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

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

Plaintiffs and Appellees,

v.

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

Defendants and Appellants.

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

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STATEMENT OF THE ISSUE

Whether the district court manifestly abused its discretion in preliminarily enjoining Appellants from enforcing Mont. Admin. Rule 37.8.311(5) (the "2022 Rule"), the policy of the Montana Motor Vehicle Division ("MVD") of issuing an amended driver's license containing a sex designation consistent with a person's gender identity only if the person provides an amended birth certificate, and Senate Bill 458 ("SB 458") as applied to the issuance of amended birth certificates and amended driver's licenses (collectively, the "State Policies").

STATEMENT OF THE CASE

On April 30, 2021, Governor Greg Gianforte signed SB 280, 2021 Leg., 67th Sess. (Mont. 2021) ("SB 280") into law. SB 280 permitted amendments to the sex designation on birth certificates only where the applicant provided a court order and proof of surgery. *See id.*

SB 280 reversed procedures previously adopted by DPHHS in September 2017 that allowed transgender people to amend their birth certificates by submitting a completed gender-designation form attesting to gender transition, 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 Thirteenth Judicial District Court preliminarily enjoined SB 280 and its 2021 implementing regulation and ordered the State to reinstate the 2017 procedures. Dkt. 11-5. *Id.* at 32.

On June 10, 2022, DPHHS sought to circumvent the injunction by enacting the 2022 Rule, which categorically 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 DPHHS for openly and repeatedly defying the court's preliminary injunction. Dkt. 11-6.

On May 19, 2023, Gov. Gianforte signed into law SB 458, 2023 Leg., 68th Sess. (Mont. 2023). SB 458 created a narrow, binary definition of sex based on reproductive capability. SB 458 was one of myriad measures enacted in recent years attacking the rights of transgender Montanans.[1]

[1] *See*, *e.g.*, HB 121, 2025 Leg., 69th Sess. (Mont. 2025) (regulating transgender individuals' restroom use in publicly funded facilities, preliminarily enjoined in *Perkins v. State*, Cause No. DV 25-282, 4th Judicial District Court), May 16, 2025); SB 99, 2025 Leg., 68th Sess. (Mont. 2023) (prohibiting medical treatment of gender dysphoria in minors, enjoined in *Cross by & through Cross v. State*, 2024 MT 303, 419 Mont. 290, 560 P.3d 637); HB 539, 2023 Leg., 68th Sess. (Mont. 2023) (criminalizing "drag story hours," enjoined in *Imperial Sovereign Court v. Knudsen*, 699 F. Supp. 3d 1018 (D. Mont. 2023)); and HB 112, 2021 Leg., 67th Sess. (Mont. 2021) (prohibiting transgender women from participating in interscholastic athletics, enjoined in *Barrett v. State*, 2024 MT 86, 416 Mont. 226, 547 P.3d 630).

On February 20, 2024, 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." Dkt. 61 at 2; *see also* Mont. Admin. Reg. Notice 37–1002, No. 11 (June 10, 2022). The same February 2024 DPHHS announcement indicated that, going forward, the process for amending birth certificates would be subject to the provisions of SB 458. Dkt. 61 at 2.

In addition, in 2024, the Montana Department of Justice ("DOJ") and Attorney General Austin Knudsen adopted a new MVD policy 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. *See* Dkt. 11-2 ¶¶6–7.

On April 18, 2024, Plaintiffs–Appellees Jessica Kusner-Kalarchik and Jane Doe (together, "Appellees") filed this lawsuit against Defendants–Appellants the State of Montana, Governor Gianforte, DPHHS, DPHHS Director Brereton, DOJ, and Attorney General Knudsen (together, "Appellants") seeking declaratory and

injunctive relief with respect to the State Policies. Dkt. 1. Appellees asserted that the State Policies violate their rights under the Montana Constitution to equal protection, to privacy, and to be free from compelled speech; the Montana Administrative Procedure Act; and the Montana Governmental Code of Fair Practices. *Id.* ¶¶65–91 Dkt. 68, Ex. A, ¶97; Dkt. 70.

On May 17, 2024, Appellees moved for a preliminary injunction to prohibit Appellants from enforcing the State Policies. Dkt. 11, 12. On June 25, 2024, a different district court struck down SB 458, holding that it violated Mont. Const. art. V, §11(3). *Reagor et al. v. State of Montana et al.* (Cause No. DV 23-1245, 4th Judicial District Court), June 25, 2024. On February 18, 2025, another district court held that SB 458 violated the rights of privacy and equal protection and was therefore unconstitutional. *Edwards et al. v. State of Montana et al.* (Cause No. DV 23-1026, 4th Judicial District Court), February 18, 2025. SB 458 is currently permanently enjoined.

On December 16, 2024, the district court in the instant case granted Appellees' motion for a preliminary injunction, enjoining Appellants "from directly or indirectly enforcing" the State Policies. Dkt. 61 at 14. The district court found that Appellees demonstrated a likelihood of success on the merits, as well as irreparable harm, by establishing a valid prima facie case that the challenged state actions violate their fundamental right under Article II, Section 4 of the Montana Constitution to be

free from sex discrimination, and that the balance of equities and public interest favor preliminary injunctive relief. *Id.* at 12–13. This appeal followed. Dkt. 81.

STATEMENT OF THE FACTS

I. Gender Identity and Gender Dysphoria

"Gender identity" refers to a person's fundamental internal sense of belonging to a particular sex. Dkt. 11-3 ¶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 harmful to a person's health and well-being. *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 also 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." Dkt. 11-3 ¶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. 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." Dkt. 11-4 ¶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). Identity documents that are inconsistent with someone's gender identity and presentation "limit the utility of identity documents for security screening and identity verification." Dkt. 11-4, ¶25.

Forcing transgender people to use identity documents that do not match their gender identity creates a discordance that causes them to experience "a myriad of deleterious social and psychological consequences." Dkt. 11-3 ¶¶42, 45–47; *see also*

Dkt. 11-4 ¶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. Dkt. 11-3 ¶¶42, 45.

Being forced to use identity documents that do not match a person's gender identity can result in ridicule, harassment, accusations of fraud, discrimination, and violence when a person is called on to present identification that states a sex inconsistent with how the person publicly presents themself. *Id*. ¶¶45–46; Dkt. 11-4 ¶23. Such inconsistencies also can limit access to "services, employment, and social participation." *Id*. ¶24. In a study comparing participants who had changed the sex designation on their identity documents and others who had not, those who had 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

Identity documents inconsistent with gender identity also can cause transgender people to "isolate" to avoid situations involving discrimination or harassment, "lead[ing] to feelings of hopelessness, lack of agency, and despair." Dkt. 11-3 ¶45. This, in turn, can "cause major psychiatric disorders, including generalized anxiety disorder, major depressive disorder, posttraumatic stress disorder, emotional decompensation, and suicidality." *Id.*; Dkt. 11-4 ¶¶23–24.

Being socially and legally recognized with correct identification is essential to successful treatment. Dkt. 11-3 ¶44. Indeed, the accepted standards of care state that changing the sex designation on identity documents greatly helps alleviate gender dysphoria. *Id.; see also* 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).[2] 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. Dkt. 11-4 ¶13. Additionally, other studies have shown that accurate identity documents promote economic benefits, including higher rates of employment, and increased income. *Id*. ¶¶4, 20.

III. The Effects of the State Policies on Appellees

A. Jessica Kusner-Kalarchik

Jessica Kusner-Kalarchik is a forty-nine-year-old transgender woman, assigned a male sex at birth. Dkt. 11-1 ¶¶2, 4. Prior to issuance of the preliminary injunction below, her birth certificate still included a male sex designation, even though she has known she is female for many years. *Id.* ¶4.

