Patrick Gunn (admitted *Pro Hac Vice)*
COOLEY LLP
101 California Street, 5th Floor
San Francisco, California 94111-5800
Telephone: (415) 693-2070
Facsimile: (415) 693-2222
Email: pgunn@cooley.com

Mary O'Grady (011434)
Colin Proksel (034133)
Payslie Bowman (035418)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
Email: mogrady@omlaw.com
Email: cproksel@omlaw.com
Email: pbowman@omlaw.com

Attorneys for Plaintiffs and Proposed Class
Additional counsel listed on following page

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HELEN ROE, a minor, by and through her parent and next friend MEGAN ROE; JAMES POE, a minor, by and through his parent and next friend LAURA POE; AND CARL VOE, a minor by and though his parent and next friend RACHEL VOE,

Plaintiffs,

v.

DON HERRINGTON, in his official capacity as Interim State Registrar of Vital Records and Interim Director of the Arizona Department of Health Services,

Defendant.

Case No. 4:20-cv-00484-JAS

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PLAINTIFFS' SUPPLEMENTAL RESPONSES TO DEFENDANT'S DISCOVERY REQUESTS

Barrett J. Anderson (admitted *Pro Hac Vice)*
COOLEY LLP
4401 Eastgate Mall
San Diego, California 92121-1909
Telephone: (858) 550-6000
Facsimile: (858) 550-6420
Email: banderson@cooley.com

Asaf Orr (admitted *Pro Hac Vice)*
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Telephone: (415) 392-6257
Facsimile: (415) 392-8442
Email: aorr@nclrights.org

Attorneys for Plaintiffs and Proposed Class

I. INTRODUCTION

Plaintiffs oppose Defendant's Motion to Compel Plaintiffs' Supplemental Responses to Defendant's Discovery Requests. (Dkt. 122 ("Br.").) This case is about whether the surgical requirement in A.R.S. § 36-337(A)(3) unconstitutionally discriminates against Plaintiffs and the Proposed Class. It is not about Defendant's tangential, irrelevant, and disproportionately burdensome discovery demands, many of which are moot because Plaintiffs have already provided the requested documents in hopes of moving this case forward expeditiously and avoiding exactly this type of gratuitous motion practice.

First, Defendant requests information purportedly relevant to the Declaration of Lizette Trujillo, which Plaintiffs submitted in support of their Motion for Class Certification over nine months ago. (Dkt. 89-1, Declaration of Lizette Trujillo ("Trujillo Decl.").) Defendant seeks to compel disclosure of the identities of nonparty transgender children and their families to try to "verify whether they are indeed members of the Putative Class." (Br. at 11.) But "a plaintiff 'is not required to identify any other class member at the class certification stage.'" *Head v. Citibank, N.A.*, 340 F.R.D. 145, 150 (D. Ariz. 2022) (quoting *Wesley v. Snap Finance LLC*, 339 F.R.D. 277, 293 (D. Utah 2021)). Further, requiring Plaintiffs to identify each transgender child that Ms. Trujillo knows so that Defendant can "verify" them is not relevant or proportional to the only issue for which Plaintiffs cited her declaration in the pending class-certification motion: whether there more than forty transgender people who have been or will be born in Arizona whose constitutional rights are violated by A.R.S. § 36-337(A)(3). Given the lack of relevance of this information, the privacy stakes of this case, and the likely risks to members of the putative class from revealing their identities, the Court should prohibit Defendant from seeking further discovery into identities of nonparty transgender people.

Second, Plaintiffs collected, reviewed, and produced thousands of pages of documents of Plaintiffs' Mothers' social media information pertaining to their children or transgender issues generally. There is nothing more to produce. In addition, Defendant's assertion that Plaintiffs' Mothers' social media is relevant to Plaintiffs' emotional harm is

wrong. In cases like this one challenging the constitutionality of a state law, the injury is the defendant's mere *invasion* of the right. Defendant's reliance on inapt cases addressing discovery related to emotional distress *damages* is thus misplaced. His other arguments—that he requires the social media records to challenge class-certification and standing—likewise miss the mark. Even if the additional social media information is marginally relevant (and it is not), Defendant's request is not proportional to the needs of this case.

Third, Defendant's request for Plaintiffs' medical records and lists of healthcare providers contradicts Defendant's earlier representations to the Court that he would not dispute Plaintiffs' diagnoses or treatment for gender dysphoria. Moreover, Defendant's demand is again disproportionate to his needs or the needs of this case. Plaintiffs produced pre-existing doctor letters attesting to Helen Roe and James Poe's diagnoses and treatment and offered to provide one for Carl Voe. Such letters would suffice for Defendant's professed need at far less burden to Plaintiffs and their medical providers.

Fourth, Defendant's proposed Court order commands Plaintiffs to sign releases to allow Defendant to subpoena their current and former schools for records. Although Plaintiffs object to the relevance of such records, they have already requested their school records and produced everything they received in response. There is nothing more to obtain. Allowing Defendant to repeat the exercise is unnecessary and risks exposing Plaintiffs' identities and participation in this litigation to school and district personnel.

Defendant's motion to compel should be denied.

II. PROCEDURAL BACKGROUND

A. Commencement and denial of Defendant's motion to dismiss.

On November 4, 2020, Plaintiffs filed this lawsuit alleging that the surgical requirement in A.R.S. § 36-337(A)(3) violates their rights under the Fourteenth Amendment's Equal Protection and Due Process Clauses. (Dkt. 1.) The same day, Plaintiffs filed a motion for a preliminary injunction for former Plaintiff Jane Doe. (Dkt. 3.) On November 27, the parties reached a negotiated settlement by which Defendant stipulated that the Arizona Department of Health Services ("ADHS") would provide Jane Doe an

amended birth certificate reflecting her female gender identity. (Dkt. 39, *et seq.*) The Court ordered ADHS to amend Jane Doe's birth certificate on November 30. (Dkt. 41.)

