IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0139

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JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated,

*Plaintiffs and Appellees*,

v.

STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as Governor of the State of Montana; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services; MONTANA DEPARTMENT OF JUSTICE; and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,

*Defendants and Appellants*.

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# APPELLANTS' OPENING BRIEF

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On Appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. ADV-2024-261, The Honorable Mike Menahan, Presiding

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## STATEMENT OF THE ISSUES

Defendants-Appellants (collectively, the "State") raise the following issues:

1. Did Plaintiffs establish standing?
2. Did the District Court err and abuse its discretion by using "serious questions" and "sliding scale" preliminary injunction tests prohibited by MCA § 27-19-201(4)(b), and relying on declarations based on information and belief?
3. Did the District Court err and abuse its discretion by enjoining important State policies, absent a showing of likelihood of success or irreparable harm, and where the balance of equities and public interest support the State?
4. Did the District Court err and abuse its discretion by issuing an overbroad injunction that extends to unchallenged applications of State policies?

## STATEMENT OF THE CASE

In 2024, two Plaintiffs, biological men who purported to transition to a female identity before filing suit, challenged Montana's policies predicating birth certificate sex amendments on verified documentation that the person's sex was originally listed incorrectly or misidentified, based on sex chromosomes, gonads, and genitalia at birth. *See* ARM § 37.8.311; *see also* Dkt. 1 (complaint). Though these policies apply without regard to sex or gender identity, Plaintiffs claim that the State's biological definition of sex is "an assault on transgender Montanans." Dkt. 1 ¶ 4. Plaintiffs allege that the policies "violate the Montana Constitution's equal-

protection guarantee, privacy protections, and prohibition against compelled speech." Appendix, Dkt. 61 at 3.

About a month after suing the State and several State agencies and officials for injunctive and declaratory relief, Plaintiffs moved for a preliminary injunction and class certification. Dkts. 11, 13. The parties briefed those motions and presented expert affidavits on the preliminary injunction, and the District Court held a hearing then issued an injunction. Dkt. 61 at 4, 14. Applying prior precedents adopting a sliding scale test for preliminary injunctions, the Court held that Plaintiffs first needed to show only "a serious question going to the merits"—rather than a likelihood of success. *Id.* at 5–6. And the District Court found that Plaintiffs "rais[ed] a serious question on the merits" of their equal protection claim. *Id.* at 12. According to the District Court, the policies treat "transgender" and "cisgender Montanans" "seeking to amend the sex designation on their birth certificates or driver's licenses" differently. *Id.* at 7. The District Court ignored that no one can obtain an amendment by invoking their gender identity. The District Court found discrimination based on transgender status and equated that discrimination to sex discrimination based on the U.S. Supreme Court's Title VII decision in *Bostock v. Clayton County*. *Id.* at 7–10. *Then* the District Court adopted a new theory not advanced by Plaintiffs and not supported by this Court's precedents—that *all* sex discrimination is subject to strict scrutiny because of the narrow prohibition in article II, section 4 of the Montana

Constitution on sex discrimination "in the exercise of [a person's] civil or political rights." *Id.* at 10–11. Applying strict scrutiny, the District Court agreed that the "State may have a compelling state interest in ensuring accurate vital statistics" but held that there was "a serious question" about narrow tailoring. *Id.* at 11–12.

Though the District Court found no more than a serious question on the merits—which, according to Plaintiffs, does not require even "a probability of success," Nov. 14, 2024 Tr. 11—it collapsed the remaining injunction factors into the merits. Its discussion of irreparable harm, balance of equities, and the public interest is entirely focused on the likelihood-of-success—even though the District Court did not find such a likelihood. The Court said that "the loss of a constitutional right constitutes irreparable harm," Dkt. 61 at 12, ignoring that Plaintiffs had not shown even "a probability" of any such loss. The Court waved away the last two factors, too, reasoning that its "serious question" on the merits "tips" those factors "decisively." *Id.* at 13–14.

Without discussion of the scope of the injunction, the District Court preliminarily enjoined *all* applications of Montana's birth certificate amendment rule, ARM § 37.8.311(5)(b). Dkt. 61 at 14. The Court also enjoined a purported motor vehicle policy conditioning driver's license sex changes on an amended birth certificate and, "as applied to issuing amended birth certificates and amended driver's licenses," a state statute defining "sex" as biological. *Id.*; *see* SB 458 § 1

(codified at MCA § 1-1-201(1)(f)).[1] Separately, the Court denied Plaintiffs' motion for class certification, reasoning that "[t]he outcome of the litigation necessarily affects all members of Plaintiffs' proposed class regardless of whether the litigation is conducted as a class action or not." Dkt. 59 at 4.

The State timely appealed from the preliminary injunction. Dkt. 81.

## STATEMENT OF FACTS

Thousands of children are born in the United States each day. These births "not only create a new generation of Americans" but also provide vital information for state public officials who are tasked with recording "population changes, demographics, fertility rates, infant mortality, and other medical issues." *Gore v. Lee*, 107 F.4th 548, 551 (6th Cir. 2024). This data is typically compiled in large part through birth certificates that record the facts of each child's birth. The federal government seeks to collect this information as well, to "secure uniformity in the registration and collection of mortality, morbidity, and other health data." 42 U.S.C. § 242k(g). Among the relevant pieces of data requested by the National Center for Health Statistics and provided by all States is the biological sex of each child. *Gore*, 107 F.4th at 552. An executive order confirms that "[w]hen administering or

[1] Two other decisions from a different district court have enjoined the definition of "sex" in MCA § 1-1-201(1)(f). *Edwards v. State*, No. DV-23-1026 (Fourth Jud. Dist. Court, Missoula Cty., Feb. 18, 2025); *Reagor v. State*, No: DV-23-1245 (Fourth Jud. Dist. Court, Missoula Cty., June 25, 2024).

enforcing sex-based distinctions, every agency and all Federal employees acting in an official capacity on behalf of their agency shall use the term 'sex' and not 'gender' in all applicable Federal policies and documents." Exec. Order. No. 14168 (Jan. 20, 2025).

The federal and state governments' interests in collecting birth information are not new. The "practice traces its origins to our early history." *Gore*, 107 F.4th at 551. As early as 1639, the Massachusetts Bay Colony required registration of births, marriages, and deaths. *Id*. at 551–52. By the mid-twentieth century, Montana and every other State used birth certificates to collect data, including about biological sex. *Id.* at 552.

The Montana Department of Public Health and Human Services (DPHHS) is charged with establishing an accurate statewide system of vital statistics and with adopting rules for gathering, recording, using, amending, and preserving vital statistics and vital records relating to births, deaths, fetal deaths, marriages, and dissolutions of marriage. *See, e.g.*, MCA §§ 50-15-102, 50-15-103. Montana law contemplates that the birth certificates and other records of birth include the sex of the child. *See, e.g.*, *Id.* §§ 50-15-203, 50-15-224, 50-15-304. Under regulations promulgated by DPHHS, each certificate of birth and certified copy of a birth record (as well as of a birth that resulted in a stillbirth) must include the sex of the infant whose birth is being registered (the "registrant"). ARM §§ 37.8.128(2)(e), (4)(e),

37.8.301(4). "A certificate of birth for every child born in Montana must be completed and filed within ten calendar days after the date of birth." *Id.* § 37.8.301(1).

