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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

AMELIA MARQUEZ, et al.,

PLAINTIFFS,

v.

STATE OF MONTANA ET AL.,

DEFENDANTS.

Cause No. DV-21-00873
Hon. Michael G. Moses

STATE'S RESPONSE TO PLAINTIFFS' MOTION TO CLARIFY

INTRODUCTION

The Court's April 12, 2022 Order ("Order") put Defendant Department of Public Health and Human Services ("DPHHS") in an uncertain regulatory situation.[1] The Order granted Plaintiffs' motion for a preliminary injunction and enjoined Defendants "from enforcing any aspect of SB 280 during the pendency of this action according to the prayer of the Plaintiffs' motion and complaint" because Plaintiffs met their prima facie burden for a facial vagueness challenge. Order, at 35; *id.* ¶ 168.[2] Thus, under the terms of the order, Defendants could no longer (1) require a "surgical procedure" and court order to change an applicant's sex on his birth certificate or (2) undertake any further rulemaking with respect to SB 280. *See* SB 280 §§ 1–2. DPHHS has obeyed that order entirely.

But Plaintiffs now complain that DPHHS has failed to do something Plaintiffs never requested and this Court never ordered. The Court did not order Defendant DPHHS to reinstate the 2017 Rule or otherwise initiate rulemaking to recreate and reimpose the 2017 Rule. Nor could it. The Court expressly declined to reach the question of whether SB 280 reaches constitutionally protected conduct, Order, ¶ 157, and Plaintiffs brought no independent challenge to the regulations that effectuated

[1] Department of Public Health and Human Services Notice of Adoption of Temporary Emergency Rule, ¶ 6.

[2] Plaintiffs' Amended Complaint seeks declaratory relief under the Montana Constitution, the Montana Human Rights Act ("MHRA"), and the Code and asks the Court to preliminarily and permanently enjoin Defendants from enforcing SB 280. Dkt. 42.3, 21. Likewise, Plaintiffs' preliminary injunction briefing asks this Court to "preliminarily enjoin[] Defendants … from enforcing the Act." Dkt. 38, 38.

SB 280. They never challenged the regulatory elimination of the 2017 Rule. And they never asked for mandatory injunctive relief that, at the conclusion of the litigation, may have given the Court discretion to order DPHHS to reinstate the 2017 Rule. But Plaintiffs have pleaded a case that precludes this Court from ordering the reinstatement of the 2017 Rule. Their Amended Complaint simply doesn't ask for the relief they now demand.

The Court's order thus left *no* regulatory process for changing one's sex on a birth certificate. So DPHHS—pursuant to other independent regulatory authority—issued a temporary emergency rule to establish a process for reviewing applications for changes to sex on individual birth certificates. And pursuant to that same regulatory authority, DPHHS is now undertaking notice and comment rulemaking to adopt a similar permanent rule.

Plaintiffs defined the scope of their lawsuit, and they only challenged SB 280. Meanwhile, DPHHS undertook its own, independent rulemaking to fill the regulatory gap created by the Court's preliminary injunction. That order's plain terms and the suit's requested relief delimit the scope of the preliminary injunction. Defendants have fully complied with the injunction.

Plaintiffs—represented by perhaps the largest and most storied public interest law firm in American History—pleaded this case in a way that now precludes the relief they seek in this motion. Even now, they fail to ask for the precise relief they're truly after—mandatory injunctive relief—and they fail to articulate or apply (or satisfy) the attendant legal standard relevant to that form of relief. And they do all this

by attempting to graft in a new claim against a totally distinct DPHHS regulatory action. The Court must reject Plaintiffs' attempt to redefine the scope of their own lawsuit and obtain relief outside the four corners of their Amended Complaint. This motion should be denied.

