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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,  
YELLOWSTONE COUNTY

AMELIA MARQUEZ, an individual; and  
JOHN DOE, an individual,

Plaintiffs,

v.

STATE OF MONTANA, et al.,

Defendants.

DV 21-873  
Hon. Michael G. Moses

**STATE OF MONTANA’S BRIEF  
IN OPPOSITION TO  
PLAINTIFFS’ MOTION FOR  
LEAVE TO FILE A SECOND  
AMENDED COMPLAINT**

**INTRODUCTION**

Plaintiffs Marquez and Doe initiated this lawsuit only on their own behalf. They drafted the original Complaint, set forth their legal theories, identified claims, and defined the relief they sought from SB 280, and only SB 280. The State immediately moved to dismiss, citing significant deficiencies in the Complaint.

Plaintiffs then amended their Complaint, again acting only for themselves, adding two new claims against SB 280 under the Montana Human Rights Act and the Montana Governmental Code of Fair Practices. The State again moved to dismiss the Amended Complaint, noting additional deficiencies in Plaintiffs’ Amended Complaint. This Court permitted Plaintiffs to proceed but dismissed Plaintiffs’ claim under the Montana Human Rights Act.

Now—nearly 500 days after the filing of the lawsuit—Plaintiffs seek to fundamentally change course in this litigation, raising new theories of harm, adding challenges to DPHHS administrative rules, and accusing the State of acting in bad faith.<sup>1</sup> No party has conducted any discovery. There are no new facts that justify the continued moving target. The deadline for amending Plaintiffs’ pleading as of right has long passed, and the court’s scheduling order does not change Plaintiffs’ obligations under Rule 15. Plaintiffs should litigate their original case; to the extent they want to challenge the 2022 Rule, the proper mechanism is to file a separate lawsuit with the correct claims to challenge an administrative rule.

#### **ARGUMENT**

Plaintiffs accuse the State of being “more than willing to ignore valid court orders and engage in needless additional litigation.” Dkt. 83, at 5. But the State’s position has been consistent regarding the claims Plaintiffs brought and the relief

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<sup>1</sup> To the extent Plaintiffs seek to relitigate the issues raised in Plaintiffs’ motion of clarification on this Court’s preliminary injunction order, this Court addressed these issues in its September 19 Order, and these issues are presently pending before the Montana Supreme Court.

they sought. Plaintiffs’ pleadings never challenged any rules promulgated by DPHHS—they only challenged a statute. After this Court issued a clarification order of its preliminary injunction, DPHHS has followed the 2017 Rule in processing birth certificate applications. *See* Ferlicka Declaration (“Exhibit A”). However, a valid legal question exists regarding whether DPHHS is entitled to promulgate rules under its general statutory rulemaking authority on the establishment and maintenance of a system of vital records and whether this Court can enjoin that general rulemaking authority—especially where the rule at issue is outside the scope of the pleadings, as this Court acknowledged. As such, the State availed itself of its statutory right to seek supervisory control on the question of the scope of this Court’s preliminary injunction order. Rather than summarily dismiss the State’s petition, the Montana Supreme Court ordered responsive briefing. This petition remains pending. The State’s legitimate pursuit of its own legal remedies in litigation riddled with procedural problems does not “conclusively demonstrate[]” anything except that the State will vigorously defend its laws (and regulations) in court. Dkt. 83, at 5.

Importantly, no iteration of Plaintiffs’ pleadings ever expressly challenged the 2021 Rule. Plaintiffs only challenged SB 280. Now, rather than plead new claims aimed at DPHHS’s regulatory actions, Plaintiffs try to fit their challenges to the 2021 and 2022 Rules into their existing constitutional claims against SB 280. Statutes and rules, though, are distinct legal creatures. The amendments as proposed are therefore infirm because Plaintiffs have not followed the proper procedure to challenge these rules under the Montana Administrative Procedures Act (“MAPA”).

Plaintiffs’ defective attempt to amend their already amended Complaint is futile, only serves to muddle this litigation, cause undue delay, and prejudice the State in its defense of SB 280—the only issue in this case.

### **I. The Court Should Not Permit Plaintiffs to Amend a Second Time.**

Plaintiffs cite this Court’s scheduling order as a basis for amending their Amended Complaint. Dkt. 83, at 5–6. But scheduling orders do not supersede the requirements set forth in other rules of civil procedure. *See Shields v. Helena Sch. Dist. No. 1*, 284 Mont. 138, 145, 943 P.2d 999, 1003 (1997) (holding that parties still had to comply with Rule 15 even though the scheduling order permitted amendments); *see also Cleveland v. Wright*, DV-00-369, 2001 ML 3779, at \*8 (Mont. Dist. Ct., 21st Jud. Dist. July 25, 2001) (noting the same for Rule 21). Because Plaintiffs seek to amend their already-amended Complaint and transform this case into a class action, they must still comply with Rule 15 and Rule 23.

Rule 15 permits a court, in its discretion, to grant or deny a motion to amend “when justice so requires.” Mont. R. Civ. P. 15 (a). But this does not mean that the court must allow amendments in all instances. *See Lindsey’s v. Pro. Consultants*, 244 Mont. 238, 242, 797 P.2d 920, 923 (1990); *see also* 6 Wright and Miller, Federal Practice and Procedure § 1487, at 427.<sup>2</sup> An amendment to a pleading is not appropriate when they prejudice the other party. *Peuse v. Malkuch*, 275 Mont. 221, 911 P.2d 1153, 1156–57 (1996). An amendment is also inappropriate if it “causes

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<sup>2</sup> The Montana Supreme Court looks to the interpretation of the federal rules when implementing the Montana rules. *Prentice Lumber Co. v. Hukill*, 161 Mont. 8, 14, 504 P.2d 277, 280 (1972).

undue delay, is made in bad faith, is based upon a dilatory motive on the part of the movant, or is futile.” *Stundal v. Stundal*, 2000 MT 21, ¶ 12, 298 Mont. 141, 995 P.2d 420.

As discussed below, Plaintiffs’ proposed amendments to challenge the 2021 and 2022 Rules significantly prejudice the State and cause further delay. Plaintiffs’ proposed amendments regarding Doe and Marquez are futile. And Plaintiffs’ other amendments, to which they did not alert this Court, are not made in good faith. The Court’s scheduling order does not constitute blanket permission for the existing parties to graft new theories, claims, harms, and parties into this litigation.

**A. The proposed amendments prejudice the State.**

“A district court is justified in denying a motion to amend if granting the motion would cause ‘undue prejudice to the opposing party.’” *Bardsley v. Pluger*, 2015 MT 301, ¶ 20, 381 Mont. 284, 358 P.3d 907 (quoting *Lindey’s*, 244 Mont. at 242, 797 P.2d at 923). “The prejudice sufficient to support a court’s denial of a motion to amend can be ... added time, energy, and money in resolving the case due to additional discovery and time to determine the sufficiency of the claims alleged in the amended complaint.” *Smith v. Butte-Silver Bow Cnty.*, 266 Mont. 1, 10, 878 P.2d 870, 875 (1994) (citing *Lindey’s*, 244 Mont. at 242, 797 P.2d at 923). Because of the risk of prejudicing the opposing party, litigants can change legal theories in the middle of litigation “only in extraordinary circumstances.” *Bardsley*, ¶ 21.

Amendments relating to already-filed briefing presumptively prejudice the opposing party. *Bardsley*, ¶ 21 (citing *Peuse*, 911 P.2d at 1157). The Montana Supreme Court has “found undue prejudice when the opposing party already had

expended substantial effort and expense in the course of the dispute that would be wasted if the moving party were allowed to proceed on a new legal theory.” *Farmers Coop. Ass’n v. Amsden, LLC*, 2007 MT 286, ¶ 14, 339 Mont. 445, 171 P.3d 690 (internal citations and quotations omitted); see also *Foman v. Davis*, 371 U.S. 178, 182 (1962) (citing “undue delay” and “undue prejudice to the opposing party” as reasons to deny leave to amend).

In one case, *Peuse v. Malkuch*, the party attempted to amend their pleadings after a motion for partial summary judgment on those issues had been filed. 911 P.2d at 1156–57. The Montana Supreme Court affirmed denial of the motion to amend because the alternative “allow[s] seriatim assertion of claims.” *Id.* at 1156. That, in turn, undermines “one of the important thrusts of the rules of civil and appellate procedure,” namely, “that actions contain all related claims ... in order that cases proceed in an orderly and expeditious manner to final judgment.” *Id.*

Here, after Plaintiffs filed each of their original Complaint and Amended Complaint, the State pointed out numerous deficiencies in their pleadings. Rather than address these problems, Plaintiffs continued litigating the case as pleaded, focusing entirely on the question of SB 280. But now Plaintiffs seek to inject two administrative rules into this litigation by simply adding “the 2021 Rule, and the 2022 Rule” to the existing claims and the prayer for relief. This is improper for several reasons.

First, the 2021 Rule was promulgated to effectuate SB 280. DPHHS had issued a proposed rule prior to the filing of this lawsuit, and the 2021 Rule was finalized

within days of Plaintiffs filing this lawsuit. But they never challenged this rule until now. The parties have fully briefed two motions to dismiss, the district court has issued a preliminary injunction, and the Montana Supreme Court is considering a petition for a writ of supervisory control. Adding the 2021 Rule effectively restarts this litigation. This is highly prejudicial at this stage of the litigation. *See Peuse*, 911 P.2d at 1157 (“If the amendments were allowed after the motion for summary judgment, Peuse would be unduly prejudiced since his motion was based on the original pleadings which remained unchanged for almost two years.”).

Failure to include the 2021 Rule until now rests entirely with Plaintiffs, and allowing them to add the claim this late in litigation—while the State’s petition is pending before the Montana Supreme Court—prejudices the State. Plaintiffs provide no justification for this unreasonable delay. *See Rates Tech., Inc. v. Nortel Networks Corp.*, 399 F.3d 1302, 1309–10 (Fed. Cir. 2005) (“[F]ailure to seek such leave, much less to do so in a timely fashion, renders its purported [supplemental pleading] improper.”). Plaintiffs chose to challenge SB 280 rather than challenge the associated administrative rule. Plaintiffs have simply waited too long to add a challenge to the 2021 Rule to this case.

Second, amending the Amended Complaint with respect to the 2022 Rule also prejudices the State because it significantly changes and expands the scope of this litigation and seeks to undercut the State’s petition for writ of supervisory control. *See Peuse*, 911 P.2d at 1157. DPHHS undertook this rulemaking pursuant to its independent rulemaking authority under MCA §§ 50-15-102, -103, -204, -208, -223.

Adding the 2022 Rule to this litigation, rather than filing a separate lawsuit, shifts this litigation away from the original challenge, which was a challenge to SB 280 alone. *See Bardsley*, ¶ 21; *Peuse*, 911 P.2d at 1157; *see also Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 330–31 (1971) (“[I]n deciding whether to permit . . . an amendment, the trial court [i]s required to take into account any prejudice that [the non-movant] would have suffered as a result ....”). DPHHS did not promulgate the 2022 Rule pursuant to SB 280. It did so under its general statutory rulemaking authority on the establishment and maintenance of a system of vital records. Challenging the 2022 Rule raises the question about DPHHS’s general rulemaking authority, a question not at issue in this case.

The State’s petition asks the Montana Supreme Court to limit the scope of this lawsuit to the challenge to SB 280—the only challenge the Plaintiffs have advanced for nearly 18 months. A decision on the writ will resolve questions related to the scope of this litigation and whether it involves the 2021 or 2022 Rules. Thus, permitting Plaintiffs to amend their Complaint to add claims against the 2021 and 2022 Rules is an attempt to nullify the writ and expand the scope of the lawsuit after the fact. Again, such a tactic is highly prejudicial to the State. *See Peuse*, 911 P.2d at 1156–57.

Beyond clearly prejudicing the State, Plaintiffs fail to show “extraordinary circumstances” justifying these amendments. *Bardsley*, ¶ 12. In fact, the circumstances under which Plaintiffs seek leave to file their Second Amended Complaint are far from extraordinary. Plaintiffs could have waited a few days to



challenge the finalized 2021 Rule in their initial lawsuit. They didn't. They could have challenged it when they amended their Complaint the first time. They didn't. They never challenged the temporary emergency rule, and they did not challenge the 2022 Rule until now. And now, even in their challenge of the 2022 Rule, Plaintiffs fail to raise the proper claims. These circumstances do not rise to the level of "extraordinary" as required under Rule 15. Because the proposed amendments prejudice the State, Plaintiffs' motion for leave to file a Second Amended Complaint should be denied.

**B. Plaintiffs' proposed amendments are futile.**

Additionally, Plaintiffs seek to add futile allegations about the personal histories of the named plaintiffs. *See Stundal*, ¶ 12. They assert new allegations about discrimination and harassment that Doe experienced prior to this litigation. Dkt. 83, at 7. They also add allegations about Marquez's personal history of taking hormone-replacement therapy. Dkt. 84, ¶ 80. Plaintiffs, though, admit that these alleged instances of discrimination and harassment predate the filing of the original Complaint. Plaintiffs, moreover, were the ones in possession of these facts. Both Doe and Marquez were aware of their personal histories. If truly relevant to the litigation, Plaintiffs should have included this information in the original Complaint, not in their Second Amended Complaint. Plaintiffs provide no justification for their dilatory actions.

Neither the allegations about Doe's experiences or Marquez's hormone-replacement therapy bolster their basis for standing, nor do they relate to the

Plaintiffs' claims. Plaintiffs have brought a constitutional challenge to SB 280, and now the 2021 and 2022 Rules. Whether Doe has been harassed by private individuals, and whether Marquez has undergone hormone-replacement therapy, have no bearing on whether the State's regulations on birth certificate amendments are constitutional. These factual allegations do not involve any State actors, they do not relate to the birth certificate amendment process, and the Court must reject these amendments.

In addition, Plaintiffs now seek to add two administrative rules to their challenge. As the State has consistently argued, administrative rules are different from statutes, and parties seeking to challenge administrative rules must do so through the correct channels. Here, that proper channel is MAPA. *See* § 2-4-506; *see also, e.g., Core-Mark Int'l, Inc. v. Mont. Bd. Of Livestock*, 2014 MT 197, ¶ 23, 376 Mont. 25, 329 P.3d 1278 (“[A] party may seek a declaratory judgment that an administrative rule is invalid or inapplicable under [MAPA]”); *Pennaco Energy, Inc. v. Mont. Bd. Of Env't Rev.*, 2008 MT 425, ¶ 23, 347 Mont. 415, 199 P.3d 191 (requiring parties to challenge administrative rules under MAPA); *Lohmeier v. State*, 2008 MT 307, ¶ 17, 346 Mont. 23, 192, P.3d 1137 (same).

While the district court need not reach the ultimate merits to resolve a motion to amend a pleading, the merits must be considered if the amendments are futile. *Hawkins v. Harney*, 2003 MT 58, ¶ 39, 314 Mont. 384, 66 P.3d 305. *Cf. Hobble-Diamond Cattle v. Triangle Irrigation Co.*, 249 Mont. 322, 324–25, 815 P.2d 1153, 1155–56 (1991). Here, the proposed amendments are still legally insufficient.

*Hawkins*, ¶ 39. If the Court grants Plaintiffs’ motion, the State will file a third motion to dismiss the claims because—even after significant briefing—Plaintiffs have still failed to bring the proper claims. They seek to declare unconstitutional both the 2021 and 2022 Rules, yet they do not bring any claim under MAPA. This disregard for proper procedural mechanisms only serves to muddle the current issues, delay the lawsuit from proceeding, and prejudice the State.

