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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

SUSAN EDWARDS, et al., Plaintiffs, v. THE STATE OF MONTANA, et al., Defendants.	Dept. No. 1 Cause No. DV 23–1026 Hon. Leslie Halligan **DEFENDANTS' REPLY BRIEF IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT** **[ORAL ARGUMENT REQUESTED]**

COME NOW Defendants, by and through counsel, and respectfully submit their Reply Brief in Support of their Cross Motion for Summary Judgment.

ISSUE: WHETHER PLAINTIFFS HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SB 458 WHEN THEY ARE NOT INJURED OR THREATENED TO BE INJURED BY THE STATUTES BEING AMENDED?

STATEMENT OF FACTS AND INTRODUCTION

Defendants deposed each Plaintiff regarding all of the statutes that are amended by SB 458 immediately following the filing of the initial pleadings. As to each statute, the named Plaintiffs admitted that none of them applied to them. The only injury was the process of passing SB 458 in that they were offended by the Legislature defining the word "sex" as it applied to humans for purposes of the listed statutes in the title to SB 458.

Anna Tellez was asked:

> Q. What specifically has Senate Bill 458's passage done to prevent you specifically from self-identifying as a female?
> Answer. By the definition of Senate Bill 458, it defines me as a male from here on out under the Montana State Code.
>
> Q. … It has not prevented you from getting an occupation, correct?
> Answer. No it has not.
>
> Q. … So it's just the new definition, it bothers you; is that fair?
> Answer. No. The new definition defines me as male in any way I would have to interact with the State from October 31st moving forward.
>
> Q. But you have not interacted with the State where it has impacted you, has it?
> Answer. Not as of yet.

Tellez Depo. p.31-32, ln. 11-17.

> Eden Atwood was asked:
>
> Q. As of October 31st specifically, what discrimination have you endured as a result of Senate Bill 458?
> Answer. Well, the writing of it.
>
> Q. … Okay. As of October 31st specifically, what happened that has reduced your value? It's in paragraph 10.
> Answer. The writing of the bill is inflammatory and harmful to me.

Atwood Depo. p.33-37, ln. 24-7.

> Kael Fry was asked:
>
> Q. … Specifically, as of October 31st what discrimination have you endured as a result of Senate Bill 458?
> Answer. Well, for example, I would really like to be able to change my birth certificate, and I have not been able to do so. This particular bill, I am at a different place in that I am further into my transition, so I've already changed my driver's license, I've already changed by Social Security card, I've already changed my passport …
>
> Q. … So you have not tried at any time to change your birth certificate?
> Answer. I have not at this point.
>
> Q. … Okay. And it also states that the social community has excluded you. And as of October 31st, can you give me specific instances where the social community has included [sic] you because of Senate Bill 458?
> Answer: So, again, it's because I am further along in my transition, this senate bill has not excluded me …
>
> Q. But specifically it hasn't?
> A. Not me, no.

Fry Depo. p.30-33, ln. 9-13.

Shannon Aloia was asked:

> Q. As of October 31st specifically what discrimination have you endured as a result of SB 458?
> Answer. None that I am aware of.

Aloia Depo. p. 21, ln. 6-9.

Shannon also confirmed that she was not excluded from any social or political community. Aloia Depo. p. 21, ln. 10-15.

Susan Edwards was asked:

> Q. Have you specifically experienced discrimination since October 31, 2023?
> Answer. No.

Edwards Depo. p.29, ln. 6-8.

Like Aloia, Susan Edwards has not been excluded from any social or political communities, nor has Edwards' value been reduced as a result of SB 458. Edwards Depo. p.30 ln. 14-25.

The Two Spirit Society was asked:

> Q. As of October 31st, 2023, specifically what discrimination has the Society endured as a result of Senate Bill 458.
> Answer. I – we don't know yet, just because I think there's a lot of uncertainty how, if this law will actually even go into effect, so – and how it will be implemented.
>
> Q. So you can't cite any specific instances of discrimination against the Society?
> Answer. Not within the last six or seven months.

Two Spirit Depo. p. 52-53 ln. 21-7.

The Society also was not excluded from any social or political communities because of SB 458 nor did the legislation reduce the value of the Two Spirit Society. Two Spirit Depo. p. 53-55, ln. 22-14.

