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 DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff Amelia Marquez and Plaintiff John Doe (collectively "Plaintiffs") submitted a motion for a preliminary injunction and a brief in support on July 21, 2021.

(Dkt. 6; Dkt. 12). Defendants the State of Montana, Gregory Gianforte, the Montana Department of Public Health and Human Services ("DPHHS"), and Adam Meier (collectively "Defendants") submitted a motion to dismiss pursuant to Mont. R. Civ. P. 12(b)(6) on August 18, 2021. (Dkt. 23). Defendants also submitted their combined brief in opposition to the motion for preliminary injunction and in support of their motion to dismiss. (Dkt. 24). These motions have been fully briefed and the Court held a hearing on the motions pending before it on December 22, 2021. (Dkt. 46).

Upon agreement by the parties and with permission from the Court, Defendants submitted their motion and brief in support to dismiss Plaintiffs' amended complaint on January 1, 2022. (Dkt. 50; Dkt. 51). Plaintiffs submitted their response on February 11, 2022. (Dkt. 55; Dkt. 56). Defendants submitted their reply on March 4, 2022. (Dkt. 60). The Court requested that proposed findings of fact and conclusions of law be submitted in regard to the pending motion to dismiss and for the preliminary injunction.

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

Findings of Fact

A. The Parties

1. Amelia Marquez ("Ms. Marquez") is a woman who was born in Montana and currently resides in Billings, Montana. (Am. Compl., ¶ 19; Marquez Aff., ¶ 2).

2. Ms. Marquez is transgender and wishes to correct her Montana birth certificate, which currently identifies her as male. (Am. Compl., ¶ 19; Marquez Aff., ¶¶ 4, 7).

3. Ms. Marquez has been employed by Yellowstone Boys and Girls Ranch for the last three years. (Am. Compl., ¶ 50; Marquez Aff., ¶ 3).

4. Although Ms. Marquez has known she is female for some years and has lived her life accordingly, her birth certificate designates her as male. (Am. Compl., ¶¶ 51-52; Marquez Aff., ¶¶ 4-5).

5. Ms. Marquez began presenting as the woman she is approximately five years ago. (Am. Compl., ¶ 52; Marquez Aff., ¶ 5).

6. For the last four years, Ms. Marquez has worked with medical and mental-health providers to assist her in bringing her body, and the other ways she expresses her gender, into alignment with her female gender identity. (Am. Compl., ¶ 52; Marquez Aff., ¶ 5).

7. Ms. Marquez was diagnosed with gender dysphoria and has taken feminizing hormone therapy for the last two years. (Am. Compl., ¶ 52; Marquez Aff., ¶ 5).

8. Ms. Marquez legally changed her name to a traditionally female name two years ago. (Am. Compl., ¶ 52; Marquez Aff. ¶ 5).

9. Additionally, Ms. Marquez changed her name and sex designation on her Montana driver's license so that it accurately reflects who she is. (Am. Compl., ¶ 52; Marquez Aff., ¶ 5).

10. Ms. Marquez would like to change her name and sex designation on her birth certificate to match her female gender identity but is unable to do so because of SB 280. (Am. Compl., ¶ 53; Marquez Aff., ¶ 7).

11. Ms. Marquez describes that her "inability to obtain a birth certificate that accurately reflects [her] female gender identity is a painful and stigmatizing reminder of the State of Montana's refusal to recognize [her] as a woman." (Am. Compl., ¶ 53; Marquez Aff., ¶ 7).

12. Ms. Marquez describes that denying her an accurate birth certificate places her at risk of embarrassment or even violence every time she is required to present her birth certificate because it incorrectly identifies her as male. (Am. Compl., ¶ 54; Marquez Aff., ¶ 8).

13. Ms. Marquez has had personal experience with the high incidence of harassment and discrimination experienced by transgender people, having been the target of this treatment in both her personal and professional life. (Am. Compl., ¶ 55; Marquez Aff., ¶ 10).

14. Due to these experiences, Ms. Marquez has learned that she must take extra precautions for her personal safety and is afraid anytime she is in situations where her status as transgender might be revealed to people whom she does not already know and trust. (Am. Compl., ¶ 55; Marquez Aff., ¶ 10).

15. Ms. Marquez is typically perceived as female, so any time she is forced to present an identity document that incorrectly identifies her as male, such as her birth certificate, she is "outed" as transgender. (Am. Compl., ¶ 56; Marquez Aff., ¶ 9).

16. The thought of being outed to a stranger in this way causes Ms. Marquez a great deal of anxiety because she can never be sure whether or not someone will respond negatively, or even violently, to her because she is transgender. (Am. Compl. ¶ 56; Marquez Aff., ¶ 9).

17. Mr. Doe is a man who was born in Montana and currently resides out of state. (Am. Compl., ¶ 20; Doe Aff., ¶ 2).

18. Mr. Doe is transgender and wishes to correct his Montana birth certificate, which identifies him as female. (Am. Compl., ¶ 20; Doe Aff., ¶¶ 1, 3, 7).

