IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 25-0397

CASEY PERKINS, SPENCER MCDONALD, KASANDRA REDDINGTON, JANE DOE, and JOHN DOE,

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.

APPELLEES' ANSWERING BRIEF

On Appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV-2025-282

(Appearances on the following page)

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STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that appellees' claims are justiciable where House Bill 121, immediately upon taking effect, regulated appellees by restricting their access to restrooms and other covered facilities that correspond to their gender identity.
2. Whether the district court appropriately exercised its discretion in preliminarily enjoining enforcement of House Bill 121, a law barring transgender people from using restrooms and other covered facilities that correspond to their gender identity, and intersex people from using such facilities altogether.
3. Whether the district court appropriately exercised its discretion to preliminarily enjoin House Bill 121 in full where appellees established that the law is likely facially unconstitutional and harms transgender and intersex people across Montana.

STATEMENT OF THE CASE

On March 27, 2025, Governor Gianforte signed into law House Bill 121 ("HB 121" or the "Act"), the challenged statute in this case. HB 121 bans transgender people from using covered facilities that correspond to their gender identity: "[A]n individual may not enter a restroom, changing room, or sleeping quarters that is designated for females or males unless the individual is a member of the designated

sex," where "female" and "male" are defined based on sex traits "present at birth." HB 121 §§ 2(12), 3(2). These restrictions apply to a sweeping range of public spaces, including schools, offices, libraries, courthouses, and state parks. *Id.* § 2(3), (9), (10). HB 121 also ignores the existence of intersex people—who are born with sex traits that are not uniformly "female" or "male"—and does not appear to allow them to use covered facilities at all. The Act took immediate effect. *Id.* § 7.

On the same day, Plaintiffs-Appellees ("Plaintiffs")—four transgender adults and one intersex adult—filed this lawsuit alleging that the Act violates their rights under the Montana Constitution to equal protection, privacy, life's basic necessities, and due process. Dkt. 1. They also moved for emergency injunctive relief and submitted five declarations describing the serious and irreparable harm that HB 121 would cause them. Dkt. 7. In opposing Plaintiffs' motion, Defendants—the State of Montana, the Governor, and the Attorney General (collectively, the "State")—submitted no declarations and called no witnesses.

On April 2, the district court granted a temporary restraining order. Dkt. 11. The court thereafter held a preliminary-injunction hearing.

On May 16, the district court entered a preliminary injunction. Dkt. 25 ("PI Op."). In a detailed, 51-page decision, the court concluded that Plaintiffs' claims were justiciable, *id.* 10–17; that Plaintiffs were likely to succeed on the merits of at least their equal protection and privacy claims, *id.* 17–46; that Plaintiffs would suffer

irreparable harm absent a preliminary injunction, *id.* 46–47; and that the balance of equities and the public interest each favored granting preliminary relief, *id.* 47–50. The court did not reach Plaintiffs' basic-necessities and due-process claims.

On June 3, Representative Kerri Seekins-Crowe, the sponsor of HB 121, intervened as a Defendant. Dkt. 31.

On July 31, Missoula County joined the lawsuit as a Plaintiff. The County operates many public buildings that are "covered entities" under HB 121 and faces potentially onerous liability for non-compliance. Dkt. 45 ¶¶ 86–93, 174–79. Because the Act has been enjoined since the County's appearance, it has not separately had to move for preliminary relief and is not a party to this appeal.

STATEMENT OF THE FACTS

I. Gender identity, gender dysphoria, and intersex identity

A person's gender identity is their deeply felt, internal sense of belonging to a particular gender, which can differ from the sex they were assigned at birth. *See Cross by & through Cross v. State*, 2024 MT 303, ¶ 5, 419 Mont. 290, 560 P.3d 637; *Marquez v. State*, Cause No. DV 21-873, 2022 WL 4486283, at *3 (Mont. Dist. Ct. Apr. 21, 2022). Transgender people have a gender identity that does not correspond to their birth-assigned sex, and cisgender people have a gender identity that aligns with their birth-assigned sex. *Cross*, ¶ 5. "The medical consensus in the United States is that gender identity is innate and that efforts to change a person's gender identity

are [not only] harmful to [their] health and well-being," but also "unethical." *Marquez*, Cause No. DV 21-873, at *4.

The incongruence between a person's gender identity and their birth-assigned sex can cause clinically significant distress or impaired functioning known as gender dysphoria. *Cross*, ¶ 5. Gender dysphoria is a serious medical condition and, left untreated, "can lead to significant lifelong distress, clinically significant anxiety and depression, self-harming behaviors, and an increased risk of suicidality." *Id.*, ¶ 7.

Treating gender dysphoria involves bringing a patient's body and gender expression into alignment with their gender identity. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522–23 (3d Cir. 2018). An aspect of this treatment is "social transition"—the process through which transgender people live and become socially recognized in accordance with their gender identity. *Id.* Social transition includes allowing transgender people to dress and use names, restrooms, and other sex-separated facilities consistent with their gender identity. *Id.*

Intersex people are born with reproductive anatomy or other sex traits that do not uniformly correspond with what is usually deemed "female" or "male." *See Zzyym v. Pompeo*, 958 F.3d 1014, 1018 (10th Cir. 2020); InterACT, *Intersex Variations Glossary*, https://interactadvocates.org/intersex-definitions/ (last visited Oct. 10, 2025). For example, some intersex people have both ovarian and testicular tissue. *Intersex Variations Glossary*, *supra*. Others have combinations of

chromosomes that are different from the XY and XX chromosomes usually associated with the male and female categories. *Id.* Being intersex is a naturally occurring variation and typically does not require any treatment. InterACT, *What is intersex?*, https://interactadvocates.org/faq/ (last visited Oct. 10, 2025). Although intersex people may be assigned a legal sex of "female" or "male" at birth, their gender identity may not align with their birth-assigned sex. *Intersex Variations Glossary*, *supra*.

II. HB 121

HB 121 took effect on March 27, 2025. HB 121, 2025 Leg., 69th Sess. (Mont. 2025). The Act bars transgender people from using sex-separated facilities corresponding to their gender identity in public spaces across Montana, and intersex people from using those facilities at all. It provides: "A covered entity shall designate each multi-occupancy restroom, changing room, or sleeping quarters for the exclusive use of females or males." HB 121 § 3(1). Such facilities "may be used only by members of that sex." *Id.* § 3(2). "Covered entities" encompass all "public building[s]" and "public school[s]"—including hospitals, offices, libraries, museums, dormitories, and university buildings—as well as "correctional center[s]," "juvenile detention facilit[ies]," and "local domestic violence program[s]." *Id.* § 2(3), 2(9).

The Act proclaims that "there are exactly two sexes, male and female." *Id.* § 2(12). It narrowly defines "female" and "male" in terms of certain physical characteristics and genetics supposedly identifiable at birth, "including sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth." *Id.* § 2(4), 2(7), 2(12). These definitions expressly disregard "an individual's psychological, behavioral, social, chosen, or subjective experience of gender." *Id.* § 2(12). They also exclude intersex people, whose sex traits are not uniformly "female" or "male."

