

Akilah Lane (Bar No. 60742990)
Alex Rate (Bar No. 11226)
ACLU Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
Telephone: 406-203-3375
lanea@aclumontana.org
ratea@aclumontana.org

Malita Picasso*
Jon W. Davidson*
(admitted only in California)
**American Civil Liberties Union
Foundation**
125 Broad Street
New York, NY 10004
Telephone: 212-549-2561
Facsimile: 212-549-2650
mpicasso@aclu.org
jondavidson@aclu.org

F. Thomas Hecht*
Tina B. Solis*
Seth A. Horvath*
Nixon Peabody LLP
70 West Madison Street, Suite 3500
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

Elizabeth Halverson PC
1302 24th Street West #393
Billings, MT 59102
Telephone: 406-698-9929
ehalverson@halversonlaw.net

* Admitted *pro hac vice*

**IN THE THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE**

AMELIA MARQUEZ, an individual; and)
JOHN DOE, an individual,)
)
 Plaintiffs,)
)
 v.)
)
 STATE OF MONTANA; GREGORY)
 GIANFORTE, in his official capacity as the)
 Governor of the State of Montana; the)
 MONTANA DEPARTMENT OF PUBLIC)
 HEALTH AND HUMAN SERVICES; and)
 CHARLES T. BRERERTON, in his official)
 capacity as the Director of the Montana)
 Department of Public Health and Human)
 Services,)
)
 Defendants.)
)

Case No. DV 21-00873

Hon. Michael G. Moses

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

INTRODUCTION

Plaintiffs Amelia Marquez (“Ms. Marquez”) and John Doe (“Mr. 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 all transgender people born in Montana who currently want, or who in the future will want, to amend the sex designation on their Montana birth certificates; 2) appointing the named Plaintiffs as representatives of the class; and 3) appointing the ACLU Montana Foundation, Inc., the American Civil Liberties Union Foundation, Nixon Peabody, L.L.P., and Elizabeth Halverson, P.C., as class counsel.

FACTUAL BACKGROUND

Plaintiffs filed this action against the State of Montana and various state officials in their official capacity (together, “Defendants”) challenging Senate Bill 280 and the regulation adopted pursuant to it (together, “SB 280” or the “Act”) under the Constitution and laws of Montana.

Plaintiffs also challenge a Permanent Rule (the “Rule”) promulgated by Defendant Department of Public Health and Human Services (“DPHHS”) following this Court’s issuance of a preliminary injunction. The Rule was designed to avoid compliance with the preliminary injunction and to deny transgender individuals the ability to amend the sex marker on their birth certificates.

On April 21, 2022, this Court granted Plaintiffs’ motion for preliminary injunction and enjoined Defendants “from enforcing any aspect of SB 280 during the pendency of this action.” Finding of Fact, Conclusion of Law and Order (the “PI Order”) at 35. Pursuant to Montana law, once a preliminary injunction is entered, the parties are required to return to the status quo, which is defined by law as the “last actual, peaceable, noncontested condition preceding the controversy in this matter”—specifically, “that which existed prior to the enactment of SB 280.”

PI Order ¶ 181. The status quo immediately prior to the enactment of SB 280 was the 2017 regulations governing applications for amendments to birth-certificate sex markers. These rules “permitted a transgender person to amend his or her original birth certificate by submitting to DPHHS a completed gender designation form attesting to gender transition or providing government-issued identification displaying the correct sex designation or providing a certified court order indicating a gender change.” PI Order ¶ 61. In light of these clear findings and the Order of the Court, transgender people born in Montana are presently entitled to amend their birth certificates pursuant to the 2017 regulations.

On May 23, 2022, after several weeks of disregarding the PI Order and ignoring the 2017 regulations, DPHHS promulgated a Temporary Emergency Rule (“Temporary Rule”) prohibiting all amendments to birth-certificate sex markers arising from gender transition, gender identity, or change in gender identity. MAR Notice No. 37-1001 ¶ 11. This was a direct assault on transgender individuals’ rights and a violation of the Court’s instruction to maintain the status quo. It also was a violation of the equal-protection clause of the Montana Constitution and the Montana Governmental Code of Fair Practices (“GCFP”).

