Hon. Shane A. Vannatta
District Court Judge, Dept. 5
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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

CASEY PERKINS, an individual; SPENCER MCDONALD, an individual; KASANDRA REDDINGTON, an individual; JANE DOE, an individual; and JOHN DOE, an individual, Plaintiffs, 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.	Dept. 5 Cause No.: DV-25-282 OPINION & ORDER (GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION)

This matter comes before the Court upon *Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction* and brief in support ("Motion") (Dkt #s 7, 8) filed March 27, 202. On April 2, 2025, the Court entered the *Temporary Restraining Order and Order Setting Preliminary Injunction Hearing*. (Dkt # 11). On April 16, 2025, Defendants identified in the caption ("the State" or "Defendants") filed a Response. (Dkt # 16). On April 21, 2025, Plaintiffs identified in the caption ("Plaintiffs") filed a Reply. (Dkt # 17). On April 21, 2025, the Court

heard oral argument on the Motion. The parties stipulated to extending the Temporary Restraining Order until May 16, 2025. (Dkt # 18, Minute Entry). The Motion has been fully briefed. The Court has considered the record before it and deems the matter submitted for ruling.

ORDER

Based upon the following Opinion, IT IS HEREBY ORDERED that:

1. *Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction* (Dkt # 7) is GRANTED; Defendants and their agents, employees, representatives, and successors are RESTRAINED and ENJOINED from enforcing and/or otherwise implementing HB 121, directly or indirectly, until such time as the Court rules on Plaintiffs' Complaint for Declaratory Relief.
2. Pursuant to Mont. Code Ann. § 27-19-306(1) no written undertaking is required of Plaintiffs in the interest of justice.

OPINION

I. Summary of Opinion.

This ruling is a Preliminary Injunction pending final resolution of the Complaint for Declaratory Relief. Individuals affected by the new law (Plaintiffs) seek a Preliminary Injunction restraining the State of Montana (Defendants) from enforcing Montana House Bill 121 enacted by the 2025 Montana Legislature and signed by Governor Gianforte ("HB 121" or "the Act"). HB 121 requires most public facilities to designate multi-occupancy restrooms, changing rooms, and

sleeping quarters for the exclusive use of females or males; requires individuals to use the bathroom corresponding to their sex at birth; and creates a private cause of action to sue the entity for failure to take reasonable steps to police use of the multi-occupancy bathrooms by the proper sex.

The question presented is whether Plaintiffs have met the requirements of Montana's four factor preliminary injunction test required by Mont. Code Ann. § 27-19-201 (2025). Plaintiffs have met those requirements by establishing that they are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in their favor, and this Order is in the public interest. This initial ruling rests on Plaintiffs' Equal Protection (Count I) and Privacy (Count II) claims.

The Court's ruling is only a preliminary injunction based upon a first look at the case and upon a limited factual record. The parties will have further opportunity to present evidence, and the Court may make further factual determinations prior to a final ruling. Also, prior to a final ruling, a party may seek review from the Montana Supreme Court under certain circumstances.

II. Background.

On March 27, 2025, Plaintiffs filed the Complaint alleging the Act is unlawful and unconstitutional pursuant to the following counts. Count I: Equal Protection – alleging the Act facially discriminates against Plaintiffs and other transgender and intersex Montanans on the basis of both transgender status and sex; Count II: Privacy – alleging each Plaintiff has an actual and reasonable

expectation of privacy (1) in their decision to use restrooms, changing rooms, and sleeping quarters that correspond with their gender identity and (2) in their gender identity, anatomy, genetic code and medical history, and alleging the Act commands the State's interference in those decisions; Count III: Right to Pursue Life's Basic Necessities; and Count IV: Due Process. The Court does not address Plaintiffs' Count III and Count IV claims in this Opinion.

A. HB 121 (the Act).

Montana House Bill 121, 2025 Leg., 69th Sess. (Mont. 2025) ("HB 121" or "the Act") was effective upon Governor Gianforte's signature on March 27, 2025. The Act's stated purpose is,

> **Section 1. Purpose.** The purposes of [sections 1 through 4] are to:
>
> (1) reaffirm the longstanding meanings of the terms "sex", "male", and "female" in law; and
>
> (2) preserve women's restrooms, changing rooms, and sleeping quarters for women in facilities where women have traditionally been afforded privacy and safety from acts of abuse, harassment, sexual assault, and violence committed by men.

(Dkt # 1, Ex. A). The Act includes definitions for 'female,' 'male,' and 'sex.' (Id., § 2). The district court in *Edwards* ruled that SB 458, defining 'female,' 'male,' and 'sex' (which are the same definitions as those in HB 121), is facially unconstitutional. (*Edwards v. State*, Cause No. DV-23-1026, Feb. 18, 2025, Order on Cross Motions for Summary Judgment). The Court addresses the definitions in the context of HB 121. The parties also dispute whether the definitions exclude intersex people. At this stage in the proceedings, the Court does not specifically address whether the definitions exclude intersex people.

Relevant to Plaintiffs' claims, the Act includes the following safety and privacy provision,

> **Section 3. Safety and privacy in covered entities.** (1) A covered entity shall designate each multi-occupancy restroom, changing room, or sleeping quarters for the exclusive use of females or males.
>
> (2) A restroom, changing room, or sleeping quarters within a covered entity that is designated for females or males may be used only by members of that sex. Except as provided in subsection (4), an individual may not enter a restroom, changing room, or sleeping quarters that is designated for females or males unless the individual is a member of the designated sex.
>
> (3) A covered entity shall take reasonable steps to provide individuals with privacy from members of the opposite sex in designated restrooms, changing rooms, and sleeping quarters.

(Id., § 3 (1), (2), (3)). The Act's private right of action is provided in the remedies provision,

> **Section 4. Remedies.** (1) An individual who, while accessing a restroom or changing room designated for use by the individual's sex, encounters another individual of the opposite sex in the restroom or changing room has a private cause of action for declaratory and injunctive relief, nominal damages, and any other appropriate relief against the covered entity that:
>
> (a) provided the other individual permission to use a restroom or changing room designated for the opposite sex; or
>
> (b) failed to take reasonable steps to prohibit the other individual from using the restroom or changing room designated for the opposite sex.
>
> (2) An individual who is required by a covered entity to share sleeping quarters with an individual of the opposite sex has a private cause of action for declaratory and injunctive relief, nominal damages, and any other appropriate relief against the covered entity.
>
> (3) (a) All civil actions brought pursuant to this section must be initiated within 2 years after the violation occurred.
>
> (b) An individual aggrieved under this section who prevails in court may recover reasonable attorney fees and costs from the offending covered entity.

B. The Plaintiffs.

Casey Perkins is a transgender woman assigned the sex designation of male at birth, but her gender identity is female. (Dkt # 1, ¶ 13). Spencer McDonald is a transgender man assigned the sex designation of female at birth, but his gender identity is male. (Dkt # 1, ¶ 21). Spencer considers his transgender status to be private. (Id., ¶ 6). Kasandra Reddington is transfeminine assigned the sex designation of male at birth, but she identifies more feminine than masculine, without identifying as a specific gender. (Dkt #1, ¶ 35). Jane Doe is a transgender woman assigned the sex designation of male at birth but identifies as a woman. (Dkt # 1, ¶ 55). Jane considers her transgender identity to be private. (Id., ¶ 19). John Doe is intersex assigned the sex designation of male at birth but has sex traits and reproductive anatomy corresponding to both the male gender and the female gender; he identifies as a male. (Dkt # 1, ¶¶ 66, 69). John considers his status as an intersex person to be private information and his gender identity to be a private decision. (Id., ¶¶ 9, 30).

The Plaintiffs provide Declarations as exhibits to Dkt # 8 describing their experience of using restrooms (and for John Doe also changing rooms) in covered entities.

III. Legal Standard.

The 2025 amended statute, effective March 25, 2025, is the applicable standard.

