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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

vs.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as Chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as 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. CV-19-00035-TUC-RM (LCK)

DEFENDANTS STATE OF ARIZONA, DAVIDSON, AND SHANNON'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Defendants State of Arizona, Gilbert Davidson, and Paul Shannon (collectively "State Defendants") submit this Reply in Support of their Motion to Dismiss. This Court should dismiss the Complaint because Plaintiff does not dispute that (1) he did not follow the appeal process within the Health Plan, (2) he did not file an EEOC Charge against the State of Arizona or the Arizona Department of Administration ("DOA"), (3) the gender reassignment surgery exclusion applies neutrally to both men and women, (4) the Health Plan contains numerous other exclusions for various treatments and surgeries, including some that are medically necessary, (5) while the exclusion may have the effect of excluding surgery for treatment of a condition (here, gender dysphoria), the Health Plan excludes treatments and surgeries for various other conditions, (6) the Health Plan provides coverage for other gender transition services, and (7) there has been no discriminatory motive or intent on the part of the State Defendants. Also, Plaintiff has not cited any case from the District of Arizona or Ninth Circuit requiring an employer to cover gender reassignment surgery in a health plan. And with the exception of the Western District of Wisconsin (not precedent for this Court), Plaintiff has not cited any case holding that an employer's gender reassignment surgery exclusion in a health plan violates Title VII or Equal Protection.[1]

I. PLAINTIFF FAILED TO FOLLOW THE REQUIRED APPEAL PROCESS.

Plaintiff admits he did not follow the appeal process in the Plan. He claims there was no "meaningful opportunity" to address the medical necessity of gender reassignment surgery and the exclusion, but that is not correct. Plaintiff could have addressed the exclusion and whether it was "inconsistent with applicable law" through the appeal process, and an Independent Review Organization ("IRO") could have evaluated the exact issue presented in this case. Fundamentally, Plaintiff seeks coverage for a surgery under the Plan. Plaintiff submitted a claim that was denied, but did not follow Plan terms for an appeal – instead, he immediately filed a lawsuit. The language in the Plan is clear: "12.12 Limitation. No action at law or in equity can be brought to recover on this Health Plan until the appeals

[1] Plaintiff cites various materials outside of the pleadings: Motion for Class Certification, Plaintiff's Declaration, and BCBSAZ Member Appeal and Grievance Process. Including these materials in Motion to Dismiss briefing is inappropriate under Fed.R.Civ.P. 12(d).

procedure has been exhausted as described in this Plan." (Doc. 1, Exh. A, p. 74). But Plaintiff's lawsuit is exactly that – he is attempting "to recover on this Health Plan" (have surgery paid for) without following the appeals procedure. Per the Plan's own terms, Plaintiff cannot bring suit before exhausting the administrative remedy, and the time to appeal has now passed. Exhaustion of remedies is "a matter of judicial discretion" (*McGraw v. Prudential,* 137 F.3d 1253, 1263 (10th Cir. 1998)), and it has been employed to prevent every benefit claim denial from turning "literally, into a federal case" (*Lane v. Sunoco,* 260 F. App'x 64, 66 (10th Cir. 2008)). In *Diaz v. Un. Agric.,* the plaintiff sued his employer and plan for benefits, arguing failure to comply with statutory requirements other than ERISA. The Ninth Circuit held, "many employee claims for plan benefits may implicate statutory requirements imposed by ERISA or COBRA (or perhaps other statutes, for that matter). . . . a claimant [does not have] the license to attach a 'statutory violation' sticker to his or her claim and then to use that label as an asserted justification for a total failure to pursue the congressionally mandated internal appeal procedures." 50 F.3d 1478, 1484 (9th Cir. 1995). Here, Plaintiff admits "whether the Plan's categorical exclusion is 'inconsistent with applicable law' is precisely what is in dispute in this case" (Doc. 39, p.18) – and that is exactly the point. Plaintiff should not be permitted to bypass the well-established rules designed to protect courts from having to opine on every benefits determination.[2]

The appeal process would not have been futile or the remedy inadequate, as Plaintiff claims. Each level of review exists for a reason.[3] The document governing the State's self-funded plan and appeal process is the DOA Benefit Options Summary Plan Description, which - by its own terms - specifically empowers the IRO to decide questions of law, including whether a decision is "inconsistent with applicable law." (Doc. 1, Exh. A, p.73). The BCBSAZ Member Appeal and Grievance Process to which Plaintiff refers does not

