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

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

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

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

IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual; **Plaintiffs,** **v.** **STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and ADAM MEIER, in his official capacity as the Director of the Montana Department of Public Health and Human Services,** **Defendants.**	**Case No. DV-21-00873** **Judge: Michael G. Moses** **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Amelia Marquez ("Ms. Marquez") and John Doe ("Mr. Doe") (together, "Plaintiffs") apply, pursuant to § 27–19–301, MCA, for a preliminary injunction prohibiting the State of Montana; its governor, Gregory Gianforte ("Governor Gianforte"); the Montana Department of Health and Human Services ("DPHHS"); and DPHHS's director, Adam Meier (collectively, "Defendants" or the "State"), from enforcing Senate Bill 280's unconstitutional restrictions on transgender Montanans' ability to change the sex designation on their Montana birth certificates.

INTRODUCTION

The 2021 Montana State Legislature has engaged in targeted and systematic attacks on transgender Montanans without any justification. These efforts have included attempts to limit healthcare options for transgender people, prevent them from participating in school sports, and restrict their ability to include accurate information on government-issued documents. Regrettably, these measures are part of a national effort to marginalize individuals who already experience daily discrimination and high rates of violence.

This lawsuit challenges the constitutionality of SB 280 (the "Act"), which states, in relevant part, that "[t]he sex of a person designated on a birth certificate may be amended only if [DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person born in Montana has been changed by surgical procedure." *See* SB 280. The Act is a solution in search of a problem. Since 2017, transgender Montanans have been able to change the sex designation on their birth certificates simply by submitting an affidavit to DPHHS. DPHHS administered that process without incident until the legislature passed the Act. Now, transgender Montanans who, for whatever reason, have not had surgery, including because it may not be medically necessary for them or may be too expensive, cannot amend their birth certificates to

accurately identify their sex. Moreover, even transgender Montanans who have had surgery must now retain counsel, appear in front of a judge, and produce private medical information in open court in order to secure a court order allowing them to amend their sex designation. These measures are costly, invasive, and completely unjustified by any state interest.

The Act unconstitutionally burdens the ability of transgender Montanans to change the sex designation on their Montana birth certificates. Plaintiffs, transgender individuals who wish to correct the sex designation on their Montana birth certificates, are likely to succeed on the merits of their claims that the Act unconstitutionally infringes on their constitutional rights to equal protection, privacy (both informational privacy and the right to be free from state interference with medical decisions), and due process. (*See infra* Arg., Part I.) Plaintiffs additionally meet the other requirements for preliminary injunctive relief: They currently are, and will continue to be, irreparably harmed by the Act; the balance of equities weighs in their favor; and an injunction will not be adverse to the public interest. (*See infra*, Arg., Parts II–III.)

Based on these considerations, Plaintiffs are entitled to a preliminary injunction prohibiting Defendants, as well as their agents, employees, representatives, and successors, from enforcing the Act, directly or indirectly.

BACKGROUND

I. The Plaintiffs

A. Ms. Marquez

Ms. Marquez is a woman who was born in Montana and currently resides in Billings, Montana. (Marquez Aff., ¶ 2.) She is transgender and wishes to correct her Montana birth certificate, which incorrectly identifies her as male. (*Id.*, ¶¶ 2.)

B. Mr. Doe

Mr. Doe is a man who was born in Montana and currently resides out of state. (Doe Aff., ¶ 2.) He is transgender and wishes to correct his Montana birth certificate, which incorrectly identifies him as female. (*Id.*, ¶2.)

II. Gender Dysphoria and Its Treatment

Transgender people have a gender identity that differs from their assigned sex at birth. (Ettner Aff., ¶ 16). Gender identity refers to a person's fundamental internal sense of belonging to a particular gender. (*Id.*, ¶ 19.) The medical consensus in the United States is that gender identity is innate and that efforts to change a person's gender identity not only are harmful to a person's health and well-being, but also are unethical. (*Id.*, ¶ 25.)

Gender identity 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.) Instead, it refers to a person's "inner sense of belonging to a particular gender." (*Id.*) *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." (*Id.*, ¶ 26.) 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 "with gender dysphoria have an intense and persistent discomfort with their assigned sex that leads to impairment in functioning." (*Id.*)

Treatment of gender dysphoria is guided by the standards of care set forth by the World Professional Association for Transgender Health, which were originally published in 1979 and are now in their seventh edition. (*Id.*, ¶ 31.) These guidelines reflect the professional consensus about the psychological, psychiatric, hormonal, and surgical management of gender dysphoria. (*Id.*, ¶ 31.)

The recognized standard of care for gender dysphoria involves treatments designed to bring a person's body and gender expression into alignment with their gender identity. (*Id.*, ¶¶ 33,39.) This course of treatment has different components depending on the medical needs of each transgender person. (*Id.*, ¶¶ 29, 33.) As with other forms of healthcare, a patient considers the available treatment options and makes treatment decisions in consultation with their healthcare provider. (*See id.*) Forcing a particular course of treatment, such as the gender-affirming surgery the Act requires, without reference to the particular needs and circumstances of an individual patient is medically irresponsible. (*See id.*, ¶¶ 25, 35, 39.)

Gender-affirming surgery is not medically necessary, or medically desirable, for all transgender people. (*Id.*, ¶¶ 37, 49.) Even for those for whom surgery is appropriate, the specific surgical procedure will vary based on the person's individual needs. (*See id.*, ¶ 33.) For some, surgery is medically contraindicated; for others it is cost-prohibitive. (*Id.*, ¶ 49.) Like other major healthcare decisions, decisions about gender-affirming surgery are profoundly personal, require confidential medical evaluations, and often involve intimate conversations with family members. (*See id.*, ¶¶ 29, 33, 46.) The State has no role to play in these highly personal, highly sensitive deliberations.

Treatment for gender dysphoria also includes living one's life consistently with one's gender identity. (*Id.*, ¶¶ 33, 36, 39.) This includes using identity documents that accurately reflect

one's gender identity. (*Id.*, ¶ 41.) Forcing transgender people to use identity documents that do not match their gender identity, or forcing them to go without identity documents, creates a discordance that causes "a myriad of deleterious social and psychological consequences" for the individual. (*Id.*, ¶¶ 40, 43–45.)

Being forced to use documents that do not match a person's gender can also result in discrimination and violence when transgender people are called upon to present identification that identifies a gender inconsistent with how a transgender person publicly presents himself or herself. (*Id.*, ¶¶ 43- 44.)

