Leslie Halligan, District Court Judge
Fourth Judicial District
Missoula County Courthouse
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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

SUSAN EDWARDS; MONTANA TWO SPIRIT SOCIETY; KAEL FRY; ANNA TELLEZ; EDEN ATWOOD; SHANNON ALOIA, Plaintiffs, v. THE STATE OF MONTANA; GREG GIANFORTE, in his official capacity as GOVERNOR OF MONTANA, AUSTIN KNUDSEN, in his official capacity as ATTORNEY GENERAL OF MONTANA, Defendants.	Dept. No. 1 Cause No. DV-23-1026 **ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

This matter comes before the Court on opposing motions for summary judgment. Plaintiffs' *Motion for Summary Judgment on Counts I, II, & III* ("Motion") seeks to declare Senate Bill 458 as facially unconstitutional. Defendants' (collectively, the "State") Motion for Summary Judgment seeks to dismiss Plaintiffs' claims arguing the absence of a case or controversy. The Court has considered both motions, the parties' supporting and opposing briefs, and the

replies thereto. Having considered the entirety of the record before it, the Court rules as follows:

ORDERS

(1) Defendants' Motion for Summary Judgment is DENIED. Plaintiffs have satisfied the case and controversy requirement, and thus, have standing to challenge SB 458's constitutionality.

(2) Plaintiffs' Motion for Summary Judgment is GRANTED, pursuant to Count I and II of Plaintiffs' Complaint. The Court DECLARES SB 458 facially unconstitutional in violation of the Montana Constitution's guarantees of equal protection and privacy. Having decided so, the Court declines to address the remaining constitutional count.

(3) IT IS HEREBY ORDERED that Defendants, as well as their agents, employees, representatives, and successors, are enjoined from directly or indirectly enforcing SB 458, or any law with the same effect.

(4) The Court GRANTS Plaintiffs' request for an award of its reasonable attorney's fees and costs incurred in this action. The Court instructs Plaintiffs to file and serve an affidavit of attorney's fees and costs within 21 days of the date of this Order. The Defendants shall have 14 days thereafter to challenge the reasonableness of the amounts claimed by Defendants and to request a hearing if desired.

MEMORANDUM

I. FACTUAL AND PROCEDURAL BACKGROUND

This declaratory action arises from the enactment of Senate Bill 458 ("SB 458") by the Montana Legislature, which went into effect on October 1, 2023. SB

458 creates definitions for the previously undefined terms "female," "male," and "sex," as used in the Montana Code. The definitions are codified within Mont. Code Ann. § 1-1-201(1), among other definitions for terms such as "oath" and "person." To ensure wide application, SB 458 expressly provides that wherever these terms are used in the code, the new definitions apply. Since the text of the definition sections of SB 458 is the crux of the present Motion, the Court repeats them here for ready reference:

> (1) Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:
>
> (a) "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.
>
> (b) "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.
>
> . . .
>
> (f) "Sex" means the organization of the body parts and gametes for reproduction in human beings and other organisms. In human beings, there are exactly two sexes, male and female, with two corresponding types of gametes. The sexes are determined by the biological and genetic indication of male or female, including sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth,

> without regard to an individual's psychological, behavioral, social, chosen, or subjective experience of gender.

Plaintiffs allege SB 458 impermissibly limits the definitions of sex into binary categories without any scientific, medical, or legal justification. Plaintiffs ask the Court to declare SB 458 facially unconstitutional and permanently enjoin the State from enforcing it.[1]

The Complaint contends the challenged bill violates the Montana Constitution's guarantee of equal protection (Mont. Const. art. II, § 4), privacy protection (Mont. Const. art. II, § 10), right to individual dignity (Mont. Const. art. II, § 4), and free speech protection (Mont. Const. art. II, § 7). However, on February 22, 2024, Plaintiffs moved for summary judgment on only Counts I (equal protection), II (privacy), and III (dignity). Plaintiffs' Motion argues summary judgment is appropriate because SB 458 is facially unconstitutional pursuant to the following grounds:

> First, SB 458 violates the equal protection clause by ejecting Plaintiffs from the protective ambit of Montana's public accommodations laws on the basis of their sex and culture. Second, SB 458 violates Plaintiffs' right to privacy by usurping their entitlement to make deeply personal decisions regarding their gender identity. Third, SB 458 violates the right to dignity by defining Plaintiffs as non-human and depriving them of legal recognition.

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[1] SB 458 has been declared unconstitutional and is permanently enjoined. *Reagor v. State of Montana*, Cause No: DV-23-1245 (Mont. Fourth Jud. Dist. Court, Missoula Cty., June 25, 2024).

A preliminary injunction also was issued precluding enforcement of SB 458 as it relates to birth certificate amendments. *Kalarchik v. State of Montana*, Cause No: ADV-24-261 (Mont. First Jud. Dist. Court, Lewis and Clark Cty., Dec. 16, 2024).

Br. Supp. Mot. at 8 (Doc. 11).

Conversely, the State has filed a countermotion for summary judgment ("MSJ"), arguing Plaintiffs have not suffered any injury traceable to SB 458, thus, Plaintiffs fail to demonstrate the requisite case-or-controversy standing to maintain their claims. However, even if the requisite standing requirement is satisfied, the State contends the Plaintiffs' constitutional challenge fails because:

> Plaintiffs are the rare few to whom SB 458's definitions might not squarely apply. In other words, SB 458's definitions still accurately and validly apply in the overwhelmingly vast majority of their possible applications. This hardly amounts to adequate basis for Plaintiffs to maintain a facial challenge.

Defs.' Combined Br. Opp. Pls.' Mot. & Supp. Defs.' MSJ at 15 (Doc. 29) (hereafter "Defs.' Br. Supp. MSJ").

Therefore, the primary issue before the Court in consideration of the Defendants' MSJ is whether the requisite case-or-controversy standing has been satisfied. In consideration of the Plaintiffs' Motion, the primary issue is whether SB 458 is facially unconstitutional.

