

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

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

TO: All Concerned Persons

1. The Department of Public Health and Human Services (department) adopts the following temporary emergency rule because it desires to provide for the accurate identification of sex on birth certificates. As a result of an April 21, 2022 preliminary injunction issued against the department with respect to enforcement of S.B. 280, codified at Mont. Code Ann. (MCA) § 50-15-224, it is necessary to adopt this emergency rule to govern the procedures of the Office of Vital Records and to inform the public concerning when the Office of Vital Records will change the identification of an individual’s sex on the birth certificate, to ensure such accuracy.

2. Under Montana law, the department is charged with establishing a statewide system of vital statistics and with adopting rules for gathering, recording, using, amending, and preserving vital statistics and vital records, relating to births, deaths, fetal deaths, marriages, and dissolutions of marriage. See, e.g., MCA §§ 50-15-102, 50-15-103. Montana statutes contemplate that the birth certificates and other records of birth include the sex of the child. See, e.g., MCA §§ 50-15-203 (written report which constitutes a birth certificate for a child of unknown parentage shall contain the sex of the child); 50-15-224 (amendment of the sex of a person cited on a birth certificate); 50-15-304 (substitute birth certificate for an adopted person shall contain the sex of such person). Under regulations promulgated by the department, each certificate of birth and certified copy of a birth record (as well as of a birth that resulted in a stillbirth) has to include the sex of the registrant. ARM §§ 37.8.128(2)(e) & (4)(e); 37.8.301(4) (if birth occurs other than in a health care facility, birth certificate must be filed along with an affidavit including the child’s sex); 37.8.311 (amendment of birth certificate for sex changes).

3. In 2007, the department adopted a new rule (codified at ARM § 37.8.311(5)) that the sex of a registrant (the individual about whom a birth certificate pertains) as cited on a certificate may be amended only if the department receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the individual born in Montana has been changed by surgical procedure, and providing certain information. See 2007 MAR 2127 (Dec. 20, 2007), corrected, 2008 MAR 169 (Jan. 31, 2008). It cross-referenced another ARM provision with respect to situations where the sex of an individual was listed incorrectly on the original birth

certificate. *Id.*¹ Subsequently, in 2017, the department amended § 37.8.311(5). Apparently purporting to change the "sex" data element on birth certificates to a "gender" data element, the amended rule provided that the gender of a registrant could be corrected if the department received a correction affidavit, accompanied by (1) "a completed gender designation form issued by the department certifying under penalty of perjury that the individual had undergone gender transition or has an intersex condition and that the gender designation on the person's birth certificate should be changed accordingly, and the request . . . is not for any fraudulent or other unlawful purpose"; (2) "presentation of a government-issued identification displaying the correct gender designation"; or (3) "a certified copy of an order from a court with appropriate jurisdiction indicating that the gender of an individual born in Montana has been changed." 2017 MAR 2436 (Dec. 22, 2017). The 2021 Montana legislature enacted S.B. 280, which was signed into law on April 30, 2021, was immediately effective, and, essentially, adopted into the Montana Code the provisions of the 2007 rule. See MCA § 50-15-224. Pursuant to legislative direction, the department amended its rules to re-adopt the version of the provision in effect prior to the 2017 rulemaking and to repeal the provisions adopted in the 2017 rulemaking.² The proposed rule was published on May 28, 2021 and the notice of adoption was published on July 23, 2021, with the effective date of July 24, 2021.

4. The constitutionality of S.B. 280 was challenged in a lawsuit filed against the State of Montana, the Governor, the department and the Director in Montana's Thirteenth Judicial District Court, Yellowstone County, as well as in complaints filed with the State Human Rights Bureau; plaintiffs also pled claims for discrimination under the Montana Civil Rights Act. Plaintiffs sought a preliminary injunction against enforcement of S.B. 280 on July 19, 2021. The defendants sought dismissal of the lawsuit on August 17, 2021.

