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STATE OF MONTANA
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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual, Plaintiffs, v. STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as Governor of the State of Montana; et al., Defendants.	DV-21-00873 Hon. Michael G. Moses **DECLARATION OF KATHLEEN L. SMITHGALL RE: DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

I, KATHLEEN L. SMITHGALL, make the following Declaration under penalty of perjury:

1. I am counsel for Defendants in the above action, am competent to testify as to the matters set forth herein, and make this Declaration based on my own personal knowledge and/or belief. I am generally familiar with the claims, materials, documents, and pleadings regarding this matter.

2. Attached as Exhibit A is a true and correct copy of the transcript from the December 22, 2021 hearing, cited in Defendants' Brief in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint.

3. This transcript was prepared by Claudette Henry at the request of Defendants.

4. I hereby declare under penalty of perjury under the laws of the State of Montana that the foregoing is true and correct to the best of my knowledge.

Dated this 28th day of January, 2022.

KATHLEEN L. SMITHGALL
Assistant Solicitor General

Exhibit A

1 MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY
2
3 AMELIA MARQUEZ and)
JOHN DOE,)
4)
Plaintiffs,)
5) Cause No. DV 21-873
vs.)
6)
STATE OF MONTANA, ET AL.,)
7)
Defendants.)
8
9 TRANSCRIPT OF PROCEEDINGS
10
Courtroom 608 - Dept. No. 3
11 Yellowstone County Courthouse
Billings, Montana
12 December 22, 2021
13
HONORABLE MICHAEL G. MOSES, PRESIDING JUDGE
14 MOTIONS HEARING
15
16 APPEARANCES
17 For the Plaintiffs: ALEX RATE
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1 **P R O C E E D I N G S**

2 **THE COURT: This is Cause Number DV 21 873**

3 **Amelia Marquez et al versus Greg Gianforte as the**

4 **Governor of the State of Montana et al. This is the**

5 **time set for hearing on two matters. There is filed a**

6 **motion to dismiss in this particular matter filed by the**

7 **Defendant and also there is a request for preliminary**

8 **injunction in this particular matter. Are the**

9 **Plaintiffs ready to proceed?**

10 **MR. RATE: We are, your Honor. Thank you.**

11 **THE COURT: If you would please identify yourselves**

12 **there at the table.**

13 **MR. RATE: Alex Rate with ACLU of Montana on behalf**

14 **of the Plaintiffs.**

15 **MS. LANE: Akilah Lane with ACLU of Montana on**

16 **behalf of the Plaintiffs.**

17 **THE COURT: And then who have we got on the Zoom?**

18 **MS. SMITHGALL: Yes, your Honor. My name is**

19 **Kathleen Smithgall, and I am representing the State of**

20 **Montana and the other defendants in this matter.**

21 **THE COURT: Anybody else on the Zoom? Looks like we**

22 **have --**

23 **MR. RATE: Your Honor, if I may just briefly, we**

24 **believe that one of our clients may be participating by**

25 **Zoom. And he is proceeding under a pseudonym. So I**

1 would just ask that he not identify himself by name for
2 purposes of this proceeding.
3 THE COURT: That would be fine. This is an open
4 session of the court. All people may appear. Looks
5 like we may have as many as 16 people appearing on the
6 Zoom, probably 15 'cause I think I'm number one. And
7 everybody is welcome. Thank you. First of all, let's
8 talk about the motion to dismiss. Let's start with you
9 counsel for the State.
10 MS. SMITHGALL: Thank you, your Honor. Good
11 afternoon. And may it please the Court, as I said
12 previously, my name is Kathleen Smithgall and I
13 represent the State of Montana, Governor Greg Gianforte,
14 Department of Public Health and Human Services, and
15 Director Adam Meier. And I would like to reserve three
16 minutes for rebuttal.
17 And then as an initial matter, your Honor, we
18 wanted to -- both parties discussed supplemental
19 briefing with respect to the two added claims that -- in
20 Plaintiffs' amended complaint. It added a claim under
21 the Montana Human Rights Act and Montana Governmental
22 Code of Fair Practice.
23 And so, both parties would ask this Court to
24 reserve ruling on the motion to dismiss and allow the
25 parties to file supplemental briefings on those two

1 **claims. And we can submit a motion to that affect.**
2 **THE COURT: You agree, Mr. Rate?**
3 **MR. RATE: Only to the exception -- I don't actually**
4 **believe that the briefing -- so first of all, we agree**
5 **that we can brief the statutory claims under the Human**
6 **Rights Act and Government Code for Fair Practices and**
7 **that should be fine. I don't think that the State's**
8 **argument related to dismissal on our constitutional**
9 **claims will necessarily change.**
10 **Ms. Smithgall can address that. But we**
11 **certainly don't want to hold in abeyance any ruling on**
12 **the pending motion for preliminary injunction any longer**
13 **that we absolutely have to, your Honor.**
14 **THE COURT: I will hold in abeyance the -- both**
15 **motions. First of all, I want to hear and obtain as**
16 **much input as possible on both of these motions on all**
17 **of the issues on both of these motions. Obviously, the**
18 **motion to dismiss came before the amended complaint was**
19 **filed.**
20 **And so, that makes sense. So you will have an**
21 **opportunity to submit briefing and proposed findings if**
22 **you wish on that. Have you agreed upon how much time**
23 **you need?**
24 **MR. RATE: We have not yet, your Honor. We expect**
25 **that we will be able to convene with the State in short**

1 order and come up with a schedule.
2 MS. SMITHGALL: Yes, agreed.
3 THE COURT: Well, let's hear the beginnings of
4 motion to dismiss then. How is that?
5 MS. SMITHGALL: Perfect. Yes. We will go ahead and
6 address the four constitutional claims. So as you know,
7 Plaintiffs challenge SB-280, which establishes the
8 process for a person to amend their sex on their birth
9 certificate. The legislature brought consistency to
10 this process by creating a state law standard rather
11 than promulgating subject to administrative whiplash.
12 This law is important for a variety of reasons,
13 including maintaining accurate vital statistics. And
14 the legislature developed this standard, which
15 incorporated the process that was in place for over a
16 decade before being changed under the Bullock
17 administration.
18 So in the original complaint as we noted,
19 Plaintiffs raised four claims, first, violation of the
20 equal protection clause of the Montana Constitution,
21 violation of their right to informational privacy,
22 violation of their right to medical decisionmaking, and
23 violation of due process.
24 Each of these four claims must be dismissed for
25 two reasons. First, Plaintiffs lack standing to bring

1 these claims and, second, Plaintiffs have failed to
2 state a claim upon which relief can be granted. I'm
3 first going to address the standing issue and then now
4 turn to substance of the claims themselves, which I know
5 we will also address extensively with respect to the
6 preliminary injunction motion.
7 So for standing, of course, this court is a
8 court of limited jurisdiction. It is not enough that
9 the issues raised in this litigation are of grave public
10 importance. The parties must establish that they are
11 the proper parties to bring these claims in this court.
12 The principle of constitutional standing comes for
13 Article 7 Section 4 but -- of the Montana Constitution.
14 But it has been interpreted as imposing the
15 same restrictions as said -- found in federal court
16 under Article 3. So standing requires Plaintiffs to
17 show, one, that they have been personally injured or
18 have been threatened with immediate injury as a direct
19 result of the statute enforcement; two, that this injury
20 is fairly traceable to the alleged violation; and,
21 three, that it is likely this injury will be redressed
22 by favorable decision.
23 So Plaintiffs each have to establish standing.
24 And they have failed to establish these three elements
25 most notable injury in fact, which under Bullock v Fox

1 must be concrete actual and imminent, not abstract,
2 conjectural, or hypothetical. So I'm going to address
3 each of the Plaintiffs' allegations of injury in fact in
4 turn.
5 So first I would like to turn to Marquez.
6 Marquez includes two allegations of purported harm.
7 First, SB-280 and I quote, "places Marquez at risk of
8 violence, harassment, and discrimination every time
9 Marquez presents an identity document." Second, Marquez
10 lives in fear of having to present a birth certificate
11 to someone who may respond negatively.
12 Neither of these allegations though is
13 sufficient to support an injury for purposes of
14 standing. For a threatened injury to establish injury
15 in fact, the Plaintiffs must assert facts showing and I
16 quote, "an immediate danger of sustaining some direct
17 injury." And this comes from Olson verus Department of
18 Revenue.
19 Similar language, of course, appears in both
20 federal and state law. In Clapper versus Amnesty
21 International, for example, the Supreme Court held that
22 the risk must be certainly impending. And then in
23 Committee for an Effective Judiciary versus State, a
24 Montana case, the risk in that was a, quote, "virtual
25 certainty."