BACKGROUND

DPHHS first established a process for amending sex on a person's birth certificate in 2007. It later amended ARM 37.8.311 in 2017 ("2017 Rule") to amend the process allowing a person to designate a gender identity and put that on the person's birth certificate. Governor Gianforte signed SB 280 into law on April 30, 2021. SB 280 was "effective on passage and approval." SB 280 § 4. On June 17, 2021, DPHHS hosted a public hearing to consider amendments to ARM 37.8.311, which would conform the rules with SB 280. *See* Montana Administrative Register Notice 37-945, Dep't of Public Health and Human Servs. (May 28, 2021). On July 16, 2021, Plaintiffs filed this lawsuit and sought a preliminary injunction against SB 280. One week later, on July 24, 2021, DPHHS finalized its new rule ("2021 Rule"). Plaintiffs never challenged the 2021 Rule, only SB 280.

The 2017 rule—to which Plaintiffs wish to return—was completely rescinded by the 2021 Rule. After the Court's preliminary injunction iced the 2021 Rule, however, there was left no regulatory process—at all—by which individuals could request DPHHS to amend the sex listed on their birth certificates. DPHHS couldn't enforce the 2021 Rule that effectuated SB 280, but the 2021 Rule had rescinded the 2017

Rule. The order created a regulatory gap. DPHHS's temporary emergency rule fills that gap.

DPHHS promulgated the temporary emergency rule and is conducting rulemaking for the permanent rule pursuant to its independent rulemaking authority.[3] Jurisdictionally, Plaintiffs can't reach those new rulemakings in this case, as they have alleged it. For present purposes, they asked only to enjoin SB 280, which the Court has done. They didn't challenge the 2021 Rule's rescission of the 2017 Rule; nor did they seek mandatory injunctive relief ordering DPHHS to reinstate the 2017 Rule.[4] They must lie in the bed they made.

Plaintiffs pleaded a case that precludes this Court from even considering the relief they now want. Despite that, Plaintiffs suggest that Defendants and their counsel acted in bad faith. Not so. DPHHS's actions after the Court's preliminary injunction order—including the adoption of the emergency temporary rule—accord entirely with that order. Plaintiffs simply don't like the results that have flown directly from their own pleading decisions. And despite Plaintiffs' late-breaking requests, this Court cannot sua sponte alter the scope of the case they pleaded.

Defendants' counsel informed Plaintiffs during a May 23, 2022, video conference that Defendant DPHHS was preparing to imminently publish a rule to grapple with the effects of the Court's preliminary injunction order. *See* Smithgall Decl. ¶ 6.

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[3] DPHHS has emergency rulemaking authority under MCA § 2-4-303 and independent rulemaking authority under MCA §§ 50-15-102, -103, -204, -208, -223.

[4] All this should cause the Court to reconsider the propriety of a preliminary injunction that, given the Plaintiff-defined scope of the case and the specific relief they requested, cannot preserve what the Court defines as the status quo.

Plaintiffs' counsel inquired no further into the then-putative rule's substance or about how the new rule might affect the litigation. *Id.* And when DPHHS issued its temporary emergency rule, Defendants' counsel immediately forwarded it to Plaintiffs' counsel. *Id.* ¶ 7. Rather than discussing the matter further with Defendants' counsel, Plaintiffs instead continued to decry the agency's actions to the press.[5]

During the video conference, moreover, Plaintiffs' counsel confirmed to Defendants' counsel that neither Plaintiff had even attempted to amend the sex entries on their birth certificates after the Court issued its preliminary injunction. Plaintiffs' counsel were instead concerned about reports they had heard from others that DPHHS was not immediately processing birth certificate amendment applications. *See, e.g.*, Dkt. 71.1 (declaration of Colin Gerstner, who is not a party in this case). This underscores Plaintiffs' inability to establish standing or show injuries in their own right. It's also important to remember that Plaintiffs' counsel don't represent "the people" at large.[6] The May 23 conference simply revealed what was already clear—neither this Court's preliminary injunction nor any DPHHS action following that order has affected the plaintiffs in this litigation.

