Akilah Lane (Bar No. 60742990)
Alex Rate (Bar No. 11226)
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806
406-203-3375
ratea@aclumontana.org
lanea@aclumontana.org

John Knight, Admitted *pro hac vice*
ACLU Foundation
LGBTQ & HIV Project
150 North Michigan Avenue, Suite 600
Chicago, IL 60601
Telephone: 312-201-9740
Facsimile: 312-288-5225
jaknight@aclu.org

F. Thomas Hecht, *pro hac vice* forthcoming
Tina B. Solis, *pro hac vice* forthcoming
Seth A. Horvath, *pro hac vice* forthcoming
Nixon Peabody LLP
70 West Madison Street, Suite 3500
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

Elizabeth Halverson PC
1302 24th Street West #393
Billings, MT 59102
406-698-9929
ehalverson@halversonlaw.net

IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual; **Plaintiffs,** **v.** **STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and ADAM MEIER, in his official capacity as the Director of the Montana Department of Public Health and Human Services,** **Defendants.**	**Case No. DV 21-00873** **Hon. Michael G. Moses** **PLAINTIFFS' BRIEF IN OPPOSITION OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) M.R.Civ. P**

COME NOW Plaintiffs Amelia Marquez and John Doe (collectively, "Plaintiffs"), by and through counsel, and hereby file and serve their brief in opposition to Defendants the State of Montana, Gregory Gianforte, the Montana Department of Public Health and Human Services, and Adam Meier's (collectively, "Defendants") motion to dismiss ("Motion to Dismiss"). Defendants have filed a combined brief in opposition to Plaintiffs' motion for a preliminary injunction and in support of the Motion to Dismiss. Plaintiffs have filed a Reply in support of their motion for a preliminary injunction ("Reply Brief"). Contemporaneously, Plaintiffs also file this response to the Motion to Dismiss.

INTRODUCTION

Plaintiffs have filed a complaint challenging the constitutionality of Montana's SB 280 law (the "Act"), which places undue burdens on transgender people seeking to conform the sex designation on their birth certificates with their gender identity. The requirements of the Act are costly, invasive, and completely unjustified by any state interest. The Act is part of a slew of bills from the 2021 Montana State Legislature aimed at systematically attacking transgender Montanans, mirroring anti-transgender legislation pursued in other states as part of a national effort to marginalize individuals who already experience daily discrimination and high rates of violence.

Defendants have filed a Rule 12(b)(6) motion to dismiss on the grounds that Plaintiffs failed to plead sufficient facts and allegations to entitle them to relief and failed to exhaust administrative remedies prior to initiating this action in this Court. Defendants' motion has no merit.

As set forth in the Reply Brief, Plaintiffs have pleaded legally sufficient claims and supporting facts. Contrary to Defendants' contentions, Plaintiffs have alleged in detail the harms they face by being deprived of birth certificates that correctly identify their sex. Additionally, exhaustion of administrative remedies is neither necessary nor warranted in the context of Plaintiffs' constitutional challenges to the Act, which are not subject to administrative exhaustion. Based on these considerations, Defendants' Motion to Dismiss should be denied.

STANDARD OF REVIEW

Montana is a notice-pleading state. Rule 8 M. R. Civ. P. requires only that a complaint set forth a "short, plain statement of the claim." Defendants acknowledge that, "[w]hen considering a motion to dismiss under M. R. Civ. P. 12(b)(6), all well-pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable

to plaintiff." (*See* Def. Br. 4–5 (citing *Sinclair v. BN & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 2000 P. 3d 36) (citation omitted).)

Motions to dismiss under Rule 12(b)(6) are disfavored. *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250 ("A motion to dismiss is viewed with disfavor and rarely granted."). A court should not dismiss a complaint unless it appears beyond doubt that a plaintiff can prove no set of facts that would entitle them to relief. *Poeppel v. Flathead City*, 1999 MT 130, ¶ 17, 294 Mont. 487, 982 P.2d 1007; *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 161, 920 P.2d 108, 110 (1996). Plaintiffs have met their burden by pleading sufficient allegations and facts in their complaint that, when taken as true and construed in the light most favorable to Plaintiffs, must withstand a motion to dismiss under M. R. Civ. P. 12.

ARGUMENT

I. Plaintiffs' claims have been properly pleaded.

Pursuant to Rule 12(b)(6), the allegations in Plaintiffs' Complaint, which provide individual histories for Plaintiffs, summarize gender dysphoria and its treatment, explain the discrimination that transgender people repeatedly encounter, and explain the Act's effects on Plaintiffs, including their injuries, must all be taken as true, and any inferences from those allegations must be drawn in Plaintiffs' favor. (*See* Compl., ¶¶ 13–14, 19–43, 44–56, 64, 72.) Similarly, the allegations of intentional discrimination resulting from the Act must be taken as true. (*See id.*, ¶¶ 1, 6–8, 33, 34, 39, 60, 61.)

The taken-as-true allegations of the Complaint properly support each of Plaintiffs' causes of action. Among other things, those allegations include a detailed explanation of the importance to transgender people of birth certificates containing accurate sex designations and the manner in which the Act intentionally limits transgender people's ability to change the sex designation on their birth certificates. Specifically:

- A person's sex designation is determined by their gender identity, not their sex assigned at birth or their anatomy. Gender-affirming surgery, even for those transgender people who have a medical need for it, does not "change" their sex, but rather affirms it. (Compl., ¶ 29.)
- A birth certificate is an essential government-issued document that individuals use for various important purposes throughout their lifetime. Birth certificates are used in a wide variety of contexts, such as determining

eligibility for employment, providing identification for travel, proving age, and enrolling in government programs. (*Id.*, ¶ 40.)

- A mismatch between someone's gender identity and the sex designation on their birth certificate discloses that person's transgender identity, a profoundly private piece of information in which a transgender person has a reasonable expectation of privacy. Transgender people who are denied accurate birth certificates are deprived of significant control over where, when, how, and to whom they disclose their transgender identity. (*Id.*, ¶ 42.)
- A mismatch between someone's gender identity and the information on their birth certificate subjects transgender people to discrimination and harassment in a variety of settings, including employment, healthcare, and interactions with government employees and officials. (*Id.*, ¶ 43.)
- Being forced to hold and present documents that do not match a person's gender can result in such discrimination, and even in violence, when transgender people are called upon to present identification that identifies a sex designation inconsistent with how a transgender person publicly presents himself or herself. (*Id.*, ¶ 27.)
- Defendants, through the Act, refuse to acknowledge a transgender person's gender by providing them a birth certificate matching their gender identity, unless they undergo a significant surgical procedure and disclose private information in a public court proceeding. (*Id.*, ¶ 41.)
- The Act's sole purpose is to intentionally burden a transgender person's ability to correct their birth-certificate sex designation to conform with their gender. (*Id.*, ¶ 34.)
- The legislature failed to offer any legitimate public purpose for the Act, and none exists. The Act was passed to express antipathy toward and to harm transgender people. (*Id.*, ¶ 39.)

