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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA AND JOEY BANKS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

PLAINTIFFS,

V.

STATE OF MONTANA AND AUSTIN KNUDSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA, IN HIS OFFICIAL CAPACITY, AND HIS AGENTS AND SUCCESSORS.

DEFENDANTS.

Cause No. DDV 2013–407
Hon. Christopher Abbott

STATE'S REPLY IN SUPPORT OF APPLICATION TO DISSOLVE PRELIMINARY INJUNCTION
(Filed under Seal)[1]

[1] The State moves concurrently to file its reply under seal because Section I(A) cites to and quotes from matters filed under seal in this case.

INTRODUCTION

The State moves to dissolve the preliminary injunction in this case. It's been 3,181 days since the consent injunction was entered. That's eight years, eight-and-a-half months, or 104.5 months, or 34.8 trimesters since the State agreed to a preliminary injunction because it was confident the case would be decided quickly. The State appreciates this Court's apparent readiness to finally decide the summary judgment issues that have been fully briefed for five years. *See* (Doc. 261 at 2). But the delay imposed by other Montana courts in this case has been patently unjust. Defendants no longer consent to the injunction—and consent was its only basis—and to leave it in place one day longer would merely perpetuate the abuses meted out by other judicial officers willing to treat the preliminary injunction as a permanent one.

Plaintiffs object, and why wouldn't they? *See* (Doc. 265 at 2) ("Defendants now seek to dissolve this partial injunction for no other reason than they believe this case is proceeding too slowly.").[2] Other district courts have given them what amounts to

[2] Plaintiffs content themselves with allowing the preliminary injunction to operate as a permanent injunction. The record in this case is clear. The State, not Plaintiffs, filed multiple notices of submittal to bring this case to a resolution. *See* (Doc. 243). Arguably, a motion to dismiss for failure to prosecute would also be proper under these facts. *See Becky v. Norwest Bank Dillon, N.A.*, 245 Mont. 1, 8, 798 P.2d 1011, 1015 (1990) (Motions to dismiss for failure to prosecute are proper in light of plaintiffs' unreasonable inactivity in furthering its case). Plaintiffs' contentment at drawing this case out into what approaches nearly a decade stands in contrast to these same Plaintiffs' claims in other cases involving Article II, Section 10 claims. *See* Brief in Opposition to Motion to Stay District Court Proceedings at 4, *Planned Parenthood of Montana and Joey Banks, M.D. v. State of Montana,* No. DV-21-00999 (13th Jud. Dist. Oct. 22, 2021) (Staying district court proceedings pending appeal would "delay Plaintiffs' vindication of [their] rights."). Planned Parenthood of Montana's and Joey Banks' position in that case cannot be reconciled with Planned Parenthood of Montana's and Joey Banks' position and actions in this case.

final victory for nearly a decade without ever showing any entitlement to *any* relief. It's a good deal if you can get it. But as this Court knows—and every court should know—allowing dispositive motions to sit idle for five years and a consent-based injunction to remain in place for almost nine years does violence to judicial process and the public interest. HB 391—duly enacted by a Republican Legislature and acquiesced to by a Democratic Governor—must be allowed to take effect immediately. Not next week. Not on or after June 10, 2022. Today.

The State must be able to enforce its laws designed to protect minor Montanans from predatory harms. Plaintiffs belittle these interests in shielding pregnant minors from sexual violence and abuse. *See* (Doc. 265 at 5). But the evidence already on record in this case demonstrates precisely why the State must enforce these vital laws, because the Plaintiffs fail to adequately protect the interests of their patients.

I. The parties briefed the merits five-years ago, obviating any need for further arguments on preliminary questions.

The State argued in its brief in support that additional briefing on a preliminary injunction serves little purpose, as the merits questions have been fully and adequately briefed. *See* (Doc. 261 at 9). Plaintiffs ask this Court to put on blinders to the parties' discovery, briefing, and motions related to the merits. *See* (Doc. 265 at 4). Plaintiffs then launch into rehashing their merits arguments. *See* (Doc. 265 at 4–6). Respectfully, that proves the State's point. Further argument on the questions related to the merits is unnecessary as those arguments have been briefed and pending for five years. It is not necessary to engage in an analysis of a

likelihood of success on the merits for example, when the Court possesses full briefing on the merits.