1 The Plaintiff here have asserted no facts
2 showing that a perceived risk of future violence,
3 harassment, and discrimination is likely, let alone,
4 immediate or virtually certain nor did Plaintiffs allege
5 who will perpetrate the violence, harassment, or
6 discrimination against Plaintiffs.
7 They just simply conclude that these risks
8 exist. And without additional facts, this is
9 insufficient. Plaintiffs also failed to show why these
10 speculative harms are now -- are only now at issue.
11 Marquez lives as an openly transgender woman for over
12 five years now.
13 But Marquez has not attempted to change sex on
14 the birth certificate under the old rule or the new
15 rule. Plaintiffs claims of injury are that the sex
16 listed on Marquez's birth certificate does not match
17 Marquez's gender identity. But this was the case prior
18 to SB-280 under the old rule. This means that
19 Plaintiffs injuries that they claim are not certainly
20 impending nor is Marquez in any immediate danger of
21 sustaining an injury from SB-280.
22 The injury Marquez alleges predate SB-280.
23 There are no factual allegations in the complaint that
24 suggest Marquez has ever attempted to change the birth
25 certificate or intends to do so in the future nor are

1 there any factual allegations in the complaint that
2 Marquez have ever had to present a birth certificate in
3 the past or will have to do so in the future.
4 And this case bears a striking resemblance to
5 Olson versus Department of Revenue where certain
6 residence who lived in the state of Montana did not
7 reside within any particular county and those residence
8 wanted to challenge the requirement that they reside
9 within a county to obtain -- in order to run for office
10 or obtain hunting and fishing licenses.
11 But the court in that case held that they had
12 no standing because they had not actually attempted to
13 run for office or obtain a hunting and fishing license
14 nor did they allege they plan to do so in the future.
15 Again, here Marquez has not attempted to change sex on
16 the birth certificate nor have Plaintiffs asserted any
17 fact in the complaint showing that Marquez will seek to
18 do so in the future.
19 And, again, Plaintiffs don't allege anywhere in
20 the complaint where -- that a birth certificate will be
21 the only document to accomplish whatever Plaintiffs need
22 to accomplish. Marquez also asserts fear of having to
23 present a birth certificate.
24 But fear of a hypothetical scenario in the
25 future has been expressly rejected as a basis for

1 standing, again, as stated in Olson and then again
2 Committee for an Effective Judiciary versus State. The
3 threat and injury must be immediate or virtually
4 certain. And claims of discrimination against
5 transgender people broadly do not translate to
6 complaints of specific and personal harm under SB-280.
7 Plaintiffs don't allege facts personal to
8 Marquez that establish an injury in fact necessary to
9 have standing. And even if this Court found that the
10 injuries claimed in Plaintiffs complaint are sufficient,
11 they are not fairly traceable to the claims alleged nor
12 are they addressable.
13 Traceability requires that Plaintiffs show that
14 the alleged violation here, SB-280, causes the very
15 harms that Plaintiffs allege and redressability needs a
16 success of this action, which declaring SB-280
17 unconstitutional would redress the very injuries that
18 Plaintiffs allege here. But the claims of injury are
19 not traceable to the alleged violation of SB-280.
20 As we mentioned before, Marquez claims two
21 injuries, risk of violence and harassment after
22 presenting an identity document and fear of having to
23 present a birth certificate to someone who may respond
24 negatively. But first of all, neither of these claims
25 are fairly traceable to a privacy claim or medical

1 decisionmaking claim.
2 Plaintiffs don't assert facts showing that
3 Marquez's privacy interest have been violated nor did
4 Plaintiffs allege facts asserting Marquez had not been
5 free to make personal medical decisions. And then for
6 both equal protection and due process claims, Plaintiffs
7 have not alleged facts showing an intent to change
8 Marquez's birth certificate.
9 And, again, Marquez did not attempt to make
10 this change under the old rule. Plaintiffs cannot claim
11 that Marquez's injury from not having a birth
12 certificate with the correct sex designation only now
13 exist after passage of SB-280 when Marquez also had a
14 birth certificate without the correct sex designation
15 under the old rule.
16 This also does not explain how fear of
17 harassment and violence only exist now as a result of
18 SB-280. This Plaintiffs claims are not fairly traceable
19 to the law itself. Finally, the harms alleged by
20 Marquez are not redressable by declaring SB-280
21 unconstitutional.
22 Plaintiffs complaints include broad references
23 to past incident of violence and harassment against
24 Marquez. But the complaint does not assert that these
25 incidents were a result of Marquez presenting a birth

1 certificate. Declaring SB-280 unconstitutional simply
2 alters the process by which one must change one's birth
3 certificate.
4 It does not eliminate potential violence or
5 harassment against transgender individuals. That's
6 because Marquez failed to state a claim or injury in
7 fact that is fairly traceable to the alleged violation
8 and is redressable by this Court. The Court must
9 dismiss Marquez's claims.
10 Now, turn to Doe's claims. Doe likewise has
11 failed to state an injury in fact fairly traceable to
12 the alleged violation and that is redressable by this
13 Court. Plaintiffs assert that sharing private medical
14 records causes, quote, "a great deal of emotional
15 distress due to fear to exposure and humiliation.
16 In addition, Doe asserts that SB-280 requires
17 Doe to undertake the financial cost and burden of coming
18 to Montana. But like Marquez, Doe does not explain how
19 this emotional distress exist only now that SB-280 is in
20 place, even though Doe's birth certificate remained
21 unchanged under the old rule.
22 And in addition, these claims of injury are not
23 fairly traceable to the alleged violations here. Courts
24 routinely protect individual privacy right balancing
25 this right to privacy against the public right to know.

1 Plaintiffs don't explain how ordinary judicial
2 proceedings would be insufficient if Doe chooses to
3 undergo the birth certificate amendment process.
4 In this case, Doe is proceeding under
5 pseudonym. There is no reason to believe that this
6 process would not also be available in other court
7 proceedings. And, again, Plaintiffs claim of injuries
8 are traceable to SB-280 itself. Emotional distress and
9 presenting a birth certificate would have existed prior
10 to -- to passage of SB-280.
11 Plaintiffs, again, also failed to assert facts
12 showing that Doe has attempted the amendment process or
13 will be required to present a birth certificate at some
14 point in the future. In addition, while Plaintiffs
15 alleged these financial costs and burdens of coming to
16 Montana, it is again not clear from the complaint how
17 these claims are tied to SB-280.
18 Doe would be subject to cost for changing a
19 driver's license or a name or undergoing other document
20 changes. And there are other cost -- there are costs
21 associated with amending sex on the birth certificate
22 under SB-2 -- under the 20 -- excuse me -- under the
23 2017 Rule.
24 So Plaintiffs don't assert the factual
25 allegation connecting these financial claims -- these

1 financial harm to SB-280 itself. So now the State
2 agrees Doe does not need to provide an exact dollar
3 amount or anticipate every single cost. But Plaintiffs
4 must make factual allegation explaining how these costs
5 are associated with SB-280 and like with Marquez there
6 are serious redressability issues here.
7 Declaring SB-280 unconstitutional simply alters
8 the process by which one must change one's birth
9 certificate. It does not address the emotional distress
10 or financial cost claims. Before we get on to
11 Plaintiffs failure to state a claim, I just want to
12 recap the injuries alleged and why they are
13 insufficient.
14 So Plaintiffs allege SB-280 place Marquez at
15 risk of violence, harassment, and discrimination every
16 time Marquez presents an identity document. The same
17 threat and injury exist under the old rule. And
18 Plaintiffs do not assert anywhere in the complaint when
19 Marquez has had to present a birth certificate in the
20 past or will have to do so in the future.
21 Plaintiffs also allege Marquez lives in fear.
22 But, again, same fear existed under the old rules and
23 fear alone is insufficient to establish standing. So
24 Doe asserts that sharing private medical records causes
25 a great deal of emotional distress. But this SB-280

1 does not require public disclosure of private medical
2 records.
3 In addition, Plaintiffs assert SB-280 requires
4 Doe to undertake the financial cost and burden of coming
5 to Montana, but, again, Plaintiffs don't explain how
6 these costs differ from the old rule. These alleged
7 injury are not injuries in fact that are fairly
8 traceable to SB-280 and redressable by this Court
9 because neither Doe or Marquez has standing to bring
10 these claims. The Court should dismiss their claims.
11 So in addition to the standing problem, which
12 we have discussed, Plaintiffs have failed to state a
13 claim upon which relief can be granted. And I know that
14 we are going to talk about each of these claims in a lot
15 more detail under the preliminary injunction motion, but
16 I would like to briefly discuss why each of these claims
17 must be dismissed under the 12-B-6 standard.
18 So, first, the equal protection claim,
19 Plaintiffs equal protection claim must fail first
20 because SB-280 applies equally to all individuals and,
21 two, transgender status is not a protected class in
22 Montana or under federal law.
23 And anyone seeking to change sex on their birth
24 certificate must go through the same process. Now,
25 Plaintiffs argue that transgender individuals are the

1 only individuals who want to amend sex on their birth
2 certificate. But this is untrue.
3 Nontransgender individuals like intrasex
4 individuals or individuals with a clerical error on
5 their sex designation will also be subject to SB-280.
6 Furthermore, this type of logic doesn't hold up with
7 respect to other birth certificate amendments. A
8 statute is not unconstitutional just because only one
9 subpart of the population avails itself of that statute.
10 As the State notes in its combined brief in
11 support of the motion to dismiss and response to the
12 preliminary injunction motion, only adopted individuals
13 will avail themselves of the statute that allows them to
14 change their parental information on their birth
15 certificate.
16 Likewise, only individuals who didn't have
17 paternity established at birth will seek to add
18 paternity to their birth certificate. But these statute
19 aren't unconstitutional simply because they impose
20 additional requirements on adopted individuals or
21 individuals with unknown paternity.
22 The question is not who will avail themselves
23 of the law but whether the law applies equally and
24 SB-280 does. It is also worth noting that this logic
25 would have meant that the 2017 Rule also was

1 unconstitutional, that is, any requirement imposed on an
2 individual seeking to amend sex on their birth
3 certificate must be unconstitutional because only
4 transgender individuals will seek to amend their sex
5 under Plaintiffs' theory.
6 Plaintiffs' claims also must fail because
7 transgender status is not a protected class in Montana.
8 Plaintiffs ask this Court to create a new protected
9 class, one that has twice now been rejected by the
10 legislature. And because Plaintiffs do not fall within
11 a protected class and because the legislature has a
12 legitimate state interest in maintaining accurate vital
13 statistics, Plaintiffs have failed to state a claim.
14 Moving next to the right of -- right of
15 informational privacy. Plaintiffs argue that under
16 SB-280 they are forced to publicly disclose medical
17 records. But this claim fails for several reasons.
18 First, only individuals who voluntarily avail themselves
19 of SB-280 must undertake any sort of process at all.
20 The law imposes no requirements unless and
21 until one takes the necessary steps to change one's
22 birth certificate something that neither Doe nor Marquez
23 has done here. Plaintiffs cite no authority for the
24 argument that society recognizes a right to privacy in
25 voluntary proceeding.