Ms. Kusner-Kalarchik was diagnosed with gender dysphoria approximately three years ago. *Id.* ¶6. She lives her life as a woman in all circumstances and has

[2] https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644.

been living publicly as female since 2022. *Id.* ¶¶5–6. She has taken multiple steps to bring her body and gender expression into line with her female gender identity. *Id.*

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

Ms. Kusner-Kalarchik needs to have the sex designation on her birth certificate match what she knows to be her female sex, but the State Policies prevented that. *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. Kusner-Kalarchik has had personal experience with incidents of harassment and discrimination because of her transgender status in both her personal and professional life. *Id.* ¶¶10–12. Ms. Kusner-Kalarchik is typically perceived as female, so every time she is forced to present an identity document that incorrectly identifies her as male, she is forced to "out" herself as transgender, placing her at risk of harassment, discrimination, and violence. *Id.* ¶¶9 –13. Ms. Kusner-Kalarchik lives in fear of having to present her birth certificate to someone who may respond negatively or even violently. *Id.* ¶¶9, 13.

B. Jane Doe

Jane Doe is a 25-year-old transgender woman, assigned a male sex at birth. Dkt. 11-2 ¶¶2–3. Prior to issuance of the preliminary injunction, her birth certificate and driver's license still listed a male sex designation, even though she has known she is female for many years. *Id.* ¶¶3, 10.

In January 2022, Ms. Doe was diagnosed with gender dysphoria. *Id.* ¶4. That year, Ms. Doe began living and presenting fully and openly as the woman she knows herself to be. *Id.* She has taken various steps to bring her physical appearance and presentation into alignment with her sex. *Id.*

Ms. Doe needs to have the sex designation on her birth certificate match the sex she knows herself to be, but the 2022 Rule and SB 458 prohibited that. *Id.* ¶¶5–7. She also needs to have the sex designation on her Montana driver's license match what she knows to be her sex, but the MVD policy and SB 458 prohibited that. *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. Ms. Doe is concerned about presenting her identity documents to people who may harm her if they become aware she is transgender. *Id.* ¶¶9–12. She is typically perceived as female, so anytime she is

forced to present an identity document that 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 matched her appearance, and she has encountered challenges because of the discrepancy between the information on her driver's license and her physical appearance and presentation. *Id.*

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for a manifest abuse of discretion. *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶5, 409 Mont. 378, 515 P.3d 301. A court abuses its discretion when it acts "arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *Id.* A manifest abuse of discretion is one that is "obvious, evident, or unmistakable." *Id.*

"The grant or denial of injunctive relief is a matter within the broad discretion of the district court based on applicable findings of fact and conclusions of law." *Davis v. Westphal*, 2017 MT 276, ¶10, 389 Mont. 251, 405 P.3d 73. The district court's factual findings are reviewed for clear error. *See State v. Reynolds*, 2017 MT 25, ¶13, 386 Mont. 267, 389 P.3d 243. A court's "findings of fact are clearly erroneous if they are not supported by substantial credible evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made." *Id.* To the

extent the district court's ruling is based on legal conclusions, this Court "review[s] the district court's conclusions of law to determine whether the interpretation of the law is correct." *Weems v. State*, 2019 MT 98, ¶7, 395 Mont. 250, 440 P.3d 4.

"Statutes are presumed constitutional, and the party challenging a statute has the burden of proving it unconstitutional or showing that the statute infringes on a fundamental right." *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶11, 416 Mont. 44, 545 P.3d 1074 (internal citations omitted). Once "the challenger shows an infringement on a fundamental right, a presumption of constitutionality is no longer available." *Id.* Then, the law is subject to "a higher level of scrutiny and the burden necessarily shifts to the state to demonstrate that the statute is constitutional." *Id*.

SUMMARY OF THE ARGUMENT

Appellees have standing, both because the loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued, and also because their injuries are concrete and not speculative. Denying Appellees (and all transgender Montanans) access to accurate identity documents forces them to "out" themselves every time they are required to produce a birth certificate or driver's license, and exposes them to harassment, discrimination, and violence.

The district court, relying upon *Stensvad v. Newman Ayers Ranch, Inc.*, 2024 MT 246, 418 Mont. 378, applied the proper test in granting Appellees' motion for

preliminary injunction. The 2025 amendment to the preliminary injunction statute was not in effect at the time the preliminary injunction was entered and did not contain a retroactivity provision. In any event, the district court examined all four factors of the preliminary injunction test and determined that Appellees were entitled to a preliminary injunction even under the new standard adopted by the 2025 legislature.

The district court properly relied upon Appellees' declarations at the preliminary injunction hearing. The lone statement in Appellees' declaration that the district court relied upon was based upon the declarant's knowledge and belief and was admissible pursuant to well-established exceptions to the rule against hearsay.

The district court properly concluded that Appellees are entitled to a preliminary injunction because: 1) They are likely to succeed on the merits of their claims that the State Policies violate their right to equal protection since those policies discriminate on the basis of sex and as such are subjected to strict scrutiny. Appellants cannot demonstrate that the State Policies are justified under any level of scrutiny; 2) Appellees will suffer irreparable harm–both in the form of the loss of a constitutional right as well as the concrete, non-speculative injuries arising from forced outing–if the State Policies remain in effect; and 3) the balance of the equities and public interest tilt sharply in Appellees' favor.

The preliminary injunction is not overbroad. The district court appropriately tailored the injunction based on the parties, facts, and law because the State Policies' intended effect is to deny Appellees (and all transgender Montanans) access to accurate identity documents.

ARGUMENT

I. Appellees have standing.

Appellants argue that Appellees lack standing, claiming that Appellees' alleged injuries are speculative. AOB at 14-15. Appellants' argument has no merit.

To have standing, the Montana Constitution requires plaintiffs to show they have suffered "a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action." *Schoof v. Nesbit*, 2014 MT 6, ¶15, 373 Mont. 226, 316 P.3d 831 (internal citation omitted). If the alleged injury "is premised on the violation of constitutional and statutory rights, standing depends on whether the constitutional or statutory provision ... can be understood as granting persons in the plaintiff's position a right to judicial relief." *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶11, 389 Mont. 122, 406 P.3d 427 (internal quotation marks omitted).

In the context of claims under Montana's equal protection guarantee, the injury that a plaintiff needs to show is the "denial of equal treatment resulting from the imposition of [a] barrier." *Gazelka v. St. Peter's Hosp.*, 2015 MT 127, ¶15, 379

Mont. 142, 347 P.3d 1287 (internal quotation marks omitted); *see also Schoof v. Nesbit*, 2014 MT 6, ¶¶19–23, 373 Mont. 226, 316 P.3d 831 (concluding that the plain language of provisions of the Montana Constitution confers a personal stake sufficient to establish standing for a plaintiff seeking to vindicate the rights guaranteed by those sections).

Appellees' injuries derive from the "denial of equal treatment resulting from the imposition of [a] barrier." *Gazelka*, ¶15 (finding that unequal treatment and unequal opportunity were sufficient to establish standing where the plaintiff brought claims challenging discrimination based on her social condition). Specifically, as the district court acknowledged, the State Policies "affect cisgender and transgender Montanans in an unequal manner," Dkt. 61 at 8, and unequal treatment of transgender people "necessarily discriminates on the basis of sex." *Id*. at 10. The denial of equal treatment resulting from the State Policies confers standing on Appellants to challenge their constitutionality.

In addition, Appellees' injuries are not speculative. Every time a transgender person is compelled to share private information related to their transition, they are forced to publicly "out" themselves. *See* Dkt. 11-3 ¶¶15, 42, 45–47; Dkt. 11-4 ¶¶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 humiliating and degrading. *See* Dkt. 11-3 ¶¶15, 42, 45–47; Dkt. 11-4 ¶¶17–18, 23, 26. Appellees

have suffered, and will continue to suffer, this humiliation and degradation if they are prohibited from amending the sex designation on their identity documents to match what they know their sex to be. *See* Dkt. 11-1; Dkt. 11-2. The "threatened loss" of Appellees' rights is a "concrete injury" sufficient to confer standing on them. *See Cross*, 2024 MT 303, ¶16 (holding that plaintiffs established standing through a "concrete injury" consisting of a "threatened loss" of their rights).

