

ACLU FOUNDATION OF ARIZONA

3707 North 7th Street, Suite 235

Phoenix, Arizona 85014

Telephone: (602) 650-1854

Facsimile: (602) 650-1376

Email: kbrody@acluaz.org

Email: mbrizgys@acluaz.org

Kathleen E. Brody – 026331

Molly Brizgys – 029216

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

125 Broad Street, Floor 18

New York, New York 10004

Telephone: (212) 549-2650

Facsimile: (212) 549-2627

E-Mail: jblock@aclu.org

E-Mail: lcooper@aclu.org

Joshua A. Block

(*pro hac vice* motion to follow)

Leslie Cooper

(*pro hac vice* motion to follow)

AIKEN SCHENK HAWKINS & RICCIARDI P.C.

2390 East Camelback Road, Suite 400

Phoenix, Arizona 85016

Telephone: (602) 248-8203

Facsimile: (602) 248-8840

E-Mail: jbs@aikenschenk.com

E-Mail: ham@aikenschenk.com

E-Mail: nbv@aikenschenk.com

James Burr Shields - 011711

Heather A. Macre - 026625

Natalie B. Virden - 031609

Attorneys for Plaintiff Russell B. Toomey

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RUSSELL B. TOOMEY,

Case No. _____

Plaintiff,

v.

COMPLAINT

**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.

1 Plaintiff Russell B. Toomey, on behalf of himself and all others similarly situated,
2 brings this action against Defendants State of Arizona, Arizona Board of Regents, d/b/a
3 University of Arizona, Ron Shoopman, Larry Penley, Ram Krishna, Bill Ridenour,
4 Lyndel Manson, Karrin Taylor Robson, Jay Heiler, Fred DuVal, Gilbert Davidson, and
5 Paul Shannon, for violations of Title VII of the Civil Rights Act of 1964 and the Equal
6 Protection Clause of the Fourteenth Amendment.
7
8

9 INTRODUCTION

10 1. The State of Arizona provides healthcare coverage to State employees
11 through a self-funded health plan controlled by the Arizona Department of
12 Administration (“the Plan”). (Exhibit A.)
13

14 2. The Plan generally provides coverage for medically necessary care, but
15 singles out transgender employees for unequal treatment by categorically denying all
16 coverage for “[g]ender reassignment surgery” regardless of whether the surgery qualifies
17 as medically necessary treatment. As a result, transgender individuals enrolled in the
18 Plan have no opportunity to demonstrate that their transition-related care is medically
19 necessary, and they have no opportunity to appeal any adverse determination to an
20 independent reviewer.
21
22
23

24 3. In the past, some public and private insurance companies excluded
25 coverage for treatment of gender dysphoria (or “transition-related care”), including
26 surgical treatments, based on the erroneous assumption that such treatments were
27
28

1 cosmetic or experimental. Today, however, every major medical organization to address
2 the issue has recognized that such exclusions have no basis in medical science and that
3 transition-related care is effective, safe and medically necessary for treatment of gender
4 dysphoria.
5

6
7 4. Plaintiff Russell Toomey, Ph.D., is a man who is transgender. He is
8 employed as an Associate Professor at the University of Arizona. As a result of the Plan's
9 discriminatory exclusion, Dr. Toomey has been blocked from receiving a medically
10 necessary hysterectomy prescribed by his physician in accordance with the widely
11 accepted standards of care for treating gender dysphoria. The Plan provides coverage for
12 the same hysterectomies when prescribed as medically necessary treatment for other
13 medical conditions. But, the Plan categorically excludes coverage for hysterectomies
14 when they are medically necessary for purposes of "[g]ender reassignment."
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17
18 5. If the discriminatory exclusion were removed, Dr. Toomey would have an
19 opportunity to prove that his surgery is medically necessary under the Plan's generally
20 applicable standards for establishing medical necessity.
21
22

23 6. If the discriminatory exclusion were removed, Dr. Toomey would also have
24 the right to appeal any adverse determination to an independent reviewer within the third-
25 party claims administrator and, if necessary, to an independent review organization.
26
27

1 14. Dr. Toomey is employed by Defendant, the Arizona Board of Regents, as
2 an Associate Professor at the University of Arizona.
3

