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** Admitted pro hac vice*

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,)

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,)

Case No. DV-25-2024-0000261-CR

Hon. Mike Menahan

PLAINTIFFS' BRIEF IN SUPPORT OF
OPPOSED MOTION FOR LEAVE TO
FILE AMENDED COMPLAINT

Defendants.)
)

Plaintiffs Jessica Kalarchik and Jane Doe move this Court, in accordance with Rule 15(a) of the Montana Rules of Civil Procedure, for leave to amend their complaint against the State of Montana; its governor, Gregory Gianforte, in his official capacity; the Montana Department of Public Health and Human Services (“DPHHS”); DPHHS’s director, Charles T. Brererton, in his official capacity; the Montana Department of Justice; and Montana Attorney General Austin Knudsen, in his official capacity.

INTRODUCTION

On April 18, 2024, Plaintiffs filed a complaint before this Court challenging (1) the constitutionality of the regulation codified as Montana Administrative Rule 37.8.311(5) (the “2022 Rule”), which categorically bans transgender applicants from obtaining amendments to the sex designation on their Montana birth certificates; (2) the constitutionality of the Montana Motor Vehicle Division’s (“MVD”) new policy and practice of only amending the sex designation on driver’s licenses if the individual requesting the amendment provides an amended birth certificate; and (3) the constitutionality of SB 458 to the extent SB 458 serves as a basis for the 2022 Rule, the new MVD policy and practice, or both.

Plaintiffs contemporaneously filed complaints before the Montana Human Rights Bureau (“MHRB”), which have since been dismissed on the basis that the MHRB had no authority to decide the constitutional questions raised by the complaints. Plaintiffs seek leave to amend their complaint before this Court to (1) acknowledge the determinations of the MHRB and (2) allege a statutory claim for violations of the Montana Governmental Code of Fair Practices (the “Code”).

BACKGROUND

On April 18, 2024, Plaintiffs filed a complaint against Defendants before this Court alleging that the 2022 Rule, the new MVD policy and practice, and SB 458 are unconstitutional. Contemporaneously with the filing of that complaint, Plaintiffs filed complaints before the MHRB alleging, in relevant part, violations of the Montana Human Rights Act and the Code on the basis that the 2022 Rule, the new MVD policy and practice, and SB 458 discriminate against Plaintiffs based on sex.

On October 3, 2024, the MHRB dismissed both complaints under the same case number. The MHRB concluded that the “gravamen” of the complaints was a challenge to the constitutionality of the 2022 Rule, the new MVD policy and practice, and SB 458 and found that the MHRB lacked authority to decide constitutional questions. *See* Ex. A, Proposed Am. Compl., Exs. 1 & 2. The MHRB noted that “[i]t is well settled that [c]onstitutional questions are properly decided by a judicial body, not an administrative official, under the principle of separation of powers.” *Id.* The MHRB authorized Plaintiffs to prosecute their challenges to the 2022 Rule, the new MVD policy and practice, and SB 458 before the district court, concluding that “the charging part[ies] may pursue the complaint[s] in district court.” *Id.*

LEGAL STANDARDS

Under Rule 15(a)(2) of the Montana Rules of Civil Procedure, “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Mont. R. Civ. P. 15(a)(2). Rule 15 memorializes a general policy favoring the amendment of pleadings. In *Hobble–Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 325, 815 P.2d 1153, 1155 (1991), the Montana Supreme Court held

that it has “interpreted . . . Rule [15] liberally, allowing amendment of pleadings as the general rule and denying leave to amend as the exception.”

ARGUMENT

Plaintiffs’ proposed amended complaint sets forth allegations regarding the administrative exhaustion of Plaintiffs’ remedies before the MHRB and Plaintiffs’ statutory claim under the Code. Ex. A, Proposed Am. Compl., ¶¶ 14–20, ¶¶ 99–112. Plaintiffs could not have asserted the allegations in the proposed amended complaint at the time the original complaint was filed since those allegations relate to the MHRB’s disposition of the complaints filed before it, which the MHRB did not rule upon until after the original complaint was filed before this Court.

CONCLUSION

FOR THESE REASONS, Plaintiffs respectfully request the entry of an order:

- (a) granting them leave to file the amended complaint attached to this brief as Exhibit A; and
- (b) granting any other relief in Plaintiffs’ favor that the Court deems just.

Dated: January 16, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing **Plaintiffs' Brief in Support of Opposed Motion for Leave to File Amended Complaint** was served by eService on counsel for Defendants:

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EXHIBIT A

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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,)**

Case No. DV-25-2024-0000261-CR

Hon. Mike Menahan

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Defendants.)
)

Plaintiffs Jessica Kalarchik (“Ms. Kalarchik”) and Jane Doe (“Ms. Doe”) (together, “Plaintiffs”), through their undersigned attorneys, and as representatives of the class described below,¹ bring this amended complaint against the State of Montana; its governor, Gregory Gianforte, in his official capacity (“Governor Gianforte”); the Montana Department of Public Health and Human Services (“DPHHS”); DPHHS’s director, Charles T. Brererton, in his official capacity (“Director Brererton”); the Montana Department of Justice (“DOJ”); and Montana Attorney General Austin Knudsen (“Attorney General Knudsen”), in his official capacity (collectively, “Defendants”).

INTRODUCTION

1. This is an action for declaratory and injunctive relief against Defendants arising out of policies and practices that make it impossible for transgender people born in Montana to obtain birth certificates, or for transgender people in Montana to obtain driver’s licenses, that accurately reflect their sex. Defendants’ policies and practices are part of an effort to deny transgender people rights that are widely available to other Montanans. Defendants’ conduct reflects a broad and abiding intent to discriminate against transgender people throughout Montana.

2. Consistent with this intent to discriminate, on February 20, 2024, based on a regulation codified as Montana Administrative Rule 37.8.311(5) that originally went into effect on September 10, 2022 (the “2022 Rule”), DPHHS announced that, effective immediately, the agency (a) would process applications for amending the sex designations on birth certificates *only* if the

¹ On December 8, 2024, the Court denied Plaintiffs’ motion for class certification. Plaintiffs have repleaded their class-certification allegations to ensure that they do not waive those allegations in order to preserve them for appeal.

sex identified on the applicant's birth certificate was the result of a scriveners' error or incorrect data entry or if the sex of the individual was misidentified on the original certificate and (b) would not amend a birth certificate based on "gender transition, gender identity, or change of gender." *See* Mont. Admin. Reg. Notice 37–1002, No. 11 (June 10, 2022). The effect of the 2022 Rule is to categorically ban transgender applicants from obtaining birth-certificate amendments to reflect the sex they know themselves to be.

3. The same February 2024 DPHHS announcement indicated that, going forward, the amendment process would be subject to the restrictive provisions of Senate Bill 458 ("SB 458").

4. SB 458 was adopted by the Montana Legislature on April 27, 2023, and signed into law by Governor Gianforte on May 19, 2023. In an assault on transgender Montanans, SB 458 declared that: "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 and female without regard to an individuals' psychological, behavioral, social, or chosen or subjective experience of gender."

5. SB 458 is scientifically incorrect and improperly seeks to limit the meaning of sex without legal, medical, or scientific justification.

