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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 ADAM MEIER, in his)
official capacity as the Director of the)
Montana Department of Public Health)
and Human Services,)
Defendants.)

Case No. DV21-00873

Judge: Michael G. Moses

**PLAINTIFFS' BRIEF IN SUPPORT OF
 MOTION FOR PROTECTIVE ORDER
 AND LEAVE TO PROCEED UNDER A
 PSEUDONYM**

INTRODUCTION

On July 16, 2021, Plaintiffs Amelia Marquez and John Doe (“Mr. Doe” or “Plaintiff”) filed a complaint challenging the constitutionality of Montana’s SB 280 law (the “Act”), which places undue burdens on transgender people seeking to conform the sex designation on their birth certificates with their gender identity. Pursuant to Rule 26(c) of the Montana Rules of Civil Procedure, Mr. Doe seeks a protective order and leave to proceed pseudonymously because publicly disclosing his identity could reasonably expose him to harassment, discrimination, and violence. As a transgender man, Plaintiff is member of a historically marginalized and politically disempowered group that frequently experiences discrimination, harassment, and violence that may even be life-threatening. His status as a transgender man, and his associated medical conditions, are sensitive and deeply personal. Thus, requiring Mr. Doe to publicly disclose his identity through court filings forces him to disclose extremely private information and subjects him to potential harm.

Mr. Doe does not object to providing his legal name to the Defendants under seal but requests that the Court enter a protective order (i) barring further dissemination of his name and (ii) requiring that any documents containing his legal name be filed under seal.

Plaintiff submits the following brief in support of his motion.

ARGUMENT

Generally, a complaint must state the names of all parties to the action. Mont. R. Civ P. 10(a). However, Mont. R. Civ. P. 26(c) grants this court discretion to enter a protective order to maintain the confidentiality of a plaintiff’s identity, for good cause, when necessary to “protect [the plaintiff] from annoyance, embarrassment, oppression, or undue burden or expense . . .” As set forth below, Mr. Doe’s significant privacy interest, coupled with the risk for potential

discrimination, harassment, and physical violence if a protective order is not granted, provide good cause for the court to grant his motion for protective order and leave to proceed under a pseudonym.

Although there is no Montana state-court case law governing this issue, under well-established Ninth Circuit precedent, a party may proceed under a pseudonym “where there is a need for the cloak of anonymity.” *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1980). The Ninth Circuit applies a balancing test to determine whether a “party’s need for anonymity outweighs prejudice to the opposing party and the public’s interest in knowing the party’s identity.” *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000). The factors considered in this balancing test are: (1) the severity of the threatened injury; (2) the reasonableness of the plaintiff’s fears; (3) the plaintiff’s vulnerability to the harm they fear; (4) prejudice to defendants; and (5) the public interest. *Id.* In applying the *Advanced Textile* factors, the facts in this case weigh heavily in favor of allowing Mr. Doe to proceed under a pseudonym.

First, the threat of injury to Mr. Doe if his identity, including his transgender status and related private medical information, is publicly revealed is severe. Publicly disclosing a person’s transgender status puts them at risk of hostility, harassment, and injury. *See Brocksmith v. United States*, 99 A. 3d 690, 698 n. 8 (D.C. 2014) (“The hostility and discrimination that transgender individuals face in our society is well documented.”). Further, being forced to hold and present documents that do not match a person’s gender identity can result in discrimination and violence when transgender people are called upon to present identification that identifies a sex designation inconsistent with how a transgender person publicly presents himself or herself. (Compl. at ¶ 27.) In his complaint, Mr. Doe alleges that the Act creates a risk of harm to him based on, among other things, its forced disclosure of his transgender status. The remedy he seeks in his complaint is

declaratory and injunctive relief so that he will not be forced to reveal his transgender status every time he produces his birth certificate, thus reducing the significant risk of harm associated with being publicly outed.

There is a long and well-documented history of discrimination, harassment, and violence against LGBTQIA¹ people in the United States. Transgender people have been specifically targeted and subjected to particularly harsh treatment, including oftentimes fatal violence. “[T]here exist numerous documented instances of those targeted for violence based on their. . . gender identity.” *In re E.P.L.*, Misc. 3d 336, 338 (N.Y. Sup. Ct. 2009); *see also Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F. 3d 1034, 1051 (7th Cir. 2017) (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”) In a 2015 survey by the National Center for Transgender Equality, 46% of respondents reported that they were verbally harassed within the preceding year due to their transgender status.² In an alarming 2019 survey of transgender adults living in rural areas, 43% of respondents reported experiencing some form of harassment or violence in the prior year based on their transgender status.³ Unfortunately, the trend of violence against transgender people is on the rise. In 2021, the Human Rights Campaign reported that there were a record number of violent fatalities perpetrated against transgender individuals in the United States.⁴

¹ “LGBTQIA” means lesbian, gay, bisexual, transgender, queer, intersex and/or asexual.