In 2022, DPHHS was confronted with a serious problem to its birth certificate data collection. As it explained in its notice accompanying the rule challenged here when it was proposed, an injunction against a prior Montana law (SB 280) regulating birth certificate sex amendments (on vagueness grounds) left it without a "regulatory mechanism by which [it] can accept and process birth certificate sex identification amendment applications." MAR Notice No. 37-1002, 2022 Mont. Admin. Register No. 11, at 898 (June 10, 2022), https://perma.cc/G44J-CX24 ("2022 MAR Notice"). Emphasizing its "obligation to ensure the accuracy of vital records," DPHHS proposed a new rule. *Id.* at 896. DPHHS noted that the U.S. National Institutes of Health and other medical authorities had concluded that "'[s]ex' is a biological classification" that "originates from an organism's sex chromosome complement." *Id.* at 899–900. According to then World Health Organization guidance discussed in the notice, sex is "a biological characteristic," while "gender [i]s a social construct." *Id.* at 900 n.8. Medical authorities warned that "[t]he terms *sex* and *gender* should not be used interchangeably." *Id.*

DPHHS then noted that "statutory provisions governing Montana birth certificates" "use the word 'sex,' not 'gender' or 'gender identity.'" *Id.* at 901–02.

The agency also emphasized that "[t]he birth certificate generally records only facts that are known (or knowable) at the time of the person's birth"—like sex, not gender identity. *Id.* at 902. Thus, emphasizing that "a birth certificate is, first and foremost, a vital record which records the facts concerning the birth of a person in Montana"—a record implicating "important departmental and public health interests in the collection and maintenance of accurate vital statistics and records"—DPHHS, after comment and amendment, adopted the amendment rule challenged here. *Id.* at 903.

That regulation governing birth certificate amendments for adoptions, name changes, and sex changes is found at ARM § 37.8.311. The relevant provision for sex amendments lays out alternative procedures applicable in "any period in which the department is subject to an injunction against enforcement of S.B. 280." *Id.* § 37.8.311(a). Because such an injunction exists, subsection (b) currently governs. *See* Dkt. 1 ¶ 9.

Under the operative provision, "[t]he sex of a registrant as cited on a certificate may be corrected only if" one of two conditions exists. ARM § 37.8.311(5)(b). The first condition is if "the sex of an individual was listed incorrectly on the original certificate as a result of a scrivener's error or a data entry error, and the department receives a correction affidavit and supporting documents," including health care records from the time of birth "that identify the sex of the individual, with an affidavit from the health care facility or professional attesting to the date and

accuracy of the records." *Id.* § 37.8.311(5)(b)(i). The second condition is if "the sex of the individual was misidentified on the original certificate and the department receives a correction affidavit and supporting documents," "including a copy of the results of chromosomal, molecular, karyotypic, DNA, or genetic testing that identify the sex of the individual, together with an affidavit from the health care facility, health care professional, or laboratory testing facility that conducted the test and/or analyzed the test results, attesting to the test results and their accuracy." *Id.* § 37.8.311(5)(b)(ii).

In short, sex on a birth certificate can be changed only if originally listed incorrectly or misidentified—and only with supporting "specific documentation" to "ensure the accuracy of the birth certificate as a vital record." 2022 MAR Notice, *supra*, at 904. Necessarily, as explained in DPHHS's rulemaking notice, amendments based solely on "gender transition, gender identity, or change of gender"—or any other reason without proper documentation of original error—are not authorized. *Id.* at 902.

Even though it is not the basis of the 2022 rule, DPHHS reiterated in 2024 that it would apply the birth certificate amendment process consistent with Senate Bill 458, which defined "sex" to "mean[] the organization of the body parts and gametes for reproduction." SB 458 § 1 (codified at MCA § 1-1-201(1)(f)); *see DPHHS Officials State 2022 Administrative Rule Governs Sex Marker Birth*

*Certificate Change Requests*, https://perma.cc/F8AR-VCYS (Feb. 20, 2024) ("Feb. 2024 Notice"). The statutory definition explains that "[t]he sexes are determined by the biological and genetic indication of male or 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." MCA § 1-1-201(1)(f).[2]

Last, according to Plaintiffs, Montana's Motor Vehicle Division in 2024 implemented a policy of declining "to issu[e] amended driver's licenses" with a different sex designation "without an amended birth certificate." Dkt. 61 at 14; *see* Dkt. 1 ¶ 10. Plaintiffs' only evidence of this policy is unsourced hearsay that one Plaintiff could not obtain a new driver's license "without a court order and a corrected birth certificate." Dkt. 11-2 ¶ 7.

## STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Montanans Against Irresponsible Densification, LLC v. State*, 2024 MT 200, ¶ 10, 418 Mont. 78, 84, 555 P.3d 759, 764 (*MAID*) (quoting *Winter v. Natural Res.*

[2] The Legislature has passed Senate Bill 437, which repeals MCA § 1-1-201 and enacts a new section relating to terms of wide applicability, including "sex." That bill has not yet been transmitted to the Governor. *See* https://bills.legmt.gov/#/laws/bill/2/LC4192?open_tab=sum The policies enjoined in this case are consistent with SB 437's definition of "sex."

*Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). This Court reviews a district court's grant or denial of a preliminary injunction "for manifest abuse of discretion." *Mercer v. Montana Dep't of Pub. Health & Hum. Servs.*, 2025 MT 9, ¶ 9, 562 P.3d 502, 507. "A court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *Id.* "If the district court's decision on a preliminary injunction was based upon legal conclusions, this Court will review those conclusions for correctness." *Id.* (citing *MAID*, ¶ 8).

"A statute is presumed constitutional unless it conflicts with the Montana Constitution, in the judgement of the court, beyond a reasonable doubt." *State v. Akhmedli*, 2023 MT 120, ¶ 3, 412 Mont. 538, 541, 531 P.3d 562, 563 (cleaned up). Every presumption must be indulged in favor of a legislative act. *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

## SUMMARY OF THE ARGUMENT

The District Court's preliminary injunction should be reversed or vacated.

*First*, Plaintiffs lack standing. Both have other identification documents, and neither provides any non-speculative evidence that they might someday need to present the documents they purportedly desire *or* that the unknown recipients are likely to be hostile.

*Second*, the District Court erred by using the "serious question" merits and "sliding scale" injunction tests. These tests have been specifically disapproved by Montana law, and this Court should, at a minimum, remand for a proper application of binding procedural law. It also erred by relying on affidavits supported by information and belief, particularly as to the MVD policy.

*Third*, the District Court should not have entered a preliminary injunction no matter the standard. On the merits, Plaintiffs do not state a sex-discrimination claim under equal protection principles. Anyone, regardless of sex or gender identity, can have their birth certificates amended to reflect their biological sex markers. Even applying *Bostock*'s (inapplicable) rule—change the sex and see what results—confirms the point. A woman who identifies as a woman can only have her birth certificate changed to reflect biological sex markers. *No one* can have their birth certificate changed simply to reflect their gender identity. There is no sex or gender identity discrimination. Because the challenged policies do not facially discriminate based on sex or transgender status, heightened scrutiny does not apply. The District Court also erred by devising a new argument on behalf of Plaintiffs, designating *all* sex discrimination a fundamental rights violation triggering strict scrutiny—and excising the narrower language in the equal protection clause. The Plaintiffs simply dislike the State's definition of "sex"—the biological definition supported by medical authorities, biologists, the federal government, and, until a few years ago,

everyone else—but that is not an equal protection claim. Only rational basis review applies, and the State has a rational basis in keeping accurate records of biological sexes—as the federal government and States across the nation have done for centuries. Thus, Plaintiffs have no likelihood of success.

