

Akilah Lane (Bar No. 60742990)  
Alex Rate (Bar No. 11226)  
**ACLU of Montana**  
P.O. Box 1968  
Missoula, MT 59806  
406-203-3375  
lanea@aclumontana.org  
ratea@aclumontana.org

Malita Picasso, *pro hac vice* pending  
**ACLU Foundation**  
**LGBTQ & HIV Project**  
125 Broad Street  
New York, NY 10004  
Telephone: 212-549-2561  
mpicasso@aclu.org

F. Thomas Hecht, *pro hac vice* pending  
Tina B. Solis, *pro hac vice* pending  
Seth A. Horvath, *pro hac vice* pending  
**Nixon Peabody LLP**  
70 West Madison Street, Suite 3500  
Chicago, IL 60601  
Telephone: 312-977-4443  
Facsimile: 312-977-4405  
fthecht@nixonpeabody.com  
tbsolis@nixonpeabody.com  
sahorvath@nixonpeabody.com

Elizabeth Halverson PC  
1302 24th Street West #393  
Billings, MT 59102  
406-698-9929  
ehalverson@halversonlaw.net

**IN THE THIRTEENTH JUDICIAL DISTRICT COURT  
COUNTY OF YELLOWSTONE**

**AMELIA MARQUEZ, an individual;** )  
**and JOHN DOE, an individual;** )  
 )  
  **Plaintiffs,** )  
 )  
  **v.** )  
 )  
**STATE OF MONTANA; GREGORY** )  
**GIANFORTE, in his official capacity as** )  
**the Governor of the State of Montana;** )  
**the MONTANA DEPARTMENT OF** )  
**PUBLIC HEALTH AND HUMAN** )  
**SERVICES; and ADAM MEIER, in his** )  
**official capacity as the Director of the** )  
**Montana Department of Public Health** )  
**and Human Services,** )  
 )  
  **Defendants.** )  
 )  
 )

**Case No. DV 21-00873**

**Hon. Michael G. Moses**

**CORRECTED PLAINTIFFS’ BRIEF  
IN OPPOSITION OF DEFENDANTS’  
MOTION TO DISMISS AMENDED  
COMPLAINT PURSUANT TO  
M. R. CIV. P. RULE 12(b)(6)**

## INTRODUCTION

Plaintiffs’<sup>1</sup> Amended Complaint continues to challenge the constitutionality of Montana SB 280 (the “Act”), which places undue burdens on transgender people seeking to conform the sex designation on their birth certificates with their gender identity. The Amended Complaint’s four claims for violations of (1) equal protection (Count I), (2) the fundamental right to informational privacy (Count II), (3) the fundamental right to be free from state interference with medical decisions (Count III), and (4) substantive due process (Count IV) should be sustained for all the reasons set forth in Plaintiffs’ response to Defendants’ original motion to dismiss, which Plaintiffs incorporate by reference.

So, too, should the Amended Complaint’s claims for violations of (1) the Montana Human Rights Act (“MHRA”) (Count V) and (2) the Montana Governmental Code of Fair Practices (“MGCFP”) (Count VI). Those claims, which Plaintiffs alleged after the Montana Human Rights Bureau (“MHRB”) dismissed their MHRB complaints because the agency lacked authority to decide the constitutional questions raised by Plaintiffs, are the subject of newly asserted arguments in Defendants’ motion to dismiss the Amended Complaint. Those arguments have no merit.

*First*, Plaintiffs’ discrimination claim is actionable under the MHRA. MHRA claims are not limited to claims involving so-called “specific acts” of discrimination, but rather may include claims challenging the legality of another statute, such as the Act. This conclusion is borne out by the broad statutory language of the MHRA and case law interpreting the statute. Moreover, Plaintiffs have alleged specific acts of discrimination under the MHRA by alleging that the Act was signed into law by a state official, that it requires regulatory implementation by other state officials, and that it discriminates against transgender people.

---

<sup>1</sup> “Plaintiffs” refers to Amelia Marquez and John Doe. “Defendants” refers to the State of Montana, Gregory Gianforte (“Governor Gianforte”), the Montana Department of Public Health and Human Services (“DPHHS”), and Adam Meier.

*Second*, the Act discriminates based on transgender status. By its own terms, the Act targets transgender people, and only transgender people, by requiring them to undergo invasive surgery, initiate a court proceeding, and obtain an order confirming that their sex has been changed by surgical procedure in order to change the sex designation on their birth certificates. *See* SB 280. A cisgender person, whose gender identity is consistent with their birth-assigned sex, has no reason to seek a change in the sex designation on their birth certificate.

