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**UNITED STATES DISTRICT COURT**  
**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; et al.,  
  
Defendants.

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

**PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT**

1 Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified classes  
2 (“Plaintiff” or “Dr. Toomey”), submits the following Memorandum of Law in support of his  
3 Motion for Summary Judgment (the “Motion”). This Motion is accompanied by the  
4 Declaration of Russel B. Toomey, the Transmittal Declaration of Christine K. Wee and the  
5 exhibits thereto, and Plaintiff’s LRCiv 56.1 Statement Of Fact (“PSOF”).

## 6 INTRODUCTION

7 The State of Arizona’s (“Arizona” or the “State”) self-funded health plan for State  
8 employees (the “Plan”) categorically excludes coverage for any “gender reassignment  
9 surgery”<sup>1</sup> even when the surgery otherwise qualifies as “medically necessary” under the  
10 Plan’s generally applicable standard. On behalf of himself and the certified classes, Dr.  
11 Toomey seeks: (1) a declaration that the “Gender Reassignment Surgery” Exclusion  
12 (defined below in Background Section II.B) violates Title VII of the 1964 Civil Rights Act  
13 and the Equal Protection Clause of the Fourteenth Amendment and (2) an injunction barring  
14 Defendants from enforcing the “Gender Reassignment Surgery” Exclusion and requiring  
15 them to assess gender affirming surgeries for medical necessity in accordance with the  
16 Plan’s generally applicable standards and procedures.

17 After nearly four years of discovery and motion practice, Dr. Toomey now seeks  
18 summary judgment to stop Defendants’ ongoing and irreparable harm. Because the “Gender  
19 Reassignment Surgery” Exclusion facially discriminates on the basis of sex and transgender  
20 status, and because Defendants’ only justification for the Exclusion—cost control—fails to  
21 satisfy any standard of scrutiny, there are no triable questions of fact in this case, and Dr.  
22 Toomey and the Classes are entitled to judgment as a matter of law.

## 23 BACKGROUND

### 24 I. GENDER DYSPHORIA AND GENDER AFFIRMING SURGERY

25 Dr. Toomey is a man who is transgender: he is a man with a male gender identity,  
26

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27 <sup>1</sup> Plaintiff uses the term “gender reassignment surgery” to mirror the language of the  
28 Exclusion. The more appropriate terminology for such surgery today is “gender  
confirming surgery,” “transition related surgery,” or “gender affirming surgery.”

1 but the sex assigned to him at birth was female. PSOF ¶ 1.<sup>2</sup> Although being transgender is  
 2 not a mental disorder, transgender men and women may require treatment for “gender  
 3 dysphoria,” a “serious but treatable medical condition” characterized by “[d]istress that is  
 4 caused by a discrepancy between a person’s gender identity and that person’s sex assigned  
 5 at birth (and the associated gender role and/or primary and secondary sex characteristics).”  
 6 *Edmo v. Corizon, Inc.*, 935 F.3d 757, 768 (9th Cir. 2019) (quoting World Prof’l Ass’n for  
 7 Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and*  
 8 *Gender-Nonconforming People* 2 (7th ed. 2011) (“WPATH SOC”)); PSOF ¶ 2. The World  
 9 Professional Association for Transgender Health (“WPATH”) publishes widely accepted  
 10 standards of care for treating gender dysphoria. *Edmo*, 935 F.3d at 769, 788 n.16  
 11 (recognizing WPATH standards as “the internationally recognized guidelines for the  
 12 treatment of individuals with gender dysphoria” and the “gold standard on this issue”);  
 13 PSOF ¶ 3. Under those standards, medically necessary<sup>3</sup> treatment for gender dysphoria may  
 14 require steps to affirm one’s gender identity and transition from living as one gender to  
 15 another. *Id.* ¶ 4. This treatment may include hormone therapy, surgery, and other medical  
 16 services. *Id.* For some individuals, “surgery is essential and medically necessary to alleviate  
 17 their gender dysphoria.” *Edmo*, 935 F.3d at 770 (quoting WPATH SOC at 54); PSOF ¶ 5.

18 Today, transition-related surgical care is routinely covered by private insurance, and  
 19 “[t]he weight of opinion in the medical and mental health communities agrees that [gender  
 20 affirming surgery] is safe, effective, and medically necessary in appropriate circumstances.”  
 21 *Edmo*, 935 F.3d at 770; PSOF ¶ 7. In order to narrow the issue in dispute in this litigation,  
 22 the Parties have stipulated “that the medical necessity of gender affirming surgery will not  
 23

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24 <sup>2</sup> The facts in this section are drawn primarily from Plaintiff’s expert report from Dr. Loren  
 25 Schechter. See Decl. Ex. 1. Defendants did not designate an expert witness on these  
 26 topics, leaving Dr. Schechter’s testimony undisputed.

27 <sup>3</sup> The medical community and insurers recognize a distinction between (i) medically  
 28 necessary procedures, which are performed for the purpose of curing or preventing  
 progression of a medical condition, and (ii) cosmetic procedures, which are not  
 performed for a medical purpose. PSOF ¶ 6.

1 be an issue in this case,” and that “if it is determined that the exclusion violates Title VII or  
2 the Equal Protection Clause of the Fourteenth Amendment, the Plan will then need to  
3 determine medical necessity on a case by case basis.” PSOF. ¶ 8; Doc. 128 at 11:11-16.

4 **II. THE STATE’S HEALTHCARE PLAN AND ITS EXCLUSION OF GENDER**  
5 **REASSIGNMENT SURGERY**

6 **A. The Plan And Its Administration**

7 Arizona provides healthcare to State employees through a self-funded healthcare plan  
8 (the “Plan”). PSOF ¶ 9. The Plan is “self-funded” by the State, meaning the State ultimately  
9 controls its design and which benefits it covers or excludes. *Id.* ¶ 10. The Plan is  
10 administered by the Arizona Department of Administration (the “ADOA”). *Id.* ¶ 11.  
11 Healthcare policy decisions are customarily delegated to the Benefits Services Division, the  
12 sub-agency of the ADOA that is specifically tasked with maintaining and administering the  
13 State’s Plan. *Id.* ¶ 12. Substantive determinations regarding Plan design are typically made  
14 by administrative professionals at the ADOA. *Id.* ¶¶ 12, 13. ADOA also contracts with  
15 third-party administrators, such as Blue Cross Blue Shield (“Blue Cross”), which handle  
16 claims administration for State employees who are covered by the Plan. *Id.* ¶¶ 14, 15.

17 The Plan generally provides coverage for medically necessary care, which is defined in  
18 the Plan as treatment that is

- 19 1. Ordered by a physician; 2. Not more extensive than required to meet the basic  
20 health needs; 3. Consistent with the diagnosis of the condition for which they  
21 are being utilized; 4. Consistent in type, frequency and duration of treatment  
22 with scientifically based guidelines by the medical-scientific community in the  
23 United States of America; 5. Required for purposes other than the comfort and  
convenience of the patient or provider; 6. Rendered in the least intensive setting  
that is appropriate for their delivery; and 7. Have demonstrated medical value.

24 *Id.* ¶ 16. When a claim is submitted, ADOA’s third-party administrators are responsible for  
25 making an initial determination of whether the treatment is medically necessary under the  
26 Plan. *Id.* ¶ 17. If one of ADOA’s third-party administrators denies coverage for a treatment  
27 based on purported lack of medical necessity, the Plan provides a right to appeal the decision  
28 to an independent reviewer and, if necessary, to further appeal to an external independent

1 review organization. *Id.* ¶ 18.

