes them from its definition of “sex” altogether. *See Edwards*, Cause No. DV-23-1026, at 11 (“By declaring as a matter of law that human beings can only be ‘exactly’ one of the two sexes, [the Act] explicitly excludes [intersex people] from the definition of human beings.”). Whereas the Act permits people who fit its definitions of “female” and “male” to access sex-separated facilities, intersex individuals are provided no access to any

such facility, even if that individual’s gender identity aligns with their birth-assigned sex. Thus, the similarly situated classes in evaluating the equal protection claim of the intersex Plaintiff are people who fit into the Act’s definitions of “female” and “male” and intersex people. *See id.* at 27–28.

Because the Act discriminates against transgender and intersex individuals based on their transgender and intersex status, it also necessarily discriminates based on sex. As the U.S. Supreme Court pointed out, “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020); *accord Cross*, ¶ 63 (McKinnon, J., concurring) (“[T]ransgender discrimination is, by nature, sex discrimination.”). *Bostock* addressed Title VII of the Civil Rights Act of 1964, which, like Montana’s Equal Protection Clause and unlike the federal Equal Protection Clause, “explicitly prohibits discrimination on the basis of sex.” *Cross*, ¶ 63 (McKinnon, J., concurring). Thus, “*Bostock*’s logic is sound” as applied to the transgender Plaintiffs’ equal protection claim. *Id.*

Discrimination based on intersex status is also, by nature, sex discrimination.

People who fit certain definitions of “sex” are treated one way; people who do not are treated a different way.

Examples of the Act’s application make this clear: A transgender woman who had the characteristics defined by the Act as “male” at birth cannot use the

women’s restroom at a Montana public library but a cisgender woman who had the characteristics defined by the Act as “female” at birth can. That is, the Act “penalizes a person identified as male at birth for traits or actions that it tolerates in an [individual] identified as female at birth.” *Bostock*, 590 U.S. at 660.<sup>6</sup> Similarly, an intersex person who does not fit into the Act’s defined categories of “male” or “female” cannot access any sex-designated restroom at a Montana public library, but people who fit into the Act’s defined categories can.

In sum, the Act singles out transgender and intersex Montanans for disfavored treatment.

**2. The Act is subject to strict scrutiny because it targets a suspect class and infringes upon numerous fundamental rights.**

To determine which of the three levels of scrutiny—strict scrutiny, middle-tier scrutiny, or rational basis—to apply to a challenged law, Montana courts consider both the nature of the rights implicated and the class of people targeted.

*Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 17, 302 Mont. 518, 15 P.3d 877.

Strict scrutiny applies “where the legislation at issue infringes upon a fundamental

---

<sup>6</sup> See, e.g., *Cross*, Cause No. DV-23-541, 2023 WL 6392607, at \*9 (relying on *Bostock*’s reasoning to conclude that a law that discriminates on the basis of transgender status must also discriminate on the basis of sex under Montana’s equal protection clause); *Kalarchik*, Cause No. ADV-2024-261, at 9–10 (same); *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024) (applying *Bostock*’s reasoning to hold that an Oklahoma policy that discriminates based on transgender status necessarily discriminates based on sex for equal protection purposes).

right or discriminates against a suspect class.” *Id.* ¶ 17. A right is “fundamental” if “it is guaranteed by the Declaration of Rights found at Article II” of the Montana Constitution. *Montana Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207,988 P.2d 1236. This “most stringent standard of review,” *Powell*, ¶ 17, requires the government to show that the challenged law “is the least onerous path to a compelling government interest,” *Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 75, 416 Mont. 44, 545 P.3d 1074.

“Middle-tier scrutiny” applies if the challenged law does not burden a suspect class and affects a constitutional right not found in the Declaration of Rights. *Snetsinger*, ¶ 18. To satisfy this level of scrutiny, the government must show “that the classification is reasonable (*i.e.*, not arbitrary and justified by relevant and legislative state interests),” and that “the asserted government[al] interest is more important than the infringement of the right.” *Jacobsen*, ¶¶ 40–41.

“[W]here the right at issue is neither fundamental nor warrants middle-tier scrutiny,” courts review the challenged law under the rational basis test. *Powell*, ¶ 19. Even under this level of scrutiny, the classification “must be rationally related to a legitimate government interest.” *Snetsinger*, ¶ 19. Animus is not a legitimate government interest. *See U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

The Act is subject to strict scrutiny because it infringes upon several fundamental rights *and* discriminates against a suspect class. Although the

Montana Supreme Court has yet to identify the level of scrutiny applicable to classifications based on transgender, intersex status, or sex, Justice McKinnon partially addressed the question in her concurrence in *Cross*. There, the Court affirmed an injunction of the law enacted through SB 99 proscribing gender-affirming medical care for transgender youth. *Cross*, ¶¶ 1–2. Justice McKinnon reasoned that “[s]trict scrutiny is undoubtedly the appropriate tier of scrutiny” for such classifications based on transgender status.<sup>7</sup> *Id.* ¶ 62. The district courts in *Edwards*, *Cross*, and *Kalarchik* similarly concluded that strict scrutiny governs review of such classifications. *See Edwards*, Cause No. DV-23-1026, at 18–21; *Cross*, Cause No. DV-23-541, 2023 WL 6392607, at \*10; *Kalarchik*, Cause No. ADV-2024-261, at 10–11. The straightforward application of Montana law compels the same conclusion here.

**a. Transgender status is a suspect classification.**

Strict scrutiny applies to the Act because transgender status is a suspect classification. “A suspect class is one ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’” *In re S.L.M.* (1997), 287 Mont. 23, 33, 951 P.2d

---

<sup>7</sup> In *Cross*, the Court held that SB 99 likely violates the right of privacy secured by the Montana Constitution and therefore did not reach the plaintiffs’ equal protection claim. *See Cross*, ¶¶ 35, 56.

1365, 1371 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)), *abrogated on other grounds by Planned Parenthood of Mont. v. State*, 2024 MT 178, 417 Mont. 457, 554 P.3d 153. Transgender Montanans constitute a suspect class under this test.

*First*, transgender people—in Montana and elsewhere—have been subjected to “a history of purposeful unequal treatment.” *Id.* Discrimination against the transgender community has been extensively documented. *See* S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), *available at* <https://perma.cc/7CTQ-GV8Z> (“Transgender Survey”). Transgender people face discrimination, harassment, and violence at school, in the workplace, when trying to find a place to live, during encounters with police, in doctors’ offices and emergency rooms, at the hands of service providers and businesses, and in other aspects of life. *Id.*

That discrimination continues. In Montana, the Legislature and executive branch have repeatedly enacted laws targeting transgender Montanans. *See* Factual Background Section II, *supra*. Each of these laws has been found by courts to be unconstitutional or likely unconstitutional. For example, a court preliminary enjoined SB 99 after determining that “the purported purpose given for SB 99 is disingenuous” and noting that “[t]he legislative record is replete with animus toward transgender persons.” *Cross*, Cause No. DV-23-541, 2023 WL 6392607, at



\*14, \*18–19 (internal quotation marks omitted); *see Edwards*, Cause No. DV-23-1026, at 28–29 (holding that in enacting SB 458, “the Legislature seeks to permit discrimination against a person whose [birth-assigned] sex does not align with their gender identity”); *Barrett v. State*, 2024 MT 86, ¶ 50, 416 Mont. 226, 547 P.3d 630 (finding HB 112 unconstitutional); *Kalarchik*, Cause No. ADV-2024-261, at 13–14 (concluding the DPHHS Rule and MVD Policy likely violate equal protection).

At the national level, too, there is a long history of invidious discrimination against transgender people. The National Center for Transgender Equality has catalogued the many anti-transgender actions taken by the federal executive branch. *See The Discrimination Administration: Trump’s Onslaught Against LGBTQ Rights and the Safety of the Trans Community*, National Center for Transgender Equality, <https://transequality.org/the-discrimination-administration> (last visited March 16, 2025). And within the first ten days of his second presidency, Donald Trump issued a series of executive orders pronouncing it “the policy of the United States to recognize two sexes, male and female,” as “immutable biological reality” and effectively commanding the federal government to deny the existence of transgender people<sup>8</sup>; prohibiting the federal

---

<sup>8</sup> Exec. Order No. 14168, 90 FR 8615, §§ 1–2 (Jan. 20, 2025), *available at* <https://perma.cc/CMK2-ZJ9Q> (casting gender identity as “an internal, fluid, and subjective sense of self unmoored from biological facts”); *id.* §§ 3–5 (ordering all federal agencies and employees to enforce the executive order’s definition of sex,

government from supporting gender-affirming medical treatment for transgender youth<sup>9</sup>; and banning transgender people from serving in the military.<sup>10</sup>

*Second*, transgender people suffer a level of “political powerlessness” sufficient to warrant “extraordinary protection” under the law because of the community’s small population and the enduring societal prejudices against transgender people. *S.L.M.*, 287 Mont. at 32, 951 P.2d at 1371. “[O]ther than certain races, one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people.” *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610–11 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (quoting *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018)).

A 2022 study by the Williams Institute estimates that less than one percent of Montanans above the age of 18 identify as transgender. Jody L. Herman, et al., *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Institute 9 (June 2022), <https://perma.cc/3JQW-52QD>. “The transgender

---

including with respect to the application of statutes, regulations, and guidance; identification documents; use of federal funds; housing and shelter programs; and sex-separated spaces in workplaces).

<sup>9</sup> Exec. Order No. 14187, 90 FR 8771, § 1 (Jan. 28, 2025), *available at* <https://perma.cc/JC9V-5TM2>.

<sup>10</sup> Exec. Order No. 14183, 90 FR 8757, § 1 (Jan. 27, 2025), *available at* <https://perma.cc/ADZ4-XX2P>.

community . . . suffers from high rates of employment discrimination, economic instability, and homelessness.” *Grimm*, 972 F.3d at 611. Nearly one-third of transgender people fall below the poverty line, more than twice the rate of the general U.S. population. Transgender Survey, *supra*. “[P]eople who are transgender are twice as likely as the general population to have experienced unemployment.” *Grimm*, 972 F.3d at 611–12 (citing Transgender Survey). And nearly one-third of transgender people have experienced homelessness—a rate two and a half times higher than the general population. Transgender Survey, *supra*.