The Complaint also describes the injuries caused to Plaintiffs by the Act, stating, in relevant part that:

- Ms. Marquez would like to change the sex designation on her birth certificate to match her female gender identity but is unable to do so because

of the Act. Her inability to obtain a birth certificate that accurately reflects her female gender identity is a painful and stigmatizing reminder of the State of Montana's refusal to recognize her as a woman. (*Id.*, ¶ 47.)

- Further, denying Ms. Marquez an accurate birth certificate places her at risk of violence, harassment, and discrimination every time she presents an identity document that incorrectly identifies her as male. (*Id.*, ¶ 48.)
- Mr. Doe would like to correct the sex designation on his birth certificate to accurately reflect his male gender identity but does not wish to be forced to publicly share in court private information and records regarding his transgender status, medical treatment, and anatomy. (*Id.*, ¶ 52.)
- Mr. Doe does not wish to undergo additional gender-affirming surgery at this time. Due to the vagueness of the Act's surgery requirement, Mr. Doe does not know whether his top surgery would be sufficient to satisfy the Act. Furthermore, even if Mr. Doe's top surgery were deemed sufficient for purposes of obtaining a court order, the idea of having to share private medical records related to his transition with a judge, in a public court proceeding, to determine whether he is the man he knows himself to be is demeaning to Mr. Doe and causes him a great deal of emotional distress due to his fear of exposure and humiliation at having his transgender status revealed. (*Id.*, ¶ 54.)
- In addition to his fear of having to expose his personal medical information and out himself as transgender in a public forum, the Act would require Mr. Doe to undertake the financial costs and other burdens of coming to Montana to seek a court order, since Mr. Doe currently resides outside of Montana. Among other things, Mr. Doe would need to pay for transportation to Montana, request time off of work (and risk losing his job because of the nature of his work), and retain an attorney to represent him in a court hearing to complete the process. (*Id.*, ¶ 56.)

Additionally, the Complaint comprehensively sets forth the legal theories underlying each of Plaintiffs' claims:

***Count I*:** Count I pleads a claim for violation of the equal-protection clause of the Montana Constitution, including each of the factual predicates for this claim and the basis for the heightened-scrutiny standard of review. (*See* Compl., ¶¶ 6–8 33, 34, 39, 59–65, 72, 78.) *See also Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶¶ 15–29, 325 Mont. 148, 104 P.3d 445; *McDermott v. Mont. Dep't of Corr.*, 2001 MT 134, ¶¶ 29–44, 305 Mont. 462, 29 P.2d 992. It does so by alleging that the Act targets Plaintiffs solely because they are transgender.

As alleged in the Complaint, the Act burdens Plaintiffs' ability to change the sex designation on their birth certificate by requiring them to (1) initiate a court proceeding to obtain an order confirming that they have had gender-affirming surgery, (2) present the confidential and intimate details of that surgery to a court, (3) obtain a court order, and (4) submit an application to DPHHS for an amended a birth certificate to reflect their gender accurately. Similarly-situated cisgender people who seek to amend portions of their birth certificates, by contrast, are not subjected to the same invasive requirements. (*Id.*, ¶¶ 61, 62.)

***Counts II & III*:** Counts II and III plead violations of Plaintiffs' fundamental rights to informational privacy and to be free from state interference with medical decisions. Both claims are based on the provisions of Article II, Section 10, of the Montana Constitution and allegations of subjective and actual expectations of privacy. (*See* Compl., ¶¶ 4, 36, 41, 50, 52, 54, 56, 68–73, 76–79.) *See also Armstrong v. State*, 1999 MT 261, ¶¶ 29–34, 296 Mont. 361, 989 P.2d 364; *State v. Nelson*, 283 Mont. 231, 241–42, 941 P.2d 441, 448 (1997).

Count II pleads an informational-privacy claim due to the Act's requirement that Plaintiffs disclose private medical information, as well as their transgender status, both of which they have a subjective and actual expectation of privacy in, in a public court proceeding in order to correct the sex designation on their birth certificates. (*Id.*, ¶ 41.). As further alleged in the Complaint, if Plaintiffs are unable to obtain an accurate birth certificate due to the unconstitutionally burdensome requirements of the Act, then Plaintiffs are forced to disclose their transgender status each time they produce a birth certificate reflecting a sex designation that fails to accord with their gender identity. (*Id.*, ¶ 42.)

Count III alleges that the Act requires Plaintiffs to undergo surgery they may not want, need, or be able to complete in order to receive a birth certificate that accurately reflects their gender in violation of their right to be free from state interference with their medical decision-making. (*Id.*, ¶¶ 13, 14, 25, 78.)

Count IV: Count IV pleads violations of substantive due process as guaranteed by Article II, Section 17, of the Montana Constitution and describes the oppressive, vague, and poorly defined requirements of the Act. (*See* Compl., ¶¶ 3, 6, 7, 30, 78, 83–87.) *See also Yurczyk v. Yellowstone County*, 2004 MT 3, ¶¶ 32–34, 319 Mont. 436, 83 P.2d 266. It does so by asserting that a person's sex designation is determined by their gender identity and not their sex assigned at birth or their anatomy, and that gender-affirming surgery does not change a person's sex, but rather affirms it. (*Id.*, ¶¶ 29, 30.) As a result, it is impossible for Plaintiffs to know what surgery the Act requires in order to correct the sex designation on their birth certificates. (*Id.*, ¶¶ 54, 55, 86.)

Each of the counts also pleads the absence of any reasonable justification for the Act and the availability of less restrictive alternatives. (*See* Compl., ¶¶ 30, 39, 61, 65, 73, 79, 87, 89.)

Based on the foregoing, Plaintiffs' complaint adequately pleads violations of their rights to equal protection, informational privacy, medical decision-making, and due process in accordance with the requirements of Rule 12(b)(6). Defendants' Motion to Dismiss should be denied.

