Kathleen E. Brody – 026331
Molly Brizgys – 029216
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014
Telephone: (602) 650-1854
Email: **kbrody@acluaz.org**
Email: **mbrizgys@acluaz.org**

Joshua A. Block**
Leslie Cooper**
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, New York 10004
Telephone: (212) 549-2650
E-Mail: **jblock@aclu.org**
E-Mail: **lcooper@aclu.org**
Admitted Pro hac vice

James Burr Shields - 011711
Heather A. Macre - 026625
Natalie B. Virden - 031609
AIKEN SCHENK HAWKINS & RICCIARDI P.C.
2390 East Camelback Road, Suite 400
Phoenix, Arizona 85016
Telephone: (602) 248-8203
E-Mail: **burr@aikenschenk.com**
E-Mail: **ham@aikenschenk.com**
E-Mail: **nbv@aikenschenk.com**

Attorneys for Plaintiff Russell B. Toomey

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; **Andy Tobin**, in his official capacity as 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)

OBJECTION TO REPORT AND RECOMMENDATION (DOC. 46)

Plaintiff, Dr. Russell Toomey, respectfully submits this Objection to the portion of the Magistrate Judge's Report & Recommendation regarding dismissal of his claims for sex discrimination under Title VII. (Doc. 46, pp. 5-8).

I. Under *Price Waterhouse*, the "Gender Reassignment Exclusion" Facially Discriminates Based on Sex.

As explained in Dr. Toomey's Response to the State Defendants' Motion to Dismiss, (Doc. 39, pp. 5-6), sex discrimination under Title VII includes discrimination based on a person's gender nonconformity. The Supreme Court held in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality), that "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex under Title VII. The plaintiff in *Price Waterhouse*, Ann Hopkins, was a female senior manager who was advised that if she wanted to become a partner in the firm she should be less "macho," take "a course in charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. The Supreme Court held that discriminating against Ms. Hopkins on these grounds was discrimination because of sex.

In *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), the Ninth Circuit applied *Price Waterhouse* to discrimination against a transgender prisoner. 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.* at 1195. The Ninth Circuit rejected that distinction. The Ninth Circuit explained 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 to act in the way expected of a man or woman is forbidden under" *Price Waterhouse* as sex discrimination, *id.* at 1202.

Applying the Supreme Court's decision in *Price Waterhouse* and the Ninth Circuit decision in *Schwenk*, district courts within this Circuit have consistently recognized that discrimination based on a person's transgender or transitioning status inherently constitutes "sex" discrimination under Title VII and other civil rights statutes. *See Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (concluding based on *Schwenk* that "discrimination on the basis of transgender identity is discrimination on the basis of sex"); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016) (concluding based on *Schwenk* that "gender-identity discrimination is actionable under Title VII"); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (concluding based on *Schwenk* that "discrimination against transgender individuals is a form of gender-based discrimination subject to intermediate scrutiny"); *see also Stockman v. Trump*, No. EDCV171799JGBKKX, 2017 WL 9732572, at *15 (C.D. Cal. Dec. 22, 2017) (reasoning that *Schwenk* "strongly suggested that discrimination on the basis of one's transgender status is equivalent to sex-based discrimination"). Judge Berzon has interpreted *Schwenk* the same way. *See Latta v. Otter*, 771 F.3d 456, 495 n.12 (9th Cir.

2014) (Berzon, J., concurring) (citing *Schwenk* for the proposition that "discrimination on the basis of transgender status is also gender discrimination").

Outside this Circuit, the Sixth, Seventh, and Eleventh Circuits have similarly held that discrimination against transgender or transitioning individuals is inherently sex discrimination under *Price Waterhouse*. "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017); *accord EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018), *petition for cert granted*, 139 S. Ct. 1599 (Apr. 22, 2019); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). And "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). "[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); *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.").

Applying these principles, courts across the country have recognized that insurance and health care policies that categorically exclude coverage for transition-related

healthcare facially discriminate on the basis of "sex" under Title VII and other civil rights statutes. *See Boyden v. Conlin*, 17-cv-264-WMC, 2018 WL 4473347 (W.D. Wis. Sept. 18, 2018) (exclusion in State employee health plan discriminated based on sex under Title VII and Equal Protection Clause); *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 discriminated based on sex in violation of Section 1557 of the Affordable Care Act); *Flack*, 2018 WL 3574875, at *12-*16 (plaintiffs granted preliminary injunction on claims that exclusion in Wisconsin Medicaid statute discriminated based on sex in violation of Section 1557 of the Affordable Care Act and the Equal Protection Clause); *Norsworthy*, 87 F. Supp. 3d at 1118-21 (plaintiff stated valid claim that exclusion in prison healthcare policy constituted sex discrimination in violation of Equal Protection Clause).