The Act creates a "private cause of action" against a covered entity for any "individual who, while accessing a restroom or changing room designated for use by the individual's sex, encounters another individual of the opposite sex." *Id.* § 4(1). Similarly, any "individual who is required by a covered entity to share sleeping quarters with an individual of the opposite sex has a private cause of action" against the entity. *Id.* § 4(2).

During the legislative process, HB 121's proponents repeatedly denigrated transgender people, suggesting that their mere presence in spaces with cisgender people sharing the same gender identity poses a threat to cisgender people. Representative Seekins-Crowe stated that "[m]en do not belong in women['s]

spaces."[1] And Lieutenant Governor Kristen Juras "tied HB 121 to several other pieces of legislation" targeting the transgender community, each of which has been found by Montana courts to be unconstitutional or likely unconstitutional.[2] *See Barrett v. State*, 2024 MT 86, ¶ 50, 416 Mont. 226, 547 P.3d 630; *Cross*, ¶ 57; *Edwards v. State*, Cause No. DV-23-1026, Dkt. 54 at 2 (Mont. Dist. Ct. Feb. 18, 2025).

As the State admits, in enacting HB 121, "the Legislature provided no evidence of privacy or safety offenses in covered facilities in Montana," nor evidence that "'transgender or intersex people have a predisposition toward' privacy or safety offenses." Dkt. 16. Instead, during the legislative process, several individuals testified about their general concerns about sexual abuse or personal discomfort with sharing space with transgender people. Appellants' Br. 32–33.

III. The Plaintiffs

Plaintiffs are five Montanans: Casey Perkins, Spencer McDonald, Kas Reddington, and Jane Doe, who are transgender, and John Doe, who is intersex. Like other Montanans, Plaintiffs rely on spaces regulated by the Act for work, education, recreation, and myriad other activities. Dkt. 8, Perkins Decl. ¶¶ 3, 9, 11; McDonald Decl. ¶¶ 7–8, 18–19; Reddington Decl. ¶¶ 6–7, 17; Jane Doe Decl. ¶¶ 8, 14–16; John

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[1] Michael Santoscoy, *Montana House Committee Hears Testimony on Controversial Gender Privacy Bill*, NBC Montana (Jan. 10, 2025), https://perma.cc/B6XF-N59K.

[2] Jonathon Ambarian, *Montana Bill Would Tie Bathrooms to Biological Sex, Allow Lawsuits for Noncompliance*, KTVH (Jan. 10, 2025), https://perma.cc/K32R-TM9K.

Doe Decl. ¶¶ 12, 18, 23. They have all filed declarations detailing the significant harms they would suffer if the Act were enforced.

For Plaintiffs, HB 121 would make activities as routine as using the restroom fraught and humiliating. The Act would "out" the transgender Plaintiffs as transgender every time they enter a covered restroom—it requires Mr. McDonald, like other transgender men, to use women's restrooms, even though he presents as a man; and it requires Ms. Perkins, like other transgender women, to use men's restrooms, even though she presents as a woman. McDonald Decl. ¶ 15; Perkins Decl. ¶ 12. Being outed, in turn, exposes Plaintiffs to significant risks of harassment, abuse, and violence. *See, e.g.*, Reddington Decl. ¶ 23; Jane Doe Decl. ¶ 23. And being compelled to use facilities inconsistent with their gender identity would cause daily humiliation and discomfort. Perkins Decl. ¶ 8; McDonald Decl. ¶¶ 15–17; Reddington Decl. ¶¶ 27, 29; Jane Doe Decl. ¶ 23. As to Mr. Doe, he does not even know whether he can use any covered facilities because the Act's definitions exclude intersex people altogether. John Doe Decl. ¶¶ 8, 15, 31.

In short, without a preliminary injunction, the Act would force Plaintiffs to make the impossible choice between maintaining their safety and privacy and accessing basic necessities like bathrooms. *See, e.g.*, Perkins Decl. ¶ 12; McDonald Decl. ¶ 17.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for manifest abuse of discretion. *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 5, 409 Mont. 378, 515 P.3d 301 ("*Planned Parenthood I*").

SUMMARY OF THE ARGUMENT

HB 121 is the latest iteration of the State's relentless assault on transgender and intersex Montanans. It denies transgender people what cisgender people take for granted: the right to use restrooms, changing rooms, and sleeping quarters that align with their gender identity in public spaces. And its restrictive definitions of "sex" make it unclear whether intersex people can use any such facilities at all.

The district court correctly concluded that the Montana Constitution does not countenance this discrimination. *First*, Plaintiffs' claims are justiciable because HB 121 directly restricts Plaintiffs' access to essential facilities: It dictates that "an individual may not enter a restroom, changing room, or sleeping quarters" unless it corresponds to their birth-assigned sex. These restrictions render it difficult, if not impossible, for Plaintiffs and other transgender and intersex Montanans to work, recreate, and participate fully in public life. The restrictions also make every trip to the restroom a fraught undertaking for transgender people, during which they face a heightened risk of being harassed, abused, and physically attacked.

Second, the district court rightly found that HB 121 likely violates Plaintiffs' fundamental rights to equal protection and privacy. The Act discriminates based on transgender and intersex status (and, by extension, sex) because it imposes burdens specifically on transgender and intersex people. And the State does not seriously dispute that transgender status and sex are suspect classifications. Moreover, the Act compromises Plaintiffs' privacy rights by requiring covered entities to condition access to sex-separated facilities on people's "gonads" and "genitalia." This potentially requires Plaintiffs to disclose their transgender or intersex identity—and associated medical and genetic information—every time they enter a restroom. The Act further authorizes private lawsuits whenever a person is perceived to be using the "wrong" facility, making that person's anatomy, genetics, and medical history a central issue in ensuing court proceedings.

Because HB 121 infringes on fundamental rights *and* targets suspect classes, it must survive strict scrutiny. But the law cannot pass even rational-basis review because it is driven by animus and does not advance the pretextual interest asserted by the State. Quite the opposite, the uncontroverted record evidence shows that forcing transgender people to use facilities inconsistent with their gender identity makes everyone less safe. Indeed, the State concedes that HB 121 requires transgender men who present as men to use *women's* restrooms.

Third, the district court faithfully applied this Court's precedent in holding that the Act's infringement of Plaintiffs' constitutional rights is an irreparable injury, that the State suffers no harm from having unconstitutional practices enjoined, and that it is in the public interest to enjoin such practices. Further, the State has not rebutted Plaintiffs' evidence of the concrete harms the Act would inflict on them. Nor has the State shown that it is injured by the pre-HB 121 status quo, which allows it to maintain sex-separated facilities that do not single out transgender and intersex people for disfavored treatment.

Fourth, the district court properly exercised its discretion to preliminarily enjoin HB 121 in full based on Plaintiffs' showing that the law is likely facially unconstitutional and harms transgender and intersex people across the State.

This Court should therefore affirm.

