IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0397

CASEY PERKINS; SPENCER McDONALD; KASANDRA REDDINGTON; JANE DOE; and JOHN DOE,

Plaintiffs and Appellees,

v.

STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as Governor of the State of Montana; and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,

Defendants and Appellants.

MONTANA LEAGUE OF CITIES AND TOWNS' *AMICUS CURIAE* BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County Cause No. DV-25-282
The Honorable Shanna Vannatta, Presiding Judge

Appearances:
Attorneys for Plaintiffs and Appellees

Alex Rate
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806-1968
(406) 224-1447
ratea@aclumontana.org

Robin Turner
Legal Voice
P.O. Box 582
Missoula, MT 59806
(206) 682-9552 Ext. 110
rturner@legalvoice.org

Terry Ding*
ACLU Foundation
125 Broad Street, 17th Floor
New York, NY 10004
(212) 549-2500
ttding@aclu.org

Julie A. Murray *
ACLU Foundation
915 15th Street, NW
Washington, DC 20005
(202) 675-2326
jmurray@aclu.org

Attorneys for Defendants/Appellants * *Admitted Pro Hac Vice*

Austin Knudsen
Montana Attorney General
Michael D. Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Assistant Attorney General
Montana Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
Thane.johnson@mt.gov
Michael.russell@mt.gov
Alwyn.lansing@mt.gov
Michael.noonan@mt.gov

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

The Montana League of Cities and Towns ("the League"), by leave of Court granted on motion, respectfully submits this brief amicus curiae in support of Appellees.[1]

STATEMENT OF INTEREST

Montana League of Cities and Towns (the "League") is an incorporated, nonpartisan, nonprofit association of 121 of Montana incorporated cities, towns, and consolidated city-county governments. It acts as a clearinghouse and advocacy organization through which Montana municipalities cooperate for their mutual benefit. The League's purpose is to: (1) promote cooperation among the cities and towns of the state of Montana, to study local and common problems, and to seek solutions and suggest efficient operational methods; and (2) to provide a forum and an organization whereby through cooperative effort and appropriate action, municipal governments may exercise their impact and effect on local, state and national affairs that are of concern to Montana cities and towns.

The impact of HB 121 and the issues raised in this litigation are germane and central to the League's purpose. House Bill 121 applies to "covered entities." HB 121, § 2. A "covered entity" includes public buildings. *Id*. In turn, public buildings include any "building that is owned or leased by a public agency as defined in 18-20 1-101 and that is open to the public, including but not limited to: 21 (a) a building

that is used for educational, office, or institutional purposes; or (b) a library, museum, school, hospital, auditorium, dormitory, or university building." *Id.*

The League's members own and operate many facilities considered "covered entities." Thus, the bill is intended to require Montana municipalities to:

(1) Designate each multi-occupancy restroom, changing room, and sleeping quarters for the exclusive use of either females or males; and

(2) Take reasonable steps to provide individuals with privacy from members of the opposite sex in a restroom, changing room, and sleeping quarters.

Id. § 3.

The bill creates a cause of action against a Montana municipality if a person encounters an individual of the opposite sex in the restroom or changing room and either:

(1) The covered entity provided permission for the individual to use a restroom or changing room designated for the opposite sex; or

(2) Failed to take reasonable steps to prohibit someone from using the restroom or changing room designated for the opposite sex.

(1)

Id. § 4. The remedies for such a violation are declaratory and injunctive relief, nominal damages, any other appropriate legal relief, and reasonable attorney's fees if the plaintiff prevails. *Id*. § 5.

//

//

//

ARGUMENT

I. THIS CONTROVERSY IS RIPE AND JUSTICIABLE

HB 121 threatens imminent harm to plaintiffs and the League's members. Because the law had an immediate effective date, Plaintiffs cannot wait for the court to make a final determination as to its constitutionality. Plaintiffs' liability, as "covered entities" under the bill, started on March 27, 2025. The obligations HB 121 imposes on amici (regardless of the fact such obligations are completely unknown based on the language of HB 121) began on that day. This case presents definite and concrete issues whose timing is of the utmost importance.

