AUSTIN KNUDSEN
Montana Attorney General
KRISTIN HANSEN
Lieutenant General
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
PATRICK M. RISKEN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov
prisken@mt.gov

Attorneys for Defendants

CLERK OF THE
DISTRICT COURT
TERRY HALPIN
2021 OCT 28 P 2:51
FILED
BY
DEPUTY

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; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and ADAM MEIER, in his official capacity as the Director of the Montana Department of Public Health and Humant Services, Defendants.	DV-21-00873 Hon. Michael G. Moses **DEFENDANTS' REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO MONT. R. CIV. P. 12(b)(6)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Administration exhaustion is appropriate. 1

A. Plaintiffs created this procedural mess. 1

B. The exhaustion doctrine applies. 3

1. The pure legal question exception does not apply. 3

2. The constitutional law exception does not apply. 5

II. Plaintiffs re-recite their allegations, but they cannot overcome the Complaint's deficiencies. 6

A. Plaintiffs lack standing to assert these claims. 7

B. Plaintiffs have also failed to state claims upon which relief can be granted. 9

1. SB 280 does not violate equal protection. 9

2. SB 280 does not violate the right to informational privacy. 15

3. SB 280 does not violate the "right" to make one's own medical decisions. 17

4. SB 280 does not violate due process. 19

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

CASES

A.B. Small Co. v. Am. Sugar Refin. Co.,
267 U.S. 233 (1925) 19

Armstrong v. State,
1999 MT 261, 296 Mont. 361, 989 P.2d 364 18

Barna v. Bd. of Sch. Drs. of Panther Valley Sch. Dist.,
877 F.3d 136 (3d Cir. 2017) 6

Barnicoat v. Comm'r of Dept. of Labor and Indus.,
201 Mont. 221, 653 P.2d 498 (1982) 3

Barr v. Great Falls Int'l Airport Auth.,
2005 MT 36, 326 Mont. 93, 107 P.3d 471 17

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 14

Booth v. Churner,
532 U.S. 731 (2001) 2

Bostock v. Clayton Cty.,
140 S. Ct. 1731 (2020) 12

Buckley v. Valeo,
424 U.S. 1 (1976) 14

Bullock v. Fox,
2019 MT 50, 395 Mont. 35, 435 P.3d 1187 .... 7, 8

Cook v. Mt. Rail Link, No. 78444,
1995 Mont. Dist. LEXIS 443 16

Cossitt v. Flathead Indus.,
2018 MT 82, 319 Mont. 156, 415 P.3d 486 7

FCC v. Beach Commc'ns,
508 U.S. 307 (1993) 14

Gazelka v. St. Peter's Hosp.,
2018 MT 152, 392 Mont. 1, 420 P.3d 528 10

Haines v. Kerner,
404 U.S. 519 (1972) 7

Henricksen v. State,
2004 MT 20, 319 Mont. 307, 84 P.3d 38 16

Hoffman Estates v. Flipside, Hoffman Estates,
455 U.S. 489 (1982) 9

Larson v. State
166 Mont. 449, 534 P.2d 854 (1975) 4

Jarussi v. Bd. of Trs.,
204 Mont. 131, 664 P.2d 316 (1983) 5

Jones v. Mont. Univ. Sys.,
2007 MT 82, 337 Mont. 1, 155 P.3d 1247 1–2

Keller v. Dep't of Revenue,
182 Mont. 478, 597 P.2d 736 (1979) 4

Lockhart v. United States,
376 F.3d 1027 (9th Cir. 2004) 7

In re Matter of S.L.M.,
287 Mont. 23, 951 P.2d 1365 (1997) 11

McCarthy v. Madigan,
503 U.S. 140 (1992) 2, 3

Missoula v. Mt. Water Co.,
2018 MT 139, 391 Mont. 422, 419 P.3d 685 .... 14, 15

Mitchell v. W. Yellowstone,
235 Mont. 104, 765 P.2d 745 (1988) 5

Parisi v. Davidson,
405 U.S. 34 (1972) 3

Paycom Payroll, LLC v. Richison,
758 F.3d 1198 (10th Cir. 2014) 6

Powell v. State Comp. Ins. Fund,
2000 MT 321, 302 Mont. 518, 15 P.3d 877 19

Shoemaker v. Denke,
2004 MT 11, 319 Mont. 238, 84 P.3d 4 2

Sinclair v. BN & Santa Fe Ry.,
2008 MT 424, 347 Mont. 395, 200 P.3d 46 6

State v. Cotterell,
2008 MT 409, 347 Mont. 231, 198 P.3d 254 6

State v. Porter,
2018 MT 16, 390 Mont. 174, 410 P.3d 955 9

Stratemeyer v. Lincoln Cnty.,
259 Mont. 147, 855 P.2d 506 (1993) 14

Stuart v. Dep't of Social & Rehab. Servs.,
247 Mont. 433, 807 P.2d 710 (1991) 5, 6

