

1 C. Christine Burns #017108  
2 Kathryn Hackett King #024698  
3 Sarah N. O’Keefe #024598  
4 **BURNSBARTON PLC**  
5 2201 East Camelback Road, Ste. 360  
6 Phone: (602) 753-4500  
7 [christine@burnsbarton.com](mailto:christine@burnsbarton.com)  
8 [kate@burnsbarton.com](mailto:kate@burnsbarton.com)  
9 [sarah@burnsbarton.com](mailto:sarah@burnsbarton.com)  
10 *Attorney for Defendants State of Arizona*  
11 *Gilbert Davidson, and Paul Shannon*

7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF ARIZONA  
9

10 Russell B. Toomey,  
11 Plaintiff,  
12 vs.  
13 State of Arizona; Arizona Board of  
14 Regents, d/b/a University of Arizona, a  
15 governmental body of the State of Arizona;  
16 et al.,  
17 Defendants.

Case No. CV-19-00035-TUC-RM (LCK)  
**DEFENDANTS STATE OF  
ARIZONA, DAVIDSON, AND  
SHANNON’S MOTION TO DISMISS  
COMPLAINT**

17 Defendants State of Arizona, Gilbert Davidson, and Paul Shannon (collectively  
18 “State Defendants”) move to dismiss Plaintiff Russell Toomey’s Complaint pursuant to  
19 Fed.R.Civ.P. 12(b)(1) and 12(b)(6). Toomey’s Complaint against the State Defendants  
20 should be dismissed in its entirety because: (1) Toomey failed to follow the administrative  
21 appeal process set forth in the health plan, and this bars his claims, (2) the health plan’s  
22 exclusion for “gender reassignment surgery” does not discriminate “because of sex,” as it  
23 applies equally to all employees, regardless of sex; the exclusion is just one of many other  
24 surgical and treatment exclusions in the plan; and the plan provides some other gender  
25 transition services, (3) sovereign immunity bars Toomey’s claims against Davidson and  
26 Shannon, and (4) Toomey did not file a Charge of Discrimination against the State of  
27 Arizona and thus failed to exhaust his administrative remedies.<sup>1</sup>

28 <sup>1</sup> Pursuant to L.R.12.1(c), Kathryn King (counsel for State Defendants) and Burr Shields

1           **I. FACTUAL BACKGROUND**

2           **A. Plaintiff Russell Toomey**

3           According to the Complaint, Toomey is a man who is transgender. (*See* Complaint,  
4 Doc. 1, ¶¶4, 38) Toomey has a male gender identity, but the sex assigned to him at birth  
5 was female. (*Id.*) Toomey transitioned to live consistently with his male identity in 2003.  
6 (*Id.*) Since 2003, Toomey has received testosterone as a medically necessary treatment for  
7 gender dysphoria; he also received chest reconstruction surgery in 2004. (*Id.*) Toomey  
8 alleges he has “gender dysphoria,” which he claims is the “diagnostic term for the  
9 clinically significant emotional distress experienced as a result of the incongruence of  
10 one’s gender with their assigned sex and the physiological developments associated with  
11 that sex.” (*Id.*, ¶¶27, 38) He further alleges his “treating physicians have recommended  
12 that he receive a hysterectomy as a medically necessary treatment for gender dysphoria.”  
13 (*Id.*, ¶39)

14           **B. The Health Plan**

15           Toomey is currently employed as an Associate Professor at the University of  
16 Arizona. (*Id.* ¶¶4, 14) He receives healthcare coverage through a self-funded health plan  
17 (“Health Plan”) provided by the State of Arizona through the Arizona Department of  
18 Administration (“ADOA”). (*Id.*, ¶¶1, 32) The Health Plan identifies several categories of  
19 individuals who are eligible for coverage, including an “Eligible state Employee” and  
20 “Eligible university Employee,” among others, and provides different enrollment  
21 provisions for different categories of eligible members. (*Id.*, Exh. A, at p. 6-8)

22           Individuals enrolled in the Health Plan must choose to receive benefits through a  
23 network provider. (*Id.*, ¶33) In 2018, the four network providers were Aetna, Blue Cross  
24 Blue Shield of Arizona (“BCBSAZ”), Cigna, and UnitedHealthcare. (*Id.*) In 2018,  
25 Toomey selected coverage through BCBSAZ. (*Id.*)

26  
27           \_\_\_\_\_ and Heather Macre (Plaintiff’s counsel) met and conferred in good faith regarding this  
28 motion on March 15, 2018. The parties have been unable to agree the pleading is curable  
by a permissible amendment.

1 Article 10.1 of the Health Plan outlines “Exclusions and General Limitations.” It  
2 states, “[i]n addition to any services and supplies specifically excluded in any other  
3 Article of the Plan Description, any services and supplies which are not described as  
4 covered are excluded. In addition, the following are specifically excluded Services and  
5 Supplies...” (*Id.*, Exh. A, p. 55-58) Article 10.1 then goes on to identify numerous  
6 surgical procedures, treatments, and other medical services that are excluded from  
7 coverage. This list of 53 exclusions includes, for example, “Any medical treatment and/or  
8 prescription related to infertility once diagnosed,” various “bariatric procedures,”  
9 “Surgery for correction of Hyperhidrosis,” “Treatment of erectile dysfunction and sexual  
10 dysfunction,” “Phase 3 Cardiac rehabilitation,” “hair transplants, and treatment of  
11 alopecia or hair loss,” “Blood administration for the purpose of general improvement in  
12 physical conditions,” “Cosmetic surgery or surgical procedures primarily for the purpose  
13 of altering appearance,” “training or educational therapy for learning disabilities,  
14 developmental delays and intellectual disabilities,” and other exclusions. (*Id.*) Thus, not  
15 all services and procedures deemed medically necessary by a clinician are covered under  
16 the Health Plan; certain medically necessary procedures may be excluded from coverage.

