

AUSTIN KNUDSEN  
Montana Attorney General  
KRISTIN HANSEN

*Lieutenant General*

DAVID M.S. DEWHIRST

*Solicitor General*

KATHLEEN L. SMITHGALL

*Assistant Solicitor General*

215 North Sanders

P.O. Box 201401

Helena, MT 59620-1401

Phone: 406-444-2026

Fax: 406-444-3549

david.dewhirst@mt.gov

kathleen.smithgall@mt.gov

EMILY JONES

*Special Assistant Attorney General*

Jones Law Firm, PLLC

115 N. Broadway, Suite 410

Billings, MT 59101

Phone: 406-384-7990

emily@joneslawmt.com

*Attorneys for Defendants*

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
YELLOWSTONE COUNTY

AMELIA MARQUEZ, an individual;  
and JOHN DOE, an individual,

Plaintiffs,

v.

STATE OF MONTANA; GREGORY  
GIANFORTE, in his official capacity as  
Governor of the State of Montana; et  
al.,

Defendants.

DV-21-00873

Hon. Michael G. Moses

**BRIEF IN SUPPORT  
OF DEFENDANTS' MOTION  
TO DISMISS PLAINTIFFS'  
AMENDED COMPLAINT**

## INTRODUCTION

Defendants State of Montana, Governor Gregory Gianforte, Montana Department of Public Health and Human Services, and Director Adam Meier (together, “Defendants”) moved to dismiss Plaintiffs’ claims on August 17, 2021. Dkt. 23. Plaintiffs have since amended their Complaint (Dkt. 42) to add two new statutory claims, which the State now also seeks to dismiss.<sup>1</sup> At the time of this amendment, Defendants’ Motion to Dismiss (Dkt. 23–24) was fully briefed and scheduled for argument. The parties presented argument on the original motion on December 22, 2021, under an agreement that Defendants would have the opportunity to file supplemental briefing on the two new statutory claims. At the hearing, the Court ordered the parties to submit additional briefs on these claims. Defendants incorporate all arguments raised previously in support of their original Motion to Dismiss (Dkt. 24); in their reply brief in support of their motion to dismiss (Dkt. 37); and at the December 22, 2021, hearing (Dkt. 46).<sup>2</sup> Defendants move to dismiss the Amended Complaint based on these incorporated arguments as well as the arguments set forth below.

### **I. Plaintiffs Fail to State a Claim Under the Montana Human Rights Act.**

Plaintiffs’ claim under the Montana Human Rights Act (“MHRA”), MCA §§ 49-1-102, 2-308, and 2-302, must fail. Section 49-1-102 prohibits discrimination “because of race, creed, religion, color, sex, physical or mental disability, age, or national

---

<sup>1</sup>Defendants did not oppose Plaintiffs’ motion for leave to amend the Complaint on the agreement that Plaintiffs would not add additional claims. Because Plaintiffs added two statutory claims to their Amended Complaint, both parties agreed that additional briefing on the motion to dismiss was necessary to address the new claims.

origin ....” This prohibition covers discrimination arising in employment and public accommodations. *Id.* Sections 49-2-302 and 2-308 prohibit the state from denying “services, goods, facilities, advantages, or privileges because of ... sex ...,” or otherwise aiding in such a denial of services or privileges. Each of these statutory provisions allows individuals to seek relief from a specific act of discrimination taken against them. *See e.g., Lay v. State Dep’t of Military Affairs*, 2015 MT 158, ¶ 16, 379 Mont. 365, 351 P.3d 672 (reviewing a specific retaliation claim under § 49-1-102); *Baumgart v. State*, 2014 MT 194, ¶ 5, 376 Mont. 1, 332 P.3d 225 (reviewing a specific termination claim under § 49-2-308); *Hansen v. Bozeman Police Dep’t*, 2015 MT 143, ¶ 7, 379 Mont. 284, 350 P.3d 372 (reviewing a hotel’s refusal to register a specific guest); *see also Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 29, 387 Mont. 202, 394 P.3d 159 (reviewing a claim where two counties failed to fill prescription for inmate); *Albert v. City of Billings*, 2012 MT 159, ¶ 27, 365 Mont. 454, 282 P.3d 704 (reviewing a disparate treatment claim). A duly enacted statute is fundamentally different from a discriminatory employment practice or denial of a good or service. *See generally* MCA §§ 49-2-301–313 (describing prohibited discriminatory practices).

