Hon. Jason Marks, District Court Judge
Fourth Judicial District, Dept. No. 4
Missoula County Courthouse
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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

PHOEBE CROSS, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Dept. No. 4 Cause No. DV-23-541 **ORDER DENYING DEFENDANTS' RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT OR ORDER**

This matter comes before the Court on Defendants' *Rule 60(b) Motion for Relief from Judgment or Order* ("*Motion*") (Doc. 293). The Court has considered Defendants' *Motion* and the corresponding Brief in Support (Doc. 294), Plaintiffs' Brief in Opposition (Doc. 300), and Defendants' Reply Brief (Doc. 302). The Court is fully informed and prepared to rule.

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MEMORANDUM

Defendants move for relief from the Court's May 13, 2025 Order Re: Cross-Motions for Summary Judgment ("Order") (Doc. 279) under Rule 60(b)(2), Rule 60(b)(5), and Rule 60(b)(6) of the Montana Rules of Civil Procedure.

A. Rule 60(b)(2)

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> . . .
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> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b) . . . .

M. R. Civ. P. 60(b)(2). A district court must consider four factors when granting a motion for relief for newly discovered evidence:

> (1) The alleged 'newly discovered' evidence came to the moving party after the trial;
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> (2) It was not a want of diligence which precluded its earlier discovery;
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> (3) The materiality of the evidence is so great it would probably produce a different result on retrial; and
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> (4) The alleged 'new evidence' is not merely cumulative, and not tending to impeach or discredit witnesses in the case.

See In re B.B., 2001 MT 285, ¶ 40, 307 Mont. 379, 37 P.3d 715; *Fjelstad v. State ex rel. Dep't of Highways*, 267 Mont. 211, 220–21, 883 P.2d 106, 111–12 (1994)).

Defendants argue that there is newly discovered evidence necessitating relief from the Order under Rule 60(b)(2). They proffer a letter from the U.S. Secretary of

Health and Human Services ("HHS Letter"), a peer-reviewed article by Lauren Schwartz, a study by Dr. Johanna Olson-Kennedy, and recent clinic closures in the United States.

1. HHS Letter

Defendants move the Court to relieve them from the Order pursuant to Rule 60(b)(2) on the grounds that the HHS Letter is newly discovered evidence. Defendants argue the HHS Letter shows the federal government has now "acted" and given specific direction regarding gender-affirming care for minors, and that the new official position of the United States is that gender-affirming care is "junk science" and carries a significant risk of harm.

The HHS Letter was issued on May 28, 2025. It "advises [health care providers] to read with care" a review published by the HHS on May 1, 2025 ("HHS Review"). Defs.' Br. in Supp. Rule 60(b) Mot. Ex. A, at 1 (Doc. 294). The HHS Letter "expects" health care providers, health care risk managers, and state medical boards to make updates to treatment protocols based on the findings in the HHS Review. *Id.* It also cautions providers to avoid relying on the WPATH Standards of Care based on the HHS Review. *Id.* The HHS Letter closes by saying the "HHS may soon undertake new policies and oversight actions, consistent with applicable law . . . ." *Id.*, at 2.

The Court acknowledges that the HHS Letter was issued shortly after the issuance of the Order, meaning Defendants did not have access to it during briefing or argument. However, the HHS Letter does not contain any new evidence concerning gender-affirming care for minors suffering from gender dysphoria; instead, it simply urges providers to read the HHS Review and relies on the HHS Review's conclusions.

Defendants had access to the HHS Review, dated May 1, 2025, prior to issuance of the Order. Indeed, Defendants previously presented the HHS Review to the Court for consideration. *See* Defs.' Br. in Supp. Mot. to Vacate Sched. Or., at 4–9 (Doc. 274). The Court considered the HHS Review and denied Defendants' Motion to Vacate Scheduling Order for lack of good cause because the HHS Review simply "summarize[d], synthesize[d], and critically evaluate[d] the *existing literature* on the best practices for promoting the health and well-being of children and adolescents with distress related to their sex or to social expectations associated with their sex." *Id.* Ex. A, at 11 (emphasis added). The latest-published work considered as part of the HHS Review was disseminated in January 2025, well before the Order, and well before Defendants' Motion to Vacate Scheduling Order.

