IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0397

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

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.

***AMICUS CURIAE* BRIEF OF INTERACT: ADVOCATES FOR INTERSEX YOUTH**

On Appeal from the Montana Fourth Judicial District Court, Missoula County, Cause No. DV-32-2025-282, the Honorable Shane Vannatta, Presiding

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INTEREST OF *AMICUS CURIAE*

Amicus curiae interACT: Advocates for Intersex Youth is a nonprofit legal advocacy organization dedicated to advancing the rights of individuals born with intersex traits—innate variations in physical sex characteristics that do not fit typical notions of male or female bodies. interACT's mission includes opposing discrimination and harmful practices against intersex people in settings ranging from healthcare to education and public life.

Amicus is interested in this matter because HB 121 directly impacts the community that interACT serves: enforcing restrictions based on physical sex characteristics contributes to anti-intersex discrimination. *Amicus* is well-situated to assist the Court in its consideration of the relationship between HB 121 and intersex individuals' equal protection and privacy rights.

SUMMARY OF ARGUMENT

Under House Bill 121 ("HB 121" or "the Act"), multi-user restrooms, changing rooms, and sleeping quarters in public buildings must be "designated…for the exclusive use of females or males." HB 121 § 3(1). The Act further states that sex shall be determined "without regard to an individual's psychological, behavioral, social, chosen, or subjective experience of gender" but shall be based on "the biological and genetic indication of male or female," with reference to chromosomes, gonads, and "nonambiguous internal and external genitalia present at

birth." HB 121 § 2(12). While the Act clearly targets transgender individuals, it similarly infringes on the rights of intersex individuals.

Specifically, the Act defines "female" and "male" according to an individual's chromosomes (XX or XY), gamete production (ova or sperm), and how the reproductive and endocrine systems are otherwise "oriented." HB 121 § 2(4), (7). In reality, there is a wide range of natural variation in the development, appearance, and function of such characteristics. Unsurprisingly, many people born with intersex variations do not neatly fit into HB 121's classification scheme; the Act provides no clear answer as to which sex-separated facilities – if any – they may lawfully use. Even intersex individuals who "fit" into the Act's definitions may be misclassified according to particular physical characteristics named in HB 121 and denied access to facilities that align with their gender identity.

In these ways, the Act's treatment of intersex individuals (as well as transgender individuals) violates the Montana Constitution, imperiling rights to equal protection, privacy, and more. As enforcement of HB 121 would cause irreparable harm to intersex and transgender Montanans, the Order granting the preliminary injunction should be affirmed.

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ARGUMENT

I. Intersex People Have Innate Variations in Physical Sex Characteristics That Differ From Stereotypical Expectations About Male and Female Bodies.

The term "intersex" encompasses a wide range of innate variations in physical sex-related traits—genitals, internal reproductive organs, chromosomes, and/or hormone function—that differ from typical binary notions of male and female bodies. (Intersex variations are sometimes referred to as "differences in sex development" (DSD) in medical contexts.) Sometimes intersex variations are visually apparent at birth, but they may not be discovered until later in life.

Being intersex is not the same as being transgender (although some intersex individuals are also transgender). Similarly, having an intersex variation does not automatically make someone non-binary; some intersex people do identify their gender as non-binary, while many other intersex people identify as men or as women. Thus, intersex is not generally considered a "third" sex category *per se*, but rather represents the wide range within which physical sex-related characteristics can develop.

Intersex traits originate from variations in the embryonic development process. A fertilized egg usually has two sex chromosomes: XX or XY. For the first weeks of gestation XX and XY embryos look the same: both possess undifferentiated gonadal tissue, Müllerian and Wolffian ducts, a genital tubercle, and

labioscrotal folds. These structures later develop in different ways depending on genetic and hormonal factors. Typically, for an embryo with XY chromosomes the gonads become testes; the Müllerian ducts regress as the Wolffian ducts develop into the vas deferens, epididymis, and seminal vesicles; the genital tubercle becomes a penis; and the labioscrotal folds fuse to form a scrotum. For an embryo with XX chromosomes, typically the gonads become ovaries; the Wolffian ducts regress as the Müllerian ducts develop into the uterus, fallopian tubes, and upper portion of the vagina; the genital tubercle becomes a clitoris; and the labioscrotal folds develop into the outer labia. At puberty, hormones secreted by the testes or ovaries cause the expression of secondary sex characteristics such as facial hair, body hair, and breast development.

