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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

Judge Hon. Mike Menahan

**PLAINTIFFS' BRIEF IN SUPPORT
OF MOTION FOR RULE 23 CLASS
CERTIFICATION, APPOINTMENT
OF CLASS REPRESENTATIVES,
AND APPOINTMENT OF CLASS
COUNSEL**

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INTRODUCTION

Plaintiffs Jessica Kalarchik (“Ms. Kalarchik”) and Jane Doe (“Ms. Doe”) (together, “Plaintiffs”) move this Court for an order: 1) certifying this case as a class action pursuant to M. R. Civ. P. 23 with a proposed class consisting of (a) all transgender people born in Montana who currently want, or who in the future will want, to have the sex designation on their Montana birth certificate be consistent with what they know their sex to be, as determined by their gender identity, and (b) all transgender people who currently want, or in the future will want, to have the sex designation changed on their Montana driver’s license, to match what they know their sex to be, as determined by their gender identity; 2) appointing the named Plaintiffs as representatives of the class; and 3) appointing the ACLU Montana Foundation, Inc., the American Civil Liberties Union Foundation, and Nixon Peabody, L.L.P., as class counsel.

FACTUAL BACKGROUND

Plaintiffs filed this action for declaratory and injunctive against the State of Montana and various state officials in their official capacity (together, “Defendants”) challenging under the Constitution and laws of Montana Defendants’ policies and practices that make it impossible for people born in Montana to obtain birth certificates, or for transgender people in Montana to obtain driver’s licenses, that accurately reflect their sex and gender.

These policies and practices include: 1) a regulation codified as Mont. Admin. R. 37.8.311(5) (2022), that originally went into effect on September 10, 2022 (the “2022 Rule”); 2) Defendants’ announcement on February 2, 2024 that, effective immediately, the Montana Department of Public Health and Human Services (“DPHHS”) would process applications for amending the sex designations on birth certificates only if the sex identified on the applicant’s birth certificate was the result of a scriveners’ error or incorrect data entry or if the sex of the

individual was misidentified on the original certificate and that DPHHS would not amend a birth certificate based on “gender transition, gender identity, or change of gender based in part on Defendants’ reading of Senate Bill 458, S.B. 458, 2023 Leg., 68th Sess. (Mont. 2023) (“SB 458”), adopted by the Montana Legislature on April 27, 2023 and signed by Governor Gianforte on May 19, 2023; and 3) the Montana Department of Justice at some point in 2024 ending the Montana Motor Vehicle Division’s prior practice of permitting changes to the sex designation on Montana driver’s licenses based on a letter from a doctor stating that the person seeking the change was in, or had completed, process of changing their sex characteristics (collectively, “Defendants’ policies and practices”).

Montana has a history of discriminatory animus against transgender people. A previous statute, Senate Bill 280, required applicants seeking to amend the sex designation on their birth certificates to obtain a court order based on an attestation proving that the applicant’s sex had “been changed by surgical procedure.” S.B. 280, 2021 Leg., 67th Sess. (Mont. 2021) (amending Mont. Admin. R. 37.8.102 and 37.8.311) (“SB 280”). On April 21, 2022, the Montana 13th Judicial District Court entered a preliminary injunction enjoining enforcement of SB 280 and its 2021 implementing regulation. Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss and Granting Plaintiffs’ Motion for a Preliminary Injunction, *Marquez v. State of Montana*, No. DV 21-873, (Mont. Dist. Ct. Apr. 21, 2022) (“*Marquez* Preliminary Injunction Order”). The Court declared SB 280 void for vagueness and ordered the State of Montana, Governor Gianforte, DPHHS, and Director Brererton to reinstate the less restrictive procedures established in 2017 for processing applications to change sex designations on Montanans’ birth certificates. *Id.* DPHHS openly defied the district court’s preliminary injunction order and sought to circumvent the injunction by promulgating the 2022

Rule, which completely prohibited transgender people from changing the sex designations on their birth certificates. Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiffs’ Motion Seeking Clarification of the Preliminary Injunction, *Marquez v. State of Montana*, No. DV 21-873, (Mont. Dist. Ct. Sept. 19, 2022) (“*Marquez Clarification Order*”). On June 26, 2023, the district court permanently enjoined the enforcement of SB 280 and its 2021 implementing regulation and entered a finding of contempt against DPHHS for defying the court’s preliminary injunction order. Order Granting Plaintiffs’ Motion for Summary Judgment, *Marquez v. State of Montana*, No. DV 21-873, (Mont. Dist. Ct. June 26, 2023) (“*Marquez Summary Judgement Order*”).

