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**IN THE THIRTEENTH JUDICIAL DISTRICT COURT  
 COUNTY OF YELLOWSTONE**

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

v. )

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

Defendants. )

Case No. DV 21-00873

Hon. Michael G. Moses

**PLAINTIFFS' MOTION TO ENFORCE  
 THE PRELIMINARY INJUNCTION  
 ORDER BY ORDERING DEFENDANTS  
 TO SHOW CAUSE WHY THEY  
 SHOULD NOT BE HELD IN CIVIL  
 CONTEMPT FOR VIOLATING THE  
 ORDER**

Plaintiffs Amelia Marquez and John Doe (together, the “Plaintiffs”) respectfully move this Court, based on good cause, to enforce its April 21, 2022 Findings of Fact, Conclusion of Law and Order (the “Preliminary Injunction Order”) by ordering Defendants to show cause why they should not be held in contempt for failing to maintain the status quo consistent with this Court’s Preliminary Injunction Order.

Opposing counsel have been contacted regarding this motion, and they oppose the motion. Plaintiffs contemporaneously file their brief in support of this motion.

Dated: January 25, 2023

Respectfully Submitted,

By: Akilah Deernose

Akilah Deernose

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and accurate copy of the foregoing **Plaintiffs' Motion to Enforce the Preliminary Injunction Order by Ordering Defendants to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Order** via email on counsel for Defendants:

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Electronically signed by Krystel Pickens on behalf of Akilah Deernose on January 25, 2023.

## **CERTIFICATE OF SERVICE**

I, Akilah Maya Deernose, hereby certify that I have served true and accurate copies of the foregoing Motion - Motion for Contempt to the following on 01-25-2023:

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Electronically signed by Krystel Pickens on behalf of Akilah Maya Deernose  
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STATE OF MONTANA; GREGORY )  
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Case No. DV 21-00873

Hon. Michael G. Moses

**PLAINTIFFS' BRIEF IN SUPPORT OF  
 MOTION TO ENFORCE THE  
 PRELIMINARY INJUNCTION ORDER  
 BY ORDERING DEFENDANTS TO  
 SHOW CAUSE WHY THEY SHOULD  
 NOT BE HELD IN CIVIL CONTEMPT  
 FOR VIOLATING THE ORDER**



## I. INTRODUCTION

Plaintiffs respectfully move this Court to enforce its April 21, 2022 Findings of Fact, Conclusion of Law and Order (the “Preliminary Injunction Order” or the “PI Order”) by ordering Defendants to show cause why they should not be held in contempt for failing to maintain the status quo consistent with this Court’s Preliminary Injunction Order. The Montana Supreme Court’s January 10, 2023 Order (the “Writ Order”) reaffirmed that this Court’s Preliminary Injunction Order “*requires* DPHHS to maintain the status quo, which reinstates the 2017 Rule for as long as the Preliminary Injunction Order—which DPHHS did not appeal—remains in effect.” Dkt. 97, at 6-7 (emphasis added). The Preliminary Injunction Order still remains in place, which means that DPHHS *must* maintain the status quo by applying the 2017 Rule as the process by which individuals may amend the sex marker on their birth certificate for the duration of this litigation. *See* Dkt. 97, at 6-7; Dkt. 77, ¶¶ 15-20; Dkt. 61, ¶ 180-18. Despite what have now been three judicial orders confirming DPHHS’s obligation to maintain the status quo by reinstating the 2017 Rule for the duration of this litigation, Defendants are currently processing sex marker amendments to Montana birth certificates under its 2022 Rules. By failing to maintain the 2017 Rules and preserve the status quo, Defendants will be in violation of the Preliminary Injunction Order.

In this Court’s September 19, 2022 Finding of Facts, Conclusion of Law, and Order Granting in Part and Denying in Part Plaintiffs’ Motion Seeking Clarification of the Preliminary Injunction (the “Clarification Order”), Defendants were warned that “[m]otions for contempt based on continued violations of the Order will be promptly considered.” Dkt. 77, ¶ 21. Consistent with this Court’s admonitions, Plaintiffs submit this motion to enforce the Preliminary Injunction Order by

ordering Defendants to show good cause why they should not be held in contempt for refusing to maintain the status quo and process sex marker changes in accordance with the 2017 Rule.

