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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

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

Plaintiffs,

v.

STATE OF MONTANA, et al.,

Defendants.

Cause No. ADV-2024-261

**ORDER – MOTION  
FOR PRELIMINARY  
INJUNCTION**

Before the Court is Plaintiffs Jessica Kalarchik (Kalarchik) and Jane Doe’s (Doe) motion for a preliminary injunction. Alex Rate, Marthe Y. VanSickle, Malita Picasso, Jon W. Davidson, F. Thomas Hecht, Tina B. Solis, and Seth A. Horvath represent the Plaintiffs. Alwyn Lansing, Michael Russell, Thane Johnson, Michael Noonan, and Emily Jones represent Defendants State of Montana, Gregory Gianforte, in his official capacity as the Governor of the State of Montana (Gianforte), the Montana Department of Public Health and Human Services (DPHHS), Charles T. Brereton, in his official capacity as the Director of

1 the Montana Department of Public Health and Human Services (Brereton), the  
2 Montana Department of Justice (DOJ), and Austin Knudsen, in his official  
3 capacity as Attorney General of the State of Montana (Knudsen) (collectively  
4 “State”).

### 5 STATEMENT OF FACTS

6 On April 18, 2024, Plaintiffs filed a complaint for declaratory and  
7 injunctive relief challenging Senate Bill 458 (SB 458), Montana Administrative  
8 Rule 37.8.311(5) (2022 Rule), and a 2024 Montana Motor Vehicle Division  
9 (MVD) policy to only issue an amended driver’s license with a sex designation  
10 reflecting a person’s gender identity if the person provides an amended birth  
11 certificate (MVD policy) (collectively “challenged state actions”). Plaintiffs  
12 allege Defendants’ policies and practices are part of an effort to deny transgender  
13 people rights that are widely guaranteed to other Montanans and reflect an intent  
14 to discriminate against transgender people throughout the state.

15 The 2022 Rule, which originally went into effect on September 10,  
16 2022, provides DPHHS would process applications for amending the sex  
17 designations on birth certificates only if the sex identified on the applicant’s birth  
18 certificate was the result of a scriveners’ error or incorrect data entry or if the sex  
19 of the individual was misidentified on the original certificate. In a February 2024  
20 notice, DPHSS declared it would not amend birth certificates based on “gender  
21 transition, gender identity, or change of gender.” *See* Mont. Admin. Reg. Notice  
22 37-1002, No. 11 (Jun. 10, 2022).

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1                   On May 19, 2023, Gianforte signed SB 458 into law. SB 458,  
2 codified at Montana Code Annotated § 1-1-201(1)(f), defines “sex” as applicable  
3 to the Montana Code Annotated as:

4  
5                   . . . the organization of the body parts and gametes for reproduction  
6 in human beings and other organisms. In human beings, there are  
7 exactly two sexes, male and female, with two corresponding types of  
8 gametes. The sexes are determined by the biological and genetic  
9 indication of male or female, including sex chromosomes, naturally  
10 occurring sex chromosomes, gonads, and nonambiguous internal and  
11 external genitalia present at birth, without regard to an individual's  
12 psychological, behavioral, social, chosen, or subjective experience of  
13 gender.

14 Mont. Code Ann. § 1-1-201(1)(f).

15 Plaintiffs allege SB 458 is scientifically incorrect and improperly seeks to limit  
16 the meaning of sex without legal, medical, or scientific justification.<sup>1</sup>

17 Plaintiffs’ complaint alleges the challenged state actions violate the  
18 Montana Constitution’s equal-protection guarantee, privacy protections, and  
19 prohibition against compelled speech, as well as the provisions of Montana Code  
20 Annotated § 2-4-506. On May 17, 2024, Plaintiffs moved for a preliminary  
21 injunction requesting the Court:

22                   preliminarily enjoining Defendants, as well as their agents,  
23 employees, representatives, and successors, from directly or  
24 indirectly enforcing (1) the 2022 Rule on its face or as applied to  
25 issuing amended birth certificates, (2) the new MVD policy and  
practice as applied to issuing amended driver’s licenses, and (3) SB  
458 as applied to issuing amended birth certificates and amended

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<sup>1</sup> SB 458 was recently declared unconstitutional and is permanently enjoined.  
*Reagor v. State of Montana*, Cause No: DV-23-1245 (Mont. Fourth Jud. Dist.  
Court, Missoula Cty.) (June 25, 2024).

1 driver’s licenses, including but not limited to prohibiting Defendants  
2 from denying applications to amend the sex designation on birth  
3 certificates or driver’s licenses based on the 2022 Rule, the new  
4 MVD policy and practice, SB 458, or any further administrative  
5 rulemaking or other action directed toward enforcement of the 2022  
6 Rule, the new MVD policy and practice, or SB 458 as applied to  
7 issuing birth certificates or driver’s licenses.

