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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 ADAM MEIER, 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' MOTION SEEKING
CLARIFICATION OF THE
PRELIMINARY INJUNCTION AND
TO DECLARE INVALID THE
TEMPORARY EMERGENCY RULE
PUBLISHED BY DEFENDANT THE
MONTANA DEPARTMENT OF
PUBLIC HEALTH AND HUMAN
SERVICES IN RESPONSE TO THIS
COURT'S APRIL 21, 2022 ORDER**

Plaintiffs, through their counsel of record, respectfully move the Court, based on good cause, to clarify the requirements of this Court’s April 21, 2022 Findings of Fact, Conclusions of Law and Order (“Order”) enjoining Defendants from enforcing “any aspect of [Senate Bill 280 (“SB 280”)] during the pendency of this action according to the prayer of the Plaintiffs’ motion and complaint[.]” Order at p. 35, ¶ 5(a). This Court has the authority to clarify its already unambiguous Order and eliminate any purported confusion. *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 19, 402 Mont. 92, 475 P. 3d 748 (internal citations omitted) (“In subsequently interpreting or clarifying a prior judgement, the issuing court may more precisely explain or specify the original meaning or effect of the judgment or provide the additional specification necessary to implement it.”).

As more fully set forth in the accompanying brief and supporting documents, Plaintiffs come before the Court in response to Defendants’ alleged confusion regarding the Order. Defendants relied on this “confusion” as justification for several weeks of inaction following the issuance of the Order, and their subsequent adoption of a Temporary Rule, which more severely restricts amendments to the gender marker on birth certificates than SB 280 and violates both the letter and spirit of this Court’s Order. Further, regarding the Temporary Rule, § 2-4-303, MCA vests this Court with the power to review the “sufficiency” of the underlying “imminent peril” an agency relied on in issuing an emergency or temporary rule.

Specifically, Plaintiffs request that this Court:

- (1) Clarify that its Order requires reverting back to the 2017 regulations governing the amendment of birth certificates;

- (2) Compel Defendants, as well as their agents, employees, representatives, and successors, to perform their obligations under this Court's Order and preserve the status quo by reverting to the 2017 regulations;
- (3) Order that the Temporary Rule is unlawful and void because it violates § 2-4-303, MCA; and
- (4) Grant any other relief the Court deems just, including but not limited to holding Defendants in contempt.

Plaintiffs concurrently file their brief in support of this motion with supporting declarations and exhibits. Counsel for Defendants have been contacted and oppose this Motion.

Dated: June 7, 2022

Respectfully submitted,

By: /s/ Akilah Lane
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CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction and to Declare Invalid the Temporary Emergency Rule Published by Defendant the Montana Department of Public Health and Human Services in Response to this Court's April 21, 2022 Order via email on counsel for the Defendants:

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Electronically signed by Krystel Pickens on behalf of Akilah Lane
Dated June 7, 2022

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**AMELIA MARQUEZ, an individual;
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Case No. DV 21-00873

Hon. Michael G. Moses

**PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION SEEKING CLARIFICATION
OF THE PRELIMINARY
INJUNCTION AND TO DECLARE
INVALID THE TEMPORARY
EMERGENCY RULE PUBLISHED BY
DEFENDANT THE MONTANA
DEPARTMENT OF PUBLIC HEALTH
AND HUMAN SERVICES IN
RESPONSE TO THIS COURT'S
APRIL 21, 2022 ORDER**

INTRODUCTION

“The court’s decision leaves this department in an ambiguous and uncertain situation.”
Department of Public Health and Human Services Notice of Adoption of Temporary
Emergency Rule, ¶ 6.¹

On April 21, 2022, this Court issued its Findings of Fact, Conclusions of Law and Order (hereinafter “Order”) enjoining Defendants from enforcing “any aspect of [Senate Bill 280² (“SB 280”)] during the pendency of this action according to the prayer of the Plaintiffs’ motion and complaint[.]” Order at p. 35, ¶ 5(a). The reference to “any aspect” of SB 280 necessarily included restraining the implementation of the 2021 rule the State promulgated pursuant to SB 280, which simply mirrored SB 280’s language. There is nothing “ambiguous” or “uncertain” about the Court’s Order. Nevertheless, in what might charitably be described as willful ignorance, Defendants rely on their purported confusion to justify adopting an *even more draconian policy* deliberately intended to harm transgender Montanans. The Court should not allow these tactics. The Court has the authority to clarify its already unambiguous Order and eliminate Defendants’ alleged confusion. It should exercise that authority here.

At the time of its enactment, SB 280 represented a stark departure from the then-existing policy of the Montana Department of Public Health and Human Services (“DPHHS”) that had been in place since 2017 (“the 2017 regulations”). The 2017 regulations did not impose a surgical requirement and instead “permitted a transgender person to amend his or her original birth certificate by submitting to DPHHS a completed gender designation form attesting to gender

¹ A true and correct copy of this Department of Public Health and Human Services Notice of Adoption of Temporary Emergency Rule (hereinafter “Temporary Rule”) is attached as Exhibit “D” to the Declaration of Akilah Lane (“Lane Decl.”).

² SB 280, 67th Leg. Reg. Sess. (Mont 2021). As this Court concluded, “SB 280 provides that the original sex designation on a birth certificate may be amended only if [the Department of Public Health and Human Services] receives a certified copy of an order from a court with appropriate jurisdiction including that the sex of the applicant has been ‘changed’ by surgical procedure.” Order ¶ 63.

transition or providing government-issued identification displaying the correct sex designation or providing a certified court order indicating a gender change.” Order ¶¶ 61-62. This is undisputed.

Initially, for more than a month after this Court entered its Order, Defendants failed to take any action to comply with the Order. Then, after weeks of inaction, DPHHS published the Temporary Rule in violation of §2-4-303, MCA, the state law limiting when emergency rules can be issued. DPHHS claimed that the Temporary Rule corrects the “confusion” created by this Court’s Order. Temporary Rule ¶ 6. Remarkably, as part of this Temporary Rule, DPHHS announced that it will “not authorize the amendment of the sex identified/cited on a birth certificate based on gender transition, gender identity, or change of gender” under any circumstances other than to correct a scrivener’s or data entry error or an original misidentification shown by genetic testing. Temporary Rule ¶¶ 11, 17(2).

This new policy flagrantly circumvents this Court’s Order and the established law of Montana that a preliminary injunction “prevents further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.” Order ¶ 138 (citing *City of Billings v. Cty. Water Dist.*, 281 Mont. 219, 226, 935 P.2d 246, 250 (1997)); *see also Yockey v. Kearns Properties, LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185 (the “function of a preliminary injunction is to preserve the *status quo* and to minimize the harm to all parties pending full trial”). Despite this Court’s recognition of the irreparable harms suffered by transgender people when they are denied access to accurate birth certificates, Defendants unilaterally have decreed that transgender Montanans should now be totally unable to obtain a sex marker correction. This new and total ban only applies when requested birth certificate amendments are based on “gender transition, gender identity, or change of gender[.]” Temporary Rule ¶ 11. The ban is irreconcilable with the findings and directives set forth in this Court’s Order.

Plaintiffs respectfully request that this Court (1) clarify that the Order restored the status quo of the 2017 regulations; (2) compel Defendants, as well as their agents, employees, representatives, and successors, to perform their obligations under the Order and preserve the status quo by reverting to the 2017 regulations (3) declare that the Temporary Rule, which violates the Order as well as state law, is unlawful and void; and (4) grant any other relief the Court deems just.

