Akilah Lane (Bar No. 60742990)
Alex Rate (Bar No. 11226)
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806
406-203-3375
ratea@aclumontana.org
lanea@aclumontana.org

John Knight, admitted *pro hac vice*
ACLU Foundation
LGBTQ & HIV Project
150 North Michigan Avenue, Suite 600
Chicago, IL 60601
Telephone: 312-201-9740
Facsimile: 312-288-5225
jaknight@aclu.org

F. Thomas Hecht, *pro hac vice* forthcoming
Tina B. Solis, *pro hac vice* forthcoming
Seth A. Horvath, pro hac vice forthcoming
Nixon Peabody LLP
70 West Madison Street, Suite 3500
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

Elizabeth Halverson PC
1302 24th Street West #393
Billings, MT 59102
406-698-9929
ehalverson@halversonlaw.net

IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual;

Plaintiffs,

v.

STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the 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 Human Services,

Defendants.

Case No. DV 21-00873

Hon. Michael G. Moses

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

In the opening pages of their brief, Defendants[1] erroneously claim that Plaintiffs' effort to amend the sex designation on their birth certificates "defies both history and genetic reality." Def. Br. 1. This position ignores current scientific knowledge and at least a decade of state and federal jurisprudence. *See* Pl. Br. 4–7, 16–20.

Contrary to Defendants' assertions, prohibiting Plaintiffs from freely amending their birth certificates to accurately reflect their gender identity is not necessary to "prevent fraud, provide emergency services, [or] protect public health." Def. Br. 1. Defendants do not cite a single example of how burdening transgender people who wish to amend the sex designation on their birth certificates will further any of these objectives. Indeed, no one from the Montana Office of Vital Records, or from any Montana law-enforcement agency, provided testimony to support the Act before the legislature or to oppose Plaintiffs' motion before this Court.

In defending a statute such as the Act, the state has the burden of justifying the statute based on specific evidence rather than broad generalizations. *See Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶¶ 16–17, 325 Mont. 148, 104 P.3d 445. No such evidence exists here. From 2017 until the passage of the Act in 2021, Montana had a minimally restrictive, more sensible, policy in place for allowing transgender people to change their birth-certificate sex designations. *See* Mont. Admin. Register Notice No. 37–807 (amending Admin. R. Mont. 37.8.102 & 37.8.311). No one raised any complaint about this policy. The existence of the earlier policy clearly shows that there are less restrictive alternatives to those required by the Act.

For these reasons, and as discussed in further detail below, Plaintiffs have presented a prima facie case in support of preliminarily enjoining Defendants from enforcing the Act. The Court should grant the preliminary injunctive relief requested by Plaintiffs.

ARGUMENT

As a preliminary matter, Defendants have both (1) moved to dismiss Plaintiffs' action pursuant to M.R. Civ. P. 12(b)(6) (the "Motion to Dismiss") and (2) responded to Plaintiffs' motion for a preliminary injunction. In Defendants' combined brief, they conflate the legal standards for a motion to dismiss and a preliminary injunction and fail to conduct a separate analysis under the

[1] Unless otherwise specified or clarified, defined terms have the same meaning as in Plaintiffs' initial brief.

two different standards. Plaintiffs have simultaneously filed a separate response to the Motion to Dismiss. For the reasons set forth in the response, the Motion to Dismiss has no merit.

Defendants' opposition to Plaintiffs' motion for a preliminary injunction likewise has no merit. *First*, the Montana Human Rights Act's ("MHRA") exhaustion provisions do not preclude Plaintiffs from proceeding with their lawsuit. Plaintiffs fully address Defendants' exhaustion argument in their response to the Motion to Dismiss, which they incorporate here by reference. *Second*, as discussed below, Plaintiffs are likely to prevail on the merits of their claims. *Third*, as discussed below, Plaintiffs have standing to pursue their claims, and an injunction is necessary to prevent irreparable harm.

I. Plaintiffs are likely to succeed on the merits of their claims.

A. Defendants have not offered any evidence to rebut Plaintiffs' arguments.

As an initial matter, Defendants have not offered any evidence to rebut the evidence Plaintiffs submitted to prove their claims. This evidence includes:

- The expert testimony of Dr. Randi Ettner on the standard of care for gender dysphoria, the importance of having identification documents that accurately reflect one's gender, the danger to transgender people of having identity documents that do not match their gender identity, and the confidential nature of gender-affirming medical procedures (Ettner Aff.);
- The American Medical Association's policy seeking to eliminate surgical requirements such as those mandated by the Act (Pl. Br. 6);
- The U.S. State Department's policy on gender in U.S. passports and consular reports of birth abroad (*id.*);
- The opinion of the Michigan Attorney General concluding that a Michigan law comparable to the Act is unconstitutional; (*id.* 6–7);
- The proceedings of the Montana Senate Judiciary Committee and Montana House Judiciary Committee reflecting the inadequate justifications for the Act offered by the Act's sponsors (*id.* 8–9);
- The American Bar Association's ("ABA") summary of the uses to which birth certificates are typically put (*id.* 9-10);
- *The Report of the 2015 U.S. Transgender Survey* summarizing the discrimination, and potential violence, transgender people confront (*id.* 20-21);

- A study by the Williams Institute discussing the number of adults who identify as transgender in Montana and nationwide (*id.* 22); and

- Plaintiffs' testimony regarding their transgender status; their expectation of privacy in their medical records; the medical treatments they have received in connection with their transgender status; their experience with discrimination; and the likelihood of adverse confrontations if they are compelled to disclose identification documents, including birth certificates, that do not match their expressed gender (Marquez Aff.; Doe Aff.).

Defendants, for their part, have not submitted ***any*** evidence to support their justifications for the Act—namely, that the Act is necessary to maintain accurate vital statistics and assist law enforcement. In the absence of such evidence, and in the presence of the substantial evidence presented by Plaintiffs, Plaintiffs have, without question, established "a prima facie case" that they are entitled to preliminary injunctive relief. *See Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4.