ARGUMENT

The district court correctly concluded that Plaintiffs' claims are justiciable and that they established all four elements required to obtain a preliminary injunction: (a) likelihood of success on the merits; (b) irreparable harm absent preliminary relief; (c) the balance of equities; and (d) the public interest. *See Planned Parenthood of Montana v. State*, 2024 MT 228, ¶ 12, 418 Mont. 253, 557 P.3d 440 ("*Planned Parenthood II*").

I. The district court correctly held that Plaintiffs' claims are justiciable.

The district court correctly concluded that Plaintiffs have standing to bring their claims and that those claims are ripe. The Act's plain text belies the State's assertion, Appellants' Br. 12, 15, that it regulates only covered entities, not individuals: "*[A]n individual* may not enter a restroom, changing room, or sleeping quarters that is designated for females or males unless the individual is a member of the designated sex." HB 121 § 3(2) (emphasis added). As the district court noted, this provision is "compulsory." PI Op. 11.

By restricting Plaintiffs' access to the basic necessity of restrooms and other sex-separated facilities, HB 121 began harming Plaintiffs the moment it took effect. Plaintiffs were forced to either use facilities misaligned with their gender identity, thereby exposing them to harassment and violence, or forego use of those facilities altogether, thereby interfering with their full participation in daily life and work. Perkins Decl. ¶¶ 8, 12; McDonald Decl. ¶¶ 15, 17; Reddington Decl. ¶¶ 23, 28; Jane Doe Decl. ¶¶ 23, 25; *see also, e.g.*, Jody L. Herman et al, *Safety and Privacy in Public Restrooms and Other Gendered Facilities*, The Williams Institute (2025), https://perma.cc/D8RX-KKXM (documenting harassment and violence experienced by transgender individuals when accessing bathrooms).

As a result, the harm HB 121 inflicts on Plaintiffs is "actual" and "concrete," not "hypothetical," and establishes both ripeness, *see Reichert v. State ex rel.*

McCulloch, 2012 MT 111, ¶¶ 54–56, 365 Mont. 92, 278 P.3d 455, and injury, *see Barrett*, ¶ 35 (plaintiffs challenging law banning transgender student athletes from university sports established "injury due to actual exclusion from participation"). Moreover, Plaintiffs' "standing to challenge the [Act's] constitutionality" is clear because they are "the individuals against whom the statute is intended to operate" and "deny[ing] [them] standing would effectively immunize the statute from constitutional review." *Gryczan v. State* (1997), 283 Mont. 433, 446, 942 P.2d 112, 120.

That some Plaintiffs may be permitted to use single-occupancy restrooms does not, as the State argues, Appellants' Br. 13–14, nullify their injury from being excluded from multi-occupancy restrooms, *see* Statement of Facts III, *supra*. Further, in some of Plaintiffs' workplaces and many of the regulated spaces they frequent, only multi-occupancy restrooms are available. *See, e.g.*, Perkins Decl. ¶ 10; Reddington Decl. ¶ 15; John Doe Decl. ¶ 13.

The State contends that Plaintiffs' claims are not ripe because it is "unclear what covered entities will do to comply" with the Act. Appellants' Br. 12. But HB 121 directly restricts Plaintiffs' conduct, regardless of covered entities' actions and whether third parties have a private right of action to enforce the Act against Plaintiffs. *See* HB 121 § 3(2) ("[A]n individual may not enter . . . ."). Moreover, the evidence shows that covered entities immediately took steps to comply with the Act

when it was in effect. *See, e.g.*, Andy Tallman, *UM rushed to comply with bathroom bill the day it was signed. It was blocked a week later.*, Missoulian (Apr. 2, 2025), https://perma.cc/6MRD-5TFF. And they did not, as the State speculates, magically eliminate all multi-occupancy restrooms to do so. *See id.*; *see also* Dkt. 45 ¶¶ 92–93 (Missoula County describing the "potentially insurmountable problems with converting [multi-occupancy] restrooms" to single-occupancy facilities).

Next, the State asserts that Plaintiffs have no standing to bring their claims because they have not demonstrated "enforcement authority by Defendants." Appellants' Br. 16. But Plaintiffs need not make such a showing to obtain judicial review. Rather, standing exists where a plaintiff's injury is "fairly traceable" to the defendant's conduct and "would be alleviated by successfully maintaining the action." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 32–33, 360 Mont. 207, 255 P.3d 80. It is indisputable that HB 121 is a law enacted by the State; that, absent the preliminary injunction, the law would injure Plaintiffs; and that those injuries would be redressed, for example, by a holding that the Act is unconstitutional. *See Barrett*, ¶ 33.

The State's focus on enforcement authority also conflates federal and state law. It cites federal cases that examine officials' enforcement authority to determine whether sovereign immunity applies. *See* Appellants' Br. 16 (citing *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952 (8th Cir. 2015)). But it is

well-established that, in Montana, suits against the State for constitutional violations are permissible. *See Gryczan*, 283 Mont. at 446, 942 P.2d at 120. The Act targets transgender Montanans, and the State cannot "immunize the statute from constitutional review" by purporting to outsource enforcement of its discriminatory scheme. *Id.*; *see also Comm. for an Effective Judiciary v. State* (1984), 209 Mont. 105, 110–11, 679 P.2d 1223, 1226 (recognizing public interest standing).

In any event, the State, Governor, and Attorney General *do* maintain authority to enforce the Act. The Governor "has full powers of supervision, approval, [and] direction" over state departments, § 2-15-103, MCA, which are themselves covered entities responsible for implementing the Act, HB 121 § 2(3), (9). And the Act's private right of action does not preempt the Attorney General's authority to enforce the Public Health Law, where HB 121 will be codified. *See* § 50-1-103, MCA; HB 121 § 5.

II. The district court correctly held that Plaintiffs are likely to succeed on the merits of their claims.

To secure a preliminary injunction, Plaintiffs need only show a likelihood of success on one of their claims. *See Cross*, ¶ 56. The district court determined that Plaintiffs have made that showing as to both their equal protection and privacy claims. PI Op. 17–31. Because Plaintiffs have "show[n] an infringement on [these] fundamental right[s], a presumption of constitutionality is no longer" applicable to the Act. *Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 11, 416 Mont. 44,

545 P. 3d 1074 (citations omitted). Instead, the Act is subject to "a higher level of scrutiny and the burden necessarily shifts to the state to demonstrate that the statute is constitutional." *Id*.

A. The Act violates Plaintiffs' right to equal protection.

Plaintiffs are likely to succeed on their equal protection claim because the Act targets transgender and intersex people for disfavored treatment without justification. The Montana Constitution guarantees that "[n]o person shall be denied the equal protection of the laws" and that "[t]he dignity of the human being is inviolable." Mont. Const. art. II, § 4. Article II, Section 4 "provides even more individual protection than does the Fourteenth Amendment," *Planned Parenthood II*, ¶ 29 (citation omitted), especially given that it expressly recognizes the right to individual dignity in a way that "[t]he federal constitution does not," *Walker v. State*, 2003 MT 134, ¶ 73, 316 Mont. 103, 68 P.3d 872.

Montana courts evaluate equal protection claims "under a three-step process: (1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny." *Planned Parenthood of Mont. v. State*, 2024 MT 178, ¶ 26, 417 Mont. 457, 554 P.3d 153 ("*Planned Parenthood III*") (citation omitted).