8 Pl. Mot. For Prelim. Inj., p. 2 (May 17, 2024).

9 Following briefing, the Court held oral argument on the motion on November 14,  
10 2024. The matter is now ripe.

11 **PRINCIPLES OF LAW**

12 Pursuant to Montana Code Annotated § 27-19-201(3), the party  
13 moving for an injunction “bears the burden of demonstrating the need for an  
14 injunction order.” Under § 27-19-201(1), as amended by the 2023 Montana  
15 Legislature:

16 A preliminary injunction order or temporary restraining order may  
17 be granted when the applicant establishes that: (a) the applicant is  
18 likely to succeed on the merits; (b) the applicant is likely to suffer  
19 irreparable harm in the absence of preliminary relief; (c) the balance  
20 of equities tips in the applicant’s favor; *and* (d) the order is in the  
21 public interest.

22 Mont. Code Ann. § 27-19-201(1). The Montana Legislature intended for  
23 this standard to “mirror the federal preliminary injunction standard.”

24 Mont. Code Ann. § 27-19-201(4).

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1 The Montana Supreme Court further clarified the new preliminary  
2 injunction standard in *Stensvad v. Newman Ayers Ranch, Inc.*, 2024 MT 246, 418  
3 Mont. 378. Adopting the preliminary injunction framework from the Ninth  
4 Circuit, the *Stensvad* court held:

5 the preliminary injunction standard sets forth a conjunctive test that  
6 requires an applicant to make a sufficient showing as to each of the  
7 four factors.... Unless it is clear that an applicant fails to raise  
8 serious questions going to the merits, a district court should likewise  
consider and address each of the remaining factors.

9 *Id.* at ¶ 29. “The serious questions test continues to allow Montana courts to  
10 preserve the status quo until a full trial can be held without having to tread too far  
11 into the merits of the case.” *Id.* at ¶ 26.

12 **ANALYSIS**

13 Plaintiffs have challenged 2022 Rule on its face and as applied to  
14 issuing amended birth certificates, the MVD policy and practice as applied to  
15 issuing amended driver’s licenses, and SB 458 as applied to issuing amended  
16 birth certificates and amended driver’s licenses on the grounds they violate the  
17 Montana Constitution’s equal-protection guarantee, privacy protections, and  
18 prohibition against compelled speech, as well as the provisions of Montana Code  
19 Annotated § 2-4-506. “Statutes are presumed to be constitutional, and we regard  
20 that presumed constitutionality as a high burden to overcome. The challenging  
21 party bears the burden of proving the statute is unconstitutional.” *Planned  
22 Parenthood v. State*, 2024 MT 178, ¶ 16, 417 Mont. 457, ¶ 16, 554 P.3d 153, ¶ 16  
23 (citations omitted).

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1           As a threshold matter, the Court rejects the State’s argument this  
2 litigation presents a nonjusticiable political question. The State argues Plaintiffs’  
3 claims would impermissibly require the Court to write a new protected class into  
4 Montana law. Thus, the State concludes it is within the exclusive jurisdiction of  
5 the legislature to determine whether transgender status constitutes a protected  
6 class. However, “the courts, as final interpreters of the Constitution, have the  
7 final ‘obligation to guard, enforce, and protect every right granted or secured by  
8 the Constitution...’” *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT  
9 69, ¶ 18, 326 Mont. 304, ¶ 18, 109 P.3d 257, ¶ 18 (quoting *Robb v.*  
10 *Connolly* (1884), 111 U.S. 624, 637, 4 S. Ct. 544, 551, 28 L. Ed. 542, 546).  
11 Determining whether a statute or state policy violates Plaintiffs’ constitutional  
12 rights is directly in the jurisdiction of the Court.

13 **Likelihood of Success on the Merits**

14           The first step in the Court’s preliminary injunction analysis is  
15 whether Plaintiffs are likely to succeed on the merits. Under Montana’s  
16 preliminary injunction standard, “likelihood of success does not require the  
17 applicant to establish entitlement to final judgment, relief at all events on final  
18 hearing, relief at a trial on the merits, or evidence sufficient to prevail at  
19 trial.” *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 18, 418 Mont. 253,  
20 ¶ 18, 557 P.3d 440, ¶ 18 (citing *Planned Parenthood of Mont.*, 2022 MT 157,  
21 ¶ 30). To satisfy this factor, Plaintiffs must raise a serious question going to the  
22 merits of their claims.