## **II. BACKGROUND**

On April 21, 2022, this Court issued its Preliminary Injunction Order 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[.]” Dkt.61, at 35 ¶ 5 (a). In that order, Defendants were directed to maintain the status quo—defined as the “last actual, peaceable, noncontested condition which preceded the pending controversy”—thereby requiring Defendants to follow the 2017 Rule to process sex marker amendments to Montana birth certificates while the Preliminary Injunction Order remains in effect. *Id.* ¶¶ 61-62.

Despite the fact that the 2017 Rule constituted the governing rule that existed prior to SB 280, and that reverting to the status quo required Defendants to follow the 2017 Rule, Defendants adopted an Emergency Rule and an identical Permanent Rule (the “2022 Rule”) (together, the “Rules) prohibiting transgender people from ever amending the sex designation on their Montana birth certificates. *See* Dkt. 77, ¶¶ 7-13. Defendants tried to justify their actions by claiming that they were confused as to their obligations under the Preliminary Injunction Order.

Defendants’ professed confusion was unconvincing. *Id.*; *see also* Dkt. 97, at 4-6. Nonetheless, in response to Defendants’ blatant disregard of the Preliminary Injunction Order, Plaintiffs filed a motion asking this Court to clarify the terms of its already clear order to dispel any professed confusion on Defendants’ part. Dkt. 71. On September 19, 2022, after full briefing on the issue and oral argument, this Court issued its Clarification Order finding that Defendants claims of confusion were “demonstrably ridiculous” and that they had “unlawfully circumvented

the entire purpose of a preliminary injunction and disregarded and disrespected the judicial process” by making such claims. Dkt. 77, ¶ 19. This Court then reaffirmed that the Preliminary Injunction Order “required that defendants return to the status quo- which is evidenced by SB 280 itself- . . . a return to the 2017 regulations.” Dkt. 77, ¶ 24.

Dissatisfied with the Clarification Order, Defendants took the extraordinary step of applying to the Montana Supreme Court for a writ of supervisory control, insisting that this Court did not order DPHHS to revert to the 2017 Rules. *See* Case No. OP 22-0552 at 5. In the alternative, Defendants argued in their petition “that DPHHS need not follow the District Court’s Order that it reinstate the 2017 Rule.” Dkt. 97, 4. The Montana Supreme Court disagreed and made it clear that “[i]n enjoining SB 280, and thereby maintaining the status quo, or ‘last, actual, peaceable, noncontested condition which preceded the pending controversy,’ the District Court unquestionably reinstated the 2017 Rule for so long as its preliminary injunction remains in effect.” Dkt. 97, at 6.

Following the Montana Supreme Court’s Writ Order, DPPHS publicly declared that “given the court’s decision, the department will follow and implement its 2022 rule,”<sup>1</sup> thereby abolishing the right of transgender Montanans to amend the sex markers on their birth certificates. In its Writ Order, the Montana Supreme Court, however, did not rule that the 2022 Rule was valid. Instead, the Court only held that the 2022 Rule had yet to be properly challenged in this litigation and provided two avenues by which the District Court could properly have jurisdiction over it—one of which, by the time the Writ Order was entered, Plaintiffs had already

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<sup>1</sup> *See* Mara Silvers, Montana Free Press, *State Supreme Court splits decision over judge’s actions in transgender birth certificate case* (Jan. 10, 2023), available at <https://montanafreepress.org/2023/01/10/montana-court-issues-split-decision-in-transgender-birth-certificate-appeal/>; S. Ragar, Montana Public Radio, *Amid legal battles, the health dept. bars gender changes on birth certificates* (Jan. 11, 2023), available at <https://www.mtpr.org/montana-new/2023-01-11/amid-legal-battles-the-health-dept-bars-gender-changes-on-birth-certificates>.

moved to undertake through their pending motion for leave to file a second amended complaint. *See* Dkt. 97, at 6; Dkt. 84, ¶¶ 103, 11, 142; Dkt. 95, at 7-8; Dkt. 100. Holding that a court did not have jurisdiction over a legal challenge to an administrative rule is wholly different than holding that a party can implement and enforce a rule that violates an existing injunction in an ongoing lawsuit. Nonetheless, after inquiry by Plaintiffs’ counsel, Defendants’ counsel confirmed that the DPHHS is currently processing sex marker amendments to birth certificates under the 2022 Rule rather than the 2017 Rule, as the PI order requires.