II. The district court did not err in applying the preliminary injunction standard.

The district court entered its preliminary injunction on December 16, 2024, after this Court held in *Stensvad* that an applicant must make at least a "sufficient showing" of each of the four preliminary injunction factors[3] based on the "serious questions" and "sliding scale" approach. *Stensvad*, ¶¶25–29; *see also* Dkt. 61 at 14:5–12.

Thereafter, on March 25, 2025, an amendment to the preliminary injunction statute took effect. *See* §27–19–201, MCA. The amended statute continues to require a district court to assess the four preliminary injunction factors independently but adds that a district court "may not use a sliding scale test, the serious questions test,

[3] The four factors require that the applicant for a preliminary injunction adequately show that (a) they are "likely to succeed on the merits"; (b) they are "likely to suffer irreparable harm in the absence of preliminary relief"; (c) "the balance of equities tips in [their] favor"; and (d) the order is in the public interest." *Stensvad*, ¶10.

flexible interplay, or another federal circuit modification to the criteria." H.B. 409, 69th Leg. Sess. (Mont. 2025) (codified at §27–19–201(4)(b), MCA).

Appellants argue that the district court abused its discretion by not complying with the amended preliminary injunction statute. As explained below, that amendment does not apply here. Even if it did, that would not change the outcome of this appeal, because the district court did not rely on the "sliding scale" or "serious questions" tests.

A. The 2025 amendment to §27–19–201, MCA does not apply.

Appellants incorrectly argue that the 2025 amendment to the preliminary injunction statute, which took effect months *after* the district court entered the preliminary injunction here, abrogates that order and requires that the district court redo its analysis based on the subsequently enacted law.

First, this Court's review of a preliminary injunction "is confined to whether the district court manifestly abused its discretion ... 'under the *governing* preliminary injunction standards.'" *Mercer v. Mont. Dep't of Pub. Health & Hum. Servs*., 2025 MT 9, ¶12, 420 Mont. 201, 562 P.3d 502 (emphasis added). The governing standard when the district court entered the preliminary injunction was set forth in *Stensvad*. Contrary to Appellants' argument, AOB at 17, it is irrelevant that this *appeal* was *pending* when the 2025 amendment took effect.

Second, in Montana, laws are not retroactive unless the legislature clearly expresses its intent to make them so. *See* §1–2–109, MCA ("No law contained in any of the statutes of Montana is retroactive unless expressly so declared."). The 2025 amendment includes no retroactivity clause and thus does not apply. *See id.* If the amendment were retroactive, its application would call into question every preliminary injunction issued before March 25, 2025.

When Montana lawmakers have intended changes to laws governing injunctions to apply retroactively, they have expressly stated that intent. For example, an amendment to §27–19–103, MCA regarding "when an injunction may not be granted" expressly states that it applies "retroactively, within the meaning of [section] 1–2–109, to all occurrences on or after January 1, 2021." SB 135, 68th Leg. Sess. (Mont. 2023), codified at §27–19–103, MCA. Had the Legislature intended the 2025 amendment to apply retroactively, it would have said so. *See Town Pump, Inc. v. Petroleum Tank Release Comp. Bd.*, 2008 MT 15, ¶20, 341 Mont. 139, 176 P.3d 1017 (legislature's revision of 13 other provisions in chapter 11 expressly making three of them retroactive was "evidence that the Legislature clearly knows how to make amendments retroactive when it desires to do so").

In any event, without a clear and valid legislative statement to the contrary, the retroactivity of statutory procedural changes applies only to rulings not yet made, else decades of longstanding rulings issued before those changes would need to be

revisited. *See Wenz v. Schwartze*, 183 Mont. 166, 177, 598 P.2d 1086, 1093 (1979) (finding that the court's pre-effective date jurisdictional rulings are not subject to the UCCJA even if considered procedural) (citing *Simonson v. Int'l Bank*, 14 N.Y.2d 281, 289 (1964) ("But different considerations are involved ... when proceedings are already pending.... [W]hile procedural changes are ... applicable to subsequent proceedings in pending actions, ... it takes a clear expression of legislative purpose to justify a retrospective application of even a procedural statute so as to affect proceedings previously taken in such actions")).

Finally, this Court should reject Appellants' alternative argument that the 2025 amendment merely "clarified" the meaning of the injunction statute. AOB at 17–18. Appellants cite *McCoy v. Chase Manhattan Bank, USA*, 654 F.3d 971, 974 (9th Cir. 2011), but it is distinguishable. In *McCoy*, the legislature explicitly stated, "This Act provides a clarifying amendment ... and does not change the meaning of the existing statute," and "[t]he clarification is prompted by a conflict in recent court decisions construing this section." *Id*. at 974.

This is not the case here. The Montana legislature has not used any similar language in relation to the 2025 amendment. Legislative intent must be determined "from the act itself and no other source." *Tipton v. Montana Thirteenth Jud. Dist. Ct.*, 2018 MT 164, ¶13, 392 Mont. 59, 421 P.3d 780; *Saint Vincent Hosp. & Health Ctr., Inc. v. Blue Cross & Blue Shield of Mont.*, 261 Mont. 56, 60, 862 P.2d 6, 9

(1993). Because the legislature has provided no indication of its intent to clarify rather than change the law in the statute, this Court should reject Appellants' argument.[4]

B. Even if the 2025 amendment to §27–19–201, MCA applied, the district court did not employ a sliding scale approach or fail to properly apply the likelihood of success test.

The district court went *beyond* the floor set by *Stensvad* to find not just a "sufficient showing" of "serious questions," but also that Appellees had established a "likelihood" of success on the merits and of irreparable harm absent preliminary relief. Thus, regardless of whether the 2025 amendment applies, the outcome is the same.

Contrary to Appellants' argument, AOB at 17, the district court did not "implicitly" apply a sliding scale approach. Nowhere in the Order did the district court state that it was applying a sliding scale test. To the contrary, the order quoted *Stensvad*'s acknowledgment that "the preliminary injunction standard sets forth a conjunctive test that requires an applicant to make a sufficient showing *as to each of*

[4] Additionally, this Court made clear in *Stensvad* that "[t]he serious questions test continues to allow Montana courts to preserve the status quo until a full trial can be held without having to tread too far into the merits of the case." *Stensvad*, ¶ 26. Appellants ignore *Stensvad* and instead rely on an earlier case interpreting §27–19–201, *Montanans Against Irresponsible Densification, LLC v. State*, 2024 MT 200, ¶ 9, 418 Mont. 78, 555 P.3d 759. As the most recent Montana Supreme Court case, *Stensvad*, cited by the district court, controls.

the four factors," demonstrating that the district court would *not* be applying a sliding scale test. Dkt. 61 at 5:5–8 (emphasis added); *Stensvad*, ¶ 9.

The district court separately analyzed each factor. First, the district court held the Appellees "have met their burden of establishing likelihood of success on the merits under the preliminary injunction standard" by "rais[ing] a valid prima facie case the challenged state actions violate their fundamental right to be free from discrimination on the basis of sex under the Montana Constitution." Dkt. 61 at 12:7–11. Specifically, the court found that (1) "[Appellees] have established the challenged state actions affect cisgender and transgender Montanans in an unequal manner," Dkt. 61 at 8:21–23; (2) discrimination based on transgender status constitutes discrimination based on sex, *id*. at 9:6–9; (3) "[i]f the challenged state actions discriminate against transgender individuals on the basis of their transgender status, they also necessarily discriminate on the basis of sex," *id*. at 10:16–18); (4) the right to be free from discrimination based on sex is a fundamental right, warranting a strict scrutiny analysis, *id*. at 11:4–6; and (5) under a strict scrutiny analysis, Appellants have not shown that the challenged actions are narrowly tailored, *id*. at 11:23–24. The district court then reiterated that "[Appellees] have demonstrated a likelihood of success on the merits of their equal protection claim." *Id*. at 13:16–18.

