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12 *Ron Shoopman, Larry Penley, Ram Krishna,*
13 *Bill Ridenour, Lyndel Manson, Karrin Taylor Robson,*
14 *Jay Heiler, and Fred DuVal*

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF ARIZONA

13 **Russell B. Toomey,**

14 Plaintiff,

15 v.

16
17 **State of Arizona; Arizona Board of Regents,**
18 **d/b/a University of Arizona,** a governmental
19 body of the State of Arizona; **Ron Shoopman,**
20 in his official capacity as Chair of the Arizona
21 Board of Regents; **Larry Penley,** in his official
22 capacity as Member of the Arizona Board of
23 Regents; **Ram Krishna,** in his official capacity
24 as Secretary of the Arizona Board of Regents;
25 **Bill Ridenour,** in his official capacity as
26 Treasurer of the Arizona Board of Regents;
27 **Lyndel Manson,** in her official capacity as
28 Member of the Arizona Board of Regents;
Karrin Taylor Robson, in her official capacity
as Member of the Arizona Board of Regents;
Jay Heiler, in his official capacity as Member
of the Arizona Board of Regents; **Fred DuVal,**
in his official capacity as Member of the
Arizona Board of Regents; **Gilbert Davidson,**

Case No. CV 19-00035-TUC-RM
(LCK)

**DEFENDANTS ARIZONA
BOARD OF REGENTS, RON
SHOOPMAN, LARRY PENLEY,
RAM KRISHNA, BILL
RIDENOUR, LYNDEL MANSON,
KARRIN TAYLOR ROBSON,
JAY HEILER, AND FRED
DUVAL'S NOTICE OF FILING
FIRST AMENDED ANSWER**

1 in his official capacity as Interim Director of
2 the Arizona Department of Administration;
3 **Paul Shannon**, in his official capacity as
4 Acting Assistant Director of the Benefits
5 Services Division of the Arizona Department of
6 Administration,

Defendants.

7 Defendants Arizona Board of Regents, Ron Shoopman, Larry Penley, Ram Krishna,
8 Bill Ridenour, Lyndel Manson, Karrin Taylor Robson, Jay Heiler, and Fred DuVal
9 (“Answering Defendants”) hereby give notice of the filing of Answering Defendants’ First
10 Amended Answer under Federal Rule of Civil Procedure 15(a)(1)(A).

11 RESPECTFULLY SUBMITTED this April 5, 2019.

12 **PERKINS COIE LLP**

13 By /s/ Paul F. Eckstein
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Phoenix, AZ 85012

17 *Attorneys for Defendants Arizona Board of*
18 *Regents, Ron Shoopman, Larry Penley, Ram*
19 *Krishna, Bill Ridenour, Lyndel Manson, Karrin*
20 *Taylor Robson, Jay Heiler, and Fred DuVal*

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 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.

A copy was also e-mailed this April 5, 2019 to:

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s/ Clair Wendt

ATTACHMENT

(Redline: First Amended Answer)

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Bill Ridenour, Lyndel Manson, Karrin Taylor Robson,
Jay Heiler, and Fred DuVal*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

**State of Arizona; Arizona Board of Regents,
d/b/a University of Arizona**, a governmental
body of the State of Arizona; **Ron Shoopman**,
in his official capacity as Chair of the Arizona
Board of Regents; **Larry Penley**, in his official
capacity as Member of the Arizona Board of
Regents; **Ram Krishna**, in his official capacity
as Secretary of the Arizona Board of Regents;
Bill Ridenour, in his official capacity as
Treasurer of the Arizona Board of Regents;
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**DEFENDANTS ARIZONA
BOARD OF REGENTS, RON
SHOOPMAN, LARRY PENLEY,
RAM KRISHNA, BILL
RIDENOUR, LYNDEL MANSON,
KARRIN TAYLOR ROBSON,
JAY HEILER, AND FRED
DUVAL'S FIRST AMENDED
ANSWER TO PLAINTIFF'S
COMPLAINT**

in his official capacity as Interim Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

