

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

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

Plaintiffs,

v.

STATE OF MONTANA, et al.,

Defendants.

Cause No. ADV-2024-261

**ORDER – MOTION
FOR PRELIMINARY
INJUNCTION**

Before the Court is Plaintiffs Jessica Kalarchik (Kalarchik) and Jane Doe's (Doe) motion for a preliminary injunction. Alex Rate, Marthe Y. VanSickle, Malita Picasso, Jon W. Davidson, F. Thomas Hecht, Tina B. Solis, and Seth A. Horvath represent the Plaintiffs. Alwyn Lansing, Michael Russell, Thane Johnson, Michael Noonan, and Emily Jones represent Defendants State of Montana, Gregory Gianforte, in his official capacity as the Governor of the State of Montana (Gianforte), the Montana Department of Public Health and Human Services (DPHHS), Charles T. Brereton, in his official capacity as the Director of

1 the Montana Department of Public Health and Human Services (Brereton), the
2 Montana Department of Justice (DOJ), and Austin Knudsen, in his official
3 capacity as Attorney General of the State of Montana (Knudsen) (collectively
4 “State”).

5 **STATEMENT OF FACTS**

6 On April 18, 2024, Plaintiffs filed a complaint for declaratory and
7 injunctive relief challenging Senate Bill 458 (SB 458), Montana Administrative
8 Rule 37.8.311(5) (2022 Rule), and a 2024 Montana Motor Vehicle Division
9 (MVD) policy to only issue an amended driver’s license with a sex designation
10 reflecting a person’s gender identity if the person provides an amended birth
11 certificate (MVD policy) (collectively “challenged state actions”). Plaintiffs
12 allege Defendants’ policies and practices are part of an effort to deny transgender
13 people rights that are widely guaranteed to other Montanans and reflect an intent
14 to discriminate against transgender people throughout the state.

15 The 2022 Rule, which originally went into effect on September 10,
16 2022, provides DPHHS would process applications for amending the sex
17 designations on birth certificates only if the sex identified on the applicant’s birth
18 certificate was the result of a scriveners’ error or incorrect data entry or if the sex
19 of the individual was misidentified on the original certificate. In a February 2024
20 notice, DPHSS declared it would not amend birth certificates based on “gender
21 transition, gender identity, or change of gender.” *See* Mont. Admin. Reg. Notice
22 37-1002, No. 11 (Jun. 10, 2022).

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1 On May 19, 2023, Gianforte signed SB 458 into law. SB 458,
2 codified at Montana Code Annotated § 1-1-201(1)(f), defines “sex” as applicable
3 to the Montana Code Annotated as:

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5 . . . the organization of the body parts and gametes for reproduction
6 in human beings and other organisms. In human beings, there are
7 exactly two sexes, male and female, with two corresponding types of
8 gametes. The sexes are determined by the biological and genetic
9 indication of male or female, including sex chromosomes, naturally
10 occurring sex chromosomes, gonads, and nonambiguous internal and
11 external genitalia present at birth, without regard to an individual's
12 psychological, behavioral, social, chosen, or subjective experience of
13 gender.

14 Mont. Code Ann. § 1-1-201(1)(f).

15 Plaintiffs allege SB 458 is scientifically incorrect and improperly seeks to limit
16 the meaning of sex without legal, medical, or scientific justification.¹

17 Plaintiffs’ complaint alleges the challenged state actions violate the
18 Montana Constitution’s equal-protection guarantee, privacy protections, and
19 prohibition against compelled speech, as well as the provisions of Montana Code
20 Annotated § 2-4-506. On May 17, 2024, Plaintiffs moved for a preliminary
21 injunction requesting the Court:

22 preliminarily enjoining Defendants, as well as their agents,
23 employees, representatives, and successors, from directly or
24 indirectly enforcing (1) the 2022 Rule on its face or as applied to
25 issuing amended birth certificates, (2) the new MVD policy and
26 practice as applied to issuing amended driver’s licenses, and (3) SB
27 458 as applied to issuing amended birth certificates and amended

¹ SB 458 was recently declared unconstitutional and is permanently enjoined.
Reagor v. State of Montana, Cause No: DV-23-1245 (Mont. Fourth Jud. Dist.
Court, Missoula Cty.) (June 25, 2024).