19. Mr. Doe works two part-time jobs and is a college student. (Am. Compl., ¶ 57; Doe Aff., ¶ 2).

20. Mr. Doe would like to correct the sex designation on his birth certificate to accurately reflect his male gender identity but does not wish to be forced to share publicly, in court, the private information and records regarding his transgender status, medical treatment, and anatomy. (Am. Compl., ¶ 58; Doe Aff., ¶ 7).

21. Mr. Doe has known that he is a man for approximately five years. (Doe Aff., ¶ 3).

22. Mr. Doe was diagnosed with gender dysphoria in July 2019 and has lived and identified fully as male for the last year and a half. (Am. Compl., ¶ 59; Doe Aff., ¶ 5).

23. Mr. Doe, with the assistance of his treating health professionals, has taken certain steps to bring his body into conformity with his male gender identity. (Am. Compl., ¶ 59; Doe Aff., ¶ 6).

24. Mr. Doe has taken hormone therapy for approximately two years and, in the spring of 2021, underwent masculinizing chest-reconstruction surgery, commonly known as "top surgery." (Am. Compl., ¶ 59; Doe Aff., ¶ 6).

25. Mr. Doe does not wish to undergo additional gender-affirming surgery at this time. (Am. Compl., ¶ 60; Doe Aff., ¶ 6).

26. Mr. Doe does not know whether his top surgery would be sufficient to satisfy the requirements of SB 280. (Am. Compl., ¶ 60; Doe Aff., ¶ 8).

27. Mr. Doe describes that he knew he was a man prior to his top surgery and does not believe that his top surgery is what made him a man. (Am. Compl., ¶ 61; Doe Aff., ¶ 8). Furthermore, even if Mr. Doe's top surgery were sufficient for purposes of obtaining a court order, the idea of having to share private medical records related to his transition 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. (Am. Compl., ¶ 60; Doe Aff., ¶ 9).

28. Mr. Doe is also concerned about the risk he could face of discrimination, harassment, or even violence if he is required to show his birth certificate to a stranger who is biased or hostile toward people who are transgender. (Doe Aff., ¶ 10).

29. Because Mr. Doe is perceived as male, having to produce a birth certificate that identifies him as female will "out" him as transgender. *Id*. at ¶ 10.

30. It is important for Mr. Doe to retain the freedom to choose when, and under what circumstances, he decides to share deeply personal medical information regarding his transition, his body, and his transgender status. (Am. Compl., ¶ 61; Doe Aff., ¶ 11).

31. The State of Montana is a government entity subject to and bound by the laws of the State of Montana and its Constitution (Am. Compl., ¶ 21).

32. 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. (Am. Compl., ¶ 22).

33. As a state agency, DPHHS is not entitled to immunity from suit under Article II, Section 18, of the Montana Constitution. *Id*.; Mont. Const. art. II § 18.

34. DPHHS has supervisory authority over the process for amending birth certificates. § 50-15-103, MCA.

35. DPHHS has been charged under Senate Bill 280 ("SB 280") with amending the State's administrative regulations to make them consistent with SB 280. (Am. Compl., ¶ 22); § 50-15-224, MCA.

36. Governor Gianforte is the governor of the State of Montana. (Am. Compl., ¶ 23).

37. Governor Gianforte is Montana's principal executive officer and is responsible for administering Montana's laws, including SB 280. *Id.*; Mont. Const. art. VI § 18.

38. Director Meier is the Director of DPHHS. (Am. Compl., ¶ 24).

39. Director Meier is the chief executive officer of DPHHS and is responsible for administering SB 280. *Id.*; Mont. Admin. R. 37.1.101.

B. Background

40. Transgender people have a gender identity that differs from their assigned sex at birth. (Am. Compl., ¶ 25; Ettner Decl., ¶¶ 16, 22).

41. Plaintiffs' expert described that "for transgender people, the sex assigned at birth does not align with the individual's genuine, experienced sex, resulting in the distressing condition of gender dysphoria." (Ettner Decl. ¶ 16). Further, that "[e]xternal genitalia alone—the critical criterion for assigning sex at birth—is not an accurate proxy for a person's sex" but rather that "[a] person's sex is comprised of a number of components including, inter alia: chromosomal composition (detectible through karyotyping); gonads and internal reproductive organs (detectible by ultrasound, and occasionally by a physical pelvic exam); external genitalia (which are visible at birth); sexual differentiations in brain development and structure (detectible by functional magnetic resonance imaging studies and autopsy); and gender identity." (Ettner Decl., ¶¶ 17-18; *see also* Am. Compl., ¶ 27).

42. Gender identity refers to a person's fundamental internal sense of belonging to a particular gender. (Am. Compl., ¶ 26; Ettner Decl., ¶ 19); *see also F.V. v. Barron* (D. Idaho 2018), 286 F. Supp. 3d 1131, 1136 (noting that although "[s]ex determinations made at birth are most often based on the observation of external genitalia alone," "[t]here is scientific consensus that biological sex is determined by numerous elements…").

43. "People diagnosed with gender dysphoria have an intense and persistent discomfort with their assigned sex that leads to an impairment in functioning." (Ettner Decl., ¶ 26; Am. Compl., ¶ 28).