17 Another exclusion in the Health Plan is “Gender Reassignment Surgery.” (*Id.*)  
18 While “Gender Reassignment Surgery” is excluded, the Health Plan does provide  
19 coverage for other forms of treatment for individuals with gender dysphoria. For example,  
20 coverage is provided for mental health counseling and hormone therapy medically  
21 necessary for gender dysphoria.<sup>2</sup> (*Id.*, Exh. A, p. 26-27, 55-58).

### 22 **C. Toomey’s Request for Coverage of a Hysterectomy**

23 Dr. Tiffany Woods Karsten submitted a precertification to BCBSAZ requesting  
24 approval for Toomey to receive a “total hysterectomy with removal of tubes and ovaries  
25 surgery” for his “health issue of transsexualism and gender identity disorder.” (*Id.*, Exh.  
26 G) On August 10, 2018, BCBSAZ sent a letter to Toomey explaining it could not approve

27 \_\_\_\_\_  
28 <sup>2</sup> The Health Plan defines “Covered Service” as “a service which is Medically Necessary and eligible for payment under the [Health] Plan.” (Doc. 1, Exh. A, p. 93).

1 his request because the procedure “is considered a gender reassignment surgery, which is  
2 a benefit exclusion” under Section 10.1 of the Health Plan. (*Id.*) The August 10, 2018  
3 letter explained, “You have the right to appeal this decision. If you or your doctor chooses  
4 to proceed with the appeal process, you may call the appeal line and fax any additional  
5 supporting information .... Please see the reverse side of this letter for the BCBSAZ  
6 appeal and grievance procedures.” (*Id.*) The letter also provided contact information for  
7 Toomey to submit his appeal. (*Id.*)

8 As noted in the August 10, 2018 letter, the Health Plan contains “Claims Appeal  
9 Procedures.” This procedure allows a member to appeal a denial of a claim for benefits.  
10 (*Id.*, Exh. A, p. 69-75). Under the procedure, the “initial request for review *must* be  
11 directed to the Third Party Claim administrator within 180 days after the claim payment  
12 date or the date of the notification of denial of benefits....The review of the denial will be  
13 made by the Third Party Claim Administrator, or by an appropriate named fiduciary who  
14 is neither the party who made the initial claim determination nor the subordinate of such  
15 party.” (*Id.*, p. 70) (emphasis added). This is a “Level 1” appeal. (*Id.*, p. 72-73) There is  
16 also a “Level 2” appeal, which “must be filed within 60 days of the Level 1 denial” and  
17 will be reviewed and responded to by a different staff person with the Third Party Claim  
18 Administrator. (*Id.*) The final step is a “Level 3” appeal, which “must be filed within 60  
19 days of the Level 2 denial”; this involves a “review[] by an accredited Independent  
20 Review Organization (IRO) as required under federal law at no charge to the Member.”  
21 (*Id.*) In reviewing the claim, the IRO is not “bound by any decisions or conclusions  
22 reached during the Plan’s internal claims and appeals process.” (*Id.*) The IRO is tasked  
23 with reviewing information and documents received and considering, among other things,  
24 “The terms of [the] Plan to ensure that the IRO’s decision is not contrary to the terms of  
25 the Plan, *unless the terms are inconsistent with applicable law.*” (*Id.*) Thus, the appeal  
26 process allows a member to challenge—and requires the IRO to review—whether the  
27 terms of the Health Plan are contrary to the law. The Health Plan also makes clear that a  
28 member may not file a lawsuit unless the member has first exhausted the administrative

1 review process: “12.12 Limitation. No action at law or in equity can be brought to recover  
2 on this Health Plan until the appeals procedure has been exhausted as described in this  
3 Plan.” (*Id.*, p. 74)

4 Toomey did not follow the appeal process described in the Health Plan and the  
5 August 10, 2018 letter from BCBSAZ. (*Id.*, ¶¶6, 36) Had Toomey followed this appeal  
6 process, he could have pursued with the IRO the exact same position he is asserting in his  
7 lawsuit—that “the terms [of the Health Plan] are inconsistent with applicable law.” (*Id.*,  
8 Exh. A, p. 73) Despite the specific requirement in the Health Plan, Toomey failed to  
9 follow this appeal process, and chose to file this lawsuit instead.

#### 10 **D. Toomey’s Charge of Discrimination and Complaint.**

11 On August 15, 2018, Toomey filed a Charge of Discrimination (“Charge”) with the  
12 Equal Employment Opportunity Commission (“EEOC”) against “The Board of Regents of  
13 the University of Arizona,” alleging sex discrimination. (*Id.*, ¶22 and Exh. B; *see also*  
14 Charge, attached as Exh. 1).<sup>3</sup> The Board of Regents is a board established under Arizona  
15 law that “consists of ten appointive members.” A.R.S. § 15-1621(A). The Board of  
16 Regents is responsible for “maintain[ing] . . . universities [that] are respectively  
17 designated northern Arizona university, Arizona state university and the university of  
18 Arizona.” A.R.S. § 15-1601(A). Toomey did not file a Charge against the State of  
19 Arizona or the ADOA. (Doc. 1, ¶¶1, 22, Exh. A; Exh. 1)

20 As it relates to the State Defendants, Toomey’s Complaint asserts two claims: (1)  
21 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* against the State of  
22 Arizona, and (2) Equal Protection Clause of the Fourteenth Amendment (42 U.S.C. §  
23 1983) against Shannon and Davidson. (Doc. 1). Davidson is the former Interim Director  
24 of ADOA.<sup>4</sup> Shannon is the Acting Assistant Director of the Benefits Services Division of