II. LEGAL STANDARD

Summary judgment is appropriate where there are no "genuine issues as to any material fact," and "the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). Each movant must demonstrate that no genuine issues of material fact exist. Once accomplished, the burden shifts to the non-moving party to prove, "by more than mere denial and speculation, that a genuine issue does exist." *Gryczan v. State*, 283 Mont. 433, 440, 942 P.2d 112, 116–17 (1997) (citation

omitted). If there are no genuine issues to any material facts, "the court must then determine whether the moving party is entitled to judgment as a matter of law." *Id.*

III. JUSTICIABLE CASE-OR-CONTROVERY

A. Criteria to satisfy case-or-controversy standing.

"Standing is one of several justiciability doctrines which limit Montana courts, like federal courts, to deciding only 'cases' and 'controversies.'" *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80. Courts lack the power to resolve a case brought by a plaintiff who lacks standing, i.e., "a personal stake in the outcome—because such a party presents no actual case or controversy." *Heffernan*, ¶ 29 (citing *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶¶14-16, 340 Mont. 56, 172 P.3d 1232). This limitation prevents courts from publishing orders that address "purely political or theoretical disputes." *350 Mont. v. State*, 2023 MT 87, ¶ 14, 412 Mont. 273, 529 P.3d 847. In a multi-plaintiff case, "only one plaintiff must have standing for a claim to proceed[.]" *Cross v. State*, 2024 MT 303, ¶ 16, 419 Mont. 290, 419 Mont. 290.

There are "two strands to standing: the case-or-controversy requirement imposed by the Constitution, and judicially self-imposed prudential limitations." *Heffernan*, ¶ 31 (citation omitted). To satisfy the constitutional case-or-controversy requirement, a plaintiff must demonstrate three elements: injury in fact, causation, and redressability. *Barrett v. State*, 2024 MT 86, ¶ 30, 416 Mont. 226, 547 P.3d 630 (citing *Heffernan*, ¶ 32). A court must also consider several prudential limits in its case-or-controversy analysis. *Id.*

B. Constitutional standing.

Having deposed all six Plaintiffs, the State asserts that "not a single Plaintiff suffered a specific concrete injury that was remotely traceable to SB 458." Defs.' Br. Supp. MSJ at 14. The State opines the only injury cited was "the mere fact that the Legislature passed SB 458," which demonstrates "nothing more than a political disagreement[.]" *Id.* The State contends that Plaintiffs are "purportedly afraid of something unknown that might happen in the future because of the definition of the word 'sex,' not something that was certainly impending[;]" and thus, "Plaintiffs' being offended over a definition is not injury in fact for standing purposes." Defs.' Reply Br. Supp. MSJ at 7-8 (Doc. 41).

In turn, Plaintiffs assert that SB 458 has caused concrete injury because it forces Plaintiffs to identify with inaccurate definitions when interacting with the State, inflicting immediate harm, and by taking away legal protections otherwise available, SB 458 threatens discrimination and provides no legal redress creating imminent harm. Susan Edwards, Kael Fry, Anna Tellez, Eden Atwood, and Shannon Aloia ("Individual Plaintiffs"), argue "SB 458 strips them of public accommodations protections, interferes with their autonomy, and dehumanizes them." Pls.' Combined Br. Opp. Defs.' MSJ & Reply Br. Supp. Pls.' Mot. at 5 (Doc. 33) (hereafter "Pls.' Reply Br. Supp. Mot."). Regarding Plaintiff Two Spirit Society, it asserts organization standing on the basis that "SB 458 frustrates its mission and forces it to divert resources." Pls.' Reply Br. Supp. Mot. at 13. Because only one

Plaintiff must satisfy standing in a multi-plaintiff case, the Court focuses on the Individual Plaintiffs in its analysis. *Barrett*, ¶ 19.[2]

It is not enough to demonstrate injury-in-fact, i.e., a "concrete harm that is actual or imminent," Plaintiffs must also establish causation, i.e., a "fairly traceable connection between the injury and the conduct complained of [.]" *Barrett*, ¶ 30 (citing *Heffernan*, ¶ 32). The Complaint provides that SB 458's new definitions are incorporated into the following code sections:

> § 2-18-208 ("comparable worth" anti-discrimination in state jobs); § 7-15-4207 (discrimination in urban renewal processes); § 7-34-2123 (discrimination in hospital admissions); § 13-27-408 (voter information pamphlets); § 13-35-301 (fair campaign practices); § 13-38-201 (appointment of committee representatives at primaries); § 20-7-1306 (designation of athletic teams); § 20-9-327 (female youth correctional facility admissions); § 20-25-501 (university students' domiciliary intent); § 20-25-707 (discrimination in university work-study programs); § 22-2-306 (discrimination in cultural and aesthetic projects grants); § 33-1-201 (insurance code definitions); § 35-20-209 (cemetery internment records); § 39-2-912 (wrongful discharge); § 40-1-107 (marriage license applications); § 40-1-401 (prohibited marriages); § 40-5-907 (child support case registries); § 40-5-1031 (parentage and child support pleadings); § 41-5-103 (Montana Youth Court Act); § 42-2-204 (presumption of "knowledge" in pregnancy); § 45-5-625 (sexual abuse of children); §§ 46-19-301, -401 (Western Interstate Corrections Compact inmate classifications); § 46-32-105 (expungement); §§ 49-1-102, 49-2-101, 49-3-101 (Montana Human Rights Act); §§ 50-5-105, -602 (healthcare discrimination); § 50-11-101 (reproductive human cloning); § 50-15-101 (vital statistics); § 50-

[2] Regardless however, Plaintiff Two Spirit Society satisfies associational standing pursuant to *Hefferman*, ¶ 43-46 ("It is well established that an association has standing to bring suit on behalf of its members, even without a showing of injury to the association itself, when (a) at least one of its members would have standing to sue in his or her own right, (b) the interests the association seeks to protect are germane to its purpose, and (c) neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit.")