44. The medical consensus in the United States is that gender identity is innate and that efforts to change a person's gender identity are harmful to a person's health and well-being, but also are unethical. (Am. Compl., ¶ 26; Ettner Decl., ¶ 25).

45. Treatment of gender dysphoria is guided by the standards of care promulgated by the World Professional Association for Transgender Health ("WPATH"), which were originally published in 1979 and are now in their seventh edition. (Am. Compl., ¶ 29; Ettner Decl., ¶ 31).

46. WPATH's standards of care reflect the professional consensus regarding the psychological, psychiatric, hormonal, and surgical management of gender dysphoria. (Am. Compl., ¶ 29; Ettner Decl., ¶¶ 33, 39).

47. The recognized standard of care for gender dysphoria involves treatments designed to bring a person's body and gender expression into alignment with their gender identity. (Am. Compl., ¶ 30; Ettner Decl., ¶¶ 33, 39).

48. This course of treatment has different components depending on the medical needs of each transgender person. (Am. Compl., ¶ 30; Ettner Decl., ¶¶ 29, 33).

49. As with other forms of healthcare, a patient considers the available treatment options and makes treatment decisions in consultation with their healthcare provider. (Am. Compl., ¶ 30; Ettner Decl., ¶¶ 29, 33).

50. Surgery is not medically necessary, or medically desirable, for all transgender people. (Am. Compl., ¶ 31; Ettner Decl., ¶¶ 37, 49).

51. Even for those for whom surgery is appropriate, the specific surgical procedure will vary based on the person's individual needs. (Am. Compl., ¶ 31; Ettner Decl., ¶ 33).

52. For some, surgery is medically contraindicated; for others it is cost prohibitive. (Am. Compl., ¶ 31; Ettner Decl., ¶¶ 49-50).

53. 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. (Am. Compl., ¶ 31; Ettner Decl., ¶¶ 29, 33, 46).

54. Treatment for gender dysphoria also includes living one's life consistently with one's gender identity. (Am. Compl., ¶ 31; Ettner Decl., ¶¶ 33, 36, 39).

55. Living one's life consistently with one's gender identity includes using identity documents that accurately reflect one's gender identity. (Am. Compl., ¶ 32; Ettner Decl., ¶¶ 40-41).

56. Gender-affirming surgery, even for those transgender people who have a medical need for it, does not "change" their sex, but rather affirms it. (Am Compl., ¶ 35; Ettner Decl., ¶¶ 33-34, 38).

57. Defendants did not submit any evidence rebutting the evidence submitted by Plaintiffs.

C. SB 280

58. 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).

59. On April 30, 2021, Governor Gianforte signed SB 280, which became immediately effective upon his signature. *See* SB 280; (Am. Compl., ¶ 37).

60. 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).

61. 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).

62. 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).

63. 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).

64. The order required by SB 280 must contain sufficient information for DPHHS to locate the original birth certificate. *See* SB 280; (Am. Compl., ¶ 41).

65. DPHHS' inability to locate the original birth certificate does not excuse an applicant's obligation to comply with SB 280. *See* SB 280; (Am. Compl. ¶ 41).

66. SB 280 does not specify which Montana or other out-of-state court shall have "appropriate jurisdiction" to issue the order mandated by SB 280. *See* SB 280; (*see* Am. Compl., ¶ 41).

67. SB 280 also does not specify whether any licensed medical or other professional will review the submission to DPHHS; does not define or describe what constitutes a

qualifying surgical procedure or a qualifying surgical result; and does not specify the nature of the proof, or the standards, applicable to the court proceedings the applicant must initiate to obtain the mandated order. *See* SB 280; (Am. Compl., ¶¶ 41, 92).

68. SB 280 also contains no exceptions for medical contraindication or the inability to pay the cost of the mandated procedures. *See* SB 280; (Am. Compl., ¶ 43).

69. A birth certificate is an essential government-issued document that individuals use for various important purposes throughout their lifetime. *See* § 50-15-221, MCA; (Am. Compl., ¶ 46).

70. Birth certificates are used in a wide variety of contexts, such as determining eligibility for school or employment, obtaining a passport, proving age, enrolling in government programs, and obtaining a marriage license. (Am. Compl. ¶ 46).

71. 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. (Am. Compl., ¶¶ 48-49; Ettner Decl., ¶¶ 40, 43, 46).

72. 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. (Am. Compl., ¶ 48; Ettner Decl., ¶ 46).

73. A mismatch between someone's gender identity and the information on their birth certificate also subjects transgender people to discrimination and harassment in a

variety of settings, including employment, healthcare, and interactions with government employees and officials. (Am. Compl. ¶¶ 33, 49; Ettner Decl. 43-45).

74. A mismatch between someone's gender identity and the information on their birth certificate may even subject them to violence. (Am. Compl., ¶ 33).

75. 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).

