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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

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

Plaintiffs,

v.

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

Defendants.

Cause No.: DV 21-873

Judge Michael G. Moses

ORDER

This matter is before the Court to address all outstanding motions. On January
25th, 2023, Plaintiffs, Amelia Marquez and John Doe, filed Plaintiffs' Motion to Enforce

1 the Preliminary Injunction Order by Ordering Defendants to Show Cause why They
2 Should not be Held in Civil Contempt for Violating the Order. (Court Doc. #102). On
3 February 8th, 2023, Defendants, the State of Montana; Gregory Gianforte, in his official
4 capacity as the Governor of the State of Montana; the Montana Department of Public
5 Health and Human Services; and Charles T. Brereton, in his official capacity as the
6 Director of the Montana Department of Public Health and Human Services, filed
7 Defendant’s Response to Plaintiff’s Motion for Enforcement of Preliminary Injunction.
8 (Court Doc. #105). On February 16th, 2023, Plaintiffs filed their Reply in Support of
9 Motion to Support the Preliminary Injunction Order by Ordering Defendants to Show
10 Cause why They Should not be Held in Civil Contempt for Violating the Order.
11 (Court Doc. #114).

12 On March 20th, 2023, Plaintiffs filed a Motion for Summary Judgment pursuant
13 to Rule 56 of M. R. Civ. P. (Court Doc. #122). On April 10th, 2023, Defendants filed
14 their Response to Plaintiffs’ Motion for Summary Judgment. (Court Doc. #129). On
15 April 24th, 2023, Plaintiffs filed their Reply Brief in Support of Motion for Summary
16 Judgment. (Court Doc. #130).

17 A hearing on both outstanding motions was held on June 1st, 2023.
18 Additionally, this Court will consider the matter of attorney fees and costs as
19 requested by Plaintiffs in their Motion for Contempt and their Amended Complaint
20 for Declaratory and Injunctive Relief filed on December 3rd, 2021. (Court Doc. #42).

21 I. FACTUAL BACKGROUND

22 On April 12th, 2021, the Montana state legislature passed Senate Bill 280 (“SB
23 280”) and sent it to Governor Gianforte for his signature. SB 280 stated, in relevant
24 part, that “[t]he sex of a person designated on a birth certificate may be amended only
25 if [the Montana Department of Health and Human Services (“DPHHS”)] receives a

1 certified copy of an order from a court with appropriate jurisdiction indicating that the
2 sex of the person born in Montana has been changed by surgical procedure.” SB 280
3 did not define what type of surgical procedure would qualify under the statute.
4 Governor Gianforte signed the bill on April 30th, 2021, and it immediately became
5 effective. (Court Doc. #77).

6 Prior to the passage of SB 280, the procedure in place allowed those born in
7 Montana to amend the sex designation of their birth certificate by submitting to
8 DPHHS either: (1) a completed gender-designation form attesting to gender transition;
9 (2) a government-issued identification displaying the correct sex designation; or (3) a
10 certified court order indicating a gender change. These procedures, which started in
11 2017 (“2017 Rule”) did not require surgery or a court proceeding. (Court Doc. #77).

12 On April 21st, 2022, this Court issued an Order preliminarily enjoining SB 280.
13 In that Order, this Court instructed the Defendants to return to the status quo prior to
14 the passage of SB 280. This Court made it clear in the Order that it intended
15 Defendants to return to applying the 2017 Rule. Defendants, instead, engaged in
16 temporary rulemaking and promulgated a temporary rule (the “2022 Rule”) whereby
17 DPHHS removed the procedure for changing the sex designation of birth certificates
18 altogether. (Court Doc. #77).

19 Plaintiffs came before this Court again on June 7th, 2022, and sought
20 clarification of this Court’s Order granting the preliminary injunction. This Court
21 clarified the intention behind the preliminary injunction and again told Defendants
22 that they were to return to applying the 2017 Rule until this litigation could be
23 resolved. (Court Doc. #77). Following the clarification, Defendants began applying
24 the 2017 Rule. (Court Doc. #107).

