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IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual; **Plaintiffs,** **v.** **STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and ADAM MEIER, in his official capacity as the Director of the Montana Department of Public Health and Human Services,** **Defendants.**	**Case No. DV 21-00873** **Hon. Michael G. Moses** **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION SEEKING CLARIFICATION OF THE PRELIMINARY INJUNCTION AND TO DECLARE INVALID THE TEMPORARY EMERGENCY RULE PUBLISHED BY DEFENDANT THE MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES IN RESPONSE TO THIS COURT'S APRIL 21, 2022 ORDER**

INTRODUCTION

On June 7, 2022, Plaintiffs filed a motion and accompanying brief requesting that the Court clarify the terms of its April 21, 2022 Findings of Fact, Conclusion of Law and Order (the "Order") to eliminate any professed confusion on the part of Defendants. Additionally, the motion and brief challenged Defendants' attempted end-run around the Order through the adoption and implementation of a Temporary Rule by Defendant Department of Public Health and Human Services ("DPHHS"). Specifically, Plaintiffs asked the Court to confirm that its Order enjoining Defendants from enforcing "any aspect of SB 280" included the 2021 Rule adopted pursuant to SB 280 as well as that Rule's repeal of the 2017 regulations, and clarify for Defendants that, pursuant to the Order, Defendants are required to preserve the status quo by reverting to the 2017 regulations.

In response, Defendants argue that (a) the 2017 regulations were rescinded by the 2021 Rule implementing SB 280 and are therefore of no effect; (b) Plaintiffs never directly challenged the repeal of the 2017 regulations, precluding the Court from reinstating those regulations; (c) requiring DPHHS to process applications in accordance with the 2017 regulations is, in effect, a mandatory injunction unsupported by the record; and (d) the Temporary Rule was a proper exercise of rulemaking that cannot be challenge by Plaintiffs or set aside by this Court. These arguments misconstrue the Court's Order, misstate the law, and ignore the nature of these proceedings.

Once this Court enjoined the enforcement of any aspect of SB 280, all rules, procedures, or other enforcement or enabling mechanisms adopted pursuant to SB 280 were likewise enjoined. It was beyond DPHHS' rulemaking authority to issue the Temporary Rule because there was a Court order in place dictating the regulatory scheme to be followed by Defendants. Additionally,

the Temporary Rule was issued in clear violation of the Montana Administrative Procedure Act ("MAPA"). If Defendants did not agree with this Court's preliminary injunction, the appropriate response was to seek a stay and appeal the order, which they have not done. Defendants cannot continue to circumvent the preliminary injunction order by unlawfully creating alternative policies or rules that cause – and even exacerbate – the exact harm that the preliminary injunction was meant to prevent.

ARGUMENT

Defendants concede that "[t]he 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 . . .'" Def. Br. 2 (citing Order at 35). Defendants further admit that a straightforward understanding of "any aspect" of SB 280 necessarily includes any attendant rulemaking undertaken to implement the statute, stating that "[l]ogically the Court's injunction prevents DPHHS from *enforcing* the 2021 Rule – because that rule implements SB 280's precise term." Def. Br. 9 (emphasis in original).

Defendants attempt to reframe and redirect the Court's attention to issues that are not at play in this case or at issue in Plaintiffs' motion to clarify. Specifically, Defendants fail to analyze or directly address reversion to the status quo, a central component to any preliminary injunction. As this Court explained, "[t]he ***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." Order ¶ 138 (emphasis added) (citing *City of Billings v. Cty. Water Dist.*, 281 Mont. 219, 226, 935 P. 2d 246, 250 (1997) (internal quotation marks omitted). This well-established purpose of a preliminary injunction is completely undermined when Defendants depart even further from the status quo by implementing a rule of law that did not exist prior to

the pending controversy, and that, in this case, is a more restrictive policy than the one the Court enjoined.

