Hon. Shane A. Vannatta
District Court Judge, Dept. 5
Missoula County Courthouse
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Missoula, MT 59802-4292
(406) 258-4765

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

SARA BERNDT and BRYAN BERNDT, on behalf of their child, M.B., Plaintiffs/Petitioners, vs. THE MONTANA DEPARTMENT OF JUSTICE, MOTOR VEHICLE DIVISION, DRIVER SERVICES BUREAU; REBECCA CONNORS, individually and in her capacity as the Bureau Chief of the Montana Motor Vehicle Division; and LAURIE BAKRI, individually and in her capacity as Administrator of the Montana Motor Vehicle Division; AMY L.N.U., individually and in her capacity as an employee of the Missoula Branch of the Montana Motor Vehicles Division; MARK L.N.U., individually and in his capacity as the supervisor of the Missoula Branch of the Montana Motor Vehicles Division, Defendants/Respondents.	Dept. 5 Cause No.: DV-32-2024-393 OPINION & ORDER RE PETITION FOR JUDICIAL REVIEW

This matter comes before the Court upon *Plaintiffs' Petition for Judicial Review* ("Petition") (Dkt # 1) filed July 12, 2024. On February 20, 2025,

Respondents identified in the caption (collectively "DOJ") filed a Response to the Petition (Dkt # 33). On April 4, 2025, Petitioners Sara Berndt and Bryan Berndt on behalf of their child M.B. ("Petitioners," "the Berndts," or "M.B.") filed an Opening Brief (Dkt # 35). On April 21, 2025, the DOJ filed a Response (Dkt # 36). On June 4, 2025, Petitioners filed a Reply (Dkt # 39). Petitioners and Respondents filed supplemental authority (Dkt #s 40, 42). The Petition has been fully briefed.

On August 19, 2025, the Court heard oral argument. The Court has considered the Petition and the record before it and deems the matter submitted for ruling.

ORDER

Based upon the Opinion below, IT IS HEREBY ORDERED that the Montana Human Rights Commission ("MHRC") Final Agency Decision (Dkt # 1, Ex. A) is REVERSED; the case is REMANDED for reinstatement of the Hearing Officer's Administrative Decision ("Administrative Decision") (Dkt # 35, Ex. 2) as follows and unless otherwise stated:

1. Awarding the Berndts affirmative relief by requiring the MVD to issue M.B. a driver's license based on their application which includes a non-binary sex designation;
2. The Court reinstates the Administrative Decision Findings of Fact and Conclusions of Law as modified in this Opinion; and
3. The Court AFFIRMS Finding of Fact ("FOF") No. 19 in the Final Agency Decision.

IT IS FURTHER ORDERED that, based on Mont. Code Ann. §§ 49-2-512(3), 49-2-506(1)(a) and the following Opinion, the DOJ is PROHIBITED from denying driver's licenses to applicants who indicate their legal sex on the driver's license application (the applicant must still meet all other statutory application requirements).

OPINION

I. Procedural/Factual Background.

M.B. possesses a Montana birth certificate issued by the Department of Public Health and Human Services ("DPHHS") identifying their 'sex' as non-binary ("NB"). (Dkt # 35, Ex. 1, June 14, 2023, Dept. of Labor and Industry, Office of Administrative Hearings, Order on Cross Motions for Summary Judgment ("OAH MSJ Order"), ¶¶ 1, 7) (Dkt # 35, Ex. 2, December 26, 2023, Administrative Decision, ¶¶ 1, 17) (Dkt # 1, Ex. A, June 13, 2024, MHRC Final Agency Decision, p. 6, not modifying FOF 1-18 and 21-27[1]) (Dkt # 35, Ex. 5, July 19, 2023 administrative hearing transcript, 36:7-10) (Dkt # 36, p. 3).

On April 22, 2022, M.B. appeared for a scheduled appointment with the Motor Vehicles Division ("MVD") in Missoula to take the practical driving test and passed (after already having passed an approved Montana Traffic Education Course and being issued a Montana Learner License). (Dkt # 35, Ex. 1, p. 2, ¶¶ 3, 4, 5) (Dkt # 35, Ex. 2, p. 3, ¶¶ 14, 15, 16) (Final Agency Decision, FOF adopted).

[1] The Court abbreviates this citation to state, "Final Agency Decision, FOF adopted."

M.B. had a photograph taken and provided the required payment. (Dkt # 35, Ex. 1, p. 2, ¶ 5) (Dkt # 35, Ex. 2, p. 3, ¶ 16) (Final Agency Decision, FOF adopted).

On the portion of the application form that requires the applicant to identify their sex there are only two boxes – male or female – and when completing the sex portion of the form, Petitioners hand wrote "NB" to correspond to the actual sex listed on M.B.'s Montana birth certificate. (Dkt # 35, Ex. 1, p. 2, ¶ 7) (Dkt # 35, Ex. 2, p. 3, ¶¶ 17, 18) (Final Agency Decision, FOF adopted).

As of December 26, 2023, when the Administrative Decision was entered, the MVD utilized a third-party vendor called IDEMIA to produce the physical licenses that are issued to Montana drivers. (Dkt # 35, Ex. 2, p. 2, ¶ 3) (Final Agency Decision, FOF adopted). IDEMIA provides the cameras and computer program that the MVD uses to create licenses. (Dkt # 35, Ex. 2, p. 2 ¶ 3) (Final Agency Decision, FOF adopted). To utilize the IDEMIA system, the MVD's staff input the information contained in the driver's license application into the IDEMIA system. (Dkt # 35, Ex. 2, p. 2, ¶ 4) (Final Agency Decision, FOF adopted).

The application for a driver's license is matched to each input necessary for the IDEMIA system. (Dkt # 35, Ex. 2, ¶ 5) (Final Agency Decision, FOF adopted). Thus, if the applicant does not fill out or cannot complete any portion of the application, the IDEMIA system will not process the application. (Dkt # 35, Ex. 2, p. 2, ¶ 5) (Final Agency Decision, FOF adopted). Once the application information is input into the IDEMIA system, the system creates a temporary license that can be printed out and provided to the licensee. (Dkt # 35, Ex. 2, p. 2, ¶ 6) (Final

Agency Decision, FOF adopted). IDEMIA then creates a physical license, using all the licensee's information contained in their application, which is mailed to the licensee. (Dkt # 35, Ex. 2, p. 2, ¶ 6) (Final Agency Decision, FOF adopted).