The Temporary Rule also provided that, in the event the PI Order was lifted or reversed, SB 280 would be reinstated along with its burdensome and discriminatory requirements. Thus, pursuant to the Temporary Rule, any dismissal of Plaintiffs’ suit in the absence of a permanent injunction against the enforcement of SB 280 would allow SB 280 to take effect once again and leave Plaintiffs and members of Plaintiffs’ proposed class subject to the burdens of the Act.

On July 26, 2022, DPHHS converted the Temporary Rule to a Permanent Rule (together, the “Rules”). The provisions of the Permanent Rule are identical to those of the Temporary Rule. The Permanent Rule also violates the Court’s order to maintain the status quo as well as the

equal-protection and due-process clauses of the Montana Constitution and the prohibition on sex discrimination in the GCFP.

Based on Defendants' conduct, Plaintiffs filed a motion asking the Court to confirm that its PI Order required reverting to the status quo preceding the pending controversy—i.e., the 2017 regulations. On September 19, 2022, this Court issued a written order granting in part Plaintiffs' motion seeking clarification of the preliminary injunction ("Clarification Order"). The Court reaffirmed that the PI Order required Defendants "[to] perform their obligations under this Court's Order and preserve the status quo by reverting to the 2017 DPHHS regulations governing the amendment of birth certificates." Clarification Order at 10.

By issuing the Rules, Defendants not only sought to take the State backwards to a time preceding the 2017 regulations, but have, in fact, gone much further by attempting to abolish *any* opportunity for transgender Montanans to correct the sex designation on their birth certificates. Defendants enacted Rules that not only failed to preserve the status quo, as required under this Court's orders and Montana law, but sought to upend and reverse the status quo. DPHHS has concluded that it is preferable to deny transgender individuals the ability to change their birth-certificate sex markers—regardless of the consequences to Plaintiffs and members of the proposed class—than to comply with the Court's Orders and return to the 2017 regulations. 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 280 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, ¶ 7, 445 P.3d 834, ¶ 7 (quoting *Roose v. Lincoln Cty. Emp. Grp. Health Plan*, 2015 MT 324, ¶ 14, 381 Mont. 409, ¶ 14, 362 P.3d 40, ¶ 14). 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 Proc. Before Trial*, § 10:252 (Rutter Group 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.² 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 Yellowstone 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 Montana Rule of Civil Procedure 23. *Kramer v. Fergus Mutual Ins. Co.*, 2020 MT 258, ¶ 14, 401 Mont. 489, ¶ 14, 474 P.3d 310, ¶ 14. 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).

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, ¶ 52, 288 P.3d 193, ¶ 52.

² Plaintiffs maintain that, regardless of the availability of class-wide relief, their individual claims will remain live pursuant to well-recognized exceptions to the mootness doctrine, including the public-interest exception and the capable-of-repetition-yet-evading-review doctrine.

A. 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, ¶ 18, 308 P.3d 38, ¶ 18 (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, ¶ 15, 307 P.3d 291, ¶ 15.

Plaintiffs’ proposed class definition is “all transgender people born in Montana who currently want, or who in the future will want, to amend the sex designation on their Montana birth certificates.” Second Am. Compl. ¶ 38.

B. 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.

1. Joinder of All Proposed Class Members Is Impracticable.

Joinder is impractical because Plaintiffs’ proposed class is sufficiently numerous. *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 20, 385 Mont. 396, ¶ 20, 384 P.3d 455 ¶ 20. “There is no bright-line number of class members that will establish numerosity.” *Morrow v. Monfric., Inc.*, 2015 MT 194, ¶ 9, 380 Mont. 58, ¶ 9, 354 P.3d 558, ¶ 9. “Instead, the numerosity of the class and the impracticability of joinder must be determined on a case by case basis, with consideration given to all of the surrounding circumstances.” *Id.* (citation omitted). “While . . . 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, ¶ 21, 513 P. 3d 1256, ¶ 21. “Generally, fewer than 21 potential class members is regarded as inadequate, while more than 40 is likely to be sufficient.” *Morrow*, ¶ 19. (citation omitted).