---

25 <sup>3</sup> Although Toomey did not attach his Charge to the Complaint, it is a public record and he  
26 references the Charge in the Complaint, so this Court can consider the Charge without  
27 converting this motion into a motion for summary judgment. *U.S. v. 14.02 Acres of Land  
28 More or Less in Fresno Cty.*, 547 F.3d 943, 955 (9th Cir. 2008) (court may take judicial  
notice of matters of public record and consider them without converting a Rule 12 motion  
into one for summary judgment); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

<sup>4</sup> Elizabeth Thorson was appointed Interim Director of ADOA in February 2019. Counsel

1 ADOA. (*Id.*, ¶¶20, 21) Toomey seeks declaratory relief and “[p]ermanent injunctive relief  
2 . . . requiring Defendants to remove the Plan’s categorical exclusion of coverage for  
3 ‘[g]ender reassignment surgery’ and evaluate whether Dr. Toomey and the proposed  
4 classes’ surgical care for gender dysphoria is ‘medically necessary.’” (*Id.*, p. 22).

## 5 **II. LEGAL STANDARD**

6 Fed.R.Civ.P. 12(b)(6) requires dismissal when a complaint fails to state a claim  
7 upon which relief can be granted. In order to survive a Rule 12(b)(6) motion to dismiss,  
8 the complaint must contain sufficient facts “to state a claim to relief that is plausible on its  
9 face.” *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1034 (9th Cir. 2010) (quoting  
10 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is plausible on its face when the  
11 plaintiff pleads facts that allow the court to make a reasonable inference that the defendant  
12 is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678.

13 A complaint should also be dismissed when the Court lacks subject-matter  
14 jurisdiction over the claims presented. Fed.R.Civ.P. 12(b)(1). A court lacks subject matter  
15 jurisdiction over a Title VII claim where the plaintiff has failed to exhaust his  
16 administrative remedies by filing a Charge against the defendant. *Sommatino v. United*  
17 *States*, 255 F.3d 704, 707-11 (9th Cir. 2001).

## 18 **III. LEGAL ANALYSIS**

### 19 **A. Plaintiff’s Complaint Should be Dismissed Because he did not Exhaust 20 Administrative Remedies as Required by the Health Plan.**

21 The Affordable Care Act (“ACA”) (Public Law 111-148) made changes to the  
22 Public Health Services Act (“PHSA”) relating to group health plans, such as the Health  
23 Plan here. The PHSA regulations incorporate the claims and appeals procedures from the  
24 Employee Retirement Income Security Act (“ERISA”), including the requirement that  
25 plans provide for a full and fair review and abide by specific claims and appeals  
26 procedures – even if a plan is not subject to ERISA. 45 C.F.R. 147.136(b)(2)(ii)(C)  
27 (providing “full and fair review” and requiring plans to abide by ERISA regulations, 29

28 \_\_\_\_\_  
for the State Defendants has requested Plaintiff substitute Thorson for Davidson.

1 C.F.R. 2560.503-1(h)(2)). Thus, both ERISA and non-ERISA plans must provide a “full  
2 and fair review” process for a participant to appeal a claim denial.

3 As required in the PHSA regulations, the Health Plan at issue here provides a  
4 detailed process for a full and fair review of any adverse benefit decision. The member  
5 must file an appeal within 180 days,<sup>5</sup> and the process then includes a Level 2 and Level 3  
6 appeal. An IRO (who reviews the Level 3 appeal) is to consider the “terms of [the] Plan to  
7 ensure that the IRO’s decision is not contrary to the terms of the Plan, *unless the terms are*  
8 *inconsistent with applicable law.*” (Doc. 1, Exh. A, p. 73) (emphasis added). Thus,  
9 Toomey had the opportunity, and the obligation, to give the Health Plan a chance to  
10 review his claim denial and to approve the claim if denying it was contrary to applicable  
11 law. Toomey, however, did not follow the Health Plan’s required procedure to review and  
12 evaluate whether the “terms are inconsistent with applicable law”; instead, he went  
13 straight to court. This prevents him from now bringing this suit, as the Health Plan states:  
14 “No action at law or in equity can be brought to recover on this Plan until the appeals  
15 procedure has been exhausted as described in this Plan.” (*Id.*, p. 74).

16 The courts have been clear - disputes should be addressed within the appeals  
17 process of a health plan, under both ERISA and non-ERISA plans—so courts do not  
18 become administrators of health plans. This is why exhaustion of administrative remedies  
19 is mandatory before a plan member may bring suit. *See Harrow v. Prudential*, 279 F.3d  
20 244, 249-50 (3d Cir. 2002) (courts require exhaustion of administrative remedies “to help  
21 reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment  
22 of claims for benefits; to provide a nonadversarial method of claims settlement; and to  
23 minimize the costs of claims settlement for all concerned”); *McGraw v. Prudential*, 137  
24 F.3d 1253, 1263 (10th Cir. 1998) (“ERISA contains no explicit exhaustion requirement  
25 although we have observed exhaustion of administrative (i.e., company or plan-provided)  
26 remedies is an implicit prerequisite to seeing judicial relief”); *Lane v. Sunoco*, 260 F.

---

27 <sup>5</sup> Toomey’s claim was denied on August 10, 2018; therefore, his deadline to file an appeal  
28 under the Health Plan was February 6, 2019.

