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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. Colette B. Davies** **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES**

INTRODUCTION

Defendants[1] engaged in protracted litigation to enforce a facially unconstitutional statute, repeatedly disregarding multiple court orders in the process. They now seek to avoid the consequences of their conduct, arguing that (1) the Court should reconsider granting Plaintiffs their attorneys' fees as prevailing parties under the private-attorney-general doctrine, and (2) the fees requested by Plaintiffs are unreasonable. Resp. at 3–14. Neither argument has any merit, and the Court should grant Plaintiffs' motion.

As the Court originally found in its June 26, 2023, order:

- Defendants acted in contempt of court by deliberately failing to follow the Court's preliminary injunction, disregarding the Court's clarification order, and disregarding their obligation under Montana law to preserve the status quo mandated by the previous orders of this Court and the Montana Supreme Court. Doc. 133 at 5–10, 20. This conduct entitles Plaintiffs to recover their attorneys' fees.

- Plaintiffs also are entitled to recover their attorneys' fees under the private-attorney-general doctrine because "[t]his case vindicates constitutional interests"; Plaintiffs, as private parties, needed to bring this case to vindicate a critical constitutional right because Defendants "fought to enforce a law that they later conceded was unconstitutional"; and Plaintiffs were forced to "exert additional effort" to enforce the Court's preliminary injunction because Defendants "were in contempt of court for large portions of this litigation." *Id*. at 15–17.

- In addition, Plaintiffs are entitled to recover their attorneys' fees because Defendants did not act in good faith. *Id*. at 19.

Nothing in Defendants' response alters any of these conclusions.

Defendants' objection to the reasonableness of the requested fee award likewise has no merit. A team of experienced attorneys coordinated their efforts to prosecute a successful

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

constitutional challenge to a facially unconstitutional law. Although Defendants hyperbolically argue that the requested fee award "shocks the conscience of any Montana practitioner," Resp. at 11, the true "shock" is that Defendants enacted an intentionally discriminatory law targeting transgender Montanans and then ignored multiple court orders requiring them to preserve the status quo while the litigation was pending. The legal fees incurred to enjoin Defendants' years-long illegal and unconstitutional conduct were reasonable and should be awarded in their entirety.

ARGUMENT

I. The Court should not reconsider the basis for the fee award.

Defendants had the opportunity to appeal the Court's fee award but failed to do so properly. Doc. 184 at 7. They now seek reconsideration of the fee award, despite failing to perfect their appeal. The Court should deny Defendants' request to reconsider the fee award.

In response to the Court's June 26, 2023, summary-judgment order, Defendants sought to vacate the fee award by filing a motion under Rule 60(b)(6) of the Montana Rules of Civil Procedure. Doc. 149. The Rule 60 motion was ill-founded for the reasons set forth in Plaintiffs' response to the motion. Doc. 160. The Court elected not to rule on the motion, resulting in its automatic denial. *See* M. R. Civ. P. 60(a)(1); M. R. Civ. P. 59(f).

On February 23, 2024, Defendants filed a motion under Rule 54(b) of the Montana Rules of Civil Procedure for an order certifying for interlocutory appeal (1) the Court's June 26, 2023, order, in which the Court awarded Plaintiffs their attorneys' fees, and (2) the denial of Defendants' Rule 60 motion. Doc. 171. Plaintiffs did not oppose the motion. On March 22, 2024, the Court granted Defendants' motion to certify and stayed further litigation over Plaintiffs' attorneys' fees pending remand from any appeal by Defendants. Docs. 175, 176.

On May 20, 2024, following the Court's certification order, Defendants filed a notice of appeal. Doc. 177. On May 29, 2024, the Montana Supreme Court dismissed Defendants' appeal without prejudice on the basis that the Supreme Court had no jurisdiction over the appeal because Defendants failed to attach a certification order to their notice of appeal. *See* 5/29/24 Supreme Court Order. Afterward, Defendants did not properly file a notice of appeal or seek rehearing of the order dismissing their appeal. Defendants thus failed to timely perfect their appeal under Rule 54(b).