Moreover, “[t]ransgender people frequently experience harassment in places such as schools (78%), medical settings (28%), and retail stores (37%),” and outright “physical assault in places such as schools (35%) and places of public accommodation (8%).” *Grimm*, 972 F.3d at 612 (citing Transgender Survey). “[E]xtreme bias against gender nonconformity” and “particularly violent” crimes perpetrated against transgender persons have also been well documented. *Id.* (citing Transgender Survey).

Transgender people also face barriers to political representation. *See, e.g.*, Philip E. Jones, et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*, 82 Pub. Opinion Q., May 2018, at 252, 265, <https://academic.oup.com/poq/article/82/2/252/4996117> (in randomized experiment, nominating a transgender candidate reduced proportion of respondents

who would vote for their own party’s candidate from 68 percent to 37 percent). Even in the rare instances when transgender politicians are elected, they encounter harassment and discrimination—as the experience of Representative Zooney Zephyr, the first transgender woman to hold public office in Montana, illustrates. *See, e.g.*, H.R.J. Res. 1, 2025 Leg., 69th Sess. (Mont. 2025) 10–75, *available at* <https://perma.cc/4LXK-JUBG> (resolution introduced shortly after Zephyr’s election seeking to bar transgender legislators from using legislative restrooms consistent with their gender identity).

That transgender Montanans have had to count on the courts to safeguard their rights against sustained attacks “from the majoritarian political process” only underscores that this community needs heightened protection. *S.L.M.*, 287 Mont. at 33, 951 P.2d at 1371; *see* Factual Background Section II, *supra*.

In sum, the historical and ongoing realities of the discrimination against and limited political power of transgender people confirm that transgender status is a suspect classification. *See Cross*, No. DV-23-541, 2023 WL 6392607, at \*9–10 & n.7 (applying strict scrutiny for other reasons but noting “the Court believes that transgender persons comprise a suspect class”).<sup>11</sup>

---

<sup>11</sup> Numerous federal courts have recognized that transgender people constitute at least a quasi-suspect class because, among other factors, they have “historically been subject to discrimination” and “lack[] political power.” *Grimm*, 972 F.3d at 610–13; *accord Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir.

**b. The Act burdens the fundamental right to equal treatment based on sex and sex is a suspect classification.**

Strict scrutiny also applies to the Act because it infringes Montanans' fundamental right to not be discriminated against on the basis of sex. Any right guaranteed by the Montana Constitution's Declaration of Rights is a fundamental right that triggers strict scrutiny. *See Montana Env't Info. Ctr.*, ¶¶ 63–64; *Gryczan v. State* (1997), 283 Mont. 433, 449, 942 P.2d 112, 122. The Declaration of Rights expressly provides that the state shall not “discriminate against any person in the exercise of his civil or political rights on account of . . . sex.” Mont. Const. art. II, § 4. And “transgender discrimination is, by nature, sex discrimination.” *Cross*, ¶ 63 (McKinnon, J., concurring). Likewise with intersex discrimination. *See* Argument Section II.A.1, *supra*. By discriminating on the basis of transgender and intersex

---

2019); *Ray v. McCloud*, 507 F. Supp. 3d 925, 936–38 (S.D. Ohio 2020); *Flack v. Wis. Dep't of Health Serv.*, 395 F. Supp. 3d 1001, 1019–22 (W.D. Wis. 2019); *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142–45 (D. Idaho 2018); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 718–22 (D. Md. 2018); *Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016), *stay of preliminary injunction denied sub nom. Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Marlett v. Harrington*, No. 15–cv–01382, 2015 WL 6123613, at \*4 (E.D. Cal. Oct. 16, 2015).

status, the Act necessarily discriminates on the basis of sex, burdening a fundamental right and triggering strict scrutiny.

Justice McKinnon’s concurrence in *Cross* endorsed this rationale. Joined by Justice Gustafson, Justice McKinnon observed that “the Montana Constitution’s equal protection provision . . . explicitly prohibits discrimination on the basis of sex.” *Cross*, ¶ 63. Thus, “the right to be free from discrimination based on sex” is a fundamental right. *Id.* ¶ 62. In concluding that “strict scrutiny is the appropriate standard of review,” Justice McKinnon noted that “we need not parse federal gender discrimination law in search of an analogous level of scrutiny” because “Article II, Section 4 provides even more individual protection” than its federal counterpart and “is unequivocal in its intolerance for . . . discrimination based on sex.” *Id.* ¶ 64 (citation and internal quotation marks omitted). The district courts in *Kalarchik* and *Cross* reached the same conclusion for the same reason. *See Kalarchik*, Cause No. ADV-2024-261, at 10–11; *Cross*, Cause No. DV-23-541, 2023 WL 6392607, at \*11.

Strict scrutiny applies for the independent reason that sex is a suspect classification. Although the “Montana Supreme Court has not yet . . . explicitly stated that sex is a suspect class,” “[f]ederal courts and the United States Supreme Court have applied ‘heightened scrutiny’ when an equal protection claim involves gender-based or sex-based discrimination.” *Id.* at \*10 (citing *J.E.B. v. Alabama*,

511 U.S. 127, 135 (1994)). They have done so in recognition of the reality that “our Nation has had a long and unfortunate history of sex discrimination” stemming from “archaic and overbroad generalizations about gender” as well as “outmoded notions of the relative capabilities of men and women.” *J.E.B.*, 511 U.S. at 135–36 (citations and internal quotation marks omitted); *see State v. Miller*, 2022 MT 92, ¶ 54, 408 Mont. 316, 510 P.3d 17 (McKinnon, J., concurring) (explaining that discrimination “based on gender stereotypes . . . ‘ratify and reinforce prejudicial views of the relative abilities of men and women’” and have “wreaked injustice in so many spheres of our country’s public life” (citing *J.E.B.*, 511 U.S. at 140)). Thus, under federal law, “gender-based classifications require an exceedingly persuasive justification in order to survive constitutional scrutiny.” *J.E.B.*, 511 U.S. at 136.

In light of the Montana Constitution’s express prohibition of sex-based discrimination in an Equal Protection Clause that provides for even more individual protection than its federal counterpart, the Act’s sex-based discrimination warrants strict scrutiny both because it burdens a fundamental right and because it is a suspect classification.

**c. The Act burdens the fundamental rights to privacy and to pursue life’s basic necessities.**

Lastly, the Act is subject to strict scrutiny for the independent reason that it burdens the fundamental rights to privacy and to pursue life’s basic necessities.

“Any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis.” *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. The right to privacy and to pursue life’s basic necessities are each enshrined in the Declaration of Rights and are therefore fundamental rights. *See* Mont. Const. art. II, §§ 3, 10. As detailed below, the Act infringes upon each of those rights. *See* Argument Section II.B–C, *infra*.

### **3. The Act cannot survive any level of scrutiny.**

There is no legitimate justification for the Act’s discriminatory treatment of transgender and intersex people. Accordingly, it fails every level of scrutiny.

#### **a. Animus against transgender people is not a legitimate state interest, much less a compelling one.**

Strict scrutiny requires the State to establish, among other things, “a compelling state interest” in the challenged classification, *Montana Env’t Info. Ctr.*, ¶ 61, while rational-basis review requires the State to establish “a legitimate government interest,” *Snetsinger*, ¶ 19. The Act is rooted in bare animus against transgender people, which is not a legitimate state interest, much less a compelling one. *See Moreno*, 413 U.S. at 534 (“[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

Statements by HB 121’s proponents lay bare that the Act is driven by antipathy towards people who do not conform to the restrictive gender binary the Act imposes. Representative Seekins-Crowe, the sponsor of HB 121, stated that



“[m]en”—referring to transgender women—“do not belong in women[’s] spaces” and threaten “the dignity and safety of girls.”<sup>12</sup> Meanwhile, Lieutenant Governor Juras suggested that efforts to allow transgender people to live with dignity as equal members of society were part of “the far left’s ideological crusade.”<sup>13</sup> The Act itself erases official recognition of transgender identities by defining sex to exclude “an individual’s psychological, behavioral, social, chosen, or subjective experience of gender.” HB 121 § 2(12). And the Act is just the latest iteration of the relentless attacks the Legislature has directed at transgender Montanans. *See* Factual Background Section II, *supra*; *Cross*, Cause No. DV-23-541, 2023 WL 6392607, at \*14 (“The legislative record [for SB 99] is replete with animus toward transgender persons”).

Across history, there have been similar claims of “discomfort” about simply sharing spaces with those perceived as different. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* 107 (Knopf 1975). But even if such beliefs stem from “profound and deep convictions,” *Lawrence v. Texas*, 539 U.S. 558, 571 (2003), “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases” for treating a vulnerable group differently, *City of Cleburne*

---

<sup>12</sup> Santoscoy, *supra* n.2.

<sup>13</sup> Ambarian, *supra* n.4.

*v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Discomfort with or dislike of transgender people cloaked as a privacy or safety concern is not a legitimate basis for imposing unequal or stigmatizing treatment.

The animus behind the Act is especially offensive to the Montana Constitution because “[t]he plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated.” *Walker*, ¶ 82. According to the Legislature, the notion of transgender women sharing public facilities with cisgender women and transgender men sharing public facilities with cisgender men is so objectionable that the government must outlaw it—and cisgender people can sue simply for having to share a covered facility with a transgender person. *See* HB 121 § 4. The idea that the mere presence of transgender people in public spaces poses a threat to society “deliberately reduces [their] value” and “fails to acknowledge their worth as persons, directly violat[ing] their dignity.” *Walker*, ¶ 18. A legislative rationale so irreconcilable with the dignity clause cannot justify any law.

**b. Even assuming there is a legitimate or compelling state interest implicated, the Act does not advance it, and, in fact, does the opposite.**

Even assuming the State’s interest in imposing the discriminatory classification here is legitimate or compelling, the Act cannot survive any standard of review. To satisfy strict scrutiny, the State must show that “the challenged law is

narrowly tailored to serve a compelling government interest and only that interest.” *Cross*, ¶ 22. Indeed, the law must be “the least onerous path that can be taken to achieve the state objective.” *Montana Env’t Info. Ctr.*, ¶ 61. To satisfy rational-basis review, the State must show that its action is “rationally related to a legitimate government interest.” *Snetsinger*, ¶ 19. Defendants can make neither showing here because the Act not only fails to advance the State’s purported interest but, in fact, undermines it.

