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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

PHOEBE CROSS, et al. Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. DV 2023–541 Hon. Jason Marks **DEFENDANTS' REPLY IN SUPPORT OF RULE 60(b)(2), 60(b)(5), AND 60(b)(6) MOTION FOR RELIEF FROM JUDGMENT OR ORDER**

INTRODUCTION

Sometimes "[t]he determination of the existence of genuine issues of material fact is one that is not always easily ascertained." *Sprunk v. First Bank Sys.*, 252 Mont. 463, 466, 830 P.2d 103 (1992). Quite the opposite here. Every court in the country that proceeded past the preliminary injunction stage so far—besides this Court—found genuine factual questions precluding summary judgment on the very same issues.

Those courts, from state trial courts to the U.S. Supreme Court, uniformly heard the same arguments with the same medical evidence and expert opinions that this Court heard. Yet somehow, against the strong current, this Court stands out as the only court in the country to grant summary judgment—finding, without construing the evidence in Defendants' favor, that no genuine issues of material fact exist. That is the impetus of Defendants' Motion. This Court's extraordinary deviation from the beaten path demands Rule 60 extraordinary relief.

ARGUMENT

I. Rule 60 relief is warranted.

A. Rule 60(b)(2).

"[O]pen questions regarding basic factual issues before medical authorities and other regulatory bodies … 'afford[s] little basis for judicial responses in absolute terms.'" *United States v. Skrmetti*, 605 U.S. ___, ___, 145 S. Ct. 1816, 1837 (2025) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974) (second modification in original). Disregarding that uncertainty, this Court decided that Plaintiffs sufficiently proved there were *no* questions of material fact that preclude summary judgment. That critical error resulted in a miscarriage of justice and significant harm to the people of Montana and some of their most vulnerable children.

"The record evidence here is extensive, complex, and disputed." *Skrmetti*, 145 S. Ct. at 1885 (Kagan, J., dissenting). But when summary judgment briefing was complete here, even more new evidence undercutting Plaintiffs' claims came to light,

with more emerging seemingly every week. (*See* Doc. 294 at 5–8). That is unsurprising. Courts have long recognized that medicine is an evolving field. This is why courts afford States "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). Indeed, it is counterfactual to argue that medical research is arbitrarily ossified because of a certain stage of litigation. Because of this, mechanisms like Rule 60(b)(2) exist so to provide relief when the facts don't match the final judgment. The new evidence here is more than enough to warrant relieving Defendants from this Court's grant of summary judgment for Plaintiffs.

Under Rule 60(b)(2), relief is proper if new evidence: "(1) came to the moving party after trial; (2) [] was not a want of due diligence which precluded its earlier discovery; (3) [its] materiality … is so great that it would probably produce a different result on retrial; and (4) [it] is not merely cumulative." *Moore v. Frost*, 2021 MT 74, ¶ 12, 403 Mont. 483, 483 P.3d 1090.

Defendants presented many examples of new evidence which this Court should have considered. Beyond the HHS letter, Defendants also presented to the Court the Schwartz peer-reviewed article, Olson-Kennedy's study, and the ongoing developments with clinic closures in Montana and across the country, just to name a few examples. Any one of these sufficiently passes the *Frost* test; altogether, Defendants present an overwhelming case for relief from the summary judgment order. The obvious issue here is Plaintiffs' attempt to ignore new evidence that undermines

their arguments, but this contravenes the foundational truth-seeking function of the litigation process. *See , e.g.*, *Richardson v. State*, 2006 MT 43, ¶ 64, 331 Mont. 231, 130 P.3d 634 ("The first sentence in the Preamble of the Montana Rules of Professional Conduct states that '[a] lawyer shall always pursue the truth.'"). The correct response is not to run away from these facts,[1] but to re-open discovery so this hyper-political case can be properly litigated.

Plaintiffs' only response to this sea-change of new evidence is that this evidence is not, in fact, new or material. That is absurd. First, the Health and Human Services ("HHS") Letter reflects the most up to date policy position of the United States regarding Medicalized Gender Transition ("MGT"). Although Plaintiffs disagree with this policy, it nonetheless represents the official position of the United States, including its federal agencies like the HHS. This is not peanuts. The official policy of the United States is that MGT rests on junk science. This policy also aligns the United States with restrictions on MGT from Europe. Plaintiffs cannot meagerly deny this by distorting the HHS letter as just a summary of existing literature. This letter *is* the expression of the HHS's position on the quality (or lack thereof) of MGT and its evidence base. And this letter is new evidence of that new official position.