Second, the district court held that Appellees "have established a prima facie case the challenged state actions infringe their constitutional rights under the Montana State Constitution's equal protection clause" and thus "have demonstrated a likelihood of irreparable harm absent an injunction." Dkt. 61 at 12:22–13:3.

Third and fourth, the district court assessed the balance of equities and the public interest. Dkt. 61 at 13:5–14:3. It analyzed these factors together because "[w]hen the government opposes a preliminary injunction, these two factors merge into one inquiry." *Id.* at 13:7–9. This was appropriate.

Further, as the district court noted, this Court, citing Ninth Circuit precedent, has held that "[a] plaintiff's likelihood of success on the merits of a constitutional claim ... tips the merged third and fourth factors decisively in [their] favor." *Id*. at 13:13–19 (citing *Planned Parenthood*, ¶40.) The district court applied this Court's binding precedent and found that the balance of equities tips in Appellees' favor, stating that "the government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented." *Id*. at 20:20–24. Similarly, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id*. at 13:24–14:3 (citing *Planned Parenthood*, ¶40).

III. The district court did not err in relying on Appellees' declarations.

Appellants argue that the district court erred in granting a preliminary injunction because Appellees' declarations purportedly were improper under §27–19–303(2)(b), MCA. AOB at 18. The Court should reject this argument.

§27–19–303(2)(b), MCA states that "[a]n injunction order may not be granted on affidavits unless: ... the material allegations of the affidavits setting forth the grounds for the order are made positively and not upon *information* and belief." *See* §27–19–303(2)(b), MCA. This prohibition does not apply here. Appellees' declarations were not based on "information and belief" but rather stated that they were based on "*knowledge* and belief." *See, e.g.*, Dkt. 11-2 at 5 (emphasis added). Appellants cite no authority establishing that affidavits based on "knowledge and belief" are invalid under §27–19–303(2)(b), MCA.

In any event the court never cited the declarations, nor did it indicate that it was relying on any disputed factual content in those declarations. *See* Dkt. 61. Rather, the court concluded, based on the legal arguments presented, that Appellees established a likelihood of success on the merits, that they suffered irreparable harm, and that the balance of equities and public interest tip in their favor. *Id.* at 12–14.

The only fact that arguably could have been based on a declaration is the uncontested fact that Ms. Doe was denied an amended driver's license based on an MVD policy that an amended driver's license containing a sex designation consistent

with a person's gender identity is only available if the person provides an amended birth certificate to the MVD. Dkt. 11-2 ¶7. Although Appellants repeatedly refer to this as a "purported" or "alleged" MVD policy, AOB at 12, 22, they never actually dispute that this was the operative policy at the time the preliminary injunction was issued. Indeed, they have failed to submit any evidence suggesting the contrary. In any event, if this were not the MVD's policy, then it is unclear how Appellants could be harmed by a preliminary injunction enjoining it.

Appellants also argue that the only evidence of the MVD's policy is "unsourced hearsay that one Plaintiff could not obtain a new driver's license without a court order and a corrected birth certificate." AOB at 19. However, this statement is based on what Ms. Doe was told by the MVD's staff. Dkt. 11-2 ¶7. Appellants do not dispute that this interaction occurred or deny that this is what Ms. Doe was told. This statement is not hearsay. Rather, it qualifies as an admission by a party opponent because it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of that relationship." Mont. R. Evid. 801(d)(2)(D).

Alternatively, even if Rule 801(d)(2)(D) did not apply, the statement would still fall under the hearsay exception for evidence of a declarant's "[t]hen-existing state of mind" or "intent." Mont. R. Evid. 803(3). The statement that the MVD's staff made was based on the agency's current policy regarding what was required for

Ms. Doe to obtain an amended driver's license. The statement is admissible as evidence of the agency's intent to enforce that policy.

IV. The district court properly issued the preliminary injunction.

A. Appellees established a likelihood of success on the merits.

As shown below, the district court rightly concluded that "[Appellees] have met their burden of establishing likelihood of success on the merits under the preliminary injunction standard" because they "have raised a valid prima facie case [that] the challenged actions violate their fundamental right to be free from discrimination on the basis of sex under the Montana Constitution." Dkt. 61 at 12:8–11.

1. Appellees established that they are likely to succeed in showing that the State Policies violate the Montana Constitution because they discriminate based on sex.

The district court ruled that the Appellees are likely to prevail on their claim that the State Policies discriminate based on sex because they "affect cisgender and transgender Montanans in an unequal manner," Dkt. 61 at 8:21–23, and because unequal treatment of transgender people "necessarily discriminates on the basis of sex." *Id*. at 10:18. That ruling was correct. As Justice McKinnon explained in her concurrence in *Cross*, "transgender discrimination is, by nature, sex discrimination." *Cross*, ¶63.

Like Justice McKinnon, *see id*., the district court found persuasive the U.S. Supreme Court's reasoning in *Bostock v. Clayton County*, 590 U.S. 644 (2020), *see* Dkt. 61 at 9:13–15, a title VII case that held that "it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex." *Bostock*, 590 U.S. at 660. *Bostock* explained that discrimination against those who are transgender "penalizes a person identified as male at birth for actions or traits or actions" that would be tolerated if that person had been "identified as female at birth." *Id.; see also id*. at 660–61 ("transgender status [is] inextricably bound up with sex."). That is true. It is not even possible to define the word "transgender" without using the word "sex."

Appellants may incorrectly argue that, in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), the U.S. Supreme Court held that *Bostock*'s reasoning does not apply to claims based on the equal protection clause. The Supreme Court did not question *Bostock*'s reasoning in *Skrmetti*, however, and it expressly stated that it was *not* deciding the issue of *Bostock*'s reach. 145 S. Ct. at 1834 ("We have not yet considered whether *Bostock*'s reasoning reaches beyond the title VII context, and we need not do so here.").[5]

[5] While the lower courts are divided on that issue, the Ninth Circuit and Tenth Circuits, and numerous federal district courts have followed *Bostock*'s reasoning in considering equal protection claims. *Griffith v. El Paso County*, 129 F.4th 790, 807 (10th Cir. 2025); *Hecox v. Little*, 79 F.4th 1009, 1026-27 (9th Cir. 2023), *cert.*

Appellants also may argue that, when the Supreme Court's granted certiorari in *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024), and then vacated that decision and remanded the case, *Stitt v. Fowler*, No. 24–801, 2025 WL 1787695, at *1 (U.S. June 30, 2025), it disapproved of *Fowler*'s conclusion that *Bostock*'s reasoning applies to equal protection claims and therefore the district court erred when it "adopt[ed]" *Fowler*'s "reasoning." *See* Dkt. 61 at 10. Not so. A U.S. Supreme Court order granting cert., vacating the judgment it was reviewing, and remanding the case (known as a "GVR") "doesn't necessarily signal a disagreement with the panel's reasoning or result." *Vincent v. Bondi*, 127 F.4th 1263, 1264 n.1 (10th Cir. 2025). Instead, a GVR is simply "an efficient way for the Supreme Court to obtain the views of the lower courts on the effect of a new decision, whatever those views may be." *Klikno v. United States*, 928 F.3d 539, 544 (7th Cir. 2019) (explaining that a GVR does not carry with it "some kind of presumption that the result would change"); *see also Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir. 2006) ("[A] GVR does not indicate, nor even suggest, that the lower court's decision was erroneous.").

