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**IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY**

**JESSICA KALARCHIK, an individual,)
and JANE DOE, an individual, on)
behalf of themselves and all others)
similarly situated,)**

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; CHARLES T.)
BRERERTON, in his official capacity)
as the Director of the Montana)
Department of Public Health and)
Human Services; the MONTANA)
DEPARTMENT OF JUSTICE; and)
AUSTIN KNUDSEN, in his official)
capacity as Attorney General of the)
State of Montana,)**

Defendants.)

Case No. DV-25-2024-0000261-CR

Hon. Mike Menahan

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

INTRODUCTION

Plaintiffs’¹ motion establishes that each of the four factors governing leave to amend under Rule 15(a)(2), which states that “the court should freely give leave when justice so requires,” favors granting Plaintiffs leave to file their second amended complaint:

- There has been no undue delay because Senate Bill 437 (“SB 437”) did not exist, let alone take effect, until March 24, 2026. (Motion at 6.)
- There is no bad faith or dilatory motive because the amendment responds to a genuine intervening legislative development. (*Id.* at 6.)
- Defendants will suffer no undue prejudice because the case remains at an early stage, no trial date has been set, and the SB 437 allegations track legal theories already found to support a likelihood of success on the merits in *Kalarchik v. State*, 2026 MT 76. (*Id.* at 7.)
- The amendment is not futile because the proposed SB 437 allegations rest on the same constitutional challenges this Court and the Montana Supreme Court have already sustained against Senate Bill 458’s (“SB 458”) nearly identical definitions. (*Id.* at 7.)

Defendants’ opposition does not meaningfully dispute that Plaintiffs have satisfied any of the four factors warranting amendment. Instead, Defendants raise five arguments that do not withstand scrutiny.

First, Defendants argue that the second amended complaint is futile because it seeks relief broader than a “substitute definitional statute,” including an injunction against rulemaking Defendants have not yet adopted. (Resp. at 7–8.) But the second amended complaint’s request for

¹ “Plaintiffs” refers to both named plaintiffs. “Defendants” refers to all named defendants.

relief merely extends language present—and unopposed—in the original complaint’s prayer for relief since April 2024 and the amended complaint’s prayer for relief since January 2025. It asks for nothing new.

Second, Defendants argue that the amendment would cause undue prejudice because it comes after a lay-witness-list deadline and introduces a “new legal theory.” (Resp. at 8–10.) Contrary to Defendants’ assertion, Plaintiffs filed their motion to amend on August 6, 2026, two weeks before that deadline, and the SB 437 allegations do not introduce new theories but rather mirror the equal-protection, privacy, and compelled-speech theories Defendants have litigated in this case since 2024.

Third, Defendants argue that Plaintiffs “failed to preserve” the possibility of amendment in the stipulated scheduling order. (Resp. at 10–12.) But that order, which Defendants themselves negotiated, sets no deadline for amending the pleadings at all. (Resp. at 2.) As a result, there was no deadline for Plaintiffs to preserve, and there is no analogy to *Lindey’s v. Professional Consultants, Inc.*, 244 Mont. 238, 797 P.2d 920 (1990), where the movant disregarded an explicit amendment deadline in the scheduling order.

Fourth, Defendants argue that the second amended complaint’s SB 458 allegations are moot because the legislature repealed SB 458 effective March 24, 2026, the same day it replaced SB 458 with SB 437’s nearly identical definitions. (Resp. at 11–15.) Mootness requires that there be no reasonable expectation the same party will face the same action again. *See Skinner Enters., Inc. v. Lewis & Clark City–Cnty. Health Dep’t*, 1999 MT 106, ¶ 18, 294 Mont. 310, 980 P.2d 1049. Here, Defendants’ own brief describes a legislature that has reenacted the same challenged definition three times in five years. (Resp. at 5–6, 15.)

Fifth, Defendants argue that the second amended complaint cannot “relate back” under Rule 15(c). (Resp. at 15–17.) Plaintiffs do not need their SB 437 claims to relate back to 2024 to be timely. SB 437 took effect less than six months ago, and Defendants identify no limitations period that bars a challenge to it.

For these reasons, and as discussed below, the Court should grant Plaintiffs’ motion.

ARGUMENT

Each of the factors applicable under Rule 15(a)(2) weighs in favor of granting Plaintiffs leave to file their proposed second amended complaint. Defendants’ arguments do not change this analysis.

1. No Undue Delay. Plaintiffs’ motion establishes that Plaintiffs could not have alleged the SB 437 claims any earlier because SB 437 did not exist, and did not take effect, until March 24, 2026, more than a year after the amended complaint was filed and while Defendants’ appeal of the preliminary injunction was pending before the Montana Supreme Court. (Motion at 6.) There thus has been no undue delay.