4 15. The Arizona Board of Regents provides healthcare to its employees,
5 including Dr. Toomey, through a self-funded plan controlled by the Arizona Department
6 of Administration.
7

8 16. Defendant Ron Shoopman is sued in his official capacity as Chair of the
9 Arizona Board of Regents.
10

11 17. Defendant Ram Krishna is sued in his official capacity as Secretary of the
12 Arizona Board of Regents.
13

14 18. Defendant Bill Ridenour is sued in his official capacity as Treasurer of the
15 Arizona Board of Regents.
16

17 19. Defendants Larry Penley, Lyndel Manson, Karrin Taylor Robson, Jay
18 Heiler, and Fred DuVal are sued in their official capacities as Members of the Arizona
19 Board of Regents.
20

21 20. Defendant Gilbert Davidson is sued in his official capacity as Interim
22 Director of the Arizona Department of Administration.
23

24 21. Defendant Paul Shannon is sued in his official capacity as Acting Assistant
25 Director of the Benefits Services Division of the Arizona Department of Administration.
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EXHAUSTION OF ADMINISTRATIVE REQUIREMENTS

22. On August 15, 2018, Dr. Toomey timely filed a charge with the Equal Employment Opportunity Commission against the Arizona Board of Regents for sex discrimination in violation of Title VII.

23. On December 14, 2018, the Department of Justice issued a right-to-sue letter to Dr. Toomey, which was received on December 27, 2018. (Exhibit B.)

FACTUAL ALLEGATIONS

Transgender individuals and gender dysphoria

24. Gender identity is a well-established medical concept, referring to one's sense of oneself as belonging to a particular gender. Typically, people who are designated female at birth based on their external anatomy identify as girls or women, and people who are designated male at birth identify as boys or men. For transgender individuals, however, the sense of one's gender identity differs from the sex assigned to them at birth.

25. Transgender men are men who were assigned "female" at birth, but have a male gender identity. Transgender women are women who were assigned "male" at birth, but have a female gender identity.

26. Although the precise origins of each person's gender identity is not fully understood, experts agree that it likely results from a combination of biological factors as well as social, cultural, and behavioral factors.

1 27. Being transgender is not a mental disorder. Men and women who are
2 transgender have no impairment in judgment, stability, reliability, or general social or
3 vocational capabilities solely because of their transgender status. But transgender men
4 and women may require treatment for “gender dysphoria,” the diagnostic term for the
5 clinically significant emotional distress experienced as a result of the incongruence of
6 one’s gender with their assigned sex and the physiological developments associated with
7 that sex. The criteria for diagnosing gender dysphoria are set forth in the Diagnostic and
8 Statistical Manual of Mental Disorders (DSM-V) (302.85).
9

10
11
12 28. The widely accepted standards of care for treating gender dysphoria are
13 published by the World Professional Association for Transgender Health (“WPATH”).
14 Under the WPATH standards, medically necessary treatment for gender dysphoria may
15 require medical steps to affirm one’s gender identity and transition from living as one
16 gender to another. This treatment, often referred to as transition-related care, may include
17 hormone therapy, surgery (sometimes called “sex reassignment surgery” or “gender
18 confirmation surgery”), and other medical services that align individuals’ bodies with
19 their gender identities.
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24 29. Under the WPATH standards, the exact medical treatment varies based on
25 the individualized needs of the person. Under each patient’s treatment plan, the goal is to
26
27

1 enable the individual to live all aspects of one's life consistent with one's gender identity,
2 thereby eliminating the distress associated with the incongruence.
3

4 30. In the past, public and private insurance companies excluded coverage for
5 transition-related care based on the assumption that such treatments were cosmetic or
6 experimental. Today, however, transition-related surgical care is routinely covered by
7 private insurance programs. The American Medical Association, the American
8 Psychological Association, the American Psychiatric Association, the American College
9 of Obstetricians and Gynecologists, and other major medical organizations have issued
10 policy statements and guidelines supporting healthcare coverage for transition-related
11 care as medically necessary under contemporary standards of care. No major medical
12 organization has taken the position that transition-related care is not medically necessary
13 or advocated in favor of a categorical ban on insurance coverage for transition-related
14 procedures.
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20 31. Medicare began covering transition-related surgery in 2014 after an
21 independent medical board in the U.S. Department of Health & Human Services
22 rescinded an old Medicare policy that had excluded surgery from Medicare coverage.
23 The decision explained that the Medicare surgery exclusion was based on a medical
24 review conducted in 1981 and failed to take into account subsequent developments in
25 surgical techniques and medical research. Medicare now provides coverage for
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1 transition-related surgical care for gender dysphoria on a case-by-case basis based on
2 individualized medical need.