Plaintiffs filed an amended complaint on January 8, 2021. (Dkt. 47.) The amended complaint asserted a class action on behalf of "[a]ll transgender individuals born in Arizona, now and in the future, who seek to change the sex listed on their birth certificates but have not undergone a 'sex change operation' as treatment for their gender dysphoria." (*Id.* ¶ 113.) Plaintiffs agreed to extend Defendant's response deadline by 30 days, from February 8 to March 10. (Dkt. 50.)

Defendant filed a motion to dismiss on March 10, asserting *inter alia* that Plaintiffs lacked standing under Article III of the U.S. Constitution. (Dkt. 56 at 5–10.) The Court denied the motion to dismiss, stating in its August 5 decision that "[t]he record before the Court demonstrates that Plaintiffs[] have standing." (Dkt. 83 at 15.) Additionally, the Court concluded that "[d]iscrimination against transgender people is discrimination based on sex; as such, heightened scrutiny applies" to the surgical requirement. (*Id.* at 9.)

Following the decision, the parties filed a joint report and Rule 26(f) case management statement on August 9. (Dkt. 84.) Under "Disputed Facts and Legal Issues," Defendant represented that:

> Defendant does not dispute the medical definition of gender identity/gender dysphoria, or the accepted medical/psychological best practices to treat gender dysphoria in minors. Nor does she anticipate that there will be any dispute regarding Plaintiffs' social history, including their diagnoses and/or treatment of gender dysphoria.

(*Id.* at 7.) With respect to Plaintiffs' emotional well-being, Defendant only disputed that "the social and emotional impact that Plaintiffs allege *is the result of A.R.S. § 36-337*." (*Id.* (emphasis added).) Following that, the Court issued a scheduling order setting the end of fact discovery for February 25, 2022. (Dkt. 87 at 2.)

B. Plaintiffs file their motion for class certification.

Plaintiffs filed a motion for class certification on August 25, 2021. (Dkt. 89.) Certification would permit the case to proceed, while also allowing the Court to order

ADHS to amend the named Plaintiffs' birth certificates "us[ing] its equitable powers," as it had for Jane Doe. (*See* Dkt. 85 at 8:4–10.) In that motion, Plaintiffs argued that all four elements are satisfied in this case, with typicality, commonality, and adequacy "satisfied as a matter of law." (Dkt. 91 at 2.) With respect to numerosity, Plaintiffs offered several sources evincing the number of transgender individuals born in Arizona, including five different demographic studies. (Dkt. 89 at 4–7 & nn. 3–8; Dkt. 89-3, Declaration of Colin Proksel Exs. A–E.) As additional support, Plaintiffs submitted Ms. Trujillo's declaration, in which she attested to personally knowing at least fifty families who wished to amend the sex listed on their children's birth certificates but could not because of the surgical requirement enforced by Defendant. (Dkt. 89 at 6; Trujillo Decl. ¶¶ 6, 10–12.)

Defendant requested class-related discovery, including the need to depose Ms. Trujillo and the three Plaintiffs' Mothers. On September 15, 2021, the Court ordered that the parties "shall have 60 days . . . to conduct class action discovery, 30 days to propound written discovery, and 30 days from the date of the last written response to take the depositions of Lizette Trujillo and the parents/next friends of the three named Plaintiffs." (Dkt. 100.) The Court explained that "[t]he written discovery and depositions shall primarily focus on class certification issues," but that "to the extent there is any potential overlap with merits issues, it shall be allowed via both written discovery requests and during the depositions." (*Id.*)

C. Defendant's discovery requests and Plaintiffs' productions.

Defendant served Plaintiffs with his first set of requests for production and interrogatories on September 23, 2021. (Dkt. 101.) On November 8, Plaintiffs served responses and objections. (Dkt. 106.) In a December 10 letter, Defendant clarified he was requesting: (1) the identities of all transgender people seeking to change the gender marker on their birth certificates who participate in the support groups Ms. Trujillo is associated with or who responded to the Facebook polls she referenced; (2) Plaintiffs' Mothers' social media information demonstrating the emotional states of their children; (3) all school records; and (4) Plaintiffs' complete medical and mental health records. (Dkt. 122-2,

Declaration of Dana M. Keene ("Keene Decl.") Ex. 2 at 25–36.)

After a December 17 meet and confer, Plaintiffs wrote to Defendants on January 10, 2022, reiterating their positions that certain material was irrelevant and would not be produced. (Keene Decl. Ex. 2 at 40–41.) Specifically, Plaintiffs objected to producing the names and birth dates of individuals involved in the support groups and Facebook polls, as well as any social media information beyond that which directly addresses Plaintiffs' emotional distress related to their transgender status. (*Id.*) Although Plaintiffs maintained that it was irrelevant, they nonetheless agreed to seek and produce responsive school records concerning their experience as transgender students and offered to obtain letters from their healthcare providers confirming that each Plaintiff has been diagnosed with, and is receiving clinically appropriate treatment for, gender dysphoria. (*Id.* at 41.)

To facilitate ongoing discovery, the parties agreed once again to push the deadlines, changing the fact discovery deadline from February 4 to June 24. (Dkt. 110.) In a letter dated February 17, Defendant stated that he intended to file a motion to compel if Plaintiffs did not agree to provide what he demanded by March 4. (Keene Decl. Ex. 2 at 46.) Plaintiffs did not change their stated positions as of March 4 and Defendant did not file his proposed motion to compel.

