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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. Colette B. Davies**
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' RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF MONTANA RULE OF CIVIL PROCEDURE 60 MOTION FOR RELIEF FROM ORDER REGARDING CONTEMPT AND ATTORNEYS' FEES**
Defendants.	)	

Plaintiffs Amelia Marquez and John Doe (together, "Plaintiffs") submit the following response to the Rule 60 motion filed by Defendants the State of Montana, Gregory Gianforte ("Governor Gianforte"), the Montana Department of Public Health and Human Services (the "DPHHS"), and Charlie Brererton (together, "Defendants" or the "State").

INTRODUCTION

After two years of litigation over the constitutionality of SB 280, which Defendants repeatedly and unnecessarily extended with their deleterious conduct, it should come as no surprise that Defendants have filed yet another factually and legally unsupported motion. This time, Defendants improperly ask this Court to set aside its contempt order, and its award of attorneys' fees and costs, based on Rule 60(b) M. R. Civ. P. (the "Rule 60(b) Motion").[1] Defendants argue that the Court's June 26, 2023 order (the "June 2023 Order") was based on factual and legal mistakes and infected by judicial bias. As has been the case repeatedly throughout this litigation, Defendants' arguments are undercut by their statements and their conduct to the contrary. This time, those statements and conduct are on the record.

During the June 1, 2023 hearing on all pending motions, Defendants' counsel ***conceded*** that the State had violated the Court's April 21, 2022 order (the "Preliminary Injunction") and the Court's September 19, 2022 order (the "Clarification Order"):

- "It is very hard—and to justify noncompliance, I can only explain it. And I can only apologize. 'Cause that's all I can do." Defs.' Rule 60(b) Mot. Ex. D, at 13:10-13 (transcript of June 1, 2023 hearing).

- "And all I can do, Your Honor, is put my hat in my hand and apologize and—and say that by God, if I have anything to say about it, it is not going to happen again. That's all I can do. And—but I—it didn't take me very long, seven days. Well, it was about 14 days in and Emily and I are talking and we knew what we had to do. And that's why I'm here. And I'm here with my hat in my hand and humbly saying I apologize." Defs.' Rule 60(b) Mot. Ex. D, at 17:10-18.

Counsel also ***conceded*** that the State should pay some amount of attorneys' fees:

- "I just ask that, obviously, fees from the State are always one of those issues we got to battle. I would just ask for a hearing. And that those fees be reasonable. Lately I have been seeing a battle of like 20 attorneys. And I don't know if we need 20 attorneys. I have practiced a long time and realize I can do quite a bit by

[1] While Defendants' motion also references Rule 60(a) M. R. Civ. P., that subsection is plainly inapplicable, as it simply allows a court to "correct a clerical mistake or a mistake arising from oversight or omission," which is not what Defendants argue occurred in this case.

myself. So if its [sic] limited to one attorney and they are reasonable hours and—then I'm fine with that. I think that's expected. I didn't exactly know—you never know what to anticipate when you stand before a judge with your hat in hand." Defs.' Rule 60(b) Mot. Ex. D, at 17:21-18:7.

In addition, counsel ***committed*** to negotiating with Plaintiffs in good faith regarding the attorneys' fees that should be awarded:

- "My guess, Your Honor, is I will make a very strong effort to try to negotiate an agreement. Just get it so it is not even an issue before the Court. I will do my best." Defs.' Rule 60(b) Mot. Ex. D, at 18:25-19:3.

Finally, Counsel ***applauded*** the Court for its conduct:

- "And—but I appreciate—I appreciate your—just your demeanor and everything, Your Honor. And thank you. And I apologize on behalf of my client." Defs.' Rule 60(b) Mot. Ex. D, at 18:8-10.

In a desperate attempt to walk back those on-the-record concessions and admissions, Defendants reverse course and now argue that they never violated the Preliminary Injunction or the Clarification Order, that they are not obligated to pay *any* attorneys' fees or costs, and that the Court's conduct demonstrated bias against the State.[2] These arguments are not supported by the facts nor the law, and the Court should deny Defendants' motion.

ARGUMENT

I. The Standards that Govern Rule 60(b) Motions

On June 26, 2023, after a full hearing and briefing, the Court entered an order holding Defendants in contempt for deliberately failing to follow the Court's Preliminary Injunction and Clarification Order, and disregarding their legal obligation to preserve the status quo as mandated by those orders. The Court also granted Plaintiffs' Motion for Summary Judgment and awarded attorneys' fees to Plaintiffs in part as a sanction for Defendants' contempt, and in part as prevailing parties, after Plaintiffs' successful two-year challenge to the constitutionality of SB 280. Doc. 133. Defendants have now chosen to proceed with a motion, principally based on Rule 60(b)(6) M. R. Civ. P., seeking to vacate the finding of contempt and otherwise reverse the June 2023 Order. Defendants' motion should be denied.

[2] In addition, notwithstanding the commitment to negotiate fees, Defendants refused to make any offer in response to Plaintiffs' demand for attorneys' fees and costs. Instead, Defendants' counsel emailed Plaintiffs' counsel on August 18, 2023, "I was advised yesterday that no counter offer will be extended. Sorry."

Defendants' Rule 60(b) Motion devotes minimal attention to the standards by which such motions are measured. It ignores the purpose of Rule 60(b) and the jurisprudence that establishes the rule as a limited remedy with specific constraints. Rule 60(b) is not a catchall for any and all grievances that unsuccessful litigants can manufacture. The rule only applies "where extraordinary circumstances prevent[] a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Montana courts place great weight on the doctrine of finality. *In re Marriage of Hopper*, 1999 MT 310, ¶ 29, 297 Mont. 225, 991 P.2d 960. Because Rule 60(b) is an exception to the doctrine of finality, it is narrowly construed.