[2] Plaintiff's cases do not involve an employee trying to obtain a benefit under a health plan with an appeal process to which the employee agreed. *Thomas v. Eastman,* 183 F.3d 38 (1st Cir. 1999) (alleged discriminatory layoff); *Patsy v. Bd. of Regents,* 457 U.S. 496 (1982) (exhaustion of state administrative remedies); *Knight v. Kenai Peninsula,* 131 F.3d 807 (9th Cir. 1997) (exhaustion of union remedies/arbitration non-union plaintiffs did not agree to).

[3] State Defendants do not concede earlier levels of review would not have helped Plaintiff.

apply to the State Plan; this document (not attached to the Complaint) applies to other plans (such as fully-insured plans) insured by BCBSAZ. Thus, Plaintiff should have followed the appeal process before involving the Court in this dispute.[4]

II. PLAINTIFF HAS FAILED TO STATE A TITLE VII CLAIM.

A. Congressional Action is Required.

In Title VII, Congress made clear it was unlawful for an employer to discriminate "because of sex." Plaintiff claims the State Defendants discriminated against him because of his transgender status, but as explained in the Motion (with supporting case law), (i) courts cannot expand Title VII without congressional action, and (ii) Congress has repeatedly had the opportunity to enact legislation to add gender identity to Title VII, but has not done so. (Doc. 24, p.9-10). Plaintiff cannot refute that when Title VII does not protect a particular category, legislative action is required to change that.[5] Plaintiff argues Congress's failure to enact new legislation to add gender identity is not relevant because later acts of Congress are not probative of prior legislative intent. But the point is that expanding the scope of a federal statute requires congressional, not judicial, action. *Gunnison v. Comm. of Int. Rev.*, 461 F.2d 496, 499 (7th Cir. 1972) ("Further expansion of the favored treatment specifically provided in §402(a)(2) as an exercise of legislative grace is a function for the Congress, not for the Courts"). Yet here, Congress has failed to act to expand Title VII. Congress's failure to act demonstrates Title VII does not include unenumerated categories. *Bibby v. Phil. Coca Cola,* 260 F.3d 257, 265 (3d Cir. 2011)

[4] The appeal process itself is not an equal protection violation, as Plaintiff claims. Courts routinely require plaintiffs to exhaust administrative review before filing suit against a governmental entity, whether in the EEOC process or regarding a denial of benefits. *See, e.g., Roche v. Aetna*, 165 F. Supp. 3d 180, 186-90 (D.N.J. 2016). Here, the appeal process is neutral and applies to every member – regardless of gender or transgender status– appealing a benefit denial. And *Fla Chap. v. Jacksonville,* 508 U.S. 656 (1993) does not establish an equal protection violation for a health plan appeal; the alleged "barrier" there was an ordinance requiring 10% of city contracts be awarded to minority-owned businesses.

[5] While courts can interpret a statute to cover situations that fit within the language of the statute, they cannot do so when an interpretation expands the statute by adding protected classifications. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Title VII discrimination because of sex includes sex-stereotyping); *Oncale v. Sundowner*, 523 U.S. 75, 78 (1998) (Title VII's sex discrimination clause "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment").

("Harassment on the basis of sexual orientation has no place in our society….Congress has not yet seen fit, however, to provide protection against such harassment").

B. The Exclusion is not Title VII Discrimination "Because of Sex."

Plaintiff argues Title VII already applies to transgender status, attempting to ground his claim in cases applying *Price Waterhouse*. But *Price Waterhouse* does not support expanding Title VII's protections to transgender persons as a group beyond cases that involve sex-stereotyping.[6] And Plaintiff's reliance on *Schwenk v. Hartford,* 204 F.3d 1187 (9th Cir. 2000), is misplaced. *Schwenk* was a prison sexual assault case involving the 8th Amendment (cruel and unusual punishment) and Gender Motivated Violence Act (GMVA); it was not a Title VII or Equal Protection case. In *Schwenk*, the Ninth Circuit applied *Price Waterhouse* sex-stereotyping, noting "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one." Indeed, "Schwenk testified that her appearance and mannerisms were very feminine, and that Mitchell was aware of these characteristics. In fact, Mitchell offered to bring her make-up and other 'girl stuff' from outside the prison in order to enhance the femininity of her appearance. Thus, the evidence offered . . . tends to show that Mitchell's actions were motivated, at least in part, by Schwenk's gender – in this case, *by her assumption of a feminine rather than a typically masculine appearance or demeanor*." *Id.* at 1202 (emphasis added) ("Discrimination because one fails to act in the way expected of a man or a woman is forbidden").