6. Sex cannot be reduced to a simple "exactly-two-sexes" binary system. Instead, sex exists on a spectrum. The oversimplification on which SB 458 relies ignores, among other things, the existence of multiple genes involved in sex differentiation; the breadth of the endocrine system, which has multiple organs with multiple functions; and growing research documenting that gender identity is biologically based. Sex consists of a complex set of biological, psychological, and social factors, including but not limited to the behavioral or subjective experience of sex. SB 458 wrongfully excludes most of those factors from the definition of sex.

7. The February 2024 DPHHS announcement also declared that implementing the 2022 Rule “aligns” with the requirements of SB 458. The phrase “aligns with” is not defined in the statute or in any of DPHHS’s statements. The February 2024 announcement, however, asserted that enacting SB 458 *requires* implementing the 2022 Rule, thereby linking the 2022 Rule and SB 458. Thus, under the guise of “clarifying” a distinction between sex and gender, these two interwoven provisions have incorporated discriminatory definitional principles into Montana law.

8. Montana has a history of discriminatory animus against transgender people. A previous statute, Senate Bill 280 (“SB 280”), required applicants seeking to amend the sex designation on their birth certificates to obtain a court order based on an attestation proving that the applicant’s sex had “been changed by surgical procedure.”

9. On April 21, 2022, the Montana 13th Judicial District Court entered a preliminary injunction enjoining enforcement of SB 280 and its 2021 implementing regulation. The Court declared SB 280 void for vagueness and ordered the State of Montana, Governor Gianforte, DPHHS, and Director Brererton to reinstate the less restrictive procedures established in 2017 for processing applications to change sex designations on Montanans’ birth certificates. DPHHS openly defied the district court’s preliminary-injunction order and sought to circumvent the injunction by promulgating the 2022 Rule, which completely prohibited transgender people from changing the sex designations on their birth certificates. On June 26, 2023, the district court permanently enjoined the enforcement of SB 280 and its 2021 implementing regulation and entered a finding of contempt against DPHHS for defying the court’s preliminary-injunction order.

10. In addition, at some point in 2024, the Montana Department of Justice ended the Montana Motor Vehicle Division’s (“MVD”) prior practice of permitting changes to the sex designation on Montana driver’s licenses based on a letter from a doctor stating that the person

seeking the change was in, or had completed, the process of changing their sex. Instead, without following any notice-and-comment procedures, DOJ and Attorney General Knudsen, on information and belief, adopted a new policy and practice that the MVD would only issue an amended driver's license with a sex designation consistent with an individual's gender identity, rather than their sex assigned at birth, if the individual provided an amended birth certificate, which the 2022 Rule prohibits transgender individuals from obtaining (the "new MVD policy and practice"). On information and belief, this new MVD policy and practice was also based on the application of SB 458.

11. On April 18, 2024, Plaintiffs filed complaints with the Montana Human Rights Bureau ("MHRB") challenging the 2022 Rule, the new MVD policy and practice for issuing amended driver's licenses, and SB 458 to the extent it serves as the basis of either or both, on the grounds that they violate Article II, sections 4, 7, and 10, of the Montana Constitution, as well as the Montana Human Rights Act and the Governmental Code of Fair Practices (the "Code").

12. On October 3, 2024, the MHRB dismissed both complaints under the same case number. The MHRB concluded that the "gravamen" of the complaints was a challenge to the constitutionality of the 2022 Rule, the new MVD policy and practice, and SB 458 and that the MHRB lacked authority to decide constitutional questions. The MHRB noted that "[i]t is well settled that [c]onstitutional questions are properly decided by a judicial body, not an administrative official, under the principle of separation of powers."

13. The MHRB authorized Plaintiffs to prosecute their challenges to the 2022 Rule, the new MVD policy and practice, and SB 458 before the district court, concluding that "the charging part[ies] may pursue the complaint[s] in district court."

14. A true and correct copy of the October 3, 2024, letter and attachments from the MHRB addressing Ms. Kalarchik's and Ms. Doe's complaints is attached as Exhibit 1.

15. Exhibit 1 incorporates by reference a Final Investigative Report that sets forth the bases for the MHRB's conclusions with respect to Ms. Kalarchik and Ms. Doe.

16. The 2022 Rule on its face and as applied to issuing amended birth certificates, and SB 458 as applied to issuing amended birth certificates, continue the State of Montana's efforts to limit transgender people's ability to amend their birth certificates. In addition, as applied to issuing amended driver's licenses, the new MVD policy and practice and SB 458 extend the State of Montana's discriminatory efforts regarding birth-certificate amendments to driver's-license amendments. The 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses violate the Montana Constitution's equal-protection guarantee, its privacy protections, and its prohibition against compelled speech, as well as the provisions of section 2-4-506 of the Montana Administrative Procedure Act (the "MAPA"), § 2-4-506, MCA, and the Code.

17. Plaintiffs and the class members are entitled to (a) a declaratory judgment that the 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses are invalid, illegal, and unconstitutional and (b) a preliminary and permanent injunction prohibiting Defendants from directly or indirectly enforcing the 2022 Rule on its face or as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses, including but not limited to

by prohibiting Defendants from denying applications to amend sex designations on birth certificates or driver's licenses based on the 2022 Rule, the new MVD policy and practice, SB 458, or any further administrative rulemaking directed toward the subject matter of the 2022 Rule, the new MVD policy and practice, or SB 458.

18. Plaintiffs bring their request for declaratory and injunctive relief regarding the 2022 Rule, the new MVD policy and practice, and SB 458 based on, among other provisions of law, § 2-4-506, MCA (MAPA). § 2-4-506 authorizes declaratory-judgment actions seeking to have a rule declared invalid "if it is found that the rule or its application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff," as is the case with respect to the 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses.

JURISDICTION AND VENUE

19. This Court has original jurisdiction over this case under Article VII, Section 4, of the Montana Constitution and § 3-5-302, MCA.

20. This Court has jurisdiction to grant declaratory relief under the Montana Uniform Declaratory Judgments Act. § 27-8-201, MCA ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."); § 27-8-202, MCA ("Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . .").

21. This Court also has jurisdiction to grant declaratory relief under the MAPA. § 2-4-506, MCA ("A Rule may be declared invalid . . . in an action for declaratory judgment if it is

found that the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff.”).

22. This Court has jurisdiction to grant injunctive relief under § 27–19–101 *et seq.*, MCA.

23. Under § 25–2–126, MCA, venue is proper in Lewis and Clark County because this is an action against the State of Montana; its governor; DPHHS, an agency of the State of Montana; the director of DPHHS; DOJ, an agency of the State of Montana; and the Montana Attorney General.

PARTIES

Plaintiffs

24. Ms. Kalarchik is a woman who was born and raised in Montana, but she now lives in Alaska. Ms. Kalarchik is transgender and wishes to correct her Montana birth certificate, which incorrectly indicates that she is male. Ms. Kalarchik has long known that she is different from other people but kept her gender identity hidden for many years. She began to publicly present as female in 2020. Ms. Kalarchik seeks to amend her birth certificate to accurately reflect that she is female but has been denied the opportunity to obtain an accurate amended birth certificate.