If the Court were to determine this conflict is not yet ripe, it would also have to find that the amici and other covered entities would not suffer immediate harm by its passage. Allowing the law to go into effect before its constitutionality is determined means the liability of all "covered entities," including amici's members, begins. Local governments will have to immediately address the potential and unknown liabilities and assess their resources for compliance with the measure. Local governments have already adopted their budgets for fiscal year 2025-26. There is not "plenty of time for this Court to consider and decide the constitutional issues before any action would be required by the new law." *MEA-MFT v. McCulloch*, 2012 MT 211, ¶ 37, 366 Mont. 266, 291 P.3d 1075. Requiring compliance with the vague, unfunded requirements of HB 121 will cause immediate, irreparable injury

to "covered entities" and their taxpayers when a determination is likely to be made that the bill is unconstitutional, as demonstrated below.

II. HB 121 IS INVALID, FACIALLY DEFECTIVE, AND UNCONSTITUTIONAL.

In addition to those issues addressed by the District Court, the League believes that the Court should be aware of HB 121's additional constitutional infirmities. The League understands that, generally, the Court will not consider issues raised by amici. *Reichert v. State*, 2012 MT 111, ¶ 26, 365 Mont. 92, 278 P.3d 455. This Court has deviated from that rule when issues of statewide importance are at issue. *Id*. (collecting cases). This is such a case.

A. HB 121 Is Unconstitutionally Vague on Its Face and as Applied to Amici.

The issue of vagueness may be raised in two different connotations: (1) whether it is vague on its face; and (2) whether it is vague as applied. *State v. Martel*, 273 Mont. 143, 149, 902 P.2d 14, 18 (1995).

> "'[A] statute ... is void [for vagueness] on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute.'"

Id. at 150, 18, citing *Monroe v. State*, 265 Mont. 1, 873 P.2d 230, 231 (1994), *Choteau v. Joslyn*, 208 Mont. 499, 678 P.2d 665, 668 (1984). *See also State v. Crisp*, 249 Mont. 199, 814 P.2d 981 (1991); *State v. Woods*, 221 Mont. 17, 716 P.2d 624 (1984). "The Legislature is not required to define every term it employs when

constructing a statute." *Id.* "The failure to include exhaustive definitions will not automatically render a statute overly vague, so long as the meaning of the statute is clear and provides a defendant with adequate notice of what conduct is proscribed." *Id.*, at 151, 19.

Additionally, "[t]he proper inquiry is whether the statute is impermissibly vague in every application, not whether the statute is vague as applied to some, but not all, hypothetical scenarios." *State v. Watters*, 2009 MT 163, ¶ 30, 350 Mont. 465, 208 P.3d 408 (citation omitted). Further, "[a] person challenging a statute as facially void must demonstrate that the statute is vague 'in the sense that no standard of conduct is specified at all.'" *Id.* ¶ 31 (citation omitted). Finally, "[t]his Court has recognized that 'an unreasonable interpretation and dissection of a statute will not render it void for vagueness.'" *Id.* ¶ 36 citing *Broers v. Montana Dept. of Revenue*, 237 Mont. 367, 371, 773 P.2d 320, 323 (1989).

(1) HB 121 is Vague on Its Face.

In this case, the standard of conduct HB 121 imposes on amici and all other "covered entities" is incomprehensible, unspecified, contradictory, or so imprecise that amici's members cannot conform their conduct to its requirements even if they tried. HB 121 sets forth the following requirements for conduct:

> (1) A covered entity **shall designate** each multioccupancy restroom, changing room, or sleeping quarters for the exclusive use of females or males.…

(3) A covered entity **shall take reasonable steps** to provide individuals with privacy from members of the opposite sex in designated restrooms, changing rooms, and sleeping quarters….

