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19 *Attorneys for Defendants*

20 **UNITED STATES DISTRICT COURT**

21 **DISTRICT OF ARIZONA**

22 D.T., a minor, by and through his parent and
23 next friend Lizette Trujillo; et al.,

24 Plaintiffs,

25 v.

26 Dr. Cara Christ, M.D., et al.,

27 Defendants.

No. 4:20-cv-00484-JAS

DEFENDANTS' REQUEST FOR
DIRECTION ON PLAINTIFFS'
PROPOSED SECOND AMENDED
COMPLAINT

AND

MOTION TO POSTPONE BRIEFING
RE: MOTION TO DISMISS
AMENDED COMPLAINT

**[Expedited Briefing and Ruling
Requested]**

1 Amid briefing on Defendants’ Motion to Dismiss the Amended Complaint,
2 Plaintiffs lodged a Second Amended Complaint that *adds twelve claims*. Defendants are
3 unsure how to proceed; no matter what they do, Plaintiffs’ posthumous proposed
4 amendments will result in additional delay, briefing, and expenditure of resources.
5 Defendants therefore request direction on how *the Court* would like to proceed.
6 Defendants further request the Court to postpone the remaining briefing on Defendants’
7 pending Motion to Dismiss until that directive is given.

8 To simplify the briefing process and conserve judicial resources, Defendants
9 propose that Plaintiffs’ Second Amended Complaint be filed and that Defendants be
10 permitted to respond to that complaint instead of continuing to address a complaint that
11 will be superseded. Although Defendants disagree that Plaintiffs’ Second Amended
12 Complaint cures all the deficiencies set forth in Defendants’ Motion to Dismiss (Dkt. 56),
13 the Second Amended Complaint, in addition to adding new claims that need to be
14 addressed, potentially moots or alters some of Defendants’ arguments. It therefore would
15 be futile for Defendants to continue to argue (and require the Court to decide) arguments
16 that might be resolved by the Second Amended Complaint. It is more judicious to file the
17 Second Amended Complaint now and allow Defendants to make all relevant arguments in
18 a single motion to dismiss.

19 MEMORANDUM OF POINTS AND AUTHORITIES

20 I. Background.

21 Plaintiffs are five transgender children and their parents who are challenging the
22 constitutionality of A.R.S. § 36-337(A)(3) and A.A.C. R9-19-208(O).¹ Plaintiffs have
23 filed an original Complaint (Dkt. 1) and an Amended Complaint (Dkt. 47). The Amended
24 Complaint raises four constitutional claims² against three Defendants: Dr. Cara Christ

25 _____
26 ¹ A.R.S. § 36-337(A)(3) requires the state register to amend a person’s birth
27 certification upon receiving an application and a written statement by a physician that
28 verifies that the person has undergone a “sex change operation or has a chromosomal
count that establishes the sex of the person as different than in the registered birth
certificate.” A.A.R. R9-19-208(O) explains the application process.

² The constitutional claims are: Count I - equal protection; Count II - due process

1 (State Registrar of Vital Records and Director of the Arizona Department of Health
2 Services); Thomas Salow (Branch Chief of the Division of Public Health Licensing
3 Services); and Krystal Colburn (Assistant State Registrar and Bureau Chief of the Bureau
4 of Vital Records). (*Id.*, ¶¶ 19-21, 121-144.) The Defendants are sued in their official
5 capacities only. (*Id.*)

6 Prior to filing the Motion to Dismiss, counsel for Defendants and Plaintiffs met and
7 conferred pursuant to Local Rule 12.1(c) regarding the adequacy of the allegations in the
8 Amended Complaint. (Dkt. 56 at 26.) Relevant here, Defendants identified two
9 deficiencies: (1) the claims against Defendants Salow and Colburn are duplicative of the
10 claims against Defendant Christ because all three are sued in their official capacities only,
11 and therefore, they amount to three identical claims against the State of Arizona, *see*
12 *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (official-capacity claims are the functional
13 equivalent of a suit against the State); and (2) the request for nominal damages is invalid
14 because the State is entitled to Eleventh Amendment immunity and neither the State nor
15 state officials acting in their official capacities are “persons” within the meaning of 42
16 U.S.C. § 1983 for purposes of damages. *See Will v. Mich. Dep’t of State Police*, 491 U.S.
17 58, 71 (1989). Defendants asked Plaintiffs to dismiss all claims against Defendants
18 Thomas and Colburn and to dismiss their request for nominal damages or to propose
19 curative amendments. (Ex. 1.) Plaintiffs refused to do either. (*Id.*)