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granted, 2025 WL 1829165 (July 3, 2025) (No. 24-38); *de la Fuente Díaz v. González*, 2025 WL 1549377, at *6 (D.P.R. May 30, 2025*); LeTray v. City of Watertown*, 718 F.Supp.3d 192, 205 (N.D.N.Y. 2024); *D.T. v. Christ*, 552 F.Supp.3d 888, 896 (D. Ariz. 2021).

Appellants further may argue that, even apart from the application of *Bostock*'s reasoning, *Skrmetti* rejected the conclusion of the district court, Justice McKinnon, and *Fowler* that laws that discriminate based on transgender status necessarily discriminate based on sex under equal protection analysis. That too is not accurate. In *Skrmetti*, the Supreme Court did not issue any ruling regarding discrimination based on transgender status or sex. It instead concluded that a Tennessee law regulating medical treatment for gender dysphoria in minors did not classify based on sex or transgender status but rather based on age and medical use. *Skrmetti*, 145 S. Ct. at 1829–30, 1833. In fact, the Court twice expressly cabined its sex discrimination analysis to "the medical context." *Id*. By contrast, the State Policies are not based on the government's regulation of medical treatment nor on age. Moreover, the *Skrmetti* decision made clear that it was not addressing laws that "do[] not regulate a class of treatments or conditions" but instead "regulate[] a class of *persons* identified on the basis of a specified characteristic." *Id*. at 1834 n.3. That is what the State Policies do, treating the class of Montanans who are transgender differently from the class of Montanans who are not.

Even had the Supreme Court ruled that laws discriminating based on transgender status do not discriminate based on sex or rejected applying *Bostock*'s reasoning to federal equal protection claims—neither of which it did—that would not matter. As Justice McKinnon explained in her concurrence in *Cross*, "the

Montana Constitution's equal protection provision offers a critical distinction [from the U.S. Constitution's equal protection clause]—like Title VII, it explicitly prohibits discrimination on the basis of sex. Thus, even if the Supreme Court limits *Bostock*'s recognition of transgender status-based sex discrimination to the Title VII context, the Montana Constitution is not limited in the same way. *Bostock*'s logic is sound." *Cross*, ¶63; *see also Planned Parenthood*, ¶73 ("Our equal protection clause guarantees more individual protection that does the Fourteenth Amendment of the U.S. Constitution.").

In addition to the logic that discrimination against transgender people necessarily discriminates based on sex, the State Policies also can be seen to discriminate based on sex for a slightly different reason. The difference between cisgender and transgender people rests on whether the *sex* they were assigned at birth is the same as or different from the sex they currently identify as and know themselves to be. *See* Dkt. 12 at 5. The State Policies therefore discriminate against transgender people based on the sex they were identified as at birth regardless of whether *Bostock*'s reasoning should be followed in equal protection cases. In other words, Appellants refused to provide each Appellee a birth certificate listing her sex

as female only because she was identified as male rather than female at birth, which is unequal treatment based on sex.[6]

Appellants raise a host of arguments trying to escape the conclusion that they are treating Montanans differently based on sex, but none bear even minimal scrutiny.

Appellants first argue that the State Policies do not discriminate based on sex because they do not treat people in similar circumstances unequally. AOB at 20. But this Court held in *Vision Net v. Dep't of Rev.*, 2019 MT 205, ¶16, 397 Mont. 118, 447 P.3d 1034, that "two groups are similarly situated if they are equivalent in all respects other than the factor constituting the alleged discrimination." Transgender and cisgender Montanans are similarly situated in their need for birth certificates and driver's licenses that list the sex they identify as and know themselves to be, but Appellants discriminate against transgender Montanans by refusing to allow them to have birth certificates and driver's licenses that match their gender identity while allowing cisgender Montanans to have such identity documents.[7]

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[6] It does not matter that the district court did not rely on this analysis. As this Court held in *Grosvold v. Neely*, 2025 MT 99, ¶11, 568 P.3d 525, this Court "will affirm a district court' ruling for reaching the right result, even if it reached that result for the wrong reason."

[7] Appellants note that Appellees challenge only the amendment process and not the recording of the sex someone was identified as at birth. AOB at 22; *see also* AOB at 4–8. That is true. Appellees are not challenging the original recording of what sex

Furthermore, transgender and cisgender Montanans are similarly situated in sometimes needing the State to issue them *amended* birth certificates, but they are treated unequally in the ability to get them given that the State allows cisgender people to obtain amended birth certificates making changes to their original birth certificate,[8] including even a change to the sex listed on their original birth certificate if their sex was incorrectly listed due to a scrivener's error or incorrect data entry,[9] while not allowing transgender Montanans to obtain the amended identity documents they need. *See Ray v. McCloud*, 507 F. Supp. 3d 925, 934–35 (S.D. Ohio 2020) (transgender individuals whom a state denies "the opportunity to have a birth certificate that reflects how they present to society" "are similarly situated to people

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someone was identified as at birth but rather the restriction on who may obtain an *amended* birth certificate. *See* Dkt. 61 at 7–8 ("Whereas cisgender Montanans can obtain amended birth certificates and driver's licenses with a sex marker accurately reflecting their gender identity, transgender Montanans cannot."). In addition, Appellees are not asking to have Appellants destroy an individual's original birth certificate; they are only challenging Appellants' unequal treatment of cisgender and transgender Montanans with regard to who can obtain an amended birth certificate that they can present to others without disclosing that they are transgender and exposing themselves to potential discrimination, harassment, and even violence. Appellees have no objection to Appellants retaining their original birth certificates for Appellants to examine for other legitimate State purposes.

[8] *See* §40–5–234(4), MCA (permitting issuance of an amended birth certificate when there has been an order of nonpaternity based on a genetic test exclusion); §40–6–123, MCA (requiring issuance of a substitute certificate of birth upon a Montana court order or upon the request of a court of another state).

[9] *See* Mont. Admin. Rule 37.8.311(5)(b)(i).

who are allowed to change" what was on their original birth certificate); *see also F.V.*, 286 F. Supp. 3d at 1141 ("laws [that] give certain 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" violate equal protection).

Appellants next argue that the State Policies do not discriminate based on sex because "[n]o person, no matter their sex or gender identity, can amend their birth certificate merely by invoking their gender identity." AOB at 20. That argument is untenable. Appellants' policies discriminate based on sex because they deny an individual the ability to change the sex marker on their identity documents if it is different from the sex they identify as.[10] Appellants' argument ignores the "basic principle" that the Constitution "protects *persons*, not *groups*." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis in original); *see also J.E.B. v. Alabama*, 511 U.S. 127, 131, 146 (1994) (holding that government action that treats an individual unequally because of their sex violates equal protection even though the challenged practice applies equally to both sexes). This is why this Court

[10] Thus, even in the very unusual situation that Appellants imagine where Appellants allowed someone assigned male at birth to change the sex marker on their birth certificate to female because they believed they were transgender but then denied that person the ability to change the sex marker back to male if they no longer believed that, *see* AOB at 27, would still discriminate based on sex. Appellants would be denying that person the ability to change the sex marker on their amended birth certificate because it does not match the sex they now identify as.

should not follow the out-of-state cases Appellants cite that erroneously conclude that that restrictions on transgender individuals' ability to obtain amendments to the sex designations on their birth certificates do not discriminate based on sex under the U.S. Constitution because they purportedly "treat[] the sexes equally." *See* AOB at 21–22 (citing *Gore v. Lee*, 107 F.4th 548, 555 (6th Cir. 2024); *Corbitt v. Sec'y of the Alabama L. Enf't Agency*, 115 F.4th 1335, 1346 (11th Cir. 2024)).