1 driver's licenses, including but not limited to prohibiting Defendants
2 from denying applications to amend the sex designation on birth
3 certificates or driver's licenses based on the 2022 Rule, the new
4 MVD policy and practice, SB 458, or any further administrative
5 rulemaking or other action directed toward enforcement of the 2022
Rule, the new MVD policy and practice, or SB 458 as applied to
issuing birth certificates or driver's licenses.

6 Pl. Mot. For Prelim. Inj., p. 2 (May 17, 2024).

7
8 Following briefing, the Court held oral argument on the motion on November 14,
9 2024. The matter is now ripe.

10 **PRINCIPLES OF LAW**

11 Pursuant to Montana Code Annotated § 27-19-201(3), the party
12 moving for an injunction "bears the burden of demonstrating the need for an
13 injunction order." Under § 27-19-201(1), as amended by the 2023 Montana
14 Legislature:

15 A preliminary injunction order or temporary restraining order may
16 be granted when the applicant establishes that: (a) the applicant is
17 likely to succeed on the merits; (b) the applicant is likely to suffer
18 irreparable harm in the absence of preliminary relief; (c) the balance
of equities tips in the applicant's favor; *and* (d) the order is in the
public interest.

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20 Mont. Code Ann. § 27-19-201(1). The Montana Legislature intended for
21 this standard to "mirror the federal preliminary injunction standard."

22 Mont. Code Ann. § 27-19-201(4).

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1 As a threshold matter, the Court rejects the State’s argument this
2 litigation presents a nonjusticiable political question. The State argues Plaintiffs’
3 claims would impermissibly require the Court to write a new protected class into
4 Montana law. Thus, the State concludes it is within the exclusive jurisdiction of
5 the legislature to determine whether transgender status constitutes a protected
6 class. However, “the courts, as final interpreters of the Constitution, have the
7 final ‘obligation to guard, enforce, and protect every right granted or secured by
8 the Constitution...” *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT
9 69, ¶ 18, 326 Mont. 304, ¶ 18, 109 P.3d 257, ¶ 18 (quoting *Robb v.*
10 *Connolly* (1884), 111 U.S. 624, 637, 4 S. Ct. 544, 551, 28 L. Ed. 542, 546).
11 Determining whether a statute or state policy violates Plaintiffs’ constitutional
12 rights is directly in the jurisdiction of the Court.

13 **Likelihood of Success on the Merits**

14 The first step in the Court’s preliminary injunction analysis is
15 whether Plaintiffs are likely to succeed on the merits. Under Montana’s
16 preliminary injunction standard, “likelihood of success does not require the
17 applicant to establish entitlement to final judgment, relief at all events on final
18 hearing, relief at a trial on the merits, or evidence sufficient to prevail at
19 trial.” *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 18, 418 Mont. 253,
20 ¶ 18, 557 P.3d 440, ¶ 18 (citing *Planned Parenthood of Mont.*, 2022 MT 157,
21 ¶ 30). To satisfy this factor, Plaintiffs must raise a serious question going to the
22 merits of their claims.

23 Although Plaintiffs have raised challenges under four separate
24 legal theories, Plaintiffs only need to demonstrate one of their claims satisfies the
25 requirements of Montana Code Annotated § 27-19-201(1) to obtain a preliminary

1 injunction. Because the Court finds the issue dispositive, it focuses its analysis
2 on Plaintiffs' equal protection claim. Article II, Section 4 of the Montana
3 Constitution provides no person shall be denied equal protection of the laws.
4 Analyzing an equal protection claim involves a three-step process. The Court
5 must:

6 (1) identify the classes involved and determine if they are similarly
7 situated; (2) determine the appropriate level of scrutiny to apply to
8 the challenged legislation; and (3) apply the appropriate level of
scrutiny to the challenged statute.

9 *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, ¶ 28,
10 325 P.3d 1211, ¶ 28.