Through Defendants’ policies and practices, Defendants have sought to do something beyond even what SB 280 and its 2021 regulation sought to do by now attempting to abolish *any* opportunity for transgender individuals born in Montana to correct the sex designation on their birth certificates. Defendants also have sought to abolish *any* opportunity for transgender individuals residing in Montana to change the sex listed on their driver’s license. Class certification will enable Plaintiffs and members of the proposed class to challenge the actions of DPHHS and the Rules as well as the burdens of SB 458 on behalf of Montana’s entire transgender population.

ARGUMENT

Class actions are intended to “conserve the judiciary’s and the similarly situated parties’ resources by permitting the single litigation of common issues of fact and law.” *Knudsen v. University of Montana*, 2019 MT 175, ¶ 7, 396 Mont. 443, 445 P.3d 834 (quoting *Roose v. Lincoln Cty. Emp. Grp. Health Plan*, 2015 MT 324, ¶ 14, 381 Mont. 409, 362 P.3d 40). A class action can provide a group remedy without the cost and delay of multiple lawsuits and the attendant risk of inconsistent judgments. A. Wallace Tashima, et al., *Federal Civil Procedure Before Trial* § 10:252

(2002).¹ Class certification has two additional benefits. It prevents a case from being dismissed as moot as a result of individual settlements or court relief for the named plaintiffs that do not extend to all members of the class. Class certification also prevents defendants from limiting the reach of any injunctive or declaratory relief to the location of the issuing court—in this case Lewis & Clark County—which otherwise would require duplicative and wasteful suits in each county in which any of the class members reside. Given the definition of the proposed class in this case, certification appropriately ensures that whatever remedy this Court provides will have statewide applicability and statewide strength.

Class certification in this action is governed by the criteria set out in M. R. Civ. P. 23. *Kramer v. Fergus Farm Mutual Ins. Co.*, 2020 MT 258, ¶ 14, 401 Mont. 489, 474 P.3d 310. Certification of a class for injunctive relief is appropriate when it “meet[s] the four preliminary requirements of M. R. Civ. P. 23(a) —numerosity, commonality, typicality, and adequate representation—and satisfies any of the three subsections of M.R. Civ. P. 23(b).” *Id.* A plaintiff that meets the requirements of Rule 23 under either the federal or Montana rules has a categorical right to pursue his or her claim as a class action. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.* 559 U.S. 393, 398 (2010).²

¹ Montana courts have a “long history of relying on federal jurisprudence when interpreting the class-certification requirements of Rule 23[.]” *Chipman v. NW Healthcare Corp.*, 2012 MT 242, ¶ 52, 366 Mont. 450, 288 P.3d 193.

² That class certification is appropriate is further evidenced by the recent ruling in *Roe by and through Roe v. Herrington*, No. CV-20-00484, 2023 WL 575950 (D. Ariz. Aug. 10, 2023), which certified a class under Federal Rule of Civil Procedure 23—which is similar to Montana Rule of Civil Procedure 23—of all individuals born in Arizona, now and in the future, who seek to change the sex listed on their birth certificate

I. The Proposed Class Definition

“[A] class certification order ‘must define the class and the class claims, issues or defenses.’” *Diaz v. State*, 2013 MT 219, ¶ 18, 371 Mont. 214, 308 P.3d 38 (citing M. R. Civ. P. 23(c)(1)(B)). “The District Court’s choice of class definition thus forms a mandatory component of the appealable class certification order.” *Id.* However, “under M. R. Civ. P. 23(c)(1)(C),” a district court “maintains discretion to modify the class definition at any time until final judgment[.]” *Rolan v. New West Health Serv.*, 2013 MT 220, ¶ 15, 371 Mont. 228, 307 P.3d 291.