25. Jane Doe is a woman who was born in Montana and is a longtime resident of Montana. Ms. Doe is transgender and wishes to correct her Montana birth certificate and driver’s license, which incorrectly indicate that she is male. Ms. Doe has known that she was female since she was a youth and has lived publicly as female for approximately two years. Ms. Doe seeks to amend her birth certificate and driver’s license to accurately reflect that she is female but has been denied the opportunity to obtain an accurate amended birth certificate or driver’s license.

Defendants

26. The State of Montana is a government entity subject to and bound by the laws of the State of Montana and its constitution. Under Article II, Section 18, of the Montana Constitution, the state is not entitled to immunity from suit in this case.

27. DPHHS is an agency of the State of Montana that is subject to and bound by the laws of the State of Montana and its constitution. As a state agency, DPHHS is not entitled to immunity from suit under Article II, Section 18, of the Montana Constitution. DPHHS has supervisory authority over the processes for amending birth certificates in the state of Montana.

28. Governor Gianforte is the elected governor of the State of Montana. He is the state's principal executive officer and is responsible for administering Montana's laws.

29. Director Brererton is the Director of DPHHS. He is the head of the agency and is responsible for administering and enforcing the 2022 Rule and SB 458.

30. DOJ is an agency of the State of Montana that is subject to and bound by the laws of the State of Montana and its constitution. As a state agency, DOJ is not entitled to immunity from suit under Article II, Section 18, of the Montana Constitution. DOJ has been involved in enforcing the new MVD policy and practice and SB 458.

31. Attorney General Knudsen is the Montana Attorney General. He is the head of DOJ and has been involved in enforcing the new MVD policy and practice and SB 458.

32. Governor Gianforte, Director Brererton, and Attorney General Knudsen each have taken a sworn oath to uphold and enforce the Montana Constitution.

CLASS ALLEGATIONS

33. Plaintiffs bring this action under Rules 23(a) and (b)(2) of the Montana Rules of Civil Procedure on behalf of themselves and all others similarly situated.

34. Plaintiffs seek to represent a class defined as (a) all transgender people born in Montana who currently want, or who in the future will want, to have the sex designation on their Montana birth certificate changed to match what they know their sex to be, as determined by their gender identity, and (b) all transgender people who currently want, or who in the future will want, to have the sex designation on their Montana driver's license changed to match what they know their sex to be, as determined by their gender identity.

35. In accordance with Rule 23(a)(1), joining all members of the class is impracticable. There are at least 3,400 transgender individuals above the age of 13 born or living in Montana. *See* Jody L. Herman, Andrew R. Flores, and Kathryn K. O'Neil, *How Many Adults and Youth Identify as Transgender*, Williams Institute (June 2022), at 13. Even if only a modest number of these individuals were born in Montana and seek to amend their birth certificates or live in Montana and seek to amend their driver's licenses, this class membership is well within the parameters accepted by the Montana Supreme Court for class certification.

36. Moreover, although the numerosity requirement is often cast in purely numerical terms, its core component is that joinder is impracticable, whatever the cause. Having many class members is not the only way to satisfy Rule 23's requirements. *See* Newberg on Class Actions, § 3:11 (5th ed.). Other factors include (a) the financial resources available to class members to finance their own lawsuit, (b) the ability of class members to institute individual lawsuits in light of threats of harassment and potential violence, (c) the geographic dispersion of the class, and (d) the plaintiffs' request for prospective relief involving future class members.

37. Each of these factors renders joinder impracticable. Transgender people face high rates of poverty and homelessness.² In Montana, for example, rates of poverty among transgender people are at least double the rate among cisgender people.³ Nearly one-third of this population falls below the poverty line. In addition, nearly one-third has experienced homelessness. S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality (Dec. 2016). These considerations make financing an independent lawsuit difficult, if not impossible.

38. Transgender people continue to face discrimination and harassment, including threats of violence, when their status is made public without their consent and in circumstances outside of their control. *Id.* Acts of discrimination and threats of violence suppress transgender people's willingness to step forward to protect their rights.

39. Further, the class is geographically dispersed in a large and thinly populated state. Organizing and coordinating joinder under these circumstances would be extremely difficult.

40. Finally, because the class includes future applicants for birth-certificate or driver's-license amendments, it is not possible to identify with any precision the class's current membership. "Future claimants generally meet the numerosity requirement due to the impracticality of counting such class members much less joining them." *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019).

41. In accordance with Rule 23(a)(2), there are questions of law or fact common to the class. Each member of the class shares an interest in determining the constitutionality of the 2022

² Bianca D.M. Wilson, et al., *LGBT Poverty in the United States: Trends at the Onset of COVID-19*, Williams Institute, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Poverty-COVID-Feb-2023.pdf>.

³ Soon Kyu Choi, et al., *State Profiles of LGBT Poverty in the United States*, Williams Institute, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/State-LGBT-Poverty-Dec-2019.pdf>

Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses, including the Montana Constitution's equal-protection guarantee, its protection of informational privacy, and its protection against compelled speech. In addition, each class member shares an interest in determining the validity under § 2–4–506 of the MAPA of the 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses. Further, each class member shares with the named Plaintiffs the burdens of proving and demonstrating the legal sufficiency of the claims set forth in this complaint.

42. In accordance with Rule 23(a)(3), the class representatives' claims are typical of the class's claims. Indeed, the class representatives' claims are identical to the class's claims.

43. In accordance with Rule 23(a)(4), Plaintiffs, as class representatives, will fairly and adequately protect the class's interests. Plaintiffs' interests are not antagonistic to the class's interests. Plaintiffs and the class members suffer from the same harms inflicted by the 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses, and Plaintiffs and the class members seek the same litigation outcomes in the form of declaratory and injunctive relief. Neither of the named Plaintiffs seek monetary relief, so no financial conflict will arise between the named Plaintiffs' claims and the class members' claims. Plaintiffs' declarations in support of their motion for class certification will demonstrate their ability and intent to act as faithful and diligent class stewards.

44. Plaintiffs' counsel are competent to represent the class and are prepared to defend vigorously the interests of the class as a whole. Plaintiffs are represented by experienced counsel from the ACLU Montana Foundation, Inc., the American Civil Liberties Union Foundation, and the law firm of Nixon Peabody LLP. The lawyers affiliated with the above law firms and organizations, and who are appearing in this matter, have extensive experience in complex constitutional litigation, as well as class-action litigation, in Montana and throughout the United States. They also have extensive experience representing transgender litigants. The credentials of the proposed class counsel are described in greater detail in Plaintiffs' forthcoming motion for class certification. Indeed, the successful prosecution of the SB 280 litigation, in which the district court permanently enjoined SB 280 and its 2021 implementing regulation as unconstitutional and awarded the plaintiffs their attorney's fees, is evidence that Plaintiffs' counsel is competent and committed to the class's interests.

45. Plaintiffs seek certification of a class under Rule 23(b)(2). As set forth in this complaint, Defendants have acted on grounds that apply generally to the class so that final injunctive relief, or corresponding declaratory relief, is appropriate for the class as a whole. A declaration recognizing the unconstitutional nature of the 2022 Rule, the new MVD policy and practice, and SB 458, and a permanent injunction against enforcing any aspect of the 2022 Rule, the new MVD policy and practice, or SB 458 as applied to the 2022 Rule or the new MVD policy and practice, would provide relief to every class member. This is precisely the relief Plaintiffs seek.