D. Procedural History

76. On July 16, 2021, Plaintiffs filed their complaint in this matter. (Dkt. 1).

77. On July 19, 2021, Plaintiffs filed their motion for a preliminary injunction. (Dkt. 6).

78. On July 22, 2021, Plaintiffs filed complaints with the Montana Human Rights Bureau ("MHRB") challenging the constitutionality of SB 280. (*Amelia Marquez v. State*, HRB Case No. 021056 (July 2021)).

79. On August 17, 2021, Defendants responded to Plaintiffs' motion for a preliminary injunction and also submitted a motion to dismiss the complaint. (Dkt. 23; Dkt 24).

80. On September 24, 2021, Plaintiffs filed their reply in support of the motion for a preliminary injunction and their response to defendants' motion to dismiss. (Dkt. 30; Dkt. 31).

81. On October 28, 2021, Defendants filed their reply in support of the motion to dismiss. (Dkt. 37).

82. On November 3, 2021, the MHRB dismissed Plaintiffs' MHRB complaints on the basis that the MHRB lacked the authority to decide the constitutional questions raised by Plaintiffs and authorized Plaintiffs to proceed in this Court. (Am. Compl. Exs. 1, 2).

83. On December 3, 2021, Plaintiffs filed a motion for leave to file an amended complaint asserting statutory claims for violations of the Montana Human Rights Act ("MHRA") and the Montana Governmental Code of Fair Practices ("MGCFP"). (Dkt. 41; Dkt. 42).

84. On December 3, 2021, the Court granted the motion. (Dkt. 44).

85. On December 22, 2021, the Court held a hearing on Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss. (Dkt. 46).

86. On January 28, 2022, Defendants filed a motion to dismiss the amended complaint. (Dkt. 50; Dkt 51).

87. On February 11, 2022, Plaintiffs submitted their response to Defendants' motion to dismiss the amended complaint. (Dkt. 56).

88. On March 4, 2022, Defendants submitted their reply in support of the motion to dismiss Plaintiffs' amended complaint. (Dkt. 60).

89. Also on March 4, 2022, both parties submitted proposed findings of fact and conclusions of law.

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

Conclusions of Law

90. 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.

91. The Court has jurisdiction over this action. § 25-2-125, MCA; § 25-2-126, MCA; *see also* §§ 27-19-101, *et seq*., MCA.

A. Standing

92. To establish standing "[i]n the context of challenges to government action," the complaining party must (1) "clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party." *Armstrong v. State*, 1999 MT 261, ¶ 6, 296 Mont. 361, ¶ 6, 989 P.2d 364, ¶ 6; *see also Gryczan v. State*, 283 Mont. 433, 442-43, 942 P.2d 112, 119 (1997).

93. Plaintiffs have pleaded in Counts I through IV of the Amended complaint that they have suffered, or will suffer, violations of constitutional rights, including under Article II, Section 4, of the Montana Constitution (equal protection of the laws); Article II, Sections 10 and 17, of the Montana Constitution (privacy rights and medical decision

autonomy); and Article II, Section 17 of the Montana Constitution (substantive due process).

94. Defendants contend that Plaintiffs do not have standing to challenge SB 280 because "Plaintiffs' alleged injuries are no more than generalized concerns over abstract, future harm that lack basis, are ill-defined, and may never materialize." (Dkt. 24 at 9). Defendants also argue that Plaintiffs could have changed their birth certificates under the old rule but did not, Plaintiffs purposely availing themselves in this matter undermines their fear of being outed, and that Plaintiffs did not provide specific examples of when a birth certificate must be shown. (Dkt. 24 at 6-9).

95. As set forth in the amended complaint, Plaintiffs allege SB 280 intentionally imposes unnecessary and substantial burdens on transgender people who wish to amend their birth certificate to accurately reflect their sex. Plaintiffs described multiple instances in which a birth certificate must be shown and the necessity of having matching documents in order to assist in the treatment of gender dysphoria.

96. Defendants suggest that because Plaintiffs have voluntarily availed themselves in this case that their fear of being "outed as transgender" in other instances is moot. (Dkt. 24 at 8). The Court does not find this argument persuasive.

97. Transgender people, including Plaintiffs, are precisely the only individuals effected by SB 280.

98. "This [targeted specificity] is sufficient to give [Plaintiffs] standing to challenge the constitutionality of the statute." *Gryczan*, 283 Mont. at 446.

B. Administrative Exhaustion

99. On July 22, 2021, Plaintiffs filed complaints with the MHRB challenging the constitutionality of SB 280.

100. In response, Defendants argued in their motion to dismiss that this case could not proceed until the MHRB proceedings were exhausted.

101. On November 3, 2021, the MHRB dismissed the complaints, concluding that the MHRB lacked the authority to decide the constitutional questions raised by Plaintiffs.

102. The MHRB authorized Plaintiffs to proceed in this Court. (Am. Compl., ¶¶ 13-15).

103. As a result, Defendants' argument that Plaintiffs must exhaust administrative remedies is now moot and the Court need not address the arguments of the parties as to this issue further.