In the two months that followed, Plaintiffs searched for, collected, reviewed, and produced responsive documents. It took considerable effort and was greatly disruptive to coordinate and collect this information from the numerous personal email and social media accounts, computer hard drives, and paper files of four different active mothers. It was particularly burdensome given these families are navigating both the ongoing COVID-19 pandemic and the discrimination their children experience because they are transgender. Plaintiffs also requested documents from third parties, including the schools they have attended and the support groups Ms. Trujillo referenced in her declaration. Plaintiffs reviewed and produced all the responsive documents from those many disparate collections, including (as is relevant here):

- The Facebook polls referenced by Ms. Trujillo in her declaration, redacting only the names of poll respondents and assigning each unique respondent an identifier to allow Defendant to identify any duplicates or family overlap.
- Documents from Ms. Trujillo that addressed the number of members in, and organizational structure of, the support groups she referenced in her declaration.
- Every social media post or message by Plaintiffs' Mothers that referenced their children or transgender issues generally.
- Pre-existing letters from healthcare providers for Helen Roe and James Poe attesting to their diagnoses of, and treatment for, gender dysphoria.
- Every document Plaintiffs received from their school records requests. (Some of those schools, however, did not have records due to their record retention policies.)

(Declaration of Colin Proksel ("Proksel Decl.") ¶¶ 2–6.) Ultimately, despite taking the position that much of what Defendant requested was irrelevant and burdensome, Plaintiffs nevertheless produced 4,149 documents totaling 38,561 pages in four rolling productions, the last of which was served on April 28. (*Id.* ¶ 7.)[1]

In an April 26 email, Defendant restated his February 17 discovery demands. (Keene Decl. Ex. 2 at 67–68.)[2] On May 2, Plaintiffs responded that they "anticipate[d] that most of the concerns in [the] April 26 email are resolved by [the April 28 production]," but that regardless Plaintiffs' positions with respect to Defendant's requests had not changed since January 10 and it was too late to demand that Plaintiffs duplicate their efforts. (*Id.* Ex. 2 at 64–65.)[3] On June 6, Defendant filed the instant motion to compel.

---

[1] Defendant has thus far produced only 32 documents totaling 384 pages. (*Id.* ¶ 8.)

[2] Page numbers for the April 26 email correspond to the PDF page numbers of the sealed version of Exhibit 2 to the Keene Decl. All other page numbers cited in this brief for Exhibit 2 are to the publicly filed version.

[3] Defendant argues that Plaintiffs have not "specifically identified any of the[] documents" produced and have not "supplemented their responses to include any substantive information." (Br. at 7.) That is incorrect. Plaintiffs supplemented their discovery responses substantively on April 29, (Dkt. 117), and again on May 13 (at Defendant's request) to include the Bates ranges of responsive documents, even though Plaintiffs did not believe that they were obligated to do so, (Dkt. 119). Defendant cites no authority that requires Plaintiffs to provide an itemized list of every document produced or detail the Plaintiffs' position on the documents' relevancy or responsiveness. Such an obligation would be far beyond anything required by Rule 26. In any event, the motion does not ask the Court to order Plaintiffs to provide such an itemized list, so Plaintiffs do not further address the issue in this brief. Defendant has otherwise failed to identify what other information he believes requires supplementation.

III. LEGAL STANDARD

"Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed R. Civ. P. 26(b)(1). "If the information sought is deemed by the court to be irrelevant, the court should restrict discovery to protect a party from 'annoyance, embarrassment, oppression, or undue burden or expense.'" *Roehrs v. Minn. Life Ins. Co.*, 228 F.R.D. 642, 644 (D. Ariz. 2005) (quoting Fed. R. Civ. P. 26(c)) (denying in part motion to compel where there was an insufficient nexus between information sought and parties to the case).

The proportionality requirement is "intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse." Fed. R. Civ. P. 26 Advisory Committee Notes. "Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case." *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) (denying motion to compel "[b]ecause the proposed discovery is not proportional to the needs of the case" where movant already obtained relevant information sufficient to address the issue). When assessing proportionality, courts consider "the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). If the court determines the discovery sought is not relevant or proportional to the needs of the case, "the court must limit the frequency or extent of discovery." Fed. R. Civ. P. 26(b)(2)(C)(iii). "[T]he simple fact that requested information is discoverable under Rule 26(a) does not mean that discovery must be had." *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 237 (S.D. Cal. 2015) (citation omitted).

IV. ARGUMENT

A. The Court should deny Defendant's request to identify nonparty transgender people as irrelevant and disproportionate.

Defendant first seeks the identities, birth dates, and other identifying information of nonparty transgender individuals, arguing that he needs this information "to test [Ms.] Trujillo's avowals" in her declaration. (Br. at 9.) Specifically, Defendant demands the

identities of three sets of individuals: (1) members of third-party organizations—namely, the Southern Arizona Gender Alliance ("SAGA"), Families Transformed (a support group within SAGA), and the Arizona Trans Youth and Parent Organization ("AZTYPO"); (2) respondents to certain private Facebook polls in closed groups run by Families Transformed and AZTPYO; and (3) "all individuals [Ms. Trujillo] allegedly talked to and/or heard stories as referenced in her Declaration." (Br. at 11.)

"[A] plaintiff 'is not required to identify any other class member at the class certification stage.'" *Head*, 340 F.R.D. at 150 (quoting *Wesley*, 339 F.R.D. at 293). Defendant's request should be denied for that reason alone. Also, the collection of such identifying information is disproportionate to the needs of this case and needlessly intrudes on the privacy of nonparty transgender children—one of the core issues in this case.

(i) Numerosity does not require identification of proposed class members.