At the first step, "[t]he goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 29, 374 Mont. 453, 325 P.3d 1211.

At the second step, courts consider the nature of the rights implicated and the class of people targeted to determine which level of scrutiny to apply. *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶¶ 17–19, 302 Mont. 518, 15 P.3d 877. Strict scrutiny applies where the law "infringes upon a fundamental right or discriminates against a suspect class." *Id.* ¶ 17. A right is fundamental if "it is guaranteed by the [Montana Constitution's] Declaration of Rights." *Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236. Middle-tier scrutiny applies if the law does not burden a suspect class and affects a non-fundamental constitutional right. *Snetsinger v. Mont. Univ. Sys*., 2004 MT 390, ¶ 18, 325 Mont. 148, 104 P.3d 445. And "where the right at issue is neither fundamental nor warrants middle-tier scrutiny," rational-basis review applies. *Powell*, ¶ 19.

1. The Act discriminates based on transgender status, intersex status, and sex.

Under the Act, covered entities must "designate each [covered facility] for the exclusive use of females or males," HB 121 § 3(1), where "female" and "male" are "determined by the biological and genetic indication of male or female," including "genitalia present at birth," *id.* § 2(12). Those facilities "may be used only by members of" the defined "female" and "male" categories. *Id.* § 3(2). These

provisions create three distinct suspect classifications based on transgender status, intersex status, and sex.

a. Transgender status

One relevant classification analyzes the Act's impact on cisgender people versus transgender people. PI Op. 22. Cisgender people, whose gender identity aligns with the Act's definitions of "female" or "male," can use covered facilities consistent with their gender identity. But transgender people, whose gender identity differs from the characteristics the Act defines as "female" or "male," cannot. *Id.* The Act expressly dictates that a person's gender identity must be disregarded. HB 121 § 2(12).

The State insists that "the Act does not discriminate based on transgender status" because "it makes no mention . . . of transgender" people. Appellants' Br. 21. But Montana's equal protection guarantee is not so easily elided. Equal protection analysis focuses on whether a challenged law "treat[s] . . . two groups differently." *Snetsinger*, ¶ 27. Even "an apparently neutral classification may violate equal protection if in reality" it "impose[s] different burdens on different classes of persons." *Id.* ¶ 16 (cleaned up). For example, *Snetsinger* held that a university policy discriminated based on sexual orientation because "unmarried opposite-sex couples [were] able to avail themselves of health benefits" while "unmarried same-sex

couples" were not. *Id.* ¶ 27. This Court recognized discrimination even though the policy spoke of marital status rather than sexual orientation.

Indeed, every Montana court to have examined a law similar to HB 121 has agreed it classifies based on transgender status because it imposes greater burdens on transgender people. *See, e.g.*, *Edwards*, Cause No. DV-23-1026, at 27–28; *Cross v. State*, Cause No. DV-23-541, 2023 WL 6392607, at *8 (Mont. Dist. Ct. Sept. 27, 2023), *aff'd*, *Cross*, ¶ 57; *Kalarchik v. State*, Cause No. ADV-2024-261, Dkt. 61 at 7–8 (Mont. Dist. Ct. Dec. 16, 2024).

Rather than engaging with Montana courts' interpretation of the Montana Constitution, the State relies, Appellants' Br. 20, 22–23, on the U.S. Supreme Court's decision in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), which held that a Tennessee law banning minors from receiving certain medical care was not subject to strict scrutiny under federal equal protection law. *Id.* at 1829. Yet *Skrmetti* itself acknowledged that "neutral terms can mask [unlawful] discrimination" and that "a State may not circumvent the [federal] Equal Protection Clause by writing in abstract terms." *Id.* at 1829, 1831. "Further, Montana's equal protection clause materially differs from and is more expansive than its federal counterpart," so "[t]he *Skrmetti* decision does not impact th[e] body of Montana law" applying strict scrutiny to anti-transgender classifications. *Cross v. State*, Cause No. DV-23-541, Dkt. 308 at 12–14 (Mont. Dist. Ct. Oct. 2, 2025). It is telling that the State does not even mention this

on-point Montana precedent, instead basing its equal protection and level-of-scrutiny arguments almost entirely on inapposite federal decisions. *See* Appellants' Br. 19–36.

b. Intersex status

The Act also discriminates based on intersex status because, "[b]y declaring as a matter of law that human beings can only be 'exactly' one of the two sexes," it "explicitly excludes [intersex people] from the definition of human beings." *Edwards*, Cause No. DV-23-1026, at 11. People who fit the Act's definitions of "female" and "male" can access sex-separated facilities. *See* HB 121 § 3(1)–(3). But intersex people, who do not fit those definitions, cannot. Thus, another relevant classification analyzes the Act's impact on intersex people versus people who fit the Act's definitions of "female" and "male." PI Op. 22.

The State's argument that the Act does not discriminate against intersex people because "it makes no mention" of them, Appellants' Br. 21, fails for the same reason it fails as to transgender people: the Act prevents intersex people from accessing covered facilities on the same terms as non-intersex people. Contrary to the State's contention, Appellants' Br. 14, the Act does not clarify things for intersex people by providing that "[a]n individual who would otherwise fall within [its definitions of female or male], but for a biological or genetic condition, is [female or male]." HB 121 § 2(4), (7). This provision does not explain what "biological or

genetic condition" means. And even assuming an intersex person can discern whether they have a qualifying "condition," the Act does not explain how they are supposed to determine which of the "female" or "male" categories they would "fall within" "but for" that condition.

c. Sex

Because the Act discriminates based on transgender and intersex status, it necessarily also discriminates based on sex. "[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020); *see Cross*, ¶ 63 (McKinnon, J., concurring) ("[T]ransgender discrimination is, by nature, sex discrimination."). An example makes this clear: A transgender woman born with the characteristics the Act categorizes as "male" cannot use the women's restroom at a public library, but a cisgender woman born with "female" characteristics can.

Discrimination based on intersex status is likewise, by nature, sex discrimination. An intersex person who does not fit into the Act's categories of "male" or "female" cannot access any sex-designated restroom at a public library, but a person who fits into those categories can.

The State acknowledges that the Act is a sex-based classification but claims the classification is permissible because "it treats the[] two classes the same." Appellants' Br. 20, 24 & n.6. Similarly, the State argues that the Act's actual impact

on transgender and intersex people is irrelevant because "the law applies to *all* Montanans." Appellants' Br. 33–34. Characterizing a law that specifically harms transgender and intersex people as applying to all people is akin to downplaying a law banning interracial marriage as applying to all races. *See Flowers v. Mississippi*, 588 U.S. 284, 299–300 (2019) (warning that this notion "has no place in our modern equal protection jurisprudence" (citation omitted)). The reality is that the Act "penalizes a person identified as male at birth for traits or actions that it tolerates in an [individual] identified as female at birth." *Bostock*, 590 U.S. at 660.

2. The Act's targeting of suspect classes and infringement on fundamental rights independently require application of strict scrutiny.