1 App’x 64, 65–66 (10th Cir. 2008); *Roche v. Aetna*, 165 F. Supp. 3d 180, 188 (D.N.J.  
2 2016) (in case evaluating non-ERISA plan, plaintiff’s argument “does not obviate the  
3 requirement to seek administrative review before filing suit”; granting summary judgment  
4 because plaintiff did not exhaust administrative remedies before filing suit).

5 Toomey’s Complaint sidesteps the process designed in the Health Plan. In this  
6 lawsuit, Toomey is seeking coverage for a procedure under the Health Plan. He submitted  
7 a claim that was denied, but did not follow the required process in the Health Plan to  
8 appeal the denial of his claim—a process that would have allowed him to make the very  
9 same arguments to the IRO he has presented to this Court: that the “terms are inconsistent  
10 with applicable law.” *Perry v. Simplicity Eng’g*, 900 F.2d 963, 966 (6th Cir. 1990)  
11 (“Nothing in the legislative history suggests that Congress intended federal district courts  
12 would function as substitute plan administrators, a role they would inevitably assume if  
13 they received and considered evidence not presented to administrators concerning an  
14 employee’s entitlement to benefits”). Per the Health Plan’s terms, Toomey cannot bring  
15 suit before exhausting the administrative remedy, and his deadline to file an appeal passed  
16 on February 6, 2019. Thus, Toomey’s Complaint should be dismissed with prejudice.

### 17 **B. Toomey’s Title VII Claim Should Be Dismissed.**

18 Title VII makes it an “unlawful employment practice for an employer . . . to fail or  
19 refuse to hire or to discharge any individual, or otherwise to discriminate against any  
20 individual with respect to his compensation, terms, conditions, or privileges of  
21 employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1). Title VII  
22 does not define the term “sex.” “It is a fundamental canon of statutory construction that,  
23 unless otherwise defined, words will be interpreted as taking their ordinary, contemporary,  
24 common meaning.” *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). “Therefore,  
25 we look to the ordinary meaning of the term [] at the time Congress enacted the statute.”  
26 *Perrin v. U.S.*, 444 U.S. 37, 42 (1979). When Title VII was enacted in 1964, the “ordinary  
27 meaning” of the term “sex” was biological sex: “either of two divisions of organisms  
28

1 distinguished respectively as male or female.” Webster’s Seventh New Collegiate  
2 Dictionary 795 (1963).

3 A coverage exclusion that applies equally to members of both sexes, as here, does  
4 not violate Title VII. “The critical issue” in determining whether an employer has engaged  
5 in sex discrimination, as “Title VII’s text indicates, is whether members of one sex are  
6 exposed to disadvantageous terms or conditions of employment to which members of the  
7 other sex are not exposed.” *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80  
8 (1998). The Health Plan—which excludes “gender transition surgery” for members of both  
9 sexes—applies neutrally to both men and women and does not result in disparate,  
10 disadvantageous treatment of similarly-situated male or female employees. Therefore, it  
11 does not discriminate “because of sex.”

12 Plaintiff alleges the Health Plan exclusion discriminates against him “based on  
13 transgender status and gender nonconformity.” (Doc. 1, ¶60) Congress has passed  
14 legislation that prohibits discrimination based on “gender identity” as a separate category  
15 (in addition to “sex” or “gender”) in other contexts. *See* 18 U.S.C. § 249(a)(2)(A) and  
16 (c)(4) (prohibiting acts or attempts to cause bodily injury to any person “because of the  
17 actual or perceived religion, national origin, gender, sexual orientation, gender identity, or  
18 disability of any person”); 34 U.S.C. § 12291(b)(13)(A) (prohibiting discrimination in  
19 federally funded programs “on the basis of actual or perceived race, color, religion,  
20 national origin, sex, gender identity (as defined in paragraph 249(c)(4) of Title 18), sexual  
21 orientation, or disability”). Despite those decisions, Congress has repeatedly considered  
22 but thus far rejected proposed legislation that would add “gender identity” to the list of  
23 protected classes for employment non-discrimination purposes. *See, e.g.*, The Equality  
24 Act: H.R. 2282, 115th Cong. (2017), H.R. 3185 114th Cong. (2015), S. 1858, 114th Cong.  
25 (2015); Employment Non-Discrimination Act: H.R. 1755, 113th Cong. (2013), S. 815,  
26 113th Cong. (2013), S. 811, 112th Cong. (2011), H.R. 1397, 112th Cong. (2011), H.R.  
27 2981, 111th Cong. (2009), H.R. 3017, 111th Cong. (2009), S. 1584, 111th Cong. (2009),  
28 H.R. 2015, 110th Cong. (2007). One bill currently before Congress seeks to add “gender

1 identity” as a protected class in employment. The Equality Act, H.R. 5, 116th Cong.  
2 (2019). Thus, to date, Congress has decided not to add transgender status as a group to the  
3 list of protected classes in Title VII. *DeLeon v. Ashcroft*, 105 F.App’x 176, 180 (9th Cir.  
4 2004) (“To read language into a statute that Congress has considered and rejected, is not a  
5 construction of [the] statute, but, in effect an enlargement of it by the court”); *U.S. v.*  
6 *LKAV*, 712 F.3d 436, 444 (9th Cir. 2013) (“a decision to [rearrange] or rewrite [a] statute  
7 falls within the legislative, not the judicial, prerogative”).