Despite these rulings, Defendants now ask the Court to reconsider one of the grounds for the fee award: the application of the private-attorney-general doctrine. Resp. at 3–9. As an initial matter, the private-attorney-general doctrine was not the only basis for the fee award. The Court also relied on its discretionary authority to award Plaintiffs their attorneys' fees under section 27–8–313 of the Montana Code based on Defendants' lack of good faith. Doc. 133, at 19. Defendants do not appear to challenge this aspect of the fee award.

Regardless, the Court should not reconsider its reliance on the private-attorney-general doctrine. As the Court explained in its March 22, 2024, certification order, "as of June 26, 2023 [shortly before Judge Moses retired and the matter was reassigned to Judge Davies], the ***sole*** remaining issue before the district court was the ***amount*** of reasonable attorney's fees." Doc. 175. at 4 (emphasis added). As that order further states, "Should this matter continue in the district court without being certified on appeal, the ***sole*** question remaining is the ***amount*** of reasonable fees at issue. The question of whether Judge Moses' award of attorneys' fees was either factually or legally correct is no longer a justiciable issue before this Court." *Id*. (emphasis added).

In other words, Defendants are not entitled to argue that "the private attorney general does not justify an award of attorney fees over the entire cause sua sponte." Resp. at 3. Nor are they

entitled to argue that "Plaintiffs fail to meet all three factors necessary to succeed under the private attorney general doctrine." *Id.* at 5. The only "justiciable issue" before the Court is the reasonableness of the fees requested by Plaintiffs. *See* Doc. 175 at 4 (emphasis added).

By challenging the grounds for the Court's fee award yet again, without the Court's invitation to do so, Defendants have continued their pattern of disregarding the Court's time, wasting the Court's resources, and requiring Plaintiffs to once again spend additional time responding to Defendants' groundless position. The Court should deny Defendants' motion to reconsider.

II. The private-attorney-general doctrine justifies the fee award.

Even assuming Defendants were entitled to relitigate the basis for the fee award (which they are not), Plaintiffs have satisfied all three factors of the private-attorney-general doctrine. *See Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs (Monstrust)*, 1999 MT 263, ¶ 66, 296 Mont. 402, 989 P.2d 800.

Defendants contend that the first factor in the three-part *Montrust* test—"the strength or societal importance of the public policy vindicated by the litigation"— is not met. Resp. at 5. Defendants are incorrect. Plaintiffs have shown the strength and societal importance of the litigation and its constitutional implications, and the Court has correctly adopted Plaintiffs' position.

The first *Montrust* factor 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 routine matters of statutory interpretation or self-interested claims brought for pecuniary gain. *See Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶ 25, 359 Mont. 393, 251 P.3d 131; *see also Montrust*,

¶ 66; *Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085 (private-attorney-general fees may be recovered "only in litigation vindicating constitutional interests"). While the Court may not have reached all of Plaintiffs' constitutional arguments, it ultimately did hold that the statute and regulation Plaintiffs challenged in this case violated the Montana Constitution's due-process guarantee because they were unconstitutionally vague. See Doc. 133 at 12.

With respect to the second factor—"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 against vague laws. No other parties brought the challenge, and once the challenge was brought, Defendants fought for nearly two years against the declaratory and injunctive relief requested by Plaintiffs. *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 ultimately affirmed Plaintiffs' position that Defendants were violating the preliminary injunction, litigate a motion to enforce the preliminary injunction, and then 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. Defendants attempt to argue that the Court acknowledged that the third factor was not met by repeating the Court's statement that, "[o]n its face, SB 280 and the 2021 Rule may only impact a small number of individuals." Resp. at 6; Doc. 133 at 17. But Defendants ignore the Court's actual holding. As the Court's June 2023 order

explains, while only a relatively small number of people may 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." *Id.*[2]

Defendants further claim there is a presumption against awarding fees when the state defends a law in good faith, as Defendants assert they have done here. Resp. at 7. However, there was no legitimate argument, or bona fide difference of opinion, regarding the unconstitutional vagueness of SB 280. Instead, 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. Based on these concessions, Defendants' nearly two-year defense of this case, before summary-judgment briefing occurred, was frivolous and in bad faith.

As the Court stated 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).