Plaintiffs assert their claims fall within these provisions because “[d]iscrimination on the basis of gender identity constitutes discrimination on the basis of sex.” Dkt. 42 ¶ 101. But none of these provisions provide Plaintiffs with a cause of action

---

<sup>2</sup>As Defendants explained in Dkts. 24 and 37, Plaintiffs lack standing to bring their claims because they have not alleged an injury in fact that is fairly traceable to their claims. Plaintiffs’ claimed injury—discrimination—is the same for each of their claims, so Defendants fully incorporate its standing arguments raised previously. *See* Dkt. 24, Section II.A; Dkt. 37, Section II.

for this Court to declare that SB 280 violates the MHRA. Dkt. 42 ¶ 103. Plaintiffs cite no statutory provision that gives the Court the authority under the MHRA to review the facial validity of a statute on the basis that it is allegedly discriminatory. Rather, the MHRA details a person’s right to seek relief from a “discriminatory practice.” MCA § 49-2-501. To the extent any claim can be made against Defendants under these provisions, it is limited to specific acts of refusal or denial of services. *See e.g., Lay*, ¶ 16; *Baumgart*, ¶ 5; ¶¶ 7, 22 (defining the act of aiding and abetting as a “tortious act”); *Hansen*, ¶ 7. The MHRA is not a mechanism to challenge the validity of an entire law. Plaintiffs, therefore, do not state a claim for which this Court can grant relief.

Even if Plaintiffs could state a cause of action, SB 280 does not discriminate on the basis of gender identity, transgender status, or sex. Anyone who wishes to change the sex designation on their birth certificates must follow precisely the same requirements. In other words, all Montanans—regardless of gender identity, transgender status, or sex—are subject to these provisions, so they cannot be discriminatory.

This new claim also fails on a basic conceptual level. Even assuming *arguendo* that SB 280 violates or conflicts with the MHRA, this is still not a basis to invalidate SB 280. This Court lacks the authority to declare an entire statute invalid on the basis that it might violate another statute. Neither the MHRA nor the Montana Governmental Code of Fair Practices (the “Code”) are super-statutes. *See In re Williams*, 219 Mont. 6, 10, 709 P.2d 1008 (1985) (explaining the methods of statutory interpretation when two statutes conflict); *see also Acosta v. Gonzales*, 439 F.3d 550, 555 (9th

Cir. 2006) (“[C]onflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute.” (internal quotation marks omitted)), *abrogated on other grounds by Garfias-Rodriguez v. Holder*, 649 F.3d 942, 948 (9th Cir. 2011).

**A. SB 280 does not discriminate on the basis of gender identity or transgender status.**

SB 280 does not discriminate on the basis of gender identity, transgender status, or sex. *See* Dkt. 24, III.A.I. Whether a transgender man seeking to change the “female” birth certificate designation, 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 legislatively prescribed process. Again, these requirements apply equally to everyone.

SB 280 is not “designed to impose different burdens on different classes of persons.” *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421. Nor does it impose different burdens on individuals within the same class of persons. Plaintiffs merely assume only transgender individuals will want to change the sex on their birth certificates, so “in reality,” SB 280 imposes different burdens on different individuals within the same class. *Id.* Not only is that speculative argument (not evidence), but also by that logic, any government-prescribed process for changing one’s birth certificate would unlawfully discriminate, including the provisions governing adoption and paternity. *See* Dkt. 24, 13–14; Tr. 17–18, 54 (explaining that adopted children and children without established paternity are the ones most likely to avail themselves of other birth certificate processes) (Transcript attached to Smithgall

Declaration as “Exhibit A”).<sup>3</sup> Under Plaintiffs’ view, the administrative process SB 280 replaced likewise wouldn’t pass muster. Yet they seek to return to the old rule—a rule that, like the adoption and paternity provisions, imposes a neutral, nondiscriminatory process on anyone seeking to change their birth certificate sex. *Id.* *Spina* also requires that even if Plaintiffs could show that SB 280 is not a neutral law, they must also show that it can be “traced to an impermissibly discriminatory purpose.” *Spina*, ¶ 85. Plaintiffs simply cannot meet this standard. They only allege that SB 280 treats transgender individuals differently and that the law must therefore be invalid. This is insufficient.

**B. Transgender status is not a protected class under Montana law.**

Even if this Court concluded that SB 280 treats individuals differently based on gender identity or transgender status (which, as shown above, it doesn’t), transgender status is not a protected class in Montana law. *See* Dkt. 24, III.A.2. Montana courts have declined to include transgender identity among the protected classes. *See Mont. State University-Northern v. Bachmeier*, 2021 Mont. 26, ¶¶ 27–28, 403 Mont. 136, 480 P.3d 233 (noting that sex, meaning “male or female,” is a protected class); *Snetsinger v. Mont. Univ. System*, 2004 MT 390, ¶ 61, 325 Mont. 148, 104 P.3d 445 (Nelson, J., concurring) (“[s]exual and gender orientation is not considered a ‘suspect class’ ...”); *Donaldson v. State*, 2012 Mont. 288, ¶ 54, 367 Mont. 228, 292 P.3d

---

<sup>3</sup> Because this is the certified transcript from the hearing on Defendants’ original Motion to Dismiss, which is incorporated in this brief and accompanying motion, this Court can take judicial notice of the transcript pursuant to Montana Rule of Evidence 201(b).