FACTUAL AND PROCEDURAL BACKGROUND

On July 16, 2021, Plaintiffs Amelia Marquez and John Doe (collectively “Plaintiffs”) filed a complaint challenging the constitutionality of Montana’s SB 280 (the “Act”), which places undue burdens on transgender people seeking to conform the sex designation on their birth certificates with their gender identity. On July 21, 2021, Plaintiffs filed a Motion for Preliminary Injunction. On August 17, 2021, Defendants responded to Plaintiffs’ Motion for Preliminary Injunction and also submitted a Motion to Dismiss the Complaint. On December 22, 2021, this Court heard argument on the various Motions, and, on March 4, 2022, both Parties submitted proposed findings of fact and conclusions of law.

On April 21, 2022, this Court issued its Order. The Order contains several key findings, including but not limited to the following:

- “Living one’s life consistently with one’s gender identity includes using identity documents that accurately reflect one’s gender identity.” Order ¶ 55.
- “The procedures in place prior to the effective date of SB 280 permitted a transgender person to amend his or her original birth certificate by submitting to DPHHS a completed gender-designation form attesting to gender transition or providing government-issued identification displaying the correct sex designation or providing a certified court order indicating a gender change.” Order ¶ 61.

- “A birth certificate is an essential government-issued document that individuals use for various important purposes throughout their lifetime.” Order ¶ 69.
- “A mismatch between someone’s gender identity and sex designation on their birth certificate discloses that person’s transgender identity- a profoundly private piece of information in which a transgender person has a reasonable expectation of privacy. Order ¶ 71.
- “Transgender people who are denied accurate birth certificates are deprived of significant control over where, when, how, and to whom they disclose their transgender identity.” Order ¶ 72.
- “A mismatch between someone’s gender identity and the information on their birth certificate also subjects transgender people to discrimination and harassment in a variety of settings, including employment, healthcare, and interactions with government employees and officials.” Order ¶ 73.
- “A mismatch between someone’s gender identity and the information on their birth certificate may even subject them to violence.” Order ¶ 74.
- “Only transgender individuals are subjected to [the procedures and burdens of SB 280] in order to have a birth certificate that accurately reflects their gender.” Order ¶ 113.
- “Plaintiffs are entitled to a preliminary injunction based on their pleadings and uncontested evidentiary submissions.” Order ¶ 149.
- “Plaintiffs have described injury due to being unable to change the sex designations on their birth certificates” Order ¶ 172.
- “The last actual, peaceable, noncontested condition preceding the controversy in this matter was that which existed prior to the enactment of SB 280.” Order ¶ 181.

Soon after the Order was entered, and in reliance on the clear directive issued by the Court, individuals began contacting DPHHS to change the gender marker on their birth certificate. DPHHS, however, refused to permit any amendments, inexplicably informing individuals that it could neither help them nor comment about whether DPHHS intended to provide a process for individuals to make such a change. *See* Lane Decl. ¶ 3; *see also* Gerstner Decl. ¶¶ 3-5, Exhibit G; Lane Decl. Exhibits A and B.

On a call between counsel for the Parties on May 5, 2022, Plaintiffs' counsel asked how Defendants intended to comply with the Order. Lane Decl. ¶ 4. Defendants' counsel stated that they were working with DPHHS "on its obligations under" the Order and would inform Plaintiffs of their plan as soon as possible. Lane Decl. ¶ 4-5. After waiting for almost two more weeks with no word or justification from Defendants for their continued noncompliance with the Order, Plaintiffs advised Defendants that they would seek judicial intervention if Defendants continued to defy the Order. *See* Lane Decl. ¶ 7; *see also* Lane Decl. Exhibit C.

Pursuant to Rule 37, M.R.Civ.P., at the request of Plaintiffs, counsel for the Parties met on May 23, 2022, in an attempt to resolve the issue without court involvement. Lane Decl. ¶¶ 7-8. At that meet-and-confer meeting, Plaintiffs' counsel again apprised Defendants' counsel of Defendants' duty to comply with the Preliminary Injunction. *Id.* ¶ 8. Importantly, Defendants' counsel agreed with Plaintiffs' counsel that, when a preliminary injunction is issued, the obligations of the parties ordinarily revert to the status quo that preceded the dispute. *Id.* At that meeting, counsel for Defendants did not offer any justification for why, in this instance, Defendants had not reverted to the status quo. *Id.*

As the Court noted in its Order, returning to the status quo meant returning to the procedures in place as part of the 2017 regulations. Rather than comply with the Order and process

requests pursuant to the 2017 regulations, however, on May 23, 2022, *the same day* and shortly after that the Parties met, DPHHS issued the Temporary Rule. Lane Decl. ¶ 9. The Temporary Rule makes it effectively impossible for a transgender Montanan to amend the gender marker on a birth certificate, going well beyond the severe restrictions codified by SB 280. *See* Lane Decl. Exhibit D.

The Temporary Rule, in relevant part, provides that gender marker/sex may *only* be changed if:

- (a) “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 . . . ; or
- (b) 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.”

Temporary Rule ¶17(2) (emphasis added).

Through the Temporary Rule, and in violation of the Court’s Order, Defendants have further regressed from an unconstitutionally restrictive process requiring surgery to modify the gender marker on a birth certificate to an absolute ban on transgender individuals obtaining such a modification. This is not the relief Plaintiffs sought in their Complaint or their Motion for a Preliminary Injunction, and it blatantly flouts both the spirit and letter of the Court’s Order.

ARGUMENT

To the extent that there is any ambiguity in this Court’s Order (there is not), and to address any lingering confusion that Defendants may have about how to comply with that Order (there should be none), this Court has equitable power to issue clarifying instructions. District courts retain the jurisdiction to enter any necessary orders to “enforce [their] judgements and decrees.”

Smith v. Foss, 177 Mont. 443, 446-47, 582 P.2d 329 (1978) (internal citations omitted). The Montana Supreme Court has recognized that a district court’s jurisdiction to enforce its judgment includes the inherent power “to make such orders and issue such process as may be necessary” to ensure the effectiveness of interlocutory orders.³ *Id.*

Courts may interpret or clarify a prior judgment in order to “more precisely explain or specify the original meaning or effect of the judgment or provide additional specification necessary to implement it.” *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 19, 402 Mont. 92, 475 P.3d 748, (citing *Smith*, 177 Mont. At 446-47, 582 P.2d at 331-32; *La Plant v. La Plant*, 170 Mont. 155, 159, 551 P.2d 1014, 1016 (1976)). Clarification orders neither involve nor effect a substantive alteration or amendment of the prior judgment, but instead merely explain and refine rights already recognized in the initial order. *Id.* (internal citations omitted).

Clarification orders go hand in hand with injunctive relief because an injunction need not “explicitly prohibit every conceivable plan designed to defeat it.” *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc’y*, 774 F.3d 935, 954 (9th Cir. 2014). Rather the scope and requirements of an injunction are ascertained “in light of its purpose and history—in other words, ‘what the decree was really designed to accomplish.’” *Salazar v. Buono*, 559 U.S. 700, 762 (2010) (Breyer, J, dissenting) (citing *Vicksburg v. Henson*, 231 U.S. 259, 273 (1913)). They are not solely based on the “strict letter” of the order. *Inst. of Cetacean Rsch.*, 774 F.3d at 949 (citing *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942).

