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**MONTANA FOURTH JUDICIAL DISTRICT COURT,  
MISSOULA COUNTY**

SUSAN EDWARDS; MONTANA TWO  
SPIRIT SOCIETY; KAEL FRY; ANNA  
TELLEZ; EDEN ATWOOD;  
SHANNON ALOIA,

*Plaintiffs,*

vs.

THE STATE OF MONTANA; GREG  
GIANFORTE, in his official capacity as  
GOVERNOR OF MONTANA; AUSTIN  
KNUDSEN, in his official capacity as  
ATTORNEY GENERAL OF  
MONTANA,

*Defendants.*

Cause No. \_\_\_\_\_

**Complaint**

**INTRODUCTION**

1. In 2023, the Montana State Legislature set out to dismantle decades of legal precedent protecting Montanans from sex discrimination. Claiming that judges have improperly conflated sex and gender, and apparently outraged that existing laws protect individuals whose gender does not align neatly with legislators'

expectations, the Legislature passed Senate Bill 458 (“SB 458”) to remove those protections. SB 458 defines “female,” “male,” and “sex” by reference to reproductive capacity—i.e., sex chromosomes and gametes—and incorporates these new definitions throughout the entire Montana Code Annotated.

2. SB 458’s definitions are unscientific and unworkable. And by supplanting the common-sense meaning of these terms, SB 458 improperly categorizes many Montanans, excludes others from legal recognition entirely, and deprives them of the benefits and protections of myriad state laws. Laws that prohibit sex-based discrimination do so whether that discrimination is based on perceived biological differences between sexes or arises from the ways people behave, present, and identify in relation to their sex. SB 458 targets and excludes Plaintiffs—a group of Two Spirit, intersex, and transgender individuals and organizations—from legal protection and from recognized social and political communities.

3. Legislators’ reasons for passing SB 458—to disambiguate “sex” and “gender” and to remove legal protections for non-cisgender persons—are half-baked and discriminatory. As bill sponsor Senator Carl Glimm explained:

Now you may be asking yourself why this bill is even necessary. And the answer is pretty straightforward. Today there are some, including judges, who conflate the terms “sex” and “gender.” And while these terms, in history, used to mean the same thing, they don’t mean the same thing anymore. And they can no longer be used interchangeably. . . . Gender is obviously something different than biological sex. Biological sex is immutable, and that means you can’t change it. And there’s only two biological sexes. You may claim to be able to change your gender and to express your gender in a different way, but you can never change your biological sex. And that’s why Senate Bill 458 is necessary. . . . [W]e need to draw a clear distinction between sex and gender, and that’s what this bill does.

4. Even if clarifying distinctions between sex and gender were important, SB 458 does not eliminate confusion between gender and sex. Gender discrimination is sex discrimination. *Harrison v. Chance*, 244 Mont. 215, 221, 797 P.2d 200, 204 (1990) (“When sexual harassment is directed at an employee solely because of gender, the employee is faced with a working environment fundamentally different from that faced by an employee of the opposite gender. . . . We hold that sexual harassment is sexual discrimination under the Montana Human Rights Act.”) (emphasis added); Ord. Denying Resp.’s Mot. Summ. J., *Maloney v. Yellowstone Cty. & Bd. of Cty. Comm’rs.*, No. 1570-2019, at 10–11 (Mont. Dep’t of Labor & Indus. Office of Admin. Hrgs., Aug. 14, 2020) (concluding Montana Human Rights Act’s sex-based protections extend to transgender employees); *see also Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020) (holding that sexual orientation and gender identity are protected by Title VII of the 1964 Civil Rights Act).

5. In 1975, the Montana Legislature enacted § 12-216, R.C.M., now codified as § 1-1-201(2), MCA. S. 2, Mont. 44th Leg., Reg. Sess., Ch. 535 (Mont. 1975). Among other changes, the law clarified that wherever the term “man” appears in the code, it includes “woman.” *See* § 12-216, R.C.M. 1947; § 1-1-201(2), MCA. The Legislature passed SB 2 to “do away with discriminatory language” in Montana law. S. 2, Mont. 44th Leg., Reg. Sess., Judiciary Comm.: Comm. Minutes (Jan. 10, 1975). Nearly 50 years later, SB 458 intentionally narrows Montana law. If SB 2 intended to “do away with” discrimination, SB 458’s purpose is the opposite: to discriminate.

6. SB 458 infringes on Montanans’ constitutional rights and fails any level of scrutiny. Under the Montana Constitution, SB 458 violates the rights to individual dignity, Mont. Const. art. II, § 4, equal protection of the laws, *id.*, individual privacy, *id.* art. II, § 10, and freedom of speech, *id.* art. II, § 7. The bill also violates the United States Constitution’s Freedom of Speech Clause, U.S. Const. amend. I.

### **JURISDICTION AND VENUE**

7. Plaintiffs bring this action under the Montana Constitution and the United States Constitution. Article VII, § 4 of the Montana Constitution and § 3-5-302, MCA, provide this Court with original jurisdiction.

8. This Court has jurisdiction to grant declaratory relief pursuant to §§ 27-8-201 et seq., MCA, and injunctive relief pursuant to §§ 27-19-101 et seq., MCA.

9. Venue is proper in Missoula County under § 25-2-126(1), MCA.

### **PARTIES & FACTUAL ALLEGATIONS**

#### **A. Plaintiffs**

10. Because of SB 458’s inaccurate binary definitions, Plaintiffs face substantial risk of discrimination on the basis of gender identity and/or sex and are deprived of a state law process to remedy such harm. SB 458 purposefully excludes Plaintiffs from the social and political community, deliberately reduces their value, forces them to disclose private medical and biological information, and requires them to misgender themselves. Finally, SB 458 degrades, demeans, and humiliates Plaintiffs because of their sex and gender.