3
4 **The Self-Funded Health Plan’s “Gender Reassignment” Exclusion**

5 32. Dr. Toomey’s healthcare coverage is provided and paid for by the State of
6 Arizona through the Plan.

7
8 33. Individuals enrolled in the Plan must choose to receive benefits through a
9 Network Provider. In 2018, the four Network Providers were Aetna, Blue Cross Blue
10 Shield of Arizona, Cigna, and UnitedHealthcare. Dr. Toomey’s Network Provider is Blue
11 Cross Blue Shield of Arizona.

12
13
14 34. The Plan generally provides coverage for medically necessary care, which
15 the Plan defines as “services, supplies and prescriptions, meeting all of the following
16 criteria”: (1) ordered by a physician; (2) not more extensive than required to meet the
17 basic health needs; (3) consistent with the diagnosis of the condition for which they are
18 being utilized; (4) consistent in type, frequency and duration of treatment with
19 scientifically based guidelines by the medical-scientific community in the United States
20 of America; (5) required for purposes other than the comfort and convenience of the
21 patient or provider; (6) rendered in the least intensive setting that is appropriate for their
22 delivery; and (7) have demonstrated medical value.

1 35. In the event that the Plan denies coverage for a treatment based on
2 purported lack of medical necessity, the Plan provides a right to appeal the decision to an
3 independent reviewer at the third-party claims administrator and, if necessary, to further
4 appeal to an external independent review organization. If an independent reviewer
5 concludes that the treatment is medically necessary, that decision is binding, and the Plan
6 must immediately authorize coverage for the treatment.
7

8
9 36. The Plan does not apply these generally applicable standards and
10 procedures to surgical care for gender dysphoria. Instead, the Plan categorically denies all
11 coverage for “[g]ender reassignment surgery” regardless of whether the surgery qualifies
12 as medically necessary. Transgender individuals enrolled in the Plan have no opportunity
13 to demonstrate that their transition-related care is medically necessary or to appeal any
14 adverse determination to an independent reviewer.
15
16
17

18 37. All four of the health insurance companies who serve as Network Providers
19 for the Plan have adopted internal policies and standards for determining when transition-
20 related surgery for gender dysphoria is medically necessary and, thus, covered. (Exhibits
21 C – F.) But, as a result of the Plan’s “gender reassignment” exclusion, the Network
22 Providers do not apply those internal policies and standards when administering the Plan
23 to Arizona State employees and, instead, automatically deny coverage of transition-
24 related surgery.
25
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Dr. Toomey's Medically Necessary Treatment for Gender Dysphoria

38. 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. Dr. Toomey transitioned to live consistently with his male identity in 2003. Since 2003, Dr. Toomey has received testosterone as a medically necessary treatment for gender dysphoria. He also received medically necessary chest reconstruction surgery in 2004.

39. In accordance with the WPATH Standards of Care, Dr. Toomey's treating physicians have recommended that he receive a hysterectomy as a medically necessary treatment for gender dysphoria.

40. The Plan provides coverage for the same surgery when prescribed as medically necessary treatment for other medical conditions, but not when the surgery is performed as part of transition-related care.

41. Dr. Toomey has satisfied all of the criteria for a medically necessary hysterectomy under the WPATH Standards of Care.¹

¹ Those criteria are: (a) Two referral letters from qualified mental health professionals; (b) Persistent, well documented gender dysphoria; (c) Capacity to make a fully informed decision and to consent for treatment; (d) Age of majority in a given country; (e) If significant medical or mental health concerns are present, they must be well controlled; and (f) Twelve continuous months of hormone therapy as appropriate to the patient's gender goals (unless the patient has a medical contraindication or is otherwise unable or unwilling to take hormones).

