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7
 8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE DISTRICT OF ARIZONA

10 **Russell B. Toomey,**

11 Plaintiff,

12 v.

13 **State of Arizona; Arizona Board of Regents,**
 14 **d/b/a University of Arizona,** a governmental
 body of the State of Arizona; **Ron Shoopman,**
 15 in his official capacity as Chair of the Arizona
 Board of Regents; **Larry Penley,** in his official
 16 capacity as Member of the Arizona Board of
 Regents; **Ram Krishna,** in his official capacity
 17 as Secretary of the Arizona Board of Regents;
 18 **Bill Ridenour,** in his official capacity as
 Treasurer of the Arizona Board of Regents;
 19 **Lyndel Manson,** in her official capacity as
 Member of the Arizona Board of Regents;
 20 **Karrin Taylor Robson,** in her official capacity
 as Member of the Arizona Board of Regents;
 21 **Jay Heiler,** in his official capacity as Member
 of the Arizona Board of Regents; **Fred Duval,**
 22 in his official capacity as Member of the
 Arizona Board of Regents; **Gilbert Davidson,**
 23 in his official capacity as Interim Director of
 the Arizona Department of Administration;
 24 **Paul Shannon,** in his official capacity as
 25 Acting Assistant Director of the Benefits
 Services Division of the Arizona Department of
 26 Administration,

27 Defendants.
 28

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

**MOTION TO STAY PROCEEDINGS
 PENDING U.S. SUPREME COURT
 DECISION IN *R.G. & G.R. HARRIS
 FUNERAL HOMES V. E.E.O.C.*, 2019
 WL 1756679 (2019)**

1 Defendants State of Arizona, Gilbert Davidson, and Paul Shannon (collectively
2 “State Defendants”) hereby move this Court for an order staying further proceedings in
3 this action pending the resolution by the United State Supreme Court of *R.G. & G.R*
4 *Harris Funeral Homes v. E.E.O.C.*, 2019 WL 1756679 (2019) (hereinafter *Harris Funeral*
5 *Homes*). On April 22, 2019, the United States Supreme Court granted *certiorari* in *Harris*
6 *Funeral Homes*, a case that is anticipated to provide guidance on legal issues that have
7 been presented in Plaintiff’s Complaint and the State Defendants’ Motion to Dismiss (now
8 pending). Therefore, a stay of this action will serve the orderly administration of justice.
9 The State Defendants will suffer substantial hardship if they are required to litigate in this
10 case issues which the Supreme Court is currently reviewing in *Harris Funeral Homes*.
11 Indeed, the time and resources that will be expended in addressing the pending motion to
12 dismiss, the motion for class certification, and the underlying merits of the case, including
13 wide-ranging discovery related to class certification and substantive claims, undoubtedly
14 will impose a heavy burden on defendants and the Court. In contrast, Plaintiff Russell B.
15 Toomey (“Plaintiff” or “Toomey”) will not be harmed by a relatively brief stay while the
16 Supreme Court considers *Harris Funeral Homes* in the 2019-2020 term.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION AND BACKGROUND**

19 According to the Complaint, Toomey is a man who is transgender. Toomey has a
20 male gender identity, but the sex assigned to him at birth was female. Toomey
21 transitioned to live consistently with his male identity in 2003. Since 2003, Toomey has
22 received testosterone as a medically necessary treatment for gender dysphoria. Toomey
23 received chest reconstruction surgery in 2004. (*See* Doc. 1, ¶¶ 4, 38).

24 As alleged in the Complaint, Toomey is currently employed as an Associate
25 Professor at the University of Arizona. He receives healthcare coverage through a self-
26 funded plan (“Health Plan”) provided by the State of Arizona through the Arizona
27 Department of Administration (“ADOA”). Individuals enrolled in the Health Plan must
28 choose to receive benefits through one of four network providers. In 2018, Toomey
selected Blue Cross Blue Shield of Arizona (“BCBSAZ”) as his network provider.

