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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual, Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	DV-21-00873 Hon. Michael G. Moses **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The Defendants concede that no surgery can change a person's sex. To the extent that such concession means, as this Court concluded in its Findings of Fact, Conclusions of Law, and Order Granting in Party and Denying in Part Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for a Preliminary Injunction ("preliminary injunction"), that SB 280 is unconstitutionally vague, Defendants concede the narrow issue that SB 280 is unconstitutionally vague on its face

and as applied because neither a surgical procedure, nor any other medical treatment can change a person's sex. The Defendants make no other concessions in this matter. Specifically, the Defendants oppose any final ruling that holds SB 280 unconstitutional on any other grounds other than vagueness due to the fact that no medical procedure or treatment changes a person's sex.[1] Furthermore, Defendants oppose any relief that is broader than necessary to address this particular conclusion of law. Specifically, Defendants reiterate their position that, given the manner in which Plaintiffs pled their case, this court lacks the authority to order the Department of Public Health and Human Services ("Department") to reinstate the 2017 rule.

Moreover, the Defendants and specifically, the Department has acted in good faith throughout this litigation. As previously noted in other pleadings, the Plaintiffs only challenged the constitutionality of SB 280. The Plaintiffs failed to challenge any of the rules promulgated pursuant to statute nor did they file a claim under the Montana Administrative Procedure Act to challenge any rules promulgated by the Department.

The Department believed in good faith that the preliminary injunction left a void in regulations because SB 280 eliminated the 2017 rule, necessitating the 2022 rule. The Montana Administrative Register Notice 37-1002 attached to Plaintiffs' Brief in support of its Motion for Summary Judgment ("Brief") as Exhibit "A" makes this deference to this Court's Order abundantly clear.[2]

The Department's good faith quandary is expressed in Exhibit "A" as follows:

> 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

[1] In issuing its preliminary injunction, this Court noted that, for purposes of the preliminary injunction, "the Court has declined to analyze whether SB 280 reaches constitutionally protected conduct." Preliminary Injunction ¶ 157a.
[2] The Declaration of Akilah Deernose, attached to plaintiffs' brief in summary of their motion for summary judgment, inaccurately labels MAR 37-1002, the Notice of Public Hearing on Proposed Amendment, as the emergency rule; it is not.

> 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 on 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. 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.

Montana Admin. Reg. Not. 37-1002, No. 11-6/10/22 at 898-899. As set forth in that notice, this Court's "finding that 'no surgery changes a person's sex' has caused the department to consider the issue," and, based on the scientific evidence reviewed, conclude that the Court was correct, that because "[s]ex is a biological variable defined by characteristics encoded in DNA" which is immutable, surgery cannot change a person's sex. *Id.* at 900. Because the statutory provisions governing Montana birth certificates and vital records identify "sex," not "gender" of the person/infant as one of the data elements to be collected and included in a Montana birth certificate, the Department proposed, and ultimately adopted, the 2022 Rule. The 2022 Rule was adopted under statutory authority granted to the Department independent of SB 280. *Id.* at 896, 903-904.

Nevertheless, following the Court's Order on Plaintiffs' Motion for Clarification (Doc. 77), the Department immediately began processing applications under the 2017 Rule pending the Montana Supreme Court's disposition of the State's Petition for Writ of Supervisory Control. (*See* Doc. 107 at ¶ 2.) This further evidences the Department's good faith efforts to comply with this Court's orders.

In response to the Defendants' Petition for a Writ of Supervisory Control, the Montana Supreme Court affirmed that this Court lacks jurisdiction over the 2022 Rule. (See Order in OP 22–522 (Jan. 10, 2023)) ("DPHHS is entitled relief insofar as the Clarification Order purports to enjoin DPHHS from engaging in rulemaking, as Plaintiffs have not properly challenged the 2022 Rule under MAPA and its implementation therefore has not been brought before the District Court. IT IS THEREFORE ORDERED that the State's Petition for a Writ of Supervisory Control is GRANTED IN PART to the extent that the [Clarification Order] enjoins the 2022 Rule.") (emphasis in the original). The 2022 Rule has never been subject to a legal challenge by the Plaintiffs, and no court has enjoined it.

The Defendants have complied with this Court's Order with respect to SB 280 because SB 280 was premised on the proposition that an individual's sex could be changed by a surgical procedure. The Department and the State have confirmed the unequivocal finding of the Court citing resources including material from the National Institutes of Health, a component of the U.S. Department of Health and Human Services. Based upon this fact as asserted in Exhibit "A," the State concedes to the narrow issue asserted in Plaintiffs' Brief that SB 280 is unconstitutionally vague because it was based upon a mistaken premise that surgery could change a person's sex. See MAR Notice No. 37-1002. Given the manner in which Plaintiffs plead their case, any remedy should be narrowly tailored as well. The Court should only grant relief to the named Plaintiffs enjoining SB 280 solely on the issue of vagueness.

STATEMENT OF FACTS

Defendants stipulate to Statement of Facts 1 through 5 as alleged in Plaintiff Brief in Support of Motion for Summary Judgment. On May 23, 2022, the Department adopted a

temporary emergency rule because the Department believed in good faith that the preliminary injunction left a void of regulation on the standard to change the identification of sex on birth certificates. Because an emergency rule expires by law 120 days from its adoption, the Department adopted its 2022 Rule referenced as Montana. Admin. Reg. Not. 37-1002. While the Department believes the 2022 Rule is lawful and effective pursuant to the Montana Supreme Court's January 10, 2023 Order, the Department has paused processing any requests to change the sex designation on a birth certificate until Plaintiffs' Motion to Enforce is decided because the Department desires to comply with the Orders of this Court and the Montana Supreme Court.

