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MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND CLARK COUNTY

JESSICA KALARCHIK, an individual, and  
JANE DOE, an individual, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

STATE OF MONTANA; GREGORY  
GIANFORTE, in his official capacity as the  
Governor of the State of Montana; the  
MONTANA DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES;  
CHARLES T. BRERETON, in his official  
capacity as the Director of the Montana  
Department of Public Health and Human  
Services; the MONTANA DEPARTMENT OF

Cause No. ADV 24-261  
Hon. Michael Menahan

**DEFENDANTS' RESPONSE IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION**

**[ORAL ARGUMENT REQUESTED]**

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JUSTICE; and AUSTIN KNUDSEN, in his  
official capacity as Attorney General for the  
State of Montana,

Defendants.

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### **INTRODUCTION**

Sex is biological and binary—male and female. Biological science, Montana Supreme Court precedent, and now SB 458 and the 2022 Rule all reflect this reality.<sup>1</sup> To be sure, sex and subjective gender identity are separate and distinct concepts that are not factually, legally, or logically equivalent. Plaintiffs’ prospect of success in this matter hinges entirely on the Court ignoring or outright rejecting this reality or otherwise becoming entangled in Plaintiffs’ web of linguistic and conceptual conflation and manipulation.

None of Plaintiffs’ claims survive an analysis rooted in common sense, objective reality, and applicable precedent. First, Plaintiffs cannot establish any equal protection violation because subjective gender identity is not a protected class recognized by Montana law, and Plaintiffs cannot show (or define) similarly situated classes. Second, Plaintiffs fail to show any government involvement in medical treatment that could form the basis of any alleged violation of the right to privacy. Third, there is no compelled speech, as birth certificates and driver’s licenses are neither speech nor beliefs—they are simply government documents stating facts such as a person’s sex. Plaintiffs therefore fail to demonstrate a likelihood of success on the merits of their claims.

Plaintiffs also fail to show that it is likely they will suffer irreparable harm in the absence of injunctive relief, having lived with the challenged provisions in effect and inexplicably delayed bringing this case. The balance of the equities and public interest likewise favor Defendants,

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<sup>1</sup> As for the alleged “MVD policy and practice,” Plaintiffs have the burden of proving all the elements of a preliminary injunction, including the existence and substance of the challenged policy or practice. *See* Doc. 1 at ¶ 10.

particularly considering that (at the risk of stating the obvious) the Legislature must have the ability to define operative terms in the laws that it passes. Ultimately, Plaintiffs' claims amount to non-judicial political questions that would require the Court to stray from its proper judicial role and invade the province of the Legislature by rejecting its explicit definitions and creating a new protected class out of whole cloth.

Plaintiffs meet none of the elements required for injunctive relief, and their Motion must be denied.

### **LEGAL STANDARD**

A preliminary injunction may be granted only 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. Mont. Code Ann. § 27-19-201(1). The Legislature expressly stated its intention that "the language in subsection (1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." Mont. Code Ann. § 27-19-201(4); *see also Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (applying identical test adopted in SB 191) (citing *Munaf v. Geren*, 553 U.S. 674, 689–690 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–312 (1982)). Importantly, "[t]he applicant for an injunction... bears the burden of demonstrating the need for an injunction order." Mont. Code Ann. § 27-19-201(4). A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief; it is never awarded as of right. *Winter*, 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (per curiam)); *Benisek*, 138 S. Ct. at 1943.

## ARGUMENT

### **I. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.**

Plaintiffs seek to have the Court impermissibly write a new protected class into the law. However, such lawmaking is a fundamental function of the legislative branch, not the judiciary. The political question doctrine prevents the Court from considering Plaintiffs' claims here.

The political question doctrine “is essentially a function of the separation of powers, and it excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the Legislature] or the confines of the Executive Branch.” *Rangel v. Boehner*, 20 F. Supp. 3d 148, 166 (D.D.C. 2013) (cleaned up). Montana recognizes that political questions involve those issues “in the exclusive legal domain” of sister branches of government, as well as issues where “the governing constitution ... does not provide a standard for adjudication of the issue.” *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241. Importantly here, “Article VII, Section 4(1) [of the Montana Constitution] embodies the same limitations imposed by Article III [of the Federal Constitution.]” *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567 (emphasis added). “Accordingly, federal precedents interpreting the Article III requirements for justiciability are persuasive authority for interpreting the justiciability requirements of Article VII, Section 4(1).” *Id.*

Plaintiffs' claims present non-justiciable political questions that would effectively require the Court to write a new protected class into Montana law. Were the Court to do so by creating the new protected class of subjective “gender identity”—which is separate and distinct from sex—it would be invading the province of the Legislature and violating the separation of powers. The political question doctrine directs the Court to refrain from addressing such political questions, and the Court should deny Plaintiffs' Motion for this reason.

## II. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

Plaintiffs have failed to overcome the presumption of constitutionality to which SB 458 is entitled as a duly enacted law passed by Montanans' elected representatives. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a meaningless presumption: “[t]he constitutionality of a legislative enactment is prima facie presumed,” and “[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act.” *Id.*, ¶¶ 73–74. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statute. *Satterlee v. Lumberman’s Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Plaintiffs bear the burden to prove unconstitutionality beyond a reasonable doubt, and if any doubt exists, it must be resolved in favor of the constitutionality of SB 458. *Id.*; *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877. Plaintiffs are not likely to succeed on the merits of their claims because they cannot prove that SB 458 is unconstitutional beyond a reasonable doubt.

### A. THERE IS NO VIOLATION OF EQUAL PROTECTION.

Courts evaluate equal protection claims under a three-step analysis. First, the Court identifies the classes involved and determines if they are similarly situated. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445. Second, once the relevant classifications have been identified, the Court determines the appropriate level of scrutiny to apply. *Id.* at ¶ 17. Finally, the Court applies the appropriate level of scrutiny to the statute: strict scrutiny, middle-tier scrutiny, or the rational basis test. *Id.* The Court identifies similarly situated classes by isolating the factor allegedly subject to impermissible discrimination; if two groups are identical in all other respects, they are similarly situated. *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 19, 402 Mont. 277, 477 P.3d 1065 (internal citations omitted).

Showing “that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner” is a prerequisite to pleading a cognizable equal protection violation in Montana. *Vision Net, Inc. v. State*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d 1034. “[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination.” *Id.* “If the classes are not similarly situated, then it is not necessary for us to analyze the challenge further.” *Id.* (cleaned up). Only if Plaintiffs survive that step do courts proceed to determining the appropriate level of scrutiny. *Gazelka v. St. Peter’s Hosp.*, 2018 MT 152, ¶ 15, 392 Mont. 1, 420 P.3d 528.

### **1. Montana Law Does Not Recognize Subjective Gender Identity As A Protected Class.**

Plaintiffs cannot establish two similarly situated classes or differential treatment based on a protected class because subjective gender identity is not the same as sex and is not a protected class. There are only two sexes as recognized by Montana law: male and female. *See Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶ 16, 322 Mont. 434, 97 P.3d 546, *Mont. State Univ.-Northern v. Bachmeier*, 2021 MT 26, ¶ 28, 403 Mont. 136, 480 P.3d 233. Sex does not include or rely on subjective gender identity, nor is subjective gender identity a protected class under Montana law. *See* Mont. Const. Art. II, § 4 (“The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”)

A review of sex discrimination jurisprudence reveals that the Montana Supreme Court recognizes and applies the male-female sex binary in such cases. *See Mtn. States. Tel. & Tel. Co. v. Commr. of Labor and Indus.*, 187 Mont. 22, 38–39, 608 P.2d 1047, 1056 (1979) (Pregnancy is

a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus, classification based on pregnancy is a sex-based distinction); *Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶ 16, 322 Mont. 434, 97 P.3d 546 (“First, the plaintiff must be a member of a protected class. In a sexual harassment scenario, only two classes are possible, male and female.”); *Bachmeier*, ¶ 28 (a claimant first must establish membership in a protected class, either male or female) (citing *Campbell*, ¶ 16). “As has been already pointed out, neither federal jurisprudence nor this Court’s case law recognizes gender or sexual orientation as an arbitrary classification or “suspect class” for equal protection purposes. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 82, 325 Mont. 148, 104 P.3d 445 (Nelson, J., concurring). Indeed, in *Marquez v. State*, another case involving transgender-identifying plaintiffs seeking to amend their birth certificates to change the sex to reflect their subjective gender identity, the district court found that “[t]he parties agree...that no surgical procedure can change an individual’s sex.” *Marquez v. State*, Thirteenth Judicial District Court, Yellowstone County, Cause No. DV 21-873, Order (June 26, 2023) at 11.

In *Berndt v. Montana Department of Justice, et al.*, before the Human Rights Commission of the State of Montana, Cause No. 220498 (2024), the Human Rights Commission (“HRC”) found that the term “sex” is binary—either male or female—and specifically ruled that a person claiming to be “nonbinary” was not a member of a protected class within the meaning of the Human Rights Act on the basis of sex.<sup>2</sup> A copy of the Transcript of Hearing with the oral pronouncement of decision is **attached as Exhibit A**. The HRC’s written decision in *Berndt*, issued on June 13, 2024, is **attached as Exhibit B**.

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<sup>2</sup> Plaintiffs cite *Maloney v. Yellowstone County*, Nos. 1570-2019 & 1572-2019 (Mont. Dep’t of Lab. & Indus., Aug. 14, 2020) for the proposition that discrimination based on gender identity is a form of discrimination based on sex. *See* Doc. 12 at 25. This citation is inapposite and has been overruled by the 2024 decision by the Montana Human Rights Commission in *Berndt v. Montana Department of Justice, et al.*, Cause No. 220498.

Federal law does not support Plaintiffs’ position, either. Plaintiffs misrepresent *Bostock v. Clayton County.*, 140 S. Ct. 1731 (2020). The question in *Bostock* was whether Title VII of the Civil Rights Act prohibited employers from firing employees simply for being homosexual or transgender. *Bostock*, 140 S. Ct. at 1737. As a matter of statutory construction, the U.S. Supreme Court stated at the outset: sex refers “only to biological distinctions between male and female.” *Id.* at 1739. *Bostock* does not hold that sex encompasses gender identity, and the Supreme Court expressly limited its ruling there to the narrow employment scenario before it:

Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’

*Id.* at 1753.

The *Bostock* Court concluded that Title VII’s prohibition on employment discrimination covers gay and transgender individuals “in part because of sex,” which “has always been prohibited by Title VII’s plain terms.” *Id.* at 1743. But this reasoning is limited to Title VII, as *Bostock* itself makes clear. *Id.* at 1753 (expressly declining to “prejudge” other applications, including “sex-segregated bathrooms, locker rooms, and dress codes.”)

Title VII focuses on but-for discrimination—it is “unlawful...for an employer to discriminate against any individual because of sex.” *L.W. v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023) (cleaned up) (citing 42 U.S.C. § 2000e-2(a)(1)). “The Equal Protection Clause focuses on the denial of equal protection: ‘No State shall...deny to any person within its jurisdiction the equal protection of the laws.’” *Id.* (citing U.S. Const. amend. XIV, § 1). “‘That such differently worded provisions’—comparing the Constitution and Titles VI and VII— ‘should mean the same thing is implausible on its face.’” *Id.* (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2220 (2023) (Gorsuch, J., concurring). “[T]he Court in *Bostock*



relied exclusively on the specific text of Title VII.” *Eknes-Tucker v. Governor, of the State of Ala.*, 80 F.4th 1205, 1228 (11th Cir. 2023), 2023 U.S. App. LEXIS 21942. “Because *Bostock* therefore concerned a different law (with materially different language) and a different factual context, it bears minimal relevance to the instant case.” *Id.* at 1229.

The Sixth Circuit recently echoed the limited nature of the *Bostock* ruling, rejecting an attempt (similar to Plaintiffs’ here) to expand *Bostock* beyond its intended reach:

...the plaintiffs and the federal government invoke a Title VII case, *Bostock v. Clayton County*. The Court concluded that Title VII’s prohibition on employment discrimination “because of...sex” covers gay and transgender individuals. But that text-driven reasoning applies only to Title VII, as *Bostock* and many subsequent cases make clear. *Bostock*, 140 S. Ct. at 1753 (declining to “prejudge” other discrimination laws); *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (refusing to apply *Bostock* to the Age Discrimination in Employment Act); *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021)(reasoning that Title VII analysis does not apply to Title IX).

*Skrmetti*, 83 F.4th at 484.

Plaintiffs mischaracterize *Bostock*, ignoring the Supreme Court’s limiting language with respect to its holding as well as its disclaimer that the *Bostock* decision proceeded on the premise that there are only two sexes, male and female. *Bostock*, 140 S. Ct. at 1739 (“But because nothing in our approach to these cases turns on the outcome of the parties’ debate, and because the employees concede the point for argument’s sake, we proceed on the assumption that “sex” signified what the employers suggest, referring only to biological distinctions between male and female.”) Subjective gender identity is not a protected class, nor does sex as a protected class include subjective gender identity.

Other courts have also rejected Plaintiffs’ arguments for subjective gender identity as a protected class. *See, e.g., Skrmetti*, 83 F.4th at 480–84 (Tennessee’s ban applies to “all minors, regardless of sex. Such an across-the-board regulation lacks any of the hallmarks of sex discrimination. It does not prefer one sex over the other. The availability of testosterone, estrogen,

and puberty blockers does not turn on invidious sex discrimination but on the age of the individual and the risk-reward assessment of treating this medical condition (as opposed to another) with these procedures.”); *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1228–30 (11th Cir. 2023) (“Of course, [the Alabama ban] discusses sex insofar as it generally addresses treatment for discordance between biological sex and gender identity, and insofar as it identifies the applicable cross-sex hormone(s) for each sex—estrogen for males and testosterone and other androgens for females. [But] the statute did “not discriminate based on sex for two reasons. First, the statute does not establish an unequal regime for males and females...Second, the statute refers to sex only because the medical procedures that it regulates—puberty blockers and cross-sex hormones as a treatment for gender dysphoria—are themselves sex-based...Chiefly, the regulation of a course of treatment that, by the nature of things, only transgender individuals would want to undergo would not trigger heightened scrutiny unless the regulation is a pretext for invidious discrimination against such individuals, and, here, the district court made no findings of such a pretext.”).

Moreover, subjective gender identity is not the same as sex as a matter of scientific fact. (See the expert report of evolutionary biologist Dr. Colin Wright, Ph.D. **attached as Exhibit C** (defining and describing sex and explaining how it is determined)). Indeed, Plaintiffs’ own expert, Randi Ettner, implicitly acknowledges that subjective gender identity is different from sex by referring to Plaintiffs’ gender identity as “genuine, experienced sex” rather than “sex.” See Doc. 11, Exhibit 3 at ¶ 16 (“However, for transgender people, the sex assigned at birth does not align with the individual’s genuine, experienced sex, resulting in the distressing condition of gender dysphoria.”) Plaintiffs’ expert continues: “Gender dysphoria is the clinically significant distress or impairment of functioning that can result from the incongruence between a person’s *gender identity* and the *sex* assigned to them at birth.” (Doc. 11, Exhibit 3 at ¶ 29) (emphasis added).

Plaintiffs’ other expert, Ayden Scheim, also refers to a “gender designation” on birth certificates or other documents—a recognition that sex is different from gender and gender identity. (Doc. 11, Exhibit 4, ¶¶ 1, 3-6, 10-17, 19, 25-26). Plaintiffs recognize that gender identity is not sex.

SB 458 and the 2022 Rule do not implicate sex as a suspect class. Although sex is a suspect class under Montana law (*see A.J.B. v. Mont. Eighteenth Jud. Dist. Court*, 2023 MT 7, ¶ 24, 411 Mont. 201, 523 P.3d 519), a party asserting a sex-based discrimination claim must demonstrate an “official action that closes a door or denies an opportunity to women (or to men).” *United States v. Virginia*, 518 U.S. 515, 532 (1996). The challenged law and Rule apply equally to individuals who identify as transgender and individuals who do not. SB 458 merely provides a definition for “sex” as that term is used throughout Montana law. The 2022 Rule, too, applies evenly to everyone. No individual—regardless of gender identity—can change his or her birth certificate’s sex marker unless there was a scrivener’s error or the person’s sex is misidentified at birth and the wrong sex is cited on the birth certificate, with the misidentification only being discovered later, such as through DNA or genetic testing. *See* ARM 37.8.311(5)(b)(ii). Contrary to Plaintiffs’ argument, SB 458 and the 2022 Rule do not discriminate based on transgender status. Moreover, not all transgender-identifying individuals seek to change their birth certificates or driver’s licenses to reflect their subjective gender identity. *See Doe v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring) (“the transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex).”). Sex does not include subjective gender identity.

## **2. Subjective Gender Identity Is Not Immutable.**

Next, Plaintiffs advocate for the inclusion of subjective gender identity under the protected class of sex based on an immutable trait argument, but subjective gender identity is clearly not

immutable. The existence of detransitioners and desisters is irrefutable evidence of that fact.<sup>3</sup> The

Clinical Advisory Network on Sex and Gender describes a detransitioner as follows:

A detransitioner is someone who previously identified as transgender and received medical and/or surgical interventions as a result, but stopped taking these interventions and no longer identifies as transgender in the same way. The person would self-describe as a detransitioner. Medical interventions may have included puberty blockers and cross sex hormones. Surgical interventions may have included double mastectomy, oophorectomy, hysterectomy and neophalloplasty for females or an orchiectomy, neovaginoplasty and breast implants for males. After having undergone one or many of these medico-surgical interventions, detransitioners stop pursuing their transgender identity and most often re-identify with their biological sex.<sup>4</sup>

A desister is described as follows:

A desister is someone who previously identified as transgender but who re-identified with their biological sex prior to any medical intervention. Prior to re-identifying with their biological sex, many desisters underwent some degree of social transition including a change of name, pronouns, clothes, hairstyle and/or other modifications so they could express their gender identity.<sup>5</sup>

In a Canadian study of 139 boys clinic-referred for gender dysphoria, 87.8% of those who were assessed at a mean age of 7.49 years and reassessed at 20.58 years desisted.<sup>6</sup> “Evidence from the

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<sup>3</sup> See Respaut, Robin, Chad Terhune, and Michelle Conlin: *Why detransitioners are crucial to the science of gender care*, Reuters, December 22, 2022. Available at <https://www.reuters.com/investigates/special-report/usa-transyouth-outcomes/> (accessed June 16, 2024); Paul, Pamela: *As Kids, They Thought They Were Trans. They No Longer Do*. The New York Times, February 2, 2024. Available at <https://www.nytimes.com/2024/02/02/opinion/transgender-children-gender-dysphoria.html> (accessed June 16, 2024); Valdes, Daniela and Kinnon MacKinnon: *Take Detransitioners Seriously*, The Atlantic, January 18, 2023. Available at <https://www.theatlantic.com/ideas/archive/2023/01/detransition-transgender-nonbinary-gender-affirming-care/672745/> (accessed June 16, 2024); Vandebussche, E. (2021). Detransition-Related Needs and Support: A Cross-Sectional Online Survey, *Journal of Homosexuality*, 69(9), 1602-1620. <https://doi.org/10.1080/00918369.2021.1919479>; Kiefel, Camille: *I Thought I Was Nonbinary. Now I Help Detransitioners*, Newsweek, July 31, 2023. Available at <https://www.newsweek.com/nonbinary-surgery-breast-removal-detransitioning-1816309> (accessed June 16, 2024); Cerundolo, Aida: *Gender transitions aren't always right. Medicine must officially recognize detransition*, The Hill, February 15, 2024. Available at <https://thehill.com/opinion/healthcare/4468358-gender-transitions-arent-always-right-medicine-must-officially-recognize-detransition/> (accessed June 16, 2024).

<sup>4</sup> Clinical Advisory Network on Sex and Gender, *What do the terms 'detransition' and 'desistance' mean?*, 2024. Available at <https://can-sg.org/frequently-asked-questions/what-do-the-terms-detransition-and-desistance-mean/> (accessed June 16, 2024).

<sup>5</sup> Clinical Advisory Network on Sex and Gender, *What do the terms 'detransition' and 'desistance' mean?*, 2024. Available at <https://can-sg.org/frequently-asked-questions/what-do-the-terms-detransition-and-desistance-mean/> (accessed June 16, 2024).

<sup>6</sup> D. Singh, S.J. Bradley, & K.J. Zucker, A Follow-Up Study of Boys With Gender Identity Disorder, 12 *Frontiers in Psychology* 1-18 (2021).

10 available prospective follow-up studies from childhood to adolescence (reviewed in the study by Ristori and Steensma) indicates that for ~80% of children who meet the criteria for GDC, the GD recedes with puberty.”<sup>7</sup>

As discussed above, transgender status or subjective gender identity—unlike race or sex—is not an immutable characteristic or a protected class. The U.S. Supreme Court has opined on sex as a suspect class:

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility...

*Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), 93 S. Ct. 1764, 36 L. Ed. 2d 583. If gender identity were an immutable characteristic, like sex, individuals such as desisters and detransitioners would not exist. Gender identity is subjective and therefore not an immutable characteristic that might justify its recognition as a suspect or protected class. Plaintiffs cannot show two similarly situated classes or differential treatment based on a protected class and thus cannot state a cognizable or likely successful equal protection claim.

#### **B. PLAINTIFFS HAVE SHOWN NO VIOLATION OF THEIR RIGHT TO PRIVACY.**

Plaintiffs cite no Montana law for the proposition that “transgender status” or subjective gender identity implicate the right to privacy, nor do SB 458 and the 2022 Rule implicate the right to privacy. They simply reflect the law defining sex—which is consistent with Montana Supreme Court law, as described above. SB 458 and the 2022 Rule are also consistent with the biological science. *See Exhibit C.*

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<sup>7</sup> Kaltiala-Heino R, Bergman H, Työlajärvi M, Frisén L. Gender dysphoria in adolescence: current perspectives. *Adolesc Health Med Ther.* 2018 Mar 2;9:31-41. doi: 10.2147/AHMT.S135432. PMID: 29535563; PMCID: PMC5841333.

Plaintiffs' reliance on *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 is likewise misplaced. *Armstrong* explained that:

...broadly, the right of each individual to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government...is protected under the personal autonomy component of the fundamental right of individual privacy set out in Article II, Section 10 of the Montana Constitution.

*Id.* ¶ 39. However, unlike the government's involvement in choice of medical provider in *Armstrong*, there is no such government action here. Birth certificates and driver's licenses are not healthcare information. They are legal documents. The government here is not interfering with Plaintiffs' choice of medical provider or medical decision affecting their bodily integrity and health. Rather, SB 458 provides an objective definition for a term used throughout Montana law. This is not government action.

The 2022 Rule does not interfere with medical decisions or medical providers, either. The 2022 Rule recognizes and upholds the definition of sex throughout Montana law, both under SB 458 and longstanding Montana Supreme Court precedent. *See* Argument Section II.A.i, *supra*. This case is nothing like *Armstrong*. Plaintiffs fail to demonstrate any government action that would amount to a violation of the right to privacy and, therefore, are not likely to succeed on the merits of that claim.

### **C. THERE IS NO VIOLATION OF THE FREEDOM OF SPEECH.**

#### **1. Neither Birth Certificates Nor Driver's Licenses Force Plaintiffs To State A Belief With Which They Disagree; Biological Sex Is An Objective Fact.**

SB 458 and the 2022 Rule do not compel speech from Plaintiffs; they do not involve speech at all. Neither birth certificates nor driver's licenses force Plaintiffs to state a belief with which they disagree; biological sex is an objective fact. Plaintiffs also provide no authority for their

argument that presenting a legal document such as a birth certificate or driver's license is "speech," and cases where laws have been invalidated for unconstitutionally compelling speech are inapplicable here.

For example, the U.S. Supreme Court struck down an Illinois law that required public employees, including nonmembers who objected to a union's positions on collective bargaining, to subsidize a union as unconstitutional compelled speech since it required nonmembers to subsidize private speech on matters of substantial public concern. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 929-930 (2018). "[A] 'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" *Janus*, 585 U.S. at 893 (internal citations omitted). *Janus* has no bearing on Plaintiffs' claims in this case.

In *Wooley v. Maynard*, the U.S. Supreme Court struck down a New Hampshire statute requiring the display of the New Hampshire motto "Live Free or Die" on a vehicle license plate as a condition to driving was unconstitutional. 430 U.S. 705, 716-717 (1977). "New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message – or suffer a penalty, as Maynard already has." *Id.* at 715. Unlike the New Hampshire statute, Plaintiffs here are not being compelled to serve as "couriers" for an ideology with which they disagree. Rather, sex is an objective fact displayed on birth certificates and driver's licenses. It is not a belief or speech. And further unlike *Wooley*, where the compelled speech occurred every time they drove their cars anywhere, there are very limited situations where an individual's birth certificate or driver's license has to be produced and displayed.

## **2. Alternatively, If Sex On Birth Certificates Or Driver's Licenses Is "Speech," It Is Permissible Government Speech.**

In the alternative, if the Court disagrees that the marker of sex on a birth certificate or driver's license is not compelled speech, it nonetheless survives as permissible government speech. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (internal citations omitted). "A government entity has the right to "speak for itself." *Id.* (internal citations omitted). For example, "[p]ermanent monuments displayed on public property typically represent government speech." *Id.* at 470. The government may speak on government documents, as is the case here. Birth certificates and driver's licenses are government documents. The information on those documents, including the biological sex of the person on the birth certificate or driver's license, is permitted government speech. Plaintiffs fail to demonstrate a violation of constitutional speech rights. As a result, they are not likely to succeed on the merits of that claim.

### **III. PLAINTIFFS ARE NOT LIKELY TO SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.**

Courts look with disfavor on plaintiffs who engage in unexplained delay prior to seeking a preliminary injunction. Indeed, a "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985). *See also Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213–14 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief."); *Playboy Enters., Inc. v. Netscape Communications Corp.*, 55 F. Supp. 2d 1070, 1090 (C.D. Cal.) (five-month delay in seeking injunctive relief demonstrated lack of irreparable harm), *aff'd*, 202 F.3d 278 (9th Cir. 1999); *Valeo Intellectual Prop., Inc. v. Data Depth Corp.*, 368 F. Supp. 2d 1121, 1128 (W.D. Wash. 2005) (three-month delay in seeking injunctive relief undercut the existence of irreparable harm).



Plaintiffs must show more than a possibility of future harm; they are required “to demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22 (emphasis in the original) (citations omitted). *See also* 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, 154-155 (2d ed. 1995) (“A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury”). Furthermore, “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers).

Plaintiffs’ delay in bringing this case until now undercuts their claims of harm. SB 458’s effective date was October 1, 2023. The 2022 Rule was first promulgated in 2022. Plaintiffs’ significant delay in bringing this case and their motion for preliminary injunction belies their claims of any harm, let alone irreparable harm.<sup>8</sup> The Motion should be denied on this basis. Moreover, Plaintiffs’ claim that constitutional injury is per se irreparable harm is circular; SB 458 and the 2022 Rule are not unconstitutional. Plaintiffs’ only basis for claiming irreparable harm is their claim that the challenged law and Rule are unconstitutional. This is not enough, as there is a

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<sup>8</sup> In their argument about irreparable harm, Plaintiffs claim that “[t]he inability to access identity documents accurately reflecting one’s true sex can exacerbate gender dysphoria by causing shame and amplifying the fear of exposure.” (Doc. 12 at 39). One commenter in the public comment period of the 2022 Rule cited a study examining legal gender marker and name changes on passports and state driver’s license/ID. While the study found that such changes are associated with lower negative emotional response to gender-based mistreatment and improved mental health outcomes among transgender populations, it did not examine gender marker changes on birth certificates and acknowledged certain limitations, including that it “does not purport to evaluate the psychological effects of policy change” and that “causation between policy changes and our outcomes cannot be claimed.” *See* A. Restar et al., *Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve [sic] mental health outcomes among trans populations*, SSM – Population Health 11 (2020) 100595, <https://doi.org/10.1016/j.ssmph.2020.100595>. It should be noted that DPHHS’s Office of Vital Records continues to process name changes on birth certificates and other birth records for transgender persons in the same manner in which it processes name changes for other persons. *See Notice of Amendment*, MAR 37-1002 (Jun. 10, 2022). In addition to the reasons cited in Argument Section III, *supra*, Plaintiffs cannot demonstrate irreparable harm because they lack evidence that changing the sex marker on a birth certificate to match one’s subjective gender identity rather than biological sex has any psychological effect. Their argument suffers from causation and redressability defects, among others.

presumption of constitutionality, and Plaintiffs must establish that irreparable injury is *likely* in the absence of an injunction. SB 458 and the 2022 Rule have been in effect for months. Plaintiffs have not shown that they have suffered any harm thus far, let alone that they will suffer irreparable harm in the absence of a preliminary injunction. Plaintiffs' Motion fails for this reason as well.

#### **IV. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST FAVOR DEFENDANTS.**

While Plaintiffs' failure to meet any of the above prongs defeats their Motion, Plaintiffs also fail to demonstrate that the balance of the equities and the public interest tip in their favor. The balance of the equities and the public interest factors merge when the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). A preliminary injunction movant must show that "the balance of equities tips in his favor." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)). In assessing whether the plaintiffs have met this burden, courts have a "duty . . . to balance the interests of all parties and weigh the damage to each." *See L.A. Memorial Coliseum Commn. v. Natl. Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). When an injunction is sought that will adversely affect a public interest, a court may in the public interest withhold relief until a final determination on the merits, even if the postponement is burdensome to the plaintiff. *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982)). In fact, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger*, 456 U.S. at 312).

SB 458 and the 2022 Rule follow Montana Supreme Court precedent recognizing sex as biological, immutable, and binary: male or female. They promote the State's interest in having

consistent, objective definitions for a term of wide usage and significance in the Montana Code Annotated. The 2022 Rule simply respects the definition of sex in SB 458 and existing Montana Supreme Court precedent. Enjoining the Rule would create conflict in the law. SB 458 also upholds Montana Supreme Court precedent. Enjoining SB 458, in particular, would have significant public policy implications—it would affect countless sections of Montana law by eliminating a critical definition. *See* SB 458 (2023), **attached as Exhibit D** (amending sections 1-1-201, 2-18-208, 7-15-4207, 7-34-2123, 13-27-408, 13-35-301, 13-38-201, 20-7-1306, 20-9-327, 20-25-501, 20-25-707, 22-2-306, 33-1-201, 35-20-209, 39-2-912, 40-1-107, 40-1-401, 40-5-907, 40-5-1031, 41-5-103, 42-2-204, 45-5-625, 46-19-301, 46-19-401, 46-32-105, 49-1-102, 49-2-101, 49-3-101, 50-5-105, 50-5-602, 50-11-101, 50-15-101, 50-19-103, 50-60-214, 53-20-142, 53-21-121, 53-21-142, 60-5-514, 60-5-522, 61-5-107, and 72-1-103, MCA). Some sections referenced above deal with sensitive topics such as sexual abuse of children. Definitions like those provided by SB 458 are essential for these statutes to function. It remains unclear whether it is Plaintiffs’ intention to upend the law, including definitions in criminal statutes designed to protect child victims. SB 458 defines words in the law—a function well within the Legislature’s power. The definitions in SB 458 reflect understandings of the term “sex” within Montana since time immemorial and aligns with Montana Supreme Court precedent. To enjoin SB 458 would be to reject the Legislature’s authority to define the terms it uses in the laws it passes. The Legislature’s ability to define terms in the law is axiomatic, and the Court must respect this co-equal branch of government and the separation of powers embodied in the Montana Constitution. The balance of the equities and public interest therefore weigh heavily in Defendants’ favor, and the Court should deny Plaintiffs’ Motion accordingly.

**CONCLUSION**

For all these reasons, the Court should deny Plaintiffs' Motion for Preliminary Injunction.

Defendants respectfully request oral argument on this Motion.

DATED this 20th day of June, 2024.

Austin Knudsen  
MONTANA ATTORNEY GENERAL

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ATTORNEYS FOR DEFENDANTS

# Exhibit A

BEFORE THE HUMAN RIGHTS COMMISSION OF THE STATE OF MONTANA

\_\_\_\_\_ )  
 SARA BERNDT and BRYAN BERNDT, ) No. 00220498  
 on behalf of their minor child) )  
 M.B., ) )  
 ) )  
 Charging Parties, ) )  
 ) )  
 v. ) )  
 ) )  
 THE MONTANA DEPARTMENT OF ) )  
 JUSTICE, et al. ) )  
 ) )  
 Respondents. ) )  
 \_\_\_\_\_ )

TRANSCRIPT OF HEARING

March 21, 2024  
Helena, MT

COMMISSIONERS PRESENT:

Chairman Damrow  
Commissioner Bartos  
Commissioner Molina  
Commissioner Almy

Also Present:  
Jennifer Stallkamp  
Annah Howard

Counsel for Parties:

Misty Gaubatz Charging Parties  
Alwyn Lansing Respondents

Transcribed by  
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Courthouse 406-256-2722  
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## P R O C E E D I N G S

1  
2 CHAIRMAN DAMROW: Good morning, everyone. Today is  
3 Thursday, March 21st, 2024, time is approximately 9:14 a.m.  
4 and I'd like to call to order this meeting of the Montana  
5 Human Rights Commission.

6 My name is Peter Damrow and I'm the Chair of the  
7 Commission. I want to apologize for our brief delay, we had  
8 this morning, our counsel had a brief conflict, we were  
9 accommodating, so that you all for your patience for the  
10 delayed start this morning.

11 Couple notes before we begin, these proceedings are  
12 recorded, both the audio and video of take's hearing will  
13 become part of our official public record.

14 And then finally, when we do votes, we will do them  
15 by roll call, just so we can keep track of everything more  
16 clearly. And we will begin with our first roll call for  
17 attendance so my fellow commissioners, if you could please  
18 indicate your presence after I call your name, beginning with  
19 Commissioner Molina

20 COMMISSIONER MOLINA: Commissioner Molina  
21 present.

22 CHAIRMAN DAMROW: Commissioner Almy.

23 COMMISSIONER ALMY: Commissioner Almy present.

24 CHAIRMAN DAMROW: Commissioner Bartos.

25 COMMISSIONER BARTOS: Commissioner Bartos present.

1           CHAIRMAN DAMROW: So we have four Commissioners  
2 present, so we do have a quorum. Thank you, gentlemen.

3           Also with us today are Jennifer Stallkamp, our  
4 attorney for the Department of Labor and Industry and Annah  
5 Howard, our legal secretary.

6           I believe we all received a draft of the minutes of  
7 our prior meeting of January 26th, 2024. Is there a -- do I  
8 have a motion to approve these minutes as drafted or are there  
9 any purported revisions to the same?

10           COMMISSIONER BARTOS: Commissioner Bartos moves to  
11 approve the minutes.

12           COMMISSIONER: I will second it.

13           CHAIRMAN DAMROW: So if you'd please indicate your  
14 vote on the minutes as I call your name.

15           Commissioner Molina.

16           COMMISSIONER MOLINA: Yes.

17           CHAIRMAN DAMROW: Commissioner Almy.

18           COMMISSIONER ALMY: Yes.

19           CHAIRMAN DAMROW: Commissioner Bartos.

20           COMMISSIONER BARTOS: Yes.

21           CHAIRMAN DAMROW: And I will also vote yes. So the  
22 minutes of the commission meeting of January 26th, 2024, are  
23 hereby approved.