As this Court stated in its Order, and as Plaintiffs repeatedly referenced in their motion, the "[s]tatus quo means 'the last actual, peaceable, noncontested condition which preceded the pending controversy." Order ¶¶ 139, 180 (internal quotation marks and citations omitted); *see also* Pl. Br. 9-11. Here, as was made clear in the Order and at the preliminary injunction hearing, the noncontested condition preceding the current controversy is the status that existed under the 2017 regulations. Order ¶ 181; *see also* Pl. Br. 9-11.

Plaintiffs' motion to clarify is really quite simple: first, it seeks clarification from the Court that the Order intended a return to the status quo existing prior to the enactment of SB 280 and its implementing regulations. Order ¶ 181. In this case, that entails a return to the relevant 2017 regulations for processing birth certificate amendment applications. Second, the motion seeks a declaration from the Court that the Temporary Rule initiated by DPHHS in response to the preliminary injunction violates the instruction to return to the status quo and also violates the statutory requirements of § 2-4-303, MCA. Plaintiffs are not asking for any new or different form of relief. Plaintiffs simply seek clarification to quell Defendants' asserted confusion as to their obligations and responsibilities pursuant to the Order.

1. Preserving the status quo necessarily requires a return to the 2017 regulations.

For over a century,[1] Montana law clearly has provided that when a preliminary injunction is granted, the subject matter of the controversy returns to the status quo. As previously stated, the

[1] *See Postal Telegraph-Cable Co. v. Nolan* (1916), 53 Mont. 129 ("The purpose of an injunction pendente lite is to maintain the status quo until the relative rights of the parties can be determined by a trial on the merits.").

status quo is defined by law as "the last actual, peaceable, noncontested condition preceding the controversy." Order ¶¶ 139, 180 (quoting *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839 and citing *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 350 440 P.3d 4); *see also* Pl. Br. 9-11. As this Court explained in its Order, and as was made clear at the preliminary injunction hearing, the last condition preceding the controversy in this case was the 2017 regulations in place immediately prior to the effective date of SB 280 and its implementing regulations, including the 2021 Rule. Order ¶¶ 61, 181; s*ee also* Pl. Br. 9-11.

Defendants make no effort to contend with this status quo analysis despite its controlling presence in the Court's Order, at the preliminary injunction hearing, and in Montana law. Instead, Defendants argue that since Plaintiffs never separately challenged the 2021 Rule and regulations (which included the rescission of the 2017 regulations as part of the adoption of the 2021 Rule), the Court is powerless to order Defendants' reversion to the 2017 regulations. Def. Br. 8-9. The Court should reject this unconvincing argument for three reasons.

First, contrary to Defendants' contentions, the reinstatement of the 2017 regulations is not a function of who pleaded which claims for relief or whether Plaintiffs specifically asked for the reinstatement of the prior rules as relief. The reinstatement is a consequence of the preliminary injunction itself. It is an independent structural aspect of the law, which is what Plaintiffs are asking the Court to clarify for Defendants. *See, e.g., Trs. of the Wash.–Idaho–Mont. Carpenters–Emp'rs Retirement Trust Fund v. Galleria P'ship*, 239 Mont. 250, 780 P.2d 608, 617 (1989) ("Courts sitting in equity are empowered to determine all questions involved in the case and to do complete justice; this includes the power to fashion an equitable result. An equity court whose jurisdiction has been invoked for an equitable purpose, will proceed to determine any other equities existing between the parties connected with the main subject of the suit, and grant all relief necessary to

the entire adjustment of the subject.") (internal citation omitted). The reinstatement of the 2017 regulations is what the law governing preliminary injunctions requires.

Second, Defendants misconstrue the record. Defendants' assertion that Plaintiffs never raised the issue of the reinstatement of the 2017 regulations overlooks the exchange between the Court and Plaintiffs' counsel that specifically addressed the issue during the preliminary injunction hearing. On questioning by the Court, Plaintiffs' counsel argued that the 2017 regulations constituted the status quo to which the parties would return should a preliminary injunction issue. 12/22/21 Hearing Transcript 49:16-50:5. The Court agreed. Defendants counsel sat silently without objection. It is hard to imagine more dispositive evidence of the fact that the Court and Plaintiffs addressed the question of the reinstatement of the 2017 regulations prior to the issuance of the Court's Order.