According to a 2022 report published by the Williams Institute, approximately .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% 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

³ Andrew R. Flores et. al., *How Many Adults Identify as Transgender in the United States* (2022), The Williams Institute, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

⁴ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016), *The Report of the 2015 U.S. Transgender Survey* 88 (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (“Trans Survey”); U.S. Census, *Montana Population Topped the 1 Million Mark in 2020* (Aug. 21, 2021) available at <https://www.census.gov/library/stories/state-by-state/montana-population-change-between-census->

and have not yet amended the sex marker on their birth certificates to be consistent with the sex they identify as. 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). William B. Rubenstein, 1 *Newberg and Rubenstein on Class Actions* § 3:11 (6th ed. June 2022 Update). While numerosity of the class strongly supports finding that joinder may be impracticable, “it is not the only such situation[.]” and the Court may also consider, as others have, various nonnumeric 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 ability of class members to initiate lawsuits; (c) the geographic dispersion of the class; and (d) the existence of an indeterminate number of future class members eligible for injunctive relief. *Id.* (internal citations and quotation marks omitted)

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. Trans 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, including

decade.html. (noting that Montana’s total population in 2020 of 1,084,225, of whom 78.4% (or 850,032) were adults).

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 amendments, it is not possible to identify with any precision the current membership of the class. “The inclusion of future class members 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. Haw. State Dep’t of Educ.*, 30 F.4th 828, 838-839 (9th Cir. 2022) (internal citations omitted). “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.” William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3.3 (6th ed. June 2022 Update). 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. Given, however, the approximate number of current class members 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.*, 838-840.

2. 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 that is capable of class wide 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, ¶ 5, 458 P.3d 1031, ¶ 5 (quoting *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, ¶ 25, 379 Mont. 265, ¶ 25, 350 P.3d 39, ¶ 25). 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, “class litigation must present a common issue of law *or* fact... [R]egardless of differences among class members, [the commonality] element is met if a single issue is common to all.” *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, ¶ 16, 342 Mont. 380, ¶ 16, 180 P.3d 1164, ¶16 (internal citations omitted); *see also Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 257 (C.D. Cal. 2008) (“Courts have found that a single common issue of law or fact is sufficient. . .”) (internal citations omitted).

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 SB 280 and the Rules deny class members equal protection of the law by discriminating against transgender people on the basis of sex and gender identity;
- (2) Whether SB 280 violates class members' right to privacy by forcing them to disclose protected and private information in order to obtain an accurate birth certificate;
- (3) Whether SB 280 infringes on class members' right to individual autonomy in making medical decisions without government intrusion, including the right to refuse unwanted or unnecessary medical treatment;
- (4) Whether SB 280 is unconstitutionally vague and therefore facially void;
- (5) Whether SB 280 and the Rules are subject to and can survive heightened constitutional review; and
- (6) Whether Defendants' enforcement of SB 280 and the Rules constitute performance of government services in a manner that discriminates on the basis of sex in violation of the GCFP.

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, SB 280 or the enforcement of the Rules deprives one class member of equal protection under the law because it discriminates 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 born in Montana; (2) each is transgender; (3) each wants to obtain a birth certificate that accurately reflects their sex, as determined by their gender identity; and (4) under SB 280 and the challenged Rules, 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 SB 280 and the Rules.

3. 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, ¶ 22, 372 P.3d 457, ¶ 22 (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, ¶ 35, 267 P.3d 756, ¶ 35).

In *In Re Blue Cross and Blue Shield of Montana, Inc.*, the Montana Supreme Court 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, "stemm[ed] from the same event, practice, or course of conduct that forms the basis of the class claims[.]" *Id.*, ¶ 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.

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 SB 280 and the challenged Rules. Plaintiffs and the proposed class members all also assert the same legal theories, which are detailed in Counts I through IV and Count VI of Plaintiffs' Second Amended Complaint, and which this Court has found sufficient to withstand

Defendants' motion to dismiss and supportive of the Court's order granting Plaintiffs' motion for preliminary injunction. Further, Plaintiffs and members of the proposed class similarly seek to reinstitute the 2017 regulations, a process by which transgender people born in Montana can readily seek and obtain birth certificates that are consistent with their sex, as determined by their gender identity.