The version of the IDEMIA system that the MVD used, as of December 26, 2023, only has two sex designations: male and female. (Dkt # 35, Ex. 2, p. 2, ¶ 7) (Final Agency Decision, FOF adopted). The MVD did not have the ability to enter a non-binary or other non-traditional sex designation into the version of the IDEMIA system that the MVD operated at the time. (Dkt # 35, Ex. 2, p. 3, ¶ 8) (Final Agency Decision, FOF adopted).

The MVD inquired with IDEMIA in 2022 about the possibility of changing the system to include a non-binary sex designation. (Dkt # 35, Ex. 2, p. 3, ¶ 9) (Final Agency Decision, FOF adopted). This would have allowed the MVD to input a licensee's sex designation as non-binary and have it displayed on the licensee's license. (Dkt # 35, Ex. 2, p. 3, ¶ 9) (Final Agency Decision, FOF adopted). At that time, IDEMIA quoted the MVD an approximate figure of $50,000.00 for the programming change to allow for a non-binary sex designation. (Dkt # 35, Ex. 2, p. 3, ¶ 10) (Final Agency Decision, FOF adopted). Despite receiving this quote, the MVD (as of December 26, 2023) did not make any arrangements to have the IDEMIA system altered to allow for a non-binary sex designation. (Dkt # 35, Ex. 2, p .3, ¶ 11) (Final Agency Decision, FOF adopted).

Recent to the December 26, 2023 Administrative Decision, the MVD contracted to change to a system called CARS, which cost the MVD approximately

$100,000.00. (Dkt # 35, Ex. 2, p. 3, ¶ 12) (Final Agency Decision, FOF adopted). Despite changing to that new system, the MVD (as of December 26, 2023) had not requested that a non-binary sex designation be included with the program change even though it would be possible. (Dkt # 35, Ex. 2, p. 3, ¶ 12) (Final Agency Decision, FOF adopted). The MVD estimated that it would cost between $30,000.00 to $40,000.00 in programming costs to make the change to CARS to allow for a non-binary designation. (Dkt # 35, Ex. 2, p. 3, ¶ 13) (Final Agency Decision, FOF adopted).

On or about April 22, 2022, the MVD informed M.B. that the department was in the process of updating its forms to include an option for non-binary individuals, but that the update would not be completed for approximately a year. (Dkt # 35, Ex. 1, p. 2, ¶ 8) (Dkt # 35, Ex. 2, p. 4, ¶ 19) (Dkt # 1, Ex. A, Final Agency Decision, p. 6, ¶ 19 modifying to one employee of MVD informed M.B.).

The MVD refused to issue a driver's license to M.B. (Dkt # 35, Ex. 1, p. 2, ¶ 9) (Dkt # 35, Ex. 2, p. 4, ¶ 20) (Dkt # 1, Ex. A, p. 6, ¶ 20).

Following the April 22, 2022 appointment, M.B.'s parents contacted MVD Bureau Chief Rebecca Connors to discuss the situation. (Dkt # 35, Ex. 1, p. 2, ¶ 10) (Dkt # 35, Ex. 2, p. 4, ¶ 21) (Final Agency Decision, FOF adopted). On April 27, 2022, they spoke with Ms. Connors who informed them that no Montana driver's license had ever been issued to a non-binary person. (Dkt # 35, Ex. 1, p. 2, ¶ 11) (Dkt # 35, Ex. 2, p. 4, ¶ 22) (Final Agency Decision, FOF adopted).

On May 25, 2022, counsel for M.B. spoke with Derek Oestreicher who

informed M.B.'s counsel that the MVD would not issue a Montana driver's license unless M.B. listed their "biological sex," as opposed to their "legal sex," on the application form, and that the sex listed on M.B.'s Montana birth certificate is not M.B.'s biological sex. (Dkt # 35, Ex. 1, p. 2, ¶ 12) (Dkt # 35, Ex. 2, p. 4, ¶ 23) (Final Agency Decision, FOF adopted).

On July 20, 2022, the Berndts filed a verified complaint with the Montana Human Rights Bureau ("MHRB"). (Dkt # 35, Ex. 3, Verified Complaint) (Dkt # 35, Ex. 2, p. 4, ¶ 24) (Final Agency Decision, FOF adopted).

On January 17, 2023, the MHRB entered its Final Investigative Report, finding reasonable cause to believe unlawful discrimination occurred as alleged in the complaint. (Dkt # 35, Ex. 4, Final Investigative Report).

On June 14, 2023, the Hearing Officer granted summary judgment on liability in favor of the Berndts on the basis that no genuine issue of material fact existed regarding whether the MVD discriminated against M.B. on the basis of sex when it refused to issue a driver's license to M.B. because it would not accept a non-binary sex designation on M.B.'s license application. (Dkt # 35, Ex. 1, OAH MSJ Order) (Dkt # 35, Ex. 2, p. 4, ¶ 25) (Final Agency Decision, FOF adopted).

On July 19, 2023, the Hearing Officer convened the contested hearing on the issue of what damages, if any, the discrimination by the MVD has caused M.B. (Dkt # 35, Ex. 1, p. 7) (Dkt # 35, Ex. 2, p. 4, ¶ 26) (Final Agency Decision, FOF adopted). M.B.'s application for driver's license was admitted by stipulation. (Dkt # 35, Ex. 5, 7:22-8:15).

On December 26, 2023, the Hearing Officer issued the Administrative Decision on the Berndts' complaint. (Dkt # 35, Ex. 2, Administrative Decision). Therein, the Hearing Officer entered FOF (1 – 27) and Conclusions of Law ("COL") (1 – 7). (Id., p. 2-4, 12). The Hearing Officer awarded the Berndts affirmative relief ordering the MVD to issue M.B. a Montana driver's license with a non-binary sex designation. (Id., p. 12).

