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**MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY**

WILLARD RANDALL; KIAH ABBEY;
DIANE SANDS; MONTANA
CHAPTER OF THE NATIONAL
ORGANIZATION FOR WOMEN;
AMERICAN ASSOCIATION OF
UNIVERSITY WOMEN OF
MONTANA,

Plaintiffs,

v.

STATE OF MONTANA; LAURIE
ESAU, in her official capacity as
COMMISSIONER OF THE
MONTANA DEPARTMENT OF
LABOR AND INDUSTRY; and TROY
DOWNING, in his official capacity as
COMMISSIONER OF SECURITIES
AND INSURANCE, MONTANA
STATE AUDITOR,

Defendants.

FILED

NOV 02 2022

ANGIE SPARKS, Clerk of District Court
By **K KRESGE** Deputy Clerk

Cause No.:

ADV 2022-95

COMPLAINT

MICHAEL F. McMAHON
Presiding Judge

INTRODUCTION

In 2021, the Montana Legislature passed House Bill 379 (“HB 379”) to allow insurers to discriminate in establishing insurance premium rates, giving a legislative stamp of approval on corporate profits extracted from Montanans based on their sex and marital status. In addition to giving insurers free range to set discriminatory rates, HB 379 excludes individuals harmed by insurance discrimination from seeking recourse through the process set forth under the Montana Human Rights Act (“MHRA”) and thus protects insurers from such claims.

Legislators justified their decision by claiming that the existing law was worse for women—that, without sex discrimination, women face higher insurance costs. But that’s not what the data show. In reality, no reliable correlation between sex and insurable risk exists, and allowing insurance companies to consider sex and marital status simply gives them one more tool to increase profits and leads to unpredictable discrimination against Montana consumers across different insurance classes.

Because HB 379 constitutes state-sanctioned discrimination, it violates both the equal protection and special legislation provisions of the Montana Constitution. Plaintiffs, a mix of individuals who will be injured by discrimination and organizations with members who will be injured, bring this action for declaratory and injunctive relief, seeking a return to the parity that has guided insurance determinations in Montana for nearly four decades.

PARTIES

A. Individual Plaintiffs

1. Willard Randall is a resident of Kalispell, Montana. He is in a long-term relationship, but he is not married. Randall owns his own home and small business and has maintained insurance policies for both continuously since 1991 and 2013, respectively. Additionally, Randall has maintained auto insurance coverage since he began driving and anticipates continuing to purchase auto insurance coverage for himself and for his partner. HB 379 harms Randall because he will be charged higher insurance rates based solely on his sex and/or marital status and will be denied the process and remedies the MHRA provides.
2. Kiah Abbey is a resident of Missoula, Montana. She is in a long-term relationship, but she is not married. Abbey has maintained auto insurance coverage since she began driving and anticipates continuing to purchase auto insurance coverage. Abbey also maintains life insurance and renters' insurance coverage and has requested quotes for long-term disability coverage. HB 379 harms Abbey because she will be charged higher insurance rates based solely on her sex and/or marital status and will be denied the process and remedies the MHRA provides.
3. Diane Sands is a resident of Missoula, Montana. She is in a long-term same-sex relationship, but she is not married. Sands maintains auto insurance and anticipates continuing to purchase auto insurance coverage. She also maintains health and life insurance policies through her employer and anticipates seeking

new coverage when her employment-based coverage ends. HB 379 harms Sands because she will be charged higher insurance rates based solely on her sex and/or marital status and will be denied the process and remedies the MHRA provides.