The Ninth Circuit described its holding in *Schwenk* in *Kastl v. Maricopa Cty.,* 325 F.App'x. 492 (9th Cir. 2009) ("we held [in *Schwenk*]. . . that transgender individuals may state viable sex discrimination claims on the theory that the perpetrator was motivated by the victim's real or perceived non-conformance to socially-constructed gender norms. After [*Price Waterhouse*] and *Schwenk*, it is unlawful to discriminate against a transgender (or

[6] As Plaintiff notes, the U.S. 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 Fun. Homes v. EEOC,* 2019 WL 1756679 (2019).

any other) person because he or she does not behave in accordance with an employer's expectations for men or women"); *Nichols v. Azteca,* 256 F.3d 864 (9th Cir. 2001) (*Price Waterhouse* "applies with equal force to a man who is discriminated against for acting too feminine," and describing *Schwenk* as "comparing the scope of the [GMVA] with the scope of Title VII, which forbids '[d]iscrimination because one fails to act in the way expected of a man or woman'"). Thus, *Schwenk* does not establish transgender status is "because…of sex" or protected as a group under Title VII.

The other cases cited by Plaintiff similarly involve allegations of sex-stereotyping not present here. *Prescott v. Rady,* 265 F.Supp.3d 1090, 1099 (S.D. Cal.2017) (in Affordable Care Act (ACA) claim, staff "continuously referr[ed] to him with female pronouns, despite knowing that he was a transgender boy", "refused to treat Kyler as a boy precisely because of his gender non-conformance" and "told him, Honey, I would call you 'he,' but you're such a pretty girl"); *Roberts v. Clark Cty.,* 215 F.Supp.3d 1001, 1015 (D.Nev. 2016) (defendant "banned Roberts from the women's bathroom because he no longer behaved like a woman. This alone shows that the school district discriminated against Roberts based on his gender and sex stereotypes"); *Glenn v. Brumbry,* 663 F.3d 1312, 1318-20 (11th Cir. 2011) (terminated plaintiff dressed "inappropriate," "unsettling," and "unnatural"; gave example of a male "wearing jewelry that was considered too effeminate, carrying a serving tray too gracefully, or taking too active a role in childrearing"); *Whitaker v. Kenosha,* 858 F.3d 1034 (7th Cir. 2017) (plaintiff was told he "would have to complete a surgical transition . . . to be permitted access to the boys' restroom" and case "show[ed] sex stereotyping").[7] Here, the exclusion applicable to all employees does not punish Plaintiff based on a sex stereotype; does not require Plaintiff act or dress in a certain way or use a certain bathroom, or punish him for his conduct, dress, appearance, or mannerisms; and there is no allegation the exclusion was based on his

[7] *Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018) is not persuasive: (1) it is now in question and pending before the Supreme Court, and (2) termination was because plaintiff was "no longer going to represent himself as a man" and "wanted to dress as a woman."

conduct, dress, appearance, mannerisms, or failure to act like a man/woman.

