N 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.

DEFENDANTS' REPLY BRIEF

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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INTRODUCTION

It is critical to understand what this appeal does and does not involve. This appeal involves only the State's determination of what fields of information to include on certain government-issued documents. The Legislature chose to include biological sex as a field displayed on birth certificates, and the MVD purportedly includes the same information on drivers' licenses. Including this information does not discriminate on the basis of sex any more than including a person's race or birth date discriminates on the basis of race or age. Equally important is what this appeal does not involve—any claim of discriminatory intent by the Legislature or MVD.

The preliminary injunction was a manifest abuse of discretion and must be reversed. First, Plaintiffs lack standing because they only claim speculative future harm from the inclusion of these fields of information. The District Court also erred by using the disapproved "serious question" and "sliding scale" tests and relying on improper declarations based only on "knowledge and belief."

Additionally, Plaintiffs are not likely to succeed on the merits because they do not state a sex-discrimination claim under equal protection principles. Anyone, regardless of sex or gender identity, can have their birth certificates amended to reflect their biological sex because that is the field of information included. Instead, Plaintiffs challenge the definition of "sex," which they would like to change to mean "gender identity." Only rational basis review applies to this type of challenge.

The District Court also impermissibly collapsed the remaining injunction factors into likelihood of success. Not every potential legal violation involves irreparable harm, and the balance of equities and public interests are stated by the law, which adopts a biological definition of "sex" in pursuit of accurate vital records.

At minimum, the injunction was overbroad, eliminating constitutional applications of Montana's birth certificate amendment statute and the MVD's processes.

ARGUMENT

I. Plaintiffs lack standing.

To establish standing, a plaintiff must show an injury in fact, causation, and redressability. *Heffernan v. Missoula City Council*, 2011 MT 91, 360 Mont. 207, 255 P.3d 80. Here, Plaintiffs' claimed injuries are speculative. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). The purported injuries are a "risk of embarrassment and even violence every time [they] [are] required to present [their] birth certificate[s]." Dkt. 11, Ex. 1 ¶ 8. Plaintiffs argue (at 16) their injury is not speculative because they are required to "out" themselves every time they present their documents, but again, they fail to identify a specific example of this occurring. Because Plaintiffs' injury depends on a speculative chain of causation involving unknown reactions of third parties, and Plaintiffs provided no specific evidence

supporting any link in this chain of causation, they have not shown they are likely to satisfy the standing requirement. *See Murthy v. Missouri*, 603 U.S. 43, 57 (2024).

Plaintiffs, quoting *Gazelka v. St. Peter's Hospital*, 2015 MT 127, ¶ 15, 379 Mont. 142, 347 P.3d 1287, also argue (at 15) that they satisfy the injury requirement because they are denied equal treatment. To establish standing to bring an equal protection claim "the injury in fact [the plaintiff] needs to show is the 'denial of equal treatment resulting from [a] barrier.'" *Id.*

The rule articulated in *Gazelka* confers standing only "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than … members of another group[.]" *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Here, the State has not erected a barrier that "makes it more difficult for [transgender Montanans] to obtain [birth certificate amendments] than it is for [cisgender Montanans]." *Id.* Instead, as explained more fully below, *supra* Part III, both groups confront the same "barriers" to obtaining an amended birth certificate.

II. The District Court erred by using the serious questions and sliding scale tests and relying on declarations based on knowledge and belief.

This Court should vacate the injunction and remand for the District Court to apply the correct standard codified in MCA § 27-19-201, which requires movants establish the four preliminary injunction elements independently, and to follow

MCA § 27-19-303(2)(b), which prohibits declarations based on information and belief.

Plaintiffs erroneously invoked a "sliding scale" approach, Dkt. 12 at 14, while the State argued for a higher standard in reliance on MCA § 27-19-201(4). Dkt. 28 at 3. Contrary to Plaintiffs' argument (at 20-22), the District Court did not apply likelihood of success as to each factor but expressly applied the "serious questions test" and implicitly applied the sliding scale approach. Dkt. 61 at 5, 6, 12.

