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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,
Plaintiff,
v.

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

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

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

1 Division of the Arizona Department of
2 Administration,

3
4 Defendants.

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

9 **INTRODUCTION**

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

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

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

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

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

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

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

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

23 **Answer to Paragraph 4: The State Defendants admit the Plan defines a**
24 **“Covered Service” as “a service which is Medically Necessary and eligible for**
25 **payment under the Plan” (Article 17). The State Defendants further admit the Plan**
26 **contains “Exclusions and General Limitations” (Section 10.1) which exclude**
27 **numerous “Services and Supplies” from coverage regardless of “Medical Necessity,”**
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1 and one of those exclusions is “Gender reassignment surgery.” The State Defendants
2 lack sufficient knowledge or information to admit or deny the allegations that
3 Plaintiff is a man who is transgender and currently employed as an Associate
4 Professor at the University of Arizona, and therefore the State Defendants deny
5 those allegations. The State Defendants deny the remaining allegations in Paragraph
6 4 of the Complaint.

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

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

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

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

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

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

23 8. Dr. Toomey brings this Amended Complaint on behalf of himself and a
24 proposed class of similarly situated individuals for declaratory and injunctive relief
25 requiring Defendants to remove the Plan’s categorical exclusion of coverage for “[g]ender
26 reassignment surgery” and evaluate whether transgender individuals’ surgical care for
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1 gender dysphoria is “medically necessary” in accordance with the Plan’s generally
2 applicable standards and procedures.

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

8 JURISDICTION AND VENUE

9 9. This action arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C.
10 § 2000e *et seq.* (“Title VII”), the Constitution of the United States, and 42 U.S.C. § 1983.

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

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

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

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

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

24 12. Venue lies with this Court pursuant to 42 U.S.C. § 2000e-5(f)(3) because
25 the unlawful employment practice was committed in the State of Arizona.
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1 **Answer to Paragraph 17: Upon information and belief, the State Defendants**
2 **admit the allegations in Paragraph 17 of the Complaint.**

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

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

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

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

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

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

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

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

26 **EXHAUSTION OF ADMINSTRATIVE REQUIREMENTS**
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1 **lack sufficient knowledge or information to admit or deny the specific definitions**
2 **and allegations contained in Paragraph 24 of the Complaint, and therefore deny**
3 **them.**

4 25. Transgender men are men who were assigned “female” at birth, but have a
5 male gender identity. Transgender women are women who were assigned “male” at birth,
6 but have a female gender identity.

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

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

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

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

24 **Answer to Paragraph 27: The State Defendants state the DSM-V manual**
25 **speaks for itself. The State Defendants further state that “gender dysphoria” is**
26 **defined in DSM-V (p. 451) as “the distress that may accompany the incongruence**
27 **between one’s experienced or expressed gender and one’s assigned gender.” The**
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1 State Defendants lack sufficient knowledge or information to admit or deny the
2 remaining allegations identified in Paragraph 27 of the Complaint, and therefore
3 deny them.

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

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

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

23 **Answer to Paragraph 29: The State Defendants state the WPATH “Standards**
24 **of Care” document speaks for itself. The State Defendants further state WPATH**
25 **has several versions of “Standards of Care,” and it is unknown which version**
26 **Plaintiff is referencing in Paragraph 29 of the Complaint. The State Defendants lack**
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1 **sufficient knowledge or information to admit or deny the remaining allegations**
2 **identified in Paragraph 29 of the Complaint, and therefore deny them.**

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

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

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

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

27 **The Self-Funded Health Plan’s “Gender Reassignment” Exclusion**
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1 32. Dr. Toomey’s healthcare coverage is provided and paid for by the State of
2 Arizona through the Plan.

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

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

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

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

22 **Answer to Paragraph 34: The State Defendants admit the Plan provides**
23 **coverage for some services, supplies, and prescriptions that are medically necessary,**
24 **and the Plan defines “Medically Necessary/Medical Necessity” as “services, supplies**
25 **and prescriptions, meeting all of the following criteria: 1. Ordered by a physician; 2.**
26 **Not more extensive than required to meet the basic health needs; 3. Consistent with**
27 **the diagnosis of the condition for which they are being utilized; 4. Consistent in type,**
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1 frequency and duration of treatment with scientifically based guidelines by the
2 medical-scientific community in the United States of America; 5. Required for
3 purposes other than the comfort and convenience of the patient or provider; 6.
4 Rendered in the least intensive setting that is appropriate for their delivery; and 7.
5 Have demonstrated medical value.” The State Defendants deny the remaining
6 allegations in Paragraph 34 of the Complaint.

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

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

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

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

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

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

15 **Dr. Toomey’s medically necessary treatment for gender dysphoria**

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

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

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

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

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

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

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

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

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

22 **Answer to Paragraph 42: The State Defendants state the Aetna, Blue Cross**
23 **Blue Shield of Arizona, Cigna, and United Healthcare documents attached as**
24 **Exhibits C-F to the Complaint speak for themselves. The State Defendants further**
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26 ¹ Those criteria are: (a) Two referral letters from qualified mental health professionals; (b) Persistent, well documented
27 gender dysphoria; (c) Capacity to make a fully informed decision and to consent for treatment; (d) Age of majority in
28 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)

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

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

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

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

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

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

22
23 [W]e cannot approve this request because the laparoscopic total
24 hysterectomy with removal of tubes and ovaries surgery, for your diagnosis
25 of transsexualism and gender identity disorder is considered a gender
26 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:

27 10.1 Exclusions and General Limitations
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“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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 64. By providing a facially discriminatory employer-sponsored health plan, the
25 State of Arizona and the Arizona Board of Regents have unlawfully discriminated—and
26 continue to unlawfully discriminate—against Dr. Toomey and members of the proposed
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1 class “with respect to [their] compensation, terms, conditions, or privileges of
2 employment, because of ...sex.” 42 U.S.C. § 2000e-2(a)(1).

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

5
6 **COUNT II**
7 **VIOLATION OF THE EQUAL PROTECTION CLAUSE**
8 **(Against Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson,**
9 **Heiler, DuVal, Tobin and Shannon in their official capacities)**

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

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

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

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

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

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

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

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

3 **Answer to Paragraph 68: The State Defendants admit Ariz. Admin. Code R2-
4 6-103(A) provides, “Within the limits prescribed by law, the Director shall determine
5 the type, structure, and components of the insurance plans made available by the
6 Department.” The State Defendants admit that Andy Tobin is Director of the
7 Arizona Department of Administration. The State Defendants deny the remaining
8 allegations contained Paragraph 68 of the Complaint.**

9
10 69. In his official capacity as Acting Assistant Director of Benefit Services
11 Division of the Arizona Department of Administration, Defendant Paul Shannon has
12 direct oversight and responsibility for administering the benefits insurance programs for
13 State employees, including employees of the Arizona Board of Regents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 13 a. Men and women who are transgender, as a class, have historically
14 been subject to discrimination.
- 15 b. Men and women who are transgender, as a class, have a defining
16 characteristic that bears no relation to an ability to perform or contribute to
17 society.
- 18 c. Men and women who are transgender, as a class, exhibit immutable
19 or distinguishing characteristics that define them as a discrete group.
- 20 d. Men and women who are transgender, as a class, are a minority with
21 relatively little political power.

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

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

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

1 surgical care for gender dysphoria is “medically necessary” in accordance with the Plan’s
2 generally applicable standards and procedures.

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

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

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

9 **AFFIRMATIVE DEFENSES**

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

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

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

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

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

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

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

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

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- 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

1 **CERTIFICATE OF SERVICE**

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

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