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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual, Plaintiffs, v. STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and ADAM MEIER, in his official capacity as the Director of the Montana Department of Public Health and Humant Services, Defendants.	DV-21-00873 Hon. Michael G. Moses **DEFENDANTS' COMBINED BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS**

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INTRODUCTION

Governments rely extensively on accurate vital statistics. Having access to authentic records helps prevent fraud, provide emergency services, and protect the public health. The quintessential source for vital statistics is the birth certificate. In Montana, a birth certificate records a child's sex—a biological (and genetic) fact—at birth. The government relies upon that fact—the truth—of sex when providing public services and determining public policy. It therefore has an unquestioned interest in the accuracy and integrity of vital records. There is no right to change a vital public record to indicate a "sex" that defies both history and genetic reality. Yet both the Department of Public Health and Human Services ("Department") and now the Legislature have provided a path for individuals to change "sex" on their birth certificates. This is an act of legislative and administrative grace, and the Legislature—like the Department before it—may determine what requirements are necessary to make this change.[1] *See* Senate Bill ("SB") 280. Birth certificates serve an important purpose, including accurately recording a person's sex at birth. And the State has an interest in maintaining these records and preventing fraud.

[1] Prior to 2017, individuals were only able to change the sex on their birth certificate if the Department received a court order indicating that the sex of the individual had been changed by surgical procedure. Mont. Admin. R. 37.8.311 (2007) ("2007 Rule"). SB 280 simply reinstates this pre-2017, neutrally applied process.

Accordingly, Defendants State of Montana, Governor Gregory Gianforte, Montana Department of Public Health and Human Services, and Director Adam Meier (together, "Defendants") oppose Plaintiffs' Motion for a Preliminary Injunction and move to dismiss the Complaint pursuant to Montana Rule of Civil Procedure 12(b)(6).

HUMAN RIGHTS BOARD PROCEEDINGS

Defendants wish to notify the Court that Plaintiffs filed Complaints of Discrimination with the Human Rights Bureau ("HRB") on July 22, 2021, after their initial attempt to file the instant preliminary injunction motion. Under Montana law, an HRB proceeding is the exclusive remedy for discrimination prohibited by Article II, § 4 of the Montana Constitution. Mont. Code Ann. § 49-2-512(1); *see also Borges v. Missoula Cnty. Sheriff's Office*, 2018 MT 14, ¶ 19, 390 Mont. 161, 415 P.3d 976; *Edwards v. Cascade Cnty. Sheriff's Dep't*, 2009 MT 451, ¶ 73, 354 Mont. 307, 223 P.3d 893. A claim for relief "may not be entertained by a district court other than by the procedures specified" in the Act. Mont. Code Ann. § 49-2-512(1). "A party claiming discrimination may not file a claim in district court without first obtaining an adjudication of that claim by the HRB." *Borges*, ¶ 19. And "failure to exhaust available administrative remedies precludes them from bringing a viable claim in district court." *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 39, 337 Mont. 1, 155 P.3d 1247.

The State is still reviewing the propriety of filing what amounts to a claim challenging the constitutionality of a statute before the HRB. But because Plaintiffs chose to file HRB complaints, they are now "required to pursue these claims under the procedures provided in the Montana Human Rights Act." *Id*. *See, e.g., Borges*, ¶ 19. The "gravamen" of Plaintiffs' Complaint is identical to the claims contained in their HRB Complaints. *Lay v. State Dep't of Military Affairs*, 2015 MT 158, ¶ 15, 379 Mont. 365, 351 P.3d 672.[2] The Court should dismiss this case and deny all Plaintiffs' requested relief until they exhaust the administrative process as required by law.