8 Toomey is asking this Court to use Title VII to require employer-sponsored benefit  
9 plans to cover gender reassignment surgery for a classification of individuals that Title  
10 VII does not currently protect. Courts have explained this is beyond the province of the  
11 judiciary, and instead is a task for Congress. *See Etsitty v. Utah Transit Auth.*, 502 F.3d  
12 1215, 1222 n.2 (10th Cir. 2007) (“If transsexuals are to receive legal protection apart from  
13 their status as a male or female, . . . such protection must come from Congress and not the  
14 courts”); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (“if the term  
15 ‘sex’ as it is used in Title VII is to mean more than biological male or female, the new  
16 definition must come from Congress”); *Sommers v. Budget Mktg.*, 667 F.2d 748, 750 (8th  
17 Cir. 1982) (“the plain meaning must be ascribed to the term ‘sex’ in absence of clear  
18 congressional intent to do otherwise. Furthermore, the legislative history does not show  
19 any intention to include transsexualism in Title VII”); *Johnston v. Univ. of Pittsburgh*, 97  
20 F. Supp. 3d 657, 676-77 (W.D. Pa. 2015) (“It is within the province of Congress—and not  
21 this Court— to identify those classifications which are statutorily prohibited”; sex “means  
22 nothing more than male and female, under the traditional binary conception of sex  
23 consistent with one’s birth or biological sex”).

24 Toomey may attempt to rely on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)  
25 and its progeny to support his Title VII claim, but the holding in *Price Waterhouse* is  
26 inapposite. For one thing, the case did not involve transgender persons. Rather, in *Price*  
27 *Waterhouse*, a female plaintiff alleged her employer failed to promote her to partnership  
28 because she was “aggressive.” The Supreme Court held Title VII was intended to prohibit

1 disparate treatment based on “sex stereotypes,” which is a failure to conform to  
2 stereotypical gender norms based on an individual’s conduct: “[A]n employer who acts on  
3 the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted  
4 on the basis of gender...An employer who objects to aggressiveness in women but whose  
5 positions require this trait places women in an intolerable and impermissible catch 22: out  
6 of a job if they behave aggressively and out of a job if they do not.” *Id.* at 250-51. The  
7 *Price Waterhouse* “sex stereotyping” theory is distinct from the facts here. The exclusion  
8 in the Health Plan does not require that Toomey act or behave a certain way – nor is there  
9 an allegation that the medical benefits decision was based on Toomey’s conduct. The  
10 exclusion is facially neutral, applicable to all employees, regardless of sex. And  
11 Toomey’s Complaint does not allege he is unable to present himself at work as a male or  
12 suffers any adverse consequences from doing so. Thus, the benefits exclusion does not  
13 constitute “sex stereotyping” under *Price Waterhouse*.

14 But even if Title VII reaches an employer-sponsored health plan’s exclusion of  
15 gender reassignment surgery (it does not), the Complaint still does not state a claim. Title  
16 VII discrimination occurs “where an employer has treated a particular person less  
17 favorably than others *because of* a protected trait.... A disparate-treatment plaintiff must  
18 establish that the defendant had a discriminatory intent or motive for taking a job-related  
19 action.” *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (emphasis added) (internal citations  
20 and question marks omitted). “It is insufficient for a plaintiff . . . to show the employer  
21 was merely aware of the adverse consequences the policy would have on a protected  
22 group.” *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985). Here, a facially  
23 neutral benefits policy cannot give rise to a Title VII claim where, as here, Plaintiff’s  
24 Complaint does not contain allegations supporting a reasonable inference – “stronger than  
25 a mere possibility,” *Windy City Innov. v. Microsoft*, 2016 WL 3361858, at \*3 (N.D. Cal  
26 2016) – that the exclusion resulted from an intent to discriminate against a protected class.  
27 *See Wood v. City of San Diego*, 678 F.3d 1075, 1081-82 (9th Cir. 2012) (being “aware”  
28

1 male employees would disproportionately benefit from a change to surviving spouse  
2 benefit is not enough under Title VII).

3 Here, the Health Plan exclusion does not discriminate *because of sex*, sex-  
4 stereotyping, or transgender status. Indeed, the Health Plan provides coverage for some  
5 gender transition services, including mental health counseling and hormone therapy  
6 deemed medically necessary by a clinician to treat gender dysphoria—demonstrating the  
7 Health Plan does *not* eliminate coverage for all gender transition treatment. Also, the  
8 gender reassignment surgery exclusion is just one of many exclusions in the Health Plan –  
9 all of which apply to various individuals regardless of medical necessity. (Doc. 1, Exh. A,  
10 p. 26-27, 55-58, 93) Thus, Toomey’s Title VII claim should be dismissed with prejudice.

### 11 **C. Toomey’s Equal Protection Act Claim Should Be Dismissed.**

12 The Equal Protection Clause of the 14th Amendment provides: “No State shall . . .  
13 deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const.  
14 Amend. XIV, § 1. The Equal Protection Clause “does not forbid classifications. It simply  
15 keeps governmental decisionmakers from treating differently persons who are in all  
16 relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). A “classification  
17 neither involving fundamental rights nor proceeding along suspect lines is accorded a  
18 strong presumption of validity” and is subject to minimum scrutiny—rational basis  
19 review. *Heller v. Doe*, 509 U.S. 312, 319–21 (1993).

