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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 CHARLIE 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' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THEIR SECOND AMENDED COMPLAINT**

Plaintiffs Amelia Marquez and John Doe (collectively, "Plaintiffs") submit the following reply 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 the director of DPHHS, Charles Brererton.

INTRODUCTION

Pursuant to Rule 15 (a)(2) of the Montana Rules of Civil Procedure, "[c]ourts should freely give leave [to amend]" a complaint, and pursuant to this Court's scheduling order granting the litigants leave to add additional parties and claims by November 14, 2022, Plaintiffs filed their motion for leave to file the Second Amended Complaint on October 28, 2022, weeks before the deadline set forth in the scheduling order. Dkt 70, ¶ 1. Despite the timeliness of Plaintiffs' motion, Defendants complain that it comes too late. This position has no merit.

The schedule set by the Court provides the parties with ample time to prosecute and defend this case. Discovery has only just started and does not close until May 15, 2023, and the deadline for completing summary-judgment briefing is June 14, 2023, more than six months from now. Dkt. 70, ¶¶ 3, 7. The trial in this matter, to the extent that a trial will be necessary, is not set to begin until August 14, 2023. Dkt. 70, ¶ 10. There is ample time for both sides to prepare for and litigate their claims and defenses as set forth in the Second Amended Complaint.

Clearly, the Court's extended scheduling contemplated motion practice directed to evolving claims and parties, particularly when those claims arise in the midst of the litigation itself. This is not uncommon in complex constitutional cases with multiple parties and multiple claims. The Second Amended Complaint contains just such additional, mid-litigation claims.

Furthermore, any material delay in the progress of the case is the result of Defendants' actions. In the aftermath of the preliminary injunction entered by the Court, Defendants engaged in a pattern of intentional misconduct including, *inter alia*, violating the preliminary injunction,

issuing rules that unlawfully ban transgender individuals from amending their birth certificates altogether, and ignoring the Court's mandate to return to the 2017 Rule for processing requests to amend. Dkt. 77, ¶¶ 9-10, 21, 24. All of this was contrary to the Court's explicit directive to preserve the status quo. The proposed Second Amended Complaint targets this misconduct.

On December 5, 2022, Defendants filed a response to Plaintiffs' motion for leave to file their Second Amended Complaint. Dkt. 91. Defendants' response mischaracterizes the record, ignores the Court's scheduling order, miscites Montana case law, and disregards the Montana Rules of Civil Procedure.

ARGUMENT

A. The Second Amended Complaint properly targets Defendants' mid-litigation misconduct.

Defendants' lead argument in response to Plaintiffs' motion for leave to file the Second Amended Complaint is that there is "nothing new" that justifies granting the motion. Dkt. 91, at 2. This is demonstrably false. Less than a week after filing the initial Complaint, Plaintiffs moved for the entry of a preliminary injunction seeking to enjoin SB 280 *directly or indirectly*, including the 2021 Rule. Dkts. 6, 12. This was entirely appropriate given that the 2021 Rule was the mirror image of SB 280. Both SB 280 and the 2021 Rule expressly authorized the repeal of the 2017 Rule that governed the birth certificate amendment process prior to the passage of SB 280 and sought to replace it with the more restrictive 2021 Rule. On April 21, 2022, this Court granted Plaintiffs' motion and preliminarily enjoined enforcement of *any aspect of SB 280*, including the 2021 Rule. Dkt. 61, at 35.

Montana law requires that, following the entry of a preliminary injunction, the parties are obligated to return to the status quo that existed prior to the entry of the preliminary injunction. See *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶¶ 20, 26, 409 Mont. 378, ¶ 26, 515 P.3d

301 ¶ 26; *Weems v. State,* 2019 MT 98, ¶ 26, 395 Mont. 350, ¶ 26, 440 P. 3d 4, ¶ 26*; see also Clark Fork Coal v. Tubbs,* 2016 MT 229, ¶ 39, 384 Mont. 503, ¶ 39, 380 P.3d 771, ¶ 39 (holding that when a court invalidates a rule, "the effect is to return to the previous status of the law, which necessarily means in most instances that the former rule is reinstated"). The status quo in this case is the 2017 Rule.