20 Defendants then filed their Motion to Dismiss. (Dkt. 56.) In response to the
21 deficiencies noted above, Plaintiffs asserted that they are “easily cured” by amendments
22 they propose in a Second Amended Complaint attached as an exhibit to their Response.
23 (Dkt. 61 at 9-10; Dkt. 61-1.) The proposed amendments included adding claims against
24 all three Defendants in their *individual* capacities. (Dkt. 61-1, ¶¶ 19-21.) By adding these
25 individual-capacity claims, they contend that Defendants’ duplication argument is moot,
26

27 “right to privacy”; Count III - due process “right to individual liberty and autonomy”;
28 Count IV - due process “right to choose whether to undergo a particular medical
treatment.”

1 and that they may now recover nominal damages. (Dkt. 61 at 10 & n.4.) Plaintiffs make
2 a cursory request in the body of their Response to amend their Amended Complaint by
3 filing their Second Amended Complaint. (*Id.* at 10.)

4 **II. The Court Should Instruct How the Parties Are to Proceed.**

5 If Plaintiffs believed that they could have cured their pleading deficiencies, they
6 should have done so by filing their Second Amended Complaint *before* Defendants filed
7 their Motion to Dismiss. Instead, they circumvented Local Rule 12.1(c), and waited until
8 after Defendants filed their Motion, only to acknowledge the deficiencies Defendants had
9 identified and seek leave to amend. Such unfortunate maneuvering is problematic in and
10 of itself. The purpose of Local Rule 12.1(c) is to avoid briefing on motions to dismiss
11 unless necessary, not to generate unnecessary briefing.

12 Nonetheless, by adding individual-capacity claims against Defendants Christ,
13 Thomas, and Colburn, they have added twelve new claims to this lawsuit (four
14 constitutional claims asserted against the three Defendants in their individual capacities).
15 Defendants are entitled to move to dismiss those new claims, but because Plaintiffs have
16 merely proposed them in their Second Amended Complaint, Defendants must now wait
17 for the Court to rule on the Motion to Dismiss the Amended Complaint and, if leave is
18 granted, move to dismiss those claims in the Second Amended Complaint. Successive
19 rounds of briefing are not only inefficient, but prohibited by the Court:

20 The parties should raise all of their arguments for dismissal in
21 one motion to dismiss as early as possible in the case. ...
22 Furthermore, filing successive motions to dismiss ... after the
23 Court has already resolved such a motion is extremely
24 inefficient and often causes long and unnecessary delays as a
case is essentially halted during the period between the filing
of a dispositive motion and the Court's ultimate ruling on a
dispositive motion after it has been fully briefed.

(Dkt. 7 at 3.) Plaintiffs forced this dilemma on Defendants.

25 After Plaintiffs filed their Response and proposed Second Amended Complaint, the
26 parties conferred about how to proceed. (Exhibit 1.) Defendants proposed that Plaintiffs
27 file their Second Amended Complaint now (with Defendants' consent) and Defendants
28

1 would file a new motion to dismiss that included all their arguments, including those
2 against the new claims, in one motion. That would avoid not only further briefing on the
3 pending Motion to Dismiss but also the delay associated with a second round of briefing
4 after the Court rules on the pending Motion. Plaintiffs proposed a round of supplemental
5 briefing now that addressed the adequacy of Plaintiffs' new claims. Defendants
6 considered that proposal, but after further consideration, it is unworkable. The Second
7 Amended Complaint has not been filed. Thus, any briefing and arguments on the
8 proposed claims would be theoretical and any ruling advisory.