20 Toomey’s allegations for his Title VII and Equal Protection Act (§1983) claims are  
21 the same – that the Health Plan discriminates “based on transgender status and gender  
22 nonconformity.” (Doc. 1, ¶¶60, 72). In “discrimination suits, the elements of a plaintiff’s  
23 case are the same, based on the disparate treatment elements outlined in *McDonnell*  
24 *Douglas*, whether that case is brought under §§ 1981, 1983 or Title VII. Because  
25 plaintiff’s Title VII [] claims failed, so would his claims under §§1981 and 1983.” *Drake*  
26 *v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir. 1991); *see also Etsitty*, 502 F.3d at  
27 1227-28 (“Because Etsitty does not argue there was a violation of the Equal Protection  
28 Clause separate from her Title VII sex discrimination claim, her Equal Protection claim

1 fails for the same reasons discussed above”). Thus, for the same reasons explained above,  
2 the Health Plan does not discriminate based on sex. *Krauel v. Iowa Methodist Med. Ctr.*,  
3 95 F.3d 674, 680 (8th Cir. 1996) (the “fertility treatment exclusion is not a sex-based  
4 classification because it applies equally to all individuals, male or female”); *Saks v.*  
5 *Franklin Covey*, 316 F.3d 337, 347 (2d Cir. 2003) (“Because male and female employees  
6 afflicted by infertility are equally disadvantaged by the exclusion of surgical impregnation  
7 procedures, we conclude that the plan does not discriminate on the basis of sex”).

8 The Supreme Court has cautioned against “creat[ing] a new quasi-suspect  
9 classification and subject[ing] all governmental action based on that classification to more  
10 searching evaluation.” *City of Cleburne v. Cleburne Living*, 473 U.S. 432, 446 (1985).  
11 Courts have applied the rational basis test to classifications based on transgender status.  
12 *Druley v. Patton*, 601 F.App’x 632, 635 (10th Cir. 2015) (“To date, this court has not held  
13 that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal  
14 Protection claims”); *Murillo v. Parkinson*, 2015 WL 3791450, \*12 (C.D. Cal. 2015);  
15 *Kaeo–Tomaselli v. Butts*, 2013 WL 399184, \*5 (D. Haw. 2013) (“Nor has this court  
16 discovered any cases in which transgendered individuals constitute a ‘suspect’ class”);  
17 *Jamison v. Davue*, 2012 WL 996383, \*4 (E.D.Cal. 2012) (“transgender individuals do not  
18 constitute a ‘suspect’ class, so allegations that defendants discriminated against him based  
19 on his transgender status are subject to a mere rational basis review”); *Brainburg v.*  
20 *Coalinga State Hosp.*, 2012 WL 3911910, \*8 (E.D. Cal. 2012); *Stevens v. Williams*, 2008  
21 WL 916991, \*13 (D. Or. 2008) (“Transsexuals are not a suspect class for purposes of the  
22 equal protection clause” and thus “classifications based upon these grounds must only be  
23 reasonably related to legitimate penological interests”); *Johnston*, 97 F. Supp. 3d at 668  
24 (“rational basis standard” for “allegations of discrimination by transgender individuals”).

25 On a rational basis review, a classification “is accorded a strong presumption of  
26 validity.” *Heller*, 509 U.S. at 319. “State legislatures are presumed to have acted within  
27 their constitutional power despite the fact that, in practice, their laws result in some  
28 inequality. A statutory discrimination will not be set aside if any state of facts reasonably

1 may be conceived to justify it.” *McGowan v. State of Md.*, 366 U.S. 420, 425-26 (1961).  
2 Here, Toomey has “not allege[d] any facts suggesting the . . . decision concerning [the  
3 exclusion] do[es] not bear a rational relation to a legitimate state purpose.” *Druley*, 601  
4 F.App’x at 635-36. “Where, as here, there are plausible reasons for [the state] action, [the  
5 court’s] inquiry is at an end.” *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179  
6 (1980) (Supreme Court recognizing the “task of classifying persons for benefits inevitably  
7 requires that some persons who have an almost equally strong claim to favored treatment  
8 be placed on different sides of the line”). Courts have recognized that the government’s  
9 interests in cost containment and reducing health costs are substantial. *See, e.g., Harris v.*  
10 *Lexington-Fayette Urban County Gov’t*, 685 Fed. App’x 470, 473 (6th Cir. 2017); *IMS*  
11 *Health Inc. v. Sorrell*, 630 F.3d 263 (2d Cir. 2010). Thus, Toomey’s Equal Protection Act  
12 claim should be dismissed with prejudice.

#### 13 **D. Sovereign Immunity Bars the Claims Against Davidson and Shannon.**

14 The 11th Amendment provides that “[t]he Judicial power of the United States shall  
15 not be construed to extend to any suit in law or equity, commenced or prosecuted against  
16 one of the United States by Citizens of another State . . . .” U.S. Const. Amend. XI. The  
17 Eleventh Amendment bars suits against a state brought by private parties, whether the  
18 relief sought is money damages or an injunction. *See Seminole Tribe of Fla. v. Fla.*, 517  
19 U.S. 44, 54 (1996); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01  
20 (1984) (“It is clear, of course, that in the absence of consent a suit in which the State or  
21 one of its agencies or departments is named as the defendant is proscribed by the Eleventh  
22 Amendment. This jurisdictional bar applies regardless of the nature of the relief sought.”).

23 *Ex Parte Young* recognizes an exception to 11th Amendment immunity that allows  
24 an action for “prospective injunctive relief” by a private citizen against a state officer  
25 whose acts violate federal law. 209 U.S. 123 (1908). A court applying the *Ex Parte Young*  
26 doctrine “need only conduct a ‘straightforward inquiry’ into whether [the] complaint  
27 alleges an ongoing violation of federal law and seeks relief properly characterized as  
28 prospective.” *Verizon Md. Inc. v. Public. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002).