Third, Defendants' contention disregards the allegations of the Amended Complaint that SB 280 was an intentional effort to dismantle the 2017 regulations. Am. Compl. ¶ 39. ("The Act was created with the specific intent to reverse regulations previously promulgated by DPHHS in December 2017 that had functioned well for years without incident.") The preservation of the 2017 regulations, which constitutes the status quo, has been at the center of Plaintiffs' challenge to SB 280 since the filing of the initial and amended Complaints, both of which raised the impropriety of the 2021 regulation and the revocation of the 2017 regulations. Compl. ¶¶ 38, 61; Am. Compl. ¶¶ 44, 67. Both requested that the Court enjoin Defendants from enforcing the Act directly or indirectly, which necessarily included SB 280's provisions for revoking the 2017 regulations as set forth in the Act's fourth "Whereas" clause and Section 2 of the Act.[2] Defendants' conclusion

[2] SB 280's fourth "Whereas" clause stated "WHEREAS, the Legislature intends to repeal the rulemaking adopted in MAR Notice No. 37-807" (that is, ARM 37.8.102 and 37.8.31, the 2017 regulations), and its Section 2 required DPHHS "to amend ARM 37.8.102 and 37.8.311 in

that the Motion "requires the agency to affirmatively reinstate an administrative rule that is not a part of this lawsuit," Def. Br. 13, is demonstrably false.

Under these circumstances, it is entirely appropriate for the Court to clarify that the Court's Order contemplated preserving the status quo, which is a reversion to the 2017 regulations.

2. The injunction against enforcement of SB 280 prevents Defendants from enforcing any of its provisions, making repeal of the 2017 regulations ineffective.

As pled in Paragraph 39 of the Amended Complaint, SB 280 was created in part to repeal the 2017 regulations. The language of SB 280 declares that it was the intent of the Montana legislature to repeal the 2017 regulations (MAR Notice No. 37-0807) and replace them with the 2021 regulation, which exactly mirrored the language of SB 280.[3] Contrary, however, to Defendants' argument, the Order – which enjoins enforcement of "*any aspect of SB 280*" (emphasis added) – also prohibits enforcement of the 2021 regulation and its repeal of the 2017 regulations. SB 280 required the adoption of the 2021, which is clearly an "aspect" of SB 280. As an aspect of SB 280, the 2021 regulation that was adopted is void and has no effect. In *Clark Fork Coalition v. Tubbs*, the Montana Supreme Court held that when a court invalidates a rule, as the preliminary injunction has done here, "the effect is to return to the previous status of the law, which necessarily means in most instances that the former rule is reinstated." *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 39, 384 Mont. 503, 380 P.3d 771; *see also Paulsen v. Daniels,* 413 F.3d

conformity with this act." SB 280 (2021), available at https://leg.mt.gov/bills/2021/billpdf/SB0280.pdf.

[3] Moreover, Defendants' Notice of Temporary Rule states that the 2021 Rule was promulgated, "[p]ursuant to legislative direction, […] to repeal the provisions adopted in the 2017 rulemaking." Department of Public Health and Human Services Notice of Adoption of Temporary Emergency Rule ¶ 3.

999, 1008 (9th Cir. 2005) ("[T]he effect of invalidating an agency rule is to reinstate the rule previously in force."). Because the preliminary injunction voids adoption of the 2021 regulation, Defendants' argument that the 2021 regulation rescinded the 2017 regulations is of no effect.

3. Courts have plenary power to clarify their orders and doing so does not convert a preliminary injunction into a mandatory injunction.