As noted above, in this Court’s Clarification Order, Defendants were warned that “[m]otions for contempt based on continued violations of the Order will be promptly considered.” Dkt. 77, ¶ 21. Consistent with this Court’s admonitions, Plaintiffs submit this motion to order Defendants to show cause why they should not be held in contempt for violating the Preliminary Injunction Order by refusing to maintain the status quo and process sex marker changes in accordance with the 2017 Rule.

### **III. ARGUMENT**

#### **A. This Court Has the Authority to Enforce Its Orders by Directing Defendants to Show Cause Why They Should Not Be Held in Contempt.**

Courts “are imbued with inherent authority to enforce compliance with their lawful orders by holding noncompliant parties in contempt.” *Spallone v. United States*, 493 U.S. 265, 276, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990). Pursuant to section 3-1-501(1)(e), MCA, “disobedience of any lawful judgment, order, or process of the court” is contempt to the “authority of the court.” Section 3-1-501(3), MCA, sets forth that “[a] contempt is civil if the sanction imposed seeks to force the contemnor’s compliance with a court order,” and “[i]f the court’s purpose in imposing the sanction is to attempt to compel the contemnor’s performance of an act, the court shall impose the sanction under 3-1-520.” A contempt that is “not committed in

the immediate view and presence of the court or judge in chambers is an indirect or constructive contempt.” *Kauffman v. Mont. Twenty-First Jud. Dist. Ct.*, 1998 MT 239, ¶¶ 19, 25, 291 Mont 122, ¶¶ 19, 25, 966 P.2d 715, ¶¶ 19, 25; *see also* §§ 3-1-512-20, MCA.

“An indirect contempt proceeding may be initiated either by issuance of an affidavit-supported ‘warrant of attachment’ for the arrest, appearance, and answer of the alleged contemnor in accordance with §§ 3-1-513-18, MCA, or by a contempt show cause order issued on motion or sua sponte by the court.” *Fouts v. Mont. Eighth Judicial Dist. Court*, 2022 MT 9, ¶ 8, 407 Mont. 166, ¶ 8, 177-78, 502 P.3d 689, ¶ 8; (reversing a District Court’s order of indirect contempt where it was found that the District Court failed to make an underlying evidentiary finding on whether the contemnor was able to comply with the subject order and where the coercive sanction went beyond the limiting language of section 3-1-501(3), MCA); *see also* §§ 3-1-512- 513, MCA *Valley Unit Corp. v. City of Bozeman*, 232 Mont. 52, 54-55, 754 P.2d 822, 824 (1988) (issuing contempt order initiated on show cause motion and supporting affidavit did not exceed the court’s jurisdiction). The procedure for indirect contempt requires that a contempt show cause order be supported by either “an affidavit of the facts . . . presented to the court or judge or appropriate judicial notice of pertinent facts sufficient to state a prima facie case of contempt followed by a hearing on the merits.” *Fouts* at ¶ 8 (internal citations and quotation marks omitted).

In April 2022, this Court granted Plaintiffs’ motion for a preliminary injunction and thereby ordered Defendants to maintain the status quo for the duration of the litigation. Dkt. 61. In September 2022, this Court confirmed, in no uncertain terms, that its Preliminary Injunction Order required Defendants to maintain the 2017 Rule for amending the sex marker on Montana birth certificates. Dkt. 77. In January 2023, the Montana Supreme Court affirmed this Court’s

finding that the April 2022 Preliminary Injunction Order requires DPHHS to reinstate “the 2017 Rule for as long as the Preliminary Injunction Order—which DPHHS did not appeal—remains in effect.” Dkt. 96. In light of these orders, Defendants have an unmistakable duty to revert to the 2017 Rule until this case is resolved, or until the injunction is otherwise modified or terminated. Defendants’ willful failure to comply with their duty to revert to the 2017 Rule is contempt of court, as a matter of law.