Since we are here, a couple points. First, Plaintiffs' shallow attempts at undermining the State's compelling interests in combatting sexual violence against minors is belied by evidence already in the case record. The State elected to point the Court to the general legal issues at stake in its opening brief, but given the statements of Plaintiffs, it is necessary to detail examples of exactly why this interest remains at the fore. Second, Plaintiffs err by arguing a narrow, and incorrect, construction of Article II, Section 16 that effectively denies civil defendants any recourse in delayed proceedings.

A. The laws in question further the State's vital interest in protecting minors from sexual violence.[3]

Plaintiffs, apparently, object to the State's interest in combatting sex crimes and sexual abuse committed against minors. (Doc. 265 at 5). Evidence entered into the record by the State demonstrates why this interest remains paramount despite Plaintiffs' protests. Planned Parenthood Montana ("PPMT") is a mandatory reporter for child abuse under MCA § 41-3-201. *See* ([redacted]) (FILED UNDER SEAL). PPMT views this obligation as requiring a two-step inquiry: first, that the female is under the age of 16 years, and second, that the female either exhibits signs of abuse or reports the abuse. [redacted] (FILED UNDER SEAL). However, even though PPMT's

[3] The State references matters filed under seal in this section. The State, therefore, concurrently moves the Court to file the instant brief under seal as well, or in the alternative, redact this portion of its brief to protect confidentiality.

mandatory reporting policy requires reporting "where there is reason to suspect child abuse [or] rape," PPMT does not consider sexual activity by a female under the age of 16 years with an adult male in-and-of itself to indicate "abuse." [redacted] (FILED UNDER SEAL); *but see* MCA, § 45-5-501(1)(b)(iv) (a victim is incapable of consent when the victim is "less than 16 years old").

In one case involving a [redacted] pregnant mother and a 19-year-old father, a district court judge reported the matter to law enforcement based on his belief—after questioning PPMT—that PPMT would probably not report the abuse. *See* ([redacted]). PPMT reported the incident weeks later. It reported the [redacted]year-old was being seen "for birth control and other testing" and reported that she was in a relationship with an 18-year-old. *See* ([redacted], [redacted]) (FILED UNDER SEAL). Court documents directly contradict PPMT's report. *Compare* ([redacted], [redacted] (the Montana Supreme Court in an order dated [redacted], stated the boyfriend's age as 19)) (FILED UNDER SEAL); ([redacted]) (in a report filed on [redacted], PPMT stated the boyfriend's age as 18) (FILED UNDER SEAL). This case, and others detailed by the State's experts, demonstrate the compelling and paramount interest in combatting sex crimes against minors. *See* ([redacted], [redacted]) (FILED UNDER SEAL).[4] The longer the preliminary injunction is unjustly allowed to linger, the longer these

[4] The State disputes Plaintiffs' Statement of Undisputed Facts ¶¶ 34, 57, 60–61, 63–99, referenced in Plaintiffs' response brief. (Doc. 265 at 4–6); ([redacted], [redacted]). Many of the undisputed facts referenced by Plaintiffs remain subject to the State's motions to strike and exclude testimony and opinions. *See* (Doc. 243) (listing six such pending motions).

vulnerable girls will remain at risk. That is why the preliminary injunction must be dissolved immediately.

B. Article II, Section 16 applies to all litigants.

Article II, Section 16's command to administer justice without sale, denial, or delay applies to all parties in litigation. *Cf. State ex rel. Carlin v. District Court*, 118 Mont. 127, 135, 164 P.2d 155, 159 (1945) (Delay by the district court does not require "litigants sit idly by and lose their rights through the immutable results of the passage of time[.]"). Rather, in accordance with the principle that justice delayed is justice denied, courts must timely resolve matters in dispute so neither party operates in perpetual legal limbo. *See Bolich v. Bolich*, 199 Mont. 45, 49, 647 P.2d 844, 847 (1982) (denying motion for continuance because delaying the case seven additional months would constitute a denial of justice to the respondent in a marriage dissolution proceeding).