5. On April 21, 2022, the district court issued its Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for a Preliminary Injunction (decision). While dismissing plaintiffs' claim under the Montana Human Rights Act, the court concluded that plaintiffs had adequately pled their other claims. The district court granted plaintiffs' request for a preliminary injunction, finding that "Plaintiffs here established a prima facie case that SB 280 impermissibly [sic] vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process because it is unconstitutionally void." Apr. 21, 2022 Decision at ¶ 170. "[F]or the purposes of [the] preliminary injunction," the court expressly "declined to analyze whether SB 280 reaches constitutionally protected conduct." Decision at ¶ 157a. The court granted plaintiffs' motion for preliminary injunction and enjoined the department and the other defendants "from enforcing any aspect of

¹ In 2015, the department made nonsubstantive revisions to the regulation. See MAR Notice 37-714, 2015 MAR 1492 (Sept. 24, 2015).

² The 2021 rule maintained the nonapplicability of the provision with respect to situations where the sex of the person was designated incorrectly on the original birth certificate due to data entry error.

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

6. The court's decision leaves this department in an ambiguous and uncertain situation. The court's preliminary injunction means that, pending final resolution of the litigation, the department's Office of Vital Records (OVR) cannot accept and process birth certificate sex designation amendment applications according to the procedures set forth in S.B. 280 and the department rules that implement S.B. 280. Yet the effect of the 2021 rulemaking was to eliminate the 2017 rule, just as one effect of the 2017 rule was to eliminate the 2007 rule. The court did not issue a mandatory injunction directing the department to re-implement the 2017 rule. Accordingly, there is currently no non-enjoined regulatory mechanism by which the department can accept and process birth certificate sex identification amendment applications.⁴ While the court's preliminary injunction currently precludes OVR from accepting and processing birth certificate sex designation amendment applications pursuant to the procedures set forth in S.B. 280, there is a perception that OVR should be accepting birth certificate sex designation amendment applications – and regardless of where such applications would ordinarily stand in OVR's backlog of applications for changes to Montana vital records – immediately process such applications pursuant to the non-existent 2017 rule. The department needs, immediately, to correct this confusion and clearly set forth the standards under which such applications will be processed. Montanans deserve to know how such applications will be handled in this period. OVR has received several such applications and also has received a number of inquiries about how to submit such applications and on the status of currently pending applications. All of these facts combine to require immediate action on the part of the department.

³ Although plaintiffs amended their complaint long after the 2021 rules were published, neither their initial complaint, their amended complaint nor their other pleadings ever requested any relief related to the 2021 rulemaking. Instead, plaintiffs' amended complaint requested that the court:

- Declare S.B. 280 unconstitutional on its face and as applied;
- Declare S.B. 280 illegal under the Montana Human Rights Act;
- Declare S.B. 280 illegal under the Code;
- Preliminarily and permanently enjoin Defendants, as well as their agents, employees, representatives, and successors, from enforcing S.B. 280, directly or indirectly;
- Award Plaintiffs' the reasonable attorney's fees and costs incurred in bringing this action; and
- Grant any other relief the Court deems just.

⁴ Such an order would be improper because plaintiffs did not seek a mandatory injunction or otherwise request that the department re-implement the 2017 rule. Even if plaintiffs had requested this relief, they did not meet the standard for a mandatory injunction, which is a different and higher standard than the standard for a preliminary injunction. Notably, despite the fact that S.B. 280 was effective upon passage and approval, plaintiffs did not immediately file suit nor did they seek a temporary restraining order after they filed the suit but before the Department had concluded the 2021 rulemaking. Nor would it be appropriate to grant plaintiffs, at this preliminary stage of the litigation, the relief to which they would only be entitled if they obtain final relief on the merits. See *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963) ("it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial."); see also *United States v. Barrows*, 404 F.2d 749, 752 (9th Cir. 1968).

7. The department's 2007 rule, as well as SB 280 (which largely codified in statute that rule), was premised on the proposition that an individual's sex could be changed by surgery. But, in the decision finding plaintiffs had established a prima facie case that S.B. 280 is impermissibly vague and violates due process, the court found that "Plaintiffs provided un rebutted evidence describing that neither gender-affirming surgery nor any other medical treatment that a transgender person undergoes changes that person's sex" – that "no surgery changes a person's sex" – but that surgery "aligns a person's body and lived in experience with the person's gender identity," which the court found is "a person's fundamental internal sense of belonging to a particular gender." Decision at ¶¶ 161, 42.

