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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)
CHARLIE BRERERTON, 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' BRIEF 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**

I. INTRODUCTION

Plaintiffs respectfully move this Court to enforce its April 21, 2022 Findings of Fact, Conclusion of Law and Order (the “Preliminary Injunction Order” or the “PI Order”) by ordering Defendants to show cause why they should not be held in contempt for failing to maintain the status quo consistent with this Court’s Preliminary Injunction Order. The Montana Supreme Court’s January 10, 2023 Order (the “Writ Order”) reaffirmed that this Court’s Preliminary Injunction Order “*requires* DPHHS to maintain the status quo, which reinstates the 2017 Rule for as long as the Preliminary Injunction Order—which DPHHS did not appeal—remains in effect.” Dkt. 97, at 6-7 (emphasis added). The Preliminary Injunction Order still remains in place, which means that DPHHS *must* maintain the status quo by applying the 2017 Rule as the process by which individuals may amend the sex marker on their birth certificate for the duration of this litigation. *See* Dkt. 97, at 6-7; Dkt. 77, ¶¶ 15-20; Dkt. 61, ¶ 180-18. Despite what have now been three judicial orders confirming DPHHS’s obligation to maintain the status quo by reinstating the 2017 Rule for the duration of this litigation, Defendants are currently processing sex marker amendments to Montana birth certificates under its 2022 Rules. By failing to maintain the 2017 Rules and preserve the status quo, Defendants will be in violation of the Preliminary Injunction Order.

In this Court’s September 19, 2022 Finding of Facts, Conclusion of Law, and Order Granting in Part and Denying in Part Plaintiffs’ Motion Seeking Clarification of the Preliminary Injunction (the “Clarification Order”), Defendants were warned that “[m]otions for contempt based on continued violations of the Order will be promptly considered.” Dkt. 77, ¶ 21. Consistent with this Court’s admonitions, Plaintiffs submit this motion to enforce the Preliminary Injunction Order by

ordering Defendants to show good cause why they should not be held in contempt for refusing to maintain the status quo and process sex marker changes in accordance with the 2017 Rule.

II. BACKGROUND

On April 21, 2022, this Court issued its Preliminary Injunction Order 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[.]” Dkt.61, at 35 ¶ 5 (a). In that order, Defendants were directed to maintain the status quo—defined as the “last actual, peaceable, noncontested condition which preceded the pending controversy”—thereby requiring Defendants to follow the 2017 Rule to process sex marker amendments to Montana birth certificates while the Preliminary Injunction Order remains in effect. *Id.* ¶¶ 61-62.

Despite the fact that the 2017 Rule constituted the governing rule that existed prior to SB 280, and that reverting to the status quo required Defendants to follow the 2017 Rule, Defendants adopted an Emergency Rule and an identical Permanent Rule (the “2022 Rule”) (together, the “Rules) prohibiting transgender people from ever amending the sex designation on their Montana birth certificates. *See* Dkt. 77, ¶¶ 7-13. Defendants tried to justify their actions by claiming that they were confused as to their obligations under the Preliminary Injunction Order.

Defendants’ professed confusion was unconvincing. *Id.*; *see also* Dkt. 97, at 4-6. Nonetheless, in response to Defendants’ blatant disregard of the Preliminary Injunction Order, Plaintiffs filed a motion asking this Court to clarify the terms of its already clear order to dispel any professed confusion on Defendants’ part. Dkt. 71. On September 19, 2022, after full briefing on the issue and oral argument, this Court issued its Clarification Order finding that Defendants claims of confusion were “demonstrably ridiculous” and that they had “unlawfully circumvented

the entire purpose of a preliminary injunction and disregarded and disrespected the judicial process” by making such claims. Dkt.77, ¶ 19. This Court then reaffirmed that the Preliminary Injunction Order “required that defendants return to the status quo- which is evidenced by SB 280 itself- . . . a return to the 2017 regulations.” Dkt. 77, ¶ 24.

Dissatisfied with the Clarification Order, Defendants took the extraordinary step of applying to the Montana Supreme Court for a writ of supervisory control, insisting that this Court did not order DPHHS to revert to the 2017 Rules. *See* Case No. OP 22-0552 at 5. In the alternative, Defendants argued in their petition “that DPHHS need not follow the District Court’s Order that it reinstate the 2017 Rule.” Dkt. 97, 4. The Montana Supreme Court disagreed and made it clear that “[i]n enjoining SB 280, and thereby maintaining the status quo, or ‘last, actual, peaceable, noncontested condition which preceded the pending controversy,’ the District Court unquestionably reinstated the 2017 Rule for so long as its preliminary injunction remains in effect.” Dkt. 97, at 6.

