

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

**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.

....
....

1 **I. Background**

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

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

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

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

4 On September 1, 2020, Plaintiff filed the instant Motion for Preliminary
5 Injunction. (Doc. 115.) On November 30, 2020, Magistrate Judge Bowman issued an
6 R&R recommending that this Court deny the Motion for Preliminary Injunction. (Doc.
7 134.) Plaintiff and the University Defendants filed Objections to the R&R. (Docs. 135,
8 139.)

9 **II. Standard of Review**

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

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

22 **III. Motion for Preliminary Injunction**

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

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

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

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

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

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

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

9 **IV. Report and Recommendation**

10 The R&R recommends denying Plaintiff's Motion for Preliminary Injunction.
11 (Doc. 134.) The R&R finds that Plaintiff's burden of proof is heightened because he
12 seeks a mandatory injunction that would order Defendants to grant him the relief he seeks
13 in this case, and preliminary injunctive relief of that nature is generally disfavored. (*Id.* at
14 2-4.)

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

1 (*Id.* at 8-9.)

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

9 **V. University Defendants' Response to Report and Recommendation**

10 The University Defendants filed a Response to the R&R that reiterates the
11 arguments they raised in their Response to the Motion for Preliminary Injunction. (Docs.
12 139, 122.) The University Defendants indicate they do not object to the requested
13 injunctive relief as long as (1) the injunction entered against the Arizona Board of
14 Regents is no greater than the injunction entered against the State, and (2) the injunction
15 is not entered against the individually named Regents. (Doc. 139.)

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

19 **VI. Plaintiff's Objection to Report and Recommendation**

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

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

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

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

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

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

7 The State Defendants responded to Plaintiff’s Objection. (Doc. 144.) The State
8 Defendants argue first that the R&R correctly determined that Plaintiff seeks a mandatory
9 injunction that disrupts the status quo rather than a prohibitory injunction that maintains
10 the status quo, and that Plaintiff has not met the heightened standard for mandatory
11 injunctive relief. (*Id.* at 2-3 (citing *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320
12 (9th Cir. 1994)).) The State Defendants further contend that the preliminary injunctive
13 relief sought would prematurely grant the ultimate relief Plaintiff and the class members
14 seek in this litigation—that is, gender-transition surgeries being paid for by the State—
15 even if the State ultimately prevails in the litigation. (*Id.* at 3-5 (citing *Tanner Motor*
16 *Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-9 (9th Cir. 1963); *RoDa Drilling Co. v.*
17 *Siegal*, 552 F.3d 1203, 1208-9 (10th Cir. 2009)).) The State Defendants contend that
18 Plaintiff’s reliance on *Hernandez* is inapposite because Plaintiff has not demonstrated a
19 constitutional violation akin to the erroneous detention at issue in *Hernandez*. (*Id.* at 4.)

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

26 VII. Applicable Law and Analysis

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

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

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

6 “A prohibitory injunction preserves the status quo,” while a “mandatory injunction
7 goes well beyond simply maintaining the status quo pendente lite and is particularly
8 disfavored.” *Stanley*, 13 F.3d at 1320 (internal citation and quotation omitted). “When a
9 mandatory preliminary injunction is requested, the district court should deny such relief
10 unless the facts and law clearly favor the moving party.” *Id.* “[G]enerally an injunction
11 will not lie except in prohibitory form.” *Anderson v. United States*, 612 F.2d 1112, 1115
12 (9th Cir. 1979) (internal citation omitted). Mandatory injunctions “are not granted unless
13 extreme or very serious damage will result and are not issued in doubtful cases or where
14 the injury complained of is capable of compensation in damages.” *Id.* Before reaching the
15 merits of a preliminary injunction, courts consider whether the injunctive relief sought is
16 prohibitory or mandatory. *Stanley* at 1320.

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

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

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

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

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

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

1 circumstances that are not present here.

2 Accordingly,

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

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

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

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

12 Dated this 26th day of February, 2021.

13

14

15

16

17

18

19

20

21

22

23


24

25

26

27

28



Honorable Rosemary Márquez
United States District Judge