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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; **Gilbert Davidson**, in his official capacity as Interim Director of the Arizona 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.

Case No. 4:19-cv-00035-TUC-RM (LAB)

PLAINTIFF'S RESPONSE TO DEFENDANTS STATE OF ARIZONA, DAVIDSON AND SHANNON'S MOTION TO DISMISS COMPLAINT

Plaintiff hereby responds to and opposes the Motion to Dismiss ("Motion") filed by Defendants State of Arizona, Gilbert Davidson, and Paul Shannon (collectively "State

Defendants") (DE #24).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background

Transgender individuals and gender dysphoria

Gender identity is a well-established medical concept referring to one's sense of oneself as belonging to a particular gender. For transgender individuals the sense of one's gender identity differs from the sex assigned to them at birth. (Complaint, DE #1 at ¶24).

Being transgender is not a mental disorder. 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. (*Id.* at ¶27).

The World Professional Association for Transgender Health ("WPATH") publishes widely-accepted standards of care for treating gender dysphoria. Under those standards, medically necessary treatment for gender dysphoria may require steps to affirm one's gender identity and transition from living as one gender to another. This treatment may include hormone therapy, surgery and other medical services. (*Id.* at ¶28). The exact medical treatment varies as the goal is to enable an individual to live all aspects of life consistent with one's gender identity, thereby eliminating the distress associated with incongruence. (*Id.* at ¶29).

Today transition-related surgical care is routinely covered by private insurance. The American Medical Association, the American Psychological Association, the American Psychiatric Association, the American College of Obstetricians and Gynecologists and others have issued policy statements and guidelines supporting healthcare coverage for transition-related 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. (*Id.* at ¶30).

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

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. (*See* Plaintiff's Motion for Class Certification (DE #28); Declaration of Russell Toomey, pg. 3). In accordance with WPATH standards, Dr. Toomey's physicians have recommended that he receive a hysterectomy as a medically necessary treatment for gender dysphoria. (*Id*. at 4).

Dr. Toomey's healthcare coverage is provided by the State of Arizona through a state-sponsored insurance plan (the "Plan"). (*See* Complaint, DE #1 at Exhibit A, pg. 1-3). The Plan generally provides coverage for medically necessary care. (*See id.* at Exhibit A, pg.100). 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 and, if necessary, to further appeal to an external independent review organization. (*See id.* at Exhibit A pg. 69-72).

The Plan categorically denies all coverage for "[g]ender reassignment surgery" regardless medical necessity. (*See id.* Exhibit A pg. 56). Transgender individuals have no meaningful opportunity to demonstrate that their transition-related care is medically necessary as it is specifically excepted from the Plan. (*Id.* at ¶36). As a result, Dr. Toomey was denied preauthorization for a hysterectomy on August 10, 2018. (*Id.* at Exhibit G.). The denial was based solely on the Plan's exclusion for "gender reassignment surgery."

Claims for Relief

Dr. Toomey challenges the facial validity of the Plan's "gender reassignment surgery" exclusion. As alleged in the Complaint, the "gender reassignment surgery" exclusion facially violates Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. Dr. Toomey seeks injunctive and

declaratory relief. (*See generally*, Complaint at DE #1).[1]

II. The "Gender Reassignment Surgery" Exclusion Violates Title VII

A. Discrimination Based on a Person's Transgender Status and Gender Nonconformity Violates Title VII.

Under controlling Ninth Circuit precedent, discrimination "because of [a person's] transsexuality" is discrimination because of such individual's sex. *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000). The plaintiff in *Schwenk* was a transgender woman who was attacked by a male prison guard. The defendant argued that that the attack "occurred because of Schwenk's transsexuality," which—according to the defendant, "is not an element of gender but rather constitutes gender dysphoria, a psychiatric illness." *Id.* The Ninth Circuit rejected that distinction. The Ninth Circuit explained that under the Supreme Court's decision in *Price Waterhouse v. Hopkins*, "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. 228, 251 (1989) (plurality). Applying *Price Waterhouse*, the Ninth Circuit in *Schwenk* held that transgender individuals are people "whose outward behavior and inward identity do not meet social definitions" associated with the sex assigned to them at birth, *id.* at 1201, and "[d]iscrimination because one fails

