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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 Regents,**  
14 **d/b/a University of Arizona**, a governmental  
body of the State of Arizona; **Ron Shoopman**,  
15 in his official capacity as Chair of the Arizona  
Board of Regents; **Larry Penley**, in his official  
16 capacity as Member of the Arizona Board of  
Regents; **Ram Krishna**, in his official capacity  
17 as Secretary of the Arizona Board of Regents;  
**Bill Ridenour**, in his official capacity as  
18 Treasurer of the Arizona Board of Regents;  
**Lyndel Manson**, in her official capacity as  
19 Member of the Arizona Board of Regents;  
**Karrin Taylor Robson**, in her official capacity  
20 as Member of the Arizona Board of Regents;  
**Jay Heiler**, in his official capacity as Member  
21 of the Arizona Board of Regents; **Fred Duval**,  
22 in his official capacity as Member of the  
Arizona Board of Regents; **Gilbert Davidson**,  
23 in his official capacity as Interim Director of  
the Arizona Department of Administration;  
24 **Paul Shannon**, in his official capacity as  
25 Acting Assistant Director of the Benefits  
Services Division of the Arizona Department of  
26 Administration,

27 Defendants.  
28

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

**DEFENDANTS STATE OF  
ARIZONA, DAVIDSON, AND  
SHANNON’S REPLY IN SUPPORT  
OF MOTION TO DISMISS  
COMPLAINT**

1 Defendants State of Arizona, Gilbert Davidson, and Paul Shannon (collectively  
2 “State Defendants”) submit this Reply in Support of their Motion to Dismiss. This Court  
3 should dismiss the Complaint because Plaintiff does not dispute that (1) he did not follow  
4 the appeal process within the Health Plan, (2) he did not file an EEOC Charge against the  
5 State of Arizona or the Arizona Department of Administration (“DOA”), (3) the gender  
6 reassignment surgery exclusion applies neutrally to both men and women, (4) the Health  
7 Plan contains numerous other exclusions for various treatments and surgeries, including  
8 some that are medically necessary, (5) while the exclusion may have the effect of excluding  
9 surgery for treatment of a condition (here, gender dysphoria), the Health Plan excludes  
10 treatments and surgeries for various other conditions, (6) the Health Plan provides coverage  
11 for other gender transition services, and (7) there has been no discriminatory motive or  
12 intent on the part of the State Defendants. Also, Plaintiff has not cited any case from the  
13 District of Arizona or Ninth Circuit requiring an employer to cover gender reassignment  
14 surgery in a health plan. And with the exception of the Western District of Wisconsin (not  
15 precedent for this Court), Plaintiff has not cited any case holding that an employer’s gender  
16 reassignment surgery exclusion in a health plan violates Title VII or Equal Protection.<sup>1</sup>

17 **I. PLAINTIFF FAILED TO FOLLOW THE REQUIRED APPEAL PROCESS.**

18 Plaintiff admits he did not follow the appeal process in the Plan. He claims there was  
19 no “meaningful opportunity” to address the medical necessity of gender reassignment  
20 surgery and the exclusion, but that is not correct. Plaintiff could have addressed the  
21 exclusion and whether it was “inconsistent with applicable law” through the appeal process,  
22 and an Independent Review Organization (“IRO”) could have evaluated the exact issue  
23 presented in this case. Fundamentally, Plaintiff seeks coverage for a surgery under the Plan.  
24 Plaintiff submitted a claim that was denied, but did not follow Plan terms for an appeal –  
25 instead, he immediately filed a lawsuit. The language in the Plan is clear: “12.12 Limitation.  
26 No action at law or in equity can be brought to recover on this Health Plan until the appeals

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27 <sup>1</sup> Plaintiff cites various materials outside of the pleadings: Motion for Class Certification,  
28 Plaintiff’s Declaration, and BCBSAZ Member Appeal and Grievance Process. Including these materials in Motion to Dismiss briefing is inappropriate under Fed.R.Civ.P. 12(d).

