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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

AMELIA MARQUEZ, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	DV 21–873 Hon. Collette B. Davies **DEFENDANTS' BRIEF IN SUPPORT OF MONT. R. CIV. P. 60 MOTION FOR RELIEF FROM CONTEMPT AND ATTORNEYS' FEES ORDER**

INTRODUCTION

The District Court's June 26, 2023 Order (Doc. 133) holding Defendants in contempt and awarding attorneys' fees to Plaintiffs contains numerous factual and legal mistakes justifying relief under Mont. R. Civ. P. 60. Specifically, the Court premised its contempt finding on mistakes arising from oversights and omissions, the Court legally erred in awarding fees to Plaintiffs, and the Court allowed apparent bias against Defendants to color its view of their objectively reasonable conduct. Defendants therefore request relief from the Order as explained below.

PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

On April 30, 2021, Governor Gianforte signed Senate Bill 280 ("SB 280"), which became effective upon his signature. (Doc. 61 at 11; *see also* SB 280, attached as **Exhibit A**.) In relevant part, SB 280 required a person wishing to amend the sex designation on a Montana birth certificate to present a court order stating their sex had been changed by surgical procedure. (Ex. A.) SB 280 also directed the Montana Department of Public Health and Human Services ("DPHHS") to amend the 2017 version of Admin. R. Mont. 37.8.311 (the "Rule") to conform with SB 280. (Ex. A at § 2.) On May 28, 2021, DPHHS published notice of a public hearing on its proposed amendments to the 2017 Rule. *See* MAR Notice 37–945 (May 28, 2021). Plaintiffs filed their Complaint on July 16, 2021, alleging SB 280 violated their right to equal protection (Count I), violated their right to privacy (Count II), improperly interfered with their medical decision-making (Count III), and was unconstitutionally vague (Count IV). (Doc. 1.) Plaintiffs did not challenge the Rule and requested no relief concerning the Rule. On July 23, 2021, DPHHS published notice of amendment of the Rule to take effect July 24, 2021 ("2021 Rule"). *See* MAR Notice 37–945 (Jul. 23, 2021).

Six months later, on December 3, 2021, Plaintiffs amended their Complaint to further allege that SB 280 violated the Montana Human Rights Act ("MHRA") (Count V) and the Montana Governmental Code of Fair Practices (Count VI). (Doc. 42, Ex. A at ¶¶ 97–110; Doc. 44.) Among other relief, Plaintiffs requested an award of reasonable attorneys' fees. (Doc. 42, Ex. A at 21.) Importantly, the Amended Complaint also did not challenge any version of the Rule, nor did it assert any specific challenge or seek any specific relief pertaining to the rulemaking process by which the Rule was previously repealed or amended. (*See generally* Docs. 1 and 42 at Ex. A.) Plaintiffs sought a preliminary injunction against SB 280 on the various bases alleged in their Amended Complaint. (Doc. 12.)

On April 21, 2022, the Court entered 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 (Doc. 61.) The Court dismissed Count V (MHRA violation) of Plaintiffs' Amended Complaint but allowed their remaining claims to proceed. (*Id.*) The Court preliminarily enjoined SB 280, but only on the basis that Plaintiffs made a prima facie showing that it was unconstitutionally vague, specifically ordering that "Defendants are enjoined from enforcing any aspect of SB 280 during the pendency of this action according to the prayer of the Plaintiffs' motion and complaint[.]" (*Id.*). The Court noted maintaining the status quo as the

purpose of a preliminary injunction (*Id.* at 24) and explained that "[s]tatus quo means the last actual, peaceable, noncontested condition which preceded the pending controversy." (*Id.* at 24, 34) (quotation and citation omitted). However, the Court did not order Defendants to reinstate any prior version of the Rule by new rulemaking or other procedure, nor did it otherwise dictate any regulatory process for changing a person's sex on a birth certificate. (*Id.*)

Thus, while SB 280 was clearly enjoined, the Order was silent regarding the 2021 Rule. Prior to the issuance of the preliminary injunction, the 2021 Rule repealed the 2017 Rule. This led to significant confusion as to what exactly the "status quo" meant in this context. (*See* Doc. 72 at 4–5.) DPHHS genuinely believed the Court's preliminary injunction Order left a regulatory gap, and this belief was objectively reasonable because the Order did not specifically direct DPHHS to reinstate the 2017 Rule or provide any other instruction or guidance regarding the Rule. Upon this objectively reasonable belief, and pursuant to its general rulemaking authority under Mont. Code Ann. §§ 2-4-303, and 50-15-102, -103, -204, -208, and -223, DPHHS promulgated a temporary emergency rule and began the rulemaking process for a new permanent Rule ("2022 Rule"). (*See id.* at 5.) The 2022 Rule was premised on the Court's finding that "no surgery changes a person's sex," (Order at ¶ 161). DPHHS thus determined that "human sex is an observable, immutable and important biological classification." *See* MAR 37–1001 at 4–5 (Jun. 10, 2022) (emergency rule); MAR 37–1002 (Jun. 10, 2022) (proposal notice).

Plaintiffs sought clarification from the Court regarding whether the Court's preliminary injunction Order required DPHHS to revert to the 2017 Rule. (Doc. 71.) At the hearing on this motion, Plaintiffs presented no evidence that the actions and motives of Defendants in promulgating the 2022 Rule were anything other than what Defendants stated—that the 2022 Rule was promulgated pursuant to DPHHS's statutory general rulemaking authority to fill what it perceived to be a regulatory gap. Despite no evidence in the record of any bad faith, wrongful motive, or intent to violate a court order by any Defendant or counsel, the district court made numerous statements at the hearing that the State and DPHHS didn't care about the status quo, didn't like being enjoined, and passed rules for the purpose of circumventing a court order. (Hrg. Tr. (Sept. 15, 2022), attached as **Exhibit B**.) The Court clarified that it intended its preliminary injunction to require Defendants to return to applying the 2017 Rule. (Doc. 77.) The Clarification Order issued September 19, 2022 made the following relevant findings and conclusions:

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

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

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

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

[. . .]