1 Second, the medical records are not publicly
2 disclosed. Yes, SB-280 requires individuals seeking to
3 amend their birth certificate to go through a court
4 proceeding. But as discussed earlier, courts like this
5 one routinely protect individual's privacy interest of
6 individuals by allowing them to file under pseudonym or
7 sealing the proceedings.
8 Moreover the 2017 Rule, which Plaintiffs seek
9 to return to also require some level of disclosure of
10 medical information. Again, Plaintiffs have failed to
11 state a privacy claim. The -- next, Plaintiffs make a
12 claim of medical interference. But this is not a claim
13 Montana courts recognize. And Plaintiffs reliance on
14 Armstrong is misplaced.
15 Unlike the right to abortion in Armstrong,
16 there is no constitutional right to change one's birth
17 certification. This is just another privacy claim,
18 which for reasons above must fail. Finally, Plaintiffs
19 claim that SB-280 violates their right to due process
20 because it is unconstitutionally vague.
21 But to succeed on a vagueness claim with
22 respect to civil steps there must be a showing not just
23 that the law is confusing or there is some uncertainty
24 or the law is subject to multiple interpretations but
25 rather it is entirely incomprehensible and reaches a

1 substantial amount of constitutionally protected
2 conduct.
3 Plaintiffs assert no constitutionally protected
4 conduct at issue here. Again, there is no right to
5 amend one's birth certificate. And so, Plaintiffs due
6 process claims fail as well because Plaintiffs Doe and
7 Marquez lacks standing and have failed to state a claim
8 upon which relief can be granted, this Court must
9 dismiss their claim. Thank you.
10 THE COURT: Response to the motion to dismiss.
11 MR. RATE: Thank you, your Honor. Good afternoon
12 again. Alex Rate for the Plaintiffs. So I just want to
13 clarify that a substantial portion of the State's
14 original motion to dismiss was predicated on this
15 argument that we have failed to exhaust administrative
16 remedies.
17 It certainly appears like that argument is no
18 longer on the table as a result of the Montana Human
19 Rights Bureau issuing the right to sue and us filing an
20 amended complaint, including the statutory claims. So
21 that leaves, to my understanding, the two outstanding
22 issues related to the motion to dismiss, one, do our
23 clients have standing?
24 Meaning, is there injury -- have they suffered
25 concrete injury that is traceable to the Act. And, two,

1 have they stated a claim under Rule 8 and Rule 12? And
2 I say my understanding because, frankly, the State has
3 created a bit of a mess here by choosing to file a brief
4 in opposition to our motion for preliminary injunction
5 and motion to dismiss simultaneous.
6 It is entirely unclear which document they are
7 relying upon for which of their arguments and, of
8 course, that matters because the standard for a motion
9 to dismiss, which is very differential, under which all
10 of the well-pled allegations and inferences are to be
11 drawn in the Plaintiffs favor is very different than the
12 standard for issuing a motion for preliminary
13 injunction.
14 And let me give you a couple of examples. So
15 the Defendant say that Ms. Marquez does not have
16 standing because, quote, "When running for public
17 office, she made her status as a transgender female
18 publicly known." They say that Marquez alleges a
19 generalized fear of being outed as transgender.
20 Those are arguments related to standing that
21 they make in their combined brief. And for those
22 propositions, they rely upon Ms. Marquez's affidavit.
23 And, of course, for purposes of considering the pending
24 motion to dismiss, looking at anything outside the four
25 corners of the complaint is improper.

1 So we are at a significant disadvantage because
2 it is up to the Plaintiffs and, frankly, now the Court
3 to tease out exactly which facts, which underlying
4 documents the State is relying upon for which of it
5 contentions. So moreover, the State seems to
6 misapprehend under the Rule 12 standard what it actually
7 means to state a claim.
8 For example, in their reply brief in support of
9 the motion to dismiss, they spent a great deal of time
10 talking about the legitimate state interest that are
11 advanced by the Act. But those facts related to the
12 legitimate stated interest that the State may or may not
13 have are not before this Court in the context of the
14 motion to dismiss.
15 Rather those claims that are included in the
16 complaint are the only claims that need be considered
17 for purpose of the Rule 12 motion. And, furthermore,
18 the cases that they rely upon in their reply brief
19 supporting the motion to dismiss were all decided after
20 length evidentiary proceedings.
21 In the case of the Missoula Water Company, that
22 was a three-week bench trial, which resulted in the
23 determination of what was or was not a fundamental right
24 and what the legitimate state interest might be. So
25 what I want to do briefly is address the State's

1 argument first that we have somehow waived some of our
2 arguments in opposition to their motion to dismiss and
3 this really permeates their briefing in their reply.
4 So this reasoning is fundamentally flawed for
5 numerous reasons. First, as I already noted this
6 problem to the extent there is one is of the Defendant's
7 own making because of their decision to file a combined
8 brief. Second of all, the cases that they rely on
9 Cottrell, Barna, Paycom, those cases stand for the very
10 unremarkable proposition that a party cannot raise an
11 issue on appeal for the -- that has not previously been
12 addressed in the district court.
13 That is Black Letter Law. And nobody here is
14 arguing otherwise. But, of course, the circumstances
15 that we are dealing with here are very different. This
16 case is in its infancy. We are before the district
17 court. All of our claims and defenses may be
18 considered.
19 Now, second and perhaps more importantly, the
20 claims that are set forth in our complaint are clearly
21 identified or the facts that are set forth are clearly
22 identified in our brief in opposition to the motion to
23 dismiss.
24 And we pointed the Court to exactly those
25 paragraphs that support standing and support our legal

1 claims. And, finally, to the extent that there are any
2 stones that are unturned, we have plenty of legal
3 arguments that are included in our reply brief in
4 support of preliminary injunction that the Court may
5 rely upon for purposes of demonstrating that we have
6 made a claim.
7 So I'm going to briefly address the standing
8 issue now. And then my colleague Akilah Lane will
9 address the preliminary injunction in short order, and
10 she will go into great detail related to the
11 constitutional claims that we have raised so -- and the
12 reason why I'm doing it goes -- stands to reason if the
13 Court grants our preliminary injunction, then we have
14 stated a claim.
15 And likewise, if the Court dismisses the case,
16 I don't expect to see an injunction issue any time in
17 the near future. So the State's argument really boils
18 down to this, they say our -- the harms that our clients
19 have suffered are too attenuated, too hypothetical. And
20 they rely on the Bullock and the Cossitt cases, which
21 incidentally the court found the plaintiffs in those
22 cases actually did have standing.
23 And they say, look, your clients haven't
24 actually attempted to correct the sex designation on
25 their birth certification under the provision of SB-280

1 and so, therefore, they are not injured. Now, as a
2 preliminary legal matter, the State made the same
3 argument, which was roundly rejected by the Montana
4 Supreme Court in the Weems case.
5 And that's a case in which I am intimately
6 familiar because it is our case. And in that case,
7 Helen Weems challenged a restriction on the provision of
8 abortions that provided only doctors or physician
9 assistants could perform abortion services. And at the
10 time, Ms. Weems was an advanced practice registered
11 nurse, who was competent to perform the procedures.
12 But at the time we filed the complaint and
13 filed for a preliminary injunction, she had neither
14 received all of the training that she needed nor had she
15 actually tried to perform an abortion in Montana. And
16 the court said that she had standing to sue under those
17 circumstances.
18 And it noted that, quote, "The state's standing
19 argument is circular. It maintains that plaintiffs
20 cannot challenge the statute unless they are licensed to
21 perform the procedure in question. But acknowledges
22 that the statute prevents them from seeking such
23 licensure."
24 The same is true here. The State is arguing
25 that our clients cannot challenge SB-280 unless they

1 attempt to correct their birth certificate. But they
2 can't do so because of the statute itself. And that
3 follows the well-reasoned line of authority from -- for
4 example, the Gryczan case in which a couple challenged
5 the deviate sexual conduct statute in Montana.
6 A statute which have been on the books for
7 decades but which had not been enforced. And the court
8 found that the plaintiffs had standing, quote, "because
9 they were precisely individuals against whom this
10 statute is intended to operate. Here, our clients and
11 transpeople in Montana are precisely the people against
12 who SB-280 is intended to operate.
13 So more importantly setting aside the legal
14 stuff for a moment, this is not imagined future harm but
15 rather harm that is present and real. So let me direct
16 the Court's attention back to the four corners of our
17 complaint, which is the only document that is proper to
18 rely upon for purposes of the motion to dismiss.
19 Fact number 1, Amelia Marquez and John Doe
20 intend to change the gender marker on their birth
21 certificate. That is contained in paragraphs 19, 20, 53
22 and 58 of the complaint. Fact number 2, but for SB-280
23 or the Act, our clients would be able to file a simple
24 attestation form with the Department of Public Health
25 and Human Services to correct the sex designation on

