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12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15 D.T., a minor, by and through his parent
and next friend Lizette Trujillo; Jane Doe, a
16 minor, by and through her parent and next
friend Susan Doe; Helen Roe, a minor, by
17 and through her parent and next friend
Megan Roe; James Poe, a minor by and
18 though his parent and next friend Laura
Poe; and Carl Voe, a minor by and though
19 his parent and next friend Rachel Voe,

20 Plaintiffs,

21 v.

22 Dr. Cara M. Christ, in her official capacity
as State Registrar of Vital Records and
23 Director of the Arizona Department of
Health Services; Thomas Salow, in his
24 official capacity as Branch Chief of the
Division of Public Health Licensing
25 Services at the Arizona Department of
Health Services; and Krystal Colburn, in
26 her official capacity as Bureau Chief and
Assistant State Registrar of the Bureau of
27 Vital Records at the Arizona Department of
Health Services,

28 Defendants.

Case No. 4:20-cv-484-JAS

**JOINT STATUS REPORT ON CLASS
DISCOVERY**

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1 On September 1, 2021, all parties participated in the conference ordered by the
2 Court, (Dkt. 87), and submit this joint report as required by the same.¹ Plaintiffs were
3 represented by their attorneys Asaf Orr, Barrett Anderson, and Payslie Bowman. Defendant
4 was represented by Patricia LaMagna, Dan Struck, and Nick Acedo. Despite their efforts,
5 the parties were unable to reach a mutual agreement regarding the scope or timing of class
6 discovery. The parties jointly request a status conference with the Court to resolve this
7 matter.

8 For the Court’s convenience, below is a summary of the parties’ respective positions
9 on the scope and timing of discovery.

10 Plaintiffs’ Position: Plaintiffs continue to maintain that pre-certification discovery is
11 not needed to fully brief or adjudicate their motion for class certification. “A court, when
12 asked to certify a class, is merely to decide a suitable method of adjudicating the case and
13 should not ‘turn class certification into a mini-trial’ on the merits.” *Edwards v. First Am.*
14 *Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015); *see also Kamm v. Cal. City Dev. Co.*, 509 F.2d
15 205, 210 (9th Cir. 1975) (pre-certification discovery phase is not required where all
16 necessary factual issues supporting certification can be resolved without discovery); Order,
17 *Toomey v. Arizona*, Case No. 4:19-cv-35 (D. Ariz. filed Jun. 12, 2020) (granting
18 certification of two classes in transgender discrimination case against Arizona without
19 discovery, despite Defendants’ previously request to conduct pre-certification discovery,
20 *see Order, Toomey v. Arizona*, Case No. 4:19-cv-35 (D. Ariz. filed Feb. 6, 2020)). Pre-
21 certification discovery will interfere—and significantly overlap—with fact discovery on the
22 merits of Plaintiffs’ claims and is unlikely to uncover facts necessary to determine the
23 existence of a class. *Kamm*, 509 F.2d at 210.

24 As the Court is aware, there are four elements at issue on Plaintiff’s motion for class
25 certification: numerosity, commonality, typicality, and adequacy of representation.
26

27 ¹ The parties did not account for the Labor Day holiday in proposing the September 6,
28 2021 deadline for this status report in their Joint Rule 26(f) Report. (*See* Dkt. 84 at 9). Given
the Court was not open on that federal holiday, the parties mutually agreed to submit this
joint report on September 7, 2021.

1 *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). Plaintiffs' position
2 is that the elements of Rule 23(a) are satisfied as a matter of law in this case. (Dkt. 89 at 7–
3 11.) No discovery is necessary to meet the low burden of showing that there are “questions
4 of law and fact common to the class,” that Named Plaintiffs’ interests align with those of
5 the putative class, and that Named Plaintiffs and their counsel will adequately represent the
6 interests of the class. Likewise, discovery will not assist the parties—or the Court—in
7 applying Rule 23(b)(2) to this case.² As such, contrary to Defendant’s position below,
8 Plaintiffs would only need to submit more declarations or conduct discovery in the event
9 Defendants offer evidence that requires correction, significantly weakening—if not,
10 eliminating—the basis for Defendant’s request for pre-certification discovery.

11 For numerosity, Plaintiffs believe they have submitted more than sufficient
12 demographic evidence to demonstrate the putative class contains “40 or more members”
13 such that “joinder of all members is impracticable.” *Toomey v. Arizona*, 2020 WL 2465707,
14 at *2 (D. Ariz. May 12, 2020) (quoting *Perez v. First Am. Title Ins. Co.*, 2009 WL 2486003,
15 at *2 (D. Ariz. 2009)). Lizette Trujillo’s declaration was simply corroboration. Plaintiffs
16 understand Defendant’s desire to test the evidence of numerosity, which is why Plaintiffs
17 initially proposed Defendant have forty-five days to conduct discovery on numerosity and
18 file her opposition to class certification. As part of that proposal, and to expedite that
19 discovery, Plaintiffs further offered to produce, within ten days of Defendant accepting the
20 proposal, the data collected from the Facebook polls referenced in Ms. Trujillo’s
21 declaration, (Dkt. 89-1), redacting only the personally identifying information for the
22 participants. Plaintiffs also offered to produce Ms. Trujillo for a deposition.