Recognizing the importance of identification documents, the American Medical Association ("AMA") has adopted a policy urging states to eliminate any requirement that transgender people have gender-affirming surgery to amend their birth certificate. *See AMA announced policies adopted on final day of Special Meeting* (June 16, 2021), *available at* https://www.ama-assn.org/press-center/press-releases/ama-announced-policies-adopted-final-day-special-meeting. The rationale for the AMA's policy is to ease the path to amending identification documents so that psychological stress, depression, invasions of privacy, and harassment, including potential violence against transgender people, are avoided. *Id.* In the same vein, the U.S. Department of State recently announced that it is moving to a self-attestation policy, and the inclusion of a nonbinary option, for U.S. passports. *See Proposing Changes to the Department's Policies on Gender on U.S. Passports and Consular Reports of Birth Abroad* (June 30, 2021), *available at* https://www.state.gov/proposing-changes-to-the-departments-policies-on-gender-on-u-s-passports-and-consular-re ports-of-birth-abroad/. And just last month, the State of Michigan's Attorney General issued a legal opinion concluding that a Michigan law that, like the Act, requires a person to undergo gender-affirming surgery in order to alter the sex designation on

a birth certificate, violates the equal-protection and due-process clauses of the U.S. and Michigan Constitutions. *See AG Nessel Opinion: Sex-Reassingnment Surgery Requirement for Birth Certificate Change is Unconstitutional* (June 30, 2021), *available at* https://www.michigan.gov/ag/0,4534,7-359-92297_47203-562951--,00.html.

A person's sex designation is determined by their gender identity, not their sex assigned at birth or their anatomy. (*See* Ettner Aff., ¶¶ 17-19, 48.) Gender-affirming surgery, even for those transgender people who have a medical need for it, does not "change" their sex, but rather affirms it. (*Id.*, ¶¶ 33–34, 38.) Through the Act, the State has imposed a draconian medical requirement on transgender people that has no medical or other rational justification. (*Id.*, ¶ 35.) It reinstates an archaic understanding of transgender people and ignores modern medical guidelines. (*See id.*, ¶¶ 31–35, 42.)

III. The Act

On April 12, 2021, the Legislature passed the Act and sent it to Governor Gianforte for signature. On April 30, 2021, Governor Gianforte signed the Act, which became immediately effective upon his signature.

The Act states that it "is effective on passage and approval and applies to amendments to sex designations in birth certificates that are received by the [DPHHS] on or after the effective date of this act." *See* SB 280. The Act also states, in relevant part that: "The sex of a person designated on a birth certificate may be amended only if the [DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person born in Montana has been changed by surgical procedure." *See id.*

The Act was created with the specific intent to reverse procedures previously promulgated by DPHHS in December 2017 that had functioned well for several years without incident. *See*

MAR Notice. No. 37–807 (amending ARM 37.8.102 & 37.8.311.) These procedures permitted a transgender person to amend his or her original birth certificate by submitting to DPHHS a completed gender-designation form attesting to gender transition *or* providing government-issued identification displaying the correct sex designation *or* providing a certified court order indicating a gender change. *See id.* The 2017 procedures did not require surgery or court proceedings. *See id.*

The Act's only purpose is to intentionally burden a transgender person's ability to correct their birth-certificate sex designation to conform with their gender. The Act provides that the original sex designation on a birth certificate may be amended *only* if DPHHS receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the applicant has been "changed" by surgical procedure. *See* SB 280. The order must contain sufficient information for DPHHS to locate the original birth certificate. *See id.* DPHHS's inability to locate the original birth certificate does not excuse an applicant's obligation to comply with the Act. *See id.*

The Act does not specify which Montana or other out-of-state court shall have "appropriate jurisdiction." *See id.* Nor does the Act specify what, if any, medical or other professional shall review the submission to DPHHS; define or describe what constitutes a qualifying surgical procedure or a qualifying surgical result; or specify the nature of the proof, or the standards, applicable to the court proceedings the applicant must initiate to obtain the mandated order. *See id.* The Act also contains no exceptions for medical contraindication, or the inability to pay the cost of the mandated procedures. *See id.*

The legislature failed to offer any legitimate public purpose for the Act, and none exists. *See* 2/25/21 Senate Judiciary Hearing, 9:13:52, *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-

1/40697?agendaId=201705 (Sen. Glimm, SB 280's sponsor, offering a twofold justification for SB 280: (1) "the need for birth records[,] . . . a vital statistic tool, . . . to be based on facts," which "need to be what happened when the baby was born," and (2) curtailing "the rulemaking process in agencies" in favor of "standing up" for legislative oversight of "major policy change[s]," such as the procedure for amending birth certificates); 3/26/21 House Judiciary Hearing, 8:35:32, *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/40541?agendaId=210529 (Sen. Glimm, SB 280's sponsor, offering same twofold justification for SB 280). In fact, the Act was passed to express antipathy towards, and to harm, the transgender community, as repeatedly noted during the floor debates on SB 280. *See* 3/1/21 Senate Floor Debate, 15:27:51 *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/42169?agendaId=221674 (Sen. Bennett, in opposition, stating that SB 280 "has nothing to do with statistics or making sure that . . . information in some bureaucrats' drawer is accurate . . . . This is a bill about putting a thumb in the eye of trans people."); 4/9/21 House Floor Debate, 12:55:02, *available at* http://sg001harmony.sliq.net/00309/Harm%20ony/en/PowerBrowser/%20PowerBrowserV2/20170221/-1/41091?agendaId=214739 (Rep. Abbott, in opposition, stating that "[w]hat we're forcing here, if we pass this bill, is for trans folks in the state to have incongruous documents," which "creates a dangerous situation for a lot of trans folks").

IV. The Need for Birth Certificates Matching One's Gender Identity

A birth certificate is an essential government-issued document that individuals use for various important purposes throughout their lifetime. *See* § 50–15–221, MCA. Birth certificates are used in a wide variety of contexts, such as determining eligibility for school or employment,

obtaining a passport, proving age, enrolling in government programs, and obtaining a marriage license. *See* American Bar Association, *Birth Certificates* (Nov. 20, 2018), *available at* https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/birth-certificates/. A mismatch between someone's gender identity and the sex designation on their birth certificate discloses that person's transgender identity—a profoundly private piece of information in which a transgender person has a reasonable expectation of privacy. (*See* Ettner Aff., ¶¶ 40, 43, 46.)

Transgender people who are denied accurate birth certificates are deprived of significant control over where, when, how, and to whom they disclose their transgender identity. (*See id.*, ¶ 46.) A mismatch between someone's gender identity and the information on their birth certificate also subjects transgender people to discrimination and harassment in a variety of settings, including employment, healthcare, and interactions with government employees and officials.

V. The Act's Effects on Plaintiffs

A. Ms. Marquez

Ms. Marquez is a 27-year-old woman who was born in Yellowstone County, Montana, and currently resides in Billings, Montana. (Marquez Aff., ¶ 2.) For the last three years, she has been employed by Yellowstone Boys and Girls Ranch. (*Id.*, ¶ 3.) She is transgender. (*Id.*, ¶ 4.) At birth, she was incorrectly assigned the sex designation of male. (*Id.*, ¶ 4.) Although she has known she is female for some years and lives her life accordingly, her birth certificate still incorrectly includes a male sex designation. (*Id.*, ¶¶ 4–5.)