19. The Court is unconvinced by Defendants' claim that the Order "left no regulatory process for changing one's sex on a birth certificate" and that the Order put DPHHS "in an uncertain regulatory situation." Indeed, the Court finds these claims are demonstrably ridiculous. The Order expressly stated at ¶ 181 that "[t]he last actual, peaceable, noncontested condition preceding the controversy in this matter was that which existed prior to the enactment of SB 280." SB 280 itself identifies what that noncontested condition was that existed prior. Defendants have unlawfully circumvented the entire purpose of a preliminary injunction and disregarded and disrespected the judicial process with these claims.

[. . .]

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

[. . .]

24. To the extent necessary due to Defendants "confusion," the Court clarifies that with the Order issued on April 21, 2022, it required that Defendants return to the status quo—which as evidenced by SB 280 itself—is a return to the 2017 DPHHS regulations that were in effect until the enactment of SB 280. The 2017 regulations provided that DPHHS "allow an individual

> to correct the gender designation on the individual's birth certificate by providing to DPHHS a correction affidavit accompanied by: (1) a completed gender designation form certifying that the individual has undergone gender transition or has an intersex condition; (2) a government-issued identification displaying the correct gender designation; or (3) a certified copy of a court order indicating that the gender of the individual born in Montana has been changed[.]" The Court attaches, as Exhibit A, the 2017 DPHHS regulations that Defendants will return to, for clarity for Defendants, and to avoid any future claims of confusion. If Defendants require further clarification, they are welcome to request it from the Court rather than engage in activities that constitute unlawful violations of the Order.

(Doc. 77 at 5, 7–10.)

Defendants immediately complied with the Court's directive and began applying the 2017 Rule on September 20, 2022. (Second Aff. Karin Ferlicka, ¶ 3 (Aug. 22, 2023), attached as **Exhibit C**.) They then sought a writ of supervisory control from the Montana Supreme Court—while complying with the Clarification Order—in a good faith effort to obtain answers to legitimate legal questions, including whether the district court could enjoin the 2022 Rule. (Doc. 97.) The Montana Supreme Court granted supervisory control, ruling DPHHS was entitled to relief "insofar as the Clarification 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." (*Id.* at 7.) The Court also ruled, however, that the preliminary injunction required DPHHS to revert to the 2017 Rule. (*Id.* at 5–6.) Although it recognized the State's dilemma that "DPHHS must either implement the 2017 Rule, thereby violating its own administrative rules and exposing itself to potential liability under MAPA, or it must implement the 2022 Rule, thereby risking contempt of court," the Court nevertheless left both the 2017 Rule and the 2022 Rule intact. (*Id.* at 5, 7.) Based on its good faith interpretation of the Montana Supreme Court's Order, DPHHS directed that birth certificate amendment applications begin to be processed in accordance with the 2022 Rule. (Ex. C at ¶ 5; Doc 105 at 2.)

In response, Plaintiffs filed a Motion to Enforce the Preliminary Injunction Order on January 25, 2023. (Doc. 102.) When it thus became clear that Plaintiffs had a conflicting interpretation of the Montana Supreme Court's Order, DPHHS paused processing applications to amend the sex designation on birth certificates pending further guidance from this Court in a good faith effort to comply with the law and the relevant orders. (Doc. 107, ¶ 5; Ex. C at ¶ 6; Doc 105

at 5–6.) While the directive to process amendment applications for sex designations on birth certificates under the 2022 Rule was in effect for just over three weeks, DPHHS made no final disposition applying the 2022 Rule to any complete application during that time. (Ex. C at ¶¶ 5–7.) This means that DPHHS did not deny any application for sex designation amendment on the basis that the application, which may have met the requirements of the 2017 Rule, did not meet the requirements of the 2022 Rule. (*Id.*) DPHHS also continued accepting applications for future processing. (*Id.* at ¶ 6.)

In the meantime, the Court denied Plaintiffs' Motion for Leave to File a Second Amended Complaint and Plaintiffs' Motion for Rule 23 Class Certification. (Docs. 117–118.) Plaintiffs also moved for summary judgment on Count IV of their Amended Complaint, solely on the basis that SB 280 was unconstitutionally vague because sex cannot be changed by surgery. (Doc. 122; Doc. 123.)[1] In the interest of expediently resolving this matter, heeding the Court's admonitions regarding vagueness at the September 15, 2022 hearing (Ex. B at 60–61), and because of the very narrow focus of the dispositive motion, Defendants conceded the narrow issue that SB 280 was unconstitutionally vague on its face and as applied because neither a surgical procedure, nor any other medical treatment can change a person's sex. (Doc. 129 at 1–2.)

The Court held a hearing on Plaintiffs' outstanding Motion to Enforce and Motion for Summary Judgment on June 1, 2023. (Hrg. Tr. (Jun. 1, 2023), attached as **Exhibit D**.) At the hearing, defense counsel acknowledged the Montana Supreme Court's finding that this Court's preliminary injunction had required reversion to the 2017 Rule. (*Id.* at 12:25–14:6.) However, the Court cut off defense counsel's attempt to explain Defendants' position on the Montana Supreme Court's ruling upholding the 2022 Rule,[2] expressing its reluctance to even discuss the 2022 Rule given that it had no jurisdiction over it. (*Id.* at 14:7–16:23; Aff. Thane Johnson, ¶¶ 3–5 (Aug. 25, 2023), attached as **Exhibit E)**.) Following the June 1, 2023, hearing, DPHHS resumed processing applications under the 2017 Rule. (Ex. C at ¶ 8.)

