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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 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO 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) FILED BY DEFENDANTS STATE OF ARIZONA, GILBERT DAVIDSON AND PAUL SHANNON

Plaintiff Dr. Russell Toomey submits the following Memorandum of Points and Authorities in Opposition to the Motion to Stay filed by the Defendants State of Arizona,

Gilbert Davidson, and Paul Shannon (collectively "State Defendants"), Dkt. 41.

INTRODUCTION

Dr. Russell Toomey brought this case on behalf of himself and a proposed class of similarly situated transgender individuals, who are categorically denied coverage for transition-related care to treat gender dysphoria as a result of the State Defendants' discriminatory health insurance policy. He asserts claims for sex discrimination under Title VII of the Civil Rights Act of 1964 and claims under the Equal Protection Clause for discrimination based on sex *and* discrimination based on transgender status. The State Defendants have filed a Motion to Dismiss (DE #24), which was fully briefed on May 16, 2109, and is currently and awaiting decision. Dr. Toomey has filed a Motion for Class Certification (DE #28), which has been held in abeyance pending resolution of the Motion the Dismiss.

The State Defendants now ask the Court to stay the entire case—including class certification discovery and briefing—until the Supreme Court issues a decision in *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18–107, at some point in 2020. *Harris Funeral Homes* is a Title VII case that will address "[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 v. EEOC*, No. 18–107, 2019 WL 1756679 (U.S. Apr. 22, 2019) (Mem) (granting certiorari). That decision may impact Dr. Toomey's Title VII claim for sex discrimination, and it may provide guidance for Dr. Toomey's equal protection claim based on sex discrimination. But *Harris Funeral Homes* will have no impact on Dr. Toomey's equal protection claims based on transgender status, which are independently subject to heightened scrutiny. Regardless of how the Supreme Court rules, the parties will have to engage in exactly the same fact discovery, both for the class certification stage and on the merits. In the meantime, Dr. Toomey and the Proposed Class continue to suffer irreparable harm each day they are denied medically necessary care as a result of the State Defendants' unlawful policy.

Because a stay would not conserve any judicial resources and would impose irreparable harm on Dr. Toomey and the Proposed Class, this Court should deny the Motion.

BACKGROUND

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). 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 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."

On behalf of himself and a Proposed Class, Dr. Toomey challenges the facial validity of the Plan's "gender reassignment surgery" exclusion, seeking injunctive and declaratory relief. Dr. Toomey's claims are based on *both* Title VII of the Civil Rights Act of 1964 *and* the Equal Protection Clause of the Fourteenth Amendment. With respect to Title VII, Dr. Toomey contends that the Plan's categorical exclusion of coverage for "gender reassignment surgery" discriminates against him and other transgender employees "because of . . . sex." (Pl's Opp. to Mot. to Dismiss (DE #39) at 5-12). But Dr. Toomey's claims under the Equal Protection Clause are not based solely on sex discrimination. Dr. Toomey contends that the categorical exclusion of coverage for "gender reassignment surgery" violates the Equal Protection Clause because (a) it is subject to heightened scrutiny as discrimination based on sex and is not substantially related to an important governmental interest (*id.* at 12-13), (b) it is subject to heightened scrutiny as

discrimination based on transgender status and is not substantially related to an important governmental interest (*id.* at 13), and (c) it fails even rational-basis review because it imposes disparate treatment that is not rationally related to a legitimate governmental interest (*id.* at 13-14).

The State Defendants filed a motion to dismiss on March 18, 2019. After that motion to dismiss was filed and before Dr. Toomey filed his opposition, the Supreme Court granted certiorari in *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18–107, 2019 WL 1756679 (U.S. Apr. 22, 2019) (Mem), to decide two issues related to Title VII.

In his opposition to the Motion to Dismiss, Dr. Toomey explained why the Supreme Court's grant of certiorari in *Harris Funeral Homes* should not delay these proceedings:

> 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.

(Pl's Opp. to Mot. to Dismiss (DE #39) at 5 n.1). In their Reply Memorandum filed on May 16, 2019, the State Defendants acknowledged that the Supreme Court had granted certiorari in *Harris Funeral Homes* but made no argument that this case should be stayed as a result of the grant of certiorari. (Def's Reply (DE #40) at 5 n.6).

Now—over a month after the Supreme Court granted certiorari and two weeks after filing their Reply Memorandum—the State Defendants have reversed course and ask this Court to stay proceedings for almost a year until the Supreme Court issues a decision in

Harris Funeral Homes at some point in 2020.

ARGUMENT

Under *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936), courts have inherent power to stay proceedings, but they do not enjoy "unfettered discretion." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). In deciding whether to grant a stay, courts must consider (1) "the possible damage which may result from the granting of the stay," (2) "the hardship or inequity which a party must suffer in being required to go 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." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). The "proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). And if there is "even a fair possibility" of harm to the opposing party, the moving party "must make out a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255; *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005).