Ms. Marquez began presenting as the woman she is approximately five years ago. (*Id.*, ¶ 5.) For the last four years, she has worked with medical and mental-health providers to assist her in bringing her body, and the other ways she expresses her gender, into alignment with her female

gender identity. (*Id.*) She has taken feminizing hormone therapy for the last two years. (*Id.*) Ms. Marquez legally changed her name to a traditionally female name two years ago. (*Id.*) Additionally, she changed her name and sex designation on her Montana driver's license, so that it accurately reflects who she is. (*Id.*).

Ms. Marquez would like to change the sex designation on her birth certificate to match her female gender identity but is unable to do so because of the Act. (*Id.*, ¶ 7.) Her inability to obtain a birth certificate that accurately reflects her female gender identity is a painful and stigmatizing reminder of the State's refusal to recognize her as a woman. (*Id.*, ¶ 7.)

Denying Ms. Marquez an accurate birth certificate places her at risk of embarrassment or even violence every time she presents the document, because it incorrectly identifies her as male. (*Id.*, ¶ 8.) Ms. Marquez has had personal experience with the high incidence of harassment and discrimination experienced by transgender people, having been the target of this treatment in both her personal and professional life. (*Id.*, ¶10.) Due to these experiences, she has learned that she must take extra precautions for her personal safety and is afraid anytime she is in situations where her status as transgender might be revealed to people whom she does not already know and trust. (*Id.*)

Ms. Marquez is typically perceived as female, so anytime she is forced to present an identity document, such as her birth certificate, that incorrectly identifies her as male, she is "outed" as transgender. (*Id.*, ¶ 9.) The thought of being outed to a stranger in this way causes her a great deal of anxiety, because she can never be sure whether or not someone will respond negatively, or even violently, to her because she is transgender. (*Id.*). She is well aware of the kind of discrimination and humiliation that transgender people commonly face. (*Id.*).

B. Mr. Doe

Mr. Doe is a 22-year-old man who was born in Bozeman, Montana, and who currently resides outside of Montana. (Doe Aff., ¶ 2.) Mr. Doe currently works two part-time jobs and will return to college in the fall. (*Id.*, ¶ 2.)

Mr. Doe would like to correct the sex designation on his birth certificate to accurately reflect his male gender identity but does not wish to be forced to share publicly, in court, private information and records regarding his transgender status, medical treatment, and anatomy. (*Id.*, ¶ 7.) At birth, Mr. Doe was assigned the gender designation of female, so the sex designation on his birth certificate also incorrectly identifies him as female. (*Id.*, ¶ 3.) However, he has known that he is a man for approximately five years. (*Id.*). Since adolescence, Mr. Doe has expressed his gender in a traditionally male manner in, for example, the way he cut his hair, the clothing he chose to wear, and in his desire to participate in activities with and otherwise be treated as a boy. (*Id.*, ¶ 4). He was diagnosed with gender dysphoria in July, 2019 and has lived and identified fully as male for the last year and a half. (*Id.*, ¶ 5.) Mr. Doe, with the support and assistance of his treating health professionals, has taken certain steps to bring his body into conformity with his male gender identity. (*Id.*, ¶ 6.) He has taken hormone therapy for approximately two years, and in the spring of 2021, he underwent masculinizing chest reconstruction surgery, commonly known as "top surgery." (*Id.*)

Mr. Doe does not wish to undergo additional gender-affirming surgery at this time. (*Id.*, ¶ 8.) He does not know whether his top surgery would be sufficient to satisfy the Act. (*Id.*, ¶ 8.) He knew he was a man well before he had surgery and does not believe that his top surgery is what made him a man. (*Id.*) Furthermore, even if Mr. Doe's top surgery were sufficient for purposes of obtaining a court order, the idea of having to share private medical records related to his transition

with a judge, in a public court proceeding, to determine whether he is the man he knows himself to be is demeaning to Mr. Doe and causes him a great deal of emotional distress due to his fear of exposure and humiliation at having his transgender status revealed. (*Id.*, ¶ 9.)

In addition, Mr. Doe is concerned about the risk he could face of discrimination, harassment, or even violence if he is required to show his birth certificate to a stranger who is biased or hostile towards people who are transgender. (*Id.*, ¶ 10). Because he is perceived as male, having to produce a birth certificate that identifies him as female will "out" him as transgender. (*Id.*) It is important to him to retain the freedom to choose when, and under what circumstances, he decides to share the deeply personal medical information regarding his transition, his body, and his transgender status. (*Id.*, ¶11.)

In addition to his fear of having to expose his personal medical information and out himself as transgender in a public forum, the Act would require Mr. Doe to undertake the financial costs and other burdens of coming to Montana to seek a court order, since Mr. Doe currently resides outside Montana. (*Id.*, ¶ 12.) He would need to pay for transportation to Montana, request time off of work (and risk losing his job because of the nature of his work), and retain an attorney to represent him in a court hearing to complete the process. (*Id.*, ¶ 12.) He would, moreover, have to undertake these burdens with no guarantee that he would be able to satisfy the Act's requirements. (*Id.*, ¶ 12.) Not having a Montana birth certificate that correctly identifies Mr. Doe as male is a constant reminder that the State of Montana does not accept him as the man he knows himself to be. (*Id.*, ¶ 13.)

LEGAL STANDARDS

An applicant is entitled to a preliminary injunction where, as here, (1) "it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in

restraining the commission or continuance of the act," (2) "it appears that commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant," or (3) "the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights." § 27–19–201, MCA. "These requirements are in the disjunctive, meaning that findings that satisfy one subsection are sufficient." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 14, 366 Mont. 224, 228, 286 P.3d 1161, 1165.

In order to be granted a preliminary injunction "[a]n applicant need only establish a prima facie case, not entitlement to final judgment." *Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4. Under Montana law, "'[p]rima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Id.* (citations omitted). In other words, an applicant "need not make a case that would entitle him or her to relief at a trial on the merits; an applicant must prove only a probable right and a probable danger that such right will be denied absent injunctive relief." *M.H., Jr. v. Mont. High Sch. Assoc.*, 280 Mont. 123, 136, 929 P.2d 239, 247 (1996).

In determining whether to issue an injunction, a court considers "(1) the likelihood that the movant will succeed on the merits of the action; (2) the likelihood that the movant will suffer irreparable injury absent the issuance of a preliminary injunction; (3) [whether] the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party (a balancing of the equities); and (4) [whether] the injunction, if issued, would not be adverse to the public interest." *Van Loan v. Van Loan*, 271 Mont. 176, 182, 895 P.2d 614, 617 (1995).

ARGUMENT

Plaintiffs are likely to prevail on the merits of their claims and will suffer irreparable harm, including the violation of their constitutionally protected rights, if no preliminary injunction is granted. A preliminary injunction also will not cause any harm to the State, as shown by the existence of the prior process for changing the sex designation on a birth certificate, which worked effectively for several years without incident. For these reasons, and as discussed in further detail below, Plaintiffs satisfy all four elements of preliminary injunctive relief, and the Court should grant their motion for a preliminary injunction.

