

Hon. Shane A. Vannatta
District Court Judge, Dept. 5
Missoula County Courthouse
200 W Broadway St
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,

v.

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-24-637

OPINION & ORDER DENYING
DEFENDANTS' MOTION TO
DISMISS

This matter comes before the Court upon *Defendants' Motion to Dismiss*
Plaintiffs' Petition for Judicial Review and brief in support ("Motion") (Dkt #s 13,

14) filed September 10, 2024. On October 8, 2024, Petitioners Sara Berndt and Bryan Berndt on behalf of their child M.B. (“Petitioners,” “Berndt,” or “M.B.”) filed a response (Dkt # 19). On October 22, 2024, Respondents identified in the caption (collectively “DOJ”) filed a reply (Dkt # 20). On December 9, 2024, Petitioners filed a Sur-Reply. (Dkt # 28). The Motion has been fully briefed. On January 24, 2025, the Court heard oral argument. The Court has considered the record before it and deems the matter submitted for ruling.

ORDER

Based upon the following Opinion, IT IS HEREBY ORDERED that *Defendants’ Motion to Dismiss Plaintiffs’ Petition for Judicial Review* (Dkt # 13) is DENIED.

OPINION

I. Procedural/Factual Background.

M.B. is the now adult child of Sara and Bryan Berndt. (Dkt # 1, ¶ 4). M.B. is non-binary, uses the pronouns “they” and “them,” and was a minor at the inception of this action. (Id., ¶¶ 4, 9).

On or about March 25, 2021, Petitioners sought to correct the sex listed on M.B.’s Montana birth certificate along with the name change granted by the Fourth Judicial District Court in an unrelated proceeding. (Id., ¶¶ 16, 17). Sara and Bryan completed the State’s Gender Designation Form in accordance with A.R.M. 37.8.311 (2017). (Id., ¶ 16). The State used that form to change the ‘sex’ on M.B.’s Montana birth certificate, and likely that of other individuals pursuant to A.R.M.

37.8.311. (Id., ¶ 18). M.B. possesses a Montana-issued birth certificate (Montana Certificate of Live Birth) identifying their ‘sex’ as non-binary. (Id., ¶¶ 4, 9).

On or about April 22, 2022, M.B. appeared for a scheduled appointment with the Motor Vehicles Division (MVD) in Missoula to take the practical driving test. (Id., ¶ 19). Prior to that, M.B. had taken and passed an approved Montana Traffic Education Course through Missoula Public Schools and was issued a Montana Learner License. (Id.). After passing the practical driving test at MVD, M.B. presented proof of completion of the Montana Traffic Education Course, had a photograph taken by an MVD employee, and attempted to complete the full application and provide the required payment necessary to obtain a Montana Driver’s License with full driving privileges. (Id., ¶ 20).

The application form presented M.B. with only two options: male or female, neither of which corresponds to the actual sex listed on M.B.’s Montana birth certificate or M.B.’s United States passport. (Id., ¶¶ 4, 22). Petitioners completed the written portion of the application duly writing in M.B.’s sex as “NB,” meaning non-binary. (Id., ¶ 21). The electronic portion of the application was completed by an MVD employee. (Id.).

The MVD denied M.B.’s application for a driver’s license because M.B. could not identify their sex as one of the two options provided in the application – male or female. (Id., ¶ 4). Therefore, the MVD did not provide M.B. with a driver’s license. (Id., ¶ 23). Although MVD learned that the computer program

they use to issue licenses could be changed so that non-binary individuals could be issued licenses, no action to effect such change was taken. (Id., ¶ 26, 31, 32).

Petitioners filed their Verified Complaint with the Montana Human Right Bureau (the Bureau) in July of 2022. Following an investigation, on January 17, 2023, the Bureau found reasonable cause to believe unlawful discrimination occurred as alleged in the Charging Parties' Complaint. (Id., ¶ 27). The Complaint was then certified to the Office of Administrative Hearings (OAH) on February 13, 2023. There, the parties each filed summary judgment motions, and the Hearing Officer issued a Summary Judgment Order in favor of the Charging Parties on June 14, 2023. (Id., ¶ 28).

