

Alex Rate (Bar No. 11226)
Marthe Y. VanSickle (Bar No. 67068789)
ACLU Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
Telephone: 406-204-0287
ratea@aclumontana.org
vansicklem@aclumontana.org

Malita Picasso*
Jon W. Davidson*
(admitted only in California)
**American Civil Liberties Union Foundation
LGBTQ & HIV Project**
125 Broad Street
New York, NY 10004
Telephone: 212-549-2561
Facsimile: 212-549-2650
mpicasso@aclu.org
jondavidson@aclu.org

F. Thomas Hecht*
Tina B. Solis*
Seth A. Horvath*
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

** Pro hac vice applications forthcoming*

**IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY**

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

Plaintiffs,

v.

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

Defendants.

Case No. ADV 2024-261

Hon. Mike Menahan

**PLAINTIFFS' BRIEF IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION..... 1

BACKGROUND 5

I. Gender Identity and Gender Dysphoria 5

II. Treating Gender Dysphoria Including Social Transition 6

III. The Need for Identity Documents Matching One’s Gender Identity..... 6

IV. The 2022 Rule, SB 458, and the New MVD Policy and Practice 9

V. The Effects of the 2022 Rule, SB 458, and the New MVD Policy and Practice on Plaintiffs and Other Transgender Montanans 11

A. Ms. Kalarchik..... 11

B. Ms. Doe..... 12

LEGAL STANDARDS 14

ARGUMENT..... 15

I. Plaintiffs are likely to succeed on the merits and are likely to suffer irreparable harm in the absence of preliminary injunctive relief..... 15

A. Plaintiffs are likely to succeed on their claim that Defendants have violated their constitutional right to equal protection. 16

1. The 2022 Rule, the new MVD policy and practice, and SB 458, as applied, differentiate on the basis of transgender status and sex..... 17

2. Transgender and cisgender Montanans seeking to amend their birth certificates or driver’s licenses are similarly situated for equal protection purposes. 18

3. The 2022 Rule, the new MVD policy and practice, and SB 458 are subject to heightened scrutiny..... 20

a. Transgender status is a suspect classification under Montana law. 21

b. Federal courts across the country support applying heightened scrutiny to classifications that discriminate against transgender people..... 23

c. The 2022 Rule, the new MVD policy and practice, and SB 458 burden fundamental rights..... 25

4. The 2022 Rule, the new MVD policy and practice, and SB 458 cannot survive strict scrutiny..... 26

5. The 2022 Rule, the new MVD policy and practice, and SB 458 cannot survive middle-tier or rational-basis review...... 29

B. Plaintiffs also are likely to succeed on their claim that Defendants have violated their constitutional right to privacy. 32

C. Plaintiffs further are likely to succeed on their claim that Defendants have violated their constitutional right to be free from compelled speech. 35

D.	Plaintiffs additionally are likely to succeed on their claim that Defendants have impaired, or threatened to impair, Plaintiffs' legal rights or privileges in violation of § 2-4-506 of the MAPA.....	36
II.	Plaintiffs are likely to suffer irreparable harm in the absence of preliminary injunctive relief.....	37
III.	The balance of equities weighs in Plaintiffs' favor, and the injunction would not be adverse to the public interest.	41
IV.	Plaintiffs should not be required to post a bond.	41
CONCLUSION	42

INTRODUCTION

In recent years two branches of Montana’s government – the Legislature and the Executive – have undertaken sustained and unjustified attacks on two-spirit, lesbian, gay, bisexual, transgender, queer, intersex, and asexual (“2S-LGBTQIA”) individuals in Montana. From denying medically necessary care to banning drag performances, from removing references to 2S-LGBTQIA people and issues from classrooms to suing the Biden Administration over inclusive Title IX policies, the Executive and Legislative branches are dead set on erasing 2S-LGBTQIA identities in Montana. But these harmful policies cannot escape scrutiny from our third branch of government – the Judiciary. And every time these laws and policies are tested against the Montana Constitution, they fail. Order Granting Plaintiffs’ Motion for Preliminary Injunction, *Van Garderen v. State of Montana*, No. DV-23-541, (Mont. Dist. Ct. Sept. 27, 2023) (“*Van Garderen Order*”)¹; Order Granting Plaintiffs’ Motion for Summary Judgment, *Marquez v. State of Montana*, No. DV 21-873, (Mont. Dist. Ct. June 26, 2023)². Now, Defendants are seeking to dramatically restrict access to accurate Montana identity documents for transgender people, jettisoning prior policies that made it possible for transgender people to obtain such accurate identity documents that worked without any problems. These new efforts must meet the same fate as the other misguided and discriminatory anti-2S-LGBTQIA measures adopted by Defendants. They are unconstitutional and must be struck down.

Plaintiffs are two transgender women, born in Montana, who seek access to identity documents that accurately reflect who they are. Plaintiffs challenge the constitutionality of new restrictions on the ability of transgender individuals born in Montana to amend the sex designation

¹ Attached as Exhibit 8.

² Attached as Exhibit 6.

on their Montana birth certificates, and of transgender individuals living in Montana to amend the sex designation of their driver's licenses, to match what they know their sex to be. In addition to violating equal protection, privacy, and free-speech rights guaranteed under Montana's Constitution, these new restrictions on having accurate and non-discriminatory identity documents violate transgender individuals' statutory right under the Montana Administrative Procedure Act ("MAPA") to be free from administrative rules that impair their legal rights or privileges.

On February 20, 2024, based on a regulation codified as Montana Administrative Rule 37.8.311(5) that originally went into effect on September 10, 2022 (the "2022 Rule"), but that defendant Montana Department of Health and Human Services ("DPHHS") previously was enjoined from enforcing, the DPHHS announced that, effective immediately, the agency (1) would process applications for amending the sex designation on birth certificates *only* if the sex identified on the applicant's birth certificate resulted from a scrivener's error or incorrect data entry or if the applicant's sex was misidentified on the original certificate and (2) would not amend a birth certificate based on "gender transition, gender identity, or change of gender." *See* Mont. Admin. Reg. Notice 37-1002, No. 11 (June 10, 2022).

The same February 2024 DPHHS announcement indicated that, going forward, the birth-certificate-amendment process would be subject to the provisions of Senate Bill 458. S.B. 458, 2023 Leg., 68th Sess. (Mont. 2023) ("SB 458"). SB 458, which was adopted by the legislature on April 27, 2023, and signed into law by Governor Gianforte on May 19, 2023, states that "[i]n human beings, there are exactly two sexes, male and female, with two corresponding types of gametes. The sexes are determined by the biological and genetic indication of male or female... without regard to an individual's psychological, behavioral, social, chosen or subjective

experience of gender.” *See* SB 458. The February 2024 DPHHS announcement declared that implementing the 2022 Rule “aligns” with the requirements of SB 458.

In addition, at some point in 2024, the Montana Department of Justice (“DOJ”) and Attorney General Knudsen ended the DOJ Montana Motor Vehicle Division’s (“MVD”) prior practice of permitting changes to the sex designation on Montana driver’s licenses based on a letter from a doctor stating that the person seeking the change was in, or had completed, the process of changing their gender. Instead, without following any notice-and-comment procedures, the DOJ and Attorney General Knudsen adopted a new policy and practice that the MVD would only issue an amended driver’s license with a sex designation consistent with a person’s gender identity, rather than their assigned sex at birth, if the person provided an amended birth certificate -- which the 2022 Rule prohibits transgender people from obtaining.

The 2022 Rule, the new MVD policy and practice, and SB 458 are solutions in search of a problem. Beginning in 2017, transgender individuals born in Montana were able to change the sex designation on their birth certificates simply by submitting an affidavit to the DPHHS affirming what they know their sex to be. The DPHHS administered that procedure without incident until the legislature passed Senate Bill 280 in 2021. S.B. 280, 2021 Leg., 67th Sess. (Mont. 2021) (amending Mont. Admin. R. 37.8.102 and 37.8.311) (“SB 280”). After SB 280 and its 2021 implementing regulation were legally challenged and preliminarily enjoined on void-for-vagueness grounds, the birth-certificate-amendment procedure reverted by law to the 2017 procedure until a permanent injunction against their enforcement was entered. The DPHHS pointed to no adverse consequences of having had to revert to the 2017 procedure.

Similarly, before the MVD adopted its new policy and practice regarding driver’s license amendments, a transgender person could obtain an amendment simply by submitting a letter from

a doctor. The previous MVD policy and practice for amending the sex designation on driver's licenses, like the 2017 procedure for amending the sex designation on birth certificates, functioned without incident as well.

