

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' REPLY BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

SB 280 (the “Act”) requires individuals seeking to amend their Montana birth certificate to file with DPHHS an order “from a court with appropriate jurisdiction indicating that the sex of the person born in Montana has been changed by surgical procedure.” *See* SB 280, 67th Leg. Reg. Sess. (2021) (codified at § 50-15-224, MCA (2021)). All parties agree that a person’s sex cannot be changed by surgical procedure. Plaintiffs challenged the law, in part, on that very basis. Defendants concede the point six times in their response to Plaintiffs’ motion for summary judgment. Dkt. 129 (Defendants Response to Plaintiffs’ Motion for Summary Judgment) at p. 1 (“Defendants concede that no surgery can change a person’s sex”); 1-2 (“Defendants concede ... that SB 280 is unconstitutionally vague on its face and as applied because ... a surgical procedure ... [cannot] change a person’s sex.”); 4 (“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.”); 6 (“Defendants concede, as the Court concluded, no surgery changes a person’s sex.”); 6-7 (“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 ... a surgical procedure [cannot] change a person’s sex.”); 7-8 (“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 ... a surgical procedure... [cannot] change a person’s sex.”).

Defendants accordingly do not object to the Court granting Plaintiffs’ motion for summary judgment. Nor do they contest either the factual or the legal basis upon which Plaintiffs’ motion rests—i.e., the fact that surgery cannot change a person’s sex makes SB 280 unconstitutionally vague on its face and as applied.¹ As such, there remains no genuine dispute as to any material facts, and therefore as a matter of law Plaintiffs are entitled to summary judgment on their vagueness claim under Article II, section 17 of the Montana Constitution. The Court should declare SB 280 void because it is unconstitutionally vague and permanently enjoin Defendants from enforcing it.

Further, SB 280’s implementing regulation (the “2021 Rule”) should be declared unconstitutionally vague and void. The 2021 Rule was adopted to enforce SB 280 as required by SB 280’s terms. It contains language identical to that of SB 280, which Defendants concede is unconstitutionally vague. Therefore, the 2021 Rule should also be declared unconstitutionally vague and void and its enforcement by Defendants should be permanently enjoined.²

ARGUMENT

“[A]t the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses. Rather, the

¹ In ruling on Plaintiffs’ motion for a preliminary injunction, this Court previously held that “Plaintiffs have 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 because it is unconstitutionally void.” Dkt. 61 (Findings of Fact, Conclusion of Law, and Order Granting in Part Defendant’s Motion to Dismiss and Granting Plaintiff’s Motion for a Preliminary Injunction), ¶ 170.

² Plaintiffs have not moved for summary judgment with respect to the regulations adopted by the Defendants in 2022, which this Court has ruled are “unrelated to SB 280 and the rules promulgated pursuant to SB 280.” Dkt. 117 (Order Denying Plaintiffs’ Motion for Leave to File Second Amended Complaint) at p. 4. Plaintiffs also do not ask this Court, in ruling on their summary judgment motion, to reinstate the 2017 Rule in place prior to the enactment of SB 280. Plaintiffs also do not need to respond here to Defendants’ irrelevant assertions about their purported good faith and other issues relating to Plaintiffs’ pending motion to enforce the preliminary injunction order. Those issues will be argued before the Court in a hearing set for June 1, 2023 (that hearing will also address Plaintiffs’ motion for summary judgment). *See* Dkt. 127 (Order Setting Hearing On All Motions Including Trial Motions for June 1, 2023).

court examines the [record] to determine whether there is a genuine issue as to any material fact relating to the legal issues raised and, if there is not, whether the moving party is entitled to judgement as a matter of law on the undisputed fact.” *Andersen v. Shenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, ¶ 2, 220 P.3d 675, ¶ 2 (internal citations omitted).

“A material fact is a fact that involve[s] the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact.” *Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶ 15, 323 Mont. 295, ¶ 15, 100 P.3d 137, ¶ 15. In this case, there is no genuine issue as to any material fact relating to Plaintiffs’ vagueness claim, and Plaintiffs are entitled to judgment as a matter of law on that claim, which will resolve this case.

