

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0572

PHOEBE CROSS, a minor by and through his guardians Molly Cross and Paul Cross; MOLLY CROSS, an individual; PAUL CROSS, an individual; JANE DOE, an individual; JOHN DOE, an individual; JUANITA HODAX, on behalf of herself and her patients, KATHERINE MISTRETTA, on behalf of herself and her patients,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.,

Defendants and Appellants.

APPELLANTS' FOURTH NOTICE OF SUPPLEMENTAL AUTHORITY

On appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV 2023–541, the Honorable Jason Marks, Presiding

APPEARANCES:

Austin Knudsen

Montana Attorney General

Thane Johnson

Michael D. Russell

Alwyn Lansing

Michael Noonan

Assistant Attorneys General

MONTANA DEPARTMENT OF JUSTICE

PO Box 201401

Helena, MT 59620-1401

Phone: 406-444-2026

thane.johnson@mt.gov

michael.russell@mt.gov

alwyn.lansing@mt.gov

michael.noonan@mt.gov

Emily Jones

Special Assistant Attorney General

JONES LAW FIRM, PLLC

115 N. Broadway, Suite 410

Billings, MT 59101

Phone: 406-384-7990

emily@joneslawmt.com

Appellants State of Montana, Governor Greg Gianforte, Montana Board of Medical Examiners, Montana Board of Nursing, Montana Department of Public Health and Human Services, and Charlie Brereton submit this notice of supplemental authority. Mont. R. App. 12(6). Appellants direct the Court to a recent authority addressing the issue of invidious discriminatory purpose and legislative animus. *See* Appellants’ Op.Br. at 39-41.

I. *Doe v. Surgeon General*

On August 26, 2024, the United States Court of Appeals for the Eleventh Circuit stayed a preliminary injunction issued by a federal district court in Florida. *Doe v. Surgeon Gen.*, No. 24-11996, 2024 U.S. App. LEXIS 21601, at *13-14 (11th Cir. Aug. 26, 2024), attached as Exhibit A. The Appellate Court first observed that the lower court properly recognized *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023), and denied enjoining the gender-affirming care ban for “discriminat[ion] based on sex” and “gender nonconformity,” and that “transgender individuals were discrete and insular minority entitled to strict scrutiny.” *Id.* at *8. However, “[w]ith every other way closed by [] case law,” the lower court found the prohibition was a “pretext for, and [was] based on, an invidious discriminatory purpose” and concluded that it could not survive intermediate scrutiny. *Id.* at *9.

The Eleventh Circuit determined that the lower court “likely misapplied the presumption that the legislature acted in good faith” because, despite finding that a

“significant number of legislators” were likely “motivated by their desire to ensure that patients receive only proper medical care,” the court attempted to determine whether the perceived animus of a few legislators “silently motivated” others. *Id.* at *10-11. The Court rejected this “mixed-motive analysis” because the legislature had a legitimate interest that supported action and that the case law relied upon by the lower court failed to support its conclusion. *Id.* at *11.

The Court further found that while the district court “likely misapplied intermediate scrutiny,” “rational basis applied when considering a law very similar to this one.” *Id.* “What's more, even if the district court were correct in its animus decision, heightened scrutiny under the Equal Protection Clause does not apply to invidious discrimination based on a non-suspect class, and “[n]either the Supreme Court nor this court has recognized transgender status as a quasi-suspect class.” *Id.* at *11-12 (quoting *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 419 (6th Cir. 2023)); (citing *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 (11th Cir. 2022) (en banc); *Eknes-Tucker*, 80 F.4th at 1220; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000)).

DATED this 17th day of September 2024.

Austin Knudsen
MONTANA ATTORNEY GENERAL

/s/ Michael Noonan

Michael Noonan
Thane Johnson
Michael Russell
Alwyn Lansing
Assistant Attorneys General
PO Box 201401
Helena, MT 59620-1401

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101

ATTORNEYS FOR
DEFENDANTS/APPELLANTS

CERTIFICATE OF SERVICE

I, Michael Noonan, hereby certify that I have served true and accurate copies of the foregoing Notice - Supplemental Authority to the following on 09-17-2024:

Michael D. Russell (Govt Attorney)

215 N Sanders

Helena MT 59620

Representing: Charlie Brereton, Greg Gianforte, Austin Miles Knudsen, Montana Board of Medical Examiners, Montana Board of Nursing, MT Dept of Public Health & Human Services, State of Montana

Service Method: eService

Alwyn T. Lansing (Govt Attorney)

215 N. Sanders St.

Helena MT 59620

Representing: Charlie Brereton, Greg Gianforte, Austin Miles Knudsen, Montana Board of Medical Examiners, Montana Board of Nursing, MT Dept of Public Health & Human Services, State of Montana

