Alex Rate (Bar No. 11226)
Marthe Y. VanSickle (Bar No. 67068789)
ACLU Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
Telephone: 406-204-0287
ratea@aclumontana.org
vansicklem@aclumontana.org

Malita Picasso*
Jon W. Davidson* **
American Civil Liberties Union Foundation
LGBTQ & HIV Project
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212-549-2561
Facsimile: 212-549-2650
mpicasso@aclu.org
jondavidson@aclu.org

F. Thomas Hecht*
Tina B. Solis*
Seth A. Horvath*
Nixon Peabody LLP
70 West Madison Street, Suite 5200
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

* Admitted *pro hac vice*
** Admitted only in California

IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated,	
Plaintiffs,	**Case No. DV-25-2024-0000261-CR**
v.	**Judge Hon. Mike Menahan**
STATE OF MONTANA, et. al.,	
Defendants.	**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I. Plaintiffs Are Likely to Establish that the 2022 Rule, the New MVD Policy and Practice, and SB 458 as Applied to Both, (collectively "the Challenged Policies") Violate the Equal Protection Clause of the Montana Constitution.

Defendants argue that Plaintiffs are not likely to succeed on the merits of their equal protection claim because, they contend, Plaintiffs must prove unconstitutionality beyond a reasonable doubt, Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Resp.") at 5, "Plaintiffs cannot establish two similarly situated classes," "gender identity is not the same as sex," and "gender identity '[is not] a protected class under Montana law." Resp. at 6. Defendants are wrong on all counts. To obtain a preliminary injunction, Plaintiffs need only show that they are *likely* to succeed on their constitutional claim, as they have. As explained below, transgender people are similarly situated to cisgender people in their need to possess accurate identity documents, discrimination against transgender people necessarily is a form of sex discrimination prohibited by Montana's Equal Protection Clause, discrimination against transgender people independently warrants heightened scrutiny under that clause, and Plaintiffs are likely to succeed in showing the Challenged Policies to both cannot survive any level of scrutiny.[1]

A. Transgender people are similarly situated to cisgender people with respect to their need to possess accurate identity documents.

Transgender and cisgender people seeking to amend their Montana birth certificates or driver's licenses are similarly situated for equal protection purposes. All people, transgender or not, share an identical interest in having identity documents that contain information accurately reflecting who they are and how they identify themselves to others, whether through their name, their date of birth, their parents, their physical description, or their sex designation. *See Ray v. McCloud*, 507 F. Supp. 3d 925, 935 (S.D. Ohio 2020) (finding that transgender people seeking to amend the sex marker on their birth certificates "are similarly situated to people who are allowed to change their accurately recorded birth parents or name[,]" such as adoptees or married individuals); *see also F.V. v. Barron*, 286 F. Supp. 3d 1131, 1141 (D. Idaho 2018) (finding that categorical ban on birth certificate sex designation changes for transgender people violated equal protection where it "g[a]ve certain people [such as adopted people] access to birth certificates that

[1] SB 458 was recently declared unconstitutional and is permanently enjoined. *Reagor v. State of Montana*, Cause No: DV-23-1245 (Mont. Fourth Jud. Dist. Court, Missoula Cty.) (June 25, 2024).

accurately reflect who they are, while denying transgender people, as a class, access to birth certificates that accurately reflect their gender identity").

Before the 2022 Rule,[2] cisgender and transgender people could obtain a Montana birth certificate with a sex marker that accurately reflected their gender identity. After the 2022 Rule was implemented, cisgender people still have access to Montana birth certificates with a sex marker that reflect their gender identity. Transgender people, however, may no longer obtain a birth certificate reflecting their gender identity. Consequently, the 2022 Rule affects transgender people but not cisgender people. This is the precise reasoning the 10th Circuit recently adopted in reversing a district court's dismissal of an equal protection challenge to Oklahoma's policy prohibiting transgender people from amending the sex marker on their birth certificates. *Fowler v. Stitt*, 104 F.4th 770, 786 (10th Cir. 2024).

The same is true of driver's license amendments. Transgender people are similarly situated to cisgender people who need to change information on their driver's licenses, such as their names. *See Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1315 (M.D. Ala. 2021), *appeal filed*, No. 21-10486 (11th Cir. Feb. 12, 2021) (finding that policy requiring genital surgery before transgender people could change the sex designation on their driver's licenses violated equal protection where it "obligate[d] [state] officials to review a license applicant's birth records and medical documentation, decide what they believe the applicant's sex to be, and determine the contents of the individual's license based on that decision").

