Akilah Deernose (Bar No. 60742990)
Alex Rate (Bar No. 11226)
ACLU Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
Telephone: 406-203-3375
deernosea@aclumontana.org
ratea@aclumontana.org

Malita Picasso*
Jon W. Davidson*
(admitted only in California)
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Telephone: 212-549-2561
Facsimile: 212-549-2650
mpicasso@aclu.org
jondavidson@aclu.org

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

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

* Admitted *pro hac vice*

IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual, **Plaintiffs,** **v.** **STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLES T. BRERERTON, in his official capacity as the Director of the Montana Department of Public Health and Human Services,** **Defendants.**	**Case No. DV 21-00873** **Hon. Michael G. Moses** **PLAINTIFFS' BRIEF IN SUPPORT OF MONT. R. CIV. P. 56 MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In 2021, Montana enacted SB 280, which imposed new restrictions on the ability of individuals born in Montana to obtain an amendment to the sex marker on their birth certificates. Plaintiffs immediately challenged the new law, bringing multiple state constitutional and statutory claims, including a claim that SB 280, and its implementing regulation (the "2021 Rule"), were unconstitutionally vague in violation of Article II, section 17 (the Due Process Clause), of the Montana Constitution. Dkt. 1 (Pls' Complaint), ¶¶ 1, 3, 81-90; Dkt. 44 (Order Granting Leave to File Amended Complaint); Dkt. 42, Ex. A (Pls' Amended Complaint), ¶¶ 1, 3, 87-96. The basis of Plaintiffs' vagueness claim is that SB 280 and the 2021 Rule fail to provide a person of ordinary intelligence a reasonable opportunity to know how to comply with SB 280's provisions, if that is even possible, in order to amend the sex marker on their birth certificate. Dkt. 42, Ex. A, ¶ 90.

SB 280 provides that: "The sex of a person designated on a birth certificate may be amended only if the [Department of Public Health and Human Services] received a certified copy of an order from a court with appropriate jurisdiction *indicating that the sex of the person born in Montana has been changed by surgical procedure*." SB 280, 67th Leg. Reg. Sess. (2021) (codified at § 50-15-224, MCA (2021)) (emphasis added). SB 280 declared that it was the intent of the Montana legislature to repeal the existing attestation process in place for transgender Montanans to amend the sex marker on their birth certificates (the "2017 Rule") and replace it with a new process "in conformity with" SB 280 (the "2021 Rule"). *See* SB 280, 67th Leg. Reg. Sess. (Mont. 2021); *see also* Mont. Admin. Reg. Notice 37-807, No. 24 (Dec. 22, 2017). Once promulgated, the 2021 Rule mirrored the exact language of SB 280. *See* Mont. Admin. Reg. Notice 37-945, No. 10 (May 28, 2021); Mont. Admin. Reg. 37.8.311(5)(a); Mont. Admin. Reg. 37.8.102.

On April 21, 2022, at the preliminary injunction stage, this Court found, that Plaintiffs had established a prima facie case that SB 280 is "impermissibly vague in all of its applications" and therefore "violates Plaintiffs' fundamental right to due process because it is unconstitutionally void." Dkt. 61, ¶ 170. In its order, the Court found that Plaintiffs had provided unrebutted evidence that no "gender-affirming surgery … that a transgender person undergoes changes that person's sex." *Id*., ¶ 161. The Court further recognized that, in light of this unrebutted evidence, "it is unclear what type of 'surgical procedure' will meet [SB 280's] requirements to change 'the sex of the person born in Montana[.]'" *Id*. The Court found that the absence of clear guiding standards "could lead to different interpretations among whichever judge in whatever constitutes a court with appropriate jurisdiction" and thus " 'impermissibly delegates basic policy matters to…judges…for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications[.]'" *Id.*, ¶ 168 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982), 455 U.S. 489, 498, 102 S. Ct. 1186, 1193).

On September 19, 2022, following the entry of the preliminary injunction and further briefing, the Court entered an order clarifying, "[t]o the extent necessary," that the preliminary injunction encompassed the 2021 Rule and required Defendants to maintain the status quo represented by the 2017 Rule. Dkt. 77 (Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction), ¶¶ 24, 20; *see also State of Montana v. Montana Thirteenth Judicial Dist. Court*, OP 22-0552, 2023 WL 142673, at *3 (Mont. Jan. 10, 2023) (denying request for writ of supervisory control as to preliminary injunction's reinstatement of 2017 Rule); *see also* Dkt. 117 (Order Denying Plaintiffs' Motion for Leave to File a Second Amended Complaint) at p. 3.

Since this Court's April 21, 2022 Order, Defendants have offered no evidence to dispute the conclusions set forth in that order. To the contrary, they have conceded that the "basis for S.B. 280"—that "an individual's sex could be changed through surgery"—was "mistaken" and that, upon reconsideration of that basis, "no surgery changes a person's sex." *See* Deernose Decl. Exhibit A (Mont. Admin. Reg. Notice 37-1002, No. 11 (June 10, 2022),[1] ¶ 4 (12th paragraph thereunder)).

In contrast with the vague provisions of SB 280 and the 2021 Rule, Plaintiffs' argument for summary judgment is simple and straightforward, and their entitlement to this relief rests on settled law and undisputed facts. SB 280 and the 2021 Rule are unconstitutionally vague on their face because they "fail[] to give a person of ordinary intelligence fair notice" of the course of conduct that a person must undertake to satisfy their requirements. *State v. Dugan*, 2013 MT 38, ¶ 67, 369 Mont. 39, ¶ 67, 303 P.2d 755, ¶ 67. Moreover, they are unconstitutional as applied to Plaintiffs because they fail to provide them with actual notice of how to comply with their provisions in order to amend the sex marker on their birth certificates and fail to provide any guidance as to how those provisions should or could be applied.

Plaintiffs ask this Court to grant their motion for summary judgment and issue an order (1) declaring SB 280 and the 2021 Rule to be unconstitutionally vague and (2) permanently enjoining Defendants from enforcing SB 280 and the 2021 Rule.

STATEMENT OF UNDISPUTED FACTS

1. In 2021, the State of Montana enacted SB 280. Dkt. 61, ¶¶ 58-59. Dkt. 42, Ex. A, ¶ 37; Dkt. 69 (Defs' Answer to Amended Complaint), ¶ 37.

[1] Plaintiffs respectfully ask this Court to take judicial notice of the statements made by a government agency contained within Mont. Admin. Reg. Notice 37-1002, No. 11 (June 10, 2022). Pursuant to Rule 201(b), a fact may be judicially noticed if it is "one subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Further, Rule 201(d) states that a court must take judicial notice of facts "if requested by a party and supplied with the necessary information." Mont. R. Evid. 201.

2. SB 280 provides that: "The sex of a person designated on a birth certificate may be amended only if the [Department of Public Health and Human Services ("DPHHS")] received a certified copy of an order from a court with appropriate jurisdiction *indicating that the sex of the person born in Montana has been changed by surgical procedure*." SB 280 (emphasis added); Dkt. 61, ¶ 60; Dkt. 42, Ex. A ¶ 38; Dkt. 69, ¶ 38.