There are many ways in which this "typical" process can vary, affecting how bodies develop, appear, and function. There are more than 40 known intersex variations, and estimates suggest that about 2% of the population has one. interACT: Advocates for Intersex Youth, Intersex Variations Glossary (2022), https://interactadvocates.org/wp-content/uploads/2022/10/Intersex-Variations-Glossary.pdf; Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 Am. J. Human Biol. 151, 159 (2000).

Some variations affect hormone production (via gonadal development or adrenal function), which can affect genital appearance and/or secondary sex characteristics:

- **Congenital Adrenal Hyperplasia (CAH)** affects the enzymes responsible for the adrenal glands' hormone production. People with CAH and XX chromosomes may naturally produce higher-than-typical levels of testosterone, which sometimes results in a larger-than-typical clitoris and/or the fusion of the urethra and vaginal canal to form a single opening. They may also develop body and facial hair during childhood or puberty.
- **Swyer Syndrome**, which affects people with XY chromosomes, is a form of "complete gonadal dysgenesis," meaning that the gonadal tissue does not develop into testes or ovaries (and does not produce hormones or gametes). Without testosterone production, they do not develop a penis, and usually develop a vulva and vagina. Because they also do not produce anti-Müllerian hormone, the Müllerian ducts often develop to form a uterus and fallopian tubes. They usually require hormone therapy to start puberty, and may menstruate (without ovulating) if they receive estrogen.
- People with **"Ovotesticular DSD"** are born with both ovarian and testicular tissue: either one testis and one ovary, or one or more ovotestes (a gonad composed of ovarian and testicular cells together). Some people with this

variation produce both viable sperm and viable eggs. Genital and secondary sex characteristic development vary depending on estrogen and testosterone production.

In other variations, hormone *production* is typical, but differences in androgen receptor genes or hormone-related enzymes change the body's responses to those hormones:

- People with **Androgen Insensitivity Syndrome (AIS)** have XY chromosomes and testes, and either a *diminished response* (partial AIS) or *no response* (complete AIS) to testosterone. People with complete AIS are born with a vulva, vagina, and undescended testes. Because their body naturally aromatizes (converts) testosterone to estrogen, they will develop breasts and other features associated with typical estrogen puberty. People with partial AIS could be born with a shallow vaginal opening and/or a phallus that may be perceived as a large clitoris or small penis. Because they aromatize some of their testosterone, they may develop some features associated with typical testosterone puberty and some associated with typical estrogen puberty.
- In **Aromatase Deficiency**, a person with XX chromosomes does not have the enzyme responsible for converting androgens into estrogen, leading to higher testosterone levels and lower estrogen levels. At birth, they may have a larger-than-typical clitoris and/or labial fusion (resembling a scrotal appearance). At

puberty, they may not menstruate or develop breasts, and may develop characteristics such as facial hair.

- People with **5-alpha Reductase Deficiency (5-ARD)** have XY chromosomes and testes that produce typical levels of testosterone, but do not have the enzyme that converts testosterone to the more powerful androgen dihydrotestosterone (DHT). People with 5-ARD often have noticeable genital differences at birth, such as a smaller-than-typical penis or genitals that do not look like either a typical penis or vulva. Others have a typical-looking vulva. In adolescence, people with 5-ARD often develop some features associated with typical testosterone puberty and may experience genital growth.

Variations originating in a person's chromosomes (or particular chromosome-linked genes) can affect reproductive organ development, hormone function, or other characteristics:

- People with **Klinefelter Syndrome** have an extra copy of the X chromosome, resulting in a 47XXY karyotype. They may have lower testosterone production, start puberty late (sometimes requiring hormone therapy), or develop breast tissue. Klinefelter Syndrome may not cause visually apparent differences.
- In **De la Chapelle Syndrome**, also called "XX Male Syndrome," the SRY gene translocates from a Y chromosome to an X chromosome, causing

someone with XX chromosomes to develop genitals and internal organs typically seen with XY chromosomes. They will be born with a penis and testes and are typically infertile. In adolescence, they may experience breast growth, and may not develop characteristics associated with typical testosterone puberty.