1 procedure has been exhausted as described in this Plan.” (Doc. 1, Exh. A, p. 74). But  
2 Plaintiff’s lawsuit is exactly that – he is attempting “to recover on this Health Plan” (have  
3 surgery paid for) without following the appeals procedure. Per the Plan’s own terms,  
4 Plaintiff cannot bring suit before exhausting the administrative remedy, and the time to  
5 appeal has now passed. Exhaustion of remedies is “a matter of judicial discretion” (*McGraw*  
6 *v. Prudential*, 137 F.3d 1253, 1263 (10th Cir. 1998)), and it has been employed to prevent  
7 every benefit claim denial from turning “literally, into a federal case” (*Lane v. Sunoco*, 260  
8 F. App’x 64, 66 (10th Cir. 2008)). In *Diaz v. Un. Agric.*, the plaintiff sued his employer and  
9 plan for benefits, arguing failure to comply with statutory requirements other than ERISA.  
10 The Ninth Circuit held, “many employee claims for plan benefits may implicate statutory  
11 requirements imposed by ERISA or COBRA (or perhaps other statutes, for that matter). . . .  
12 a claimant [does not have] the license to attach a ‘statutory violation’ sticker to his or her  
13 claim and then to use that label as an asserted justification for a total failure to pursue the  
14 congressionally mandated internal appeal procedures.” 50 F.3d 1478, 1484 (9th Cir. 1995).  
15 Here, Plaintiff admits “whether the Plan’s categorical exclusion is ‘inconsistent with  
16 applicable law’ is precisely what is in dispute in this case” (Doc. 39, p.18) – and that is  
17 exactly the point. Plaintiff should not be permitted to bypass the well-established rules  
18 designed to protect courts from having to opine on every benefits determination.<sup>2</sup>

19 The appeal process would not have been futile or the remedy inadequate, as Plaintiff  
20 claims. Each level of review exists for a reason.<sup>3</sup> The document governing the State’s self-  
21 funded plan and appeal process is the DOA Benefit Options Summary Plan Description,  
22 which - by its own terms - specifically empowers the IRO to decide questions of law,  
23 including whether a decision is “inconsistent with applicable law.” (Doc. 1, Exh. A, p.73).  
24 The BCBSAZ Member Appeal and Grievance Process to which Plaintiff refers does not  
25

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26 <sup>2</sup> Plaintiff’s cases do not involve an employee trying to obtain a benefit under a health plan  
27 with an appeal process to which the employee agreed. *Thomas v. Eastman*, 183 F.3d 38  
(1st Cir. 1999) (alleged discriminatory layoff); *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982)  
(exhaustion of state administrative remedies); *Knight v. Kenai Peninsula*, 131 F.3d 807 (9th  
28 Cir. 1997) (exhaustion of union remedies/arbitration non-union plaintiffs did not agree to).

<sup>3</sup> State Defendants do not concede earlier levels of review would not have helped Plaintiff.

1 apply to the State Plan; this document (not attached to the Complaint) applies to other plans  
2 (such as fully-insured plans) insured by BCBSAZ. Thus, Plaintiff should have followed the  
3 appeal process before involving the Court in this dispute.<sup>4</sup>

## 4 **II. PLAINTIFF HAS FAILED TO STATE A TITLE VII CLAIM.**

### 5 **A. Congressional Action is Required.**

6 In Title VII, Congress made clear it was unlawful for an employer to discriminate  
7 “because of sex.” Plaintiff claims the State Defendants discriminated against him because  
8 of his transgender status, but as explained in the Motion (with supporting case law), (i)  
9 courts cannot expand Title VII without congressional action, and (ii) Congress has  
10 repeatedly had the opportunity to enact legislation to add gender identity to Title VII, but  
11 has not done so. (Doc. 24, p.9-10). Plaintiff cannot refute that when Title VII does not  
12 protect a particular category, legislative action is required to change that.<sup>5</sup> Plaintiff argues  
13 Congress’s failure to enact new legislation to add gender identity is not relevant because  
14 later acts of Congress are not probative of prior legislative intent. But the point is that  
15 expanding the scope of a federal statute requires congressional, not judicial, action.  
16 *Gunnison v. Comm. of Int. Rev.*, 461 F.2d 496, 499 (7th Cir. 1972) (“Further expansion of  
17 the favored treatment specifically provided in §402(a)(2) as an exercise of legislative grace  
18 is a function for the Congress, not for the Courts”). Yet here, Congress has failed to act to  
19 expand Title VII. Congress’s failure to act demonstrates Title VII does not include  
20 unenumerated categories. *Bibby v. Phil. Coca Cola*, 260 F.3d 257, 265 (3d Cir. 2011)