> (1) A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that:

> (a) the applicant is likely to succeed on the merits;
> (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief;
> (c) the balance of equities tips in the applicant's favor; and
> (d) the order is in the public interest.
> . . . .
> (3) The applicant for an injunction provided for in this section bears the burden of demonstrating the need for an injunction order.
> (4) (a) It is the intent of the legislature that the language in subsection (1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law.
> (b) When conducting the preliminary injunction analysis, the court shall examine the four criteria in subsection (1) independently. The court may not use a sliding scale test, the serious questions test, flexible interplay, or another federal circuit modification to the criteria.

Mont. Code Ann. § 27-19-201 (2025 HB 409 amending (4) and effective March 25, 2025).

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Montanans Against Irresponsible Densification, LLC v. State*, 2024 MT 200, ¶ 10, 418 Mont. 78, 84, 555 P.3d 759, 764 ("*MAID*") (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008) (citation omitted)); *Stensvad v. Newman Ayers Ranch, Inc.*, 2024 MT 246, ¶ 27, 418 Mont. 378, 391, 557 P.3d 1240, 1247. The 2023 Legislature amended the statute to adopt the four factors from *Winter*, a conjunctive test. *MAID*, ¶¶ 10, 12; *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 12, 418 Mont. 253, 265, 557 P.3d 440, 451 ("*Planned Parenthood 2024*").

> In summary, in accordance with *Winter*, the legislature's directive, and the plain language of the statute, the preliminary injunction standard sets forth a conjunctive test that requires an applicant to make a sufficient showing as to each of the four factors. *The sufficiency of that showing* is determined using the Ninth Circuit's *serious questions framework*.

Stensvad, ¶ 29 (*emphasis* added) (addressing the plain language of the 2023 amended statute).

The 2025 amended statute states, "When conducting the preliminary injunction analysis, the court *shall examine the four criteria in subsection (1) independently*." (Mont. Code Ann. § 27-19-201(4)(b) (2025)) (*emphasis* added). This directive is clear, and the Montana Supreme Court had already been applying the conjunctive test from *Winter*. The 2025 amended statute also states, "The court may not use a sliding scale test, the serious questions test, flexible interplay, or another federal circuit modification to the criteria." (Mont. Code Ann. § 27-19-201(4)(b) (2025)) (emphasis added). This directive is less clear. On the one hand, the Legislature seems to indicate its intent that the Court is prohibited from applying the serious questions test to its analysis. On the other hand, the Legislature also seems to state that the Court may not modify the four criteria in subsection (1) by applying the serious questions test. These are two different mandates making the Legislature's overall intent unclear. The serious questions test does not modify the requirement that the applicant must make a sufficient showing as to each of the four factors (criteria). Rather, the serious questions test goes to the sufficiency of that showing. (*Stensvad*, ¶ 29).

While the Court finds the above discrepancy in the Legislature's mandates in the 2025 amended statute, in this Opinion the Court considers all the factors of subsection (1) independently in its interpretation and application of the same (Mont. Code Ann. § 27-19-201(4)(a) (2025)) without application of the serious questions test as to the sufficiency of the Plaintiffs' showing. In addition (not instead of), the Court will consider whether Plaintiffs' showing makes a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had.

"[T]he United States Supreme Court, other federal courts, and this Court have remained resolute that the purpose of a preliminary injunction is 'to preserve the relative positions of the parties until a trial on the merits can be held.'" *Stensvad*, ¶ 28 (citing *See Starbucks Corp. v. McKinney*, 602 U.S. 339, 144 S. Ct. 1570, 1576, 219 L. Ed. 2d 99 (2024); *City & Cnty. of S.F. v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 789 (9th Cir. 2019) (quoting *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010)); *Planned Parenthood 2024*, ¶ 16); *Cross v. State*, 2024 MT 303, ¶ 52, 419 Mont. 290, 314-15, 560 P.3d 637, 653 (citing *Starbucks Corp.*, 602 U.S. at 346, 144 S. Ct. at 1576, 219 L. Ed. 2d 99 (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834, 68 L. Ed. 2d 175 (1981)); *see* Mont. Code Ann. § 27-19-201(4) (expressing intent that "interpretation and application" of the new standard "closely follow United States [S]upreme [C]ourt case law")). "Consistent with this standard, we long have recognized that '[d]uring a show cause hearing on a preliminary injunction, the

district court should restrict itself to determining whether the applicant has made a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had.'" *Cross*, ¶ 52 (citations omitted).

IV. Analysis.

A. Justiciability.

1. Whether Plaintiffs' claims are ripe.

Ripeness is concerned with whether the case presents an "actual, present" controversy. *Reichert v. State*, 2012 MT 111, ¶ 54, 365 Mont. 92, 116, 278 P.3d 455, 472 (citation omitted). "Ripeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication." *Id.*, ¶ 55 (citing Wright et al., *Federal Practice and Procedure* § 3531.12, 163, § 3532.1, 383) (additional citations omitted). "The basic purpose of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.*, ¶ 54 (citations omitted).

"The constitutional component [to the ripeness inquiry] focuses on whether there is sufficient injury, and thus is closely tied to standing." *Id.*, ¶ 56 (citation omitted). "The prudential component, on the other hand, involves a weighing of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (citation omitted).

> The principal consideration under the fitness inquiry is whether there is a factually adequate record upon which to base effective review. … The more the question presented is purely one of

> law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa. ...

Id. (citations omitted).

The State's ripeness arguments blend constitutional and prudential components to the ripeness inquiry. The Court addresses the constitutional component to the ripeness inquiry in its analysis below regarding standing (injury in fact). Therefore, the Court only addresses here the prudential component of ripeness.

The State contends that the case is not ripe because there is no appropriate record on which the Court can base a decision. For each of the Plaintiffs – Perkins, McDonald, and Reddington – who have stated they use multi-occupancy restrooms, the State contends it is purely speculative that anyone (third parties) 'will raise an issue' (with Plaintiffs' use) and what if anything the covered entity would do regarding an issue raised. (Dkt # 16, p. 10-11). Here, the State appears to suggest that Plaintiffs may continue to use multi-occupancy restrooms as they had before and it will only 'be an issue' if someone complains to the covered entity and even then, it won't 'be an issue' if the covered entity provides single-occupancy restrooms.

The Court is not persuaded by the State's contention. The Act clearly states that an individual is not allowed to enter a multi-occupancy restroom designated female or male unless the individual is a member of the designated sex as defined by the Act. (HB 121, § 3(2)). This is compulsory; the Court presumes people will

obey the law and assumes the Legislature enacts laws for the people to follow. *See* Mont. Code Ann. § 1-3-223 ("The law neither does nor requires idle acts."), and In re V.K.B., 408 Mont. 392, 395, 2022 MT 94, ¶ 1, 510 P.3d 66, 69 ("The court presumes the legislature acts with deliberation and full knowledge of all existing laws on a subject and does not pass meaningless legislation."). Regardless of whether third parties 'will raise an issue,' Plaintiffs are not allowed to use the designated restrooms of their gender identity. The requirements in § 4 also bely the State's suggestion that this is optional. It is only if a covered entity provided the other individual permission to use a restroom designated for the opposite sex or if it failed to take reasonable steps to prohibit the other individual from using the restroom that the third party has a private cause of action. The fact that the Act itself does not create a private cause of action against an individual who does not comply with § 3 (rather against the covered facility), does not mean Plaintiffs do not have to comply with the Act or that they will not be made a party to such a suit. While it is speculative of when an individual will take advantage of the private cause of action in the Act (no suits have yet been filed seeking the remedies of the Act), once the Act was enacted (March 27, 2025), its provisions became law not to be selectively implemented, applied, or obeyed.

Plaintiffs' claims are not based on abstract disagreements. Plaintiffs have alleged the Act violates their constitutional rights which are implicated upon enactment of the Act. The infringement on their fundamental rights is not implicated only when there are third party suits against covered entities or when a

covered entity takes actions to implement the Act. Plaintiffs' claims addressed at this stage are purely legal questions presented, and additional facts are not required to aid in that inquiry. Therefore, there is a factually adequate record upon which to base effective review. Plaintiffs' claims are fit for judicial decision and withholding court consideration would be an undue hardship to the parties.

2. Whether Plaintiffs have standing.

"Standing is a threshold question of justiciability, required by Article VII, Section 4(1), of the Montana constitution, that focuses on whether the claimant is a proper party to assert a claim." *Cross*, ¶ 16 (citation omitted).