- Due to random differences in embryonic development, people with **mosaicism** or **chimerism** have different chromosome patterns in some cells of their body than in others (*e.g.*, some cells with XX chromosomes and others with XY, or some with XY and some with XXY). Both mosaicism and chimerism can cause variations in one's genitals, gonads and other reproductive structures, hormone function, secondary sex characteristics, and fertility—for example, having combinations of internal structures like a fallopian tube along with a vas deferens, or developing pubertal changes unexpected for their assigned sex.
- In **Turner Syndrome**, a person is born with a 45X karyotype instead of 46XX, or with a mosaic combination of 45X and other chromosome patterns. For instance, individuals with Turner Syndrome with mosaic 45X/46XY chromosomes may be born with testicular tissue (and often experience typical testosterone puberty), and may have a typical-appearing penis or vulva or may have genital differences such as hypospadias.

Other variations primarily affect internal organs and are unlikely to be outwardly apparent:

- In **Mayer-Rokitansky-Küster-Hauser Syndrome (MRKH)**, the Müllerian ducts do not develop typically. People with MRKH have XX chromosomes and may be born with no vagina or a shallow vagina, and a partial uterus or absent uterus. They usually have ovaries that produce typical levels of estrogen, and experience typical estrogen puberty.
- **Persistent Müllerian Duct Syndrome (PMDS)** occurs when the Müllerian ducts— which typically break down in a fetus with XY chromosomes— remain and begin developing as they would in a fetus with XX chromosomes. People with PMDS have XY chromosomes, a penis and testes, and also may have a uterus, fallopian tubes, and/or upper vaginal canal. PMDS may be discovered later in life due to suspicious abdominal pain or uterine bleeding from the urethra.

Like non-intersex children, intersex children usually receive a sex assignment of either male or female at birth, based on their genital appearance. (Assigning a sex for purposes of raising a child as a boy or a girl does *not* require infant surgery; *see* discussion at II, *infra*.) If a baby has noticeable genital variations, providers may investigate and consider factors such as chromosomes, internal organs, and hormonal or genetic characteristics as well. Hughes et al. *Consensus statement on*

management of intersex disorders 91 Arch Dis. Child. 554, 556 (2006). Experts' opinions differ regarding which factors carry the most weight in sex assignment decisions, and individual providers could make opposite recommendations for the most appropriate sex assignment for a given intersex child. Diamond et al., *Gender Assignment for Newborns with 46XY Cloacal Exstrophy: A 6-Year Followup Survey of Pediatric Urologists*, 186 J. Urol. 1642, 1643, 1642-1645 (2011); Houk & Lee, *Approach to Assigning Gender in 46,XX Congenital Adrenal Hyperplasia with Male External Genitalia: Replacing Dogmatism with Pragmatism*, 95 J. Clin. Endocrinol. & Metab. 4501, 4505-4507 (Oct. 2010).

What this means in practice is that even an intersex person's medical providers can only offer their best guesses. Sometimes these guesses are correct, and an intersex person will identify with and continue living in the binary sex category they were originally assigned. However, this is frequently not the case. Observed rates differ based on variation: data show that about 5% of individuals with Complete Androgen Insensitivity, 10% of individuals with Congenital Adrenal Hyperplasia, 12.5% of individuals with Ovotesticular "DSD," and 20% of individuals with Partial Androgen Insensitivity do not identify with their originally assigned sex. P.S. Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 Nat. Rev. Urol. 620, 621-622 (Nov. 2012). For people with 5-alpha Reductase Deficiency, the rate is over 60%. ***Id.***

Faced with this reality, physicians who treat intersex individuals broadly recognize today that the key determinant of an individual's sex classification is their ultimate gender identity. Lee et al., *Global Disorders of Sex Development Update Since 2006: Perceptions, Approach and Care*, Hormone Research in Paediatrics, 11 (2016). This shift reflects the fact that neither chromosomes, nor gonads, nor genital appearance at birth is a consistently successful predictor of the correct sex assignment for intersex children, and medical providers now recognize that "future gender identity cannot be predicted for any infant with absolute certainty." Johnson et al., *Differences of Sex Development: Current Issues and Controversies*, 50 UROL. CLIN. N. AM. 433, 438 (2023). In other words, there are no reliable criteria in terms of bodily traits that can objectively and accurately indicate another person's "true sex." Accordingly – for transgender people as well as intersex people – it is not scientifically or legally sound to enforce legislative restrictions that purport to do just that.