As discussed below, all of the relevant factors weigh strongly against the State Defendants' request for a stay in this case. A stay would not conserve judicial resources because Dr. Toomey and the Proposed Class have independent claims under the Equal Protection Clause for discrimination based on transgender status. A stay would severely prejudice Dr. Toomey and the Proposed Class as they continue to be denied medically necessary healthcare. And the State Defendants would suffer no cognizable hardship from proceeding with the case.

I. A Stay Would Not Conserve Judicial Resources

Staying proceedings until the Supreme Court rules in *Harris Funeral Homes* would not conserve any judicial resources. Although the Supreme Court's eventual ruling in *Harris Funeral Homes* may have an impact on Dr. Toomey's claims for sex discrimination, *Harris Funeral Homes* will not affect his equal protection claims for discrimination based

on transgender status. Because Dr. Toomey's claims under Title VII and the Equal Protection Clause are both based on the same underlying facts, the ruling in *Harris Funeral Homes* will not have any impact on the scope of the factual questions related to the underlying claims and class certification question. Regardless of how the Supreme Court rules, the parties will have to spend the same "time, effort, and resources to continue litigating this case through discovery on class certification issues and [Dr.] Toomey's underlying claims." Def.'s Mot. 9.

Moreover, despite the State Defendants' assertions to the contrary, Dr. Toomey's claims under the Equal Protection Clause for discrimination based on transgender status do not rise and fall with his claims under Title VII. The State Defendants cite to *Etsitty v. Utah Transit*, 502 F.3d 1215, 1227-28 (10th Cir. 2007), in which the Tenth Circuit held that "[b]ecause [the plaintiff] d[id] not argue there was a violation of the Equal Protection Clause separate from her Title VII sex discrimination claim, her Equal Protection claim fails for the same reasons." But, unlike in *Etsitty*, Dr. Toomey *does* allege discrimination based on transgender status "separate and apart from" his claim based on sex discrimination.

The other cases cited by the State Defendants are even more distinguishable. In those cases, courts held that because the plaintiffs failed *as factual matter* to prove race or national-origin discrimination under Title VII, the plaintiffs also failed as a factual matter to establish a violation of the Equal Protection Clause. In this case, however, the State Defendants are attempting to argue that if the discriminatory exclusion does not *as a legal matter* constitute sex discrimination under Title VII, then it also cannot as a legal matter violate the Equal Protection Clause as discrimination based on transgender status. That is illogical, and the State Defendants cannot cite any case supporting such a proposition.

II. A Stay Would Irreparably Harm Dr. Toomey and Other Members of the Proposed Class.

The harm that a stay would inflict on Dr. Toomey and other proposed class members also weighs heavily against staying this matter. "Plaintiffs have a strong interest in

resolving their claims expeditiously and in vindicating any constitutional or statutory violations to which they may have been subjected." *Melendres v. Maricopa Cty.*, No. 07-CV-02513-PHX-GMSM, 2009 WL 2515618, at *2 (D. Ariz. Aug. 13, 2009). Those interests are particularly strong in this case because Dr. Toomey and the proposed class seek injunctive relief for coverage of medically necessary health care. *See Lockyer v. Mirant Corp.,* 398 F.3d 1098, 1112 (9th Cir.2005) (finding that a stay was not warranted where, "[u]nlike the plaintiffs in [other cases], who sought only damages for past harm, the [plaintiff] seeks injunctive relief against ongoing and future harm."); *Burrell v. Colvin*, No. CV-14-0050-PHX-LOA, 2014 WL 3894109, at *1 (D. Ariz. Aug. 8, 2014) ("[C]ourts more appropriately enter stay orders where a party seeks only damages, does not allege continuing harm, and does not seek injunctive or declaratory relief as a stay would result only in delay in monetary recovery.").

The State Defendants attempt to trivialize the harm that a stay would inflict on Dr. Toomey and the Proposed Class by comparing this case to *Gustavson v. Mars, Inc.*, No. 13-CV-04537-LHK, 2014 WL 6986421, at *1 (N.D. Cal. Dec. 10, 2014), a case in which the plaintiff sued a candy company because "5 chocolate products that she purchased" were "'misbranded' in violation of federal and California law." Dr. Toomey's case is not about candy wrappers. It is a civil rights case about the denial of medically necessary healthcare. Courts in this Circuit have long recognized that "the denial of needed medical care is serious" and "irreparable harm." *Alday v. Raytheon Co.*, No. CV 06-32 TUC DCB, 2008 WL 11441997, at *5 (D. Ariz. Oct. 2, 2008).[1]