(6) This section may not be construed to prohibit a covered entity from:

(a) adopting policies necessary to accommodate individuals protected under the Americans with Disabilities Act of 1990 or young children or elderly persons in need of assistance;

(b) establishing single-occupancy restrooms, changing rooms, or sleeping quarters or family restrooms, changing rooms, or sleeping quarters; or

(c) redesignating a multi-occupancy restroom, changing room, or sleeping quarters designated for exclusive use by one sex to a designation for exclusive use by the opposite sex.

HB 121 § 3. It also imposes potential liability on the League's members:

Section 4. Remedies.

(1) An individual who, while accessing a restroom or changing room designated for use by the individual's sex, encounters another individual of the opposite sex in the restroom or changing room has a private cause of action for declaratory and injunctive relief, nominal damages, and any other appropriate relief against the covered entity that:

(a) provided the other individual permission to use the restroom or changing room designated for use by the opposite sex; or

(b) failed to take reasonable steps to prohibit the other individual from using the restroom or changing room designated for use by the opposite sex.

(2) An individual aggrieved under this section who prevails in court may recover reasonable attorney fees and costs from the offending covered entity."

Id. § 4.

This language begs the following questions. First, the League's members are expressly allowed to adopt policies (1) necessary to accommodate individuals protected under the Americans with Disabilities Act of 1990 or young children or elderly persons in need of assistance, (2) establishing single-occupancy restrooms, or (3) redesignating restrooms or changing rooms designated for exclusive use by one sex. Beyond that, if there is a designation for exclusive use by the opposite sex, then are there any actions they are supposed to take to avoid liability? Must they employ technology, alter existing signs, or station staff in or near restrooms and changing rooms to ensure the exclusive use of those facilities by those for whom each facility is designated? What would a reasonable person do, especially in times during which opinions regarding this charged issue can change quickly? This is precisely the type of conundrum the vagueness doctrine is meant to avoid.

Second, if an individual encounters another individual of the opposite sex in the restroom or changing room, and the covered entity "failed to take reasonable steps" to prohibit the individual of the opposite sex from using the restroom or changing room, then what standard of care does that language impose? What exactly is it amici are supposed to do to comply with the law? Is this strict liability or a reasonable person standard?

Municipalities cannot comply with HB 121 because they cannot decipher what is required of them to avoid the liability. As such, HB 121 is invalid and unconstitutional on its face.

(2) HB 121 is Unconstitutionally Vague as Applied to Municipalities.

Even if HB 121 was not void on its face, it would fall because it is unconstitutionally vague as applied to the League's members.

> When faced with a vague-as-applied challenge to a statute, we determine whether the challenged statute provides a person with **actual notice** and whether the statute provides **minimal guidelines** to law enforcement. Dixon, ¶ 27. To determine whether the statute provides actual notice, we examine the statute in light of the defendant's conduct to determine if the defendant **reasonably could have understood** that the statute prohibited such conduct.

State v. Watters, ¶ 32 (emphasis added) (citation omitted). Here, HB 121 does not provide any guidelines to amici. Amici are not on actual notice of what the statute requires of them, other than not giving permission to individuals of one sex to enter a restroom or changing room designated for the other sex. This is not enough.

Since liability can still be imposed for amici's "failure to take reasonable steps," what else is required? There is no definition of what reasonable steps entail, even though it is an action that must be taken in addition to designating each restroom and changing room for exclusive use by males or females. Thus, amici would still be liable for "failing to take reasonable steps to provide individuals with privacy from members of the opposite sex in designated restrooms and changing rooms" if a person of the opposite sex goes into that restroom or changing room even

though they had signs posted and did not give permission to the individual to use that restroom or changing room. This language impermissibly imposes liability without identifying how to avoid that liability.

(3) HB 121 Violates Montana's Constitutional Prohibition Against Local and Special Laws.