Several essential principles follow from this. ***First***, Rule 60(b) is not the same as, or a substitute for, an appeal—i.e., it is not a device with which a losing party can relitigate and contest all issues of fact and law previously raised and adjudicated by a court. *See Maraziti v. Thorpe*, 52 F.3d 252, 255 (9th Cir. 1995) (stating that because the plaintiff's "Rule 60(b) motion merely reiterated the arguments that he had already presented to the district court, the motion was properly denied."). Defendants' Rule 60(b) Motion, like the motion at issue in *Maraziti*, simply rehashes and repackages the arguments previously made in Defendants' opposition to the entry of a preliminary injunction, Defendants' response to Plaintiffs' motion for clarification, and Defendants' request for a writ of supervisory control. In each, Defendants presented the same arguments asserted in the Rule 60(b) Motion. This misuse of Rule 60(b) warrants dismissing the Rule 60(b) Motion. *See Essex Ins. Co. v. Moose's Saloon Inc*., 2007 MT 202, ¶ 22, 338 Mont. 423, 166 P.3d 451 ("[A] motion for relief pursuant to Rule 60(b)(6) must contain 'more than a request for rehearing or a request that the District Court change its mind.'").

Second, legal error by itself does not warrant applying Rule 60(b). Simply arguing that the Court got the law wrong, as Defendants repeatedly do throughout their Rule 60(b) Motion—including their challenge to fee-shifting—is not sufficient to obtain relief under the rule. A request for relief grounded solely on the basis that an order violated the law "has set forth no grounds that would justify the application of Rule 60(b)(6)." *Lussy v. Dye* (1985), 215 Mont. 91, 93, 695 P.2d 465, 467; *see also Rattler Holdings v. United Parcel Serv.*, No. CV 20-117-M-, 2021 WL 1740468, at *1 (D. Mont. May 3, 2021) (an argument that a matter was wrongly decided does not "meet[] the high standard necessary to set aside an order or judgment under Rule 60(b)(6)."); *Glacier Elec. Coop. v. Gervais,* No. CV 14-75-GF-, 2015 WL 5437615, at *3

(D. Mont. Sept. 15, 2015) ("Even if the application [of caselaw] were to represent legal error, it does not constitute 'extraordinary circumstances' that would justify the reopening of a final judgment."). In *Lussy*, the Montana Supreme Court held that the proper avenue for seeking redress from an allegedly erroneous decision, solely on the basis that it is erroneous, is the appellate process. *Lussy*, 215 Mont. at 93, 695 P.2d at 466. Defendants have yet to invoke that process. Typically, Rule 60(b) Motions are granted only in extraordinary circumstances involving gross attorney misconduct (i.e. a lawyer failing to advise a client about the existence of a dispositive hearing, or failing to attend a dispositive hearing) or an error by the clerk (i.e. the clerk failing to provide proper notice of an impending foreclosure). No such cause exists here.

Finally, a Rule 60(b)(6) movant must be "blameless" in the proceedings that resulted in the order or judgment that is the subject of the Rule 60(b)(6) Motion. *Id.* Defendants in this case were certainly not blameless. They knowingly refused to return to the 2017 regulation for processing sex marker amendments (the "2017 Rule") —the status quo—despite (1) Montana law that requires returning to the status quo in the aftermath of a preliminary injunction, (2) two orders from this Court explicitly directing Defendants to return to the 2017 Rule, and (3) an order from the Montana Supreme Court unambiguously affirming that Defendants were obligated to return to the 2017 Rule. Rather than complying with these court orders and Montana law, Defendants promulgated two regulations—one temporary and one permanent (the "2022 Rule")—directing the DPHHS to deny all applications for birth certificate amendments other than those seeking to correct obvious clerical errors. The 2022 Rule is a step backward for the transgender community and the State of Montana. It clearly was intended to destroy the status quo, not preserve it.

Moreover, Defendants repeatedly and intentionally misstated the law or the terms of the Preliminary Injunction. Multiple examples of their misconduct are set forth below. *See infra* Section II(B). Several of them caught the Court's attention. On September 19, 2022, after oral argument and reviewing briefs, the Court concluded that Defendants' claim of "confusion" as an excuse for not complying with the Court's orders was "demonstrably ridiculous" and "disregarded and disrespected" the judicial process. Doc. 77, ¶ 19. Defendants' misconduct has also been criticized by their own counsel. At the June 1, 2023, hearing on Plaintiffs' motion to enforce the Preliminary Injunction (the "Motion to Enforce"), counsel for Defendants lamented: "It is very hard . . . to justify noncompliance . . . . [A]ll I can do, Your Honor, is put my hat in my

hand and apologize and [] say that by God, if I have anything to say about it, it is not going to happen again." Defs.' Rule 60(b) Mot. Ex. D, at 13:10-11, 17:10-13. It is hard to imagine a more damning critique of Defendants' conduct than the observations of their own counsel.

Defendants are obviously not blameless for the circumstances underlying the Court's June 2023 Order. As a result, their Rule 60(b) Motion fails.

II. Defendants' Rule 60(b) Motion is Based on Multiple Misstatements About the Facts and Procedural History of the Case.

Defendants' Rule 60(b) Motion argues that the June 2023 Order was based on the Court's mistaken view of the facts and should therefore be stricken. In particular, the Rule 60(b) Motion argues that the Court (1) "misapprehen[ded]" the actions of the DPHHS, (2) "misread[]" the order the Supreme Court entered on Defendants' request for a writ of supervisory control (the "Writ Order"), (3) prevented Defendants' counsel from "fully" explaining Defendants' position at the June 1, 2023 hearing when the judge waved his hand, (4) wrongfully imputed the conduct of the DPHHS to the State of Montana and the Governor, and (5) based its adverse decisions against Defendants on the Court's bias against them. Defs.' Rule 60(b) Mot. 10, 17. In addition, Defendants claim that their actions—however contumacious they may have been—were undertaken in good faith. *Id.* These arguments are based on multiple misstatements about the facts, the law, and the procedural history of the case. Contrary to Defendants' assertions, the circumstances underlying the Court's contempt and fee-shifting rulings are straightforward and firmly support the Court's June 2023 Order.