As the U.S. Supreme Cout held in *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015), laws restricting marriage to different-sex couples "abridge central precepts of equality" even though they equally constrain both gay people and heterosexuals from marrying someone of the same sex. *See also McLaughlin v. Florida*, 379 U.S. 184, 190–91 (1964) (rejecting the "narrow view of the Equal Protection Clause" that "equal application" of a discriminatory law makes it constitutional). As the Supreme Court recently explained in *Skrmetti*, "The antimiscegenation law that this Court struck down in *Loving v. Virginia* ... would not have shed its race-based classification had it, for example, prohibited '*any* person from marrying an individual of a different race.' Such a law would still have turned on a race-based classification: It would have prohibited Mildred Jeter (a Black woman) from marrying Richard Loving (a white man), while permitting a white woman to do so.'" 145 S. Ct. at 1831 (emphasis in original). So here, Appellees would be able to obtain a birth certificate identifying

their sex as the sex with which they identify had they been identified as female when they were born rather than male.

Appellants' further argument that the State Policies treat people differently based only on "the justification for the birth certificate amendment," AOB at 20, merely restates what their policies do, not whether they are constitutional. *See*, *e.g.*, *Henry v. State Comp. Ins. Fund,* 199 MT 126, ¶28, 295 Mont. 449, 982 P.2d 456 (rejecting argument that unequal treatment of workers who suffered a work-related injury on one shift and workers who suffered a work-related injury on more than one work shift were not similarly situated because each class was required to seek benefits under a separate legislative enactment when that is what was being challenged and members of both classes had the same need for rehabilitation benefits). In the instant case, the State's policy of allowing Montanans to change the sex marker on their original birth certificate based on the justification that it does not accurately reflect the sex they were assigned at birth (which only cisgender people would seek) but not allowing people to change that sex marker for the justification that it does not reflect the sex they identify as and know themselves to be (which only transgender people would seek) is precisely what Appellees claim violates equal protection by treating transgender people differently than cisgender people.

Appellants additionally seek to rely on a footnote in *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), to argue that the policies at issue in this case do not

discriminate based on transgender status, AOB at 24, but that is wrong for four reasons. First, this Court has rejected *Geduldig*'s rationale that differential treatment based on pregnancy does not constitute sex discrimination. *See Bankers Life & Cas. Co.*, 263 Mont. 156, 161, 866 P.2d 241, 243 (1993) ("differential treatment of pregnancy constitutes sex discrimination in Montana"). Second, the U.S. Supreme Court explained in *Skrmetti* that *Geduldig* "does not speak to" government action that treats unequally a "class of *persons* identified on the basis of a specified characteristic," 145 S. Ct. at 1834 n.3 (emphasis in original), as is the case here with respect to the class of people who are transgender. Third, the Court explained in *Geduldig* that it believed that a law that denied women pregnancy-related disability benefits should be seen as facially neutral because covering disabilities due to pregnancy would decrease the level of benefits or lead to increased employee contributions for non-pregnant women as well as men, *id*., so women were on both sides of the line of who was being adversely affected. By contrast, the State Policies do not draw a line in which some transgender individuals are benefitted and some harmed. Fourth, *Geduldig*'s footnote exempted from its analysis situations involving "invidious discrimination against members" of one group, *id*., and, as shown *supra, n.*1, the State Policies are part of a broad legislative attack that does involve invidious discrimination against transgender Montanans.

Appellants' other argument that Appellees are challenging the contours of a class rather than the classification itself, AOB at 37, relies on cases like *Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev*., 438 F.3d 195 (2d Cir. 2006). But the cases Appellants cite arose in the unique context of race-based affirmative action, where the Constitution requires that the classification be crafted as narrowly as possible. *Id.* at 200–01; *Orion Ins. Grp. v. Wash. State Off. of Minority & Women's Bus. Enters*., No. 16–5582, 2017 WL 3387344, at *2 (W.D. Wash. Aug. 7, 2017) *aff'd*, 754 F. App'x 556 (9th Cir. 2018). Subsequent decisions have limited *Jana-Rock* to these sorts of "remedial statutes," *see, e.g.*, *Doe v. Horne*, 115 F.4th 1083, 1106–07 (9th Cir. 2024), which of course cannot describe the State Policies. And even if *Jana-Rock* did apply here, that decision recognized that under-inclusiveness triggers heightened scrutiny if the exclusion was "motivated by a discriminatory purpose," 438 F.3d at 200. The State Policies' rejection of the 2017 policy to instead categorically preclude transgender Montanans from obtaining birth certificates reflecting their gender identity shows that the State Policies were adopted to discriminate against transgender people.

2. Because Appellants' policies discriminate based on sex, they must be subjected to strict scrutiny.

This Court explained in *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶17, 325 Mont. 148, 104 P.3d 445, that "when addressing a challenge under the Montana Constitution's Equal Protection Clause," "one of three levels of scrutiny appl[ies]."

"Strict scrutiny applies if a suspect class or fundamental right is affected." *Id*. "Middle tier scrutiny [applies] if the law affects a right conferred by the Constitution but is not found in the Constitution's Declaration of Rights," *id*., ¶18, which does not apply here because the right to equal protection is found in the Declaration of Rights. "The rational basis test is appropriate when neither strict scrutiny nor middle tier scrutiny apply." *Id*., ¶19. This Court further explained in *Butte Community Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986), that a right is "fundamental" 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."

While this Court has never definitively determined what level of scrutiny should be applied to sex discrimination, Justice McKinnon correctly concluded in her concurrence in *Cross* that "[s]trict scrutiny is undoubtedly the appropriate tier of scrutiny" that should be applied to state action that violates "the right to be free from discrimination based on sex." *Cross*, ¶62. As she explained, that is because "the right to be free from discrimination based on sex" is a "fundamental" right, *id*., given that "Article II, Section 4 is unequivocal in its intolerance for discrimination, which includes discrimination based on sex." *Id*., ¶64. That is precisely what the district

court concluded. Dkt. 61 at 11:4–5 ("the right to be free from discrimination on the basis of sex is a fundamental right").[11]

The right not to be discriminated against based on sex meets the test of a fundamental right enunciated in *Butte Community Union*. Article II, Section 4 is part of the Declaration of Rights, and "this Court has repeatedly held that the rights enumerated in the Declaration of Rights (Article II) of Montana's Constitution are fundamental constitutional rights." *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶25, 349 Mont. 475, 204 P.3d 693; *see also Snetsinger*, ¶15 (concluding that the right to equal protection under the Montana Constitution "embod[ies] a *fundamental* principal of fairness") (emphasis added). In addition, regardless of whether the protection against sex discrimination flows from Section 4's guarantees of "dignity,"[12] "equal protection of the laws," or not being subjected to

[11] Appellants object that the sentence in Article II, Section 4 that the district court relied on to conclude that the right not to be discriminated against based on sex is fundamental was not the basis for strict scrutiny advanced by Appellees and that this was unfair to Appellants. AOB at 2, 32. Appellants suffered no harm, however, because they have challenged the district court's reasoning here. *See also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

[12] As this Court has explained, "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.

discrimination "in the exercise of … civil or political rights on account of ... sex," it is a right "without which other constitutionally guaranteed rights would have little meaning." That is because, without the right to equal protection, the Montana Constitution's other rights would have no meaning at all to Montanans deprived of those rights because of their sex.

Discrimination based on sex also should receive strict scrutiny based on this Court's holding that "[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 C.H*. 210 Mont. 184, 198, 683 P.2d 931, 938 (1984) (internal quotation marks and citation omitted). Numerous state supreme courts have held that sex discrimination deserves strict scrutiny for such reasons. *See, e.g*., *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 18–20, 95 Cal. Rptr. 329, 340–41, 485 P.2d 529, 5440–41 (1971); *Baehr v. Lewin*, 74 Haw. 530, 580, 852 P.2d 44, 67 (1993); *In Interest of McLean*, 75 S.W.2d 696, 698 (Tex. 1987), and so should this Court.[13]

[13] Even if discrimination based on sex for some reason did not warrant application of strict scrutiny, Appellees also demonstrated below that discrimination based on transgender status meets all the requirements to be found a suspect classification. As Appellees' briefing on their preliminary injunction motion showed, *see* Dkt. 12 at 21–25; Dkt. 34 at 5–6, transgender people in Montana and elsewhere (1) have been "subjected to …a history of purposeful unequal treatment," and (2) "have been "relegated to such a position of political powerlessness as to command extraordinary protection form the majoritarian political process," which are the two requirements

3. Appellees established that they are likely to succeed in showing that the challenged policies cannot satisfy strict scrutiny.