The 2022 Rule, the new MVD policy and practice, and SB 458 as applied to amendments to birth certificates and driver's license sex designation changes, unconstitutionally eliminate the ability of transgender individuals born in Montana to correct the sex designation on their Montana birth certificate and of transgender individuals living in Montana to correct the sex designation on their driver's license. As further discussed below, Plaintiffs have established that they are likely to succeed on the merits of their claims that the 2022 Rule, the new MVD policy and practice, and SB 458 as applied to birth certificate and driver's license sex designation changes infringe on their constitutional and statutory rights. (*See infra* Argument Part I.) In addition, Plaintiffs have also established that they have suffered, and will continue to suffer, irreparable injury based on Defendants' conduct. (*See infra* Argument Part II.) Lastly, Plaintiffs have also established that the balance of equities weighs in their favor, and an injunction will not be adverse to the public interest. (*See infra* Argument Part III.)

Based on these considerations, Plaintiffs are entitled to a preliminary injunction prohibiting Defendants, as well as their agents, employees, representatives, and successors, from directly or indirectly enforcing (1) the 2022 Rule on its face or as applied to issuing amended birth certificates, (2) the new MVD policy and practice as applied to issuing amended driver's licenses, and (3) SB 458 as applied to issuing amended birth certificates and amended driver's licenses.

BACKGROUND

I. Gender Identity and Gender Dysphoria

“Gender identity” refers to a person’s fundamental internal sense of belonging to a particular gender. (Ex. 3, Ettner Decl., ¶ 19.) Transgender people have a gender identity that differs from their assigned sex at birth. (*Id.* ¶ 16). Cisgender people have a gender identity that aligns with their assigned sex at birth. (*Id.* ¶ 22. The medical consensus in the United States is that gender identity is innate and that efforts to change a person’s gender identity are not only harmful to a person’s health and well-being, but also unethical. (*Id.* ¶¶ 27–28.)

Gender identity refers to a person’s “inner sense of belonging to a particular [gender],” and is not simply a function of the appearance of an infant’s external genitalia at birth, which is typically the limited basis for the sex designation on a person’s birth certificate. (*Id.* ¶¶ 17–19) *See Hecox v. Little*, 79 F.4th 1009, 1016 (9th Cir. 2023); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136 (D. Idaho 2018) (noting that although “[s]ex determinations made at birth are most often based on the observation of external genitalia alone,” “[t]here is scientific consensus that biological sex is determined by numerous elements”).

“Gender dysphoria is the clinically significant distress or impairment of functioning that can result from the incongruence between a person’s gender identity and the sex assigned to them at birth.” (Ex. 3, Ettner Decl., ¶ 29.) It is a serious medical condition that is “associated with severe and unremitting emotional pain from the incongruity between various aspects of one’s sex.” (*Id.*) People diagnosed “with gender dysphoria have an intense and persistent discomfort with their assigned sex that leads to impairment in functioning.” (*Id.*)

II. Treating Gender Dysphoria Including Social Transition

Treatment of gender dysphoria is guided by the World Professional Association for Transgender Health’s (“WPATH”) standards of care, which were originally published in 1979 and are now in their eighth edition. (Ex. 3, Ettner Decl., ¶ 34.) These guidelines reflect the professional consensus about the psychological, psychiatric, hormonal, and surgical management of gender dysphoria. (*Id.* ¶¶ 34–36.) A Montana district court recently recognized that the WPATH sets forth the standard of care for the treatment of gender dysphoria and relied on these standards at the preliminary injunction stage because they are “endorsed and cited as authoritative by leading medical organizations, including the American Medical Association, the American Psychological Association, and the American Academy of Pediatrics, among others.” (Ex. 8, *Van Garderen* Order, at 30.)

The recognized standard of care for gender dysphoria involves treatments designed to bring a person’s body and gender expression into alignment with their gender identity. (Ex. 3, Ettner Decl., ¶¶ 41, 51.) This course of treatment has different components depending on each transgender person’s medical needs. (*Id.* ¶¶ 32, 36.) Treatment for gender dysphoria also includes social transition, which refers to living one’s life consistently with one’s gender identity. (*Id.* ¶¶ 36, 41.) This includes using identity documents that accurately reflect one’s gender identity. (*Id.* ¶¶ 43–44.)

III. The Need for Identity Documents Matching One’s Gender Identity

Identity documents are “foundational documents” required for multiple aspects of daily life, including “access to healthcare, employment, education, social services, and financial services; entry to age-restricted or secured spaces (e.g., bars, government buildings, schools, airplanes); making purchases (i.e., by credit card or check); and voting.” (Ex. 4, Scheim Decl., ¶

24.) Common examples of identity documents are birth certificates and driver’s licenses, both of which are regulated by Montana law. *See* § 50–15–221, MCA (discussing the process for “birth registration”); § 61–5–116, MCA (discussing the requirement that driver’s licenses be carried and exhibited on demand).

Recognizing the importance of identity documents, the American Medical Association (“AMA”) has adopted a policy urging states to eliminate barriers to birth-certificate amendments by transgender people. *See AMA Announced Policies Adopted on Final Day of Special Meeting*, AMA (June 16, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-announced-policies-adopted-final-day-special-meeting>. The rationale for the AMA’s policy is to ease the path to amending identity documents because preventing transgender people from doing so contributes to their “marginalization and minoritization.” *Id.*

Forcing transgender people to use identity documents that do not match their gender identity, or forcing them to go without identity documents, creates a discordance that causes them to experience “a myriad of deleterious social and psychological consequences.” (Ex. 3, Ettner Decl., ¶¶ 42, 45–47; *see also* Ex. 4, Scheim Decl., ¶ 26.) A mismatch between someone’s gender identity and the sex designation on their birth certificate or driver’s license discloses that person’s transgender identity, a profoundly private piece of information in which a transgender person has a reasonable expectation of privacy. (*See* Ex. 3, Ettner Decl., ¶¶ 42, 45.) Transgender people who are denied accurate birth certificates and driver’s licenses are deprived of significant control over where, when, how, and to whom they disclose their transgender identity when they need to present identity documents, which occurs frequently. (*See id.* ¶ 48.)

Being forced to use identity documents that do not match a person’s gender identity can result in discrimination and violence when a person is called on to present identification that states

a sex inconsistent with how the person publicly presents himself or herself. (Ex. 3, Ettner Decl., ¶¶ 45–46; Ex. 4, Scheim Decl., ¶ 23.) It can also limit access to services, employment, and social participation. (Ex. 4, Scheim Decl., ¶ 24.) Relatedly, inaccurate identity documents have limited utility for security screening and identity verification. (*Id.* ¶ 25.)

The negative effects of carrying inaccurate identity documents are well-established. (Ex. 3, Ettner Decl., ¶ 45; Ex. 4, Scheim Decl., ¶¶ 23–24.) Inaccurate documents can cause transgender people to “isolate” to avoid situations involving discrimination or harassment, “lead[ing] to feelings of hopelessness, lack of agency, and despair.” (Ex. 3, Ettner Decl., ¶ 45.) This, in turn, can “cause major psychiatric disorders, including generalized anxiety disorder, major depressive disorder, posttraumatic stress disorder, emotional decompensation, and suicidality.” (*Id.*; Ex. 4, Scheim Decl., ¶¶ 23–24.)

By contrast, transgender people who have the correct sex designation on some of or all their identity documents are less likely to report psychological distress and suicidality. (Ex. 4, Scheim Decl., ¶ 13.) Additionally, in a study comparing participants who had changed the sex designation on their identity documents and others who had not, those who had done so were “35% less likely to have ever experienced identity document-related mistreatment than those [who] had not changed the gender marker on any documents [and] . . . 34% less likely to have experienced such mistreatment than individuals who had the correct gender marker on only some of their documents.” (*Id.* ¶ 15.) Other studies have shown that accurate identity documents promote economic benefits, including higher rates of employment and increased income. (*Id.* ¶¶ 4, 20.)

Recognizing the importance of having accurate and usable identity documents, several federal agencies have implemented self-attestation policies that make it easier for transgender people to update the sex markers on their passport and social security records. *See Selecting Your*

Gender Marker, Travel.State.Gov, <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html> (last updated Apr. 19, 2024); Abigail Zapote, *Social Security Implements Self-Attestation of Sex Marker in Social Security Number Records*, Social Security Administration (Oct. 20, 2022), <https://blog.ssa.gov/social-security-implements-self-attestation-of-sex-marker-in-social-security-number-records/>; *How Do I Change the Sex Identification on My Social Security Record?*, Social Security Administration, <https://www.ssa.gov/people/lgbtq/gender-identity.html> (last visited May 14, 2024). By preventing transgender people from updating the sex marker on their birth certificate and driver’s license, Montana forces transgender people to use identity documents that are inconsistent with those issued by the federal government.