The DOJ appealed the Hearing Officer's decision to the MHRC. (Final Agency Decision, p. 2). The MHRC considered the matter on March 21, 2024. (Id.).

On June 13, 2024, the MHRC issued a Final Agency Decision modifying FOF 19, 20 and COL 2-7 of the Administrative Decision concluding that the DOJ is the prevailing party in the matter. (Final Agency Decision, p. 6-7).

On July 12, 2024, Petitioners filed the Petition for Judicial Review (Dkt # 1).

II. Legal Standard.

The Court's judicial review of the Final Agency Decision must be confined to the record. Mont. Code Ann. § 2-4-704(1).

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
>
> (a) the administrative findings, inferences, conclusions, or decisions are:
>
> (i) in violation of constitutional or statutory provisions;
>
> (ii) in excess of the statutory authority of the agency;
>
> (iii) made upon unlawful procedure;

> (iv) affected by other error of law;
> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;

Mont. Code Ann. § 2-4-704(2)(a). "[C]ourts are limited to 'review[ing] the entire record to determine whether the agency's findings of fact are clearly erroneous and whether its determinations of law are correct.'" *Norval Elec. Coop., Inc. v. Lawson*, 2022 MT 245, ¶ 22, 411 Mont. 77, 89, 523 P.3d 5, 14-15 (citation omitted).

III. Legal Analysis.

Petitioners ask the Court to review the Final Agency Decision of the MHRC pursuant to Mont. Code Ann. § 2-4-704 seeking relief including reinstating the Hearing Officer's order of affirmative relief. The DOJ contends that the Court should affirm the Final Agency Decision because the MHRC's findings of fact are not clearly erroneous and the conclusions of law are correct.

A. Whether the FOF in the Final Agency Decision are clearly erroneous.

The parties do not discuss whether FOF No. 19 is disputed, therefore the Court does not address whether it is erroneous and affirms FOF No. 19 in the Final Agency Decision.

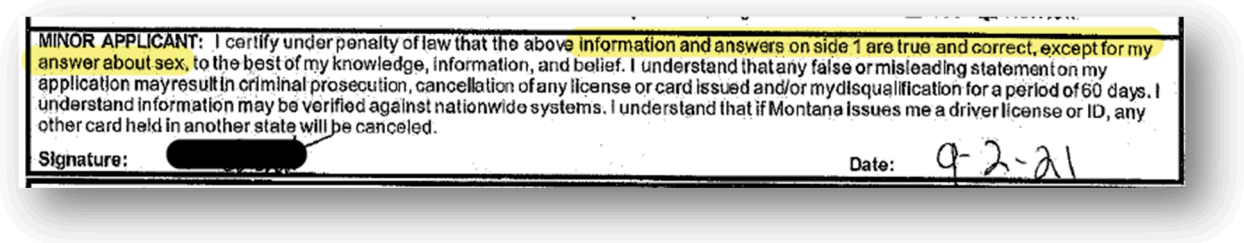
The parties dispute whether the following modified FOF No. 20 is erroneous.

> 20. MVD refused to issue a driver's license to M.B. because M.B.'s application form ~~could~~ was not ~~be~~ completed and entered into the IDEMIA system.

(Final Agency Decision, FOF).

Petitioners assert that this amended finding is erroneous because it ignores the fact that M.B. could not complete the application by choosing either the 'male' or 'female' box because of M.B.'s non-binary status. The DOJ contends that this amended finding is accurate because M.B. failed to complete a driver's license application, preventing MVD from processing the application and entering it into the IDEMIA system, and therefore M.B. was not a qualified applicant.

At oral argument, the DOJ presented M.B.'s application and Petitioners did not dispute the veracity of the form or application[2]. The DOJ argued that the following section of the application form supports its position that M.B. did not complete the form when M.B. did not mark the box 'male' or 'female'.



MINOR APPLICANT: I certify under penalty of law that the above information and answers on side 1 are true and correct, except for my answer about sex, to the best of my knowledge, information, and belief. I understand that any false or misleading statement on my application may result in criminal prosecution, cancellation of any license or card issued and/or my disqualification for a period of 60 days. I understand information may be verified against nationwide systems. I understand that if Montana issues me a driver license or ID, any other card held in another state will be canceled.

Signature: [redacted] **Date:** 9-2-21

(Application, p. 2).

M.B.'s birth certificate issued by the DPHHS in 2021 in accordance with the law indicates M.B.'s NB status. The MVD provided M.B. with an application that only had an option for M.B. to mark a box 'male' or 'female' in the 'sex' portion on page 1. M.B. hand wrote 'NB' in the 'sex' portion on the application instead of marking either box. The Final Agency Decision states, "On the application, *M.B.*

[2] At the July 19, 2023 hearing, M.B.'s application was admitted by stipulation.

listed sex as "NB" to mean "non-binary."" (Final Agency Decision, p. 1) (*emphasis* added). Here, the MHRC acknowledges M.B.'s act of completing the form (providing information in the 'sex' portion of the application). The DOJ's contention that M.B. did not complete the application is inaccurate. M.B. accurately completed the form, but in doing so did not mark a box 'male' or 'female'.

The MHRC states in the Final Agency Decision, "The Montana Code governing applications for driver's licenses requires an applicant to provide a *sex designation of either male or female*. MCA § 61-5-107(2)." (Final Agency Decision, p. 1) (*emphasis* added). This description of the statute is incorrect.

"Each application for a learner license, driver's license, commercial driver's license, or motorcycle endorsement must be made on a form furnished by the department." Mont. Code Ann. § 61-5-107(1) (2021). "Each application must include the full *legal* name, date of birth, sex, residence address of the applicant [and the applicant's social security number], must include a brief description of the applicant, and must provide the following additional information." Mont. Code Ann. § 61-5-107(2) (2021) (*emphasis* added).

> In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Mont. Code Ann. § 1-2-101 (2021).

The language of Mont. Code Ann. § 61-5-107(2) is clear. The word 'legal' modifies: name, date of birth, sex, residence [and social security number]. If the application is only required to include the legal name but not the legal date of birth this would be an absurd result; 'legal' modifies each piece of personally identifiable information that the applicant must include. The statute's requirements are that each application:

> -must include the full legal name, legal date of birth, etc.,
> -and must include a brief description of the applicant,
> -and must provide additional information.

