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; and 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.

APPELLANTS' REPLY BRIEF

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

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INTRODUCTION

The Montana Legislature passed HB121 to promote safety and maintain the longstanding norm of protecting modesty and privacy through sex-segregated facilities in narrow contexts. HB121 protects biological girls/women from having to undress in a locker room with biological boys/men. It also protects a woman with an abusive husband by preventing him from using an ambiguous law to gain access to her at a domestic violence shelter. It protects incarcerated women from having to change, shower, and generally cohabitate with men. This is not an attempt to exclude transgender individuals from society. It is an attempt to preserve the privacy and modesty long recognized as appropriate. *See, e.g.*, MCA § 49-2-404 (1974 law providing that "[s]eparate lavatory, bathing, or dressing facilities based on the distinction of sex may be maintained for the purpose of modesty or privacy."). No level of scrutiny permits this Court to usurp the Legislature's appropriate policy decision.

ARGUMENT

I. Plaintiffs' claims are not justiciable.

The Act regulates "covered entities," and the only remedy provided is against covered entities. HB121 §§ 2(3), 4. Plaintiffs do not dispute that the Act does not permit suits against them or permit their joinder to a

suit against a covered entity. Nor have Plaintiffs shown any actual, present controversy as to any of the restrooms Plaintiffs identified. Yet, Plaintiffs ignore all this and instead cherry-pick one phrase from HB121 § 3(2) that they contend regulates them. AB at 12-13. But this phrase must be read in context. Section 3 lays out the list of substantive rules that *covered entities* must follow. Among that list of substantive rules, § 3(2) makes it clear *to covered entities* that individuals are not to use the facilities designated for the opposite sex. And the Act's enforcement mechanism likewise applies *only* to covered entities. *See, e.g.*, *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011) (no standing where national-day-of-prayer law "imposes duties on the President alone").

Additionally, Plaintiffs showed no enforcement authority by Defendants. *See Am. Freedom Def. Initiative v. Lynch*, 217 F. Supp. 3d 100, 105 (D.D.C. 2016). Plaintiffs contend (at 14-15) this is unnecessary, "[r]ather, standing exists where a plaintiff's injury is 'fairly traceable' to the defendant's conduct and 'would be alleviated by successfully maintaining the action.'" But no such traceability exists here because Defendants have no connection to HB121. MCA § 50-1-103 only permits

the Department of Health to bring an action, through the Attorney General, to enforce a public health law "administered by the department." AB at 15. And MCA § 2-15-103 only grants the Governor "full powers of supervision, approval, [and] direction" over state departments to the extent those departments are "administer[ing] the policies of the executive branch." *Id.* HB121 is not "administered by the department" or a policy of the executive branch.

Plaintiffs, relying on *Gryczan v. State*, 283 Mont. 433, 942 P.2d 122 (1997), argue (at 14-15) they need not show enforcement authority because suits challenging the constitutionality of a statute against the State are always permissible. But in *Gryczan*, this Court held that plaintiffs had standing to challenge the constitutionality of a Montana law criminalizing same-sex intercourse, despite the State not having prosecuted any of the plaintiffs "because enforcement [of the statute] ha[d] not been foresworn by the Attorney General." *Id.* at 446. The determinative fact was the Attorney General's ability to enforce the statute.

This Court has also not recognized blanket "public interest standing." AB at 15. Instead, in *Committee for an Effective Judiciary v. State*, it held that plaintiffs could assert the public interest of the right to vote

to challenge a law which effectively eliminated rights to vote for certain judicial candidates in violation of a constitutional provision that was "so clearly intended to benefit" voters. 209 Mont. 105, 108, 679 P.2d 1223, 1225 (1984).

Finally, the Act is not "immunized … from constitutional review" because Plaintiffs' instant claims are non-justiciable at this early stage. AB at 15. Plaintiffs have not shown the law can *never* be challenged, so their argument fails on its own terms.[1]

II. Plaintiffs' claims fail on the merits.

A. Plaintiffs' facial claim fails.

For their facial challenge, Plaintiffs must show "'that the law is unconstitutional in all of its applications.'" *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131. Plaintiffs recognize they are unable to meet this demanding standard, so they focus on how the law will supposedly affect transgender Montanans and complain that to apply the actual standard would generally preclude relief. AB at 32-33. A facial challenge is indeed "the most difficult challenge to mount

[1] The Court should reject League Amici's argument (at 3-4) that it must determine *Amici's* potential standing for the same reason. League Amici are not parties—their alleged harm is irrelevant.

successfully," *United States v. Salerno*, 481 U.S. 739, 745 (1987), because the plaintiff seeks invalidation of an entire statute claiming it "is unconstitutional as written." *See United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010). Accordingly, the no-set-of-circumstances test balances the Legislature's ability to enact a law with the Court's very limited role to invalidate a law in its entirety.