IV. The 2022 Rule, SB 458, and the New MVD Policy and Practice

On April 30, 2021, Governor Gianforte signed SB 280 into law. *See* SB 280. SB 280 stated, in relevant part, that “[t]he 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.*

SB 280 reversed procedures previously enacted by the DPHHS in September 2017 that allowed transgender people to amend their birth certificates by submitting to the 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. Reg. Notice 37–807, No. 18 (Sept. 22, 2017) (amending Mont. Admin. R. 37.8.102 and 37.8.311). The 2017 procedures did not require surgery or court proceedings. *See id.*

On April 21, 2022, the Montana 13th Judicial District Court entered a preliminary injunction prohibiting enforcement of SB 280 and its 2021 implementing regulation. Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss and Granting Plaintiffs’ Motion for a Preliminary Injunction, *Marquez v. State of Montana*, No. DV 21-873, (Mont. Dist. Ct. Apr. 21, 2022) (“*Marquez Preliminary Injunction Order*”)³. The court declared SB 280 unconstitutionally void for vagueness and ordered the State of Montana, Governor Gianforte, the DPHHS, and Director Brererton to reinstate the less restrictive procedures established in 2017 for processing applications to change the sex designation on Montanans’ birth certificates. (*Id.* at 32.)

On June 10, 2022, the DPHHS sought to circumvent the injunction by enacting the 2022 Rule, which prohibited transgender people from changing the sex designation on their birth certificates. *See* Mont. Admin. Reg. Notice 37–1002, No. 11 (June 10, 2022). On June 26, 2023, the district court permanently enjoined the enforcement of SB 280 and its 2021 implementing regulation and entered a finding of contempt against the DPHHS for openly and repeatedly defying the court’s preliminary-injunction order. (Ex. 5, *Marquez Preliminary Injunction Order*.)

As noted above, on February 20, 2024, the DPHHS announced that, effective immediately, based on the 2022 Rule, the agency (1) would process applications for amending the sex designation on birth certificates *only* if the sex identified on the applicant’s birth certificate resulted from a scrivener’s error or incorrect data entry or if the applicant’s sex was misidentified on the original certificate and (2) would not amend a birth certificate based on “gender transition, gender identity, or change of gender.” (Ex. 7, DPHHS Press Release.) *See also* Mont. Admin. Reg. Notice 37–1002, No. 11 (June 10, 2022). As also noted above, the same February 2024 DPHHS

³ Attached as Exhibit 5.

announcement indicated that, going forward, the birth-certificate-amendment process would be subject to the provisions of SB 458. (Ex. 7, DPHHS Press Release.)

In addition, in 2024, the DOJ and Attorney General Knudsen adopted a new MVD policy and practice that the MVD would only issue an amended driver's license with a sex designation consistent with a person's gender identity, rather than their assigned sex at birth, if the person provided an amended birth certificate, which the 2022 Rule prohibits transgender people from obtaining.

V. The Effects of the 2022 Rule, SB 458, and the New MVD Policy and Practice on Plaintiffs and Other Transgender Montanans

A. Ms. Kusner-Kalarchik

Ms. Kusner-Kalarchik is a forty-nine-year-old woman who was born and raised in Montana, and currently resides in Anchorage, Alaska. (Ex. 1, Kalarchik Aff., ¶ 2.) Ms. Kusner-Kalarchik is currently employed as a forensic nurse examiner at a local hospital in Alaska. (*Id.* ¶ 3.) She is a veteran and served for thirty-one years in the United States Army, including eight years as a military JAG NCO in the JAG Corps. (*Id.*)

Ms. Kusner-Kalarchik is transgender. (*Id.* ¶ 4.) She was assigned the male sex at birth. (*Id.*) Her birth certificate still includes a male sex designation, even though she has known she is female for many years. (*Id.*)

Ms. Kusner-Kalarchik was diagnosed with gender dysphoria approximately two years ago. (*Id.* ¶ 6.) She has been living publicly as female since 2022. (*Id.*) She lives her life as a woman in all circumstances. (*Id.* ¶¶ 5–6.) She has taken multiple steps to bring her body and gender expression into line with her female gender identity. (*Id.*)

In 2022, Ms. Kusner-Kalarchik's healthcare provider prescribed her hormone therapy as part of the treatment of her gender dysphoria. (*Id.*) In addition, she has legally changed her name

to a traditionally feminine one and has changed her name and sex designation on both her Alaska nursing license, driver's license and her federal social-security card. (*Id.*)

Ms. Kusner-Kalarchik must change the sex designation on her birth certificate to match what she knows to be her female sex, but she is unable to do so because of (1) the 2022 Rule on its face and as applied to issuing amended birth certificates and (2) SB 458 as applied to issuing amended birth certificates. (*Id.* ¶¶ 7–9.) Ms. Kusner-Kalarchik's inability to obtain a birth certificate that accurately reflects her female sex is a painful and stigmatizing reminder of the State of Montana's refusal to recognize her as a woman. (*Id.*)

Further, Ms. Kalarchik has had personal experience with incidents of harassment and discrimination because of her transgender status in both her personal and professional life. (*Id.* ¶ 10–13.) Denying her an accurate birth certificate places her at risk of violence, harassment, and discrimination every time she presents an identity document that incorrectly identifies her as male. (*Id.*)

Ms. Kusner-Kalarchik lives in fear of having to present her birth certificate to someone who may respond negatively or even violently. (*Id.*) Ms. Kusner-Kalarchik is typically perceived as female, so anytime she is forced to present an identity document that incorrectly identifies her as male, she is forced to “out” herself as transgender. (*Id.* ¶ 9.)

B. Ms. Doe

Ms. Doe is a 25-year-old woman who was born and raised in Helena, Montana, where she currently resides. (Ex. 2, Doe Aff., ¶ 2.) She is transgender woman, which means she was assigned the male sex at birth. (*Id.* ¶ 3.) Her birth certificate and driver's license still lists a male sex designation, even though she has known she is female for many years. (*Id.* ¶¶ 3, 10.)

In 2022, Ms. Doe began living and presenting fully and openly as the woman she knows herself to be. (*Id.* ¶ 4.) She has taken various steps to bring her physical appearance and presentation into alignment with her sex. (*Id.*) In January of 2022, she was diagnosed with gender dysphoria and her healthcare provider began prescribing Ms. Doe hormone-replacement therapy, which she continues to receive to treat her gender dysphoria. (*Id.*)

Ms. Doe would like to change the sex designation on her birth certificate to match the sex she knows herself to be, but she is unable to do so because of the 2022 Rule and SB 458. (*Id.* ¶¶ 5–7.) She also would like to change the sex designation on her Montana driver’s license to match what she knows to be her sex, as determined by her gender identity, but is unable to do so because of the new MVD policy and practice and SB 458. (*Id.*) Ms. Doe’s inability to obtain accurate identity documents places her at risk of violence, harassment, and discrimination every time she presents an identity document that incorrectly identifies her as male. (*Id.* ¶ 8.)

Ms. Doe has faced discrimination for being transgender in both her personal and professional life. (*Id.* ¶¶ 10–11.) She is afraid of what people who do not have a close relationship with her could do to harm her if they become aware that she is transgender. (*Id.*)

Ms. Doe does everything in her power to avoid violence, discrimination, and harassment because she knows that transgender people across the state and country are at increased risk of mistreatment. (*Id.*) She takes extra precautions, including avoiding the use of public restrooms and changing rooms. (*Id.*)

Ms. Doe is concerned about presenting her identity documents to people who may respond negatively. (*Id.* ¶¶ 9–12.) She is typically perceived as female, so anytime she is forced to present an identity document that incorrectly identifies her as male, she is forced to “out” herself as transgender. (*Id.*) As Ms. Doe’s appearance has shifted, her driver’s license no longer matches her

appearance, and has encountered challenges because of the discrepancy between the information on her driver’s license and her physical appearance and presentation. (*Id.*)

LEGAL STANDARDS

Montana’s preliminary injunction standard was recently revised to follow the federal standard. *See* S.B. 191, 2023 Leg., 68th Sess. (Mont. 2023) (“SB 191”) (amending § 27–19–201, MCA). Under the new standard, a court may grant a preliminary injunction when an applicant establishes: “(a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant’s favor; and (d) the order is in the public interest.” SB 191 § 1; *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Montana Legislature intended for this standard to “mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law.” SB 191 § 1(4).

The federal standard—now also the Montana standard—in the Ninth Circuit follows a “sliding scale” approach where “a stronger showing of one element may offset a weaker showing of another.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). When the “balance of hardships tips sharply” in favor of a plaintiff, the plaintiff need only show “serious questions going to the merits” as long as the plaintiff can also show that “there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135. “Serious questions” are “questions which cannot be resolved one way or the other at the hearing on the injunction and . . . are ‘substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.’” *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (citation omitted).

Plaintiffs satisfy each element of the preliminary injunction standard: Because Plaintiffs are in fact likely to succeed on the merits, have suffered or are likely to suffer irreparable injury, and the balance of hardships tips sharply in their favor, they are entitled to injunctive relief. As such, they certainly satisfy the sliding scale approach and establish serious questions going to the merits.