HB 121 also violates Article V, § 12 of the 1972 Constitution. That section reads: "The legislature shall not pass a special or local act when a general act is, or can be made, applicable." In the case of *Rohlfs v. Klemenhagen, LLC*, the Montana Supreme Court stated, "[i]n the constitutional context, a law is not local or special if it operates in the same manner upon all persons in like circumstances. If a law operates uniformly and equally upon all brought within the circumstances for which it provides, it is not a local or special law." 2009 MT 440, ¶ 12, 354 Mont. 133, 227 P.3d 42. *Rohlfs* also stated, "On the other hand, a law is special legislation if it confers particular privileges or disabilities upon a class of persons arbitrarily selected from a larger group of persons, all of whom stand in the same relation to the privileges or disabilities." *Id.*

Additionally, the Court in *D & F Sanitation Serv. v. Billings* stated:

> Special laws are laws made for individual cases, or for less than a class; local laws are special as to place. Such laws are prohibited in order **to prevent a diversity of laws on the same subject**. *Id.* The test for a special law is: "Does it operate equally upon all of a group of objects which, having regard to the purpose of the legislature, are distinguished by characteristics sufficiently

> marked and important to make them a class by themselves?" State ex rel. Redman v. Meyers (1922), 65 Mont. 124, 128, 210 P. 1064, 1066.

219 Mont. 437, 442, 713 P.2d 977, 980 (1986) (Emphasis added.)

HB 121 constitutes a local law and violates Montana's constitution. The implementation of the law will differ among the 127 municipalities in Montana. Since what constitutes "reasonable steps" is patently vague in HB 121, and because specific guidance is not provided, each "covered entity" is likely to do something different in terms of protecting themselves from liability.

Not only is it vague for amici; members of the public will face a litany of varying requirements when using local, state, or educational restrooms. They won't know what to do or how to act in any given restroom or changing room as there will not be a uniform rule to apply. When they do act wrongly, in any situation and under any circumstance, it is the covered entity, not the person, that is liable. Such disparities among covered entities will undoubtedly create disparate application of this law among them. HB 121 creates a diversity of laws on this one subject matter among the numerous municipalities in Montana, much less across the variety of local governments, state agencies, and school districts to which these vague requirements apply.

HB 121 is also a special law because it not only creates a diversity of laws, it also creates a conflict of laws on the same subject. For example, the ADA requires Title II entities to provide accommodations to the disabled without regard to any

"policy" that this law allows covered entities to adopt. Under the ADA, it is undeniable that a municipality would have to allow a mother to take her disabled adult son into the women's restroom to change him, and that the mother does not have to wait until the municipality adopts some sort of policy to allow that to happen.

If someone then encounters the disabled adult son in the women's restroom, they can sue the municipality for giving the mom permission to enter with her son (or failing to take reasonable steps to keep her from doing so). In this way, the municipality cannot comply with both the federal law and HB 121. This creates additional risk of liability for municipalities for complying with the federal ADA law in the absence of an accommodations policy.

In one case, a municipality that enacts such policies will likely be treated differently from a municipality that does not pass such policies. As this Court is aware, a failure to follow an entity's own policies is evidence of negligence. Lawyers who represent claimants under HB 121 will likely assert that the failure to enact such policies (which are allowed by HB 121) violates the standards imposed by the act (whether that be the reasonable person standard or the strict liability standard).

It is also a special law because it arbitrarily imposes liability on some municipalities by allowing each city or town to determine how to implement the law. In other words, by allowing municipalities the ability to enact policies that accommodate disabled persons, it will likely result in disparate treatment of those

local governments regarding their liabilities. As set forth above, if they enact such accommodations, they will be bound to follow them and may be held liable for failing to abide by them. On the other hand, if they fail to enact such policies, they may still be held liable for not doing so under the disparate standards the law imposes (whether strict liability or the reasonable person standard).