8. The court's finding that "no surgery changes a person's sex" has caused the department to consider the issue. The National Institutes of Health (NIH), a component of the U.S. Department of Health and Human Services, matter-of-factly explains that

"Sex" is a biological classification encoded in our DNA. Males have XY chromosomes, and females have XX chromosomes. Sex makes us male or female. Every cell in your body has a sex—making up tissues and organs, like your skin, brain, heart, and stomach. Each cell is either male or female, depending on whether you are a man or a woman.⁵

In 2014, recognizing that there were differences in disease manifestation and response to treatment between men and women and that research about such differences may be critical to the interpretation, validation, and generalizability of research findings – and may inform clinical interventions – NIH issued a policy on sex as a biological variable in research.⁶ In guidance issued on that policy, NIH noted that "[s]ex is a biological variable defined by characteristics encoded in DNA."⁷ An NIH leader further explained, "[s]ex' originates from an organism's sex chromosome complement—XX or XY chromosomes in humans, and is reflected in the reproductive organs. Each cell has a sex."⁸ An Endocrine Society scientific

⁵ NIH, Office of Research on Women's Health, *How Sex and Gender Influence Health and Disease*, https://orwh.od.nih.gov/sites/orwh/files/docs/SexGenderInfographic_11x17_508.pdf.

⁶ See NIH, *Consideration of Sex as a Biological Variable in NIH-funded Research*, NOT-OD-15-102, issued June 9, 2015, <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-102.html>.

⁷ NIH Guidance, *Consideration of Sex as a Biological Variable in NIH-funded Research* (NIH Guidance) at 1 (2017), https://orwh.od.nih.gov/sites/orwh/files/docs/NOT-OD-15-102_Guidance.pdf; see also *Journal of Women's Health, Sex as a Biological Variable: A 5-Year Progress Report and Call to Action* (June 2020), <https://pubmed.ncbi.nlm.nih.gov/31971851/>.

⁸ Janine A. Clayton, *Applying the new SABV (Sex as a Biological Variable) policy to research and clinical care*, *Physiology & Behavior* 187 (2018) 2-5 (published online Aug. 17, 2017), <https://doi.org/10.1016/j.phybeh.2017.08.012>; see also Leah R. Miller, Cheryl Marks, *et al.*, *Considering sex as a biological variable in preclinical research*, 31 *Federation of American Societies for Experimental Biology Journal* 29-34 (Sept. 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6191005> (defining "Sex" as "being XY or XX"). In contrast, NIH defines "gender" as the "social, cultural, and psychological traits linked to human males and females through social context." See NIH Guidance, *supra*, at 1; Janine Clayton, *supra*, at 2. Other sources describe gender as "psychological or cultural rather than biological," or as including "perception of the individual as male, female, or other, both by the individual and by society." See

statement notes that "[s]ex is a biological concept" and that "[h]uman biological sex is often assessed by examining the individual's complement of sex chromosomes as determined by karyotypic analysis."⁹ Thus, as some scientists have noted, "[h]uman sex is an observable, immutable and important biological classification"; it is biological (and, thus, genetic), binary, and immutable.¹⁰ The department agrees.

9. The department now considers the Montana system for issuing (and amending) birth certificates in light of the foregoing. The department disagrees with the district court in the above-referenced litigation that plaintiffs established a prima facie case that SB 280 is "impermissibly vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process." However, because sex is a biological concept that is encoded in an individual's DNA and, thus, is genetic and immutable, the department agrees with the district court that "no surgery changes a person's sex." The department, thus, concludes that the premise upon which it based its 2007 rule (which, in turn, appears to have been the basis for S.B. 280) – that an individual's sex could be changed through surgery – was mistaken. As a result, and consistent with the court's preliminary injunction order with respect to S.B. 280, the department does not re-impose the S.B. 280 requirements/2007 rule requirements for amendment of the cited sex on birth certificates in this emergency rule.