II. Administrative exhaustion is not a basis for dismissal.

Defendants have taken paradoxical positions regarding administrative exhaustion. Defendants argue in the brief in support of their Motion to Dismiss that Plaintiffs must exhaust their claims in front of the Montana Human Rights Bureau ("HRB") before pursuing those claims before this Court (*see* Def. Br. 2–3), while simultaneously arguing in their reply brief to the HRB that the HRB lacks jurisdiction over Plaintiffs' claims (*see* Exhibit 1). Defendants cannot have it both ways.

Defendants' argument that Plaintiffs' case must be dismissed for failure to exhaust administrative remedies has no merit. *See* § 49–2–512, MCA. *First*, the Montana Human Rights Act ("MHRA") and its exhaustion provisions are directed to claims of discrimination. *See* § 49-1-102 MCA. The claims of Count II (violation of privacy rights), Count III (violation of the right to make autonomous medical decisions), and Count IV (violation of substantive due process) are not based on acts of discrimination within the jurisdiction of the HRB. The HRB has no jurisdiction over claims outside of the equal-protection context, and therefore exhaustion is not required. *Second*, the Montana Supreme Court has held that the MHRA's exhaustion requirement does not apply to constitutional claims. *Shoemaker v. Denke*, 2004 MT 11, ¶ 20, 319 Mont. 238, 84 P.3d 4. The issues in this case, as Defendants themselves acknowledge (Def. Br. 3, n. 2), are exclusively constitutional. Indeed, the entire case is centered on the constitutionality of the Act. *Third*, purely

legal claims are not subject to exhaustion. Under the separation-of-powers principles set forth in Article III of the Montana Constitution, interpretations of law—such as those at the center of this dispute—must be decided by courts, not administrative agencies. *Keller v. Dep't of Revenue,* 182 Mont. 478, 483–85, 597 P.2d 736, 739–40 (1979). *Fourth*, the MHRA itself provides that a charging party in administrative proceedings may seek a preliminary injunction in the district court, as Plaintiffs have done here. § 49–2–503, MCA. Plaintiffs' motion for a preliminary injunction, now pending before this Court, is expressly authorized by statute and beyond the reach of administrative exhaustion.

A. The MHRA's exhaustion provisions do not apply to Counts II, III, and IV.

The MHRA and its administrative procedures are directed only to claims of discrimination. *See* § 49–1–102, MCA. Plaintiffs' claims for violations of Montana's equal-protection guarantee (Count I) are claims of discrimination and are thus potentially subject to the MHRA. But the same is not true for their remaining claims.

As set forth in Plaintiffs' preliminary-injunction brief, (1) Count II of the Complaint alleges that the Act violates Plaintiffs' right to privacy under Article II, Sections 10 and 17, of the Montana Constitution; (2) Count III alleges that the Act interferes with Plaintiffs' right to make autonomous medical decisions under Article II, Sections 10 and 17, of the Montana Constitution; and (3) Count IV alleges that the Act denies Plaintiffs substantive due process of law under Article II, Section 17, of the Montana Constitution. Each of these counts plead significant injuries for which a preliminary injunction is appropriate, but none of them are based on acts of discrimination to which the MHRA is directed. Only Count I, which alleges violations of equal protection, potentially falls within the MHRA's reach.

For this reason, Defendants' argument that Counts II, III, and IV are barred by the doctrine of administrative exhaustion has no merit. These counts must be allowed to stand.

B. Constitutional claims are not subject to administrative exhaustion.

Article III, Section 1, of the Montana Constitution addresses the separation of powers between and among the judiciary, the legislature, and the executive branch. Importantly, the Constitution states that "*[n]o person or persons charged with exercising the power properly belonging to one branch shall exercise any power properly to either of the others....*" *See* Montana Const., art. III, § 1 (emphasis added). Thus, as a general matter, if an act of the legislature violates

the Constitution, the courts, not an administrative agency, "have the power, and it is their duty, so to declare." *In re Clark's Estate,* 105 Mont. 401, 411, 74 P.2d 401, 406 (1937).

Consistent with the principles of Article III and *Clark's Estate,* the Montana Supreme Court has expressly held that "[t]he exhaustion doctrine does not apply to constitutional issues...." *Jarussi v. Bd. of Trs.*, 204 Mont. 131, 135–36, 664 P.2d 316, 318 (1983) (citations omitted). Rather, "[c]onstitutional questions are properly decided by a judicial body, not an administrative official, under the principle of separation of powers." *Id.*

In *Jarussi*, the Court held that claims arising from purported violations of the constitutional right to observe school-board deliberations under the "right to know" provisions of the Montana Constitution were not subject to the exhaustion requirement. *Id.* The Court reached the same conclusion in *Mitchell v. Town of West Yellowstone,* 235 Mont. 104, 109–10, 765 P.2d 745, 748, (1988) (equal-protection claim not subject to exhaustion), and *Stuart v. Department of Social & Rehabilitation Services,* 247 Mont. 433, 438–39, 807 P.2d 710, 712–13 (1991) (constitutional claims were not subject to administrative exhaustion).

The claims pending before this Court are clearly constitutional in nature, as alleged in the Complaint and as set forth in Plaintiffs' preliminary-injunction brief. Each claim alleges that the Act is unconstitutional on its face and as applied. The claims are therefore not subject to resolution by an administrative agency, but rather require adjudication by a court.

Defendants themselves concede that Plaintiffs' claims are constitutional in nature. (Def. Br. 3, n 2 ("In the HRB complaints and this Complaint, Marquez and Doe . . . assert that SB 280 violates the same constitutional provisions, namely, Mont. Const. Art II §§ 4, 10 and 17.").) Resolving these constitutional claims for equal protection (Count I), privacy (Counts II and III), and due process (Count IV) requires adjudication by a court.

The cases on which Defendants rely do not support their exhaustion argument:

- *Borges v. Missoula County Sheriff's Office,* 2018 MT 14, 390 Mont. 161, 415 P.3d 976, was an employment-discrimination case that raised no constitutional issues. *Borges*, ¶ 1.