Arguments regarding damages were held on July 19, 2023. (Id., ¶ 29). The Hearing Officer issued a Decision on December 26, 2023, and awarded Petitioners affirmative relief in the form of requiring Respondents to issue M.B. a driver's license with a non-binary sex designation. (Id., ¶ 33).

On December 28, 2023, Respondents appealed the Hearing Officer's decisions to the Montana Human Rights Commission ("MHRC"). (Id., ¶ 34).

The MHRC considered the matter on March 21, 2024. (Id., ¶ 35).

The Final Agency Decision.

On June 13, 2024, the MHRC issued a final written decision reversing the Hearing Officer's findings. (Id.). The MHRC Final Agency Decision ("Final Agency Decision") is attached to the Petition as Exhibit A. (Id., ¶ 37). The MHRC determined that the hearing officer erred as a matter of law by failing to conduct a

proper analysis of the statutory meaning of the term “sex” within the Montana Human Rights Act (MHRA) and improperly expanding the term to include “gender identity.” (Id., Ex. A, June 13, 2024, Final Agency Decision, p. 3).

The MHRC determined that the following law applied. The MHRA makes it “an unlawful discriminatory practice for the state or any of its political subdivisions to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of . . . sex. . . .” Mont. Code Ann. § 49-2-308(1)(a). (Id.). The MHRC concluded,

As of 2022, when the underlying circumstances giving rise to this matter occurred, neither the MHRA nor the Montana Code Annotated defined the term “sex.” Thus, the hearing officer was required to follow Montana law governing interpretation of undefined statutory terms but failed to properly do so.”

(Id.).

The MHRC found that the hearing officer’s examination of the legislative history of Mont. Code Ann. § 49-2-308 instead of conducting a plain meaning analysis of the term “sex” as used in the MHRA was error. (Id., p. 4). The MHRC also found it error that the Hearing Officer relied on a single United States Supreme Court case ([*Bostock v. Clayton Cnty.*, 590 U.S. 644, 140 S. Ct. 1731 \(2020\)](#)) to support his conclusion while failing to distinguish multiple Montana cases on the subject. (Id., p. 5).

The MHRC modified the Hearing Officer decision as follows,

IT IS HEREBY ORDERED that the hearing officer decision is MODIFIED as follows:

Findings of Fact:

19. M.B. was informed, by ~~two~~ one Department employees, 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.

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.

Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over this case.
Mont. Code Ann. § 49-2-505.

2. The term sex within the meaning of the 2021 version of the Montana Human Rights Act does not include gender identity.

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).~~

~~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).~~

(Id., p. 6).

~~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).~~

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

~~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 parties in this matter.~~

(Id., p. 7).

Petitioners seek relief from the Court pursuant to the MHRA (Mont. Code Ann. § 49-2-101 et seq.), the Montana Constitution, Art. II, § 4, and the Montana Administrative Procedure Act (“MAPA”) (Mont. Code Ann. § 2-4-704). (Dkt # 1, p. 9).

II. Relevant Background Law.

A. Relevant law in 2021 when the Montana Department of Public Health and Human Services (“DPHHS”) issued M.B. a corrected birth certificate.

The parties do not dispute the legal issuance of M.B.’s corrected birth certificate. However, a discussion of the applicable law is relevant to the Court’s legal analysis.

On or about March 25, 2021, Petitioners completed the State’s Gender Designation Form in accordance with A.R.M. 37.8.311 (2017). (Dkt # 1, ¶ 16). The State used that form to change the sex on M.B.’s Montana birth certificate. (Id., ¶

18). The actual sex listed on M.B.'s Montana birth certificate and M.B.'s United States passport is NB (non-binary). (Id., ¶¶ 21, 22).