Notwithstanding this duty, Defendants are currently following the 2022 Rule for processing sex marker amendments for Montana birth certificates. Defendants are blatantly violating the Preliminary Injunction Order that has twice been reaffirmed by this Court and the Montana Supreme Court. This Court is therefore authorized to grant Plaintiffs’ motion and order Defendants to show cause why they should not be held in contempt of the Court’s PI Order.

**B. This Court Is Empowered to Hold Defendants in Contempt and Impose Sanctions to Ensure Compliance with its April 2022 Preliminary Injunction Order.**

Pursuant to section 3-1-520, MCA, “when the sanction imposed for a contempt seeks to compel the contemnor to perform an act that is in the power of the contemnor to perform, the contemnor may be incarcerated, subjected to a fine in an amount not to exceed \$500, or both, until the contemnor has performed the act.” A prerequisite to imposing a coercive civil sanction is a finding that the act “is in the power of the contemnor to perform.” Section 3-1-520, MCA; *VanSkyock v. Manley*, 2017 MT 99, ¶ 13, 387 Mont. 307, ¶ 13, 393 P.3d 1068, ¶ 13,.

It is well within the power of the DPHHS to comply with the Preliminary Injunction Order and reinstate the 2017 Rules. In fact, in the Clarification Order, this Court included a link to the 2017 Rules to assist Defendants in complying with the Preliminary Injunction Order and, as noted previously, stated that it would promptly consider motions for contempt based on

continued violations of the PI Order. Dkt. 77, ¶ 21. Moreover, after issuance of the Court's Clarification Order, Defendants temporarily complied with the Preliminary Injunction, so it is clearly in their power to do so. Defendants' refusal to revert to the 2017 Rule constitutes a violation of the Preliminary Injunction Order, and a finding that Defendants are failing to implement the 2017 Rule is sufficient grounds for holding them in contempt and imposing appropriate sanctions. Plaintiffs ask that, upon finding Defendants in contempt, this Court impose sanctions that will most effectively and swiftly bring Defendants into full compliance with the Preliminary Injunction Order.

In addition, Plaintiffs request that, within 10 days of the entry of the order granting this motion, Defendants provide a full report to the Court, and to Plaintiffs' counsel, describing, in detail, the actions taken to conform Defendants' conduct to the 2017 Rule for amending the sex markers on Montana birth certificates. Further, Plaintiffs request that, within 10 days of the entry of the order granting this motion, DPHHS circulate a copy of the Court's order to each agent, officer, and employee of DPHHS with any responsibility for processing requests to amend birth certificates.

Finally, Plaintiffs request that they be awarded the reasonable attorney's fees and costs arising out of all the work Plaintiffs' counsel performed in connection with this motion, their motion to clarify the Preliminary Injunction Order, and their response to Defendants' motion for a writ of supervisory control. *See In Re Marriage of Redfern*, 214 Mont. 169, 173, 692 P.2d 470 (1984) ("Reasonable attorney fees are permissible in a contempt action."); *Novak v. Novak*, 2014 MT 62, ¶ 37, 374 Mont. 182, ¶ 37, 320 P. 3d 459, ¶ 37 (same); *see also Overfield v. City of Great Falls*, 2013 MT 67N, 2013 WL 979106\*1 (Mont., 2013).

#### IV. CONCLUSION

**FOR THESE REASONS**, either independently or in combination, Plaintiffs respectfully request the entry of an order enforcing the Court's Preliminary Injunction Order as follows:

- (1) ordering Defendants to show cause why they should not be held in contempt of court for failing to maintain the status quo consistent with this Court's Preliminary Injunction Order;
- (2) holding Defendants in contempt of court;
- (3) imposing sanctions to ensure Defendants' compliance with the Preliminary Injunction Order;
- (4) requiring Defendants, within 10 days of the entry of the order granting this motion, to provide a full report to the Court, and to Plaintiffs' counsel, describing, in detail, the actions taken to conform Defendants' conduct to the 2017 Rule for amending the sex markers on Montana birth certificates;
- (5) requiring DPHHS, within 10 days of the entry of the order granting this motion, to circulate a copy of the Court's order to each agent, officer, and employee of DPHHS with any responsibility for processing requests to amend birth certificates;
- (6) awarding Plaintiffs the reasonable attorney's fees and costs arising out of all work performed in connection with this motion, their motion to clarify the PI Order, and their response to Defendants' motion for a writ of supervisory control; and
- (7) granting any other relief in Plaintiffs' favor that the Court deems just.

