

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JANE AND JOHN DOES 1 - 10, individually
and on behalf of others similarly situated,

Plaintiffs,

v.

UNIVERSITY OF WASHINGTON, a
Washington public corporation; DAVID
DALEIDEN, an individual; and ZACHARY
FREEMAN, an individual;

Defendants.

No.

MOTION FOR CLASS CERTIFICATION

Note for Motion: August 26, 2016

I. INTRODUCTION, STATEMENT OF FACTS, AND RELIEF REQUESTED

Defendants David Daleiden and Zachary Freeman are anti-abortion activists who have submitted requests to the University of Washington (“UW”) under the Public Records Act (“PRA”), seeking documents related to fetal tissue research or donations (“Requests”). Plaintiffs Jane and John Does 1-10 are current and former employees, contractors, representatives, volunteers, or interns of various entities involved in fetal tissue research or donations who have been notified that their names and/or other identifying information appear in the documents that are intended to be released (“Documents”). Public disclosure of the Documents without redaction of the identifying information of Plaintiffs and others similarly situated would violate constitutional protections and express PRA exemptions.¹

There are approximately 150 individuals impacted by the proposed disclosures in response to the Requests, all of whom will be benefited by the relief of a single declaratory and injunctive order requiring the redaction of their personal identifying information from the Documents. Accordingly, in the interests of judicial economy and uniformity, Plaintiffs respectfully request that this Court certify—pursuant to FRCP 23(a) and b(2)—a Class consisting of:

All individuals whose names and/or personal identifying information (work addresses, work or cell phone numbers, email addresses) are contained in documents prepared, owned, used, or retained by the UW that are related to fetal tissue research or donations.

Plaintiffs also request that Vanessa Power, Jill Bowman, Janet Chung, Steven Fogg, David

¹ The facts relating to this case have been previously set out in Plaintiffs’ concurrently filed Motion for Temporary Restraining Order and Preliminary Injunction and Plaintiffs will not burden the Court by further reiterating them here.

1 Edwards, and Mallory Bouchee be appointed as joint class counsel.

2 **II. STATEMENT OF ISSUES**

3 Should the court certify the proposed Class under FRCP 23(a) and 23(b)(2)?

4 **III. EVIDENCE RELIED UPON**

5 This motion is based upon the Declarations of Vanessa Power, David Edwards, and Janet
6 Chung in Support of the Motion for Class Certification, filed herewith, and the pleadings
7 concurrently filed in this case.

8 **IV. AUTHORITY**

9 The decision to grant or deny class certification is within the trial court's discretion. *See*
10 *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008). To grant class certification, the Court
11 determines whether the prerequisites of FRCP 23(a) are satisfied and that the class fits within at
12 least one of the categories of FRCP 23(b). *See* FRCP 23. This determination is made without
13 respect to the merits of the case. *See Stockwell v. City and County of San Francisco*, 749 F.3d
14 1107, 1111-12 (2014).

15 **A. This Action Satisfies All Four Requirements of Rule 23(a)**

16 In order to achieve class status, a putative class must satisfy four prerequisites:

17 (1) the class is so numerous that joinder of all members is impracticable; (2) there
18 are questions of law or fact common to the class; (3) the claims or defenses of the
19 representative parties are typical of the claims or defenses of the class; and (4) the
20 representative parties will fairly and adequately protect the interests of the class.

21 FRCP 23(a). Plaintiffs meet these requirements.

22 **1. The Class is Numerous**

23 The proposed Class here includes approximately 150 members. There is no magic
24 number for determining whether a class size is sufficiently numerous, but “[i]n general, courts
25

1 find the numerosity requirement satisfied when a class includes at least 40 members.” *Rannis v.*
2 *Recchia*, 380 F. Appx. 646, 651 (9th Cir. 2010); *see also Dunakin v. Quigley*, 99 F. Supp. 3d.
3 1297, 1326-27 (W.D. Wash. 2015) (Robart, J.) (granting class status to a group of approximately
4 300); *McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan & Trust*, 268
5 F.R.D. 670, 673 (W.D. Wash. 2010) (Martinez, J.) (granting class status to a group of 27
6 plaintiffs). Typically, a fact-specific inquiry is appropriate to determine whether joinder would
7 be impracticable. Impracticable does not mean impossible, but that it would be “difficult[] or
8 inconvenien[t to] join[] all members of the class.” *Harris v. Palm Springs Alpine Estates, Inc.*,
9 329 F.2d 909, 913–14 (9th Cir. 1964).