Second, the Schwartz study is new evidence which likely would produce a different result here. This particular piece of evidence is the latest in an ever-growing

[1] Indeed, it would be comical for a lawyer to object to evidence, reasoning "because it's devastating to my case!" *Liar Liar*, Universal Pictures (1997).

chorus from the scientific community disavowing Plaintiffs' specious platitude that MGT is lifesaving care. Plaintiffs' only response is that the Schwartz study is "cumulative" and "immaterial" (Doc. 300 at 8), as if these baseless criticisms somehow defeat its pertinence here. That study contradicts Plaintiffs' position, finding "the overall mortality risk of transgender women, as measured via the standardized mortality ratio, was higher compared to men in the general population and even higher compared to women," and leading causes of death include heart disease, cancer, and suicide. (Doc. 294 at 7). That finding (again) upends Plaintiffs' position. No matter what, the Schwartz study is new evidence this Court should have considered and is new evidence which would likely change the outcome of this litigation.

Third, the Olson-Kennedy study is similarly likely to produce a different outcome at trial. Fatally, Plaintiffs' own medical expert, Olson-Kennedy, found that MGT does not actually produce more benefits than harm. Plaintiffs' response on this point is frankly befuddling. They claim that Olson-Kennedy's recently published study is not new because Defendants questioned Olson-Kennedy about the study. But at the time of questioning, the study was not yet released. Indeed, Plaintiffs implicitly admit this to be the case, trying to sweep under the rug the fact Olson-Kennedy withheld publication because she believed it would hurt MGT's defense in litigation. Also, Plaintiffs decidedly have shifted their framing of the purpose of puberty blockers, switching from benefiting minors to now "prevent worsening mental health" of minors.

(Doc. 300 at 11). This is not an instance where simple rebranding can distract from reality.

Finally, the cascade of clinic closures further upset this litigation. One of Plaintiffs' motivations for initiating this litigation was to ensure clinicians could continue providing minors MGT at their clinics. If those clinics are shuttered, then they are not providing minors MGT. In quick succession, clinics have closed, investigations have opened, and MGT has stopped. Plaintiffs try to paint these facts as political attacks or further evidence of a supposed "animus." But that is exactly what discovery and trial are for—to get to the bottom of these facts and ascertain the truth. They cannot meaningfully dispute the usefulness of these facts without sufficient basis. And that sufficient basis will come not from the media but through discovery and trial by jury.

The totality of the facts and circumstances here strongly support Rule 60(b)(2) relief. New evidence continues to pour in, further raising questions surrounding MGT. This new evidence is highly relevant and probative to the factual disputes here. And without more discovery, this Court's Order will continue to drift farther from reality. The parties, the Court, and the public all have interest in understanding the most complete evidence supporting the best practices in treating minors diagnosed with gender dysphoria. The Court should therefore grant Defendants' Motion.

B. Rule 60(b)(5).

Because of "the historic power of a court of equity to modify its decree in the light of changed circumstances," this Court has authority to grant relief under Rule

60(b)(5). Wright & Miller, *Fed. Prac. & Proc.* § 2863 (3d ed.). Indeed, federal courts follow a two-part test to exercise this power: the moving party must show (1) "a significant change in factual conditions or in the law warranting modification of the order" and (2) "that the changed conditions make compliance with the court's order more onerous, unworkable, or detrimental to the public interest." *Defenders of Wildlife v. Martin*, No. 2:05-CV-00248-RHW, 2021 WL 5890661, at *3 (E.D. Wash. Dec. 13, 2021). Under this two-part test, Defendants prove *Skrmetti* and other recent developments in federal caselaw—which *Plaintiffs, Defendants, and this Court relied on* at all parts of this litigation—merit Rule 60(b)(5) relief.

Not only is *Skrmetti* a major change in decisional law, but as the majority opinion, concurrences, and dissents highlight, this area is rife with questions of fact and consistent changes in the relevant science. The takeaway here is not so much what the U.S. Supreme Court ultimately found (which alone is preeminent), but how the U.S. Supreme Court viewed the facts. And every justice there agreed questions of fact permeated every aspect of their analysis. Plaintiffs try to misdirect from this point, saying that Montana is not bound by *Skrmetti*. But that is not the point. *Facts don't change because of where they are heard*. If the U.S. Supreme Court found questions of fact, if federal circuit courts consistently found questions of fact, if state trial courts consistently found questions of fact, how can this Court <u>not</u> find questions of fact? *Skrmetti* is a change in decisional law on this point because it plainly establishes the existence questions of material fact this Court ignored. Plaintiffs cannot escape this.