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 the restrictions on the process for amending birth-certificate sex markers that are imposed by SB 280 and the Rules.

Finally, the claims asserted by Ms. Marquez and Mr. 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 SB 280 or the challenged Rules—namely, the denial of an accurate birth certificate consistent with their sex, as determined by their gender identity, and the resulting harms, which are thoroughly detailed in Plaintiffs' Second Amended Complaint. In addition, they all seek the same relief based on the same legal theories.

4. 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 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 of Montana*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4. Mr. Rate has appeared before this Court on numerous occasions. Akilah Lane is an experienced staff attorney with the ACLU Montana Foundation, Inc. She, too, has previously appeared before this Court.
- (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 (S.D.W. Va. 2021). 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*, Hearing Officer Decision and Notice of Issuance of Administrative Decision, Case No. 1572-2019, Jan. 24, 2022. She has also appeared before this Court, successfully arguing Plaintiffs’ motion to clarify the PI Order. 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.2d 1077 (9th Cir. 2015); *Carcaño v. Cooper*, 203 F. Supp. 3d 615 (M.D.N.C. 2019); *Karnofski v. Trump*, 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 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 at all levels throughout the United States. They currently represent transgender clients in a challenge to the State of Iowa's refusal to provide Medicaid reimbursement for gender-affirming medical care. The case is currently pending before the Iowa Supreme Court. They previously 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.
- (4) Elizabeth Halverson is an experienced trial attorney with extensive experience in the Thirteenth Judicial District. Since 2004 Ms. Halverson has represented plaintiffs in

cases across the State of Montana.⁵ She serves as Plaintiffs' local counsel before this Court in this case.

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 by Defendants. Plaintiffs' birth certificates 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 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.

Plaintiffs and their experienced counsel will fairly and adequately protect class interests and will vigorously prosecute the action on behalf of the class. The preparation of the initial Complaint, Amended Complaint, and Second Amended Complaint; the successful prosecution of the motion for a preliminary injunction; the response to Defendants' motion to dismiss; the prosecution of the motion to clarify the PI Order; and the resistance to Defendants' petition for writ of supervisory control are evidence of Plaintiffs' and their counsel's commitment to

⁵ For the same reasons, class counsel also meet the requirements of M.R. Civ. P. 23(g)(1)(A), which lists several factors that courts may consider in appointing class counsel, including i) the work counsel has done in identifying or investigating potential claims in the action; ii) counsel's experiences in handling class actions, other complex litigation, and the types of claims asserted in the action; iii) counsel's knowledge of the applicable law; and iv) the resources that counsel will commit to representing the class. M.R.Civ. P. 23(g)(1)(B) allows the court to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the class. The Rule 23(g)(1)(A) "factors should be weighed together as a whole, and the appointing court need not treat any single factor as decisive in deciding on the appointment of class counsel." William B. Rubenstein, 1 *Newberg and Rubenstein on Class Actions* § 3:81 (6th ed. June 2022 Update). Further, Rule 23(g)(1)(B)'s "catch-all provision effectively incorporates much if not all of the case law developed under traditional Rule 23(a)(4) adequacy of class counsel analysis." *Id.*

representing the interests of Plaintiffs and members of the proposed class aggressively. They are also evidence of Plaintiffs' and counsels' ability to do so effectively.

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

In addition to 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 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 “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, ¶61, 310 P.3d 452, ¶ 61).