2 The Plan covers far more than the bare minimum of what is legally required. *Id.* ¶¶  
3 21, 22. For example, the Plan covers many high-cost prescription drugs even when low-  
4 cost generic alternatives are available. *Id.* ADOA has also *added* coverage for previously  
5 excluded medical procedures once they became accepted by insurers as standard care,  
6 despite the cost increase associated with the expanded coverage. *Id.* ¶ 23 (summarizing new  
7 benefits recently added to Plan). For example, in 2014, the ADOA voluntarily added  
8 coverage for a new type of bariatric surgery for weight-loss, and in 2016 it added coverage  
9 for 3-D Mammography. *Id.* ¶ 23(b)–(f). Both procedures imposed some cost, and neither  
10 was required by law. *Id.* As another example, ADOA Plan Administrator Elizabeth Schafer  
11 testified that before her departure in 2018, ADOA added coverage for new hepatitis-C drug,  
12 which is “extremely expensive.” *Id.* ¶ 23 (g).

13 Before expanding coverage, Benefits Services Division professionals consider the  
14 projected cost increase of a benefit by looking to existing cost data from third-party  
15 administrators and other self-funded insurance providers who cover the procedure. *Id.* ¶ 19.  
16 When the projected cost is minimal or non-significant, that ordinarily weighs in favor of  
17 ADOA covering the proposed benefit. *Id.* ¶ 20.

#### 18 **B. The “Gender Reassignment Surgery” Exclusion**

19 The Plan’s broad coverage of medically necessary care is subject to a list of discrete  
20 exclusions. PSOF ¶ 24. In one of those exclusions, the Plan categorically denies all  
21 coverage for “[g]ender reassignment surgery” regardless of medical necessity (the “Gender  
22 Reassignment Surgery’ Exclusion,” or the “Exclusion”). *Id.* ¶ 25. Under the Exclusion,  
23 transgender individuals are denied even the opportunity to demonstrate that their transition-  
24 related surgery is medically necessary under the Plan’s generally applicable definitions and  
25 procedures. *Id.* ¶ 26.

26 The “Gender Reassignment Surgery” Exclusion categorically denies coverage for  
27 procedures such as hysterectomies, chest surgery, vaginoplasties, and phalloplasties when  
28 performed for the purpose of “gender reassignment” even though the Plan covers similar or

1 identical surgical procedures used to treat other diagnoses, and which are otherwise covered  
 2 under the Plan. *Id.* ¶¶ 25, 27. These procedures do not become more expensive simply  
 3 because they are being performed for the purpose of treating gender dysphoria. *Id.* ¶ 29.

4 The original version of the Exclusion barred coverage for “transsexual surgery” and  
 5 “medical or psychological counseling” and “hormonal therapy” attendant to such surgery  
 6 (the “Prior Exclusion”). PSOF ¶ 31. Neither the Defendants nor any fact witnesses have  
 7 been able to identify the rationale for the Prior Exclusion. *Id.* ¶ 32. In 2017, after decision-  
 8 making that occurred in 2015-16 (*see infra* at Background Section II.C, D), the Exclusion  
 9 was changed to its current language. *Id.* ¶ 54.

### 10 C. ADOA’s Consideration of Whether to Remove the Exclusion in 2015-16

11 In 2015, in response to inquiries from State university employees and a proposed rule  
 12 from the U.S. Department of Health and Human Services implementing Section 1557 of the  
 13 Affordable Care Act, ADOA gathered information to address whether it should keep,  
 14 remove, or modify the Prior Exclusion. PSOF ¶¶ 33, 34.

15 The results of ADOA’s research were compiled into a comprehensive chart prepared  
 16 by ADOA Plan Administrator Elizabeth Schafer, which incorporated input from other  
 17 ADOA employees, including a cost analysis prepared by Finance Manager Kelly Sharritts  
 18 (the “ADOA Research Summary”). *Id.* ¶¶ 36, 37. Summarizing available cost studies, the  
 19 ADOA Research Summary concluded that [REDACTED]

20 [REDACTED]  
 21 [REDACTED] *Id.* ¶ 38 (emphasis added). Then, using available  
 22 cost data, the ADOA Research Summary estimated that that ADOA would experience  
 23 between [REDACTED] claims per year for “transgender coverage,” and that the cost of  
 24 covering the benefits would [REDACTED] *Id.* ¶ 39.

25 ADOA employees deposed in this litigation, including Kelly Sharritts (who performed the  
 26 cost analysis) agreed that in light of the Plan’s size and the cost of other covered benefits,  
 27 this estimated cost was insignificant. *Id.* ¶ 40 (ADOA witnesses describing estimated cost  
 28 as “low,” “miniscule” or “not significant”). No other cost assessment was performed by

1 ADOA in 2015 or 2016, and the ADOA Benefits Services Division Director in 2016, Marie  
2 Isaacson, agreed that there was no reason to doubt the accuracy of Ms. Sharritts' cost  
3 estimate, as reflected in the ADOA Research Summary. *Id.* ¶¶ 41, 42.

4 ADOA's internal cost projection was supported by external analysis that ADOA  
5 reviewed in 2015-16. *Id.* ¶ 43. For example, ADOA reviewed a cost report by the Williams  
6 Institute, which "support[ed] a very low utilization and cost associated with adding [the]  
7 benefit and [would have] no real impact" on the Plan. *Id.* ¶ 43(a). ADOA also gathered  
8 information from other states with employee health plans, which advised that covering  
9 gender affirming care did not significantly impact the finances of their healthcare plans. *Id.*  
10 ¶ 43(b). For example, the State of Washington reported to ADOA that in its experience,

11 [REDACTED]  
12 [REDACTED] *Id.* (emphasis added). The State of Colorado likewise indicated that it had  
13 experienced no cost increase associated with coverage of transgender benefits. *Id.*

14 Ms. Sharritts' estimate of immaterial cost is also bolstered by an expert witness report  
15 from Joan Barrett, a certified actuary who specializes in healthcare cost projection. *Id.* ¶ 44.  
16 Ms. Barrett reviewed the cost information collected by ADOA in 2015-16 and summarized  
17 in the ADOA Research Summary. *Id.* She testified that the cost increase associated with  
18 covering gender affirming surgery in 2016 was less than 0.1%, an "amount so small that it  
19 would be considered immaterial from an actuarial perspective," meaning that it would not  
20 impact the ordinary decision-making of a health insurance provider. *Id.* Defendants have  
21 not designated any expert witness to dispute Ms. Barrett's analysis.

#### 22 **D. Closed-Door Meeting With the Governor's Office**

23 Despite its own findings that the costs of coverage would be immaterial, ADOA  
24 ultimately maintained its Exclusion after a closed-door meeting with the Arizona governor's  
25 office (the "Governor's Office") in the fall of 2016. PSOF ¶ 45. The meeting was attended  
26 by Marie Isaacson (the Director of ADOA Benefits Service Division in 2016), Christine  
27 Corieri (Healthcare Policy Advisor in the Governor's Office), and legal counsel. *Id.* ¶ 46.  
28 Ms. Isaacson testified that "[t]here wasn't really a discussion" at the meeting. *Id.* ¶ 47. Ms.