Moreover, to the degree Defendants argue that the mere issuance of the HHS Letter constitutes newly discovered evidence because it "shows that the federal government has now acted and given specific direction[,]" that argument is also

unavailing. Defs.' Br. in Supp. Mot., at 6 (Doc. 294). The HHS Letter does not mandate any new action. Instead, it states that it may, in the future, "undertake new policies and oversight actions, consistent with applicable law . . . ." *Id.* Ex. A, at 2. Again, the HHS Letter simply "urges" providers to "read the Review" and act accordingly. *Id.* Therefore, although the HHS Letter was issued after the Order, it does not constitute newly discovered evidence under Rule 60(b)(2).

2. Schwartz Article

Defendants move the Court to relieve them from the Order pursuant to Rule 60(b)(2) on the grounds that an article authored by Lauren Schwartz is new evidence. Defendants rely on this article for the finding that "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 included heart disease, cancer, and suicide. *Id.* Ex. D, at 4.

The article, titled "Emerging and accumulating safety signals for the use of estrogen among transgender women," was published on June 12, 2025. It "compiles several emerging and accumulating safety signals in the medical literature" and "includes many reviews and observational studies of safety signals . . . ." *Id.*, at 1, 6. Thus, although it was published after the Order, it is not an original scientific study proffering new evidence; instead, it is an article compiling the results of pre-existing

studies. The most recent work discussed in the article seems to be from early 2025—well before summary judgment briefing, oral argument, and the Order. Additionally, the conclusion Defendants rely on this article for refers to a study published in 2021. *Id.*, at 4. Defendants certainly had time to review, analyze, and present that evidence prior to the Order. Therefore, this article is not newly discovered evidence under Rule 60(b)(2).

3. Dr. Olson-Kennedy's Study

Defendants move the Court to relieve them from the Order pursuant to Rule 60(b)(2) on the grounds a study conducted by Dr. Olson-Kennedy is newly discovered evidence. Defendants rely on the study to argue it would probably produce a different result regarding the right to privacy and enhancement of minors' protections.

The results of Dr. Olson-Kennedy's study, titled "Mental and emotional health of Youth after 24 Months of Gender-Affirming Medical Care Initiated with Pubertal Suppression," were published on May 16, 2025. The study "aimed to understand the impact of medical intervention initiated with GnRHas on psychological well-being among youth with gender dysphoria over 24 months. *Id.* Ex. E, at 1. It concluded that:

> Participants initiating medical interventions for gender dysphoria with GnRHas have self- and parent- reported psychological and emotional health comparable with the population of adolescents at large, which remains relatively stable over 24 months. Given that the mental health

> of youth with gender dysphoria who are older is often poor, it is likely that puberty blockers prevent the deterioration of mental health.

Id., at 2.

The results of Dr. Olson-Kennedy's study were posted on May 16, 2025, just days after the Order. However, the record shows that Defendants were aware of the study and the results prior to summary judgment briefing, oral argument, and the Order. Defendants questioned Dr. Olson-Kennedy about this study, its results, and the reasons for delay in publishing during her deposition. *See* Supp. App., at 044-52 (Doc. 204); Defs.' Br. in Supp. Mot. Sum. J., at 6, n. 6 (Doc. 190) (citing Azeen Ghorayshi, *U.S. Study on Puberty Blockers Goes Unpublished Because of Politics, Doctor Says*, The New York Times (Oct. 23, 2024)) ("The leader of the long-running study said that the drugs did not improve mental health in children with gender distress . . . ."). Moreover, Dr. Olson-Kennedy specifically testified in her deposition about the results Defendants now cite as new evidence. *See* Supp. App., at 048–49 (Doc. 204) ("there was no statistically significant change . . . from baseline to 24 months."). Therefore, because the record makes clear Defendants knew about this study and its results prior to the issuance of the Order, it is not newly discovered evidence as contemplated by Rule 60(b)(2).

