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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual, Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	DV 21–873 Hon. Michael G. Moses **STATE OF MONTANA'S RESPONSE IN OPPOSITION TO PLAINTIFFS' RULE 23 MOTION FOR CLASS CERTIFICATION**

INTRODUCTION

This case has lingered for a year and a half—during this time, Plaintiffs have sought to amend their Complaint twice, completely altering the scope of the lawsuit. Plaintiffs brought this case. They chose the parties, the claims, and the legal theories.

And their claims were so urgent that they sought a preliminary injunction of SB 280, which this Court granted. Yet, nearly 500 days after the initial Complaint was filed, the parties are unable to move forward with this litigation and potential discovery because Plaintiffs have changed their mind again. It is unclear who Plaintiffs want to be part of this lawsuit. It is unclear what type of relief they seek. And it is unclear what plethora of State laws and agency rules are now at issue in this case. *See generally* State's Br. in Opp. to Pls' Motion to Amend. From the State's first filing, the State pointed out that the relief Plaintiffs seek only applies to Plaintiffs. *See* Dkt. 14, at 25.[1] Now, following two motions to dismiss, a motion for a preliminary injunction, a motion for clarification on the preliminary injunction, and a petition for a writ of supervisory control currently pending before the Montana Supreme Court, Plaintiffs seek to certify a class on behalf 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." Dkt. 86, at 6.

Plaintiffs present this amorphous class based on an ever-evolving theory of harm that Plaintiffs have failed to properly plead at every stage. Even now, Plaintiffs are seeking to amend their Amended Complaint to add new claims and fundamentally alter this litigation, to the prejudice of the State. It is inappropriate to consider class certification at this time because neither party knows what is at

[1] Named defendants are the State of Montana, Governor Gianforte, the Montana Department of Public Health and Human Services, and Director Charles Brereton (collectively, "the State").

issue in this litigation. Moreover, Plaintiffs have failed to meet their burden under Montana Rule of Civil Procedure 23. This Court must deny the motion.

ARGUMENT

In order 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 in order 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."). Here, Plaintiffs fail to meet the requirements under Rule 23(a) and Rule 23(b). This Court, therefore, must deny their motion to certify the class.

I. Plaintiffs' Class Definition Fails.

Plaintiffs' proposed class definition fails for two reasons. First, Plaintiffs' own filings present inconsistencies that result in an ill-defined class. Initially, as noted above, Plaintiffs define their class as "all transgender people born in Montana." Dkt. 86, at 6. Later, though, Plaintiffs allege that the members of the class "are geographically dispersed throughout Montana," meaning the class members are not only born in Montana but also reside in Montana.[2] Conflicting descriptions of a class in a motion for class certification warrant denial. *See, e.g.,* W*hite v. Williams,* 208 F.R.D. 123, 125 (D.N.J. 2002) (denying class certification because "Plaintiffs'

[2] This, of course, means that Doe is not a member of the class as Doe resides out of state.

proposed definition of the class is overly broad, amorphous and vague"); *Barnhill v. City of Chicago*, 98 C 4807, 2000 U.S. Dist. LEXIS 12615, at *5–7 (N.D. Ill. Aug. 23, 2000) (denying class certification because Plaintiffs' failure to clearly the define the class "is not caused by a lack of knowledge about the details of the class that further discovery will resolve"). Regardless of how Plaintiffs intend to define the class, these internal inconsistencies mean that this Court cannot certify a class because it is not clear what class should be certified.

Second, Plaintiffs' proposed class definition fails based on the claims they have brought. As discussed more below, Plaintiffs challenge SB 280 (and now seek to challenge the 2021 Rule and the 2022 Rule), and according to their motion to clarify, they seek to return to the 2017 Rule. But the 2017 Rule still doesn't permit every transgender individual identified in either of Plaintiffs' proposed classes to amend his or her birth certificate.[3] The 2017 Rule still requires an individual to file a correction affidavit accompanied by either a gender designation form, government-issued identification, or court order. The 2017 Rule also requires some disclosure of one's transgender status. In other words, giving Plaintiffs the relief they seek—returning to the 2017 Rule—will not give many of the class members the relief they

[3] *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).

purportedly seek, which is to amend the sex designation on their birth certificates.[4] The procedural mechanism for certifying class actions was not designed to accommodate individuals with such nuanced views, interests, and objectives. Instead, Rule 23 contains safeguards designed to ensure that the class is composed of members who can actually receive the relief the lawsuit aims to secure.

