IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 25–0397

CASEY PERKINS; SPENCER McDONALD; KASANDRA REDDINGTON; JANE DOE; and JOHN DOE,

Plaintiffs and Appellees,

v.

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

Defendants and Appellants.

BRIEF OF *AMICUS CURIAE* REPRESENTATIVE KERRI SEEKINS-CROWE

On Appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV 25–282, The Honorable Shane Vannatta, Presiding

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STATEMENT OF INTEREST

Representative Kerri Seekins-Crowe is a duly elected member of the Montana State Legislature, representing House District 39. She was also the primary bill sponsor of House Bill ("HB") 121 (2025), a bill reaffirming the longstanding meaning of the word "sex" and protecting the privacy and safety of women and girls in government facilities. She has a personal and unique interest in maintaining the effectiveness of her vote to pass this law. Mont. Code Ann. § 5-2-107(1)(b). Further, she has "a personal stake in ensuring proper interpretation and administration of the constitution and legislative enactments and referendums that is distinguishable from that of the public generally[.]" *Id.* Representative Seekins-Crowe submits this *amicus* brief to defend the Legislature's constitutional prerogative to determine policies governing public women's spaces in Montana. Judicial intrusion explicitly undermines the separation of powers and the democratic mandate of Montana's Constitution. Representative Seekins-Crowe supports the position of the Defendants and Appellants in this matter that the preliminary injunction against HB 121 was erroneously granted.

SUMMARY OF ARGUMENT

Montana courts should defer policy decisions to the State Legislature under the doctrine of separation of powers. This deference is grounded in the Montana Constitution's explicit assignment of policymaking to the Legislative branch.

Judicial attempts to substitute Legislative judgment in policy matters directly threaten the integrity of Montana's constitutional order and undermine the people's right to self-governance.

The Montana Constitution vests the Legislative branch with the sole power to deliberate on matters of broad social policy, including the boundaries of privacy in gender-designated public spaces such as restrooms, prisons, locker rooms, and domestic violence shelters. The Legislative branch—reflecting the will of the people through democratic processes—is best positioned to determine what privacy standards serve the public interest, especially in contexts fraught with competing claims of safety, dignity, and equality. Judicial intrusion into these questions constitutes a violation of the separation of powers, improperly elevating judicial philosophy over the Legislature's considered judgment and the people's sovereign prerogative.

HB 121 passes constitutional muster. Space segregation policy does not impede private autonomy; it merely sets reasonable boundaries for public conduct. Collective privacy interests—especially for women and girls in vulnerable settings—may only be protected through legislative action. The State must balance the privacy expectations of all constituents—particularly women who may be at risk in spaces lacking clear boundaries—against the interests of individuals asserting gender variance. This is particularly true where, as here, Plaintiffs have not proven

a subjective expectation of privacy that society is willing to recognize as objectively reasonable.

Plaintiffs' argument that restricting access to women's spaces violates equal protection for transgender and intersex individuals likewise fails. First, this Court has never recognized transgender status to be a suspect classification, and current legal jurisprudence trends away from such a determination. *See, e.g. United States v. Skrmetti*, 145 S. Ct. 1815 (2025). The Montana Legislature has strong interests in ensuring the security, privacy, and dignity of women and girls in places where they are necessarily vulnerable. Courts must recognize that equal protection is not a weapon to destroy neutral rules designed to protect the safety and privacy of females. The judiciary should not second-guess the Legislature's judgment on such matters. The people of Montana—through their elected representatives—retain the right to define the contours of privacy and safety in public spaces. The preservation of liberty depends on courts respecting their role as interpreters, not makers, of law.

ARGUMENT

The Montana Constitution declares that "the power of the government of this state is divided into three distinct branches: legislative, executive, and judicial." Mont. Const. art. III, § 1. This division—fundamental to our republican form of government—not only creates a system of checks and balances but firmly places the power to make broad policy determinations with the Legislature. This case presents

this question: shall policy for Montana's most sensitive public spaces be shaped by duly elected Legislators, reflecting the will and interests of Montana voters, or will it be dictated by courts in disregard of separation of powers? Attempts to invoke Judicial power to override Legislative judgments in these contexts endangers constitutional stability. Montana's Legislature, as the body closest to the people, is uniquely situated to weigh complex competing interests in public policy, gender-specific safety, and the protection of vulnerable citizens. Strong deference to the Legislative is vital to the rule of law, democratic legitimacy, and public order.

