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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

AMELIA MARQUEZ, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	DV-21-00873 Hon. Michael G. Moses **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

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INTRODUCTION

This Court must dismiss Plaintiffs' claims under the Montana Human Rights Act ("MHRA") and the Governmental Code of Fair Practices (the "Code"). Plaintiffs seek to invalidate SB 280 because they claim it is a discriminatory law. But the MHRA and the Code are the improper vehicles for this challenge. Plaintiffs have, therefore, failed to state a claim under either the MHRA or the Code upon which relief can be granted.

I. Plaintiffs Fail to Assert a Valid Claim Under the Montana Human Rights Act.

Plaintiffs' new argument is simply this: because the Human Rights Board dismissed its claim under the MHRA, Plaintiffs can bring this claim in district court. Dkt. 55, 5 (explaining that the MHRA authorizes a plaintiff to commence a civil action after dismissal). But Plaintiffs still must abide by all the jurisdictional requirements and assert a proper cause of action in district court. The district court must independently evaluate the procedural and claim-processing standards. For example, if the Human Rights Board dismissed an individual's claim but then the district court separately determined that individual lacked standing, the plaintiff could not proceed in district court. Likewise, a plaintiff asserting a claim with no valid cause of action cannot assert a challenge in district court regardless of whether the Human Rights Board gives permission to bring the claim in district court. Here, Plaintiffs have failed to assert a valid claim under the MHRA, so this Court must dismiss their claim.

The MHRA only authorizes challenges to specific acts of discrimination. *See* Dkt. 51, 2–4. Defendants cite numerous cases where courts have reviewed challenges brought under the MHRA. *Id.* Plaintiffs assert that none of these cases "prohibit[] a plaintiff from challenging the legality of a discriminatory statute under the MHRA." Dkt. 55. That's no surprise. Those cases challenged *specific acts* of discrimination prohibited by the MHRA. Plaintiffs' attempt to sidestep this threshold obstacle falls flat. The question is not whether MHRA cases expressly prohibit this type of a challenge but instead whether the MHRA establishes a cause of action for challenging the validity of a duly enacted law. It does not. *See* Dkt. 51, 2–3.

Plaintiffs assert that this Court must read the MHRA broadly to cover these claims because it does not explicitly prohibit these types of challenges. Dkt. 55, 6. In support of this argument, Plaintiffs cite a single case where a federal court purportedly allowed a plaintiff to use the MHRA to challenge the legality of an ordinance. *See* Dkt. 55, 7. In *Montana Fair Housing, Inc. v. City of Bozeman*, 854 F. Supp. 2d 832 (D. Mont. 2012), the plaintiffs challenged a local zoning ordinance under MCA § 49-2-305 as well as the Fair Housing Act. None of these provisions are at issue in this case. And importantly, a local zoning ordinance passed by a municipality is different from a statute passed by the Legislature. Unlike a local zoning ordinance, SB 280 is a legislative act, and courts must read it in conjunction with other legislative acts like the MHRA. *See In re Williams*, 219 Mont. 6, 10, 709 P.2d 1008 (1985) (explaining the methods of statutory interpretation when two statutes

conflict). Courts do not afford the same presumption when a municipality passes a local ordinance.

In *Montana Fair Housing*, the City of Bozeman also did not raise the argument that the MHRA only applies to specific acts of discrimination. *See Mont. Fair Hous.*. 854 F. Supp. 2d at 843–44; Brief in Support of Defendants City of Bozeman, Andy Epple, and Vicki Hasler's Motion for Summary Judgment, *Mont. Fair Hous., Inc. v. City of Bozeman*, 854 F. Supp. 2d 832 (2012), Dkt. 104; Defendants City of Bozeman, Andy Epple, and Vicki Hasler's Response to Plaintiff's Motion for Partial Summary Judgment, *Mont. Fair Hous. Inc. v. City of Bozeman*, 854 F. Supp. 2d 832 (2012), Dkt. 114. Because the existence of a cause of action is not jurisdictional, courts need not address the question if not raised by the parties. *See Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 17 (2017) (explaining that claim-processing rules can be waived or forfeited) *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (explaining that failure of a cause of action is not jurisdictional). The district court, therefore, analyzed the challenge under the MHRA without any discussion of whether such an analysis was even appropriate. Defendants here challenge such an application, and this court must interpret the MHRA in accordance with the Montana Supreme Court, which has limited its application to cases involving specific acts of discrimination. *See* Dkt. 51, 2–4.