Plaintiffs use Ms. Trujillo's declaration as additional support for the numerosity element of class-certification. (Dkt. 89 at 6.) To demonstrate numerosity, a plaintiff need only show that the putative class contains "40 or more members" such that "joinder of all members is impracticable." *Toomey v. Arizona*, 2020 WL 2465707, at *2 (D. Ariz. May 12, 2020) (first quoting *Perez v. First Am. Title Ins. Co.*, 2009 WL 2486003, at *2 (D. Ariz. Aug. 12, 2009); and then quoting Fed. R. Civ. P. 23(a)(1)). A plaintiff is not required to prove the identity of those putative class members. In *Head*, the court rejected the defendant's argument that the plaintiff failed to establish numerosity because he "ha[s] not identified any other class members." 340 F.R.D. at 150. The corollary must also be true: Defendant may not demand that Plaintiffs identify other specific class members simply so that he can attempt to "prove or disprove" that they are in the class. Defendant cites no authority to the contrary. The actual identities of nonparty transgender people in the putative class are thus irrelevant. *See, e.g.*, *Borquez v. Schirio*, 296 F. App'x 605, 606 (9th Cir. 2008) (affirming denial of "motion to compel disclosure of the addresses of non-party former Arizona Department of Corrections officers").

Defendant's apparent desire to investigate and question each transgender child and

the families that have communicated with Ms. Trujillo or the organizations identified above, (*see* Br. at 11–12), is manifestly improper for the same reason. It would also necessitate burdensome and intrusive discovery into the personal lives of nonparties to obtain information that has no relevance to any issue in this case. Defendant has sufficient information to depose Ms. Trujillo regarding her statements in support of numerosity; namely, the Facebook polls with unique identifiers, documents in which she discussed the number of members in the various support groups in which she is a member, and the organizational documents of those groups. (Proksel Decl. ¶¶ 2–3.) No more is required.

Defendant is incorrect that Ms. Trujillo's declaration is the "*only* direct evidence supporting numerosity." (Br. at 9.) Plaintiffs also filed five different demographic studies showing that the class numbers in the thousands, at least. (Dkt. 89 at 4–6.) Other courts in this district have held that demographic evidence is *by itself* sufficient to establish numerosity. *See Toomey*, 2020 WL 2465707, at *2 (certifying class and finding numerosity requirement satisfied using only demographic evidence of the number of transgender people in Arizona). And numerosity is satisfied if such evidence, together with "general knowledge and common sense," demonstrate that "joinder would be impracticable." *Head*, 340 F.R.D. at 150 (ruling numerosity met because "it seems virtually impossible" class was less than forty based on estimates of class size deduced by "logic" from call records); *see also Sullivan v. Kelly Servs., Inc.*, 268 F.R.D. 356, 362 (N.D. Cal. 2010) (certifying class over defendant's objection that it could not ascertain all class members' identities because the class definition "provides objective criteria by which prospective plaintiffs can identify themselves as class members"). Given the demographic studies and common sense, there is not even a remote possibility that Defendant will be able to demonstrate there are fewer than forty transgender individuals who were born in Arizona—alive now or who will ever be born—whose constitutional rights are violated by A.R.S. § 36-337(A)(3).[4]

[4] For Defendant to suggest otherwise is disingenuous. The State of Arizona is currently a defendant in a class action in this district in which the court certified a class that is presumed to include over 1,000 state employees and their dependents who are, or will be, excluded from insurance coverage for surgical treatment for gender dysphoria by the state's

Consequently, the relevance of the identities of nonparty transgender people is minimal at best, and the Court should not allow Defendant to conduct such an unwarranted inquest.

(ii) Nonparty identities are not relevant to any other class-certification element.

Aside from numerosity, Plaintiffs do not cite Ms. Trujillo's declaration in support of any other element of class certification. (*See* Dkt. 89 at 7–12.) Defendant advances no more than a bald claim to the contrary. There is thus no basis to seek the identities of transgender people to "test" any other aspect of Ms. Trujillo's declaration. In any event, as with the numerosity requirement, Plaintiffs are not required to identify other class members to establish any other element of class certification. *See, e.g.*, *Wesley*, 339 F.R.D. at 293 (ruling plaintiff need not identify other class members to show typicality).

Defendant asserts the need to identify putative class members to verify their individual injuries are like Plaintiffs'. The extent of a class member's injury is irrelevant to class certification; rather, a plaintiff may demonstrate commonality and typicality simply by showing that each class member suffered the same *type* of injury. *Knapper v. Cox Commc'ns, Inc.*, 329 F.R.D. 238, 241–43 (D. Ariz. 2019). In *Knapper*, the court rejected the defendant's argument that plaintiff could not be a class representative because her alleged injury was less severe than others in the class, holding "[t]he fact that some of the proposed members might have different degrees of injuries, or none at all, does not render the claim or the alleged injury atypical." *Id.* at 243; *see also Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) (holding typicality does not require plaintiffs "be identically positioned to each other or to every class member"). Here, every class member has the same injury: the violation of their constitutional rights by Defendant's enforcement of A.R.S. § 36-337(A)(3). Their identities are simply not relevant or proportional to this case.

(iii) The privacy risks of exposing proposed class members' identities dwarfs Defendant's alleged need.

Identifying nonparty transgender individuals would violate the very constitutional

employee health benefits plan. *Toomey*, 2020 WL 2465707, at *3. Many of those class members are also members of the putative class in this case.

rights that Plaintiffs seek to vindicate on behalf of class members: the right to maintain the privacy of one's transgender status. Rule 26 specifically addresses this: "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . forbidding the disclosure or discovery . . . ." Fed. R. Civ. P. 26(c)(1)(A). Courts apply Rule 26(c)(1) to protect nonparties from having their private information disclosed, especially where, as here, it is of little relevance. For example, in *Roberts v. Clark County School District*, a defendant sought to compel production of information about a transgender plaintiff's transition. 312 F.R.D. 594, 602–04 (D. Nev. 2016). The court denied the request, citing Rule 26(c)(1) and finding that producing such private and personal information about the plaintiffs' transgender status could cause embarrassment. *Id.* The same outcome should obtain here.