4. Clinic Closings

Defendants move the Court to relieve them from the Order pursuant to Rule 60(b)(2) on the grounds that certain clinic closures constitute newly discovered

evidence. Defendants also argue the decision to close multiple clinics or to cease offering certain drugs or surgeries in multiple states "shows they are likely to be concerned about real risks from the procedures they are providing." Defs.' Br. in Supp. Mot., at 8 (Doc. 294). Defendants specifically point to Children's Hospital Los Angeles, Community Medical Center in Missoula, and a clinic in Billings.

Some of these clinic closures occurred subsequent to the issuance of the Order, meaning they were not available to Defendants during briefing or argument. However, the materiality of these clinic closures are not so great that they would probably produce a different result on summary judgment as required to constitute newly discovered evidence under Rule 60(b)(2).

The Children's Hospital Los Angeles closed its child-focused Center for Transyouth Health and Development on July 22, 2025. Defendants' source makes clear that the decision to close was due to "the increasingly severe impacts of recent administrative actions and proposed policies," not because there was a change in providers' treatment recommendations or the standards of care endorsed by major medical organizations. *See* Jule Sharp, *Children's Hospital Los Angeles to close trans youth center*, CBS Los Angeles (June 13, 2025), https://perma.cc/AG3X-DRLV.

Similarly, the closures in Montana do not reflect a change in providers' treatment recommendations or the standards of care endorsed by major medical

organizations. Instead, as made clear by Defendants' sources, Community Medical Center in Missoula stopped providing gender-affirming care for minors due to "legislative and regulatory changes at the state and federal levels." *See* Zach Volheim, *Missoula's Community Medical Center to end gender-affirming care*, KPAX News (June 12, 2025), https://perma.cc/5W9A-WHWG; Aaron Bolton, *Missoula hospital will stop offering gender-affirming care to minors*, Montana Public Radio (June 11, 2025), https://perma.cc/M4BC-5QQT (also reporting a large decrease in care across the state is in part due to threatening letters from the Trump Administration, state and federal policy changes, and a resulting environment that has scared hospital systems).

Defendants argue that these closures constitute new evidence that shows the risks of gender-affirming care "are real" and shows "the State can regulate them for minors without triggering strict scrutiny." Defs.' Br. in Supp. Mot., at 7–8 (Doc. 294). However, again, Defendants' own sources state that these cessations of care are due to legislative and regulatory changes at the state and federal levels, not due to recognition of increased risk or a change in the major medical organizations' support for gender-affirming care as an effective, safe treatment for minors with gender dysphoria. *See id.*, at 3, n.4, n.5. Thus, the materiality of the of the clinic closures are not so great that they would probably produce a different result.

B. Rule 60(b)(5)

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> . . .
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> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable . . . .

M. R. Civ. P. 60(b)(5).

Defendants move the Court to relieve them from the Order pursuant to Rule 60(b)(5) on the grounds that applying the permanent injunction prospectively is no longer equitable. Defendants specifically argue a change in law based on *United States v. Skrmetti*, and a change in factual conditions based on the HHS Letter, an FBI investigation, and clinic closures. 605 U.S. ___, ___, 145 S. Ct. 1816, 1837 (2024).