³ Additionally, “[c]ourts have the power to enforce their judgments, orders or process through their power of contempt.” *Gillispie v. Sherlock*, 279 Mont. 21, 24, 929 P.2d 199, 201 (1996). Pursuant to § 3-1-501 (1)(e), MCA, “disobedience of any lawful judgment, order or process of the court” is a contempt of court. An indirect or constructive contempt is one “not committed in the immediate view and presence of the court or judge in chambers” and is civil if “the sanction imposed seeks to force the contemnor’s compliance with a court order and the contemnor may avoid the sanction by complying with the subject order.” *Fouts v. Mont. Eighth Judicial Dist. Court*, 2022 MT 9, ¶ 7, 407 Mont. 166, 177, 2022 Mont. LEXIS 10 (internal citations and quotations omitted). Proceedings for indirect civil contempt “may be initiated . . . sua sponte by the court.” *Id.* at ¶ 8.

Here, it is undeniable what the Order was intended to accomplish: ensuring that Defendants allow Plaintiffs and all transgender Montanans to avail themselves of the 2017 regulations during the pendency of this case. Nonetheless, based on Defendants' feigned confusion, it is necessary for the Court to explain and refine rights already recognized in the initial order. *Meine* at ¶ 19 (internal citations omitted).

I. This Court's Order Directs Defendants to Cease Enforcement of SB 280 and Revert to the Status Quo Pending the Ultimate Resolution of This Litigation.

In its Order, this Court reiterated the well-established principle that "[t]he purpose of a preliminary injunction is to prevent 'further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.'" Order ¶ 138 (citing *City of Billings*, 281 Mont. 219 at 226). This Court also emphasized the Montana Supreme Court's holding that "the status quo is 'the last actual, peaceable, noncontested condition which preceded the pending controversy....'" Order ¶ 139 (quoting *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839). As the Court found, "[t]he last actual, peaceable, noncontested condition preceding the controversy in this matter was that which existed *prior to the enactment of SB 280*." Order ¶ 181 (emphasis added). The Court explained:

The procedures in place *prior to the effective date of SB 280* permitted a transgender person to amend his or her original birth certificate by submitting to DPHHS a completed gender-designation form attesting to gender transition or providing government-issued identification displaying the correct sex designation or providing a certified court order indicating a gender change.

Order ¶ 61 (emphasis added).

At the hearing on the Preliminary Injunction in December 2021, the Court specifically asked Plaintiffs' counsel to describe the status quo that would control the amendment process if a preliminary injunction were entered. Plaintiffs' counsel replied that reverting to the 2017 regulations constituted preserving the status quo. Lane Decl. ¶ 1. Defendants' representatives were

present for that hearing and did not object to the assertion that, if a preliminary injunction were entered, preserving the status quo would involve reverting to the 2017 regulations. *Id.*

The Court's Order, the colloquy at the December 2021 hearing, and Defendants' concession during the Parties' May 2022 meet-and-confer meeting (*i.e.*, that reverting to the status quo is the ordinary result of a preliminary injunction) leave no room for misinterpretation or confusion. The clear directive of the Order is that, during the pendency of this litigation, Defendants must implement the procedures that existed prior to the enactment of SB 280. This means permitting transgender people to amend the sex marker on their birth certificates as provided in the 2017 regulations.

Defendants argue that when they issued the 2021 regulation—a regulation issued pursuant to the now enjoined SB 280 that simply mirrored SB 280's language— they extinguished all prior regulations, and, therefore, the 2017 regulations were no longer applicable. Thus, Defendants argue, they are currently not bound by any birth certificate amendment procedures. This misconstrues the impact of the Court's Order and the law governing preliminary injunctions. *First*, the 2021 regulation itself has necessarily been enjoined by the Court as part of the injunction against enforcing “any aspect” of SB 280. The 2021 regulation qualifies as an “aspect” of SB 280 that the Court enjoined because the 2021 regulation and its purported replacement of the 2017 regulations only occurred because of the now-enjoined SB 280. It logically follows that, while a law is enjoined, it does not have any legal effect. That leaves the 2017 regulations in place as the operative set of procedures.

Second, returning to the status quo requires returning “to the last, actual, peaceable non-contested condition preceding the controversy.” Order ¶ 139 (quoting *Porter*, 192 Mont. 175 at 181). The 2017 regulations represent the status quo that existed before SB 280 was enacted. Order

¶ 181. The history of how the 2017 regulations came about or how the enjoined SB 280 and regulations adopted pursuant to it purported to affect the 2017 regulations are irrelevant to defining the status quo.

II. Defendants' Temporary Rule Conflicts with the Letter and Spirit of the Preliminary Injunction Ordered by This Court.

Rather than returning to the status quo as required by the Order, Defendants waited for nearly five weeks, without providing any information to the public, and then announced that they had adopted the Temporary Rule. The Temporary Rule not only questions the soundness of this Court's findings and legal conclusions, but also makes it entirely clear that transgender individuals are the intended target of Defendants' efforts to restrict the process of obtaining amendments to birth certificates. The Temporary Rule's ban on amendments to birth certificates explicitly states that the rule "does not authorize the amendment of the sex identified/cited on a birth certificate based on gender transition, gender identity, or change of gender." Temporary Rule ¶ 11. It would be difficult to find a clearer example of a violation of the Montana Constitution's guarantee of equal protection of the laws. The Preliminary Injunction proceedings were animated by a concern for the health and well-being of Montana's transgender community. The Order echoes those issues and concerns. The Temporary Rule blatantly disregards those concerns, treating transgender people different from all others, with no discernible valid justification.

III. Defendants Exceeded the Scope of Their Rulemaking Power by Implementing the Temporary Rule.

Not only is the Temporary Rule an attempt to defy the letter and spirit of the Order, but additionally DPHHS exceeded its rulemaking power by adopting the Temporary Rule.⁴ Section 2-

⁴ In the event that the Temporary Rule remains in effect, Plaintiffs intend to seek leave to amend their Complaint to include violations of Montana's Administrative Procedures Act, § 2-4-101 *et seq.*, MCA.

4-303, MCA imposes strict requirements for the issuance of emergency rules. Defendants complied with none of them. That statute provides that:

- “An emergency rule may be adopted only in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety or welfare that cannot be averted or remedied by any other administrative act.”
- “The sufficiency of the reasons justifying a finding of imminent peril and the necessity for emergency rule making must be compelling. . . .”
- “Because the exercise of emergency rule making power precludes the people’s constitutional right to prior notice and participation in the operations of their government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse.”
- “The sufficiency of the reasons for finding imminent peril . . . is subject to judicial review upon petition by any person. The matter must be set for hearing at the earliest possible time and takes precedence over all other matters except older matters of the same character.”