The District Court collapsed the remaining injunction factors into likelihood of success on the merits. That was error. Not every potential legal violation involves irreparable harm or the absence of countervailing interests—especially when the merits factor is a mere "serious question," meaning that the Constitution was likely *not* violated. Regardless, Plaintiffs do not articulate a harm sufficient for standing, much less certain irreparable harm. And the balance of equities and public interests are stated by the law adopted by the People's representatives—a law that adopts a biological definition of "sex" in pursuit of accurate vital records.

If nothing else, the District Court's injunction was vastly overbroad. It eliminated all applications of Montana's birth certificate amendment process, even those with no relation to gender identity. It enjoined a purported MVD policy that is derivative of the birth certificate process—which had already been enjoined. And it enjoined a definitional provision in a state statute absent any showing that this definition was somehow discriminatory.

This Court should reverse, or, at a minimum, vacate and remand.

## ARGUMENT

### I. The Plaintiffs Lack Standing.

"[S]tanding is a threshold, jurisdictional requirement in every case." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 219, 255 P.3d 80, 90. "[T]he 'cases at law and in equity' language of Article VII, Section 4(1) of the Montana Constitution" "embodies the same limitations as are imposed on federal courts by the 'case or controversy' language of Article III of the United States Constitution." *Montana Immigrant Just. All. v. Bullock*, 2016 MT 104, ¶ 18, 383 Mont. 318, 324, 371 P.3d 430, 436 (internal quotation marks omitted). "At the preliminary injunction stage," "the plaintiff must make a 'clear showing' that she is 'likely' to establish each element of standing." *Murthy v. Missouri*, 603 U.S. 43, 58 (2024).

"[T]he constitutional aspect of standing requires a plaintiff to show that he has personally been injured or threatened with immediate injury by the alleged constitutional or statutory violation." *Olson v. Dep't of Revenue*, 223 Mont. 464, 470, 726 P.2d 1162, 1166 (1986). "[T]he irreducible constitutional minimum of standing has three elements: injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), causation (a fairly traceable connection between the injury and the conduct complained of), and redressability (a likelihood that the requested relief will redress the alleged injury)." *Heffernan v. Missoula City*

*Council*, 2011 MT 91, ¶ 32, 360 Mont. 207, 220, 255 P.3d 80, 91 (internal quotation marks omitted).

"[T]hreatened injury must be *certainly impending* to constitute injury in fact," and "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (cleaned up). Reliance on "highly speculative fear[s]" or "a highly attenuated chain of possibilities" "does not satisfy the requirement that threatened injury must be certainly impending." *Id.* at 410; *accord Gottlob v. Desrosier*, 2025 MT 56, ¶¶ 13-14, 565 P.3d 1196, 1202 ("This injury must be concrete—that is, it must be 'actual or imminent, not conjectural or hypothetical.'").

Here, the Plaintiffs' claimed injuries are speculative, and they do not show any certainly impending injury. The first Plaintiff, Jessica Kalarchik, is a biological male who lives in Alaska and "began living and presenting as" a female two years before filing this suit, around age 47. Dkt. 11, Ex. 1 ¶¶ 2, 5. Kalarchik's "Alaska nursing license, driver's license, and federal social security card" reflect a female identity. *Id.* ¶ 6. Kalarchik's purported injury is a "risk of embarrassment and even violence every time I am required to present my birth certificate." *Id.* ¶ 8.

Similarly, Jane Doe claims to have begun "living and presenting" as a female two years before suing, around age 23. Dkt. 11, Ex. 2 ¶¶ 2, 4. Doe has a "social security card with [a female] sex designation." *Id.* ¶ 7. Doe's remaining testimony is

a facsimile of Kalarchik's, as Doe repeats the allegation of a "risk of discrimination, harassment and even violence every time I am required to present my identity documents." *Id.* ¶ 8.

The Plaintiffs' purported injury is far too speculative. "The one-step-removed, anticipatory nature of the[] [Plaintiffs'] alleged injuries presents [them] with two particular challenges": (1) courts "cannot redress injury that results from the independent action of some third party not before the court," and (2) "because the plaintiffs request forward-looking relief, they must face a real and immediate threat of repeated injury." *Murthy*, 603 U.S. at 57 (cleaned up). Here, Plaintiffs showed no likelihood of being imminently "required to present" one of the identification documents they are seeking—as opposed to one of the other identifications they already have. *E.g.*, Dkt. 11, Ex. 1 ¶ 8. And they provided no evidence that a particular likely recipient of any desired document is likely to be "biased or hostile." *Id.* ¶¶ 8–9. They pointed to no specific "past injuries" tied to one of these documents, much less a certainly impending future response. *Murthy*, 603 U.S. at 59; *cf. Olson*, 223 Mont. at 470, 726 P.2d at 1166 (finding lack of standing where plaintiffs did not show they "sought to run for a county office and were prohibited from doing so").[3]

[3] Even if Doe had made a clear showing of injury with respect to a driver's license, that would not give Doe standing to attack the birth certificate rule. "[S]tanding is not dispensed in gross," and "plaintiffs must demonstrate standing for each claim that they press against each defendant, and for each form of relief that they seek." *Murthy*, 603 U.S. at 61 (internal quotations marks omitted).

Because Plaintiffs' injury depends on a speculative chain of causation involving unknown reactions of third parties not before the Court, and Plaintiffs provided no specific evidence supporting any link in this chain of causation, they have not shown that they are clearly likely to satisfy the standing requirement. Thus, no preliminary injunction should have been issued.

## II. The District Court Erred by Using the Serious Questions and Sliding Scale Tests and Relying on Declarations Based on Information and Belief.

The Court should vacate the preliminary injunction and remand to the District Court to apply the correct injunction standard codified in MCA § 27-19-201. After amendment earlier this year, that statute requires movants to establish each of the four elements for a preliminary injunction before a District Court may grant relief—including an actual likelihood of success on the merits—*without* "us[ing] a sliding scale" or "serious questions test." MCA § 27-19-201(1), (4)(b).

Plaintiffs invoked a "sliding scale" approach to preliminary injunctions and argued that, on the first factor, they "need only show 'serious questions going to the merits.'" Dkt. 12 at 14. They explained that "serious questions need not . . . even present a probability of success." Nov. 14, 2024 Tr. 11. The State argued for a higher standard in reliance on MCA § 27-19-201(4), which even before amendment required that Montana courts "closely follow United States supreme court case law." Dkt. 28 at 3. But the District Court expressly applied the "serious questions test" and

implicitly applied the sliding scale approach. Dkt. 61 at 5, 6, 12 (relying on *Stensvad v. Newman Ayers Ranch, Inc.*, 2024 MT 246, 418 Mont. 378, 557 P.3d 1240).

The District Court's Order does not comply with Montana law because the Legislature has rejected these tests. On March 25, 2025, the Governor signed HB 409, which amended § 27-19-201 to add a new subsection 4(b): "When conducting the preliminary injunction analysis, the court shall examine the four criteria . . . independently. The court may not use a sliding scale test, the serious questions test, flexible interplay, or another federal circuit modification to the criteria." 2025 Mont. Laws ch. 20.

Here, the State's appeal of the preliminary injunction was pending at the time the 2025 amendment to § 27-19-201 took effect. It is therefore appropriate to apply this amendment and vacate the preliminary injunction that is based on an incorrect legal standard. "[A] change in a law that is merely procedural rather than substantive" should "be applied retroactively," and changes like this—involving "the burden of proof"—are "procedural." *City of Helena v. Cmty. of Rimini*, 2017 MT 145, ¶¶ 17–18, 388 Mont. 1, 7, 397 P.3d 1, 6–7.