B. Plaintiffs are likely to succeed in showing that the Act violates equal protection.

As set forth in their initial brief, Plaintiffs are likely to succeed in showing that the Act violates equal protection. Transgender and cisgender Montanans seeking to amend their birth certificates are similarly situated for equal-protection purposes (Pl. Br. 16–17); the Act, which discriminates against transgender people, is subject to heightened scrutiny (*id.* 17–23); and the Act cannot survive heightened scrutiny (*id.* 23–28).

With regard to the latter, impairing transgender people's right to correct the sex designation on their birth certificates is not reasonable, and the need for the impairment—purportedly to ensure accurate record-keeping—does not outweigh the value of the right that is impaired. *Id.* 24. Alternatively, the requirements the Act imposes on transgender people—a surgical procedure and the public court-ordered affirmation of that procedure—are not narrowly tailored to serve a compelling government interest. *Id.* Nothing in the legislative record supports a finding that there were any problems maintaining "accurate" vital statistics under the State's previous policy, which allowed people to change their sex designation without having to undergo surgery or disclose private medical records to a court and DPHHS. *Id.* 24–25. Moreover, Defendants cannot show that a judge is more capable than a transgender person, and the person's chosen medical providers, to determine the course of care sufficient and necessary for them to

come into alignment with their gender identity. *Id.* 25. As set forth below, Defendants' arguments to the contrary have no merit.

1. Transgender Montanans seeking to amend their birth certificates are similarly situated for equal-protection purposes.

Defendants concede that transgender and nontransgender Montanans are "similarly situated for equal-protection purposes." Def. Br. 11. They erroneously argue, however, that the Act "applies equally to all individuals." *Id.* 10, 11–14. It does not.

The Act, by its own terms, targets transgender people, and only transgender people, by requiring them to undergo surgery, initiate a court proceeding, and obtain an order affirming that they have had gender-affirming surgery, in order to change the sex designation on their birth certificates. *See* SB 280. It expressly states, in relevant part, that: "The sex of a person designated on a birth certificate may be amended only if the [DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction ***indicating that the sex of the person born in Montana has been changed by surgical procedure.***" *See Id.* (emphasis added).

By referring to persons who "change[]" their "sex," the Act is, by definition and on its face, referring to transgender people—the only group of people who identify by a sex designation that differs from their sex assigned at birth. *See Id.* As noted in Dr. Ettner's affidavit, "[t]he only difference between transgender people and cisgender people is that the latter have gender identities that are consistent with their birth-assigned sex whereas the former do not." Ettner Aff., ¶ 22. A cisgender person, whose gender identity is consistent with their birth-assigned sex, has no reason to seek a change in the sex designation on their birth certificate because a cisgender person's gender identity matches their sex assigned to them at birth.

Only transgender people are required to undergo surgery, to present the confidential and intimate details of that surgery to a court, obtain a court, and submit an application to DPHHS in order to obtain a birth certificate that accurately reflects their gender. *See Id.* This is true even though surgery is not what determines a person's sex and even though many transgender people do not need, want, or have access to gender-affirming surgery. *Id.*, ¶¶ 34–35, 38 (discussing immutability of gender identity), 49–50 (discussing propriety of, and access to, surgical care). By contrast, cisgender people are not required to undertake these burdensome measures to ensure that their birth certificates reflect how they present to society.

As noted in Plaintiffs' brief (Pl. Br. 16–17), *Ray v. McCloud*, 507 F. Supp. 3d 925 (S.D. Ohio 2020), and *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018), firmly support the conclusion that impairing transgender people's ability to change the sex designation on their birth certificates violates equal protection. In *Ray*, the court concluded that a policy prohibiting transgender people from changing the sex designation on their birth certificates treated transgender people differently from similarly situated cisgender people by categorically denying the former the opportunity to have a birth certificate reflecting how they present to society but allowing the latter the same right. *See Ray*, 507 F. Supp. 2d at 934–36. In *F.V.*, the court reached a similar conclusion. *F.V.*, 286 F. Supp. 3d at 1140–41.

Defendants' efforts to distinguish these cases are unpersuasive. It makes no difference, as Defendants suggest, that *Ray* and *F.V.* involved categorical bans on changes to birth-certificate sex designations as opposed to conditional limitations on those changes. Def. Br. 12–13. Like the policies prohibiting changes to birth-certificate sex designations in *Ray* and *F.V.*, the Act conditions transgender people's ability to pursue those changes on a surgical requirement, a court-order requirement, and an agency-approval requirement that do not apply to cisgender people who seek to make changes so that their birth certificates accurately reflect who they are. Because no surgery exists that changes a person's sex, the Act conditions a transgender person's ability to receive an accurate birth certificate on their achieving the impossible. Ettner Aff., ¶¶ 34–35, 38. Even if gender-affirming surgery were sufficient, it is something many transgender people cannot undergo and a huge burden for those who can. *Id.*, ¶¶ 49–50.

Finally, in a confusing attempt to justify the Act, Defendants argue that, if the Act is deemed discriminatory, then the policy predating the Act, which also required proof of a gender change, was discriminatory as well, and since Plaintiffs seek to "revert" to the pre-Act policy, neither must be discriminatory. Def. Br. 13–14. This tortured comparison does not support Defendants' conclusion. The procedures in place before the Act, which were promulgated by DPHHS in December 2017, permitted a transgender person to amend his or her original birth certificate by submitting to DPHHS a completed gender-designation form attesting to gender transition *or* providing government-issued identification displaying the correct sex designation *or* providing a certified court order indicating a gender change. *See* Mont. Admin. Register Notice No. 37–807 (amending Admin. R. Mont. 37.8.102 & 37.8.311). The 2017 procedures did not require surgery or court proceedings. *See Id.* Contrary to Defendants' misguided comparison, the

2017 procedures illustrate that the Act imposes an unconstitutionally restrictive burden on transgender people, not that it is "neutral." Def. Br. 14.)