11
12 “The first prerequisite to a meritorious claim under the equal protection clause is
13 a showing that the state has adopted a classification that affects two or more
14 similarly situated groups in an unequal manner.” *Powell v. State Comp. Ins.*
15 *Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, ¶ 22, 15 P.3d 877, ¶ 22. The Montana
16 Supreme Court has held, “two groups are similarly situated if they are equivalent
17 in all relevant respects other than the factor constituting the alleged
18 discrimination.” *Goble* at ¶ 28. Plaintiffs have defined the classes as Montanans
19 seeking to amend the sex designation on their birth certificates or driver's
20 licenses and cisgender Montanans seeking to amend the sex designation on their
21 birth certificates or driver's licenses.

22 Plaintiffs argue the two classes are equivalent in all relevant
23 respects other than their status as transgender or cisgender. Plaintiffs further
24 argue the challenged state actions discriminate against transgender people on the
25 basis of their transgender status and on the basis of sex. Whereas cisgender

1 Montanans can obtain amended birth certificates and drivers licenses with a sex
2 marker accurately reflecting their gender identity, transgender Montanans cannot.
3 In contrast, the State argues Plaintiffs cannot prevail on their equal protection
4 claim because they have failed to establish two similarly situated classes or
5 differential treatment based on a protected class. The State's argument relies
6 primarily on the conclusion discrimination on the basis of transgender status is
7 not discrimination on the basis of sex. The State argues transgender Montanans
8 do not constitute a protected class and therefore equal protection does not apply.
9 Based on this conclusion, the State ends its equal protection argument at the class
10 identification step.

11 However, whether the challenged state actions constitute
12 discrimination on the basis of sex and whether transgender status is a protected
13 class relate more to the appropriate level of scrutiny. "When a statute treats
14 similarly situated individuals dissimilarly, but not on the basis of a suspect
15 classification or in the exercise of a fundamental right, a court must subject the
16 discriminating statute to rational-basis review." *Gazelka v. St. Peter's Hosp.*,
17 2015 MT 127, ¶ 21, 379 Mont. 142, ¶ 21, 347 P.3d 1287, ¶ 21 (citing *McDermott*
18 *v. Mont. Dep't of Corr.*, 2001 MT 134, ¶¶ 31-32, 305 Mont. 462, 29 P.3d 992).
19 Thus, even if the Court found the alleged discrimination did not involve a suspect
20 class or fundamental right, that would not be the end of the equal protection
21 analysis. Regarding the class identification step, Plaintiffs have established the
22 challenged state actions affect cisgender and transgender Montanans in an
23 unequal manner.

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1 The Court next turns to the appropriate level of scrutiny to apply to
2 the challenged state actions. Plaintiffs urge the Court to apply strict scrutiny on
3 the basis transgender Montanans constitute a suspect class. However, the Court
4 finds it is not necessary at this point in the litigation to determine whether
5 transgender Montanans constitute a suspect class on the basis of their transgender
6 status. Rather, the Court addresses the State’s contention discrimination on the
7 basis of transgender status is not discrimination on the basis of sex. Based on a
8 review of recent United States Supreme Court and federal court decisions, the
9 Court disagrees with the State’s conclusion.

10 In *Bostock v. Clayton County*, 590 U.S. 644, 140 S. Ct. 1731
11 (2020), the United States Supreme Court addressed discrimination based on
12 sexual orientation or transgender status in the context of employment
13 discrimination under Title VII. There, the Supreme Court held “it is impossible
14 to discriminate against a person for being homosexual or transgender without
15 discriminating against that individual based on sex.” *Id.* at 660. In the present
16 matter, the State asks this Court to restrict the holding in *Bostock* to the context
17 of Title VII of the Civil Rights Act of 1974. Plaintiffs, on the other hand, argue
18 the logic of the holding applies broadly in an equal protection context.
19 In *Fowler v. Stitt*, 104 F.4th 770 (2024), the United States Court of Appeals for
20 the Tenth Circuit applied the *Bostock* reasoning to an equal protection claim
21 substantially similar to the one before this Court. In *Fowler*, the plaintiffs
22 challenged an Oklahoma policy which denied sex-designation amendments on
23 birth certificates on the grounds the policy violated the equal protection clause of
24 the United States Constitution by unlawfully discriminating against transgender
25 people on the basis of transgender status and sex.