Alternatively, this Court should hold the 2025 amendment clarified that § 27-19-201 has not permitted a sliding scale test for a preliminary injunction since 2023. There is a well-established canon of construction that an amendment may "*clarif [y]* the meaning of the prior language, to the extent the former provision was ambiguous

and leading to conflicting results in the courts." *McCoy v. Chase Manhattan Bank, USA*, 654 F.3d 971, 974 (9th Cir. 2011). Here, the Legislature provided in 2023 that that the elements for a preliminary injunction should "mirror the federal preliminary injunction standard" and "closely follow United States supreme court case law." 2023 Mont. Laws ch. 43. In *Stensvad*, relied on by the District Court here, this Court found an ambiguity regarding that language based the fact that different federal circuits had adopted different tests, and this Court followed the Ninth Circuit test. ¶¶ 17–29. But only months earlier, this Court in *MAID* adopted a much more straightforward, textual reading of § 27-19-201. ¶ 12. The 2025 amendment to § 27-19-201 can therefore be interpreted as a prompt clarification that the Legislature has intended (since 2023) that the movant must establish more than a serious question on the merits—and must establish each of the four elements.

Either way, the statute expressly prohibits the serious questions and sliding scale tests that were applied below. As this Court has recognized, under the likelihood-of-success factor used by other courts—and now required by Montana law—"[a] mere 'serious question' going to the merits . . . is insufficient." *Stensvad*, ¶ 19. Because the District Court found only a "serious question," vacatur and remand is necessary for the District Court to conduct a proper analysis in the first instance.

Finally, the declarations filed by Plaintiffs could not support a preliminary injunction under MCA 27-19-303(2)(b), which provides "[a]n injunction order may

not be granted on affidavits unless: … the material allegations of the affidavits setting forth the grounds for the order are made positively and not upon information and belief." Here the Declarations of both Plaintiffs state, "I … declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief." See Dkt. 11-1 at p. 5; Dkt. 11-2 at p. 5. This is particularly problematic where Plaintiffs' only evidence of the MVD policy is unsourced hearsay that one Plaintiff could not obtain a new driver's license "without a court order and a corrected birth certificate." Dkt. 11-2 ¶ 7.

## III. The District Court Abused Its Discretion by Enjoining Important, Non-Discriminatory State Policies.

No matter the standard, the District Court erred and abused its discretion by enjoining the challenged rules and alleged practices here. No factor supports a preliminary injunction.

### A. The Plaintiffs Failed to Show a Likelihood of Success on the Merits.

The District Court found that Plaintiffs showed a likelihood of success because they "raise[d] a serious question" about their "equal protection claim." Dkt. 61 at 6–7. According to the District Court, this "serious question" was whether "the challenged state actions violate their fundamental right to be free from discrimination on the basis of sex." *Id.* at 12.

Article II, section 4 of the Montana Constitution guarantees equal protection and embodies "a fundamental principle of fairness: that the law must treat similarly-

situated individuals in a similar manner." *McDermott v. Montana Dep't of Corr.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 470, 29 P.3d 992, 998. The first step to analyzing an equal protection challenge requires identifying "the classes involved and determin[ing] whether they are similarly situated." *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 154, 104 P.3d 445, 449. "Once the relevant classifications have been identified," courts "next determine the appropriate level of scrutiny." *Id*. ¶ 17. Strict scrutiny applies when a suspect class or fundamental right is affected. *McDermott,* ¶ 31. The Montana Supreme Court "has not yet explicitly identified the level of scrutiny applicable to classifications that are sex-based, nor has it explicitly stated that sex is a suspect class." *Cross v. State*, 2024 MT 303, ¶ 61, 560 P.3d 637, 655 (McKinnon, J., concurring).

Here, Plaintiffs have no likelihood of success on their equal protection claim. First, they cannot satisfy the threshold requirement of showing that Montana's policies facially involve "the unequal treatment of people *in similar circumstances*." *Planned Parenthood of Montana v. State*, 2024 MT 178, ¶ 27, 417 Mont. 457, 477, 554 P.3d 153, 166 (emphasis added). Montana's policies do not discriminate based on sex or transgender status. Rather, they classify based on the justification for the birth certificate amendment. No person, no matter their sex or gender identity, can amend their birth certificate merely by invoking their gender identity.

Plaintiffs' actual complaint is with Montana's biological-based definition of sex, but that is not a claim sounding in equal protection. The Plaintiffs wish to be classified as female, but that is merely an underclusiveness challenge to the State's definition of female—and such challenges are subject only to rational basis review. These policies are easily related to Montana's legitimate government interests in recording the biological sex of a newborn at birth and "maintaining a consistent, historical, and biologically based definition of sex." *Gore*, 107 F.4th at 561. Thus, Plaintiffs lack a likelihood of success on the merits of their equal protection claim.

**1. The policies do not discriminate based on sex.**

Limiting birth certificate sex changes to designations that were originally incorrect or misidentified does not discriminate based on sex. That policy "makes one relevant distinction": "It distinguishes between those applicants who produce evidence that the doctor erred in identifying [or recording] their biological sex at birth and those who do not." *Id*. at 555. That policy "treats the sexes identically." *Id.* "[A]nyone may amend their certificate if they provide" proper documentation. *Id.* The policy "does not impose any special restraints on, and does not provide any special benefits to, applicants due to their sex." *Id.* Because "[t]he policy treats the sexes equally," *id.*, there is no coherent argument that the policy discriminates based on sex *qua* sex. *See also Corbitt v. Sec'y of the Alabama L. Enf't Agency*, 115 F.4th

1335, 1346 (11th Cir. 2024) (holding that a similar policy "does not separate or classify individuals based on sex").

Of course, there is no doubt that doctors originally had to "answer the same question on each original birth certificate: Was the baby a 'male' or 'female' based on their biological sex?" *Gore*, 107 F.4th at 555. "But the *amendment* policy does no such thing," for "[i]t does not attach any significance to the biological sex of the applicant." *Id.* And Plaintiffs challenge only the amendment process. *See* Dkt. 1 ¶ 12. They "never claim that the Constitution forbids [Montana] from recording the biological sex of a newborn—something the States uniformly do today and have consistently done since Massachusetts began the practice in 1842." *Gore*, 107 F.4th at 555–56. The Plaintiffs "thus do not challenge the steadfast practice of simply recording an 'enduring' difference in the biological makeup of the species at birth." *Id.* at 556 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)) (Ginsburg, J.)). "Nor could they. When a law does not ascribe different benefits and burdens to the sexes, that law does not discriminate based on sex, even if sex 'factors into' the law's application." *Id.*; *see Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022).

Bare "[c]lassification is not discrimination." *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941). And the alleged MVD policy—of "only issu[ing] an amended driver's license . . . if the person provides an amended birth certificate,"

Dkt. 61 at 2—applies equally to both sexes. Thus, Plaintiffs fail to show facial discrimination based on sex.

**2. The policies do not discriminate based on transgender status.**

The District Court did not suggest that the policies directly discriminate based on sex. Rather, the Court held that Plaintiffs had raised "a serious question" that the policies facially discriminate based on transgender status, and thus derivatively, sex. Dkt. 61 at 6, 9–10. The Court found facial discrimination between these two allegedly similarly situated classes: "[transgender] Montanans seeking to amend the sex designation on their birth certificates or driver's licenses and cisgender Montanans seeking to amend the sex designation on their birth certificates or driver's licenses." *Id.* at 7.