*Third*, Plaintiffs have sufficiently alleged that transgender status is a protected class under Montana law. Both Montana and federal case law supports acknowledging that transgender status is, in fact, protected. The Montana Supreme Court interprets the MHRA broadly enough to incorporate the protections guaranteed by the Montana Constitution’s Declaration of Rights. Consistent with those protections, Plaintiffs have alleged grounds for concluding that transgender people have been subjected to a history of purposeful unequal treatment and suffer a level of political powerlessness sufficient to warrant heightened protection under the law. Alternatively, the MHRA’s protections against sex discrimination necessarily encompass protections against discrimination based on an individual’s transgender status because gender-identity discrimination, including the gender-identity discrimination perpetuated by the Act, is inherently sex-based.

*Fourth*, for the reasons set forth above, Plaintiffs’ discrimination claim is also actionable under the MGCFP. That statute requires all state governmental services—including the service of amending birth certificates—to be performed without discrimination based on sex.

## **LEGAL STANDARDS**

Montana is a notice-pleading state. Rule 8 of the Montana Rules of Civil Procedure requires only that a complaint set forth a “short, plain statement of the claim.” M. R. Civ. P. Rule 8. It is well established that, “[w]hen considering a motion to dismiss under M. R. Civ. P. 12(b)(6), all

well-pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable to plaintiff.” *Sinclair v. BN & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 2000 P. 3d 36 (citation omitted).

Motions to dismiss under Rule 12(b)(6) are “viewed with disfavor and rarely granted.” *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250. A court should not dismiss a complaint unless it appears beyond doubt that a plaintiff can prove no set of facts that would entitle them to relief. *Poeppele v. Flathead City*, 1999 MT 130, ¶ 17, 294 Mont. 487, 982 P.2d 1007; *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 161, 920 P.2d 108, 110 (1996).

In this case, Plaintiffs have pleaded allegations that, when taken as true and construed in the light most favorable to them, easily withstand Defendants’ motion to dismiss.

## ARGUMENT

### I. Plaintiffs’ have sufficiently pleaded their claims.

As an initial matter, in accordance with Rule 8, the allegations in Counts V and VI of the Amended Complaint properly support each of those causes of action.

Count V of the Amended Complaint alleges a claim for discrimination under the MHRA. (AC, ¶¶ 97–103.) The MHRA prohibits discrimination based on sex and recognizes freedom from sex discrimination as a basic right. § 49–1–102, MCA. (*Id.*, ¶ 98.) The MHRA also expressly prohibits any state entity or political subdivision from discriminating in providing, or withholding, any advantages or privileges based on sex. § 49–2–308, MCA. (*Id.*) In addition, it is unlawful for any person or government agency to aid or abet any act of discrimination forbidden by the MHRA. § 49–2–302, MCA. (*Id.*)

Defendants, through the Act, have violated the provisions of the MHRA, and Plaintiffs have been injured by Defendants’ conduct. (*Id.*, ¶ 99.) Defendants have discriminated against

Plaintiffs based on their gender identity by restricting transgender people’s ability to change the sex designation on their birth certificates by requiring any transgender person who seeks to amend their sex designation to undergo gender-affirming surgery and initiate a legal proceeding to prove that their sex “has been changed by surgical procedure.” (*Id.*, ¶ 100.) Discrimination based on transgender status is sex discrimination under the MHRA. (*Id.*, ¶ 101.)

Count VI alleges a claim for discrimination under the MGCFP. (*Id.*, ¶¶ 104–10.) The MGCFP requires that government services, such as the amendment of birth certificates, be made available or performed without discrimination based on sex. § 49–3–205, MCA. (*Id.*, ¶ 105.) No state entity, local governmental agency, or state or local official may become a party to any agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices, including discrimination based on sex. § 49–3–205, MCA. (*Id.*)

Defendants, through the Act, have violated the provisions of the MGCFP, and Plaintiffs have been injured by Defendants’ conduct. (*Id.*, ¶ 106.) As previously noted, Defendants have discriminated against Plaintiffs based on their gender identity by restricting transgender people’s ability to change the sex designation on their birth certificates by requiring any transgender person who seeks to amend their sex designation to undergo gender-affirming surgery and initiate a legal proceeding to prove that their sex “has been changed by surgical procedure.” (*Id.*, ¶ 107.) Discrimination based on transgender status is sex discrimination under the MGCFP. (*Id.*, ¶ 108.)

Based on these allegations, Plaintiffs’ MHRA and MGCFP claims have been properly pleaded.

## **II. Plaintiffs have stated a legally cognizable claim under the MHRA.**

### **A. Plaintiffs’ discrimination claim is actionable under the MHRA.**

Defendants argue that Plaintiffs' discrimination claim is not actionable under the MHRA because the MHRA "allows individuals to seek relief from a specific act of discrimination taken against them" rather than challenge the legality of a statute on its face. (Defs.' Br. at 2–5.) Defendants' argument fails for two reasons.