It is also gallingly hypocritical for Plaintiffs to now run away from federal law after they relied so heavily upon it throughout this litigation. Plaintiffs' Motion for Summary Judgment relied on no less than 18 different federal cases. Throughout all of their briefing, into their arguments they sprinkle federal cases like salt: *Bostock v. Clayton County*, *Brandt v. Rutledge*, *Hecox v. Little*, and *Kadel v. Folwell*. Yet suddenly, federal caselaw "in no way impacts" this case. To them, these once useful cases are now just some caselaw to be forgotten—down the memory hole they go.

Even this Court relied on federal caselaw to interpret Montana law. For example, it said that "if heightened scrutiny is the appropriate level of review when the *federal Equal Protection Clause* is implicated, the Court posits that strict scrutiny is the appropriate level of review when Montana's Equal Protection Clause is implicated." (Doc. 131 at 26) (emphasis added). Plaintiffs' inconsistency on this point plagues their argument. Right as the decisional law begins to disfavor their outcome, they flee from it. But that does not simply negate all the federal law they once so insistently invoked. Plaintiffs picked those cherries, and they cannot return them to the tree now that their palate finds them too sour.

Although it is true that *Skrmetti*, as a technical legal matter, "cannot answer what this Court is being asked … [because] [t]he Montana Constitution stands on its own," *Cross v. State*, 2024 MT 303, ¶ 60, 419 Mont. 290, 560 P.3d 637 (McKinnon, concurring), *Skrmetti* nonetheless and at the very least highlights the deficiencies of

this Court's Order, specifically when this Court found there are no genuine questions of material fact. Rule 60(b)(5) relief is therefore proper.

C. Alternatively, Rule 60(b)(6).

"[R]elief is available under Rule 60(b)(6) … for situations other than those enumerated in the first five subsections of the rule." *Bahm v. Southworth*, 2000 MT 244, ¶ 14, 301 Mont. 434, 10 P.3d 99. A movant must show: (1) "extraordinary circumstances exist"; (2) the movant acted "within a reasonable time" to set aside the judgment; and (3) "the movant was blameless." *Skogen v. Murray*, 2007 MT 104, ¶ 13, 337 Mont. 139, 157 P.3d 1143. If this Court concludes relief under Rules 60(b)(2) and (5) is unavailable, then it must grant relief under 60(b)(6).

If relief is unavailable under any other subsection of Rule 60(b), then extraordinary circumstances demand relief under Rule 60(b)(6). As Defendants demonstrated, extraordinary circumstances exist to justify such relief here. These extraordinary circumstances include (but are not limited to): a directly on point U.S. Supreme Court case; this Court's failure to consider a monumental change in the United States' policy on MGT, including its federal agencies like HHS; further relevant developments from European countries—developments that the U.S. Supreme Court believed "demonstrate the open questions regarding basic factual issues," *Skrmetti*, 145 S. Ct. at 1836; and this Court's fickle adjudication of this case, deciding in the eleventh hour that, even when viewing facts for Defendants, Plaintiffs proved there were no disputes of material fact such that Defendants were not entitled to a trial on the merits.

The HHS Report and Letter are not, as Plaintiffs describe them, "irrelevant and politically motivated" (Doc. 300 at 15). They are the official positions of the United States. And it is impossible for this Court to have considered developments from Europe and still find no genuinely disputed questions of material fact.

Defendants are not challenging the proper judicial role; Defendants are challenging this Court's extraordinary one-of-a-kind finding that no material disputes of fact exist with respect to Plaintiffs' claims. The weight of evidence plainly establishes otherwise. Yet this Court, against all other American courts' findings to the contrary, believed a trial was no longer necessary. Because of that finding, these extraordinary circumstances, absent relief under a different Rule 60(b) subsection, merit Rule 60(b)(6) relief.

CONCLUSION

"[This] case *will* *procced to trial*, at which point the District Court will finally resolve the disputed facts and issue a final determination on the constitutional issues presented." *Cross*, ¶ 57 (emphasis added). Earlier, "[This] Court emphasizes its findings here are not binding at trial, *which will be the appropriate time to fully evaluate the merits* of the competing evidence presented in this case." (Doc. 131 at 47). At every juncture before summary judgment, this Court and the Montana Supreme Court recognized this case *would go to trial*. Yet trial never happened. This sudden shift seems inexplicable, given that both this Court and the Montana Supreme Court previously recognized several factual disputes requiring resolution at trial. Rule 60

relief corrects this Court's erroneous decision to ignore new relevant evidentiary developments and to deprive Defendants of their right to a trial on the merits. After all, trial by jury is the most effective process our legal system has devised to ascertain the truth, and that is what Defendants ultimately seek here—the truth.

This Court should grant Defendants' Motion, reopen discovery, and allow this matter to proceed to trial by jury.

DATED this 22nd day of August 2025.

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