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14 **UNITED STATES DISTRICT COURT**  
15 **DISTRICT OF ARIZONA**

16 **Russell B. Toomey,**  
17  
18 Plaintiff,  
19  
20 v.

CV 19-CV-0035-TUC-RM (LAB)

21 **State of Arizona; Arizona Board of Regents,**  
22 **d/b/a University of Arizona,** a governmental  
23 body of the State of Arizona; **Ron Shoopman,** In  
24 his official capacity as Chair of the Arizona Board  
25 of Regents; **Larry Penley,** in his official capacity  
26 as member of the Arizona Board of Regents; **Ram**  
27 **Krishna,** in his official capacity as Secretary of  
28 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,

**PLAINTIFF’S SUPERSEDING**  
**MOTION FOR CLASS**  
**CERTIFICATION**

Defendants.

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**INTRODUCTION**

The State of Arizona provides health care coverage to its employees through a self-funded healthcare plan controlled by the Arizona Department of Administration. (Am. Compl., Doc. 86). The Plan categorically excludes “gender reassignment surgery,” regardless of whether the surgery qualifies as medically necessary to treat gender dysphoria. (Am. Compl, Doc. 86 at pg. 7). Plaintiff Russell B. Toomey, Ph.D., brings a facial challenge to that categorical exclusion under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and the Equal Protection Clause of the Fourteenth Amendment. (Am. Compl., Doc. 86 at pg. 5). On December 23, 2019, this Court denied Defendants’ motion to dismiss Dr. Toomey’s claims and held that Dr. Toomey had stated valid claims for relief under both Title VII and the Equal Protection Clause. (Doc. 69).

Plaintiff respectfully moves the Court for an order certifying this case as a class action under Fed. R. Civ. P. 23(b)(2) and appointing Plaintiff’s counsel as class counsel under Rule 23(g). In support of this Motion, Plaintiff submits his own declaration about his medical claim, as well as information about his connections to the transgender community in Arizona that make him uniquely well-situated to represent the interests of the classes.

**BACKGROUND**

As an employee of the Arizona Board of Regents, Dr. Toomey is provided healthcare coverage through the State of Arizona’s self-funded healthcare plan controlled by the Arizona Department of Administration. (Am. Complaint, Doc. 86, pg. 1-3). The Plan generally provides coverage for medically necessary care, but the Plan categorically denies all coverage for “[g]ender reassignment surgery” regardless of whether the surgery qualifies as medically necessary to treat gender dysphoria. Transgender individuals enrolled in the Plan have no opportunity to demonstrate that their surgical care to treat gender dysphoria (also known as “transition-related care” or “gender-affirming care” is

1 medically necessary.

2 As a result of the Plan’s categorical exclusion for “gender reassignment surgery,”  
3 Dr. Toomey was denied preauthorization for his hysterectomy on August 10, 2018. (Doc.  
4 86-7.). The denial was based solely on the Plan’s exclusion for “gender reassignment  
5 surgery.”

6 Dr. Toomey challenges the facial validity of the Plan’s “gender reassignment  
7 surgery” exclusion, which denies transgender individuals an equal opportunity to  
8 demonstrate that their transition-related surgical care is medically necessary. As alleged  
9 in the Complaint, Dr. Toomey contends that the “gender reassignment surgery” exclusion  
10 facially violates Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause  
11 of the Fourteenth Amendment. (Am. Compl., Doc. 86 at pg. 5). On December 23, 2019,  
12 this Court denied Defendants’ motion to dismiss Dr. Toomey’s claims and held that Dr.  
13 Toomey had stated valid claims for relief under both Title VII and the Equal Protection  
14 Clause. (Doc. 69).

### 15 **Proposed Classes**

16 Pursuant to Federal Rule of Civil Procedure 23(b)(2), Dr. Toomey seeks class-wide  
17 injunctive and declaratory relief on behalf of two classes. (Am. Compl., Doc. 86 at pg. 11-  
18 12). For purposes of the Title VII claims against the State of Arizona and the Arizona Board  
19 of Regents, the first class is defined as:

20 Current and future employees of the Arizona Board of Regents who are or  
21 will be enrolled in the self-funded Plan controlled by the Arizona Department  
22 of Administration, and who have or will have medical claims for transition-  
23 related surgical care.