Taylor v. Dep't of Fish, Wildlife & Parks,
205 Mont. 85, 666 P.2d 1228 (1983) 3, 4

Threkeld v. Colorado,
2000 MT 369, 303 Mont. 432, 16 P.3d 359 .... 7, 15, 18

Weems v. State,
2019 MT 98, 395 Mont. 350, 440 P.3d 4 8

OTHER AUTHORITIES

Montana Code Annotated
§ 49-2-501 2
§ 49-2-512 5

Montana Rules of Civil Procedure
Rule 12(b)(6) 14

INTRODUCTION

The State filed a combined motion to dismiss and response to Plaintiffs' preliminary injunction. State Combined Brief, Dkt. 24. Plaintiffs replied in support of their preliminary injunction motion and separately responded to the State's motion to dismiss. The State now replies in support of its motion to dismiss. Dismissal is appropriate because Plaintiffs have failed to exhaust their administrative remedies and state any claim upon which relief can be granted.

I. Administration exhaustion is appropriate.

A. Plaintiffs created this procedural mess.

Plaintiffs—not Defendants—chose to file identical claims simultaneously before the Montana Human Rights Bureau ("HRB") and the district court.[1] The State's argument that this Complaint should be dismissed harmonizes with the State's response to Plaintiffs' HRB complaints. *See* Dkt. 24 at 2–3 ("The State is still reviewing the propriety of filing what amounts to a claim challenging the constitutionality of a statute before the HRB."). Because Plaintiffs chose to file before the HRB—despite the impropriety of the forum—the district court must dismiss the Complaint while the HRB proceeds. *See Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 39, 337 Mont. 1, 155 P.3d 1247 ("Petitioners first must exhaust available administrative

[1] Plaintiffs argue that Counts II, III, and IV are not within the jurisdiction of the HRB, so exhaustion is not required for these claims. Dkt. 30 at 7. This argument has no merit. The relief Plaintiffs seek is the same for each count before this court and for the claims brought before the HRB: declare SB 280 unconstitutional. If Plaintiffs are successful in front of the HRB (which the State argues lacks jurisdiction), then that would moot Counts II, III, and IV before this court.

remedies before pursuing a state law discrimination claim in district court."); *see also Shoemaker v. Denke*, 2004 MT 11, ¶ 26, 319 Mont. 238, 84 P.3d 4 (requiring dismissal where administrative remedies have not been exhausted). There is no wiggle room; the law is clear; this Court *must* dismiss the Complaint. Once the Court dismisses this Complaint—as *Jones* requires—the HRB should dismiss the complaints before it for lack of jurisdiction. *See* Plaintiffs' Response Brief, Dkt. 30, Exhibit 1 (State's HRB Response). To be clear, the State believes Plaintiffs' claims fail on the merits in any forum, but that doesn't mean this Court may sidestep clearly applicable rules that currently divest it of power to hear this case.

Administrative exhaustion prevents piecemeal litigation. *See Jones*, ¶ 39. Far from being formalistic, requiring administrative exhaustion ensures there is one record, not multiple-potentially conflicting—records for the adjudication of a claim. If the HRB rejects the State's arguments about its lack of jurisdiction, it will proceed with its investigation, and this Court will need to cease consideration of the claims while the administrative remedy is pursued and exhausted. *See, e.g., McCarthy v. Madigan,* 503 U.S. 140, 145 (1992), *superseded on other grounds*, *Booth v. Churner*, 532 U.S. 731 (2001) (explaining that (1) an agency should have primary responsibility for the program it administers and (2) exhaustion promotes judicial efficiency by avoiding piecemeal litigation). And if the agency dismisses the HRB complaints, then Plaintiffs will have exhausted the administrative process they initiated. Process matters, particularly in the context of discrimination claims in Montana. *See* M.C.A. § 49-2-501 (establishing a nonjudicial remedial path). Plaintiffs brought us to this

procedural juncture by filing before both the HRB and in district court. Their procedural missteps do not afford them the benefit of litigating an identical claim in different for a in a hope that if they are denied relief in one, their claim will be accepted by the other. This Complaint must, therefore, be dismissed.