But the State's policies treat these two classes the same. Anyone can receive a birth certificate (and then driver's license) amendment if they provide evidence that the original sex designation was incorrect or misidentified. And anyone would be denied an amendment if they do not. If an individual in either class identified by the District Court submitted evidence for seeking a sex designation change based on gender identity, that change would be rejected. That is because gender identity makes no difference: a transgender person—or a cisgender person, a non-binary person, a two-spirit person, or any other person—could correct the original sex

designation for qualifying reasons. And no one could amend the designation simply by invoking gender identity. Gender identity is irrelevant to the classification.

The birth certificate amendment policy creates these two classes: (1) persons with birth certificates that reflect their sex chromosomes, gonads, and genitalia present at birth, who cannot amend, and (2) persons with birth certificates that do not reflect these characteristics, who can seek amendment. This policy is facially neutral toward gender identity and transgender status. Persons of all gender identities can fall within both groups, which means that, under settled equal protection principles, there is a "lack of identity" between the classification and transgender status. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974); *accord K.C. v. Individual Members of Med. Licensing Bd. of Indiana*, 121 F.4th 604, 619 (7th Cir. 2024).

An example proves the point. Take a biological woman who realizes that her Montana-issued birth certificate incorrectly classified her as a male. Though she had female sex chromosomes, gonads, and genitalia at birth, the document classified her as a male due to a clerical error. After realizing this mistake, the woman seeks to amend her birth certificate to reflect her gender identity by submitting a letter that invokes her gender identity. That amendment would be denied for lacking the requisite evidence that the birth certificate inaccurately reflected her sex chromosomes, gonads, and genitalia at birth. "No person, male or female, [cisgender

or transgender,] may amend a birth certificate simply because it conflicts with their gender identity." *Gore*, 107 F.4th at 556. There is no gender discrimination.

By analogy, consider a person who requests a date correction on a birth certificate because they identify as being born in 2001 rather than 1981.[4] A denial of that change would not discriminate based on age. Anyone can seek a date correction, and anyone who lacks proper documentation for the correction would be denied. *See* ARM § 37.8.108. The same is true here: anyone, regardless of sex or gender identity, can seek a sex correction. They simply must have the required documentation about their biological sex at birth.

In short, Montana's policy applies based on justification for the amendment, not transgender status. And absent discrimination based on transgender status, there can be no derivative sex discrimination of the type invoked by the District Court.

The District Court reasoned that "[w]hereas cisgender Montanans can obtain amended birth certificates and drivers licenses with a sex marker accurately reflecting their gender identity, transgender Montanans cannot." Dkt. 61 at 7–8. That's wrong. Again, a cisgender Montanan who demanded a change simply to conform with their gender identity would be denied, as that is not a qualifying reason

[4] Individuals have tried to change birth certificate birth dates based on "a psychological disconnect" between biological age and age identity. *In re Doe*, 2017 WL 1375331, at *1 (Minn. Ct. App. Apr. 17, 2017); *see* Alexander A. Boni-Saenz, *Legal Age*, 63 B.C. L. Rev. 521, 524 (2022).

for an amendment. Montana "does not guarantee anyone a birth certificate matching gender identity, only a certificate that accurately records a historical fact: the sex of each newborn." *Gore*, 107 F.4th at 556. And the District Court's comparison does not "show[] that the Policy imposes a sex-based classification;" it "instead reveal[s] the heart of the[] [Plaintiffs'] dissatisfaction with the Policy: the reasons [Montana] accepts for changing designated sex on a driver's license." *Corbitt*, 115 F.4th at 1347 n.9. As discussed below, "[t]his dissatisfaction is ultimately just an argument about the Policy's" definition of sex—not equal protection. *Id.*

The District Court also said that, "[i]n a February 2024 notice, [DPHHS] declared it would not amend birth certificates based on 'gender transition, gender identity, or change of gender.'" Dkt. 61 at 2. But the February 2024 notice said no such thing. *See* Feb. 2024 Notice, *supra*. That notice pointed to the applicable rule in ARM § 37.8.311, which does not reference gender identity. What the District Court quoted was part of a thorough explanation of the proposed rule—not the operative language of any rule. And that explanation merely pointed out that, among many other amendments that would not qualify, amendments based solely on "gender transition, gender identity, or change of gender" are insufficient. 2022 MAR Notice, *supra*, at 902. That explanation does not show discrimination based on gender identity—individuals of any gender identity could seek and be denied a

change on that basis alone—but reinforces that the rule classifies based on justification.

Though some courts have incorrectly assumed that similar policies apply *only* to transgender individuals, that's wrong too. *See , e.g.*, *Morris v. Pompeo*, 706 F. Supp. 3d 1074, 1087 (D. Nev. 2020) ("Any person who has undergone a 'gender transition' to a new gender is, by definition, transgender."). Montana's policies apply to everyone. And this assumption especially ignores individuals who seek to detransition to their previous gender identities. Take a biological man born with his Montana-issued birth certificate accurately reflecting his sex chromosomes, gonads, and genitalia at birth. Before these policies, the man successfully amended his birth certificate to female on the basis that he identified as a female. But now, he seeks to detransition—and once more hopes to amend his birth certificate solely based on gender identity. That amendment would be denied, based on the same policies that apply to all regardless of sex or gender identity.

Montana's policies thus discriminate based only on the reason for the birth certificate amendment—whether the original sex designation was incorrect or misidentified. The policies do not discriminate based on sex or gender identity, so only rational basis review applies. *Farrier v. Teacher's Ret. Bd.*, 2005 MT 229, ¶ 16,

328 Mont. 375, 380, 120 P.3d 390, 395. Because the District Court's only basis for finding a "serious question" on the merits was legal error, this Court should reverse.[5]

### 3. *Bostock* would not help Plaintiffs even if it applied.

Though the District Court invoked the U.S. Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), that decision would not help Plaintiffs even if it applied outside the federal Title VII context (which the U.S. Supreme Court specifically declined to do). As shown above—and unlike what the Court in *Bostock* found—there is no discrimination based on gender identity here. Under *Bostock*'s but-for causation test, courts "change one thing at a time and see if the outcome changes." 590 U.S. at 656. If a man who identifies as a woman seeks a birth certificate amendment to "female" based on gender identity, that amendment would be denied. Likewise, if a woman who identifies as a woman sought the same and provided the same justification, the amendment would be denied. Unlike in *Bostock*, the man who identifies as a woman would not be "intentionally penalized" "for traits" that would be "tolerate[d] in a[] [person] identified as female at birth."

[5] The Plaintiffs did not argue—and the District Court did not suggest—that heightened scrutiny likely applies to the challenged policies because of "a discriminatory intent" or "discriminatory application." *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (1981); *contra Fowler v. Stitt*, 104 F.4th 770, 788 (10th Cir. 2024) (relying on such arguments to impose heightened scrutiny), *cert. petition filed*. Thus, these issues are not before this Court and cannot justify the injunction. *See , e.g.*, *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, 259, 961 P.2d 100, 103.

*Id.* at 660. Sex plays no "role" in Montana's decision, *id.*, which turns only on the documentation of an original error or misidentification. *See Gore*, 107 F.4th at 556.