46. For the reasons set forth above, and as will be further demonstrated in Plaintiffs' forthcoming motion for class certification, all the requirements of Rule 23 have been met.

ALLEGATIONS COMMON TO ALL COUNTS

Gender Dysphoria and Its Treatment

47. Transgender people have a gender identity that differs from their assigned sex at birth.

48. Gender identity refers to a person's fundamental internal sense of being a particular sex. The medical consensus in the United States is that gender identity is innate and that forced efforts to change a person's gender identity not only are harmful to a person's health and well-being, but also are unethical.

49. According to the American College of Physicians, the American Psychiatric Association, and other major medical organizations, every person has a gender identity that cannot be altered voluntarily and cannot be ascertained immediately after birth.

50. Gender dysphoria is a diagnosable medical condition defined by the clinically significant distress caused by the marked incongruence between a person's gender identity and the sex they were assigned at birth. It is a serious medical condition that some, but not all, transgender people experience.

51. Treatment of gender dysphoria is guided by the standards of care set forth by the World Professional Association for Transgender Health, which were originally published in 1979 and are now in their eighth edition. These guidelines reflect the professional consensus about the psychological, psychiatric, hormonal, and surgical management of gender dysphoria.

52. The accepted standard of care is to address gender dysphoria with treatments designed to bring a person's body and gender expression into line with their gender identity. This course of treatment has different components depending on the medical and psychological needs of each transgender person. As with other forms of healthcare, a patient considers the available

treatment options and makes treatment decisions in consultation with their family and healthcare provider.

53. Treatment for gender dysphoria also includes living one's life consistently with one's gender identity. This includes having identity documents that accurately reflect one's sex, as determined by one's gender identity. Forcing transgender people to use identity documents that do not match their gender identity or forcing them to go without identity documents—the ultimate results of the 2022 Rule, the new MVD policy and practice, and Defendants' interpretation of SB 458 with respect to issuing amended birth certificates and amended driver's licenses—is inconsistent with medical protocols and can result in elevated levels of anxiety, depression, and suicidality.

54. Being forced to hold and present documents that do not match a person's sex as determined by their gender identity can also result in discrimination, harassment, and violence when transgender people are called upon to present identification that contains a sex designation inconsistent with their gender expression. This is the essential danger of the 2022 Rule, the new MVD policy and practice, and Defendants' interpretation of SB 458 with respect to issuing amended birth certificates and amended driver's licenses: they compel transgender people, under obligation of law, to carry identity documents that are contrary to the sex they know themselves to be and present as to others, thereby increasing the risk that they will be discriminated against, harassed, or subjected to violence.

55. Recognizing the importance of identification documents, the American Medical Association (“AMA”) has adopted a policy urging states to ease the path to amending those documents so that psychological stress, depression, suicidality, invasions of privacy, and harassment, including potential violence against transgender people, are avoided. The total ban on

amending identification documents contemplated by the 2022 Rule, the new MVD policy and practice, and Defendants' application of SB 458 with respect to issuing amended birth certificates and amended driver's licenses directly contradicts the AMA's policy.

**The Need for Birth Certificates and Driver's Licenses
Matching One's Sex, as Determined by One's Gender Identity**

56. Birth certificates and driver's licenses are essential government-issued documents that individuals use for various important purposes throughout their lifetime. They are used in a wide variety of contexts, such as determining eligibility for, among other things, employment, providing identification for travel, proving age, enrolling in government programs, and engaging in a wide range of financial transactions.

57. A mismatch between someone's gender identity and the sex designation on their birth certificate or driver's license discloses that person's transgender identity, a profoundly private piece of information in which transgender people have a reasonable expectation of privacy. People who are denied accurate birth certificates and driver's licenses are deprived of significant control over where, when, how, and to whom they disclose their transgender identity.

58. A mismatch between a transgender person's gender identity and the information on their birth certificate or driver's license subjects them to discrimination and harassment in a variety of settings, including employment, healthcare, travel, a wide range of financial transactions, and interactions with government employees and officials, including but not limited to law-enforcement personnel.

Plaintiffs' Personal Histories

59. Plaintiff Jessica Kalarchik is a 49-year-old woman who was born and raised in Butte, Montana, and currently resides in Anchorage, Alaska. Ms. Kalarchik is currently employed

as a forensic nurse examiner at her local hospital in Alaska. She is a veteran and served for 31 years in the armed forces, including eight years in the JAG Corps. She is married to her wife Renee.

60. Ms. Kalarchik is transgender. She was assigned the male sex at birth. Her birth certificate still includes a male sex designation, even though she has known that she is female for many years.

61. Ms. Kalarchik has been living publicly as female for the past year. She presents as female in all circumstances of her daily life. She has taken multiple steps to bring her body and gender expression into alignment with her female gender identity. Ms. Kalarchik was diagnosed with gender dysphoria and began receiving gender-affirming hormone therapy in May 2022. She continues to meet with her treating healthcare professional regularly. She and her doctor have determined that gender-affirming surgery such as face surgery or orchiectomy are appropriate and necessary to treat her gender dysphoria, but she is financially unable to pursue this care at this time. Additionally, Ms. Kalarchik has legally changed her name to align with her female gender identity and has changed her name and sex marker on both her Alaska driver's license and her social security card.

62. Ms. Kalarchik has been happier and healthier after starting her transition and hormone therapy. Living as her authentic self has significantly reduced her stress and anxiety, which in turn has improved her overall health and eliminated her life-long struggles with acid reflux and high blood pressure.

63. Ms. Kalarchik needs to change the sex designation on her birth certificate to match her female sex, as determined by her gender identity, but is unable to do so because of the 2022 Rule on its face and as applied to issuing amended birth certificates and SB 458 as applied to issuing amended birth certificates. Ms. Kalarchik's inability to obtain a birth certificate that

accurately reflects her female sex is a painful and stigmatizing reminder of the State of Montana's refusal to recognize her as a woman.

64. Further, denying Ms. Kalarchik an accurate birth certificate places her at risk of violence, harassment, and discrimination every time she presents a birth certificate that incorrectly identifies her as male.

65. Ms. Kalarchik has had first-hand experience with incidents of harassment and discrimination in both her personal and professional life.

66. Ms. Kalarchik lives in fear of having to present her birth certificate to someone who may respond negatively or even violently. Ms. Kalarchik is typically perceived as female, so anytime she is forced to present an identity document that incorrectly identifies her as male, she is forced to "out" herself as transgender.

67. Plaintiff Jane Doe began living fully and openly as female approximately two years ago. She has taken various steps to bring her body and the other ways she expresses her identity into line with her female gender identity. For the last two years, Ms. Doe has taken hormone replacement therapy with the aid and support of her treating healthcare professional. Ms. Doe is a graphic designer. Ms. Doe needs to change the sex designation on her birth certificate to match her female gender identity but is unable to do so because of the 2022 Rule. Ms. Doe needs to change the sex designation on her driver's license to match her female gender identity but is unable to do so because of the new MVD policy and practice. Both the 2022 Rule and the new MVD policy and procedure preventing her from amending her identity documents stem from the government's application of SB 458. Her inability to obtain accurate identity documents places her at risk of violence, harassment, and discrimination every time she presents an identity document that incorrectly identifies her as male.