The Motion cites cases showing that transgender discrimination *not* based on sex-stereotyping is not cognizable under Title VII. (Doc. 24, p.10-11). Plaintiff seeks to minimize these cases by claiming they are, or rely upon, pre-*Price Waterhouse* decisions; but this does not render those cases inapplicable. Indeed, cases citing to *Holloway, Sommers* or *Ulane* acknowledge the viability of a *Price Waterhouse* sex-stereotyping theory, but decline to extend transgender discrimination beyond sex-stereotyping, thus accurately reflecting current Title VII law. *Etsitty v. Utah Transit,* 502 F.3d 1215 (10th Cir. 2007) (holding transgender persons are not a protected class; assuming without deciding that a sex stereotyping theory under *Price Waterhouse* is viable); *Johnston v. Univ. of Pittsburgh*, 97 F.Supp.3d 657 (W.D.Pa. 2015) (finding transgender is not a protected status but considering plaintiff's sex stereotyping claim); *Eure v. Sage*, 61 F. Supp. 3d 651, 661-63 (W.D. Tex. 2014) (declining to find discrimination based on transgender status, but considering sex stereotyping claim and finding it not supported by the facts alleged; "courts have been reluctant to extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because the plaintiff's status as a transgender man or woman, without any additional evidence related to gender stereotype non-conformity"); *Creed v. Family Exp.,* 2007 WL 2265630, *3-4 (N.D. Ind. 2007) (following *Ulane* as to transgender status discrimination but finding plaintiff had stated a viable claim for gender stereotyping); *Johnson v. Fresh Mark*, 337 F. Supp. 2d 996 (N.D. Ohio 2003) (rejecting transgender status claim not based on stereotyping), *aff'd*, 98 F.App'x. 461 (6th Cir. 2004). Because there is no allegation Toomey was treated differently because he acted, dressed, or exhibited mannerisms inconsistent with his biological sex, his Title VII claim should be dismissed.

C. The Exclusion does not Facially Discriminate Based on Sex.

Plaintiff contends the Plan exclusion facially discriminates based on sex. But that is not correct. On its face, the gender reassignment surgery exclusion applies neutrally to both

men and women.[8] The exclusion denies gender reassignment surgery to men transitioning to become women, and women transitioning to become men. *See In re Union Pac. RR.,* 479 F.3d 936 (8th Cir. 2007) (upholding benefits exclusion for contraception, as it fell equally on both men and women). Second, the plan contains numerous other exclusions for various treatments and surgeries, including some that are medically necessary; thus, the plan does not *only* exclude gender reassignment surgery. Third, the exclusion may have the effect of excluding surgery for treatment of a particular condition (here, gender dysphoria), but the Plan also excludes treatments and surgeries for various other conditions (e.g., diagnosed infertility, hyperhidrosis, obesity, erectile dysfunction, sexual dysfunction, cosmetic surgery for a clinically depressed person due to his/her appearance). Further, the Plan provides coverage for other gender transition services (hormone therapy and mental health counseling). Thus, the Plan does not discriminate based on sex or transgender status.[9]

Plaintiff argues the exclusion facially discriminates based on sex-stereotyping. Not so. The cases Plaintiff cites are inapposite as they involve claims of wrongful termination, not a facially neutral policy regarding one category of services. *Glenn,* 663 F.3d 1312 (claim based on termination of plaintiff); *Dawson v. H&H Elec.,* 2015 WL 5437101 (E.D. Ark. 2015) (wrongful termination claim). In some cases, the line between sex-stereotyping claims and claims based upon protected status may become blurry where an employer reacts negatively to a particular transgender person's appearance and mannerisms in the workplace and takes action such as termination. For example, a manager's comments can be parsed in different ways. But that is different from the present case, which involves a facially neutral policy regarding coverage for one category of services. Plaintiff does not allege anything about how people reacted to him in the workplace, judged the way he should look or behave, or disfavored him because of discomfort with his appearance, behavior, or transition.[10]

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[8] Plaintiff argues the policy facially discriminates because it excludes services when sought by transgender people. But that is a disparate impact theory, which Plaintiff has not alleged.

[9] Just because (i) medical organizations support healthcare coverage for transition-related care, or (ii) some employers choose to cover gender reassignment surgery (Doc. 39, p.3) does not mean the law mandates coverage be provided for gender reassignment surgery.

[10] *Kastle v. Maricopa Cty.,* 2004 WL 2008954 (D. Ariz. 2004) analyzed whether an

Plaintiff cites *Boyden v. Conlin* (W.D. Wis.) in support of his Title VII claim. But this case was decided under Seventh Circuit precedent and is not binding on this Court under current Ninth Circuit precedent (see above). Also, the exclusion in *Boyden* excluded all services associated with gender reassignment, unlike the exclusion here. *Tovar* and *Flack*[11]are also not dispositive, as the federal courts in Minnesota and Wisconsin were evaluating ACA claims (not Title VII claims), the plans contained a broad exclusion for transition coverage (not just surgery), and the decisions relied on *Harris* which is now on appeal. Plaintiff also cites cases from California (*Denegal, Norsworthy,* and *McQueen*) involving prisoners who were completely denied reassignment surgery by the prisons where they were incarcerated. But in those cases, prisoners were completely deprived of the ability to undergo medical procedures and express their gender identity while incarcerated; there were also allegations and evidence of hostility (refusing to allow a plaintiff to change her name and deliberate indifference to medical needs) and 8th Amendment cruel and unusual punishment claims.[12]