1 their birth certificate.
2 That is paragraph 39 of our complaint. Fact
3 number 3, our clients are unable to comply with the
4 procedures required by the Act because of cost, the
5 requirement to take time off work, uncertainty about
6 what surgery is required, and the very predictable
7 attendant humiliation and embarrassment associated with
8 disclosing private medical information in order to
9 obtain a court order.
10 Those allegations are contained in paragraphs
11 19, paragraph 20, and paragraph 60 of the complaint.
12 Fact number 4, living with inaccurate identity documents
13 causes anxiety and depression and can result in
14 discrimination, harassment, and violence and exacerbate
15 the manifestation of gender dysphoria.
16 That's paragraphs 32, 33 and 34 of the
17 complaint. And, finally, fact number 5, our clients
18 have specifically experienced harassment, violence,
19 discrimination as a result of their transgender status,
20 which we have proven by having inaccurate identity
21 documents. And that is in paragraph 55 of the
22 complaint.
23 So these are the facts that exists for this
24 Court's consideration upon a motion to dismiss. And,
25 frankly, it borders on the offensive for the State to

1 argue that these injuries are no more than generalized
2 concerns over abstract future harm that lack basis.
3 Accurate identity documents are a matter of
4 life and death to our clients and indeed to all
5 transgender Montanans. Now, as if we haven't jumped
6 high enough over the exceedingly low hurdle that the
7 12-B standard employs. Per, again, the Weems line of
8 authority even a de minimis violation of a
9 constitutional right confer standing on to a party.
10 And the State nonsensically suggest that we
11 haven't identified the constitutional right at play.
12 And they say there is no constitutional right to change
13 your birth certificate. That may be the case. But any
14 time the State confers a particular benefit whether it
15 is in a voting rights context, whether it is in a
16 reproductive rights context, whether it is in this
17 context, they have to apply equally.
18 And so, we have alleged sufficient facts. And,
19 in fact, an excruciating detail supporting our claims
20 of -- for constitutional violation to equal protection
21 due process of law and privacy. So, your Honor, I think
22 that we have easily met our burden to withstand this
23 motion to dismiss.
24 Unless the Court has further questions, I will
25 leave it to my colleague, Akilah Lane, to argue

1 preliminary injunction and the applicable legal
2 standards that apply to our constitutional claims. And
3 we urge the Court to dismiss -- reject the State's
4 motion to dismiss. Thank you.
5 THE COURT: Thank you. Three-minute rebuttal.
6 MS. SMITHGALL: Thank you, your Honor. Yes. Just
7 briefly would like address a couple points raised by
8 Plaintiffs. So the standard for a preliminary
9 injunction as we will get to in our next argument is
10 likelihood of success on the merits, the State's
11 position is that not only are Plaintiffs not likely to
12 succeed on the merit but that their claims utterly
13 failed so there is no claim upon which Plaintiffs can
14 receive relief.
15 Now, Plaintiffs rely on Weems to show that
16 Marquez and Doe don't actually have to attempt to change
17 their birth certificate. But the problem with the
18 alleged injury as the State have said is that there --
19 these injuries predated SB-280. They are not fairly
20 traceable to the law itself, so this undermines their
21 claims of injury because these injuries again existed
22 prior to SB-280.
23 The State is not disputing that these injuries
24 exist. And the State is not disputing that the Court
25 should not -- the Court must take these as fact. They

1 are listed in the complaint. But, again, these claims
2 of injuries have to rise to the level of injury required
3 to establish any and they have to be fairly traceable to
4 SB-280. Here they are not.
5 Plaintiffs compare this to the voting right and
6 reproductive right. But there is a right to vote, and
7 there is a right to an abortion. There is no right to
8 change one's birth certificate. Because the Plaintiffs
9 have failed to show standing -- that they have standing
10 to bring these claims and the claims they have brought
11 are not ones upon which relief can be granted, the Court
12 should dismiss their claims. Thank you.
13 THE COURT: Thank you. Let's address the
14 preliminary injunction, please.
15 MS. LANE: Good afternoon, your Honor. Akilah Lane
16 on behalf of the Plaintiffs. This case is about the
17 Montana State Legislature intentionally targeting
18 Plaintiffs and indeed all transgender Montanans by
19 denying them accurate documents in violation of their
20 constitutional rights to equal protection, privacy, and
21 due process.
22 By placing nearly impossible burdens upon
23 transgender Montanans, the State claims the right to
24 practically exclude most transgender Montanans from
25 obtaining a state issued essential identity document.

1 Plaintiffs are two transgender adults who seek to
2 correct the sex designation on their birth certificates
3 and are being denied the ability to do so due to the
4 wholly unnecessary burdensome and demeaning requirements
5 of the Act.
6 It bears noting that while Plaintiffs briefing
7 on the matter is replete with evidence supporting their
8 assertions, including expert testimony from a recognized
9 authority on gender dysphoria, the State has failed to
10 offer any evidence in support of its claim. Today we
11 ask the Court to preliminarily enjoin the State from
12 implementing the Act for three reasons.
13 First, Plaintiffs have established a
14 prima facie case that they are likely to succeed in
15 proving that the Act violates the constitutional rights
16 to equal protection, privacy, and due process; second,
17 due to Act's abridgement of those rights, Plaintiffs
18 will suffer irreparable harm given that the loss of any
19 constitutional rights constitutes irreparable harm; and,
20 third, Plaintiffs suffer the very real economical and
21 psychological consequences and harms of having to live
22 with discorded identity documents, including the fear of
23 harassment and ridicule and the pain that comes with
24 knowing that the state of Montana refuses to accept the
25 gender identity they know themselves to be.

1 **To issue a preliminary injunction, the State**
2 **need only find the Plaintiffs have made a prima facie**
3 **showing of likelihood of success of any one of their**
4 **constitutional claims or alternatively that Plaintiffs**
5 **stand to suffer either irreparable harm due to the loss**
6 **of their constitutional rights or harm as implied by the**
7 **other sections of the code.**
8 **Starting with likelihood of success on our**
9 **constitutional claims, I will address the merits of our**
10 **equal protection claim. Montana's equal protection**
11 **clause provides that no person shall be denied the equal**
12 **protection of the laws. This clause embodies the**
13 **fundamental principle of fairness that the law must**
14 **treat all similarly situated individuals in a similar**
15 **manner.**
16 **Further, it is important to note that Montana's**
17 **equal protection clause offers greater protections in**
18 **that of its federal counterpart. When evaluating an**
19 **equal protection claim, Montana states -- state court**
20 **engage in a three-step analysis; first, identifying**
21 **whether similarly situated individuals are being treated**
22 **differently; second, identifying the appropriate level**
23 **of scrutiny; and, third, determining whether a state can**
24 **justify its actions based on the level of scrutiny**
25 **imposed.**

1 Starting with first step, the analysis, we look
2 to whether or not transgender and nontransgender
3 Montanans seeking to have accurate identity documents
4 are similarly situated. Here, the State concedes that
5 the transgender and nontransgender Montanans are
6 similarly situated and that they have identical interest
7 in having accurate birth certificates.
8 Since transgender and nontransgender Montanans
9 are similarly situated in that interest, we next move to
10 whether or not the law treats them differently.
11 Contrary to the State's contentions otherwise, the law
12 is not equally applicably to all people. The law on its
13 face and by definition only applies to transgender
14 people because transgender people are the only people
15 who identify by a sex designation that differs than that
16 that was assigned to them at birth.
17 So when we look at the Act, we can see that the
18 Act only requires that transgender people undergo
19 surgery, submit confidential information related to --
20 related to that surgery to a court, obtain a court
21 order, and submit an application to DPPHS simply in
22 order to have an accurate birth certificate.
23 Thus, the law on its face is treating similarly
24 situated individuals differently. That turns us to the
25 second step of the analysis, determining the appropriate

1 level of scrutiny under a straightforward application of
2 Montana law strict scrutiny applies where a law either
3 hinder fundamental right or a suspect class is affected.
4 A right is considered fundamental under Montana
5 law if it is a right that either listed in the
6 declaration of rights or is a right without which other
7 constitutionally guaranteed rights would have little
8 meaning. As I will discuss in greater detail
9 momentarily, strict scrutiny should apply because this
10 law implicates fundamental rights to privacy and equal
11 protection and due process.
12 So if we set aside straightforward fundamental
13 right analysis, that leads to strict scrutiny. The
14 overwhelming body of federal contemporary law also holds
15 that transgender people are members of a suspect class
16 and thus heightened scrutiny should apply. Both Montana
17 and the US Supreme Court apply a nearly identical test
18 to determine whether a new classification warrants
19 heightened scrutiny.
20 Under Montana law a suspect class is found
21 where either the class in questions has been saddled
22 with such disabilities subjected to a history of
23 purposeful unequal treatment or relegated to a position
24 of political powerlessness so as to man extraordinary
25 protection from the majoritarian political process.