[1] The Supreme Court recently granted a petition for writ of certiorari to decide "[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989)." *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, 2019 WL 1756679, at *1 (U.S. Apr. 22, 2019). That grant of certiorari does not warrant delaying a ruling on the State Defendants' motion to dismiss. Although the Supreme Court's ultimate decision may affect Dr. Toomey's Title VII claims, it will not resolve Dr. Toomey's Equal Protection claims. Moreover, delaying a ruling on the pending motion or otherwise staying proceedings in this case would impose irreparable harm on Dr. Toomey and those like him each day they are denied care.

to act in the way expected of a man or woman is forbidden under Title VII," *id.* at 1202.[2]

Schwenk thus established in the Ninth Circuit that under Title VII and similar civil rights statutes, "discrimination on the basis of transgender identity is discrimination on the basis of sex." *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017); *accord Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1012 (D. Nev. 2016) (applying *Schwenk*); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CIV.02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (same).

The Sixth, Seventh and Eleventh Circuits all agree with the Ninth Circuit. *See EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018) ("*Harris Funeral Homes*"), *pet. for cert. filed* No. 18-107 (June 24, 2018); *Whitaker*, 858 F.3d at 1051; *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011). Indeed, "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *Harris Funeral Homes*, 884 F.3d at 575.

Instead of applying the Ninth Circuit's binding precedent in *Schwenk*, the State Defendants attempt to draw a distinction between discrimination based on a person's gender nonconforming mannerisms and appearance (which, the State Defendants concede, is a form of sex discrimination) and discrimination based on a person's

[2] Although the claim in *Schwenk* was brought pursuant to the Gender Motivated Violence Act (the "GMVA"), 42 U.S.C. §13981, the Ninth Circuit held that the GMVA should be interpreted in parallel with Title VII and that "for purposes of these two acts, the terms "sex" and "gender" have become interchangeable." *Schwenk*, 204 F.3d at 1202.

transgender status (which, the State Defendants contend, is *not* sex discrimination). *See* Def.'s Mem. 10-11. That arbitrary distinction cannot be reconciled with *Schwenk*'s statement that transgender individuals are gender nonconforming in both their "outward behavior *and inward identity*." *Schwenk*, 204 F.3d at 1201 (emphasis added). As the Sixth, Seventh and Eleventh Circuits have all explained, "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker*, 858 F.3d at 1048; *accord Glenn*, 663 F.3d at 1316; *Harris Funeral Homes*, 884 F.3d at 577; *Prescott*, 265 F. Supp. 3d at 1099.

The State Defendants do not identify any court within the Ninth Circuit that has drawn a distinction between a transgender person's mannerisms and that person's transgender status. Instead, the State Defendants rely exclusively on out-of-circuit cases that adhere to a line of decision that *Schwenk* explicitly repudiated. *Schwenk* explained that before *Price Waterhouse*, the courts in *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977), *Sommers v. Budget Mktg.*, 667 F.2d 748, 750 (8th Cir. 1982), and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), had adopted a narrow construction of the term "sex" based on presumptions about legislative intent. *Schwenk* declared that "[t]he initial judicial approach taken in cases such as *Holloway* [and *Sommers*] and *Ulane* has been overruled by the logic and language of *Price Waterhouse*." *Schwenk*, 204 F.3d at 1201. All of the cases cited by the State Defendants were either decided before *Price Waterhouse* or adhere to "[t]he initial judicial approach" from *Ulane* that *Schwenk* repudiated. *Schwenk*, 204 F.3d at 1201. *See* DE #24, Motion to Dismiss, pg. 11; *Etsitty*

v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) (agreeing with *Ulane*); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 671 n.14 (W.D. Pa. 2015) ("T]his Court will follow the definition embraced by *Ulane* and its progeny.").

State Defendants also contend that sex discrimination against transgender people is implicitly excluded from Title VII because Congress passed unrelated statutes in 2009 and 2013 that explicitly protect individuals based on "gender identity." *See* DE #24, Motion to Dismiss, pg. 14 (citing 18 U.S.C. §249(a)(2) and 42 U.S.C. §13925(b)(13)(A)). But Congress's use of the term "gender identity" in different statutes passed in 2009 and 2013 says nothing about the meaning of "because of . . . sex" in a statute adopted by Congress in 1964. *United States v. O'Donnell*, 608 F.3d 546, 552 (9th Cir. 2010) ("[T]he choice of wording in the latter [statute] offers little insight into the meaning of the former."). By using the overlapping terms of "sex" and "gender identity" in statutes passed in 2009 and 2013, Congress simply "cho[se] to use both a belt and suspenders to achieve its objectives." *Harris Funeral Homes, Inc.*, 884 F.3d at 578.