B. Organizational Plaintiffs

4. The Montana Chapter of the National Organization for Women (“MTNOW”) is a nonprofit organization headquartered in Bozeman, Montana. MTNOW’s mission is to advocate for equal rights for women, advance economic equality, fight bigotry against the LGBTQIA+ community, and end violence against women. MTNOW is deeply invested in preventing sex discrimination and discrimination against individuals based on family structure.
5. MTNOW has more than 500 members located across the state of Montana. MTNOW’s members are Montanans who care about sex discrimination and discrimination based on family status. HB 379 harms MTNOW’s members by allowing them to be charged higher insurance rates based solely on their sex and/or marital status, and by denying them access to the process and remedies the MHRA provides. This harm strikes at the core of the values shared by MTNOW and its members.
6. American Association of University Women of Montana (“AAUW-MT”) is a nonprofit organization headquartered in Missoula, Montana. AAUW-MT works to remove the barriers and biases that stand in the way of gender equity by advocating for laws and policies that ensure equity and end discrimination.
7. AAUW-MT has roughly 300 members located across the state of Montana.

AAUW-MT's members are Montanans who care deeply about preventing and ending sex-based discrimination. HB 379 harms AAUW-MT's members by allowing them to be charged higher insurance rates based solely on their sex and/or marital status and denying them access to the process and remedies the MHRA provides. This harm directly implicates AAUW-MT's mission, which it shares with its members.

C. Defendants

8. The State of Montana is a duly admitted state of the United States.
9. Laurie Esau is the Commissioner of the Department of Labor and Industry (the "Department"). As the agency's chief executive officer, she is responsible for ensuring the Department's administration of the MHRA, including the provisions of HB 379, through the Department's Montana Human Rights Bureau (the "Bureau"). Commissioner Esau is named in her official capacity.
10. Troy Downing is the Commissioner of Securities and Insurance, Montana State Auditor. As the chief executive officer of the Montana Department of Insurance, he is responsible for administering the Montana Insurance Code, §§ 33-1-101 *et seq.*, MCA. Commissioner Downing is named in his official capacity.

JURISDICTION & VENUE

11. Plaintiffs bring this action under the Montana Constitution. Article VII, Section 4, of the Montana Constitution provides this Court with original jurisdiction, as does § 3-5-302, MCA.
12. This Court has jurisdiction to grant declaratory relief pursuant to § 27-8-201 *et*

seq., MCA, and injunctive relief pursuant to § 27-19-101 *et seq.*, MCA.

13. Venue is proper in Lewis & Clark County under § 25-2-126(1), MCA.

COMMON ALLEGATIONS

A. Constitutional & Statutory Framework

14. The Montana Constitution is a modern document intended to “stand on its own footing and . . . to provide individuals with fundamental rights and protections far broader than those available through the federal system” and drafted “to meet the changing circumstances of contemporary life.” *Dorwart v. Caraway*, 2002 MT 240, ¶ 94, 312 Mont. 1, 58 P.3d 128 (Nelson, J., concurring) (quoting Amicus Br. of Wade Dahood, former Chairman of the Bill of Rights Comm.; Mont. Const. Conv., II Verbatim Trans., *Bill of Rights Comm. Proposal*, at 619 (Feb. 22, 1972)).
15. Notions of dignity and equal protection are central to and prominent throughout the foundational document. The Montana Constitution’s prohibition against discrimination is broad:

“The dignity of the human being is inviolable. 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.”

Mont. Const., art. II, § 4.

16. “Article II, Section 4, of the Montana Constitution provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution.” *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390,

¶ 15, 325 Mont. 148, 104 P.3d 445. Even a law containing apparently neutral classifications may nonetheless “violate equal protection ‘if in reality it constitutes a devise designed to impose different burdens on different classes of persons.’” *Id.* ¶ 16 (quoting *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 327, 982 P.2d 421).