24           So because this is a public meeting we do allow  
25 brief time for public comment under Montana's open meetings



1 laws. If you are in the room and wish to give a public  
2 comment at this time, now is the opportunity to do so.

3 If you are tuning in via Zoom, please indicate your  
4 willingness to provide a public comment at this time by using  
5 a raised hand feature. And if you are calling in via  
6 telephone, if you -- I believe if you hit \*9, to indicate your  
7 willingness to give a public comment at this time, we will  
8 entertain public comments now if there is any.

9 (No response.)

10 CHAIRMAN DAMROW: Seeing none, we will move on to  
11 any comments or reports from the Department of Labor and  
12 Industry from our agency counsel, or any reports of new  
13 appeals from our prior commission decisions.

14 MS. STALLKAMP: There are no new appeals, Mr. Chair.  
15 You have several of your cases that are working their way  
16 through the court system on judicial review, and I just lost  
17 my train of thought, but nothing new.

18 CHAIRMAN DAMROW: Thank you, counsel.

19 MS. STALLKAMP: Oh, I apologize, now I remember what  
20 I wanted to say, you'd asked for an update on the Cotton  
21 matter, which you may recall, it is currently briefing at the  
22 Supreme Court, the District Court issued an order overturning  
23 your decision, the Commission's decision and reinstating the  
24 hearing officer's original decision. And so that has been  
25 appealed and it's currently briefing through the Supreme

1 Court.

2 CHAIRMAN DAMROW: Thank you, counsel.

3 MS. STALLKAMP: Mm-hmm.

4 (First item on the agenda was heard.)

5 CHAIRMAN DAMROW: Okay. So with that, turning to  
6 the next item on our agenda.

7 This is the time and place for the consideration of  
8 the case of Sara and Bryan Berndt, on behalf of their minor  
9 child, M.B., versus the Department of Justice, et al, as  
10 Case No. 0220498. The case is similarly before us on review  
11 of the hearing officer's decision in this matter.

12 Once again, for the record I am Peter Damrow,  
13 Chairman of the Montana Human Rights Commission, and the  
14 presiding officer for these proceedings.

15 If the other commissioners could please indicate  
16 whether they have reviewed the complete record as submitted by  
17 the parties when I call their names, beginning with  
18 Commissioner Molina.

19 COMMISSIONER MOLINA: Commissioner Molina has  
20 reviewed the entire file.

21 CHAIRMAN DAMROW: Commissioner Almy.

22 COMMISSIONER ALMY: Commissioner Almy has reviewed  
23 the entire record.

24 CHAIRMAN DAMROW: Commissioner Bartos.

25 COMMISSIONER BARTOS: Commissioner Bartos has

1 reviewed the entire case records.

2 CHAIRMAN DAMROW: I have also reviewed the records,  
3 so all members participating have indicated they have reviewed  
4 the record.

5 Once again as a reminder to everybody, these  
6 proceedings are recorded and both the audio and video will  
7 become part of our official public record for this hearing.

8 As with our prior matter, because this is an appeal  
9 from a hearing officer's decision, each side will have up to  
10 30 minutes to present their case. As appellant, the  
11 Department -- being the Department of Justice, being able to  
12 reserve a portion of their opening for rebuttal, as  
13 previously, Annah Howard will act as our timekeeper, but just  
14 please, kind of refer to counsel as to how much time you may  
15 have left.

16 MS. STALLKAMP: I will wave my arms.

17 CHAIRMAN DAMROW: And then following argument, we  
18 will break for lunch at that point, and then we will resume  
19 and open it up for questioning amongst the Commission.

20 So before we begin, are there any questions by the  
21 parties? And, counsel, what was your name?

22 MS. LANSING: Good morning. Alwyn Lansing for the  
23 Respondents from the Department of Justice.

24 COMMISSIONER BARTOS: Before we begin, Mr. Chairman,  
25 was there ever a request for any of this matter to be closed

1 in terms of the open meeting law?

2 CHAIRMAN DAMROW: I don't think there was. I  
3 don't --

4 MS. STALLKAMP: Not to my knowledge, but I will  
5 defer to Mr. -- sorry, not Mr., Ms. Lansing and I believe, the  
6 attorney's parties' counsel name has escaped me for a moment.

7 MS. GAUBATZ: Misty Gaubatz for the charging  
8 parties. Thank you.

9 MS. STALLKAMP: Was there -- my apologies, counsel,  
10 it just literally flew out of my head while I was looking at  
11 Ms. Lansing.

12 No, there was no closing of the hearing, right?

13 MS. GAUBATZ: There was not. Thank you for -- thank  
14 you for inquiring.

15 MS. STALLKAMP: Yep. So, Commissioner Bartos, I  
16 think that we are okay. We will use the minor's initials if  
17 we need to, or just refer to the minor.

18 COMMISSIONER BARTOS: Okay.

19 MS. STALLKAMP: Is fine.

20 COMMISSIONER BARTOS: Very good, thank you.

21 CHAIRMAN DAMROW: Okay. So, Ms. Lansing, no  
22 questions about our procedure before we begin?

23 MS. LANSING: None.

24 CHAIRMAN DAMROW: And, Ms. Gaubatz, I apologize, how  
25 do you pronounce the last name?

1 MS. GAUBATZ: Gaubatz, Mr. Chairman, but anything  
2 close enough will work for me.

3 CHAIRMAN DAMROW: I appreciate that. Any questions  
4 about the procedure before we begin?

5 MS. GAUBATZ: I have none. Thank you.

6 CHAIRMAN DAMROW: Okay. Thank you.

7 Ms. Lansing, you may begin when ready and please be  
8 sure to identify yourself for the record.

9 MS. LANSING: Thank you.

10 Alwyn Lansing for the Department of Justice on  
11 behalf of the Respondents.

12 If the hearing officer correctly construed Bostock,  
13 U.S. Supreme Court precedent, Montana law and the prevailing  
14 law across this nation, then he'd grant summary judgment for  
15 the Respondents and none of us would be here.

16 The hearing officers's ruling was totally out of  
17 bounds. It was not supported by the law, the evidence, or  
18 common sense. His order violates separation of powers and  
19 this Commission should reject the hearing officer's order and  
20 rule for the Respondents.

21 The facts of this case are simple, charging party  
22 M.B. and M.B.'s parents went to the Motor Vehicle Division in  
23 Missoula seeking a driver's license for M.B.

24 MVD presented the Berndts with an application that  
25 required M.B. to fill out several boxes with information,

1 including name and sex. M.B., whose sex is female, has a  
2 gender identity of nonbinary. Accordingly, M.B. did not  
3 complete the driver's license application because M.B. did not  
4 select either option of male or female in the sex box, but  
5 instead wrote in the letters NB.

6 The application was incomplete, and MVD was unable  
7 to provide M.B. with the license without the male or female  
8 sex designation selected. Then M.B. brought this case  
9 alleging sex discrimination.

10 This is wrong both factually and legally.  
11 Factually, sex and gender identity are two distinct concepts.  
12 Sex is immutable, biological and binary, male or female.

13 Gender identity is fluid and can encompass a number  
14 of different identities. Indeed the Berndts acknowledge at  
15 various points in the record the differences between sex and  
16 gender. For example, when seeking to change M.B.'s birth  
17 certificate, the Berndts stated under oath, quote, The gender  
18 listed on the Montana birth certificate for my child is  
19 currently incorrect and should be changed. The Montana birth  
20 certificate incorrectly states that my child's gender is  
21 female, however, my child's gender is actually nonbinary and  
22 the Montana birth certificate should be amended to reflect  
23 this truth. My child has undergone gender transition and the  
24 birth certificate should be change accordingly.

25 And that's at Exhibit B at Exhibits D and E.

1           The hearing officer erroneously conflated sex and  
2 gender identity, and these findings should be rejected.

3           MVD, as the evidence below showed, was unable to  
4 process M.B.'s application without the male or female sex  
5 selected, as those were the only options. Legally, both the  
6 hearing officer and charging parties inflate gender identity  
7 and sex, misreading a U.S. Supreme Court case to conclude that  
8 it creates a protected class of gender identify, not what the  
9 Bostock case said. Nor did MVD discriminate against M.B. on  
10 the basis of M.B.'s sex.

11           That brings us to the mixed motive defense under  
12 Administrative Rule 24.9.611, subsection 1. This is the  
13 defense MVD has raised throughout this case. The rule says,  
14 When a charging party proves that the respondent engaged in  
15 unlawful discrimination but the respondent proves the same  
16 action would have been taken in the absence of discrimination,  
17 the case is a mixed motive case.

18           The hearing officer applied the wrong standard in  
19 finding that respondents did not plead the defense, when in  
20 fact, under Montana's notice pleading standard, respondents  
21 raised it at the earliest time possible in their preliminary  
22 prehearing statement.

23           Finally, the evidence did not support the hearing  
24 officer's findings that MVD was in the process of changing its  
25 forms to allow for nonbinary driver's licenses or that M.B.

1           could not complete the application.

2                       The Commission should reject these unsupported  
3 findings.

4                       First, Bostock does not stand for the proposition  
5 that the hearing officer and charging parties say that it  
6 does. The question in Bostock versus Clayton County, 140  
7 S. Crt. 1731, 2020, was whether Title VII of the Civil Rights  
8 Act prohibited employers from firing employees simply for  
9 being homosexual or transgender.

10                      The Supreme Court stated at the outset, quote, Sex  
11 refers to, quote, only to biological distinctions between male  
12 and female, end quote. That's Bostock at 1739.

13                      So the hearing officer was wrong in his conclusion  
14 that Bostock stands for the proposition that sex encompasses  
15 gender identity. And the Supreme Court expressly limited the  
16 ruling of Bostock to the narrow employment scenario before it.  
17 Quote, under Title VII 2, we do not purport to address  
18 bathrooms, locker rooms or anything else of the kind. The  
19 only question before us is whether an employee -- employer who  
20 fires someone simply for being homosexual or transgender has  
21 discharged or otherwise discriminated against that individual  
22 because of such individual sex.

23                      That's Bostock at 1753.

24                      The Sixth Circuit recently echoed the limited nature  
25 of the Bostock ruling in L.W. versus Skremetti, 83 F.4th 460



1 at 484, Sixth Circuit 2023, striking down the plaintiff's  
2 attempt there, like the charging parties here, to expand  
3 Bostock beyond its intended reach.

4 Quote, the plaintiffs and the federal government  
5 invoke a Title VII case, Bostock versus Clayton County. The  
6 Court concluded that Title VII's prohibition on employment  
7 discrimination, quote, because of sex, end quote, covers gay  
8 and transgender individuals. But that text driven reasoning  
9 applies only to Title VII, as Bostock and many other  
10 subsequent cases make clear, Bostock 140, S.Ct at 1753  
11 declining to prejudge other discrimination laws.

12 Pelcha versus MW Bancorp, Inc., 988, F.3rd 318 at  
13 324, Sixth Circuit 2021, refusing to apply Bostock to the Age  
14 Discrimination and Employment Act.

15 Meriwether versus Hartop, 992 F.3rd 492 at 510, note  
16 four, Sixth Circuit 2021, reasoning that Title VII analysis  
17 does not apply to Title IX, end quote.

18 It is clear that the hearing officer grossly misread  
19 Bostock, even expressly ignoring the Supreme Court's limiting  
20 language with respect to its holding, as well as its  
21 disclaimer that the Bostock decision proceeded on the premise  
22 that there are only two sexes, male and female.

23 The hearing officer's entire order rested on this  
24 flawed interpretation of Bostock. MVD did not discriminate  
25 against M.B. on the basis of M.B.'s sex. Gender identity is

1 different from sex. And gender identity is not a protected  
2 class. The hearing officer has no authority for that  
3 proposition, it was error and this Commission should correct  
4 that error, respecting the true intent and language of  
5 Bostock.

6 Respondents sufficiently pled their mixed motive  
7 defense and the hearing officer applied the wrong pleading  
8 standard. Unable to torture Bostock into a favorable argument  
9 for themselves, charging parties tried to change the pleading  
10 standard to accuse respondents of not having raised their  
11 defense.

12 This Commission should reject the hearing officer's  
13 adoption of charging parties incorrect pleading standard, and  
14 instead recognize that respondents properly and timely pled  
15 the mixed motive defense in their preliminary prehearing  
16 statement when they said, quote, Respondents had a legitimate  
17 nondiscriminatory reason for denying a driver's license to  
18 M.B., and respondents legitimate nondiscriminatory reason for  
19 denying M.B. a driver's license was not a pretext and was not  
20 based on an unlawful motive. End quote.

21 That's Exhibit M at paragraphs 34 and 35.

22 Under Montana's notice pleading requirements, these  
23 allegations were sufficient to give charging parties notice  
24 that MVD intended to present evidence of a legitimate,  
25 nondiscriminatory reason for its actions, thus reaching the

1 same result.

2 The hearing officer's findings of fact were not  
3 supported by evidence. This Commission can reject a hearing  
4 officer's findings where, based upon a review of the complete  
5 record, the findings were not based upon competent,  
6 substantial evidence. That is the case here.

7 Finding of fact No. 19 wrongly states that MVD  
8 informed M.B. that MVD was in the process of updating its  
9 forms to include options for nonbinary individuals, but that  
10 the update would not be complete for approximately a year.

11 However, MVD Bureau Chief, Rebecca Connors'  
12 testimony at the hearing made no such representation. And  
13 indeed charging parties line of questioning at that hearing  
14 about what Missoula MVD employees represented to the Berndts,  
15 sustained an objection on hearsay and foundation grounds.

16 MS. HOWARD: 20 minutes, Ms. Lansing.

17 MS. LANSING: Thank you.

18 Bottom line, there is no substantial evidence that  
19 MVD was actively in the process of changing its forms when  
20 M.B. submitted an application.

21 Finding of fact No. 20 that the driver's license  
22 application could not a be completed is also factually  
23 inaccurate. There is no evidence anywhere in the record that  
24 M.B. was prevented from completing the application. M.B.  
25 chose not to complete the sex data field to MVD's system

1 specifications.

2 I direct the Commission to Exhibit L at 19, lines 5  
3 through 20 to line 18.

4 These findings are wrong and the Commission should  
5 reject them as it is entitled to do under the Montana  
6 Administrative Procedure Act when the findings were not based  
7 on competent, substantial evidence.

8 Finally, the hearing officer lacks authority to  
9 order the affirmative relief ordered. The hearing officer  
10 unlawfully invaded the province of the legislature when he  
11 ordered MVD to produce a driver's license with a nonbinary sex  
12 designation.

13 This is not only in conflict with existing law,  
14 SB 458 defining the term sex, male and female, but also gross  
15 overreach by a hearing officer who lacks authority under  
16 Montana law to invalidate or modify statutes.

17 The hearing officer even acknowledged that SB 458  
18 prohibited him from ordering MVD to change its driver's  
19 license system to allow nonbinary licenses. Exhibit L at 10.  
20 But he still ordered MVD to create a license for M.B. that  
21 violates the statute.

22 Even if SB 458 were not the law, the hearing  
23 officer's order invaded legislative power, as it is only the  
24 legislature or the people, by initiative or referendum, who  
25 can modify a statute. And only courts can invalidate statutes

1 or resolve conflicts between them.

2 Not to mention the extreme unfairness of the  
3 charging parties asking the taxpayers foot the bill for this  
4 unlawful affirmative relief ordered by the hearing officer.

5 The Montana constitution sets these parameters to  
6 prevent gross violations of the separation of powers, like the  
7 hearing officer's order.

8 The Commission should honor the Montana  
9 constitution, as well as uphold Montana and U.S. Supreme Court  
10 precedent by reversing the erroneous order of the hearing  
11 officer, rejecting his findings and finding for the  
12 respondents.

13 Thank you.

14 CHAIRMAN DAMROW: Thank you, Ms. Lansing.

15 Counsel for the charging party, you are up and ten I  
16 believe can you see Annah with her time cards if she were  
17 to --

18 MS. GAUBATZ: Yes, I can. Thank you.

19 CHAIRMAN DAMROW: Okay.

20 MS. HOWARD: I don't know if you can see the  
21 details, but I can call them out too.

22 CHAIRMAN DAMROW: Okay.

23 MS. GAUBATZ: I appreciate that. Thank you.

24 MS. HOWARD: Sure.

25 CHAIRMAN DAMROW: Okay. So, counsel, you may

1 proceed when you're ready.

2 MS. GAUBATZ: Thank you, Mr. Chairman.

3 May it please the Commission, my name is Misty  
4 Gaubatz, and I represent the charging parties in this matter,  
5 the Berndt family. Bryan, Sara and their minor child Max, who  
6 was often identified as M.B. in this matter.

7 Thank you for allowing me to appear by video, my  
8 clients are a working class family of modest means and this  
9 makes this proceeding accessible them. So thank you on their  
10 behalf as well.

11 My client Max, like most teens, was excited to get  
12 their driver's license. And after taking the class, passing  
13 the test, and paying the fee, Max expected to be able to  
14 receive a driver's license. However, respondents, who are  
15 state agents, refused to provide Max with a license, solely on  
16 the basis that Max's sex is nonbinary.

17 The HRB investigator in this case found reason to  
18 believe that respondents discriminated against Max on the  
19 basis of sex. The hearings officer also found in Max's favor.

20 Now respondents are appealing, and before I address  
21 the substance of their appeal, I want to point out that in  
22 their reply brief before this Commission, respondents have  
23 compared my client to a cat. And this isn't the first time  
24 throughout these proceedings that respondents have tried to  
25 dehumanize this child by comparing them to an animal.

1           In their post-hearing brief before the Office of  
2 Administrative Hearings, respondents compared Max to a zebra.  
3 Well, Max is a human being. And a Montanan with rights. And  
4 one of those rights is to be free from discrimination from the  
5 State and from state agencies on the basis of sex when  
6 applying for a driver's license.

7           Montana Code Annotated Section 49-2-308 tells us  
8 that Max has this right, but respondents are trying to deny  
9 Max that right. And they seek to continue to deny Max that  
10 right by appealing the ruling in Max's favor on four issues.  
11 Those issues are, one, they claim that two of the hearing  
12 officers findings are wrong.

13           Two, they claim that they didn't discriminate  
14 against Max on the basis of sex.

15           Three, they claim that the hearing officer's remedy  
16 is incorrect.

17           And, four, they claimed that they have had a mix  
18 motive defense for discriminating against Max all along.

19           I'll address each of these claims in order. First,  
20 respondents ask this Commission to overturn findings 19 and 20  
21 and I'll address those in numerical order.

22           Now, this Commission can only reject the hearing  
23 officer's findings if it first reviews the entire record, and  
24 then determines after that review, that the hearing officer's  
25 findings are not based upon competent, substantial evidence.

1           Substantial evidence is a low threshold. It only  
2 requires that a reasonable mind could accept as adequate -- it  
3 only requires evidence that a reasonable mind could accept as  
4 adequate to support a conclusion.

5           The Montana Supreme court in 2023 in Cremer Rodeo  
6 Land and Livestock Company versus McMullen told us that  
7 substantial evidence can even be, quote, Inherently weak, and  
8 it can be less than a preponderance and even contradicted by  
9 other evidence.

10           The evidence supporting the hearing officer's  
11 findings goes well beyond that level. And this Commission  
12 cannot modify his findings.

13           Finding 19 states that, quote, M.B. was informed by  
14 two Department employees that the Department was in the  
15 process of updating its forms to include an option for  
16 nonbinary individuals, but that the update would not be  
17 completed for approximately a year. End quote.

18           The substantial evidence for this finding comes from  
19 charging party Sara Berndt's testimony to this fact at the  
20 hearing on damages. And we know from Montana Code Annotated  
21 Section 26-1-301, that the direct evidence of one witness who  
22 is entitled to full credit is sufficient for proof of any  
23 fact.

24           Sara testified that when she was at the MVD, the  
25 manager told her, quote, Told me, that at the time they were



1 working on a new system and they won't be updating their  
2 current system any further, but it would be a year out until  
3 the new system -- until they have the new system with the new  
4 check box. End quote.

5 This evidence from Sara's testimony meets the  
6 substantial evidence standard. Were that not enough, Bureau  
7 Chief Rebecca Connors testified that her manager employees  
8 communicated to my clients about changing their system to  
9 allow nonbinary licenses to be produced so that maybe this  
10 might be something they could do down the road.

11 She also testified that MVD inquired about changing  
12 their system to allow licenses to be issued to nonbinary  
13 individuals as early as May of 2022.

14 Finding 19 is supported by substantial evidence and  
15 this Commission cannot disturb it.

16 Respondents also challenge finding 20, which states  
17 that, quote, MVD refused to issue a driver's license to M.B.  
18 because M.B.'s application could not be completed and entered  
19 into IDEMIA system.

20 Again, this Commission cannot disturb this finding  
21 if it is supported by substantial evidence, and it is so  
22 supported.

23 Bureau Chief Rebecca Connors testified, quote, right  
24 now our system will only allow for male or female, as well as  
25 IDEMIA, the card program, only allows for male and female.

1 Ms. Connor's further testified that, quote, We cannot accept  
2 when -- if somebody put in -- if they wanted to put in let's  
3 say, I'm looking at height, for instance, if somebody wanted  
4 to say they're 20 feet tall, we would reject it based off that  
5 because it is not within the parameters of the system and  
6 along with this goes the sex.

7 We know that Finding 20 is supported by substantial  
8 evidence because Ms. Connors' testimony told us that MVD  
9 refused to issue a license to M.B. because M.B.'s application  
10 form could not be completed and entered into the IDEMIA  
11 system. The Commission cannot disturb this finding.

12 The second issue respondents appeal is the question  
13 of whether they discriminated against Max on the basis of sex.  
14 They did. And they continue to do so each day that they  
15 refuse to provide Max with a driver's license.

16 Montana Code Annotated Section 61-5-111(2)(a),  
17 states, That once an applicant provides payment of the  
18 required fees, the MVD "shall" issue a driver's license to  
19 each qualifying applicant.

20 Respondents don't deny that Max took all the  
21 necessary steps that a person needs to take in order to  
22 receive a driver's license, including, passing the practical  
23 test and paying the licensing fee. But they still won't give  
24 Max a license and this is solely because Max is nonbinary.

25 One argument respondents give is that Max's sex

1 really isn't nonbinary. But this isn't a genuine argument  
2 that respondents can even make. Respondents are state agents,  
3 and the State of Montana has already confirmed that Max's sex  
4 is nonbinary. It says so on Max's birth certificate, which  
5 was issued by the State of Montana. Max's United States  
6 passport also supports this.

7 Now, Ms. Conners also testified that my client  
8 listed their sex on the license application. When asked about  
9 that portion of the application, she said, quote, There is NB  
10 written in there, which as I now know means nonbinary.

11 Respondents have tried to complicate this issue by  
12 trying to parse out gender from sex. They argue that even  
13 though my client's birth certificate says that their sex is  
14 nonbinary, well, the State of Montana is just somehow  
15 mistaken. And they argue that even though my client says  
16 their sex is nonbinary, well, my client is somehow mistaken.

17 That's just their subjective feeling. Respondents  
18 argue in their pleadings about the genitals of my client, who  
19 is a minor. Does my client produce sperm or eggs. Well, I  
20 never had to discuss my genitals or reproductive capacity when  
21 applying for a driver's license, and I doubt that any other  
22 Montanans have had to discuss these things at the DMV either.

23 The sole reason respondents are bringing up such an  
24 intimate and private issue is because they seek license to  
25 discriminate against my client on the basis of sex, and

1 Montana law prohibits that.

2 Even more, the State of Montana, through its  
3 agencies, has already agreed that gender and sex are the same  
4 thing as far as the law is concerned.

5 Administrative Rule of Montana 37-8-311 provided a  
6 path for Montanans to correct the sex and have that -- correct  
7 their sex and have that reflected on their birth certificate.  
8 The State created and distributed a, quote, Gender designation  
9 form to do so.

10 Once a person like Max completed the gender  
11 designation form, the State accepted that the person's sex was  
12 different from what was originally listed on their birth  
13 certificate and issued a new one.

14 MS. HOWARD: Ms. Gaubatz, you have 20 minutes.

15 MS. GAUBATZ: Thank you.

16 The State understood that gender and sex were the  
17 same thing as far as the law was concerned until Max applied  
18 for a driver's license. Then they sought to change the rules,  
19 to try to justify the plain fact that they discriminated  
20 against Max on the basis of sex.

21 To put it simply, if Max had said their sex was  
22 male, or if Max had said their sex was female, we probably  
23 wouldn't be here today, but because Max was brave enough to  
24 speak the truth of who they are, a person whose sex is  
25 nonbinary, respondents have discriminated against them, and

1 this violates Montana law and the hearing officer correctly  
2 decided this issue.

3 The next issue respondents object to is the hearing  
4 officer's remedy. That remedy is to provide Max with a  
5 driver's license. Interestingly respondents have not proposed  
6 an alternative remedy.

7 Once the determination is made that respondents  
8 discriminated against my client by refusing to provide a  
9 license on the basis of sex, the logical remedy is to stop  
10 discriminating against my client and provide a license.

11 Respondent rely upon SB 458 to argue that the  
12 hearing officer lacked authority to order this reasonable  
13 remedy. Well, SB 458 was not in existence at the time that  
14 respondents discriminated against Max. Respondents refused to  
15 provide Max a license on April 22nd of 2022. SB 458 didn't go  
16 into effect until well over a year later, on October 1st,  
17 2023. It doesn't apply.

18 Respondents next rely upon the separation of powers  
19 to say that, quote, The Commission cannot impose penalties on  
20 the MVD. But this remedy here is not a penalty. All the  
21 hearing officer has directed respondents to do is to follow  
22 the law. To issue a license as Montana Code Annotated  
23 61-5-111(2) (a) says they must do, because Max is a qualifying  
24 applicant.

25 The statute requires that all applying applicants

1 must be issued a license. It says nothing about sex.  
2 Interestingly, a Montana's driver's license isn't even  
3 required to list the sex of a licensed driver. Montana Code  
4 Annotated 61-5-111, specifies all of the information that must  
5 be contained on a license. Sex is not part of that  
6 requirement. The hearing officer's remedy is rooted in law  
7 and it should not be changed.

8 The final issue respondents appeal is the ruling  
9 that they were prohibited from asserting a mixed motive  
10 defense after summary judgment had been issued when  
11 respondents had not made such an argument previously.

12 Now, the Montana Supreme court in Ladders has said  
13 that the proper test for mixed motive cases comes from the  
14 U.S. Supreme Court case Price Waterhouse. Under the Price  
15 Waterhouse test, respondents are required to assert their  
16 mixed motive defense as an affirmative defense.

17 And they were required to plead that they would have  
18 made the same decision to not issue Max a license even in the  
19 absence of any unlawful sex discrimination.

20 Respondents never asserted such an affirmative /TEUF  
21 defense, nor did they present any such argument until after  
22 summary judgment had already been issued.

23 Rule 8C of the Montana Rules of Civil Procedure is  
24 clear. In response to a pleading, a party must affirmatively  
25 state an affirmative defense. Respondents did not do that

1 here. There was no affirmative defense.

2 Even beyond that, the Court has said that litigants  
3 are not allowed to change legal theories after summary  
4 judgment has been issued, except for in extraordinary cases.

5 In their initial pleadings, respondents never  
6 asserted an affirmative defense. And in their summary  
7 judgment motion, respondents never made an argument that they  
8 would have denied Max a license even in the absence of sex  
9 discrimination.

10 In response to charging parties summary judgment  
11 motion, respondents never made that argument. Respondents  
12 didn't make that argument in any of their pleadings until just  
13 before the hearing on damages, when it was convenient for them  
14 to try to prevent my clients from seeking attorney's fees for  
15 this case. However, Montana law says that it's too late to  
16 argue a new theory after summary judgment. The hearing  
17 officer was correct.

18 MS. HOWARD: Ms. Gaubatz, you have 15 a minutes.

19 MS. GAUBATZ: Thank you.

20 In fact, even though respondents did not properly  
21 plead this affirmative defense, the hearing officer did allow  
22 respondents to argue their mixed motive defense at the hearing  
23 on damages.

24 So respondents have the benefit of making their  
25 argument even though it was too late to do so. But it still

1 did not convince the hearing officer, and that's because  
2 respondents did not assert a proper mixed motive defense.

3 Respondents attempt at a mixed motive defense was to  
4 say that their computer system would not allow them to provide  
5 a license to Max because Max is nonbinary, and the computer  
6 system does not have a way to create a nonbinary license.

7 Even though Montana law doesn't require sex to be  
8 listed on a driver's license, respondents testimony  
9 established that the only reason they cannot create a license  
10 for nonbinary individuals is because they have actively chosen  
11 not to include this ability in their program updates.

12 Respondents argue that their hands are simply tied a  
13 here, even while they acknowledge that they have chosen to tie  
14 their own hands.

15 Respondents cannot claim that their technological  
16 inability to issue a license to a nonbinary person is  
17 legitimate and would be the same result under  
18 nondiscriminatory motives because respondents have  
19 specifically chosen to omit the technological ability to issue  
20 licenses to nonbinary people like Max. And they chose this  
21 because they are actively discriminating against my client.

22 In sum, the hearing officer's decision was correct  
23 under Montana law. Findings of fact are supported by a  
24 substantial evidence and this Commission cannot disturb them.

25 Respondents did discriminate against Max on the



1 basis of sex, and the proper remedy is to order them to stop  
2 discriminating against Max and to issue a license.

3 And respondents mixed motive argument, was untimely  
4 under the rules and fails the test. The hearing officer was  
5 right in rejecting that. This Commission should uphold the  
6 hearing officer's decision.

7 Thank you.

8 CHAIRMAN DAMROW: Thank you, Ms. Gaubatz. I  
9 believe, Ms. Lansing, you do have some time for rebuttal, if  
10 you'd like to proffer any rebuttal argument at this time.

11 MS. LANSING: Yes, thank you.

12 CHAIRMAN DAMROW: And Annah, can you confirm how  
13 much time.

14 MS. HOWARD: You have about 17 minutes.

15 MS. LANSING: Thank you.

16 CHAIRMAN DAMROW: You may begin when ready.

17 MS. LANSING: When the law and the facts don't favor  
18 you, you attack the opposing side.

19 Charging parties attempt to distract from Bostock,  
20 U.S. Supreme Court precedent, merely even acknowledging it, by  
21 lobbying a number of accusations against respondents, but  
22 charging parties never address Bostock's clear limiting  
23 language and inapplicability to this case.

24 Sex and gender identity are different concepts, and  
25 charging parties, other than citing to their own client's

1 statements throughout this case, do not have authority for the  
2 proposition that Montana law protects as a class, gender  
3 identity or that gender identity and sex are the same thing.  
4 They are not.

5 Charging parties position conflicts with U.S.  
6 Supreme Court and Montana law. Even without SB 458,  
7 respondents have already acknowledged to this Commission the  
8 issues with the hearing officer's affirmative relief ordered,  
9 and the separation of powers is not to be dismissed, as  
10 charging parties do. But a serious -- serious flaw in the  
11 hearing officer's affirmative relief that cannot stand.

12 And to respond to charging parties, it is worth  
13 noting that SB 58 was in existence and in effect when this  
14 hearing officer made his ruling in direct conflict with  
15 Montana law.

16 Further, other Montana precedent indicates that sex  
17 is the biological, immutable, binary as respondents have  
18 described, not the gender identity the charging parties  
19 described.

20 I direct the Commission's attention to page 10 of  
21 respondents' appeal brief. Subheading A, where the  
22 respondents cite a number of cases indicating differences  
23 between the male and female sexes and the sex binary. For  
24 example, Mountain States Tel. & Tel. Co. versus Commissioner  
25 of Labor and Industry, 187 Mont 22, at 38 to 39, that is a

1 1979 case, holding, Pregnancy a condition unique to women and  
2 the ability to become pregnant is a primary characteristic of  
3 the female sex. Thus, classification based on pregnancy is  
4 sex-based distinction.

5 Or consider, Campbell versus Garden City Plumbing  
6 and Heating, Inc., 2004 Montana 231, at paragraph 16. In  
7 sexual harassment claims, plaintiff must first show membership  
8 in a protected class, only two classes are possible, male and  
9 female.

10 Or the Bachmeier case at paragraph 28, a claimant  
11 must first establish membership in a protected class, either  
12 male or female.

13 Accordingly, the hearing officer's determination  
14 that the Montana Supreme Court has not had occasion to weigh  
15 in on the definition of sex is incorrect. The Court has  
16 weighed in repeatedly and it has indicated that the sex  
17 definition is consistent with what respondents have said, as  
18 well as the U.S. Supreme Court and current Montana law, as  
19 well as prevailing law across this country.

20 As for raising the mixed motive defense, I state for  
21 the record again, that respondents raised this defense in  
22 their preliminary prehearing statement and could not have been  
23 a lot more clear. That was in paragraphs 25 and 26. I will  
24 read them again. Respondents had a legitimate  
25 nondiscriminatory reason for denying a driver's license to

1 M.B. Respondents legitimate nondiscriminatory reason for  
2 denying M.B. a driver's license was not a pretext and was not  
3 based on an unlawful motive.

4 As for the evidence at the hearing, what the  
5 transcript shows is that M.B. did not complete the sex  
6 designation box in the application. M.B. wrote a separate set  
7 of two letters, NB. M.B. did not select male or female, which  
8 were the two boxes on that form, one of which is required to  
9 select to complete the form. That is why MVD could not give  
10 M.B. a license.

11 I also direct the Commission's attention to another  
12 notable moment from the hearing where MVD Bureau Chief Rebecca  
13 Connors was questioned about whether any other nonbinary  
14 individuals has made the same request as M.B.

15 Rebecca Connors testified, I only know of one other  
16 and we let them know that we could only proceed with the two  
17 options and then they selected a sex.

18 That is very different from the present case where  
19 M.B. did not select a sex. She did not complete the  
20 application, and that is why M.B. was not awarded a license.

21 And it is very telling that the charging parties  
22 refuse to grapple with the Bostock decision, which completely  
23 cuts against their position.

24 And if that wasn't enough, Montana law and other  
25 courts across this country also conflict with the charging

1 parties and the hearing officer's decision.

2 The hearing officer's decision is unsupported by  
3 law, unsupported by evidence, and must be rejected by this  
4 Commission.

5 Thank you.

6 CHAIRMAN DAMROW: Thank you, counsel. And with  
7 that, before we proceed to questioning, we'll take a brief  
8 recess for lunch, we're thinking 12:45, 1 o'clock?

9 MS. STALLKAMP: It's up to you, Mr. Chairman.

10 COMMISSIONER BARTOS: Five after one for those that  
11 don't walk so fast.

12 CHAIRMAN DAMROW: Five after one it is. We will be  
13 in recess until then.

14 (Lunch recess.)

15 CHAIRMAN DAMROW: Okay. We are back on the record  
16 for Montana Human Rights Commission hearing of March 21st,  
17 2024 the time is approximately 1:06 p.m.

18 Right before we recessed for lunch, parties in the  
19 matter of the Berndts on behalf of their minor child, M.B.  
20 versus the Department of Justice, we had heard argument for  
21 both parties.