9 Plaintiffs' decision to propose a Second Amended Complaint after the parties
10 conferred on the adequacy of their Amended Complaint and Defendants filed their Motion
11 to Dismiss will—unfortunately—cause some delay. Defendants continue to believe that
12 the most efficient way forward is for Plaintiffs to file their Second Amended Complaint
13 now (with Defendants' consent) and for Defendants to file a new motion to dismiss that
14 addresses both the old and the new claims. But they will follow the Court's preference.

15 **III. The Court Should Postpone Defendants' Reply.**

16 Defendants' Reply in support of their Motion to Dismiss Amended Complaint is
17 currently due by May 10, 2021. Defendants respectfully request the Court to postpone
18 that deadline while it decides how to move forward.³ Alternatively, Defendants request to
19 extend the deadline until seven days after the Court's ruling on this Motion.

20 **IV. Conclusion.**

21 For these reasons, Defendants request this Court's direction on how it would like to
22 proceed with Defendants' pending Motion to Dismiss Amended Complaint and Plaintiffs'
23 proposed Second Amended Complaint. Defendants further request this Court to postpone
24 the deadline to file Defendants' Reply in support of their Motion to Dismiss.

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27 ³ Plaintiffs agreed to extend the Reply deadline to May 17, 2021, but that does not
28 resolve the issues pertaining to the Second Amended Complaint and the associated
successive briefing.

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants.

/s/ Nicholas D. Acedo

EXHIBIT 1

EXHIBIT 1

From: [Anderson, Barrett](#)
To: [Nick Acedo](#); [Corcoran, Aubrey Joy](#)
Cc: [Ray, Kevin](#); [Dana Keene](#); [Dan Struck](#); [EducationHealth](#); [Asaf Orr](#); [Colin Proksel](#); [Payslie Bowman](#); [LaMagna, Patricia](#); [Sherri Wolford](#)
Subject: RE: D.T. v. Christ, Case No. 4:20-cv-00484-JAS (D. Ariz.) - Extension
Date: Friday, May 7, 2021 1:34:22 PM
Attachments: [image001.png](#)

Counsel:

We will agree to postpone the Reply brief deadline to May 17, which is what we agreed to before.

With respect to a motion seeking leave to proceed to a second motion to dismiss, we believe that your proposed solution is both inefficient and unwarranted. The only purportedly “new” issue that you have identified pertains to Defendants being sued in their personal capacities. Every other issue will be fully briefed as of your Reply and thus the Court will be positioned to decide them. It would be tremendously wasteful to re-brief arguments already before the Court and, in any event, Defendants are not entitled to a second bite at the apple on those points. There is also no cause for further delay at the pleading stage on those arguments, especially considering that the amended complaint was filed four months ago and both parties took extensions to fully brief those points.

For the “new” issue, we assume that you intend to raise qualified immunity, but we would be willing to meet and confer if you have other arguments. We note that you could have argued qualified immunity in your opening motion, given that suing officials in their personal capacities is an obvious way to cure the alleged deficiency that you argue in your motion. More importantly, even if such an immunity argument were to succeed, and we have grave doubts that it would, it would not result in dismissal of any cause of action in the case and thus cannot dispose of the complaint. Again, there is no cause for delay when the case does not rise or call on what the Court rules on the “new” issue.

Despite all of that, we understand that Defendants would like “the last word” on your qualified-immunity argument. The most efficient path forward is to jointly request that the Court allow supplemental briefing on just that point. We are willing to stipulate to the following supplemental briefing schedule, again restricted only to arguments concerning suing Defendants in their personal capacity:

- Defendants’ Supplemental Brief: May 28
- Plaintiffs’ Supplemental Opposition Brief: June 11
- Defendants’ Supplemental Reply Brief: June 18

Let us know if you agree.