"Strict scrutiny is the appropriate level of scrutiny to apply to HB 121" because "transgender status" and sex are "suspect class[es]," and because the Act "burdens [Plaintiffs'] fundamental rights." PI Op. 31.

a. Transgender status is a suspect classification.

The district court correctly held—and the State does not seriously dispute—that transgender status is a suspect classification. "A suspect class is 'one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *In re S.L.M.*

(1997), 287 Mont. 23, 33, 951 P.2d 1365, 1371 (citation omitted), *abrogated on other grounds by Planned Parenthood III*, ¶ 21.

First, transgender people—in Montana and across the country—have suffered a history of purposeful unequal treatment. They face discrimination, harassment, and violence in almost every aspect of public life. *See* Dkt. 8 at 28–30; S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), https://perma.cc/7CTQ-GV8Z ("Transgender Survey"). The federal government has a history of discriminating against transgender people—an assault that has only escalated under the second Trump administration. *See* Dkt. 8 at 29–30 (cataloguing flurry of executive orders targeting transgender people).

Montana's Legislature and executive branch have been no less relentless in targeting transgender Montanans. *See* Statement of Facts II, *supra*. Each of the State's anti-trans laws has been held to be unconstitutional or likely unconstitutional. *See id.* And courts have determined that "the purported purpose given for" some of these laws has been "disingenuous," noting, for example, that "[t]he legislative record is replete with animus toward transgender persons." *Cross*, Cause No. DV-23-541, 2023 WL 6392607, at *14, *18–19 (internal quotation marks omitted); *see Edwards*, Cause No. DV-23-1026, at 28–29; *Barrett*, ¶ 50.

Second, the transgender community suffers a level of political powerlessness that warrants extraordinary protection under the law because of its small population

and the enduring societal prejudices it faces. Transgender people suffer from disproportionately high rates of poverty, homelessness, and employment discrimination. *See* Dkt. 8 at 30–32; Transgender Survey, *supra*. Moreover, they are frequently the victims of harassment, outright "physical assault," and "particularly violent" crimes. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 612 (4th Cir. 2020). They also face barriers to political representation, and even in the rare instances when transgender politicians are elected, they encounter harassment and discrimination. *See* Dkt. 8 at 32 (describing experience of Montana Representative Zooey Zephyr).

The district court carefully considered this evidence and concluded that "[t]ransgender Montanans have been subjected to such a history of purposeful unequal treatment and have been relegated to such a position of political powerlessness as to" constitute "a suspect class." PI Op. 24–27.

The State presented no evidence to refute this conclusion, and on appeal it relegates its contrary position to a footnote. *See* Appellants' Br. 21 n.5. There it cites only two federal court decisions that declined to recognize transgender people as a suspect class because the U.S. Supreme Court has not done so. *See Gore v. Lee*, 107 F.4th 548, 558 (6th Cir. 2024); *Johnston v. Univ. of Pittsburgh of Commw. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015). But this Court's construction of Montana law is not tethered to the U.S. Supreme Court's federal

precedent, much less to lower court decisions that purport to read federal tea leaves. Further, this Court's independence is at its apex in circumstances like these, where the Montana Constitution's equal protection guarantee is more protective than its federal counterpart. *See Planned Parenthood II*, ¶ 29. In any event, many other federal courts have recognized that transgender people constitute at least a quasi-suspect class because "one would be hard-pressed to identify a class of people more discriminated against historically" than "transgender people." *Grimm*, 972 F.3d at 610–13; *see* Dkt. 8 at 32 n.11 (collecting cases).

Accordingly, "transgender status is a suspect class" under Article II, Section 4. *Cross*, ¶ 65 (McKinnon, J., concurring).

b. The Act burdens the fundamental right to equal treatment based on sex, and sex is a suspect classification.

The district court also correctly held that the right not to be discriminated against based on sex is a fundamental right and that sex is a suspect classification. PI Op. 27–28.

The Declaration of Rights expressly provides that the State shall not "discriminate against any person in the exercise of his civil or political rights on account of . . . sex." Mont. Const. art. II, § 4. The State contends that this language does not give rise to a "fundamental right 'to be free from discrimination on the basis of sex,' at least for anything beyond 'civil or political rights.'" Appellants' Br. 26–27. But "[t]he guarantee of equal protection is a fundamental right," period. *Planned*

Parenthood III, ¶ 26. That means "the right to be free from discrimination based on sex" is a fundamental right. *Cross*, ¶¶ 62–63 (McKinnon, J., concurring); *see Kalarchik*, Cause No. ADV-2024-261, at 10–11 (same); *Cross*, Cause No. DV-23-541, 2023 WL 6392607, at *11 (same). Even if Article II, Section 4 were as narrow as the State contends, access to public spaces is unquestionably a civil right. *See Bates v. Neva*, 2013 MT 246, ¶ 1, 371 Mont. 466, 308 P.3d 114 (noting that Montana law prohibits discrimination in public accommodations); *Johnson v. Virginia*, 373 U.S. 61, 62 (1963).

Sex is also a suspect classification—a point the State does not dispute. *See generally* Appellants' Br. Nor can it, given the well-documented reality that "our Nation has had a long and unfortunate history of sex discrimination" stemming from "archaic and overbroad generalizations about gender" as well as "outmoded notions of the relative capabilities of men and women." *J.E.B. v. Alabama*, 511 U.S. 127, 135–36 (1994) (cleaned up); *see State v. Miller*, 2022 MT 92, ¶ 54, 408 Mont. 316, 510 P.3d 17 (McKinnon, J., concurring) (explaining that discrimination "based on gender stereotypes" has "wreaked injustice in so many spheres of our country's public life" (citation omitted)). This subjects the Act to strict scrutiny. *Powell*, ¶ 17.

c. The Act burdens the fundamental rights to privacy and to pursue life's basic necessities.

Finally, as explained below, the Act is subject to strict scrutiny for the independent reason that it burdens the right to privacy and the right to pursue life's

basic necessities. *See* Argument II.B., II.C., *infra*; Mont. Const. art. II, §§ 3, 10. Both those rights are "fundamental rights" "explicit in the Declaration of Rights." *Gryczan*, 283 Mont. at 449, 942 P.2d at 122; *Wadsworth v. State* (1996), 275 Mont. 287, 299, 911 P.2d 1165, 1171–72.

3. The Act cannot survive any level of constitutional review, much less the strict scrutiny that applies.

As discussed above, multiple independent grounds exist for applying strict scrutiny to HB 121. To survive strict scrutiny, the State must demonstrate that the Act is "narrowly tailored to serve a compelling government interest and only that interest." *Cross*, ¶ 22. Under this test, it must show that the Act "is the least onerous path" to achieve its asserted interest. *Jacobsen*, ¶ 75.

As the district court correctly held, however, HB 121 cannot survive even rational-basis review, under which a classification "must be rationally related to a legitimate government interest." *Snetsinger*, ¶ 19. Because the Act cannot satisfy this lesser burden, it necessarily cannot survive the strict scrutiny that applies.