22 And at this time, I would like to open it up for  
23 questioning. And once the Commission or the parties -- and  
24 if, Ms. Lansing, you can take the podium, I'll open it up for  
25 questioning of you on behalf of the DOJ first. So...

1           Fellow Commissioners, does anybody have questions  
2 for counsel for the DOJ?

3           COMMISSIONER ALMY: I do have a question for  
4 counsel. It was mentioned by the other -- the opposing  
5 counsel that sex is not required on a driver's license, would  
6 you comment on that. That was first I heard that. I thought  
7 it was required on a driver's license and then opposing  
8 counsel says it's s not.

9           MS. LANSING: Commission Almy, I can tell you that  
10 MVD does require sex on its form, on its application for a  
11 driver's license.

12           COMMISSIONER ALMY: Does the State of Montana in the  
13 Code say it needs to be there, or just MDT?

14           MS. LANSING: State of Montana --

15           COMMISSIONER ALMY: I'm curious --

16           MS. LANSING: -- I -- yeah, I'm looking for a  
17 statute.

18           COMMISSIONER ALMY: You quoted it, and I -- I -- I  
19 don't have access to follow up on that, but...

20           (Pause.)

21           MS. LANSING: So I would direct the Commission to  
22 Montana Code Annotated 61-5-107, subsection 2, 2021, which  
23 says that driver's license applicants must provide their,  
24 quote, full legal name, date of birth, sex, residence address  
25 of the applicant, and the applicant's social security number.

1 COMMISSIONER ALMY: MCA 61-5-107?

2 MS. LANSING: Subsection 2.

3 COMMISSIONER ALMY: Sub 2.

4 MS. LANSING: Yes.

5 COMMISSIONER ALMY: Okay.

6 CHAIRMAN DAMROW: Counsel -- oh, go ahead,  
7 Commissioner Bartos.

8 COMMISSIONER BARTOS: A follow-up question, counsel.  
9 Was that statute in effect on the date of the application that  
10 is in question now?

11 MS. LANSING: Yes, Commissioner Bartos, because that  
12 was the 2021 --

13 COMMISSIONER BARTOS: Okay.

14 MS. LANSING: -- statute.

15 COMMISSIONER BARTOS: So for Commissioners'  
16 references, the actual application is on page 109, it goes on  
17 for several pages.

18 COMMISSIONER ALMY: Yeah.

19 COMMISSIONER BARTOS: And at the very top, the  
20 left-hand side.

21 So of this particular form, from the State's  
22 perspective, was consistent with the statutory language that  
23 the legislature had in place at the time?

24 MS. LANSING: Yes.

25 COMMISSIONER BARTOS: Okay. And in -- I'll ask

1           counsel for M.B. the same question; but do you know, I don't  
2           see it anywhere in the record, whether M.B. had or currently  
3           has a driver's -- a student driver's permit?

4                    MS. LANSING: M.B. did have a driver's permit, yes.  
5           And it should be part of the record. I can locate the exact  
6           exhibit for the Commission.

7                    COMMISSIONER BARTOS: That's -- the --

8                    MS. LANSING: And come get back to you.

9                    COMMISSIONER BARTOS: The more -- the more important  
10          question is, does that student driver's permit, does that  
11          become void after a period of time, or do you know whether  
12          it's current, whether M.B. has -- was able to utilize that  
13          driver's permit during the course of this -- of this  
14          litigation?

15                   MS. LANSING: I'm not sure on that, Commissioner.

16                   COMMISSIONER BARTOS: Okay. I'll propose that to  
17          counsel.

18                   Well, then, I'm unclear, the -- regardless of what  
19          happens with this case, the only entity in Montana that can  
20          amend the Montana Human Rights Act to include the words  
21          "gender identity" or something similar to that, is the Montana  
22          legislature; is that correct?

23                   MS. LANSING: Yes.

24                   COMMISSIONER BARTOS: And so what is being asked of  
25          us here, through the 10,000 pages, is that we interpret the



1 statute that is currently under the Montana Human Rights Act  
2 within the definition of sex, to include gender identity?

3 MS. LANSING: Yes, I believe that's what's being  
4 asked, and that -- that's at odds with Montana and law and  
5 U.S. Supreme Court precedent.

6 COMMISSIONER BARTOS: Are you aware of any other  
7 statutes similar to the Human Rights Act where a hearing  
8 officer has expanded the definition of a word or words in a  
9 statute to incorporate additional individuals or different  
10 individuals? Are you aware of any -- anything like that in  
11 Montana?

12 (Pause.)

13 MS. LANSING: I don't believe so. I'm not sure.

14 COMMISSIONER BARTOS: I -- I didn't think so either.  
15 I -- I was trying to find something of that nature.

16 And I'm -- I'll ask this question to counsel as  
17 well, is -- does a hearing officer have the authority, under  
18 the Administrative Procedures Act, to define language in a  
19 statute similar to what's happening here?

20 MS. LANSING: Unequivocally the answer is no. And  
21 the statutes that detail canons of statutory construction in  
22 Montana, support that as well, similar to the office of a  
23 judge, a hearing officer can't insert what's been omitted or  
24 omit what's been inserted in the statute. And that's  
25 effectively what the hearing officer has done here and what

1 charging parties advocate for.

2 COMMISSIONER BARTOS: And so I can complete this  
3 train -- train of thought, you are not aware of -- and I'll  
4 ask counsel, our counsel at the appropriate time, whether the  
5 Human Rights Commission in anytime in its history or recent  
6 history, has engaged in extending or defining a term, a  
7 statutory term similar to what is being asked here?

8 MS. LANSING: Not that I'm aware of, Commissioner.  
9 And I really believe that is within the purview of the  
10 legislature.

11 COMMISSIONER BARTOS: Okay. I just wanted to make  
12 sure --

13 MS. LANSING: Or -- or the courts, of course, can  
14 interpret statutes and, you know, analyze constitutionality,  
15 things like that, but I -- I can say with confidence that it  
16 is not the Commission's role to expand language in the statute  
17 or create new definitions.

18 COMMISSIONER BARTOS: Mm-hmm. In --

19 MS. LANSING: I'm not aware of that happening.

20 COMMISSIONER BARTOS: If you have the opportunity to  
21 look at page 6 of the hearing officer's decision, for us folks  
22 it's page 23 of the case record, the -- there is a footnote on  
23 the bottom of page 6 by the hearing officer, There can be no  
24 argument that driving and an associated driver's license is  
25 not a privilege in Montana, as the Montana Supreme Court has

1 held that a driver's license is a privilege.

2 COMMISSIONER ALMY: Where are you finding this,  
3 Rick?

4 COMMISSIONER BARTOS: It's at the very bottom --

5 COMMISSIONER ALMY: What's the page number?

6 CHAIRMAN DAMROW: 23 of our record.

7 COMMISSIONER BARTOS: 23.

8 CHAIRMAN DAMROW: Page 6 of the hearing officer's  
9 decision, page 23 of our record.

10 COMMISSIONER BARTOS: There can be no argument that  
11 driving and an associated driver's license is not a privilege  
12 in Montana, as the Montana Supreme court has held that a  
13 driver's license is a privilege.

14 I mean -- I mean, it's double talk there. I -- am I  
15 missing something?

16 MS. LANSING: I agree with you that that footnote is  
17 confusing.

18 COMMISSIONER BARTOS: Yeah. It may have been a  
19 typographical error that hasn't been noticed until we got  
20 here, but --

21 MS. STALLKAMP: No, Commissioner, I read that as,  
22 you can't make the argument that a driver's license is not a  
23 privilege and is a right.

24 COMMISSIONER BARTOS: Oh, I see. The distinction is  
25 between the right --

1 MS. STALLKAMP: The right and a privilege.

2 COMMISSIONER BARTOS: -- and a privilege?

3 MS. STALLKAMP: Yes.

4 COMMISSIONER BARTOS: Okay.

5 MS. STALLKAMP: I -- it's a stylistic choice by the  
6 hearing officer to write it that way. I would not choose to,  
7 for the very reasons you're all looking at, but...

8 COMMISSIONER BARTOS: And, counsel, I -- and these  
9 questions aren't trying to -- you know, pull you through  
10 constitutional law again, but is there a difference between a  
11 protected class and a suspect class in constitutional law?

12 What's happening here is the charging party has  
13 claimed and the hearing officer has found, or concluded that  
14 gender identity is a -- is a protected class. And -- and  
15 there was language in -- in -- in some of the briefs that talk  
16 about suspect class.

17 Is there a difference between the two, and what is  
18 it? Or am I going nowhere with that?

19 MS. LANSING: In my understanding of protected  
20 class, is sort of the broader category when you're -- when  
21 you're talking about protected classes and they have -- then  
22 they trigger heightened scrutiny by a reviewing court.

23 Suspect is a level of protected class, in my  
24 understanding. And there is also quais suspect, and I believe  
25 nonsuspect. Those may not be the exact right terms. But in

1 my understanding, to best answer your question, I think  
2 protected class is a broader category.

3 And what I can say definitively, based on Bostock  
4 and the other authorities I cited earlier this morning, is  
5 that gender identity is not a protected class and it is  
6 different from sex.

7 COMMISSIONER BARTOS: And -- and I understand the  
8 differences when you apply a state interest versus a rational  
9 basis test on all of that.

10 The other question I have is with regard to the  
11 affirmative relief that was granted, that said State of  
12 Montana issue a license for this kid, basically. And the  
13 argument you made is Senate Bill 248 was --

14 MS. STALLKAMP: 458.

15 COMMISSIONER: 245.

16 MS. STALLKAMP: 458.

17 CHAIRMAN DAMROW: 458.

18 COMMISSIONER BARTOS: 458, it's there somewhere,  
19 Senate Bill 458, specifically defines sex through those --  
20 those paragraphs.

21 And the argument that M.B. is making is -- well, no,  
22 that was after the fact, since the hearing officer's order on  
23 the motion for summary judgment was rendered prior to the  
24 legislature enacting 458, we should ignore 458.

25 It's my understanding the State's argument is that's

1 true, but the actual affirmative relief that is ordered by the  
2 hearing officer occurred after the enactment of 458, or was  
3 that still prior to 458?

4 MS. LANSING: The order on the relief was after 458.

5 COMMISSIONER BARTOS: Okay. So October 1st of 2023  
6 was the effective date of 458, by statute?

7 MS. LANSING: Yes.

8 COMMISSIONER BARTOS: And then the order issued by  
9 the hearing officer was day after Christmas, on the 23rd -- or  
10 the 26th of 2023.

11 Is there -- in your legal research and in  
12 preparation for this argument, did you find any -- any  
13 comparable situations where a judge or a hearing officer or  
14 the Supreme Court rendered an opinion and that -- but the  
15 legislature had enacted something before that opinion was  
16 issued?

17 Maybe I said it the wrong way. Was there a  
18 situation where hearing officer issued its decision after the  
19 effective date of Senate Bill 458, but the -- but the original  
20 granting of the summary judgment was prior to 458. So was  
21 there ever a situation where, let's say a district judge  
22 renders an order prior to the legislature enacting legislation  
23 that would have reversed the order of the judge. Which would  
24 take precedent in that regard?

25 (Pause.)

1 COMMISSIONER BARTOS: It was the --

2 MS. LANSING: Just a moment.

3 COMMISSIONER BARTOS: Okay.

4 (Pause.)

5 MS. LANSING: There was a case in this judicial  
6 district, the First, called *Hell v. State*, involving a  
7 challenge to a provision of the MEBA statute, and in the midst  
8 of this litigation, the legislature passed a law changing the  
9 challenge to statute.

10 COMMISSIONER BARTOS: Okay. So --

11 MS. LANSING: So I would argue that that is a  
12 comparable situation.

13 COMMISSIONER BARTOS: Okay. And so the Court in  
14 that situation had to respect the -- the mandates of the  
15 legislature at that point?

16 MS. LANSING: That's certainly what I would argue,  
17 although that case is on appeal currently.

18 COMMISSIONER BARTOS: Okay.

19 MS. LANSING: But I would just take this opportunity  
20 also to raise that even independent of SB 458, you take that  
21 out of the equation, it is relevant, but just for -- for  
22 purposes of discussion, if you take it out of the equation,  
23 the affirmative relief awarded is still highly problematic and  
24 unlawful because it does invade the legislatures province  
25 by -- by essentially expanding the statute, as you had

1 suggested earlier --

2 COMMISSIONER BARTOS: It changes --

3 MS. LANSING: -- it's only -- it's only the  
4 legislature can modify a statute in that way.

5 COMMISSIONER BARTOS: And --

6 MS. LANSING: And certainly, only the legislature  
7 that can add protected classes.

8 COMMISSIONER BARTOS: So what -- what occurred here  
9 is, or could have occurred here was a hearing officer amending  
10 a statute? If -- if --

11 MS. LANSING: Yes, in effect.

12 COMMISSIONER BARTOS: That was the point you were  
13 trying to make.

14 The other question is more of a factual question,  
15 the original birth certificate for M.B. identified a sex; was  
16 that correct?

17 MS. LANSING: Yes.

18 COMMISSIONER BARTOS: And that's in the record?

19 CHAIRMAN DAMROW: Yes.

20 COMMISSIONER BARTOS: Okay. I was looking for it  
21 and I am going to assume it's in there.

22 CHAIRMAN DAMROW: Yes, sir.

23 COMMISSIONER BARTOS: And so, subsequently, the  
24 Department of Public Health provided a form and then an  
25 opportunity for people to change that designation on a birth



1 certificate from a male or female to NB, or nonbinary?

2 MS. LANSING: I would point out that it was called a  
3 gender designation form, which is further indication that  
4 gender and sex -- or gender identity and sex are not the same  
5 thing.

6 COMMISSIONER BARTOS: But that was not done  
7 statutorily? The Department of Public Health was not -- was  
8 not reacting to a statute that was -- that was enacted that --  
9 that said, oh, God, we better change our form because the  
10 legislature said give another -- another option on the birth  
11 certificate?

12 MS. LANSING: That was done by agency rule making.

13 COMMISSIONER BARTOS: It was agency rule making.

14 MS. LANSING: Correct.

15 COMMISSIONER BARTOS: Was there any -- was there any  
16 challenge at that time to that proposed agency rule when it  
17 was made?

18 MS. LANSING: I would have to look into that. I am  
19 not sure off the top of my head.

20 COMMISSIONER BARTOS: Okay.

21 CHAIRMAN DAMROW: I think -- my understanding is it  
22 was in place when that form was submitted, but it has since  
23 been amended or revised to remove that pathway.

24 MS. LANSING: Yes -- - that that was many years ago,  
25 and the law -- and the law and rules are different today

1 regarding birth certificates.

2 COMMISSIONER BARTOS: Are you aware of --

3 MS. STALLKAMP: Sorry, Mr. -- Commissioner Bartos, I  
4 just want to point out that it was within DPHHS's rule-making  
5 authority to -- to do the rule making. They had the statutory  
6 bounds to make the rules associated with how an individual  
7 could change their birth certificate.

8 COMMISSIONER BARTOS: Okay.

9 MS. STALLKAMP: So it wasn't just DPHHS deciding to  
10 do something, the legislature had said, you must make rules  
11 about this.

12 COMMISSIONER BARTOS: Okay, but I just -- my  
13 question is, did the legislature specifically -- you know,  
14 provide -- the legislature provides general authority to state  
15 agencies to run their -- their departments. Was there a  
16 specific directive by the legislature to amend the  
17 administrative rule to incorporate the opportunity for NB?

18 MS. LANSING: Are you talking about the rule --

19 COMMISSIONER BARTOS: Yeah, the rule.

20 MS. LANSING: -- several years ago?

21 COMMISSIONER BARTOS: Yeah.

22 MS. LANSING: I'm not aware of any such directive.

23 COMMISSIONER BARTOS: And I one or two more  
24 questions and then I'll turn it over back to the Chair.

25 Are you aware of the Ridgeway versus Helena School

1 District case? It was a federal case involving discrimination  
2 based on sex?

3 MS. LANSING: I do not believe I am.

4 COMMISSIONER BARTOS: Thank you. I have exhausted  
5 mine at this point, Mr. Chairman.

6 CHAIRMAN DAMROW: Nothing further, Commissioner  
7 Bartos?

8 I have no questions. Any further questions for the  
9 DOJ's counsel from Commissioners?

10 MS. MOLINA: I'm good.

11 CHAIRMAN DAMROW: Thank you, Ms. Lansing. You may  
12 have a seat.

13 MS. LANSING: Thank you.

14 CHAIRMAN DAMROW: And at this point we'll open it up  
15 for questioning for charging party's counsel.

16 Ms. Gaubatz, are you on the line?

17 MS. GAUBATZ: I am, Mr. Commissioner. Thank you.

18 CHAIRMAN DAMROW: Excellent. Okay. I will open it  
19 up now to questions for charging party's counsel.

20 COMMISSIONER ALMY: I have a question, you had  
21 indicated that sex is required -- is not required on the  
22 driver's license, you gave a code, and then we just heard  
23 about another code that says it is required. Can you help me  
24 out there?

25 MS. GAUBATZ: Yes, sir, I can, and I have the code

1 book right here in my hand. And I will read to you from  
2 Montana Code Annotated Section 61-5-111 that's sub (2) (a), and  
3 what it says is that the Department, upon receipt of payment  
4 of the fees specified in this section, "shall" issue a  
5 driver's license to each qualifying applicant.

6 And then it goes on and says, The license must  
7 contain. And it indicates all of the things that must be  
8 contained in a license, and sex is not there.

9 I'll read those to you, sir. The license must  
10 contain a full face photograph of the licensee and the size  
11 and form prescribed by the Department, which my client did  
12 have a photograph taken.

13 It must contain a distinguishing number issued to  
14 the licensee. I assume that means the driver's license  
15 number.

16 It must include the full legal name, date of birth,  
17 and Montana residence address, unless the licensee requests  
18 the use of a mailing address, except that the Montana  
19 resident's address must be used for Real ID compliant driver's  
20 License, unless authorized by the Department rule.

21 A brief description of the licensee.

22 Either the licensee's customary manual signature or  
23 a reproduction of the licensee's customary manual signature.

24 And, if the applicant qualifies under subsection 7  
25 an indication of applicant's status as a veteran. Period.

1           There is no requirement for a Montana license to  
2           indicate a licensee's sex.

3           COMMISSIONER ALMY: What does that -- 61.5.107(2)  
4           say and how and why are they different?

5           MS. GAUBATZ: Yes, sir, the way that they are  
6           different is that the statute that you just cited to,  
7           61-5-107(2) talks about the application. So what we have is a  
8           requirement for an application to -- for an applicant to  
9           include a person's legal name, date of birth, sex, resident's  
10          address of the applicant, their Social Security number and a  
11          brief description.

12          So the application does require that an applicant  
13          list the sex, the driver's license does not require the sex to  
14          be issued.

15          In this case, the State of Montana has already  
16          confirmed that Max's sex is nonbinary. The State issued a  
17          birth certificate stating that. And so my client is faced  
18          with a form that says, Please list your sex, my client  
19          dutifully did so by listing the sex indicated on their birth  
20          certificate.

21          COMMISSIONER ALMY: Okay.

22          CHAIRMAN DAMROW: But, counsel, it does indicate to  
23          list the sex, not necessarily the sex as identified on the  
24          applicant's birth certificate, does it not?

25          MS. GAUBATZ: Well, it does not indicate where that

1 person should source that from. I would assume that for the  
2 majority of us, the sex listed on our birth certificate or the  
3 sex that we can identify ourselves with, that's our sex. For  
4 my client, both the State of Montana and my client agree that  
5 their sex is nonbinary.

6 CHAIRMAN DAMROW: All right. So -- I'll just pick  
7 up on this --

8 COMMISSIONER ALMY: Go ahead.

9 CHAIRMAN DAMROW: -- I wasn't quite sure you had  
10 anything.

11 COMMISSIONER Almy: No, go ahead.

12 CHAIRMAN DAMROW: Okay. So, counsel, to be quite  
13 frank, I'm having issues with the hearing officer's approach  
14 to the statutory interpretation in this case, and do find it a  
15 little concerning there wasn't much effort made on charging  
16 party's part to analogize the Bostock case to this situation,  
17 or the other Montana Supreme Court decisions that explicitly  
18 coupled the protected class with being either male or female,  
19 in the Campbell case and Bachmeier, that I think was as recent  
20 as 2021, kind of more recently than some of the decisions you  
21 cited in your briefing. So I'm hoping you can maybe help to  
22 kind of clarify those, I mean those cases were very explicit  
23 about the fact a -- a protected class of sex as far as Montana  
24 law goes is only male or female.

25 MS. GAUBATZ: Well, I think the question in Bostock

1 is which -- which section of Bostock are we going to cite to,  
2 right? Bostock said that transgender status is inextricably  
3 bound up with sex. That's a direct quote from the case.

4 That comes from, you know, 140 Supreme Court, 1731,  
5 1741, it says that transgender status is inextricably bound up  
6 with sex. And to discriminate on these grounds requires an  
7 employer to intentionally treat employees differently because  
8 of sex.

9 The Supreme Court in Bostock is saying that  
10 somebody's (audio cut out) is bound up with their sex, it's  
11 equating these things.

12 One of the reasons I didn't expound upon this is  
13 because, sir, I believe that respondents really should  
14 estopped from making this argument.

15 The State has already recognized that gender and sex  
16 are the same. This gender designation form that we've heard  
17 about is the form that the State held out to the public and  
18 accounted in the Administrative Rules and said, if the sex on  
19 your birth certificate is incorrect or needs to be changed, to  
20 change your sex, you complete the gender designation form.  
21 That is an -- you know that is accepting that gender and sex  
22 are the same thing.

23 What we have here is my client who followed the  
24 rules, my client said, Okay, State of Montana, I'll follow  
25 your rules, I'll follow Administrative Rule 37.8.311, I'll

1 fill out your gender designation form. Thank you for  
2 correcting the sex on my birth certificate. I will now take  
3 all of the classes and do all the steps required to get a  
4 license. My client followed those rules and was still denied  
5 a license.

6 This is kind of a bait and switch situation. And  
7 the State should be estopped from arguing that it hasn't  
8 already effectually said that gender and sex are the same  
9 thing.

10 There are additional cases beyond Bostock which --  
11 which support this. There are Montana cases that support  
12 this.

13 If we take a look at the Snetsinger versus Montana  
14 University System case, that's 2004 MT 390, at paragraph 83,  
15 in a concurring opinion Justin -- Justice Nelson says, That  
16 laws based on gender orientation are palpably sex based.  
17 Right?

18 If we're looking at the Bachmeier case, which was a  
19 case regarding gender discrimination as well, the Court said,  
20 When sexual harassment is directed at an employee solely  
21 because of gender, the employee is faced with a working  
22 environment fundamentally different from that faced by an  
23 employee of the opposite gender. That difference constitutes  
24 sexual discrimination.

25 In other words, treating someone different because



1 of their gender is the same thing as treating someone  
2 different because of their sex. That's what we have here.

3 My client's sex is nonbinary, it's confirmed by the  
4 State. But if we have to parse this out and get into more  
5 kind of academic theories and the difference between sex and  
6 gender, the Supreme Court has said that treating someone  
7 different because of their gender, is the same thing as  
8 treating someone different because of their sex.

9 CHAIRMAN DAMROW: So for purposes of a  
10 discrimination claim under the Montana Human Rights Act  
11 statutory framework, I mean, the first piece of that is  
12 establishing placement in a protected class, and that same  
13 case, Bachmeier, that you were just citing to kind of  
14 explicitly said for the same purposes, A claimant must first  
15 establish membership in a protected class, you know, dealing  
16 with sexual harassment -- they didn't say that -- but either  
17 male or female.

18 So to me that kind of basically establishes that  
19 even the Supreme Court is establishing sex as being one or the  
20 other, no option for a nonbinary status as being a protected  
21 class under Montana law.

22 MS. GAUBATZ: In the Bachmeier case?

23 CHAIRMAN DAMROW: Yes, that was paragraph 28.

24 MS. GAUBATZ: So it does say that, except that, you  
25 know, below that in paragraph 88 is what I just quoted from,

1 saying that treating somebody differently because of gender,  
2 right? Harassment directed at an employee solely because of  
3 gender, that difference constitutes sexual discrimination.

4 So, I mean, we can take these sections out of  
5 context and try and make them say what we will, but I think  
6 the fact here comes exactly back to, the State has already  
7 issued a birth certificate stating that my client's sex is  
8 nonbinary. We don't need to get to the question of, gosh, is  
9 gender and sex, are these different things. The Commission  
10 doesn't need to make that decision.

11 CHAIRMAN DAMROW: Okay. So -- so by the same token,  
12 I guess you're arguing the State, the DOJ, is basically  
13 estopped from asserting any mixed motive case because they  
14 didn't plead it sufficiently. I haven't seen any argument in  
15 briefing saying the State is essentially estopped from  
16 asserting these positions, the arguments they are today and  
17 through this proceeding, because the State had already issued  
18 this birth certificate with a nonbinary status on it.

19 So, I mean, where in your briefing, I guess, do you  
20 raise or make any sort of argument that the State is somehow  
21 estopped from taking some sort of contrary position given the  
22 fact it had issued this birth certificate?

23 MS. GAUBATZ: So the standard for that mixed motive  
24 pleading is different from this. You're correct that the  
25 charging parties have not used the word estopped in their

1           briefings, prior to the briefing before this Commission,  
2           essentially we're stating it in another way at this time.

3                     But the charging parties' argument has been, from  
4           the beginning, that the State has already issued a birth  
5           certificate to Max affirming that their sex is nonbinary.

6                     And, in fact, earlier when you were -- when you were  
7           requesting Ms. Lansing, I think you asked about Max's original  
8           birth certificate. I would point out that that birth  
9           certificate has been sealed by the Court and cannot be brought  
10          out, except for under order of the Court.

11                    So if it is part of the exhibits in here, that would  
12          be improper. I don't believe it's part of the exhibits. I  
13          believe that the exhibit, which is included here, does state  
14          what my client's sex is, as recognized currently by the State,  
15          which is nonbinary.

16                    CHAIRMAN DAMROW: Okay. So going back to, I guess,  
17          the hearing officer's -- the crux of the hearing officer's  
18          decision being that, in light of, you know, the Bostock case,  
19          that it, you know, somehow -- that it expands the definition  
20          of sex to include gender identify and things of that, and  
21          other classes of that nature, you know, Bachmeier doesn't --  
22          or I mean not Bachmeier, Bostock doesn't speak to nonbinary  
23          status or gender identity, but was strictly limited to, you  
24          know, homosexual individuals or transgender individuals.

25                    So is -- are you claiming nonbinary is one in the

1 same with transgender status, or, I guess, where does  
2 nonbinary fit in with that definition? I'm having a hard time  
3 reading that definition to -- or reading that case to  
4 seemingly expand that -- that definition to include that when  
5 those -- when those classes were never mentioned in that case.

6 MS. GAUBATZ: Right. And, again, I think this is an  
7 academic distinction. But to me when I look at the word  
8 transgender, right? To change gender. Nonbinary fits under  
9 that umbrella, right? I think that there are a number of  
10 descriptors that can fit under the term transgender.

11 So, yes, I would argue that transgender does  
12 encompass nonbinary individuals.

13 CHAIRMAN DAMROW: Okay. So -- so nonbinary is, from  
14 your perspective, a form of transgender identity and for  
15 purposes of your argument, gender and sex, again just to  
16 clarify, are one in the same, and which is where you kind of  
17 get to the fact that gender identify also falls under the  
18 definition of sex under Montana's Human Rights Act; is that  
19 fair?

20 MS. GAUBATZ: I think that's an apt description, but  
21 I think that ahead of that, again, the State has already  
22 opined and set up rules and procedures affirming that gender  
23 and sex are the same.

24 CHAIRMAN DAMROW: Okay. But, again, just to clarify  
25 the -- the methodology, the approach to obtain and submit that

1 gender designation form, that regulation was and annuled,  
2 ratified, or kind of -- doesn't exist anymore, correct? I  
3 mean, it existed at the time your client had submitted --  
4 filled out and submitted that, but that doesn't exist any  
5 longer, correct?

6 MS. GAUBATZ: My understanding of what happened with  
7 that form is that it did exist and that Administrative Rule  
8 existed, the Governor issued an executive order to sort of  
9 change that Administrative Rule; that was challenged at the  
10 Supreme court and the Supreme Court put a stay on that and  
11 directed the Governor that he could not -- he could not issue  
12 that executive order.

13 And, again, this is -- I apologize for the unartful  
14 articulation of this history, I don't have all of this history  
15 in front of me, but then my understanding is that it went  
16 through the legislative process in a more proper way later on  
17 and then was changed.

18 So it is not a current rule, except that it was at  
19 the time when my client followed that rule and had a new birth  
20 certificate issued. There is no rule invalidating my client's  
21 birth certificate or any other birth certificate that may  
22 exist out there that Montanans have gotten by following  
23 Montana's rules.

24 CHAIRMAN DAMROW: Okay. Thank you, counsel. Those  
25 are all the questions I had. Is there anything further?

1 COMMISSIONER BARTOS: Yes.

2 CHAIRMAN DAMROW: Commissioner --

3 COMMISSIONER BARTOS: I do. One of your opening  
4 comments in your -- your presentation, counselor, is the  
5 actions of the State employees in Missoula who was working  
6 with -- with M.B. You made -- and -- and I wrote this down  
7 pretty quickly, so I may be inaccurate, but you said they  
8 refused to provide him a license. Isn't -- isn't that  
9 inaccurate? It was -- they were "unable" to provide a  
10 license, would you agree with that?

11 MS. GAUBATZ: Well, sir, I think that's semantics.  
12 But, no, I think it's accurate to say that they did refuse to  
13 provide my client a license.

14 The statute says that they "must" provide my client  
15 with a license if my client fills out the form, get their  
16 photo taken and pays the fee, and my client did that, and they  
17 were refused.

18 COMMISSIONER BARTOS: I sensed an ulterior motive on  
19 the part of the employee, a State employee when you said they  
20 refused as opposed to saying, we're not able to do it because  
21 of, and then this whole situation that arose.

22 I may be reading more into that argument than there  
23 is, but -- but I was of concern of that.

24 The -- the commentary that Commissioner Almy and  
25 Commissioner Damrow visited about, the two statutes, where one

1 statute talks about the application process and the  
2 requirement that the sex be identified; and then the second  
3 statute where sex is not identified.

4           Isn't there a rule of statutory construction that  
5 the courts have used consistently in Montana that were -- when  
6 there are two statutes, the -- the presumption is that we're  
7 going to try to work it together, that -- that it fits.  
8 And -- and in that -- in that regard, isn't the statute with  
9 regard to the application, a precondition of being able to  
10 obtain the driver's license?

11           And if you don't fill out the application and  
12 provide the information necessary, regardless of the reason,  
13 you don't get -- you don't get to the second statute? You  
14 can't ignore the first statute; is that correct?

15           MS. GAUBATZ: Sir, I can appreciate that  
16 perspective, except the statute regarding the license  
17 application doesn't say that the Department has to create a  
18 form limiting the sex that an applicant can put in there. It  
19 says that an applicant must list their sex. My client did  
20 list their sex, it's not my client's fault that the Department  
21 created a form which didn't allow them to put in the sex  
22 that's listed on their birth certificate, as confirmed by the  
23 State. My client complied with that statute.

24           And if we're going to look at the difference between  
25 those two statutes, we have one which is an application, a

1 form, right? A process that someone goes through. And then a  
2 license, which is an identification card, that's accepted in  
3 many localities, that's accepted by law enforcement officers,  
4 it's accepted at the airport for travel. And that seems to me  
5 that that's the more important statute and we're going to look  
6 at that and the legislature says, we don't need to have a  
7 person's sex listed on there. Nobody is ever going to again  
8 look at that application form that's filled out at the DMV by  
9 an applicant, right? That's not the important part. The  
10 important part is the license that's issued. No requirement  
11 for sex is listed there.

12 And I'll just reiterate that the statute says, An  
13 applicant must list their sex, it doesn't say must choose  
14 between male or female, it doesn't say that the Department  
15 must issue a form that only allows a person to list male or  
16 female, it doesn't say that if an applicant's form is anything  
17 other than male or female, they should lie and choose a sex,  
18 right? If my client had picked male, then I assume the  
19 Department would have given them a license. If my client had  
20 picked female, I assume the Department would have issued them  
21 a license.

22 COMMISSIONER BARTOS: But --

23 MS. LANSING: Not my --

24 COMMISSIONER BARTOS: -- counsel, can we -- we go  
25 back to the original question then, is, what was the



1 definition of sex? And -- and the arguments that, you know,  
2 permeate through all of these briefs is, well, no, there is  
3 now a definition of sex, and that gets to the affirmative  
4 relief argument, but prior to that point in time, there was no  
5 definition of sex. There was a common, legal -- well, there  
6 was an ordinary meaning and there was a legal meaning.

7           Would you agree with me that -- that the words  
8 binary or nonbinary were nonexistent and had no -- no  
9 references in any cases or statutes that I'm aware of prior to  
10 this issue arising?

11           MS. GAUBATZ: No, sir, I wouldn't agree with you  
12 that it was nonexistent. The State of Montana has printed it  
13 on at least one birth certificate, so it was in existence  
14 prior to this happening.

15           And as far as a definition of sex, there was no  
16 codified definition of sex. And we know from Montana Code  
17 Annotated Section 1-2-109, that no law contained in any of the  
18 statutes of Montana is retroactive unless so expressly  
19 declared.

20           And this -- this law, SB 458, was not declared to be  
21 retroactive. Therefore, the definition of sex that was  
22 created by it does not apply.

23           COMMISSIONER BARTOS: But the -- but there was no  
24 statutory definition of the word sex because there was a  
25 common and accepted understanding of the ordinary and the

1 legal meaning; would you agree to that?

2 MS. GAUBATZ: I do not agree with that, and if you  
3 will give me one second to pull up some authority on that,  
4 I -- I can assist you, I believe.

5 (Pause.)

6 MS. GAUBATZ: So if we take a look at Montana Code  
7 Annotated Section 1-2-105, and this is as it existed prior to  
8 SB 458, that is Section 1-2-105, it indicates, Words used in  
9 the masculine gender include the feminine and neuter.

10 So if we just look at that stature alone, we have a  
11 masculine gender, we have a feminine gender and we have neuter  
12 gender. That is codified into Montana Code recognizing that  
13 there are at least three genders.

14 We can continue on in the Code and take a look at  
15 Section 1-1-107, which states, Whenever the meaning of a word  
16 or phrase is defined in any part of the Montana Code, such  
17 definition is applicable to the same word or phrase wherever  
18 it occurs and wherever a -- except where a contrary intention  
19 plainly appears.

20 The reason I'm telling you this is because  
21 Section 30 -1-102 says, Words of masculine gender include the  
22 feminine and the neuter. And when the sense so indicates,  
23 words of the neuter gender may refer to any gender. It  
24 doesn't say either gender, it says "any gender", implying more  
25 than two.

1           COMMISSIONER BARTOS: May -- which brings me to the  
2 question I asked counsel for the State, are you aware of the  
3 Ridgeway versus Helena School district case?

4           MS. GAUBATZ: Sir, when you mentioned that I -- I  
5 looked it up fairly quickly on my phone. It appears to be a  
6 case from 1986, I haven't had a chance to review that, but I  
7 sure will after today's hearing.