24 For purposes of the equal protection claims against Andy Tobin and Paul Shannon in their  
25 official capacities, the second class is defined as:

26 Current and future individuals (including Arizona State employees and their  
27 dependents), who are or will be enrolled in the self-funded Plan controlled  
28 by the Arizona Department of Administration, and who have or will have  
medical claims for transition-related surgical care.

## ARGUMENT

1  
2 This is the paradigmatic case for class certification. Dr. Toomey brings a facial  
3 challenge to the Plan’s “gender reassignment” exclusion, which applies across the board to  
4 all Plan members regardless of medical necessity. A single injunction would provide relief  
5 to all class members by lifting the categorical exclusion and allowing class members’  
6 claims for transition-related surgery to be evaluated for “medical necessity” under the  
7 Plan’s generally applicable standards.

### I. The Proposed Classes Meet All the Rule 23(a) Requirements.

#### A. Numerosity

8  
9  
10 “A proposed class satisfies the numerosity requirement if members are so numerous  
11 that joinder would be impracticable. There is no fixed threshold, but courts in this circuit  
12 generally have held that classes of **40 or more** satisfy the numerosity requirement.”  
13 *Valenzuela v. Ducey*, No. CV-16-03072-PHX-DGC, 2017 WL 6033737, at \*4 (D. Ariz.  
14 Dec. 6, 2017) (internal quotation marks and citations omitted) (emphasis added). A class  
15 can also “be certified without determination of its size, so long as it’s reasonable to believe  
16 it large enough to make joinder impracticable and thus justify a class action suit.” *Arnold*  
17 *Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th  
18 Cir. 2014). “Where the exact size of the class is unknown, but general knowledge and  
19 common sense indicate that it is large, the numerosity requirement is satisfied.” 1 Alba  
20 Cone & Herbert B. Newberg, *Newberg on Class Actions* § 3.3 (4th ed. 2002))

21  
22 To establish numerosity, therefore, Dr. Toomey must demonstrate—at most—that  
23 it is reasonable to believe based on general knowledge and common sense that (a) at least  
24 40 current or future Board of Regents employees will be enrolled in the self-funded Plan  
25 and have medical claims for transition-related, (b) at least 40 current or future individuals  
26 (including Arizona State employees and their dependents) will be enrolled in the self-  
27 funded Plan and have medical claims for transition-related care. In making that showing,  
28

1 Dr. Toomey is not limited to evidence that would be admissible under the Federal Rules of  
2 Evidence. *Valenzuela*, 2017 WL 6033737, at \*4.

3 Numerosity is easily satisfied in this case based on Dr. Toomey's first-hand  
4 knowledge and reasonable inferences from demographic data. Dr. Toomey is already  
5 personally aware of at least six other employees of the Board of Regents who are unable  
6 to receive transition-related surgery because of the challenged exclusion. (Toomey Decl.,  
7 Exhibit A, at pg. 4).

8 Demographic data further indicates that the total number of class-members could be  
9 over 1,000. As of 2017, the Board of Regents employed 35,614 individuals at Arizona's  
10 public universities.<sup>1</sup> As of 2018, approximately 137,700 individuals receive healthcare  
11 through the State's self-funded plan.<sup>2</sup> According to a 2016 study from the Williams  
12 Institute, approximately 0.62% of Arizonans identify as transgender.<sup>3</sup> Recent surveys  
13 further reflect that an estimated 25% to 35% of individuals who identify as transgender or  
14 gender non-binary have undergone some form of gender conforming surgery.<sup>4</sup> And an  
15 additional 61% of transgender men and 54% of transgender women reported *wanting* some  
16 form of gender conforming surgery in the future.<sup>5</sup>

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19 <sup>1</sup> Arizona Board of Regents, University System Quick Facts, *available at*  
20 <https://www.azregents.edu/universtiy-system-quick-facts> (last visited February 13, 2020).