C. Defendants' Motion to Dismiss

104. Defendants moved to dismiss pursuant to Rule 12(b)(6). Under that rule, "a complaint should be dismissed where the factual allegations fail to state a claim upon which relief can be granted." *Stokes v. State*, 2005 MT 42, ¶ 6, 107 P.3d 494, 495. "A motion to dismiss is viewed with disfavor and rarely granted." *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, ¶ 9, 32 P.3d 1250, ¶ 9.

105. When addressing a Rule 12(b)(6) motion, "all well-pleaded allegations of fact are taken as true." *Stokes*, ¶ 6. Courts must construe the complaint "in the light most favorable to the plaintiff and all allegations of fact contained therein are taken as true." *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, ¶ 8, 66 P.3d 316, ¶ 8 (quoting *Willson v. Taylor* (1981), 194 Mont. 123, 126, 634 P.2d 1180, 1182)(quotations omitted).

106. "Dismissal of an action is justified only when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim" under any set of facts. *Fennessy*, ¶ 9.

107. Defendants argue that Plaintiffs have failed to state a claim under any of the four counts alleged in Plaintiffs' first complaint (Dkt. 1) or under the additional two counts added in Plaintiffs' amended complaint (Dkt. 42).

108. The taken-as-true allegations of the amended complaint support Counts I-IV and Count VI of the amended complaint's counts.

109. Count I of the amended complaint adequately pleads a claim for violation of the Montana Constitution's equal protection clause, including each of the factual predicates for the claim. *See Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶¶ 15-29, 325 Mont. 148, ¶¶ 15-29, 104 P.3d 445, ¶¶ 15-29; (*see* Am. Compl., ¶¶ 6-8, 40, 47, 63-72).

110. Plaintiffs allege SB 280 substantially burdens their ability to amend their birth certificates to accurately reflect their sex.

111. As set forth in the amended complaint, Plaintiffs may only obtain an amendment to their birth certificates by submitting to intrusive and unnecessary surgical procedures, initiating a court proceeding, and obtaining a court order affirming the completion of a surgery.

112. Further, to obtain a court order, Plaintiffs must publicly disclose confidential, intimate details of their medical treatment.

113. Only transgender individuals are subjected to these procedures and burdens in order to have a birth certificate that accurately reflects their gender.

114. Counts II and III of the amended complaint adequately plead violations of Plaintiffs' fundamental rights to informational privacy and to be free from state interference with medical decisions.

115. Both claims are based on Article II, Section 10, of the Montana Constitution. *See Armstrong v. State*, 1999 MT 261, ¶¶ 29-34, 296 Mont. 361, ¶¶ 29-34, 989 P.2d 364, ¶¶ 29-34; (*see* Am. Compl., ¶¶ 4, 31, 42, 47, 48, 58, 60, 61, 73-86).

116. As set forth in the amended complaint, SB 280 requires Plaintiffs to disclose private medical information, as well as information about their transgender status, in a public proceeding with no assurance of confidentiality.

117. SB 280 also compels Plaintiffs to undergo surgery they may not want or need or that is not part of their prescribed medical care or that they may not be able to afford.

118. Count IV of the amended complaint adequately pleads violations of substantive due process, as protected by Article II, Section 17, of the Montana Constitution. *See Yurczyk v. Yellowstone Cty.*, 2004 MT 3, ¶¶ 32-35, 319 Mont. 169, ¶¶ 32-35, 83 P.3d 266, ¶¶ 32-35; (*see* Am. Compl., ¶¶ 30, 31, 60, 61, 87-96).

119. Count IV of the amended complaint describes the vague and poorly defined requirements SB 280 imposes as a condition of amending Plaintiffs' birth certificates.

120. As described in the amended complaint, SB 280 requires transgender people to undergo "surgical procedures" in order to amend their birth certificates but wholly fails to identify what procedure is sufficient to comply with SB 280, what evidence is necessary to comply with SB 280, and who will make the medical decision that a party has met the vague, undefined requirements of SB 280.

121. Count V of the amended complaint does not adequately plead a claim for discrimination under the MHRA. (Am. Compl., ¶¶ 97-103).

122. The MHRA prohibits discrimination based on sex and recognizes freedom from sex discrimination as a basic right. § 49-1-102, MCA; (Am. Compl., ¶ 98).

123. The Montana Supreme Court has only applied the MHRA to specific acts of discrimination. *See e.g.*, *Lay v. State Dep't of Military Affairs*, 2015 MT 158, ¶ 17, 379 Mont. 365, ¶ 17, 351 P.3d 672, ¶ 17; *Baumgart v. State*, 2014 MT 194, ¶ 7, 376 Mont. 1, ¶ 7, 332 P.3d 225, ¶ 7; *Hansen v. Bozeman Police Dep't*, 2015 MT 143, ¶ 19, 379 Mont. 284, ¶ 19, 350 P.3d 372, ¶ 19.

124. Plaintiffs cite to *Maloney v. Yellowstone County et al*., as supporting the contention that discrimination on the basis of gender identity constitutes discrimination on the basis of sex, however, even in that case a specific act of discrimination was at issue. *See Maloney v. Yellowstone County*, Hearing Officer Decision and Notice of Issuance of Administrative Decision, Case No. 1572-2019, Jan. 24, 2022.