10. As noted above, when the statutory provisions governing Montana birth certificates and vital records identify the data elements to be collected and included in a Montana birth certificate, one of those data elements is the sex of the

Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968) (describing gender as "psychological or cultural rather than biological"); Adhi Bhargava, Arthur P. Arnold, et al., *Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement*, 42 *Endocrine Review* 219-258, 228 (June 2021) (published online Mar. 11, 2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8348944/>; see also "Gender," Lexico, <https://www.lexico.com/en/defintion/gender> ("Gender" means "[e]ither of the two sexes ... when considered with reference to social and cultural differences rather than biological ones"). With respect to the relationship between sex and gender, it is important to note that "[s]ex is an essential part of vertebrate biology, but gender is a human phenomenon; sex often influences gender, but gender cannot influence sex." Adhi Bhargava, Arthur Arnold et al., *supra*, at 228.

⁹ Adhi Bhargava, Arthur Arnold, et al., *supra*.

¹⁰ Emma Hilton, Pam Thompson, et al., Letter to the Editor, *The reality of sex*, *Irish Journal of Medical Science* (2021) 190:1647 (published online Jan. 15, 2021), <https://doi.org/10.1007/s11845-020-02464-4> (rejecting as "entirely without scientific merit" the claim that "sex is neither fixed nor binary": "there are two sexes, male and female, and in humans, sex is immutable (disorders of sexual development are very rare and, in any event, do not result in any additional sexes)"); see also Georgi K. Marinov, *In Humans, Sex is Binary and Immutable*, *Acad. Quest.* (2020) 33:279-288 (published online May 9, 2020), <https://doi.org/10.1007/s12129-020-09877-8> ("the objective truth is that sex in humans is strictly binary and immutable, for fundamental reasons that are common knowledge to all biologists taking the findings of their discipline seriously").

person/infant.¹¹ Such statutory provisions use the word "sex,"¹² not "gender" or "gender identity". Because "sex" and "gender" are different concepts, the department would not read the statutory provisions concerning birth certificates or records of births as including "gender" in the requirement to record the sex of the person. This interpretation is consistent with the context: The birth certificate generally records only facts that are known (or knowable) at the time of the person's birth. Sex is one of those facts: A person's sex can be determined – by observation, examination, or testing – at the time of birth. Gender/gender identity, as a social, psychological, and/or cultural construct, cannot.¹³ Consequently, the department has determined that the proper interpretation of the statutory provisions governing birth certificate/vital records and the vital records system is that the person's sex, not his or her gender or gender identity, is required to be recorded on the birth certificate. Thus, this emergency rule does not redesignate, substitute, or conflate the "sex" data element as a "gender" data element on birth certificates, as

¹¹ While the specific provision on the creation of a birth certificate or record of birth does not identify the data elements to be collected and recorded, it is clear from the statutory context that the sex of the person is to be recorded because another provision refers to the issuance of substitute birth certificates as including the sex of the person: It would not make sense to have such a provision if the legislature did not intend for the original birth to include the person's sex. See, e.g., MCA § 50-15-304 (substitute birth certificate for an adopted person shall contain the sex of such person). And yet another provision establishes that the written report which constitutes a birth certificate for a child of unknown parentage contain the sex of the child. MCA § 50-15-203. The U.S. standard certificate of birth, see <https://www.cdc.gov/nchs/data/dvs/birth11-03final-ACC.pdf> (last visited May 19, 2022), includes the sex of the infant (male or female), and states uniformly collect and record the sex of the infant on their birth certificates. This vital statistic is important for historical, demographic, public policy and public health reasons.

¹² Both at the time that the vital records provisions in the Montana Code were first adopted and today, and especially in the context of vital records, the term "sex" was (and is) understood to mean biological differences between males and females. Compare American Heritage Dictionary 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); Webster's Third New International Dictionary 2081 (1971) ("[T]he sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); 9 Oxford English Dictionary 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.") with Webster's New World College Dictionary 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions").