To begin, there is no legitimate state interest justifying the Act, and certainly no compelling interest, because it is rooted in bare animus against transgender people. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). That is apparent on the face of the Act, which denies recognition of transgender identities by commanding covered entities to

disregard "an individual's psychological, behavioral, social, chosen, or subjective experience of gender." HB 121 § 2(12). And statements by HB 121's proponents confirm that the Act is driven by antipathy towards people who do not conform to its restrictive definitions of "sex"—so much so that the Act allows cisgender people to sue for merely having to share space with transgender people. *See* Statement of Facts II, *supra*; HB 121 § 4.

Even assuming the State has a legitimate or compelling interest, the Act is not appropriately tailored to it and is in fact irrational for at least three reasons.

First, as the State concedes, "the Legislature provided no evidence of privacy or safety offenses in covered facilities in Montana," nor evidence that "'transgender or intersex people have a predisposition toward' privacy or safety offenses." Dkt. 16 at 36–37; *see* PI Op. 33–35 (noting lack of such evidence). That is unsurprising. Courts have found that claims that transgender people pose a threat to others simply by using facilities corresponding to their gender identity are "based upon sheer conjecture" and "marked by misconception and prejudice." *Grimm*, 972 F.3d at 614–15 (citation omitted); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1052 (7th Cir. 2017) (same). And the empirical evidence is overwhelming that "gender identity nondiscrimination ordinances" across the country have not affected "privacy and safety in public restrooms." Susan Hazeldean, *Privacy As Pretext*, 104 Cornell L. Rev. 1719, 1731–32 (2019) ("Hazeldean").

Second, testimony and data that the State *does* muster are inapposite. FBI statistics purporting to show that men commit violent crimes at higher rates than women, *see* PI Op. 34, say nothing about transgender people. *See Craig v. Boren*, 429 U.S. 190, 208–09 (1976) (equal protection principles "are not to be rendered inapplicable by statistically measured but loose-fitting generalities"). Similarly, the State cites legislative testimony about an instance of sex trafficking that neither occurred in Montana nor involved transgender people.[3] Appellants' Br. 32. And while other witnesses discussed general concerns about sexual abuse or discomfort with simply being in a space with transgender people, *see id.* at 31–33, such claims of "discomfort" have been voiced across history about sharing spaces with those perceived as different, *see* Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 107 (Knopf 1975). Even if such beliefs stem from "deep convictions," *Lawrence v. Texas*, 539 U.S. 558, 571 (2003), they "are not permissible bases" for treating a vulnerable group differently, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

[3] In a footnote, the State cites articles about three assaults. Appellants' Br. 35 n.11. This post-hoc justification cannot support the Legislature's passage of HB 121. Regardless, none of the assaults occurred in Montana. Further, one took place in a private residence, *Martinez v. State*, 2018 WY 147, ¶¶ 3–4, 432 P.3d 493 (Wyo. Dec. 31, 2018); and another was the subject of an investigation, which found "no evidence" that the assault happened in a "girl's bathroom" or that the assailant was transgender, Drew Wilder, *Loudon sex assault unsealed by judge*, NBC Washington (Sept. 14, 2023), https://www.nbcwashington.com/news/local/loudoun-school-sex-assault-investigation-unsealed-by-judge/3423751/.

Third, substantial evidence in fact contradicts the Legislature's claim that the Act's exclusion of transgender and intersex people advances anyone's privacy or safety. It is transgender people who are most vulnerable to harassment and violence in sex-separated spaces. *See* Hazeldean, *supra*, at 1740 (citing disproportionately high rates of abuse, violence, and sexual assault against transgender people). The Act harms this already vulnerable community while failing to protect its purported beneficiaries.

In light of all this evidence, the Act is fundamentally illogical and therefore fails rational-basis review. *See Snetsinger*, ¶ 27 (policy denying benefits for same-sex partners that are available to opposite-sex couples failed rational-basis review where "there is no justification for treating the two groups differently").

As it cannot survive rational-basis review, the Act necessarily fails strict scrutiny. As discussed, the State has not met its burden "to *demonstrate* a compelling interest" justifying the Act "by competent evidence,"[4] *Wadsworth*, 275 Mont. at 303–04, 911 P.2d at 1174–75 (conflict-of-interest rule adopted to avoid the appearance of impropriety failed strict scrutiny where evidence "established that there were no complaints about any appearance of impropriety"); *Jacobsen*, ¶¶ 102–

[4] The State contends that "[s]trict scrutiny does not necessarily require the State to make an evidentiary showing of a compelling state interest" or narrow tailoring, but cites only a case applying rational-basis review and a partial dissent in support. Appellants' Br. 34. Even assuming the State *could* satisfy strict scrutiny without an evidentiary showing, it cannot do so here because the evidence shows that the Act undermines the interest the State claims to be achieving.

06 (rule prohibiting ballot collection to combat voting fraud failed strict scrutiny where there was no "evidence of fraud related to ballot collection in Montana"). Nor has the State established that HB 121 is "the least onerous path that can be taken to achieve the state objective." *Montana Env't Info. Ctr.*, ¶ 61. The Legislature did not consider simple, less exclusionary measures for addressing its concerns about privacy and safety, such as installing enclosed restroom stalls. Moreover, "Montana law already criminalizes th[e] behavior" the Act purports to address. *Jacobsen*, ¶ 105; *see* Dkt. 8 at 40–41 (identifying criminal statutes).

4. The State's criticisms of the district court's scrutiny analysis are meritless.

The State's arguments that the district court erred in applying the levels of scrutiny are without merit.

First, the State's arguments rest on a fundamental misapprehension: that the district court's order entails "[t]he abolition of any sex designation from restrooms and other facilities." Appellants' Br. 23. The order did no such thing. As the State itself points out, sex-separated facilities have long existed throughout Montana. Appellants' Br. 21 (citing § 49-2-404, MCA). Plaintiffs have never suggested that these facilities are inherently unconstitutional. The Act, however, goes much further than authorizing sex-separated facilities. It limits access to facilities based on restrictive definitions of "female" and "male" that expressly refuse to recognize transgender and intersex identities. *See* HB 121 § 2(4), (7), (12). The result is that

everyone in Montana can use sex-separated facilities corresponding to their gender identity—except transgender and intersex people. They alone are stigmatized and made unwelcome in public spaces across the State. *That* is the Act's constitutional infirmity.

Second, the State argues that a facial challenge to the Act cannot succeed because "the Act does not violate [cisgender people's] constitutional rights." Appellants' Br. 17–18. This "argument misunderstands how courts analyze facial challenges." *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015). "The proper focus of the constitutional inquiry is the group for whom the law is a restriction"—here, transgender and intersex people—"not the group for whom the law is irrelevant." *Id.* (citation omitted). Otherwise, the State's proposed analysis would "preclude facial relief" in every case. *Id.* at 417–18. By definition, every discriminatory classification treats some groups favorably and others unfavorably. Focusing only on the favored groups would bless every discriminatory law as facially constitutional.

Third, the State asserts that "limiting [the Act's] 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." Appellants' Br. 31–32. This just underscores the lack of any rational relationship between the Act's strictures and its purported purpose. In the State's telling, to be effective in keeping men out of

women's spaces, the Act must apply to all people who present as men. But, as the State concedes, the Act *requires* transgender men "who outwardly present[] as . . . m[en]" to use *women's* restrooms. Transcript of Prelim. Inj. Hearing at 48:13–51:5. Far from making sex-separated spaces safer for women, the Act makes them more fraught for everyone.