Section 27-19-201 governs the burden of proof for obtaining a preliminary injunction, so any change to that "burden of proof [creates] a procedural change" not subject to § 1-2-109's prohibition against retroactive application. *See City of Helena v. Cmty. of Rimini*, 2017 MT 145, ¶ 18, 388 Mont. 1, 397 P.3d 1. Plaintiffs, citing MCA § 1-2-109, argue (at 18) that the Legislature did not indicate § 27-19-201 applies retroactively. But Plaintiffs fail to recognize that "newly-amended statutes which relate only to procedural matters and do not affect substantive rights of the parties do not fall within the scope of § 1-2-109." *Weiss v. State*, 219 Mont. 447, 449, 712 P.2d 1315, 1316 (1986).

Contrary to Plaintiffs' contention (at 18-19), this exception holds true even when the procedural change occurs while the case is on appeal. In *Stephenson v. Lone Peak Preserve, LLC*, 2025 MT 148, ¶ 13, 423 Mont. 46, ___ P.3d ___, this Court applied the current § 27-19-201 and analyzed the preliminary injunction

factors independently even though the injunction was issued before the amendment was effective. *See id.* ¶ 13 n.3; *see also Weiss*, 219 Mont. at 449, 712 P.2d at 1316; *State Compensation Insurance Fund v. Sky Country, Inc*., 239 Mont. 376, 379, 780 P.2d 1135, 1137 (1989).

Alternatively, this Court should hold the 2025 amendment clarified that § 27-19-201 has not permitted a sliding-scale test since 2023. *See McCoy v. Chase Manhattan Bank, USA,* 654 F.3d 971, 974 (9th Cir. 2011) (citing Sutherland treatise). Despite *McCoy* and Sutherland focusing on the timing of the enactment and the existence of conflicting judicial interpretations, Plaintiffs argue (at 19-20) that an amendment must also expressly state it is a clarification. Even if this were required, H.B. 409's whereas clauses suffice. *See* 2025 Mont. Laws ch. 20. They first note that the Legislature amended the law in 2023 and then state, "the use of the serious questions test or any other sliding scale test is contrary to the legislative intent ***expressed*** in section 27-19-201, MCA." *Id.* (emphasis added).

Plaintiffs' declarations also could not support a preliminary injunction under MCA § 27-19-303(2)(b), which prohibits granting an injunction on affidavits unless "the material allegations of the affidavits … are made positively and not upon information and belief." This is critical because the Court clearly relied on the declarations to enjoin the purported MVD policy.

Plaintiffs claim (at 23) that their declarations did not violate this provision because they stated they were "true to the best of my knowledge and belief." But changing the word "information" to the word "knowledge" makes no difference—the declarations failed to meet the positive verification standard the statute requires. *See Taeger Enters., Inc. v. Herdlein Techs.*, 445 S.E.2d 848, 853 (Ga. Ct. App. 1994) (Affidavit verified on "the best of the affiant's knowledge and belief is just a variation of information and belief"); *see also Henderson v. Reynolds*, 81 N.E. 494, 495 (Ind. 1907) (Affidavit must be positively verified, a verification based on "knowledge and belief" is insufficient); *Lightfoot v. Weissgarber*, 763 S.W.2d 624, 628 (Tex. Ct. App. 1989) (same); *J. Walters Constr. Co. v. Greystone S. P'ship*, 817 P.2d 201, 205 (Kan. Ct. App. 1991) (same); *Heitz v. Sayers*, 113 A. 901, 902 (Del. Super. Ct. 1921) (same). And because this is a statutory requirement, it is immaterial that the unsourced hearsay relied on by one Plaintiff might be admissible under the Rules of Evidence. AB at 24-25.