City of Los Angeles v. Patel, 576 U.S. 409 (2015), does not alter this analysis. AB at 32. There, a statute requiring hotels to maintain certain information and provide it to the police without a warrant violated the Fourth Amendment. *Id.* at 421. The court held that the city could not insulate the ordinance from facial review by relying on *other* Fourth Amendment exceptions (e.g., exigent circumstances) because these exceptions operate under *any* law addressing warrants and thus would insulate *every* warrant statute from review. *Id.* at 418-19.

Here, Defendants are not invoking an equal protection exception when arguing Plaintiffs cannot succeed on their facial challenge. Instead, Defendants have demonstrated the law operates constitutionally in most circumstances—whether it be a woman entering a men's restroom to avoid longer lines, or a man entering a women's locker room for

gratification. The law is clearly constitutional in these circumstances; Plaintiffs' facial challenge must fail.[2]

B. Plaintiffs' equal protection claim fails.

1. The Act classifies, but does not discriminate, based on sex.

The Act clearly applies on the basis of an individual's sex as either male or female at birth, determined by the individual's possession of either XX or XY sex chromosomes, while accounting for genetic conditions. *See* HB121 § 2(4), (7). The Act makes no mention of transgender status, and the Act's operative definitions, male and female, each include transgender people. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 808 (11th Cir. 2022).

Similarly, the Act does not prohibit men from using women's facilities while permitting women to use men's facilities. *See United States v. Skrmetti*, 145 S. Ct. 1816, 1831 (2025) ("The law does not prohibit conduct for one sex that it permits for the other [as] no minor may be

[2] Plaintiffs' argument (at 33) that such a conclusion would allow for discrimination assuming the targeted group is small enough is also meritless. The Act does not target transgender people. It preserves privacy and protects women. Plaintiffs object to this policy, but that does not mean they have successfully demonstrated the Act is facially unconstitutional. *See Roe v. Critchfield*, 137 F.4th 912, 924-25 (9th Cir. 2025).

administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence[.]"); *see also Trump v. Orr*, No. 25A319, 2025 WL 3097824, at *1 (U.S. Nov. 6, 2025) (printing biological sex on passports does not "subject[] anyone to differential treatment").[3]

Plaintiffs (at 17-22) do not dispute that the Act treats the biological sexes the same but seek to fundamentally change the definition of sex to include subjective gender identity. They claim that refusing to let "[a] transgender woman born with the characteristics the Act categorizes as 'male' … use the women's restroom," while allowing "a cisgender woman born with 'female' characteristics" to use that room is sex discrimination. But "sex" has always been defined as an "immutable characteristic determined solely by the accident of birth." *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The two definitions must remain distinct. *See Adams*, 57 F.4th at 809. For this reason, Plaintiffs (at 18-20) are also

[3] Plaintiffs (at 18-20) disregard every relevant federal precedent and rely heavily on Montana district court decisions, which this Court has yet to review, arguing Montana's Constitution provides broader protections. However, they fail to articulate how this Court determines whether a class is similarly situated in any way meaningfully different than federal courts—each similarly attempts to determine the class that is being allegedly discriminated against.

incorrect that the act classifies based on transgender status because it treats people who are different biological sexes but who have the same gender identity differently.[4] *See Tennessee v. Kennedy*, No. 1:24cv161-LG-BWR, 2025 WL 2982069, at *9-10 (S.D. Miss. Oct. 22, 2025) ("Title IX … includes express … carve-outs for differentiating between the sexes when it comes to separate living and bathroom facilities, among others;" thus, "HHS exceeded the scope of its statutory authority when it expanded the Title IX phrase 'on the basis of sex' to include 'discrimination on the basis of gender identity.'").