Defendants also note that Congress has failed to pass several bills that would have explicitly protected transgender people from discrimination based on gender identity. This "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation," *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011), because "[c]ongressional inaction cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). *cf.*

Massachusetts, 549 U.S. at 529-30 ("That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant . . . in 1970 and 1977.").[3]

B. The "Gender Reassignment Surgery" Exclusion Facially Discriminates Based on Sex.

The "gender reassignment surgery" exclusion violates Title VII, which prohibits employers from "discriminat[ing] 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). It is well-settled that Title VII prohibits employers from providing health insurance and other fringe benefits that facially discriminate on the basis of sex. *See Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1082 (1983); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983); *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984).

In a case with strikingly similar facts, the U.S. District Court for the Western District of Wisconsin recently held that a similar exclusion in Wisconsin's state-

[3] Even if it were permissible to interpret an earlier statute based on post-enactment legislative history, "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks omitted). "[A]nother reasonable interpretation of that legislative non-history is that some Members of Congress believe that . . . the statute requires, not amendment, but only correct interpretation." *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008); *see also Harris Funeral Homes*, 884 F.3d at 578; *Whitaker*, 858 F.3d at 1047-48.

employee health plan discriminated against transgender employees on the basis of sex in violation of Title VII and the Fourteenth Amendment. *See Boyden v. Conlin*, 17-cv-264-WMC, 2018 WL 4473347 (W.D. Wis. Sept. 18, 2018). That decision is consistent with the decisions of many other district courts evaluating similar exclusions in the context of private health insurance, Medicaid programs, and prison health care policies. *See Tovar v. Essentia Health.*, No. CV 16-100 (DWF/LIB), 2018 WL 4516949, at *3 (D. Minn. Sept. 20, 2018) (plaintiff stated valid claim that exclusion in insurance plan violated Section 1557 of the Affordable Care Act); *Flack v. Wis. Dep't of Health Servs.*, No. 18-CV-309-WMC, 2018 WL 3574875, at *12-*16 (W.D. Wis. July 25, 2018) (plaintiffs granted preliminary injunction on claims that exclusion in Wisconsin Medicaid statute violated Section 1557 of the Affordable Care Act and the Equal Protection Clause); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1118–21 (N.D. Cal. 2015) (plaintiff stated valid claim that exclusion in prison healthcare policy violated Equal Protection Clause).

On its face, the Plan's "gender reassignment surgery" exclusion discriminates against transgender employees on the basis of sex. Under the exclusion, the same procedures that are covered as medically-necessary treatments for non-transgender employees are excluded from coverage when related to "gender reassignment." *See McQueen v. Brown*, No. 215CV2544JAMACP, 2018 WL 1875631, at *3 (E.D. Cal. Apr. 19, 2018), *report and recommendation adopted*, No. 215CV2544JAMACP, 2018 WL 2441713 (E.D. Cal. May 31, 2018) (upholding equal protection claim that prison discriminated by treating transgender woman's request for medically necessary

transition-related surgery differently from "a non-transgender inmate's request for medically-necessary surgery."); *Denegal v. Farrell*, No. 15-01251, 2016 WL 3648956, at *7 (E.D. Cal. July 8, 2016) (upholding equal protection claim that prison "discriminate[s] against transgender women by denying surgery (vaginoplasty) that is available to cisgender women"); *Norsworthy*, 87 F. Supp. 3d at 1120 (same).

State Defendants' "gender reassignment surgery" exclusion also facially discriminates based on sex stereotypes and gender nonconformity because a person's "transitioning status constitutes an inherently gender non-conforming trait." *Harris Funeral Homes*, 884 F.3d at 577; *accord Glenn*, 663 F.3d at 1314 (firing employee because of her "intended gender transition" is sex discrimination); *Dawson*, 2015 WL 5437101, at *3 (same). "[D]iscriminating on the basis that an individual was going to, had, or was in the process of changing their sex—or the most pronounced physical characteristics of their sex—is *still* discrimination based on sex." *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 949 (W.D. Wis. 2018).