3. Gender-affirming surgery, even for those transgender people who have a medical need for it, does not "change" their sex. Dkt. 61, ¶ 56; Dkt. 7, ¶ 33-34, 38 (Expert Declaration of Dr. Randi Ettner); *see also* Dkt. 108 (updated Expert Declaration of Dr. Randi Ettner), ¶¶ 37-38; Deernose Declaration Exhibit A¶ 4 (12th paragraph thereunder).

4. On May 28, 2021, DPHHS proposed adopting the 2021 Rule through Montana Administrative Register Notice 37-945. *See* Mont. Admin. Reg. Notice 37-945, No. 10 (May 28, 2021).

5. The language of the 2021 Rule, which mirrored the language of SB 280, was subsequently codified at Montana Administrative Rule 37.8.311, now Montana Administrative Rule 37.8.311(5)(a), and Montana Administrative Rule 37.8.102. *See* Mont. Admin. Reg. Notice 37-945, No. 10 (May 28, 2021); Mont. Admin. R. 37.8.311(5)(a); Mont. Admin. R. 37.8.102.

6. Amelia Marquez ("Ms. Marquez") is a woman who is transgender and who wishes to correct the sex marker on her Montana birth certificate, which currently identifies her as male. Dkt. 61, ¶ 2; Dkt. 9 (Marquez Aff.), ¶¶ 4, 7.

7. Although Ms. Marquez has known she is female for some years and has lived her life accordingly, her birth certificate designates her as male. Dkt. 61, ¶ 4; Dkt 9, ¶¶ 4-5.

8. Mr. Doe is a man who is transgender and wishes to correct his Montana birth certificate, which identifies him as female. Dkt. 61, ¶ 18; Dkt. 8 (Doe Aff.), ¶¶ 1, 3, 7.

9. Although Mr. Doe has known that he is a man for more than 6 years, and has lived his life accordingly for more than three years, his birth certificate designates him as female. Dkt. 61, ¶¶ 21-22; Dkt. 8, ¶¶ 3,5.

10. Mr. Doe was diagnosed with gender dysphoria in July 2019. Dkt. 61, ¶ 22; Dkt. 8, ¶ 5.

11. Mr. Doe, with the assistance of his treating health professionals, has taken certain steps to bring his body into conformity with his male gender identity. Dkt. 61, ¶ 23; Dkt. 8, ¶ 6.

12. Mr. Doe began hormone therapy in 2019 and, in the spring of 2021, underwent masculinizing chest-reconstruction surgery, commonly known as "top surgery." Dkt. 61, ¶ 24; Dkt. 8, ¶ 6.

13. Mr. Doe does not wish to undergo additional gender-affirming surgery at this time. Dkt. 61, ¶ 25; Dkt. 8, ¶8.

14. Mr. Doe does not know whether his top surgery would be sufficient to satisfy the requirements of SB 280. Dkt. 61, ¶ 26; Dkt. 8, ¶ 8.

LEGAL STANDARD

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits" demonstrate that there is "no genuine issue as to any material fact" and thus the movant is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c). The moving party has the burden of establishing that there is no genuine issue of material fact. *Sprunk v. First Bank Sys.*, 252 Mont. 463, 465, 830 P.2d 103, 104 (1992) (internal citations omitted). To defeat a motion for summary judgment, the opposing party must present specific facts and cannot rely on statements that are speculative or conclusory. *Id*.

ARGUMENT

I. SB 280 and the 2021 Rule Violate the Due Process Guarantee of Article II, Section 17, of the Montana Constitution.

Article II, Section 17, of the Montana Constitution guarantees due process. Mont. Const. art. II, § 17 ("No person shall be deprived of life, liberty, or property without the due process of law"). "The theory underlying substantive due process reaffirms the fundamental concept that the due process clause contains a substantive component, which bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action." *Newville v. State, Dept. of Family Services,* 267 Mont. 237, 249, 883 P.2d 793, 800 (1994). Due process encompasses the "basic principle" that "an enactment is void for vagueness if its prohibitions are not clearly defined." *City of Whitefish v. O'Shaughnessy,* 216 Mont. 433, 440, 704 P.2d 1021, 1025 (1985).

These constitutional prohibitions against vague statutes are nearly as old as Montana itself. Less than ten years after Montana was admitted as a state into the union, the Montana

Supreme Court recognized that if an act of legislation is so vague that "the means for carrying it out are not provided, or are inadequate," it must be "declared inoperative and void." *Hilburn v. St. Paul, M. & M. Ry. Co.*, 23 Mont. 229, 238 58 P. 551, 554 (1899); *see also State v. O'Leary*, 43 Mont. 157, 164, 115 P. 204, 206 (1911) (summarizing *Hilburn* as providing a "general rule of law" that, "if an act of the Legislature is so vague and uncertain in its terms as to convey no meaning, or if the means of carrying out its provisions are not adequate or effective, or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the courts to declare it void and inoperative.").

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *City of Whitefish,* 216 Mont. at 440, 704 P.2d at 1025. "A vagueness challenge to a statute may be maintained under two different theories: (1) because the statute is so vague that it is rendered void on its face; or (2) because it is vague as applied in a particular situation." *Dugan,* ¶ 66. As explained below, SB 280 is unconstitutionally vague both on its face and as applied to Plaintiffs.

A. SB 280 and the 2021 Rule Are Unconstitutionally Vague on Their Face.

A statute or regulation is unconstitutionally vague on its face "if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Dugan*, ¶ 67 (internal citations and quotation marks omitted). The Montana Supreme Court, following the guidance of the U.S. Supreme Court, has recognized two principal values that the vagueness doctrine seeks to safeguard. *State v. Stanko*, 1998 MT 321, ¶ 23, 292 Mont. 192, 974 P.2d 1132 1136. First, the doctrine insists that the laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited because the Constitution presumes that people are free to

steer between lawful and unlawful conduct. *Id.* Second, the Constitution demands explicit standards to prevent arbitrary and discriminatory enforcement of statutes. *Id.*

The Act and the 2021 Rule are unconstitutionally vague on their face not only because they "fail[] to give a person of ordinary intelligence fair notice" of the conduct necessary to satisfy the provisions of the Act and the 2021 Rule in order to obtain an accurate birth certificate, *see Dugan*, ¶ 67, but also because they are "so conflicting and inconsistent in [their] provisions that [they] cannot be executed." *State v. O'Leary,* 43 Mont. at 165, 115 P. at 206. That is to say, "no standard of conduct is specified at all." *Monroe v. State*, 265 Mont. 1, 4, 873 P.2d 230, 231 (1994) (internal citations and quotation marks omitted).

There is no dispute that SB 280 and the 2021 Rule require that, as a condition of amending the sex designation on one's birth certificate, a transgender person provide DPHHS with "a certified copy of an order from a court with appropriate jurisdiction indicating that "the sex of the person born in Montana has been changed by surgical procedure." SB 280; Mont. Admin. Reg. Notice 37-945, No. 10 (May 28, 2021); Mont. Admin. R. 37.8.311(5)(a); Dkt. 69, ¶ 2 (stating that SB 280 "speaks for itself and is the best evidence of its contents"). Defendants acknowledge that the Act was "premised on the proposition that an individual's sex could be changed by surgery." Deernose Declaration Exhibit A¶ 4 (12th paragraph thereunder). They also concede that that premise was "mistaken" and that "no surgery changes a person's sex," Deernose Declaration Exhibit A¶ 4 (12th paragraph thereunder), as this Court already concluded. Dkt. 61, ¶ 161.