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

Plaintiffs are likely to succeed on the merits of their claims that the Act violates their right to equal protection, their right to informational privacy, their right to be free from state interference with medical decision-making, and their right to due process. Although Plaintiffs need only demonstrate that they are likely to succeed on the merits of one of their claims to obtain preliminary injunctive relief, Plaintiffs are likely to succeed on the merits of all four claims.

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

First, Plaintiffs are likely to succeed on the merits of their equal-protection claim. Article II, Section 4, of the Montana Constitution guarantees that "no person shall be denied the equal protection of the laws" and "embod[ies] a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *McDermott v. Mont. Dep't of Corr.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 470, 29 P.3d 992, 998. The Montana Constitution's equal-protection clause "provides for even more individual protection than does the federal equal protection clause." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 58, 325 Mont. 148, 166, 104 P.3d 445, 457 (internal citation and quotation marks omitted).

As a corollary to equal protection, the Montana Constitution explicitly recognizes that "[t]he dignity of the human being is inviolable." Mont. Const. art. II, § 4. "The plain meaning of the dignity clause commands that the intrinsic worth and basic humanity of persons may not be violated." *Walker v. State*, 2003 MT 134, ¶ 82, 316 Mont. 103, 122, 63 P.3d 872, 884.

In evaluating an equal-protection claim, a court must first identify whether similarly situated classes are being treated differently. *Snetsinger*, ¶ 16. If so, then the court must decide the appropriate level of scrutiny. *Id.*

In this case, transgender and non-transgender Montanans seeking to amend their birth certificates are similarly situated for equal-protection purposes, and the classification created by the Act is subject to, and cannot survive, heightened scrutiny, as discussed below.

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

Transgender and non-transgender Montanans seeking to amend their birth certificates are similarly situated for equal-protection purposes. They are the same in all legally relevant ways because all people, transgender or not, share an identical interest in having a birth certificate that contains information accurately reflecting who they are and how they identify themselves to others, whether through their name, their date of birth, their parents, or their sex designation.

As one court has explained, even assuming, "for the sake of argument," that a transgender person's sex designation were correctly recorded at the time of birth, transgender people "are similarly situated to people who are allowed to change their accurately recorded birth parents or name," given that "adoptive parents can amend an adopted child's birth certificate to reflect the adopted parents' names, and individuals who have legally changed their names can have a birth certificate modified to reflect that change, but [transgender people] are not afforded the same ability to change their birth certificates to align with their gender identities." *See Ray v. McCloud*,

507 F. Supp. 3d 925, 935 (S.D. Ohio 2020); *see also F.V.*, 286 F. Supp. 3d at 1141 (finding that categorical ban on birth-certificate sex-designation changes for transgender people violated equal protection where it "g[a]ve certain people [such as adopted people] access to birth certificates that accurately reflect who they are, while denying transgender people, as a class, access to birth certificates that accurately reflect their gender identity").

The same is true here. Transgender and non-transgender Montanans seeking to amend their birth certificates are similarly situated for equal-protection purposes, but the Act treats the former group differently from the latter by requiring them to undergo a court-approved surgical procedure before they can have an accurate birth certificate. This unequal treatment is unconstitutional.

2. The Act is subject to heightened scrutiny.

Montana courts recognize two levels of heightened scrutiny for equal-protection purposes. "Strict scrutiny applies if a suspect class or fundamental right is affected[]." *Id.*, ¶ 17 (internal citation omitted). It requires the State to show that a law "is narrowly tailored to serve a compelling government interest." *Id.*; *see also Mont. Envt'l Info. Ctr. v. Dep't of Env. Quality*, 1999 MT 248, ¶ 61, 296 Mont. 207, 225, 988 P.2d 1236, 1245 (strict scrutiny requires state to establish that discrimination advances a compelling state interest, is closely tailored to advance only that interest, and is "the least onerous path that can be taken to achieve the state objective").

"Middle-tier scrutiny" applies "if the law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution's Declaration of Rights." *Snetsinger*, ¶ 18. Under this standard, "the State must demonstrate the law or policy in question is reasonable and the need for the resulting classification outweighs the value of the right to an individual." *Id.*

Even where a classification does not affect fundamental or important constitutional rights or burden a suspect class, the classification "must be rationally related to a legitimate government interest." *Id.*, ¶ 19.

The Montana Supreme Court has not identified the level of scrutiny applicable to classifications based on transgender status. Heightened scrutiny should apply.

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

A growing number of federal courts have found that intermediate or strict scrutiny is appropriate to examine classifications based on transgender status. For example, in *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015), the court found that discrimination against transgender people is subject to heightened scrutiny since transgender people have suffered a history of discrimination and prejudice, a person's identity as transgender has nothing to do with the person's ability to contribute to society, and transgender people represent a discrete minority class that is politically powerless to bring about change on its own. *Id.* at 139–40.

Many other courts have reached the same conclusion. *See, e.g., Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Marlett v. Harrington*, No. 1:15–cv–01382–MJS (PC), 2015 WL 6123613, at *4 (E.D. Cal. 2015) (same); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (same), *stay of preliminary injunction denied*, 845 F.3d 217, 222 (6th Cir. 2016); *Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017) (same); *M.A.B. v. Bd. of Educ. of Talbot County*, 286 F. Supp. 3d 704, 718–22 (D. Md. 2018) (same); *F.V.*, 286 F. Supp. 3d at 1142–45 (same); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Flack v. Wis. Dep't of Health Servs.*, 395 F.

Supp. 3d. 1001, 1019–22 (W.D. Wis. 2019) (same); *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019) (same); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607–08 (4th Cir. 2020) (same); *Ray*, 507 F. Supp. 3d at 936–38.

In addition, heightened scrutiny applies since discrimination against transgender people is a form of sex discrimination. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–43 (2020) (discrimination against someone because they are transgender is sex discrimination); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (intermediate scrutiny applies to transgender classification, which is sex-based); *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011) (same); *Corbitt v. Taylor*, No. 2:18cv91–MHT, 2021 WL 142282, at *3–4 (M.D. Ala. Jan. 15, 2021) (same); *see also Rolando v. Fox*, 23 F. Supp. 3d 1227, 1232–33 (D. Mont. 2014) (classification based on sexual orientation is subject to heightened scrutiny); *Maloney v. Yellowstone County, et al.*, Cause No. 1570–019 & 1572–2019 (Department of Labor and Industry, August 14, 2020) (finding that discrimination based on gender identity is a form of discrimination based on sex), *available at https://www.aclumontana.org/sites/default/files/field_documents/maloney_eleanor-_conformed_complaint_redacted.pdf.*

Three of these courts have applied heightened scrutiny in circumstances similar to those at issue here. *See F.V.*, 286 F. Supp. 3d at 1142–45 (applying heightened scrutiny in challenge to constitutionality of Idaho state policy prohibiting transgender people from changing the sex designation on their birth certificates); *Ray*, 507 F. Supp. 3d at 936–38 (applying heightened scrutiny in challenge to constitutionality of Ohio state policy prohibiting transgender people from changing the sex designation on their birth certificates); *Corbitt*, 2021 WL 142282, at *3–4 (applying heightened scrutiny in challenge to constitutionality of Alabama policy requiring

transgender people to have "genital surgery" before changing the sex designation on their driver's licenses).