Rather than return to the status quo or otherwise comply with the preliminary injunction by processing requests to amend the sex designation on birth certificates in accordance with the 2017 Rule, Defendants instead adopted a Temporary Emergency Rule and then an identical Permanent Rule (the "2022 Rules") that completely banned transgender people from amending the sex designation on their birth certificates. Dkt. 77, ¶¶ 9-13; Dkt. 83, at 3-5. The 2022 Rules were a retaliatory response to the preliminary injunction, impairing the constitutional rights of transgender Montanans.

On June 6, 2022, Plaintiffs moved for clarification that the preliminary injunction required a return to the 2017 Rule. Dkt. 71. On September 19, 2022, the Court granted the motion concluding: "Defendants . . . shall perform their obligations under this Court's Order and *preserve the status quo* by reverting to the 2017 DPHHS Rule governing the amendment of birth certificates." Dkt. 77, at 10; (emphasis added). After initially asserting that they would not abideby the Clarification Order,[1] Defendants ultimately announced that they would revert to the 2017 Rule for processing birth certificate amendments, *but only provisionally.* [2]

[1] Shortly after this Court issued its ruling on Plaintiffs' motion to clarify on September 15, 2022, the DPHHS issued a statement to the press expressing an intent to continue enforcing the 2022 Rule notwithstanding the Court's order: "It's unfortunate that the judge's ruling today does not square with his vague April decision. The 2022 final rule that the Department issued on September 9[, 2022] remains in effect, and we are carefully considering next steps." *State health department defies judge's order on birth certificates*, Mara Silvers, Montana Free Press (Sept. 15, 2022) available at https://montanafreepress.org/2022/09/15/health-department-defies-judges-transgender-birth-certificate-order/.

[2] Following this Court's issuance of its written order on Plaintiffs' motion to clarify on September 19, 2022, the DPHHS issued a press statement indicating its disagreement with the decision and reluctant intent to comply with the order: "The Department has received the court's order clarifying the preliminary injunction and despite disagreeing

Notwithstanding Defendants' nominal consent to obey the Court's order, they continue to insist that the Court improperly imposed the return to the status quo and that the rules prohibiting transgender individuals from amending their birth certificates are a valid exercise of state power. Further, Defendants have reserved the right to reinstate the provisions of the 2021 Rule implementing SB 280 in the event that the preliminary injunction is lifted.[3]

Defendants' refusal to abide by the preliminary injunction, their continuing objection to the validity of the 2017 Rule as the status quo, their reservation of the right to reinstate the 2021 Rule, and their 2022 efforts to ban *all* birth certificate amendment applications submitted by transgender individuals have been properly included in the Second Amended Complaint. Dkt. 84, ¶¶ 1-20. Rule 15 contemplates case developments that create the need for mid-litigation pleading amendments. In addition, this Court's scheduling order was designed to accommodate precisely such a need.

B. The Second Amended Complaint properly challenges the 2021 and 2022 Rules.

Defendants argue that Plaintiffs seek "to fundamentally change the course of the litigation" by addressing the 2021 Rule more explicitly, as well as the 2022 Rules, in the Second Amended Complaint. Dkt. 91, at 2. Defendants assert that since, according to them, Plaintiffs have never challenged the 2021 Rule or the 2022 Rules, Plaintiffs cannot now try to "fit their challenges" to

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with it, it intends to comply with its terms[.] The Department stands by its actions and analysis concerning the April 2022 preliminary injunction decision, as set forth in its rulemaking that addressed critical regulatory gaps left by the court." *Montana health department now "intends to comply" with judge's birth certificate order*, Mara Silvers, Montana Free Press (Sept. 19, 2022) available at https://montanafreepress.org/2022/09/19/montana-health-dept-now-intends-to-comply-with-birth-certificate-ruling/.