[1] Plaintiffs developed their argument over time, beginning with the broad assertion under Count IV that SB 280 "does not define what the surgery should be or identify who—DPHHS, the court, or the applicant's physician—decides what type of surgery is sufficient to comply with the Act." (Doc. 1 at 17–18; Doc. 42 at 25–26.) (*See also* Doc. 12 at 34–35.) Defendants did not and could not have known Plaintiffs' much more narrowed position based on the immutability of sex until they filed their Motion for Summary Judgment nearly two years later. (Docs. 122–123.)

[2] This is the reason for defense counsel's inability to provide an explanation of DPHHS's actions following the Clarification Order. (Doc. 133 at 8.)

The Court issued its Order on Plaintiffs' enforcement motion and dispositive motion on June 26, 2023, which: 1) held Defendants in contempt for applying the 2022 Rule, not the 2017 Rule, immediately after the Montana Supreme Court's January 10, 2023 Order; 2) awarded Plaintiffs' attorneys' fees related to the contempt proceedings; and 3) awarded Plaintiffs' attorneys' fees for this entire litigation pursuant to its *sua sponte* invocation of the private attorney general doctrine. (Doc. 133.) The Order contained the following factual mistakes:

- Following the Order from the Supreme Court, Defendants stopped applying the 2017 Rule and the DPHHS did not provide a method to change the sex designation on birth certificates throughout the remainder of this case. (Doc. 133 at 4.)[3]

- Instead of following this Court's Order and the law, Defendants engaged in new rulemaking procedures and promulgated the 2022 Rule. (*Id.* at 5.)[4]

- The "status quo," the 2017 Rule, that Defendants were ordered to return to would have preserved Montanans' constitutional rights, which all parties now concede. (*Id.*)[5]

- [Defendants] blatantly ignored this Court's instructions to return to the status quo. Defendants understood what the status quo was prior to SB 280. In a hearing on September 15, 2022, Defendants acknowledged that prior to the passage of SB 280, the 2017 Rule was in place. (*Id.* at 6.)[6]

- Following the Order from the Supreme Court, Defendants stopped applying the 2017 Rule and returned to applying the 2022 Rule, in violation of both this Court's previous Orders and the Montana Supreme Court Order. (*Id.* at 6–7.)[7]

- Even after this Court's Order that temporarily enjoined SB 280, this Court's Clarification of that Order, and the Montana Supreme Court's Order upholding that Order, Defendants refused to apply the 2017 Rule. [. . .] The requirements placed

[3] This fails to fully account for DPHHS's relevant actions following and in the context of the Montana Supreme Court's January 10, 2023 Order. (*See* Doc. 107; Ex. C.)
[4] DPHHS was not enjoined from engaging in new rulemaking and did so lawfully. (*See* Doc. 97 at 7.)
[5] Defendants did not concede that the 2017 Rule would have preserved Montanans' constitutional rights, they only conceded the narrow issue that SB 280 was unconstitutionally vague on its face and as applied because neither a surgical procedure, nor any other medical treatment can change a person's sex. (*See* Doc. 129 at 1–2.)
[6] Defendants did not blatantly ignore the Court's instructions; they engaged in new rulemaking based on their objectively reasonable conclusion that the Court's April 21, 2022 Order left a problematic regulatory gap and that they had independent statutory authority to adopt the 2022 Rule. (*See* Doc. 72 at 4–5.)
[7] This misstates and fails to fully account for DPHHS's relevant actions following and in the context of the Montana Supreme Court's January 10, 2023 Order. (*See* Doc. 107; Ex. C.) It also ignores the Montana Supreme Court's determination that DPHHS was not enjoined from implementing the 2022 Rule. (*See* Doc. 97 at 7.)

on Defendants by [the preliminary injunction] Order have been repeatedly clarified and repeatedly disregarded. (*Id.* at 7.)[8]

- Between January 10th, 2023 and June 1st, 2023, Defendants continued to refuse to apply the 2017 Rule, knowing this was in violation of this Court's Order. (*Id.*)[9]

- At the hearing on June 1st, 2023, this Court addressed the issue of contempt and Defendants had the opportunity to provide justification for their continued violations of this Court's Order. (*Id.*)[10]

- However, defense counsel could not provide a legitimate explanation or an explanation of any kind for the continued noncompliance of his clients. There is no legal justification for Defendants' continued refusal to follow Court orders after numerous clarifications by this Court and by the Supreme Court of Montana. (*Id.* at 8.)[11]

- Defendants repeatedly disobeyed a lawful order from this Court, showing their contempt for this judicial body and the judicial system as a whole. (*Id.* at 8.)[12]

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

- Defendants were made aware numerous times that their conduct was in violation of this Court's valid Order, yet they willfully and continuously thumbed their nose at

[8] This ignores the Montana Supreme Court's recognition of the State's dilemma that "DPHHS must either implement the 2017 Rule, thereby violating its own administrative rules and exposing itself to potential liability under MAPA, or it must implement the 2022 Rule, thereby risking contempt of court," and the conflict posed by its leaving both the 2017 Rule and the 2022 Rule intact. (*See* Doc. 97 at 5, 7.) This also ignores the facts that after the Court's Clarification Order, DPHHS processed birth certificate amendment applications under the 2017 Rule and that following the Supreme Court's Order and Plaintiffs' Motion to Enforce, DPHHS paused processing such applications pending clarification by the Court, and did not, in fact, deny any applications based on the 2022 Rule.

[9] DPHHS did not refuse to apply the 2017 Rule after the Montana Supreme Court's January 10, 2023 Order; it temporarily paused the processing of amendment applications, pending clarification, in good faith when it understood Plaintiffs' contrary interpretation of the Supreme Court's Order in its Motion to Enforce.

[10] But the Court's actions precluded such justification. *See* n.2, *supra*.