Given that the Montana Constitution's equal-protection clause "provides for even more individual protection than" its federal equivalent, *Snetsinger*, ¶ 58, and based on the growing consensus among federal courts under the federal equal-protection clause, this Court should apply heightened scrutiny to the Act.

b. Montana's test for ascertaining the appropriate level of equal-protection scrutiny mandates applying heightened scrutiny.

Applying heightened scrutiny is also consistent with the test the Montana Supreme Court has adopted for determining the appropriate level of equal-protection scrutiny. As the Court has noted, "[a] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection form the majoritarian political process." *In re Matter of S.L.M.*, 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); *see also In re Matter of C.H.*, 210 Mont. 184, 198, 683 P.2d 931, 938 (same).

This test mandates applying at least intermediate scrutiny to classifications that discriminate against transgender Montanans. *First*, transgender people, in Montana and elsewhere, have been "subjected to such a history of purposeful unequal treatment." *Matter of S.L.M.*, 287 Mont. at 33. Discrimination based on transgender status has been extensively documented. S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Washington, DC, National Center for Transgender Equality (2016), *available at* https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf ("Transgender Survey"). Published in 2016, the Transgender Survey describes the discrimination,

harassment, and even violence that transgender people encounter at school, in the workplace, when trying to find a place to live, during encounters with police, in doctors' offices and emergency rooms, at the hands of service providers and businesses, and in other aspects of life. *Id.*

Transgender people nationally and in Montana continue to face discrimination. To the extent they have seen progress in protecting their rights, there is considerable backlash against that progress—including through discriminatory legislation enacted by the Montana State Legislature. *See The Discrimination Administration*, National Center for Transgender Equality, *available at* https://transequality.org/the-discrimination-administration (discussing long pattern of antitransgender executive-branch initiatives at the federal level); Jeremy W. Peters, et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. Times (Feb. 22, 2017), *available at* https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html (discussing rescission of protections for transgender students that had allowed them to use bathrooms corresponding with their gender identify); *Trump Announces That He Will Ban Transgender People from Serving in the Military*, Wash. Post (July 26, 2017), *available at* https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7_story.html (discussing announcement of ban on transgender people serving in the military).

The most recent examples of animus against transgender people in Montana include (1) the Act, which intentionally and facially discriminates against transgender Montanans seeking to change the sex designation on their birth certificates; (2) HB 112, which bans transgender girls and women from participating in sports consistent with their gender identity at the elementary, secondary, or post-secondary levels; and (3) HB 113, which, while ultimately defeated, would

have prohibited medical professionals from providing hormonal treatments or gender-affirming surgery to minors. *See* SB 280; HB 112; HB 113. These acts do not stand alone. *See ACLU of Montana Found., Inc. v. Montana ex rel. Fox*, No. OP 17–0449, 2017 WL 9532878, at *1 (Mont. Sept. 19, 2017) (discussing ballot initiative for the "Montana Locker Room Privacy Act," which would have "require[d] government entities to designate a protected facility in a government building or public school for use only by members of one sex"). Taken together, these examples illustrate the long, troubling history of invidious discrimination against transgender people in Montana and elsewhere.

Second, transgender people suffer a level of "political powerlessness" sufficient to warrant "extraordinary protection" under the law because of the community's small population size and the enduring societal prejudices against transgender people. *Matter of S.L.M.*, 287 Mont. at 33. A 2016 study by the Williams Institute estimates that just 0.34 percent of Montanans identify as transgender. Andrew R. Flores, et al., *How Many Adults Identify as Transgender in the United States?*, Williams Institute (June 2016), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

Transgender people face staggering rates of poverty and homelessness. Nearly one-third of transgender people fall below the poverty line, more than twice the rate of the general U.S. population. S. E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality 5 (Dec. 2016), *available at* https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf . Nearly one third of transgender people have experienced homelessness. *Id.*

Transgender people also face barriers to political representation. *See, e.g.*, Philip E. Jones, et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*, 82 Pub.

Opinion Q. 252, 265 (Summer 2018), *available at* https://academic.oup.com/poq/article/82/2/252/4996117 (in randomized experiment, nominating a transgender candidate reduced proportion of respondents who would vote for their own party's candidate from 68 percent to 37 percent).

These factors—the "history of purposeful unequal treatment" and the presence of "political powerlessness"—support applying heightened scrutiny to the Act. *Matter of S.L.M.*, 287 Mont. at 33.

c. The Act burdens a fundamental right.

The Act is also subject to heightened scrutiny because it burdens a fundamental right. "Any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis." *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). A right is "fundamental" under Montana's Constitution if the right is either found in the Declaration of Rights or is a right "without which other constitutionally guaranteed rights would have little meaning." *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986). As shown below, the Act burdens Plaintiffs' right to informational privacy and their right to make their own decisions regarding medical treatment. *See infra* Parts I(B)–(C). For these additional reasons, it is subject to strict scrutiny.

3. The purported need for the Act does not outweigh the value of the right it impairs, nor is it narrowly tailored to serve a compelling governmental interest.

The Act cannot survive heightened scrutiny. The Act, by its own terms, targets transgender people, and only transgender people, by requiring them to undergo surgery, initiate a court proceeding, and obtain an order affirming that they have had gender-affirming surgery, in order to change the sex designation on their birth certificates. *See* SB 280. Only after undergoing surgery,

presenting the confidential and intimate details of that surgery to a court, and obtaining a court order may a transgender person submit an application to DPHHS to obtain a birth certificate that accurately reflects their gender. *See id.* By contrast, cisgender people—i.e., people whose gender identity matches their sex assigned at birth—are not required to undertake any measures to ensure that their birth certificates reflect how they present to society. *See Ray*, 507 F. Supp. 2d at 934–36 (concluding that policy prohibiting transgender people from changing the sex designation on their birth certificates treated transgender people differently from similarly situated cisgender people by categorically denying the former the opportunity to have a birth certificate reflecting how they present to society but allowing the latter the same right); *F.V.*, 286 F. Supp. 3d at 1140–41 (same).

Impairing transgender people's right to correct the sex designation on their birth certificates is not "reasonable," and the need for the impairment—purportedly to ensure accurate record-keeping—does not outweigh the value of the right that is impaired. *See Snetsinger*, ¶ 18. Indeed, an "accurate" birth certificate is one that describes who someone is, as well as how they identify and express their gender, which is determined by a person's gender identity. Thus, the purported state interest in "accuracy" is undermined, rather than supported, by the Act.