1 42. All four of the Network Providers for the Plan have adopted internal
2 policies and guidelines that authorize hysterectomies as medically necessary treatments
3 for gender dysphoria based on the same criteria used by the WPATH Standards of Care.
4

5 43. As a result of the Plan's categorical exclusion for "gender reassignment
6 surgery," Dr. Toomey's Network Provider—Blue Cross Blue Shield of Arizona—denied
7 preauthorization for Dr. Toomey's hysterectomy on August 10, 2018. (Exhibit G.).
8

9 44. In denying preauthorization, Blue Cross Blue Shield of Arizona did not
10 apply its own internal guidelines for determining whether the hysterectomy is a medically
11 necessary treatment for gender dysphoria. The denial was based solely on the Plan's
12 exclusion for "gender reassignment surgery."
13
14

15 45. The denial letter from Blue Cross Blue Shield of Arizona stated:
16

17 [W]e cannot approve this request because the laparoscopic total
18 hysterectomy with removal of tubes and ovaries surgery, for your diagnosis
19 of transsexualism and gender identity disorder is considered a gender
20 reassignment surgery, which is a benefit exclusion. This finding is based on
21 your benefit plan booklet on pages 56 & 57 under the heading of
22 "Exclusions and General Limitations" which states:

23 10.1 Exclusions and General Limitations

24 "In addition to any services and supplies specifically excluded in any other
25 Article of the Plan Description, any services and supplies which are not
26 described as covered are excluded. In addition, the following are
27 specifically excluded Services and Supplies:

- 28 • Gender reassignment surgery."

1 If you choose to get the laparoscopic total hysterectomy with removal of
2 tubes and ovaries surgery, BCBSAZ will not cover the costs of this service.

3 (Ex. G at 1.)

4 **CLASS ALLEGATIONS**

5
6 46. Dr. Toomey brings this action on behalf of himself and a class of similarly
7 situated individuals pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.
8 Through the “gender reassignment surgery” exclusion, Defendants have “acted or refused
9 to act on grounds that apply generally to the class, so that final injunctive relief or
10 corresponding declaratory relief is appropriate respecting the class as a whole.” Rule
11 23(b)(2).
12

13
14 47. Class certification is appropriate because Dr. Toomey challenges the facial
15 validity of the Plan’s “gender reassignment surgery” exclusion, which denies transgender
16 individuals an equal opportunity to demonstrate that their transition-related surgical care
17 is medically necessary. The denial of that equal opportunity is an injury in fact that can
18 be resolved on a class-wide basis.
19
20

21
22 48. Dr. Toomey seeks a declaratory judgment and injunction requiring
23 Defendants to remove the Plan’s categorical exclusion of coverage for “[g]ender
24 reassignment surgery” and evaluate whether transgender individuals’ surgical care for
25
26

1 gender dysphoria is “medically necessary” in accordance with the Plan’s generally
2 applicable standards and procedures.
3

4 49. Dr. Toomey proposes two classes based on the claims against each
5 Defendant.
6

7 50. With respect to (a) the Title VII claim against the State of Arizona and the
8 Arizona Board of Regents and (b) the equal protection claim against Defendants Ron
9 Shoopman, Ram Krishna, Bill Ridenour, Larry Penley, Lyndel Manson, Karrin Taylor
10 Robson, Jay Heiler, and Fred DuVal in their official capacities: the proposed class
11 consists of all employees of the Arizona Board of Regents enrolled in the self-funded
12 Plan controlled by the Arizona Department of Administration who have medical claims
13 for transition-related surgical care.
14
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17 51. With respect to the equal protection claim against Defendants Gilbert
18 Davidson and Paul Shannon in their official capacities: the proposed class consists of all
19 individuals (including Arizona State employees and their dependents) enrolled in the self-
20 funded Plan controlled by the Arizona Department of Administration who have medical
21 claims for transition-related surgical care.
22
23

24 52. Each of the proposed classes is so numerous that joinder of all members is
25 impracticable.
26
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28