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1 Defendants applied to the Montana Supreme Court for “a writ of supervisory
2 control directing the Thirteenth Judicial District Court, Yellowstone County, to vacate
3 its September 19, 2022 Findings of Fact, Conclusions of Law, and Order Granting in
4 Part and Denying in Part Plaintiffs’ Motion Seeking Clarification of the Preliminary
5 Injunction”. (OP 22-0552). In their Order, the Supreme Court reiterated that the
6 Defendants were to apply the 2017 Rule as the status quo that was present prior to the
7 injunction until this litigation concluded. As an aside, the Supreme Court noted that
8 this Court has no jurisdiction to enjoin the 2022 Rule. The Supreme Court also noted
9 that this Court’s clarification was not necessary as the original Order provided
10 Defendants with clear instructions. Following the Order from the Supreme Court,
11 Defendants stopped applying the 2017 Rule and the DPHHS did not provide a method
12 to change the sex designation on birth certificates throughout the remainder of this
13 case. (Court Doc. #107).

14 On January 25th, 2023, Plaintiffs filed a Motion to Enforce the Preliminary
15 Injunction Order by Ordering Defendants to Show Cause why They Should not be
16 Held in Civil Contempt for Violating the Order. (Court Doc. #102). On March 20th,
17 2023, Plaintiffs filed a Motion for Summary Judgment pursuant to Rule 56 of M. R.
18 Civ. P., arguing that SB 280 is unconstitutionally void as vague on its face and as
19 applied to Plaintiffs. (Court Doc. #122). This Court set a hearing on both matters for
20 June 1st, 2023. (Court Doc. #127).

21 II. DISCUSSION

22 Three matters remain before the Court in this case. First, the Court must
23 address whether to hold Defendants in contempt of court for their repeated failure to
24 follow this Court’s Order that preliminarily enjoined SB 280. Second, the Court will
25 address Plaintiffs’ request for Summary Judgment under Rule 56 of M. R. Civ. P.

1 Finally, this Court will consider the issue of whether to award attorney fees to
2 Plaintiffs as the prevailing party.

3 **a. Contempt of Court**

4 On January 25th, 2023, Plaintiffs moved for the Court to Enforce the
5 Preliminary Injunction Order by Ordering Defendants to Show Cause why They
6 Should not be Held in Civil Contempt for Violating the Order. (Court Doc. #102). The
7 January 25th Motion was filed following significant pleadings from both parties
8 regarding this Court's preliminary injunction as well as clarification from this Court
9 and the Montana Supreme Court.

10 The Order preliminarily enjoining SB 280, issued April 21st, 2022, ordered
11 Defendants to "preserve the status quo pending final resolution" and to return to "that
12 which existed prior to the enactment of SB 280". (Court Doc. #61). This Court
13 unequivocally intended Defendants to return to the 2017 Rule that was in place prior
14 to the passage of SB 280. Instead of following this Court's Order and the law,
15 Defendants engaged in new rulemaking procedures and promulgated the 2022 Rule.
16 Defendants represented that they believed this was necessary as there was "no rule in
17 place". (Court Doc. #77). The "status quo", the 2017 Rule, that Defendants were
18 ordered to return to would have preserved Montanans' constitutional rights, which all
19 parties now concede.

20 On June 7th, 2022, Plaintiffs filed a Motion to Clarify before this Court. (Court
21 Doc. #71). Plaintiffs requested clarification regarding the preliminary injunction and
22 expressed concern that DPHHS was violating this Court's Order. In that Motion,
23 Plaintiffs requested this Court to "[g]rant any other relief the Court deems just,
24 including but not limited to holding Defendants in contempt."
25

1 Defendants responded to Plaintiffs' Motion to Clarify by expressing confusion
2 with this Court's Order temporarily enjoining SB 280. (Court Doc. #72). Defendants
3 asserted that the 2022 Rule filled a vacancy that was created when SB 280 was
4 enjoined. They blatantly ignored this Court's instructions to return to the status quo.
5 Defendants understood what the status quo was prior to SB 280. In a hearing on
6 September 15th, 2022, Defendants acknowledged that prior to the passage of SB 280,
7 the 2017 Rule was in place. (Court Doc. #77).

8 On September 19th, 2022, this Court issued its Findings of Fact, Conclusions of
9 Law, and Order Granting in Part and Denying in Part Plaintiffs' Motion Seeking
10 Clarification of the Preliminary Injunction. (Court Doc. #77). The Court again
11 emphasized that the Order that granted the preliminary injunction of SB 280 had also
12 ordered DPHHS to return to the 2017 Rule. This Court chose not to hold Defendants
13 in contempt at that time. For four months following the clarification, Defendants
14 followed the Order and returned to applying the 2017 Rule. (Court Doc. #107).