1 Isaacson did not provide a recommendation about whether ADOA should remove the  
2 Exclusion because she did not think the decision was hers to make. *Id.* ¶ 48.

3 After reviewing the advice of legal counsel, Ms. Corieri announced that ADOA  
4 would cover gender affirming hormones and counseling, but would continue to exclude  
5 gender affirming surgery. *Id.* ¶ 50. The decision was not based on cost, but on the purported  
6 conclusion that coverage was not legally mandated. *Id.* at ¶¶ 49, 51. Ms. Corieri testified  
7 at her deposition that she did not recall being presented with ADOA’s cost analysis, and that  
8 she did not recall asking for or receiving any cost-assessment related to the Exclusion. *Id.*  
9 ¶ 52. After the closed-door meeting, Ms. Corieri approved the new language of the  
10 Exclusion on behalf of the Governor’s Office. *Id.* ¶ 53. The Exclusion (as modified) went  
11 into effect for the 2017 Plan year. *Id.* ¶ 54.

12 As part of discovery, Dr. Toomey filed a motion to compel production of documents  
13 regarding the legal advice that formed the basis of ADOA’s 2016 decision not to provide  
14 coverage for “gender reassignment surgery.” Doc 195. After Defendants disclaimed  
15 reliance on any advice-of-counsel defense, this Court denied the motion to compel but  
16 precluded Defendants “from arguing that they held a good-faith subjective belief that their  
17 decision to maintain the exclusion for gender reassignment surgery was legal.” Doc. 278.

18 When questioned about the circumstances surrounding the 2016 closed-door  
19 meeting, State witnesses testified that it was rare for the Governor’s Office to be involved  
20 in Plan decisions. PSOF ¶ 55(a) (current Benefits Services Division Director Shannon  
21 confirming that it is “not very common” that he even meets with anyone in the Governor’s  
22 Office); *see also id.* ¶ 55(b) (Plan Administration Manager Scott Bender unable to recall a  
23 single instance in which the Governor’s Office was involved in a Plan change before the  
24 ADOA made a recommendation). ADOA’s Lead Plan Administrator Yvette Medina only  
25 recalls two instances in which the Governor’s Office proposed Plan language: “same-sex or  
26 domestic partners” and “the nondiscrimination transgender item.” *Id.* ¶ 55(c).

27 **E. ADOA Responds to Dr. Toomey’s Lawsuit**

1 In response to Dr. Toomey’s lawsuit, and at the request of Defendants’ attorneys,  
2 ADOA’s actuary, Michael Meisner, performed a new cost analysis regarding “transgender  
3 benefits” in 2019 (the “Meisner Analysis”). PSOF ¶ 56. Meisner’s 2019 analysis conflicts  
4 with ADOA’s 2015-16 analysis, and predicts a higher cost increase. *Id.* ¶ 57. The Meisner  
5 analysis cites just two sources, including “cheatsheets.com,” which Meisner found by  
6 searching yahoo.com. *Id.* ¶ 58.

7 Joan Barrett, a certified actuary who specializes in healthcare cost projection,  
8 reviewed Mr. Meisner’s 2019 analysis and concluded that it was “deeply flawed,”  
9 “inconsistent with the [Actuarial Standards of Practice], as well as basic principles of  
10 estimation and statistics,” and that it results in a “material overstatement of the cost for  
11 ADOA to cover gender reassignment surgery.” *Id.* ¶ 60. Among other flaws, Ms. Barrett  
12 noted that Meisner’s analysis (i) erroneously assumes that all transgender individuals would  
13 seek to have gender reassignment surgery every year, year after year; (ii) erroneously  
14 conflates utilization rate with the prevalence of transgender identity; and (iii) fails to  
15 consider publicly available data sources, which the ADOA had previously considered in  
16 2016. *Id.* ¶¶ 61, 62. Ms. Barrett also notes that Mr. Meisner “misinterpret[ed] the sources  
17 he relied on,” for example conflating average cost per claim with a quality-adjusted-life year  
18 (QALY), “an entirely different measurement.” *Id.* ¶ 63. Defendants have not designated Mr.  
19 Meisner as an expert witness in this litigation or provided any other expert testimony to  
20 support his analysis.

21 **F. Application of the “Gender Reassignment Surgery” Exclusion to Dr.**  
22 **Toomey.**

23 Dr. Toomey is a tenured professor at the University of Arizona. PSOF ¶ 64. As an  
24 employee of the Arizona Board of Regents, Dr. Toomey receives healthcare through the  
25 State’s self-funded Plan. PSOF ¶ 65. Although Dr. Toomey’s medical providers have  
26 recommended for many years that he undergo a hysterectomy as medically necessary  
27 treatment for his gender dysphoria, Dr. Toomey did not feel that he had enough job security  
28 to challenge the “Gender Reassignment Surgery” Exclusion until he received tenure in 2017.

1 PSOF ¶ 66. To comply with WPATH standards, Dr. Toomey obtained a letter of referral to  
2 undergo the hysterectomy from two licensed mental health professionals. *Id.* ¶ 67. Dr.  
3 Toomey then met with Dr. Tiffany Karsten, a surgeon who specializes in treating gender  
4 dysphoria who agreed that performing a hysterectomy was medically necessary. *Id.* ¶ 68.  
5 But when Dr. Toomey’s surgeon requested pre-authorization from Blue Cross Blue Shield—  
6 the third-party administrator for Dr. Toomey’s Plan—it refused to pre-approve the  
7 procedure because “laparoscopic total hysterectomy with removal of tubes and ovaries  
8 surgery for a diagnosis of transsexualism and gender identity disorder is considered gender  
9 reassignment surgery, which is a benefit exclusion.” *Id.* ¶ 69.<sup>4</sup>

10 At the time that Blue Cross denied preauthorization, Blue Cross—and all the other  
11 third-party administrators for the ADOA Plan—had adopted internal coverage guidelines  
12 recognizing hysterectomies and other gender affirming surgeries as medically necessary  
13 treatment for gender dysphoria. *Id.* ¶ 71. But for purposes of administering ADOA’s Plan,  
14 the third-party administrators were required to deny Dr. Toomey’s procedure pursuant to the  
15 “Gender Reassignment Surgery” Exclusion instead of applying their own internal coverage  
16 guidelines. *Id.* ¶ 69.

### 17 PROCEDURAL HISTORY

18 Dr. Toomey filed an Equal Employment Opportunity Commission (“EEOC”) Charge  
19 against his employer on August 15, 2018, alleging sex discrimination under Title VII. PSOF  
20 ¶ 72. After receiving a right-to-sue notice from the EEOC, he filed this lawsuit on January  
21 23, 2019. *See generally* Doc. 1.

22 On December 23, 2019, this Court denied the State Defendants’ motion to dismiss,  
23 finding that Dr. Toomey had adequately pled claims of unlawful discrimination under both  
24

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25 <sup>4</sup> A representative from Blue Cross initially told Dr. Toomey’s surgeon that  
26 hysterectomies do not require pre-authorization, but Dr. Toomey was concerned that the  
27 surgeon had been provided incorrect information and that he would ultimately be held  
28 financially responsible. When Dr. Toomey called Blue Cross to clarify that the  
hysterectomy would be for the purpose of treating gender dysphoria, Blue Cross  
confirmed that the surgery would not be covered. PSOF ¶ 70.