"Under strict scrutiny, the government must show" that the state action being challenged "is the least onerous path to a compelling state interest." *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 75, 416 Mont. 44, 545 P.3d 1074; *McDermott v. Mont. Dep't of Corr.,* 2001 MT 134, ¶ 31, 305 Mont. 462, 29 P.3d 992 ("Under this standard, the State has the burden of showing that the classification or State action is narrowly tailored to serve a compelling State interest."); *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364 (adding that the state action "must be narrowly tailored to effectuate *only* that interest") (emphasis added).

The district court pointed out that, in opposing Appellees' motion for a preliminary injunction, Appellants "offer[ed] no argument regarding the state's interest or how the challenged state actions relate to that interest" and that Appellants also had "not demonstrated that the challenged state actions are narrowly tailored." Dkt. 61 at 11:23–24. Accordingly, Appellants have waived any argument that they have met their burden to demonstrate that the State Policies satisfy strict scrutiny.

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for a classification to be held suspect under the Montana Constitution. *In re Matter of S.L.M.*, 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997); *C.H.*, 210 Mont. at 33. As noted in footnote 6 above, this Court can affirm on this alternative basis for applying strict scrutiny to the State Policies.

Appellants for the first time now contend that their policies "protect the integrity and accuracy of birth certificates by ensuring that they accurately reflect one's biological sex"; "maintain a consistent definition based on physical identification at birth" used in "records-matching programs used by various state agencies"; "further[] public health and research capabilities, including statistical studies related to maternal health, public-health surveillance, and local health planning"; and "ensure equality for women" by providing "a ready, reliable, non-invasive means of verifying the biological sex of participants in sports" "sleeping placement, and restroom usage." AOB 38–40. Even were those arguments not waived, Appellants have submitted no evidence that would meet their burden of *demonstrating* that those interests are compelling, are narrowly tailored to effectuate only those interests, and are the least onerous path to achieving such state interests. Appellants have not even submitted any arguments that the interests they have now asserted are compelling or adequately narrowly tailored.

Furthermore, the district court concluded that a state interest of "ensuring accurate vital statistics" could not be narrowly tailored because

> [p]rior to the implementation of the challenged state actions, transgender Montanans were able to obtain amended birth certificates and drivers licenses. [Appellees] argue nothing in the public record supports a finding there were problems maintaining accurate vital statistics before the implementation of the challenged state actions. Thus, the state interest could presumably be effectuated without the challenged state actions. If the challenged state actions are not

> necessary to effectuate the state interest, they cannot be narrowly tailored.

Dkt. 51 and 11–12.[14] *See also Ray*, 507 F. Supp. 3d at 938 ("[T]he idea that the State of Ohio has a true interest in maintaining historically accurate records is undermined by the fact that Ohio permitted transgender people to change the sex marker on their birth certificates until 2016. Appellants have offered no evidence to explain why 'historical accuracy' has only recently become a State interest, or why it was necessary to change its Policy to further that interest.").[15]

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[14] In addition, as for the asserted state interest of furthering "public health and research capabilities," the fact that Appellees are not asking that their original birth certificates be destroyed (only that they be given amended birth certificates they can use without outing themselves as being transgender) means that those original birth certificates could continue to be used for such public health and research capabilities. As for the federal Executive Order Appellants seek to rely on, it only applies to "Federal policies and documents," AOB at 4–5, not Montana documents, and to the extent the federal government wants to know what is on original birth certificates, as just explained, Appellees are not asking Appellants to destroy them.

[15] *See also H.R. by and through Roe v. Cunico*, 745 F. Supp. 3d 842, 852 (D. Ariz. 2024) (state's requirement of gender-affirming surgery to change the sex marker on birth certificates in order to maintain the accuracy of vital records failed both strict and heightened scrutiny); *Ray*, 507 F. Supp. 3d at 938–40 (denial of ability to change sex marker on birth certificates failed any level of scrutiny); *F.V.*, 286 F. Supp. 3d at 1142 (prohibition on changing sex marker on birth certificates failed even rational basis scrutiny); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (state policy requiring amended birth certificate to change the sex on one's driver's license "bears little if any connection to [the state's] purported interests" of "(1) 'maintaining accurate state identification documents'' and (2) "ensuring … consisten[cy] with other state records'" and "is far from the least restrictive means of accomplishing the state's goals"); *K.L. v. State*, No. 3AN–11–05431, 2012 WL 2685183, at *7 (Alaska Super. Ct. Mar. 12, 2012) (preventing transgender people

Moreover, 45 states across the country allow transgender people to amend the sex marker on their birth certificate,[16] and 38 states allow them to change the sex marker on their driver's license without an amended birth certificate.[17] Many of these states have allowed these changes for years without noted problems. This further shows that states do not need to discriminate against their transgender residents with regard to the sex listed on their birth certificates and driver's licenses and that Appellants' late raised and unsupported arguments about why they supposedly have to deny transgender Montanans the identity documents they need cannot satisfy strict scrutiny.

4. Appellees further established that they are likely to succeed in showing that State Policies cannot survive even rational basis review.

"Under the rational basis test, the law or policy must be rationally related to a legitimate government objective." *Snetsinger*, ¶19. The government action cannot be justified by state interests that "could be … adopted without infringing on the

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from "changing the sex designation on [their driver's] license does not bear a close and substantial relationship to furtherance of the state's interest in accurate documentation and identification").

[16] *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).

[17] *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).

important constitutional provisions that protect all Montanans," such as the right to equal protection. *Id*., ¶28. Here, that is clearly the case since the State previously allowed Montanans to obtain amended birth certificates simply by submitting an affidavit affirming what they know their sex to be, without incident. Dkt. 12 at 3. Accordingly, the state interests Appellants now identify were able to be met without violating the rights of transgender Montanans, and the challenged state actions cannot satisfy the rational basis test.

Moreover, even under rational basis review, state action burdening otherwise unprotected classes is impermissible if it is based on animus, *see U.S. 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"). Given that the legislature's elimination of Montanans' previous ability to obtain amended birth certificates to reflect their gender identity was part of an unrelenting legislative attack on the rights of transgender Montanans, the State Policies should be found to violate Article II, Section 4 on this alternative ground.[18]

[18] The district court noted that Appellees had raised "four separate legal theories" for why they were entitled to a preliminary injunction against Appellants' policies. Dkt. 61 at 5; *see also* Dkt. 1, at 21–24; Dkt. 69, Ex. A, at 22–26; Dkt. 70, at 1. Because Appellees "only need[ed] to demonstrate one of their claims" and the court found

B. The district court correctly found that Appellees would suffer irreparable harm in the absence of a preliminary injunction.

The district court correctly concluded that "[Appellees] have met their burden of establishing likelihood of success on the merits under the preliminary injunction standard" because they "have raised a valid prima facie case [that] the challenged actions violate their fundamental right to be free from discrimination on the basis of sex under the Montana Constitution." Dkt. 61 at 12:8–11. The district court was correct. This Court has repeatedly concluded that "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 Netzer Law Office, P.C. v. State ex rel. Knudsen*, 2022 MT 234, ¶20, 410 Mont. 513, 520 P.3d 335 (same); *Planned Parenthood*, ¶60 (same). Thus, Appellees have established irreparable harm based on their loss of a constitutional right.