> [T]he 'cases at law and in equity' language of Article VII, Section 4(1) embodies the same limitations as are imposed on federal courts by the 'case or controversy' language of Article III. [. . .] Accordingly, federal precedents interpreting the Article III requirements for justiciability are persuasive authority for interpreting the justiciability requirements of Article VII, Section 4(1).

Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 2010 MT 26, ¶ 144, 355 Mont. 142, 142, 226 P.3d 567, 569 (citations omitted).

> In federal jurisprudence, "the irreducible constitutional minimum of standing" has three elements: injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), causation (a fairly traceable connection between the injury and the conduct complained of), and redressability (a likelihood that the requested relief will redress the alleged injury).

Heffernan v. Missoula City Council, 2011 MT 91, ¶ 32, 360 Mont. 207, 220, 255 P.3d 80, 91 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct.

2130, 2136, 119 L. Ed. 2d 351 (1992); *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 103, 118 S. Ct. 1003, 1016-17, 140 L. Ed. 2d 210 (1998)).

a. Injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical); also, constitutional ripeness inquiry.

The State contends that Plaintiffs have not shown a concrete injury that is actual or imminent. The State argues that it is purely speculative as to whether anyone will raise an issue (with Plaintiffs' use of restrooms), whether a lawsuit will be filed, and whether a covered entity will take actions that will harm Plaintiffs. The State also asserts that the only remedy in the Act is a private right of action against a "covered entity" and Plaintiffs are not "covered entities." The State propounds no additional arguments in support of its position on standing.

Plaintiffs argue that, as soon as it was enacted, the Act directly bars them from using facilities that correspond to their gender identity, it requires covered entities to enforce those restrictions against Plaintiffs, and in doing so the Act violates their constitutional rights.

In Montana, to meet the constitutional case-or-controversy requirement, the "plaintiff must clearly allege a past, present, or threatened injury to *a property or civil right*— i.e., an invasion of *a legally protected interest*." *Heffernan*, ¶¶ 33, 35. Plaintiffs allege that the Act violates their rights under Mont. Const. art. II, § 4 (Equal Protection), Mont. Const. art. II, § 10 (Privacy), Mont. Const. art. II, § 3 (Right to Pursue Life's Basic Necessities), and Mont. Const. art. II, § 17 (Due Process). (Dkt # 1). Plaintiffs have alleged an invasion of a legally protected interest, an illegality that is likely to cause them to suffer a threatened injury to

their exercise of constitutional rights. The support for Plaintiffs' allegations is set forth below regarding the likelihood of succeeding on the merits of their equal protection and privacy claims and regarding the likelihood that Plaintiffs will suffer irreparable harm in the absence of preliminary relief.

The Act excludes transgender people from covered entities that align with their gender identity. Plaintiffs thus have a personal stake in the outcome of the case. Plaintiffs have supported their allegations that implementation of the Act infringes their fundamental rights and a credible future and ongoing injury due to that infringement exists. Likewise, Plaintiffs have shown that any injuries that have not yet happened are sufficiently likely to happen to support present adjudication.

b. Causation (a fairly traceable connection between the injury and the conduct complained of).

"A plaintiff has legal standing to assert a claim if … the claim is based on an alleged wrong or illegality that has caused, or is likely to cause, the plaintiff to suffer a past, present, or threatened injury to person, property, *or* exercise of civil or constitutional right." *Held v. State*, 2024 MT 312, ¶ 32, 419 Mont. 403, 422-423, 560 P.3d 1235, 1249. The parties do not directly address causation.

Here, upon enactment, the Plaintiffs must comply with the Act. (HB 121, § 3(2)). Plaintiffs' compliance implicates the alleged violation of fundamental constitutional rights. There is a fairly traceable connection between the injury and the conduct complained of. The State's reliance on the argument that the Act creates a private cause of action with remedies attributed to covered entities and therefore Plaintiffs are not injured does not negate causation here. Plaintiffs'

exercise of civil or constitutional rights are nevertheless implicated by the enactment.

c. Redressability (a likelihood that the requested relief will redress the alleged injury).

"[T]he injury must be one that would be alleviated by successfully maintaining the action." *Heffernan*, ¶ 33 (citations omitted).

The State argues that Plaintiffs have not shown enforcement authority by the Defendants such that Plaintiffs are likely to have standing against all the Defendants they seek to enjoin. The State does not provide legal support that Montana requires such a showing for standing.

Plaintiffs argue that Montana's standing doctrine does not require Plaintiffs to show that Defendants are responsible for enforcing the Act and that regardless, the State, Governor, and Attorney General *do* maintain authority to implement and enforce the Act. The Governor "has full powers of supervision, approval, [and] direction" over state departments. (Mont. Code Ann. § 2-15-103). The Attorney General has parallel authority to enforce the public health laws where HB 121 will be codified. (Mont. Code Ann. § 50-1-103) (HB 121, § 5).

Regardless of the Defendants' enforcement authority, if Plaintiffs successfully maintain the action, their injury (invasion of a legally protected interest) would be alleviated. Plaintiffs clearly allege that upon its enactment, HB 121 is likely to cause them to suffer a present or threatened injury to *a property or civil right* – i.e., an invasion of *a legally protected interest*. Those injuries would

be redressed by a declaration that the Act is unconstitutional, thus rendering the law null and void.

In applying the elements in *Heffernan*, Plaintiffs have clearly alleged the constitutional case-or-controversy requirement (standing). Likewise, Plaintiffs' claims meet the constitutional ripeness inquiry (injury in fact). Below, the Court addresses the merits of those allegations.

The State has not argued that Plaintiffs lack prudential standing. Therefore, the Court does not address prudential rules here.

B. Whether Plaintiffs are likely to succeed on the merits.

Statutes enjoy a presumption of constitutionality. *MAID*, ¶ 13 (citations omitted). "[T]he party challenging a statute has the burden of proving it unconstitutional or showing that the statute infringes on a fundamental right." *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 11, 416 Mont. 44, ¶ 11, 545 P.3d 1074, ¶ 11 (citing *Weems v. State*, 2023 MT 82, ¶ 34, 412 Mont. 132, 529 P.3d, 798) ("*Weems II*") (additional citations omitted). "If the challenger shows an infringement on a fundamental right, a presumption of constitutionality is no longer available." *Id.* (citation omitted).

To prevail on facial challenges, Plaintiffs must show that "no set of circumstances exists under which the [challenged sections] would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, ¶ 14, 368 P.3d 1131, ¶ 14 ("*MCIA II*")) (additional citations omitted). "In the context of a constitutional

challenge, an applicant for preliminary injunction need not demonstrate that the statute is unconstitutional beyond a reasonable doubt, but 'must establish a prima facie case of a violation of its rights under' the constitution." *MAID*, ¶ 13 (citing *Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, ¶ 18, 440 P.3d 4, ¶ 19 (quoting *City of Billings*, 281 Mont. at 227, 935 P.2d at 251)); *Cross*, ¶ 33. "All courts agree that plaintiff must present a prima facie case but need not show a certainty of winning." *Cross*, ¶ 33 (citing Wright & Miller, § 2948.3). "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Weems*, ¶ 18 (citing *Prima facie, Black's Law Dictionary* (10th ed. 2014)); *Cross*, ¶ 33.

Plaintiffs' burden here is to present a prima facie case that they are likely to succeed on the merits showing there are no set of circumstances under which HB 121 would be valid because it is unconstitutional, or it infringes on a fundamental right. Because Plaintiffs have shown they are likely to succeed on the merits that HB 121 is an infringement on fundamental rights (set forth below), a presumption of constitutionality of the Act is no longer available.

1. Count I: Equal Protection (Mont. Const. art. II, § 4).

"The Fourteenth Amendment to the United States Constitution and Article II, Section 4 of the Montana Constitution guarantee equal protection of the law to every person." *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 18, 402 Mont. 277, ¶ 18, 477 P.3d 1065, ¶ 18 (citing *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 16, 302 Mont. 518, 15 P.3d 977). "Article II, Section 4, of the Montana

Constitution provides even more individual protection than does the Fourteenth Amendment to the U.S. Constitution." *Planned Parenthood 2024*, ¶ 29; *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, ¶ 15, 104 P.3d 445, ¶ 15.

