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IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 22-0552

STATE OF MONTANA ET AL.,

Petitioners,

v.

MONTANA THIRTEENTH JUDICIAL DISTRICT, YELLOWSTONE COUNTY, THE HONORABLE MICHAEL G. MOSES PRESIDING,

Respondent.

SUMMARY RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL

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Introduction

The Petition for Writ of Supervisory Control ("Petition") should be denied because the State has failed to establish that an emergency situation exists making the normal appeal process inadequate or that the District Court made a mistake of law causing gross injustice. The District Court properly granted a preliminary injunction against a law it found likely to violate the Montana Constitution. The State failed to appeal that order.

The District Court's order followed longstanding state law in requiring a return to the status quo existing before the law was enacted. Claiming confusion, the State refused to comply with the order and instead adopted a regulation that violated the preliminary injunction. Plaintiffs filed a motion to clarify, asking the District Court to confirm that its order required the State to return to the status quo. The District Court granted that motion, affirming the State's obligation to revert to the status quo. The State has not appealed that order either.

The State now seeks the "extraordinary remedy" of supervisory control. The only thing "extraordinary" is the State's relentless effort to circumvent the District Court's valid orders and Montana law. The Petition should be denied.

Procedural History

On April 30, 2021, Governor Gianforte signed Senate Bill 280 ("SB 280"), which immediately went into effect. SB 280 overturned the simple attestation

process in place since 2017 by which transgender individuals born in Montana could obtain an amended birth certificate to accurately reflect their sex (the "2017 Rule"), instead requiring a court order that their sex had somehow been surgically changed.

On July 16, 2021, Plaintiffs filed their Complaint, challenging the constitutionality of SB 280 and seeking injunctive relief against enforcing SB 280 "directly or indirectly." *See* App.F, Prayer for Relief, ¶ B; *see also* App.D, Prayer for Relief, ¶ D.[1] Less than a week later, Plaintiffs filed their motion for preliminary injunction against the State's enforcement of SB 280.

On April 21, 2022, the District Court issued its Findings of Fact, Conclusions of Law and Order ("Order") enjoining the State from enforcing "*any aspect of SB 280* during the pendency of this action according to the prayer of the Plaintiffs' motion and complaint[.]" App.A, p. 35, ¶ 5(a) (emphasis added). SB 280 declared that it was the intent of the Montana legislature to repeal the 2017 Rule—i.e., MAR Notice No. 37–807—and replace it with the rule promulgated in 2021 (the "2021 Rule"). *See* SB 280, 67th Leg. Reg. Sess. (Mont. 2021). Once promulgated, the 2021 Rule mirrored the exact language of SB 280. *See* MAR Notice No. 37–945.

In the Order, the District Court directed a return to the status quo, applying the well-settled "last actual, peaceable, noncontested condition which preceded the

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[1] Appendices A through E are attached to the State's petition. Appendices F through I are attached to this response.

pending controversy" standard in determining that the status quo in the pending controversy was that which existed immediately before SB 280's enactment. App.A, ¶¶ 180-181, quoting *Weems v. State,* 2019 MT 98, ¶ 26, 395 Mont. 350, ¶ 26, 440 P. 3d 4, ¶ 26. As the District Court correctly recognized, this required using the 2017 Rule to process birth-certificate amendments rather than the requirements imposed by SB 280 or the 2021 Rule. App.A, ¶¶ 61-62.

Rather than comply with the Order and process birth-certificate amendments under the 2017 Rule, the State adopted an Emergency Rule, and an identical Permanent Rule (the "2022 Rule") (together, the "Rules"), prohibiting transgender people from amending the sex designation on their Montana birth certificates altogether. The State justified the Rules by claiming that it was confused about its obligations under the Order and that the purported emergency created by this confusion supported adopting the new Rules. *See* Notice of Adoption of Temporary Emergency Rule. App.H (s*ee* Ex. D). The Rules directly contradicted the Order.