Finally, the State's suggestion that a discriminatory law passes constitutional scrutiny so long as the targeted group is small enough turns the Equal Protection Clause on its head. *See* Appellants' Br. 30–31 ("[N]inety-nine percent of the people the Act applies to are 'cisgender' Montanans."). The Montana Constitution guarantees that "*[n]o person* shall be denied the equal protection of the laws," Mont. Const. art. II, § 4 (emphasis added), and "the number of individuals in a class is immaterial for equal protection analysis," *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 n.* (2000). Overlooking discrimination against minority groups would defeat the Equal Protection Clause's purpose of guarding against discriminatory "majoritarian rule." *Stratemeyer v. Lincoln Cnty.* (1993), 259 Mont. 147, 155, 855 P.2d 506, 512–13 (Trieweiler, J., dissenting).

B. The Act violates Plaintiffs' right to privacy.

Plaintiffs are likely to succeed in showing that the Act violates their right to privacy. Montana's "right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state

interest." Mont. Const. art. II, § 10. Article II, Section 10 affords "significantly broader protection" than the U.S. Constitution, *Armstrong v. State*, 1999 MT 261, ¶¶ 34, 41, 296 Mont. 361, 989 P.2d 364, "reflect[ing] Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives,'" *Cross*, ¶ 22 (citation omitted).

Montana courts analyze privacy claims using a two-part test, asking (1) "[w]hether the person involved had a subjective or actual expectation of privacy," and (2) "[w]hether society is willing to recognize that expectation as reasonable." *State v. Nelson* (1997), 283 Mont. 231, 239, 941 P.2d 441, 447. This test establishes that HB 121 infringes on both Plaintiffs' "autonomy privacy" in "making intimate personal decisions or conducting personal activities" without "intrusion," and their "informational privacy," which "preclud[es] the dissemination of sensitive" information. *Id.*, 283 Mont. at 241, 941 P.2d at 448.

At step one, Plaintiffs have an actual expectation of autonomy privacy in their decision to use restrooms, changing rooms, and sleeping quarters corresponding to their gender identity. *E.g.*, Reddington Decl. ¶ 19; Jane Doe Decl. ¶ 18; John Doe Decl. ¶ 28. Plaintiffs also have an actual expectation of informational privacy in their transgender and intersex identities, which implicate sensitive medical information. *E.g.*, Jane Doe Decl. ¶ 19; John Doe Decl. ¶ 9.

At step two, Plaintiffs' expectation of privacy is reasonable. PI Op. 42–45. As to autonomy privacy, choices about how to live in accordance with our gender identity are "intimate personal decisions." *Nelson*, 283 Mont. at 241, 941 P.2d at 448. We reasonably expect that the government will not "intru[de]" or "interfere[]" with them. *Id.*; *see Edwards*, Cause No. DV-23-1026, at 20 ("Regulations that interfere with an individual's ability to self-define and make personal choices concerning their identity infringes on the right to privacy."). Moreover, it is paramount to transgender people's wellbeing to be able to live in alignment with their gender identities—a core part of many transgender people's medical treatment for gender dysphoria. *See Boyertown Area Sch. Dist.*, 897 F.3d at 522–23. Thus, interfering with transgender people's decisions to use facilities that align with their gender identity also undermines their autonomy privacy right to "make medical judgments affecting [their] bodily integrity and health." *Armstrong*, ¶ 39.

As to informational privacy, "the zone of privacy" encompasses a person's "medical and psychiatric history." *Nelson*, 283 Mont. at 241, 941 P.2d 441 at 448. Accordingly, a "person's transgender [or intersex] identity" is "a profoundly private piece of information in which [they have] a reasonable expectation of privacy." *Marquez*, Cause No. DV 21-873, 2022 WL 4486283, at *5; *see Powell v. Schriver*, 175 F.3d 107, 111–12 (2d Cir. 1999) ("constitutional right to maintain medical confidentiality" applies to transgender identity).

The Act violates these privacy interests in drastic ways. It requires covered entities to condition access to restrooms and other facilities on people's "sex chromosomes," "gonads," and "genitalia." HB 121 § 2(12). Thus, it forces Plaintiffs into situations—as routine as using a public restroom—where they could be required to disclose their transgender or intersex identity, exposing them to a heightened risk of harassment and violence. *See* Perkins Decl. ¶ 12; McDonald Decl. ¶ 15; Reddington Decl. ¶¶ 23, 27; Jane Doe Decl. ¶ 23; Hazeldean, *supra*, at 1740–41. The Act also authorizes individuals to sue covered entities for noncompliance. HB 121 § 4. This means that every time one person sees someone in a restroom or changing room that they perceive to be the "wrong sex," they can sue. The anatomy, genetics, and medical history of the person alleged to be in the wrong facility "will necessarily be subject to inquiry" in the ensuing lawsuit. PI Op. 42–43.

The State misconstrues "the action of choosing which public restroom to enter" as being about informational privacy. Appellants' Br. 37. Rather, decisions about how to live in accordance with our gender identity are protected as autonomy privacy, which rejects government "interfere[nce] with the autonomy of each individual to make decisions in matters generally considered private." *Armstrong*, ¶ 33. The State does not dispute that the Act requires transgender men who live and present as men to use women's restrooms and transgender women who live and present as women to use men's restrooms. This violates their autonomy privacy.

The State's reference to a longstanding Montana law allowing sex-separated facilities also misses the point. Appellants' Br. 37–38. Unlike that law, the Act purports to tell transgender people what sex they are, commands covered entities to condition access based on people's genetics and anatomy, and authorizes lawsuits to verify whether people are using the "correct" facilities based on their genetics and anatomy. Thus, the Act also violates Plaintiffs' informational privacy.

C. The Act violates Plaintiffs' right to pursue life's basic necessities and due process.

Even if this Court were to disagree with the district court on the likelihood of success on Plaintiffs' equal protection and privacy claims, this Court should still affirm because Plaintiffs are also likely to succeed on their basic-necessities and due-process claims. *See State v. Larson*, 2023 MT 236, ¶ 14, 414 Mont. 200, 539 P.3d 655 ("This Court may affirm a district court's decision on any basis supported by the record.").

The Act burdens Plaintiffs' "inalienable rights" of "pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Mont. Const. art. II, § 3. The Act denies transgender people the basic necessity of accessing sex-separated facilities consistent with their gender identity and denies intersex people access to these facilities altogether. Urination, bowel movements, and menstrual hygiene are not optional, and people cannot stay for long

in spaces where they cannot use the restroom. *See, e.g.*, Reddington Decl. ¶ 30. Many transgender people will forgo spending time in public spaces to avoid having to use restrooms inconsistent with their gender identity. *See, e.g.*, Perkins Decl. ¶¶ 12–13; Hazeldean, *supra*, at 1740–41. The Act applies even to hospitals, HB 121 § 2(9)(b), compromising transgender and intersex Montanans' access to healthcare that could be the difference between life and death.

