

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

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

Plaintiffs,

v.

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

Defendants.

Cause No.: DV 21-873

Judge Michael G. Moses

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING IN
PART AND DENYING IN PART
PLAINTIFFS' MOTION SEEKING
CLARIFICATION OF THE
PRELIMINARY INJUNCTION**

Plaintiff Amelia Marquez and Plaintiff John Doe (collectively "Plaintiffs")

submitted a motion on June 7, 2022, (Dkt. 71) seeking clarification of the Findings of

Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for a Preliminary Injunction filed by the Court on April 21, 2022. (Dkt. 61). For clarity, the Court will refer to its Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for a Preliminary Injunction as "the Order". Plaintiffs additionally sought a declaration that the temporary emergency rule published by Defendant, the Montana Department of Public Health and Human Services ("DPHHS"), be declared invalid. (Dkt. 71). Defendants the State of Montana, Governor Gregory Gianforte, DPHHS, and DPHHS Director Charlie Brereton¹ (collectively "Defendants") submitted their response on June 21, 2022. (Dkt. 72). Plaintiffs submitted their reply on July 5, 2022. (Dkt. 73). This motion has been fully briefed and the Court held a hearing on the motion on September 15, 2022. (Dkt. 76). The Court issued its order concerning Plaintiffs motion orally during the hearing and now issues the following Findings of Fact and Conclusions of Law in accordance with that oral pronouncement.

The Court has considered the briefs, evidence presented, and oral arguments made by counsel. The Court now makes the following:

¹ Charlie Brereton was appointed as the Director of the Department of Public Human Health Services in June 2022. The State of Montana noted that it will be filing a motion to amend the caption to change "Adam Meier" to "Charlie Brereton," however, no such motion has been received by the Court as of the drafting of this order.

Findings of Fact

1. On April 12, 2021, the legislature passed SB 280 and sent it to Governor Gianforte for signature. *See* SB 280, 67th Leg. Reg. Sess. (Mont 2021); (Am. Compl., ¶ 37).
2. On April 30, 2021, Governor Gianforte signed SB 280, which became immediately effective upon his signature. *See* SB 280; (Am. Compl., ¶ 37).
3. SB 280 states, in relevant part that “[t]he sex of a person designated 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 person born in Montana has been changed by surgical procedure.” *Id.*; (Am. Compl., ¶ 38).
4. The procedures in place prior to the effective date of SB 280 permitted a transgender person to amend his or her original birth certificate by submitting to DPHHS a completed gender-designation form attesting to gender transition or providing government-issued identification displaying the correct sex designation or providing a certified court order indicating a gender change. *See* 24 Mont. Admin. Reg. 2436-2440 (Dec. 22, 2017) (amending Mont. Admin. R. 37.8.102 and 37.8.311); (Am. Compl., ¶ 39).
5. The 2017 procedures did not require surgery or court proceedings. *See* 24 Mont. Admin. Reg. 2436-2440 (Dec. 22, 2017) (amending Mont. Admin. R. 37.8.311); (Am. Compl., ¶ 39).

6. SB 280 provides that the 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 including that the sex of the applicant has been “changed” by surgical procedure. *See* SB 280, 67th Leg. Reg. Sess. (Mont 2021); (Am. Compl. ¶ 41).

7. This Court issued the Order preliminarily enjoining SB 280 on April 21, 2022. (Dkt 61). In the Order, the following was made clear:

ii. Status Quo

180. “Status quo means ‘the last actual, peaceable, noncontested condition which preceded the pending controversy.’” *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 350, ¶ 26, 440 P.3d 4, ¶ 26 (quoting *Porter v. K & S P’ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839). Additionally, “[t]hat a statute has been on the books for some time is not the relevant inquiry when entertaining a request to enjoin it.” *Weems*, ¶ 26.

181. The last actual, peaceable, noncontested condition preceding the controversy in this matter was that which existed prior to the enactment of SB 280.

8. Counsel for Defendants admitted during the hearing on September 15, 2022, that “[p]rior to 280, the 2017 rule was in place[.]” Hr’g Tr. 27:13-16, Sept. 15, 2022 (Smithgall). Thus, Defendants had knowledge of what constituted “that which existed prior to the enactment of SB 280” as described in the Order.

9. Additionally, counsel for Defendants admitted that because of the Order, Defendants DPHHS and its Director promulgated these new administrative rules. Hr’g Tr. 27:9-12, Sept. 15, 2022 (Smithgall). Counsel for Defendants represents that was because “there was no rule in place” however, as described previously, counsel for

Defendants was entirely aware that the 2017 rule was what was in place prior to SB 280.