2. The Act cannot withstand heightened scrutiny.

Defendants also erroneously argue that "transgender individuals are not a protected or suspect class under Montana or federal law." Def. Br. 10, 14–18. Defendants are incorrect.

Defendants suggest that, because various MHRA provisions do not expressly refer to gender identity or transgender status as a protected class, classifications against transgender people are not subject to heightened scrutiny. *Id.* 14–15. In doing so, they fail to address Plaintiffs' argument that Montana's test for ascertaining the appropriate level of equal-protection scrutiny independently mandates applying heightened scrutiny to classifications that discriminate against transgender Montanans. Pl. Br. 20–23. As noted in Plaintiffs' initial brief, transgender people, in Montana and elsewhere, have been "subjected to . . . a history of purposeful unequal treatment" and suffer a level of "political powerlessness" that warrants "extraordinary protection" under the law. *See In re Matter of S.L.M.*, 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997); Pl. Br. 20, 22.

The MHRA's language does not dictate the outcome of this constitutional analysis. If it did, then Montanans' constitutional right to equal protection would improperly rise and fall based on the legislature's definition of protected statutory classes under the MHRA. This approach is inconsistent with the broad, independent protections of the Montana Constitution's equal-protection clause, which "provides for even more individual protection than does the federal equal protection clause." *Snetsinger*, ¶ 58 (internal citation and quotation marks omitted).

In any event, Defendants' argument fails on its own terms since the MHRA prohibits sex discrimination (*see* Def. Br. 14–15), and discrimination against transgender people is a form of sex discrimination, thereby independently triggering heightened scrutiny (*see* Pl. Br. 19). Defendants' reliance on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), to suggest otherwise is misplaced. Contrary to Defendants' assertions, *Bostock* conclusively establishes that discrimination against transgender people is a form of sex discrimination. *Id.* at 1741–43. There, the Court held that, for purposes of Title VII of the Civil Rights Act of 1964, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741. Defendants do not mention this aspect of *Bostock* in their brief, let alone explain why it does not apply to an equal-protection claim.

Bostock's logic is consistent with opinions from three federal courts of appeals and several federal district courts. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (intermediate scrutiny applies to transgender classification, which is sex-based); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (same); *Glenn v. Brumby*, 663 F.3d 1312, 1318 (8th Cir. 2011) (same); *Corbitt v. Taylor*, 513 F.Supp.3d 1309, 1312 (M.D. Ala. Jan. 15, 2021) (same); *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d. 1001, 1019–22 (W.D. Wis. 2019) (same); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 952 (W.D. Wis. 2018) (same).

The case law on which Defendants rely is inapposite. Although Defendants cite five federal district-court cases for the proposition that transgender status is not a suspect class (Def. Br. 15 n. 11), these cases are outliers and fail to represent the weight of federal authority, which, as set forth above and in Plaintiffs' brief, includes recent decisions from multiple federal courts of appeals, as well as multiple federal district courts, concluding that classifications based on transgender status are subject to heightened scrutiny, both because transgender status is a protected class and because discrimination against transgender people constitutes sex discrimination. (*See* Pl. Br. 18–19).

Defendants also ignore that several federal district courts have applied heightened scrutiny in circumstances *nearly identical* to those at issue here. *See F.V.*, 286 F. Supp. 3d at 1142–45 (applying heightened scrutiny in challenge to constitutionality of Idaho policy prohibiting transgender people from changing the sex designation on their birth certificates); *Ray*, 507 F. Supp. 3d at 936–38 (applying heightened scrutiny in challenge to constitutionality of Ohio policy prohibiting transgender people from changing the sex designation on their birth certificates); *Corbitt*, 513 F.Supp.3d at 1312-1313 (applying heightened scrutiny in challenge to constitutionality of Alabama policy requiring transgender people to have "genital surgery" before changing the sex designation on their driver's licenses). Defendants do not address these well-reasoned decisions.

In addition, Defendants fail to address Plaintiffs' argument that the Act is subject to heightened scrutiny because it burdens Plaintiffs' fundamental right to informational privacy and their fundamental right to make their own decisions regarding medical treatment. (Pl. Br. 23.) The Act's unequal imposition of substantial burdens on transgender people's enjoyment of these fundamental rights separately warrants applying heightened scrutiny. *See Gryczan v. State*, 283

Mont. 433, 449, 942 P.2d 112, 122 (1997) ("Any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis.").

3. The Act cannot withstand rational-basis review.

Alternatively, even if the Court were to find that the Act is subject to rational-basis review (which it should not do), the Act cannot withstand rational-basis review because the classification it imposes on transgender people is not "rationally related to a legitimate government interest." *Snetsinger*, ¶ 19.

Notably, rational-basis review does not protect laws that burden otherwise unprotected classes when a classification is based purely on animus, such as the classification at issue here. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). At the very least, a "more searching form of rational basis review [is applied] to strike down such laws under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

Requiring transgender people to undergo gender-affirming surgery, and to obtain a confirmatory court order regarding that surgery, before they can change the sex designation on their birth certificates is not rationally related to a legitimate government interest. Medically managing gender dysphoria includes aligning "appearance, presentation, expression, and often, the body to reflect a person's true sex as determined by their gender identity." Ettner Aff., ¶ 52. Correcting the sex designation on identification documents, including birth certificates, "confers social and legal recognition of identity and is crucial to this process." *Id.* "Privacy, and the ability to control whether, when, how, and to whom to disclose one's transgender status, are essential to accomplishing this therapeutic aim." *Id.*, ¶ 46.