364 (Nelson, J., dissenting) (explaining that established law doesn't recognize sexual orientation as a suspect class). This court must follow the law.

Plaintiffs cite *Maloney v. Yellowstone County*,<sup>4</sup> where the Office of Administrative Hearings determined that discrimination based on transgender status falls under the MHRA. But in reaching this conclusion, the hearing officer relied on the non-majority opinion from *Snetsinger*, which actually—as noted above—stands for the opposite proposition. The *Snetsinger* majority declined to make sexual orientation a protected class. ¶ 29. Justice Nelson's concurring opinion merely expressed his conviction that sexual orientation *should* be a protected clause—while noting that it wasn't under Montana law. ¶ 61. Transgender status and gender identity were not even at issue in *Snetsinger*.

In support of their argument, Plaintiffs also cite *Bostock v. Clayton County*. In that case, however, the Court reiterated that “homosexuality and transgender status are distinct concepts from sex.” 140 S. Ct. 1731, 1746–47 (2020). Moreover, *Bostock*'s holding is that sex discrimination occurs when sex is the “but-for” cause of a negative employment decision. Here, of course, there is no negative employment decision and *Bostock* simply does not apply. Sex is not the “but-for” cause of anything at issue here. SB 280 applies equally to all individuals—whether a person is born male or female or currently identifies as male or female, *anyone* seeking to change sex on his or her birth certificate must undertake the same process. *See* Tr. 56–57.

---

<sup>4</sup>Order Denying Respondent's Motion for Summary Judgment and Granting Charging Party's Partial Motion for Summary Judgment, *Maloney v. Yellowstone Cnty*, Dep't of Labor and Industry Office of Admin. Hearings, Nos. 1570-2019, 1572-2019 (Aug. 14, 2020) (“*Maloney Order*”).

*Bostock* does not stand for the proposition that a party can challenge legislation it believes discriminates on the basis of gender identity or transgender status. Rather, *Bostock* explains why Plaintiffs’ challenge under the MHRA must fail. As discussed above, *see supra* Section I, each of the statutory provisions cited in Plaintiffs’ Amended Complaint covers specific acts of discrimination. None of these provisions establish a cause of action to challenge a law—these provisions protect individuals from specific “discriminatory acts.” In *Bostock*, each of the individuals bringing suit had been fired—each employer took action against their respective employee. *See Bostock*, 140 S. Ct. at 1737–38 (2020) (summarizing facts of all three cases); *EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018). Here, no such discriminatory act is alleged.

*Bostock* was a specific case decided in the specific statutory context of Title VII. 140 S. Ct. at 1753 (“The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual because of such individual’s sex.” (internal quotations omitted)). And the Court refused to prejudge any other questions not before it. Plaintiffs ask this Court to do something extraordinary—expand *Bostock* to create a new protected class under Montana law when there has been no discrimination, no negative employment decision, and no “but-for” causation.

The *Maloney* decision cites *Bostock* for the conclusion that “[d]iscrimination based on transgender status falls under the MHRA’s prohibition on sex discrimination.” *Maloney* Order at 12. But as discussed above, this is not an accurate reading

of *Bostock*. This Court should not compound the error by holding otherwise. As *Bostock* states, and as quoted by the hearing officer, “[a]n individual’s homosexuality or transgender status is not relevant to employment decisions.” *Id.* at 9 (quoting *Bostock*, 140 S. Ct. at 1741). No employment decision is at issue here. As explained at oral argument in this case, the *Bostock* conclusion has no bearing on whether a law is constitutional or otherwise valid. Tr. 56–57 (explaining how *Bostock* holding is utterly inapplicable to this case).

In both 2017 and 2019, the Montana Legislature rejected attempts to amend the MHRA and add gender identity as a protected class. *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). The Legislature was clear that it does not intend “sex” to include gender identity in the current statutory text. Plaintiffs here attempt to rewrite the statutory provision in a manner expressly rejected by the Legislature. But this is not a faithful reading of the statute, and no authoritative court decision supports Plaintiffs’ position.