Respondents acknowledge that DPHHS processed Petitioners' request pursuant to the 2017 version of Admin. R. Mont. 37.8.311(5). (Dkt # 14, p. 4).

This subsection of A.R.M. 37.8.311 'Adoptions, Name Changes, and Gender Changes' (2017) states,

- (5) The *gender* of a registrant as cited on a certificate may be corrected if the department receives:
 - (a) a correction affidavit accompanied by a completed gender designation form issued by the department certifying under penalty of law that that the individual has undergone gender transition or has an intersex condition and that the gender designation on their birth certificate should be changed accordingly, and the request for gender designation is for the purpose of ensuring the birth certificate accurately reflects their gender and is not for any fraudulent or other unlawful purpose; or
 - (b) a correction affidavit accompanied by presentation of a government-issued identification displaying the correct gender designation; or
 - (c) a correction affidavit accompanied by a certified copy of an order from a court with appropriate jurisdiction indicating that the gender of an individual born in Montana has been changed. The order must contain sufficient information for the department to locate the original record. If the registrant's name is also to be changed, the order must indicate the full name of the registrant as it appears on the original birth certificate and the full name to which it is to be amended.

[ARM 37.8.311\(5\) \(2017\)](#) (*emphasis* added). This A.R.M. was effective December 23, 2017 (*Id.*) and amended the following,

- (5) The *sex* of a registrant as cited on a certificate may be amended only if the department receives a certified copy of an

order from a court with appropriate jurisdiction indicating that the sex of an individual born in Montana has been changed by surgical procedure. The order must contain sufficient information for the department to locate the record. If the registrant's name is also to be changed, the court order must indicate the full name of the registrant as it appears on the original birth certificate and the full name to which it is to be amended. If the order directs the issuance of a new certificate that does not show amendments, the new certificate will not indicate on its face that it was amended. If the sex of an individual was listed incorrectly on the original certificate, refer to ARM 37.8.108.

[A.R.M. 37.8.311\(5\) \(2015\)](#) (*emphasis* added).

In 2021, DPHHS amended this subsection of the rule to state the same as it had been in the 2015 version with an effective date of July 24, 2021. [ARM 37.8.311\(5\) \(2021\)](#). The 2021 rule amendment has been the subject of separate litigation.

All versions of the ARM cite to statutory authority including Mont. Code Ann. § 50-15-204 which remained unchanged throughout those times and includes,

- (2) The department or its designee may amend a birth, death, or fetal death certificate upon submitting proof as required by the department.
- (3) The department shall adopt rules establishing the circumstances under which vital records may be corrected or amended and the procedure to correct or amend those records.

[Mont. Code Ann. § 50-15-204\(2\)\(3\) \(2017\)](#).

Thus, the law in place when Petitioners sought and obtained the birth certificate correction for M.B. was the 2017 version of ARM 37.8.311(5) and likewise is not affected by the referenced separate litigation. Under the 2015 rule,

the *sex* of a registrant as cited on a certificate may be amended pursuant to the conditions therein. However, under the 2017 rule, the *gender* of a registrant as cited on a certificate may be corrected pursuant to the conditions therein.

B. Relevant law in 2022 when the MVD provided M.B. an application (April 22, 2022) which only had the option of male and 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).” (Dkt # 1, Ex. A, p. 1) (*emphasis added*). The plain language of this statute states,

(2) 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*).

“Any person who makes any false affidavit or knowingly swears or affirms falsely to any matter or thing required by the terms of parts 1 through 3 of this chapter to be sworn to or affirmed is guilty of false swearing and upon conviction shall be punishable as provided by 45-7-202.” Mont. Code Ann. § 61-5-303 (2021).

