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IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual;	)	
Plaintiffs,	)	**Case No. DV 21–00873**
v.	)	**Hon. Michael G. Moses**
STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLIE BRERERTON, in his official capacity as the Director of the Montana Department of Public Health and Human Services,	)	**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO ENFORCE THE PRELIMINARY INJUNCTION ORDER BY ORDERING DEFENDANTS TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE ORDER**
Defendants.	)	

I. INTRODUCTION

Plaintiffs' Motion to Enforce the Preliminary Injunction Order[1] (the "Motion to Enforce") establishes that, based on the Preliminary Injunction Order, the Clarification Order, and the Writ Order, Defendants are required to revert to the 2017 Rule until this case is resolved and have been required to do so since each of those orders was entered. Dkt. 103, at 6–7. Defendants have confirmed that they began following and implementing the 2022 Rule, not the 2017 Rule, and then "paused" that implementation, thereby *still* not following the 2017 Rule. Resp., Dkt. 105, at 6–7. This Court has the authority to hold Defendants in contempt of court—and should, in fact, do so—based on Defendants' ongoing noncompliance with the Preliminary Injunction Order.

Defendants' response to the Motion to Enforce (the "Response") has no merit. *First*, the Response is based on multiple misstatements about the procedural history of the case. For example, contrary to Defendants' assertions, Plaintiffs *did* challenge the 2021 Rule in their original complaint. In addition, Plaintiffs *did* seek reversion to the 2017 Rule as a remedy for Defendants' misconduct. Moreover, in their proposed Second Amended Complaint, Plaintiffs *do* seek to challenge the validity of the 2022 Rule in accordance with MAPA.

Second, the Writ Order does not permit Defendants to enforce the 2022 Rule. On the contrary, the Writ Order simply states that Defendants were "entitled to relief insofar as the Clarification Order purport[ed] to enjoin DPHHS ***from engaging in rulemaking*** . . . ." *See* Case No. OP 22–0552 at 7 (emphasis added). The Writ Order "GRANTED IN PART" Defendants' petition for writ of supervisory control (the "Petition for Writ") to the extent the Clarification

[1] Unless otherwise specified or redefined for clarity, capitalized terms have the same meaning as in Plaintiffs' motion.

Order enjoined the 2022 Rule. *See id*. The Writ Order did not, as Defendants falsely suggest, hold that Defendants "can *enforce* the 2022 Rule." Dkt. 105, at 4 (emphasis added).

Third, Defendants' conduct warrants finding them in contempt of court. Defendants are not complying with the Preliminary Injunction Order, the Clarification Order, or the Writ Order, because they are not following the 2017 Rule. Defendants' argument that they allegedly have been proceeding "in good faith" does not alter this analysis. *See* Dkt. 105M at 6. "Good faith" is not a defense to civil contempt. But even if it were, Defendants have not acted in good faith by adhering to their unilateral, incorrect interpretation of the Writ Order to begin applying the 2022 Rule and, more recently, to completely "pause" the process for amending the sex markers on transgender individuals' birth certificates. This "pause" is tantamount to enforcing the de facto ban on sex-marker amendments for transgender people created by the 2022 Rule. Defendants are obligated to follow the 2017 Rule, not to follow the 2022 Rule or "pause" the amendment process, both of which are inconsistent with the 2017 Rule. By not following the 2017 Rule, Defendants continue to violate the Preliminary Injunction Order.

Fourth, Plaintiffs are entitled to recover the reasonable attorney's fees and costs arising out of all the work Plaintiffs' counsel performed in connection with (1) Plaintiffs' Motion to Clarify the Preliminary Injunction Order (the "Motion to Clarify"), (2) Plaintiffs' response to Defendants' Petition for Writ, and (3) the Motion to Enforce. Plaintiffs' fee request addresses Defendants' ongoing refusal to enforce the 2017 Rule, which dates back to the time period in which the Motion to Clarify was filed and—regrettably—continues to this day. The scope of the fee request is proper.

For these reasons, and as discussed in further detail below, the Court should hold Defendants in contempt of court and impose sanctions to secure Defendants' compliance with the Preliminary Injunction Order.

