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

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

Plaintiffs and Appellees,

v.

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

Defendants and Appellants.

APPELLANTS' OPENING BRIEF

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

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STATEMENT OF THE ISSUES

Defendants-Appellants (collectively, the "State") raise the following issues:

1. Whether Plaintiffs' claims are ripe?

2. Whether Plaintiffs established standing?

3. Whether the district court erred and abused its discretion by enjoining an important State law absent a showing of likelihood of success or irreparable harm, and where the balance of equities and public interest support the State?

4. Whether the district court erred and abused its discretion by issuing an overbroad injunction that extends to unchallenged applications of State law?

STATEMENT OF THE CASE

Plaintiffs challenged House Bill 121 (2025) ("HB 121" or "the Act"), which provides in part that "[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." HB 121 § 3(2); *see also* Dkt.1 (complaint). HB 121 defines a person's "sex" based on sex chromosomes, gonads, and genitalia at birth. HB 121 § 2(12). Though HB 121 applies without regard to subjective gender identity, Plaintiffs claim that it "singl[es] out transgender and intersex people for discriminatory treatment[.]" Dkt.1 ¶5. Plaintiffs allege that the Act infringes their "rights to equal protection, privacy, to pursue life's basic necessities, and due process[.]" Dkt.8 at 3.

On March 27, 2025, the same day the Act became effective and the Plaintiffs filed their Complaint, Plaintiffs also moved for a preliminary injunction. Dkt.8. On April 2, 2025, the district court entered a temporary restraining order until it could rule on Plaintiffs' request for a preliminary injunction. Dkt.11. The parties briefed the preliminary injunction motion, and the district court held a hearing, then issued an injunction. Dkt.25 at 1. The district court first found that Plaintiffs' claims were ripe and that Plaintiffs had standing. *Id.* at 10-17. Then, the district court found Plaintiffs were likely to succeed on the merits of both their equal protection claim and their privacy claim; the district court did not address Plaintiffs' remaining claims. *Id.* at 3.

Regarding Plaintiffs' equal protection claim, the district court concluded the similarly situated classes relevant to its analysis are "cis female/male individuals" and "individuals who identify as transgender/intersex female/male." *Id.* at 22. The district court then concluded that because the act allows "cis female/male individuals" to use restrooms or changing rooms "that correspond to their gender identity and transgender/intersex female/male individuals [can]not" the Act treats different classes of people differently. *Id.* at 22. The district court determined that strict scrutiny applied for three different reasons. First, because "[t]ransgender status is a suspect class for the purposes of equal protection analysis." *Id.* at 27. Second,

because sex is a "suspect classification." *Id.* at 28. And finally, because "[t]ransgender discrimination is, by nature, sex discrimination." *Id.* at 29-30.

The district court also found "Plaintiffs have shown that the Act burdens their fundamental right of privacy." *Id.* at 31. Specifically, the Court found Plaintiffs had an actual or subjective expectation of privacy in their transgender or intersex identity, anatomy, genetics, and medical history and in their decision to use restrooms, changing rooms, and sleeping quarters that correspond with their gender identity and "[e]ach 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." *Id.* at 41-42. And, relying on this Court's statement in *Gryczan v. State*, 283 Mont. 433, 450, 942 P.2d 112, 122 (1997), that "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," the district court concluded that "[a]ll 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." *Id.* at 43. The district court also relied on this Court's reasoning regarding homosexuals' privacy expectations in their consensual, sexual activities to conclude that society is willing to recognize these stated privacy expectations. *Id.* at 45.

Consequently, the district court analyzed the Act under strict scrutiny, applying middle-tier and rational-basis review in the alternative. *Id.* at 31-40. The district court's analysis was essentially the same under each. It concluded that the State's proffered evidence "(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." *Id.* at 34 (emphasis added). To be narrowly tailored then, the district court concluded the Act could only prohibit "*cis* males from entering female restrooms, changing rooms, and sleeping quarters." *Id.* at 35 (emphasis added). Because the Act also "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 was 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," or "rationally related to [its] interest." *Id.* at 31-40.

The district court then collapsed the remaining injunction factors into the merits. Its discussion of irreparable harm, balance of equities, and the public interest focused entirely on Plaintiffs' purported likelihood-of-success. The Court said that the "violations of their fundamental rights (equal protection, right of privacy) under the Montana Constitution … constitutes irreparable harm here as a matter of law."

Id. at 47. The Court waved away the last two factors, too, reasoning that alleged constitutional violation outweighs any interest in enforcing the Act. *Id.* at 48-50.

The district court preliminarily enjoined *all* applications of the Act, including those about which Plaintiffs never alleged harm, such as juvenile detention facilities, correctional centers, domestic violence programs, and public schools (other than colleges). Instead, the district court concluded "[w]hether Plaintiffs have alleged irreparable harm as to each covered entity does not negate the irreparable harm already shown." *Id.* at 47.

The State timely appealed from the preliminary injunction. Dkt.33.

STATEMENT OF THE FACTS

The Governor signed HB 121 into law on March 27, 2025, and it took effect immediately. 2025 Mont. Laws ch. 33. HB 121 added a new part to Chapter 4, Title 50 of the Montana Code Annotated. These sections provide that "a covered entity shall designate each multi-occupancy restroom, changing room, or sleeping quarters for the exclusive use of females or males," and "[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." HB 121 § 3(1)-(2).

A "covered entity" includes "a correctional center, a juvenile detention facility, a local domestic violence program, a public building, or a public school." HB 121 § 2(3). The Act defines a person's "sex" to be "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."

The Act also defines "male" and "female":

> "Female" means a member of the human species who, under normal development, has XX chromosomes and produces or would produce relatively large, relatively immobile gametes, or eggs, during her life cycle and has a reproductive and endocrine system oriented around the production of those gametes. An individual who would otherwise fall within this definition, but for a biological or genetic condition, is female.
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> . . . .
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> "Male" means a member of the human species who, under normal development, has XY chromosomes and produces or would produce small, mobile gametes, or sperm, during his life cycle and has a reproductive and endocrine system oriented around the production of those gametes. An individual who would otherwise fall within this definition, but for a biological or genetic condition, is male.