- In *Edwards v. Cascade County Sheriff's Department*, 2009 MT 451, 354 Mont. 307, 223 P.3d 893, no constitutional claims independent of the plaintiffs' claims of discrimination were at issue. *Edwards*, ¶¶ 56–57. The constitutional claims asserted were subject to exhaustion because they were deemed to be components of the plaintiff's political-discrimination claim. *Id.*

- *Jones v. Montana University System*, 2007 MT 82, 337 Mont. 1, 155 P.3d 1247, involved the failure to invite two gubernatorial candidates to campaign debates and a resulting claim of "political discrimination." *Jones*, ¶ 37. Despite a "careful scouring" of the plaintiffs' complaint, the Court could not identify any substantive constitutional challenge under the U.S. Constitution and did not identify any under the Montana Constitution, either. *See id.*, ¶¶ 33, 39. Although the Court concluded that the claims of "political discrimination" were subject to exhaustion, it acknowledged that "[a] party normally need not exhaust available administrative remedies before seeking to vindicate [constitutional] claims." *Id.*, ¶ 39 (citations omitted).

Defendants appear to recognize that constitutional claims cannot be resolved administratively. Their brief states that "[t]he State is still reviewing the propriety of filing what amounts to be a claim challenging the constitutionality of a statute before the HRB." (Def. Br. 3.) If, however, the Court finds that exhaustion is required for Plaintiffs' equal-protection claim (and for the foregoing reasons, it should not), Plaintiffs respectfully request that the Court permit Plaintiffs to amend their complaint once exhaustion has been completed.

C. Purely legal claims are not subject to administrative exhaustion.

Montana courts also recognize an exception to administrative exhaustion when purely legal issues are at the center of a dispute. *See Shoemaker*, ¶ 20 (First Amendment claim would not have been subject to administrative exhaustion if it had been a purely legal claim, but the petitioner also "presented a contested issue of fact"). The HRB's task is to resolve factual disputes over discrimination claims. Courts must resolve matters of law and other matters more generally. Requiring administrative exhaustion for purely legal claims runs afoul of the separation-of-powers clause in Article III of the Montana Constitution.

For example, in *Keller,* 182 Mont. at 483–85, 597 P.2d at 739–40, the Montana Supreme Court held that challenging a decision of the State Tax Appeal Board required interpreting the law and therefore had to be done before the judiciary, not before an administrative agency. The same was true in *Taylor v. Department of Fish, Wildlife, & Parks*, 205 Mont. 85, 93–94, 666 P.2d 1228, 1232 (1983) (employment-discrimination dispute involving only interpretations of law was not subject to exhaustion), and *Larson v. State*, 166 Mont. 449, 456–57, 534 P.2d 854, 858 (1975) (challenge to State of Montana's local tax-appraisal system was a purely legal challenge, not a question of fact requiring administrative exhaustion).

As set forth in Plaintiffs' preliminary-injunction brief, and as confirmed by the arguments in Defendants' brief, the questions for this Court to resolve in connection with both the motion for a preliminary injunction and the Motion to Dismiss are legal, not factual. For example, the facts giving rise to Plaintiffs' standing are not contested. The only question is whether those facts are legally sufficient, as pleaded, to sustain Plaintiffs' claims. Similarly, the question of irreparable injury involves no disputed facts but only whether the possibility of constitutional deprivations is legally sufficient to state a prima facie case (which it clearly is). *See Driscoll v. Stapleton,* 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.2d 386. In the same vein, the equal-protection issues before this Court—namely, whether the Act is subject to heightened scrutiny and whether transgender and cisgender people seeking to amend their birth certificates are similarly situated for equal-protection purposes—do not require adjudicating facts, but rather interpreting the language of the Act and the relevant case law.

Whether one applies the motion-to-dismiss standard of Rule 12(b)(6), under which the allegations of the Complaint must be taken as true, *see Poeppel*, 1999 MT 130, ¶ 2, or the standard for entering a preliminary injunction, under which Plaintiffs need only establish a prima facie case in support of their position, *see Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, there is no fact-finding role for the HRB. Administrative exhaustion is not required.

D. The MHRA expressly authorizes Plaintiffs to seek preliminary injunctive relief without exhausting administrative remedies.

Finally, the MHRA itself expressly authorizes Plaintiffs to proceed with their motion for a preliminary injunction, notwithstanding the MHRA's exhaustion provisions. The statute states that, any time after initiating proceedings with the HRB, the charging party—here, Plaintiffs—may pursue a preliminary injunction *in the district court* "pursuant to the rules governing preliminary injunctions in civil actions." *See* § 49–2–503, MCA. This is precisely what Plaintiffs have done here.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Reply Brief, Defendants' Motion to Dismiss should be denied.

Dated: September 23, 2021

Respectfully submitted,

By: _____
Alex Rate

Akilah Lane
Alex Rate
ACLU of Montana
P.O. Box 9138
Missoula, MT 59807
406-203-3375
ratea@aclumontana.org
lanea@aclumontana.org

John Knight, pro hac vice forthcoming
ACLU Foundation
LGBTQ & HIV Project
150 North Michigan Avenue, Suite 600
Chicago, IL 60601
Telephone: 312-201-9740
Facsimile: 312-288-5225
jknight@aclu-il.org

F. Thomas Hecht, pro hac vice forthcoming
Tina B. Solis, pro hac vice forthcoming
Seth A. Horvath, pro hac vice forthcoming
Nixon Peabody LLP
70 West Madison Street, Suite 3500
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

Elizabeth Halverson PC
1302 24th Street West #393
Billings, MT 59102
406-698-9929
ehalverson@halversonlaw.net

CERTIFICATE OF SERVICE

I, Alex Rate, hereby certify on this date I emailed a true and accurate copy of the foregoing documents to:

David M.S. Dewhirst
Solicitor General
Office of the Attorney General, State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Kathleen L. Smithgall
Assistant Solicitor General
Office of the Attorney General, State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Patrick M. Risken
Assistant Attorney General
Office of the Attorney General, State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Jeremiah Langston
Assistant Attorney General
Office of the Attorney General, State of Montana
P.O. Box 201401
Helena, MT 59620-1401

DATED: September 23, 2021

Alex Rate

EXHIBIT 1

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov

Attorneys for Respondent

BEFORE THE MONTANA DEPARTMENT OF LABOR & INDUSTRY
HUMAN RIGHTS BUREAU

CHARGING PARTY: John Doe RESPONDENT: State of Montana c/o The Montana Attorney General	Charge No. 0210529 **RESPONSE TO CHARGING PARTY'S COMPLAINT OF DISCRIMINATION**

This response is filed by the State of Montana and is addressed to the complaint filed July 27, 2021, by the charging party, John Doe.