DPHHS complied with the Court's order. It no longer requires applicants to

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[5] *See, e.g.*, Emma Wulfhorst, *MT DPHHS issues emergency rule: 'no surgery changes a person's sex*,' NBC Montana (May 24, 2022), https://nbcmontana.com/news/local/mt-dphhs-issues-emergency-rule-no-surgery-changes-a-persons-sex; Mara Silvers, *Lawmakers to DPHHS: birth certificate emergency rule is 'anti-democratic and insulting to Montanans*,' Montana Free Press (May 26, 2022), https://montanafreepress.org/2022/05/26/montana-lawmakers-urge-dphhs-to-rescind-emergency-birth-certificate-rule/; *see also* Dkt. 71.1 Ex. A–C.

[6] The State does.

satisfy SB 280's prescribed procedures when attempting to amend the sex entry on their birth certificates. *See* Order, at 35. Plaintiffs received exactly what they asked for. Any claim that DPHHS's new temporary emergency rule harms them falls flat when considering they never undertook the amendment process under the 2017 Rule, under the 2021 Rule, during the post-order time period where no rule existed, or now—under the temporary emergency rule.

ARGUMENT

I. The Court lacks the authority to reinstate the 2017 Rule.

Plaintiffs did not challenge the 2021 Rule, which rescinded the 2017 Rule. They likewise never requested mandatory injunctive relief to force DPHHS to reissue and impose the 2017 Rule. This Court lacks the jurisdiction and power to now issue relief that wasn't requested on claims that weren't brought. The Court and the parties are confined to the four corners of Plaintiffs' Amended Complaint.

A. The Court lacks jurisdiction to consider any of DPHHS's rules.

Plaintiffs argue that the Court's order required Defendant DPHHS to return to operating under the 2017 Rule. It doesn't. The Court (1) enjoined Defendants "from enforcing any aspect of SB 280 during the pendency of this action *according to the prayer of the Plaintiffs' motion and complaint*;"[7] (2) denied Defendants' motion to dismiss Counts I-IV and VI; (3) granted Defendants' motion to dismiss Count V; and (4) waived the requirement that Plaintiffs post a security bond. Order at 35

[7] Plaintiffs' Prayer for Relief (Dkt. 42.3 at 21):

(emphasis added). The prayer of relief in Plaintiffs' Amended Complaint reads as follows:

> **WHEREFORE**, Plaintiffs respectfully request that this Court:
> A. Declare the Act unconstitutional on its face and as applied for the reasons set forth above;
> B. Declare the Act illegal under the MHRA;
> C. Declare the Act illegal under the Code;
> D. Preliminarily and permanently enjoin Defendants, as well as their agents, employees, representatives, and successors, from enforcing the Act, directly or indirectly;
> E. Award Plaintiffs' [sic] the reasonable attorney's fees and costs incurred in bringing this action; and
> F. Grant any other relief the Court deems just.

Dkt. 42.3 at 21. In their preliminary injunction motion, Plaintiffs requested "a preliminary injunction to prohibit … [Defendants] from enforcing Senate Bill 280's unconstitutional restrictions on transgender Montanans' ability to change the sex designation on their Montana birth certificates." Dkt. 6. And in their memorandum supporting that motion, Plaintiffs requested an order "(a) Preliminarily enjoining Defendants, as well as their agents, employees, representative, and successors, from enforcing the Act, directly or indirectly; and (b) granting any other relief the Court deems just." Dkt. 12. Plaintiffs never requested a return to the 2017 Rule.

Fundamentally, the Court lacks jurisdiction to grant the relief Plaintiffs request in this motion because they didn't challenge any DPHHS rules in this case. *See Fuller v. Frank*, 916 F.2d 558, 563 (9th Cir. 1990) (noting the court cannot consider claims outside the Complaint); *Donnes v. State*, 206 Mont. 530, 537, 672 P.2d 617, 621 (1983) (refusing to consider issues not pled). In a case like this—where Plaintiffs *only* challenge the validity of a statute—courts are powerless to order government

agencies to affirmatively undertake proceedings that would reinstate a former agency rule. *See Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 25, 384 Mont. 503, 380 P.3d 771 (issuing a final judgment invalidating a rule revision and reverting to the prior rule w*here plaintiffs specifically asked for both forms of relief*); *Burns v. Musselshell*, 2019 MT 291, ¶ 17 (distinguishing a challenge to an administrative rule from a challenge to a statute). Statutes and rules are distinct legal creatures, and only when plaintiffs challenge the validity of both may courts enter remedial action targeting both.

