No. 21-71312

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: STATE OF ARIZONA, ANDY TOBIN, and PAUL SHANNON
STATE OF ARIZONA, ANDY TOBIN, PAUL SHANNON,

Petitioners,
v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

Respondent.

RUSSELL B. TOOMEY, ARIZONA BOARD OF REGENTS D/B/A UNIVERSITY OF ARIZONA, RON SHOOPMAN, LARRY PENLEY, RAM KRISHNA, BILL RIDENOUR, LYNDEL MANSON, KARRIN TAYLOR ROBSON, JAY HEILER, FRED DUVAL, Real Parties In Interest

OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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I. INTRODUCTION

This is a civil rights challenge to the State of Arizona's categorical exclusion of "gender reassignment surgery" (the "**Exclusion**") from insurance coverage under the only health insurance plan offered to Arizona State employees. Dr. Russell B. Toomey, together with two certified classes of similarly situated individuals ("**Plaintiff**" or "**Dr. Toomey**"), argues that Arizona's exclusion of such coverage, which denies these individuals the opportunity to even demonstrate the medical necessity of certain gender-affirming care, discriminates against them based on sex and transgender status in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Constitution of the United States.

Petitioners (the "**Defendants**" or the "**State**")[1] counter that their refusal to cover surgical treatments for gender dysphoria is maintained for "legitimate, non-discriminatory, and non-pretexual reasons." (**Exhibit A** (State's Answer to Amended Complaint (or "**Answer**") at 28 (J).) In probing the veracity of this defense, Dr. Toomey asked the State to explain the "reasons why" it maintains the Exclusion. (**Petition** (or "**Pet.**") **Ex. 3** at Exhibit 4, at Request No. 1.) The State responded that the Exclusion is maintained "because the State concluded, under the law, that it was

[1] In the proceeding below, the Petitioners are one of several named defendants, including the Arizona Board of Regents. As used herein, however, the term "**Defendants**" refers only to the Petitioners *i.e.* the State of Arizona, Andy Tobin and Paul Shannon.

not legally required" to cover this care. (*Id*. at Exhibit 5, at Response No. 1.) Yet at every turn, the Defendants have refused to permit Dr. Toomey to evaluate or assess the bases of its defense as they contend the "legal advice [they] received regarding this issue is covered by the attorney-client privilege." (*Id.*) For instance, the Defendants identified two legal memoranda in response to Dr. Toomey's interrogatory inquiring about any "research, studies . . . or other documents considered, reviewed, or relied on" in the Defendants' decision-making about the Exclusion, but asserted that these "documents are covered by the attorney-client privilege." (*Id.* at Exhibit 4, at Response 7.) The State's witnesses have also stated in depositions that the "primary reason" the State excludes coverage for "gender reassignment surgery" is because it concluded—based on legal advice—that the law did not require it to cover such surgery. (*Id.* at Exhibit 6, at 31:8 – 32:8; *id*. at Exhibit 7, at 167:12 – 168:3.)

Applying the at-issue doctrine, which prevents a party from unfairly leveraging legal advice as both a sword and a shield, the Magistrate Judge and the District Court both concluded that the State's conduct waived the attorney-client privilege. While Defendants insisted that they never asserted legal advice as a defense, the District Court rejected this position as squarely at odds with the factual record. The Court concluded that Defendants – through their interrogatory response and deposition testimony – in fact had placed the content of specific privileged

communications at issue, thereby entitling Dr. Toomey to examine for himself the legal advice that the State affirmatively identified as the primary reason it maintained the Exclusion.

Under these circumstances, the District Court's straightforward application of the long-established at-issue doctrine was not clearly erroneous, let alone grounds for the extraordinary relief Defendants now seek. In seeking this relief, the Petition merely recycles legally unsupported and factually inaccurate arguments that the Court below already considered and rejected. It should be denied.

II. ISSUE PRESENTED

Whether the District Court committed a clear and indisputable error extraordinary enough to warrant mandamus by finding that Defendants impliedly waived attorney-client privilege as to particular documents Defendants placed at issue by their affirmative conduct in defense of Dr. Toomey's claims of discrimination.

III. BACKGROUND

A. Dr. Toomey's Discrimination Claims

Dr. Toomey is a Professor at the University of Arizona, and a transgender man. (**Pet. Ex. 2** (the "**Amended Complaint**") at ¶ 4.) As a State employee, he receives healthcare coverage under the State of Arizona's self-funded health plan (the "**Plan**"), which is controlled and administered by the Arizona Department of

Administration (the "**ADOA**"). (*Id.* at ¶¶ 1-4.) On August 10, 2018, Dr. Toomey was denied preauthorization for a hysterectomy, a procedure deemed medically necessary by his treating physicians for treatment of his gender dysphoria. The sole basis for the denial was the Plan's categorical Exclusion of coverage for "[g]ender reassignment surgery." (*Id*. at ¶¶43-44.) The Exclusion precludes coverage for procedures such as hysterectomies, even when the procedure qualifies as medically necessary, so long as (and only when) the procedures are used as treatment of gender dysphoria. (*Id.* at ¶¶ 2, 36.) On January 23, 2019, Dr. Toomey filed an action in the United States District Court for the District of Arizona, alleging that the Exclusion discriminates based on sex and transgender status in violation of Title VII and the Equal Protection Clause.[2] (**Pet. Ex. 6** (the "**Magistrate Order**") at 2.)[3]

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[2] As virtually every other court to consider the question has recognized, excluding coverage for medically necessary surgery because the surgery is performed for purposes of "gender reassignment" facially discriminates on the basis of "sex" in violation of the Equal Protection Clause, Title VII, and other civil rights statutes. *See e.g,. Hammons v. Univ. of Md. Med. Sys. Corp.*, No. DKC 20-2088, 2021 WL 3190492, at *18 (D. Md. July 28, 2021) (Section 1557 of the ACA); *Kadel v. Folwell*, 446 F. Supp. 3d 1 (M.D.N.C. 2020) (equal protection, Title IX, and Section 1557 of the ACA); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024 (D. Alaska 2020) (Title VII); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018) (Section 1557 of the ACA); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018) (Equal Protection, Title VII, and Section 1557 of the ACA); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018) (Section 1557 of the ACA).

[3] Unless otherwise noted, pin citations refer to the page number in the bottom margin of a document.

Although Dr. Toomey argues that the Exclusion is facially discriminatory, the State has consistently argued that the Exclusion is facially neutral and that Dr. Toomey must establish that the State has acted with discriminatory intent. In their Answer to Dr. Toomey's Amended Complaint, the State asserted as an affirmative defense that their actions regarding the Exclusion "were taken for legitimate, non-discriminatory, and non-pretexual reasons." (**Exhibit A** at 28 at Affirmative Defense J) In response to Dr. Toomey's motion for a preliminary injunction, the Defendants argued that there "are plausible reasons for [the state] action" and that the State has a legitimate interest in cost containment and reducing health costs. (**Exhibit B** at 12-13.) On November 30, 2020, the Magistrate Judge accepted the State's argument and held in a report and recommendation that Dr. Toomey must prove discriminatory intent by the State to succeed on his claims. (**Exhibit C** at 7-9.) On February 26, 2021, the District Court adopted the report and recommendation on narrower grounds, denying Dr. Toomey's motion for preliminary injunction, but without resolving whether the Exclusion is facially discriminatory or adopting the Magistrate Judge's holding that Dr. Toomey must establish discriminatory intent to prevail on his claims. (**Exhibit D** at 11.)

B. Defendants' Reliance On Advice Of Counsel In Discovery Responses And Depositions

Following the Magistrate Judge's report and recommendation requiring Dr. Toomey to prove discriminatory intent, Dr. Toomey served interrogatories and

requests for production on December 8, 2020, seeking documents and communications concerning, among other things, whether the Exclusion "should be adopted, modified, retained, or eliminated and the rationale provided or discussed." (*See* **Pet. Ex. 3** (the "**Motion**") at Exhibit 2 at No. 1.) Defendants withheld certain documents responsive to Dr. Toomey's requests on the grounds that these documents were protected by the attorney-client privilege. (**Motion** at Exhibit 9.) The most recent iteration of the Defendants' Privilege Log, served on May 10, 2021, asserts the attorney-client privilege with respect to eighty-five documents, all of which, by virtue of being responsive to Dr. Toomey's requests, relate to the Exclusion. (*Id.*)

Despite withholding documents on the basis of attorney-client privilege, Defendants repeatedly stated in their response to interrogatories that legal advice, and the State's understanding of the law, drove the State's decision to maintain the Exclusion.

First, in response to Dr. Toomey's Interrogatory No. 1, which asked Defendants to "[i]dentify and describe *all reasons why*" the State maintains the Exclusion, Defendants responded that:

> The State of Arizona's self-funded health plan excludes coverage for gender reassignment surgery *because* the State concluded, under the law, that it was not legally required to change its health plan to provide such coverage under either Title VII of the Civil Rights Act or under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

(**Motion** at Exhibit 5, at Response No. 1 (emphasis added).) The same interrogatory response goes on to assert that "[t]he legal advice that the State received regarding this issue is covered by the attorney-client privilege." (*Id.*) Beyond Defendants' purported conclusion that they were "not legally required" to cover gender-affirming surgery, Defendants put forth only one other potential reason for maintaining the Exclusion: cost containment. (*See id*.) But as Dr. Toomey pointed out in the briefing below, discovery has refuted this purported rationale. (*See* **Motion** at 12 n.1 (citing State testimony confirming that cost was *not* a "driving factor" behind the Exclusion).)

Second, Dr. Toomey's Interrogatory No. 4 asked Defendants to "[i]dentify all persons who participated in formulating, adopting, maintaining, reviewing, approving, or deciding to continue" the Exclusion. (**Motion** at Exhibit 4 at No. 4.) In response, Defendants first objected to this interrogatory "because it seeks information covered by the attorney-client privilege," and then—"[s]ubject to and without waiving this objection"—identified six individuals, *three* of whom were then lawyers for the State, indicating that counsel were central to the decision-making regarding the Exclusion. (**Motion** at Exhibit 5, at Response No. 4.)

Third, Dr. Toomey's Interrogatory No. 7 asked Defendants to identify "all research, studies, data, reports, publications, testimony, or other documents considered, reviewed, or relied on by Defendants relating to" the Exclusion.

(**Motion** at Exhibit 4, at No. 7.) In response, Defendants listed two legal memoranda, which they asserted "are covered by the attorney-client privilege," again demonstrating that legal advice was central to the State's decision-making regarding the Exclusion. (*Id*. at Exhibit 5 at Response No. 7.)

In addition to relying on advice of counsel in their interrogatory responses, the Defendants also put forward witnesses that stated in deposition that the Exclusion was maintained *primarily* based on legal advice. Marie Isaacson, the ADOA Benefits Services Division Director who oversaw the ADOA's assessment of and ultimate decision to maintain the Exclusion in 2016, and Scott Bender, the former Plan Administration Manager at the ADOA also involved in that decision-making,[4] were questioned regarding the State's rationale for the Exclusion, and both cited advice of counsel as *the primary rationale* for maintaining it. (**Motion** at Exhibit 6 at 31:8-32:8 (stating that "the deciding factor" for maintaining the Exclusion was "[w]hat was required by law for us to cover," and that "legal counsel" were among the "group who made the decision"); *id*. at Exhibit 7 at 167:12-168:3 (stating that the "primary reason" for maintaining the Exclusion was that ADOA understood, based on advice of counsel, that it was "not required" by law to cover the benefit).)

[4] Defendants identified both Ms. Isaacson and Mr. Bender as "persons with knowledge" of "the reasons" for maintaining the Exclusion. (**Motion** at Exhibit 5 at Response No. 2.)

C. Dr. Toomey's Motion To Compel

On May 20, 2021, Dr. Toomey filed a motion to compel the production of certain documents withheld on the basis of attorney-client privilege, arguing that the State had both impliedly and expressly waived the privilege. (*See* **Motion**.) Specifically, Dr. Toomey argued that Defendants had placed the legal advice they received regarding the legality of the Exclusion at issue by (1) asserting it in their responses to interrogatories as a "reason why" the State maintained the Exclusion, and by (2) putting forth State witnesses who defended the Exclusion during deposition by citing legal advice. (*See id*.)

On June 28, 2021, the Magistrate Judge issued a written order, granting the Motion. (**Magistrate Order**.) The Magistrate Order concluded that Defendants had impliedly waived the attorney-client privilege by placing advice of counsel at issue, making it necessary to probe that legal advice in determining a central issue in this case: the Defendants' rationale for the allegedly discriminatory Exclusion. The Magistrate Judge relied upon, among other things, *United States v. Sanmina Corp.*, 968 F.3d 1107 (9th Cir. 2020) in its determination that Defendants waived attorney-client privilege. In *Sanmina*, the Ninth Circuit explained that "[w]aivers by implication rest on the 'fairness principle,'" which means "that parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." *Sanmina*, 968 F.3d at 1117

(quoting *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003)). The Magistrate Judge reasoned that Defendants "implied they received legal advice on the propriety of the Exclusion from counsel and relied on that legal advice when they decided to establish or maintain the Exclusion even if they did not say so explicitly," and ordered production of "all the documents currently withheld on the basis of attorney-client privilege [Defendants] received on the legality of the Exclusion." (**Magistrate Order** at 6.)[5]

On September 21, 2021, the District Court affirmed the Magistrate Order and directed Defendants to produce the implicated documents. (*See* **Pet. Ex. 1** (the "**Order**").) The District Court found that the record supported affirming the Magistrate Order. The Court's reasoned that "despite the [Defendants'] protestations to the contrary, the [Defendants'] Interrogatory Responses indicate that they relied on the advice of legal counsel in deciding to maintain the exclusion of coverage for gender reassignment surgery." (*Id*. at 7.)

On October 1, 2021, Defendants filed a motion to stay the Order while they petitioned this Court for a writ of mandamus. (*See* **Exhibit E**.) On October 4, 2021, Defendants filed the present Petition. (*See* **Petition**.)

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[5] The Magistrate Order did not reach the Motion's alternative argument regarding express wavier. (*See generally*, Magistrate Order.) Even if the Order were reversed, Dr. Toomey maintains that his express waiver arguments (which are based on disclosure of the advice) would separately mandate disclosure of the documents implicated by this proceeding.

IV. THE PETITION SHOULD BE DENIED

"The writ of mandamus is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (refusing to grant mandamus even where petitioning party made a "strong case" that lower court erred) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). It is such an extreme measure that it "requires [the Court] to have a 'firm conviction' that the district court misinterpreted the law or committed a 'clear abuse of discretion.'" *In re Walsh*, 15 F.4th 1005, 1010 (9th Cir. 2021) (quoting *In re Perez*, 749 F.3d 849, 855 (9th Cir. 2014)); *see also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1146–47 (9th Cir. 2005). A mere misinterpretation of the law will not justify invocation of mandamus except in "exceptional circumstances" where a misinterpretation "amount[s] to a judicial usurpation of power" or "a clear abuse of discretion." *In re Boon Glob. Ltd.*, 923 F.3d 643, 649 (9th Cir. 2019) (quoting *In re Van Dusen*, 654 F.3d at 840-41).

"[T]he petitioner [also] bears the burden of showing that its right to issuance of the writ is clear and indisputable." *Id.* Meeting this standard is "especially difficult 'in the discovery context.'" *In re Walsh*, 15 F.4th at 1010 (quoting *In re Perez*, 749 F.3d at 854). This Court has identified multiple reasons for this including that the Court is "particularly reluctant to interfere with a district court's day-to-day management of its cases." *Id.* And "[d]istrict courts have wide latitude in

controlling discovery." *In re Anonymous Online Speakers*, 661 F.3d 1168, 1176 (9th Cir. 2011) (internal quotations and citation omitted). This Court uses the *Bauman* factors to determine whether mandamus is appropriate, specifically looking at whether: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems, or issues of law of first impression. *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977); *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010). "While not every factor need be present at once the absence of the third factor, clear error, is dispositive." *In re High Country Paving, Inc.*, 799 F. App'x 548, 549 (9th Cir. 2020) (quoting *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010)) (internal quotations and citations omitted; alterations incorporated).

As discussed below, all five *Bauman* factors weigh in favor of denying mandamus here.

A. The District Court Did Not Clearly Err In Concluding That Defendants Waived The Attorney-Client Privilege By Placing The Content Of The Communications "At Issue"

The clear error standard "is significantly deferential and is not met unless the

reviewing court is left with a 'definite and firm conviction that a mistake has been committed.'" *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) (quoting *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 708 (9th Cir.2009) and *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 623 (1993)). Defendants do not point to any facts that were overlooked or law that was misapplied by the Order. Instead, the Petition rehashes factually inaccurate and legally unsupported arguments that were already raised before the Magistrate Judge and the District Court in opposition to the Motion and properly rejected.

The District Court found that Defendants' insistence that they did not put legal advice at issue was squarely at odds with the factual record. (**Magistrate Order** at 4-5 (rejecting Defendants' argument that they did not leverage advice of counsel to their defense, finding "The record . . . indicates otherwise."); **Order** at 4, 7 (finding that, "despite the [Defendants'] protestation to the contrary," the "record reveals" that Defendants "relied on the advice of legal counsel in deciding to maintain the [Exclusion].").) The Petition does not identify any clear error in the Magistrate or District Court's analysis, and instead seeks to overturn the soundly decided Order by parroting the same counterfactual protestation made in opposition to the Motion: that Defendants have not placed legal advice regarding the Exclusion at issue. As both the Magistrate and District Court recognized, the record indicates otherwise.

1. The Order Properly Applies The At-Issue Doctrine To The Factual Record

Under the at-issue doctrine, a party asserting the advice of legal counsel to defend its intent in taking certain action cannot then assert the attorney-client privilege to shield that advice from discovery. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) (finding defendant impliedly waived attorney-client privilege by relying on legal advice to support reasonableness of actions). As discussed below, the Order properly applied the at-issue doctrine to the facts of this case and prevented Defendants from unfairly leveraging legal advice and their alleged understanding of the law as a sword to defend against claims of discriminatory intent, while simultaneously shielding that advice from Dr. Toomey's scrutiny. (**Order** at 6-7; **Magistrate Order** at 5-6.)

As the Petition concedes, the at-issue doctrine of implied waiver applies any time "a party, in the course of litigation, (1) makes an affirmative act injecting privileged materials into a proceeding, (2) thereby putting the materials at issue, (3) where application of the privilege would deny the opposing party access to information needed to effectively litigate its rights in the adversarial system." (**Pet**. at 19, citing *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999), *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2015 WL 12911719, at *2 (D. Ariz. May 14, 2015).)

A party need not formally plead an "advice of counsel" defense to implicate the at-issue doctrine; rather, they can do so during discovery by affirmative conduct

that impliedly puts legal advice at issue. In *Chevron*, for example, the defendant corporation implicated the at-issue doctrine "[d]uring the course of discovery," by submitting a witness declaration maintaining that a legally challenged investment was reasonable because it was "based upon" legal considerations and was "made in reliance upon" counsel's advice. *Chevron*, 974 F.2d at 1162. The Ninth Circuit held that the defendant placed "privileged" information at-issue and explained that "[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield." *Id.*

The Order properly applies this prevailing standard to the factual record, which is replete with affirmative conduct that puts at issue the legal advice Defendants received while evaluating whether to maintain the Exclusion. (*See* **Order** at 6-7; *see also* **Magistrate Order** at 4-6.) As summarized *supra* in Section III.A., Dr. Toomey's Amended Complaint alleges that the State's Exclusion is discriminatory. In their Answer to the Amended Complaint, Defendants stated as an affirmative defense that their actions regarding the Exclusion "were taken for legitimate, non-discriminatory, and non-pretexual reasons." *Supra* at Section III.A. Accordingly, Dr. Toomey's Interrogatory No. 1 asked Defendants to "[i]dentify and describe all *reasons why* the State of Arizona's self-funded health plan controlled by the [ADOA] excludes coverage for 'gender reassignment surgery.'" *Supra* at Section III.B. (emphasis added). Defendants responded that the Exclusion was maintained

"*because* the State concluded, under the law, that it was not legally required" to cover gender reassignment surgery. *Supra* at Section III.B. (emphasis added).[6] The plain words of this response put forward legal advice and the State's understanding of the law as the basis for the Exclusion. Where a party explains the motivation for its conduct by maintaining that it believed its actions were legal, it affirmatively places its "knowledge of the law and the basis for [its] understanding of what the law requires in issue." (**Motion** at 9, citing *Chevron*, 974 F.2d at 1162.)

Further, Dr. Toomey's Interrogatories Nos. 4 and 7 asked Defendants to (1) "[i]dentify all persons who participated in formulating, adopting, maintaining, reviewing, approving, or deciding to continue" the Exclusion, and to (2) identify "all research, studies, data, reports, publications, testimony, or other documents considered, reviewed, or relied on by [Defendants] relating to" the Exclusion. *Supra* at Section III.B. Defendants responded to these requests by pointing to lawyers and legal documents. *Supra* at Section III.B. In light of these responses, it is clear that (i) lawyers were essential to and heavily involved in the State's decision-making regarding the Exclusion and that (ii) the State is affirmatively relying on advice of

[6] The Petition suggests that the State's conclusion regarding the legality of the Exclusion was one of "many reasons" why the Exclusion was maintained. (**Pet.** at 20.) But the State's response to Interrogatory No. 1 only lists two "reasons why" the State maintained the Exclusion: (1) its alleged understanding that the Exclusion was lawful and (ii) cost containment. *See supra* at Section III.B. Dr. Toomey would be unfairly disadvantaged if he were disallowed from probing one of the State's mere two purported "reasons why" the Exclusion was maintained.

counsel to defend the propriety of the Exclusion. This is further supported by testimony of State witnesses, who testified that legal advice was not just a consideration, but the "primary reason" for maintaining the Exclusion. *Supra* at Section III.B.

The Order summarized these various affirmative acts, and then properly concluded that Defendants "implicitly waived the attorney-client privilege with respect to the withheld documents by relying upon the legal advice they received regarding the [Exclusion] as 'evidence that they harbored no discriminatory intent' in maintaining the [Exclusion]." (**Order** at 2-7.) "Plaintiff cannot realistically dispute [Defendants'] claimed reason for maintaining the [Exclusion] without access to the legal advice that Defendants relied upon in making that decision, and [] 'fairness' thus mandates that Plaintiff be able to review the substance of that advice." (*Id*. at 4; *see also id*. at 7 (summarizing and adopting the Magistrate Order).)

2. The Defendants' Arguments Misstate The Law And Mischaracterize The Factual Record

Defendants' contention that the Order is clearly erroneous is premised on already-rejected arguments that misstate the law and mischaracterize the record.

First, the Petition argues that the District Court committed clear error in applying the at-issue doctrine because Defendants did not formally plead an "advice of counsel" defense. (**Pet.** at 19 ("[Defendants] Did Not Assert An 'Advice of Counsel' Defense").) But a party need not ceremoniously plead or announce that it

is asserting an advice of counsel defense in order for the at issue doctrine to apply. (**Motion** at 9 (citing *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992), *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2015 WL 12911719 at *4 (D. Ariz. May 14, 2015)); **Pet. Ex. 8** (the "**Reply**") at 5-6 (same).) Rather, "[t]he doctrine of implied waiver is invoked when a party makes the content of his attorney's advice relevant to some claim or defense in the case." *Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364, 1370 (Fed. Cir. 2012) (citing *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir.2003) (en banc); *Chevron*, 974 F.2d at 1162)).

Thus, the applicability of the at-issue doctrine is determined by examining the *substance* of the parties' claims and defenses, not by the magic words "advice of counsel." The at-issue doctrine can be implicated during discovery, by conduct such as (i) submission of a witness declaration or (ii) deposition testimony. (**Motion** at 10 (citing *Chevron* and *Melendres*); **Reply** at 5-6.) In this case, the Order carefully considers Defendants' conduct during discovery, including written discovery responses and State witness testimony and concludes that this affirmative conduct put the State's legal advice about the Exclusion at issue. (*See* **Order**.)

Second, Defendants suggest that their interrogatory responses disclosed only the fact that "legal counsel was consulted," not that legal advice was relied on or factored into the State's decision-making regarding the Exclusion. (**Pet.** at 19-27.)

Defendants go so far as to represent that they never disclosed "what the legal advice was," "whether [Defendants] relied upon any advice from legal counsel," or "whether actions were based on or justified by legal advice." (*Id.*) But even if Defendants' assertions were true (they are not), they would be irrelevant. Under the at-issue doctrine, "[e]ven if the party does not expressly disclose the advice received, but only alludes to it, the privilege can be deemed waived by implication." *Wi-LAN, Inc.*, 684 F.3d at 1370 (citing *Bittaker*, 331 F.3d at 719; *Chevron*, 974 F.2d at 1162).

In addition to being irrelevant, Defendants' assertions are also flatly contradicted by the reco rd. As explained *supra*, when asked to list the "reasons why" the State decided to maintain the Exclusion, Defendants responded "*because* the State concluded, under the law, that it was not legally required" to cover "gender reassignment surgery." *Supra* at Section III.B. If there was any doubt as to whether this alleged understanding was influenced by advice of counsel, the interrogatory response goes on to state that "[t]he legal advice that the State received regarding this issue is covered by the attorney-client privilege." *Supra* at Section III.B. Moreover, State witnesses familiar with the State's decision-making regarding the Exclusion testified during deposition that "the deciding factor" or the "primary reason" for the existence of the Exclusion was that the law did not require gender reassignment surgery to be covered. *Supra* at Section III.B. The record makes clear that Defendants received and relied on legal advice in maintaining the Exclusion

"even if they did not say so explicitly." *Supra* at Section III.C.