21 \_\_\_\_\_  
22 <sup>4</sup> The appeal process itself is not an equal protection violation, as Plaintiff claims. Courts  
23 routinely require plaintiffs to exhaust administrative review before filing suit against a  
24 governmental entity, whether in the EEOC process or regarding a denial of benefits. *See,*  
25 *e.g., Roche v. Aetna*, 165 F. Supp. 3d 180, 186-90 (D.N.J. 2016). Here, the appeal process  
26 is neutral and applies to every member – regardless of gender or transgender status—  
27 appealing a benefit denial. And *Fla Chap. v. Jacksonville*, 508 U.S. 656 (1993) does not  
28 establish an equal protection violation for a health plan appeal; the alleged “barrier” there  
was an ordinance requiring 10% of city contracts be awarded to minority-owned businesses.

<sup>5</sup> While courts can interpret a statute to cover situations that fit within the language of the  
statute, they cannot do so when an interpretation expands the statute by adding protected  
classifications. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Title VII discrimination  
because of sex includes sex-stereotyping); *Oncale v. Sundowner*, 523 U.S. 75, 78 (1998)  
(Title VII’s sex discrimination clause “evinces a congressional intent to strike at the entire  
spectrum of disparate treatment of men and women in employment”).

1 (“Harassment on the basis of sexual orientation has no place in our society . . . Congress has  
2 not yet seen fit, however, to provide protection against such harassment”).

3 B. The Exclusion is not Title VII Discrimination “Because of Sex.”

4 Plaintiff argues Title VII already applies to transgender status, attempting to ground  
5 his claim in cases applying *Price Waterhouse*. But *Price Waterhouse* does not support  
6 expanding Title VII’s protections to transgender persons as a group beyond cases that  
7 involve sex-stereotyping.<sup>6</sup> And Plaintiff’s reliance on *Schwenk v. Hartford*, 204 F.3d 1187  
8 (9th Cir. 2000), is misplaced. *Schwenk* was a prison sexual assault case involving the 8th  
9 Amendment (cruel and unusual punishment) and Gender Motivated Violence Act (GMVA);  
10 it was not a Title VII or Equal Protection case. In *Schwenk*, the Ninth Circuit applied *Price*  
11 *Waterhouse* sex-stereotyping, noting “the perpetrator’s actions stem from the fact that he  
12 believed that the victim was a man who ‘failed to act like’ one.” Indeed, “Schwenk testified  
13 that her appearance and mannerisms were very feminine, and that Mitchell was aware of  
14 these characteristics. In fact, Mitchell offered to bring her make-up and other ‘girl stuff’  
15 from outside the prison in order to enhance the femininity of her appearance. Thus, the  
16 evidence offered . . . tends to show that Mitchell’s actions were motivated, at least in part,  
17 by Schwenk’s gender – in this case, *by her assumption of a feminine rather than a typically*  
18 *masculine appearance or demeanor.*” *Id.* at 1202 (emphasis added) (“Discrimination  
19 because one fails to act in the way expected of a man or a woman is forbidden”).

20 The Ninth Circuit described its holding in *Schwenk* in *Kastl v. Maricopa Cty.*, 325  
21 F.App’x. 492 (9th Cir. 2009) (“we held [in *Schwenk*]. . . that transgender individuals may  
22 state viable sex discrimination claims on the theory that the perpetrator was motivated by  
23 the victim’s real or perceived non-conformance to socially-constructed gender norms. After  
24 [*Price Waterhouse*] and *Schwenk*, it is unlawful to discriminate against a transgender (or  
25

26 <sup>6</sup> As Plaintiff notes, the U.S. Supreme Court recently granted a petition for writ of certiorari  
27 to decide “[w]hether Title VII prohibits discrimination against transgender people based on  
28 (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*,  
490 U.S. 228 (1989).” *R.G. & G.R. Harris Fun. Homes v. EEOC*, 2019 WL 1756679 (2019).