Plaintiffs' response is that even if the MHRA does not provide a cause of action to challenge later-enacted statutes, this court *should* nevertheless interpret it to allow for one. There is no basis in the statutory text or in case law supporting

Plaintiffs' position. *See* Dkt. 51, 2–4. Plaintiffs have numerous avenues to challenge the validity of the statute on its face—as they have done—and the MHRA is not an appropriate vehicle. *See* MCA §§ 49-1-102 (prohibiting discrimination in employment and public accommodations), 2-308 (prohibiting the state from denying services to certain protected classes), and 2-302 (same); *see also* Dkt. 51, 3 (citing examples of the Montana Supreme Court's application of the MHRA). Later-enacted statutes like SB 280 cannot be struck down on the basis that they violate an earlier-enacted statute. A legislature cannot bind a future legislature—this is undemocratic. *Fletcher v. Peck*, 10 U.S. 87, 135 (1810) ("[O]ne legislature cannot abridge the powers of a succeeding legislature."); *see also United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Calif. L. Rev. 1773, 1776 (2003) (stating that binding future legislatures, also known as entrenchment, "is inconsistent with the democratic principle that present majorities rule themselves.") (internal quotations omitted)); Charles L. Black Jr., *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189, 191 (1972) (noting that binding a future legislature is "a thing which, on the most familiar and fundamental principles, so obvious as rarely to be stated, no Congress for the time being can do"). So even if SB 280 did violate the MHRA, a court could not strike it down on that basis.

Plaintiffs, in the alternative, assert that this case, in fact, involves a specific act of discrimination. The specific act is that SB 280 was "signed into law" and is implemented by a governmental agency. That's simply rhetorical misdirection.

Signing a bill into law is not the type of discriminatory act the MHRA prohibits—or even contemplates. Courts simply may not invalidate laws on this basis. *See Winstar Corp.*, 518 U.S. at 873*; Fletcher*, 10 U.S. at 135.

Again, Plaintiffs' true argument is that SB 280 is unconstitutional on its face and as applied. While Plaintiffs' constitutional arguments fail for other reasons, *see* Dkts. 24, 37, 46, the constitutional framework is the appropriate framework within which this Court should review challenges to the validity of duly enacted laws. Plaintiffs' challenge to the constitutionality of SB 280 is not a challenge to a specific act of discrimination.[1]

A. SB 280 is not a discriminatory law.

SB 280 does not discriminate on the basis of transgender status. Dkt. 51, 5–6. Plaintiffs repeat from prior briefing their same argument that because transgender individuals are the only ones to avail themselves of the SB 280 requirement, the law is, ipso facto, discriminatory. Dkt. 55, 7–10.

Plaintiffs fail to explain how SB 280 discriminates against transgender individuals while the previous rule did not discriminate against transgender individuals. The *only* distinction Plaintiffs point to is the fact that SB 280 requires a surgical procedure. *See* Dkt. 55, 10. But this is a red herring. The surgical requirement has no bearing on *who* is subject to the act—only what is required after the person avails themselves of the act. Assuming, *arguendo*, that only transgender

[1] And, of course, Plaintiffs have not faced any act of discrimination by DPHHS given that neither Doe nor Marquez has attempted to change their birth certificate.

individuals will seek to change their birth certificates under SB 280, then the same must have been true of the old rule. And regardless of what the old rule required, the fact that *only* transgender individuals would avail themselves of the rule suggests that such a rule would—under Plaintiffs' theory—be discriminatory. *See* Dkt. 51, 15–16. Plaintiffs also fail to explain how SB 280 is any different than the adoption and paternity birth certificate alteration provisions, where only certain individuals avail themselves of the procedures. Just because certain individuals choose to change their birth certificates does not mean that the procedural requirements for that change discriminates against those classes of persons. Again, SB 280 applies to every individual equally.

Plaintiffs cite *Ray v. McCloud* and *F.V. v. Barron* in support of their arguments that this type of law discriminates against transgender individuals. Dkt. 55, 9. Plaintiffs assert "[i]t makes no difference" that these cases involved categorical bans on changing one's sex designation. *Id.* But this distinction is critically important. *Ray* and *F.V.* explain that the challenged laws were discriminatory *because* other individuals could change their birth certificates to reflect adoption or paternity, while those seeking to change the sex on their birth certificate could not. *Ray v. McCloud*, 507 F. Supp. 3d 925, 935 (S.D. Ohio 2020); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1141 (D. Id. 2018). The laws were unconstitutional because transgender individuals seeking to amend the sex designation on their birth certificates were similarly situated to other individuals seeking to amend other designations on their birth certificates. *Id.* The failure to provide an amendment process for sex designations

while providing an amendment process for other changes treated individuals differently. *Id.* But here, the State has provided an amendment process. So respectfully, it makes *all* the difference "that *Ray* and *F.V.* involved categorical bans." Dkt. 55, 9.

Because SB 280 applies equally to all individuals, it does not discriminate on the basis of transgender status, and this Court must dismiss Plaintiffs' claims. *See* Dkt. 55, 5–6.

B. Montana does not recognize transgender status is a protected class.

Even if this Court concluded that SB 280 discriminates on the basis of gender identity or transgender status, this is not a protected status in Montana. *See* Dkt. 51, 6–9. Although Plaintiffs say "[t]his argument has no merit," Plaintiffs do not cite a single case or statutory provision that establishes transgender status as a protected class. Dkt. 55, 10. Instead, Plaintiffs' argument is that Montana law permits this Court to establish transgender status as a protected class under both the Montana Constitution and the MHRA. But this just proves Defendants' point—transgender status is not a protected class under Montana law. *See* Dkt. 51, 6–9. And this Court isn't free to establish transgender status as a new protected class. *See Snetsinger v. Mont. Univ. System*, 2004 MT 390, ¶ 27, 325 Mont. 148, 104 P.3d 445 (declining to create nontextual protected classes).