II. Joinder is not Impracticable.

Rule 23(a) first requires that the proposed class be "so numerous that joinder of all members is impracticable."[5] While no "bright-line number" satisfies this numerosity requirement, Plaintiffs carry the burden of presenting evidence of the number of class members. *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 20, 385 Mont. 396, 384 P.3d 455. "Mere speculation" is insufficient to satisfy this requirement. *Diaz v. Blue Cross & Blue Shield of Mont., 20*11 MT 322, ¶ 31, 363 Mont. 151, 267 P.3d 756. 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

[4] Importantly, Plaintiffs have never brought a legal challenge to the 2017 Rule, even though it does not afford the relief sought by the class.

[5] 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.

have not changed gender on their birth certificate.[6] For example, forty-four percent of those surveyed have not even attempted to change their birth certificate. Trans Equality Survey, at 88. 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. Reinstating the 2017 Rule makes no difference for those who don't take the steps necessary to amend their birth certificate. It also doesn't have any impact on those who are not ready to amend their birth certificates. Accordingly, even if this Court considers the surveys identified by Plaintiffs, the data still does not support a class action seeking to enjoin the 2021 Rule or 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."[7] *Id.* Plaintiffs overstate the number of individuals in their proposed class, and therefore cannot show that joinder is impracticable.

This leads to the next glaring issue with Plaintiffs' estimates: the numbers do not establish how many individuals intend to amend their birth certificate. *See Allen*

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[6] Montana birth certificates only identify sex on birth certificates, not gender. Even when the 2017 Rule, which uses the word "gender," was first in place, the birth certificate forms continued to use the word "sex."

[7] Importantly, the survey does not evaluate the alleged barriers these individuals perceived. It is not at all clear that these answers would change if they lived in a State that had an identical rule as the 2017 Rule versus a rule identical to the 2022 Rule.

v. Ollie's Bargain Outlet, Inc., 37 F.4th 890, 896–97 (3d Cir. 2022). In other words, the studies do not establish that the proposed class is as numerous as Plaintiffs claim. *Id.* Here, the original Plaintiffs, Marquez and Doe, have yet to attempt to amend their birth certificates after years of identifying as transgender, including a significant period under the 2017 Rule. They have not attempted to do so since the initiation of this litigation nearly 18 months ago. And they have not attempted to do so at any point during the injunction.[8] The original Plaintiffs themselves demonstrate exactly why Plaintiffs' estimates overstate the number of individuals.

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* Ferlicka Declaration ("Exhibit A"). Two years later, in 2019, 52 individuals applied to change their sex designation under the 2017 Rule. *Id.* And last year, under the 2021 Rule, 43 individuals applied to change their sex designation. *Id.* Over the past five years, DPHHS has received only 235 applications to amend a person's sex designation on their birth certificate. *Id.* Not only is this a far cry from Plaintiffs' estimated 1,700 individuals, but it also shows that the number of applications has not significantly changed under the 2017 Rule, the 2021 Rule, and now the 2022 Rule.

[8] Plaintiffs, again, argue that the State refused to enforce this Court's injunction. Without repeating the arguments already fully briefed and argued, the State simply notes that Plaintiffs did not attempt to amend their birth certificate between the time the injunction issued and when DPHHS issued its temporary emergency rule. And they have not attempted to do so since DPHHS stated it would process birth certificates under the 2017 Rule in light of this Court's order on Plaintiffs' motion to clarify. Plaintiffs can point fingers as much as they want, but the truth remains: neither Marquez nor Doe has *ever* attempted to amend their birth certificates.

Plaintiffs' challenge to SB 280—and now the 2021 and 2022 Rules—will only impact those who have applied to amend their sex designation or those who seek to amend their sex designation. 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 these statutes or rules. Plaintiffs' own facts just don't support this.

In "specific circumstances," the court may look at "nonnumeric factors" like "judicial economy, geographic distribution of putative class members, the size of the members' individual claims, and the ability to initiate individual lawsuits." *Roose v. Lincoln Cnty. Emp. Grp. Health Plan*, 2015 MT 324, ¶ 18, 381 Mont. 409, 362 P.3d 40. Plaintiffs first point to the high rates of poverty and homelessness among transgender individuals as evidence for why a class action is necessary. Dkt. 86, at 8. Plaintiffs rely on the same survey they relied on above, which means it suffers the same deficiencies—very few of these individuals are actually precluded from changing their birth certificates because of the barriers alleged in Plaintiffs' Amended Complaint. A significant number of these individuals choose not to change their birth certificates for reasons unrelated to the alleged barriers imposed by the 2021 Rule or the 2022 Rule.