1 Title VII and the Equal Protection Clause. Doc. 69. In doing so, this Court rejected the  
2 Magistrate Judge’s report and recommendation to dismiss Dr. Toomey’s Title VII claim.

3 On June 15, 2020, this Court granted Dr. Toomey’s motion for class certification.  
4 Doc. 108. On September 1, 2020, Dr. Toomey filed a motion for preliminary injunction.  
5 Doc. 115. On November 30, 2020, the Magistrate Judge issued a Report and  
6 Recommendation recommending denial of the motion for preliminary injunction (Doc. 134)  
7 (the “PI R&R”). The PI R&R found that Dr. Toomey had not met the heightened standard  
8 for a mandatory injunction, and that the Exclusion did not constitute facial discrimination  
9 on the basis of sex or transgender status under Title VII or the Equal Protection Clause. *Id.*  
10 On February 26, 2021, this Court adopted the PI R&R but “only to the extent that it  
11 recommends denying the Motion for Preliminary Injunction on the grounds that Plaintiff has  
12 not met the heightened standard for obtaining mandatory injunctive relief,” and otherwise  
13 rejected the PI R&R. Doc. 162 at 11.

#### 14 SUMMARY JUDGMENT STANDARD

15 Summary judgment is appropriate where there is no genuine issue of material fact  
16 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A  
17 dispute as to a material fact is “genuine” if there is sufficient evidence for a reasonable jury  
18 to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
19 248 (1986). The opposing party may not rest upon the mere allegations or denials of the  
20 moving party’s pleading, but must present significant and probative evidence to support its  
21 claim. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

#### 22 ARGUMENT

23 The undisputed facts unequivocally show that the “Gender Reassignment Surgery”  
24 Exclusion singles out gender affirming surgery for uniquely different treatment. The Plan  
25 covers hysterectomies, vaginoplasties, phalloplasties, mastectomies, and mammoplasties  
26 when medically necessary to treat other conditions, but denies coverage for the same  
27 procedures when they are necessary to treat gender dysphoria. *See supra* at Background  
28 Section II.B. The plain terms of the “Gender Reassignment Surgery” Exclusion (which

1 refers to “gender” on its face) applies sex-based rules and enforces sex stereotypes that  
2 transgender people should maintain physical features consistent with their sex assigned at  
3 birth. Thus, the Exclusion violates Title VII under the controlling standard articulated in  
4 *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1742 (2020). The PI R&R’s contrary  
5 conclusion that the Exclusion is facially neutral under *Geduldig v. Aiello*, 417 U.S. 484  
6 (1974), and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), conflicts with this Court’s  
7 ruling on the motion to dismiss and with the recognition of other courts that “*Geduldig*-  
8 based reasoning had no place in Title VII analysis.” *Lange v. Houston Cnty, Ga.*, No. 5:19-  
9 CV-392 (MTT), 2022 WL 1812306, at \*13 n.14 (M.D. Ga. June 2, 2022).

10 Because the Exclusion facially discriminates based on sex and transgender status, it  
11 also implicates heightened scrutiny under the Equal Protection Clause. The PI R&R’s  
12 recommendation to the contrary conflicts with this Court’s prior decision, which explicitly  
13 rejected the argument that the “Gender Reassignment Surgery” Exclusion merely “targets a  
14 ‘service’ rather than transgender individuals.” Doc. 69 at 10-11. Moreover, although  
15 *Geduldig* applies to equal protection claims, the “Gender Reassignment Surgery” Exclusion  
16 is critically different from restrictions related to pregnancy or abortion. Unlike pregnancy  
17 and abortion, the “Gender Reassignment Surgery” Exclusion incorporates explicit sex  
18 classifications. See *Fain v. Crouch*, No. CV 3:20-0740, 2022 WL 3051015, at \*14  
19 (S.D.W.Va. Aug. 2, 2022); *Kadel v. Folwell*, No. 1:19CV272, 2022 WL 2106270 (“*Kadel*  
20 *IP*”), at \*21 (M.D.N.C. June 10, 2022); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 999-1000  
21 (W.D. Wis. 2018). And, unlike abortion or pregnancy, discrimination based on “gender  
22 reassignment” or gender dysphoria is facially discriminatory as a form of proxy  
23 discrimination under *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 273–274  
24 (1993), and *Davis v. Guam*, 932 F.3d 822, 837-838 (9th Cir. 2019).

25 The undisputed facts establish that the Exclusion does not survive heightened  
26 scrutiny—or even rational basis review. In response to this lawsuit, State Defendants have  
27 only offered one rationale for maintaining the sex-based discrimination enshrined in the  
28 Exclusion: cost containment. But cost containment is not recognized as a permissible basis

1 for sex-based line drawing. And, even it were, the record establishes that, at the time of the  
2 State’s decision-making in 2016, the cost of covering gender affirming surgery was  
3 immaterial, which would ordinarily favor coverage, not exclusion. Moreover, the State’s  
4 own witnesses have conceded that the Exclusion was *not* maintained because of cost.  
5 Because Defendants have failed to provide any explanation for treating the costs associated  
6 with transition-related surgery differently from the costs associated with other medically  
7 necessary treatments, Defendants’ reliance on “cost control” fails even rational basis review.  
8 *See Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011).

9 **I. THE “GENDER REASSIGNMENT SURGERY” EXCLUSION VIOLATES**  
10 **TITLE VII.**

11 Under Title VII, it is “an unlawful employment practice for an employer . . . to  
12 discriminate against any individual with respect to his compensation, terms, conditions, or  
13 privileges of employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2.  
14 “Health insurance is a term, condition, or privilege of employment under Title VII.” Doc.  
15 69 at 7 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682  
16 (1983)). Discrimination based on transgender status violates Title VII “because to  
17 discriminate on these grounds requires an employer to intentionally treat individual  
18 employees differently because of their sex.” *Bostock*, 140 S. Ct. at 1742; *see also Doe v.*  
19 *Snyder*, 28 F.4th 103, 114 (9th Cir. 2022).

20 To establish a claim for “disparate treatment” under Title VII, a plaintiff must show  
21 that the employer has “intentionally treat[ed] a person worse because of sex.” *Bostock*, 140  
22 S. Ct. at 1740. The undisputed facts establish that Dr. Toomey has met the *Bostock* standard.  
23 And Defendants’ asserted rationale for the Exclusion does not provide a defense that can  
24 sustain their facially discriminatory policy. Further, contrary to the PI R&R’s assumption,  
25 Dr. Toomey does not have to prove that “the Plan exclusion exists because the Plan authors  
26 do not like gender transition and have created this exclusion specifically to burden  
27 transgender individuals.” PI R&R at 6.<sup>5</sup> An employer who “intentionally applies sex-based

28 <sup>5</sup> Although there is more than sufficient evidence for a reasonable factfinder to conclude  
that Defendants maintained the “Gender Reassignment Surgery” Exclusion because of

1 rules” necessarily engages in “intentional” discrimination, regardless of the employer’s  
 2 motivations or reasons for doing so. *Bostock*, 140 S. Ct. at 1745.

3 **A. The Exclusion Facially Discriminates On The Basis Of Sex.**

4 As virtually every other court to consider the question has recognized, excluding  
 5 insurance coverage for medically necessary surgery because the surgery is performed for  
 6 purposes of “gender reassignment” facially discriminates on the basis of “sex” in violation  
 7 of Title VII and other civil rights statutes.<sup>6</sup>

8 By definition, excluding coverage for medically necessary surgery because the  
 9 surgery is performed for the purposes of “gender reassignment” “unavoidably discriminates  
 10 against persons with one sex identified at birth and another today.” *Bostock*, 140 S. Ct. at  
 11

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12 dislike and disapproval of gender transition, Dr. Toomey does not seek summary  
 13 judgment on that basis.