17. In adopting Section 4, the framers meant “to eradicate public and private discriminations based on race, color, sex, culture, social origin or condition, or political or religious ideas.” *Gazelka v. St. Peter’s Hosp.*, 2018 MT 152, ¶ 8, 392 Mont. 1, 420 P.3d 528 (cleaned up). In furtherance of that goal, the 1974 Montana Legislature enacted the Montana Human Rights Act (“MHRA”), §§ 49-1-101 *et seq.*, MCA.
18. Consistent with the plain language of the Montana Constitution’s strong equal protection guarantee, the MHRA recognizes the right to be free from sex discrimination as a civil right, § 49-1-102(1), MCA, and prohibits certain discriminatory practices in a variety of settings—including employment, public accommodations, housing, and insurance, § 49-2-101 *et seq.*, MCA. It also provides an extensive remedial scheme for violations. *Id.*
19. In 1983, Montana became the first state to expressly prohibit sex discrimination in insurance determinations, providing that it as “an unlawful discriminatory practice for a financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage . . . including discrimination in regard to rates or

premiums and payments or benefits.” Section 49-2-309, MCA.

20. In addition to prohibiting a form of private discrimination that Article II, Section 4 also bars, the 1983 law extended the remedial process and relief established in the MHRA specifically to individuals injured through discriminatory insurance determinations.
21. Under the MHRA’s remedial process, individuals bring complaints to the Department for the Montana Human Rights Bureau’s investigation. If the Bureau finds the complaint’s allegations are supported, it “attempt[s] to achieve a resolution of the complaint by conference, conciliation, and persuasion.” Section 49-2-504(1)(a), MCA. If resolution cannot be achieved, the Department holds an administrative hearing to determine what relief, if any, is appropriate. Sections 49-2-505(1) and 49-2-506(1), (2), MCA.
22. Montana courts employ a framework of tiered scrutiny to assess state actions that interfere with Montanans’ fundamental rights. *See, e.g., Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386 (“Under strict scrutiny, statutes will be found unconstitutional ‘unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.’”) (quoting *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 15, 314 Mont. 314, 65 P.3d 576). “The most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right or discriminates against a suspect class.” *Gulbrandson v. Carey*, 272 Mont. 494, 901 P.2d 573, 579 (1995).

23. The Montana Constitution also expressly prohibits the Legislature from passing “a special or local act when a general act is, or can be made, applicable.” Mont. Const. art. V, § 12.
24. “[A] law is special legislation if it confers particular privileges or disabilities upon a class of persons arbitrarily selected from a larger group of persons, all of whom stand in the same relation to the privileges or disabilities.” *Rohlf’s v. Klemenhagen, LLC*, 2009 MT 440, ¶ 12, 354 Mont. 133, 227 P.3d 42; *see also Lowery v. Garfield Cty.*, 122 Mont. 571, 587, 208 P.2d 478, 487 (1949). Even laws that act on a given class may be constitutional, but only “if the class established is germane to the purpose of the law and is characterized by some special qualities or attributes which reasonably render the legislation necessary.” *Rohlf’s*, ¶ 13.

B. House Bill 379

25. Nearly 40 years after prohibiting discrimination against Montanans on the basis of sex and marital status, the legislature elected to reintroduce discrimination and withdraw the MHRA’s protections, foreclosing access to its remedial process for sex- and marital status-based discriminatory rate-setting practices.
26. HB 379 sanctions the use of “ratemaking methodologies based on sex or marital status in establishing insurance premium rates.” The resulting carveout to the MHRA’s prohibition against sex and marital status discrimination in the issuance or operation of insurance plans is unconstitutional.
27. This new exception has applied to insurance contracts entered into or renewed

since January 1, 2022.

28. Legislators stated their intent to benefit one class of insurance consumers—and disadvantage others—based solely on the consumers’ sex or marital status. *See, e.g.,* Mont. Leg., Senate Bus., Labor, & Econ. Affairs Comm. on HB379, Hrg. Video at 9:13:37 (March 17, 2021) (“Not allowing the consideration of sex in rate making has been detrimental to insurance, especially women, who often pay higher insurance premiums.”) (Sen. Vinton).

29. Nearly across the board, testimony acknowledged that insurance rates for certain consumer classes, like teenage boys, would rise. For example, Bruce Spencer, a lobbyist for the National Association of Mutual Insurance Companies and a proponent witness for HB 379 in a hearing before the Senate Business, Labor, and Economic Affairs Committee, testified:

Just so you can see that I'm not self-serving here, I have two teenage boys. My car insurance rates, if the bill passes, are going to go up more than my client is paying me to stand up here today.