#### **1. The Montana Two Spirit Society (“Two Spirit Society”)**

11. Plaintiff Two Spirit Society is a non-profit organization dedicated to increasing awareness of the culture and tradition of Two Spirit Native American and Indigenous people. “Two Spirit” is a unique cultural term that, depending on the tribe or ancestry, can represent different gender identities and distinct concepts in relation to gender. As a broad umbrella term, “Two Spirit” is used commonly to refer to different and tribally distinct genders and gender roles that defy the Western European binary conception of gender. Two Spirit identity may, for example, refer to people who embody both feminine and masculine genders or who embody a distinct third gender. Although today the term “Two Spirit” is used as a catch-all term for these gender and tribal-specific identities, traditionally, different tribes used different words for non-cisgender people, and those terms carried distinct meaning and significance. Two Spirit people hold integral spiritual roles within their tribes.

12. Colonization and assimilation repressed Two Spirit culture, but it reemerged during the gay rights movement and in response to the HIV and AIDS epidemic. The Two Spirit Society formed in 1996 to conduct an annual educational *Two Spirit Gathering*. Today, it advocates for Two Spirit persons, histories, and traditions, through various forms of community engagement, presentations, and workshops. The Two Spirit Society hosts the annual *Montana Two Spirit Gathering* and has hosted the *International Two Spirit Gathering*.

13. SB 458 is colonization: it means to eradicate Two Spirit culture by rejecting the legitimacy of Two Spirit people and the sovereignty of Indian Tribes. SB 458 directly harms the Two Spirit Society’s mission and the communities for

which it advocates. Many Two Spirit people have already experienced discrimination and harassment on the basis of their sex, gender, race, and culture, and they fear that the animus will continue. SB 458 will force Two Spirit people to misidentify themselves in conflict with their personal dignity, privacy, and culture, and it will remove state law protections against discrimination.

## **2. Transgender Plaintiffs Edwards, Fry, and Tellez**

14. Plaintiff Susan Edwards is a transgender woman who resides in Terry, Montana. She is a veteran and retired accountant. Growing up, Edwards felt significant pressure to conform to “boyish” stereotypes. In high school, she began crossdressing secretly. After nearly 40 years of repressing her identity, Edwards came out as “Susan” and eventually had gender correction surgery. Edwards has survived discrimination and harassment in her community and fears that she will not have any recourse for future discrimination. She is concerned about the social and legal implications of being misidentified under Montana law.

15. Plaintiff Kael Fry is a transgender man who resides in Missoula, Montana. He is a therapist who focuses on meeting the mental health needs of transgender, nonbinary, and other gender nonconforming individuals and families. Fry, who was assigned female at birth, began questioning femininity at a young age but did not have the tools or the language to explain or even conceptualize his experience. Fry is over six feet tall and has broad shoulders. During college, he experimented with masculine clothing and hair styles. Fry experienced immense anxiety and gender dysphoria—the confusion and despair that gender nonconforming

people feel when their body does not match the subjective understanding of their gender. Fry refrained from speaking in public and using public restrooms as a result. After five years of questioning his gender identity, Fry made the carefully-informed decision to transition to a man in 2007—a decision that saved his life. Today, he uses his education and personal experiences to help transgender and nonbinary people address difficult life experiences related to their gender identity. In the past, Fry has experienced gender-based discrimination and harassment in, *inter alia*, public accommodations, such as public restrooms and gyms. He fears that the discrimination and harassment will continue.

16. Plaintiff Anna Tellez is a transgender woman who resides in Miles City, Montana. She is an industrial refrigeration mechanic and a parent to two children. Tellez began her transition to woman six years ago and had gender reassignment surgery four years ago. For the first year-and-a-half of her transition, Tellez experienced extreme harassment in her community because she was not “passing” as a woman. Tellez’s own State Representative, Greg Kmetz, publicly harassed Tellez in their mutual hometown. Tellez encountered Kmetz—who was unknown to her at the time—while shopping for welding gas at Kmetz’s business in Miles City. Kmetz looked at Tellez and asked her if she had a vagina. On April 21, 2023, Kmetz voted in favor of SB 458. SB 458, Third Reading, Mont. House Vote Tabulation (Apr. 21, 2023).<sup>1</sup> Because of this and similar incidents, Tellez struggled with her mental

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<sup>1</sup> Available at [https://laws.leg.mt.gov/legprd/LAW0211W\\$BLAC.VoteTabulation?P\\_VOTE\\_SEQ=H2454&P\\_SESS=20231](https://laws.leg.mt.gov/legprd/LAW0211W$BLAC.VoteTabulation?P_VOTE_SEQ=H2454&P_SESS=20231).

health, culminating in a suicide attempt, as well as inpatient and outpatient treatment. Tellez's life since has improved, thanks to gender-affirming healthcare and the support of her family, but Tellez fears that she will continue to experience gender-based harassment and discrimination.

17. Under SB 458, Edwards, Fry, and Tellez can be denied access to public accommodations, employment, state benefits, insurance, housing, and healthcare based on their gender identities, without any state law remedies. SB 458 authorizes the State and private businesses to refuse to recognize Edwards, Tellez, and Fry as the people they are. They fear being forced to disclose their biological sex—revealing intensely private information about their medical histories, denying them the right of self-definition, and subjecting them to harassment and violence. Fry specifically fears that he cannot marry his long-time partner because of SB 458 and that he will be forced to identify as “female” on their marriage license application.

### **3. Intersex Plaintiffs Atwood and Aloia**

18. Plaintiff Eden Atwood is a psychotherapist, licensed clinical social worker, and professional actor and musician who resides in Helena, Montana. Atwood was born with external genitalia consistent with a female designation and was assigned female at birth. She presents as a woman and uses she/them pronouns, meaning that she is comfortable using either feminine or nonbinary pronouns.

19. Growing up in Butte, Montana, in the 1980s, Atwood became concerned that she was not experiencing the same puberty-associated developmental changes as her peers. She had no pubic or armpit hair and did not menstruate. As a freshman



in high school, Atwood had surgery to remove internal testes—reproductive glands or gonads that produce testosterone—without her consent or knowledge. She was placed on hormone treatment and eventually learned she would never have biological children. Atwood was also prescribed at-home, self-vaginal dilation for the sole purpose of someday “accommodating,” as the doctor put it, a partner during sexual intercourse. While still a teenager, a family member told Atwood that she was “half man, half woman.” Atwood lived in constant fear that she would be exposed and misunderstood or subjected to scorn and ridicule.