Indeed, the "gender reassignment surgery" exclusion targets transition-related surgery precisely *because* the healthcare is being provided for a gender non-conforming purpose. By categorically excluding this coverage, State Defendants are impermissibly "insisting that [employees' anatomy] match[] the stereotype associated with their" sex assigned at birth. *Price Waterhouse*, 490 U.S. at 251. As another district court explained: "[T]he Exclusion entrenches the belief that transgender individuals must preserve the genitalia and other physical attributes of their natal sex over not just personal preference,

but specific medical and psychological recommendations to the contrary." *Boyden*, 2018 WL 4473347, at *13; *cf. Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. 02-1531, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.").

Moreover, contrary to the State Defendants' assertions (*See* DE #24, Motion to Dismiss, pg. 12), the fact that the Plan covers *some* treatments for gender dysphoria does not make the surgical exclusion facially neutral. The prison policies in *McQueen*, *Denegal*, and *Norsworthy* also provided hormone therapy for gender dysphoria, but the refusal to provide surgery still discriminated on the basis of sex. "An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis." *Norris*, 463 U.S. at 1082 n.10.

III. The "Gender Reassignment Surgery" Exclusion Violates Equal Protection.

The "gender reassignment surgery" exclusion also violates the Equal Protection Clause. Courts in this Circuit have recognized that discrimination based on transgender status is sex discrimination and subject to heightened scrutiny. *See, e.g.*, *Latta v. Otter*, 771 F.3d 456, 495 n.12 (9th Cir. 2014) (Berzon, J., concurring); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1143 (D. Idaho 2018); *Karnoski v. Trump*, No. 17-1297, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104,

1119 (N.D. Cal. 2015).[4]

Courts in this Circuit have also recognized that discrimination based on transgender status is independently subject to heightened scrutiny as at least a quasi-suspect classification in its own right under the Ninth Circuit's decision in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481–84 (9th Cir. 2014):

> The pervasive and extensive similarities in the discrimination faced by transgender people and [gay] people are hard to ignore: (1) transgender people have been the subject of a long history of discrimination that continues to this day; (2) transgender status as a defining characteristic bears no "relation to ability to perform or contribute to society; (3) transgender status and gender identity have been found to be "obvious, immutable, or distinguishing characteristic[s];" and (4) transgender people are unarguably a politically vulnerable minority.

F.V., 286 F. Supp. 3d at 1145; *accord Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *9-11 (W.D. Wash. Apr. 13, 2018); *Norsworthy*, 87 F.Supp.3d at 1119 n.8.

The State Defendants do not attempt to defend the "gender reassignment surgery" exclusion under heightened scrutiny. And, the only justification for they offer for the exclusion—reducing costs—not only fails to satisfy heightened scrutiny, but fails even rational basis review. (*See* DE #24, Motion to Dismiss). Although "a state has a valid interest in preserving the fiscal integrity of its programs" and "may legitimately attempt to limit its expenditures . . . a State may not accomplish such a purpose by invidious

[4] Even if the Supreme Court were to conclude that discrimination against transgender people is not a form of sex discrimination under Title VII, discrimination against transgender individuals would still qualify as gender discrimination requiring heightened scrutiny for purposes of the Equal Protection Clause. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 163 (2d Cir. 2018), *cert. granted,* No. 17-1623, 2019 WL 1756678 (U.S. Apr. 22, 2019) (Lynch J., dissenting) (dissenting from majority's conclusion that Title VII prohibits discrimination based on sexual orientation but noting that "the role of the courts in interpreting the Constitution is distinctively different from their role in interpreting acts of Congress").

distinctions between classes of its citizens." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). Concerns about costs are insufficient to "justify gender-based discrimination in the distribution of employment-related benefits" under heightened scrutiny. *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 647 (1975). And even under rational-basis review, the government may not reduce costs by arbitrarily discriminating between two similarly situated groups. *See Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (finding costs concerns cannot justify denying insurance coverage to same-sex couples under rational basis review).

Because State Defendants have failed to provide any explanation for treating the costs associated with transition-related surgery differently from the costs associated with other medically necessary treatments, the State Defendants' goal of reducing costs cannot justify the "gender reassignment surgery" exclusion under any standard of scrutiny.