B. Discrimination on the basis of transgender status constitutes sex discrimination prohibited by the Montana Constitution's Equal Protection Clause.

Defendants argue that gender identity is not the same as sex, but the equal protection question at issue here is whether discrimination against transgender people necessarily discriminates *based on* their sex. The Supreme Court ruled in *Bostock* that "it is impossible to discriminate against a person for being… transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). The Court in

[2] The 2022 Rule was adopted at the time that the Defendants were enjoined from enforcing S.B. 280, which required transgender people seeking to amend their Montana birth certificate to obtain a court order stating that they had surgically changed their sex. Prior to S.B. 280, transgender people could amend the sex marker on their birth certificate by self-attestation. Plaintiffs' Brief in Support of Motion for a Preliminary Injunction.

Bostock reasoned that an employer who fires an employee for being transgender necessarily takes into consideration the sex the employee was assigned at birth and punishes them for failing to identify with that sex.

In parallel fashion here, when a person seeks to amend the sex marker on their Montana birth certificate, the 2022 Rule requires that Defendants take into account the person's sex assigned at birth and issue that amendment if the applicant's gender identity is consistent with the sex assigned to them at birth, but deny the amendment if the applicant's gender identity is inconsistent with the sex assigned to them at birth. Take for example two women who each possess a Montana birth certificate that lists their sex as male and who seek to amend the vital document to accurately reflect their sex. The first woman is cisgender, meaning she was designated as female at birth and her gender identity is female. The second woman is transgender, meaning she was designated male at birth but her gender identity is female. The only difference between the two applicants is the sex that they were designated at birth. Under the 2022 Rule, the first woman is permitted to amend her birth certificate so that the sex marker is consistent with her gender identity, but the second woman is prohibited from doing so because her gender identity does not conform to the sex she was designated at birth. "'[I]f changing the [applicant's] sex would have yielded a different choice by the [Defendants],'" then sex-based discrimination has occurred." *Fowler*, 104 F.4th at *37-38.

Defendants claim that *Bostock* can be ignored because it was decided under Title VII, rather than the Equal Protection Clause. Response at 8-9. Contrary to Defendants' contentions, however, *Bostock* did not say its "reasoning is limited to Title VII," Resp. at 8, or suggest that its assessment of sex classifications could not apply in other contexts. The Court simply said it did not "prejudge" how its analysis would apply to the "terms" of other laws. *Bostock*, 140 S. Ct. at 1753. Defendants offer no reasoned basis to elevate the *Bostock* Court's unremarkable refusal to decide questions not before it into a rule that *Bostock*'s reasoning has no bearing on analyzing classifications involving non-conformity with sex designated at birth. The legal reasoning and straight-forward logic that *Bostock* employed cannot simply be cabined to a particular statute or constitutional provision. If a person is being treated differently because they are transgender, by definition that treatment is based on that individual's sex. *See Fowler v. Stitt*, 104 F.4th, at *47 ("We … join the courts that have applied *Bostock*'s reasoning to equal protection claims. *See*, *e.g.*, *Kadel v. Folwell*, 100 F.4th 122, 153–54 (4th Cir. 2024) (en banc); *Id.* at 177–81 (Richardson, J., dissenting); *Hecox v. Little*, 104F.4th 1061,at *11 (9th Cir.2024); *LeTray v. City of Watertown*, No. 5:20-cv-1194

(FJS/TWD), —— F.Supp.3d ——, ——, 2024 WL 1107903, at *7 (N.D.N.Y. Feb. 22, 2024); *D.T. v. Christ*, 552 F. Supp. 3d 888, 896 (D. Ariz. 2021)."); *see also Grimm v. Gloucester Cty. School Bd.,* 972 F.3d 586, 608 (4th Cir. 2020) ("Many courts, including the Seventh and Eleventh Circuits, have held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause.")

