UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

STERLING MISANIN, et al., *Plaintiffs*, v. ALAN WILSON, in his official capacity as Attorney General of South Carolina, et al., *Defendants.*	)	Case No. 2:24-cv-04734-RMG

DEFENDANTS' BRIEF IN OPPOSITION
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

David H. Thompson*
Brian W. Barnes*
Nicole J. Moss*
Clark L. Hildabrand*
John D. Ramer*
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Thomas T. Hydrick (Fed. 13322)
Assistant Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
T: 803-734-4127
ThomasHydrick@scag.gov

* *Pro Hac Vice*

Dated: October 31, 2024

Counsel for Defendants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Codes

Other Authorities

INTRODUCTION

Just months ago, the Supreme Court rejected the proposition that plaintiffs may obtain injunctive relief for medical or surgical interventions that they are not personally seeking. *See Labrador v. Poe*, 144 S. Ct. 921 (Mem.) (2024). Indeed, that case arose in this precise context—plaintiffs seeking injunctive relief to access medical or surgical interventions as a treatment for gender dysphoria. *See id.* at 921-22 (Gorsuch, J., concurring). And the Supreme Court stayed a district court decision that purported to award injunctive relief not only with respect to parties not before the court, but also with respect to interventions that no plaintiff was seeking. *See id.* at 921 (staying the order "except as to the provision to the plaintiffs of the treatments they sought below").

Yet, under the guise of a class action, Plaintiffs here attempt to make the very maneuver that the Supreme Court foreclosed. The Court should reject that attempt. Although a class action is used to obtain relief for *parties* not before the Court, it cannot be used to obtain relief for *injuries* not before the Court. And as *Labrador v. Poe* makes clear, Plaintiffs may not obtain injunctive relief for particular medical or surgical interventions that they are not seeking.

Moreover, even for individuals seeking the *same* intervention, the purportedly individualized nature of this medical care—something Plaintiffs' experts have emphasized repeatedly—forecloses Plaintiffs' ability to satisfy Rule 23. Specifically, Plaintiffs cannot show commonality, typicality, or adequacy due to the practice of so-called "gender affirming care," which Plaintiffs' own expert, Dr. Olson-Kennedy, has said turns exclusively on a patient's subjective and individualized "embodiment goals." And for the same reason that Plaintiffs may not pursue injunctive relief for interventions they are not seeking, they also cannot satisfy the requirement of Rule 23(b)(2). Nor can Plaintiffs show numerosity with respect to minors or with respect to surgery for adults. The Court should deny Plaintiffs' motion for class certification.

BACKGROUND[1]

Earlier this year, the State of South Carolina enacted H 4624 to protect minors and state-funding recipients from unproven and harmful medical and surgical interventions used as a treatment for gender dysphoria. As relevant here, the Act takes a number of actions with respect to those interventions. First, it prohibits their use with respect to minors as of August 1. *See* S.C. CODE ANN. §§ 44-42-320(A)-(B). For those minors already using these interventions, the Act creates a drawdown period that concludes on January 31, 2025. *See id.* § 44-42-320(C). The Act also makes it a crime to knowingly perform a *genital* gender reassignment surgery on minors. *See id.* § 44-42-320(E). In addition, the Act prohibits public funds from being "used directly or indirectly for gender transition procedures." *Id.* § 44-42-340. It likewise provides that South Carolina's "Medicaid Program shall not reimburse or provide coverage" for them. *Id.* § 44-42-350.

The Act can be enforced in a number of ways. First, a person may bring "a claim" for "compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief" in light of "an actual or threatened violation" for the prohibition on gender transitions for minors. *Id.* § 44-42-360(B). Second, if an individual provides gender transitions to minors, "the appropriate licensing board" will deem it "unprofessional conduct" and the provider will "be subject to discipline by the licensing entity with jurisdiction over the physician, mental health provider, or other medical health care professional." *Id.* § 44-42-360(A). Finally, the Attorney General may bring an action to enforce compliance with both the prohibition on gender transitions for minors and the prohibition on the use of public funds for gender transition procedures. *See id.* § 44-42-360(F). The Act took effect on May 21, 2024.