Following the Montana Supreme Court’s Writ Order, DPPHS publicly declared that “given the court’s decision, the department will follow and implement its 2022 rule,”¹ thereby abolishing the right of transgender Montanans to amend the sex markers on their birth certificates. In its Writ Order, the Montana Supreme Court, however, did not rule that the 2022 Rule was valid. Instead, the Court only held that the 2022 Rule had yet to be properly challenged in this litigation and provided two avenues by which the District Court could properly have jurisdiction over it—one of which, by the time the Writ Order was entered, Plaintiffs had already

¹ *See* Mara Silvers, Montana Free Press, *State Supreme Court splits decision over judge’s actions in transgender birth certificate case* (Jan. 10, 2023), available at <https://montanafreepress.org/2023/01/10/montana-court-issues-split-decision-in-transgender-birth-certificate-appeal/>; S. Ragar, Montana Public Radio, *Amid legal battles, the health dept. bars gender changes on birth certificates* (Jan. 11, 2022), available at <https://www.mtpr.org/montana-new/2023-01-11/amid-legal-battles-the-health-dept-bars-gender-changes-on-birth-certificates>.

moved to undertake through their pending motion for leave to file a second amended complaint. *See* Dkt. 97, at 6; Dkt. 84, ¶¶ 103, 11, 142; Dkt. 95, at 7-8; Dkt. 100. Holding that a court did not have jurisdiction over a legal challenge to an administrative rule is wholly different than holding that a party can implement and enforce a rule that violates an existing injunction in an ongoing lawsuit. Nonetheless, after inquiry by Plaintiffs’ counsel, Defendants’ counsel confirmed that the DPHHS is currently processing sex marker amendments to birth certificates under the 2022 Rule rather than the 2017 Rule, as the PI order requires.

As noted above, in this Court’s Clarification Order, Defendants were warned that “[m]otions for contempt based on continued violations of the Order will be promptly considered.” Dkt.77, ¶ 21. Consistent with this Court’s admonitions, Plaintiffs submit this motion to order Defendants to show cause why they should not be held in contempt for violating the Preliminary Injunction Order by refusing to maintain the status quo and process sex marker changes in accordance with the 2017 Rule.

III. ARGUMENT

A. This Court Has the Authority to Enforce Its Orders by Directing Defendants to Show Cause Why They Should Not Be Held in Contempt.

Courts “are imbued with inherent authority to enforce compliance with their lawful orders by holding noncompliant parties in contempt.” *Spallone v. United States*, 493 U.S. 265, 276, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990). Pursuant to section 3-1-501(1)(e), MCA, “disobedience of any lawful judgment, order, or process of the court” is contempt to the “authority of the court.” Section 3-1-501(3), MCA, sets forth that “[a] contempt is civil if the sanction imposed seeks to force the contemnor’s compliance with a court order,” and “[i]f the court’s purpose in imposing the sanction is to attempt to compel the contemnor’s performance of an act, the court shall impose the sanction under 3-1-520.” A contempt that is “not committed in

the immediate view and presence of the court or judge in chambers is an indirect or constructive contempt.” *Kauffman v. Mont. Twenty-First Jud. Dist. Ct.*, 1998 MT 239, ¶¶ 19, 25, 291 Mont 122, ¶¶ 19, 25, 966 P.2d 715, ¶¶ 19, 25; *see also* §§ 3-1-512-20, MCA.

“An indirect contempt proceeding may be initiated either by issuance of an affidavit-supported ‘warrant of attachment’ for the arrest, appearance, and answer of the alleged contemnor in accordance with §§ 3-1-513-18, MCA, or by a contempt show cause order issued on motion or sua sponte by the court.” *Fouts v. Mont. Eighth Judicial Dist. Court*, 2022 MT 9, ¶ 8, 407 Mont. 166, ¶ 8, 177-78, 502 P.3d 689, ¶ 8; (reversing a District Court’s order of indirect contempt where it was found that the District Court failed to make an underlying evidentiary finding on whether the contemnor was able to comply with the subject order and where the coercive sanction went beyond the limiting language of section 3-1-501(3), MCA); *see also* §§ 3-1-512- 513, MCA *Valley Unit Corp. v. City of Bozeman*, 232 Mont. 52, 54-55, 754 P.2d 822, 824 (1988) (issuing contempt order initiated on show cause motion and supporting affidavit did not exceed the court’s jurisdiction). The procedure for indirect contempt requires that a contempt show cause order be supported by either “an affidavit of the facts . . . presented to the court or judge or appropriate judicial notice of pertinent facts sufficient to state a prima facie case of contempt followed by a hearing on the merits.” *Fouts* at ¶ 8 (internal citations and quotation marks omitted).