(1) A person commits the offense of false swearing if the person knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made when the person does not believe the statement to be true and:

(a) the falsification occurs in an official proceeding;

- (b) the falsification is purposely made to mislead a public servant in performing an official function; or
- (c) the statement is one that is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.
- (2) Subsections (4) through (7) of 45-7-201 apply to this section.
- (3) A person convicted of false swearing shall be fined an amount not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

[Mont. Code Ann. § 45-7-202 \(2021\).](#)

III. Legal Standards.

Judicial Review of the Final Agency Decision.

The petition must include a concise statement of the facts upon which jurisdiction and venue are based, a statement of the manner in which the petitioner is aggrieved, and the ground or grounds specified in 2-4-704(2) upon which the petitioner contends to be entitled to relief. The petition must demand the relief to which the petitioner believes the petitioner is entitled, and the demand for relief may be in the alternative.

[Mont. Code Ann. § 2-4-704\(2\)\(b\).](#)

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\(2\)\(a\).](#)

“As such, courts 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).

Motion to Dismiss.

A motion to dismiss under Rule 12(b)(6) allows the district court to examine only whether “a claim has been adequately stated in the complaint.” [Meagher v. Butte-Silver Bow City-County, 2007 MT 129, ¶ 15, 337 Mont. 339, 343, 160 P.3d 552, 556.](#)

A pleading which states a claim for relief must contain:

- (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (2) a demand for the relief sought, which may include relief in the alternative or different types of relief.

[Mont. R. Civ. P. 8\(a\)\(1\)\(2\).](#)

“A claim is subject to dismissal only if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim.” [Puryer v. HSBC Bank USA, Nat'l Ass'n, 2018 MT 124, ¶ 12, 391 Mont. 361, 366,](#)

[419 P.3d 105, 109](#). In considering a motion to dismiss, the complaint must be construed in a light which is most favorable to the plaintiff. [Harris v. St. Vincent Healthcare, 2013 MT 207, ¶ 14, 371 Mont. 133, 137, 305 P.3d 852, 855](#) (citation omitted). “The liberal notice pleading requirements of M. R. Civ. P. 8(a) and 12(b)(6) do ‘not go so far to excuse omission of that which is material and necessary in order to entitle relief,’ and the ‘complaint must state something more than facts which, at most, would breed only a suspicion’ that the claimant may be entitled to relief.” [Anderson v. ReconTrust Co., N.A., 2017 MT 313, ¶ 8, 390 Mont. 12, 16, 407 P.3d 692, 696](#) (citations omitted). “[T]he court is under no duty to take as true legal conclusions or allegations that have no factual basis or are contrary to what has already been adjudicated.” [Cowan v. Cowan, 2004 MT 97, ¶ 14, 321 Mont. 13, 17-18, 89 P.3d 6, 9](#) (citation omitted).

IV. Legal Analysis.

Petitioners petition 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.

Petitioners allege that the MVD provided M.B. with an application that only had an option for M.B. to choose either male or female. No option was provided for M.B. to complete the form to accurately reflect M.B.’s non-binary status which was indicated on M.B.’s birth certificate issued by the DPHHS in 2021 in accordance with the law. Petitioners argue that when the MVD denied M.B. a

license because M.B. could not legally choose either male or female, the MVD violated M.B.'s rights under the law.

The DOJ argues the following contentions in support of its Motion. The law is settled in Montana - sex is male or female. A claim for sex discrimination must therefore allege discrimination based upon one's sex being male or female. The Petitioners can only establish that M.B. has a subjective gender identity that is not a part of any protected class, and as such their claims fail under any set of facts. The MHRC rejected Petitioners' arguments based upon sound Montana precedent.

In addressing this Motion, below the Court applies the required legal standards.

A. Whether the Petition fails to state a cognizable legal theory for relief regarding 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 (Mont. Code Ann. § 2-4-704(2)(a)).

Violation of constitutional provisions.

Petitioners allege violations of constitutional provisions (specifically Mont. Const. art. II, § 4 (Dignity, Equal Protection)) at (Dkt # 1, ¶¶ 42, 44, 45, 46, 47, 48, 49, 50).