1 Similar to the State’s arguments here, the defendants in *Fowler*
2 argued against applying the holding in *Bostock* in the equal protection context
3 because there the Supreme Court noted, “[t]he only question before us is whether
4 an employer who fires someone simply for being homosexual or transgender has
5 discharged or otherwise discriminated against that individual ‘because of such
6 individual's sex.’” *Bostock* at 681. Thus, the defendants conclude, the Supreme
7 Court only intended the holding to apply in the context of Title VII claims.
8 However, the *Fowler* Court rejected the argument this language intended to limit
9 the application of *Bostock* because, “[a]lthough that was the only question the
10 Supreme Court decided, the Court did not indicate that its logic concerning the
11 intertwined nature of transgender status and sex was confined to Title VII.”
12 *Fowler* at 790.

13 Relying on the United States Supreme Court decision in *Bostock*,
14 the Tenth Circuit Court in *Fowler* concluded because the Oklahoma policy
15 intended to discriminate based on transgender status, it necessarily intends to
16 discriminate based in part on sex. This Court adopts the same reasoning. If the
17 challenged state actions discriminate against transgender individuals on the basis
18 of their transgender status, they also necessarily discriminate on the basis of sex.
19 The Montana Supreme Court has not yet identified the level of scrutiny
20 applicable to classifications based on transgender status or sex. However, if a
21 right is “explicit in the Declaration of Rights in Montana's Constitution, it is a
22 fundamental right.” *Gryczan v. State* (1997), 283 Mont. 433, 449, 942 P.2d 112,
23 122. Article II, Section 4 of Montana’s Constitution, found in the Declaration of
24 Rights, establishes a fundamental right to individual dignity. It states:

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1 “Neither the state nor any person, firm, corporation, or institution shall
2 discriminate against any person in the exercise of his civil or political rights on
3 account of race, color, *sex*, culture, social origin or condition, or political or
4 religious ideas.” (emphasis added) Therefore, the right to be free from
5 discrimination on the basis of sex is a fundamental right. “Strict scrutiny applies
6 when a classification affects a suspect class or threatens a fundamental right.”
7 *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 31, 305 Mont. 462, ¶ 31,
8 29 P.3d 992, ¶ 31 (citing *Armstrong v. State*, 1999 MT 261, P34, 296 Mont. 361,
9 ¶ 34, 989 P.2d 364, ¶ 34).

10 Under a strict scrutiny analysis, “the State has the burden of
11 showing that the classification or State action is narrowly tailored to serve a
12 compelling State interest.” *Id.* Because the State ended its equal protection
13 analysis at the class identification step, it offers no argument regarding the state’s
14 interest or how the challenged state actions relate to a state interest. Plaintiffs
15 argue the challenged state actions do not serve a compelling government interest.
16 However, referencing 11 Mont. Admin. Reg. Notice 37–1002 (June 10, 2022),
17 Plaintiffs suggest the purpose of the challenged state actions are to ensure
18 “accurate vital statistics.” The State may have a compelling state interest in
19 ensuring accurate vital statistics. As this case moves forward, the Court
20 anticipates the argument regarding the state interest will become more clear.
21 However, even if the State can demonstrate a compelling state interest in
22 ensuring accurate vital statistics, the challenged state actions still must be
23 narrowly tailored to effectuate that interest. Here, the State has not demonstrated
24 the challenged state actions are narrowly tailored. Prior to the implementation of
25 the challenged state actions, transgender Montanans were able to obtain amended

1 birth certificates and drivers licenses. Plaintiffs argue nothing in the public
2 record supports a finding there were problems maintaining accurate vital
3 statistics before the implementation of the challenged state actions. Thus, the
4 state interest could presumably be effectuated without the challenged state
5 actions. If the challenged state actions are not necessary to effectuate the state
6 interest, they cannot be narrowly tailored.