**1. The MHRA is not limited in the manner suggested by Defendants.**

*First*, the MHRA is not limited in the manner suggested by Defendants. Although Defendants cite several cases that address discrimination claims in contexts other than challenges to the legality of a statute, none of those cases prohibits a plaintiff from challenging the legality of a discriminatory statute under the MHRA. (*See id.* at 3 (collecting cases regarding discriminatory retaliation, discriminatory termination, discriminatory denial of access to a public accommodation, discriminatory denial of access to a service, and disparate treatment).) No such limitation is contained in the MHRA's statutory language, which broadly prohibits discrimination "because of . . . sex," including in both employment and, as here, public accommodations, including but not limited to in the form of denying "services, goods, facilities, advantages, or privilege because of . . . sex" or otherwise "[a]iding" in that denial. *See* §§ 49–1–102, 49–2–302, 49–2–308, MCA.

Indeed, where, as here, an administrative claim has been dismissed, the MHRA expressly authorizes a plaintiff to commence a civil action for appropriate relief, including "any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against." *See* §§ 49–2–504(7)(b)(ii), 49–2–506(1)(b), 49–2–512(3), MCA. This provision clearly encompasses a challenge to the legality of a discriminatory statute under the MHRA. And to the extent this provision is "susceptible to more than one plausible construction" (which it is not), this Court must "adopt the construction that provides the intended protection" under the MHRA, given that the "[t]he purpose of the MHRA is to protect the

individual right to be free from discrimination.” *See Bates v. Neva*, 2014 MT 336, ¶ 26, 377 Mont. 350, 339 P.3d 1265.

Defendants mistakenly rely on the principle that “[c]onflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute.” (Defs.’ Br. at 5 (internal quotation marks omitted).) By Defendants’ logic, no discriminatory statute enacted after the MHRA went into effect could *ever* violate the MHRA’s protections against discrimination. This position is untenable. *See Maier v. State*, 2021 MT 296, ¶ 8, 406 Mont. 280, 498 P.3d 755 (“Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.”).

Moreover, contrary to Defendants’ assertions, at least one court has expressly ruled that the MHRA *allows* challenges to the legality of a statute. In *Montana Fair Housing, Inc. v. City of Bozeman*, 854 F. Supp. 2d 832 (D. Mont. 2012), the United States District Court for the District of Montana, relying on the MHRA, found that the defendant’s zoning ordinance was facially discriminatory in violation of the statute. *See id.* at 843–44. In doing so, the court did not address any individual claims of discrimination. *See id.* On the contrary, it found that the ordinance was “facially discriminatory against the disabled” under the MHRA and also constituted facial “age-based discrimination under state law.” *Id.* at 843. Tellingly, Defendants do not cite this case in their brief.

## **2. Alternatively, Plaintiffs have alleged specific acts of discrimination.**

*Second*, even assuming that the MHRA is limited in the manner suggested by Defendants (which it is not), Plaintiffs have, in fact, alleged that Defendants engaged in “specific act[s] of discrimination . . . against them.” (*See* Defs.’ Br. at 3.) The Amended Complaint expressly alleges that, “[o]n April 12, 2021, the Legislature passed the Act and sent it to Governor Gianforte for

signature,” and “[o]n April 30, 2021, Governor Gianforte signed the Act, which became immediately effective upon his signature.” (AC, ¶ 37.) The Amended Complaint further alleges that “[t]he Act directs DPHHS to issue implementing regulations in conformity with the Act.” (*Id.*, ¶ 44.) In addition, the Amended Complaint alleges that the Act “restricts the ability of transgender people to change the sex designation on their birth certificates by requiring any transgender person who seeks to amend their sex designation to undergo gender-affirming surgery and initiate a legal proceeding to prove that they have completed the surgery.” (*Id.*, ¶¶ 2, 38.)

By alleging that the Act was signed into law by a state official, that it requires regulatory implementation by other state officials, and that it discriminates against transgender people, the Amended Complaint sufficiently alleges specific acts of discrimination against transgender people. In accordance with the MHRA, those acts qualify as the “unlawful discriminatory practice” of “refus[ing], withhold[ing] from, or deny[ing] to a person” the “state . . . services . . . , advantages, or privileges” associated with changing the sex designation on a birth certificate, a state-issued form of identification. *See* § 49–2–308, MCA.

**B. The Act discriminates against transgender people.**

Defendants also argue that the Act does not discriminate based on “gender identity, transgender status, or sex.” (Defs.’ Br. at 4, 5–6.) This argument merely rehashes Defendants’ constitutional argument that the Act is not discriminatory for purposes of the Montana Constitution’s equal-protection guarantee. Their statutory argument fails for the same reasons as their constitutional argument.