HB 121 § 2(4), (7).

The Act also provides "a private cause of action for declaratory and injunctive relief, nominal damages, and any other appropriate relief against the covered entity" to "[a]n 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" if the covered entity either "(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." HB 121 § 4(1). The Act provides the same private right of action against a covered entity if the individual was required "to share sleeping quarters with an individual of the opposite sex[.]" HB 121 § 4(2).

Plaintiffs-Appellees ("Plaintiffs") are Casey Perkins and Jane Doe, "transgender women" "assigned the sex designation of male at birth but [whose] gender identity is female"; Spencer McDonald, "a transgender man ... assigned the sex designation of female at birth but his gender identity is male"; Kasandra Reddington, a "transfeminine … assigned the sex designation of male at birth but she identifies as more feminine than masculine, without identifying as a specific gender"; and John Doe, who is "intersex … assigned the sex designation of male at birth but has traits and reproductive anatomy corresponding to both the male gender and the female gender … [and] identifies as male." Dkt.1 at ¶¶13, 21, 35, 55, 66, 69.[1] Defendants-Appellants are the State of Montana, Governor Greg Gianforte, and Attorney General Austin Knudsen in their official capacities. Dkt.1 at ¶¶80-82.

[1] Plaintiffs subsequently filed their Amended Complaint for Declaratory and Injunctive Relief (Dkt.45), adding Missoula County as a Plaintiff. The addition of this Plaintiff has no bearing on this appeal. *See Cross v. State*, 2024 MT 303, ¶ 20, 419 Mont. 290, 560 P.3d 637.

STANDARD OF REVIEW

"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, 555 P.3d 759 (*MAID*) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008)). This Court reviews a district court's grant or denial of a preliminary injunction "for manifest abuse of discretion." *Mercer v. Mont. HHS*, 2025 MT 9, ¶ 9, 420 Mont. 201, 562 P.3d 502. "A court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *Id.* "If the district court's decision on a preliminary injunction was based upon legal conclusions, this Court will review those conclusions for correctness." *Id.* (citing *MAID*, ¶ 8).

"A statute is presumed constitutional unless it conflicts with the Montana Constitution, in the judgement of the court, beyond a reasonable doubt." *State v. Akhmedli*, 2023 MT 120, ¶ 3, 412 Mont. 538, 531 P.3d 562 (cleaned up). Every presumption must be indulged in favor of a legislative act. *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

"'Issues of justiciability—such as standing, mootness, ripeness, and political question—are questions of law that [this Court] also review de novo.'" *Advocs. for Sch. Tr. Lands v. State*, 2022 MT 46, ¶ 5, 408 Mont. 39, 505 P.3d 825.

SUMMARY OF THE ARGUMENT

The preliminary injunction should be reversed or vacated.

First, Plaintiffs claims are not ripe, and they lack standing. The Act applies only to "covered entities," and the only remedy is a private right of action against the "covered entity." HB 121 §§ 3, 4. Plaintiffs cannot point to anyone suing or threatening to sue a covered entity under the Act, let alone a concrete threat that as a result of the suit or potential suit a covered entity will take any specific action that will harm Plaintiffs. There is thus no "factually adequate record upon which to base effective review," only speculation about what might happen.

Second, Plaintiffs failed to meet their burden of establishing the Act is unconstitutional in all its applications as is necessary to succeed on their facial challenges.

Third, Plaintiffs do not state a discrimination claim under equal protection principles. No one, regardless of sex, transgender status, intersex status, or gender identity, can use a restroom designated for the sex opposite theirs at birth. And even though the Act designates based on sex, it does not discriminate on that basis because the law treats the sexes equally. Thus, the appropriate level of review is rational basis, which the Act survives.

The Act's stated purpose is to affirm definitions of the sexes and preserve women's facilities "from acts of abuse, harassment, sexual assault, and violence

committed by men." HB 121 § 1(2). This is a proper and important use of the State's police powers. And the Act is appropriately focused on areas such as restrooms, changing rooms, and sleeping quarters, which have certain vulnerabilities such as being typically more secluded and lacking security cameras or other monitoring.

Fourth, Plaintiffs' right to privacy claim also fails. Regardless of whether Plaintiffs believe they have an expectation of privacy as to which facilities they use, this is not an expectation society accepts as reasonable for the simple fact that, for the vast majority of individuals, this information is not private. A "cis" woman's sex and gender identity is generally immediately knowable upon her entering a public restroom. To hold that transgender people have a privacy expectation that society is willing to recognize in this same information bestows upon them greater rights and more protected privacy interests than others in the same society.

Fifth, the district court collapsed the remaining injunction factors to likelihood of success. That was error. Not every potential legal violation involves irreparable harm or the absence of countervailing interests. The district court also failed to determine if Plaintiffs were harmed by each covered entity. And the balance of equities and public interests are stated by the law adopted by the People's representatives—a law that adopts a biological definition of "sex" in pursuit of protecting women.

This Court should reverse, or at a minimum vacate and remand.

ARGUMENT

I. The district court erred by concluding Plaintiffs' claims are justiciable.

Montana courts' judicial power "is limited to 'justiciable controversies.'" *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 53, 365 Mont. 92, 278 P.3d 455. Here, Plaintiffs adopted a litigate first-approach by filing their lawsuit and moving for a preliminary injunction the very day the Act became effective, which resulted in fatal jurisdictional flaws, including a lack of ripeness and standing. *See Colwell v. HHS*, 558 F.3d 1112, 1123 (9th Cir. 2009) (dismissing based on prudential ripeness where parties rushed to sue over policy guidance without any concrete example of how the agency will use the policy guidance).

Here, the Act applies to "covered entities," which are correctional centers, juvenile detention facilities, local domestic violence programs that receive certain public funding, public buildings, and public schools. HB 121 § 1(3). And the only remedy in the text of the Act is a private right of action against the "covered entity," *See* HB 121 § 4. Even then, the only award a plaintiff can obtain is "declaratory and injunctive relief, nominal damages, and … other appropriate relief" against the covered entity. *Id.*

Plaintiffs cannot point to anyone suing or threatening to sue a covered entity under the Act, let alone a concrete threat that as a result of the suit or potential suit a covered entity will take any specific action that will harm Plaintiffs. There is thus

no "factually adequate record upon which to base effective review," only speculation about what might happen.