> 19-103 (prenatal care); § 50-60-214 (restroom accessibility in public buildings); § 53-20-142 (residential facilities for developmental disabilities); §§ 53-21-121, -142 (mental health commitment); §§ 60-5-514, -522 (business eligibility for tourist-oriented directional signs); § 61-5-107 (driver's licenses); § 72-1-103 (trusts and estates).

The affected codes are vast and address a plethora of different subject matters. In addressing the injury and causation elements, the Court must consider whether SB 458's enactment causes immediate harm, and/or imminent harm by invading Plaintiffs' legally protected interests. This analysis requires the Court to consider what legal protections were available prior to the bill's enactment, and how the bill changed Plaintiffs' legal interests.

The Court begins with consideration of Plaintiffs' argument concerning immediate constitutional harm. Plaintiffs argue that because they are transgender, Two Spirit, and intersex Montanans, SB 458 excludes them "from the definition of human beings." Pls.' Br. Supp. Mot. at 7-8. Focusing on Plaintiffs Eden Atwood and Shannin Aloia, who are intersex, their biological composition is not provided for under SB 458's two categories defining human beings. Pls.' Br. Supp. Mot. Ex. 4, ¶¶ 3–7; Ex. 3, ¶¶ 3–5.

Atwood was born with Complete Androgen Insensitivity; "an X chromosome variation that can cause a person to present as female—with external 'female' genitalia (including a lower vagina, labia, clitoris, and urethra)— but without female internal reproductive organs." Pls.' Am. Compl. ¶ 21 (Doc. 14). Atwood was assigned female at birth and did not know of her condition until later in life. She first noticed a distinction from her peers when she did not experience menstruation. Without her consent or knowledge, she had a surgery which removed her internal

testes her freshman year of high school. She was prescribed hormone treatment and at-home self-vaginal dilation so as to later "accommodate" a partner during sexual intercourse. Although treated as 'female' by the medical community in her formative years, because she was born with XY chromosomes, SB 458 considers her 'male.'

Aloia was born with 17beta Hydroxysteroid Dehydrogenase 3 Deficiency; a condition where there is a shortage of androgen, a male sex hormone, which causes external genitalia to appear more consistent with a female designation and "disrupts the development of external sex organs before birth." Compl. ¶ 23. Although born with XY chromosomes and testes, Aloia was assigned female at birth. *Id.* At three years old, "lumps" developed in Aloia's stomach, prompting surgery which removed the testes and resulted in "sterilization, ongoing hormone treatments, and an atypical puberty." Compl. ¶ 22. Though treated as female by the medical community in their formative years, SB 458 requires Aloia to use "male" for government purposes, including their driver's license and marriage certificate application. Aloia seeks to marry a male partner, but SB 458 would require Aloia to identify as male. Thus, in response to SB 458, the wedding was halted.

SB 458 changed intersex Plaintiffs Atwood's and Aloia's legal recognition under the law in a large swath of contexts. *See e.g.*, Mont. Code Ann. § 13-38-201(1); Mont. Code Ann. § 20-9-327(2)(c); Mont. Code Ann. § 20-25-501(1)(b) (defining "Minor" as a person under 18 years old who is either a male or female under 1-1-201); Mont. Code Ann. § 33-1-201 (defining persons under the definitions of 1-1-201 for insurance purposes); Mont. Code Ann. § 35-20-209; Mont. Code Ann. § 40-1-401; Mont. Code Ann. § 41-5-103; Mont. Code Ann. § 42-2-204; Mont. Code

Ann. § 45-5-625(5)(b)(i)(A); Mont. Code Ann. § 46-19-401; Mont. Code Ann. § 50-11-101; Mont. Code Ann. § 50-15-101(15); Mont. Code Ann. § 50-19-103(1); Mont. Code Ann. § 50-60-214; Mont. Code Ann. § 53-20-142(14); and Mont. Code Ann. § 72-1-103(54) (Defining "Testator: as "an individual of either sex, as defined in 1-1-201."). The most prevalent being the legal definition of "sex" which states:

> In human beings, there are exactly two sexes, male and female, with two corresponding types of gametes. The sexes are determined by the biological and genetic indication of male or female, including sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual's psychological, behavioral, social, chosen, or subjective experience of gender.

As demonstrated by intersex Plaintiffs, "the biological and genetic indication of male or female" at birth can include a mix of both. In such cases, a doctor may proceed to elect a sex designation for a child, subjecting them to the psychological, behavioral, and social experience of being treated and identified as the sex chosen by the doctor. This may occur even without the child knowing that their biological composition is different than their peers, only learning later when complications arise during puberty. By declaring as a matter of law that human beings can only be "exactly" one of the two sexes, SB 458 explicitly excludes Atwood and Aloia from the definition of human beings, causing immediate harm traceable to SB 458.

In addition to lacking legal recognition under the law, Individual Plaintiffs also assert that SB 458 restricts their ability to self-identify their gender. Pls.' Reply Br. Supp. Mot. at 10. This is particularly probative to the analysis when considering that SB 458's definitions do not account for Atwood's and Aloia's biological composition, thus, they would be required to incorrectly identify their biology on

varying forms and applications. *See e.g.*, Mont. Code Ann. § 40-1-107 (form for license, marriage certificate, and consent); Mont. Code Ann. § 40-5-907(2); Mont. Code Ann. § 40-5-1031; Mont. Code Ann. § 53-21-121; and Mont. Code Ann. § 61-5-107 (driver's license forms). When a person requests an amendment on their driver's license or birth certificate, the State's refusal to do so may cause significant harm. S*ee Kalarchik v. State of Montana*, Cause No: ADV-24-261 (Mont. First Jud. Dist. Court, Lewis and Clark Cty., Dec. 16, 2024). In *Kalarchik*, SB 458, as applied to issuing amended birth certificates and amended driver's licenses, was preliminary enjoined due to its unconstitutional effect. Likewise, Aloia seeks to complete a marriage certificate with their partner but seeks to list their appropriate gender. SB 458 would prohibit the State from doing so, resulting in immediate harm inexplicably traceable to SB 458.