See id.

10. Rather than returning to what counsel for Defendants admit was the rule in place prior to SB 280, Defendants apparently interpret “that which existed prior to the enactment of SB 280” to mean they have carte blanche to enact whatever regulations they want as evidenced by the actions taken by Defendants after the issuing of the Order.

11. Specifically, Defendants DPHHS and its Director, rather than reverting to the status quo, refused to issue corrections to birth certificates for weeks in violation of the Order.

12. Defendants DPHHS and its Director, rather than reverting to the status quo, issued a temporary rule in violation of the Order.

13. Defendants DPHHS and its Director, rather than reverting to the status quo, engaged in a rule making process and ultimately adopted a new rule in violation of the Order.

From the foregoing Findings of Fact, the Court now makes the following:

Conclusions of Law

14. To the extent that the foregoing Findings of Fact are more properly considered Conclusions of Law, they are incorporated by reference herein as such. To the extent

that these Conclusions of Law are more appropriately considered Findings of Fact, they are incorporated as such.

15. “The purpose of a preliminary injunction is to prevent ‘further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.’” *City of Billings v. Cty. Water Dist.*, 281 Mont. 219, 226, 935 P.2d 246, 250 (1997) (quoting *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 297-98 (1995)).

16. The Montana Supreme Court has held that the status quo is “the last actual, peaceable, noncontested condition which preceded the pending controversy...” *Porter v. K & S P’ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839 (internal quotations omitted). More recently, the Montana Supreme Court has reiterated that the “purpose of equitable injunctive relief is **to preserve the status quo and minimize the harm to all parties** pending final resolution on the merits.” *Mont. Democratic Party v. Jacobsen* No. DA 22-0172 (May 17, 2022), 2022 Mont. LEXIS 459, at *6 (citing *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 18, 395 Mont. 160, 437 P.3d 142)(emphasis added); see also *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 6, 409 Mont. 378, ¶ 6 (“the purpose of a preliminary injunction, [] is ‘to maintain the status quo pending trial.’”)(citations omitted).

17. Additionally, the Montana Supreme Court has described that “when a court invalidates the current rule, the effect is to return to the previous status of the law,

which necessarily means in most instances that the former rule is reinstated.” *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 39, 384 Mont. 503, ¶ 39, 380 P.3d 771, ¶ 39.

18. In the case at bar, SB 280 went into effect immediately upon Governor Gianforte’s signing on April 30, 2021. Plaintiffs filed their Complaint on July 16, 2021 requesting, *inter alia*, that SB 280 be preliminarily enjoined. Plaintiffs filed their motion for a preliminary injunction on July 21, 2021. Thus, shortly after SB 280 went into effect, Plaintiffs provided notice that it was contested. The status quo, which as stated above, is the “last actual, peaceable, noncontested condition which preceded the pending controversy” requires a return to the condition preceding the pending controversy which was—as stated in SB 280 itself—the December 2017 DPHHS regulations. *See* SB 280 (“WHEREAS, in December 2017, the Department of Public Health and Human Services (DPHHS) adopted MAR Notice No. 37-807, which amended ARM 37.8.102 and 37.8.311 to allow an individual to correct the gender designation on the individual’s birth certificate by providing to DPHHS a correction affidavit accompanied by: (1) a completed gender designation form certifying that the individual has undergone gender transition or has an intersex condition; (2) a government-issued identification displaying the correct gender designation; or (3) a certified copy of a court order indicating that the gender of the individual born in Montana has been changed[.]”).

19. The Court is unconvinced by Defendants’ claim that the Order “left no regulatory process for changing one’s sex on a birth certificate” and that the Order put

DPHHS “in an uncertain regulatory situation.” Indeed, the Court finds these claims are demonstrably ridiculous. The Order expressly stated at ¶ 181 that “[t]he last actual, peaceable, noncontested condition preceding the controversy in this matter was that which existed prior to the enactment of SB 280.” SB 280 itself identifies what that noncontested condition was that existed prior. Defendants have unlawfully circumvented the entire purpose of a preliminary injunction and disregarded and disrespected the judicial process with these claims.

20. By enjoining Defendants from enforcing any aspect of SB 280 during the pendency of this action according to the prayer of the Plaintiffs’ motion and complaint the Court clearly and unmistakably required that Defendants return to that which was in effect prior to the enactment of SB 280, given that would be the status quo, and the DPHHS 2017 regulations were those that were in effect prior to the passage of SB 280. There can be no serious argument that the DPHHS regulations adopted after the enjoining of SB 280 constitute a return to the status quo.