Answer

Defendants Arizona Board of Regents, Ron Shoopman, Larry Penley, Ram Krishna, Bill Ridenour, Lyndel Manson, Karrin Taylor Robson, Jay Heiler, and Fred DuVal (“Defendants”) answer Plaintiff Russell B. Toomey’s (“Plaintiff”) Complaint. Defendants do not object to offering the insurance coverage requested by Plaintiff in the Complaint, but because Defendants are required to “accept the benefit level, plan design, insurance providers, premium level and other terms and conditions determined by” the Arizona Department of Administration (“ADOA”), A.R.S. § 38-656(E), Defendants do not have the reasonable authority to offer the coverage and remove the Plan exclusion requested by Plaintiff in the Complaint. As part of the State of Arizona plan, Defendants must offer the health insurance that Defendant ADOA permits them to offer. Defendants have previously urged ADOA to remove the types of coverage exclusions requested by Plaintiff in the Complaint, but ADOA has not eliminated all exclusions; that decision was in its sole control. Defendants do not object to Plaintiff’s requested permanent injunctive relief against Defendants State of Arizona and ADOA, but request to be dismissed from this suit because Defendants have no reasonable choice but to offer insurance under the Plan that ADOA provides.

INTRODUCTION

1. Defendants admit the allegations contained in Paragraph 1.
2. Defendants deny the allegations contained in Paragraph 2, except that Defendants admit that the self-funded health plan that the State of Arizona uses to offer healthcare coverage to State employees, which is controlled by the Arizona Department of

1 Administration (“the Plan”), generally provides coverage for medically necessary care and
2 excludes coverage for “[g]ender reassignment surgery.”

3 3. Defendants do not have knowledge or information sufficient to answer the
4 allegations contained in Paragraph 3 and therefore deny them.

5 4. Defendants admit the allegation contained in Paragraph 4 that Plaintiff is
6 employed as an Associate Professor at the University of Arizona. Defendants further admit
7 that the Plan generally provides coverage for medically necessary care and excludes
8 coverage for “[g]ender reassignment surgery.” Defendants do not have knowledge or
9 information sufficient to answer the remaining allegations and therefore deny them.

10 5. Defendants deny the allegations contained in Paragraph 5, except that
11 Defendants admit that, were the exclusion for “[g]ender reassignment surgery” removed
12 from the Plan, Plaintiff would have an opportunity to prove that a gender reassignment
13 surgery is medically necessary under the Plan’s generally applicable standards for
14 establishing medical necessity.

15 6. Defendants deny the allegations contained in Paragraph 6, except that
16 Defendants admit that, were the exclusion for “[g]ender reassignment surgery” removed
17 from the Plan, Plaintiff would have the right to appeal any adverse determination regarding
18 the medical necessity of a gender reassignment surgery to an independent reviewer within
19 the third-party claims administrator and, if necessary, to an independent review
20 organization.

21 7. Defendants deny the allegations contained in Paragraph 7.

22 8. Defendants deny the allegations contained in Paragraph 8, except that
23 Defendants admit that Plaintiff avers that he brought the Complaint on behalf of himself
24 and a proposed class of similarly situated individuals for a declaratory judgment and
25 injunctive relief that would require Defendants to remove the Plan’s exclusion for “[g]ender
26 reassignment surgery.” Further, Defendants do not object to Plaintiff’s requested
27 permanent injunctive relief against Defendants State of Arizona and ADOA.
28

JURISDICTION AND VENUE

9. Defendants admit the allegation contained in Paragraph 9 that this action “arises under” Title VII of the Civil Rights Act of 1964 and the United States Constitution, but Defendants deny that Plaintiff has stated a valid claim under those authorities.

10. Defendants admit the allegations contained in Paragraph 10.

11. Defendants admit the allegations contained in Paragraph 11.

12. Defendants deny the allegations contained in Paragraph 12, except that Defendants admit that venue is proper in this Court.

PARTIES

13. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 13 and therefore deny them.

14. Defendants admit the allegations contained in Paragraph 14.

15. Defendants deny the allegations contained in Paragraph 15, except that Defendants admit that Defendant Arizona Board of Regents offers its employees healthcare insurance through the Plan.

16. Defendants admit the allegations contained in Paragraph 16.

17. Defendants admit the allegations contained in Paragraph 17.

18. Defendants admit the allegations contained in Paragraph 18.

19. Defendants admit the allegations contained in Paragraph 19.

20. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 20 and therefore deny them.

21. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 21 and therefore deny them.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

22. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 22 and therefore deny them.

23. Defendants admit the allegations contained in Paragraph 23.

FACTUAL ALLEGATIONS

24. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 24 and therefore deny them.

25. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 25 and therefore deny them.

26. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 26 and therefore deny them.

27. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 27 and therefore deny them.

28. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 28 and therefore deny them.

29. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 29 and therefore deny them.

30. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 30 and therefore deny them.

31. Defendants do not have knowledge or information sufficient to answer the allegations contained in Paragraph 31 and therefore deny them.

32. Defendants admit the allegations contained in Paragraph 32.

33. Defendants admit the allegations contained in Paragraph 33.

34. Defendants admit the allegations contained in Paragraph 34.

35. Defendants admit the allegations contained in Paragraph 35.

36. Defendants deny the allegations contained in Paragraph 36, except that Defendants admit that the Plan generally provides coverage for medically necessary care and excludes coverage for “[g]ender reassignment surgery.” Defendants further admit that, were the exclusion for “[g]ender reassignment surgery” removed from the Plan, policyholders would have an opportunity to prove that a gender reassignment surgery is medically necessary under the Plan’s generally applicable standards for establishing

1 medical necessity. Finally, Defendants admit that, were the exclusion for “[g]ender
2 reassignment surgery” removed from the Plan, policyholders would have the right to appeal
3 any adverse determination regarding the medical necessity of a gender reassignment surgery
4 to an independent reviewer within the third-party claims administrator and, if necessary, to
5 an independent review organization.

6 37. Defendants do not have knowledge or information sufficient to answer the
7 allegations contained in Paragraph 37 and therefore deny them, except that Defendants
8 admit that the four health insurance companies who serve as Network Providers for the Plan
9 have adopted policies and standards for determining when a gender reassignment surgery
10 is medically necessary. Defendants also state that the Plan speaks for itself: the Plan
11 generally provides coverage for medically necessary care and excludes coverage for
12 “[g]ender reassignment surgery.”

13 38. Defendants do not have knowledge or information sufficient to answer the
14 allegations contained in Paragraph 38 and therefore deny them.

15 39. Defendants do not have knowledge or information sufficient to answer the
16 allegations contained in Paragraph 39 and therefore deny them.

17 40. Defendants deny the allegations contained in Paragraph 40, except that
18 Defendants admit that the Plan generally provides coverage for medically necessary care
19 and excludes coverage for “[g]ender reassignment surgery.”

20 41. Defendants do not have knowledge or information sufficient to answer the
21 allegations contained in Paragraph 41 and therefore deny them.

22 42. Defendants do not have knowledge or information sufficient to answer the
23 allegations contained in Paragraph 42 and therefore deny them.

24 43. Defendants do not have knowledge or information sufficient to answer the
25 allegations contained in Paragraph 43 and therefore deny them, except that Defendants
26 admit that Blue Cross Blue Shield of Arizona denied preauthorization for Plaintiff’s
27 hysterectomy.
28

1 44. Defendants do not have knowledge or information sufficient to answer the
2 allegations contained in Paragraph 44 and therefore deny them, except that Defendants
3 admit that Blue Cross Blue Shield of Arizona denied preauthorization for Plaintiff's
4 hysterectomy.

5 45. Defendants admit the allegations contained in Paragraph 45.

6 **CLASS ALLEGATIONS**

7 46. Defendants deny the allegations contained in Paragraph 46, except that
8 Defendants admit that Plaintiff avers that he brought the Complaint on behalf of himself
9 and a proposed class of similarly situated individuals. Defendants also admit that the Plan,
10 which the State of Arizona uses to offer healthcare coverage to State employees, generally
11 provides coverage for medically necessary care and excludes coverage for "[g]ender
12 reassignment surgery."

13 47. Defendants deny the allegations contained in Paragraph 47, except that
14 Defendants admit that Plaintiff challenges the facial validity of the Plan's exclusion for
15 "[g]ender reassignment surgery."