Here, Plaintiffs only challenged SB 280 and have obtained a preliminary injunction against it. But they seem to believe that this Court's injunction also requires DPPHS to rescind the 2021 Rule and initiate rulemaking to repromulgate and reimpose the 2017 Rule. They are wrong, and no authority supports their position. Logically, the Court's injunction prevents DPHHS from *enforcing* the 2021 Rule—because that Rule implements SB 280's precise terms. But the Court did not and cannot declare the 2021 Rule (and its rescission of the 2017 Rule) invalid. Plaintiffs didn't make the 2021 Rule's validity a question in this case. MCA § 2-4-506; *see also, e.g.*, *Core-Mark Int'l, Inc. v. Mont. Bd. Of Livestock*, 2014 MT 197, ¶ 23, 376 Mont. 25, 329 P.3d 1278 ("[A] party may seek a declaratory judgment that an administrative rule is invalid or inapplicable under [MAPA]"); *Pennaco Energy, Inc. v. Mont. Bd. Of Env't Rev.*, 2008 MT 425, ¶ 23, 347 Mont. 415, 199 P.3d 191 (requiring parties to challenge administrative rules under MAPA); *Lohmeier v. State*, 2008 MT 307, ¶ 17, 346 Mont. 23, 192 P.3d 1137 (same).

But *Clark Fork*'s automatic reversion rule doesn't apply here for two reasons.

First, the Court did not declare the rule invalid—it only preliminarily enjoined the statute that served as the basis for the 2021 Rule. *See Clark Fork*, ¶ 25. And importantly, the Court did not invalidate SB 280—it made abundantly clear it was not determining that Plaintiffs were likely to succeed on the merits of their claims against SB 280. *See* Order ¶¶ 140–44. This is why DPHHS worded the proposed rule at ARM 37.8.311(5) as it did—subsection 5(b) only applies while subsection 5(a) is enjoined.[8] Taking this Court at its word, it hasn't come close to finally invalidating SB 280—much less, the administrative rule Plaintiffs haven't challenged. *See, e.g.*, *Clark Fork*, ¶ 25; *see also In re O'Sullivan*, 117 Mont. 295, 304 (1945).

Second, because Plaintiffs failed to challenge the 2021 Rule or request reinstatement of the 2017 Rule, *Clark Fork*'s automatic reversion doesn't apply here. *See* Dkt. 42.3, at 21. Plaintiffs simply asked the Court to declare SB 280 facially unconstitutional and "illegal" under the MHRA and the Code; and to enjoin Defendants from enforcing SB 280. *See* Dkt. 42.3, at 21. In *Clark Fork*, the validity and enforceability of the challenged rule was squarely at issue. *Clark Fork*, ¶ 41; *see also In re O'Sullivan*, 117 Mont. 295, 304 (1945) (declaring a new statute unconstitutional on the merits and reaffirming the well-settled rule that "an unconstitutional statute enacted to take the place of a prior statute does not affect the prior statute."). Not so here. Plaintiffs' suit challenges only the validity of SB 280, not the regulatory actions that led to the 2021 Rule's rescission of 2017 Rule. They pled the case this way. Now

[8] Department of Health and Human Services Notice of Public Hearing on Proposed Amendment to ARM 37.8.311 (May 31, 2022).

they want something outside the scope of their own claims. This Court shouldn't exculpate Plaintiffs from their own pleading decisions.

B. The Court cannot convert a preliminary injunction to a mandatory injunction.

To obtain an order from this Court directing DPHHS to reinstate the 2017 Rule, Plaintiffs would have needed to request a mandatory injunction to that effect. They didn't. Thus, a mandatory injunction ordering DPHHS to reinstate the 2017 Rule falls outside the scope of the litigation—as Plaintiffs have defined it—and the Court cannot grant the relief Plaintiffs now seek.