ARGUMENT

I. Applicable Standards

Preliminary injunctive relief is "an extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794. An applicant seeking injunctive relief must show a "likelihood of success on the merits" and that "the applicant would suffer harm which could not be adequately remedied

[2] Plaintiffs each filed two complaints with the HRB—one against the State (c/o the Attorney General) and one against the Department. In the HRB complaints and this Complaint, Marquez and Doe (by and through the ACLU) assert that SB 280 violates the same constitutional provisions—namely, MONT. CONST. art. II, §§ 4, 10, and 17. *Compare* Complaint at ¶¶ 58, 68, 76, and 82, *with* Doe HRB Complaints at ¶ 14 and Marquez HRB Complaints at ¶ 11. The HRB complaints include additional state and federal constitutional challenges to SB 280 but include all the claims alleged in this lawsuit.

after a trial on the merits." *M.H. v. Montana High Sch. Ass'n*, 280 Mont. 123, 135, 929 P.2d 239, 247 (1996).

In other words, an applicant need not establish entitlement to relief on the merits but must show they are likely to succeed on the merits. *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123; *see also Montana High Sch. Ass'n*, 280 Mont. at 135–36 (noting that likelihood of success on the merits is a necessary finding in a preliminary injunction analysis). Plaintiffs agree that a preliminary injunction requires a showing of likelihood of success on the merits. *See* Brief in Support of Motion for Preliminary Injunction at 14 (citing *Van Loan v. Van Loan*, 271 Mont. 176, 182, 895 P.2d 614, 617–18 (1995), which requires the moving party prove each element for a preliminary injunction including "the likelihood that the movant will succeed on the merits of the action."). Here, Plaintiffs aren't likely to succeed on the merits, and they haven't established they will suffer some "irreparable injury" or that they are otherwise entitled to relief. Mont. Code Ann. § 27-19-201(1)–(2); *see also Driscoll v. Stapleton*, 2020 MT 247, ¶ 17, 401 Mont. 405, 473 P.3d 386.

Not only are Plaintiffs not entitled to a preliminary injunction, but this action must also be dismissed pursuant to Montana Rule of Civil Procedure 12. "When considering a motion to dismiss under M. R. Civ. P. 12(b)(6), all well-pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable to the plaintiff."

Sinclair v. BN & Santa Fe Ry., 2008 MT 424, ¶ 25, 347 Mont. 395, 200 P.3d 46 (citation omitted). "Courts are not required, however, to accept allegations of law and legal conclusions in a complaint as true." *Threkeld v. Colorado*, 2000 MT 369, ¶ 33, 303 Mont. 432, 16 P.3d 359; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (A complaint must offer more than "naked assertions devoid of further factual enhancement.") (internal citation and quotations omitted). A "complaint must state something more than facts which, at the most, would breed only a suspicion that the claimant may be entitled to relief." *Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 319 Mont. 156, 415 P.3d 486 (cleaned up).

II. Standing

"[T]he judicial power of Montana's courts is limited to 'justiciable controversies.'" *BNSF Ry. Co. v. Asbestos Claims Court*, 2020 MT 59, ¶ 54, 399 Mont. 180, 459 P.3d 857 (citation omitted). Application of the justiciability doctrine is especially crucial in constitutional challenges because of the "deeply rooted commitment not to pass on questions of constitutionality unless … necessary." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (internal quotations omitted). In Montana, that "commitment" is embodied in the rule that laws are presumably constitutional. *See State v. Davison*, 2003 MT 64, ¶ 8, 314 Mont. 427, 67 P.3d 203. "Every possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.; see also GBN, Inc. v. Mont. Dep't of Revenue*, 249 Mont. 261, 265, 815 P.2d 595, 597 (1991) ("If a

doubt exists, it is to be resolved in favor of the legislation"); *State v. Stark*, 100 Mont. 365, 368, 52 P.2d 890, 891 (1935) ("[T]he constitutionality of any Act shall be upheld if it is possible to do so.").

To establish standing, a plaintiff must demonstrate a "past, present, or threatened injury to a property or civil right … that … would be alleviated by successfully maintaining the action." *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187 (citation and internal quotation omitted). "The alleged injury must be: concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; [it must be] redressable; and distinguishable from injury to the public generally." *Id*. (citations omitted). Standing is a threshold justiciability question, "especially … where a … constitutional violation is claimed." *Olson v. Dep't of Rev.*, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986). Absent standing, the court risks issuing advisory opinions that—by definition—invade the prerogatives of the policymaking branches.