The Court next considers Plaintiffs' argument concerning imminent discrimination and a lack of legal recourse. Under Montana law, people are afforded legal recourse if unlawfully discriminated against based on their sex in a large array of settings. *See* Mont. Code Ann. § 2-18-208 (protection against pay and job classification discrimination in public employment); Mont. Code Ann. § 7-15-4207 (protection against discrimination in housing); Mont. Code Ann. § 7-34-2123 (protection from hospital admission discrimination); Mont. Code Ann. § 13-27-408 (protection against voter information pamphlet language containing discriminatory or hostile remarks towards a particular group); Mont. Code Ann. § 13-35-301 (prohibiting candidates for public office from appealing to prejudice based on race, sex, creed, or national origin); Mont. Code Ann. § 20-25-707 (protection against

discrimination in work-study programs); Mont. Code Ann. § 22-2-306 (protections against discrimination in the issuance of grant funds); Mont. Code Ann. § 39-2-912 (protections against wrongful discharge from employment due to unlawful discrimination); Mont. Code Ann. § 49-1-102 (human rights protection to be free from discrimination in employment and the right to enjoy public accommodations without discrimination); Mont. Code Ann. § 50-5-105 (protection against discrimination in all phases of the operation of a health care facility); and Mont. Code Ann. § 60-5-514 (requiring businesses seeking placement of a business sign on a specific information sign panel to conform with laws prohibiting discrimination in public accommodations). Plaintiffs argue these legal protections have been modified to exclude them from protection against discrimination on the basis of sex, creating a credible threat of injury.

An injury is "an invasion of a legally protected interest." *Heffernan*, ¶ 35. An injury is credible when a plaintiff is "in immediate danger of sustaining some direct injury" as a result of a statute's enforcement. *Olson v. Dep't of Revenue*, 223 Mont. 464, 470, 726 P.2d 1162, 1166 (1986). In *Olson*, there was no credible injury when the appellants complained of county residence requirements to run for county office, or obtain a hunting or fishing license, because the appellants did not attempt to run for office or obtain a hunting or fishing license, thus, there was no imminent injury on the horizon. *Id.* However, an injury-in-fact may exist when there is "a credible threat of ongoing and future injury due to actual discrimination and lack of recourse." *Barrett*, ¶ 33. In *Barrett*, the Montana Supreme Court addressed Mont. Code Ann. § 20-7-1306(3), which required sports teams to be designated as either

male, female, or coed, pursuant to SB 458's definitions of sex. The Plaintiffs in *Barrett* demonstrated a credible injury because the statute excluded transgender athletes from sports, leaving them with no legal recourse. *Barrett*, ¶ 35 (the "exclusion of transgender athletes, is not an abstract or remote contingency."). The Court finds *Barrett* instructive here.

Prior to SB 458, intersex, Two Spirit, and transgender Montanans had legal recourse to seek relief if unlawfully treated differently on the basis of sex. This was true regardless of if a person was discriminated against for having a certain sex, for having a sex that is out of harmony with their gender identity, or for having biological components indicative of both female and male sex. However, SB 458's enactment narrowed the legal recourse available for sex discrimination by restricting the definition of "male," "female," and "sex." SB 458's modifications effectively preclude certain remedies which were otherwise available. Intersex Plaintiffs Aloia and Atwood, for example, would face difficulty arguing they were discriminated against based on their sex, because the law only provides for two sexes, neither of which they fit neatly into. Unlike harm arising out of the inability to obtain a fishing license for one who never sought such license, the loss of legal recourse for discrimination demonstrates a "personal stake in the outcome of the controversy" sufficient to support the injury prong of constitutional standing. *Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 371, 922 P.2d 1140, 1143 (1996). Such injury is directly traceable to SB 458's modification of protections against discrimination.

The last element of constitutional standing is "redressability" which requires Plaintiffs to demonstrate "a likelihood that the requested relief will address the alleged injury." *Barrett*, ¶ 30. In *Barrett*, the court explained that if the challenged statute was "declared unconstitutional and enjoined . . . the harm will necessarily cease, affording complete redress." *Barrett*, ¶ 35. Likewise, Plaintiffs' claims are redressable. Should SB 458 be declared unconstitutional in substance, Plaintiffs' injuries necessarily cease.

C. Prudential limitations analysis.

A court must consider the prudential limitations in its standing analysis: "the plaintiff generally must assert his/her[/their] own legal rights and interests; the courts will not adjudicate generalized grievances more appropriately addressed in the representative branches; and the plaintiff's complaint must fall within the zone of interests protected by the law." *Barrett*, ¶ 30. Applied here, Plaintiffs have demonstrated a concrete injury personal to their own legal rights and interests as provided above. Accordingly, the Court focuses its analysis on the second and third prudential limitation.

At oral argument the State emphasized its belief that this case presents a non-justiciable controversy. The State suggests that because SB 458 has recently been permanently enjoined in *Reagor v. State of Montana*, Cause No: DV-23-1245 (Mont. Fourth Jud. Dist. Court, Missoula Cty.) (June 25, 2024), "the bear is already dead," and thus, the Court is unable to provide relief. Put simply, the State argues that the Court would be issuing an advisory opinion only, as SB 458 is currently not in effect, thus resolution of this case is better suited in a legislative, and not, judicial forum.

Plaintiffs reject this position, arguing that though *Reagor* permanently enjoined SB 458, it did so on the basis that the bill violated Mont. Const. art. V, § 11(3), by not containing a single subject in the title. Such challenge, Plaintiffs assert, concerned only the form of the bill and did not address the bill's substance, thus, there remains a justiciable controversy. By seeking the bill's substance to be declared unconstitutional, Plaintiffs contend, they seek a ruling concerning a legal basis distinct from that presented in *Reagor.*

Despite the State's oral argument, that "the bear is already dead," it is clear that *Reagor* did not resolve the disputes presently before the Court. Senator Carl Glimm, who sponsored SB 458, has submitted a bill draft, LC4192, in the 2025 legislative session, which by its title bears remarkable similarity to SB 458.[3] Moreover, *Reagor* did not resolve Plaintiffs' constitutional challenges as to SB 458's substance. Therefore, the issues presented before the Court do not regard a generalized grievance with no threat of harm, instead it presents a justiciable controversy properly decided in the judicial forum, as the threat of harm in the enforcement of SB 458, or bills of similar character, remains prevalent.