Plaintiffs, relying on *Snetsinger v. Montana University System*, argue (at 18) that a seemingly neutral classification can violate equal protection if "in reality [it] impose[s] different burdens on different

[4] Plaintiffs also conflate these definitions when they argue (at 37) Section 49-2-404 is distinguishable from HB121 because HB121 "purports to tell transgender people what sex they are." And Amicus interACT's arguments (at 9-11) suffer the same flaws. If a law cannot use the "objectiv[e]," (*see* interACT Amicus at 14), biological definition of sex to classify people in a non-discriminatory way, then all situations in which sex-separations are necessary (e.g., domestic violence centers or correctional institutions) will be impossible.

classes of persons."[5] 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445. In *Snetsinger*, a university policy allowing unmarried heterosexual couples, but not unmarried homosexual couples, to receive health benefits violated equal protection because, even though the policy referred to marriage, the university did not actually require marriage. It allowed a heterosexual couple to attest to their domestic partnership in an affidavit but refused the same for homosexual couples. But here, the Act does not purport to apply to sex, while in actuality applying to gender identity. Instead, it makes a non-discriminatory classification based on biological sex.

2. The Act is subject to rational basis review.

This Court "has not yet explicitly identified the level of scrutiny applicable to classifications that are sex-based," *Cross v. State*, 2024 MT 303, ¶ 61, 419 Mont. 290, 560 P.3d 637 (McKinnon, J., concurring), but it should hold that when a law classifies, but does not discriminate, based

[5] Even if a law imposes "*different* burdens on *different* classes of people," it should not violate the Equal Protection Clause. *Id.* (emphasis added). Instead, the analysis should be whether a law imposes different burdens on *the same* class of persons.

on sex, rational-basis review applies.[6] For heightened scrutiny to apply, a law must *discriminate* based on sex, e.g., it must "prescribe[] one rule for [women], [and] another for [men]." *Sessions v. Morales-Santana*, 582 U.S. 47, 58 (2017) (collecting cases).

Montana's Equal Protection Clause requires the same rule. Article II, Section 4 prohibits sex-based classifications, requiring strict scrutiny only as to fundamental rights—freedoms of speech and religion, the right of privacy, and the rights to vote and interstate travel. *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 43, 744 P.2d 895, 897 (1987). Plaintiffs disagree and contend (at 25-26) that "'[t]he guarantee of equal protection is a fundamental right' period." However, this cannot be squared with this Court's precedent, which articulates three levels of scrutiny depending on the right or classification at issue. And it would make this Court a super-legislature.

Plaintiffs also argue (at 25-26) that the Court should consider sex a suspect classification and apply heightened scrutiny to any law that even references sex. However, there are inherent differences between the

[6] Because the Act does not burden the rights to privacy and to pursue life's basic necessities, neither of these claims require application of strict scrutiny. *See* Part II(C)-(D), *infra*.

sexes that sometimes requires non-invidious, sex-based legislation, *see Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981), so courts treat sex-based classifications differently than other classifications. *Skrmetti*, 145 S. Ct. at 1828-30.

Alternatively, if this Court holds that HB121 classifies based on transgender status, it should hold that transgender status is not a suspect class because it "is not marked by the same sort of 'obvious, immutable, or distinguishing characteristics' as race or sex," is not "definitively ascertainable at the moment of birth," is not a "discrete group," and has not been historically subject to "a longstanding pattern of discrimination *in the law*" by the state. *See Skrmetti*, 145 S. Ct. at 1851-53 (Barrett, J., concurring).[7]

Plaintiffs claim (at 22-25) that transgender people are politically powerless, but "[t]ransgender individuals have had considerable success

[7] Indeed, from 2022 to 2024, the number of 18- to 24-year-olds who previously identified as transgender was cut in half. Melissa Rudy, *Number of young adults identifying as transgender plunges by nearly half in two years*, Fox News (Oct. 22, 2025, at 7:00 am), http://foxnews.com/health/number-young-adults-identifying-transgender-plunges-nearly-half-two-years. *See also* https://www.skeptic.com/article/transgenderism-is-in-rapid-decline-among-young-americans/ [skeptic.com].

politically" with a "political record [that] shows a country vigorously engaged in a new policy issue, one in which transgender individuals have won in some areas and lost in others." *Gore v. Lee*, 107 F.4th 548, 558 (6th Cir. 2024). As Plaintiffs recognize, they have succeeded on every challenge they have brought in Montana courts. This hardly amounts to political powerlessness. Instead, maintaining some successes and some losses "is a stubborn reality of all political debates." *Id.*

Finally, HB121 was not passed with animus. AB at 23, 27-28.[8] From time immemorial, societies have recognized the need for privacy between the sexes. This has resulted in restrooms where biological women and men have privacy from the other, locker rooms where young girls and boys are not forced to disrobe in front of each other, and sleeping quarters in which one sex is not forced to sleep near the other.[9] *See Roe*, 137 F.4th at 923 (recognizing "that protecting bodily privacy is an

[8] Plaintiffs' reliance on comments made by the Lieutenant Governor cannot support this contention either, as she is not even part of the legislative process. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (single legislator's comments are insufficient to impute intent on the whole body).