There is no evidence that barring transgender people from using sex-separated facilities consistent with their gender identity and intersex people from using sex-separated facilities altogether is necessary to achieve the Act’s stated purpose of protecting women—or even that doing so would advance that purpose at all. To begin with, the Act’s premise—that excluding transgender and intersex people would afford women “privacy and safety from acts of abuse, harassment, sexual assault, and violence committed by *men*,” HB 121 § 1(2) (emphasis added)—is misguided, because transgender and intersex women are women. *See, e.g., Perkins Decl.* ¶ 4.

Setting aside that fundamental misapprehension, the Legislature offers no evidence of privacy or safety offenses occurring in public restrooms, changing rooms, or sleeping quarters in Montana, and no evidence that transgender or intersex people have a predisposition toward such offenses. *See Wadsworth v. State*

(1996), 275 Mont. 287, 303, 911 P.2d 1165, 1174 (“[D]emonstrating a compelling interest entails something more than simply saying it is so.” (emphasis in original)). Courts have roundly rejected the unsupported claim that transgender people pose a threat to others simply by using facilities that align with their gender identity. In *Grimm*, for example, the Fourth Circuit observed that the defendant school board did “not present any evidence that a transgender student . . . is likely to be a peeping tom, rather than minding their own business like any other student.” 972 F.3d at 614. The court concluded that the board’s argument about the privacy and security of students in bathrooms was not only “based upon sheer conjecture and abstraction,” but also “marked by misconception and prejudice.” *Id.* at 614–15; *see also Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1052 (7th Cir. 2017) (“What the record demonstrates here is that the School District’s privacy argument is based upon sheer conjecture and abstraction.”). As Plaintiffs explain, transgender and intersex people generally take pains to *avoid* bringing attention to themselves while in sex-separated facilities for their own safety. *See, e.g.*, Reddington Decl. ¶¶ 19–20; Jane Doe Decl. ¶ 18; John Doe Decl. ¶ 28.

The lack of evidence produced by the Legislature is unsurprising since Montana already has robust laws criminalizing abuse, sexual assault, and violence. *See, e.g.*, §§ 45-5-501–45-5-513, MCA (“Sexual Crimes” including sexual assault, sexual intercourse without consent, and indecent exposure); *id.* § 45-5-223

(“Surreptitious visual observation or recordation” in a public place); *id.* § 45-8-221 (“Predatory loitering by sexual offender”). In addition, simple measures such as installing enclosed restroom stalls and urinal dividers are a less onerous way to preserve privacy than excluding transgender people altogether. *See Montana Env’t Info. Ctr.*, ¶ 61 (strict scrutiny requires the State to take “the least onerous path . . . to achieve the state objective”). Given that criminal law already prohibits the conduct the Act purports to address and the availability of less burdensome privacy measures, the Act is not narrowly tailored to serve its stated purpose. Put differently, the Act is nowhere close to being “the least onerous path that can be taken to achieve” the State’s purported objectives. *Montana Env’t Info. Ctr.*, ¶ 61.

Far from supporting the Legislature’s justification for the Act, the evidence belies it. “Twenty-one states, the District of Columbia, and more than 200 cities and counties have adopted nondiscrimination laws allowing transgender people to access sex-segregated facilities that accord with their gender identity,” and “there have not been reports of sexual assaults in bathrooms as a result.” Susan Hazeldean, *Privacy As Pretext*, 104 Cornell L. Rev. 1719, 1731 (2019) (hereinafter “Hazeldean”) (citing surveys and news reports). Among others, an empirical survey conducted in 2019 “found no evidence that privacy and safety in public restrooms changed as a result of the passage” of “gender identity nondiscrimination ordinances for public accommodations.” *Id.* at 1732 (citing

Amira Hasenbush, Andrew R. Flores & Jody L. Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 *Sexuality Rsch. & Soc. Pol’y* 70, 80 (2019)).

The Legislature can do no more than “simply say[] it is so” that the Act protects women. *Wadsworth*, 275 Mont. at 303, 911 P.2d at 1174. The Act therefore cannot survive strict scrutiny. *See id.* at 303–04 (holding that a conflict-of-interest rule adopted “for the singular purpose of avoiding the appearance of impropriety” failed strict scrutiny where “[t]he evidence . . . established that there were no complaints about any appearance of impropriety”).

And, given that the evidence contradicts the Legislature’s claim that barring transgender people from using facilities consistent with their gender identity and intersex people from using sex-separated facilities at all advances anyone’s privacy or safety, the Act is not rationally related to any government interest in privacy and safety. In fact, it is transgender people who are most vulnerable to harassment and violence in sex-separated spaces such as restrooms: “In a recent survey of transgender Americans, 12% reported being verbally harassed in public restrooms within the previous year, while 1% were physically attacked, and 1% were sexually assaulted. Another 9% said someone had denied them access to a bathroom. Perhaps not surprisingly, . . . almost 60% [of transgender people] had avoided

using public restrooms for fear of confrontation.” Hazeldean, *supra*, at 1740; *see e.g.*, Reddington Decl. ¶¶ 19–20; Jane Doe Decl. ¶ 18; John Doe Decl. ¶ 28.

Because there is no justification for the Act’s imposition of restrictions on only transgender and intersex Montanans, and because the Act fails to protect its purported beneficiaries while also harming others, it also fails rational-basis review. *See Snetsinger*, ¶ 27 (holding that policy denying employees health benefits for same-sex partners that are available to opposite-sex couples failed rational-basis review where “there is no justification for treating the two groups differently”); *Cross*, Cause No. DV-23-541, 2023 WL 6392607, at \*14 (holding that SB 99 fails rational-basis review because it treats transgender and cisgender youth differently without justification).<sup>14</sup>

**B. The Act violates Plaintiffs’ fundamental right to privacy.**

Plaintiffs have also shown at least serious questions going to the merits of their claim that the Act violates their constitutional right to privacy. Article II, Section 10 of the Montana Constitution provides: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the

---

<sup>14</sup> Needless to say, if the Act fails rational-basis review, it cannot withstand middle-tier scrutiny. Animus is not a “relevant . . . state interest” and the Act’s discriminatory treatment of transgender people is “arbitrary” because it is unsupported by any evidence that excluding transgender people from using public facilities consistent with their gender identity furthers the safety and privacy of women. *Jacobsen*, ¶¶ 40–41 (setting forth standard for middle-tier scrutiny).

showing of a compelling state interest.” Mont. Const. art. II, § 10. “That the right to privacy is separately protected in the Montana Constitution ‘reflects Montanans’ historical abhorrence and distrust of excessive governmental interference in their personal lives.’” *Cross*, ¶ 22 (quoting *Gryczan*, 283 Mont. at 455, 942 P.2d at 125). That is why “Montana adheres to one of the most stringent protections of its citizens’ right to privacy in the United States”—protections “significantly broader” than those afforded by the U.S. Constitution. *Armstrong v. State*, 1999 MT 261, ¶¶ 34, 41, 296 Mont. 361, 989 P.2d 364.

Montana courts follow a two-part test to determine whether a privacy interest is protected under Article II, Section 10: (1) “[w]hether the person involved had a subjective or actual expectation of privacy,” and (2) “[w]hether society is willing to recognize that expectation as reasonable.” *State v. Nelson* (1997), 283 Mont. 231, 239, 941 P.2d 441, 446. This test confirms that the Act infringes on both Plaintiffs’ “autonomy privacy,” which protects their interest in “making intimate personal decisions or conducting personal activities without observation, intrusion, or interference”; and Plaintiffs’ “informational privacy,” which protects their interest in “precluding the dissemination or misuse of sensitive and confidential information.” *Id.* at 241, 941 P.2d at 448 (quoting *Hill v. National Collegiate Athletic Ass’n*, 7 Cal.4th 1 (1994)).



At the first step of the two-part test, each Plaintiff has an actual expectation of privacy in their decision to use restrooms, changing rooms, and sleeping quarters that correspond with their gender identity. They consider their decisions about where and when to use restrooms and other facilities to perform necessary bodily functions, dress and undress, and sleep to be private. *E.g.*, Reddington Decl. ¶ 19; Jane Doe Decl. ¶ 18; John Doe Decl. ¶ 28; *see Armstrong*, ¶ 33 (explaining that autonomy privacy “protect[s] citizens from . . . governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private”); *Edwards*, Cause No. DV-23-1026, at 20 (noting that the right to privacy “is implicated when the State interferes with one’s ability to make decisions regarding an individual’s body and psyche”).

Each Plaintiff also has an actual expectation of privacy in their transgender or intersex identity, anatomy, genetics, and medical history. The Act requires public entities to restrict access to covered facilities to people based on their “sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth.” HB 121 § 2(12). It further authorizes individuals to sue covered entities for not complying with the Act. *Id.* § 4. The Act would therefore entail governmental and private inquiries into people’s transgender or intersex identity, anatomy, genetics, and medical history. Such information is “sensitive and confidential.” *Nelson*, 283 Mont. at 241, 941

P.2d at 448; *see, e.g.*, McDonald Decl. ¶ 6; Reddington Decl. ¶ 19; Jane Doe Decl. ¶¶ 18–19; John Doe Decl. ¶ 30; *see, e.g.*, *Marquez*, Cause No. DV 21-873, 2022 WL 4486283, at \*5 (finding that a “person’s transgender identity” is “a profoundly private piece of information”); *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) (right to privacy includes right to maintain confidentiality of transgender status); *Ray*, 507 F. Supp. 3d at 932 (same).

At the second step of the test, Plaintiffs’ expectations of privacy are reasonable. As to autonomy privacy, all Montanans have the right to “mak[e] intimate personal decisions” and “conduct[] personal activities without observation, intrusion, or interference.” *Nelson*, 283 Mont. at 241, 941 P.2d at 448 (citation omitted). Decisions about how to express and live in accordance with our own gender identity are deeply intimate and personal. *See Edwards*, Cause No. DV-23-1026, at 20 (“Regulations that interfere with an individual’s ability to self-define and make personal choices concerning their identity infringes on the right to privacy.”); *e.g.*, McDonald Decl. ¶ 6; Reddington Decl. ¶ 19; John Doe Decl. ¶ 30; *cf. Gryczan*, 283 Mont. at 450, 942 P.2d at 122 (noting that “all adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation”). We reasonably expect that the government will not intrude or interfere with those decisions, much less gainsay them.