1 Pertinently, not all services and procedures deemed medically necessary by a clinician are
2 covered under the Health Plan. Article 10.1 of the Health Plan specifically excludes
3 numerous surgeries, procedures, treatments, and other medical services from coverage,
4 one of which is “gender reassignment surgery.” The Health Plan provides coverage for
5 other forms of treatment for individuals with gender dysphoria, including mental health
6 counseling and hormone therapy medically necessary for gender dysphoria. (*See* Doc. 1,
7 ¶¶ 1, 4, 14, 32-33, Exh. A at p. 26-27, 55-58).

8 Toomey alleges his physician submitted a precertification to BCBSAZ requesting
9 approval for Toomey to receive a “total hysterectomy with removal of tubes and ovaries
10 surgery” for his “health issues of transsexualism and gender identity disorder.” On
11 August 10, 2018, BCBSAZ sent a letter to Toomey denying approval of his request
12 because the procedure “is considered a gender reassignment surgery, which is a benefit
13 exclusion” under Section 10.1 of the Health Plan. (*See* Doc. 1, ¶ 43, Exh. G).

14 On January 23, 2019, Toomey filed the Complaint in this action challenging the
15 Health Plan’s “gender reassignment surgery” exclusion. (Doc. 1). Toomey alleges that
16 the Health Plan discriminates against Toomey and other transgender employees “because
17 of sex” in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”) and deprives
18 Toomey and other transgender individuals of equal treatment under the Equal Protection
19 Clause of the Fourteenth Amendment. (Doc. 1, ¶ 7). Toomey asserts that discrimination
20 “on the basis of transgender status or gender nonconformity is discrimination on the basis
21 of ‘sex’ under Title VII.” (*Id.*, ¶ 59). Toomey contends that the Health Plan exclusion for
22 “gender reassignment surgery” discriminates “based on transgender status and gender
23 nonconformity” (*Id.*, ¶ 60). Toomey further alleges that “[b]ecause medical transition
24 from one sex to another inherently transgresses gender stereotypes, denying medically
25 necessary coverage based on whether surgery is performed for purposes of ‘gender
26 reassignment’ constitutes impermissible discrimination based on gender nonconformity.”
(*Id.*, ¶ 61).

27 Toomey seeks class-wide injunctive and declaratory relief on behalf of two classes:
28 (1) “[e]mployees of the Arizona Board of Regents enrolled in a self-funded Plan

1 controlled by the Arizona Department of Administration who have or will have medical
2 claims for transition-related surgical care” and (2) “individuals (including Arizona State
3 employees and their dependents) enrolled in the self-funded Plan controlled by the
4 Arizona Department of Administration who have medical claims or will have claims for
5 transition-related surgical care.” (Doc. 28, p. 7). Toomey seeks declaratory relief and
6 “[p]ermanent injunctive relief.... requiring Defendants to remove the [Health Plan’s]
7 categorical exclusion of coverage for ‘[g]ender reassignment surgery’ and evaluate
8 whether Dr. Toomey and the proposed classes’ surgical care for gender dysphoria is
9 ‘medically necessary’.” (Doc. 1, p. 22 ¶ B).

10 On March 3, 2019, the State Defendants moved to dismiss the Complaint pursuant
11 to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). (Doc. 24). On April 5, 2019, Plaintiff filed a
12 Motion for Class Certification, requesting an order certifying the case as a class action
13 under Fed.R.Civ.P. 23(b)(2) and appointing Plaintiff’s counsel as class counsel under
14 Rule 23(g). (Doc. 28). Shortly thereafter, the parties filed a joint motion and stipulation
15 to stay briefing on the Plaintiff’s Motion for Class Certification until the Court rules on
16 the State Defendants’ Motion to Dismiss. The parties further stipulated that if the Court
17 denies the Motion to Dismiss, they will submit to the Court a joint proposed discovery and
18 briefing schedule with respect to the Motion for Class Certification within ten days of the
19 ruling on the Motion to Dismiss (“Joint Motion”). (Doc. 36). The Court granted the Joint
20 Motion and stayed the briefing on the Motion for Class Certification on April 23, 2019.
21 (Doc. 38). The Motion to Dismiss was fully briefed on May 16, 2019. (*See* Doc. 40).
22 This Court has not yet issued a ruling on the State Defendants’ Motion to Dismiss. While
23 the parties were in the middle of briefing the Motion to Dismiss, the United States
24 Supreme Court granted *certiorari* in *Harris Funeral Homes* to review: “Whether Title VII
25 prohibits discrimination against transgender people based on (1) their status as
26 transgendered or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228
(1989).” 2019 WL 1756679 (April 22, 2019).