Plaintiffs also point to geographic dispersion "throughout Montana" as a basis for meeting the numerosity requirement. As an initial matter, this logic would mean that any constitutional challenge in Montana would warrant class certification simply because Montana is a large, rural state. Courts, moreover, have rejected class certifications based on geographic dispersion where all class members reside in the

same State, even where they reside outside that court's jurisdiction. *See, e.g.*, *Jaynes v. United States*, 69 Fed. Cl. 450, 454 (Fed. Cl. 2006); *Muse v. Holloway Credit Sols., LLC*, 337 F.R.D. 80, 87 (E.D. Pa. 2020); *Clarkson v. Alaska Airlines, Inc.*, 2:19-cv-0005, 2020 U.S. Dist. LEXIS 263516, at *21 (E.D. Wa. Nov. 3, 2020). In addition, Doe's participation in this lawsuit undermines Plaintiffs' claim. Doe resides out of state, yet Doe has been able to participate in this lawsuit as one of the two plaintiffs. Because of technological advancements that permit individuals to participate remotely, geographic dispersion is not persuasive. *See, e.g.*, *In re Zetia Ezetimibe Antitrust Litig.*, 2:18-md-2836, 2022 U.S. Dist. LEXIS 38171, at *52 (E.D. Va. Jan. 25, 2022). Plaintiffs carry the burden of establishing that the class is so numerous that joinder is impracticable. Plaintiffs have not made this showing.

III. The Questions of Law or Fact are not Common to the Class.

Rule 23(a)(2) requires "questions of law or fact common to the class." While courts view this as a "relatively low burden for plaintiffs," Plaintiffs here fail to satisfy this requirement. First, Plaintiffs' Montana Human Rights Act[9] and Montana Governmental Code of Fair Practices claims are fact-specific inquiries and require a showing of a specific act against a specific individual. *See* Dkt. 51, at 2–5; Dkt. 61, ¶ 123. Such claims are inappropriate for class actions.

[9] This Court dismissed Plaintiffs' claim under the Montana Human Rights Act. Plaintiffs have reasserted this claim in their Second Amended Complaint to preserve this claim for any appeal. The State likewise responds to preserve its argument that this type of claim is inappropriate for class action litigation. In addition, because the Montana Governmental Code of Fair Practices is a subpart of the Montana Human Rights Act, that claim must be dismissed as well. *See generally* Mont. Code Ann. Title 49.

To meet the commonality requirement, moreover, Plaintiffs must demonstrate "the class members have suffered the same injury." *Rogers v. Lewis & Clark Cnty.*, 2022 MT 144, ¶ 23, 409 Mont. 267, 513 P.3d 1256 (internal quotations and citations omitted). But many of Plaintiffs' proposed class members do not suffer the same injury.[10] As discussed above—based on the surveys cited by Plaintiffs—most transgender individuals have opted not to amend their birth certificates for reasons not relevant to this litigation. These individuals cite other reasons, none of which are redressable in this litigation, for not seeking to amend their birth certificate.[11] Thus, examining all of Plaintiffs' class members will not yield a common answer for why they have not amended their birth certificate. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011). Such common fact is necessary for Plaintiffs to prove that the State's statutes or Rules cause harm for Plaintiffs and the class members.

Plaintiffs assert that their proposed class meets the commonality requirement because "each wants to obtain a birth certificate that accurately reflects their sex, as determined by their gender identity." Dkt. 86, at 11. But Plaintiffs' own studies, and DPHHS's Declaration, belie this assertion. There is no evidence that even a majority

[10] And again, neither Plaintiff in this case has attempted to change their birth certificate.

[11] From the outset of this litigation, the State has asserted that Plaintiffs lack standing to raise these claims. Although the Court rejected this argument previously, the issues raised at the class certification stage highlight the serious deficiencies in Plaintiffs' pleading.

of Plaintiffs' proposed class seek to amend their birth certificate. Plaintiffs' claims fail to satisfy the commonality requirement.[12]

IV. The Claims or Defense are not Typical.

The typicality requirement "ensures the named class members' interests align with the interests of absent class members." *Byorth*, ¶ 33. The typicality requirement generally "prevents plaintiffs from bringing a class action against defendants with whom they have not had any dealings." *Diaz*, ¶ 35. Plaintiffs must show that their claims arise "from the same event, practice, or course of conduct that forms the basis of the class claims." *McDonald v. Washington*, 261 Mont. 392, 402, 862 P.2d 1150, 1156 (1993) (quotations and citations omitted).