This is particularly so because, for many transgender people diagnosed with gender dysphoria, living in accordance with their gender identity—including using facilities consistent with their gender identity—is a core component of their medical treatment. *See Grimm*, 972 F.3d at 597 (“Using the school restrooms matching their gender identity is one way that transgender students can affirm their gender and socially transition . . . .”); *Horne*, 115 F.4th at 1107 n.13 (noting that “[f]or social transition to be clinically effective [as a component of treatment for gender dysphoria], it must be respected consistently across all aspects of a transgender individual’s life”). And “the right of each individual to make medical judgments affecting her or his bodily integrity and health . . . free from the interference of the government” is itself a “fundamental privacy right” that the Montana Constitution secures for all Montanans. *Armstrong*, ¶¶ 39, 62; *accord Montana Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 23, 382 Mont. 256, 368 P.3d 1131 (“In pursuing one’s own health, an individual has a fundamental right to obtain . . . medical treatment.”).

As to informational privacy, “the zone of privacy created by [the Montana Constitution] extends to,” among other things, a person’s “medical and psychiatric history.” *Nelson*, 283 Mont. at 241, 941 P.2d 441 at 448. A person therefore has a reasonable expectation of privacy in their transgender or intersex status as well as all the other intensely personal information that the Act lists as the basis for

determining whether an individual is complying with the law. *See* HB 121 § 2(12). Consistent with these principles, a Montana district court found in *Marquez* that a “person’s transgender identity” is “a profoundly private piece of information in which a transgender person has a reasonable expectation of privacy.” No. DV 21-873, 2022 WL 4486283, at \*5; *see also, e.g., Powell*, 175 F.3d at 112 (right to privacy includes right to maintain confidentiality of transgender status); *Ray*, 507 F. Supp. 3d at 932 (same); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (concluding that “sexuality and choices about sex . . . are interests of an intimate nature” protected by the right to privacy).

The district court in *Marquez* underscored that the dangers to transgender people of being forced to disclose their transgender identity are very real. That case concerned legislation limiting transgender people’s ability to amend their birth certificates to reflect their gender identity. *Marquez*, No. DV 21-873, 2022 WL 4486283, at \*4–5. The court noted that “[t]ransgender people who are denied accurate birth certificates are deprived of significant control over where, when, how, and to whom they disclose their transgender identity.” *Id.* at \*5. Such disclosure could “subject[] transgender people to discrimination and harassment in a variety of settings, including employment, healthcare, and interactions with government employees and officials,” and “may even subject them to violence.” *Id.*; *see also, e.g., Reddington Decl.* ¶¶ 19–20; *Jane Doe Decl.* ¶¶ 19–20.

Here, too, the Act potentially forces transgender and intersex Montanans into situations—as routine as using a public restroom—where they could be required to disclose their transgender or intersex identity. Indeed, by requiring transgender people to use facilities inconsistent with their gender identity, the Act publicly “outs” them as transgender every time they use a covered facility. *See* Perkins Decl. ¶ 12; McDonald Decl. ¶ 15; Reddington Decl. ¶ 27; Jane Doe Decl. ¶ 23. In doing so, the Act exposes transgender and intersex Montanans to a heightened risk of discrimination, harassment, and violence. *See* Hazeldean, *supra*, at 1740 (reporting high rates at which transgender people are harassed and assaulted in public restrooms).

In short, the gravity of Plaintiffs’ privacy interest in their intimate personal information cannot be overstated. No compelling state interest justifies the Act’s intrusion on Plaintiffs’ privacy interests. *See* Argument Section II.A.3, *supra*; *Cross*, ¶ 22 (noting that strict scrutiny applies when the fundamental right to privacy is implicated).

**C. The Act burdens Plaintiffs’ right to pursue life’s basic necessities.**

Next, Plaintiffs have shown at least serious questions going to the merits of their claim that the Act burdens their “inalienable rights . . . of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness

in all lawful ways.” Mont. Const. art. II, § 3. “The inalienable right to pursue life’s basic necessities is stated in the Declaration of Rights and is therefore a fundamental right.” *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172.

The Act denies transgender people the basic necessity of access to restrooms and other sex-separated facilities consistent with their gender identity and denies intersex people access to these facilities altogether. Urination, bowel movements, and menstrual hygiene are not optional and people must use restrooms to meet these needs. *See, e.g., Whitnack v. Douglas County*, 16 F.3d 954, 958 (8th Cir.1994) (“[R]easonably adequate sanitation and the ability to eliminate and dispose of one’s bodily wastes without unreasonably risking contamination are basic identifiable human needs . . . .”); *Grimm*, 972 F.3d at 625 (Wynn, J., concurring) (noting that bathrooms are “basic necessities”). People cannot stay for long in spaces where they cannot use the restroom.

But, under the Act, transgender Montanans can access only restrooms that are *inconsistent* with their gender identity—a prospect so uncomfortable and humiliating that many transgender people will forgo spending time in public spaces to avoid it. *See, e.g., Perkins Decl.* ¶¶ 12–13; *McDonald Decl.* ¶¶ 17–19; *Reddington Decl.* ¶¶ 28–30; *Jane Doe Decl.* ¶¶ 25–26; *see Hazeldean, supra*, at 1740–41 (noting that “almost 60% [of transgender Americans] had avoided using public restrooms for fear of confrontation,” and that almost “a third of transgender

people said they limited the amount they ate or drank at least once in the previous year so they did not need to use a public restroom,” which “often had health consequences”); *Grimm*, 972 F.3d at 597 (citing one survey reporting that “[w]hen being forced to use a special restroom or one that does not align with their gender, more than 40% of transgender students fast, dehydrate, or find ways not to use the restroom”). Forcing transgender Montanans into this Hobson’s choice prevents them from “seeking their safety, health and happiness in all lawful ways.” Mont. Const. art. II, § 3. And the Act does not tell intersex people which restrooms they are permitted to use, if they are permitted to use them at all. *See* Argument Section II.D, *infra*. The Act applies even to “hospital[s],” HB 121 § 2(9)(b), making it an obstacle to transgender and intersex Montanans’ access to healthcare that could be the difference between life and death.

The Act imposes an especially heavy burden on Montanans who work (or seek to work) in public buildings or attend (or seek to attend) public schools and universities. The many Montanans who work in public buildings and attend public schools must spend extended time there. They cannot continue in their professions or education without sacrificing “safety [and] health” to use restrooms inconsistent with their gender. Mont. Const. art. II, § 3; *see Simmons v. P & P Contractors, Inc.*, No. 90-1536, 940 F.2d 653, 1991 WL132400, at \*2 (4th Cir. July 22, 1991) (noting that “employees everywhere . . . use[] the restroom out of personal necessity

during the work day”). Thus, the Act impairs Plaintiffs’ right to secure “the most basic of life’s necessities, such as food, clothing, and shelter” and “other essentials of modern life, including health and medical insurance,” through employment and education. *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172 (explaining that “without the right to the opportunity to pursue employment, the right to pursue life’s basic necessities would have little meaning”) (quoting *Butte Community Union v. Lewis* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311–13).

Again, no compelling state interest justifies the Act’s intrusion on Plaintiffs’ right to pursue life’s basic necessities. *See* Argument Section II.A.3, *supra*.

**D. The Act burdens Plaintiffs’ right to due process.**

Finally, Plaintiffs have at least shown serious questions going to the merits of their claim that the Act violates their fundamental right to due process by giving intersex people no notice of how they can comply with the law. Intersex people do not fit in the Act’s restrictive definitions of “female” or “male.” As a result, it is unclear whether they are permitted to use any sex-separated facilities at all.

The Montana Constitution’s Due Process Clause encompasses the “basic principle” that “[a] statute must be drawn with sufficient clarity and definiteness to inform persons of ordinary intelligence what actions are proscribed.” *City of Whitefish v. O’Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025. “A statute is void on its face if it fails to give a person of ordinary intelligence fair



notice that his contemplated conduct is forbidden.” *State v. Dugan*, 2013 MT 38, ¶ 67, 369 Mont. 39, 303 P.3d 755 (citation and internal quotation marks omitted). And a statute is vague as applied if it fails to “provide[] a person with actual notice” or “minimal guidelines to law enforcement.” *Id.*

The Act is unconstitutionally vague as to intersex people like Plaintiff John Doe because it gives them no notice regarding whether the law deems them male or female. The Act recognizes “exactly two sexes, male and female.” HB 121 § 2(12). The premise of this binary classification is that “male” and “female” are unambiguously “determined by . . . biological and genetic indication[s]” such as “naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth.” *Id.* But—reflecting its scientific inaccuracy—this binary scheme simply does not fit intersex people, who are born with other sex traits or reproductive anatomy that are neither only male nor only female. *See Edwards*, Cause No. DV-23-1026, at 20–21 (observing that “the definitions under SB 458,” which are identical to those in the Act, “do not accurately define [intersex people’s] . . . sex”); *Intersex Variations Glossary, supra*. John Doe, for example, has both male genitalia and breast tissue. John Doe Decl. ¶ 5.