**C. Plaintiffs’ proposed amendments will cause undue delay.**

Finally, Plaintiffs’ proposed amendments will cause undue delay. *See Lindsey’s*, 244 Mont. at 243, 797 P.2d at 923 (“Granting the amendments would have required additional discovery and time to determine the sufficiency of the claims alleged in the amended complaints, all costing the defendants additional time, energy and money to resolve the case.”); *Stundal*, ¶ 12. Specifically, Plaintiffs’ new class allegations expand the scope of this lawsuit and raise new questions before this Court.

For many of the same reasons that Plaintiffs’ new allegations regarding Doe and Marquez are inappropriate, the new allegations regarding the proposed class are inappropriate. Plaintiffs, again, rely on facts and circumstances that existed at the outset of litigation—there has been no discovery in this case or opportunity for Plaintiffs to uncover new facts. Now, after 18 months of substantial briefing and oral argument, Plaintiffs seek to expand this lawsuit to encompass approximately 1,700 alleged class members.

In support of adding 1,700 class members to this litigation, Plaintiffs assert that it is necessary to provide “an effective statewide remedy for Defendants’

conduct.” Dkt. 83, at 9. But, from the beginning of litigation, the State has noted that Plaintiffs’ relief would be limited to Doe and Marquez. *See* Dkt. 14, at 25. If Plaintiffs sought statewide relief for “all transgender people born in Montana who currently want, or who in the future will want, to amend the sex designation on their Montana birth certificates,” then they should have requested this relief in their original Complaint or even in their Amended Complaint. *See* Dkt. 86, at 6 (defining the proposed class). But they chose not to.

Plaintiffs attempt to tie this newly discovered deficiency in their pleadings to the “Defendants’ refusal to abide by this Court’s preliminary injunction, and from their promulgation of the restrictive 2022 Rules” fails. Dkt. 83, at 9. As an initial matter, the State’s position on the scope of this Court’s preliminary injunction order and DPHHS’s authority to promulgate the 2022 Rule is an entirely separate matter that has already been addressed by this Court and is currently before the Montana Supreme Court. And, in fact, this Court agreed that the 2022 Rule was an entirely separate issue outside the scope of this litigation. More importantly, though, the relief Plaintiffs apparently seek is to return to the 2017 Rule—something they still fail to request in their Second Amended Complaint. *See* Dkt. 84, at 33.

But the developments in this litigation have no bearing on this ultimate relief. Plaintiffs either want DPHHS to return to the 2017 Rule solely to process the yet unfiled applications of Marquez and Doe, or they want it for all transgender Montanans seeking to change the sex designations on their birth certificates. Plaintiffs have argued that they can get this ultimate relief by challenging SB 280

alone. *See* Dkt. 71, 73. Not only does this show obvious pleading problems, but it also demonstrates that Plaintiffs could have brought a class action from the beginning. Whether Plaintiffs feel the State complied with the Court’s injunction does not alter this fact. They provide no explanation for why they failed to seek class certification up until now. Rather, their argument shows a thinly veiled attempt to paper over Plaintiffs’ own dilatory actions by making bad faith allegations against the State. Given that Plaintiffs could have requested class certification and relief in the form of a mandatory injunction requiring implementation of the 2017 Rule, and that permitting class certification at this stage of litigation will cause undue delay in resolving the issues, this Court should deny their motion.

## **II. Plaintiffs Failed to Notify the Court of the Actual Scope of Their Proposed Amendments.**

Finally, Plaintiffs fail to alert the Court to all the substantive changes they made in their Second Amended Complaint. Plaintiffs seek leave only to add the 2021 and 2022 Rules to this litigation, add class allegations, and add allegations about John Doe. *See* Dkt. 83. But by comparing the Amended Complaint to the Second Amended Complaint, it is evident that Plaintiffs made additional substantive changes without providing any explanation or justification for the amendments. *See* Smithgall Declaration (“Exhibit B”). This Court should reject their motion on this basis alone. *See Stundal*, ¶ 12 (amendments made in bad faith are inappropriate). Of particular significance, Plaintiffs changed “gender” to “sex” throughout the Second Amended Complaint, which substantively alters their claims. *Compare* Dkt. 42.1, ¶ 26 (“Gender identity refers to a person’s fundamental internal sense of belonging to

a particular gender.”) *with* Dkt. 84, ¶ 52 (“Gender identity refers to a person’s fundamental internal sense of being a particular sex.”); *compare* Dkt. 42.1, ¶ 23 (“This includes using identity documents that accurately reflect one’s gender identity.”) *with* Dkt. 84, ¶ 58 (“This includes using identity documents that accurately reflect one’s sex...”); *compare* Dkt. 42.1, ¶ 33 (“Being force to hold and present documents that do not match a person’s gender ...”) *with* Dkt. 84, ¶ 59 (“Being forced to hold and present documents that do not match a persons’ sex as determined by their gender identity.”); *compare* Dkt. 42.1, ¶ 40 (“The Act’s sole purpose is to intentionally burden a transgender person’s ability to correct their birth-certificate sex designation to conform with their gender.”) *with* Dkt. 84, ¶ 65 (“[T]he Act’s sole purpose has been to burden ... a transgender person’s ability to correct their birth-certificate sex designation to conform with what they know their sex to be ...”); *compare* Dkt. 42.1, ¶ 52 (describing the way Marquez expresses Marquez’s “gender”) *with* Dkt. 84, ¶ 80 (describing the way Marquez expresses Marquez’s “sex”); *compare* Dkt. 42.1, ¶ 53 (Marquez seeks to amend the birth certificate to match Marquez’s “gender identity”) *with* Dkt. 84, ¶ 81 (Marquez seeks to amend the birth certificate to match “sex”); *compare* Dkt. 42.1, ¶ 58 (Doe seeks to amend the birth certificate to reflect Doe’s “gender identity”) *with* Dkt. 84, ¶ 86 (Doe seeks to amend the birth certificate to reflect “sex”); *compare* Dkt. 42.1, ¶ 78 (discussing “a sex designation that is inconsistent with their gender”) *with* Dkt. 84, ¶ 109 (discussing “a sex designation that is inconsistent with their sex”); *compare* Dkt. 42.1, ¶ 107 (asserting that the State discriminated against Plaintiffs “on the basis of their gender identity”) *with*

Dkt. 84, ¶ 138 (asserting that the State discriminated against Plaintiffs “on the basis of their gender identity and sex”).

These changes are significant because DPHHS only recognizes sex on individual birth certificates, not gender. The State has consistently argued throughout this litigation that sex and gender are distinct concepts. *See, e.g.*, Dkt. 60, at 7–8; *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746–47 (2020). Even Plaintiffs’ experts and this Court acknowledge that sex and gender identity are separate concepts. Dkt. 61, ¶ 41 (quoting Plaintiffs’ expert and finding that “gender identity” is one component of “sex”). Now, Plaintiffs seek to reframe their pleadings by substituting the word “sex” for “gender.” This, of course, prejudices the State’s briefing up until this point, which relied on Plaintiffs’ use of the word “gender.” Plaintiffs may try to argue that these terms are interchangeable—as the State has consistently argued, they are not—but Plaintiffs’ later assertions belie this claim. They argue, for the first time, that these laws discriminate “on the basis of their gender identity *and* sex,” thereby treating them as separate and distinct concepts. Dkt. 84, ¶¶ 138–139. Because the Supreme Court, the State, and apparently the Plaintiffs treat these as distinct concepts, Plaintiffs’ substitution of these words constitutes a substantive amendment that alters this litigation. *See Bostock*, 140 S. Ct. at 1739 (proceeding on the assumption that “sex” refers “only to biological distinctions between male and female” and does not include “gender”). Plaintiffs owe a duty of candor to this Court to disclose material facts, and their failure to alert the

Court and the State of these changes weighs strongly against permitting Plaintiffs to file their Second Amended Complaint.

### CONCLUSION

This Court should reject Plaintiffs' attempt to amend their already-amended Complaint. Their proposed amendments prejudice the State because of the significant briefing already done in this case. In addition, the proposed amendments are futile and will cause undue delay of this litigation. If Plaintiffs wanted to challenge the 2021 Rule, which DPHHS promulgated in direct response to SB 280, they should have done so in their original Complaint or their Amended Complaint. If Plaintiffs want to challenge the 2022 Rule, which DPHHS promulgated pursuant to its independent rulemaking authority, they can file a new lawsuit challenging DPHHS's general rulemaking authority and follow the procedural requirements of MAPA. Plaintiffs cannot, however, simply add "the 2021 Rule, and the 2022 Rule," to their existing claims. Moreover, Plaintiffs cannot substantively amend their Complaint without notifying the parties and this Court of the changes and explaining why such changes are necessary at this stage of litigation. For these reasons, this Court should deny their motion.



Dated this 5th day of December, 2022.

Austin Knudsen  
MONTANA ATTORNEY GENERAL

*/s/ Kathleen L. Smithgall* \_\_\_\_\_

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
YELLOWSTONE COUNTY

AMELIA MARQUEZ, AN INDIVIDUAL;  
AND JOHN DOE, AN INDIVIDUAL,

PLAINTIFFS,

v.

STATE OF MONTANA, ET AL.,

DEFENDANTS.

DV-21-00873  
Hon. Michael G. Moses

**DECLARATION  
OF KARIN FERLICKA**

I, Karin Ferlicka, declare:

1. I am over the age of eighteen and competent to testify, and I make this declaration based on my personal knowledge.

**EXHIBIT A**

2. I am the Office of Vital Records (“OVR”) State Registrar for the Montana Department of Public Health & Human Services.

3. In that role, I am responsible for overseeing and processing request for issuance of vital records and amendments to vital records.

4. Since this Court’s September 19, 2022 Order, the Office of Vital Records has been operating under the Department’s 2017 Rule with respect to requests to amend birth certificates to change the sex designated on the birth certificates.

I submit this declaration pursuant to Mont. Code Ann. § 1-6-105(a). I hereby declare under penalty of perjury that the foregoing is true and correct.

DATED this 5th day of December, 2022.



KARIN FERLICKA

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**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
YELLOWSTONE COUNTY**

AMELIA MARQUEZ, et al.,

PLAINTIFFS,

v.

STATE OF MONTANA et al.,

DEFENDANTS.

Cause No. DV-21-00873  
Hon. Michael G. Moses

**DECLARATION OF KATHLEEN  
SMITHGALL IN SUPPORT OF THE  
STATE'S RESPONSE OPPOSING  
PLAINTIFFS' MOTION TO AMEND  
AMENDED COMPLAINT**

I, Kathleen L. Smithgall, make the following Declaration under penalty of perjury:

1. I am counsel for Defendants in the above-captioned case, am competent to testify as to the matters set forth herein, and make this Declaration based on my own personal knowledge and/or belief. I am generally familiar with the claims, materials, documents, and pleadings regarding this matter.

2. Attached to this declaration is a comparison of Plaintiffs' Amended Complaint,

**EXHIBIT B**

which Plaintiffs filed on December 3, 2021, and Plaintiffs' proposed Second Amended Complaint, which Plaintiffs filed on October 28, 2022.

3. I submit this declaration pursuant to Mont. Code Ann. § 1-6-105(a).
4. I hereby declare under penalty of perjury that the foregoing is true and correct.

DATED this 5th day of December, 2022.

/s/ Kathleen L. Smithgall  
Kathleen L. Smithgall

11/28/2022 3:58:10 PM

## Compare Results

### Summary of Comments on [Compare Report].pdf

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Old File:	versus	New File:
<b>42 2021-12-03 Pit's BIS of Mot for Leave to File Amended Complaint - Ex. A.pdf</b>		<b>84 2022-10-28 Second Amended Complaint.pdf</b>
23 pages (751 KB)		38 pages (372 KB)
11/28/2022 3:38:25 PM		10/28/2022 10:52:22 AM

#### Total Changes

**416**

Text only comparison

#### Content

191 Replacements  
166 Insertions  
59 Deletions

#### Styling and Annotations

0 Styling  
0 Annotations

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IN THE 13TH JUDICIAL DISTRICT COURT  
COUNTY OF YELLOWSTONE

AMELIA MARQUEZ, an individual;  
and JOHN DOE, an individual; on  
behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

STATE OF MONTANA; GREGORY  
GIANFORTE, in his official capacity as  
the Governor of the State of Montana;  
the MONTANA DEPARTMENT OF  
PUBLIC HEALTH AND HUMAN  
SERVICES; and CHARLES T.  
BRERERTON, in his official capacity  
as the Director of the Montana  
Department of Public Health and  
Human Services,

Defendants.

Case No. DV 21-00875

Hon. Michael G. Moses

**SECOND AMENDED CLASS  
ACTION COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

- Text Replaced  
[Old]: "Hecht, pro hac vice pending Tina B. Solis, pro hac vice pending Seth A. Horvath, pro hac vice pending"  
[New]: "Hecht\* Tina B. Solis\* Seth A. Horvath\*\*"
- Text Replaced  
[Old]: "of Montana"  
[New]: "Montana Foundation, Inc."
- Text Inserted  
"Telephone:"
- Text Replaced  
[Old]: "John Knight, pro hac vice pending ACLU Foundation LGBTQ & HIV Project 150 North Michigan Avenue, Suite 600 Chicago, IL 60601 Telephone: 312-201-9740 Facsimile: 312-288-5225 jaknight@aclu.org"  
[New]: "Malita Picasso\* Jon W. Davidson\* (admitted only in California) American Civil Liberties Union Foundation 125 Broad Street New York, NY 10004 Telephone: 212-549-2561 Facsimile: 212-549-2650 mpicasso@aclu.org jondavidson@aclu.org"
- Text Replaced  
[Old]: "24th"  
[New]: "24 th"
- Text Inserted  
"Telephone:"
- Text Inserted  
\*\* Admitted pro hac vice"
- Text Replaced  
[Old]: "individual,"  
[New]: "individual; on behalf of themselves and all others similarly situated, ) )"
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") )"
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") ) )"
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") )"
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") SECOND AMENDED CLASS ACTION"
- Text Replaced  
[Old]: "ADAM MEIER,"  
[New]: "CHARLES T. BRERERTON,"
- Text Inserted  
")"
- Text Deleted  
"Defendants."
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"Defendants."

Plaintiffs Amelia Marquez (“Ms. Marquez”) and John Doe (“Mr. Doe”) (together, “Plaintiffs”), through their undersigned attorneys, and as representatives of the class described below, bring this Second Amended Complaint against the State of Montana; its governor, Gregory Gianforte, in his official capacity (“Governor Gianforte”); the Montana Department of Health and Human Services (“DPHHS”); and DPHHS’s director, Charles T. Brererton in his official capacity (“Director Brererton”) (collectively, “Defendants”).

**INTRODUCTION AND PROCEDURAL BACKGROUND**

1. This is an action for declaratory and injunctive relief against Defendants arising out of legislative and regulatory efforts that make it impossible for transgender people born in Montana to obtain accurate birth certificates. Senate Bill 280 (the “Act”) was one of three bills targeting this vulnerable group that was put forward during the 67th regular Montana legislative session, and one of two that passed. Without any justification, much less a compelling or important state interest, the Montana State Legislature (the “Legislature”) adopted the Act, and Governor Gianforte signed it into law.