Defendants' further argument that the 2022 Rule and the new MVD policy do not discriminate based on sex because they apply "evenly to everyone[,]" has been repeatedly rejected by numerous courts in nearly identical contexts to this. *See Fowler v. Stitt*, 104 F.4th 770, at *16 ("[W]e are unpersuaded by the argument that [the policy at issue] is not sex-based discrimination if it applies equally to all sexes.") *Id*. at *11 ("[S]tate action may apply to everyone equally but not affect everyone equally[.]"); *Kadel v. Folwell*, 100 F.4th 122, 147 (4th Cir. 2024) (the "'narrow view' of the Equal Protection Clause—that a law does not discriminate if it applies equally to all"—makes "no sense," according to *McLaughlin v. Florida*, 379 U.S. 184 (1964)," which "explicitly rejected this line of reasoning."); *see also Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (restricting marriage to different-sex couples discriminates based on sexual orientation even though heterosexuals were equally constrained from marrying someone of the same sex); *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) ("The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."). That argument should be rejected here as well.

Defendants' reliance on *Berndt v. Montana Dept. of Justice*, Human Rights Commission of the State of Montana, Cause No. 220498 (2024) is equally unavailing. That administrative decision addressed whether the Montana Human Rights Act required the Motor Vehicle Division to issue a driver's license with a non-binary sex marker to an individual who is nonbinary, an issue not presented here. It did not address the constitutional claims that are the basis for Plaintiffs' preliminary injunction motion. It also is not binding on this Court. *City of Great Falls v. Board of Commissioners of Cascade County*, 2024 MT 118, ¶ 14 ("[I]t is particularly and exclusively within the province of the judiciary to construe and adjudicate provisions of constitutional, statutory, and the common law as applied to facts at issue in particular cases.") (citation and internal quotation marks omitted). This Court, and not the Human Rights Commission, has the "'exclusive authority and duty' within constitutional limits 'to adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law provisions and to render appropriate judgments thereon

in the context of cognizable claims for relief.'" *Id*. In fact, neither the Human Rights Bureau nor the Human Rights Commission have jurisdiction to decide constitutional issues. *Jarussi v. Bd. of Trustees*, 204 Mont. 131, 135, 664 P.2d 316 (1983).

C. Transgender status constitutes a suspect classification requiring the application of heightened scrutiny under the Montana Constitution.

Defendants argue that gender identity is not a basis of discrimination prohibited by the Montana Constitution, but they cite no case so holding and they fail to controvert the showing Plaintiffs made in their brief in support of their motion for a preliminary injunction as to why discrimination based on transgender status meets the constitutional test for heightened scrutiny. Numerous courts have agreed that not only does the Equal Protection Clause protect transgender people against discrimination but also that heightened scrutiny must be applied to such discrimination. *See* Ex. 8, *van Garderen* Order p. 25, n. 7 ("[T]he Court believes that transgender persons comprise a suspect class[.]"); *Hecox v. Little*, No. 20-35813, (9th Cir. June 7, 2024) ("[H]eightened scrutiny applies to laws that discriminate on the basis of transgender statutes" because "gender identity is at least a 'quasi-suspect class.'"); *Karnoski v. Trump*, 926 F.3d 1180, 1200-1201 (9th Cir. 2019) (same); *Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020) ("…[T]he Court finds that transgender individuals are a quasi-suspect class entitled to heightened scrutiny.").

The 2022 Rule discriminates on the basis of transgender status because it prohibits individuals from amending the sex marker on their birth certificate only when the basis of the amendment is "gender transition, gender identity, or change of gender." *See* Ex. 7, *DPHHS Officials State 2022 Administrative Rule Governs Sex Marker Birth Certificate Change Requests* p. 1-2. The targeting of transgender people for differential treatment could not be clearer, and Defendants' assertions that the 2022 Rule "appl[ies] equally to individuals who identify as transgender and individuals who do not[,]" ring hollow in light of such unequivocal language and the wealth of case law, cited above, rejecting the argument that a law that harms only one group is constitutional if that law on its face applies to everyone. Response at 11. And because an amended birth certificate is required to correct the sex marker on one's driver's license under the new MVD policy, this policy also necessarily discriminates on the basis of transgender status.

Defendants do not contest that transgender people have been subjected to a history of, and continue to face, purposeful unequal treatment; that transgender people suffer a level of political

powerlessness sufficient to warrant extraordinary protection under the law because of their small population size and enduring societal prejudices against them; or that transgender people face barriers to political representation. Nothing more is required to warrant strict scrutiny under the Montana Constitution. *See In re Matter of S.L.M.,* 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997).