III. The District Court abused its discretion by enjoining important, non-discriminatory state policies.

A. Plaintiffs failed to show a likelihood of success on the merits.

Adjudicating an equal protection challenge first requires identifying "the classes involved and determin[ing] whether they are similarly situated"; then courts can "determine the appropriate level of scrutiny." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445. Here, the statute and purported

policy do not discriminate based on sex or transgender status. Plaintiffs' actual complaint is with the definition of sex, which is subject only to rational basis review, and which is met here.

Plaintiffs do not dispute that they did not argue below that heightened scrutiny applies because of "a discriminatory intent" or "discriminatory application." *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (1981); *contra Fowler v. Stitt*, 104 F.4th 770, 788 (10th Cir. 2024), *vacated and remanded* No. 24-801, 2025 WL 1787695 (U.S. June 30, 2025). Thus, these issues are not before the Court and cannot support affirmance. *See Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 13, 289 Mont. 255, 961 P.2d 100.

1. The policies do not discriminate based on sex or transgender status.

Limiting birth certificate sex changes to designations that were originally incorrect or misidentified does not discriminate based on sex or transgender status. For a law to "classify" based on sex, it must "prescribe one rule for women, and another for men." *United States v. Skrmetti*, 145 S. Ct. 1816, 1856-57 (2025) (Alito, J., concurring) (cleaned up) (collecting cases). The 2022 rule and the alleged MVD policy "treats the sexes identically" as "anyone may amend their certificate if they provide" "evidence that the doctor erred in identifying [or recording] their biological sex at birth." *Gore v. Lee*, 107 F.4th 548, 555 (6th Cir. 2024).

Plaintiffs argue (at 25-26) that the District Court correctly found facial discrimination between two allegedly similarly situated classes: "[transgender] … and cisgender Montanans seeking to amend the sex designation on their birth certificates or driver's licenses." This is incorrect for at least two reasons. First, the policies treat these two classes the same. Anyone can receive a birth certificate (and then driver's license) amendment if they provide evidence that the original sex designation was incorrect or misidentified. And anyone would be denied an amendment if they do not.

Second, the amendment policy actually creates these two classes: (1) persons with birth certificates whose sex field reflects their biological sex at birth, who cannot amend, and (2) persons with birth certificates that do not reflect their biological sex, who can amend. The policies are facially neutral toward subjective gender identity and transgender status. Instead, they simply reflect a legislative judgment as to *what* fields to include on these forms.

Plaintiffs (at 26-28) try to distinguish the U.S. Supreme Court's decision in *Skrmetti*, 145 S. Ct. 1816, claiming it did not limit *Bostock v. Clayton County*, 590 U.S. 644 (2020), and "did not issue any ruling regarding discrimination based on transgender status or sex." Tellingly, Plaintiffs failed to address *Skrmetti*'s actual holding, which rejected an argument nearly identical to Plaintiffs' and held Tennessee's prohibition against providing certain medical treatments (such as

puberty blockers) from treating gender dysphoria while permitting the same treatment in all other cases did not discriminate on the basis of transgender status or gender identity. 145 S. Ct. at 1829.

In determining the relevant class for equal protection purposes, the Supreme Court rejected the plaintiffs' argument that the law "prohibits certain treatments for minors of one sex while allowing those same treatments for minors of the opposite sex" because "an adolescent whose biological sex is female cannot receive puberty blockers or testosterone to live and present as a male, but an adolescent whose biological sex is male can," and vice versa. *Id.* at 1830. Instead, the Court (including two justices in the majority in *Bostock*) concluded "[t]he law does not prohibit conduct for one sex that it permits for the other [because] no minor may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence; minors of any sex may be administered puberty blockers or hormones for other purposes." *Id.* at 1831.

The same is true here. The law regarding what information to include in the "sex" field of birth certificates classifies based on the justification for the amendment—allowing anyone, regardless of gender identity or transgender status, to obtain an updated birth certificate for any reason articulated in the law, and prohibiting receiving an updated birth certificate for any other reason.