In response to the State's refusal to comply with the Order, and its claimed "confusion," on June 7, 2022, Plaintiffs filed a motion asking the District Court to confirm that its Order required reverting to the status quo preceding the pending controversy—i.e., the 2017 Rule. App.H.

On September 15, 2022, the District Court entered a bench ruling clarifying that its original Order required reverting to the 2017 Rule for processing birth-

certificate amendments. App.G. The Court stated: "The arguments were clear. We addressed the issue. We addressed the issue of the 2021 rules. I addressed the issues in my findings and conclusions. I thought that the order was clear." App.C, p. 12.

DPHHS immediately repudiated the Court's bench ruling. *See State health department defies judge's order on birth certificates*, Montana Free Press, *available at* https://montanafreepress.org/2022/09/15/health-department-defies-judges-transgender-birth-certificate-order/.

On September 19, 2022, the District Court issued a written order granting in part Plaintiffs' motion seeking clarification of the preliminary injunction ("Clarification Order"). App.B. The District Court reaffirmed that the Order required Defendants "[to] perform their obligations under this Court's Order and preserve the status quo by reverting to the 2017 DPHHS regulations governing the amendment of birth certificates." *Id.* at 10.

On September 23, 2022, the State applied to this Court for a writ of supervisory control. Despite two District Court orders directing the State to preserve the status quo by reverting to the 2017 Rule, the State continues to insist that the District Court "did not order DPHHS to revert to the 2017 Rule" and that the District Court "lacks the authority to order DPHHS to return to the 2017 Rule." Petition at 1. What's more, the State claims that the 2022 Rule is "unquestionably in effect"

despite the District Court's confirmation that a valid preliminary injunction was in place reinstating the 2017 procedures the 2022 Rule directly contradicts. *Id.* at 5.

Standard of Review

Supervisory control is an extraordinary remedy that may be invoked only when a case involves purely legal questions and urgent or emergency factors exist making the normal appeal process inadequate. M.R. App. P. 14(3); *Barrus v. Mont. First Jud. Dist. Ct.*, 2020 MT 14, ¶ 17, 398 Mont. 353, ¶ 17 456 P.3d 577, ¶ 17. For a writ to issue, the petitioner must demonstrate at least one of three additional criteria: (a) the other court is proceeding under a mistake of law and is causing a gross injustice; (b) constitutional issues of state-wide importance are involved; or (c) the other court has granted or denied a motion for substitution of a judge in a criminal case. Mont. R. App. P. 14(3)(a)-(c). None of those criteria apply here.

Argument

I. The District Court did not make a mistake of law, but rather entered an appropriate preliminary injunction requiring return to the status quo of the 2017 Rule and then clarified its Order to address the State's intentional noncompliance.

The State incorrectly argues that the Clarification Order improperly amended the preliminary injunction and interfered with the State's rulemaking authority. Petition at 3-4. The District Court's Order requiring the State to preserve the status quo is a normal function of granting a preliminary injunction. The District Court correctly determined that the status quo in this matter was the 2017 Rule. The

Clarification Order simply reaffirmed that conclusion. App.B, ¶ 17, citing *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 39, 384 Mont. 503, ¶ 39, 380 P.3d 771, ¶ 39. This ruling did not amend the original preliminary injunction.

The State incorrectly contends that Plaintiffs only challenged SB 280 and not the 2021 Rule, which repealed the 2017 Rule. Petition at 10. This ignores the allegations in the Complaint and the Amended Complaint that SB 280 was an intentional effort to dismantle the 2017 Rule. *See, e.g.*, App.F, ¶ 33 ("The Act was created with the specific intent to reverse regulations previously promulgated by DPHHS in December 2017 that had functioned well for years without incident."); App.D, ¶ 39 (same).