Plaintiffs’ proposed class definition is “(a) all transgender people born in Montana who currently want, or who in the future will want, to have the sex designation on their Montana birth certificate changed to be consistent with what they know their sex to be, as determined by their gender identity, and (b) all transgender people who currently want, or who in the future will want, to have the sex designation on their Montana driver’s license changed to match what they know their sex to be, as determined by their gender identity.” Complaint ¶ 29, Doc. 001.

II. The Proposed Class Satisfies the Rule 23(a) Requirements.

The party seeking class certification must first establish the following four requirements provided in Rule 23(a):

- (1) the class is such that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

M. R. Civ. P. 23(a). While the class-action proponent must satisfy each of these requirements, the party, “need not prove each element with absolute certainty.” *Roose*, ¶ 14. As shown below,

Plaintiffs satisfy all of these prerequisites. Therefore, the proposed class should be certified, Plaintiffs should be designated as class representatives, and Plaintiffs' attorneys should be appointed as class counsel.

A. Joinder of All Proposed Class Members Is Impracticable.

Joinder is impractical because Plaintiffs' proposed class is sufficiently numerous. "There is no bright-line number of class members that will establish numerosity." *Byorth v. USAA Casualty Ins. Co.*, 2016 MT 302, ¶ 20, 385 Mont. 396, 384 P.3d 455. "Instead, the numerosity of the class and impracticability of joinder must be determined on a case by case basis, with consideration given to all of the surrounding circumstances." *Morrow v. Monfric., Inc.*, 2015 MT 194, ¶ 9, 380 Mont. 58, 354 P.3d 558 (citations omitted). Moreover, "[w]hile Rule 23(a)(1) is often referred to as the 'Numerosity' requirement, at its heart is that joinder is impracticable." *Roose*, ¶ 18. Numerousness of the proposed class "provides an obvious" means of establishing the impracticability of joinder. *Id.* However, "the class action proponent need not prove [numerosity] with absolute certainty. *Id.* at 14. In addition, "[w]hile . . . the party proposing a class action must produce some evidence to support a finding on numerosity, this does not require precision, only evidence the size of the potential class is so numerous joinder of all members is impracticable." *Rogers v. Lewis & Clark Cnty*, 2022 MT 144 ¶ 21, 409 Mont. 267, 513 P. 3d 1256. "Generally, fewer than 21 potential class members is regarded as inadequate, while more than 40 is likely to be sufficient." *Morrow*, ¶ 9 (citation omitted).

According to a 2022 report published by the Williams Institute, approximately 0.41% of Montanans above the age of 18 identify as transgender, which equates to more than 3,400

people.³ Recent national surveys further reflect that an estimated 49 percent of individuals who identify as transgender or gender non-binary do not have identity documents reflecting the sex as to which they identify.⁴ Given these figures, an estimated 1,700 Montanan adults are transgender and have not yet amended the sex marker on their birth certificates and/or driver’s licenses to be consistent with their sex. This estimate alone would likely satisfy the numerosity requirement, given the impracticability of joining even 100 of these individuals, let alone 1,700.

It is important to emphasize, however, that the presence of numerous class members is not the only way to satisfy the requirements of Rule 23(a). Vol. 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:11 (6th ed. 2023)) While numerosity of the class strongly supports finding that joinder may be impracticable, “it is not the only such situation[.]” *Roose*, ¶ 18, and the Court may also consider, as others have, various nonnumeric factors such as “judicial economy arising from the avoidance of a multiplicity of actions,” *Morrow*, ¶ 10, as well as other factors impacting the “the ability to initiate individual lawsuits[.]” *Roose*, ¶ 18. Such other factors include (a) the financial resources available to class members to finance their own lawsuit; (b) the geographic dispersion of the class; and (c) the existence of an indeterminate number of future class members eligible for injunctive relief. *Morrow*, ¶ 10. (internal citations and quotation marks omitted).

³ Jody L. Herman, et al., *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Institute 9 (June 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

⁴ S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (“Transgender Survey”); America Counts Staff, *Montana Population Topped the 1 Million Mark in 2020*, United States Census Bureau (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/montana-population-change-between-census-decade.html> (noting that Montana’s total population in 2020 of 1,084,225, of whom 78.4% (or 850,032) were adults).