I. COURTS ARE CONSTITUTIONALLY RESTRICTED FROM POLICYMAKING, WHICH IS THE LEGISLATURE'S PURVIEW.

The Montana Constitution explicitly divides governmental authority among three branches: legislative, executive, and judicial. Mont. Const. art. III, § 1. "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." *Id.* "The separation of governmental powers into equal branches is a fundamental precept of the American constitutional form of government. The drafters of the Montana Constitution, commenting on Article III, stated that 'dividing the powers of government among three branches of state government is essential to any constitution.'" *MEA-MFT v. McCulloch*, 2012 MT 211, ¶ 26, 366 Mont. 266, 291 P.3d 1075 (citing Mont. Const. Conv., Committee Reports, Feb. 19, 1972, p. 818). "The separation of powers in the

Montana Constitution is 'designed to act as a check on an overly ambitious branch of government.'" *Id.* (citation omitted). This mandatory separation allocates to the Legislature the exclusive responsibility to design, deliberate, and adopt laws establishing the policies affecting public life.

This Court has recognized "for over a century that the Montana conception of separation of powers 'is designed to prevent a single branch from claiming or receiving inordinate power[.]'" *O'Neill v. Gianforte*, 2025 MT 2, ¶ 16, 420 Mont. 125, 561 P.3d 1018 (citing *Powder River Cnty. v. State*, 2002 MT 259, ¶ 114, 312 Mont. 198, 60 P.3d 357); *see also Coate v. Omholt*, 203 Mont. 488, 492, 662 P.2d 591, 594 (1983) (each branch of government is equal, coordinate, and independent); *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 330, 137 P. 392, 395 (1913) ("[Separation of powers] is not to be sought in extravagant pretensions to power, but rather in a firm maintenance of . . . clear authority coupled with a frank and cheerful concession of the rights of the co-ordinate departments." (quotation omitted)). "The Separation of Powers provision is not a grant of power, but a limitation upon power, specifically, upon the inappropriate exercise of power by a branch beyond that respectively granted under Articles V, VI, and VII of the Montana Constitution." *Brown v. Gianforte*, 2021 MT 149, ¶ 55, 404 Mont. 269, 488 P.3d 548 (citation omitted). The Legislature's plenary authority to enact laws governing public

matters—including the regulation of privacy in women's spaces in governmental facilities—stands as a core principle of Montana's constitutional system.

Judicial interference with Legislative policymaking not only disrupts this balance but undermines the legitimacy of law itself. "Courts have no constitutional power or authority to act as a 'super-legislature' second-guessing 'the wisdom, need, and propriety' of legislative enactments that may 'touch' upon 'economic problems, business affairs, or social conditions[.]'" *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 171, 416 Mont. 44, 545 P.3d 1074 (Sandefur, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Cutone v. Anaconda Deer Lodge*, 187 Mont. 515, 524, 610 P.2d 691, 697 (1980) (this Court is not "a super-legislature" and generally has no authority to overturn non-arbitrary public policy determinations of the Legislature within the bounds of its constitutional power).

In reviewing the constitutionality of legislation enacted by Montana's lawmakers, "it is imperative to the preservation of the sacrosanct separation of powers dictated by the Montana Constitution that we consistently recognize, however distasteful in the political firestorm of the day, that the broad Legislative authority, and resulting public policy prerogative exclusively granted to the Legislature by the Montana Constitution, necessarily includes the power and discretion within constitutional limits, to enact legislation that many may view as … bad public policy[.]" *Id.* at ¶ 172 (Sandefur, J., dissenting). Justice Rice lately voiced

concern about "a recent trend of holdings wherein the Court has resolved cases after setting aside longstanding governing principles of the law." *Mont. Envtl. Info. Center v. Gianforte ("MEIC")*, 2025 MT 112, ¶ 68, 422 Mont. 136, 569 P.3d 555 (Rice, J., dissenting). He observed that: "When established principles are discarded, a legal vacuum is left that must necessarily be backfilled arbitrarily, including potentially the justices' personal preferences, desires, agendas, and even biases, whether knowingly or not." *Id.* "To be sure, the exercise of constitutional duties by the legislative and judicial branches will at times produce tension and even disagreement; but that tension should not arise from the failure of the Court to follow the established standards of the law." *Id.* at ¶ 73.