IV. The Eleventh Amendment does not bar Dr. Toomey's claims.

The State Defendants incorrectly argue that sovereign immunity bars the injunctive relief Dr. Toomey is seeking against defendants Shannon and Davidson. (*See* DE #24, Motion to Dismiss, pg. 14-16). The State Defendants do so by misconstruing the relief Mr. Toomey is seeking as a retroactive payment of benefits (a monetary award) rather than as a straightforward prospective injunction that may or may not have ancillary costs. (*See* DE #24, Motion to Dismiss, pg. 15).

The State Defendants cite *Edelman v. Jordan*, 415 U.S. 651 (1974), which held

that the retroactive payments of benefits was akin to a monetary award because it involved the payment of a substantial amount of money and it would be used to make "reparation[s] for the past." *Id*. at 664. But in so holding, the Court in *Edelman* was careful to maintain that a federal court remains empowered to order expenditure of funds from a state treasury if it is "ancillary" to injunctive relief. The test is whether relief is a "necessary consequence of compliance in the future." *Id* at 668.

Despite the State Defendant's efforts at contorting the nature of the remedy, Dr. Toomey's claim for prospective injunctive relief squarely fits into the exception in *Ex Parte Young*. 209 U.S. 123 (1908). The result *may* be that once Dr. Toomey's claim is evaluated under for medical necessity, it will result in payment for transition-related surgeries. But this relief is ancillary to injunctive relief and is not barred by *Edelman*.[5]

V. Dr. Toomey's EEOC Charge Against the Arizona Board of Regents Exhausted His Title VII Claims Against the State of Arizona.

Dr. Toomey filed an EEOC charge against the "Board of Regents of the University of Arizona" and did not proceed with litigation until after he received a Notice of Right to Sue. (*See* Complaint, DE #1 at Ex. B.) The State Defendants nevertheless allege that Plaintiff failed to exhaust administrative remedies under Title VII by failing to specifically name the "State of Arizona" in his EEOC charge. That is incorrect. A

[5] The State Defendants also rely upon *La Fleur v. Wallace State Cmty Coll*., 955 F. Supp. 1406, 1422 (M.D. Ala. 1996). The plaintiff in *La Fleur* sought *back pay and lost benefits* for the time she was not employed, reinstatement, injunctive and declaratory relief, and attorneys' fees and costs. *Id.* at 1422-1424 (emphasis added). Not surprisingly, the court denied the plaintiff back pay and benefits under *Edelman*. *Id*. at 1422. The injunctive relief was granted. *Id*. at 1423.

plaintiff may proceed against a party not named in the EEOC charge "if the respondent named in the EEOC charge is a principal or agent of the unnamed party" or if the parties are "substantially identical." *Sosa v. Hiraoka*, 920 F.2d 1451, 1459 (9th Cir. 1990) (internal quotations omitted). The State of Arizona exercises control over the terms and conditions of the Arizona Board of Regents' health plan. (*See* Defendants Arizona Board of Regents' Answer to Plaintiff's Complaint DE #23). And the Arizona Board of Regents "is also treated as a state agent" for purposes of sovereign immunity. *Karam v. Univ. of Ariz.*, No. CV-18-00455-TUC-RCC, 2019 WL 588151, at *4 (D. Ariz. Feb. 13, 2019); *see also Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) ("[T]he State of Arizona treats ABOR as a division of the State under Arizona law."). Because of the principal/agent relationship between the State and the Board and the two entities are "substantially identical," Plaintiff's EEOC charge encompasses both the Board of Regents and the State of Arizona.[6]

VI. Dr. Toomey Does Not Have to Exhaust the Plan's Internal Appeal Process Before Challenging the Plan's Facially Discriminatory Provisions.

The State Defendants incorrectly argue that that the Complaint should be dismissed because Dr. Toomey failed to exhaust administrative remedies under the Plan's

[6] The State Defendants cite no authority to the contrary. In *Lattimore v. Polaroid*, 99 F.3d 456 (1st Cir. 1996), the Plaintiff included causes of action in his complaint that were not included in his EEOC charge. Similarly, in *Luce v. Dalton*, 166 F.R.D. 457 (S.D. Cal. 1996), the Plaintiff sought to amend his complaint to include new theories of discrimination that were not included in his EEOC charge. Finally, in *Sommatino v. United States*, 255 F.3d 704 (9th Cir. 2001), the plaintiff failed entirely to file an EEOC charge. That is not the situation here. Plaintiff timely filed an EEOC charge, and factual allegations in the Complaint are in line with the facts described in Plaintiff's EEOC charge. The only difference is that Plaintiff named "The Board of Regents of the University of Arizona" ("Board") as his employer but included both the Board and the "State of Arizona" in his Complaint.

internal appeal procedures. This argument relies entirely on case law governing claims brought under ERISA, not claims brought under Title VII or for Equal Protection. The exhaustion requirements that courts have developed for ERISA do not apply to claims under Title VII and the Equal Protection Clause.