8           COMMISSIONER BARTOS: And -- and the reason for  
9 that, and I'll retain it for our discussion among the  
10 Commissioners, is -- is -- there were two federal judges in  
11 the Ninth Circuit Court that -- it was very clear in terms of  
12 the differentiation between male and female, boy and girl.  
13 And, ultimately, resulted in a court order, extensive, and  
14 then an affirmation by the Eleventh -- or the Ninth Circuit.

15           So I -- but I won't burden you with that, that  
16 question, because it is a very long, lengthy decision, but  
17 believe has ramifications here.

18           MS. GAUBATZ: I appreciate that, and I think that we  
19 should look at Ninth Circuit decisions since then. We can  
20 take a look at Brooks versus the City of San Mateo, which came  
21 out of the Ninth Circuit in 2000, in which the Ninth Circuit  
22 says, quote, Sexual harassment is a species of gender  
23 discrimination. Right? Sex and gender are the same. Sexual  
24 harassment is a species of gender discrimination.

25           COMMISSIONER BARTOS: Right. But, counsel --

1 MS. GAUBATZ: We can also take a look at --

2 COMMISSIONER BARTOS: -- in -- in Ridgeway -- in  
3 Ridgeway versus School District, Helena School District, they  
4 dealt specifically with sex discrimination under Title IX, and  
5 with the Montana Human Rights Act, with regard to sex  
6 discrimination, boy, girl, with absolutely no reference to  
7 neutral categories, nonbinary categories, at all.

8 And -- and -- and it -- its application to Montana  
9 and the Montana Human Rights Act that, you know, we're  
10 supposed to -- to guard and protect, tells me that if there is  
11 a change of the protected class with regard to sex, it is not  
12 going to be a hearing officer, it's not going to be this  
13 Commission, and I don't believe it's going to even be a court,  
14 but it's the legislature that will have to amend the Montana  
15 Human Rights Act as its application to a protected class.

16 MS. GAUBATZ: Yes, sir, that would make sense --

17 COMMISSIONER BARTOS: Would you agree with that?

18 MS. GAUBATZ: I would agree with that if we were  
19 asking you to amend the definition, but my client is not  
20 asking this Commission to amend the definition. My client is  
21 asking this Commission to apply the law as it was written  
22 before the State changed and moved the goalposts.

23 And that law -- I -- with all due respect, sir, the  
24 case that you're quoting from 1986, there has been law that  
25 has come out since then, and -- and the case that I just

1 quoted to you is much more recent than -- than that case,  
2 which appears to be 30 years old.

3 The statutes which I just read to you, which talks  
4 about the masculine gender, the feminine gender and the neuter  
5 gender, one refers to any gender, not either gender, right?  
6 Those are things that were laws enacted by the State of  
7 Montana at the time that my client applied for a license.

8 And so I'm not asking this Commission to change the  
9 definition of anything, I'm asking this Commission to apply  
10 the laws as they're written.

11 COMMISSIONER BARTOS: So I understand. Thank you.  
12 But -- okay. I -- yeah, I've just got one or two more  
13 questions, Mr. Chairman.

14 CHAIRMAN DAMROW: Go ahead.

15 COMMISSIONER BARTOS: And they were the questions I  
16 asked counsel for the State, and you probably have the factual  
17 information for us. Does M.B. have a student driver's permit?

18 MS. GAUBATZ: Yes, sir, the State of Montana did  
19 issue M.B. a student driver's permit.

20 COMMISSIONER BARTOS: And is he currently using the  
21 student driver's permit?

22 MS. GAUBATZ: I don't know if my client is using  
23 that permit.

24 COMMISSIONER BARTOS: But it's available to him?

25 MS. GAUBATZ: It -- it at least was --

1 MS. STALLKAMP: The minor is not a him.

2 COMMISSIONER BARTOS: Oh, I'm sorry. I'm -- I  
3 apologize.

4 MS. STALLKAMP: Thank you.

5 COMMISSIONER BARTOS: I -- available to M.B. I'm  
6 sorry.

7 MS. STALLKAMP: Thank you, Commissioner.

8 MS. GAUBATZ: So I do not know the parameters around  
9 what makes a learner's permit available to a person or how  
10 long a learner's permit may be valid. But I do know that the  
11 State of Montana did grant my client a learner's permit.

12 COMMISSIONER BARTOS: Very good. And has he ever  
13 retained -- oh, I'm sorry -- has the person ever retained a  
14 driver's license or applied for a driver's license outside of  
15 the State of Montana?

16 MS. GAUBATZ: No, sir.

17 COMMISSIONER BARTOS: Okay. Thank you. I'll be  
18 done.

19 CHAIRMAN DAMROW: Commissioner Almy.

20 COMMISSIONER ALMY: No.

21 CHAIRMAN DAMROW: Commissioner Molina.

22 COMMISSIONER MOLINA: No, I'm good.

23 CHAIRMAN DAMROW: Okay. I have no further questions  
24 as well. So, counsel, thank you so much for entertaining our  
25 questions, and I guess at this point, we will open it up for

1 deliberation, discussion amongst the Commission.

2 MS. GAUBATZ: Thank you.

3 CHAIRMAN DAMROW: Thank you.

4 (Pause.)

5 CHAIRMAN DAMROW: Commissioner Bartos, you can start  
6 on this one.

7 COMMISSIONER BARTOS: Well, let me -- let me -- go  
8 from the point where I left off with Ridgeway versus the  
9 Helena School District, for the Commissioners vantage point or  
10 benefit, the case originated in 1984, it lasted for  
11 approximately four years. It was a case brought by the  
12 American Civil Liberties Union on behalf of a number of girls  
13 in the athletic programs in Montana, claimed that Montana, the  
14 State of Montana discriminated on the basis of sex, that the  
15 boys enjoyed considerable amounts of benefit in activities as  
16 opposed to the girls.

17 It became a federal district court case before Judge  
18 Lovell, who has since -- is deceased, and ultimately it also  
19 resulted in a settlement agreement known as the Ridgeway  
20 Settlement Agreement, where I, first and foremost, the -- the  
21 federal judge sought the parties to agree as to how to deal  
22 with these -- this discrimination.

23 The settlement agreement is probably 40, 50 pages in  
24 length. It talks about every aspect of extracurricular  
25 activities within the State of Montana. And it is found in

1 every high school library in the state. And -- and the most  
2 important feature of that, was the recognition that there were  
3 two sexes, male and female, boy, girl. There was never ever  
4 in that litigation any suggestion of nonbinary identification,  
5 something other than the sex as it was defined in -- in -- in  
6 the Ridgeway Settlement Agreement.

7 And ironically, the ACLU had represented those girls  
8 and boys -- or the girls and the parents of those girls. The  
9 bottom line is, if -- if -- if the Human Rights -- or the  
10 hearing officer's decision becomes binding and it alters the  
11 Montana Human Rights Act to extend the definition beyond male,  
12 female, boy, girl, it will have a significant impact on the  
13 Ridgeway Settlement Agreement and the way athletics for those  
14 kids are going to be affected.

15 Because now, if -- if this is the case, there is  
16 boy, there is girl, now there is a subjective gender,  
17 nonbinary, it throws that whole system out of loop.

18 It was in existence for 30 years, there are  
19 approximately 140,000 students that are governed by that  
20 Ridgeway Settlement Agreement, and by the Court action, both  
21 at the district court and at the Ninth Circuit court level.

22 At no time was there ever any individual raised the  
23 concern about a nonbinary individual, never.

24 On top of that, Judge -- the district judge here  
25 requested the assistance of a facilitator to go throughout the



1 State of Montana, interview parents, school boards, Montana  
2 High School association, various entities with regard to the  
3 application of the Human Rights Act and -- and what was about  
4 ready to come down.

5 At no time, and ironically the facilitator at the  
6 time was a former chief justice of the Supreme Court, Frank  
7 Haswell, at no time did Justice Haswell report anything other  
8 than issues involving male, female, boy, girl.

9 And -- and the point I'm making here is from, at  
10 least the perspective of this Commissioner and -- and my  
11 experiences involving the Human Rights Act, the ordinary,  
12 legal meaning of sex was male, female, boy, girl. It has  
13 never even approached or even was raised even by the parties  
14 with regard to nonbinary.

15 If -- if the hearing officer's decision is upheld,  
16 then we have created a new susp -- or a new protected class.  
17 And quite frankly, I -- I disagree with the arguments that we  
18 can expand it by interpretation. It is legislatively mandated  
19 only through a legislative action by the legislature with the  
20 Montana Human Rights Act, and it's only in its application  
21 to -- to Montana outside of -- outside of the -- the -- the  
22 recent Bostock decision, would have to be at -- at the (audio  
23 cut out).

24 Those are my initial comments, I have others, but  
25 those are my initial comments.

1                   COMMISSIONER ALMY: Just a -- I'll -- more of a  
2 question, are we going to go through the findings of fact, and  
3 then are we going to go through the conclusions of law, is  
4 that kind of process?

5                   CHAIRMAN DAMROW: Yes, after -- yeah, after  
6 discussion, we'll open it up for the two specifically that  
7 were disputed for findings of fact and then --

8                   COMMISSIONER BARTOS: Right.

9                   COMMISSIONER ALMY: -- and then we'll go to the  
10 conclusions of law and --

11                  CHAIRMAN DAMROW: Yes.

12                  COMMISSIONER ALMY: -- do what because that is  
13 really where the heart of the matter is at.

14                  CHAIRMAN DAMROW: Yeah, yeah. And I assume we will  
15 talk about it and we will discuss it and then we'll get to  
16 that.

17                  So I view this, I mean, strictly as a failure on the  
18 hearing officer's part to properly apply canons of statutory  
19 interpretation appropriately. I mean, Ms. Gaubatz is correct  
20 that we need to read and interpret the law as written. And as  
21 written, the Montana Human Rights Act provides that, you know,  
22 the State shall not refuse, to withhold, or deny any person,  
23 you know, facilities, funds, goods, etcetera, because of race,  
24 creed religion, sex, marital status and it names a few others.

25                  So in order for Ms. Gaubatz, you know, the charging

1 party to prevail, sex inherently needs to include gender and  
2 gender -- the gender identity of nonbinary.

3 And so to get there, I feel the hearing officer  
4 incorrectly applied basic canons of statutory interpretation  
5 and skipped over necessary steps.

6 So, I guess, for first and foremost and as counsel  
7 for the Department of Justice mentioned, I mean, it's a  
8 abundantly clear that Montana courts and statutory canons of  
9 construction, provides in construction of statute the office  
10 of judge or administrative law judge in this matter, is simply  
11 to ascertain, to declare what is in the terms or substance  
12 contained in the statute, not to insert what has been omitted,  
13 or to omit what has been inserted.

14 So, in this case, there's already one violation by  
15 inserting more into this statute than what is there and  
16 expanding upon that definition.

17 So to the extent the hearing officer wants to read  
18 the term sex as being ambiguous, then there are certain steps  
19 to follow as far as ascertaining the specific meaning of an  
20 undefined term within the statute.

21 So as he pointed out there was no statutory  
22 definition of the term sex in Montana law, so when that  
23 happens, the courts are to first consider the plain and  
24 ordinary meaning of a term before resorting to things like  
25 extra jurisdictional authority like he did in this case to

1 reach his -- to reach his decision, and as provided by counsel  
2 for the Department of Justice, a basic Merriam Webster's  
3 definition of the term sex refers to it, you know, in the  
4 binary fashion, distinguishing it on reproductive organs and  
5 other definition of sex, identifies it in the binary manner  
6 of, you know, according to chromosomes, things of that nature.

7 So even the plain and ordinary meaning of the term  
8 sex connotes a binary classification as male or female. And  
9 for the hearing officer to plainly skip over that step in the  
10 process, is concerning and I -- there was no explanation for  
11 why there was no consideration given to that first very  
12 fundamental step of statutory construction.

13 To the next step, so even -- so even if it is,  
14 remains undefined there is no plain and ordinary meaning, and  
15 that -- I should actually step back a little bit. So that  
16 consideration also includes, you know, looking to prior case  
17 law to determine whether prior cases have interpreted a  
18 particular term.

19 And in this case, I mean, there are multiple Montana  
20 Supreme Court cases that include that sex as a protected  
21 class, inherently just pertains to male or female, that  
22 Bachmeier decision we discussed, clearly indicating, you know,  
23 a claimant must establish membership in a protected class,  
24 either male or female, and then there was at Campbell decision  
25 as well.

1           So both of those are relatively recent Montana  
2 Supreme Court cases. And in the Campbell case indicates, In  
3 sexual harassment claims, plaintiffs -- plaintiff must first  
4 show membership in a protected class, only two classes are  
5 possible, male and female.

6           So dictionary definitions, Montana case law, all  
7 suggest that the term sex has a binary meaning and there is no  
8 nonbinary option available under that.

9           So even assuming they are -- the term still  
10 continues to be ambiguous, there is no definition, courts are  
11 then instructed to potentially consider legislative history,  
12 which is what the hearing officer did in this case, because  
13 the intent of our legislature could somehow provide further  
14 context and influence decisions to how the legislature came to  
15 enact certain laws and that is meant to be subjective and  
16 guiding how specific terms are to be interpreted.

17           So -- but in this case, the hearing officer  
18 recognized that there had been prior legislative attempts to  
19 write gender identity and things like nonbinary status into  
20 these laws that were explicitly rejected by the historical  
21 legislature, but then somehow uses the future action of the  
22 legislature in enacting 458 to say that that -- the enactment  
23 of that bill somehow means that it was -- that it was intended  
24 to include all these other gender identities, which I feel was  
25 kind of inconsistent with looking at the legislative history,

1 when the hearing officer considered future acts as part of  
2 ascertaining the legislative intent.

3 So I thought that was further error on the hearing  
4 officer's part by not just considering the lone legislative  
5 history that clearly indicated that other attempts to write in  
6 and expand this definition were explicitly rejected by  
7 legislature, which to me indicates and suggests that sex had a  
8 binary definition at that point as well, as suggested by that  
9 history.

10 So those are my biggest issues with this one. The  
11 whole issue about the Montana birth certificate, I -- I think  
12 I mentioned there is no indication in the form, the  
13 application to list, you know, the sex as identified on one's  
14 birth certificate, but just the sex in general. There is no  
15 estoppel argument made to somehow preclude the State from  
16 bringing these arguments now despite the fact that under prior  
17 laws or approaches or avenues they were able to submit this  
18 gender designation form to get that completed.

19 So, anyway, those -- those are my thoughts. I'd be  
20 curious as to my fellow Commissioners thoughts or opinions.

21 COMMISSIONER ALMY: I just went to the conclusions  
22 of law that on page -- our page 54, and I'm going, wrong,  
23 wrong, wrong, wrong, all the way down and I mean I'm just -- I  
24 couldn't disagree more with the conclusions of law. I mean,  
25 maybe -- and there is probably a couple of the findings of

1 fact I'm in disagreement, but the conclusions of law, are just  
2 wrong. And that's not very lawyer of me, but it -- he's  
3 wrong.

4 CHAIRMAN DAMROW: Commissioner Molina, any thoughts?

5 COMMISSIONER MOLINA: Nah.

6 CHAIRMAN DAMROW: Commissioner Bartos, any other --

7 COMMISSIONER BARTOS: Yes. And so we can move on to  
8 the specifics of the findings and the conclusions, I just want  
9 to make a further commentary, I disagree with the argument  
10 that -- that we look at only one statute to define what is  
11 required to receive a driver's license in Montana.

12 It's really common in Montana's legislature that --  
13 that sections of the law aren't -- they don't follow each  
14 other in that numerical order in a particular title, simply  
15 because of the, you know, the every two years that the  
16 legislature meets.

17 So when -- when the legislature defined the  
18 application process to achieve a driver's license, it was  
19 their intent that they wanted to have the identity of sex on  
20 the application, so that's where they created the statute and  
21 then the administrative branch of the government then  
22 responded to that requirement.

23 And then perhaps subsequently or in a different  
24 setting, the legislature said, Well, we want these items as  
25 well. You have to reconcile the various statutes in order to

1 give meaning to the legislative direction.

2 And in doing that, the commentary I made during  
3 our -- the course of our -- of our discussion or questioning,  
4 commentary I made is, it was a precondition of the legislature  
5 to have an application completed with sex identified in order  
6 to get to the next phase or provision of law, that being  
7 the -- the issuance of the driver's license itself.

8 And so you have to reconcile both of those together,  
9 and I believe the hearing officer did not incorporate again  
10 the legislative intent here.

11 CHAIRMAN DAMROW: Okay. So any other thoughts  
12 before we turn to the findings of fact?

13 COMMISSIONER BARTOS: Generally speaking, there were  
14 a lot -- I would agree with Commissioner Almy, there are a lot  
15 more than I would want to visit about. But I think it's more  
16 important to utilize our time to get to the findings and  
17 conclusions.

18 CHAIRMAN DAMROW: Agreed. Okay. So turning to the  
19 first disputed Finding of Fact, No. 19, does anybody have the  
20 hiring officer's decision?

21 COMMISSIONER ALMY: I have got it right here.

22 MS. STALLKAMP: It's 36 of your materials.

23 CHAIRMAN DAMROW: So Finding of Fact No. 19, M.B.  
24 was informed by two department employees that the Department  
25 was in the process of updating its forms to include an option



1 for nonbinary individuals, but that the update would not be  
2 completed for approximately a year.

3 So any thoughts or dispute on that one?

4 COMMISSIONER MOLINA: It's probably true, but it's  
5 only half the truth, because we found out later that the  
6 Department had said, no, that's not true at all. So I mean  
7 it's a finding of fact. But it's half a fact.

8 CHAIRMAN DAMROW: But I think kind of recognizing  
9 the -- again the small, the low bar for supporting findings of  
10 fact being substantial evidence, but -- which means -- doesn't  
11 necessarily rise to a preponderance of the evidence, but it's  
12 more than a scintilla for those. I think the cited testimony,  
13 on page 400 of our record, indicates that -- I guess the  
14 charging parties -- the charging party Sara Berndt testified  
15 that one MVD employee told her at the time they were working  
16 on a new system and they wouldn't be updating their current  
17 system any further, and it will be a year out until they have  
18 the new system with the new check box. So I know it's  
19 ticky-tacky, but I don't know if there were exactly two  
20 individuals that had recommended this change was happening. I  
21 mean, I know at least, based on her testimony to the extent  
22 she allegedly heard it, that would support at least that she  
23 heard that by one person.

24 So I don't know if it's worth revising to clarify  
25 that be, was informed. Maybe make that distinction, that

1 clarification, that M.B. was informed by one department  
2 employee, based on that testimony. But I don't know, what are  
3 other thoughts.

4 COMMISSIONER BARTOS: Well, not -- I recall the  
5 transcript and the arguments, but I think -- I think the big  
6 picture and put it in context, was that State employees are  
7 trying to provide a service to -- to the public and -- and --  
8 and the State employee may have over spoke or presented the  
9 situation in the manner that -- that softened the -- the, you  
10 know, the information as opposed to being more accurate in --  
11 in -- in -- in providing that information.

12 It was -- it was -- but the update would not be  
13 completed for -- well, it's really hard to try to figure out  
14 how -- how you would want to say that, that would accurately  
15 reflect what -- what occurred and how the hearing officer  
16 determined that.

17 I think -- I think at the very least, the amendment  
18 is, M.B. was informed by "a" Department employee, that the  
19 Department was in the process of updating its forms, to  
20 include an option -- was perhaps considering to update its  
21 forms --

22 COMMISSIONER MOLINA: Let me interject just a  
23 second, M.B. wasn't told that, the mother was told that.

24 COMMISSIONER BARTOS: Hmm.

25 COMMISSIONER MOLINA: The mother was told that.

1 M.B. didn't -- it doesn't say M.B. was told that.

2 COMMISSIONER BARTOS: Oh, is that right?

3 COMMISSIONER MOLINA: It says -- the charging party  
4 had testified that an MVD employee told me at the time we were  
5 working on this, it wasn't M.B., it was the mother thereof.

6 MS. STALLKAMP: So, Commissioners, but they wouldn't  
7 have been in separate places.

8 COMMISSIONER MOLINA: Yeah, but I'm just saying --

9 MS. STALLKAMP: The mother would have been with the  
10 child.

11 COMMISSIONER MOLINA: That's what it says right  
12 there. And -- and M.B. might not have been there. M.B. could  
13 have been in a different room.

14 MS. STALLKAMP: For purposes of not rejudging the  
15 hearing officer's findings of fact that are based on what is a  
16 very low bar of evidence, if the charging party testified  
17 that -- that she was informed, and the hearing officer said  
18 M.B. was informed, M.B. is the subject of the issue.

19 COMMISSIONER BARTOS: Right. Right.

20 MS. STALLKAMP: So while I --

21 COMMISSIONER MOLINA: I'm being picky, I -- yes.

22 MS. STALLKAMP: Yeah.

23 COMMISSIONER MOLINA: Yes, I am, but --

24 MS. STALLKAMP: I think you're going too far down --  
25 I think.

1 COMMISSIONER MOLINA: Rabbit hole.

2 MS. STALLKAMP: I think both Commissioners are going  
3 too far down the rabbit hole. I agree that the testimony says  
4 one MVD employee informed the charging parties that they were  
5 in the process of updating. I don't think we need to -- the  
6 hearing officer is entitled to deference on credibility of  
7 witnesses, and took the witness testimony from MVD, that one  
8 of our customer service folks or managers may have testified  
9 to that, may have softened it, but --

10 COMMISSIONER ALMY: Yeah, I don't want to --

11 MS. STALLKAMP: I don't think you can amend the  
12 finding of fact that far.

13 COMMISSIONER MOLINA: I don't want -- I don't want  
14 to go down that rabbit hole.

15 CHAIRMAN DAMROW: But could at least revise it to  
16 reflect that it was just one --

17 MS. STALLKAMP: One, yes.

18 CHAIRMAN DAMROW: -- as opposed to two?

19 MS. STALLKAMP: Yes.

20 CHAIRMAN DAMROW: Okay. Any further discussion  
21 or --

22 COMMISSIONER BARTOS: How about the words customer  
23 service employee?

24 MS. STALLKAMP: I think we can say one Department --

25 CHAIRMAN DAMROW: I think that is saying the same

1 thing, she was --

2 MS. STALLKAMP: -- employee.

3 COMMISSIONER ALMY: Yeah.

4 CHAIRMAN DAMROW: Okay.

5 COMMISSIONER BARTOS: You really didn't want to  
6 elevate it, you know, when I read this, I don't want to  
7 elevate it to the degree that the employee actually had full  
8 knowledge and authority --

9 MS. STALLKAMP: That's right.

10 COMMISSIONER BARTOS: -- to say what he said.

11 MS. STALLKAMP: That's not what the finding of fact  
12 says though. All of the finding of fact says is that the  
13 Department -- that the party -- the charging parties were  
14 informed that the Department was in the process of updating  
15 their forms.

16 COMMISSIONER BARTOS: Okay.

17 MS. STALLKAMP: That's all it says. That they were  
18 informed as such.

19 CHAIRMAN DAMROW: So based on that, I would move to  
20 just simply amende Finding of Fact No. 19 to reflect that it  
21 was one Department employee, not two.

22 So is there a second to that motion.

23 COMMISSIONER ALMY: Yes, second.

24 CHAIRMAN DAMROW: Okay. So please indicate your  
25 votes as I go around. Commissioner Almy.

1 COMMISSIONER ALMY: Yes, sir.

2 CHAIRMAN DAMROW: Commissioner Molina.

3 COMMISSIONER MOLINA: Yes.

4 CHAIRMAN DAMROW: Commissioner Bartos.

5 COMMISSIONER BARTOS: Yes.

6 CHAIRMAN DAMROW: I will also vote yes, so it  
7 carries. So Finding of Fact No. 19 is hereby revised to  
8 reflect, M.B. was informed by one, not two Department  
9 employees of that.

10 Okay. So then the next one, Finding of Fact No. 20,  
11 MVD refused to issue a driver's license to M.B. because M.B.'s  
12 application form could not be completed and entered into the  
13 IDEMIA system, and I believe the quarrel is over the "could  
14 not" verse "would not" language.

15 (Pause.)

16 CHAIRMAN DAMROW: I also think it's kind of -- I  
17 mean, I know it's kind of semantics on the part of the hearing  
18 officer to say that, but I mean --

19 COMMISSIONER BARTOS: Mm-hmm, mm-hmm.

20 CHAIRMAN DAMROW: -- there's -- I mean it's arguable  
21 either way.

22 COMMISSIONER ALMY: Yeah. I would like to see it  
23 say "was not completed." As -- no could not, was not  
24 completed. It says can't or was not.

25 COMMISSIONER MOLINA: Physically can't mark the box.

1 I don't know that's true. Is it could, it wasn't. And let  
2 somebody else worry about why. And I would say --

3 CHAIRMAN DAMROW: Was not as opposed to could not?

4 COMMISSIONER BARTOS: Let me try to rephrase. Was  
5 not completed -- was not completed and entered into the  
6 system.

7 MS. STALLKAMP: I mean I think you're -- I think  
8 Mr. Chair is right, that you're arguing semantics at this  
9 point, and i --

10 COMMISSIONER MOLINA: Well, but I think -- I think  
11 we need --

12 MS. STALLKAMP: I need you to point me to a spot in  
13 the record where it's "was not" versus "could not."

14 COMMISSIONER MOLINA: Well, the hearing officer is  
15 saying too, he's saying -- he's indicating that it could not  
16 be completed, they tell me they physically couldn't mark an X  
17 on there?

18 MS. STALLKAMP: They argued that they -- they  
19 couldn't mark the X because --

20 COMMISSIONER MOLINA: No, they couldn't -- they  
21 physically couldn't mark the X. They chose not to. And it  
22 wasn't -- it wasn't completed, as it was a couldn't.

23 COMMISSIONER BARTOS: Yeah, I mean --

24 MS. STALLKAMP: I don't know that there's citation  
25 to or that the -- any of the parties were asked whether or

1 not -- I don't know -- this is a tough one because of the way  
2 the hearing officer wrote it.

3 COMMISSIONER MOLINA: Yeah, and that's my point.  
4 I -- I'm disappointed with the hearing officer, the way he  
5 ruled this. He slanted it. And that disappoints me. I'm  
6 trying to --

7 CHAIRMAN DAMROW: If I can -- was not, by the  
8 application itself not having one of the check box, I mean, I  
9 think that's record support for the fact that it simply was  
10 not completed as opposed to --

11 MS. STALLKAMP: Right, but if the -- if M.B.  
12 testified, I couldn't complete it because it was inaccurate,  
13 there was not an accurate box for my sex, then M.B. testified  
14 he -- they could not complete it. And that's record evidence.

15 COMMISSIONER BARTOS: Could you word direct that  
16 again for us.

17 MS. STALLKAMP: Well, I -- the argument would be  
18 that M.B. would have testified, I can't complete this because  
19 there is not an accurate or a correct designation for me. And  
20 he wrote -- M.B. wrote in NB as --

21 COMMISSIONER ALMY: Did M.B. testify?

22 MS. STALLKAMP: Or SB testified. Let me look.

23 COMMISSIONER BARTOS: MVD was unable to issue a  
24 driver's license because -- because the application form ...

25 MS. STALLKAMP: Yes, M.B. did testify.



1 COMMISSIONER ALMY: He did, yeah, okay. Yeah, yeah.

2 MS. STALLKAMP: And M.B. testified, it's on  
3 page 163, Commissioners, of your record, M.B. testified that  
4 M.B. wrote NB in the sex category, not marking either box.

5 (Audio cut out.)

6 CHAIRMAN DAMROW: So just 163 --

7 MS. STALLKAMP: I'm scrolling back up, because that  
8 was -- that was M.B.'s specific testimony, that they had  
9 marked the nonbinary, had written the NB in there.

10 If you scroll up to page 161, line -- lines 15 and  
11 16, M.B. has testified to having -- it being important to  
12 having a sex listed accurately on his driver's license.

13 (Pause.)

14 CHAIRMAN DAMROW: Not necessarily that I could not,  
15 it may have been testified that it was important, but not that  
16 he -- that he could not complete the application (audio cut  
17 out).

18 UNIDENTIFIED INDIVIDUAL: If you look at the bottom  
19 of page 139, on to page 140, they talk about compare this  
20 to -- assuming applicant, answer yes or no to that, the  
21 question is if you have a relationship. They wouldn't process  
22 it. So -- at this point, you know, a measure of the complete  
23 application.

24 COMMISSIONER BARTOS: I think we also have  
25 determined a plumber's wrench in here. The Commissioners can

1 take a look at case record No. 19 where the order of the  
2 party's cross-motion for summary judgment, we go to where they  
3 said it is undisputed facts, No. 9.

4 COMMISSIONER ALMY: There you go.

5 COMMISSIONER MOLINA: That's -- that's what I'm  
6 saying. Yeah.

7 COMMISSIONER BARTOS: And that's what -- that No. 9  
8 is what I'm -- I would put into No. 20.

9 CHAIRMAN DAMROW: Mm-hmm, those are essentially one  
10 in the same.

11 COMMISSIONER BARTOS: Yes.

12 CHAIRMAN DAMROW: To, Commissioner Almy, would you  
13 care to make a motion on this one? I guess, now knowing that,  
14 I mean Finding of Fact No. 9 and No. 20.

15 COMMISSIONER ALMY: Yeah, I mean, if we can  
16 substitute the language from page 19 on No. 9, MVD refused to  
17 provide M.B. with a driver's license because the application  
18 form could not be completed, that's -- and -- or -- or --

19 MS. STALLKAMP: Those --

20 COMMISSIONER ALMY: -- or that --

21 CHAIRMAN DAMROW: That's --

22 MS. STALLKAMP: Those say the same thing.

23 CHAIRMAN DAMROW: Those say the same thing.

24 COMMISSIONER ALMY: Yeah.

25 COMMISSIONER BARTOS: Yeah. Well, there's more on

1 this one.

2 MS. STALLKAMP: Just that the -- that the -- that  
3 they couldn't enter it into the IDEMIA system.

4 COMMISSIONER BARTOS: I'm sorry -- oh, the...

5 CHAIRMAN DAMROW: That 9 and 20 essentially say the  
6 same thing, so I think if one is amended to indicate the  
7 application form was not completed, we amend both to reflect  
8 the same.

9 COMMISSIONER: (Inaudible.)

10 COMMISSIONER BARTOS: So the Commissioners  
11 understand, undisputed facts means that the parties agreed and  
12 submitted proposed findings of fact to the -- to the hearing  
13 officer that they both agreed upon.

14 COMMISSIONER ALMY: Both agreed to it.

15 COMMISSIONER BARTOS: Yeah.

16 COMMISSIONER ALMY: Well, if they both agreed to it,  
17 then I'm going to have to agree to it too.

18 CHAIRMAN DAMROW: Yeah, counsel has a good point, I  
19 mean, this was on a motion for summary judgment, not from a  
20 hearing officer decision, so they are titled as undisputed  
21 fact as opposed to findings of fact. So technically that  
22 appears to be undisputed.

23 MS. STALLKAMP: The -- yes, the finding of facts  
24 from the undisputed finding of fact was then moved into Fact  
25 20 in the final order that the hearing officer issued.

1           CHAIRMAN DAMROW: That was the order for summary  
2 judgment, so where was the...

3           Got it. Oh, okay.

4           (Pause.)

5           MS. STALLKAMP: It's on page 30, the -- the  
6 administrative decision issued by the hearing officer to close  
7 the case at the hearing level and send it here.

8           CHAIRMAN DAMROW: Got it. Okay. So you were  
9 looking at Undisputed Fact 9, and we're only to consider the  
10 hearing officer decision --

11          COMMISSIONER ALMY: Right.

12          CHAIRMAN DAMROW: -- on it? Okay. Does anybody  
13 care to make a motion on that one? To reflect that the form  
14 was not completed as opposed to could not be completed?

15          COMMISSIONER ALMY: Yeah, I'll make the motion.  
16 No. 20, MVD refused to issue a driver's license to M.B.  
17 because M.B.'s application form was not completed and entered  
18 into the IDEMIA system.

19          CHAIRMAN DAMROW: And I would second that. So  
20 please indicate your vote as I go around. Beginning with  
21 Commissioner Almy.

22          COMMISSIONER ALMY: Yes, sir.

23          CHAIRMAN DAMROW: Commissioner Molina.

24          COMMISSIONER MOLINA: Yes.

25          CHAIRMAN DAMROW: Commissioner Bartos.

1 COMMISSIONER BARTOS: Yes.

2 CHAIRMAN DAMROW: And I will vote yes. So motion  
3 carries. Finding of Fact No. 20 is hereby amended to read,  
4 MVD refused to issue a driver's license to M.B. because M.B.'s  
5 application form was not completed, and entered into the  
6 IDEMIA system.

7 So with that being said, those are the disputed  
8 findings of fact.

9 So turning to our conclusions of law, that is  
10 page 54 of our record.

11 COMMISSIONER BARTOS: Question for counsel, we  
12 struggled with this before, the hearing officer goes on pages  
13 and pages of discussion --

14 MS. STALLKAMP: Mm-hmm.

15 COMMISSIONER BARTOS: -- which can be assumed to be  
16 conclusions of law, when he draws, you know -- you know, the  
17 Bostock decision and the like.

18 MS. STALLKAMP: Mm-hmm.

19 COMMISSIONER BARTOS: How do we deal with pages of  
20 narratives that we disagree with in -- in -- in light of what  
21 I seem to understand my fellow Commissioners and I are wanting  
22 to do?

23 MS. STALLKAMP: Great question. When the Commission  
24 issues a final order, and I realize the three of you  
25 Commissioners don't always see them, the Chair approves them

1 and signs them, the narrative of your discussion, your legal  
2 analysis of a particular decision is included in that.

3 So you really just need to have the discussion  
4 surrounding the conclusions of law, and the legal reasons that  
5 you wish to, in this case -- I'm extrapolating a little --  
6 wish to overturn and the reasons for that.

7 Your motion will reflect that you are making a  
8 change, and then the final order that is issued will contain  
9 the legal reasoning for the change.

10 COMMISSIONER BARTOS: And the final order then it  
11 would be circulated among the Commissioners in draft form?

12 MS. STALLKAMP: No. Those go for view of the Chair,  
13 the Chair reads them for his, because his signature is the one  
14 that appears on them.

15 COMMISSIONER BARTOS: And the Commissioners don't  
16 have input on that?

17 MS. STALLKAMP: Generally we have just summarized  
18 your decision based on what is happening here, drafting by  
19 committee is never a good idea and because Chair Damrow's name  
20 appears on the final order, he approves the legal reasoning  
21 that comes out of your discussions today and my advice to you,  
22 and then we issue that order.

23 COMMISSIONER ALMY: Would he be inclined to send it  
24 to us so we can read it after the fact?

25 MS. STALLKAMP: Yeah, by all means. Yeah. I

1 apologize that we haven't been --

2 COMMISSIONER ALMY: Normally, you know, this is kind  
3 of an easy case, but I would like to see what we said.

4 MS. STALLKAMP: Of course.

5 CHAIRMAN DAMROW: And, of course, I understand all  
6 our orders are true to the --

7 MS. STALLKAMP: Yes.

8 CHAIRMAN DAMROW: -- discussion and commentary by  
9 the Commission. I don't go rogue and issue anything off the  
10 beaten path that we haven't already discussed.