1 any other) person because he or she does not behave in accordance with an employer's  
2 expectations for men or women"); *Nichols v. Azteca*, 256 F.3d 864 (9th Cir. 2001) (*Price*  
3 *Waterhouse* "applies with equal force to a man who is discriminated against for acting too  
4 feminine," and describing *Schwenk* as "comparing the scope of the [GMVA] with the scope  
5 of Title VII, which forbids '[d]iscrimination because one fails to act in the way expected of  
6 a man or woman)'). Thus, *Schwenk* does not establish transgender status is "because...of  
7 sex" or protected as a group under Title VII.

8 The other cases cited by Plaintiff similarly involve allegations of sex-stereotyping  
9 not present here. *Prescott v. Rady*, 265 F.Supp.3d 1090, 1099 (S.D. Cal.2017) (in  
10 Affordable Care Act (ACA) claim, staff "continuously referr[ed] to him with female  
11 pronouns, despite knowing that he was a transgender boy", "refused to treat Kyler as a boy  
12 precisely because of his gender non-conformance" and "told him, Honey, I would call you  
13 'he,' but you're such a pretty girl"); *Roberts v. Clark Cty.*, 215 F.Supp.3d 1001, 1015  
14 (D.Nev. 2016) (defendant "banned Roberts from the women's bathroom because he no  
15 longer behaved like a woman. This alone shows that the school district discriminated  
16 against Roberts based on his gender and sex stereotypes"); *Glenn v. Brumbry*, 663 F.3d  
17 1312, 1318-20 (11th Cir. 2011) (terminated plaintiff dressed "inappropriate," "unsettling,"  
18 and "unnatural"; gave example of a male "wearing jewelry that was considered too  
19 effeminate, carrying a serving tray too gracefully, or taking too active a role in  
20 childrearing"); *Whitaker v. Kenosha*, 858 F.3d 1034 (7th Cir. 2017) (plaintiff was told he  
21 "would have to complete a surgical transition . . . to be permitted access to the boys'  
22 restroom" and case "show[ed] sex stereotyping").<sup>7</sup> Here, the exclusion applicable to all  
23 employees does not punish Plaintiff based on a sex stereotype; does not require Plaintiff act  
24 or dress in a certain way or use a certain bathroom, or punish him for his conduct, dress,  
25 appearance, or mannerisms; and there is no allegation the exclusion was based on his

26  
27 <sup>7</sup> *Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018) is not persuasive: (1) it is now in  
28 question and pending before the Supreme Court, and (2) termination was because plaintiff  
was "no longer going to represent himself as a man" and "wanted to dress as a woman."

1 conduct, dress, appearance, mannerisms, or failure to act like a man/woman.

2 The Motion cites cases showing that transgender discrimination *not* based on sex-  
3 stereotyping is not cognizable under Title VII. (Doc. 24, p.10-11). Plaintiff seeks to  
4 minimize these cases by claiming they are, or rely upon, pre-*Price Waterhouse* decisions;  
5 but this does not render those cases inapplicable. Indeed, cases citing to *Holloway*, *Sommers*  
6 or *Ulane* acknowledge the viability of a *Price Waterhouse* sex-stereotyping theory, but  
7 decline to extend transgender discrimination beyond sex-stereotyping, thus accurately  
8 reflecting current Title VII law. *Etsitty v. Utah Transit*, 502 F.3d 1215 (10th Cir. 2007)  
9 (holding transgender persons are not a protected class; assuming without deciding that a sex  
10 stereotyping theory under *Price Waterhouse* is viable); *Johnston v. Univ. of Pittsburgh*, 97  
11 F.Supp.3d 657 (W.D.Pa. 2015) (finding transgender is not a protected status but considering  
12 plaintiff's sex stereotyping claim); *Eure v. Sage*, 61 F. Supp. 3d 651, 661-63 (W.D. Tex.  
13 2014) (declining to find discrimination based on transgender status, but considering sex  
14 stereotyping claim and finding it not supported by the facts alleged; "courts have been  
15 reluctant to extend the sex stereotyping theory to cover circumstances where the plaintiff is  
16 discriminated against because the plaintiff's status as a transgender man or woman, without  
17 any additional evidence related to gender stereotype non-conformity"); *Creed v. Family*  
18 *Exp.*, 2007 WL 2265630, \*3-4 (N.D. Ind. 2007) (following *Ulane* as to transgender status  
19 discrimination but finding plaintiff had stated a viable claim for gender stereotyping);  
20 *Johnson v. Fresh Mark*, 337 F. Supp. 2d 996 (N.D. Ohio 2003) (rejecting transgender status  
21 claim not based on stereotyping), *aff'd*, 98 F.App'x. 461 (6th Cir. 2004). Because there is  
22 no allegation Toomey was treated differently because he acted, dressed, or exhibited  
23 mannerisms inconsistent with his biological sex, his Title VII claim should be dismissed.