The tension inherent in the separation of powers has heightened between Montana's Legislative and Judicial branches in recent years. "Only recently, this Court has correctly chided the Legislature to stay in its own well-defined lane of constitutional authority." *Mont. Democratic Party*, ¶ 172 (Sandefur, J., dissenting) (citing *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶¶ 5–52, 405 Mont. 1, 493 P.3d 980; *McLaughlin*, ¶¶ 58–78 (McKinnon, J., concurring); *McLaughlin*, ¶¶ 79–83 (Sandefur, J., concurring)). "The precious distributed-powers constitutional form of government that the good citizens of this State have chosen to live under since 1889 will survive and be well-served only if [this Court does] the same." *Id.*

In this case, the Court should "stay in its own well-defined lane of constitutional authority," *id.*, and reverse the preliminary injunction against HB 121.

Policy decisions relating to the privacy of women in public restrooms, locker rooms, shelters, and correctional facilities implicate complex social, cultural, and safety considerations. Legislators, elected by and accountable to the people, are tasked with evaluating these considerations, balancing competing interests, and setting the policies of the State. The Legislative process facilitates public hearings allowing input from various stakeholders, advocacy groups, experts, and affected citizens; cross-partisan deliberations enabling the reconciliation of competing rights and societal interests; and the opportunity for amendments and refinements that reflect evolving public values. The Montana Legislature is equipped to gather comprehensive evidence through hearings, commissions, and investigative research and hear firsthand testimony from affected groups. This wealth of expertise and information fosters Legislative solutions that are both practical and grounded in real-world needs.

The privacy of women and girls in designated public spaces is a matter of public health, dignity, and safety. It implicates the protection of vulnerable populations in highly sensitive settings. This protective rationale does not run counter to anti-discrimination objectives; rather, it is an expression of the State's

responsibility to prevent discrimination against women and girls by preserving their zones of safety. Indeed, as Representative Seekins-Crowe has stated:

> "This bill isn't about exclusion — it's about common-sense boundaries that ensure fairness and respect in vulnerable spaces like restrooms, locker rooms and correctional facilities. Montanans deserve the peace of mind that their families are safe."[1]

Montana's Legislature has reasonably concluded that sex-segregated spaces based on biological sex serve to protect women and girls from unwanted male intrusion in intimate facilities reduce risks of sexual harassment, assault, and exploitation, and preserve the dignity and sense of security that women reasonably expect in privacy zones. *See* HB 121, § 1(2) (2025). These important state interests empower the Legislature to establish rules that reflect social realities and safety imperatives. Such Legislative value judgments are of a political nature, appropriately left to the political branches, and should not be second-guessed by Judicial policy preference. This is because the Judiciary, in its role as interpreter of law, lacks both the mandate and the means to engage in public policy formation. As such, courts must exercise restraint when asked to invalidate laws pertaining to social policy.

Further, when courts encroach on the Legislature's policy prerogatives or substitute their views for the Legislature's, they undermine the rule of law and compromise public trust in each branch's independence. The proper role of courts is

[1] Mara Silvers, *Bathroom bill clears GOP-led legislature, poised to become law*, Montana Free Press, Feb. 11, 2025, available at https://tinyurl.com/3hccr7j8.

to respect Legislative policy judgments, not override them on debatable social issues. After all, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co. v. Ma*y, 194 U.S. 267, 270 (1904).