[11] *See supra* at 3, 5–6 and n.2, nn.9–10.

[12] *See* nn. 2–4, 6–9, *supra*.

[13] *See* nn.2–4, 6–9, *supra*. Moreover, seeking supervisory control and prevailing in part in that effort is well within the established procedures of the judicial branch of government.

this Court, wasting Plaintiffs' time, energy, and money to enforce that Order and violating the constitutional rights of Montanans. (*Id.* at 10.)[14]

- However, in the hearing on the motion on June 1st, 2023, Defendants conceded that the 2021 Rule "parrots the statute" and is unconstitutional as well. (*Id.* at 11.)[15]

Furthermore, the Court made no specific factual findings as to the conduct of the State of Montana or Governor Gianforte separate from the conduct of the DPHHS Defendants. While the Court's Order decries the conduct of DPHHS—which it misunderstood, misstated, and misinterpreted—the Order is simply devoid of any findings of wrongful conduct by the State or the Governor. The Court additionally permanently enjoined the 2021 Rule even though it was never properly challenged by Plaintiffs or otherwise placed at issue in the parties' pleadings. The Order contains numerous other mistakes of law as explained further below.

ARGUMENT

Courts may correct mistakes in a judgment, order, or other part of the record arising from oversight or omission on motion. Mont. R. Civ. P. 60(a). Additionally, on motion and just terms, a court may relieve a party from an order for mistake, inadvertence, surprise, or excusable neglect, or any other reason that justifies relief. Mont. R. Civ. P. 60(b)(1) and (6). The purpose of Rule 60 "is to achieve substantial justice." *In re Marriage of Remitz*, 2018 MT 298, ¶ 11, 393 Mont. 423, 431 P.3d 338 (citing *Peterson v. Mont. Bank, N.A.*, 212 Mont. 37, 45-46, 687 P.2d 673, 678 (1984)) (footnote omitted). In accordance with this purpose, "[t]he degree of appellate scrutiny of a trial court's ruling on a Rule 60(b) motion depends on whether the trial court set aside the judgment. If the trial court refused to set aside the judgment, only a slight abuse of discretion need be shown to warrant reversal." *ECI Credit, LLC v. Diamond S Inc.*, 2018 MT 183, ¶ 14, 392 Mont. 178, 422 P.3d 691 (citing *Karlen v. Evans*, 276 Mont. 181, 185, 915 P.2d 232, 235 (1996)). This lesser degree of appellate scrutiny applies when a district court refuses to reopen an action under Rule 60 "because our policy is that litigated cases are to be decided on the merits." *Whitefish Credit Union v. Sherman*, 2012 MT 267, ¶ 7, 367 Mont. 103, 289 P.3d 174. A district court abuses its discretion if it "act[s] arbitrarily without employment of conscientious judgment or exceed[s] the

[14] *See* nn.2–9, *supra*.

[15] Defendants did not concede that the 2021 rule is unconstitutional; they only conceded the narrow issue that SB 280 was unconstitutionally vague on its face and as applied because neither a surgical procedure, nor any other medical treatment can change a person's sex. (*See* Doc. 129 at 1–2.)

bounds of reason resulting in substantial injustice." *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 19, 338 Mont. 423, 166 P.3d 451 (citations omitted).

Here, the Court's June 26, 2023 Order is riddled with mistakes of fact and law that justify granting Defendants relief from certain portions of the Order. Specifically, Defendants request that the Court grant them relief by 1) vacating the portion of the Order finding Defendants in contempt and awarding fees as a sanction for contempt; and 2) vacating the portion of the Order granting attorneys' fees to Plaintiffs for prevailing on summary judgment. Because these portions of the Order are not based on facts established in the record or supported by Montana law, Rule 60 relief is appropriate.

I. THE COURT PREMISED ITS CONTEMPT ORDER ON MISTAKES OF FACT.

As explained in detail above, the Court's contempt finding is rooted in its misreading of the Montana Supreme Court's Order, its misapprehension of DPHHS's subsequent actions, and its preventing defense counsel from fully explaining Defendants' position at the June 1, 2023 hearing. The Supreme Court Order and DPHHS's reasonable interpretation of it demonstrate anything but contempt of this Court. Indeed, it remains entirely unclear how DPHHS could be free to implement the 2022 Rule, yet simultaneously be required to maintain application of the 2017 Rule.

There simply is no factual or legal basis against this backdrop for the Court to find that Defendants repeatedly and willfully disobeyed or "blatantly ignored" its lawful orders or otherwise "thumbed their noses" at the Court. Rather, Defendants behaved reasonably and in good faith while navigating the extraordinary circumstances presented by this case. The Court was mistaken about DPHHS's decision making, its actions (and the timing thereof), and its compliance with applicable orders. The Court improperly imputed DPHHS's actions and alleged intentions to the other named Defendants. Relief from this portion of the Court's June 26, 2023 Order is warranted.

II. THE COURT'S AWARD OF ATTORNEYS' FEES IS PREMISED ON FACTUAL AND LEGAL MISTAKES.

Montana follows the American Rule that prevailing parties generally are not entitled to attorneys' fees. *Western Tradition P'ship v. Bullock*, 2012 MT 271, ¶ 9, 367 Mont. 112, 291 P.3d 545 (citing *Trustees of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 19, 315 Mont. 210, 69 P.3d 633). While equitable exceptions to this rule exist, the Montana Supreme Court construes them narrowly "lest they swallow the rule." *Id.* (citing *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 23, 351 Mont. 464, 215 P.3d 649). The Montana Supreme Court rejects expansion of equitable exceptions

when the effect would "drive a stake into the heart of the American Rule." *Id.* (citing *Jacobsen*, ¶ 22 (quoting *Mtn. West Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 40, 315 Mont. 231, 69 P.3d 652).