II. Intersex People Experience Discrimination and Harm From Reductive Notions of What Male or Female Bodies "Should" Look Like.

Like transgender individuals, intersex people face discrimination in contexts including education, employment, healthcare, and public services. In a recent survey, 67% of intersex people reported some form of discrimination within the prior year. Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022* (Ctr. for Am. Progress, 2023),

https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022. Specifically relevant here, 50% of LGBTQ youth who are intersex have been discouraged or prevented from using restrooms that align with their gender identity. The Trevor Project, *The Mental Health and Well-Being of LGBTQ Youth Who are Intersex*, 14 (December 2021).

Intersex people are also frequently subjected to non-consensual surgery in infancy and early childhood that aims to forcibly conform an intersex child's body to match stereotypes associated with the assigned sex category. This practice, known as Intersex Genital Mutilation (IGM), is most commonly carried out before the age of two and includes procedures like clitoral reduction, infant vaginoplasty, relocating the penile urethral opening, and removing gonads or other internal reproductive organs. Human Rights Watch & interACT, "*I Want To Be Like Nature Made Me": Medically Unnecessary Surgeries on Intersex Children in the US*, 25, 48-49 (2017) https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us. Operating unnecessarily on intersex infants violates self-determination and carries serious risks to which the patient cannot yet consent, including sterilization, loss of future sexual function, and the unique risk that infant surgery will enforce a sex assignment that will not match the individual's gender identity. *Id. 9-10.* For these reasons, IGM has been decried by human rights organizations, legal experts, and leaders in the medical field. *Id. 42,*

96-97, 132-152; United Nations Office of the High Commissioner for Human Rights, *Background Note: Human Rights Violations Against Intersex People,* (2019); American Bar Association, Resolution 511 (2023), https://www.americanbar.org/news/reporter_resources/midyear-meeting-2023/house-of-delegates-resolutions/511; M. Joycelyn Elders et al., *Re-Thinking Genital Surgeries on Intersex Infants* (Palm Ctr., June 2017), https://tinyurl.com/4x3ansn2.

IGM is starkly distinct from gender-affirming care. Crucially, gender-affirming care is necessary medical treatment sought by a patient to alleviate gender dysphoria or meet self-defined embodiment goals consistent with their gender identity, while IGM is imposed upon very young intersex children without their consent and irrespective of what their own wishes and needs will be. Ironically, while transgender youth face a deluge of political attacks on access to gender-affirming care, intersex children continue to suffer nonconsensual IGM in hospitals across the United States. Brief for Amicus Curiae interACT: Advocates for Intersex Youth in Support of Petitioner, *United States v. Skrmetti*, No. 23-477 (U.S. Sept. 6, 2024), https://interactadvocates.org/wp-content/uploads/2024/09/USA-v-Skrmetti-Amicus-Curiae-interACT-Brief-in-Support-of-Petitioner.pdf. In fact, current legislative bans on gender-affirming care make explicit exceptions to *avoid* restricting the practice of IGM. *Id.* This hypocritical approach cruelly denies

transgender youth the care they need while simultaneously exposing intersex children to ongoing harm, depriving both groups of bodily autonomy.

The superficially contradictory result – that certain medical interventions are banned for transgender young people while intersex infants cannot escape them – is explainable only through the lens of enforcing conformity with one's sex assigned at birth. *Id.* Promoting IGM seeks to force intersex infants onto one side of the "line" (either "M" or "F") as swiftly as possible, while blocking access to transition-related healthcare attempts to keep transgender youth from ever crossing to the other side of that line. This same pattern appears in legislation like HB 121 that purports to "objectively" sort all individuals into one of two boxes, downplaying natural variation on one hand and disallowing self-identification on the other. In *amicus*'s experience advocating for intersex rights over almost 20 years, rigid and restrictive views of what it means to be male or female often go hand-in-hand with anti-intersex bias, including approval of "normalizing" intersex infants through coercive genital and sterilizing surgeries.