II. THE DISTRICT COURT EXCEEDED ITS CONSTITUTIONAL AUTHORITY WHEN IT ENJOINED HB 121.

A. THE DISTRICT COURT ERRED IN DETERMINING THAT PLAINTIFFS DEMONSTRATED A RIGHT OF PRIVACY.

The right to privacy enumerated in Mont. Const. art. II, § 10 provides important protections against unwarranted governmental invasions of personal autonomy but does not extend to invalidate neutral, democratically enacted laws regulating conduct within public or shared facilities. States possess police power "to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States." *Kafka v. Mont. Dept. Fish, Wildlife & Parks*, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 (passage of initiative eliminating game farms did not amount to an unconstitutional taking and was a proper exercise of the state's police power); *Kafka*, ¶ 127 (Nelson, J., dissenting) (citing *Mugler v. Kansas*, 123 U.S. 623, 659–63 (1887) (regulation of manufacture and sale of intoxicating liquors, whether for general or merely personal use, was within the ambit of state police powers).

"In general, privacy is the 'ability to control access to information about oneself.'" *State v. Staker*, 2021 MT 151, ¶ 8, 404 Mont. 307, 489 P.3d 489 (citing *State v. Hyem*, 193 Mont. 51, 62, 630 P.2d 202, 209 (1981) (citations omitted)). Under Montana's constitutional privacy provision, a right to privacy exists "only to the extent that an individual has or had a reasonable expectation of privacy under the totality of the circumstances at issue." *Id.* at ¶ 10 (citing *Raap v. Bd. of Trustees, Wolf Point Sch. Dist.*, 2018 MT 58, ¶ 11, 391 Mont. 12, 414 P.3d 788; *State v. Solis*, 214 Mont. 310, 314, 693 P.2d 518, 520 (1984); *Missoulian, Inc. v. Bd. of Regents*, 207 Mont. 513, 522, 675 P.2d 962, 967 (1984); *Mont. Hum. Rts. Div. v. City of Billings*, 199 Mont. 434, 442, 649 P.2d 1283, 1287 (1982)). A reasonable expectation of privacy exists "only to the extent that an individual has a subjective expectation of privacy that is objectively reasonable in society." *Id.* at ¶ 11 (citing *State v. Stewart*, 2012 MT 317, ¶¶ 33–34, 367 Mont. 503, 291 P.3d 1187; *State v. Allen*, 2010 MT 214, ¶¶ 47–61, 357 Mont. 495, 241 P.3d 1045; *State v. Goetz*, 2008 MT 296, ¶¶ 27–37, 345 Mont. 421, 191 P.3d 489; *State v. Boyer*, 2002 MT 33, ¶ 20, 308 Mont. 276, 42 P.3d 771; *State v. Scheetz*, 286 Mont. 41, 48, 950 P.2d 722, 726 (1997); *State v. Bullock*, 272 Mont. 361, 375, 901 P.2d 51, 70 (1995) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); *Solis*, 214 Mont. at 314, 693 P.2d at 520; *Missoulian*, 207 Mont. at 522, 675 P.2d at 967; *Montana Hum. Rts. Div.*, 199 Mont. at 442, 649 P.2d at 1287).

Whether an individual has a subjective expectation of privacy that is objectively reasonable in society is a mixed questions of fact and law under the totality of the circumstances. *Id.* (citing *Raap*, ¶ 12 (citing *Moe v. Butte-Silver Bow Cty.*, 2016 MT 103, ¶ 19, 383 Mont. 297, 371 P.3d 415); *Scheetz*, 286 Mont. at 48, 950 P.2d at 726 (noting that assessment of an expectation of privacy depends on various factors)). Absent a reasonable expectation of privacy, there is no constitutional intrusion. *Id.* (citing *Allen*, ¶ 47; *State v. Elison*, 2000 MT 288, ¶ 48, 302 Mont. 228, 14 P.3d 456; *Hulse v. Mont. Dept. of Justice, Motor Veh. Div.*, 1998 MT 108, ¶ 22, 289 Mont. 1, 961 P.2d 75 (citing *Scheetz*, 286 Mont. at 41, 950 P.2d at 724)). Relevant considerations include "the nature and circumstances of the location and setting at issue and the extent to which the subject overtly or implicitly assumed, considered, desired, or endeavored to ensure that the subject activity or information would remain concealed or undisclosed to others." *Id.* at ¶ 21 (citing *Stewart*, ¶ 40; *Allen*, ¶¶ 48–51; *Goetz*, ¶¶ 28–30 (citing *Elison*, ¶ 51)); *see also State v. Dess*, 201 Mont. 456, 464, 655 P.2d 149, 153 (1982) (existence or non-existence of the right to exclude others may also be relevant to the existence and objective reasonableness of a subjective expectation).