Under Montana law, “[t]he purpose of a preliminary injunction is to prevent further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.” *City of Billings v. Cnty. Water Dist. of Billings Heights*, 281 Mont. 219, 226, 935 P.2d 246, 250 (1997) (internal quotation marks omitted); *see also Planned Parenthood of Mont. v. State ex rel. Knudsen*, 2022 MT 157, ¶ 6, 409 Mont. 378, 515 P.3d 301. The status quo is “the last actual, peaceable, noncontested condition which preceded the pending controversy” *Porter v. K & S P’ship*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981) (internal quotation marks omitted); *Planned Parenthood*, ¶¶ 22–30. In this case, the status quo is the 2017 procedures for amending birth certificates and the prior procedures for amending driver’s licenses.

The “loss of a constitutional right constitutes harm or irreparable injury for the purposes of issuing a preliminary injunction.” *Netzer Law Office, P.C. v. State ex rel. Knudsen*, 2022 MT 234, ¶ 20, 410 Mont. 513, 520 P.3d 335; *Planned Parenthood*, ¶¶ 59–60.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits and are likely to suffer irreparable harm in the absence of preliminary injunctive relief.

Plaintiffs are likely to succeed on the merits of their claims that the 2022 Rule, the new MVD policy and practice, and SB 458 as applied to prohibit the amendment of birth certificates or driver’s licenses, violate the Montana Constitution’s equal protection, privacy, and free-speech provisions, as well as the MAPA, and will suffer irreparable harm based on Defendants’ conduct

in the absence of the requested injunction. *See* § 27–19–201(1), MCA. Although Plaintiffs are only required to meet this standard with respect to one of their claims to obtain a preliminary injunction, they have done so with respect to all four.

A. Plaintiffs are likely to succeed on their claim that Defendants have violated their constitutional right to equal protection.

Article II, section 4, of the Montana Constitution guarantees that “no person shall be denied the equal protection of the laws” and “embod[ies] a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner.” *A.J.B. v. Montana Eighteenth Jud. Dist. Ct., Gallatin Cnty.*, 2023 MT 7, ¶¶ 24–25, 411 Mont. 201, 523 P.3d 519. The Montana Constitution’s equal protection clause “provides even more individual protection than” the federal equal protection clause. *Id.*; *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987). As a corollary to equal protection, the Montana Constitution explicitly recognizes that “[t]he dignity of the human being is inviolable.” Mont. Const. art. II, § 4. “The plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated.” *Walker v. State*, 2003 MT 134, ¶ 82, 316 Mont. 103, 68 P.3d 872.

In evaluating an equal protection claim, a district court employs a three-step process by (1) identifying “the classes involved and determin[ing] if they are similarly situated;” (2) determining “the appropriate level of scrutiny to apply to the challenged statute;” and (3) applying “the appropriate level of scrutiny to the statute.” *A.J.B.*, ¶ 25; (Ex. 8, *Van Garderen Order*, at 20.)

In this case: the 2022 Rule, the new MVD policy and practice, and SB 458, as applied, differentiate on the basis of transgender status and sex; transgender and cisgender Montanans seeking to amend their birth certificates and driver’s licenses are similarly situated for equal protection purposes; the classifications created by the 2022 Rule, the new MVD policy and practice, and SB 458 are subject to a standard of review that is more stringent than the intermediate

scrutiny applied in cases of sex discrimination under the federal equal protection clause; and these classifications cannot survive any level of judicial review.

1. The 2022 Rule, the new MVD policy and practice, and SB 458, as applied, differentiate on the basis of transgender status and sex.

On their face, the 2022 Rule, the MVD policy and practice, and SB 458, as applied, impose a classification on the basis of both transgender status and sex, and single out transgender people for different and less favorable treatment vis-à-vis cisgender people.

The 2022 Rule automatically and categorically denies applications made by transgender people to amend the sex designation on their birth certificates to align with their gender identity. In fact, it expressly prohibits transgender people from amending the sex marker if the basis to do is to align the birth certificate with their gender identity, which is one of the primary factors that determines a person's sex. (Ex. 3, Ettner Decl., ¶¶ 24–26). Yet, the 2022 Rule does allow for cisgender people to amend the sex marker on their birth certificate when it was “misidentified at birth” based on the infant's external genitalia, and that misidentification is discovered later based on other sex-determining characteristics, so long as those do not include the person's gender identity.

This targeting of transgender people is further evidenced by the 2022 Rule's reference to “gender transition, gender identity, and change of gender” as the only purposes that cannot serve as a basis for the amendment because a transgender person is, by definition, a person whose identity is not congruent with their assigned sex at birth. (Ex. 8, *Van Garderen* Order, at 21.) In other words, only transgender people would seek to amend their birth certificate based on “gender transition, gender identity, and change of gender.” The 2022 Rule was drafted with precision to single-out individuals based solely on their transgender status. The same is true for the new MVD policy and practice because it conditions the amendment of a driver's license's sex marker on the

applicant having obtained an amended birth certificate. The new MVD policy and practice thus necessarily incorporates the 2022 Rule’s differential treatment based on transgender status.

Because the 2022 Rule and the new MVD policy and practice discriminate on the basis of transgender status, they also discriminate on the basis of sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being... transgender without discriminating against that individual based on sex.”); (Ex. 8, *Van Garderen Order*, at 24–26) (analyzing the Montana Constitution’s equal protection clause and relying on *Bostock*’s reasoning to find that a law that discriminates on the basis of transgender status must also discriminate on the basis of sex).

2. Transgender and cisgender Montanans seeking to amend their birth certificates or driver’s licenses are similarly situated for equal protection purposes.

Transgender and cisgender Montanans seeking to amend their birth certificates or driver’s licenses are similarly situated for equal protection purposes. They are the same in all legally relevant ways because all people, transgender or not, share an identical interest in having identity documents that contain information accurately reflecting who they are and how they identify themselves to others, whether through their name, their date of birth, their parents, their physical description, or their sex designation.

As one court has explained in the context of birth certificate amendments, even assuming, “for the sake of argument,” that a transgender person’s sex designation was correctly recorded at the time of birth, transgender people “are similarly situated to people who are allowed to change their accurately recorded birth parents or name,” given that “adoptive parents can amend an adopted child’s birth certificate to reflect the adopted parents’ names, and individuals who have legally changed their names can have a birth certificate modified to reflect that change, but

[transgender people] are not afforded the same ability to change their birth certificates to align with their gender identities.” *Ray v. McCloud*, 507 F. Supp. 3d 925, 935 (S.D. Ohio 2020); *see also F.V.*, 286 F. Supp. 3d at 1141 (finding that categorical ban on birth certificate sex designation changes for transgender people violated equal protection where it “g[a]ve certain people [such as adopted people] access to birth certificates that accurately reflect who they are, while denying transgender people, as a class, access to birth certificates that accurately reflect their gender identity”).

The same applies to driver’s license amendments. Transgender people are similarly situated to people who are allowed to change information on their driver’s licenses, such as their names, given that cisgender people can change their names and other identifying information, but transgender people are not allowed to change their driver’s licenses to align with their gender identities. *See Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1315 (M.D. Ala. 2021), *appeal filed*, No. 21-10486 (11th Cir. Feb. 12, 2021) (finding that policy requiring genital surgery before transgender people could change the sex designation on their driver’s licenses violated equal protection where it “obligate[d] [state] officials to review a license applicant’s birth records and medical documentation, decide what they believe the applicant’s sex to be, and determine the contents of the individual’s license based on that decision”).

In short, transgender and cisgender Montanans seeking to amend their birth certificates or driver’s licenses are similarly situated for equal protection purposes, but the 2022 Rule, the new MVD policy and practice, and SB 458 treat the former group differently from the latter by categorically prohibiting them from amending those documents.

3. The 2022 Rule, the new MVD policy and practice, and SB 458 are subject to heightened scrutiny.

Montana courts recognize two levels of heightened scrutiny for equal protection purposes. “Strict scrutiny applies if a suspect class or fundamental right is affected[.]” *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. It requires the government to show that a law “is the least onerous path to a compelling government interest.” *Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 75, 545 P.3d 1074; *see also Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 1999 MT 248, ¶ 61, 296 Mont. 207, 988 P.2d 1236 (strict scrutiny requires the state to establish that discrimination advances a compelling state interest, is closely tailored to advance only that interest, and is “the least onerous path that can be taken to achieve the state objective”).

“Middle-tier scrutiny” applies if challenged government action does not burden a suspect class and “if the law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution’s Declaration of Rights.” *Snetsinger*, ¶ 18. Under this standard, the government must show “that the classification is reasonable (i.e., not arbitrary and justified by relevant and legislative state interests)[.]” and that “the asserted government[al] interest is more important than the infringement of the right.” *Jacobsen*, ¶¶ 40–41.

Even where neither strict scrutiny nor middle-tier scrutiny apply, the classification “must be rationally related to a legitimate government interest.” *Snetsinger*, ¶ 19.