125. Plaintiffs here do not allege a specific act of discrimination given that signing a bill into law is not a specific act of discrimination.

126. Therefore, the Court finds that Plaintiffs have failed to state a claim as to Count V such that Count V should be dismissed.

127. Count VI of the amended complaint alleges a claim for discrimination under the Montana Governmental Code of Fair Practices ("MGCFP"). (Am. Compl., ¶¶ 104-10).

128. The MGCFP requires that government services be made available or performed without discrimination based on sex. § 49-3-205, MCA; (Am. Compl., ¶ 105).

129. 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, including discrimination based on sex. § 49-3-205, MCA; (Am. Compl., ¶ 105).

130. Plaintiffs allege that the amending of birth certificates constitutes a service provided by the government.

131. Plaintiffs have alleged, Defendants—through SB 280—have violated provisions of the MGCFP, and Plaintiffs have been injured by Defendants' conduct. (*Id*. at ¶ 106).

132. Plaintiffs allege Defendants have discriminated against Plaintiffs based on their gender identity by restricting transgender people's ability to change the sex designation on their birth certificates through requiring any person who seeks to amend their sex designation to undergo surgery and initiate a legal proceeding to prove that their sex "has been changed by surgical procedure." (Am. Compl., ¶ 107).

133. Individuals who are not transgender do not need to undergo such steps to have a birth certificate that accurately reflects who they are and how they identify themselves to others. (*See* Am. Compl., ¶ 68).

134. Plaintiffs have alleged discrimination based on transgender status is sex discrimination under the MGCFP. (Am. Compl., ¶ 108).

135. Based on these allegations, Plaintiffs have properly pleaded the claims set forth in Counts I through IV and VI of the amended complaint. Therefore, Defendants' motion to dismiss is denied as to those counts but granted as to Count V.

D. Plaintiffs' Motion for a Preliminary Injunction

136. Under the Montana Code Annotated, an applicant is entitled to a preliminary injunction where (1) "it appears the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act," (2) "it appears that commission or continuance of some act during the litigation

would produce a great or irreparable injury to the applicant," or (3) "the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights." § 27-19-201, MCA.

137. "These requirements are disjunctive, meaning that findings that satisfy one subsection are sufficient." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 14, 366 Mont. 224, ¶ 14, 286 P.3d 1161, ¶ 14.

138. "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)).

139. 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)

140. To obtain a preliminary injunction, a plaintiff only needs to establish a prima facie case, not entitlement to final judgment. *See Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, ¶ 18, 440 P.3d 4, ¶ 18 (internal citations omitted); *City of Whitefish v. Bd. of Cty. Comm'rs of Flathead Cty.*, 2008 MT 436, ¶ 25, 347 Mont. 490, ¶ 25, 199 P.3d 201, ¶ 25 (internal citations omitted); *City of Billings v. Cty. Water Dist.* (1997), 281 Mont. 219, 226, 935 P.2d 246, 250 (citing *Knudson v. McDunn* (1995), 271 Mont. 61, 894 P.2d 295, 298).

141. "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Weems*, ¶ 18 (quoting *Prima facie, Black's Law Dictionary* (10th ed. 2014).

142. In addition, a request "for preliminary injunctive relief require[s] some demonstration of threatened harm or injury, whether under the "great or irreparable injury" standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA." *BAM Ventures, Ltd. Liab. Co. v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, ¶ 16, 437 P.3d 142, ¶ 16.

143. The Montana Supreme Court has held that "loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *Mont. Cannabis Indus. Ass'n*, ¶ 15; *see also Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386.

144. In *Planned Parenthood of Montana, et al v. State of Montana, et al*., this Court applied the prima facie standard in granting preliminary injunctive relief enjoining the enforcement of legislative enactments restricting access to medical and procedural abortions. *See Planned Parenthood of Mont*., No. DV 21-999, Order Granting Preliminary Injunction, at 15-16 ("To make a sufficient showing for a preliminary injunction to issue, applicants need only establish a prima facie case….")(citing *Weems*).

145. This Court applied Montana Supreme Court precedent that descried the additional elements, such as likelihood of success on the merits, are only relevant in

those limited circumstances where "'a party's monetary judgment may be made ineffectual by actions of the adverse party thereby irreparably injuring the applicant.'" *See id.*; *see also Van Loan v. Van Loan* (1995), 271 Mont. 176, 895 P.2d 614, 617 (describing the likelihood of success element and other elements were "adopt[ed] [] as the test in Montana to determine whether a preliminary injunction should issue when a party's monetary judgment may be made ineffectual by the actions of the adverse party thereby irreparably injuring the applicant.").

146. Plaintiffs are not seeking compensation in this matter.

147. The prima facie standard governs Plaintiffs' motion for a preliminary injunction in this case. *See Planned Parenthood of Mont.*, No. DV 21-999, Order Granting Preliminary Injunction, at 15-16 (citing *Van Loan v. Van Loan* (1995), 271 Mont. 176, 895 P.2d 614, 617).