Like the exclusions at issue in other cases, the "gender reassignment surgery" exclusion at issue in Arizona's State employee health plan targets transition-related surgery precisely because the healthcare is being provided for a gender non-conforming purpose of gender transition. Dr. Toomey's hysterectomy would be covered if it were medically necessary treatment for other medical conditions, but because his hysterectomy is for the gender-nonconforming purpose of gender transition, the "gender reassignment surgery" provision categorically excludes it from coverage regardless of medical necessity. By categorically excluding coverage on this basis, 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, and "imposing . . . stereotypical

notions of how sexual organs and gender identity ought to align," *Harris Funeral Homes*, 884 F.3d at 576. As another district court explained, "the 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.

For all these reasons, Dr. Toomey has stated a valid claim for sex discrimination under Title VII.

II. The Magistrate Judge Mischaracterized *Schwenk* and Misapplied *Manhart*'s "But For" Test.

In recommending that the Title VII claim be dismissed, the Magistrate Judge did not discuss or distinguish any of foregoing cases. Ignoring *Price Waterhouse* entirely, the Magistrate Judge re-characterized *Schwenk* as "a straightforward application of" *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). (Doc. 46, p.8). In *Manhart*, the Supreme Court held that a discriminatory life insurance policy violated Title VII because it did "not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." *Id.* at 711 (internal quotation marks omitted). The Magistrate Judge reasoned that the prison guard's attack in *Schwenk* was sex discrimination under *Manhart*'s "simple test" because "[t]he evidence presented at summary judgment suggested that [the guard] was attracted to males who displayed feminine characteristics. If Schwenk were female (that is, if the sex assigned to her at birth was female) rather than male and displayed the same feminine appearance

and demeanor that Schwenk displayed, then the attack would not have occurred." (Doc. 46, p. 8). By contrast, the Magistrate Judge reasoned, Dr. Toomey could *not* show "that the Plan exclusion would not apply if his sex [assigned at birth] were different." (*Id.* at 6).

The conclusion was fundamentally flawed in at least three respects.

First, the Magistrate Judge's re-characterization of *Schwenk* rests on a mistaken factual premise. The Magistrate Judge assumed that "[if] Schwenk were female (that is, if the sex assigned to her at birth was female) rather than male and displayed the same feminine appearance and demeanor that Schwenk displayed, then the attack would not have occurred." (*Id.* at 8). But Schwenk "was incarcerated in the *all-male* Washington State Penitentiary." *Schwenk*, 204 F.3d at 1193 (emphasis added). The prison guard was attracted to the plaintiff's "assumption of a feminine rather than a typically masculine appearance or demeanor," and he offered "to bring her make-up and 'girl stuff' from outside the prison in order to enhance the femininity of her appearance." *Id.* at 1202. Nothing in the *Schwenk* opinion supports the Magistrate Judge's assumption that the prison guard preferred to sexually assault transgender women instead of cisgender women if given the opportunity. To the contrary, the court cited to psychological literature indicating that "prison rapists strongly resist the characterization of their activities as homosexual. Instead, they conceive their sexual partners as female members of the prison social order." *Id.* at 1203 n.14.

Second, the Ninth Circuit in *Schwenk* never cited to *Manhart* or purported to be a straightforward application of the *Manhart* test. Instead, the Ninth Circuit grounded its

analysis in *Price Waterhouse* and its protections from discrimination based on gender nonconformity. But in applying *Schwenk*, the Magistrate Judge focused exclusively on *Manhart* without discussing *Price Waterhouse* at all. As a result, the Magistrate Judge never addressed the overwhelming number of cases both inside and outside the Ninth Circuit holding that discrimination against transgender individuals is inherently discrimination based on gender conformity under *Price Waterhouse*. The Magistrate Judge also never addressed cases applying that principle in the specific context of insurance exclusions like the one at issue in this case.