[3] The DPHHS included within the provisions of the Notice of Public Hearing on Proposed Amendments that ultimately resulted in the 2022 Rule the following language evidencing its desire to reinstate and enforce S.B. 280 as soon as "the department is not subject to an injunction against enforcement S.B. 280[.]" Montana Administrative Register Notice 37-1002, No. 11, Notice of Public Hearing on Proposed Amendment (June 10, 2022). The DPHHS also reasserted this position in its response to public comments issued in conjunction with its Notice of Amendment to ARM 37.8.311, "[r]ecognizing that SB 280 is the clearest indicator of legislative intent with respect to changing the sex identified on a birth certificate, the [2022 Rule] provides that the new language is only effective when and to the extent that the department is subject to an injunction against enforcement of SB 280 or SB 280 has otherwise been invalidated." Response # 10, Montana Administrative Register Notice 37-1002, No. 17, Notice of Amendment (Sept. 9, 2022).

both the 2021 Rule and the 2022 Rules (jointly, "the Rules") into the pending litigation. *Id.* at 3. This assertion has no basis in law. Moreover, it is directly at odds with Rule 15 and inconsistent with the terms of the scheduling order. It is also flatly contradicted by the record.

Contrary to Defendants' argument, the 2021 Rule has always been an integral part of this litigation and has been repeatedly challenged by Plaintiffs. The language of SB 280 itself recognizes that the legislative intent of SB 280 was to repeal the 2017 Rule and replace it with the more restrictive provisions of the 2021 Rule. SB 280, § 2. Defendants conceded as much in their brief in response to Plaintiffs' motion to clarify. Dkt. 72, at 4. The initial Complaint, the motion for a preliminary injunction, the Amended Complaint, and the motion to clarify all took aim at both SB 280 and the 2021 Rule and Defendants' effort to replace the 2017 Rule with more restrictive requirements.

Similarly, the 2022 Rules also have an extended presence in this litigation. Since the entry of the preliminary injunction and Defendants' subsequent attempts to ban transgender individuals from accessing the birth certificate amendment process, the 2022 Rules have repeatedly been the subject of Plaintiffs' argument, including playing an important role in the September 15, 2022 hearing on Plaintiffs' motion to clarify. The 2022 Rules reflect Defendants' decision to disregard the preliminary injunction and ignore their obligation to preserve the status quo. Dkt. 77, ¶¶ 19-21, 24. Challenging Defendants' contumacious conduct in the Second Amended Complaint is clearly proper and easily falls within the reach of the Court's scheduling order, which permits Plaintiffs to seek leave to join additional parties or amend the pleadings on or before November 14, 2022. Plaintiffs easily met that deadline by filing their motion seeking leave to file the Second Amended Complaint on October 28, 2022.

The Second Amended Complaint's challenge to the 2022 Rules is also consistent with the Court's equitable power to entertain proceedings to enforce its own orders. Montana courts have

long recognized the broad scope of that power. *See Smith v. Foss*, 177 Mont. 443, 446-47, 582 P.2d 329 (1978) (noting that a district court's jurisdiction includes the "inherent power …to make such orders and issue such process as may be necessary" to ensure the effectiveness of its orders); *see also Trs of the Wash-Idaho-Mont Carpenters-Emprs. Retirement Trust Fund v. Galleria P'ship,* 239 Mont. 250, 265, 780 P.2d 608, 617 (1989) ("An 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.").

C. The challenge to the Rules is consistent with Montana law.

Defendants incorrectly assert that the motion for leave to file the Second Amended Complaint should be denied because the Second Amended Complaint does not plead a proper basis for challenging either the 2021 Rule or the 2022 Rules. Contrary to Defendants' assertion, the Second Amended Complaint sets forth a detailed claim for declaratory and injunctive relief against both the 2021 Rule and the 2022 Rules, highlighting Defendants' resistance to the preliminary injunction, their failure to preserve the status quo, and their failure to abide by the 2017 Rule. Dkt. 84, ¶¶ 1-20, 63-73.

The Montana Declaratory Judgments Act, § 2-4-506 (1), MCA, provides that "a rule may be declared invalid or inapplicable . . . if it is found that the rule or its threated application interferes with or *impairs or threatens to interfere with or impair the legal rights or privileges of the Plaintiff*." (Emphasis added.) Further, § 27-8-202, MCA, provides that any person whose rights or status "are affected" by a rule or statute may properly "obtain a declaration of rights, status, or other legal relations thereunder."

Plaintiffs' claims fall well within the reach of these provisions of the Montana Declaratory Judgment Act and have been properly pleaded as such in the Second Amended Complaint.