There is no legitimate reason to interfere with this aim. For a transgender person, a birth certificate bearing an incorrect sex designation or revealing a birth name risks disclosing the fact that the person is transgender. *Id.*, ¶ 54. This disclosure invades privacy, releases confidential medical information, and exposes the individual to grave psychological and physical harm. *Id.*

There is, moreover, no rational distinction between transgender and cisgender people relative to their need for birth certificates that accurately reflect their identifying information. Both groups have an interest in ensuring the accuracy of their vital information. The Act draws an arbitrary distinction for this purpose between the procedures that apply to one group and those that apply to the other. In addition, to the extent Defendants claim that the state has an interest "in maintaining accurate vital statistics and preventing constant, capricious, or fraudulent changes to

birth records" (Def. Br. 18), there is absolutely no evidence, in the legislative record or otherwise, showing that there were any problems maintaining "accurate" vital statistics under the state's previous policy, which allowed transgender people to change their sex designation without having to undergo surgery or disclose private medical records to a court and DPHHS. *See* DPHHS Mont. Admin. Register Notice No. 37–807 (amending Admin. R. Mont. 37.8.102 & 37.8.311).

For these reasons, the Act cannot withstand rational-basis review under the Montana Constitution's equal-protection clause. *See, e.g., Snetsinger*, ¶ 15 (holding that policy prohibiting employees from receiving insurance coverage for their same-sex domestic partners was not rationally related to legitimate government interest and violated Montana Constitution's equal-protection clause); *Henry v. State Compensation Ins. Fund*, 1999 MT 126, ¶ 36, 294 Mont. 449, 982 P.2d 456 (holding that eliminating workers with occupational diseases from eligibility for rehabilitation benefits was not rationally related to legitimate government interest and violated Montana Constitution's equal-protection clause).

C. Plaintiffs are likely to succeed in showing that the Act violates Plaintiffs' right to informational privacy.

The Court should reject Defendants' argument that Plaintiffs' privacy rights are not at issue because Plaintiffs can "voluntarily" amend their birth certificates. Def. Br. 18–21. The right to privacy is a constitutionally protected right where the person has a subjective and actual expectation of privacy and society is willing to recognize that expectation as reasonable. Pl. Br. 28–31. Defendants' assertion that Plaintiffs have no subjective and actual expectations of privacy is not supported by any legal authority or any evidence.

This case challenges the forced disclosure of private medical information about a person's transgender status in order to obtain an accurate state-issued identity document that is available to cisgender people without any similar disclosure requirements. Defendants' reliance on *Henricksen v. State* and *Cook v. Mt. Rail Link* is misplaced. In both of those cases, the courts affirmed that medical records "deserve the utmost constitutional protection" and that "the Montana Constitution guarantees informational privacy in the sanctity of one's medical records." *See Henricksen v. State*, 2004 MT 20, ¶ 36, 319 Mont. 307, 84 P. 3d 38 (internal quotation marks omitted); *Cook v. Mt. Rail Link*, No. 78444, 1995 Mont. Dis. LEXIS 443, ¶ 6 (4th Jud. Dist., Mar. 3, 1995). In *Henricksen* and *Cook*, the need to assess the amount of damages claimed by the plaintiffs was directly related to the contents of their medical records. Even under those circumstances, it was clear that any

privacy-right "waiver is not unlimited," and a "defendant may only discover records related to prior physical or mental conditions if they relate to currently claimed damages." *Henricksen*, ¶ 36.

Here, unlike in those cases, there is no relationship between Plaintiffs' desire to change the sex designation on their birth certificates and a court's need to assess their medical records related to surgery. From a medical and scientific perspective, a transgender person's sex is determined by their gender identity, *not* based on whether the person has undergone surgery or on any aspect of their anatomy. *See* Ettner Aff., ¶ 48. Nor does surgery serve to change a person's sex. *See Id.*, ¶¶ 33–34, 38.

Defendants incorrectly claim that all people who wish to change other data on their birth certificates must waive the privacy rights they have in their medical records. Def. Br. 19 ("It's the same for those who wish to change other data on their birth certificates"). This argument ignores the fact that, where the state encroaches on an individual's privacy rights, it must have a compelling purpose for doing so and must narrowly tailor its means for achieving that purpose.

All people who seek to amend their birth certificates do so to align the information on those documents with current facts. In some cases, a fact was unknown or mistaken at birth (e.g., unknown paternity or unknown sex), so the amendment completes or corrects the record. In the case of transgender people, the sex designation on a birth certificate typically was derived from the appearance of an infant's external genitalia at birth. Ettner Aff., ¶¶ 17–19. Although that may have been the best evidence at birth, it does not follow that genitalia remains an unerring determiner of an individual's gender. *Id.* And regardless of whether the requested change is an amendment to, or correction of, the sex designation on a birth certificate, making surgery, and the disclosure of surgery, a prerequisite to that change for transgender people is vastly disproportionate to the requirements for cisgender people who wish to amend or correct their birth certificates. Any suggestion that birth certificates capture only information at the time of a person's birth is belied by the fact that the state allows other information on birth certificates to be corrected or amended after the time of birth, including gender.

Defendants cite § 50–15–204, MCA, and § 50–15–223, MCA, as evidence that all people who wish to amend their birth certificates must provide protected medical records to a court of appropriate jurisdiction. Def. Br. 19. However, neither the rules promulgated to effectuate § 50–15–204 nor the text of § 50–15–223 contain requirements that a person must undergo a surgical procedure and then submit private medical records related to that procedure to a court of

appropriate jurisdiction. Moreover, each of those statutes provides for alternative methods and exceptions for presenting required information. In fact, the text of § 50–15–223, which applies to "[c]ertificates of birth following adoption, legitimation, or determination or acknowledgement of paternity," allows for a simple attestation of paternity as an alternative to providing DPHHS with an order from a court of appropriate jurisdiction. *See* § 50–15–223(1)(b)(ii), MCA.