A prevailing party may recover attorneys' fees against the State of Montana only if the court finds that the State's claim or defense was frivolous or pursued in bad faith. *Id.* at ¶ 10 (citing Mont. Code Ann. § 25-10-711(1)(b)). A claim or defense is frivolous or in bad faith "when it is 'outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion.'" *Id.* (citing *Ostergren v. Mont. Dept. of Revenue*, 2004 MT 30, ¶ 23, 319 Mont. 405, 85 P.3d 738 (quoting *Jones v. City of Billings*, 279 Mont. 341, 344, 927 P.2d 9, 11 (1996); *Armstrong v. Mont. Dept. of Justice*, 250 Mont. 468, 469–70, 820 P.2d 1273, 1274 (1991)). Mont. Code Ann. § 27-8-313 allows courts to award fees in declaratory judgment actions as "supplemental relief" when the court determines such relief to be "necessary and proper." *Id.* at ¶ 11 (citing *Wagner v. Woodward*, 2012 MT 19, ¶ 31, 363 Mont. 403, 270 P.3d 21 (citing *Buxbaum*, ¶ 42)).

The Montana Supreme Court repeatedly cautions that any exceptions to the American Rule must be narrow and in cases involving the State, even narrower. *See Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 34, 314 Mont. 314, 65 P.3d 576 (reasoning the only potential liability for fees against the State would lie for the actions of the Legislature in enacting an unconstitutional bill and the Legislature is immune from suit for legislative acts). The State is not aware of any case where the Montana Supreme Court has allowed attorneys' fees in a routine case seeking declaratory and injunctive relief based only on the purported unconstitutionality of a challenged statute. *See, e.g. Western Tradition P'ship*, ¶ 13; *Clark Fork Coalition v. Tubbs*, 2017 MT 184, ¶¶ 25–26, 388 Mont. 205, 399 P.3d 295; *Mont. Immigrant Justice Alliance v. Bullock*, 2016 MT 104, ¶ 51, 383 Mont. 318, 371 P.3d 430; *Forward Mont. v. State*, Lewis and Clark County Cause No. ADV 2021–611, Or. on Mot. for Attorney Fees (Sept. 16, 2022). The narrow exceptions rely on unique facts and exceptional circumstances not present here. *See Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, 296 Mont. 402, 89 P.2d 800 ("*Montrust*") (State breached its fiduciary duty to maintain trust lands); *City of Helena v. Svee*, 2014 MT 311, 377 Mont. 158, 339 P.3d 32 (municipal government filed civil and criminal charges prior to plaintiffs filing a declaratory judgment action); *Burns v. Musselshell Cnty.*, 2019 MT 291, ¶ 22, 398 Mont. 140, 454 P.3d 685 (county stipulated to an election recount procedure in violation

of state law). Because the State defended SB 280 in good faith against multiple legal theories advanced by Plaintiffs, an award of fees is not warranted.

A. THE COURT ERRED IN DENYING DEFENDANTS AN OPPORTUNITY TO ADDRESS THE MERITS OF A FEES AWARD.

Mont. R. Civ. P. 54(d)(2)(A) requires claims for attorneys' fees to be made by motion. The motion must be filed no later than 14 days after the entry of judgment, specify the judgment and the statute, rule, or other grounds entitling the movant to the award; state the amount sought or provide a fair estimate of it; and disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made. Mont. R. Civ. P. 54(d)(2)(B). "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Small v. McRae*, 200 Mont. 497, 506, 651 P.2d 982, 987 (1982) (quoting *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961)). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Id.*, 651 P.2d at 987 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.*, 651 P.3d at 987 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

This lawsuit is a garden variety declaratory judgment action challenging the constitutionality of a statute. (Doc. 42, Ex. A at 21.) Plaintiffs' Amended Complaint requested that the Court "[a]ward Plaintiffs' [sic] the reasonable attorney's fees and costs incurred in bringing this action." (*Id.*) The Court, *sua sponte*, granted Plaintiffs' request for fees based on the private attorney general doctrine in the same Order that it granted summary judgment, without waiting for Plaintiffs to file a motion for fees. (Doc. 133 at 14–19; *cf.* Mont. R. Civ. P. 54(d)(2).) Plaintiffs never filed the motion required by Rule 54 or invoked the private attorney general doctrine as a basis for fees. As such, Defendants had neither prior notice of this doctrine as the basis for a fee award, nor an opportunity to brief the issue beforehand. This violates Mont. R. Civ. P. 54(d)(2) and Defendants' right to due process. *See DeVoe v. Mont. Dept. Revenue*, 263 Mont. 100, 118, 866 P.2d 228, 239 (1993) (when relief as substantial as attorneys' fees is sought by a party to litigation, the other party is entitled to prior notice and an opportunity to address the merits of granting such relief). While Defendants had notice that Plaintiffs were seeking attorneys' fees in this litigation, they had no opportunity to meaningfully address the merits of granting such relief.

As such, Mont. R. Civ. P. 54 and Defendants' due process rights were violated by the Court's Order. This was a mistake of law from which Defendants are entitled to relief.

B. APPLICATION OF THE PRIVATE ATTORNEY GENERAL DOCTRINE WAS A MISTAKE OF LAW PREMISED ON FACTUAL ERRORS.

Moreover, the private attorney general doctrine does not serve as a legally sufficient basis for fees in this case. The private attorney general doctrine exists as a rarely used equitable doctrine to award fees in cases "when the government, for some reason, fails to properly enforce interests which are significant to its citizens[.]" *Western Tradition P'ship*, ¶ 13 (citing *Montrust*, ¶ 64 (quotation omitted)). When the "only potential liability of the State for fees would lie for the actions of the Legislature in enacting an unconstitutional bill" then "no avenue" exists to impose a fee award. *Finke*, ¶ 34.