Disregarding this reality, Plaintiffs (at 30-31) attempt to support their argument that the law treats similarly situated people differently using two examples: (1) "cisgendered" people can have documents that accurately reflect their gender identity while transgender people cannot, and (2) both groups occasionally need documents amended but, while "cisgendered" people can have their birth certificates amended consistent with the policy, transgender people cannot have their birth certificates amended to reflect their gender identity. Neither argument demonstrates a similarly situated class that is being treated unequally. First, Montana's birth certificates only reflect a person's objective biological sex—not a person's subjective gender identity. "Cisgendered" people are not treated differently than transgender people. Everyone's birth certificate provides the same information regardless of which subjective gender identity a person asserts. Second, both groups can have their documents amended consistent with the policy, and neither group can obtain an amendment for any other reason. There is no unequal treatment.

Additionally, a person of any gender identity can fall within both groups regarding whether their biological sex field can be amended, which means under settled equal protection principles there is a "lack of identity" between the classification and transgender status. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

And contrary to Plaintiffs' four assertions (at 34-35), *Geduldig*'s reasoning is applicable. First, this Court's holding in *Bankers Life and Casualty Co. v. Peterson*, 263 Mont. 156, 159, 866 P.2d 241, 243 (1993), was not issued in the equal protection context, but was limited to a "unique" Montana insurance statute with "no federal or sister-state counterpart." Additionally, the policy does not classify based on a class of persons, *e.g.* transgender people, so any purported limitation of *Geduldig* by *Skrmetti* is inapplicable. Finally, as explained above, the question whether the policy was instituted because of discriminatory intent is not before this Court, but nothing in the record indicates it was, and there are valid reasons other than a discriminatory intent to enact the policies. Consequently, each of Plaintiffs' arguments (at 36, 44) regarding animus are incorrect.

Plaintiffs alternatively argue (at 29, 32-34) that regardless of whether transgender discrimination is sex discrimination, the policy discriminates on the basis of sex because transgender people are unable to have documents that accurately reflect the sex "they know themselves to be." This argument conflates "sex" and "gender identity." A person's sex—the objective biological characteristic a person was born with—"like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Plaintiffs recognize that subjective gender identity, however, can be fluid and change over time. *See* AB at 32 n.10. That the Legislature chose to include

one field but not another on certain government documents is simply not discrimination.

Plaintiffs make another alternative argument (at 39) that sex is a suspect class warranting heightened scrutiny because it is "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."[1] *In re C.H.*, 210 Mont. 184, 198, 683 P.2d 931, 938 (1984). Existing Montana law rejects this approach. *See Matter of Kujath's Est.*, 169 Mont. 128, 131-33, 545 P.2d 662, 664-65 (1976) (upholding law that imposed different but "reciprocal" approaches on married men and women, even after "the adoption of the 1972 Constitution").

The U.S. Supreme Court also rejects it. While "women [have] faced more than a century's worth of discrimination in the law," *Skrmetti*, 145 S. Ct. at 1853 (Barrett, J., concurring), neither this Court nor the U.S. Supreme Court has "held that sex-based classifications are 'suspect,'" *id.* at 1863 (Alito, J., concurring). Instead, the Supreme Court has balanced its recognition "that such classifications warrant more

[1] Plaintiffs' third alternative argument (at 39 n.13) is that "discrimination based on transgender status meets all the requirements to be found a suspect classification." But transgender status is not a suspect class as it "is not marked by the same sort of 'obvious, immutable, or distinguishing characteristics' as race or sex," is not "definitively ascertainable at the moment of birth," is not a "discrete group," and has not been historically subject to "*de jure* discrimination." *See Skrmetti*, 145 S. Ct. at 1851-53 (Barrett, J., concurring); *see also id.* at 1861-67 (Alito, J., concurring).

careful inspection," with the reality that "there are real differences between men and women that may sometimes justify legislation that classifies based on sex," and has applied intermediate scrutiny. *Id.* at 1863-64 (Alito, J., concurring). Even if intermediate scrutiny applied, the policies would survive. *See* Part III(A)(5), *supra*.