A. Plaintiffs' claims are not ripe.

"[C]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *McDonald v. Jacobsen*, 2022 MT 160, ¶ 8, 409 Mont. 405, 515 P.3d 777 (citing *Reichert*, ¶ 54). The "basic purpose" of ripeness is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Reichert*, ¶ 54.

HB 121 requires the covered entity—not the individual—ensure that the law is followed. Because Plaintiffs brought a pre-enforcement challenge, it is currently unclear what covered entities will do to comply with the Act, including providing additional single occupancy restrooms. *See* Dkt. 8, Perkins Declaration, ¶ 5 ("DLI Human Resources created a unisex restroom for me[.]"); *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 798 (11th Cir. 2022) ("Transgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex.").

The district court improperly rejected this reality, concluding instead that "[t]he 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." Dkt.25 at 12 (emphasis added). First, any reliance on the fact that Plaintiffs might be made a party to a future suit to conclude Plaintiffs' claims are ripe is inappropriate, as the Act does not permit such a joinder. Second, the district court failed to give proper weight to the pre-enforcement nature of this suit, as it is the covered entities—not Plaintiffs—that are required to ensure compliance by making the necessary accommodations.

Plaintiffs have not shown any actual, present controversy as to any of the restrooms Plaintiffs identified. For example, Plaintiff Casey Perkins ("Perkins") states that there are two multi-occupancy, sex-designated restrooms on the fourth floor of the Department of Labor and Industry ("DLI") where Perkins works, which even prior to the Act, Perkins "only [used] when the floor is empty or only in emergencies." Dkt.8 at 10; *see also* Mont. Code Ann. § 49-2-404 (fifty-year-old law providing that "[s]eparate lavatory, bathing, or dressing facilities based on the distinction of sex may be maintained for the purpose of modesty or privacy."). Perkins notes there is also a single-occupancy restroom elsewhere in the building. Dkt.8 at 10. It is purely speculative whether anyone will raise an issue with DLI regarding the Act and what, if anything, DLI will do regarding the bathrooms on the fourth floor.

Plaintiff Kasandra Reddington ("Reddington") claims to use a women's restroom at Helena College's Donaldson Campus, while noting there are also single-

occupancy restrooms. *Id.* at 14. Reddington also claims to use multi-occupancy restrooms at Helena College's Airport Campus and the University of Montana Missoula's Campus. *Id.* Reddington does not make any allegations that there has been any issue regarding Reddington's usage of multi-occupancy restrooms, and it is purely speculative that anyone will raise an issue and what if anything the relevant college would do. Reddington also claims to visit Spring Meadow Lake State Park, which has multi-occupancy bathrooms, but does not state that there has been an issue, or what if anything the park staff would do regarding an issue (including providing additional single-occupancy bathrooms).[2]

Finally, Plaintiff John Doe is intersex due to a genetic condition, but has a birth-observed sex of male, a male gender identity, and uses male bathrooms. *Id.* at 16-17. The Act expressly includes as male "[a]n individual who would otherwise fall within this definition, but for a biological or genetic condition." HB 121, § 1(7).[3] There is thus no basis to even speculate that the Act will have any practical impact on him.

In sum, Plaintiffs do not allege an issue involving anyone (let alone transgender or intersex individuals) relating to the Act, only the passage of a law that

[2] Plaintiffs Jane Doe and Spencer McDonald allege similar facts regarding restroom usage to Reddington and Perkins. *See* Dkt.8.

[3] The district court declined to address the Act's application to intersex people. Dkt.25 at 4.

applies to third parties, that might cause third parties to take some actions, that might impact Plaintiffs in the future. This case simply is not ripe because there is no appropriate record on which the district court can base a decision.

B. Plaintiffs lack standing.

"[S]tanding is a threshold, jurisdictional requirement in every case." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80. "At the preliminary injunction stage," "the plaintiff must make a 'clear showing' that she is 'likely' to establish each element of standing." *Murthy v. Missouri*, 603 U.S. 43, 58 (2024). "[T]he 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*, ¶ 32 (internal quotation marks omitted); *see also Mont. Immigrant Just. All. v. Bullock*, 2016 MT 104, ¶ 18, 383 Mont. 318, 371 P.3d 430 (Montana's standing requirement "embodies the same limitations as are imposed on federal courts" by the U.S. Constitution).

First, Plaintiffs have not shown a concrete injury that is actual or imminent. As noted in Part I, *supra*, the Act applies to covered entities. How those covered entities will comply with the Act is not yet clear.

Second, Plaintiffs did not show enforcement authority by Defendants such that they are likely to have standing against all the Defendants they seek to enjoin. *See Am. Freedom Def. Initiative v. Lynch*, 217 F. Supp. 3d 100, 105 (D.D.C. 2016) ("Defendant's lack of enforcement authority is fatal to Plaintiffs' standing to bring this action…"); *see also Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015) ("The governor and attorney general do not have authority to enforce the Reader System Act, so they do not cause injury to Digital Recognition. The Act provides for enforcement only through private actions for damages.").

The district court ignored this and concluded that "regardless of the Defendants' enforcement authority, if Plaintiffs successfully maintain the action, their injury (invasion of a legally protected interest) would be alleviated." Dkt.25 at 16. Affirming this reasoning would eviscerate a key component of standing for it is a "long-standing rule that a plaintiff may not sue a[n] ... official who is without any power to enforce the complained-of statute." *Am. Freedom Def. Initiative*, 217 F. Supp. 3d at 105. Indeed, this would allow a plaintiff seeking a declaratory judgment to sue *any defendant* regardless of their connection to the underlying conflict because if the plaintiff were successfully able to obtain his desired declaration, his "injury … would be alleviated" even though the defendant were an irrelevant party. This simply

cannot be.[4] Thus, it was entirely necessary for the district court to determine if Defendants are actually able to enforce the Act. Because they are not, Plaintiffs lack standing.