Third, Defendants argue that the State's understanding of the law could have been based on several non-privileged sources "such as newspaper articles." (**Pet.** at 21.) The District Court properly rejected this argument, finding that "[i]f the [Defendants'] understanding of the law was based, say, on a newspaper article, then they would not have affirmatively stated that '[t]he legal advice that the State received regarding this issue is covered by the attorney-client privilege.' The attorney-client privilege does not cover newspaper articles." (**Magistrate Order** at 5-6; **Order** at 7.) Moreover, Defendants did not list newspaper articles in their response to Dr. Toomey's Interrogatory No. 7, which asked Defendants to enumerate the documents considered and relied upon in maintaining the Exclusion. (*See* **Motion** at Exhibit 5 at Response No. 7.)

The contention that the State's understanding of the law was not influenced by advice of counsel is further contradicted by State testimony. Marie Isaacson, Director of the Benefits Services Division of the ADOA when the decision to maintain the Exclusion was made, testified that the State "sought legal counsel and that – *with the legal counsel's recommendation* and meeting with the governor's office there was a decision made." (**Magistrate Order** at 5 (emphasis added).)

Fourth, Defendants argue that even if attorneys were involved in the decision-making regarding the Exclusion (they were), "not every communication between a

lawyer and a client is privileged." (**Pet.** at 25.) This is beside the point. The Order only implicates documents that Defendants are withholding on the basis of attorney-client privilege. (*See generally* **Order**.) Moreover, the Order does not base its application of the at-issue doctrine on Defendants' mere "identification of the fact that attorneys were present at a meeting." (**Pet.** at 26.) As explained *supra*, the Order is premised on a series of affirmative acts that put forth legal advice and the State's understanding of the law to defend against Dr. Toomey's claim of discriminatory motive. *Supra* at Section III.B.

3. Discriminatory Intent Is Relevant Both To Dr. Toomey's Claims And The Defendants' Defenses

Defendants argue that evidence regarding the State's motivation for maintaining the Exclusion is not relevant because Dr. Toomey's claims solely allege facial discrimination. (**Pet**. at 33.) This is wrong. The State's rationale for maintaining the Exclusion is highly relevant–both to Dr. Toomey's claims and to the State's defenses. Moreover, Defendants have waived the argument that the State's intent is irrelevant.

First, Defendants' argument that Dr. Toomey's claims are limited to facial discrimination is premised on an incomplete and inaccurate reading of Dr. Toomey's Amended Complaint. Defendants' intent is highly relevant to allegations of facial discrimination under the Equal Protection Clause, because under heightened scrutiny, the constitutionality of a discriminatory classification must be determined

by examining the "actual purpose" for state action, not *post hoc* justifications. *See SmithKline Beecham Corp. v. Abbott Lab'ies*, 740 F.3d 471, 483 (9th Cir. 2014). Moreover, despite Defendants' assertion to the contrary, Dr. Toomey's Amended Complaint explicitly alleges that the Exclusion "lacks any rational basis and is grounded in sex stereotypes, discomfort with gender nonconformity and gender transition, and moral disapproval of people who are transgender." (**Amended Complaint** at ¶ 81.)

Second, it is commonplace for litigants to pursue arguments in the alternative. While Dr. Toomey does maintain among other things that the Exclusion is facially violative of Title VII and the Equal Protection Clause (*see generally* **Pet.** Ex. 2), the Magistrate Judge's report & recommendation regarding Dr. Toomey's motion for a preliminary injunction concluded that Dr. Toomey must prove discriminatory intent by the Defendants to succeed on his claims. (**Exhibit C** at 6-9.) It is unsettled what standard the District Court will ultimately apply to Dr. Toomey's claims, and therefore discovery about Defendants' intent "concerns an indispensable element of Toomey's causes of action" and such "documents remain relevant." (**Exhibit F** at 5.)

Third, Defendants themselves have put the State's intent at issue. In their Answer to Dr. Toomey's Amended Complaint, Defendants stated as an affirmative defense that their actions regarding the Exclusion "were taken for legitimate, non-

discriminatory, and non-pretexual reasons." *Supra* at Section III.A. Further, Defendants agreed in a joint status report that one of the disputed factual questions in this case is "[w]hether the decision to exclude gender reassignment surgery in the Health Care Plan was actually motivated by a legitimate governmental interest." (**Exhibit G** at 11.)

Fourth, Defendants' argument that the State's motivation is not relevant should be deemed waived "because it was never presented to the district court below." *Munns v. Kerry*, 782 F.3d 402, 412 (9th Cir. 2015); *see Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1178 n.7 (9th Cir. 2016). Neither Defendants' opposition to the Motion (**Pet. Ex. 5**), nor their objections to the Magistrate Order (**Pet. Ex. 7**), argued that the State's intent is irrelevant to Dr. Toomey's claims.[7] The Petition offers no reason why this Court should now entertain an argument that Defendants could have—but chose not to—raise before the District Court.

B. Defendants Cannot Establish The Other *Bauman* Factors

Because Defendants have failed to establish that the decision below was clearly erroneous, this Court can deny the Petition for mandamus without addressing the remaining *Bauman* factors. *See In re Walsh*, 15 F.4th 1005, 1010 (9th Cir. 2021)

[7] Making such an argument would have been bizarre after Defendants had, among other things (i) engaged in months of document discovery and depositions aimed at exploring the State's motivation for the Exclusion and (ii) agreed in a written status report that the State's "actual[] motivat[ion]" was a live issue. (**Exhibit G** at 11.)

(denying petition for mandamus and noting "we need not consider the other *Bauman* factors" because "[t]he third factor, clear error as a matter of law, is a necessary condition for granting a writ of mandamus.") (quoting *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011)). But even if the Court were to consider the remaining *Bauman* factors, none of them supports Defendants' request for mandamus relief.

1. Defendants Have Other Adequate Means Of Relief

"The need to show the lack of an available remedy absent a writ of mandamus goes to the heart of this extraordinary remedy which should be sparingly employed." *Cole v. U.S. Dist. Ct. For Dist. of Idaho*, 366 F.3d 813, 818 (9th Cir. 2004). Defendants correctly assert that they have no right to appeal this matter at the interlocutory stage. But, as the Supreme Court explained in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 110 (2009), parties have other "appellate options" for obtaining review. One "long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions," which "allow[s] a party to obtain postjudgment review without having to reveal its privileged information." *Id.* at 111. (*But see* **Pet.** at 20, n.4 (stating that Defendants have "no intention of pursuing that option.").) Another option is a post-judgment appeal, which the Supreme Court has recognized as an adequate remedy for attorney-client privilege rulings. *Mohawk*, 558 U.S. at 108-09. Given these alternatives, the unavailability of an interlocutory appeal does not itself entitle the State to mandamus relief because "[m]andamus

cannot be subverted to perform the function of an interlocutory appeal, over which [the Ninth Circuit has] no jurisdiction." *Gulf Rsch. & Dev. Co. v. Harrison*, 185 F.2d 457, 459 (9th Cir. 1950).

The first *Bauman* factor therefore weighs in favor of denying the Petition.

2. Any Potential Damage Or Prejudice Is Correctable On Appeal

In arguing that they satisfy the second *Bauman* factor, the Defendants both (i) overstate the harm imposed in complying with the Order and (ii) disregard established precedent on the redressability of harm on appeal. (*See* **Pet.** at 7.)

The Order is narrowly tailored, and does not compel production of all the documents that Defendants withheld on the basis of privilege, or all communications that Defendants have ever had with counsel. Instead, the Order mandates production of currently withheld documents "related to Defendants' decision-making regarding the [Exclusion]," and expressly states that "Defendants need not produce documents that relate solely to [their] defense in the instant litigation." (**Order** at 7.) Therefore, compliance with the Order will not reveal Defendants' litigation strategy or any legal advice Defendants' received in the course of defending against Dr. Toomey's lawsuit.

The narrow scope of the Order makes this case a far cry from *Hernandez v. Tanninen* upon which Defendants heavily rely. In *Hernandez*, the district was found to have erred because they issued a *blanket waiver* of the attorney client privilege,

and this Court's reasoning focused on the scope of the waiver. 604 F.3d at 1101 (9th Cir. 2010) ("The *blanket waiver*, however, is particularly injurious." (emphasis added)). No blanket wavier is presented by the Order. Moreover, because there is a protective order in this case that safeguards the confidentiality of produced documents (*see* **Exhibit H**), any harm that might otherwise arise from public disclosure here is limited. *Mohawk*, 558 U.S. at 112 (noting that protective orders "limit the spillover effects of disclosing sensitive information.").

Moreover, in evaluating potential harm, this Court should consider the fairness and policy-based reasoning behind the "at-issue" waiver. The Order is not premised on the fact that Defendants sought legal advice when the Exclusion was maintained; it is based on Defendants' affirmative use of that advice in their defense in the present litigation. *Supra* at Section III.B. Thus, the Order poses no risk of chilling consultation with counsel generally and instead discourages only the exact conduct that the at-issue doctrine is designed to discourage *i.e.* unfair leverage of legal advice as both a sword and a shield.

Both this Court and the Supreme Court have taken a skeptical approach to arguments about chilling that assume *ex ante* considerations of waiver:

> One reason for the lack of a discernible chill is that, in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal. Whether or not immediate collateral order appeals are available, clients and counsel must account for the possibility that they will later be required by law to disclose their

> communications for a variety of reasons—for example, because they misjudged the scope of the privilege, because they waived the privilege, or because their communications fell within the privilege's crime-fraud exception.

Mohawk, 558 U.S. at 110 (emphasis added)

> Denying immediate appellate review [of an order to compel documents withheld on the basis of attorney-client privilege] would have no 'discernible chill' because 'deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel.'

Perry v. Schwarzenegger, 591 F.3d 1147, 1155-56 (9th Cir. 2010) (quoting *Mohawk*, 558 U.S. at 109-110).

Like any other run-of-the-mill case involving claims of attorney-client privilege, any prejudice that might result from an erroneous privilege ruling in this case can be fully remedied on appeal from final judgment. The Supreme Court has instructed that "[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." *Mohawk*, 558 U.S. at 109.

Defendants argue that they are not subject to *Mohawk*'s general principal as they are confronted with both a "particularly injurious" and a "novel" privilege ruling. (Pet. at 22-23.) But *Mohawk* makes clear that mandamus sets a high bar for such claims. 558 U.S. at 111 ("[A] party may petition the court of appeals for a writ

of mandamus" in the event of "extraordinary circumstances . . . when a disclosure order . . . works a manifest injustice.") (citing *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 390 (2004)). In any event, Defendants cannot point to anything in the District Court's opinion that is either "particularly injurious" or "novel." Nor do Defendants identify any "manifest injustice" that would result from the compliance with the Order. *Mohawk*, 558 U.S. at 111.

Instead, the Petition opts for conclusory statements and relies on three inapposite cases for support. (**Pet.** at 14-18 (citing *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), *Hernandez v. Tanninen*, 604 F.3d 1095 (9th Cir. 2010), and *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).) Each of these cases cuts against Defendants.

In *Perry*, this Court went to great lengths to explain why *unlike attorney-client privilege*, First Amendment privilege was ill-suited for remedy on final appeal. 591 F.3d at 1155-56 (listing reasons why erroneous attorney-client privilege orders are better suited for review after final judgment than erroneous First Amendment privilege orders). For example, unlike attorney-client privilege, First Amendment privilege "concerns a privilege of constitutional dimensions"; "public interest associated with [First Amendment Privilege] is of greater magnitude" than attorney-client privilege; "disclosures concerning protected First Amendment political associations have a profound chilling effect" while there is no discernable chill from

disclosures concerning attorney-client privilege; and "unlike the attorney-client privilege, the First Amendment privilege is rarely invoked." *Id*.

Unlike here, the district court in *Hernandez* did not place any limits on the scope of waiver. 604 F.3d at 1101. This Court made explicitly clear that it was "[t]he breadth of the waiver finding, untethered to the subject-matter disclosed, [that] constitute[d] a particularly injurious privilege ruling." *Id.* The same concerns are absent here because the Order was subject to multiple limitations.

In *Jicarilla*, the Government had already complied with the discovery order and produced the disputed documents; yet the Supreme Court found that "[t]he Government's compliance with the production order does not affect [the Court's] review" because "effective relief" could still be provided after the production had been made. 564 U.S. at 169, n.2 (2011). Thus, *Jicarilla* stands as an example of how the court may effectively remedy the erroneous disclosure of privileged documents.

Finally, contrary to Defendants' assertion, "[c]ompelling a government entity to produce documents protected by the attorney client privilege" is neither particularly injurious nor novel. (**Pet.** at 18) *Jicarilla*, for instance, is not novel because of the unremarkable fact that the government was asserting attorney-client privilege, but rather because the case concerns the unique quasi-fiduciary relationship between the federal government and indigenous nations. 564 U.S. at

186–87. Although courts have recognized that government entities can claim attorney-client privilege, they have also generally rejected "parties' attempts to withhold attorney-client communications from a litigation adversary while relying on the same material to advance a claim in court." *Am. C.L. Union v. Nat'l Sec. Agency*, 925 F.3d 576, 589-91 (2d Cir. 2019); *Modesto Irrigation District v. Gutierrez*, 1:06-CV-00453 OWWDLB, 2007 WL 763370, at *13 (E.D. Cal. Mar. 9, 2007) (holding that "the traditional rationale for the [attorney-client] privilege applies with special force in the government context[,]" but that "[t]he privilege may be waived" and that "because the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose.") Like any entity that is capable of asserting the attorney-client privilege, a government entity is able to waive it. The State cites no authority to the contrary.

The second *Bauman* factor therefore weighs in favor of denying the Petition.

3. The District Court Did Not "Oft-Repeat Error" Or Disregard The Federal Rules

Defendants have not, and cannot, present any credible arguments that the District Court's alleged error is "oft-repeated." *Cole v. U.S. District Court For District of Idaho*, 366 F.3d 813, 823 n.13 (9th Cir. 2004) ("The fourth factor, oft-repeated error or persistent disregard of the federal rules, does not apply because there is no evidence that this error has been made more than once.") Defendants do not, and cannot, argue that the District Court has erred *repeatedly* in its consideration

of the attorney-client privilege, because it has addressed this issue just once in this matter, in the present Order before the Court. Defendants miss the point of the fourth factor, conflating arguments about the misapplication of the attorney-client privilege and clear error (the third *Bauman* factor), with arguments about how the District Court, or the Order itself, "oft-repeats" error or persistently disregards the federal rules. The final argument section of Defendants' brief simply reprises their incorrect assertion that the Order "encompasses too much" by premising implied waiver on Defendants "mere acknowledgement" that legal counsel was consulted. (**Pet.** at 28-30.) As explained *supra* at Section IV.A., the Order's finding of implied waiver is based on much more than a simple "acknowledgement" by Defendants that legal advice was consulted regarding the Exclusion. It is premised on Defendants' affirmative and continuous use of legal advice in this litigation to defend against Dr. Toomey's claim of discriminatory motive.

The fourth *Bauman* factor weighs in favor of denying the Petition.

4. Defendants' Concede This Case Does Not Raise Novel Issues

The Defendants concede the last *Bauman* factor. (**Pet.** at 19 (claiming that "four of the *Bauman* factors weigh in favor of issuing a writ of mandamus" and listing only four factors).) They wisely do not allege that "the district court's order raises new and important problems, or issues of law of first impression." *Bauman*, 557 F.2d 650, 655. Nor could they. "Most district court rulings on these matters [of

pretrial attorney-client privilege orders] involve the routine application of settled legal principles. They are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the norm." *Mohawk*, 558 U.S. at 110.

V. CONCLUSION

For all the reasons discussed above, Defendants' Petition should be denied.

DATED this 14th day of December, 2021.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Dr. Toomey states that Dr. Toomey is unaware of any related, pending cases before this Court.

DATED this 14th day of December, 2021.

ACLU FOUNDATION OF ARIZONA

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Opposition to Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 14, 2021. Notice of this filing will be sent by email to all parties and parties of interest by operation of the Court's electronic filing system.

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Dated: December 14, 2021

*By /s/ **Christine K. Wee***
Christine K. Wee

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a) (5) and (6), because it is proportionately spaced serif font, has a typeface of 14 points and contains 7,556 words.

Dated: December 14, 2021

*By /s/ **Christine K. Wee***
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EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as Chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services

Case No. CV-19-00035-TUC-RM (LAB)

ANSWER TO AMENDED COMPLAINT BY DEFENDANTS STATE OF ARIZONA, ANDY TOBIN, AND PAUL SHANNON

Division of the Arizona Department of Administration,

Defendants.

Defendants State of Arizona, Andy Tobin, and Paul Shannon (collectively the "State" or the "State Defendants"), for their Answer to Plaintiff's Complaint, hereby admit, deny, and allege as follows. The State Defendants deny all allegations in the Complaint that are not specifically admitted herein.

INTRODUCTION

1. The State of Arizona provides healthcare coverage to State employees through a self-funded health plan controlled by the Arizona Department of Administration ("the Plan"). (Exhibit A.)

Answer to Paragraph 1: The State Defendants admit the State of Arizona provides health insurance coverage to State of Arizona employees through a self-funded health plan administered by the Arizona Department of Administration. The State Defendants further admit that Exhibit A to the Complaint is the Summary Plan Description for the 2018 health plan ("Plan"). The State Defendants deny the remaining allegations in Paragraph 1 of the Complaint.

2. The Plan generally provides coverage for medically necessary care but singles out transgender employees for unequal treatment by categorically denying all coverage for "[g]ender reassignment surgery" regardless of whether the surgery qualifies as medically necessary treatment. As a result, transgender individuals enrolled in the Plan have no opportunity to demonstrate that their transition-related care is medically necessary, and they have no opportunity to appeal any adverse determination to an independent reviewer.

Answer to Paragraph 2: The State Defendants admit the Plan defines a "Covered Service" as "a service which is Medically Necessary and eligible for payment under the Plan" (Article 17). The State Defendants further admit the Plan

contains "Exclusions and General Limitations" (Section 10.1) which exclude numerous "Services and Supplies" from coverage regardless of "Medical Necessity," and one of those exclusions is "Gender reassignment surgery." The State Defendants deny the remaining allegations in Paragraph 2 of the Complaint.

3. In the past, some public and private insurance companies excluded coverage for treatment of gender dysphoria (also called "transition-related care" or "gender-affirming care"), including surgical treatments, based on the erroneous assumption that such treatments were cosmetic or experimental. Today, however, every major medical organization to address the issue has recognized that such exclusions have no basis in medical science and that transition-related care is effective, safe and medically necessary for treatment of gender dysphoria.

Answer to Paragraph 3: The State Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 3 of the Complaint, and therefore deny them.

4. Plaintiff Russell B. Toomey, Ph.D., is a man who is transgender. He is employed as an Associate Professor at the University of Arizona. As a result of the Plan's discriminatory exclusion, Dr. Toomey has been blocked from receiving a medically-necessary hysterectomy prescribed by his physician in accordance with the widely accepted standards of care for treating gender dysphoria. The Plan provides coverage for the same hysterectomies when prescribed as medically necessary treatment for other medical conditions. But, the Plan categorically excludes coverage for hysterectomies when they are medically necessary for purposes of "[g]ender reassignment."

Answer to Paragraph 4: The State Defendants admit the Plan defines a "Covered Service" as "a service which is Medically Necessary and eligible for payment under the Plan" (Article 17). The State Defendants further admit the Plan contains "Exclusions and General Limitations" (Section 10.1) which exclude numerous "Services and Supplies" from coverage regardless of "Medical Necessity,"

and one of those exclusions is "Gender reassignment surgery." The State Defendants lack sufficient knowledge or information to admit or deny the allegations that Plaintiff is a man who is transgender and currently employed as an Associate Professor at the University of Arizona, and therefore the State Defendants deny those allegations. The State Defendants deny the remaining allegations in Paragraph 4 of the Complaint.

5. If the discriminatory exclusion were removed, Dr. Toomey would have an opportunity to prove that his surgery is medically necessary under the Plan's generally applicable standards for establishing medical necessity.

Answer to Paragraph 5: The State Defendants deny the allegations in Paragraph 5 of the Complaint.

6. If the discriminatory exclusion were removed, Dr. Toomey would also have the right to appeal any adverse determination to an independent reviewer within the third-party claims administrator and, if necessary, to an independent review organization.

Answer to Paragraph 6: The State Defendants deny the allegations in Paragraph 6 of the Complaint.

7. On its face, the Plan discriminates against Dr. Toomey and other transgender employees "because of …sex" in violation of Title VII of the Civil Rights Act of 1964 and deprives Dr. Toomey and other transgender employees of equal treatment under the Equal Protection Clause of the Fourteenth Amendment.

Answer to Paragraph 7: The State Defendants deny the allegations in Paragraph 7 of the Complaint.

8. Dr. Toomey brings this Amended Complaint on behalf of himself and a proposed class of similarly situated individuals for declaratory and injunctive relief requiring Defendants to remove the Plan's categorical exclusion of coverage for "[g]ender reassignment surgery" and evaluate whether transgender individuals' surgical care for

gender dysphoria is "medically necessary" in accordance with the Plan's generally applicable standards and procedures.

Answer to Paragraph 8: The State Defendants admit Plaintiff is attempting to bring this Amended Complaint on behalf of himself and a proposed class, but deny that class certification is appropriate or permissible. The State Defendants deny that Plaintiff and any proposed class are entitled to declaratory relief, injunctive relief, or any relief whatsoever.

JURISDICTION AND VENUE

9. This action arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"), the Constitution of the United States, and 42 U.S.C. § 1983.

Answer to Paragraph 9: Paragraph 9 of the Complaint contains legal conclusions to which no response is necessary. In the event a response is deemed necessary, the State Defendants deny that Plaintiff has a valid claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"), the Constitution of the United States, or 42 U.S.C. § 1983.

10. This Court has jurisdiction pursuant to Article III of the United States Constitution; 28 U.S.C. §§ 1331, 1343; and 42 U.S.C. § 2000e-5(f)(3).

Answer to Paragraph 10: The State Defendants admit jurisdiction is proper in this Court.

11. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

Answer to Paragraph 11: The State Defendants deny the allegations in Paragraph 11 of the Complaint and specifically deny that Plaintiff is entitled to declaratory relief or any relief whatsoever.

12. Venue lies with this Court pursuant to 42 U.S.C. § 2000e-5(f)(3) because the unlawful employment practice was committed in the State of Arizona.

Answer to Paragraph 12: The State Defendants admit venue is proper in this Court. The State Defendants deny the remaining allegations in Paragraph 12 of the Complaint.

PARTIES

13. Plaintiff Russell B. Toomey, Ph.D., resides in Tucson, Arizona.

Answer to Paragraph 13: The State Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 13 of the Complaint, and therefore deny them.

14. Dr. Toomey is employed by Defendant, the Arizona Board of Regents, as an Associate Professor at the University of Arizona.

Answer to Paragraph 14: The State Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 14 of the Complaint, and therefore deny them.

15. The Arizona Board of Regents provides healthcare to its employees, including Dr. Toomey, through a self-funded plan controlled by the Arizona Department of Administration.

Answer to Paragraph 15: The State Defendants admit the Arizona Board of Regents offers healthcare insurance to employees of the Arizona Board of Regents through a self-funded health insurance plan administered by the Arizona Department of Administration. The State Defendants deny the remaining allegations in Paragraph 15 of the Complaint.

16. Defendant Ron Shoopman is sued in his official capacity as Chair of the Arizona Board of Regents.

Answer to Paragraph 16: Upon information and belief, the State Defendants admit the allegations in Paragraph 16 of the Complaint.

17. Defendant Ram Krishna is sued in his official capacity as Secretary of the Arizona Board of Regents

Answer to Paragraph 17: Upon information and belief, the State Defendants admit the allegations in Paragraph 17 of the Complaint.

18. Defendant Bill Ridenour is sued in his official capacity as Treasurer of the Arizona Board of Regents.

Answer to Paragraph 18: Upon information and belief, the State Defendants admit the allegations in Paragraph 18 of the Complaint.

19. Defendants Larry Penley, Lyndel Manson, Karrin Taylor Robson, Jay Heiler, and Fred DuVal are sued in their official capacities as Members of the Arizona Board of Regents.

Answer to Paragraph 19: Upon information and belief, the State Defendants admit the allegations in Paragraph 19 of the Complaint.

20. Defendant Andy Tobin is sued in his official capacity as Interim Director of the Arizona Department of Administration.

Answer to Paragraph 20: The State Defendants deny that Andy Tobin is Interim Director of the Arizona Department of Administration. The State Defendants admit that Andy Tobin is the Director of the Arizona Department of Administration. Upon information and belief, the State Defendants admit the remaining allegations in Paragraph 20 of the Complaint.

21. Defendant Paul Shannon is sued in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration.

Answer to Paragraph 21: The State Defendants deny that Paul Shannon is Acting Assistant Director. The State Defendants admit that Paul Shannon is Assistant Director, Benefits Services Division of the Arizona Department of Administration. Upon information and belief, the State Defendants admit the remaining allegations in Paragraph 21 of the Complaint.

EXHAUSTION OF ADMINSTRATIVE REQUIREMENTS

22. On August 15, 2018, Dr. Toomey timely filed a charge with the Equal Employment Opportunity Commission against the Arizona Board of Regents for sex discrimination in violation of Title VII.

Answer to Paragraph 22: Upon information and belief, the State Defendants admit that on or about August 15, 2018, Plaintiff filed an EEOC Charge against the Board of Regents of the University of Arizona, alleging sex discrimination. The remaining allegations in Paragraph 22 of the Complaint contain legal conclusions to which no response is necessary. In the event a response is deemed necessary, the State Defendants deny the remaining allegations in Paragraph 22 of the Complaint.