Moreover, Plaintiff has not alleged a discriminatory intent or motive on the part of the State Defendants, and thus he cannot state a Title VII disparate treatment claim: "A discriminatory motive may be established by the employer's informal decisionmaking or 'a formal, facially discriminatory policy,' but 'liability depends on whether the protected trait . . . actually motivated the employer's decision." *Wood v. San Diego*, 678 F.3d 1075, 1081 (9th Cir. 2012) (affirming dismissal of Title VII claim where plaintiff only alleged "the City was aware that male employees would disproportionately benefit from the change").

III. PLAINTIFF HAS FAILED TO STATE AN EQUAL PROTECTION CLAIM.

Plaintiff argues discrimination based on transgender status is subject to heightened

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employer may "require a biologically female employee believed to possess stereotypically male traits to provide proof of her genitalia or face consignment to the men's restroom." Plaintiff was *required* to have reassignment surgery to use the women's restroom and was terminated when she refused to use the men's restroom. Those facts are not present here.

[11] Judge William Conley in Wisconsin issued the decisions in both *Flack* and *Boyden*.

[12] In a Title VII case involving an exclusion denying gender reassignment surgeries, the Second Circuit noted, "it is not clear that the denial of benefits, without more, constitutes an adverse employment action." *Mario v. P & C,* 313 F.3d 758 (2d Cir. 2002).

scrutiny. But the Supreme Court has not recognized transgender status as a suspect class for Equal Protection purposes. Plaintiff does not respond to the numerous cases in the Motion holding that rational basis review applies. (Doc. 24, p.12-14).[13] Plaintiff simply cites his own cases in arguing that discrimination based on transgender status is subject to heightened scrutiny, but those cases are inapposite. *Latta v. Otter,* 771 F.3d 456 (9th Cir. 2014) (Toomey cited dicta from concurring opinion in same-sex marriage case where transgender people were not "represented among the plaintiff class"); *F.V. v. Barron,* 286 F.Supp.3d 1131 (D.Id. 2018) (defendants conceded equal protection claims were valid regarding policy of categorically banning transgender people from amending sex on birth certificates); *Karnoski v. Trump,* 2017 WL 6311305 (W.D.Wash. 2017) (categorical ban on transgender individuals in military); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D.Cal. 2015) (deliberate indifference to medical needs of prison inmate); *SmithKline v. Abbott,* 740 F.3d 471 (9th Cir. 2014) (sexual orientation in jury selection). Thus, rational basis review applies.

"To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause . . . a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington,* 152 F.3d 1193, 1194 (9th Cir. 1998). It "is the plaintiff's burden to demonstrate that a challenged policy lacks rational basis." *Alexander v. Ca.,* 2012 WL 439498 (E.D. Cal. 2012) (citing *Heller v. Doe*, 509 U.S. 312 (1993)). The State has no obligation to provide coverage for every procedure an employee desires, whether medically necessary or not. Plaintiff concedes the government has a valid interest in cost containment, preserving fiscal

[13] This case does not involve discrimination based on sex or sex-stereotyping; thus, rational basis applies. But even if intermediate scrutiny applies, Plaintiff's claim must fail. *U.S. v. Virginia*, 518 U.S. 515 (1996) (To succeed in intermediate scrutiny, "a party seeking to uphold government action . . . must establish an exceedingly persuasive justification for the classification" and "show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives"). This intermediate level of judicial scrutiny recognizes that sex "has never been rejected as an impermissible classification in all instances." *Rostker v. Goldberg,* 453 U.S. 57, 69 n.7 (1981). As explained in Section III, there is a substantial relationship between the exclusion and the State's important interests in cost-containment. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015) ("administrative convenience and economic cost-saving" are "relevant" to intermediate scrutiny analysis).

integrity, and limiting expenditures. (Doc. 39, p.13). Under rational basis review, the State's interest in containing health insurance costs justifies the numerous exclusions within the Plan, including that for gender reassignment surgery. The Court may take judicial notice of the fact that additional procedures impose extra costs on the State's health insurance program. Thus, a rational decision was made not to extend coverage to a number of different procedures, including the one at issue here.