68. Ms. Doe does everything in her power to avoid violence, discrimination, and harassment because she knows that transgender people across the state and country are at increased risk of this mistreatment. She takes extra precautions, including avoiding the use of public restrooms and changing rooms. Ms. Doe has faced discrimination within her own close circle after coming out. In light of the mistreatment she experienced from people with whom she had a close relationship, Ms. Doe is particularly afraid that strangers who learn that she is transgender will target her for mistreatment, discrimination, and violence.

69. Ms. Doe is concerned about presenting her identity documents to people who may respond negatively. Ms. Doe is typically perceived as female, so anytime she is forced to present an identity document that incorrectly identifies her as male, she is forced to “out” herself as transgender. As Ms. Doe’s appearance has shifted, her driver’s license no longer matches her appearance, and she has experienced increasing issues with this disparity.

CLAIMS FOR RELIEF

COUNT I **(Equal Protection of the Laws)**

70. Plaintiffs incorporate all other paragraphs of this complaint as if fully set forth in this count.

71. Article II, Section 4, of the Montana Constitution states that “[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.”

72. The 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver’s licenses, and SB 458 as applied to issuing amended birth certificates and amended driver’s licenses deny Plaintiffs and the class members equal protection of the laws based on sex and gender identity. Under Montana law, discrimination based on gender identity is a form of discrimination based on sex. *Maloney v.*

Yellowstone County, et al., Cause No. 1570–2019 & 1572–2019 (Department of Labor and Industry, August 14, 2020); *Scarlet van Garderen, et al., v. State of Montana, et al.*, Cause No. DV-23-541, Order Granting Plaintiffs’ Motion for Preliminary Injunction (Fourth Judicial District Court, Missoula County, Sept. 27, 2023). Both are forbidden by the equal-protection clause of Article II, Section 4, of the Montana Constitution.

73. The 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended birth certificates, and SB 458 as applied to issuing amended birth certificates and amended driver’s licenses discriminate against transgender people by prohibiting amendments to birth-certificate and driver’s-license sex designations arising from gender transition, gender identity, or change of gender.

74. This prohibition serves no legitimate nondiscriminatory purpose. In fact, with respect to amending sex designations on birth certificates, it is a major step backward from the procedures established in Montana in December 2017, under which amendments to birth-certificate sex designations were allowed without substantive legal objection and required only a supporting affidavit from the applicant.

75. Similarly situated people whose gender identity matches their sex assigned at birth, and who seek to amend portions of their birth certificates or driver’s licenses unrelated to sex designation or gender identity, may do so without the same burdens and prohibitions imposed on transgender people.

76. Discrimination based on sex is subject to strict scrutiny because the Montana Constitution’s equal protection guarantee is more stringent and “provides for even more individual protection” than the federal constitution. *Scarlet van Garderen, et al., v. State of Montana, et al.*, Cause No. DV-23-541, Order Granting Plaintiffs’ Motion for Preliminary Injunction (Fourth

Judicial District Court, Missoula County, Sept. 27, 2023) (quoting Justice Nelson’s concurring opinion in *Snetsinger v. Montana University System*, 2004 MT 390, ¶ 58). Applying anything less than strict-scrutiny review to policies that discriminate on the basis of sex would be inconsistent with the intentionally broad protections afforded by the Montana Constitution’s equal-protection guarantee.

77. Discrimination based on transgender status is subject to heightened scrutiny because (a) transgender people have suffered a long history of discrimination, which continues to this day; (b) transgender people are a discrete and insular group that lacks the political power to protect their rights effectively; (c) a person’s gender identity or status bears no relation to the person’s ability to contribute to society; and (d) gender identity is a core defining trait, fundamental to a person’s identity, that, as a condition of equal treatment, a person cannot be required to abandon.

78. The 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver’s licenses, and SB 458 as applied to issuing amended birth certificates and amended driver’s licenses also violate the individual dignity, diminish the intrinsic worth, and compromise the inalienable rights of Plaintiffs and other members of the class in violation of Article II, Section 3, of the Montana Constitution.

79. The 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver’s licenses, and SB 458 as applied to issuing amended birth certificates and amended driver’s licenses are not narrowly tailored to further a compelling state interest, nor are they substantially related to an important government interest.

80. For these reasons, Plaintiffs and the class members are entitled to the declaratory and injunctive relief requested below with respect to the 2022 Rule, the new MVD policy and practice, and SB 458.

COUNT II
(Right to Privacy)

81. Plaintiffs incorporate all other paragraphs of this complaint as if fully set forth in this count.

82. Article II, Section 10, of the Montana Constitution provides that the right of individual privacy is essential to a free society and “shall not be infringed without a showing of compelling state interest.” This fundamental right to privacy encompasses confidential informational privacy and guarantees the right “to control circulation of personal information.” *State v. Nelson* (1997), 283 Mont. 231, 941 P.2d 441.

83. In addition, the substantive protections of the due-process clause of Article II, Section 17, of the Montana Constitution include the right to privacy. “Informational privacy is a core value furthered by the state constitutional guarantees.” *See State v. Nelson* (1997), 283 Mont. 231, 941 P.2d 441.

84. Based on Montana’s constitutional guarantees and its common law, Plaintiffs and the class members have a reasonable expectation of privacy regarding their transgender status.

85. The 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver’s licenses, and SB 458 as applied to issuing amended birth certificates and amended driver’s licenses severely burden Plaintiffs’ and the class members’ right of privacy by eliminating the ability of transgender people to amend the sex designation on their birth certificates and driver’s licenses, thereby forcing them

to disclose their transgender status whenever they must present a birth certificate or driver's license that discloses their sex assigned at birth rather than their sex as determined by their gender identity.

86. Because the 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses infringe on the right to privacy, they are subject to strict scrutiny. No compelling state interest justifies violating Article II, Sections 10 and 17, of the Montana Constitution by issuing amended birth certificates and amended driver's licenses subject to the restrictions imposed by the 2022 Rule, the new MVD policy and practice, and SB 458. Nor are these violations related to a substantial or important government interest. Under principles of substantive due process, Plaintiffs' and the class members' privacy interests outweigh any purported justification Defendants could assert for violating those interests.

87. For these reasons, Plaintiffs and the class members are entitled to the declaratory and injunctive relief requested below with respect to the 2022 Rule, the new MVD policy and practice, and SB 458.

COUNT III **(Compelled Speech)**

88. Plaintiffs incorporate all other paragraphs of this complaint as if fully set forth in this count.

89. The Montana Constitution states, "No law shall be passed impairing the freedom of speech or expression." Mont. Const, Art. II, §7. Under the Montana Constitution, a law regulating expressive content is presumptively invalid. *State v. Lamoureux* 2021 MT 94 ¶ 21, 404 Mont. 61, 485 P.3d 192. One component of the constitutional protection of the right to speak is

that speech or expression cannot be compelled. Speech protections shield more than the written or spoken word. *Wooley v Maynard*, 430 U.S. 705, 715 (1977).