2. The Act and its related regulations are administered by Director Brererton and DPHHS. The Act, as passed, restricts the ability of transgender people to change the sex designation on their birth certificates by requiring them to undergo unidentifed surgery and initiate a legal proceeding, to obtain a court order to prove that they have completed the surgery.

3. The Act does not describe what evidence is sufficient to satisfy its requirements. Nor does it describe the nature or extent of the surgery required to comply with the Act.

4. The Act expressly directed DPHHS to repeal the pre-SB 280 procedures for processing applications to amend the sex designation on a birth certificate. Those procedures, which were adopted in 2017, did not require surgery or court proceedings or public disclosures.

- Text Replaced**  
[Old]: “complain”  
[New]: “and as representatives of the class described below, bring this Second Amended Complaint”
- Text Replaced**  
[Old]: “Adam Meier,”  
[New]: “Charles T. Brererton”
- Text Replaced**  
[Old]: “Meier” (collectively, “Defendants”), as set forth below. INTRODUCTION  
[New]: “Brererton” (collectively, “Defendants”). INTRODUCTION AND PROCEDURAL BACKGROUND”
- Text Replaced**  
[Old]: “a law that makes it difficult, if not impossible, for transgender Montanans to correct the sex designation on their birth certificates to conform to their gender.”  
[New]: “legislative and regulatory efforts that make it impossible for transgender people born in Montana to obtain accurate birth certificates.”
- Text Replaced**  
[Old]: “is administered by Director Meier and DPHHS and”  
[New]: “and its related regulations are administered by Director Brererton and DPHHS. The Act, as passed,”
- Text Replaced**  
[Old]: “any transgender person who seeks to amend their sex designation to undergo gender-affirming surgery and initiate a legal proceeding”  
[New]: “them to undergo unidentifed surgery and initiate a legal proceeding, to obtain a court order”
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“or extent”
- Text Inserted**  
“The Act expressly directed DPHHS to repeal the pre-SB 280 procedures for processing applications to amend the sex designation on a birth certificate. Those procedures, which were adopted in 2017, did not require surgery or court proceedings or public disclosures.”
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“2”



In addition, the Act directed DPHHS to promulgate implementing regulations that mirrored the restrictive anti-transgender provisions of the Act.

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5. In 2021, DPHHS followed the legislative directive of SB 280 by implementing a rule that repealed the 2017 procedure and adopted the operative provisions of SB 280 (the "2021 Rule"). In its Notice of Public Hearing on Proposed Amendment that commenced the rulemaking process that resulted in the 2021 Rule, DPHHS's sole justification for the 2021 Rule, as set forth in the Statement of Reasonable Necessity, was, "to implement the requirements of SB 280 and comply with the new law." The 2021 Rule simply mirrors the restrictive language of the Act without addressing the Act's ambiguities, vagueness, or other constitutional deficiencies.

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"In 2021, DPHHS followed the legislative directive of SB 280 by implementing a rule that repealed the 2017 procedure and adopted the operative provisions of SB 280 (the "2021 Rule"). In its Notice of Public Hearing on Proposed Amendment that commenced the rulemaking process that resulted in the 2021 Rule, DPHHS's sole justification for the 2021 Rule, as set forth in the Statement of Reasonable Necessity, was, "to implement the requirements of SB 280 and comply with the new law." The 2021 Rule simply mirrors the restrictive language of the Act without addressing the Act's ambiguities, vagueness, or other constitutional deficiencies."

6. The Act and the 2021 Rule invade the privacy of transgender people born in Montana. An individual's gender identity and medical treatment are intensely personal and private. The Act and the 2021 Rule interfere with the rights of transgender people to make private medical decisions by conditioning their access to a government-issued identity document on their ability and willingness to undergo undefined surgical procedures, a condition imposed on no other group of Montanans. The Act and the 2021 Rule further require public disclosure and review of a person's gender identity and medical treatments in order to amend an important government document. The Act and the 2021 Rule require Plaintiffs to submit private information, including medical records, to a court in order to obtain an court order in accordance with the Act. Neither the Act nor the 2021 Rule describe to which court, or in which jurisdiction, or by what procedure a transgender applicant must petition to obtain such an order.

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"5."  
Text Replaced  
[Old]: "invades the privacy of transgender Montanans."  
[New]: "and the 2021 Rule invade the privacy of transgender people born in Montana."  
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"6."  
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[Old]: "The Act requires public review of a person's gender identity and medical treatment"  
[New]: "The Act and the 2021 Rule interfere with the rights of transgender people to make private medical decisions by conditioning their access to a government-issued identity document on their ability and willingness to undergo undefined surgical procedures, a condition imposed on no other group of Montanans. The Act and the 2021 Rule further require public disclosure and review of a person's gender identity and medical treatments"  
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[Old]: "would"  
[New]: "and the 2021 Rule"  
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[Old]: "5. Once"  
[New]: "Neither the Act nor the 2021 Rule describe to which court, or in which jurisdiction, or by what procedure a transgender applicant must petition to obtain such an order."  
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[Old]: "judge"  
[New]: "court"  
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[Old]: "a"  
[New]: "an"  
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"Pursuant to the Act and the 2021 Rule, once"  
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"7."  
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[Old]: "authorities at DPHHS in order"  
[New]: "DPHHS authorities for approval"  
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[Old]: "6."  
[New]: "No provision of the Act or the 2021 Rule mandates"  
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[Old]: "2"  
[New]: "3"

7. Pursuant to the Act and the 2021 Rule, once a court order is entered, a transgender applicant must submit an application to the appropriate DPHHS authorities for approval to amend the sex designation on their birth certificate. No provision of the Act or the 2021 Rule mandates

review of these applications by trained medical personnel. Nor does any provision of the Act or the 2021 Rule specify what evidence courts or DPHHS will use or require in deciding whether to grant a transgender applicant's petition.

Text Inserted  
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8. Only transgender applicants who seek to conform the sex designation on their birth certificates to their gender identity are subject to the medical-intervention and court-order requirements of the Act and the 2021 Rule. There are no medical, economic, or other exceptions to the requirements of the Act or the 2021 Rule.

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"8."

Text Replaced  
[Old]: "Act."  
[New]: "Act and the 2021 Rule."

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"the requirements of the Act or the 2021 Rule."

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[Old]: "the Act's requirements."  
[New]: "Even if the Act or the 2021 Rule identified the specific surgery that transgender people must undergo in order to amend their birth certificates, many"

9. Even if the Act or the 2021 Rule identified the specific surgery that transgender people must undergo in order to amend their birth certificates, many transgender people are unable to undergo gender-affirming surgeries. For some, surgical treatment of gender dysphoria is not medically necessary, while for others it is medically contraindicated, meaning that surgery would actually be harmful to their health and wellness. Others do not have health-insurance coverage for, or cannot otherwise afford the cost of, preparing for, undergoing, and recovering from surgery.

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"7."

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[Old]: "able"  
[New]: "unable"

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[Old]: "the gender-affirming surgery the Act compels. For some, the surgery"  
[New]: "gender-affirming surgeries. For some, surgical treatment of gender dysphoria"

Many gender-affirming surgeries often involve long preparatory and recovery periods. And for many, familial, occupational, or academic obligations pose insurmountable barriers to surgical access, particularly for those who reside in areas without surgical providers and who must therefore travel long distances for a surgical procedure.

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[Old]: "contraindicated. Others do not have health-insurance coverage for, or cannot otherwise afford the cost of the surgery. Others cannot take off time from work for the surgery."  
[New]: "contraindicated, meaning that surgery would actually be harmful to their health and wellness. Others do not have health-insurance coverage for, or cannot otherwise afford the cost of, preparing for, undergoing, and recovering from surgery. Many gender-affirming surgeries often involve long preparatory and recovery periods. And for many, familial, occupational, or academic obligations pose insurmountable barriers to surgical access, particularly for those who reside in areas without surgical providers and who must therefore travel long distances for a surgical procedure."

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[Old]: "8."  
[New]: "10."

10. The Act was created to marginalize transgender people. It was one of several 2021 legislative efforts that actively aimed to discriminate against transgender Montanans and capitalize on anti-transgender sentiment.

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[Old]: "people."  
[New]: "Montanans and capitalize on anti-transgender sentiment."

11. On April 21, 2022, the Court entered a preliminary injunction order (the "Order") prohibiting the enforcement of the Act, or any aspect of the Act, including the 2021 Rule, pending the outcome of this case. The Court found that Plaintiffs presented a prima facie case that the

Text Inserted  
"On April 21, 2022, the Court entered a preliminary injunction order (the "Order") prohibiting the enforcement of the Act, or any aspect of the Act, including the 2021 Rule, pending the outcome of this case. The Court found that Plaintiffs presented a prima facie case that the"

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"11."

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provisions of the Act were unconstitutional under the due-process clause of the Montana Constitution. The Court also rejected Defendants' efforts to dismiss Plaintiffs' claims under the equal-protection provisions of the Montana Constitution (Article II, Section 4), Plaintiffs' claims to privacy and to be free from state interference in medical decisions under the Montana Constitution (Article II, Sections 10 and 17), and Plaintiffs' claims under the Montana Governmental Code of Fair Practices (the "Code").

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12. Under Montana law, the issuance of a preliminary injunction preserves the status quo during the pendency of the action. The status quo is defined as the last actual, peaceable, noncontested condition preceding the controversy. In this case, the status quo constituted a return to the procedures that governed birth-certificate amendments immediately prior to the passage of the Act—namely, the procedures adopted by DPHHS in December 2017. These 2017 procedures are the immediate precursor to the Act. They do not require surgery, court orders, or the involuntary disclosure of medical information or transgender status in order to change the sex designation on a person's Montana birth certificate.

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"12."

13. Rather than comply with the Order and return to the 2017 procedures, on May 23, 2022, DPHHS issued a Notice of Adoption of Temporary Emergency Rule (the "Notice") announcing an emergency rule (the "Emergency Rule"). The Notice announced that DPHHS had changed its position, concluding that sex is immutable and eliminating the surgical requirement. In its place, however, DPHHS imposed a total ban, prohibiting the amendment of birth certificates that are "based on gender transition, gender identity, or change of gender." In effect, DPHHS foreclosed the entire birth-certificate amendment process for transgender people, including Plaintiffs, at the expense of their health and constitutional rights.

Text Inserted  
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"5"

14. Despite its own conclusion that sex is an immutable characteristic and that the surgery required by the Act is not medically justified, DPHHS nonetheless reserved the right to return to the restrictions of the Act and the 2021 Rule, including surgery and public disclosures, should the preliminary injunction be lifted or otherwise expire. Apparently, if the opportunity arises, DPHHS intends to impose the requirements of the Act and the 2021 Rule once again, which underscores the need for Plaintiffs and members of the class to seek permanent injunctive and declaratory relief.

Text Inserted  
"Despite its own conclusion that sex is an immutable characteristic and that the surgery required by the Act is not medically justified, DPHHS nonetheless reserved the right to return to the restrictions of the Act and the 2021 Rule, including surgery and public disclosures, should the preliminary injunction be lifted or otherwise expire. Apparently, if the opportunity arises, DPHHS intends to impose the requirements of the Act and the 2021 Rule once again, which underscores the need for Plaintiffs and members of the class to seek permanent injunctive and declaratory relief."

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"14."

15. On September 10, 2022, DPHHS replaced the Emergency Rule with a permanent rule (the "2022 Rule"). The 2022 Rule, like the Emergency Rule, forbids birth-certificate amendments based on gender transition, gender identity, or change of gender. It also includes a provision that would re-impose the requirements of the Act and the 2021 Rule if the preliminary injunction were to be lifted or otherwise expire.

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"On September 10, 2022, DPHHS replaced the Emergency Rule with a permanent rule (the "2022 Rule"). The 2022 Rule, like the Emergency Rule, forbids birth-certificate amendments based on gender transition, gender identity, or change of gender. It also includes a provision that would re-impose the requirements of the Act and the 2021 Rule if the preliminary injunction were to be lifted or otherwise expire."

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"On September 19, 2022, this Court issued an Order ("Clarification Order") clarifying that its April 21, 2022, Order enjoined Defendants from enforcing "any aspect of SB 280[.]" including the 2021 Rule, and required the preservation of the status quo prior to the enactment of SB 280. This Court ordered—for the second time—that the status quo to be preserved for the duration of the litigation was the 2017 process for amending the sex designation on birth certificates. Finally, the Clarification Order made clear that the 2022 Rule could not be enforced, as doing so would disrupt the status quo and violate the existing preliminary injunction."

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"16."

16. On September 19, 2022, this Court issued an Order ("Clarification Order") clarifying that its April 21, 2022, Order enjoined Defendants from enforcing "any aspect of SB 280[.]" including the 2021 Rule, and required the preservation of the status quo prior to the enactment of SB 280. This Court ordered—for the second time—that the status quo to be preserved for the duration of the litigation was the 2017 process for amending the sex designation on birth certificates. Finally, the Clarification Order made clear that the 2022 Rule could not be enforced, as doing so would disrupt the status quo and violate the existing preliminary injunction.

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"16."

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"On September 23, 2022, following this Court's Clarification Order, the State filed a petition for a writ of supervisory control with the Montana Supreme Court. In that Petition, the State asked the Montana Supreme Court to take the extraordinary measure of issuing the writ of supervisory control, claiming that this Court "did not order DPHHS to revert to the 2017 Rule"

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"17."

17. On September 23, 2022, following this Court's Clarification Order, the State filed a petition for a writ of supervisory control with the Montana Supreme Court. In that Petition, the State asked the Montana Supreme Court to take the extraordinary measure of issuing the writ of supervisory control, claiming that this Court "did not order DPHHS to revert to the 2017 Rule"

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"6"

and that this Court “lacks the authority to order DPHHS to return to the 2017 Rule.” In addition, the State claimed that the 2022 Rule is “unquestionably in effect” despite this Court’s confirmation that a valid preliminary injunction was in place reinstating the 2017 procedures that the 2022 Rule directly contradicts.

18. Defendants continue to assert that the 2022 Rule is the controlling set of procedures for applications for birth-certificate amendments, notwithstanding the fact that, under the 2022 Rule, absent an injunction, DPHHS does not accept, and will not approve, applications from transgender people for amendments arising from gender transition, gender identity, or change of gender.

19. The Act, the 2021 Rule, and the 2022 Rule, violate the Montana Constitution’s equal-protection guarantee, due-process guarantee, and privacy provisions, as well as the Montana Governmental Code of Fair Practices (the “Code”). The Act and the 2021 Rule additionally violate the Montana Human Rights Act (“MHRA”).

20. Both the Emergency Rule and the 2022 Rule were deliberately promulgated by DPHHS to circumvent the preliminary-injunction order of April 21, 2022, and to target transgender people and deprive them of an accurate government-issued identity document.

**JURISDICTION AND VENUE**

21. Original jurisdiction is conferred on this Court through Article VII, Section 4, of the Montana Constitution and § 3–5–302, MCA.

22. This Court has jurisdiction to grant declaratory relief under the Montana Uniform Declaratory Judgments Act, §§ 27–8–201, -202, MCA; M. R. Civ. P. 57.

23. This Court has jurisdiction to grant injunctive relief under § 27–19–101 *et seq.*, MCA.

Text Replaced  
[Old]: “is unconstitutional.”  
[New]: “and that this Court “lacks the authority to order DPHHS to return to the 2017 Rule.” In addition, the State claimed that the 2022 Rule is “unquestionably in effect” despite this Court’s confirmation that a valid preliminary injunction was in place reinstating the 2017 procedures that the 2022 Rule directly contradicts.”