1 There is a long and well-documented history of
2 invidious discrimination against transgender people,
3 both in Montana and in the rest of the nation. In just
4 this last legislative session, we saw several bills
5 specifically aimed at limiting the rights of transgender
6 individuals.
7 Beyond that in a 2016 study, it was found that
8 transgender people only make up point 34 of one percent,
9 so point 34 of one percent of Montana's population.
10 Further, transgender people suffer a rate of poverty and
11 homelessness that is twice that of the general
12 population.
13 So on just these facts alone, we can see that
14 the transgender population is the one that suffers such
15 a severe level of political powerlessness as to warrant
16 the extraordinary protection that the equal protection
17 clause was intended to provide.
18 Now, if we turn to federal jurisprudence for
19 guidance, Bostock conclusively established the
20 discrimination against transgender people is a form of
21 sex discrimination. And although Bostock was concerned
22 with discrimination in the context of Title 7 of the
23 Civil Rights Act of 1964, its logical assertion that it
24 is impossible to discriminate against a transgender
25 individual without discriminating against that

1 individual on the basis of sex is applicable on all
2 context where laws target transgender people for unequal
3 treatment, which is exactly the case here under the Act.
4 Further, the State uses out of date federal
5 authority for its contention that transgender status is
6 not a suspect class. In actuality, the overwhelming
7 majority of contemporary federal law supports finding
8 transgender status as a suspect class and thus applying
9 heightened scrutiny.
10 Accordingly, since transgender and
11 nontransgender Montanans are similarly situated but are
12 being treated under this law and the law impedes their
13 fundamental right and the transgender people also belong
14 to a suspect class, we can now move along to the
15 appropriate level of scrutiny.
16 In applying strict scrutiny where fundamental
17 rights are affected, the State's action can only be
18 upheld if the State can show a compelling reason for the
19 infringement of those rights and that the law is
20 narrowly tailored to serve that interest. In this case,
21 the State cannot meet that burden.
22 The State's claim that this law is necessary in
23 order to maintain accurate vital statistics and prevent
24 fraud is completely undermined by the fact the State
25 managed to maintain accurate vital statistics under the

1 2017 policy, which was far less restrictive and allowed
2 for simple attestation.
3 Further, the State offered no evidence of any
4 problems under the previous policy. Additionally during
5 the legislative hearing and deliberations for the Act,
6 the key legislatures failed to offer specific evidence
7 of either fraud or issues with accuracy that arose under
8 the previous policy.
9 And those same legislatures failed to consider
10 or adopt the leading and up-to-date scientific and
11 medical knowledge related to the treatment of the
12 conditions associated with transgender status in
13 determining the requirements of the Act. So in short,
14 this law places an undue burden on transgender people's
15 constitutional rights without any compelling
16 justification and the needs is necessarily not nearly
17 tailored to meet that end since the State was able to
18 achieve its purported goals through far less restrictive
19 means with the previous policy.
20 Moreover, even under a middle tier scrutiny,
21 the Act would fail. In order to survive middle tier
22 scrutiny, the State must demonstrate that the law or
23 policy in question is reasonable and that the need for
24 the result in classification outweighs the value of the
25 rights' burden to the individual.

1 As I have just illustrated, the State need for
2 impairing the rights of Plaintiffs does not and cannot
3 outweigh the value of the rights of Plaintiffs. The
4 State's purported goal in accuracy is reachable through
5 less restrictive means and also is not reachable through
6 the requirements in place since there is no surgery that
7 exist that change the sex of a person.
8 Thus, the law is not reasonable and accordingly
9 would even fail under middle tier -- under middle tier
10 scrutiny analysis. So we have demonstrated that we are
11 entitled to leave based on the Act's violation of equal
12 protection, which alone is sufficient for the Court to
13 issue a preliminary injunction.
14 Nonetheless, at this point, I will move to the
15 likelihood of success on our privacy claims. As we well
16 know the Montana Constitution provides broad robust
17 privacy protections. Protections that are far greater
18 than that of federal constitution. Within the scope of
19 Montana's privacy rights are the right of informational
20 privacy and autonomy.
21 In this situation, Plaintiffs have a
22 constitutionally protected right -- privacy right in
23 both their status as a transgender person and in the
24 contents of their medical records. The State makes the
25 preposterous argument that Plaintiffs' privacy rights

1 are implicated by the Act because their birth
2 certificate -- because amending their birth certificate
3 is, quote, unquote, "an involuntarily act -- or a
4 voluntary act" -- sorry.
5 The State relies on an inopposite law for this
6 assertion stating that there is no privacy concern here
7 because Plaintiffs can choose to waive that interest if
8 they want an accurate ID. There is absolutely no doubt
9 that the Montana state's constitutions privacy extends
10 informational privacy rights to the contents of one's
11 medical records.
12 In Hendricksen, the very case upon which the
13 State relied for making its absurd contention that
14 privacy rights are not implicated in this case, the
15 court explicitly said that the Montana Constitution
16 guarantees informational privacy in the sanctity of
17 one's medical records.
18 And that medical records deserve the utmost
19 constitutional protection and, further, that any waiver
20 of privacy rights is not unlimited. More importantly to
21 the issues in this case, the Hendricksen court was
22 specifically concerned with medical records as it
23 related to damages claim by plaintiffs, which is wholly
24 different than the situation here where the disclosure
25 of private medical records has absolutely no relevance

1 to the need for a person, a transgender person, to
2 correct the sex designation on their birth certificate.
3 Additionally, courts across the nation have
4 recognized that transgender people have a privacy right
5 in their transgender status. And that that right
6 extends to people being able to retain control over
7 when, how, where, and to whom they disclose their
8 transgender status.
9 So following that line of rational, it bears
10 repeating that even if someone such Ms. Marquez
11 discloses her transgender status to some, that does not
12 mean she has completely forfeited her privacy rights in
13 that status and the State can just force her to disclose
14 that status whenever it wants her to.
15 The burden this law places upon transgender
16 individuals is not only wholly unnecessary but is also
17 purposefully humiliating. No one and I mean no one
18 wants to go in front of a stranger, a judge,
19 nonetheless, and disclose the intimate details of their
20 personal private medical records especially those as
21 sensitive as the ones can -- related to transgender
22 status just in order to have an accurate birth
23 certificate.
24 Defendants fail to provide any compelling
25 justification and indeed none exist for requiring

1 **Plaintiffs to disclose through constitutionally**
2 **protected private medical information about their**
3 **transgender status and associated medical records.**
4 **Nontransgender people are able to accept -- are**
5 **able to obtain accurate identity documents without any**
6 **such similar force disclosures even in analogous**
7 **situations such as unknown paternity or adoption. And**
8 **there is absolutely no reason why Plaintiffs should have**
9 **to here.**
10 **The bottom line is that neither a court nor**
11 **DPPHS needs information contained in one's medical**
12 **records in order to change or correct the sex**
13 **designation on someone's birth certificate. From both a**
14 **scientific and a medical standpoint, a person's sex is**
15 **their gender.**
16 **And their gender identity is not related to any**
17 **aspect of their anatomy. There is absolutely no**
18 **relationship between the required information and a**
19 **transgender person's need to correct the sex designation**
20 **on their birth certificate. Most importantly, the State**
21 **should not be in the business of forcing unnecessary**
22 **disclosure of such private information especially when**
23 **it has no compelling or even reasonable justification**
24 **for doing so.**
25 **In regards to the second prong of our privacy**

1 claim, autonomy privacy, it is completely impermissible
2 for the State to try to insert itself in an individual's
3 personal medical decision. The State lacks authority to
4 compel a person to undergo surgery and likewise lacks
5 medical expertise to determine what medical procedures
6 are appropriate to bring a person's body into line with
7 the gender identity.
8 When we take a step back and really consider
9 the issues in general terms, what we are really looking
10 at is the right of everyone to be free from unwarranted
11 and unnecessary government intrusion. The State argues
12 that medical interference is not a claim that is
13 recognized under Montana law. And that is just false.
14 In Armstrong, the Montana Supreme Court held
15 that the personal autonomy component of the right to
16 privacy broadly guarantees individuals the right to make
17 medical judgments affecting her or his bodily integrity
18 and health in partnership with a chosen healthcare
19 provider free from state interference.
20 Similar to this context, the law challenged in
21 Armstrong did not prevent a woman from obtaining an
22 abortion just as this law does not forthrightly prevent
23 a transgender person from updating their birth
24 certificate. But in Armstrong, the law served to limit
25 a woman's choice of abortion provider once she made the

1 decision to have an abortion and the supreme -- the
2 Montana Supreme Court in that case held at that point
3 after a woman made the decision to have an abortion that
4 it was entirely impermissible for the state to try to
5 interfere with that decision by limiting her choice of
6 provider.
7 That is the same case here. As soon as a
8 transgender person decides they need to correct
9 gender -- the sex designation on their birth
10 certificate, it is entirely impermissible for the State
11 to attempt to interfere and tell them what surgery they
12 must have in order to be -- in order to authentically
13 be transgender.
14 The State is not qualified to prescribe surgery
15 as medically necessary nor conclude that an individual
16 is authentically transgender unless they have had
17 surgery. Once again, the State attempts to confuse the
18 issue central to this case by arguing that the State is
19 justified in requiring surgery as a precondition to
20 obtaining an accurate birth certificate because there is
21 no constitutional right to having an accurate ID.
22 This assertion is not only incorrect but fails
23 to accurately frame the State's actions. This case is
24 not about whether or not a person has a constitutional
25 right to a birth certificate. This case is about what

