FILED
08/06/2024
*Amy McGhee*
CLERK
Missoula County District Court
STATE OF MONTANA
By: Debbie Bickerton
DV-32-2023-0001026-CR
Halligan, Leslie
48.00

Constance Van Kley
Rylee Sommers-Flanagan
Dimitrios Tsolakidis
Upper Seven Law
P.O. Box 31
Helena, MT 59624
(406) 306-0330
constance@uppersevenlaw.com
rylee@uppersevenlaw.com
dimitrios@uppersevenlaw.com

*Attorneys for Plaintiffs*

**MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY**

| | |
|---|---|
| SUSAN EDWARDS; MONTANA TWO SPIRIT SOCIETY; KAEL FRY; ANNA TELLEZ; EDEN ATWOOD; SHANNON ALOIA,<br><br>*Plaintiffs*,<br>vs.<br><br>THE STATE OF MONTANA; GREG GIANFORTE, in his official capacity as GOVERNOR OF MONTANA; AUSTIN KNUDSEN, in his official capacity as ATTORNEY GENERAL OF MONTANA,<br><br>*Defendants*. | Cause No. DV 23-1026<br>Hon. Leslie Halligan<br><br>**Plaintiffs' Brief in Opposition to Defendants' Motion for Stay** |

## INTRODUCTION

Despite asking this Court to proceed with a hearing on the pending cross-motions for summary judgment, State Defendants ("the State") seek an indefinite stay pending resolution of an appeal that they have yet to file in a collateral action. A stay is an extraordinary remedy, and the State fails to justify its request here. With the scheduling order already vacated and both parties seeking a hearing, all that remains for this Court to stay is its ruling after the hearing. Precedent, logic, and judicial efficiency all counsel against the State's request. The motion to stay must be denied.

## BACKGROUND

Plaintiffs commenced this action on October 11, 2023, seeking to enjoin and declare unconstitutional Senate Bill 458 ("SB 458"). Dkt. 1, Compl. (Oct. 11, 2023). Plaintiffs moved for summary judgment on the grounds that SB 458 violates their fundamental rights to equal protection, privacy, and dignity under the Montana Constitution. Dkt. 10, Pls.' Mot. for Summ. J. (Feb. 22, 2024); Mont. Const. art. II, §§ 4, 10. To accommodate the State's desire for early depositions, Plaintiffs consented to a lengthy extension for the State's response. Dkt. 24, Defs.'

Unopp. Mot. for Ext. (Mar. 22, 2024). The parties' cross-motions for summary judgment were fully briefed on June 14 and June 28. Dkt. 35, Not. of Issue (June 14, 2024); Dkt. 42, Not. of Issue (June 28, 2024).

On June 25, another judge in this district enjoined SB 458 in *Reagor v. State*, No. DV-23-1245 (Mont. 4th Jud. Dist. Ct. June 25, 2024), finding that SB 458 violates the Montana Constitution's single subject rule, Mont. Const. art. V, § 11(3), because the word "sex" is ambiguous and the bill does not contain a single subject "clearly expressed in its title," *Reagor*, at 6, 12. The decision did not address the substance of SB 458 or any of the legal theories Plaintiffs advanced in this case.

The State intends to appeal the decision. *See* Dkt. 45, Br. in Supp. of Defs.' Mot. for Stay at 4 (July 23, 2024) ("Defs.' Stay Br."). And SB 458's primary proponent and drafter, Jeff Laszloffy, asserts that the legislature will simply pass a bill identical to SB 458 but with a new title that avoids the single subject rule violation.[1] *The Myth of Judicial Impartiality*, Mont. Family Found.: Radio Updates (June 28, 2024) ("[I]f

---

[1] In such circumstances, the interests of justice and judicial efficiency would counsel in favor of amending or supplementing the pleadings rather than dismissal and the filing of a new lawsuit because Plaintiffs challenge SB 458 for substantively violating their rights. *See, e.g.*, Mont. R. Civ. P. 15(a)(b)(2), (d).

necessary, the same bill with an amended title will be passed in the next legislative session.").[2]

Notwithstanding *Reagor*, the parties agree that the Court should proceed with hearing the pending motions in the upcoming weeks. Just four days prior to filing its motion to stay, the State informed the Court that, "Defendants would certainly like a hearing on their pending Motion for Summary Judgment, stay or not." Ex. 1, Email from M. Russell to C. Sowre (July 19, 2024) (emphasis added). Additionally, the scheduling order has been vacated by agreement of the parties, meaning there are no active deadlines to be stayed. Dkt. 46, Ord. (July 23, 2024). In short, the State asks this Court to hear the cross-motions and then to wait an indefinite period to issue its decision pending resolution of a yet-to-be-filed appeal in a collateral case.