Defendants argue only that gender identity is not immutable, Resp. at 11-12. Defendants' factual support for that contention is flawed,[3] but more importantly Defendants misunderstand what immutability means in equal protection analysis. *See Windsor v. United States*, 699 F.3d 169, 183, n. 4 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013) (observing that "a trait [is] effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity"); *Golinski v. U.S. Off. Of Personnel Mgt.*, 824 F. Supp. 2d 968, 987 (N.D. Cal. 2022) (a characteristic is immutable if it "so fundamental to one's identity that a person should not be required to abandon" it). Moreover, the Supreme Court's equal protection cases that reference immutability ask whether the group discriminated against exhibits "obvious, immutable, *or distinguishing characteristics that define them as a discrete group*," *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (emphasis added). This certainly is true of transgender people. *Ray*, 507 F.Supp.3d at 937 ("[T]ransgender people have common, immutable characteristics that 'define them as a discrete group[.]'"). And other cases have noted that immutability is not a strictly necessary factor for heightened scrutiny to apply. *Windsor*, *supra*, 699 F.3d at 181. Heightened scrutiny must therefore be applied to the Challenged Policies.

D. The Challenged Policies cannot survive any level of scrutiny.

Defendants have failed to assert a compelling, important or even legitimate interest that is served by the Challenged Policies. Plaintiffs have shown that the Court should apply strict scrutiny because the 2022 Rule and the MVD policy burden Plaintiffs' fundamental rights to privacy and freedom from compelled speech, *see infra* Sections II and III., and because they discriminate on the basis of a transgender status, which is a suspect classification, *see supra* Sections I(A)-(C). Moreover, "[a]lthough the Montana Supreme Court has declined to explicitly label sex or gender a suspect class, if heightened scrutiny is the appropriate level of review when the federal Equal Protection Clause is implicated, the Court posits that strict scrutiny is the appropriate level of review when Montana's Equal Protection Clause is implicated." *See* Ex. 8, *van Garderen* Order, at

[3] *see* Rebuttal Declaration of Dr. Randi C. Ettner, ¶¶ 8-12, attached as Exhibit 1.

26, ln. 5-7. Strict scrutiny requires the Defendants to establish that discrimination advances a compelling state interest, is closely tailored to advance only that interest, and is "the least onerous path that can be taken to achieve the state objective" *Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 75, 545 P.3d 1074. Defendants make no effort to meet their burden.

Given that Defendants fail to provide even a legitimate justification for Defendants' discrimination against Plaintiffs, Plaintiffs are likely to succeed on their equal protection claim regardless of the level of scrutiny.

II. Plaintiffs Are Likely to Establish that the Challenged Policies Violate Plaintiffs' Fundamental Right to Privacy.

Defendants argue that Plaintiffs have not shown a violation of their right to privacy because birth certificates and driver's licenses are not healthcare information, and defendants are not interfering with medical decisions or choices of medical providers. Resp. at 15. Defendants' response fails to take account of the broad scope of the Montana Constitution's protection of privacy,[4] which encompasses an individual's right to confidential informational privacy. *St. James Community Hosp., Inc. v. District Court*, 2003 MT 261, ¶ 8, 317 Mont. 419, 77 P.3d 534. This includes "the right of individuals to control the disclosure and circulation of personal information." *Montana Shooting Sports Ass'n, Inc. v. State*, 2010 MT 8, ¶ 14, 355 Mont. 49, 224 P.3d 1240. This right is implicated when Plaintiffs (1) have a subjective or actual expectation of privacy regarding the information and (2) that expectation is reasonable. *Id.*

Defendants make no effort to refute that prohibiting transgender people from amending the sex marker on their identity documents forcibly discloses their transgender status every time they must present the unamended documents. Defendants also fail to argue that (1) Plaintiffs lack an actual expectation of privacy regarding their transgender status, or (2) such an expectation is unreasonable. Nor could they.

When a transgender woman presents an identity document that lists her sex as "male" she is stripped of the ability to keep private her transgender status. And when a transgender man

[4] The 1972 Montana Constitutional Convention delegates made clear that privacy, the "*right to be let alone*", was considered "**the most important right of them all**". Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1681 (emphasis added). Montana courts have reified the importance of privacy by examining infringements under strict scrutiny. *Gryzcan v. State,* 283 Mont. 433, 449, 942 P.2d 112.

presents an identity document that lists his sex as "female" he is stripped of the ability to keep private his transgender status. "[T]he discrepancy between the license and their physical appearance can lead to the forced disclosure of the person's transgendered (sic) status." *K.L. v. Alaska*, No. 3AN-11-05431 Cl., 2012 WL 2685183 at *6 (Superior Court of Alaska, March 12, 2012). This forced disclosure of their transgender status places them at unacceptably high risk of being targeted by anti-transgender discrimination, harassment, and violence.