Defendants incorrectly argue that Plaintiffs' motion to clarify is, in effect, a request for a mandatory injunction that was never pled and has no basis in law or fact. Def. Br. 3. That is not so. The Motion expressly seeks a straightforward clarification from the Court of the preliminary injunction Order. Courts may interpret or clarify a prior judgment or order to describe or explain its meaning or to provide "additional specification necessary to implement [the order]." *Meine v. Hren Ranches, Inc.* 2020 MT 284, ¶ 19, 402 Mont. 92, 475 P.3d 748 (internal citations omitted); *see also* Pl. Br. 7-9. Montana law recognizes that a court's jurisdiction to enforce judgments includes the inherent power to make orders and issue such process "as may be necessary" to ensure the effectiveness of interlocutory orders. *Smith v. Foss*, 177 Mont. 443, 446-47, 582 P.2d 329 (1978); *see also* Pl. Br. 7-9. These principles are particularly apt here, where Defendants claim "[t]he court's decision leaves this department in an ambiguous and uncertain situation." Department of Public Health and Human Services Notice of Adoption of Temporary Emergency Rule ¶ 6.

Asking a party to revert to the status quo pursuant to a preliminary injunction order does not convert a preliminary injunction to a mandatory injunction. *See Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, (9th Cir. 2014) (holding that Plaintiffs' request for preliminary injunction enjoining Defendants from enforcing any new law or policies that threatened the status quo did not convert the preliminary injunction into a mandatory injunction). "A mandatory injunction orders a responsible party to take action," while "[a] prohibitory injunction prohibits a party from

taking action ***and preserves the status quo*** pending a determination of the action on the merits." *Id.* at 1060 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878–79 (9th Cir. 2009)) (emphasis added). Requiring Defendants to revert to the status quo pursuant to the preliminary injunction order does not convert the preliminary injunction to a mandatory injunction, because preserving the status quo is part and parcel of a preliminary injunction. Were that not the case, practically every preliminary injunction could be considered a mandatory injunction (which of course not all are), as such injunctions regularly require the defendants to revert to the status quo existing prior to the defendants' actions challenged in a case.

A motion for clarification of a Court's order is, obviously, not a request for a mandatory injunction; it is simply a request for clarification of what the Court already has ordered. But even if the Court were to characterize Plaintiffs' request for clarification as a request for a mandatory injunction, such an injunction would be justified given that the record for declaring SB 280 unconstitutional is entirely uncontested. Although Plaintiffs were only required to meet the lesser burden of the prima facie standard, the Court made it clear that Plaintiffs pled sufficient arguments and evidence to meet the more demanding burden of likelihood of success. Order ¶ 149 ("alternatively, even under the more demanding standard requiring a showing of likelihood of success on the merits, Plaintiffs are entitled to a preliminary injunction based on their pleadings and uncontested evidentiary submissions"). Thus, even if the Court found that Plaintiffs were requesting a mandatory injunction, which they are not, Plaintiffs likely would meet the heightened standard required for a mandatory injunction because "the principles upon which mandatory and prohibitory injunctions are granted do not materially differ." *City of Whitefish v. Troy Town Pump*, 2001 MT 58, ¶ 21, 304 Mont. 346, 21 P. 3d 1026 (quoting *Grosfield v. Johnson* (1935), 98 Mont. 412, 421, 39 P.2d 660, 664 (internal quotations omitted)).

4. The State exceeded its rulemaking authority in issuing the Temporary Rule, and the Court has jurisdiction to review the Rule.

Rather than simply abide by the terms of the Order and preserve the status quo by reverting to the 2017 regulations, Defendants issued the Temporary Rule in violation of both the spirit and the letter of the Order and contrary to the requirements of the statute controlling the issuance of emergency temporary regulations. The promulgation of the Temporary Rule was driven by Defendants' misconception that the Order created a gap in the application process given that the 2017 regulations were repealed by the 2021 Rule. This argument, however, overlooks the fact that the 2021 Rule was enjoined. A law or regulation that is enjoined is void and has no effect. Thus, the 2017 regulations are the operative procedures under Montana law; there is not now and never was any gap for the Temporary Rule to fill.