Third, despite the Magistrate Judge's assumption to the contrary, Dr. Toomey *can* show that he was treated in a manner that but for his sex assigned at birth would have been different.[1] Dr. Toomey requires a hysterectomy as medically necessary treatment to align his body with his male identity. Because Dr. Toomey was assigned a female sex at birth, his surgery is categorically excluded from coverage as "gender reassignment surgery" without regard to medical necessity. By contrast, the exclusion would not apply to a man

[1] The Magistrate Judge appeared to equate "sex" under Title VII with sex assigned at birth. But *Schwenk* explicitly rejected that "narrow" definition of the term. *Schwenk* explained that under *Price Waterhouse* the term "sex" in Title VII includes characteristics sometimes referred to as "gender," such as masculinity, femininity, and "sexual identity." *Schwenk*, 204 F.3d at 1201-02. Other courts have increasingly recognized that the ordinary definition of the term "sex" in 1964 and today recognized, includes both physical attributes of sex, as well as cultural and behavioral ones. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016) (collecting dictionary definitions), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017); *Fabian v. Hosp. Cent. Of Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (same); "sex, n. 4a," OED Online, Oxford University Press (defining sex as "a social or cultural phenomenon, and its manifestations" and collecting definitions dating back to 1651). In this case, Dr. Toomey has established sex discrimination even under the Magistrate Judge's narrow definition of the term.

with male sex assigned at birth who was born with a uterus and fallopian tubes as a result of Persistent Mullerian Duct Syndrome ("PMDS").[2] *Cf. Flack*, 328 F. Supp. 3d at 948 (explaining that exclusion of transition related care from Wisconsin's Medicaid program discriminated based on sex assigned at birth because "if a natal female were born without a vagina, she could have surgery to create one, which would be covered by Wisconsin Medicaid if deemed medically necessary" but "a natal male suffering from gender dysphoria would be denied the same medically necessary procedure because of her sex").

More generally, Dr. Toomey's sex assigned at birth is part of what makes him transgender. The Magistrate Judge reasoned that "[t]here will be times when discrimination against a transgender individual does violate Title VII, but only where the plaintiff presents evidence showing that the discriminatory behavior would not occur if the plaintiff's sex were different." (Doc. 46, p. 6). But that is a false distinction. A transgender individual is a person whose gender identity is different from their sex assigned at birth. Discrimination based on transgender status is *always* discrimination that would not occur but for the person's sex assigned at birth because, if the person's sex assigned at birth were different, the person would not be transgender. *See Harris Funeral Homes*, 884 F.3d at 578 ("Because an employer cannot discriminate against an employee for being transgender without considering that employee's [sex assigned at birth], discrimination on the basis of

[2] National Inst. of Health, *Genetic & Rare Disease Center: Persistent Mullerian duct syndrome*, at https://rarediseases.info.nih.gov/diseases/8435/persistent-mullerian-duct-syndrome.

transgender status necessarily entails discrimination on the basis of sex [assigned at birth].”). By discriminating against Dr. Toomey based on his transgender status, Defendants are necessarily treating him in a manner that, but for his sex assigned at birth, would be different.

III. Conclusion

Whether Dr. Toomey’s Title VII claims are analyzed under *Price Waterhouse* as discrimination based on gender nonconformity or analyzed under *Manhart* as discrimination that would not occur but for a person’s sex assigned at birth, Dr. Toomey has stated a valid claim for sex discrimination and State Defendant’s Motion to Dismiss should be denied in its entirety.

DATED this 2nd day of July, 2019.

ACLU FOUNDATION OF ARIZONA

By /s/ Kathleen E. Brody
Kathleen E. Brody
Molly Brizgys
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Joshua A. Block
(*pro hac vice* granted)
Leslie Cooper
(*pro had vice* granted)
125 Broad Street, Floor 18
New York, New York 10004

AIKEN SCHENK HAWKINS & RICCIARDI P.C.
James Burr Shields
Heather A. Macre
Natalie B. Virden
2390 East Camelback Road, Suite 400
Phoenix, Arizona 85016

Attorneys for Plaintiff Russell B. Toomey

CERTIFICATE OF SERVICE

I hereby certify that on 2nd day of July, 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:

C. Christine Burns christine@burnsbarton.com
Kathryn Hackett King kate@burnsbarton.com
Sarah N. O'Keefe
BURNSBARTON PLC
2201 E. Camelback Rd., Suite 360
Phoenix, AZ 85016
Attorneys for Defendants State of Arizona, Gilbert Davidson, and Paul Shannon

Paul F. Eckstein PEckstein@perkinscoie.com
Austin C. Yost AYost@perkinscoie.com
Perkins Coie LLP
2901 N. Central Ave., Suite 2000
Phoenix, AZ 85012-2788
DocketPHX@perkinscoie.com
Attorneys for Defendants Arizona Board of Regents, d/b/a University of Arizona; Ron Shoopman; Larry Penley; Ram Krishna; Bill Ridenour; Lyndel Manson;Karrin Taylor Robson; Jay Heiler; and Fred Duval

/s/ Sonora Rose