For these reasons, courts across the country have recognized that transgender people have a right to keep private their transgender status, protected by the right to privacy afforded by the federal constitution, which is far less protective of the individual right to privacy than is the Montana Constitution. *Ray v. Himes*, No. 2:18-cv-272, 2019 WL 11791719 at *9 (S.D. Ohio, September 12, 2019) ("…Defendants' Policy of refusing to change birth certificates to reflect gender identity implicates a release of personal information that is of a sexual, personal, and humiliating nature and could lead to bodily harm, resulting in violations of Plaintiffs' [federal] informational right to privacy.") (internal quotations omitted); *Powell v. Schriver,* 175 F.3d 107, 112 (2d Cir. 1999) (finding that a right of privacy includes confidentiality of transgender status); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) ("By permitting plaintiffs to change the name on their birth certificate, while prohibiting the change to their gender markers, the Commonwealth forces them to disclose their transgender status in violation of their [federal] constitutional right to informational privacy."); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (finding that requiring the disclosure of one's transgender status implicates their [federal] fundamental right to privacy because it is highly intimate information the disclosure of which creates "a very real threat to[their] personal security and bodily integrity.").

Defendants also mischaracterize the broader thrust of *Armstrong*, which recognizes that the Montana Constitution's broad right to privacy also includes a right to bodily autonomy in medical decision-making. *Armstrong v. Montana*, 1999 MT 261, ¶¶ 52-53, 296 Mont. 361, 989 P.2d 364 ("Few matters more directly implicate personal autonomy and individual privacy than medical judgements affecting one's bodily integrity and health."). The Challenged Policies also implicate this right to bodily autonomy in medical decision-making. Correct identification can be essential to successful treatment for gender dysphoria. Ex. 3, Ettner Dec., ¶¶ 33, 38, 42-45, 49. Individuals who are inhibited from undergoing this aspect of a treatment plan may be reminded that their

identity is perceived by society and the government as illegitimate whenever they use their identity documents and may be unable to undergo the social transition they require. *Id.*

III. Plaintiffs Are Likely to Establish that the Challenged Policies Violate Plaintiffs' Constitutional Right to be Free from Compelled Speech.

Defendants fail to rebut Plaintiffs' likelihood of success of their compelled speech claim. Defendants' assertion that there are very limited situations where an individual's birth certificate or driver's license has to be produced, Resp. at 15, ignores the frequency with which such identity documents in fact are demanded and does not undercut that, whenever Plaintiffs are required to produce those identity documents, they are being forced to present the government's ideological viewpoint on what their sex is, a viewpoint that they disagree with and a viewpoint that is at odds with experts in the fields of human medicine, genetics, and psychology. *See* Ettner Rebuttal Decl. at ¶¶ 5-6. This is no different than the ideological compulsion the Supreme Court condemned as unconstitutional compelled speech in *Wooley v. Maynard*. 430 U.S. 705, 716-17 (1977).

IV. Plaintiffs' Suit Raises Justiciable Issues Properly Before the Court.

Defendants' argument that this case presents nonjusticiable political questions is without merit. As a preliminary matter, the political question doctrine has rarely been invoked in Montana decisions, and the few to do so have been narrow and do not compel its application in this case.[5] More importantly, Defendants effectively seek to turn the political question doctrine on its head by arguing that it is only the legislature –rather than the courts – that can interpret, restrict or expand constitutional terms. In fact, the courts of Montana are particularly and exclusively empowered "to construe and adjudicate provisions of constitutional, statutory, and the common law as applied to facts at issue in particular cases." *City of Great Falls v. Board of Commissioners of Cascade County*, 2024 MT 118, ¶ 14.

[5] "[N]on-justiciable political questions include issues in the exclusive legal domain of the legislative branch, executive branch, or the will of the electorate at the polls." *Larson v. State ex rel.*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241. Article II, Section 4's Equal Protection Clause does not constitute a "non-self-executing [clause]" because it is not addressed explicitly to the Legislature. *Mitchell v. Glacier County*, 2017 MT 258, ¶ 23, 389 Mont. 122, 406 P.3d 427 (quoting *Colombia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 15, 326 Mont. 304, 109 P.3d 257). Rather, this provision "directly implicate[s] right[s] guaranteed to individuals under Montana's Constitution," and is thus justiciable. *Colombia Falls*, 2005 MT at ¶ 18. Like the plaintiffs in *Colombia Falls* who challenged Montana's administration of the public schools as violating the Montana Constitution's Public Schools Clause, Plaintiffs here have raised justiciable claims because those claims implicate Plaintiffs' individual right to equal protection.