---

[2] *Available at* https://www.montanafamily.org/radio-updates/. Judicial notice of Laszloffy's podcast is appropriate because it is capable of "accurate and ready determination" and not subject to "reasonable dispute." *See* Mont. R. Evid. 201(b); *see also United States v. Ojai Valley Cmty. Hosp., Inc.*, No. CV 17-6972 JGB, 2018 WL 6177257, at *1 n.1 (C.D. Cal. July 30, 2018) (taking judicial notice of podcast). Plaintiffs cite the podcast not for its truth but to show Laszloffy's "then-existing state of mind" or "intent." Mont. R. Evid. 801(c), 803(3).

## LEGAL STANDARD

"A court has inherent power to stay proceedings"—but only "after balancing the competing interests." *Henry v. Mont. Seventeenth Jud. Dist. Ct.*, 198 Mont. 8, 13, 645 P.2d 1350, 1353 (1982). The use of this power cannot be "arbitrary" but rather "must be in the exercise of a sound discretion." *State ex rel. Kennedy v. Mont. Fifth Jud. Dist. Ct.*, 121 Mont. 320, 336, 194 P.2d 256, 264 (1948). "An applicant for a stay must make out a <u>clear case of hardship or inequity</u> in being required to go forward." *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 16, 400 Mont. 1, 462 P.3d 218 (emphasis added). "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Henry*, 198 Mont. at 13, 645 P.2d at 1353 (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)).

## ARGUMENT

In Montana, *Landis v. North American Co.* governs motions to stay. *See Flying T Ranch*, ¶ 16 (citing *Landis*, 299 U.S. at 255). The Montana Supreme Court recognizes three guiding principles from *Landis*: (1) courts have "inherent power to stay proceedings"; (2) "[t]he suppliant for

a stay must make out a clear case of hardship or inequity"; and (3) any delay must be "[]moderate," "not oppressive in its consequences," and in furtherance of the "public welfare or convenience." *Henry*, 198 Mont. at 13–14, 645 P.2d at 1353. The State's request for an indefinite stay pending resolution of an anticipated appeal in a collateral case is immoderate, oppressive in its consequences, and fails to demonstrate "hardship or inequity." *See Landis*, 299 U.S. at 255 (vacating district court's stay pending appeal of collateral challenge to the same law). Moreover, the State's assertion that Plaintiffs' claims are no longer justiciable misapprehends precedent, elides the fundamental differences between the present case and *Reagor*, and makes no sense in the context of a stay motion.

## I. The State has not demonstrated a "clear case" of hardship or inequity, and the risk of prejudice to the Plaintiffs is high.

A stay is an extraordinary remedy granted "only in rare circumstances." *Columbia Falls Aluminum Co., LLC v. Atl. Richfield Co.*, No. CV 18-131-M-DWM, 2020 WL 4382481, at *2 (D. Mont. July 31, 2020). The applicant must establish a "clear case of hardship or inequity" to justify a stay. *Flying T Ranch*, ¶ 17. A stay is especially inappropriate when, as here, (1) it is indefinite in nature, (2) the relief sought is

nonmonetary, (3) resolution of the issues in the collateral action would not assist with resolution of the issues in the current action; and (4) the stay would not promote docket efficiency and fairness. *State Farm Fire & Cas. Co. v. Huelskamp*, No. CV 22-145-M-KLD, 2023 WL 9101572, at *2 (D. Mont. Dec. 4, 2023); *McCollough v. Minnesota Lawyers Mut. Ins. Co.*, No. CV-09-95-BLG-RFC-CSO, 2010 WL 441533, at *4 (D. Mont. Feb. 3, 2010); *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066–67 (9th Cir. 2007); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109–10 (9th Cir. 2005).

In *Landis*, the United States Supreme Court held that a district court abused its discretion by granting an indefinite stay pending resolution of a collateral but related case. 299 U.S. at 255. There, two holding companies sued the Securities and Exchange Commission ("SEC") to enjoin enforcement of a recently passed federal statute. *Id.* at 249. Meanwhile, the SEC sued other holding companies to enforce the statute. *Id.* at 250. Because the defendant companies in the SEC's enforcement action also challenged the agency's statutory authority, the district court stayed the *Landis* case pending resolution of the other case, including any appeals. *Id.* at 250–51. The district court reasoned that

the SEC's ability to enforce the statute would be fully determined in the other action. *Id.* The Supreme Court reversed because an indefinite stay pending appeal of a collateral action was "immoderate" and because there was no evidence that proceeding with the case would cause the SEC hardship or inequity. *Id.* at 256–57.