The statute therefore requires the application to include the *legal* sex. The statute does not require that only the options of 'male' and 'female' are allowed to be included in the application. The MHRC's interpretation of this statute is an error of law.

Furthermore, the DOJ does not cite to law that only an applicant that can indicate that they are either male or female is a 'qualified' applicant.

"The department, upon receipt of payment of the fees specified in this section, shall issue a driver's license to each *qualifying* applicant." Mont. Code Ann. § 61-5-111(2)(a) (2021) (*emphasis* added).

> The license must contain:
> (i) a full-face photograph of the licensee in the size and form prescribed by the department;
> (ii) a distinguishing number issued to the licensee;
> (iii) the full legal name, date of birth, and Montana residence address unless the licensee requests use of the mailing address, except that the Montana residence address must be used for a REAL ID-compliant driver's license unless authorized by department rule;

> (iv) a brief description of the licensee;
> (v) either the licensee's customary manual signature or a reproduction of the licensee's customary manual signature; and
> (vi) if the applicant qualifies under subsection (7), indication of the applicant's status as a veteran.

Mont. Code Ann. § 61-5-111(2)(a)(i-vi) (2021). 'Sex' is not required to be shown on the license. 'Qualifying' is not defined in the definition section at Mont. Code Ann. § 61-5-119 (2021). 'Non-binary' is not included in those to whom the department may *not* issue a license at Mont. Code Ann. § 61-5-105 (2021).

The DOJ's position that M.B. was not a 'qualified' applicant because M.B. did not select 'male' or 'female' when M.B.'s Montana issued birth certificate states 'NB', is not supported by the evidence or statutes. Furthermore, whether the MVD could enter M.B.'s 'sex' information of NB into the IDEMIA system is not determinative of M.B.'s qualifications as an applicant. MB accurately completed the form. It was the MVD that did not accept the NB designation (M.B.'s legal sex) and that did not enter the information in the system.

The minor applicant certification excerpt above does not support the DOJ's position. Instead, the fact that the answer about sex is exempt from the minor's certification shows an ambiguity in the form. Mont. Code Ann. § 61-5-107(2) requires that the application include the applicant's legal sex on the form, but the DOJ's reliance on the exemption suggests that the accuracy of the sex designation that a minor provides in the 'sex' section does not matter. If the sex designation does not have to be true and correct, then the information can hardly be considered

necessary and/or required at all to determine a minor applicant's qualifications to obtain a license.

The Court determines that the amended FOF 20 in the Final Agency Decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and the conclusions are affected by other error of law. (Mont. Code Ann. § 2-4-704(2)(a)(iv)(v)). M.B. did accurately complete the application form (consistent with their Montana birth certificate – indicating their legal sex), but the MVD did not enter the form into the IDEMIA system because M.B. did not mark the box 'male' or 'female'. In failing to enter the form into the system, the MVD refused to issue M.B. a driver's license which prejudices M.B.'s substantial rights.

The Court further finds that the following modification of Administrative Decision FOF 20 is not erroneous: (additions underlined; ~~deletions stricken~~)

> 20. MVD refused to issue a driver's license to M.B. because M.B.'s accurately completed application form ~~could not be completed and~~ was not entered into the IDEMIA system.

B. Whether M.B.'s substantial rights have been prejudiced because the COL in the Final Agency Decision are in violation of constitutional provisions.

The Petitioners contend that this is a statutory violations case. However, the Court must also address violations of constitutional provisions because constitutional supremacy prohibits statutory interpretation that disregards the protections afforded by the Montana Constitution.

1. Constitutional Supremacy.

The Montana Supreme Court has addressed the supremacy of the Montana Constitution consistently and definitively.

> The supremacy of constitutional mandates is too well established to require citation. This principle is summarized in 16 Am.Jur.2d, Constitutional Law, § 56:
>
> "A written constitution is not only the direct and basic expression of the sovereign will, it is also the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it, and must control as it is written until it is changed by the authority which established it. No function of government can be discharged in disregard of or in opposition to the fundamental law. The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations."

Gen. Agric. Corp. v. Moore, 166 Mont. 510, 515-16, 534 P.2d 859, 862-63 (1975).

> Certainly, this Court and our subordinate district courts have exclusive power and authority in justiciable cases to determine the meaning and proper application of constitutional and statutory law, and to review legislative and executive acts for conformance with applicable constitutional provisions. *See* Mont. Const. arts. III, § 1, and VII, §§ 1, (2)(a), and (4)(1); *Larson v. State*, 2019 MT 28, ¶ 42, 394 Mont. 167, 434 P.3d 241; *Best v. City of Billings Police Dep't*, 2000 MT 97, ¶ 16, 299 Mont. 247, 999 P.2d 334; *State v. Finley*, 276 Mont. 126, 134-35, 915 P.2d 208, 214 (1996), *overruled in part on other grounds by State v. Gallagher*, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817; *General Agric. Corp. v. Moore*, 166 Mont. 510, 515-16, 534 P.2d 859, 862-63 (1975) (discussing "supremacy of constitutional mandates" and that no governmental function "can be discharged in disregard of" or

> "beyond" constitutional "limitations"—citation omitted); *Marbury v. Madison*, 5 U.S. 137, 167 and 177-79, 2 L. Ed. 60, 70 and 71-75 (1803) ("[i]t is emphatically the province and duty" of the judicial branch to determine "what the law is," "interpret" its meaning, determine how it applies in "particular cases," and, in the case of constitutional apportionment of government power, review whether government acts or enactments comport and "conform[]" with applicable constitutional provisions).

City of Great Falls v. Int'l Ass'n of Fire Fighters, 2024 MT 302, ¶ 20, 419 Mont. 262, 282, 560 P.3d 621, 632 (emphasis added).