1 happens once a person, a transgender person, decides
2 they need an accurate birth certificate.
3 At that point, it is not the State's place to
4 either limit, coerce, or otherwise intervene with a
5 person's course of medical treatment in order to receive
6 that state benefit. Especially they are requiring
7 something as risky as surgery. Also, as is the case for
8 many transgender people as Ms. Marquez -- many
9 transgender people in general and Ms. Marquez in
10 particular, surgery is simply unobtainable in addition
11 to cost and other things associated with surgery such as
12 time off work and time to heal.
13 Additionally, surgery is a not necessary as
14 treatment for every transgender person. For some, it
15 can even be contraindicated. And some people simply do
16 not want to have surgery. The State should not be
17 trying to insert itself into the medical decisions of
18 individuals by forcing transgender people to undergo
19 potentially unnecessary or unwanted surgery simply in
20 order to have an accurate birth certificate especially
21 when they don't place any similar burdens on anyone
22 else.
23 And so, in attempting to do so, the State is --
24 violates Plaintiffs rights to privacy. As to our final
25 claim, we believe that we will likely succeed on our

1 claim that the Act is unconstitutionally vague in
2 violation of Plaintiffs' right to due process.
3 As an initial matter, the State contends that
4 the Act cannot violate due process because it does not
5 reach a substantial amount of constitutionally protected
6 conduct because there is no constitutional right to a
7 birth certificate, again, the State's argument is
8 baseless and confuses the critical issues in the case.
9 As I have just outlined, the Act undoubtedly
10 implicates Plaintiffs' rights to equal protection to
11 privacy and due process. On top of that, the Act
12 violates due process because it is impermissibly vague
13 in all of its application. The law is incomprehensible
14 because there is no surgery that exist that can change
15 the sex of a person.
16 So there can be no logical idea as to what
17 surgical outcome the Act mandates. The Act demands that
18 people undertake as series of action while failing to
19 define any of the terms within the Act. For example,
20 the Act fails to identify what kind of surgery a person
21 must have. It fails to describe what evidence a person
22 must provide in order obtain a court order.
23 And it fails to tell people what qualifies --
24 what court qualifies as having appropriate jurisdiction.
25 So a person especially one who is proceeding pro se

1 would have absolutely no idea where to even start to try
2 to meet the requirements of the Act.
3 So not only is the law vague and it does not
4 guide a person of regular intelligence into
5 understanding what steps they would need to take in
6 order to fulfill the mandates of the Act, also the laws
7 mandate that a person submit proof that they have had
8 sex -- that the sex of a person born in Montana has been
9 changed by surgical procedure is also an impossible
10 mandate to fulfill.
11 So accordingly, since the Act imposes
12 substantial burdens of upon Plaintiffs as a precondition
13 to correcting the sex designation on their birth
14 certificate but fails to provide the level of clarity
15 that the substantive due process demand, the Act
16 violates Plaintiffs' rights to substantive due process.
17 So we have shown that we are entitled to
18 preliminary injunctive release based on any of the
19 constitutional violations just outlined and
20 additionally we are also entitled to relief based on the
21 continued harm that our plaintiffs are enduring. Our
22 primary argument is that any abridgment of a
23 constitutional right constitutes irreparable harm.
24 This is a well settled tenet of Montana law.
25 And we have just provided that the law violates

1 **Plaintiffs' rights to equal protection, privacy, and due**
2 **process. Additionally in this case, we have two**
3 **plaintiffs, who need and deserve Montana birth**
4 **certificates with correct sex designation.**
5 **But as long as the Act stands as written, they**
6 **are unable to obtain such documents. Though the State**
7 **tries to dismiss the very real and significant harm**
8 **experienced by Plaintiffs, the State did not offer any**
9 **evidence in the record to counter the data and expert**
10 **testimony that Plaintiffs set forth outlining the harm**
11 **suffered by transgender people, who cannot access**
12 **accurate identity documents.**
13 **The necessity of transgender people having such**
14 **access cannot be understated. Because as provided in**
15 **our briefing in many cases, access to such documentation**
16 **can save lives by gravely reducing suicidal ideations**
17 **and suicide attempts. As provided in the record,**
18 **Ms. Marquez cannot undergo gender affirming surgery at**
19 **this time due to the cost and her inability to take the**
20 **necessary time off of work and her graduate studies.**
21 **Additionally, Ms. Marquez has faced**
22 **discrimination and harassment due to her transgender**
23 **status. And as long as she is forced to carry**
24 **nonconforming identity documents, her risk of harassment**
25 **and discrimination remains high. As for our other**

1 **plaintiff, John Doe, he does not know whether the**
2 **surgery he has had is sufficient to meet the**
3 **requirements of the Act.**
4 **He greatly fears being forced to go in front of**
5 **a judge in an open-court proceeding and share the**
6 **private and intimate details of his medical records.**
7 **Further, he cannot undertake financial burdens of**
8 **traveling to Montana and hiring an attorney now,**
9 **especially when there are zero assurances as to whether**
10 **or not he can even meet the requirements of the Act.**
11 **In summary, a state cannot deprive a person of**
12 **their constitutional rights to equal protection, due**
13 **process, and privacy simply because they do not approve**
14 **of or understand a medical condition or status.**
15 **Additionally, a state benefit conferred upon the people**
16 **can't be taken and then redistributed in unequal**
17 **fashion.**
18 **What the State is simply saying is, well, if**
19 **you snooze, you loose. That defies logic and the spirit**
20 **behind the equal protection clause. In this case when**
21 **you zoom out and really examine the critical issues at**
22 **play, the improper actions and motivations of the State**
23 **becomes exceeding -- are brought into sharper focus and**
24 **it becomes exceedingly clear that there is no**
25 **justifiable purpose for the law.**

1 **Instead this laws was born of anti-transgender**
2 **animus and medical falsities intended to humiliate,**
3 **exclude, and target a group of people who already**
4 **regularly experience discrimination and hostility. At**
5 **this point, I reserve the rest of my time for rebuttal.**
6 **Thank you, your Honor.**
7 **THE COURT: One simple little question,**
8 **Governor Gianforte signed this Act into law on**
9 **April 30th, 2021. It has been law since. Became**
10 **effective upon his signature. It's been the law since**
11 **April 30, 2021. And it is December 2021. What effect**
12 **does that have?**
13 **MS. LANE: Well, it has the effect of preventing**
14 **both Plaintiffs from attempting to access corrected**
15 **birth certificate.**
16 **THE COURT: What effect does it have upon a**
17 **preliminary injunction, if any?**
18 **MS. LANE: Your Honor, I'm not sure I understand**
19 **your question.**
20 **THE COURT: Well, the status quo prior to**
21 **April 30, 2021, was something different than the status**
22 **quo on May 1st.**
23 **MS. LANE: Yes.**
24 **THE COURT: 2021. So how do I address status quo?**
25 **MS. LANE: Well, the status quo would be going back**

1 to the 2017 policy before the law was put into effect.
2 THE COURT: Simple as that?
3 MS. LANE: Simple as that.
4 THE COURT: Very good. Thank you.
5 MS. LANE: Thank you, your Honor.
6 THE COURT: Counsel.
7 MS. SMITHGALL: Thank you, your Honor. Preliminary
8 injunctive relief is an extraordinary remedy. I have
9 cited Montana Code Annotated Section 27-19-201
10 Subsections 1, 2, and 3 as the basis for their
11 preliminary injunction. The parties are in agreement
12 that the standard is the likelihood of success on the
13 merits.
14 So like Plaintiffs, I'm going to walk through
15 each of Plaintiffs' claims and explain why they do not
16 meet the standard.
17 THE COURT: One little interruption here.
18 MS. SMITHGALL: Yes, your Honor.
19 THE COURT: Let's talk about the standard. Each of
20 you cited the standard for cases of this kind where we
21 are not talking about money. So what is the real
22 standard for preliminary injunction? Is it as cited by
23 the State and as cited by the Plaintiff in this case?
24 Or is it as quoted by this Court in the abortion case in
25 the issuance of preliminary injunction in that case?

1 Has anybody taken a look and compared those two
2 different standards?
3 MS. SMITHGALL: Yes, your Honor. The State's
4 position consistently and those arguments were made in
5 the Planned Parenthood case as well is that likelihood
6 of success on the merits is inherent in each of the
7 subsections. And this come from M.H. Junior versus
8 Montana High School where the court said plaintiffs must
9 show, quote, "a probable right and a probable danger
10 that such a right will be denied as injunctive relief."
11 So the probable right and the probable danger
12 inherently includes some element of likelihood of
13 success on the merits. And I would like to walk through
14 actually since you have raised this question each of the
15 subsections and explain exactly how likelihood of
16 success on the merit is built in.
17 THE COURT: I anticipated your position would be
18 that this standard applies. But I'm a little surprised
19 that the Plaintiffs haven't identified a little
20 different standard as a standard that was addressed in
21 the abortion case that is presently before this Court
22 in which we did grant a preliminary injunction.
23 So I -- I assume the State is going to maintain
24 their position that their standard applies, which is
25 different than my ruling. They have appealed that. And

1 **it is presently on appeal. But I'm a little surprised**
2 **that the Plaintiff didn't adjust. And so, would you**
3 **please address that in proposed findings and conclusions**
4 **and supplemental briefing.**
5 **MS. LANE: Yes, your Honor.**
6 **THE COURT: Very good. Thank you. You may proceed.**
7 **MS. SMITHGALL: Okay. Your Honor, so, yeah, I will**
8 **just reassert the State's position on -- again that each**
9 **of the three subsections require likelihood of success**
10 **on the merits and briefly I will address subsection 2**
11 **because I think that's where there is oftentimes the**
12 **most confusion.**
13 **So subsection 2 requires a showing that**
14 **continuance of the Act will produce a great or**
15 **irreparable injury. But it is not simple enough that**
16 **you can -- that a plaintiff can claim an injury. They**
17 **must show that this continuous act is going to cause**
18 **harm.**
19 **In M.H. Junior versus Montana High School**
20 **Association sets up subsection 2 that is based on an**
21 **implicit determination that the applicant is likely to**
22 **succeed on his or her underlying claim and as a result**
23 **would suffer irreparable injury. So subsection 2, yes,**
24 **it just says irreparable injury.**
25 **But as the Supreme Court has noted, implicit in**