B. The exhaustion doctrine applies.

The exhaustion doctrine provides that "if an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review." *Barnicoat v. Comm'r of Dept. of Labor and Indus.*, 201 Mont. 221, 225, 653 P.2d 498, 500 (1982). It recognizes "that agencies, not the courts, ought to have primary responsibility" for the programs they administer. *McCarthy*, 503 U.S. at 145. This doctrine "allow[s] an administrative agency to perform functions within its special competence, which is to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972).

While there are exceptions to this doctrine, none apply here because Plaintiffs are simultaneously seeking the same relief in two different fora. The two exceptions relevant here are the "pure legal question" exception and the "constitutional law" exception. Neither permits a party to shop for relief by filing in both an agency and a district court at the same time.

1. The pure legal question exception does not apply.

The pure legal question exception applies when the question involves an "interpretation of law that must be made by the judiciary." *Taylor v. Dep't of Fish, Wildlife & Parks*, 205 Mont. 85, 94, 666 P.2d 1228, 1232 (1983). Plaintiffs note that

the questions in this case "are legal, not factual." Dkt. 30 at 10. Of course, this begs the question why Plaintiffs filed before the HRB at all; or why—after seeing the State's exhaustion arguments—Plaintiffs declined to withdraw their HRB complaints.

Notwithstanding the cases cited by Plaintiffs, which are distinguishable, the exception does not apply in these circumstances. In *Keller v. Dep't of Revenue*, 182 Mont. 478, 597 P.2d 736 (1979), the question of law—whether the Department of Revenue used the wrong principle of appraisal—arose out of the agency's proceedings. In *Keller*, plaintiffs first filed before the Department of Revenue before seeking review of the Department's decision in district court. *Id.* at 479–80, P.2d at 737–38. That is, the district court litigation arose out of the agency process after the agency process had run its course. *Keller* does not provide that plaintiffs could have filed in district court before or at the same time they filed before the Department of Revenue. Similarly, in *Taylor*, the plaintiff filed in district court only after he received an unfavorable ruling from the HRB. 205 Mont. at 87–88. And in *Larson v. State*, 166 Mont. 449, 456, 534 P.2d 854, 857 (1975), the plaintiffs brought their challenge directly to the district court, bypassing the agency altogether. These cases don't validate Plaintiffs' procedural decisions here: identical claims cannot proceed simultaneously before both a state agency and a district court.

2. The constitutional law exception does not apply.

The constitutional law exception likewise does not apply. Courts must adjudicate legal and—especially—constitutional questions. "Constitutional questions are properly decided by a judicial body, not an administrative official." *Jarussi v. Bd. of Trs.*, 204 Mont. 131, 135–36, 664 P.2d 316, 318 (1983). The State agrees with that rule, yet Plaintiffs haven't withdrawn their HRB complaints. And the theory of discrimination in their HRB complaints largely tracks with their equal protection arguments in this case. Given these factors, and the rule that a court and agency may not consider identical claims at the same time, *see* M.C.A. § 49-2-512 ("A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter."), the HRB review process must be exhausted before this Court may exercise jurisdiction. If the HRB (improperly, in the State's view) accepts jurisdiction, then the HRB process must unfold before the parties could proceed before this—or any—court.

Plaintiffs again fail to cite authority supporting their mistaken position that identical claims may proceed before both the district court and the HRB. In *Jarussi*, the plaintiff sought relief from the School Board before appealing the decision to the district court rather than the county superintendent of schools. 204 Mont. at 135. In *Mitchell v. W. Yellowstone*, 235 Mont. 104, 105–06, 765 P.2d 745, 748 (1988), the plaintiff filed directly in the district court rather than with the Board of Adjustment as required by a local town ordinance. Finally, in *Stuart v. Dep't of Social & Rehab. Servs.*, 247 Mont. 433, 435, 807 P.2d 710, 711 (1991), the plaintiffs first attempted to resolve the dispute before the Department of Social and Rehabilitation Services.

When they failed to reach a satisfactory result, they filed an action in the district court. *Id.* In all these cases, the courts never permitted a party to proceed on the same legal theories before an administrative agency and a court at the same time.