Ultimately, HB 121 will treat municipalities differently, hold them to different legal standards, and impose disparate requirements upon similarly situated members of the public. The law will not operate uniformly and equally for all municipalities or members of the public, much less for the other entities subject to it. As such, it is a local or special law that violates Montana's constitution.

III. HB 121 CONSTITUTES AN INVALID UNFUNDED MANDATE.

HB 121 places an unfair and illegal burden on the League's members. Mont. Code Ann. § 1-2-112(1) prohibits laws from requiring a local government to provide any service or facility that requires the direct expenditure of funds not expected of local governments:

> [A] law enacted by the legislature that requires a local government unit to perform an activity or provide a service or facility that requires the direct expenditure of additional funds and that is not expected of local governments in the scope of their usual operations must provide a specific means to finance the activity, service, or facility other than a mill levy. Any law that fails to provide a specific means to finance any activity, service, or facility is not effective until specific means of financing are provided by the legislature from state or federal funds.

Id.

As noted above, HB 121 requires municipalities to designate all multi-occupancy restrooms and changing rooms for the exclusive use of males or females, and to take "reasonable steps" to prohibit certain persons from using certain facilities.

Any "reasonable steps" a local government takes will involve spending limited local resources. Some may contend that the law will require municipalities to construct separate single restrooms for each building or facility controlled by a municipality.

Such expenditures are "not expected of local governments in the scope of their usual operations." Mont. Code Ann. § 1-2-112(1) Further, since such expenditures are substantial, HB 121 constitutes an unfunded mandate. Indeed, the fiscal note for the bill acknowledged that "[l]ocal governments may experience fiscal impacts and technical impacts associated with the implementation of HB 121. However, at the time of publication, those concerns and impacts were not available."[2]

Under Montana law, cities and towns are prohibited from increasing existing mill levies more than half the average rate of inflation for the prior 3 years or imposing any new mill levies. With limited exceptions, any new revenue sources for

[2] Amici is the entity responsible for providing fiscal impact analysis for municipalities to the Governor's Budget Office. In December 2024, the Executive Branch implemented a new fiscal note system, which delayed the delivery of fiscal note requests to the League until after the start of the 2025 Legislative Session. The League received the fiscal note request for HB 121 on January 9, 2025, but the deadline for the response – January 7, 2025 – had already passed. https://docs.legmt.gov/download-ticket?ticketId=ecefa779-42f2-4aaf-b5cc-a71964f26197

municipalities must be put before the local electorate for a vote pursuant to Mont. Code Ann. § 15-10-425.

These restrictions on revenues make the annual budgeting process an important process of prioritizing local services and directing limited resources according to goals and needs unique to each city and town in Montana. New mandates that require local governments to act, enforce policies, and be subject to new causes of actions, without new sources of revenue, further dilute existing resources and strain local government services. The prohibition contained in Mont. Code Ann. § 1-2-112(1) is designed to avoid such unfunded mandates.

Importantly, Mont. Code Ann. 1-2-112(2), allows legislation to impose an unfunded mandate if the bill expressly does so. However, in such a case, the title of a bill that imposes an unfunded mandate must include "SUPERSEDING THE UNFUNDED MANDATE LAWS" as well as a section that provides: "Unfunded mandate laws superseded. The provisions of [this act] expressly supersede and modify the requirements of 1-2-112 through 1-2-116." There is no such language in HB 121.

This law provides no source of funding for municipalities to comply with its provisions. As such, it constitutes an unfunded mandate. The preliminary injunction should remain in effect to protect amici's members from this unlawful mandate.

IV. THE PRELIMINARY INJUNCTION PROTECTS AMICI FROM IMMEDIATE LIABILITY UNDER AN ACT THAT IS UNCONSTITUTIONAL AND CONTRARY TO MONTANA STATUTE.