14 <sup>6</sup> See, e.g., *Fain v. Crouch*, No. CV 3:20-0740, 2022 WL 3051015, at \*8 (S.D.W. Va. Aug.  
 15 2, 2022) (granting summary judgment for Section 1557); *Kadel II*, No. 1:19CV272,  
 16 2022 WL 2106270, at \*28 (granting summary judgment for Title VII); *Lange v. Houston*  
 17 *Cnty, Ga.*, No. 5:19-CV-392 (MTT), 2022 WL 1812306, at \*10 (M.D. Ga. June 2, 2022)  
 18 (granting summary judgment for Title VII); *Hammons v. Univ. of Md. Med. Sys. Corp.*,  
 19 551 F. Supp. 3d 567, 589 (D. Md. 2021) (denying motion to dismiss for Section 1557);  
 20 *C.P. by & through Pritchard v. Blue Cross Blue Shield of Ill.*, 536 F. Supp. 3d 791, 797  
 21 (W.D. Wash. 2021) (denying motion to dismiss for Section 1557); *Kadel v. Folwell*, 446  
 22 F. Supp. 3d 1 (M.D.N.C. 2020) (“*Kadel I*”) (denying motion to dismiss for Title VII);  
 23 *Fletcher v. Alaska*, 443 F. Supp. 3d 1024 (D. Alaska 2020) (granting summary judgment  
 24 for Title VII); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018) (denying  
 25 motion to dismiss for Section 1557); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis.  
 26 2018) (granting summary judgment for Title VII and Section 1557); *Flack v. Wis. Dep’t*  
 27 *of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018) (issuing preliminary injunction  
 28 for Title VII and Section 1557).

The two outlier exceptions to that consensus are the PI R&R in this case, which was  
 rejected in relevant part by this Court (Doc. 162 at 11), and the decision in *Hennesy-*  
*Waller v. Snyder*, 529 F. Supp. 3d 1031, 1044 (D. Ariz. 2021), which erroneously  
 distinguished Title VII precedent from claims brought under Section 1557 of the  
 Affordable Care Act. *But see Doe v. Snyder*, 28 F.4th 103, 113 (9th Cir. 2022) (affirming  
 denial of preliminary injunction on other grounds but holding that the district court’s  
 reasoning was “based on an erroneous reading of *Bostock*”).

1 1746. “The characteristics of sex and gender are directly implicated; it is impossible to refer  
2 to the Exclusion without referring to them.” *Kadel I*, 446 F. Supp. 3d at 18 (M.D.N.C.  
3 2020). As this Court already held in denying the Defendants’ motion to dismiss, the  
4 Exclusion treats Dr. Toomey in a manner that, but for his sex assigned at birth, would be  
5 different: “[H]ad Plaintiff been born a male, rather than a female, he would not suffer from  
6 gender dysphoria and would not be seeking gender reassignment surgery.” Doc 69 at 10;  
7 *accord Hammons*, 551 F. Supp. 3d at 591 (explaining that “gender dysphoria [is] a condition  
8 inextricably linked to being transgender,” and plaintiff was denied a hysterectomy  
9 “specifically because it [is] linked to this condition”).

10 The “Gender Reassignment Surgery” Exclusion also discriminates based on gender  
11 nonconformity and sex stereotyping, which—under *Bostock*—is another example of  
12 disparate treatment based on sex assigned at birth. Discrimination based on gender  
13 nonconformity “penalizes a person identified as male at birth for traits or actions that [the  
14 employer] tolerates in an employee identified as female at birth,” and vice versa. *Bostock*,  
15 140 S. Ct. at 1741. As this Court already explained in denying the motion to dismiss, “[t]his  
16 narrow exclusion of coverage for ‘gender reassignment surgery’ is directly connected to the  
17 incongruence between Plaintiff’s natal sex and his gender identity,” which “implicates the  
18 gender stereotyping prohibited by Title VII.” Doc. 69 at 10-11; *accord Boyden*, 341 F.  
19 Supp. 3d at 997 (explaining that excluding transition-related care “implicates sex  
20 stereotyping by . . . requiring transgender individuals to maintain the physical characteristics  
21 of their natal sex”); *Kadel I*, 446 F. Supp. 3d at 14 (“By denying coverage for gender-  
22 confirming treatment, the Exclusion tethers Plaintiffs to sex stereotypes which, as a matter  
23 of medical necessity, they seek to reject.”)<sup>7</sup>

24  
25 <sup>7</sup> For example, if Dr. Toomey had been assigned a male sex at birth and had been born  
26 with a uterus and fallopian tubes as a result of Persistent Mullerian Duct Syndrome  
27 (“PMDS”), the Plan would cover the medically necessary surgery to align his anatomy  
28 with his identity as a man. Amended Complaint; Exhibit A, Doc. 86-1 at 55 (exclusion  
of coverage for “cosmetic surgery” does not exclude “necessary care and treatment of  
medically diagnosed congenital defects and birth abnormalities” or “surgery required to

1           **B. The PI R&R Erred in Concluding that the Exclusion Is Facially Neutral**  
 2           **Under Gilbert.**

3           Against the overwhelming weight of authority, and the Court’s prior reasoning in its  
 4 motion to dismiss, the PI R&R concluded that the Exclusion was facially neutral. Doc 134  
 5 (the “PI R&R”). To reach that conclusion, the PI R&R relied on *General Electric Co. v.*  
 6 *Gilbert*, 429 U.S. 125 (1976), which held that discrimination based on pregnancy is not  
 7 discrimination based on sex under Title VII. The PI R&R reasoned that, under *Gilbert*,  
 8 discrimination based on pregnancy is not sex discrimination because “while all pregnant  
 9 people are women, not all women become pregnant.” PI R&R at 5. The PI R&R concluded  
 10 that “[t]his case is similar” because “while all persons seeking gender transition surgery are  
 11 transgender, not all transgender persons seek gender transition surgery.” *Id.* Although  
 12 Congress subsequently overruled *Gilbert* by passing the Pregnancy Discrimination Act, 42  
 13 U.S.C. § 2000e(k), the PI R&R stated that the *Gilbert* Court’s underlying method of  
 14 “analysis . . . is still controlling.” *Id.* at 5 n.2.

15           That was error. When Congress overruled *Gilbert*, “it unambiguously expressed its  
 16 disapproval of both the holding *and the reasoning* of the Court in the *Gilbert* decision.”  
 17 *Newport News*, 462 U.S. at 678 (emphasis added). “The House Report stated, ‘It is the  
 18 Committee’s view that the dissenting Justices correctly interpreted the Act.’ Similarly, the  
 19 Senate Report quoted passages from the two dissenting opinions, stating that they ‘correctly  
 20 express both the principle and the meaning of [T]itle VII.’” *Id.* at 678-679 (footnotes  
 21 omitted). Because Congress abrogated the holding *and the reasoning* of *Gilbert*, *Bostock*—  
 22 not *Gilbert*—sets the “controlling” analysis. *See Lange*, 2022 WL 1812306, at \*13 n.14  
 23 (applying *Geduldig* to equal protection claim but refusing to apply *Gilbert* to Title VII claim  
 24 because Congress “not only overturned *Gilbert*, but it also made clear that its *Geduldig*-  
 25

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26  
 27           repair bodily damage a person receives from an injury”). But because Dr. Toomey was  
 28 assigned a female sex at birth, his surgery to align his anatomy with his identity as a man  
 is excluded as “gender reassignment.”