The District Court's holding to the contrary depends on changing more than "one thing at a time." *Bostock*, 590 U.S. at 656. The District Court implicitly changed the justification offered for the amendment—from a bare statement of gender identity (for the man) to fully documented evidence of an original error or misidentification of biological sex (for the woman). That change means the State's decision about these hypothetical amendments are not the "same"—and persons who seek amendments solely for gender identity purposes are not similarly situated to persons to seek amendments to correct an original error or misidentification of biological sex. As the Supreme Court said in *Bostock*, "[t]o 'discriminate against' a person" would require "treating that individual worse than others who are similarly situated." 590 U.S. at 657. "[T]wo groups are similarly situated [only] if they are equivalent in all relevant respects other than the factor . . . constituting the alleged discrimination." *Planned Parenthood*, ¶ 27. Here, no aspect of the State's amendment policy turns on a person's sex or gender identity.

At any rate, *Bostock*'s analysis does not apply here. Whatever the merit of *Bostock*'s logic in Title VII's but-for analysis, it does not carry over to the equal protection context. *Cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 290, 308 (2023) (Gorsuch, J., concurring)

(distinguishing the Equal Protection Clause from Title VI). Title VII "focuses on but-for discrimination," whereas equal protection provisions "focus[] on the denial of equal protection." *L.W. v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023), *cert. granted United States v. Skrmetti,* 144 S. Ct. 2679 (2024). "[T]his explains why Title VII covers disparate impact claims," while equal protection provisions do not. *Id.* at 485.

*Bostock* does not apply for another reason. *Bostock*'s equivalence between discrimination based on transgender status and discrimination based on sex was premised on a simple relationship: transgender means the opposite of one's sex. *See* 590 U.S. at 660–61. But Plaintiffs claim that "sex exists on a spectrum," "consist[ing] of a complex set of biological, psychological, and social factors, including but not limited to the behavioral or subjective experience of sex." Dkt. 1 ¶ 6. And according to authorities invoked by Plaintiffs (Dkt. 12 at 6), being transgender is not limited to those "whose gender identity does not match their assigned sex," but "also encompasses many other labels" and "can be fluid, shifting in different contexts."[6] On that understanding, a female who identifies as transgender and non-binary could decide that "female" best summarizes their understanding of their sex—and seek a birth certificate amendment accordingly. Nothing prohibits a

[6] Jason Rafferty et al., *Ensuring Comprehensive Care & Support for Transgender & Gender-Diverse Children & Adolescents*, 142 Pediatrics no. 4, at 2 (Oct. 2018), https://perma.cc/8PYT-CGUG.

biological female from identifying as a transgender female. Thus, on Plaintiffs' own account, discrimination based on transgender status—which does not exist here anyway—would not equate to discrimination based on sex.

Last and relatedly, Plaintiffs' theory has no logical stopping point. Again, if Plaintiffs are right that many gender identities exist,[7] their theory would presumably require, as a matter of the Montana Constitution, birth certificate and driver's license boxes for *all* of these identities. It would also require changes on demand, as "an individual's gender identity vacillates throughout the day" or year, and as new gender identities spring into recognition by whatever private interest groups have declared themselves the arbiters of such matters. *Corbitt*, 115 F.4th at 1350 n.12; *see* Dkt. 34, Ex. 1 ¶ 6 (invoking "the consensus of experts," "particularly of those with expertise regarding transgender people").

All of this should be academic, because Montana's policies do not discriminate based on sex or gender identity. They discriminate based on justification for the birth certificate amendment—nothing else. And discrimination on that basis does not give rise to heightened scrutiny.

[7] *See* The Trevor Project, *National Survey on LGBT Youth Mental Health 2019*, at 7, https://perma.cc/5MTL-GFBG ("more than 100"); *see* Dkt. 12 at 1 (referring to "two-spirit").

#### 4. The District Court departed from the parties' arguments in applying strict scrutiny.

Even if the State's policies somehow discriminated based on sex, the District Court's justification for applying strict scrutiny was in error and an abuse of discretion. The District Court invoked the third sentence of article II, section 4 of Montana's Constitution: "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." Without analysis or explanation, the Court announced: "Therefore, the right to be free from discrimination on the basis of sex is a fundamental right," and strict scrutiny applies. Dkt. 61 at 11.

Putting aside that there is no sex discrimination here, this line of reasoning—which flouts this Court's repeated refusal to hold categorically that sex discrimination is subject to heightened scrutiny—fails for at least three reasons.

First and most troublingly, Plaintiffs did not make this argument. In fact, nowhere in their preliminary injunction briefing did they even mention article II, section 4's sentence about "civil or political rights." The Plaintiffs had the burden of showing entitlement to the extraordinary relief of a preliminary injunction, *MAID*, ¶ 10, but they never argued that strict scrutiny applied because of a fundamental right against sex discrimination. The Plaintiffs identified other fundamental rights

supposedly at issue—"privacy rights and free-speech rights" (Dkt. 12 at 26)—but the District Court refused to rule on those bases. Dkt. 61 at 6–7.

The District Court had no warrant to make up an argument for Plaintiffs. Not only does that depart from the rule of party presentation, but it also denied Defendants an opportunity to answer this argument. "It is not [a] Court's job" "to develop legal analysis" for a party. *Johansen v. State*, 1998 MT 51, ¶ 24, 288 Mont. 39, 47, 955 P.2d 653, 658 (1998). "[O]ur adversarial system of adjudication "is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020) (cleaned up). Courts "do not, or should not, sally forth each day looking for wrongs to right," but "decide only questions presented by the parties." *Id.* at 376 (cleaned up). The District Court's reliance on a theory of its own making was error.

Second, the District Court's theory conflates two questions: the presence of a fundamental "civil or political right" and the presence of a suspect classification. "Article II, Section 4, protects against two *distinct* types of unequal treatment." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 7, 392 Mont. 1, 4, 420 P.3d 528, 531–32 (2018) (emphasis added). "First, it generally provides that '[n]o person shall be denied the equal protection of the laws.'" *Id.* ¶ 7. It "then more specifically" prohibits discrimination "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." *Id.*

"Examples of fundamental rights"—in other words, civil or political rights—"are the right of privacy, freedom of speech, freedom of religion, right to vote and the right to interstate travel," while "[e]xamples of suspect classifications include wealth, race, nationality" and sex. *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 43, 744 P.2d 895, 897 (1987). The third sentence of article II, section 4 prohibits sex-based classifications only as to fundamental rights. It could not create a *new* fundamental right "to be free from discrimination on the basis of sex," at least for anything beyond "civil or political rights." In effect, the District Court read the third sentence *without* its "more specific[]" limitation. *Gazelka*, ¶ 7.

Third and relatedly, modifying a state's internal record of birth is not a fundamental civil or political right. The third sentence of article II, section 4 is limited to "civil or political rights." But Montana could presumably stop making or keeping birth records entirely, and no fundamental right would be infringed. Just as "the right to receive Workers' Compensation benefits is not a fundamental right which would trigger a strict scrutiny analysis of equal protection," modifying Montana's internal birth record—or even receiving a copy of that record—is not a fundamental "civil or political right." *Cottrill*, 229 Mont. at 42–43, 744 P.2d at 897. Thus, the third sentence of article II, section 4, does not apply, so even if there were

sex discrimination, it could not implicate a fundamental right. Only rational basis review applies.