21. Defendants engage in needless legal gymnastics to attempt to rationalize their actions and their calculated violations of the Order. If Defendants representations were deemed to have merit, preliminary injunctions in Montana would be rendered meaningless. The Court is unconvinced by Defendants legal arguments and alleged interpretations of the Order. Motions for contempt based on continued violations of the Order will be promptly considered.

22. The Court agrees with Defendants that the Court does not have jurisdiction over the new regulations issued by the DPHHS, however, those rules were issued in violation of the Order requiring Defendants DPHHS and its Director to return to the status quo and therefore a return to the 2017 DPHHS regulations.

23. The Preamble to the Montana Rules of Professional Conduct provides that “[w]hile it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, **it is also a lawyer’s duty to uphold legal process.**” (Emphasis added). The Court expects that this professional rule will be followed by those subject to the Montana Rules of Professional Conduct.

24. To the extent necessary due to Defendants “confusion,” the Court *clarifies* that with the Order issued on April 21, 2022, it required that Defendants return to the status quo—which as evidenced by SB 280 itself—is a return to the 2017 DPHHS regulations that were in effect until the enactment of SB 280. The 2017 regulations provided that DPHHS “allow an individual to correct the gender designation on the individual’s birth certificate by providing to DPHHS a correction affidavit accompanied by: (1) a completed gender designation form certifying that the individual has undergone gender transition or has an intersex condition; (2) a government-issued identification displaying the correct gender designation; or (3) a certified copy of a court order indicating that the gender of the individual born in Montana has been changed[.]” The Court attaches, as Exhibit A, the 2017 DPHHS regulations that Defendants will return

to, for clarity for Defendants, and to avoid any future claims of confusion. If Defendants require further clarification, they are welcome to request it from the Court rather than engage in activities that constitute unlawful violations of the Order.

The Court, being fully informed, having considered all briefs on file and in-court arguments, makes the following decision:

IT IS HEREBY ORDERED:

1. The Court clarifies that the preliminary injunction ordered on April 21, 2022, as described above, required reverting back to the 2017 DPHHS regulations governing the amendment of birth certificates (a copy of these 2017 DPHHS regulations is attached as Exhibit A for clarity for Defendants²); and

2. Defendants, as well as their agents, employees, representatives, and successors, shall perform their obligations under this Court's Order and preserve the status quo by reverting to the 2017 DPHHS regulations governing the amendment of birth certificates.

3. Plaintiffs' motion seeking that the Court declare invalid the temporary emergency rule published by DPHHS in response to this Court's April 21, 2022 order is **DENIED** as moot.

² The 2017 DPHHS regulations can also be found at: <https://rules.mt.gov/gateway/ShowRuleVersionFile.asp?RVID=46589> and <https://rules.mt.gov/gateway/ShowRuleVersionFile.asp?RVID=46588>

4. Plaintiffs' requested the Court "[g]rant any other relief the Court deems just, including but not limited to holding Defendants in contempt." The Court will not hold Defendants in contempt at this time.

DATED September 19, 2022

/s/ Michael G. Moses
District Court Judge

cc: Akilah Lane
Alex Rate
F. Thomas Hecht
Tina B. Solis
Seth A. Horvath
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EXHIBIT A

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37.8.311 ADOPTIONS, NAME CHANGES, AND GENDER CHANGES

(1) The department will replace the original birth certificate with a new one without indicating that the information was amended in cases of adoption, a determination of paternity, an acknowledgment of paternity, or legitimation.

(2) In order to establish the replacement certificate, the department must be provided with the following:

(a) For an adoption:

- (i) a certified copy of the certificate of adoption; and
- (ii) a certified copy of the final order of adoption.

(b) For a legitimation:

- (i) a notarized Acknowledgement of Paternity for Legitimation; and
- (ii) a certified copy of the marriage certificate.

(c) For a court order establishing paternity:

(i) a certified copy of the court order establishing paternity under [40-6-123](#), MCA, which must contain:

- (A) the child's name as it appears on the original certificate;
 - (B) the child's date and county of birth; and
 - (C) the full name, date of birth, and place of birth of the father being placed on the certificate.
- (d) For an acknowledgement of paternity when the last name of the child is being changed:
- (i) a notarized Acknowledgement of Paternity signed by both parents; and
 - (ii) a notarized request for a new certificate signed by both parents.

(3) Once paternity has been established, the registrant's last name may only be changed through an adoption, legitimation, or court order.