There also is no dispute that, after SB 280 and the 2021 Rule went into effect, and until this Court issued its April 21, 2022, Preliminary Injunction, "DPHHS started processing requests for changes in the sex on birth certificates in accordance with the mandates of SB 280, which

required that DPHHS be provided with a court order that met the requirements of SB 280 in order to amend the sex designation on the birth certificate[,]" and that "DPHHS rejected any requests that were not accompanied that (sic) contained the information required by SB 280." Deernose Declaration Exhibit B.

There additionally is no dispute that the Act and the 2021 Rule do not identify which "surgical procedure" would or could satisfy the Act's and the 2021 Rule's requirement. SB 280; Mont. Admin. Reg. Notice 37-945, No. 10 (May 28, 2021); Mont. Admin. R. 37.8.311(5)(a); Dkt 69, ¶ 3.

There further is no dispute that the Act and the 2021 Rule do not identify who—DPHHS, a court, or an applicant's physician—is authorized to decide whether any particular "surgical procedure" would be sufficient to meet the requirement, or the basis upon which such a decision would be made. They likewise do not specify what court is "a court with appropriate jurisdiction" from which an applicant is permitted to obtain the required order, including whether someone born in Montana but who lives outside Montana must seek such an order from a Montana court. SB 280; Mont. Admin. Reg. Notice 37-945, No. 10 (May 28, 2021); Mont. Admin. R. 37.8.311(5)(a); Dkt. 69, ¶ 92.

Finally, there is no dispute that the Act and the 2021 Rule do not identify the standard of proof applicable to the court proceeding that they require or the standard, if any, governing DPHHS's review of the court's order. SB 280; Mont. Admin. Reg. Notice 37-945, No. 10 (May 28, 2021); Mont. Admin. R. 37.8.311(5)(a); Dkt. 69, ¶ 3.

Absent these basic specifications, the Act and the 2021 Rule are "so vague that [they are] rendered void on [their] face." *Dugan,* ¶ 66; *see also Western Native Voice v. Stapleton,* 2020

Mont. Dist. 3 Lexis 3,¶ 49 (finding Montana's Ballot Interference and Protection Act ("BIPA") unconstitutionally vague on its face).

SB 280 and the 2021 Rule not only "fail to give a person of ordinary intelligence fair notice" of the course of conduct the person must undertake to satisfy their requirements, *Dugan*, ¶ 67, but also provide *no* notice to *any* person of what is required, and Defendants have repeatedly failed to provide any of the above-referenced specifications at any point during the course of this litigation.

If Defendants genuinely disputed whether SB 280 and the 2021 Rule impose a reasonably intelligible standard, they could have so specified and identified, for example, (1) the surgical procedure by which individuals can purportedly change their sex, (2) the appropriate court from which the person seeking the amendment must obtain the necessary order, or (3) the evidentiary standard to be applied by the court adjudicating a request for such an order and DPPHS's review of such an order, if one could be obtained. But they have not done so.

Instead, Defendants have eliminated any possible dispute that SB 280 and the 2021 Rule impose a requirement that is absolutely impossible to satisfy for those seeking to amend the sex marker on their Montana birth certificates. That is because both parties agree, as this Court previously concluded, that neither gender-affirming surgery nor any other medical treatment that a transgender person undergoes changes that person's sex. Dkt. 61, ¶ 161; Dkt. 42, ¶ 35; Dkt. 108 ¶¶ 37-38; Deernose Declaration Exhibit A, ¶ 4 (12th paragraph thereunder).

In light of Defendants' admission that there is no surgical procedure by which a person can change their sex, the Act and the 2021 Rule's demand for a court order "indicating that the sex of the person born in Montana has been changed by surgical procedure" is so vague that "the means for carrying it out are … inadequate," *Hilburn*, 23 Mont. at 238, 58 P. 554, rendering it

"so conflicting and inconsistent in its provisions that it cannot be executed[.]" *State v. O'Leary*, 43 Mont. at 165, 115 P. at 206. As such, "it is incumbent upon the courts to declare it void and inoperative." *Id*.

B. SB 280 and the 2021 Rule Are Unconstitutionally Vague as Applied to Plaintiffs.

The Act and the 2021 Rule also are unconstitutionally vague as applied to Plaintiffs. A statute or regulation "is unconstitutionally vague as applied to [an individual] if: (1) it fails to provide 'actual notice' to the [individual], or (2) it fails to provide 'minimal guidelines' to law enforcement regarding the defendant's conduct." *State v. Hamilton,* 2018 MT 253, ¶ 20, 393 Mont. 102, ¶ 20, 428 P.3d 849, ¶ 20 (internal citations and quotation marks omitted). A statute or regulation fails to provide "minimal guidelines" when it fails "to prevent arbitrary and discriminatory enforcement." *Id.* (internal citations and quotation marks omitted).

Again, it is indisputable that the Act and the 2021 Rule do not provide "actual notice" to Plaintiffs regarding (1) the type of "surgical procedure" they must undergo to comply with the Act and the 2021 Rule; (2) what court is "a court with appropriate jurisdiction" from which an applicant is permitted to obtain the required order; (3) the identity of who decides whether the "surgical procedure" is sufficient to comply with the Act and the 2021 Rule; (4) the standard of proof applicable to a court proceeding under the Act and the 2021 Rule; or (5) the standard, if any, governing DPHHS's review of the court's order under the Act and the 2021 Rule. *See* SB 280; Mont. Admin. Reg. Notice 37-945, No. 10 (May 28, 2021); Mont. Admin. R. 37.8.311(5)(a). The absence of these "minimal guidelines" virtually guarantees that the Act and the 2021 Rule will be arbitrarily and inconsistently applied across cases, particularly given this Court's conclusion, and the parties' agreement, that an individual's sex cannot be changed by

surgical procedure. *See Western Native Voice,* ¶ 62 (finding BIPA unconstitutionally vague as applied).

The effects of this lack of clarity are particularly acute in this case. For example, although Mr. Doe has had chest surgery, he "does not know whether [his] top surgery would be sufficient" to meet the Act and the 2021 Rule's requirement that he have "a surgical procedure to change [his] sex." Dkt. 8, ¶ 8. Mr. Doe "knew [he] was a man well before [he] had surgery and do[es] not believe that [his] top surgery is what made [him] a man." *Id.* Similarly, if, at some later date, either Ms. Marquez or Mr. Doe had the means or desire to undergo gender-affirming surgery, they would have no way of knowing in advance whether the particular surgery in question ultimately would qualify them to amend the sex designation on their birth certificates or from which court they should obtain a court order indicating they have undergone such surgery. For these reasons, the Act and the 2021 Rule are unconstitutionally vague as applied, as well as unconstitutional on their face.