The Act, by its own terms, targets transgender people, and only transgender people, by requiring them to undergo surgery, initiate a court proceeding, and obtain an order confirming that their sex has been changed by surgical procedure in order to change the sex designation on their



birth certificates. *See* SB 280. It expressly states, in relevant part, that: “The sex of a person designated on a birth certificate may be amended only if the [DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction ***indicating that the sex of the person born in Montana has been changed by surgical procedure.***” *See id.* (emphasis added).

By referring to persons who “change[]” their “sex,” the Act is, by definition and on its face, referring to transgender people—the only group of people who identify by a sex designation that differs from their sex assigned at birth. *See* SB 280. As Plaintiffs have alleged, “[t]ransgender people have a gender identity that differs from their assigned sex at birth.” (AC, ¶ 25.) A cisgender person, whose gender identity is consistent with their birth-assigned sex, has no reason to seek a change in the sex designation on their birth certificate. (*See id.*, ¶ 68.)

Under the Act, only transgender people are required to undergo surgery, to present the confidential and intimate details of that surgery to a court, obtain a court order, and submit an application to DPHHS in order to obtain a birth certificate that accurately reflects their gender. *See* SB 280. This is true even though (1) transgender people’s sex is what they know it to be, and there is no surgery capable of changing this, and (2) many transgender people do not need, want, or have access to gender-affirming surgery. (*Id.*, ¶¶ 31, 35.) By contrast, cisgender people are not required to undertake these burdensome measures to ensure that their birth certificates reflect what they know their sex to be and how they present to society. (*Id.*, ¶ 68.)

*Ray v. McCloud*, 507 F. Supp. 3d 925 (S.D. Ohio 2020), and *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018), firmly support the conclusion that impairing transgender people’s ability to change the sex designation on their birth certificates discriminates based on transgender status. In *Ray*, the court concluded that a policy prohibiting transgender people from changing the sex designation on their birth certificates treated transgender people differently from similarly situated

cisgender people by categorically denying the former the opportunity to have a birth certificate “that reflects how they present to society” but allowing the latter the same right. *See Ray*, 507 F. Supp. 2d at 934–36. In *F.V.*, the court reached a similar conclusion. *F.V.*, 286 F. Supp. 3d at 1140–41 (explaining that the equal-protection clause does not permit “laws [that] give certain people access to birth certificates that accurately reflect who they are, while denying transgender people, as a class, access to birth certificates that accurately reflect their gender identity”).

It makes no difference that *Ray* and *F.V.* involved categorical bans on changes to birth-certificate sex designations as opposed to conditional limitations on those changes. Both absolute and conditional bans on changing the sex designation on a birth certificate treat transgender people worse than people who are not transgender, who are not required to undergo surgery and obtain a court order and agency approval to have a birth certificate that accurately reflects who they are. Even if gender-affirming surgery did change a person’s sex, which it does not (*id.*, ¶ 35), this surgery is something many transgender people cannot undergo and a huge burden for those who can (*id.*, ¶¶ 30–31).

In the face of these overwhelming allegations, Defendants argue that anyone “who seek[s] to change their birth certificate’s listed sex must satisfy the same legislatively prescribed process.” (Defs.’ Br. at 5.) The glaring error in this logic is that the so-called “process” is necessarily targeted at transgender people, since cisgender people generally have no reason to seek a change in the sex designation on their birth certificates, given that their gender identity already matches their sex assigned to them at birth.

Defendants’ reference to how the Act affects intersex people does not change this analysis. (*See id.*) Laws that improperly discriminate against members of one group are not valid simply because they also discriminate against members of another group. Here, the fact that the Act also

discriminates against intersex people whose birth certificates do not reflect the sex they know themselves to be does not negate or justify the Act’s discrimination against transgender people.

Finally, in a confusing attempt to justify the Act, Defendants appear to argue that, if the Act is deemed discriminatory, then the policy predating the Act, which required attestation of a gender change, was discriminatory as well, and since Plaintiffs seek to revert to the pre-Act policy, neither must be discriminatory. (Defs.’ Br. at 5–6.) This tortured comparison does not support Defendants’ conclusion. As set forth in the Amended Complaint, the procedures in place before the Act, which were promulgated by DPHHS in December 2017, permitted a transgender person to amend his or her original birth certificate by submitting to DPHHS a completed gender-designation form attesting to gender transition *or* providing government-issued identification displaying the correct sex designation *or* providing a certified court order indicating a gender change. (AC, ¶ 39.) *See* Mont. Admin. Register Notice No. 37–807 (amending Admin. R. Mont. 37.8.102 & 37.8.311). The 2017 procedures did not require surgery, court proceedings, or public disclosure of confidential medical information. *See id.* Contrary to Defendants’ misguided comparison, the 2017 procedures illustrate that the Act discriminates against transgender people, not that it is “neutral.”

**C. Transgender status is a protected class under Montana law.**

Defendants next argue that transgender status is not a protected class under Montana law. (Defs.’ Br. at 6–9.) This argument has no merit.