2. Bostock would not help Plaintiffs even if it applied.

Bostock does not help Plaintiffs even if it applied outside the federal Title VII context. Under *Bostock*'s but-for causation test, courts "change one thing at a time and see if the outcome changes." 590 U.S. at 656. Applying this holding here, if a man who identifies as a woman seeks a birth certificate amendment to "female" based on subjective gender identity, that amendment would be denied. Likewise, if a woman who identifies as a woman sought the same and provided the same justification, the amendment would be denied. Unlike *Bostock*, a man who identifies as a woman would not be "intentionally penalized" "for traits" that would be "tolerate[d] in a[] [person] identified as female at birth." *Id.* at 660. Plaintiffs (at 26) cite this exact passage but fail to explain how, applied to the present case, it reaches Plaintiffs' desired conclusion.[2]

[2] Plaintiffs argue (at 28-29) that even if the U.S. Supreme Court limits *Bostock* to Title VII, it would still apply here because Montana's Equal Protection Clause expressly includes "sex." That is irrelevant because the whole point is that the law permitting birth certificate amendments does not classify based on sex, and even if it did, *Matter of Kujath's Estate* rejected this argument.

3. Even if the policies constitute sex-based discrimination, strict scrutiny should not apply.

Even if the State's policies somehow discriminated based on sex (they don't), the District Court's justification for applying strict scrutiny—invoking the third sentence of Article II, Section 4 to conclude "the right to be free from discrimination on the basis of sex is a fundamental right"—was in error and an abuse of discretion. Dkt. 61 at 11; *see Matter of Kujath's Est.*, 169 Mont. at 131-33, 545 P.2d at 664-65.

First, Plaintiffs did not make this argument, and the District Court had no warrant to make up an argument for them. Plaintiffs argue (at 38 n.11) the State "suffered no harm" because it can argue against this reasoning on appeal. But by "rendering its decision on a ground not raised by any party at any stage of the proceedings, … the district court disregarded the longstanding principle of party presentation and, in doing so, abused its discretion." *Astellas Pharma, Inc. v. Sandoz, Inc.*, 117 F.4th 1371, 1377 (Fed. Cir. 2024); *see also United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020).

Second, the District Court's theory conflates Article II, Section 4's "two distinct types of unequal treatment": (1) the presence of a fundamental "civil or political right" and (2) the presence of a suspect classification. *Gazelka*, ¶ 7. "Examples of fundamental rights"—in other words, civil or political rights—"are the right of privacy, freedom of speech, freedom of religion, right to vote and the right to interstate travel," while "[e]xamples of suspect classifications include

wealth, race, nationality"—and sex. *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 43, 744 P.2d 895, 897 (1987). Sex-based classifications are only prohibited as to fundamental rights.

Plaintiffs disregard this and instead argue (at 38) that the "right not to be discriminated against based on sex meets the test of a fundamental right enunciated in *Butte Community Union* [*v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986)]." In *Lewis*, this Court announced that a fundamental right is either a right found in "Montana's Declaration of Rights or … a right 'without which other constitutionally guaranteed rights would have little meaning.'" *Id.* A review of this Court's case law indicates that this latter test has been employed to articulate a new fundamental right sparingly, and in such a case, it has been used to protect a right without which persons would be unable to pursue a right articulated by the Declaration of Rights. *See, e.g.*, *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996) (articulating a right to an opportunity to pursue employment as it is "necessary to enjoy the right to pursue life's basic necessities" guaranteed by the Declaration of Rights).