10 In assessing impracticality of joinder, courts consider factors such as “(1) the judicial
11 economy that will arise from avoiding multiple actions; (2) the geographic dispersion of
12 members of the proposed class; (3) the financial resources of those members; (4) the ability of
13 the members to file individual suits; and (5) requests for prospective relief that may have an
14 effect on future class members.” *McCluskey* at 674. All of these factors support a class action
15 here. The alternative to class certification would be joining all individuals named in the records
16 or the filing of separate lawsuits, which would only serve to impose unnecessary administrative
17 burdens on the Court and financial burdens on the plaintiffs. These individual lawsuits would
18 repetitively seek the exact same non-monetary relief for members distributed across and outside
19 the State, making a single class action a far more practical solution to the challenge of disclosure
20 under the Public Records Act. Finally, although this action does not seek relief from future
21 requests, a class action would provide the State more guidance than would individualized
22 actions on how to handle similar requests in the future. Thus, the requirement of numerosity is
23 met.
24
25

2. There Are Numerous Common Questions of Law and Fact

Rule 23 requires that there are common issues of law or fact to all the class members. “What matters to class certification is . . . the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal citations omitted). This requirement is “construed permissively” and poses a “limited burden” because it “only requires a single significant question of law or fact.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012). Here, the members of the proposed Class have common questions of law and fact on nearly every issue. All have personal identifying information that is found in the Documents. All wish to preclude the dissemination of that information. All rely, at a minimum, on the right to privacy and association that would be violated should their personal identifying information be released in response to the Requests. The ultimate legal question at the heart of this case—namely whether an exemption to the PRA prohibits release of the Documents without redaction—is universally applicable to all members of the proposed Class.

The only potential dissimilarity between the members of the proposed Class is that some class members are current or former employees of a public agency, and others are private citizens who interacted with the public agency. In particular, there is a potential that public employees are entitled to an additional argument for redaction under RCW 42.56.230(3). However—as detailed in Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction—the application of RCW 42.56.230(3) overlaps significantly with the right to privacy and association held by all class members. Thus, this potential dissimilarity does not present a conflict and does not weigh against certification because there are still multiple questions of law and fact that relate to all potential members of the proposed Class. Given these

1 facts, the commonality requirement is satisfied.

2 **3. Plaintiffs Satisfy the Typicality Requirement**

3 The third class action prerequisite is that the claims or defenses of the representative
4 parties are typical of the claims or defenses of the class. “[T]he commonality and typicality
5 requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether
6 under the particular circumstances maintenance of a class action is economical and whether the
7 named plaintiff’s claim and the class claims are so interrelated that the interests of the class
8 members will be fairly and adequately protected in their absence.” *Wal-Mart*, 564 U.S. at 349 n.
9 5 (citation omitted). Plaintiffs represent a broad cross section of the types of individuals who
10 would have personal identifying information contained in the Documents. Accordingly,
11 Plaintiffs would suffer harms similar to those of the other members of the proposed Class,
12 including disclosure of their information to the public and along with it the risk of harassment,
13 anxiety, and physical harm. *See, e.g.*, Declarations of Jane and John Does (detailing the Does’
14 reasonable fears relating to the disclosure of their personal information). Because the Plaintiffs
15 represent the factual and legal issues that could arise among all the members of the proposed
16 Class, the positions of the Doe Plaintiffs are typical of the class as a whole.

17 **4. The Named Plaintiffs and Their Counsel Will Fairly and Adequately Protect the**
18 **Interests of the Class**

19 Finally, class certification can be granted only if “the representative parties will fairly
20 and adequately protect the interests of the class.” This prong has two sub-parts: “(1) do the
21 named plaintiffs and their counsel have any conflicts of interest with other class members and
22 (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the
23 class?” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The answers to both
24 inquiries support certification of the proposed Class.

1 First, the Does are seeking declaratory and injunctive relief, and all of the other members
2 of the proposed class are seeking the same declaratory and injunctive relief. There are no
3 damages at stake, and thus, no conflict of interest between the representatives and the members
4 of the proposed Class that would preclude the Does from making decisions that would benefit
5 the remainder of the class. Indeed, the procedural posture of this action minimizes the
6 possibility of conflict; the action seeks the redaction of the personal identifying information of
7 the members of the proposed Class, and members are free to contact the Attorney General to
8 have their information released if they disagree and would like their information disclosed
9 nonetheless. Further, counsel for the proposed Class are serving pro bono and have no interest
10 in the outcome of the case other than obtaining the declaratory and injunctive relief sought by all
11 members of the proposed Class. Moreover, counsel have significant experience in litigation
12 under the Public Records Act and with complex class action litigation. *See generally* Power
13 Decl., Edwards Decl., Chung Decl.