Plaintiffs here do not allege concrete, actual, or imminent injuries sufficient to establish standing. They instead allege abstract fears about presenting their identity documents, exposing personal medical information, and discrimination and violence. *See, e.g.*, Complaint ¶ 50, 56. But Plaintiffs fail to allege why these speculative and hypothetical harms are only now at issue. Marquez has lived as an openly transgender woman for approximately five years, and Doe has, for some time, lived as an openly transgender man.

Complaint ¶ 46, 53. Both had the option to change their birth certificates under the 2017 Rule[3] or its predecessor. Yet neither did, nor even expressed interest in taking the steps necessary to change their birth certificates. *See* Complaint, ¶¶ 44–56 (neither Doe nor Marquez allege they have previously sought to change their birth certificates or are currently trying to change their birth certificate).[4] Until now. Plaintiffs have utterly failed to articulate why their vague fears—anxiety over presenting identity documents, fear of exposing personal medical information, and general fear of discrimination and violence—arose only after SB 280's enactment. Moreover, Marquez (1) has disclosed Marquez's medical status as a named plaintiff in this lawsuit, (2) legally changed Marquez's name, which required a court proceeding, *see* Mont. Code Ann. § 27-31-101, and (3) changed Marquez's name and sex on Marquez's Montana driver's license.

The harms alleged by Marquez and Doe are too attenuated to be anything more than hypothetical. *See Bullock*, 2019 MT 50, ¶ 31.

Doe's alleged harm arises from the desire to not share information and records with the court. Complaint, ¶ 52. This harm is solely tied to "the idea of having to share private medical records related to his transition with a judge[.]" Complaint, ¶ 54. Sharing such records with a judge allegedly causes

[3] Mont. Admin. R. 37.8.311(5) (2017) ("2017 Rule").

[4] This alone should defeat Plaintiffs' request for injunctive relief.

"fear of exposure and humiliation at having his transgender status revealed." *Id*. Yet Doe purposefully availed himself of this Court in this matter.

And Doe fails to establish why ordinary judicial proceedings or existing law do not address these concerns. *See e.g., Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 52, 372 Mont. 409, 313 P.3d 129 (showing that courts routinely balance the individual right to privacy against the public right to know). Doe has also filed under seal in this case and hasn't demonstrated why a similar process would be insufficient or unavailable under the requirements set forth by SB 280.

Marquez alleges a generalized fear of being "outed as transgender." Marquez Affidavit, ¶ 9. But that fear can't be reconciled with the Complaint's concession that Marquez is a named plaintiff in this lawsuit and has been "living fully and openly" as a transgender female for five years. Complaint, ¶ 46. When running for public office, Marquez made Marquez's status as a transgender female publicly known. *See* Marquez Affidavit, ¶ 10. These facts undermine Marquez's alleged fear of disclosing transgender status to "people who I do not already know and trust." *Id*.[5] Further, Marquez alleges incidents of harassment based on transgender status but never links those to the

[5] Again, Marquez presumably disclosed this information to legally change Marquez's name, *see* Mont. Code Ann. § 27-31-101, and to change the name and sex designation on Marquez's Montana driver's license. *See* Marquez Affidavit at 2.

presentation of a birth certificate. *See* Marquez Affidavit, ¶ 10. It is entirely unclear how the State's requirements for altering a non-public vital statistic could cause spontaneous harassment in a grocery store.

Both Plaintiffs' alleged injuries are no more than generalized concerns over abstract, future harm that lack basis, are ill-defined, and may never materialize. *See Bullock*, ¶ 31. Sympathetic inference is no substitute for adequate pleading—or for actual injuries. *Cossitt*, ¶ 9. Plaintiffs, furthermore, provide no specific, concrete examples of when their birth certificates must be presented, or that other documentation could not be provided to establish whatever facts would be established by presentation of their birth certificates. Plaintiffs' articulated concerns don't support standing in a judicial proceeding, and they can't survive a motion to dismiss.[6]