Barrett

From: Nick Acedo <NAcedo@strucklove.com>
Sent: Friday, May 7, 2021 11:09 AM
To: Anderson, Barrett <banderson@cooley.com>; Corcoran, Aubrey Joy <AubreyJoy.Corcoran@azag.gov>

Cc: Ray, Kevin <Kevin.Ray@azag.gov>; Dana Keene <dkeene@strucklove.com>; Dan Struck <DStruck@strucklove.com>; EducationHealth <EducationHealth@azag.gov>; Asaf Orr <AOrr@nclrights.org>; Colin Proksel <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; LaMagna, Patricia <Patricia.LaMagna@azag.gov>; Sherri Wolford <SWolford@strucklove.com>

Subject: RE: D.T. v. Christ, Case No. 4:20-cv-00484-JAS (D. Ariz.) - Extension

[External]

Counsel,

After much consideration, we cannot agree to those terms. We should be allowed the last word on any argument and if we go down that route it is more efficient to simply restart the briefing. We will be filing a motion asking the Court to accept your proposed Second Amended Complaint and restart the briefing schedule. That way, the Court can decide what it would like to do.

Will you stipulate to postpone our Reply deadline until the Court rules on the Motion (we will file the Motion on Monday and request expedited briefing and consideration)? We would ask to file the Reply 7 days after any ruling. If not, will you at least stipulate to an extension of time to file the Reply until May 21?

Thank you,

Nick

From: Anderson, Barrett <banderson@cooley.com>

Sent: Friday, April 30, 2021 3:23 PM

To: Nick Acedo <NAcedo@strucklove.com>; Corcoran, Aubrey Joy <AubreyJoy.Corcoran@azag.gov>

Cc: Ray, Kevin <Kevin.Ray@azag.gov>; Dana Keene <dkeene@strucklove.com>; Dan Struck <DStruck@strucklove.com>; EducationHealth <EducationHealth@azag.gov>; Asaf Orr <AOrr@nclrights.org>; Colin Proksel <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; LaMagna, Patricia <Patricia.LaMagna@azag.gov>; Sherri Wolford <SWolford@strucklove.com>

Subject: RE: D.T. v. Christ, Case No. 4:20-cv-00484-JAS (D. Ariz.) - Extension

Counsel:

Thank you for the email. Although we disagree with your characterization of the content of our communications and recent filings, we are interested in finding a mutually agreeable solution to the issue you raise. We do not agree to a new round of briefing on the Second Amended Complaint, but instead propose the following:

- You agree that, for purposes of your Reply brief, the Second Amended Complaint is the operative pleading for purposes of the motion to dismiss.
- We agree to allow you to raise “new” arguments in your Reply brief, limited to (1) your mootness arguments for Plaintiffs D.T. and Jane Doe and (2) your duplicativeness arguments

for Defendants Salow and Colburn.

- You agree to allow us to file a Sur-reply brief, limited to those “new” arguments.
- The parties agree not to raise any “new” arguments with respect to any other issues.
- The parties jointly file a stipulation with the above agreement with the Court.

With respect to the status of the petitions by Plaintiffs Helen Roe, James Poe, and Carl Voe, we disagree that we added “new” information to the proposed Second Amended Complaint, but rather clarified their status. As you may recall, you did not raise any of your jurisdictional/abstention arguments during the meet-and-confer process, and thus did not allow us the opportunity to address them at that time. Further, as you are aware from our Opposition brief, we believe that the status of those petitions is only one of several reasons that the abstention doctrines do not apply, including that the petitions do not challenge the constitutionality of Subsection (A)(3). Of course, you may withdraw your arguments if you believe they are inapt in light of the clarification, but we do not believe it is necessary or appropriate to produce early discovery while your motion is pending.

Sincerely,
Barrett

From: Nick Acedo <NAcedo@strucklove.com>

Sent: Friday, April 30, 2021 11:19 AM

To: Anderson, Barrett <banderson@cooley.com>; Corcoran, Aubrey Joy <AubreyJoy.Corcoran@azag.gov>

Cc: Ray, Kevin <Kevin.Ray@azag.gov>; Dana Keene <dkeene@strucklove.com>; Dan Struck <DStruck@strucklove.com>; EducationHealth <EducationHealth@azag.gov>; Asaf Orr <AORr@nclrights.org>; Colin Proksel <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; LaMagna, Patricia <Patricia.LaMagna@azag.gov>; Sherri Wolford <SWolford@strucklove.com>