1 **that injury is the fact that there must be some showing**
2 **on the merit. And, yes, I will say the State's position**
3 **is that the likelihood of success is the proper**
4 **standard.**
5 **So I will address that -- the claims in turn.**
6 **The first is equal protection claim. The Plaintiffs**
7 **note that the Court must first identify the class**
8 **involved and whether the class is protected and then the**
9 **Court must apply the appropriate level of scrutiny.**
10 **Both parties agree that for equal protection purposes**
11 **transgender and nontransgender Montanans are similarly**
12 **situated.**
13 **The first, SB-280 applies equally to all**
14 **individuals, anyone seeking to change to amend sex on**
15 **their birth certificate must undergo the same process.**
16 **And the State establishes these neutral process for any**
17 **amendment to a birth certificate whether it is to add**
18 **paternity, amend the parents to reflect an adoption, or**
19 **here to amend sex.**
20 **An equal protection claim simply asks whether**
21 **similarly situated individuals are treated the same**
22 **under the challenged law. Here, transgender and**
23 **nontransgender individuals must go through the exact**
24 **same process to amend their birth certificate.**
25 **Now, to the extent that Plaintiffs claim that**

1 this law affects transgender individuals differently
2 because they are the only ones who avail themselves of
3 the law, this is a disparate impact claim, which is
4 separate and unrelated to an equal protection claim.
5 This claim is also previously untrue because
6 there are other individuals who might need to change sex
7 on their birth certificate. As discussed earlier, this
8 includes intersex individuals as well as individuals
9 with birth certificate containing a clerical error.
10 And, again, applying this same logic in the context of
11 other birth certificate amendment, a law is not
12 unconstitutional because simply because one subpart of
13 the population chooses to avail itself of that law.
14 Adopted children constitute the majority of
15 individuals who will amend their parents' names on their
16 birth certificate. And a child and children who don't
17 know their fathers at birth constitute a majority of
18 individuals who will later seek to add paternity. These
19 laws are not unconstitutional just because -- just like
20 SB-280 is not unconstitutional simply because one
21 subpart of the population choose to avail itself of that
22 law more than others.
23 In addition, like we discussed earlier, this
24 will mean that the 2017 Rule, which Plaintiffs seek to
25 return to also violated equal protection because more

1 transgender individuals avail themselves of the 2017
2 Rule than others. But Plaintiffs don't take issue with
3 the 2017 Rule.
4 They ask this Court to return to that rule.
5 And so, Plaintiffs issue is not that SB-280 imposes a
6 process at all but rather they don't like the process it
7 imposes. And this is a policy disagreement, not an
8 equal protection claim. Plaintiffs equal protection
9 claim also fails because, again, transgender individuals
10 are not a protected class under Montana and federal law.
11 The individual dignity clause under Montana
12 Constitution includes as protected classes, race, color,
13 sex, culture, social origin or condition, and political
14 or religious ideas. No Montana court has ever held that
15 transgender individuals are a protected class. And the
16 legislature has expressly rejected a standing protected
17 classes in this manner.
18 And the cases that Plaintiffs rely on do not
19 establish that transgender individuals are part of a
20 protected class. And I would like to address each of
21 those cases in turn. The first, Bostock does not
22 establish the transgender individuals are part of a
23 protected class.
24 As the Supreme Court noted, Bostock is a very
25 narrow case limited to that specific factual scenario

1 under Title 7. The court concluded that whenever sex is
2 a but for cause of a negative employment decision sex
3 discrimination has occurred. The court refused to
4 prejudge any other questions like the questions before
5 the Court today.
6 From Bostock, we get two very important points
7 that are relevant to today's case. First, the court
8 stated that transgender status is a distinct concept
9 from sex, meaning transgender status does not fit into
10 the existing protected class itself. Second, as stated
11 earlier, sex discrimination occurs when sex is a, quote,
12 "but for cause of a negative employment decision."
13 The majority explains this. For example, would
14 like to repeat here, if a company hired a male and a
15 female and both were Yankees fans, then firing the
16 female because she's a Yankees fan but not firing the
17 male because he is a Yankees fan will constitute sex
18 discrimination. Both individuals are engaging in the
19 same conduct and sharing in the same traits but only the
20 female is terminated.
21 Sex is therefore the but for cause of the
22 negative employment decision. So the court then
23 analogizes this to the transgender context. Just like
24 the Yankees example the company hires two individuals,
25 one who is born a male and one who is born a female but

1 both individuals now present themselves as female.
2 They are engaged in same conduct and share
3 similar traits. In this scenario, they present as
4 females rather than as Yankees fans. But the company
5 only terminates the person who is born male and now
6 identify as female. Again, biological sex is the but
7 for cause of this negative employment decision. But the
8 challenge to that is situated completely different.
9 There is no but for causation here as SB-280
10 applies equally to each individual regardless of whether
11 a person was born male or female and whether that
12 person's gender identity align with his or her sex and
13 obviously there is no negative employment decision,
14 which is a critical component of Bostock.
15 So not only does Bostock establish a
16 transgender individual as part of a protected class but
17 its rational is entirely applicable when analyzing
18 SB-280. Plaintiffs also cite two other cases in their
19 briefing, again, discussing as much today and, again, in
20 their F.V. versus Barron and Ray versus McCloud in
21 support of recognizing transgender status as a protected
22 class.
23 But these cases don't support that conclusion.
24 So F.V. involved an administrative rule that
25 categorically and automatically denied all of

1 **applications to change listed sex. And defendants did**
2 **not defend its constitutionality.**
3 **They agreed with the plaintiffs that the rule**
4 **should be changed and did not provide a single**
5 **justification for the rule that was in place. Here, the**
6 **State is vigorously defending the challenged law, which**
7 **unlike the administrative rule is entitled to several**
8 **presumptions of constitutionality.**
9 **In addition and importantly, SB-280 does not**
10 **categorically and automatically deny an application to**
11 **change sex, quite the opposite. It establishes a**
12 **consistent process for amending sex on a birth**
13 **certificate. Importantly too, is the fact that two of**
14 **plaintiffs in F.V. actually attempted to change their**
15 **birth certificates and were denied.**
16 **Again, here Plaintiffs never attempted to make**
17 **this change. Finally, the provisions of this case cited**
18 **by Plaintiffs about protected classes are dicta. The**
19 **court held that the administrative rule at issue in F.V.**
20 **did not survive rational basis review, again, because**
21 **the state put forth no justification for the law.**
22 **And its discussion about protected classes, the**
23 **court was actually advising the defendants about how**
24 **they should craft their new administrative rule. Again,**
25 **the court struck the law down based on rational basis.**

1 Similarly in Ray versus McCloud, which challenge the law
2 did not allege -- did not allow for anyone to change sex
3 on their birth certificate.
4 Plaintiffs challenge that both the law and also
5 the governor's policy interpreting the law. Then the
6 court's rational in this case is very important here.
7 It determined that because the new policy prevent any
8 change to sex it treated individuals seeking to change
9 sex differently than those seeking to change other
10 aspects of their birth certificate like parents or name.
11 The distinguishing factor in Ray is therefore
12 not present here because SB-280 establishes a process
13 for changing sex just like other statutory provision
14 establish a process for changing parents or names on a
15 birth certificate.
16 DLI's decision Maloney versus Yellowstone
17 County and other cases are decisions cited by Plaintiffs
18 in their brief is also not particularly informative as
19 the State noted in briefing as well. First of all, this
20 is an agency opinion so it is persuasive authority only.
21 Second, the claim is brought under the Montana Humans
22 Rights Act, not a constitutional provision.
23 And third, the hearing officer relied on a
24 concurrence where the majority of the court declined to
25 address whether sexual orientation was a protected

1 class. The non-majority opinion cited in that decision
2 in DLI opined that it should be a protected class.
3 But the majority held that it was not. So this
4 decision in DLI not only misinterpreted the existing law
5 but has little bearing on the constitutional claims
6 before this Court. So the Court should not consider
7 that as persuasive authority. So because the law
8 applies equally to everyone, we don't need to reach the
9 question of level of scrutiny.
10 But even if the Court found that the law
11 treated similarly situated individuals differently,
12 transgender individuals as we said are not a protected
13 class. So rational basis review applies and State only
14 needs to show that the law is rationally related to
15 legitimate government interest. This is a very
16 differential standard.
17 As long as there is any reasonably conceivable
18 state of facts that could provide a rational basis, the
19 law must prevail. As SB-280 notes in the bill itself,
20 the state has an interest in an accurate vital
21 statistics. So let's turn to stated privacy claims,
22 which also does not succeed.
23 For state of privacy claim, Plaintiffs must
24 establish that they have subjective or actual
25 expectation of privacy and if society is willing to

1 recognize expectation is reasonable. Plaintiffs can
2 establish neither here.
3 Plaintiffs assert that they have a subjective
4 or actual expectation of privacy and medical records.
5 The State does not dispute this. But SB-280 did not
6 require public disclosure of medical records. It only
7 requires disclosure to a court with appropriate
8 jurisdiction if an individual choses to avail him or
9 herself of SB-280.
10 And courts routinely balance privacy interest
11 against the public's right to know. And like the --
12 like here they can proceed under pseudonym or the court
13 can file the records under seal. The cases Plaintiffs
14 cited in support of the privacy of medical records are
15 all concerned with public circulation of private
16 information, which is not a concern under SB-280.
17 It is worth reminding the Court that Marquez
18 ran for public office as a transgender woman. Marquez
19 in particular cannot claim -- now claim a right to
20 privacy in a fact that was part of a public campaign.
21 And even though Doe has not made this information
22 publicly available, there is no reason to believe that
23 SB-280 will force Doe to disclose transgender status to
24 anyone besides the court, which can, as this Court has
25 done allow Doe to proceed under a pseudonym.