The requirements the Act imposes on transgender people—a surgical procedure and the public court-ordered affirmation of that procedure—also are not "narrowly tailored to serve a compelling government interest." *Id.*, ¶ 17. The Act does not serve a compelling government interest. The State's only stated justifications for the Act are to ensure accurate vital statistics and ensure legislative, rather than executive, primacy over regulating birth-certificate amendments. *See* 2/25/21 Senate Judiciary Hearing, 9:13:52, *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/40697?agendaId=201705

(discussing sponsor's rationale for the Act); 3/26/21 House Judiciary Hearing, 8:35:32, *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/40697?agendaId=201705 (same). Nothing in the legislative record supports a finding that there were any problems maintaining "accurate" vital statistics under the previous policy, which. allowed people to change their sex designation without having to undergo surgery or disclose private medical records to a court and DPHHS. *See* DPHHS MAR Notice No. 37–807 (amending ARM 37.8.102 & 37.8.311). On the contrary, many of the legislative comments offered in support of the Act are based on misguided speculation and assumptions about transgender people and the perceived need to regulate their identification documents differently from those of cisgender people, including unsupported assertions about criminality and invocations of principles. *See, e.g.*, 4/9/21 House Floor Debate, 12:57:26, *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41091?agendaId=214739(Representative Skees, in support, stating "If you rob a grocery store, we're looking for a six foot, white male. That's what this stuff does. That's what this bill is about."); *id.* at 12:57:58 (Representative Phalen, in support, stating: "God created Man in His own image, in the image of God He created him. Male and female he created them.").

Additionally, even if the Act served a compelling state interest (which it does not), the Act is not narrowly tailored to meet that interest. *First*, there are less restrictive means of maintaining accurate vital statistics, such as the previous policy for amending the sex designation on birth certificates. *See* MAR Notice No. 37–807 amending ARM 37.8.102 & 37.8.311. *Second*, the State cannot show that a judge is more capable than a transgender person to determine, with the advice of their chosen medical providers, the course of care sufficient and necessary for themselves to

come into alignment with their gender identity. (*See* Ettner Aff., ¶¶ 29, 31, 33 (noting the need for "individualized treatment" for gender dysphoria based on "medically accepted standards of care").)

The Act's full-scale overhaul of the framework for sex-designation changes is highly problematic. Being unable to correct the sex designation on one's identity documents, including one's birth certificate, means that transgender people are forced to display documents that indicate their birth-assigned sex—typically assumed based only by the appearance of genitalia at birth—rather than their actual sex as determined by their gender identity and their life experience. (*Id.*, ¶ 40.) This creates "deleterious social and psychological consequences" for transgender people. (*Id.*)

Identity documents consistent with a person's life experience affirm and consolidate gender identity, mitigating distress and other consequences. (*Id.*, ¶ 41.) Changes in gender presentation and role to feminize or masculinize appearance, as well as social and legal recognition, are crucial components of treating gender dysphoria. (*Id.*) Social transition involves dressing, grooming, and otherwise outwardly presenting oneself through social signifiers of a person's true sex, as determined by their affirmed gender identity. (*Id.*)

The social-transition process ameliorates the shame of growing up living as a "false self" and the grief of being born into the "wrong body." (*Id.*, ¶ 42.) Being socially and legally recognized with correct identification is essential to successful treatment. (*Id.*) Indeed, the World Professional Association for Transgender Health's *Standards of Care for the Health of Transsexual, Transgender, and Nonconforming People* explicitly state that changing the sex designation on identity documents greatly assists in alleviating gender dysphoria. (*Id.*) *See Standards of Care, available at* https://www.wpath.org/publications/soc. Uncorrected identity documents serve as constant reminders that one's identity is perceived by society and government as "illegitimate."

(*Id.*) Individuals who desire and require surgery must, as a prerequisite, undergo a social transition, which can be thwarted by inaccurate identification documents. (*Id.*)

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

These experiences of humiliation and discrimination have serious and enduring consequences. (*Id.*, ¶ 45.) It is well documented that stigmatization and victimization are the most powerful predictors of current and future mental-health problems. (*Id.*) A birth certificate is required in numerous situations. (*Id.*) For transgender individual people, an inaccurate birth certificate can transform a mundane interaction into a traumatic experience. (*Id.*)

Many people who suffer from gender dysphoria go to great lengths to align their physical characteristics, voice, mannerisms, and appearance to match their gender identity. (*Id.*, ¶ 46.) Since gender identity is immutable, these changes undergoes a social transition, legal recognition of that transition is vital, and an accurate birth certificate is an important aspect of that recognition. (*Id.*, ¶ 47.) This is because congruent identity documentation confers privacy—i.e., the right to maintain stewardship of personal and medical information—and allows an individual to live a safe and healthy life. (*Id.*)

From a medical and scientific perspective, there is no basis for refusing to acknowledge a transgender person's sex, as determined by their gender identity, based on whether that person has undergone surgery or any other medical treatment, or based on the permanence of any particular transition-related treatment. (*Id.*, ¶ 48.) The appearance of genitalia, or the ratio of circulating sex steroids, are not relevant to a person's innate and immutable gender identity. (*Id.*)

Moreover, not all individuals with gender dysphoria require hormonal or surgical treatment. (*Id.*, ¶ 49.) For some, social-role transition may be sufficient to alleviate their distress. (*Id.*) Indeed, for many transgender people, surgery is not medically necessary or may be safely delayed as their gender dysphoria is alleviated through social-role transition and other medical treatments. (*Id.*) It is estimated that only 33% of transgender people undergo some form of gender-related surgery. (*Id.*) Because of financial and other systemic barriers to necessary medical treatments, not all individuals for whom surgical intervention is medically indicated are able to access these options. (*Id.*)

There is no reason to require transgender people to undergo hormonal or surgical treatment in order to obtain identity documents, including birth certificates, that accurately reflect who they are. By extension, there is no reason to require them to obtain court approval of that treatment as a precondition to updating their identity documents. The Act, which needlessly imposes these burdensome requirements, cannot withstand heightened scrutiny, and its enforcement should be enjoined. *See Snetsinger*, ¶¶ 17–18; *see also Corbitt*, 2021 WL 142282, at *5–11; *Ray*, 507 F. Supp. 2d at 936–40; *F.V.*, 286 F. Supp. 3d at 1140–45.

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

Second, Plaintiffs are likely to succeed on the merits of their informational-privacy claim. Article II, Section 10, of the Montana Constitution provides: "The right of individual privacy is

essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. The Montana Constitution gives Montanans "one of the most stringent protections of its citizens' right to privacy in the United States." *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 373, 989 P.2d 364, 374. "Where the right of individual privacy is implicated, Montana's Constitution affords significantly broader protection than does the federal constitution." *Armstrong*, ¶ 41 (citing *Gryczan v. State*, 283 Mont. at 448.)