23 Defendant rejected that reasonable and targeted proposal, countering with an
24 extensive and burdensome list of discovery demands, including broad document requests
25 regarding the identity of putative class members and depositions related to the merits of the
26

27 ² As this Court has previously held, Plaintiffs have standing to bring each of the claims
28 contained in their Amended Complaint. (Dkt. 83 at 12–15). Given the Court’s analysis of
that issue, discovery pertaining to standing will have no bearing on Plaintiffs’ pending
motion for class certification.

1 case rather than focused on class certification. Nearly all of Defendant’s other demands are
2 indistinguishable from the scope of fact discovery and reach far beyond the reasonable
3 scope of discovery needed to respond to Plaintiffs’ motion here. The Court should reject
4 Defendants’ attempt to “turn class certification into a mini-trial on the merits.” *Edwards*,
5 798 F.3d at 1178.

6 Plaintiffs are of course willing to agree to a discovery and response period of sixty
7 days, as originally stated in the Joint Rule 26(f) Report, but do not believe that any
8 additional time above that lengthy period is needed or warranted.

9 *Defendant’s Position:*

10 “The class action is an exception to the usual rule that litigation is conducted by and
11 on behalf of the individual named parties only.” *Comcast Corp. v. Behrend*, 569 U.S. 27,
12 33 (2013) (internal quotation marks and citation omitted). “To come within the exception,
13 a party seeking to maintain a class action must affirmatively demonstrate his compliance
14 with Rule 23.” *Id.* (internal quotation marks and citation omitted). It is no longer good
15 enough to *allege* your way through Rule 23’s elements. “Rule 23 does not set forth a mere
16 pleading standard. A party seeking class certification ... must be prepared to prove that
17 there are *in fact* sufficiently numerous parties, common questions of law or fact,” *Wal-Mart*
18 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), “typicality of claims or defenses, and
19 adequacy of representation, as required by Rule 23(a),” *Comcast*, 569 U.S. at 33. “The
20 party must also satisfy through evidentiary proof at least one of the provisions of Rule
21 23(b).” *Id.* In addition to Rule 23’s elements, Plaintiffs must demonstrate that they—and
22 each member of the class—have standing to pursue their claims. *TransUnion LLC v.*
23 *Ramirez*, 141 S. Ct. 2190, 2206–08 (2021).

24 This is far from a “low burden,” as Plaintiffs contend. If the Court were to rule on
25 Plaintiffs’ Motion for Class Certification now—without any discovery or opposition—it
26 would have to deny it. Plaintiffs rely solely on the allegations in their Amended Complaint
27 and the declaration of a *former* Plaintiff/parent/next friend (Lizette Trujillo). (Dkt. 89, 89-
28 1.) Plaintiffs do not submit any declarations of the named Plaintiffs. Thus, they have not

1 even attempted to demonstrate that their claims are typical of the class they seek to
2 represent, that they will adequately represent them, or that they have standing.³ See
3 *TransUnion*, 141 S. Ct. at 2208 (“[P]laintiffs must demonstrate standing for each claim that
4 they press and for each form of relief that they seek.”); *Staton v. Boeing Co.*, 327 F.3d 938,
5 957 (9th Cir. 2003) (“To determine whether the representation meets this standard, we ask
6 two questions: (1) Do the representative plaintiffs and their counsel have any conflicts of
7 interest with other class members, and (2) will the representative plaintiffs and their counsel
8 prosecute the action vigorously on behalf of the class?”); *Hanon v. Dataproducts Corp.*,
9 976 F.2d 497, 508 (9th Cir. 1992) (“The purpose of the typicality requirement is to assure
10 that the interest of the named representative aligns with the interests of the class. ... The
11 test of typicality is whether other members have the same or similar injury, whether the
12 action is based on conduct which is not unique to the named plaintiffs, and whether other
13 class members have been injured by the same course of conduct. ... We agree that a named
14 plaintiff’s motion for class certification should not be granted if there is a danger that absent
15 class members will suffer if their representative is preoccupied with defenses unique to it.”)
16 (internal quotation marks and citation omitted).