Each of these factors makes joinder impractical. *First*, transgender individuals experience high rates of poverty and homelessness. Nearly one-third fall below the poverty line.

Transgender Survey, *supra*, at 144. A comparable percentage experience homelessness. *Id.* at 178. This renders financing an independent lawsuit difficult if not impossible for members of Plaintiffs' class. Many simply do not have the individual resources to protect their interests.

Second, transgender people continue to face discrimination and harassment, including threats of violence when their status is made public. *Id.* at 198. This public hostility actively discourages transgender participation in individual lawsuits for fear of reprisals, and indeed potentially violent reprisals. Proceeding as a class diminishes the salience of such threats to any individual class member, as there is both safety in numbers and relative anonymity for class members.

Third, the members of the class are geographically dispersed throughout Montana, a geographically large and thinly populated state. Where proposed class members "are not found in the same jurisdiction, the impracticability of joinder is increased." *Morrow*, ¶ 13 (internal citations omitted). Organizing and coordinating joinder of individual claims under these circumstances is extremely difficult. Travel to and communications with individual transgender claimants would need to span hundreds of miles and involve complicated logistics. Collective work by and through class representatives is a major reason for using a class device under these circumstances.

Finally, because Plaintiffs' class includes future applicants for birth-certificate and/or driver's license amendments, it is not possible to identify with any precision the current membership of the class. "The inclusion of future class members in a class is not itself unusual or objectionable," and where "a class's membership changes continually over time, that factor

weighs in favor of concluding that joinder of all members is impracticable.” *A.B. v. Hawaii State Dep’t of Educ.*, 30 F.4th 828, 838 (9th Cir. 2022) (internal citations omitted). “[C]lasses including future claimants generally meet the numerosity requirement due to the impracticality of counting such class members, much less joining them.” *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (internal citations omitted). “[I]t is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members,” and “a good-faith estimate of the class size is sufficient when the precise number of class members is not readily ascertainable.” Vol. 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:13 (6th ed. 2023). Here, it is impossible to know or predict with any precision the number of transgender individuals who will someday need to change the sex marker on their birth certificate and/or driver’s license. Given, however, the approximate number of current class members (in excess of 1,700) and the fact that the transgender population will continue to grow, this factor weighs in favor of finding that joinder is impracticable. *See A.B.*, 30 F.4th at 838—40.

B. The Claims of Plaintiffs and the Proposed Class Members Share Common Questions of Law.

The commonality requirement of Rule 23(a) is satisfied when the claims of the plaintiffs and class members “depend upon a common contention of such a nature that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Houser v. City of Billings*, 2020 MT 51, ¶ 5, 399 Mont. 140, 458 P.3d 1031 (quoting *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, ¶ 25, 379 Mont. 265, 350 P.3d 39). All questions of fact and law need not be common to satisfy this rule. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Indeed, “a single common question [of law or fact] will satisfy the commonality

element[.]” *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶50, 366 Mont. 450, 288 P.3d 193.

The claims of Plaintiffs and the proposed class clearly satisfy the commonality requirement. Those claims are all based on common contentions of law, which, when established on summary judgment or at trial, will resolve the issues central to each of the individual class member’s claims. These shared common questions of law include, in whole or in part:

- (1) Whether Defendants’ policies and practices deny class members equal protection of the law in violation of Article II, Section 4, of the Montana Constitution by discriminating against transgender people based on sex and gender identity;
- (2) Whether Defendants’ policies and practices violates class members’ right to privacy in violation of Article II, Section 10, of the Montana Constitution by eliminating the ability of transgender people to amend the sex designation on their birth certificates and/or driver’s licenses, thereby by forcing them to disclose their transgender status whenever they must present a birth certificate or driver’s license that discloses their sex assigned at birth, rather than their sex as determined by their gender identity;
- (3) Whether Defendants’ policies and practices violate class members’ right under Article II, section 7, of the Montana Constitution not to be compelled to engage in speech or expression by requiring transgender people to misidentify themselves whenever they must produce their Montana birth certificate or driver’s license that contains a sex designation that does not accurately state their sex or gender;
- (4) Whether Defendants’ policies and practices are subject to and can survive strict scrutiny and/or heightened constitutional review;

(5) Whether Defendants’ policies and practices interfere with or impair or threaten to interfere with or impair the legal rights of Plaintiffs in violation of the Montana Administrative Procedure Act.