Conversely, *Lewis* is inapplicable, as Plaintiffs failed to demonstrate how the policies at issue prohibit persons from pursuing another articulated right. Plaintiffs have made no showing that not modifying the fields included on particular government documents (*e.g.*, a state's record of birth) prevents them from exercising

any rights at all. And Plaintiffs have not shown that a person has a privacy expectation "society is prepared to recognize as 'reasonable'" in their biological sex, such that merely including that information on government documents infringes the right to privacy. *See Gryczan v. State*, 283 Mont. 433, 447-48, 942 P.2d 112, 121 (1997). Thus, only rational basis review applies.

4. Plaintiffs' challenge to the meaning of "sex" is a definitional attack subject to rational basis review.

Plaintiffs' real complaint is to the definition of sex such that a biological male who identifies as a woman still has a biological sex of male (and vice versa). That is not an equal protection claim. It is a challenge to the state's definition of "sex," subject only to rational basis review. This is apparent as Plaintiffs do not seek equal application to transgender persons of the rule currently applied to "cisgender" persons. Rather, they seek a different rule entirely, and in fact *unequal* treatment: they want the "sex" designation on Montana birth certificates to reflect biological sex at birth for some people and subjective gender identity for others.

Nor can Plaintiffs invoke heightened scrutiny by challenging the contours of a class rather than the classification itself. "Once it has been established that the government is justified in resorting to" a protected "classification[]" like sex, heightened scrutiny "has little utility in supervising the government's definition." *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 210 (2d Cir. 2006) (rejecting challenge to definition of Hispanic for purposes of affirmative

action purposes). Plaintiffs (at 36) do not dispute that their challenge is with the definition of sex but attempt to distinguish *Jana-Rock*, arguing under-inclusiveness triggers heightened scrutiny if the exclusion was "motivated by a discriminatory purpose." As explained, Part III(A)(1), *supra*, the policies were not motivated by animus, so only rational basis review applies.

5. Montana's policies survive rational basis review and heightened scrutiny.

Rational-basis review "is the most deferential standard of review." *Montana Cannabis Indus. Ass'n v. State,* 2016 MT 44, ¶ 26, 382 Mont. 256, 368 P.3d 1131. The policy need only have a "reasonable relation to some permitted end of governmental action." *Id.* ¶ 38. Montana's policies are rationally related to at least four interests: (1) they protect the integrity and accuracy of birth certificates by ensuring they accurately reflect biological sex; (2) the accurate biological-sex information furthers public health and research capabilities; (3) they assist the State's administrative and auditing functions; and (4) they ensure equality for women, whether through sex-separated sports or sex-separated restrooms. These interests are even weighty enough to survive heightened scrutiny and there is no narrower means by which the State could achieve them.[3]

[3] Plaintiffs argue (at 41-42) that the policies cannot survive strict scrutiny because the State did not show there was an issue prior to the policies' enactment. But "[a] harm need not have occurred before a legislature can act[.]" *Roe v. Critchfield*, 137 F.4th 912, 925 (9th Cir. 2025).

Plaintiffs argue (at 40-41) that the State waived any argument that the policies survive rational basis review, but this is incorrect. First, while a party "may not raise an entirely new legal theory" on appeal, he "may bolster his preserved issues with additional legal authority or make further arguments *within the scope of the legal theory* articulated to the trial court." *State v. Norman*, 2010 MT 253 ¶ 24, 358 Mont. 252, 244 P.3d 737 (emphasis added); *see also Becker v. Rosebud Operating Servs., Inc.*, 2008 MT 285, ¶ 17, 345 Mont. 368, 191 P.3d 435. The legal theory advanced by the parties below directly related to the policies' constitutionality under the Equal Protection Clause. Thus, any argument regarding whether the policies survive review under that theory have not been waived.

Here, the District Court was clearly given an opportunity to consider whether the policies survived scrutiny. *See Kellogg v. Dearborn Info. Servs., LLC*, 2005 MT 188, ¶ 15, 328 Mont. 83, 119 P.3d 20 (noting "it is unfair to fault the trial court on an issue that it was never given an opportunity to consider"). It would be inequitable to preclude the State from making arguments which relate directly to the District Court's conclusion. This argument is not waived, and while rational basis review is the correct standard, the policy also survives heightened scrutiny.