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 SB 280 and/or the Rules (1) discriminate against transgender individuals in violation of the Montana Constitution and the GCFP Code by treating transgender people worse than similarly situated cisgender people; (2) infringe on constitutionally protected privacy interests of transgender individuals; and (3), with regard to substantive due process, are unacceptably vague, rendering them void. Plaintiffs’ claims also turn on whether the Rules were issued in violation of the PI Order. In both instances, the evidence will show that Defendants have acted on grounds that apply generally to the class

ACLU Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
Telephone: 406-203-3375
lanea@aclumontana.org
ratea@aclumontana.org

Malita Picasso*
Jon W. Davidson*
(admitted only in California)
American Civil Liberties Union Foundation
125 Broad Street,
New York, NY 10004.
Telephone: 212-549-2561
mpicasso@aclu.org

F. Thomas Hecht*
Tina B. Solis*
Seth A. Horvath*
Nixon Peabody LLP
70 West Madison Street, Suite 3500
Chicago, IL 60601
Telephone: 312-977-4443
Facsimile: 312-977-4405
fthecht@nixonpeabody.com
tbsolis@nixonpeabody.com
sahorvath@nixonpeabody.com

Elizabeth Halverson PC
1302 24th Street West #393
Billings, MT 59102
Telephone: 406-698-9929
ehalverson@halversonlaw.net

* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I certify that the foregoing **Plaintiffs' Brief in Support of Motion for Rule 23 Class Certification, Appointment of Class Representatives, and Appointment of Class Counsel** was served by eService on counsel for Defendants:

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
P.O. Box 201401
Helena, MT 59620-1401
Telephone: 406-444-2026
Facsimile: 406-444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Telephone: 406-384-7990
emily@joneslawmt.com

Electronically signed by Krystel Pickens on behalf of Akilah Lane
on October 28, 2022

CERTIFICATE OF SERVICE

I, Akilah Maya Lane, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 10-28-2022:

David M.S. Dewhirst (Govt Attorney)

215 N Sanders

Helena MT 59601

Representing: Montana Department of Health and Human Services, Meier, Adam, As Director Of Dphhs, Gianforte, Gregory As Governor Of State Of Montana

Service Method: eService

Kathleen Lynn Smithgall (Govt Attorney)

215 N. Sanders St.

Helena MT 59601

Representing: Montana Department of Health and Human Services, Meier, Adam, As Director Of Dphhs, Gianforte, Gregory As Governor Of State Of Montana

Service Method: eService

Emily Jones (Attorney)

115 North Broadway

Suite 410

Billings MT 59101

Representing: Gianforte, Gregory As Governor Of State Of Montana

Service Method: eService

Alexander H. Rate (Attorney)

713 Loch Leven Drive

Livingston MT 59047

Representing: Amelia Marquez

Service Method: eService

Elizabeth A. Halverson (Attorney)

1302 24th Street West #393

Billings MT 59102

Representing: Amelia Marquez

Service Method: eService

State of Montana (Minor)

Use this one

Service Method: Email

John Doe I (Plaintiff)
Service Method: Email

Kristin N. Hansen (Attorney)
P.O. Box 1288
Bozeman 59771
Representing: Montana Department of Health and Human Services, Meier, Adam, As Director Of
Dphhs, Gianforte, Gregory As Governor Of State Of Montana
Service Method: Email

Austin Miles Knudsen (Attorney)
P.O. Box 624
Culbertson 59218
Representing: Montana Department of Health and Human Services, Meier, Adam, As Director Of
Dphhs, Gianforte, Gregory As Governor Of State Of Montana
Service Method: Email

F. Thomas Hecht (Attorney)
70 West Madison Street, Suite 3500
Chicago 60601
Representing: Amelia Marquez
Service Method: Email

John Knight (Attorney)
150 North Michigan Avenue Suite 600
Chicago 60601
Representing: Amelia Marquez
Service Method: Email

Tina B Solis (Attorney)
70 West Madison Street Suite 3500
Chicago 60601
Representing: Amelia Marquez
Service Method: Email

Malita Picasso (Attorney)
125 Broad Street
New York 10004
Representing: Amelia Marquez
Service Method: Email

Jon W. Davidson (Attorney)
125 Broad Street
New York
Representing: Amelia Marquez
Service Method: Email

Seth A Horvath (Attorney)

70 West Madison Street Suite 3500
Chicago 60601
Representing: Amelia Marquez
Service Method: Email

Electronically signed by Krystal Pickens on behalf of Akilah Maya Lane
Dated: 10-28-2022