23           Although Plaintiffs have raised challenges under four separate  
24 legal theories, Plaintiffs only need to demonstrate one of their claims satisfies the  
25 requirements of Montana Code Annotated § 27-19-201(1) to obtain a preliminary

1 injunction. Because the Court finds the issue dispositive, it focuses its analysis  
2 on Plaintiffs’ equal protection claim. Article II, Section 4 of the Montana  
3 Constitution provides no person shall be denied equal protection of the laws.  
4 Analyzing an equal protection claim involves a three-step process. The Court  
5 must:

6 (1) identify the classes involved and determine if they are similarly  
7 situated; (2) determine the appropriate level of scrutiny to apply to  
8 the challenged legislation; and (3) apply the appropriate level of  
scrutiny to the challenged statute.

9 *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, ¶ 28,  
10 325 P.3d 1211, ¶ 28.

11  
12 “The first prerequisite to a meritorious claim under the equal protection clause is  
13 a showing that the state has adopted a classification that affects two or more  
14 similarly situated groups in an unequal manner.” *Powell v. State Comp. Ins.*  
15 *Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, ¶ 22, 15 P.3d 877, ¶ 22. The Montana  
16 Supreme Court has held, “two groups are similarly situated if they are equivalent  
17 in all relevant respects other than the factor constituting the alleged  
18 discrimination.” *Goble* at ¶ 28. Plaintiffs have defined the classes as Montanans  
19 seeking to amend the sex designation on their birth certificates or driver’s  
20 licenses and cisgender Montanans seeking to amend the sex designation on their  
21 birth certificates or driver’s licenses.

22 Plaintiffs argue the two classes are equivalent in all relevant  
23 respects other than their status as transgender or cisgender. Plaintiffs further  
24 argue the challenged state actions discriminate against transgender people on the  
25 basis of their transgender status and on the basis of sex. Whereas cisgender

1 Montanans can obtain amended birth certificates and drivers licenses with a sex  
2 marker accurately reflecting their gender identity, transgender Montanans cannot.  
3 In contrast, the State argues Plaintiffs cannot prevail on their equal protection  
4 claim because they have failed to establish two similarly situated classes or  
5 differential treatment based on a protected class. The State’s argument relies  
6 primarily on the conclusion discrimination on the basis of transgender status is  
7 not discrimination on the basis of sex. The State argues transgender Montanans  
8 do not constitute a protected class and therefore equal protection does not apply.  
9 Based on this conclusion, the State ends its equal protection argument at the class  
10 identification step.

11                   However, whether the challenged state actions constitute  
12 discrimination on the basis of sex and whether transgender status is a protected  
13 class relate more to the appropriate level of scrutiny. “When a statute treats  
14 similarly situated individuals dissimilarly, but not on the basis of a suspect  
15 classification or in the exercise of a fundamental right, a court must subject the  
16 discriminating statute to rational-basis review.” *Gazelka v. St. Peter's Hosp.*,  
17 2015 MT 127, ¶ 21, 379 Mont. 142, ¶ 21, 347 P.3d 1287, ¶ 21 (citing *McDermott*  
18 *v. Mont. Dep't of Corr.*, 2001 MT 134, ¶¶ 31-32, 305 Mont. 462, 29 P.3d 992).  
19 Thus, even if the Court found the alleged discrimination did not involve a suspect  
20 class or fundamental right, that would not be the end of the equal protection  
21 analysis. Regarding the class identification step, Plaintiffs have established the  
22 challenged state actions affect cisgender and transgender Montanans in an  
23 unequal manner.

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1           The Court next turns to the appropriate level of scrutiny to apply to  
2 the challenged state actions. Plaintiffs urge the Court to apply strict scrutiny on  
3 the basis transgender Montanans constitute a suspect class. However, the Court  
4 finds it is not necessary at this point in the litigation to determine whether  
5 transgender Montanans constitute a suspect class on the basis of their transgender  
6 status. Rather, the Court addresses the State’s contention discrimination on the  
7 basis of transgender status is not discrimination on the basis of sex. Based on a  
8 review of recent United States Supreme Court and federal court decisions, the  
9 Court disagrees with the State’s conclusion.