Dated: January 25, 2023

Respectfully submitted,

By: /s/Akilah Deernose



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IN THE THIRTEENTH JUDICIAL DISTRICT COURT  
 COUNTY OF YELLOWSTONE

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

Plaintiffs, )

v. )

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

Defendants. )

Case No. DV 21-00873

Hon. Michael G. Moses

AFFIDAVIT OF AKILAH DEERNOSE

I, Akilah Deernose, submit the following Affidavit in support of Plaintiffs' Motion to Enforce the Preliminary Injunction Order by Ordering Defendants to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Preliminary Injunction Order. I am the Civil Rights Staff Attorney at the American Civil Liberties Union of Montana, Foundation (ACLU-MT) and counsel to Plaintiffs in the above-captioned case. This declaration is based in part on my personal knowledge and also on becoming familiar with the documents attached to this Affidavit. I could competently testify to the matters set forth in this Declaration.

1. On April 21, 2022 this Court granted a Preliminary Injunction in this case (referred to herein as the "Preliminary Injunction Order" or "PI Order").
2. In the months following this Court's issuance of the PI Order, Defendants failed to comply with their obligation to revert to the status quo. Instead, Defendants promulgated two rules, a Temporary Emergency Rule and a uniform Permanent Rule ("the 2022 Rules"), both of which directly contradict the PI Order.
3. In response to Defendants' actions, Plaintiffs filed a motion seeking clarification of the preliminary injunction on June 7, 2022. After completing briefing and a hearing on Plaintiffs' motion, this Court issued a bench ruling, followed by a Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction (the "Clarification Order"), directing Defendants to abide by the Preliminary Injunction order by preserving the status quo and reverting to the 2017 Rules governing sex marker amendments on birth certificates.
4. Defendants, apparently displeased with the PI Order and Clarification Order, took the extraordinary measure of petitioning the Montana Supreme Court for a writ of

supervisory control, arguing, among other things, that this Court “lacks the authority to order DPHHS to return to the 2017 Rule.” *See* Case No. OP 22-0552.

5. Defendants, nonetheless, reverted to the 2017 Rules for processing sex marker changes on birth certificates following the Clarification Order.
6. On January 10, 2023, the Montana Supreme Court issued an order granting in part and denying in part Defendant’s writ, in which it affirmed that the Preliminary Injunction Order, which Defendants never appealed, requires the DPHHS to maintain the status quo, reinstating the 2017 Rule and that DPHHS is required to do so for as long as the PI Order remains in effect. *See* Dkt, 97, at 6-7.
7. Immediately following issuance of the Writ Order and despite this Courts two previous judicial orders and the Montana Supreme Court’s order confirming the DPHHS’ obligations to reinstate the 2017 Rules, the DPPHS publicly proclaimed that it intended to enforce the 2022 Rules. True and Correct copies of the Montana Free Press and Montana Public Radio articles cited to on page four of Plaintiffs’ Brief in Support of the Motion to Enforce the Preliminary Injunction Order by Ordering Defendants to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Preliminary Injunction Order are attached to this Declaration, respectively, as Exhibits A and B.
8. After receiving many inquiries as to the current process by which the DPHHS was processing sex marker changes on birth certificates and hearing no further word from the DPHHS and the DPPHS’ omission of information about its proclamation of its intent to enforce the 2022 Rules in the news section of the DPHHS website or the issuance of any Montana Administrative Register notices, on January 19, 2023



Plaintiffs' Counsel reached out to Defendants' counsel asking to be apprised as to how the DPPHS was currently processing birth certificate sex marker amendments.