Alternatively, Plaintiffs explain that transgender status is encompassed in the protections against discrimination based on "sex." Dkt. 55, 16–18. Plaintiffs rely on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), but as Defendants explained,

Bostock does not establish that protections against sex discrimination cover protections against discrimination on the basis of transgender status. Dkt. 51, 7–9. *Bostock* expressly states that these are unique concepts. *Bostock*, 140 S. Ct. at 1746–47 (2020) ("[H]omosexuality and transgender status are distinct concepts from sex."). And again, *Bostock*'s holding is inapplicable to this case because there is no adverse employment decision at issue. Dkt. 51, 7–9. If this Court adopts Plaintiffs' reading of *Bostock*, it would also render the 2017 rule unconstitutional because requiring any process at all—under Plaintiffs' theory—would discriminate against transgender individuals on the basis of sex.

Plaintiffs then cite *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which involved a challenge based on sex discrimination. Dkt. 55, 17–18. But *Bostock* specifically rejected the argument that *Price Waterhouse*'s prohibition on sex stereotyping applies in the context of gender identity or transgender status. *Bostock*, 140 S. Ct. at 1764 ("This argument fails because it is based on a faulty premise, namely, that Title VII forbids discrimination based on sex stereotypes."). *Bostock* expressly noted that "[p]laintiffs who allege that they were treated unfavorably because of their sexual orientation or gender identity are not in the same position as the plaintiff in *Price Waterhouse*." *Id.* The other cases Plaintiffs cite do not alter this conclusion. In *Beaver v. Mont. Dep't of Nat. Res. & Conservation*, 2003 MT 287, ¶¶ 59, 63, 318 Mont. 35, 78 P.3d 857, the Montana Supreme Court expressly declined to resolve the sex-stereotyping argument and then concluded that *Price Waterhouse* did not apply. In *Laudert v. Richland County Sheriff's Dep't*, 2000 MT 218, ¶¶ 29–31,

301 Mont. 114, 7 P.3d 386, the Court only applied *Price Waterhouse*'s "mixed-motive" test and did not rest its conclusion on any discussion of sex stereotyping. And in *Campbell v. Garden City Plumbing & Heating, Inc., 20*04 MT 231, ¶¶ 21–22, 322 Mont. 435, 97 P.3d 546, the Court expressly rejected the claims of gender-stereotyping. These cases didn't endorse Plaintiffs' theory that discrimination based on transgender status is a form of sex discrimination.

Because Montana law does not recognize transgender status as a protected class and doesn't treat transgender discrimination as a form of sex discrimination, this Court must dismiss Plaintiffs' claims.

II. Plaintiffs Fail to Assert a Valid Claim under the Governmental Code of Fair Practices.

This Court also lacks the authority to declare SB 280 invalid under the Code. *See* Dkt. 51, 10. In response to Defendants' argument that the Code does not provide a cause of action for challenging SB 280, Defendants simply recite the relevant provisions of the Code and assert that it should be analyzed together with the MHRA. Dkt. 55, 20. But Plaintiffs cite no authority that supports their theory that the Code itself provides a cause of action for challenges seeking to declare an entire law invalid.

Plaintiffs correctly note that *Jones v. Montana University System,* 2007 MT 82, ¶ 37, 337 Mont. 1, 155 P.3d 1247—as cited by Defendants—does not expressly prohibit challenging the legality of a statute under the MHRA or the Code. *Id.* But the fact that it is not expressly prohibited does not mean that the Code permits such a challenge. *See* Dkt. 51, 10. As explained in Defendants' brief, *Jones* is the *only* case where the Montana Supreme Court has considered a challenge specifically under the

Code, and there, the Supreme Court considered a challenge to a specific discriminatory act—not a purportedly discriminatory law. *Id.* Here, unlike in *Jones*, there is no specific act of discrimination. *See supra* Section I. Plaintiffs cite no authority where a court has struck down an entire statute because it "violates the Code." Dkt. 42 ¶ 110. To the extent the Plaintiffs rely on their MHRA arguments, these arguments likewise fail. *See supra* Section I.

This Court can fully resolve the merits of this dispute within the confines of Plaintiffs' constitutional claims, and it should do so rather than violating the axiomatic principle that past legislatures can't bind future ones. Accordingly, this Court must dismiss Plaintiffs' claim under both the MHRA and the Code.

CONCLUSION

Plaintiffs seek to use the MHRA and the Code as alternative bases for this Court to declare SB 280 invalid. But these challenges are inappropriate because these statutes only apply to challenges based on specific acts of discrimination. SB 280 is a duly enacted law, consistent with the Montana Constitution, the MHRA, the Code, and the relevant body of cases. For the reasons stated herein, and the reasons stated in Dkts. 24, 37, 51, and at the December 22, 2021 hearing, this Court must dismiss Plaintiffs' claims.

DATED this 4th day of March, 2022.

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