**1. Plaintiffs have sufficiently alleged that transgender status is a protected class.**

Contrary to Defendants’ contention, Plaintiffs have sufficiently alleged that transgender status is a protected class. As an initial matter, Montana courts have not “declined to include transgender identity among the protected classes.” (Defs.’ Br. at 6.) None of the cases cited by

Defendants addressed this issue. In *Montana State University–Northern v. Bachmeier*, 2021 MT 26, ¶¶ 27–28, 403 Mont. 136, 480 P.3d 233, the Montana Supreme Court noted that sex is a protected class. And in *Snetsinger v. Montana University System*, 2004 MT 390, ¶ 61, 325 Mont. 148, 104 P.3d 445 (Nelson, J., concurring), and *Donaldson v. State*, 2012 MT 288, ¶ 54, 367 Mont. 228, 292 P.3d 364 (Nelson, J., dissenting), one justice, writing separately in each case, observed that, under established law, sexual and gender orientation was not a protected class, concluding in both instances, that it should, in fact, be one. Ultimately, whether transgender status qualifies as a protected class under Montana law was not at issue or decided in any of these cases.

Montana precedent supports acknowledging that transgender status is, in fact, a protected class. The Montana Supreme Court has found that the MHRA must be interpreted broadly enough to incorporate the protections guaranteed by the Montana Constitution’s Declaration of Rights. *See Edwards v. Cascade County Sheriff’s Dep’t*, 2009 MT 451, ¶ 73, 354 Mont. 307, 223 P.3d 893. The MHRA implements the antidiscrimination rights enumerated in Article II, Section 4, of the Montana Constitution, which provides that “[t]he dignity of the human being is inviolable[.]” guarantees equal protection under the law to all people, and additionally forbids government-imposed discrimination against any person on account of sex. Mont. Const. art. II, § 4; *Edwards*, ¶ 73; *Snetsinger*, ¶ 15.

The Montana Constitution protects individual rights far more expansively than the U.S. Constitution. *Snetsinger*, ¶ 15 (“Article II, Section 4 of the Montana Constitution provides even more individual protection than the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution”); *Gryczan v. State*, 283 Mont. 433, 448, 942 P.2d 112, 121 (1997) (“Montana’s Constitution affords citizens broader protection of their right to privacy than does the

federal constitution”). In *Gryczan*, for example, the Montana Supreme Court held that a statute that criminalized private, sexual conduct between consenting adults of the same sex violated the Montana Constitution despite the fact that the U.S. Supreme Court had previously held that an identical statute did not violate the U.S. Constitution. *Gryczan*, 283 Mont. at 451.

Under this expansive framework, transgender status easily qualifies as a protected class. As the Montana Supreme Court has noted, “[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 Matter of S.L.M.*, 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); see also *In re Matter of C.H.*, 210 Mont. 184, 198, 683 P.2d 931, 938 (1984) (same). The Amended Complaint’s allegations regarding the “heightened scrutiny” applicable to discrimination based on transgender status more than sufficiently establish the protected status of transgender people for purposes of overcoming Defendants’ motion to dismiss. (See AC, ¶ 69.)

Even if the Court were to look beyond the allegations in the Amended Complaint—which would be improper in the context of a motion to dismiss but which appears to be a constraint Defendants are unwilling to abide by (Defs.’ Br. at 6 n.3.)—the Montana Supreme Court’s test for identifying a “suspect class” is satisfied here. Transgender people, in Montana and elsewhere, have been “subjected to . . . a history of purposeful unequal treatment.” *Matter of S.L.M.*, 287 Mont. at 33. Discrimination based on transgender status has been extensively documented. S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Washington, DC, National Center for Transgender Equality (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (“Transgender Survey”). Published in 2016, the Transgender Survey

describes the discrimination, harassment, and even violence that transgender people encounter at school, in the workplace, when trying to find a place to live, during encounters with police, in doctors' offices and emergency rooms, at the hands of service providers and businesses, and in other aspects of life. *Id.*

Transgender people nationally and in Montana continue to face discrimination. To the extent they have seen progress in protecting their rights, there is considerable backlash against that progress—including through discriminatory legislation enacted by the Montana State Legislature. See *The Discrimination Administration*, National Center for Transgender Equality, available at <https://transequality.org/the-discrimination-administration> (discussing long pattern of antitransgender executive-branch initiatives at the federal level); Jeremy W. Peters, et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. Times (Feb. 22, 2017), available at <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html> (discussing rescission of protections for transgender students that had allowed them to use bathrooms corresponding with their gender identify); *Trump Announces That He Will Ban Transgender People from Serving in the Military*, Wash. Post (July 26, 2017), available at [https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7\\_story.html](https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7_story.html) (discussing announcement of ban on transgender people serving in the military).