11 MS. STALLKAMP: We have also had at least one order  
12 that Commissioner Damrow (audio cut out) but signed the final  
13 order as well.

14 COMMISSIONER BARTOS: Anything -- and it's not a  
15 negative reflection on any of the Commissioners, it's -- it's  
16 because of the complexity of this case --

17 MS. STALLKAMP: Mm-hmm.

18 COMMISSIONER BARTOS: -- and the possibility and the  
19 probability that this case will be appealed --

20 MS. STALLKAMP: Yes.

21 COMMISSIONER BARTOS: -- that it -- the higher  
22 authority, be it a district judge or some federal court, for  
23 God's sakes will know what we -- what our observations were at  
24 this point.

25 MS. STALLKAMP: Yeah. I mean, your discussion

1 appears on the record, in a public meeting that is part of the  
2 administrative record, that is transferred to whichever court  
3 gets it next.

4 CHAIRMAN DAMROW: Okay. So turning to the  
5 conclusions of law, initially I was trying to read through  
6 these again when Curt was saying there is issues with every  
7 single one of them, and I quite frankly have to agree based on  
8 our discussion. I think --

9 COMMISSIONER ALMY: One is okay.

10 CHAIRMAN DAMROW: The first one -- yeah, one is  
11 okay. So I guess I would move to accept in Conclusion of Law  
12 No. 1 being the Department of Labor and Industry does in fact  
13 have jurisdiction over this case pursuant to Montana law.

14 So is there a second to that?

15 COMMISSIONER ALMY: Yes, I'll second that.

16 CHAIRMAN DAMROW: Okay. So please indicate your  
17 first. Commissioner Almy.

18 COMMISSIONER ALMY: Yes.

19 CHAIRMAN DAMROW: Commissioner Molina.

20 COMMISSIONER MOLINA: Yes.

21 CHAIRMAN DAMROW: Commissioner Bartos.

22 COMMISSIONER BARTOS: Yes.

23 CHAIRMAN DAMROW: And I'll vote yes, motion carries.  
24 Conclusion of Law No. 1 is accepted as drafted.

25 Regarding the remainder, we can leave No. 5 for the



1 moment, because I don't think we talked about the mixed motive  
2 issue very much.

3 But Conclusions of Law No. 2, 3, 4, 6, and 7, I  
4 would move to reject those conclusions of law as noted.

5 Is there a second to that motion?

6 COMMISSIONER ALMY: Mr. Bartos, your turn.

7 COMMISSIONER BARTOS: Well, just to clarify again,  
8 3, 4 --

9 CHAIRMAN DAMROW: No, 2.

10 COMMISSIONER ALMY: 2, 3, 4 --

11 CHAIRMAN DAMROW: 2, 3, 4, 6, 7.

12 COMMISSIONER BARTOS: There's a second?

13 COMMISSIONER ALMY: You're going to do that.

14 COMMISSIONER BARTOS: I second. Well, I'm told to  
15 second, so...

16 CHAIRMAN DAMROW: Okay, so it has been moved and  
17 seconded that those conclusions of law are rejected.

18 Please indicate your vote as I go around. Beginning  
19 with Commissioner Molina.

20 COMMISSIONER MOLINA: Yes.

21 CHAIRMAN DAMROW: Commissioner Almy.

22 COMMISSIONER ALMY: Yes.

23 CHAIRMAN DAMROW: Commissioner Bartos.

24 COMMISSIONER BARTOS: Yes.

25 CHAIRMAN DAMROW: And I'll vote yes, the motion

1 carries.

2 MS. STALLKAMP: Sorry, Mr. Chair, I'm going to make  
3 you talk a little bit about -- I realize you've had the  
4 discussion already, do you just want to reject them outright,  
5 do you want to substitute a conclusions of law?

6 CHAIRMAN DAMROW: I would say outright.

7 MS. STALLKAMP: Okay.

8 CHAIRMAN DAMROW: Based on how they are.

9 MS. STALLKAMP: Okay. So --

10 CHAIRMAN DAMROW: I mean, we -- we could accept  
11 portions of them, but there are certain clauses within there  
12 that are --

13 MS. STALLKAMP: Right.

14 CHAIRMAN DAMROW: -- clearly kind of against what  
15 we're thinking.

16 MS. STALLKAMP: So here's what we're left with. You  
17 have rejected 2, 3, 4, 6 and 7, you have adopted 1, which is  
18 great.

19 COMMISSIONER ALMY: And 5 is a jump ball.

20 MS. STALLKAMP: Yes. And you still need to talk  
21 about 5, which you haven't yet.

22 CHAIRMAN DAMROW: Yes.

23 MS. STALLKAMP: And then you will probably need to  
24 enter some other conclusions of law, because you have rejected  
25 the ones existing here.

1 COMMISSIONER BARTOS: Which --

2 CHAIRMAN DAMROW: Okay.

3 COMMISSIONER BARTOS: Which is so difficult, because  
4 I'm sure it takes hours and hours of -- of thought processes  
5 to develop proposed conclusions of law on a case like this.  
6 And -- and we try to do it among four or five Commissioners  
7 within minutes. I mean --

8 CHAIRMAN DAMROW: I feel like we could potentially  
9 come up with some new ones based on how they are worded here,  
10 but just to reframe them --

11 MS. STALLKAMP: So, yeah --

12 COMMISSIONER ALMY: -- to adopt them accordingly, is  
13 that what you were thinking, counsel?

14 MS. STALLKAMP: Here's -- here's what I am  
15 picturing, at least for two, that -- that the def -- the basis  
16 of sex as that term exists in the Human Rights Act, does not  
17 include gender identity. And, therefore, M.B. is not a member  
18 of a protected class.

19 CHAIRMAN DAMROW: Okay.

20 MS. STALLKAMP: And I -- am putting too many words  
21 in your mouth?

22 COMMISSIONER BARTOS: Well, just --

23 MS. STALLKAMP: I just put that out there.

24 COMMISSIONER BARTOS: If we could just stop there  
25 for a second.

1 MS. STALLKAMP: Yeah.

2 COMMISSIONER BARTOS: Was this just -- and I don't  
3 remember the original complaint, but was -- was this case just  
4 solely based on the Montana Human Rights Act? Or was there --  
5 was there a federal statute?

6 MS. STALLKAMP: I believe it was just based on the  
7 Human Rights. Let me -- I'm checking though.

8 COMMISSIONER BARTOS: And the Montana Constitution.

9 (Pause.)

10 MS. STALLKAMP: Yes, equal protection under  
11 Article, 2 Section 4, Article 2, Article 11, Section 4 of the  
12 Constitution, Montana Constitution.

13 And then article -- I'm sorry, my apologies,  
14 Article 2, Section 4 for both of these, printing didn't  
15 transfer well. For dignity and equal protection.

16 And then a claim for discrimination under the Human  
17 Rights Act.

18 Discrimination by the State also under the Human  
19 Rights Act. 49-2-308.

20 So no -- nothing federal, just the Constitution, two  
21 constitutional issues, two state issues.

22 COMMISSIONER BARTOS: And so would you then advise  
23 the Commissioners to include references to the Montana  
24 Constitution?

25 MS. STALLKAMP: I think the constitutional

1 violations are based on the definition of -- the way sex is  
2 defined. Sorry, lawyering on the spot is not any easier than  
3 commissionering on the spot.

4 CHAIRMAN DAMROW: And, counsel, it helps, I don't  
5 know if any constitutional references are necessary --

6 MS. STALLKAMP: I don't think they are.

7 CHAIRMAN DAMROW: -- for purposes of our conclusions  
8 of law. And what you were suggesting as far as needing to  
9 come up with other conclusions of law, I think simply the  
10 fact, you know, the conclusion of law that we have, you know,  
11 discussed and have all come to the agreement to today, that  
12 M.B. is not a member of a protected class within the meaning  
13 of the Montana Human Rights Act on the basis of sex, would be  
14 sufficient.

15 MS. STALLKAMP: Yep.

16 CHAIRMAN DAMROW: Would you agree?

17 MS. STALLKAMP: I agree that is a much more cogent  
18 representation of the discussion than what I --

19 CHAIRMAN DAMROW: I do my best.

20 MS. STALLKAMP: -- I was trying to say.

21 CHAIRMAN DAMROW: I try to help. So is that  
22 sufficient for kind of -- and then I guess for purposes of --  
23 maybe the last one, for purposes of MCA 49-2-505, subsection  
24 8, respondents are the prevailing parties in this matter?

25 MS. STALLKAMP: Yep.

1           CHAIRMAN DAMROW: Okay. So why don't we -- to the  
2 extent we need to adopt new conclusions of law, I would now  
3 make a motion to submit those two I just suggested, if there  
4 was any confusion or that -- or clarification needed after we  
5 do so, but is there a second to that motion?

6           COMMISSIONER ALMY: Second.

7           CHAIRMAN DAMROW: Okay. So it's moved and seconded.  
8 So to adopt the -- the new conclusions of law and then we  
9 still need to address No. 5 real quick, but...

10          COMMISSIONER BARTOS: So what are the new  
11 conclusions of law?

12          CHAIRMAN DAMROW: So --

13          MS. STALLKAMP: My apologies.

14          CHAIRMAN DAMROW: Well, go ahead.

15          MS. STALLKAMP: Okay. Conclusion of Law No. 2 will  
16 read, M.B. is not a member of a protected class within the  
17 meaning of the Montana Human Rights Act on the basis of sex.  
18 Period.

19          COMMISSIONER BARTOS: You know what we just said, if  
20 M.B. chose to say, person is nonbinary, we're saying here that  
21 the person is neither male or female. And it's the Human  
22 Rights Commission that is saying a human being, a person, it  
23 doesn't fit within a male or female because male or female is  
24 a protected class within the Human Rights Act.

25                 Or am I just taking this out --

1 MS. STALLKAMP: I think, Commissioner, you've just  
2 undone the last two years of discussion we have been having,  
3 if that's where you're going.

4 COMMISSIONER BARTOS: Right. But -- but just by  
5 itself, just the language by itself in a paragraph in the  
6 conclusions of law --

7 MS. STALLKAMP: But the conclusions of law apply the  
8 facts of the case, including that M.B. is a nonbinary.

9 COMMISSIONER BARTOS: But if you tell that to a  
10 district court judge so that --

11 MS. STALLKAMP: Fine.

12 COMMISSIONER BARTOS: -- and perhaps that's where  
13 the narration will come in with -- with the Chair of the -- of  
14 the Commission to draw that -- you know, draw that  
15 explanation.

16 Sometimes our -- our -- our answer to this is so  
17 short, it -- it develops -- you know, we know what we're  
18 saying, but when you get this raw, on of piece of paper in  
19 front of a district judge sitting in Missoula, he or she is  
20 going to say, What did they just say here?

21 I don't know if they -- the judge will put it in --

22 CHAIRMAN DAMROW: With all due -- so, Commissioner  
23 Bartos, the whole -- our whole discussion and agreement  
24 centered around the fact that the term sex for purposes of  
25 Montana Human Rights Act does not include or is not expansive

1 enough to include things such as gender identity. That is  
2 what it is saying.

3 COMMISSIONER BARTOS: So why isn't that a conclusion  
4 of law?

5 COMMISSIONER MOLINA: Yeah, I mean I think we need  
6 to say that, I think that.

7 MS. STALLKAMP: So you want to add a conclusion of  
8 law that says, gender identity is not included within the  
9 definition of sex of the Montana Human Rights Act?

10 COMMISSIONER BARTOS: That would be a lot more  
11 than -- a lot better than not saying anything in that regard.

12 CHAIRMAN DAMROW: I guess that would work. Counsel?

13 MS. STALLKAMP: Yep.

14 CHAIRMAN DAMROW: Okay. Could he reread it then,  
15 please. I'm sorry.

16 MS. STALLKAMP: Let me pull it out of my -- let me  
17 type it and then I'll read it for you. Did we vote on  
18 Mr. Chair's motion from -- from 2:41 p.m., Hannah.

19 CHAIRMAN DAMROW: We -- we did not, we got caught up  
20 in discussion. I will withdraw that motion until we have a  
21 new recitation of that conclusion of law.

22 MS. STALLKAMP: Okay. Because I -- while I'm doing  
23 things.

24 (Pause.)

25 MS. STALLKAMP: Okay. The term sex as within the



1 meaning of the Montana Human Rights Act does not include  
2 gender identity.

3 CHAIRMAN DAMROW: Would that be a separate one or  
4 would that be one in the same?

5 MS. STALLKAMP: It would be a separate one.

6 CHAIRMAN DAMROW: Okay. Yes.

7 MS. STALLKAMP: I'd probably put it above because it  
8 makes more sense there.

9 CHAIRMAN DAMROW: Do we need to clarify that it is  
10 related to the 2021 version since there is now a law on the  
11 books that makes that abundantly clear, or does that even  
12 matter?

13 MS. STALLKAMP: I -- I will add 2021 version.

14 CHAIRMAN DAMROW: Got it.

15 MS. STALLKAMP: Okay. So --

16 COMMISSIONER BARTOS: Would you -- and then add the  
17 words nonbinary gender identity, or just gender identity?

18 MS. STALLKAMP: You have not had any discussion  
19 around nonbinary gender identity versus a different gender  
20 identity. Yes.

21 COMMISSIONER ALMY: So we better keep it pretty  
22 narrow?

23 MS. STALLKAMP: I would just say, does not include  
24 gender identity since that's been the basis of --

25 COMMISSIONER ALMY: Got it.

1 MS. STALLKAMP: -- discussion.

2 CHAIRMAN DAMROW: I agree with counsel. So --

3 MS. STALLKAMP: Okay. So new Conclusion of Law  
4 No. 2 reads, The term sex within the meaning of the 2021  
5 version of the Montana Human Rights Act does not include  
6 gender identity.

7 And then new Conclusion of Law No. 3 will read,  
8 M.B. is not a member of a protected class within the 2021  
9 version of the Montana Human Rights Act on the basis of sex.

10 CHAIRMAN DAMROW: I believe that sounds right.

11 COMMISSIONER BARTOS: M.B. is a not member of a  
12 protected class within the meaning of the Montana Human Rights  
13 Act, identified -- should we say something about identified as  
14 nonbinary on the basis of sex?

15 MS. STALLKAMP: I don't think that's necessary.

16 CHAIRMAN DAMROW: I think counsel was right, it's  
17 got to get in there.

18 COMMISSIONER BARTOS: All right. Okay. I'm -- the  
19 gender identity, I think we will try to cover it all.

20 CHAIRMAN DAMROW: So with those two revisions, and  
21 then moving to amend or revise the final conclusion of law  
22 that I guess will be No. 4, now -- or whatever conclusion of  
23 law it ends up being at the end, for purposes of Montana Code  
24 Annotated 49-2-508, subsection 8, respondents are the  
25 prevailing parties in this matter.

1           So with those three, again understanding we still  
2 need to address the mixed motive issue, with those three  
3 revisions in mind, I would move to adopt these three new  
4 conclusions of law.

5           COMMISSIONER ALMY: Did we nix 2, 3, 4, 6 and 7?

6           CHAIRMAN DAMROW: Yes.

7           COMMISSIONER ALMY: They are out?

8           MS. STALLKAMP: Yes, we talked about that one  
9 already.

10          COMMISSIONER BARTOS: Yeah.

11          CHAIRMAN DAMROW: Is there a second?

12          COMMISSIONER ALMY: Second.

13          CHAIRMAN DAMROW: Okay. So please indicate your  
14 vote. Commissioner Almy.

15          COMMISSIONER ALMY: Yes, sir.

16          CHAIRMAN DAMROW: Commissioner Molina.

17          COMMISSIONER MOLINA: Yes.

18          CHAIRMAN DAMROW: Commissioner Bartos.

19          COMMISSIONER BARTOS: Yes.

20          CHAIRMAN DAMROW: And I will vote yes, so those  
21 three new conclusions of law are hereby adopted.

22                 So just leaving us with the mixed motive issue that  
23 we have yet to discuss, but is there any issue or discussion  
24 on that one?

25          COMMISSIONER BARTOS: I think your commentary

1 earlier, if I was listening to you correctly, Mr. Chairman, I  
2 was agreeing with on the mixed motive. I -- in my opinion, I  
3 believe the conclusion of law as written here is -- is wrong.

4 There was the affirmative defense provided  
5 sufficiently in advance of the order on the motion for summary  
6 judgment, and I believe the hearing officer erred on No. 5.

7 COMMISSIONER ALMY: Do we nix it or do he we revise  
8 it?

9 CHAIRMAN DAMROW: I think we could just reject that  
10 one.

11 COMMISSIONER ALMY: I agree.

12 MS. STALLKAMP: I think so.

13 CHAIRMAN DAMROW: Okay. So is there a motion  
14 regarding Conclusion of Law No. 5, pertaining to the mixed --  
15 whether the mixed motive defense was timely raised?

16 COMMISSIONER BARTOS: I'll move to reject Conclusion  
17 of Law No. 5.

18 CHAIRMAN DAMROW: Okay. Is there a second?

19 COMMISSIONER MOLINA: Second.

20 CHAIRMAN DAMROW: So please indicate your vote.  
21 Commission Almy.

22 COMMISSIONER ALMY: Yes.

23 CHAIRMAN DAMROW: Commissioner Bartos.

24 COMMISSIONER BARTOS: Yes.

25 CHAIRMAN DAMROW: Commissioner Molina.

1 COMMISSIONER MOLINA: Yes.

2 CHAIRMAN DAMROW: I'll vote yet. So Conclusion of  
3 Law No. 5 that reads a mixed motive defense was not timely  
4 raised and does not apply to the facts in this matter is  
5 hereby rejected.

6 So with that, counsel, I believe that takes care of  
7 all of our conclusions of law, or am I missing --

8 MS. STALLKAMP: Nope, you got them all.

9 CHAIRMAN DAMROW: Okay.

10 COMMISSIONER BARTOS: Do we do anything with the  
11 order itself? The wording of the order under -- under -- on  
12 the numeral No. 5?

13 COMMISSIONER ALMY: Yeah, that's --

14 MS. STALLKAMP: Was that the affirmative relief?

15 COMMISSIONER BARTOS: Yes.

16 COMMISSIONER MOLINA: I have it right here.

17 CHAIRMAN DAMROW: I think -- I think that was just  
18 regarding the redaction of a --

19 COMMISSIONER ALMY: It says to issue a driver's  
20 license.

21 CHAIRMAN DAMROW: Oh, yeah, okay.

22 MS. STALLKAMP: You have struck the conclusion of  
23 law that M.B. --

24 CHAIRMAN DAMROW: It's No. 6, yeah, pertaining to  
25 the relief. So I mean, do we need another motion to kind of

1 affirmatively fleck that out of the order piece of it, or is  
2 that inherently take care of that.

3 MS. STALLKAMP: We could do a motion to strike that  
4 bit as well. I don't know that it's -- because you want to  
5 leave the rest of it there, right?

6 CHAIRMAN DAMROW: Yes. Yeah, the remainder just  
7 talks about redaction.

8 MS. STALLKAMP: Yes, yep.

9 CHAIRMAN DAMROW: And birth certificate.

10 MS. STALLKAMP: Yeah.

11 CHAIRMAN DAMROW: Okay. So for all -- just for all  
12 intents and purposes, I guess, because we have already  
13 stricken Conclusion of Law No. 6, regarding M.B.'s entitled to  
14 be issued a driver's license, to strike the first clause under  
15 section 5, the order based on the foregoing, the hearing  
16 officer hereby orders the Department is issue a driver's  
17 license to nonbinary sex designation. Is there a second to  
18 that motion?

19 COMMISSIONER ALMY: Second.

20 CHAIRMAN DAMROW: Okay. So please indicate your  
21 vote, beginning with Commissioner Molina.

22 COMMISSIONER MOLINA: Yes.

23 CHAIRMAN DAMROW: Commissioner Bartos ay.

24 COMMISSIONER BARTOS: Yes.

25 CHAIRMAN DAMROW: Commissioner Almy.

1 COMMISSIONER ALMY: Yes.

2 CHAIRMAN DAMROW: And I'll vote yes, so that portion  
3 is hereby stricken.

4 Counsel, is all this sufficient or do we need to get  
5 one final --

6 MS. STALLKAMP: No, I think that is --

7 CHAIRMAN DAMROW: -- motion to --

8 MS. STALLKAMP: That is sufficient, I just --  
9 Commissioner Almy, did you second that last vote?

10 COMMISSIONER ALMY: I did.

11 MS. STALLKAMP: Or indicated affirmatively.

12 COMMISSIONER ALMY: I did.

13 MS. STALLKAMP: Perfect. Okay.

14 COMMISSIONER ALMY: The first line.

15 CHAIRMAN DAMROW: With that in mind, so a written  
16 order will be prepared and mailed to the parties giving notice  
17 of our decision. So with that I hereby conclude our  
18 consideration of the hearing officer's decision --

19 COMMISSIONER BARTOS: Before we do a conclusion,  
20 just one more question, for staff.

21 MS. STALLKAMP: Yeah.

22 COMMISSIONER BARTOS: What about the order on the  
23 motion for summary judgment?

24 MS. STALLKAMP: What about it?

25 COMMISSIONER BARTOS: Do we have to do anything?

1 MS. STALLKAMP: No. I don't think so.

2 COMMISSIONER BARTOS: Because it -- one was an order  
3 and then he made findings and he drew a conclusion.

4 MS. STALLKAMP: So there was a -- the motion for  
5 summary judgment is a procedural order that you dealt with  
6 when you got rid of the conclusion of law that --

7 COMMISSIONER BARTOS: Yeah.

8 MS. STALLKAMP: -- M.B. was a protected --

9 CHAIRMAN DAMROW: It was just incorporated into it.

10 MS. STALLKAMP: Yes.

11 COMMISSIONER BARTOS: Okay.

12 MS. STALLKAMP: So that they -- they had the motion  
13 for summary judgment with the finding that MVD discriminated,  
14 and you addressed that insofar as you addressed the conclusion  
15 of law that M.B. was entitled to a protected class status and  
16 then the hearing on sanctions was what the actual contested  
17 fees hearing.

18 COMMISSIONER BARTOS: Okay.

19 CHAIRMAN DAMROW: Okay. So with that, an original  
20 order will be prepared and mailed to the parties giving notice  
21 of our decision.

22 With that I hereby conclude our consideration of the  
23 case of Sara and Bryan Berndt on behalf of their minor child,  
24 M.B. versus the Department of Justice as case No. 0220498.

25 And then before moving on to the final matter on our



1 agenda today, in consideration of counsel for the opposing  
2 party, sorry to keep you wait that much longer, but maybe just  
3 a brief, ten-minute break before assuming the next case.

4 So we will be in recess until 3:05.

5 (Proceedings concluded.)

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## CERTIFICATE OF REPORTER

I, STEPHANIE MICHELS, Official Court Reporter, Registered Professional Reporter, and Registered Merit Reporter,

Do hereby certify that I transcribed in machine shorthand the foregoing electronically recorded hearing at the time, place and with the appearances of counsel hereinbefore noted.

I further certify that the transcript transcribed from the electronic recording by means of computer-assisted transcription, is a full, true, and correct transcript of the oral testimony adduced therein, to the best of my ability.

I further certify that I am not of counsel for, nor in any way related to, any of the parties in this matter, nor am I in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of May, 2024.

/s/ Stephanie Michels  
STEPHANIE MICHELS  
Official Court Reporter,  
Registered Professional Reporter,  
and Registered Merit Reporter.

# Exhibit B

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

\*\*\*\*\*

SARA BERNDT & BRYAN BERNDT, OBO  
MINOR CHILD, M.B.,  
Charging Party/Appellee,

HRB CASE NO.0220498

FINAL AGENCY DECISION

-v-

MONTANA DEPARTMENT OF JUSTICE,  
MOTOR VEHICLE DIVISION, DRIVER  
SERVICES BUREAU, ET AL.,  
Respondent/Appellant.

\*\*\*\*\*

M.B. is the minor child of Bryan and Sara Berndt. M.B. identifies as non-binary. In 2022, M.B. sought to obtain a Montana driver’s license. The Montana Code governing applications for driver’s licenses requires an applicant to provide a sex designation of either male or female. MCA § 61-5-107(2). On the application, M.B. listed sex as “NB” to mean “non-binary.” Respondent then denied M.B.’s application for a driver’s license for failure to identify M.B.’s sex as one of the two options provided in the application and as required by § 61-5-107(2).

Charging Party then filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in governmental services on the basis of sex. Following an informal investigation, the Department determined that reasonable cause supported the Berndts’ allegations. Before the case went before the Office of Administrative Hearings of the Department of Labor & Industry, the parties filed cross-motions for summary judgment on their respective claims and defenses to liability. The hearing officer granted the Charging Party’s motion for summary judgment, finding that discrimination did occur, and denied the Respondent’s motion on June 14, 2023.

The case then proceeded to a contested case hearing on damages, pursuant to Mont. Code Ann. § 49-2-505. The hearing officer issued a Decision on December 26, 2023 and awarded

Charging Party affirmative relief in the form of requiring Respondent to issue Charging Party a driver's license with a non-binary sex designation.

Respondent then filed an appeal with the Montana Human Rights Commission (Commission), challenging the hearing officer's summary judgment ruling and damage award. The Commission considered the matter on March 21, 2024. Misty D. Gaubatz, attorney, appeared and presented oral argument on behalf of Berndt. Alwyn Lansing, attorney, appeared and presented oral argument on behalf of Montana Department of Justice, Motor Vehicle Division, Driver Services Bureau, et al. (DOJ).

### **STANDARD OF REVIEW**

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3). The commission reviews conclusions of law for correctness and to determine whether the hearing officer misapplied the law to the facts of the case. The commission reviews findings of fact to determine whether substantial evidence exists to support the particular finding. Admin. R. Mont. 24.9.123(4)(b); *Schmidt v. Cook*, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be less than a preponderance." *State Pers. Div. v. DPHHS*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305.

### **DISCUSSION**

Before the Commission, Appellant DOJ argues that the hearing officer misapplied case law, erroneously conflated gender and sex, and erred in determining MB was unable to complete the application for a driver's license. Berndt counters by arguing the hearing officer's decision is

correct and should be affirmed. After careful consideration of the complete record and the argument presented by the parties, the Commission determined the hearing officer erred as a matter of law by failing to conduct a proper analysis of the statutory meaning of the term “sex” within the Montana Human Rights Act (MHRA) and improperly expanding the term to include “gender identity.”

The MHRA makes it “an unlawful discriminatory practice for the state or any of its political subdivisions to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of . . . sex. . . .” Mont. Code Ann. § 49-2-308(1)(a). As of 2022, when the underlying circumstances giving rise to this matter occurred, neither the MHRA nor the Montana Code Annotated defined the term “sex.”<sup>1</sup> Thus, the hearing officer was required to follow Montana law governing interpretation of undefined statutory terms but failed to properly do so.

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. “When the legislature has not defined a statutory term, [courts] consider the term to have its plain and ordinary meaning.” *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666. If the language of the statute is clear and unambiguous, the courts are not to interpret the statute any further. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. To determine the plain meaning of a statutorily undefined term, courts routinely consider dictionary definitions, prior case law, and the larger statutory scheme in which the term appears. *Giacomelli*, ¶ 18 (internal citations omitted). “If after reviewing the plain

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<sup>1</sup> The Montana Legislature has since enacted S.B. 458, 68th Leg., (Mont. 2023), that unequivocally excluded “gender identity” from the definition of “sex” into dozens of parts of state code. However, because that bill was enacted and signed into law after the events giving rise to this matter occurred and contains no retroactive provision, it does not apply to this case.

words, however, confusion or ambiguity exists, [courts] turn to the legislative history for guidance.” *State v. Gregori*, 2014 MT 169, ¶ 13, 375 Mont. 367, 328 P.3d 1128.

Here, instead of conducting a plain meaning analysis of the term “sex” as used in the MHRA, the hearing officer proceeded directly to examine the legislative history. (Order on Parties’ Cross Mots. for Summ. J. (“Order”), at 4-5.) This was error. Basic dictionary definitions of the word “sex” clearly define the word in terms of anatomical biology to the exclusion of references to gender identity. *See, e.g., Sex*, Merriam-Webster’s Dictionary, [available at https://www.merriam-webster.com/dictionary/sex](https://www.merriam-webster.com/dictionary/sex) (last visited May 15, 2024) (defining “sex” as “either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures.”); *Sex*, STEDMAN’S MEDICAL DICTIONARY (28th Ed. 2006) (“The biologic character or quality that distinguishes male and female from one another as expressed by analysis of the person’s gonadal, morphologic (internal and external), chromosomal, and hormonal characteristics.”). Thus, for the hearing officer to circumvent the plain meaning of the term “sex” as defined by various dictionaries and proceed to analyze legislative history was in error.

Even the hearing officer’s assessment of the legislative history was incorrect. The goal of statutory interpretation is to give effect to the legislature’s intent. *Giacomelli*, ¶ 18. Here, the hearing officer failed to examine *any* legislative history of the subject statute, Mont. Code Ann. § 49-2-308. Rather, the hearing officer took a holistic approach to the Legislature’s past and present actions in how it has treated the term “sex” to guide his analysis. *See Order*, at 5. Importantly, the hearing officer acknowledged that the Montana Legislature, prior to 2022, had historically rejected multiple efforts to define the term “sex” to include gender identity. *Id.* This acknowledgment, in and of itself, should have sufficed to suggest that the Legislature likely never intended to include gender identity within the ambit of the term “sex.” Yet, the hearing officer argued that since the 2023 Legislature recently enacted SB 458 that expressly defined “sex” as male or female, the “conflicting attempts by the Legislatures establishes that the term

‘sex’ was undefined and capable of varying definitions **for the time period applicable to this case.**” *Id.* (emphasis added). In other words, the hearing officer erroneously interpreted legislative acts occurring *after* the subject event in 2022 – and long after the initial enactment of Mont. Code Ann. § 49-2-308 – as legislative “history” and instructive as to how the Legislature has interpreted and treated the term “sex.” The hearing officer’s analysis of Mont. Code Ann. § 49-2-308’s legislative history was therefore incorrect and in error.

Finally, the hearing officer’s reliance on a single United States Supreme Court Case to support his conclusion while failing to distinguish multiple Montana cases on the subject was similarly in error. Order, at 5-6 (citing *Bostock v. Clayton Cty. Ga.*, 590 U.S. 140 (2020)). As a preliminary matter, the *Bostock* Court did not interpret the term “sex” within the context of Mont. Code Ann. § 49-2-308 but instead analyzed Congress’ intent in its use of the word in Title VII of the Civil Rights Act of 1964. *Bostock*, 140 S. Ct. at 1753 (expressly limiting the scope of the Court’s ruling to the instant matter and refusing to address any other state or federal discrimination law). Although federal law may be instructive when interpreting provisions of the MHRA, *see* Order, at 5, to turn to and rely exclusively upon federal law while neglecting germane state law is erroneous. Indeed, there are multiple Montana cases that appear to suggest its jurisprudence recognizes “sex” to mean only male or female. *See, e.g., Mont. State Univ.-Northern v. Bachmeier*, 2021 MT 26, ¶ 28, 403 Mont. 136, 480, P.3d 233 (recognizing that a claimant in a discrimination case “first must establish membership in a protected class, either male or female”); *Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶ 16, 322 Mont. 434, 97 P.3d 546 (recognizing that in sexual harassment claims, plaintiff must first show membership in a protected class and that “only two classes are possible, male and female”); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶¶ 62, 325 Mont. 148, 104 P.3d 445 (Nelson, J., concurring) (“As with federal case law, this Court’s jurisprudence has never acknowledged gender orientation as a suspect class.”); *Mtn. States Tel. & Tel. Co. v. Comm’r. Of Labor and Indus.*, 187 Mont. 22, 38–39, 608 P.2d 1047, 1056 (1979) (“Pregnancy is a condition unique to



women, and the ability to become pregnant is a primary characteristic of the female sex. Thus, any classification which relies on pregnancy as the determinative criterion is a distinction based on sex.”). However, the hearing officer neglected to analyze or distinguish any of these Montana cases and relied solely upon *Bostock*. By expanding the term “sex” in Mont. Code Ann. § 49-2-308 to include “gender identity,” the hearing officer inserts what has been omitted from the statute in derogation of the fundamental principles of statutory construction. *See Fox*, ¶ 18. To do so was therefore in error and warrants reversal of the hearing officer’s Order.

### ORDER

IT IS HEREBY ORDERED that the hearing officer decision is MODIFIED as follows:

#### Findings of Fact:

19. M.B. was informed, by ~~two~~ one Department employees, that the Department was in the process of updating its forms to include an option for non-binary individuals, but that the update would not be completed for approximately a year.

20. MVD refused to issue a driver’s license to M.B. because M.B.’s application form ~~could~~ was not ~~be~~ completed and entered into the IDEMIA system.

#### Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over this case.  
Mont. Code Ann. § 49-2-505.

2. The term sex within the meaning of the 2021 version of the Montana Human Rights Act does not include gender identity.

3. M.B. is not a member of a protected class within the meaning of the 2021 version of the Montana Human Rights Act on the basis of sex. ~~as the 2021 version of that term included non-binary gender identity. See e.g. Bostock v. Clayton County, Georgia, 590 U.S. 140, 140 S. Ct. 1731 (2020).~~

~~3. The MHRA prohibits discrimination in governmental services based upon sex, including gender identity under the 2021 version of the statute. Mont. Code Ann. § 49-2-308 (2021).~~

~~4. Charging Parties proved, as a matter of law that the Department violated the MHRA and discriminated against M.B. when it refused to issue M.B. a driver's license due to M.B.'s inability to accurately state M.B.'s sex on the Department's driver's license application form. Mont. Code Ann. § 49-2-308(1) (2021).~~

~~5. A mixed motive defense was not timely raised and does not apply to the facts of this matter.~~

~~6. M.B. is entitled to be issued a driver's license.~~

~~7.4. For purposes of Mont. Code Ann. § 49-2-505(8), Charging Parties Respondent is are the prevailing parties in this matter.~~

Either party may petition the district court for judicial review of the Final Agency Decision. Mont. Code Ann. §§ 2-4-702 and 49-2-505. This review must be requested within 30 days of the date of this order. A party must promptly serve copies of a petition for judicial review upon the Human Rights Commission and all parties of record. Mont. Code Ann. § 2-4-702(2).

DATED this 13th day of June, 2024.



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Peter M. Damrow, Chair  
Human Rights Commission

## CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 13th day of June 2024.

Misty D. Gaubatz  
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Annah Howard, Legal Secretary  
Montana Human Rights Bureau

# Exhibit C

## **EXPERT TESTIMONY OF DR COLIN WRIGHT, PHD**

I, Colin Wright, PhD, hereby declare and state as follows:

1. I am over 18 years of age, of sound mind, and in all respects competent to testify.
2. I have been retained by the legal representatives for Defendants as an expert in connection with Case No. ADV 2024-261. The opinions expressed herein are my own and do not express the views or opinions of my employer.
3. I have actual knowledge of the matters stated herein. If called to testify in this matter, I would testify truthfully and based on my expert opinion.