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Mont. Const. art. II, § 4. "The plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated." *Walker v. State*, 2003 MT 134, ¶ 82, 316 Mont. 103, ¶ 82, 68 P.3d 872, ¶ 82.

"The principal purpose of [Montana's] Equal Protection Clause is 'to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action.'" *Hensley*, ¶ 18 (quoting *MCIA II*, ¶ 15) (citing *Powell*, ¶ 16). "Equal protection thus guarantees that persons similarly situated with respect to a legitimate government purpose of a law receive like treatment." *Id.* (citing *Rausch v. State Comp. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 114 P.3d 192 ("*Rausch II*")); *Planned Parenthood 2024*, ¶ 29.; *See also*, *Snetsinger*, ¶ 15.

> This Court evaluates potential equal protection violations under a three-step process. [ ] First, the Court identifies the classes involved and determines if they are similarly situated. [ ] Second, the Court determines the appropriate level of scrutiny to apply to the challenged statute. [ ] Finally, the Court applies the appropriate level of scrutiny to the statute. [ ]

Hensley, ¶ 18 (internal citations omitted to *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶¶ 15, 17, 18, 353 Mont. 265, 222 P.3d 566).

a. Identification of the classes involved and whether they are similarly situated.

Plaintiffs argue that the Act treats similarly situated classes differently by imposing restrictions on transgender and intersex people that do not apply to cisgender people. They contend the Act discriminates against transgender people in that it permits cisgender people, whose gender identity generally aligns with the characteristics defined by the Act as "female" or "male," to use covered facilities that are consistent with their gender identity, while barring transgender people, whose gender identity differs from the characteristics defined by the Act as "female" or "male," from doing the same.

The State contends that the actual classification the Act employs classifies individuals based on sex – male or female – as defined by the Act. The State argues the definitions apply to every person in Montana, not just those in the transgender or intersex communities, and do so without classifying any person on the basis of their "trans"- or "cis"-gendered identity. The State concludes that the Act cannot be said to discriminate against transgender people as a class because it does not distinguish between people on the basis of their subjective gender identity.

"The goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 29, 374 Mont. 453, ¶ 29, 325 P.3d 1211, ¶ 29 (citing *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (quoting *Atty. Gen. of U.S. v. Irish People, Inc.*, 684 F.2d 928, 946, 221 U.S. App. D.C. 406 (D.C. Cir. 1982)).

"We identify similarly situated classes by isolating the factor allegedly subject to impermissible discrimination; if two groups are identical in all other respects, they are similarly situated." *Hensley*, ¶ 19 (citing *Goble*, ¶ 29) (citing *Snetsinger*, ¶ 27; *Oberson v. U.S. Dept. of Agric.*, 2007 MT 293, ¶¶ 19-20, 339 Mont. 519, 171 P.3d 715)). "[T]o prevail on an equal protection challenge, a party must demonstrate that the state has adopted a classification which discriminates against individuals similarly situated by treating them differently on the basis of that classification." *Rausch II*, ¶ 18 (citing *See Powell*, ¶ 22).

The State's contention that the Act cannot be said to discriminate against transgender people because the definitions of 'sex,' 'female,' and 'male' apply to every person in Montana without classifying any person on the basis of their "trans"- or "cis"-gendered identity is disingenuous. "A law or policy that contains an apparently neutral classification may violate equal protection if 'in reality [it] constitutes a device designed to impose different burdens on different classes of persons.'" *Snetsinger*, ¶ 16 (citing *State v. Spina*, 1999 MT 113, P85, 294 Mont. 367, P85, 982 P.2d 421, P85). Here, the definition of 'sex' in the Act belies the apparently neutral classification based on the Act's definitions.

> "Sex" means the organization of the body parts and gametes for reproduction in human beings and other organisms. In human beings, there are exactly two sexes, male and female, with two corresponding types of gametes. The sexes are determined by the biological and genetic indication of male or female, including sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth, *without regard to an individual's*

> *psychological, behavioral, social, chosen, or subjective experience of gender*.

(HB 121, § 2(12)) (*emphasis* added). The State asserts that the inclusion of the emphasized portion of the definition "is to make clear that that is *not* relevant for purposes of the classification." (Dkt # 16, p. 16, fn 9). However, in so isolating the definition of 'sex' the State acknowledges that there is a segment of the Montana population that has a psychological, behavioral, social, chosen, or subjective experience of gender different from the Act's definitions. In reality, the Act via its definitions constitutes a device designed to impose different burdens on different classes of persons.

The factor that is subject to impermissible discrimination is that cis female/male individuals are allowed to use restrooms, changing rooms in covered entities that correspond to their gender identity and transgender/intersex female/male individuals are not. Therefore, the two classes are (1) cis female/male individuals and (2) individuals who identify as transgender/intersex female/male. If the Act's requirement of sex designation at birth is removed, the two groups (cis gender people and transgender/intersex people) are similarly situated in all other respects, they identify their gender as female/male. Plaintiffs have demonstrated that the Act adopts a classification which treats the similarly situated classes differently by imposing restrictions on transgender and intersex people that do not apply to cisgender people. (*See*, *Rausch II*, ¶ 18).

b. The appropriate level of scrutiny to apply to HB 121.

"We apply one of three levels of scrutiny when addressing a challenge under the Montana Constitution's Equal Protection Clause: strict scrutiny, middle-tier scrutiny, or the rational basis test." *Snetsinger*, ¶ 17 (citation omitted).

i. Whether strict scrutiny is the appropriate level of scrutiny.

"Strict scrutiny applies if a suspect class or fundamental right is affected." *Snetsinger*, ¶ 17 (citation omitted).

Whether transgender status is a suspect class.

The State contends that federal and state case law does not support identifying transgender status as a suspect class for equal protection purposes. The State relies on the following from *Snetsinger*.

> Sexual and gender orientation is not considered a "suspect class" and discrimination so based does not merit strict scrutiny/compelling interest analysis under federal law. *See Lofton v. Kearney* (S.D. Fla. 2001), 157 F. Supp. 2d 1372, 1382 (collecting cases at n.14), *affirmed by Lofton v. Sec'y of the Dep't of Children and Family Services* (11th Cir. 2004), 358 F.3d 804; *Baker v. State* (Vt. 1999), 170 Vt. 194, 744 A.2d 864, 878 n.10; *Lawrence v. Texas* (2003), 539 U.S. 558, 579-88, 123 S. Ct. 2472, 2484-85, 156 L. Ed. 2d 508 (O'Connor, J., concurring).

Snetsinger, ¶ 61 (Nelson, J., specially concurring) (emphasis added).

> As with federal case law, this Court's jurisprudence has never acknowledged gender orientation as a suspect class. Although we have stated that Article II, Section 4 provides more individual protection than does its federal counterpart, *Cottrill*, 299 Mont. at 42, 744 P.2d at 897, in practice, Montana's equal protection jurisprudence – as the Court's Opinion demonstrates – largely follows federal law. *See* Vicki C. Jackson,

> *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15, 28-29 n.45 (Winter 2004) (hereinafter *Jackson*); *Elison*, at 36-38.

Id., ¶ 62 (Nelson, J., specially concurring).

Indeed, and as the State notes, as of 2024 the Montana Supreme Court "has not yet explicitly identified the level of scrutiny applicable to classifications that are sex-based, nor has it explicitly stated that sex is a suspect class." *Cross*, ¶ 61 (McKinnon, J., concurring) (citing the district court order).

> Federal cases currently being litigated on equal protection grounds (regarding gender-affirming care) "are instructive in certain ways, but they cannot answer what this Court is being asked: how sex/gender discrimination and suspect class discrimination should be handled under the unique equal protection provision of the *Montana* Constitution.

Cross, ¶ 60 (McKinnon, J., concurring).

Plaintiffs posit that transgender Montanans constitute a suspect class pursuant to application of the definition adopted in *In re S.L.M.*. "A suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *In re S.L.M.* (1997), 287 Mont. 23, 33, 951 P.2d 1365, 1371 (quoting *San Antonio Independent School Dist. v. Rodriguez* (1973), 411 U.S. 1, 28, 93 S. Ct. 1278, 1294, 36 L. Ed. 2d 16, 40) (repudiated on other grounds in *Planned Parenthood 2024*).