Process matters. None of the cases cited by Plaintiffs permit them to continue litigating these issues both before the HRB and this Court. This Court must dismiss Plaintiffs' claims for failure to exhaust administrative remedies.

II. Plaintiffs re-recite their allegations, but they cannot overcome the Complaint's deficiencies.[2]

Just because a motion to dismiss is viewed in a light most favorable to the non-moving party, *see Sinclair v. BN & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 200 P.3d 46, does not mean a plaintiff can bypass the minimum standards for

---

[2] Plaintiffs appear to bifurcate the State's arguments by responding to some in their reply in support of a preliminary injunction and others in their response to the State's motion to dismiss. Plaintiffs, however, fail to comprehend that the State's arguments are applicable to both, supporting its motion to dismiss and refuting Plaintiffs' claims to a preliminary injunction. The same arguments provide the basis for this Court to deny Plaintiffs' preliminary injunction motion *and* to grant the State's motion to dismiss. Because Plaintiffs fail to address these arguments in response to the motion to dismiss, they have forfeited their responsive arguments in this context. *See State v. Cotterell*, 2008 MT 409, ¶ 45, 347 Mont. 231, 198 P.3d 254 ("[W]e need not consider this argument further since Cotterell failed to raise or address it in his motions before the District Court"); *see also Barna v. Bd. of Sch. Drs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 146–49, n.7 (3d Cir. 2017) ("Forfeiture is the failure to make the timely assertion of a right….Waiver, in contrast, is the intentional relinquishment or abandonment of a known right (cleaned up)); *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1203 (10th Cir. 2014) ("Waiver is accomplished by intent, but forfeiture comes about through neglect."). Although Plaintiffs addressed the State's arguments in reply in support of their motion for preliminary injunction, that is insufficient: A different legal standard applies to motions to dismiss. *See* Dkt. 24 at 3–5. Plaintiffs have forfeited any response to such bases for dismissal. Notwithstanding this, the State will address, in the context of its motion to dismiss the Complaint, the arguments made in Plaintiffs' reply brief.

pleading a claim. That these motions are "disfavored," *see* Dkt. 30 at 2, does not relieve Plaintiffs of the obligation to clearly plead facts to support claims on which relief can be granted. A "complaint must state something more than facts which, at the most, would breed only a suspicion that the claimant may be entitled to relief." *Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 319 Mont. 156, 415 P.3d 486 (cleaned up). Plaintiffs are represented by counsel, and the court should not salvage their claims that have been deficiently pleaded. Only in *pro se* cases do courts "bend over backwards to pluck a viable claim" from a plaintiff's ill-pled complaint. *Lockhart v. United States*, 376 F.3d 1027, 1028 (9th Cir. 2004); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (noting that allegations of a pro se complaint are held "to less stringent standards than formal pleadings drafted by lawyers"). Here, Plaintiffs recite conclusory allegations, *see* Dkt. 30 at 5–6, at which the court is not required to accept as true. *Threkeld v. Colorado*, 2000 MT 369, ¶ 33, 303 Mont. 432, 16 P.3d 359.

A. Plaintiffs lack standing to assert these claims.

Plaintiffs address standing in their reply in support of their preliminary injunction motion, but their lack of standing is equally grounds for dismissal of their Complaint. They have forfeited their response to the State's standing argument in context of the motion to dismiss. *See supra* Section II n.2.

Each injury alleged by Plaintiffs is hypothetical and speculative. *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187. Marquez has not actually attempted to change Marquez's birth certificate under the old regulation or the new

law. The same appears true for Doe. Marquez "would *like to* change sex designation." Dkt. 30 at 3 (emphasis added). Marquez believes future denial of "an accurate birth certificate" places Marquez "at risk." Dkt. 30 at 4. Doe "*would like* to correct the sex designation." Dkt. 30 at 4 (emphasis added). "The *idea* of having to share private medical records … causes Does a great deal of emotional distress." Dkt. 30 at 4 (emphasis added). And Doe has "fear" of exposing personal medical information. Dkt. 30 at 4. These injuries are abstract, speculative, and hypothetical because neither plaintiff has attempted to change their birth certificate, nor did they attempt to change their birth certificates under the 2017 Rule despite their alleged desire to do so. *See Bullock v. Fox.*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187 (requiring injuries to be "concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical"). Imagined future harm based on events that have not yet transpired—because of Plaintiffs' own failure to act—cannot be the basis for a claim.