Defendants do not dispute that SB 437 did not exist, let alone take effect, until March 24, 2026. (Resp. at 5–6.) Instead, they argue that Plaintiffs “had an opportunity from March 24, 2026 to May 29, 2026 to raise the [second amended complaint’s] proposed amendment” before the stipulated scheduling order was entered, and that three months passed before Plaintiffs moved. (Resp. at 7.)

This characterization ignores the procedural posture of the case during that time frame. This Court stayed “further proceedings” pending the outcome of Defendants’ appeal on March 25, 2025. (Resp. at 5.) The case did not return to this Court’s active docket until the Montana Supreme Court issued its decision on April 14, 2026, when the parties negotiated the terms of a new

schedule, which this Court entered on May 29, 2026. (Resp. at 5.) Plaintiffs moved for leave to amend nine weeks after entry of that schedule, and Defendants identify no point between April 14, 2026, and August 6, 2026, at which Plaintiffs could or should have moved sooner. *Cf. Lindey's*, 244 Mont. at 242–43, 797 P.2d at 923 (denying leave where delay resulted from the movant's own procrastination rather than new developments). There has been no undue delay.

2. No Bad Faith or Dilatory Motive. Plaintiffs' motion establishes that the proposed amendment responds to a genuine, intervening legislative development. It does not seek to harass Defendants or delay these proceedings. (Motion at 6.)

Defendants characterize Plaintiffs' motion as an attempt to “reset the clock,” obtain a “third bite at the apple,” and create a “perpetual docket.” (Resp. at 2.) They likewise describe the motion as a “dilatory tactic.” (Resp. at 12.) But Defendants identify no fact suggesting that Plaintiffs seek anything other than to challenge, in the same forum where the underlying policies are already enjoined, a statute the legislature enacted solely to perpetuate definitions this Court and the Montana Supreme Court have already found likely unconstitutional.

It is Defendants' own legislative actions, not Plaintiffs' litigation conduct, that supplies the only evidence of strategic timing in this case. SB 437's sponsor acknowledged drafting the bill in “defiance” of judicial rulings against SB 458, and the Speaker of the House delayed signing SB 437 specifically to prevent a related challenge to it. (*See* Motion at 3–4; *see also* Resp. at 3–6.) Plaintiffs' motion, filed within weeks of SB 437's effective date and this Court's resumption of active proceedings, reflects diligence, not a dilatory motive.

3. No Undue Prejudice to Defendants. Plaintiffs' motion establishes that Defendants will not be unduly prejudiced if Plaintiffs are allowed to file the second amended complaint.

(Motion at 7.) The case remains at an early stage on the merits, with discovery ongoing; no trial date has been set; and the new SB 437 allegations track the claims already pleaded against SB 458.

Defendants raise two prejudice arguments, neither of which meets their burden. *See Ally Fin., Inc. v. Stevenson*, 2018 MT 278, ¶ 16, 393 Mont. 332, 430 P.3d 522 (a court “balances undue prejudice against the sufficiency of the amending party’s rationale”).

First, Defendants argue that “[t]he stage of the proceedings” weighs against leave because the parties’ lay-witness-list exchange deadline of August 21, 2026, “passed while Plaintiffs’ motion [was] pending,” requiring “a new statutory record” and “a new witness list.” (Resp. at 9–10.) But Plaintiffs filed their motion on August 6, 2026, two weeks before that deadline. Any prejudice from the deadline’s passage is attributable to the pendency of Plaintiffs’ timely filed motion, not to any delay by Plaintiffs.

These circumstances are consistent with *Ally Financial’s* holding that a motion to amend filed “prior to the deadline . . . for pre-trial motions” supports amendment rather than undue prejudice. *See Ally Fin.*, ¶ 18. No dispositive motion is pending here. And Defendants do not identify any trial date the amendment would disrupt. *Cf. Peuse v. Malkuch*, 275 Mont. 221, 228, 911 P.2d 1153, 1157 (1996) (once summary judgment has been filed, leave should be granted “only in extraordinary cases”).