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“Defendants continue to assert that the 2022 Rule is the controlling set of procedures for applications for birth-certificate amendments, notwithstanding the fact that, under the 2022 Rule, absent an injunction, DPHHS does not accept, and will not approve, applications from transgender people for amendments arising from gender transition, gender identity, or change of gender. 19. The Act, the 2021 Rule, and the 2022 Rule, violate the Montana Constitution’s equal-protection guarantee, due-process guarantee, and privacy provisions, as well as the Montana Governmental Code of Fair Practices (the “Code”). The Act and the 2021 Rule additionally violate the Montana Human Rights Act (“MHRA”).”

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“18.”

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“Both the Emergency Rule and the 2022 Rule were deliberately promulgated by DPHHS to circumvent the preliminary-injunction order of April 21, 2022, and to target transgender people and deprive them of an accurate government-issued identity document.”

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“20.”

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[Old]: “9.”  
[New]: “21.”

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[Old]: “10.”  
[New]: “22.”

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[Old]: “57.”  
[New]: “57”

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[Old]: “11.”  
[New]: “23.”

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[Old]: “3.”  
[New]: “7”

24. Pursuant to § 25-2-126, MCA, venue is proper in Yellowstone County because

suit may be brought in the county where any one of the individual plaintiffs resides. Plaintiff

Amelia Marquez is a longtime resident of Yellowstone County and was so at the commencement

of this suit. She is currently studying out of state for the semester and intends to return to

Yellowstone County after she completes her studies and associated internships. Venue is also

proper in Yellowstone County pursuant to § 25-2-126, MCA, because it is the county in which the

claims arose.

25. On July 22, 2021, Plaintiffs filed complaints with the Montana Human Rights

Bureau (“MHRB”) challenging the Act on the grounds that it violates Article II, Paragraphs 3, 4,

10, and 17 of the Montana Constitution, as well as MHRA, the Code, and the Fourteenth

Amendment to the United States Constitution.

26. On November 3, 2021, the MHRB “dismissed [the complaints] from th[e]

administrative process.” The MHRB concluded that the “gravamen” of the complaints was a

challenge to the constitutionality of Act and that the MHRB lacked authority to decide

constitutional questions. The MHRB noted that “[i]t is well settled that [c]onstitutional questions

are properly decided by a judicial body, not an administrative official, under the principle of

separation of powers.”

27. The MHRB authorized Plaintiffs to prosecute their challenges to the Act before the

district court, concluding that “the charging part[ies] may pursue the complaint[s] in district court.”

28. A true and correct copy of the November 3, 2021, letter and attachments from the

MHRB addressing Ms. Marquez’s complaint was attached as Exhibit 1 to the First Amended

Complaint.

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"12."

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"24."

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[Old]: "County. 13. On July 22, 2021, Plaintiffs filed complaints with the Montana Human Rights Bureau (“MHRB”) challenging the Act on the grounds that it violates Article II, Paragraphs 3, 4, 10, and 17 of the Montana Constitution, as well as the Montana Human Rights Act (“MHRA”), the Governmental Code of Fair Practices (the “Code”), and the Fourteenth Amendment to the United States Constitution. 14.”

[New]: "County and was so at the commencement of this suit. She is currently studying out of state for the semester and intends to return to Yellowstone County after she completes her studies and associated internships. Venue is also proper in Yellowstone County pursuant to § 25-2-126, MCA, because it is the county in which the claims arose. 25. On July 22, 2021, Plaintiffs filed complaints with the Montana Human Rights Bureau (“MHRB”) challenging the Act on the grounds that it violates Article II, Paragraphs 3, 4, 10, and 17 of the Montana Constitution, as well as MHRA, the Code, and the Fourteenth Amendment to the United States Constitution. 26.”

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"longtime"

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"28."

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[Old]: "1, 17."  
[New]: "1 to the First Amended Complaint."

Text Replaced

[Old]: "is"  
[New]: "was"

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[Old]: "4"  
[New]: "8"

29. A true and correct copy of the November 3, 2021, letter and attachments from the MHRB addressing Mr. Doe's complaint was attached as Exhibit 2 to the First Amended Complaint.

- Text Inserted  
"29."
- Text Replaced  
[Old]: "2. 18."  
[New]: "2 to the First Amended Complaint."
- Text Replaced  
[Old]: "is"  
[New]: "was"

30. Exhibit 1 and Exhibit 2 each incorporate by reference a Final Investigative Report that sets forth the bases for the MHRB's conclusions with respect to Ms. Marquez and Mr. Doe.

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[Old]: "incorporates"  
[New]: "incorporate"
- Text Inserted  
"30."

**PARTIES**

*Plaintiffs*

31. Ms. Marquez is a woman who was born in Montana and is a longtime resident of Billings, Montana. Ms. Marquez is transgender and wishes to correct her Montana birth certificate, which incorrectly indicates that she is male. She has lived and worked in Montana her entire adult life. For most of her adult life, Ms. Marquez has lived and identified as female. Although she has undertaken hormone therapy and counseling, Ms. Marquez cannot afford surgery that may be required by the Act, and by the 2021 Rule, if the preliminary injunction is lifted. She does not have the financial means to pay the required out-of-pocket costs. Ms. Marquez also cannot take off time from work and studies for such surgery and post-operative recovery. Nor does she wish to undergo such surgery at this time.

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"19."
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[Old]: "currently resides in"  
[New]: "is a longtime resident of"
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[Old]: "the surgery"  
[New]: "surgery that may be"
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[Old]: "because she"  
[New]: "and by the 2021 Rule, if the preliminary injunction is lifted. She"
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[Old]: "for the"  
[New]: "and studies for such"
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[Old]: "this"  
[New]: "such"
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"20."

32. Mr. Doe is a man who was born in Montana and currently resides out of state. He is transgender and wishes to correct his Montana birth certificate, which incorrectly identifies him as female. Since adolescence, Mr. Doe has expressed his gender in a traditionally male manner and has lived and identified fully as male for the last two-and-a-half years. Mr. Doe has taken hormone therapy for three years and completed masculinizing chest-reconstruction surgery ("top surgery"). He does not wish to undergo additional surgery at this time.

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"32."
- Text Replaced  
[Old]: "year and a half"  
[New]: "two-and-a-half years."
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[Old]: "two"  
[New]: "three"
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[Old]: "chest reconstruction"  
[New]: "chest-reconstruction"
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[Old]: "5"  
[New]: "9"

*Defendants*

33. The State of Montana is a government entity subject to and bound by the laws of the State of Montana and its constitution. Under Article II, Section 18, of the Montana Constitution, the state is not entitled to immunity from suit in this case.

34. DPHHS is an agency of the State of Montana that is subject to and bound by the laws of the State of Montana and its constitution. As a state agency, DPHHS is not entitled to immunity from suit under Article II, Section 18, of the Montana Constitution. DPHHS has supervisory authority over the process for amending birth certificates. DPHHS was charged under the Act with amending the state's administrative regulations to make them consistent with the Act.

35. Governor Gianforte is the elected governor of the State of Montana. He is the state's principal executive officer and is responsible for administering Montana's laws, including the Act.

36. Director Brererton is the Director of DPHHS. He is the agency's chief executive officer and is responsible for administering the Act and its related regulations.

**CLASS ALLEGATIONS**

37. Ms. Marquez and Mr. Doe bring this action under Rules 23(a) and (b)(2) of the Montana Rules of Civil Procedure on behalf of themselves and all others similarly situated.

38. Plaintiffs seek to represent a class defined as all transgender people born in Montana who currently want, or who in the future will want, to have the sex designation changed on their Montana birth certificate in order to be consistent with what they know their sex to be (that is, their gender identity).

39. In accordance with Rule 23(a)(1), joinder of all members of the class is impracticable. There are at least 3,400 transgender individuals above the age of 13 born or living in Montana. See Jody L. Herman, Andrew R. Flores, and Kathryn K. O'Neil, *How Many Adults*

- Text Replaced [Old]: "21." [New]: "33."
- Text Deleted "absent certain conditions not present"
- Text Deleted "22."
- Text Inserted "34."
- Text Replaced [Old]: "has been" [New]: "was"
- Text Deleted "23."
- Text Deleted "recently"
- Text Inserted "35."
- Text Inserted "36."
- Text Replaced [Old]: "24, Director Meier" [New]: "Director Brererton"
- Text Inserted "the Act and its related regulations. CLASS ALLEGATIONS"
- Text Inserted "Ms. Marquez and Mr. Doe bring this action under Rules 23(a) and (b)(2) of the Montana Rules of Civil Procedure on behalf of themselves and all others similarly situated."
- Text Inserted "37."
- Text Inserted "Plaintiffs seek to represent a class defined as all transgender people born in Montana who currently want, or who in the future will want, to have the sex designation changed on their Montana birth certificate in order to be consistent with what they know their sex to be (that is, their gender identity)."
- Text Inserted "38."
- Text Inserted "In accordance with Rule 23(a)(1), joinder of all members of the class is impracticable. There are at least 3,400 transgender individuals above the age of 13 born or living in Montana. See Jody L. Herman, Andrew R. Flores, and Kathryn K. O'Neil, How Many Adults"
- Text Inserted "39."
- Text Inserted "10"



and Youth Identify as Transgender, Williams Institute (June 2022), at 13. Even if only a modest number of these individuals were born in Montana and seek to amend their birth certificates, this class membership is well within the parameters accepted by the Montana Supreme Court for class certification.

Text Inserted  
"and Youth Identify as Transgender, Williams Institute (June 2022), at 13. Even if only a modest number of these individuals were born in Montana and seek to amend their birth certificates, this class membership is well within the parameters accepted by the Montana Supreme Court for class certification."

40. Moreover, although the numerosity requirement is often cast in purely numerical terms, its core component is that joinder is impracticable, whatever the cause. The presence of many class members is not the only way to satisfy the requirements of Rule 23. 1. Newberg on Class Actions, § 3:11 (5th ed.) Other factors include (a) the financial resources available to class members to finance their own lawsuit, (b) the ability of class members to institute individual lawsuits in light of threats to transgender people of harassment and potential violence, (c) the geographic dispersion of the class, and (d) the plaintiffs' request for prospective relief involving future class members.

Text Inserted  
"Moreover, although the numerosity requirement is often cast in purely numerical terms, its core component is that joinder is impracticable, whatever the cause. The presence of many class members is not the only way to satisfy the requirements of Rule 23. 1. Newberg on Class Actions, § 3:11 (5th ed.) Other factors include (a) the financial resources available to class members to finance their own lawsuit, (b) the ability of class members to institute individual lawsuits in light of threats to transgender people of harassment and potential violence, (c) the geographic dispersion of the class, and (d) the plaintiffs' request for prospective relief involving future class members."

Text Inserted  
"40."

41. Each of these factors renders joinder impracticable. Transgender people face high rates of poverty and homelessness. Nearly one-third of transgender people fall below the poverty line. In addition, nearly one-third of transgender people have experienced homelessness. S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality (Dec. 2016). This renders financing an independent lawsuit difficult, if not impossible.

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Text Inserted  
"41."

42. Transgender people continue to face discrimination and harassment, including threats of violence, when their status is made public. *Id.* Acts of discrimination and threats of violence suppress the willingness of transgender people to step forward to protect their rights.

Text Inserted  
"Transgender people continue to face discrimination and harassment, including threats of violence, when their status is made public. *Id.* Acts of discrimination and threats of violence suppress the willingness of transgender people to step forward to protect their rights."

Text Inserted  
"42."

43. Further, the class is geographically dispersed in a large and thinly populated state. Organizing and coordinating joinder under these circumstances would be extremely difficult.

Text Replaced  
[Old]: "the Act."  
[New]: "Further, the class is geographically dispersed in a large and thinly populated state. Organizing and coordinating joinder under these circumstances would be extremely difficult."

Text Inserted  
"43."

Text Inserted  
"11"

44. Finally, because the class includes future applicants for birth-certificate amendments, it is not possible to identify with any precision the current membership in the class.

"Future claimants generally meet the numerosity requirement due to the impracticality of counting such class members much less joining them." *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019).

45. In accordance with Rule 23(a)(2), there are questions of law or fact common to the class. Each member of the class shares an interest in determining the constitutionality of SB 280 and all related rules and regulations that restrict or eliminate the ability of transgender people to amend the sex designation on their Montana birth certificates—under the Montana Governmental Code of Fair Practices, and the Montana Constitution’s equal-protection clause, substantive-due-process guarantee, right to informational privacy, and right to freedom from state interference with medical decisions. Each member of the class shares with Ms. Marquez and Mr. Doe the burdens of proving and demonstrating the legal sufficiency of the claims set forth in this Second Amended Complaint.

46. In accordance with Rule 23(a)(3), these claims of the representatives of the class—Ms. Marquez and Mr. Doe—are typical of the claims of the class. Indeed, they are identical to the claims of the class.

47. In accordance with Rule 23(a)(4), Ms. Marquez and Mr. Doe, as representatives of the class, will fairly and adequately protect the interests of the class. Their interests are not antagonistic to the interests of the class. They suffer from the same harms inflicted by Defendants and seek the same litigation outcomes in the form of declaratory and permanent injunctive relief. Neither Ms. Marquez nor Mr. Doe seeks monetary relief, so no financial conflict will arise between the claims of Ms. Marquez and Mr. Doe and the claims of the class members. The declarations of Ms. Marquez and Mr. Doe submitted to this Court in support of the motion for preliminary

Text Inserted

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Text Inserted

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"47."

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"12"

injunction, as well as the post-injunction proceedings, evidence their ability and intent to act as faithful and aggressive class stewards.

Text Inserted  
"injunction, as well as the post-injunction proceedings, evidence their ability and intent to act as faithful and aggressive class stewards."

48. Plaintiffs' counsel are competent to represent the class and are prepared to defend vigorously the interests of the class as a whole. Plaintiffs are represented by experienced counsel from the ACLU Montana Foundation, Inc., the American Civil Liberties Union Foundation, the law firm of Nixon Peabody LLP, and Elizabeth Halverson PC, who is local counsel in Billings, Montana. The lawyers affiliated with the above law firms and organizations, and who have appeared in this matter, have extensive experience in complex constitutional litigation, as well as class-action litigation, in Montana and throughout the United States. They also have extensive experience representing transgender litigants. The credentials of the proposed class counsel are described in greater detail in the motion for class certification and its supporting brief. The prior two complaints filed in this case, the proposed Second Amended Complaint, the successful prosecution of the motion for preliminary injunction before this Court, and the successful prosecution of the motion for clarification before this Court are evidence of counsel's competence and commitment to the interests of the class.

Text Inserted  
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"48."

Text Inserted  
"Plaintiffs seek certification of a class under Rule 23(b)(2). As is set forth in this Second Amended Complaint, and as is evident from the preliminary-injunction proceedings before this Court, Defendants have acted on grounds that apply generally to the class so that final injunctive relief, or corresponding declaratory relief, is appropriate for the class as a whole. Accordingly, a declaration recognizing the unconstitutional nature of SB 280, and a permanent injunction against enforcing any aspect of SB 280, including the 2021 Rule and the 2022 Rule, would provide relief to every member of the class. This is precisely the relief Plaintiffs seek."

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"49."

Text Inserted  
"All the requirements of Rule 23 have been met."

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"50."

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"There are many factors that determine gender identity, including genetic characteristics. Gender identity is not simply a function of the appearance of an infant's external genitalia at birth, which is typically the limited basis for the sex designation on a person's birth certificate."