Here, the State likewise seeks an indefinite—and thus immoderate—stay pending its appeal of *Reagor*. And as in *Landis*, it does so without offering any evidence that it will face hardship or inequity if the Court rules on the pending motions. *Cf. id.* at 255 ("The suppliant for a stay must make out a clear case for hardship or inequity in being required to go forward."). Nor could it. The cross-motions for summary judgment are fully briefed, and the State has requested that the Court proceed with hearing them. All other deadlines in the case have been vacated. There is nothing left for the State to do but wait for the decision of this Court. This Court's final determination of pending motions imposes no hardship or inequity on the State. But even if the State sought to stay the forthcoming hearing, "being required to defend a suit does not constitute a clear case of hardship or inequity within the

meaning of *Landis*." *Dependable Highway*, 498 F.3d at 1066. As such, the motion for a stay must be denied.

Although there is no harm to the State in going forward, a stay would prejudice Plaintiffs by delaying resolution of their claims indefinitely. Once filed, the *Reagor* appeal could take well over a year to resolve. *See, e.g.*, *Wittman v. City of Billings*, 2022 MT 129, 409 Mont. 111, 512 P.3d 1209 (notice of appeal filed December 22, 2020, and opinion published July 5, 2022). Applications for indefinite stays are strongly disfavored and routinely denied. *See Landis*, 299 U.S. at 259 (vacating a stay under similar circumstances); *Flying T Ranch*, ¶ 17 (same); *In re Crow Water Compact*, 2015 MT 217, ¶¶ 32–34, 380 Mont. 168, 354 P.3d 1217 (affirming stay denial where resolution of related federal case would delay proceedings); *In re PG&E Corp. Sec. Litig.*, 100 F.4th 1076, 1087–88 (9th Cir. 2024) (vacating a stay where defendants failed to establish hardship and stay would prejudice plaintiffs); *Dependable Highway*, 498 F.3d at 1067 (vacating a stay where awaiting resolution of collateral case would unduly delay proceedings); *W. Sec. Bank v. Schneider Ltd. P'ship*, No. CV 15-10-BLG-SPW-CSO, 2015 WL 2127211, at *4 (D. Mont. May 6, 2015) (denying an indefinite stay because resolution of the collateral

action would "not resolve any disputed issues" in the case); *Lair v. Murry*, 871 F. Supp. 2d 1058, 1068 (D. Mont. 2012) (denying an indefinite stay because the court "c[ould] not predict when the U.S. Supreme Court w[ould] resolve" the collateral case); *Ayotte v. Am. Econ. Ins. Co.*, No. CV 09-57-BU-RFC-CSO, 2010 WL 1418751, at *4 (D. Mont. Mar. 15, 2010) (denying stay that "would be of indefinite duration"); *Anderson v. United States*, No. 2:18-cv-02173-JAD-EJY, 2020 WL 5882030, at *1 (D. Nev. Sep. 14, 2020) ("Plaintiff does not state for how long he seeks a stay. This, in and of itself, militates against a stay of proceedings.").

A stay here is particularly inappropriate because the issue to be determined in the *Reagor* appeal—whether SB 458 violates the single subject rule—is entirely distinct from the issues presented in this case—whether SB 458 violates Plaintiffs' fundamental rights to equal protection, privacy, and dignity under the Montana Constitution. *See Flying T Ranch*, ¶ 17 (holding that a lower court abused its discretion in staying a case pending resolution of a collateral action, where the separate action involved different questions of law and fact); *see also Landis*, 299 U.S. at 256, 259 (vacating a stay despite observing that, "in all likelihood," the pending appeal will "settle many [similar questions of

fact and law] and simplify all of them"); *W. Sec. Bank*, 2015 WL 2127211, at *4 (denying a stay where "resolution of the arbitration w[ould] not resolve any disputed issues in [the] case"); *Lair*, 871 F. Supp. 2d at 1068 (denying a stay where it was unclear whether the collateral action would resolve any issues in the case). The Montana Supreme Court's potential determination of whether SB 458 violates the single subject rule will do nothing to determine whether SB 458 violates Plaintiffs' rights to equal protection, privacy, and dignity. Because *Reagor* will not resolve any disputes in this case, a stay is inappropriate. Moreover, deciding the briefed cross-motions promotes judicial efficiency, allowing consolidation of any potential appeal with the *Reagor* appeal.