A. The Facts supporting the contempt order

In 2021, the State of Montana enacted Senate Bill 280 ("SB 280"). Doc. 61, ¶¶ 58–59. Doc. 42, Ex. A, ¶ 37; Doc. 69, ¶ 37. SB 280 states that: "The sex of a person designated on a birth certificate may be amended only if [the DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction *indicating that the sex of the person born in Montana has been changed by surgical procedure*." S.B. 280, 2021 Leg., 67th Sess. (Mont. 2021) ("SB 280") (emphasis added); Doc. 61, ¶ 60; Doc. 42, Ex. A, ¶ 38; Doc. 69, ¶ 38.

On May 28, 2021, the DPHHS proposed adopting the implementing regulations for SB 280 (the "2021 Rule") through Montana Administrative Register Notice 37–945. *See* 10 Mont. Admin. Reg. 608-612 (May 28, 2021). The language of the 2021 Rule, which mirrored the language of SB 280, was subsequently codified at Montana Administrative Rule 37.8.311, now

Montana Administrative Rule 37.8.311(5)(a), and Montana Administrative Rule 37.8.102. *See* 10 Mont. Admin. Reg. 608-612 (May 28, 2021); Mont. Admin. R. 37.8.311(5)(a) (2022); Mont. Admin. R. 37.8.102 (2021).

On July 16, 2021, Plaintiffs filed their complaint against Defendants. Doc. 1. The complaint alleged, in relevant part, that SB 280 (1) violated Plaintiffs' right to equal protection, (2) violated their right to privacy, (3) improperly interfered with their medical decision-making, and (4) was unconstitutionally vague. *Id.* Among other things, the complaint asked the Court to "[p]reliminarily and permanently enjoin Defendants, as well as their agents, employees, representatives, and successors, from enforcing [SB 280], directly or indirectly." *Id.* at 18. After the conclusion of a separate proceeding before the Montana Human Rights Bureau that Plaintiffs initiated to challenge SB 280 under the Montana Human Rights Act ("MHRA"), Plaintiffs later amended their complaint to allege that SB 280 violated the MHRA. Doc. 42, Ex. A.

On April 21, 2022, following full briefing and argument, this Court issued the Preliminary Injunction, which 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[.]" Doc. 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 pre-existing 2017 Rule for processing sex marker amendments to Montana birth certificates while the Preliminary Injunction was in effect. *Id.*, ¶¶ 180-181.[3]

Despite the facts that (1) the 2017 Rule was the governing rule before SB 280 was enacted and (2) the status quo required following the 2017 Rule, Defendants adopted the 2022 Rule, which categorically prohibited transgender people from amending the sex designation on their Montana birth certificates. *See* Doc. 77, ¶¶ 7–13. Defendants tried to justify the 2022 Rule by claiming they were confused about their obligations under the Preliminary Injunction. *See, e.g.,* Defs.' Rule 60(b) Mot. 3.

Defendants' alleged confusion was a ruse. Doc. 77, ¶¶ 7–13; *see also* Doc. 97 at 4–6. In response to Defendants' repeated violations of the Preliminary Injunction, Plaintiffs filed a

[3] The 2017 Rule permitted a transgender person to amend his or her original birth certificate by submitting to the DPHHS a completed gender-designation form attesting to gender transition or providing government-issued identification displaying the correct sex designation or providing a certified court order indicating a gender change. *See* 24 Mont. Admin. Reg. 2436-2440 (Dec. 22, 2017) (amending Mont. Admin. R. 37.8.102 and 37.8.311).

motion asking this Court to clarify the terms of its order to dispel any so-called confusion on Defendants' part. Doc. 71. On September 19, 2022, after full briefing and argument, the Court issued the Clarification Order, finding that Defendants' claims of confusion were "demonstrably ridiculous" and that Defendants had "unlawfully circumvented the entire purpose of a preliminary injunction and disregarded and disrespected the judicial process" by making those claims. Doc. 77, ¶ 19. The Court also reaffirmed that the Preliminary Injunction "required that Defendants return to the status quo—which as evidenced by SB 280 itself—[was] a return to the 2017 [Rule]." *Id.*, ¶ 24.

Dissatisfied with the Clarification Order, Defendants took the extraordinary step of applying to the Montana Supreme Court for a writ of supervisory control, falsely insisting that this Court did not order the DPHHS to revert to the 2017 Rule. *See* Doc. 97, at 5. The Montana Supreme Court disagreed, making 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 remain[ed] in effect." *Id.* at 6.

Following the entry of the Montana Supreme Court's Writ Order, the DPPHS publicly declared that, "given the [Supreme Court's] decision, the department w[ould] follow and implement its 2022 rule,"[4] thereby abolishing the right of transgender Montanans to amend the sex markers on their birth certificates. In doing so, the DPHHS misconstrued the Writ Order. In the Writ Order, the Supreme Court did not rule that the 2022 Rule was valid. *See id.* at 6–7. Instead, the Court merely held that the 2022 Rule itself had yet to be properly challenged in this litigation. *Id.* at 7. The Supreme Court also identified two avenues for this Court to exercise jurisdiction over the 2022 Rule, one of which Plaintiffs had already sought to take by the time the Writ Order was entered by moving for leave to file a second amended complaint challenging the 2022 Rule. *See id.* at 6; Doc. 84, ¶¶ 103, 127, 142; Doc. 95 at 7–8; Doc. 100.