Text Replaced  
[Old]: "6"  
[New]: "13"

49. Plaintiffs seek certification of a class under Rule 23(b)(2). As is set forth in this Second Amended Complaint, and as is evident from the preliminary-injunction proceedings before this Court, Defendants have acted on grounds that apply generally to the class so that final injunctive relief, or corresponding declaratory relief, is appropriate for the class as a whole. Accordingly, a declaration recognizing the unconstitutional nature of SB 280, and a permanent injunction against enforcing any aspect of SB 280, including the 2021 Rule and the 2022 Rule, would provide relief to every member of the class. This is precisely the relief Plaintiffs seek.

50. All the requirements of Rule 23 have been met.

ALLEGATIONS COMMON TO ALL COUNTS

*Gender Dysphoria and Its Treatment*

51. Transgender people have a gender identity that differs from their assigned sex at birth.

52. Gender identity refers to a person's fundamental internal sense of being a particular sex. The medical consensus in the United States is that gender identity is innate and that forced efforts to change a person's gender identity not only are harmful to a person's health and well-being, but also are unethical.

53. According to the American College of Physicians, the American Psychiatric Association, and other major medical organizations, every person has a gender identity that cannot be altered voluntarily and cannot be ascertained immediately after birth.

54. Gender dysphoria is a medically recognized condition defined by a marked incongruence between a person's gender identity and the sex they were assigned at birth. It is a serious medical condition. Some, but not all, transgender people experience gender dysphoria.

55. Treatment of gender dysphoria is guided by the standards of care set forth by the World Professional Association for Transgender Health, which were originally published in 1979 and are now in their eighth edition. These guidelines reflect the professional consensus about the psychological, psychiatric, hormonal, and surgical management of gender dysphoria.

56. It is the recognized standard of care to address gender dysphoria with treatments designed to bring a person's body and gender expression into line with their gender identity. This course of treatment has different components depending on the medical needs of each transgender person. As with other forms of healthcare, a patient considers the available treatment options and makes treatment decisions in consultation with their healthcare provider. Forcing a particular

- Text Replaced  
[Old]: "belonging to a particular gender."  
[New]: "being a particular sex."
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"27."
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"53."
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"28."
- Text Inserted  
"54."
- Text Replaced  
[Old]: "have"  
[New]: "experience"
- Text Deleted  
"29."
- Text Inserted  
"55."
- Text Replaced  
[Old]: "seventh"  
[New]: "eighth"
- Text Deleted  
"30."
- Text Inserted  
"56."
- Text Replaced  
[Old]: "7"  
[New]: "14"

course of treatment, such as surgery, as the Act and the 2021 Rule require, without reference to the particular needs and circumstances of an individual patient, is medically irresponsible. In some circumstances, it may constitute medical malpractice.

57. Surgery is not medically necessary or medically desirable for all transgender people, as Defendants now concede based on the 2022 Rule. Even for those who need it, the specific surgery that a transgender person needs varies based on individual circumstances. For some, surgery is medically contraindicated, while for others it is cost-prohibitive. Like other major healthcare decisions, decisions about gender-affirming surgery are profoundly personal, require confidential medical evaluations, and often involve intimate conversations with family members.

The state has no role to play in these deliberations.

58. Treatment for gender dysphoria also includes living one's life consistently with one's gender identity. This includes using identity documents that accurately reflect one's sex, as determined by one's gender identity. Forcing transgender people to use identity documents that do not match their gender identity, or forcing them to go without identity documents, is inconsistent with medical protocols and can result in elevated levels of anxiety and depression.

59. Being forced to hold and present documents that do not match a person's sex as determined by their gender identity can also result in discrimination and violence when transgender people are called upon to present identification that identifies a sex designation inconsistent with a transgender person's public expression.

60. Recognizing the importance of identification documents, the American Medical Association ("AMA") has adopted a policy urging states to eliminate any requirement that

-  Text Replaced  
[Old]: "the gender-affirming surgery the Act requires,"  
[New]: "surgery, as the Act and the 2021 Rule require,"
-  Text Replaced  
[Old]: "patient"  
[New]: "patient,"
-  Text Replaced  
[Old]: "31. Gender-affirming surgery"  
[New]: "Surgery"
-  Text Inserted  
"57."
-  Text Replaced  
[Old]: "people."  
[New]: "people, as Defendants now concede based on the 2022 Rule."
-  Text Replaced  
[Old]: "a person's individual needs."  
[New]: "individual circumstances."
-  Text Replaced  
[Old]: "evaluations"  
[New]: "evaluations,"
-  Text Replaced  
[Old]: "In a free society, the"  
[New]: "The"
-  Text Deleted  
"32."
-  Text Inserted  
"58."
-  Text Inserted  
"one's sex, as determined by"
-  Text Inserted  
"elevated levels of"
-  Text Deleted  
"33."
-  Text Inserted  
"59."
-  Text Inserted  
"sex as determined by their gender identity"
-  Text Replaced  
[Old]: "person publicly presents himself or herself. 34."  
[New]: "person's public expression."
-  Text Deleted  
"how"
-  Text Inserted  
"60."
-  Text Deleted  
"See AMA announced policies adopted on final day of Special Meeting (June 16, 2021), available at"
-  Text Deleted  
"-1"
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course of treatment, such as surgery, as the Act and the 2021 Rule require, without reference to the particular needs and circumstances of an individual patient, is medically irresponsible. In some circumstances, it may constitute medical malpractice.

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<sup>2</sup> <https://www.ama-assn.org/press-center/press-releases/ama-announced-policies-adopted-finalday-special-meeting> . 2 See Proposing Changes to the Department's Policies on Gender on U.S. Passports and Consular Reports of Birth Abroad -United States Department of State (June 30, 2021), available at <https://www.state.gov/proposing-changes-to-the-departments-policies-on-gender-on-u-spssports-and-consular-reports-of-birth-abroad/>.

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[Old]: "8"  
[New]: "15"

transgender people have gender-affirming surgery to amend their birth certificates.<sup>1</sup> The rationale for the AMA’s policy is to ease the path to identification documents so that psychological stress, depression, invasions of privacy, and harassment, including potential violence against transgender people, are avoided. Additionally, the United States Department of State now allows applicants to self-select the sex listed on their passport and Consular Reports of Birth Abroad, without requiring medical certification.<sup>2</sup>

61. A person’s sex is determined by their gender identity, not their sex assigned at birth or their anatomy. Gender-affirming surgery, even for those transgender people who have a medical need for it, does not “change” their sex, but rather affirms it.

62. By embracing the Act, the State of Montana has imposed a draconian medical requirement on transgender people that has no medical or other rational justification. It reinstates an archaic understanding of transgender people and ignores modern medical treatment guidelines.

**The Act and Its Effects**

63. On April 12, 2021, the Legislature passed the Act and sent it to Governor Gianforte for signature. On April 30, 2021, Governor Gianforte signed the Act, which became immediately effective upon his signature.

64. The Act states, in relevant part, that: “The sex of a person designated on a birth certificate may be amended only if the [DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person born in Montana has been

<sup>1</sup> See AMA announced policies adopted on final day of Special Meeting (June 16, 2021), available at <https://www.ama-assn.org/press-center/press-releases/ama-announced-policies-adopted-final-day-special-meeting>.

<sup>2</sup> See U.S. Dep’t of State – Bureau of Consumer Affairs, *Selecting Your Gender Marker*, available at <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html>.



















- Text Replaced  
[Old]: "has proposed changes to the passport and Consular Reports of Birth Abroad application process to allow applicants to self-select their gender,"  
[New]: "now allows applicants to self-select the sex listed on their passport and Consular Reports of Birth Abroad,"
- Text Deleted  
"35."
- Text Deleted  
"designation"
- Text Inserted  
"61."
- Text Deleted  
"36."
- Text Inserted  
"62."
- Text Deleted  
"37."
- Text Inserted  
"63."
- Text Deleted  
"38."
- Text Inserted  
"64."
- Text Replaced  
[Old]: "part"  
[New]: "part,"
- Text Inserted  
"<sup>1</sup> See AMA announced policies adopted on final day of Special Meeting (June 16, 2021), available at <https://www.ama-assn.org/press-center/press-releases/ama-announced-policies-adopted-finalday-special-meeting>. <sup>2</sup> See U.S. Dep’t of State – Bureau of Consumer Affairs, *Selecting Your Gender Marker*, available at <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gendermarker.html>."
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[Old]: "9"  
[New]: "16"

changed by surgical procedure.” The Act was created with the **express intent to reverse regulations** previously promulgated by DPHHS in **December 2017** that had functioned well for **years**. These procedures 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. The 2017 procedures did not require surgery or court proceedings.

**65.** In contrast to the 2017 procedures, the Act’s sole purpose has been to burden, if not outright eliminate, a transgender person’s ability to correct their birth certificate sex designation to conform with what they know their sex to be, as determined by their gender identity.

**66.** The Act and the 2021 Rule provide that an original sex designation on a birth certificate may be amended *only* if DPHHS receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the applicant has been “changed” by surgical procedure. The order must contain sufficient information for DPHHS to locate the original birth certificate. DPHHS’s inability to locate the original birth certificate does not excuse an applicant’s obligation to comply with the Act.

**67.** The Act and the 2021 Rule require individuals, including Plaintiffs and other members of the class to spend a significant amount of money to retain an attorney and attend court proceedings. The Act also unnecessarily delays the amendment process by requiring court proceedings that are subject to continuance or other postponement. The Act and the 2021 Rule also require an individual to reveal confidential medical information, and information about one’s transgender status, in a public proceeding or incur the expense and uncertainty of moving to proceed under a pseudonym.

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"39."
-  Text Replaced  
[Old]: "specific"  
[New]: "express"
-  Text Replaced  
[Old]: "December,"  
[New]: "December"
-  Text Replaced  
[Old]: "years without incident."  
[New]: "years."
-  Text Replaced  
[Old]: "40. The Act's sole purpose is to intentionally burden"  
[New]: "In contrast to the 2017 procedures, the Act's sole purpose has been to burden, if not outright eliminate,"
-  Text Inserted  
"65."
-  Text Replaced  
[Old]: "their gender,"  
[New]: "what they know their sex to be, as determined by their gender identity."
-  Text Deleted  
"41."
-  Text Replaced  
[Old]: "provides"  
[New]: "and the 2021 Rule provide"
-  Text Inserted  
"66."
-  Text Deleted  
"42."
-  Text Replaced  
[Old]: "requires individuals, including Plaintiffs,"  
[New]: "and the 2021 Rule require individuals, including Plaintiffs and other members of the class"
-  Text Inserted  
"67."
-  Text Replaced  
[Old]: "also requires"  
[New]: "and the 2021 Rule also require"
-  Text Replaced  
[Old]: "information"  
[New]: "information,"
-  Text Replaced  
[Old]: "someone's status as transgender in a public proceeding,"  
[New]: "one's transgender status, in a public proceeding"
-  Text Inserted  
"and uncertainty"
-  Text Inserted  
"17"



68. The Act and the 2021 Rule contain no exceptions for medical contraindications of

the inability to pay the cost of the mandated procedures.

***The Preliminary Injunction and the Unlawful Rules***

69. On April 21, 2022, this Court entered a preliminary injunction that enjoined

Defendants, for the duration of this case, from enforcing the provisions of the Act or "any aspect"

of the Act, including the 2021 Rule. The Order expressly provides that the status quo preserved by

the preliminary injunction is the birth-certificate amendment procedures in effect prior to the

passage of the Act—namely, the procedures adopted by DPHHS in December 2017. The 2017

procedures constitute the last, actual, peaceable, noncontested condition preceding the controversy

in this matter that existed prior to the enactment of SB 280. The 2017 procedures did not mandate

surgical measures, require the involuntary disclosure of medical procedures, or compel the public

disclosure of transgender status as part of the application process.

70. Defendants refused to abide by the Order and refused to process applications in

accordance with the 2017 procedures, instead claiming "uncertainty" and "confusion" as to the

effect of the Order on the application process. Using this falsely claimed "confusion" and

"uncertainty" as justification, DPHHS issued the Emergency Rule and, shortly thereafter, the 2022

Permanent Rule, both of which absolutely forbade birth-certificate amendments based on gender

identity, gender transition, or change of gender. Both the Emergency Rule and the 2022 Rule were

thinly disguised efforts to circumvent the Order. Defendants made no effort whatsoever to return

to the status quo as required by the Order and Montana law.

71. In light of the Defendants' alleged confusion and uncertainty, on June 7, 2022,

Plaintiffs moved to clarify the April 21, 2022, Order and affirm their understanding that, according

Text Deleted  
"43."

Text Replaced  
[Old]: "contains no exceptions for medical contraindications,"  
[New]: "and the 2021 Rule contain no exceptions for medical contraindications"

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"68."

Text Replaced  
[Old]: "Act. 44. The"  
[New]: "The Preliminary Injunction and the Unlawful Rules"

Font "TimesNewRomanPSMT" changed to "TimesNewRomanPS-BoldItalicMT".

Text Replaced  
[Old]: "Act directs DPHHS to issue implementing regulations"  
[New]: "On April 21, 2022, this Court entered a preliminary injunction that enjoined Defendants, for the duration of this case, from enforcing the provisions of the Act or "any aspect" of the Act, including the 2021 Rule. The Order expressly provides that the status quo preserved by the preliminary injunction is the birth-certificate amendment procedures in effect prior to the passage of the Act—namely, the procedures adopted by DPHHS in December 2017. The 2017 procedures constitute the last, actual, peaceable, noncontested condition preceding the controversy in this matter that existed prior to the enactment of SB 280. The 2017 procedures did not mandate surgical measures, require the involuntary disclosure of medical procedures, or compel the public disclosure of transgender status as part of the application process."

Text Inserted  
"69."

Text Replaced  
[Old]: "in conformity with"  
[New]: "Defendants refused to abide by the Order and refused to process applications in accordance with the 2017 procedures, instead claiming "uncertainty" and "confusion" as to the effect of the Order on the application process. Using this falsely claimed "confusion" and "uncertainty" as justification, DPHHS issued the Emergency Rule and, shortly thereafter, the 2022 Permanent Rule, both of which absolutely forbade birth-certificate amendments based on gender identity, gender transition, or change of gender. Both the Emergency Rule and the 2022 Rule were thinly disguised efforts to circumvent the Order. Defendants made no effort whatsoever to return to the status quo as required by the Order and Montana law."

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"70."

Text Inserted  
"In light of the Defendants' alleged confusion and uncertainty, on June 7, 2022, Plaintiffs moved to clarify the April 21, 2022, Order and affirm their understanding that, according"

Text Inserted  
"71."

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"18"

to the April 21, 2022, Order and established Montana law, the preliminary injunction required the parties to preserve the status quo by maintaining the 2017 birth-certificate amendment procedures.

Text Replaced  
[Old]: "the 45. The legislature failed to offer any legitimate public purpose for"  
[New]: "to the April 21, 2022, Order and established Montana law, the preliminary injunction required the parties to preserve the status quo by maintaining the 2017 birth-certificate amendment procedures."

72. Following a hearing on September 15, 2022, the Court reaffirmed that the 2017 procedures governed the application process until this case is fully resolved on the merits. The Court rejected Defendants' arguments, characterizing them as "needless legal gymnastics" and "demonstrably ridiculous." The Court directed DPHHS to begin processing applications consistent with the 2017 procedures immediately.