The Court’s adjudication of these issues will be based upon findings that are applicable to the claims of all class members equally and will thus ensure consistent resolution. If, for instance, Defendants’ policies and practices deprive one class member of equal protection under the law because they discriminate against transgender people on the basis of sex and gender identity, the deprivation is the same among all class members.

Plaintiffs and the proposed class members also share a common core of facts, and the law applies equally to their individual claims based on those common facts: (1) each is either born in and/or currently is domiciled in Montana; (2) each is transgender; (3) each wants to obtain a Montana birth certificate and/or driver’s license that accurately reflects their sex, as determined by their gender identity; and (4) under Defendants’ policies and practices, each is prohibited from obtaining a birth certificate that accurately reflects their sex, as determined by their gender identity, due to the same or similar constitutional and statutory infirmities of Defendants’ policies and practices.

C. The Claims of the Proposed Representative Plaintiffs Are Typical of the Claims of the Putative Class Members.

The typicality element is satisfied where the plaintiffs’ claims are typical of the claims of the proposed class members, in that they arise from, “the same event, practice, or course of conduct that forms the basis of the class claims and [are] based upon the same legal or remedial theory.” *In re Blue Cross and Blue Shield of Montana, Inc.*, 2016 MT 121, ¶ 22, 383 Mont. 404, 372 P.3d 457 (quoting *Chipman*, ¶ 53). “In Montana, ‘the typicality requirement is not

demanding.” *Id.* ¶ 23 (quoting *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶ 35, 363 Mont. 151, 267 P.3d 756).

The typicality requirement is satisfied when plaintiffs challenge a uniform policy that injures proposed class members in the same manner and is based on the same legal theories. *See e.g. Chipman*, ¶¶ 53-56. For this reason, the Montana Supreme Court has held that the typicality requirement was satisfied because all the class members, including the representative plaintiffs, had comparable dealings with the defendants—namely, that they were all insured by the defendants—and the class-representatives’ claims, “stem[med] from the same event, practice, or course of conduct that forms the basis of the class claims[.]” *In re Blue Cross & Blue Shield of Montana*, ¶ 24 (internal citations and quotation marks omitted). The Court found that, despite the fact that some class members had plans governed by ERISA and others did not, all class members sought and were entitled to the same relief: recovery of the benefits that they had been wrongly denied. *Id.*

The same analysis applies here. In this case, Plaintiffs and the proposed class members are all subject to the same state policies and procedures and all seek the same remedy—i.e., the invalidation of Defendants’ policies and practices. Plaintiffs and the proposed class members all also assert the same legal theories, which are detailed in Counts I through VI of Plaintiffs’ Complaint.

Furthermore, Plaintiffs and the proposed class members have all had equivalent dealings with Defendants in this matter: as people born in Montana, they have been issued birth certificates by DPHHS and are subject to Defendants’ policies and practices for amending birth-certificate sex markers and/or they have been issued driver’s licenses by and are subject to Defendants’ policies and practices for amending driver’s licenses.

Finally, the claims asserted by Ms. Kalarchik and Ms. Doe are typical of those of the proposed class. Plaintiffs and the proposed class members will suffer the same injury if Defendants are permitted to enforce Defendants’ policies and practices—namely, the denial of an accurate birth certificate consistent with their sex, as determined by their gender identity, and/or an accurate driver’s license consistent with their sex, as determined by their gender identity and the resulting harms from Defendants’ policies and practices which are thoroughly detailed in Plaintiffs’ Complaint. In addition, Plaintiffs and the proposed class members all seek the same relief based on the same legal theories.

D. The Representative Parties Will Fairly and Adequately Protect the Interests of the Class Members.

The fourth requirement of Rule 23(a) permits certification “where the representative parties will fairly and adequately protect the interests of the class.” *In re Blue Cross & Blue Shield of Montana*, ¶ 25. Counsel for the named representatives must be “qualified and competent and able to conduct the litigation.” *Id.* Additionally, the interests of the named representatives must “not be antagonistic to the interests of the rest of the class.” *Id.* (internal citations and quotation omitted).