In the Court's Clarification Order, the Court warned Defendants that "[m]otions for contempt based on continued violations of the [Preliminary Injunction] w[ould] be promptly

[4] *See* Mara Silvers, *State Supreme Court splits decision over judge's actions in transgender birth certificate case*, Montana Free Press (Jan. 10, 2023), https://montanafreepress.org/2023/01/10/montana-court-issues-split-decision-in-transgender-birth-certificate-appeal/ (last visited Sept. 20, 2023); Shaylee Ragar, *Amid legal battles, the health dept. bars gender changes on birth certificates*, Montana Public Radio (Jan. 11, 2023), https://www.mtpr.org/montana-news/2023-01-11/amid-legal-battles-the-health-dept-bars-gender-changes-on-birth-certificates (last visited Sept. 20, 2023) .

considered." Doc. 77, ¶ 21. Consistent with the Court's admonition, on January 25, 2023, Plaintiffs filed their Motion to Enforce. Doc. 103. The Motion to Enforce explained that, despite three judicial orders confirming the DPHHS's obligation to maintain the status quo by reinstating the 2017 Rule—(1) the Preliminary Injunction, (2) the Clarification Order, and (3) the Writ Order—Defendants were processing sex marker amendments to Montana birth certificates under the 2022 Rule. *Id.* In response to the motion, Defendants 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. Doc. 105 at 6–7.

On June 26, 2023, after full briefing and argument, the Court entered an order granting the Motion to Enforce. Doc. 133. In relevant part, the Court found that "Defendants [were] in contempt of court and [were] ordered to pay Plaintiffs the attorney fees and costs associated with the contempt of court action from January 10th, 2023, to June 1st, 2023." *Id.* at 20. The Court also found that "[r]easonable attorney fees and costs w[ould] be awarded to Plaintiffs for the cost of their litigation . . . .". *Id.*

B. Defendants' misstatements

The Rule 60(b) Motion misstates numerous key facts. For example:

- ***Challenge to the 2021 Rule*:** Defendants erroneously claim that Plaintiffs did not challenge the 2021 Rule in their original complaint. Defs.' Rule 60(b) Mot. 2. As this Court has already acknowledged, Plaintiffs *did* challenge the 2021 Rule. The Court's 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* Doc. 77, ¶ 20 (emphasis added).

- ***Reversion to the 2017 Rule*:** Defendants also erroneously assert that there was "significant confusion" regarding the status quo restored by the Preliminary Injunction. Defs.' Rule 60(b) Mot. 3. There was not. In the Preliminary Injunction, the Court expressly acknowledged that, by seeking to preliminarily enjoin SB 280, Plaintiffs sought to preserve the status quo. *See* Doc. 77, ¶ 20. "[A]s stated in SB 280 itself," the status quo was "the December 2017 DPHHS regulations." *Id.*, ¶ 18.

- ***Effect of the Preliminary Injunction*:** Defendants falsely claim that the Preliminary Injunction left a "regulatory gap" that required Defendants to engage in rulemaking. Defs.' Rule 60(b) Mot. 3. Contrary to this assertion, the Preliminary Injunction told Defendants exactly what to do: apply the 2017 Rule. *See* Doc. 61, ¶¶ 61–62, 180–81, 183(5)(a); *see also* Doc. 77, ¶¶ 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*:** Defendants incorrectly suggest that, because the Montana Supreme Court left the 2022 Rule "intact," Defendants could enforce the 2022 Rule. Defs.' Rule 60(b) Mot. 5. In reality, 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 a writ of supervisory control was filed. *See* Doc 97 at 7.

- ***Defendants' Alleged "Good Faith":*** Defendants also argue that they have been proceeding in "good faith" since the Preliminary Injunction and Clarification Orders were entered. Defs.' Rule 60(b) Mot. 5. "Good faith," however, 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*, 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 Jud. Dist. Court*, 2011 MT 289, ¶ 19, 362 Mont. 485, 495, 265 P.3d 659, 663 (stating that "[d]isobedience of . . . an order of the court may constitute contempt of court."). Even if this were not the case, Defendants have failed to submit any actual evidence that Director Brererton, Governor Gianforte, the DPHHS, or the State acted in good faith.

- ***Notice of Plaintiffs' Position*:** Defendants falsely suggest that they only became aware of Plaintiffs' disagreement with Defendants' reading of the Writ Order on January 25, 2023, when Plaintiffs filed the Motion to Enforce. Defs.' Rule 60(b) Mot. 5. 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." Doc. 102 at 2 (emphasis in original). Defendants' have been on notice of Plaintiffs' position since at least that date.[5]

- ***Plaintiffs' Alleged Change of Position:*** Defendants erroneously state that Plaintiffs "narrowed" their position regarding the vagueness of SB 280. Defs.' Rule 60(b) Mot. 6 n.1. They did not. Plaintiffs have always maintained that SB 280 does not define what type of surgery is sufficient to comply with SB 280 and that, in any event, gender-affirming surgery, even for those transgender people who have a medical need for it, does not "change" their sex, but rather reaffirms it. Doc. 1 at ¶¶ 29, 81–90; Doc. 42, Ex. A, ¶¶ 35, 87–96.

- ***Governor Gianforte and the State of Montana:*** Defendants erroneously suggest that the Court needed to make "specific factual findings" regarding the conduct of the State of Montana and Governor Gianforte to hold them in contempt. Defs.' Rule 60(b) Mot. 9.