20. Atwood eventually learned she was born with Complete Androgen Insensitivity: an X chromosome variation that can cause a person to present as female—with external “female” genitalia (including a lower vagina, labia, clitoris, and urethra)—but without female internal reproductive organs. The medical community considers Atwood female. But Atwood was born with XY chromosomes, and SB 458 therefore considers her “male.”

21. Plaintiff Shannon Aloia is a 45-year-old resident of Missoula who uses they/them pronouns. They were born with internal “male” genitalia but assigned female at birth. When Aloia was three years old, their testes were removed during an exploratory surgery prompted by “lumps” in their stomach—resulting in forced sterilization, ongoing hormone treatments, and an atypical puberty.

22. Aloia was born with 17beta Hydroxysteroid Dehydrogenase 3 Deficiency. People with this condition are considered male, genetically—with XY chromosomes and testes—but a shortage of androgen, a male sex hormone, disrupts

the development of external sex organs before birth. As a result, most people with this condition are born with external genitalia that appear more consistent with a “female” designation.

23. Aloia was assigned female at birth and presents as androgynous. When a form requires a binary choice, they identify as “female.” But SB 458 requires Aloia to use “male” for government purposes, including their driver’s license and marriage certificate application, defying even the medical community’s view. This is especially harmful for Aloia because they are engaged and have been planning a wedding for several years. Aloia and their partner, who is male, planned to marry in the summer of 2023, but SB 458’s passage halted those plans. When Aloia and their partner learned that the bill would require Aloia to identify as a male on their marriage application and might prohibit their marriage entirely, they indefinitely postponed the wedding.

24. Neither Atwood nor Aloia fits neatly into SB 458’s definitions. SB 458 states that “there are exactly two sexes, male and female.” Although the definitions of male and female refer to “genetic” and “biological condition[s],” SB 458 fails to distinguish between external and internal genitalia; it fails to define genetic or biological conditions; and it fails to account for intersex people like Atwood and Aloia. Atwood and Aloia have already endured harassment and trauma on the basis of sex, and they fear that this mistreatment will continue.

## **B. Defendants**

25. The State of Montana is a duly admitted state of the United States.

26. Defendant Greg Gianforte is the Governor of the State of Montana. Gianforte is responsible for the execution of state laws. He oversees state agencies charged with implementing SB 458. He is named in his official capacity.

27. Defendant Austin Knudsen is the Montana Attorney General. Knudsen is Montana’s chief law enforcement officer and director of the Montana Department of Justice. Knudsen will oversee the implementation and enforcement of multiple provisions of SB 458. He is named in his official capacity.

## BACKGROUND

### A. Two Spirit

28. Traditionally, Two Spirit people assumed combined roles of “men” and “women.” *Two Spirit*, IHS.gov (last visited Sept. 6, 2023).<sup>2</sup> Most tribes considered Two Spirit people neither men nor women but as distinct, alternate genders. *Id.*

29. Two Spirit people occupied special spiritual roles as healers, shamans, and ceremonial leaders, and work roles as chiefs, pottery-makers, weavers, hunters, and leaders in warfare. *Id.* A variety of traits distinguished Two Spirit individuals from the gender binary, including temperament, dress, lifestyle, and social roles. *Id.* Their sexuality tended to diverge from the heteronormativity and monogamy common to Western European cultures. *Id.*

30. “The disruptions caused by conquest and disease . . . resulted in the loss of many traditions in Native communities,” including Two Spirit culture, which was “singled out for condemnation, interference, and many times violence.” *Id.* More

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<sup>2</sup> Available at <https://www.ihs.gov/lgbt/health/twospirit/>.

recently, Native Americans have revived Two Spirit roles and traditions. *Id.* Although often included in the umbrella category of LGBTQ+, the term Two Spirit “does not simply mean someone who is a Native American/Alaskan and gay.” *Id.* Two Spirit people hold unique cultural and spiritual significance.

## **B. Transgender**

31. As a medical term, “sex is a multidimensional biological construct based on anatomy, physiology, genetics, and hormones.” *What Are Sex & Gender?*, Nat’l Inst. Health.<sup>3</sup> “Gender” is a social construct based on “expectations about status, characteristics, and behavior as they are associated with certain sex traits.” *Id.*

32. “Transgender” (or “trans”) is a term for people whose gender identity differs from their assigned sex at birth. *See generally Understanding Transgender People: The Basics*, Nat’l Ctr. for Transgender Equality (Jan. 27, 2023).<sup>4</sup>

33. Many trans people experience gender dysphoria, a condition listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and defined as “psychological distress that results from an incongruence between one’s sex assigned at birth and one’s gender identity.” *What is Gender Dysphoria?*, Am. Psychiatric Ass’n.<sup>5</sup> Untreated, it can lead to anxiety, depression, self-harm, eating disorders, unemployment, substance abuse, and suicide. *Gender Dysphoria: Overview*, Mayo

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<sup>3</sup> Available at <https://orwh.od.nih.gov/sex-gender> (last visited Aug. 14, 2023).

<sup>4</sup> Available at <https://transequality.org/issues/resources/understanding-transgender-people-the-basics>.

<sup>5</sup> Available at <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited Sept. 13, 2023).