90. The 2022 Rule on its face and as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses compel Plaintiffs and the class members to misidentify themselves by a sex designation that does not accurately state their sex. They also force Plaintiffs and the class members to comply with a binary definition of sex that requires them to (a) forego having accurate identification documents, including but not limited to birth certificates and driver's licenses, and (b) incur the risks of discrimination, harassment, and violence associated with having inaccurate identification documents.

91. This compelled speech is subject to strict scrutiny, and no government interest in compelling Plaintiffs and the class members to misidentify themselves with an inaccurate sex designation outweighs their interest in accurately designating their sex on their birth certificates and driver's licenses.

92. For these reasons, Plaintiffs and the class members are entitled to the declaratory and injunctive relief requested below with respect to the 2022 Rule, the new MVD policy and practice, and SB 458.

COUNT IV
(Montana Administrative Procedure Act)

93. Plaintiffs incorporate all other paragraphs of this complaint as if fully set forth in this count.

94. § 2-4-506, MCA, authorizes declaratory-judgment actions seeking to have a rule declared invalid "if it is found that the rule or its application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff."

95. The 2022 Rule on its face and as applied to issuing amended birth certificates and amended driver's licenses, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses interfere with and impair, and threaten to interfere with and impair, the legal rights or privileges of Plaintiffs and the class members, including their rights and privileges under the Montana Constitution to equal protection, to privacy, and to be free from compelled speech.

96. For these reasons, Plaintiffs and the class members are entitled to the declaratory and injunctive relief requested below with respect to the 2022 Rule, the new MVD policy and practice, and SB 458.

COUNT V
(Montana Governmental Code of Fair Practices)

97. Plaintiffs incorporate all other paragraphs of this complaint as if fully set forth in this count.

98. The Montana Governmental Code of Fair Practices requires that government services, such as the amendment of birth certificates and driver's licenses, be made available or performed without discrimination based on sex. § 49-3-205, MCA. No state entity, local governmental agency, or state or local official may become a party to any agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices such as discriminating based on sex. § 49-3-205, MCA.

99. Based on the conduct alleged in Count I, Defendants, through the 2022 Rule, the new MVD policy and practice, and SB 458 to the extent it serves as the basis of the 2022 Rule, the new MVD policy and practice, or both, have violated the provisions of the Code, and Plaintiffs have been injured by Defendants' conduct.

100. As set forth in Count I, the 2022 Rule, the new MVD policy and practice, and SB 458 discriminate against transgender people by prohibiting amendments to birth-certificate and driver's-license sex designations arising from gender transition, gender identity, or change of gender.

101. Discrimination based on gender identity constitutes discrimination based on sex, as the MHRB concluded in *Maloney v. Yellowstone County et al.*, Cause No. 1570–2019 & 1572–2019 (Department of Labor and Industry, August 14, 2020), and the United States Supreme Court acknowledged in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–43 (2020).

102. There is no nondiscriminatory justification for limiting transgender people's ability to change the sex designation on their birth certificates or driver's licenses in the manner required by the 2022 Rule, the new MVD policy and practice, or SB 458.

103. For these reasons, Plaintiffs are entitled to the declaratory and injunctive relief requested below with respect to the 2022 Rule, the new MVD policy and practice and SB 458 to the extent it serves as the basis of the 2022 Rule, the new MVD policy and practice, or both.

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Declare that (i) the 2022 Rule is unconstitutional on its face and as applied to issuing amended birth certificates, (ii) the new MVD policy and practice is unconstitutional as applied to issuing amended driver's licenses, and (iii) SB 458 is unconstitutional as applied to issuing amended birth certificates and amended driver's licenses;
- B. Declare that (i) the 2022 Rule is invalid under § 2–4–506, MCA on its face and as applied to issuing amended birth certificates, (ii) the new MVD policy and practice is invalid under § 2–4–506, MCA as applied to issuing amended driver's licenses, and (iii) SB 458 is invalid under § 2–4–506, MCA as applied to issuing amended birth certificates and amended driver's licenses;
- D. Declare that (i) the 2022 Rule is invalid under the Code on its face and as applied to issuing amended birth certificates, (ii) the new MVD policy and practice is invalid under the Code, and (iii) SB 458 is invalid under the Code

to the extent it serves as the basis of the 2022 Rule, the new MVD policy and practice, or both;

- E. Preliminarily and permanently enjoin Defendants, as well as their agents, employees, representatives, and successors, from directly or indirectly enforcing the 2022 Rule on its face or as applied to issuing amended birth certificates, the new MVD policy and practice as applied to issuing amended driver's licenses, and SB 458 as applied to issuing amended birth certificates and amended driver's licenses, including but not limited to by prohibiting Defendants from denying applications to amend sex designations on birth certificates or driver's licenses based on the 2022 Rule, the new MVD policy and practice, SB 458, or any further administrative rulemaking directed toward the subject matter of the 2022 Rule, the new MVD policy and practice, or SB 458;
- F. Certify a class, in accordance with Rule 23 of the Montana Rules of Civil Procedure, of (i) all transgender people born in Montana who currently want, or who in the future will want, to have the sex designation on their Montana birth certificate changed to match what they know their sex to be, as determined by their gender identity, and (ii) all transgender people who currently want, or who in the future will want, to have the sex designation on their Montana driver's license changed to match what they know their sex to be, as determined by their gender identity;
- G. Certify the named Plaintiffs as representatives of the class and their counsel as class counsel; and
- H. Award Plaintiffs the reasonable attorney's fees and costs incurred in bringing this action.
- I. Award any other relief this Court deems just and proper.

Respectfully submitted,

By: /s/ Alex Rate
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EXHIBIT 1 to EXHIBIT A



October 3, 2024

A.C.L.U.

c/o Alex Rate, Attorney at Law

c/o Marthe VanSickle, Attorney at Law

ratea@aclumontana.org

vansickle@aclumontana.org

Montana Department of Justice

c/o Michael Russell, Attorney at Law

c/o Thane Johnson, Attorney at Law

c/o Alwyn Lansing, Attorney at Law

c/o Michael Noonan, Attorney at Law

c/o Emily Jones, Attorney at Law

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Subject: A.C.L.U. v. State of Montana

Case No. 240274

After investigation, the Human Rights Bureau has found no reasonable cause to believe that discrimination occurred in the above-referenced case. This determination is based on the investigator's recommendation, which is enclosed.

Section 49-2-504(7), MCA, requires the Human Rights Bureau to dismiss a complaint when it has made a no reasonable cause finding. With a notice of dismissal, a charging party may continue the administrative process by filing an objection to the dismissal with the Montana Human Rights Commission within 14 days after the issuance of this dismissal or a charging party may discontinue the administrative process and commence proceedings in district court within 90 days after the issuance of this dismissal.

If you have any questions, please contact our office.

Sincerely,

A handwritten signature in dark ink, appearing to read "Marieke Beck".

Marieke Beck

Bureau Chief

Human Rights Bureau

Enclosures: Final Investigative Report, Notice of Dismissal

HUMAN RIGHTS BUREAU
EMPLOYMENT RELATIONS DIVISION
DEPARTMENT OF LABOR AND INDUSTRY

A.C.L.U.,
Charging Party

CASE NO. 240274

-v-

State of Montana,
Respondent

NOTICE OF DISMISSAL AND
NOTICE OF RIGHT TO FILE
CIVIL ACTION IN DISTRICT COURT

TO: A.C.L.U., Charging Party; State of Montana, Respondent.