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[5] 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. Michels, *Montana Supreme Court issues order in birth certificate lawsuit*, Bozeman Daily Chronicle (Jan. 11, 2023), https://www.bozemandailychronicle.com/news/politics/montana-supreme-court-issues-order-in-birth-certificate-lawsuit/article_6944576b-ae2a-570e-9277-0b23727588c1.html (last visited Sept. 20, 2023) (quoting ACLU press release stating that the 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).").

Defendants do not, and cannot, dispute that the DPHHS and Governor Gianforte are arms of the State of Montana. In addition, Defendants have not provided any evidence establishing that Governor Gianforte was not responsible for Defendants' failure to comply with the Preliminary Injunction. 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). The Court properly sanctioned all the Defendants with contempt, including Governor Gianforte and the State of Montana.

These misstatements undermine any basis for Defendants' Rule 60(b) Motion.

III. The Court's Order that Defendants Pay Plaintiffs' Attorneys Fees Was Not Premised on Mistakes of Fact and Law.

A. Defendants have failed to show that the Court's order that Defendants pay Plaintiffs' reasonable attorneys' fees as a sanction for Defendants' contempt was improper.

As part of Plaintiffs' Motion to Enforce, Plaintiffs asked the Court to award Plaintiffs their reasonable attorneys' fees and costs incurred in connection with that motion, their motion to clarify the Preliminary Injunction, and their response to Defendants' motion for a writ of supervisory control. Doc. 103 at 8. The Court agreed that an award of attorneys' fees and costs associated with Defendants' repeated violations of the Preliminary Injunction was warranted as a sanction for Defendants' contempt in flouting that court order, but the Court limited fees to those incurred between January 10, 2023 (the date of entry of the Writ Order, in which the Montana Supreme Court ruled that the Court's Preliminary Injunction required Defendants to reinstate the 2017 Rule), and June 1, 2023 (the date of the hearing on the Motion to Enforce). Doc 133 at 10, 19, 20. Defendants concede that during this period they either enforced the 2022 Rule or "paused" processing applications to amend the sex designation on birth certificates, Defs.' Rule 60(b) Mot. 5—neither of which complied with the Preliminary Injunction's express and subsequently affirmed mandate to reinstate the 2017 Rule.

Defendants did not dispute in their opposition to Plaintiffs' Motion to Enforce or in Defendants' current Rule 60(b) Motion that attorneys' fees can be awarded as a remedy for contempt, and Montana law is clear that such an award is proper. *See Novak v. Novak*, 2014 MT 62, ¶ 37, 374 Mont. 182, 191, 320 P.3d 459, 466 ("Reasonable attorney fees are permissible in a contempt action."); *In re Marriage of Redfern* (1984), 214 Mont. 169, 173, 692 P.2d 468, 470 (same); *see also In re Marriage of Dreesbach* (1994), 265 Mont. 216, 225, 875 P.2d 1018, 1023 (stating that "the District Court has equitable powers to punish a party for contempt beyond the

confines of [the predecessor statute to 3–1–520, MCA, which like the current contempt statute permitted the same $500 fine[6]]," which can include "reasonable attorney's fees"). Defendants thus have failed to show any mistake of fact or law regarding the Court's award of reasonable attorneys' fees and costs in connection with the contempt.

B. Defendants also have failed to show that the Court's order that Defendants pay Plaintiffs' reasonable attorneys' fees incurred in litigating this case (without duplicate recovery of the fees awarded as a contempt sanction) was improper.

Defendants concede the law applicable to the non-contempt-related award of attorneys' fees. They admit that § 27–8–313, MCA, allows attorneys' fees to be awarded in declaratory-judgment actions such as this one as a form of "supplemental relief" when a court determines such relief to be "necessary and proper." Defs.' Rule 60(b) Mot. 11. They concede that satisfying the three-factor test enunciated by the Montana Supreme Court in *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs* ("*Montrust*"), 1999 MT 263, ¶ 66, 296 Mont. 402, 421-22, 989 P.2d 800, 811-12, entitles a party to an award of attorneys' fees. Defs.' Rule 60(b) Mot. 13. They further concede that attorneys' fees may be awarded when defendants' defense of a case is frivolous or in bad faith. *Id*.

As the Court's June 2023 Order itself shows, the Court correctly determined that an award of attorneys' fees to Plaintiffs was necessary and proper, properly applied the three-factor test, and correctly held that Defendants' defense of this case was frivolous or in bad faith. *See* Doc. 133 at 14–19. Defendants accordingly have failed to show any mistake of fact or law regarding the Court's award to Plaintiffs of reasonable attorneys' fees and costs relating to this action. In any event, relief under Rule 60(b)(6) is unavailable for errors of law. *Lussy,* 215 Mont. at 93, 695 P.2d at 466.

Defendants protest that "[t]his lawsuit is a garden variety declaratory judgment action challenging the constitutionality of a statute," Defs.' Rule 60(b) Mot. 12, but the Court already has held that that "this case is far from a 'garden variety' declaratory judgment action." Doc. 133 at 17. The Court so held because Defendants acknowledged on multiple occasions that the statue was "facially flawed and impossible to comply with" and ultimately conceded that the challenged statute was "unconstitutional from its inception," *id*. at 18, given that it was void for

[6] *Compare* § 3–1–520, MCA, *with* the now repealed § 3–1–519, MCA, referenced in *Dreesbach* and available at https://leg.mt.gov/bills/1997/mca/3/1/3-1-519.htm.

vagueness in violation of the Due Process Clause of Article II, Section 17, of the Montana Constitution. Doc. 133 at 11.

The first factor in *Montrust*'s three-part test—"the strength or societal importance of the public policy vindicated by the litigation"—is met in disputes such as this one over government action that turns on "constitutionally-based arguments" and where "constitutional concerns [are] integrated into the rationale underlying the decision," as opposed to mundane matters of statutory interpretation or self-interested claims brought for pecuniary gain. *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶ 25, 359 Mont. 393, 251 P.3d 131; *see also Montrust*, ¶ 66*; see also Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 78, 103 P.3d 1085, 1091 (private attorney general fees may be recovered "only in litigation vindicating constitutional interests").