10           In *Bostock v. Clayton County*, 590 U.S. 644, 140 S. Ct. 1731  
11 (2020), the United States Supreme Court addressed discrimination based on  
12 sexual orientation or transgender status in the context of employment  
13 discrimination under Title VII. There, the Supreme Court held “it is impossible  
14 to discriminate against a person for being homosexual or transgender without  
15 discriminating against that individual based on sex.” *Id.* at 660. In the present  
16 matter, the State asks this Court to restrict the holding in *Bostock* to the context  
17 of Title VII of the Civil Rights Act of 1974. Plaintiffs, on the other hand, argue  
18 the logic of the holding applies broadly in an equal protection context.  
19 In *Fowler v. Stitt*, 104 F.4th 770 (2024), the United States Court of Appeals for  
20 the Tenth Circuit applied the *Bostock* reasoning to an equal protection claim  
21 substantially similar to the one before this Court. In *Fowler*, the plaintiffs  
22 challenged an Oklahoma policy which denied sex-designation amendments on  
23 birth certificates on the grounds the policy violated the equal protection clause of  
24 the United States Constitution by unlawfully discriminating against transgender  
25 people on the basis of transgender status and sex.

1 Similar to the State’s arguments here, the defendants in *Fowler*  
2 argued against applying the holding in *Bostock* in the equal protection context  
3 because there the Supreme Court noted, “[t]he only question before us is whether  
4 an employer who fires someone simply for being homosexual or transgender has  
5 discharged or otherwise discriminated against that individual ‘because of such  
6 individual's sex.’” *Bostock* at 681. Thus, the defendants conclude, the Supreme  
7 Court only intended the holding to apply in the context of Title VII claims.  
8 However, the *Fowler* Court rejected the argument this language intended to limit  
9 the application of *Bostock* because, “[a]lthough that was the only question the  
10 Supreme Court decided, the Court did not indicate that its logic concerning the  
11 intertwined nature of transgender status and sex was confined to Title VII.”  
12 *Fowler* at 790.

13 Relying on the United States Supreme Court decision in *Bostock*,  
14 the Tenth Circuit Court in *Fowler* concluded because the Oklahoma policy  
15 intended to discriminate based on transgender status, it necessarily intends to  
16 discriminate based in part on sex. This Court adopts the same reasoning. If the  
17 challenged state actions discriminate against transgender individuals on the basis  
18 of their transgender status, they also necessarily discriminate on the basis of sex.  
19 The Montana Supreme Court has not yet identified the level of scrutiny  
20 applicable to classifications based on transgender status or sex. However, if a  
21 right is “explicit in the Declaration of Rights in Montana's Constitution, it is a  
22 fundamental right.” *Gryczan v. State* (1997), 283 Mont. 433, 449, 942 P.2d 112,  
23 122. Article II, Section 4 of Montana’s Constitution, found in the Declaration of  
24 Rights, establishes a fundamental right to individual dignity. It states:

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1 “Neither the state nor any person, firm, corporation, or institution shall  
2 discriminate against any person in the exercise of his civil or political rights on  
3 account of race, color, *sex*, culture, social origin or condition, or political or  
4 religious ideas.” (emphasis added) Therefore, the right to be free from  
5 discrimination on the basis of sex is a fundamental right. “Strict scrutiny applies  
6 when a classification affects a suspect class or threatens a fundamental right.”  
7 *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 31, 305 Mont. 462, ¶ 31,  
8 29 P.3d 992, ¶ 31 (citing *Armstrong v. State*, 1999 MT 261, P34, 296 Mont. 361,  
9 ¶ 34, 989 P.2d 364, ¶ 34).

10 Under a strict scrutiny analysis, “the State has the burden of  
11 showing that the classification or State action is narrowly tailored to serve a  
12 compelling State interest.” *Id.* Because the State ended its equal protection  
13 analysis at the class identification step, it offers no argument regarding the state’s  
14 interest or how the challenged state actions relate to a state interest. Plaintiffs  
15 argue the challenged state actions do not serve a compelling government interest.  
16 However, referencing 11 Mont. Admin. Reg. Notice 37–1002 (June 10, 2022),  
17 Plaintiffs suggest the purpose of the challenged state actions are to ensure  
18 “accurate vital statistics.” The State may have a compelling state interest in  
19 ensuring accurate vital statistics. As this case moves forward, the Court  
20 anticipates the argument regarding the state interest will become more clear.  
21 However, even if the State can demonstrate a compelling state interest in  
22 ensuring accurate vital statistics, the challenged state actions still must be  
23 narrowly tailored to effectuate that interest. Here, the State has not demonstrated  
24 the challenged state actions are narrowly tailored. Prior to the implementation of  
25 the challenged state actions, transgender Montanans were able to obtain amended

1 birth certificates and drivers licenses. Plaintiffs argue nothing in the public  
2 record supports a finding there were problems maintaining accurate vital  
3 statistics before the implementation of the challenged state actions. Thus, the  
4 state interest could presumably be effectuated without the challenged state  
5 actions. If the challenged state actions are not necessary to effectuate the state  
6 interest, they cannot be narrowly tailored.