INTRODUCTION

John Doe has filed a Complaint with the Human Rights Bureau (the "HRB") against the State of Montana for alleged discrimination. The basis of Doe's claim is that the Birth Certificate Act ("SB 280") discriminates against Doe because of Doe's sex and transgender identity. Complaint ¶ 13. Because of this, Doe argues, SB 280 violates rights protected under the Montana Human Rights Act, the Montana Governmental Code of Fair Practices, the Constitution of the State of Montana, and the United States Constitution. Complaint ¶ 14.

Doe's claim fails for several reasons.

First, Doe has failed to identify a discriminatory actor or a discriminatory act in Doe's complaint. Doe challenges a law itself, not some adverse employment action or insurance coverage plan. And the State—the Respondent—did not "sign[] the Birth Certificate Act into law" as claimed by Doe. Complaint ¶ 13. The Governor did. The passage and enactment of a law cannot be a discriminatory act simply because one disagrees with the substance of the text contained therein.

Second, such a dispute *might* be suitable for judicial resolution, but it lies outside the competency of the HRB to opine on the constitutionality of state statutes.

Third, Doe has failed to state a valid claim under the Montana Human Rights Act or the Montana Governmental Code of Fair Practices. Not only has Doe failed to allege any discriminatory act, Doe has failed to show how SB 280 is facially discriminatory.[1] To the extent Doe challenges the substance of SB 280—which the HRB lacks jurisdiction to address—Doe has failed to demonstrate that SB 280 is in fact discriminatory.

For these reasons, the HRB must dismiss Doe's complaint.

I. Doe's Claims Must be Dismissed

The HRB lacks jurisdiction and must dismiss this complaint. HRB Admin. R. 24.8.22; 24.8.403. Its jurisdiction is limited to "administering complaints of

[1] Admittedly, Doe does not have to show how SB 280 is facially discriminatory because a facial challenge to a statute belongs before a court, not the HRB. But given that there is no other way to read Doe's complaint, the State will respond to the facial challenge implicit in Doe's complaint.

discrimination filed pursuant to the Montana Human Rights Act (act) and the Governmental Code of Fair Practices (code)." HRB Admin. R. 24.8.101. Any complaints that do not allege discrimination under these two statutes must be dismissed. HRB Admin. R. 24.8.101.

Doe's sole complaint is that SB 280 violates Doe's rights under the Montana Human Rights Act, the Montana Governmental Code of Fair Practices, the Constitution of the State of Montana, and the United States Constitution. That is, the *signing of the law itself* violates Doe's rights. Complaint ¶ 13. But signing a law is not an act of discrimination. It is only when that law is applied in a discriminatory manner that there is an act of discrimination.[2] And Doe has failed to allege that the law has been applied in a discriminatory manner—in fact, neither before nor after enactment of SB 280 has Doe has even attempted to change the sex on Doe's birth certificate. Doe's failure to identify either an act of discrimination or a discriminatory actor is fatal to the claim of discrimination. Because Doe has failed to state a claim for discrimination under the Montana Human Rights Act or the Montana Governmental Code of Fair Practices, the HRB must dismiss the complaint.

Doe has stated no discriminatory act sufficient to sustain this complaint.

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[2] It is also important to note that Doe has filed this complaint against the "State of Montana C/O The Montana Attorney General." Neither the "State" nor the "Montana Attorney General" signed SB 280 into law.

II. The HRB Lacks Jurisdiction to Determine the Constitutionality of Duly Enacted Laws

Doe's complaint must be understood to challenge the substance of SB 280 (as opposed to its application), which is a challenge the HRB cannot adjudicate. The HRB is not the proper forum to resolve this facial challenge to SB 280. Specifically, Doe's assertion that SB 280 violates the Montana and U.S. Constitutions cannot be resolved by this body. "Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers." *Jarussi v. Bd. of Trustees*, 204 Mont. 131, 135 (1983) (citing Mont. Const. art. III, § 1); *see also Stuart v. Dep't of Social & Rehab. Servs.*, 247 Mont. 433, 348 (1991). The HRB's own Administrative Rules support this. The HRB is only tasked with reviewing complaints under the Montana Human Rights Act and the Governmental Code of Fair Practices, not state and federal constitutions. HRB Admin. R. 24.8.101. Because Doe's complaint is a challenge to the constitutionality of SB 280, the HRB lacks jurisdiction and must dismiss the complaint.

III. Doe Fails to State a Claim Under the Montana Human Rights Act

Even if Doe asserted a specific discriminatory act that the HRB could investigate and resolve—which Doe has not—the claims made under the Montana Human Rights Act must fail. Doe claims SB 280 violates Montana Code §§ 49-1-102, -302, -304, -308, -309. As an initial matter, §§ 49-1-302, -304, -308, -309 do not appear in the Montana Code Annotated. Because these provisions do not exist, no challenge can be made under these provisions, nor can the State respond to any arguments made with respect to these provisions.

Doe's remaining claim under the Montana Human Rights Act fails because the cited provision does not apply. Section 49-1-102 prohibits discrimination "because of race, creed, religion, color, sex, physical or mental disability, age, or national origin." Doe does not make any assertion that transgender identity is covered by the "sex" provision of § 49-1-102. Even if Doe had attempted to change Doe's birth certificate (which Doe has not), and even if Doe's request was denied (which it has not been), this would not violate § 49-1-102 because "transgender identity" is not a protected class under that provision. Even if it were a protected class, the application of SB 280 to transgender individuals is not discriminatory.

Doe's claim the SB 280 discriminates on the basis of Doe's sex likewise fails—there has been no discriminatory act. SB 280 treats both sexes exactly the same. Both males and females who wish to change the sex designation on their birth certificates must follow precisely the same requirements.