II. The district court abused its discretion by enjoining important, non-discriminatory state policies.

A. The district court improperly concluded there is no set of circumstances under which the Act would be valid.

To succeed on their facial challenge, Plaintiffs were required to "show that 'no set of circumstances exists under which [the Act] would be valid, *i.e.,* that the law is unconstitutional in all of its applications.'" *Mont. Cannabis Indus. Ass'n*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131. "That the challenged provision 'might operate unconstitutionally under some conceivable set of circumstances is

[4] Plaintiffs seek declaratory relief under the Montana Uniform Declaratory Judgments Act (Dkt.1 at 4), but the UDJA does not independently confer standing. *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 42, 389 Mont. 122, 406 P.3d 427 ("Without an independent ground for standing, [plaintiffs] cannot assert a claim under the [UDJA]."). This means Plaintiffs cannot establish redressability simply by arguing their alleged injuries will be alleviated by a declaration that the challenged law is unconstitutional. *See Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) ("A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action.") (citation omitted); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier[, b]ut…that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."). To conclude otherwise would be to accept the circular argument that redressability is established because declaratory relief is available, and declaratory relief is available because redressability is established.

insufficient to render it wholly invalid.'" *Id.* ¶ 73. The district court properly recognized this was Plaintiffs' burden, but then entirely ignored the State's argument that Plaintiffs' claim could not survive such a demanding standard and concluded, without discussing how, that "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." Dkt.25 at 17, 46.

In actuality, Plaintiffs are unable to meet this burden. The Act does not apply exclusively to (or even address) transgender Montanans. Instead, it prohibits *all* persons from using certain sex-designated facilities. Plaintiffs' own brief below stated that transgender Montanans likely make up less than one percent of Montana's population. Dkt.8 at 30. This means that ninety-nine percent of the people to whom the Act applies are not transgender, and it is clear that as applied to these "cisgender" people, the Act does not violate their constitutional rights to privacy or equal protection, *see infra* Part II(B)-(C). The district court failed to address the law's application to "cisgender" people at all in its analysis but treated the law as if it applied *only* to transgender Montanans. Even assuming the district court's conclusion regarding the violation of the rights of transgender people is correct, the Act is clearly still valid in ninety-nine percent of cases.

In *Roe v. Critchfield*, the Ninth Circuit held the plaintiff could not succeed on a facial challenge to Idaho's bill that required public school students use restrooms

and changing facilities designated for their biological sex. 137 F.4th 912, 924 (9th Cir. 2025). The court even reasoned that it could "not presume [the bill]'s application to each type of facility will be substantially related to the State's objective of protecting student privacy." *Id.* "Rather," the outcome was "dictated by" the fact that the plaintiff had raised a facial challenge and could not demonstrate there was "no set of circumstances … under which the Act would be valid." *Id.* at 924-25. As the same is true here, Plaintiffs' facial claims must fail.

B. Plaintiffs failed to show a likelihood of success on the merits of their equal protection claim.

The Montana Constitution guarantees equal protection and embodies "a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *McDermott v. Mont. Dep't of Corr.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992. The first step to analyzing an equal protection challenge requires identifying "the classes involved and determin[ing] whether they are similarly situated." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445. "Once the relevant classifications have been identified," courts "next determine the appropriate level of scrutiny." *Id.* ¶ 17. Strict scrutiny applies when a suspect class or fundamental right is affected. *McDermott,* ¶ 31. However, if the Legislature enacts a law that imposes different requirements on similarly situated individuals, but those requirements are not imposed on a suspect class and do not implicate a fundamental right or another constitutional right that triggers middle-tier

scrutiny, they are subject only to rational basis review. *Mont. Cannabis Indus. Ass'n*, ¶ 16.

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

Here, the Act clearly states it applies on the basis of an individual's sex as either male or female at birth. *See United States v. Skrmetti*, 145 S.Ct. 1816, 1829 (2025) (looking to the "face" of the act to determine its classifications). Thus, the similarly situated classes for equal protection purposes are males and females determined by the individual's possession of either XX or XY sex chromosomes, while accounting for genetic conditions. *See* HB 121 § 2(4), (7). The district court nonetheless concluded that the actual similarly situated classes were "cis female/male individuals" and "individuals who identify as transgender/intersex female/male" because the Act's definition of "sex" was determined "without regard to an individual's psychological, behavioral, social, chosen, or subjective experience of gender," constituting "a device designed to impose different burdens on different classes of persons." Dkt.25 at 22.

Yet, the Act does not discriminate based on transgender status—it makes no mention whatsoever of transgender or intersex status.[5] Instead, it makes a permissible legislative classification of people based on sex, in line with longstanding precedent and without reference to any individual's subjective gender identity. *See Adams*, 57 F.4th at 808 (Policy that required students use the bathroom corresponding to their sex at birth "facially classifie[d] based on biological sex—not transgender status or gender identity" because "[t]ransgender status and gender identity [we]re wholly absent from the bathroom policy's classification."). Notably, Montana has had a law on the books *for five decades* in its Human Rights Act stating "[s]eparate lavatory, bathing, or dressing facilities based on the distinction of sex may be maintained for the purpose of modesty or privacy." Mont. Code Ann. § 49-2-404.

[5] Even if this Court disagrees, it should decline to hold transgender status is a suspect class and apply rational basis review. *See Johnston v. Univ. of Pitt. of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670 (W.D. Pa. 2015) (noting that "neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause," and applying rational basis review); *Gore v. Lee*, 107 F.4th 548, 558 (6th Cir. 2024) (noting "[t]he Supreme Court 'has never defined a suspect or quasi-suspect class on anything other than a trait that is definitively ascertainable at the moment of birth'" and applying rational basis review); *see also id.* (alternatively recognizing that transgender people cannot "establish a cognizable claim of political powerlessness" because "[t]ransgender individuals have had considerable success politically," and documenting successes).

Importantly, these definitions apply to all Montanans. So, the Act's operative definitions for the purpose of its classifications, male or female, each include transgender people. *See Adams*, 57 F.4th at 808 (noting "both sides of the classification—biological males and biological females—include transgender students); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993).