Clinic.<sup>6</sup> Treatment for gender dysphoria includes adopting corrected pronouns, changing name and gender markers on government identification, and hormone therapy or surgical affirmation. *Id.*

34. When a trans person decides to live according to the gender identity that defines them, they “transition.” *Understanding Transgender People*. Transitioning can be difficult for trans people, who often face discrimination and harassment. *Id.* Trans people nevertheless choose to transition because expressing their gender identity is essential to their well-being. *Id.*

### C. Intersex

35. Today, 1% of people have some recognizable form of “disorder of sexual differentiation.” Claire Ainsworth, *Sex Redefined*, *Nature* 518, 288–91 (2015).<sup>7</sup> Under the narrowest definition, “intersex” means a person born without ovaries or testes or with one of each, known as “ovotestis” (previously “hermaphroditism”). In ordinary parlance, however, “intersex” encompasses many sexual differentiation disorders. Despite some disagreement within the medical community about precisely which disorders meet intersex criteria, there is consensus that some individuals blur the lines between male and female.

36. Five weeks into development, a human embryo has the potential to form both male and female anatomy. *Id.* At six weeks, the embryo’s previously indeterminate gonad starts to become an ovary or a testis. *Id.* A testis secretes

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<sup>6</sup> Available at <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255> (last visited Aug. 28, 2023).

<sup>7</sup> Available at <https://www.nature.com/articles/518288a> (last visited Aug. 28, 2023).

testosterone; an ovary makes estrogen. *Sex Redefined*. Gonad development generally depends on sex chromosomes: a fetus with XX chromosomes is expected to develop an ovary, while XY chromosomes are associated with a testis. *Id.* Sex chromosomes also drive the development of external genitalia and secondary sex characteristics. *Id.*

37. But gene variations affecting gonad development and alterations in hormone signaling can sometimes result in a fetus with XY chromosomes developing “female” characteristics or with XX chromosomes developing “male” characteristics. *Id.* These differences can also cause a number of sexual differentiation disorders. Complete Androgen Insensitivity arises when hormone receptors are unable to process male sex hormones. *Id.* People with Androgen Insensitivity have XY chromosomes and internal testes and generally present with female external genitalia. *Id.* 17beta Hydroxysteroid Dehydrogenase 3 Deficiency (“17b-HSD3”) typically results in XY chromosomes and female or ambiguous external genitalia. Lindsay M. Mains et al., *17beta-Hydroxysteroid Dehydrogenase 3 Deficiency in a Male Pseudohermaphrodite* (May 16, 2007).<sup>8</sup>

38. Roughly 25 genes are involved in sex differentiation. Researchers observe significant variation in these genes, much of which has only mild effects, causing some to characterize sex as, “[b]iologically, . . . a spectrum.” *Sex Redefined*.

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<sup>8</sup> Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2259022/>.

### C. Senate Bill 458

39. Under “Terms of wide applicability,” § 1-1-201, MCA, SB 458 codifies new definitions for female, male, and sex, Ex. A, S. 458, Mont. 68th Leg., Reg. Sess. (2023) [hereinafter “SB 458”].

#### 1. Terms of wide applicability

40. Under SB 458, “‘Female’ means a member of the human species who, under normal development, has XX chromosomes and produces or would produce relatively large, relatively immobile gametes, or eggs, during her life cycle and has a reproductive and endocrine system oriented around the production of those gametes. An individual who would otherwise fall within this definition, but for a biological or genetic condition, is female.” SB 458, § 1(a).

41. “Male,” under SB 458, means “a member of the human species who, under normal development, has XY chromosomes and produces or would produce small, mobile gametes, or sperm, during his life cycle and has a reproductive and endocrine system oriented around the production of those gametes. An individual who would otherwise fall within this definition, but for a biological or genetic condition, is male.” *Id.* § 1(b).

42. SB 458 defines the term “sex” as “the organization of the body parts and gametes for reproduction in human beings and other organisms.” *Id.* § 1(f). The definition goes on:

In human beings there are exactly two sexes, male and female, with two corresponding types of gametes. The sexes are determined by the biological and genetic indication of male and female, including sex chromosomes, naturally occurring sex chromosomes, gonads, and

nonambiguous internal and external genitalia present at birth, without regard to an individual’s psychological, behavioral, social, chosen, or subjective experience of gender.

*Id.* (emphasis added). This is scientifically—and socially—inaccurate.

43. Indeed, this definition of sex undoes any attempt that the qualifier “but for a biological or genetic condition” makes to include people with intersex conditions in the definitions of female and male. Even if sections (1)(a) and (1)(b) could be read to sufficiently account for all intersex people—and they cannot—the broad-sweeping language of (1)(f), defining sex, swallows the exceptions.

44. Terms of wide applicability apply to the entire code. Section 1-1-201(1), MCA. Accordingly, SB 458’s definitions apply to every reference to female, male, and sex throughout the code. The consequences are vast.

45. Specifically, SB 458 incorporates the new definitions into the following code sections: § 2-18-208 (“comparable worth” anti-discrimination in state jobs); § 7-15-4207 (discrimination in urban renewal processes); § 7-34-2123 (discrimination in hospital admissions); § 13-27-408 (voter information pamphlets); § 13-35-301 (fair campaign practices); § 13-38-201 (appointment of committee representatives at primaries); § 20-7-1306 (designation of athletic teams); § 20-9-327 (female youth correctional facility admissions); § 20-25-501 (university students’ domiciliary intent); § 20-25-707 (discrimination in university work-study programs); § 22-2-306 (discrimination in cultural and aesthetic projects grants); § 33-1-201 (insurance code definitions); § 35-20-209 (cemetery internment records); § 39-2-912 (wrongful discharge); § 40-1-107 (marriage license applications); § 40-1-401 (prohibited



marriages); § 40-5-907 (child support case registries); § 40-5-1031 (parentage and child support pleadings); § 41-5-103 (Montana Youth Court Act); § 42-2-204 (presumption of “knowledge” in pregnancy); § 45-5-625 (sexual abuse of children); §§ 46-19-301, -401 (Western Interstate Corrections Compact inmate classifications); § 46-32-105 (expungement); §§ 49-1-102, 49-2-101, 49-3-101 (Montana Human Rights Act); §§ 50-5-105, -602 (healthcare discrimination); § 50-11-101 (reproductive human cloning); § 50-15-101 (vital statistics); § 50-19-103 (prenatal care); § 50-60-214 (restroom accessibility in public buildings); § 53-20-142 (residential facilities for developmental disabilities); §§ 53-21-121, -142 (mental health commitment); §§ 60-5-514, -522 (business eligibility for tourist-oriented directional signs); § 61-5-107 (driver’s licenses); § 72-1-103 (trusts and estates).