---

[1] Like Plaintiffs, *see* Pls'. Mot. for Class-Cert. at 3 n.2, Doc. 6 (Aug. 30, 2024) ("Class-Cert. Mot."), Defendants incorporate by reference the statement of facts contained in their concurrently filed opposition to Plaintiffs' motion for a preliminary injunction.

Over three months later, the Plaintiffs filed their complaint in this case. *See* Compl., Doc. 1 (Aug. 29, 2023). The complaint seeks injunctive relief against enforcement of the Act[2] by the Attorney General, the South Carolina Department of Health and Human Services (DHHS), the Medical University of South Carolina (MUSC), and the South Carolina Public Benefit Authority (PEBA). *See id*. ¶¶ 18-45, pp. 58-60 (prayer for relief). Plaintiffs claim that enforcement of the Act violates the Equal Protection Clause, the doctrine of substantive Due Process, the Affordable Care Act (ACA), the Medicaid Act, the Americans with Disabilities Act, and the Rehabilitation Act. *See id*. ¶¶ 198-267.

Plaintiffs simultaneously filed a motion for a preliminary injunction with respect to some of their claims and have sought to certify several classes. *See* Mot. for Prelim. Inj., Doc. 7 (Oct. 30, 2024). Specifically, they seek to certify (1) a class for minors "diagnosed with gender dysphoria and whose medically indicated treatment, as judged by their licensed medical professional, includes or will include the provision of 'gender transition procedures,' as defined by H 4624," (2) a class for parents of minors in the minor class, (3) a class for "individuals with gender dysphoria who receive health insurance through a state-funded health insurance plan, such as South Carolina Medicaid or South Carolina's PEBA, and who, because of S.C. Code Ann. § 44-42-340, are or will be denied coverage for medically indicated 'gender transition procedures,' as defined by H 4624," and (4) a class for "individuals with gender dysphoria who receive medical care through MUSC but who, because of S.C. Code Ann. § 44-42-340, are or will be denied care for medically indicated 'gender transition procedures,' as defined by H 4624." Class-Cert Mot. 2. Defendants now file this opposition to Plaintiffs' motion for class certification.

[2] Although Plaintiffs' motions are broadly framed as a challenge to H 4624 in its entirety, Plaintiffs do not challenge Section 2 of the Act, which is codified at S.C. CODE ANN. § 59-32-36. Thus, that provision will remain in effect regardless of any injunctive relief Plaintiffs obtain.

LEGAL STANDARD

A "party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). "Rule 23 does not set forth a mere pleading standard." *Dukes*, 564 U.S. at 350. Thus, a Court may not "simply . . . accept the allegations of a complaint at face value in making class action findings," but rather must "mak[e] 'findings' that the requirements of Rule 23 have been satisfied." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004). And the Plaintiffs bear the burden of demonstrating their entitlement to class certification by a preponderance of the evidence. *See In re Blackbaud, Inc., Customer Data Breach Litig.*, MDL No. 2972, 2024 WL 2155221, at *20 (D.S.C. May 14, 2024); *see also* Class-Cert. Mot. 10 (conceding Plaintiffs must show Rule 23 requirements are met by a preponderance of the evidence).

ARGUMENT

Rule 23 establishes a two-part test for class certification. First, Plaintiffs must establish that their proposed classes satisfy the four requirements of Rule 23(a): (1) the classes are "so numerous 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[es]"; and (4) "the representative parties will fairly and adequately protect the interests of the class[es]." FED. R. CIV. P. 23(a). "These basic prerequisites are commonly referred to as numerosity, commonality, typicality, and adequacy, respectively." *Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 254 F.R.D. 68, 71 (E.D.N.C. 2008).