7 Plaintiffs have met their burden of establishing likelihood of  
8 success on the merits under the preliminary injunction standard. Plaintiffs have  
9 raised a valid prima facie case the challenged state actions violate their  
10 fundamental right to be free from discrimination on the basis of sex under the  
11 Montana Constitution. Although the State did not suggest any state interest  
12 served by the challenged state actions, Plaintiffs raised a potentially compelling  
13 state interest. However, Plaintiffs have succeeded in raising a serious question  
14 on the merits as to whether the challenged state actions are narrowly tailored.

15 **Likelihood of Irreparable Harm**

16 The next step in the preliminary injunction analysis is whether  
17 Plaintiffs are likely to suffer irreparable harm in the absence of an injunction.  
18 The Montana Supreme Court has consistently held, “the loss of a constitutional  
19 right constitutes irreparable harm for the purpose of determining whether a  
20 preliminary injunction should be issued.” *Mont. Cannabis Indus. Ass’n v. State*,  
21 2012 MT 201, ¶15, 366 Mont. 224, 286 P.3d 1161 (citing *Elrod v. Burns*,  
22 427 U.S. 347, 373, 96 S. Ct. 2673, 2689-690, 49 L. Ed. 2d 547 (1976)). As  
23 addressed above, Plaintiffs have established a prima facie case the challenged

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1 state actions infringe their constitutional rights under the Montana State  
2 Constitution’s equal protection clause. Therefore, Plaintiffs have demonstrated a  
3 likelihood of irreparable harm absent an injunction.

#### 4 **Balance of Equities and Public Interest**

5 The third step of the preliminary injunction analysis is whether the  
6 balance of equities tips in Plaintiffs’ favor. The final step of the preliminary  
7 injunction test is whether an injunction is in the public interest. The Court  
8 analyzes these factors together because “[w]hen the government opposes a  
9 preliminary injunction, these two factors ‘merge into one inquiry.’” *Planned*  
10 *Parenthood of Mont. v. State*, 2024 MT 228, ¶ 39, 418 Mont. 253, ¶ 39,  
11 557 P.3d 440, ¶ 39 (quoting *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir.  
12 2021)).

13 Citing Ninth Circuit precedent, the Montana Supreme Court has  
14 held, “[a] plaintiff’s likelihood of success on the merits of a constitutional claim .  
15 . . tips the merged third and fourth factors decisively in his favor.” *Id.* at ¶ 40  
16 (quoting *Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023)). Here, Plaintiffs  
17 have demonstrated a likelihood of success on the merits of their equal protection  
18 claim. Thus, under Montana law, the third and fourth factors weigh in Plaintiffs’  
19 favor.

20 Additionally, applying recent Montana Supreme Court precedent,  
21 the balance of equities “tips in [Plaintiffs’] favor because ‘the government  
22 suffers no harm from an injunction that merely ends unconstitutional practices  
23 and/or ensures that constitutional standards are implemented.’” *Id.* (quoting *Doe*  
24 *v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017)). Finally, a preliminary injunction is  
25 ////

1 “in the public interest because ‘it is always in the public interest to prevent the  
2 violation of a party’s constitutional rights.’” *Id.* (quoting *Melendres v. Arpaio*,  
3 695 F.3d 990, 1002 (9<sup>th</sup> Cir. 2012)).

4 **CONCLUSION**

5 Plaintiffs have demonstrated their request for a preliminary  
6 injunction satisfies the requirements of Montana Code Annotated § 27-19-201(1).  
7 Therefore, Defendants, as well as their agents, employees, representatives, and  
8 successors, are enjoined from directly or indirectly enforcing (1) the 2022 Rule  
9 on its face or as applied to issuing amended birth certificates; (2) the MVD policy  
10 and practice as applied to issuing amended driver’s licenses without an amended  
11 birth certificate; and (3) SB 458 as applied to issuing amended birth certificates  
12 and amended driver’s licenses.

13 **ORDER**

14 **IT IS HEREBY ORDERED** Plaintiffs’ motion for a preliminary  
15 injunction is **GRANTED**.

16  
17  
18 /s/ Mike Menahan  
19 MIKE MENAHAN  
20 District Court Judge

21 cc: All via email:  
22 John Davidson  
23 Alwyn Lansing  
24 Seth A. Horvath  
25 Robert Farris-Olsen  
Marthe Y. Vansickle  
Michael Russell

1 Alex Rate  
2 Malita Picasso  
3 F. Thomas Hecht  
4 Thane P. Johnson  
5 Emily Jones  
6 Michael Noonan  
7 Tina B. Solis  
8 Austin M. Knudsen

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