## **2. Specific amendments**

46. SB 458’s definitions ignore the identity, inherent worth, and dignity of Two Spirit, intersex, transgender, and nonbinary Montanans. The bill writes gender nonconforming people out of the code and compels them to misidentify themselves. The law should be invalidated on this basis alone. But if that were not enough, the changes to each specific provision of Montana law will have impractical, costly, and harmful consequences, even beyond those contemplated by its drafters.

47. For example, incorporating SB 458’s definition of “sex” into § 49-2-303, MCA, results in the following rule: “It is unlawful discriminatory practice for . . . an employer to refuse employment to a person . . . because of [the organization of the body parts and gametes for reproduction in human beings and other organisms . . .

without regard to an individual’s psychological, behavioral, social, chosen, or subjective experience of gender].” *See* SB 458, §§ 1(1)(f), 27(21); § 49-2-303(1)(a), MCA. In other words, SB 458 authorizes employers to “refuse employment to a person,” § 49-2-303(1)(a), MCA, because of their “psychological, behavioral, social, chosen, or subjective experience of gender,” SB 458, § 1(1)(f).

**a. Amendments authorizing discrimination against Plaintiffs**

48. SB 458 intentionally and dramatically changes state antidiscrimination law to distinguish between sex- and gender-based discrimination. The former remains unlawful only insofar as an individual falls within SB 458’s unscientific definitions, whereas the latter is largely no longer unlawful, except where coextensive with sex-based discrimination as SB 458 defines it. Senator Glimm was clear about the bill’s purpose when he introduced it: he wanted to ensure that antidiscrimination provisions do not protect people like Plaintiffs, whose gender does not match the Legislature’s pseudo-scientific definition of their “sex.”

49. In particular, SB 458 definitively removes all gender-based protections from the Montana Human Rights Act (“MHRA”), §§ 49-1-101 et seq., MCA. SB 458, §§ 26–28. The MHRA is the “exclusive remedy” for acts of unlawful discrimination in Montana. Section 49-2-512, MCA. SB 458 therefore deprives Plaintiffs of any state remedy for instances of gender-based discrimination in employment, public accommodations, housing, financial assistance and credit transactions, education, retaliation, state benefits, and insurance and retirement plans.

50. SB 458 also discriminates on the basis of gender identity in all phases of private and public healthcare services, § 50-5-105, MCA; the Montana Insurance Code, §§ 33-1-101 et seq., MCA; urban renewal projects, § 7-15-4207, MCA; district hospital admissions, § 7-34-2123, MCA; university work-study programs, § 20-25-707, MCA; state job classifications, § 2-18-208, MCA; cultural and aesthetic projects grants, § 22-2-306, MCA; and business informational and tourist-oriented signs, §§ 60-5-514 & -522, MCA. *See* SB 458, §§ 2–4, 11–13, 29, 38–39.

**b. Amendments requiring Plaintiffs to misidentify themselves**

51. SB 458 applies throughout the code to define individuals according to its unscientific binary—and to require individuals to so identify. This forced identification is culturally repugnant to Two Spirit Montanans; degrading to Two Spirit, transgender, intersex, and nonbinary Montanans; and medically inaccurate for intersex Montanans.

52. Specific amendments that compel Montanans to misidentify their sex include the following: § 13-38-201, MCA (election committee representatives); § 40-1-107, MCA (marriage licenses); §§ 50-15-101 through -412, MCA (birth certificates); and § 61-5-107, MCA (driver’s licenses and motorcycle endorsements). SB 458, §§ 7, 16, 32, 40.

**c. Amendments that deny Plaintiffs benefits and legal protection**

53. SB 458 further operates to exclude Plaintiffs and other gender nonconforming individuals from certain statutory privileges. Whether these changes

will cause Plaintiffs to be misidentified only or will instead fully deny them legal benefits as well, the harm is significant.

54. To begin, SB 458 creates potentially unsafe, even violent situations for trans people in state custody. It requires transgender girls, for example, whom SB 458 defines as “male,” to be housed together with cisgender male youths. SB 458, § 9 (amending § 20-9-327, MCA). It similarly amends the Western Interstate Corrections Compact, § 46-19-301, MCA, requiring transgender adult inmates to be housed according to their sex, as defined by SB 458. *See* SB 458, § 19.

55. Next, SB 458 amends § 40-1-401(1)(d), MCA, to prohibit “a marriage between persons of the same sex, as defined in 1-1-201.” SB 458, § 17. But that code section was invalidated as unconstitutional in *Rolando v. Fox*, 23 F. Supp. 3d 1227 (D. Mont. 2014). By attempting to change the meaning of the “Prohibited Marriages” statute, the Legislature appears to create a new category of unlawful marriages based on SB 458’s unscientific definition of sex.

56. SB 458 also amends § 13-27-408, MCA (allowing language in voter information pamphlets that “incites, counsels, promotes, or advocates hatred, abuse, violence, or hostility toward, or that tends to cast shame upon” gender nonconforming people); § 13-35-301, MCA (allowing “appeal[s] to prejudice” during political campaigns); § 20-7-1306, MCA (incorporating SB 458’s definitions into rules governing intercollegiate sports); § 20-25-501, MCA (incorporating SB 458’s definitions to university students); § 45-5-625, MCA (amending child sex abuse crimes); §§ 50-5-602 et seq., MCA (removing gender nonconforming people from

physician’s “continuing responsibility for healthcare”); § 50-60-214, MCA (requiring “accessible restrooms for each sex,” per SB 458); § 53-21-121, MCA (commitment petition must indicate a binary gender); and § 72-1-103(54), MCA (limiting testators to SB 458’s binary definitions). SB 458, §§ 5–6, 8, 10, 18, 30, 34–36, 41.