Once Plaintiffs satisfy the requirements of Rule 23(a), they must also show that the putative class fits into one of three categories enumerated in Rule 23(b). *Gariety*, 368 F.3d at 362. Here, the Plaintiffs rely exclusively on Rule 23(b)(2). Class-Cert Mot. 21-22. That provision requires Plaintiffs to show that Defendants have "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." FED. R. CIV. P. 23(b)(2). Here, Plaintiffs neither satisfy Rule 23(a) nor Rule 23(b)(2).

I. Plaintiffs May Not Certify A Class Seeking Relief That They Lack Standing To Obtain.

The named Plaintiffs for each class must have Article III standing in order to bring an action on behalf of class members. "That a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016) (cleaned up). Thus, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also* 1 WILLIAM RUBENSTEIN & HERBERT NEWBERG, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 2.3 (6th ed. 2024).

Here, as explained more fully in Defendants' accompanying opposition to Plaintiffs' motion for a preliminary injunction, Plaintiffs lack Article III standing for various aspects of their claims.[3]

A. The Named Minor And Parent Plaintiffs Lack Standing To Certify A Class.

The Minor and Parent Plaintiffs have failed to show redressability because they have not sought injunctive relief against enforcement of the private cause of action or the licensing provision in Section 44-42-320(A)-(B). *See* Defs.' PI Opp'n I.A.1. Therefore, even if the Minor and Parent Plaintiffs obtained the injunctive relief they seek, that injunction would not remedy

[3] To avoid repeating the entirety of the same analysis in this memorandum, Defendants incorporate here their standing analysis from their PI opposition brief. *See* Defs.' PI Opp'n I.A.

their injuries because private parties and the relevant medical licensing boards "remain free to enforce, or not to enforce, those policies." *Murthy v. Missouri*, 144 S. Ct. 1972, 1995 (2024). And Plaintiffs have failed to identify any medical professional in the State of South Carolina who would offer the interventions at issue here while the Act's private cause of action and licensing provision remain enforceable. Thus, no named plaintiff has standing to support certification of the "Minor Class" or "Parent Class." *See* Class-Cert Mot. 2.

Separately, even if the Minor Plaintiffs or Parent Plaintiffs have standing to obtain injunctive relief with respect to *some* medical interventions, they do not have standing to pursue injunctive relief with respect to any other. As the Supreme Court's recent stay decision in this very context makes clear, Plaintiffs may only obtain injunctive relief for the particular "treatments they sought" in their papers. *Labrador*, 144 S. Ct. at 921 (Gorsuch, J., concurring). Because courts may only "issu[e] equitable orders that redress the injuries of the plaintiffs before them," a plaintiff may not seek injunctive relief for interventions the plaintiff is not pursuing. *Id.* at 926 (Gorsuch, J., concurring).

Under *Poe v. Labrador*, then, the Court must assess standing and the scope of injunctive relief only with respect to the interventions that the Plaintiffs actually seek here. And no Plaintiff in this case has used, is using, or intends to use puberty blockers as part of a gender transition. Moreover, Plaintiffs have provided no evidence that any Minor Plaintiff intends to seek a surgery that would be prohibited by Section 44-42-320. *See, e.g.*, Gary Goe Dep. 96:24-97:3 (attached hereto as Exhibit 1) (stating "there's no surgery" that Gary Goe is "aware of being contemplated for Grant" Goe). And even if Grant Goe intended to seek some form of surgery (*e.g.*, a mastectomy) as a treatment for gender dysphoria, Plaintiffs have not demonstrated standing for relief with

respect to any other surgery, such as genital surgery.[4] Therefore, to the extent the Minor and Parent Plaintiffs have standing to seek injunctive relief for *some* interventions such as cross-sex hormones, there is no plaintiff with standing to support certifying the Minor Class or Parent Class with respect puberty blockers or surgeries for minors.