The Montana Supreme Court has held that:

> [I]f the right of informational privacy is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records. In contrast to telephone company billing records, for which there is no reasonable expectation of privacy, medical records fall within the zone of privacy protected by Article II, Section 10 of the Montana Constitution. As the Montana Legislature has recognized, 'health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy and health care or other interests.' Medical records are quintessentially 'private' and deserve the utmost constitutional protection.

State v. Nelson, 283 Mont. 231, 242, 941 P.2d 441, 447 (1997) (holding that "medical records and medical information are protected under Article II, Section 10's guarantee of privacy. . .") (internal citations omitted).

Montana courts apply a two-part test when determining whether a privacy interest is protected under Article II, Section 10, of the Montana Constitution. *Id.* at 239 (citing *State ex rel. Great Falls Tribune Co. v. Eighth Judicial Dist. Court*, 238 Mont. 310, 318, 777 P.2d 345, 350 (1989)). The test focuses on (1) whether the person involved had a subjective or actual expectation of privacy and (2) whether society is willing to recognize that expectation as reasonable. *Id.*

When a person seeks medical care from their treating physician, they have a subjective and actual expectation that the care will remain private and privileged between them and their doctor. Plaintiffs have a subjective and actual expectation of privacy in the medical records describing the

subject matter of their patient–physician relationships. They also have a privacy interest in their transgender status. *See Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) (right to privacy includes right to maintain confidentiality of transgender status); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (same); *Ray*, 507 F. Supp. 2d at 932 (same).

In addition, society is willing to recognize that the expectation of privacy that attaches to private medical records, as well as to a person's transgender status, is a reasonable one. "Informational privacy is a core value furthered by state constitutional guarantees of privacy." *Nelson*, 941 P.2d at 447. "[T[he zone of privacy created by those provisions extends to the details of a patient's medical and psychiatric history." *Id.* By including medical records within the scope of constitutionally protected privacy rights, the Montana Supreme Court has recognized the reasonableness of a person's expectation in keeping those records private.

Plaintiffs thus have a subjective and actual expectation of privacy in their medical records and transgender status that society is willing to recognize as reasonable. The Act violates their right to privacy by forcing them to disclose this constitutionally protected information.

In particular, the Act requires Plaintiffs to disclose their transgender status, medical conditions, and related medical treatments to a court with no guarantee of confidentiality. *See* SB 280. It also requires them to disclose their private medical information to DPHHS, which is charged with reviewing court orders entered under the Act. *Id.* The State's need for access to this information, the confidentiality of which the Act does not safeguard in any way, is heavily outweighed by the harm caused by both sides of the ultimatum into which Plaintiffs are forced: (1) to disclose the contents of their private medical records if they seek to change their birth certificates or, alternatively, (2) to out themselves every time they have to show their birth certificates for employment, school, or other purposes.

For these reasons, Plaintiffs have an actual and reasonable expectation of privacy in information contained in their medical records. This is particularly true given the sensitivity of information related to their anatomy and transgender status. They also have an actual and reasonable expectation of privacy in avoiding being outed as transgender when they display their birth certificates. Fear of disclosure takes a grave toll on transgender people, causing many harmful psychological and physiological consequences. (Ettner Aff., ¶¶ 40–44). The State's alleged interest in maintaining accurate records does not outweigh Plaintiffs' reasonable expectation that the privacy of their medical information will be preserved. Additionally, the State's successful experience with its former process for amending the sex designation on birth certificates shows that the Act is not the least restrictive means of furthering the State's purported interest.

The State has no compelling interest in requiring Plaintiffs to disclose their constitutionally protected private information, and the Act's infringement on Plaintiffs' informational privacy is not narrowly tailored to serve a compelling state interest. *See supra* Part I(A). Plaintiffs have thus established a likelihood of success on the merits of their informational-privacy claim.

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

Third, Plaintiffs are likely to succeed on the merits of their medical-interference claim. "[O]ne's right to choose or refuse medical treatment, . . . [is] protected under the personal autonomy component of the individual privacy guarantees of Montana's Constitution." *Armstrong*, ¶ 52. "Few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health." *Id.*, ¶ 53. Under the strict-scrutiny test set forth in *Armstrong*, which applies here, any law infringing on the right to privacy "must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest." *Armstrong*, ¶ 34; *accord Gryczan*, 283 Mont. at 449.

The Act infringes on the right to personal autonomy encompassed within the fundamental right to privacy by impermissibly forcing Plaintiffs, and other transgender people, to undergo surgery that may be medically contraindicated, unwanted, or economically infeasible in order to correct the sex designation on their birth certificates. Transgender people who are unable to meet the Act's surgery requirement are forced to live with the constant risk of disclosing their transgender status against their will because of a basic identity document that does not match their gender. (Ettner Aff., ¶¶ 40, 43).

As discussed above, the Act does not serve a compelling state interest, since nothing in the legislative record supports a finding that there were any problems with maintaining "accurate" vital statistics under the previous policy for changing the sex designation on birth certificates. *See supra* Part I(A). Additionally, even if the Act served a compelling state interest, the Act is not narrowly tailored to meet that interest because there are less restrictive means of maintaining accurate vital statistics, and the State cannot show that a judge is more capable than a treating physician of determining the sufficiency of a transgender person's gender-affirming medical care. *See supra* Part I(A). For these reasons, Plaintiffs are likely to show that the Act violates their right to freedom from state interference with their medical decisions.

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

Fourth, Plaintiffs are likely to succeed on the merits of their due-process claim. Article II, Section 17, of the Montana Constitution guarantees due process. Mont. Const. art. II, § 17 ("No person shall be deprived of life, liberty, or property without the due process of law."). "The theory underlying substantive due process reaffirms the fundamental concept that the due process clause contains a substantive component, which bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action."

Newville v. State, Dept. of Family Services, 267 Mont. 237, 249, 883 P.2d 793, 800 (1994). Due process encompasses the "basic principle" that "an enactment is void for vagueness if its prohibitions are not clearly defined." *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 440, 704 P.2d 1021, 1025–26 (1985). "A vagueness challenge to a statute may be maintained under two different theories: (1) because the statute is so vague that it is rendered void on its face; or (2) because it is vague as applied in a particular situation." *State v. Dugan*, 2013 MT 38, ¶ 66, 369 Mont. 39, 62, 303 P.3d 755, 772. Plaintiffs have pleaded both theories and are likely to prevail on both.