A. Transgender individuals are not a protected class.

Montana's laws make clear that transgender status is not a protected class. *See, e.g.*, Mont. Code Ann. § 49-1-102 (declaring the "right to be free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin"); § 49-2-303 (declaring it unlawful for an employer to discriminate against a person because of "race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex"); § 49-2-308 (declaring it unlawful for a state to deny services to anyone based on "race, creed, religion, sex, marital status, color, age, physical or mental disability, or national origin"); § 49-2-307 (declaring it unlawful for an educational institution to discriminate because of

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classes.[4]

The U.S. Supreme Court has not recognized transgender identity as a suspect classification. In *Bostock v. Clayton County*, the Court adopted the well-established assumption that "homosexuality and transgender status are distinct concepts from sex." 140 S. Ct. 1731, 1746–47 (2020). The *Bostock* majority's conclusion that

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This is further supported by the fact that in both 2017 and 2019, the Montana Legislature rejected bills that would recognize gender identity as a protected class separate from sex. *See* An Act Protecting Gender Identity or Expression and Sexual Orientation Under the Laws Prohibiting Discrimination, HB 465, 66th Legislature (2019) (tabled in committee); An Act Protecting Gender Identity or Expression and Sexual Orientation Under the Laws Prohibiting Discrimination, HB 417, 65th Legislature (2017) (tabled in committee). Not only does this show that gender identity is not already a protected class under existing laws, but it also shows that gender identity is separate from sex, which is a protected class.

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Here, though—beyond the fact that employment discrimination under Title VII is not at issue—SB 280 doesn't discriminate against transgender individuals. SB 280 imposes exactly the same requirements on those born male as those born female. Whether a transgender man seeking to change the "female" birth certificate designation, or a transgender woman seeking to change the "male" birth certificate designation, or anyone else (such as an intersex person), those who seek to change their birth certificate's listed sex must satisfy the same statutory requirements.

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B. SB 280 does not discriminate against transgender individuals.

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But the State imposes numerous processes for changing birth certificates, including procedures that involve the action of a court of competent jurisdiction. For example, if paternity of a child is established after a birth certificate has been issued,

[6] In fact, Doe seeks reversion to the rule that was in place prior to SB 280. Complaint, *Marquez v. State*, DV 21-00873, Dkt. 1 (Yellowstone Cty. Dist. Ct. July 16, 2021).

the parents of the child must provide credible evidence of paternity and submit affidavits to change the child's birth certificate. *See* Mont. Code Ann. § 50-15-223; Mont. Admin. R. 37.8.311(2) (2017). In many cases, a court order determining paternity is required. *Id.* Likewise, an individual seeking to change their birth certificate after an adoption must follow a certain procedure, which includes getting a court order finalizing adoption. *See* Mont. Admin. R. 37.8.311(1)–(2) (2017). A neutral process to change sex on one's birth certificate does not discriminate against transgender individuals any more than these rules discriminate against adopted individuals or individuals with previously unknown fathers—that is to say, not at all.

C. SB 280 Does Not Discriminate on the Basis of Sex.

To the extent Doe's complaint could be read to assert a separate claim of discrimination on the basis of sex, this claim would also fail. Doe has not identified a discriminatory act, and the HRB lacks jurisdiction to declare a statute invalid. *See supra* Section III. As discussed above, SB 280 applies equally to all individuals and imposes identical burdens on anyone seeking to change the sex designation on their birth certificate. *See supra* Section III.A. So although sex—unlike transgender identity—is a protected class under Montana law, Doe has failed to state a claim of discrimination.

IV. Doe Fails to State a Claim Under the Governmental Code of Fair Practices

Doe's claim under the Montana Governmental Code of Fair Practices fails for the same reasons as the claim under the Montana Human Rights Act. Section 49-3-205 states that "[a]ll services of every state or local governmental agency must be

performed without discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin." As discussed above, SB 280 applies equally to all individuals, regardless of "race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin." If Doe seeks to include transgender identity under "sex" as a protected class, Montana law says no. *See supra* Section III.B. And the HRB lacks the authority to expand or reinterpret plainly established Montana law.

Doe's claim under § 49-3-208 (cross-referencing § 49-2-304) fails because this provision only applies to public accommodations. Public accommodation is defined as a "place," and the relevant statutory provisions only apply to the "owner, lessee, manager, agent, or employee" of this "place." §§ 49-2-101(20); 49-2-304. Doe has not alleged that any state agency has permitted an "owner, lessee, manager, agent, or employee" of a "place" or "business establishment" to discriminate.[7] §§ 49-2-101(20);

[7] Also, a government entity, place, or service cannot be a public accommodation. Even if SB 280 was discriminatory—which it is not—it governs a process that only the government rather than private actors can administer, which means it is not covered by public accommodation provisions. State and local authorities have the responsibility not to *permit* any violation of the public accommodations provisions of Mont. Code Ann. § 49-2-304. *See* Mont. Code Ann. § 49-3-208. In other words, the government cannot pass rules or laws that allow entities covered under the public accommodations provision to discriminate against protected classes. But this provision does not mean that the public accommodation laws themselves apply to government entities, places, or services. Section 49-2-101 only includes private entities and "public amusement and business establishments" in its list of what entities constitute public accommodations—nowhere in the defined term does a government entity, "place," or service appear. Under the *ejusdem generis* canon, this definition must be interpreted to only include "things of the same general kind or class specifically mentioned." A. Scalia & B. Garner, Reading Law 199 (2012); *see also Aleksich v. Industrial Accident Fund*, 116 Mont. 127, 139 (1944) ("The doctrine of ejusdem generis is a well known rule of construction to aid in ascertaining the meaning of

49-2-304; 49-3-208. And regardless, the law applies equally to all individuals, regardless of transgender status, and transgender individuals are not a protected class. *See supra* Section III.

Even if the HRB were to find that Doe was discriminated against, it *still* must dismiss the Complaint. A person or entity "is not subject to penalties under this chapter if compliance with the provisions of this chapter would cause the person to violate the provisions of another state law." Mont. Code. Ann. § 49-2-210. SB 280 is the law—passed by the Legislature and signed by the Governor. If the State is found to have violated the Governmental Code of Fair Practices, it cannot be subject to penalties because compliance (allowing Doe to change the sex on Doe's birth certificate without meeting the requirements in SB 280) would cause the State to violate SB 280—a duly enacted state law. The Governmental Code of Fair Practices is not a super-statute. No court, let alone the HRB—a creature of statute—could read its statutory provisions to override another statute like SB 280.

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statutes and other written instruments, the doctrine being that where an enumeration of specific things is followed by some more general word or phrase, such general phrase is to be held to refer to things of the same kind as those enumerated."). The general terms—"all other public amusement and business establishments"—must be read to only include places like the specific terms—inns, restaurants, campgrounds, and salons—rather than government entities, places, or services. This is further supported by the fact that no Montana court has applied the public accommodations provision to a government entity (like the Attorney General or DPHHS), place (like the Attorney General's office or DPHHS office), or service (like changing a vital record), nor has any Montana Court interpreted § 49-3-208 to apply public accommodations provisions to the government.

