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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,	**Case No. DV-25-2024-0000261-CR**
v.	**Judge Hon. Mike Menahan**
STATE OF MONTANA, et al.,	
Defendants.	**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

For the following reasons, the Court should grant Plaintiffs' Motion for Class Certification. Defendants' Response in Opposition to Plaintiffs' Motion for Class Certification ("Response") fails to present any valid reason for the Court to deny the motion.

I. Class Certification Is Necessary.

Defendants' primary argument appears to be that class certification is unnecessary because the 2022 Rule, the MVD policy and practice, and SB 458[1] as applied to birth certificates and driver's licenses "will either be held constitutional to all or unconstitutional to all." Response at 2; *see also id.* at 7 ("These provisions will either be found constitutional and lawful or unconstitutional or unlawful. This holding will apply to all. A class action is unwarranted here.").[2]

Defendants' position might be tenable if Defendants stipulated that any judgment in this case will bind them in how they act with regard to *all* transgender individuals, but they have not even offered that. To the contrary, in non-class litigation brought against many of the same defendants as this case in which a Montana District Court granted a statewide preliminary injunction, the Montana Attorney General's office is arguing on appeal that it is error to grant a preliminary injunction that goes beyond protecting the individually named plaintiffs. *See* Appellants' Opening Brief at 56-57, *van Garderen v. State of Montana*, No. DA 23-0572 (Mont. Feb. 9, 2024) [3], and Appellants' Reply Brief at 18-20, *van Garderen v. State of Montana*, No. DA 23-0572 (Mont. May 7, 2024).[4] Granting Plaintiffs' motion for class certification will prevent Defendants from making a similar argument in this case that any relief this Court may order must be limited to the named plaintiffs.[5]

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[1] SB 458 was recently declared unconstitutional and is permanently enjoined. *Reagor v. State of Montana*, Cause No.: DV-23-1245 (Mont. Dist. Ct.) (June 25, 2024). A true and correct copy of that decision is attached as Exhibit A to the Declaration of Alex Rate.

[2] Defendants argue that this conclusion should control here because this was the reasoning stated in *Marquez v. State*. Response at 1, 6-7. But for the reasons explained below, that ruling was erroneous. Because the court in that case granted a permanent injunction in favor of the plaintiffs in that case, holding that an earlier statutory restriction on changing the sex marker on Montana birth certificates violated the Montana Constitution on its face—which Defendants never appealed—the plaintiffs in that case never had a need to or could appeal that court's mistaken denial of class certification.

[3] Attached as Exhibit B to the Declaration of Alex Rate.

[4] Attached as Exhibit C to the Declaration of Alex Rate.

[5] Indeed, if Defendants' position is that a Montana District Court decision in a challenge to a state law is binding on the State as to individuals who are not parties to that challenge, then Defendants

Moreover, a class action is necessary to prevent possible mootness from developing. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) ("the termination of a class representative's claim does not moot the claims of the unnamed members of the class") (citations omitted). This is because, once a class has been certified, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by" the named class representative, and the controversy remained "very much alive for the class of persons she ha[d] been certified to represent." *Sosna v. Iowa*, 419 U.S. 393, 399, 401 (1975). Mootness is particularly important in a case such as this, where a preliminary injunction might permit the named plaintiffs to proceed with amending their identity documents before a final decision on the merits is rendered.

II. Plaintiffs Have Adequately Established All Elements Required under Rule 23(a) to Obtain Class Certification.

A. Numerosity

Defendants believe that Plaintiffs have failed to adequately show that the class membership is so numerous to make joinder of all members of the class impracticable, as stated in Rule 23(a)(1), because, they argue, Plaintiffs' submission of evidence regarding the number of transgender adults in Montana who have not amended the sex marker on their birth certificate fails to take into account that some transgender individuals may not want to do so. Response at 4-6. But Defendants' Response notes that 280 Montanans applied to change the sex designation on their birth certificates in the last seven years. *Id.* at 5. Even if only one-quarter of that number want to amend the sex marker on their birth certificate now or will want to do so in the future but are or will be precluded from doing so by the law and rule challenged by this lawsuit, that is more than enough to meet the numerosity requirement. *See Morrow v. Monfric, Inc*., 2015 MT 194, ¶¶ 9, 19, 380 Mont. 58, 354 P.3d 558 ("Generally, … more than 40 [class members] is likely to be sufficient.").[6]

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cannot contest in this case that SB 458 as applied to the issuance of amended birth certificates and driver's licenses is unconstitutional, given that another Montana District Court has now ruled that SB 458 in is unconstitutional its entirety. *See Reagor v. State of Montana*, *supra*.