Preserving the 2017 Rule, which constitutes the status quo, has always been central to Plaintiffs' challenge to SB 280. Both the Complaint and the Amended Complaint raised the impropriety of the 2021 Rule and its revocation of the 2017 Rule. App.F, ¶¶ 38, 61; App.D, ¶¶ 44, 67. Plaintiffs' requests in both their Complaint and Amended Complaint to enjoin the State from enforcing SB 280 "directly or indirectly" necessarily included both SB 280 and the 2021 Rule's provisions for revoking the 2017 Rule. At the December 2021 hearing on the Motion for a Preliminary Injunction, Plaintiffs' counsel expressly advised the Court that the status quo was the 2017 Rule for purposes of a preliminary injunction. The State's counsel did not contest this. App.H. The District Court agreed with Plaintiffs.

Regardless, the reinstatement of the 2017 Rule is not dependent on Plaintiffs' prayer for relief. The reinstatement is a consequence of the preliminary injunction itself and the District Court's equitable authority. That authority is necessarily broad, and the State's suggestion that the District Court did not have "jurisdiction" to do what it did, *see* Petition at 9, 12, disregards Montana law and these fundamental equity principles.

Just months ago, this Court explained that the purpose of a preliminary injunction is "to 'preserve the status quo and minimize the harm to all parties pending final resolution on the merits.'" *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 26, 409 Mont. 378, ¶ 26, 515 P.3d 301, ¶ 26 (internal citations and quotation marks omitted).[2] This reaffirmed a century of Montana law providing that, when a preliminary injunction is granted, the subject matter of the controversy returns to the status quo. *See Postal Tel.–Cable Co. v. Nolan* (1916), 53 Mont. 129, 134, 162 P. 169, 170; *City of Billings v. Cnty. Water Dist.* (1997), 281 Mont. 219, 226, 935 P.2d 246, 250; *see also* App.A, ¶ 138. The "status quo" is defined by law

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[2] In its order clarifying the preliminary injunction, the District Court relied heavily on *Planned Parenthood*: "Those standards are very well outlined in Planned Parenthood of Montana versus state decided August 9, 2022. Justice Baker did a thesis on what preliminary injunctions were all about. That's going to be the law of the land for a long, long, long time. She clarified those standards in spades." App.C, p. 48.

as "the last actual, peaceable, noncontested condition preceding the controversy." *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839.

As explained in the Order, the last condition preceding the controversy in this case was the 2017 Rule in place before the effective date of SB 280 and its implementing 2021 Rule, making the 2017 Rule the status quo. App.A, ¶¶ 61, 181. The status quo is not merely, as the State mistakenly suggests, "stopp[ing] enforce[ement]" of SB 280. *See* Petition at 9.

The State argues that the 2017 Rule cannot be reinstated because the 2021 Rule, and its purported rescission of the 2017 Rule, were never challenged. This overlooks that the 2021 Rule only exists because the now-enjoined SB 280 authorized the 2021 Rule. While the law is enjoined, neither it nor the 2021 Rule it created have any legal effect. *See In re Application of O'Sullivan* (1945), 117 Mont. 295, 304, 158 P.2d 306, 310 (stating that "an unconstitutional statute enacted to take the place of a prior statute does not affect the prior statute"); *Clark Fork Coal.*, ¶ 39 (the effect of an injunction "is to return to the previous status of the law," which, in the context of an administrative rule, "necessarily means in most instances that the former rule is reinstated"). Accordingly, while this litigation is pending, the 2017 Rule necessarily remains the operative set of procedures for birth-certificate amendments requested by transgender people.

Moreover, "[c]ourts sitting in equity are empowered to determine all questions involved in the case and to do complete justice...." *Trs. of the Wash.–Idaho–Mont. Carpenters–Emp'rs Retirement Trust Fund v. Galleria P'ship* (1989), 239 Mont. 250, 265, 780 P.2d 608, 617. "[T]his includes the power to fashion an equitable result." *Id*. As a consequence, "[a]n equity court whose jurisdiction has been invoked for an equitable purpose, will proceed to determine any other equities existing between the parties connected with the main subject of the suit, and grant all relief necessary to the entire adjustment of the subject." *Id*.