In *Skrmetti*, the U.S. Supreme Court recently rejected an argument nearly identical to Plaintiffs' here and held Tennessee's prohibition against providing certain medical treatments (such as puberty blockers) from treating gender dysphoria while permitting the same treatment in all other cases did not discriminate on the basis of transgender status or gender identity. 145 S.Ct. at 1829. In determining the relevant class for equal protection purposes, the Supreme Court rejected the plaintiffs' argument that the law "prohibits certain treatments for minors of one sex while allowing those same treatments for minors of the opposite sex" because "an adolescent whose biological sex is female cannot receive puberty blockers or testosterone to live and present as a male, but an adolescent whose biological sex is male can," and vice versa. *Id.* at 1830. Instead, the Court concluded "[t]he law does not prohibit conduct for one sex that it permits for the other [because] no minor may be administered puberty blockers or hormones to treat gender dysphoria, gender

identity disorder, or gender incongruence; minors of any sex may be administered puberty blockers or hormones for other purposes." *Id.* at 1831.

The same is true here. The Act allows anyone, regardless of gender identity or transgender status, to use certain facilities designated for use by their biological sex and prohibits the same from using those facilities designated for use by the opposite biological sex. *See Adams*, 57 F.4th at 808.

The abolition of any sex designation from restrooms and other facilities in covered entities would lead to its own undesirable results—e.g., the inability to keep men out of the female sleeping quarters in a domestic violence shelter—so as a matter of public policy, the Legislature decided a choice must be made. *See id.* at 805; *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (noting that admitting women to Virginia Military Institute "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements").

And in making that choice, the Legislature has based the law on an immutable characteristic—an individual's biological sex—as opposed to a person's subjective gender identity, which can be difficult to establish and change over time. *See Adams*, 57 F.4th at 807 (noting "the Supreme Court's longstanding recognition that 'sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth'"); *Gore*, 107 F.4th at 558 ("Unlike existing suspect classes,

transgender individuals 'do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.'").

The district court alternatively concluded that because "Montana's Constitution provides an express prohibition of sex-based discrimination in the Equal Protection Clause," sex is a suspect class, then without any discussion as to how, determined the Act discriminates based on sex and is subject to strict scrutiny. Dkt.25 at 28. This line of reasoning—which flouts this Court's repeated refusal to hold categorically that sex classifications are subject to heightened scrutiny—is incorrect for at least two reasons.[6]

First, while the Act classifies on the basis of "sex" (male or female), it treats these two classes the same so it does not discriminate on the basis of sex. *See Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941) (Bare "[c]lassification is not discrimination."); *Adams*, 57 F.4th at 805 ("In light of the privacy interests that arise from the physical differences between the sexes, it has been commonplace and

[6] It is for these same reasons, that the district court's third alternative conclusion that "[b]y discriminating on the basis of transgender and intersex status, the Act necessarily discriminates on the basis of sex," Dkt.25 at 30, fails. *See Adams*, 57 F.4th at 809 ("This appeal centers on … whether discrimination based on biological sex necessarily entails discrimination based on transgender status. It does not—a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status."); *see also Roe*, 137 F.4th at 925 (holding Idaho's bill which required public school students use restrooms and changing facilities designated for their biological sex was "not facially unconstitutional under the Equal Protection Clause" regardless of "whether viewed as classifying students based on their sex or based on their transgender status.").

universally accepted—across societies and throughout history—to separate on the basis of sex those public restrooms, locker rooms, and shower facilities that are designed to be used by multiple people at a time."(citation omitted)); *id.* at 804 ("'[S]eparate places to disrobe, sleep, [and] perform personal bodily functions are permitted, *in some situations required*, by regard for individual privacy.'" (quoting Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975, at A21)).

A male may not use certain facilities designated for use by females, just as females may not use certain facilities designated for use by males. "No person, male or female, [cisgender or transgender,] may" use a facility designated for use by others of the opposite born sex. *See Gore*, 107 F.4th at 556; *See also Corbitt v. Sec'y of the Ala. L. Enf't Agency*, 115 F.4th 1335, 1346 (11th Cir. 2024) ("[T]he Equal Protection Clause does not proscribe all laws and regulations that relate to or implicate sex in their subject matter …. Rather, [it] is concerned with differential treatment, especially when the differential treatment is due to sex-based classifications."). To require any law that classifies, but does not discriminate, based on sex must survive strict scrutiny, impermissibly shrinks the Legislature's ability to legislate. *See Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) ("[B]ecause the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated

in law as though they were the same, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances" (internal punctuation and citations omitted)).

Second, putting aside that there is no sex discrimination here, the district court's theory conflates two questions: the presence of a fundamental "civil or political right" and the presence of a suspect classification. "Article II, Section 4, protects against two *distinct* types of unequal treatment." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 7, 392 Mont. 1, 420 P.3d 528 (emphasis added). "First, it generally provides that '[n]o person shall be denied the equal protection of the laws.'" *Id.* It "then more specifically" prohibits discrimination "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." *Id.*

"Examples of fundamental rights"—in other words, civil or political rights—"are the right of privacy, freedom of speech, freedom of religion, right to vote and the right to interstate travel," while "[e]xamples of suspect classifications include wealth, race, nationality," and sex. *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 43, 744 P.2d 895, 897 (1987). The third sentence of Article II, Section 4 prohibits sex-based classifications only as to fundamental rights. It could not create a new fundamental right "to be free from discrimination on the basis of sex," at least for

anything beyond "civil or political rights." In effect, the district court read the third sentence without its "more specific[]" limitation. *Gazelka*, ¶ 7. Accordingly, the district court wrongly concluded the proper classification for equal protection purposes was "cis female/male individuals" and "individuals who identify as transgender/intersex female/male." In actuality, the correct classification for equal protection purposes is sex. And because "[t]he [Act] treats the sexes equally," *Gore*, 107 F.4th at 555, it does not discriminate based on sex. Consequently, the Act does not implicate a fundamental right, another constitutional right, or discriminate against a suspect class. *See Johnston*, 97 F. Supp. 3d at 670 ("[S]eparating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause.").