27 Based on the United States Supreme Court’s decision to review *Harris Funeral*
28 *Homes*, a case that will provide guidance on legal issues presented in Toomey’s

1 Complaint and the State Defendants' Motion to Dismiss, the State Defendants request that
2 the Court stay further proceedings in this action, including the pending motions and
3 discovery, until the United States Supreme Court issues its decision in *Harris Funeral*
4 *Homes*.

5 **II. THIS ACTION SHOULD BE STAYED**

6 a. **Standard for Issuing a Stay**

7 It is well established that a district court has discretionary power to stay
8 proceedings before it. *Landis v. North America Co.*, 299 U.S. 248, 254 (1936) (“[T]he
9 power to stay proceedings is incidental to the power inherent in every court to control the
10 disposition of the causes on its docket with economy of time and effort for itself, for
11 counsel, and for litigants.”). The Court “may, with propriety, find it is efficient for its
12 own docket and the fairest course for the parties to enter a stay of an action before it,
13 pending resolution of independent proceedings which bear upon the case.” *Mediterranean*
14 *Enters. Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983); *Leyva v. Certified*
15 *Grocers of Cal. Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Where such a stay is considered,
16 the court need not find that the two cases present identical issues or that the issues to be
17 resolved in the other proceeding “are necessarily controlling over the action before the
18 court.” *Mediterranean Enters. Inc.*, 708 F.2d at 1465. Instead, a finding that the cases
19 present substantially similar issues is sufficient. *See Landis*, 299 U.S. at 254; *Leyva*, 593
20 F.2d at 864.

21 In determining whether to exercise its discretion to issue a stay, the Court must
22 weigh the following factors:

23 [1] the possible damage which may result from the granting of the stay; [2]
24 the hardship or inequity which a party must suffer in being required to go
25 forward, and [3] the orderly course of justice measured in terms of the
simplifying or complicating of issues, proof, and questions of law which
could be expected to result from a stay.”

26 *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55).

27 As demonstrated below, in this particular case, it is appropriate for the Court to exercise
28

1 its broad discretion to issue a stay pending the Supreme Court’s disposition in *Harris*
2 *Funeral Homes*.

3 b. **Harris Funeral Homes**

4 In *Harris Funeral Homes*, Aimee Stephens, who is transgender, worked as a
5 funeral director at R.G. & G.R. Harris Funeral Homes, Inc. (the “Funeral Home”).
6 Stephens was terminated from the Funeral Home shortly after Stephens disclosed that she
7 intended to transition from male to female and would represent herself and dress as a
8 woman while at work. The EEOC initiated litigation against the Funeral Home on behalf
9 of Stephens, claiming it had violated Title VII by, among other things, terminating
10 Stephen’s employment on the basis of her transgender or transitioning status and her
11 refusal to conform to sex-based stereotypes. *EEOC v. R.G. Harris Funeral Homes Inc.*,
12 884 F.3d 560, 566-67 (6th Cir. 2018). The EEOC sought to enjoin the Funeral Home from
13 discriminating against an employee or applicant because of their sex, including on the
14 basis of gender identity.