Courts must make a threshold determination that equitable considerations support an award of attorneys' fees. *Id.* at ¶ 12 (citing *Mungas*, ¶ 45; *Hughes v. Ahlgren*, 2011 MT 189, ¶¶ 13, 21, 361 Mont. 319, 258 P.3d 439; *United Natl. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 269, ¶ 39, 352 Mont. 105, 214 P.3d 1260). If that threshold determination is met, courts apply a three-part "tangible parameters test" to determine whether an award of fees is necessary or proper as required by Mont. Code Ann. § 27-8-313. *Id.* (citing *Renville v. Farmers Ins. Exch*, 2004 MT 366, ¶ 27, 324 Mont. 509, 105 P.3d 280). Three factors, at a minimum, must be present to invoke the doctrine: 1) the strength or societal importance of the public policy vindicated by the litigation, 2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, and 3) the number of people standing to benefit from the decision. *Id.* at ¶ 14 (quoting *Montrust*, ¶ 66). The private attorney general doctrine doesn't apply in cases like this, which involve a simple constitutional challenge to a legislative enactment.

1. The Equitable Threshold Factors Do Not Support an Award of Fees.

The Court based its award of fees on the rationale that the equitable factors were met because the State defended a law it knew was unconstitutional and Defendants were in contempt for large portions of the litigation. This rationale is mistaken. In cases involving a "garden variety" constitutional challenge to a legislative enactment, the American Rule governs. *See Mont. Immigrant Justice Alliance*, ¶ 53; *Western Tradition P'ship*, ¶ 21. Courts should not assess "the relative strength or weakness of public policies furthered by their decisions…a role closely approaching that of the legislative function." *Id.* at ¶ 16 (citing *Bitterroot Protective Assn.*, ¶ 22

(quotation omitted)). Separation of powers requires courts to use caution to avoid interference with the legislative and executive functions. *Id.*

The private attorney general doctrine's predicate—"when the government, for some reason, fails to properly enforce interests which are significant to its citizens"—fails in cases like this because of the State's significant interest in defending state laws. *See id.* at ¶ 20. The Attorney General's defense of state statute is "grounded in constitutional principles and in an effort to enforce interests the executive deemed equally significant to its citizens," compared to the constitutional challenge itself. *Id.* The Attorney General is the legal officer of the state and has the duties and powers provided by law," including "to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest." *Id.* at ¶ 17; Mont. Const, art. VI, § 4(4); Mont. Code Ann. § 2-15-501(1). Indeed, the district court here recognized this at the September 15, 2022 hearing: "Counsel is working their tail-ends off in trying to figure out how to defend this statute. That is their job. That is their responsibility." (Ex. B at 58:9–11.)

In *Montana Immigrant Justice Alliance*, the Attorney General unsuccessfully defended the constitutionality of a citizen-passed initiative. *Id.* at ¶ 52. In *Western Tradition Partnership*, the Attorney General defended, unsuccessfully, the state's corporate political speech ban in the wake of *Citizens United v. FEC*, 588 U.S. 310 (2010). *Id.* at ¶ 5. The United States Supreme Court summarily rejected the Attorney General's arguments saying "[t]here can be no serious doubt" that the holding of *Citizens United* applies to the Montana statute. *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012). Even then, the Montana Supreme Court declined to grant attorneys' fees because of the equitable interests in the Attorney General defending the constitutionality of duly enacted statutes. *Western Tradition P'ship*, ¶ 17. Courts should balance the claims at issue against the Attorney General's constitutional prerogative to defend all laws enacted by the people, or the people's representatives. *Id.* at ¶¶ 16–20. Article V, Section 11 of the Montana Constitution counsels more caution, not less. The Attorney General must presume—not second-guess—that the legislature made an independent judgment as to whether its actions complied with the constitution. *Cf. Brown v. Gianforte*, 2021 MT 49, ¶ 32, 404 Mont. 269, 488 P.3d 548 (courts presume legislative acts constitutional).

A fee award in this case would "eviscerate" the American Rule and undercut the equitable principles supporting the Attorney General defending statutory enactments. As the Court

recognized in *Western Tradition Partnership*, the legislature entrusted the Attorney General "to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest." *Id.* at ¶ 17 (quoting Mont. Code Ann. § 2-15-501(1)). Imposition of attorneys' fees in constitutional cases chills a full and faithful defense of the State's interest in seeing its laws enforced. *Id.*

2. The Court Neglected to Consider the Tangible Parameters Test.

If the threshold equitable considerations are met, the Court must still analyze the "three-part 'tangible parameters test' adopted by [the Montana Supreme Court] in *Trustees of Indiana University v. Buxbaum*." *Davis v. Jefferson Cnty. Election Off.*, 2018 MT 32, ¶ 13, 390 Mont. 280, 412 P.3d 1048 (denying fees under Mont. Code Ann. § 27-8-313). Plaintiffs must establish "(1) a [defendant] possesses what the plaintiffs sought in the declaratory relief action; (2) it is necessary to seek a declaration showing the plaintiffs are entitled to the relief sought; and (3) the declaratory relief sought was necessary in order to change the status quo." *Svee*, ¶ 22. The Court utterly failed to address the tangible parameters test (*see* Doc. 133 at 14–19)—a mistake of law that warrants relief from the attorneys' fees portion of the Order.

3. Defendants Did Not Act in Bad Faith.

The Montana Legislature created a statutory exception to the American Rule, authorizing attorneys' fees against the State if the court determines the State's defense "was frivolous or pursued in bad faith." § 25-10-711(1)(b). "A claim or defense is frivolous or in bad faith when it is outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion." *Mont. Immigrant Justice Alliance*, ¶ 48. The district court's criticism of the State's choice to defend SB 280 ignores the substantial, often overriding, interest in defending duly enacted laws—even when those laws may be subject to unfavorable precedent—because Montana citizens expect the Attorney General to defend Montana's laws. *See Western Tradition P'ship*, ¶¶ 5, 20.