1 53. For each of the proposed classes, there are questions of law or fact common
2 to the class. Because Dr. Toomey brings a facial challenge, the class claims do not
3 depend on whether a particular individual's transition-related surgery is ultimately proven
4 to be medically necessary. Dr. Toomey merely seeks declaratory relief and an injunction
5 providing all class members the opportunity to have their claims for transition-related
6 surgery evaluated for medical necessity under the same standards and procedures that the
7 Plan applies to other medical treatments.
8
9

10
11 54. For each of the proposed classes, the claims or defenses of the
12 representative parties are typical of the claims or defenses of the class.
13

14 55. For each of the proposed classes, Dr. Toomey will fairly and adequately
15 protect the interests of the class.
16

17 **COUNT I**
18 **VIOLATION OF TITLE VII**
19 **(Against State of Arizona and Arizona Board of Regents)**

20 56. Title VII of the Civil Rights Act of 1964 provides that employers may not
21 "discriminate against any individual with respect to his compensation, terms, conditions,
22 or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-
23 2(a)(1).
24

25 57. The State of Arizona and the Arizona Board of Regents are employers as
26 that term is defined in Title VII, 42 U.S.C. § 2000e-(a) and (b).
27
28

1 58. An employer-sponsored health plan is part of the “compensation, terms,
2 conditions, or privileges of employment.” 42 U.S.C. § 2000e-2(a)(1).
3

4 59. Discrimination on the basis of transgender status or gender nonconformity
5 is discrimination on the basis of “sex” under Title VII.
6

7 60. The employer-sponsored health plan provided by the State of Arizona and
8 the Arizona Board of Regents facially discriminates based on transgender status and
9 gender nonconformity by categorically excluding coverage for all medically necessary
10 “gender reassignment surger[ies].”
11

12 61. Because medical transition from one sex to another inherently transgresses
13 gender stereotypes, denying medically necessary coverage based on whether surgery is
14 performed for purposes of “gender reassignment” constitutes impermissible
15 discrimination based on gender nonconformity.
16
17

18 62. Because the need to undergo gender transition is a defining aspect of
19 transgender status, discrimination based on gender transition is discrimination against
20 transgender individuals as a class.
21

22 63. By categorically excluding all coverage for “[g]ender reassignment
23 surgery,” the Plan deprives Dr. Toomey and other transgender employees of an equal
24 opportunity to prove that their transition-related surgery is medically necessary under the
25 same standards and procedures that apply to other medical conditions.
26
27

COUNT II
VIOLATION OF THE EQUAL PROTECTION CLAUSE
(Against Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson,
Heiler, DuVal Davidson and Shannon in their official capacities)

66. Pursuant to 42 U.S.C. § 1983, Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Davidson and Shannon, in their official capacities, are liable for declaratory and injunctive relief for violations of the Equal Protection Clause.

67. In their official capacity as officers and members of the Arizona Board of Regents, Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, and DuVal are responsible for the terms and conditions of employment at the University of Arizona.

1 68. In his official capacity as Interim Director of the Arizona Department of
2 Administration, Defendant Gilbert Davidson is responsible for “determin[ing] the type,
3 structure, and components of the insurance plans made available by the Department [of
4 Administration].” Ariz. Admin. Code R2-6-103.
5

6 69. In his official capacity as Acting Assistant Director of Benefit Services
7 Division of the Arizona Department of Administration, Defendant Paul Shannon
8 Shannon has direct oversight and responsibility for administering the benefits insurance
9 programs for State employees, including employees of the Arizona Board of Regents.
10

11 70. The Equal Protection Clause of the Fourteenth Amendment provides: “No
12 State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
13

14 71. Arizona State employees are protected by the Equal Protection Clause.
15

16 72. The employer-sponsored health plan provided by the State of Arizona and
17 the Arizona Board of Regents facially discriminates based on transgender status and
18 gender nonconformity by categorically excluding coverage for all medically necessary
19 “gender reassignment surgery.”
20

21 73. Because medical transition from one sex to another inherently transgresses
22 gender stereotypes, denying medically necessary coverage for based on whether surgery
23 is performed for purposes of “gender reassignment” constitutes impermissible
24 discrimination based on gender nonconformity.
25