15 Defendants applied to the Supreme Court of Montana for a writ of supervisory
16 control arguing that this Court did not order them to revert to the 2017 Rule. The
17 Supreme Court issued an Order that reaffirmed that this Court's injunction "requires
18 DPHHS to maintain the status quo, which reinstates the 2017 Rule for as long as the
19 Preliminary Injunctive Order ... remains in effect." (OP 22-0552). The Supreme Court
20 noted that this Court's original Order that granted the preliminary injunction of SB 280
21 was clear and that the clarification later issued was not necessary. The Supreme Court
22 also mentioned that this Court had no jurisdiction to address the constitutionality of
23 the 2022 Rule. Following the Order from the Supreme Court, Defendants stopped
24 applying the 2017 Rule and returned to applying the 2022 Rule, in violation of both
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1 this Court's previous Orders and the Montana Supreme Court Order. (Court Doc.
2 #107).

3 Even after this Court's Order that temporarily enjoined SB 280, this Court's
4 Clarification of that Order, and the Montana Supreme Court's Order upholding that
5 Order, Defendants refused to apply the 2017 Rule. Following the Supreme Court's
6 Order, Defendants announced that they would follow the Supreme Court's decision
7 and implement the 2022 Rule. This was contrary to what the Supreme Court ordered.
8 While the 2022 Rule has not yet been properly challenged, the continued enforcement
9 of that rule violates this Court's Order to preserve the status quo. The requirements
10 placed on Defendants by that Order have been repeatedly clarified and repeatedly
11 disregarded.

12 In September 2022, this Court decided not to hold Defendants in contempt.
13 However, in the face of continued violations of this Court's Order, Plaintiffs renewed
14 their request to have Defendants held in contempt on January 25th, 2023. Between
15 January 10th, 2023, and June 1st, 2023, Defendants continued to refuse to apply the
16 2017 Rule, knowing this was in violation of this Court's Order. At the hearing on June
17 1st, 2023, this Court addressed the issue of contempt and Defendants had the
18 opportunity to provide justification for their continued violations of this Court's
19 Order.

20 At that hearing, Plaintiffs expressed their concern and frustration at
21 Defendants' continued refusal to follow the Order preliminarily enjoining SB 280.
22 Plaintiffs noted that "it is well within Defendants' power to comply with a preliminary
23 injunction order." New defense counsel came before the Court with "hat in hand" to
24 explain his clients' actions. Defendants reiterated that they believed this Court's
25 Order that granted the preliminary injunction of SB 280 and ordered Defendants to

1 revert to the status quo was confusing. After this Court clarified the intentions behind
2 that Order yet again, defense counsel apologized and indicated that such contempt “is
3 not going to happen again”.

4 The Court respects the candor of the new defense counsel to finally come before
5 this Court with “hat in hand”. However, defense counsel could not provide a
6 legitimate explanation or an explanation of any kind for the continued noncompliance
7 of his clients. There is no legal justification for Defendants’ continued refusal to follow
8 Court orders after numerous clarifications by this Court and by the Supreme Court of
9 Montana.

10 Plaintiffs requested that Defendants be held in contempt of court. While this
11 Court refrained from such a decision in September 2022 after Defendants’ initial
12 refusal to follow the temporary injunction, such restraint is no longer warranted.

13 Courts “are imbued with inherent authority to enforce compliance with their
14 lawful orders by holding noncompliant parties in contempt.” *Spallone v. Untied States*,
15 493 U.S. 265, 276, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990). Pursuant to MCA § 3-1-
16 501(1)(e), “disobedience of any lawful judgment, order, or process of the court” is
17 contempt to the “authority of the court.” Defendants repeatedly disobeyed a lawful
18 order from this Court, showing their contempt for this judicial body and the judicial
19 system as a whole.

20 In the hearing held June 1st, 2023, Plaintiffs stated that Defendants had
21 “managed to completely frustrate the entire process of the preliminary injunction.”
22 This Court agrees. The Plaintiffs requested a preliminary injunction in this case to
23 ensure that Montanans’ constitutional rights were protected while this case was
24 pending. When they requested the preliminary injunction nearly two years ago,
25 Plaintiffs expressed concern that SB 280 was unconstitutional on its face and that, if

1 enacted, would irreparably harm Montanans. The purpose of an injunction is to
2 preserve the status quo and to minimize the harm to all parties pending a final
3 resolution on the merits. *Mont. Democratic Party v. Jacobsen*, 2022 MT 184 ¶ 15, 410
4 Mont. 114, 518 P.3d 58. Plaintiffs met their burden under MCA § 27-19-201 by
5 showing that a preliminary injunction was necessary to ensure that they would not
6 suffer irreparable injury. This Court granted a preliminary injunction enjoining SB
7 280. All parties now concede that the Court was correct.