² James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). Executive Summary of the Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality, at *3, [USTS-Executive-Summary-Dec17.pdf \(transequality.org\)](#)

³ Movement Advancement Project. November 2019. Where We Call Home: Transgender People in Rural America, at *20, [Rural-Trans-Report-Nov2019.pdf \(lgbtmap.org\)](#)

⁴ Human Rights Campaign Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021>.

For a transgender person, possessing inaccurate identity documents amplifies fear of exposure, which corrodes their physical and mental health and can cause them to isolate in order to avoid situations that might evoke discrimination, ridicule, accusations of fraud, harassment, or even violence. (Ettner Aff. ¶¶ 43–44.) When an individual is transgender, “an inaccurate birth certificate can transform a mundane interaction into a traumatic experience.” (Ettner Aff. ¶ 45.) Repeated negative experiences inevitably erode resilience, thereby worsening gender dysphoria and attendant psychiatric disorders. (Ettner Aff. ¶ 45 (citing Ohasi, Anderson & Bolder, 2017; Hazenbuehler, et al 2014).) In recognizing the importance of identity documents, the American Medical Association adopted a policy aimed at easing the path to identification documents for transgender people in hopes that psychological stress, depression, invasions of privacy, and harassment, including potential violence against transgender people, are avoided. (Compl. ¶ 28). Mr. Doe is concerned about the risks of discrimination, harassment, or violence that he could face if he is required to show his birth certificate to a stranger who is biased or hostile towards people who are transgender. (Doe Aff. ¶10). Further, because he is perceived as male, having to produce a birth certificate that identifies him as female will out him as transgender. (*Id.* at ¶ 10).

Mr. Doe’s fear of harassment and violence is sufficient to meet the threatened-injury prong of the balancing test. *See Advanced Textile*, 214 F.3d at 1067–68 (courts permit anonymity when disclosing party’s identity creates a risk of physical or mental harm). Due to the risk of harm associated with outing a transgender person’s transgender status, numerous courts have permitted transgender plaintiffs to proceed under a pseudonym. *See Karnoski v. Trump*, No. C18–01297MJP, 2018 U.S. Dist. LEXIS 167232, at *3–5 n. (W.D. Wash. Oct. 10, 2017) (plaintiff, a transgender female, was granted leave to appear under a pseudonym due to the risk of the public outing of her transgender status possibly resulting in the loss of her military career and benefits); *John Doe v.*

Blue Cross & Blue Shield, 794 F. Supp. 72 (1st Cir. 1992) (plaintiff, a transgender male, was not required to disclose his name because his right to privacy outweighed the public interest, and the threat of harm resulting from disclosing his identity, as well as the likelihood of social stigmatization, was more significant than the public interest in disclosure).

Second, based on the numerous reports of public harassment and violence against transgender individuals, Mr. Doe's fears are reasonable. To meet the reasonable-fear prong, Mr. Doe need only show that, under the circumstances, "a reasonable person would believe that the threat might actually be carried out." See *Advanced Textile*, 214 F.3d at 1071; *Doe v. Kamehameha Sch.*, 596 F.3d 1036, 1044 (9th Cir. 2010) (court must "consider the surrounding context and other listeners' reactions to the threats"). During the last legislative session, the Montana legislature introduced at least three pieces of legislation directly aimed at limiting the rights of transgender people.⁵ The numerous bills aimed at transgender individuals illustrate the animus that exists towards transgender people in Montana. Additionally, as outlined above, transgender people face significant risk of harm anytime their transgender status is made public. It is thus reasonable for Mr. Doe to fear such harm if he is forced to disclose his transgender status. See *Doe v. Genesis Healthcare*, No. 21-551, 2021 U.S. Dist. LEXIS 78205, at *5-6 (E.D. Pa. Apr. 23, 2021) (plaintiff, a transgender woman, demonstrated a reasonable fear of severe harm of discrimination and harassment due to her transgender status).

Further, due to the extremely sensitive and private nature of the claims at issue in this case, Mr. Doe's request for anonymity is reasonable. See *D.T. v. Armstrong*, Case No. 1:17-cv-00248-

⁵ Eric Dietrich, Amand Eggert, Alex Sakariassen and Mara Silvers, *Winners, losers and mixed bags of the 67th Montana Legislature*, Montana Free Press (April 29, 2021), <https://montanafreepress.org/2021/04/29/winners-losers-and-mixed-bags-of-the-67th-montana-legislature/>.

