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**IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE**

AMELIA MARQUEZ, an individual;)
and JOHN DOE, an individual,)
)
 Plaintiffs,)
)
 v.)
)
 STATE OF MONTANA; GREGORY)
 GIANFORTE, in his official capacity as)
 the Governor of the State of Montana;)
 the MONTANA DEPARTMENT OF)
 PUBLIC HEALTH AND HUMAN)
 SERVICES; and CHARLES T.)
 BRERERTON, in his official capacity)
 as the Director of the Montana)
 Department of Public Health and)
 Human Services,)
)
 Defendants.)

Case No. DV 21-00873

Hon. Michael G. Moses

**PLAINTIFFS' BRIEF IN SUPPORT
OF OPPOSED MOTION FOR LEAVE
TO FILE SECOND AMENDED
COMPLAINT**

Plaintiffs Amelia Marquez and John Doe (together, “Plaintiffs”), in accordance with the scheduling order entered in this matter on June 2, 2022, and Rule 15(a)(2) of the Montana Rules of Civil Procedure, submit the following brief in support of their motion for leave to file their Second Amended Complaint against the State of Montana; its governor, Gregory Gianforte; the Montana Department of Health and Human Services (“DPHHS”); and DPHHS’s director, Charles T. Brererton.¹

INTRODUCTION

Pursuant to this Court’s June 2, 2022 scheduling order, “[a]ll motions to join additional parties and to amend the pleadings shall be filed by November 14, 2022.” Scheduling Order, ¶ 1 (emphasis added). Plaintiffs’ motion for leave to file a Second Amended Complaint, which seeks to “join additional parties” and to “amend the pleadings,” precedes the scheduling-order deadline by more than two weeks. Discovery is not set to close until May 15, 2023; the deadline for summary-judgment briefing is not until June 14, 2023; and trial in this matter is not set to begin until August 14, 2023. *Id.*, ¶¶ 3, 7, 10. The scheduling order provides Defendants with more than sufficient opportunity to respond to the Second Amended Complaint, conduct discovery, engage in summary-judgment briefing, and prepare for trial.

In addition, Rule 15(a)(2) of the Montana Rules of Civil Procedure supports granting Plaintiffs leave to amend the complaint. Rule 15(a)(2) states that “[t]he court should freely give leave [to amend] when justice so requires.” M. R. Civ. P. 15(a)(2). Granting leave to amend is particularly appropriate where, as here, (1) amending the complaint is necessary to address Defendants’ own post-injunction misconduct; (2) amending the complaint to assert class allegations will provide an effective statewide remedy for Defendants’ misconduct; (3) the Court

¹ This Court granted Defendants’ Motion to Substitute new DPHHS director Charles Brereton for former director Adam Meier on September 23, 2022. Dkt. 80.

is already familiar with the facts and claims alleged in the Second Amended Complaint; and (4) the amendment will not cause any prejudice to Defendants.

For these reasons, and as discussed in further detail below, the Court should enter an order granting Plaintiffs leave to file the Second Amended Complaint.

THE ALLEGATIONS OF THE SECOND AMENDED COMPLAINT

The allegations in the Second Amended Complaint are described below. They arise out of events well known to this Court and to Defendants. The need to add these allegations to this lawsuit arose from Defendants' actions and conduct in the aftermath of the Court's April 21, 2022, preliminary injunction.

I. Defendants' Conduct in the Wake of this Court's Preliminary Injunction

On April 21, 2022, the Court preliminarily enjoined the enforcement of SB 280, and any aspect of SB 280, on constitutional grounds. Consistent with Montana law, the Court's order directed the parties to return to the status quo existing immediately prior to SB 280's enactment. As the Court recognized, this required returning to the 2017 procedures for processing applications for birth-certificate amendments. Those procedures did not involve the restrictive requirements of SB 280.