Plaintiff argues costs cannot be used to justify "gender-based discrimination," but the exclusion here does not involve gender-based discrimination (see above) and the cases cited by Plaintiff are inapposite. *Shapiro v. Thompson,* 394 U.S. 618 (1969) (residency waiting period for public welfare benefits penalized plaintiffs from exercising a constitutional right to move from state to state); *Califano v. Goldfarb,* 430 U.S. 199 (1977) (challenge to survivors' benefits provision that discriminated against female wage earners by affording them less protection); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975) (gender-based distinction of granting survivors' benefits to widow if deceased was a man, but not if deceased was a woman); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (statute terminated eligibility for all health-care benefits of state employees' same-sex domestic partners). Because Plaintiff's Title VII claim fails (see above), the Court should dismiss the Equal Protection claim as well. *Okwuosa v. Empl. Dev.,* 143 F.App'x. 20, 23 (9th Cir. 2005) ("Because Okwuosa failed to establish a *prima facie* case of discrimination for purposes of Title VII, the district court correctly granted summary judgment on Okwuosa's claim of unlawful discrimination on the basis of race and national origin under §1983").[14]

IV. SOVEREIGN IMMUNITY APPLIES.

Toomey argues sovereign immunity does not apply because he is seeking a "straightforward prospective injunction." But this is not correct. Plaintiff is asking the Court to remove the exclusion and "evaluate whether [Toomey's] surgical care for gender dysphoria is 'medically necessary' in accordance with the Plan's generally applicable

[14] Plaintiff's citation of language from a Second Circuit dissenting opinion in *Zarda v. Altitude Express, Inc*. does not change this result under Ninth Circuit precedent.

standards and procedures." (Doc. 1, p. 22). Plaintiff has already alleged the surgery is a "medically necessary hysterectomy prescribed by his physician." (*Id*. ¶4) Thus, in actuality, he is not merely seeking "prospective injunctive relief" under *Ex Parte Young,* nor is the relief sought a mere expenditure of funds ancillary to prospective injunctive relief. *Verizon v. Public. Serv.*, 535 U.S. 635, 645 (2002); *Seminole Tribe v. Fla*., 517 U.S. 44, 54 (1996). Toomey is – in essence - seeking a "retroactive award" of a benefit that he claims was previously wrongfully denied. This retrospective relief is not permissible under *Edelman.*

V. PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

Plaintiff concedes he only filed an EEOC Charge against the Board of Regents, which "consists of ten appointive members." A.R.S. § 15-1621(A). He did not file a Charge against the State or DOA - the agency he alleges "exercises control over the terms and conditions of the Arizona Board of Regents' health plan" (Doc. 39, p.16). Thus, the State and DOA were not on notice of Plaintiff's allegations through the EEOC process, and did not have the opportunity to review or respond to Plaintiff's allegations. This flies in the face of the charge requirements in statute. 42 U.S.C. § 2000e-5(e)(1). Plaintiff argues he was not required to name the State or DOA based on the principal/agent or "substantially identical" exceptions in *Sosa v. Hiraoka.* But as explained in *Sosa*, courts do not *always* invoke the exceptions; courts are just "particularly likely to invoke one of these exceptions when the initial EEOC charge was filed without the assistance of counsel, since the charging party may not understand the need to name all parties in the charge, or may be unable to appreciate the separate legal identities of, for instance, a corporation and its officers." 920 F.2d 1451 (9th Cir. 1990). But here, Plaintiff filed his EEOC charge *with* the assistance of counsel, and thus he should have properly named the State (now a defendant).[15] (Doc. 1, ¶22 and Exh. B); *see also* Exh. 1.[16] Plaintiff failed to exhaust administrative remedies with respect to the State, and thus his Title VII claim should be dismissed.

[15] Plaintiff's cases, *Karam* and *Ariz. Students' Ass'n*, are not persuasive as they address an agency relationship for purposes of sovereign immunity (not for an EEOC Charge).
[16] Exhibit 1 is a public record received from the EEOC. *See* footnote 3 in Motion to Dismiss.

RESPECTFULLY SUBMITTED this 16th day of May, 2019.

BURNSBARTON PLC

By */s/Kathryn Hackett King*
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Sarah N. O'Keefe

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants.

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