III. Likelihood of Success on the Merits

Plaintiffs' claims fail as a matter of law and are therefore unlikely to succeed on the merits. Bare and baseless legal assertations can't survive a motion to dismiss. *See Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6 (A "court is under no duty to take as true legal conclusions or allegations

[6] If the Court determines Plaintiffs have standing and are entitled to a preliminary injunction, that injunction should be limited in scope to the two Plaintiffs. Otherwise, the injunction would practically invalidate SB 280 on the merits, allowing any petitioners to skirt the new law's requirements before resolution of plaintiffs' claims on the merits. But again, Plaintiffs don't have standing, aren't entitled to any injunctive relief, and the case should be dismissed.

that have no factual basis."). According to the plaintiffs, SB 280 violates equal protection, their rights to informational privacy, their rights to freedom of medical decision-making, and due process. Plaintiffs are wrong on all counts.

A. SB 280 Does Not Violate the Equal Protection Clause of the Montana Constitution.

The Montana Constitution robustly protects individual dignity:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

MONT. CONST. art. II, § 4. A violation occurs only when there is actual discrimination based upon one of the listed classes. So in assessing a claim like this one, the Court must first identify the classes involved. *See Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 18, 402 Mont. 277, 477 P.3d 1065. Then courts must determine and apply the appropriate level of scrutiny to apply to the alleged discriminatory treatment. *Id.*

The central question here is whether SB 280 discriminates against individuals based on any of the protected classes identified in Article II, § 4. The answer must be no for two reasons. First, SB 280 applies equally to all individuals. And second, transgender individuals are not a protected or suspect class under Montana or federal law.

1. Transgender and Non-Transgender Individuals are Part of the Same Class.

To succeed on an equal protection challenge, a plaintiff "must first identify the classes involved and determine whether they are similarly situated." *Henry v. State Compensation Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, 982 P.2d 456. "[T]he law must treat similarly-situated individuals in a similar manner." *McDermott v. Mont. Dep't of Corr.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992. The "equal protection clause does not preclude different treatment of different groups so long as all individuals within the group are treated the same." *Rausch v. State Comp. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 114 P.3d 192 (*Rausch II*) (citing *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877).

Plaintiffs concede and the State agrees that, under SB 280, transgender and non-transgender Montanans are "similarly situated for equal-protection purposes." *See* Brief in Support of Motion for Preliminary Injunction at 16. SB 280 treats all individuals—transgender or not—the same. *Anyone* seeking to change the sex on their birth certificate must go through the same process to amend their birth certificate. No one in Montana, regardless of his or her gender identity, has an unlimited right to amend the sex recorded at birth on a birth certificate. *See* Mont. Admin. R. 37.8.311(5) (2017). Transgender individuals born in Montana don't possess more rights than those conferred upon

other Montana-born individuals.[7] On its face and as applied, therefore, SB 280 doesn't discriminate against transgender individuals.

Plaintiffs cite instances where other courts have struck down restrictions on amending birth certificates, but these cases are inapplicable and non-binding on this Court. In *Ray v. McCloud*, 507 F. Supp. 3d 925 (S.D. Ohio 2020) and *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136 (D. Idaho 2018), the laws at issue prohibited anyone from changing the sex listed on their birth certificate while permitting individuals to change other data of their birth certificate. In both cases, the courts determined that the plaintiffs (who wanted to change their birth certificates' listed sex) were similarly situated to people seeking to change their birth parents, adoptive parents, and names under the respective state statutes. The categorical ban on changing the sex listed on one's birth certificate, therefore, violated equal protection given the other state statutes that allowed birth certificate amendments. SB 280, by contrast, allows all

[7] To the extent Plaintiffs allege this equal treatment affects them unequally—because only transgender individuals would want to change their birth certificates' sex designations—that is a claim of disparate impact, not disparate treatment. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (describing disparate treatment as "treat[ing] some people less favorably than others because of their race, color, religion, sex, or national origin" and describing disparate impact from "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another"). Plaintiffs do not cite any authority where a Montana court has applied disparate impact analysis under Montana's equal protection clause. Furthermore, Plaintiffs do not support the allegation that only transgender individual would want to change their sex designations.

individuals to change the sex on their birth certificate if they follow the legislatively prescribed process. Just like changing other birth certificate data, petitioners must meet certain requirements, and those requirements are the same for everyone. *See* Mont. Code Ann. § 50-15-204 (permitting the Montana Department of Public Health and Human Services to "establish[] the circumstances under which vital records may be corrected or amended and the procedure to correct or amend those records").