Conclusion

For the foregoing reasons, the HRB should dismiss Doe's Complaint.

DATED this 8th day of August, 2021.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ David M.S. Dewhirst*
DAVID M.S. DEWHIRST
Solicitor General

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was delivered by email to the following:

Akilah Lane
Alex Rate
ACLU of Montana
lanea@aclumontana.org
ratea@aclumontana.org

Date: September 8, 2021

/s/ David M.S. Dewhirst
DAVID M.S. DEWHIRST
Solicitor General

AUSTIN KNUDSEN
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Assistant Solicitor General
P.O. Box 201401
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Phone: (406) 444-2026
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov

Attorneys for Respondent

BEFORE THE MONTANA DEPARTMENT OF LABOR & INDUSTRY
HUMAN RIGHTS BUREAU

CHARGING PARTY: Amelia Marquez RESPONDENT: State of Montana c/o The Montana Attorney General	Charge No. 0210526 **RESPONSE TO CHARGING PARTY'S COMPLAINT OF DISCRIMINATION**

This response is filed by the State of Montana and is addressed to the complaint filed July 22, 2021, by the charging party, Amelia Marquez.

INTRODUCTION

Amelia Marquez has filed a Complaint with the Human Rights Bureau (the "HRB") against the State of Montana for alleged discrimination. The basis of Marquez's claim is that the Birth Certificate Act ("SB 280") discriminates against Marquez because of Marquez's sex and transgender identity. Complaint ¶ 10. Because of this, Marquez argues, SB 280 violates rights protected under the Montana Human Rights Act, the Montana Governmental Code of Fair Practices, the Constitution of the State of Montana, and the United States Constitution. Complaint ¶ 11.

Marquez's claim fails for several reasons.

First, Marquez has failed to identify a discriminatory actor or a discriminatory act in Marquez's complaint. Marquez challenges a law itself, not some adverse employment action or insurance coverage plan. And the State—the Respondent—did not "sign[] the Birth Certificate Act into law" as claimed by Marquez. Complaint ¶ 10. The Governor did. The passage and enactment of a law cannot be a discriminatory act simply because one disagrees with the substance of the text contained therein.

Second, such a dispute *might* be suitable for judicial resolution, but it lies outside the competency of the HRB to opine on the constitutionality of state statutes.

Third, Marquez has failed to state a valid claim under the Montana Human Rights Act or the Montana Governmental Code of Fair Practices. Not only has Marquez failed to allege any discriminatory act, Marquez has failed to show how SB 280 is facially discriminatory.[1] To the extent Marquez challenges the substance of SB 280—which the HRB lacks jurisdiction to address—Marquez has failed to demonstrate that SB 280 is in fact discriminatory.

For these reasons, the HRB must dismiss Marquez's complaint.

I. Marquez's Claims Must be Dismissed

The HRB lacks jurisdiction and must dismiss this complaint. HRB Admin. R. 24.8.22; 24.8.403. Its jurisdiction is limited to "administering complaints of

[1] Admittedly, Marquez does not have to show how SB 280 is facially discriminatory because a facial challenge to a statute belongs before a court, not the HRB. But given that there is no other way to read Marquez's complaint, the State will respond to the facial challenge implicit in Marquez's complaint.

discrimination filed pursuant to the Montana Human Rights Act (act) and the Governmental Code of Fair Practices (code)." HRB Admin. R. 24.8.101. Any complaints that do not allege discrimination under these two statutes must be dismissed. HRB Admin. R. 24.8.101.

Marquez's sole complaint is that SB 280 violates Marquez's rights under the Montana Human Rights Act, the Montana Governmental Code of Fair Practices, the Constitution of the State of Montana, and the United States Constitution. That is, the *signing of the law itself* violates Marquez's rights. Complaint ¶ 10. But signing a law is not an act of discrimination. It is only when that law is applied in a discriminatory manner that there is an act of discrimination.[2] And Marquez has failed to allege that the law has been applied in a discriminatory manner—in fact, neither before nor after enactment of SB 280 has Marquez has even attempted to change the sex on Marquez's birth certificate. Marquez's failure to identify either an act of discrimination or a discriminatory actor is fatal to the claim of discrimination. Because Marquez has failed to state a claim for discrimination under the Montana Human Rights Act or the Montana Governmental Code of Fair Practices, the HRB must dismiss the complaint.

Marquez has stated no discriminatory act sufficient to sustain this complaint.

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[2] It is also important to note that Marquez has filed this complaint against the "State of Montana C/O The Montana Attorney General." Neither the "State" nor the "Montana Attorney General" signed SB 280 into law.

II. The HRB Lacks Jurisdiction to Determine the Constitutionality of Duly Enacted Laws

Marquez's complaint must be understood to challenge the substance of SB 280 (as opposed to its application), which is a challenge the HRB cannot adjudicate. The HRB is not the proper forum to resolve this facial challenge to SB 280. Specifically, Marquez's assertion that SB 280 violates the Montana and U.S. Constitutions cannot be resolved by this body. "Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers." *Jarussi v. Bd. of Trustees*, 204 Mont. 131, 135 (1983) (citing Mont. Const. art. III, § 1); *see also Stuart v. Dep't of Social & Rehab. Servs.*, 247 Mont. 433, 348 (1991). The HRB's own Administrative Rules support this. The HRB is only tasked with reviewing complaints under the Montana Human Rights Act and the Governmental Code of Fair Practices, not state and federal constitutions. HRB Admin. R. 24.8.101. Because Marquez's complaint is a challenge to the constitutionality of SB 280, the HRB lacks jurisdiction and must dismiss the complaint.

III. Marquez Fails to State a Claim Under the Montana Human Rights Act

Even if Marquez asserted a specific discriminatory act that the HRB could investigate and resolve—which Marquez has not—the claims made under the Montana Human Rights Act must fail. Marquez claims SB 280 violates Montana Code §§ 49-1-102, -302, -304, -308, -309. As an initial matter, §§ 49-1-302, -304, -308, -309 do not appear in the Montana Code Annotated. Because these provisions do not exist, no challenge can be made under these provisions, nor can the State respond to any arguments made with respect to these provisions.