16 48. Defendants deny the allegations contained in Paragraph 48, except that
17 Defendants admit that Plaintiff seeks a declaratory judgment and injunctive relief that
18 would require Defendants to remove the Plan's exclusion for "[g]ender reassignment
19 surgery." Further, Defendants do not object to Plaintiff's requested permanent injunctive
20 relief against Defendants State of Arizona and ADOA.

21 49. Defendants admit the allegations contained in Paragraph 49 that Plaintiff
22 proposes two classes based on the claims raised.

23 50. Defendants admit the allegations contained in Paragraph 50 that Plaintiff
24 proposes a class consisting of all employees of the Arizona Board of Regents enrolled in
25 the Plan who have medical claims for transition-related surgical care.

26 51. Defendants admit the allegations contained in Paragraph 51 that Plaintiff
27 proposes a class consisting of all individuals (including State of Arizona employees and
28

1 their dependents) enrolled in the Plan who have medical claims for transition-related
2 surgical care.

3 52. Defendants do not have knowledge or information sufficient to answer the
4 allegations contained in Paragraph 52 and therefore deny them.

5 53. Defendants deny the allegations contained in Paragraph 53, except that
6 Defendants admit that Plaintiff challenges the facial validity of the Plan's exclusion for
7 "[g]ender reassignment surgery." Defendants also admit that the Plan generally provides
8 coverage for medically necessary care and excludes coverage for "[g]ender reassignment
9 surgery." Defendants further admit that Plaintiff seeks a declaratory judgment and
10 injunctive relief that would require Defendants to remove the Plan's exclusion for "[g]ender
11 reassignment surgery." In addition, Defendants do not object to Plaintiff's requested
12 permanent injunctive relief against Defendants State of Arizona and ADOA.

13 54. Defendants do not have knowledge or information sufficient to answer the
14 allegations contained in Paragraph 54 and therefore deny them.

15 55. Defendants do not have knowledge or information sufficient to answer the
16 allegations contained in Paragraph 55 and therefore deny them.

17 **COUNT I—VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964**

18 56. Defendants admit the allegations contained in Paragraph 56.

19 57. Defendants admit the allegations contained in Paragraph 57.

20 58. Defendants admit the allegations contained in Paragraph 58.

21 59. Defendants do not have knowledge or information sufficient to answer the
22 allegations contained in Paragraph 59 and therefore deny them, except that Defendants
23 acknowledge that the Ninth Circuit has ruled that "'sex' under Title VII encompasses both
24 sex—that is, the biological differences between men and women—and gender." *Schwenk*
25 *v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).
26
27
28

1 60. Defendants deny the allegations contained in Paragraph 60, except that
2 Defendants admit that the Plan generally provides coverage for medically necessary care
3 and excludes coverage for “[g]ender reassignment surgery.”

4 61. Defendants deny the allegations contained in Paragraph 61.

5 62. Defendants deny the allegations contained in Paragraph 62.

6 63. Defendants deny the allegations contained in Paragraph 63, except that
7 Defendants admit that the Plan generally provides coverage for medically necessary care
8 and excludes coverage for “[g]ender reassignment surgery.”

9 64. Defendants deny the allegations contained in Paragraph 64.

10 **COUNT II—VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE**
11 **FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

12 65. Defendants admit the allegations contained in Paragraph 65.

13 66. Defendants deny the allegations contained in Paragraph 66; but Defendants
14 state that they do not object to Plaintiff’s requested permanent injunctive relief against
15 Defendants State of Arizona and ADOA.

16 67. Defendants deny the allegations contained in Paragraph 67.

17 68. Defendants do not have knowledge or information sufficient to answer the
18 allegations contained in Paragraph 68 and therefore deny them, except that Defendants
19 admit that the ADOA Director must “determine the type, structure, and components of the
20 insurance plans made available by [ADOA].” Ariz. Admin. Code R2-6-103(A).

21 69. Defendants admit the allegations contained in Paragraph 69.

22 70. Defendants admit the allegations contained in Paragraph 70.

23 71. Defendants admit the allegations contained in Paragraph 71.

24 72. Defendants deny the allegations contained in Paragraph 72, except that
25 Defendants admit that the Plan generally provides coverage for medically necessary care
26 and excludes coverage for “[g]ender reassignment surgery.”