8 When this Court issued its preliminary injunction, Defendants were not
9 without recourse. They could have appealed the preliminary injunction Order to the
10 Supreme Court, but they chose not to. Instead, they chose to ignore the Order and
11 promulgate the new 2022 Rule. Only after Plaintiffs sought to enforce the Order, did
12 Defendants go to the Montana Supreme Court for a writ of supervisory control.
13 Defendants acted in total disregard for this Court and the established procedures of
14 the judicial branch of government.

15 Later, in this Order, this Court will grant Plaintiffs' Motion for Summary
16 Judgment and permanently enjoin SB 280 because it is unconstitutional. *See infra*
17 Subsection II(b). The preliminary injunction enjoining SB 280 and ordering
18 Defendants to return to the status quo will no longer be in effect following this Order.
19 Most of the remedies for contempt of court are related to imposing sanctions to secure
20 compliance with court orders. Following this Order, Defendants will no longer have
21 to comply with the preliminary injunction, instead they will have to comply with this
22 Order. Sanctions to force compliance would no longer be appropriate.

23 However, Defendants are in contempt of court and due to the Defendants'
24 flagrant disregard for this Court and its preliminary injunction Order, some form of
25 sanction is warranted. Plaintiffs requested reasonable attorney fees and costs arising

1 out of the work they were required to perform in connection with the entire contempt
2 proceedings. Because this Court decided not to hold Defendants in contempt in
3 September 2022, fees and costs related to the contempt proceedings will be limited to
4 between January 10th, 2023, when Defendants reverted to no longer applying the 2017
5 Rule, and June 1st, 2023. (Court Doc. #7); see *In re Marriage of Redfern*, 214 Mont. 169,
6 173, 692 P.2d, 470 (1984) (finding reasonable attorney fees permissible in a contempt
7 action).

8 During the June 1st, 2023, hearing, Defendants requested that attorney fees and
9 costs related to the contempt proceedings be limited to “one attorney” on Plaintiffs’
10 side. This Court does not believe narrowing a fee award to such a request is
11 warranted prior to a reasonableness hearing. Defendants were made aware numerous
12 times that their conduct was in violation of this Court’s valid Order, yet they willfully
13 and continuously thumbed their nose at this Court, wasting Plaintiffs’ time, energy,
14 and money to enforce that Order and violating the constitutional rights of Montanans.
15 Plaintiffs should be reimbursed for the time expended. Defendants will reimburse
16 Plaintiffs for all reasonable attorney fees related to the actions listed in the paragraph
17 above. If necessary, those fees will be determined at a hearing on the reasonableness
18 of the fees and costs.

19 **b. Summary Judgment**

20 Summary Judgment is appropriate when “the pleadings, the discovery and
21 disclosure materials on file, and any affidavits” demonstrate that there is “no genuine
22 issue of material fact” and the movant is entitled to judgment as a matter of law. M. R.
23 Civ. P. 56(c). The movant has the initial burden to demonstrate that no genuine issue
24 of material fact exists. *Toombs v. Getter Trucking, Inc.*, 256 Mont. 282, 846 P.2d 265
25 (1993). Once this has been accomplished, the burden shifts to the non-moving party to

1 prove, by more than mere denial and speculation, that a genuine issue does exist. *S.M.*
2 *v. R.B.*, 261 Mont. 522, 862 P.2d 1166 (1993). Once the court determines that no
3 genuine issue of material fact exists, the court must then determine whether the
4 moving party is entitled to judgment as a matter of law. *Lindey's Inc. v. Professional*
5 *Consultants, Inc.*, 244 Mont. 238, 797 P.2d 920 (1990).

6 Plaintiffs moved for summary judgment in March 2023 noting that SB 280 and
7 the rule promulgated to enforce it (the "2021 Rule") are unconstitutionally vague on
8 their face and as applied to Plaintiffs. Defendants, shortly after, conceded that SB 280
9 is unconstitutionally vague. The parties independently arrived at this conclusion
10 because both agree that no surgical procedure can change an individual's sex. In their
11 Response to Plaintiffs' Motion for Summary Judgment, Defendants conceded that SB
12 280 was unconstitutional, but did not address the 2021 Rule. However, in the hearing
13 on the motion on June 1st, 2023, Defendants conceded that the 2021 Rule "parrots the
14 statute" and is unconstitutional as well.