The Act imposes an especially heavy burden on the many Montanans who work in public buildings or attend public schools and universities. These Montanans must spend extended time in those spaces. *See, e.g.*, Reddington Decl. ¶ 30; Jane Doe Decl. ¶ 26. They cannot continue their employment or education without sacrificing "their safety, health, and happiness" to use restrooms inconsistent with their gender identity. Mont. Const. art. II, § 3. Thus, the Act impairs Plaintiffs' right to secure "the most basic of life's necessities, such as food, clothing, and shelter" and "other essentials of modern life, including health and medical insurance." *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172.

The Act also violates Plaintiffs' right to due process. Because it gives intersex people no notice of whether it classifies them as female or males, the Act is void for vagueness on its face and as applied to Plaintiff John Doe. *See State v. Dugan*, 2013 MT 38, ¶ 67, 369 Mont. 39, 303 P.3d 755 ("A statute is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is

forbidden," and vague as applied if it fails to "provide a person with actual notice" or "minimal guidelines to law enforcement." (cleaned up)).

The Act recognizes "exactly two sexes, male and female," which it decrees are unambiguously "determined by" certain "biological and genetic indication[s]." HB 121 § 2(12). But intersex people are born with sex traits or reproductive anatomy that are neither only "male" nor only "female." *See Edwards*, Cause No. DV-23-1026, at 20–21 (observing that "the definitions under SB 458," which are identical to the Act's, "do not accurately define" intersex people's sex). Plaintiff John Doe, for example, has both male genitalia and breast tissue. John Doe Decl. ¶ 5. Thus, it is unclear whether intersex people are permitted to use covered facilities at all. *See id.* ¶ 31.

The State has effectively conceded this. At the preliminary-injunction hearing, counsel for the State said: "[E]ach of them you can't classify. This is an -- this is an intersex person. They have different -- different medical issues. And we -- we would have to explore those medical issues to -- to see whether they fit within those definitions." Transcript of Prelim. Inj. Hearing at 53:1–12. And in *Edwards*, the State admitted that "SB 458's definitions," which parallel HB 121's, "might not squarely apply" to intersex people." Cause No. DV-23-1026, at 5 (quoting State's briefing). That the State cannot even say how the Act applies to intersex people reflects that ordinary Montanans would not know either.

The State asserts that the Act's application to intersex people is clear because it provides that "[a]n individual who would otherwise fall within [its definitions of female or male], but for a biological or genetic condition, is [female or male]." HB 121 § 2(4), (7). As noted above, however, this provision is itself vague because it neither explains what "biological or genetic condition" means nor how intersex people can determine whether they would be "female" or "male" "but for" a qualifying condition. *See* Argument II.A.1.b., *supra*.

III. The district court correctly held that the remaining preliminary-injunction factors favor Plaintiffs.

The district court properly concluded that the remaining preliminary-injunction factors weigh in favor of granting preliminary relief.

As to irreparable harm, the district court faithfully applied this Court's precedent that for "purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Planned Parenthood I*, ¶ 6. This Court has so held in a case, like this one, involving a "right to privacy and right to equal protection." *Planned Parenthood II*, ¶ 38; *e.g.*, *Cross*, ¶ 48 (finding irreparable harm based on likelihood of success on privacy claim). And *Montanans Against Irresponsible Densification, LLC v. State*, which the State mischaracterizes, affirms that longstanding rule. 2024 MT 200, ¶ 16, 418 Mont. 78, 555 P.3d 759 ("[F]ederal courts most commonly recognize *privacy* and First Amendment violations as

causing irreparable injuries." (emphasis added)); *see* Appellants' Br. 39 (omitting the word "privacy").

Although the irreparable harm analysis could end here, Plaintiffs also have attested to the concrete harms the Act inflicts on them: the exclusion from essential facilities and public spaces, the forced disclosure of sensitive personal information, and the risks of being subjected to harassment and violence. *See, e.g.*, McDonald Decl. ¶ 15; Reddington Decl. ¶¶ 22–24; Jane Doe Decl. ¶ 23. The State does not dispute that these harms would be irreparable beyond the bare assertion that they are "hypothetical." Appellants' Br. 40.

The balance of equities and the public interest likewise favor granting the preliminary injunction. PI Op. 48–50. The harm flowing from the Act's violation of Plaintiffs' fundamental rights and Plaintiffs' exposure to discrimination, harassment, and violence is substantial. By contrast, the injunction causes no harm to the State. It simply restores the status quo prior to the Act's passage; the State can continue maintaining sex-separated facilities, just without singling out transgender and intersex people for lesser treatment. As to that status quo, the State has provided no evidence of transgender people entering women's restrooms to harm women. *See* Argument II.A.3., *supra*.

The State argues that the district court failed to give proper weight to the State's injury from having its law enjoined. Appellants' Br. 41. But "the government

suffers no harm from an injunction that merely ends unconstitutional practices," and "it is always in the public interest to prevent the violation of a party's constitutional rights." *Planned Parenthood II*, ¶ 40; *see Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) (injunction that prevents unconstitutional actions imposes little burden on the government compared to the harm faced by individuals whose rights are jeopardized).

IV. The scope of the district court's preliminary injunction is proper.

The district court rightly exercised its discretion to preliminarily enjoin the Act in full. PI Op. 47. Plaintiffs need not, as Defendants assert, allege harms specific to "each covered entity" across Montana.[5] Appellants' Br. 40. A facial claim by its nature "is not limited to plaintiffs' particular case, but challenges application of the law more broadly." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). That is why this Court has fully enjoined laws in facial challenges and rejected the contention that "Plaintiffs had to show injury from each subsection of the statute to acquire standing to challenge it." *Cross*, ¶¶ 15, 17. Relatedly, this Court has recognized "the rights of citizens to assert the public interest in challenging the legality of legislative action that allegedly flies in the face of our state constitution." *Comm. for an Effective Judiciary*, 209 Mont. at 111, 679 P.2d at 1226.

[5] The State also wrongly asserts that Plaintiffs have alleged harm only with respect to "restrooms and changing rooms." Appellants' Br. 41 n.13. Plaintiffs have described harms concerning sleeping quarters as well. Dkt. 17, Reddington Supp. Decl. ¶¶ 5–7.

Here, the district court determined that the Act facially violates transgender and intersex Montanans' fundamental rights, PI Op. 45–46, reflecting that its "constitutional infirmities" are "not limited to the present facts but stem from the statute itself," *Park Cnty. Env't Council v. Montana Dep't of Env't Quality*, 2020 MT 303, ¶ 88, 402 Mont. 168, 477 P.3d 288. Accordingly, "the [district] court's decision not to parse out particular provisions of the statute from the injunction was within its discretion." *Cross*, ¶ 39.

CONCLUSION

For the foregoing reasons, the district court's preliminary-injunction order should be affirmed.

Dated: October 13, 2025

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CERTIFICATE OF COMPLIANCE

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I, Alex Rate, hereby certify that I have served true and accurate copies of the foregoing document via the e-filing system to the following on October 13, 2025.

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