### **C. SB 280 does not discriminate on the basis of sex.**

To the extent Plaintiffs challenge SB 280 because it discriminates on the basis of sex as distinct from gender identity or transgender status, this claim also fails. SB 280 does not distinguish between males or females. *See, e.g., Lay*, ¶ 16 (reviewing sexual favoritism claim which was based on the sex of the female employee); *Harrison v. Chance*, 244 Mont. 215, 221, 797 P.2d 200, 204 (1990) (reviewing sexual

DEFENDANTS’ MOTION TO DISMISS PLAINTIFFS’ AMENDED COMPLAINT | 9

harassment claim which was based on sex of female employee). Again, SB 280 treats all individuals the same. *See supra* Section I.A. Plaintiffs' claim under the MHRA must fail because there is no alleged discriminatory action, and SB 280 is a decidedly neutral law.

## **II. Doe Fails to State a Claim Under the Governmental Code of Fair Practices.**

Plaintiffs' claim under the Code 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 ... sex ....” Plaintiffs cite no statutory basis giving this Court the authority to declare that SB 280 “violates the Code.” Dkt. 42 ¶ 110; *see also* MCA § 49-3-315 (applying the same procedures set forth under the Montana Human Rights Act, which are limited to reviewing claims of a “discriminatory practice”). Plaintiffs argue (conclusorily) that because the Code prohibits discrimination (Dkt. 42, ¶ 105) and “Plaintiffs have been injured by Defendants’ conduct,” (Dkt. 42, ¶ 106), this Court has the authority to declare SB 280 invalid under the Code. But the Court does not have this authority. In fact, this Court has only addressed discrimination under this provision once, and it too related to specific discriminatory acts, not allegedly discriminatory laws. *Jones v. Mont. Univ. Sys*, 2007 MT 82, ¶ 37, 337 Mont. 1, 155 P.3d 1247. The Code is not a basis for declaring SB 280 invalid. *See supra* Section I.

As discussed above, SB 280 applies equally to all individuals, regardless of gender identity, transgender status, or sex. *See supra* Section I. Plaintiffs seek to include gender identity and transgender status under “sex” as a protected class,

contrary to Montana law. *See id.* But just like the MHRA, the Code does not create a cause of action to challenge SB 280, and, in any event, SB 280 is not discriminatory for all the reasons stated above. Accordingly, Plaintiffs second statutory claim fails.

### CONCLUSION

Plaintiffs seek to rewrite statutory provisions and read discrimination into an otherwise nondiscriminatory statute. SB 280 applies to all Montanans, regardless of gender identity, transgender status, or sex. Gender identity and transgender status, furthermore, are not protected classes under Montana law. And finally, neither the MHRA nor the Code provide Plaintiffs with a cause of action to challenge the validity of SB 280. For these reasons, and the reasons stated in Dkts. 24, 37 and at the December 22, 2021 hearing, this Court must dismiss Plaintiffs' claims.

DATED this 28th day of January, 2022.

AUSTIN KNUDSEN  
Montana Attorney General

KRISTIN HANSEN  
*Lieutenant General*

DAVID M.S. DEWHIRST  
*Solicitor General*

EMILY JONES  
*Special Assistant Attorney General*

*/s/ Kathleen L. Smithgall*

---

KATHLEEN L. SMITHGALL

*Assistant Solicitor General*

215 North Sanders

P.O. Box 201401

Helena, MT 59620-1401

p. 406.444.2026

kathleen.smithgall@mt.gov

*Attorney for Defendants*

## CERTIFICATE OF SERVICE

I, Kathleen Lynn Smithgall, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 01-28-2022:

Alexander H. Rate (Attorney)  
713 Loch Leven Drive  
Livingston MT 59047  
Representing: John Doe I, Amelia Marquez  
Service Method: eService

Akilah Maya Lane (Attorney)  
2248 Deerfield Ln  
Apt B  
Helena MT 59601  
Representing: Amelia Marquez  
Service Method: eService

Elizabeth A. Halverson (Attorney)  
1302 24th Street West #393  
Billings MT 59102  
Representing: Amelia Marquez  
Service Method: eService

Emily Jones (Attorney)  
115 North Broadway  
Suite 410  
Billings MT 59101  
Representing: Gianforte, Gregory As Governor Of State Of Montana  
Service Method: eService

John Knight (Attorney)  
150 North Michigan Avenue Suite 600  
Chicago 60601  
Representing: Amelia Marquez  
Service Method: Email

Tina B Solis (Attorney)  
70 West Madison Street Suite 3500  
Chicago 60601  
Representing: Amelia Marquez

Service Method: Email

Seth A Horvath (Attorney)  
70 West Madison Street Suite 3500  
Chicago 60601  
Representing: Amelia Marquez  
Service Method: Email

F. Thomas Hecht (Attorney)  
70 West Madison Street, Suite 3500  
Chicago 60601  
Representing: Amelia Marquez  
Service Method: Email

Electronically signed by Buffy Ekola on behalf of Kathleen Lynn Smithgall  
Dated: 01-28-2022