15 This case places the Court in a highly unusual position. Not only have the
16 parties agreed that summary judgment is appropriate, they have also agreed on the
17 legal basis to grant summary judgment.

18 Article II, Section 17, of the Montana Constitution and The Fifth Amendment of
19 the United States Constitution guarantee due process under the law. Due process bars
20 "arbitrary governmental actions regardless of the procedures used to implement them
21 and serves as a check on governmental action". *Neville v. State, Dept. of Family Services*,
22 267 Mont. 237, 249, 883 P.2d 793, 800 (1994). Due process encompasses the basic
23 principle that an enactment is void for vagueness if its prohibitions are not clearly
24 defined. *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 440, 704 P.2d 1021, 1025
25 (1985).

1 A vagueness challenge to a statute may be raised on two different bases: (1)
2 because the statute is so vague that it is rendered void on its face; or (2) because it is
3 vague as applied in a particular situation. *State v. Watters*, 2009 MT 163, ¶ 24, 350
4 Mont. 465, 208 P.3d 408. Plaintiffs raised both arguments. They asserted that SB 280
5 and the 2021 Rule are void for vagueness on their face and as applied to Plaintiffs as
6 individuals.

7 “A statute is ‘void on its face if it fails to give a person of ordinary intelligence
8 fair notice’” of how to comply. *Id.* at ¶ 25, quoting *State v. Dixon*, 2000 MT 82, ¶ 20, 299
9 Mont. 165, 988 P.2d 544. A person challenging the statute bears the burden of showing
10 that the statute is “impermissibly vague in all of its applications”. *Id.* at ¶ 18. Here,
11 the Court confronts a statute that both sides have agreed cannot be enforced because it
12 is premised on a factual impossibility. SB 280 and the 2021 Rule require an individual
13 who is trying to change their birth certificate to provide proof that their sex has been
14 changed with a surgical procedure. The parties in this litigation have ultimately
15 agreed that no surgical procedure exists that can change an individual’s sex.
16 Complying with SB 280 and the 2021 Rule is thus impossible. Because the law cannot
17 be complied with in any application, it is void on its face.

18 SB 280 and the 2021 Rule are also void for vagueness as applied to Plaintiffs as
19 individuals. There are two elements in the analysis to determine if a law is vague as
20 applied. The statute must provide: (1) actual notice to citizens; and (2) minimal
21 guidelines to govern law enforcement. *Dixon*, at ¶ 27. A statute or regulation must
22 provide “sufficient guidelines to prevent arbitrary and discriminatory enforcement”.
23 *Id.* at ¶ 31. A vague law risks enforcement or resolution on an “ad hoc and subjective
24 basis”. *Id.* at ¶ 30.

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1 As applied to Plaintiffs, SB 280 and the 2021 Rule do not provide actual notice
2 to Plaintiffs of how to comply with the law in order to change their birth certificates.
3 Based on the plain language of SB 280 and the 2021 Rule, Plaintiffs have no idea what
4 type of “surgical procedure” would be necessary to amend the sex designation on
5 their birth certificates.

6 Further, SB 280 and the 2021 Rule do not provide the necessary minimal
7 guidelines so that enforcers know how to uniformly comply with the law. There are
8 no guidelines regarding: (1) what courts have “appropriate jurisdiction” to issue an
9 order to change one’s birth certificate; (2) who has authority to decide what types of
10 surgical procedures comply with the law; (3) the standard of proof applicable to a
11 court proceeding pursuant to SB 280 and the 2021 Rule; or (4) the standard governing
12 DPHHS’s review of a court’s order under SB 280 and the 2021 Rule. Without minimal
13 guidelines to ensure that enforcers apply the law consistently to all persons, ad hoc
14 enforcement that could be arbitrary or discriminatory is likely, if not inevitable. As
15 applied to Plaintiffs, SB 280 and the 2021 Rule are void for vagueness.