The Montana Supreme Court has not yet identified the level of scrutiny applicable to classifications based on transgender status or sex but, as explained below, and as another District Court recently held, the Court should apply strict scrutiny to Defendants’ actions at issue in this matter. (*See Ex. 8, Van Garderen Order*, at 26) (“Although the Montana Supreme Court has declined to explicitly label sex or gender a suspect class, if heightened scrutiny is the appropriate

level of review when the federal Equal Protection Clause is implicated, the Court posits that strict scrutiny is the appropriate level of review when Montana's Equal Protection Clause is implicated”).

a. Transgender status is a suspect classification under Montana law.

The Montana Supreme Court has noted, “[a] suspect class is one ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’” *In re Matter of S.L.M.*, 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); see also *In re Matter of C.H.*, 210 Mont. 184, 198, 683 P.2d 931, 938 (same). Transgender Montanans constitute a suspect classification under this test. (See Ex. 8, *Van Garderen Order*, at 25 n.7) (applying strict scrutiny for other reasons but noting that transgender people comprise a suspect class).

First, transgender people, in Montana and elsewhere, have been “subjected to . . . a history of purposeful unequal treatment.” *S.L.M.*, 287 Mont. at 33, 951 P.2d at 1371. Discrimination based on transgender status has been extensively documented. S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (“Transgender Survey”). Published in 2016, the Transgender Survey describes the discrimination, harassment, and even violence that transgender people encounter at school, in the workplace, when trying to find a place to live, during encounters with police, in doctors’ offices and emergency rooms, at the hands of service providers and businesses, and in other aspects of life. *Id.*

Transgender people nationally and in Montana continue to face discrimination. To the extent they have seen progress in protecting their rights, there is considerable backlash against that progress—including through discriminatory legislation enacted by the Montana legislature. See

The Discrimination Administration: Trump’s Record of Action Against Transgender People, National Center for Transgender Equality, <https://transequality.org/the-discrimination-administration> (last visited May 14, 2024) (discussing long pattern of anti-transgender executive-branch initiatives at the federal level).

Recent examples of animus against transgender people in Montana include (1) SB 99, which bans gender-affirming medical care for transgender children⁴; (2) SB 280 and its 2021 implementing regulation, which intentionally and facially discriminated against transgender Montanans seeking to change the sex designation on their birth certificates until it was permanently enjoined in 2023; and (3) HB 112, which bans transgender girls and women from participating in sports consistent with their gender identity at the elementary, secondary, or post-secondary levels. *See* S.B. 99, 2023 Leg., 68th Sess. (Mont. 2023) (“SB 99”); SB 280; H.B. 112, 2021 Leg., 67th Sess. (Mont. 2021) (“HB 112”). These acts do not stand alone. *See ACLU of Mont. Found., Inc. v. State ex rel. Fox*, No. OP 17–0449, 2017 WL 9532878, at *1 (Mont. Sept. 19, 2017) (discussing ballot initiative for the “Montana Locker Room Privacy Act,” which would have “require[d] government entities to designate a protected facility in a government building or public school for use only by members of one sex”). Taken together, these examples illustrate the long, troubling history of invidious discrimination against transgender people in Montana and elsewhere.

Second, transgender people suffer a level of “political powerlessness” sufficient to warrant “extraordinary protection” under the law because of the community’s small population size and the enduring societal prejudices against transgender people. *S.L.M.*, 287 Mont. at 33, 951 P.2d at

⁴ “The legislative record [of SB 99] is replete with animus toward transgender persons, mischaracterizations of the treatments proscribed by SB 99, and statements from individual legislators suggesting personal, moral, or religious disapproval of gender transition.” (Ex. 8, *Van Garderen Order*, at 34.)

1371. A 2022 study by the Williams Institute estimates that just 0.41 percent of Montanans above the age of 18 identify as transgender. Jody L. Herman, et al., *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Institute 9 (June 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

Transgender people face staggering rates of poverty and homelessness. Nearly one-third of transgender people fall below the poverty line, more than twice the rate of the general U.S. population. Transgender Survey, *supra*. Nearly one-third of transgender people have experienced homelessness. *Id.*

Transgender people also face barriers to political representation. *See, e.g.*, Philip E. Jones, et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*, 82 Pub. Opinion Q., May 2018, at 252, 265, <https://academic.oup.com/poq/article/82/2/252/4996117> (in randomized experiment, nominating a transgender candidate reduced proportion of respondents who would vote for their own party's candidate from 68 percent to 37 percent).

These factors—the “history of purposeful unequal treatment” and the presence of “political powerlessness”—support applying strict scrutiny to the 2022 Rule, the new MVD policy and practice, and SB 458 as applied to applications for changes to sex designations on Montana birth certificates and driver’s licenses. *S.L.M.*, 287 Mont. at 33, 951 P.2d at 1371.

b. Federal courts across the country support applying heightened scrutiny to classifications that discriminate against transgender people.

Even though the Montana Constitution’s equal protection clause provides greater protections than its federal counterpart, federal courts across the nation have found that intermediate or strict scrutiny is appropriate to examine classifications based on transgender status under the federal suspect classification test. *See e.g., Adkins v. City of New York*, 143 F. Supp. 3d

134, 139–40 (S.D.N.Y. 2015) (finding that transgender people have suffered a history of discrimination and prejudice, a person’s identity as transgender has nothing to do with the person’s ability to contribute to society, and transgender people represent a discrete minority class that is politically powerless to bring about change on its own); *Ray*, 507 F. Supp. 3d at 936–38 (same); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (finding that discrimination on the basis of transgender status is subject to intermediate scrutiny); *Marlett v. Harrington*, No. 15–cv–01382, 2015 WL 6123613, at *4 (E.D. Cal. Oct. 16, 2015) (same); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (same), *stay of preliminary injunction denied sub nom. Dodds v. United States Dep’t of Educ.* 845 F.3d 217, 222 (6th Cir. 2016); *Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017) (same); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 718–22 (D. Md. 2018) (same); *F.V.*, 286 F. Supp. 3d at 1142–45 (same); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019) (same); *Flack v. Wis. Dep’t of Health Serv.*, 395 F. Supp. 3d 1001, 1019–22 (W.D. Wis. 2019) (same); *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019) (same); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607–08 (4th Cir. 2020) (same).

In addition, heightened scrutiny, which applies to sex discrimination, is required here since discrimination against transgender people is a form of sex discrimination. *See Bostock*, 140 S. Ct. at 1741–43 (discrimination against someone because they are transgender is sex discrimination); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (intermediate scrutiny applies to transgender classification, which is sex-based); *Glenn v. Brumby*, 663 F.3d 1312, 1318–19 (11th Cir. 2011) (same); *Corbitt*, 513 F. Supp. 3d at 1314–15 (same); *B.P.J. v. West Virginia State Bd. of Educ.*, 98 F.4th 542, 555–58 (4th Cir. 2024) (same); *see also*

Rolando v. Fox, 23 F. Supp. 3d 1227, 1232–33 (D. Mont. 2014) (classification based on sexual orientation is subject to heightened scrutiny); *Maloney v. Yellowstone County*, Nos. 1570–2019 & 1572–2019 (Mont. Dep’t of Lab. & Indus., Aug. 14, 2020) (finding that discrimination based on gender identity is a form of discrimination based on sex).

Several of these courts have applied heightened scrutiny in circumstances like those at issue here. *See F.V.*, 286 F. Supp. 3d at 1142–45 (applying heightened scrutiny in challenge to constitutionality of Idaho state 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 state policy prohibiting transgender people from changing the sex designation on their birth certificates); *Corbitt*, 513 F. Supp. 3d at 1313–15 (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).

Given that the Montana Constitution’s equal protection clause “provides for even more individual protection than” its federal equivalent, *Cottrill*, 229 Mont. at 42, 744 P.2d at 897, and based on the significant number of courts addressing this issue under the federal equal protection clause, if this Court determines that strict scrutiny does not apply, nevertheless it should apply heightened scrutiny to the 2022 Rule, the new MVD policy and practice, and SB 458 as applied to applications for changes to sex designations on Montana birth certificates and driver’s licenses. (*See Ex. 8, Van Garderen Order*, at 27.) (“Because Montana’s equal protection guarantee is more stringent than that of its federal counterpart...[s]trict scrutiny better mimics the federal ‘heightened scrutiny’ test”).

c. The 2022 Rule, the new MVD policy and practice, and SB 458 burden fundamental rights.

The 2022 Rule, the new MVD policy and practice, and SB 458 as applied to applications for changes to sex designations on Montana birth certificates and driver’s licenses also are subject to heightened scrutiny because they burden fundamental rights. “Any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis.” *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). A right is “fundamental” under Montana’s Constitution if the right is either found in the Declaration of Rights or is a right “without which other constitutionally guaranteed rights would have little meaning.” *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986).