Defendants claim this factor was not met because the Attorney General had the power to defend the case. Defs.' Rule 60(b) Mot. 14. But, as the June 2023 Order held, the public policy vindicated by this litigation—"Ensuring that laws are clear enough that they can be enforced without violating the Due Process Clause"—is "of great societal importance." Doc. 133 at 16. Indeed, the Montana Supreme Court has held that "[v]ague laws offend . . . important values." *Whitefish v. O'Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025. Moreover, that the Attorney General had the *power* to defend against this lawsuit does not mean it was *proper* to do so when the Attorney General concluded the case was not defensible. *See W. Tradition P'ship v. Bullock*, 2012 MT 271, ¶ 17, 367 Mont. 112, 118, 291 P.3d 545, 550 (noting that "the Attorney General has discretion to decide whether or not to defend [a challenged statute's] constitutionality"). When the Attorney General concludes that a challenged statute is unconstitutional, unlike in *Western Tradition*, *see id.* ¶ 20, there is nothing to balance against the societal importance of not countenancing unconstitutionally vague laws.

As for the second factor of the test—"the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff," *Montrust*, ¶ 66—it clearly was necessary for Plaintiffs to bring this action to enforce the Montana Constitution's prohibition on vague laws. No other parties ever brought such a challenge, and the government fought for nearly two years against Plaintiffs obtaining declaratory and injunctive relief. *See* Doc. 133 at 16. The burden on Plaintiffs was considerable. Plaintiffs had to file suit, defend against a motion to dismiss, litigate a contested preliminary injunction motion, litigate a contested motion to clarify the Preliminary

Injunction, defend against a writ of supervisory control that affirmed Plaintiffs' position that Defendants were violating the Preliminary Injunction, litigate a motion to enforce the Preliminary Injunction, and then successfully move for summary judgment. *See* Doc. 133 at 16, 18.

The third and final factor of the test—"the number of people standing to benefit from the decision," *Montrust*, ¶ 66—also is met here. As the June 2023 Order explains, while only a relatively small number of people want to amend the sex designation on their birth certificates, *all* Montanans benefit from upholding the state's Due Process Clause because permitting unconstitutional laws to remain in force "erodes the constitutional protections enjoyed by all citizens of the state of Montana." Doc. 133 at 17.[7]

Defendants fare no better in arguing that attorneys' fees cannot be awarded under *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 34, 314 Mont. 314, 325, 65 P.3d 576, 583, which held that, when only the State of Montana is sued (a condition that does not apply to this case), and when "the only potential liability of the State for fees would lie for the actions of the Legislature in enacting an unconstitutional bill," an award of fees would transgress the rule that the legislature "is immune from suit for any legislative act or omission by its legislative body." Here, the legislature itself was not sued, and liability comes not simply from the legislature's passage of SB 280, but rather from Defendants' *enforcement* of that law and Defendants' action in *defending* this lawsuit even though they have conceded SB 280 is unconstitutional. *See*, *e.g.*, *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 737–39 (1980) (attorneys' fees may not be premised "on acts or omissions for which appellants enjoyed absolute legislative

[7] That all factors of the three-factor test are met also means that an award of fees was "necessary or proper" under § 27–8–313, MCA, applicable to declaratory-judgment actions such as this. To analyze whether attorneys' fees are "necessary or proper" in a declaratory-judgment action, courts first consider whether equitable considerations support the award. Such equitable considerations exist when, as here, the suit is between private parties and the government, which are not similarly situated parties on equal footing. *City of Helena v. Svee*, 2014 MT 311, ¶ 20, 377 Mont. 158, 166, 339 P.3d 32, 37. Courts next apply the "tangible parameters test." *Davis v. Jefferson Cty. Elec. Off.*, 2018 MT 32, ¶ 13, 390 Mont. 280, 285, 412 P.3d 1048, 1052. This test asks whether "(1) the other party 'possesses' what the party filing the declaratory judgment sought in the litigation; (2) the party filing the declaratory judgment action needed to seek a declaration showing that it is entitled to the relief sought; and (3) the declaratory relief sought was necessary in order to change the status quo." *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 67, 394 Mont. 135, 163, 433 P.3d 1230, 1248. All three elements of this test were met here. Defendants possessed the power not to enforce SB 280; Plaintiffs needed to seek a declaration showing that they were entitled to the relief sought since Defendants contested that relief; and, without bringing this action, enforcement of SB 280 would not have ceased.

immunity," but immunity does not lie against the very same government actors when they are "subject to suit in their direct enforcement role").

Plaintiffs also are entitled to fees under § 25–10–711(1), MCA, which provides that:

> In any civil action brought by or against the state, a political subdivision, or an agency of the state or a political subdivision, the opposing party, whether plaintiff or defendant, is entitled to the costs enumerated in 25-10-201 and reasonable attorney fees as determined by the court if: (a) the opposing party prevails against the state, political subdivision, or agency; and (b) the court finds that the claim or defense of the state, political subdivision, or agency that brought or defended the action was frivolous or pursued in bad faith.

This is a basis for attorneys' fees independent from the three-factor test. *See Montrust*, ¶¶ 63–67 (rejecting State's argument that it was immune to fee-shifting because it did not make frivolous arguments or act in bad faith and adopting three-part test without any bad-faith requirement); *see also Cmty. Ass'n for N. Shore Conserv., Inc. v. Flathead Cty.*, 2019 MT 147, ¶¶ 48–55, 396 Mont. 194, 215-18, 445 P.3d 1195, 1208-10 (separately analyzing the three-factor test and the bad-faith test).