2. The district court's improper conclusion regarding the relevant class tainted its scrutiny analysis.

This Court "has not yet explicitly identified the level of scrutiny applicable to classifications that are sex-based," *Cross*, ¶ 61 (McKinnon, J., concurring), but it should hold that when a law classifies, but does not discriminate, based on sex, rational-basis review applies. Indeed, this Court has recognized the unavoidability of creating classifications as part of governing: "To a certain extent, nearly all legislation classifies or sets forth classifications of applicability, benefits and recipients. If some of these classifications are imperfect they do not necessarily

violate the equal protection clauses." *See Arneson v. State By & Through Dep't of Admin., Teachers' Ret. Div.,* 262 Mont. 269, 274, 864 P.2d 1245, 1248 (1993). Because this Court has also acknowledged the application of middle-tier scrutiny to sex or gender classifications in federal law, middle-tier scrutiny could also be appropriate.[7] *See id.* at 273, 864 P.2d at 1247.

To clear middle-tier scrutiny, the "means chosen by the legislature (classification) must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 272-73, 864 P.2d at 1247. Any classification that survives middle-tier scrutiny will also survive rational basis analysis, which only requires that the "classification is rationally related to furthering a legitimate state purpose." *Id.* at 273, 864 P.2d at 1247. The rational-basis standard of review "is the most deferential standard of review." *Mont. Cannabis Indus. Ass'n*, ¶ 26. But regardless of what level of scrutiny applies to the Act's nondiscriminatory, sex-based classifications, "every possible presumption must be indulged in favor of [its] constitutionality." *Id.*

The district court incorrectly held strict scrutiny applied but alternatively applied both middle-tier and rational-basis scrutiny and still concluded the Act was unconstitutional. This analysis was deeply flawed because it was a direct result of

[7] As explained in this section, even if this Court were to apply strict scrutiny, the Act would still survive.

the district court's misunderstanding of the relevant class which it determined to be transgender Montanans. Thus, the Court required the State provide evidence justifying the Act's application against exclusively transgender people, even though the Act expressly applies to all Montanans and was purposed on that basis. The Court reasoned:

> Without distinguishing evidence, the Court must conclude that the evidence [the State] 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.

Dkt.25 at 34.

Below, the State cited the FBI's crime statistics for Montana that show in the last five years nearly 72% of aggravated assaults, 83% of rapes, 74% of murders, and 73% of criminal sexual contact offenses were committed by males. In contrast, 91% of rape victims and 76% of criminal sexual contact victims were female. This pattern holds true for less violent offenses such as "criminal sexual contact"—73% of offenders are male; 76% of victims are female.[8]

In addition, scientific studies demonstrate that males have, on average, significantly greater muscle thickness than females, likely "related to gender

[8] Federal Bureau of Investigation, *Crime Data Explorer*, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend (last accessed July 10, 2025).

differences in muscle morphology."[9] These greater average strength differences found in the morphology of males compared to females makes females more vulnerable when in an enclosed space with males as compared to an enclosed space with only females. *See Ballard v. United States*, 329 U.S. 187, 193 (1946) ("[A] community made up exclusively of one is different from a community composed of both.").

There was no basis for the district court limiting the State's evidence to exclusively "cis men." This is faulty for the same reason that the Court would not interpret sex-based statistics in other contexts—such as statistics on employment discrimination—as only limited to "cis men" or "cis women."

Moreover, even if this limitation were valid (it isn't), it should not have resulted in the district court's conclusion that the Act was facially invalid under *any* level of scrutiny, as the Legislature clearly fashioned the Act to apply to all people including "cis men" for the purpose of protecting women. As previously explained, based on Plaintiffs' own estimation, ninety-nine percent of the people the Act applies to are "cisgender" Montanans. Consequently, applying rational-basis or middle-tier scrutiny (or even strict scrutiny), the Act is clearly substantially related to its

[9] *E.g.*, Sandro Bartolomei, *A Comparison between Male and Female Athletes in Relative Strength and Power Performances*, J. of Functional Morphology and Kinesiology, Feb 9, 2021; 6(1):17, https://pmc.ncbi.nlm.nih.gov/articles/PMC7930971/.

important government objective of protecting women and is "substantially related to the achievement of those objectives" as it unquestionably does so in virtually every instance. *Arneson*, 262 Mont. at 272-73, 864 P.2d at 1248.

The district court, however, did not reach this conclusion because it looked exclusively to how the Act may impact transgender people—less than one percent of those covered by the Act. Indeed, the district court concluded that, to be narrowly tailored or substantially related to the State's interests, the Act must expressly make exception for transgender people and only prohibit "cis males from entering female restrooms, changing rooms, and sleeping quarters." Dkt.25 at 35. But the Legislature declined to fashion the Act in this way because limiting its application to exclusively "cis" men is unworkable because covered entities would have no way to ensure that "cis" men are not taking advantage of the law, as gender identity is not an immutable characteristic. *See Bridge v. Okla. State Dep't of Educ.*, 711 F. Supp. 3d 1289, 1297 (W.D. Okla. 2024) ("If the Court adopted Plaintiffs' position, any biological male could claim to be transgender and then be allowed to use the same restroom or changing area as girls. This is a major safety concern …. it would put school officials in the position of either having to conduct a subjective analysis of the sincerity of an individual's gender identity or merely take their word for it."); *see also id.* at 1297 n.9 ("To be clear, the argument is not that transgender individuals are more likely to

be bad actors, but that others could exploit the seemingly standardless concept of 'gender identity' in order to gain access to vulnerable persons." (cleaned up)).

Indeed, the Legislature heard testimony that men were taking advantage of similar lax laws. Robin Sertell testified regarding her experience meeting a young lady escaping sex trafficking who "shook as she recounted how [her trafficker] would follow her into the public restrooms taking advantage of relaxed laws in some states that allow men into women's restrooms in order to keep track of her." "[T]raffickers use public restrooms to trap and control their victims during public transportation." (at 8:38:40).[10]

Derek Oestreicher from the Montana Family Foundation testified that:

> This Bill is designed to protect women and girls from the risk of abuse, harassment, sexual assault, and violence in private and intimate spaces. These risks are not hypothetical. Across the nation, there are growing concerns about cases where men, whether acting with malicious intent or otherwise, have entered women's facilities and caused women and girls to feel unsafe and violated.