1. Section 49-2-504(7), MCA provides that the Human Rights Bureau (Bureau) shall dismiss a complaint and the charging party may file a civil action in district court if the Bureau has investigated the complaint and determined that the allegations of the complaint are not supported by a preponderance of the evidence.

2. As bureau chief of the Human Rights Bureau, I hereby certify that the requirements for dismissal of this complaint have been met in that:

a. The Bureau has investigated the complaint pursuant to §49-2-504, MCA; and

b. The Bureau has issued a no reasonable cause finding in which it determined that the allegations of the complaint were not supported by a preponderance of the evidence.

3. This decision to dismiss the complaint is final and completes the administrative process unless the charging party files an objection seeking Human Rights Commission (Commission) review of the decision within fourteen (14) days after issuance.

4. The original, one (1) paper copy, and a digital copy of any objections to this decision must be filed by **October 17, 2024**, at the following address: Montana Human Rights Commission, P.O. Box 1728, Helena, MT, 59624-1728. The Commission is transitioning to electronic filing of all briefing materials. Digital submissions of less than 5MB can be emailed to **hrcappeals@mt.gov**. Digital submissions larger than 5MB must be submitted on a CD disk and mailed with the original paper filing. For questions about digital submissions, file size, or, if you do not have electronic filing capability, contact the Commission secretary at (406) 444-4356. The objection and any briefs must also include a *Certificate of Service* showing a copy of the objection was served on the opposing party.

The Commission's procedures for considering an objection to a dismissal of a complaint are

1 explained in Montana Administrative Rules 24.9.111, 24.9.112 and 24.9.121. Consideration of
2 an objection will be based upon the record unless oral argument is requested and authorized by
3 the Commission. The Commission will review an objection under an abuse of discretion
4 standard.

5 5. In order to pursue this complaint of discrimination in a district court forum, the charging
6 party must file the complaint at the district court in the district in which the alleged violation
7 occurred for appropriate relief. THE COMPLAINT MUST BE FILED WITHIN NINETY (90)
8 DAYS AFTER THE ISSUANCE OF THIS NOTICE UNLESS AN APPEAL TO THE
9 COMMISSION IS FILED. IF AN APPEAL IS FILED, THE CHARGING PARTY WILL
10 HAVE NINETY (90) DAYS FROM THE FINAL ORDER OF THE COMMISSION
11 AFFIRMING THE NOTICE OF DISMISSAL. IF THE CHARGING PARTY FAILS TO FILE
12 A COMPLAINT IN DISTRICT COURT WITHIN THE NINETY (90) DAY PERIOD, THE
COMPLAINT IS BARRED AT BOTH THE ADMINISTRATIVE AND JUDICIAL LEVELS.

13 6. A district court has discretion to award attorney's fees to the prevailing party in a
14 discrimination action in district court.

15 7. The issuance of this notice constitutes the completion of the administrative process with
16 regard to the above case.

17 8. The case is dismissed and the charging party may pursue the complaint in district court.
18 DATED October 3, 2024.

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Marieke Beck, Bureau Chief
Human Rights Bureau

CERTIFICATE OF SERVICE

For the Human Rights Bureau the undersigned certifies that a true and correct copy of the foregoing NOTICE OF DISMISSAL AND NOTICE OF RIGHT TO FILE CIVIL ACTION IN DISTRICT COURT was mailed to the following by Electronic/U.S. Mail, postage prepaid October 3, 2024.

A.C.L.U.

c/o Alex Rate, Attorney at Law

c/o Marthe VanSickle, Attorney at Law

ratea@aclumontana.org

vansicklem@aclumontana.org

Montana Department of Justice

c/o Michael Russell, Attorney at Law

c/o Thane Johnson, Attorney at Law

c/o Alwyn Lansing, Attorney at Law

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Kim Cobas

Data Manager

24.9.111 DOCUMENT FORM AND SERVICE (1) All documents, pleadings, and papers to be filed shall be eight and one-half inches by eleven inches (8½" x 11") in size, standard quality, opaque, unglazed paper, with a minimum 50% recycled content, of which least 10% shall be postconsumer waste, and in 12-point font or larger, double-spaced, and clearly legible. Exhibits or other documents shall be reproduced in like size unless the original exhibit is required. The commission may require the reproduction of an oversized demonstrative or other exhibit in a size appropriate for the record.

(2) Copies of all submissions filed must be served upon all parties of record, including intervenors or other parties allowed to appear for special purposes, and all submissions must contain or be accompanied by a certificate of service showing proof of the method of service and the date upon which such service was made. Service of copies of submissions upon parties shall be made in accordance with Rule 5 of the Montana Rules of Civil Procedure and may be made by means of first class mail, postage prepaid, unless the commission designates another manner of service. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-106, 49-2-204, 49-2-511, 493-315, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98; TRANS, from 24.9.1703, and AMD, 2008 MAR p. 2636, Eff. 12/25/08; AMD, 2017 MAR p. 91, Eff. 1/7/17.)

24.9.112 FILINGS WITH THE COMMISSION (1) Any document required or permitted to be filed with the commission may be filed in three ways: hard copy, electronically, or telephonic facsimile (fax). In all instances, a hard copy original must be provided as indicated in (4) and (5).

(2) Electronic filing must take the following form:

(a) The electronic mail address for document filing is hrcappeals@mt.gov. Documents to be filed by e-mail must be attached to the e-mail in Portable Document Format (.pdf). Attachments larger than eight megabytes cannot be accepted. Filings may be submitted in multiple attachments if necessary.

(b) Documents may also be filed electronically by storing them on a compact disc and filing that compact disc with the commission, as stated in (5).

(3) For facsimile filing, the number is (406) 443-3234. Documents which are longer than twenty pages, inclusive of attachments and exhibits, may not be filed by fax.

(4) Hard copy filings or filings of compact discs may be mailed to: Human Rights Bureau, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728; or delivered by hand to 33 South Last Chance Gulch, Suite 2B, Helena, Montana 59601.

(5) If filing is made by e-mail or fax, a hard copy original of the identical document must be received by the commission not more than five days following the filing. If such original is not received and good cause is not shown, the e-mail or fax filing will be stricken from the record.

(6) A document is filed, no matter how it is transmitted, on the date it is received by the commission, not the date it is mailed. It is the responsibility of the filing party to ensure that documents are timely received by the commission.

(7) Notwithstanding any other rule to the contrary, any party may request to file documents solely in hard copy by filing a motion to that effect with the commission. The commission may grant such request for good cause shown. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-204, 49-2-505, 49-2-511, MCA; NEW, 2017 MAR p. 91, Eff. 1/7/17.)

24.9.121 OBJECTIONS TO DISMISSAL OF COMPLAINT (1) A party who is dissatisfied with a department decision to dismiss a complaint may seek commission review of the decision by filing a written objection within 14 days after the issuance of the notice of dismissal. The objection will be considered at the next commission meeting after conclusion of the briefing schedule, issued in accordance with the following:

(a) An objecting party who wishes to file a supporting brief must file and serve the opening brief within twenty-one days after the department decision to dismiss the complaint.