B. No Plaintiff Has Standing To Certify A Class Seeking Injunctive Relief Against MUSC.

There is no plaintiff with standing to support a class action against MUSC. The only plaintiff to have sued MUSC is Sterling Misanin. And the only intervention Misanin is currently seeking is a phalloplasty, but Misanin has no intention of seeking that surgery at MUSC because Misanin does not even believe there is a doctor at MUSC who could perform the surgery. *See* Ex. 7 to Defs.' PI Opp'n, Sterling Misanin Dep. 63:16-66:4. Thus, Misanin has no injury in fact that is traceable to MUSC and no standing to support a class action seeking injunctive relief against MUSC. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021); *see also* Defs.' PI Opp'n I.A.4.

II. Plaintiffs Have Failed To Satisfy Federal Rule Of Civil Procedure 23(a) For Their Requested Classes.

A proposed class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Plaintiffs fail to satisfy Rule 23(a) in several respects. First, they have failed to satisfy numerosity with respect to the Minor Class. Second, they have failed to satisfy the remaining three requirements of 23(a), which "tend to merge," *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 337 (4th Cir. 1998) (quoting *Falcon*, 457 U.S. at 157 n.13), due to the diversity of the putative class members, the distinct interventions that may be sought, and the

[4] Genital surgeries on minors would not necessarily be a null set. Plaintiffs' expert Dr. Olson-Kennedy testified that she referred a minor for a "vulvovaginoplasty" within the last year or so. *See* Ex. 2 to Defs.' PI Opp'n, Johanna Olson-Kennedy Dep. 84:19-85:8. But no minor Plaintiff here is seeking any surgery.

necessarily individualized "treatment" that Plaintiffs' own experts champion. Finally, although Plaintiffs cite cases that previously certified classes in this context, *see* Class-Cert Mot. 10-11, those classes were certified before the Supreme Court's decision in *Labrador*, which provides the proper analysis for disentangling the various medical and surgical interventions at issue. That analysis matters because it shows that "gender-affirming care" is not a monolith but rather a collection of various and distinct interventions—a conclusion that carries consequences with respect to class certification.

A. Plaintiffs Have Failed To Show Numerosity For The Minor And Parent Classes.

"To satisfy the numerosity requirement, [Plaintiffs] must show that 'the class is so numerous that joinder of all members is impracticable.'" *Mitchell v. Conseco Life Ins. Co.*, No. 8:12-cv-548-TMC, 2013 WL 2407129, at *2 (D.S.C. June 3, 2013) (quoting FED. R. CIV. P. 23(a)(1)). For this requirement, "numbers alone are not controlling," and a district court should consider "all the circumstances of the case" when assessing whether Plaintiffs have satisfied it. *Ballard v. Blue Shield of S.W. Va., Inc.*, 543 F.2d 1075, 1080 (4th Cir. 1976). The Plaintiffs bear the burden to show that class members are so numerous "that their joinder is impracticable." *Yates v. NewRez LLC*, 686 F. Supp. 3d 397, 404 (D. Md. 2023) (citing *Poindexter v. Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972) and *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 356-57 (3d Cir. 2013)).

Here, Plaintiffs have offered essentially no proof of their own with respect to numerosity, relying instead on purported "information and belief." *See* Class-Cert Mot. 12. Defendants' responses to Plaintiffs' interrogatories regarding numerosity thus provide the best evidence of numbers for the putative classes. And those numbers reveal that Plaintiffs cannot demonstrate

numerosity with respect to minors for *any* medical or surgical intervention or with respect to adults for surgery.