### 3. Legislative history

57. When Senator Glimm requested to draft SB 458, a Legislative Services Division employee asked “how [he] would like to define sex in Montana law.” Glimm provided a first draft on February 9, 2023, and instructed her to direct all future questions to Jeff Laszloffy, a lobbyist for a conservative Christian advocacy group.

58. Laszloffy subsequently instructed Legislative Services:

The definition should be included in Title 1. Any other reference to “sex” in the code should refer back to this Title 1 definition. For instance, MCA 61-5-107(2) refers to “sex” as part of the required information for an application for a driver’s license. [SB 458] should include an amendment to this section to read: “Each application must include the full legal name, date of birth, sex **as defined in [SB 458]**, residence of the applicant . . . .” The same reference mechanism could be used for the Human Rights Bureau laws in Title 49 wherever “sex” is referenced.

Ex. B, Email from Laszloffy, J. to Leg. Servs. Div. (Feb. 13, 2023).

59. In the first draft, the definitions of female and male made no reference to “biological” or “genetic” conditions. But Senator Brad Molnar moved to amend SB 458, Mont. Leg., S. Fl. Sess. Hrg. at 13:22:46–13:25:00 (Mar. 15, 2023),<sup>9</sup> after hearing testimony from Dr. Lauren Wilson, President of the Montana Chapter of the

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<sup>9</sup> Available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46233?agendaId=259267>.

American Academy of Pediatrics, explaining that the bill would exclude many sex presentations, Mont. Leg., S. Pub. Health, Welfare, & Safety Hrg. at 18:27:57–18:30:25 (Feb. 27, 2023).<sup>10</sup>

60. But the amendment did not resolve concerns. Dr. Wilson testified again, explaining, “The amendments added to address intersex people actually make the bill more inaccurate.” Mont. Leg., H. Jud. Hrg. at 8:45:14–8:45:20 (Apr. 13, 2023).<sup>11</sup> She pointed out that, to claim “there are exactly two sexes, male and female,” is, “medically, not true.” *Id.* at 8:43:50–8:44:06. Dr. Wilson described how SB 458 would wholly exclude people with Partial and Complete Androgen Insensitivity:

There also are all sorts of people whose reproductive and endocrine systems are not organized around the production of the gamete that would typically correlate with them. One example is Partial and Complete Androgen Insensitivity: people are “XY” but appear female externally. Their reproductive and endocrine systems are a mixture of what one would consider male and female. This is often not identified at birth but instead is identified at puberty. When it is identified at birth, we are not able to predict whether a person will feel more male or female. It’s truly 50-50 for how they identify.

*Id.* at 8:45:20–8:45:51.

61. Legislators ignored her testimony. The House excised attempts to account for intersex people completely and added the following clause: “An individual

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<sup>10</sup> Available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/1/46699?agendaId=255346>.

<sup>11</sup> Available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/1/47804?agendaId=272359>.

who would otherwise fall within this definition, but for a biological or genetic condition, is female [(or male)].” SB 458, § 1.

62. SB 458 passed on April 27, 2023.

#### 4. Legislative intent

63. In passing SB 458, the Legislature intended to remove state law protections from gender-based discrimination.

64. As sponsor Senator Glimm repeatedly asserted, “Today there are some, including judges, who conflate the terms sex and gender.” H. Jud. Hrg. at 8:21:40–8:21:51; S. Pub. Health, Welfare, & Safety Hrg. at 18:06:05–18:06:15. Glimm insisted that it is “necessary” to draw a distinction between gender and sex because of the modern concepts of “multiple genders, gender fluidity, gender expression, and transgenderism.” S. Pub. Health, Welfare, & Safety Hrg. at 18:06:22–18:06:26, 18:06:37–18:06:49.

65. Laszloffy—a lobbyist, drafter, and the architect of SB 458—echoed this intent: “The courts should not create definitions—that’s the legislature’s job. That’s your job, and that’s why we’re here today.” H. Jud. Hrg. at 8:24:30–8:24:39. He claimed that disambiguating sex from gender would lead to “rational, intelligent debates and clear laws.” *Id.* at 8:24:40–8:24:45.

66. Laszloffy gave two examples of “harm” caused by “using sex and gender interchangeably.” *Id.* at 8:26:10–8:26:17. First, he identified Senate Bill 280 (2021), which would have blocked transgender Montanans from updating their birth certificates to reflect their gender unless a court order showed a surgical sex change.

SB 280 was permanently enjoined on June 26, 2023. Ord., *Marquez v. State*, No. DV 21-873 (Mont. 13th Jud. Dist. Ct. June 26, 2023). Laszloffy cited the preliminary injunction, complaining that the judge had “conflated the terms sex and gender.” H. Jud. Hrg. at 8:26:30–8:26:51; see Findings of Fact & Concl. of Law, *Marquez v. State*, No. DV 21-873 (Mont. 13th Jud. Dist. Ct. Apr. 21, 2022). Senator Glimm repeated this argument on the Senate Floor. S. Fl. Sess. at 13:21:33–13:22:30.

67. Second, Laszloffy pointed to § 13-38-201, MCA, which requires the appointment of one man and one woman from opposing parties to primary election precinct committees. Laszloffy hypothesized that, without SB 458, a political party might appoint two representatives with XY chromosomes, one of whom identifies as a man, the other as a woman, thereby undermining the intent of § 13-38-201, MCA. H. Jud. Hrg. at 8:26:54–8:27:54. He did not identify any connection between the legislative intent of § 13-38-201, MCA, and the reproductive capacity or chromosomal makeup of election precinct committee members. He gave no reason why the Legislature would intend people with different sex chromosomes to serve on committees, as opposed to people with different genders.

68. Supportive legislators echoed those sentiments. During the Second Reading in the House, Representative Naarah Hastings argued that permitting a trans woman to serve on a committee with a man would be, “in effect, two biological males and no place left on the committee for a biological female.” Mont. Leg., S. Fl.