Pursuant to § 2-4-303 (1)(a), MCA, “[a]n emergency rule may be adopted only in circumstances that *truly and clearly constitute an existing imminent peril to the public health, safety, or welfare* that cannot be averted or remedied by any other administrative act.” (Emphasis added.) The Temporary Rule fails to meet these requirements. It does not describe any “imminent” threat to public health, safety, or welfare. Defendants having a preliminary injunction entered against their enforcement of any aspect of SB 280 does not create such an imminent threat. Nor does the fact that the parties who lost the motion claim not to understand what the Court has done. A motion for reconsideration or a stay or an appeal may all be appropriate where a party does not

understand or agree with a Court’s ruling, but a bogus emergency rule clearly is not appropriate. The Montana Code requires “compelling” evidence of imminent threat to public health and safety; Defendants have produced none. *Id.*

Defendants claim that the Order creates confusion as to what processing procedures apply in the aftermath of the Preliminary Injunction. This is incorrect. The Order unmistakably provides that the 2017 regulations are currently the controlling procedures for processing requests to amend birth certificates. Plaintiffs request that the Court alleviate Defendants’ purported “confusion” by clarifying that its Order requires Defendants to revert to the status quo of the 2017 regulations and declaring the Temporary Rule unlawful and void.

Further, the Montana Code states that the predicate for a finding of imminent threat is that there exists no other “administrative act” that could ameliorate the threat. Section 2-4-303(1)(a), MCA. This Court’s Order provided Defendants with a blueprint for exactly what administrative actions to undertake to avert any imminent threat to public health or safety—i.e., by simply reverting to the status quo of the 2017 regulations.

Finally, the procedure for adopting an emergency rule requires that, “[p]rior to adoption of an emergency rule, the agency *shall* make a good faith effort to provide special notice to each committee member and each member staff.” Section 2-4-303(1)(c)(ii), MCA (emphasis added). Defendants failed to provide such notice, thereby avoiding public accountability. DPHHS certainly knows how to provide such notice. It simply chose not to.

To address DPHHS’s overreach, lawmakers on the Montana State Legislature Interim Committee on Children, Families, and Health and Human Services (the “Committee”) issued a letter to Director Adam Meier complaining of the lack of notice and notifying him that the DPHHS’s actions were “unlawful.” Lane Decl, Exhibit F. The Committee demanded that the

Temporary Rule be “immediately rescind[ed].” *Id.* In doing so, the Committee affirmed that there was no imminent peril that could not be remedied through other administrative action, stating: “[I]t is patently obvious that no such imminent peril could exist. Waiting until court action concludes can easily be done and would not result in any imminent danger to the public health, safety or welfare.” *Id.* The Committee further asserted that DPHHS did not follow the appropriate procedure and make a “good faith effort to provide special notice to each committee member.” *Id.* The Committee did not mince words in describing DPHHS’s actions as “the unlawful misuse of emergency rulemaking to circumvent the democratic means of adopting rules that require citizen input, the consideration of expert evidence, and a deliberative process within the agency.” *Id.*

IV. Conclusion

Transgender Montanans, including Plaintiffs, continue to be denied access to a birth certificate accurately reflecting their identity and thus continue to suffer the precise injury that this Court found irreparable in its order enjoining SB 280. Order ¶¶ 175-179. Every day in which Defendants willfully refuse to comply with this Court’s Order is another day that Plaintiffs—and indeed all transgender Montanans possessing inaccurate identity documents—remain at risk of having their transgender status involuntarily disclosed, thereby subjecting them to discrimination and even violence. Defendants’ palatable contempt for the transgender individuals singled out by the Temporary Rule serves as a continued “painful and stigmatizing reminder of the State of Montana’s refusal to recognize them to be who they know themselves to be.” Order ¶ 11.

This Court could not have foreseen that, rather than comply with its directive or seek a stay, Defendants would attempt to circumvent the preliminary injunction by pursuing an alternative route to arrive at a policy that ensures that no transgender individual in Montana is able to amend the gender marker on their birth certificate.

Accordingly, for the above stated reasons, Plaintiffs respectfully request that the Court:

- (a) “Clarify” that its Order requires reverting back to the 2017 regulations governing the amendment of birth certificates;
- (b) Compel Defendants, as well as their agents, employees, representatives, and successors, to perform their obligations under this Court’s Order and preserve the status quo by reverting to the 2017 regulations;
- (c) Order that the Temporary Rule is unlawful and void because it violates § 2-4-303, MCA; and
- (d) Grant any other relief the Court deems just, including but not limited to holding Defendants in contempt.

Dated: June 7, 2022

Respectfully submitted,

By: /s/ Akilah Lane
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CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing Brief in Support of Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction and to Declare Invalid the Temporary Emergency Rule Published by Defendant the Montana Department of Public Health and Human Services in Response to this Court's April 21, 2022 Order via email on counsel for the Defendants:

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Electronically signed by Krystel Pickens on behalf of Akilah Lane
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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 ADAM MEIER, 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 LANE
IN SUPPORT OF PLAINTIFFS'
MOTION SEEKING CLARIFICATION
OF THE PRELIMINARY
INJUNCTION AND TO DECLARE
INVALID THE TEMPORARY
EMERGENCY RULE PUBLISHED BY
DEFENDANT THE MONTANA
DEPARTMENT OF PUBLIC HEALTH
AND HUMAN SERVICES IN
RESPONSE TO THIS COURT'S
APRIL 21, 2022 ORDER**

I, Akilah Lane, submit the following Declaration in support of Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction and to Declare Invalid the Temporary Emergency Rule Published by Defendant the Montana Department of Public Health and Human Services in Response to this Court's April 21, 2022 Order. 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 my personal knowledge and also on becoming familiar with the documents attached to this Declaration. I could competently testify to the matters set forth in this Declaration.

1. On December 22, 2021, a hearing was held before this Court on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss. At that hearing, this Court specifically asked Plaintiffs to describe the status quo that would control the amendment process should a preliminary injunction be entered. Plaintiffs replied that reverting to the 2017 regulations constituted preserving the status quo. Defendants' representatives were present for that hearing and did not object to the assertion that, if a preliminary injunction were entered, preservation of the status quo would require reversion to the 2017 regulations.
2. On April 21, 2022, this Court granted a Preliminary Injunction in this case ("Order").
3. Soon after the news of the Order spread, ACLU-MT began receiving calls and intake inquiries concerning DPHHS not processing gender marker changes for birth certificates notwithstanding this Court's issuance of the Order. True and correct copies of the KTVH and Daily Montana articles cited to on page six of Plaintiffs' Brief In Support of Motion Seeking Clarification of the Preliminary Injunction and to Declare Invalid the Temporary Emergency Rule Published by Defendant the Montana

Department of Health and Human Services in Response to this Court's April 21, 2022 ("Plaintiffs' Brief") are attached to this Declaration, respectively, as Exhibits A and B.

4. On May 5, 2022, counsel for the Parties met via phone. On that call, counsel for Plaintiffs asked how counsel for Defendants intended to ensure that their clients complied with the Order. Defendants did not provide any specifics, but stated that they were working with DPHHS and would let Plaintiffs know when they had something to share. A true and correct copy of the AP news article cited on page six of Plaintiffs' Brief is attached to this Declaration as Exhibit C.
5. Counsel for Defendants' sent a follow-up email after the May 5th call reiterating that they were "actively working with DPHHS on its obligations under" the Order and would inform Plaintiffs of their plan as soon as possible.
6. For the next two weeks, Plaintiffs heard no word or justification from Defendants regarding their continued non-compliance with the Order.
7. On May 20, 2022, counsel for Plaintiffs contacted counsel for Defendants to advise them of Plaintiffs' intent to seek judicial intervention and request that the Parties schedule a meet and confer to attempt to resolve the issue without court involvement.
8. On May 23, 2022, counsel for the Parties held a meet and confer where Plaintiffs' counsel again apprised Defendants' counsel of Defendants' duty to comply with the Preliminary Injunction Order. Defendants' counsel agreed with Plaintiffs' counsel that when a preliminary injunction is issued, ordinarily the obligations of the parties are to revert to the status quo that preceded the dispute. Counsel for Defendants

offered no justification for why, in this instance, Defendants decided not to revert to the status quo.