1 based reasoning had no place in Title VII analysis”).<sup>8</sup>

2 *Bostock* makes clear why *Gilbert*'s reasoning has no application here. The PI R&R  
3 concluded that the Exclusion “is not, on its face, discrimination on the basis of sex” because  
4 it “only applies to natal females who seek a hysterectomy for the purpose of gender  
5 transition. The exclusion discriminates against some natal females but not all.” PI R&R at  
6 8. That is precisely the argument repudiated by *Bostock* itself, which emphasized that “[Title  
7 VII] focuses on discrimination against individuals, not groups.” 140 S. Ct. at 1745. Under  
8 *Bostock*, “[i]t’s no defense for the employer to note that, while he treated that individual  
9 woman worse than he would have treated a man, he gives preferential treatment to female  
10 employees overall. The employer is liable for treating this woman worse in part because of  
11 her sex.” *Id.* at 1741. Similarly, discriminating against transgender men does not  
12 discriminate against *all* people with a female sex assigned at birth, but just the subset of  
13 people who were assigned a female sex at birth and have a male gender identity. Under  
14 *Bostock*, however, discrimination against a transgender man still violates Title VII because  
15 it treats that person in a manner that, but for his sex assigned at birth, would be different.  
16 The same is true here. The Exclusion does not harm every person with a female sex assigned  
17 at birth or every person with a male gender identity, but every individual harmed by the  
18 Exclusion is still harmed based on the incongruity between their sex assigned at birth and  
19 their gender identity.

20 Similarly, the Exclusion facially discriminates based on transgender status even

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21  
22 <sup>8</sup> The PI R&R cited *In re Union Pac. R.R. Emp. Pracs. Litig.*, 479 F.3d 936, 943 (8th Cir.  
23 2007), and *Coleman v. Bobby Dodd Inst., Inc.*, No. 4:17-CV-29, 2017 WL 2486080, at  
24 \*2 (M.D. Ga. June 8, 2017), but neither case purported to apply *Gilbert*'s reasoning. To  
25 the contrary, *Coleman* specifically recognized that the plaintiff might have been able to  
26 state a claim if she had alleged that Defendants had “treat[ed] a uniquely feminine  
27 condition, such as excessive menstruation, less favorably than similar conditions  
28 affecting both sexes, such as incontinence.” 2017 WL 2486080, at \*2. Similarly, the  
court in *In re Union* held that excluding coverage for contraception is nondiscriminatory  
if a policy excludes all contraception treatments for both men and women; the court did  
not hold that Title VII allowed employers to exclude coverage for a condition unique to  
a particular sex. 479 F.3d at 944-945.

1 though (as the PI R&R noted) it harms just a subset of transgender “persons seeking gender  
2 reassignment surgery” and not all “transgender people in general.” PI R&R at 5. Under  
3 *Bostock*, when a particular transgender individual is denied coverage under the Exclusion,  
4 that individual has been discriminated against because of their sex in violation of Title VII  
5 even if other transgender people are not harmed. *See Lange*, 2022 WL 1812306, at \*11  
6 (rejecting argument that policy was facially neutral under Title VII because it discriminates  
7 against only the subset of transgender people who need transition-related surgery); *Boyden*  
8 341 F. Supp. 3d at 996 (“[T]he Exclusion need not injure all members of a protected class  
9 for it to constitute sex discrimination.”).

10 Moreover, the fact that the Plan covers *other* treatments for gender dysphoria does  
11 not make the “Gender Reassignment Surgery” Exclusion facially neutral. Courts have  
12 repeatedly rejected the identical argument. *See Fain*, 2022 WL 3051015, at \*7 (rejecting  
13 argument that surgery exclusion is not facially discriminatory because other gender  
14 dysphoria treatments are covered); *Lange*, 2022 WL 1812306, at \*13 (rejecting defendants’  
15 argument that surgery exclusion is not facially discriminatory because “the plan covers some  
16 treatment relating to [plaintiff’s] transgender status”); *contra* PI R&R at 6 (appearing to  
17 accept the argument rejected in *Lange*). “An employer that offers one fringe benefit on a  
18 discriminatory basis cannot escape liability because he also offers other benefits on a  
19 nondiscriminatory basis.” *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred*  
20 *Compen. Plans v. Norris*, 463 U.S. 1073, 1081 n.10 (1983).

21 **C. Defendants’ Purported Cost Rationale Is Not a Defense Under Title**  
22 **VII.**

23 Defendants only assert one alleged rationale for maintaining the “Gender  
24 Reassignment Surgery” Exclusion: cost control. But “cost savings cannot justify a facially  
25 discriminatory policy.” *Lange*, 2022 WL 1812306, at \*13 n.15 (citing *Manhart*, 435 U.S.  
26 at 717) (“[N]either Congress nor the courts have recognized [a cost justification] defense  
27 under Title VII.”); *see also Newport News*, 462 U.S. at 685 n.26 (“[No cost justification] is  
28 recognized under Title VII once discrimination has been shown.”). Even if cost savings

1 could justify a discriminatory policy, the record establishes that the cost of providing  
 2 coverage would have been immaterial. *Supra* at Background Sections II.C, D, E. Because  
 3 Defendants have no legal defense for their facially discriminatory policy, Dr. Toomey and  
 4 the Class are entitled to judgment as a matter of law.

5 **II. THE “GENDER REASSIGNMENT SURGERY” EXCLUSION VIOLATES**  
 6 **THE EQUAL PROTECTION CLAUSE.**

7 The “Gender Reassignment Surgery” Exclusion also violates the Equal Protection  
 8 Clause of the Fourteenth Amendment. As discussed below, the Exclusion facially  
 9 discriminates on the basis of sex and transgender status, automatically triggering heightened  
 10 scrutiny under the Equal Protection Clause. The State Defendants’ proffered cost rationale  
 11 for the “Gender Reassignment Surgery” Exclusion fails to satisfy heightened scrutiny—or  
 12 even rational basis review.

13 **A. The Exclusion Facially Discriminates Based On Sex and Transgender**  
 14 **Status.**

15 When the government draws distinctions based on quasi-suspect classifications such  
 16 sex or transgender status, those distinctions are subject to heightened scrutiny under the  
 17 Equal Protection Clause. *See Snyder*, 28 F.4th at 113. “[P]laintiffs challenging policies that  
 18 facially discriminate on the basis of sex [or transgender status] need not separately show  
 19 either ‘intent’ or ‘purpose’ to discriminate.” *Latta v. Otter*, 771 F.3d 456, 481 (9th Cir.  
 20 2014) (Berzon, J., concurring); *accord Shaw v. Reno*, 509 U.S. 630, 642 (“No inquiry into  
 21 legislative purpose is necessary when the [suspect or quasi-suspect] classification appears  
 22 on the face of the statute.”).