Text Replaced  
[Old]: "the Act, and none exists. The Act was passed"  
[New]: "Following a hearing on September 15, 2022, the Court reaffirmed that the 2017 procedures governed the application process until this case is fully resolved on the merits. The Court rejected Defendants' arguments, characterizing them as "needless legal gymnastics" and "demonstrably ridiculous." The Court directed DPHHS to begin processing applications consistent with the 2017 procedures immediately."

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"72."

73. In open defiance of the Court, Defendants initially issued statements to the press that they would not comply with the Court's orders. Within days, however, Defendants reversed course and announced that they would, in fact, comply, but only provisionally.

Text Replaced  
[Old]: "to express antipathy toward and to harm transgender people. The Need for Birth Certificates Matching"  
[New]: "In open defiance of the Court, Defendants initially issued statements to the press that they would not comply with the Court's orders. Within days, however, Defendants reversed course and announced that they would, in fact, comply, but only provisionally. The Need for Birth Certificates Matching One's Sex, as Determined by"

Text Inserted  
"73."

***The Need for Birth Certificates Matching One's Sex, as Determined by One's Gender Identity***

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"46."

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"74."

74. A birth certificate is an essential government-issued document that individuals use for various important purposes throughout their lifetime. Birth certificates are used in a wide variety of contexts, such as determining eligibility for employment, providing identification for travel, proving age, and enrolling in government programs.

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"47."

Text Replaced  
[Old]: "to acknowledge a transgender person's gender by providing them a birth certificate matching their gender identity, unless they undergo a significant surgical procedure and disclose private information in a public court proceeding, deprives that person"  
[New]: "to issue to transgender people an amended birth certificate, either based on the procedures and requirements of the Act and the 2021 Rule or based on the ban on such amendments under the 2022 Rule, deprives transgender applicants"

Text Inserted  
"75."

75. Defendants' refusal to issue to transgender people an amended birth certificate, either based on the procedures and requirements of the Act and the 2021 Rule or based on the ban on such amendments under the 2022 Rule, deprives transgender applicants of their rights to equality and privacy in violation of the Montana Constitution.

Text Deleted  
"48."

Text Inserted  
"76."

Text Replaced  
[Old]: "10"  
[New]: "19"

76. A mismatch between someone's gender identity and the 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. 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.

77. A mismatch between someone's gender identity and the information on their birth certificate subjects transgender people to discrimination and harassment in a variety of settings, including employment, healthcare, and interactions with government employees and officials. The Montana Constitution protects against these adverse outcomes.

*The Named Plaintiffs' Personal Histories*

78. Plaintiff Amelia Marquez is a 27-year-old woman who was born in Yellowstone County, Montana. For the first part of this year, Ms. Marquez was a substitute teacher in the Billings Public School district and was also employed by Transvisible Montana. She is currently finishing her Masters of Education in Curriculum through the Montana Educator Preparation Program.

79. Ms. Marquez is transgender. She was assigned the male sex at birth. Her birth certificate still includes a male sex designation, even though she has known that she is female for approximately six years.

80. Ms. Marquez began living fully and openly as female approximately six years ago. She has taken various steps to bring her body, and the other ways she expresses her sex, into line with her female gender identity. For the last three years, Ms. Marquez has taken hormone-replacement therapy with the aid and support of her treating healthcare professional. Additionally, Ms. Marquez has legally changed her name to a traditionally feminine one and has changed her name and sex designation on her Montana driver's license to match her gender identity.

81. Ms. Marquez would like to change the sex designation on her birth certificate to match her female sex, as determined by her gender identity, but is unable to do so because of the

- Text Deleted  
"49."
- Text Inserted  
"77."
- Text Inserted  
"The Named"
- Text Deleted  
"50."
- Text Inserted  
"78."
- Text Replaced  
[Old]: "Montana, and currently resides in Billings, Montana."  
[New]: "Montana. For the first part of this year, Ms."
- Text Replaced  
[Old]: "has been employed by Yellowstone Boys and Girls Ranch, 51."  
[New]: "was a substitute teacher in the Billings Public School district and was also employed by Transvisible Montana. She is currently finishing her Masters of Education in Curriculum through the Montana Educator Preparation Program."
- Text Deleted  
"For the last three years, Ms."
- Text Inserted  
"79."
- Text Replaced  
[Old]: "five"  
[New]: "six"
- Text Deleted  
"52."
- Text Inserted  
"80."
- Text Replaced  
[Old]: "five"  
[New]: "six"
- Text Replaced  
[Old]: "body"  
[New]: "body,"
- Text Replaced  
[Old]: "gender"  
[New]: "sex,"
- Text Replaced  
[Old]: "For the last two years, Ms. Marquez has taken hormone"  
[New]: "Marquez has taken hormone-replacement"
- Text Inserted  
"For the last three years, Ms."
- Text Deleted  
"replacement"
- Text Replaced  
[Old]: "license. 53."  
[New]: "license to match her gender identity."
- Text Inserted  
"81."

people who are denied accurate birth certificates are deprived of significant control over where, when, how, and to whom they disclose their transgender identity.

77. A mismatch between someone's gender identity and the information on their birth certificate subjects transgender people to discrimination and harassment in a variety of settings, including employment, healthcare, and interactions with government employees and officials. The Montana Constitution protects against these adverse outcomes.

#### *The Named Plaintiffs' Personal Histories*

78. Plaintiff Amelia Marquez is a 27-year-old woman who was born in Yellowstone County, Montana. For the first part of this year, Ms. Marquez was a substitute teacher in the Billings Public School district and was also employed by Transvisible Montana. She is currently finishing her Masters of Education in Curriculum through the Montana Educator Preparation Program.

79. Ms. Marquez is transgender. She was assigned the male sex at birth. Her birth certificate still includes a male sex designation, even though she has known that she is female for approximately six years.

80. Ms. Marquez began living fully and openly as female approximately six years ago. She has taken various steps to bring her body, and the other ways she expresses her sex, into line with her female gender identity. For the last three years, Ms. Marquez has taken hormone-replacement therapy with the aid and support of her treating healthcare professional. Additionally, Ms. Marquez has legally changed her name to a traditionally feminine one and has changed her name and sex designation on her Montana driver's license to match her gender identity.

81. Ms. Marquez would like to change the sex designation on her birth certificate to match her female sex, as determined by her gender identity, but is unable to do so because of the

Text Replaced  
[Old]: "gender identity"  
[New]: "sex, as determined by her gender identity,"

Text Inserted  
"the"

Text Replaced  
[Old]: "11"  
[New]: "20"

Act and the 2021 Rule, as well as the 2022 Rule. Her inability to obtain a birth certificate that accurately reflects her female sex is a painful and stigmatizing reminder of the State of Montana's refusal to recognize her as a woman.

Text Replaced  
[Old]: "the Act."  
[New]: "Act and the 2021 Rule, as well as the 2022 Rule."

Text Replaced  
[Old]: "gender identity"  
[New]: "sex"

82. Further, denying Ms. Marquez an accurate birth certificate places her at risk of violence, harassment, and discrimination every time she presents an identity document that incorrectly identifies her as male.

Text Deleted  
"54."

Text Inserted  
"82."

Text Deleted  
"55."

83. Ms. Marquez has had personal experience with the high incidence of violence, harassment, and discrimination that transgender people endure, because she has been the target of this mistreatment in both her personal and professional life. Due to these experiences, she has learned that she must take extra precautions for her personal safety.

Text Inserted  
"83."

Text Replaced  
[Old]: "experienced by transgender people,"  
[New]: "that transgender people endure,"

Text Deleted  
"56."

Text Inserted  
"84."

84. Ms. Marquez lives in fear of having to present her birth certificate to someone who may respond negatively or even violently. Ms. Marquez is typically perceived as female, so anytime she is forced to present an identity document that incorrectly identifies her as male, she is forced to "out" herself as transgender.

Text Deleted  
"57."

Text Replaced  
[Old]: "who currently resides outside of Montana. Mr. Doe currently works two part-time jobs and will return to college in the fall. 58."  
[New]: "belongs to a fifth-generation Montana ranching family. He currently resides outside of Montana, where he is enrolled in a trade school."

Text Inserted  
"85."

Text Inserted  
"86."

85. Mr. Doe is a 22-year-old man who was born in Bozeman, Montana, and belongs to a fifth-generation Montana ranching family. He currently resides outside of Montana, where he is enrolled in a trade school.

Text Replaced  
[Old]: "gender identity"  
[New]: "sex, as determined by his gender identity,"

Text Inserted  
"treatment, and anatomy in the event that the preliminary injunction is lifted and the requirements of the Act and the 2021 Rule are reinstated."

86. Mr. Doe would like to correct the sex designation on his birth certificate to accurately reflect his male sex, as determined by his gender identity, but does not wish to be forced to publicly share in court private information and records regarding his transgender status, medical treatment, and anatomy in the event that the preliminary injunction is lifted and the requirements of the Act and the 2021 Rule are reinstated.

Text Replaced  
[Old]: "12"  
[New]: "21"

87. Previously, when Mr. Doe's identity as a transgender man has been disclosed, he has been subjected to harassment and threatening conduct. Mr. Doe was denied a bank account when, in the course of applying for the account, his non-concordant identity documents disclosed his transgender status and resulted in the denial of his application. On at least one occasion, Mr. Doe and a companion were followed in downtown Bozeman, Montana, by a pickup truck for several blocks as the driver shouted transphobic slurs through a megaphone, publicly shaming Mr. Doe and his companion to crowds gathered in downtown Bozeman. On several occasions, Mr. Doe has been denied access to venues because of his transgender status.

88. For several years, Mr. Doe worked in ranching. He is a skilled equestrian trainer specializing in working with horses that are difficult to manage. As his transgender status became known, Mr. Doe was subjected to demeaning comments and conduct. His adverse treatment in the ranching community led him to conclude that he could not continue to work in the Montana ranching community because he is transgender, despite his considerable skills. As a result, Mr. Doe left the State of Montana.

89. Since adolescence, Mr. Doe has expressed his gender in a traditionally male manner and has lived and identified fully as the man he is for the two-and-a-half years. Mr. Doe, with the support and assistance of his treating health professionals, has taken certain steps to bring his body into conformity with his male gender identity. He has taken hormone therapy for approximately three years. In spring 2021, Mr. Doe underwent masculinizing chest-reconstruction surgery, commonly known as "top surgery."

90. In the event the Act and the 2021 Rule are reinstated, Mr. Doe does not wish to undergo additional gender-affirming surgery at this time. Due to the vagueness of the Act's and the 2021 Rule's surgery requirement, Mr. Doe does not know whether his top surgery would be

- Text Inserted  
"Previously, when Mr. Doe's identity as a transgender man has been disclosed, he has been subjected to harassment and threatening conduct. Mr. Doe was denied a bank account when, in the course of applying for the account, his non-concordant identity documents disclosed his transgender status and resulted in the denial of his application. On at least one occasion, Mr. Doe and a companion were followed in downtown Bozeman, Montana, by a pickup truck for several blocks as the driver shouted transphobic slurs through a megaphone, publicly shaming Mr. Doe and his companion to crowds gathered in downtown Bozeman. On several occasions, Mr. Doe has been denied access to venues because of his transgender status."
- Text Inserted  
"87."
- Text Replaced  
[Old]: "treatment and his anatomy. 59."  
[New]: "For several years, Mr. Doe worked in ranching. He is a skilled equestrian trainer specializing in working with horses that are difficult to manage. As his transgender status became known, Mr. Doe was subjected to demeaning comments and conduct. His adverse treatment in the ranching community led him to conclude that he could not continue to work in the Montana ranching community because he is transgender, despite his considerable skills. As a result, Mr. Doe left the State of Montana. 89."
- Text Inserted  
"88."
- Text Replaced  
[Old]: "male for the last year and a half."  
[New]: "the man he is for the two-and-a-half years."
- Text Replaced  
[Old]: "two"  
[New]: "three"
- Text Replaced  
[Old]: "chest reconstruction"  
[New]: "chest-reconstruction"
- Text Replaced  
[Old]: "60."  
[New]: "90. In the event the Act and the 2021 Rule are reinstated,"
- Text Inserted  
"and the 2021 Rule's"
- Text Inserted  
"22"

sufficient to satisfy the **Act and the 2021 Rule if the surgery requirements were to be reinstated.**

Furthermore, even if Mr. Doe's top surgery were deemed sufficient for purposes of obtaining a court order, the idea of having to share private medical records related to his transition with a judge, in a public court proceeding, to determine whether he is the man he knows himself to **be**, is demeaning to Mr. Doe and causes him a great deal of emotional distress due to his fear of exposure and humiliation at having his transgender status revealed.

91. The surgery Mr. Doe has had to date is not what made him male, and he would like to retain the freedom to choose when, and under what circumstances, he shares the deeply personal medical information regarding his transition, his body, and his transgender status.















92. **If the surgical and court-order requirements of the Act and the 2021 Rule were reinstated, then Mr. Doe would be compelled to undertake the financial costs and other burdens of coming to Montana to seek a court order, since Mr. Doe currently resides outside of Montana.** Among other things, Mr. Doe would need to pay for transportation to Montana, **take time off from the classes in which he is enrolled, and retain an attorney to represent him in a court hearing to complete the birth-certificate amendment process required by the Act and the 2021 Rule as drafted.**

**CLAIMS FOR RELIEF**

**COUNT I**  
**(Equal Protection of the Laws)**

93. Plaintiffs hereby incorporate all other paragraphs of this complaint as if fully set forth in this claim.

94. Article II, Section 4, of the Montana Constitution states that **"The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws."**














-  Text Replaced  
[Old]: "Act."  
[New]: "Act and the 2021 Rule if the surgery requirements were to be reinstated."
-  Text Replaced  
[Old]: "be"  
[New]: "be,"
-  Text Deleted  
"61."
-  Text Inserted  
"91."
-  Text Replaced  
[Old]: "62. In addition to his fear of having to expose his personal medical information and out himself as transgender in a public forum, the Act would require Mr. Doe"  
[New]: "If the surgical and court-order requirements of the Act and the 2021 Rule were reinstated, then Mr. Doe would be compelled"
-  Text Inserted  
"92."
-  Text Replaced  
[Old]: "of work (and risk losing his job because of the nature of his work), and retain an attorney to represent him in a court hearing to complete the process."  
[New]: "from the classes in which he is enrolled, and retain an attorney to represent him in a court hearing to complete the birth-certificate amendment process required by the Act and the 2021 Rule as drafted."
-  Text Replaced  
[Old]: "request"  
[New]: "take"
-  Text Deleted  
"63."
-  Text Inserted  
"93."
-  Text Deleted  
"64."
-  Text Replaced  
[Old]: "No"  
[New]: ""The dignity of the human being is inviolable. No"
-  Text Inserted  
"94."
-  Text Replaced  
[Old]: "13"  
[New]: "23"

~~95. The Act, the 2021 Rule, and the 2022 Rule, on their face and as applied, deny Plaintiffs and the class members equal protection of the laws on the basis of sex. Under Montana law, discrimination on the basis of gender identity is a form of discrimination on the basis of sex. *Maloney v. Yellowstone County et al.*, Cause No. 1570–2019 & 1572–2019 (Department of Labor and Industry, August 14, 2020). Both forms of discrimination are forbidden by the equal-protection clause of Article II, Section 4, of the Montana Constitution.~~

~~96. Absent injunctive relief, and to the extent the requirements of SB 280 and the 2021 Rule are reinstated, the Act and the 2021 Rule target transgender people, and only transgender people, by burdening their ability to change the sex designation on their birth certificates and requiring that applicants initiate court proceedings to obtain an order affirming that they have had some unidentified surgery. Only after undergoing surgery, presenting the confidential and intimate details of that surgery to a court, and obtaining a court order may a transgender person submit an application to DPHHS to obtain an accurate amended birth certificate.~~