1 Plaintiffs next claim is a medical interference
2 claim. This is not a claim under Montana law. This is
3 a privacy claim. Plaintiffs discuss Armstrong in
4 support of this claim. But Armstrong is not on point
5 for establishing a broad right to medical
6 decisionmaking.
7 Armstrong protect a medical decision for choice
8 of an abortion provider in that case after a person
9 exercises as constitutionally protected right, the right
10 to have an abortion. Plaintiffs here are free to make
11 any medical decision they desire. This decision has no
12 bearing on any constitutional right. There is no
13 constitutional right to change your birth certificate.
14 And a desire to change a birth certificate does
15 not create a right nor does it establish any cause of
16 action to challenge SB-280. SB-280 simply does not
17 prohibit Plaintiffs from making any medical decision.
18 It simply outlines the process for an individual to
19 amend his or her birth certificate.
20 Finally, Plaintiffs failed to state a due
21 process claim. As we discussed, there is no
22 constitutional right to change a birth certificate. For
23 a court to find a civil statute unconstitutionally vague
24 that statute must be so vague and indefinite as really
25 to no rule or standard at all.

1 Importantly, the standards that Plaintiffs
2 claim is unconstitutionally vague is the exact standard
3 that was in place for decades prior to the 2017 Rule.
4 So to the extent that Plaintiffs do assert a due process
5 claim, they must show an underlying substantive right
6 and that the restrictions are, quote, "unreasonable or
7 arbitrary when balanced against the purpose of the
8 legislature and enacting a statute."
9 Again, there is no right to change one's birth
10 certificate. And the legislature establishing process
11 for amending a birth certificate is not unreasonable or
12 arbitrary. The 2017 Rule establish a process just like
13 the rule before it did. Plaintiffs just don't like what
14 this rule and process requires. But this has no bearing
15 on the substantive right or the legislature's aim to
16 protect vital records and enforce birth records
17 statutes.
18 We have already discussed Plaintiffs failure to
19 allege an injury in context of the motion to dismiss.
20 But Plaintiffs also failed to allege an injury in
21 context of the preliminary injunction motion.
22 Plaintiffs assert that the loss of the constitutional
23 right itself and alone is enough to constitute
24 irreparable harm.
25 So Plaintiffs have pointed to no constitutional

1 right that they stand to lose because of the SB-280.
2 Again, there is no constitutional right to change one's
3 birth certificate. And in order for them to claim
4 constitutional right to privacy and medical
5 decisionmaking are violated that presupposes that there
6 is a right to change one's birth certificate and that
7 they have a right to engage to avail themselves of 280.
8 But, again, there is no constitutional right to
9 change one's birth certificate. And SB-280 is a
10 voluntary process an individual can choose to undergo.
11 At no point have Plaintiffs ever attempted to change
12 their birth certificate, not under the 2017 Rule and not
13 under this rule.
14 They cannot now claim that the Court must give
15 them preliminary relief. Plaintiffs have waited to
16 change their birth certificate. And if the Court does
17 not dismiss Plaintiffs claims, then Plaintiffs can wait
18 until the Court resolves the issues on the merits.
19 Now, your Honor asked Plaintiffs about the
20 status quo. The status quo at this point is SB-280.
21 Plaintiffs waited three months to file for preliminary
22 injunction after SB-280 became -- was put into effect.
23 And with now engaging in extensive briefing, it is now
24 eight months pass when this law was in effect. This law
25 is the status quo.

1 And the Court should deny the preliminary
2 injunction on that basis. There are no exigent or
3 emergency circumstances that justify preliminary
4 injunction particularly where Plaintiffs have no -- have
5 no -- Plaintiffs claims have no merit and there is no
6 irreparable injury.
7 Accordingly, the State ask this Court to deny
8 Plaintiffs motion for preliminary injunction. Thank
9 you, your Honor.
10 THE COURT: Thank you. Rebuttal.
11 MS. LANE: Your Honor, first to address the
12 preliminary injunction standard, I first want to point
13 out that the Court issued that -- the abortion order
14 after we had already submitted our reply brief for
15 preliminary injunction in this so that was before you
16 made your judgment on which preliminary injunction
17 standard should apply, nonetheless, we think that we can
18 win under either.
19 And this Court we understand rejected the
20 Van Loan analysis in Planned Parenthood because it
21 applies to case involving monetary judgments. That
22 standard may be correct. But even under the more
23 conservative standards that are enumerated here, we
24 would win.
25 Our position is that it is not particularly

1 relevant what standard the Court employs, either the
2 Van Loan standard or the Planned Parenthood standard we
3 would win either way. And we will address that in our
4 proposed findings.
5 Further, as to the State's disparate impact,
6 although this -- this law does have a disparate impact
7 on -- that it impacts transgender people more than it
8 impacts anyone else. Typically a disparate impact
9 analysis -- or typically under disparate impact, what
10 you have is a law that impacts everyone but it harms a
11 group of people more than others.
12 And in this case, this law only harms
13 transgender people. It does not harm everyone else.
14 And also, the examples that the State offered about
15 unknown paternity or adoption, those are not applicable
16 here or they are not even analogous in that in those
17 situations not only are similar burdens not placed upon
18 people attempting to correct their birth certificates
19 for those reasons.
20 But also under those statutes, it allows
21 alternative ways to submit information. So there is no
22 surgery requirement. And in addition, there is no
23 requirement that people are submitting private
24 information to a court. It allows -- both of those
25 allow simple attestation and different alternatives

1 **within the statute.**

2 **And also the State said that Bostock was not**

3 **applicable or that Bostock held that sex -- that**

4 **discrimination on the base of transgender status is**

5 **different than sex discrimination. That is not the**

6 **case.**

7 **That case specifically hold -- held that**

8 **transgender status is a subset of sex discrimination.**

9 **So it is impossible to discriminate against someone on**

10 **the basis of transgender status without discriminating**

11 **against them on their basis of their sex.**

12 **Also the State said that this law was different**

13 **from the federal laws that we cite where there is F.V.**

14 **and Ray where there is categorical ban against people,**

15 **transgender people, correcting their sex designation on**

16 **their birth certificate. And although those cases did**

17 **deal with the categorical ban, it is the same as here**

18 **because this policy is prohibit -- is making it**

19 **impossible for people changing their birth certificate**

20 **since it requires surgery that changes the sex of an**

21 **individual.**

22 **And we know that that is not a sex that exist.**

23 **So in practically speaking, it is banning transgender**

24 **people from changing their birth certificate. And also**

25 **the State saying that it has interest in accurate vital**

1 statistics. It is actually undermined by the Act since
2 allowing a person to correct the gender designation or
3 the sex designation on their birth certificate to
4 reflect their gender identity actually allows for an
5 accurate birth certificate, whereas, currently those
6 people have an inaccurate birth certificate.
7 And also, I guess the last point is that the
8 State argued that disclosure of medical records could be
9 handled by allowing people to proceed under pseudonym or
10 do an in-camera review. And the point practically
11 speaking, most people who proceed pro se would not know
12 how to even access those measures.
13 So even if that were possible, that wouldn't
14 actually work in most situations. And alternatively,
15 that would still require those individuals to share that
16 private information with the judge against their will.
17 Thank you, your Honor.
18 THE COURT: Very good. Thank you. If counsel will
19 work out when to submit, I would like those submissions
20 simultaneous and the -- just work out the timing for
21 that and get those submissions to the Court in the form
22 of proposed findings and conclusions and brief in
23 support. Anything else before the Court in this matter
24 today?
25 MS. SMITHGALL: No, your Honor.

1 MR. RATE: Nothing from the Plaintiff, your Honor.
2 THE COURT: Very good. Thank you very much. We are
3 in recess on this matter.
4 (Proceedings concluded)
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2 **CERTIFICATE OF REPORTER**

3

4 **I, CLAUDETTE HENRY, Official Court Reporter,**

5 **do hereby certify that I reported in machine shorthand**

6 **the foregoing proceedings at the time, place and with**

7 **the appearances of counsel hereinbefore noted.**

8 **I further certify that the transcript**

9 **transcribed from my original shorthand notes by means of**

10 **computer-assisted transcription, is a full, true, and**

11 **correct transcript of the oral testimony adduced**

12 **therein, to the best of my ability.**

13 **I further certify that I am not of counsel**

14 **for, nor in any way related to, any of the parties in**

15 **this matter, nor am I in any way interested in the**

16 **outcome thereof.**

17 **IN WITNESS WHEREOF, I have hereunto set my**

18 **hand this 14th day of January, 2022.**

19

20 **/s/ Claudette Henry**

21

22 **CLAUDETTE HENRY**
OFFICIAL COURT REPORTER

23

24

25

CERTIFICATE OF SERVICE

I, Kathleen Lynn Smithgall, hereby certify that I have served true and accurate copies of the foregoing Affidavit - Affidavit to the following on 01-28-2022:

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Dated: 01-28-2022