1. Change in the law

Defendants' primary argument is that *Skrmetti* reflects a major change in decisional law and that prospective application of the permanent injunction is therefore no longer equitable under Rule 60(b)(5). This argument is unavailing because *Skrmetti* does not reflect a major change in Montana law. Plaintiffs' claims are based on the Montana Constitution, and the Court primarily applied Montana Constitutional law in its Order. Thus, the conclusion reached by the United States Supreme Court in *Skrmetti*—that a Tennessee law ("SB1") prohibiting gender-

affirming care for minors did not violate the federal equal protection clause—does not reflect a change in decisional Montana law. Further, even assuming it does, Rule 60(b)(5) "does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding . . . ." *State ex rel. Rhodes v. Dist. Ct.*, 183 Mont. 394, 396, 600 P.2d 182, 183 (1979) (also stating "when a decisional law change occurs, subsequent to final judgment in a particular case . . . final judgment should not be altered."). Nevertheless, the Court will address each of Defendants' five points.

First, Defendants argue *Skrmetti* shows the presence of a clear and serious health risk. Defendants cite Justice Thomas's concurrence, which "explains" the health risks, finding that "these treatments carry risks." *Skrmetti*, 145 S. Ct. at 1842 (Thomas, J., concurring). Even assuming *arguendo* that Justice Thomas's concurrence constitutes a major change in decisional law, it does not materially affect the Court's reasoning and resulting Order. Like Justice Thomas, the Court stated, "[i]t cannot be disputed that risk is an inevitable component of medical care and that many—if not all—medical treatments carry significant risks that patients, their families, and their doctors weigh against potential benefits." Or., at 11 (Doc. 279). However, it likewise is undisputed that all potential risks associated with gender-affirming medical care that Defendants relied on are posed by other

treatments minors receive free from legislative interference in Montana. *Id.*, at 10–11. Moreover, *Skrmetti* does not change the undisputed fact that Montana does not ban other medical treatments based on potential risks; indeed, the Montana Legislature passed a "right-to-try" statute guaranteeing the rights of adults and minors to use investigational drugs that are not approved by the FDA for any indication. *Id.*, at 11; SB 422, 2023 Leg., 68th Sess. (Mont. 2023). Therefore, Justice Thomas's concurrence discussing risk does not constitute a material change in law rendering the permanent injunction no longer equitable under Rule 60(b)(5).

Second, Defendants argue *Skrmetti* represents a change in decisional law because, for purposes of an equal protection analysis, the Supreme Court held "SB1 prohibits healthcare providers from administering puberty blockers and hormones to *minors* for certain *medical uses*, regardless of a minor's sex," and it "disagree[d]" that the law "relies on sex-based classifications" because such sex-based arguments ignored "a key aspect of any medical treatment: the underlying medical concern the treatment is intended to address." *Skrmetti*, 145 S. Ct. at 1829–30. The Supreme Court went on to say that *Bostock v. Clayton Cty.*, 590 U.S. 644 (2020), did not compel the conclusion that SB1 categorized based on sex or transgender status. *Id.*, 145 S. Ct. at 1834–35.

This Court, citing *Bostock*, did reason that SB 99 was subject to strict scrutiny because it discriminated based on transgender status and was a sex-based

classification. However, this Court also reasoned that SB 99 was subject to strict scrutiny because it infringed on separate fundamental rights, including the right to privacy and the right of freedom of speech and expression. Therefore, assuming *arguendo* that a change in decisional law has occurred regarding application of *Bostock* and equal protection analyses, the Court's application of strict scrutiny—and the ultimate result that SB 99 did not survive strict scrutiny review—remains unaffected.

Further, Montana's equal protection clause materially differs from and is more expansive than its federal counterpart. *Planned Parenthood of Mont. v. State ex rel. Knudsen*, 2025 MT 120, ¶ 73, 422 Mont. 241, 570 P.3d 51 ("Our equal protection clause guarantees more individual protection than does the Fourteenth Amendment of the U.S. Constitution."). In the same vein, the Court applied strict scrutiny to SB 99 in its equal protection analysis because SB 99 infringed on separate fundamental rights. As Plaintiffs point out, in several contexts where the Supreme Court of the United States has rejected constitutional claims, the Montana Supreme Court has nonetheless applied struct scrutiny under Montana's equal protection clause because a challenged law infringed on a fundamental right. *See, e.g.*, *id.*, ¶ 72 (20-week abortion ban "violates the equal protection clause under Article II, Section 4 of the Montana Constitution because 'it wrongly creates legal classifications based on the

exercise of a fundamental right.'"). The *Skrmetti* decision does not impact this body of Montana law. Therefore, Defendants are not entitled to relief under Rule 60(b)(5).