23. On December 14, 2018, the Department of Justice issued a right-to-sue letter to Dr. Toomey, which was received on December 27, 2018. (Exhibit B.)

Answer to Paragraph 23: Upon information and belief, the State Defendants admit the Department of Justice issued a right-to-sue letter to Dr. Toomey, which is dated December 14, 2018. The State Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 23 of the Complaint, and therefore deny them.

FACTUAL ALLEGATIONS

Transgender individuals and gender dysphoria

24. Gender identity is a well-established medical concept, referring to one's sense of oneself as belonging to a particular gender. Typically, people who are designated female at birth based on this external anatomy identify as girls or women, and people who are designated male at birth identify as boys or men. For transgender individuals, however, the sense of one's gender identity differs from the sex assigned to them at birth.

Answer to Paragraph 24: The State Defendants note the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition ("DSM-V"), which Plaintiff cites in the Complaint, contains definitions of "gender identity" and "transgender" that differ from those stated in Paragraph 24 of the Complaint. The State Defendants

lack sufficient knowledge or information to admit or deny the specific definitions and allegations contained in Paragraph 24 of the Complaint, and therefore deny them.

25. Transgender men are men who were assigned "female" at birth, but have a male gender identity. Transgender women are women who were assigned "male" at birth, but have a female gender identity.

Answer to Paragraph 25: The State Defendants lack sufficient knowledge or information to admit or deny the specific definitions and allegations contained in Paragraph 25 of the Complaint, and therefore deny them.

26. Although the precise origins of each person's gender identity is not fully understood, experts agree that it likely results from a combination of biological factors as well as social, cultural, and behavioral factors.

Answer to Paragraph 26: The State Defendants lack sufficient knowledge or information to admit or deny the allegations identified in Paragraph 26 of the Complaint, and therefore deny them.

27. Being transgender is not a mental disorder. Men and women who are transgender have no impairment in judgment, stability, reliability, or general social or vocational capabilities solely because of their transgender status. But transgender men and women may require treatment for "gender dysphoria," the diagnostic term for the clinically significant emotional distress experienced as a result of the incongruence of one's gender with their assigned sex and the physiological developments associated with that sex. The criteria for diagnosing gender dysphoria are set forth in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) (302.85).

Answer to Paragraph 27: The State Defendants state the DSM-V manual speaks for itself. The State Defendants further state that "gender dysphoria" is defined in DSM-V (p. 451) as "the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." The

State Defendants lack sufficient knowledge or information to admit or deny the remaining allegations identified in Paragraph 27 of the Complaint, and therefore deny them.

28. The widely accepted standards of care for treating gender dysphoria are published by the World Professional Association for Transgender Health ("WPATH"). Under the WPATH standards, medically necessary treatment for gender dysphoria may require medical steps to affirm one's gender identity and transition from living as one gender to another. This treatment, often referred to as transition-related care or gender-affirming care, may include hormone therapy, surgery (sometimes called "sex reassignment surgery" or "gender confirmation surgery"), and other medical services that align individuals' bodies with their gender identities.

Answer to Paragraph 28: The State Defendants state the World Professional Association for Transgender Health ("WPATH") "Standards of Care" document speaks for itself. The State Defendants further state WPATH has several versions of "Standards of Care," and it is unknown which version Plaintiff is referencing in Paragraph 28 of the Complaint. The State Defendants lack sufficient knowledge or information to admit or deny the remaining allegations identified in Paragraph 28 of the Complaint, and therefore deny them.

29. Under the WPATH standards, the exact medical treatment varies based on the individualized needs of the person, under each patient's treatment plan, the goal is to enable the individual to live all aspects of their life consistent with their gender identity, thereby eliminating the distress associated with the incongruence.

Answer to Paragraph 29: The State Defendants state the WPATH "Standards of Care" document speaks for itself. The State Defendants further state WPATH has several versions of "Standards of Care," and it is unknown which version Plaintiff is referencing in Paragraph 29 of the Complaint. The State Defendants lack

sufficient knowledge or information to admit or deny the remaining allegations identified in Paragraph 29 of the Complaint, and therefore deny them.

30. In the past, public and private insurance companies excluded coverage for transition-related care based on the assumption that such treatments were cosmetic or experimental. Today, however, transition-related surgical care is routinely covered by private insurance programs. The American Medical Association, the American Psychological Association, the American Psychiatric Association, the American College of Obstetricians and Gynecologists, and other major medical organizations have issued policy statements and guidelines supporting healthcare coverage for transition-related care as medically necessary under contemporary standards of care. No major medical organization has taken the position that transition-related care is not medically necessary or advocated in favor of a categorical ban on insurance coverage for transition-related procedures.

Answer to Paragraph 30: The State Defendants lack sufficient knowledge or information to admit or deny the allegations identified in Paragraph 30 of the Complaint, and therefore deny them.

31. Medicare began covering transition-related surgery in 2014 after an independent medical board in the U.S. Department of Health & Human Services rescinded an old Medicare policy that had excluded surgery from Medicare coverage. The decision explained that the Medicare surgery exclusion was based on a medical review conducted in 1981 and failed to take into account subsequent developments in surgical techniques and medical research. Medicare now provides coverage for transition-related surgical care for gender dysphoria on a case-by-case basis based on individualized medical need.

Answer to Paragraph 31: The State Defendants lack sufficient knowledge or information to admit or deny the allegations identified in Paragraph 31 of the Complaint, and therefore deny them.

The Self-Funded Health Plan's "Gender Reassignment" Exclusion

32. Dr. Toomey's healthcare coverage is provided and paid for by the State of Arizona through the Plan.

Answer to Paragraph 32: The State Defendants admit Dr. Toomey has health insurance coverage that is partially paid for by the State of Arizona through the Plan. The State Defendants deny the remaining allegations in Paragraph 32 of the Complaint.

33. Individuals enrolled in the Plan must choose to receive benefits through a Network Provider. In 2018, the four Network Providers were Aetna, Blue Cross Blue Shield of Arizona, Cigna, and UnitedHealthcare. Dr. Toomey's Network Provider is Blue Cross Blue Shield of Arizona.

Answer to Paragraph 33: The State Defendants admit the allegations in Paragraph 33 of the Complaint.

34. The Plan generally provides coverage for medically necessary care, which the Plan defines as "services, supplies and prescriptions, meets all of the following criteria": (1) ordered by a physician; (2) not more extensive than required to meet the basic health needs; (3) consistent with the diagnosis of the condition for which they are being utilized; (4) consistent in type, frequency and duration of treatment with scientifically based guidelines by the medical-scientific community in the United States of America; (5) required for purposes other than the comfort or convenience of the patient or provider; (6) rendered in the least intensive setting that is appropriate for their delivery; and (7) have demonstrated medical value.

Answer to Paragraph 34: The State Defendants admit the Plan provides coverage for some services, supplies, and prescriptions that are medically necessary, and the Plan defines "Medically Necessary/Medical Necessity" as "services, supplies and prescriptions, meeting all of the following criteria: 1. Ordered by a physician; 2. Not more extensive than required to meet the basic health needs; 3. Consistent with the diagnosis of the condition for which they are being utilized; 4. Consistent in type,

frequency and duration of treatment with scientifically based guidelines by the medical-scientific community in the United States of America; 5. Required for purposes other than the comfort and convenience of the patient or provider; 6. Rendered in the least intensive setting that is appropriate for their delivery; and 7. Have demonstrated medical value." The State Defendants deny the remaining allegations in Paragraph 34 of the Complaint.

35. In the event that the Plan denies coverage for a treatment based on purported lack of medical necessity, the Plan provides a right to appeal the decision to an independent reviewer at the third-party claims administrator and, if necessary, to further appeal to an external independent review organization. If an independent reviewer concludes that the treatment is medically necessary, that decision is binding, and the Plan must immediately authorize coverage for the treatment.

Answer to Paragraph 35: The State Defendants state the Plan's appeal process (in Article 12) speaks for itself and also provides information that is not contained in Paragraph 35 of the Complaint, and therefore the State Defendants deny Plaintiff's general characterization of the entire appeal process.

36. The Plan does not apply these generally applicable standards and procedures to surgical care for gender dysphoria. Instead, the Plan categorically denies all coverage for "[g]ender reassignment surgery" regardless of whether the surgery qualifies as medically necessary. Transgender individuals enrolled in the Plan have no opportunity to demonstrate that their transition-related care is medically necessary or to appeal any adverse determination to an independent reviewer.

Answer to Paragraph 36: The State Defendants admit the Plan contains "Exclusions and General Limitations" (Section 10.1) that exclude numerous "Services and Supplies" from coverage regardless of "Medical Necessity," and one of those exclusions is "Gender reassignment surgery." The State Defendants deny the remaining allegations in Paragraph 36 of the Complaint.

37. All four of the health insurance companies who serve as Network Providers for the Plan have adopted internal policies and standards for determining when transition-related surgery for gender dysphoria is medically necessary and thus, covered. (Exhibits C-F.) But, as a result of the Plan's "gender reassignment" exclusion, the Network Providers do not apply those internal policies and standards when administering the Plan to Arizona State employees and, instead, automatically deny coverage of transition-related surgery.

Answer to Paragraph 37: The State Defendants state the Aetna, Blue Cross Blue Shield of Arizona, Cigna, and United Healthcare documents attached as Exhibits C-F to the Complaint speak for themselves. The State Defendants admit the Plan contains "Exclusions and General Limitations" (Section 10.1) that exclude numerous "Services and Supplies" from coverage regardless of "Medical Necessity," and one of those exclusions is "Gender reassignment surgery." The State Defendants deny the remaining allegations in Paragraph 37 of the Complaint.

Dr. Toomey's medically necessary treatment for gender dysphoria

38. Dr. Toomey is a man who is transgender, which means that he has a male gender identity, but the sex assigned to him at birth was female. Dr. Toomey transitioned to live consistently with his male identity in 2003. Since 2003, Dr. Toomey has received testosterone as a medically necessary treatment for gender dysphoria. He also received medically necessary chest reconstruction surgery in 2004.

Answer to Paragraph 38: The State Defendants lack sufficient knowledge or information to admit or deny the allegations identified in Paragraph 38 of the Complaint, and therefore deny them.

39. In accordance with the WPATH Standards of Care, Dr. Toomey's treating physicians have recommended that he receive a hysterectomy as a medically necessary treatment for gender dysphoria.

Answer to Paragraph 39: The State Defendants lack sufficient knowledge or information to admit or deny the allegations identified in Paragraph 39 of the Complaint, and therefore deny them.

40. The Plan provides coverage for the same surgery when prescribed as medically necessary treatment for other medical conditions, but not when the surgery is performed as part of transition-related care.

Answer to Paragraph 40: The State Defendants admit the Plan defines a "Covered Service" as "a service which is Medically Necessary and eligible for payment under the Plan" (Article 17). The State Defendants further admit the Plan contains "Exclusions and General Limitations" (Section 10.1) which exclude numerous "Services and Supplies" from coverage regardless of "Medical Necessity," and one of those exclusions is "Gender reassignment surgery." The State Defendants deny the remaining allegations in Paragraph 40 of the Complaint.

41. Dr. Toomey has satisfied all of the criteria for a medically necessary hysterectomy under the WPATH Standards of Care.[1]

Answer to Paragraph 41: The State Defendants lack sufficient knowledge or information to admit or deny the allegations identified in Paragraph 41 of the Complaint, and therefore deny them.

42. All four of the Network Providers for the Plan have adopted internal policies and guidelines that authorize hysterectomies as medically necessary treatments for gender dysphoria based on the same criteria used by the WPATH Standards of Care.

Answer to Paragraph 42: The State Defendants state the Aetna, Blue Cross Blue Shield of Arizona, Cigna, and United Healthcare documents attached as Exhibits C-F to the Complaint speak for themselves. The State Defendants further

[1] Those criteria are: (a) Two referral letters from qualified mental health professionals; (b) Persistent, well documented gender dysphoria; (c) Capacity to make a fully informed decision and to consent for treatment; (d) Age of majority in a given country; (e) If significant medical or mental health concerns are present, they must be well controlled; and (f) Twelve continuous months of hormone therapy as appropriate to the patient's gender goals (unless the patient has a medical contraindication or is otherwise unable or unwilling to take hormones)

state the WPATH "Standards of Care" document speaks for itself. Further, WPATH has prepared several versions of "Standards of Care," and it is unknown which version Plaintiff is referencing in Paragraph 42 of the Complaint. The State Defendants lack sufficient knowledge or information to admit or deny the remaining allegations identified in Paragraph 42 of the Complaint, and therefore deny them.

43. As a result of the Plan's categorical exclusion for "gender reassignment surgery," Dr. Toomey's Network Provider—Blue Cross Blue Shield of Arizona—denied preauthorization for Dr. Toomey's hysterectomy on August 10, 2018. (Exhibit G.)

Answer to Paragraph 43: The State Defendants state that Exhibit G to the Complaint speaks for itself. The State Defendants lack sufficient knowledge or information to admit or deny the remaining allegations identified in Paragraph 43 of the Complaint, and therefore deny them.

44. In denying preauthorization, Blue Cross Blue Shield of Arizona did not apply its own internal guidelines for determining whether the hysterectomy is a medically necessary treatment for gender dysphoria. The denial was based solely on the Plan's exclusion for "gender reassignment surgery."

Answer to Paragraph 44: The State Defendants state that Exhibit G to the Complaint speaks for itself. The State Defendants lack sufficient knowledge or information to admit or deny the remaining allegations identified in Paragraph 44 of the Complaint, and therefore deny them.

45. The denial letter from Blue Cross Blue Shield of Arizona stated:

> [W]e cannot approve this request because the laparoscopic total hysterectomy with removal of tubes and ovaries surgery, for your diagnosis of transsexualism and gender identity disorder is considered a gender reassignment surgery, which is a benefit exclusion. This finding is based on your benefit plan booklet on pages 56 & 57 under the heading of "Exclusions and General Limitations" which states:
>
> 10.1 Exclusions and General Limitations

> "In addition to any services and supplies specifically excluded in any other Article of the Plan Description, any services and supplies which are not described as covered are excluded. In addition, the following are specifically excluded Services and Supplies:
>
> - Gender reassignment surgery."
>
> If you choose to get the laparoscopic total hysterectomy with removal of tubes and ovaries surgery, BCBSAZ will not cover the costs of this service.
>
> (Ex. G at 1.)

Answer to Paragraph 45: The State Defendants admit the quotation contained in Paragraph 45 of the Complaint is contained in Exhibit G, but the quotation is incomplete.

CLASS ALLEGATIONS

46. Dr. Toomey brings this action on behalf of himself and a class of similarly situated individuals pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Through the "gender reassignment surgery" exclusion, Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Rule 23(b)(2).

Answer to Paragraph 46: The State Defendants admit Plaintiff is attempting to bring this action on behalf of himself and a proposed class, but deny that class certification is appropriate or permissible. The State Defendants deny the remaining allegations in Paragraph 46 of the Complaint.

47. Class certification is appropriate because Dr. Toomey challenges the facial validity of the Plan's "gender reassignment surgery" exclusion, which denies transgender individuals an equal opportunity to demonstrate that their transition-related surgical care is medically necessary. The denial of that equal opportunity is an injury in fact that can be resolved on a class-wide basis.

Answer to Paragraph 47: The State Defendants deny the allegations in Paragraph 47 of the Complaint.

48. Dr. Toomey seeks a declaratory judgment and injunction requiring Defendants to remove the Plan's categorical exclusion of coverage for "[g]ender reassignment surgery" and evaluate whether transgender individuals' surgical care for gender dysphoria is "medically necessary" in accordance with the Plan's generally applicable standards and procedures.

Answer to Paragraph 48: The State Defendants admit Plaintiff is seeking declaratory judgment and an injunction, but deny that Plaintiff is entitled to a declaratory judgment, injunction, or any other relief whatsoever.

49. Dr. Toomey proposes two classes based on the claims against each Defendant.

Answer to Paragraph 49: Upon information and belief, the State Defendants admit Dr. Toomey has proposed two classes but deny that class certification for either proposed class is appropriate.

50. With respect to (a) the Title VII claim against the State of Arizona and the Arizona Board of Regents and (b) the equal protection claim against Defendants Ron Shoopman, Ram Krishna, Bill Ridenour, Larry Penley, Lyndel Manson, Karrin Taylor Robson, Jay Heiler, and Fred DuVal in their official capacities: the proposed class consists of all current and future employees of the Arizona Board of Regents, who are or will be enrolled in the self-funded Plan controlled by the Arizona Department of Administration, and who have or will have medical claims for transition-related surgical care.

Answer to Paragraph 50: The State Defendants admit that Plaintiff has defined a proposed class as set forth in Paragraph 50, but deny that class certification for this proposed class is appropriate.

51. With respect to the equal protection claim against Defendants Andy Tobin and Paul Shannon in their official capacities: the proposed class consists of all current and future individuals (including Arizona State employees and their dependents) who are or will be enrolled in the self-funded Plan controlled by the Arizona Department of Administration, and who have or will have medical claims for transition-related surgical care.

Answer to Paragraph 51: The State Defendants admit that Plaintiff has defined a proposed class as set forth in Paragraph 51, but deny that class certification for this proposed class is appropriate.

52. Each of the proposed classes is so numerous that joinder of all members is impracticable.

Answer to Paragraph 52: The State Defendants deny the allegations in Paragraph 52 of the Complaint.

53. For each of the proposed classes, there are questions of law or fact common to the class. Because Dr. Toomey brings a facial challenge, the class claims do not depend on whether a particular individual's transition-related surgery is ultimately proven to be medically necessary. Dr. Toomey merely seeks declaratory relief and an injunction providing all class members the opportunity to have their claims for transition-related surgery evaluated for medical necessity under the same standards and procedures that the Plan applies to other medical treatments.

Answer to Paragraph 53: The State Defendants deny the allegations in Paragraph 53 of the Complaint.

54. For each of the proposed classes, the claims or defenses of the representative parties are typical of the claims or defenses of the class.

Answer to Paragraph 54: The State Defendants deny the allegations in Paragraph 54 of the Complaint.

55. For each of the proposed classes, Dr. Toomey will fairly and adequately protect the interests of the class.

Answer to Paragraph 55: The State Defendants deny the allegations in Paragraph 55 of the Complaint.

COUNT I
VIOLATION OF TITLE VII
(Against State of Arizona and Arizona Board of Regents)

56. Title VII of the Civil Rights Act of 1964 provides that employers may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's…sex." 42 U.S.C. § 2000e-2(a)(1).

Answer to Paragraph 56: The State Defendants admit the allegations contained in Paragraph 56 of the Complaint.

57. The State of Arizona and the Arizona Board of Regents are employers as that term is defined in Title VII, 42 U.S.C. § 2000e-(a) and (b).

Answer to Paragraph 57: Paragraph 57 contains a legal conclusion to which no response is necessary. To the extent a response is deemed necessary, the State Defendants deny the allegations in Paragraph 57 of the Complaint.

58. An employer-sponsored health plan is part of the "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

Answer to Paragraph 58: Paragraph 58 contains a legal conclusion to which no response is necessary. To the extent a response is deemed necessary, the State Defendants deny the allegations in Paragraph 58 of the Complaint.

59. Discrimination on the basis of transgender status or gender nonconformity is discrimination on the base of "sex" under Title VII.

Answer to Paragraph 59: Paragraph 59 contains a legal conclusion to which no response is necessary. To the extent a response is deemed necessary, the State Defendants deny the allegations in Paragraph 59 of the Complaint.

60. The employer-sponsored health plan provided by the State of Arizona and the Arizona Board of Regents facially discriminates based on transgender status and gender nonconformity by categorically excluding coverage for all medically necessary "gender reassignment surger[ies]."

Answer to Paragraph 60: The State Defendants deny the allegations contained in Paragraph 60 of the Complaint.

61. Because medical transition from one sex to another inherently transgresses gender stereotypes, denying medically necessary coverage based on whether surgery is performed for purposes of "gender reassignment" constitutes impermissible discrimination based on gender nonconformity.

Answer to Paragraph 61: The State Defendants deny the allegations contained in Paragraph 61 of the Complaint.

62. Because the need to undergo gender transition is a defining aspect of transgender status, discrimination based on gender transition is discrimination against transgender individuals as a class.

Answer to Paragraph 62: The State Defendants deny the allegations contained in Paragraph 62 of the Complaint.

63. By categorically excluding all coverage for "[g]ender reassignment surgery," the Plan deprives Dr. Toomey and other transgender employees of an equal opportunity to prove that their transition-related surgery is medically necessary under the same standards and procedures that apply to other medical conditions.

Answer to Paragraph 63: The State Defendants deny the allegations contained in Paragraph 63 of the Complaint.

64. By providing a facially discriminatory employer-sponsored health plan, the State of Arizona and the Arizona Board of Regents have unlawfully discriminated—and continue to unlawfully discriminate—against Dr. Toomey and members of the proposed

class "with respect to [their] compensation, terms, conditions, or privileges of employment, because of …sex." 42 U.S.C. § 2000e-2(a)(1).

Answer to Paragraph 64: The State Defendants deny the allegations contained in Paragraph 64 of the Complaint.

COUNT II
VIOLATION OF THE EQUAL PROTECTION CLAUSE
(Against Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Tobin and Shannon in their official capacities)

65. At all relevant times, Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Tobin and Shannon have acted under color of State law.

Answer to Paragraph 65: The State Defendants lack sufficient knowledge or information to admit or deny the allegations identified in Paragraph 65 of the Complaint, and therefore deny them.

66. Pursuant to 42 U.S.C. § 1983, Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Tobin and Shannon, in their official capacities, are liable for declaratory and injunctive relief for violations of the Equal Protection Clause.

Answer to Paragraph 66: The State Defendants deny the allegations contained in Paragraph 66 of the Complaint.

67. In their official capacity as officers and members of the Arizona Board of Regents, Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, and DuVal are responsible for the terms and conditions of employment at the University of Arizona.

Answer to Paragraph 67: The State Defendants lack sufficient knowledge or information to admit or deny the allegations identified in Paragraph 67 of the Complaint, and therefore deny them.

68. In his official capacity as Director of the Arizona Department of Administration, Defendant Andy Tobin is responsible for "determin[ing] the type,

structure, and components of the insurance plans made available by the Department [of Administration]." Ariz. Admin. Code R2-6-103.

Answer to Paragraph 68: The State Defendants admit Ariz. Admin. Code R2-6-103(A) provides, "Within the limits prescribed by law, the Director shall determine the type, structure, and components of the insurance plans made available by the Department." The State Defendants admit that Andy Tobin is Director of the Arizona Department of Administration. The State Defendants deny the remaining allegations contained Paragraph 68 of the Complaint.

69. In his official capacity as Acting Assistant Director of Benefit Services Division of the Arizona Department of Administration, Defendant Paul Shannon has direct oversight and responsibility for administering the benefits insurance programs for State employees, including employees of the Arizona Board of Regents.

Answer to Paragraph 69: The State Defendants deny that Paul Shannon is Acting Assistant Director. The State Defendants admit that Paul Shannon is Assistant Director of Benefit Services Division of the Arizona Department of Administration, and in that role has certain oversight and responsibility for administering the benefits insurance programs for State employees and employees of the Arizona Board of Regents. The State Defendants deny the remaining allegations contained in Paragraph 69 of the Complaint.

70. The Equal Protection Clause of the Fourteenth Amendment provides: "no State shall…deny to any person within its jurisdiction the equal protection of the laws."

Answer to Paragraph 70: The State Defendants admit the allegations in Paragraph 70 of the Complaint.

71. Arizona State employees are protected by the Equal Protection Clause.

Answer to Paragraph 71: The State Defendants admit the allegations in Paragraph 71 of the Complaint, but specifically deny that Plaintiff has a valid Equal Protection Clause claim in this case.

72. The employer-sponsored health plan provided by the State of Arizona and the Arizona Board of Regents facially discriminates based on transgender status and gender nonconformity by categorically excluding coverage for all medically necessary "gender reassignment surgery."

Answer to Paragraph 72: The State Defendants deny the allegations contained in Paragraph 72 of the Complaint.

73. Because medical transition from one sex to another inherently transgresses gender stereotypes, denying medically necessary coverage for based on whether surgery is performed for purposes of "gender reassignment" constitutes impermissible discrimination based on gender nonconformity.

Answer to Paragraph 73: The State Defendants deny the allegations contained in Paragraph 73 of the Complaint.

74. Because the need to undergo gender transition is a defining aspect of transgender status, discrimination based on gender transition is discrimination against transgender individuals as a class.

Answer to Paragraph 74: The State Defendants deny the allegations contained in Paragraph 74 of the Complaint.

75. By categorically excluding all coverage for "[g]ender reassignment surgery," the Plan deprives Dr. Toomey and other transgender employees of an equal opportunity to prove that their transition-related surgical is medically necessary under the same standards and procedures that apply to other medical conditions.

Answer to Paragraph 75: The State Defendants deny the allegations contained in Paragraph 75 of the Complaint.

76. By providing a facially discriminatory employer-sponsored health plan, the State of Arizona and the Arizona Board of Regents, by and through Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Tobin and Shannon, acting in their respective official capacities, have unlawfully discriminated—

and continue to unlawfully discriminate—against Dr. Toomey and members of the proposed class on the basis of gender, which is subject to heightened scrutiny under the Equal Protection Clause.

Answer to Paragraph 76: The State Defendants deny the allegations contained in Paragraph 76 of the Complaint.

77. By providing a facially discriminatory employer-sponsored health plan, the State of Arizona and the Arizona Board of Regents, by and through Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Tobin and Shannon, acting in their respective official capacities, have unlawfully discriminated—and continue to unlawfully discriminate—against Dr. Toomey and members of the proposed class on the basis of transgender status, which is independently subject to heightened scrutiny under the Equal Protection Claus.

a. Men and women who are transgender, as a class, have historically been subject to discrimination.

b. Men and women who are transgender, as a class, have a defining characteristic that bears no relation to an ability to perform or contribute to society.

c. Men and women who are transgender, as a class, exhibit immutable or distinguishing characteristics that define them as a discrete group.

d. Men and women who are transgender, as a class, are a minority with relatively little political power.