Based on these well-established principles, a district court has independent equitable authority to fashion an appropriate remedy such as a return to the 2017 Rule where, as here, the requirements for preliminary injunctive relief have been satisfied. *See* § 27–19–201, MCA.

The State also argues that the District Court had no jurisdiction to enjoin the terms of the 2021 Rule absent a substantive challenge to the Rule under the Montana Administrative Procedure Act. Petition at 8, 10. But the Clarification Order establishes that the District Court was not exercising substantive jurisdiction over the Rules themselves. Instead, the District Court was clarifying that "those rules were issued in violation of the Order requiring [the State] to return to the status quo and therefore return to the 2017 DPHHS regulations." App.B, ¶ 22.

A court clearly has the equitable power to enforce and police its own orders, as the District Court did here. The status quo that the law requires cannot be preserved if a state agency is allowed to use its rulemaking authority to implement rules antithetical to the status quo to circumvent a proper injunction.

The State also argues that it is now in a "legally and factually impossible position" because it must simultaneously obey the Orders as well as its own rules. Petition at 4. The State argues that this urgently renders the appeal process inadequate but never explains why. *Id*. In reality, the situation the State finds itself in is one of its own making—namely, its refusal to follow court orders and the 2017 Rule. The fact that the State is now enjoined from following the improperly adopted Rules is no more of an "emergency" than the fact that it cannot currently follow SB 280.

If the State had truly felt that it was in an "impossible situation" and that the Order was "vague," it could have appealed the Order or returned to the District Court for clarification. Instead, it let the time for an appeal run, while refusing to process amendments to the sex marker on birth certificates and promulgating restrictive Rules under the guise of being "in an uncertain regulatory situation." App.B, ¶ 19; *See Woldstab v. Fourth Judicial Court, Missoula County*, 2022 WL 1155738, at *1 (Apr. 19, 2022) ("We have repeatedly held that 'a writ of supervisory control is not to be used as a means to circumvent the appeal process. Only in the most extenuating

circumstances will such a writ be granted.'"), quoting *State ex rel. Ward v. Schmall* (1980), 190 Mont. 1, 4, 617 P.2d 140, 141.

Through both its action and inaction, the State "unlawfully circumvented the entire purpose of a preliminary injunction and disregarded and disrespected the judicial process...." App.B, ¶ 19. The State's request for a writ of supervisory control is yet another attempt to disregard the normal "judicial process" and therefore should be denied.

II. Reinstating the 2017 Rule is not a mandatory injunction.

The State mischaracterizes the District Court's directive to return to the status quo as a "mandatory injunction" and argues that the Clarification Order did not meet the heightened standards for such relief. Petition at 13-14. The State is wrong. The Clarification Order is clearly *not* a mandatory injunction, and even if it were, it is fully supported by the record before the District Court.

First, a request to clarify an order is not a request for a mandatory injunction. Montana courts have the power to interpret or clarify a prior order to describe or explain its meaning or provide "additional specification necessary to implement [the order]." *Meine v. Hren Ranches Inc.*, 2020 MT 284, ¶ 19, 402 Mont. 92, ¶19, 475 P.3d 748, ¶ 19. Clarification—as the word itself indicates—merely involves interpreting or making clear a court's original meaning without material alteration or deviation.

Montana law recognizes that a court's jurisdiction includes the inherent power to clarify orders to ensure that parties understand their obligations. *See Smith v. Foss* (1978), 177 Mont. 443, 446-47, 582 P.2d 329, 331-32 (explaining that under Montana law, District Courts have inherent power to enforce their judgements "and to make such orders and issue such process as may be necessary to render them effective") (internal citations omitted); *La Plant v. La Plant* (1976), 170 Mont. 155, 159, 551 P.2d 1014, 1016 (same). Neither *Smith*, *Meine*, *La Plant*, nor any related decisions characterize clarifications as mandatory injunctions.