Plaintiffs assert the State has failed to acknowledge that "[a] plaintiff's standing may arise from an alleged violation of a constitutional or statutory right." Plaintiffs' Reply Brief, Dkt. 31 at 17 (quoting *Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4. But Plaintiffs haven't articulated what constitutional rights have been violated. With respect to Count I, Plaintiffs simply repeat that SB 280 violates the equal-protection clause of the Montana Constitution. They claim that similarly situated individuals are not subject to the same requirements, Dkt. 30 at 5, but they do not identify any right that has been infringed. Plaintiffs seem to suggest

that the constitutional right is the "inability to access identity document[s] accurately reflecting one's true sex." Dkt. 31 at 18. But this is not a constitutional right.

With respect to Counts II and III, Plaintiffs claim a violation of the right to "informational privacy and to be free from state interference with medical decisions." Dkt. 30 at 6. As the State has noted, Montana does not recognize a broad right to be free from interference in medical decisions. Dkt. 24 at 21–22. And the right to privacy does not extend to information publicly shared in litigation or during one's campaign for public office. *Id.* at 20. Finally, with respect to Count IV, Plaintiffs have failed to show that changing one's birth certificate is "constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494–95 (1982). Without showing that this conduct is protected, Plaintiffs' claim of a due process violation fails. Simply repeating conclusory statements and speculative harms is insufficient to establish standing. *See* Dkt. 24 at 5–9. [3]

B. Plaintiffs have also failed to state claims upon which relief can be granted.

1. SB 280 does not violate equal protection.

To state a viable equal protection claim, Plaintiffs must show that SB 280 does not apply equally to similarly situated individuals and that they are part of a protected class. Plaintiffs can establish neither.

---

[3] In Plaintiffs' Reply, they state that SB 280's precondition violates their "right to bodily integrity." Dkt. 31 at 18. The court should not consider this argument, raised for the first time in Plaintiffs' reply. *See State v. Porter*, 2018 MT 16, ¶ 16 n.1, 390 Mont. 174, 410 P.3d 955 ("This Court will not entertain an argument first raised in a reply brief.").

As to the first consideration, SB 280 applies equally to all individuals. Plaintiffs failed to respond to this argument in their response to the State's motion to dismiss, and so have forfeited any rebuttal to the State's common-sense argument. *See supra* Section II n.2. In Dkt. 31, Plaintiffs argue that by referring to persons who "change[]" their "sex," the Act is only referring to transgender persons. Dkt. 31 at 4. But that merely reasserts the same conclusory claim the State already addressed. Dkt. 24 at 13–14. Plaintiffs haven't responded (and can't respond) to the State's argument that under their equal protection theory, the relief they seek—reinstatement of the 2017 Rule—discriminates in precisely the same way they allege SB 280 does: it imposed certain requirements on individuals who wanted to change the sex identified on their birth certificates. Plaintiffs call this interpretation "tortured." Dkt. 31 at 5. They distinguish the 2017 Rule because it did not require surgery. But the question is not what the challenged rule requires. The question is whether the requirements—whatever they may be—apply to every individual equally. The 2017 Rule only applied to individuals who sought to "change" their "sex" on their birth certificate. *See* Dkt. 31 at 4. Likewise, SB 280 only applies to individuals who seek to "change" their "sex" on their birth certificate. *See Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 528 ("[A] statute does not violate the right to equal protection simply because it benefits a particular class as discrimination only exists when people in similar circumstances are treated unequally." (quotations omitted)). And because Plaintiffs argue that imposing requirements on these individuals under SB 280 targets transgender individuals, it

must be the case that imposing requirements on these same individuals seeking to change sex on their birth certificate under the 2017 Rule also targets transgender individuals.[4] Plaintiffs can call this logic tortured, but they can't—and don't—rebut it.

Asserting an equal protection violation also requires Plaintiffs to show that transgender individuals are a protected or suspect class. Under Montana law, it is unequivocally clear that they are not. Dkt. 24 at 14–17. Plaintiffs don't address this argument in their response, so this argument is forfeited. *See supra* Section II n.2. Plaintiffs reassert that the test for identifying suspect classes is whether the class has been "subjected to … a history of purposeful unequal treatment" and suffer a level of "political powerlessness." Dkt. 31 at 6 (citing *In re Matter of S.L.M.*, 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997)). But the Montana Legislature and Montana courts have declined to create new protected classes like gender identity and transgender status. Dkt. 24 at 14–15 (citing relevant statutory provisions and judicial precedent). This is not merely an absence of a decision on the matter but an express rejection of the opportunity to create similar protected classes.