Second, Defendants argue that the second amended complaint “states a new theory,” citing *Farmers Co-op Association v. Amsden, LLC*, 2007 MT 286, ¶ 14, 339 Mont. 445, 171 P.3d 690, for the proposition that “[s]ubstantial effort is wasted when the movant is allowed to proceed on a new legal theory.” (Resp. at 10.) The SB 437 allegations are not a new theory, and Plaintiffs’ second amended complaint asserts as much. Like SB 458, SB 437 “supplies an additional, independent, and continuing statutory basis for Defendants’ denial of Plaintiffs’ ability to obtain

amended birth certificates and driver's licenses reflecting their sex as determined by their gender identity and for Defendants' ongoing enforcement of the 2022 Rule and the new MVD policy and practice." (Motion Ex. A, Proposed Second Amended Complaint, ¶ 19.) Plaintiffs' challenge to SB 437 asserts the same equal-protection, privacy, and compelled-speech theories under Article II, Sections 4, 7, and 10 of the Montana Constitution that the parties have litigated since April 2024, applied to a statute that replicates the definitions already at issue. (Motion at 6–7.)

Unlike *Estate of Mandich v. French*, 2022 MT 88, ¶ 34, 408 Mont. 296, 509 P.3d 6, where amendment would have required "litigating the[] new claims, effectively restarting the case," granting leave here requires no discovery into unfamiliar legal theories. It requires only that Defendants defend the same theories they have defended for over two years, as applied to a statute whose text and legislative history Defendants themselves have already briefed at length. (*See Resp.* at 5–6, 13–17.)

Third, Defendants argue that Plaintiffs "failed to preserve any amendment to the pleadings in the stipulated scheduling order" and compare this case to *Lindey's*. (*Resp.* at 10–12.) That analogy fails. In *Lindey's*, the scheduling order set an explicit deadline—July 1, 1989—for amending the pleadings, and the movant sought leave nearly two months later, after that deadline had passed and after a defendant had moved for summary judgment. *Lindey's*, 244 Mont. at 241, 797 P.2d at 922. (*See id.* at 11.) Here, by contrast, Defendants concede that the stipulated scheduling order "omits any reference to a deadline for potentially amending or supplementing the pleadings." (*Id.* at 2.) There is no deadline for Plaintiffs to have missed, and no summary-judgment motion is pending. Defendants would have this Court penalize Plaintiffs for failing to negotiate, unprompted, a deadline addressing a hypothetical future amendment concerning a statute that had taken effect only weeks before the schedule was negotiated and while the case remained on

interlocutory stay through most of that period. (*Id.* at 5.) Rule 15(a)(2) does not impose this obligation, and Defendants cite no other authority imposing one.

4. The Amendment Is Not Futile. Plaintiffs’ motion establishes that the futility standard is not met here. (Motion at 7.) The proposed second amended complaint’s SB 437 allegations fall within the legal theories—violation of the Montana Constitution’s equal-protection and dignity guarantees (Article II, Section 4), right to privacy (Article II, Section 10), and freedom of speech (Article II, Section 7)—that this Court and the Montana Supreme Court have already found sufficient to sustain Plaintiffs’ existing claims against SB 458’s nearly identical definitions. (See Mot. Ex. A, Proposed Second Am. Compl. ¶¶ 16–22, 87–88, 96, 102.) And the same reasoning and legal theories are being separately advanced against SB 437 in *Edwards v. State* (Missoula Cnty. Cause No. DV-23-1026), further confirming that the proposed claims are not frivolous or futile.

Defendants raise three futility arguments, none of which meets the standard for denying leave to amend. Under that standard, a motion for leave to amend may be denied as futile only “where it cannot be said that the pleader can develop no set of facts under its proposed amendment that would entitle the pleader to the relief sought.” *Griffin v. Moseley*, 2010 MT 132, ¶ 22, 356 Mont. 393, 234 P.3d 869.

First, Defendants argue that the second amended complaint “asks for more than a substitute definitional statute” because its prayer for relief would enjoin ““any further administrative rulemaking directed toward the subject matter of the 2022 Rule, the new MVD policy and practice, SB 458, or SB 437.”” (Resp. at 7–8 (quoting Motion Ex. A at 31).) This language is not new. The original complaint requested substantively identical relief in April 2025—an injunction reaching “any further administrative rulemaking directed toward the subject matter of the 2022 Rule, the

new MVD policy and practice, or SB 458.” (Dkt. 1, Compl. Prayer ¶ C.) And the operative amended complaint has requested the same relief as the original complaint since January 2025. (Dkt. 70, Am. Compl. Prayer ¶ E.) Defendants have never moved to strike or narrow this request for relief. The second amended complaint simply extends the same, previously unchallenged language to include SB 437. There is nothing futile about relief Defendants have not challenged as part of this case for over two years.