SB 280 regulates all individuals neutrally, and it is not "designed to impose different burdens on different classes of persons." *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421. Perhaps Plaintiffs suggest the *only* people who want to change the sex on their birth certificates are transgender individuals, so "in reality," SB 280 imposes different burdens on different individuals within the same class. *Id.*[8] By that logic, though, the process to which the plaintiffs would revert—the 2017 Rule—also unlawfully discriminates because it imposed certain requirements individuals had to meet before changing sex on their birth certificates. Under Plaintiffs' theory, the only nondiscriminatory process for changing the listed sex on one's birth certificate is a process that imposes no requirements at all. But that can't be right. For example, if paternity of a child is established after a birth certificate

[8] Plaintiffs don't support this premise—that only transgender individuals will want to change their birth certificate's sex designation—with any facts in the Complaint.

has been issued, the parents of the child must provide credible evidence of paternity and submit affidavits to change the birth certificate. *See* Mont. Code Ann. § 50-15-223; Mont. Admin. R. 37.8.311(2) (2017). These requirements are neutral, but one could argue that these requirements discriminate against individuals with an unknown father.[9] This is absurd. Just because the requirements have changed does not mean that the new requirements somehow now treat individuals in the same class differently.[10]

2. Transgender Individuals are not a Protected Class.

Even if the Court concluded that SB 280 treats transgender individuals differently, Montana's laws make clear that gender identity or transgender status are not protected classes. *See, e.g.*, Mont. Code Ann. § 49-1-102 (declaring the "right to be free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin"); § 49-2-303 (declaring it unlawful for an employer to discriminate against a person because

[9] The same could be said of individuals seeking to change their birth certificate in cases of adoption. No one would argue these neutrally applied procedures to change a birth certificate discriminate against adopted individuals just because they are the only individuals seeking such a change. *See* Mont. Admin. R. 37.8.311(1) (2017).

[10] Again, this would be a disparate impact claim, which Plaintiffs do not allege. And even if they did allege this, equal protection "guarantees equal *laws*, not equal results." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (emphasis added); *see also Washington v. Davis*, 426 U.S. 229, 242 (1976) (spurning the notion that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the [federal] Equal Protection Clause simply because it may affect a greater proportion of one race than of another").

of "race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex"); § 49-2-308 (declaring it unlawful for a state to deny services to anyone based on "race, creed, religion, sex, marital status, color, age, physical or mental disability, or national origin"); § 49-2-307 (declaring it unlawful for an educational institution to discriminate because of "race, creed, religion, sex, marital status, color, age, physical disability, or national origin"); § 49-2-304 (declaring it unlawful for a public accommodation to deny services because of "sex, marital status, race, age, physical or mental disability, creed, religion, color, or national origin"). Montana courts have not included gender identity among the protected classes. *See Mont. State University-Northern v. Bachmeier*, 2021 Mont. 26, ¶ 27–28, 403 Mont. 136, 480 P.3d 233 (noting that sex, meaning "male or female," is a protected class); *Snetsinger v. Mont. Univ. System*, 2004 MT 390, ¶ 61, 325 Mont. 148, 104 P.3d 445 ("[s]exual and gender orientation is not considered a 'suspect class'"); *Donaldson v. State*, 2012 Mont. 288, ¶ 54, 367 Mont. 228, 292 P.3d 364 (Nelson, J., dissenting) (expressing disagreement with established law and arguing sexual orientation *should* be a suspect class).[11]

[11] Federal law also supports this conclusion. *See, e.g., Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (applying rational basis review because transgender status is not a suspect class); *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 6, 2012) ("it is not apparent that transgender individuals constitute a 'suspect' class"); *Jamison v. Davue,* No. S-11-cv-2056 WBS, 2012 WL 996383,

