

1 Patrick Gunn (admitted *Pro Hac Vice*)
COOLEY LLP
2 101 California Street, 5th Floor
San Francisco, California 94111-5800
3 Telephone: (415) 693-2070
Facsimile: (415) 693-2222
4 Email: pgunn@cooley.com

5 Mary O'Grady (011434)
Colin Proksel (034133)
6 Payslie Bowman (035418)
OSBORN MALEDON, P.A.
7 2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
8 Telephone: (602) 640-9000
Facsimile: (602) 640-9050
9 Email: mogrady@omlaw.com
Email: cproksel@omlaw.com
10 Email: pbowman@omlaw.com

11 *Attorneys for Plaintiffs and Proposed Class*
Additional counsel listed on following page
12

13 **UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15 Helen Roe, a minor, by and through her
parent and next friend Megan Roe; James
16 Poe, a minor, by and through his parent and
next friend Laura Poe; and Carl Voe, a
17 minor by and though his parent and next
friend Rachel Voe,
18

19 Plaintiffs,

20 v.

21 Don Herrington, in his official capacity as
Interim State Registrar of Vital Records and
22 Interim Director of the Arizona Department
of Health Services,

23 Defendant.

Case No. 4:20-cv-00484-JAS

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO EXTEND
REMAINING DEADLINES**

24
25
26
27
28

1 Barrett J. Anderson (admitted *Pro Hac Vice*)
Jessica Taylor (admitted *Pro Hac Vice*)
2 COOLEY LLP
10265 Science Center Drive
3 San Diego, California 92121-1117
Telephone: (858) 550-6000
4 Facsimile: (858) 550-6420
Email: banderson@cooley.com
5 Email: jtaylor@cooley.com

6 Rachel Berg (admitted *Pro Hac Vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
7 870 Market Street, Suite 370
San Francisco, California 94102
8 Telephone: (415) 343-7679
Facsimile: (415) 392-8442
9 Email: rberg@nclrights.org

10 *Attorneys for Plaintiffs and Proposed Class*

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Plaintiffs oppose Defendant's Motion to Extend Remaining Deadlines (Dkt. 207)
2 because Defendant fails to make the requisite showing of good cause under Federal Rule of
3 Civil Procedure 16(b)(4).

4 Defendant argues the deadlines in the case should be extended because Plaintiffs
5 filed a Motion to Quash Defendant's untimely subpoenas to Plaintiffs' experts (Dkt. 206).
6 This argument is unavailing for three reasons. First, as argued in the Motion to Quash,
7 Defendant's subpoenas are untimely because the deadline for Plaintiffs' experts to respond
8 to them was after those experts' mutually-agreed-upon deposition dates and after the
9 stipulated expert-discovery deadline. Second, Defendant has still not explained why he
10 waited until the eleventh hour to serve the untimely subpoenas to Plaintiffs' experts,
11 especially given that Plaintiffs served their expert disclosures almost two and a half months
12 ago. Third, the documents Defendant seeks via those subpoenas would be burdensome to
13 collect and produce, are in many cases privileged or irrelevant, and most importantly, are
14 undeniably insignificant to the material issues at this point in the litigation. That is so
15 because Defendant does not dispute Plaintiffs' experts' central opinions, Defendant has not
16 disclosed his own experts, and the depositions of Plaintiffs' experts came before their
17 obligations to respond to the subpoenas. The Court should not reward Defendant's dilatory
18 conduct; rather, it should grant Plaintiffs' Motion to Quash and reject Defendant's belated
19 request for an unwarranted and unnecessary extension.

20 Defendant also argues the Court should extend the case deadlines because of
21 Plaintiffs' pending Motion for Class Certification (Dkt. 89) based on the one-way
22 intervention rule. This argument also fails for two reasons. First, the Motion for Class
23 Certification is fully briefed, and at the oral argument on June 22, 2023, the Court informed
24 the parties that it expected to issue a ruling within 30 days. Plaintiffs thus understand that
25 the Court's decision on the Motion for Class Certification is imminent and will likely be
26 issued before the current dispositive motion deadline of August 18, 2023. Second, even if
27 the decision were not imminent, the one-way intervention rule does not apply to class-
28 certification motions, like Plaintiffs', that seek to certify a class under Rule 23(b)(2). *Gooch*