III. The Act's Definitions of "Sex," "Male," and "Female" Neither Adequately Nor Accurately Include People with Intersex Variations.

As the foregoing discussion illustrates, challenges inevitably arise when attempting to classify intersex people based on reductive notions of stereotypical sex development. Just as no specific bodily trait (or combination thereof) can reliably determine the correct sex assignment for an intersex child, any policy that purports

to define an individual's sex based on their chromosomes, genitals, gonads, gametes, or hormone function will always misclassify some intersex people, and will outright exclude others. HB 121 is no exception.

A. The Definitions Do Not Clearly Apply to All Intersex People.

HB 121's definitions of "female" and "male" reference chromosomes (specifically XX or XY), gametes (ova or sperm), and how the reproductive and endocrine system is "oriented" around the production of such gametes (a concept that is left abstract and amorphous in the text). HB 121 § 2(4),(7). It is simply not the case that all individuals can be so neatly classified.

- Some intersex individuals have characteristics matching *neither* of HB 121's definitions. A person with Klinefelter Syndrome who has 47XXY chromosomes, or a person with Turner Syndrome who has 45X chromosomes, is not described by XX- or XY-based criteria. Intersex Variations Glossary at 21, 29. Others who produce neither sperm nor ova likewise fit neither definition, such as someone with Swyer Syndrome who has "streak" gonads – tissue that did not develop into testes or ovaries and does not produce any gametes. *Id.* at 28.
- Other intersex individuals have a characteristic that would match *both* definitions. For example, a person with 46XX/46XY chimerism who technically has both XX and XY chromosomes could fit the Act's definitions

of "male" *and* "female," as could a person with ovotestes who produces both ova and sperm. *Id.* at 14, 25.

- Some intersex individuals have chromosomes and/or gamete production that may fit one definition under HB 121, while additional aspects of how their "reproductive and endocrine system [is] oriented" arguably point toward the other. For example, in De la Chapelle Syndrome a person's XX chromosomes would define them as "female." Since their testes do not produce sperm, they do not technically fit the Act's definition of "male." However, having testes, seminal vesicles, a prostate, and a penis seems indicative that their reproductive system was "oriented around the production of" sperm. *Id.* at 16. And in Swyer Syndrome, many individuals with XY chromosomes will develop a uterus and fallopian tubes, and some may experience menstrual bleeding. *Id.* at 28. With assisted reproductive technology, some may be able to carry a pregnancy.

HB 121 provides no clarity regarding which facilities (if any) intersex individuals in the above scenarios are permitted to use.

Lastly, there are many intersex individuals whose chromosomes and gametes align with a single definition under HB 121, but that category does not match their gender identity (and often also does not match their sex assigned at birth). People with Complete Androgen Insensitivity (CAIS), who have XY chromosomes and

produce sperm, are nearly always assigned female due to their external appearance and typically grow up to identify as women. *Id.* at 10. People with Congenital Adrenal Hyperplasia (CAH) (who have XX chromosomes and produce eggs) are sometimes assigned male at birth if their genitals significantly "virilized" in utero due to androgen influence. *Id.* at 14. On occasions when such individuals are assigned male, they often continue to live happily as men. Houk and Lee, 4503, 4506. Under HB 121's definitions, intersex women with CAIS and intersex men with CAH (among others) are arbitrarily forced into categories inconsistent with their identity and lived experience.

B. The Exclusion and Misclassification of Intersex People Is Not Negated by "Would Otherwise" and "But For" Shoehorning in HB 121.

In *Edwards v. Montana*, the definitions of "female," "male," and "sex" contained in SB 458 (identical to those in HB 121) were found to exclude the intersex Plaintiffs in that case because such definitions declared "as a matter of law that human beings can only be 'exactly' one of the two sexes" and did not accurately "account for [intersex Plaintiffs'] biological composition." *Edwards v. State of Montana*, No. DV-23-1026, Order on Cross-Motions for Summary Judgment, at 11 (Mont. 4th Jud. Dist. Ct., Missoula Cnty. Feb. 18, 2025). In the current case, the District Court declined to specifically address whether HB 121's definitions technically "exclude" intersex people. PI Op. at 4.