Plaintiffs contend that transgender Montanans have been subjected to a history of purposeful unequal treatment *and* relegated to a position of political powerlessness. They argue that the Montana Legislature's enactment of the following bills and the Montana Executive Branch's implementation of administrative rules are examples of this purposeful unequal treatment of transgender/intersex Montanans:

- 2021 Senate Bill 280 requiring surgery and court proceedings to change gender on a Montana birth certificate.
- 2021 House Bill 112 requiring interscholastic athletes to participate under sex assigned at birth.
- 2023 Senate Bill 99 prohibiting gender-affirming health care for transgender youth.
- 2023 Senate Bill 458 requiring Montanans be classified by 'exactly two sexes, male and female' as defined by their reproductive capabilities.
- 2025 HB 121 prohibiting transgender and intersex Montanans from using facilities in covered entities that correspond with their gender identity.
- Administrative rules and policies preventing transgender people from amending their birth certificates and driver's licenses to reflect their gender identities.

Plaintiffs cite to *Grimm*, for examples of national historical discrimination against transgender individuals and of how they are a minority lacking political power. "[O]ne would be hard-pressed to identify a class of people more

discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people." *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 610-11 (4th Cir. 2020) (quoting *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018)). "[T]here is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access." *Id.*, 972 F.3d at 611 (quoting *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 749 (E.D. Va. 2018)). "The transgender community also suffers from high rates of employment discrimination, economic instability, and homelessness." *Id.*.

> Transgender people frequently experience harassment in places such as schools (78%), medical settings (28%), and retail stores (37%), and they also experience physical assault in places such as schools (35%) and places of public accommodation (8%). [ ] Indeed, transgender people are more likely to be the victim of violent crimes. [ ] So, in 2009, Congress expanded federal protections against hate crimes to include crimes based on gender identity. ... In so doing, the House Judiciary Committee recognized the "extreme bias against gender nonconformity" and the "particularly violent" crimes perpetrated against transgender persons. [ ]

Id., 972 F.3d at 612 (internal citations to Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 509-10, 517 (2016) omitted).

> [T]ransgender people constitute a minority lacking political power. Comprising approximately 0.6% of the adult population in the United States, transgender individuals are certainly a

> minority. Even considering the low percentage of the population that is transgender, transgender persons are underrepresented in every branch of government.

Id., 972 F.3d at 613.

Transgender Montanans have been subjected to such a history of purposeful unequal treatment and have been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. Transgender status is a suspect class for the purposes of equal protection analysis. (*See also*, *Cross*, ¶ 65, (McKinnon, J., concurring) ("[T]ransgender persons comprise a suspect class")). Therefore, strict scrutiny applies.

Whether sex is a suspect class.

The State asserts that the only operative class in the Act for the purposes of equal protection analysis is sex, and that it does not trigger strict scrutiny.

The Montana Supreme Court has not yet explicitly stated that sex is a suspect class. The United States Supreme Court has applied 'heightened scrutiny' when an equal protection claim involves gender-based or sex-based discrimination.

> Since *Reed* v. *Reed*, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971), this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, see *Schlesinger* v. *Ballard*, 419 U.S. 498, 506-507, 42 L. Ed. 2d 610, 95 S. Ct. 572 (1975), or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig* v. *Boren*, 429 U.S. 190, 198-199, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). See also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 441, 87

> L. Ed. 2d 313, 105 S. Ct. 3249 (1985) (differential treatment of the sexes "very likely reflect[s] outmoded notions of the relative capabilities of men and women").

J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 135, 114 S. Ct. 1419, 1424-25 (1994).

> It is necessary only to acknowledge that "our Nation has had a long and unfortunate history of sex discrimination," [*Frontiero v. Richardson*, 411 U.S. 677, 684], a history which warrants the heightened scrutiny we afford all gender-based classifications today. Under our equal protection jurisprudence, gender-based classifications require "an exceedingly persuasive justification" in order to survive constitutional scrutiny. See *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 273, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979). See also *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982); *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461, 67 L. Ed. 2d 428, 101 S. Ct. 1195 (1981).

Id., 511 U.S. at 136, 114 S. Ct. at 1425.

Montana's Constitution provides an express prohibition of sex-based discrimination in the Equal Protection Clause, a fundamental right greater than provided in the federal equal protection clause. Sex is a suspect classification. The Act's sex-based discrimination warrants strict scrutiny because sex is a suspect classification.

Below, the Court further describes discrimination based on transgender status as sex-based discrimination in violation of a fundamental right under Montana's Constitution.

Whether the Act burdens fundamental rights.

Fundamental right to equal protection of the laws.

Montana's right to equal protection is expressly provided in the Declaration of Rights. (Mont. Const. art. II, § 4). It is a fundamental right. The Court set forth above how HB 121 facially burdens this fundamental right by treating the similarly situated classes (cis female/male individuals and individuals who identify as transgender female/male) differently by imposing restrictions on transgender and intersex people that do not apply to cisgender people.

Fundamental right to be free from discrimination based on sex.

The Declaration of Rights expressly provides that the state shall not "discriminate against any person in the exercise of his civil or political rights on account of . . . sex." Mont. Const. art. II, § 4. "When legislation infringes on fundamental rights, including within the equal protection framework, it receives strict scrutiny because the interest discriminated against *is* a fundamental right." *Cross*, ¶ 62 (McKinnon, J., concurring) (citing *Planned Parenthood 2024*, ¶ 29; *Snetsinger*, ¶ 170).

> Article II, Section 4 is unequivocal in its intolerance for discrimination, which includes discrimination based on sex. Article II, Section 4 "provides even more individual protection" than its federal counterpart, *Snetsinger*, ¶ 15, so we need not parse federal gender discrimination law in search of an analogous level of scrutiny.

Id., ¶ 64 (McKinnon, J., concurring).

"[T]ransgender discrimination is, by nature, sex discrimination. This logic is supported in part by *Bostock v. Clayton County*, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), where the Supreme Court held that discrimination based on transgender status is sex discrimination." *Id.*, ¶ 63 (McKinnon, J., concurring).

> [T]he Montana Constitution's equal protection provision offers a critical distinction—like Title VII, it explicitly prohibits discrimination on the basis of sex. Thus, even if the Supreme Court limits *Bostock*'s recognition of transgender status-based sex discrimination to the Title VII context, the Montana Constitution is not limited in the same way. *Bostock*'s logic is sound: "[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."

Id. (quoting *Bostock*, 590 U.S. at 660, 140 S. Ct. at 1741).

Discrimination based on sex, as explicitly contained in the equal protection clause, includes discrimination on the basis of transgender status. By discriminating on the basis of transgender and intersex status, the Act necessarily discriminates on the basis of sex, burdening a fundamental right and triggering strict scrutiny.

Fundamental right of privacy.

"The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. "The right to privacy is fundamental; its protection 'exceed[s] even that provided by the federal constitution.'" *Cross*, ¶ 22 (quoting *Armstrong v. State*, 1999 MT 261, ¶¶ 34-35, 296 Mont. 361, 989 P.2d 364).

> That the right to privacy is separately protected in the Montana Constitution "reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." *Gryczan v. State*, 283 Mont. 433, 455, 942 P.2d 112, 125 (1997); *accord Weems v. State*, 2023 MT 82, ¶ 35, 412 Mont. 132, 529 P.3d 798 (*Weems II*) (noting a delegate's comment that the "right to be let alone" is "the most important right of them all" (quoting Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1681)).

Id. "Since the right to privacy is explicit in the Declaration of Rights in Montana's Constitution, it is a fundamental right and any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis." *Gryczan*, 283 Mont. at 449, 942 P.2d at 122.

Plaintiffs have shown that the Act burdens their fundamental right of privacy (see below analysis regarding Plaintiffs' Count II: Privacy claim).

Strict scrutiny is the appropriate level of scrutiny to apply to HB 121 in the equal protection analysis because transgender status is a suspect class, and Plaintiffs have shown they are likely to succeed on their claims that HB 121 burdens their fundamental rights – equal protection of the laws, to be free from discrimination based on sex, and right of privacy.

c. Applying the appropriate level of scrutiny to the Act.