7 Plaintiffs have met their burden of establishing likelihood of
8 success on the merits under the preliminary injunction standard. Plaintiffs have
9 raised a valid prima facie case the challenged state actions violate their
10 fundamental right to be free from discrimination on the basis of sex under the
11 Montana Constitution. Although the State did not suggest any state interest
12 served by the challenged state actions, Plaintiffs raised a potentially compelling
13 state interest. However, Plaintiffs have succeeded in raising a serious question
14 on the merits as to whether the challenged state actions are narrowly tailored.

15 **Likelihood of Irreparable Harm**

16 The next step in the preliminary injunction analysis is whether
17 Plaintiffs are likely to suffer irreparable harm in the absence of an injunction.
18 The Montana Supreme Court has consistently held, “the loss of a constitutional
19 right constitutes irreparable harm for the purpose of determining whether a
20 preliminary injunction should be issued.” *Mont. Cannabis Indus. Ass’n v. State*,
21 2012 MT 201, ¶15, 366 Mont. 224, 286 P.3d 1161 (citing *Elrod v. Burns*,
22 427 U.S. 347, 373, 96 S. Ct. 2673, 2689-690, 49 L. Ed. 2d 547 (1976)). As
23 addressed above, Plaintiffs have established a prima facie case the challenged

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1 state actions infringe their constitutional rights under the Montana State
2 Constitution’s equal protection clause. Therefore, Plaintiffs have demonstrated a
3 likelihood of irreparable harm absent an injunction.

4 **Balance of Equities and Public Interest**

5 The third step of the preliminary injunction analysis is whether the
6 balance of equities tips in Plaintiffs’ favor. The final step of the preliminary
7 injunction test is whether an injunction is in the public interest. The Court
8 analyzes these factors together because “[w]hen the government opposes a
9 preliminary injunction, these two factors ‘merge into one inquiry.’” *Planned*
10 *Parenthood of Mont. v. State*, 2024 MT 228, ¶ 39, 418 Mont. 253, ¶ 39,
11 557 P.3d 440, ¶ 39 (quoting *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir.
12 2021)).

13 Citing Ninth Circuit precedent, the Montana Supreme Court has
14 held, “[a] plaintiff’s likelihood of success on the merits of a constitutional claim .
15 . . tips the merged third and fourth factors decisively in his favor.” *Id.* at ¶ 40
16 (quoting *Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023)). Here, Plaintiffs
17 have demonstrated a likelihood of success on the merits of their equal protection
18 claim. Thus, under Montana law, the third and fourth factors weigh in Plaintiffs’
19 favor.

20 Additionally, applying recent Montana Supreme Court precedent,
21 the balance of equities “tips in [Plaintiffs’] favor because ‘the government
22 suffers no harm from an injunction that merely ends unconstitutional practices
23 and/or ensures that constitutional standards are implemented.’” *Id.* (quoting *Doe*
24 *v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017)). Finally, a preliminary injunction is
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1 “in the public interest because ‘it is always in the public interest to prevent the
2 violation of a party’s constitutional rights.’” *Id.* (quoting *Melendres v. Arpaio*,
3 695 F.3d 990, 1002 (9th Cir. 2012)).

4 **CONCLUSION**

5 Plaintiffs have demonstrated their request for a preliminary
6 injunction satisfies the requirements of Montana Code Annotated § 27-19-201(1).
7 Therefore, Defendants, as well as their agents, employees, representatives, and
8 successors, are enjoined from directly or indirectly enforcing (1) the 2022 Rule
9 on its face or as applied to issuing amended birth certificates; (2) the MVD policy
10 and practice as applied to issuing amended driver’s licenses without an amended
11 birth certificate; and (3) SB 458 as applied to issuing amended birth certificates
12 and amended driver’s licenses.

13 **ORDER**

14 **IT IS HEREBY ORDERED** Plaintiffs’ motion for a preliminary
15 injunction is **GRANTED**.

16
17
18 /s/ Mike Menahan
19 MIKE MENAHAN
20 District Court Judge

21 cc: All via email:
22 John Davidson
23 Alwyn Lansing
24 Seth A. Horvath
25 Robert Farris-Olsen
Marthe Y. Vansickle
Michael Russell

Alex Rate
Malita Picasso
F. Thomas Hecht
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