Second, Defendants argue that the second amended complaint’s SB 458 allegations are moot because SB 437 repealed SB 458 effective March 24, 2026. (Resp. at 13–15.) A case is not moot, however, where there is “a reasonable expectation that the same complaining party would be subject to the same action again.” *Skinner*, ¶ 18; *see also Sch. Dist. v. Bd. of Pers. Appeals*, 214 Mont. 361, 364, 692 P.2d 1261, 1263 (1985).

Here, Defendants’ own recitation of the legislative history supplies that expectation. The Thirteenth Judicial District Court enjoined SB 280’s predecessor restriction in 2022; the Department of Public Health and Human Services (“DPHHS”) responded by adopting the 2022 Rule; the 2023 legislature responded to further litigation by enacting SB 458 with the same definitions; and, after this Court and the Montana Supreme Court held those definitions likely unconstitutional, the 2025 legislature enacted SB 437 with, in Defendants’ own words, the same “mechanics” as SB 458. (Resp. at 12, 15; *see also* Motion at 2–4.) A party that has reenacted the same challenged definition three times in five years, each time in direct response to adverse rulings, cannot credibly claim there is no reasonable expectation Plaintiffs will face the same restriction again.

In any event, mootness of the SB 458-specific relief would not render the second amended complaint as a whole futile. Defendants themselves concede that “[t]he DPHHS rule and the

alleged MVD policy predate and are independent of SB 437 (and SB 458).” (Resp. at 9.) The second amended complaint’s claims against the 2022 Rule and the MVD policy—the same claims on which this Court granted, and the Montana Supreme Court affirmed, a preliminary injunction—remain unaffected by SB 458’s repeal. *Kalarchik*, ¶¶ 1, 44. Because Plaintiffs can, at minimum, develop a set of facts under the proposed amendment that would entitle Plaintiffs to relief on those independent claims and on the new SB 437 allegations, the amendment is not futile. *Griffin*, ¶ 22.

Defendants’ reliance on *West Virginia v. B.P.J.*, 146 S. Ct. 2356 (2026), does not change this analysis. (Resp. at 15.) *B.P.J.* held that Title IX and the federal Equal Protection Clause permit states to determine eligibility for women’s and girls’ sports based on an individual’s sex assigned at birth. *B.P.J.*, 146 S. Ct. at 2378. It says nothing about Montana’s Individual Dignity and Nondiscrimination Clauses under Article II, Section 4, provisions the Montana Supreme Court has already held “far exceed the protections provided by the federal Equal Protection Clause.” *Kalarchik*, ¶ 26. Nor does it say anything about the right to privacy under Article II, Section 10, or about the compelled-speech theory this case presents. A federal decision addressing athletic eligibility under different statutory and constitutional provisions cannot render futile, as a matter of law, claims this Court and the Montana Supreme Court have already found likely to succeed under Montana’s own Constitution. *See Kalarchik*, ¶¶ 25–35.

Third, Defendants argue that the second amended complaint cannot “relate back” to the original 2024 complaint under Rule 15(c) because SB 437 did not exist when this action was filed. (Resp. at 15–17.) Relation back matters only when a claim would otherwise be time-barred. *See* Mont. R. Civ. P. 15(c). It allows an amendment to be treated as filed on the date of an earlier pleading for statute-of-limitations purposes. *See id.* Plaintiffs’ SB 437 claims do not require this treatment. SB 437 took effect on March 24, 2026, less than six months before Plaintiffs moved for

leave to amend, and Defendants identify no limitations period that would bar a claim challenging it if filed today in a new action. Rule 15(c) is thus beside the point. A claim that is independently timely does not need to relate back to survive.

Alternatively, even if the relation-back doctrine did apply (which it does not), the second amended complaint's SB 437 allegations about Defendants' continuing practice of denying transgender Montanans amended identification documents through successive, near-identical statutory definitions arise from the same course of conduct as the amended complaint's SB 458 allegations. Consistent with *Flanigan v. Prudential Federal Saving & Loan Association*, 221 Mont. 419, 428, 720 P.2d 257, 262–63 (1986), which Defendants themselves cite (Resp. at 16), an amendment may add a new theory of recovery where it arises from the same occurrence as the original pleading. That is the case here.

CONCLUSION

FOR THESE REASONS, Plaintiffs respectfully request the entry of an order:

- (a) granting them leave to file the second amended complaint attached to the brief in support of their motion to amend as Exhibit A; and
- (b) granting any other relief in Plaintiffs' favor that the Court considers just.

Dated: September 23, 2026

Respectfully submitted,

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I certify that **Plaintiffs' Reply in Support of Motion for Leave to File Second Amended Complaint** was served by eService on counsel for Defendants:

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Electronically signed by Joslin Knightstep on behalf of Alex Rate
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I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 09-23-2026:

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