Defendants incorrectly assert that Plaintiffs do not have an expectation of privacy in the highly personal and sensitive information contained in their medical records simply because the decision to change their birth certificates is "voluntary." Def. Br. 21. Society is willing to recognize a reasonable expectation of privacy in medical records related to a person's transgender status and other related medical conditions and treatments, particularly as it relates to a person's anatomy. A person's transgender identity is a profoundly private piece of information in which a transgender person has a reasonable expectation of privacy. Compl., ¶ 42. Courts have recognized the extremely sensitive nature of transgender status and the reasonableness of keeping this information private. As one court has stated, "[t]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate." *Powell v. Schriver*, 175 F 3.d 107, 111 (2d Cir. 1999); *see also K.L. v. State,* No. 3AN–11–05431 CI, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar 12, 2012) (noting the court's agreement that "one's transgender[] status is private, sensitive personal information" and "is entitled to protection"). Transgender people who are denied accurate birth certificates are deprived of significant control over where, when, how, and to whom they disclose their transgender identity.

Further, a person retains their privacy rights even after disclosing private information in one setting. *Cf. C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005) ("[T]the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of that information to others.") Although the fact that Ms. Marquez has disclosed her transgender status to some may be taken in to account, it does not mean that she no longer has a reasonable expectation of privacy in her transgender status and the medical information directly related to that status.

Defendants mistakenly frame the medical-privacy issue as one where "the concern is about the circulation of private information." Def. Br. 19. The cases on which Defendants rely do not address the full scope of informational privacy. *Id.* (citing *Malcomson v. Liberty Nw.*, 2014 MT 242, 376 Mont. 306, 339 P. 3d 1235; *St. James Cmty. Hosp., Inc. v. Dist. Court,* 2003 MT 261,

Mont. 419, 77 P. 3d 534). Both cases involved the nonconsensual dissemination of private medical information. *See Malcomson*, ¶ 29; *St. James*, ¶ 8.

The issues before this Court go beyond the dissemination of private medical information. They involve the expectation of privacy that transgender people have in their medical records and transgender status and society's willingness to recognize that expectation as reasonable. A court does not need the information in a person's medical records to change the sex designation on a birth certificate. This, coupled with the fact that many transgender people do not need, or cannot obtain, surgery, means that the Act cannot pass strict scrutiny, since there is no legitimate purpose for the Act's surgery or court-order requirements.

Defendants' argument that Plaintiffs may proceed pseudonymously to eliminate any concern that information will be publicly disseminated misconstrues critical issues concerning an individual's constitutional right to privacy. Def. Br. 20. Defendants not only oversimplify the requirements of the Act, but also incorrectly equate the Act's requirements with those of other statutes. Their contention that, under the previous "2017 Rule, individuals had to disclose *certain* information to the government to change their birth certificate," is misleading. *Id.* (emphasis added). The 2017 procedures did not require surgery, a court appearance and order, or intimate disclosure. *See* Mont. Admin. Register Notice. No. 37–807 (amending Admin. R. Mont. 37.8.102 & 37.8.311).

Finally, Defendants' assertion that "[P]laintiffs cannot complain that they are being forced to disclose information they intend to share with others, including the government," misrepresents the nature of the information required by the Act. Def. Br. 20. Plaintiffs do not wish to "present to others" an updated birth certificate that reflects a sex aligned with their gender identity; rather, they wish to update the sex designation on their birth certificates to accurately reflect their gender identity. They wish to do this so that, when they are called upon to present their birth certificates, those documents are accurate, just as they are for cisgender people, and do not reveal their transgender status to everyone who sees them.

Defendants have failed to provide any compelling justification for requiring Plaintiffs to disclose constitutionally protected information about their transgender status. Plaintiffs have a reasonable expectation of privacy in this information and should not be required to disclose it.

D. Plaintiffs are likely to succeed in showing that the Act violates their right to freedom from state interference with medical decisions.

Contrary to Defendants' assertions, Montana law recognizes "medical interference" within the penumbra of protections guaranteed to every person under Montana's constitutional right to privacy. (Def. Br. 21–22.) In *Armstrong v. State*, the Montana Supreme Court held that the personal-autonomy component of the right to privacy "broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government." *See Armstrong v. State*, 1999 MT 261, ¶ 14, 296 Mont. 361, 989 P.2d 364.

Defendants incorrectly suggest that *Armstrong* applies only in the context of choosing a medical provider for abortions. Def. Br. 22. It does not. *Armstrong*, 1999 MT 261. The law challenged in *Armstrong* did not prevent a woman from obtaining an abortion; rather, it limited a woman's right to choose an abortion provider *after* the woman chose to have an abortion. The Court held that the state was impermissibly inserting itself in a medical decision by attempting to limit a person's choice of medical care in violation of the individual's constitutionally protected right to privacy. *See Id.*, ¶ 52. As in *Armstrong*, once a person decides to amend their birth certificate to align with their gender, it is not Defendants' place to decide what the appropriate medical procedure should be, nor is it their place to coerce the person into undergoing that procedure in order to receive a state benefit that is conferred upon others without the same interference.

Once a transgender person decides to change their birth certificate, the Act impermissibly allows Defendants to insert themselves into that decision, in violation of the person's constitutional right to privacy, by requiring them to undergo surgery. Like other major healthcare decisions, decisions about gender-affirming surgery are profoundly personal and require confidential medical evaluations. Ettner Aff., ¶¶ 29, 33. The state has no role to play in these deliberations. The state lacks authority to compel individuals to undergo these medical procedures and likewise lacks medical expertise to determine what medical procedures are appropriate.

E. Plaintiffs are likely to succeed in showing that the Act violates due process.

As set forth in Plaintiffs' initial brief, the Act violates the substantive-due-process guarantee of the Montana Constitution both on its face and as applied. (Pl. Br. 33–36.)