II. ARGUMENT

A. Defendants' Response Is Based on Multiple Misstatements About the Procedural History of the Case.

As an initial matter, Defendants' Response to the Motion to Enforce is based on multiple misstatements about the procedural history of the case. For example:

- ***Challenge to the 2021 Rule*:** Defendants erroneously claim that Plaintiffs did not challenge the 2021 Rule in their original complaint. Dkt. 105, at 1. As this Court has already acknowledged, Plaintiffs *did* challenge the 2021 Rule. The Clarification Order expressly states that "[b]y enjoining Defendants from enforcing any aspect of SB 280 during the pendency of this action ***according to the prayer of the Plaintiffs' motion and complaint*** the Court clearly and unmistakably required that Defendants return to that which was in effect prior to the enactment of SB 280"—namely, "the DPHHS 2017 regulations." *See* Dkt. 77, at ¶ 20 (emphasis added).

- ***Reversion to the 2017 Rule*:** Defendants also erroneously assert that Plaintiffs did not seek to revert to the 2017 Rule as a remedy for Defendants' misconduct. Dkt. 105, at 2. The Court has ruled that the preliminary injunction Plaintiffs requested in their pleadings encompassed this exact relief. According to the Court, by seeking to preliminarily enjoin SB 280, Plaintiffs sought to preserve the status quo. *See* Dkt. 77, at ¶ ¶ 18-20. "[A]s stated in SB 280 itself," the status quo was "the December 2017 DPHHS regulations." *Id*. at ¶ 18.

- ***Notice to Defendants*:** Defendants falsely suggest that they only became aware of Plaintiffs' disagreement with Defendants' reading of the Writ Order on January 19, 2023, when Plaintiffs' counsel emailed Defendants' counsel about the status of the procedure for processing amendments to birth-certificate sex markers. Dkt. 105, Resp., at 6. In fact, on January 13, 2023, when Plaintiffs filed their statement addressing Defendants' Notice of Supplemental Authority regarding the Writ Order, Plaintiffs expressly stated that "[a]ny attempt by Defendants to enforce *any* policy other than that created by the 2017 Rule while the Preliminary Injunction remains in effect . . . would violate that Preliminary Injunction and the law." Dkt. 100, at 2 (emphasis in original). Defendants' have been on notice of Plaintiffs' position since at least that date.[2]

[2] Plaintiffs' position also was set forth in a press release issued by the ACLU of Montana on January 10, 2023, which was reported on in the press. *See* Holly K. *Michaels, Montana Supreme Court Issues Order in Birth Certificate Lawsuit*, BOZEMAN DAILY CHRONICLE, Jan. 11, 2023, *available at* https://www.bozemandailychronicle.com/news/politics/montana-supreme-court-issues-order-in-birth-certificate-lawsuit/article_6944576b-ae2a-570e-9277-0b23727588c1.html (quoting ACLU press release stating that the

- ***Challenge to the 2022 Rule*:** In addition, Defendants falsely state that Plaintiffs have not sought to challenge the 2022 Rule in accordance with MAPA. Dkt. 105, at 7-8. Under MAPA, a party can challenge a rule by filing a declaratory-judgment action. *See* § 2–4–506, MCA. In Plaintiffs' proposed Second Amended Complaint, they followed section 2–4–506 by seeking a declaratory judgment that the 2022 Rule is unconstitutional. Dkt. 84, at ¶¶ 103, 112, 142. Although the proposed Second Amended Complaint does not expressly cite section 2–4–506, Plaintiffs were not required to cite the statute, either by the statute itself or by the Montana Rules of Civil Procedure. *See* § 2–4–506, MCA; M. R. Civ. P. 8 (a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought"). In any event, the reply in support of Plaintiffs' Motion for Leave to File the Second Amended Complaint does cite MAPA. *See* Dkt. 95, at 7–8. And, as set forth in Plaintiffs' statement addressing Defendants' Notice of Supplemental Authority, Plaintiffs are prepared to include a specific citation to section 2–4–506 in their proposed Second Amended Complaint if this Court deems the citation necessary in light of the Writ Order. *See* Dkt. 100, at 3.

- ***Effect of the Preliminary Injunction Order*:** Defendants also erroneously claim that the Preliminary Injunction Order left a "void" that required Defendants to engage in rulemaking. Dkt. 105, at 2. Contrary to this assertion, the Preliminary Injunction Order told Defendants exactly what to do: apply the 2017 Rule. *See* Dkt. 61, at ¶¶ 61–62, 180–81, 183(5)(a); *see also* Dkt. 77, at ¶¶ 18–20. There was no need for new rulemaking, and even if there were, the only enforceable rule would have been one that followed the 2017 Rule, not one that sought to contravene it.