Likewise, the U.S. Supreme Court has not recognized transgender individuals as a suspect class. In *Bostock v. Clayton County*, the Court adopted the well-established assumption that "homosexuality and transgender status are distinct concepts from sex." 140 S. Ct. 1731, 1746–47 (2020). The majority also limited its analysis *to the Title VII context*, finding that discrimination based on homosexuality and transgender status necessarily entailed discrimination based upon sex. *Id.* at 1753. The Court explained that if an employer "retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Id.* at 1741.

Here, though—beyond the fact that Title VII is not at issue—there is no such discrimination. SB 280 doesn't impose requirements on a person identified as male at birth any different from those it imposes on a person identified as female at birth. Whether a transgender man seeking to change the "female"

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at *3 (E.D. Cal. Mar. 22, 2012) ("transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review"); *Kaeo-Tomaselli v. Butts*, No. 11-cv-00670 LEK, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013) (noting the court could find no "cases in which transgendered individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05-cv-10321-NRB, 2009 WL 229956, *13 (S.D.N.Y. Jan. 29, 2009) (applying rational basis review because transgender individuals are not a protected class).

birth certificate designation, or a transgender woman seeking to change the "male" birth certificate designation, *or anyone else* (such as an intersex person), those who seek to change their birth certificate's listed sex must satisfy the exact same requirements.

Because transgender status is not a protected class, rational basis review applies. *See Lesage v. Twentieth Judicial Dist. Court*, 2021 MT 72, ¶ 10, 403 Mont. 476, 483 P.3d 490; *State v. Ellis*, 2007 MT 201, ¶¶ 10–11, 339 Mont. 14, 167 P.3d 896. And SB 280 easily survives rational basis review.

3. SB 280 Serves Legitimate Government Interests.

Under rational basis review, laws "are presumed constitutional, with the challenger bearing the heavy burden of demonstrating that the enactment or rule is not rationally related to any legitimate government interest." *Lesage*, ¶ 10. The standard is highly deferential, and any laws must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis." *FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993). It is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* "[J]udicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Plaintiffs' equal protection claim doesn't meet that heavy burden. Montana has a legitimate government interest in enforcing birth record statutes, maintaining vital statistics and preventing fraud. These legitimate state

interests are reinforced by SB 280. *See Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification").

The State's interests in maintaining accurate vital statistics and preventing constant, capricious, or fraudulent changes to birth records is clear. SB 280 survives rational basis review. Plaintiffs' equal protection allegations fail to state a claim and should be dismissed.

B. SB 280 Does Not Violate a Person's Right to Informational Privacy

Plaintiffs' informational privacy claim also lacks merit. A privacy interest is only protected under Article II, § 10 if (1) the person has a subjective or actual expectation of privacy and (2) society is willing to recognize that expectation as reasonable. *State v. Nelson*, 283 Mont. 231, 239, 941 P.2d 441, 447 (1997); *see also Mont. Shooting Sports Ass'n v. State*, 2010 Mont. 8, ¶ 14, 355 Mont. 49, 224 P.3d 1240.

Plaintiffs do not have a subjective or actual expectation of privacy in their medical records when seeking to change their birth certificates' listed sex. In *Nelson*, the Court held that medical records can be discovered through an investigative subpoena if there is a compelling state interest. *Id.* at 242. But this case is about SB 280, and under that law, individuals need only disclose

their medical records to a court with appropriate jurisdiction if they choose to change their birth certificate's sex designation. *See, e.g., Henricksen v. State,* 2004 MT 20, ¶ 36, 319 Mont. 307, 84 P.3d 38 (noting that an individual can waive right to privacy in medical records); *Cook v. Mt. Rail Link,* No. 78444, 1995 Mont. Dist. LEXIS 443 (4th Jud. Dist. Mar. 3, 1995) (same). It's the same for those who wish to change other data on their birth certificates. *See* Mont. Code Ann. § 50-15-204; Mont. Code Ann. § 50-15-223. *Nelson* doesn't speak to the issues here.