There are sharply limited instances when a court can grant a mandatory injunction absent an explicit request from the parties. Montana law provides for supplemental relief in the form of a mandatory injunction when "necessary or proper" to enforce a declaratory judgment. MCA § 27-8-313. No similar mechanism exists for enforcing a preliminary injunction—unsurprising, given that no declaratory judgment exists at the preliminary stage. Nor does Montana law provide for such supplemental relief at the preliminary injunction stage. After all, courts treat mandatory injunctions as an "extraordinary remedial process which is granted, not as a matter of right but in the exercise of a sound judicial discretion." *Morrison v. Work*, 266 U.S. 481, 490 (1925). At this stage, the Court may not sua sponte issue the mandatory injunctive relief Plaintiffs seek, so Plaintiffs would have needed to request it. Their failure to do so forecloses the relief they seek in this motion.

And even if Plaintiffs could seek a mandatory injunction to "compel a restoration of the status quo," they cannot do so here because they only sought to enjoin

Defendants from enforcing SB 280. *See Texas & New Orleans R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 479 (1928) (permitting a mandatory injunction only when a party "proceeds to complete the acts sought to be enjoined"). Here, though, Defendants did not "proceed[] to complete the acts sought to be enjoined" as the parties did in *Texas & New Orleans R. Co.*. *Id.* Quite the opposite: Plaintiffs requested that the Court preliminarily enjoin SB 280, the Court did (although not on all of the bases requested by Plaintiffs), and DPHHS no longer requires individuals to go through the process articulated in SB 280 for changing their birth certificates. The mandatory relief permitted in *Texas & New Orleans R. Co.* can't apply here.

No mechanism exists under Montana law for courts to convert a preliminary injunction to a mandatory injunction. And no circumstances exist in this case that would allow for such equitable relief. Plaintiffs never challenged the 2021 Rule. Plaintiffs never requested mandatory injunctive relief reinstating the 2017 Rule. And mandatory injunctive relief is not appropriate in this case at this stage of the litigation. Accordingly, the Court cannot now—at the behest of Plaintiffs—issue a mandatory injunction ordering DPHHS to reinstate the 2017 Rule.

C. Even if the Court could issue a mandatory injunction, Plaintiffs have not met their burden.

Plaintiffs make clear they want to restore the perceived status quo by requiring DPHHS to reinstate the 2017 Rule, which would constitute mandatory injunctive relief.[9] At the preliminary injunction stage, there's no apparent authority permitting

[9] While mandatory injunctions function similarly to mandamus, they are distinguishable and require Plaintiffs to meet a heightened burden. Mandamus "commands the performance of a particular duty" while mandatory injunctions "require the undoing

Montana courts to convert a preliminary injunction into a mandatory injunction; and that's perhaps why neither Montana statutes nor caselaw articulate a preliminary mandatory injunction standard. In the absence of Montana law on point, this Court looks to the Ninth Circuit, which requires Plaintiffs to meet a heightened standard. *See Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist.*, 2002 MT 18, ¶ 12, 308 Mont. 189, 40 P.3d 400 (finding Ninth Circuit law persuasive in the absence of Montana law).

The Ninth Circuit "particularly disfavor[s]" mandatory injunctions and thus requires a showing of "extreme or very serious damage" where the merits of the case are not "doubtful." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009); *see also Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995) (requiring a showing of "extreme or very serious damage"). In *Marlyn Nutraceuticals*, the Court held that the district court's order went beyond restraining the company "from further acts of possible infringement" and "instead required Marlyn to take the affirmative step of recalling its product." *Id.* at 879. Here, requiring DPHHS to reinstate the 2017 Rule goes behind enjoining the agency from enforcing SB 280. It instead requires the agency to affirmatively reinstate an administrative rule that is not part of this lawsuit. Because this would be "something more than a prohibitory preliminary injunction," Plaintiffs must meet the heightened standard showing "extreme or very serious damage." *Id.*

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of injurious acts and restoration of the status quo." *In re "A" Family*, 184 Mont. 145 (1979); *see also Newman v. Wittmer*, 277 Mont. 1 (1996).