1. The Act is unconstitutionally vague.

Substantive due process serves as a check on arbitrary and oppressive governmental action. (Pl. Br. 33–34.) This includes constitutional protection from statutes that impose unduly vague or

poorly defined requirements or penalties. *See Yurczyk v. Yellowstone Cnty.*, 2004 MT 3, ¶¶ 33–34, 319 Mont. 169, 83 P.3d 266.

The Act denies these constitutional protections to Plaintiffs. It imposes substantial burdens on their efforts to amend their birth certificates to accurately reflect their gender identity. In particular, it compels Plaintiffs, as a condition of amending their birth certificates, to undergo surgery and provide to DPHHS a certified court order that "the sex of the person born in Montana has been changed by surgical procedure." SB 280, § 1. This, in turn, requires incurring the expense and disruption of legal proceedings to obtain the order required by the Act.

Despite imposing these burdens, the Act (1) fails to identify or define what manner of surgery, or what surgical outcome, is sufficient for DPHHS's approval, given that there is no surgery that can change a person's sex from a medical and scientific standpoint; (2) fails to describe what evidence is necessary to obtain the required court order; (3) fails to tell applicants which courts are "appropriate" to obtain the order; and (4) fails to describe the nature of the proceeding that must be initiated to obtain the order. Pl. Br. 35–36. This vague and undefined process requires disclosing constitutionally protected private medical records and transgender status in public court proceedings with no guarantee of confidentiality.

Defendants insist that the Act is constitutional and seek to justify it on the grounds that it will facilitate law-enforcement efforts and promote the accuracy of vital statistics. Defendants do not describe either of these justifications in any detail. No one from the Montana Office of Vital Records, or from any Montana law-enforcement agency, provided testimony to support the Act before the legislature or to oppose Plaintiffs' motion before this Court.

Regulating birth-certificate amendments is possible without the intrusive burdens of the Act. Indeed, the availability of less restrictive alternatives is underscored by Montana's own experience. The more flexible and accommodating regulations promulgated in 2017 functioned without issue until the Act superseded them 2021. The Act should not be allowed to stand.

2. Defendants cannot justify the Act.

In their brief, Defendants make four arguments. *First*, they argue that the Act is not sufficiently vague to sustain Plaintiffs' claims. Def. Br. 22–23. This ignores the prima facie case established by Plaintiffs' submissions. The Act's requirement of proof that one has undergone surgery to change their sex is impossible to achieve, given that no surgery changes a person's sex. *See* Ettner Aff., ¶¶ 33–34, 38. This requirement is incomprehensible for people like Mr. Doe, who

have no way of knowing which medical procedures among several would be sufficient to satisfy DPHHS. Mr. Doe cannot determine whether his existing top surgery is sufficient to satisfy the Act or whether further medical procedures and legal proceedings would be necessary. In effect, the Act makes Mr. Doe guess at the outcome of following the procedures set forth in the Act, incurring the expense and disruption of invasive surgery, as well as of legal proceedings, without knowing whether, after these efforts, he will be permitted to amend his birth certificate or his application will be dismissed because he had the wrong kind of surgery, obtained the wrong surgical outcome, or relied on an order from the wrong court.

The impact of this definitional vacuum is compounded by DPHHS's failure to promulgate the regulatory procedures to which potential applicants will be subject or the standards of proof that will accompany their submissions. No reasonable person can know what DPHHS or the Act requires because the statutory and regulatory schemes are completely devoid of specifics. This is not a matter of confusing language; it is a fatal absence of any structure, or defined procedure, upon which applicants can rely. *See City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 440, 704 P.2d 1021, 1025 (1983) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must supply explicit standards for those who apply them."); *see also Yurczyk*, ¶¶ 33–34.

In support of their argument, Defendants cite *A.B. Small Co. v American Sugar Refining Co.*, 267 U.S. 233 (1925), a 1925 United States Supreme Court decision in which the Court deemed commercial sugar contracts enforceable, rejecting a defense that a price-control statute and related contracts were too vague and uncertain to be enforced. *Id.* at 238–42. The contracts at issue were agreed to by private parties who entered into a relationship with an understanding not only of the language of the contracts, which they themselves had drafted, but also of the federal price-control statute that controlled the transactions. *A.B. Small* has little or nothing in common with this case, which does not involve consensual commercial conduct or foreseeability. This case, unlike *A.B. Small*, implicates Defendants' imposition of burdensome restrictions on individuals seeking a public benefit—not a 100-year-old commercial dispute between sophisticated private parties.

Second, Defendants argue that because there is no constitutional right to amend a birth certificate, the substantive-due-process claims must be dismissed. Def. Br. 23. This argument ignores the violations of the constitutional rights to informational privacy and autonomous medical decision-making pleaded in Counts II and III of the Complaint. Both are fundamental rights under the Montana Constitution. *See* Mont. Const., art. II, §§ 10, 17. Both sets of rights are integrally

part of Plaintiffs' challenge to the Act. Pl. Br. 29– 33. The Montana Supreme Court has held that Montana's right to privacy is implicated whenever a statute infringes upon medical considerations and decisions, such as those imposed on Plaintiffs by the Act. *See Weems*, ¶ 19; *see also Love v. Johnson,* 146 F. Supp.3d 848, 855 (E.D. Mich. 2015).

Third, Defendants argue that because Plaintiffs have not yet attempted to amend their birth certificates, they have no standing to challenge the Act. Def. Br. 24. This ignores the contents of Plaintiffs' affidavits. Ms. Marquez has testified that she would like to change the sex designation on her birth certificate to match her female gender identity but is unable to do so because of the Act and the burdens it imposes on her. Pl. Br. 10–11. Similarly, Mr. Doe has testified that he would like to correct the sex designation on his birth certificate to accurately reflect his male gender identity but is unwilling to undertake the approval process unless he can do so without being compelled to share private medical information regarding the specifics of his medical treatment and transgender status. *See Love*, 146 F. Supp 3d at 855 (informational privacy extends to transgender status.) This testimony confers standing on Plaintiffs to challenge the Act on due-process grounds. *See Gryczan*, 283 Mont. at 446, 942 P.2d at 120.