14 Plaintiffs and their counsel are committed to prosecuting this action vigorously on behalf
15 of the Class and have the resources to do so. Neither Plaintiffs nor their counsel have interests
16 that are contrary to or that conflict with those of the Proposed Class. Thus, the adequacy of
17 representation requirement is satisfied.

18 **B. Plaintiffs Meet the Requirements for Certification Under Rule 23(b)**

19 In addition to satisfying the four requirements of Rule 23(a), the proposed Class must
20 qualify as at least one of the types of class actions identified in Rule 23(b). Here, Plaintiffs seek
21 certification under CR 23(b)(2),² which applies whenever “the party opposing the class has
22 acted or refused to act on grounds that apply generally to the class, so that final injunctive relief
23 or corresponding declaratory relief is appropriate respecting the class as a whole.” Rule
24

25 ² The proposed Class could be certified under any of the Rule 23(b) class types, but Plaintiffs seek certification under Rule 23(b)(2) because it presents the clearest example of why a class is warranted in this case.

1 23(b)(2). “The key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory
2 remedy warranted—the notion that the conduct is such that it can be enjoined or declared
3 unlawful only as to all of the class members or as to none of them.’” *Wal-Mart*, 564 U.S. at
4 360. “In other words, Rule 23(b)(2) applies only when a single injunction or declaratory
5 judgment would provide relief to each member of the class.” *Id.*

6 This case arises from UW’s decision to release the Documents without redacting the
7 personal identifying information relating to members of the proposed Class. All members of the
8 proposed Class will be equally impacted by a single declaratory ruling that the disclosure of
9 such information is exempted under the PRA and a single injunctive order requiring UW to
10 redact that information in compliance with the PRA. Moreover, injunctive relief on behalf of
11 the proposed Class achieves systemic changes to UW’s PRA process that would obviate the
12 need for future lawsuits seeking similar relief. *See, e.g., Dunakin*, 99 F. Supp. 3d. at 1333 (“If
13 the putative class members were to proceed on an individual basis, they might obtain the
14 individual services they seek without obtaining systemic changes to DHHS’s conduct that would
15 benefit the class as a whole, a result that could lead to countless individual claims seeking the
16 exact same relief.”). Accordingly, this proposed Class fits squarely within Rule 23(b)(2) and is
17 appropriate for certification.

18 **C. The Court Should Approve Class Counsel**

19 Plaintiffs also seek appointment of Vanessa Power, Jill Bowman, Janet Chung, Steven
20 Fogg, David Edwards, and Mallory Bouchee as joint class counsel. Pursuant to Rule 23(g), the
21 Court must consider:

- 22 (i) the work counsel has done in identifying or investigating potential claims in
23 the action;
- 24 (ii) counsel's experience in handling class actions, other complex litigation, and
25 the types of claims asserted in the action;

1 (iii) counsel's knowledge of the applicable law; and

2 (iv) the resources that counsel will commit to representing the class when
3 determining whom to appoint.

4 The accompanying declarations of David Edwards, Vanessa Power, and Janet Chung
5 demonstrate that counsel meet these requirements. This Court should approve the undersigned
6 counsel to represent the proposed Class.

7 **V. CONCLUSION**

8 In light of the foregoing, the class should be certified and class counsel should be
9 approved.

10 DATED: August 3, 2016.

STOEL RIVES LLP

11 

12
13 Vanessa Soriano Power, WSBA No. 30777
vanessa.power@stoel.com
14 Jill D. Bowman, WSBA No. 11754
jill.bowman@stoel.com

15 Stoel Rives LLP
16 600 University Street, Suite 3600
Seattle, WA 98101-4109
17 Telephone: (206) 624-0900
Fax: (206) 386-7500

18 Cooperating Attorney for Legal Voice

19 **LEGAL VOICE**
20 Janet S. Chung, WSBA No. 28535
jchung@legalvoice.com
21 Legal Voice
22 907 Pine Street, Suite 500
Seattle, WA 98101-1818
23 Telephone: (206) 682-9552
24 Fax: (206) 682-9556
25

**CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP**
David Edwards, WSBA No. 44680
dedwards@corrchronin.com
Steven W. Fogg, WSBA No. 23528
sfogg@corrchronin.com
Mallory Bouchee, WSBA No. 50194
mbouchee@corrchronin.com
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
Telephone: (206) 625-8600
Fax: (206) 625-0900

Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25