Answer to Paragraph 77: The State Defendants deny the allegations contained in Paragraph 77 of the Complaint.

78. The Plan's discriminatory exclusion is not narrowly tailored to serve a compelling governmental interest.

Answer to Paragraph 78: The State Defendants deny the allegations contained in Paragraph 78 of the Complaint.

79. The Plan's discriminatory exclusion is not substantially related to an important governmental interest.

Answer to Paragraph 79: The State Defendants deny the allegations contained in Paragraph 79 of the Complaint.

80. The discriminatory exclusion cannot be justified by a governmental interest in limiting coverage to medically necessary treatments because the Plan's general provisions limiting healthcare to "medically necessary" treatments already serves that interest. The only function of the categorical exclusion is to exclude medical care that would otherwise qualify as medically necessary under the Plan's generally applicable standards.

Answer to Paragraph 80: The State Defendants deny the allegations contained in Paragraph 80 of the Complaint.

81. The Plan's discriminatory exclusion lacks any rational basis and is grounded in sex stereotypes, discomfort with gender nonconformity and gender transition, and moral disapproval of people who are transgender.

Answer to Paragraph 81: The State Defendants deny the allegations contained in Paragraph 81 of the Complaint.

RELIEF REQUESTED

For the foregoing reasons, Plaintiff respectfully requests that the Court grant the following relief to Dr. Toomey and members of the proposed classes:

A. Declaratory relief, including but not limited to a declaration that Defendants State of Arizona and the Arizona Board of Regents violated Title VII and that Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Tobin and Shannon in their official capacities violated the Equal Protection Claus;

B. Permanent injunctive relief with respect to all Defendants, requiring Defendants to remove the Plan's categorical exclusion of coverage for "[g]ender reassignment surgery" and evaluate whether Dr. Toomey and the proposed classes'

surgical care for gender dysphoria is "medically necessary" in accordance with the Plan's generally applicable standards and procedures.

C. Plaintiffs' reasonable costs and attorneys' fees pursuant to Title VII and 42 U.S.C. § 1988; and

D. Such other relief as the Court deems just and proper.

Answer to Relief Requested: This section constitutes Plaintiff's prayer for relief. The State Defendants deny the allegations in this section of the Complaint and deny that Plaintiff is entitled to any relief whatsoever.

AFFIRMATIVE DEFENSES

A. Plaintiff's Complaint fails to state a claim upon which relief may be granted.

B. Plaintiff's Complaint should be dismissed for failure to exhaust administrative remedies required by the Plan.

C. Plaintiff's Complaint should be dismissed for failure to exhaust administrative remedies, including because Plaintiff failed to timely file a Charge of Discrimination with the EEOC or similar state agency against the State of Arizona, Defendant Andy Tobin (or formerly Defendant Gilbert Davidson), or Defendant Paul Shannon.

D. Plaintiff's claims may be barred by the doctrines of waiver, laches, and/or estoppel.

E. Plaintiff's claims may be barred by applicable statutes of limitations.

F. Plaintiff's claims for damages, if any, may be barred, in whole or in part, by failure to mitigate alleged damages.

G. Plaintiff's claims may be barred by the doctrine of sovereign immunity and the Eleventh Amendment.

H. Defendants have at all times acted in good faith to comply with the provisions of federal and state law. Defendants have neither intentionally nor willfully violated Plaintiff's rights in any manner nor acted maliciously

or with reckless disregard with respect to Plaintiff or any aspect of Plaintiff's employment, and at no time have Defendants acted with any intent to injure Plaintiff.

I. Defendants have fulfilled all obligations imposed on them by law.

J. Defendants' actions were taken for legitimate, non-discriminatory, and non-pretextual reasons.

K. Plaintiff's claims are barred because the employment decision about which he complains was made on the basis of reasonable factors other than Plaintiff's sex, gender non-conformity, or transgender status.

L. Even if Plaintiff is able to prove that a prohibited factor motivated the alleged employment action, which the State Defendants expressly deny, the same action would have been taken absent such motivation and therefore the Plaintiff's claims must fail.

M. Defendant's actions were not designed, intended, or used to discriminate because of sex, gender non-conformity, or transgender status.

N. To the extent Plaintiff has raised a disparate impact claim, all standards and criteria used by Defendants in the employment decision are consistent with business necessity and job-related.

O. Any action taken by Defendants was rationally related to a legitimate government interest.

P. Any action taken by Defendants was reasonable and necessary to serve, and substantially related to, an important government purpose.

Q. Any action taken by Defendants was narrowly tailored to serve a compelling government interest.

R. Plaintiff's claims may be barred on the basis of absolute/qualified immunity.

S. The State Defendants are not Plaintiff's employer.

T. Plaintiff cannot satisfy the prerequisites for class certification and, therefore, lack standing and cannot represent the interests of others.

U. Class certification may be inappropriate due to conflicts of interest between Plaintiff and purported class members, or between and among purported class members.

V. Plaintiff cannot satisfy the prerequisites under Federal Rule of Civil Procedure 23 to certify this action as a class action.

The State Defendants have not knowingly or intentionally waived any applicable affirmative defenses. The State Defendants reserve the right to amend their Answer to add such affirmative defenses as may become available or apparent during this proceeding and discovery.

WHEREFORE, the State Defendants demand judgment against Plaintiff as follows:

A. Dismissing the Complaint with prejudice;

B. For costs, disbursements and attorney fees; and

C. For such other relief as the Court deems just and equitable.

RESPECTFULLY SUBMITTED this 10th day of March, 2020.

BURNSBARTON PLC

By *_/s/ C. Christine Burns_*
C. Christine Burns
Kathryn Hackett King
Alison Pulaski Carter

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2020 I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants.

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s/*Carolyn Galbreath*

EXHIBIT B

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RUSSELL B. TOOMEY,

Plaintiff,

v.

STATE OF ARIZONA; ARIZONA BOARD OF REGENTS D/B/A UNIVERSITY OF ARIZONA, a governmental body of the State of Arizona; RON SHOOPMAN, in his official capacity as Chair of the Arizona Board of Regents; LARRY PENLEY, in his official capacity as Member of the Arizona Board of Regents; RAM KRISHNA, in his official capacity as Secretary of the Arizona Board of Regents; BILL RIDENOUR, in his official capacity as Treasurer of the Arizona Board of Regents; LYNDEL MANSON, in her official capacity as Member of the Arizona Board of Regents; KARRIN TAYLOR ROBSON, in her official capacity as Member of the Arizona Board of Regents; JAY HEILER, in his official capacity as Member of the Arizona Board of Regents; FRED DUVAL, in his official capacity as Member of the Arizona Board of Regents; ANDY TOBIN, in his official capacity as Director of the Arizona

No. 4:19-cv-00035

DEFENDANTS STATE OF ARIZONA'S, ANDY TOBIN'S, AND PAUL SHANNON'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Department of Administration; PAUL SHANNON, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

I. INTRODUCTION

Defendants State of Arizona, Andy Tobin as Director of the Arizona Department of Administration, and Paul Shannon as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration (collectively, the "State Defendants") file this Opposition to Plaintiff's Motion for Preliminary Injunction.

The Court should not grant Plaintiff's motion because the relief sought would effectively decide the case at this point in the litigation as it would result in all the relief Plaintiff seeks in this case—a highly disfavored result. Plaintiff seeks a *mandatory* injunction, which orders a party to take action rather than refrain from taking action, but such injunctions should only be granted when the moving party demonstrates that the facts and law clearly favor that party and granting the relief. Plaintiff fails to meet this standard. Further, Plaintiff is not likely to succeed on his claim for protection under Title VII of the Civil Rights Act or under the Equal Protection clause of the Fourteenth Amendment. Even considering the Supreme Court's recent decision in *Bostock v. Clayton Cty., Georgia*, case law does not support the relief Plaintiff seeks under either of those laws. Finally, Plaintiff fails to meet the necessary standards of demonstrating that he or the Plaintiff Class will suffer irreparable harm if the Motion is not granted. The Court should deny the Motion.

II. A PRELIMINARY INJUNCTION IS NOT APPROPRIATE TO GRANT THE RELIEF REQUESTED.

Courts specifically disfavor preliminary injunctions that "give the movant all the relief it would be entitled to if it prevailed in a full trial." *RoDa Drilling Co. v. Siegal*, 552

F.3d 1203, 1209 n.3 (10th Cir. 2009); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006); *see also Edmo v. Corizon, Inc.*, 935 F.3d 757, 780–81 (9th Cir. 2019) (due in part to "the nature of the relief requested," an injunction ordering the defendant to perform gender reassignment surgery was a permanent injunction).

That is exactly what Plaintiff requests here. Through his Motion, Plaintiff seeks an injunction that (1) bars Defendants from enforcing the exclusion and (2) requires Defendants to evaluate, on a case-by-case basis, whether a request for gender reassignment surgery is "medically necessary." (Doc. 115 at 1:1–9.) In his Amended Complaint, Plaintiff sought identical injunctive relief. (Doc. 86 at 15:10-15) (seeking injunctive relief "requiring Defendants to remove the [Health] Plan's categorical exclusion of coverage for '[g]ender reassignment surgery' and evaluate whether Dr. Toomey and the proposed class's surgical care for gender dysphoria is 'medically necessary' in accordance with the Plan's generally applicable standards and procedures"). Ultimately, Plaintiff's requested injunction would require Defendants to evaluate, on a case-by-case basis, whether Plaintiff's and the Plaintiff Class's prescribed care for gender dysphoria is medically necessary in accordance with the Plan, and provide coverage for requested gender reassignment surgeries when medically necessary. Such an order would resolve Plaintiff's claims at issue in this case as well as any employee who has sought the same procedure and would render the action moot as there would be no further relief the Court could grant to Plaintiff.

For this reason alone, Plaintiff's requested injunction should be denied.

III. PLAINTIFF IS NOT ENTITLED TO A PRELIMINARY INJUNCTION.

A. Plaintiff Must Meet A Higher Standard.

A preliminary injunction can take two forms. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878–79 (9th Cir. 2009). There can be either a

"prohibitory" injunction, which prohibits a party from taking action, or a "mandatory" injunction, which "orders a responsible party to 'take action.'" *Id.* (citations omitted).

Mandatory injunctions are "particularly disfavored" by courts. *Id.*; *see also O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d at 975; *RoDa Drilling*, 552 F.3d at 1209 n.3. Requests for mandatory injunctions are "subject to heightened scrutiny." *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir.1993); *Marlyn Nutraceuticals*, 571 F.3d at 878–79; *O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d at 975; *RoDa Drilling*, 552 F.3d at 1209 n.3. Mandatory injunctions should not be issued unless "the facts and law ***clearly favor*** the moving party." *Id.* (emphasis added).

Plaintiff's requested injunction is a mandatory injunction. The injunction, if issued, would require Defendants to take certain actions—namely begin evaluating whether gender reassignment surgery is medically necessary and providing coverage for that procedure if it is. (Doc. 115 at 1:1–9.) As such, Plaintiff is required to meet the higher burden of showing that the facts and law *clearly favor* granting such an injunction. However, as detailed below, Plaintiff cannot meet this burden.

B. Plaintiff Is Not Likely To Succeed On His Claims.

1. Plaintiff's Title VII Claim

Title VII makes it an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

Plaintiff alleges the Plan exclusion discriminates against him "based on transgender status and gender nonconformity." Through this lawsuit, Plaintiff seeks to use Title VII to require employer-sponsored benefit plans to cover gender reassignment surgery—a

procedure that governing law does not require plans to cover.[1] In his Motion, Plaintiff asserts that he is likely to succeed on this claim based on *Bostock v. Clayton Cty., Georgia*, ___ U.S. ___, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020). (Doc. 115 at 6:10–18.) However, Plaintiff reads *Bostock* too broadly.[2]

Bostock is not dispositive here. In *Bostock*, the Court determined that an employer who fires an employee for being homosexual or transgender discriminates against the employee in violation of Title VII. *Id.* at 1737. In reaching this conclusion, *Bostock* relied on the traditional meaning of "sex" as "biological distinctions between male and female." *Id.* at 1739. *Bostock*, thus, restates the well-established understanding that Title VII protects employees from discrimination if they are treated differently based on their sex, and further states that it is impossible to separate an employee's sex as a factor when considering their sexual orientation or transgender status. *Id.* at 1741–42. *Bostock* does not create a new protected class for transgender employees. That is, Title VII protects a person from discrimination not because he or she is gay or transgender but because he or she is treated differently based on his or her sex as male or female.

The dissent in *Bostock* identifies several areas of Title VII law that remain unsettled. *Id.* at 1778–1783 (Alito, J., dissenting). These include sports, housing, freedom of speech,

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[1] On June 12, 2020, the Office for Civil Rights of the Department of Health and Human Services issued new final rules that revised the agency's prior rules addressing nondiscrimination provisions set forth in § 1557 of the Affordable Care Act. The new rules eliminate the requirement that certain plans cover gender reassignment surgery. Although the new rules have been challenged and the U.S. District Court for the Eastern District of New York issued a preliminary injunction against HHS's repeal of its prior rules (*see Walker v. Azar*, 20CV2834FBSMG, 2020 WL 4749859, at *10 (E.D.N.Y. Aug. 17, 2020), there currently is no requirement that plans cover gender transition surgeries.

[2] Plaintiff also relies heavily on this Court's Order denying the State Defendants' Motion to Dismiss. (*See* Doc. 115 at 5:21–6:3.) However, in considering a motion to dismiss, courts only consider whether the plaintiff has stated a claim "that is plausible on its face," accepting all allegations and reasonable inferences as true (*see Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)), not whether a claim is likely to succeed or supported by the evidence.

and healthcare benefits. *Id.* (Alito, J., dissenting). As to healthcare, Justices Alito and Thomas note that, due to *Bostock*, "healthcare benefits may emerge as an intense battleground under the Court's ruling." *Id.* at 1781 (Alito, J., dissenting). Neither the dissent nor the majority suggest that the provision of any specific healthcare benefits to transgender persons is conclusively determined by *Bostock*. *See, e.g., id.* at 1778 (Alito, J., dissenting) (refusing to "suggest how any of these issues should necessarily play out under the Court's reasoning"). No court has determined *Bostock*'s effect on medical plans.[3]

The Plan does not violate Title VII. A medical plan, even one provided by a state, is not required to cover all "medically necessary" procedures. *See, e.g.*, *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453 (6th Cir. 1998) (exclusion for organ transplants); *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318 (S.D.N.Y. 2000), *aff'd in part, remanded in part*, 316 F.3d 337 (2d Cir. 2003) (exclusion for infertility treatment); *Mullen v. Boyd Gaming Corp.*, 182 F.3d 914 (5th Cir. 1999) (exclusion of medically necessary weight loss treatment); *Martin v. Masco Indus. Employees' Benefit Plan*, 747 F. Supp. 1150 (W.D. Pa. 1990) (exclusion of medically necessary breast reduction). Aside from certain minimum requirements, health plans have broad discretion to exclude treatments or procedures even if they are medically necessary. For example, a plan can exclude all breast augmentation or reduction, including some that are medically necessary. *See Milone v. Exclusive Healthcare, Inc.*, 244 F.3d 615, 619 (8th Cir. 2001) (noting that a plan provision excluding breast augmentation or reduction surgeries for any purposes except for cancer-related reasons was allowable, but ultimately holding that the plan acted arbitrarily and capriciously in denying coverage in the case at issue), *abrogated on other grounds by Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966 (8th Cir. 2002).

[3] The health plan cases cited by Plaintiff—*Fletcher v. Alaska*, 443 F.Supp. 3d 1024 (D. Alaska 2020) and *Kadel v. Folwell*, 446 F.Supp. 3d 1 (M.D.N.C. 2020)—were decided prior to the Supreme Court's ruling in *Bostock*.

The Plan does not provide coverage or benefits for "gender reassignment surgeries," regardless of the employee's sex. Under the Plan, a "Covered Service" is "a service which is Medically Necessary *and* eligible for payment under the Plan." (Doc 86-1, Exhibit A at 93) (emphasis added). Coverage, thus, can be denied either because a service is not medically necessary or because it is an excluded service regardless of whether it is medically necessary. Indeed, the Plan excludes several procedures, many of which might be considered "medically necessary," including certain bariatric procedures, surgery to treat hyperhidrosis (excessive sweating), and phase 3 cardiac rehabilitation, among others. (Doc. 86-1 at pp. 55-58.) Similar to these procedures, the Plan excludes gender reassignment surgery, regardless of whether it is medically necessary. Admittedly, such an exclusion may only affect transgender individuals (both male and female), but plans have consistently been allowed to exclude services that may only affect one sex such as breast reduction surgery that is medically necessary to relieve pain and discomfort. *See Martin*, 474 F. Supp at 1151. Therefore, the State Defendants' exclusion of gender reassignment surgery, similar to the other non-covered procedures, is not discrimination on the "basis of sex."[4]

None of the cases cited by Plaintiff support that the State Defendants must cover all "medically necessary" procedures that treat gender dysphoria. In *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785–797 (9th Cir. 2019), the only Ninth Circuit case cited by Plaintiff, the court analyzed whether denying medically necessary gender transition surgery to an imprisoned person constituted cruel and unusual punishment under the Eighth Amendment. *Edmo* did not analyze a medical benefits plan, and, further, did not hold that a medical plan exclusion for gender reassignment surgery violates Title VII. In fact, the *Edmo* court repeatedly states that such surgery ***can be*** medically necessary ***in certain circumstances***,

[4] In fact, the Plan provides coverage for some gender transition services, including mental health counseling and hormone therapy to treat gender dysphoria—demonstrating that the Plan does not discriminate against transgender persons or eliminate coverage for all gender transition treatment.

not that it always is. *See* 935 F.3d at 767, 769. That is, a plan may exclude procedures even when the procedure is medically necessary. Similarly, *Kadel v. Folwell*—a District Court case outside of this circuit—analyzed discrimination under Title IX of the Education Amendments and ACA § 1557, not Title VII, and does not hold that a medical benefits plan must provide coverage for gender reassignment surgery. 446 F. Supp. 3d 1 (M.D.N.C. 2020). Finally, *Fletcher v. Alaska* is a non-precedential District Court case, which has not been affirmed by the Ninth Circuit, and was decided prior to the Supreme Court's ruling in *Bostock*. 443 F. Supp. 3d 1024 (D. Alaska 2020). Again, *Fletcher* does not hold that medical plans must cover all "medically necessary" procedures to treat gender dysphoria.

It makes sense that employers are not required to cover all "medically necessary" procedures in light of the fact that both the cost of health care and overall health care spending continues to increase each year. The Centers for Medicare and Medicaid report that national health care expenses grew by 4.6% in 2018 and are expected to grow at an annual average rate of 5.4% for the period of 2019 through 2028, which is 1.1 percentage points faster than the expected annual growth in gross domestic product per year on average for that same time period.[5] Consequently, employers have strived to contain costs using a variety of tools. Those have included (i) shifting to high deductible health plans, (ii) implementing wellness programs to improve employee health and reduce claims, (iii) shifting more costs to employees by increasing premiums, co-pays, and the cost of obtaining out-of-network services, (iv) using technology such as telemedicine, and (v) excluding certain expensive specialty drugs or procedures as allowed by law—even if those services, treatments, or procedures may be considered to be medically necessary. Plans are allowed to take these steps to control health care spending. The Plan's exclusion for gender-

[5] Centers for Medicare and Medicaid Services. (2016, December 2) available at https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html, last visited September 23, 2020.

transition surgeries is allowable and consistent with health plans' ability to limit what they cover. Mandating that plans cover all medically necessary services could have the effect of discouraging employers from providing any health coverage at all or increasing the cost that employers pass on to employees to levels that impair the ability of employees to take advantage of their employer-sponsored plans. Under the Affordable Care Act, employers with at least 50 full-time employees (or the equivalent), are required to offer health coverage to full-time employees and their dependents that meet certain minimum coverage standards or make a tax payment called the Employer Share Responsibility Payment ("ESRP"). *See* 26 U.S.C. § 4980H. In recent years, as health expenses have increased, some employers have opted to drop coverage and instead pay the ESRP.

Finally, Plaintiff misstates and misrepresents the Plan's claims and appeals process by suggesting that the Plan provides coverage for any and all medically necessary treatments. (*See* Doc. 115 at 3:8-9) (citing the Plan's claims and appeals procedures at Doc. 86-1 at p. 100). While it is correct to state that the Plan can deny a claim because it is not medically necessary, it is incorrect to suggest that all medically necessary services, treatments, and procedures must be covered. Some treatments or procedures are denied because they are excluded under the terms of the Plan. *See supra*, 7:4-10 (discussion of "Covered Service" under the Plan).

For the reasons set forth above, Plaintiff has failed to meet his high burden to show that he is likely to succeed on his Title VII claim or that the law *clearly favors* granting the injunction.

2. Plaintiff's Equal Protection Claim

The Equal Protection Clause of the 14th Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Equal Protection Clause "does not forbid classifications. It simply

keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). A "classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" and is subject to minimum scrutiny—rational basis review. *Heller v. Doe*, 509 U.S. 312, 319–21 (1993). On a rational basis review, a classification "is accorded a strong presumption of validity." *Heller*, 509 U.S. at 319. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. State of Md.*, 366 U.S. 420, 425-26 (1961).

Numerous courts have held that transgender persons are not a suspect or quasi-suspect class and, as a result, applied the rational basis test to classifications based on transgender status. *Druley v. Patton*, 601 F.App'x 632, 635 (10th Cir. 2015) ("To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims"); *Murillo v. Parkinson*, 2015 WL 3791450, *12 (C.D. Cal. 2015); *Kaeo–Tomaselli v. Butts*, 2013 WL 399184, *5 (D. Haw. 2013) ("Nor has this court discovered any cases in which transgendered individuals constitute a 'suspect' class"); *Jamison v. Davue*, 2012 WL 996383, *4 (E.D.Cal. 2012) ("transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review"); *Brainburg v. Coalinga State Hosp.*, 2012 WL 3911910, *8 (E.D. Cal. 2012); *Stevens v. Williams*, 2008 WL 916991, *13 (D. Or. 2008) ("Transsexuals are not a suspect class for purposes of the equal protection clause" and thus "classifications based upon these grounds must only be reasonably related to legitimate penological interests"); *see also Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) ("rational basis standard" for "allegations of discrimination by transgender individuals").

Neither *Bostock* nor the other cases cited by Plaintiff change this standard. First, *Bostock* did not create a new protected class for transgender persons or hold that they constitute a suspect or quasi-suspect class for equal protection purposes. Instead, *Bostock* involved a matter of pure statutory interpretation. (*See* Doc. 66 at 5) (noting that a then upcoming Supreme Court case (*Harris Funeral Homes*) may provide guidance regarding Title VII but not Equal Protection claims). *See also Bollfrass v. City of Phoenix*, No. CV-19-04014-PHX-MTL, 2020 WL 4284370, at *1 (D. Ariz. July 27, 2020) (noting that *Bostock* "involved a matter of statutory interpretation" of Title VII and does not affect Equal Protection claims). Therefore, *Bostock* does not support applying a heightened standard of review here. Second, Plaintiff cites *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) and two non-binding cases citing *Karnoski*: *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138 (D. Idaho Aug. 17, 2020), and *Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, at *16 (4th Cir. Aug. 26, 2020), *as amended* (Aug. 28, 2020). However, *Karnoski* does **not** find that transgender persons are a quasi-suspect class. 926 F.3d at 1200–01; *see also Hecox*, 2020 WL 4760138, at *26 (stating that *Karnoski* did not hold that transgender individuals constitute a quasi-suspect class). Instead, the *Karnoski* court applied heightened scrutiny because the policy at issue *facially* discriminated against transgender persons. 926 F.3d at 1201.

Moreover, *Karnoski* is distinguishable from the facts of this case. In *Karnoski*, the Court was evaluating a federal policy ("2018 Policy") that disqualified only transgender persons from military service; that same policy did not disqualify non-transgender (cisgender) individuals from military service. 926 F.3d at 1199. Thus, the 2018 Policy in *Karnoski* specifically targeted transgender individuals: "On its face, the 2018 Policy regulates on the basis of transgender persons," as the policy itself disqualified "transgender persons" from military service. *Id*. at 1201. Further, the 2018 Policy effectively served as an almost complete exclusion of transgender persons from military service: "Beyond the

narrow reliance exception, transgender individuals who wish to serve openly in their gender identity are altogether barred from service." *Id*. at 1199, n.15. Thus, the Court "conclude[d] that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies" (which was "intermediate scrutiny"). *Id*. at 1201.

Here, in contrast to *Karnoski*, the Plan does not specifically target transgender persons. The gender reassignment surgery exclusion is just one of *many* different exclusions in the Plan that apply to various individuals (both transgender and cisgender) regardless of medical necessity. Transgender individuals are covered under the Plan, and they receive coverage for medically necessary treatments in the vast majority of cases—like all other individuals. All persons—transgender and cisgender—are subject to numerous exclusions for various treatments, procedures, and surgeries within the Plan, even if a physician has designated such treatment, procedure, or surgery as "medically necessary." Further, the Plan provides coverage for some gender transition services, including mental health counseling and hormone therapy. Thus, the Plan does not eliminate coverage for all gender transition treatment. In contrast to the policy at issue in *Karnoski*, the Plan here does not specifically target transgender individuals; it does not "regulate on the basis of transgender status" or constitute discrimination or a classification based on transgender status or the basis of sex. Thus, the heightened scrutiny applied in *Karnoski* is not warranted based on the facts of the instant case.