As discussed below, the 2022 Rule, the new MVD policy and practice, and SB 458 as applied to applications for changes to sex designations on Montana birth certificates and driver’s licenses burden Plaintiffs’ privacy rights and free-speech rights under sections 7 and 10 of Article II of the Montana Constitution. (*See infra* Argument Parts I(B)–(C).) For these additional reasons, they are subject to strict scrutiny.

4. The 2022 Rule, the new MVD policy and practice, and SB 458 cannot survive strict scrutiny.

The 2022 Rule, the new MVD policy and practice, and SB 458 as applied to applications for changes to sex designations on Montana birth certificates and driver’s licenses cannot survive strict scrutiny, which requires the state to demonstrate that they are “the least onerous path to a compelling government interest.” *Jacobsen*, ¶ 75.

These challenged government actions target transgender people, and only transgender people, by categorically banning them from changing the sex designation on their Montana birth certificates and driver’s licenses. *See* Mont. Admin. Reg. Notice 37–1002, No. 11 (June 10, 2022); SB 458. By contrast, cisgender people are permitted to obtain accurate Montana birth certificates

and driver’s licenses that reflect how they present themselves to society. *See, e.g., Ray*, 507 F. Supp. 3d at 934–36 (concluding that 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 themselves to society but allowing the latter the same right); *F.V.*, 286 F. Supp. 3d at 1140–41 (same); *Corbitt*, 513 F. Supp. 3d at 1316–23 (finding that policy requiring genital surgery before transgender people could change the sex designation on their driver’s licenses treated transgender people differently from similarly situated cisgender people based solely on the nature of their genitalia).

The categorical restrictions these challenged government actions impose on transgender people are not “narrowly tailored to serve a compelling government interest.” *Snetsinger*, ¶ 17. As an initial matter, the 2022 Rule, the new MVD policy and practice, and SB 458 as applied to applications for changes to sex designations on Montana birth certificates and driver’s licenses do not serve a compelling government interest. *See Gonzales v. Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (prohibiting sex designation changes not justified by any legitimate government interest). Defendants’ only stated justification for the 2022 Rule, which presumably they would argue applies to the new MVD policy and practice and SB 458 as applied in these contexts, is to ensure “accurate vital statistics.” *See Mont. Admin. Reg. Notice 37–1002*, No. 11 (June 10, 2022). Nothing in the public record supports a finding that there were any problems maintaining “accurate vital statistics” before the 2022 Rule, the new MVD policy and practice, and SB 458 went into effect, given that the 2017 DPHHS birth-certificate-amendment procedure predating the 2022 Rule and SB 280 and its 2021 regulation, and the MVD driver’s-license-amendment procedure predating the February 2024 policy change, both allowed transgender people to change the sex

designation on their Montana birth certificates and driver’s licenses without incident. *See, e.g.*, Mont. Admin. Reg. Notice 37–807, No. 24 (Dec. 22, 2017) (amending Mont. Admin. R. 37.8.102 and 37.8.311).

Moreover, 45 states across the country allow transgender people to amend the sex marker on their birth certificate,⁵ and 38 states allow them to change the sex marker on their driver’s license without an amended birth certificate.⁶ Many of these states have allowed these changes to birth certificates and driver’s licenses for years without any widespread problems with the ability of those states to maintain “accurate vital statistics.” The same is true in the context of federal policies that permit transgender people to update their passports and social security records to align with their gender identity. Finally, Defendants have not set forth a more detailed explanation of the use of these vital statistics that is required to meet their burden of establishing that maintaining their accuracy serves a compelling interest or is narrowly tailored to advance that interest.

Many of the DPHHS responses to comments in the public record when the 2022 Rule was considered were based on misguided speculation and assumptions about transgender people and the perceived need to regulate their identification documents differently from those of cisgender people. *Compare* Mont. Admin. Reg. Notice 37–1002, No. 11 (June 10, 2022) (amending Mont. Admin. R. 37.8.311). (opining that because chromosomes are biological, sex based on genital appearance alone should be conclusive in determining an individual’s sex) *with* Ex. 3, Ettner Decl., ¶ 26 (stating that this opinion “fails to account for the developmental influences of the gonadal

⁵ *Identity Document Laws and Policies: Birth Certificates*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/identity_documents/birth_certificate (last updated May 14, 2024).

⁶ *Identity Document Laws and Policies: Gender Markers on Driver’s Licenses*, Movement Advancement Project, <https://www.lgbtmap.org/img/maps/citations-id-drivers-license.pdf> (last updated Apr. 22, 2024).

hormones before and early after birth” and noting that “[h]uman neurobiology is far more complex, and the brain, the ultimate determinant of gender, is also immutable and biological, albeit not visible”).

Additionally, even if the 2022 Rule, the new MVD policy and practice, and SB 458 as applied in this context served a compelling government interest (which they do not), they are not narrowly tailored to meet that interest. There are, without question, less restrictive means of maintaining accurate vital statistics. Beginning in 2017, transgender Montanans were able to change the sex designation on their birth certificates simply by submitting an affidavit to the DPHHS, a procedure the DPHHS administered without incident for nearly four years. *See* Mont. Admin. Reg. Notice 37–807, No. 24 (Dec. 22, 2017) (amending Mont. Admin. R. 37.8.102 and 37.8.311). Similarly, before the MVD adopted its new policy and practice regarding driver’s license amendments, a transgender person could obtain an amendment simply by submitting a letter from a doctor.

Based on these considerations, the 2022 Rule, the new MVD policy and practice, and SB 458 as-applied cannot withstand strict scrutiny. *See Snetsinger*, ¶¶ 17–18; *see also Corbitt*, 513 F. Supp. 3d at 1316–23; *Ray*, 507 F. Supp. 3d at 936–40; *F.V.*, 286 F. Supp. 3d at 1140–45.

5. The 2022 Rule, the new MVD policy and practice, and SB 458 cannot survive middle-tier or rational-basis review.

“Because Montana’s equal protection guarantee is more stringent than that of its federal counterpart, middle-tier scrutiny is too low a bar.” (Ex. 8, *Van Garderen* Order, at 27.) Still, even under middle-tier scrutiny, impairing transgender people’s right to correct the sex designation on their birth certificates and driver’s licenses is not “reasonable,” and the need for the impairment—purportedly to ensure accurate recordkeeping, *see* Mont. Admin. Reg. Notice 37–1002, No. 11 (June 10, 2022) (amending Mont. Admin. R. 37.8.311)—does not outweigh the value of the right

that is impaired. *See Snetsinger*, ¶ 18. Indeed, an “accurate” identity document is one that describes who someone is, as well as how they identify and express their sex, which is determined by a person’s gender identity. Thus, the purported state interest in “accuracy” is undermined, rather than supported, by the 2022 Rule, the new MVD policy and practice, and SB 458 as applied to applications for changes to sex designations on Montana birth certificates and driver’s licenses.

In fact, the 2022 Rule, the new MVD policy and practice, and SB 458 as applied to applications for changes to sex designations on Montana birth certificates and driver’s licenses cannot even withstand rational-basis review because the classification and burdens they impose on transgender people are not “rationally related to a legitimate government interest.” *Snetsinger*, ¶ 19 (citation omitted).

Rational-basis review does not protect state action that burdens otherwise unprotected classes when a classification is based on animus, such as the classification at issue here. *See United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”). The 2022 Rule, the new MVD policy and practice, and SB 458, as applied to applications for changes to sex designations on Montana birth certificates and driver’s licenses, are motivated by animus towards the transgender community, as evidenced by *inter alia* the relentless efforts of the Defendants to make the existence of transgender people in the state of Montana as unbearable as possible.

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 Decl., ¶¶ 14, 36, 38, 43–44, 49, 51.) Correcting the sex designation on

identification documents, including birth certificates, “confers social and legal recognition of identity and is crucial to this process.” (*Id.* ¶¶ 14, 51.) “Privacy, and the ability to control whether, when, how, and to whom to disclose one’s transgender status, is essential to accomplishing this therapeutic aim.” (*Id.* ¶ 48.) There is no legitimate reason to interfere with this aim.

For a transgender person, an identity document bearing an incorrect sex designation risks disclosing the fact that the person is transgender. (*Id.* ¶ 53.) 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 identity documents that accurately reflect their identifying information. Both groups have an interest in ensuring the accuracy of their vital information. The 2022 Rule, the new MVD policy and practice, and SB 458 as-applied draw 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, there is absolutely no evidence, in the legislative record or otherwise, showing that there were any problems maintaining “accurate” vital statistics under the 2017 birth certificate policy, or the MVD policy prior to February 2024.

For these reasons, the 2022 Rule, the new MVD policy and practice, and SB 458 as-applied cannot withstand rational basis review under the Montana Constitution’s Equal Protection Clause. *See, e.g., Snetsinger*, ¶ 27 (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 Comp. Ins. Fund*, 1999 MT 126, ¶¶ 38, 45, 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).

Based on these considerations, the 2022 Rule, the new MVD policy and practice, and SB 458 as-applied cannot withstand any level of scrutiny, and Plaintiffs have established that they are likely to prevail on the merits of their equal protection claims.