17 Plaintiffs’ counsel surely know that this deficiency defeats their Motion. The only
18 explanation is that they intend to submit carefully drafted declarations from the named
19 Plaintiffs, reciting these elements, with their Reply. As a matter of due process and fairness,
20 Defendant must engage in discovery now, including taking the depositions of the
21 parents/next friends of the three named Plaintiffs and serving written discovery on them, to
22 explore their willingness to serve as class representatives and to determine whether the
23 allegations attributed to them in the Amended Complaint—regarding the tribulations
24 allegedly associated with amending their birth certificates—are true. Currently, the

25 ³ In denying Defendant’s Motion to Dismiss, the Court addressed only the redressability
26 component of standing. (Dkt. 83 at 12–15.) It did not address the first element of standing:
27 whether the plaintiff “suffered an injury in fact that is concrete, particularized, and actual
28 or imminent.” *TransUnion*, 141 S. Ct. at 2203; see also *Susan B. Anthony List v. Driehaus*,
573 U.S. 149, 158 (2014) (injury-in-fact requirement “helps to ensure that the plaintiff has
a personal stake in the outcome of the controversy”) (internal quotation marks and citation
omitted).

1 unverified Amended Complaint, prepared by their attorneys, is the only basis for their
2 claims, and that is not adequate to satisfy typicality or adequacy. *Wal-Mart Stores*, 564
3 U.S. at 350.

4 Regarding the submitted declaration of Lizette Trujillo, Defendant must test her
5 avowals, and the Court “must perform ‘a rigorous analysis to ensure that the prerequisites
6 of Rule 23(a) have been satisfied.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th
7 Cir. 2011) (quoting *Wal-Mart*, 564 U.S. at 350–51). “Frequently that ‘rigorous analysis’
8 will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be
9 helped.” *Wal-Mart*, 564 U.S. at 351. “The class determination generally involves
10 considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s
11 cause of action.” *Id.* (internal quotation marks and citation omitted). Indeed, the Supreme
12 Court has “[r]epeatedly emphasized that it may be necessary for the court to probe behind
13 the pleadings before coming to rest on the certification question.” *Comcast*, 569 U.S. at 33;
14 *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1960–61 (2021)
15 (“As we have repeatedly explained, a court has an obligation before certifying a class to
16 determine that Rule 23 is satisfied, even when that requires inquiry into the merits.”)
17 (internal quotation marks and citation omitted).

18 Plaintiffs cite *Edwards v. First American Corporation*, 798 F.3d 1172 (9th Cir.
19 2015), and *Kamm v. California City Development Company*, 509 F.2d 205 (9th Cir. 1975),
20 to discourage any discovery. But neither case is helpful to their cause. In *Kamm*, the court
21 recognized that “[t]he propriety of a class action cannot be determined in some cases
22 without discovery, as for example, where discovery is necessary to determine the existence
23 of a class or set of subclasses. To deny discovery in a case of that nature would be an abuse
24 of discretion.” 509 F.2d at 210. And in *Edwards*, the court reiterated that Rule 23 “is not
25 a pleading standard, so to the extent necessary, our determination of commonality will
26 inevitably touch upon the merits of plaintiffs’ underlying” claims. 798 F.3d at 1178. These
27 cases are consistent with *Goldman Sachs*, *Comcast*, and *Wal-Mart*, and recognize that class
28 discovery is generally necessary. See *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313

1 (9th Cir. 1977) (noting that “the better and more advisable practice for a District Court to
2 follow is to afford the litigants an opportunity to present evidence as to whether a class
3 action was maintainable”); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942
4 (9th Cir. 2009) (“Our cases stand for the unremarkable proposition that often the pleadings
5 alone will not resolve the question of class certification and that some discovery will be
6 warranted.”).⁴

7 Discovering the factual bases for Trujillo’s avowals is critical here. Her declaration
8 serves as the *only* basis purportedly supporting commonality and Rule 23(b)(2) and it is the
9 only *direct* evidence, albeit speculative, regarding numerosity of the putative class. She
10 avows that: she is closely connected with the Southern Arizona Gender Alliance (“SAGA”),
11 Families Transformed, and the Arizona Trans Youth and Parent Organization; “[m]any” in
12 those groups are “concerned about—or unwilling to pursue—a court order correcting” their
13 birth certificates; in July 2021, she conducted a poll on Facebook, in which “[f]ifty-two
14 people responded that they would amend their child’s birth certificate through the private
15 administrative process if they could”; and she posted a “similar poll” on SAGA’s Facebook
16 page and “more than twenty additional people responded that they would use the private
17 administrative process if it were available to them.” (Dkt. 89-1.)