The most recent examples of animus against transgender people in Montana include (1) the Act, which intentionally and facially discriminates against transgender Montanans seeking to change the sex designation on their birth certificates; (2) HB 112, which bans transgender girls and women from participating in sports consistent with their gender identity at the elementary, secondary, or post-secondary levels; and (3) HB 113, which, while ultimately defeated, would

have prohibited medical professionals from providing hormonal treatments or gender-affirming surgery to minors. *See* SB 280; HB 112; HB 113. These acts do not stand alone. *See ACLU of Mont. Found., Inc. v. Mont. ex rel. Fox*, No. OP 17–0449, 2017 WL 9532878, at \*1 (Mont. Sept. 19, 2017) (discussing ballot initiative for the “Montana Locker Room Privacy Act,” which would have “require[d] government entities to designate a protected facility in a government building or public school for use only by members of one sex”). Taken together, these examples illustrate the long, troubling history of invidious discrimination against transgender people in Montana and elsewhere.

In addition, transgender people suffer a level of “political powerlessness” sufficient to warrant “extraordinary protection” under the law because of the community’s small population size and the enduring societal prejudices against transgender people. *Matter of S.L.M.*, 287 Mont. at 33. A 2016 study by the Williams Institute estimates that just 0.34 percent of Montanans identify as transgender. Andrew R. Flores, et al., *How Many Adults Identify as Transgender in the United States?*, Williams Institute (June 2016), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

Transgender people face staggering rates of poverty and homelessness. Nearly one-third of transgender people fall below the poverty line, more than twice the rate of the general U.S. population. S. E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Nat’l Ctr. for Transgender Equality 5 (Dec. 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. Nearly one third of transgender people have experienced homelessness. *Id.*

Transgender people also face barriers to political representation. *See, e.g.*, Philip E. Jones, et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*, 82 Pub. Opinion Q. 252, 265 (Summer 2018), available at <https://academic.oup.com/poq/article/82/2/252/4996117> (in randomized experiment, nominating a transgender candidate reduced proportion of respondents who would vote for their own party’s candidate from 68 percent to 37 percent).

These factors—the “history of purposeful unequal treatment” and the presence of “political powerlessness”—support concluding that transgender status is a protected class under Montana law. *Matter of S.L.M.*, 287 Mont. at 33.

A growing number of federal courts have reached the same conclusion under federal law. For example, in *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015), the court found that discrimination against transgender people is subject to heightened scrutiny since transgender people have suffered a history of discrimination and prejudice, a person’s identity as transgender has nothing to do with the person’s ability to contribute to society, and transgender people represent a discrete minority class that is politically powerless to bring about change on its own. *Id.* at 139–40. Multiple other federal courts have followed suit.<sup>2</sup>

Alternatively, transgender status qualifies as a protected class because, as discussed in further detail below, *see infra* Part II(C)(2), discrimination against transgender people is a form of sex discrimination. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–43 (2020) (discrimination against someone because they are transgender is sex discrimination); *Whitaker v.*

---

<sup>2</sup> *See, e.g.*, *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Marlett v. Harrington*, No. 1:15-cv-01382-MJS (PC), 2015 WL 6123613, at \*4 (E.D. Cal. 2015); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016), *stay of preliminary injunction denied*, 845 F.3d 217, 222 (6th Cir. 2016); *Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017); *M.A.B. v. Bd. of Educ. of Talbot County*, 286 F. Supp. 3d 704, 718–22 (D. Md. 2018); *F.V.*, 286 F. Supp. 3d at 1142–45; *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Flack v. Wis. Dep’t of Health Servs.*, 395 F. Supp. 3d 1001, 1019–22 (W.D. Wis. 2019); *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607–08 (4th Cir. 2020); *Ray*, 507 F. Supp. 3d at 936–38.



*Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (transgender classification is sex-based); *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011) (same); *Corbitt v. Taylor*, No. 2:18cv91–MHT, 2021 WL 142282, at \*3–4 (M.D. Ala. Jan. 15, 2021) (same); *see also Maloney v. Yellowstone County, et al.*, Cause No. 1570–019 & 1572–2019 (Department of Labor and Industry, August 14, 2020) (finding that discrimination based on gender identity is a form of discrimination based on sex), <https://www.aclumontana.org/en/cases/eleanor-maloney-v-yellowstone-county>.

In sum, given that the Montana Constitution “provides for even more individual protection than” its federal equivalent, *Snetsinger*, ¶ 58, and based on the growing consensus among federal courts that transgender status is a protected class, Plaintiffs’ allegations more than sufficiently establish that transgender status is protected under the MHRA.