(at 8:12:10). He gave an example of a young girl in Bozeman and her peers who "have been deeply uncomfortable and distressed by the school's policy allowing a biological male to use the women's restroom and locker rooms, and these young

[10] Available at https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250110/-1/51155#info_.

girls feel that their privacy has been violated, and they feel helpless as their concerns are dismissed by school administrators." (at 8:13:09).

Riley Gaines, a former collegiate athlete, testified regarding her experience of having to change in front of a naked man, and that she was never "asked for [her] consent, … [and] did not give [her] consent to this exposure." (at 8:29:18).

Loy Chvilicek, who helped start a domestic and sexual violence program, testified that "One in three women have been sexually abused. Consider one in three women and their feelings when they go into a public restroom." (at 8:25:33).

And Amie Ichikawa, who was formerly incarcerated, testified that "Ninety-two percent of incarcerated women are survivors of sexual abuse," and that in her experience it would be cruel and unusual to house these survivors with inmates of the male sex. (at 8:31:54).

To combat this abuse, the State enacted a law which prohibits anyone from using the opposite sexes' facilities. This creates a clear, bright-line rule based on a person's immutable characteristics.

Finally, the district court's reasoning also misunderstood the actual burden the State bears when defending its laws. The district court concluded the State was required to "provide evidence of trans females committing" these crimes in order to satisfy any level of scrutiny. Dkt.25 at 34, 37, 38. But that is not the case. Again, the

law applies to *all* Montanans, so it was inappropriate for the district court to narrow its view to exclusively "trans women."

Also, even "[s]trict scrutiny does not necessarily require the State to make an *evidentiary showing* of a compelling state interest or that the subject statute is narrowly tailored to further that interest," because "the questions of whether an asserted government interest is constitutionally compelling and whether a challenged statute is narrowly tailored to further that interest are *questions of law*." *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 161, 416 Mont. 44, 545 P.3d 1074 (Sandefur, J., concurring in part, dissenting in part) (emphasis added); *see also id.* ("Nor does satisfaction of strict scrutiny necessarily require evidentiary proof that the disputed means chosen by the legislature to further an asserted government interest was in fact 'actually necessary' to achieve that interest, or that no other feasible and less restrictive means was available to further the asserted government interest" (internal citation omitted)). *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 32, 354 Mont. 133, 227 P.3d 42 ("It is not for this Court to review the quantity and quality of information that moved the Legislature to act. The Court's task is to examine the result and if the law is rationally related to a legitimate government purpose, it withstands a constitutional challenge."). Consequently, the State was not required to meet an evidentiary burden of establishing "trans women" are committing the same crimes as "cis men" in order for the Act to pass constitutional

muster.[11] *See Roe*, 137 F.4th at 925 ("A harm need not have occurred before a legislature can act; nor is it our role to decide whether the legislative action is substantively good policy.").

The classification and means of its implementation are therefore not only substantially related to the Act's objectives but also rationally related to furthering that objective. *See* Mont. Code Ann. § 49-2-404 (fifty-year-old law providing that "[s]eparate lavatory, bathing, or dressing facilities based on the distinction of sex may be maintained for the purpose of modesty or privacy.")*; Byrd v. Maricopa Cnty.*

[11] Regardless, the State did cite to several instances of transgender individuals having been found guilty of sexual assault in bathrooms in other states. *Virginia family sues school system for $30 million over student's sexual assault in bathroom*, AP News (Oct. 6, 2023) (describing the convicted attacker as a "male student … wearing a skirt in a women's bathroom"), https://apnews.com/article/loudoun-virginia-lawsuit-transgender-bathroom-sexual-assault-a26168568cc20c2aa6cec9bef50e7c3f; *Transgender Wyoming woman convicted of sexually assaulting 10-year-old girl in bathroom*, Fox News (updated October 20, 2017), https://www.foxnews.com/us/transgender-wyoming-woman-convicted-of-sexually-assaulting-10-year-old-girl-in-bathroom; *Parent files lawsuit after daughter 'severely beaten' in bathroom by trans student*, ABC 15 News (June 1, 2023), https://wpde.com/news/nation-world/parent-files-lawsuit-after-daughter-severely-beaten-in-bathroom-by-trans-student-oklahoma-city-edmond-memorial-high-school-superintendent-angela-grunewald. The case of sexual assault in Virginia by a male student in a girls' bathroom is instructive of the Act's purpose because there appears to be some debate whether the attacker was genuinely transgender. Drew Wilder, *Loudon school sex assault investigation unsealed by judge*, NBC Washington (Sept. 14, 2023) https://www.nbcwashington.com/news/local/loudoun-school-sex-assault-investigation-unsealed-by-judge/3423751/. That the attacks happened and that they were made possible by policies that allowed the male student to enter the girls' bathroom is the precise harm the Act seeks to prevent, regardless of the attacker's subjective gender identity.

Sheriff's Dep't, 629 F.3d 1135, 1141 (9th Cir. 2011) (en banc) (noting the "longstanding recognition that the desire to shield one's unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity"); *Adams*, 57 F.4th at 805 ("[C]ourts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts."). The Act is constitutional under rational basis, middle-tier, or even strict scrutiny. *See Adams*, 57 F.4th at 805 (school's bathroom policy satisfied intermediate scrutiny); *Bridge*, 711 F. Supp. 3d at 1297 (same); *Johnston*, 97 F. Supp. 3d at 669-70 (holding college's bathroom policy survived rational-basis review and intermediate scrutiny).

C. Plaintiffs failed to show a likelihood of success on the merits of their right to privacy claim.

A privacy interest is only protected under the Montana Constitution where (1) "the person involved had a subjective or actual expectation of privacy," and (2) "society is willing to recognize that expectation as reasonable." *State v. Nelson*, 283 Mont. 231, 239, 941 P.2d 441, 446 (1997). The district court improperly concluded that Plaintiffs have an "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," that society is willing to recognize. Dkt.25 at 41-46.