In the months following the preliminary injunction, Defendants refused to comply with the order or Montana law. Instead, Defendants unilaterally promulgated a Temporary Emergency Rule and an identical Permanent Rule ("the 2022 Rules"), both of which prohibit processing *any* application for changes to sex designations on birth certificates based on gender transition, gender identity, or change of gender. The 2022 Rules directly contradict the Court's preliminary injunction, and Montana law, which require the parties to return to the status quo that existed prior to the enactment of SB 280 for the duration of the litigation. As this Court recognized, the status

quo is the 2017 procedures that permit transgender people to amend their birth certificates without the burdensome requirements of SB 280 or the 2021 Rule, which was the mirror image of SB 280. Promulgating rules that categorically prohibit transgender people from amending their birth-certificate sex designations disrupts, rather than preserves, this status quo.

As a result of Defendants' conduct, on June 7, 2022, Plaintiffs were forced to file a motion seeking clarification of the preliminary injunction. Following briefing on Plaintiffs' motion, this Court held a hearing on September 15, 2022. At the hearing, the Court entered a bench ruling ordering that "[t]he rules of 2017 will apply during the course of this litigation." Dkt. 76. Notwithstanding the Court's bench order, Defendants immediately issued the following public statement:

The Department thoroughly evaluated the judge's vague April 2022 decision and crafted our final rule to be consistent with the decision. It's unfortunate that the judge's ruling today does not square with the vague April decision. The 2022 final rule that the Department issued on September 9 remains in effect, and we are carefully considering next steps.

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, this Court issued its Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction. Dkt. 77. Once again, the Court ordered that "Defendants, as well as their agents, employees, representatives, and successors, shall 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.*

Only after the Court issued its written order did Defendants finally begin processing birth-certificate amendments pursuant to the process defined by the 2017 Rule. On September 23, 2022, however, Defendants applied to the Montana Supreme Court for a writ of supervisory control. *See* Case No. OP 22-0552. Inexplicably, Defendants have argued in support of their application for the writ that this Court “did not order DPHHS to revert to the 2017 Rule” and that this Court “lacks the authority to order DPHHS to return to the 2017 Rule.” *Id.*

Defendants’ application for a writ conclusively demonstrates their commitment to implementing a rule that categorically bars transgender Montanans from amending their birth certificates at the first available opportunity. In their rush to deny transgender Montanans the ability to obtain a birth certificate accurately reflecting their sex, as determined by their gender identity, Defendants have been, and continue to be, more than willing to ignore valid court orders and engage in needless additional litigation.

Because Defendants’ application for a writ of supervisory control reaffirms their position that the Permanent Rule is still valid and in effect, Plaintiffs’ Second Amended Complaint also alleges that the Permanent Rule violates Plaintiffs’ constitutional rights. In addition, based on Defendants’ conduct to date and their insistence that the 2017 Rule is no longer in effect (notwithstanding this Court’s orders to the contrary), Plaintiffs’ Second Amended Complaint seeks a declaration that the 2022 Permanent Rule’s categorical prohibition against amending birth certificates is unconstitutional.

II. The Class Allegations

The Court’s scheduling order provides that parties in this case have until November 14, 2022, to add parties and claims. Consistent with the scheduling order, Plaintiffs seek to certify a

Rule 23 class consisting of all transgender people born in Montana who currently want, or who in the future will want, to amend the sex designation on their Montana birth certificates. *See* Second Amend. Compl., ¶¶ 37–50. Several factors support adding class allegations to this case.

First, Defendants’ conduct in the wake of the preliminary injunction—and particularly DPHHS’s conduct—has a statewide reach that affects hundreds, if not thousands, of people born in Montana. The most sensible, efficient way to litigate the claims arising from Defendants’ conduct is via a Rule 23 class action. To do otherwise would require transgender people who wish to secure their rights to file hundreds of separate but identical suits to obtain the relief requested in this litigation. This would necessarily result in an otherwise-avoidable waste of resources for both the courts and the parties.