Defendant's misplaced reliance on the protective order does not solve this problem. The order protects the information from public view, but personally identifying nonparty transgender individuals outs them without their consent to all involved in this litigation. *See Blum v. Schlegel*, 150 F.R.D. 38, 41 (W.D.N.Y. 1993) (denying plaintiff's motion to compel third party's employment file, finding "assertion of speculative, unsubstantiated reasons for production" was insufficient and even with protective order "[d]isclosure of these documents would serve only to cause further annoyance, embarrassment, oppression and hardship" to the third party.) Good cause exists to reject Defendant's requests here.

Plaintiffs request the Court affirmatively prohibit Defendants from seeking further discovery into the identity of any nonparty transgender people or families, including by discovery request to Plaintiffs, subpoenas to third parties, or in depositions of any witness. Rule 26(c)(1)(D) provides that the Court may "forbid[] inquiry into certain matters . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." As argued above, Defendant is not entitled to the identities of nonparty transgender people and allowing such discovery would place these nonparties and their families at greater risk for no reason. The Court should order Defendant to stop.

B. The Court should deny Defendant's request for further information from Plaintiffs' Mothers' social media accounts.

Defendant next asserts that he is entitled to eight broad categories of social media documents belonging to Plaintiffs' Mothers. (Br. at 12–15 & n. 10.) Plaintiffs have already produced all relevant and responsive social media records in those eight categories from Plaintiffs' Mothers—*i.e.*, any that reference their children or transgender issues generally. (Proksel Decl. ¶ 4.) There are no more relevant and responsive records to produce. But even if more records did exist, Defendant's arguments as to their relevance are unavailing.

First, Defendant chiefly argues that social media information from Plaintiffs' Mothers is relevant to the emotional status of their children. (Br. at 13–15.) Not so. Plaintiffs' injury in this case is the violation of their constitutional rights. *See, e.g.*, *Ne. Fla. Ch. of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."); *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978) (holding plaintiffs did not need to prove injury other than fact of due process violation to prevail); *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) ("It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." (cleaned up)); *Melendres v. Arpaio*, 695 F.3d 990, 998 (9th Cir. 2012) (affirming that "exposure to unconstitutional policy while going about one's daily life constitutes ongoing harm" (cleaned up)). Here, Defendant conflates allegations showing the emotional harm to Plaintiffs *arising from* Defendant's violation of their constitutional rights with a claim for emotional distress *damages*, and erroneously relies upon cases addressing the latter. (Br. at 13 (*citing Barten v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 11111477, at *2 (D. Ariz. June 17, 2015) (granting in part and deferring in part decision on motion *in limine*, and noting "evidence of other stress factors in the plaintiff's life" would be admissible at trial if relevant "to emotional distress damages"); *Wilkins v. Maricopa Cnty.*, 2010 WL 2231909,

at *4 (D. Ariz. June 2, 2010) (finding mental health records relevant only because of "Plaintiff's claims for mental and emotional damages").)

Plaintiffs do not seek emotional distress damages; indeed, Plaintiffs do not seek damages at all. (*See* Dkt. 78 at 3 ("Plaintiffs no longer seek nominal damages in this action.").) There is thus no need for Defendant to delve into the details of Plaintiffs' emotional state, or to "assess the magnitude of those injuries," or "to determine whether [Plaintiffs'] claims regarding invasion of privacy, exposure, and/or harassment are indeed true." (Br. at 13–14.) But even if those ends were appropriate (and they are not), Defendant fails to explain how a *mother's* social media activity—beyond what Plaintiffs have already produced—could be relevant to the violation of her *child's* constitutional rights. The cases Defendant cites involve a person's own social media records used to establish that person's emotions and mental state, and even then only when such records would be relevant to the plaintiff's alleged damages.[5] Defendant otherwise cites no law entitling him to "a broad scope of discovery" into Plaintiffs' Mothers' social media.[6]

Second, Defendant's assertion that the social media records are relevant to the typicality and commonality elements of the class certification analysis holds no water. (Br. at 13.) Plaintiffs assert that these two elements are "satisfied as a matter of law in this case." (Dkt. 91 at 2; *see also* Dkt. 89 at 7–11.) There is thus no basis for Defendant to demand documents (and further delay discovery) to refute an argument Plaintiffs never advanced.

---

[5] (*See* Br. at 14 (citing *Hinostroza v. Denny's, Inc.*, 2018 WL 3212014, at *6 (D. Nev. June 29, 2018) (allowing limited discovery of *plaintiff's* social media relevant to alleged physical and emotional distress *damages*); *Brown v. City of Ferguson*, 2017 WL 386544, at *2 (E.D. Mo. Jan 27, 2017) (allowing limited discovery of *plaintiff's* social media relevant to *inter alia* loss of companionship, future support, and emotional distress *damages*)); *Robinson v. Jones Lang LaSalle Americas, Inc.*, 2012 WL 3763545, at *2 (D. Or. Aug. 29, 2012) (permitting limited discovery of *plaintiff's* social media relevant to emotional distress *damages*); *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 437 (S.D. Ind. 2010) (allowing limited discovery of *claimants'* social media where each "alleged severe emotional distress, including post-traumatic stress disorder," but declining to "address the proper scope of discovery for 'garden variety emotional distress claims'").)