15 The parties submitted dueling motions for summary judgment. On August 18,
16 2016, the United States District Court for the Eastern District of Michigan granted
17 summary judgment in favor of the Funeral Home on both claims. The district court held
18 that Stephens could not prevail on her claim that her termination was due to transgender
19 status or gender identity because “transgendered or transsexual status is currently not
20 protected under Title VII.” *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100
21 F.Supp.3d 594, 598-99 (E.D. Mich. 2015).

22 The Sixth Circuit reversed on March 7, 2018, holding that transgender individuals
23 may assert claims arising out of discrimination based on their failure to conform to sex
24 stereotypes pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Sixth
25 Circuit found that sex stereotyping claims are well established under Title VII and there is
26 “no reason to exclude Title VII coverage for non sex-stereotypical behavior simply
27 because the person is transsexual.” *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 572
28 (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)). The Sixth Circuit

1 reasoned that “discrimination against transgender persons necessarily implicates Title
2 VII’s proscriptions against sex stereotyping” because “an employer cannot discriminate
3 on the basis of transgendered status without imposing its stereotyping notions of how
4 sexual organs and gender identity ought to align.” *Id.* at 576.

5 The Sixth Circuit also held that “it is analytically impossible to fire an employee
6 based on that employee’s status as transgender person without being motivated, at least, in
7 part by the employee’s sex.” *Id.* at 575. Accordingly, the Sixth Circuit found that the
8 district court erred

9 in finding that Stephens could not alternatively pursue a claim that she was
10 discriminated against on the basis of her transgender and transitioning
11 status. Discrimination on the basis of transgender and transitioning status is
12 necessarily discrimination on the basis of sex, and thus the EEOC should
13 have had the opportunity to prove that the Funeral Home violated Title VII
14 by firing Stephens because she is transgendered and transitioning from
15 male to female.

16 *R.G. Harris Funeral Homes Inc.*, 884 F.3d at 566-67.

17 On July 20, 2018, the Funeral Home filed its petition for *certiorari* with the United
18 States Supreme Court. On April 22, 2019, the Supreme Court granted the petition for
19 *certiorari* on the following: “Whether Title VII prohibits discrimination against
20 transgender people based on (1) their status as transgendered or (2) sex stereotyping under
21 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).” 2019 WL 1756679 (April 22, 2019).
22 Briefing on the merits is underway and a decision in *Harris Funeral Homes* is expected
23 during the 2019-2020 term.

24 c. **The CMAX Factors Favor a Stay**

25 A balance of the factors set forth by the Ninth Circuit in *CMAX* supports issuing a
26 stay here.

27 i. **The “Orderly Course of Justice” Will Be Served by a Stay.**

28 The factor addressing the “orderly course of justice” strongly weighs in favor of a
stay. In *Harris Funeral Homes*, the U.S. Supreme Court is reviewing (1) whether
transgender status is *per se* a protected class under Title VII and (2) whether Title VII
prohibits discrimination against transgender individuals under the sex-stereotyping theory

1 articulated in the U.S. Supreme Court’s *Price Waterhouse* case. Here, Toomey’s
2 Complaint alleges (i) discrimination on the basis of transgendered status or gender
3 nonconformity is discrimination on the basis of sex under Title VII and (ii) the Health
4 Plan exclusion for gender reassignment surgery discriminates based on “transgender status
5 and gender nonconformity” in violation of Title VII. (Doc. 1, ¶¶ 59-60). Toomey also
6 challenges the “gender reassignment surgery” exclusion under *Price Waterhouse*’s sex-
7 stereotyping theory, alleging that the denial of the gender reassignment surgery constitutes
8 impermissible discrimination because “medical transition from one sex to another
9 inherently transgresses gender stereotypes.” (*Id.*, ¶ 61). In the Motion to Dismiss, the
10 State Defendants argue that Toomey is asking this Court to use Title VII to require
11 employer-sponsored benefit plans to cover gender reassignment surgery for a
12 classification of individuals that Title VII does not currently protect; further, the gender
13 reassignment surgery exclusion does not constitute “sex stereotyping” under *Price*
14 *Waterhouse*. (Doc. 24). Thus, in *Harris Funeral Homes*, it is expected that the Supreme
15 Court will provide guidance on legal issues that have been presented in Toomey’s
16 Complaint and the Motion to Dismiss.

