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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

<p>AMELIA MARQUEZ, an individual; and JOHN DOE, an individual,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>STATE OF MONTANA, et al.,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">DV 21-873 Hon. Michael G. Moses</p> <p style="text-align: center;">DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR ENFORCEMENT OF PRELIMINARY INJUNCTION</p>
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INTRODUCTION

Throughout this litigation, the Department has acted in good faith, consistent with its careful and reasonable reading of Plaintiffs' pleadings and the orders of this Court and the Montana Supreme Court. Plaintiffs' pleadings only challenged the constitutionality of SB 280—they did not challenge any rules promulgated pursuant to that statute, nor did they bring a claim under the

Montana Administrative Procedures Act (“MAPA”). Following this Court’s preliminary injunction of SB 280, the Department believed in good faith that it had the authority under its general rulemaking power to promulgate a new rule to fill the void left by the injunction. When Plaintiffs protested that the Department did not revert to the 2017 Rule—a remedy their pleadings never sought—the Department in good faith explained its understanding of this Court’s preliminary injunction order in response to Plaintiffs’ motion to clarify. When the Court’s order on that motion indirectly enjoined the 2022 Rule, the Department in good faith sought supervisory control from the Montana Supreme Court, while complying with this Court’s clarification order.

When the Supreme Court issued its order on January 10, 2023 (“Order”), the Department viewed the Order as a win for the Department’s rulemaking authority, understanding that while the 2017 Rule did go back into effect after this Court’s preliminary injunction order, the new 2022 Rule was not subject to an injunction and the Department was free to enforce the 2022 Rule. Not until Plaintiffs’ counsel reached out, demanding to know why the Department was not complying with the 2017 Rule, did the Department become aware that Plaintiffs had interpreted the Supreme Court’s Order differently. The Department truthfully responded to Plaintiffs’ demands in good faith, stating that “[t]he Department is processing birth certificate amendments under its 2022 Rule, which is not subject to any injunction, as confirmed by the Montana Supreme Court’s January 10 Order.” (Aff. Kathleen L. Smithgall, ¶ 4 (Feb. 8, 2023).)

At no time during this litigation has either the Department or the Governor¹ intentionally violated a Court order or purposely taken any action for which contempt can properly be imposed. Both parties before this Court celebrated the Supreme Court Order as a win. Plaintiffs read the

¹ Although Plaintiffs’ Motion seeks contempt against both Defendants, Plaintiffs do not explain what actions by the Governor warrant a finding of contempt.

Order as requiring the Department to comply with the 2017 Rule. The Department reads the Order as permitting the Department to enforce the 2022 Rule. But these interpretations cannot both be accurate. Resolving Plaintiffs' present motion requires this Court to consider the Montana Supreme Court's Order, which unequivocally determined that the 2022 Rule was not subject to any injunction and remained outside the scope of this litigation. The Supreme Court's determination—and the Department's good faith actions in reliance on the plain language of the Order—requires this Court to deny Plaintiffs' motion.

I. THE ORDER PERMITS THE DEPARTMENT TO ENFORCE THE 2022 RULE.

In response to this Court's clarification order on September 19, 2022, the Department immediately complied and started processing birth certificates pursuant to the 2017 Rule. In the meantime, the State pressed its good faith legal arguments before the Montana Supreme Court. In its petition for writ of supervisory control, the State first reiterated its position that the 2017 Rule did not go into effect following the original preliminary injunction order. (Pet. for Writ of Supervisory Control ("Petition") 3 (Sept. 23, 2022).) The State also pressed the issue of whether the agency could undertake new rulemaking pursuant to its independent rulemaking authority when it implemented the 2022 Rule. (*Id.*)

The Montana Supreme Court agreed that the legal arguments warranted further review and exercised supervisory control. (Order at 5) (disagreeing with Plaintiffs' framing of the issues and "find[ing] it appropriate to consider this question via this petition for writ"). While the Supreme Court ultimately rejected the State's first argument, it is beyond the pale to suggest that the Department has consistently been acting in bad faith by pressing the arguments that the Supreme Court found important and persuasive. (*See id.* at 7) (granting relief in part to the State). After all, the Supreme Court granted supervisory control—the relief the State requested. (*Id.* at 5.)