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](#). “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](#) (citing *Grooms v. Ponderosa Inn* (1997), 283 Mont. 459, 467, 942 P.2d 699, 703). “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 v. Mont. Univ. Sys., 2004 MT 390, ¶ 72, 325 Mont. 148, 170, 104 P.3d 445, 460](#) (J. Nelson specifically concurring) (citing *State ex rel. Diederichs v. State Highway Comm'n* (1931), 89 Mont. 205, 211, 296 P. 1033, 1035).

The DOJ acknowledges that Petitioners filed their Charge of Discrimination on July 20, 2022, asserting violations of equal protection and the constitutional right to dignity, as well as discrimination based on sex. (Dkt # 14, p. 5). The DOJ argues that M.B. cannot show they are a member of a protected class because Montana law does not recognize subjective gender identity as a protected class. (Dkt # 14, p. 11). The DOJ argues that Petitioners have failed to either demonstrate that M.B. belongs to a protected class or that M.B. was treated differently because of membership in the protected class. (Dkt # 14, p. 12).

The Petitioners allege that gender identity is sex-based, and the rights enumerated in Article II, Section 4 of the Montana Constitution (dignity and equal protection) forbids government-imposed discrimination against any person on account of sex-based discrimination or unwarranted discrimination. (Dkt # 1, ¶¶ 44, 45, 46, 48, 49, 50). They allege that sex is a protected class and that it is not possible to discriminate against an individual based on their gender identity without also discriminating against them on the basis of their sex (citing *Snetsinger* and *Bostock*). (Id., ¶¶ 44, 45). Petitioners have alleged disparate treatment of M.B. They allege that M.B.'s accurately completed MVD application (based on M.B.'s Montana birth certificate) was not accepted and entered into the computer system by the MVD, and as a result they were denied a driver's license when the MVD otherwise affords services to cisgender individuals whose birth certificates reflect the same.

Construing the Petition in a light most favorable to the Petitioners, the Petitioners have pled a cognizable legal theory for relief that the appellant's substantial rights have been prejudiced because (a) the administrative findings, inferences, conclusions, or decisions are (i) in violation of constitutional provisions.

Violation of statutory provisions.

Petitioners allege violations of statutory provisions of the MHRA (specifically Mont. Code Ann. §§ 49-1-102, 49-2-304) at (Dkt # 1, ¶¶ 42, 43, 44, 45, 46, 47, 48).

(1) The right to be free from discrimination because of race, creed, religion, color, sex, as defined in 1-1-201, physical or mental disability, age, or national origin is recognized as and declared to be a civil right. This right must include but not be limited to:

...

(b) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement.

[Mont. Code Ann. § 49-1-102\(1\)\(b\).](#)

(1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation:

(a) to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, marital status, race, age, physical or mental disability, creed, religion, color, or national origin;

[Mont. Code Ann. § 49-2-304\(1\)\(a\) \(2021\).](#)

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 emphasis of the DOJ’s arguments in the Motion is that Petitioners cannot state a cognizable claim for sex discrimination in violation of the MHRA. Indeed, the emphasis in the Final Agency Decision is that the hearing officer erred as a matter of law by failing to conduct a proper analysis of the statutory meaning of the term “sex” within the MHRA and improperly expanding the term to include

“gender identity.” The DOJ contends that Montana law is clear, “sex” does not include “gender identity” as that term is used in the MHRA. (Dkt # 14, p. 2). The DOJ contends that sex discrimination Montana jurisprudence applies the male-female binary in such cases. (Dkt # 14, p. 7-8, citing cases). The DOJ also disputes that *Bostock* supports the conclusion that sex includes gender identity. (Id., p. 9-11).