B. Plaintiffs also are likely to succeed on their claim that Defendants have violated their constitutional right to privacy.

Article II, section 10, of the Montana Constitution states, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. The Montana Constitution gives Montana "one of the most stringent protections of its citizens' right to privacy in the United States." *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364. "[W]here the right of individual privacy is implicated, Montana's Constitution affords significantly broader protection than does the federal constitution." *Id.* ¶ 41.

The Montana Supreme Court has held that "[m]edical records and medical information are protected under Article II, Section 10's guarantee of privacy." *State v. Nelson*, 283 Mont. 231, 244, 941 P.2d 441, 450 (1997). In doing so, the Court acknowledged that, under Montana law, "health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interest in privacy and health care or other interests." *Nelson*, 283 Mont. at 242, 941 P.2d at 448 (internal quotation marks omitted). The Court also acknowledged "[t]he right to control circulation of personal information is fundamental." *Nelson*, 283 Mont. at 241, 941 P.2d at 448 (internal quotation marks omitted).

Montana courts apply a two-part test to determine whether a privacy interest is protected under Article II, section 10, of the Montana Constitution. *Nelson*, 283 Mont. at 239, 941 P.2d at

447. The test focuses on (1) “[w]hether the person involved had a subjective or actual expectation of privacy” and (2) “[w]hether society is willing to recognize that expectation as reasonable.” *Id.* Plaintiffs meet these requirements.

First, Plaintiffs have a subjective or actual expectation of privacy of their transgender status. *See Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) (right to privacy includes right to maintain confidentiality of transgender status); *Gonzalez*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (same); *Ray*, 507 F. Supp. 3d at 932 (same). This is consistent with the constitutionally protected “zone of privacy” that includes, among other things, “the individual interest in avoiding disclosure of personal matters.” *See Whalen v. Roe*, 429 U.S. 589, 598–99 (1977) (internal quotation marks omitted).

Second, the expectation of privacy that attaches to Plaintiffs’ transgender status is reasonable. The Montana Supreme Court has acknowledged that “[i]nformational privacy is a core value furthered by state constitutional guarantees of privacy.” *See Nelson*, 283 Mont. at 241, 941 P.2d at 448. “[T]he zone of privacy created by those provisions extends to,” among other things, a person’s “medical and psychiatric history.” *Id.* Consistent with these protections, a person has a reasonable expectation of privacy in intimate personal information, such as their transgender status. *See, e.g., Powell*, 175 F.3d at 111 (finding that “[t]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate”); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (concluding that “sexuality and choices about sex... are interests of an intimate nature” protected by the right to privacy, and acknowledging that “[t]he legitimacy of an individual’s expectation [of privacy] depends, at least in part, upon the intimate or otherwise personal nature of” the information in question) (internal quotation marks omitted).

The 2022 Rule, the new MVD policy and practice, and SB 458 as-applied violate Plaintiffs’ constitutional right to privacy by prohibiting them from amending their birth certificates, thereby forcing them to reveal their transgender status whenever they are required to show those documents. This forced “outing” has serious adverse psychological effects and health consequences and often results in outright hostility toward transgender people. (Ex. 3, Ettner Decl., ¶¶ 15, 42, 45–47; Ex. 4, Scheim Decl., ¶ 23.) Conversely, transgender people whose identity documents are consistent with the way they present themselves to the public experience better mental health and less mistreatment. (Ex. 4, Scheim Decl., ¶¶ 13, 15, 17–18, 26.)

Given the harms associated with discordant identity documents, transgender people have a cognizable interest in protecting their right to privacy by amending those documents. No “compelling state interest” justifies infringing on this right and endangering the psychological and physical health of transgender Montanans. *See* Mont. Const. art. II, § 10. *See also Gonzalez*, 305 F. Supp. 3d at 333.

Additionally, even if Defendants had a compelling interest in the restrictions imposed by the 2022 Rule, the new MVD policy and practice, and SB 458 as-applied (which they do not), there are less restrictive means of furthering that interest, as evidenced by the 2017 DPHHS birth-certificate-amendment procedure predating the 2022 Rule and the MVD driver’s-license-amendment procedure predating the February 2024 policy change. *See* Mont. Admin. Reg. Notice 37–807, No. 24 (Dec. 22, 2017) (amending Mont. Admin. R. 37.8.102 and 37.8.311).

This conclusion is supported by multiple state and federal decisions holding that restricting the amendment of identity documents violates the constitutional right to privacy. *See, e.g., Ray*, 507 F. Supp. 3d at 931–34 (forced disclosure of transgender status based on policy prohibiting changes to sex designation on birth certificates violated constitutional right to privacy); *Gonzalez*,

305 F. Supp. 3d at 332–34 (forced disclosure of transgender status based on statutes allowing transgender people to change the name on their birth certificates, but not their sex designation, violated constitutional right to privacy); *Love v. Johnson*, 146 F. Supp. 3d 848, 851, 853–57 (E.D. Mich. 2015) (forced disclosure of transgender status based on policy requiring transgender people to procure an amended birth certificate to obtain an amended driver’s license implicated constitutional right to privacy); *K.L. v. State*, No. 3AN–11–05431 CI, 2012 WL 2685183, at *3–8 (Alaska Super. Ct. Mar 12, 2012) (forced disclosure of transgender status based on absence of procedure allowing transgender people to change the sex designation on their driver’s licenses violated constitutional right to privacy).

C. Plaintiffs further are likely to succeed on their claim that Defendants have violated their constitutional right to be free from compelled speech.

The Montana Constitution states that “[n]o law shall be passed impairing the freedom of speech or expression.” Mont. Const., art. II, § 7. Under the Montana Constitution, a law regulating expressive content is presumptively invalid. *State v. Lamoureux*, 2021 MT 94, ¶ 21, 404 Mont. 61, 485 P.3d 192.

An important corollary to these principles is that speech or expression cannot be compelled. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The compelled-speech doctrine ensures that government officials cannot “compel[] individuals to mouth support for views they find objectionable[.]” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emp.*, 585 U.S. 878, 892 (2018).

Under the compelled-speech doctrine, the U.S. Supreme Court has repeatedly struck down laws forcing people to express or embrace a viewpoint with which they disagree. *See, e.g., Id.* at 892 (state could not authorize public-sector unions to assess “agency fees” from nonmember public-sector employees without their consent); *Wooley*, 430 U.S. at 715, 717 (state could not force

individuals to display state motto on license plates); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (state could not force schoolchildren to recite the pledge of allegiance).

The 2022 Rule, the new MVD policy and practice, and SB 458 violate these principles by forcing transgender people to carry and present identity documents containing a sex designation that conflicts with what they know and believe their sex to be, and to instead disseminate the state’s view of their sex. It should be enjoined. *See, e.g., Planned Parenthood*, ¶ 48 (affirming preliminary injunction of law requiring abortion providers to inform patients about “abortion pill reversal” where plaintiffs made prima facie showing that requirement impermissibly compelled speech in violation of Article II, section 7, of the Montana Constitution).

D. Plaintiffs additionally are likely to succeed on their claim that Defendants have impaired, or threatened to impair, Plaintiffs’ legal rights or privileges in violation of § 2–4–506 of the MAPA.

On February 20, 2024, the DPHHS announced that implementing the 2022 Rule “aligns” with the requirements of SB 458. (Ex. 7, DPHHS Press Release.) Likewise, in 2024 the DOJ and Attorney General Knudsen adopted a new policy and practice that the MVD would only issue an amended driver’s license with a sex designation consistent with a person’s gender identity, rather than their assigned sex at birth, if the person provided an amended birth certificate, which the 2022 Rule prohibits transgender people from obtaining.

The 2022 Rule, the new MVD policy and practice, and SB 458 are scientifically incorrect. They ignore the existence of multiple genes involved in sex differentiation; the breadth of the endocrine system, which has multiple organs with multiple functions; and growing research documenting that gender identity is biologically based. (*See, e.g., Ex. 3, Ettner Decl.*, ¶ 26) (noting that the Statement of Reasonable Necessity for the 2022 Rule “fails to recognize that there are several biological contributors to sex”). They also completely block access to identity-document

sex designation amendments, an important curative method for addressing the effects of gender dysphoria. (*Id.* ¶¶ 42–43.)

MAPA authorizes declaratory-judgment actions seeking to have a rule declared invalid “if it is found that the rule or its threatened application *interferes with or impairs or threatens to interfere with or impair* the legal rights or privileges of the plaintiff.” § 2–4–506, MCA (emphasis added). As discussed above (*see supra* Argument Parts I(A)–(C)), the 2022 Rule, the new MVD policy and practice, and SB 458 violate Plaintiffs’ equal protection, privacy, and free-speech rights under the Montana Constitution by preventing them from amending the sex designation on their birth certificates and driver’s licenses. As a result, they interfere with, impair, and threaten to interfere with or impair Plaintiffs’ legal rights or privileges in violation of § 2–4–506.