**2. Alternatively, the MHRA’s protections against sex discrimination expressly encompass protections against discrimination based on transgender status.**

*Second*, regardless of whether transgender status constitutes a protected class, the MHRA’s protections against sex discrimination necessarily encompass protections against discrimination based on an individual’s transgender status. This conclusion is mandated by over three decades of federal case law, which guides Montana courts’ interpretation of the MHRA. *See Jackson v. Costco Wholesale Corp.*, 2018 MT 262, ¶ 19, 393 Mont. 191, 429 P.3d 641 (“Because the MHRA is modeled on federal anti-discrimination laws . . . , [it is] useful and appropriate to consider federal statutes, regulations, and caselaw as persuasive authority when interpreting provisions of the MHRA.”); *McDonald v. Dep’t of Evtl. Quality*, 2009 MT 209, ¶ 39 n.4, 351 Mont. 243, 214 P.3d 749 (same).

Most recently, in *Bostock v. Clayton County*, the United States Supreme Court held that, under Title VII of the Civil Rights Act of 1964, discrimination against someone because they are transgender is sex discrimination. *Bostock*, 140 S. Ct. at 1741–43. Although Defendants seek to distinguish *Bostock* on the basis that it dealt with employment discrimination (Defs.’ Br. at 7–8.), *Bostock*’s broad rationale is not limited to employment cases. The Court in *Bostock* reasoned, without qualification, that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 1741.

*Bostock* reaffirmed a long line of federal cases recognizing that discrimination against transgender people is sex discrimination. *See, e.g., EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571–580 (6th Cir. 2018); *Whitaker*, 858 F.3d at 1048-1049; *Glenn*, 663 F.3d at 1316–17; *Barnes v. City of Cincinnati*, 401 F.3d 729, 736–38 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Harford*, 204 F.3d 1187, 1198–1203 (9th Cir. 2000).

As these cases acknowledged, “discrimination on the basis of transgender and transitioning status” is by its very nature sex discrimination. *R.G.*, 884 F.3d at 574–75. It is “analytically impossible” to make a decision based on an individual’s “status as a transgender person without being motivated, at least in part, by the [person’s] sex.” *Id.* at 575. “There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity . . . .” *Id.* at 576–77.

These cases, for their part, drew on the United States Supreme Court’s holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the Court held that sex discrimination encompasses discrimination based on a person’s failure to conform to stereotypical gender norms—the type of discrimination to which transgender people often are subjected. *Id.* at 250–52,

258 (plurality opinion); *see also id.* at 258–61 (White, J., concurring); *id.* at 272–73 (O’Connor, J., concurring). The Montana Supreme Court has specifically relied on *Price Waterhouse* in analyzing MHRA claims, including those alleging sex discrimination under a sex-stereotyping theory, recognizing that discrimination based on failure to conform to sex stereotypes is a form of sex-based discrimination prohibited by the MHRA. *See, e.g., Beaver v. Mont. Dep’t of Nat. Res. & Conservation*, 2003 MT 287, ¶ 63, 318 Mont. 35, 78 P.3d 857; *Laudert v. Richland County Sheriff’s Dep’t*, 2000 MT 218, ¶¶ 24–27, 301 Mont. 114, 7 P.3d 386; *see also Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶¶ 12–14, 322 Mont. 435, 97 P.3d 546.

Defendants emphasize that the legislature has twice declined to incorporate protections for gender identity into the MHRA. (Defs.’ Br. at 9.) This, however, is not dispositive. Bills fail for many reasons. Since the MHRA is already “modeled on federal anti-discrimination laws,” and interpreted in light of case law addressing those laws, *see Jackson*, 2018 MT 262, ¶ 19, adding express protections for gender identity into the MHRA would be mere surplusage. *See Am. Linen Supply Co. v. Dep’t of Revenue*, 189 Mont. 542, 545, 617 P.2d 131, 133 (1980) (“An interpretation that gives effect is always preferred over an interpretation that makes the statute void or treats the statute as mere surplusage.”). In light of the longstanding federal case law in this area, and based on the Montana Supreme Court’s reliance on that case law, the MHRA’s protections against sex discrimination encompass protections against discrimination based on transgender status.

#### **D. The Act discriminates based on sex.**

Defendants further argue that the Act does not discriminate based on sex because it “does not distinguish between males or females.” (Defs.’ Br. at 9–10.) Defendants are incorrect.

For the same reasons that the MHRA’s protections against sex discrimination encompass protections against discrimination based on transgender status, the Act discriminates based on sex.

A classification based on transgender status is inherently sex-based, and a sex-based classification cannot stand under the MHRA. *See supra* Part II(C)(2).

It is, moreover, no justification to assert that the Act treats transgender men and transgender women the same. Regardless of whether the Act discriminates equally based on gender, it is still impermissible for the Act to discriminate based on transgender status. *See, e.g., Bostock*, 140 S. Ct. at 1742 (noting that an employer cannot justify firing a person for being transgender just because the employer fires both transgender men and transgender women); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (rejecting argument that a ban on same-sex couples is permissible because both men and women are prohibited from marrying someone of the same sex).