[6] Plaintiffs redacted certain irrelevant information from the social medical records to protect the identities of nonparties and the privacy of Plaintiffs' Mothers with respect to issues not pertinent to the litigation. At Defendant's request, Plaintiffs produced a redaction log detailing the basis for the redactions on June 6, 2022. (Proksel Decl. ¶ 10.) Those redactions are not at issue in the motion.

Regardless, social media records are not relevant to any element of class certification in this case. For example, in class-action lawsuits challenging facially discriminatory statutes, such as this one, "it is sufficient for typicality if the plaintiff endured a course of conduct directed against the class." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2018). Furthermore, "[t]he actions of the defendant need not affect each member of the class in the same manner" for a plaintiff to allege commonality. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (internal quotation marks omitted).[7]

Third, and finally, Defendant's bald contention that Plaintiffs' Mothers' social media is relevant to standing, (Br. at 13), is meritless. The Court already considered and rejected this argument in Defendant's motion to dismiss, ruling "that Plaintiffs' have standing." (Dkt. 83 at 15.) For these reasons, Defendant's overreaching request for Plaintiffs' Mothers' social media activity should be denied as irrelevant and not proportional.

C. The Court should deny Defendant's request for Plaintiffs' medical records and providers.

Defendant is incorrect that Plaintiffs put their medical records and healthcare providers "at issue" by simply alleging that they have been diagnosed with and are being treated for gender dysphoria. (Br. at 15.) At the threshold, Defendant does not contest that Plaintiffs are transgender. Additionally, Defendant's request for such detailed medical information from each of the Plaintiffs also directly contradicts his clear representations to the Court in the case management statement that he does not "anticipate that there will be any dispute regarding Plaintiffs' social history, including their diagnoses and/or treatment of gender dysphoria." (Dkt. 84 at 7.) Nothing about the case has changed since he made that representation to the Court; he should be held to his word. Even if he did, Plaintiffs will not offer their medical records or testimony from their healthcare providers as evidence in this case to prove that they are transgender. Defendant otherwise offers only two reasons

[7] The same analysis applies to the other class-certification elements. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5, 360–61 (2011) (holding commonality and typicality requirements "tend to merge with the adequacy-of-representation requirement" and Rule 23(b)(2) is satisfied "when a single injunction or declaratory judgment would provide relief to each member of the class"); (*see also* Dkt. 89 at 11–13).

for the information; neither entitles him to the records he seeks.

First, Defendant asserts that he must "verify" Plaintiffs' diagnoses of and treatment for gender dysphoria to challenge class certification and Plaintiffs' standing. (Br. at 15.) As argued above, Plaintiffs and putative class members need not be affected by a constitutional injury in the same way to show the elements of class certification, and Plaintiffs' Article III standing has been recognized by the Court. In any event, obtaining and producing medical records and lists of healthcare providers is not necessary when a doctor's letter from each Plaintiffs' provider would establish the same facts with far less burden. *See Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 936 (9th Cir. 1994) (emphasizing the goal of the Federal Rules is "efficient discovery"). Plaintiffs have already produced doctor's letters confirming Helen Roe's and James Poe's diagnoses and treatment and maintain their offer to produce such a letter for Carl Voe as well. (Proksel Decl. ¶ 5.)

That such letters would suffice can hardly be disputed. Defendant accepts similar doctor letters from non-transgender people seeking to correct the sex listed on their birth certificates. (*See* Dkt. 121-2 at 99–101.) And, as the Court ruled when it denied Defendant's motion to dismiss, ADHS's "current statutory and regulatory scheme does not require any investigation whatsoever such as reviewing medical records, contacting treating physicians, requiring an independent medical examination, or otherwise requiring a transgender person to disrobe before Arizona Department of Health Services officials to confirm the existence (or absence) of external genitalia stemming from some unspecified 'sex change operation.'" (Dkt. 83 at 14.) Defendant should not be awarded more medical information than he would be entitled to under the discriminatory law at issue in this case.

Such letters would also be consistent with what the Arizona Department of Transportation and the federal government accept from applicants seeking to correct the sex listed on identity documents such as Arizona state driver's licenses, U.S. Passports, and Social Security records. (*See* Dkt. 30, Plaintiffs' Reply in support of Jane Doe's Motion for Preliminary Injunction at 9; Dkt. 30-5, Declaration of Colin Proksel Ex. 5 at 61 (requiring letter from physician attesting that applicant is "irrevocably committed to the gender-change

process"), Ex. 6 at 64 (requiring physician's letter attesting to "appropriate clinical treatment for gender transition" to change gender marker on U.S. Passports), Ex. 7 at 67 (requiring same for Social Security records).) Finally, Plaintiffs allege that the maximum that Defendant is allowed to demand under the Fourteenth Amendment from transgender applicants who seek to amend their birth certificates is evidence that they have "undergone clinically appropriate treatment for the purpose of gender transition." (Dkt. 47 at 31.) Doctor's letters attesting to such treatment would thus suffice to meet the standard that Plaintiffs propose for a future permanent injunction aimed at curing the constitutional infirmities in A.R.S. § 36-3376(A)(3). Defendant is entitled to no more.

Second, Defendant again invokes Plaintiffs' emotional harm arising from the discriminatory surgical requirement, this time as grounds to rifle through Plaintiffs' medical records and history. (Br. at 15–16.) Defendant's argument fails for the same reason: this case does not involve emotional distress damages. *Peters v. Milestone Techs., Inc.*, 2021 WL 5177856, at *2 (D. Ariz. Nov. 8, 2021) (finding limited medical records relevant only because "Plaintiff makes a claim for emotional distress damages" and "Plaintiff's medical records are not otherwise discoverable"). In any event, the Court should not allow Defendant to access private medical information simply to see what those records "may show." (Br. at 15.) Such a fishing expedition through Plaintiffs' deeply private and irrelevant information falls squarely under the Court's authority to prohibit under Rule 26(c)(1). *See, e.g.*, *Roberts*, 312 F.R.D. at 604 ("It is difficult to fathom a subject more likely to cause embarrassment than requesting proof of one's genitalia."). The Court should deny Defendant's request for Plaintiffs' medical records and healthcare providers.