Subject: RE: D.T. v. Christ, Case No. 4:20-cv-00484-JAS (D. Ariz.) - Extension

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Counsel,

Thank you for stipulating to a 1-week extension of time for our Reply. But after further review of your Response, we have a different proposal. When we conferred on our Motion to Dismiss, we conveyed that we would be moving to dismiss D.T. and Jane Doe as Plaintiffs because their requests for prospective relief were moot and they were not entitled to any damages against the Defendants (named in their official capacities). We also conveyed that the claims against Salow and Colburn (in their official capacities) were duplicative. In your March 9, 2021 Email, you disagreed and refused to dismiss these claims/parties or otherwise make any curative amendments. But in your Response, you concede these points (Dkt. 61 at 9–10 & n.4) and propose curative amendments by adding individual-capacity claims against all three Defendants. It is unfortunate that we had to brief those issues after our LRCiv 12.1(c) discussions, and now we are in the awkward position of raising new arguments in our reply—we believe that the curative amendments are insufficient to save the claims

by D.T. and Jane Doe and against Salow and Colburn.

To get things back on track, we propose that you file your Second Amended Complaint (“SAC”) now (with our agreement) and then we will re-move to dismiss the SAC. That will allow us to argue against your amendment; it will allow you to provide your counter-argument; and it will eliminate the risk of a second round of briefing after a ruling on this first round, further delaying the litigation. Filing your SAC now will expedite the process.

Your proposed Second Amended Complaint also adds information relating to the petitions filed by Helen Roe, James Poe, and Carl Voe to controvert our jurisdictional/abstention arguments. We are not in a position to verify the accuracy of those amendments (e.g., whether the cases were closed) because we do not have access to the docket, filings, or orders and you did not provide them to the Court so that it could confirm its jurisdiction. Will you provide us that information? If, after our review, we believe they undermine our arguments, we may withdraw some or all of them. If you agree to file your SAC now, that should allow adequate time to exchange and review the information.

Thanks,

Nick

Nicholas D. Acedo

Partner

STRUCK LOVE BOJANOWSKI & ACEDO, PLC

3100 West Ray Road | Suite 300 | Chandler AZ 85226

480.420.1609 | nacedo@strucklove.com | STRUCKLOVE.COM

From: Anderson, Barrett <banderson@cooley.com>

Sent: Tuesday, April 27, 2021 9:46 AM

To: Corcoran, Aubrey Joy <AubreyJoy.Corcoran@azag.gov>

Cc: Ray, Kevin <Kevin.Ray@azag.gov>; Dana Keene <dkeene@strucklove.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; EducationHealth <EducationHealth@azag.gov>; Asaf Orr <AORr@nclrights.org>; Colin Proksel <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; LaMagna, Patricia <Patricia.LaMagna@azag.gov>

Subject: RE: D.T. v. Christ, Case No. 4:20-cv-00484-JAS (D. Ariz.) - Extension

Aubrey Joy:

We would agree to a stipulation to that end, although we'd like to review the document that you intend to file before we finally sign off.

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

D.T., a minor, by and through his parent and
next friend Lizette Trujillo; et al.,

Plaintiffs,

v.

Dr. Cara Christ, M.D., et al.,

Defendants.

No. 4:20-cv-00484-JAS

**ORDER GRANTING
DEFENDANTS' REQUEST FOR
DIRECTION ON PLAINTIFFS'
PROPOSED SECOND AMENDED
COMPLAINT**

AND

**MOTION TO POSTPONE BRIEFING
RE: MOTION TO DISMISS
AMENDED COMPLAINT**

Upon consideration of Defendants' Request for Direction on Plaintiffs' Proposed Second Amended Complaint and Motion to Postpone Briefing Re: Motion to Dismiss Amended Complaint (Doc. ____), and good cause appearing,

IT IS HEREBY ORDERED that the Request is granted. Plaintiffs are directed to file the proposed Second Amended Complaint. Defendants' response, including any motion to dismiss, is due 14 days thereafter.

IT IS FUTHER ORDERED that the Motion is granted. Defendants' deadline to file a Reply in support of the Motion to Dismiss Amended Complaint is postponed until further order of the Court.