17 Moreover, because Toomey’s Title VII claim and Equal Protection Clause claim
18 (under 42 U.S.C. §1983) are based on the same allegation – that the Health Plan
19 discriminates “based on transgender status and gender nonconformity” – a decision in
20 *Harris Funeral Homes* is likely going to provide guidance on Toomey’s Equal Protection
21 Clause claim as well, as courts have noted a connection between Title VII and Equal
22 Protection Clause claims under §1983. See *Okwuosa v. Empl. Dev.*, 143 F.App’x. 20, 23
23 (9th Cir. 2005) (“Because Okwuosa failed to establish a prima facie case of discrimination
24 for purposes of Title VII, the district court correctly granted summary judgment on
25 Okwuosa’s claim of unlawful discrimination on the basis of race and national origin under
26 §1983”); *Etsitty v. Utah Transit*, 502 F.3d 1215, 1227-28 (10th Cir. 2007) (“Because
27 Etsitty does not argue there was a violation of the Equal Protection Clause separate from
28 her Title VII sex discrimination claim, her Equal Protection claim fails for the same
reasons discussed above”); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir.

1 1991) (In discrimination suits, the elements of a plaintiff’s case are the same, based on the
2 disparate treatment elements outlined in *McDonnell Douglas*, whether that case is brought
3 under §§ 1981, 1983 or Title VII. Because plaintiff’s Title VII [] claims failed, so would
4 his claims under §§1981 and 1983).

5 Put simply, the issues in *Harris Funeral Homes* are relevant to legal claims and
6 defenses that have been presented in this case. Thus, a stay to await the Supreme Court’s
7 decision in *Harris Funeral Homes* would serve the orderly administration of justice and
8 likely could resolve (or at a minimum limit and simplify) the issues in this case. In
9 contrast to the benefit to be obtained awaiting resolution of the *Harris Funeral Homes*
10 decision, failure to do so could result in inconsistent rulings that will need to be
11 disentangled. Indeed, the *Harris Funeral Homes* decision could change the applicable
12 law in such a way that this Court’s intervening rulings will be nullified or will need to be
13 made anew. A stay, therefore, is most “efficient for [the court’s] own docket and the
14 fairest course for the parties[.]” *Leyva*, 593 F.2d at 863.

15 **ii. The State Defendants Will Suffer Substantial Hardship if the**
16 **Case Is Not Stayed.**

17 If a stay is not issued, and the State Defendants are compelled to proceed defending
18 the case, inequity will result. Central issues in this case are before the United States
19 Supreme Court; it is highly anticipated that *Harris Funeral Homes* will yield a decision
20 that is relevant to the claims and defenses in this case. It would be a significant waste of
21 time, effort, and resources for both parties and the Court to continue litigating this case
22 through the pleading stage and (if any claims survive) through discovery on class
23 certification issues and Toomey’s underlying claims, as well as through class certification
24 proceedings, when the Supreme Court is poised to issue a ruling in a case involving legal
25 issues that have been presented in this case. Given the U.S. Supreme Court’s review of
26 *Harris Funeral Homes*, the Court and the parties currently all face the risk of dedicating
27 substantial resources litigating issues that may ultimately prove unnecessary. Under these
28 circumstances, this case should be stayed to await clarification from the Supreme Court in
Harris Funeral Homes before proceeding further with litigation that will impose

1 substantial burdens on the Court and the parties. *See Lopez v. American Express Bank*,
2 2010 WL 3637755, *4 (C.D. Cal. September 17, 2010) (granting stay pending decision of
3 the Supreme Court and noting the significant costs that defendants would incur related to
4 fact and expert discovery, motion practice and trial preparation to defend the action in
5 absence of a stay).