1 v. *Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012) (“[W]e find no support for
2 applying the prohibition on one-way intervention to Rule 23(b)(2) class certifications, in
3 which class members may not opt out and therefore make no decision about whether to
4 intervene.”); *Centeno v. Quigley*, No. C14-200 MJP, 2015 WL 432537, at *3 (W.D. Wash.
5 Feb. 2, 2015) (stating the one-way intervention rule is applicable only to Rule 23(b)(3)
6 classes where putative class members have the right to opt out). The one-way intervention
7 rule applies only to Rule 23(b)(3) classes, which permit class members to opt out of an
8 unfavorable decision and require notice to class members; in contrast, Rule 23(b)(2) class
9 members may not opt out and are only entitled to appropriate notice directed at the court’s
10 discretion. *See* Fed. R. Civ. P. 23(c)(2)(A)-(B).¹

11 In addition to being legally unsupported, Defendant’s request for an extension should
12 be denied for the following two reasons. First, Defendant is wasting Plaintiffs’ resources.
13 Plaintiffs have cooperated with Defendant to extend case deadlines when Plaintiffs thought
14 Defendant perhaps had good cause. As discussed above, that is not true now. At this point
15 in the case, Plaintiffs are concerned that Defendant’s strategy has reduced to merely
16 delaying the final resolution of this litigation and wasting Plaintiffs’ resources—in this
17 instance by serving untimely subpoenas, engaging in unnecessary discovery disputes, and
18 seeking avoidable extensions to the case deadlines.² Plaintiffs are further concerned that
19 Defendant’s delay tactics will endlessly continue until the Court draws a line in the sand.
20 The time for the Court to do so is now. Second, Defendant’s newest requested extension
21 would prejudice Plaintiffs by further delaying resolution of this case and their receipt of
22 corrected birth certificates. Plaintiffs filed this litigation nearly three years ago. This case is
23 not complex, and both parties agree it can be resolved on summary judgment (Dkt. 154 ¶ 4).

24
25 ¹ Plaintiffs’ Motion for Class Certification does not ask the Court to direct notice.

26 ² Defendant’s dilatory strategy is needlessly increasing the fees and costs of this litigation.
27 Should Plaintiffs prevail, they fully intend to seek their fees and costs from Defendant, and
28 regret that Defendant’s choice to engage in unnecessary discovery disputes and pointless
motion practice is running up the bill—a bill that Plaintiffs must ultimately ask the Court to
bless. Plaintiffs respectfully request the Court recall that, when and if the time comes to
adjudicate Plaintiffs’ motion for fees and costs.

1 Plaintiffs should not be made to wait any longer, especially given that Defendant's request
2 for more time is premised solely on his inability to serve his discovery in a timely manner.

3 Accordingly, for the reasons above, the Court should deny Defendant's Motion to
4 Extend Remaining Deadlines. Plaintiffs reserve their objections to the requests in
5 Defendant's subpoenas and Defendant's ability to re-depose Plaintiffs' experts.

6 Dated: August 2, 2023

OSBORN MALEDON, P.A.

8 /s/Colin M. Proksel

Mary O'Grady (011434)

Colin Proksel (034133)

Payslie Bowman (035418)

OSBORN MALEDON, P.A.

2929 North Central Avenue, 21st Floor

Phoenix, Arizona 85012-2793

Telephone: (602) 640-9000

Facsimile: (602) 640-9050

Email: mogrady@omlaw.com

Email: cproksel@omlaw.com

Email: pbowman@omlaw.com

15 Rachel Berg (admitted *Pro Hac Vice*)

NATIONAL CENTER FOR LESBIAN

RIGHTS

870 Market Street, Suite 370

San Francisco, California 94102

Telephone: (415) 343-7679

Facsimile: (415) 392-8442

Email: rberg@nclrights.org

19 Patrick Gunn (admitted *Pro Hac Vice*)

COOLEY LLP

101 California Street, 5th Floor

San Francisco, California 94111-5800

Telephone: (415) 693-2070

Facsimile: (415) 693-2222

Email: pgunn@cooley.com

23 Barrett J. Anderson (admitted *Pro Hac Vice*)

Jessica Taylor (admitted *Pro Hac Vice*)

COOLEY LLP

10265 Science Center Drive

San Diego, California 92121-1117

Telephone: (858) 550-6000

Facsimile: (858) 550-6420

Email: banderson@cooley.com

Email: jtaylor@cooley.com

28 *Attorneys for Plaintiffs and Proposed Class*