Appellees' equal protection claim "dispositive," it did not reach Appellees' claims that the State Policies violate the Montana Constitution's guarantee of privacy, its prohibition against compelled speech, and the provisions of §2–4–506, MCA. Dkt. 61 at 6–7. Those other claims were fully briefed to the district court, *see* Dkt. 12 at 32–37, Dkt. 28 at 13–16 Dkt. 34 at 7–9. Should this Court disagree that State Policies violate equal protection, Appellees request that the Court consider whether those other claims present an alternative basis for affirming the district court's preliminary injunction or allow further briefing to this Court on that question. Should the Court decline to take either of those steps, Appellees request that the Court remand this case to the district court to consider whether those other claims justify the grant of a preliminary injunction against the State Policies.

Additionally, since the district court's ruling can be upheld on any grounds supported by the record, *see Grosvold*, ¶11, it bears mentioning that Appellees also tendered evidence establishing a likelihood of irreparable harm based on the State Policies. Appellees submitted the declarations of Dr. Randi C. Ettner, PhD, a licensed clinical and forensic psychologist with expertise on gender dysphoria, and Ayden Scheim, PhD, an epidemiologist. Dkt. 11-3; Dkt. 11-4. Their declarations, which Appellants failed to rebut on this point, demonstrate that irreparable injury to Appellees in this matter is certainly likely, and not merely speculative, in the absence of an injunction. *See supra* Part III (discussing serious psychological harms and exposure to discrimination and violence caused by transgender individuals having to display identity documents listing their assigned sex at birth rather than their sex as determined by their gender identity).

Additionally, Appellees submitted evidence that the State Policies personally cause them irreparable harm. *See* Dkt. 11-1 Dkt. 11-2. Appellees have suffered, and will continue to suffer, this humiliation and degradation if they are prohibited from amending the sex designation on their identity documents to match what they know their sex to be.

C. The district court correctly found that the balance of equities and public interest favor preliminary injunctive relief.

Appellants argue that the balance of equities and public interest disfavor the injunction, claiming that enjoining a state statute constitutes irreparable harm to

Appellants. AOB at 44. This argument misapprehends the applicable legal standards and the record in this case.

As the district court correctly recognized, when the government opposes a preliminary injunction, the balance of equities and public interest "merge into one inquiry." Dkt. 61 at 13:9. Under controlling precedent, "[a] plaintiff's likelihood of success on the merits of a constitutional claim ... tips the merged third and fourth factors decisively in his favor." *Id*.,13:14–15. Here, that district court found that Appellees demonstrated a likelihood of success on their equal protection claim is itself sufficient to satisfy the merged balance-of-equities and public-interest inquiry.

Appellants cite *Maryland v. King*, 567 U.S. 1301, 1303 (2012), for the proposition that "any time a State is enjoined from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." AOB at 44. If that statement were controlling, every preliminary injunction ever enjoining a state statute would have been erroneous. Moreover, *King* is an in-chambers opinion by a single justice and does not represent the binding view of the U.S. Supreme Court. In contrast, as the district court acknowledged, the Ninth Circuit has explicitly held that "the government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented." Dkt. 61 at 13:21–23.

In addition, Appellants have not identified any factual evidence in the record showing concrete harm that they would suffer from the preliminary injunction. *See* AOB at 44. Instead, they offer general assertions untethered to any evidentiary showing. That is insufficient to justify disturbing the district court's careful equitable assessment, especially considering that Appellees face severe and irreparable ongoing harm from the State Policies. Dkt. 12 at 41; *see also supra* Part IV(B).

Appellants' reliance on abstract state interests cannot outweigh the concrete and ongoing injury to Appellees' constitutional rights. The district court properly concluded that the balance of equities and public interest support the preliminary injunction.

V. The district court's injunction is not overbroad.

Finally, Appellants argue that the district court erred by purportedly issuing an overbroad injunction that extends to unchallenged applications of state policies. AOB at 45. The Court should reject this argument.

The injunction prohibits Appellants from enforcing "the 2022 Rule on its face or as applied to issuing amended birth certificates." Dkt. 61 at 14:8–9. Appellants argue that the injunction is overbroad, claiming it applies to all applications of the 2022 Rule, including those having nothing to do with gender identity. AOB at 45. However, the 2022 Rule addresses only the narrow issue of altering the "sex" data element on a Montana birth certificate. An injunction pertaining to all applications

of the 2022 Rule, whether on its face or as applied to issuing birth certificates, is warranted.

Appellants argue that there is no basis for concluding that all applications of the 2022 Rule are void. *Id*. Appellants misapprehend the scope of the rule. Section (5)(a) of the 2022 Rule, applicable when SB 280 was enjoined, states that "[t]he sex of a registrant as cited on a certificate may be amended only if" DPHHS receives a court order attesting that "the sex of an individual born in Montana has been changed by surgical procedure." *See* Mont. Admin. Rule 37.8.311(5)(a). This requirement burdens transgender individuals who do not wish to undergo surgery or are unable to do so.

Section (5)(b) of the 2022 Rule currently restricts instances in which the sex marker on a registrant's birth certificate may be corrected. *See* Mont. Admin. Rule 37.8.311(5)(b). It limits sex marker amendments to a scrivener's or data entry error. *Id.*

The 2022 Rule's restrictive criteria restrict transgender individuals' ability to obtain accurate birth certificates. The 2022 Rule can be enjoined, and its criteria can be removed from consideration, without preventing Appellants from adopting a new rule that does not contain a sex-based classification but still permits other amendments to birth certificates.

Appellants also argue that the district court incorrectly enjoined the purported "MVD policy and practice as applied to issuing amended driver's licenses without an amended birth certificate." AOB at 45. Appellants claim that Appellees "do not appear to contend that such a policy would itself discriminate on any basis or otherwise be legally infirm." *Id*. This argument has no merit.

The MVD policy conditions the amendment of a driver's license's sex marker on the applicant having obtained an amended birth certificate. Dkt. 12 at 17–18. The district court did not broadly enjoin MVD's driver's license amendment policies. Rather, the injunction was specifically limited to the aspect of the MVD policy that requires individuals to present an amended birth certificate to change the sex marker on a driver's license. The court did not enjoin any other part of the driver's license policy or the MVD's general practices. Rather, the court focused its findings on the harm caused by requiring an applicant to obtain an amended birth certificate as a prerequisite for changing the sex marker on a driver's license. The court's injunction was limited, enjoining the MVD's policy only to the extent that the policy required an amended birth certificate to change the sex marker on a driver's license.

The district court also enjoined a definitional provision of "SB 458 as applied to issuing amended birth certificates and amended driver's license." Dkt. 61 at 14:11–12. Appellants argue that "[Appellees] would not have standing to independently attack a definitional provision in state law" and "do not contend that

this definitional provision is itself unlawful." AOB at 46. This argument is misleading.

Specifically, if Appellees have standing to challenge the 2022 Rule and the MVD policy, then they should also have standing to challenge SB 458 to the extent its definition is being used to justify the 2022 Rule or the MVD policy. That is particularly so given that DPHHS announced that "implementing the 2022 Rule "aligns" with the requirements of SB 458." Dkt. 12 at 3.

Applied in this manner, SB 458 causes the same injuries to Appellees as the 2022 Rule and the MVD policy. Those injuries are traceable both to the 2022 Rule and the MVD policy, on the one hand, and to SB 458, on the other. Enjoining the enforcement of SB 458's definition in this context redresses the same injuries Appellees suffer from the 2022 Rule and the MVD policy. It would be illogical to hold that Appellees have standing to challenge these policies but not the statute that is being used to justify or require the policies. Therefore, the district court's order is not overbroad.

CONCLUSION

For these reasons, this Court should affirm the preliminary injunction the district court entered on December 16, 2024.

Dated: July 18, 2025

Respectfully submitted,

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 10991 words, excluding the tables, certificate of service, and certificate of compliance.

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