In cases concerning privacy of medical records, the concern is about the circulation of private information. For example, in *Malcomson v. Liberty Nw.*, 2014 MT 242, 376 Mont. 306, 339 P.3d 1235, the Court declared unconstitutional a statute that allowed insurance companies to talk directly to physicians of those claiming workers' compensation. The Court explained that the right to privacy would "be lost if the individual d[id] not know what healthcare information is being circulated or to whom." *Id.* ¶ 29. Likewise, in *St. James Cmty. Hosp., Inc. v. Dist. Court*, 2003 MT 261, ¶ 8, 317 Mont. 419, 77 P.3d 534, the Court expressed concern "with the prospect of having patient names released without the patients' consent."

Here though, under SB 280, Plaintiffs would only be required to disclose their medical records to a court with appropriate jurisdiction to obtain the required court order. Just like other judicial proceedings, a judicial proceeding

ordering the Department to change the birth certificate of a person born in Montana could be conducted under seal or under pseudonym as this proceeding is being conducted. There can be no legitimate concern that this information will be publicly disseminated.

SB 280, moreover, cannot violate Plaintiffs' right to informational privacy because even under the 2017 Rule, individuals had to disclose certain information to the government to change their birth certificate. And the very government record Plaintiffs wish to change is the one they apparently wish to present to others that, when altered, will reflect a sex aligned with their gender identity. Plaintiffs cannot complain they are being forced to disclose information they intend to share with others, including the government.[12]

Society is not willing to recognize as reasonable an expectation of privacy in the medial information necessary to change one's birth certificate under SB 280. These medical records would not be disclosed to the public; they constitute evidence—submitted to a court with appropriate jurisdiction (under seal, if plaintiffs choose to do so)—necessary to produce an order that will allow the Department to amend a vital statistic. *See Mont. Shooting Sports Ass'n*, ¶ 18 (distinguishing between State collection of protected information and

[12] In this regard, Defendants note that Plaintiff Marquez already disclosed such information to Montana or to Montana courts to obtain a legal name change and to change name and sex designation on Marquez's Montana driver's license. Marquez Affidavit at 2.

disclosure of protected information by the State to the general public). Disagreement with a law cannot be the basis for an expectation of privacy. Plaintiffs cite no authority establishing that society recognizes a right to privacy in voluntary proceedings. *But see id.*, ¶ 15 (noting that plaintiffs could avoid disclosure of protected information by opting not to engage in the process they sought to challenge). The law only requires individuals to present medical information about medical treatments to such court if they want to change their government-issued birth certificate.

Because Plaintiffs' informational privacy claim lacks merit, it must be dismissed.

C. SB 280 Does Not Violate a Person's Right to Medical Decisionmaking.

Plaintiffs' "medical-interference claim" is not a claim Montana law recognizes. In reality, it's just another privacy claim and likewise lacks merit. *See* Brief in Support of Motion for Preliminary Injunction at 31 (citing and discussing privacy cases). SB 280 doesn't require anyone to undergo any medical procedure. It creates a neutral process by which individuals can change the sex designations on their birth certificates. Individuals don't have the right (and Plaintiffs have identified no contrary authority) to change the sex designations on their birth certificates. But the State allows all individuals who meet one set of requirements to do so. The State may obviously establish what

those neutral requirements are—just like the Department did in its 2007 and 2017 Rules.

Plaintiffs' reliance on *State v. Armstrong* is misplaced. *Armstrong* considered statutes that prevented women from obtaining abortions from healthcare providers of their choosing. *Armstrong v. State*, 1999 MT 261, ¶ 45, 296 Mont. 361, 989 P.2d 364. First, the right to an abortion is recognized and established. *Id.* The right to change the sex designation on a birth certificate is not. Second, SB 280 doesn't curtail Plaintiffs' healthcare provider choices at all. Third, it doesn't require transgender or any other individuals to have surgery. Rather, if Plaintiffs, for example, wish to have their birth certificates' *sex* designation correspond to their current *gender identity*, they must follow the statutorily prescribed process (which again, was the existing process until 2017). The choice remains entirely with each individual.