27 73. Defendants deny the allegations contained in Paragraph 73.

28 74. Defendants deny the allegations contained in Paragraph 74.

75. Defendants deny the allegations contained in Paragraph 75, except that Defendants admit that the Plan generally provides coverage for medically necessary care and excludes coverage for “[g]ender reassignment surgery.”

76. Defendants deny the allegations contained in Paragraph 76.

77. Defendants deny the allegations contained in Paragraph 77.

78. Defendants deny the allegations contained in Paragraph 78.

79. Defendants deny the allegations contained in Paragraph 79.

80. Defendants deny the allegations contained in Paragraph 80, except that Defendants admit that the Plan generally provides coverage for medically necessary care and excludes coverage for “[g]ender reassignment surgery.”

81. Defendants deny the allegations contained in Paragraph 81.

GENERAL DENIAL

82. Defendants deny any and all allegations in Plaintiff’s Complaint that are not specifically admitted herein.

AFFIRMATIVE DEFENSES

1. Plaintiff’s Complaint fails to state a claim against Defendants upon which relief can be granted.

2. Defendants do not have the reasonable authority to choose the Plan or the specific terms and exclusions of the Plan that offers health insurance for employees of the State of Arizona, including employees of Defendant Arizona Board of Regents, under A.R.S. § 38-656(E).

3. Defendant Arizona Board of Regents should be dismissed under *Arizona Students’ Association v. Arizona Board of Regents*, 824 F.3d 858, 865 & n.3 (9th Cir. 2016) (describing the plaintiff’s decision to name the Arizona Board of Regents as the defendant, “instead of naming either the President, Chair, or other members of [the Arizona Board of Regents] in their official capacities” as an “error” because the “*Young* doctrine is premised

1 on the fiction that such a suit [against an official-capacity defendant] is not an action against
2 a ‘State’ and is therefore not subject to the sovereign immunity bar” (citation omitted)).

3 4. Plaintiff’s Complaint should be dismissed because Plaintiff did not exhaust
4 the administrative remedies required by the Plan.

5 WHEREFORE, Defendants request that the Court enter judgment in their favor as
6 follows:

7 A. Dismissing Plaintiff’s Complaint against Defendants with prejudice because
8 Defendants are required to “accept the benefit level, plan design, insurance providers,
9 premium level and other terms and conditions determined by” ADOA. A.R.S. § 38-656(E).
10 Defendants do not have the reasonable authority to offer the coverage and remove the Plan
11 exclusion requested by Plaintiff in the Complaint. As part of the State of Arizona plan,
12 Defendants must offer the insurance that Defendant ADOA permits them to offer.
13 Defendants have previously urged ADOA to remove the types of coverage exclusions
14 requested by Plaintiff in the Complaint, but ADOA has not eliminated all exclusions; that
15 decision was in its sole control. Defendants do not object to Plaintiff’s requested permanent
16 injunctive relief against Defendants State of Arizona and ADOA, but move to be dismissed
17 from this suit because Defendants have no reasonable choice but to offer insurance under
18 the Plan that ADOA provides. Plaintiff seeks relief from Defendants that they cannot
19 reasonably provide because the Plan is selected and controlled by ADOA and not by
20 Defendants.

21 B. Dismissing Defendant Arizona Board of Regents under *Arizona Students’*
22 *Association v. Arizona Board of Regents*, 824 F.3d 858, 865 & n.3 (9th Cir. 2016).

23 C. Dismissing Plaintiff’s Complaint because Plaintiff did not exhaust the
24 administrative remedies required by the Plan.

25 D. Awarding Defendants their attorney fees and costs pursuant to Title VII of
26 the Civil Rights Act of 1964 and 42 U.S.C. § 1988; and

27 E. Awarding Defendants such other relief as the Court deems just and proper.
28

1
2 RESPECTFULLY SUBMITTED this April 5, 2019.

3 **PERKINS COIE LLP**

4 By s/ Paul F. Eckstein
5 Paul F. Eckstein
6 Austin C. Yost
7 2901 N. Central Avenue, Suite 2000
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/s/ Clair Wendt