The Ninth Circuit and other federal courts developed an exhaustion requirement for ERISA as a matter of statutory interpretation. "Quite early in ERISA's history, [the Ninth Circuit] announced as the general rule governing ERISA claims that a claimant must avail himself or herself of a plan's own internal review procedures before bringing suit in federal court." *Diaz v. United Agr. Employee Welfare Ben. Plan & Tr.*, 50 F.3d 1478, 1483 (9th Cir. 1995) (citing *Amato v. Bernard*, 618 F.2d 559, 566–68 (9th Cir.1980)); *see also Russell v. CVS Caremark Corporation*, No. CV-16-00284-PHX-PGR, 2017 WL 1090677, at *3 (D. Ariz. Mar. 23, 2017).

"In Title VII, by contrast, Congress chose not to impose a particular employer-internal appeals procedure." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 52 (1st Cir. 1999) (contrasting ERISA and Title VII). The only exhaustion requirements for Title VII are those related to filing a charge with the Equal Employment Opportunity Commission. Similarly, there is similarly no exhaustion requirement for bringing an equal protection claim pursuant to 42 U.S.C. §1983 outside the context of prisoners. *See Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982); *see also Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir.1997) ("The statute requires exhaustion only when brought by prisoners. Thus, mandating exhaustion in this case would not be

consistent with congressional intent.").

VII. Dr. Toomey's Pursuit of the Appeal Process within the Plan would be futile.

Even if plaintiffs were required to exhaust internal appeals before filing suit under Title VII or the Equal Protection Clause, exhaustion would still be inappropriate here. The exhaustion requirements for ERISA do not apply when "resort to the administrative route is futile or the remedy inadequate." *Amato*, 618 F.2d at 568. *See also, Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 626–27 (9th Cir. 2008). Both exceptions apply here.

The State Defendants do not contend that Dr. Toomey has any hope of prevailing during the Plan's internal appeals' process. The plain terms of the Plan categorically exclude coverage for his surgery. Instead, the State Defendants argue that after Dr. Toomey exhausts his *internal* appeals, he would then be able to request an *external* appeal from an Independent Review Organization ("IRO"), which would allegedly be free to ignore terms of the Plan that are "inconsistent with applicable law." But whether the Plan's categorical exclusion is "inconsistent with applicable law" is the precisely what is in dispute in this case.

The State Defendants offer no support for the notion that medical reviewers at an IRO are empowered to decide disputed legal questions. To the contrary, the information provided by Dr. Toomey's network provider, BCBS AZ, refutes that contention. Per BCBS AZ's IRO guidelines, "BCBS AZ sends the external review to the Arizona Department of Insurance (the 'ADOI'). ADOI decides contact coverage cases and refers

medical necessity cases and issues of medical judgment to an external Independent Review Organization (IRO)."[7] In other words, the ADOI keeps and decides "coverage cases" and sends medical questions to an outside IRO. There is no hint that the IRO is empowered to resolve disputed legal questions. Indeed, the back of Dr. Toomey's denial letter advises that, in addition to pursing an internal appeal, he "may have other remedies under state or federal law such as filing suit."

Moreover, even if an IRO were so empowered, requiring Dr. Toomey and other transgender employees to go through the lengthy exhaustion process would itself be an equal protection violation. Before even getting to the point of requesting an IRO, Dr. Toomey would have to complete two levels of internal review. (*See* Complaint, DE#1 at Ex. A at Section 12.09-12.10.) In fact, the State Defendants concede that the initial levels of review will not help Plaintiff.

"When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). Requiring exhaustion in these circumstances simply places another discriminatory "barrier" to equal treatment on the basis of sex.

[7] See guide here: https://www.azblue.com/~/media/azblue/files/about/standardappealpacket.pdf

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CERTIFICATE OF SERVICE

I hereby certify that on 1st day of May, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a copy was electronically transmitted to the following:

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