As a result, the Act does not give an intersex person of ordinary intelligence fair notice of whether they are required to use male- or female-designated facilities. *See Dugan*, ¶ 66 (“[W]e insist that laws give the person of ordinary intelligence a

reasonable opportunity to know what is prohibited, so that he may act accordingly.”). In fact, the State has admitted in other litigation that the Act’s “definitions might not squarely apply” to intersex people.” *Edwards*, Cause No. DV-23-1026, at 5 (quoting State’s summary judgment briefing). Nor does the Act give Plaintiff John Doe actual notice of how he can follow the law. *See John Doe Decl.* ¶ 31 (“I want to follow Montana law, but medical science defines me as intersex, and I simply have no idea how I can follow HB 121 when I do not fit into its binary gender definitions.”). The lack of even “minimal guidelines” as to how the Act applies to intersex people virtually guarantees it will be arbitrarily and inconsistently applied. *Id.*

The Act is at least as vague as the law enjoined as likely unconstitutional in *Marquez*, No. DV 21-873, 2022 WL 4486283, at \*4–5. That law permitted a transgender person to amend the sex marker on their birth certificate “only if [DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person born in Montana has been changed by surgical procedure.” *Id.* at \*12 (alteration in original). The court in *Marquez* found this law was likely “impermissibly vague in all of its applications” because it “does not define what the [surgical procedure] should be or identify who . . . decides what type of surgery is sufficient to satisfy” the law. *Id.* at \*12–13. Similarly, in *Western Native Voice v. Stapleton*, a court struck down a state law

restricting ballot collection measures as void for vagueness on its face and as applied because, among other things, the statutory definitions were “insufficient to give notice of what is prohibited.” Cause No. DV 20-0377, 2020 WL 8970685, at \*25–27 (Mont. Thirteenth Jud. Dist. Ct., Yellowstone Cnty., Sep. 25, 2020).

Because the Act gives intersex people no notice of whether it classifies them as male or female, it is void for vagueness on its face and as applied to Plaintiff John Doe. *O’Shaughnessy*, 216 Mont. at 440, 704 P.2d at 1025.

### **III. Plaintiffs Will Suffer Irreparable Harm Absent Preliminary Relief.**

Plaintiffs have established irreparable harm here as a matter of law. “[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury.” *Cross*, ¶ 48 (citation omitted). Because Plaintiffs have demonstrated the Act is violating their constitutional rights to equal protection, privacy, to pursue life’s basic necessities, and due process, they have shown they are suffering irreparable harm. *See* Argument Section II, *supra*; *e.g.*, *Planned Parenthood of Mont.*, ¶ 38 (finding irreparable harm where the Court determined the plaintiffs were likely to succeed on their constitutional equal protection and privacy claims).

Moreover, deprivation of these constitutional rights will inflict concrete harms on Plaintiffs and other transgender and intersex Montanans. By forcing transgender people to use covered facilities that do not align with their gender identity, and giving intersex people no notice of whether they can use covered

facilities at all, the Act forces them to choose between three options, each of which is harmful: (1) endure significant physical discomfort by avoiding public restrooms and other sex-separated facilities altogether—an option that is medically risky, will often prove impractical if not impossible, and can cause serious emotional and psychological harm, *see Hazeldean, supra*, at 1740–41; *e.g.*, Jane Doe Decl. ¶ 26; (2) avoid use of government buildings and other public facilities—an option that may preclude them from doing their jobs, continuing their education, or accessing healthcare and the courts, *see Hazeldean, supra*, at 1740; *e.g.*, Perkins Decl. ¶ 12–13; McDonald Decl. ¶¶ 17, 19; Reddington Decl. ¶¶ 28–30; Jane Doe Decl. ¶¶ 25–26; John Doe Decl. ¶¶ 29, 31; or (3) disclose their transgender or intersex identity publicly and face the psychological distress, harassment, and violence that may result, *see, e.g.*, Perkins Decl. ¶ 12; McDonald Decl. ¶ 15; Reddington Decl. ¶¶ 19–20, 23, 27; Jane Doe Decl. ¶¶ 18–19, 23. These harms are all “irreparable with a monetary remedy, which makes [Plaintiffs’] claim[s] appropriate for a preliminary injunction.” *Cross*, ¶ 51.

#### **IV. The Balance of Equities and the Public Interest Weigh Decisively in Favor of an Injunction.**

“When the government opposes a preliminary injunction,” the balance-of-equities and public-interest factors “merge into one inquiry.” *Planned Parenthood of Mont.*, ¶ 39 (citation and internal quotation marks omitted). Here, that inquiry weighs sharply in Plaintiffs’ favor.

To start, Plaintiffs’ “likelihood of success on the merits of [their] constitutional claim[s] . . . tips the merged third and fourth factors decisively in [their] favor.” *Planned Parenthood of Mont.*, ¶ 40 (citation omitted). The balance of equities tips in Plaintiffs’ favor “because ‘the government suffers no harm from an injunction that merely ends unconstitutional practices.’” *Id.* (quoting *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017)). And “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Id.* (citations and internal quotation marks omitted).

Further, as detailed above, enforcement of the Act prevents transgender and intersex Montanans from safely using restrooms, changing rooms, and sleeping quarters at work, at school, in hospitals, and in courthouses. *See* Argument Section II.C, *supra*. The Act therefore compels Plaintiffs and others to choose between excluding themselves from a sweeping range of public spaces and disclosing highly personal information in a manner that risks exposing them to discrimination, harassment, and violence. *See id.*

By contrast, there are no interests favoring enforcement of the Act while this Court adjudicates Plaintiffs’ claims. A preliminary injunction would merely maintain the status quo prior to the Act’s enactment, when transgender and intersex people were not barred from using sex-separated facilities consistent with their gender identity and neither the State nor the public suffered significant hardship.

Although proponents of the Act suggest that cisgender women will be harmed if transgender and intersex women are allowed to use women’s facilities, *see* HB 121 § 1, that purported fear is not borne out by the evidence. To the contrary, hundreds of jurisdictions have adopted laws allowing transgender and intersex people to use sex-separated facilities that align with their gender identity and the evidence reveals no deleterious effects on privacy or safety. *See* Argument Section II.A.3, *supra*; *e.g.*, McDonald Decl. ¶ 13; Reddington Decl. ¶¶ 11, 16; Jane Doe Decl. ¶¶ 12, 17; John Doe Decl. ¶ 27.

**V. Plaintiffs Should Not Be Required to Post a Bond.**

The Court should exercise its discretion under § 27–19–306(1), MCA, to allow Plaintiffs to forgo posting a bond as a precondition to obtaining injunctive relief. Although an injunction bond may be required “for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained,” it may be waived in the interests of justice. *See* § 27–19–306(1), MCA. Here, Defendants do not stand to suffer any pecuniary harm if a preliminary injunction is entered. *See, e.g., Cross*, Cause No. DV-23-541, 2023 WL 6392607, at \*18–19 (preliminarily enjoining SB 99 without requiring bond); *Kalarchik*, Cause No. ADV-2024-261, at 41 (preliminarily enjoining 2024 Policy and 2022 Rule without requiring bond). Therefore, no bond should be required.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court:

- (a) Enter a temporary restraining order, followed by a preliminary injunction, enjoining Defendants, as well as their agents, employees, representatives, and successors, from enforcing the Act, directly or indirectly; and
- (b) Granting any other relief the Court deems just.

Dated: March 27, 2025

Respectfully submitted,

By: /s/ Alex Rate  
Alex Rate

Alex Rate  
**ACLU of Montana**  
P.O. Box 1968  
Missoula, MT 59806-1968  
(406) 224-1447  
[ratea@aclumontana.org](mailto:ratea@aclumontana.org)

Terry Ding\*  
**ACLU Foundation**  
125 Broad Street, 17<sup>th</sup> Floor  
New York, NY 10004  
(212) 549-2500  
[ttding@aclu.org](mailto:ttding@aclu.org)

Julie Murray\*  
**ACLU Foundation**  
915 15th Street, NW  
Washington, DC 20005  
(202) 675-2326  
[jmurray@aclu.org](mailto:jmurray@aclu.org)

Wendy Heipt\*  
**Legal Voice**  
907 Pine St Ste 500  
Seattle, WA 98101  
(206) 682-9552  
[wheipt@legalvoice.org](mailto:wheipt@legalvoice.org)

Robin Turner  
**Legal Voice**  
P.O. Box 582  
Missoula, MT 59806  
(206) 682-9552  
[rturner@legalvoice.org](mailto:rturner@legalvoice.org)

*\*Pro Hac Vice* applications  
forthcoming



Alex Rate  
**ACLU of Montana**  
P.O. Box 1968  
Missoula, MT 59806-1968  
(406) 224-1447  
[ratea@aclumontana.org](mailto:ratea@aclumontana.org)

Terry Ding\*  
**ACLU Foundation**  
125 Broad Street, 17<sup>th</sup> Floor  
New York, NY 10004  
(212) 549-2500  
[ttding@aclu.org](mailto:ttding@aclu.org)

Wendy Heipt\*  
**Legal Voice**  
907 Pine St Ste 500  
Seattle WA 98101  
(206) 682-9552  
[wheipt@legalvoice.org](mailto:wheipt@legalvoice.org)

Julie Murray\*  
**ACLU Foundation**  
915 15th Street, NW  
Washington, DC 20005  
(202) 675-2326  
[jmurray@aclu.org](mailto:jmurray@aclu.org)

Robin Turner  
**Legal Voice**  
P.O. Box 582  
Missoula, MT 59806  
(206) 682-9552  
[rturner@legalvoice.org](mailto:rturner@legalvoice.org)

**MONTANA FOURTH JUDICIAL DISTRICT COURT,  
MISSOULA COUNTY**

---

CASEY PERKINS, et al.,

Plaintiffs,

vs.

THE STATE OF MONTANA, and  
AUSTIN KNUDSEN, in his official  
capacity as Attorney General of the  
State of Montana,

Defendants.

---

Cause No. DV 25-282

Hon. Shane Vannatta

**DECLARATION OF  
CASEY PERKINS  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION AND  
TEMPORARY RESTRAINING  
ORDER**

I, Casey Perkins, declare as follows,

1. I am a transgender woman and one of the Plaintiffs in this case. I submit this Declaration in support of Plaintiffs' Motion for Preliminary Injunction against the enforcement of Montana House Bill (HB) 121.

2. I am 41 years old and I reside in Helena, Lewis & Clark County, Montana. I am a single parent.

3. I currently work as a License Examiner for the Montana Department of Labor and Industry (DLI) in the Employment Standards Division. I have worked for DLI since December 2015. My understanding is that HB 121 applies to DLI buildings.

4. I was assigned the gender designation of male at birth, but my gender identity is female. I began living and presenting as the woman I know myself to be during the COVID-19 pandemic, meaning I left in-person work with the outward appearance of a man and returned to in-person work as a woman.

5. My boss at the time was supportive. DLI Human Resources created a unisex restroom for me in DLI's former location at 1805 Prospect Ave in Helena. DLI has since moved locations.