148. As discussed below, Plaintiffs are entitled to preliminary injunctive relief under the prima facie standard.

149. Alternatively, even under the more demanding standard requiring a showing of likelihood of success on the merits, Plaintiffs are entitled to a preliminary injunction based on their pleadings and uncontested evidentiary submissions.

i. Void for Vagueness

150. Article II, section 17 of the Montana Constitution guarantees due process. Mont. Const. art. II, § 17 ("No person shall be deprived of life, liberty, or property without the due process of law.").

151. Due process encompasses the "basic principle" that "an enactment is void for vagueness if its prohibitions are not clearly defined." *Whitefish v. O'Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025. The Montana Supreme Court outlined how "[v]ague laws offend several important values" in *Whitefish*. *Id*. Specifically the Supreme Court described:

> First, we assume that man is free to steer between lawful and unlawful conduct, and we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. .... Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Whitefish, 216 Mont. 433, 440, 704 P.2d 1021, 1025-26 (citing *Grayned v. City of Rockford* (1972), 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99).

152. "A vagueness challenge to a statute may be maintained under two different theories: (1) because the statute is so vague that it is rendered void on its face; or (2) because it is vague as applied in a particular situation." *State v. Dugan*, 2013 MT 38, ¶ 66, 369 Mont. 39, ¶ 66, 303 P.3d 755, ¶ 66 (citing *State v. Watters*, 2009 MT 163, ¶ 24, 350 Mont. 465, 208 P.3d 408; *State v. Nye* (1997), 283 Mont. 505, 513, 943 P.2d 96, 101).

153. Plaintiffs have established a prima facie case under the first theory, as discussed below.

154. "Statutes are accorded a presumption of constitutionality; the burden of proof is upon the party challenging a statute's constitutionality." *Monroe v. State* (1994), 265 Mont. 1, 3, 873 P.2d 230, 231 (citing *GBN, Inc. v. Montana Dept. of Revenue* (1991), 249 Mont. 261, 265, 815 P.2d 595, 597). Additionally, "[a]ny doubt is to be resolved in favor of the statute." *Id*.

155. A statute is unconstitutionally vague on its face "if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Dugan*, ¶ 67 (internal quotations omitted); *Monroe*, 265 Mont. at 3, 873 P.2d at 231; *see also Yurczyk v. Yellowstone Cty.*, 2004 MT 3, ¶ 34, 319 Mont. 169, ¶ 34, 83 P.3d 266, ¶ 34.

156. "The complainant attacking a statute's validity must prove that the statute is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Monroe*, 265 Mont. at 3-4, 873 P.2d at 231 (quoting *Hoffman Estates v. Flipside, Hoffman Estates* (1982), 455 U.S. 489, 495, n. 7, 102 S.Ct. 1186, 1191).

157. When examining a "facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct," the Court "should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 494-95, 102 S. Ct. at 1191.

a. To be clear, **for the purposes of this preliminary injunction**, the Court has declined to analyze whether SB 280 reaches constitutionally protected

conduct. Thus, the issue of whether SB 280 reaches constitutionally protected conduct has not been decided by the Court in the issuance of these Findings of Fact, Conclusions of Law, and Order.

158. SB 280 provides:

> **Section 1. Sex change designation on birth certificate.** (1) The sex of a person designated on a birth certificate may be amended only if the department receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person born in Montana has been changed by surgical procedure.
>
> (2) The order must contain sufficient information for the department to locate the original birth certificate. If the person's name is to be changed, the order must indicate the person's full name as it appears on the original birth certificate and the full name to which it is to be amended.
>
> (3) If the order directs the issuance of a new birth certificate that does not show amendments, the new birth certificate may not indicate on its face that it was amended.
>
> (4) This section does not apply if the sex of a person was designated incorrectly on the original birth certificate due to a data entry error.

159. Plaintiffs have alleged SB 280 is unconstitutionally vague on its face since it "fails to give a person of ordinary intelligence fair notice" of what conduct is required under SB 280. *See Dugan,* ¶ 67.

160. Plaintiffs point to the following emphasized portions of SB 280 stating 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*." SB 280 (emphasis added).

161. Plaintiffs provided unrebutted evidence describing that neither gender-affirming surgery nor any other medical treatment that a transgender person undergoes changes that person's sex. (Ettner Decl., ¶ 34). Instead, gender-affirming surgery aligns a person's body and lived in experience with the person's gender identity, which already exists. *Id*. Therefore it is unclear what type of "surgical procedure" will meet the requirements to change "the sex of the person born in Montana" given Plaintiff's evidence that no surgery changes a person's sex.

162. Plaintiffs further describe SB 280 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 not define what the surgery should be or identify who—DPHHS, the court, or the applicant's physician or other medical professional—decides what type of surgery is sufficient to satisfy SB 280.

163. Plaintiffs provided unrebutted evidence describing there are many types of surgery available to treat gender dysphoria including facial feminization, tracheal shave, vaginoplasty, and phalloplasty. (Lane Aff., ¶ 2).

164. Plaintiffs describe that whether these surgeries qualify under SB 280 is entirely unclear given the ambiguity of the statute and Defendants' failure to promulgate implementing regulations clarifying these standards.