1 74. Because the need to undergo gender transition is a defining aspect of
2 transgender status, discrimination based on gender transition is discrimination against
3 transgender individuals as a class.
4

5 75. By categorically excluding all coverage for “[g]ender reassignment
6 surgery,” the Plan deprives Dr. Toomey and other transgender employees of an equal
7 opportunity to prove that their transition-related surgical is medically necessary under the
8 same standards and procedures that apply to other medical conditions.
9
10

11 76. By providing a facially discriminatory employer-sponsored health plan, the
12 State of Arizona and the Arizona Board of Regents, by and through Defendants
13 Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Davidson and
14 Shannon, acting in their respective official capacities, have unlawfully discriminated—
15 and continue to unlawfully discriminate—against Dr. Toomey and members of the
16 proposed class on the basis of gender, which is subject to heightened scrutiny under the
17 Equal Protection Clause.
18
19
20

21 77. By providing a facially discriminatory employer-sponsored health plan, the
22 State of Arizona and the Arizona Board of Regents, by and through Defendants
23 Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Davidson and
24 Shannon, acting in their respective official capacities, have unlawfully discriminated—
25 and continue to unlawfully discriminate—against Dr. Toomey and members of the
26
27
28

1 proposed class on the basis of transgender status, which is independently subject to
2 heightened scrutiny under the Equal Protection Clause.

3
4 a. Men and women who are transgender, as a class, have historically
5 been subject to discrimination.

6
7 b. Men and women who are transgender, as a class, have a defining
8 characteristic that bears no relation to an ability to perform or
9 contribute to society.

10
11 c. Men and women who are transgender, as a class, exhibit immutable
12 or distinguishing characteristics that define them as a discrete group.

13
14 d. Men and women who are transgender, as a class, are a minority with
15 relatively little political power.

16
17 78. The Plan's discriminatory exclusion is not narrowly tailored to serve a
18 compelling governmental interest.

19
20 79. The Plan's discriminatory exclusion is not substantially related to an
21 important governmental interest.

22
23 80. The discriminatory exclusion cannot be justified by a governmental interest
24 in limiting coverage to medically necessary treatments because the Plan's general
25 provisions limiting healthcare to "medically necessary" treatments already serves that
26 interest. The only function of the categorical exclusion is to exclude medical care that
27

1 would otherwise qualify as medically necessary under the Plan's generally applicable
2 standards.

3
4 81. The Plan's discriminatory exclusion lacks any rational basis and is
5 grounded in sex stereotypes, discomfort with gender nonconformity and gender
6 transition, and moral disapproval of people who are transgender.
7

8 **RELIEF REQUESTED**

9
10 For the foregoing reasons, Plaintiff respectfully requests that the Court grant the
11 following relief to Dr. Toomey and members of the proposed classes:

12 A. Declaratory relief, including but not limited to a declaration that Defendants
13 State of Arizona and the Arizona Board of Regents violated Title VII and that Defendants
14 Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, DuVal, Davidson and
15 Shannon, in their official capacities, violated the Equal Protection Clause;
16
17

18 B. Permanent injunctive relief with respect to all Defendants, requiring
19 Defendants to remove the Plan's categorical exclusion of coverage for "[g]ender
20 reassignment surgery" and evaluate whether Dr. Toomey and the proposed classes'
21 surgical care for gender dysphoria is "medically necessary" in accordance with the Plan's
22 generally applicable standards and procedures;
23
24

25 C. Plaintiffs' reasonable costs and attorneys' fees pursuant to Title VII and 42
26 U.S.C. § 1988; and
27

1 D. Such other relief as the Court deems just and proper.

2
3 DATED this 23rd day of January, 2019.

4 ACLU FOUNDATION OF ARIZONA

5
6
7 By /s/ Kathleen E. Brody

8 Kathleen E. Brody

9 Molly Brizgys

3707 North 7th Street, Suite 235

Phoenix, Arizona 85014

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11 AMERICAN CIVIL LIBERTIES UNION
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125 Broad Street, Floor 18

New York, New York 10004

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James Burr Shields

18 Heather A. Macre

19 Natalie B. Virden

2390 East Camelback Road, Suite 400

Phoenix, Arizona 85016

21 Attorneys for Plaintiff Russell B. Toomey