Plaintiffs reassert their broad and incorrect interpretation of *Bostock* as the basis for their argument that transgender individuals are a protected class because sex is a protected class. In fact, *Bostock* reaffirms the well-established concept that

---

[4] The same could be said for adding paternity or adoption information to a birth certificate. *See* Dkt. 24 at 13–14. The fact that these processes allow for "a simple attestation of paternity," *see* Dkt. 31 at 11, is irrelevant. The question is whether the process applies equally to similarly situated individuals. And in the case of paternity and adoption—and SB 280—it does.

"homosexuality and transgender status are distinct concepts from sex." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1746–47 (2020); *see also* Dkt. 24 at 16–17. And the U.S. Supreme Court explicitly resisted going beyond the Title VII context in *Bostock*. *See Bostock*, 140 S. Ct. at 1753 ("The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"). Plaintiffs' selective quoting from *Bostock* does not alter the reality that the Supreme Court refused to "prejudge" any questions beyond the limited question before the Court. *Id.* (refusing to consider other laws as well as other situations arising under Title VII). Even after *Bostock*, therefore, transgender individuals are not a protected class except in the narrow confines of Title VII when an employer has taken action against such an employee.

Plaintiffs repeat their citations to out-of-state precedent as support for their argument that transgender people constitute a protected class. Dkt. 31 at 6–7. But this precedent can only be viewed as persuasive authority when cited to support a determination within the court's power. Montana law makes clear that gender identity and transgender status are not protected classes. Dkt. 24 at 14–15 (citing relevant statutory provisions and judicial precedent). Because the Montana Legislature and Montana courts have rejected opportunities to create this protected

class, these non-binding cases cannot serve as the basis for creating a brand-new protected class.[5] *See* Dkt. 24 at 14–15.

Transgender individuals are not a protected class, so this Court must evaluate SB 280 under the rational basis standard. As the State noted, SB 280 serves legitimate government interests. Dkt. 24 at 17–18. Plaintiffs do not address this argument in their response, so this argument is forfeited. *See supra* Section II n.2.

Plaintiffs' view of the correct standard has changed throughout this litigation. First, they claim that "[d]iscrimination on the basis of transgender status … is subject to heightened scrutiny." Complaint, ¶ 63. In their preliminary injunction motion, they repeat their call for heightened scrutiny. BIS PI at 18. But in Plaintiffs' reply in support of this same motion, they cite the exacting scrutiny standard, asserting that "the need for the impairment [under SB 280] … does not outweigh the value of the right that is impaired." Dkt. 31 at 3. And then in their response to the State's

[5] In fact, in both 2017 and 2019, the Montana Legislature rejected bills that would recognize gender identity as a protected class separate from sex. *See* An Act Protecting Gender Identity or Expression and Sexual Orientation Under the Laws Prohibiting Discrimination, HB 465, 66th Legislature (2019) (tabled in committee); An Act Protecting Gender Identity or Expression and Sexual Orientation Under the Laws Prohibiting Discrimination, HB 417, 65th Legislature (2017) (tabled in committee).

motion to dismiss, Plaintiffs recite the heightened-scrutiny standard yet again. Dkt. 30 at 5.[6]

But because no such protected class of "people who wish to change their birth certificate" exists, Dkt. 31 at 19, rational basis applies.[7] No court in Montana has ever held otherwise. Dkt. 24 at 14–15. The rational basis standard is highly deferential to the State; the law must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis." *FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993). Plaintiffs allege the Legislature has not provided any evidence of its interest in enforcing birth record statutes, maintaining vital statistics, and preventing fraud. Dkt. 31 at 9. But Plaintiffs have the burden to plead specific facts that demonstrate "beyond a reasonable doubt" that SB 280 is not related to a legitimate government interest. *Missoula v. Mt. Water Co.*, 2018 MT 139, ¶ 46, 391 Mont. 422, 419 P.3d 685. "The purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive." *Stratemeyer v. Lincoln Cnty.*, 259 Mont. 147, 152, 855 P.2d 506, 509–10 (1993). There are plenty of legitimate reasons

---

[6] This is a serious allegation and should not be casually asserted in a reply brief. Unsurprisingly, Plaintiffs fail to demonstrate that any well-pled facts support this rhetoric. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations … a plaintiff's obligation … requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action …."). Such allegations, therefore, cannot be used to sustain the Complaint.