Even other circuits that impose a more relaxed standard than the Ninth Circuit require the plaintiff to make more than just a "prima facie" showing. Order, ¶ 140. The Tenth Circuit, for example, requires the plaintiffs to show that the four preliminary injunction factors[10] "weigh *heavily and compellingly* in favor of granting the [mandatory] injunction." *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1097 (10th Cir. 1991). The Sixth Circuit similarly held that the plaintiffs needed to satisfy the four preliminary injunction factors. *United Food & Com. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998). Because Plaintiffs cannot meet even the Sixth Circuit's standard—the lowest among the circuits—they certainly cannot meet the Ninth Circuit's standard, which Montana courts view as highly persuasive authority

This Court expressly rejected that Montana's preliminary injunction standard requires a showing of likelihood of success on the merits. Order, ¶ 144 (quoting *Planned Parenthood of Mont. v. State*, No. DV 21-999, Order Granting Preliminary Injunction, at 15–16). Whether the Court is correct or not about that, it clearly eschewed any evaluation of whether Plaintiffs were likely to succeed on the merits. *Id.* It couldn't, therefore, conclude that Plaintiffs will suffer "extreme or very serious damage." *See Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879. The Court's preliminary

[10] To meet this standard, an applicant for a preliminary injunction must show (1) likelihood of success on the merits; (2) likelihood that the applicant will suffer irreparable harm; (3) the balance of the equities tips in the applicant's favor; and (4) the preliminary injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

injunction order, again, provides the best argument against the relief Plaintiffs now seek.

II. Plaintiffs cannot challenge the temporary emergency rule in this case.

Finally, Plaintiffs cannot pursue their new attack on DPHHS's temporary emergency rule in this case. As discussed above, they never challenged or sought relief from the 2021 Rule. They certainly haven't pleaded a claim against DPHHS's new temporary emergency standard, which arises from DPHHS's independent rule-making authority—not SB 280. Plaintiffs admit as much, acknowledging that they will need to again amend their Amended Complaint to adequately challenge the temporary emergency rule under the Montana Administrative Procedure Act. Dkt. 71.1, at 11 n.4. But Plaintiffs cannot do so as a matter of right. Mont. R. Civ. P. 15. And they haven't done so yet.

The Court must look to the challenge Plaintiffs brought, the relief they sought, and the text of its order. *See Fuller*, 916 F.2d at 563; *Donnes*, 206 Mont. at 537, 672 P.2d at 620. Plaintiffs do not get to circumnavigate the district court's jurisdiction by now raising claims not properly before it. And it's not the Court's job to clean up Plaintiffs' procedural mess just because they didn't bring the right claims or ask for the right relief when they filed their lawsuit. Doing so would constitute an improper advisory opinion and exceed the power of the district court. *See Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶¶ 12–13, 355 Mont. 142, 226 P.3d 567 (refusing to render an advisory opinion where no actual case or controversy existed); *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948) (noting that the court cannot consider issues not raised). It is Plaintiffs' lawsuit—they brought the

claims, they asked for the relief, and their Amended Complaint establishing the scope of the litigation binds the parties and this Court. Plaintiffs can bring a new lawsuit challenging the new rules. They cannot continue to compound new claims onto this lawsuit as they discover them.[11]

CONCLUSION

A plaintiff possesses great power in a lawsuit. They get the first word—they get to bring the claims they want, ask for the relief they need, and introduce the narrative of their grievances to the public, the parties, and the court for the very first time. But once a plaintiff sets the terms of their complaint, those terms govern the scope of the litigation absent any amendments. Plaintiffs here brought a challenge to SB 280 and SB 280 only. They could have challenged the 2021 Rule, but they didn't. The temporary emergency rule with which they now take issue wasn't promulgated pursuant to SB 280 and accords with the clear terms of the Court's preliminary injunction. Absent Plaintiffs bringing a direct, separate challenge to this rule, the Court lacks jurisdiction to issue any order regarding the temporary emergency rule. It is simply not at issue in this case. For all these reasons, the Court should deny Plaintiffs' Motion to Clarify.