6. DLI's current location at 301 South Park Avenue in Helena previously had a unisex restroom on the fifth floor, which I used. However, in the summer of 2023, that unisex restroom flooded and was permanently closed. There is a remaining unisex single-occupancy restroom in the building basement, but it is five

floors down from where I work and very time-consuming and inconvenient to access.

7. There are two multi-stall restrooms on the fourth floor of the building, which is the floor I work on. These restrooms are gender designated. I will use the women's multi-stall restroom if my floor is empty, typically early in the morning. Otherwise, I do not use the restroom at work. I typically work half days at DLI and I "hold it" until my shift has ended and I go home for the day. In an emergency situation, I would use the fourth-floor restrooms, but it is not worth the hassle to do so regularly.

8. Although I typically do not use the restroom while at work unless it is an emergency situation, HB 121 would not even give me the option of using the restroom corresponding to my gender identity. I would not feel safe using the men's restroom. It would be demeaning and uncomfortable, and it would out me as a transgender woman. I'm scared that I would face harassment and maybe even violence.

9. I like to take my child to Memorial Park, a public park located on Lyndale Avenue in Helena. My understanding is that HB 121 applies to this park.

10. Memorial Park hosts events, holds a playground, and hosts ice skating in the winter. The restrooms at Memorial Park are multi-stall and separated by

gender. I am most comfortable using the women's restroom, which aligns with my gender identity.

11. HB 121 would make it very difficult for me and my child to spend time in a public space. Like everyone else in Montana, I need to go to public places like the DMV, the library, city hall, the park, and government offices. Often, I need to spend several hours in these spaces, which means I need to use the restroom.

12. I deserve to be treated fairly and allowed to meet my basic needs in the restroom or changing room that I belong in. But this law requires me to use men's restrooms, which is humiliating and will out me as transgender to strangers whenever I use a public restroom, because I present as a woman. I do not feel safe or comfortable using men's restrooms as a transgender woman. This means I may have no choice but to stop spending time in public spaces because of HB 121.

13. I do not want to avoid using public spaces or forego using bathroom facilities while in public spaces.

I, Casey Perkins, declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

Signed on February 17, 2025, in Helena, Lewis & Clark County.

/s/ Casey Perkins  
Casey Perkins

Alex Rate  
**ACLU of Montana**  
P.O. Box 1968  
Missoula, MT 59806-1968  
(406) 224-1447  
ratea@aclumontana.org

Terry Ding\*  
**ACLU Foundation**  
125 Broad Street, 17<sup>th</sup> Floor  
New York, NY 10004  
(212) 549-2500  
ttding@aclu.org

Wendy Heipt\*  
**Legal Voice**  
907 Pine St Ste 500  
Seattle WA 98101  
(206) 682-9552  
wheipt@legalvoice.org

Julie Murray\*  
**ACLU Foundation**  
915 15th Street, NW  
Washington, DC 20005  
(202) 675-2326  
jmurray@aclu.org

Robin Turner  
**Legal Voice**  
P.O. Box 582  
Missoula, MT 59806  
(206) 682-9552  
rtturner@legalvoice.org

*\*Pro Hac Vice* applications  
forthcoming

**MONTANA FOURTH JUDICIAL DISTRICT COURT,  
MISSOULA COUNTY**

CASEY PERKINS, an individual;  
SPENCER MCDONALD, an  
individual; KASANDRA  
REDDINGTON, an individual; JANE  
DOE, an individual; and JOHN DOE,  
an individual,

Plaintiffs,

vs.

STATE OF MONTANA;  
GREGORY GIANFORTE, in his  
official capacity as Governor of  
the State of Montana; AUSTIN

Cause No. DV 25-282

Hon. Shane Vannatta

**DECLARATION OF  
SPENCER MCDONALD  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION AND  
TEMPORARY RESTRAINING  
ORDER**

---

KNUDSEN, in his official capacity  
as Attorney General,

Defendants.

---

I, Spencer McDonald, declare as follows,

1. I am a Plaintiff in this action. I have personal knowledge of the facts set forth in this declaration and could and would testify competently to those facts if called as a witness.

2. I submit this declaration in support of Plaintiffs' Motion for a Preliminary Injunction and Temporary Restraining Order.

3. I understand that Montana House Bill 121 (HB 121) will apply to state buildings, local government buildings, public parks, and other places owned and operated by the State.

4. I am a 21-year-old senior at Carroll College, where I study political science and pre-law. I live in Helena, Lewis and Clark County.

5. I am a transgender man. I came out as a transgender man nearly three years ago. Every day, I know that when I look in the mirror, I continue to love and recognize the face and body that look back at me. Transitioning saved my life. Because of my transition, everything in my life has improved. I am kinder, more determined, outgoing, friendly, and courageous, all because I am finally home.

6. My status as a transgender man is something that I consider private. I should have the right to share that information when, where, and with whom I choose.

7. I work as a legislative session intern for the Montana Democratic Party. My work term is from January 2025 through the end of the 2025 Montana Legislative session. I currently work 12 hours per week, spending four hours in the Capitol building three days per week. I receive a stipend and college credits for this internship. My work duties include supporting legislators, completing policy research, and following the directives of full-time staff. To complete these duties, I am expected to be present in committee hearing rooms, offices, or legislator spaces in the Capitol.

8. My understanding of HB 121 is that it applies to the Capitol building.

9. My desk is in the basement of the Capitol building, in room 64, known as the Democrat “bullpen.”

10. The nearest restrooms to my office are two single-occupancy, non-gender designated restrooms in the basement. Outside these restrooms, there is a sign designating the hallway for staff only. However, members of the public use these restrooms along with legislators and staff members. These restrooms are typically in high demand.

11. I recently learned that there is one additional set of single-occupancy bathrooms in the Capitol. They are in the Senate Leadership Offices. The entrance is not in the public hallway. You must enter the Senate Leadership offices to even access the hallway where those restrooms are located. While they are technically public, I would not feel comfortable using those restrooms, not only because I am an intern, but also because the leadership of the Senate is pushing HB 121 and other bills that attack my community.

12. The remainder of the public restrooms in the Capitol building are multi-stall and gender designated.

13. If I am at my desk in the basement, I will use a single-occupancy restroom. When the single-occupancy restroom is in use, or when I am in other areas of the Capitol building, I use the multi-stall restrooms designated for men, because they align with my gender identity. I have never had any problems related to using the male restrooms in the Capitol building.

14. My job often requires me to be present near the House of Representative's chamber on the third floor of the Capitol building. The nearest restroom is a multi-stall men's restroom on the fourth floor above the chamber, so I use that restroom as well.

15. Under HB 121, the State could force me to use the women's restroom. I would be concerned about my safety and peace if I had to do that. I present as a



man and if I were to use the women's restroom, it would cause disruption and expose me to harassment and discrimination. Additionally, using the women's bathroom would out me as transgender.

16. I watched the Senate Judiciary hearings on HB 121 a few weeks ago. One of the bill's proponents spoke about her fear of sharing a restroom with men. An opponent of the bill then described recent harassment they had experienced in the women's restroom due to their appearance. I anticipate that I would experience similar harassment if I were forced to use the women's restroom.

17. I will have a difficult time doing my job under HB 121. If I cannot access the single-occupancy restroom in the basement, I would likely choose not to use the restroom at all because I do not feel safe or comfortable using the women's multi-stall restrooms.

18. I am a near-lifelong Montanan who enjoys the beauty of the outdoors. In the summer, I enjoy camping and recreating at Canyon Ferry Lake State Park. I often use campgrounds at Canyon Ferry with my friends. The campgrounds at my favorite campsite have multi-stall, gender-designated restrooms. I would not feel safe or comfortable using the men's multi-stall restrooms, as HB 121 requires me to do.


19. HB 121 would make it very difficult for me to spend time in a public space. I need to go to the DMV, the library, city hall, and government offices just

like every other Montanan. I sometimes need to spend several hours in these spaces and need access to restrooms. I deserve to be treated fairly and allowed to meet my basic needs in the restrooms that I belong in. This law will force me to make painful decisions and potentially withdraw from spending time in public spaces that I love, as well as prevent me from taking care of necessary affairs that I can only conduct in public buildings.

20. By adopting HB 121, the State of Montana is telling me that my presence and work are not valued.

I, Spencer McDonald, declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

Dated: February 17, 2025.



---

Spencer McDonald

Alex Rate  
**ACLU of Montana**  
P.O. Box 1968  
Missoula, MT 59806-1968  
(406) 224-1447  
ratea@aclumontana.org

Terry Ding\*  
**ACLU Foundation**  
125 Broad Street, 17<sup>th</sup> Floor  
New York, NY 10004  
(212) 549-2500  
ttding@aclu.org

Wendy Heipt\*  
**Legal Voice**  
907 Pine St Ste 500  
Seattle WA 98101  
(206) 682-9552  
wheipt@legalvoice.org

Julie Murray\*  
**ACLU Foundation**  
915 15th Street, NW  
Washington, DC 20005  
(202) 675-2326  
jmurray@aclu.org

Robin Turner  
**Legal Voice**  
P.O. Box 582  
Missoula, MT 59806  
(206) 682-9552  
rtturner@legalvoice.org

*\*Pro Hac Vice* applications  
forthcoming

**MONTANA FOURTH JUDICIAL DISTRICT COURT,  
MISSOULA COUNTY**

CASEY PERKINS, an individual;  
SPENCER MCDONALD, an  
individual; KASANDRA  
REDDINGTON, an individual; JANE  
DOE, an individual; and JOHN DOE,  
an individual,

Plaintiffs,

vs.

STATE OF MONTANA;  
GREGORY GIANFORTE, in his  
official capacity as Governor of  
the State of Montana; AUSTIN  
KNUDSEN, in his official capacity

Cause No. DV 25-282

Hon. Shane Vannatta

**DECLARATION OF  
KASANDRA REDDINGTON  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION AND  
TEMPORARY RESTRAINING  
ORDER**

---

as Attorney General,

Defendants.

---

I, Kasandra Reddington, declare as follows,

1. I am a Plaintiff in this action. I am over 21 years of age. I have personal knowledge of the facts contained in this declaration, and I am competent to testify about them.

2. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order to prevent the enforcement of Montana House Bill (HB) 121.

3. I understand that HB 121 requires me to use restrooms, changing rooms, and sleeping quarters that are designated for the sex I was assigned at birth, regardless of my gender identity, and applies to public facilities, including my workplace and state facilities I visit, such as public parks.

4. I am a Montana resident. I currently reside in Helena, Lewis and Clark County.

5. I was assigned a sex designation of male when I was born, but I identify as agender and transfeminine, which means I identify as more feminine than masculine, but not as a specific gender.

6. I am currently a full-time state employee working at Helena College as the College's Accessibility Services Coordinator. Helena College is a two-year public educational institution within the Montana University System.

7. My understanding of HB 121 is that it applies to Helena College.
8. Helena College has two campuses: The Donaldson Campus is located at 1115 N. Roberts Street in Helena and the Airport Campus is located at 2300 Airport Road in Helena.
9. I have worked at Helena College for eight years. My job has two components. First, I run the day-to-day operations of the Accessibility Services Office. I meet with students to determine and provide disability accommodations. I also coordinate with faculty, staff, and the college cabinet to ensure that student accessibility needs are met. Second, I am an academic advisor with the TRIO program, where I connect disadvantaged students with services.
10. My office is in the East End Advising Office on Donaldson Campus. The Donaldson Campus is a three-story building that holds campus administration and classes for humanities, cosmetology, and nursing programs. Most of Helena College's student events happen on Donaldson Campus. Additionally, many members of the public come to Donaldson Campus for community education and community events.
11. When I am at the Donaldson Campus, I use the restrooms closest to my office, which are multi-stall and separated by gender. These restrooms are used by employees, students, and members of the public. I use the women's restroom, which aligns with my gender identity. Doing so allows me to attend to my personal

needs with privacy and dignity. I have never had any issues in my workplace related to my use of a restroom consistent with my gender identity.

12. My work building also has one single-occupancy restroom, but it is farther away from my office than the multi-stall restroom I use. I would need to walk past two multi-stall women's restrooms before I reach the single-occupancy restroom. Because of a health issue, I often must use the restroom urgently and might not be able to get to the single-occupancy restroom in time to use it. The single-occupancy restroom used to be a men's room and is still commonly used by male students and staff given that history. This is another reason I am less comfortable waiting for this restroom.

13. I occasionally travel to the University of Montana–Missoula campus for work. This campus has several multi-stall restrooms designated by gender, and those are my only restroom options.

14. Additionally, about once a month, my employment requires me to work at Helena College's Airport campus. I use space in the building foyer as my office during these visits.

15. There are no single-stall restrooms at the Airport campus. All restrooms there are multi-stall and segregated by gender. These restrooms are used by employees, students, and members of the public.

16. At the Missoula Campus and the Airport campus, I use the women's restrooms, which align with my gender identity and allow me to attend to my personal needs with privacy and dignity. I have never had any issues related to my use of a restroom at these campuses consistent with my gender identity.

17. Outside of work, I enjoy visiting Montana state public parks, which I understand will also be regulated by HB 121. My favorite public park is Spring Meadow Lake State Park, which is an urban, day-use park on Helena's western edge. I visit Spring Meadow Lake State Park very often—several times each month. I use the multi-stall and gender-segregated restrooms. There are also single-use pit toilets, but like most people I know, I prefer to use the multi-stall restrooms with modern plumbing because they are cleaner, more accessible, and more user-friendly. I have not had an issue using women's multi-stall restrooms at state parks.

18. At state parks and in other public spaces, I use the restroom that aligns with my gender identity, allowing me to attend to my personal needs with dignity and safety.

19. I expect and value my privacy while using restroom facilities in public spaces. Because I am transgender, I have had my life and safety threatened numerous times, both online and in person. I have been harassed and sexually harassed. I have been denied jobs. I have been denied healthcare access by a provider. I have faced the loss of family, friends, and relationships. Given this, I

tend to be extremely cautious and try to keep my head down when I use public restrooms.

20. Early in my transition, I still used the men's restroom in multiple places. When I did, I was confronted in those restrooms and asked to use the women's restroom. Although this is less of a problem for me now that I use women's restrooms, I still minimize use of public restrooms because I'm scared of the risk of discrimination and conflict.

21. In all public spaces, I seek to live my life in safety and with dignity.

22. If HB 121 remains in effect, I will be forced into an impossible situation.

23. If I were forced to use the men's multi-stall bathroom, which does not align with my gender identity, I fear that I would have to face the intrusive questions and harassment I received early in my transition. I am also concerned that I would be outed as a transgender woman and experience violence.

24. If I continue to use the women's restroom, I potentially threaten the workplace I love and the service I provide to the student community, because someone could sue the College under HB 121. I am concerned about the challenges faced by my workplace and the College's ability to serve students.

25. If I had to start using the single-stall restroom in the Donaldson Campus building where I work, it would be inconvenient because it is farther from



my office than the women's restroom. Also, as I explained above, I often must use the restroom urgently because of a medical issue, so I am very concerned that I would not have time to get to the single-stall restroom when I need it. The problem becomes worse if the single-stall restroom is occupied by someone else, as I would then have to backtrack and go to the men's restroom.

26. Another problem is that in some of my workplaces, such as the Airport Campus, there are only multi-stall, gender-segregated restrooms, so I would be required to use the men's restroom under HB 121.

27. Using a men's restroom would dramatically impact my safety. It would out me to any stranger, dramatically increasing the risk that I would face violence and malicious identification. It would also affect my relationships with students and co-workers. This would make me much more uncomfortable and unsafe when I am just trying to go about my day.

28. If HB 121 remains in effect, I would also not be able to enjoy the state parks because I would not feel comfortable or safe being required to use the men's restrooms there.

29. I understand the point of HB 121's regulation of places like public colleges and state parks is to make it impossible for me to continue using multi-stall bathrooms that align with my gender identity. Under HB 121, even if I don't face formal punishments or consequences for using bathrooms aligned with my


gender identity, I fear that doing so will lead to invasive questioning, harassment, and unwanted attention because HB 121 tells the public that I don't belong there.

30. I also do not want to avoid using public spaces or forego using bathroom facilities while in public spaces. It is not realistic for me to be in public places, including my office and recreational areas, for a full working day and recreating for several hours without access to bathroom facilities. It would be painful and could lead to infections and other physical harm. I also do not think it would be fair to expect me to do that. My cisgender colleagues and neighbors do not have to deal with this humiliation and physical suffering just to be in public spaces.

31. I feel like by adopting HB 121, the State of Montana is telling me that I am not a valued state employee and member of the community.

I, Kasandra Reddington, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Signed on February 17, 2025, in Helena, Lewis & Clark County

  
\_\_\_\_\_  
Kasandra Reddington

Alex Rate  
**ACLU of Montana**  
P.O. Box 1968  
Missoula, MT 59806-1968  
(406) 224-1447  
ratea@aclumontana.org

Terry Ding\*  
**ACLU Foundation**  
125 Broad Street, 17<sup>th</sup> Floor  
New York, NY 10004  
(212) 549-2500  
ttding@aclu.org

Wendy Heipt\*  
**Legal Voice**  
907 Pine St Ste 500  
Seattle WA 98101  
(206) 682-9552  
wheipt@legalvoice.org

Julie Murray\*  
**ACLU Foundation**  
915 15th Street, NW  
Washington, DC 20005  
(202) 675-2326  
jmurray@aclu.org

Robin Turner  
**Legal Voice**  
P.O. Box 582  
Missoula, MT 59806  
(206) 682-9552  
rtturner@legalvoice.org

*\*Pro Hac Vice* applications  
forthcoming

**MONTANA FOURTH JUDICIAL DISTRICT COURT,  
MISSOULA COUNTY**

CASEY PERKINS, an individual;  
SPENCER MCDONALD, an  
individual; KASANDRA  
REDDINGTON, an individual; JANE  
DOE, an individual; and JOHN DOE,  
an individual,

Plaintiffs,

vs.

STATE OF MONTANA;  
GREGORY GIANFORTE, in his  
official capacity as Governor of  
the State of Montana; AUSTIN

Cause No. DV 25-282

Hon. Shane Vannatta

**DECLARATION OF  
JANE DOE  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION AND  
TEMPORARY RESTRAINING  
ORDER**

---

|   |  |
|---|--|
| KNUDSEN, in his official capacity<br>as Attorney General, |  |
|---|--|

Defendants.

---

I, Jane Doe, declare as follows:

1. I am a Plaintiff in this action. I am 25 years old, have personal knowledge of the facts contained in this declaration, and am competent to testify about them.

2. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order to prevent the enforcement of Montana House Bill (HB) 121.

3. I understand that HB 121 requires me to use restrooms, changing rooms, and sleeping quarters designated for the sex I was assigned at birth, regardless of my gender identity, and applies to public facilities, including my workplace and public spaces I often visit.

4. I was born and raised in Helena, Lewis and Clark County, Montana, and I currently reside there.

5. My sex assigned at birth was male, but I identify as a woman. I have experienced discomfort surrounding my assigned sex and have had symptoms of gender dysphoria since I was in middle school. By the time I was in college, I understood that I was transgender. I have been diagnosed with gender dysphoria.

6. I transitioned when I was 22 years old and began living as the woman I know myself to be. I have worked with medical and mental health providers to help me bring my physical appearance and presentation into alignment with my gender identity. I have been taking feminizing hormone therapy as part of the treatment for my gender dysphoria since January of 2022.

7. I am a graphic designer in the Montana State Print & Mail Department, Government Services Division, where I have worked for nearly two and a half years. My day-to-day duties include utilizing templates for every agency and department's business card printing and other frequent print job needs, preparing sent files to be printed and produced, designing materials such as brochures and logos from scratch, as well as cleaning and maintaining mailing lists of protected personal information used to mail important documents such as vehicle renewal postcards or important tax information.

8. I work in a State Print & Mail Department warehouse at 1698 A St, Helena, MT 59601. My understanding is that HB 121 applies to the warehouse.

9. The warehouse is split into two halves. One half holds the print shop, which is a one-level warehouse space. The other half of the building is divided into two floors and holds office spaces. My cubicle is in the office portion of the building.