[7] And in this context, the court definitely should not engage in a balancing test, *see* Dkt. 31 at 3, like the one used in certain First Amendment cases. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

for the Legislature to limit the ability to change the sex identified on birth certificates in the absence of surgical alterations. Take prisons, for example. If a trans woman is incarcerated in a woman's-only facility and assaults a fellow female inmate, and the trans woman's birth certificate says "female," the State will not be able to move this individual to an all-male facility to protect the female inmates. *See, e.g.*, Dori Monson Show, *DOC employee reports men are claiming to be women to transfer prisons*, KIRORADIO (Mar. 8, 2021), https://mynorthwest.com/2666243/doc-washington-correctional-center-women-men-transfer/; Matt Masterson, *Lawsuit: Female Prisoner Says She Was Raped by Transgender Inmate*, WTTWNews (Feb. 19, 2020), https://news.wttw.com/2020/02/19/lawsuit-female-prisoner-says-she-was-raped-transgender-inmate. Enforcing birth record statutes, maintaining vital statistics, and preventing fraud are conceivable purposes, and the court should not second guess the prudence of this legislative decision. *Mt. Water Co.*, ¶ 46.

Plaintiffs have failed to state an equal protection claim because SB 280 applies equally to all individuals, transgender individuals are not a protected class, and there is a rational basis for the requirements adopted by the Legislature.

2. SB 280 does not violate the right to informational privacy.

Plaintiffs have also failed to state a claim that SB 280 violates the right to informational privacy. Plaintiffs just reassert that they "have a subjective and actual expectation of privacy" in their transgender status. Dkt. 30 at 5. But the Court is not required to accept these simplistic legal conclusions as true for purposes of a motion to dismiss. *Threkeld*, ¶ 33. In their response brief, Plaintiffs fail to address

the State's argument that there is no subjective or actual expectation of privacy, so this argument is forfeited in the motion to dismiss context. *See supra* Section II n.2.

In their reply brief, Plaintiffs critique the State's reliance on *Henricksen* and *Cook*, which the State cited for the unremarkable proposition that an individual can waive their right to privacy in medical records. *See, e.g., Henricksen v. State,* 2004 MT 20, ¶ 36, 319 Mont. 307, 84 P.3d 38; *Cook v. Mt. Rail Link, No. 78444*, 1995 Mont. Dist. LEXIS 443 (4th Jud. Dist. Mar. 3, 1995). This red herring should not distract the court from the obvious: Plaintiffs do not cite a single case supporting their conclusion that they have a subjective or actual expectation of privacy in their transgender status.

Furthermore, Plaintiffs do not show that society has or will recognize this privacy expectation as reasonable, particularly in this case. They claim that "[t]ransgender people who are denied accurate birth certificates are deprived of significant control over where, when, how, and to whom they disclose their transgender identity." Dkt. 31 at 11. But they don't plead with specificity why they would have to show their birth certificates to anyone. Plaintiffs also claim to have a privacy interest in public court proceedings, Dkt. 30 at 5, but make no showing as to why proceeding under Doe and under seal would not be available to those who actually seek to change their birth certificates. These conclusory statements are insufficient to support the Complaint.

And Marquez, specifically, has made Marquez's transgender status known publicly. Dkt. 24 at 19–20. There are no facts in the Complaint that suggest otherwise. Plaintiffs conclude by saying that just because Marquez has disclosed Marquez's transgender status "to some" (correction: to all—Marquez is a plaintiff in this lawsuit and ran for public office), *see* Dkt. 31 at 11, Marquez still has a reasonable expectation of privacy in Marquez's transgender status. Incorrect. Expectation of privacy means a person expects to keep certain information private. Society does not recognize as reasonable a person's expectations that information voluntarily made public can regain a private character. *See Barr v. Great Falls Int'l Airport Auth.*, 2005 MT 36, ¶ 19, 326 Mont. 93, 107 P.3d 471 (no expectation of privacy in public information). For Marquez, the cat is out of the bag.

Accordingly, Plaintiffs have failed to state a claim for informational privacy because they cannot show that they have any expectation of privacy that society recognizes as reasonable.