**5. Plaintiffs' actual challenge is to the meaning of "sex," a definitional attack subject only to rational basis review.**

Plaintiffs' real complaint is that a biological male who identifies as a woman (or two-spirit, non-binary, etc.) is classified by the State as a man. That is not an equal protection claim. It is a challenge to the definition of "sex." But equal protection "does not proscribe all laws and regulations that relate to or implicate sex in their subject matter," *Corbitt*, 115 F.4th at 1346, and again, Plaintiffs "never claim that the Constitution forbids [Montana] from recording the biological sex of a newborn," *Gore*, 107 F.4th at 555.

Thus, Plaintiffs' challenge is not an equal protection one, but an underinclusiveness challenge to the State's definition. The Plaintiffs have a belief that the definition of female should be expanded to include some males, based on their belief that sex in humans "is more complex than in [any] other animal species." Dkt. 34, Ex. 1 ¶ 5. They believe that "one's gender identity is . . . the primary determinant of an individual's sex." Dkt. 11-3 ¶ 20; *id.* ¶ 23 ("[T]ransgender men are men and transgender women are women.").

Plaintiffs are entitled to those beliefs, as pseudo-scientific as they are. *See generally* Dkt. 28, Ex. C (testimony of the State's evolutionary biologist); 2022 MAR Notice, *supra*, at 899–902 (exhaustively collecting authorities that "gender

cannot influence sex"); *Virginia*, 518 U.S. at 533 (Ginsburg, J.) ("Physical differences between men and women" "are enduring" and "[i]nherent."). But such definitional challenges are analyzed only under rational basis, and Plaintiffs do not come close to showing that the biological understanding of sex—an understanding shared with federal law and centuries of scientific expertise—is *irrational*. *See Gore*, 107 F.4th at 556.

Plaintiffs "do not dispute the accuracy of [their] sex designation at birth" under Montana law. *Id.* at 556–57. In their more candid moments, they concede that they want to change the sex designation *even when* "a transgender person's sex designation was correctly recorded at the time of birth." Dkt. 12 at 18. Plaintiffs do not challenge the requirement to check the "male" or "female" box, and indeed seem to *desire* that requirement stay in force. And their own expert agreed that transitioning, including via medical treatments, "do[es] not change a woman into a man or vice versa." Dkt. 11-3 ¶ 40 (cleaned up).

Plaintiffs simply dislike the State's definition of "sex" and would prefer it to follow "eleven States [that] have adopted" their approach. *Gore*, 107 F.4th at 557. But that is a dispute with the State's definition of "sex"—one better directed to the policymaking branches of government—not an equal protection claim.

The remedy sought by Plaintiffs proves the point. They do not seek equal application to transgender persons of the rule currently applied to "cisgender"

persons. Rather, they seek a different rule entirely, and in fact *unequal* treatment: they want the "sex" designation on Montana birth certificates to reflect biological sex based on sex chromosomes, gonads, and genitalia at birth for some people and gender identity for others.

Nor can Plaintiffs invoke heightened scrutiny by challenging the contours of a class rather than the classification itself. As mentioned, Plaintiffs are invoking an underinclusiveness argument—that the State's definitions of "male" and "female" should be expanded for some people. "Once it has been established that the government is justified in resorting to" a protected "classification[]" like sex, heightened scrutiny "has little utility in supervising the government's definition." *Jana-Rock Const., Inc. v. New York State Dep't of Econ. Dev.*, 438 F.3d 195, 210 (2d Cir. 2006) (rejecting challenge to definition of Hispanic for purposes of affirmative action purposes). This remains true even when the line "appear[s] arbitrary or unfair to persons classified as being within or" outside a particular category. *Id.*; *see, e.g.*, *Orion Ins. Grp. v. Washington State Off. of Minority & Women's Bus. Enters.*, No. 16-5582 RJB, 2017 WL 3387344 (W.D. Wash. Aug. 7, 2017) (applying rational-basis review to a claim challenging the definition of "Black"), *aff'd*, 754 F. App'x 556 (9th Cir. 2018). Likewise, here, Plaintiffs' challenge to the State's failure to include some biological males in the definition of

"female" (and vice versa) is an underinclusiveness challenge that does not trigger heightened scrutiny.

In sum, the District Court legally erred in holding that Plaintiffs are likely to succeed in showing discrimination based on a suspect class. So its only reason for imposing heightened scrutiny was wrong, and only rational basis review applies.

**6. Montana's policies easily survive rational basis review and would also satisfy heightened scrutiny.**

The District Court did not suggest that Plaintiffs are likely to succeed on rational basis review, and they are not. The rational-basis standard of review "is the most deferential standard of review." *Montana Cannabis Indus. Ass'n v. State,* 2016 MT 44, ¶ 26, 382 Mont. 256, 268, 368 P.3d 1131, 1142. The government policy need only have a "reasonable relation to some permitted end of governmental action." *Id.* ¶ 38. Montana's policies easily clear the low hurdle of rational basis review by ensuring the accuracy of vital records, furthering health and research efforts, facilitating records-matching programs, and protecting women's rights—interests so weighty that they would satisfy even heightened scrutiny.

First, the policies protect the integrity and accuracy of birth certificates by ensuring that they accurately reflect one's biological sex. *See* 2022 MAR Notice, *supra*, at 903. "[P]rotect[ing] the integrity and accuracy of [Montana's] vital records" "is a legitimate state interest." *Gore*, 107 F.4th at 561. "Allowing changes to reflect gender identity would mean that some birth certificates would show

biological sex, others gender identity." *Id*. Montana's policy logically "[m]aintain[s] a consistent definition, based on physical identification at birth, and "protect[s] the integrity and accuracy of [the State's] vital records." *Id*. In fact, this Court has previously obligated Montana to collect and potentially disclose relevant and accurate health data that is derived in part through birth certificates. *See Jackson v. State*, 1998 MT 46, ¶ 52, 287 Mont. 473, 491, 956 P.2d 35, 47 (1988) (duty to provide "full disclosure of a child's medical and familial background [to adoptive parents]"). A consistent definition—and verifiable evidence of a person's sex—is necessary to operationalize many provisions of Montana law. *See, e.g.*, MCA § 33-1-201 (insurance regulations); *id.* § 13-38-201 (one election precinct representative of each sex).

Second, Montana's policies aid the public health of its citizens. The biological-sex information contained in a birth certificate furthers public health and research capabilities, including statistical studies related to maternal health, public-health surveillance, and local health planning. Promoting the public health and fostering research efforts are "legitimate state interests." *Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005). And the preservation of accurate biological information is rationally related to those efforts. *See Pavan v. Smith*, 582 U.S. 563, 568 (2017) (Gorsuch, J., dissenting); *see also For Women Scotland Ltd. v. Scottish Ministers*, [2025] UKSC 16 ¶¶ 239, 247 ("When data are broken down by [gender

identity] not biological sex, the result may seriously distort or impoverish our understanding of social and medical phenomena.").

Third, Montana's policies assist the State's administrative and auditing functions. The sex designation on a birth certificate is routinely included as a data element in records-matching programs used by various state agencies, and a correct sex designation is necessary to enable state functions. *E.g.*, MCA § 2-18-208 (equal pay provision).

Fourth, Montana's policies ensure equality for women. "[B]irth certificates provide a ready, reliable, non-invasive means of verifying the biological sex of participants" in sports and in other contexts. *Fowler v. Stitt*, 676 F. Supp. 3d 1094, 1126 (N.D. Okla. 2023), *aff'd in part, rev'd in part and remanded*, 104 F.4th 770, *cert. petition filed*. By maintaining a clear record of biological sex, Montana's policies maintain the State's ability to "[r]ecogniz[e] and respect[] biological sex differences" between males and females. *Skrmetti*, 83 F.4th at 486; *accord For Women Scotland*, ¶ 247. This is necessary in circumstances like sports participation, sleeping placement, and restroom usage. Thus, the State's policy is rationally related to multiple legitimate government interests, and would survive even heightened scrutiny.