1. The Act is unconstitutionally vague on its face.

A statute is unconstitutionally vague on its face "if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Dugan*, ¶ 67 (internal quotation marks omitted). The Act is unconstitutionally vague on its face since it "fails to give a person of ordinary intelligence fair notice" of what conduct is required under the Act. *See id.*

The Act states that "[t]he sex of a person designated on a birth certificate may be amended *only if [DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction* indicating that the sex of the person born in Montana has been changed by *surgical procedure*." *See* SB 280 (emphases added). However, neither gender-affirming surgery nor any other medical treatment that a transgender person undergoes changes that person's sex. (Ettner Aff., ¶ 34.) Instead, it aligns a person's body and lived experience with the person's gender identity, which already exists. The Act requires that, as a condition of amending the sex designation on a transgender person's birth certificate, a transgender person must undergo a "surgical procedure" but does not define what the surgery should be or identify who—DPHHS, the court, or the applicant's physician—decides what type surgery is sufficient. There are many types of surgery

available to treat gender dysphoria, from facial feminization, to tracheal shave, to vaginoplasty and phalloplasty. (Lane Aff. ¶ 2.) Whether these surgeries—some of which are minimally invasive and others of which are quite extensive—qualify under the Act is entirely unclear based on the plain language of the statute.

The Act also does not identify the standard of proof applicable to the court proceeding that the Act requires. Nor does the Act identify the standard, if any, governing DPHHS's review of the court's order. Absent these basic specifications, the Act "is so vague that it is rendered void on its face." *Dugan*, ¶ 66; *see also Western Native Voice v. Stapleton*, No. DV 20–0377 (13th Dist., Yellowstone Cnty. Sept. 25, 2020), ¶ 49 (finding Montana's Ballot Interference and Protection Act ("BIPA") unconstitutionally vague on its face), *available at* https://www.aclu.org/legal-document/order-western-native-voice-v-stapleton-decision.

b. The Act is unconstitutionally vague as applied.

The Act is also unconstitutionally vague as applied to Plaintiffs. "A statute is unconstitutionally vague as applied to [an individual] if: (1) it fails to provide 'actual notice' to the [individual], or (2) it fails to provide 'minimal guidelines' to law enforcement regarding the defendant's conduct." *State v. Hamilton*, 2018 MT 253, ¶ 20, 393 Mont. 102, 110, 428 P.3d 849, 855 (internal quotation marks omitted). A statute fails to provide "minimal guidelines" when it fails "to prevent arbitrary and discriminatory enforcement." *Id.* (internal quotation marks omitted).

The same principles apply here. As noted, the Act does not provide "actual notice" to Plaintiffs regarding (1) the type of "surgical procedure" they must undergo to comply with the Act; (2) the identity of who decides whether the "surgical procedure" is sufficient to comply with the Act; (3) the standard of proof applicable to a court proceeding under the Act; or (4) the standard, if any, governing DPHHS's review of the court's order under the Act. *See* SB 280. The absence

of these "minimal guidelines" virtually guarantees that the Act will be arbitrarily and inconsistently applied across cases. *See Western Native Voice*, ¶ 62 (finding BIPA unconstitutionally vague as applied).

The effects of this lack of clarity are particularly acute in this case. For example, although Mr. Doe has had top surgery, he "does not know whether [his] top surgery would be sufficient" to meet the Act's requirement that he have "a surgical procedure to change [his] sex." (Doe Aff., ¶ 8.) Mr. Doe "knew [he] was a man well before [he] had surgery and do[es] not believe that [his] top surgery is what made [him] a man." (*Id.*) Similarly, if, at some later date, either Ms. Marquez or Mr. Doe had the means or desire to undergo gender-affirming surgery, they would have no way of knowing in advance whether the particular surgery in question ultimately would qualify them to amend the sex designation on their birth certificates. For these reasons, the Act is unconstitutionally vague as applied.

II. Plaintiffs have suffered, and will continue to suffer, irreparable injury.

Plaintiffs have already suffered, and will continue to suffer, irreparable injury as a result of the Act. As the Montana Supreme Court has concluded, "the loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *See Mont. Cannabis Indus. Ass'n*, ¶ 15; *see also Weems*, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction."). That is the case here. Plaintiffs have demonstrated that their constitutional rights to equal protection, privacy, personal autonomy, and due process, are being infringed. These constitutional violations constitute irreparable injuries.

Additionally, the Act has dire real-world consequences for both Ms. Marquez and Mr. Doe. If either Ms. Marquez or Mr. Doe attempts to obtain a birth certificate under the provisions of the

Act, both will suffer irreparable emotional and financial harm. The Act requires that any person who wishes to change the sex designation on their birth certificate to present proof of surgery to a court. *See* SB 280. Every time a transgender person is compelled to share private information related to their transition, they are forced to publicly out themselves. The mental and emotional toll of being forced, against one's will, to publicly share personal information related to gender-affirming surgery is both humiliating and degrading. (*See* Marquez Aff., ¶ 9–10; Doe Aff., ¶ 9-10.) This process would force Plaintiffs to go in front of a judge, and put themselves at the judge's mercy, to determine whether the judge believes that whatever surgery Plaintiffs have had—or, in the case of Ms. Marquez, not had—is sufficient to satisfy the vague surgery requirement of the Act.

Furthermore, Mr. Doe will suffer irreparable financial harm if he attempts to change the sex designation on his birth certificate based on the requirements of the Act. (Doe Aff., ¶ 12.) Unlike the former process, which had no requirement for surgery or court proceedings, the Act requires that anyone seeking to change a birth certificate's sex designation participate in court proceedings. For someone like Mr. Doe, who lives outside Montana, the requirement of participating in a court proceeding means that he will have to travel to Montana to fulfill the Act's requirements. This means that, in addition to having to pay for travel costs, Mr. Doe will have to request time off of work and hire an attorney to represent him in the judicial proceedings required by the Act. (*Id.*) Undertaking this financial burden to meet the Act's requirements will cause irreparable harm to Mr. Doe. If he takes the measures required by the Act, there is no basis for him to seek reimbursement for doing so.

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

The balance of equities tips sharply in Plaintiffs' favor. In contrast to the severe and irreparable ongoing constitutional injuries that Plaintiffs face under the Act, Defendants will not be harmed if the Act is enjoined. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011) (threat of "irreparabl[e] los[s]" to the plaintiff tips "the balance of hardships between the parties . . . sharply in favor of [the plaintiff]"). Additionally, injunctive relief serves the public interest in this case because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted). Thus, granting a preliminary injunction in this case would prevent irreparable harm to Plaintiffs, while serving the public interest and causing the State no harm or inconvenience.

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

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

CONCLUSION

FOR THESE REASONS, Plaintiffs Amelia Marquez and John Doe respectfully request the entry of an order:

(a) preliminarily enjoining Defendants, as well as their agents, employees, representatives, and successors, from enforcing the Act, directly or indirectly; and

(b) granting any other relief the Court deems just.

Dated: July 19, 2021

Respectfully submitted,

By: _____
Akilah Lane

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

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

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

Elizabeth Halverson PC
1302 24th Street West #393
Billings, MT 59102

406-698-9929
chalverson@halversonlaw.net