3. SB 280 does not violate the "right" to make one's own medical decisions.

As stated in the State's combined brief, a medical-interference claim is not one Montana law recognizes, so Plaintiffs fail to state a claim upon which relief can be granted with respect to that claim. Dkt. 24 at 21. Plaintiffs do not address this argument in their response, so this argument is forfeited. *See supra* Section II n.2.

SB 280, of course, doesn't compel anything. If an individual wishes to change the "sex" on his or her birth certificate, that individual must undertake certain surgery. In reply, Plaintiffs just assert that because Plaintiffs do not want to undergo

surgery, SB 280 violates their right to be free from interference with medical decisionmaking. Dkt. 31 at 12; *see also Threkeld*, ¶ 33 (courts are not required to accept legal conclusions as true). SB 280 does not limit the choice of Plaintiffs to undergo, or not, a medical procedure. It is silent on that decision. Besides the fact that Plaintiffs never attempted to avail themselves of the 2017 Rule, Montana law doesn't recognize this medical interference claim.

Plaintiffs reassert that *Armstrong* somehow provides for broad relief because the challenged law "limited a woman's right to choose an abortion provider *after* the woman chose to have an abortion." Dkt. 31 at 13. Plaintiffs argue that the State is "impermissibly inserting itself in a medical decision by attempting to limit a person's choice of medical care." Dkt. 31 at 13. But *Armstrong* protects a medical decision (choice of abortion provider) after a person exercises a constitutionally protected right (right to have an abortion). Here, the State is not limiting a person's choice of medical care when it comes to a constitutionally protected right—Plaintiffs are free to seek the medical care they desire. This decision is untethered to any constitutional right. While the right to an abortion is recognized and established, *see* Dkt. 24 at 22 (citing *Armstrong v. State*, 1999 MT 261, ¶ 45, 296 Mont. 361, 989 P.2d 364), there is no recognized right to change the sex designation on a birth certificate. And Montana law does not recognize a broad right to make one's own medical decisions. To the extent this is a privacy claim, the State reasserts its arguments that Plaintiffs have no right to privacy over their transgender status. *See supra* Section II.B.2.

4. SB 280 does not violate due process.

Plaintiffs fail to state a due process violation claim. There is no constitutionally protected right to change one's birth certificate. Dkt. 24 at 23. Plaintiffs do not address this argument in their response, so this argument is forfeited. *See supra* Section II n.2.

To succeed on a substantive due process claim, Plaintiffs must show an "underlying substantive right[]" and that the "restrictions … are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 28, 302 Mont. 518, 15 P.3d 877. The test is "reasonableness of a statute in relation to the State's power to enact legislation." *Id.* (quotations omitted). Plaintiffs assert that SB 280 "imposes substantial burdens on their efforts to amend their birth certificates to accurately reflect their gender identity." Dkt. 31 at 14. But there is no right to change one's birth certificate. The Legislature has *allowed* individuals to change their birth certificate for a variety of reasons, *see supra* Section II.B.1, but this is an act of legislative grace, not a guaranteed right. Plaintiffs, moreover, have failed to show that SB 280 is unreasonable. *See supra id.* The Legislature has an interest in enforcing birth record statutes, maintaining vital statistics, and preventing fraud.[8]

[8] To the extent Plaintiffs try to distinguish *A.B. Small Co. v. Am. Sugar Refin. Co.*, 267 U.S. 233, 238–39 (1925), the State cited this to establish the standard for showing that a rule is unconstitutionally vague. Dkt. 24 at 22. The State does not assert these cases are factually similar.

CONCLUSION

For the foregoing reasons, this Court must dismiss Plaintiffs' claims.

DATED this 28th day of October, 2021.

AUSTIN KNUDSEN
Montana Attorney General

KRISTIN HANSEN
Lieutenant General

DAVID M.S. DEWHIRST
Solicitor General

/s/ David M.S. Dewhirst
DAVID M.S. DEWHIRST
Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
p. 406.444.2026
david.dewhirst@mt.gov

Attorney for Defendants

Certificate of Service

I certify a true and correct copy of the foregoing was delivered by email to the following:

Akilah Lane
Alex Rate
ACLU of Montana
lanea@aclumontana.org
ratea@aclumontana.org

John Knight
ACLU Foundation LGBTQ & HIV Project
jaknight@aclu.org

F. Thomas Hecht
Tina B. Solis
Seth A. Horvath
Nixon Peabody LLP
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

Elizabeth Halvorson PC
ehalvorson@halversonlaw.net

Date: October 28, 2021

ROCHELL STANDISH