Marquez's remaining claim under the Montana Human Rights Act fails because the cited provision does not apply. Section 49-1-102 prohibits discrimination "because of race, creed, religion, color, sex, physical or mental disability, age, or national origin." Marquez does not make any assertion that transgender identity is covered by the "sex" provision of § 49-1-102. Even if Marquez had attempted to change Marquez's birth certificate (which Marquez has not), and even if Marquez's request was denied (which it has not been), this would not violate § 49-1-102 because "transgender identity" is not a protected class under that provision. Even if it were a protected class, the application of SB 280 to transgender individuals is not discriminatory.

Marquez's claim the SB 280 discriminates on the basis of Marquez's sex likewise fails—there has been no discriminatory act. SB 280 treats both sexes exactly the same. Both males and females who wish to change the sex designation on their birth certificates must follow precisely the same requirements.

A. Transgender individuals are not a protected class.

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But the State imposes numerous processes for changing birth certificates, including procedures that involve the action of a court of competent jurisdiction. For example, if paternity of a child is established after a birth certificate has been issued,

[6] In fact, Marquez seeks reversion to the rule that was in place prior to SB 280. Complaint, *Marquez v. State*, DV 21-00873, Dkt. 1 (Yellowstone Cty. Dist. Ct. July 16, 2021).

the parents of the child must provide credible evidence of paternity and submit affidavits to change the child's birth certificate. *See* Mont. Code Ann. § 50-15-223; Mont. Admin. R. 37.8.311(2) (2017). In many cases, a court order determining paternity is required. *Id.* Likewise, an individual seeking to change their birth certificate after an adoption must follow a certain procedure, which includes getting a court order finalizing adoption. *See* Mont. Admin. R. 37.8.311(1)–(2) (2017). A neutral process to change sex on one's birth certificate does not discriminate against transgender individuals any more than these rules discriminate against adopted individuals or individuals with previously unknown fathers—that is to say, not at all.

C. SB 280 Does Not Discriminate on the Basis of Sex.

To the extent Marquez's complaint could be read to assert a separate claim of discrimination on the basis of sex, this claim would also fail. Marquez has not identified a discriminatory act, and the HRB lacks jurisdiction to declare a statute invalid. *See supra* Section III. As discussed above, SB 280 applies equally to all individuals and imposes identical burdens on anyone seeking to change the sex designation on their birth certificate. *See supra* Section III.A. So although sex—unlike transgender identity—is a protected class under Montana law, Marquez has failed to state a claim of discrimination.

IV. Marquez Fails to State a Claim Under the Governmental Code of Fair Practices

Marquez's claim under the Montana Governmental Code of Fair Practices fails for the same reasons as the claim under the Montana Human Rights Act. Section 49-3-205 states that "[a]ll services of every state or local governmental agency must be

performed without discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin." As discussed above, SB 280 applies equally to all individuals, regardless of "race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin." If Marquez seeks to include transgender identity under "sex" as a protected class, Montana law says no. *See supra* Section III.B. And the HRB lacks the authority to expand or reinterpret plainly established Montana law.

Marquez's claim under § 49-3-208 (cross-referencing § 49-2-304) fails because this provision only applies to public accommodations. Public accommodation is defined as a "place," and the relevant statutory provisions only apply to the "owner, lessee, manager, agent, or employee" of this "place." §§ 49-2-101(20); 49-2-304. Marquez has not alleged that any state agency has permitted an "owner, lessee, manager, agent, or employee" of a "place" or "business establishment" to discriminate.[7]

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[7] Also, a government entity, place, or service cannot be a public accommodation. Even if SB 280 was discriminatory—which it is not—it governs a process that only the government rather than private actors can administer, which means it is not covered by public accommodation provisions. State and local authorities have the responsibility not to *permit* any violation of the public accommodations provisions of Mont. Code Ann. § 49-2-304. *See* Mont. Code Ann. § 49-3-208. In other words, the government cannot pass rules or laws that allow entities covered under the public accommodations provision to discriminate against protected classes. But this provision does not mean that the public accommodation laws themselves apply to government entities, places, or services. Section 49-2-101 only includes private entities and "public amusement and business establishments" in its list of what entities constitute public accommodations—nowhere in the defined term does a government entity, "place," or service appear. Under the *ejusdem generis* canon, this definition must be interpreted to only include "things of the same general kind or class specifically mentioned." A. Scalia & B. Garner, Reading Law 199 (2012); *see also Aleksich v. Industrial Accident Fund*, 116 Mont. 127, 139 (1944) ("The doctrine of ejusdem generis is a well known rule of construction to aid in ascertaining the meaning of

§§ 49-2-101(20); 49-2-304; 49-3-208. And regardless, the law applies equally to all individuals, regardless of transgender status, and transgender individuals are not a protected class. *See supra* Section III.

Even if the HRB were to find that Marquez was discriminated against, it *still* must dismiss the Complaint. A person or entity "is not subject to penalties under this chapter if compliance with the provisions of this chapter would cause the person to violate the provisions of another state law." Mont. Code. Ann. § 49-2-210. SB 280 is the law—passed by the Legislature and signed by the Governor. If the State is found to have violated the Governmental Code of Fair Practices, it cannot be subject to penalties because compliance (allowing Marquez to change the sex on Marquez's birth certificate without meeting the requirements in SB 280) would cause the State to violate SB 280—a duly enacted state law. The Governmental Code of Fair Practices is not a super-statute. No court, let alone the HRB—a creature of statute—could read its statutory provisions to override another statute like SB 280.

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statutes and other written instruments, the doctrine being that where an enumeration of specific things is followed by some more general word or phrase, such general phrase is to be held to refer to things of the same kind as those enumerated."). The general terms—"all other public amusement and business establishments"—must be read to only include places like the specific terms—inns, restaurants, campgrounds, and salons—rather than government entities, places, or services. This is further supported by the fact that no Montana court has applied the public accommodations provision to a government entity (like the Attorney General or DPHHS), place (like the Attorney General's office or DPHHS office), or service (like changing a vital record), nor has any Montana Court interpreted § 49-3-208 to apply public accommodations provisions to the government.

Conclusion

For the foregoing reasons, the HRB should dismiss Marquez's Complaint.

DATED this 8th day of August, 2021.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ David M.S. Dewhirst*
DAVID M.S. DEWHIRST
Solicitor General

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was delivered by email to the following:

Akilah Lane
Alex Rate
ACLU of Montana
lanea@aclumontana.org
ratea@aclumontana.org

Date: September 8, 2021

/s/ David M.S. Dewhirst
DAVID M.S. DEWHIRST
Solicitor General