Mont. Leg., Senate Bus., Labor, & Econ. Affairs Comm. on HB379, Hrg. Video at 9:28:57 (March 17, 2021).

30. The legislature’s stated intent and understanding is, in itself, facially discriminatory, as is the resulting law. Even so, legislators were incorrect about how classes of insurance consumers would be affected. In fact, women are often subject to higher insurance rates when sex discrimination is allowed. Povich, Elaine S., *What? Women Pay More Than Men for Auto Insurance? (Yup.)*,

Stateline Article, PewTrusts.org. (Feb. 1, 2019);¹ Philips, Bob, *Why Is There a Gender Gap in Insurance Rates?*, Breeze (Dec. 20, 2021).²

31. But that is neither the end of nor the only story. Since HB 379’s passage, preliminary assessments of how premium rates are set when based solely on sex—in Montana measuring only variations in auto insurance—showed a range among insurers from a 22 percent increase charged to men to a 17 percent increase charged to women, indicating “the application of gender as a rating factor was inconsistent and contradictory.” *Auto Insurers Often Charge Women More Since State Repealed Ban on Sex-Based Pricing Despite Commissioner’s Promise*, Consumer Federation of America (March 26, 2022).³ Given the apparent grab bag of conclusions to be gleaned, no justification for sex-based discrimination exists, making these rate-setting policies arbitrary, at best.
32. Opponent legislators pointed out concerns with the bill’s constitutionality, noting the breadth of protection under Article II and the nature of sex as an immutable characteristic. Mont. Leg., Senate Floor Session on HB379 Video at 13:48:57 (March 23, 2021) (Sen. Sands); *id.* at 13:54:15 (Sen. Morigeau).
33. HB 379 not only expressly allows private entities to discriminate, it also prevents individuals who are discriminated against from using the MHRA to

¹ Available at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/02/11/what-women-pay-more-than-men-for-auto-insurance>.

² Available at <https://www.meetbreeze.com/blog/insurance-rate-gender-gap/>.

³ Available at https://consumerfed.org/press_release/montana-auto-insurers-often-charge-women-more-since-state-repealed-ban-on-sex-based-pricing-despite-commissioners-promise/.

pursue relief. It exempts insurance companies from participating in Bureau proceedings pursuant to the process set forth in the MHRA.

34. HB 379 treats insurance companies differently than employers, landlords, lenders, banks, educational institutions, retirement plan providers, and other financial institutions, permitting only insurance companies to discriminate against consumers on the basis of sex and marital status.

CLAIMS FOR RELIEF

Count One

(Violation of the Right to Equal Protection Under Law, Mont. Const., art. II § 4)

35. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.
36. The Montana Constitution provides: “The dignity of the human being is inviolable. 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.” Mont. Const., art. II, § 4.
37. “Article II, Section 4, of the Montana Constitution provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution.” *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445. Even laws containing apparently neutral classifications may nonetheless “violate equal protection ‘if in reality it constitutes a devise designed to impose different burdens on

different classes of persons.” *Id.* ¶ 16 (quoting *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 327, 982 P.2d 421).