Because Plaintiffs have established a prima facie case that the 2022 Rule, the new MVD policy and practice, and SB 458 impair or threaten to impair their legal rights or privileges in violation of § 2–4–506 of the MAPA, they are entitled to a preliminary injunction under §27–19–201(1), MCA. *Planned Parenthood*, ¶¶ 21–37.

II. Plaintiffs are likely to suffer irreparable harm in the absence of preliminary injunctive relief.

As the Montana Supreme Court has concluded, “the loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued.” *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶15, 366 Mont. 224, 286 P.3d 1161; *see also Weems v. State ex rel. Fox*, 2019 MT 98, ¶ 25, 395 Mont. 350, 440 P.3d 4 (recognizing “harm from constitutional infringement as adequate to justify a preliminary injunction”); *Planned Parenthood*, ¶ 60 (affirming preliminary injunction in which district court concluded that “the loss of a constitutional right constitute[d] irreparable harm”).

That is the case here. Plaintiffs have demonstrated that their equal protection, privacy, and free-speech rights are being infringed. (*See supra* Argument Parts I(A)–(C).) These constitutional violations are irreparable injuries.

Moreover, the full-scale overhaul of the framework for sex designation changes created by the 2022 Rule, the new MVD policy and practice, and SB 458 as-applied is incredibly harmful. Being unable to correct the sex designation on one’s identity documents, including one’s birth certificate and driver’s license, means that transgender people are forced to display identity documents that often are required to be presented that indicate their assigned sex at birth—typically determined only on the appearance of their genitalia at birth—rather than their actual sex as determined by their gender identity and their life experience. (Ex. 3, Ettner Decl., ¶ 42.) This creates “deleterious social and psychological consequences” for transgender people. (*Id.*; *see also* Ex. 4, Scheim Decl., ¶ 26.)

Identity documents consistent with a person’s life experience affirm and consolidate gender identity, mitigating distress and other consequences. (Ex. 3, Ettner Decl., ¶ 43; Ex. 4, Scheim Decl., ¶¶ 4, 13, 15, 20.) Changes in gender presentation and role to feminize or masculinize appearance, as well as social and legal recognition, are crucial components of treating gender dysphoria. (Ex. 3, Ettner Decl., ¶ 43.) Social transition involves dressing, grooming, and otherwise outwardly presenting oneself through social signifiers of a person’s true sex, including identity documents, as determined by their affirmed gender identity. (*Id.*)

The social transition process ameliorates the shame of growing up living as a “false self” and the grief of being born into the “wrong body.” (*Id.* ¶ 44.) Being socially and legally recognized with correct identification is essential to successful treatment. (*Id.*) Indeed, the World Professional Association for Transgender Health’s *Standards of Care for the Health of Transgender and*

Gender Diverse People, Version 8 explicitly states that changing the sex designation on identity documents greatly helps alleviate gender dysphoria. (*Id.*) See E. Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. of Transgender Health S1 (2022), <https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644>. Uncorrected identity documents serve as constant reminders that one's identity is perceived by society and the government as "illegitimate." (Ex. 3, Ettner Decl., ¶ 44.)

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. (*Id.* ¶ 45.) Inaccurate documents can cause a person to "isolate" to avoid situations that might result in discrimination, ridicule, accusations of fraud, harassment, or even violence—experiences that are all too common among transgender people. (*Id.*) They can also limit access to services, employment, and social participation. (Ex. 4, Scheim Decl., ¶ 24.) Ultimately, these encounters lead to feelings of hopelessness, lack of agency, and despair. (Ex. 3, Ettner Decl., ¶ 45.) 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.*)

Many people who suffer from gender dysphoria go to great lengths to align their physical characteristics, voice, mannerisms, and appearance to match their gender identity. (*Id.* ¶ 48.) Since gender identity is immutable, when an individual undergoes a social transition, legal recognition of that transition is vital, and accurate birth certificates and driver's licenses are an important aspect of that recognition. (*Id.* ¶ 49.) This is because congruent identity documentation confers privacy over personal information and lets an individual live a safe, healthy life. (*Id.*)

Additionally, the 2022 Rule, the new MVD policy and practice, and SB 458 as applied to identity document sex designations have dire real-world consequences for both Ms. Kusner-Kalarchik and Ms. Doe. Ms. Kusner-Kalarchik must change the sex designation on her Montana birth certificate, and Ms. Doe must change the sex designation on her Montana birth certificate and her Montana driver's license. (*See* Ex. 1, Kalarchik Aff.; Ex. 2, Doe Aff.) The 2022 Rule, the new MVD policy and practice, and SB 458 categorically prohibit transgender people, including Ms. Kusner-Kalarchik and Ms. Doe, from amending the sex designation on their birth certificates and driver's licenses. *See* Mont. Admin. Reg. Notice 37–1002, No. 11 (June 10, 2022); SB 458. Every time a transgender person is compelled to share private information related to their transition, they are forced to publicly “out” themselves. (*See* Ex. 3, Ettner Decl., ¶¶ 15, 42, 45–47; Ex. 4, Scheim Decl., ¶¶ 17–18, 23, 26.) The mental and emotional toll of being forced, against one's will, to publicly share personal information related to one's transgender status is both humiliating and degrading. (*See* Ex. 3, Ettner Decl., ¶¶ 15, 42, 45–47; Ex. 4, Scheim Decl., ¶¶ 17–18, 23, 26.) Ms. Kusner-Kalarchik and Ms. Doe have suffered, and will continue to suffer, this degradation if they are prohibited from amending the sex designation on their identity documents to match what they know their sex to be, as determined by their gender identity. (*See* Ex. 1, Kalarchik Aff.; Ex. 2, Doe Aff.)

Because Plaintiffs have established a prima facie case that they have suffered, and will continue to suffer, irreparable injury based on the 2022 Rule, the new MVD policy and practice, and SB 458, they are entitled to a preliminary injunction under § 27–19–201(1), MCA. *Planned Parenthood*, ¶¶ 58–60.

III. The balance of equities weighs in Plaintiffs' favor, and the injunction would not be adverse to the public interest.

The balance of equities tips sharply in Plaintiffs' favor. In contrast to the severe and irreparable ongoing constitutional injuries that Plaintiffs face based on the 2022 Rule, the new MVD policy and practice, and SB 458, Defendants will not be harmed if the 2022 Rule, the new MVD policy and practice, and SB 458 are preliminarily enjoined. *See All. for the Wild Rockies*, 632 F.3d at 1137 (threat of “irreparabl[e] los[s]” to the plaintiff tips “the balance of hardships between the parties . . . sharply in favor of [the plaintiff]”). Additionally, injunctive relief serves the public interest in this case because “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted). Granting a preliminary injunction in this case will prevent irreparable harm to Plaintiffs while serving the public interest and causing Defendants no harm or inconvenience.

IV. Plaintiffs should not be required to post a bond.

Assuming the Court decides to issue a preliminary injunction (which it should), then the Court should exercise its discretion under § 27–19–306(1), MCA, and allow Plaintiffs to forgo posting a bond as a precondition to obtaining injunctive relief. Although an injunction bond may be required “for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained,” it may be waived in the interests of justice. *See* § 27–19–306(1), MCA. Here, Defendants do not stand to suffer any pecuniary harm if a preliminary injunction is entered. Therefore, no bond should be required.

CONCLUSION

FOR THESE REASONS, Plaintiffs respectfully request that this Court enter an order:

- (a) preliminarily enjoining Defendants, as well as their agents, employees, representatives, and successors, from directly or indirectly enforcing (1) the 2022 Rule on its face or as applied to issuing amended birth certificates, (2) the new MVD policy and practice as applied to issuing amended driver's licenses, and (3) SB 458 as applied to issuing amended birth certificates and amended driver's licenses, including but not limited to by prohibiting Defendants from denying applications to amend the sex designation on birth certificates or driver's licenses based on the 2022 Rule, the new MVD policy and practice, SB 458, or any further administrative rulemaking or other action directed toward enforcement of the 2022 Rule, the new MVD policy and practice, or SB 458 as applied to issuing birth certificates or driver's licenses; and
- (b) granting any other relief the Court deems just.

Dated: May 17, 2024

Respectfully submitted,

By: /s/ Alex Rate

Alex Rate (Bar No. 11226)
Marthe Y. VanSickle (Bar No. 67068789)
ACLU Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
406-204-0287
ratea@aclumontana.org
vansicklem@aclumontana.org

Malita Picasso*
Jon W. Davidson*
(admitted only in California)
American Civil Liberties Foundation
LGBTQ & HIV Project
125 Broad Street
New York, NY 10004
Telephone: 212-549-2561
mpicasso@aclu.org
jondavidson@aclu.org

F. Thomas Hecht*
Tina B. Solis*
Seth A. Horvath*
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

** Pro hac vice applications forthcoming*