[1] *See, e.g.*, *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) ("Plaintiffs have shown a risk of irreparable injury, since enforcement of [Medicaid] rule may deny them needed medical care."); *One Unnamed Deputy Dist. Attorney v. Cty. of Los Angeles*, No. CV 09-7931 ODW (SSX), 2010 WL 11463169, at *5 (C.D. Cal. Mar. 2, 2010) ("Unlike monetary injuries, constitutional violations including the disparity in health care costs cannot be adequately remedied through damages and therefore generally constitute irreparable harm." (brackets omitted)); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 997 (N.D. Cal. 2010) ("[T]he reduction or elimination of public medical benefits is sufficient to establish irreparable harm to those likely to be affected by the program cuts."); *Newton-Nations v. Rogers*, 316 F. Supp. 2d 883, 888 (D. Ariz. 2004) ("The Ninth Circuit has found irreparable injury established by a showing that plaintiffs may be denied medical care.").

The State Defendants note that Dr. Toomey has not filed a motion for a preliminary injunction (Defs.' Mot. at 11) but do not explain why that should affect this Court's analysis. As the State Defendants recognize, Dr. Toomey's claims will require "discovery on class certification issues and [Dr.] Toomey's underlying claims." Def.'s Mot. 9. Dr. Toomey seeks to proceed with that discovery as expeditiously as possible instead of attempting to litigate the case on an incomplete preliminary injunction record. By arguing that the entire case—including discovery—should be stayed, the State Defendants attempt to create a "Catch 22" where the need for discovery precludes a preliminary injunction, and the failure to request a preliminary injunction prevents the plaintiff from conducting discovery. That is not the law.

A stay pending the ruling in *Harris Funeral Homes* would also delay proceedings for an inordinately long period of time. "A stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." *Leyva v. Certified Grocers of Cal. Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979). The Supreme Court has not yet scheduled a date for oral argument in *Harris Funeral Homes*, and it is unlikely that a decision will be issued until near the end of next year's term, in June 2020. Although Defendants cite to a few cases in which courts granted stays for comparable lengths of time, none of those cases involved ongoing allegations of irreparable harm.[2] By contrast, if a stay is granted here, the

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[2] *See Audio MPEG, Inc. v. Hewlett-Packard Comp.*, No. 2:15CV73, 2015 WL 5567085, at *5 (E.D. Va. Sept. 21, 2015) (granting stay because monetary damages will be sufficient to compensate Plaintiffs for any [patent] infringement"); *Lopez v. Miami-Dade Cty.*, 145 F. Supp. 3d 1206, 1207 (S.D. Fla. 2015) (granting stay in case where plaintiffs sought damages alleging that defendant violated the Fair and Accurate Credit Transactions Act "by printing more than the last five digits of credit card numbers on receipts"); *Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. CVF 04-6663 AWI LJO, 2007 WL 135688, at *14 (E.D. Cal. Jan. 16, 2007) (granting injunctive relief based on the Clean Air Act and—in light of that holding—concluding that plaintiffs would not be prejudiced by stay of claims based on Energy Policy and Conservation Act, which sought similar relief); *cf. Cortes v.*

irreparable harm that Dr. Toomey and the Proposed Class would experience during the rest of 2019 and most of 2020 would far exceed any illusory benefit to judicial economy.

III. A Stay Would Impose No Hardship on Defendants.

Because Dr. Toomey has demonstrated "a fair possibility" of harm from a stay, the State Defendants "must make out a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255; *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005). The only "hardship" the State Defendants point to is "the risk of dedicating substantial resources litigating issues that may ultimately prove unnecessary." (Def.'s Mot. at 9).

Under controlling Ninth Circuit precedent, that is insufficient: "[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis.*" *Lockyer v. Mirant Corp.,* 398 F.3d 1098, 1112 (9th Cir. 2005).[3] Moreover, as discussed above, the same resources will have to be expended litigating Dr. Toomey's equal protection claims regardless of how the Supreme Court rules in *Harris Funeral Homes*.

CONCLUSION

Because all the relevant factors weigh strongly against a stay, the State Defendants' Motion to Stay should be denied.

Bd. of Governors, No. 89 C 3449, 1991 WL 148181, at *1 (N.D. Ill. July 19, 1991) (concluding that "delay will not unduly prejudice [plaintiff because he is currently employed by defendants at a salary not substantially below what he would receive if he were awarded the promotion he seeks").

[3] The State Defendants cite to *Lopez v. American Express Bank*, No. CV 09-07335 SJO (MANx), 2010 WL 3637755, *4 (C.D. Cal. September 17, 2010), but in that case the court concluded that any ongoing harm was not irreparable and "may be remedied by an award of damages."

DATED this 10th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on 10th day of June, 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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