Strict Scrutiny Applied.

"The strict scrutiny standard requires that the State demonstrate the challenged law is narrowly tailored to serve a compelling government interest and only that interest." *Cross*, ¶ 22 (citing *Stand Up Mont. v. Missoula Cnty. Pub. Schs.*, 2022 MT 153, ¶ 10) (*See also*, *Snetsinger*, ¶ 17). "[*D*]*emonstrating* a

compelling interest entails something more than simply saying it is so." *Wadsworth v. State* (1996), 275 Mont. 287, 911 P.2d 1165, 1174. The State must "prove the compelling interest by competent evidence." *Id*. To sustain the validity of an invasion of a fundamental right, the State "must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 61, 296 Mont. 207, ¶ 61, 988 P.2d 1236, ¶ 61 (citing *Pfost v. State* (1985), 219 Mont. 206, 216, 713 P.2d 495, 505.; *Wadsworth,* 275 Mont. at 302, 911 P.2d at 1174).

Having argued that strict scrutiny is not the appropriate level of scrutiny, the State does not present arguments that the Act is narrowly tailored to serve a compelling government interest. The State does conclude that, "[t]he classification and means of its implementation is therefore not only substantially related to the Act's objectives but also narrowly tailored to that stated purpose." (Dkt # 16, p. 39).

The Act's stated purpose is,

> **Section 1. Purpose.** The purposes of [sections 1 through 4] are to:
>
> (1) reaffirm the longstanding meanings of the terms "sex", "male", and "female" in law; and
>
> (2) preserve women's restrooms, changing rooms, and sleeping quarters for women in facilities where women have traditionally been afforded privacy and safety from acts of abuse, harassment, sexual assault, and violence committed by men.

(H.B. 121, § 1).

Plaintiffs contend that the State cannot show a compelling government interest (or middle-tier scrutiny legitimate interest) because there is no evidence

that barring transgender people from using sex separated facilities consistent with their gender identity is necessary to achieve the Act's stated purpose of protecting women – or even that doing so would advance that purpose at all.

Federal courts have agreed that equal protection challenges must be supported by more than hypotheticals or conjecture. In *Grimm*, the court agreed with the district court's conclusion that "the Board's privacy argument 'is based upon sheer conjecture and abstraction.'" *Grimm*, 972 F.3d 586, 614 (4th Cir. 2020) (citing *Grimm*, 400 F. Supp. 3d at 461 (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017)). The *Grimm* court further noted,

> [T]he Eleventh Circuit, applying heightened scrutiny to a transgender student's equal protection challenge to his high school's bathroom policy, similarly held that application of the policy did not withstand such scrutiny *due, in part, to the hypothetical nature of the asserted privacy concerns*.

Id., 972 F.3d 586, 614-15 (4th Cir. 2020) (citing *See Adams*, 2020 U.S. App. LEXIS 24968, 2020 WL 4561817, at *4-5, 7) (*emphasis* added). In *Whitaker*, the court recognized that the school district has a legitimate interest in ensuring bathroom privacy rights are protected, but that "this interest must be weighed against the facts of the case and not just examined in the abstract, to determine whether this justification is genuine." *Whitaker*, 858 F.3d 1034, 1052 (7th Cir. 2017).

Plaintiffs contend that the Legislature offers no evidence of privacy or safety offenses occurring in public restrooms, changing rooms, or sleeping quarters in

Montana, and offers no evidence that transgender or intersex people have a predisposition toward such offenses.

In support of its arguments regarding rational basis/middle tier scrutiny, the State cites to FBI crime statistics for Montana showing the percentages of aggravated assaults, rapes, murders, and criminal sexual contact offenses committed by males in contrast to female victims. However, these statistics do not distinguish between cis male and trans female offenders. The State does not provide evidence of trans females committing these offenses.

The State also does not provide evidence of instances of those offenses being committed in covered entities. The State does not provide evidence of how female privacy and safety are threatened by trans females. In addition, the State does not provide evidence of how the safety of trans females may be implicated by requiring trans females to use men's restrooms. The State does not provide evidence of how cis female privacy and safety may be implicated by requiring trans males to use the women's restrooms.

Without distinguishing evidence, the Court must conclude that the evidence provided (FBI crime statistics for Montana) supports a compelling government interest in preserving women's covered entities to afford women privacy and safety from acts of abuse, harassment, sexual assault, and violence committed by cis men. The Act must be narrowly tailored to serve and be the least onerous path to achieve that interest.

Plaintiffs argue that Montana already has robust laws criminalizing abuse, sexual assault, and violence. (Dkt # 8, p. 40-41, citing *See, e.g.*, Mont. Code Ann. §§ 45-5-501–45-5-513, ("Sexual Crimes" including sexual assault, sexual intercourse without consent, and indecent exposure); *Id.* § 45-5-223 ("Surreptitious visual observation or recordation" in a public place); *Id.* § 45-8-221 ("Predatory loitering by sexual offender")).

However, the State correctly notes that the mere existence of other laws does not prohibit the Legislature from enacting additional laws like the Act to address a compelling state interest (pursuant to competent evidence) of privacy and safety of women (from cis men).

Indeed, the Act must be narrowly tailored to serve that interest. For example (if supported by competent evidence), a narrowly tailored, least onerous path to serve that interest would be for the Act to prohibit cis males from entering female restrooms, changing rooms, and sleeping quarters. Instead, by applying the definitions of 'female,' and 'male,' the Act broadly includes trans females into the category of male without evidence of that population being a threat to the privacy and safety of women. The Act is not narrowly tailored to serve – or the least onerous path to achieve – the compelling government interest as supported by the evidence and therefore fails strict scrutiny.

Middle-Tier Scrutiny Alternatively Applied.

The Act also fails middle-tier scrutiny. "Under middle-tier scrutiny, the State must demonstrate the law or policy in question is reasonable and the need for the resulting classification outweighs the value of the right to an individual." *Snetsinger*, ¶ 18 (citation omitted). The State applies the standard in *Arneson*. "The means chosen by the legislature (classification) must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Arneson v. State by & Through its Dep't of Admin., Teachers' Ret. Div.* (1993), 262 Mont. 269, 272-73, 864 P.2d 1245, 1247.

The State contends the Act survives middle-tier scrutiny in that the Act's classification serves an important governmental objective in line with the State's police power. (Dkt # 16, p. 28). "[T]he State of Montana has a police power by which it can regulate for the health and safety of its citizens" and the Montana Supreme Court "has recognized that the State's exercise of its police powers often implicates individual rights." *Wiser v. State*, 2006 MT 20, ¶ 19, 331 Mont. 28, ¶ 19, 129 P.3d 133, ¶¶ 19, 24 (citations omitted). The State argues that the Act's stated purpose, to affirm definitions of sexes and preserve women's facilities from acts of abuse committed by men, is an acceptable and important use of the State's police powers.

In applying *Snetsinger* and/or *Arneson*, the State must (1) demonstrate the law or policy in question is reasonable and the need for the resulting classification outweighs the value of the right to an individual (*Snetsinger*); (2) show the

(classification) must serve important governmental objectives and must be substantially related to the achievement of those objectives (*Arneson*). The State has done neither.

The State argues that the Act is still substantially related to its goals of protecting women from violence, even accepting Plaintiffs' premise that the Legislature does not show that "transgender or intersex people have a predisposition toward" privacy or safety offenses. Under *Arneson* the State must also show the classification serves important governmental objectives.

The State asserts that the Act does not exclude transgender and intersex people from covered facilities by defining 'female' and 'male' because the definitions are inclusive of transgender and intersex individuals. The State's position – that because the definitions include everyone transgender and intersex people are not excluded – fails to acknowledge that the Act still adversely affects transgender individuals by said classification. Under *Snetsinger* the State must show the Act is reasonable *and* that the need for the resulting classification outweighs the value of the right to an individual.