It bears mentioning that HB 121 does contain a vague allowance for individuals who "would otherwise fall within" the definition of female or of male "but for a genetic or biological condition." HB 121 § 2 (4), (7). This language is presumably intended to account for people with intersex variations; however, that is not the same thing as being intersex-*inclusive*. Rather, this "explaining away" of intersex people clumsily sweeps them into one of two restrictive categories that – in Defendants' worldview – are "supposed" to fit everybody. Ironically, the inclusion of this "would otherwise"/"but for" language underscores how the Act's narrow and unscientific definitions fail to adequately capture people with intersex variations.

Furthermore, even with this language, it is not clear whether any given intersex person *"would otherwise"* have fit the Act's criteria for "male" rather than for "female" (or vice-versa) but for their particular variation. *See* Appellees' Brief. at 40. This language seems to suggest that every intersex individual must have some physical characteristic(s) that the Act would consider the "real" indicators of their sex category, and some other characteristics that are to be written off as merely part of their confounding "biological or genetic condition" (i.e. their intersex variation). But which are which? If someone with XX/XY chimerism *could* fit both definitions, how does one determine which definition they *"would"* have fit *but for* their chimerism? Is the "XX" half of their karyotype determinative, or is it the "XY" half? Likewise, for a person with Swyer Syndrome who has fallopian tubes and a

functioning uterus, do these organs indicate that their reproductive system is overall "oriented" such that it "would have" produced ova but for their variation? Or do their XY chromosomes indicate that their streak gonads "would have" become sperm-producing testes but for their variation?

Intersex Plaintiff-Appellee John Doe has raised this issue non-hypothetically. Because his physical characteristics do not match either definition, he has no way of knowing which facilities he may lawfully use. *See* Appellees' Br. at 38-39. Defendants-Appellants cavalierly asserted that John Doe has nothing to worry about since he "is intersex due to a genetic condition," and the Act "expressly includes as male '[a]n individual who would otherwise fall within this definition, but for a biological or genetic condition.'" Appellants' Br. at 14. But how can John Doe be confident that he would not instead be (forcibly) "expressly include[d] as *female*" when the Act's "but-for" inclusion scheme is so arbitrary and opaque? In context, Defendants-Appellants' reasoning is hardly reassuring.

IV. HB 121 Clearly Violates Intersex Individuals' Rights Under the Montana Constitution.

Whether or not one reads the Act's definitions as "excluding" intersex individuals *per se*, the District Court correctly pointed out that even "definitions [that] are inclusive of transgender and intersex individuals" can "still adversely

affect[]" these communities "by said classification."[1] PI Op. at 37. Bracketing the question of whether it is possible to split all intersex people among the Act's two definitions based on some divination of where they "would otherwise fall," the process of doing so would run afoul of their rights under the Montana Constitution regardless. *Amicus* agrees with the District Court's assessment that Plaintiffs are likely to succeed on their Privacy and Equal Protection claims.[2]

A. Violation of Privacy

Individual privacy protections under the Montana Constitution extend to both "informational privacy" (guarding against "dissemination" of "sensitive" personal information) and "autonomy privacy" (guarding against "intrusion" into personal decision-making and personal activities). Mont. Const. art. II, § 10; *State v. Nelson*, 283 Mont. 231, 241, 941 P.2d 441, 448 (1997). As to intersex individuals, HB 121 blatantly violates both of these aspects of the privacy right.

First, HB 121 violates informational privacy by potentially requiring disclosure of an individual's intersex status or specific sex characteristics. As Plaintiffs-Appellees discuss, covered entities may be sued for failing to prevent individuals from using facilities designated for a sex that the Act does not consider

[1] Defendants-Appellants further opined that John Doe should not be impacted because he was assigned male at birth and has a male gender identity. Appellants' Br. at 14. However, gender identity is specifically excluded from the Act's definitions, and sex assigned at birth clearly does not always indicate one's chromosomes and gametes.