165. Plaintiffs point out that SB 280 also does not identify the standard of proof applicable to the court proceeding that SB 280 requires.

166. Plaintiff Mr. Doe testified that he is unsure of whether his "top surgery" would qualify under the requirements imposed by SB 280.

167. Nor does SB 280 identify the standard, if any, governing DPHHS' review of the court's order.

168. Because this could lead to different interpretations among whichever judge in whatever constitutes a court with appropriate jurisdiction it "impermissibly delegates basic policy matters to…judges…for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" Plaintiffs have demonstrated a prima facie case that SB 280 is void for vagueness. *See Hoffman Estates*, 455 U.S. at 498, 102 S. Ct at 1193.

169. Absent these basic specifications, Plaintiffs contend SB 280 "is so vague that it is rendered void on its face." *Dugan*, ¶ 66; *see also Western Native Voice v. Stapleton*, No. DV

20-0377, 2020 WL 8970685 (13th Dist., Yellowstone Cnty., Sept. 25, 2020) (finding Montana's Ballot Interference and Protection Act unconstitutionally void on its face).

170. The Court finds that Plaintiffs have established a prima facie case that SB 280 impermissibly vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process because it is unconstitutionally void. Given this finding, the Court need not address the remaining contentions made by Plaintiffs.

ii. Injury

171. The Montana Supreme Court has described that "[f]or the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, ¶ 15, 473 P.3d 386, ¶ 15; *see also Weems v. State*, 2019 MT 98, ¶ 25, 395 Mont. 350, ¶ 25, 440 P.3d 4, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction.").

172. Here, Plaintiffs have described injury due to being unable to change the sex designations on their birth certificates and likely being prevented from doing so due to SB 280.

173. As discussed above, § 27-19-201, MCA, sets forth the applicable standards for obtaining a preliminary injunction.

174. The subsections of § 27-19-201 "are disjunctive; a court need find just one subsection satisfied in order to issue a preliminary injunction." *Driscoll*, ¶ 13; (citing *Bam Ventures*, ¶ 14).

175. To meet the irreparable-injury test, a "district court need find only that an applicant made a prima facie showing she will suffer a harm or injury—'whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA.'" *Driscoll*, ¶ 15 (quoting *BAM Ventures*, ¶ 16).

176. Plaintiffs have made a prima facie case that SB 280 unconstitutionally burdens their constitutional right to due process.

177. This constitutional violation constitutes an irreparable injury.

178. Plaintiffs have also alleged injuries including irreparable emotional and financial harm. Specifically, Ms. Marquez cannot undergo surgery at this time due to monetary constraints and time constraints. (Marquez Aff., ¶ 6). Mr. Doe does not know if the "top surgery" he has undergone will comply with SB 280 and will suffer financial damage if he were to attempt to change the sex designation on his birth certificate. (*See* Doe Aff., ¶¶ 8, 12)). Specifically, Mr. Doe would have to pay for travel costs and the cost of hiring an attorney to represent him in the judicial proceedings required by SB 280. Undertaking this financial burden to meet SB 280's requirements will cause irreparable harm to Mr. Doe.

179. The Court finds that Plaintiffs have demonstrated injury sufficient for a preliminary injunction.

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.

E. Conclusion

182. Plaintiffs have adequately alleged under section 27-19-201(1), MCA and (2) that they are entitled to a preliminary injunction. Plaintiffs have shown the lesser degree of harm required by subsection (1) and the irreparable injury required by subsection (2) such that an injunction is necessary to minimize the harm to all parties and preserve the status quo pending final resolution on the merits.

183. Based on the Courts finding that Plaintiffs have demonstrated a prima facie case that SB 280 is vague and therefore unconstitutionally burdens the right to due process, the Court will grant Plaintiffs' motion for a preliminary injunction.

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

1. Plaintiffs have standing to challenge SB 280;

2. Plaintiffs have adequately pleaded claims for violations of equal protection, privacy, and due process under the Montana Constitution and for a violation of the MGCFP sufficient to survive a Rule 12(b)(6) motion;

3. Plaintiffs failed to adequately plead a claim for a violation of the MHRA;

4. Plaintiffs have established a prima facie case of a violation of their right to due process under the Montana Constitution.

5. **IT IS HEREBY ORDERED:**

   a. Plaintiffs' motion for a preliminary injunction is **GRANTED** and Defendants are enjoined from enforcing any aspect of SB 280 during the pendency of this action according to the prayer of the Plaintiffs' motion and complaint;

   b. Defendants' motion to dismiss is **DENIED** as to Counts I-IV and VI;

   c. Defendants' motion to dismiss is **GRANTED** as to Count V;

   d. the Court waives the requirement that the Plaintiffs post a security bond for the payment of costs and damages as permitted by § 27-19-306(1), MCA.

DATED April 21, 2022

/s/ Michael G. Moses
District Court Judge

cc: Akilah Lane
Alex Rate
F. Thomas Hecht
Tina B. Solis
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Electronically Signed By:
Hon. Judge Michael Moses
Thu, Apr 21 2022 09:11:54 AM