> 2. Constitutional Provisions.
>
> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Mont. Const. art II, § 4 (emphasis added). "The equal protection clause requires that 'all persons be treated alike under like circumstances.'" *Schmill v. Liberty Nw. Ins. Corp.*, 2003 MT 80, ¶ 24, 315 Mont. 51, 54, 67 P.3d 290, 292 (citation omitted); *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 29, 418 Mont. 253, 275, 557 P.3d 440, 458 (Persons similarly situated are to receive like treatment). "The principal purpose of [Montana's] Equal Protection Clause is 'to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action.'" *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 18, 402 Mont. 277, ¶ 18, 477 P.3d 1065, ¶ 18.

> When resolving disputes of constitutional construction, we apply the rules of statutory construction and give a broad and liberal interpretation to the Constitution. The intent of the framers of the Constitution controls and is determined from the plain language of the words used.

Willems v. State, 2014 MT 82, ¶ 17, 374 Mont. 343, 348, 325 P.3d 1204, 1208 (citation omitted).

> [O]ur canons of constitutional construction require that we treat each separate clause as both substantively meaningful and not redundant. 'In construing a constitutional provision it is our duty to give meaning to every word, phrase, clause, and sentence therein, if it is possible so to do.'

Snetsinger, ¶ 72 (Nelson, J. specifically concurring) (citing *State ex rel. Diederichs v. State Highway Comm'n* (1931), 89 Mont. 205, 211, 296 P. 1033, 1035).

"The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people." Mont. Const. art. II, § 34.

3. Violation of the Montana Equal Protection Clause.

In advancing arguments and analysis regarding statutory violations, the parties do not address violations of the Montana Constitution. Because those statutes (addressed below) cannot be construed in a manner that disregards M.B.'s rights under the Montana Constitution, the Court addresses the violation of the equal protection clause here.

"As with federal case law, this Court's jurisprudence has never acknowledged gender orientation as a suspect class." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 62, 325 Mont. 148, 167-68, 104 P.3d 445, 458 (Nelson, J.

specially concurring). "Sexual and gender orientation is not considered a "suspect class" and discrimination so based does not merit strict scrutiny/compelling interest analysis under federal law." *Snetsinger*, ¶ 61 (Nelson, J., specially concurring) (emphasis added) (citations omitted).

However, "Article II, Section 4, of the Montana Constitution provides even more individual protection than does the Fourteenth Amendment to the U.S. Constitution." *Planned Parenthood of Mont.*, ¶ 29; *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, ¶ 15, 104 P.3d 445, ¶ 15. Despite Montana's more expansive individual protections, Montana's equal protection jurisprudence largely follows *federal* law. *Snetsinger*, ¶ 62 (Nelson, J., specially concurring) (*emphasis* added). Justice McKinnon also noted the absence of jurisprudence addressing the equal protection clause in the Montana Constitution.

> Federal cases currently being litigated on equal protection grounds (regarding gender-affirming care) "are instructive in certain ways, but they cannot answer what this Court is being asked: how sex/gender discrimination and suspect class discrimination should be handled under the unique equal protection provision of the *Montana* Constitution.

Cross v. State, 2024 MT 303, ¶ 60, 419 Mont. 290, 317, 560 P.3d 637, 655 (McKinnon, J., concurring).

"There is no good reason why we should not begin to afford all Montanans the full protections intended by the framers when they adopted Article II, Section 4." *Snetsinger*, ¶ 69 (Nelson, J., specially concurring).

> Indeed, Delegate Wade Dahood, chair of the Committee, stated: "the intent of Section 4 is simply to provide that every

> individual in the State of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1643.

Id., ¶ 78 (Nelson, J., specially concurring).

> [I]t has been the law in Montana for two decades that [a] suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *In re C.H.* (1984), 210 Mont. 184, 198, 683 P.2d 931, 938 (quoting *San Antonio School District v. Rodriguez* (1973), 411 U.S. 1, 28, 93 S. Ct. 1278, 1294, 36 L. Ed. 2d 16).

Id., ¶ 85 (Nelson, J., specially concurring). Transgender Montanans have been subjected to such a history of purposeful unequal treatment and have been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

While the Montana Supreme Court majority has declined to take up such a Montana equal protection clause analysis, Justice Nelson and Justice McKinnon have concluded in concurring opinions that gender orientation and/or transgender status is a suspect class for the purposes of equal protection analysis under the Montana Constitution. This Court agrees. “Laws based on gender orientation are palpably sex-based and are, therefore, suspect classifications under conventional equal protection analysis.” *Snetsinger*, ¶ 83 (Nelson, J., specially concurring) (*See also*, *Cross*, ¶ 65, (McKinnon, J., concurring) (“[T]ransgender persons comprise a suspect class”)).

The intent and purpose of Montana's equal protection clause is to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action and to require that all persons are to be treated alike under like circumstances. (*Hensley*, ¶ 18) (*Schmill*, ¶ 24). The intent of the framers of the Montana Constitution can be determined from the plain language of Mont. Const. art II, § 4, "No person shall be denied the equal protection of the laws." (emphasis added) (*Willems*, ¶ 17) (*Snetsinger*, ¶ 78 (Nelson, J., specially concurring) quoting Delegate Wade Dahood)).

The State of Montana issued M.B. a birth certificate with designation of NB. Then the DMV denied M.B. the ability to obtain a driver's license when they listed their legal sex as NB while, at the same time, allowing applicants who list their legal sex as either male or female to obtain a driver's license. This is arbitrary and discriminatory state action that does not treat all applicants for a driver's license alike under like circumstances and therefore it is unlawful under Montana's equal protection clause. M.B.'s substantial rights have been prejudiced because the Final Agency Decision COL No. 3 violates the Montana Constitution equal protection clause. (Mont. Code Ann. § 2-4-704(2)(a)(i)). M.B. is entitled to equal protection under the Montana Constitution in applying for a driver's license which cannot be disregarded by an adverse interpretation of applicable statutes.

C. Whether M.B.'s substantial rights have been prejudiced because the COL in the Final Agency Decision are in violation of statutory provisions.

The Legislature implements the following statutory prohibitions/ requirements,

> A state or local governmental agency may not grant, deny, or revoke the license or charter of a person on the grounds of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin. Each state or local governmental agency *shall take appropriate action* in the exercise of its licensing or regulatory power *as will assure equal treatment of all persons, eliminate discrimination, and enforce compliance with the policy of this chapter*.