[2] *Amicus* focuses on these claims but concurs with Plaintiffs-Appellees that HB 121 additionally violates the rights to due process and to pursue life's basic necessities. Compl. ¶ 149-152, ¶ 158.

them to be – which means that "the anatomy, genetics, and medical history of the person alleged to be in the wrong facility" will be directly at issue in such litigation. Appellees' Br. at 36; *see* PI Op. at 42-43. The recognized "zone of [informational] privacy," which has been construed to include medical history, certainly covers personal details related to an individual's intersex variation and associated physical characteristics. *See Nelson*, 283 Mont. at 241, 941 P.2d 441.

Second, HB 121 violates intersex individuals' right to "autonomy privacy" by usurping their right to self-identify their own sex and gender, and by interfering with their ability to make decisions accordingly about which restrooms (and other facilities) to use. In *Edwards v. Montana*, definitions identical to those in HB 121 were found to be "particularly burdensome to intersex Plaintiffs," who were forced to misidentify themselves under definitions that could not accurately account for the composition of their individual bodily characteristics. *Edwards*, at 11, 20. That court held the definitions violated the Montana Constitution in part because intersex Plaintiffs were "require[d] … to define their own existence pursuant to the State's definitions, even when the State's definitions conflict with an individual's licensed physician, a person's cultural identity…or an individual's own concept of existence." *Id.* at 24-25. By the same token, applying HB 121's definitions – which expressly bar consideration of one's lived experience and self-identification – would force many intersex people (and essentially all transgender people) into a category

and a restroom that is not correct for them. This impedes individuals' "autonomy privacy" in terms of self-definition as well as decision-making "about how to live in accordance with [one's] gender identity." *See* Appellees' Br. at 36.

B. Violation of Equal Protection

The Montana Constitution provides that "[n]o person shall be denied the equal protection of the laws." Mont. Const. art. II, § 4. HB 121 violates this guarantee because it prohibits individuals whose intersex variations do not fit the Act's definitions of "male" or "female" from accessing covered facilities on the same terms as non-intersex individuals whose bodies do match these definitions. *See* Appellees' Br. at 20. On the basis of their variations in sex characteristics, HB 121 renders many intersex people unable to lawfully access sex-separated facilities consistent with their gender identity (and may preclude some from accessing any such facilities at all). In these ways, it treats intersex people (as well as transgender people) differently than similarly situated individuals who are not intersex (and not transgender).

In *Edwards*, SB 458 was found to also violate the Equal Protection rights of intersex Plaintiffs under the Montana Constitution because its definitions allowed unequal treatment of intersex versus non-intersex individuals. For instance, the court observed that if one of the intersex Plaintiffs were fired for presenting as a woman, SB 458 (which defined her as "male" based on her chromosomes and gamete

production) would deny her recourse, but not if she were a non-intersex woman whose physical characteristics fit the legislative definition of "female." *Edwards,* at 27. With HB 121 featuring identical definitions, the same conclusion is warranted with regard to unequal treatment of intersex people in the context of sex-separated facility use.

CONCLUSION

Enforcing HB 121 will violate the rights of intersex Montanans by barring them from covered facilities that align with their gender identity (and, in some cases, possibly from all covered facilities). The District Court found that Plaintiffs-Appellees—several transgender individuals and one intersex individual—had demonstrated a likelihood of success on the merits of their claims that HB 121 violates their Equal Protection and Privacy rights under the Montana Constitution, and preliminarily enjoined the law accordingly. *Amicus* has offered supplementary information to illustrate the unique ways in which HB 121 impacts people with a range of different intersex variations. Under HB 121, intersex people, like transgender people, are disregarded and deprived of their rights and dignity, and *amicus* concurs with Plaintiffs-Appellees and the District Court that they would suffer irreparable harm from the enforcement of HB 121. For the foregoing reasons, *amicus* respectfully urges that the District Court Order issuing the preliminary injunction be affirmed.

RESPECTFULLY SUBMITTED this 28th day of October, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. Pro. 14, I hereby certify that this brief is printed with proportionally spaced Times New Roman typeface of 14 points; is double-spaced except footnotes and block quotes; and the word count of 4,978 words is less than the 5,000 word limit, exclusive of tables and certificates.

RESPECTFULLY SUBMITTED this 28th day of October, 2025.

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