6 **iii. Toomey Will Not Be Disadvantaged or Prejudiced by a Stay.**

7 In contrast to the huge (and potentially wasteful) drain on resources if this case
8 proceeds before the Supreme Court's decision in *Harris Funeral Homes*, Plaintiff will not
9 suffer damage or inequity due to a stay – particularly because the duration of the stay will
10 be relatively brief. Briefing is underway in *Harris Funeral Homes* and a decision is
11 expected from the Supreme Court in the 2019-2020 term. Accordingly, any stay will be
12 of limited duration. Courts have found stays of six months to eighteen months to be
13 reasonable and not prejudicial. *See e.g. Audio MPEG, Inc. v. Hewlett-Packard Comp.*,
14 2015 WL 5567085 at *5 (E.D. Va. Sept. 21, 2015) (noting that "...a stay of at most
15 eighteen months will not unduly prejudice plaintiffs..."); *Lopez v. Miami Dade Cty.*, 145
16 F.Supp.3d 1206, 1208 (S.D. Fla. 2015) (ruling that stay would not prejudice plaintiff
17 where decision by Supreme Court was expected within the year); *Cent. Valley Chrysler-*
18 *Jeep, Inc.*, 2007 WL 135688 at * 15 (E.D. Cal. January 16, 2007) ("Plaintiffs' exposure
19 to potential inequity or hardship if [their requested relief] is delayed for six months is
20 negligible and not sufficient to warrant this court moving forward in these proceedings
21 without the benefit of whatever simplification of the issues the Supreme Court's decision
22 [] may afford."); *Cortes v. Bd. Of Governors*, 1991 WL 148181 at * 1 (N.D. Ill. July 19,
23 1991) (finding that although stay of proceedings pending resolution of Supreme Court
24 case on analogous issues would delay trial as much as a year or more, stay would not be
25 unduly prejudicial).

26 Moreover, in contrast with a case where a stay might disrupt proceedings after
27 years of litigation, this case is at an early stage. No discovery has been taken; only the
28 Motion to Dismiss has been fully briefed. The briefing of the Motion for Class

1 Certification has been stayed. While Plaintiff might argue that he will be harmed from
2 delaying the injunctive relief sought in this case, Plaintiff did not move for a preliminary
3 injunction and any prospective injunctive relief is unlikely to be addressed by this Court
4 before the U.S. Supreme Court issues a decision in *Harris Funeral Homes*. See e.g.
5 *Gustavson v. Mars, Inc.*, 2014 WL 6986421 * 3 (N.D. Cal. Dec. 10, 2014). Based on the
6 foregoing, this factor should not weigh against the Court staying this matter.

7 **III. CONCLUSION**

8 Good cause exists for a stay because in *Harris Funeral Homes*, the U.S. Supreme
9 Court is currently reviewing legal issues that have been presented in Toomey’s Complaint
10 and the Motion to Dismiss – whether Title VII prohibits discrimination against
11 transgender individuals based on (i) their transgender status or (ii) sex stereotyping under
12 *Price Waterhouse v. Hopkins*. If a stay is not granted and this action proceeds while
13 *Harris Funeral Homes* is pending, the parties may incur substantial unnecessary costs and
14 Court rulings could be at odds with the law later interpreted by the U.S. Supreme Court.
15 Because temporarily staying the case at this early stage while awaiting the Supreme
16 Court’s ruling in *Harris Funeral Homes* will benefit the parties, conserve the Court’s
17 resources, and promote the orderly course of justice, the State Defendants respectfully
18 request that this action be stayed pending a decision by the Supreme Court in *Harris*
19 *Funeral Homes*.

20 RESPECTFULLY SUBMITTED this 29th day of May, 2019.

21
22 **BURNSBARTON PLC**

23
24 By s/C. Christine Burns
25 C. Christine Burns
26 Kathryn Hackett King
27 Sarah N. O’Keefe
28

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 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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