Here, again, Plaintiffs cast their net too wide. There is virtually no evidence that class members have opted not to amend their birth certificate because of the State's old or current statutes or Rules. In fact, the lead Plaintiffs—Marquez and Doe—never even attempted to amend their birth certificate under the 2017 Rule, the 2021 Rule, and they have yet to attempt to do so while the preliminary injunction is in place. Absent this evidence, there is no event, practice, or course of conduct causing an injury typical of all class members. *See McDonald*, 261 Mont. at 402 862 P.2d at 1156 (finding that "the typicality requirement is met because the injury claimed to be suffered by the named plaintiffs is the same as that suffered by the class and all injuries stem from the same *course of conduct* allegedly displayed by the

[12] The more narrowly Plaintiffs define the class to avoid the lack of commonality, the less likely they are to meet the numerosity requirement.

defendants"). For the same reasons Plaintiffs fail to satisfy the commonality requirement, they also fail to satisfy the typicality requirement.

V. The Parties will not Fairly and Adequately Protect Class Interests.

The fourth requirement of Rule 23(a) permits certification only where the representative party or parties will fairly and adequately protect the interests of the class members. "This requires that the named representative's attorney be qualified, experienced, and generally capable to conduct the litigation, and that the named representative's interests not be antagonistic to the interests of the class." *McDonald*, 261 Mont. at 403, 862 P.2d at 1156. Plaintiffs do not meet this requirement.

First and foremost, Plaintiffs have consistently failed to plead a proper case, even after the State pointed out the deficiencies in their Complaint, and even after they had the opportunity to amend their Complaint. *See generally* Dkt. 24; Dkt. 37; Dkt. 51; Dkt. 60; Dkt. 72. Plaintiffs brought a challenge to SB 280 only and sought relief only with respect to SB 280. After nearly a year of litigation, Plaintiffs then claimed that they actually sought relief from the 2021 Rule and wanted the agency to return to the 2017 Rule—a remedy not found in their pleadings. Now, after significant briefing and argument before this Court and the Montana Supreme Court, Plaintiffs are seeking to amend their Complaint again to challenge the 2021 Rule—which they could have done from the beginning—and the 2022 Rule, which is entirely separate from and unrelated to the issues raised in this litigation concerning SB 280. This type of meandering litigation does not demonstrate that the named plaintiffs

who seek to be the representative parties will fairly and adequately protect the interests of the class members.

Even now, after Plaintiffs have sought to add the 2021 and 2022 Rules to their lawsuit, they fail to assert the proper claims for challenging an administrative rule. They don't bring any challenge under the Montana Administrative Procedure Act ("MAPA"), so the State will immediately seek to dismiss their claims should the Court grant their motion for leave to file a Second Amended Complaint. *See* State's Br. in Opp. to Pls' Motion to Amend. The Plaintiffs have now had three bites at the apple to bring the correct claims challenging the correct statutes and administrative rules—and still do not have it right.

In addition, as discussed above, Plaintiffs struggle to define the class. *See Colman v. Theranos, Inc.*, 325 F.R.D. 629, 640 (N.D. Cal. 2018). They first state that the class covers "all transgender people born in Montana." Dkt. 86, at 6. But later they state that the members of the class "are geographically dispersed throughout Montana," suggesting that the class is actually limited only to those currently residing in Montana. *Id.* at 9. Of course, Doe does not meet these criteria as Doe resides out of state. And this internal inconsistency highlights an ill-defined class that doesn't warrant certification. *Id.* Courts have denied class certification based on failure to meet these legal requirements. *Id.* ("Counsel that is unable to timely define the class, and representatives who are not in the class, seem unlikely candidates to adequately protect class members' interests.").

Finally, as discussed above, Plaintiffs are moving for class certification nearly 18 months after the initiation of this lawsuit. This type of delay only makes sense when parties have been undertaking discovery to try to identify the number of potentially impacted individuals. Here, Plaintiffs have possessed the precise information included in their motion since the initiation of their lawsuit. The parties have not undertaken any discovery. Instead, Plaintiffs keep trying to redefine the scope of the lawsuit by amending their Complaint, adding new claims, and now trying to add more parties.[13] A party's failure to timely move for class certification calls into question the party's ability to adequate protect the interests of the class. *See, e.g.*, *Ogaz v. Honeywell Int'l*, CV 21-739-JFW, 2021 U.S. Dist. LEXIS 156686, at *4 (C.D. Cal. 2021); *Colman*, 325 F.R.D. at 640; *Jones v. Hartford Ins. Co.*, 243 F.R.D. 694, 695 (N.D. Fla. 2006); *Walker v. Columbia Univ.*, 62 F.R.D. 63, 64 (S.D.N.Y. 1973). Plaintiffs' delay here is unwarranted given the circumstances of this case, and such untimeliness weighs heavily against class certification.