Beginning with minors, the data shows a lack of numerosity for all three types of interventions: puberty blockers, cross-sex hormones, and surgeries. For surgeries, both MUSC and DHHS identified *zero* minors having received some form of surgery for gender dysphoria. *See* MUSC Resp. to Pls.' First Set of Requests for Admission and Interrogatories at 10-11 (attached hereto as Exhibit 2) (response to interrogatory No. 7) ("MUSC ROG Resp."); DHHS Resp. to Pls.' First Set of Requests for Admission and Interrogatories at 8-9 (attached hereto as Exhibit 3) (response to interrogatory no. 5) ("DHHS ROG Resp."). For puberty blockers, DHHS identified 9 minor patients who possibly received pubertal suppression to treat gender dysphoria. *See* DHHS ROG Resp. at 9.[5] MUSC identified 7 minor patients to have received *either* puberty blockers or cross-sex hormones. *See* MUSC ROG Resp. at 9. And PEBA identified only 19 minors to have received *any* intervention—*i.e.*, puberty blockers, cross-sex hormones, or surgeries. *See* PEBA Resp. to Pls.' First Set of Requests for Admission and Interrogatories at 8 (attached hereto as Exhibit 4) (response to interrogatory no. 5). Although PEBA's data does not separate out puberty blockers, cross-sex hormones, and surgeries, that low number would be insufficient to establish numerosity in any event.

With respect to cross-sex hormones in particular, DHHS identified 44 minors who had submitted claims for hormones—but only 13 of those patients had a diagnostic code for gender

[5] If anything, this number is possibly an overestimation. DHHS calculated the number of minor patients with a diagnostic code associated with gender dysphoria and cross-referenced whether the patient had received puberty blockers. *See* DHHS ROG Resp. at 8-9 (explaining search process). But the data does not conclusively demonstrate that these patients received puberty blockers *for* gender dysphoria; for example, it is possible a patient could have received puberty blockers to treat central precocious puberty, *see, e.g.*, Ex. 1 to Defs.' PI Opp'n ¶¶ 70, 73 ("Cantor Decl."), and then later (or separately) was diagnosed with gender dysphoria.

dysphoria associated with the claim. *See* DHHS ROG Resp. at 9. Moreover, that number may include the 9 individuals who received pubertal suppression as well, meaning there may be as few as 13 patients who received cross-sex hormones as a treatment for gender dysphoria. *See id.* But even assuming the number *is* 44, Plaintiffs have still failed to demonstrate numerosity because they have not explained why it would be impracticable to join those individuals.

Whichever way one slices these numbers, it is clear that Plaintiffs have failed to demonstrate numerosity for the Minor Class and Parent Class. And to the extent Plaintiffs could demonstrate numerosity with respect to cross-sex hormones, under the inquiry required by *Poe v. Labrador*, Plaintiffs have failed to demonstrate numerosity with respect to puberty blockers and surgeries. Therefore, the Court should at least deny class certification for the Minor and Parent Classes with respect to those interventions.

In addition, the Court should deny class certification with respect to surgeries for adults. DHHS identified a total of only 16 surgeries (12 genital surgeries and 4 non-genital surgeries), and some of those surgeries may have been performed on the same individual given the lack of granularity in the data. *See* DHHS ROG Resp. at 7 (response to interrogatory no. 4). Similarly, MUSC identified only 17 individuals with gender dysphoria who were current patients or had been patients within the preceding two years and received some form of gender transition surgery. *See* MUSC ROG Resp. at 10-11 (response to interrogatory no. 7). Therefore, Plaintiffs have also failed to demonstrate numerosity for any class with respect to surgery.

Finally, even if these past numbers capture the full statistical picture, they do not (and cannot) account for the possibility of individuals later detransitioning. Without "long-term follow-up" studies (which do not exist) "it cannot be known what proportion of those who transition and persist through the early stages of puberty will later (for example as young adults) come to regret

having transitioned and then *de*transition." Cantor Decl. ¶ 145. "Respected national health care systems of several countries have warned of the risk that medical transition of minors can lead to detransition and severe regret due to irreversible physical harms." *Id.* ¶¶ 175-80. Thus, even though a minor possibly obtained puberty blockers as a treatment for gender dysphoria, that does not mean the minor should be counted as a class member seeking cross-sex hormones or surgery. And even those who receive the panoply of interventions may subsequently cease identifying as transgender and detransition, thus removing them as a class member. To demonstrate numerosity, Plaintiffs would need to demonstrate that these particular patients will continue to identify as transgender in the future—which is a task that even their experts have admitted is impossible. *See* Ex. 3 to Defs.' PI Opp'n, Shumer Dep. 33:22-25 ("Q. And you cannot know for certain what a minor's gender identity will be in the future, correct?" "A. Correct").