"Even in an otherwise private setting, an individual generally has no expectation of privacy to the extent that he or she knowingly exposes something to others." *Id.* (citing *Scheetz*, 286 Mont. at 48–49, 950 P.2d at 726–27 (citing *Katz*,

389 U.S. at 351–52)). Similarly, a subjective expectation of privacy is not objectively reasonable as to information the individual chooses to share. *Id.* at ¶ 31 (citing *Goetz*, ¶ 35) (expectation that the person to whom one is speaking or otherwise discloses or exposes him or herself will not repeat or report it not objectively reasonable); *State v. Armstrong*, 463 N.J. Super. 576, 233 A.3d 610, 619 (N.J. Super. Ct. App. Div. 2020) (an individual maintains no reasonable expectation of privacy in data he chooses to share); *State v. Tentoni*, 2015 WI App 77, 365 Wis. 2d 211, 871 N.W.2d 285, 288 (Wis. Ct. App. 2015) (no reasonable expectation of privacy in text messages received and stored on recipient's cell phone); *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27, 37 (Wash. 2007) (defendant had no protected privacy interest in letter mailed to undercover detective posing as a lawyer regardless of his ignorance that the intended recipient was a detective rather than a lawyer); *United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (individual who reveals private information to another assumes the risk that his confidant will reveal that information); *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (reasonable expectation of privacy in contents of an email ends upon delivery to receipt account); *United States v. King*, 55 F.3d 1193, 1195–96 (6th Cir. 1995) (expectation of privacy in contents of a letter terminates upon delivery even if sender instructed recipient to maintain privacy).

The District Court exceeded its constitutional boundaries to merely interpret the law—not substitute its judgment for that of the Legislature—when it determined that Plaintiffs have a privacy interest that HB 121 violates. Simply put, it utterly ignored the entire body of law cited above, concluding without evidence that "Plaintiffs have a subjective or actual expectation of privacy in their transgender or intersex identity, anatomy, genetics, and medical history and in deciding to use restrooms, changing rooms, and sleeping quarters that correspond with their gender identity." (Doc. 25 at 44.) But the District Court's Order is void of any discussion of whether the Plaintiffs here have disclosed this allegedly private information to others, or whether the "transgender or intersex identity" in which they claim a privacy interest is generally known by their family, friends, co-workers, acquaintances, and circle of influence. Information that individuals disclose to others is not objectively private, as this Court has repeatedly held for decades. *See* cases cited, *supra*. The District Court declined to engage in this analysis, which constitutes reversible error.

Nor is a privacy expectation in the use of female spaces by natal males whose gender identity does not conform to their sex an expectation that society accepts as reasonable. As noted by one legal commentator:

> Indeed, far from being an instance of sex discrimination, preventing males from entering women-only private facilities is usually viewed as being required by equal concern and regard for women. Justice Ruth Bader Ginsburg took this point for granted in her majority opinion in

> *United States v. Virginia* when she explained that, for the all-male Virginia Military Institute to become coed, it "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." Moreover, in 1975, when critics argued that the Equal Rights Amendment would require unisex intimate facilities, then-Professor Ruth Bader Ginsburg explained that a ban on sex discrimination would not require such an outcome: "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy." An employer who allowed males to enter private women-only facilities could expect a Title VII lawsuit asserting it fostered a hostile work environment for women by allowing their privacy to be violated.[2]

A 2019 Gallup survey revealed that "more people [51%] think transgender individuals should use the bathroom that reflects their birth gender as opposed to their gender identity."[3] A more recent 2021 Rasmussen poll found that "the vast majority of Americans (60%) oppose this new effort to allow transgender Americans to use the bathroom they identify with," up from 49% in 2017.[4]

The District Court failed to engage in meaningful analysis on this issue, instead reaching a conclusion that appears to more closely align with a political philosophy than to follow the law. The regulation of sex-segregated facilities in restrooms, locker rooms, and shelters is a Legislative policy addressing the

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[2] Ryan T. Anderson, *The Supreme Court's Mistaken and Misguided Sex Discrimination Ruling*, Public Discourse, The Journal for the Witherspoon Institute, Jun. 16, 2020, available at https://www.thepublicdiscourse.com/2020/06/65024/.