Third, Defendants argue that *Skrmetti* represents a change in decisional law because Justice Kagan declined to employ a heightened scrutiny analysis, stating "[t]he record evidence here is extensive, complex, and disputed." *Skrmetti*, 145 S. Ct. at 1844 (Kagan, J., dissenting). Defendants argue this case had a similarly disputed record and "Justice Kagan's observation is a powerful reason why this Court must grant relief from summary judgment." Defs.' Br. in Supp. Mot., at 11–12 (Doc. 294).

Distinct from the federal standards applied in *Skrmetti*, it is sound law in Montana that the right to privacy "broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from governmental interference[,]" that any "legislation infringing the exercise of the right of privacy must be reviewed under a strict scrutiny analysis[,]" and that, in the medical context, before engaging in a strict scrutiny analysis, proponents have to "clearly and convincingly" demonstrate a "medically acknowledged, bona fide health risk." *Armstrong v. State*, 1999 MT 261, ¶¶ 22, 34, 62, 296 Mont. 361, 989 P.2d 364. Moreover, in affirming this Court's Order Granting Preliminary Injunction, the Montana Supreme Court held that SB 99 needed to satisfy strict scrutiny. *Cross et*

al. v. State et al., 2024 MT 303, ¶ 37, 419 Mont. 290, 560 P.3d 637. Thus, irrespective of disputed facts, and even assuming *arguendo* that Defendants satisfied the threshold standard by clearly and convincingly demonstrating a medically acknowledged, bona fide health risk, SB99 still needed to be subject to a strict scrutiny analysis. Therefore, this Court's application of strict scrutiny, and its ultimate determination that SB 99 did not survive, is sound, and Defendants are not entitled to relief under Rule 60(b)(5).

Fourth, Defendants argue that *Skrmetti* represents a change in decisional law because the dissenting justices stated the position of major medical associations are not dispositive, but rather "simply one piece of factual context relevant to the Court's assessment of whether SB1 is substantially related to the achievement of an important government interest." *Skrmetti*, 145 S. Ct. at 1870, n.5 (Sotomayor, J., dissenting). The Court did rely on the position of major medical organizations in its Order. However, this cherry-picked sentence from a dissenting opinion does not constitute a change in decisional law in Montana that renders prospective application of the permanent injunction inequitable under Rule 60(b)(5). Reliance on the position of major medical organizations in the United States is consistent with holdings of the Montana Supreme Court. *See, e.g.*, *Planned Parenthood of Mont. v. State*, 2024 MT 178, ¶ 38, 417 Mont. 457, 554 P.3d 153; *Cross et al.*, ¶ 35.

Finally, Defendants argue that *Skrmetti* represents a change in decisional law based on the recognition that a state can properly present "non-U.S." authorities to establish the risk of harm that justifies a law. Defendants say this Court "rejected" any foreign medical evidence, but that is untrue. The Court did review and consider the foreign studies and trends submitted in the record. The Court also asked Defendants several questions about foreign law during oral argument, even clarifying with Defendants that none of the countries they relied on enacted a categorical ban on gender-affirming medical care comparable to SB 99, and that even the most restrictive European countries allowed such care for minors 16 years old or older. *See* Or., at 24, n.3 (Doc. 279). The Court also addressed foreign practices in the Order, finding that foreign countries acknowledge the undisputed fact that some medical risk exists in medical procedures. *Id*., at 24. As stated in the Order, and again throughout this order, "some risk" does not satisfy the well-established *Armstrong* standard employed in Montana. Finally, as discussed in the preceding paragraph, focus on domestic medical organizations when engaging in such analyses is common in Montana and encouraged by the Montana Supreme Court.