Lastly, the Court addresses whether the issue falls within "the zone of interests protected by the law." *Barrett*, ¶ 30. As final interpreters of the Constitution, courts have the final obligation "to guard, enforce, and protect every right granted or secured by the Constitution . . .." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 18, 326 Mont. 304, 109 P.3d 257. Since Plaintiffs' Complaint regards their constitutional interests, this case fits squarely within the zone of interests

[3] See https://bills.legmt.gov/#/lc/bill/2/LC4192.

protected by the law, and appropriately brought before the Court. In passing SB 458, proponents cited the prerogative of the Legislature to define the words used in our laws. The Court agrees; this prerogative is undeniable. The Judicial Branch has an equally undeniable prerogative to determine whether the laws passed by the Legislature conflict with the Montana Constitution, which memorialize our state's highest ideals, making them supreme. It is through this well-established responsibility that the Court is issuing its present decision.

IV. SUBSTANTIVE CONSTITUTIONAL ANALYSIS

A. Applicable legal standard.

The Court does not take its duty here lightly, and it recognizes that laws passed by the Legislature are presumed to be constitutional. *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 382, 632 P.2d 300, 303 (1981). The party challenging the statute has the burden of proving its unconstitutionality or showing that the statute infringes upon a fundamental right. *Id.* Plaintiffs have raised their claims as a "facial" constitutional challenge, which carries a higher burden than an "as-applied" constitutional challenge. *Montana Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131. As such, Plaintiffs must demonstrate that the statute "is unconstitutional in all its applications." *Id.*

"If the challenger shows an infringement on a fundamental right, a presumption of constitutionality is no longer available." *Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 11, 416 Mont. 44, 545 P.3d 1074 (citation omitted). In such a case, the burden shifts to the State to demonstrate that the statute is justified by a compelling state interest and is narrowly tailored to effectuate only that

compelling interest. *Id.*; *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364; *Weems v. State*, 2023 MT 82, ¶ 34, 412 Mont. 132, 529 P.3d 798.

If the Court finds that the statute only "minimally burdens" a fundamental right, but does not infringe upon such right, a "middle-tier analysis is appropriate." *Jacobsen*, ¶ 38. Under a middle-tier analysis, the Court must balance "the rights infringed and the governmental interest to be served by the infringement." *Jacobsen*, ¶ 40. For the statute to survive this level of scrutiny, the State must show: (1) "the law is reasonable," and (2) that "the government's interests as asserted outweigh the burden" on the rights it infringes upon. *Jacobsen*, ¶ 53. If a statute does not infringe upon a fundamental right, "we review it under a rational basis analysis, which upholds the law if it is rationally related to a legitimate government interest." *Jacobsen*, ¶ 37 (citing *Mont. Shooting Sports Ass'n v. State*, 2010 MT 8, ¶ 20, 355 Mont. 49, 224 P.3d 1240). Even if the infringement of a fundamental right shifts the burden to the State, the Court begins its analysis presuming the statute's constitutionality. *Weems*, ¶ 34.

B. SB 458 triggers strict scrutiny because it infringes upon Plaintiffs' fundamental right to individual privacy.

"Strict scrutiny applies if a suspect class or fundamental right is affected." *Planned Parenthood v. State*, 2024 MT 178, ¶ 29, 417 Mont. 457, 554 P.3d 153; *Snetsinger v. Mont. Univ. Sys*., 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. Plaintiffs' argue strict scrutiny is appropriate because SB 458 infringes upon Plaintiffs fundamental right to privacy and dignity, and because SB 458 affects a

suspect class. Since the Court finds the issue dispositive, it focuses its scrutiny analysis on Plaintiffs' right to individual privacy argument.

"The right to privacy is explicitly guaranteed in Montana's Constitution and is a fundamental right." *Planned Parenthood*, ¶ 22. Article II, Section 10 of the Montana Constitution declares that the right to 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." This protection is unique to Montana, in that it "exceed[s] even that provided by the federal constitution." *Armstrong*, ¶¶ 34-35 (citations omitted). Indeed, the explicit protection under the Montana Constitution for the right to privacy "reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." *Gryczan*, 283 Mont. at 455, 942 P.2d at 125. Hence, the right to privacy may also be considered "the right of personal autonomy or the right to be let alone[.]" *Id.*

On one hand, the Montana Supreme Court has made clear that the right to privacy was intended to be expansive and protect Montanans from "governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Planned Parenthood*, ¶ 22 (citing *Weems*, ¶ 35; *Armstrong*, ¶ 33). On the other hand, it is also well established that the State "has a police power by which it can regulate for the health and safety of its citizens." *Wiser v. State*, 2006 MT 20, ¶ 19, 331 Mont. 28, 129 P.3d 133. Taking the interests of individual Montanans in tandem with the interests of the State, when the Legislature enacts statutes which regulate decisions regarding an individual's "body and psyche," the regulations "must be based on protecting citizens from actual health

risks." *Planned Parenthood*, ¶ 22 (citing *Weems*, ¶ 37; *Armstrong*, ¶¶ 58-59). Thus, the Legislature "may restrict this fundamental right to privacy only when it can demonstrate a medically acknowledged, *bona fide* health risk." *Cross*, ¶ 28 (citing *Armstrong*, ¶ 62).

The Court considers whether SB 458 burdens or infringes upon the fundamental right of individual privacy. Such a right is implicated when the State interferes with one's ability to make decisions regarding an individual's body and psyche. *Armstrong*, ¶ 53 ("Few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health."); *Gryczan*, 283 Mont. at 449, 942 P.3d at 122; *Planned Parenthood*, ¶ 22; *Weems,* ¶ 51. The right of privacy is also intended to protect against "information gathering and protect citizens from illegal private action and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Armstrong*, ¶ 33. Regulations that interfere with an individual's ability to self-define and make personal choices concerning their identity infringes on the right to privacy. *Marquez v. State*, Cause No: DV-21-873 (Mont. 13th Jud. Dist. Court, Missoula Cty.) (April 21, 2022).