B. Plaintiffs Have Failed To Show Commonality Because The "Treatment" Plaintiffs Seek Is Indisputably Individualized.

Plaintiffs bear the burden of proving that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 349-50 (citation omitted). "This does not mean merely that they have all suffered a violation of the same provision of law," but rather requires a showing that the claims of the class members "depend upon a common contention" that "must be of such a nature that it 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." *Id.* at 350.

Although claims and injuries need not be identical, "commonality requires a showing that the particular injury suffered by each member of the putative class was caused by a policy or practice common to all of them." *Singletery v. Equifax Info. Servs., LLC*, No. 2:09-cv-489-TMP,

2011 WL 9133115, at *19 (N.D. Ala. Sept. 22, 2011). Commonality is thus necessarily lacking where individualized factual or legal determinations are required to assess the standing and entitlement to relief of each class member. *See, e.g.*, *Rose v. SLM Fin. Corp.*, 254 F.R.D. 269, 272 (W.D.N.C. 2008) (denying class certification in a contract case because "it would be inappropriate to rule on Plaintiff's claims without considering the unique circumstances of individual class members," and the "myriad of variations of each plaintiff's situation defeats commonality"); *Dyer v. Air Methods Corps.*, No. 20-cv-2309-DCN, 2021 WL 1840833, at *5 (D.S.C. May 7, 2021) (explaining "there would be no commonality" if class claims required court to answer "with respect to each and every member" questions like "whether the patient manifested assent to the transport through conduct and/or statements").

Here, individualized factual and legal determinations are necessary to assess Plaintiffs' claims. Indeed, Plaintiffs' own description of their classes unequivocally demonstrates the individualized nature of their claims. For the Minor Class and Parent Class, Plaintiffs' description turns on whether the individuals desire "medically indicated care, as judged by their licensed medical professional." Class-Cert Mot. 2. But this description raises one of two problems. First, membership in the class turns on the subjective determination of potentially handpicked "medical professionals" and has nothing to do with Defendants' conduct. *See* 3 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra,* § 7:27 (noting the "pitfall" of "classes that are defined in ways in which membership can only be subjectively determined").

Alternatively, whether specific interventions are "medically indicated" for any particular individual turns on facts unique to that individual. Plaintiffs' own experts have stated, over and over again, that medical and surgical interventions are "individualized." As Dr. Olson-Kennedy testified, "every patient has to be evaluated as an individual based on the patient's history,

comorbidities and relationships, among many other variables." Olson-Kennedy Dep. 116:17-22. And more specifically, "the needs of each person are not identical to the needs" of others—instead, "the recommendations we make have to be specific for the individual that's in front of us." *Id*. at 116:8-13. Dr. Olson-Kennedy is not alone. Another of Plaintiffs' experts, Dr. Shumer, likewise insists that "no two patients are the same." Shumer Dep. 156:11-16; *see also id.* at 153:14-16 (agreeing "that gender-affirming care is highly individualized").

Most significantly, in Dr. Olson-Kennedy's opinion, "for any particular patient, the gender-affirming medical intervention that is indicated, is driven by the patient's embodiment goals." Olson-Kennedy Dep. 91:25-92:5. In other words, a patient's "embodiment goals" determine what is medically necessary. That is the definition of a class "in which membership can only be subjectively determined." 3 NEWBERG & RUBENSTEIN, *supra*, § 7:27. Therefore, as Plaintiffs' own experts have testified, the use of the interventions at issue here is a highly individualized process that turns on numerous variables. And ultimately, a patient's personal, subjective "embodiment goals" are what dictate the treatment. This type of diverse, subjective, and amorphous analysis is antithetical to the class-action process. Plaintiffs have thus failed to demonstrate commonality.