EJL, 2017 WL 2636519, at *2 (D. Idaho June 16, 2017) (permitting plaintiff to proceed under a pseudonym where lawsuit involved potential for disclosing sensitive medical information); *see also Doe v. Rostker*, 89 F.R.D. 158, 161 (N.D. Cal. 1981) (stating that there is “a strong interest in proceeding anonymously” in cases involving transgender individuals). A person’s transgender identity is a profoundly private piece of information in which a transgender person has a reasonable expectation of privacy. (Compl. at ¶ 42.) “The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.” *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999); *see also K.L. v. State*, No. 3AN-11-05431 CI, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar 12, 2012) (“The Court agrees that one’s transgender[] status is private, sensitive personal information” and “is entitled to protection.”). Transgender people who are denied accurate birth certificates are deprived of significant control over where, when, how, and to whom they disclose their transgender identity. (Compl. at ¶ 43.) Being stripped of one’s dignity, privacy, and the ability to move freely in society can lead to a degradation of coping strategies and cause major psychiatric disorders, including generalized anxiety disorder, major depressive disorder, posttraumatic stress disorder, emotional decompensation, and suicidality. (Ettner Aff. ¶ 43). Mr. Doe does not want to have to share private medical records related to his transition with a judge in a public court proceeding. (Doe Aff. ¶ 9.) Even the idea of having to do so is demeaning and causes him a great deal of emotional distress due to his fear of exposure and humiliation at having his transgender status revealed. (Doe Aff. ¶ 9.) Accordingly, it is reasonable for Mr. Doe to fear that revealing his identity would result in the great harm of having to publicly share his deeply personal and private information.

Third, Mr. Doe is vulnerable to the harms that he reasonably fears. In order to meet this prong, Mr. Doe must show that, based on the circumstances, “the party is vulnerable in a way that

other litigants generally are not.” *Al Orto Lado, Inc.*, No. 17–CV–02366–BAS–KSC, 2017 WL 6541446, at *5. Mr. Doe, based on his transgender status, belongs to a highly stigmatized group that often faces discrimination and harm. He has a privacy interest in maintaining the confidentiality of his transgender status. And he has a privacy interest in maintaining the confidentiality of his medical conditions related to that status. These interests are undeniably important. Generally, disclosing a litigant’s identity does not condemn the litigant to disclosing deeply intimate details of a stigmatizing status and private medical information. For transgender individuals, it does. Thus, publicly disclosing Mr. Doe’s identity makes him vulnerable to harm in a way that other litigants are not.

Fourth, there is no risk of prejudice to Defendants in allowing Mr. Doe to proceed under a pseudonym. Here, Mr. Doe only seeks to prevent disclosing his identity to the public. Subject to the Montana Rules of Evidence (and without waiving any future objections), Mr. Doe’s information will be made available to Defendants under an appropriate protective order, thus allowing Defendants to investigate claims and mount a defense. *See Doe v. Porter*, F. 3d 558, 561 (6th Cir. 2004) (finding no prejudice to defendants where granting a protective order for plaintiff’s identity would still allow defendants to “obtain all the necessary information to address” the issues in the case). Accordingly, allowing Mr. Doe to proceed under a pseudonym will not prejudice Defendants.

Mr. Doe has demonstrated a strong need to protect his identity that causes neither prejudice to Defendants nor harm to the public interest. The public’s understanding of the issues raised in this case will not be hindered by allowing Mr. Doe to proceed under a pseudonym. *See Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F. 3d 1036, 1043 (9th Cir. 2020) (quoting *Advanced Textile*, 214 F. 3d at 1072) (“[I]t is difficult to see ‘how disguising plaintiffs’

identities will obstruct public scrutiny of the important issues in this case.”). Thus, the public interest will not be harmed in allowing Mr. Doe to proceed pseudonymously because doing so will not impede the public’s understanding of the case.

On balance, the risk of harm to Mr. Doe caused by revealing his identity, disclosing his transgender status, and disclosing his associated medical conditions significantly outweighs any prejudice to Defendants. Further, allowing Mr. Doe to proceed under a pseudonym does not harm the public interest. Based on the significant need to protect Mr. Doe’s privacy and personal safety, as well as the compelling precedent for allowing transgender individuals to proceed pseudonymously, this Court should protect Mr. Doe’s identity and grant his motion for protective order and leave to proceed under a pseudonym.

CONCLUSION

Accordingly, for the above stated reasons, Plaintiff John Doe respectfully requests that the Court grant his motion for leave to proceed under a pseudonym and lodge the attached protective order.

Dated: July 30, 2021

Respectfully submitted,

By: 

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