[11] Because the preliminary injunction was based on vagueness and did not order the reinstatement or reissuance of the 2017 Rule, the emergency rule and the current rulemaking do not violate the Court's Order and, therefore, do not provide the basis for citing Defendants in contempt.

DATED this 21st day of June, 2022.

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

AMELIA MARQUEZ, et al., PLAINTIFFS, v. STATE OF MONTANA et al., DEFENDANTS.	Cause No. DV-21-00873 Hon. Michael G. Moses **DECLARATION OF KATHLEEN SMITHGALL IN SUPPORT OF THE STATE'S RESPONSE TO PLAINTIFFS' MOTION TO CLARIFY**

I, Kathleen L. Smithgall, submit the following Declaration in support of the State's Response to Plaintiffs' Motion to Clarify. I am an Assistant Solicitor General for the State of Montana and counsel to Defendants in the above-captioned case. This declaration is based on my personal knowledge and in response to the Declaration of Akilah Lane, and I can competently testify to the matters set forth in this Declaration.

1. On December 22, 2021, a hearing was held before this Court on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss. As I recall, the Court asked Plaintiffs to describe their understanding of the status quo during Plaintiffs' rebuttal in the argument on their motion for a preliminary injunction, and Defendants had no opportunity to object. But whether or not Defendants objected to Plaintiffs' characterization of the status quo in a hearing has no legal significance on the question of law now presented—whether the Court's preliminary injunction here caused an automatic reversion to the processes set forth in ARM 37.8.311 in 2017 ("2017 Rule").

2. On April 21, 2022, this Court granted a Preliminary Injunction in this case ("Order").

3. According to Plaintiffs' counsel, neither Plaintiff in this case attempted to avail themselves of the birth certificate amendment processes in effect under the 2017 Rule, the 2021 Rule, or any time after the Court's preliminary injunction order.

4. On May 5, 2022, counsel for the Parties met via phone. Defendants' counsel stated on the call that they were working with DPHHS to understand DPHHS's obligations under the Court's Order.

5. This was reiterated in Defendants' May 5 email to Plaintiffs' counsel, where Defendants' counsel again stated that they were working with DPHHS on its obligations under the Order.

6. On May 23, 2022, counsel for the Parties met and conferred via video conference. Plaintiffs' counsel asserted that DPHHS was not complying with the

Court's Order. Defendants' counsel asked Plaintiffs to explain how DPHHS was not complying with the Order. Plaintiffs' counsel stated they heard from non-parties—not their clients—that DPHHS was not processing birth certificate amendment applications at a pace that met their satisfaction. Plaintiffs' counsel also admitted that neither of the Plaintiff had submitted birth certificate amendment applications, either before or after the Court's preliminary injunction order. Defendants' counsel informed Plaintiffs' counsel that DPHHS was preparing to imminently issue an temporary emergency rule to grapple with the effects of the Court's preliminary injunction order. Defendants' counsel offered to send a copy of that temporary emergency rule to Plaintiffs' counsel as soon as Defendants' counsel obtained one. Plaintiffs' counsel did not inquire about the substance of the temporary emergency rule.

7. Defendants' counsel emailed Plaintiffs' counsel a copy of the temporary emergency rule as soon as Defendants' counsel received a copy. The next time Defendants' counsel heard from Plaintiffs' counsel was on June 6, 2022, when Plaintiffs' counsel asked for Defendants' position on Plaintiffs' "Motion seeking clarification of the Preliminary Injunction and to declare invalid the Temporary Emergency Rule." Defendants' counsel responded that Defendants oppose this motion.

8. At no time after the Court's preliminary injunction order have Defendants' counsel ever conveyed or believed that DPHHS was not complying with the Court's order.

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

DATED this 21st day of June, 2022.

/s/ *Kathleen L. Smithgall*
Kathleen L. Smithgall

CERTIFICATE OF SERVICE

I, Kathleen Lynn Smithgall, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Answer Brief to Motion to the following on 06-21-2022:

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Dated: 06-21-2022