(4) Except in the cases specified in [ARM 37.8.108](#), the amendment of a registrant's given name or surname on a birth certificate may be made only if the department receives a certified copy of an order from a court with appropriate jurisdiction. The court order that directs the name change must include the registrant's name as it appears on the certificate, the registrant's date of birth, the county of birth, if available, and information sufficient to locate and identify the record to be amended. If the court order directs the issuance of a new certificate, the record will not show amendments, and the new certificate will not indicate on its face that it was amended. The procedure to add a first name, middle name, or both, to a birth record that is more than one year old, as in the case when a child is not named at birth, is regulated under [ARM 37.8.108](#).

(5) The gender of a registrant as cited on a certificate may be corrected if the department receives:

(a) a correction affidavit accompanied by a completed gender designation form issued by the department certifying under penalty of law that that the individual has undergone gender transition or has an intersex condition and that the gender designation on their birth certificate should be changed accordingly, and the request for gender designation is for the purpose of ensuring the birth certificate accurately reflects their gender and is not for any fraudulent or other unlawful purpose; or

(b) a correction affidavit accompanied by presentation of a government-issued identification displaying the correct gender designation; or

(c) a correction affidavit accompanied by a certified copy of an order from a court with appropriate jurisdiction indicating that the gender of an individual born in Montana has been changed. The order must contain sufficient information for the department to locate the original record. If the registrant's name is also to be changed, the order must indicate the full name of the registrant as it appears on the original birth certificate and the full name to which it is to be amended.

(6) A new certificate issued pursuant to (5) will not show amendments, will not indicate on its face that it was amended, and the old certificate will be placed in a sealed file. If the gender of an individual was listed incorrectly on the original certificate due to a data entry error, refer to [ARM 37.8.108](#).

History: [50-15-102](#), [50-15-103](#), [50-15-204](#), [50-15-223](#), MCA; IMP, [50-15-102](#), [50-15-103](#), [50-15-204](#), [50-15-223](#), MCA; NEW, 2008 MAR p. 169, Eff. 1/1/08; AMD, 2015 MAR p. 1492, Eff. 9/25/15; AMD, 2017 MAR p. 2436, Eff. 12/23/17.

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37.8.102 DEFINITIONS

In addition to the definitions contained in [50-15-101](#), MCA, the following definitions apply to this chapter:

(1) "Amendment" means alteration or addition of any item on the face of a vital record after it is on file with the department, in a county clerk and recorder's office, or with a clerk of district court.

(2) "Ashes" which are the result of a cremation of a human body are considered the same as a dead body as defined in [50-15-101\(3\)](#), MCA.

(3) "Authorized certifier" means, in relation to a certified copy of a vital record, either a county clerk and recorder or a person designated by the department to issue certified copies on its behalf.

(4) "Certified copy" means a document copied or electronically extracted from a vital record filed with the department or from a duplicate copy of that record filed with a county clerk and recorder and that is printed on the department's security paper and contains an attestation by an official designated by the department that the document is a true and correct copy of the information contained in the original vital record.

(5) "Certifying official" means an individual authorized to issue a certified copy of a vital record by the department or a county clerk and recorder.

(6) "Department" means the Department of Public Health and Human Services, Office of Vital Statistics.

(7) "Filing date" means the date a vital record is accepted for registration by the department.

(8) "Intersex condition" means having, or having been diagnosed by a medical professional to have, any of a variety of conditions in which a person is born with a variation of chromosomes, gonads, sex hormones, or reproductive anatomy that is incongruent with typical notions of female or male bodies.

(9) "Literal format" means, in regard to a date, the name of the month spelled out, the numerical day of the month, and the numerical four-digit year, e.g., January 1, 1998.

(10) "Next of kin" means the spouse, parents, adult children, and adult brothers and sisters of a registrant and any other person declared next of kin by a court of competent jurisdiction.

(11) "Registrant" means an individual for whom a vital record is completed and filed, including, for example, the decedent on a death certificate, the person for whom a birth certificate is filed, the husband and wife on a divorce record, and the bride and groom on a marriage record.

(12) "Summary of evidence" means a number assigned to an affidavit, administrative order, or court order which is used to track the evidence provided to amend, correct, or reissue a vital record.

(13) "Supporting documentation" means any document required as evidence for the filing of a delayed vital record or for verification of changes to original data or adding missing data on a filed vital record.

History: [50-15-102](#), [50-15-103](#), MCA; [IMP](#), [50-15-101](#), [50-15-103](#), MCA; [NEW](#), 2002 MAR p. 397, Eff. 2/15/02; [AMD](#), 2008 MAR p. 169, Eff. 1/1/08; [AMD](#), 2017 MAR p. 2436, Eff. 12/23/17.

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