21 <sup>2</sup> Arizona Department of Administration Benefits, Health Insurance Trust Fund Annual  
22 2017 Report (2018), p. 6, *available at*  
23 [https://benefitoptions.az.gov/sites/default/files/media/LEGI\\_HITF\\_2018\\_Annual\\_Report.pdf](https://benefitoptions.az.gov/sites/default/files/media/LEGI_HITF_2018_Annual_Report.pdf).

24 <sup>3</sup> Andrew R. Flores et. al., *How Many Adults Identify as Transgender in the United States*  
25 (2016), The Williams Institute, *available at*  
26 <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

27 <sup>4</sup> Ian T. Nolan, et. al., *Demographic and temporal trends in transgender identities and*  
28 *gender confirming surgery*, 8 *Translational Andrology and Urology* 3 (2019).

<sup>5</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016), *The Report of the 2015 U.S. Transgender Survey*, Washington, DC: National Center for

1 Applying this demographic data, it is reasonable to conclude that *approximately*  
2 *221* transgender individuals currently work for the Board of Regents and *approximately*  
3 *854* transgender individuals currently receive healthcare through the State’s self-funded  
4 Plan. Applying the conservative estimate of individuals who *have* received (25%) or *wish*  
5 to receive gender conforming surgery (57%), *approximately 181* such transgender  
6 individuals work for the Board of Regents and *approximately 700* such transgender  
7 individuals receive healthcare through the State’s self-funded Plan. From this data alone,  
8 the Court can easily infer that each of the putative classes has more than 40 members. *See*  
9 *Hoffman v. Blattner Energy, Inc.*, 315 F.R.D. 324, 337 (C.D. Cal. 2016) (finding  
10 numerosity satisfied where plaintiff identified 23 employees who were actual members of  
11 the subclass and presented evidence that there were 1,229 total employees because “it is  
12 reasonable for the Court to conclude that there are other employees out of 1,229 who fall  
13 within the proposed subclass”); *Williams v. Conway*, 312 F.R.D. 248, 252 (N.D.N.Y. 2016)  
14 (reasonable inference that 0.14% of prison population is profoundly deaf because 0.14%  
15 of total population is profoundly deaf).  
16

17 Moreover, even without a statistical estimate of current class members, joinder  
18 would still be impractical because Dr. Toomey seeks declaratory and injunctive relief on  
19 behalf of “current and future” employees and State Plan beneficiaries “who have or will  
20 have” medical claims for transition-related surgical care. “[C]lasses including future  
21 claimants generally meet the numerosity requirement due to the ‘impracticality of counting  
22 such class members, much less joining them.’” *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C.  
23 Cir. 2019). “[T]he presence of future class members renders joinder inherently impractical,  
24 thus satisfying the numerosity requirement’s fundamental purpose.” *Inland Empire-*  
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27 Transgender Equality, pp. 105-106, *available at*  
28 <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

1 *Immigrant Youth Collective v. Nielsen*, No. EDCV172048PSGSHKX, 2018 WL 1061408,  
2 at \*7 (C.D. Cal. Feb. 26, 2018).

### 3 **B. Commonality**

4 The proposed classes also satisfy the requirement of commonality. “In a civil  
5 rights suit, ‘commonality is satisfied where the lawsuit challenges a system-wide practice  
6 or policy that affects all of the putative class members.’” *Ortega-Melendres v. Arpaio*,  
7 836 F. Supp. 2d 959, 989 (D. Ariz. 2011) (quoting *Armstrong v. Davis*, 275 F.3d 849,  
8 868 (9th Cir. 2001)), *aff’d*, 695 F.3d 990 (9th Cir. 2012).