2. Change in factual conditions

Defendants argue that the HHS Letter and clinic closures represent a major change in factual conditions showing that the nation's health department has raised

serious concerns about health risks and the "fraudulent" process by which medical standards were developed. Defendants also point to an FBI investigation.[1] Defendants argue these changes makes injunctive relief more onerous, unworkable, or detrimental to the public interest.

The Ninth Circuit has stated that to prevail on a motion to modify an injunction, the moving party must "demonstrate a significant change in factual conditions that made compliance with the injunction 'more onerous, unworkable, or detrimental to the public interest." *Or. Advocacy Ctr. v. Allen*, 2021 U.S. App. LEXIS 24342, *2 (Aug. 16, 2021) (citing *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005)). If Defendants made such a showing, the remedy is "the district court [] fashion[ing] a modification order that [is] 'suitably tailored to resolve the problems created' by the changed factual conditions." *Id.* (citing *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1097 (9th Cir. 2021)).

Here, for the same reasons explored in addressing arguments under Rule 60(b)(2), Defendants have not shown a significant change in factual conditions since the Order was issued, let alone significant changes that would render the permanent injunction more onerous, unworkable, or detrimental to public interest. At best, the

[1] Defendants assert that on June 24, 2025, the FBI initiated criminal investigations into Boston Children's Hospital, Children's Hospital Colorado, and Children's Hospital Los Angeles for "alleged female genital mutilations of minors, which is a felony under federal law." Defs.' Br. in Supp. Mot., at 3 (Doc. 294). Defendants' only citation to this investigation is a broken Fox News link and a broken link to the Department of Justice website.

HHS Letter and clinic closures[2] highlight the risks associated with gender-affirming medical care for minors. These risks were present—and acknowledged by the Court—at the time the Order was issued. Therefore, there is no change in factual circumstance necessitating relief under Rule 60(b)(5).

C. Rule 60(b)(6)

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> . . .
>
> (6) any other reason that justifies relief.

M. R. Civ. P. 60(b)(6).

Under Rule 60(b)(6), Defendants argue that extraordinary circumstances are present based on the Court's "refusal" to consider the HHS Review, the outcome of *Skrmetti*, the Court's "unjustified" decision to "completely defer" to major medical organizations and "refusal" to consider non-U.S. evidence, and its stance that findings of no genuine issue of material fact "are so one-sided as to raise questions of judicial activism."

The Montana Supreme Court has repeatedly held that relief under Rule 60(b)(6) is only available when the other subsections of the rule do not apply. *Detienne v. Sandrock*, 2017 MT 181, ¶ 41, 388 Mont. 179, 400 P.3d 682. In other

[2] The record before the Court tends to show the clinic closures were in response to policy changes and administrative threats, not directly due to concerns with the treatment provided to minors suffering from gender dysphoria.

words, "[i]t is generally held that if a party seeks relief under any other subsection of Rule 60(b), it cannot also claim relief under 60(b)(6)." *Koch v. Billings Sch. Dist. No. 2*, 253 Mont. 261, 265, 833 P.2d 181, 183 (1992).

Here, Defendants seek relief under Rule 60(b)(2) and Rule 60(b)(5). By doing so, Defendants are barred from also seeking relief under Rule 60(b)(6). *See, e.g.*, *Detienne*, ¶ 41 (holding appellee erroneously attempted to obtain relief under both subsections (1) and (6) of Rule 60). Therefore, the Court will not address Defendants' arguments under Rule 60(b)(6).

In conclusion, "[o]nly in an extraordinary case should Rule 60(b) be granted." *State ex rel. Rhodes*, 183 Mont. at 396, 600 P.2d at 183. Defendants have not met their burden of showing this is one of those rare, extraordinary cases meriting Rule 60(b) relief. For all of the foregoing reasons, Defendants' *Motion* is hereby DENIED.

DATED this 2nd day of October, 2025.

Hon. Jason Marks
District Court Judge

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