23 For all the same reasons that the “Gender Reassignment Surgery” Exclusion  
 24 discriminates on the basis of sex and transgender status under Title VII, it also discriminates  
 25 based on sex and transgender status under the Equal Protection Clause.<sup>9</sup> As this Court

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26 <sup>9</sup> *See, e.g., Fain*, 2022 WL 3051015, at \*8 (granting summary judgment for equal  
 27 protection claim); *Kadel*, 2022 WL 2106270, at \*17-18 (same); *Boyden*, 341 F. Supp. 3d  
 28 at 1001 (same); *Flack*, 328 F. Supp. 3d at 931 (issuing preliminary injunction for equal  
 protection claim).

1 explained, the Exclusion “is directly connected to the incongruence between Plaintiff’s natal  
2 sex and his gender identity . . . which transgender individuals by definition experience and  
3 display.” Doc. 69 at 10-11. In reaching that conclusion, this Court explicitly rejected the  
4 argument that the “Gender Reassignment Surgery” Exclusion merely “targets a ‘service’  
5 rather than transgender individuals”: “[T]ransgender individuals are the only people who  
6 would ever seek gender reassignment surgery. No cisgender person would seek, or  
7 medically require, gender reassignment. Therefore, as a practical matter, the Exclusion  
8 singles out transgender individuals for different treatment.” *Id.* at 11.

9 This Court’s conclusion is consistent with the overwhelming majority of courts inside  
10 and outside the Ninth Circuit. For example, Judge Soto in *D.T. v. Christ*, 552 F.Supp.3d  
11 888 (D. Ariz. Aug. 5, 2021), recently held that a policy requiring people to undergo a “sex  
12 change operation” to change their birth certificates facially discriminated based on  
13 transgender status. As *D.T.* explained, “[w]hile the statute and regulation do not explicitly  
14 use the phrase ‘transgender’ or explicitly state that these laws are aimed directly at  
15 ‘transgender’ people, any logical reading of the statute and regulation reflects that it applies  
16 nearly exclusively to transgender people; who else is going to voluntarily seek out a ‘sex  
17 change operation?’” *Id.* at 895-96; *accord Morris v. Pompeo*, No. 219-CV-00569-GMN-  
18 DJA, 2020 WL 6875208, at \*7 (D. Nev. Nov. 23, 2020) (“Any person who has undergone  
19 a ‘gender transition’ to a new gender is, by definition, transgender.”); *Stone v. Trump*, 356  
20 F. Supp. 3d 505, 513 (D. Md. 2018) (discrimination based on gender “transition clearly  
21 discriminates on the basis of transgender identity”).

22 **B. The PI R&R Erred in Concluding that the Exclusion Is Facially Neutral**  
23 **Under *Geduldig*.**

24 Instead of following the Court’s prior ruling with respect to the motion to dismiss,  
25 and without acknowledging contrary authority, the PI R&R adopted a theory that had not  
26 been briefed by either party and concluded that the “Gender Reassignment Surgery”  
27 Exclusion was facially neutral under *Geduldig v. Aiello*, 417 U.S. 484 (1974). In that case,  
28 the Supreme Court held that discrimination on the basis of pregnancy is not discrimination

1 on the basis of sex because not all women are pregnant. *See id.* at 496-97. The Supreme  
2 Court recently cited *Geduldig* with respect to the Equal Protection Clause, finding that the  
3 “regulation of abortion is not a sex-based classification and is thus not subject to []  
4 heightened scrutiny[.]” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245-46  
5 (2022) (quoting *Geduldig*, 417 U.S. at 496, n.20).

6 But the “Gender Reassignment Surgery” Exclusion is critically different from  
7 restrictions related to pregnancy or abortion, and constitutes a sex-based classification that  
8 triggers heightened scrutiny, for at least four reasons. *First*, unlike pregnancy and abortion,  
9 the “Gender Reassignment Surgery” Exclusion incorporates explicit sex classifications. *See*  
10 *Fain*, 2022 WL 3051015, at \*8 (rejecting argument that exclusion of treatments for gender  
11 dysphoria are facially neutral under *Geduldig*); *Kadel II*, 2022 WL 3226731, at \*20 (same);  
12 *Boyden*, 341 F. Supp. 3d 979, 999-1000 (same); *but see Lange*, 2022 WL 1812306, at \*10.  
13 As these courts have explained, “even if the Court credited Defendant’s characterization of  
14 the Plan as applying only to diagnoses of gender dysphoria, it would still receive  
15 intermediate scrutiny” because “one cannot explain gender dysphoria without referencing  
16 sex.” *Kadel II*, 2022 WL 2106270, at \*20; *Kadel I*, 446 F. Supp. 3d at 18 (“[T]he diagnosis  
17 at issue—gender dysphoria—only results from a discrepancy between assigned *sex* and  
18 *gender* identity.” (emphasis in original)).

19 *Second*, the “Gender Reassignment Surgery” Exclusion does not merely “regulat[e]  
20 a medical procedure that only [transgender people] can undergo.” *Dobbs*, 142 S. Ct. at 2245-  
21 46. The Plan provides coverage for the same surgeries when used to treat medical conditions  
22 experienced by cisgender people, but denies coverage for the same procedures when  
23 provided for “gender reassignment.” As this Court previously recognized, “had Plaintiff  
24 required a hysterectomy for any medically necessary purpose other than gender  
25 reassignment, the Plan would have covered the procedure. This narrow exclusion of  
26 coverage for ‘gender reassignment surgery’ is directly connected to the incongruence  
27 between Plaintiff’s natal sex and his gender identity.” Doc. 69 at 10. The Exclusion thus  
28 explicitly denies coverage to transgender people that the Plan provides to cisgender

1 people—and does so based on criteria directly connected to their transgender status.

2 *Third*, unlike abortion or pregnancy, discrimination based on “gender reassignment”  
3 or gender dysphoria is facially discriminatory as a form of proxy discrimination. The  
4 Supreme Court has stated that “the goal of preventing abortion does not constitute  
5 ‘invidiously discriminatory animus’ against women.” *Dobbs*, 142 S. Ct. at 2246 (quoting  
6 *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–274 (1993)). But the Court  
7 has simultaneously recognized that—unlike abortion—“[s]ome activities may be such an  
8 irrational object of disfavor that, if they are targeted, and if they also happen to be engaged  
9 in exclusively or predominantly by a particular class of people, an intent to disfavor that  
10 class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews.” *Bray*, 506  
11 U.S. at 270. In accordance with *Bray*, Ninth Circuit precedent recognizes that “[p]roxy  
12 discrimination is a form of facial discrimination” that “arises when the defendant enacts a  
13 law or policy that treats individuals differently on the basis of seemingly neutral criteria that  
14 are so closely associated with the disfavored group that discrimination on the basis of such  
15 criteria is, constructively, facial discrimination against the disfavored group.” *Davis v.*  
16 *Guam*, 932 F.3d 822, 837 (9th Cir. 2019). Thus, when a “defendant discriminates against  
17 individuals on the basis of criteria that are almost exclusively indicators of membership in  
18 the disfavored group,” the discrimination is treated as a facial classification. *Pac. Shores*  
19 *Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013).<sup>10</sup>

20 Just as a tax on wearing yarmulkes is a tax on Jews, discrimination against “gender  
21 reassignment” and gender dysphoria is a proxy for discrimination against transgender  
22 people. Indeed, ADOA personnel routinely described the excluded treatments as  
23 “transgender benefits” or “transgender coverage” during their 2016 discussions regarding

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24  
25 <sup>10</sup> Supreme Court and Ninth Circuit precedent recognizing “proxy discrimination” remain  
26 good law following the Supreme Court’s decision in *Marietta Memorial Hospital*  
27 *Employee Health Benefit Plan v. DaVita Inc.*, which rejected a “proxy discrimination”  
28 theory when applying a “coordination-of-benefits statute” but confirmed that “proxy  
discrimination” applies to “traditional antidiscrimination statute[s].” 142 S. Ct. 1968,  
1974 n.2 (2022).