Middle-tier scrutiny does not relieve the State from showing by evidence the nature of the important governmental objective. As determined in the prior section regarding the application of strict scrutiny, here too the State's evidence of the 'important governmental objective' is in preserving women's covered entities to afford women privacy and safety from acts of abuse, harassment, sexual assault, and violence committed by cis men. The State has not shown that the objective is

to preserve women's covered entities to afford women privacy and safety from acts of abuse, harassment, sexual assault, and violence committed by trans women (*Arneson*). Classifying cis men and trans women by the definition of 'male' in the Act is not substantially related to achieving the objective of affording women privacy and safety from acts of abuse, harassment, sexual assault, and violence committed by cis men. Likewise, the State has not demonstrated that it is reasonable to include trans women in the category of men from whom to protect women that outweighs the value of trans women's individual rights (*Snetsinger*).

Rational Basis Alternatively Applied.

The Act also fails rational basis scrutiny. "Under the rational basis test, the law or policy must be rationally related to a legitimate government interest." *Snetsinger*, ¶ 19 (citation omitted).

The State contends that the Act is substantially related to its legitimate goals of safety and privacy. Again, the evidence shows the actual legitimate government interest in the Act is safety and privacy of women from cis men. While the definition of 'male' in the Act includes cis men this alone does not mean the Act is *rationally* related to that interest.

The State cites testimony provided to the Legislature in support of HB 121. (*See* Dkt # 16, p. 32-35). Those who testified to their own personal privacy experiences include: Riley Gaines, a former collegiate athlete testified of having to change in front of a naked man and she did not give her consent to that exposure. (Dkt # 16, p. 34 (citing at 8:29:18) (House Judiciary Committee)); Tanaia Puchta

testified that she would have felt ashamed violated and unprotected if she had to change in front of a male (Id., p. 35, citing at 8:35:10) (House Judiciary Committee)); Jeanie Walter testified that she is petrified and triggered when she hears a male voice while she is half naked in the bathroom (Id., citing at 10:45:16) (Senate Judiciary Committee)). These testimonials support female's interest in privacy in restrooms and changing rooms. However, without more information or context these testimonials do not clarify whether they are based on experiences with cis males or trans females.

With the State's evidence showing that females need privacy and protection from cis males, the Act would be rationally related to that legitimate government interest *if* the Act specifically stated it applies to cis males. However, by the definition of male in the Act, the prohibition of trans females in female spaces is not rationally related to that interest because the State has not shown evidence the trans females are a threat to that privacy and protection of cis females. Also, the Act's requirement that trans males use female restrooms is not rationally related to the legitimate government interest in cis female privacy concerns.

The Act fails rational basis scrutiny. If the State cannot meet the rational basis test, then it cannot meet middle-tier scrutiny.

Plaintiffs propound that animus against transgender people is not a legitimate state interest. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate*

governmental interest." *United States Dep't of Agric. v. Moreno* (1973), 413 U.S. 528, 534-35, 93 S. Ct. 2821, 2826. Plaintiffs cite statements made in news coverage by proponents of HB 121 (Representative Seekins-Crowe, the sponsor of HB 121 and Lieutenant Governor Juras) as an indication of such animus. The State disputes that those statements support Plaintiffs' claim of anti-trans animus. Aside from the Court's discussion of the Montana Legislature's enactment of bills and the Montana Executive Branch's implementation of administrative rules as examples of purposeful unequal treatment of transgender/intersex Montanans, the Court does not further address here Plaintiffs' arguments regarding bare animus against the transgender population at the preliminary injunction phase of the case.

Plaintiffs have shown they are likely to succeed on the merits of their equal protection claim.

2. Count II: Privacy (Mont. Const. art. II, § 10).

"The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States – exceeding even that provided by the federal constitution. Indeed, since the right of privacy is explicit in the Declaration of Rights of Montana's Constitution, it is a fundamental right." *Planned Parenthood 2024*, ¶ 21 (citing *Armstrong*, ¶ 34). Montana courts follow a two-part test to determine whether a privacy interest is protected under Article II, § 10 of the Montana Constitution: "1) Whether the person involved had

a subjective or actual expectation of privacy; and 2) Whether society is willing to recognize that expectation as reasonable." *State v. Nelson* (1997), 283 Mont. 231, 239, 941 P.2d 441, 447 (citation omitted).

a. Whether Plaintiffs have a subjective or actual expectation of privacy (1) in their transgender or intersex identity, anatomy, genetics, and medical history, (2) in their decision to use restrooms, changing rooms, and sleeping quarters that correspond with their gender identity.

Plaintiffs contend that the Act infringes on both Plaintiffs' "autonomy privacy," and Plaintiffs' "informational privacy."

> Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ("autonomy privacy").

Nelson, 283 Mont. at 241, 941 P.2d at 448 (citing *Hill v. National Collegiate Athletic Ass'n* (Cal. 1994), 7 Cal. 4th 1, 865 P.2d 633, 654). Article II, § 10 guarantees 'autonomy privacy' and 'informational privacy.' *Id.*, 283 Mont. at 242, 941 P.2d at 448.

Plaintiffs contend that they each have an actual expectation of informational privacy in their transgender or intersex identity, anatomy, genetics, and medical history. They argue that the Act is a violation of that privacy because the Act requires that they publicly "out" themselves as transgender every time they use a covered facility, which in turn exposes them to heightened risk of discrimination, harassment, and violence. Plaintiffs have alleged that the Act's requirement that

they use women's/men's restrooms that align with their sex at birth as defined by the Act will out them as transgender to strangers because they present as a gender that does not align with that definition. (Dkt # 8, February 17, 2025, Perkins Decl., ¶ 12) (Dkt # 8, February 17, 2025, McDonald Decl., ¶ 15) (Dkt # 8, February 17, 2025, Reddington Decl., ¶¶ 23, 27) (Dkt # 8, February 17, 2025, Jane Doe Decl., ¶ 23). The State argues that even accepting Plaintiffs' argument that being observed walking into such a covered facility may "out" someone whose gender identity does not conform with their biological sex as defined in the Act, the details of that individual's "anatomy, genetics, and medical history" are not disclosed.

While being observed walking into a restroom of a covered entity does not disclose an individual's medical history, the State's conclusion is otherwise disingenuous. The Act requires covered entities to restrict access to people based on their "sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth" and provides for private causes of action against covered entities that fail to restrict access. (HB 121, § 2(12), § 4). The Act requires compliance. (Id., § 3(1)(2)). Each individual observed walking into a restroom of a covered entity does directly and indirectly disclose that individual's transgender or intersex identity, anatomy, and genetics.

Indeed, it is hard to fathom how covered entities will police the requirements of HB 121 to avoid liability from lawsuit. Assuming a trans woman uses a female bathroom and an offended individual files suit, a key fact in the lawsuit will be the sex (at birth) of the trans woman. The trans woman's birth records, DNA, and

other healthcare information will necessarily be subject to inquiry and use in a public trial to establish the covered entity's liability under the Act.

Plaintiffs also argue that they have an actual expectation in autonomy privacy in their decision to use restrooms, changing rooms, and sleeping quarters that correspond with their gender identity. Montanans have the right to make "intimate personal decisions or conducting personal activities without observation, intrusion, or interference." *Nelson*, 283 Mont. at 241, 941 P.2d at 448 (citation omitted). The State asserts that for the vast majority of individuals who choose to enter a restroom this information is not private. The State's suggestion that privacy is 'less violative' for a cis gender person does not mean there is no violation of privacy for transgender people. The State contends that regardless of whether Plaintiffs believe they have an expectation of privacy as to which restroom or sleeping quarters they use, this is not an expectation society accepts as reasonable. The Court addresses reasonableness below.

"With few exceptions not at issue here, all adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation." *Gryczan*, 283 Mont. at 450, 942 P.2d at 122. This conclusion in *Gryczan* is also sound here. All Montanans regardless of gender, fully and properly expect their transgender or intersex identity, anatomy, and genetics will not be subject to the prying eyes of others or to governmental snooping or regulation.

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.

b. Whether society is willing to recognize that expectation as reasonable.

The State contends that regardless of whether Plaintiffs believe they have an expectation of privacy as to which restroom or sleeping quarters they use, this is not an expectation society accepts as reasonable because for the vast majority of individuals this information is not private. However, the consideration is not whether the majority of people consider their choice of which restroom they use to be private (e.g. cis individuals), the consideration is whether society is willing to recognize the Plaintiffs' expectation of privacy as reasonable.