1 Toomey’s requested relief is not prospective injunctive relief. Instead, what  
2 Toomey actually seeks is a reversal of the Health Plan’s August 10, 2018 denial of  
3 coverage for his gender reassignment surgery: Toomey seeks an injunction to “remove the  
4 Plan’s categorical exclusion of coverage for ‘[g]ender reassignment surgery and evaluate  
5 whether [Toomey’s] surgical care for gender dysphoria is ‘medically necessary’ in  
6 accordance with the Plan’s generally applicable standards and procedures.” (Doc. 1, p. 22).  
7 This remedy Toomey seeks is, in fact, a “retroactive payment of benefits” to Plaintiff, and  
8 such a request is barred by the 11th Amendment. *Edelman v. Jordan*, 415 U.S. 651 (1974);  
9 *LaFleur v. Wallace State Cmty. Coll.*, 955 F. Supp. 1406, 1422 (M.D. Ala. 1996)  
10 (“Prospective injunctive relief does not include back pay and benefits”).

11 *Edelman* provides guidance. There, the plaintiff filed a class action for injunctive  
12 and declaratory relief against Illinois officials who were administering programs to aid the  
13 aged, blind, and disabled. The trial court “ordered the state officials to release and remit  
14 AABD benefits wrongfully withheld,” but the Supreme Court held the 11th Amendment  
15 barred these “retroactive payment of benefits found to have been wrongfully withheld.”  
16 *Edelman*, 415 U.S. at 656, 678. Just like in *Edelman*, Toomey’s requested relief would  
17 require a retroactive award of benefits (through the expense of public monies) that were  
18 previously denied to him. As the Supreme Court articulated in *Edelman*, this is  
19 impermissible and barred by the 11th Amendment: The relief “requires payment of state  
20 funds, not as a necessary consequence of compliance in the future with a substantive  
21 federal-question determination, but as a form of compensation to those [who were denied  
22 benefits] when petitioner was under no court-imposed obligation to conform to a different  
23 standard.” The relief “will to a virtual certainty be paid from state funds, and not from the  
24 pockets of the individual state officials who were the defendants in the action. It is  
25 measured in terms of a monetary loss resulting from a past breach of a legal duty on the  
26 part of the defendant state officials.” *Id.* at 668. Just like in *Edelman*, the relief Plaintiff  
27  
28

1 seeks against Shannon and Davidson does not meet the *Ex Parte Young* exception and is  
2 barred by the 11th Amendment.<sup>6</sup>

3 **E. Plaintiff Failed to Exhaust Administrative Remedies under Title VII.**

4 Plaintiff has asserted a Title VII claim against the State of Arizona. But the Title  
5 VII claim should be dismissed because he did not first file an EEOC Charge against the  
6 State of Arizona; thus, he failed to exhaust his administrative remedies—a prerequisite to  
7 filing a Title VII claim. Under Title VII, a “charge under this section *shall* be filed within  
8 one hundred and eighty days after the alleged unlawful employment practice occurred and  
9 notice of the charge (including the date, place and circumstances of the alleged unlawful  
10 employment practice) *shall* be served upon the person against whom such charge is made  
11 within ten days thereafter.” 42 U.S.C. § 2000e-5(e)(1) (emphasis added). Toomey filed a  
12 Charge against “The Board of Regents of the University of Arizona,” but he never filed a  
13 Charge against the State of Arizona or ADOA, which provides the Health Plan to him as  
14 an employee of the University of Arizona. (Doc. 1, ¶¶1, 4, 22, 32 and Exh. B; Exh. 1)

15 Plaintiff’s failure to exhaust his administrative remedies with respect to the State of  
16 Arizona undermines the purpose of the charge-filing requirements in Title VII, as the  
17 State and ADOA were never on notice of Toomey’s claims and there was no opportunity  
18 to review his claims or attempt conciliation through the EEOC process: “One purpose of  
19 requiring that an administrative charge be brought prior to the institution of a lawsuit is to  
20 allow the opportunity to determine the scope of the alleged violation and attempt  
21 conciliation.” *Luce v. Dalton*, 166 F.R.D. 457, 462 (S.D. Cal. 1996); *see also Lattimore v.*  
22 *Polaroid*, 99 F.3d 456, 464 (1st Cir. 1996) (Title VII “require[s] an employee to file an  
23 administrative charge as a prerequisite to commencing a civil action for employment

24 \_\_\_\_\_  
25 <sup>6</sup> “[W]hen the action is in essence one for the recovery of money from the state, the state  
26 is the real, substantial party in interest and is entitled to invoke its sovereign immunity  
27 from suit even though individual officials are nominal defendants.” *Ford Motor Co. v.*  
28 *Dep’t of Treasury*, 323 U.S. 459, 464 (1945) (overruled on other grounds). “Suits against  
state officials in their official capacity . . . should be treated as suits against the State.”  
*Hafer v. Melo*, 502 U.S. 21, 25 (1991).

1 discrimination ... to provide the employer with prompt notice of the claim and to create  
2 an opportunity for early conciliation”). Because Toomey failed to exhaust his  
3 administrative remedies against the State of Arizona, the Title VII claim should be  
4 dismissed, including for lack of subject matter jurisdiction. *Sommatino*, 255 F.3d at 707-  
5 11 (affirming dismissal for lack of subject matter jurisdiction for failure to exhaust  
6 administrative remedies by filing EEOC Charge).

7 **IV. CONCLUSION**

8 For all of the reasons set forth above, the State Defendants request dismissal of  
9 Plaintiff’s Complaint in its entirety and with prejudice.

10 RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of March, 2019.

11 **BURNSBARTON PLC**

12  
13  
14 By /s/Kathryn Hackett King

C. Christine Burns  
Kathryn Hackett King  
Sarah N. O’Keefe

**CERTIFICATE OF SERVICE**

I hereby certify that on March 18, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants.