(b) A responding party who wishes to file a response brief must file and serve the response brief within fourteen days of service of the opening brief.

(c) An objecting party who wishes to file a reply brief must file and serve the reply brief within fourteen days of service of the response brief.

(2) Briefs subject to this rule may not exceed ten pages in length and must comply with the formatting requirements set forth in ARM 24.9.111. Any specific exhibits which the party believes are essential to the commission's consideration of the matter must be attached to the party's brief. Briefs must be filed in accordance with ARM 24.9.112.

(3) Requests for oral argument must be made in writing at the time of filing the first brief of each party. If a request for oral argument is timely made, ten minutes for each party will be reserved for oral argument at the commission meeting at which the objection will be considered. The commission may request that the parties present oral argument.

(4) Consideration of the objection will be based upon the written record unless oral argument is requested by a party and authorized by the commission. For the purposes of review of objections to a dismissal of a complaint, the written record is comprised solely of the Final Investigative Report of the department, the objection, the briefing of the parties pursuant to this rule, and any attachments to that briefing.

(5) The commission will review an objection to the Human Rights Bureau's decision to dismiss a complaint under an abuse of discretion standard.

(6) If the commission sustains an objection to the dismissal of a complaint, it will reopen the case by remanding it to the department.

(a) If the complaint has not yet been informally investigated, and not more than 90 days (housing cases) or 120 days (nonhousing cases) have passed since the date of filing, it will be remanded to the Human Rights Bureau for investigation.

(b) If the complaint has been informally investigated, or if more than 90 days (housing cases) or 120 days (nonhousing cases) have passed since the date of filing, it will be remanded to the Office of Administrative Hearings to give notice of a hearing.

(7) If the commission affirms the dismissal of a complaint, it will issue a written order to the parties within 90 days of the hearing on the matter. The charging party has 90 days after receipt of the commission's order affirming the dismissal of a complaint to file the complaint in the appropriate district court. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-204, 49-2-511, 49-3-315, MCA; NEW, 1998 MAR p. 3201, Eff. 12/4/98; TRANS, from 24.9.1714, and AMD, 2008 MAR p. 2636, Eff. 12/25/08; AMD, 2017 MAR p. 91, Eff. 1/7/17.)

**MONTANA DEPARTMENT OF LABOR & INDUSTRY
EMPLOYMENT RELATIONS DIVISION
HUMAN RIGHTS BUREAU**

A.C.L.U. of Montana Foundation, Inc.,

Charging Party,

vs.

State of Montana

Respondent.

Final Investigative Report

HRB Case No. 240274¹

Recommendation: Charging Party's claim should be dismissed.²

I. ISSUE PRESENTED

Did the State of Montana discriminate against Charging Party through its implementation of Montana Administrative Rule 37.8.311(5) in violation of the Montana Human Rights Act and the Governmental Code of Fair Practices?

II. FACTUAL BACKGROUND

On April 18, 2024, the A.C.L.U. of Montana Foundation, Inc. (ACLU) filed a discrimination complaint on behalf of Jessica Kalarchik with the Human Rights Bureau (HRB) asserting the State of Montana, specifically the Department of Public Health and Human Services (DPHHS), discriminated against her on the basis of sex. The ACLU's complaint asserts that DPHHS's administrative rule 37.8.311(5), which interprets and applies Senate Bill 458 (SB 458)³, "prevents" Kalarchik from obtaining a birth certificate that accurately reflects her sex as female, consistent with her gender identity.

¹ Initial filings in this matter were erroneously marked with the case number 240273. The correct case number for this matter is 240274.

² The Human Rights Bureau has the authority to dismiss matters following an initial inquiry. *Mont. Code Ann.* § 49-2-205.

³ Senate Bill 458 made the following changes:

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.

On June 10, 2024, the State of Montana (the State) responded asserting that the ACLU had failed to establish a prima facie case of discrimination. The State sought the dismissal of the ACLU's complaint for failure to state a claim.

On June 13, 2024, the Human Rights Commission (Commission) issued a Final Agency Decision in *Berndt v. Montana Department of Justice, et al.*, HRB Case No. 0220498 (June 13, 2024), concluding "[t]he term sex within the meaning of the 2021 version of the Montana Human Rights Act does not include gender identity."

On June 25, 2024, during the HRB's informal investigation into this complaint, Montana's Fourth Judicial District Court issued an order in *Shawn Reagor, et al., v. The State of Montana*, Cause No. DV-23-1245. In this order, the Court found that SB 458 violated the Montana Constitutional noticing requirements and failed to clearly state the subject of the bill in the title. *Mont. Const. Art. V, § 11(3)*.

~~(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.

~~(e)~~(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.

III. BASIS FOR DISMISSAL

The Montana Human Rights Act (MHRA) and the Governmental Code of Fair Practices were enacted by the legislature to establish a cause of action for persons subjected to discrimination, as well as to establish an administrative process for addressing such complaints. In Montana, persons have the right to be free from discrimination on the basis of sex, among other protected classes. The administrative process set forth in the MHRA establishes procedures and remedies that are the exclusive means of legal redress for unlawful discrimination. *Mont. Code Ann. § 49-2-512(1)*.

Prior to this filing, on April 30, 2021, the ACLU filed a similar complaint asserting discrimination by the State in the enactment of Senate Bill 280, the Birth Certificate Act. On November 21, 2021, the HRB dismissed that complaint on the grounds that the nature of the complaint was a constitutional challenge.

In that dismissal, the HRB found that when discerning the nature – or gravamen – of a complaint, the Montana Supreme Court has stated that the “gravamen” determination is made irrespective of the manner in which the complaint is framed. See *Saucier v. McDonalds*, 342 Mont. 29, ¶ 56 (2008). There – as here – the gravamen of the complaint appears to be a challenge to the constitutionality of actions by the State.

In seeking dismissal the instant matter, the State relies on the Final Agency Decision issued by the Commission in the *Berndt* matter arguing that subjective gender identity is not determinative of sex. The HRB recognizes the relevance of the *Berndt* decision. However, *Berndt* presented a different type of question. In *Berndt*, the Charging Party asserted the statute – as applied – was discriminatory. In the instant case, the ACLU is not asserting that DPHHS discriminated against the Charging Party through application of the administrative rule, rather it is asserting the administrative rule – as written – is unconstitutional. This agency cannot determine constitutionality.

This administrative process offers an exclusive remedy, unless the parties are seeking a determination of the constitutionality of a rule or statute. See *Shoemaker v. Denke*, 2004 MT 11, ¶¶ 18, 19 (Shoemaker sought to bypass the administrative process arguing there was a constitutional question). It is well settled that constitutional questions are properly decided by a judicial body, not an administrative official, under the principle of separation of powers. *Shoemaker*, ¶ 5 (citing Art. III, Sec.1, 1972 Mont. Const.) Accordingly, this complaint is dismissed from this administrative process on the grounds that the HRB lacks the authority to decide this constitutional question.

Conclusion

For reasons detailed above, Charging Party’s claim should be dismissed.



Timothy Little
Montana Human Rights Bureau

10/3/24
Date

CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 01-16-2025:

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