CONCLUSION

While Plaintiffs brought a number of claims in their lawsuit, the vagueness of SB 280's and the 2021 Rule's provisions renders SB 280 and the 2021 Rule unconstitutional on their face and as applied to Plaintiffs. Judgment can be entered in Plaintiffs' favor without resolving their other claims, as a declaration that SB 280 and the 2021 Rule are unconstitutionally vague and an injunction against their enforcement will grant Plaintiffs the relief they sought in their Amended Complaint.

For the reasons set forth above, Plaintiffs respectfully request that the Court grant this motion for summary judgment, declare the provisions of SB 280 and the 2021 Rule to be so vague as to violate Article II, section 17, of the Montana Constitution, and enter a permanent injunction against Defendants' enforcement of SB 280 and the 2021 Rule.

Dated: March 20th, 2023

Respectfully submitted,

By: */s/ Akilah Deernose*
Akilah Deernose

Akilah Deernose (Bar No. 60742990)
Alex Rate (Bar No. 11226)
ACLU of Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
Telephone: 406-203-3375
deernosea@aclumontana.org
ratea@aclumontana.org

Malita Picasso*
Jon W. Davidson*
(admitted only in California)
American Civil Liberties Union Foundation
125 Broad Street,
New York, NY 10004.
Telephone: 212-549-2561
mpicasso@aclu.org
jon.davidson@aclu.org

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

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

* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **Plaintiffs' Brief in Support of Mont. R. Civ. P. 56 Motion for Summary Judgment** was served via electronic filing on counsel for Defendants:

AUSTIN KNUDSEN
Montana Attorney General
THANE JOHNSON
MICHAEL RUSSELL
Assistant Attorney Generals
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
Thane.johnson@mt.gov
Michael.russell@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Dated: March 20th, 2023

/s/ Akilah Deernose
Akilah Deernose
ACLU OF MONTANA, Foundation
P.O. Box 1968
Missoula, MT 59806

Akilah Deernose (Bar No. 60742990)
Alex Rate (Bar No. 11226)
ACLU Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
Telephone: 406-203-3375
deernosea@aclumontana.org
ratea@aclumontana.org

Malita Picasso*
Jon W. Davidson*
(admitted only in California)
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Telephone: 212-549-2561
Facsimile: 212-549-2650
mpicasso@aclu.org
jondavidson@aclu.org

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

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

* Admitted *pro hac vice*

IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual, **Plaintiffs,** **v.** **STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLES T. BRERERTON, in his official capacity as the Director of the Montana Department of Public Health and Human Services,** **Defendants.**	**Case No. DV 21-00873** **Hon. Michael G. Moses** **DECLARATION OF AKILAH DEERNOSE IN SUPPORT OF PLAINTIFFS' BRIEF IN SUPPORT OF MONT. R. CIV. P. 56 MOTION FOR SUMMARY JUDGMENT**

I, Akilah Deernose, submit the following Declaration in support of Plaintiffs' Motion for Summary Judgment. I am the Civil Rights Staff Attorney at the American Civil Liberties Union of Montana (ACLU-MT) and counsel to Plaintiffs in the above-captioned case. This Declaration is based in part on personal knowledge and on becoming familiar with the documents attached to this Declaration. If called upon to testify, I could competently testify to the matters set forth in this Declaration.

1. In response to several conversations regarding whether Defendants intended to comply with this Court's April 21, 2022 Preliminary Injunction Order and revert to the status quo in accordance with that Order, on May 23, 2022, counsel for Defendants emailed counsel for Plaintiffs a copy of the Department of Public Health and Human Services Notice of Adoption of Temporary Emergency Rule.
2. A true and correct copy of the Department of Public Health and Human Services Notice of Adoption of Temporary Emergency Rule is attached to this Declaration as Exhibit A.
3. On December 22, 2022, Plaintiffs served their First Discovery Request on Defendants.
4. On January 3, 2023, Defendants requested an extension of time for providing discovery responses up to February 21, 2023.
5. In an effort to be collegial, Plaintiffs agreed to the extension.
6. On February 21, 2023, Defendants produced Defendants' Response to Plaintiffs" First Set of Interrogatories.
7. A true and correct copy of Defendants' Response to Plaintiffs' First Set of Interrogatories, Interrogatory Response 3 is attached to this Decalaration as Exhibit B.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, based on my personal knowledge.

Dated this 20th the day of March, 2023.

/s/ *Akilah Deernose*
Akilah Deernose

EXHIBIT A

Montana Administrative Register Notice 37-1002 **No. 11**
06/10/2022

Prev Next

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of ARM 37.8.311 pertaining to changing the identification of sex on birth certificates	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On June 30, 2022, at 9:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rule. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: https://mt-gov.zoom.us/j/81839335993?pwd=emVld1VrQ1N4QnlPY0RjRkpGdVMvUT09, meeting ID: 818 3933 5993; or

(b) Dial by telephone +1 646 558 8656, meeting ID: 818 3933 5993. Find your local number: https://mt-gov.zoom.us/u/kjwuVfcA3.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on June 16, 2022, to advise us of the nature of the accommodation that you need. Please contact Kassie Thompson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

37.8.311 ADOPTIONS, NAME CHANGES, AND SEX CHANGES

(1) through (4) remain the same.

(5) For any period in which the department is subject to an injunction against enforcement of S.B. 280, codified at 50-15-224, MCA, or S.B. 280 is held invalid, (5)(b) applies. Otherwise, (5)(a) applies.

~~(5)~~ (a) The sex of a registrant as cited on a certificate may be amended only if the department receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of an individual born in Montana has been changed by surgical procedure. The order must contain sufficient information for the department to locate the original record. If the registrant's name is also to be changed, the order must indicate the full name of the registrant as it appears on the original birth certificate and the full name to which it is to be amended. If the order directs the issuance of a new certificate that does not show amendments, the new certificate will not indicate on its face that it was amended. If the sex of an individual was listed incorrectly on the original certificate, refer to ARM 37.8.108.

(b) The sex of a registrant as cited on a certificate may be corrected only if:

(i) the sex of an individual was listed incorrectly on the original certificate as a result of a scrivener's error or a data entry error, and the department receives a correction affidavit and supporting documents, consistent with ARM 37.8.108(4), (5), and (6), including a copy of the records of the health care facility or attending health care professional, contemporaneous to the birth, that identify the sex of the individual, with an affidavit from the health care facility or professional attesting to the date and accuracy of the records; or

(ii) the sex of the individual was misidentified on the original certificate and the department receives a correction affidavit and supporting documents, consistent with ARM 37.8.108(4) and (5), including a copy of the results of chromosomal, molecular, karyotypic, DNA, or genetic testing that identify the sex of the individual, together with an affidavit from the health care facility, health care professional, or laboratory testing facility that conducted the test and/or analyzed the test results, attesting to the test results and their accuracy.

AUTH: 50-15-102, 50-15-103, 50-15-204, 50-15-208, 50-15-223, MCA
IMP: 50-15-102, 50-15-103, 50-15-203, 50-15-204, 50-15-208, 50-15-223, 50-15-224, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) has an obligation to ensure the accuracy of vital records. As with the emergency rule, this proposed rule obeys the preliminary injunction currently in place with respect to enforcement of S.B. 280, addresses a critical regulatory gap, and remains consistent with current law, as well as the science.