[9] Organizational Amici also focus almost exclusively on restroom use and do not address the privacy concerns caused by the opposite sexes sharing other spaces such as open locker rooms.

important governmental objective" based on our "longstanding recognition that the desire to shield one's unclothed figure from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." (citation omitted)); *see also Orr*, 2025 WL 3097824, at *1 (finding challengers did not establish that displaying biological sex on passports "lack[s] any purpose other than a bare ... desire to harm a politically unpopular group"). Montana, itself, has maintained a statute for the last fifty years that has done exactly this. MCA § 49-2-404.

3. Alternatively, the Act survives heightened scrutiny.

Regardless of the level of scrutiny the Court applies, the Act survives. It was passed to protect women, a clearly legitimate interest that Plaintiffs concede. The State presented FBI crime statistics for Montana showing that the vast majority of crimes were committed by men with a disproportionate number of female victims. Consequently, ensuring women are protected in vulnerable places where security and video surveillance is limited or non-existent clearly furthers the State's interest. Especially where the Legislature received testimony about men taking advantage of lax laws to gain access to these facilities.

Plaintiffs cannot overcome this evidence, so they argue (at 29) that it is "inapposite" because it says nothing about transgender people. This makes sense, as the law was not targeted at transgender people. It was intended to protect women from men. It therefore follows that the State would be interested in evidence directly showing that men often harm women.

Plaintiffs also claim (at 28) the State lacks a compelling, or even legitimate interest, because "the Legislature provided no evidence of privacy or safety offenses in covered facilities in Montana." But Plaintiffs misunderstand the State's evidentiary burden. "A harm need not have occurred before a legislature can act; nor is it [the court's] role to decide whether the legislative action is substantively good policy." *Roe*, 137 F.4th at 925. Even "[s]trict scrutiny does not necessarily require the State to make an evidentiary showing of a compelling state interest or that the subject statute is narrowly tailored to further that interest," because these "are questions of law." *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 161, 416 Mont. 44, 545 P.3d 1074 (Sandefur, J., concurring in part, dissenting in part).

Plaintiffs also dispute (at 31-32) that invalidating the Act necessarily results in the abolition of any sex-designated facilities. Plaintiffs seem to recognize the need for such facilities but then claim the Act goes too far by limiting "access … based on restrictive definitions of 'female' and 'male.'" But if sex separated facilities are not separated by the sexes, then they are non-existent. That is the inherent trouble with Plaintiffs' conflated definitions of sex and gender identity. If all that is necessary to enter a women's facility—regardless of whether that is a restroom with individual stalls, a locker room where women are in every state of undress, or a domestic violence center where women go to seek refuge—is a statement, which cannot reasonably be substantiated, that a biological man identifies as a biological woman, then sex-separated facilities no longer exist. *See Bridge v. Okla. State Dep't of Educ.*, 711 F. Supp. 3d 1289, 1297, & n.9 (W.D. Okla. 2024). Because of the inability to enforce a regulation that is not based on an immutable characteristic, and because the Act's goal was to protect women from men—at least ninety-nine percent of those the Act covers—it is clearly narrowly tailored.

C. Plaintiffs' right to privacy claim fails.

The core of the right to privacy question is this: does society recognize that individuals have a reasonable expectation of privacy when choosing, within general view of the public, which public facility to walk into? The answer must be no. Plaintiffs should not be provided greater protections than are provided to others living in the same society who "disclose" their "identity, anatomy, and genetics" every time they choose which sex-designated facility to use.[10]

Plaintiffs claim (at 34-35) they have a right to expect that the government will not intrude in their decision regarding which facilities they use. *Id.* But a "cis" man who wishes to use a women's changing room could say the same thing. There is nothing that distinguishes Plaintiffs from every other Montanan—indeed the Montana Constitution prevents the unequal treatment of Montana citizens.