16 In their Response to Plaintiff’s Motion for Summary Judgment, Defendants
17 repeatedly expressed concern that this Court would issue a broader ruling that would
18 find SB 280 and the 2021 rule unconstitutional on other grounds. Under the doctrine
19 of judicial restraint, this Court will refrain from moving beyond the Due Process issue
20 presented. “The ‘cardinal principle of judicial restraint’ is that ‘if it is not necessary to
21 decide more, it is necessary not to decide more’”. *State v. Tome*, 2021 MT 229, ¶ 31, 405
22 Mont. 292, 495 P.3d 54; *citing Morse v. Frederick*, 551 U.S. 393, 431, 127 S. Ct. 2618, 2641,
23 168 L. Ed. 2d 290 (2007) (Breyer, J., concurring in the judgment in part and dissenting
24 in part). Because SB 280 and the 2021 rule are unconstitutionally void for vagueness

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1 under the Due Process Clause, this Court must refrain from addressing whether the
2 law is constitutional under Plaintiffs' additional theories.

3 Summary judgment is appropriate in this case pursuant to M. R. Civ. P. 56(c).
4 SB 280 and the 2021 Rule are vague on their face and as applied to Plaintiffs and are
5 unconstitutional under the Due Process Clauses of the Fifth Amendment of the United
6 States Constitution and Article II, Section 17, of the Montana Constitution. SB 280 and
7 the 2021 Rule are permanently enjoined. Summary judgment is granted pending the
8 determination of attorney fees and costs to be awarded to Plaintiffs.

9 **c. Attorney Fees**

10 Plaintiffs are entitled to attorney fees and costs for time spent on the latter
11 portion of the contempt of court action. However, in their first Complaint for
12 Declaratory and Injunctive Relief and their Amended Complaint for Declaratory and
13 Injunctive Relief, Plaintiffs requested that the Court "[a]ward Plaintiffs' the reasonable
14 attorney's fees and costs incurred in bringing this action". (Court Doc. #42). MCA §
15 27-8-313 provides a court with discretionary authority for an award of attorney fees in
16 a declaratory judgment action. *Trs. Of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 46, 315
17 Mont. 210, 69 P.3d 663. MCA § 27-8-313 states that "[f]urther relief based on a
18 declaratory judgment may be granted whenever necessary or proper."

19 As a general rule, attorney fees are considered to be the burden of the
20 respective litigants in a case. *City of Helena v. Svee*, 2014 MT 311, ¶ 18, 377 Mont. 158,
21 399 P.3d 32. Montana follows the "American Rule," which provides that, absent
22 statutory or contractual authority, attorney fees will not be awarded to the prevailing
23 party in a lawsuit. *Id. citing Western Tradition P'ship, Inc. v. Att'y Gen. of Mont.*, 2012
24 MT 271, ¶ 9, 367 Mont. 112, 291 P.3d 545. Attorney fees are only appropriate if

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1 equitable considerations support the award. *United Nat'l Ins. Co. v. St. Paul Fire &*
2 *Marine Ins. Co.*, 2009 MT 269, ¶ 38, 352 Mont. 105, 214 P.3d 1260.

3 The private attorney general doctrine is one of a handful of equitable exceptions
4 to the American Rule that the Montana Supreme Court has recognized. *Western*
5 *Tradition P'ship*, 2012 MT 271 at ¶ 13. The doctrine is utilized when the government,
6 for some reason, fails to properly enforce interests which are significant to its citizens.
7 *Id. citing Montanans for the Responsible Use of the Sch. Trust v. State ex rel Bd. Of Land*
8 *Comm'rs ("Montrust")*, 1999 MT 263, ¶ 64, 296 Mont. 402, 989 P.2d 800. Three factors
9 should be considered in determining whether to award fees under the private attorney
10 general doctrine: "(1) the strength or societal importance of the public policy
11 vindicated by the litigation, (2) the necessity for private enforcement and the
12 magnitude of the resultant burden on plaintiff, (3) the number of people standing to
13 benefit from the decision." *Montrust*, 2012 MT 271 at ¶ 66.

14 The Montana Supreme Court urges caution when applying the first factor of the
15 private attorney general doctrine. *Western Tradition P'ship*, ¶ 16. The first factor
16 should not allow courts' "assessments of the relative strength or weakness of public
17 policies furthered by their decisions ... a role closely approaching that of the
18 legislative function." *Bitterroot River Protective Ass'n v. Bitterroot Conserv. Dist.*, 2011
19 MT 51, ¶ 22, 359 Mont. 393, 251 P.3d 131. To address this concern, the Montana
20 Supreme Court limited the award of fees under the private attorney general doctrine
21 to cases "vindicating constitutional interests". *Id.*

22 This case vindicates constitutional interests. The statute at the center of this
23 case violates the Due Process Clause of the Montana State Constitution and the United
24 States Constitution because it is void for vagueness. *See Supra* Subsection II(b).
25 "Vague laws offend several important values". *Whitefish v. O'Shaughnessy*, 216 Mont.