9. Later in the day on May 23, 2022, counsel for Defendants emailed counsel for Plaintiffs a copy of the Department of Public and Human Services Notice of Adoption of Temporary Emergency Rule, a true and correct copy of which is attached to this Declaration as Exhibit D. A true and correct copy of the AP news article cited on page seven of Plaintiffs' Brief is attached to this Declaration as Exhibit E.
10. A true and correct copy of the letter sent by lawmakers on the Montana State Legislature Interim Committee on Children, Families, and Health and Human Services to Director Adam Meier on May 26, 2022 is attached to this Declaration as Exhibit F.

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 7th day of June, 2022

/s/ Akilah Lane
Akilah Lane

EXHIBIT A

No birth certificate fix for transgender Montanans despite court order

HELENA — The Montana state health department is not providing the forms needed for people to change the sex on their birth certificate, despite a recent court order.

The order came out of a lawsuit over a 2021 law requiring transgender Montanans get surgery and a court order to get a different sex on their birth certificate. On April 21, a Yellowstone County judge said the health department [could not enforce the law](#) until a court decides if it is constitutional. Instead, the health department was told to return to the status quo, which was [a 2017 rule](#) that simplified the process for people to change their birth certificate.

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The suit was filed in state District Court in Billings by two transgender Montanans who said the [2021 law](#) violated their right to privacy and equal protection under the law.

Under the 2017 rule, transgender Montanans needed to submit an affidavit and a gender designation form to get an updated birth certificate. The gender designation form was last available on the Montana Department of Public Health and Human Services website in April 2021, according to web archives.

Previous DPHHS gender designation form

When MTN News went to the state birth and death certificates office Friday, staff did not provide a copy of the form. Staff said the Montana Department of Justice and the health department's legal counsel were still reviewing the judge's decision.

When Dean, a transgender man born in Montana but now lives in Minnesota, heard about the preliminary injunction, he said he reached out to the state's vital statistics office to try to find out if he could get his sex changed on his birth certificate. Dean is a man, he said, but on his birth certificate he is still listed as female.

Dean requested his last name not be used because of his concerns about future employment.

Without a fixed birth certificate, Dean said he doesn't want to change any of his other official documents because they won't match. He avoids situations where he needs to submit identification documents, he said, because it feels like people are asking him what is in his pants. He's refrained from taking promotions and getting new insurance to avoid resubmitting documents.

"I don't want to have those conversations again with that big 'F' on all my documents," Dean said.

A DPHHS spokesperson, Chuck Council, would not respond to questions about how transgender Montanans can get their birth certificates fixed. Council said the ongoing lawsuit prevented him from providing any information.

The Montana Supreme Court's website did not show that the state had appealed Moses' decision as of Friday. The state has also not filed anything

yet on the district court level, according to the case's register of actions.

The 2021 law was created by Senate Bill 280, which passed the 2021 Montana Legislature and by fairly close margins – 26-23 in the Senate and 54-46 in the House – with all “yes” votes coming from Republican lawmakers. Gov. Greg Gianforte signed it into law in April 2021.

Dean said he still doesn't understand why Montana lawmakers make it so hard for people like him.

“My life is literally irrelevant to them,” Dean said. “Let me make my own life easier.”

The Montana Attorney General's Office had not responded MTNs request for comment as of Friday evening.

EXHIBIT B

No appeal, no comment and no changes allowed: Birth certificate fix in limbo for Montana

Judge issued temporary injunction in lawsuit, but Montana officials not explaining delay



Even though a judge in Yellowstone County has issued a [temporary injunction](#), stopping a law passed by the 2021 Legislature from taking effect, the Daily Montanan has confirmed that individuals wanting to change a sex

designation on a birth certificate still cannot.

Nearly two weeks ago, Yellowstone County District Judge Michael G. Moses ruled that the law change that prohibited individuals from changing the sex designation of male or female on a birth certificate without first providing proof of a surgical procedure and court order likely violated the state's constitution. In a ruling, he issued a temporary injunction, which is not a final decision, but allowed the law to revert to the standard before the new law was passed.

Prior to the 2021 law, Montana had a one-page form to change the status of a birth certificate.

Ashley Nerbovig, a reporter for the Montana Television Network, [first reported](#) a transgender man had attempted to change his birth certificate but was denied by the state. On Monday morning, the Daily Montanan confirmed with an employee that even though the law has been enjoined and no appeal had been filed, she had been ordered by the state Department of Public Health and Human Services not to implement the previous process. The employee said that she was not a lawyer and had no further direction, and was awaiting guidance from the administration. She said she was keeping contact information of people who had called about a change.

The American Civil Liberties Union of Montana, which has successfully argued the case, said it had no comment on the current status.

The Daily Montanan asked the Montana Attorney General's Office for clarification or if it had plans to appeal the injunction on Monday.

"We're not participating in your blog," said spokesperson Emilee Cantrell.

The Department of Public Health and Human Services acknowledged that it

had also received questions from the Daily Montanan on Monday, including whether it planned to appeal the ruling, or the process it was planning for changing the designation on a birth certificate, but by the end of the day, it had not provided answers or clarification.

EXHIBIT C

Montana not following transgender birth certificate ruling

On April 21, a judge temporarily blocked a state law that required trans people to undergo surgery before they could change their birth certificate gender.

May 21, 2022, 8:18 AM MDT



HELENA, Mont. — It's been a month since a Montana judge temporarily blocked enforcement of a state law that required transgender people to undergo surgery before they could change their gender on their birth certificate, and the state still isn't in compliance with the court order, the

ACLU of Montana said.

Jon Ebelt, spokesperson for the state health department, said the agency is still working with the Department of Justice to review the April 21 ruling and its implications. He did not respond to an email asking if that meant the state was evaluating whether to appeal the order.

"We have continued to be patient in allowing the state time to comply with the court ordered preliminary injunction," the ACLU of Montana said in a recent statement. "However, close to one month has passed and the State's willful indifference to the court order is inexcusable."

Montana is among a growing list of Republican-controlled states that have moved to restrict transgender rights, including requiring student-athletes to participate in sports based on their gender assigned at birth or making it illegal for transgender minors to be treated with hormones or puberty blockers.

Beginning in late 2017, transgender residents could apply to change the gender on their Montana birth certificate by filing a sworn affidavit with the health department. District Court Judge Michael Moses' order requires the state to revert back to that process while the challenge to the new law is pending.

"The fact that the state refuses ... evidences its lack of respect for the judiciary and utter disregard for the transgender Montanans who seek to have a birth certificate that accurately indicates what they know their sex to be," the ACLU said.

If the state continues to violate the preliminary injunction, ACLU of Montana staff attorney Akila Lane said the organization would ask the court to step in.

"We're only looking for the state to comply" with the preliminary injunction, Lane said Friday.

A week after the ruling was issued, Billings attorney Colin Gersten inquired about an updated gender designation application form on behalf of a friend. The Office of Vital Records responded saying: "We will contact you once we are able to discuss your options."

Gersten made another inquiry about the proper form on May 11 and did not receive a reply, according to emails shared with The Associated Press.