9. Plaintiffs made clear that they would prefer to resolve the matter without Court intervention but would file a motion to enforce if the Defendants were not complying with the Preliminary Injunction Order.
10. After 4 days, on January 23, 2022, Defendants' counsel responded that they had not yet conferred with DPHHS regarding Plaintiffs' inquiry. Counsel for Defendants asserted that they had a call scheduled with the DPHHS on January 24, 2022 and asked if Counsel could respond to Plaintiffs' inquiry following the call. Plaintiffs agreed, stressing the importance that Defendant's counsel respond to Plaintiffs as soon as possible, following the call, as their response was crucial to the impending motion to enforce.
11. On the evening of January 24, 2023 Defendants' counsel responded to Plaintiffs' inquiry by confirming that Defendants are currently processing sex marker amendments to birth certificates under its 2022 Rule.

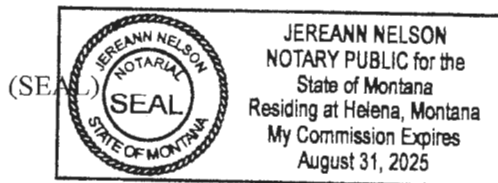
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, based on my personal knowledge.

Dated: January 25, 2023

Respectfully submitted,

By: /s/ [Signature]  
Akilah Deernose

SUBSCRIBED AND SWORN TO before me this: 25<sup>th</sup> day of January 2023, by Akilah Deernose.



[Signature]  
NOTARY FOR THE STATE OF MONTANA

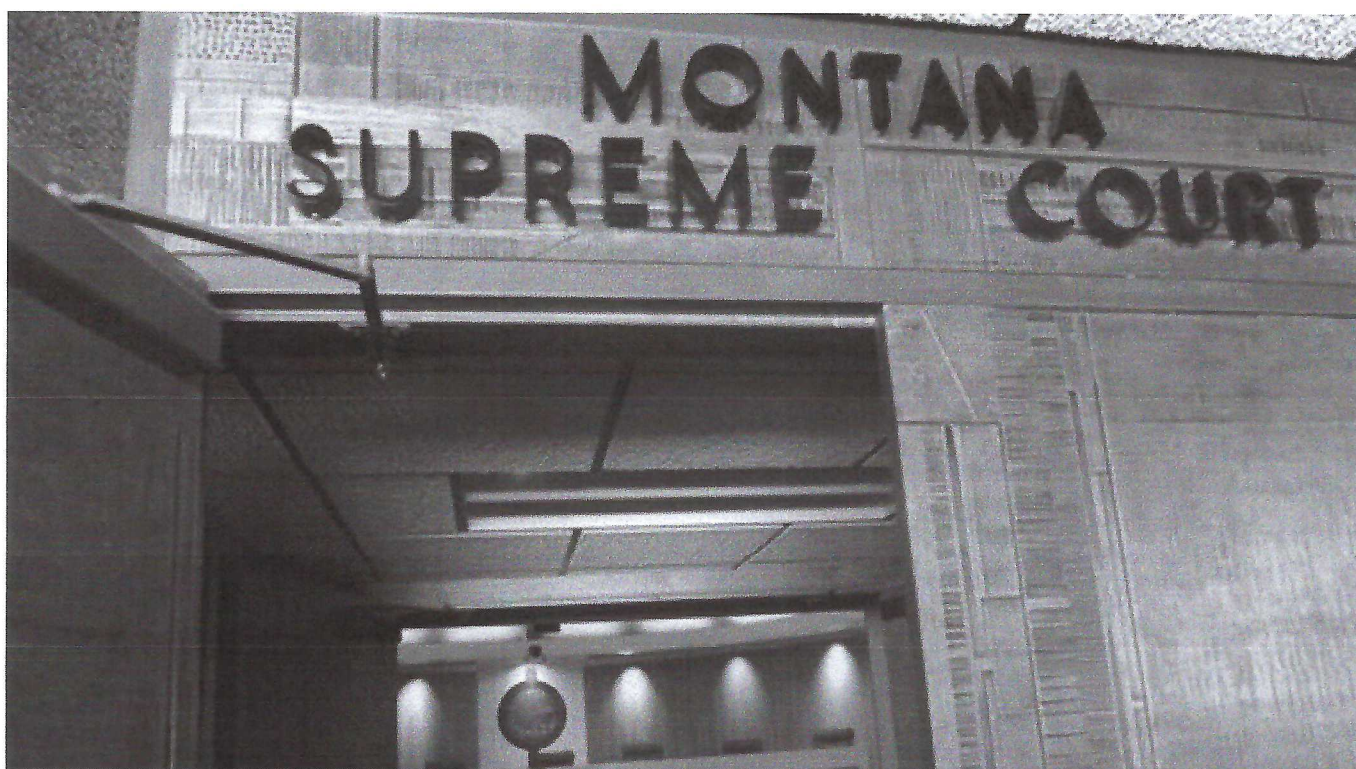
# EXHIBIT A

## HEALTH CARE

## State Supreme Court splits decision over judge's actions in transgender birth certificate case

The Tuesday ruling leaves transgender advocates and the state health departments in another legal standoff.