### **III. Plaintiffs have stated a legally cognizable claim under the MGCFP.**

Finally, Defendants argue that Plaintiffs have failed to state a claim under the MGCFP. (Defs.’ Br. at 10–11.) Defendants are incorrect.

Under the MGCFP, all state governmental services, such as the service of amending birth certificates, “must be performed without discrimination based upon . . . sex.” § 49–3–205(1), MCA. The MGCFP also prohibits state agencies from becoming “a party to an agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices.” § 49–3–205(2), MCA. In addition, the MGCFP imposes a statutory duty on state agencies to affirmatively ensure compliance with the state’s antidiscrimination policies. *See* § 49–3–205(3), MCA (requiring state agencies to “analyze all of [their] operations to ascertain possible instances of noncompliance with the policy of this chapter and . . . initiate comprehensive programs to remedy any defect found to exist”); § 49–3–201(1), MCA (stating that “[e]ach state . . . governmental agency shall take appropriate action in the exercise of its . . . regulatory power as will assure equal treatment of persons, eliminate discrimination, and enforce compliance with the policy of this chapter”).

Under the MGCFP, a “[s]tate . . . agency” includes, in relevant part, “any branch, department, office . . . , agency . . . , or other instrumentality of state government.” § 49–3–101(4)(a), MCA. The Amended Complaint implicates both the Office of the Governor and DPHHS in the discriminatory, antitransgender regime perpetuated by the Act. (*See* AC, ¶¶ 1–2.)

The MGCFP’s and the MHRA’s antidiscrimination provisions are regularly analyzed together. *See, e.g., Thompson v. Bd. of Trs., Sch. Dist. No. 12, Harlem, Blaine Cnty.*, 192 Mont. 266, 268–70, 627 P.2d 1229, 1230–31 (1981); *Mont. Fair Hous.*, 854 F. Supp. 2d at 843–46; *Romero v. Yellowstone Cnty. Sheriff Office*, No. CV 06 104 BLG RFC, 2007 WL 1140659, at \*3 (D. Mont. Apr. 16, 2007). In this case, the Act violates the MGCFP for the same reasons it violates the MHRA. *See supra* Part II.

*Jones v. Montana University System*, 2007 MT 82, ¶ 37, 337 Mont. 1, 155 P.3d 1247, on which Defendants rely, does not alter this conclusion. In that case, the Montana Supreme Court simply held that the plaintiffs had to exhaust their administrative remedies before litigating their claim that the defendant improperly refused to allow them to participate in political debates held within public buildings *Id.* The Court did *not* hold that a plaintiff is prohibited from challenging the legality of a statute under the MHRA. *Id.*, ¶¶ 37–39.

### CONCLUSION

For the reasons set forth above, Defendants’ motion to dismiss should be denied, and Plaintiffs should be allowed to proceed with the claims alleged in the Amended Complaint.

Dated: February 11, 2022

Respectfully submitted,

By:



---

Akilah Lane

Akilah Lane  
Alex Rate  
**ACLU of Montana**  
P.O. Box 1968  
Missoula, MT 59806  
406-203-3375  
lanea@aclumontana.org  
ratea@aclumontana.org

Malita Picasso, *pro hac vice* pending  
**ACLU Foundation**  
**LGBTQ & HIV Project**  
125 Broad Street  
New York, NY 10004  
Telephone: 212-549-2561  
mpicasso@aclu.org

F. Thomas Hecht, *pro hac vice* pending  
Tina B. Solis, *pro hac vice* pending  
Seth A. Horvath, *pro hac vice* pending  
**Nixon Peabody LLP**  
70 West Madison Street, Suite 3500  
Chicago, IL 60601  
Telephone: 312-977-4443  
Facsimile: 312-977-4405  
fthecht@nixonpeabody.com  
tbsolis@nixonpeabody.com  
sahorvath@nixonpeabody.com

Elizabeth Halverson PC  
1302 24th Street West #393  
Billings, MT 59102  
406-698-9929  
ehalverson@halversonlaw.net

**CERTIFICATE OF SERVICE**

I, Akilah Lane, hereby certify on this date I emailed a true and accurate copy of the foregoing document to:


David M.S. Dewhirst  
*Solicitor General*  
Office of the Attorney General, State of Montana  
P.O. Box 201401  
Helena, MT 59620-1401

Kathleen L. Smithgall  
*Assistant Solicitor General*  
Office of the Attorney General, State of Montana  
P.O. Box 201401  
Helena, MT 59620-1401

Patrick M. Risken  
*Assistant Attorney General*  
Office of the Attorney General, State of Montana  
P.O. Box 201401  
Helena, MT 59620-1401

Jeremiah Langston  
*Assistant Attorney General*  
Office of the Attorney General, State of Montana  
P.O. Box 201401  
Helena, MT 59620-1401

DATED: February 11, 2022

  
Akilah Lane