Many transgender people choose not to undergo gender-confirmation surgeries. Such procedures are sometimes deemed unnecessary or too expensive, two transgender Montanans argued in their July 2021 lawsuit.

Republican state Sen. Carl Glimm, who sponsored the legislation, has argued that the Department of Public Health and Human Services overstepped its authority in 2017 by changing the designation on a birth certificate from "sex" to "gender" and then setting rules by which the designation could be changed.

Half the states, plus the District of Columbia, allow transgender residents to change the gender designation on their birth certificates without surgical requirements or court orders, according to the policy organization Movement Advancement Project. Just over a dozen states require surgical intervention, and such barriers are being challenged in several states, including Montana.

Over the past few years, other legislation has been aimed at transgender people, and the new laws are being challenged in court.

Alabama passed a law making it a felony to prescribe gender-confirming

puberty blockers and hormones to transgender minors, but a judge has blocked the law. In Texas, Gov. Greg Abbott ordered child welfare officials to investigate parents of children receiving puberty blockers and other gender-confirming care as potential abuse. That, too, was blocked by a judge.

At least a dozen states have recently passed laws to ban transgender girls and women from participating in female sports, most recently Utah.

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EXHIBIT D

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

| | | |
|------------------------------------|---|--------------------------|
| In the matter of the adoption of a |) | NOTICE OF ADOPTION OF |
| Temporary Emergency Rule |) | TEMPORARY EMERGENCY RULE |
| pertaining to changing the |) | |
| identification of sex on birth |) | |
| certificates |) | |

TO: All Concerned Persons

1. The Department of Public Health and Human Services (department) adopts the following temporary emergency rule because it desires to provide for the accurate identification of sex on birth certificates. As a result of an April 21, 2021 preliminary injunction issued against the department with respect to enforcement of S.B. 280, codified at Mont. Code Ann. (MCA) § 50-15-224, it is necessary to adopt this emergency rule to govern the procedures of the Office of Vital Records and to inform the public concerning when the Office of Vital Records will change the identification of an individual's sex on the birth certificate, to ensure such accuracy.

2. 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., MCA §§ 50-15-102, 50-15-103. Montana statutes contemplate that the birth certificates and other records of birth include the sex of the child. See, e.g., MCA §§ 50-15-203 (written report which constitutes a birth certificate for a child of unknown parentage shall contain the sex of the child); 50-15-224 (amendment of the sex of a person cited on a birth certificate); 50-15-304 (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) & (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); 37.8.311 (amendment of birth certificate for sex changes).

3. In 2007, the department adopted a new rule (codified at 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 2127 (Dec. 20, 2007), corrected, 2008 MAR 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 § 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 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 MCA § 50-15-224. 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.

4. 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.

5. 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

¹ In 2015, the department made nonsubstantive revisions to the regulation. See MAR Notice 37-714, 2015 MAR 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.

SB 280 during the pendency of this action according to the prayer of the Plaintiffs' motion and complaint." Decision at 35.³

6. 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, 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, immediately, to correct this confusion and clearly set forth the standards under which such applications will be processed. Montanans deserve to know how such applications will be handled in this period. OVR has received several such applications and also has received a number of inquiries about how to submit such applications and on the status of currently pending applications. All of these facts combine to require immediate action on the part of the department.

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).

7. 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 un rebutted 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.

8. 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

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

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.

9. The department now considers 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 emergency rule.

10. 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

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*, 42 *Endocrine Review* 219-258, 228 (June 2021) (published online Mar. 11, 2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8348944/>; see also “Gender,” *Lexico*, <https://www.lexico.com/en/definition/gender> (“Gender” means “[e]ither of the two sexes ... when considered with reference to social and cultural differences rather than biological ones”). 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”).

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, this emergency rule does not redesignate, substitute, or conflate the “sex” data element as a “gender” data element on birth certificates, as

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., MCA § 50-15-304 (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. MCA § 50-15-203. 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 MCA § 50-15-223(1)(b), (5). 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 MCA 27-31-101; 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 MCA 50-15-223(1)(a) (referencing MCA 50-15-311). Unlike these changes that reflect historical as well as legal facts, sex—as reported on a birth certificate—records an immutable, unalterable historic fact.

the 2017 rule did, but maintains it as the “sex” data element in accordance with the relevant statutory directives and scientific evidence.

11. 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, this emergency rule does not authorize the amendment of the sex identified/cited on a birth certificate based on gender transition, gender identity, or change of gender.

12. 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 emergency rule, 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 emergency rule, 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.

13. 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, in this emergency rule, the department 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.

14. 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 have clear direction so that it can administer the vital records program in such a way that ensures the accuracy of such vital records.

15. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you require an accommodation, 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.

16. The temporary emergency rule is effective immediately, May 23, 2022.

17. The text of the emergency rule provides as follows:

EMERGENCY RULE I CHANGES TO IDENTIFICATION OF SEX ON BIRTH CERTIFICATES (1) In order to provide accurately for the identification of sex on birth certificates, this emergency rule supersedes ARM 37.8.311(5).

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

(a) 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

(b) 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: 2-4-303, 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, 5-15-223, MCA

18. The rationale for the temporary emergency rule is as set forth in paragraphs 1-14 and 19.

19. The department issues this temporary emergency rule because of the position that it finds itself in as a result of the district court's order, precluding the department from enforcing S.B. 280 during the pendency of the lawsuit challenging S.B. 280. The department intends to pursue a standard rulemaking procedure prior to the expiration of this temporary emergency rule, to adopt a similar permanent rule that would apply only when and to the extent that the department is subject to an injunction against enforcement of S.B. 280, codified at MCA § 50-15-224, or S.B. 280 is held invalid; otherwise, current ARM § 37.8.311(5) would apply. This would ensure that, consistent with the department's obligations both to carry out legislative directives and to comply with court orders, the Office of Vital Records has the directions that it requires to accept and process applications for changes to the sex identified on birth certificates, as well as to ensure the accuracy of such vital records.

20. 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 15 above or may be made by completing a request form at any rules hearing held by the department.

21. The bill sponsor notice requirements of 2-4-302, MCA, do not apply. Special notice, pursuant to 2-4-303, MCA, was made to each member of the Children, Families, Health, and Human Services Interim Committee and to each member of the committee's staff, using electronic mail on May 23, 2022.

/s/ Chad G. Parker

Chad G. Parker
Rule Reviewer

/s/ Adam Meier

Adam Meier, Director
Public Health and Human Services

Certified to the Secretary of State May 23, 2022.

EXHIBIT E

Montana bars birth certificate changes, even with surgery



BILLINGS, Mont. (AP) — Montana Gov. Greg Gianforte's administration says transgender people can not change their birth certificates even if they undergo gender-confirmation surgery, in defiance of a court order that temporarily blocked the Republican state's bid to restrict transgender rights.

The state health department said in an emergency rule that it would no longer record the category of "gender" on people's birth certificates, replacing that category with a listing for "sex" — either male or female — that can be changed only in rare circumstances.

Sex is “immutable,” according to the rule, while gender is a “social...construct” that can change over time.

“Sex is different from gender and an immutable genetic fact, which is not changeable, even by surgery,” said the rule from Public Health and Human Services director Adam Meier, a Gianforte appointee.

Only Tennessee, Oklahoma and West Virginia have similar sweeping prohibitions against changes to birth certificates, according to the civil rights group Lambda Legal. Bans in Idaho and Ohio were struck down in 2020, according to the group.