~~97. The 2022 Rule goes even further. It targets transgender people, and only transgender people, by prohibiting all amendments to birth-certificate sex designations arising from gender transition, gender identity, or change of gender.~~

~~98. These prohibitions, to which only transgender people are subject, serve no legitimate purpose. They constitute a major step backward from the procedures in place since December 2017, under which no order or surgery or intimate disclosure were required and under which amendments to birth-certificate sex designations were allowed. The effort to revoke the December 2017 procedures, and Defendants' repeated refusal to abide by court orders mandating a return to the 2017 procedures, evidence an intent to discriminate against transgender people.~~

-  Text Deleted  
"65."
-  Text Replaced  
[Old]: "on its face and as applied, denies Plaintiffs"  
[New]: "the 2021 Rule, and the 2022 Rule, on their face and as applied, deny Plaintiffs and the class members"
-  Text Inserted  
"95."
-  Text Replaced  
[Old]: "their gender identity and sex. It discriminates on the basis of gender identity, which is also"  
[New]: "sex. Under Montana law, discrimination on the basis of gender identity is"
-  Text Replaced  
[Old]: "4. 66. As described above,"  
[New]: "4, of the Montana Constitution."
-  Text Replaced  
[Old]: "the Act targets"  
[New]: "Absent injunctive relief, and to the extent the requirements of SB 280 and the 2021 Rule are reinstated, the Act and the 2021 Rule target"
-  Text Inserted  
"96."
-  Text Replaced  
[Old]: "a court proceeding"  
[New]: "court proceedings"
-  Text Replaced  
[Old]: "gender-affirming"  
[New]: "some unidentified"
-  Text Replaced  
[Old]: "his or her"  
[New]: "an"
-  Text Replaced  
[Old]: "amend a birth certificate"  
[New]: "obtain an accurate amended birth certificate."
-  Text Replaced  
[Old]: "to reflect his or her gender accurately. 67."  
[New]: "The 2022 Rule goes even further. It targets transgender people, and only transgender people, by prohibiting all amendments to birth-certificate sex designations arising from gender transition, gender identity, or change of gender."
-  Text Inserted  
"97."
-  Text Replaced  
[Old]: "burdensome procedures,"  
[New]: "prohibitions,"
-  Text Inserted  
"98."
-  Text Replaced  
[Old]: "back"  
[New]: "backward"
-  Text Replaced  
[Old]: "were required."  
[New]: "were required and under which amendments to birth-certificate sex designations were allowed."
-  Text Replaced  
[Old]: "standing alone, evidences"  
[New]: "and Defendants' repeated refusal to abide by court orders mandating a return to the 2017 procedures, evidence"



95. The Act, the 2021 Rule, and the 2022 Rule, on their face and as applied, deny Plaintiffs and the class members equal protection of the laws on the basis of sex. Under Montana law, discrimination on the basis of gender identity is a form of discrimination on the basis of sex. *Maloney v. Yellowstone County et al.*, Cause No. 1570–2019 & 1572–2019 (Department of Labor and Industry, August 14, 2020). Both forms of discrimination are forbidden by the equal-protection clause of Article II, Section 4, of the Montana Constitution.

96. Absent injunctive relief, and to the extent the requirements of SB 280 and the 2021 Rule are reinstated, the Act and the 2021 Rule target transgender people, and only transgender people, by burdening their ability to change the sex designation on their birth certificates and requiring that applicants initiate court proceedings to obtain an order affirming that they have had some unidentified surgery. Only after undergoing surgery, presenting the confidential and intimate details of that surgery to a court, and obtaining a court order may a transgender person submit an application to DPHHS to obtain an accurate amended birth certificate.

97. The 2022 Rule goes even further. It targets transgender people, and only transgender people, by prohibiting all amendments to birth-certificate sex designations arising from gender transition, gender identity, or change of gender.

98. These prohibitions, to which only transgender people are subject, serve no legitimate purpose. They constitute a major step backward from the procedures in place since December 2017, under which no order or surgery or intimate disclosure were required and under which amendments to birth-certificate sex designations were allowed. The effort to revoke the December 2017 procedures, and Defendants' repeated refusal to abide by court orders mandating a return to the 2017 procedures, evidence an intent to discriminate against transgender people.

Text Replaced  
[Old]: "14"  
[New]: "24"

99. Similarly situated cisgender people—i.e., people whose gender identity matches their sex assigned at birth—who seek to amend portions of their birth certificates or who seek to make changes to other state-identification forms, are not subjected to the same invasive requirements as transgender people who seek to amend the sex designation on their birth certificates.

Text Deleted  
"68."

Text Inserted  
"99."

Text Replaced  
[Old]: "certificates, or"  
[New]: "certificates or who"

Text Deleted  
"69."

Text Inserted  
"100."

100. Discrimination on the basis of transgender status or on the basis of sex is subject to heightened scrutiny because (a) transgender people have suffered a long history of discrimination, which continues to this day; (b) transgender people are a discrete and insular group that lacks the political power to protect their rights effectively; (c) a person's gender identity or transgender status bears no relation to his or her ability to contribute to society; and (d) gender identity is a core defining trait, fundamental to a person's identity, that, as a condition of equal treatment, a person cannot be required to abandon.

Text Replaced  
[Old]: "70. Moreover, the Act, on its face and as applied, diminishes the intrinsic worth and compromises the inalienable rights of Plaintiffs and other transgender individuals, in violation of Article II, Section 3, 71."  
[New]: "The Act, the 2021 Rule, and the 2022 Rule, on their face and as applied, violate the individual dignity, diminish the intrinsic worth, and compromise the inalienable rights, of Plaintiffs and other members of the class in violation of Article II, Section 3, of the Montana Constitution."

Text Inserted  
"101."

Text Replaced  
[Old]: "Act is"  
[New]: "Act, the 2021 Rule, and the 2022 Rule are"

Text Inserted  
"102."

Text Deleted  
"72."

101. The Act, the 2021 Rule, and the 2022 Rule, on their face and as applied, violate the individual dignity, diminish the intrinsic worth, and compromise the inalienable rights, of Plaintiffs and other members of the class in violation of Article II, Section 3, of the Montana Constitution.

Text Inserted  
"103."

Text Inserted  
"and the class members"

Text Replaced  
[Old]: "the Act unconstitutional and an injunction prohibiting the Act's enforcement."  
[New]: "the Act, the 2021 Rule, and the 2022 Rule unconstitutional. They are also entitled to a permanent injunction prohibiting enforcement of the Act, the 2021 Rule, and the 2022 Rule."

102. The Act, the 2021 Rule, and the 2022 Rule are not narrowly tailored to further a compelling state interest or substantially related to an important government interest.

Text Deleted  
"73."

Text Inserted  
"104."

103. For these reasons, Plaintiffs and the class members are entitled to a declaratory judgment finding the Act, the 2021 Rule, and the 2022 Rule unconstitutional. They are also entitled to a permanent injunction prohibiting enforcement of the Act, the 2021 Rule, and the 2022 Rule.

Text Replaced  
[Old]: "15"  
[New]: "25"

**COUNT II**  
**(Plaintiffs' Right to Privacy)**

104. Plaintiffs hereby incorporate all other paragraphs of this complaint as if fully set forth in this claim.

105. Article II, Section 10, of the Montana Constitution provides that the right of individual privacy is essential to a free society and “shall not be infringed without a showing of compelling state interest.”

Text Deleted  
"74."

Text Inserted  
"105."

106. In addition, the substantive protections of the due-process clause of Article II, Section 17, of the Montana Constitution include the right to privacy. “Informational privacy is a core value furthered by the state constitutional guarantees.” See *State v. Nelson* (1997), 283 Mont. 231, 941 P.2d 441.

Text Deleted  
"75."

Text Inserted  
"106."

Text Replaced  
[Old]: "Nelson,"  
[New]: "Nelson (1997)."

Text Replaced  
[Old]: "441 (1997), 76."  
[New]: "441."

107. Pursuant to Montana’s constitutional guarantees and its common law, Plaintiffs and the class members have a reasonable expectation of privacy regarding their transgender status and their medical treatment.

Text Inserted  
"and the class members"

Text Inserted  
"107."

Text Replaced  
[Old]: "77. The Act, on its face and as applied, violates Plaintiffs’ right to privacy by forcing Plaintiffs to disclose protected and private information. As a condition of amending their birth certificates."  
[New]: "Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule are reinstated, the Act and the 2021 Rule violate Plaintiffs’ and the class members’ right to privacy, both facially and as applied, by forcing Plaintiffs and the class members to disclose protected and private information. As a condition of amending their birth certificates pursuant to the Act and the 2021 Rule."

108. Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule are reinstated, the Act and the 2021 Rule violate Plaintiffs’ and the class members’ right to privacy, both facially and as applied, by forcing Plaintiffs and the class members to disclose protected and private information. As a condition of amending their birth certificates pursuant to the Act and the 2021 Rule, they are required to (a) submit to surgery, (b) disclose the specifics of their transgender status and their medical condition, (c) submit this sensitive and confidential information to a court, (d) obtain a court order under circumstances that have yet to be defined by DPHHS, and (e) submit the court order and other materials to DPHHS for approval. Only transgender people are subjected to these infringements on their right to privacy.

Text Inserted  
"108."

Text Deleted  
"78."

Text Inserted  
"109."

Text Replaced  
[Old]: "a basic"  
[New]: "an important"

Text Replaced  
[Old]: "their gender."  
[New]: "their sex, as determined by their gender identity."

Text Replaced  
[Old]: "16"  
[New]: "26"

109. If transgender people refuse to relinquish their right to privacy, they are consigned to carrying an important identity document—their birth certificate—with a sex designation that is inconsistent with their sex, as determined by their gender identity. In effect, transgender people who seek to perform the simple act of amending the sex designation on their birth certificates are

compelled to choose between surgery and public disclosure of their medical condition and treatment, on the one hand, and living with the dissonance between what they know their sex to be and the sex listed on their identification documents, on the other. That mismatch increases their chance of discrimination, harassment, and potential violence from the disclosure of their transgender status.

110. The 2022 Rule imposes an even more severe burden on the Plaintiffs' and class members' right of privacy by wholly eliminating the ability of transgender people to amend the sex designation on their birth certificates, regardless of surgery, thereby forcing them to disclose their transgender status any time they must present a birth certificate that states their sex assigned at birth, rather than their sex as determined by their gender identity.

111. The Act, the 2021 Rule, the 2022 Rule, and their infringements on the right of privacy are subject to strict scrutiny. There is no compelling state interest that justifies this breach of Article II, Sections 10 and 17, of the Montana Constitution. Nor are the infringements authorized by the Act, the 2021 Rule, and the 2022 Rule related to a substantial or important government interest. As a matter of substantive due process, Plaintiffs' and the class members' privacy interests outweigh any purported interest Defendants could assert.

112. For these reasons, Plaintiffs and the class members are entitled to a declaratory judgment finding the Act, the 2021 Rule, and the 2022 Rule unconstitutional. They are also entitled to a permanent injunction prohibiting the enforcement of the Act, the 2021 Rule, and the 2022 Rule.

**Count III**  
**(State Interference with Medical Decisions)**

113. Plaintiffs hereby incorporate all other paragraphs of this complaint as if fully set forth in this claim.

- Text Replaced**  
[Old]: "their gender and"  
[New]: "what they know their sex to be and the sex listed on"
- Text Replaced**  
[Old]: "79. The Act and its"  
[New]: "The 2022 Rule imposes an even more severe burden on the Plaintiffs' and class members' right of privacy by wholly eliminating the ability of transgender people to amend the sex designation on their birth certificates, regardless of surgery, thereby forcing them to disclose their transgender status any time they must present a birth certificate that states their sex assigned at birth, rather than their sex as determined by their gender identity. 111. The Act, the 2021 Rule, the 2022 Rule, and their"
- Text Inserted**  
"110."
- Text Replaced**  
[Old]: "Act"  
[New]: "Act, the 2021 Rule, and the 2022 Rule"
- Text Inserted**  
"and the class members"
- Text Replaced**  
[Old]: "80."  
[New]: "112."
- Text Inserted**  
"and the class members"
- Text Replaced**  
[Old]: "Act unconstitutional and an injunction prohibiting the Act's enforcement."  
[New]: "Act, the 2021 Rule, and the 2022 Rule unconstitutional. They are also entitled to a permanent injunction prohibiting the enforcement of the Act, the 2021 Rule, and the 2022 Rule."
- Text Replaced**  
[Old]: "81."  
[New]: "113."
- Text Inserted**  
"27"

114. Montana's Constitution protects individual autonomy in the making of medical decisions as part of a fundamental right to privacy. See *Gryczan v. State* (1997), 283 Mont. 433, 942 P.2d 112; see also Mont. Const., art. II, §§ 10, 17. Infringements on individual autonomy are subject to strict scrutiny.

Text Replaced  
[Old]: "82."  
[New]: "114."

115. The right to make certain medical decisions without government intrusion includes the right to refuse unwanted or unnecessary medical treatment.

Text Replaced  
[Old]: "State."  
[New]: "State (1997)."

Text Replaced  
[Old]: "112 (1997)."  
[New]: "112;"

Text Replaced  
[Old]: "83."  
[New]: "115."

116. Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule are reinstated, the Act and the 2021 Rule, on their face and as applied, violate Plaintiffs' and the class members' right to autonomy by forcing them to undergo unspecified surgery to secure an accurate birth certificate, on the one hand, or endanger their health and safety with an incorrect birth certificate, on the other. In effect, the Act and the 2021 Rule hold transgender people hostage. If a transgender person chooses to exercise his or her constitutional right to be free from state interference with his or her medical decisions, then the state will deny the right to amend a birth certificate.

Text Replaced  
[Old]: "84. The Act, on its face and as applied, violates Plaintiffs' right to autonomy by forcing them to undergo gender-affirming surgery to secure a correct"  
[New]: "116. Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule are reinstated, the Act and the 2021 Rule, on their face and as applied, violate Plaintiffs' and the class members' right to autonomy by forcing them to undergo unspecified surgery to secure an accurate"

Text Replaced  
[Old]: "holds"  
[New]: "and the 2021 Rule hold"

Text Replaced  
[Old]: "85."  
[New]: "117."

Text Replaced  
[Old]: "the Act's interference with Plaintiffs' constitutional right to refuse treatment. There is no justification for the State of Montana to deny to Plaintiffs their right to make medical decisions without state compulsion. 86. For these reasons, Plaintiffs"  
[New]: "interfering with Plaintiffs' and the class members' constitutional right to refuse medical care, especially when such care has not even necessarily been recommended by their medical providers or is in fact medically contraindicated. There is no justification for the State of Montana to deny to Plaintiffs or the class members their right to make medical decisions without state compulsion. 118. For these reasons, Plaintiffs and the class members"

117. There is no compelling state interest or important government interest that justifies interfering with Plaintiffs' and the class members' constitutional right to refuse medical care, especially when such care has not even necessarily been recommended by their medical providers or is in fact medically contraindicated. There is no justification for the State of Montana to deny to Plaintiffs or the class members their right to make medical decisions without state compulsion.

Text Replaced  
[Old]: "unconstitutional and an injunction prohibiting the Act's enforcement."  
[New]: "and the 2021 Rule, unconstitutional and a permanent injunction prohibiting enforcement of the Act and the 2021 Rule."