* * *

For all these reasons, the District Court erred in finding that Plaintiffs are likely to succeed on the merits—regardless of whether the standard is the (improperly low and unlawful) "serious questions test" or actual likelihood of success. And because a failure on even one of the preliminary injunction factors dooms a plaintiff's demand for extraordinary preliminary relief, MCA § 27-19-201, this Court need go no further and should reverse the District Court's order on this basis alone. But, independently, Plaintiffs also failed to satisfy the other preliminary injunction factors.

### B. The District Court Failed to Identify Irreparable Harm.

The District Court's irreparable harm analysis turned entirely on its likelihood of success finding, as the Court said that "the loss of a constitutional right constitutes irreparable harm." Dkt. 61 at 12. This effort to collapse the preliminary injunction analysis to the likelihood of success for every constitutional claim should be rejected. And Plaintiffs show no probability of actual irreparable harm. As noted above, they do not even show a harm sufficient for standing, much less an irreparable harm that would justify extraordinary relief at the outset of litigation.

To begin, the District Court found only "a serious question on the merits" of Plaintiffs' constitutional claim. Dkt. 61 at 12. As Plaintiffs themselves explained, "serious questions need not . . . even present a probability of success." Nov. 14, 2024 Tr. 11. And as explained above, that minimal finding is not enough for likelihood of

success on the merits, much less derivative irreparable harm. If there is not even a *likelihood* of a constitutional violation, it defies law and logic to characterize purely hypothetical harm from a non-likely violation as irreparable.

Under the U.S. Supreme Court precedent to which Montana law compels adherence, "simply showing some possibility of irreparable injury" is not enough. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (cleaned up); *see* MCA § 27-19-201(4). "Plaintiffs seeking preliminary relief must demonstrate that irreparable injury is likely, not merely speculative, in the absence of an injunction." *MAID*, ¶ 15. When the merits of the constitutional claim show nothing more than "a fair ground for litigation"—the standard Plaintiffs successfully sought below (Dkt. 12 at 14)—invoking the merits analysis for irreparable harm could not show more than "some possibility," either. Thus, even if Plaintiffs had shown some serious constitutional question, the District Court failed to identify any irreparable harm. *See MAID*, ¶ 19.

What's more, even if Plaintiffs had shown a *likelihood* of success on the merits, irreparable harm *still* should not be presumed. "[N]ot every constitutional infringement may support a finding of irreparable harm," especially outside of the First Amendment context. *Id.* ¶ 16. Assuming that all factors support an injunction if likelihood of success for a constitutional claim exists—as the District Court did (Dkt. 61 at 12–14)—"collapses the four factors into one." *Delaware State*

*Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 202 (3d Cir. 2024). That is improper.

*First*, "[a] preliminary injunction is an extraordinary remedy" and "a matter of equitable discretion" that "does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 24, 32. *Second*, courts sitting in equity are "not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). *Third*, collapsing the inquiry would force courts to "prejudge the merits" (at least of constitutional claims) "[e]arly in a case" when "the merits are seldom clear"—even though "[t]he other factors" are supposed to be "independent grounds to deny relief." *Delaware*, 108 F.4th at 202–03; *accord Siegel v. LePore*, 234 F.3d 1163, 1177–78 (11th Cir. 2000) (rejecting the proposition that "the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation" (cleaned up)).

But here, the District Court found no harm apart from the "serious question" of a constitutional issue. That hypothetical harm is not nearly enough for likely irreparable injury. And the other hypothetical harms invoked by Plaintiffs below do not qualify, either. "To succeed in demonstrating a threat of irreparable harm, a party must show that the harm is certain . . . and of such imminence that there is a clear and present need for equitable relief." *Roudachevski v. All-American Care Ctrs.,*

*Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (cleaned up). But Plaintiffs' "generalized fears" are not even enough for *standing*, *see supra* Part I, much less irreparable harm. *MAID*, ¶ 19. The District Court erred by entering an injunction absent a showing of irreparable harm.

### C. The Balance of Equities and Public Interest Disfavor an Injunction.

Though the balance of the equities and the public interest factors merge when the government is a party, *Nken*, 556 U.S. at 435, the District Court further collapsed its consideration of these factors down to its finding of a "serious question" on the merits. Dkt. 61 at 13–14. That was an error for all the reasons explained above. A proper balancing of these factors would favor the State. The District Court identified *no* harm to Plaintiffs apart from the merits, and "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted). As this Court has said, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction," and must consider the policymaking branches' "efforts to advance the public welfare." *MAID*, ¶ 21 (internal quotation marks omitted). The public interest is expressed by the policies those branches enacted here, and those policies support all the important public interests identified above.

*Supra* Part III.A.6. The District Court ignored all this, and its consideration of the balance of equities and public interest was an abuse of discretion.

## IV. The District Court's Injunction is Overbroad.

At a minimum, the District Court's injunction is overbroad in at least three respects. An injunction must not "sweep any more broadly than necessary" but must be "precisely and narrowly tailored." *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 28, 341 Mont. 368, 378, 178 P.3d 696, 703 (cleaned up).

*First*, the injunction below appears to apply to *all* applications of the 2022 Rule—including those having nothing to do with gender identity. The injunction enjoins Defendants from enforcing "the 2022 Rule on its face or as applied to issuing amended birth certificates." Dkt. 61 at 14. But there is no plausible contention that the Rule is *facially* unconstitutional—that *all* of its applications are void. Take an ordinary amendment request submitted without documentation, with no "gender identity" component. The District Court provided no justification for enjoining the Defendants from applying the 2022 Rule in that situation.

*Second*, the District Court independently enjoined a purported "MVD policy and practice as applied to issuing amended driver's licenses without an amended birth certificate." Dkt. 61 at 14. But Plaintiffs do not appear to contend that such a policy would itself discriminate on any basis or otherwise be legally infirm. They attack only the underlying birth certificate amendment process. And the District

Court did not articulate any infirmity in this supposed policy or practice. So once it enjoined "the 2022 Rule" "as applied to issuing amended birth certificates," *id.*, it had no warrant to separately enjoin a purported MVD policy or practice.

*Third*, the District Court also independently enjoined a definitional provision of "SB 458 as applied to issuing amended birth certificates and amended driver's licenses." Dkt. 61 at 14. But again, the Court already enjoined enforcement of the 2022 Rule about birth certificate amendments, and Plaintiffs only address amended driver's licenses as downstream from birth certificates. The Plaintiffs would not have standing to independently attack a definitional provision in state law, and they do not contend that this definitional provision is itself unlawful. Again, injunctions must be narrowly tailored, and the District Court did not justify its sweeping injunction.

## CONCLUSION

For these reasons, the District Court's order granting a preliminary injunction should be reversed, or at a minimum, vacated and remanded.

DATED this 19th day of May, 2025.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a 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 10,977 words, excluding cover page, tables of contents and authorities, certificates of service and compliance, signatures, and any appendices.

*/s/Michael D. Russell*
Michael D. Russell

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0139

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JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated,

*Plaintiffs and Appellees*,

v.

STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as Governor of the State of Montana; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services; MONTANA DEPARTMENT OF JUSTICE; and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,

*Defendants and Appellants*.

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# APPENDIX

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## CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-19-2025:

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