Other states also have recently sought to restrict transgender rights, including Indiana where [lawmakers on Tuesday](#) overrode their governor’s veto and banned transgender females from competing in girls school sports.

The Gianforte administration’s rule was issued just over a month after a state judge temporarily [blocked enforcement of a new Montana law](#) that requires transgender people to have undergone a “surgical procedure” before being allowed to change their gender on their birth certificates.

Judge Michael Moses ruled the law was unconstitutionally vague because it did not specify what procedure must be performed. The law also required transgender people to obtain a court order indicating they had a surgical procedure.

Moses’ order forced the state to revert back to a process adopted in 2017 that said transgender residents could apply to change the gender on their Montana birth certificate by filing sworn affidavits with the health department.

But state health officials said the April 21 ruling put them in “an ambiguous

and uncertain situation" and led them to craft the temporary emergency rule.

The changes exceed restrictions on transgender rights imposed by the Republican-dominated state Legislature and signed into law by Gianforte.

Shawn Reagor with the Montana Human Rights Network said the rule was "politically motivated and malicious" and would harm transgender people who want to fully participate in civil society, which includes recognition of their gender.

"It's being validated and seen for who you are. But even more so, it's being able to navigate society and be active in today's world without having a threat of violence or discrimination," Reagor said.

Democratic state lawmakers expressed outrage, calling the rule a "blatant abuse of power meant to undermine the checks and balances of our independent courts."

"While this rule is intended to make the lives of our transgender neighbors harder, it impacts all of us by eroding the rights that let us live our lives free from government overreach," said House Minority Leader Kim Abbott and Senate Minority Leader Jill Cohenour.

According to the rule, the sex listing can be changed only if someone's sex is misidentified when they're born or if the sex was wrongly recorded as a result of "a scrivener's error," according to the rule.

In response to questions about the new rule, the Department of Public Health and Human Services said "all individuals should be treated with dignity and respect."

"However," the agency statement continued, "as noted in the emergency rule, the Department has an obligation to ensure the accuracy of vital

records." Officials said the rule was consistent with state law and addresses "a critical regulatory gap" while obeying the April court ruling.

But attorney Akilah Lane with the ACLU of Montana — which sued to block the state law — said the group will take the matter back to Moses' court.

"The court order could not have been more clear. The court ordered the state to go back to the status quo," she said. "Instead, by issuing this emergency rule, they just further showed their true colors — that these laws and regulations are intended to harm transgender individuals."

Half of the U.S. states, plus the District of Columbia, allow transgender residents to change gender designation on their birth certificates without surgical requirements or court orders, according to the policy organization Movement Advancement Project that supports transgender rights.

Just over a dozen states require surgical intervention for changing gender on birth certificates and such barriers [have been challenged](#) in several states.

Many transgender people choose not to undergo gender-confirmation surgeries. Such procedures are sometimes deemed unnecessary or too expensive, two transgender Montana residents argued in their July 2021 lawsuit challenging the Montana law.

Over the last several years, legislation in numerous states has been aimed at limiting the rights of transgender people, and the new laws are being challenged in court.

Alabama passed a law making it a felony for doctors to prescribe such treatments as gender-confirming puberty blockers and hormones to transgender minors, but a judge has blocked the law.

In Texas, Republican Gov. Greg Abbott ordered child welfare officials to i

[investigate parents](#) of children receiving puberty blockers and other gender-confirming care as potential abuse. That effort was blocked by a judge.

At least a dozen states have recently passed laws to ban transgender girls and women from participating in female sports, [most recently Utah](#).

EXHIBIT F



Big Sky Country
MONTANA STATE LEGISLATURE

May 26, 2022

Director Adam Meier
Department of Public Health and Human Services
111 North Sanders, Room 301
Helena, MT 59604

Dear Director Meier:

As members of the Interim Committee on Children, Families, and Health and Human Services (CFHHS) charged with oversight of the Department of Public Health and Human Services (DPHHS), we write to request that the Department immediately rescind its unlawful emergency rule concerning Montanans' ability to correct the gender markers on their birth certificates. The Department's adoption of this rule is unlawful because it violates several sections of Montana Code Annotated (MCA) section 2-4-303, as set out more specifically below.

1. Last year, the Legislature passed HB 47 sponsored by Rep. McKamey (R), by votes of 99-1 in the House and 50-0 in the Senate, and Governor Gianforte signed it into law on April 16, 2021. HB 47 amended Montana Code Annotated (MCA) section 2-4-303 to require special notice in the event of emergency rulemaking. According to this new law, "prior to adoption of an emergency rule, the agency shall make a good faith effort to provide special notice to each committee member and each member of the committee staff." The Department violated this requirement in its adoption of the so-called emergency rule by failing to make any effort – let alone a "good faith effort" – to notify members of our Committee in advance of adoption. As documented in paragraph 21 of the notice of adoption, the Department notified us of the proposed rule at the time it was adopted—not prior to its adoption.

2. In addition to its failure to properly notify CFHHS members, the Department is in violation of MCA 2-4-303(1)(a), which requires that emergency rules be adopted "only in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any other administrative act." The same provision requires that the Department "state in writing its reasons" why there is "an existing imminent peril to the public health, safety, or welfare." The emergency rule fails to meet this basic requirement, rendering it plainly unlawful.

3. Not only is the emergency unlawful for failing to provide in writing the reasons that there is an imminent peril to the public safety, health, or welfare, but it is patently obvious that no such imminent peril could exist. Waiting until court action concludes can easily be done and would not result in any imminent danger to public health, safety, or welfare.

The above provisions are not merely hoops to be jumped through, but are meant to prohibit exactly what is happening here: the unlawful misuse of emergency rulemaking to circumvent the democratic means of adopting rules that require citizen input, the consideration of expert evidence, and a deliberative process within the agency. Indeed, the cited statute specifically says:

“Because the exercise of emergency rulemaking power precludes the people's constitutional right to prior notice and participation in the operations of their government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review upon petition by any person. The matter must be set for hearing at the earliest possible time and takes precedence over all other matters except older matters of the same character. The sufficiency of the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of judicial review...”

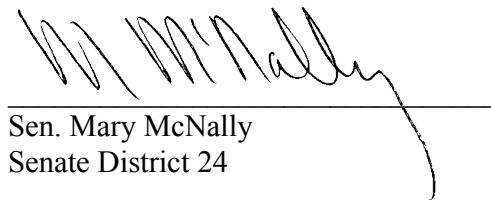
Rulemaking has substantial impact on the lives of Montanans, and to ride roughshod over their constitutional right to know and cut them out of the process through an unsubstantiated claim of “emergency” is unlawful, anti-democratic and insulting to Montanans. It is particularly surprising coming from DPHHS, which, in other contexts, has consistently required extensive studies and lengthy deliberation before acting, even when a true emergency clearly existed.

It is our hope that the agency’s failure to follow Montana law in the adoption of this emergency rule was an oversight and not meant as a direct challenge to the legislative branch’s authority to enact laws which disallow the use of the emergency rule process as a means of circumventing the constitutional rights of Montanans to participate in governmental acts which impact them. Therefore, it is our hope that this action will be corrected by simply rescinding the rule.