Petitioners allege the MHRA prohibits discrimination on the basis of sex and that gender identity is sex-based discrimination. (Id., ¶¶ 43, 44). Petitioners contend that they do not need to demonstrate that a person’s sex is the “same” thing as a person’s gender identity. (Dkt # 19, p. 10). Rather, they argue that sex and gender identity are inextricably linked, and discrimination based on gender identity is a form of sex discrimination. (Id.). They support their allegations with case law including, but not limited to *Snetsinger*, *Bostock*, [*Hecox v. Little*, 104 F.4th 1061 \(9th Cir. 2024\)](#). (Dkt # 1, ¶¶ 44, 45, 46).

Construing the Petition in a light most favorable to the Petitioners, and the Petitioners have pled a cognizable legal theory for relief that the appellant’s substantial rights have been prejudiced because (a) the administrative findings, inferences, conclusions, or decisions are (i) in violation of statutory provisions.

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B. Whether the Petition fails to state a cognizable legal theory for relief regarding if substantial rights of the appellant have been prejudiced because (a) the administrative findings, inferences, conclusions, or decisions are (ii) in excess of the statutory authority of the agency (Mont. Code Ann. § 2-4-704(2)(a)).

The Petitioners allege the Final Agency Decision was in excess of the statutory authority of the agency. (Dkt # 1, ¶¶ 51, 52, 53, 54, 55, 56, 57). They allege that the agency does not have the jurisdiction to make a determination that discrimination on the basis of sex does not include gender identity. (Id., ¶ 51). They rely on [*McDonald v. Jacobsen*, 2022 MT 160, ¶ 17, 409 Mont. 405, 416, 515 P.3d 777, 784](#) and other cases in support of their position that it is Montana’s judiciary that the Constitution vests with the “power to pass upon constitutional questions.” (Id., ¶¶ 52, 53, 54, 55). They allege that the MHRC’s attempt to write ‘gender’ out of the MHRA by defining the constitutional term sex is an exercise of ‘a power properly belonging’ to the judicial branch and violates Article III, § 1 of Montana’s Constitution. (Id., ¶¶ 51, 57).

The DOJ does not specifically address this argument. However, the DOJ does assert that the Petitioners request that the Court engage in the legislative power to rewrite several statutes to include gender identity, overturn myriad agency rules and regulations built on those supposedly incorrect statutes, and reinstate the erroneous decision of the hearing officer. (Dkt # 20, p. 3-4).

Construing the Petition in a light most favorable to the Petitioners, the Petitioners have pled a cognizable legal theory for relief that the appellant’s substantial rights have been prejudiced because (a) the administrative findings,

inferences, conclusions, or decisions are (ii) in excess of the statutory authority of the agency.

C. Whether the Petition fails to state a cognizable legal theory for relief regarding if substantial rights of the appellant have been prejudiced because (a) the administrative findings, inferences, conclusions, or decisions are (iv) affected by other error of law. (Mont. Code Ann. § 2-4-704(2)(a)).

Petitioners allege the Final Agency Decision was affected by other errors of law at (Dkt # 1, ¶ 58). They allege that discrimination on the basis of sex – by definition and as a matter of law – includes discrimination on the basis of gender identity. (Id.). Petitioners make this particular allegation with their arguments that the Final Agency Decision violates constitutional and statutory provisions.

While the DOJ does not specifically address this argument, it does contend that there was no discrimination – that M.B. was denied a license because they did not complete the application by selecting male or female in the sex data field, as required by law. (Dkt # 14, p. 12 citing Mont. Code Ann. § 61-5-107(2)) (Dkt # 20, p. 3-5). In their Sur-Reply, Petitioners contend that the rigidity of the application itself is the vessel through which MVD discriminated against M.B and that M.B. thoroughly completed the application by writing in the gender that matches their birth certificate and passport. (Dkt # 28, p. 3).

The Court includes above the applicable law regarding M.B.’s birth certificate correction and the MVD application – law which is necessarily implicated with the allegations in the Petition.

Construing the Petition in a light most favorable to the Petitioners, the Petitioners have pled a cognizable legal theory for relief that the appellant's substantial rights have been prejudiced because (a) the administrative findings, inferences, conclusions, or decisions are (iv) affected by other error of law.