Applying rational basis review, Dr. Toomey cannot overcome the "strong presumption of validity." *Heller*, 509 U.S. at 319. Specifically, Dr. Toomey has not alleged any facts suggesting that the exclusion does not bear a rational relation to a legitimate state purpose. "Where, as here, there are plausible reasons for [the state] action, [the court's] inquiry is at an end." *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (Supreme Court recognizing the "task of classifying persons for benefits inevitably requires

that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line").

Furthermore, courts, including this one, have recognized that the government's interests in cost containment and reducing health costs are legitimate and substantial. (Doc. 69 at 16:12–14.) *See, e.g., Harris v. Lexington-Fayette Urban County Gov't*, 685 Fed. App'x 470, 473 (6th Cir. 2017); *IMS Health Inc. v. Sorrell*, 630 F.3d 263 (2d Cir. 2010). Contrary to Plaintiff's assertion, this Court stated that "[l]imiting health care costs **is a legitimate state interest**" that could satisfy rational basis review. (Doc. 69 at 15:28–16:14) (emphasis added). Relying on *Romer v. Evans*, 517 U.S. 620 (1996), the Court stated that a government interest in reducing costs may not be sufficient under rational basis review where the policy was "motivated by animosity toward [a protected group]." (Doc. 69 at 16:4–11.) However, Plaintiff has presented no evidence that the exclusion for gender reassignment surgery in the Plan was motivated by any animosity or ill-will. (*See* Doc. 115 at 7:6–8:5.). Rather, applying the presumption of validity where there is a "plausible reason" supporting the challenged classification, the Court should uphold the exclusion as rationally related to healthcare cost containment.

Plaintiff has failed to meet his high burden to show that he is likely to succeed on his Equal Protection claim or that the law *clearly favors* granting the requested injunction. He is not entitled to a preliminary injunction.

C. Plaintiff Will Not Suffer Irreparable Harm.

Plaintiff contends that he will suffer irreparable harm absent an injunction because he and other similarly-situated persons will be denied "medically necessary" care. (Doc. 115 at 8:14–9:3.) However, the fact that Plaintiff may not receive "medically necessary" care does not conclusively determine that he will be irreparably harmed in the legal sense. As established above, the Plan does not have to cover all medically necessary procedures and is not required by law to do so. *Supra*, 6:9-7:3. Indeed, the Plan permissibly does not

cover a variety of procedures that could be considered "medically necessary," gender reassignment surgery is only one such procedure.

The cases cited by Plaintiff do not support his argument that a non-discriminatory exclusion that results in the denial of healthcare constitutes *de facto* irreparable harm. In *Beltran v. Myers*, 677 F.2d 1317 (9th Cir. 1982), the Ninth Circuit considered a California rule that denied Medicaid benefits to elderly, blind, and disabled individuals. The court, upon those facts and in a single sentence, stated that there was a "sufficient showing" of harm because the rule may deny plaintiffs needed medical care.[6] *Id*. at 1322. The court provided no explanation, support, or citation for this finding. *Id.* In *Edmo*, 935 F.3d at 797, *K.M. v. Regence Blueshield*, No. C13-1214 RAJ, 2014 WL 801204, at *9 (W.D. Wash. Feb. 27, 2014), *Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004), and *Z.D. ex rel. J.D. v. Grp. Health Co-op.*, No. C11-1119RSL, 2012 WL 1997705, at *13 (W.D. Wash. June 1, 2012), each court considered the unique circumstances of the plaintiffs and the evidence presented to determine if irreparable harm would result from the denial of medical care. Here, in contrast to each of these cases, Plaintiff has presented no evidence that he, or any member of the class, will suffer if they do not receive the requested surgery. (Doc. 115 at 8:7–9:3.)

Further, in cases such as *Beltran* and *Edmo* cited by Plaintiff, any irreparable harm was also based, in part, on the fact that the individual plaintiffs had no other means to obtain the medical services they sought. In *Beltran*, the plaintiff was on Medicaid due to plaintiff's economic status and in *Edmo*, the plaintiff was an incarcerated individual totally dependent on the government for any and all healthcare needs. *Beltran*, 677 F.2d at 1319; *Edmo*, 935 F. 3d at 784 ("Because 'society takes from prisoners the means to provide for their own needs' the government has an 'obligation to provide medical care for those who it is

[6] Similar to *Beltran*, *Newton-Nations v. Rogers*, 316 F. Supp. 2d 883, 888 (D. Ariz. 2004), provided no explanation for its finding that plaintiffs would suffer irreparable injury and, instead, cites only to *Beltran*.

punishing by incarceration.'") (citing *Estelle v. Gamble,* 429 U.S. 97, 104 (1976) and *Brown v. Plata*, 563 U.S. 493, 510 (2011)). There is no such claim that Dr. Toomey or the Plaintiff class is entirely dependent on the State for any and all medical care. Indeed, upon information and belief, Dr. Toomey, a university professor, has paid for other gender-transition procedures using his own resources.[7]

Moreover, irreparable harm requires a showing of harm that cannot be redressed by payment of money damages or by another legal remedy. *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (citing *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980)). Plaintiff is seeking coverage for a procedure and if he were to obtain the surgery, and the Court eventually rules that the exclusion was improper, monetary damages would remedy his loss. He has not demonstrated that he cannot obtain a hysterectomy using his own resources and seek reimbursement if the Court provides such relief. Plaintiff has failed to demonstrate irreparable harm.

Finally, as established above, Plaintiff has not shown that he is likely to succeed on his Equal Protection claim. As such, Plaintiff cannot utilize that claim of constitutional violation in and of itself as proof of his purported irreparable injury.

IV. CONCLUSION

Because Plaintiff is not likely to succeed on his claims and cannot establish that he will be irreparably harmed absent an injunction, Defendants State of Arizona, Andy Tobin, and Paul Shannon respectfully request that the Court deny Plaintiff's requested preliminary injunction.

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[7] Dr. Toomey notes in an article he authored on the ACLU's website dated January 24, 2019, that he previously paid for a double mastectomy using his own resources. https://www.aclu.org/blog/lgbt-rights/transgender-rights/arizona-provides-me-unequal-healthcare-because-im-transgender (last viewed September 18, 2020).

DATED this 25th day of September, 2020.

FENNEMORE CRAIG, P.C.

By: *s/ Ryan Curtis*
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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EXHIBIT C

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; et al.,

Defendants.

CV 19-0035-TUC-RM (LAB)

REPORT AND RECOMMENDATION

Pending before the court is the plaintiff's motion, filed on September 1, 2020, for a preliminary injunction pursuant to Fed.R.Civ.P 65(a). (Doc. 115) The defendants filed responses on September 25, 2020. (Doc. 122); (Doc. 123) The plaintiff filed a reply on October 1, 2020. (Doc. 126)

The plaintiff in this action, Russell B. Toomey, is an associate professor employed at the University of Arizona. (Doc. 86, p. 5) He receives health insurance from a self-funded health plan (The Plan) provided by the State of Arizona. (Doc. 86, pp. 3, 8) The Plan generally provides coverage for medically necessary care. (Doc. 86, p. 8) There are coverage exclusions, however, one of which is for "gender reassignment surgery." (Doc. 86, p. 9)

Toomey is a transgendered man. (Doc. 86, p. 9) "[H]e has a male gender identity, but the sex assigned to him at birth was female." (Doc. 86, p. 9) Toomey has been living as a male since 2003. (Doc. 86, p. 9) His treating physicians have recommended he receive a hysterectomy as a medically necessary treatment for his gender dysphoria. (Doc. 86, p. 9)

Toomey sought medical preauthorization for a total hysterectomy, but he was denied under the Plan's exclusion for "gender reassignment surgery." (Doc. 86, p. 10)

On January 23, 2019, Toomey brought the pending class action in which he argues the Plan's exclusion is sex discrimination under Title VII of the Civil Rights Act of 1964 and a violation of the Equal Protection Clause of the Fourteenth Amendment. (Doc. 1); (Doc. 86) In the pending motion, Toomey moves that the court issue a preliminary injunction pursuant to Fed.R.Civ.P 65(a) voiding the Plan's exclusion for gender reassignment surgery. (Doc. 115)

The Board of Regents defendants filed a response on September 25, 2020 explaining that they do not oppose the motion provided that the injunction operates against all defendants and does not name the Board members individually. (Doc. 122) The State of Arizona defendants filed a response on September 25, 2020 opposing the motion. (Doc. 123) The plaintiff filed a reply on October 1, 2020. (Doc. 126)

Discussion

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20, 129 S. Ct. at 374; *see* (Doc. 115, p. 7) (citing the *Winter* standard) In this case, Toomey's burden of proof is heightened due to the nature of the injunction that he seeks.

Often a party will seek a preliminary injunction to maintain the status quo pendente lite. *See Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). This type of injunction keeps the parties in the posture that they held prior to the lawsuit. Otherwise, it might become impossible for the plaintiff to obtain the relief he seeks and the action might become moot. *See Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) ("A preliminary injunction, of course, is not a preliminary adjudication on the merits but rather a

device for preserving the status quo and preventing the irreparable loss of rights before judgment."). This case is different. Toomey seeks an injunction from the court ordering the defendants to grant him the relief that he seeks in his complaint. Injunctions of this type, sometimes called "mandatory" injunctions as opposed to "prohibitory" injunctions, are "particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Id.* at 1115; *see Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963) ("[I]t is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial."). Mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Anderson* , 612 F.2d at 1115.

Toomey asserts to the contrary that he seeks a "prohibitory" injunction, not a "mandatory" injunction, because he seeks to "prohibit" the defendants from acting in an unconstitutional manner. (Doc. 126, p. 4) The court, however, uses the term "prohibitory" to denote an injunction that "prohibits" a party from changing the status quo pendente lite. *See Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994) ("A prohibitory injunction preserves the status quo."). This is the type of injunction that is favored. *See Anderson*, 612 F.2d at 1114-1115; *but see Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017). In the pending motion, Toomey seeks an injunction that goes beyond maintaining the status quo. This type of injunction is not favored. *See Anderson*, 612 F.2d at 1114-1115.

Addressing the merits of the motion, Toomey argues that he is likely to succeed on his claim pursuant to Title VII, which "makes it unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Ricci v. DeStefano,* 557 U.S. 557, 577, 129 S. Ct. 2658, 2672 (2009) (punctuation modified); (Doc. 115, p. 8) (citing §

2000e–2(a)(1)) This type of Title VII action is referred to as a "disparate-treatment" case[1]. *Ricci*, 557 U.S. at 577, 129 S. Ct. at 2672. "Disparate-treatment cases present the most easily understood type of discrimination . . . and occur where an employer has treated a particular person less favorably than others because of a protected trait." *Ricci*, 557 U.S. at 577, 129 S. Ct. at 2672 (punctuation modified). "A disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job-related action." *Id.* "It is insufficient for a plaintiff alleging discrimination under the disparate treatment theory to show the employer was merely aware of the adverse consequences the policy would have on a protected group." *Am. Fed'n of State, Cty., & Mun. Employees, AFL-CIO (AFSCME) v. State of Wash.*, 770 F.2d 1401, 1405 (9th Cir. 1985).

Toomey argues that he is likely to prevail on the merits because this court, in denying the defendants' motion to dismiss, held that "[d]iscrimination based on transgender status is discrimination based on sex because, but for the individual's sex assigned at birth, the employer's treatment of the individual would be different." (Doc. 115, p. 7) "[H]ad Plaintiff been born a male, rather than a female, he would not suffer from gender dysphoria and would not be seeking gender reassignment surgery." *Id.*

Toomey is correct when he says that discrimination based on transgender status is discrimination on the basis of sex in violation of Title VII. *See also Bostock v. Clayton Cty., Ga.*, —— U.S. ——, 140 S.Ct. 1731, 1737 (2020). But to succeed on the merits he must first show that the Plan exclusion is indeed discrimination on the basis of transgender status. As a practical matter, this exclusion adversely affects only transgender people, but that fact alone is not sufficient to prove discriminatory intent. It is instructive to examine a similar case: *Gen.*

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[1] A Title VII plaintiff asserting "disparate-impact" claim establishes a prima facie violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(k)(1)(A)(i); *Ricci v. DeStefano*, 557 U.S. 557, 578, 129 S. Ct. 2658, 2673 (2009). Toomey's Amended Complaint does not raise this type of claim. (Doc. 86, pp. 14-17)

Elec. Co. v. Gilbert, 429 U.S. 125, 134, 97 S. Ct. 401, 407 (1976) (superseded by statute as explained in footnote 2).

In *Gilbert*, the employer provided a disability insurance plan that excluded from coverage disabilities arising out of pregnancy. *Id.* at 404, 127. The plaintiffs, a class of women employees, claimed that the coverage exclusion violated Title VII. *Id.* at 404, 128. After all, the exclusion only affected women. The Supreme Court held to the contrary that "[w]hile it is true that only women can become pregnant," without more, the fact that the employer has chosen to exclude from coverage a condition that only affects one sex is not proof that the exclusion was created with the *intent* to discriminate against women in general. *Id.* The most that could be said for sure is that the exclusion discriminated against pregnant people. *Id.* And while all pregnant people are women, not all women become pregnant. *Id.* The exclusion therefore was not proof of discrimination against all women[2] in violation of Title VII. *Id.*

This case is similar. While it is true that only transgender persons are affected by the exclusion for gender transition surgery, without more, the fact that the State has chosen to exclude this procedure from its health plan is not proof that the State intended to discriminate against transgender people in general. The most that can be said is that the exclusion discriminates against persons seeking gender transition surgery. And while all persons seeking gender transition surgery are transgender, not all transgender persons seek gender transition surgery. The coverage exclusion, by itself, is not proof of intentional discrimination against all

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[2] Congress subsequently amended Title VII by passing the Pregnancy Discrimination Act, 42 U.S.C. ¶ 2000e(k), that amended the phrase "because of sex" or "on the basis of sex" to also mean "because of pregnancy" or "on the basis of pregnancy." Discrimination based on pregnancy is now, by statute, discrimination against all women, and the Court's holding to the contrary in *Gilbert* is no longer good law. The Court's analysis, however, is still controlling. *See also Lange v. Houston Cty., Georgia*, 2020 WL 6372702, at *11 (M.D. Ga. 2020) (commenting that the Supreme Court's analysis in *Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485 (1974), which was adopted by the *Gilbert* Court, "may seem a bit strained today, but it nonetheless remains intact.").

transgender persons in violation of Title VII. After discovery, the plaintiff may be able to prove that this coverage exclusion *was* created with the intent to discriminate against transgender persons. But at present, the plaintiff has not shown he is likely to prevail on the merits on this claim. *See, e.g., In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 944 (8th Cir. 2007) (Employee health insurance plan's failure to cover oral contraception was not a violation of Title VII); *Coleman v. Bobby Dodd Inst., Inc.*, 2017 WL 2486080, at *2 (M.D. Ga. 2017) (rejecting the plaintiff's theory that "the fact that her termination would not have occurred but for a uniquely feminine condition [excessive menstruation] is alone sufficient to show that she was terminated because of her sex.").

In his motion, Toomey asserts that "gender transition surgery" is excluded from coverage "based solely on the fact that the surgery is performed for the purposes of gender reassignment." (Doc. 115, p. 9) (punctuation modified) And while that statement is literally true, the court assumes that Toomey means something more significant. He is apparently arguing that the Plan exclusion exists because the Plan authors do not like gender transition and have created this exclusion specifically to burden transgender individuals. If that were true, then the exclusion would indeed be intentional discrimination. Toomey, however, has not presented sufficient evidence at this stage to support his argument. He notes that gender transition surgery is "safe, effective, and medically necessary in appropriate circumstance" but that fact alone does not mean that the Plan exclusion is evidence of intentional discrimination. *See* (Doc. 115, p. 8) The Plan apparently excludes from coverage other "safe, effective, and medically necessary" treatments. Moreover, the Plan *does* provide coverage for other transition-related medical care, just not surgery. (Doc. 123, p. 7, n. 4) It is therefore unclear whether the Plan authors intentionally tried to burden transgender individuals.

Toomey insists that transition-related surgical care is now routinely covered by private insurance programs. He argues that if gender transition surgery is the standard of care, then the Plan's exclusion must be proof of intentional discrimination. Toomey does not, however, provide evidence that the Plan always, or almost always, adopts the standard of care except

where transgender individuals are involved. Moreover, Toomey concedes that "in the past," coverage for transition-related care was excluded "based on the assumption that such treatments were cosmetic or experimental." (Doc. 115, p. 4) If the Plan exclusion dates from that time, then the exclusion might simply be evidence that the Plan authors were suspicious of "experimental" treatments. Toomey does not explain when the Plan exclusion was created or the circumstances surrounding its adoption.

The State defendants suggest that the exclusion could be justified as a cost-saving measure. (Doc. 123, p. 8) But they do not affirmatively state that this *was* the reason behind the exclusion. *See also* (Doc. 126, p. 7, n. 4) At this stage of the litigation, it would be premature to address reasons that the State *might* raise in the future after discovery.

Toomey directs the court to the case *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1030 (D. Alaska 2020) in support of his argument. (Doc. 115, pp. 7-8) In that case, the district court held on summary judgment that a health care plan that excludes from coverage gender transition surgery is discrimination on the basis of sex. The court explained that the "defendant's policy of excluding coverage for medically necessary surgery such as vaginoplasty and mammoplasty for employees, such a plaintiff, whose natal sex is male while providing coverage for such medically necessary surgery for employees whose natal sex is female is discriminatory on its face and is direct evidence of sex discrimination." *Id.* at 1030. It does not appear, however, that the reasoning in *Fletcher* would apply to the present case.

In this case, Toomey seeks a hysterectomy to treat his gender dysphoria. His surgery is precluded because of the Plan exclusion for gender transition surgery. Toomey cannot argue as the plaintiff in *Fletcher* did, that the Plan exclusion is facially discriminatory because he is being denied a surgical procedure due to his natal sex that would be permitted if his natal sex were different. Toomey's natal sex is female and the surgical procedure he seeks, a

hysterectomy, is ordinarily allowed for natal females.[3] The Plan exclusion only applies to natal females who seek a hysterectomy for the purpose of gender transition. The exclusion discriminates against some natal females but not all. It is not, on its face, discrimination on the basis of sex.

Toomey further argues that he is likely to succeed on his Equal Protection claim. The Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.Const.Amend.XIV, § 1. At first blush, it may appear that this Clause guarantees to all persons *equal treatment*. It does not. States may, from time to time, create classifications that result in disadvantages for various groups or persons. *See Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627 (1996). But if they do so, they must provide a justification commensurate with the gravity of inequitable treatment. *Id*. "[I]f a law neither burdens a fundamental right nor targets a suspect class, [it will be upheld] so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627 (1996). If, on the other hand, the State's classification "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," the law will fail unless the State can provide a justification sufficient to survive the court's "strict scrutiny." *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 2566 (1976).

Toomey argues that he is likely to succeed on his Equal Protection claim because the Plan exclusion is facially discriminatory[4]. *See* (Doc. 86, p. 15) He explains that because

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[3] In fact, natal males are not forbidden from having a hysterectomy either. As Toomey notes, a person suffering from Persistent Mullerian Duct Syndrome is a natal male who is born with a uterus and fallopian tubes. (Doc. 126, p. 5, n 3) Such a person presumably could get a hysterectomy without running afoul of the Plan exclusion. Hysterectomies in general are not precluded, only hysterectomies for the purpose of gender transition.

[4] "There are three types of equal protection claims: (i) that a statute or policy discriminates on its face against the plaintiff's group, (ii) that neutral application of a facially neutral statute or policy has a disparate impact, and (iii) that the defendants are unequally

transgender persons are members of a protected class, the Plan exclusion must survive heightened scrutiny, and, he asserts, it cannot.

The court will assume that Toomey is correct about the court's scrutiny[5], but as the court explained above, the Plan exclusion is not facially discriminatory against all transgender individuals. *See also Geduldig v. Aiello*, 417 U.S. 484, 494, 94 S. Ct. 2485, 2491 (1974) (An exclusion from disability insurance coverage for disability caused by normal pregnancy did not "amount[] to invidious discrimination under the Equal Protection Clause"); *Lange v. Houston Cty., Georgia*, 2020 WL 6372702, at *1, 11 (M.D. Ga. 2020) (Healthcare Plan Exclusion for "sex change surgery" appeared to be facially neutral for the purposes of the Equal Protection Clause under the analysis in *Geduldig*.). And if Toomey cannot prove that the exclusion discriminates against transgender individuals as a class, the court will not apply heightened scrutiny.

After discovery, Toomey may be able to show that the Plan exclusion is a "mere pretext designed to effect an invidious discrimination against the members of [his suspect class]." *Lange*, 2020 WL 6372702, at *11. But until then, he has not shown a likelihood to succeed on the merits. *See also Lange,* 2020 WL 6372702 at *1, 11 (Healthcare Plan Exclusion for "sex change surgery" did not appear to be facially discriminatory for the purposes of the Equal Protection Clause, but motion to dismiss was not granted where the plaintiff "plausibly alleged that the adoption of the Exclusion was motivated by [a] discriminatory purpose.").

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administering a facially neutral statute." *Lange v. Houston Cty., Georgia*, 2020 WL 6372702, at *10 (M.D. Ga. 2020). Toomey brings the first type of claim.

[5] *See Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) ("We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies.").

The court agrees that Toomey has shown "that he is likely to suffer irreparable harm in the absence of preliminary relief." *Winter,* 555 U.S. at 20, 129 S. Ct. at 374. Without preliminary relief, Toomey will be denied timely medical care. A denial such as this is not amenable to monetary relief. *Beltran v. Myers*, 677 F.2d 1317, 1321 (9th Cir. 1982) ("Plaintiffs have shown a risk of irreparable injury, since enforcement of the California rule may deny them needed medical care.")

The State defendants argue to the contrary that Toomey and the class members will not suffer irreparable harm because they can pay for the surgery now and get reimbursed later if they win on the merits. The State defendants, however, do not provide any evidence that Toomey or the class members have the ability to pay for their surgery out of pocket. And as Toomey explains, members of the Equal Protection class cannot get monetary damages from the State. (Doc. 126, p. 10)

Toomey further argues that "the public interest and the balance of the equities favor a preliminary injunction" because he has established a likelihood that the Plan exclusion violates the U.S. Constitution. (Doc. 115, p. 11) But as the court explained above, Toomey has not established at this point that the exclusion violates either Title VII or the Equal Protection clause. He suggests that this is "a conflict between financial concerns and preventable human suffering," and in such a situation, the public interest favors the reduction of suffering. (Doc. 115, p. 11) The court agrees that this is a good general principle, but it is difficult to apply in practice. There is no evidence before the court about how much the surgery costs, how many class members would seek surgery, or how financially sound the Plan currently is. Moreover, there is presently no evidence before the court as to how much "human suffering" would be alleviated should be motion be granted, assuming it is possible to offer meaningful evidence on such an issue. Without more, it is difficult to see where the balance of the equities lies. *See, e.g., Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004) (concluding that the balance of interests favored maintaining specialized health care services for the disabled, in part, because "[t]he County currently has a surplus and does not expect to experience a deficit until fiscal year

2006–2007" and it was "unclear" whether implementing the County's plan to close the medical facility would produce the cost savings that the County was expecting.).

Having balanced the various *Winter* factors in light of the heightened showing that must be made here, the court finds that a preliminary injunction should not issue and the motion should be denied. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376 (2008).

RECOMMENDATION

The Magistrate Judge recommends the District Court, after its independent review of the record, enter an order DENYING the plaintiff's motion, filed on September 1, 2020, for a preliminary injunction pursuant to Fed.R.Civ.P 65(a). (Doc. 115)

Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within 14 days of being served with a copy of this report and recommendation. If objections are not timely filed, the party's right to de novo review may be waived. The Local Rules permit the filing of a response to an objection. They do not permit the filing of a reply to a response without the permission of the District Court.

DATED this 30th day of November, 2020.

Leslie A. Bowman

Leslie A. Bowman
United States Magistrate Judge

EXHIBIT D

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Russell B Toomey,

Plaintiff,

v.

State of Arizona, et al.,

Defendants.

No. CV-19-00035-TUC-RM (LAB)

ORDER

Pending before the Court are Plaintiff's Motion for Preliminary Injunction (Doc. 115), Magistrate Judge Leslie A. Bowman's Report and Recommendation ("R&R") recommending denial of the Motion for Preliminary Injunction (Doc. 134), Plaintiff's Objection to the R&R (Doc. 135), and a Response to the R&R filed by Defendants Arizona Board of Regents ("ABOR"), Ron Shoopman, Larry Penley, Ram Krishna, Bill Ridenour, Lyndel Manson, Karrin Taylor Robson, Jay Heiler, and Fred DuVal (collectively, "University Defendants") (Doc. 139). Defendants State of Arizona, Andy Tobin, and Paul Shannon ("State Defendants") replied to Plaintiff's Objection. (Doc. 144.) The Court will deny the Motion for Preliminary Injunction, adopt in part the R&R, and overrule Plaintiff's and the University Defendants' Objections.

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I. Background

Plaintiff Dr. Russell B. Toomey is a transgendered male. (Doc. 1 at 12.) "He has a male gender identity, but the sex assigned to him at birth was female." (*Id*.) Dr. Toomey has been living as a male since 2003 and has received medically necessary hormone therapy and chest reconstruction surgery as treatment for diagnosed gender dysphoria. (Doc. 1 at 12; Doc. 24 at 2.) Dr. Toomey is employed as an Associate Professor at the University of Arizona. (Doc. 1 at 4.) His health insurance ("the Plan") is a self-funded plan provided by the State of Arizona. (*Id*. at 3, 10.) While the Plan provides coverage for most medically necessary care, including care related to transsexualism and gender dysphoria such as mental health counseling and hormone therapy, "gender reassignment surgery" is excluded from coverage. (*Id*. at 3, 10, 13; Doc. 24 at 3.)