Plaintiffs similarly fail to explain how they have a "profound[]" expectation of privacy in their transgender identities above the expectation

[10] Plaintiffs do not defend or advance the district court's reasoning regarding the expansion of this Court's decisions relating to consensual sexual relations to facility usage. *See generally* AB 33-36. This Court should similarly reject this reasoning.

of privacy "cisgender" people have in theirs. AB at 35. This argument—that Plaintiffs' transgender identities will be protected if they are not required to adhere to the act—also breaks down in any context beyond a multi-occupancy restroom with individual stalls. For example, undressing in an open locker room or using the restroom, changing, or showering in a corrections facility designated for use by the opposite sex—situations Plaintiffs seek be permitted—also would result in the disclosure of a person's sex. And for society to be willing to recognize this expectation as reasonable, Montanans would generally have to consent to someone of the opposite sex being in these types of private spaces. There is no evidence that this is the case.

D. Plaintiffs' due process and right to pursue life's basic necessities claims fail.

Plaintiffs incorrectly allege that the Act violates their right to pursue life's basic necessities and right to due process. AB at 37-40. HB121 violates neither.

While Plaintiffs are correct (at 37-38) that "[u]rination, bowel movements, and menstrual hygiene are not optional and people must use restrooms to meet those needs," they are incorrect in asserting that the Act prevents anybody from pursuing those activities. On the contrary,

the Act serves to standardize restroom choice in covered entities. "[T]he idea that the right to pursue employment and life's other 'basic necessities' is limited by the State's police power is imbedded in the plain language of the Constitution," so as here, where there is no bar to access, the State may still regulate the pursuit of necessities without violating that right. *Wiser v. State, Dep't of Com.*, 2006 MT 20, ¶ 24, 331 Mont. 28, 129 P.3d 133.

Plaintiffs (at 38-40) and Amicus interACT (at 15-19) also claim the Act is unconstitutionally vague as applied to intersex people. As an initial matter, Plaintiffs' vagueness argument fails because they are not directly regulated by the Act, and because the only enforcement mechanism is by a private party against a covered entity. Because Plaintiffs cannot be penalized in any way, regardless of whether the Act is actually vague (it isn't), their due process claim must fail. *See Smith v. Drivers Improvement Bureau*, 1998 MT 94, ¶ 11, 288 Mont. 383, 958 P.2d 677 ("Statutes *which impose penalties*, … must be clear and explicit." (emphasis added)).

Regardless, the Act is not vague. Plaintiffs (at 39) contend that "intersex people are born with sex traits or reproductive anatomy that are neither only 'male' nor only 'female,'" but the Act's definitions

contemplate the classification of individuals "who would otherwise fall within [one or the other respective] definition, but for a biological or genetic condition." HB121 §§ 2(4) and (7).

The Act is also not vague as applied. AB at 38-39. Under the Act, John Doe is classified as male and may use male facilities which correspond to his birth-observed sex—and the sex with which he has always lived. Doe reports being "diagnosed with *de la Chapelle* syndrome," a genetic condition in which the individual has "two X chromosomes," but one of the X chromosomes contains the SRY gene, "typically located on a Y chromosome" leading to Doe having "both male genitalia and breast tissue." Dkt. 8, John Doe Declaration, ¶ 4. Scientific literature confirms that Doe "would otherwise fall into" the definition of male "but for a biological or genetic condition," because he possesses the sex-determining portion of the Y chromosome, even if other portions are missing. HB121 § 2(7); Nirja Thaker, et al., *A Case of de la Chapelle Syndrome*, Cureus, 2023 Nov. 2;15(11):e48150, available at National Library of Medicine, https://pmc.ncbi.nlm.nih.gov/articles/PMC10693380/.

III. The remaining factors did not support the district court's overbroad injunction.

The district court impermissibly concluded that, because Plaintiffs were likely to succeed on the merits of their claim, they did not have to show concrete irreparable harm. Dkt. 25 at 46. But irreparable harm should not be presumed for every constitutional claim as "[a] preliminary injunction is an extraordinary remedy" and "a matter of equitable discretion" that "does not follow from success on the merits as a matter of course." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 32 (2008).

Plaintiffs disagree and argue (at 40) that a showing of likelihood of success on the merits is enough. While Plaintiffs are unlikely to succeed on the merits, if this Court disagrees, it should decline to hold that an injunction should issue as of right anytime a plaintiff brings a constitutional challenge. Even in *Cross v. State*, on which Plaintiffs rely, this Court determined that the plaintiffs had shown they would suffer actual harm apart from the purported constitutional violation. *Cross*, ¶ 52.

And despite Plaintiffs' contention (at 41), the other hypothetical harms they invoked below do not qualify, either, as they failed to "show that the harm is certain ... and of such imminence that there is a clear

and present need for equitable relief." *Roudachevski v. All-American Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (cleaned up).