If the preliminary injunction is lifted, municipalities will be unable to budget for designating restrooms and changing rooms or for "taking reasonable steps" as required by the law. Budgets for fiscal year 2025-26 were required to be adopted in September 2025. *See* Mont. Code Ann.§ 7-6-4024(3). The League's members relied on the preliminary injunction against HB 121 in adopting their budgets for this fiscal year. If HB 121 goes into effect before the courts can make a final determination as to its constitutionality, it will require amici to amend their budgets (Mont. Code Ann. §§ 7-6-4021 and 7-6-4030) thereby "stealing from Peter to pay Paul."

In other words, although the League's members would do what they can to comply with the law, that compliance will come at the cost of other public services and to the detriment of its taxpayers. Further, implementation of the law by the building of single-occupancy restrooms or taking other brick-and-mortar actions to comply with the law will not occur immediately based on the need to have public contracts bid in compliance with state and local laws. As such, municipalities will still be exposed to liability under the law even though they have not been given a chance to comply with its provisions. Such a process is patently unfair and violates amici's members' rights to due process.

V. AMICI ARE ENTITLED TO THE PRELIMINARY INJUNCTION THAT STOPS THE IMMEDIATE IMPLEMENTATION OF HB 121.

As demonstrated by the arguments herein, amici will sustain irreparable harm if this unconstitutional bill is allowed to go into effect before the District Court makes a final determination on the constitutionality and lawfulness of the bill. MCA § 27-19-102. They will be exposed to multiple and undetermined liabilities without any clear standard of conduct. They will be forced to make decisions as to what actions they must take to comply with the law without any direction regarding what steps are required. They will incur unplanned and unfunded costs of implementation in violation of state law. Compensation of amici is not an adequate remedy because such costs are unknown. As such, injunctive relief is the only effective remedy for amici. It is the only remedy which takes into account judicial resources and the inevitable multiple judicial proceedings which will arise related to HB 121 if it is allowed to go into immediate effect.

CONCLUSION

HB 121 is unconstitutionally vague and violates the due process rights of amici. HB 121 violates Montana's constitutional prohibitions against local and special laws. HB 121 violates Montana law because it is an unfunded mandate. HB 121 fails to consider the budgeting processes of local governments and unlawfully puts them in a position of liability without any ability to immediately comply with

its provisions. The Court should uphold the preliminary injunction issued by the District Court during the pendency of this litigation.

RESPECTFULLY SUBMITTED this 14th day of October 2025.

JACKSON, MURDO & GRANT, P.C.

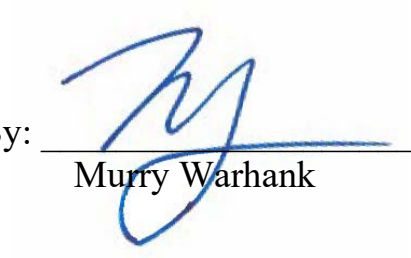
By: _____

Murry Warhank

Counsel for Montana League of Cities and Towns

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is 3,881 words, excluding certificates of service and compliance.

By: 
Murry Warhank

CERTIFICATE OF SERVICE

I, Murry Warhank, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 10-14-2025:

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Jane Doe, John Doe, Spencer McDonald, Casey Perkins, Kasandra Reddington
Service Method: eService

Robin Michelle Turner (Attorney)
Legal Voice
PO Box 582
MISSOULA MT 59806-0938
Representing: Jane Doe, John Doe, Spencer McDonald, Casey Perkins, Kasandra Reddington
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Greg Gianforte, Austin Miles Knudsen, State of Montana
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: Greg Gianforte, Austin Miles Knudsen, State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Greg Gianforte, Austin Miles Knudsen, State of Montana
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: Greg Gianforte, Austin Miles Knudsen, State of Montana

Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Kerri Seekins-Crowe
Service Method: eService

Erin Michelle Lyndes (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Montana League of Cities and Towns
Service Method: eService

Electronically signed by Kenzie Heimbach on behalf of Murry Warhank
Dated: 10-14-2025