[3] *Poll reveals broad support for transgender bathroom policies that reflect birth gender*, Christian Today, Jun. 27, 2019, available at https://tinyurl.com/3ash3xw5.

[4] Jim McCool, *Majority of Americans Oppose Transgenders Using Women's Restroom*, The Floridian, Sept. 22, 2021, available at https://tinyurl.com/3u33c2rj.

collective privacy interests of women as a class in communal settings, not an infringement on individual private choices. The State may constitutionally impose boundaries on public spaces to protect the privacy of the vulnerable population occupying those facilities. Plaintiffs have proven no subjective or objectively reasonable privacy expectations that would defeat this Legislative policy. The preliminary injunction should be reversed.

B. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT TRANSGENDER STATUS IS A SUSPECT CLASS.

The District Court failed to stay within its constitutional lane when it created a new suspect class never recognized by the Montana Legislature, this Court, or the United States Supreme Court. The District Court cited specific cases acknowledging transgender status is not a suspect class in Montana and then proceeded to conclusorily declare that it is despite this binding legal authority. (Doc. 25 at 23–27.) For support, the District Court relied primarily on a non-binding Fourth Circuit case and a British Columbia law review article, substituting the principles stated therein for established Montana jurisprudence. It is exactly this type of "cascading analytical sleight of hand" that the Legislature has taken issue with in at least the past two Legislative sessions. *Mont. Democratic Party*, ¶ 148 (Sandefur, J., dissenting) ("With the Opinion's cascading analytical sleight of hand uncovered, the resulting mischief becomes clear. However well intentioned, the Court's faulty constitutional analysis provides analytical cover, under the guise of constitutional

conformance review, to second-guess the facially non-discriminatory public policy determinations of the Legislature[.]"); *see also MEIC*, ¶ 68 (Rice, J., dissenting) (bemoaning the "recent trend of holdings wherein the Court has resolved cases after setting aside longstanding governing principles of the law" and observing that "[w]hen established principles are discarded, a legal vacuum is left that must necessarily be backfilled arbitrarily, including potentially the justices' personal preferences, desires, agendas, and even biases, whether knowingly or not.").

The United States Supreme Court has recently provided guidance that is much more consistent with Montana's legal jurisprudence and Legislative deference. While the District Court may not have had the benefit of this jurisprudence, this Court must grapple with *Skrmetti*. The State may not deny any person equal protection of the laws, but this constitutional mandate "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons[.]" *Skrmetti*, 145 S. Ct. at 1828 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)). "We have reconciled the principle of equal protection with the reality of legislative classification by holding that, 'if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.'" *Id.* at 1828. "We generally afford such laws 'wide latitude' under this rational basis review, acknowledging that 'the Constitution presumes that even

improvident decisions will eventually be rectified by the democratic processes.'" *Id.* (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)).

Mere reference to sex is insufficient to trigger heightened scrutiny. *Id.* at 1830 (citing *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 64 (2001)) ("The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction.")). Like the Montana Supreme Court, the U.S. Supreme Court "has not previously held that transgender individuals are a suspect or quasi-suspect class." *Id.* at 1833.

