

Austin Knudsen
Montana Attorney General
 Michael Russell
 Thane Johnson
 Alwyn Lansing
 Michael Noonan
Assistant Attorneys General
 MONTANA DEPARTMENT OF JUSTICE
 PO Box 201401
 Helena, MT 59620-1401
 Phone: (406) 444-2026
 Fax: (406) 444-3549
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

Emily Jones
Special Assistant Attorney General
 JONES LAW FIRM, PLLC
 115 N. Broadway, Suite 410
 Billings, MT 59101
 Phone: 406-384-7990
emily@joneslawmt.com

Attorneys for Defendants

MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND 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. BRERETON, in his official
 capacity as the Director of the Montana
 Department of Public Health and Human
 Services; the MONTANA DEPARTMENT OF

Cause No. ADV 24-261
 Hon. Michael Menahan

**DEFENDANTS' RESPONSE IN
 OPPOSITION TO PLAINTIFFS'
 MOTION FOR CLASS
 CERTIFICATION**

JUSTICE; and AUSTIN KNUDSEN, in his
official capacity as Attorney General for the
State of Montana,

Defendants.

INTRODUCTION

At the conclusion of this case, the challenged provisions will either be held constitutional to all or unconstitutional to all.¹ This is the reason why the motion for class certification in *Marquez v. State, et al.*, Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DV 21-873, another case involving transgender-identifying plaintiffs seeking to change the sex designation on their birth certificates, was denied. A class action is similarly unnecessary and unwarranted here. Plaintiffs, moreover, do not meet the requirements of Mont. R. Civ. P. (“Rule”) 23, and the Court should deny Plaintiffs’ Motion for Class Certification accordingly.

ARGUMENT

For certification of a class to be appropriate under Rule 23, Plaintiffs must meet the four elements in Rule 23(a) and one of the elements in Rule 23(b). *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 61, 371 Mont. 393, 310 P.3d 452. Plaintiffs must provide proof rather than mere presumptions to succeed on a Rule 23 class certification motion. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (“[A]ctual, not presumed, conformance with Rule 23(a) remains [] indispensable.”).

¹ To 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 common facts among the proposed class and further warrants denial of Plaintiffs’ Motion for Class Certification.

There are four elements Plaintiffs must meet under Rule 23(a). First, Rule 23(a) requires that the proposed class be “so numerous that joinder of all members is impracticable.” *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 20, 385 Mont. 396, 384 P.3d 455 (citation omitted).² While no “bright-line number” satisfies this numerosity requirement, Plaintiffs carry the burden of presenting evidence of the number of class members. *Id.* (citation omitted). “Mere speculation” is insufficient to satisfy this requirement. *Diaz v. Blue Cross & Blue Shield of Mont.*, 2011 MT 322, ¶ 31, 363 Mont. 151, 267 P.3d 756. Second, Rule 23(a) requires “questions of law or fact common to the class.” Mont. R. Civ. P. 23(a)(2). Third, Rule 23(a) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Mont. R. Civ. P. 23(a)(3). The typicality requirement generally “prevents plaintiffs from bringing a class action against defendants with whom they have not had any dealings.” *Diaz*, ¶ 35. Fourth, Rule 23(a) permits certification only where the representative party or parties will fairly and adequately protect the interests of the class members. Mont. R. Civ. P. 23(a)(4).

Plaintiffs fail to satisfy all the elements of Rule 23(a). First, Plaintiffs’ class definition is excessively broad and would require ongoing ripeness analysis for future class members. Plaintiffs seek 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 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.” (Doc. 14 at 7). Numerosity can include future class members only where “it would be

² 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.

practicable to join such future members as their claims become ripe.” *A.B. v. Haw. State Dep’t of Educ.*, 30 F.4th 828, n.4 (9th Cir. 2022). Here, 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. Administration of Plaintiffs’ proposed class is unworkable because its membership is unknown and potentially ever-growing into perpetuity.³