Defendants claim they did not act in bad faith, relying on the explanation in *Mont. Immigr. Just. All. v. Bullock*, 2016 MT 104, ¶ 48, 383 Mont. 318, 336-37, 371 P.3d 430, 444, that "[a] claim or defense is frivolous or in bad faith when it is outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion." But, as Defendants ultimately conceded, there was no legitimate argument or bona fide difference of opinion on the unconstitutional vagueness of SB 280. It is irrelevant that one of the multiple claims in Plaintiffs' complaint was dismissed or that Plaintiffs' motions for leave to file a Second Amended Complaint and for class certification were denied as coming too late or as unnecessary. *See* Docs. 61, 117, 118. Plaintiffs' claim that SB 280 violated at least one provision of the Montana Constitution had no defense. Indeed, Defendants repeatedly *conceded* during summary judgment briefing that SB 280 was unconstitutionally vague on its face and as applied. Doc. 129 at 1–2, 7, & 8. Defendants' nearly two-year defense of this case before summary judgment briefing was accordingly frivolous and in bad faith.

It is hard to put it better than the Court did itself in its June 2023 Order:

> In their Response to Plaintiffs Motion for Summary Judgment, Defendants asserted SEVEN times that they acted in good faith. (Court Doc. #129). This Court is not persuaded. Defendants stated in their Response that this case "obviously began with a mistaken premise that a person's sex could be changed with a medical procedure". However, Defendants then chose to spend

> considerable time and energy defending a statute that was based on this "mistaken premise". Defendants indicated they understood sex to be immutable multiple times early in the litigation. In their Combined Brief in Opposition to Motion for Preliminary Injunction and in Support of Motion to Dismiss, filed on August 18, 2021, merely a month after litigation commenced, Defendants referred to sex as a "biological (and genetic) fact" at birth. (Court Doc. #24). Later, in June 2022, Defendants acknowledged that the basis of SB 280 was "mistaken" as "no surgery changes a person's sex". (Court Doc. #123).
>
> Even after acknowledging that SB 280 was facially flawed and impossible to comply with, Defendants continued to file pleadings and extend the litigation for another year. At the end of that, in response to Plaintiffs' Motion for Summary Judgment, Defendants finally conceded that, in fact, "no surgery can change a person's sex" and that SB 280 was unconstitutional from its inception. (Court Doc. #129.)
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> * * * *
>
> The state here did not act in good faith or in accordance with constitutional and statutory mandates. This Court determined that it was in contempt of court for a significant portion of this litigation. Weighing the equities, this is not a garden variety case. The Defendants spent considerable time and effort defending a statute that they knew was unconstitutional. They ignored orders from this Court and an Order from the Supreme Court. Pursuant to MCA § 27–8–313, awarding Plaintiffs with reasonable attorney fees and costs for this litigation is proper.

Finally, Defendants complain that the Court acted without Plaintiffs having first filed a motion for fees.[8] Defendants have failed to show how they were in any way prejudiced or harmed by the lack of a motion. As part of their Rule 60(b) Motion, Defendants have now argued that Plaintiffs are not entitled to fees; moreover, they will have an opportunity to argue the reasonableness of fees once Plaintiffs submit their motion and briefing to the Court documenting those fees. Furthermore, granting Defendants' Rule 60(b) Motion because Plaintiffs did not file a motion to be awarded attorneys' fees would be pointless, as Plaintiffs would simply thereafter file a follow-up motion seeking the same fees, to which Defendants, through the current motion, have explained their opposition, and upon which—as this opposition to the Rule 60(b) Motion shows—Plaintiffs would be entitled to prevail.

[8] As this Court is likely aware, Judge Moses issued his June 2023 Order shortly before his retirement, no doubt not wanting another judge to have to wade through all of the filings and transcripts of hearings he presided over to determine whether or not Plaintiffs met the requirements for an award of fees. Defendants claim this denied them due process, Defs.' Rule 60(b) Mot. 12, while themselves quoting from *Small v. McRae* (1982), 200 Mont. 497, 506, 651 P.2d 982, 987, that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands" and citing nothing that supports the notion that the Due Process Clause—which was adopted to "protect the substantive and procedural rights of persons faced with deprivation of life, liberty, or property by the government," *In re J.W.*, 2021 MT 291, ¶ 23, 406 Mont. 224, 231, 498 P.3d 211, 216—provides protections to the government in addition to the governed.

IV. Defendants Have Provided No Evidence of Extraordinary Circumstances Demonstrating Judicial Bias or Animus.

Defendants argue that relief is appropriate under Rule 60(b)(6) because of the Court's "bias and express animus towards Defendants, and because the Court did not allow Defendants to explain the objectively reasonable basis for their conduct." Defs.' Rule 60(b) Mot. 17. As a preliminary matter, courts frown on baseless assertions of judicial bias or animus. "Allowing an attorney to make baseless inquiries into a judge's impartiality because that judge has made adverse rulings would result in chaos in the courts, impugn the integrity of the judge, render meaningless a judge's commitment to impartially decide cases, and completely undermine public confidence in the judiciary." *In re Estate of Boland*, 2019 MT 236, ¶ 40, 397 Mont. 319, 336, 450 P.3d 849, 860. "'Schemes to drive a judge out of a case . . . should not be allowed to succeed.'" *Id.* (quoting *State v. Ahearn*, 137 Vt. 253, 271, 403 A.2d. 696, 707 (1979)).[9]