Mont. Code Ann. § 49-3-204(1) (2021) (*emphasis* added).

1. Final Agency Decision COL No. 3.

In the Final Agency Decision, the MHRC did not adopt the following COL from the Administrative Decision.

> 2. M.B. is a member of a protected class within the meaning of the Montana Human Rights Act on the basis of sex, as the 2021 version of that term included non-binary gender identity. See e.g. *Bostock v. Clayton County, Georgia*, 590 U.S. 140, 140 S. Ct. 1731 (2020).

(Administrative Decision, COL). Instead, the MRHC modified the COL as follows,

> 3. M.B. is not a member of a protected class within the meaning of the 2021 version of the Montana Human Rights Act on the basis of sex. ~~as the 2021 version of that term included non-binary gender identity. See e.g. Bostock v. Clayton County, Georgia, 590 U.S. 140, 140 S. Ct. 1731 (2020).~~

(Id.). These conclusions address the Montana Constitution equal protection clause. The parties dispute whether the Final Agency Decision's modified COL No. 3 is correct.

The Petitioners contend that this conclusion is wrong on its face. They argue that M.B.'s non-binary gender identity has already been recognized by the State of Montana on their birth certificate. Thus, the State itself recognized non-binary as a sex classification when they included non-binary on M.B.'s birth certificate.

Above, the Court discusses the violation of the equal protection clause of the Montana Constitution. Likewise, Mont. Code Ann. § 49-3-204(1) requires that each state governmental agency shall take appropriate action in the exercise of its licensing or regulatory power as will assure *equal treatment of all persons*. The Court's analysis and conclusions above regarding the equal protection clause of the Montana Constitution are equally applicable to this statutory requirement of equal treatment of all persons and the Court adopts them here.

The Court discusses above, regarding FOF No. 20, that M.B.'s legal sex as recognized by the State of Montana is NB. M.B. is a member of a protected class within the meaning of the MHRA on the grounds of sex. In this regard, M.B.'s substantial rights have been prejudiced because the following modification in COL No. 3 is a violation of the statutory requirement of Mont. Code Ann. § 49-3-204(1) that the MVD assure equal treatment of all persons. "M.B. is <u>not</u> a member of a protected class within the meaning of the <u>2021 version of the</u> Montana Human Rights Act on the basis of sex." (Mont. Code Ann. § 2-4-704(2)(a)(i)).

The Court further concludes that the following modification of Administrative Decision COL No. 2 is not a statutory violation: (<u>additions underlined</u>; ~~deletions stricken~~)

> 2. M.B. is a member of a protected class within the meaning of the 2021 Montana Human Rights Act on the basis of sex~~, as the 2021 version of that term included non-binary gender identity~~. See e.g. *Bostock v. Clayton County, Georgia*, 590 U.S. 140, 140 S. Ct. 1731 (2020).

The Court addresses *Bostock* below.

The Court's ruling regarding FOF No. 20 and COL No. 3 [and rejected Administrative Decision COL 4 below] alone supports reversing the MHRC Final Agency Decision and reinstating the Hearing Officer's Administrative Decision (as modified by the Court). However, the Court addresses below the parties' primary arguments (the statutes that implicate the third clause of Montana Constitution, Art. II, § 4, Montana case law, and the *Bostock* case) in so far is necessary to rule on the additional COL in the Final Agency Decision on M.B.'s discrimination claim. The Court restricts its analysis to the protections afforded M.B., to whom the State of Montana issued a birth certificate indicating M.B.'s legal sex to be NB.

2. Final Agency Decision COL No. 2 and rejection of Administrative Decision COL No. 3.

The parties dispute whether the following modified COL in the Final Agency Decision are in violation of Mont. Code Ann. § 49-2-308(1)(a) (2021).

> 2. The term sex within the meaning of the 2021 version of the Montana Human Rights Act does not include gender identity.
>
> ~~3. The MHRA prohibits discrimination in governmental services based upon sex, including gender identity under the 2021 version of the statute. Mont. Code Ann. § 49-2-308 (2021).~~

(Final Agency Decision, COL).

The parties primarily address the following MHRA statute.

> (1) It is an *unlawful discriminatory practice* for the state or any of its political subdivisions:
> (a) to refuse, withhold from, or *deny* to a person any local, state, or federal funds, services, goods, facilities, advantages, or *privileges* *because of* race, creed, religion, *sex*, marital status, color, age, physical or mental disability, or national origin, unless based on reasonable grounds;

Mont. Code Ann. § 49-2-308(1)(a) (2021) (*emphasis* added). Here, the Legislature implemented in the MHRA the protections of the third clause of Article II, Section 4 of the Montana Constitution which provides, "Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Mont. Const. art II, § 4.

The MHRC relies heavily on the dictionary definition of 'sex,' rebuts the Hearing Officer's legislative history analysis, disputes the application of *Bostock*, and propounds that *Bachmeier*, *Campbell*, *Snetsinger*, and *Mountain States* are Montana precedent that a protected class is either male or female. The DOJ argues that the MHRC's statutory construction analysis via *Giacomelli* is correct.

"When the legislature has not defined a statutory term, we consider the term to have its plain and ordinary meaning." *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 19-20, 221 P.3d 666, 669-70 (citation omitted). "To determine the meaning of a statutorily undefined term, we may consider dictionary definitions, [ ], prior case law, [ ], *and the larger statutory scheme in which the term appears*, [ ]". *Id.* (internal citations omitted) (*emphasis* added). "We may also

consider similar statutes from other jurisdictions and legislative history for guidance in interpreting a statute." *Id.* (citations omitted). Pursuant to *Giacomelli*, the Court may consider dictionary definitions, prior case law, the larger statutory scheme, and may also consider legislative history. *Giacomelli* does not hold that dictionary definitions are the predominant consideration when determining a statutorily undefined term.