As a "practical necessity," "most legislation classifies for one purpose or another." *Id.* at 1850 (Barrett, J., concurring) (citing *Romer*, 517 U.S. at 631). Such classifications do not usually render a law unconstitutional; instead, laws are generally presumed to be constitutional, and a legislative classification will be upheld "so long as it bears a rational relation to some legitimate end." *Id.* (citing *Romer*, 517 U.S. at 631). There are only a few exceptions to this rule: classifications based on race, sex, and alienage. *Id.* Racial and ethnic classifications receive strict scrutiny. *Id.* (citations omitted). Classifications based on alienage are subject to similarly close scrutiny. *Id.* (citations omitted). And laws distinguishing between men and women receive intermediate scrutiny; to survive a constitutional challenge, they must be "substantially related" to achieving an "important governmental

objectiv[e].” *Id.* (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)). “Beyond these categories, the set has remained virtually closed.” *Id.* Indeed, the U.S. Supreme Court “has not recognized any new constitutionally protected classes in over four decades and instead has repeatedly declined to do so.” *Id.* (citing *Ondo v. Cleveland*, 795 F. 3d 597, 609 (6th Cir. 2015)).

“The test is strict, as evidenced by the failure of even vulnerable groups to satisfy it: . . . the mentally disabled, the elderly, and the poor are not suspect classes.” *Id.* at 1851 (citing *Cleburne*, 473 U.S. at 442; *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313–314 (1976) (per curiam); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 286 (1973)). Transgender status is not marked by the same sort of “obvious, immutable, or distinguishing characteristics” as race or sex. *Id.* (citing *L.W. v. Skrmetti*, 83 F.4th 460, 487 (6th Cir. 2023) (citations omitted)). In particular, it is not defined by a trait that is “definitively ascertainable at the moment of birth.” *Id.* (quoting *L.W.*, 83 F.4th, at 487 (quoting *Ondo*, 795 F. 3d. at 609)). Some transgender individuals “detransition” later in life—in other words, they begin to identify again with the gender that corresponds to their biological sex. *Id.* Accordingly, transgender status does not turn on an immutable characteristic. *Id.* (citation omitted). Nor is the transgender population a “discrete group;” but rather it is “large, diverse, and amorphous.” *Id.* at 1852 (citations omitted).

Holding that transgender people constitute a suspect class "would require courts to oversee all manner of policy choices normally committed to legislative discretion." *Id.*

> Consider just a few: What are the relevant risks and benefits to children of puberty blockers and hormone treatments? What is the age at which these treatments become appropriate? 15? 16? 18? What about surgeries? Expert disagreements highlight the difficulty of such choices.
>
> [. . .]
>
> Beyond the treatment of gender dysphoria, transgender status implicates several other areas of legitimate regulatory policy—ranging from access to restrooms to eligibility for boys' and girls' sports teams. If laws that classify based on transgender status necessarily trigger heightened scrutiny, then the courts will inevitably be in the business of "closely scrutiniz[ing] legislative choices" in all these domains.

Id. at 1852–83 (citing *Cleburne*, 473 U.S. at 441–42).

Legislatures have "many valid reasons to make policy in these areas," and if a statute is a rational means of pursuing a legitimate end, Montana's constitutional equal protection mandate is satisfied. *Id.* at 1853. Courts should be in the business of following and applying existing law, not creating new law. That is the prerogative of the Legislature. Transgender status is not a suspect class under Montana law, and HB 121 survives rational basis review. It therefore should not be enjoined.

CONCLUSION

Montana's constitutional tradition is rooted in the sovereign right of the people, through their elected Legislature, to make policy in matters of safety, morals,

and public welfare. Privacy and equal protection claims asserted against HB 121 misconstrue the scope of applicable constitutional provisions. This Court must not become a super-legislature, substituting its policy judgments for that of the Legislative branch. To do so would be a betrayal of both constitutional principles and the public trust. The Montana Supreme Court's duty is to uphold the separation of powers, reinforce Legislative primacy in sensitive policy domains, and refuse requests for Judicial intervention grounded in overreaching privacy or equal protection arguments. For these reasons, Representative Kerri Seekins-Crowe respectfully requests that this Court reverse the District Court's preliminary injunction against HB 121.

RESPECTFULLY SUBMITTED this 13th day of August 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that this *amicus* brief is printed with proportionately-spaced, 14-point Times New Roman font; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 4,993 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendix.

/s/ *Emily Jones*

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Electronically signed by Jami Westermeyer on behalf of Emily Jones
Dated: 08-13-2025