- ***Enforcement of the 2022 Rule*:** Finally, Defendants incorrectly state that the Montana Supreme Court held that Defendants could enforce the 2022 Rule. Dkt. 105, at 4. As discussed in further detail below, it did not. The Supreme Court simply concluded that the rulemaking process that led to the 2022 Rule could not itself be enjoined, given that Plaintiffs had not yet challenged the 2022 Rule at the time Defendants' Petition for Writ was filed. *See* Case No. OP 22–0552 at 7.

These misstatements wholly undermine the arguments set forth in Defendants' Response.

B. The Writ Order Does Not Permit Defendants to Enforce the 2022 Rule.

Defendants' argument that the Writ Order permits them to enforce the 2022 Rule has no merit. Dkt. 105, at 3–6. As previously noted, the Writ Order simply states that Defendants were "entitled to relief ***insofar*** as the Clarification Order ***purport[ed]*** to enjoin DPHHS ***from***

Supreme Court's order "confirms that the preliminary injunction granted by the Yellowstone County District Court on April 21, 2022, which remains in effect, restored the 2017 rule that was in place prior to the state's passage of (the 2021 law)."

engaging in rulemaking" because, at the time Defendants' Petition for Writ was filed, "Plaintiffs ha[d] not properly challenged the 2022 Rule under MAPA[,] and its implementation . . . ha[d] not been brought before the District Court." *See* Case No. OP 22–0552 at 7 (emphasis added). As a result, the Writ Order partially granted Defendants' Petition for Writ to the extent the Clarification Order enjoined the 2022 Rule. *See id*.

The Writ Order does not, as Defendants falsely state, hold that Defendants "can enforce the 2022 Rule." Dkt. 105, Resp., at 4. Nor does the Writ Order say anything about Plaintiffs' ability to "indirectly" or "effectively" enjoin the 2022 Rule. *See id*. at 2, 5, 8.[3] The Writ Order simply concludes that, because Plaintiffs had not yet challenged the 2022 Rule at the time the Petition for Writ was filed, the rulemaking process that led to the 2022 Rule could not itself be enjoined. *See* Case No. OP 22–0552 at 7.

Plaintiffs have never argued that Defendants cannot engage in rulemaking. In addition, this Court has never enjoined Defendants from engaging in rulemaking. Instead, in the Clarification Order, this Court found that, although it "d[id] not have jurisdiction over the new regulations issued by DPHHS, . . . those rules were issued in violation of the [Preliminary Injunction] Order requiring Defendants . . . to . . . return to the 2017 DPHHS regulations." *See* Dkt. 77, at ¶ 22.

Consistent with these positions, Plaintiffs' Motion to Enforce does not argue that Defendants cannot engage in rulemaking. Defendants remain free to adopt and enforce the 2017 Rule pursuant to new rulemaking. There also is no injunction against *adopting* the 2022 Rule. The Motion to Enforce merely argues that Defendants must comply with the Preliminary

[3] What was enjoined was taking action inconsistent with the status quo that existed before the enactment of SB 280. It is too late to appeal that ruling, as the Supreme Court noted, and complaining that this "indirectly" and "effectively" enjoins the 2022 Rule does not change that result.

Injunction Order, which requires Defendants to revert to the 2017 Rule and not *enforce* some contrary rule or decide to "pause" reverting to the 2017 Rule. This is precisely what the Writ Order requires. *See* Case No. OP 22–0552 at 6 (finding that, "[i]n enjoining SB 280, and thereby maintaining the status quo . . ., the District Court unquestionably reinstated the 2017 Rule for so long as its preliminary injunction remains in effect"). Permitting Defendants to enforce the 2022 Rule, which is totally inconsistent with the 2017 Rule, would violate this aspect of the Writ Order.

In other words, although the Writ Order allows Defendants to enact regulations, *see id*. at 7, Defendants cannot take any action, even in accordance with new regulations, that violates the Preliminary Injunction Order, *see id*. at 6, 7. Instead, under the Preliminary Injunction Order, Defendants must enforce the 2017 Rule, not the 2022 Rule, while this case is pending.

The cases cited by Defendants do not suggest otherwise. Dkt. 105, at 5. Those cases stand for the simple proposition that an agency is bound by its own rules. *See id*. They do not permit an agency to enforce those rules when the agency is subject to a preliminary injunction that prohibits it from doing so. Defendants' argument that not enforcing the 2022 Rule forces them to violate MAPA is circular and misleading. *Id*. at 7. It would be absurd to allow agencies to circumvent valid preliminary-injunction orders by implementing and enforcing rules that contradict those orders. It likewise would be absurd to allow agencies to circumvent those orders by "pausing" processes the orders require them to follow.