The Montana Constitution vests the judiciary with the "power to pass upon constitutional questions," not the legislature. *McDonald v. Jacobsen*, 2022 MT 160, ¶ 17, 409 Mont. 405, 515 P.3d 777, citing *Brown v. Gianforte*, 2021 MT 149, ¶56, 404 Mont. 269, 488 P.3d 548 (Rice, J., concurrence). Courts must "determine independently the meaning of constitutional terms, and [are] not bound by the interpretation of another branch of government." *League of Women Voters of Mich. v. Sec'y of State*, 333 Mich. App. 1, 37 (Mich. 2020) (Riordan, J., concurrence).

Plaintiffs ask the Court to construe and adjudicate the terms and provisions of Article II, Section 4 of the Montana Constitution as applied to the facts they have alleged. Since, for example, "sex" is a term included in the Constitution's Equal Protection clause, the duty to define and interpret it is exclusively "within the province of the judiciary," *City of Great Falls*, 2024 MT at ¶ 14, not the Legislature. In fact, at least one other Montana district court has done so in a strikingly similar context. Ex. 8, *van Garderen* Order, at 24–26 (analyzing the Montana Constitution's equal protection clause and finding that a law that discriminates on the basis of transgender status must also discriminate on the basis of sex).

Importantly, a political question is one that cannot be resolved by the Court, not simply one that cannot be resolved by the Court on a motion for a preliminary injunction. According to the Defendants' argument, no court would ever be able to determine whether a law creates a new suspect classification, or whether a specific type of discrimination falls within the scope of established suspect classifications. For example, the court in *Mtn. States. Tel. & Tel. Co. v. Commr. of Labor and Indus.*, would never have been able to resolve whether pregnancy discrimination is a form of sex discrimination. 187 Mont. 22, 38–39, 608 P.2d 1047 (1979). Nor could the court in *Matter of Wood* have resolved whether age is a suspect classification under Montana's Equal Protection Clause. 236 Mont. 118, 768 P.2d 1370. Essentially, acceptance of Defendants' political question argument would strip the courts of the duty with which they have been assigned by both the Montana Constitution and Supreme Court.

As such, the Court should reject Defendants' invocation of the political question doctrine and address the important questions of constitutional interpretation that Plaintiffs raise.

Dated: July 12, 2024

Respectfully submitted,

By: */s/ Alex Rate*
Alex Rate

Alex Rate (Bar No. 11226)
Marthe Y. VanSickle (Bar No. 67068789)
ACLU Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
406-204-0827
lanea@aclumontana.org
vansicklem@aclumontana.org

Malita Picasso*
Jon W. Davidson* **
American Civil Liberties Union Foundation
125 Broad Street,
New York, NY 10004.
Telephone: 212-549-2561
mpicasso@aclu.org

F. Thomas Hecht*
Tina B. Solis*
Seth A. Horvath*
Nixon Peabody LLP
70 West Madison Street, Suite 3500
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

* Admitted *Pro hac vice*
** Admitted only in California

CERTIFICATE OF SERVICE

I certify that the foregoing **Plaintiffs' Reply Brief in Support of Motion for a Preliminary Injunction** was served by eService on counsel for Defendants:

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
P.O. Box 201401
Helena, MT 59620-1401
Telephone: 406-444-2026
Facsimile: 406-444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Telephone: 406-384-7990
emily@joneslawmt.com

Electronically signed by Krystel Pickens on behalf of Alex Rate
on July 12, 2024

EXHIBIT 1

IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS and CLARK COUNTY

JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated,	)	**Case No. DV-24-2024-0000261-CR**
Plaintiffs,	)	**Presiding Judge Hon. Mike Menahan**
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. BRERERTON, in his official capacity as the Director of the Montana Department of Public Health and Human Services; the MONTANA DEPARTMENT OF JUSTICE; and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,	)	
Defendants.	)	

REBUTTAL DECLARATION OF DR. RANDI C. ETTNER, Ph.D.