Second, a statewide class prevents Defendants from limiting any injunctive relief the Court may grant to the boundaries of Yellowstone County, while continuing to enforce an unlawful statute throughout the rest of Montana. Given Defendants’ aggressive resistance to the preliminary injunction, and to this litigation as a whole, Plaintiffs fully expect to see Defendants seek to limit the relief granted by this Court in this manner.

Third, a statewide class prevents Defendants from providing relief limited to the two named Plaintiffs and then arguing that this relief moots the current constitutional challenge to SB 280. Notwithstanding the fact that well-established exceptions to the mootness doctrine would preserve Plaintiffs’ claims (among them, the public-interest exception and capable-of-repetition-yet-evading-review doctrine), Defendants should not be allowed to argue that Plaintiffs’ claims are moot by employing the strategy of granting limited relief. Regrettably, this strategy is common when state actors have the ability to craft a remedy targeted at individually named plaintiffs in the hopes of minimizing the effects of a broader adverse court ruling.

Fourth, as set forth in greater detail in Plaintiffs’ motion for class certification, the proposed class easily meets the requirements of Rule 23(a), namely, that:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

M. R. Civ. P. 23(a). Further, adding class allegations to the case is consistent with Rule 23(b)(2) because (1) “the party opposing the class has acted or refused to act on the grounds that apply generally to the class,” and (2) “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as whole.” M. R. Civ. P. 23(b)(2).

III. Additional John Doe Allegations

The Second Amended Complaint also adds allegations that describe the acts of discrimination and harassment that Plaintiff John Doe has endured and that caused him to leave Montana before this lawsuit was filed, notwithstanding a very promising career in ranching. *See* Second Amend. Compl., ¶¶ 87-88. These new allegations further emphasize the injury sustained by transgender people as a result of the hostility toward them, as reflected in Defendants’ conduct.

LEGAL STANDARDS

Under Rule 15(a)(2) of the Montana Rules of Civil Procedure, “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” M. R. Civ. P. 15(a)(2).

Rule 15 memorializes a general policy favoring the amendment of pleadings. *See Seamster v. Mussellshell Cnty., Sheriff’s Office*, 2014 MT 84, ¶ 14, 374 Mont. 358, ¶ 14, 321 P. 3d 829, ¶

14; *Hobble–Diamond Cattle Co. v. Triangle Irrigation Co.* (1991), 249 Mont. 322, 325, 815 P.2d 1153, 1155; *Sooy v. Petrolane Steel Gas Inc.* (1985), 218 Mont. 418, 421, 708 P.2d 1014, 1016. Montana courts “interpret[] . . . Rule [15] liberally, allowing amendment of pleadings as the general rule and denying leave to amend as the exception.” *Hobble–Diamond*, 249 Mont. at 325, 815 P.2d at 1155.

ARGUMENT

I. The scheduling order warrants granting Plaintiffs’ motion.

On June 2, 2022, the Court entered a scheduling order that anticipated the need for the parties to amend their pleadings. Scheduling Order, ¶ 1. The Court ordered that “all motions to join parties and to amend pleadings shall be filed by November 14, 2022.” *Id.* No party objected to this aspect of the order.

Consistent with the scheduling order, Plaintiffs have filed this motion for leave to file the Second Amended Complaint in advance of the November 2022 deadline. Defendants will have more than sufficient opportunity to respond to the Second Amended Complaint and develop whatever defense they feel is appropriate. The discovery cutoff is not until May 15, 2023; the deadline for summary-judgment briefing is not until June 14, 2023; and trial in this matter is not set to begin until August 14, 2023.

Based on the scheduling order, there is no reasonable justification for denying the motion for leave to file the Second Amended Complaint. The motion should be granted.

II. Rule 15(a) strongly favors granting Plaintiffs’ motion.

As noted, Rule 15(a) of the Montana Rules of Civil Procedure allows pleadings to be amended “freely.” *See* Mont. R. Civ. P. 15(a)(2); *see also* *Seamster*, ¶ 14; *Hobble–Diamond* at 325, 815 P.2d at 115; *Sooy*, 218 Mont. at 421, 708 P.2d at 1016. Plaintiffs’ request for leave to file

the Second Amended Complaint easily meets this liberal standard, particularly since (1) amending the complaint is necessary to address Defendants' post-injunction misconduct, (2) amending the complaint to assert class allegations will provide an effective statewide remedy for Defendants' conduct, (3) the Court is already familiar with the facts and claims alleged in the Second Amended Complaint, and (4) the proposed amendment will not cause any prejudice to Defendants.