[2] 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, which applies to declaratory-judgment actions such as this one. To analyze whether attorneys' fees are "necessary or proper" in a declaratory-judgment action, courts first consider whether equitable considerations support the award. 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, 339 P.3d 32. Courts next apply the "tangible parameters test." *Davis v. Jefferson Cty. Elec. Off.*, 2018 MT 32, ¶ 13, 390 Mont. 280, 412 P.3d 1048. 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, 433 P.3d 1230. All three elements of this test were met here. Defendants had 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.

> 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.

Doc. 133 at 18, 19.

Plaintiffs have met all the requirements for a fee award under the private-attorney-general doctrine. The Court should reject Defendants' contention that the private-attorney-general doctrine does not justify the award.

III. The requested fee award is reasonable.

A. Plaintiffs prevailed in this litigation and are entitled to recover all their attorneys' fees and costs.

Defendants argue that Plaintiffs' fees should be adjusted downward because Plaintiffs only prevailed on one count of their complaint. Resp. at 10–11. The fact the Court only entered judgment on one of the claims alleged by Plaintiffs does not mean that Plaintiffs are prohibited from recovering the full amount of their attorneys' fees. *See, e.g., Emmerson v. Walker*, 210 MT 167, ¶ 32, 357 Mont. 166, 236 P.3d 598 ("When calculating attorney fees in a case where it is impossible to segregate the attorney's time between claims entitling the party to attorney fees and other claims, an attorney may be entitled to the entire fee.") (internal quotation marks omitted).

While Plaintiffs did not obtain rulings on each of the claims they brought in this case, there is no dispute that they prevailed in this litigation. Plaintiffs filed this case to challenge the

constitutionality of SB 280 and enjoin its enforcement. Docs. 1, 6. After issuing a preliminary injunction prohibiting the enforcement of SB 280, *see* Doc. 61 at 35, ¶ 5(a), the Court, in ruling on Plaintiffs' motion for summary judgment, held that SB 280 was unconstitutionally vague and unenforceable, *see* Doc. 133. As a result, the Court permanently enjoined SB 280. Plaintiffs thus obtained the full relief they requested in their complaint.

Defendants cite *Klock v. Town of Cascade*, 284 Mont. 167, 177, 943 P.2d 1262, 1268 (1997), for the proposition that Plaintiffs are only entitled to a portion of their fees. Resp. at 11. *Klock* is inapposite.

In *Klock*, the district court awarded fees to the defendants under 42 U.S.C. § 1988, a discretionary federal fee-shifting statute, when the defendants prevailed on their motion for summary judgment. *Id.* at 175. On appeal, the Montana Supreme Court noted that "an award of attorney fees to a prevailing defendant is appropriate if the plaintiff's civil rights claim is meritless in the sense that it is groundless or without foundation." *Id.* (internal quotation marks omitted). In affirming the fee award to the defendants, the Court noted that two of the plaintiff's eight counts were civil-rights claims, and, as a result, the defendants were entitled to one-fourth of their fees. *Id.* at 176.

Klock is distinguishable. Plaintiffs did not bring meritless civil-rights claims. They won their lawsuit. In addition, this case does not involve fee-shifting against the party that filed suit. It involves fee-shifting against defendants that acted wrongfully. *Klock* thus does not support reducing the amount of Plaintiffs' recoverable attorneys' fees.

Moreover, it is not helpful to Defendants that during the parties' summary-judgment briefing, Defendants conceded that SB 280 was unconstitutionally vague. Resp. at 12. Plaintiffs were forced to brief the issue, and set forth their position, *before* Defendants' concession. Plaintiffs

also needed to file a reply brief and present argument about why sanctions were appropriate. Defendants' belated concession that SB 280 was unconstitutionally vague therefore also should not affect the amount of attorneys' fees Plaintiffs are entitled to recover.