1 433, 440, 704 P.2d 1021 (1985). Preventing “arbitrary and discriminatory enforcement”
2 is critical to due process and requires laws to provide explicit standards for those who
3 apply them. *Id.* Ensuring that laws are clear enough that they can be enforced
4 without violating the Due Process Clause is of great societal importance. This factor
5 weighs towards awarding Plaintiffs attorney fees.

6 The second factor of the private attorney general doctrine is the necessity for
7 private enforcement and the magnitude of the resultant burden on the plaintiff.
8 *Montrust*, ¶ 66. The private attorney general doctrine “is normally utilized when the
9 government, for some reason, fails to properly enforce interests which are significant
10 to its citizens.” *Bitterroot River Protective Ass’n*, ¶ 27. In this case, the government
11 fought to enforce a law that they later conceded was unconstitutional. It was
12 necessary for Plaintiffs, as a private party, to bring this case in order to vindicate a
13 critical constitutional right. *See Montrust*, ¶ 67 (finding that when the State argues it
14 must defend a statute, it “does not dispute the necessity of private enforcement of
15 Montana’s Constitution”).

16 Further, Plaintiffs exerted considerable effort over nearly two years in order to
17 enforce the Due Process Clauses of the Montana State Constitution and the United
18 States Constitution. Not only did they have to enforce constitutional rights, Plaintiffs
19 also had to exert additional effort to enforce this Court’s preliminary injunction and
20 the Order from the Supreme Court. Defendants were in contempt of court for large
21 portions of this litigation. This contempt meant that Plaintiffs were required to put in
22 additional effort and file motions that, had Defendants complied with court orders,
23 would not have been needed. This factor weighs toward finding an award for
24 attorney fees in favor of Plaintiffs.

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1 The third factor considers the number of people standing to benefit from the
2 decision. On its face, SB 280 and the 2021 Rule may only impact a small number of
3 individuals: those individuals who want to amend the sex designation of their birth
4 certificates and those individuals charged with enforcing the 2021 Rule. However,
5 enforcement of critical provisions within the Montana State Constitution has a much
6 broader effect.

7 The Due Process Clause and the void for vagueness doctrine, under which SB
8 280 and the 2021 Rule are unconstitutional, are designed to prevent arbitrary or
9 discriminatory enforcement of laws and statutes. According to the United States
10 Supreme Court, “[a] fundamental principle in our legal system is that laws which
11 regulate persons or entities must give fair notice of conduct that is forbidden or
12 required.” *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L. Ed. 2d
13 234 (2012). Preserving a “fundamental principle” of our legal system benefits all
14 people protected by our constitutions. Upholding the Due Process Clause of the
15 Montana State Constitution ensures that it remains in full force to protect all citizens of
16 the state of Montana. Further, permitting unconstitutional laws to remain in force,
17 erodes the constitutional protections enjoyed by all citizens of the state of Montana.
18 This factor weighs heavily towards awarding attorney fees to Plaintiffs.

19 Attorney fees are not warranted “in every garden variety declaratory judgment
20 action”. *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 44, 354 Mont. 50, 221 P.3d
21 1230. However, this case is far from a “garden variety” declaratory judgment action.

22 MCA § 15-10-711(1)(b) allows a court to award attorney fees to the prevailing
23 party if the State’s defense is frivolous or in bad faith. While not dispositive, MCA §
24 15-10-711(1)(b) can be used as a guidepost to analyze a claim for fees under the private
25 attorney general doctrine. *Western Tradition P’ship*, ¶ 18. The court has applied this

1 standard to protect the State against an award of attorney fees when the state acts in
2 good faith. *Id.* at ¶ 18. *See also In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d
3 898.