C. Plaintiffs Have Failed To Show Typicality Given The Diversity Of Putative Class Members And The Distinct Interventions They Seek Or Will Seek.

Plaintiffs' proposed classes cannot be certified for an additional (and related) reason: the class representatives do not assert claims that are typical of the class. Rule 23(a) requires Plaintiffs to prove that the named Plaintiffs' claims are "typical of the claims . . . of the class." FED. R. CIV. P. 23(a)(3). When assessing typicality, courts assess "'whether a sufficient relationship exists between the injury of the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.'" *Thorn v. Jefferson-Pilot Life Ins. Co.*, No. 3:00-2782-22, 2004 WL 5745993, at *7 (D.S.C. Dec. 2, 2004) (quoting 1 ALBA CONTE

& HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS 327, § 3:13 (4th ed. 2003)). "Typicality requires a representative's claims to be typical of the claims of every class member." *Bradley & Black v. Med-Trans Corp.*, No. 3:20-cv-02679-SAL, 2022 WL 22887053, at *5 (D.S.C. Mar. 31, 2022). It thus ensures "that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class." *Broussard*, 155 F.3d at 340 (quotation marks omitted).

Here, the class members vary in numerous ways that preclude a finding of typicality. For example, with respect to the Minor Class and Parent Class, the named plaintiffs are seeking cross-sex hormones exclusively; but the class is defined to include minors seeking puberty blockers or surgeries. The analysis of the medical evidence for these vastly different interventions is distinct. *See, e.g.*, Cantor Decl. ¶ 290 (noting distinct risk-benefit ratios for using puberty blockers and cross-sex hormones sequentially or independently). And the analysis changes for the different sexes and ages as well: "The harms of medicalized transition of gender does or may differ between male-to-female and female-to-male cases, differ between ages of transition, and differ according to the age-of-onset of the gender dysphoria." *Id*. ¶ 264. Thus, "[e]vidence and conclusions about harms (and safety) cannot be generalized or extrapolated across such cases." *Id.* In sum, determining whether any particular intervention is "medically necessary" or determining whether the State is justified in restricting any particular intervention turns on a different analysis depending on the intervention at issue, the age of the patient, and the patient's "comorbidities," "among many other variables." Olson-Kennedy Dep. 116:17-22.

A particularly striking example of the diversity of patients within Plaintiffs' proposed classes relates to "nonbinary" individuals. Plaintiffs appear to be assuming nonbinary individuals are within their contemplated classes. *See* Pls.' Prelim. Inj. Mot. 1 n.2 (explaining that a "nonbinary

person is someone whose gender identity does not clearly align with either male or female identity, and many nonbinary people identify themselves as transgender"). But Plaintiffs' own expert, Dr. Shumer, does not believe that nonbinary individuals would satisfy the criteria for medical interventions. *See* Shumer Dep. 151:1-16.

In addition, as explained above, even for patients seeking the *same* intervention, decisions are based on an individualized process that is "driven by the patient's embodiment goals," which are, by definition, unique and subjective. Olson-Kennedy Dep. 91:25-92:5. Plaintiffs have thus failed to demonstrate typicality for many of the same reasons they failed to demonstrate commonality.

D. Plaintiffs Have Failed To Show Adequacy Given The Diversity Of Putative Class-Members And The Distinct Interventions They Seek.

Rule 23(a)(4) permits class certification only when "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). A class representative must "'possess the same interest and suffer the same injury' as the [other] class members." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 216 (1974)). "The adequacy of representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *Olvera-Morales v. Int'l Lab. Mgmt. Corp.*, 246 F.R.D. 250, 258 (M.D.N.C. 2007) (internal quotation marks omitted).