Second, the State argues that Plaintiffs were required to establish "extreme or very serious damages" to obtain the order directing a return to the status quo. Petition at 14. The State is incorrect. The State attempts to alter the standard for an order requiring reversion to the status quo. The State relies on non-Montana decisions to argue that Plaintiffs must demonstrate the likelihood of success on the merits to obtain any such preliminary relief. Petition at 14-15. Although Plaintiffs have easily satisfied this standard, this is not what Montana law requires. Indeed, this Court recently rejected the very standard for which the State argues. *See Planned Parenthood*, ¶ 23 ("Since at least as early as 1912, the Court has applied the prima facie standard to preliminary injunctions.").

Nevertheless, there was more than enough evidence before the District Court to support the Order. Plaintiffs established a prima facie case to support their

constitutional claims. This was sufficient to support preliminary injunctive relief. *Driscoll v. Stapleton,* 2020 MT 247, ¶ 17, 401 Mont. 405, ¶ 17, 473 P. 3d 386, ¶ 17 (noting that this Court will affirm a preliminary injunction "if the record shows that [the movants] demonstrated either a prima facie case that they will suffer some degree of harm and are entitled to relief ... or a prima facie case that they will suffer 'irreparable injury' through a loss of a constitutional right..."); *Weems*, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction.").

Third, directing a party to revert to the status quo as part of a preliminary injunction does not convert a preliminary injunction into a mandatory injunction. *See Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) ("A mandatory injunction orders a responsible party to take action, while a prohibitory injunction prohibits a party from taking action."). The District Court's Order is prohibitory, not mandatory, because its sole function is preventing enforcement of "any aspect" of SB 280 as a result of SB 280's constitutional deficiencies.

Moreover, Montana courts have largely abandoned the distinction between mandatory and prohibitory injunctions. The standards on which they are based do not materially differ. *See City of Whitefish v. Troy Town Pump,* 2001 MT 58, ¶ 21, 304 Mont. 346, ¶ 21, 21 P.3d 1026, ¶ 21 (stating that the Court was aware of "no authorities ... to show Montana has differentiated the standard of review for

mandatory injunctions from that for any other injunction"); *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, n.11, 410 Mont. 114, n.11 (same).

III. Reinstating the 2017 Rule does not grant final relief.

The State further complains that returning to the status quo following the entry of a preliminary injunction "grants Plaintiffs all the relief they seek." Petition at 16. If the State is challenging the Order, this challenge is an improper stand-in for the appeal of the Order it failed to file. If the State is challenging what Montana law requires following the entry of a preliminary injunction, that law is well-settled, as recently explained in *Planned Parenthood* and *Jacobsen*.

The State's argument that requiring it to preserve the status quo improperly grants Plaintiffs final relief at a preliminary stage is also wrong. A preliminary injunction is just that: a *preliminary* injunction pending final resolution. Other substantial issues remain, including the availability of final relief; a potential award of costs and fees; and the addition of claims and parties, as authorized by the District Court's scheduling order, which Plaintiffs intend to seek.

Finally, the State complains that because there currently are only two named plaintiffs, the benefits of reverting to the 2017 Rule will extend to a wider population without the need for class certification. Petition at 15-16. But this is the norm, not the exception, in the context of preliminary injunctive relief. In both *Planned Parenthood* and *Jacobsen*, the same circumstances were present—named plaintiffs

obtained injunctive relief, without class certification, from which the broader public could ultimately benefit. The ultimate beneficiaries in this case will be determined by forthcoming motion practice, including seeking amendment of the complaint and class certification, the adjudication of final relief, and subsequent enforcement litigation.