ARGUMENT

Summary judgment should be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits show an absence of genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). "The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials." *Klock v. Town of Cascade*, 284 Mont. 167, 173, 943 P.2d 1262, 1266 (1997) (citing *Berens v. Wilson*, 246 Mont. 269, 271, 806 P.2d 14, 16 (1990)). "The party moving for summary judgment has the initial burden of showing the absence of any genuine issue of material fact in light of the substantive principles that entitle it to judgment as a matter of law." *Id.*, 943 P.2d at 1266 (citing *Cecil v. Cardinal Drilling Co.*, 244 Mont. 405, 409, 797 P.2d 232, 234 (1990)). "After the moving party has met its burden, the burden then shifts to the party opposing the motion to establish the existence of a genuine issue of material fact." *Id.* at 174, 943 P.2d at 1266 (citing *Sprunk v. First Bank System*, 252 Mont. 463, 466, 830 P.2d 103, 104 (1992)).

"The party opposing the motion must present facts of a substantial nature showing that genuine issues of material fact remain for trial." *Id.*, 943 P.2d at 1266 (citing *Wangen v. Kecskes*,

256 Mont. 165, 172, 845 P.2d 721, 726 (1993)). "In order to meet its burden, the party opposing the motion must present substantial evidence, not mere denial, speculation, or conclusory statements." *Id.*, 943 P.2d at 1266 (citing *Sprunk*, 252 Mont. at 463, 830 P.2d at 105). "'The opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, nor merely suspicions.'" *Id.*, 943 P.2d at 1266 (quoting *Fleming v. Fleming Farms, Inc.*, 221 Mont. 237, 241, 717 P.2d 1103, 1105 (1986)). Moreover, the opposing party cannot rest upon mere allegations in the pleadings, but "has an affirmative duty to respond by affidavits or other sworn testimony containing material facts that raise genuine issues; conclusory or speculative statements will not suffice." *Id.*, 943 P.2d at 1266 (quoting *Groshelle v. Reid*, 270 Mont. 443, 447, 893 P.2d 314, 316 (1995)); *see also* Mont. R. Civ. P. 56(e)(2). If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party. Mont. R. Civ. P. 56(e)(2).

I. SB 280 IS BASED UPON A MISTAKEN FACTUAL PREMISE THAT MAY RENDER IT UNCONSTITUTIONALLY VAGUE.

A party may constitutionally challenge a statute for vagueness on two different bases: (1) statute is vague on its face; or (2) the statute is vague as applied. Statutes are presumed to be constitutional, and it is the duty of the courts to construe statutes in a manner that avoids an unconstitutional interpretation if at all possible. *State v. Dixon*, 299 Mont. 165, 169, 998 P.2d 544, 547 (2000). The challenger to a statute bears the burden of establishing that a statute is unconstitutional by proof beyond a reasonable doubt. *Id.*

In this case, Defendants concede that factual premise on which SB 280 is based, that a person's sex could be changed by means of a medical procedure, is mistaken. Defendants concede, as the Court concluded, no surgery changes a person's sex. To the extent that such concession means that, as this Court concluded in its preliminary injunction, that SB 280 is unconstitutionally

vague, Defendants concede the narrow issue that SB 280 is unconstitutionally vague on its face and as applied because neither a surgical procedure, nor any other medical treatment can change a person's sex.

Unfortunately, this whole case has been wrought with mistaken ideas and understandings. It obviously began with a mistaken premise that a person's sex could be changed with a medical procedure. SB 280 and the corresponding 2021 rule voided the 2017 rule and thus, the Department felt that this Court's preliminary injunction left a void in regulation, which it sought to fill through the 2022 Rule. The Defendants believe in good faith that the Montana Supreme Court confirmed the Department validly enacted the 2022 Rule using independent rule-making authority, separate from SB 280. The Court unequivocally ruled that this Court has no jurisdiction over the 2022 Rule. No court has enjoined th2 2022 Rule. The Department has a good faith legal foundation to enforce the 2022 Rule, but has, nevertheless refrained from implementing the 2022 Rule pending decision on Plaintiffs' Motion to Enforce. Good faith is defined as "honesty in fact in the conduct or transaction concerned." Mont. Code Ann. § 30-1-201(19). See also § 28-1-211. The Defendants sincerely apologize for the confusion, but as the 2022 rule (Exhibit "A") demonstrates, they acted with honesty in fact in trying to rectify an ambiguous situation while striving to comply with Court orders. The Department opposes any summary judgment ruling by this Court that is not limited to the narrow holding that SB 280 is unconstitutional for vagueness because a surgical procedure does not change a person's sex.

CONCLUSION

Defendants concede that factual premise on which SB 280 is based, that a person's sex could be changed by means of a medical procedure, is mistaken. To the extent that such concession means that, as this Court concluded in its preliminary injunction, that SB 280 is unconstitutionally

vague, Defendants concede the narrow issue that SB 280 is unconstitutionally vague on its face and as applied because neither a surgical procedure, nor any other medical treatment can change a person's sex.

DATED this 10th day of April, 2023.

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CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 04-10-2023:

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Dated: 04-10-2023