The issue of adequacy is especially pronounced in the context of medical conditions. In *Amchem*, "named parties with diverse medical conditions sought to act on behalf of a single giant

class rather than on behalf of discrete subclasses." 521 U.S. at 626. The result was that "the interests of those within the single class are not aligned," and the class representatives were unable to provide "fair and adequate representation for the diverse groups and individuals affected." *Id.* at 626-27.

Here, the analysis above for commonality and typicality also counsels against a finding of adequacy. For example, the named plaintiffs for the Minor Class or Parent Class have no incentive to pursue the claims of all other class members because they are not seeking puberty blockers or surgeries. Similarly, Misanin is seeking a phalloplasty while Jane Doe is seeking a vaginoplasty; neither is seeking a mastectomy. Therefore, these plaintiffs have no legal interest in advocating for interventions they are neither seeking nor eligible for. And that profile raises the risk of trading-off relief that *Amchem* warned about: Plaintiffs pursuing cross-sex hormones may be willing to sacrifice part an injunction related to puberty blockers as part of a settlement. *See id*. (warning of situations where "the interests of those within the single class are not aligned"). Finally, even within the class of individuals seeking *the same* intervention, the individualized nature of the medical process, *see* II.B *supra*, again counsels against a finding of adequacy. For example, plaintiffs without an Autism Spectrum Disorder (ASD) may not "adequately protect the interests" of those individuals with gender dysphoria who *do* have an ASD. FED. R. CIV. P. 23(a)(4). Thus, Plaintiffs' motion for class certification should be denied for lack of adequacy as well.

III. Plaintiffs Have Failed To Satisfy Rule 23(b)(2) Because Relief For The Classes Would Require Individualized Injunctions.

Rule 23(b)(2) allows class treatment only when "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." FED. R. CIV. P. 23(b)(2). Therefore, "claims for *individualized* relief . . . do not satisfy the Rule." *Dukes*, 564 U.S.

at 360. "In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* "It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Id.* This conclusion follows from the fact that "Rule 23 'stems from equity practice' that predated its codification." *Id.* at 361 (quoting *Amchem*, 521 U.S. at 613).

In *Labrador v. Poe*, the Supreme Court concluded that plaintiffs could not obtain injunctive relief for interventions they were not seeking.[6] As the lead concurrence explained, that result followed from the traditional rules of equity that govern federal courts. *See Labrador*, 144 S. Ct. at 923 (Gorsuch, J., concurring). Specifically, the Supreme Court "has long held that a federal court's authority to fashion equitable relief is ordinarily constrained by the rules of equity known 'at the time of the separation of' this country from Great Britain." *Id.* (quoting *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999)). In other words, the Court's decision in *Labrador v. Poe* turned on the "equity practice that predated" the adoption of Rule 23. *Dukes*, 564 U.S. at 361 (internal quotation marks omitted).

As *Labrador v. Poe* shows, Plaintiffs' request for class-wide injunctive relief does not satisfy Rule 23(b)(2). Instead, under *Labrador v. Poe*, Plaintiffs may *only* seek injunctive relief for the particular "treatments" they are seeking here. 144 S. Ct. at 921. And therefore, any class members seeking *other* interventions would require "a *different* injunction or declaratory judgment against the defendant[s]." *Dukes*, 564 U.S. at 360. As *Dukes* explained, the nature of that relief

[6] As mentioned above, Plaintiffs have pointed to no class being certified in a similar case *after* the Supreme Court's decision in *Labrador v. Poe*.

precludes certification under Rule 23(b)(2). *Id.* at 360-61. Plaintiffs' motion for class-certification should thus be denied for this reason as well.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for class certification.

Dated: October 31, 2024

Respectfully submitted,

/s/ Thomas T. Hydrick
Thomas T. Hydrick (Fed. 13322)
Assistant Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
T: 803-734-4127
ThomasHydrick@scag.gov

David H. Thompson*
Brian W. Barnes*
Nicole J. Moss*
Clark L. Hildabrand*
John D. Ramer*
Cooper & Kirk, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

* *Pro Hac Vice*

Counsel for Defendants