The psychological injury attributable to the impact of a statute that marginalizes Plaintiffs' status also confers standing. Both Mr. Doe and Ms. Marquez have testified to the stigmatizing impact of the Act. The argument for standing is particularly compelling where, as here, Plaintiffs are the specific target of constitutionally suspect legislation and legislative antipathy toward transgender people. *See Id.* at 446 (holding that gay and lesbian plaintiffs had standing to challenge Montana's deviant-sexual-conduct statute where the plaintiffs were "precisely the individuals against whom the statute [was] intended to operate," and denying them standing "would effectively immunize the statute from constitutional review).

Fourth, Defendants repeatedly refer to the 2007 Montana rules and regulations that required proof of sex-change surgery to amend a birth certificate, arguing that these regulations from 14 years ago are a measure of the Act's reasonableness today. Def. Br. 23. These rules and regulations are not before this Court and are not material to the constitutionality of the Act. Notably, Defendants avoid any discussion of the regulations promulgated in 2017, the purpose of which was to overturn the 2007 regulations. The 2017 regulations reflected a flexible, accommodating approach to birth-certificate amendments. *See* SB 280 at 1 (summarizing 2017

rules and procedures). They did not require undergoing invasive surgery or initiating legal proceedings. They illustrate the availability of a much less restrictive alternative to the Act.

3. Defendants have not presented any evidence to support their position.

Finally, Defendants have not presented any evidence to support their position. Nothing in their brief addresses, with any specificity, the purported law-enforcement or record-keeping needs furthered by the Act. They do not discuss how, or under what circumstances, a birth certificate would be used by law enforcement. Nor have they identified any problem with gathering accurate birth or death statistics. The absence of evidence on these issues further suggests that the Act was an exhibition of political theater designed to marginalize transgender people, not a legitimate policy-making initiative.

II. Plaintiffs are suffering irreparable injury and therefore have standing to pursue their claims.

For a plaintiff to have standing, the plaintiff must show, "at an irreducible minimum," that the plaintiff "has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining that action." *Weems*, ¶ 9 (internal quotation marks omitted). The alleged injury must be "concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; . . . redressable; and distinguishable from injury to the public generally." *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P. 3d 1187.

Defendants fail to acknowledge that "[a] plaintiff's standing may arise from an alleged violation of a constitutional or statutory right." *Weems*, ¶ 9 (citation omitted). In this case, Plaintiffs have been harmed, and will continue to be harmed, by the unconstitutional requirements of the Act. The Act singles them out as transgender people, exposing them to a heightened risk of harassment and an unjust assault on their personal liberties.

Preventing transgender people from changing the sex designation on their birth certificates creates a discordance that causes "a myriad of deleterious social and psychological consequences" for those people and deprives them of significant control over where, when, how, and to whom they disclose their transgender identity. Ettner Aff., ¶¶ 43–44, 46. Contrary to Defendants' contentions, Plaintiffs have alleged and documented the harms they face by being deprived of birth certificates that correctly identify their sex. They have described their experiences in detail in their affidavits and in the Complaint. Ms. Marquez has personally experienced the high incidence of harassment and discrimination among transgender people, having been the target of this treatment

in both her personal and professional life. Marquez Aff., ¶ 10. Mr. Doe's fear of having to expose his personal medical information, and out himself in a public forum, is well founded because, in order to comply with the requirements of the Act, he will be forced to share private medical information in violation of his constitutional right to privacy. *See* Compl., ¶¶ 54, 56.

Cavalierly dismissing Plaintiffs' very real fears as vague and abstract, Defendants ignore the long and well-documented history of discrimination, harassment, and violence against LGBTQIA[2] citizens. For example, in a national study of transgender people who presented incongruent identity documents, 40% of respondents reporting being harassed. *See* Grant, Jaime M., et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, *5, NTDS_Report.pdf (transequality.org).

The inability to access identity documents accurately reflecting one's true sex can exacerbate gender dysphoria by causing shame and amplifying the fear of exposure. Ettner Aff., ¶ 43. Inaccurate documents can cause a person to isolate in order to avoid situations that might evoke discrimination, ridicule, accusations of fraud, harassment, or even violence—experiences that are all too common among transgender people. *Id.* Ultimately, this leads to feelings of hopelessness, lack of agency, and despair. *Id.* Being stripped of one's dignity, privacy, and ability to move freely in society can degrade coping strategies and cause major psychiatric disorders, including generalized anxiety disorder, major depressive disorder, posttraumatic stress disorder, emotional decompensation, and suicidality. *Id.*

Requiring surgery as a precondition to correcting or changing a birth certificate also grossly violates transgender Montanans' right to bodily integrity. *See* Mont. Const., art. II, §§ 10, 17. The requirement interferes with the treatment that a patient, in consultation with their treating healthcare provider, deems necessary and appropriate within the provider's medical expertise and judgment. The state is not qualified to prescribe surgery as medically necessary or conclude that an individual is not authentically transgender unless they have had surgery. If, as set forth in Defendants' brief, this is simply the price extracted for dispensing the state's "grace" (Def. Br. 1), then it is a dangerous and punitive price without any justification. Assuming the sole purpose of birth certificates were to maintain birth statistics, and birth certificates were never required as proof of identity, then the need to amend them might not arise. But the state requires birth certificates in

[2] "LGBTQIA" means lesbian, gay, bisexual, transgender, queer, intersex, and/or asexual.

important circumstances, and its control over the process for issuing and amending them must be exercised in a way that is nondiscriminatory and does not intrude into citizens' medical and personal privacy and physical integrity.