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

A statute is unconstitutionally vague on its face “if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.” *State v. Dugan*, 2013 MT 38, ¶ 67, 369 Mont. 39, ¶ 67, 303 P.2d 755, ¶ 67. The Parties do not dispute that SB 280 requires that, as a condition of amending the sex designation on one’s birth certificate, a transgender person must 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 (Defendant’s Answer To Plaintiff’s Amended Complaint for Declaratory and Injunctive Relief), ¶ 2 (stating that SB 280 “speaks for itself and is the best evidence of its contents”). It is also undisputed that the language of the 2021 Rule issued by DPHHS and codified at Montana Administrative Rule 37.8.311 mirrors the language of SB 280, including the provision imposing the surgical procedure requirement. Dkt. 129 at p. 4.

As noted above, Defendants concede multiple times that SB 280 is unconstitutionally vague on its face because no surgical procedure can change a person's sex. Dkt. 129 at p. 1, 1-2, 4, 6, 7, 7-8. This concession is wholly consistent with the factual and legal assertions supporting Plaintiffs' motion for summary judgment. 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. *Dugan*, ¶ 67. Both the Act and the 2021 Rule's requirement of a court order "indicating that the sex of the person born in Montana has been changed by surgical procedure," *see* SB 280; Mont. Admin. R. 37.8.311(5)(a), in order to change the sex marker on their birth certificate is so vague that "the means for carrying it out are ... inadequate." *Hilburn v. St. Paul, M. & M. Railway Co.*, 23 Mont. 229, 238, 58 P. 551, 554 (1899). As a result, the Act and the 2021 Rule are "so conflicting and inconsistent in [their] provisions that [they] cannot be executed[.]" *State ex. Rel. Holliday v. O'Leary*, 43 Mont. 157, 165, 115 P. 204, 206 (1911) (internal citation and quotation marks omitted). It is thus "incumbent upon the courts to declare [the Act and the 2021 Rule] void and inoperative." *Id.*

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).

SB 280 and the 2021 Rule are also unconstitutional as applied to Plaintiffs because they (1) 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 (2) fail to provide any guidance as to how those

provisions should or could be applied. Again, Defendants concede that SB 280 is unconstitutionally vague on its face and as applied because no surgical procedure can change a person's sex Dkt. 129 at p. 1, 1-2, 4, 6, 7, 7-8. The absence of these "minimal guidelines" virtually guarantees that the Act and the 2021 Rule will be arbitrarily and inconsistently applied across cases. *See Western Native Voice v. Stapleton*, 2020 Mont. Dist. 3 Lexis 3, ¶ 62 (holding Ballot Interference Prevention Act unconstitutionally vague as applied).

Indeed, as this Court has already acknowledged, SB 280 does not define what surgery SB 280 requires, there are many types of surgery to treat gender dysphoria, and whether these surgeries qualify under SB 280 is unclear. Dkt. 61, ¶¶ 162-64. "Because this could lead to different interpretations among whichever judge in whatever constitutes a court with appropriate jurisdiction it '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' Plaintiffs have demonstrated a prima facie case that SB 280 is void for vagueness." Dkt. 61, ¶ 168 (quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498, 102 S. Ct. 1186, 1193 (1982)).

The Court should reject Defendants' invitation to issue findings of fact that are not material to resolving the legal questions at issue in Plaintiffs' motion for summary judgement (including whether medical procedures or treatments other than the surgical procedures referenced in SB 280 and the 2021 Rule might change a person's sex and the reasons why surgery is incapable of changing a person's sex). The basis upon which the parties have determined that an individual's sex cannot be changed by surgical procedure are not material because they do not implicate the elements of Plaintiffs' vagueness claim "to an extent that necessitates resolution of the issue by a trier of fact." *Arnold*, ¶ 15.

The only material facts at issue here are that (1) SB 280 and its twin implementing regulation, the 2021 Rule, require a person seeking to change the sex marker on their birth certificate to provide DPHHS with a court order stating that the person's sex has been changed by surgical procedure; and (2) no surgical procedure can change a person's sex, making it impossible for the person seeking to amend their birth certificate (or any reasonable person) to know how to comply with SB 280 and the 2021 Regulation. No other facts are material to resolve Plaintiffs' request for a permanent injunction against SB 280 and the 2021 Rule.

II. Defendants Must Be Enjoined from Enforcing Any Aspect of SB 280 and the 2021 Rule.

As this Court previously noted in its order denying Plaintiffs' motion for class certification, "If [SB 280] is unconstitutional or unlawful, it is unconstitutional or unlawful to all." Dkt. 118 (Order RE: Rule 23 Class Certification) at p. 3. Because SB 280 is unconstitutionally vague on its face, it is void and cannot be enforced not only to Plaintiffs, but to all transgender individuals born in Montana who seek to amend their birth certificate.