Subsection (3) of § 2-4-506, MCA, declares that judgment may be entered whether or not the plaintiff has requested the agency to pass upon the validity of the rule or rules in question. The Second Amended Complaint also properly pleads constitutional violations consistent with this Court's previous decision denying Defendants' motion to dismiss and consistent with the jurisdictional provisions of Montana law. Dkt. 84, ¶¶ 93-134.

D. The class allegations are properly included in the Second Amended Complaint.

For the reasons set forth in Plaintiffs' initial brief in support of their motion for clarification and in their reply to Defendants' response to that motion, the class allegations articulated in the Second Amended Complaint are also properly part of the case. Dkt. 84, ¶¶ 37-50. Adding the class allegations, (*i.e.*, "new parties") to the Second Amended Complaint is consistent with Rule 15 and the scheduling order. The allegations also evidence compliance with Montana's class action requirements as set forth in Rule 23.

As noted above, the need for class relief became singularly evident in the aftermath of Defendants' total prohibition against the amendment of Montana birth certificates "based on gender transition, gender identity, or change of gender," and Defendants' efforts to avoid compliance with the preliminary injunction or preservation of the status quo as directed by the Court. Proceeding as a class, as argued in Plaintiffs' motion for class certification, provides Plaintiffs and the proposed class with an effective and sensible remedy to reach Defendants' misconduct that necessarily harms all members of Plaintiffs' proposed class, and not solely Plaintiffs.

Defendants also assert that because Plaintiffs did not plead such class allegations in their initial Complaint, Plaintiffs cannot do so now, notwithstanding a scheduling order that expressly permits such amendments and a procedural rule that sets forth the requirements for proceeding as

a class. Unsurprisingly, Defendants cite no case law to support their novel interpretation of class pleading waiver. None exists.

E. Defendants will suffer no prejudice as a result of granting Plaintiffs leave to file the Second Amended Complaint.

In response to the motion for leave to amend, Defendants argue that the "added time and complexity" of responding to the Second Amended Complaint constitutes undue prejudice that requires denying the motion. Dkt. 91, at 5-8. But granting Plaintiffs leave to amend works no hardship on Defendants not encountered in any other piece of complex litigation. It is certainly true that the Second Amended Complaint will require some time to respond to, but that is expected in any piece of litigation like this involving constitutional claims. If "added time and complexity" were the basis for denying leave to amend, no motion to amend could ever survive, and no amendment would ever be permitted. Every amended complaint and every amended pleading adds "time and complexity" to a matter.

To deny leave to amend on the standard that Defendants urge upon the Court is contrary to the language and jurisprudence of Rule 15. Amendments should be the general rule, not the exception. *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 325, 815 P.2d 1153, 1155 (1991); *Seamster v. Musselshell Cnty Sheriff's Office,* 2014 MT 84, ¶ 14, 374 Mont. 358, ¶ 14, 321 P.3d 829, ¶ 14. Moreover, as set forth in the Second Amended Complaint, it is Defendants' own misconduct that has contributed to the "time and complexity" of which they now complain. Whatever prejudice they might suffer is by their own hand.

Importantly, Defendants completely avoid discussing the current status of the case and the *de minimis* nature of any potential prejudice to Defendants. Document requests and interrogatories have only recently been served by Plaintiffs; Defendants themselves have yet to initiate any discovery; no depositions have been taken or even scheduled by either side; no expert reports have

been exchanged; no dispositive motions, other than Defendants' initial motions to dismiss, have been filed or adjudicated; and the discovery cutoff, any summary-judgment motions, any pre-trial procedural motions, and any trial are considerably in the future. In short, the case is still in its relatively early stages. Any prejudice Defendants claim they might suffer is easily remedied. In fact, Plaintiffs have freely consented to Defendants' requests for extensions of time throughout these proceedings.

Although much remains to be done in this case, the Court's scheduling order ensures that there is sufficient time to complete the tasks required by the litigation. Defendants, through the Montana Attorney General's office, have multiple lawyers ready to participate in the litigation. The same is true of Plaintiffs.