At the recommendation of his doctor, Dr. Toomey sought preauthorization for a total hysterectomy from his provider, Blue Cross Blue Shield of Arizona ("BCBSAZ"). (Doc. 24 at 3.) BCBSAZ refused to approve the procedure due to the Plan's exclusion of "gender reassignment surgery." (*Id*. at 4.) Subsequently, Dr. Toomey filed an Equal Employment Opportunity Commission ("EEOC") Charge against the ABOR, alleging sex discrimination under Title VII. (Doc. 24–1.) Upon receiving a Notice of Right to Sue, he filed this lawsuit. (Doc. 39 at 15.) Plaintiff seeks declaratory relief, "including but not limited to a declaration that Defendants . . . violated Title VII and . . . the Equal Protection Clause," as well as permanent injunctive relief "requiring Defendants to remove the Plan's categorical exclusion of coverage for gender reassignment surgery and evaluate whether [Plaintiff's] . . . surgical care for gender dysphoria is 'medically necessary' in accordance with the Plan's generally applicable standards and procedures." (Doc. 1 at 22.)

On December 23, 2019, this Court denied the State Defendants' Motion to Dismiss. (Doc. 69.) On June 15, 2020, this Court granted Plaintiff's Motion to Certify Class. (Doc. 108.) On that same day, the United States Supreme Court issued a decision in *Bostock v. Clayton County, Georgia* holding that an employer violates Title VII by

firing an individual for being a transgender person, as doing so is discrimination "because of" the individual's sex. 140 S. Ct. 1731, 1741 (2020). In light of the *Bostock* decision, the parties engaged in settlement discussions. (Doc. 110.) No settlement was reached.

On September 1, 2020, Plaintiff filed the instant Motion for Preliminary Injunction. (Doc. 115.) On November 30, 2020, Magistrate Judge Bowman issued an R&R recommending that this Court deny the Motion for Preliminary Injunction. (Doc. 134.) Plaintiff and the University Defendants filed Objections to the R&R. (Docs. 135, 139.)

II. Standard of Review

A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by" a magistrate judge. 28 U.S.C. § 636(b)(1). The district judge must "make a de novo determination of those portions" of the magistrate judge's "report or specified proposed findings or recommendations to which objection is made." *Id.*; *see also Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999) ("If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error.").

In determining whether to grant preliminary injunctive relief, the Court considers: (1) whether the movant "is likely to succeed on the merits"; (2) whether the movant is "likely to suffer irreparable harm" in the absence of preliminary injunctive relief; (3) the "balance of equities" between the parties; and (4) "the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

III. Motion for Preliminary Injunction

Plaintiff seeks a preliminary injunction on behalf of himself and the class members (1) barring Defendants from enforcing the categorical exclusion of coverage for gender reassignment surgery from the Plan; (2) requiring Defendants to evaluate, on a case by case basis, whether Dr. Toomey's and/or any other class members' prescribed surgical care for gender dysphoria is "medically necessary" in accordance with the Plan's generally applicable standards and procedures; and (3) providing notice of the

preliminary injunction to individuals enrolled in the Plan. (Doc. 115 at 3.)

Plaintiff argues that he has met the four factors for granting preliminary injunctive relief. (*Id*. at 7.) First, Plaintiff argues that he has demonstrated a likelihood of success on the merits of the Title VII claim. (*Id*.) In support of this argument, Plaintiff relies on this Court's Order denying the Motion to Dismiss (Doc. 69), as well as two recent out-of-circuit district court decisions and the Supreme Court's *Bostock* decision. (*Id*. at 7-8.) Plaintiff further argues that he is likely to succeed on the merits of the equal protection claim. (*Id*. at 9.) Plaintiff argues that, as a matter of law, heightened scrutiny applies to his equal protection claim, and Defendants are unlikely to carry their burden of proof under the heightened scrutiny standard. (*Id*.)

Second, Plaintiff argues that he and the class members will suffer irreparable harm absent the requested injunctive relief. (*Id*. at 10.) Plaintiff argues that, as a matter of law, the denial of medically necessary care constitutes irreparable harm. (*Id*.) Plaintiff further argues that discrimination against transgender individuals constitutes irreparable harm as a matter of law. (*Id*. at 10-11.) Third, Plaintiff argues that the public interest and the balance of equities between the parties both weigh in favor of granting injunctive relief. (*Id*. at 11.) Plaintiff argues that the denial of both constitutional rights and medically necessary care supports a finding that the balance of hardships and the public interest tip in Plaintiff's favor. (*Id*.)

The State Defendants oppose the requested injunctive relief. (Doc. 123.) First, the State Defendants argue that the injunctive relief sought would effectively decide the case because it would provide Plaintiff and the class members with all of the relief they seek and effectively render this action moot; the State Defendants contend that such a result is disfavored as a matter of law. (*Id*. at 2.) The State Defendants further argue that Plaintiff seeks a mandatory injunction and has not met the heightened standard for granting such relief. (*Id*.) Next, the State Defendants argue that Plaintiff is not likely to succeed on the merits of his Title VII or equal protection claims. (*Id*.) Finally, the State Defendants argue that Plaintiff has failed to show that he or the class members will suffer irreparable

harm in the absence of injunctive relief. (*Id*.)

The University Defendants also responded to the Motion for Preliminary Injunction. (Doc. 122.) They do not oppose the requested injunctive relief as long as: (1) the injunction entered against the ABOR is no greater than the injunction entered against the State Defendants; and (2) the injunction is not entered against the individually named Regents. (*Id*.) The University Defendants object to an injunction entered against the ABOR but not the State, because the ABOR has no independent authority to provide the health insurance coverage that Plaintiff seeks. (*Id*.)

IV. Report and Recommendation

The R&R recommends denying Plaintiff's Motion for Preliminary Injunction. (Doc. 134.) The R&R finds that Plaintiff's burden of proof is heightened because he seeks a mandatory injunction that would order Defendants to grant him the relief he seeks in this case, and preliminary injunctive relief of that nature is generally disfavored. (*Id*. at 2-4.)

Addressing the first *Winter* factor, the R&R finds that Plaintiff is not likely to succeed on the merits of his Title VII claim because he has not shown that the Plan's exclusion of gender reassignment surgery is discrimination on the basis of transgender status. (*Id*. at 4.) The R&R construes Plaintiff's Title VII claim as a disparate-treatment claim, under which an employer treats an individual less favorably than others because of a protected trait and a plaintiff must show that the discrimination was intentional. (*Id*.); *see also Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). The R&R reasons that Plaintiff is not likely to succeed on his Title VII claim because he has not shown that the Plan's categorical exclusion of gender reassignment surgery provides proof of the State's intent to discriminate against transgender persons. (*Id*. at 4-8.) The R&R further reasons that because the Plan's exclusion discriminates against some natal females but not all, the exclusion is not, on its face, discrimination based on sex. (*Id*. at 8.) The R&R further finds that Plaintiff cannot show a likelihood of success on his equal protection claim because the Plan exclusion is not facially discriminatory against all transgender persons.

(*Id*. at 8-9.)

The R&R finds that Plaintiff has shown that he is likely to suffer irreparable harm in the absence of the requested injunctive relief, because without the relief he will be denied timely medical care and such an injury cannot be remediated by money damages. (*Id*. at 9.) The R&R makes no specific finding as to the balance of hardships and the public interest, noting that there is no evidence before the Court regarding the cost of surgery, how many class members might seek surgery, or the amount of suffering that might be alleviated by granting injunctive relief. (*Id*. at 10.)

V. University Defendants' Response to Report and Recommendation

The University Defendants filed a Response to the R&R that reiterates the arguments they raised in their Response to the Motion for Preliminary Injunction. (Docs. 139, 122.) The University Defendants indicate they do not object to the requested injunctive relief as long as (1) the injunction entered against the Arizona Board of Regents is no greater than the injunction entered against the State, and (2) the injunction is not entered against the individually named Regents. (Doc. 139.)

For the reasons explained below, the Court will not grant the requested injunctive relief. Accordingly, to the extent the University Defendants' Response to the R&R constitutes an objection, it will be overruled.

VI. Plaintiff's Objection to Report and Recommendation

Plaintiff filed an Objection the R&R. (Doc. 135.) First, Plaintiff argues that the R&R erred in concluding that Plaintiff and the class members are unlikely to succeed on the Title VII and equal protection claims. (*Id*. at 1.) Plaintiff disputes the R&R's reliance on and application of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (Title VII) and *Geduldig v. Aiello*, 417 U.S. 484 (1974) (equal protection) for its finding that he is not likely to succeed on the merits of his claims. (*Id*.) Plaintiff further disputes the R&R's finding that he can only prove his Title VII disparate-treatment claim by providing evidence that Defendants were subjectively motivated by a discriminatory intent or animus. (*Id*. at 1-2.) Plaintiff contends that the applicable standard is whether the Plan's

exclusion is facially discriminatory, not whether the exclusion was motivated by a discriminatory intent. (*Id*. at 2.) Plaintiff, relying on *Bostock*, contends that he has shown that the gender reassignment surgery exclusion facially discriminates on the basis of sex because the Plan's exclusion directly implicates the characteristics of sex and gender and discriminates based on gender nonconformity. (*Id*. at 3-4.) Plaintiff argues that *Gilbert* is no longer controlling precedent following the passage of the Pregnancy Discrimination Act, and that the R&R erred in concluding that the question under Title VII is whether a given policy discriminates against all women or all men. (*Id*. at 5.)

Plaintiff further objects that he and the class members are likely to succeed on the merits of the equal protection claim. (*Id*. at 6.) Plaintiff contends that the R&R made similar errors analyzing the equal protection claim that it made analyzing the Title VII claim. (*Id*. at 7.) Specifically, Plaintiff contests the R&R's reliance on *Geduldig* and argues that there is no rule that a facially discriminatory policy must affect every member of a particular group in order to trigger heightened scrutiny. (*Id*.) Plaintiff argues that facial discrimination in violation of the equal protection clause exists when a "defendant discriminates against individuals on the basis of criteria that are almost exclusively indicators of membership in the disfavored group," and that such discrimination is present here. (*Id*. at 8 (citing *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013)).) Plaintiff further argues that Defendants have failed to provide any evidence to carry their burden of proof under heightened scrutiny of demonstrating that the exclusion serves an important governmental interest and "that the discriminatory means employed" "are substantially related to the achievement of those objectives." (*Id*. at 9 (citing *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017)).)

Plaintiff objects to the R&R's findings regarding the balance of hardships and the public interest, contending that the balance of hardships tips in his favor because the denial of medically necessary care can violate the Eighth Amendment. (*Id*. at 9 (citing *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019)).)

Lastly, Plaintiff objects to the R&R's characterization of the requested injunctive

relief as a mandatory injunction. (*Id*. at 10.) Plaintiff argues that an injunction to prevent future constitutional violations is a classic form of prohibitory injunction and should not be subjected to the heightened mandatory injunction standard. (*Id*. (citing *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017)).) Plaintiff disputes the R&R's reliance on past decisions that conflict with the Ninth Circuit's more recent precedent in *Hernandez*. (*Id*.)

The State Defendants responded to Plaintiff's Objection. (Doc. 144.) The State Defendants argue first that the R&R correctly determined that Plaintiff seeks a mandatory injunction that disrupts the status quo rather than a prohibitory injunction that maintains the status quo, and that Plaintiff has not met the heightened standard for mandatory injunctive relief. (*Id*. at 2-3 (citing *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994)).) The State Defendants further contend that the preliminary injunctive relief sought would prematurely grant the ultimate relief Plaintiff and the class members seek in this litigation—that is, gender-transition surgeries being paid for by the State—even if the State ultimately prevails in the litigation. (*Id*. at 3-5 (citing *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-9 (9th Cir. 1963); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208-9 (10th Cir. 2009)).) The State Defendants contend that Plaintiff's reliance on *Hernandez* is inapposite because Plaintiff has not demonstrated a constitutional violation akin to the erroneous detention at issue in *Hernandez*. (*Id*. at 4.)

The State Defendants further argue that Plaintiff has not met the *Winter* factors required for a preliminary injunction to issue. (*Id*. at 5.) Specifically, the State Defendants argue that Plaintiff has not shown that (1) he is likely to succeed on the merits of either his Title VII or his equal protection claim; (2) the balance of hardships favors granting injunctive relief; or (3) the public interest favors granting injunctive relief. (*Id*. at 5-10.) The State Defendants do not respond to or argue the "irreparable harm" factor.

VII. Applicable Law and Analysis

The Court declines to issue the requested preliminary injunctive relief for two reasons. First, Plaintiff and the class members seek a mandatory injunction and have not

met the heightened standard for such relief to issue. Second, the requested injunctive relief is identical to the ultimate relief Plaintiff and the class members seek in this litigation, and the Court finds it premature to grant such relief prior to discovery and summary judgment briefing.

A. Plaintiff has not met the standard for a mandatory injunction.

"A prohibitory injunction preserves the status quo," while a "mandatory injunction goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored." *Stanley*, 13 F.3d at 1320 (internal citation and quotation omitted). "When a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party." *Id*. "[G]enerally an injunction will not lie except in prohibitory form." *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979) (internal citation omitted). Mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Id*. Before reaching the merits of a preliminary injunction, courts consider whether the injunctive relief sought is prohibitory or mandatory. *Stanley* at 1320.

The injunctive relief that Plaintiff and the class members seek "goes well beyond simply maintaining the status quo." (*See* Doc. 115.) The status quo is the Plan as it currently exists, including its exclusion of coverage for gender reassignment surgery. Accordingly, Plaintiff seeks mandatory injunctive relief. Furthermore, the Court agrees with the State that *Hernandez* does not support Plaintiff's argument that an injunction that orders compliance with the Constitution is necessarily prohibitory rather than mandatory. *Hernandez* involves a violation of the Fifth Amendment Due Process Clause in the immigration detention context. 872 F.3d at 998. Here, Plaintiff alleges a violation of the Fourteenth Amendment Equal Protection Clause in the context of an employer's health insurance plan. (Doc. 86.) The Court does not find *Hernandez* sufficiently analogous to the present case to justify applying *Hernandez* in the manner that Plaintiff proposes. (Doc. 135 at 10.)

Plaintiff has not shown that "extreme or very serious damage will result" if the injunctive relief sought does not issue. *Anderson*, 612 F.2d at 1115. Furthermore, it is not clear that "the injury complained of is [not] capable of compensation in damages," *id.*, as Plaintiff could potentially pay out-of-pocket for gender reassignment surgery and be reimbursed by Defendants if he prevails on the merits.

B. Courts disfavor preliminary injunctive relief that is identical to the ultimate relief sought.

"It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo . . . pending a determination of the action on the merits." *Tanner Motor Livery*, 316 F.2d at 808–09. "[I]t is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial" in a preliminary injunction. *Id*. "This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it." *Id*.; *see also RoDa Drilling*, 552 F.3d at 1208–09 ("[B]efore we will grant [mandatory injunctive] relief, we require a movant seeking such an injunction to make a heightened showing of the four factors.")

Plaintiff seeks injunctive relief (1) barring Defendants from enforcing the exclusion of coverage for gender reassignment surgery from the Plan and (2) requiring Defendants to evaluate, on a case by case basis, whether Dr. Toomey's and/or any other class members' prescribed surgical care for gender dysphoria is "medically necessary" in accordance with the Plan's generally applicable standards and procedures. (Doc. 115.) Plaintiff's Amended Complaint seeks, in relevant part, "permanent injunctive relief. . . requiring Defendants to remove the Plan's categorical exclusion of coverage for 'gender reassignment surgery' and evaluate whether Dr. Toomey and the proposed classes' surgical care for gender dysphoria is 'medically necessary' in accordance with the Plan's generally applicable standards and procedures." (Doc. 86 at 15.)

The injunctive relief and the ultimate relief that Plaintiff seeks are identical. Precedent counsels against granting such relief in the absence of extraordinary

circumstances that are not present here.

Accordingly,

IT IS ORDERED that the Report and Recommendation (Doc. 134) is **adopted** only to the extent it recommends denying the Motion for Preliminary Injunction on the grounds that Plaintiff has not met the heightened standard for obtaining mandatory preliminary injunctive relief, and is otherwise **rejected**.

IT IS FURTHER ORDERED that the Motion for Preliminary Injunction (Doc. 115) is **denied**.

IT IS FURTHER ORDERED that Plaintiff's Objection (Doc. 135) is **overruled**.

IT IS FURTHER ORDERED that the University Defendants' Objection (Doc. 139) is **overruled**.

Dated this 26th day of February, 2021.

Honorable Rosemary Márquez
United States District Judge

EXHIBIT E

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Russell B. Toomey, Plaintiff, v. State of Arizona, *et al.* Defendants.	No. 4:19-cv-00035 **DEFENDANTS STATE OF ARIZONA'S, ANDY TOBIN'S, AND PAUL SHANNON'S MOTION TO STAY ORDER** **(EXPEDITED CONSIDERATION REQUESTED)**

Defendants State of Arizona (the "State"), Andy Tobin, and Paul Shannon (collectively, the "State Defendants") hereby submit their Motion to Stay enforcement of this Court's Order dated September 21, 2021, which compels production of documents withheld by the State Defendants pursuant to the attorney-client privilege (the "Order"). The State Defendants intend to petition the United States Court of Appeals for the Ninth Circuit for a Writ of Mandamus regarding the Order prior to the date required by the Order for production of the documents. As further detailed below, a ruling by the Ninth Circuit could significantly affect, or even invalidate, the Order. If the Order is not stayed, the State Defendants would be required to produce privileged documents and that production could

not be unwound if the Ninth Circuit later modifies or invalidates the Order. As a result, a stay is necessary and appropriate.

This Motion is supported by the following Memorandum of Points and Authorities, the pleadings and papers filed in this matter, and any oral argument heard.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL BACKGROUND

On May 20, 2021, Plaintiff filed its Second Motion to Compel Production of Documents (the "Motion"), seeking a court order compelling the State Defendants to produce documents withheld on the basis of the attorney-client privilege. (Doc. 195.) Plaintiff contends that the State Defendants waived the attorney-client privilege with respect to those documents by "asserting and relying on legal advice as a defense to the charge that discriminatory intent [motivated] [Defendants'] decision to maintain the Exclusion."[1] (*Id.* at 2.) The State Defendants timely opposed Plaintiff's Motion, and clarified that they have not asserted an "advice-of-counsel" defense. (*See* Doc. 201.)

On June 28, 2021, Magistrate Judge Bowman granted the Motion. (Doc. 213 (the "Magistrate Order").) Magistrate Judge Bowman ruled that the State Defendants *implicitly* waived the attorney-client privilege with respect to the withheld documents by asserting an advice of counsel defense as "evidence that they harbored no discriminatory intent" in maintaining the Exclusion. (*Id.* at 1-2.) Magistrate Judge Bowman relied on the State Defendants' Interrogatory Responses and deposition testimony in reaching this conclusion. (*Id.* at 4-6.) The Magistrate Order concluded that Plaintiff cannot realistically dispute Defendants' claimed reason for maintaining the Exclusion without access to the attorney-client privileged documents and that "fairness" thus mandates that Plaintiff be able to

[1] Plaintiff also asserted that the State Defendants waived the attorney-client privilege by disclosing the substance of it during depositions. (Doc. 195 at 6, 11-13.) However, neither the Magistrate Order nor District Court's order reached this argument by Plaintiff. (*See generally* Doc. 213; Doc. 241.)

review the substance of the legal advice. (*Id.* at 6.)

The State Defendants appealed the Magistrate Order. (Doc. 223.) Again, the State Defendants made clear that they have not asserted an "advice-of-counsel" defense. (*Id.* at 1-6.) The State Defendants emphasized that the attorney-client privilege is too important to be waived based on inaccurate or incomplete characterizations. (*Id.* at 7-8.) The State Defendants urged the District Court to reverse the Magistrate Order and deny Plaintiff's Motion. (*See generally id.*)

On September 21, 2021, the Court denied the State Defendant's objection. (Doc. 241 (the "Order").) The Order affirms Magistrate Judge Bowman's finding that the State Defendants asserted an advice of counsel defense, stating "the State Defendants' Interrogatory Responses indicate that they relied on the advice of legal counsel in deciding to maintain the exclusion of coverage for gender reassignment surgery." (*Id.* at 7.) The Order further states that "[w]ithout disclosure of the withheld documents, Plaintiff cannot fully respond to Defendants' argument that their reason for maintaining the exclusion was lawful and non-discriminatory because it was based on legal advice" and that "fairness mandates that the documents be disclosed." (*Id.*)

The State Defendants intend to petition the Ninth Circuit for a writ of mandamus, directing the Court to vacate its order compelling production of the privileged documents.

II. THE COURT SHOULD STAY THE ORDER PENDING RESOLUTION OF THE STATE DEFENDANTS' PETITION FOR A WRIT OF MANDAMUS.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). When considering a motion for stay, courts consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure

the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Courts apply a sliding scale analysis to these factors, where "[a]t one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. . . . [and a]t the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Golden Gate Restaurant Ass'n v. City & Cnty. Of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (internal citations and quotations omitted); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) (a movant can obtain a stay by showing that there are "serious questions going to the merits" and the balance of hardships that favors the movant).

First, State Defendants are likely to succeed on the merits in their Petition for a Writ of Mandamus. A movant need not show a high probably of success on the merits; instead, a finding that he has "at least a fair chance of success . . . is all that is required." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Further, a movant can obtain a stay by showing that there are "serious questions going to the merits." *Alliance for the Wild Rockies*, 632 F.3d at 1131–32. The State Defendants have consistently and continuously maintained that they did not assert an advice-of-counsel defense. (*See* Doc. 201, 223.) A review of the Interrogatory Responses does not change this conclusion. As outlined in the State Defendants' opposition to Plaintiff's Motion and their objection to the Magistrate Order, the content of the Interrogatory Responses does not assert an advice-of-counsel defense or waive the attorney-client privilege. (*See* Doc. 201 at 4-9; Doc. 223 at 1-6.) At the very least, the State Defendants have "at least a fair chance of success" on mandamus. In addition, the writ petition will raise "serious questions" about Plaintiff's contentions, the impact of the State Defendants' Interrogatory Responses, and the Court's determination that "fairness" requires disclosure of the documents. It is crucial that the Ninth Circuit be given the opportunity to review and rule upon State Defendants' Petition

before they are required to produce the privileged documents to Plaintiff.

Second, it cannot be disputed that State Defendants will be irreparably injured if the Order is not stayed. Preservation of the "status quo" will often prevent irreparable injury. *See Golden Gate Restaurant*, 512 F.3d at 1116. Staying the Order will merely stay the production of the privileged documents to Plaintiff for a brief period. No other case deadlines will be affected by a stay. Moreover, it is extremely unlikely that other contemplated discovery will be affected by a stay. The only outstanding discovery is the depositions of key witnesses for the State of Arizona, and the parties have agreed to postpone these depositions until the Court issues final rulings on both Plaintiff's Motion to compel the privileged documents and Plaintiff's motion to compel documents from the Governor's Office (which is currently still pending). If the State Defendants' Petition is denied, they can produce the documents within 5 court days of the denial. A stay would clearly preserve the status quo in this matter. If a stay is not granted, however, the State Defendants will be required to produce their confidential, attorney-client privileged documents to opposing parties in litigation. Once this production is made, it cannot be entirely undone even if Plaintiff is precluded from using the documents. Thus, the grave harm of disclosure cannot be unwound if the Ninth Circuit grants a Writ of Mandamus.

Third, Plaintiffs will not be injured by a stay. A delay in the case is the only possible harm that could result from a stay of the Order. As noted above, however, granting a stay of the Order will not delay any case deadlines or any discovery. In addition, this stay request is narrow and limited only to the Order, not the case in its entirety. A stay would not require further delaying the deadline for dispositive motions or any other case deadlines. For these reasons, any delay in enforcing the Order will not detrimentally affect Plaintiffs.

Finally, public interest favors granting a stay here. "The public interest is served in preserving the integrity of the right to appellate review." *Gila River Indian Cmty. v. United States*, No. CV-10-1993-PHX-DGC, 2011 WL 1656486, at *4 (D. Ariz. May 3, 2011)

(internal citations and quotations omitted). Defendants' right to review of the Order will be rendered effectively futile should the Order be enforced before review can be obtained. The Ninth Circuit may well hold that the State Defendants did not waive their attorney-client privilege and order the District Court to deny Plaintiff's Motion. As discussed above, staying enforcement of the Order will merely stay the production of the subject, privileged documents. The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981). Preserving this cherished protection unless and until a waiver has been conclusively determined is, without question, within the public interest.

III. CONCLUSION

For the foregoing reasons, a stay of the Order is warranted and necessary here. The State Defendants respectfully request that this Court stay enforcement of the Order until the Ninth Circuit rules on its Petition for a Writ of Mandamus. If the Ninth Circuit denies the State Defendant's Petition, the State Defendants will produce the documents at-issue within 5 court days of the Ninth Circuit's order.

DATED this 1st day of October, 2021.

FENNEMORE CRAIG, P.C.

By: *s/ Ryan Curtis*
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EXHIBIT F

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; et al.,

Defendants.