When a provision of a statute is ruled unconstitutional, and thus unenforceable, the remaining provisions of the statute survive only if the statute (1) contains a severability clause, or (2) if (a) the unconstitutional provisions were not necessary for the integrity of the law, or an inducement for its enactment, and (b) the remainder of the statute is complete in itself and capable of being executed in accordance with the apparent legislative intent." *Williams v. Board of Cty Comm'rs of Missoula Cty*, 2013 MT 243, ¶64, 371 Mont. 356, ¶64, 308 P.3d 88, ¶64 (internal citations and quotation marks omitted).

SB 280 contains no severability provision that would preserve any aspect of it to be enforced, and the provision that renders it unconstitutionally vague (the surgical requirement

provision) is “necessary for the integrity of the law[,]” and was “an inducement for its enactment.” *Id.* In fact, absent SB 280’s provision imposing the surgical requirement, nothing remains that would qualify as “complete in itself and capable of being executed in accordance with the apparent legislative intent.” *Id.* The purpose of enacting SB 280 was to impose a surgical requirement on those seeking to amend the sex marker on a Montana birth certificate. Without the surgical requirement provision, nothing remains that could be enforced. This is all equally true as to the 2021 Rule, which mirrors SB 280.

CONCLUSION

Plaintiffs moved for summary judgment on the narrow issue that SB 280 and the 2021 Rule are unconstitutionally vague, both on their faces and as applied to Plaintiffs. The State repeatedly concedes in its response that the premise on which SB 280 was based, i.e. that a surgical procedure was capable of changing a person’s sex, was mistaken, Dkt. 129 at p. 1, 1-2, 4, 6, 7, 7-8, and thus “SB 280 is unconstitutionally vague on its face and as applied. . . .” *Id.*, at 8. All Parties agree that no issue of material fact exists as to whether SB 280 is unconstitutionally vague on its face and as applied to Plaintiffs, which must also be true of the 2021 Rule enforcing SB 280, given that the 2021 Rule contains the same surgical requirement to change the sex marker on a Montana birth certificate.

For these reasons, summary judgment is appropriate in this matter. Accordingly, Plaintiffs respectfully request that this Court grant Plaintiffs’ 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 prohibiting Defendants’ enforcement of SB 280 and the 2021 Rule.

Dated: April 24, 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
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*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **Plaintiffs' Reply Brief in Support of 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: April 24, 2023

Electronically signed by Krystel Pickens on behalf of Akilah Deernose.

CERTIFICATE OF SERVICE

I, Akilah Maya Deernose, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 04-24-2023:

Emily Jones (Attorney)

115 North Broadway

Suite 410

Billings MT 59101

Representing: Gianforte, Gregory As Governor Of State Of Montana, Montana Department of Health and Human Services, Brereton, Charles as DPHHS Director

Service Method: eService

Thane P. Johnson (Govt Attorney)

215 N SANDERS ST

P.O. Box 201401

HELENA MT 59620-1401

Representing: Gianforte, Gregory As Governor Of State Of Montana, Montana Department of Health and Human Services, Brereton, Charles as DPHHS Director

Service Method: eService

Michael D. Russell (Govt Attorney)

215 N Sanders

Helena MT 59620

Representing: Gianforte, Gregory As Governor Of State Of Montana, Montana Department of Health and Human Services, Brereton, Charles as DPHHS Director

Service Method: eService

Seth A. Horvath (Attorney)

70 West Madison Street, Suite 5200

Chicago IL 60602

Representing: Amelia Marquez

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

John Doe I (Plaintiff)
Service Method: Other Means by Consent

Meier, Adam, As Director Of Dphhs (Defendant)
Service Method: Other Means by Consent

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

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

John Knight (Attorney)
150 North Michigan Avenue Suite 600
Chicago 60601
Representing: Amelia Marquez
Service Method: Other Means by Consent

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

Malita Vencienzo Picasso (Attorney)
125 Broad Street
New York 10004

Representing: Amelia Marquez
Service Method: Email

Electronically signed by Krystal Pickens on behalf of Akilah Maya Deernose
Dated: 04-24-2023