Finke v. State ex rel. McGrath, 2003 MT 48, 314 Mont. 314, 65 P3d. 576, cited by Defendants, also does not bar recovery in this case. Resp. at 4. In *Finke*, other than Yellowstone County—which the Court stated should not have to pay fees for the unconstitutional actions of the legislature—"[t]he only entity remaining against whom fees could be assessed [was] the State of Montana." *Id*., ¶¶ 33–34. While the legislature might be immune from suit in certain circumstances, in this case Plaintiffs did not sue the legislature, and although Plaintiffs did sue the State of Montana, they also sued the governor in his official capacity, the Montana Department of Public Health and Human Services, and the Director of the Montana Department of Public Health and Human Services in his official capacity to stop their enforcement of an unconstitutional law. *See* Doc. 1 at ¶¶ 1–2, 16–18; Doc. 44; Doc. 42, Ex. A, at ¶¶ 1–2, 22–24.

Defendants have never claimed, and cannot claim, that those defendants are immune from suit in this case. They are not. *See* MCA § 2–9–113 (providing that the governor is immune from suit only for *damages* "arising from the lawful discharge of an official duty associated with vetoing or approving bills or in calling sessions of the legislature," which was not the basis for Plaintiffs' suit against the governor); *B.Y.O.B., Inc. v. State*, 2021 MT 191, ¶ 43, 405 Mont. 88, 493 P.3d 318 (state agencies may have quasi-judicial immunity, but only for engaging in "an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies," a limitation not at issue in this case, in which Plaintiffs did not challenge an agency's discretionary adjudication) (internal quotation marks omitted); *Rahrer v.*

Bd. of Psychs., 100 MT 9, ¶ 15, 298 Mont. 28, 993 P.2d 680 (applying the same rule regarding quasi-judicial immunity to agency officials, which does not apply here).

B. Plaintiffs' attorneys submitted sufficient evidence of their experience and qualifications.

Defendants incorrectly assert that Plaintiffs did not submit "any information as to the experience and qualifications of any of their local attorneys or the attorneys admitted pro hac vice." Resp. at 14. Contrary to Defendants' assertion, Plaintiffs attached detailed declarations from Mr. Rate, Mr. Davidson, and Mr. Horvath detailing their experience and qualifications, as well as the experience and qualifications of their colleagues. *See* Doc. 184 at Ex. A, Rate Decl.; Ex. B, Davidson Decl.; Ex. C, Horvath Decl.

For example, Mr. Davidson's declaration provides substantial detail about his qualifications, as well as those of his colleagues from the ACLU, stating:

> 22. I left private practice in 1988 and joined the staff of the ACLU Foundation of Southern California as staff counsel that year and thereafter was promoted to senior staff counsel. In 1995, I moved from the ACLU Foundation of Southern California to Lambda Legal Defense and Education Fund ("Lambda Legal"), which is the nation's oldest and largest nonprofit legal organization specializing in the rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV. I began at Lambda Legal as a supervising attorney, subsequently was promoted to senior counsel, and then was selected to become the organization's national legal director, a position I served in for more than 12 years. In that position, I ultimately supervised a legal team of 31 attorneys and 16 support staff across Lambda Legal's six offices nationwide.
>
> 24. After 22 years at Lambda Legal, I departed in 2017 to briefly become a consultant for several nonprofit entities on LGBT rights issues and then, in 2018, I became Chief Counsel at Freedom for All Americans, a nonprofit organization working to obtain statutory protections against gender identity and sexual orientation discrimination nationwide. In February of 2022, I left that organization to return full-time to litigation at the ACLU, working from Los Angeles. I also have served as an adjunct professor at the UCLA School of Law, the University of Southern California Law Center, Loyola Law School, and the former Whittier Law School, teaching classes that, among other matters, addressed the rights of transgender individuals.

Doc. 184 at Ex. B, Davidson Decl., ¶¶ 23, 24. Mr. Davidson's declaration goes on to describe other cases where he has litigated issues central to this case, including the rights of transgender people to equal protection, due process, and privacy. *Id.*, ¶ 24.

Mr. Rate's and Mr. Horvath's declarations provide the same level of detail about their own experience, and those of their colleagues, from, respectively, the ACLU of Montana and Nixon Peabody. *See* Doc. 184 at Ex. A, Rate Decl., ¶¶ 19–23, Ex. C, Horvath Decl., ¶¶ 22–39.