D. The Court should deny Defendant's request for releases to subpoena Plaintiffs' school records.

Lastly, Defendant demands that Plaintiffs execute releases so that he can subpoena their school records. (Br. at 16–17.) That is unnecessary. Plaintiffs—while disagreeing that any of these records is relevant or proportional to the needs of the case—already requested all of Plaintiffs' school records and have produced everything they obtained.

(Proksel Decl. ¶ 6.) Plaintiffs explained this to Defendant, as he concedes. (Br. at 16.) Aside from speculation, Defendant provides no basis for "questioning" or "doubting" Plaintiffs' representation. (*Id.*) Defendant may wish that more documents existed, but conjecture is plainly insufficient to justify a motion to compel. *Goolsby v. Cnty. of San Diego*, 2019 WL 3891128, at *4 (S.D. Cal. Aug. 19, 2019) (denying motion to compel evidence where movant offered only "speculation" that the information it sought existed).

Further, permitting Defendant to proceed with duplicative and unnecessary subpoenas risks outing Plaintiffs as transgender to employees of their current and past schools and increases the likelihood that Plaintiffs' identities and participation in this lawsuit are revealed to the public. The Court granted Plaintiffs' motions to proceed using pseudonyms to shield their identities, (Dkts. 8 & 49), and Defendant should not be allowed to undermine that protection. *See Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (authorizing parties to use pseudonyms "when identification creates a risk of retaliatory physical or mental harm" or "when anonymity is necessary to preserve privacy in a matter of sensitive and highly personal nature") (quotation marks omitted). Consequently, Defendant's request for school records releases should be denied under Rule 26(c)(1) to protect the anonymity and security of Plaintiffs and their families.

V. CONCLUSION

For the forgoing reasons, the Court should deny Defendant's motion to compel, prohibit Defendant from seeking further discovery into the identities of nonparty transgender people, and set appropriate deadlines for Defendant to take the deposition of Ms. Trujillo (the only deposition relevant to class certification) and file an opposition to the pending motion for class certification. (Dkt. 89.)[8] To simplify the Court's resolution of the pending motions to compel filed by both Plaintiffs and Defendant, (Dkts. 121 & 122), Plaintiffs submit with this brief a single proposed order that would resolve both motions.

[8] Plaintiffs will file a response to Defendant's recently filed motion to continue deadlines, (Dkt. 131), to oppose any further extensions for Defendant's opposition to the motion for class certification and to propose a far shorter extension of the other case deadlines than that suggested by Defendant.

Dated: June 21, 2022

OSBORN MALEDON, P.A.

/s/ Colin M. Proksel

Mary O'Grady (011434)
Colin Proksel (034133)
Payslie Bowman (035418)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
Email: mogrady@omlaw.com
Email: cproksel@omlaw.com
Email: pbowman@omlaw.com

Asaf Orr (admitted *Pro Hac Vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Telephone: (415) 392-6257
Facsimile: (415) 392-8442
Email: aorr@nclrights.org

Patrick Gunn (admitted *Pro Hac Vice*)
COOLEY LLP
101 California Street, 5th Floor
San Francisco, California 94111-5800
Telephone: (415) 693-2070
Facsimile: (415) 693-2222
Email: pgunn@cooley.com

Barrett J. Anderson (admitted *Pro Hac Vice*)
COOLEY LLP
4401 Eastgate Mall
San Diego, California 92121-1909
Telephone: (858) 550-6000
Facsimile: (858) 550-6420
Email: banderson@cooley.com

Attorneys for Plaintiffs and Proposed Class

Patrick Gunn (admitted *Pro Hac Vice)*
COOLEY LLP
101 California Street, 5th Floor
San Francisco, California 94111-5800
Telephone: (415) 693-2070
Facsimile: (415) 693-2222
Email: pgunn@cooley.com

Mary O'Grady (011434)
Colin Proksel (034133)
Payslie Bowman (035418)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
Email: mogrady@omlaw.com
Email: cproksel@omlaw.com
Email: pbowman@omlaw.com

Attorneys for Plaintiffs and Proposed Class
Additional counsel listed on following page

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HELEN ROE, a minor, by and through her parent and next friend Megan Roe; JAMES POE, a minor, by and through his parent and next friend LAURA POE; AND CARL VOE, a minor, by and through his parent and next friend RACHEL VOE.

Plaintiffs,

v.

DON HERRINGTON, in his official capacity as Interim State Registrar of Vital Records and Interim Director of the Arizona Department of Health Services,

Defendant.

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

DECLARATION OF COLIN M. PROKSEL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO COMPEL

Barrett J. Anderson (admitted *Pro Hac Vice*)
COOLEY LLP
4401 Eastgate Mall
San Diego, California 92121-1909
Telephone: (858) 550-6000
Facsimile: (858) 550-6420
Email: banderson@cooley.com

Asaf Orr (admitted *Pro Hac Vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Telephone: (415) 392-6257
Facsimile: (415) 392-8442
Email: aorr@nclrights.org

Attorneys for Plaintiffs and Proposed Class

I, Colin M. Proksel, declare:

1. I am a lawyer at Osborn Maledon, P.A., attorneys of record for Plaintiffs and Proposed Class. The following statements are true and to the best of my knowledge, information, and belief, formed after a reasonable inquiry under the circumstances. If called to testify about them, I would competently testify the same.