The State has not met its burden to show that the "rare" remedy of a stay—much less an indefinite stay—is justified. *See Landis*, 299 U.S. at 255. There is no reason to delay. The motions are fully briefed, and the parties agree the Court should proceed with a hearing. An appeal of this Court's ruling is likely whatever the outcome. Resolving the motions promptly and allowing this case to be heard alongside *Reagor* would promote judicial economy and efficiency. The Court should deny the motion.

## II. Plaintiffs' claims are justiciable.

The State erroneously contends that a stay is warranted because the injunction in *Reagor* renders this case no longer justiciable. But *Reagor* considered a procedural legal issue and left SB 458's substance untouched. As a result, even though SB 458 is currently enjoined pending the State's appeal, the controversy between the parties in this case remains live and unresolved. Indeed, that the State seeks a stay rather than dismissal undermines its contention that the controversy is no longer justiciable.

"A justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion." *Clark v. Roosevelt Cty.*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48. To determine whether a justiciable controversy exists, Montana courts apply a three-part test. *See Mont.-Dakota Utils. Co. v. City of Billings*, 2003 MT 332, ¶ 9, 308 Mont. 407, 80 P.3d 1247. First, the parties must "have existing and genuine, as distinguished from theoretical rights or interests"; second, "the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a

debate or argument invoking a purely political, administrative, philosophical, or academic conclusion"; and third, "there must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status, or legal relationships of one or more of the real parties in interest." *Id.* Plaintiffs plainly satisfy all three parts.

The State does not dispute that this case implicates Plaintiffs' "existing and genuine" rights under the Montana Constitution. Instead, the State claims that, because SB 458 is currently enjoined, the parties' dispute regarding Plaintiffs' rights is "theoretical and political" and that judicial determination of this case would not have the effect of final judgment, Defs.' Stay Br. at 4. Notably, the State offers no argument or case law to support this assertion. *See generally id.* But in light of the State's avowed intent to appeal *Reagor*, *see id.* at 2, and the bill drafter's commitment to re-enact SB 458's substance if *Reagor* is affirmed, *see supra* at 2–3, the current injunction on other grounds is insufficient to render the controversy nonjusticiable. *See Mont.-Dakota Utils.*, ¶ 10.

In *Montana-Dakota Utilities*, the Montana Supreme Court determined that it had jurisdiction over a challenge to an ordinance

governing franchise fees even after the ordinance was defeated by voters because the issue was likely to recur. *Id.* ¶ 10–11. Observing "the inclination" of government officials to continue pursuing the aims of the defeated ordinance—namely, "exploiting potential new sources of revenue"—the Court found that the issues presented would, "in the absence of appellate review, arise again." *Id.* ¶ 10. As such, the Court held that proceeding with judicial review of the substantive claims would "have the effect of a final judgment in law regarding the rights" of the parties and was "appropriate," notwithstanding the fact that the voters rendered the challenged ordinance ineffective. *Id.*

The case for proceeding with judicial review is even stronger here because the *Reagor* injunction may be vacated on appeal. What is more, because the *Reagor* decision addresses only a procedural defect in the law and not its substance, even an affirmance leaves the door open for government officials to continue pursuing the unconstitutional aims of SB 458. Deciding the parties' pending cross-motions will (1) allow for immediate appellate review concurrent with *Reagor*, (2) promote judicial efficiency by offering the Montana Supreme Court all legal theories challenging SB 458, and (3) have the effect of a final judgment regarding

the lawfulness of the challenged definitions and Plaintiffs' rights under the Montana Constitution. *See id.* at ¶ 10 ("We conclude that appellate review of the franchise fee controversy will have the effect of a final judgment in law regarding the rights of local governments and utilities and is appropriate at this time.").

Finally, the request for a stay contradicts the State's claim that this case is no longer justiciable. The proper remedy for lack of justiciability is dismissal—not a stay. *Moody's Mkt., Inc. v. Mont. State Fund*, 2020 MT 217, ¶ 18, 401 Mont. 168, 471 P.3d 68 ("Once a court no longer has before it a justiciable case or controversy, it is required to dismiss the action at that point."). The State does not seek dismissal here because the controversy remains both live and justiciable. Because justiciability goes to the question of <u>whether</u> a court can hear a case and not <u>when</u> it should do so, it is an improper basis upon which to seek a stay.

## CONCLUSION

Plaintiffs respectfully ask this Court to deny the State's motion for stay.