The department is proposing to amend ARM 37.8.311(5) to provide for the accurate identification of sex on birth certificates, consistent with its statutory authority and any injunction against the enforcement of S.B. 280, codified at 50-15-224, MCA, to which it may be subject (or any potential invalidation of S.B. 280).

On May 23, 2022, the department adopted a temporary emergency rule pertaining to changing the identification of sex on birth certificates. *See* MAR Notice No. 37-1001. By law, the temporary emergency rule cannot remain in effect for a period of more than 120 days. 2-4-303, MCA. The department is proposing this rulemaking to ensure a regulatory framework remains in place for changing the identification of sex on birth certificates following expiration of the temporary emergency rule.

Under Montana law, the department is charged with establishing a statewide system of vital statistics and with adopting rules for gathering, recording, using, amending, and preserving vital statistics and vital records, relating to births, deaths, fetal deaths, marriages, and dissolutions of marriage. *See, e.g.,* 50-15-102 and 50-15-103, MCA. Montana statutes contemplate that the birth certificates and other records of birth include the sex of the child. *See, e.g.,* 50-15-203, MCA (written report which constitutes a birth certificate for a child of unknown parentage shall contain the sex of the child); 50-15-224, MCA (amendment of the sex of a person cited on a birth certificate); 50-15-304, MCA (substitute birth certificate for an adopted person shall contain the sex of such person). Under regulations promulgated by the department, each certificate of birth and certified copy of a birth record (as well as of a birth that resulted in a stillbirth) has to include the sex of the registrant. ARM 37.8.128(2)(e) and (4)(e); 37.8.301(4) (if birth occurs other than in a health care facility, birth certificate must be filed along with an affidavit including the child's sex); and 37.8.311 (amendment of birth certificate for sex changes).

In 2007, the department adopted a new rule (ARM 37.8.311(5)) that the sex of a registrant (the individual about whom a birth certificate pertains) as cited on a certificate may be amended only if the department receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the individual born in Montana has been changed by surgical procedure, and providing certain information. *See* 2007 MAR page 2127 (Dec. 20, 2007), corrected, 2008 MAR page 169 (Jan. 31, 2008). It cross-referenced another ARM provision with respect to situations where the sex of an individual was listed incorrectly on the original birth certificate. *Id.*[1] Subsequently, in 2017, the department amended ARM 37.8.311(5). Apparently purporting to change the "sex" data element on birth certificates to a "gender" data element, the amended rule provided that the gender of a registrant could be corrected if the department received a correction affidavit, accompanied by (1) "a completed gender designation form issued by the department certifying under penalty of perjury that the individual had undergone gender

transition or has an intersex condition and that the gender designation on the person's birth certificate should be changed accordingly, and the request . . . is not for any fraudulent or other unlawful purpose"; (2) "presentation of a government-issued identification displaying the correct gender designation"; or (3) "a certified copy of an order from a court with appropriate jurisdiction indicating that the gender of an individual born in Montana has been changed." 2017 MAR page 2436 (Dec. 22, 2017). The 2021 Montana legislature enacted S.B. 280, which was signed into law on April 30, 2021, was immediately effective, and, essentially, adopted into the Montana Code the provisions of the 2007 rule. *See* 50-15-224, MCA. Pursuant to legislative direction, the department amended its rules to re-adopt the version of the provision in effect prior to the 2017 rulemaking and to repeal the provisions adopted in the 2017 rulemaking.[2] The proposed rule was published on May 28, 2021, and the notice of adoption was published on July 23, 2021, with the effective date of July 24, 2021.

The constitutionality of S.B. 280 was challenged in a lawsuit filed against the State of Montana, the Governor, the department and the director in Montana's Thirteenth Judicial District Court, Yellowstone County, as well as in complaints filed with the State Human Rights Bureau; plaintiffs also pled claims for discrimination under the Montana Civil Rights Act. Plaintiffs sought a preliminary injunction against enforcement of S.B. 280 on July 19, 2021. The defendants sought dismissal of the lawsuit on August 17, 2021.

On April 21, 2022, the district court issued its Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for a Preliminary Injunction (decision). While dismissing plaintiffs' claim under the Montana Human Rights Act, the court concluded that plaintiffs had adequately pled their other claims. The district court granted plaintiffs' request for a preliminary injunction, finding that "Plaintiffs here established a prima facie case that SB 280 impermissibly [sic] vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process because it is unconstitutionally void." Apr. 21, 2022 Decision at ¶ 170. "[F]or the purposes of [the] preliminary injunction," the court expressly "declined to analyze whether SB 280 reaches constitutionally protected conduct." Decision at ¶ 157a. The court granted plaintiffs' motion for preliminary injunction and enjoined the department and the other defendants "from enforcing any aspect of SB 280 during the pendency of this action according to the prayer of the Plaintiffs' motion and complaint." Decision at 35.[3]

The court's decision leaves this department in an ambiguous and uncertain situation. The court's preliminary injunction means that, pending final resolution of the litigation, the department's Office of Vital Records (OVR) cannot accept and process birth certificate sex designation amendment applications according to the procedures set forth in S.B. 280 and the department rules that implement S.B. 280. Yet the effect of the 2021 rulemaking was to eliminate the 2017 rule, just as one effect of the 2017 rule was to eliminate the 2007 rule. The court did not issue a mandatory injunction directing the department to re-implement the 2017 rule. Accordingly, aside from the department's temporary emergency rule under MAR Notice No. 37-1001, there is currently no non-enjoined regulatory mechanism by which the department can accept and process birth certificate sex identification amendment applications.[4] While the court's preliminary injunction currently precludes OVR from accepting and processing birth certificate sex designation amendment applications pursuant to the procedures set forth in S.B. 280, there is a perception that OVR should be accepting birth certificate sex designation amendment applications and – regardless of where such applications would ordinarily stand in OVR's backlog of applications for changes to Montana vital records – immediately process such applications pursuant to the non-existent 2017 rule. The department needs to correct this confusion and clearly set forth the standards, through ordinary rulemaking, under which such applications will continue to be processed.

The department's 2007 rule, as well as SB 280 (which largely codified in statute that rule), was premised on the proposition that an individual's sex could be changed by surgery. But, in the decision finding plaintiffs had established a prima facie case that S.B. 280 is impermissibly vague and violates due process, the court found that "Plaintiffs provided unrebutted evidence describing that neither gender-affirming surgery nor any other medical treatment that a transgender person undergoes changes that person's sex" – that "no surgery changes a person's sex" – but that surgery "aligns a person's body and lived in experience with the person's

gender identity," which the court found is "a person's fundamental internal sense of belonging to a particular gender." Decision at ¶¶ 161, 42.