In this case, SB 458 takes away Plaintiffs' ability to define or identify themselves, and requires them to identify by the State's definitions. See e.g., Mont. Code Ann. § 40-1-107 (form for license, marriage certificate, and consent); Mont. Code Ann. § 40-5-907(2); Mont. Code Ann. § 40-5-1031; Mont. Code Ann. § 53-21-121; and Mont. Code Ann. § 61-5-107 (driver's license forms). This intrusion is particularly burdensome to intersex Plaintiffs, as the definitions under SB 458, do

not accurately define their biological sex; thus, the challenged statute would exclude them from the binary definitions of human being all together. See e.g., Mont. Code Ann. § 13-38-201(1); Mont. Code Ann. § 20-9-327(2)(c); Mont. Code Ann. § 20-25-501(1)(b) (defining "Minor" as a person under 18 years old who is either a male or female under 1-1-201); Mont. Code Ann. § 33-1-201 (defining persons under the definitions of 1-1-201 for insurance purposes); Mont. Code Ann. § 35-20-209; Mont. Code Ann. § 40-1-401; Mont. Code Ann. § 41-5-103; Mont. Code Ann. § 42-2-204; Mont. Code Ann. § 45-5-625(5)(b)(i)(A); Mont. Code Ann. § 46-19-401; Mont. Code Ann. § 50-11-101; Mont. Code Ann. § 50-15-101(15); Mont. Code Ann. § 50-19-103(1); Mont. Code Ann. § 50-60-214; Mont. Code Ann. § 53-20-142(14); and Mont. Code Ann. § 72-1-103(54) (Defining "Testator: as "an individual of either sex, as defined in 1-1-201."). Given that SB 458 regulates Montanans' ability to make personal and intimate decisions concerning their bodies and psyche, SB 458 infringes upon Plaintiffs' right to privacy, triggering strict scrutiny.

C. SB 458 does not survive strict scrutiny as it violates the Montana Constitution's right to privacy and equal protection clauses.

When a fundamental right is implicated, the Court applies strict scrutiny which requires the State to demonstrate that its reasoning for the enactment of the challenged law is narrowly tailored to serve a compelling State interest. *Cross,* ¶ 22 (citing *Armstrong*, ¶ 34 (citation omitted); and *Weems*, ¶ 43). Applied here, the Court considers whether the State has a compelling State interest in enacting SB 458, and whether the challenged law is narrowly tailored to serve that interest. *Id.*

The legislative record contains a general explanation of SB 458's primary purpose, as explained by its sponsor, Senator Glimm:

> Now you may be asking yourself why this bill is even necessary. And the answer is pretty straightforward. Today there are some, including judges, who conflate the terms "sex" and "gender." And while these terms, in history, used to mean the same thing, they don't mean the same thing anymore. And they can no longer be used interchangeably . . . Gender is obviously something different than biological sex. Biological sex is immutable, and that means you can't change it. And there's only two biological sexes. You may claim to be able to change your gender and to express your gender in a different way, but you can never change your biological sex. And that's why Senate Bill 458 is necessary. . . . [W]e need to draw a clear distinction between sex and gender, and that's what this bill does.

Pls.' Am. Comp. ¶ 3 (citing Mont. Leg., H. Jud. Hrg. at 8:21:40–8:21:51 (Apr. 13, 2023)). The legislative record appears to provide two reasons why 'clear distinctions' are necessary. First, legislators complained that in *Marquez v. State*, Cause No. DV-21-873 (Mont. 13th Jud. Dist. Court, Missoula Cty., April 21, 2022), a judge "conflated the terms sex and gender" when it enjoined a law restricting birth certificate amendments. H. Jud. Hrg. at 8:26:30–8:26:51; see also S. Fl. Sess. Hrg. at 13:21:33–13:22:30 (Mar. 15, 2023) (Sen. Glimm repeating same). Second, concern was raised that a transgender woman might serve on an election precinct committee with a cisgender man, which legislators feared would undermine Mont. Code Ann. § 13-38-201. H. Jud. Hrg. at 8:26:54–8:27:54. The State has not provided any argument refuting Plaintiffs' references to the legislative record, nor has it provided any alternative purpose for SB 458's enactment.

To effectuate the State's interest, SB 458 modifies the manner in which Montanans must identify their gender when interacting with the State, and excludes individuals from the definition of human being when their gender identity does not conform to SB 458's definitions. Aside from these modifications which affect privacy, SB 458 also modified a plethora of laws which protect Montanans against discrimination, by explicitly excluding protections for individuals who do not meet the definition of biological male and female under SB 458.[4]

Since Plaintiffs have raised a facial challenge, the Court must consider SB 458's modifications: (1) its modifications affecting privacy, and (2) its modifications affecting discrimination protections. *Montana Cannabis Indus. Ass'n*, ¶ 14. To satisfy strict scrutiny, the challenged law must be a compelling interest, i.e., the State's interest must be "at a minimum, some interest of the highest order and . . . not otherwise served." *Weems*, ¶ 44 (citation omitted). Moreover, the challenged law must be narrowly tailored, meaning it must be "the least onerous path that can

[4] *See e.g.* Mont. Code Ann. § 2-18-208 (protection against pay and job classification discrimination in public employment); Mont. Code Ann. § 7-15-4207 (protection against discrimination in housing); Mont. Code Ann. § 7-34-2123 (protection from hospital admission discrimination); Mont. Code Ann. § 13-27-408 (protection against voter information pamphlet language containing discriminatory or hostile remarks towards a particular group); Mont. Code Ann. § 13-35-301 (prohibiting candidates for public office from appealing to prejudice based in race, sex, creed, or national origin); Mont. Code Ann. § 20-25-707 (protection against discrimination in work-study programs); Mont. Code Ann. § 22-2-306 (protections against discrimination in the issuance of grant funds); Mont. Code Ann. § 39-2-912 (protects against wrongful discharge from employment due to unlawful discrimination); Mont. Code Ann. § 49-1-102 (human rights protection to be free from discrimination in employment and the right to enjoy public accommodations without discrimination); Mont. Code Ann. § 50-5-105 (protection against discrimination in all phases of the operation of a health care facility); and Mont. Code Ann. § 60-5-514 (requiring businesses seeking placement of a business sign on a specific information sign panel to conform with laws prohibiting discrimination in public accommodations).

be taken to achieve the state objective." *Cross,* ¶ 28 (citing *Weems*, ¶ 44; *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996)).