1 whether to maintain the Exclusion. PSOF ¶ 35. And despite the PI R&R’s assumption to  
2 the contrary, there is no general rule that a discriminatory policy must affect every member  
3 of a group in order to constitute facial discrimination. In fact, Supreme Court precedent says  
4 the opposite. *Rice v. Cayetano*, 528 U.S. 495, 516-17 (2000) (“Simply because a class . . .  
5 does not include all members of [a] race does not suffice to make the classification race  
6 neutral.”); *Nyquist v. Mauclet*, 432 U.S. 1, 8 (1977) (rejecting argument that law was facially  
7 neutral with respect to alienage because it applied only to a subset of resident aliens). Thus,  
8 a tax on yarmulkes is a tax on Jews even though not every Jew wears a yarmulke, and  
9 discrimination based on “gender reassignment” is discrimination against transgender people  
10 even though not every transgender person undergoes gender affirming surgery.

11 *Fourth*, the “Gender Reassignment Surgery” Exclusion also facially discriminates  
12 based on gender nonconformity and sex stereotypes, which independently constitutes sex  
13 discrimination under the Equal Protection Clause. Excluding coverage for transition-related  
14 care “implicates sex stereotyping by . . . requiring transgender individuals to maintain the  
15 physical characteristics of their natal sex.” *Boyden*, 341 F. Supp. 3d at 997; *accord* Doc. 69  
16 at 10-11; *Kadel I*, 446 F. Supp. 3d at 14 (“[T]he Exclusion tethers [transgender persons] to  
17 sex stereotypes which, as a matter of medical necessity, they seek to reject.”) Heightened  
18 scrutiny therefore applies.

### 19 **C. The Exclusion Does Not Survive Heightened Scrutiny**

20 Defendants bear the burden of proving that the Exclusion serves an important  
21 governmental interest and “that the discriminatory means employed” “are substantially  
22 related to the achievement of those objectives.” *Sessions v. Morales-Santana*, 137 S. Ct.  
23 1678, 1690 (2017). “Moreover, the classification must substantially serve an important  
24 governmental interest today, for in interpreting the equal protection guarantee, we have  
25 recognized that new insights and societal understandings can reveal unjustified inequality  
26 that once passed unnoticed and unchallenged.” *Id.* (quoting *Obergefell v. Hodges*, 576 U.S.  
27 644, 647 (2015)). “The burden of justification is demanding and it rests entirely on the  
28 [government].” *United States v. Virginia*, 518 U.S. 515, 533 (1996).

1 In response to Plaintiff’s lawsuit, State Defendants have offered one purported State  
2 interest for maintaining the Exclusion: cost control. PSOF ¶ 74. But the Supreme Court has  
3 been clear that cost control can never be a sufficient reason to “justify a gender-based  
4 discrimination in the distribution of employment-related benefits” under heightened  
5 scrutiny. *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977); *Weinberger v. Wiesenfeld*, 420  
6 U.S. 636, 647 (1975). “[A] State may not protect the public fisc by drawing an invidious  
7 distinction between classes of its citizens” rather the State must do more than show that a  
8 policy “saves money.” *Meml. Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974).

9 Even if cost control were a constitutionally adequate justification, the justification  
10 must be genuine, rather than a hypothesized or *post hoc* justification created in response to  
11 litigation. *Virginia*, 518 U.S. at 533. Yet the State’s own witnesses admitted that the cost  
12 of coverage was *not* the actual reason for ADOA’s decision to maintain the Exclusion in  
13 2016.<sup>11</sup> *Supra* at Background Section II.C, D. ADOA’s 2016 cost analysis, as reflected in  
14 the ADOA Research Summary, showed that the cost of covering gender affirming surgery  
15 would be minimal, which for any other treatment, would have favored coverage under  
16 ADOA’s usual practice. *Supra* at Background Section II. A, C. This is substantiated by  
17 Joan Barrett, a healthcare actuary who reviewed the cost information that was available to  
18 ADOA in 2016, and confirmed that the projected cost increase posed by covering gender  
19 reassignment surgery was less than 0.1%, “an amount so low that it would be considered  
20 immaterial from an actuarial perspective.” *Supra* at Background Section II.C. The State  
21 has offered no rebuttal to Ms. Barrett’s thorough and peer-reviewed report. And the  
22 ADOA’s own witnesses concede that the cost of coverage was so low that it would not “have  
23 mattered” in the decision-making process (PSOF ¶ 40(d)), and that cost was not what drove

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24  
25 <sup>11</sup> State Defendants made the final decision to maintain the Exclusion in 2016. *Supra* at  
26 Background Section II.D. The 2019 Meisner Analysis—which is “deeply flawed”  
27 according to Ms. Barrett’s unrebutted expert testimony (*supra* at Background Section  
28 II.B)—constitutes a post-hoc justification, “invented in response to litigation,” and does  
not create a material issue of fact as to the State’s rationale for maintaining the Exclusion  
in 2016. *See Virginia*, 518 U.S. at 533.

1 the decision to maintain the Exclusion. *Supra* at Background Section II.C, D.

2 **D. The Exclusion Does Not Survive Even Rational Basis Review**

3 Even if the “Gender Reassignment Surgery” Exclusion were considered to be facially  
4 neutral, it would still fail rational basis review. When a plaintiff “has been intentionally  
5 treated differently from others similarly situated and that there is no rational basis for the  
6 difference in treatment” the differential treatment violates equal protection regardless of the  
7 defendants’ “subjective motivation.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564-65  
8 (2000). The government may not reduce costs by arbitrarily discriminating between two  
9 similarly situated groups. *See Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (costs  
10 concerns cannot justify denying insurance coverage to same-sex couples under rational basis  
11 review). As this Court previously held, “[l]imiting health care costs is a legitimate state  
12 interest, but that interest cannot be furthered by arbitrary classifications.” Doc. 69 at 16.

13 The State has failed to provide any rational explanation for treating the costs  
14 associated with transition-related surgery differently from the costs associated with other  
15 medically necessary treatments. “[T]here is no evidence in the record to show that surgeries  
16 to treat gender dysphoria are any more or less costly than those similar surgeries to treat  
17 other diagnoses.” *Fain*, 2022 WL 3051015, at \*5; PSOF ¶ 29. Indeed, the record reveals  
18 that the costs associated with coverage of gender reassignment surgery in 2016 were—  
19 according to ADOA’s own cost assessment—immaterial. *Supra* at Background Section II.  
20 C. An immaterial projection of cost by ADOA’s administrative professionals normally  
21 favors coverage, not exclusion. *Supra* at Background Section II.A. And ADOA has added  
22 coverage for other procedures, despite the cost-increase associated with them. *Id.* ADOA’s  
23 arbitrary Exclusion fails even rational basis review.

24 **CONCLUSION**

25 Plaintiff’s Motion for Summary Judgment should be granted.

26 Respectfully submitted this 26th day of September, 2022.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 26, 2022, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

/s/ Christine K. Wee  
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