Kathleen E. Brody  
Molly Brizgys  
ACLU Foundation of Arizona  
3707 North 7<sup>th</sup> Street, Suite 235  
Phoenix, AZ 85014  
[kbrody@acluaz.org](mailto:kbrody@acluaz.org)  
[mbrizgys@acluaz.org](mailto:mbrizgys@acluaz.org)

Joshua A. Block  
Leslie Cooper  
American Civil Liberties Union Foundation  
125 Broad Street, Floor 18  
New York, NY 10004  
[jblock@aclu.org](mailto:jblock@aclu.org)  
[lcooper@aclu.org](mailto:lcooper@aclu.org)

James Burr Shields  
Heather A. Macre  
Natalie B. Virden  
Aiken Schenk Hawkins & Ricciardi P.C.  
2390 East Camelback Road, Suite 400  
Phoenix, AZ 85016  
[burr@aikenschenk.com](mailto:burr@aikenschenk.com)  
[ham@aikenschnek.com](mailto:ham@aikenschnek.com)  
[nbv@aikenschenk.com](mailto:nbv@aikenschenk.com)  
*Attorneys for Plaintiff*

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

s/Carolyn Galbreath

# **EXHIBIT 1**

REC'D EEOC

AUG 15 2018

PXDO

<b>CHARGE OF DISCRIMINATION</b>		Charge Presented To:	Agency(ies) Charge No(s):
This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.		<input type="checkbox"/> FEPA <input checked="" type="checkbox"/> EEOC	580.2018.04629
Arizona Civil Rights Division and EEOC State or local Agency, if any			
Name (Indicate Mr., Ms., Mrs.)		Home Phone No. (Include Area Code)	
Mr. Russell B. Toomey, Ph.D.		(520) 429-6496	
STREET ADDRESS		CITY, STATE AND ZIP CODE	Date of Birth
5901 E. Ryan Place		Tucson, Arizona 85712	09/28/1981
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)			
Name		No. Employees, Members	Phone No. (Include Area Code)
The Board of Regents of the University of Arizona		500 +	(520) 621-2211
Street Address		City, State and ZIP Code	
Arizona Board of Regents, Attention Secretary, 2020 N. Central Ave., Suite 230, Phoenix, AZ 85004-4593			
Name		No. Employees, Members	Phone No. (Include Area Code)
Street Address		City, State and ZIP Code	
CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))		DATE DISCRIMINATION TOOK PLACE	
<input type="checkbox"/> RACE <input type="checkbox"/> COLOR <input checked="" type="checkbox"/> SEX <input type="checkbox"/> RELIGION <input type="checkbox"/> NATIONAL ORIGIN		EARLIEST	LATEST
<input type="checkbox"/> RETALIATION <input type="checkbox"/> AGE <input type="checkbox"/> DISABILITY <input type="checkbox"/> OTHER (Specify)		7/19/18	7/19/18
		<input checked="" type="checkbox"/> CONTINUING ACTION	
THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):			
<p>I have been employed by The Board of Regents of the University of Arizona ("U of A") since August 17, 2015, most recently as an Associate Professor. I have received health insurance through the U of A since August 17, 2015. The U of A provides its employees with health insurance through a self-funded health plan controlled by the Arizona Department of Administration ("the Plan"). The Plan generally provides coverage for medically necessary care, which the plan defines as "services, supplies and prescriptions, meeting all of the following criteria": (1) ordered by a physician; (2) not more extensive than required to meet the basic health needs; (3) consistent with the diagnosis of the condition for which they are being utilized; (4) consistent in type, frequency and duration of treatment with scientifically based guidelines by the medical-scientific community in the 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.</p> <p>I am a transgender male, which means that my gender identity is male, but the sex I was assigned at birth was female. I have been living as a male since 2003, when I legally changed my name, began dressing and living as a man, and began taking gender affirming hormones. I have consistently received hormone therapy since 2003. I received gender affirming "top" surgery in 2004. Despite these actions, I suffer from anxiety, depression, and distress due to my experience of dysphoria. I have been in counseling for several years and have been diagnosed with Gender Dysphoria.</p> <p>Based on this diagnosis, I met with Dr. Tiffany Karsten, an OB/GYN, in June 2018. Dr. Karsten recommended that I have a hysterectomy in order to treat my Gender Dysphoria. Dr. Karsten's office then submitted a preauthorization request for the hysterectomy to the health insurance provided by the Plan, Blue Cross Blue Shield of Arizona ("BCBSAZ"). Dr. Karsten's office left me a voicemail about the preauthorization and told me that based on the information they received, BCBSAZ did not require preauthorization for the hysterectomy and that the surgery would be covered 100% after a \$100.00 co-pay. However, I later called BCBSAZ and asked them what the coverage would be if the hysterectomy was submitted with a code for Gender Dysphoria. I was told that there would be \$0 in coverage and that the entire procedure would be out of pocket.</p> <p>Surgical care to treat Gender Dysphoria (sometimes referred to as "transition related surgery," "gender confirming surgery," or "gender reassignment surgery") can be medically necessary treatment for Gender Dysphoria under the Plan's generally applicable criteria. The Plan provides coverage for hysterectomies when prescribed as medically necessary treatment for medical conditions, however the Plan categorically excludes coverage for the same hysterectomies when they are medically necessary to treat Gender Dysphoria. The Plan's exclusion is discriminatory and subjects me to different treatment on the basis of sex.</p>			

REC'D EEOC

AUG 15 2018

540-2018-04629 FXDO

I believe I have been discriminated against due to my sex in violation of Title VII of The Civil Rights Act, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - (When necessary for State and Local Requirements)

I declare under penalty of perjury that the foregoing is true and correct.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.  
SIGNATURE OF COMPLAINANT

Date

Charging Party (Signature)

8/15/18

Russell Blake Tramm

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE  
(Month, day and year)