Plaintiffs’ counsel consist of experienced class-action and civil-rights practitioners, including the following:

- (1) Alex Rate is the current Legal Director of the ACLU Montana Foundation, Inc. He is an experienced litigator who has prosecuted complex class and constitutional litigation throughout the State of Montana at all levels and involving many of the issues present in this case. *See, e.g., Weems v. State by and through Fox*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4. Mr. Rate has appeared before this Court on numerous occasions. Marthe Y. VanSickle graduated from the University of Montana School of

Law in May of 2020. Ms. VanSickle clerked for the Montana Supreme Court. She practiced as a defense attorney and a prosecutor prior to joining the ACLU Montana Foundation, Inc. where she is a civil rights staff attorney. She is in good standing with the Montana State Bar.

- (2) Both Jon Davidson and Malita Picasso are experienced staff attorneys for the American Civil Liberties Union Foundation (“ACLU”). Both have substantial experience in litigating the interests of ACLU clients in a broad range of constitutional settings. Both have previously represented transgender clients. Ms. Picasso is currently litigating the issues associated with state restrictions on birth-certificate amendments in other jurisdictions on behalf of ACLU clients. *Hersom v. Crouch*, Civ. No. 2:21-cv-00450, 2022 WL 908503 (S.D.W. Va. March 28, 2022). She has also previously represented transgender individuals in discrimination suits regarding access to accurate and usable birth certificates. *Ray v. McCloud*, 507 F. Supp. 3d 925 (S.D. Ohio 2020). Additionally, Ms. Picasso recently appeared before the Montana Department of Labor Office of Administrative Hearings representing a transgender Montanan in her anti-discrimination employment suit. *Maloney v. Yellowstone County*, Nos. 1570–2019 & 1572–2019 (Mont. Dep’t of Lab. & Industry, Aug. 14, 2020). Mr. Davidson is the former national Legal Director of Lambda Legal and the former Chief Counsel at Freedom for All Americans. In those capacities, as well as in his current position with the ACLU, Mr. Davidson has represented transgender individuals in a broad range of matters, including those advancing constitutional claims of violation of equal protection and privacy. *See, e.g., Rosati v. Igbinoso*, 791 F.3d 1037, 1077 (9th Cir. 2015); *Carcaño v. Cooper*, 350 F. Supp. 3d

388 (M.D.N.C. 2018); *Karnoski v. Trump*, No. C17-1297, 2017 WL 63311305 (W.D. Wash. Dec. 17, 2017).

(3) Thomas Hecht, Seth Horvath, and Tina Solis are outside cooperating counsel in this matter. All three are members in good standing of the Illinois bar. All three are or have been litigation partners at the Chicago office of the law firm of Nixon Peabody, L.L.P. All three have prosecuted and defended complex constitutional cases, including class actions in federal and state courts throughout the United States. They previously represented transgender clients in a challenge to the State of Iowa's refusal to provide Medicaid reimbursement for gender-affirming medical care. They obtained a favorable ruling from the Iowa Supreme Court declaring such restrictions to be a violation of the Iowa Civil Rights Act. *See Good v. Iowa Dep't of Hum. Services*, 924 N.W. 2d 853 (Iowa 2019). Mr. Hecht, Mr. Horvath, and Ms. Solis are representing Plaintiffs and members of the proposed class in this matter on a pro bono basis. All three have available to them the resources of Nixon Peabody L.L.P., a national law firm.

In addition, Mr. Rate, Ms. Picasso, Mr. Davidson, Mr. Hecht, Mr. Horvath, and Ms. Solis all were counsel in *Marquez v. State of Montana*, No. DV 21-873, a case with claims that overlap with Plaintiffs' claims in this case with regard to the issuance of amended birth certificates.

Plaintiffs' interests are not antagonistic to the interests of the class; rather, they align precisely with those of the class members. Plaintiffs and the proposed class members are transgender. Plaintiffs and the proposed class members were born in Montana. Plaintiffs and the proposed class members were issued birth certificates and/or driver's licenses by Defendants. Plaintiffs' birth certificates and/or driver's licenses and those of the proposed class members

currently list their sex as the sex they were assigned at birth, which is inconsistent with their actual sex, as determined by their gender identity. Plaintiffs and the proposed class members seek to amend the gender marker on their birth certificates and/or driver's licenses to align with their sex, as determined by their gender identity. Plaintiffs and the proposed class members seek to challenge Defendants' refusal to amend the gender markers on their Montana-issued birth certificates and/or on their Montana driver's licenses.