### **BACKGROUND AND QUALIFICATIONS**

I earned my Bachelor of Science (BS) degree in Evolution, Ecology, and Biodiversity from the University of California, Davis, in 2012. I later obtained my PhD in Evolution, Ecology, and Marine Biology from the University of California, Santa Barbara, in 2018. Following this, I served as an Eberly Research Postdoctoral Fellow at The Pennsylvania State University.

I have been honored with an NSF Graduate Research Fellowship, the Charles A. Storke Graduate Fellowship Award for my exceptional academic and research achievements, and the Mary P. Edmonds Award for publishing outstanding research. I have secured numerous research grants and have lectured extensively across the United States and internationally about my research and the biology of sex. To date, I have published 28 peer-reviewed scientific articles on animal behavior and the biology of sex.

As an evolutionary behavioral ecologist, I've undergone comprehensive training in the core principles that dictate behavior across the animal kingdom. Among these principles, the most prominent and consistent is related to an individual's sex, namely, whether they are male or female. My depth of knowledge in evolutionary biology and biodiversity provides me with a deep understanding and broad view of the universal defining features of males and females throughout the plant and animal kingdoms.

In drafting this report, I've drawn upon my education, training, years of research, and the research published on the biology of sex by eminent global experts in this particular field. The sources I've referenced are authoritative and come from peer-reviewed scientific publications. A detailed bibliography is attached.

All opinions I present are founded either wholly or predominantly on the specialized knowledge I've gained from my training, studies, or experience.

I have been asked to review the case filings submitted in this case and provide expert opinion on the subsequent questions:

1. What is sex and how is it determined in humans?
2. Is sex binary?
3. Is sex immutable?
4. What is the definition of intersex, and is intersex a different and third sex apart from male and female?
5. What percentage of the population is intersex?
6. Are there differences between sex and gender identity, and if so, what are those differences?
7. Is gender identity immutable?
8. Other questions of biological relevance.

## **EXPERT OPINIONS**

### **Summary of Opinions**

In biology, the sex of an individual is universally defined by the type of gamete (sperm vs ova) an individual has the function to produce. Other traits, such as chromosomes, hormones, genital morphology, body shape, brain structures, behaviors, expressions, or identity do not define an individual's sex individually or in any combination. Traits that differ between males and females apart from gametes are either upstream causes of an individual's sex or a downstream consequence of an individual's sex.

In humans, sex is an immutable trait and extremely easy to identify. Males who identify as female are still biologically male, and females who identify as male are still biologically female. Altering a body via cross-sex hormones and/or surgeries is purely cosmetic and does not literally change a person's sex.

People with differences of sexual development (DSD), or so-called "intersex" conditions, do not undermine the binary nature of sex, because they do not have reproductive systems organized around the production of a unique new type of gamete apart from sperm and ova.

### **1. What is sex and how is it determined in humans?**

Sexually reproducing species come in two forms, and the distinction is rooted in the relative size of the gametes being fused (Togashi & Cox, 2011). Some species are **isogamous**, which means they reproduce by the fusion of two gametes that are of *equal size*. Other species are **anisogamous**, meaning sexual reproduction proceeds by

the fusion of two *different sized* gametes. In anisogamous systems, the larger gamete is called an egg or ovum, and the smaller gamete is called a sperm or spermatozoon.

“**Biological sex**” refers to the sex of an individual. The sexes—male and female—represent the two distinct reproductive strategies in anisogamous species.

**Males** are defined in biology as the sex that produces numerous small gametes, or sperm (Parker, 2011). We categorize an individual organism as male based on whether he can or is expected to produce sperm based on his primary sexual anatomy (i.e., gonads). **Females** are defined as the sex that yields fewer but larger gametes, or ova (Parker, 2011). We categorize an individual organism as female based on whether she can or is expected to produce ova based on her primary sexual anatomy (i.e., gonads).

For clarity, it is crucial to distinguish between how sex is **determined** versus how sex is **defined**.

In developmental biology, “sex determination” is a precise term that describes the process by which specific genes initiate and guide sex development (Bachtrog, 2014). Mammals, including humans, exhibit “chromosomal sex determination.” Here, certain genes on chromosomes direct the development of an embryo that results in either a male or female organism. The Y chromosome is deemed “sex determining” because it typically contains a gene called *SRY* that initiates male development (Goodfellow & Lovell-Badge, 1993). Without it, a female develops. However, in very rare cases, an *SRY* gene can migrate to an X chromosome, leading to an XX male (Ergun-Longmire et al., 2005).

This mechanism differs from sex-determining methods in other organisms that do not depend on chromosomes. An example is the “temperature-dependent sex determination” found in many reptiles (Crews et al., 1994). Here, an egg’s incubation temperature dictates male or female development. For the alligator species *A. mississippiensis*, eggs incubated at higher temperatures (>34°C) yield males, while those at lower temperatures (<30°C) result in females (Lang & Andrews, 1994).

Other mechanisms for determining sex include environmental and social influences. For instance, the green spoon worm (*Bonellia viridis*) begins its life sexually undifferentiated. It will develop into a male if the larva encounters female chemical cues; otherwise, it becomes a female (Berec et al., 2005). Clownfish, on the other hand, initially emerge as males but undergo an irreversible change to females once they ascend to the pinnacle of their dominance hierarchy to gain access to an anemone (Casas et al., 2016).

These examples illustrate that sex determination mechanisms are incredibly varied. Yet, it’s crucial to note that although an individual’s sex across a diverse array of species can

be mechanistically “determined” in numerous ways through development, it is always defined the same way: by the type of gamete he or she has the function of producing.

## 2. Is sex binary?

The “sex binary” in biology refers to the simple fact that there are only two sexes in anisogamous species—males and females. This is incontrovertibly true because an individual’s sex is defined by the type of gamete (sperm or ova) their primary reproductive organs (i.e., gonads) are organized, through development, to produce. Males have primary reproductive organs organized around the production of sperm, and females, ova. Because there is no third gamete type, there are only two sexes that a person can be. Sex is therefore binary.

A common misconception exists asserting that the existence of people with certain differences of sexual development (DSDs)—or so-called “intersex” conditions where individuals exhibit genital morphology that appears neither typically male nor female—disprove the binary nature of sex. This belief, however, is rooted in a fundamental misunderstanding of what sexes are and what the sex binary refers to.

The existence of people with ambiguous sexual anatomy does not undermine the binary nature of sex because people with these conditions do not have anatomy that can or would produce a novel or intermediate type of gamete apart from sperm and ova. Sex is binary because there are only two types of gametes—sperm and ova—an individual could ever potentially produce.

Another misconception is that the sex binary refers to sex chromosomes, with XX chromosomes referring to females and XY chromosomes referring to males. While this association holds true for the vast majority of humans, there are rare instances where a person might have an extra or missing X or Y chromosome, as seen in conditions like Klinefelter (XXY) and Turner (X0) syndrome, among others. These are called sex chromosome aneuploidies. However, chromosomal combinations beyond the typical XX and XY do not undermine the binary nature of sex because they do not denote additional sexes beyond male and female. Instead, they signify chromosomal variations *within* the two sexes, because people with these conditions only ever produce either sperm or ova.

A third and final misconception offered as a refutation to the binary nature of sex centers around “secondary sex characteristics,” which refer to the sex-related anatomies that differentiate during puberty (Paciulli & Cromer, 2022), such as enlarged breasts and wider hips in females; and facial hair, deeper voices, more musculature, and broader shoulders in males. Because the distribution of these secondary sex



characteristics can overlap between males and females, it is argued we should therefore view biological sex as a continuum instead of a binary.

The primary flaw in defining a person's sex in reference to their secondary sex characteristics is that it confuses cause and effect. These traits—while plain to the eye, and inseparable from the way most laypeople think about men and women—do not actually define one's biological sex. Rather, these traits typically develop as a consequence of one's sex, via differences in the hormonal milieu produced during puberty by either male testes or female ovaries (Ellison et al., 2012).

The mere fact that these sex-related traits exhibit some overlap between the sexes does not mean that *sex itself* exhibits overlap and is therefore a non-binary “spectrum.” Regardless of the degree of overlap in secondary sex characteristics, there are still only males and females because sex is defined according to the type of gamete an individual has the function to produce.

All of the common arguments that attempt to undermine the binary nature of sex are self-refuting, because they necessarily presuppose the primacy of gametes in defining an individual's sex. For instance, we could only associate XX and XY chromosome profiles with females and males, respectively, if we had prior knowledge of what males and females were to identify the correlation. We also couldn't associate any secondary sex characteristic as being typical of males or females without a prior understanding of what constitutes males and females apart from these characteristics. What all these traits fundamentally correlate with are gametes.

### **3. Is sex immutable?**

Humans cannot change sex. While there are many examples of organisms changing sex in nature, humans are not among them. Clownfish, for example, start out life as males but undergo an irreversible change to become females once they ascend to the pinnacle of their dominance hierarchy to gain access to an anemone (Casas et al., 2016). In the humphead wrasse (*Cheilinus undulatus*), the opposite happens—they start out as female and a subset later change to male (Sadovy et al., 2003).

A revealing question to ask here is: how do we know that these species are able to change sex? We know because their primary sex organs undergo irreversible changes that cause them to stop producing one type of gamete and start producing the other.

Humans cannot change their sex because it is impossible to turn testes into ovaries or vice versa. Humans, like all mammals, are “dioecious” species, which means that we have distinct unisexual individuals, each producing either male or female gametes (Pannell et al., 2022). Our primary and secondary sex organs develop in utero, and do

not change throughout our life. Modifying one's secondary sex characteristics through hormones and/or surgery cannot change one's sex, as they do not factor into the definition of what it means to be male or female, which is rooted in the type of gamete an individual can or would produce.

A person's sex develops in utero and cannot be subsequently changed. Hormonal and/or surgical interventions that alter the appearance of primary and secondary sex characteristics are purely cosmetic.

#### **4. What is the definition of intersex, and is intersex a different and third sex apart from male and female?**

The term "intersex" is an umbrella term for developmental conditions in which an individual's primary sex organs (i.e., gonads) do not match their external phenotype, or in which an individual's sex is not clear based on the appearance of their genitals (Sax, 2002).

Intersex conditions should not be confused with differences of sex development (DSD). DSDs are a broad category that include *any* variation in sex chromosomes or sexual anatomy that falls outside a very rigid and predefined norm. The vast majority of people with DSD do not exhibit any sexual ambiguity whatsoever. While all intersex conditions are DSDs, it is not the case that all DSDs are intersex conditions.

Individuals with intersex conditions are not a third or intermediate sex because these conditions do not result in primary sex organs that produce a unique, third type of gamete.

#### **5. What percentage of the population is intersex?**

Data indicates that approximately 0.018% of people are born with an intersex condition, which are conditions in which an individual's primary sex organs (i.e., gonads) do not match their external phenotype, or in which an individual's sex is not clear based on the appearance of their genitals (Sax, 2002).

#### **6. Are there differences between sex and gender identity, and if so, what are those differences?**

According to the World Professional Association of Transgender Health (WPATH), "gender identity" is described as a person's "deeply felt, internal, intrinsic sense of their own gender" (Coleman et al., 2022). Their definition of "gender" refers to the "understandings and expectations culturally tied to people who were assigned male or female at birth" (Coleman et al., 2022). This aligns with the definition provided by the

American Psychological Association, which defines gender as “the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women.”

Hence, a person’s “gender identity” refers to their personal perception of how closely they align with the behaviors and cultural stereotypes and expectations typically associated with the male and female sexes. According to WPATH, a person is considered “transgender” if their “gender identities and/or expressions are not what is typically expected for the sex to which they were assigned at birth.” This definition is consistent with those of the American Psychological Association, the American Psychiatric Association, the Endocrine Society, and the United States’ Centers for Disease Control and Prevention (CDC).

Conversely, a person’s sex is distinct from their identity, behavior, and expression. A person’s sex is strictly based on the type of gamete they have the function to produce. Biologically, **males** are defined as the sex that produces numerous small gametes (sperm), and **females** are defined as the sex that yields fewer but larger gametes (ova) (Parker, 2011). A person’s personality, preferences, and behaviors—and the extent to which these align with what is “typically expected” for their sex—has absolutely no impact on their sex.

Thus, a person’s sex is rooted in their objective biology, not their subjective identity.

Males who identify with social roles, behaviors, and expressions typically associated with females are still males, just as females who identify with those typically associated with males are still females. This is because a person’s personality, preferences, behavior, and expression do not in any way define their sex.

## **7. Is gender identity immutable?**

The term “gender identity” is an ambiguous and entirely subjective term. However, it is not immutable under any definition. If by “gender identity” one is simply referring to the act of subjectively identifying with the masculine and feminine social roles, expectations, preferences, behaviors, and forms of expression traditionally associated with each sex, then it is quite clear that this can change over a person’s lifetime.

If it is referring to an entirely subjective inner feeling of being male or female, then the mere existence of detransitioners demonstrates that this can change as well. Every detransitioner had once firmly and sincerely believed themselves to have cross-sex identity, but now no longer do.

The best available data indicate that the large majority of gender dysphoric children desist from their cross-sex identity at pubertal onset (Kaltiala-Heino et al, 2018; Steensma & Cohen-Kettenis 2011; Wallien & Cohen-Kettenis 2008; Singh et al., 2021), indicating that “gender identity” is not a static, immutable trait.

#### **8. Other questions of biological relevance.**

What follows is my assessment of incorrect statements made by the plaintiffs and expert reports that pertain to the biology of sex.

#### **EXHIBIT 1: DECLARATION OF JESSICA KUSNER-KALARCHIK IN SUPPORT OF PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION**

**4. I am a transgender woman. At birth I was assigned the sex designation of male, so the sex designation on my birth certificate also incorrectly identified me as male. I have known I am a woman since junior high school.**

The term “male” is a biological term denoting an individual who has the function of producing sperm (small gametes). A transgender woman is by definition a biological male who identifies as a female. However, simply “identifying” as the opposite sex does not literally make someone the opposite sex. It is therefore not true that Kusner-Kalarchik’s birth certificate incorrectly identifies them as male.

**5. I have worked with medical and mental health providers to assist me in bringing my physical appearance and presentation into alignment with the sex I know myself to be.**

An individual’s sex is solely defined by the type of gamete they have the function to produce. It is not physically possible to know oneself to be a sex that they are not via introspection. Sex is not a subjective feeling, but an objective biological phenotype.

**7. My inability to obtain a birth certificate that accurately reflects my sex is stigmatizing, humiliating, and opens me up to discrimination.**

Given that Kusner-Kalarchik is biologically male (as defined by the type of gamete they have the function to produce), their birth certificate is currently accurate.

**8. Denying me an accurate birth certificate places me at risk of embarrassment and even violence every time I am required to present my birth certificate because it incorrectly identifies me as male.**

Kusner-Kalarchik's birth certificate correctly identifies them as biologically male. If Kusner-Kalarchik was biologically female, then Kusner-Kalarchik could not be accurately described as a transgender woman. Being biologically male is part of what it means to be a "transgender woman."

## **EXHIBIT 2: DECLARATION OF JANE DOE IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

**3. I am a transgender woman. At birth I was assigned the sex designation of male, so the sex designation on my birth certificate also incorrectly identifies me as male.**

As mentioned previously, being male is a necessary aspect of being a "transgender woman." That being the case, it is simply not true that Jane Doe's birth certificate incorrectly identifies them as male. If Jane Doe was biologically female, Jane Doe would not be a "transgender woman."

**4. I have worked with medical and mental health providers to assist me in bringing my physical appearance and presentation into alignment with the sex I know myself to be.**

An individual's biological sex is solely defined by the type of gamete they have the function to produce. A person's subjective inner sense of self, no matter how strong, does not define their sex, which is based on objective biology.

**7. My inability to obtain a birth certificate and a driver's license that accurately reflects my sex is stigmatizing, humiliating opens me up to discrimination, and undermines the purpose of my driver's license which is to identify me.**

Jane Doe is biologically male and therefore Jane Doe's driver's license accurately reflects their sex.

## **EXHIBIT 3: EXPERT DECLARATION OF DR. RANDI C. ETTNER, Ph.D.**

**14. Medical management of gender dysphoria includes the alignment of appearance, presentation, expression, and often, the body, to reflect a person's true sex as determined by their gender identity.**

A person's "true sex" is defined by the type of gamete they have the function to produce. This is the fundamental and universal definition of an individual's sex across all sexually reproducing anisogamous species. "Gender identity" is an entirely subjective state of mind and in no way defines a person's—or any other organism's—biological sex.

**16. At birth, infants are assigned a sex, typically male or female, based solely on the appearance of their external genitalia. For most people, that assignment turns out to be accurate, and their birth-assigned sex matches that person's actual sex. However, for transgender people, the sex assigned at birth does not align with the individual's genuine, experienced sex, resulting in the distressing condition of gender dysphoria.**

A person's sex only refers to the type of gamete an individual has the function to produce. There is no other way to be male or female besides this. A male with gender dysphoria does not mean they are truly and genuinely female. This is because the only way to truly and genuinely be female is to have the function of producing large gametes (ova).

**17. External genitalia alone—the critical criterion for assigning sex at birth—is not an accurate proxy for a person's sex.**

External genitalia is accurate in predicting a person's biological sex over 99.98% of the time (Sax 2002). This is because the morphology of a person's external genitalia is a downstream developmental consequence of their biological sex. "Gender identity," however, is not a reliable proxy for a person's sex at all because it is entirely subjective and therefore impossible to empirically test.

**18. A person's sex is comprised of a number of components including, inter alia, chromosomal composition (detectable through karyotyping); gonads and internal reproductive organs (detectable by ultrasound, and occasionally by a physical pelvic exam); external genitalia (which are visible at birth); sexual differentiations in brain development and structure (detectable by functional magnetic resonance imaging studies and autopsy); and gender identity.**

An individual's sex is only defined by the type of gamete they have the function to produce. Chromosomes do not define a person's sex, but are instead an *upstream mechanism* that determines whether an embryo develops as a male or female. External genitalia also do not define an individual's sex, but are instead a downstream developmental consequence of their sex. Plenty of animals, like many fishes and birds,

do not have external genitalia yet we are still able to identify their sex based on the type of gamete they have the function to produce. Brain structures also do not define an individual's sex, but are influenced by sex. Many species, such as Echinoderms (starfish) do not have brains yet are still easy to classify as male and female based on the type of gamete they have the function to produce. Finally, gender identity also does not define an individual's sex, because it is an entirely subjective brain state, and brain states do not define an individual's sex.

**20. When there is divergence between anatomy and identity, one's gender identity is paramount and the primary determinant of an individual's sex.**

This is simply not true. As I have outlined clearly above, biological sex is defined solely by the type of gamete an individual has the function to produce. The sexes are evolved reproductive strategies rooted in gamete production and have absolutely nothing to do with how a person happens to “identify.”

**26. The Statement of Reasonable Necessity opines that because chromosomes are biological, sex based on genital appearance alone should be conclusive in determining an individual's sex. This argument is reductive, fails to recognize that there are several biological contributors to sex, including hormones and the brain, and fails to account for the developmental influence of the gonadal hormones before and early after birth. Human neurobiology is far more complex, as is the brain, which is the ultimate determinant of sex.**

There is only one thing that defines an individual's sex: the type of gamete he or she has the function to produce. Hormones are not a “contributor to sex,” but are a downstream consequence of one's sex. Likewise, sex differences in brain structure are downstream consequences of sex. It is demonstrably false that the brain is “the ultimate determinant of sex.” If this statement were true, then it would be impossible to classify Echinoderms (starfish) according to their sex, yet we can because we are able to observe the type of gametes they produce.

**28. The evidence demonstrating that gender identity cannot be altered, either for transgender or for non-transgender individuals, further underscores the innate and immutable nature of gender identity.**

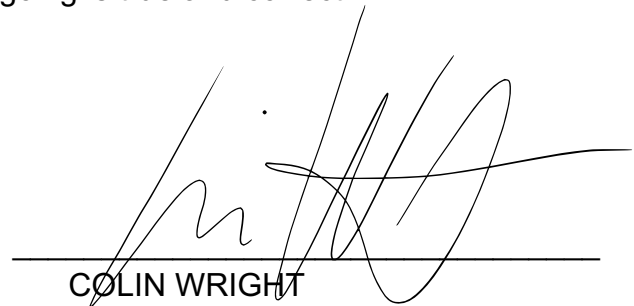
The existence of a growing population of detransitioners demonstrates that this statement is completely false.

**44. Through this process, the shame of growing up living as a "false self" and the grief of being born into the "wrong body" are ameliorated.**

People cannot be "born into the 'wrong body'" because people are not born into bodies at all. The brain and body develop in concert, and it is therefore a biological impossibility to have a brain that is "born into the 'wrong body.'" A person may have the subjective experience of such an incongruence, but this is merely subjective and does not reflect biological reality.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of June, 2024.

A handwritten signature in black ink, appearing to read 'Colin Wright', is written over a horizontal line. The signature is stylized and cursive.

COLIN WRIGHT



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# Exhibit D



AN ACT GENERALLY REVISING THE LAWS TO PROVIDE A COMMON DEFINITION FOR THE WORD SEX WHEN REFERRING TO A HUMAN; AND AMENDING SECTIONS 1-1-201, 2-18-208, 7-15-4207, 7-34-2123, 13-27-408, 13-35-301, 13-38-201, 20-7-1306, 20-9-327, 20-25-501, 20-25-707, 22-2-306, 33-1-201, 35-20-209, 39-2-912, 40-1-107, 40-1-401, 40-5-907, 40-5-1031, 41-5-103, 42-2-204, 45-5-625, 46-19-301, 46-19-401, 46-32-105, 49-1-102, 49-2-101, 49-3-101, 50-5-105, 50-5-602, 50-11-101, 50-15-101, 50-19-103, 50-60-214, 53-20-142, 53-21-121, 53-21-142, 60-5-514, 60-5-522, 61-5-107, AND 72-1-103, MCA.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 1-1-201, MCA, is amended to read:

**"1-1-201. Terms of wide applicability.** (1) Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(a) "Female" means a member of the human species who, under normal development, has XX chromosomes and produces or would produce relatively large, relatively immobile gametes, or eggs, during her life cycle and has a reproductive and endocrine system oriented around the production of those gametes. An individual who would otherwise fall within this definition, but for a biological or genetic condition, is female.

(b) "Male" means a member of the human species who, under normal development, has XY chromosomes and produces or would produce small, mobile gametes, or sperm, during his life cycle and has a reproductive and endocrine system oriented around the production of those gametes. An individual who would otherwise fall within this definition, but for a biological or genetic condition, is male.

~~(a)~~(c) "Oath" includes an affirmation or declaration.

~~(b)~~(d) "Person" includes a corporation or other entity as well as a natural person.

~~(c)~~(e) "Several" means two or more.

(f) "Sex" means the organization of the body parts and gametes for reproduction in human beings

and other organisms. In human beings, there are exactly two sexes, male and female, with two corresponding types of gametes. The sexes are 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, without regard to an individual's psychological, behavioral, social, chosen, or subjective experience of gender.

~~(d)~~(g) "State", when applied to the different parts of the United States, includes the District of Columbia and the territories.

~~(e)~~(h) "United States" includes the District of Columbia and the territories.

(2) Wherever the word "man" or "men" or a word that includes the syllable "man" or "men" in combination with other syllables, such as "workman", appears in this code, the word or syllable includes "woman" or "women" unless the context clearly indicates a contrary intent and unless the subject matter of the statute relates clearly and necessarily to a specific sex only.

(3) Whenever the term "heretofore" occurs in any statute, it must be construed to mean any time previous to the day the statute takes effect. Whenever the word "hereafter" occurs, it must be construed to mean the time after the statute containing the term takes effect."

**Section 2.** Section 2-18-208, MCA, is amended to read:

**"2-18-208. Comparable worth.** The department of administration shall, in its continuous efforts to enhance the current classification plan and pay schedules, work toward the goal of establishing a standard of equal pay for comparable worth. This standard for the classification plan shall be reached by:

(1) eliminating, in the classification of positions, the use of judgments and factors that contain inherent biases based on sex, as defined in 1-1-201; and

(2) comparing, in the classification of positions, the factors for determining job worth across occupational groups whenever those groups are dominated by males or females."

**Section 3.** Section 7-15-4207, MCA, is amended to read:

**"7-15-4207. Prohibition against discrimination.** For all of the purposes of this part and part 43, a person may not be subjected to discrimination because of sex, as defined in 1-1-201, race, creed, religion, age,

physical or mental disability, color, or national origin."

**Section 4.** Section 7-34-2123, MCA, is amended to read:

**"7-34-2123. Admission to district hospital facilities.** Such a hospital district must admit persons to its facilities without regard to race, color, or sex, as defined in 1-1-201. Such obligation shall not prevent the board of trustees of such hospital district from establishing reasonable minimum rates for hospital quarters, services, and supplies. Indigents needing such services, for the rendition of which provision is made by the laws of Montana, must be admitted to such public hospitals on terms and rates prescribed or authorized by law."

**Section 5.** Section 13-27-408, MCA, is amended to read:

**"13-27-408. Rejection of improper arguments.** The secretary of state shall reject, with the approval of the attorney general, an argument or other matter held to contain obscene, vulgar, profane, scandalous, libelous, or defamatory matter; any language that in any way incites, counsels, promotes, or advocates hatred, abuse, violence, or hostility toward, or that tends to cast ridicule or shame upon, a group of persons by reason of race, color, religion, or sex, as defined in 1-1-201; or any matter not allowed to be sent through the mail. Such arguments may not be filed or printed in the voter information pamphlet."

**Section 6.** Section 13-35-301, MCA, is amended to read:

**"13-35-301. Adoption of code of fair campaign practices.** The following code of fair campaign practices is adopted by Montana:

"There are basic principles of decency, honesty, and fair play that every candidate for public office in the United States has a moral obligation to observe and uphold, in order that, after vigorously contested but fairly conducted campaigns, our citizens may exercise their constitutional right to a free and untrammelled choice and the will of the people may be fully and clearly expressed on the issues before the country.

Therefore:

I will conduct my campaign in the best American tradition, discussing the issues as I see them, presenting my record and policies with sincerity and frankness, and criticizing without fear or favor the record

and policies of my opponent and my opponent's party that merit such criticism.

I will defend and uphold the right of every qualified American voter to full and equal participation in the electoral process.

I will conduct my campaign without the use of personal vilification, character defamation, whispering campaigns, libel, slander, or scurrilous attacks on my opposition or my opposition's personal or family life.

I will not use campaign material of any sort that misrepresents, distorts, or otherwise falsifies the facts, nor will I use malicious or unfounded accusations that aim at creating or exploiting doubts, without justification, as to the loyalty and patriotism of my opposition.

I will not make any appeal to prejudice based on race, sex, as defined in 1-1-201, creed, or national origin.

I will not undertake or condone any dishonest or unethical practice that tends to corrupt or undermine our American system of free elections or that hampers or prevents the full and free expression of the will of the voters.

Insofar as is possible, I will immediately and publicly repudiate support deriving from any individual or group that resorts, on behalf of my candidacy or in opposition to that of my opponent, to the methods and tactics that I have pledged not to use or condone."

**Section 7.** Section 13-38-201, MCA, is amended to read:

**"13-38-201. Election or appointment of committee representatives at primary -- vacancies -- tie votes.** (1) Each political party shall appoint or elect at each primary election one person of each sex, as defined in 1-1-201, to serve as committee representatives for each election precinct. The committee representatives must be residents and registered voters of the precinct.

(2) If a political party chooses to appoint precinct committee representatives, the political party shall make the appointments as provided in the party's rules.

(3) If a political party chooses to elect precinct committee representatives, the party may:

(a) administer the election itself as provided in the party's rules; or

(b) elect precinct committee representatives in a primary election, subject to 13-10-209 and

subsection (4) of this section.

- (4) In a primary election for a precinct committee representative:
- (a) if the number of candidates nominated for a party's precinct committee representatives is less than or equal to the number of positions to be elected, the election administrator may give notice that a party's precinct committee election will not be held in that precinct;
- (b) if a party precinct committee election is not held pursuant to subsection (4)(a), the election administrator shall declare elected by acclamation the candidate who filed for the position or who filed a declaration of intent to be a write-in candidate. The election administrator shall issue a certificate of election to the designated party.
- (c) write-in votes for a precinct committee representative may be counted as specified in 13-15-206(5) only if the individual whose name is written in has filed a declaration of intent as a write-in candidate by the deadline prescribed in 13-10-211(1);
- (d) in the case of a tie vote for a precinct committee representative position, the county central committee shall determine a winner.
- (5) Pursuant to 13-38-101, a vacancy in a precinct committee representative position must be filled by the party governing body as provided in its rules."

**Section 8.** Section 20-7-1306, MCA, is amended to read:

**"20-7-1306. (Temporary) Designation of athletic teams.** (1) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public elementary or high school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education must be expressly designated as one of the following based on biological sex:

- (a) males, men, or boys;
- (b) females, women, or girls; or
- (c) coed or mixed.
- (2) Athletic teams or sports designated for females, women, or girls may not be open to students of the male sex. (Void on occurrence of contingency--sec. 6, Ch. 405, L. 2021.)
- (3) For the purposes of this section, "female", "male", and "sex" are defined in 1-1-201."



**Section 9.** Section 20-9-327, MCA, is amended to read:

**"20-9-327. Quality educator payment.** (1) (a) The state shall provide a quality educator payment to:

- (i) public school districts, as defined in 20-6-101 and 20-6-701;
- (ii) special education cooperatives, as described in 20-7-451;
- (iii) the Montana school for the deaf and blind, as described in 20-8-101;
- (iv) correctional facilities, as defined in 41-5-103; and
- (v) the Montana youth challenge program.

(b) A special education cooperative that has not met the requirements of 20-7-454 may not be funded under the provisions of this section except by approval of the superintendent of public instruction.

(2) (a) The quality educator payment for special education cooperatives must be distributed directly to those entities by the superintendent of public instruction.

(b) The quality educator payment for the Montana school for the deaf and blind must be distributed to the Montana school for the deaf and blind.

(c) The quality educator payment for Pine Hills correctional facility and the facility under contract with the department of corrections for female, as defined in 1-1-201, youth must be distributed to those facilities by the department of corrections.

(d) The quality educator payment for the Montana youth challenge program must be distributed to that program by the department of military affairs.

(3) The quality educator payment is calculated as provided in 20-9-306, using the number of full-time equivalent educators, as reported to the superintendent of public instruction for accreditation purposes in the previous school year, each of whom:

(a) holds a valid certificate under the provisions of 20-4-106 and is employed by an entity listed in subsection (1) of this section in a position that requires an educator license in accordance with the administrative rules adopted by the board of public education;

(b) (i) is a licensed professional under 37-8-405, 37-8-415, 37-11-301, 37-15-301, 37-17-302, 37-22-301, 37-23-201, 37-24-301, or 37-25-302; and

(ii) is employed by an entity listed in subsection (1) to provide services to students; or

- (c) (i) holds an American Indian language and culture specialist license; and
- (ii) is employed by an entity listed in subsection (1) to provide services to students in an Indian language immersion program pursuant to Title 20, chapter 7, part 14."

**Section 10.** Section 20-25-501, MCA, is amended to read:

**"20-25-501. Definitions.** (1) Terms used in this part are defined as follows:

- (a) "Domicile" means a person's true, fixed, and permanent home and place of habitation.
  - (b) "Minor" means a male or female, as defined in 1-1-201, person who has not obtained the age of 18 years.
  - (c) "Qualified person" means a person legally qualified to determine the person's own domicile.
  - (d) "Resident student" means:
    - (i) a student who has been domiciled in Montana for 1 year immediately preceding registration at any unit for any term or session for which resident classification is claimed. Attendance as a full-time student at any college, university, or other institution of higher education is not alone sufficient to qualify for residence in Montana.
    - (ii) any graduate of a Montana high school who is a citizen or resident alien of the United States and whose parents, parent, or guardian has resided in Montana at least 1 full year of the 2 years immediately preceding the student's graduation from high school. The classification continues for not more than 4 academic years if the student remains in continuous attendance at a unit; or
    - (iii) a member of the armed forces of the United States assigned to and residing in Montana, the member's spouse, or the member's dependent children.
- (2) In the event that the definition of residency or any portion of the definition is declared unconstitutional as it is applied to payment of nonresident fees and tuition, the regents of the Montana university system may make rules on what constitutes adequate evidence of residency status not inconsistent with those court decisions."

**Section 11.** Section 20-25-707, MCA, is amended to read:

**"20-25-707. Antidiscrimination.** An employer is not eligible to employ any person under this program

if the employer practices discrimination in employment against any individual because of race, creed, religion, color, political ideas, sex, as defined in 1-1-201, age, marital status, physical or mental disability, ancestry, or national origin."

**Section 12.** Section 22-2-306, MCA, is amended to read:

**"22-2-306. Grant conditions -- additional funds -- accounts and reports.** (1) A grant may not be awarded unless the grantee accepts the Montana arts council's conditions of the grant and signs a contract stipulating those conditions.

(2) A grantee must agree in writing that:

(a) the grantee is the official and sole agency for the administration of the project described in the grant agreement; and

(b) no person will, on the grounds of race, color, national origin, sex, as defined in 1-1-201, or age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity that results from the expenditure of grant funds.

(3) The grantee must agree that the funds granted will be expended solely for the purpose and activities described in the approved proposal. All funds granted to the grantee must be spent or encumbered during the grant period.

(4) Disbursements to grantees must be as follows, based upon the cash flow needs of the projects and the revenues available:

(a) Projects that are to receive more than \$10,000 may receive an amount not exceeding 25% of the grant award in the first 6 months of the biennium, 50% in the first year of the biennium, 75% in the first 18 months of the biennium, and the balance in the remainder of the biennium. Within the limitations contained in this subsection, the amount of each payment must be determined by the Montana arts council in its discretion. Each payment may be made only after an examination of the costs incurred in the project and the amount, if any, of the unencumbered or unexpended balance of prior grant payments for the project.

(b) Projects that are to receive \$10,000 or less may receive the total grant in any fiscal quarter if the Montana arts council determines that the cultural and aesthetic project account has funds available and that, after an examination of the costs incurred by the project, total payment is appropriate.

(c) A grant award budget may be modified in accordance with this subsection. A grantee may modify line items in an approved budget in an amount not to exceed 10% of the total grant award. A grantee may, with permission of the Montana arts council, modify line items in an approved budget in an amount not to exceed 20% of the total grant award. A modification may not increase the grant award or change the scope or purpose of the award.

(5) The grantee must maintain accounts, records, and other pertinent material pertaining to the costs incurred and expenditures made under the grant. The system of accounting employed by the grantee must be in accordance with generally accepted accounting principles and be applied in a consistent manner so that project costs and expenditures can be clearly identified. Accounts, records, and other pertinent material must be maintained for 3 years from the official termination date of the grant period or until an audit, approved by the council, has been completed and any questions arising from the audit have been resolved to the satisfaction of the council.

(6) Grantees must submit to the council semiannual reports of expenditures during the course of the project and other financial and descriptive reports that the council may require. The grantee must submit, within 30 days after completion of the project, a final financial report and a narrative report stating what was accomplished with the grant. Five percent of the total grant award must be held pending receipt of final reports by the council. With regard to grantees who in the past have submitted late reports, 30% of the grant award may be held pending receipt of final reports by the council.