IV. The District Court's clarification order did not alter or otherwise amend its previous order.

The State argues that a court may not alter or amend a previous judgment through a clarification order, asserting that a court may only "provide additional specification necessary to implement" its order. Petition at 18 (internal citations omitted). The District Court did just that: it provided the "specification necessary to implement [the Order]." *Id.*

The District Court's Clarification Order did not substantively revise its original Order. The Court made clear, both in its bench and written rulings, that the Order "clearly and unmistakably required that the State return to that which was in effect prior to the enactment of SB 280, given that would be the status quo," and that "the DPHHS 2017 regulations were those that were in effect prior to the passage of SB 280." App.B, ¶ 20; *see also id.*, ¶¶ 7, 8, 9, 10, 19. In the Clarification Order, the Court cited directly to the Order to reaffirm the State's obligation to revert to the 2017 Rule and made it clear that the purpose of the Clarification Order was not to

amend any detail of its initial Order, but to "avoid any future claim of confusion" by the State. *Id*., ¶ 24.

V. The Order does not enjoin DPHHS's general rulemaking authority.

Finally, the Order does not "enjoin[] DPHHS's general rulemaking authority." Petition at 18. The Order simply prohibits the State from enforcing SB 280 or the 2021 Rule or taking any action that interferes with the Order's reversion to the 2017 Rule's procedures while the litigation is pending. *See also* Argument, Part I, *supra*. The language of the Order makes clear that the Order focuses on the statute and rules at issue here. The State is free to promulgate any rules it wishes as long as they do not contradict the Order.

This prohibition necessarily encompasses the 2022 Rule, which expressly violates an existing preliminary injunction issued to prevent the State from engaging in activity as to which "Plaintiffs have established a prima facie case" that their constitutional rights were violated. App.A, ¶ 170. Rather than abiding by the Order and reverting to the status quo established by the 2017 Rule, the State impermissibly promulgated the 2022 Rule.

Contrary to the State's assertions, the District Court did not "freez[e]" all rulemaking activity by entering its Order, but rather required the State "to return to the status quo and therefore return to the 2017 [Rule]." *See* Petition at 18; App.B, ¶ 22. Because the 2022 Rule was "issued in violation of the Order," App.B, ¶ 22, the

2022 Rule fell squarely within the scope of the preliminary injunctive relief granted by the District Court. The State's disagreement with the effect of the lawfully entered, lawfully clarified Order on the 2022 Rule does not justify interfering with the District Court's orderly handling of this case.

Conclusion

For the reasons set forth above, the State's petition for a writ of supervisory control should be denied. Should the Court not deny the petition, Plaintiffs request the opportunity to submit full briefing on the petition.

Respectfully submitted October 19, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure Rule 11 and 14(9), I certify that the Respondents' Summary Response is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material: and the word count calculated by Microsoft Word Office 365 is not more than 4,000 words, excluding the caption, Table of Contents, signature block, Certificate of Compliance, and Certificate of Service.

DATED: October 19, 2022

/s/ Akilah Lane
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Pls.’ Complaint (D.C. Doc. 1) ………………………………………......Appendix F

Bench Order (D.C. Doc. 76) ……………………………………….......Appendix G

Pls.’ Mot. Seeking Clarification of the Prelim. Inj. (D.C. Doc 71)…….Appendix H

Pls.' Reply Br. in Support of Mot. Seeking Clarification of the Prelim.

Inj. (D.C. Doc 73) …………………………………………….....Appendix I

CERTIFICATE OF SERVICE

I certify that the foregoing Respondents' Summary Response was served by eService on counsel for Petitioners:

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Hon. Judge Michael G. Moses
Yellowstone County District Court
217 N. 27th Street, Rm. 605
Billings, MT 59107

Electronically signed by Krystel Pickens on behalf of Akilah Lane
on October 19, 2022

CERTIFICATE OF SERVICE

I, Akilah Maya Lane, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 10-19-2022:

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Electronically signed by Krystel Pickens on behalf of Akilah Maya Lane
Dated: 10-19-2022