As set forth above, Defendants' actions when viewed in the context in which they were taken provide absolutely no indication of contempt or bad faith. Defendants endeavored to properly fulfill their legal obligations considering the dilemma they faced as recognized by the Montana Supreme Court, all the while following this Court's directives and attempting to resolve this matter in good faith. For example, Defendants acknowledged and heeded the Court's following direction at the summary judgment stage of this case:

> And so, let's see if we can't figure out a resolution here. I did candidly indicate that I'm very concerned about the question of vagueness. So you might talk about that amongst yourselves about that particular issue. I'm very concerned about that issue because if in the future after submissions and discussion and arguments and the issue comes down to the fact that this matter may be void for vagueness. I find it interesting that the rule left out the question of medical procedure, which we can all read between the lines with respect to that rule. But that constrains this Court as to how far I can go with respect to the constitutional question in this case. So let's take a look at the issue if you would, discuss that issue amongst yourselves, and see where we go from there. Counsel, my ruling on 280 was real clear. It violated the due process clause as—at least it was a prima facie showing that it violated the due process clause and related to the vagueness question. And so—but it was a constitutional violation here, which is a due process question. So let's address that question. I think we can address that question. I think it is an issue of law. I'm not sure because I haven't researched it. But I'm concerned about that particular issue because it will rule the day simply because I have to address that before I can get to the underlying critical question. And I think it is a critical question as to whether or not there is a constitutional question here under these circumstances. So visit with that and let's see what you think about that because I think that issue can be addressed if it is purely a legal question on summary judgment. And that might make a difference for all of us here concerning this particular matter. Like I said, I don't know because I haven't done the research on it and I haven't heard the arguments from counsel. But that's one that jumps out at me.

(Ex. B at 60:8–61:21.) Defendants' position and actions at summary judgment demonstrate anything but bad faith disregard of the Court's direction.

Furthermore, Defendants successfully defended numerous aspects of this case. (*See, e.g.*, Docs. 61, 117–118) (dismissal of Plaintiffs' Count V; denial of leave to file Second Amended Complaint; denial of Rule 23 class certification). Defendants also had no way of knowing that Plaintiffs had narrowed their void for vagueness argument to the issue of the immutability of sex until they filed their Motion for Summary Judgment, at which point Defendants conceded on that narrow issue—on the basis that "no surgery changes a person's sex—to facilitate the resolution of this case. The Court's Order errs in awarding fees all the way back to the beginning of the lawsuit on the theory that Defendants knew from the beginning that SB 280 was unconstitutional and defended it anyway, when they should instead have conceded its unconstitutionality. This rationale runs afoul of the State's obligation to defend duly enacted laws, of the fact there was a legitimate question about the binary nature of sex (among other issues), and of the fact that Plaintiffs only narrowed their case in their Motion for Summary Judgment. The court also made no factual findings supporting the contempt citation with respect to any Defendant aside from DPHHS, which

acted in good faith and whose conduct was objectively reasonable. The relevant facts in the record and full context of Defendants' defense of this lawsuit render the Court's determination that Defendants acted in contempt or bad faith entirely unsupported and unjustified.

III. THE DISTRICT COURT'S APPARENT BIAS AND ANIMUS AGAINST DEFENDANTS PERVADES THE ORDER.

Rule 60(b)(6) allows relief from an order upon "any other reason that justifies relief." The Rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *In re Marriage of Waters*, 223 Mont. 183, 187, 724 P.2d 726, 729 (1986) (quoting *Klapprott v. United States*, 335 U.S. 601, 614–15 (1949)). Relief under this provision is appropriate only in extraordinary circumstances which go beyond those covered by the first five subsections of the rule. *Essex Ins. Co.*, ¶ 20 (citing *Skogen v. Murray*, 2007 MT 104, ¶ 13, 337 Mont. 139, 157 P.3d 1143; *Falcon v. Faulkner*, 273 Mont. 327, 333, 903 P.2d 197, 201 (1995)). "Thus, before a party will be allowed to modify a final judgment under Rule 60(b)(6), he must first show that none of the other five reasons in Rule 60(b) apply." *Id.* (quoting *Marriage of Waters*, 223 Mont. at 187, 724 P.2d at 729).

As an alternative to Defendants' request for relief under Rule 60(a) and Rule 60(b)(1), Defendants seek relief from the Court's Order pursuant to Rule 60(b)(6) because of the District Court's bias and express animus toward Defendants, and because the Court did not allow Defendants to explain the objectively reasonable basis for their conduct. (*See* Ex. E at ¶¶ 3–5, explaining how the Court used nonverbal gestures to preclude further explanation from defense counsel.) If the Court determines that relief is not warranted pursuant to Mont. R. Civ. P. 60(a) or 60(b)(1), then it should consider Defendants' request for relief under subsection (b)(6). Subsections (b)(2)–(5) are not applicable here because there is no newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial; there is no fraud, misrepresentation, or misconduct by an opposing party; no party has asserted that the judgment is not void; no party has asserted that: the judgment has not been satisfied, released, or discharged; is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.

Relief under Rule 60(b)(6) applies when (1) there are extraordinary circumstances; (2) the movant acted within a reasonable time period; and (3) the movant was blameless. *Bahm v. Southworth*, 2000 MT 244, ¶ 15, 301 Mont. 434, 10 P.3d 99. Furthermore, a motion for relief

pursuant to Rule 60(b)(6) must contain "more than a request for rehearing or a request that the District Court change its mind." *Essex Ins. Co.*, ¶ 22 (citing *Lussy v. Dye*, 215 Mont. 91, 93, 695 P.2d 465, 466 (1985). "It must be shown that something prevented a full presentation of the cause or an accurate determination on the merits and that for reasons of fairness and equity redress is justified." *Id.* (citing *Lussy*, 215 Mont. at 93, 695 P.2d at 466; accord *In re Marriage of Markegard*, 2006 MT 111, ¶ 6, 332 Mont. 187, 136 P.3d 532).