As an initial matter, the Court addresses the Legislature's interest in ensuring that a transgender woman cannot serve on an election precinct committee with a cisgender man. The election precinct committee is regulated by Mont. Code Ann. § 13-38-201, yet SB 458 modifies over 40 different areas of the Montana Code. It would be difficult for the Court to find SB 458 as the "least onerous path" to achieve the Legislature's concern regarding the committee. Moreover, the State has not provided any evidence that transgender women are likely to silence cisgender women, nor evidence explaining any resulting harm to the public's health or welfare, which would be caused even if a transgender woman served on the committee. Thus, even assuming that this interest is "of the highest order" the State cannot rely upon this interest to satisfy its constitutional burden in enacting SB 458's modifications affecting privacy nor its modifications concerning discrimination. Thus, the Court focuses its constitutional analysis on the State's interest providing clear distinctions for judges who legislators believe conflate sex and gender, while upholding the protections established in the Montana Constitution.

First, the Court considers whether SB 458's modifications affecting privacy are narrowly tailored to serve a compelling State interest. The right to privacy includes the freedom to make choices "that concern the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Armstrong*, ¶ 37. SB 458 requires individuals to define their own existence pursuant to the State's definitions, even when the State's definitions conflict with an

individual's licensed physician, a person's cultural identity (Two Spirit), or an individual's own concept of existence. To justify this invasion and satisfy its burden, the State must demonstrate a compelling interest:

> in and obligation to legislate or regulate to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, *bonafide* health risk. Subject to this narrow qualification, however, the legislature has neither a legitimate presence nor voice in the patient/health care provider relationship superior to the patient's right of personal autonomy which protects that relationship from infringement by the state.

Armstrong, ¶ 59. Here, the State has not advanced evidence that judges who are alleged to have conflated sex and gender have caused harm and jeopardized public safety, health, or wellness.

When the Legislature "thrusts itself into this protected zone of individual privacy under the guise of protecting the patient's health, but, in reality, does so because of prevailing political ideology and the unrelenting pressure from individuals and organizations promoting their own beliefs and values," the State is not only infringing on personal autonomy, "it is, as well, intellectually and morally indefensible." *Armstrong*, ¶ 60. By restricting the definitions of sex in a manner which interferes with even that of a doctor and patients' definition, SB 458 prohibits the individualized care and exercise of professional medical judgment which should be afforded to the individual, in violation of the right to privacy. *Planned Parenthood*, ¶ 37. Substituting the opinions of licensed medical professionals and individuals, with that of the legislators' own beliefs and values impermissibly requires Montanans to identify themselves "based on [the] political ideology" of

legislators, in violation of the right to privacy. *Armstrong,* ¶ 62. The State has failed to satisfy its burden in defending SB 458's modifications which affect privacy. Accordingly, SB 458's modifications affecting privacy, and which require Montanans to misidentify themselves to the State, are unconstitutional.

Next, the Court considers whether SB 458's modifications affecting discrimination protections are narrowly tailored to serve a compelling State interest. In this context, Plaintiffs argue that SB 458 violates the Equal Protection Clause of Article II, Section 4 of the Montana Constitution, which provides that:

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

The principal purpose of this section "is to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action . . . notwithstanding the deference that must be given to the Legislature when it enacts a law, it is the express function and duty of this Court to ensure that all Montanans are afforded equal protection under the law." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 16, 302 Mont. 518, 15 P.3d 877 (citation omitted). Indeed, Montana "provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution." *Snetsinger*, ¶ 15 (cite omitted). Hence, the Court's equal protection analysis must be unique to the Montana Constitution, and distinct from federal jurisprudence. *State v. Covington*, 2012 MT 31, ¶¶ 20-21, 364 Mont. 118, 272 P.3d 43.

When analyzing an equal protection claim the Court first identifies "the classes involved and determine[s] if they are similarly situated;" then it applies "the appropriate level of scrutiny to the challenged statute." *Globe*, ¶ 28. Two classes are similarly situated when "they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Id.*

Plaintiffs assert that SB 458 treats cisgender individuals, i.e., those whose gender identity is in harmony with their biological sex (as defined by SB 458), different from transgender, intersex, and Two Spirit individuals, i.e., those whose gender identity is out of harmony with their biological sex (as defined by SB 458). The two classes are equal in all relevant respects, Plaintiffs argue, other than their sex and culture. Plaintiffs explain, "if a cisgender man is denied employment for appearing as a man, he has a remedy under MHRA; if a transgender or Two Spirit man is denied employment for appearing as a man, he has no remedy under MHRA." Br. Supp. Mot. at 11. Moreover, intersex Plaintiff Atwood (born female presenting but who does not have internal female sex organs, and who was assigned female at birth and treated 'female' throughout her life) could be lawfully denied employment for appearing as a 'woman' under SB 458, which considers her 'male' while a cisgender woman could not be lawfully denied employment for the same reason.