(7) The council may, at the principal place of business of the grantee and during regular business hours, examine any directly pertinent records, accounts, and documents of the grantee involving transactions related to the grant."

**Section 13.** Section 33-1-201, MCA, is amended to read:

**"33-1-201. Definitions -- insurance in general -- general terms.** For the purposes of this code, the following definitions apply unless the context requires otherwise:

(1) "Alien insurer" is an insurer formed under the laws of any country other than the United States or its states, districts, territories, and commonwealths.

(2) "Authorized insurer" is an insurer duly authorized by a certificate of authority issued by the

commissioner to transact insurance in this state.

(3) "Domestic insurer" is an insurer incorporated under the laws of this state.

~~(4)~~ "Female" has the meaning provided in 1-1-201.

~~(4)(5)~~ "Foreign insurer" is an insurer formed under the laws of any jurisdiction other than this state.

Except when distinguished by context, the term includes an alien insurer.

~~(5)(6)~~ (a) "Insurance" is a contract through which one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies.

(b) The term does not include:

(i) contracts for the installation, maintenance, and provision of inside telecommunications wiring to residential or business premises;

(ii) direct patient care agreements established pursuant to 50-4-107; or

(iii) an arrangement with a health care sharing ministry that meets the requirements of 50-4-111.

~~(6)(7)~~ (a) "Insurer" includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance. The term also includes a health service corporation in the provisions listed in 33-30-102.

(b) The term does not include a health care sharing ministry that meets the requirements of 50-4-111.

~~(8)~~ "Male" has the meaning provided in 1-1-201.

~~(7)(9)~~ "Resident domestic insurer" is an insurer incorporated under the laws of this state and:

(a) if a mutual company, not less than one-half of the policyholders are individuals who are residents of this state; or

(b) if a stock insurer, not less than one-half of the shares are owned by individuals who are residents of this state and all of the directors and officers of the insurer are residents of this state.

~~(10)~~ "Sex" has the meaning provided in 1-1-201.

~~(8)(11)~~ "State", when used in relation to jurisdiction, means a state, the District of Columbia, or a territory, commonwealth, or possession of the United States.

~~(9)(12)~~ "Transact", with respect to insurance, means to:

(a) solicit;

- (b) negotiate;
- (c) sell or effectuate a contract of insurance; or
- (d) transact matters subsequent to effectuation of the contract of insurance and arising out of it.

~~(4)~~(13) "Unauthorized insurer" is an insurer not authorized by a certificate of authority issued by the commissioner to transact insurance in this state."

**Section 14.** Section 35-20-209, MCA, is amended to read:

**"35-20-209. Duties of secretary -- record of interments.** The secretary shall perform all the duties of a secretary of a corporation and shall, in addition, keep a record of interments in which the secretary shall enter as correctly and carefully as may be the name, age, sex, as defined in 1-1-201, place of birth, and cause of death with date of burial of every person interred in the cemetery. The secretary shall procure these facts from friends or relatives of the deceased or the undertaker that gives the order for interment at that time or, if the deceased is a pauper, a stranger, or criminal, from the coroner, physician, or other public officer directing the burial of the deceased."

**Section 15.** Section 39-2-912, MCA, is amended to read:

**"39-2-912. Exemptions.** (1) This part does not apply to a discharge:

(a) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, as defined in 1-1-201, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.

(b) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

(2) For the purposes of this section, a contract for a specific term may contain a probationary period as provided for in 39-2-910 and may contain an automatic renewal clause that automatically renews the contract of employment for one or more successive terms."

**Section 16.** Section 40-1-107, MCA, is amended to read:

**"40-1-107. Form of application, license, marriage certificate, and consent.** (1) The director of the department of public health and human services shall prescribe the form for an application for a marriage license, which must include the following information:

(a) name, sex, as defined in 1-1-201, address, [social security number,] and date and place of birth of each party to the proposed marriage;

(b) if either party was previously married, the party's name and the date, place, and court in which the marriage was dissolved or declared invalid or the date and place of death of the former spouse;

(c) name and address of the parents or guardian of each party; and

(d) whether the parties are related to each other and, if so, their relationship.

(2) The director of the department of public health and human services shall prescribe the forms for the marriage license, the marriage certificate, and the consent to marriage.

[(3) The license, certificate, or consent may not contain the social security number, and the department shall keep the number from this source confidential, except that the department may use the number in administering Title IV-D of the Social Security Act.]

(4) The information contained in the marriage license application is subject to the disclosure restrictions provided in 50-15-122(5). (Bracketed language terminates on occurrence of contingency--sec. 1, Ch. 27, L. 1999.)"

**Section 17.** Section 40-1-401, MCA, is amended to read:

**"40-1-401. Prohibited marriages -- contracts.** (1) The following marriages are prohibited:

(a) a marriage entered into prior to the dissolution of an earlier marriage of one of the parties;

(b) a marriage between an ancestor and a descendant or between a brother and a sister, whether the relationship is by the half or the whole blood, or between first cousins;

(c) a marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood;

(d) a marriage between persons of the same sex, as defined in 1-1-201.

(2) Parties to a marriage prohibited under this section who cohabit after removal of the impediment

are lawfully married as of the date of the removal of the impediment.

(3) Children born of a prohibited marriage are legitimate.

(4) A contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited under subsection (1) is void as against public policy."

**Section 18.** Section 40-5-907, MCA, is amended to read:

**"40-5-907. Case registry -- abstracts -- information required -- mandatory updating.** (1) There must be registered in the case registry an abstract of:

(a) each case, including interstate cases, receiving IV-D services provided by the department;

(b) each support order entered and each modification of an existing support order made in this state after October 1, 1998; and

(c) each subsequent order or action establishing, modifying, adjusting, granting relief from, terminating, or otherwise affecting a support order in a registered case.

(2) Each abstract must include:

(a) the name, sex, as defined in 1-1-201, [social security number, other] identification numbers, if any, date of birth, driver's license number, telephone number, and residential and mailing addresses of the parents;

(b) the child's name, date of birth, sex, as defined in 1-1-201, [social security number, if any,] and residential address if different from that of the child's custodian;

(c) the name and location of the obligee if the obligee is a person or agency other than the child's parent;

(d) the name, address, and telephone number of the obligor's employer or of another payor of income to the obligor; and

(e) (i) if the child is covered by a health or medical insurance plan and the information is available in an electronic format, the name of the insurance carrier or health benefit plan, the policy identification number, the name of the persons covered, and any other pertinent information regarding coverage; or

(ii) if the child is not covered, information as to the availability of coverage for the child through the obligor's and obligee's employers.



- (3) The abstract of a support order must include:
- (a) the amount of the support payment and supplemental support payments, if any, for each child and the amount of spousal maintenance if ordered in the same case;
  - (b) the specific day or dates the payment is due;
  - (c) the inclusive dates of the support obligation;
  - (d) the terms of any condition that may affect the amount of the payment, the due date, or the obligation to pay support;
  - (e) each subsequent judgment for support arrears and the amounts of any interest, late payment penalties, and fees included in the judgment;
  - (f) any specific child support lien imposed against real or personal property of the obligor;
  - (g) the terms of any medical and health coverage provision for the child; and
  - (h) the name and county of the judicial district or the name and address of the agency where the record of the case is located and the cause number or case identification number for the case.
- (4) (a) For each IV-D case with a support order registered in the case registry, there must be a record of the date and the amount of support payments made by the obligor, dates and amounts of support collected from other sources, dates of distribution of support payments, names and locations of persons or agencies to whom support payments and collections were distributed, and the balance of support owed by the obligor.
- (b) Except as provided in subsection (5), the department need not maintain payment records in a non IV-D case.
- (5) A copy of each non IV-D income-withholding order must be included in the case registry. For each registered income-withholding order, there must be a record of payments received by the department from the payor under the income-withholding order, the date and amount of each payment, the date the department distributed the payment, and the person or agency to whom the payment was distributed.
- (6) The statistical report required by the department under 50-15-302 may be combined with and made a part of the abstract of support order form.
- (7) (a) Each support order entered or modified in this state after October 1, 1998, must include a requirement that the obligor and obligee update, as necessary, the information included in the abstract under

subsection (2).

(b) The order must also provide that in a subsequent child support enforcement action, upon sufficient showing that diligent effort has been made to ascertain the location of the obligor or obligee, the court or agency taking the enforcement action may consider the due process requirements for notice and service of process to be met with respect to the party upon delivery of written notice by regular mail to the most recent address or employer address reported to the case registry.

(c) If the support order does not include the provisions required by subsections (7)(a) and (7)(b) or if the support order was entered or last modified in this state before October 1, 1998, the department may give written notice of the provisions to the obligor and obligee. Upon receipt of the notice, the provisions have the same force and effect on the obligor and obligee as if included in the support order. (Bracketed language terminates on occurrence of contingency--sec. 1, Ch. 27, L. 1999.)"

**Section 19.** Section 40-5-1031, MCA, is amended to read:

**"40-5-1031. Pleadings and accompanying documents.** (1) In a proceeding under this part, a petitioner seeking to establish a support order, to determine parentage of a child, or to register and modify a support order of a tribunal of another state or a foreign country must file a petition. Unless otherwise ordered under 40-5-1032, the petition or accompanying documents must provide, so far as known, the name, residential address, and social security numbers of the obligor and the obligee or the parent and alleged parent and the name, sex, as defined in 1-1-201, residential address, social security number, and date of birth of each child for whose benefit support is sought or whose parentage is to be determined. Unless filed at the time of registration, the petition must be accompanied by a copy of any support order known to have been issued by another tribunal. The petition may include any other information that may assist in locating or identifying the respondent.

(2) The petition must specify the relief sought. The petition and accompanying documents must conform substantially with the requirements imposed by the forms mandated by federal law for use in cases filed by a support enforcement agency."

**Section 20.** Section 41-5-103, MCA, is amended to read:

**"41-5-103. Definitions.** As used in the Montana Youth Court Act, unless the context requires

otherwise, the following definitions apply:

- (1) "Adult" means an individual who is 18 years of age or older.
- (2) "Agency" means any entity of state or local government authorized by law to be responsible for the care or rehabilitation of youth.
- (3) "Assessment officer" means a person who is authorized by the court to provide initial intake and evaluation for a youth who appears to be in need of intervention or an alleged delinquent youth.
- (4) "Commit" means to transfer legal custody of a youth to the department or to the youth court.
- (5) "Conditional release" means the release of a youth from a correctional facility subject to the terms and conditions of the conditional release agreement provided for in 52-5-126.
- (6) (a) "Correctional facility" means a public secure residential facility or a private secure residential facility under contract with the department and operated to provide for the custody, treatment, training, and rehabilitation of:
  - (i) formally adjudicated delinquent youth;
  - (ii) convicted adult offenders or criminally convicted youth; or
  - (iii) a combination of the populations described in subsections (6)(a)(i) and (6)(a)(ii) under conditions set by the department in rule.
- (b) The term does not include a state prison as defined in 53-30-101.
- (7) "Cost containment pool" means an account from which funds are allocated by the office of court administrator under 41-5-132 to a judicial district that exceeds its annual allocation for juvenile out-of-home placements, programs, and services or to the department for costs incurred under 41-5-1504.
- (8) "Cost containment review panel" means the panel established in 41-5-131.
- (9) "Court", when used without further qualification, means the youth court of the district court.
- (10) "Criminally convicted youth" means a youth who has been convicted in a district court pursuant to 41-5-206.
- (11) (a) "Custodian" means a person, other than a parent or guardian, to whom legal custody of the youth has been given.
- (b) The term does not include a person who has only physical custody.
- (12) "Delinquent youth" means a youth who is adjudicated under formal proceedings under the

Montana Youth Court Act as a youth:

- (a) who has committed an offense that, if committed by an adult, would constitute a criminal offense;
  - (b) who has been placed on probation as a delinquent youth and who has violated any condition of probation; or
  - (c) who has violated the terms and conditions of the youth's conditional release agreement.
- (13) "Department" means the department of corrections provided for in 2-15-2301.
- (14) (a) "Department records" means information or data, either in written or electronic form, maintained by the department pertaining to youth who are committed under 41-5-1513(1)(b).
- (b) Department records do not include information provided by the department to the department of public health and human services' management information system or information maintained by the youth court through the office of court administrator.
- (15) "Detention" means the holding or temporary placement of a youth in the youth's home under home arrest or in a facility other than the youth's own home for:
- (a) the purpose of ensuring the continued custody of the youth at any time after the youth is taken into custody and before final disposition of the youth's case;
  - (b) contempt of court or violation of a valid court order; or
  - (c) violation of the terms and conditions of the youth's conditional release agreement.
- (16) "Detention facility" means a physically restricting facility designed to prevent a youth from departing at will. The term includes a youth detention facility, short-term detention center, and regional detention facility.
- (17) "Emergency placement" means placement of a youth in a youth care facility for less than 45 days to protect the youth when there is no alternative placement available.
- (18) "Family" means the parents, guardians, legal custodians, and siblings or other youth with whom a youth ordinarily lives.
- (19) "Final disposition" means the implementation of a court order for the disposition or placement of a youth as provided in 41-5-1422, 41-5-1503, 41-5-1504, 41-5-1512, 41-5-1513, and 41-5-1522 through 41-5-1525.

(20) (a) "Formal youth court records" means information or data, either in written or electronic form, on file with the clerk of district court pertaining to a youth under the jurisdiction of the youth court and includes petitions, motions, other filed pleadings, court findings, verdicts, orders and decrees, and predispositional studies.

(b) The term does not include information provided by the youth court to the department of public health and human services' management information system.

(21) "Foster home" means a private residence licensed by the department of public health and human services for placement of a youth.

(22) "Guardian" means an adult:

(a) who is responsible for a youth and has the reciprocal rights, duties, and responsibilities with the youth; and

(b) whose status is created and defined by law.

(23) "Habitual truancy" means recorded unexcused absences of 9 or more days or 54 or more parts of a day, whichever is less, in 1 school year.

(24) (a) "Holdover" means a room, office, building, or other place approved by the board of crime control for the temporary detention and supervision of youth in a physically unrestricting setting for a period not to exceed 24 hours while the youth is awaiting a probable cause hearing, release, or transfer to an appropriate detention or shelter care facility.

(b) The term does not include a jail.

(25) (a) "Informal youth court records" means information or data, either in written or electronic form, maintained by youth court probation offices pertaining to a youth under the jurisdiction of the youth court and includes reports of preliminary inquiries, youth assessment materials, medical records, school records, and supervision records of probationers.

(b) The term does not include information provided by the youth court to the department of public health and human services' management information system.

(26) (a) "Jail" means a facility used for the confinement of adults accused or convicted of criminal offenses. The term includes a lockup or other facility used primarily for the temporary confinement of adults after arrest.

(b) The term does not include a colocated juvenile detention facility that complies with 28 CFR, part 31.

(27) "Judge", when used without further qualification, means the judge of the youth court.

(28) "Juvenile home arrest officer" means a court-appointed officer administering or supervising juveniles in a program for home arrest, as provided for in Title 46, chapter 18, part 10.

(29) "Law enforcement records" means information or data, either in written or electronic form, maintained by a law enforcement agency, as defined in 7-32-201, pertaining to a youth covered by this chapter.

(30) (a) "Legal custody" means the legal status created by order of a court of competent jurisdiction that gives a person the right and duty to:

- (i) have physical custody of the youth;
- (ii) determine with whom the youth shall live and for what period;
- (iii) protect, train, and discipline the youth; and
- (iv) provide the youth with food, shelter, education, and ordinary medical care.

(b) An individual granted legal custody of a youth shall personally exercise the individual's rights and duties as guardian unless otherwise authorized by the court entering the order.

(31) "Necessary parties" includes the youth and the youth's parents, guardian, custodian, or spouse.

(32) (a) "Out-of-home placement" means placement of a youth in a program, facility, or home, other than a custodial parent's home, for purposes other than preadjudicatory detention.

(b) The term does not include shelter care or emergency placement of less than 45 days.

(33) (a) "Parent" means the natural or adoptive parent.

(b) The term does not include:

- (i) a person whose parental rights have been judicially terminated; or
- (ii) the putative father of an illegitimate youth unless the putative father's paternity is established by an adjudication or by other clear and convincing proof.

(34) "Probable cause hearing" means the hearing provided for in 41-5-332.

(35) "Regional detention facility" means a youth detention facility established and maintained by two or more counties, as authorized in 41-5-1804.

(36) "Restitution" means payments in cash to the victim or with services to the victim or the general community when these payments are made pursuant to a consent adjustment, consent decree, or other youth court order.

(37) "Running away from home" means that a youth has been reported to have run away from home without the consent of a parent or guardian or a custodian having legal custody of the youth.

(38) "Secure detention facility" means a public or private facility that:

(a) is used for the temporary placement of youth or individuals accused or convicted of criminal offenses or as a sanction for contempt of court, violation of the terms and conditions of the youth's conditional release agreement, or violation of a valid court order; and

(b) is designed to physically restrict the movements and activities of youth or other individuals held in lawful custody of the facility.

(39) "Serious juvenile offender" means a youth who has committed an offense that would be considered a felony offense if committed by an adult and that is an offense against a person, an offense against property, or an offense involving dangerous drugs.

(40) "Shelter care" means the temporary substitute care of youth in physically unrestricting facilities.

(41) "Shelter care facility" means a facility used for the shelter care of youth. The term is limited to the facilities enumerated in 41-5-347.

(42) "Short-term detention center" means a detention facility licensed by the department for the temporary placement or care of youth, for a period not to exceed 10 days excluding weekends and legal holidays, pending a probable cause hearing, release, or transfer of the youth to an appropriate detention facility, youth assessment center, or shelter care facility.

(43) "Substitute care" means full-time care of youth in a residential setting for the purpose of providing food, shelter, security and safety, guidance, direction, and, if necessary, treatment to youth who are removed from or are without the care and supervision of their parents or guardians.

(44) "Victim" means:

(a) a person who suffers property, physical, or emotional injury as a result of an offense committed by a youth that would be a criminal offense if committed by an adult;

(b) an adult relative of the victim, as defined in subsection (44)(a), if the victim is a minor; and

(c) an adult relative of a homicide victim.

(45) "Youth" means an individual who is less than 18 years of age without regard to sex, as defined in 1-1-201, or emancipation.

(46) "Youth assessment" means a multidisciplinary assessment of a youth as provided in 41-5-1203.

(47) "Youth assessment center" means a staff-secured location that is licensed by the department of public health and human services to hold a youth for up to 10 days for the purpose of providing an immediate and comprehensive community-based youth assessment to assist the youth and the youth's family in addressing the youth's behavior.

(48) "Youth care facility" has the meaning provided in 52-2-602.

(49) "Youth court" means the court established pursuant to this chapter to hear all proceedings in which a youth is alleged to be a delinquent youth, a youth in need of intervention, or a youth alleged to have violated the terms and conditions of the youth's conditional release agreement and includes the youth court judge, juvenile probation officers, and assessment officers.

(50) "Youth detention facility" means a secure detention facility licensed by the department for the temporary substitute care of youth that is:

(a) (i) operated, administered, and staffed separately and independently of a jail; or

(ii) a collocated secure detention facility that complies with 28 CFR, part 31; and

(b) used exclusively for the lawful detention of alleged or adjudicated delinquent youth or as a sanction for contempt of court, violation of the terms and conditions of the youth's conditional release agreement, or violation of a valid court order.

(51) "Youth in need of intervention" means a youth who is adjudicated as a youth and who:

(a) commits an offense prohibited by law that if committed by an adult would not constitute a criminal offense, including but not limited to a youth who:

(i) violates any Montana municipal or state law regarding alcoholic beverages; or

(ii) continues to exhibit behavior, including running away from home or habitual truancy, beyond the control of the youth's parents, foster parents, physical custodian, or guardian despite the attempt of the youth's parents, foster parents, physical custodian, or guardian to exert all reasonable efforts to mediate,



resolve, or control the youth's behavior; or

(b) has committed any of the acts of a delinquent youth but whom the youth court, in its discretion, chooses to regard as a youth in need of intervention."

**Section 21.** Section 42-2-204, MCA, is amended to read:

**"42-2-204. Presumed knowledge of pregnancy -- duty to register to be afforded notice -- putative and presumed fathers.** (1) A person who engages in sexual relations with a member of the opposite sex, as defined in 1-1-201, is presumed to know that a pregnancy could result.

(2) In addition to any other notice to which the putative father is entitled, a putative father is entitled to notice of termination of parental rights proceedings for the purposes of adoption if the putative father has complied with the requirements of the putative father registry.

(3) An individual who is not married to the mother but who is presumed to be a father under 40-6-105 and registers in accordance with this part is entitled to receive notice of a termination of parental rights proceeding."

**Section 22.** Section 45-5-625, MCA, is amended to read:

**"45-5-625. Sexual abuse of children.** (1) A person commits the offense of sexual abuse of children if the person:

(a) knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated;

(b) knowingly photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated;

(c) knowingly, by any means of communication, including electronic communication or in person, persuades, entices, counsels, coerces, encourages, directs, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated, or to view sexually explicit material or acts for the purpose of inducing or persuading a child to participate in any sexual activity that is illegal;

(d) knowingly processes, develops, prints, publishes, transports, distributes, sells, exhibits, or

advertises any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;

(e) knowingly possesses any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;

(f) finances any of the activities described in subsections (1)(a) through (1)(d) and (1)(g), knowing that the activity is of the nature described in those subsections;

(g) possesses with intent to sell any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;

(h) knowingly travels within, from, or to this state with the intention of meeting a child under 16 years of age or a person the offender believes to be a child under 16 years of age in order to engage in sexual conduct, actual or simulated; or

(i) knowingly coerces, entices, persuades, arranges for, or facilitates a child under 16 years of age or a person the offender believes to be a child under 16 years of age to travel within, from, or to this state with the intention of engaging in sexual conduct, actual or simulated.

(2) (a) Except as provided in subsection (2)(b), (2)(c), or (4), a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years and may be fined not more than \$10,000.

(b) Except as provided in 46-18-219, if the victim is under 16 years of age, a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$10,000.

(c) Except as provided in 46-18-219, a person convicted of the offense of sexual abuse of children for the possession of material, as provided in subsection (1)(e), shall be fined not to exceed \$10,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.

(3) An offense is not committed under subsections (1)(d) through (1)(g) if the visual or print medium is processed, developed, printed, published, transported, distributed, sold, possessed, or possessed with intent to sell, or if the activity is financed, as part of a sexual offender information or treatment course or program conducted or approved by the department of corrections.

(4) (a) If the victim was 12 years of age or younger and the offender was 18 years of age or older

at the time of the offense, the offender:

(i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (4)(a)(i) except as provided in 46-18-222(1) through (5), and during the first 25 years of imprisonment, the offender is not eligible for parole. The exception provided in 46-18-222(6) does not apply.

(ii) may be fined an amount not to exceed \$50,000; and

(iii) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program provided or approved by the department of corrections.

(b) If the offender is released after the mandatory minimum period of imprisonment, the offender is subject to supervision by the department of corrections for the remainder of the offender's life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.

(5) As used in this section, the following definitions apply:

(a) "Electronic communication" means a sign, signal, writing, image, sound, data, or intelligence of any nature transmitted or created in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.

(b) "Sexual conduct" means:

(i) actual or simulated:

(A) sexual intercourse, whether between persons of the same or opposite sex, as defined in 1-1-201;

(B) penetration of the vagina or rectum by any object, except when done as part of a recognized medical procedure;

(C) bestiality;

(D) masturbation;

(E) sadomasochistic abuse;

(F) lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person; or

(G) defecation or urination for the purpose of the sexual stimulation of the viewer; or

(ii) depiction of a child in the nude or in a state of partial undress with the purpose to abuse, humiliate, harass, or degrade the child or to arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person.

(c) "Simulated" means any depicting of the genitals or pubic or rectal area that gives the appearance of sexual conduct or incipient sexual conduct.

(d) "Visual medium" means:

(i) any film, photograph, videotape, negative, slide, or photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or

(ii) any disk, diskette, or other physical media that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method."

**Section 23.** Section 46-19-301, MCA, is amended to read:

**"46-19-301. Western Interstate Corrections Compact -- contents.** The Western Interstate Corrections Compact as contained herein is hereby enacted into law and entered into on behalf of this state with any and all other states legally joining therein in a form substantially as follows:

#### WESTERN INTERSTATE CORRECTIONS COMPACT

##### Article I. Purpose and Policy

The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment, and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on the basis of cooperation with one another, thereby serving the best interests of such offenders and of society. The purpose of this compact is to provide for the development and execution of such programs of cooperation for the confinement, treatment, and rehabilitation of offenders.

##### Article II. Definitions

As used in this compact, unless the context clearly requires otherwise:

(1) "state" means a state of the United States or, subject to the limitation contained in Article VII, Guam;

- (2) "sending state" means a state party to this compact in which conviction was had;
- (3) "receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction was had;
- (4) "inmate" means a male or female, as defined in 1-1-201, offender who is under sentence to or confined in a prison or other correctional institution;
- (5) "institution" means any prison, reformatory, or other correctional facility (including but not limited to a facility for the mentally ill or mentally defective) in which inmates may lawfully be confined.

### Article III. Contracts

(1) Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states.

Any such contract shall provide for:

- (a) its duration;
- (b) payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs, or treatment not reasonably included as part of normal maintenance;
- (c) participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom;
- (d) delivery and retaking of inmates;
- (e) such other matters as may be necessary and appropriate to fix the obligations, responsibilities, and rights of the sending and receiving states.

(2) Prior to the construction or completion of construction of any institution or addition thereto by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the institution or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific percent of the capacity of the institution to be kept available for use by inmates of the sending state or states so contracting. Any sending state so contracting may, to the extent that moneys are legally available therefor, pay to the receiving state a reasonable sum as consideration for such enlargement of capacity or provision of equipment or structures and reservation of capacity. Such payment may be in a lump

sum or in installments as provided in the contract.

(3) The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

#### Article IV. Procedures and Rights

(1) Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in or transfer of an inmate to an institution within the territory of another party state is necessary in order to provide adequate quarters and care or desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

(2) The appropriate officials of any state party to this compact shall have access at all reasonable times to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(3) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III.

(4) Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state in order that each inmate may have the benefit of the inmate's record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

(5) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for and treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a

receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

(6) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subsection shall be borne by the sending state.

(7) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate and the sending and receiving states shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

(8) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits, incur or be relieved of any obligations, or have such obligations modified or the inmate's status changed on account of any action or proceeding in which the inmate could have participated if confined in any appropriate institution of the sending state located within such state.

(9) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in the person's exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

#### Article V. Acts Not Reviewable in Receiving State -- Extradition

(1) Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is suspected of having committed

within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment, or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

(2) An inmate who escapes from an institution in which the inmate is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

#### Article VI. Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto, and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision, provided that, if such program or activity is not part of the customary correctional regimen, the express consent of the appropriate official of the sending state shall be required therefor.

#### Article VII. Entry into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two contiguous states from among the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. For the purposes of this article, Alaska and Hawaii shall be deemed contiguous to each other; to any and all of the states of California, Oregon, and Washington; and to Guam. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states or any other state contiguous to at least one party state upon similar action by such state. Guam may become party to this compact by taking action similar to that provided for joinder by any other eligible party state and upon the consent of congress to such joinder. For the purposes of this article, Guam shall be deemed contiguous to Alaska, Hawaii, California, Oregon, and Washington.



Article VIII. Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until 2 years after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

Article IX. Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation, or treatment of inmates or to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

Article X. Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters."

**Section 24.** Section 46-19-401, MCA, is amended to read:

**"46-19-401. Compact adopted -- text.** The Interstate Corrections Compact is entered into by this state with any and all other states legally joining therein in the form substantially as follows:

INTERSTATE CORRECTIONS COMPACT

Article I. Purpose and Policy

The party states, desiring by common action to fully utilize and improve their institutional facilities and

provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

#### Article II. Definitions

As used in this compact, unless the context requires otherwise:

- (a) "State" means a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.
- (b) "Sending state" means a state party to this compact in which conviction or court commitment was had.
- (c) "Receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction or court commitment was had.
- (d) "Inmate" means a male or female, as defined in 1-1-201, offender who is committed under sentence to or confined in a penal or correctional institution.
- (e) "Institution" means any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates may lawfully be confined.

#### Article III. Contracts

- (a) Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:
  - 1. Its duration.
  - 2. Payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance.
  - 3. Participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any

products resulting therefrom.

4. Delivery and retaking of inmates.

5. Such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

(b) The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

#### Article IV. Procedures and Rights

(a) Whenever the duly constituted authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

(b) The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(c) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state. For transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III.

(d) Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have official review of the inmate's record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

(e) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

(f) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subsection, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state.

(g) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

(h) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or the inmate's status changed on account of any action or proceeding in which the inmate could have participated if confined in any appropriate institution of the sending state located within such state.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in the inmate's exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

Article V. Acts Not Reviewable in Receiving State -- Extradition

(a) Any decision of the sending state in respect of any matter over which it retains jurisdiction

pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is formally accused of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

(b) An inmate who escapes from an institution in which the inmate is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition or rendition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

#### Article VI. Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision, provided that if such program or activity is not part of the customary correctional regimen, the express consent of the appropriate official of the sending state shall be required therefor.

#### Article VII. Entry Into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two states. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states upon similar action by such state.

#### Article VIII. Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until one

year after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

Article IX. Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

Article X. Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters."

**Section 25.** Section 46-32-105, MCA, is amended to read:

**"46-32-105. (Temporary) Expungement.** (1) Upon entry of a certificate of innocence, the court shall order the associated convictions and arrest records expunged and purged from all applicable systems, including both electronic and hard copy systems. The court shall enter the expungement order regardless of whether the claimant has prior criminal convictions in other cases that are not the subject of the claim for compensation.

(2) The order of expungement must state:

(a) the claimant's current full name;

(b) the claimant's full name at the time of arrest and conviction, if different from the claimant's current name;

(c) the claimant's sex, as defined in 1-1-201, race, and date of birth;

(d) the crime for which the claimant was arrested and convicted;

(e) the date of the claimant's arrest and the date of the claimant's conviction; and

(f) the identity of the arresting law enforcement authority and the identity of the district court that rendered the conviction.

(3) The order of expungement also must direct the department of justice to purge the conviction and arrest information from the central repository of the criminal justice information network and all applicable databases. The clerk of the court shall send a certified copy of the order to the department of justice for immediate action, and the department shall carry out the order and notify the federal bureau of investigation, the department of corrections, and any other criminal justice agency that may have a record of the conviction and arrest. The department of justice shall provide confirmation of the action to the court.

(4) If a certificate of innocence and an order of expungement are entered, the claimant must be treated as not having been arrested or convicted of the crime or crimes to which the certificate of innocence applies.

(5) (a) Upon entry of a certificate of innocence:

(i) the court shall order the expungement and destruction of any associated biological samples from the claimant. The order must state the information required to be expunged and destroyed.

(ii) the court shall seal all district court records regarding the conviction. The district court records are only available upon a good cause finding by the court.

(iii) the clerk of the court shall send a certified copy of the order to the department of justice, which must carry out the order and provide confirmation of the action to the court.

(b) The department is not required to expunge and destroy any samples record associated with the claimant related to an offense other than the offense or offenses for which the court has entered a certificate of innocence.

(6) The decision to grant or deny a certificate of innocence does not have a res judicata effect on any other criminal proceedings involving the claimant. (Terminates June 30, 2023--sec. 15, Ch. 574, L. 2021.)"

**Section 26.** Section 49-1-102, MCA, is amended to read:

**"49-1-102. Freedom from discrimination.** (1) The right to be free from discrimination because of race, creed, religion, color, sex, as defined in 1-1-201, physical or mental disability, age, or national origin is recognized as and declared to be a civil right. This right must include but not be limited to:

- (a) the right to obtain and hold employment without discrimination; and
- (b) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement.

(2) This section does not prevent the nonarbitrary consideration in adoption proceedings of relevant information concerning the factors listed in subsection (1). Consideration of religious factors by a licensed child-placing agency that is affiliated with a particular religious faith is not arbitrary consideration of religion within the meaning of this section."

**Section 27.** Section 49-2-101, MCA, is amended to read:

**"49-2-101. Definitions.** As used in this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Age" means number of years since birth. It does not mean level of maturity or ability to handle responsibility. These latter criteria may represent legitimate considerations as reasonable grounds for discrimination without reference to age.

(2) "Aggrieved party" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, and who has been or is likely to be specially and injuriously affected by a violation of this chapter.

(3) "Commission" means the commission for human rights provided for in 2-15-1706.

(4) "Commissioner" means the commissioner of labor and industry provided for in 2-15-1701.

(5) "Credit" means the right granted by a creditor to a person to defer payment of a debt, to incur debt and defer its payment, or to purchase property or services and defer payment. It includes without limitation the right to incur and defer debt that is secured by residential real property.

(6) "Credit transaction" means any invitation to apply for credit, application for credit, extension of credit, or credit sale.

(7) "Creditor" means a person who, regularly or as a part of the person's business, arranges for



the extension of credit for which the payment of a financial charge or interest is required, whether in connection with loans, sale of property or services, or otherwise.

(8) "Department" means the department of labor and industry provided for in 2-15-1701.

(9) "Educational institution" means a public or private institution and includes an academy; college; elementary or secondary school; extension course; kindergarten; nursery; school system; university; business, nursing, professional, secretarial, technical, or vocational school; or agent of an educational institution.

(10) (a) "Employee" means an individual employed by an employer.

(b) The term does not include an individual providing services for an employer if the individual has an independent contractor exemption certificate issued under 39-71-417 and is providing services under the terms of that certificate.

(11) "Employer" means an employer of one or more persons or an agent of the employer but does not include a fraternal, charitable, or religious association or corporation if the association or corporation is not organized either for private profit or to provide accommodations or services that are available on a nonmembership basis.

(12) "Employment agency" means a person undertaking to procure employees or opportunities to work.

(13) "Financial institution" means a commercial bank, trust company, savings bank, finance company, savings and loan association, credit union, investment company, or insurance company.

(14) "Housing accommodation" means a building or portion of a building, whether constructed or to be constructed, that is or will be used as the sleeping quarters of its occupants.

(15) "Labor organization" means an organization or an agent of an organization organized for the purpose, in whole or in part, of collective bargaining, of dealing with employers concerning grievances or terms or conditions of employment, or of other mutual aid and protection of employees.

(16) "National origin" means ancestry.

(17) (a) "Organization" means a corporation, association, or any other legal or commercial entity that engages in advocacy of, enforcement of, or compliance with legal interests affected by this chapter.

(b) The term does not include a labor organization.

(18) "Person" means one or more individuals, labor unions, partnerships, associations,

corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated employees' associations, employers, employment agencies, organizations, or labor organizations.

(19) (a) "Physical or mental disability" means:

(i) a physical or mental impairment that substantially limits one or more of a person's major life activities;

(ii) a record of such an impairment; or

(iii) a condition regarded as such an impairment.

(b) Discrimination based on, because of, on the basis of, or on the grounds of physical or mental disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability. An accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.