B. The District Court impermissibly collapsed the remaining factors.

Assuming that all factors support an injunction if likelihood of success for a constitutional claim exists impermissibly "collapses the four factors into one." *Del.*

State Sportsmen's Ass'n, v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 202 (3d Cir. 2024).

To begin, if there is not even a *likelihood* of a constitutional violation (the District Court found only a "serious question on the merits," Dkt. 61 at 12), it defies law and logic to characterize purely hypothetical harm from a non-likely violation as irreparable. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Even if Plaintiffs had shown a *likelihood* of success on the merits (they didn't), irreparable harm *still* should not be presumed. And Plaintiffs' contrary argument (at 45) fails, as "not every constitutional infringement may support a finding of irreparable harm." *Montanans Against Irresponsible Densification, LLC v. State*, 2024 MT 200, ¶ 16, 418 Mont. 78, 555 P.3d 759 (*MAID*); *see also Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 32 (2008).[4]

The District Court identified no harm to Plaintiffs apart from the merits and disregarded that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted). Indeed, "courts of equity" must consider the policymaking branches' "efforts to advance the public welfare." *MAID*, ¶ 21 (internal quotation marks omitted). The public interest is expressed by the policies those branches

[4] Plaintiffs alternatively argue (at 46) that they presented sufficient evidence of actual harm below. But these "generalized fears" are not even enough for *standing*, *see* Part I, *supra*, much less irreparable harm. *MAID*, ¶ 19.

enacted here, and those policies support all the important public interests identified above. *See* Part III(A)(5), *supra*. To support the District Court's holding, Plaintiffs (at 47) rely on language from *Planned Parenthood of Montana v. State*, 2024 MT 228, ¶ 40, 418 Mont. 253, 557 P.3d 440, which, quoting the Ninth Circuit, said: "A plaintiff's likelihood of success on the merits of a constitutional claim ... tips the merged third and fourth factors decisively in his favor." However, this statement was made before the 2025 amendment to § 27-19-201 which expressly requires courts determine the factors independently. When analyzed independently, these factors do not support an injunction.

IV. The injunction is overbroad.

The injunction below appears to apply to *all* applications of the 2022 rule and purported MVD policy, including those having nothing to do with subjective gender identity. But the Rule is not *facially* unconstitutional—void in *all* its applications. Plaintiffs (at 48-49) ignore this but claim—without citing any authority—that the blanket injunction is warranted because the Rule deals with amending a birth certificate's "'sex' data element." This misses the point. Even if the Rule is unconstitutional as applied to Plaintiffs (it isn't), it can be applied constitutionally in most cases.

The District Court also improperly enjoined a purported MVD policy addressing "issuing amended driver's licenses without an amended birth certificate"

and a definitional provision of "SB 458 as applied to issuing amended birth certificates and amended driver's licenses." Dkt. 61 at 14. Plaintiffs argue (at 50-51) that the injunction was appropriately limited to only a portion of the MVD policy and SB 458. Again, this misses the point—either the Rule is constitutional and there is no basis to enjoin it, the MVD policy, or SB 458, or the Rule is unconstitutional as applied to Plaintiffs so they can obtain amended birth certificates and use those certificates to acquire an updated driver's license. In neither case should the MVD policy or SB 458 be enjoined in its entirety.

CONCLUSION

For the forgoing reasons, the District Court's order should be reversed.

DATED this 1st day of August 2025.

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CERTIFICATE OF COMPLIANCE

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 for Windows is 4,965 words, excluding cover page, tables of contents and authorities, certificates of service and compliance, signatures, and any appendices.

/s/Michael D. Russell
Michael D. Russell

CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-01-2025:

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Dated: 08-01-2025