Notably, the Temporary Rule explicitly bars transgender individuals from amending the sex markers on their birth certificates if the request for amendment is based on gender transition, gender identity, or change of gender. Temporary Rule ¶ 11. This not only is blatantly unconstitutional under the Equal Protection Clause of the Montana Constitution but also is inimical to the direction of the Order to preserve the status quo. The parties are obligated to preserve the status quo and not unilaterally issue a new regulation with even more burdensome restrictions on transgender individuals. The Temporary Rule is an unjustifiable affront to the status quo, clearly designed to circumvent the preliminary injunction Order.

Defendants incorrectly argue that Plaintiffs cannot challenge the Temporary Rule because they have not initiated an original action seeking to declare the Rule invalid. Contrary to Defendants' contentions, Plaintiffs are entitled to challenge the Rule as a violation of the

preliminary injunction Order entered on Plaintiffs' behalf and for which Plaintiffs may seek appropriate remedies to the extent Defendants do not comply.[4]

In addition to violating this Court's Order, the Temporary Rule contravenes the plain language of the statue governing Emergency or Temporary rules. *See* § 2-4-303, MCA. Section 2-4-303, MCA in relevant part provides:

> ***Because the exercise of emergency rulemaking power precludes the people's constitutional right to prior notice and participation in the operations of their government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse***. An emergency rule may be adopted ***only*** in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare ***is subject to judicial review upon petition by any person.*** The matter must be set for hearing at the earliest possible time and takes precedence over all other matters except older matters of the same character. The sufficiency of the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of judicial review. The dissemination of emergency rules required by 2-4-306 must be strictly observed and liberally accomplished. (Emphasis added.)

The straightforward language in the statute vests this Court with jurisdiction to review the "sufficiency" of the agency's purported reasons for declaring an emergency. The statute similarly explains the justification for allowing judicial review: issuing an emergency rule is an extreme administrative action demanding "extraordinary safeguards against abuse." *Id.*

Pursuant to § 2-4-303, MCA, an emergency rule may only be promulgated in circumstances that constitute "an existing imminent peril to the public health, safety or welfare

[4] To be clear, resolution of the matters raised in Plaintiffs' motion for clarification do not depend on a finding by this Court that the actions of Defendants – namely the issuance of the Temporary Rule and ongoing rulemaking process – violate the MAPA. Plaintiffs address these procedural deficiencies merely as additional evidence of the unlawfulness of Defendants' conduct, which Plaintiffs have already shown violates the preliminary injunction.

that cannot be averted or remedied by any other administrative act." *Id.* The Temporary Rule falls far short of that standard. There was and is no imminent peril to the public health, safety, or welfare, and DPHHS has never identified any such peril. The professed "confusion" and "uncertainty" of the application process hardly qualifies as an imminent threat to public health and safety. Moreover, the professed confusion and uncertainty of the application process can easily be averted by simply preserving the status quo and reverting to the 2017 regulations to process applications, as the Court ordered.

CONCLUSION

It is absurd for Defendants to frame the preservation of the status quo in the context of a preliminary injunction as a request for supplemental relief. It likewise defies logic to allow Defendants to create a new status quo, especially one that is antithetical to the spirit and letter of the preliminary injunction Order granted in this case and to the relief sought by Plaintiffs' complaint and amended complaint. Furthermore, Defendants' underlying premise, that reversion to the status quo is only proper when a mandatory injunction is granted is wrong as a matter of law. Moreover, Plaintiffs are not asking, and have never asked, the Court for a mandatory injunction. Instead, Plaintiffs merely seek clarification from the Court of the terms of the existing preliminary injunction Order, so that Defendants (the only parties claiming confusion) and their agents, employees, and representatives can better understand the obligations imposed upon them by the Order.

Accordingly, for the above stated reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion to clarify.

Dated: July 5, 2022

Respectfully submitted,

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