Here, all three factors set forth in *Bahm* apply. The Court appears to have clung to an animus from Defendants' prior confusion surrounding the Court's preliminary injunction Order and projected that onto Defendants' actions taken in good faith based on the information and reasonable legal questions present at the time. Everything ranging from the substance and tone of the Court's written orders to its demeanor towards defense counsel at hearings indicates that bias played a significant role in the Court's contempt findings and attorneys' fees award. This is evidenced by the following statements at the September 15, 2022, hearing on Plaintiffs' Motion for Clarification:

- What I am interested in is the preliminary injunction and what that means in terms of the status quo. That is the question before this Court today because the State of Montana basically says, we don't care about what the status quo was before your order, Judge, we are going to pass rules that we like whenever we can, which circumvent 280 and my preliminary injunction. (Ex. B at 6:15–23.)

- They changed the rules in light of my order. They simply circumvented the order. We don't like his order. We don't like being enjoined. We don't like the fact that we have to address the question of birth certificates. And so, we are changing the rules so we are not going to address anything on the birth certificates. That was the temporary rule. It is now the final rule as of September 10. (*Id.* at 25:18–25.)

- And that was clarified on May 17 by the Montana Supreme Court. And the State moved forward anyway in complete violation of that preliminary injunction order of this Court. (*Id.* at 28:7–10.)

- What—all I need to know—here is what I'd really like to know and from the State of Montana, so the State of Montana is saying that when a court enjoins an action and enjoins a statute that has rules promulgated by the Department that are the mirror image of the statute, that, oh, we can do anything we want with the rules, we don't care because he only enjoined the statute, he didn't enjoined the rules, and we can change the rules any time we want, so we can make it—we can circumvent the constitutional question pending litigation and its only preliminary injunction, we can circumvent the Judge's order pending litigation by simply taking it to the

Department and let the Department pass whatever rules they want to pass; is that what you are telling me? (*Id.* at 33:4–18.)

- And I agree with Plaintiffs it is painful when this Court issues an order indicating that the statute is unconstitutional and along with that the mirror image of the rules, which were implemented to implement the statute are the mirror image of the statute that you think that too bad, so sad, we can do anything we want with the rules and we can circumvent this order and do what we want to do, not what the status quo was prior to the preliminary injunction. (*Id.* at 36:14–22.)

- So I am a bit offended by the fact that you think that the Department can do anything they want that does not conform to a preliminary injunction and order of a district court. (*Id.* at 37:5–8.)

- But the last actual peaceable noncontested condition preceding the controversy in this matter was that which existed prior to the enactment of SB 280. Clear as a bell. No question about that. Not a rule passed in May of 2021. Not an emergency rule passed in June of 2022 after my order. And not a rule finalized on September 10, 2022. Those rules circumvent the preliminary injunction issued by this Court. Clearly do. There isn't even any question about that, particularly in light of the Montana Supreme Court decision decided May 17, 2022, that clarified the standards. That clarification came before the emergency rule. The timing by the Department is disastrous because they are simply thumbing their nose at orders of courts. (*Id.* at 51:1–16.)

- Those rules implementing 280 they come along for the ride. And everybody knows that. We addressed those in my findings and conclusions. And to suggest otherwise and simply ignore the orders of this Court and figure out a way to sneak around it and be clever. (*Id.* at 51:25–52:5.)

- And what was undertaken by the Department in this particular case upon whatever, whoever's idea it was, simply violates this Court's preliminary injunction. And this Court's preliminary injunction is not to be violated pending the outcome of this case. That is as simple as that. And if we are simply going to circumvent order of the court where the court finds preliminarily a violation of the constitution, that is not what justice is all about. (*Id.* at 53:6–15.)

- And the Department was enjoined in all of aspects from that and decided to pass rules anyway, claiming that they have the power to do whatever they want notwithstanding an order of the Court. That really is unacceptable. (*Id.* at 54:2–6.)

- And then in response to my injunction, my preliminary injunction, to pass new rules to circumvent the question of the constitutionality of what happened in the legislature in 280 simply doesn't meet the smell test. They even identify the fact that, oh, that judge in Billings enjoined 280 and the rules in 280 we got to change them. Wrong. No. Not until we are done with this case. (*Id.* at 54:11–18.)

These statements are unsupported by any evidence in the record. Plaintiffs presented no evidence that the actions and motives of the Defendants were anything other than what Defendants stated—good faith attempts to provide direction in a perceived regulatory vacuum and to follow unclear and at times conflicting court orders. There is no evidence in the record that Defendants intended to disregard, circumvent, or violate court orders to achieve a different outcome, or that they believed they could do whatever they wanted irrespective of court rulings. The Court's contrary conclusions only serve to highlight the apparent bias and hostility underlying its rulings at issue.

These are extraordinary circumstances for which Defendants are blameless, and the timing of Defendants' current Motion is eminently reasonable, particularly considering that Defendants' objections to Plaintiffs' attorneys' fees is neither fully briefed nor resolved. (*See* Doc. 145.) It is therefore appropriate to vacate the contempt and attorneys' fees portions of June 26, 2023 Order in the interest of justice.

CONCLUSION

For the above reasons, the Court erred in holding Defendants in contempt and awarding attorneys' fees to Plaintiffs both based on the alleged contempt and its improper *sua sponte* imposition of the private attorney general doctrine. The Court should accordingly grant Defendants relief from these provisions of the June 26, 2023 Order.

DATED this 25th day of August, 2023.

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