18 Defendant must test this hearsay, inquire who these “many” people are, examine
19 these “polls,” and review the membership for these organizations. Plaintiffs’ class claims
20 are based on their allegations that A.R.S. § 36-337 invades their privacy, causes “significant
21 emotional harm and puts them at risk of discrimination, harassment, and violence,” and
22 pressures them into undergoing unwanted medical procedures. (Dkt. 47, ¶¶ 1, 4, 7, 130,
23 131, 137, 142.) These are subjective feelings and viewpoints, and it may be that not every
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25 ⁴ Plaintiffs also cite to orders issued in an unrelated transgender case, *Toomey v. Arizona*,
26 19-cv-0035-TUC-RM (LAB) (D. Ariz.). Contrary to their suggestion, the court in that case
27 did not deny the defendants’ request for class discovery. Rather, the court ordered the
28 plaintiff to file a superseding motion for class certification and, “[i]f they wish[ed], the
defendants were permitted to “incorporate into [their] response an argument that the court
should ... stay briefing and order discovery.” *Id.*, Dkt. 82 (order filed on Feb. 6, 2020). The
defendants, however, did not re-urge their previous request for class discovery in their
responses. *Id.*, Dkt. 99, 100 (responses filed on Apr. 29, 2020).

1 putative class member shares them. Such dissimilarities may defeat commonality because
2 whether a class member has a viable constitutional claim necessarily turns on whether they
3 hold the same beliefs (or even have a desire to amend their birth certificate or have already
4 done so). *See Wal-Mart Stores*, 564 U.S. at 350 (“Their claims must depend upon a
5 common contention That common contention, moreover, must be of such a nature that
6 it is capable of classwide resolution—which means that determination of its truth or falsity
7 will resolve an issue that is central to the validity of each one of the claims in one stroke.
8 What matters to class certification is ... the capacity of a class-wide proceeding to generate
9 common answers apt to drive the resolution of the litigation. Dissimilarities within the
10 proposed class are what have the potential to impede the generation of common answers.”)
11 (internal quotation marks and citation omitted). Plaintiffs have not offered the declaration
12 of a single putative class member. If they are going to rely on the hearsay avowals of
13 Trujillo to establish numerosity, commonality, and Rule 23(b)(2), Defendants should be
14 entitled to not only take Trujillo’s deposition but serve written discovery regarding her
15 avowals.⁵

16 This would not, as Plaintiffs suggest, result in a “mini-trial” on the merits. It is a
17 modest discovery request that goes to the heart of Rule 23’s elements. Even if there is some
18 overlap, that is not a basis to deny discovery. *See Ellis*, 657 F.3d at 981 (“As we explained
19 above, the merits of the class members’ substantive claims are often highly relevant when
20 determining whether to certify a class. More importantly, it is not correct to say a district
21 court may consider the merits to the extent that they overlap with class certification issues;
22 rather, a district court must consider the merits if they overlap with the Rule 23(a)
23 requirements.”); *see also Goldman Sachs*, 141 S. Ct. at 1960–61. Furthermore, the four
24 requested depositions would focus on the class certification issues; Defendant has offered
25 to expand the scope of those depositions beyond class certification to avoid taking two
26 depositions, but Defendant is amenable to limiting the depositions so long as they are not
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28 ⁵ The depositions of the parents/next friends of the three Plaintiffs will further illuminate the issues surrounding commonality and Rule 23(b)(2).

1 precluded from deposing the deponents a second time for non-class-certification discovery.
 2 As for the written discovery requests, Defendant disagrees that the requests are
 3 impermissibly broad or unduly burdensome. They are inquisitive, and permissibly so,
 4 because Plaintiffs did not provide any declarations from the named Plaintiffs and Trujillo's
 5 declaration is conclusory and vague.

6 Defendants' request is twofold: (1) allow up to 60 days to conduct class discovery—
 7 30 days to propound written discovery and 30 days from the date of the last written response
 8 to take the depositions of Lizette Trujillo and the parents/next friends of the three named
 9 Plaintiffs; and (2) allow 30 days—from the date of the last deposition—to prepare and file
 10 the opposition to the Motion for Class Certification. Plaintiffs' 60-day proposal for both
 11 discovery *and* preparing an opposition does not provide enough flexibility for both written
 12 discovery and depositions or for subsequently preparing the opposition.⁶ Indeed, Plaintiffs
 13 have requested 45 days to prepare their reply. (Dkt. 84 at 9.) Moreover, Plaintiffs will
 14 suffer no prejudice if Defendants' proposal is adopted. Class certification briefing normally
 15 does not take place until after at least six months of class discovery. Plaintiffs have not
 16 provided any basis for expediting briefing in this case—at the expense of Defendant's need
 17 to conduct discovery—and they have already alluded to conducting additional discovery
 18 after Defendant files an opposition and before they file their reply, which undercuts any
 19 claim of prejudice. (*Id.*)

20 Respectfully submitted,

21 Dated: September 7, 2021

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28 ⁶ Attorneys Dan Struck and Nicholas Acedo begin a three-week class action trial on November 1, with expedited class discovery taking place in September and October.

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