Service Method: eService

Thane P. Johnson (Govt Attorney)

215 N SANDERS ST

P.O. Box 201401

HELENA MT 59620-1401

Representing: Charlie Brereton, Greg Gianforte, Austin Miles Knudsen, Montana Board of Medical Examiners, Montana Board of Nursing, MT Dept of Public Health & Human Services, State of Montana

Service Method: eService

Emily Jones (Attorney)

115 North Broadway

Suite 410

Billings MT 59101

Representing: Charlie Brereton, Greg Gianforte, Austin Miles Knudsen, Montana Board of Medical Examiners, Montana Board of Nursing, MT Dept of Public Health & Human Services, State of Montana

Service Method: eService

Matthew Prairie Gordon (Attorney)

1201 Third Ave

Seattle WA 98101

Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta

Service Method: eService

Akilah Maya Deernose (Attorney)

1121 Knight St.

Helena MT 59601

Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta

Service Method: eService

Alexander H. Rate (Attorney)

713 Loch Leven Drive

Livingston MT 59047

Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta

Service Method: eService

Kell Olson (Attorney)

3849 E. Broadway Blvd. #136

Tucson AZ 85716

Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta

Service Method: eService

Peter C. Renn (Attorney)

800 South Figueroa St., Suite 1260

Los Angeles CA 90017

Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta

Service Method: eService

Malita Vencienzo Picasso (Attorney)

125 Broad Street, 18th Floor

New York NY 10004

Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta

Service Method: eService

Michelle Tafoya Weinberg (Attorney)

PO Box 1417

Missoua MT 59801

Representing: Biomedical Ethics and Public Health Scholars

Service Method: eService

Derek Joseph Oestreicher (Attorney)

974 Guthrie Road

Helena MT 59602

Representing: Montana Family Foundation

Service Method: eService

Colin Michael Gerstner (Attorney)

2828 1st Ave. S.

Billings MT 59101

Representing: Elliot Page, Nichole Maines

Service Method: eService

Robert M. Farris-Olsen (Attorney)

401 N. Last Chance Gulch

Helena MT 59601

Representing: GLBTQ Legal Advocates & Defenders, The National Center for Lesbian Rights

Service Method: eService

Jon Mark Moyers (Attorney)

3936 Avenue B, Suite D

Billings MT 59102

Representing: American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations

Service Method: eService

Peter M. Meloy (Attorney)

2601 E. Broadway

2601 E. Broadway, P.O. Box 1241

Helena MT 59624

Representing: Compassion & Choices

Service Method: eService

Nora W. Huppert (Attorney)

65 E. Wacker Pl., Suite 2000

Chicago IL 60601

Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta

Service Method: eService

Sophia Pelecanos (Attorney)

800 South Figueroa St.

Suite 1260

Los Angeles CA 90017

Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta

Service Method: eService

Amy Hanson (Interested Observer)

Service Method: E-mail Delivery

Katelyn Kang (Attorney)

55 Hudson Yards

New York NY 10001

Representing: Biomedical Ethics and Public Health Scholars

Service Method: E-mail Delivery

Valeria M. Pelet del Toro (Attorney)

55 Hudson Yards

New York NY 10001

Representing: Biomedical Ethics and Public Health Scholars

Service Method: E-mail Delivery

Jordan D Hershman (Attorney)
One Federal Street
Boston MA 02110
Representing: GLBTQ Legal Advocates & Defenders
Service Method: E-mail Delivery

William R Isasi (Attorney)
850 Tenth St., NW
Washington DC 20001
Representing: American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations
Service Method: E-mail Delivery

D. Jean Veta (Attorney)
850 Tenth St., NW
Washington DC 20001
Representing: American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations
Service Method: E-mail Delivery

Heather Shook (Attorney)
1201 Third Avenue, Ste 4900
Seattle WA 98101
Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta
Service Method: E-mail Delivery

Courtney Jo Schirr (Attorney)
1201 Third Avenue, Ste 4900
Seattle WA 98101
Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta
Service Method: E-mail Delivery

Sara Cloon (Attorney)
1201 Third Avenue, Ste 4900
Seattle WA 98101
Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta
Service Method: E-mail Delivery

Kayla L. Lindgren (Attorney)
1201 Third Avenue, Ste 4900
Seattle WA 98101
Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta
Service Method: E-mail Delivery

Elizabeth O. Gill (Attorney)
LGBT & AIDS Project
American Civil Liberties Union Foundation

39 Drumm Street

San Francisco CA 94111

Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta

Service Method: E-mail Delivery

Electronically signed by Buffy Ekola on behalf of Michael Noonan

Dated: 09-17-2024