9 Dr. Toomey’s claims easily meet that test. He brings a facial challenge that does  
10 not depend on whether each individual’s surgery is ultimately proven to be medically  
11 necessary. Instead, Dr. Toomey merely seeks declaratory relief and an injunction  
12 providing all class members the opportunity to have their claims for transition-related  
13 surgery evaluated for medical necessity under the same standards and procedures that the  
14 Plan applies to other medical treatments. The denial of that equal opportunity is an injury  
15 in fact that can be resolved on a class-wide basis because “[w]hen the government erects a  
16 barrier that makes it more difficult for members of one group to obtain a benefit than it is  
17 for members of another group,” the “injury in fact” is “the denial of equal treatment  
18 resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”  
19 *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508  
20 U.S. 656, 666 (1993); *see Valenzuela*, 2017 WL 6033737, at \*5 (granting class certification  
21 in which “the relevant injury is not the denial of driver’s licenses, but the fact that the State  
22 imposes requirements on class members that it does not impose on other[s]”); *Wit v. United*  
23 *Behavioral Health*, 317 F.R.D. 106, 127 (N.D. Cal. 2016) (granting class certification in  
24 challenge to insurance company’s mental health coverage guidelines because “Plaintiffs  
25 do not ask the Court to make determinations as to whether class members were *actually*  
26 entitled to benefits. Instead, Plaintiffs seek only an order that [the insurance company]  
27  
28



1 develop guidelines that are consistent with generally accepted standards and reprocess  
2 claims for coverage that were denied under the allegedly faulty guidelines.”).

### 3 **C. Typicality**

4 Under Rule 23(a)(3), the representative party must have claims or defenses that are  
5 “typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality is  
6 satisfied “when each class member’s claim arises from the same course of events, and each  
7 class member makes similar legal arguments to prove the defendants’ liability.” *Rodriguez*  
8 *v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (citations omitted). This requirement is  
9 “permissive and requires only that the representative’s claims are reasonably co-extensive  
10 with those of the absent class members; they need not be substantially identical.” *Hanlon*  
11 *v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

12 For all the same reasons that Dr. Toomey’s claims are common to the classes, Dr.  
13 Toomey’s claims are also typical of the classes. Dr. Toomey is challenging the blanket  
14 exclusion for all “gender reassignment surgery,” and he merely seeks the opportunity to  
15 demonstrate that transition-related surgical care is medically necessary. That facial  
16 challenge applies equally to every member of the proposed classes regardless of the  
17 particular type of transition-related surgery the class member seeks and regardless of  
18 whether the class member is ultimately successful in proving that their specific surgery is  
19 medically necessary. *See Flack v. Wisconsin Dep’t of Health Servs.*, 331 F.R.D. 361, 369  
20 (W.D. Wis. 2019) (certifying class action challenge to Wisconsin’s categorical exclusion  
21 of transition-related care from Medicaid plan because “all the claims arise from defendants’  
22 enforcing the Challenged Exclusion, and the relief sought simply seeks to allow the class  
23 members the right to individually seek treatment based on medical necessity, free from  
24 enforcement of the Challenged Exclusion.”).

1           **D. Adequacy of Representation.**

2           **1. The class representatives' interests are not antagonistic to the interests**  
3           **of the classes**

4           Dr. Toomey is a transgender male who is a tenured professor at the University of  
5           Arizona in the department of Family Studies and Human Development. (Decl. of Dr.  
6           Russell Toomey, Exhibit A at pg. 3). Dr. Toomey's academic research focuses on the  
7           discrimination LGBTQ youth face in their families, schools, and communities and seeks  
8           to identify ways to mitigate the association between LGBTQ discrimination and poor  
9           health outcomes. (*Id.*). Dr. Toomey is a member of the Transgender Studies Research  
10          Cluster at the University of Arizona and serves as a faculty fellow at the University of  
11          Arizona's LGBTQ Resource Center. (*Id.*). Dr. Toomey is also deeply connected to the  
12          wider transgender community in Arizona. He is on the steering committee of Camp Born  
13          this Way, an Arizona camp for transgender youth and their families. (*Id.* at 3-4). He has  
14          served on the Board of the Southern Arizona Gender Alliance which provides support,  
15          education, resources, and advocacy for Southern Arizona's community of transgender and  
16          gender non-conforming individuals. (*Id.* at 4). Given his academic expertise on these  
17          issues as well as a deep personal connection to many of the foremost transgender  
18          community groups in Arizona, Dr. Toomey is well situated to represent the interests of the  
19          classes and to communicate with them about issues in the case.