Plaintiffs and their experienced counsel will fairly and adequately protect class interests and will vigorously prosecute the action on behalf of the class. Plaintiffs' counsel's commitment to representing the interests of Plaintiffs and members of the proposed class aggressively is reflected by their zealous advocacy in *Marquez v. State*, which included: the preparation of the Complaint, and Amended Complaint; the successful prosecution of the motion for a preliminary injunction and response to Defendants' motion to dismiss;⁵ the prosecution of the motion to clarify the Preliminary Injunction Order;⁶ the resistance to Defendants' petition for writ of supervisory control before the Montana Supreme Court;⁷ and the successful prosecution of the motion for summary judgement.⁸ These are also evidence of Plaintiffs' counsel's ability to do so effectively on behalf of the proposed class in this matter.

III. Class Certification Is Appropriate Under Rule 23(b)(2).

After the Rule 23(a) requirements have been met, class certification is appropriate when the proposed class also satisfies at least one of the three subsections of Rule 23(b). *Knudsen*, ¶ 7. Class certification under Rule 23(b)(2) is warranted where “(1) the party opposing the class has

⁵ *Marquez* Preliminary Injunction Order.

⁶ *Marquez* Clarification Order.

⁷ *State v. Montana Thirteenth Judicial District Court*, Yellowstone County, OP 22-0552, 2023 WL 142673 (Montana 2023).

⁸ *Marquez* Summary Judgement Order.

acted or refused to act on the grounds that apply generally to the class, and (2) final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” *Id.* ¶ 13 (internal citations and quotation marks omitted). The first prong may be established by showing that “the defendant has a policy that affects everyone in the proposed class in a similar fashion.” *Id.* The second prong is focused on the notion that the opposing party’s conduct “is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” *Id.* (quoting *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 61, 371 Mont. 393, 310 P.3d 452).

Plaintiffs’ motion for class certification easily meets these standards. The central issues presented in this matter are purely legal, and the class members’ claims thus are not dependent on any individualized determinations. Plaintiffs’ claims turn on whether Defendants’ policies and practices (1) discriminate against transgender individuals in violation of the Montana Constitution, the Montana Human Rights Act, and the Montana Governmental Code of Fair Practice by treating transgender people worse than similarly situated cisgender people; (2) infringe on constitutionally protected privacy interests of transgender individuals; and (3) infringe on the constitutional prohibition of compelled speech; and (4). The evidence will show that Defendants have acted on grounds that apply generally to the class and that final injunctive or declaratory relief is appropriate for the class as a whole. Reaching conclusions on these questions does not require individualized findings of facts unique to the Plaintiffs or the proposed class members.

This Court should certify the proposed class and appoint class counsel. Certification of the proposed class is warranted under M. R. of Civ. P. 23(b)(2), because Defendants intend to enforce Defendants’ policies and practices against the proposed class members in the same manner, and, as a result, a declaration and injunction with respect to the whole class is appropriate.

CONCLUSION

For the foregoing reasons, Plaintiffs meet all requirements for class certification under M. R. Civ. P. 23(a) and M. R. Civ. P. 23(b)(2). Accordingly, the Court should enter an order granting the following relief:

- (1) certifying a class of (a) all transgender people born in Montana who currently want, or who in the future will want, to have the sex designation on their Montana birth certificate changed to be consistent with what they know their sex to be, as determined by their gender identity, and (b) all transgender people who currently want, or who in the future will want, to have the sex designation on their Montana driver's license changed to match what they know their sex to be, as determined by their gender identity ;
- (2) appointing Plaintiffs as class representatives; and
- (3) appointing the ACLU Montana Foundation, Inc., the American Civil Liberties Union Foundation, and Nixon Peabody, L.L.P., as class counsel.

Dated: May 17, 2024

Respectfully submitted,

By: /s/ Alex Rate
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* *Pro hac vice applications forthcoming*

CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 05-17-2024:

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