by Mara Silvers  
01.10.2023



*Credit: John S. Adams / MTFP*

The Montana Supreme Court issued a split decision Tuesday in part of an ongoing case over how transgender people can amend the sex listing on their birth certificates, leaving all parties in another legal standoff over which rules the state health department can apply when evaluating requests.

In a unanimous ruling written by Chief Justice Mike McGrath on behalf of a five-justice panel, the court said Billings District Court Judge Michael Moses was correct last September



in requiring the health department revert to a more lenient 2017 rule in order to abide his preliminary injunction in the case over Senate Bill 280. That Republican-backed bill from the last legislative session required proof of surgery and a court order before an individual can change their listed sex between “female” or “male.”

But the court also said that Moses did not have the authority to block a later, more aggressive rule adopted by the health department barring nearly all birth certificate changes to sex. Plaintiff attorneys, which include the ACLU of Montana, had not challenged the department’s most recent 2022 rules in court as part of their ongoing lawsuit, the court wrote.

“The Preliminary Injunction Order requires DPHHS to maintain the status quo, which reinstates the 2017 Rule for as long as the Preliminary Injunction Order — which DPHHS did not appeal — remains in effect,” the Tuesday Supreme Court ruling said. “However, DPHHS is entitled to relief insofar as the [September order] purports to enjoin DPHHS from engaging in rulemaking, as Plaintiffs have not properly challenged the 2022 Rule under MAPA and its implementation therefore has not been brought before the District Court.”

ACLU of Montana and the state health department issued conflicting statements Tuesday night about where the court’s ruling leaves the state’s current policies for handling changes to birth certificates.

“The Supreme Court’s order confirms that the preliminary injunction granted by the Yellowstone County District Court on April 21, 2022, which remains in effect, restored the 2017 Rule that was in place prior to the state’s passage of SB 280,” said the ACLU of Montana’s statement.

The civil rights group also said that, in accordance with the Supreme Court’s interpretation, their attorneys have challenged the department’s latest 2022 rule as part of the case pending before Judge Moses. The Billings judge has not yet ruled on that petition, which the state health department argued against.

Department of Public Health and Human Services Director Charlie Brereton said Tuesday evening that the state will apply its rule passed in 2022 in light of the court’s ruling.

“The department is pleased the Montana Supreme Court reaffirmed the rule of law, and given the court’s decision, the department will follow and implement its 2022 rule,” Brereton’s complete statement said.

DPHHS spokesperson Jon Ebelt did not respond to additional calls and requests for comment.

Prior to the court's ruling, the department had spent several months adhering to the rule from 2017, which allowed applicants to fill out a short form and attest to a need to update the sex on their birth certificate without proof of surgery or other medical records. The policy was a rule adopted under the administration of former Democratic Gov. Steve Bullock.

The Tuesday order, and the likely legal action yet to come in Moses' court, is just the latest twist in the back and forth between transgender Montanans and their advocates and the health department that is part of Republican Gov. Greg Gianforte's administration.

In the months following Moses' April order enjoining SB 280, the health department did not reimplement the 2017 rule that plaintiffs said constitutes the status quo in the case. Instead, the agency said the 2017 rule had been replaced by SB 280 and, therefore, could not be resurrected. Instead, the department adopted a more restrictive emergency rule in May that prohibited nearly all changes to the sex category on birth certificates, saying the emergency policy was necessary because of the "ambiguous and uncertain situation" created by Moses' ruling. Over the objections of public health advocates and transgender Montanans, the department adopted a permanent version of that rule in September.

The department's actions were the subject of a heated exchange in Judge Moses' courtroom late that month.