[6] Defendants also argue that a showing of numerosity cannot be based on "mere speculation," Response at 3, but, as Plaintiffs have explained in their brief in support of their motion for class certification, numerosity need not be proven with absolute certainty, and only requires "*some evidence* to support a finding on numerosity." *Rogers v. Lewis & Clark County*, 2022 MT 144 ¶ 21, 409 Mont. 267, 513 P.3d 1256 (emphasis added). As *A.B. v. Haw. State Dep't of Educ*., 30

Defendants further object to including in the class transgender individuals who in the future will want to change the sex marker on their birth certificate or driver's license because, they assert, "Numerosity can include future class members only where 'it would be practicable to join such future members as their claims become ripe,'" citing *A.B. v. Haw. State Dep't of Educ*., 30 F.4th 828, 838 n.4 (9th Cir. 2022). Response at 3-4. That is not a problem here, however. Defendants argue that "it is impossible to know who will identify as transgender in the future and want to amend their birth certificate or driver's license in the future," *id.* at 4, but when someone does identify as transgender and wants to amend these identity documents (which is only when they would become a class member under Plaintiffs' proposed class definition), their claim *will* then be ripe. *See A.B.*, 30 F.4th at 838 ("'The inclusion of future class members in a class is not itself unusual or objectionable, because '[w]hen the future persons referenced become members of the class, their claims will necessarily be ripe.'" (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010).

Moreover, Defendants ignore that, as explained in Plaintiffs' brief in support of their motion for class certification ("BIS") at 8-9, even if numerosity is not established, the Court may also consider various nonnumeric factors such as "judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members[,]" that show that current joinder of all class members is impracticable. *Morrow*, ¶ 10. Defendants have failed to contest Plaintiffs' showing that, even beyond numerosity, these other factors exist in this case. See BIS at 8-9.

B. Questions of Law or Fact Common to the Class

Defendants' sole argument is that Plaintiffs have not shown they meet Rule 23(a)(2)'s requirement of showing that this case involves "questions of law or fact common to the class" is that "[t]o the extent Plaintiffs present 'as applied' challenges to the constitutionality of SB 458, the 2022 Rule, and 'MVD policy and practice,' there is a need to consider the facts with respect to each plaintiff or member of the putative class individually, which undercuts Plaintiffs' claim of

F.4th 828, 838-39 (9th Cir. 2022), cited by Defendants, analogously explained, information about the size of previous years' classes made it "not difficult to reasonably estimate the extent to which class membership might be expected to change each year…. [A]ll that is needed is a sufficient estimate of the number of future class members to allow the court to assess what weight to give to this factor when considered together with the other pertinent considerations."

common facts among the proposed class." Response at 2 n.1, 3. But even a cursory review of the Complaint's allegations demonstrates that this argument woefully misconstrues the "as applied" allegations in Plaintiff's Complaint. Plaintiffs have not alleged that they are challenging SB 458, the 2022 Rule, and the MVD policy and practice as applied to them *individually* in a way that would not also be true as to *other* members of the class. To the contrary, what Plaintiffs have alleged is that they "*and the class members*" are entitled to declaratory relief finding that "the 2022 Rule on its face and *as applied to issuing amended birth certificates*, the new MVD policy and practice *as applied to issuing amended driver's licenses*, and SB 458 *as applied to issuing amended birth certificates and amended driver's licenses* are invalid, illegal, and unconstitutional." Compl. ¶ 12 (emphasis added); *see also id.*, ¶¶ 11, 67-68,73-74, 80-81, 85, 90, and Prayer of Compl., ¶¶ A-C.