Respectfully submitted this 6th day of August, 2024.

/s/*Dimitrios Tsolakidis*

Dimitrios Tsolakidis
Constance Van Kley
Rylee Sommers-Flanagan
UPPER SEVEN LAW

*Attorneys for Plaintiffs*

# Exhibit 1

Email from M. Russell to C. Sowre
(July 19, 2024)

| | |
|---|---|
| **Subject:** | RE: DV-23-1026 Edwards, et al vs State of Montana |
| **Date:** | Friday, July 19, 2024 at 9:41:42 AM Mountain Daylight Time |
| **From:** | Russell, Michael |
| **To:** | Sowre, Cady, Constance Van Kley, Rylee Sommers-Flanagan, Dimitrios Tsolakidis, Johnson, Thane, Lansing, Alwyn, Noonan, Michael, Emily Jones |
| **CC:** | Ekola, Buffy, Bungay, Deborah, Thompson, Kara, Jami Westermeyer |
| **Attachments:** | image001.jpg |

Good morning, Cady.

Apologies for the delayed response. It is my understanding that Plaintiffs were considering Defendants' suggestion that we agree to a stay in this matter pending resolution of the forthcoming appeal in that related case, but our attorney who has been running point in that regard has been out of the office the second half of this week, so I am not clear on the exact status of that consideration. We hope to clarify that issue next week, and we will proceed accordingly.

In any event, Defendants would certainly like a hearing on their pending Motion for Summary Judgment, stay or not, and I suspect that would not require more than an hour.

Sincerely,

**Michael D. Russell**
Assistant Attorney General
Civil Bureau Chief
Office of Montana Attorney General Austin Knudsen
(406) 444-7008

**CONFIDENTIAL—PRIVILEGED—DELIBERATIVE**
**Notice:** This email message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential, privileged, or deliberative and pre-decisional material, including attorney-client communications and attorney work product. Any unauthorized review, use, disclosure, or distribution is prohibited. This electronic transmission does not constitute a waiver of privilege. If you are not the intended recipient, and have received this message in error, please contact the sender immediately by email reply and destroy all copies of the original message, including any attachments.

---

**From:** Sowre, Cady <Cady.Sowre@mt.gov>
**Sent:** Wednesday, July 17, 2024 2:33 PM
**To:** Constance Van Kley <constance@uppersevenlaw.com>; Rylee Sommers-Flanagan <rylee@uppersevenlaw.com>; Dimitrios Tsolakidis <dimitrios@uppersevenlaw.com>; Russell, Michael <Michael.Russell@mt.gov>; Johnson, Thane <Thane.Johnson@mt.gov>; Lansing, Alwyn

<Alwyn.Lansing@mt.gov>; Noonan, Michael <Michael.Noonan@mt.gov>; Emily Jones <emily@joneslawmt.com>
**Subject:** DV-23-1026 Edwards, et al vs State of Montana

Hello,
I'm reaching out to ask if the parties in this matter would like a hearing on the pending motion. We understand that Judge Vannatta has issued a ruling in a related case, so we are curious how everyone would like to proceed. If you would like a hearing, can you let me know how much time you recommend?
Thanks,
Cady

Cady Sowre
Judicial Assistant to the Hon. Leslie Halligan
Missoula County Courthouse
200 West Broadway
Missoula, MT 59802
(406) 258-4771
(406) 258-4739 Fax
Cady.Sowre@mt.gov

## CERTIFICATE OF SERVICE

I, Dimitrios Tsolakidis, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 08-06-2024:

Constance Van Kley (Attorney)
PO Box 451
Missoula MT 59806
Representing: Kael Fry, Anna Tellez, Montana Two Spirit Society, Susan Edwards, Eden Atwood, Shannon Aloia
Service Method: eService

Rylee Sommers-Flanagan (Attorney)
P.O. Box 31
Helena MT 59624
Representing: Kael Fry, Anna Tellez, Montana Two Spirit Society, Susan Edwards, Eden Atwood, Shannon Aloia
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: Austin Knudsen, State of Montana, Gregory Gianforte
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Austin Knudsen, State of Montana, Gregory Gianforte
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Austin Knudsen, State of Montana, Gregory Gianforte
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620

Representing: Austin Knudsen, State of Montana, Gregory Gianforte
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Austin Knudsen, State of Montana, Gregory Gianforte
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: Austin Knudsen, State of Montana, Gregory Gianforte
Service Method: eService

Electronically Signed By: Dimitrios Tsolakidis
Dated: 08-06-2024