In turn, the only argument provided by the State in this respect is that "Plaintiffs are the rare few to whom SB 458's definitions might not squarely apply." Defs.' Br. Supp. at 15. Since Plaintiffs are raising a facially unconstitutional challenge, the State opines, even if SB 458 is unconstitutional as applied to the "rare few," it would not be unconstitutional in all its possible applications. *Id.* However,

the State has misinterpreted the requirements of a facial challenge in the context of an equal protection claim. By nature, such a claim necessarily involves some class of people being treated better than another class of people. Taken to its logical end, the State's argument would preclude any facial equal protection claims under law, on the grounds that the challenged state action is not unconstitutional when applied to the class who is not experiencing the unequal treatment. Such interpretation would eviscerate the protections built into the Montana Constitution. It has never been the law in this state that a rare few, even if they are "despised," should lack protection under the law. *Gryczan,* 283 Mont. at 455, 942 P.2d at 126 (" . . . while legislative enactments may reflect the will of the majority, and, arguably, may even respond to perceived societal notions of what is acceptable conduct in a moral sense, there are certain rights so fundamental that they will not be denied to a minority no matter how despised by society.").

Having failed to raise sufficient argument disproving Plaintiffs' identification of two classes which are similarly situated and unequally treated, the Court next considers whether SB 458 survives strict scrutiny. In this case, the State modified nearly a dozen anti-discrimination laws to limit protections on the basis of sex discrimination when the discrimination is directed towards someone who's biological sex (as defined by SB 458) does not align with the gender they portray. The State's interest which it is serving in enacting these modifications, is to provide clear distinctions for judges who may conflate sex and gender. Undeniably, these modifications seek to prevent a judge from extending protection against discrimination under the law, to those whom the Legislature perceives should not be

protected. In essence, the Legislature seeks to permit discrimination against a person whose sex does not align with their gender identity, believing it to be legally distinct from discrimination directed at a person on the basis of sex.

Conversely, the Plaintiffs argue whether the discrimination is lodged at a person for having a certain sex, or for not having the sex which aligns with their gender identity; in either regard, the discrimination is sex based. Hence, Plaintiffs argue SB 458 discriminates on the basis of sex, and in the context of Two Spirit individuals, on the basis of culture. In considering whether discrimination directed at a person because their sex does not align with their gender identity constitutes as sex discrimination, the Court finds *Kalarchik v. State*, persuasive.

In *Kalarchik*, the Court considered whether the logic in *Bostock v. Clayton County*, 590 U.S. 644 (2020), should be applied broadly in an equal protection context under the Montana Constitution. *Kalarchik v. State*, Cause No: ADV-24-261 at 9 (Mont. First Jud. Dist. Court, Lewis and Clark Cty., Dec. 16, 2024). In *Bostock*, the Supreme Court of the United States held that "it is impossible to discriminate against a person for being . . . transgender without discriminating against the individual based on sex." *Bostock*, 590 U.S. at 660. Similarly, the 9th Circuit has held that "[d]iscrimination on the basis of transgender status is a form of sex-based discrimination . . ." *Hecox v. Little*, 79 F.4th 1009, 1026-27 (9th Circ. 2023); see also *Fowler v. Stitt*, 104 F.4th 770 (2024) (where the court applied *Bostock* to an equal protection claim). Following similar logic, the Court in *Kalarchik* held that "[i]f the challenged state actions discriminate against transgender individuals on

the basis of their transgender status, they also necessarily discriminate on the basis of sex." *Kalarchik v. State*, Cause No: ADV-24-261 at 10.

It necessarily follows, that the Legislature's belief that sex discrimination should be legally distinct from discrimination against a person whose sex does not align with their gender, is legal fiction. Under SB 458's definitions, "female" and "male" cisgender people, i.e., those whose gender identity conforms with their biological sex, are still protected by Montana's antidiscrimination laws, but those who do not fit squarely into either category, i.e., transgender, intersex, and Two Spirit individuals, are no longer protected. Put another way, SB 458 now leaves a gap in protection for some Montanans. There is no compelling state interest in eviscerating protection against sex discrimination for individuals whose gender identities do not align with their biological sex, as such interest would be permitting sex discrimination towards a minority population, in violation of the policy of the State of Montana. *Gryczan,* 283 Mont. at 455, 942 P.2d at 126. Accordingly, SB 458 unlawfully discriminates based on sex, in violation of the Montana Constitution.

In regard to culture, Plaintiffs explain the "word culture was incorporated specifically to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians." Br. Supp. Mot. at 12-13 (quoting Bill of Rights Comm. Proposals, No. VIII, at 17). Two Spirit individuals possess gender identities which do not align with SB 458, as "many Indigenous cultures reject the gender binary." Br. Supp. Mot. at 13. By permitting discrimination against based on culture, in violation of the Montana Constitution. Accordingly, the State has failed to satisfy strict scrutiny on Plaintiffs' equal protection claims.

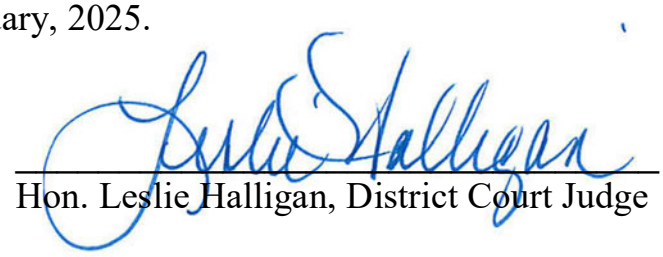
V. CONCLUSION

Based on the foregoing, the State's Motion for Summary Judgment is DENIED, as Plaintiffs have demonstrated a redressable, concrete injury, traceable to SB 458, in satisfaction of the case-or-controversy requirement imposed by the Constitution, and the judicially self-imposed prudential limitations.

Further, Plaintiffs' Summary Judgment Motion is GRANTED, pursuant to their equal protection and right to privacy claims, as the State has failed to demonstrate that SB 458 is narrowly tailored to serve a compelling State interest. The Court DECLARES SB 458 facially unconstitutional, in violation of the Montana Constitution's guarantees of equal protection and privacy. Defendants, their agents, employees, representatives, and successors, are enjoined from directly or indirectly enforcing SB 458, or any law with the same effect.

Plaintiffs' request for attorney fees and costs is GRANTED. Plaintiffs must file and serve an affidavit of fees and costs within 21 days of the date of this Order. The Defendant shall have 14 days to challenge the amount and/or request hearing.

DATED this 18th day of February, 2025.



Hon. Leslie Halligan, District Court Judge

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