The Plaintiffs misread Article II, Section 16. (Doc. 265 at 3 n.2). First, Plaintiffs absurdly characterize the State's motion as a request "to force an expedited resolution of a case[.]" *Id.* Dispositive motions have sat idle for five years. (Doc. 261 at 6). The case now approaches its ninth year. (Doc. 261 at 3).[5] If judicial decision after five and nine years constitutes expedited resolution of a case, the State is honestly curious, and likely appalled, at what Plaintiffs would consider undue delay.

[5] As *State ex rel. Carlin* warned, the immutable passage of time complicates litigation through death, discouragement, and witness unavailability. 164 P.2d at 159. Indeed, in this case, Plaintiffs have had to twice substitute named individuals as parties because of death. (Doc. 261 at 6 n.3).

Second, Plaintiffs insinuate that Article II, Section 16 confers a benefit only to plaintiffs. (Doc. 265 at 3 n.2). The logic of the Plaintiffs' theory must be that plaintiffs accrue speedy remedy benefits under Article II, Section 16, and criminal defendants possess speedy trial rights under Article II, Section 24, but *civil defendants* possess no interest in the timely administration of justice. That theory, thankfully, is belied by centuries of common law practice. *See Magna Carta,* ch. 40 (1215) ("We will not sell, or deny, or delay right or justice to anyone."). As the Montana Supreme Court succinctly stated in *Bolich*, the command to administer justice without delay applies to all parties because all parties have an interest in the timely adjudication of their legal rights and status. 647 P.2d at 846–47.

C. Plaintiffs' remaining arguments are fully addressed in prior briefing and inapplicable to the motion to dissolve.

In prior briefing, the State set forth additional reasons justifying its interests in both laws at issue in this case. *See* (Doc. 131 at 10–15) (The laws further the State's interest in protecting minors from sexual violence); (Doc. 131 at 15–19) (The laws enhance the psychological and medical well-being of minors); (Doc. 131 at 21–25) (The laws are necessary given the scientific research demonstrating minors lack capacity for fully informed decision-making). Plaintiffs unsurprisingly disagree and set forth their position. *See* (Doc. 265 at 4–5). Plaintiffs' arguments and evidence raised in response to this motion were already dealt with and responded to in the State's brief in opposition to the Plaintiffs' motion for summary judgment. *See* (Doc. 147). The State entered evidence, for example, that PPMT does not pre-screen minor patients for mental health history or conduct mental health evaluation follow-up. *See* (Doc.

147 at 9). The State contradicted Plaintiffs' fear-based arguments with statistical facts that laws like those at issue do not result in a statistically significant change in inter-family conflict. *See* (Doc. 147 at 20). Finally, as the State argued, the United States Supreme Court held that parents do possess a right to be involved in their children's abortion decisions. *See* (Doc. 147 at 21) (quoting *Bellotti v. Baird*, 443 U.S. 622, 637–38 (1979)).[6]

The point is, all of plaintiffs' arguments have been raised and briefed elsewhere and it simply isn't necessary to re-plow that ground in this motion. *See* (Doc. 261 at 9). This motion concerns the narrow matter of whether absent the State's consent, the preliminary injunction issued nine years ago can continue. It cannot. The State's consent formed the sole basis for that preliminary injunction and absent consent it must be dissolved. *See* MCA § 27-19-401 and -404. Further, under the facts of this case, the State need not sit idly by through years-long litigation and may take steps necessary to protect those this law was enacted to protect and bring the case to resolution even in the face of inaction on the part of the Plaintiffs.

II. The Court possesses equitable authority to dissolve the preliminary injunction granted nine years ago.

Plaintiffs fundamentally misconstrue the State's motion to dissolve the preliminary injunction with a motion to grant a preliminary injunction. *See generally*

[6] The State also noted, contrary to Plaintiffs' position, that under federal precedent, judicial waiver provisions like those in House Bill 391 comport with the idea that states can provide for parental involvement in a minor's abortion decision so long as the parents do not exercise a veto over the minor's choice. *See* (Doc. 147 at 19) (citing *Hodgson v. Minn.*, 497 U.S. 417, 444–45 (1990)).