Conversely, joinder is not impracticable. As their sole evidence of numerosity, Plaintiffs point to several studies with rough estimates of the number of transgender Montanans. These studies, though, overstate the number of potential class members. As an initial matter, the studies themselves don’t support Plaintiffs’ proposed class. The U.S. Census identifies several of the reasons that transgender individuals have not changed gender on their birth certificate.⁴ For example, forty-four percent of those surveyed have not even attempted to change their birth certificate. *Trans Equality Survey*, at 88.⁵ Forty-one percent say that the available options don’t fit their gender identity. *Id.* Thirty percent are not ready to change their birth certificate. *Id.* If these statements are true, then resolution of this lawsuit in Plaintiffs’ favor does not resolve these concerns.

³ Moreover, Plaintiffs’ proposed class is premised on a glaring non sequitur—a person cannot determine his or her sex (an objective, physically and scientifically observable fact and immutable characteristic) based on his or her subjective gender identity (which may change at any time). *See* Defendants’ Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction.

⁴ Montana birth certificates only identify sex on birth certificates, not subjective gender identity. Even when the 2017 Rule, which uses the word “gender,” was first in place, the birth certificate forms continued to use the word “sex.”

⁵ *See* 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 Equality Survey”) (describing numerous reasons why transgender individuals do not seek to amend the sex designation on their birth certificates).

Striking down SB 458 and/or the 2022 Rule makes no difference for those who do not take the steps necessary to amend their birth certificate. It also has no impact on those who are not ready to amend their birth certificate. Accordingly, even if this Court considers the surveys identified by Plaintiffs, the data still does not support a class action seeking to enjoin SB 458 or the 2022 Rule because a permanent injunction does not address those who won't change their birth certificate. In fact, only 25% of transgender individuals who have not yet amended their birth certificate claim that they have not done so because “they believed they [a]re not allowed.” *Id.*⁶

In addition, Plaintiffs' estimates do not comport with reality. In 2017, only 6 individuals applied to amend the sex designation on their birth certificate. *See* Affidavit of Annie Kurtz (June 17, 2024), **attached as Exhibit A**, at ¶ 4. In 2018, 36 individuals applied to change their sex designation. *Id.* at ¶ 5. In 2019, 52 individuals applied to change their sex designation. *Id.* at ¶ 6. In 2020, 58 individuals applied to change their sex designation. *Id.* at ¶ 7. In 2021, 43 individuals applied to change their sex designation. *Id.* at ¶ 8. In 2022, 42 individuals applied to change their sex designation. *Id.* at ¶ 9. In 2023, 34 individuals applied to change their sex designation. *Id.* at ¶ 10. In 2024, to date, 9 individuals have applied to change their sex designation. *Id.* at ¶ 11. This is a total of 280 individuals that have applied to change the sex designation on their birth certificates in the last seven years.⁷ This is significantly lower than Plaintiffs' estimated 1,700 individuals. *See* Doc. 14 at 9 (estimating that 1,700 Montanan adults are transgender and have not yet amended the

⁶ If Plaintiffs' response is that the class they seek to certify is only those transgender individuals who seek or will seek to change the sex designation on their Montana birth certificate or driver's license, not all transgender individuals with Montana birth certificates or driver's licenses, this makes Plaintiffs' proposed class even smaller—and further confirms that Plaintiffs do not meet the numerosity requirement of Rule 23(a).

⁷ This is the total despite all of the publicity that surrounded the events associated with the prior lawsuit over birth certificate amendments (*Marquez v. State et al.*), and despite the fact that it was well known that at certain points DPHHS's Office of Vital Records was processing birth certificate amendment applications under the 2017 Rule.

sex marker on their birth certificates and/or driver's licenses). Plaintiffs, therefore, cannot conclude that every transgender person in Montana who has a sex designation that doesn't match their gender identity is harmed by SB 458 or the 2022 Rule. *See Doe v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring) ("the transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex).") Plaintiffs overstate the number of transgender people in Montana seeking to change their birth certificate or driver's license.