The option to use a pseudonym in a court proceeding is not sufficient to cure the harms the Act causes to Plaintiffs, who wish to correct their birth certificates but are prevented from doing so by the Act. The Act's surgery requirement is unconstitutional, as is its requirement that any transgender person wishing to change the sex designation on their birth certificate disclose deeply personal information related to their anatomy and any associated diagnoses and treatments. The need for "accurate" vital statistics does not justify requiring this sort of disclosure to a court for a judge to determine whether a person's surgery is sufficient to meet the Act's vague and impossible-to-achieve requirements. Gender-affirming surgery does not actually "change" a person's sex, so the Act's requirements are unachievable. Ettner Aff., ¶¶ 33–34, 38.

The fact that Ms. Marquez is a named plaintiff in this lawsuit does not take away her right to choose when, where, or to whom she discloses her transgender status. Further, the procedures Ms. Marquez undertook to legally change her name and to change the name and sex on her driver's license did not require her to have, or prove she had, surgery or require her to disclose her personal medical records to be examined by a judge in a public court hearing.

Plaintiffs, moreover, do not need to explain why they now wish to change their birth certificates. There is no statute of limitations for requesting this change. The timing of their requests does not constitute a waiver of their constitutional rights or demonstrate, in any way, that their case lacks authenticity or validity. Treating gender dysphoria differs for every patient. *See* Ettner Aff., ¶¶ 29, 33. So, too, does the timeline for undertaking different treatments and bringing different aspects of patients' lives into alignment with their gender identity. *See Id.*

Defendants seek to downplay the importance of having accurate state-issued identity documents by stating that Plaintiffs are engaging in "voluntary proceedings." Def. Br. 21. This argument distracts from critical issues in this case. As the ABA has noted, although a birth certificate is "'a small paper,'" a birth certificate "'actually establishes who you are and gives access to the rights and privileges, and the obligations of citizenship.'" *See* https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/birth-certificates/ (quoting humanitarian Desmond Tutu). It is inconsistent for Defendants to state, on the one hand, that "the quintessential source for vital statistics is the birth certificate," but then state,

on the other hand, that amending a birth certificate to accurately reflect a person's gender is an optional endeavor. Def. Br. 1. The same could be said of many other crucial rights, including the right to vote.

Defendants seek to minimize the very real and significant harm experienced by Plaintiffs. There is a known, and almost certain, risk of disclosing their transgender status to everyone to whom they must show their birth certificates. This risk is heightened by the fact that, when Plaintiffs are required to show their identification documents to strangers, they are incapable of knowing who, among the people who view those documents, may perpetrate discrimination or violence against them. These considerations more than sufficiently establish their standing to sue.

Finally, to the extent Defendants' standing argument is actually an argument that Plaintiffs have failed to demonstrate irreparable injury, it bears repeating that Plaintiffs have made a prima facie showing of irreparable injury. As discussed in Plaintiffs' brief, § 27–19–201, MCA sets forth the applicable standards for obtaining a preliminary injunction. The subsections contained within § 27–19–201 "are disjunctive; a court need find just one subsection satisfied in order to issue a preliminary injunction. *Driscoll v. Stapleton,* 2020 MT 247, ¶ 13, 401 Mont. 405, 473 P.3d 386 (citing *Bam Ventures, LLLC v. Schifferman,* 2019 MT 67, ¶ 14, 395 Mont. 160, 437 P.3d 142). To meet the irreparable-injury test, a "district court need find only that an applicant made a prima facie showing she will suffer a harm or injury—whether under the great or irreparable injury standard of subsection (2), or the lesser degree of harm implied within the other subsections of §27–19–201, MCA." *See Driscoll,* ¶ 15 (internal quotation marks omitted).

Defendants rely on *Driscoll* for its assertion that Plaintiffs have not established "some 'irreparable injury.'" *See* Def. Br. 4. But in *Driscoll,* the Court held that, "[f]or the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll,* ¶ 15. Contrary to Defendants' assertions, Plaintiffs have made a prima facie showing that the Act impermissibly infringes upon their constitutional rights to equal protection, privacy (both informational privacy and the right to be free from state interference with medical decisions), and due process. Plaintiffs have been, and will continue to be, irreparably harmed by the Act based on the Act's infringement of those constitutionally protected rights.

CONCLUSION

FOR THESE REASONS, Plaintiffs respectfully request the entry of an order granting the relief requested in their motion.

Dated: September 23, 2021

Respectfully submitted,

By: _____
Alex Rate

Akilah Lane
Alex Rate
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806
406-203-3375
ratea@aclumontana.org
lanea@aclumontana.org

John Knight, pro hac vice forthcoming
ACLU Foundation
LGBTQ & HIV Project
150 North Michigan Avenue, Suite 600
Chicago, IL 60601
Telephone: 312-201-9740
Facsimile: 312-288-5225
jknight@aclu-il.org

F. Thomas Hecht, pro hac vice forthcoming
Tina B. Solis, pro hac vice forthcoming
Seth A. Horvath, pro hac vice forthcoming
Nixon Peabody LLP
70 West Madison Street, Suite 3500
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

Elizabeth Halverson PC
1302 24th Street West #393
Billings, MT 59102
406-698-9929
ehalverson@halversonlaw.net

CERTIFICATE OF SERVICE

I, Alex Rate, hereby certify on this date I emailed a true and accurate copy of the foregoing documents to:

David M.S. Dewhirst
Solicitor General
Office of the Attorney General, State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Kathleen L. Smithgall
Assistant Solicitor General
Office of the Attorney General, State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Patrick M. Risken
Assistant Attorney General
Office of the Attorney General, State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Jeremiah Langston
Assistant Attorney General
Office of the Attorney General, State of Montana
P.O. Box 201401
Helena, MT 59620-1401

DATED: September 23, 2021

Alex Rate