Finally, it is instructive that the case Defendants repeatedly cite, *Peuse v Malkuch,* 275 Mont. 221, 911 P.12d 1153 (1996), denied leave to amend after discovery had been completed and motions for summary judgment had been filed and argued. *Peuse* is distinguishable from this case. In this case, unlike *Peuse*, discovery is only just underway and has not been completed, and motions for summary judgment have not been filed or argued.

F. The Amended Complaint does not bar granting Plaintiffs leave to file the Second Amended Complaint.

Defendants argue that Plaintiffs' previously filed Amended Complaint should bar the motion for leave to file the Second Amended Complaint, suggesting that Plaintiffs have not been diligent in pursuing their claims. Dkt. 91, at 4. Again, Defendants distort the record.

The subject matter of the Amended Complaint and the misconduct now before the Court on Plaintiffs' motion are worlds apart. The Amended Complaint arose when the Montana Human Rights Bureau (the "Bureau") dismissed Plaintiffs' claims under the Montana Human Rights Act on the basis that the Bureau did not have the authority to resolve constitutional claims. As a result

(and at the suggestion of the Bureau), Plaintiffs' prior motion to amend sought to include in the Amended Complaint Plaintiffs' claims under to the Montana Human Rights Act. It was an expected and uncontroversial amendment to the pleadings, and one to which Defendants consented. It also predated, by many months, the Court's grant of the preliminary injunction and Defendants' misconduct as set forth in the Second Amended Complaint. The two complaints are unrelated procedurally or substantively.

G. Plaintiff John Doe should be permitted to assert his additional allegations of damage and descriptions of anti-transgender animus.

The Second Amended Complaint adds allegations that provide additional details regarding the incidents to which Plaintiff John Doe was subjected as a result of anti-transgender animus. This history further illuminates the harassment to which transgender people are subject when forced to carry and produce identification documents that misstate their sex designation.

Defendants object to including these allegations in the Second Amended Complaint because the incidents described do not directly implicate Defendants. But this misses the point. These allegations further illustrate the anti-transgender hostility that transgender people endure, particularly when their transgender status is revealed without their consent. Dkt. 84, ¶¶ 87-88. This environment is made even more hostile by Defendants' continuing efforts to impair the ability of transgender Montanans to obtain accurate identification documents. As this Court observed, "A mismatch between someone's gender identity and the information on their birth certificate also subjects transgender people to discrimination and harassment in a variety of settings including employment, healthcare, and interactions with government employees and officials." Dkt. 61, ¶ 73, citing Dkt. 17, ¶¶ 43-45.

John Doe's allegations further corroborate the Court's observations. The scheduling order permits adding such allegations, which are particularly appropriate in a notice pleading jurisdiction such as Montana.

H. The use of "sex" instead of "gender" in certain allegations of the Second Amended Complaint does not warrant denying leave to file the Second Amended Complaint.

Finally, Defendants argue that the motion for leave to amend should be denied because the Plaintiffs did not fully disclose in their motion the use of the word "sex" instead of "gender" in selected paragraphs in the Second Amended Complaint. This is a remarkably trivial argument. It makes no difference whether one characterizes the relief that Plaintiffs seek as amending a gender or sex marker on a birth certificate—the Rules promulgated by Defendants forbid both.

It appears that Defendants principal concern is not with any substantive difference between sex and gender but with whether the use of sex versus gender was properly disclosed. Dkt. 91, at 13-15. This has no relevance to the issues before the Court on Plaintiffs' motion for leave to file the Second Amended Complaint, particularly when the Court has before it Plaintiffs' Second Amended Complaint and is fully competent to decide which usage the Court believes most appropriate on the basis of context, Plaintiffs' submissions, and the expert declaration submitted by Randi Ettner at the outset of the case.

Finally, there is no evidence in the record that the Court was actually deceived by Plaintiffs' choice of language, and Defendants allude to none. Indeed, Plaintiffs used the same language in the briefing and argument on the motion to clarify without objection from Defendants. In any event, such changes are clearly permitted by the scheduling order.

CONCLUSION

For the reasons stated herein and in Plaintiffs' initial Brief in Support of Opposed Motion for Leave to File Second Amended Complaint, the Court should grant Plaintiffs' Opposed Motion for Leave to File Second Amended Complaint.

Dated: January 9, 2023

Respectfully submitted,

By: */s/ Akilah Deernose*
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