D. SB 280 Does Not Violate Due Process

Plaintiffs assert that SB 280 is unconstitutionally vague facially and as applied because it does not specify the type of surgical procedure necessary to comply with the Act. A claim that a civil statute is unconstitutionally vague requires a showing that the rule is "so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co. v. Am. Sugar Refin. Co.*, 267 U.S. 233, 238–39 (1925). But "uncertainty in [a] statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible." *Exxon*

Corp. v. Busbee, 644 F.2d 1030, 1033 (5th Cir. 1981). The Court's "first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494–95 (1982). If the statute does not, the challenge must fail unless the "enactment is impermissibly vague in all of its applications." Plaintiffs fail to meet this heavy burden.

SB 280 doesn't reach "constitutionally protected conduct." *Id.* Plaintiffs have not—and cannot—allege that there is a constitutionally protected right to change one's birth certificate. The challenge must fail on that basis alone. Furthermore, SB 280 states that a birth certificate can only be amended if a court order "indicat[es] that the sex of the person born in Montana has been changed by surgical procedure." But "[t]he Legislature is not required to define every term it employs when constructing a statute." *State v. Martel*, 273 Mont. 143, 150, 902 P.2d 14, 18 (1995). The question is whether a "reasonable person of average intelligence comprehends it." *Id.* Here, the Legislature provided a clear standard that is substantially comprehensible: the person must undergo a surgical procedure to change their sex—not their gender identity. And this is the exact standard that was in place for a decade prior to the 2017 Rule. *See* Mont. Admin. R. 37.8.311 (2007) (requiring a court order "indicating that the sex of an individual born in Montana has been changed by surgical procedure").

Plaintiffs, moreover, have not alleged that they plan to undergo any surgery or are likely to undergo any surgery in the future. Doe, in fact, doesn't plan to undergo further surgery. Brief in Support of Motion for Preliminary Injunction at 12. Plaintiffs have therefore foreclosed their due process argument.

Plaintiffs' due process claim lacks merit and must be dismissed.

IV. Plaintiffs Will Not Suffer Irreparable Injury That Could Not Be Adequately Remedied Until After Resolution on the Merits.

Plaintiffs have failed to demonstrate that they will suffer some "irreparable injury" or that they are otherwise entitled to preliminary relief. Mont. Code Ann. § 27-19-201(1). Plaintiffs recycle their merits arguments putatively as irrebuttable proof of an irreparable injury. And while Plaintiffs note that "the loss of a constitutional right constitutes irreparable harm," *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161, Plaintiffs have failed to show any constitutional right they stand to lose because of SB 280.

As noted above, Plaintiffs fail to allege that they have sought, are seeking, or would imminently seek to change the sex designation on their birth certificates. Plaintiffs also cite a "mental and emotional toll" of sharing personal information about sex reassignment surgery and "irreparable financial harm" of undergoing this type of surgery. Brief in Support of Motion for

Preliminary Injunction at 36. But a preliminary injunction will not resolve these issues and would instead hand Plaintiffs a victory on the merits—which is not appropriate at the preliminary stage of the proceedings. This Court should consider and resolve these issues without the backdrop of a manufactured emergency.

The State has a strong interest in maintaining accurate vital statistics and preventing fraud. Plaintiffs are not harmed by waiting for the Court to resolve the merits of this dispute. Indeed, they declined to change their birth certificates when the 2017 Rule was in effect. Their newfound impatience to do so disqualifies them from extraordinary equitable relief of the preliminary injunction they seek, and it's one more reason the Court should dismiss this case.[13]

[13] Defendants deny that Plaintiffs are entitled to any relief, preliminary or permanent. To the extent, however, that this Court disagrees, any relief must be limited to the two Plaintiffs before the Court.

CONCLUSION

For these reasons, Defendants respectfully request that the Court deny Plaintiff's Motion for Preliminary Injunction and dismiss the case.

DATED this 17th day of August, 2021.

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