4 In their Response to Plaintiffs Motion for Summary Judgment, Defendants
5 asserted **SEVEN** times that they acted in good faith. (Court Doc. #129). This Court is
6 not persuaded. Defendants stated in their Response that this case “obviously began
7 with a mistaken premise that a person’s sex could be changed with a medical
8 procedure”. However, Defendants then chose to spend considerable time and energy
9 defending a statute that was based on this “mistaken premise”. Defendants indicated
10 they understood sex to be immutable multiple times early in the litigation. In their
11 Combined Brief in Opposition to Motion for Preliminary Injunction and in Support of
12 Motion to Dismiss, filed on August 18, 2021, merely a month after litigation
13 commenced, Defendants referred to sex as a “biological (and genetic) fact” at birth.
14 (Court Doc. #24). Later, in June 2022, Defendants acknowledged that the basis of SB
15 280 was “mistaken” as “no surgery changes a person’s sex”. (Court Doc. #123).

16 Even after acknowledging that SB 280 was facially flawed and impossible to
17 comply with, Defendants continued to file pleadings and extend the litigation for
18 another year. At the end of that, in response to Plaintiffs’ Motion for Summary
19 Judgment, Defendants finally conceded that, in fact, “no surgery can change a person’s
20 sex” and that SB 280 was unconstitutional from its inception. (Court Doc. #129).

21 Following Defendants’ concession to summary judgment, a hearing on pending
22 motions was held. Defendants’ attorney came before this Court with “hat in hand” to
23 apologize on behalf of his clients. However, in that hearing, Defendants did not
24 mention good faith.

25

1 The state here did not act in good faith or in accordance with constitutional and
2 statutory mandates. This Court determined that it was in contempt of court for a
3 significant portion of this litigation. Weighing the equities, this is not a garden variety
4 case. The Defendants spent considerable time and effort defending a statute that they
5 knew was unconstitutional. They ignored orders from this Court and an Order from
6 the Supreme Court. Pursuant to MCA § 27-8-313, awarding Plaintiffs with reasonable
7 attorney fees and costs for this litigation is proper. However, this determination does
8 not allow Plaintiffs to recover twice on the attorney fees awarded under the contempt
9 of court action. Plaintiffs must provide Defendants with a careful accounting to
10 ensure that no fee or cost is duplicated.

11 In the Hearing on Pending Motions that occurred on June 1st, 2023, Defendants
12 asserted to the Court that they would “make a very strong effort to try to negotiate” an
13 agreement for attorney fees in order to avoid another hearing. The parties are
14 encouraged to negotiate and will have time to do so. However, that time is limited
15 and, should negotiations break down, this Court will hold a hearing to make a
16 determination of the reasonable attorney fees and costs that should be awarded to
17 Plaintiffs for litigating this case.

18 **III. CONCLUSION**

19 Defendants are in contempt of court and are ordered to pay Plaintiffs the
20 attorney fees and costs associated with the contempt of court action from January 10th,
21 2023, to June 1st, 2023. Summary judgment is granted in favor of the Plaintiffs
22 pending a determination of reasonable attorney fees and costs. SB 280 and the 2021
23 Rule are permanently enjoined as unconstitutional. Reasonable attorney fees and costs
24 will be awarded to Plaintiffs for the cost of their litigation pursuant to MCA § 27-8-313.

25

1 **IT IS HEREBY ORDERED THAT** Defendants are in contempt of court and are
2 ordered to pay Plaintiffs the attorney fees and costs related to the contempt of court
3 action from January 10th, 2023, to June 1st, 2023.

4 **IT IS FURTHER ORDERED THAT** Pending a determination of attorney fees
5 and costs, summary judgment is granted. SB 280 and the 2021 Rule are
6 unconstitutional and are permanently enjoined.

7 **IT IS FURTHER ORDERED THAT** Defendants are to pay Plaintiffs the
8 reasonable attorney fees and costs for litigating this action before this Court from the
9 preparation of the original complaint to June 1st, 2023.

10 **IT IS FURTHER ORDERED THAT** Plaintiffs are to serve an itemized
11 statement of attorney fees and costs upon Defendants no later than twenty (20) days
12 from the filing date of this Order. Defendants shall file any response or objection to
13 Plaintiffs' fee calculation no later than twenty (20) days from the date of service.
14 Parties are encouraged to make a strong effort to negotiate attorney fees between
15 them. Should negotiations break down, either party may file a motion requesting a
16 hearing before this Court regarding attorney fees no more than sixty (60) days from
17 the filing date of this Order.

18 DATED June 26, 2023

/s/ Michael G. Moses
District Court Judge

21 cc: Counsel of Record

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