A. The proposed amendment addresses conduct postdating the filing of the original complaint.

Defendants' decisions to disregard the Court's preliminary injunction and promulgate the 2022 Rules are fully described in the Second Amended Complaint. The facts and circumstances underlying the allegations only became evident after the preliminary injunction was entered in April 2022. Allegations regarding this conduct could not have been added to the case at any time beforehand.

B. The proposed amendment provides an effective statewide remedy for Defendants' conduct.

Adding class allegations to the Second Amended Complaint is also consistent with Rule 15(a). Proceeding as a class provides Plaintiffs and the proposed class with a sensible and efficient remedial path. As is evident from Defendants' refusal to abide by this Court's preliminary injunction, and from their promulgation of the restrictive 2022 Rules, the reach of their conduct is statewide. Proceeding as a class effectively addresses that conduct. It also avoids the inconsistent rulings that could result if other transgender Montanans are compelled to seek identical relief in other courts and avoids the inefficiencies that would result, for both the litigants and the court system, from litigating identical issues in multiple proceedings.

C. The Court is already familiar with the facts and claims asserted in the Second Amended Complaint.

The Court is already familiar with all the key aspects of the Second Amended Complaint. As part of the preliminary-injunction proceedings, the Court has evaluated and sustained Plaintiffs' claims under Count I (equal protection), Counts II and III (privacy rights and freedom from state interference in medical decisions), Count IV (substantive due process), and Count VI (violation of the Montana Governmental Code of Fair Practices). In addition, in Plaintiffs' motion to clarify the preliminary injunction, Plaintiffs addressed Defendants' refusal to abide by the preliminary injunction and Defendants' promulgation of the 2022 Rules.

The claims and allegations that Plaintiffs propose to add to the Second Amended Complaint are not new to the Court. They enable the Court to address Defendants' conduct in the aftermath of the preliminary injunction, they enable the Court to do so on a statewide basis, and they allow the parties to take advantage of the Court's experience with this dispute, as reflected in the lengthy findings of fact and conclusions of law set forth in the Court's preliminary-injunction order and the Court's order clarifying the preliminary-injunction order.

D. Allowing Plaintiffs to file the Second Amended Complaint will not prejudice Defendants.

Finally, Defendants will not suffer any prejudice if Plaintiffs are allowed to file the Second Amended Complaint. As a result of the Court's scheduling order, Defendants will have ample opportunity to respond to the Second Amended Complaint and ample time to conduct the necessary discovery, engage in summary judgment briefing, and prepare for trial.

Indeed, fact discovery has not yet begun, expert disclosures are months away, and the trial in the case is nearly a year away. Nothing about this schedule prevents Defendants from doing what they believe is necessary to develop a defense over the upcoming months.

Defendants also cannot claim surprise. Their own refusal to abide by the preliminary injunction, and their own promulgation of improper administrative rules, have led to the need for Plaintiffs to incorporate allegations regarding this misconduct into the Second Amended Complaint. Since Defendants' own post-injunction misconduct gave rise to these allegations, Plaintiffs should be allowed to hold Defendants accountable for that misconduct, as pleaded in the Second Amended Complaint.

CONCLUSION

FOR THESE REASONS, Plaintiffs Amelia Marquez and John Doe respectfully request the entry of an order:

- (a) granting them leave to file the Second Amended Complaint attached to this brief as Exhibit A; and
- (b) granting any other relief the Court deems just.

Dated: October 28, 2022

Respectfully submitted,

By: /s/ Akilah Lane
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CERTIFICATE OF SERVICE

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I, Akilah Maya Lane, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 10-28-2022:

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