Plaintiffs also fail to satisfy Rule 23(b). Indeed, the motion for class certification in *Marquez v. State, et al.*, Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DV 21-873, was denied for this reason. Rule 23(b) provides:

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

In that case, transgender-identifying plaintiffs sought to change the sex designation on their birth certificates. The court's Order Re: Rule 23 Class Certification in that case, **attached as Exhibit B**, is instructive. The court held:

Here, there is no 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. Further there is no risk that a decision here would substantially impair or impede other individuals' ability to protect their interests.

(Ex. B at 2).

The plaintiffs in *Marquez* challenged SB 280 (2021) (referred to by the court as “the Act,”), which dictated circumstances under which a birth certificate could be amended. In denying the motion for class certification, the *Marquez* court held:

If the Act is constitutional and lawful, it is constitutional and lawful to all. If it is unconstitutional or unlawful, it is unconstitutional or unlawful to all. A class action is unwarranted here.

(Ex. B at 3).

Similarly here, Plaintiffs have made a constitutional challenge to SB 458 and the 2022 Rule. Like SB 280 in *Marquez*, 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, too.

CONCLUSION

Because Plaintiffs fail to meet the requirements of Rule 23, the Court should deny Plaintiffs’ Motion for Class Certification.

DATED this 20th day of June, 2024.

Austin Knudsen
MONTANA ATTORNEY GENERAL

/s/ Alwyn Lansing
Alwyn Lansing
Michael Russell
Thane Johnson
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

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

ATTORNEYS FOR DEFENDANTS

Exhibit A

Austin Knudsen
Montana Attorney General
Michael Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Fax: (406) 444-3549
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Attorneys for Defendants

MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND 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. BRERETON, in his official
capacity as the Director of the Montana
Department of Public Health and Human
Services; the MONTANA DEPARTMENT OF

Cause No. ADV 24-261
Hon. Michael Menahan

AFFIDAVIT OF ANNIE KURTZ

JUSTICE; and AUSTIN KNUDSEN, in his
official capacity as Attorney General for the
State of Montana,

Defendants.

STATE OF MONTANA)
 :SS
County of Lewis & Clark)

Annie Kurtz states under oath:

1. I am over the age of eighteen and competent to testify, and this Affidavit is based on my personal knowledge.
2. I am the Office of Vital Records (“OVR”) State Registrar for the Montana Department of Public Health and Human Services.
3. In that role, I am responsible for overseeing and processing requests for issuance of vital records and amendments to vital records.
4. In 2017, OVR received 6 applications to amend an individual’s sex designation on their birth certificate.
5. In 2018, OVR received 36 applications to amend an individual’s sex designation on their birth certificate.
6. In 2019, OVR received 52 applications to amend an individual’s sex designation on their birth certificate.
7. In 2020, OVR received 58 applications to amend an individual’s sex designation on their birth certificate.
8. In 2021, OVR received 43 applications to amend an individual’s sex designation on their birth certificate.

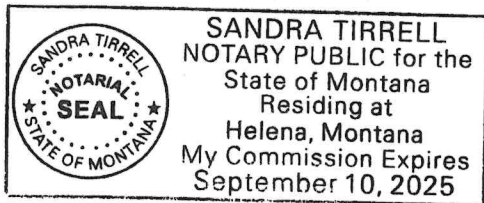
9. In 2022, OVR received 42 applications to amend an individual's sex designation on their birth certificate.
10. In 2023, OVR received 34 applications to amend an individual's sex designation on their birth certificate.
11. In 2024, to date, OVR has received 9 applications to amend an individual's sex designation on their birth certificate.
12. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of June, 2024.


ANNIE KURTZ

STATE OF MONTANA)
 :SS
County of Lewis & Clark)

Subscribed and sworn before me, a Notary Public, this 17th day of June, 2024 by Annie Kurtz.