Additionally, the district court should have evaluated whether each of the provisions it enjoined were likely to cause irreparable injury to Plaintiffs. MCA § 27-19-201(1)(b). The Act applies to various covered entities, but Plaintiffs do not claim to be harmed by its application to correctional centers, juvenile detention facilities, local domestic violence programs or public schools (except colleges). *See* Dkt. 8; *see also St. James Healthcare v. Cole*, 2008 MT 44, ¶ 28, 341 Mont. 368, 178 P.3d 696.

Plaintiffs, relying on *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010), argue (at 42) that the district court was not required to limit itself to the plaintiffs' claimed injuries, but could enjoin applications "of the law more broadly." In *Reed*, the Supreme Court reasoned it could entertain a facial challenge "not limited to plaintiffs'" referendum petition, but including "application[s] of the law more broadly to all referendum petitions." *Id.* Even though it considered applications of the law to all referendum petitions, the Court was still addressing a harm that was specific to the plaintiffs' injury. *Id.* Here, the district court went far beyond Plaintiffs' claimed injuries (restrooms, changing rooms in public

buildings), enjoining applications of the law which had no bearing on Plaintiffs' claim, especially where the State has a significant interest in maintaining the status quo of certain sex-separated facilities (domestic violence centers, locker rooms, and correctional facilities).

Finally, the district court's treatment of the remaining factors similarly failed to give proper weight to the State's injury from having its laws enjoined. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). To support the district court's holding, Plaintiffs rely (at 41-42) on language from *Planned Parenthood of Montana v. State*, 2024 MT 228, ¶ 40, 418 Mont. 253, 557 P.3d 440, which, quoting the Ninth Circuit, said: "A plaintiff's likelihood of success on the merits of a constitutional claim ... tips the merged third and fourth factors decisively in his favor." However, this statement was made before the 2025 amendment to § 27-19-201, which expressly requires courts determine the factors independently. When analyzed independently, they do not support an injunction.

IV. This Court should decline to address the issues raised by League Amici.

This Court should deny League Amici's request (at 4) that it ignore its longstanding rule that it will only consider issues raised by amici that

are consistent with the issues raised by the parties. "[T]he district court was not given an opportunity to resolve the issues raised by amici nor is it usually consonant with sound justice to reverse the district court on issues not decided in that court." *Schwinden v. Burlington N., Inc.*, 213 Mont. 382, 397, 691 P.2d 1351, 1359 (1984) (addressing issues raised exclusively by amicus because the case was an original action and the issue raised by amici was "inherently involved" with those raised by the parties). The State has not been given a meaningful opportunity to brief these issues, nor was the district court given an opportunity to decide them.

But if the Court chooses to address these issues, it should still conclude that HB121 is valid. First, HB121 is not vague. It gives ordinary people fair notice of the conduct it is prohibiting, and this is especially true where it does not impose a criminal penalty. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498-99 (1982) ("The degree of vagueness that the Constitution tolerates … depends in part on the nature of the enactment."). Indeed, the Act does not even impose civil penalties, as its only monetary remedy is nominal damages against a covered entity. HB121 § 4.

HB121 § 3 requires covered entities designate certain facilities for the exclusive use by the sexes and take reasonable steps to ensure individuals accessing those facilities receive privacy. "Reasonable steps," a requirement League Amici makes much of (at 5-9), could be necessary, for example, when a school ensures only biological females sleep in the same room on an overnight field trip.

HB121 is also not a special law, as League Amici claim (at 10-12), because it requires the same conduct from all covered entities. Everyone in Montana will be subject to the same requirement—biological males must use male facilities and biological females must use female facilities—regardless of whether a covered entity chooses to convey this with traditional "men's" and "women's" signs, post a plaque further detailing the requirements, or has an employee inform people of the law. Consequently, the Act does not violate Article V, § 12.

Finally, HB121 does not violate Section 1-2-112(1) because it does not *require* municipalities to expend additional funds. HB121 only *requires* that multi-occupancy facilities *already in existence* be designated for use by each sex exclusively. Should a municipality want to create

additional facilities or change existing ones, that is the municipality's choice.

CONCLUSION

This Court should reverse the district court's order, or at minimum, vacate and remand. The State respectfully requests oral argument in this matter.

DATED this 12th day of November 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,918 words, excluding certificate of service and certificate of compliance.

/s/ Michael D. Russell
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Dated: 11-12-2025