10. There are three restroom locations in the warehouse I work in.

Upstairs in the office portion, there are two gender-designated single-occupancy bathrooms. Downstairs in the office portion, there are gender-designated multi-stall bathrooms. The shop floor has one unisex bathroom.

11. I most often use the women's single-occupancy bathroom upstairs. I also use the women's multi-stall bathroom downstairs when the bathroom upstairs is unavailable. I use the women's bathroom because it aligns with my gender identity and doing so protects my privacy and dignity.

12. I started using the women's bathroom during my transition. I have never had any problems related to my use of the women's bathroom at work.

13. I don't use the single unisex restroom on the shop floor because it is often occupied. I would not feel comfortable using that space knowing that the unisex bathroom is in high demand. The shop floor bathroom is also significantly farther from my office than the gender-designated bathrooms that I use.

14. Outside of work, I enjoy visiting public parks. I visit parks that are run by the State of Montana as well as parks run by local municipalities.

15. Last summer I went to Giant Springs State Park in Great and Sluice Boxes State Park, both places where I used the public women's restroom with no issues. I plan to continue to visit Montana's state parks.

16. My understanding is that HB 121 will apply to these public parks.

17. At state parks and in other public spaces, I use the women's bathroom when there is a choice. This affords me privacy and dignity. I have not had any issues using the women's restrooms at public parks.

18. I value my privacy and safety when I use public bathroom facilities. I know that transgender people face harassment and violence in public, and especially in bathrooms, so I am very careful when using public bathrooms. I try not to draw any attention to myself and get in and out of the bathroom as quickly as possible.

19. I have faced discrimination for being trans in both my professional and personal life. My transgender identity is private and personal to me, and being outed to a stranger causes me anxiety because I do not know if the stranger will discriminate against me based on my transgender status. I am very well aware of the kind of discrimination and humiliation that transgender people commonly face.

20. In my personal life, most of my family has effectively disowned me because I am trans, and in the past one of my parents kicked me out of my home. I know that if my family can treat me like that, people who do not know me could be even more cruel. I currently do everything in my power to avoid situations where I might face violence or discrimination, as I know that it is very common for

transgender people to experience these consequences of people learning they are transgender.

21. All I seek is to live my life safely and with dignity, and to be treated equally with everyone else when I am in public.

22. But HB 121 makes that impossible for me. It forces me to make an awful choice.

23. If I were to use the men's bathroom, as HB 121 requires me to do, it would not only be humiliating, but also dramatically increase the risk that I will face harassment and violence, because I do not live or present as a man. It would out me as a transgender person to any stranger who sees me in the bathroom. It could also affect my relationships with my co-workers. This would make me feel very uncomfortable and anxious as I go about my day.

24. If I were to continue using the women's restroom, not only would I be violating HB 121, but I would put my job at risk. I would open my employer up to liability under HB 121 and potentially give them a reason to terminate my employment.

25. If HB 121 remains in effect, I would also not feel comfortable or safe using the men's bathroom at public parks, so I would visit them less or stop going to them at all.



26. I simply cannot avoid using public bathrooms. It is not realistic for me to be at my office for hours and hours without access to bathroom facilities. This would be hugely uncomfortable and perhaps lead to health issues. I am not sure how I would be able to continue working in the Montana State Print & Mail Department under HB 121.

27. I feel like by adopting HB 121, the State of Montana is telling me that I don't deserve the same dignified treatment as other Montanans and that I am not welcome in public spaces.

I, Jane Doe, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Signed on February 25, 2025 in Lewis & Clark County, Montana.

/s/ Jane Doe

Jane Doe

Alex Rate  
**ACLU of Montana**  
P.O. Box 1968  
Missoula, MT 59806-1968  
(406) 224-1447  
ratea@aclumontana.org

Terry Ding\*  
**ACLU Foundation**  
125 Broad Street, 17<sup>th</sup> Floor  
New York, NY 10004  
(212) 549-2500  
ttding@aclu.org

Wendy Heipt\*  
**Legal Voice**  
907 Pine St Ste 500  
Seattle WA 98101  
(206) 682-9552  
wheipt@legalvoice.org

Julie Murray\*  
**ACLU Foundation**  
915 15th Street, NW  
Washington, DC 20005  
(202) 675-2326  
jmurray@aclu.org

Robin Turner  
**Legal Voice**  
P.O. Box 582  
Missoula, MT 59806  
(206) 682-9552  
rtturner@legalvoice.org

*\*Pro Hac Vice* applications  
forthcoming

**MONTANA FOURTH JUDICIAL DISTRICT COURT,  
MISSOULA COUNTY**

CASEY PERKINS, an individual;  
SPENCER MCDONALD, an  
individual; KASANDRA  
REDDINGTON, an individual; JANE  
DOE, an individual; and JOHN DOE,  
an individual,

Plaintiffs,

vs.

STATE OF MONTANA;  
GREGORY GIANFORTE, in his  
official capacity as Governor of  
the State of Montana; AUSTIN

Cause No. DV 25-282

Hon. Shane Vannatta

**DECLARATION OF  
JOHN DOE  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION AND  
TEMPORARY RESTRAINING  
ORDER**

---

KNUDSEN, in his official capacity  
as Attorney General,

Defendants.

---

I, John Doe, declare as follows,

1. I am a Plaintiff in this action. I am over 21 years of age, have personal knowledge of the facts contained in this declaration, and am competent to testify about them.

2. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction against the enforcement of Montana House Bill (HB) 121.

3. I have lived in Montana for over 40 years and currently reside in Missoula, Missoula County.

4. I was assigned the sex designation of male at birth, but I am intersex, meaning I meet the criteria for male gender, female gender, and unknown gender in different ways. I have been diagnosed with de la Chapelle syndrome, which is one of many intersex possibilities, and means that I have two X chromosomes and the X chromosome inherited from my father is SRY-positive. The SRY protein is typically located on a Y chromosome and directs the development of sexual characteristics. I have not had my gametes tested, but individuals with de la Chapelle syndrome are typically found to produce no sperm cells.

5. I have both male genitalia and breast tissue. My body is not capable of producing the testosterone level that is typically associated with men and is more in

line with the testosterone level of women. I use hormone replacement therapy to raise my testosterone levels in order to have a normal libido, develop muscle mass, increase focus, and treat depression.

6. As I understand it, HB 121 states that “in human beings, there are exactly two sexes, male and female,” which are “determined by the biological and genetic indication of male or female,” including chromosomes, gonads, and internal and external genitalia.

7. But there are a variety of ways in which physical sex-related traits—including external genitalia, internal reproductive organs, chromosomes, and/or hormone production and response—can differ from the narrow, binary definitions of “male” and “female” in HB 121.

8. For example, I was born with traits that do not fit within either the definition of “male” or the definition of “female” in HB 121. It appears there is no place for me in HB 121’s classification of human beings. I believe HB 121 denies my existence as an intersex citizen of the state.

9. I live as a man and identify as demi-male. My status as an intersex person is a private and personal piece of information and my gender identity is a private and personal decision.

10. Because I identify as male, I typically use restrooms designated for men and have never encountered a problem doing so. Using men's restrooms allows me to attend to my personal needs with dignity and safety.

11. I expect and value my privacy while using restroom facilities in public spaces.

12. I regularly visit the Missoula Public Library for an ongoing gaming group, where I play social deduction and board games with both friends and members of the public. My understanding is that HB 121 applies to public libraries.

13. Our gaming group usually meets on the third or fourth floors of the library. The only restrooms on the fourth floor are multi-stall and designated by gender.

14. At the library, I regularly use the men's restrooms to attend to my basic needs, as that corresponds with my gender identity.

15. Under HB 121, I am not sure if I could continue to use the men's restrooms at the Montana Public Library. In fact, I am not sure if I can use any gender-designated restrooms at all, because I do not conform to the law's definition of either "female" or "male."

16. If I were to continue using the library's men's restroom, under HB 121 I may not be using the correct facilities because I am not "male" under the law's definition, which could subject me to harassment and the library to legal exposure.

17. If I were to use the library's women's restroom, under HB 121 I may not be using the correct facilities because I am also not "female" under the law's definition. And other patrons are likely to perceive me as male, which could subject me to harassment or worse, and the library to legal exposure.

18. I also regularly visit the University of Montana campus to attend events, plays, and movies, and visit the University bookstore. I attend concerts at the Adams Center stadium, which is a University facility. My understanding is that HB 121 applies to University of Montana facilities.

19. While at the University and the Adams Center, I use the multi-stall men's restrooms to attend to my basic needs, as that corresponds with my gender identity.

20. Under HB 121, I am not sure if I could continue to use the men's restrooms at the University of Montana. I do not know if I can use any gender-designated restrooms at all, because I do not conform to the law's definition of either "female" or "male."

21. If I were to continue using the University's men's restrooms, under HB 121 I may not be using the correct facilities because I am not "male" as the law defines it, which could subject me to harassment and the University to legal exposure.

22. If I were to use the University's women's restroom, under HB 121 other patrons are likely to perceive me as male, which could subject me to harassment or worse, and the University to legal exposure.

23. My spouse and I like to unwind at Splash Montana, which is a water park located at Playfair Park and owned by the City of Missoula. My understanding is that HB 121 applies to Splash Montana.

24. We enjoy using the park on recreation nights for adults only. I use the men's changing room at Splash Montana as that corresponds with my gender identity.

25. If I were to continue using Splash Montana's men's changing room, under HB 121 I may not be using the correct facilities, which could subject me to harassment and the City of Missoula to legal exposure.

26. In all public spaces, I seek to live my life in safety and with dignity.

27. I have never encountered any problems when using bathrooms facilities that correspond to the gender I identify with.

28. Because of the threats of harassment and violence against transgender and intersex individuals, I am especially mindful of my privacy when using public facilities. I am also very concerned about making others uncomfortable by using the restroom that corresponds with my gender identity.

29. I do not want to avoid using public spaces or forego using bathroom facilities while in public spaces.

30. My status as an intersex person is something I consider private and that I share only when and where I choose.

31. I want to follow Montana law, but medical science defines me as intersex, and I simply have no idea how I can follow HB 121 when I do not fit into its binary gender definitions.

I, John Doe, declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

Dated: February 17, 2025.

/s/ John Doe  
John Doe