Notary Public for the State of Montana

Exhibit B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

AMELIA MARQUEZ, AN INDIVIDUAL;
AND JOHN DOE, AN INDIVIDUAL,

Plaintiffs,

vs.

STATE OF MONTANA, ET AL.,

Defendants.

Cause No.: DV 21-873

Judge Michael G. Moses

**ORDER RE: RULE 23 CLASS
CERTIFICATION**

Plaintiffs filed their Motion for Rule 23 Class Certification on October 28, 2022.

They filed a brief in support.

Defendants filed their Response in Opposition on December 5, 2022.

Plaintiffs reply was filed January 9, 2023.

This Court has denied Plaintiffs' Motion for Leave to File their Second Amended Complaint. (See Order dated March 2, 2023) Plaintiffs' First Amended

1 Complaint remains in effect. It alleges six counts and the relief sought is found on
2 page 21 in their prayer for relief. See Document 42 Exhibit A.

3 Plaintiffs request that this Court declare “the Act” (SB 280) unconstitutional,
4 illegal under MHRA, illegal under the Code of Fair Practices, request a permanent
5 injunction to enjoin Defendants from enforcing the Act, as well as other equitable relief
6 the Court deems just.

7 Class actions are authorized pursuant to Rule 23 M.R.Civ.P. “A class action may
8 be maintained if Rule 23(a) is satisfied and if: (1) prosecuting separate actions by or
9 against individual class members would create risk of: (A) inconsistent or varying
10 adjudications with respect to individual class members that would establish
11 incompatible standards of conduct for the party opposing the class; or (B)
12 adjudications with respect to individual class members that, as a practical matter,
13 would be dispositive of the interests of the other members not parties to the individual
14 adjudications or would substantially impair or impede their ability to protect their
15 interests.”

16 Here, there is no risk of inconsistent or varying adjudications with respect to
17 individual class members that would establish incompatible standards of conduct for
18 the party opposing the class. Further there is no risk that a decision here would
19 substantially impair or impede other individuals’ ability to protect their interests.
20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

If the Act is constitutional and lawful, it is constitutional and lawful to all. If it is unconstitutional or unlawful, it is unconstitutional or unlawful to all. A class action is not warranted here.

Plaintiffs' Motion for Class Certification as to the Amended Complaint is DENIED.

DATED March 2, 2023

/s/ Michael G. Moses
District Court Judge

cc: Elizabeth Halverson
Alexander Rate
Akilah Lane
Jon Davidson
Tina Solis
F. Thomas Hecht
Seth Horvath
Malita Picasso
Austin Knudsen
Kristen Hansen
Kathleen Smithgall
Emily Jones

CERTIFICATE OF SERVICE

I, Alwyn T. Lansing, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 06-20-2024:

Marthe VanSickle (Attorney)
PO Box 1968
Missoula MT 59806
Representing: Jane Doe, Jessica Kalarchik
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Jane Doe, Jessica Kalarchik
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Charles T Brererton, State of Montana, Austin Knudsen, Montana Department Of Justice, Montana Department of Public Health and Human Services, Gregory Gianforte
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Charles T Brererton, State of Montana, Austin Knudsen, Montana Department Of Justice, Montana Department of Public Health and Human Services, Gregory Gianforte
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Charles T Brererton, State of Montana, Austin Knudsen, Montana Department Of Justice, Montana Department of Public Health and Human Services, Gregory Gianforte
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST

P.O. Box 201401

HELENA MT 59620-1401

Representing: Charles T Brererton, State of Montana, Austin Knudsen, Montana Department Of Justice, Montana Department of Public Health and Human Services, Gregory Gianforte

Service Method: eService

Michael Noonan (Govt Attorney)

215 N SANDERS ST

HELENA MT 59601-4522

Representing: Charles T Brererton, State of Montana, Austin Knudsen, Montana Department Of Justice, Montana Department of Public Health and Human Services, Gregory Gianforte

Service Method: eService

Electronically signed by Deborah Bungay on behalf of Alwyn T. Lansing

Dated: 06-20-2024