¹³ The Office of Vital Records permits changes to correct mistaken or incomplete birth certificates. A new birth certificate can be issued, for instance, that identifies the father when the father was not identified on the original birth certificate. See MCA § 50-15-223(1)(b), (5). Paternity, after all, is a fact that is known or knowable (for example, through genetic testing) at the time of birth. Separate and apart from these corrections, the Montana Legislature enacted specific laws to allow a person to update information reflecting changes to their legal identity. For example, an individual may amend his/her birth certificate to reflect a legal name change. See MCA 27-31-101; ARM 37.8.311; *In re Marriage of Rager*, 263 Mont. 361, 365, 868 P.2d 625, 627 (1994) ("[T]he child's legal name . . . remains so for all purposes unless it is changed by adoption, through a statutory petition for a name change, or by other legal means."). Montana law also authorizes issuance of a new birth certificate that reflects a child's adoptive parents, when the Department receives a certificate of adoption provided for by law. See MCA 50-15-223(1)(a) (referencing MCA 50-15-311). Unlike these changes that reflect historical as well as legal facts, sex—as reported on a birth certificate—records an immutable, unalterable historic fact.

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

11. The 2017 rule permitted the department to "correct" such "gender" data element upon receipt of a correction affidavit accompanied by a "gender designation form" attesting that the individual had undergone gender transition, a copy of a government-issued identification with the correct gender identification, or a copy of a court order that the individual's gender had been changed. As previously established, sex is different from gender and is an immutable genetic fact, which is not changeable, even by surgery. Accordingly, this emergency rule does not authorize the amendment of the sex identified/cited on a birth certificate based on gender transition, gender identity, or change of gender.

12. The department does acknowledge that there may be some instances in which it would be appropriate for the sex of a person as cited/identified on the birth certificate to be corrected or amended. In this emergency rule, the department recognizes, as it did in the 2007, 2017, and 2021 rules, that there may be data entry errors (or scrivener's errors) that result in the sex of a person being listed incorrectly on the original birth certificate. Thus, in this emergency rule, the department provides for the correction of the sex of a person if it was listed incorrectly on the original birth certificate due to a data entry error (or other scrivener's error) in the same way as in those rules, except that the department specifies some of the documentation that is required to support such correction.

13. The department similarly recognizes that, although likely infrequent, there could be instances in which a person's sex, as a biological, immutable fact, is misidentified at birth and the wrong sex is then cited on the birth certificate – with the misidentification only being discovered later, such as through DNA/genetic testing. Because a person's sex is immutable/unchangeable, the person's correct sex would have been known at birth if testing had been done at the time. In such circumstances, the department has determined that the birth certificate should be corrected. Accordingly, in this emergency rule, the department provides for the correction of the birth certificate if the person's sex was misidentified on the original birth certificate and the person supplies documentary proof consisting of, among other things, the results of appropriate testing that establishes the person's sex.

14. The department notes that a birth certificate is, first and foremost, a vital record which records the facts concerning the birth of a person in Montana. There are important departmental and public health interests in the collection and maintenance of accurate vital statistics and records such as these. It is, therefore, critical that the department's Office of Vital Records have clear direction so that it can administer the vital records program in such a way that ensures the accuracy of such vital records.

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

Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

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

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

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

(a) the sex of an individual was listed incorrectly on the original certificate as a result of a scrivener's error or a data entry error, and the department receives a correction affidavit and supporting documents, consistent with ARM 37.8.108(4), (5), and (6), including a copy of the records of the health care facility or attending health care professional, contemporaneous to the birth, that identify the sex of the individual, with an affidavit from the health care facility or professional attesting to the date and accuracy of the records; or

(b) the sex of the individual was misidentified on the original certificate and the department receives a correction affidavit and supporting documents, consistent with ARM 37.8.108(4) and (5), including a copy of the results of chromosomal, molecular, karyotypic, DNA, or genetic testing that identify the sex of the individual, together with an affidavit from the health care facility, health care professional, or laboratory testing facility that conducted the test and/or analyzed the test results, attesting to the test results and their accuracy.

AUTH: 2-4-303, 50-15-102, 50-15-103, 50-15-204, 50-15-208, 50-15-223, MCA
IMP: 50-15-102, 50-15-103, 50-15-203, 50-15-204, 50-15-208, 5-15-223, MCA

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

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

20. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the

name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 15 above or may be made by completing a request form at any rules hearing held by the department.

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

/s/ Chad G. Parker
Chad G. Parker
Rule Reviewer

/s/ Adam Meier
Adam Meier, Director
Public Health and Human Services

Certified to the Secretary of State May 23, 2022.