In any event, there are no "extraordinary circumstances" to justify relief under Rule 60(b)(6). *Bahm v. Southworth*, 2000 MT 244, ¶¶ 9, 15, 301 Mont. 434, 437–38 10 P.3d 99, 101–02 (court denied Rule 60 motion and noted that examples of "extraordinary circumstances" include "attorney misconduct or gross negligence"). Attorney misconduct—and gross attorney misconduct at that—is the primary basis for obtaining Rule 60(b) relief. *See Karlen v. Evans* (1996), 276 Mont. 181, 915 P.2d 232 (collecting cases). No allegation of gross attorney misconduct is present here. Rather, Defendants make vague assertions about the "substance and tone of the Court's written orders" and the Court's "demeanor towards defense counsel at hearings." In support of this argument, Defendants rely upon allegedly improper statements the Court made during the September 15, 2022 hearing on Plaintiffs' motion to clarify the Preliminary Injunction. But that hearing did not provide the basis for the Court's June 2023 Order. In fact, following the September 15, 2022 hearing, the Court ***refrained*** from sanctioning the State. Only after the State refused to comply with multiple court orders—including the Montana Supreme Court's Writ Order affirming that the status quo required reverting to the 2017 Rule—did the Court order the State to pay Plaintiffs' attorneys' fees and costs. In fact, at every stage of this needlessly tortured litigation, the Court bent over backward to accommodate Defendants' extreme positions, contradictory statements, and outright refusal to abide by valid

[9] This lawsuit is not the only one in which the Attorney General's office has assaulted the integrity of members of Montana's judiciary. Indeed, the Attorney General is currently facing disciplinary proceedings for doing so. *See In re Knudsen*, PR 23-0496 (Sept. 5, 2023), https://casetext.com/case/in-re-knudsen-11 (last visited Sept. 21, 2023).

orders. The Court maintained that equanimity in the face of Defendants' relentless public attacks on its integrity.[10]

Defendants' Rule 60(b) Motion presents a run-of-the-mill disagreement with the Court's ruling, even though Defendants had every opportunity to argue their position—in writing and in person—to the Court. "[T]hey had the opportunity to argue, and did argue." *Essex*, ¶ 30. In fact, when Defendants did present oral argument to the Court, their counsel ***complimented*** the Court for its even-handedness: "And—but I appreciate—I appreciate your—just your demeanor and everything, Your Honor. And thank you. And I apologize on behalf of my client." Defs.' Rule 60(b) Mot. Ex. D, at 18:8-10.

The same counsel now avers that "[t]he judge . . . precluded my attempts to explain further by holding up his hand in a manner that clearly indicated to me that he intended for me to stop talking." Defs.' Rule 60(b) Mot. Ex. E, at ¶ 4 (affidavit of Thane Johnson). But the transcript from the June 1, 2023, hearing demonstrates that Defendants' counsel had multiple opportunities to explain the State's position and spoke uninterruptedly for large portions of the hearing. Defs.' Rule 60(b) Mot. Ex. D, at 17–18. Rather than provide a satisfactory explanation for Defendants' conduct, their counsel admitted his clients' wrongdoing: "[B]y God, if I have anything to say about it, ***it is not going to happen again***. That's all I can do." *Id.* at 17:11–17:13 (emphasis added). It is absurd to suggest that such an admission of wrongdoing cannot form the basis for a contempt order or an order granting attorneys' fees.

Simply put, M.R. Civ. P. 60(b) is not a proper vehicle for modifying the judgment in this case. The cases on which Defendants rely conclusively demonstrate this. In *In re Marriage of Waters*, 223 Mont. 183, 724 P.2d 726 (1986), the Montana Supreme Court specifically noted the unique circumstances of the case before it, which involved modifying a dissolution decree based on retroactively applying the Uniformed Services Former Spouses' Protection Act. *Waters*, 223 Mont. at 188–189. The Court took pains to limit its holding based on the "unique factual situation which [was] present in th[at] case" and held that the case "d[id] not establish a general rule for reopening a final judgment merely because there has been a subsequent change in the

[10] The Attorney General's office reacted to the Court's Preliminary Injunction by issuing a statement asserting the Judge's "behavior today revealed his extreme prejudice." Ashley Nerbovig, *Judge orders state to allow transgender Montanans to change their sex marker, state says no*, KTVH (Sept. 15, 2022), https://www.ktvh.com/news/judge-orders-state-to-restore-previous-birth-certificate-change-process-affecting-transgender-montanans (last visited Sept. 21, 2023).

law upon which that judgment was based." *Id.* Rather, "[o]nly when extraordinary circumstances are found to exist . . . may Rule (60)(b)(6) be used to modify a final judgment." *Id.*

Finally, where an aggrieved party has the opportunity to appeal an order, "extraordinary circumstances" do not exist to support a Rule 60(b) motion. *Essex*, ¶¶ 28–29. Here, if Defendants disagree with the Court's sanctions order and award of attorneys' fees, they are entitled to appeal those orders to the Montana Supreme Court. They have not yet done so.[11]

Because extraordinary circumstances do not exist here, and because Defendants are not blameless, Rule 60(b) relief is not justified. Through two years of litigation, this Court has operated as a court should—impartially, fairly, courteously, and professionally. Defendants' disagreement with the outcome of this case cannot satisfy the extraordinarily high legal threshold for a Rule 60(b) motion.

CONCLUSION

FOR THESE REASONS, Plaintiffs respectfully request the entry of an order denying the Rule 60(b) Motion and granting any other relief in Plaintiffs' favor that the Court deems just.

Dated: September 22, 2023

Respectfully submitted,

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[11] Nor did Defendants avail themselves of the normal process for appeal when the Court issued the original Preliminary Injunction.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of the foregoing **Plaintiffs' Response to Defendants' Brief in Support of Montana Rule of Civil Procedure 60 Motion for Relief from Order Regarding Contempt and Attorneys' Fees** via email on counsel for Defendants:

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