First, the Supreme Court concluded that “the District Court unquestionably reinstated the 2017 Rule for long as its preliminary injunction remains in effect.” (Order at 6.) Second, the Supreme Court concluded that “DPHHS is entitled to relief insofar as the Clarification Order purports to enjoin DPHHS from engaging in rulemaking, as Plaintiffs have not properly challenged the 2022 Rule under MAPA....” (*Id.* at 7.) The Court, therefore, ordered that the State’s petition is “granted in part to the extent that the [district court orders] enjoins the 2022 Rule.” (*Id.*)

Plaintiffs focus solely on the first question and ignore the second, arguing that the Supreme Court’s decision showed that the Supreme Court “disagreed” with the State and that the Department must currently enforce the 2017 Rule. Plaintiffs further argue that “[h]olding 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.” (Doc. 103 at 5.) In other words, Plaintiffs argue that even though the Supreme Court confirmed the Department has the authority to promulgate the 2022 Rule under its general rulemaking authority and is not subject to the preliminary injunction with respect to the 2022 Rule in this case, the Department cannot enforce the 2022 Rule. This argument doesn’t comport with the plain language of the Order.

The State does not dispute that the Supreme Court held the 2017 Rule went back into effect following this Court’s preliminary injunction order. (*See* Order at 6.) And the Department, under the Order, would be required to enforce the 2017 Rule “for as long as [this court’s] preliminary injunction remains in effect.” (*Id.* at 6.) But this is only part of the Supreme Court’s holding. The Court also held that, because the Department exercised its independent rulemaking authority and promulgated the 2022 Rule after the preliminary injunction went into effect, the Department—separate and apart from this litigation—can enforce the 2022 Rule. (*See id.* at 7.)

Plaintiffs ignore the Supreme Court’s second key holding that the district court lacks jurisdiction to “enjoin[] the 2022 Rule.” As explained in prior briefing, the Department undertook the rulemaking process and finalized the 2022 Rule in good faith. (*See generally* Doc. 72, 91, 92.) The Department has the affirmative obligation under Montana law to enforce all of its rules. *See Whitehall Wind, LLC v. Mont. PSC*, 2010 MT 2, ¶ 24, (“An administrative agency must comply with its own administrative rules.”); *see also Perez v. Mortg. Bankers Assoc.*, 575 U.S. 92, 101 (2015) (noting “that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance”); *Natl. Family Plan. and Reprod. Health Assoc., Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (“[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked”). Of course, if a court enjoins a rule, the Department is relieved of this obligation. But as the Supreme Court noted, the 2022 Rule is not enjoined. (Order at 7.) Therefore, the Department can—and must—enforce the 2022 Rule.

Requiring the Department to enforce the 2017 Rule—despite its lawful promulgation of the 2022 Rule—effectively enjoins the 2022 Rule. Either the 2022 Rule is enforceable, or it is not, and the Montana Supreme Court has plainly stated that the 2022 Rule is not enjoined. It further unequivocally said that Plaintiffs have not brought a proper MAPA challenge to the 2022 Rule and, thus, no court currently has jurisdiction over its enforcement. (Order at 7.) Plaintiffs’ reading of the Supreme Court’s Order effectively enjoins the 2022 Rule by requiring the Department to enforce the 2017 Rule. Nothing about the State’s reading of the Order and Montana law can serve as grounds for contempt against the Department or the Governor when the Montana Supreme Court has held the 2022 Rule is not enjoined. As it has throughout this litigation, the Department seeks only to (1) follow Montana law; (2) implement executive policies, consistent with statute,

through its statutory rulemaking authority; and (3) comply with the orders of this Court and the Montana Supreme Court.

II. THE COURT MUST DENY PLAINTIFFS' MOTION.

Plaintiffs now come before this Court and ask that the Court hold the State in contempt and impose sanctions. The Court should deny Plaintiffs' request.

Here, Plaintiffs ask this Court to issue a show cause order, requiring the State to explain why the State should not be held in contempt or subject to sanctions. As explained above, though, the Department is complying with the Order, which affirms that the Department's independent rulemaking authority was not enjoined and the 2022 Rule is not enjoined. This resolves the issue: if the 2022 Rule is not subject to an injunction, the Department must enforce this Rule. *Whitehall Wind*, ¶ 24; *Perez*, 575 U.S. at 101; *Natl. Family Planning and Reproductive Health Assoc., Inc.*, 979 F.2d at 234. The Department has not disobeyed this court's order or the Montana Supreme Court Order (nor has it ever intended to), and therefore contempt and sanctions are inappropriate. *See* Mont. Code Ann. § 3-1-501 (permitting contempt where a party *disobeys* a lawful order).