20  
21          As both an employee of the University of Arizona Board of Regents and a  
22          participant of the Plan effected by its categorical exclusion of "gender reassignment  
23          surgery," Dr. Toomey adequately represents and his interests are aligned with all members  
24          of the classes. Because the complaint does not turn on each individual medical treatment  
25          but instead turns on the opportunity for each class member to demonstrate that their  
26          transition-related care is medically necessary the class members' interests are  
27          commensurate with each other.

1                   **2. Counsel are well qualified to represent the classes.**

2                   Plaintiff’s counsel are experienced class action and civil rights practitioners. The  
3 litigation team includes (1) Victoria Lopez, Advocacy and Legal Director of the ACLU of  
4 Arizona, who represents classes in three other matters (Exhibit B, Decl. of Victoria Lopez),  
5 (2) Christine K. Wee of the ACLU of Arizona, who represents a class in one matter, (3)  
6 Joshua Block of the ACLU who has represented several classes challenging discrimination  
7 against LGBT people and has represented other transgender individuals in discrimination  
8 suits regarding access to transition-related health care (Exhibit C, Decl. of Joshua Block),  
9 and (4) Wesley Powell and Matthew Freimuth of Willkie Farr & Gallagher LLP who are  
10 experienced class action litigators (on behalf of both plaintiffs and defendants) and have  
11 also represented transgender individuals in discrimination suits regarding access to  
12 transition-related health care and public facilities (Exhibit D, Decl. of Wesley R. Powell).

13                   **II. Dr. Toomey’s Claims Should Be Certified Under Rule 23(b)(2).**

14                   Dr. Toomey brings this action on behalf of himself and two classes of similarly  
15 situated individuals pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure,  
16 which authorizes class actions when “the party opposing the class has acted or refused to  
17 act on grounds that apply generally to the class, so that final injunctive relief or  
18 corresponding declaratory relief is appropriate respecting the class as a whole.”

19                   The key to the (b)(2) class is the indivisible nature of the injunctive or  
20 declaratory remedy warranted—the notion that the conduct is such that it can  
21 be enjoined or declared unlawful only as to all of the class members or as to  
22 none of them. In other words, Rule 23(b)(2) applies only when a single  
23 injunction or declaratory judgment would provide relief to each member of  
24 the class.

25                   *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011) (quotation marks and  
26 citations omitted). “Civil rights cases against parties charged with unlawful, class-based  
27 discrimination are prime examples” of cases suitable for certification under Rule 23(b)(2).  
28                   *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

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Dr. Toomey’s facial challenge under Title VII and the Equal Protection Clause falls squarely within the scope of Rule 23(b)(2). Through the “gender reassignment surgery” exclusion, Defendants have “acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Rule 23(b)(2). As discussed above, class certification is appropriate because Dr. Toomey challenges the facial validity of the Plan’s “gender reassignment surgery” exclusion, which denies transgender individuals an equal opportunity to demonstrate that their transition-related surgical care is medically necessary. The denial of that equal opportunity is an injury in fact that can be resolved on a class-wide basis. *See Flack*, 331 F.R.D. at 369; *Valenzuela*, 2017 WL 6033737, at \*5; *Wit*, 317 F.R.D. at 127.

**CONCLUSION**

Plaintiff has satisfied all prerequisites to and requirements of Rule 23 and, therefore, respectfully requests that the Court certify the proposed classes, approve the named Plaintiff as a class representative, and appoint Plaintiff’s counsel to represent the classes.

DATED: this 6<sup>th</sup> day of March, 2020.

ACLU FOUNDATION OF ARIZONA  
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Victoria López\*  
Christine K. Wee

(\*admission under Arizona Rule 38(f) pending)

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 2020, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties.

/s/ Christine K. Wee  
Christine K. Wee