I, Dr. Randi C. Ettner; declare as follows:

1. I have actual and personal knowledge of the matters stated herein. If called to testify in this matter, I would testify truthfully and based on my expert opinion as set forth herein.

2. As noted in my Expert Declaration previously filed in the above-captioned action, I have been retained by counsel for Plaintiffs as an expert in connection with this action. I have been asked by Plaintiffs' counsel to provide my expert opinion regarding the "Expert Testimony of Dr. Colin Wright, Ph.D." ("Dr. Wright") attached as Exhibit C to Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed in this action on June 20, 2024, which I have read.

3. Dr. Wright states in his testimony that he is an "evolutionary behavioral ecologist" and that he earned a B.A. in Evolution, Ecology, and Biodiversity, and a Ph.D. in Evolution, Ecology, and Marine Biology. While he asserts that he has "undergone comprehensive training in the core principles that dictate behavior across the animal kingdom," he does not state that he has any background or training specifically in human medicine or psychology, and he does not assert any background, training, or expertise in human sexuality, transgender people, or gender dysphoria.

4. Dr. Wright asserts in his declaration that "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." Most of the opinions expressed in Dr. Wright's testimony rest entirely on his assertion that this is the exclusive definition of sex and rely extensively on the definition of sex among non-human animals.

5. Human sexuality is more complex than in other animal species, however, because humans have cognitive abilities, self-awareness, self-recognition, and, most importantly, consciousness regarding their identity, which other animals, including other mammals, do not have. Humans understand their own thoughts and emotions, consider their existence, and have a theory of mind—the ability to understand that others have thoughts that differ from their own. Humans have language and communication abilities and the capacity for symbolic thought. These profound differences undermine a reductive definition of sex as the size of gametes an individual produces and makes generalizations drawn from the biology of animal unreliable. Dr. Wright's definition is flawed because it fails to account in any way for how humans understand what their sex to be, which, as I have explained, is their gender identity.

6. Dr. Wright's testimony regarding the definition of sex in animal biology is inconsistent with the consensus of experts in the fields of human medicine, genetics, and psychology, and particularly of those with expertise regarding transgender people, that there are numerous components that bear on how sex in human beings is appropriately defined. As further explained in my previous declaration in this action, those components include chromosomal composition, gonads and internal reproductive organs, external genitalia, sexual differentiations in brain development and structure, and gender identity. See Svingen, T. & Koopman, P. (2013); Rahmoun, M. et al. (2017); Graves, J. (2006); Foreman, et al. (2019); Polderman,,

T. et al. (2018) As my previous declaration also explains, when there is divergence between other gender identity and these other components (as is the case for transgender people), one's gender identity is paramount and is the most accurate definition of an individual's sex. See Bao & Swaab (2001).

7. Dr. Wright notes in his testimony that "sex determination mechanisms are incredibly varied" and that the determination of sex in some animals include "environmental and social influences," but other than his ipse dixit, he does not explain why such influences are irrelevant to the definition of sex among humans nor why gender identity is not the most important factor in defining an individual's sex, as I have explained to be the case in my previous expert declaration in this action.

8. Dr. Wright asserts that gender identity is "entirely subjective," but, as supported by the citations contained in my previous declaration in this action[1] and those referenced below, it is now understood that there is a biological (including genetic) basis to gender identity, which rebuts that gender identity is "entirely subjective."

9. The contribution of genes to gender identity is well documented, and twin studies show that genetic factors play a substantial role (see Polderman et al., 2018, for a review) in the development of gender identity. Diamond reported on gender incongruity among 112 sets of monozygotic ("identical") twins, illuminating the contribution of genetic factors. He found a 33.3% concordance among monozygotic male twins, and a 22.8% concordance among monozygotic female twins, which is significantly higher than found among dizygotic ("fraternal") twins or among non-twin siblings. The role of genes in the formation of gender identity was further supported by data of twins who were reared apart but both identified as transgender. And, as stated in my report, a sibling of a transgender individual is 5 times more likely to be transgender than the general population. Several researchers have assessed the role of specific genes of the androgen and estrogen receptors. They found differences among transgender and non-transgender individuals in specific gene allele distribution patterns.

[1] At two places in paragraphs 24 and 25 of my original declaration the term "gender dysphoria" was erroneously used when I intended those references instead to be to "gender identity."