The State has come and continues to come before this Court in good faith. The State genuinely reads the Montana Supreme Court's Order as leaving in place the 2022 Rule. Only upon receiving an email from Plaintiffs' counsel did the Department become aware that Plaintiffs disagreed with this interpretation. Upon receiving Plaintiffs' present motion and carefully reviewing it, as another showing of good faith, the Department paused processing applications to amend the sex designation on birth certificates altogether. (Aff. Karin Ferlicka ¶ 5 (Feb. 8, 2023).) To date, the Department has not rendered a final disposition under the 2022 Rule on any completed application for a sex or gender designation amendment, and the Department will not process any

such applications until it receives further direction from this Court.² (*Id.*) The Department understands this Court’s clarification order to require the Department to revert to the 2017 Rule, which the Department did while its Petition was pending before the Montana Supreme Court. *Id.* But because the Montana Supreme Court (1) granted the Department relief; (2) confirmed that the Department still possesses independent rulemaking authority; and (3) confirmed the 2022 Rule is not subject to any injunction, the State maintains that the Department can and must enforce the 2022 Rule.³ Nothing about these actions warrants contempt or sanctions against the Department or the Governor.

Plaintiffs seek fees on this motion, their motion to clarify the preliminary injunction order, and their response to the State’s motion for writ of supervisory control. With respect to the motion to clarify, it’s unclear why Plaintiffs ask for these fees now. They never requested them at the time of the motion, nor would fees be appropriate given that the Montana Supreme Court ultimately agreed with the State that the Department maintained its independent rulemaking authority to promulgate the 2022 Rule. This brings us to the petition for writ of supervisory control. The Montana Supreme Court accepted supervisory control of the case, which constitutes a procedural win for the State. And on the merits of the petition, the Supreme Court granted the State half of the relief it sought and vindicated the State’s argument with respect to the 2022 Rule. (*See* Order at 7 (granting relief in part to the State).) As a result, each party must bear their own

² To the Department’s knowledge, neither Plaintiff Marquez nor Plaintiff Doe have applied with the State of Montana to change the sex designation on their birth certificates.

³ The State recognizes that this Court is currently considering whether Plaintiffs can properly challenge the 2022 Rule as part of this lawsuit. Plaintiffs’ proposed further amended complaint does not contain a MAPA challenge to the 2022 Rule. (*Cf.* Order at 7 (Plaintiffs have not properly challenged the 2022 Rule under MAPA”)) As of the filing of this brief, the Court has not yet permitted Plaintiffs to raise any claims about the 2022 Rule.

fees and costs. Finally, awarding Plaintiffs fees associated with this motion would not be appropriate because the parties have a legitimate dispute about the interpretation of the Supreme Court's Order. As explained above, neither the Department nor the Governor have disobeyed a court order, acted in bad faith, or taken any other measures warranting a contempt finding.

It is not the Department's intent to engage in needless motions practice. But where parties cannot reach an agreement on a legal issue, it is necessary for the Court to provide clarity. Parties can disagree without the imposition of sanctions or contempt, especially where, as the State has demonstrated that the Department has acted in good faith, seeking to comply with this Court's orders and the Montana Supreme Court's Order.

CONCLUSION

Plaintiffs indirectly seek to have this Court do what the Montana Supreme Court said this court lacks jurisdiction to do: enjoin the Department's general rulemaking authority and enjoin the 2022 Rule. Plaintiffs have separately sought to graft the 2022 Rule into the present litigation (albeit not under MAPA), but this Court has not yet ruled on the pending motion. Until a court with jurisdiction enjoins the 2022 Rule, the Department has an obligation to enforce all of its rules, including the 2022 Rule. As demonstrated by the facts set forth above and the supporting affidavits, the Department and the Governor have acted in good faith throughout the litigation, based on a fair reading of Plaintiffs' pleadings and the orders of this court and the Montana Supreme Court. The Department continues to do so, and it has no intention of violating the order of any court. Because neither the Department nor the Governor have disobeyed a court order, contempt and sanctions are not warranted. Defendants respectfully request that this Court deny Plaintiffs' Motion.

DATED this 8th day of February 2023.

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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 02-08-2023:

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Dated: 02-08-2023