CV 19-0035-TUC-RM (LAB)

ORDER

Pending before the court is the plaintiff's motion, filed on March 18, 2021, to compel production of documents. (Doc. 168) The defendants State of Arizona, Andy Tobin, and Paul Shannon ("the State Defendants") filed a response on April 1, 2021. (Doc. 176) The plaintiff, Toomey, filed a reply on April 8, 2021 and a notice of errata on April 12, 2021. (Doc. 180); (Doc. 183)

Toomey issued his First Request for Production on December 8, 2020, in which he requested documents "concerning the State Defendants' reasons for excluding medically necessary gender-affirming surgeries" from his health insurance plan. (Doc. 168, p. 3) The State Defendants withheld certain documents "on grounds that these documents are protected from disclosure by the 'deliberative process privilege.'" *Id.* In the pending motion, Toomey seeks an order from this court precluding the State Defendants from relying on this privilege.

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The motion will be granted. The plaintiff's "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *See F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

Discussion

The plaintiff in this action, Russell B. Toomey, is an associate professor employed at the University of Arizona. (Doc. 86, p. 5) (Amended Complaint) He receives health insurance from a self-funded health plan (the Plan) provided by the State of Arizona. (Doc. 86, pp. 3, 8) The Plan generally provides coverage for medically necessary care. (Doc. 86, p. 8) There are coverage exclusions, however, one of which is for "gender reassignment surgery." (Doc. 86, p. 9)

Toomey is a transgendered man. (Doc. 86, p. 9) "[H]e has a male gender identity, but the sex assigned to him at birth was female." (Doc. 86, p. 9) Toomey has been living as a male since 2003. (Doc. 86, p. 9) His treating physicians have recommended that he receive a hysterectomy as a medically necessary treatment for his gender dysphoria. (Doc. 86, p. 9) Toomey sought medical preauthorization for a total hysterectomy, but he was denied under the Plan's exclusion for "gender reassignment surgery." (Doc. 86, p. 10)

On January 23, 2019, Toomey brought the pending class action in which he argues the Plan's exclusion is sex discrimination under Title VII of the Civil Rights Act of 1964 and a violation of the Equal Protection Clause of the Fourteenth Amendment. (Doc. 1); (Doc. 86)

This action is currently in the discovery stage. On December 8, 2020, Toomey served his First Request for Production on the State Defendants seeking documents calculated to reveal the reason why the Plan contains an exclusion for "gender reassignment surgery." (Doc. 168,

pp. 4-5) The State Defendants produced some documents but withheld[1] 35 documents "on the basis of the deliberative process privilege." (Doc. 168, pp. 6-7)

In the pending motion, Toomey moves to compel the production of these documents pursuant to Fed.R.Civ.P.37(a)(3)(B)(iv). (Doc. 168, p. 7) He asserts that the State Defendants failed to properly invoke the privilege. He further argues that the deliberative process privilege is generally inapplicable to his Request for Production given the issues involved.

In general, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, 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).

Pursuant to Fed. R. Civ. P. 37(a)(3)(B)(iv), "A party seeking discovery may move for an order compelling . . . production . . . if . . . a party fails to produce documents."

The deliberative process privilege is a creature of federal common law. *Arizona Dream Act Coal. v. Brewer*, 2014 WL 171923, at *1 (D. Ariz. 2014); *see also* Fed.R.Evid. 501. It "permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated." *F.T.C. v. Warner Commc'ns Inc*., 742 F.2d 1156, 1161 (9th Cir. 1984). "It was developed to promote frank and independent discussion among those responsible for making governmental decisions . . . and also to protect against premature disclosure of proposed agency policies or decisions." *Id.* "The ultimate purpose of the privilege is to protect the quality of agency decisions." *Id.*

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[1] In a footnote, Toomey states that some documents have been withheld under the deliberative process privilege and also because of the attorney-client privilege. (Doc. 168, p. 8, n. 2) Neither party addresses the latter privilege in any detail. Accordingly, the court expresses no opinion on the defendant's use of the attorney-client privilege.

"A document must meet two requirements for the deliberative process privilege to apply." *Warner Commc'ns Inc.*, 742 F.2d at 1161. "First, the document must be predecisional—it must have been generated before the adoption of an agency's policy or decision." *Id.* "Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies." *Id.* "Purely factual material that does not reflect deliberative processes is not protected." *Id.*

"The deliberative process privilege is a qualified one." *Warner Commc'ns Inc.*, 742 F.2d at 1161. "A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Id.* "Among the factors to be considered in making this determination are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id.* "The party asserting an evidentiary privilege has the burden to demonstrate that the privilege applies to the information in question." *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir.1988).

In his motion, Toomey first argues that the State Defendants failed to properly invoke the deliberative process privilege. He maintains that the State Defendants failed to satisfy their prima facie burden of providing a sworn declaration by an agency head attesting to the fact that "she has personally considered the material in question prior to the invocation of the privilege." (Doc. 168, p. 9) He further asserts that the State Defendants failed to show that the withheld documents are predecisional and deliberative. *Id.* Assuming without deciding that the State Defendants properly invoked the privilege, the court finds that the plaintiff's "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *See F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The court considers the four *Warner* factors. *Id.*

First, the court finds that the documents sought are highly relevant. *See Warner Commc'ns Inc.*, 742 F.2d at 1161. Toomey claims that the gender surgery exclusion is

intentional discrimination in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment. The documents sought bear directly on the thought processes and state of mind of the decision makers behind the exclusion. As such, they bear directly on the issue of intent. The document request, therefore, concerns an indispensable element of Toomey's causes of action and is directed at persons with direct knowledge of this element. *See also Arizona Dream Act Coal. v. Brewer*, 2014 WL 171923, at *3 (D. Ariz. 2014) (Equal Protection claim requires the court to consider the "actual intent" behind the policy in question.). This factor favors the plaintiff.

The State Defendants argue, to the contrary, that the documents sought are irrelevant. (Doc. 176, p. 11) They note that Toomey has argued in the past that the Plan exclusion is facially discriminatory. They assert that "[u]nder Plaintiff's own argument . . . the decision-making process and the reasons underlying [the Arizona Department of Administration's] decision to uphold the Exclusion are not relevant." *Id.* The State Defendants are correct but only to a point. Under Toomey's previous argument, the documents sought are irrelevant. That argument, however, has not been accepted by this court to date. Unless or until it is, the issue of intent remains unresolved, and the documents remain relevant.

Under the second *Warner* factor, the court considers "the availability of other evidence." *Warner Commc'ns Inc*., 742 F.2d at 1161. The court recognizes that other evidence on the issue of intent exists. If the authors of the plan exclusion were to be deposed, the plaintiff would have direct evidence on the issue of their intent. If, however, those authors acted in violation of the law, their testimony might be less candid than the plaintiff would like. Accordingly, the court concludes that while other evidence might exist, the documents sought by the plaintiff are likely to be the most *reliable* evidence on the issue. This factor also favors the plaintiff.

The State Defendants argue, to the contrary, that "[t]here is **substantial** other evidence available to Plaintiff" on the issue of intent. (Doc. 176, p. 11) (emphasis in original) They note that they have already produced more than 8,000 documents in this matter. The State Defendants, however, do not discuss any of those documents in detail. It is therefore impossible

for the court to conclude that those documents, or any of them, will be relevant, let alone dispositive, on the issue of intent. In other words, the court cannot conclude from the sheer quantity of documents disclosed to date that the plaintiff already has in his possession documents whose evidentiary value is comparable to the documents currently withheld. Quantity is not quality. *See, e.g., Weiler v. United States*, 323 U.S. 606, 608, 65 S. Ct. 548, 550 (1945).

The State Defendants further note that the plaintiff seems very curious as to whether Ms. Christina Corieri offered the Arizona Department of Administration (ADOA) any advice or counsel on the Plan exclusion. (Doc. 176, p. 12) The State Defendants suggest that the plaintiff could simply depose Ms. Corieri and ask her directly. As the court noted above, however, witnesses do not always remember what they said or did in the past with the same reliability that documentation can provide. *See* Shareholder Litigation, Vol. 2, § 21:6 ("The faintest ink is better than the best memory . . . .").

The third *Warner* factor requires the court to consider the government's role in the litigation. *Warner Commc'ns Inc*., 742 F.2d at 1161. In this case, the government is itself a defendant rather than a third party. Where the government is itself a defendant, the reason for the privilege evaporates. *See In re Subpoena Duces Tecum Served on Off. of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir.), on reh'g in part, 156 F.3d 1279 (D.C. Cir. 1998). The privilege is designed to protect the proper and efficient functioning of the government. If the government itself is accused of wrongdoing, then the privilege would not necessarily protect proper governmental functioning but instead might shield governmental malfeasance. This factor strongly favors the plaintiff. *See In re Sealed Case*, 121 F.3d 729, 738 (D.C.Cir.1997) ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government."); *In re Subpoena Duces Tecum Served on Off. of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir.), on reh'g in part, 156 F.3d 1279 (D.C. Cir. 1998) ("[I]t seems

rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination.").

The fourth *Warner* factor requires the court to consider "the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." Ordinarily, it might be assumed that disclosure of predecisional documents would make it difficult for governmental agencies to attract candid opinions in the future because parties might withhold from consideration unpopular opinions for fear that they might become public. The court finds that this general concern is of less importance in the present case. The issue here is the construction of a healthcare plan and exceptions to coverage. The construction of a healthcare plan ordinarily entails considerations of medical needs, costs, and the efficacy of treatment. One would not expect that consideration of these factors would run the risk of attracting politically sensitive or controversial views. If, as the State Defendants have suggested in the past, the Plan and its exclusions were created for entirely prosaic reasons, such as cost containment, there is little reason to fear that future health insurance decision would be adversely affected if predecisional opinions were disclosed to the public. In fact, in Arizona, one would ordinarily presume that to be the case.

"Arizona has a policy in favor of full and open disclosure, as evidenced by Arizona's open meetings law." *Arizona Dream Act Coal. v. Brewer*, 2014 WL 171923, at *3 (D. Ariz. 2014) (*citing Rigel Corp. v. State*, 225 Ariz. 65, 72–73, 234 P.3d 633, 640–41 (App.2010) ("Arizona recognizes a legal presumption in favor of disclosing public records.")). Perhaps for this reason, "Arizona courts have not recognized a deliberative process privilege under state law." *Id.* "Arizona state government officials, therefore, should reasonably expect that their deliberations in crafting policy are open to public scrutiny," and persons giving advice to Arizona government officials should ordinarily assume that their advice will not be hidden from the public gaze. *Id.* Granting the pending motion will not disturb settled expectations in Arizona concerning the public nature of governmental records. The court finds that disclosure

of documents concerning the creation of the Plan and its exclusions will have only a minimal adverse effect on future healthcare coverage deliberations.

After considering the four *Warner* factors, the court concludes that the motion for production should be granted. *See Warner Commc'ns Inc*., 742 F.2d at 1161. The plaintiff's "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Id.*; *See, e.g.*, *Arizona Dream Act Coal. v. Brewer*, 2014 WL 171923, at *3 (D. Ariz. 2014) (Deliberative process privilege did not shield documents "concerning the policy of the Governor's Office and the Arizona Department of Transportation . . . to deny driver's licenses to individuals granted deferred action status under the 2012 Deferred Action for Childhood Arrivals . . . program.").

IT IS ORDERED that the plaintiff's motion, filed on March 18, 2021, to compel production of documents is GRANTED. (Doc. 168) The State of Arizona, Andy Tobin, and Paul Shannon (The State Defendants) shall "produce all the documents currently withheld [solely] on the basis of Deliberative Process Privilege and listed on their most recent privilege log." *See* (Doc. 168-4, p. 2) The State Defendants shall comply with this order within 21 days of service.

DATED this 20th day of April, 2021.

Leslie A. Bowman

Leslie A. Bowman
United States Magistrate Judge

EXHIBIT G

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, D/B/A University of Arizona, a governmental body of the State of Arizona; et al.,

Defendants.

Case No.19-cv-00035-TUC-RM (LAB)

JOINT STATUS REPORT

Having met and conferred on September 29, 2020, the parties submit this Joint Report per Federal Rule of Civil Procedure 26(f) and the Court's order of August 14, 2020 (Doc. 114). The following numbered brief statements track those matters that the Court laid out in its order. *Id.*

1. Nature of the case.

Plaintiffs' Position:

Dr. Toomey is a man who is transgender, which means that he has a male gender identity, but the sex assigned to him at birth was female. Being transgender is not a mental disorder, but transgender men and women may require treatment for "gender dysphoria," which is the diagnostic term for the clinically significant distress experienced as a result of the incongruence of one's gender with their assigned sex and the physiological developments associated with that sex. The widely accepted standards of care for treating gender dysphoria are published by the World Professional Association for Transgender Health ("WPATH"). Under the WPATH standards, medically necessary treatment for gender dysphoria may require medical steps to affirm one's gender identity and transition from living as one gender to another. This treatment, often referred to as gender-affirming care or transition-related care, may include hormone therapy, surgery (sometimes called "sex reassignment surgery" or "transition related surgery"), and other medical services that align individuals' bodies with their gender identities.

In accordance with the WPATH Standards of Care, Dr. Toomey's treating physicians have recommended that he receive a hysterectomy as a medically necessary treatment for gender dysphoria. Transition-related surgical care is routinely covered by private insurance programs and recognized as medically necessary by every major medical organization in the United States to consider the question. No major medical organization has taken the position that transition-related care categorically is not medically necessary or advocated in favor of a categorical ban on insurance coverage for transition-related procedures.

Dr. Toomey's healthcare coverage is provided and paid for by the State of Arizona through a self-funded health insurance plan ("the Plan"). The Plan generally provides

coverage for medically necessary care, subject to certain exclusions. In the event that the Plan denies coverage for a treatment based on purported lack of medical necessity, the Plan provides a right to appeal the decision to an independent reviewer at the third-party claims administrator and, if necessary, to further appeal to an external independent review organization.

The Plan does not apply these generally applicable standards and procedures for evaluating medical necessity for surgical care for gender dysphoria. Instead, the Plan categorically denies all coverage for "[g]ender reassignment surgery" regardless of whether the surgery qualifies as medically necessary. All four of the health insurance companies who serve as Network Providers for the Plan have adopted internal policies and standards for determining when transition-related surgery for gender dysphoria is medically necessary and, thus, covered. But, as a result of the Plan's "gender reassignment surgery" exclusion, the Network Providers do not apply those internal policies and standards when administering the Plan to Arizona State employees and, instead, automatically deny coverage of transition-related surgery.

As a result of the Plan's categorical exclusion for "gender reassignment surgery," Dr. Toomey was denied preauthorization for a hysterectomy on August 10, 2018. The denial was based solely on the Plan's exclusion for "gender reassignment surgery." Dr. Toomey alleges that the "gender reassignment surgery" exclusion facially discriminates on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. Both claims have been certified as class actions for injunctive relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. For the Title VII claim, the Class consists of: "Current and future individuals (including Arizona State employees and their dependents), who are or will be enrolled in the self-funded Plan controlled by the Arizona Department of Administration, and who have or will have medical claims for transition-related surgical care." For the equal protection claim, the Class consists of: "Current and future employees of the Arizona Board of Regents who are or will be enrolled in the self-funded Plan controlled by the Arizona Department of Administration,

and who have or will have medical claims for transition related surgical care."

On behalf of himself and the certified Classes, Dr. Toomey seeks a declaration that the "gender reassignment surgery" exclusion violates Title VII and the Equal Protection Clause; a permanent injunction prohibiting Defendants from enforcing the "gender reassignment surgery" to exclude coverage for gender affirming surgery that would otherwise be recognized as medically necessary pursuant to the Plan's generally applicable standards and procedures; attorney's fees; and such other relief that the Court deems just and proper.

The State of Arizona's, Paul Shannon's, and Andy Tobin's (collectively, the "State Defendants") Position:

Dr. Toomey is a man who is transgender, which means that he identifies as having a male gender but was born female—the sex assigned to him at birth. Transgender men and women may require treatment for "gender dysphoria," which is a term that describes the feeling of discomfort or distress that might occur in people whose gender identity differs from their sex assigned at birth or sex-related physical characteristics. Transgender people might experience gender dysphoria at some point in their lives but not everyone is affected. Some transgender people feel at ease with their bodies, either with or without medical intervention. That is, not all transgender individuals feel significant distress, and not all require treatment.

Some entities, including the World Professional Association for Transgender Health ("WPATH"), have published standards of care for gender dysphoria. Treatments for gender dysphoria may include hormone therapy, surgery (sometimes called "sex reassignment surgery" or "transition related surgery"), and other medical services that align and individual's body to the individual's gender identity.

Dr. Toomey receives healthcare coverage through a self-funded health plan ("Plan") provided by the State of Arizona through the Arizona Department of Administration ("ADOA"). Under the Plan, a covered service is one that is *both* medically necessary and eligible for payment under the Plan. Thus, coverage can be denied *either* because a service is not medically necessary *or* because it is an excluded service (regardless of whether it is

medically necessary). Further, not all services, treatments, and procedures deemed medically necessary by a clinician are covered under the Plan. The Plan identifies fifty-three surgical procedures, treatments, and other medical services that are excluded from coverage. One such exclusion is for "[g]ender reassignment surgery." Each of these exclusions applies regardless of the employee's gender or sex. In the event that the Plan denies coverage for a treatment (either because it is not medically necessary or is excluded), the Plan provides a right to appeal the denial to an independent reviewer at the third-party claims administrator and, if necessary, to further appeal to an external independent review organization. As part of that process, the Plan allows Participants to appeal a denial the Participant believes is contrary to law.

Dr. Toomey's treating physicians recommended that he receive a hysterectomy as a medically-necessary treatment for gender dysphoria. Dr. Toomey was denied preauthorization for the surgery on August 10, 2018. The denial was based on the Plan's exclusion for "gender reassignment surgery"—a procedure health plans are not required to cover. Dr. Toomey did not follow the appeal process, as described in the Plan, to challenge this decision.

Dr. Toomey alleges that the "gender reassignment surgery" exclusion discriminates based on his status as a transgender man in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. Both claims have been certified as class actions for injunctive relief. On behalf of himself and the certified classes, Dr. Toomey seeks a declaration that the "gender reassignment surgery" exclusion violates Title VII and the Equal Protection Clause; a permanent injunction prohibiting Defendants from enforcing the "gender reassignment surgery" exclusion and begin coverage for gender affirming surgery that would otherwise be recognized as medically necessary pursuant to the Plan's generally applicable standards and procedures; attorneys' fees; and such other relief that the Court deems just and proper. If the Court finds that the Plan's exclusion for gender reassignment surgery violates Title VII or the Equal Protection Clause of the Fourteenth Amendment or orders a permanent or preliminary injunction prohibiting

Defendants from enforcing the exclusion, then the Plan will need to determine on a case-by-case basis, including Dr. Toomey's case, whether a claim for gender reassignment surgery is medically necessary and thus covered by the Plan.

The State Defendants assert that the Plan's exclusion violates neither Title VII or the Equal Protection Clause, and that Dr. Toomey's requested relief should be denied.

Violations of Title VII

Plaintiffs' Position: Dr. Toomey, on behalf of the certified class, brings a claim for violations of Title VII of the Civil Rights Act of 1964 against the State of Arizona and the Arizona Board of Regents. The State of Arizona and the Arizona Board of Regents are employers as that term is defined in Title VII, 42 U.S.C. § 2000e-(a) and (b). An employer-sponsored health plan is part of the "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(l).

The employer-sponsored health plan provided by the State of Arizona and the Arizona Board of Regents facially discriminates based on transgender status and gender nonconformity by categorically excluding coverage for all medically necessary "gender reassignment surger[ies]." The "gender reassignment surgery" exclusion discriminates because of sex because an employee's sex assigned at birth is a but-for cause of their transgender status and their need for surgery to treat gender dysphoria. The "gender reassignment surgery" exclusion also facially discriminates against employees by explicitly excluding medically necessary surgery because the surgery is performed for the gender-nonconforming purpose of gender transition.

By providing a facially discriminatory employer-sponsored health plan, the State of Arizona and the Arizona Board of Regents have unlawfully discriminated—and continue to unlawfully discriminate—against Dr. Toomey and members of the proposed class "with respect to [their] compensation, terms, conditions, or privileges of employment, because of . . . sex." 42 U.S.C. § 2000e-2(a)(l).

Title VII does not provide a "cost justification defense" for employers offering facially discriminatory insurance policies. Defendants are not required to cover all medically

necessary surgeries, but Defendants may not adopt insurance exclusions that facially discriminate on the basis of sex.

The State Defendants' Position: The State Defendants argue that the Health Plan exclusion does not discriminate on the basis of sex, sex stereotyping, or transgender status. The Health Plan—which excludes "gender reassignment surgery" for members of both natal sexes—applies neutrally to both men and women and does not result in disparate, disadvantageous treatment of similarly-situated male or female employees. The Health Plan provides coverage for some gender transition services, including mental health counseling and hormone therapy deemed medically necessary by a clinician to treat gender dysphoria-demonstrating the Health Plan does not eliminate coverage for all gender transition treatment. Also, a medical plan is not required to cover all medically necessary procedures. Aside from certain minimum requirements, health plans have broad discretion to exclude treatments or procedures even if they are medically-necessary. Plans may exclude medically-necessary services, treatments, and procedures even if they affect one sex more than the other such as excluding coverage for breast reduction surgeries when it is medically necessary. *See* e.g., *Martin v. Masco Indus. Employees' Benefit Plan*, 747 F. Supp 1150, 1151 (W.D. Pa 1990). The gender reassignment surgery exclusion is just one of many exclusions in the Health Plan-all of which apply to various individuals regardless of medical necessity or sex of the health plan participant or beneficiary. Thus, there has been no violation of Title VII.

The Arizona Board of Regents', Fred Duval's, Jay Heiler's, Ram Krishna's, Lyndel Manson's, Larry Penley's, Bill Ridenour's, Karrin Taylor Robson's, Ron Shoopman's (collectively, "ABOR") Position: Arizona law requires ABOR to "accept the benefit level, plan design, insurance providers, premium level and other terms and conditions determined by" the State Defendants. A.R.S. § 38-656(E); *see also* A.R.S. § 38-656(B) (providing that, when ABOR participates in the State Defendants' health insurance, the State Defendants' plan "shall be the only health . . . insurance coverage offered to" ABOR's employees). As such, ABOR argues that it has not had and does not have the

reasonable authority to independently offer the coverage outside the Plan or to remove the Plan exclusion requested by Plaintiff.

ABOR has, however, consistently urged the State Defendants to remove the types of coverage exclusions at issue in this case, but the State Defendants have not eliminated all of those exclusions. That decision was in the State Defendants' sole control.

ABOR does not object to the Plaintiff's requested preliminary or permanent injunctive relief against the State Defendants. ABOR also does not object to the requested preliminary or permanent injunctive relief against it so long as the injunction (1) is entered contemporaneously with and is no greater than the injunction entered against the State Defendants, and (2) is not entered against the individually named Regents because the injunction entered against ABOR would apply to them under Federal Rule of Civil Procedure 65(d)(2)(B) and because the Regents are predictably subject to change.

Violations of the Equal Protection Clause

Plaintiffs' Position: Dr. Toomey, on behalf of the certified class, brings a claim for violations of the Equal Protection Clause of the Fourteenth Amendment against the individual members of the Board of Regents and against Andy Tobin, Director of the Arizona Department of Administration, and Paul Shannon, Assistant Director of the Benefit Services Division of the Arizona Department of Administration.

At all relevant times, Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Shannon and Tobin have acted under color of State law. Pursuant to 42 U.S.C. § 1983, Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Shannon and Tobin are liable in their official capacities, for declaratory and injunctive relief for violations of the Equal Protection Clause.

In their official capacity as officers and members of the Arizona Board of Regents, Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, and DuVal are responsible for the terms and conditions of employment at the University of Arizona.

In his official capacity as Director of the Arizona Department of Administration, Defendant Andy Tobin is responsible for "determin[ing] the type, structure, and components

of the insurance plans made available by the Department [of Administration]." Ariz. Admin. Code R2-6-103.

In his official capacity as Acting Assistant Director of Benefit Services Division of the Arizona Department of Administration, Defendant Paul Shannon has direct oversight and responsibility for administering the benefits insurance programs for State employees, including employees of the Arizona Board of Regents.

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Arizona State employees are protected by the Equal Protection Clause. The employer-sponsored health plan provided by the State of Arizona and the Arizona Board of Regents facially discriminates based on sex and transgender status by categorically excluding coverage for all medically necessary "gender reassignment surgery."

Discrimination based on sex and transgender status is subject to heightened scrutiny under the Equal Protection Clause and must be substantially related to an important governmental interest. Under Ninth Circuit precedent, discrimination based on sex and transgender status is subject to heightened scrutiny under the Equal Protection Clause and must be substantially related to an important governmental interest. *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019).

Because medical transition from one sex to another inherently transgresses gender stereotypes, denying medically necessary coverage for based on whether surgery is performed for purposes of "gender reassignment" constitutes impermissible discrimination based on gender nonconformity.

Because the need to undergo gender transition is a defining aspect of transgender status, discrimination based on gender transition is discrimination against transgender individuals as a class.

The "gender reassignment surgery" exclusion is not substantially related to a legitimate governmental interest in controlling costs because the Supreme Court has held that concerns about costs are insufficient to justify gender-based discrimination in the

distribution of employment-related benefits under heightened scrutiny.

The "gender reassignment surgery" exclusion is not even rationally related to a legitimate governmental interest in controlling costs because it arbitrarily distinguishes between similarly situated groups based on animus, sex stereotypes, and moral disapproval.