Defendants fail to explain why this level of detail is allegedly deficient. They do not cite any legal authorities to support their position. Nor do they explain what, if any, additional details would be necessary to advise them of Plaintiffs' attorneys' experience and qualifications. The Court should reject Defendants' unfounded criticisms of the detailed documentation submitted by Plaintiffs.

C. Plaintiffs' attorneys' billing records are sufficient.

In support of their motion, Plaintiffs submitted over 50 pages of billing entries. Doc. 184 at Exs. D & E. Defendants claim that Plaintiffs' attorneys failed to keep detailed time records and performed duplicative work. Resp. at 12–14. Defendants have failed to identify which details allegedly are absent from Plaintiffs' time records. Instead, they have left Plaintiffs and the Court to identify those details.

Defendants' reliance on *Tacke v. Energy West, Inc.*, 2010 MT 39, 355 Mont. 243, 227 P.3d 601, is misplaced. Resp. at 14. In *Tacke*, the Montana Supreme Court held that the district court did not abuse its discretion in approving a fee award even though the plaintiff in that case "failed to submit contemporaneous time records detailing her counsel's work on the matter." *Tacke*, ¶¶ 33, 38. The court noted that "while [it was] not adopt[ing] a per se rule as some courts have done,

[it] strongly urge[d] counsel to keep and provide contemporaneous time records in support of attorneys' fees requests in fee-shifting cases." *Id.*, ¶ 38.

Here, unlike in *Tacke*, Plaintiffs' counsel submitted over 50 pages of contemporaneous time records describing the work they performed in this matter. Doc. 184 at Exs. D & E. In addition, the court in *Tacke* approved the fee petition, even without contemporaneous records, which further supports approving the thoroughly documented fee petition submitted in this case.

Defendants likewise fail to explain their argument that Plaintiffs' attorneys engaged in duplicative work, suggesting that the mere number of attorneys who worked on the case made the attorneys' work duplicative. Resp. at 12. Despite their broad criticism, Defendants have not identified a single example of duplication across Plaintiffs' attorneys' time records.

Defendants' assertion that Plaintiffs' attorneys' fees need to be "closely scrutinized" based on billing related to the "preparation of comments on the 2022 proposed rule" likewise has no merit. Resp. at 10, n.2. Fees related to preparing comments on the 2022 Rule *were* related to this litigation, which challenged the constitutionality of the 2022 Rule.

Finally, Defendants incorrectly claim that the rates Plaintiffs' attorneys charged were excessive, citing unsupported anecdotes of attorney representation and fees in unrelated proceedings. Resp. 13–14. In doing so, Defendants neglect to acknowledge that Plaintiffs' attorneys, who handled this matter pro bono, substantially reduced their standard hourly rates for purposes of Plaintiffs' fee request. *See* Doc. 184 at Ex. A, Rate Decl., ¶ 14; Ex. B, Davidson Decl., ¶ 14; Ex. C, Horvath Decl., ¶¶ 15, 17. Nothing in Defendants' response supports their assertion that the reduced rates changed by Plaintiffs' attorneys were excessively high.

CONCLUSION

For these reasons, Plaintiffs request the entry of an order:

(a) awarding them reasonable attorneys' fees of $34,665.00 for work performed in connection with the motion to enforce the preliminary injunction, including $19,872.50 in attorneys' fees attributable to the ACLU of Montana, $5,027.50 in attorneys' fees attributable to the ACLU, and $9,765.00 in attorneys' fees attributable to Nixon Peabody;

(b) awarding them reasonable attorneys' fees of $661,133.75 for work performed in connection with other aspects of the litigation, including $205,816.25 in attorneys' fees attributable to the ACLU of Montana, $164,415.00 in attorneys' fees attributable to the ACLU, and $290,902.50 in attorneys' fees attributable to Nixon Peabody;

(c) awarding them reasonable costs of $30,117.70, including $2,235.02 in costs attributable to the ACLU of Montana, $23,000.37 in costs attributable to the ACLU, and $4,882.31 in costs attributable to Nixon Peabody; and

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

Respectfully submitted this 6th day of September, 2024.

By: */s/ Alex Rate*
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