Sess. at 13:42:10–13:42:36 (Apr. 20, 2023).<sup>12</sup> Senator Shelley Vance made the same claim. Mont. Leg., S. Fl. Sess. Hrg., at 13:28:45–13:29:57 (Mar. 15, 2023).

69. Senator Jeremy Trebas complained that there are “at least 94 genders as of 2023.” *Id.* at 13:54:40–13:54:48. He reiterated his animus on Twitter. Even though he and other legislators purported that SB 458 “clarified” the difference between sex and gender, Trebas asserted, “Sex equals gender,” without qualification:



**Jeremy Trebas**  
@bluesaint24



Biological realities cannot be changed. You can't just call yourself female when you are a male. "Trust the science" remember. The science is that there are xx and xy chromosomes. Sex equals gender, and there are two except in rare outlier cases.

10:20 PM · Apr 25, 2023 · 121 Views

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70. Senator Theresa Manzella made similarly invidious comments about transgender Montanans on Instagram:

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<sup>12</sup> Available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/1/46172?agendaId=274959>.



71. Representative Kmetz also voted in favor of SB 458. SB 458, Third Reading, Mont. House Vote Tabulation (Apr. 21, 2023).<sup>13</sup> Kmetz has a history of harassing transgender Montanans, as demonstrated by his interaction with Tellez, a customer at his business in Miles City. *See* ¶ 16, *supra*. SB 458 allows business owners like Kmetz to harass and refuse service to transgender people like Tellez without repercussions.

72. SB 458 was motivated by legislators' animus toward trans and gender nonconforming people. SB 458 was drafted and enacted to ensure that transgender Montanans cannot enjoy the benefits and protections of Montana laws.

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<sup>13</sup> Available at [https://laws.leg.mt.gov/legprd/LAW0211W\\$BLAC.VoteTabulation?P\\_VOTE\\_SEQ=H2454&P\\_SESS=20231](https://laws.leg.mt.gov/legprd/LAW0211W$BLAC.VoteTabulation?P_VOTE_SEQ=H2454&P_SESS=20231).

## CLAIMS FOR RELIEF

### COUNT I:

#### Violation of the Right to Equal Protection of the Laws: Sex & Culture (Mont. Const. art. II, § 4)

73. Plaintiffs incorporate all foregoing allegations.

74. “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).

75. “Montana’s Equal Protection Clause provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution.” *In re Adoption of A.W.S.*, 2014 MT 322, ¶ 11, 377 Mont. 234, 339 P.3d 414. Even a law containing apparently neutral classifications may nonetheless “violate equal protection ‘if in reality it constitutes a device designed to impose different burdens on different classes of persons.’” *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445 (quoting *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 327, 982 P.2d 421). Indeed, in adopting Section 4, the framers meant “to eradicate public and private discriminations based on race, color, sex, culture, social origin or condition, or political or religious ideas.” *Gazelka v. St. Peter’s Hosp.*, 2018 MT 152, ¶ 8, 392 Mont. 1, 420 P.3d 528 (cleaned up).

76. By including “sex” specifically within Article II, Section 4, the delegates to the 1972 Constitution intended to provide individuals broader sex protections than federal law. Mont. Const. Convention, Comm. Proposals: Bill of Rights, No. VIII, at 17 (Feb. 23, 1972).

77. On its face, SB 458 creates impermissible classifications on the basis of sex, including between (i) cisgender people and noncisgender people; and (ii) intersex people and non-intersex people.

78. SB 458’s classifications are plainly premised on sex, a suspect class, and thus subject the bill to strict scrutiny under the Montana Constitution. *See Farrier v. Teacher’s Ret. Bd.*, 2005 MT 229, ¶ 16, 328 Mont. 375, 120 P.3d 390.

79. SB 458 also creates impermissible classifications on the basis of culture. “The word culture was incorporated specifically [into the Equal Protection Clause] to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians.” Mont. Const. Convention, Comm. Proposals: Bill of Rights, No. VIII, at 17 (Feb. 23, 1972).

80. “Two Spirit” is a unique cultural term for Indigenous people who defy the Western European gender binary. Two Spirit people often hold integral roles in tribal leadership, essential to tribal sovereignty.

81. SB 458 infringes on Plaintiff Two Spirit Society’s right to equal protection because it fails to recognize tribal culture, and it deprives the Society’s members of benefits and protections under Montana law on the basis of their culture.

Although SB 458 recognizes cisgender people as “human beings,” it does not recognize Two Spirit people; and this distinction is made on the basis of culture.

82. SB 458 fails strict scrutiny because the State lacks any legitimate reason—much less a compelling one—for discriminating against intersex, noncisgender, and Two Spirit people. SB 458 is motivated by animus and a bare desire to harm. SB 458 is not calculated—and is far from narrowly tailored—to achieve the Legislature’s purported intent to clarify confusion between sex and gender.

83. SB 458 violates Plaintiffs’ fundamental right to equal protection.

**COUNT II:**  
**Violation of the Right to Privacy**  
**(Mont. Const. art. II, § 10)**

84. Plaintiffs incorporate all foregoing allegations.

85. “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” Mont. Const. art. II, § 10.

86. Montana’s right to privacy safeguards both (i) “personal autonomy”—that is, the right to “make decisions in matters generally considered private”—and (ii) freedom from government intrusion—i.e., “the individual interest in avoiding accumulation and disclosure of personal matters.” *Armstrong v. State*, 1999 MT 261, ¶¶ 35, 46, 296 Mont. 361, 989 P.3d 364, (cleaned up); *Gryczan v. State*, 283 Mont. 433, 448–49, 942 P.2d 112, 121–22 (1997).

87. Montana’s right to privacy offers “significantly broader protection than does the federal constitution”: it is, in fact, “one of the most stringent protections of its citizens’ right to privacy in the United States.” *Armstrong*, ¶¶ 34, 41.

88. SB 458 infringes on Plaintiffs’ personal autonomy because it coerces them to publicly identify their sex “chromosomes,” “gametes,” and “reproductive and endocrine systems,” regardless of their “psychological, behavioral, social, chosen, or subjective experience of gender.” SB 458, § 1(a)–(b), (f).