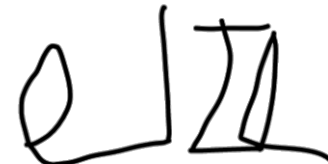
Sincerely,



Rep. Ed Stafman
Chair, House District 62



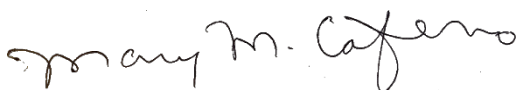
Sen. Mary McNally
Senate District 24



Rep. Danny Tenenbaum
House District 95



Sen. Jen Gross
Senate District 25



Rep. Mary Caferro
House District 81

Akilah Lane (Bar No. 60742990)

Alex Rate (Bar No. 11226)

ACLU of Montana

P.O. Box 1968

Missoula, MT 59806

Telephone: 406-203-3375

lanea@aclumontana.org

ratea@aclumontana.org

Malita Picasso, admitted pro hac vice

Jon W. Davidson, admitted pro hac vice

(admitted only in California)

ACLU Foundation

LGBTQ & HIV Project

125 Broad Street

New York, NY 10004

Telephone: 212-549-2561

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jondavidson@aclu.org

F. Thomas Hecht, admitted pro hac vice

Tina B. Solis, admitted pro hac vice

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fthecht@nixonpeabody.com

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Elizabeth Halverson PC

1302 24th Street West #393

Billings, MT 59102

Telephone: 406-698-9929

ehalverson@halversonlaw.net

**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 ADAM MEIER, 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 COLIN
GERSTNER IN SUPPORT OF
PLAINTIFFS' MOTION SEEKING
CLARIFICATION OF THE
PRELIMINARY INJUNCTION AND
TO DECLARE INVALID THE
TEMPORARY EMERGENCY RULE
PUBLISHED BY DEFENDANT THE
MONTANA DEPARTMENT OF
PUBLIC HEALTH AND HUMAN
SERVICES IN RESPONSE TO THIS
COURT'S APRIL 21, 2022 ORDER**

I, Colin Gerstner, submit the following Declaration in support of Plaintiff's Motion Seeking Clarification of the Preliminary Injunction and to Declare Invalid the Temporary Emergency Rule Published by Defendant the Montana Department of Public Health and Human Services in Response to this Court's April 21, 2022 Order. I am an attorney based in Billings, Montana. This declaration is based on my personal knowledge. I could competently testify to the matters set forth in this Declaration if called upon to testify.

1. I am an attorney for a family of a girl under the age of 18 who has a differing sexual development diagnosis with a possible intersex condition. The girl's birth certificate has her gender listed as male.

2. The family wants to change their daughter's birth certificate to change the gender to "female."

3. On April 27, 2022, I emailed the Department of Public Health and Human Services ("DPHHS") asking for a "gender designation form" or its equivalent to allow me to submit a request to change the gender on the birth certificate.

4. The DPHHS responded and did not provide a method to request a change to a birth certificate's gender.

5. Assuming that the DPHHS needed more time to comply with this Court's Order dated April 21, 2022, I waited until May 11, 2022, to follow up. On that date, I emailed the DPHHS and asked it to "send me a Gender Designation Form or let me know the current procedure." As for the date of this Declaration, I have not received a response to my May 11 email. Accordingly, to date DPHHS has not permitted the change to the birth certificate of the daughter of this family.

6. The entirety of the emails referenced above are attached as Exhibit G.

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 7th day of June, 2022

A handwritten signature in black ink, appearing to read "Colin Gerstner", written over a horizontal line.

COLIN GERSTNER

EXHIBIT G

From: [Colin Gerstner](#)
To: [HHS PHSD Vital Records Adoptions](#)
Subject: RE: Gender Designation Form
Date: Wednesday, May 11, 2022 4:52:00 PM

Thanks Karin. I'm not looking for comment on the ongoing litigation, I just want to help a client in getting a birth certificate changed to reflect the proper gender. I'm hoping now that more time has passed, the DPHHS can send me a Gender Designation Form or let me know the current procedure. Are you able to assist or point me in the right direction?

Thanks again,
Colin

From: Ferlicka, Karin <kferlicka@mt.gov> **On Behalf Of** HHS PHSD Vital Records Adoptions
Sent: Wednesday, April 27, 2022 9:28 AM
To: Colin Gerstner <colin@gerstneradamlaw.com>
Subject: RE: Gender Designation Form

Good Morning,

Thank you for your email. Montana Vital Records is not able to comment on any ongoing litigation. We will contact you once we are able to discuss your options. Regarding the preliminary injunction issued by the Montana Thirteenth Judicial District Court on April 21, 2022, we are working with the Department of Justice to understand the implications of the decision on our program.

We work all applications to our department in the order in which they are received. We are currently working applications from December. We have added your inquiry to our queue, and we will follow up with you in turn. If you live out of state, please note that transactions with our office are generally routinely conducted remotely and you need not be present in the state or at our office.

Thank you

Karin Ferlicka



Karin Ferlicka
State Registrar, Office Manager, Office of Vital Records
Financial Services & Operations Bureau
PO Box 4210 | 111 N Sanders, Rm 6 | Helena MT 59604-4210
406.444.4250 | fax 406.444.1803
kferlicka@mt.gov

From: Colin Gerstner <colin@gerstneradamlaw.com>
Sent: Wednesday, April 27, 2022 8:47 AM

To: HHS Vital Records <HHSVitalRecords@mt.gov>

Subject: [EXTERNAL] Gender Designation Form

Hello,

In 2021, 37.8.311, ARM was changed to remove reference to a “gender designation form.” On behalf of a client, I would like to submit a request to change the gender on a birth certificate. Is there a current version of the gender designation form you could email me? If not, is there any chance you could email me the last version of that form before it got discontinued?

Don’t hesitate to give me a call if you have any questions. I appreciate your attention to this.

Thanks,
Colin Gerstner



Colin Gerstner
GERSTNER ADAM LAW PLLC
2828 1st Ave. S.
Billings, MT 59101
(406) 969-3100

IMPORTANT WARNING: This message is intended for the use of the person or entity to which it is addressed and may contain information that is privileged and confidential, the disclosure of which is governed by applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this information is STRICTLY PROHIBITED. If you received this message in error, please destroy the related message and any attachments.

CERTIFICATE OF SERVICE

I, Akilah Maya Lane, hereby certify that I have served true and accurate copies of the foregoing Motion - Motion to the following on 06-07-2022:

David M.S. Dewhirst (Govt Attorney)

215 N Sanders

Helena MT 59601

Representing: Gianforte, Gregory As Governor Of State Of Montana, Montana Department of Health and Human Services, Meier, Adam, As Director Of Dphhs

Service Method: eService

Kathleen Lynn Smithgall (Govt Attorney)

215 N. Sanders St.

Helena MT 59601

Representing: Gianforte, Gregory As Governor Of State Of Montana, Montana Department of Health and Human Services, Meier, Adam, As Director Of Dphhs

Service Method: eService

Emily Jones (Attorney)

115 North Broadway

Suite 410

Billings MT 59101

Representing: Gianforte, Gregory As Governor Of State Of Montana

Service Method: eService

Alexander H. Rate (Attorney)

713 Loch Leven Drive

Livingston MT 59047

Representing: Amelia Marquez

Service Method: eService

Elizabeth A. Halverson (Attorney)

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Billings MT 59102

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Electronically signed by Krystel Pickens on behalf of Akilah Maya Lane
Dated: 06-07-2022