(Docs. 261, 265). Plaintiffs' response is replete with inapplicable legal standards to the instant motion. *See e.g.* (Doc. 265 at 2 n.1). As a reminder, since Plaintiffs' fail to respond to the requirements for dissolution, Montana statute provides "[t]he party enjoined may apply to the judge who granted the injunction order or to the court in which the action is brought to dissolve or modify the same." MCA § 27-19-401; *see also* (Doc. 261 at 7). "The application must be supported by an affidavit showing that there is not sufficient ground for the injunction to continue or that the scope of the injunction is too broad." *Id.* "If upon the hearing it satisfactorily appears that there are not sufficient grounds for the injunction order, the order must be dissolved[.]" MCA, § 27-19-404; *see also Jefferson v. Big Horn Cnty.*, 2000 MT 163, ¶ 26, 300 Mont. 284, 293, 4 P.3d 26, 32 (If "equity no longer justifies the continuance of the injunction, it may and should free the defendant's hands from the fetters by which until then its activities have been prevented, thus leaving it free to perform its lawful duties.").

Plaintiffs effectively concede the basis for the preliminary injunction rested entirely on the State's consent. *See* (Doc. 265 at 2) ("Defendants consented to that injunction ….."). Without the State's consent, the preliminary injunction lacks any continued basis and should be dissolved. *See* (Docs. 261 at 7, 262); *see also* MCA § 27-19-401 ("The application must be supported by an affidavit showing that there is not sufficient ground for the injunction to continue ….").

Instead of arguing the dissolution standards, Plaintiffs argue that once given, consent cannot be withdrawn. (Doc. 265 at 3). Plaintiffs' argument ignores the limitations on the State's consent nine years ago and ignores that changed

circumstances warrant withdrawal of consent. The State consented on a presumption that this case would go to the merits in a timely fashion and the State wanted to avoid a hasty initial ruling given the importance of the issues at stake. *See* (Doc. 10 at 2) ("The issues in this case are too important to be addressed in a hasty, truncated manner, as would be necessary under the short time-frame sought by Plaintiffs."). Five years ago, the parties submitted fully briefed motions for summary judgment after extensive discovery. *See* (Doc. 261 at 5). The State's reason for consent—that these issues be addressed after full discovery and briefing—was met five years ago, but despite the importance of the issues in this case, it has languished without decision. *See* (Doc. 261 at 5–6). After three notices of submittal, the State cannot allow the case to remain in judicial purgatory indefinitely. *See* (Doc. 243). The State's instant motion falls within the ambit of MCA § 27-19-401 because allowing a preliminary injunction to operate as a permanent injunction for nine years is too broad and unwarranted.

The State adequately stated its reasons for revoking consent. *See* (Doc. 261 at 2–6) (detailing this case's procedural history). The State thrice filed notices of submittal on the five-year-old summary judgment motions. *See* (Doc. 243); *see also supra* n.1 (Plaintiffs have abjectly failed to diligently bring this case to resolution). Nothing in the State's consent indicates an understanding that that consent could authorize enjoinment of important public health and safety laws for almost a decade. The circumstances changed because the passage of time and judicial inaction. This

Court possesses authority to dissolve the injunction based on the ongoing inequities inflicted by prior judicial inaction. *See Jefferson*, ¶26.

The State filed its application to dissolve the preliminary injunction the same day as a status conference in this case. *See* (Docs. 260, 264). The Court set oral argument for June 10, 2022, but that does not alter the procedural history that led to this point. The State, of course, welcomes this Court's scheduling of a hearing on the merits, but that does not negate or prohibit the State from taking those procedural steps necessary to protect its interests in this case.

CONCLUSION

The Court should dissolve the preliminary injunction granted in this case. (Doc. 13). That injunction rested on the State's consent which is now withdrawn. (Doc. 262). The State demonstrated good cause for withdrawing that consent and this Court should schedule a hearing on this matter pursuant to MCA §§ 27-19-401 and -404 so that the State may enforce laws necessary to protect vulnerable Montanan children.

DATED this 20th day of April, 2022.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document to counsel for the Plaintiffs via electronic mail and regular mail, postage pre-paid.

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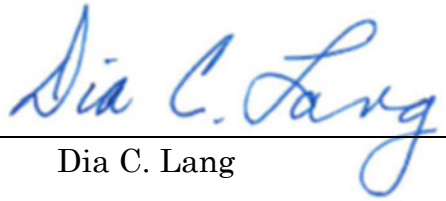
Dated: April 20, 2022



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