Text Replaced  
[Old]: "17"  
[New]: "28"

118. For these reasons, Plaintiffs and the class members are entitled to a declaratory judgment finding the Act and the 2021 Rule, unconstitutional and a permanent injunction prohibiting enforcement of the Act and the 2021 Rule.

**COUNT IV**  
**(Substantive Due Process: Vagueness)**

119. Plaintiffs hereby incorporate all other paragraphs of this complaint as if fully set forth in this claim.

120. The due-process clause of Article II, Section 17, of the Montana Constitution provides that no person shall be deprived of life, liberty, or property without due process of law.

121. In violation of the due-process clause, the Act, the 2021 Rule, and the 2022 Rule, to the extent they call for reinstatement of the Act and the 2021 Rule if the preliminary injunction is lifted, are impermissibly vague.

122. A law is unconstitutionally vague and void on its face if it fails to give a person of ordinary intelligence a reasonable opportunity to know what must be done to comply with the law's directive.

123. It is a basic principle of due process that an enactment is void for vagueness if its prohibitions or requirements are not clearly defined.

124. Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule are reinstated, the Act and the 2021 Rule require that, as a condition of amending the sex designation on a transgender person's birth certificate, a transgender person must undergo a "surgical procedure" but do not define what the surgery should be or identify who—DPHHS, the court, or the applicant's physician—decides what type of surgery is sufficient to comply with the Act and the 2021 Rule.

125. Moreover, although DPHHS now argues that sex is immutable and cannot be changed by surgery, the 2022 Rule provides that the requirements of the Act and the 2021 Rule, including surgery, may be reinstated if the preliminary injunction is lifted, notwithstanding the fact that DPHHS has publicly repudiated the scientific validity of its surgery requirements. This

- Text Replaced  
[Old]: "87."  
[New]: "119."
- Text Replaced  
[Old]: "88."  
[New]: "120."
- Text Replaced  
[Old]: "Due Process Clause, the Act is impermissibly vague. 90. A statute"  
[New]: "due-process clause, the Act, the 2021 Rule, and the 2022 Rule, to the extent they call for reinstatement of the Act and the 2021 Rule if the preliminary injunction is lifted, are impermissibly vague. 122. A law"
- Text Replaced  
[Old]: "89."  
[New]: "121."
- Text Replaced  
[Old]: "a legislative directive. 91."  
[New]: "the law's directive. 123."
- Text Replaced  
[Old]: "92. The Act requires that, as a condition of amending the sex designation on a transgender person's birth certificate, a transgender person must undergo a "surgical procedure" but does"  
[New]: "124. Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule require that, as a condition of amending the sex designation on a transgender person's birth certificate, a transgender person must undergo a "surgical procedure" but do"
- Text Replaced  
[Old]: "the Act."  
[New]: "the Act and the 2021 Rule. 125. Moreover, although DPHHS now argues that sex is immutable and cannot be changed by surgery, the 2022 Rule provides that the requirements of the Act and the 2021 Rule, including surgery, may be reinstated if the preliminary injunction is lifted, notwithstanding the fact that DPHHS has publicly repudiated the scientific validity of its surgery requirements. This"
- Text Replaced  
[Old]: "18"  
[New]: "29"

contradictory position reintroduces into the 2022 Rule the "vague" provisions of the Act and the 2021 Rule.

126. There is no compelling state interest or important government purpose in the provisions of the Act or the 2021 Rule that justify these due-process violations.

127. For these reasons, Plaintiffs and the class members are entitled to a declaratory judgment finding that the Act and the 2021 Rule are unconstitutional. They are also entitled to a permanent injunction prohibiting the enforcement of the Act and the 2021 Rule. The Act and the 2021 Rule are not narrowly tailored to further a compelling state interest or substantially related to an important government interest.

**COUNT V**  
**(Montana Human Rights Act)**

*[On Defendants' motion, Count V was dismissed by the Court. Plaintiffs have re-pleaded Count V, as well as paragraph B of the prayer for relief, in their Second Amended Complaint to ensure that there is no waiver of any of Count V's allegations and to preserve those allegations for appeal.]*

128. Plaintiffs hereby incorporate all other paragraphs of this complaint as if fully set forth in this claim.

129. The MHRA prohibits discrimination on the basis of sex and recognizes freedom from discrimination on the basis of sex as a basic right. § 49-1-102, MCA. The MHRA also expressly prohibits any state entity or political subdivision from discriminating on the basis of sex in providing any advantages or privileges or withholding any advantages or privileges. § 49-2-308 MCA. It is unlawful for any persons or government agency to aid or abet any act of discrimination forbidden by the MHRA. § 49-2-302, MCA.

**Text Replaced**  
[Old]: "93. There is no compelling state interest or important government purpose in the provisions of the Act that justifies the Act's due-process clause violations. 94. For these reasons, Plaintiffs are entitled to a declaratory judgment finding the Act unconstitutional and an injunction prohibiting the Act's enforcement. 95. The Act is"  
[New]: "contradictory position reintroduces into the 2022 Rule the "vague" provisions of the Act and the 2021 Rule. 126. There is no compelling state interest or important government purpose in the provisions of the Act or the 2021 Rule that justify these due-process violations. 127. For these reasons, Plaintiffs and the class members are entitled to a declaratory judgment finding that the Act and the 2021 Rule are unconstitutional. They are also entitled to a permanent injunction prohibiting the enforcement of the Act and the 2021 Rule. The Act and the 2021 Rule are"

**Text Inserted**  
"COUNT V (Montana Human Rights Act)"

**Text Replaced**  
[Old]: "96. For these reasons, Plaintiffs are entitled to a declaratory judgment finding the Act unconstitutional and an injunction prohibiting the Act's enforcement."  
[New]: "[On Defendants' motion, Count V was dismissed by the Court. Plaintiffs have re-pleaded Count V, as well as paragraph B of the prayer for relief, in their Second Amended Complaint to ensure that there is no waiver of any of Count V's allegations and to preserve those allegations for appeal] 128."

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**Text Deleted**  
"97."

**Text Deleted**  
"COUNT V (Montana Human Rights Act)"

**Text Replaced**  
[Old]: "98."  
[New]: "129."

**Text Replaced**  
[Old]: "19"  
[New]: "30"

130. Based on the conduct alleged in Count I, Defendants, through the Act, have violated the provisions of the MHRA, and Plaintiffs have been injured by Defendants' conduct.

Text Replaced  
[Old]: "99,"  
[New]: "130."

131. Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule are reinstated, Defendants have discriminated against Plaintiffs, who are transgender, on the basis of their gender identity by restricting the ability of transgender people to change the sex designation on their birth certificates by requiring any transgender person who seeks to amend their sex designation to undergo gender-affirming surgery and initiate a legal proceeding to prove that their sex "has been changed by surgical procedure."

Text Replaced  
[Old]: "100. As set forth in Count I,"  
[New]: "131. Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule are reinstated,"

Text Replaced  
[Old]: "101."  
[New]: "132."

Text Replaced  
[Old]: "102."  
[New]: "133."

Text Replaced  
[Old]: "violates"  
[New]: "and the 2021 Rule violate"

Text Replaced  
[Old]: "103."  
[New]: "134."

132. Discrimination on the basis of gender identity constitutes discrimination on the basis of sex, as the MHRB concluded in *Maloney v. Yellowstone County et al.*, Cause No. 1570–2019 & 1572–2019 (Department of Labor and Industry, August 14, 2020), and the United States Supreme Court acknowledged in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–43 (2020).

Text Replaced  
[Old]: "the Act's enforcement."  
[New]: "the enforcement of the Act and the 2021 Rule."

Text Replaced  
[Old]: "104."  
[New]: "135."

133. There is no nondiscriminatory justification for limiting transgender people's ability to change the sex designation on their birth certificates in the manner required by the Act.

Text Replaced  
[Old]: "105. The Montana Governmental Code of Fair Practices (the "Code")"  
[New]: "136. The Code"

Text Replaced  
[Old]: "49–3–205,"  
[New]: "49–3–205,"

134. For these reasons, Plaintiffs are entitled to a declaratory judgment that the Act and the 2021 Rule violate the MHRA and an injunction prohibiting the enforcement of the Act and the 2021 Rule.

Text Inserted  
"31"

**COUNT VI**  
**(Montana Governmental Code of Fair Practices)**

135. Plaintiffs hereby incorporate all other paragraphs of this complaint as if fully set forth in this claim.

136. The Code requires that government services, such as the amendment of birth certificates, be made available or performed without discrimination on the basis of sex. § 49–3–205, MCA. No state entity, local governmental agency, or state or local official may become a



party to any agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices such as discriminating on the basis of sex, § 49-3-205, MCA.

Text Replaced  
[Old]: "106."  
[New]: "137."

137. Based on the conduct alleged in Count I, Defendants have violated the provisions of the Code, and Plaintiffs and the class members have been injured by Defendants' conduct.

Text Replaced  
[Old]: "Defendants, through the Act,"  
[New]: "Defendants"

Text Inserted  
"and the class members"

138. Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule are reinstated, Defendants have discriminated against Plaintiffs and the class members on the basis of their gender identity and sex by restricting the ability of transgender people to change the sex designation on their birth certificates by requiring any transgender person who seeks to amend their sex designation to undergo some unidentified surgery and initiate a legal proceeding to prove what Defendants now concede is impossible—namely, that the applicant's sex "has been changed by surgical procedure."

Text Replaced  
[Old]: "107. As set forth in Count I, Defendants have discriminated against Plaintiffs, who are 20 transgender, on the basis of their gender identity"  
[New]: "138. Absent injunctive relief, and to the extent the requirements of the Act and the 2021 Rule are reinstated, Defendants have discriminated against Plaintiffs and the class members on the basis of their gender identity and sex"

Text Replaced  
[Old]: "gender-affirming"  
[New]: "some unidentified"

Text Replaced  
[Old]: "that their sex "has been changed by surgical procedure." 108."  
[New]: "what Defendants now concede is impossible—namely, that the applicant's sex "has been changed by surgical procedure." 139. The 2022 Rule also discriminates against Plaintiffs and the class members on the basis of their gender identity and sex by prohibiting all amendments to the sex designation on birth certificates arising from gender transition, gender identity, or change of gender. 140."

139. The 2022 Rule also discriminates against Plaintiffs and the class members on the basis of their gender identity and sex by prohibiting all amendments to the sex designation on birth certificates arising from gender transition, gender identity, or change of gender.

Text Replaced  
[Old]: "109."  
[New]: "141."

Text Replaced  
[Old]: "the Act, 110."  
[New]: "the Act, the 2021 Rule, and the 2022 Rule."

Text Inserted  
"32"

140. Discrimination on the basis of gender identity constitutes discrimination on the basis of sex, as the MHRB concluded in *Maloney v. Yellowstone County et al.*, Cause No. 1570-2019 & 1572-2019 (Department of Labor and Industry, August 14, 2020), and the United States Supreme Court acknowledged in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741-43 (2020).

141. There is no nondiscriminatory justification for limiting transgender people's ability to change the sex designation on their birth certificates in the manner required by the Act, the 2021 Rule, and the 2022 Rule.

142. For these reasons, Plaintiffs and the class members are entitled to a declaratory judgment that the Act, the 2021 Rule, and the 2022 Rule violate the Code and an injunction prohibiting the enforcement of the Act, the 2021 Rule, and the 2022 Rule.

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Declare the Act, the 2021 Rule, and the 2022 Rule unconstitutional on their face and as applied for the reasons set forth above;
- B. Declare the Act and the 2021 Rule illegal under the MHRA;
- C. Declare the Act, the 2021 Rule, and the 2022 Rule illegal under the Code;
- D. Preliminarily and permanently enjoin Defendants, as well as their agents, employees, representatives, and successors, from enforcing the Act, the 2021 Rule, and the 2022 Rule, directly or indirectly;
- D. Certify a class, in accordance with Rule 23 of the Montana Rules of Civil Procedure, of all transgender people born in Montana who currently want, or who in the future will want, to have the sex designation changed on their Montana birth certificate to match what they know their sex to be, as determined by their gender identity;
- E. Appoint the named Plaintiffs in this Complaint as representatives of the class;
- F. Appoint the ACLU Montana Foundation, Inc., the American Civil Liberties Union Foundation, Nixon Peabody LLP, and Elizabeth Halverson PC as class counsel.
- F. Award Plaintiffs' and the class members the reasonable attorney's fees and costs incurred in bringing this action; and
- G. Grant any other relief the Court deems just.

Dated: October 28, 2022

Respectfully submitted,

By: /s/ Akilah Lane  
Akilah Lane

Akilah Lane (Bar No. 60742990)  
Alex Rate (Bar No. 11226)  
ACLU Montana Foundation, Inc.  
P.O. Box 1968  
Missoula, MT 59806

Text Inserted  
"142."

Text Inserted  
"and the class members"

Text Replaced  
[Old]: "Act violates the Code and an injunction prohibiting the Act's enforcement. PRAYER FOR RELIEF WHEREFORE, Plaintiffs respectfully request that this Court: A. Declare the Act unconstitutional on its"  
[New]: "Act, the 2021 Rule, and the 2022 Rule violate the Code and an injunction prohibiting the enforcement of the Act, the 2021 Rule, and the 2022 Rule. WHEREFORE, Plaintiffs respectfully request that this Court: A. Declare the Act, the 2021 Rule, and the 2022 Rule unconstitutional on their"

Text Inserted  
"and the 2021 Rule"

Text Replaced  
[Old]: "the Act"  
[New]: "the Act, the 2021 Rule, and the 2022 Rule"

Text Inserted  
"the 2021 Rule, and the 2022 Rule, directly or indirectly; D. Certify a class, in accordance with Rule 23 of the Montana Rules of Civil Procedure, of all transgender people born in Montana who currently want, or who in the future will want, to have the sex designation changed on their Montana birth certificate to match what they know their sex to be, as determined by their gender identity; E. Appoint the named Plaintiffs in this Complaint as representatives of the class; F. Appoint the ACLU Montana Foundation, Inc., the American Civil Liberties Union Foundation, Nixon Peabody LLP, and Elizabeth Halverson PC as class counsel. F. Award Plaintiffs' and the class members the"

Text Inserted  
"Dated: October 28, 2022 Respectfully submitted, By: /s/ Akilah Lane Akilah Lane (Bar No. 60742990) Alex Rate (Bar No. 11226) ACLU Montana Foundation, Inc. P.O. Box 1968 Missoula, MT 59806"

Text Replaced  
[Old]: "21"  
[New]: "33"

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**CERTIFICATE OF SERVICE**

I certify that the foregoing **Second Amended Class Action Complaint For Declaratory and Injunctive** was served by eService on counsel for Defendants:

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Electronically signed by Krystal Pickens on behalf of Akilah Lane  
on October 28, 2022

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**CERTIFICATE OF SERVICE**

I, Akilah Maya Lane, hereby certify that I have served true and accurate copies of the foregoing Complaint - Amended Complaint to the following on 10-28-2022:

David M.S. Dewhirst (Govt Attorney)  
215 N Sanders  
Helena MT 59601  
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Service Method: eService

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Electronically signed by Krystal Pickens on behalf of Akilah Maya Lane  
Dated: 10-28-2022

**EXHIBIT B**

## CERTIFICATE OF SERVICE

I, Kathleen Lynn Smithgall, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 12-05-2022:

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Electronically signed by Dia Lang on behalf of Kathleen Lynn Smithgall  
Dated: 12-05-2022