VI. Plaintiffs Fail to Satisfy Rule 23(b)(2).

Even if Plaintiffs satisfy the four requirements of Rule 23(a), Plaintiffs still must satisfy one of the three subsections in Rule 23(b). Here, Plaintiffs argue that they satisfy Rule 23(b)(2), which requires a showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final

[13] Plaintiffs cite their extensive briefing in this case as evidence of their experience. Dkt. 86, at 16. But addressing a problem that one created does not make one a problem solver. Had Plaintiffs brought a challenge to the 2021 Rule in the first place, the parties could have avoided much of the briefing about which Plaintiffs now boast.

injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The first part of this requires a showing that the defendant has a policy in place that affects everyone in the class similarly. *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶ 13, 396 Mont. 443, 445 P.3d 834. The second part requires a showing that the equitable remedy is indivisible. *Id.* Because a Rule 23(b)(2) class is a "mandatory class," and its members cannot opt out, it is imperative that the relief awarded "applies to all class members." *Roose*, ¶ 17.

As to the first part of Rule 23(b)(2), Plaintiffs have not shown that SB 280, the 2021 Rule, or the 2022 Rule affects everyone in the class similarly. Again, Plaintiffs fail to clearly define the class. On one hand, they say that the class covers all transgender individuals born in Montana, on the other hand, they say the class only covers all transgender individuals born in and residing in Montana. They also claim that the class covers all individuals who want to amend the sex designation on their birth certificate, yet the studies they cite show that a significant number of transgender individuals do not want to amend the sex designation on their birth certificate or want to amend the sex designation but can't do so for unrelated reasons (*e.g.*, they can't afford to amend the sex designation, they don't want to amend the sex designation to male or female, etc.). Because of the ill-defined class, Plaintiffs cannot say that the State's laws affect everyone in the class similarly—we don't know who is in the class. Doe and Marquez, moreover, have yet to try to amend their birth certificates. They declined to do so under the 2017 Rule as it existed prior to the 2021 Rule and as it exists currently in light of the preliminary injunction of SB 280 and

this Court's order. This provides further evidence that the State's laws don't actually impact everyone in the class similarly. The laws only apply to individuals who submit applications to amend the sex designation on their birth certificates.

As to the second part of Rule 23(b)(2), again, the State's conduct only applies to individuals who submit applications to amend the sex designation on their birth certificates. The State does not dispute that if SB 280, the 2021 Rule, or the 2022 Rule, are declared facially unconstitutional, such a declaration would apply to all individuals who submit an application to the State. Unfortunately for Plaintiffs, that's not how they pleaded their case, nor is it how they define their class. They fail to meet this second part of Rule 23(b)(2) for the same reasons they fail to meet the first part.

CONCLUSION

Plaintiffs' motion is too little too late. They fail to meet the requirements under Rule 23. And they bring this motion after a year and half of litigation, seeking the same relief they originally sought for Doe and Marquez for an entire class of individuals. If Plaintiffs believe that their original Complaint sought relief in the form of returning to the 2017 Rule—something the State disputes—then the facts of the case do not support class certification at this late juncture. This Court must deny their belated motion to certify an ill-defined class of plaintiffs.

Dated this 5th day of December, 2022.

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

AMELIA MARQUEZ, AN INDIVIDUAL; AND JOHN DOE, AN INDIVIDUAL, PLAINTIFFS, V. STATE OF MONTANA, ET AL., DEFENDANTS.	DV-21-00873 Hon. Michael G. Moses **DECLARATION OF KARIN FERLICKA**

I, Karin Ferlicka, declare:

1. I am over the age of eighteen and competent to testify, and I make this declaration based on my personal knowledge.

EXHIBIT A

2. I am the Office of Vital Records ("OVR") State Registrar for the Montana Department of Public Health & 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, the 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 40 applications to amend an individual's sex designation on their birth certificate.

I submit this declaration pursuant to Mont. Code Ann. § 1-6-105(a). I hereby declare under penalty of perjury that the foregoing is true and correct.

DATED this 5th day of December, 2022.

KARIN FERLICKA

EXHIBIT A

CERTIFICATE OF SERVICE

I, Kathleen Lynn Smithgall, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 12-05-2022:

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Dated: 12-05-2022