Specifically, the district court found transgender people who walk into a sex-designated facility will have to disclose their "transgender or intersex identity, anatomy, and genetics" and confidential records because the district court failed to "fathom how covered entities will police the requirements of HB 121 to avoid liability from lawsuit." Dkt.25 at 42. First, even assuming such a lawsuit is filed, there is no statutory authority permitting anyone other than the covered entity from being named a defendant to the suit. And this reasoning demonstrates the difficulties of resolving the Plaintiffs' claims on a pre-enforcement challenge before covered entities are given the opportunity to comply with the new law.

Instead, Plaintiffs should not be provided greater protections than are provided to others living in the same society. Regardless of whether Plaintiffs believe they have an expectation of privacy as to which facility they use, this is not an expectation society accepts as reasonable for the simple fact that, for the vast majority of individuals, this information is not private. Virtually everyone in society "discloses" their "identity, anatomy, and genetics" by choosing which sex-designated facility to use. While what one does inside a covered facility such as a restroom may be considered private, the action of choosing which public restroom to enter is generally made in public view.

And Montana law—for five decades—has expressly recognized the basic, and common-sense principle that "[s]eparate lavatory, bathing, or dressing facilities

based on the distinction of sex may be maintained for the purpose of modesty or privacy." Mont. Code Ann. § 49-2-404. Given this obvious history, it was improper for the Court to issue a judicial fiat that society now recognizes a right to privacy when entering a sex-designated bathroom or other, similar sex-designated space.

Second, the district court stretched precedent regarding consensual, sexual activity occurring in private to conclude use of public facilities corresponding with a transgender person's gender identity is similarly protected as private. For instance, the district court stated: "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." Dkt.25 at 43-44. True enough. But it then held that this reasoning applied to transgender Montanans' choice in which facility to use. *Id.* But it simply does not follow that because society recognizes a privacy right for an adult to have consensual sexual relations, a transgender person has a privacy right to use the facility of their choice.

Indeed, merely walking into a multi-occupancy facility is not a personal activity one expects to conduct "without observation." And while one expects to be safe from the "prying eyes of others" once inside a bathroom stall, for instance, accessing the covered facility designated for either males or females is not what is

meant by "consensual sexual activities." Thus, Plaintiffs' privacy rights are not implicated.[12]

III. The district court did not find irreparable injury regarding each of the Act's provisions and failed to give proper weight to the State's injury from having its law enjoined.

The district court failed to "address the concrete harms alleged by Plaintiffs," but exclusively relied on its likelihood-of-success finding, reasoning that "the loss of a constitutional right constitutes irreparable harm." Dkt.25 at 46. This effort to collapse the preliminary injunction analysis to the likelihood of success for every constitutional claim should be rejected.

Irreparable harm should not be presumed. First, "[a] preliminary injunction is an extraordinary remedy" and "a matter of equitable discretion" that "does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 24, 32. "[N]ot every constitutional infringement may support a finding of irreparable harm," especially outside of the First Amendment context. *MAID*, ¶ 16. Second, courts sitting in equity are "not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Third, collapsing the inquiry would force courts to "prejudge the merits" (at least of constitutional claims) "[e]arly in a case" when "the merits are seldom clear"—even though "[t]he other factors" are supposed to be "independent grounds to deny relief."

[12] If this Court disagrees, the Act still survives scrutiny. *See supra* Part II(B)(2).

Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 202-03 (3d Cir. 2024); *accord Siegel v. LePore*, 234 F.3d 1163, 1177-78 (11th Cir. 2000) (rejecting the proposition that "the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation" (cleaned up)).

Hypothetical harm from a constitutional violation is not nearly enough for likely irreparable injury. And the other hypothetical harms invoked by Plaintiffs below do not qualify either. "To succeed in demonstrating a threat of irreparable harm, a party must show that the harm is certain … and of such imminence that there is a clear and present need for equitable relief." *Roudachevski v. All-American Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (cleaned up). But Plaintiffs' generalized fears are not even enough for *standing*, *see supra* Part I, much less irreparable harm. *MAID*, ¶ 19.

Additionally, the district court should have evaluated whether each of the provisions it enjoined were likely to cause irreparable injury to Plaintiffs. Mont. Code Ann. § 27-19-201(1)(b). Instead, the district court concluded that Plaintiffs did not have to allege harm specific to each covered entity because "[w]hether Plaintiffs have alleged irreparable harm as to each covered entity does not negate the irreparable harm already shown." Dkt.25 at 47.

The Act applies to covered entities including "[a] correctional center, a juvenile detention facility, a local domestic violence program, a public building, or a public school." But none of Plaintiffs claim to be harmed by the Acts application to correctional centers, juvenile detention facilities, local domestic violence programs or public schools (except colleges). *See* Dkt.8. The Court should have determined if these portions of the Act caused Plaintiffs irreparable harm. Because they do not, the injunction is overbroad. [13] *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 28, 341 Mont. 368, 178 P.3d 696 (An injunction must not "sweep any more broadly than necessary" but must be "precisely and narrowly tailored." (cleaned up)).

Finally, the district court's treatment of the balance of the equities and public interest factors similarly failed to give proper weight to the State's injury from enjoining its laws. The district court identified *no* harm to Plaintiffs apart from the merits, and "[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*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted). As this Court has said, "courts of equity should pay

[13] Even if this Court otherwise agrees with the district court's analysis, it should still vacate the district court's injunction and remand with instructions that the injunction's scope be limited to those provisions Plaintiffs actually challenged—restrooms and changing rooms in "public building[s]."

particular regard for the public consequences in employing the extraordinary remedy of injunction," and must consider the policymaking branches' "efforts to advance the public welfare." *MAID*, ¶ 21 (internal quotation marks omitted). The public interest is expressed by the laws those branches enacted here, and that law supports all the important public interests identified above. *Supra* Part II(B)(2). The district court ignored all this, and its consideration of the balance of equities and public interest was an abuse of discretion.

CONCLUSION

For these reasons, the district court's order granting a preliminary injunction should be reversed, or at minimum vacated and remanded.

DATED this 13th day of August 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,971 words, excluding certificate of service and certificate of compliance.

/s/Michael D. Russell
Michael D. Russell

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

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

Plaintiffs and Appellees,

v.

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

Defendants and Appellants.

APPENDIX

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

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