"I said 'all aspects,'" Moses said during the September hearing, referring to the injunction of SB 280. "And what was undertaken by the department in this particular case, upon whoever's idea it was, simply violates this court's preliminary injunction."

In his written order, Moses called the state's justification for passing additional rules in 2022 "demonstrably ridiculous" and said that the state had "unlawfully circumvented the entire purpose of a preliminary injunction and disregarded and disrespected the judicial process with these claims."

The health department stood by its 2022 rule for four days, until Moses' written order was published, before saying the state would revert to the 2017 rule. Later that week, state



attorneys appealed to the state Supreme Court to take over the case from Moses, writing in court filings that the case “cries out for supervisory control.”

In the state’s appeal, attorneys argued the district judge was wrong in ordering the health department to revert to a prior rule after it had adopted a new, contradictory protocol in September. Doing so infringed on the state’s rulemaking authority, attorneys said.

Judge Moses has not indicated when he intends to provide a response to the most recent petitions over whether the 2022 rules should be amended into the ACLU of Montana’s ongoing case.

## **LATEST STORIES**

### **Bill would reverse ballot issue requirements created in 2021 session**

A Republican lawmaker and a group of unlikely bedfellows from across the political spectrum are working to repeal a law that erected additional hurdles to getting an issue placed on the ballot.

by [Arren Kimbel-Sannit](#) 01.23.2023

### **Flathead officials get pushback after calling on community to stop helping homeless people**

Last week, Republican commissioners Brad Abell, Randy Brodehl and Pam Holmquist signed a letter alleging that the homeless population in the Flathead Valley is growing because of services being offered in the area, including a low-barrier shelter that opened in 2019.

by [Justin Franz](#) 01.23.2023

### **The Session: Relationships in the Capitol**

The life cycle of legislation is just getting started. The mechanics of public power are sorting and sifting policy, and much of that work starts with the building of relationships.

by [MTFP Staff](#) 01.23.2023

# EXHIBIT B



## Politics

Montana politics, elections and legislative news

# Amid legal battles, the health dept. bars gender changes on birth certificates

Montana Public Radio | By Shaylee Ragar

Published January 11, 2023 at 6:36 PM MST



LISTEN • 1:19

The state health department says it will reinstate a rule that bars transgender Montanans from updating the gender markers on their birth certificates. The Montana Supreme Court is now involved in the latest step in a murky legal fight over the policy.

The Montana Supreme Court found that a district court erred in directing health department rulemaking when it told the health department to walk back its ban on birth certificate amendments.

After a law regulating birth certificates was temporarily blocked last spring, the health department was ordered to return to the status quo while the lawsuit plays out. Department officials instead created a new rule banning amendments to gender markers.

Yellowstone District Court Judge Michael Moses rebuked that move, saying officials should have reverted back to a previous rule that allowed for updates to those records. The state Supreme Court says that order was outside of his jurisdiction.



ACLU of Montana has filed an amended motion in district court to challenge the health department's rule so that the judge can properly weigh in. The policy is in legal limbo until Moses issues a new ruling.

## Tags

[Montana News](#)[Montana Legislature](#)[Montana Supreme Court](#)[Montana Department of Public Health and Human Services](#)[Michael Moses](#)[ACLU of Montana](#)[LGBTQ](#)

## Shaylee Ragar

Shaylee began covering state government and politics for Montana Public Radio in August 2020. Originally from Belgrade, Montana, she graduated from the University of Montana's journalism program and previously worked as a reporter for the Bozeman Daily Chronicle and UM's Legislative News Service. Please share tips, questions and concerns by emailing [shaylee.ragar@mso.umt.edu](mailto:shaylee.ragar@mso.umt.edu).

[See stories by Shaylee Ragar](#)

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**Democrats propose \$20 million for Montana's struggling behavioral health system**

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**Flathead County commissioners say free services are empowering 'the homeless lifestyle'**

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## **CERTIFICATE OF SERVICE**

I, Akilah Maya Deernose, hereby certify that I have served true and accurate copies of the foregoing Affidavit - Affidavit in Support to the following on 01-25-2023:

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Electronically signed by Krystel Pickens on behalf of Akilah Maya Deernose  
Dated: 01-25-2023