The State of Montana issued M.B. a birth certificate indicating their legal sex of NB. Therefore, here, a dictionary definition of sex is not required to give effect to the larger statutory scheme in which 'sex' appears in the above statute. The plain language of the statute is that it is unlawful discriminatory practice for the state to deny a person privileges *because of sex* unless based on reasonable grounds. The larger statutory scheme mandates that it is unlawful discriminatory practice to refuse a person privileges no matter their sex, no matter their marital status, no matter their religion, etc.' This consideration of the larger statutory scheme gives meaning to the prohibition of discrimination in the MHRA, the third clause of Article II, Section 4 of the Montana Constitution, and Montana's equal protection clause. Furthermore, this statutory scheme does not impede the exemption included by the Legislature, 'unless based on reasonable grounds.'

Contrary to the DOJ's contention, Montana case precedent in *Bachmeier*, *Campbell*, *Snetsinger*, and *Mountain States* does not require the Court to apply a dictionary definition of 'sex' here.

The DOJ argues that the Montana Supreme Court has never expanded the meaning of sex to include differential treatment because of subjective gender identity (Dkt # 36, p. 6) and relies on the following. "To establish a claim [of sexual harassment], a claimant first must establish membership in a protected class, *either male or female*." *Mont. State Univ.-Northern v. Bachmeier*, 2021 MT 26, ¶ 28, 403 Mont. 136, 149, 480 P.3d 233, 243 (citing, *Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶ 16, 322 Mont. 434, 438-39, 97 P.3d 546, 550, "In a sexual harassment scenario, only two classes are possible, male and female.") (*emphasis* added).

However, in this same paragraph the court also states,

> Importantly, "neither proof of sexual desire nor proof of sexual stereotyping is required to establish discrimination based on sex." *Campbell*, ¶ 21. Instead, the "normal definition" of discrimination is "differential treatment." *Babb v. Wilkie*, U.S. , 140 S. Ct. 1168, 1173, 206 L. Ed. 2d 432 (2020) (quoting *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 174, 125 S. Ct. 1497, 1504, 161 L. Ed. 2d 361 (2005)).

Id. (emphasis added). While these subsequently cited conclusions do not address the only two classes 'male' 'female' position taken by the DOJ, these conclusions do place emphasis on differential treatment being prohibited and establishing discrimination based on sex. The *Bachmeier* court further held, "Put another way, the statute [49-2-303(1)(a)] 'prohibits discrimination in employment practices based on a person's sex when the demands of the position do not warrant a sex distinction.'" *Id.*, ¶ 27 (citing *Campbell*, ¶ 13).

The DOJ also relies on the following in *Snetsinger*. "As with federal case law, this Court's jurisprudence has never acknowledged gender orientation as a suspect class." *Snetsinger*, ¶ 62 (Nelson, J. specifically concurring). However, as the Court discusses above regarding violations of Montana's equal protection clause, despite Montana's more expansive individual protections, Montana's equal protection jurisprudence largely follows *federal* law. *Id.* (Nelson, J., specially concurring) (*emphasis* added). Justice Nelson concludes that, "Laws based on gender orientation are palpably sex-based and are, therefore, suspect classifications under conventional equal protection analysis." *Id.*, ¶ 83 (Nelson, J., specially concurring) (emphasis added).

The DOJ's reliance on *Mountain States* is inapposite. In *Mountain States*, the court's analysis involved whether distinctions based on pregnancy are sex linked classifications. *Mountain States Tel. & Tel. Co. v. Comm'r of Labor & Indus.*, 187 Mont. 22, 38-39, 608 P.2d 1047, 1056 (1979).

The precedent in *Bachmeier*, *Campbell*, and *Snetsinger* supports considering discrimination based on or because of or no matter the sex (the larger statutory scheme in which 'sex' appears in the above statute).

The federal decision in *Bostock* also supports the Court's conclusion that sex discrimination is a prohibition of discrimination based on sex or because of sex (no matter the sex). In fact, *Bostock* specifically addresses discrimination because of sex.

The DOJ argues the *Bostock* decision is inapplicable here because the *Bostock* court expressly limited the scope of its decision by paraphrasing the following,

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.

Bostock v. Clayton Cnty., 590 U.S. 644, 681, 140 S. Ct. 1731, 1753 (2020). The DOJ also argues the *Bostock* decision is inapplicable here because the court did not interpret the term 'sex' within the context of Mont. Code Ann. § 49-2-308. While *Bostock* does not specifically identify the MHRA, the *Bostock* court does specifically identify the issue before it as one to address discrimination because of sex, the precise words in Mont. Code Ann. § 49-2-308(1)(a).

> Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. 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*." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." *Burlington N. & S. F. R.*, 548 U. S., at 59, 126 S. Ct. 2405, 165 L. Ed. 2d 345. Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Id. (*emphasis* added).

The Petitioners contend that *Bostock* supports their position, relying on the following. "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.*, 590 U.S. at 660, 140 S. Ct. at 1741. The *Bostock* court provides explanations for this conclusion which are instructive here.

> Or take [for example] an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id.

> But unlike any of these other traits or actions, homosexuality and transgender status are *inextricably bound up with sex*. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Id., 590 U.S. at 660-61, 140 S. Ct. at 1742 (*emphasis* added).

The DOJ has not shown that the *Bostock* court's analysis, reasoning, and conclusions are inapplicable in this case. In fact, given that the Montana Constitution includes even greater protection than that afforded by Title VII, the reasoning and conclusions in *Bostock* are persuasive. While *Bostock* of course does not address the MHRA, the court does address discrimination because of sex and

concludes that discrimination based on transgender status is differential treatment because of their sex. In her concurring opinion in *Cross*, Justice McKinnon also found the logic in *Bostock* to be sound.

"[T]ransgender discrimination is, by nature, sex discrimination. This logic is supported in part by *Bostock v. Clayton County*, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), where the Supreme Court held that discrimination based on transgender status is sex discrimination." *Cross v. State*, 2024 MT 303, ¶ 63, 419 Mont. 290, 318, 560 P.3d 637, 655 (McKinnon, J., concurring).

> [T]he Montana Constitution's equal protection provision offers a critical distinction—like Title VII, it explicitly prohibits discrimination on the basis of sex. Thus, even if the Supreme Court limits *Bostock*'s recognition of transgender status-based sex discrimination to the Title VII context, the Montana Constitution is not limited in the same way. *Bostock*'s logic is sound: "[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."