In April 2022, this Court granted Plaintiffs’ motion for a preliminary injunction and thereby ordered Defendants to maintain the status quo for the duration of the litigation. Dkt. 61. In September 2022, this Court confirmed, in no uncertain terms, that its Preliminary Injunction Order required Defendants to maintain the 2017 Rule for amending the sex marker on Montana birth certificates. Dkt. 77. In January 2023, the Montana Supreme Court affirmed this Court’s

finding that the April 2022 Preliminary Injunction Order requires DPHHS to reinstate “the 2017 Rule for as long as the Preliminary Injunction Order—which DPHHS did not appeal—remains in effect.” Dkt. 96. In light of these orders, Defendants have an unmistakable duty to revert to the 2017 Rule until this case is resolved, or until the injunction is otherwise modified or terminated. Defendants’ willful failure to comply with their duty to revert to the 2017 Rule is contempt of court, as a matter of law.

Notwithstanding this duty, Defendants are currently following the 2022 Rule for processing sex marker amendments for Montana birth certificates. Defendants are blatantly violating the Preliminary Injunction Order that has twice been reaffirmed by this Court and the Montana Supreme Court. This Court is therefore authorized to grant Plaintiffs’ motion and order Defendants to show cause why they should not be held in contempt of the Court’s PI Order.

B. This Court Is Empowered to Hold Defendants in Contempt and Impose Sanctions to Ensure Compliance with its April 2022 Preliminary Injunction Order.

Pursuant to section 3-1-520, MCA, “when the sanction imposed for a contempt seeks to compel the contemnor to perform an act that is in the power of the contemnor to perform, the contemnor may be incarcerated, subjected to a fine in an amount not to exceed \$500, or both, until the contemnor has performed the act.” A prerequisite to imposing a coercive civil sanction is a finding that the act “is in the power of the contemnor to perform.” Section 3-1-520, MCA; *VanSkyock v. Manley*, 2017 MT 99, ¶ 13, 387 Mont. 307, ¶ 13, 393 P.3d 1068, ¶ 13,.

It is well within the power of the DPHHS to comply with the Preliminary Injunction Order and reinstate the 2017 Rules. In fact, in the Clarification Order, this Court included a link to the 2017 Rules to assist Defendants in complying with the Preliminary Injunction Order and, as noted previously, stated that it would promptly consider motions for contempt based on

continued violations of the PI Order. Dkt. 77, ¶ 21. Moreover, after issuance of the Court's Clarification Order, Defendants temporarily complied with the Preliminary Injunction, so it is clearly in their power to do so. Defendants' refusal to revert to the 2017 Rule constitutes a violation of the Preliminary Injunction Order, and a finding that Defendants are failing to implement the 2017 Rule is sufficient grounds for holding them in contempt and imposing appropriate sanctions. Plaintiffs ask that, upon finding Defendants in contempt, this Court impose sanctions that will most effectively and swiftly bring Defendants into full compliance with the Preliminary Injunction Order.

In addition, Plaintiffs request that, within 10 days of the entry of the order granting this motion, Defendants 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. Further, Plaintiffs request that, within 10 days of the entry of the order granting this motion, DPHHS 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.

Finally, Plaintiffs request that they be awarded the reasonable attorney's fees and costs arising out of all the work Plaintiffs' counsel performed in connection with this motion, their motion to clarify the Preliminary Injunction Order, and their response to Defendants' motion for a writ of supervisory control. *See In Re Marriage of Redfern*, 214 Mont. 169, 173, 692 P.2d , 470 (1984) ("Reasonable attorney fees are permissible in a contempt action."); *Novak v. Novak*, 2014 MT 62, ¶ 37, 374 Mont. 182, ¶ 37, 320 P. 3d 459, ¶ 37 (same); *see also Overfield v. City of Great Falls*, 2013 MT 67N, 2013 WL 979106*1 (Mont., 2013).

IV. 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 Order;
- (2) holding Defendants in contempt of court;
- (3) imposing sanctions to ensure Defendants' compliance with the Preliminary Injunction Order;
- (4) 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;
- (5) 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;
- (6) awarding Plaintiffs the reasonable attorney's fees and costs arising out of all work performed in connection with this motion, their motion to clarify the PI Order, and their response to Defendants' motion for a writ of supervisory control; and
- (7) granting any other relief in Plaintiffs' favor that the Court deems just.

Dated: January 25, 2023

Respectfully submitted,

By: /s/Akilah Deernose

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of the foregoing **Plaintiffs' Brief 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 email on counsel for Defendants:

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Electronically signed by Krystel Pickens on behalf of Akilah Deernose on January 25, 2023.

CERTIFICATE OF SERVICE

I, Akilah Maya Deernose, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 01-25-2023:

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