38. HB 379 violates Article II, Section 4 in four ways.
39. First, HB 379 authorizes insurance companies to discriminate against Montanans on the basis of sex. Because sex is an express protected class recognized in Article II, HB 379 interferes with a suspect class and must be subject to strict scrutiny, *see, e.g., McDermott v. Mont. Dep’t of Corrs.*, 2001 MT 134, ¶ 31 (“Strict scrutiny applies when a classification affects a suspect class.”). The bill cannot survive even rational basis scrutiny, however, because the discrimination serves only to enrich insurance companies and arbitrarily harm individual consumers on the basis of sex.
40. Second, HB 379 excludes insurance consumers discriminated against on the basis of sex from the process set forth under the MHRA. *Cf. Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 19 (concluding that to deny certain benefits based on age was not rationally related to a legitimate governmental interest). Thus, HB 379 arbitrarily discriminates against consumers of insurance compared to similarly situated consumers in different industry settings.
41. Third, HB 379 authorizes insurance companies to discriminate against Montanans on the basis of marital status. Like sex, marital status is an improper classification for insurance determinations because it bears no relationship to ratemaking decisions. *See Snetsinger*, ¶ 27 (“The principal purpose of the Equal Protection Clause, Article II, Section 4, of the Montana

Constitution, is to ensure citizens are not subject to arbitrary and discriminatory state action.”). There is no justification for distinguishing between married and unmarried individuals, nor any justification for discriminating against individuals based on the sex of their partners. Because marital status discrimination is often intertwined with sex, strict scrutiny should apply, but even if it does not, HB 379 cannot survive even rational basis review.

42. Fourth and finally, HB 379 excludes insurance consumers discriminated against on the basis of marital status from the process set forth under the MHRA, and thereby discriminates against insurance consumers compared to similarly situated consumers in different industry settings. *See Snetsinger*, ¶ 27 (“[W]e conclude there is no justification for treating the two groups differently, nor is the University System's policy rationally related to a legitimate governmental interest.”); *cf. Reesor*, ¶ 19. HB 379 fails strict scrutiny and rational basis review because marital status is not rationally related to insurance risk.
43. HB 379 authorizes private discrimination by insurance companies. It also openly sets apart a class of consumers and prevents them from accessing remedies available to similarly situated classes.
44. Legislators acknowledged that the law was likely to have a differential impact on men and women. They did not discuss any reasons for permitting discrimination on the basis of marital status. To the extent HB 379 was a misguided attempt to remediate past discrimination against women, it is unjustified and unsupported by the data. At best, HB 379 has an arbitrary but

sex-based impact on individuals. At worst, it will cause persistent discrimination against specific classes of consumers while depriving them of the administrative process to challenge that discrimination.

Count Two

(Violation of the Prohibition on Special Legislation, Mont. Const. art. V, § 12)


45. Plaintiff incorporates herein all the foregoing allegations as if set forth in full.
46. Article V bars the Montana Legislature from passing “a special or local act when a general act is, or can be made, applicable.” Mont. Const. art. V, § 12.
47. “[A] law is special legislation if it confers particular privileges or disabilities upon a class of persons arbitrarily selected from a larger group of persons, all of whom stand in the same relation to the privileges or disabilities.” *Rohlf’s*, ¶ 12; *see also Lowery*, 122 Mont. 571, 587, 208 P.2d 478, 487. Even laws that act on a given class may be constitutional, but only “if the class established is germane to the purpose of the law and is characterized by some special qualities or attributes which reasonably render the legislation necessary.” *Rohlf’s*, ¶ 13.
48. HB 379 provides a special benefit for insurance companies that other private businesses and individuals do not enjoy. As a result, insurance companies do not face the same regulatory regime as similarly situated entities. Moreover, insurance consumers are distinguished from and disadvantaged in relation to other consumers.
49. HB 379 is special legislation that singles out insurance companies for special treatment, to the detriment of a single class of consumers.

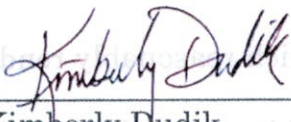
PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. A declaratory judgment that HB 379 is unconstitutional.
2. An order enjoining Defendants from enforcing any aspects of HB 379.
3. An order granting any other appropriate relief that may be necessary to enjoin implementation of HB 379.
4. An award of attorneys' fees and costs incurred in bringing this action pursuant to the Declaratory Judgment Act and the Private Attorney General Doctrine.
5. Any further relief this Court deems just and proper.

Respectfully submitted this 2nd day of November, 2022.


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