Id. (quoting *Bostock*, 590 U.S. at 660, 140 S. Ct. at 1741).

Here, the Court must interpret Mont. Code Ann. § 49-2-308(1)(a) in the larger statutory scheme rather than applying a dictionary definition of the word 'sex.' The State of Montana already acknowledged M.B.'s legal sex as NB on their birth certificate. The MVD denied M.B. a driver's license because M.B. indicated their sex is NB. M.B.'s non-binary status is inextricably bound up with sex. In denying M.B. a driver's license, the MVD intentionally treated M.B. differently because of their sex.

M.B.'s substantial rights have been violated because the Final Agency Decision COL No. 2 and rejection of Administrative Decision COL No. 3 are in violation of Mont. Code Ann. § 49-2-308(1)(a) (2021). (Mont. Code Ann. § 2-4-704(2)(a)(i)).

The Court further concludes that the following modification of Administrative Decision COL No. 3 is not a violation of Mont. Code Ann. § 49-2-308(1)(a) (2021): (additions underlined; ~~deletions stricken~~)

> 3. The MHRA prohibits discrimination in governmental services based upon the legal sex, ~~including gender identity~~ under the 2021 version of the statute. Mont. Code Ann. § 49-2-308 (2021).
>
> 3. Final Agency Decision rejection of Administrative Decision COL No. 4.

The MHRC rejected the following.

> ~~4. Charging Parties proved, as a matter of law that the Department violated the MHRA and discriminated against M.B. when it refused to issue M.B. a driver's license due to M.B.'s inability to accurately state M.B.'s sex on the Department's driver's license application form. Mont. Code Ann. § 49-2-308(1) (2021).~~

(Final Agency Decision, COL).

The Court has ruled that the modified FOF No. 20 is erroneous and that the above COL are constitutional/statutory violations, therefore the rejection of this COL is also in violation of the MHRA. The Court further concludes that the following modification of Administrative Decision COL No. 4 is not a violation of the MHRA: (additions underlined; ~~deletions stricken~~)

> 4. Charging Parties proved, as a matter of law that the Department violated the MHRA and discriminated against M.B. when it refused to issue M.B. a driver's license because the MVD did not enter M.B.'s accurately completed application form into the IDEMIA system ~~due to M.B.'s inability to accurately state M.B.'s sex on the Department's driver's license application form~~. Mont. Code Ann. § 49-2-308(1) (2021).
>
> 4. Final Agency Decision rejection of Administrative Decision COL No. 5.

The MHRC rejected the following.

> ~~5. A mixed motive defense was not timely raised and does not apply to the facts of this matter.~~

(Final Agency Decision, COL).

The DOJ does not address the MHRC's rejection of this COL in its Response.

The Administrative Decision includes FOF regarding the capabilities and utilization of the IDEMIA system version the MVD used at the time of the decision and regarding changing the system to include an NB designation. (Administrative Decision, FOF ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11). It also includes FOF regarding the change to a system called CARS that could be programmed to allow for an NB designation, but the MVD had not requested that change. (Id., FOF ¶¶ 12, 13). The FOF also address that the MVD informed M.B. that the department was in the process of updating forms to include an option for non-binary individuals, but that the update would not be completed for approximately a year and that no Montana driver's license had ever been issued to a non-binary person.

(Id., FOF ¶¶ 19, 22). On May 25, 2022, counsel for M.B. spoke with Derek Oestreicher who informed M.B.'s counsel that the MVD would not issue a Montana driver's license unless M.B. listed their "biological sex," as opposed to their "legal sex," on the application form, and that the sex listed on M.B.'s Montana birth certificate is not M.B.'s biological sex. (Id., FOF ¶ 23).

The Administrative Decision includes analysis of whether the DOJ timely raised its mixed motive defense and whether the defense would be applicable under the facts at p. 5-9 of the decision. The Administrative Decision provides legal support for COL No. 5. Although concluding that the defense was untimely made, the OAH hearing officer took testimony regarding the defense. (*See* e.g., Dkt # 35, Ex. 5, July 19, 2023, OAH transcript of proceedings, Motor Vehicles Department Bureau Chief Rebecca Connors testimony, 17:12-18:1, 20:22-21:14, 25:24-26:18).

The Final Agency Decision does not address the mixed motive defense except indicating the Administrative Decision COL No. 5 is rejected. At the MHRC hearing, the commissioner discussion was only whether the defense was timely raised, "There was the affirmative defense provided sufficiently in advance of the order on the motion for summary judgment, and I believe the hearing officer erred on No. 5." (Dkt # 36, Ex. C, March 21, 2024, MHRC hearing transcript, 103:4-6; vote taken to reject the COL, 102:22-104:5). The MHRC modified only FOF No. 19 and 20 of the Administrative Decision and therefore adopted the FOF

addressed above. The Final Agency Decision rejecting the Administrative Decision COL 5 is not supported by the record.

M.B.'s substantial rights have been prejudiced by the MHRC rejection of Administrative Decision COL 5, because that rejection is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. (Mont. Code Ann. § 2-4-704(2)(a)(v)).

Like with their complaint filed with the MHRB (Dkt # 35, Ex. 3), the Petitioners seek only the following monetary relief, "Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, associated with this litigation." (Dkt # 1, p. 14).

5. Final Agency Decision rejection of Administrative Decision COL No. 6.
6. Final Agency Decision rejection of Administrative Decision COL No. 7 and modifying as Final Agency Decision COL No. 4.

The MHRC makes the following modifications in the Final Agency Decision.

~~6. M.B. is entitled to be issued a driver's license.~~

~~7.~~4. For purposes of Mont. Code Ann. § 49-2-505(8), ~~Charging Parties~~ Respondent is ~~are~~ the prevailing part~~ies~~y in this matter.

By operation of the Court's conclusions and rulings herein, the Administrative Decision COL 6 and 7 are reinstated.

ELECTRONICALLY SIGNED AND DATED BELOW.

c: Misty D. Gaubatz

Alex H. Rate
Marthe Y. VanSickle
Austin M. Knudsen/Alwin T. Lansing/Michael D. Russel/Thane P. Johnson/Michael Noonan