A. THE NAMED PLAINTIFFS HAVE NOT SUSTAINED INJURY IN FACT AND THEREFORE LACK STANDING.

The district courts of the State of Montana have original jurisdiction in all civil matters in cases at law and in equity. Mont. Const., Art. VII, § 4(1).

> At the threshold of every case, especially those where a statutory or constitutional violation is claimed to have occurred, is the requirement that the plaintiff allege 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues…'

Baker v. Carr, 369 U.S. 186, 204 (1962), quoted in *Olson v. Dept. of Revenue*, 223 Mont. 464, 726 P.2d 1162 (1986).

Standing to sue is based upon two distinct legal principles, the first being constitutional, which extends original jurisdiction of a district court in cases at law and in equity. *Olson, supra.* This provision has been construed by the Montana Supreme Court to embody the same limitations that are imposed on federal courts under Article III - Case or Controversy. *Stewart v. Bd. of Cty. Com'rs. of Big Horn Cty.,* 175 Mont. 197, 573 P.2d 184 (1977); *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567. The second legal principle of the standing to sue doctrine is one of judicial restraint imposed for reasons of policy. *Olson, supra.* At a minimum, a plaintiff must establish that he has been

personally injured or threatened with immediate injury by the alleged constitutional or statutory violation. *Olson, supra.* Before a court can find a statute unconstitutional,

> The party who assails it must show, not only that the statute is invalid, but that he has sustained, or is in immediate danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Chovanak v. Matthews, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948). *See also Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 10, 389 Mont. 122, 406 P.3d 427 (a plaintiff "must show that he has sustained or is in immediate danger of sustaining some direct injury. . . and not merely that he suffers in some indefinite way in common with people generally").

The Supreme Court in *Olson* stated that it may be true that the plaintiffs would not have been permitted to obtain a hunting or fishing license if they had sought one, but they had not applied for a hunting or fishing license, nor had they attempted to run for county office which they were alleging they were denied that opportunity. In *Olson,* the court found that the plaintiffs lacked standing to assert their constitutional claim because they alleged an injury which others may have suffered, but not an injury to themselves.

Here, Plaintiffs' case suffers from the same problem. They allege an injury which others may suffer at some time in the future, but no injury personal to

themselves. The undisputed facts establish that Plaintiffs have done nothing with regard to the statutes that are impacted by SB 458. The Plaintiffs have not attempted to engage in any of the State programs that are amended by SB 458. None have experienced any discrimination because of SB 458, nor have they been denied anything because of the legislation.

Defendants chose to depose all of the Plaintiffs as soon as possible because a detailed review of the amended statutes from SB 458 made it very likely that none of the Plaintiffs had suffered an injury in fact. This strategy was validated by Plaintiffs' depositions. At most, Plaintiffs were upset by the passage of the legislation, not by the specific statues that the legislation amended. 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. Plaintiffs fail to prove they "ha[ve] sustained, or [are] in immediate danger of sustaining some direct injury as a result of its enforcement." *Grossman v. Dep't of Nat. Res.*, 209 Mont. 427, 682 P.2d 1319 (1984).

"Injury in fact involves invasion of a legally protected interest that is concrete, particularized, and actual or imminent. An imminent or threatened injury must be certainly impending to constitute injury in fact, and allegations of possible future injury are not sufficient." *Citizen Ctr. v. Gessler*, 770 F.3d 900 (10th Cir. 2014). The "threatened injury must be certainly impending to constitute injury in

fact," and claims that "of possible future injury" fail to be sufficient for standing. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). As described in the Plaintiffs' testimonies, no injury or imminent threat of injury could be stated. Rather, the Plaintiffs provide allegations of possible future injury. Plaintiffs' being offended over a definition is not injury in fact for standing purposes.

Based upon the foregoing, this Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Cross Motion for Summary Judgment. Taking the undisputed facts as true, Plaintiffs lack standing because they have not been injured in fact by any of the amended statutes. The Court should dismiss Plaintiffs' claims accordingly.

Defendants respectfully request oral argument on this Cross Motion for Summary Judgment.

DATED this 28th day of June, 2024.

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CERTIFICATE OF SERVICE

I, Thane P. Johnson, hereby certify that I have served true and accurate copies of the foregoing Motion - Motion for Summary Judgment (Government) to the following on 06-28-2024:

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Dated: 06-28-2024