Here, the fact that Defendants promulgated the 2022 Rule after this litigation was filed, and after the Preliminary Injunction Order was entered, does not mean that they may enforce the 2022 Rule in violation of the Preliminary Injunction Order, much less that they "***must*** enforce the 2022 Rule." Dkt. 105, at 7 (emphasis added). If Defendants' position were correct, then any

preliminary injunction against a state agency could be undermined by subsequent rulemaking. This outcome, which Defendants impermissibly sought to achieve by adopting the 2022 Rule instead of returning to the 2017 Rule, is inconsistent with Montana law. *See, e.g., City of Billings v. Cnty. Water Dist*., 281 Mont. 219, 226, 935 P.2d 246, 250 (1997) ("The purpose of a preliminary injunction is to prevent further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.") (internal quotation marks omitted).

C. Defendants' Conduct Warrants Finding Them in Contempt of Court.

Contrary to Defendants' assertions, their conduct warrants finding them in contempt of court. Dkt. 105, at 6–8.

As explained above, *see supra* Part II(B), Defendants are not complying with the Preliminary Injunction Order, the Clarification Order, or the Writ Order. The Preliminary Injunction Order requires them to enforce the 2017 Rule while this case is pending. *See* Dkt. 61, at ¶¶ 61–62, 180–81, at 35 ¶ 5(a); *see also* Dkt. 77, at ¶¶ 18–20. The Writ Order does the same, and although the Writ Order does not *enjoin* the 2022 Rule, it also does not permit Defendants to *enforce* it. *See* Case No. OP 22–0552, at 6–7.

Defendants' attempt to argue that they have been proceeding "in good faith" does not alter this analysis. *See* Dkt. 105, at 6. *First*, regardless of whether Defendants have acted in good faith since the Preliminary Injunction Order was entered, "good faith" is not a defense to civil contempt. *See, e.g., Lasar v. Ford Motor Co.*, 239 F. Supp. 2d 1022, 1027 (D. Mont. 2003) ("[C]ivil contempt does not require a willful violation[,] and good faith is not a defense."), *aff'd in part, and rev'd in part, on other grounds, Lasar v. Ford Motor Co.*, 399 F.3d 1101 (9th Cir. 2005); *United States v. Montgomery*, 155 F. Supp. 633, 636 (D. Mont. 1957) ("[N]on-

compliance with a court's decree is not excused by testimony that the defendant acted in good faith . . . .").

On the contrary, under Montana law, "disobedience of any lawful judgment, order, or process of the court" is contempt to the "authority of the court." *See* § 3–1–501(1)(e), MCA; *see also Animal Found. of Great Falls v. Mont. Eighth Judicial Dist. Court*, 2011 MT 289, ¶ 19, 362 Mont. 485, ¶ 19, 265 P.3d 659, ¶ 19. (stating that "[d]isobedience of . . . an order of the court may constitute contempt of court"). Here, Defendants have disobeyed the Preliminary Injunction Order by refusing to enforce the 2017 Rule while this case is pending. As a result, they are in contempt of court.

Second, even assuming that Defendants could purge themselves of their contempt by demonstrating that they have acted in good faith, they have not acted in good faith by adhering to their unilateral, incorrect interpretation of the Writ Order. As Defendants admit, they have "paused processing applications to amend the sex designation on birth certificates altogether." Dkt. 105, at 6. This conduct, in and of itself, violates the Preliminary Injunction Order. Defendants are obligated to enforce the 2017 Rule, not "pause" the amendment process. By doing the latter instead of the former, they are violating the Preliminary Injunction Order.

Third, Defendants have not presented any actual evidence of good faith. The affidavit of Kathleen Smithgall, one of Defendants' attorneys, merely describes the conduct in which Defendants engaged after Plaintiffs' counsel notified Defendants' counsel that Defendants were not complying with the Preliminary Injunction Order. Dkt. 106, Smithgall Aff. As set forth in Ms. Smithgall's affidavit, by January 24, 2023, Defendants admittedly were "processing birth certificate amendments under [the] 2022 Rule," not under the 2017 Rule. *Id*. at ¶ 2.