The State also contends that the Act seeks to protect privacy expectations for those, once inside restrooms where members of one sex will have privacy from the other. While what one does inside a covered entity such as a shared sleeping quarters or multi-occupancy restroom may be considered private, the State contends that merely walking into such a facility is not a personal activity one expects to conduct "without observation."

Plaintiffs explain that they do not contend that walking into a shared sleeping quarters or restroom is a private activity. Rather, a "person's transgender identity" is "a profoundly private piece of information in which a transgender person has a reasonable expectation of privacy." (Dkt # 8, p. 48, citing *Marquez v.*

State, Cause No. DV-21-873, 2022 WL 4486283, at *5). Plaintiffs argue the Act forces transgender people to involuntarily disclose their transgender status; that alone is a privacy intrusion.

> [C]onsenting adults expect that neither the state nor their neighbors will be cohabitants of their bedrooms. Moreover, while society may not approve of the sexual practices of homosexuals, or [particular sexual practices between heterosexuals] that is not to say that society is unwilling to recognize that all adults, regardless of gender or marital state, at least have a reasonable expectation that their sexual activities will remain personal and private.

Gryczan, 283 Mont. at 450, 942 P.2d at 122. The court's reasoning in *Gryczan* is applicable here. While some in society may not understand or approve of transgender or intersex identity, that does not equate to society being unwilling to recognize that all individuals have a reasonable expectation that their gender identity, anatomy, genetics will remain personal and private.

Society is willing to recognize as reasonable Plaintiffs' subjective or actual expectation of privacy (1) in their transgender or intersex identity, anatomy, genetics, and medical history, (2) in their decision to use restrooms, changing rooms, and sleeping quarters that correspond with their gender identity. Plaintiffs have shown they are likely to succeed on the merits of their right of privacy claim.

Regarding both the equal protection and right of privacy claims, it makes no difference whether Plaintiffs' rights are violated by restricting their use of restrooms, changing rooms, or sleeping quarters and in what particular covered entity – in any instance Plaintiffs are likely to succeed on the merits that their

fundamental rights are infringed. Therefore, Plaintiffs have shown they are likely to succeed on the merits that there are no set of circumstances under which the Act would be valid.

C. Whether Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief.

The Court must examine this criterion independently. (Mont. Code Ann. § 27-19-201(4)(b) (2025)). The State argues that Plaintiffs must show more than a possibility of future harm; they are required "to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. 7, 22, 129 S. Ct. 365, 375 (citations omitted). The State also asserts that because Plaintiffs have not made any allegations regarding sleeping quarters (HB 121, § 1(2), § 2(13)), they have not shown an irreparable injury pursuant to HB 121, § 4(2). Likewise, the State asserts that Plaintiffs have not made any allegations regarding correctional centers, juvenile detention facilities, local domestic violence programs, or public schools (other than colleges) (HB 121, § 2(3)) in their Motion.

"For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 6, 409 Mont. 378, ¶ 6, 515 P.3d 301, ¶ 6 ("*Planned Parenthood 2022*") (citing *Driscoll*, ¶ 15; *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161).

> When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, § 2948.1; *see also Deerfield Med.*

> *Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (citation omitted) (irreparable injury is established when constitutional right of privacy is threatened or being impaired); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547 (1976)). ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'").

Cross, ¶ 48.

Plaintiffs have shown they are likely to succeed on the merits of their claims of violations of their fundamental rights (equal protection, right of privacy) under the Montana Constitution, which constitutes irreparable harm here as a matter of law. Whether Plaintiffs have alleged irreparable harm as to each covered entity does not negate the irreparable harm already shown. Absent the injunction, the Act is likely to cause Plaintiffs irreparable injury by violating their fundamental rights under the Montana Constitution. The Court therefore does not address the concrete harms alleged by Plaintiffs.

D. Whether the balance of equities tips in Plaintiffs' or the State's favor and whether this Order is in the public interest.

"When the government opposes a preliminary injunction, these two factors 'merge into one inquiry.'" *Planned Parenthood 2024*, ¶ 39 (citing *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021) (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)). The 2025 amended preliminary injunction statute indicates that the Court must examine these criteria independently. (Mont. Code Ann. § 27-19-201(4)(b) (2025)). This amended provision does not distinguish between government and non-government party

opposition to a preliminary injunction. Regardless, the Court considers each of these criteria separately.

Balance of equities.

The balance of equities tips in Plaintiffs' favor because "the government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented." *Planned Parenthood 2024*, ¶ 40 (citing *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) (internal quotation marks omitted).

The State argues that the following should apply. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King* (2012), 567 U.S. 1301, 133 S. Ct. 1, 3 (citation omitted). In *Maryland v. King*, a divided Maryland Court of Appeals overturned King's conviction, holding the collection of his DNA violated the Fourth Amendment because his expectation of privacy outweighed the State's interests and Maryland applied for a stay of that judgment pending the U.S. Supreme Court's disposition of its petition for a writ of certiorari. *Id.*, 567 U.S. 1301, 133 S. Ct. 1, 2 (lower court citation omitted).

Montana's fundamental right to privacy exceeds the protections provided by the federal constitution. *Planned Parenthood of Mont.*, ¶ 21. Likewise, Montana's equal protection clause provides even more individual protection than does the Fourteenth Amendment to the U.S. Constitution. *Id.*, ¶ 29. While it may be *a form of* irreparable injury if the State is enjoined from effectuating statutes, this does not

in and of itself equate to the irreparable harm suffered as the result of the State's infringement of fundamental rights.

Plaintiffs have shown they are likely to succeed on the merits that the Act infringes on their fundamental rights (equal protection and privacy) in a manner that risks exposing them to discrimination, harassment, and violence. The preliminary injunction suspends implementation of the Act pending a ruling on the Complaint; returning the parties to the status quo pending a final ruling. The State has not shown even a rational basis for the Act; that its legitimate government interest in protecting the privacy and safety of women from cis men is rationally related to the Act. Any interest favoring enforcement of the Act while this Court adjudicates Plaintiffs' claims is outweighed by Plaintiffs' interests in protecting their fundamental rights. The balance of equities tips in Plaintiffs' favor.

In the Public Interest.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights, [ ], and "all citizens have a stake in upholding the Constitution. [ ]" *Planned Parenthood 2024*, ¶ 40 (citations omitted). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138-39 (9th Cir. 2009) (citations omitted).

The State argues that beyond the harm it will suffer from having the Act enjoined, women who use restrooms could suffer harm from the removal of a law

that could prevent men from entering those spaces. Plaintiffs argue that a preliminary injunction would merely maintain the status quo prior to the Act's enactment, when transgender and intersex people were not barred from using sex-separated facilities consistent with their gender identity and neither the State nor the public suffered significant hardship.

The State does not provide evidence of trans female offenses against women or evidence of offenses being committed in covered entities to support the necessity of immediate implementation of the Act. Rather, the State's concerns regarding trans females are conjecture. In addition, a return to the status quo pending a final determination of the case does not leave women, for whom the State is concerned could suffer harm, without recourse. Laws criminalizing the behavior about which the State expresses concern already exist and are available pending final disposition of the Complaint. (e.g., Mont. Code Ann. §§ 45-5-501–45-5-513, MCA ("Sexual Crimes" including sexual assault, sexual intercourse without consent, and indecent exposure); § 45-5-223 ("Surreptitious visual observation or recordation" in a public place); § 45-8-221 ("Predatory loitering by sexual offender"). This Order is in the public interest.

E. Whether Plaintiffs should be required to post a bond.

Plaintiffs ask the Court to exercise its discretion under Mont. Code Ann. § 27–19–306(1), to allow them to forgo posting a bond as a precondition to obtaining injunctive relief. Plaintiffs argue that Defendants do not stand to suffer any pecuniary harm if a preliminary injunction is entered. The State does not respond

to this issue. The State not having shown it would suffer any pecuniary harm; the Court waives the requirements of Mont. Code Ann. § 27–19–306 in the interest of justice.

ELECTRONICALLY SIGNED AND DATED BELOW.

c: attorneys of record