The court's finding that "no surgery changes a person's sex" has caused the department to consider the issue. The National Institutes of Health (NIH), a component of the U.S. Department of Health and Human Services, matter-of-factly explains that

> "Sex" is a biological classification encoded in our DNA. Males have XY chromosomes, and females have XX chromosomes. Sex makes us male or female. Every cell in your body has a sex—making up tissues and organs, like your skin, brain, heart, and stomach. Each cell is either male or female, depending on whether you are a man or a woman.[5]

In 2014, recognizing that there were differences in disease manifestation and response to treatment between men and women and that research about such differences may be critical to the interpretation, validation, and generalizability of research findings – and may inform clinical interventions – NIH issued a policy on sex as a biological variable in research.[6] In guidance issued on that policy, NIH noted that "[s]ex is a biological variable defined by characteristics encoded in DNA."[7] An NIH leader further explained, "'[s]ex' originates from an organism's sex chromosome complement—XX or XY chromosomes in humans, and is reflected in the reproductive organs. Each cell has a sex."[8] An Endocrine Society scientific statement notes that "[s]ex is a biological concept" and that "[h]uman biological sex is often assessed by examining the individual's complement of sex chromosomes as determined by karyotypic analysis."[9] Thus, as some scientists have noted, "[h]uman sex is an observable, immutable and important biological classification"; it is biological (and, thus, genetic), binary, and immutable. [10] The department agrees.

The department has now considered the Montana system for issuing (and amending) birth certificates in light of the foregoing. The department disagrees with the district court in the above-referenced litigation that plaintiffs established a prima facie case that SB 280 is "impermissibly vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process." However, because sex is a biological concept that is encoded in an individual's DNA and, thus, is genetic and immutable, the department agrees with the district court that "no surgery changes a person's sex." The department, thus, concludes that the premise upon which it based its 2007 rule (which, in turn, appears to have been the basis for S.B. 280) – that an individual's sex could be changed through surgery – was mistaken. As a result, and consistent with the court's preliminary injunction order with respect to S.B. 280, the department does not re-impose the S.B. 280 requirements/2007 rule requirements for amendment of the cited sex on birth certificates in this proposed rulemaking for the period of time injunctive relief remains in effect.

As noted above, when the statutory provisions governing Montana birth certificates and vital records identify the data elements to be collected and included in a Montana birth certificate, one of those data elements is the sex of the person/infant.[11] Such statutory provisions use the word "sex,"[12] not "gender" or "gender identity." Because "sex" and "gender" are different concepts, the department would not read the statutory provisions concerning birth certificates or records of births as including "gender" in the requirement to record the sex of the person. This interpretation is consistent with the context: The birth certificate generally records only facts that are known (or knowable) at the time of the person's birth. Sex is one of those facts: A person's sex can be determined – by observation, examination, or testing – at the time of birth. Gender/gender identity, as a social, psychological, and/or cultural construct, cannot. [13] Consequently, the department has determined that the proper interpretation of the statutory provisions governing birth certificate/vital records and the vital records system is that the person's sex, not his or her gender or gender identity, is required to be recorded on the birth certificate. Thus, the proposed rule amendments do not redesignate, substitute, or conflate the "sex" data element as a "gender" data element on birth certificates, as the 2017 rule did, but maintains it as the "sex" data element in accordance with the relevant statutory directives and scientific evidence.

The 2017 rule permitted the department to "correct" such "gender" data element upon receipt of a correction affidavit accompanied by a "gender designation form" attesting that the individual

had undergone gender transition, a copy of a government-issued identification with the correct gender identification, or a copy of a court order that the individual's gender had been changed. As previously established, sex is different from gender and is an immutable genetic fact, which is not changeable, even by surgery. Accordingly, the proposed rule amendments do not authorize the amendment of the sex identified/cited on a birth certificate based on gender transition, gender identity, or change of gender.

The department does acknowledge that there may be some instances in which it would be appropriate for the sex of a person as cited/identified on the birth certificate to be corrected or amended. In this proposed rulemaking, the department recognizes, as it did in the 2007, 2017, and 2021 rules, that there may be data entry errors (or scrivener's errors) that result in the sex of a person being listed incorrectly on the original birth certificate. Thus, in this proposed rulemaking, the department provides for the correction of the sex of a person if it was listed incorrectly on the original birth certificate due to a data entry error (or other scrivener's error) in the same way as in those rules, except that the department specifies some of the documentation that is required to support such correction.

The department similarly recognizes that, although likely infrequent, there could be instances in which a person's sex, as a biological, immutable fact, is misidentified at birth and the wrong sex is then cited on the birth certificate – with the misidentification only being discovered later, such as through DNA/genetic testing. Because a person's sex is immutable/unchangeable, the person's correct sex would have been known at birth if testing had been done at the time. In such circumstances, the department has determined that the birth certificate should be corrected. Accordingly, this proposed rulemaking provides for the correction of the birth certificate if the person's sex was misidentified on the original birth certificate and the person supplies documentary proof consisting of, among other things, the results of appropriate testing that establishes the person's sex.

The department notes that a birth certificate is, first and foremost, a vital record which records the facts concerning the birth of a person in Montana. There are important departmental and public health interests in the collection and maintenance of accurate vital statistics and records such as these. It is, therefore, critical that the department's Office of Vital Records has clear direction so that it can administer the vital records program in such a way that ensures the accuracy of such vital records.

ARM 37.8.311

The department proposes that current ARM 37.8.311(5) remain unchanged, but be redesignated as ARM 37.8.311(5)(a).

In new ARM 37.8.311(5), the department proposes that ARM 37.8.311(5), as redesignated ARM 37.8.311(5)(a), apply when and to the extent that the department is not subject to an injunction against enforcement of S.B. 280, codified at 50-15-224, MCA, and S.B. 280 remains valid. The department desires to execute the will of the legislature as set forth in S.B. 280, continues to vigorously defend the legislation in the courts of Montana, and will implement and enforce it, to the extent not enjoined from doing so by the courts. The department is currently subject to such a preliminary injunction. Because of the exigencies of the situation and the fact that, with the imposition of the preliminary injunction, there was currently no non-enjoined regulatory mechanism by which the department could accept and process birth certificate sex identification amendments, it issued an emergency rule (MAR Notice No. 37-1001) to adopt a standard pursuant to which the department's Office of Vital Records would accept and process applications for changes to the sex of a registrant, as identified on the registrant's birth certificate. Recognizing that the emergency rule may expire prior to the resolution of the litigation in which the preliminary injunction was imposed, the department proposes to amend ARM 37.8.311(5) to adopt the provisions of the emergency rule, for as long as the department is enjoined from enforcing S.B. 280, or S.B. 280 is held invalid. The department clarifies that it relies upon 50-15-224, MCA, enacted by S.B. 280, only with respect to ARM 37.8.311(5)(a).