State Defendants' Position: State Defendants argue that the Health Plan does not target transgender persons. The gender reassignment surgery exclusion is one of many different exclusions in the Health Plan that apply to various individuals (both transgender and cisgender) regardless of medical necessity. Further, transgender individuals are covered under the Health Plan, and they receive coverage for medically necessary treatments in the vast majority of cases. All persons-transgender and cisgender-are subject to numerous exclusions for various treatments, procedures, or surgery that may be "medically necessary." Further, the Health Plan provides coverage for some gender transition services, including mental health counseling and hormone therapy deemed medically necessary by a clinician. The Health Plan does not eliminate coverage for all gender transition treatment. Further, numerous courts have held that transgender persons are not a suspect or quasi-suspect class, and as a result, applied the rational basis test to classifications based on transgender status. The Supreme Court of the United States' recent decision in *Bostock v. Clayton Cty., Georgia* , ___ U.S. ___, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) does not change this. In *Karnoski v. Trump*, the Ninth Circuit Court of Appeals did not find that transgender persons are a suspect or quasi-suspect class. 926 F.3d 1180, 1200-01 (9th Cir. 2019). The court in *Karnoski* applied a level of scrutiny greater than a rational basis test because the policy at issue was facially discriminatory, which is not the case here. *Id*. at 1200. It is the State Defendants' position that Plaintiff cannot overcome a strong presumption of validity that the exclusion does not bear a rational relation to a legitimate state purpose.

ABOR's Position: ABOR incorporates here its position on the Title VII issue above, which is directly applicable to Dr. Toomey's legal arguments on the Equal Protection claims against ABOR.

2. Factual and legal issues genuinely in dispute, and whether they can be narrowed by stipulation or motion.

Whether the "gender reassignment surgery" exclusion discriminates against employees because of sex, in violation of Title VII.

Whether the "gender reassignment surgery" exclusion discriminates against beneficiaries on the basis of sex under the Equal Protection Clause.

Whether the "gender reassignment surgery" exclusion discriminates against beneficiaries on the basis of transgender status under the Equal Protection Clause.

Whether discrimination against transgender individuals is subject to heightened scrutiny under the Equal Protection Clause.

Whether the "gender reassignment surgery" exclusion is substantially related to an important governmental interest. The parties have narrowed the issues in this dispute by agreeing that the medical necessity of gender affirming surgery will not be an issue in this case. That is, if it is determined that the exclusion violates Title VII or the Equal Protection Clause of the Fourteenth Amendment, the Plan will then need to determine medical necessity on case by case basis. However, the State Defendants, by agreeing with this stipulation, do not concede that Plaintiff's requested procedure (or those that other members of the Classes may request) is medically necessary. The parties may also be able to narrow the issues in dispute by stipulating that the only governmental interest relied upon by State Defendants is an interest in controlling costs.

Whether the "gender reassignment surgery" exclusion is rationally related to a legitimate governmental interest. The parties may also be able to narrow the issues in dispute by stipulating that only governmental interest relied upon by State Defendants is an interest in controlling costs.

Whether the decision to exclude gender reassignment surgery in the Health Care Plan was actually motivated by a legitimate governmental interest.

3. Jurisdictional basis of the case.

Plaintiff asserts that the Court has jurisdiction over this action per 28 U.S.C. §1331

because it arises under the Constitution of the United States.

4. Parties not yet served, and parties that have not filed an answer or other appearance.

All parties have been served and/or Defendants do not contest service at this time. All parties have filed an answer.

5. Names of parties not subject to the Court's jurisdiction.

Defendants do not contest the Court's personal jurisdiction at this time.

6. **Dispositive or partially dispositive issues to be decided by pretrial motions, and legal issues about which pretrial motions are contemplated.**

Plaintiffs filed a Motion for Preliminary Injunction which has been fully briefed by the parties. The parties anticipate filing cross-motions for summary judgment at the close of discovery.

7. Whether the case is suitable for reference to arbitration, to a special master, or a United States Magistrate Judge.

The parties do not consent to referring the case to arbitration, a special master, or a United States Magistrate Judge.

8. The status of related cases.

The plaintiffs in *D.H., et al. v. Snyder,* No. 4:20-cv-00335-TUC-SHR, filed a Motion to Transfer Case to Judge Rosemary Marquez on August 11, 2020. (Doc. 113). That case challenges a categorical exclusion for "gender reassignment surgery" in Arizona's Medicaid program for minors. The Court denied that motion on October 20, 2020.

9. Statement of the parties' compliance with the discovery requirements of the Mandatory Initial Discovery Pilot Project.

The parties have exchanged initial disclosures and document productions consistent with the Mandatory Initial Discovery Pilot Program.

Plaintiff served the parties with his initial discovery responses on April 17, 2019, and his amended initial discovery responses on March 26, 2020.

Defendant ABOR served the parties with their initial disclosures on April 17, 2019. Defendant ABOR then served the parties with a total of six supplemental disclosures on the

following dates: April 22, 2019, May 29, 2019, July 9, 2019, April 17, 2020, June 10, 2020, and July 15, 2020.

State Defendants served the parties with their initial disclosures on February 5, 2020, and their First Amended Mandatory Initial Discovery Responses on September 28, 2020.

10. Suggested changes, if any, in the limitations on discovery imposed by the Local Rules and the Federal Rules of Civil Procedure.

None.

11. Proposed deadlines for:

EVENT	DEADLINE
Filing motions to amend the complaint and to join additional parties	**NOVEMBER 30, 2020**
Pretrial disclosure of lay witnesses, expert witnesses, and expert testimony	**DECEMBER 21, 2020; FEBRUARY 1, 2021; MARCH 15, 2021 (RESPECTIVELY)**
Completing discovery	**MAY 3, 2021**
Filing of dispositive motions	**JUNE 7, 2021**
Lodging proposed joint pretrial order	**Within 30 days after resolution of the dispositive motion; if no dispositive motion is filed then July 5, 2021.**
Filing a joint letter to the Court concerning the status of settlement discussions	**Plaintiffs propose that the parties will meet and confer regarding the timing of this deadline, and propose dates prior to the close of fact discovery.**

12. Estimated date and length of trial.

Plaintiffs propose that the parties will meet and confer regarding these deadlines and requirements and submit proposed dates prior to the close of fact discovery. The parties anticipate the trial length to be no longer than two weeks in duration.

13. Whether a jury trial has been requested.

A jury trial has not been requested.

14. The prospects for settlement, including any request to have a settlement conference before a United States Magistrate Judge.

The parties do not think a settlement conference would be productive at this stage

of the case, but may request a settlement conference after the Court rules on Plaintiff's Motion for a Preliminary Injunction.

15. Whether any unusual, difficult, or complex problems or issues exist that would require this case to be placed on the complex track for case management purposes.

The parties do not believe this case poses any unusual, difficult, or complex problems that would merit the case being placed on the complex track for case management purposes.

16. Any other matters that the parties feel will aid the Court in expediting the disposition of this matter efficiently.

None at this time.

Respectfully submitted this 23rd day of October, 2020.

ACLU FOUNDATION OF ARIZONA
By */s/ Christine K. Wee*
Christine K. Wee

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

/s/ Christine K. Wee
Christine K. Wee

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

vs.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as Chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as member of the Arizona Board of Regents; **Lyndel Manson**, in her capacity as member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her capacity as member of the Arizona Board of Regents; **Jay Heiler**, in his capacity as member of the Arizona Board of Regents; **Fred Duval**, in his capacity as member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Service Division of the Arizona Department of Administration,

Defendants.

Case No. CV 19-0035-TUC-RM (LAB)

STIPULATED PROTECTIVE ORDER

The Court recognizes that many of the documents and much of the information ("Materials" as defined herein) being sought through discovery in the above-captioned action are normally kept confidential by the parties. The Materials to be exchanged throughout the course of the litigation between the parties may contain trade secret or other confidential research, development, commercial, or highly personal information, as is contemplated by

Federal Rule of Civil Procedure 26(c)(1)(G). Additionally, the Materials to be exchanged throughout the course of the litigation between the parties may contain Protected Health Information ("PHI"), as that term is defined in 45 C.F.R. § 160.103, of Plaintiff and other Plan beneficiaries, which should be produced subjected to the provisions of the Health Insurance Portability and Accountability Act of 1996, codified primarily at 18, 26 & 42 U.S.C. (2003) ("HIPAA"). The parties have agreed to be bound by the terms of this Protective Order ("Order") in this action to facilitate the document production and disclosure and protect the respective interests of the parties in their trade secrets, confidential, and/or highly personal information. This Order shall remain in effect unless modified pursuant to the terms contained in this Order.

IT IS THEREFORE ORDERED THAT,

The following Definitions shall apply in this Order:

A. The term "Confidential Information" will mean and include information contained or disclosed in any materials, including documents, portions of documents, answers to interrogatories, responses to requests for admissions, trial testimony, deposition testimony, and transcripts of trial testimony and depositions, including data, summaries, and compilations derived therefrom that is deemed to be Confidential Information by any party to which it belongs.

B. The term "Materials" will include, but is not be limited to: documents; correspondence; memoranda; financial information; email; specifications; marketing plans; marketing budgets; customer information; materials that identify customers or potential customers; price lists or schedules or other matter identifying pricing; minutes; letters; statements; cancelled checks; contracts; invoices; drafts; books of account; worksheets; forecasts; notes of conversations; desk diaries; appointment books; expense accounts; recordings; photographs; motion pictures; sketches; drawings; notes of discussions with third parties; other notes; business reports; instructions; disclosures; other writings; records of website development; and internet archives.

C. The term "Counsel" will mean counsel of record, and other attorneys,

paralegals, secretaries, and other support staff employed in the following parties:

- ACLU Foundation of Arizona;
- American Civil Liberties Union;
- Fennemore Craig, P.C.;
- Perkins Coie LLP;
- Willkie Farr & Gallagher LLP; and
- The Arizona Department of Administration.

The following provisions shall apply in this litigation:

1. Each party to this litigation may disclose PHI without the written authorization of the individual whose PHI is disclosed in accordance with 45 CFR § 164.512(e), which allows for disclosure of such information in the course of a judicial proceeding in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of the court, if the parties enter into a qualified protective order that meets the requirements of 45 CFR § 164.512(e)(1)(v).

2. Each party to this litigation that produces or discloses any Materials, answers to interrogatories, responses to requests for admission, trial testimony, deposition testimony, and transcripts of trial testimony and depositions, or information that the producing party believes should be subject to this Protective Order may designate the same as "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY."

(a) Designation as "CONFIDENTIAL": Any party may designate information as "CONFIDENTIAL" only if, in the good faith belief of such party and its Counsel, the unrestricted disclosure of such information could be harmful to the business or operations of such party or the information consists of PHI.

(b) Designation as "CONFIDENTIAL – FOR COUNSEL ONLY": Any party may designate information as "CONFIDENTIAL – FOR COUNSEL ONLY" only if, in the good faith belief of such party and its Counsel, the information is among that considered to be most sensitive

by the party, including but not limited to trade secret or other confidential research, development, financial, personal, medical, customer related data or other commercial information.

3. In the event the producing party elects to produce Materials for inspection, no marking need be made by the producing party in advance of the initial inspection. For purposes of the initial inspection, all Materials produced will be considered as "CONFIDENTIAL – FOR COUNSEL ONLY," and must be treated as such pursuant to the terms of this Order. Thereafter, upon selection of specified Materials for copying by the inspecting party, the producing party must, within a reasonable time prior to producing those Materials to the inspecting party, mark the copies of those Materials that contain Confidential Information with the appropriate confidentiality marking.

4. Whenever a deposition taken on behalf of any party involves the disclosure of Confidential Information of any party:

(a) the deposition or portions of the deposition must be designated as containing Confidential Information subject to the provisions of this Order; such designation must be made on the record whenever possible, but a party may designate portions of depositions as containing Confidential Information after transcription of the proceedings; a party will have until thirty (30) days after receipt of the deposition transcript to inform the other party or parties to the action of the portions of the transcript to be designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY."

(b) the disclosing party will have the right to exclude from attendance at the deposition, during such time as the Confidential Information is to be disclosed, any person other than the deponent, Counsel (including their staff and associates), the court reporter, and the person(s) agreed upon pursuant to paragraph 8, below; and

(c) The originals of the deposition transcripts and all copies of the deposition must bear the legend "CONFIDENTIAL" or

"CONFIDENTIAL – FOR COUNSEL ONLY," as appropriate, and the original or any copy ultimately presented to a court for filing must not be filed unless it can be accomplished under seal, identified as being subject to this Order, and protected from being opened except by order of this Court.

5. All Confidential Information designated as "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" must not be disclosed by the receiving party to anyone other than those persons designated within this Order and must be handled in the manner set forth below, and in any event, must not be used for any purpose other than in connection with this litigation, unless and until such designation is removed either by agreement of the parties, or by order of the Court.

6. Information designated "CONFIDENTIAL – FOR COUNSEL ONLY" may be viewed only by:

(a) Counsel (as defined in paragraph C, above) of the receiving party;

(b) Independent experts and stenographic and clerical employees associated with such experts. Prior to receiving any Confidential Information of the producing party, the expert must execute a copy of the "Agreement to Be Bound by Stipulated Protective Order," attached hereto as Exhibit A. Counsel for the receiving party must provide the name and curriculum vitae of the expert and a copy of the executed Exhibit A to the producing party at least five (5) business days prior to providing any Confidential Information to such expert. The producing party may object to the disclosure within the five (5) day period, in which case, the parties agree to promptly confer and use good faith to resolve any objection. If the parties are unable to resolve any objection, the objecting party may file a motion seeking a ruling regarding the disclosure with the Court within ten (10) days following the meet and confer. Counsel for the receiving party must retain executed copies of such exhibits;

(c) The Court and any Court staff and administrative personnel;

(d) Any court reporter employed in this litigation and acting in that capacity; and

(e) Any person indicated on the face of the document to be its author or co-author, or any person identified on the face of the document as one to whom a copy of such document was sent before its production in this action.

7. Information designated "CONFIDENTIAL" may be viewed only by the individuals listed in paragraph 5, above, and by the additional individuals listed below:

(a) Party principals or executives who are required to participate in policy decisions with reference to this action;

(b) Technical personnel of the parties with whom Counsel for the parties find it necessary to consult, in the discretion of such Counsel, in preparation for trial of this action; and

(c) Stenographic and clerical employees associated with the individuals identified above.

8. All information that has been designated as "CONFIDENTIAL – FOR COUNSEL ONLY" by the producing or disclosing party, and any and all reproductions of that information, must be retained in the custody of the Counsel for the receiving party, except that independent experts authorized to view such information under the terms of this Order may retain custody of copies such as are necessary for their participation in this litigation, but only during the course of this litigation. The principals, employees or other agents of the parties who received information prior to and apart from this litigation that was subsequently disclosed in this litigation as being either "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" may also retain copies of that information as is necessary for use in their respective businesses.

9. Before any Materials produced in discovery, answers to interrogatories, responses to requests for admissions, deposition transcripts, or other documents which are

designated as Confidential Information are filed with the Court for any purpose, the party seeking to file such material must seek permission of the Court to file the material under seal. Nothing in this order shall be construed as automatically permitting a party to file under seal. The party seeking leave of Court shall show "compelling reasons" (where the motion is more than tangentially related to the merits of the case) or "good cause" for filing under seal. *See Ctr. For Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016). Additionally, such party seeking to file under seal shall, within the applicable deadline, file a redacted, unsealed version of any motion, response or reply if such party is waiting for a ruling from the Court on filing an unredacted, sealed version of the same document.[1] Further, no portion of the trial of the matter shall be conducted under seal.

10. Confidential Information and Materials designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" shall be used solely for the prosecution or defense of this action. A party who wishes to use Confidential Information and/or Materials designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" for a purpose other than the prosecution or defense of this action must request permission, in writing, from Counsel for the producing party. The receiving party's request must identify the Confidential Information and/or Materials designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" that the receiving party wishes to use, and identify the purpose for which it wishes to use Confidential Information and/or Materials designated "CONFIDENTIAL" or "CONFIDENTIAL –FOR COUNSEL ONLY." If the parties cannot resolve the question of whether the receiving party can use Confidential Information and/or Materials designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" for a purpose other than the prosecution or defense of this action within

[1] If a party wishes to use the opposing party's confidential designations to support or oppose a motion, the opposing party bears the burden to make the "compelling reasons" showing. In the event the party wishing to use the confidential information anticipates this scenario arising, the party shall initiate a discovery dispute conference call consistent with the terms of the Court's Rule 16 Scheduling Order at least fourteen (14) days before the due date of the filing in which the party wishes to reference the information.

fourteen (14) days of the producing party's receipt of such a request, the receiving party may move the Court for a ruling on the receiving party's request. In the event any party files a motion seeking to use Confidential Information and/or Materials designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" for a purpose other than the prosecution or defense of this action, the Confidential Information and/or Materials designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" shall be submitted to the Court, under seal, for an in-camera inspection. Any Confidential Information and/or Materials designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" at issue must be treated as Confidential Information, as designated by the producing party, until the Court has ruled on the motion or the matter has been otherwise resolved. Any Confidential Information and/or Materials containing PHI may not be used or disclosed for any purpose other than the prosecution or defense of this action.

11. At any stage of these proceedings, any party may object to a designation of Materials as Confidential Information. The party objecting to confidentiality must notify, in writing, Counsel for the producing party of the objected-to Materials and the grounds for the objection. If the dispute is not resolved consensually between the parties within fourteen (14) days of receipt of such a notice of objections, the objecting party may move the Court for a ruling on the objection. In the event any party files a motion challenging the designation or redaction of information, the document shall be submitted to the Court, under seal, for an in-camera inspection. The Materials at issue must be treated as Confidential Information, as designated by the producing party, until the Court has ruled on the objection or the matter has been otherwise resolved.

12. At any stage of these proceedings, any party may request that it be permitted to disclose Materials designated as Confidential Information to individuals not permitted by this Order to view such Materials. The party must notify, in writing, Counsel for the producing party of the identity of the relevant Materials and the individuals to whom the party wishes to disclose the Materials. If the request is not resolved consensually between the parties within fourteen (14) days of receipt of such a request, the requesting party may

move the Court for a ruling allowing such disclosure. In the event any party files a motion requesting such disclosure, the document shall be submitted to the Court, under seal, for an in-camera inspection. The Materials at issue must be treated as Confidential Information, as designated by the producing party, until the Court has ruled on the request.

13. All Confidential Information must be held in confidence by those inspecting or receiving it. To the extent the Confidential Information has not been disclosed prior to and apart from this litigation, it must be used only for purposes of this action. If the Confidential Information was exchanged between the parties prior to and apart from this litigation for purposes of conducting their respective businesses, the parties may continue to use that otherwise Confidential Information for that purpose. The parties may not distribute the Confidential Information beyond those persons or entities that had received the Confidential Information prior to this litigation. In addition, counsel for each party, and each person receiving Confidential Information, must take reasonable precautions to prevent the unauthorized or inadvertent disclosure of such information. If Confidential Information is disclosed to any person other than a person authorized by this Order, the party responsible for the unauthorized disclosure must immediately bring all pertinent acts relating to the unauthorized disclosure to the attention of the other parties and, without prejudice to any rights and remedies of the other parties, make every effort to prevent further disclosure by the party and by the person(s) receiving the unauthorized disclosure.

14. No party will be responsible to another party for disclosure of Confidential Information under this Order if the information in question is not labeled or otherwise identified as such in accordance with this Order.

15. If a party, through inadvertence, produces any Confidential Information without labeling or marking or otherwise designating it as such in accordance with this Order, the producing party may give written notice to the receiving party that the Materials produced are deemed Confidential Information, and that the Materials produced should be treated as such in accordance with that designation under this Order. The receiving party must treat the Materials as confidential, once the producing party so notifies the receiving

party. If the receiving party has disclosed the Materials before receiving the designation, the receiving party must notify the producing party in writing of each such disclosure. Counsel for the parties will agree on a mutually acceptable manner of labeling or marking the inadvertently produced Materials as "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" – SUBJECT TO PROTECTIVE ORDER.

16. Nothing within this Order will prejudice the right of any party to object to the production of any discovery material on the grounds that the material is protected as privileged or as attorney work product.

17. Nothing in this Order will bar Counsel from rendering advice to their clients with respect to this litigation and, in the course thereof, relying upon any information designated as Confidential Information, provided that the contents of the information must not be disclosed.

18. This Order will be without prejudice to the right of any party to oppose production of any information for lack of relevance or any other ground other than the mere presence of Confidential Information. The existence of this Order must not be used by either party as a basis for discovery that is otherwise improper under the Federal Rules of Civil Procedure.

19. Information designated Confidential pursuant to this Order also may be disclosed if: (a) the party or non-party making the designation consents to such disclosure; (b) the Court, after notice to all affected persons, allows such disclosure; or (c) the party to whom Confidential Information has been produced thereafter becomes obligated to disclose the information in response to a lawful subpoena, provided that the subpoenaed party gives prompt notice to Counsel for the party which made the designation, and permits Counsel for that party sufficient time to intervene and seek judicial protection from the enforcement of this subpoena and/or entry of an appropriate protective order in the action in which the subpoena was issued.

20. Nothing in this Confidentiality Order shall limit any producing party's use of its own documents or shall prevent any producing party from disclosing its own Confidential

Information to any person. Such disclosures shall not affect any confidential designation made pursuant to the terms of this Order so long as the disclosure is made in a manner which is reasonably calculated to maintain the confidentiality of the information. Nothing in this Order shall prevent or otherwise restrict Counsel from rendering advice to their clients, and in the course thereof, relying on examination of stamped confidential information.

21. Within thirty (30) days of the final termination of this action, including any and all appeals, each party must purge all Confidential Information from all machine-readable media on which it resides and must either (a) return all Confidential Information to the party that produced the information, including any copies, excerpts, and summaries of that information, or (b) destroy same. With respect to paper copies, return or destruction of Confidential Information is at the option of the producing party. Notwithstanding the foregoing, Counsel for each party may retain all Confidential Information, provided that any documents containing Confidential Information are marked as subject to this Order, and will continue to be bound by this Order with respect to all such retained information, after the conclusion of this litigation. Further, attorney work product Materials that contain Confidential Information need not be destroyed, but, if they are not destroyed, the person in possession of the attorney work product will continue to be bound by this Order with respect to all such retained information, after the conclusion of this litigation.

22. The restrictions and obligations set forth within this Order will not apply to any information that: (a) the parties agree should not be designated Confidential Information; (b) the parties agree, or the Court rules, is already public knowledge; or (c) the parties agree, or the Court rules, has become public knowledge other than as a result of disclosure by the receiving party, its employees, or its agents, in violation of this Order.

23. Any party may designate as "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" any Materials that were produced during the course of this action without such designation before the effective date of this Order, as follows:

(a) Parties to this action may designate such Materials by sending written notice of such designation, accompanied by copies of the designated

Materials bearing the appropriate legend of "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" to all other parties in possession or custody of such previously undesignated Materials. Any party receiving such notice and copies of designated Materials pursuant to this subparagraph shall return to the producing party all undesignated copies of such Materials in its custody or possession, or shall affix the appropriate legend to all copies of the designated Materials in its custody or possession.

(b) Upon notice of designation pursuant to this paragraph, parties shall also: (i) make no disclosure of such designated Materials or information contained therein except as allowed under this Order; and (ii) take reasonable steps to notify any persons known to have possession of such designated Materials or information of the effect of such designation under this Order.

(c) All such designations must be made within thirty (30) days of the date of this Order.

24. Transmission by e-mail or facsimile is acceptable for all notification purposes within this Order.

25. This Order may be modified by agreement of the parties, subject to approval by the Court.

26. The Court may modify the terms and conditions of this Order for good cause, or in the interest of justice, or on its own order at any time in these proceedings.

27. After termination of this action, the provisions of this Order shall continue to be binding, except with respect to those documents and information that became a matter of public record. This Court retains and shall have continuing jurisdiction over the parties and recipients of Confidential Information and Materials designated as confidential for enforcement of the provisions of this Order following termination of this litigation.

28. Entering into, agreeing to, and/or producing or receiving documents designated

as "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" or otherwise complying with the terms of this Order shall not constitute an admission or adjudication by any party that any particular document designated as Confidential Information is private, confidential, or proprietary information warranting protection.

SO STIPULATED.

Dated: March 5, 2021

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SO ORDERED.

Dated this 5th day of March, 2021.

Leslie A. Bowman
United States Magistrate Judge

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

vs.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as Chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as member of the Arizona Board of Regents; **Lyndel Manson**, in her capacity as member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her capacity as member of the Arizona Board of Regents; **Jay Heiler**, in his capacity as member of the Arizona Board of Regents; **Fred Duval**, in his capacity as member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Service Division of the Arizona Department of Administration,

Defendants.

Case No. CV 19-0035-TUC-RM (LAB)

AGREEMENT TO BE BOUND STIPULATED PROTECTIVE ORDER

Date:
Time:
Dept:
Judge:

I, _____, declare and say that:

1. I am employed as_____

By

_____

2. I have read the Stipulated Protective Order (the "Order") entered in _____ and have received a copy of the Order.

3. I promise that I will use any and all "Confidential" or "Confidential – For Counsel Only" information, as defined in the Order, given to me only in a manner authorized by the Order, and only to assist Counsel in the litigation of this matter.

4. I promise that I will not disclose or discuss such "Confidential" or "Confidential – For Counsel Only" information with anyone other than the persons described in paragraphs 3, 8 and 9 of the Order.

5. I acknowledge that, by signing this agreement, I am subjecting myself to the jurisdiction of the United States District Court for the District of Arizona with respect to the enforcement of the Order.

6. I understand that any disclosure or use of "Confidential" or "Confidential – For Counsel Only" information in any manner contrary to the provisions of the Protective Order may subject me to sanctions for contempt of court.

7. I will return all "Confidential" or "Confidential – For Counsel Only" Materials (as defined in the Order) to the attorney who provided it to me, upon request of that attorney, and will confirm in writing to the requesting attorney that I have done so. I shall not retain any copies of said Materials or any information contained within "Confidential" or "Confidential – For Counsel Only" Materials.

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

Date: _____ _____

Signature