10. Further, the advent of sophisticated brain imagery techniques, such as functional magnetic resonance imaging, has enabled researchers to study large numbers of human brains in living persons. They have found that transgender individuals differ from non-transgender people with respect to the gray and white matter of the brain, cortical and subcortical structures (central to behavior) and the microstructure of the brain bundles that connect the regions of the brain.

11. Most of these brain differences are in the right hemisphere of the brain. The significance of the right hemisphere is important, as that area is linked to higher somatosensory cognitive processes known as "somatorepresentation." This refers to knowledge and attitudes about bodies generally, one's own body specifically, emotions and attitudes directed toward one's own body and the link between the physical body and the psychological self (Longo, 2010). The brain in humans is primed to recognize oneself as male or female. Animals lack this perceptual process.

12. Dr. Wright further asserts that gender identity is mutable, relying on a misunderstanding of research regarding what is sometimes referred to as "detransitioning." This research has nothing to do with the definition of sex. Rather, interviews with adults who transitioned to a sex inconsistent with their sex identified at birth and subsequently no longer sought to do so, show that the reasons for this were parental pressure, finding transitioning too hard, experiencing harassment or discrimination, and trouble getting a job. See https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9516050/. Moreover, most of the research relied on to claim that detransitioning is common was done on minors before the current standards for diagnosis of gender dysphoria among children and adolescents existed and reflects minors who may have been mischaracterized as transgender when they actually were simply displaying gender-nonconforming behaviors, such as preferring toys traditionally associated with a sex different than they were assigned at birth.

13. There is nothing in Dr. Wright's testimony that undermines the accuracy of the opinions set forth in my original declaration in this action. Dr. Wright's myopic focus on the definition of sex in animal biology ignores the fact that humans differ from animals in numerous respects, and particularly in how the unique consciousness of human beings shapes their identity, including their understanding of their

sex, which experts in the field of human medicine, psychology, and sexuality agree is how the sex of a human individual is best understood and defined.

14. Attached to this Rebuttal Declaration is a list of references I consulted and on which I relied in preparing my original Expert Declaration and this Rebuttal Declaration.

I declare under penalty of perjury under the laws of the state of Montana that the foregoing is true and correct.

Dated this 10 day of July 2024 in Evanston, Illinois.

Dr. Randi C. Ettner

Dr. Randi C. Ettner

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CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 07-12-2024:

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: Austin Knudsen, Montana Department of Public Health and Human Services, State of Montana, Charles T Brererton, Gregory Gianforte, Montana Department Of Justice
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Austin Knudsen, Montana Department of Public Health and Human Services, State of Montana, Charles T Brererton, Gregory Gianforte, Montana Department Of Justice
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: Austin Knudsen, Montana Department of Public Health and Human Services, State of Montana, Charles T Brererton, Gregory Gianforte, Montana Department Of Justice
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Austin Knudsen, Montana Department of Public Health and Human Services, State of Montana, Charles T Brererton, Gregory Gianforte, Montana Department Of Justice
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Austin Knudsen, Montana Department of Public Health and Human Services, State of Montana, Charles T Brererton, Gregory Gianforte, Montana Department Of Justice
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Austin Knudsen, Montana Department of Public Health and Human Services, State of Montana, Charles T Brererton, Gregory Gianforte, Montana Department Of Justice
Service Method: eService

Marthe VanSickle (Attorney)
PO Box 1968
Missoula MT 59806
Representing: Jane Doe, Jessica Kalarchik
Service Method: eService

World Professional Association For Transgender Health (Third Party Defendant)
Service Method: Other Means by Consent

Malita Picasso (Attorney)
125 Broad Street
New York 10004
Representing: Jessica Kalarchik
Service Method: Email

F. Thomas Hecht (Attorney)
70 West Madison Street, Sutie 3500
Chicaog 60601
Representing: Jessica Kalarchik
Service Method: Email

Tina B. Solis (Attorney)
70 West Madison Street, Sutie 3500
Chicago 60601
Representing: Jessica Kalarchik
Service Method: Email

Seth A. Horvath (Attorney)
70 West Madison Street, Sutie 3500
Chicago 60601
Representing: Jessica Kalarchik
Service Method: Email

Jon W. Davidson (Attorney)
125 Broad Street
New York 10004
Representing: Jessica Kalarchik
Service Method: Email

Electronically signed by Krystel Pickens on behalf of Alexander H. Rate
Dated: 07-12-2024