Consistent with the emergency rule issued in MAR Notice No. 37-1001, the department proposes in new (5)(b), that the sex of a registrant, as cited on a certificate may be corrected only if (i) the sex of the individual was listed incorrectly as a result of a scrivener's error or a data

entry error; or (ii) the sex of the individual was misidentified at birth and the wrong sex was identified on the original certificate, with the misidentification only being discovered later. In each case, the department would require the submission of a correction affidavit and supporting documents. The department proposes that the Office of Vital Records be able to determine the amount and type of supporting documentation required in each instance (by cross-reference to the relevant provisions in ARM 37.8.108), but would require the correction affidavit be supported by, respectively, (i) records of the health care facility or attending health care professional, contemporaneous to the birth, that identify the sex of the individual, with an affidavit from the health care facility or professional attesting to the date and accuracy of the records; or (ii) the results of chromosomal, molecular, karyotypic, DNA, or genetic testing that identify the sex of the individual, together with an affidavit from the health care facility, health care professional, or laboratory testing facility that conducted the test and/or analyzed the test results, attesting to the test results and their accuracy. Identification in the rule of specific documentation that will be required to support applications for the correction of the sex identification on an individual's birth certificate will help ensure the accuracy of the birth certificate as a vital record and that the Office of Vital Records only receives applications which meet the standard for the correction of the identification of an individual's sex on the birth certificate.

Finally, the department proposes to amend the listing of MCA provisions that authorize this rulemaking, to include 50-15-208, MCA, and of implementing MCA provisions, to include 50-15-203 and 50-15-208, MCA.

Fiscal Impact

There is no anticipated fiscal impact associated with the proposed amendments to ARM 37.8.311.

The proposed amendments are intended to be effective upon the day after the date of publication of the adoption notice.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kassie Thompson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., July 8, 2022.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA do not apply.

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

/s/ Robert Lishman
Robert Lishman
Rule Reviewer

/s/ Adam Meier
Adam Meier, Director
Public Health and Human Services

Certified to the Secretary of State May 31, 2022.

[1] In 2015, the department made nonsubstantive revisions to the regulation. *See* MAR Notice No. 37-714, 2015 MAR page 1492 (Sept. 24, 2015).

[2] The 2021 rule maintained the nonapplicability of the provision with respect to situations where the sex of the person was designated incorrectly on the original birth certificate due to data entry error.

[3] Although plaintiffs amended their complaint long after the 2021 rules were published, neither their initial complaint, their amended complaint nor their other pleadings ever requested any relief related to the 2021 rulemaking. Instead, plaintiffs' amended complaint requested that the court:

- Declare S.B. 280 unconstitutional on its face and as applied;
- Declare S.B. 280 illegal under the Montana Human Rights Act;
- Declare S.B. 280 illegal under the Code;
- Preliminarily and permanently enjoin Defendants, as well as their agents, employees, representatives, and successors, from enforcing S.B. 280, directly or indirectly;
- Award Plaintiffs' the reasonable attorney's fees and costs incurred in bringing this action; and
- Grant any other relief the Court deems just.

[4] Such an order would be improper because plaintiffs did not seek a mandatory injunction or otherwise request that the department re-implement the 2017 rule. Even if plaintiffs had requested this relief, they did not meet the standard for a mandatory injunction, which is a different and higher standard than the standard for a preliminary injunction. Notably, despite the fact that S.B. 280 was effective upon passage and approval, plaintiffs did not immediately file suit nor did they seek a temporary restraining order after they filed the suit but before the department had concluded the 2021 rulemaking. Nor would it be appropriate to grant plaintiffs, at this preliminary stage of the litigation, the relief to which they would only be entitled if they obtain final relief on the merits. *See Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963) ("it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial."); *see also United States v. Barrows*, 404 F.2d 749, 752 (9th Cir. 1968).

[5] NIH, Office of Research on Women's Health, *How Sex and Gender Influence Health and Disease*, https://orwh.od.nih.gov/sites/orwh/files/docs/SexGenderInfographic_11x17_508.pdf.

[6] *See* NIH, *Consideration of Sex as a Biological Variable in NIH-funded Research*, NOT-OD-15-102, issued June 9, 2015, https://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-102.html.

[7] NIH Guidance, Consideration of Sex as a Biological Variable in NIH-funded Research (NIH Guidance) at 1 (2017), https://orwh.od.nih.gov/sites/orwh/files/docs/NOT-OD-15-102_Guidance.pdf; *see also* Journal of Women's Health, *Sex as a Biological Variable: A 5-Year Progress Report and Call to Action* (June 2020), https://pubmed.ncbi.nlm.nih.gov/31971851/.

[8] Janine A. Clayton, *Applying the new SABV (Sex as a Biological Variable) policy to research and clinical care*, Physiology & Behavior 187 (2018) 2-5 (published online Aug. 17, 2017), https://doi.org/10.1016/j.phybeh.2017.08.012; *see also* Leah R. Miller, Cheryl Marks, *et al., Considering sex as a biological variable in preclinical research*, 31 Federation of American Societies for Experimental Biology Journal 29-34 (Sept. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6191005 (defining "Sex" as "being XY or XX"). In contrast, NIH defines "gender" as the "social, cultural, and psychological traits linked to human males and females through social context." *See* NIH Guidance, *supra,* at 1; Janine Clayton, *supra*, at 2. Other sources describe gender as "psychological or cultural rather than biological," or as including "perception of the individual as male, female, or other, both by the individual and by society." *See* Robert J. Stoller, Sex and Gender: On the Development of Masculinity and Femininity 9 (1968) (describing gender as "psychological or cultural rather than biological"); Adhi Bhargava, Arthur P. Arnold, et al., *Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement*, Endocrine Review (June 2021) 42(3):219-258, 220-221, 228 (published online Mar. 11, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8348944/ ("The terms *sex* and *gender* should not be used interchangeably. Sex is dichotomous, with sex determination in the fertilized zygote, stemming from unequal expression of sex chromosomal genes. By contrast, gender includes perception of the individual as male, female, or other, both by the individual and by society."); *see also* "Gender," Lexico, https://www.lexico.com/en/defintion/gender ("Gender" means "[e]ither of the two sexes … when considered with reference to social and cultural differences rather than biological ones"); Alberto Frigerio, Lucia Ballerini, et al., *Structural, Functional and Metabolic Brain Differences as a Function of Gender Identity or Sexual Orientation: A Systematic Review of the Human Neuroimaging Literature*, Archives of Sexual Behavior (2021) 50:3329-3352, 3329

(published online May 6, 2021), https://doi.org/10.1007/s10508-021-02005-9 ("we refer to 'sex' to the biological condition (chromosomal, gonadal, and phenotypic), 'gender' to the inner psychological perception of one's own identity (gender identity) and to the outer cultural perception in behavior and habits attributed to and assumed by masculinity and femininity (gender role) . . ."); World Health Organization, "Gender and Health," https://www.who.int/news-room/questions-and-answers/item/gender-and-health ("Gender interacts with but is different from sex. The two terms are distinct and should not be used interchangeably. It can be helpful to think of sex as a biological characteristic and gender as a social construct."). With respect to the relationship between sex and gender, it is important to note that "[s]ex is an essential part of vertebrate biology, but gender is a human phenomenon; sex often influences gender, but gender cannot influence sex." Adhi Bhargava, Arthur Arnold et al., *supra*, at 228.