(20) (a) "Public accommodation" means a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons. It includes without limitation a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbering, barbering nonchemical, cosmetology, electrology, esthetics, or manicuring salon or shop, bathroom, resthouse, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, or hospital and all other public amusement and business establishments.

(b) Public accommodation does not include an institution, club, or place of accommodation that proves that it is by its nature distinctly private. An institution, club, or place of accommodation may not be considered by its nature distinctly private if it has more than 100 members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages, directly or indirectly, from or on behalf of nonmembers, for the furtherance of trade or business. For the purposes of this subsection (20), any lodge of a recognized national fraternal organization is considered by its nature distinctly private."

(21) "Sex" has the meaning provided in 1-1-201.

**Section 28.** Section 49-3-101, MCA, is amended to read:

**"49-3-101. Definitions.** As used in this chapter, the following definitions apply:

(1) "Age" means number of years since birth. It does not mean level of maturity or ability to handle responsibility, which may represent legitimate considerations as reasonable grounds for discrimination without reference to age.

(2) "Commission" means the commission for human rights provided for in 2-15-1706.

(3) (a) "Physical or mental disability" means:

(i) a physical or mental impairment that substantially limits one or more of a person's major life activities;

(ii) a record of such an impairment; or

(iii) a condition regarded as such an impairment.

(b) Discrimination based upon, because of, on the basis of, on the grounds of, or with regard to physical or mental disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability. Any accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.

(4) "Sex" has the meaning provided in 1-1-201.

~~(4)~~(5) "State or local governmental agency" means:

(a) any branch, department, office, board, bureau, commission, agency, university unit, college, or other instrumentality of state government; or

(b) a county, city, town, school district, or other unit of local government and any instrumentality of local government.

~~(5)~~(6) "Qualifications" means qualifications that are genuinely related to competent performance of the particular occupational task."

**Section 29.** Section 50-5-105, MCA, is amended to read:

**"50-5-105. Discrimination prohibited.** (1) All phases of the operation of a health care facility must be without discrimination against anyone on the basis of race, creed, religion, color, national origin, sex, as defined in 1-1-201, age, marital status, physical or mental disability, or political ideas.

(2) (a) A health care facility may not refuse to admit a person to the facility solely because the person has an HIV-related condition.

(b) For the purposes of this subsection (2), the following definitions apply:

(i) "HIV" means the human immunodeficiency virus identified as the causative agent of acquired immunodeficiency syndrome (AIDS) and includes all HIV and HIV-related viruses that damage the cellular branch of the human immune or neurological system and leave the infected person immunodeficient or neurologically impaired.

(ii) "HIV-related condition" means any medical condition resulting from an HIV infection, including but not limited to seropositivity for HIV.

(3) A person who operates a facility may not discriminate among the patients of licensed physicians. The free and confidential professional relationship between a licensed physician and patient must continue and remain unaffected.

(4) Except for a hospital that employs its medical staff, a hospital considering an application for staff membership or granting privileges within the scope of the applicant's license may not deny the application or privileges because the applicant is licensed under Title 37, chapter 6."

**Section 30.** Section 50-5-602, MCA, is amended to read:

**"50-5-602. Definitions.** As used in this part, the following definitions apply:

(1) "Department" means the department of public health and human services provided for in 2-15-2201.

(2) "Family practice" means comprehensive medical care with particular emphasis on the family unit, in which the physician's continuing responsibility for health care is not limited by the patient's age or sex, as defined in 1-1-201, or by a particular organ system or disease entity.

(3) "Residency training" means a community-based family practice program to train family practice resident physicians, sponsored by one or more community hospitals and physicians in Montana, for inpatient and outpatient training.

(4) "Resident physician" means any physician in advanced medical specialty training."

**Section 31.** Section 50-11-101, MCA, is amended to read:

**"50-11-101. Definitions.** As used in this part, the following definitions apply:

(1) "Embryo" means an organism of the species *Homo sapiens* from the single cell stage to 8 weeks of development.

~~(2)~~ (2) "Female" has the meaning provided in 1-1-201.

~~(2)(3)~~ (2)(3) "Fetus" means an organism of the species *Homo sapiens* from 8 weeks of development until complete expulsion or extraction from a woman's body or removal from an artificial womb or other similar environment designed to nurture the development of the organism.

~~(3)(4)~~ (3)(4) "Oocyte" means the human female germ cell, the egg.

~~(4)(5)~~ (4)(5) "Reproductive human cloning" means human cloning intended to result in the gestation or birth of a child who is genetically identical to another conceptus, embryo, fetus, or human being, living or dead.

~~(5)(6)~~ (5)(6) "Somatic cell" means a diploid cell, having a complete set of chromosomes, obtained or derived from a living or deceased human body at any stage of development."

**Section 32.** Section 50-15-101, MCA, is amended to read:

**"50-15-101. Definitions.** Unless the context requires otherwise, in parts 1 through 4 the following definitions apply:

(1) "Advanced practice registered nurse" means an individual who has been certified as an advanced practice registered nurse as provided in 37-8-202.

(2) "Authorized representative" means a person:

(a) designated by an individual, in a notarized written document, to have access to the individual's vital records;

(b) who has a general power of attorney for an individual; or

(c) appointed by a court to manage the personal or financial affairs of an individual.

(3) "Dead body" means a human body or parts of a human body from which it reasonably may be concluded that death occurred.

(4) "Department" means the department of public health and human services provided for in 2-15-2201.

(5) "Dissolution of marriage" means a marriage terminated pursuant to Title 40, chapter 4, part 1.

(6) "Fetal death" means death of the fetus prior to the complete expulsion or extraction from its mother as a product of conception, notwithstanding the duration of pregnancy. The death is indicated by the fact that after expulsion or extraction, the fetus does not breathe or show any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles. Heartbeats are distinguished from transient cardiac contractions. Respirations are distinguished from fleeting respiratory efforts or gasps.

(7) "Final disposition" means the burial, interment, cremation, removal from the state, or other authorized disposition of a dead body or fetus.

(8) "Invalid marriage" means a marriage decreed by a district court to be invalid for the reasons contained in 40-1-402.

(9) "Live birth" means the complete expulsion or extraction from the mother as a product of conception, notwithstanding the duration of pregnancy. The birth is indicated by the fact that after expulsion or extraction, the child breathes or shows any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles. Heartbeats are distinguished from transient cardiac contractions. Respirations are distinguished from fleeting respiratory efforts or gasps.

(10) "Local registrar" means a person appointed by the department to act as its agent in administering this chapter in the area set forth in the letter of appointment.

(11) "Person in charge of disposition of a dead body" means a person who places or causes a dead body or the ashes after cremation to be placed in a grave, vault, urn, or other receptacle or otherwise disposes of the body or fetus and who is a funeral director, an employee acting for a funeral director, or a person who first assumes custody of a dead body or fetus.

(12) "Physician" means a person legally authorized to practice medicine in this state.

(13) "Registration" means the process by which vital records are completed, filed, and incorporated into the official records of the department.

(14) "Research" means a systematic investigation designed primarily to develop or contribute to generalizable knowledge.

(15) "Sex" has the meaning provided in 1-1-201.

~~(15)~~(16) (a) "Stillbirth" means a fetal death occurring after a minimum of 20 weeks of gestation.

(b) The term does not include an abortion, as defined in 50-20-104.

~~(16)~~(17) "System of vital statistics" means the registration, collection, preservation, amendment, and certification of vital records. The term includes the collection of reports required by this chapter and related activities, including the tabulation, analysis, publication, and dissemination of vital statistics.

~~(17)~~(18) "Vital records" means certificates or reports of birth, death, fetal death, marriage, and dissolution of marriage and related reports.

~~(18)~~(19) "Vital statistics" means the data derived from certificates or reports of birth, death, fetal death, induced termination of pregnancy, marriage, and dissolution of marriage and related reports."

**Section 33.** Section 50-19-103, MCA, is amended to read:

**"50-19-103. Prenatal blood sample required for serological test.** (1) Every female, as defined in 1-1-201, regardless of age or marital status, seeking prenatal care from a health care provider is required to submit a blood specimen for the purpose of a standard serological test. In submitting the specimen to the laboratory, the health care provider shall designate it as a prenatal test.

(2) A health care provider who attends a pregnant woman shall at the first professional visit take the blood sample and submit it to a laboratory.

(3) A person permitted to attend a pregnant woman, but not permitted to take blood samples, must have the sample taken by a person permitted to take blood samples and submit it to a laboratory.

(4) A health care provider who violates this part is guilty of a misdemeanor. However, a health care provider who requests a sample of blood in accordance with this provision and whose request is refused is not guilty of a violation of this section."

**Section 34.** Section 50-60-214, MCA, is amended to read:

**"50-60-214. Alteration of primary function area.** (1) An alteration that affects or could affect the use of or access to a primary function area in a public building must be made to ensure, to the extent possible, that the path of travel to the altered primary function area and the restrooms, telephones, and drinking fountains serving the altered primary function area are readily accessible and usable by persons with disabilities.

(2) (a) A person or entity is not required to make alterations to provide an accessible path of travel to an altered primary function area if in terms of cost and scope the alterations to the path of travel are disproportionate to the cost of the alterations to the primary function area. Alterations to a path of travel to an altered primary function area must be considered disproportionate if the cost exceeds 20% of the cost of the alterations to the primary function area. This subsection does not prohibit an expenditure to alter a path of travel that exceeds 20% of the cost of the alterations to a primary function area.

(b) If the cost of altering a path of travel to an altered primary function area is disproportionate as provided in subsection (2)(a), the path of travel must be made accessible to the extent possible without incurring disproportionate costs. The alterations to the path of travel must be made by providing, in the following order or priority:

(i) an accessible entrance and accessible exterior route to the accessible entrance from accessible parking and passenger loading zones or from a public sidewalk if the public sidewalk is immediately adjacent to the public building site;

(ii) an accessible path of travel to the altered primary function area;

(iii) accessible restrooms for each sex, as defined in 1-1-201, or a single unisex restroom when allowed by the applicable building code; and

(iv) accessible elements, including but not limited to storage spaces and alarms.

(3) A person or entity subject to the provisions of this section is also subject to the provisions of 50-60-213(5)(a) and (5)(b)."

**Section 35.** Section 53-20-142, MCA, is amended to read:

**"53-20-142. Rights while in residential facility.** Persons admitted to a residential facility for a period of habilitation have the following rights:

(1) Residents have a right to dignity, privacy, and humane care.

(2) Residents are entitled to send and receive sealed mail. Moreover, it is the duty of the facility to foster the exercise of this right by furnishing the necessary materials and assistance.

(3) Residents must have the same rights and access to private telephone communication as patients at any public hospital except to the extent that the individual treatment planning team or the qualified



intellectual disability professional responsible for formulation of a particular resident's habilitation plan writes an order imposing special restrictions and explains the reasons for the restrictions. The written order must be renewed monthly if any restrictions are to be continued.

(4) Residents have an unrestricted right to visitation except to the extent that the individual treatment planning team or the qualified intellectual disability professional responsible for formulation of a particular resident's habilitation plan writes an order imposing special restrictions and explains the reasons for the restrictions. The written order must be renewed monthly if restrictions are to be continued.

(5) Residents have a right to receive suitable educational and habilitation services regardless of chronological age, degree of intellectual disability, or accompanying disabilities.

(6) Each resident must have an adequate allowance of neat, clean, suitably fitting, and seasonable clothing. Except when a particular kind of clothing is required because of a particular condition, residents must have the opportunity to select from various types of neat, clean, and seasonable clothing. The clothing must be considered the resident's throughout the resident's stay in the facility. Clothing, both in amount and type, must make it possible for residents to go out of doors in inclement weather, to go for trips or visits appropriately dressed, and to make a normal appearance in the community. The facility shall make provision for the adequate and regular laundering of the residents' clothing.

(7) Each resident has the right to keep and use the resident's own personal possessions except insofar as the clothes or personal possessions may be determined by the individual treatment planning team or the qualified intellectual disability professional to be dangerous either to the resident or to others.

(8) Each resident has a right to a humane physical environment within the residential facility. The facility must be designed to make a positive contribution to the efficient attainment of the habilitation goals of the resident. To accomplish this purpose:

(a) regular housekeeping and maintenance procedures that will ensure that the facility is maintained in a safe, clean, and attractive condition must be developed and implemented;

(b) pursuant to an established routine maintenance and repair program, the physical plant must be kept in a continuous state of good repair and operation so as to ensure the health, comfort, safety, and well-being of the residents and so as not to impede in any manner the habilitation programs of the residents;

(c) the physical facilities must meet all fire and safety standards established by the state and

locality. In addition, the facility must meet the provisions of the life safety code of the national fire protection association that are applicable to it.

(d) there must be special facilities for nonambulatory residents to ensure their safety and comfort, including special fittings on toilets and wheelchairs. Appropriate provision must be made to permit nonambulatory residents to communicate their needs to staff.

(9) Residents have a right to receive prompt and adequate medical treatment for any physical or mental ailments or injuries or physical disabilities and for the prevention of any illness or disability. The medical treatment must meet standards of medical practice in the community. However, nothing in this subsection may be interpreted to impair other rights of a resident in regard to involuntary commitment for mental illness, use of psychotropic medication, use of hazardous, aversive, or experimental procedures, or the refusal of treatment.

(10) Corporal punishment is not permitted.

(11) The opportunity for religious worship must be accorded to each resident who desires worship. Provisions for religious worship must be made available to all residents on a nondiscriminatory basis. An individual may not be compelled to engage in any religious activities.

(12) Residents have a right to a nourishing, well-balanced diet. The diet for residents must provide at a minimum the recommended daily dietary allowance as developed by the national academy of sciences. Provisions must be made for special therapeutic diets and for substitutes at the request of the resident, the resident's parents, guardian, or next of kin, or the responsible person appointed by the court in accordance with the religious requirements of any resident's faith. Denial of a nutritionally adequate diet may not be used as punishment.

(13) Residents have a right to regular physical exercise several times a week. It is the duty of the facility to provide both indoor and outdoor facilities and equipment for exercise. Residents have a right to be outdoors daily in the absence of contrary medical considerations.

(14) Residents have a right, under appropriate supervision, to suitable opportunities for the interaction with members of the opposite sex, as defined in 1-1-201, except when the individual treatment planning team or the qualified intellectual disability professional responsible for the formulation of a particular resident's habilitation plan writes an order to the contrary and explains the reasons for the order. The order must be renewed monthly if the restriction is to be continued."

**Section 36.** Section 53-21-121, MCA, is amended to read:

**"53-21-121. Petition for commitment -- contents of -- notice of.** (1) The county attorney, upon the written request of any person having direct knowledge of the facts, may file a petition with the court alleging that there is a person within the county who is suffering from a mental disorder and who requires commitment pursuant to this chapter.

(2) The petition must contain:

(a) the name and address of the person requesting the petition and the person's interest in the case;

(b) the name of the respondent and, if known, the address, age, sex, as defined in 1-1-201, marital status, and occupation of the respondent;

(c) the purported facts supporting the allegation of mental disorder, including a report by a mental health professional if any, a statement of the disposition sought pursuant to 53-21-127, and the need for commitment;

(d) the name and address of every person known or believed to be legally responsible for the care, support, and maintenance of the respondent for whom evaluation is sought;

(e) the name and address of the respondent's next of kin to the extent known to the county attorney and the person requesting the petition;

(f) the name and address of any person whom the county attorney believes might be willing and able to be appointed as friend of respondent;

(g) the name, address, and telephone number of the attorney, if any, who has most recently represented the respondent for whom evaluation is sought; if there is no attorney, there must be a statement as to whether to the best knowledge of the person requesting the petition the respondent for whom evaluation is sought is indigent and unable to afford the services of an attorney;

(h) a statement of the rights of the respondent, which must be in conspicuous print and identified by a suitable heading; and

(i) the name and address of the mental health facility to which it is proposed that the respondent may be committed, if known.

(3) Notice of the petition must be hand-delivered to the respondent and to the respondent's counsel on or before the initial appearance of the respondent before the judge or justice of the peace. The respondent's counsel shall meet with the respondent, explain the substance of the petition, and explain the probable course of the proceedings. Notice of the petition and the order setting the date and time of the hearing and the names of the respondent's counsel, professional person, and friend of respondent must be hand-delivered, mailed, or sent by a facsimile transmission to the person or persons legally responsible for care, support, and maintenance of the respondent, the next of kin identified in the petition, any other person identified by the county attorney as a possible friend of respondent other than the one named as the friend of respondent, the director of the department or the director's designee, and the mental health facility to which the respondent may be committed, if known. The notice may provide, other than as to the respondent and the respondent's counsel, that no further notice will be given unless written request is filed with the clerk of court."

**Section 37.** Section 53-21-142, MCA, is amended to read:

**"53-21-142. Rights of persons admitted to facility.** Patients admitted to a mental health facility, whether voluntarily or involuntarily, have the following rights:

(1) Patients have a right to privacy and dignity.

(2) Patients have a right to the least restrictive conditions necessary to achieve the purposes of commitment. Patients must be accorded the right to appropriate treatment and related services in a setting and under conditions that:

(a) are the most supportive of the patient's personal liberty; and

(b) restrict the patient's liberty only to the extent necessary and consistent with the patient's treatment need, applicable requirements of law, and judicial orders.

(3) Patients have rights to visitation and reasonable access to telephone communications, including the right to converse with others privately, except to the extent that the professional person responsible for formulation of a particular patient's treatment plan writes an order imposing special restrictions. The written order must be renewed after each periodic review of the treatment plan if any restrictions are to be continued. Patients have an unrestricted right to visitation with attorneys, with spiritual counselors, and with private physicians and other professional persons.

(4) Patients have an unrestricted right to send sealed mail. Patients have an unrestricted right to receive sealed mail from their attorneys, private physicians and other professional persons, the mental disabilities board of visitors, courts, and government officials. Patients have a right to receive sealed mail from others except to the extent that a professional person responsible for formulation of a particular patient's treatment plan writes an order imposing special restrictions on receipt of sealed mail. The written order must be renewed after each periodic review of the treatment plan if any restrictions are to be continued.

(5) Patients have an unrestricted right to have access to letter-writing materials, including postage, and have a right to have staff members of the facility assist persons who are unable to write, prepare, and mail correspondence.

(6) Patients have a right to wear their own clothes and to keep and use their own personal possessions, including toilet articles, except to the extent that clothes or personal possessions may be determined by a professional person in charge of the patient's treatment plan to be dangerous or otherwise inappropriate to the treatment regimen. The facility has an obligation to supply an adequate allowance of clothing to any patients who do not have suitable clothing of their own. Patients must have the opportunity to select from various types of neat, clean, and seasonable clothing. The clothing must be considered the patient's throughout the patient's stay at the facility. The facility shall make provision for the laundering of patient clothing.

(7) Patients have the right to keep and be allowed to spend a reasonable sum of their own money.

(8) Patients have the right to religious worship. Provisions for worship must be made available to all patients on a nondiscriminatory basis. An individual may not be required to engage in any religious activities.

(9) Patients have a right to regular physical exercise several times a week. The facility shall provide facilities and equipment for physical exercise. Patients have a right to be outdoors at regular and frequent intervals in the absence of contrary medical considerations.

(10) Patients have the right to be provided, with adequate supervision, suitable opportunities for interaction with members of the opposite sex, as defined in 1-1-201, except to the extent that a professional person in charge of the patient's treatment plan writes an order stating that the interaction is inappropriate to the treatment regimen.

(11) Patients have a right to receive prompt and adequate medical treatment for any physical

ailments. In providing medical care, the mental health facility shall take advantage of whatever community-based facilities are appropriate and available and shall coordinate the patient's treatment for mental illness with the patient's medical treatment.

(12) Patients have a right to a diet that will provide at a minimum the recommended daily dietary allowances as developed by the national academy of sciences. Provisions must be made for special therapeutic diets and for substitutes at the request of the patient or the friend of respondent in accordance with the religious requirements of any patient's faith. Denial of a nutritionally adequate diet may not be used as punishment.

(13) Patients have a right to a humane psychological and physical environment within the mental health facilities. These facilities must be designed to afford patients with comfort and safety, promote dignity, and ensure privacy. The facilities must be designed to make a positive contribution to the efficient attainment of the treatment goals set for the patient. In order to ensure the accomplishment of this goal:

(a) regular housekeeping and maintenance procedures that will ensure that the facility is maintained in a safe, clean, and attractive condition must be developed and implemented;

(b) there must be special provision made for geriatric and other nonambulatory patients to ensure their safety and comfort, including special fittings on toilets and wheelchairs. Appropriate provision must be made to permit nonambulatory patients to communicate their needs to the facility staff.

(c) pursuant to an established routine maintenance and repair program, the physical plant of each facility must be kept in a continuous state of good repair and operation in accordance with the needs of the health, comfort, safety, and well-being of the patients;

(d) each facility must meet all fire and safety standards established by the state and locality. In addition, any hospital must meet the provisions of the life safety code of the national fire protection association that are applicable to hospitals. A hospital must meet all standards established by the state for general hospitals to the extent that they are relevant to psychiatric facilities.

(14) A patient at a facility has the right:

(a) to be informed of the rights described in this section at the time of admission and periodically after admission in language and terms appropriate to the patient's condition and ability to understand;

(b) to assert grievances with respect to infringement of the rights described in this section,

including the right to have a grievance considered in a fair and timely manner according to an impartial grievance procedure that must be provided for by the facility; and

(c) to exercise the rights described in this section without reprisal and may not be denied admission to the facility as reprisal for the exercise of the rights described in this section.

(15) In order to assist a person admitted to a program or facility in the exercise or protection of the patient's rights, the patient's attorney, advocate, or legal representatives must be given reasonable access to:

(a) the patient;

(b) the program or facility areas where the patient has received treatment or has resided or the areas to which the patient has had access; and

(c) pursuant to the written authorization of the patient, records and information pertaining to the patient's diagnosis, treatment, and related services.

(16) A person admitted to a facility must be given access to any available individual or service that provides advocacy for the protection of the person's rights and that assists the person in understanding, exercising, and protecting the person's rights as described in this section.

(17) This section may not:

(a) obligate a professional person to administer treatment contrary to the professional's clinical judgment;

(b) prevent a facility from discharging a patient for whom appropriate treatment, consistent with the clinical judgment of a professional person responsible for the patient's treatment, is or has become impossible to administer because of the patient's refusal to consent to the treatment;

(c) require a facility to admit a person who has, on prior occasions, repeatedly withheld consent to appropriate treatment; or

(d) obligate a facility to treat a person admitted to the facility solely for diagnostic evaluation."

**Section 38.** Section 60-5-514, MCA, is amended to read:

**"60-5-514. Business eligibility -- criteria -- restrictions.** (1) To be eligible for placement of a business sign on a specific information sign panel, a business establishment shall meet standards for "GAS", "FOOD", "LODGING", and "CAMPING" services in rules adopted by the department pursuant to guidelines in

the Manual on Uniform Traffic Control Devices, as amended.

(2) (a) Each business identified on a specific information sign shall provide assurance of its conformity with all applicable laws concerning the provision of public accommodations without regard to race, color, sex, as defined in 1-1-201, culture, social origin or condition, or political or religious ideas.

(b) If such a business violates any of these laws, it loses eligibility for business identification on a specific information sign.

(3) No business that owns any outdoor advertising structure in violation of the provisions of Title 75, chapter 15, part 1, may be eligible for business identification on a specific information sign for 1 year after the illegal outdoor advertising structure is removed unless the owner voluntarily removes it within 45 days of receiving notification under 75-15-131."

**Section 39.** Section 60-5-522, MCA, is amended to read:

**"60-5-522. Business eligibility -- criteria -- restrictions.** (1) To be eligible for business identification on a tourist-oriented directional sign, a business establishment shall meet the following standards for a business, service, or activity:

- (a) Gas, food, lodging, and camping services must:
  - (i) be licensed and approved by the state and local agencies regulating the particular type of business;
  - (ii) provide an acceptable level of service to the public;
  - (iii) be in continuous operation at least 8 hours a day, 5 days a week, including Saturday or Sunday; and
  - (iv) have a telephone and restroom facilities available for public use.
- (b) Recreation services must:
  - (i) be licensed and approved by state and local agencies as required by law;
  - (ii) provide to families and the public activities of interest in which people participate for purposes of physical exercise, collective amusement, or enjoyment of nature. Such activities may include hiking, golfing, skiing, boating, swimming, picnicking, fishing, and horseback riding.
- (c) Tourist services must:



- (i) be licensed as required by law;
  - (ii) be open to the public at least 8 hours a day, 5 days a week, including Saturday or Sunday, during the normal tourist season; and
  - (iii) provide a natural, recreational, historical, cultural, educational, or entertainment activity or a unique or unusual commercial or nonprofit activity, from which the major portion of income or visitors is derived during normal business seasons from motorists not residing in the immediate area of the activity.
- (2) Priority under subsection (1)(a) must be given to businesses that are in continuous operation for 12 months a year.
- (3) (a) Each business identified on a tourist-oriented directional sign shall provide assurance of its conformity with all applicable laws concerning the provision of public accommodations without regard to race, color, sex, as defined in 1-1-201, culture, social origin or condition, or political or religious ideas.
- (b) If a business violates any of these laws, it loses eligibility for business identification on a tourist-oriented directional sign.
- (4) A business that owns any outdoor advertising structure in violation of the provisions of Title 75, chapter 15, part 1, may not be eligible for business identification on a tourist-oriented directional sign for 1 year after the illegal outdoor advertising structure is removed unless the owner voluntarily removes it within 45 days of receiving notification under 75-15-131."

**Section 40.** Section 61-5-107, MCA, is amended to read:

**"61-5-107. Application for license or motorcycle endorsement.** (1) Each application for a learner license, driver's license, commercial driver's license, or motorcycle endorsement must be made on a form furnished by the department. Each application must be accompanied by the proper fee, and payment of the fee entitles the applicant to not more than three attempts to pass the examination within a period of 6 months from the date of application. A voter registration form for mail registration as prescribed by the secretary of state must be attached to each driver's license application. If the applicant wishes to register to vote, the department shall accept the registration and forward the form to the election administrator.

(2) Each application must include the full legal name, date of birth, sex, as defined in 1-1-201, residence address of the applicant [and the applicant's social security number], must include a brief description

of the applicant, and must provide the following additional information:

- (a) the name of each jurisdiction in which the applicant has previously been licensed to drive any type of motor vehicle during the 10-year period immediately preceding the date of the application;
- (b) a certification from the applicant that the applicant is not currently subject to a suspension, revocation, cancellation, disqualification, or withdrawal of a previously issued driver's license or any driving privileges in another jurisdiction and that the applicant does not have a driver's license from another jurisdiction;
- (c) a brief description of any physical or mental disability, limitation, or condition that impairs or may impair the applicant's ability to exercise ordinary and reasonable control in the safe operation of a motor vehicle on the highway;
- (d) a brief description of any adaptive equipment or operational restrictions that the applicant relies upon or intends to rely upon to attain the ability to exercise ordinary and reasonable control in the safe operation of a motor vehicle on the highway, including the nature of the equipment or restrictions; and
- (e) if the applicant is a foreign national whose presence in the United States is temporarily authorized under federal law, the expiration date of the official document issued to the applicant by the bureau of citizenship and immigration services of the department of homeland security authorizing the applicant's presence in the United States.

[(3) The department shall keep the applicant's social security number from this source confidential, except that the number may be used for purposes of subtitle VI of Title 49 of the U.S.C. or as otherwise permitted by state law administered by the department and may be provided to the department of public health and human services for use in administering Title IV-D of the Social Security Act.]

(4) (a) When an application is received from an applicant who is not ineligible for licensure under 61-5-105 and who was previously licensed by another jurisdiction, the department shall request a copy of the applicant's driving record from each jurisdiction in which the applicant was licensed in the preceding 10-year period. The driving record may be transmitted manually or by electronic medium.

(b) When received, the driving records must be appended to the driver's record created and maintained in this state. The department may rely on information contained in driving records received under this section to determine the appropriate action to be taken against the applicant upon subsequent receipt of a report of a conviction or other conduct requiring suspension or revocation of a driver's license under state law.

(5) An individual who is under 26 years of age but at least 15 years of age and who is required to register in compliance with the federal Military Selective Service Act, 50 App. U.S.C. 453, must be provided an opportunity to fulfill those registration requirements in conjunction with an application for a learner license, driver's license, commercial driver's license, or state identification card. If under 18 years of age but at least 15 years of age, an individual must be provided an opportunity to be registered by the selective service system upon attaining 18 years of age. Any registration information supplied on the application must be transmitted by the department to the selective service system. (Bracketed language terminates on occurrence of contingency-- sec. 1, Ch. 27, L. 1999.)"

**Section 41.** Section 72-1-103, MCA, is amended to read:

**"72-1-103. General definitions.** Subject to additional definitions contained in the subsequent chapters that are applicable to specific chapters, parts, or sections and unless the context otherwise requires, in chapters 1 through 6, the following definitions apply:

(1) "Agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under a natural death act.

(2) "Application" means a written request to the clerk for an order of informal probate or appointment under chapter 3, part 2.

(3) "Beneficiary", as it relates to:

(a) a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer;

(b) a charitable trust, includes any person entitled to enforce the trust;

(c) a beneficiary of a beneficiary designation, refers to a beneficiary of:

(i) an account with POD designation or a security registered in beneficiary form (TOD); or

(ii) any other nonprobate transfer at death; and

(d) a beneficiary designated in a governing instrument, includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, and a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

- (4) "Beneficiary designation" refers to a governing instrument naming a beneficiary of:
- (a) an account with POD designation or a security registered in beneficiary form (TOD); or
  - (b) any other nonprobate transfer at death.
- (5) "Child" includes an individual entitled to take as a child under chapters 1 through 5 by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.
- (6) (a) "Claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate that arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration.
- (b) The term does not include estate taxes or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.
- (7) "Clerk" or "clerk of court" means the clerk of the district court.
- (8) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.
- (9) "Court" means the district court in this state having jurisdiction in matters relating to the affairs of decedents.
- (10) "Descendant" of an individual means all of the individual's descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this code.
- (11) "Devise" when used as a noun means a testamentary disposition of real or personal property and when used as a verb means to dispose of real or personal property by will.
- (12) "Devisee" means a person designated in a will to receive a devise. For purposes of chapter 3, in the case of a devise to an existing trust or trustee or to a trustee or trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.
- (13) "Disability" means cause for a protective order as described by 72-5-409.
- (14) "Distributee" means any person who has received property of a decedent from the decedent's personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the

extent of distributed assets or increment to distributed assets remaining in the trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(15) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to chapters 1 through 5 as originally constituted and as it exists from time to time during administration.

(16) "Exempt property" means that property of a decedent's estate that is described in 72-2-413.

(17) "Fiduciary" includes a personal representative, guardian, conservator, and trustee.

(18) "Foreign personal representative" means a personal representative appointed by another jurisdiction.

(19) "Formal proceedings" means proceedings conducted before a judge with notice to interested persons.

(20) "Governing instrument" means a deed; will; trust; insurance or annuity policy; account with POD designation; security registered in beneficiary form (TOD); pension, profit-sharing, retirement, or similar benefit plan; instrument creating or exercising a power of appointment or a power of attorney; or dispositive, appointive, or nominative instrument of any similar type.

(21) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment but excludes one who is merely a guardian ad litem.

(22) "Heirs", except as controlled by 72-2-721, means persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent.

(23) "Incapacitated person" has the meaning provided in 72-5-101.

(24) "Informal proceedings" means proceedings conducted without notice to interested persons by the clerk of court for probate of a will or appointment of a personal representative.

(25) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. The term also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of and matter involved in any

proceeding.

(26) "Issue" of a person means a descendant.

(27) "Joint tenants with the right of survivorship" includes co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

(28) "Lease" includes an oil, gas, coal, or other mineral lease.

(29) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(30) "Minor" means a person who is under 18 years of age.

(31) "Mortgage" means any conveyance, agreement, or arrangement in which property is used as security.

(32) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of death.

(33) "Organization" means a corporation, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.

(34) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under chapters 1 through 5 by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(35) "Payor" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(36) "Person" means an individual, a corporation, an organization, or other legal entity.

(37) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(38) "Petition" means a written request to the court for an order after notice.

(39) "Proceeding" includes action at law and suit in equity.

(40) "Property" includes both real and personal property or any interest in that property and means

anything that may be the subject of ownership.

(41) "Protected person" has the meaning provided in 72-5-101.

(42) "Protective proceeding" has the meaning provided in 72-5-101.

(43) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(44) "Security" includes any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; collateral trust certificate; transferable share; voting trust certificate; in general, any interest or instrument commonly known as a security; any certificate of interest or participation; or any temporary or interim certificate, receipt, or certificate of deposit for or any warrant or right to subscribe to or purchase any of the foregoing.

(45) "Settlement", in reference to a decedent's estate, includes the full process of administration, distribution, and closing.

(46) "Sign" means, with present intent to authenticate or adopt a record other than a will:

(a) to execute or adopt a tangible symbol; or

(b) to attach to or logically associate with the record an electronic symbol, sound, or process.

(47) "Special administrator" means a personal representative as described by chapter 3, part 7.

(48) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(49) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(50) "Successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or chapters 1 through 5.

(51) "Supervised administration" refers to the proceedings described in chapter 3, part 4.

(52) "Survive" means that an individual has neither predeceased an event, including the death of another individual, nor is considered to have predeceased an event under 72-2-114 or 72-2-712. The term includes its derivatives, such as "survives", "survived", "survivor", and "surviving".

(53) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(54) "Testator" includes an individual of either sex, as defined in 1-1-201.

(55) "Trust" includes an express trust, private or charitable, with additions to the trust, wherever and however created. The term also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The term excludes other constructive trusts and excludes resulting trusts; conservatorships; personal representatives; trust accounts as defined in 72-6-111 and Title 72, chapter 6, parts 2 and 3; custodial arrangements pursuant to chapter 26; business trusts providing for certificates to be issued to beneficiaries; common trust funds; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another.

(56) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(57) "Ward" means an individual described in 72-5-101.

(58) "Will" includes codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession."

**Section 42. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

- END -



I hereby certify that the within bill,  
SB 458, originated in the Senate.

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Secretary of the Senate

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President of the Senate

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2023.

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Speaker of the House

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2023.

SENATE BILL NO. 458

INTRODUCED BY C. GLIMM

AN ACT GENERALLY REVISING THE LAWS TO PROVIDE A COMMON DEFINITION FOR THE WORD SEX WHEN REFERRING TO A HUMAN; AND AMENDING SECTIONS 1-1-201, 2-18-208, 7-15-4207, 7-34-2123, 13-27-408, 13-35-301, 13-38-201, 20-7-1306, 20-9-327, 20-25-501, 20-25-707, 22-2-306, 33-1-201, 35-20-209, 39-2-912, 40-1-107, 40-1-401, 40-5-907, 40-5-1031, 41-5-103, 42-2-204, 45-5-625, 46-19-301, 46-19-401, 46-32-105, 49-1-102, 49-2-101, 49-3-101, 50-5-105, 50-5-602, 50-11-101, 50-15-101, 50-19-103, 50-60-214, 53-20-142, 53-21-121, 53-21-142, 60-5-514, 60-5-522, 61-5-107, AND 72-1-103, MCA.

## CERTIFICATE OF SERVICE

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Dated: 06-20-2024