C. Typicality

Defendants' only argument in opposition to Plaintiffs having satisfied Rule 23(a)(3)'s requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" is that "[t]he typicality requirement generally 'prevents plaintiffs from bringing a class action against defendants with whom they have not had any dealings.'" Response at 3 (citing *Diaz v. Blue Cross & Blue Shield of Mont.*, 2011 MT 322, ¶ 35, 363 Mont. 151, 267 P.3d 756). But *Diaz* explained that "the typicality requirement is not demanding," that "[t]he typicality requirement under Rule 23(a)(3) is designed to ensure that the named representatives' interests are aligned with the class's interests, the rationale being that [a] named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class," and that "[t]ypicality is met if the named plaintiff's claim stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory." *Id.* (internal quotation marks, italicizations, and citations omitted). Here, that is all the case. The named Plaintiffs' claims stem from the same conduct that Defendants engage in or, absent an injunction will engage in, as to *all* the class members; are based upon the same legal theories applicable to *all* class members; and seek the same relief for not just themselves but for *all* class members. Moreover, Plaintiffs *have* alleged that they have had dealings with Defendants through denying Jane Doe in obtaining an amended driver's license, through the adoption of Rule 2022, and through Defendants' position that SB 458 requires the definition of sex on which

Defendants premised both the 2022 Rule and the MVD policy and practice, which keep both Ms. Kalarchik and Ms. Doe from obtaining amended birth certificates.

D. Fairly and Adequately Protecting the Interests of the Class

Although Defendants claim that "Plaintiffs fail to satisfy *all* the elements of Rule 23(a)," Response at 3 (emphasis added), Defendants fail to make any argument as to why Plaintiffs do not meet Rule 23(a)(4)'s requirement that "the representative parties will fairly and adequately protect the interests of the class." M. R. Civ. P. 23(a)(4). Defendants do not assert that the Plaintiffs are antagonistic to the class or that Plaintiffs' counsel are not qualified, competent, and able to conduct the litigation, even though Plaintiffs have demonstrated the lack of such antagonism and the qualifications, competency, and ability of Plaintiffs' counsel to conduct this litigation. See BIS at 13-18. This element accordingly must be found to be met as well, meaning that all of Rule 23(a)'s requirements for class certification are satisfied in this case.

III. Plaintiffs also satisfy Rule 23(b).

Defendants' lone argument that Plaintiffs "fail to satisfy Rule 23(b)" is that a ruling from this Court that the 2022 Rule, the MVD policy and practice, and SB 458 as applied to both will "apply to all" even if the Court denies class certification. Response at 6-7. Plaintiffs already explain above that this position conflicts with Defendants' arguments in a case now before the Montana Supreme Court and that the district court ruling in *Marquez*, on which Defendants premise their argument, was in error.

Moreover, Rule 23(b) states that its requirements can be satisfied in three different, alternative ways, all of which are met here. Rule 23(b)(1)(A) states that Rule 23(b) is satisfied if "prosecuting separate actions by or against individual class members would create risk of … inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." M. R. of Civ. P. 23(b)(1)(A). Unless this Court grants Plaintiffs' motion for class certification, members of the putative class could file lawsuits in other districts that reach conclusions conflicting with those that may be reached by this Court. That would leave Defendants free to continue to deny those members of the putative class amended birth certificates and driver's licenses and would create incompatible standards for Defendants' conduct should this Court issue an order in this case requiring Defendants to issue such amended birth certificates and driver's licenses to Plaintiffs.

Rule 23(b)(2) states that Rule 23(b) alternatively is satisfied if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." M. R. of Civ. P. 23(b)(2). Plaintiffs already explain above why this is met in this case.

Rule 23(b)(3) states that Rule 23(b) *also* is satisfied if "the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." M. R. of Civ. P. 23(b)(3). Plaintiffs demonstrated above why this is true here.

Furthermore, as Plaintiffs have explained (*see* BIS at 18-19), the Montana Supreme Court ruled in *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶ 13, 396 Mont. 443, 445 P.3d 834, that class certification is warranted under Rule 23(b) where "(1) the party opposing the class has 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" (internal citations and quotation marks omitted). As further explained above, that too is true in this case.

IV. Conclusion

For the reasons set forth above and in Plaintiffs' brief in support of their motion for class certification, Plaintiffs' motion should be granted.

Dated: July 12, 2024

Respectfully submitted,

By: */s/ Alex Rate*
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