[9] Adhi Bhargava, Arthur Arnold, et al., *supra.*

[10] Emma Hilton, Pam Thompson, et al., Letter to the Editor, *The reality of sex,* Irish Journal of Medical Science (2021) 190:1647 (published online Jan. 15, 2021), https://doi.org/10.1007/s11845-020-02464-4 (rejecting as "entirely without scientific merit" the claim that "sex is neither fixed nor binary": "there are two sexes, male and female, and in humans, sex is immutable (disorders of sexual development are very rare and, in any event, do not result in any additional sexes")); *see also* Georgi K. Marinov, *In Humans, Sex is Binary and Immutable,* Acad. Quest. (2020) 33:279-288 (published online May 9, 2020), https://doi.org/10.1007/s12129-020-09877-8 ("the objective truth is that sex in humans is strictly binary and immutable, for fundamental reasons that are common knowledge to all biologists taking the findings of their discipline seriously"); Lucy Griffith, Katie Clyde et al., *Sex, Gender, and Gender Identity: A Re-Evaluation of the Evidence*, BJPsych Bulletin (2021) 45:291-299, 293, https://doi.org/10.1192/bjb.2020.73 ("Humans are sexually dimorphic; there are only two viable gametes and two sexes . . . . Sex is determined at fertilization and revealed at birth or, increasing, in utero. The existence of rare and well-described 'disorders (differences) of sexual differentiation' does not negate the fact that sex is binary.").

[11] While the specific provision on the creation of a birth certificate or record of birth does not identify the data elements to be collected and recorded, it is clear from the statutory context that the sex of the person is to be recorded because another provision refers to the issuance of substitute birth certificates as including the sex of the person: It would not make sense to have such a provision if the legislature did not intend for the original birth to include the person's sex. *See, e.g.,* 50-15-304, MCA (substitute birth certificate for an adopted person shall contain the sex of such person). And yet another provision establishes that the written report which constitutes a birth certificate for a child of unknown parentage contain the sex of the child. § 50-15-203, MCA. The U.S. standard certificate of birth, *see* https://www.cdc.gov/nchs/data/dvs/birth11-03final-ACC.pdf (last visited May 19, 2022), includes the sex of the infant (male or female), and states uniformly collect and record the sex of the infant on their birth certificates. This vital statistic is important for historical, demographic, public policy and public health reasons.

[12] Both at the time that the vital records provisions in the Montana Code were first adopted and today, and especially in the context of vital records, the term "sex" was (and is) understood to mean biological differences between males and females. *Compare* American Heritage Dictionary 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); Webster's Third New International Dictionary 2081 (1971) ("[T]he sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . . ."); 9 Oxford English Dictionary 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.") *with* Webster's New World College Dictionary 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions").

[13] The Office of Vital Records permits changes to correct mistaken or incomplete birth certificates. A new birth certificate can be issued, for instance, that identifies the father when the father was not identified on the original birth certificate. *See* 50-15-223(1)(b), (5), MCA. Paternity, after all, is a fact that is known or knowable (for example, through genetic testing) at the time of birth. Separate and apart from these corrections, the Montana Legislature enacted specific laws to allow a person to update information reflecting changes to their legal identity. For example, an individual may amend his/her birth certificate to reflect a legal name change. *See* 27-31-101, MCA; ARM 37.8.311; *In re Marriage of Rager*, 263 Mont. 361, 365, 868 P.2d 625, 627 (1994) ("

[T]he child's legal name … remains so for all purposes unless it is changed by adoption, through a statutory petition for a name change, or by other legal means."). Montana law also authorizes issuance of a new birth certificate that reflects a child's adoptive parents, when the department receives a certificate of adoption provided for by law. *See* 50-15-223(1)(a), MCA (referencing 50-15-311, MCA). Unlike these changes that reflect historical as well as legal facts, sex—as reported on a birth certificate—records an immutable, unalterable historic fact.

INTERROGATROY NO. 3: Identify and describe any of the Defendants' efforts to enforce SB 280, the 2021 Rule, and/or the 2022 Permanent Rule, including, but not limited to, which officers or employees of the Defendants are responsible for such enforcement efforts.

RESPONSE: Defendants object for the reason that the term "enforce" is vague and ambiguous. Because SB 280 was immediately effective upon enactment and signature of the Governor, DPHHS started processing requests for changes in the sex on birth certificates in accordance with the mandate of SB 280, which required that DPHHS be provided with a court order that met the requirements of SB 280 in order to amend the sex designated on the birth certificate. DPHHS rejected any requests that were not accompanied that contained the information required by SB 280. Because the Supreme Court did not preclude the promulgation of further rules by DPHHS in its order, DPHHS promulgated the 2022 Permanent Rule.

INTERROGATORY NO. 4: Identify each person known to any of the Defendants with knowledge of the Plaintiffs' allegations in the Second Amendment Complaint, and, for each such person, include their full name, job title, business or home address, and the nature of and basis for the knowledge they possess.

RESPONSE: Defendants object on the grounds that the foregoing seeks information protected by the attorney-client privilege and the work product privilege. Defendants also object that the Interrogatory seeks personal individual information protected by their right to privacy. Subject to the stated objections and without waiving the same, Defendants will produce individual names identifying each person in accordance with an Order of Protection.

INTERROGATORY NO. 5: Identify the number of individuals, by year, who, from January 1, 2016, to the present, have requested that the sex marker on their Montana birth certificates be amended, including any requests that refer to a "gender" marker.

CERTIFICATE OF SERVICE

I, Akilah Maya Deernose, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 03-20-2023:

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Meier, Adam, As Director Of Dphhs, Montana Department of Health and Human Services, Gianforte, Gregory As Governor Of State Of Montana
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Meier, Adam, As Director Of Dphhs, Montana Department of Health and Human Services, Gianforte, Gregory As Governor Of State Of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Meier, Adam, As Director Of Dphhs, Montana Department of Health and Human Services, Gianforte, Gregory As Governor Of State Of Montana
Service Method: eService

Jon W. Davidson (Attorney)
125 Broad Street, 18th Floor
New York NY 10004
Representing: Amelia Marquez
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Amelia Marquez
Service Method: eService

Elizabeth A. Halverson (Attorney)

1302 24th Street West #393
Billings MT 59102
Representing: Amelia Marquez
Service Method: eService

State of Montana (Minor)
Use this one
Service Method: Other Means by Consent

John Doe I (Plaintiff)
Service Method: Email

Austin Miles Knudsen (Attorney)
P.O. Box 624
Culbertson 59218
Representing: Meier, Adam, As Director Of Dphhs, Montana Department of Health and Human Services, Gianforte, Gregory As Governor Of State Of Montana
Service Method: Other Means by Consent

Seth A Horvath (Attorney)
70 West Madison Street Suite 3500
Chicago 60601
Representing: Amelia Marquez
Service Method: Email

Malita Vencienzo Picasso (Attorney)
125 Broad Street
New York 10004
Representing: Amelia Marquez
Service Method: Email

F. Thomas Hecht (Attorney)
70 West Madison Street, Suite 3500
Chicago 60601
Representing: Amelia Marquez
Service Method: Email

Tina B Solis (Attorney)
70 West Madison Street Suite 3500
Chicago 60601
Representing: Amelia Marquez
Service Method: Email

John Knight (Attorney)
150 North Micigan Avenue Suite 600
Chicago 60601
Representing: Amelia Marquez
Service Method: Email

Electronically Signed By: Akilah Maya Deernose
Dated: 03-20-2023