The affidavit of Karin Ferlicka, the state registrar for DPHHS's Office of Vital Records ("OVR"), is likewise unavailing. Ms. Ferlicka's affidavit simply describes what DPHHS instructed OVR to do with respect to sex-marker amendments and explains how OVR followed those instructions. Dkt. 107, Ferlicka Aff. As set forth in Ms. Ferlicka's affidavit, on January 11, 2023, DPHHS "directed OVR to process applications in accordance with the [2022 Rule]," and on February 2, 2023, DPHHS "directed OVR to temporarily pause processing of applications for amendments to sex designation." *Id*. at ¶ 2.

These affidavits confirm that, after the Writ Order was issued, Defendants unilaterally chose to enforce the 2022 Rule, and then chose to "pause" the application process. The affidavits do not establish that Defendants proceeded in good faith.

It bears mentioning that Plaintiffs' request for a contempt finding applies equally to all the Defendants, including Governor Gianforte. *See* Dkt. 105, at 2 n.1. While Plaintiffs are not suggesting that Governor Gianforte should be jailed to enforce a contempt citation, he is one of the Defendants in this case, the Preliminary Injunction Order applies to all the Defendants, and the Preliminary Injunction Order is being violated. Despite submitting two affidavits in response to the Motion to Enforce, Defendants have not provided any evidence establishing that Governor Gianforte was not responsible for Defendants' failure to comply with the Preliminary Injunction Order. Nothing in the record demonstrates that Governor Gianforte, who is the head of Montana's executive branch and is charged with "see[ing] that the laws are faithfully executed," took any steps to ensure that the 2017 Rule would be enforced after the Writ Order was issued. *See* Mont. Const., art. VI, § 4(1). As a result, Governor Gianforte is also in contempt, and this Court is legally permitted to sanction him as well as the other Defendants.

D. Plaintiffs Are Entitled to Recover the Reasonable Attorney's Fees and Costs Requested in the Motion to Enforce.

Finally, contrary to Defendants' assertions, Plaintiffs are entitled to recover the reasonable attorney's fees and costs arising out of all the work Plaintiffs' counsel performed in connection with (1) the Motion to Clarify, (2) Plaintiffs' response to Defendants' Petition for Writ, and (3) the Motion to Enforce. Dkt. 105, at 7–8.

Defendants' do not dispute that attorney's fees and costs can be awarded in connection with a contempt proceeding. *See id*. Here, Defendants' ongoing contumacious conduct began during the time period in which the Motion to Clarify was filed. That conduct necessitated filing the Motion to Clarify, opposing the Petition for Writ, and, most recently, filing the Motion to Enforce.

With respect to the work performed in opposing the Petition for Writ, it is immaterial that the Montana Supreme Court found that the 2022 Rule could not be enjoined based on the absence of a pending challenge by Plaintiffs to the 2022 Rule. *See* Dkt. 105, at 7-8. Although the Montana Supreme Court declined to enjoin the 2022 Rule, the Court also reaffirmed this Court's ruling that Defendants were required to enforce the 2017 Rule. *See* Case No. OP 22–0552, at 6–7.

In any event, Defendants cannot reasonably dispute that Plaintiffs are entitled to attorney's fees and costs incurred in briefing the Motion to Enforce, which seeks a contempt finding based on Defendants' misconduct. *See* Dkt. 104, at 7–8. Therefore, at a minimum, the Court should award Plaintiffs the attorney's fees and costs associated with the Motion to Enforce and this reply.

III. CONCLUSION

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

(1) ordering Defendants to show cause why they should not be held in contempt of court for failing to maintain the status quo consistent with this Court's Preliminary Injunction Oder;

(2) holding Defendants in contempt of court;

(3) requiring Defendants, within 10 days of the entry of the order granting this motion, to provide a full report to the Court, and to Plaintiffs' counsel, describing, in detail, the actions taken to conform Defendants' conduct to the 2017 Rule for amending the sex markers on Montana birth certificates;

(4) requiring DPHHS, within 10 days of the entry of the order granting this motion, to circulate a copy of the Court's order to each agent, officer, and employee of DPHHS with any responsibility for processing requests to amend birth certificates;

(5) awarding Plaintiffs the reasonable attorney's fees and costs arising out of all work performed in connection with the Motion to Clarify, Plaintiffs' response to Defendants' Petition for Writ, and the Motion to Enforce; and

(6) granting any other relief in Plaintiffs' favor that the Court deems just.

Dated: February 16, 2023

Respectfully submitted,

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

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