89. By depriving Plaintiffs of the ability to self-identify their gender, SB 458 encroaches on their ability to make “intimate and personal choices that concern the right to define one’s own concept of existence.” *See Armstrong*, ¶ 37.

90. SB 458 also infringes on Plaintiffs’ freedom from government intrusion because it compels disclosure of sensitive healthcare and biological information. SB 458 compels disclosure of biological and genetic information—namely, sex “chromosomes,” “gametes,” and “reproductive and endocrine systems.” For Plaintiffs specifically, SB 458 requires disclosure of healthcare information, including, in many instances, (i) that they are transgender, intersex, or Two Spirit; (ii) whether they’ve had gender-affirming surgeries and other treatment; (iii) that their internal genitalia may be anatomically inconsistent with their external genitalia; or (iv) that they may have been assigned a sex at birth that differs from the way they currently present.

91. Plaintiffs have a subjective and actual expectation of privacy in information regarding their chromosomes, gametes, and internal and external genitalia as well as in their status as Two Spirit, intersex, or transgender. That

expectation is also objectively reasonable. *See State v. Nelson*, 283 Mont. 231, 242, 941 P.2d 441, 447 (1997) (“[T]he zone of privacy . . . extends to the details of a patient’s medical and psychiatric history.”); *see also Powell v. Schriver*, 175 F.3d 107, 112 (2d. Cir. 1999) (“individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality”).

92. As a fundamental right—and by its plain terms—the right to privacy requires that SB 458 face strict scrutiny.

93. But SB 458 fails strict scrutiny because the State lacks a compelling interest to impose on Plaintiffs a binary definition of sex and/or gender. SB 458 is not at all calculated—and far from narrowly tailored—to achieve the Legislature’s purported intent to clarify confusion between sex and gender.

94. SB 458 violates Plaintiffs’ fundamental right to privacy.

**COUNT III:**  
**Violation of the Right to Individual Dignity**  
**(Mont. Const. art. II, § 4)**

95. Plaintiffs incorporate all foregoing allegations.

96. “The dignity of the human being is inviolable.” Mont. Const. art. II, § 4. The right to individual dignity is a fundamental right. *Armstrong*, ¶ 72.

97. “[T]reatment which deliberately reduces the value of persons, and which fails to acknowledge their worth as persons, directly violates their dignity.” *Walker v. State*, 2003 MT 134, ¶ 81, 316 Mont. 103, 68 P.3d 872. And the Dignity Clause protects the right to “recognition” and “inclusion” in the political and social

community. *State v. Wellknown*, 2022 MT 95, ¶ 42, 408 Mont. 411, 510 P.3d 84 (Baker, J., concurring).

98. SB 458 infringes Plaintiffs’ right to dignity because it degrades and demeans them, fails to acknowledge their worth, and denies them recognition within Montana’s social and political community.

99. SB 458 is subject to strict scrutiny under the Dignity Clause.

100. SB 458 fails strict scrutiny because the State lacks any legitimate reason—much less a compelling one—to erase all gender nonconforming people from Montana law. SB 458 is motivated by animus and a bare desire to harm Plaintiffs. SB 458 is not calculated—and certainly is not narrowly tailored—to achieve the Legislature’s purported intent to clarify confusion between sex and gender.

101. SB 458 violates Plaintiffs’ right to individual dignity.

**COUNT IV:**  
**Violation of the Freedom of Speech**  
**(Mont. Const. art. II, § 7; U.S. Const. amend. I, as Incorporated Against the**  
**States, U.S. Const. amend. XIV)**

102. Plaintiffs incorporate all foregoing allegations.

103. “No law shall be passed impairing the freedom of speech or expression.”  
Mont. Const. art. II, § 7.

104. “Congress shall make no law . . . abridging the freedom of speech . . . .”  
U.S. Const. amend. I. Additionally, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor shall any State deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.



105. “Under the First Amendment to the United States Constitution and Article II, § 7, of the Montana Constitution, a law regulating expressive content is ‘presumptively invalid.’” *State v. Lamoureux*, 2021 MT 94, ¶ 21, 404 Mont. 61, 485 P.3d 192, *cert. denied* 142 S. Ct. 860 (2022) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

106. The Government compels speech if there is (i) speech, (ii) to which the plaintiff objects, (iii) that is compelled, and (iv) that is readily associated with the plaintiff. *See Cressman v. Thompson*, 798 F.3d 938, 949–51 (10th Cir. 2015).

107. Content-based restrictions must survive strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

108. SB 458 compels speech because it requires Plaintiffs to identify with a sex that does not represent them. It forces them to speak this message on their driver’s licenses and marriage license applications. It compels Plaintiffs to identify inaccurately in order to receive any protections on the basis of sex in housing, employment, insurance, financial and credit transactions, and public accommodations.

109. SB 458 regulates the content of Plaintiffs’ speech by regulating the gender identity a person may use when engaging in all aspects of public life.

110. Because SB 458 restricts speech based on its content, it is presumptively unconstitutional and subject to strict scrutiny.

111. SB 458 does not satisfy strict scrutiny. The State lacks a legitimate reason—much less a compelling one—for coercing people to identify with a sex that

presumably aligns with their sex chromosomes. SB 458 is not at all calculated—and is far from narrowly tailored—to achieve the Legislature’s purported intent to clarify confusion between sex and gender.

112. SB 458 violates Plaintiffs’ freedom of speech.

**PRAYER FOR RELIEF**

Plaintiffs respectfully request that this Court:

- a. Enter judgment for Plaintiffs and against Defendants;
- b. Declare SB 458 facially unconstitutional;
- c. Permanently enjoin Defendants from enforcing SB 458;
- d. Award Plaintiffs their costs, disbursements, and reasonable attorney’s fees incurred in bringing this action; and
- e. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 11th day of October 2023.

*/s/Dimitrios Tsolakidis*  
Dimitrios Tsolakidis  
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