D. Whether the Petition fails to state a cognizable legal theory for relief regarding if substantial rights of the appellant have been prejudiced because (a) the administrative findings, inferences, conclusions, or decisions are (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record (Mont. Code Ann. § 2-4-704(2)(a)).

The Petitioners allege the Final Agency Decision was clearly erroneous at (Dkt # 1, ¶ 59). They allege that the evidence demonstrates that M.B. was denied a driver's license that accurately identified M.B.'s gender for one reason: M.B. is nonbinary. (Id.).

Petitioners argue that the MHRC made the following erroneous legal conclusions:

- Basic dictionary definitions of the word “sex” clearly define the word in terms of anatomical biology to the exclusion of references to gender identity;
- The hearing officer’s reliance on a single United States Supreme Court Case to support his conclusion while failing to distinguish multiple Montana cases on the subject was similarly in error;
- By expanding the term “sex” in Mont. Code Ann. § 49-2- 308 to include “gender identity,” the hearing officer inserts what has been omitted from the statute in derogation of the fundamental principles of statutory construction. See *Fox*, ¶ 18. To do so was therefore in error and warrants reversal of the hearing officer’s Order. (Citing *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898);
- The term sex within the meaning of the 2021 version of the Montana Human Rights Act does not include gender identity; and
- M.B. is not a member of a protected class within the meaning of the 2021 version of the MHRA on the basis of sex.

(Dkt # 1, ¶ 36) (Dkt # 19, p. 7). Petitioners contend that sex and gender identity are inextricably linked, and discrimination based on gender identity is a form of sex discrimination.

The DOJ does not directly address the allegation that the Final Agency Decision was clearly erroneous. However, its arguments in support of the Final Agency Decision clearly dispute that the MHRC made the alleged erroneous legal conclusions.

Construing the Petition in a light most favorable to the Petitioners, the Petitioners have pled a cognizable legal theory for relief that the appellant’s substantial rights have been prejudiced because (a) the administrative findings, inferences, conclusions, or decisions are (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

E. Whether the Petition fails to state a cognizable legal theory for relief regarding if substantial rights of the appellant have been prejudiced because (a) the administrative findings, inferences, conclusions, or decisions are (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion (Mont. Code Ann. § 2-4-704(2)(a).

The Petitioners allege the Final Agency Decision was arbitrary and capricious and was clearly an unwarranted exercise of discretion (Dkt # 1, 60). They allege that the transcript of the MHRC hearing demonstrates that the Commission was arbitrarily focused on an outcome that would result in a denial of M.B.'s claims, in stark contrast to the Hearing Officer's fair weighing of the record evidence and legal arguments of the parties. (Id.).

Petitioners allege that the following is an example of a demonstrated desire to reach a predetermined outcome without regard to applicable facts or the law. Commissioner Almy: "I just went to the conclusions of law on that page—our page 54, and I'm going, wrong, wrong, wrong, wrong, all the way down, and I mean I'm just—I couldn't disagree more with the conclusions of law. I mean maybe—and there is probably a couple of the findings of fact I'm in disagreement, but the conclusions of law, are just wrong. And that's not very lawyer of me, but it—he's wrong." (Dkt # 1, ¶ 38).

The DOJ does not directly address this allegation. However, its arguments in support of the Final Agency Decision indicate that it would dispute that the Final Agency Decision was arbitrary and capricious or was clearly an unwarranted exercise of discretion.

Construing the Petition in a light most favorable to the Petitioners, the Petitioners have pled a cognizable legal theory for relief that the appellant's substantial rights have been prejudiced because (a) the administrative findings, inferences, conclusions, or decisions are (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

ELECTRONICALLY SIGNED AND DATED BELOW.

c: Misty D. Gaubatz
Alexander H. Rate/Marthe Y. VanSickle
Austin M. Knudsen/Alwin T. Lansing/Michael D. Russel/Thane P. Johnson/Michael Noonan