2. Plaintiffs produced the Facebook polls referenced in the Declaration of Lizette Trujillo submitted in support of Plaintiffs' Motion for Class Certification. (Dkt. 89-1.) Plaintiffs redacted only the names of poll respondents and assigned each unique respondent an identifier to allow Defendant to identify any duplicates or family overlap. The Bates numbers for those documents are: TRUJILLO0000001 through TRUJILLO0000019.

3. Plaintiffs produced all documents from Ms. Trujillo that discussed the number of members in the Southern Arizona Gender Alliance ("SAGA"), Families Transformed (which is a support group within SAGA), and the Arizona Trans Youth and Parent Organization ("AZTYPO"). Plaintiffs also produced the articles of incorporation and bylaws of SAGA and AZTYPO. The Bates numbers for those documents are: AZTYPO00001 through AZTYPO00042; SAGA00001 through SAGA00023; and TRUJILLO0000001 through TRUJILLO0000370.

4. Plaintiffs produced all social media documents from Megan Roe, Laura Poe, and Rachel Voe that referenced their children or transgender issues generally. The Bates numbers for those documents are: POE00522 through POE01290; ROE00088 through ROE00227; and VOE00354 through VOE00356.

5. Plaintiffs produced pre-existing letters from healthcare providers for Helen Roe and James Poe attesting to their diagnoses of, and treatment for, gender dysphoria. The Bates numbers for those documents are: ROE00033 and POE01291. If requested, Plaintiffs will provide such a physician's letter from a healthcare provider for Carl Voe.

6. Plaintiffs requested their records from the schools they have attended or are attending obtained. Some of those schools reported that they did not have records for

Plaintiffs because of their record retention policies. Plaintiffs produced all documents they received from those requests. The Bates numbers for those documents are: POE00001 through POE00072; ROE00001 through ROE00024; and VOE00001 through VOE00020.

7. Plaintiffs have produced 4,149 documents totaling 38,561 pages in four rolling productions, the last of which Plaintiffs served on April 28, 2022.

8. As of today, Defendant has produced 32 documents totaling 384 pages.

9. On June 6, 2022, Plaintiffs served a redaction log that provides the grounds for the redactions to documents in Plaintiffs' productions.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Dated: June 21, 2022

/s/ Colin M. Proksel

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Helen Roe, a minor, by and through her parent and next friend Megan Roe; James Poe, a minor, by and through his parent and next friend Laura Poe; and Carl Voe, a minor, by and through his parent and next friend, Rachel Voe,

Plaintiffs,

v.

Don Herrington, in his official capacity as Interim State Registrar of Vital Records and Interim Director of the Arizona Department of Health Services,

Defendant.

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

[PROPOSED] ORDER GRANTING PLAINTIFFS' CORRECTED MOTION TO COMPEL (DKT. 121), DENYING DEFENDANT'S MOTION TO COMPEL (DKT. 122), AND GRANTING OTHER RELIEF

Having considered Plaintiffs' Motion to Compel, (Dkt. 121), and Defendant's Motion to Compel, (Dkt. 122), and with good cause showing,

IT IS HEREBY ORDERED:

1. **The Court GRANTS Plaintiffs' Corrected Motion to Compel, (Dkt. 121).**

Defendant is ordered to provide responses to Plaintiffs' Interrogatory Nos. 1 and 9 through 16 and to produce documents responsive to Plaintiffs' Requests for Production Nos. 14 through 17. Defendant shall serve supplemental responses to the above listed interrogatories and requests for production with 21 days of this Order.

Defendant is also ordered to provide the following information to Plaintiffs within seven days of this Order:

- A list of the justifications for the surgical requirement in A.R.S. § 36-337(A)(3) that Defendant intends to assert in this action. This list will be solely for the purpose of facilitating the parties' negotiation of Defendant's ESI search parameters. Defendant's forthcoming supplemental responses as ordered above shall be the Defendant's final opportunity to assert or amend his justifications.
- A "hit report" showing the number of documents that hit on all of Plaintiffs' proposed terms and custodians, with detailed information showing hits by search term and custodian. (*See* Dkt. 121-2 at 103).
- A report showing how many of the documents in the above hit report are unique and have not previously been produced in response to Lizette Trujillo's public records request.
- A written counterproposal from Defendant containing his proposed list of custodians and search terms.

The parties are ordered to attempt to resolve the dispute about Defendant's ESI search parameters by meeting and conferring within seven days of Defendant providing the above information. The parties are ordered to file a joint status report about their discussions within two days of the meet and confer.

2. The Court DENIES Defendant's Motion to Compel, (Dkt. 122).

3. The Court further ORDERS as follows:

Defendant is prohibited from seeking or obtaining any discovery—including by discovery request to Plaintiffs, subpoena to a third party, or in any deposition—the names, birth dates, or any other personally identifying information of any nonparty transgender person, including information about (a) the members of or Facebook groups of Southern Arizona Gender Alliance, Families Transformed, and Arizona Trans Youth and Parent Organization; (b) the Facebook polls produced in this litigation; or (c) any transgender person or their families that have communicated with Lizette Trujillo.

Defendant shall have 21 days from the date of this Order to complete the deposition of Lizette Trujillo. Defendant shall have 35 days from the date of this Order to file his

opposition to Plaintiffs' Motion for Class Certification, (Dkt. 89). These deadlines supersede the deadlines in the Court's Order dated September 15, 2021. (Dkt. 100.)

This Order shall not affect Defendant's ability to depose Megan Roe, Laura Poe, and Rachel Voe, or otherwise conduct fact discovery within the timelines set by the Court. Those timelines are currently the subject of a pending motion to continue that is not yet fully briefed. (Dkt. 131.) The Court will issue a separate order on that motion.

IT IS SO ORDERED.

Dated this _____ day of _____, 2022