24 C. The Exclusion does not Facially Discriminate Based on Sex.

25 Plaintiff contends the Plan exclusion facially discriminates based on sex. But that is  
26 not correct. On its face, the gender reassignment surgery exclusion applies neutrally to both  
27  
28

1 men and women.<sup>8</sup> The exclusion denies gender reassignment surgery to men transitioning  
2 to become women, and women transitioning to become men. *See In re Union Pac. RR.*,  
3 479 F.3d 936 (8th Cir. 2007) (upholding benefits exclusion for contraception, as it fell  
4 equally on both men and women). Second, the plan contains numerous other exclusions for  
5 various treatments and surgeries, including some that are medically necessary; thus, the  
6 plan does not *only* exclude gender reassignment surgery. Third, the exclusion may have the  
7 effect of excluding surgery for treatment of a particular condition (here, gender dysphoria),  
8 but the Plan also excludes treatments and surgeries for various other conditions (e.g.,  
9 diagnosed infertility, hyperhidrosis, obesity, erectile dysfunction, sexual dysfunction,  
10 cosmetic surgery for a clinically depressed person due to his/her appearance). Further, the  
11 Plan provides coverage for other gender transition services (hormone therapy and mental  
12 health counseling). Thus, the Plan does not discriminate based on sex or transgender status.<sup>9</sup>

13 Plaintiff argues the exclusion facially discriminates based on sex-stereotyping. Not  
14 so. The cases Plaintiff cites are inapposite as they involve claims of wrongful termination,  
15 not a facially neutral policy regarding one category of services. *Glenn*, 663 F.3d 1312 (claim  
16 based on termination of plaintiff); *Dawson v. H&H Elec.*, 2015 WL 5437101 (E.D. Ark.  
17 2015) (wrongful termination claim). In some cases, the line between sex-stereotyping  
18 claims and claims based upon protected status may become blurry where an employer reacts  
19 negatively to a particular transgender person's appearance and mannerisms in the workplace  
20 and takes action such as termination. For example, a manager's comments can be parsed in  
21 different ways. But that is different from the present case, which involves a facially neutral  
22 policy regarding coverage for one category of services. Plaintiff does not allege anything  
23 about how people reacted to him in the workplace, judged the way he should look or behave,  
24 or disfavored him because of discomfort with his appearance, behavior, or transition.<sup>10</sup>

25  
26 <sup>8</sup> Plaintiff argues the policy facially discriminates because it excludes services when sought  
27 by transgender people. But that is a disparate impact theory, which Plaintiff has not alleged.

28 <sup>9</sup> Just because (i) medical organizations support healthcare coverage for transition-related  
care, or (ii) some employers choose to cover gender reassignment surgery (Doc. 39, p.3)  
does not mean the law mandates coverage be provided for gender reassignment surgery.

<sup>10</sup> *Kastle v. Maricopa Cty.*, 2004 WL 2008954 (D. Ariz. 2004) analyzed whether an

1 Plaintiff cites *Boyden v. Conlin* (W.D. Wis.) in support of his Title VII claim. But  
2 this case was decided under Seventh Circuit precedent and is not binding on this Court  
3 under current Ninth Circuit precedent (see above). Also, the exclusion in *Boyden* excluded  
4 all services associated with gender reassignment, unlike the exclusion here. *Tovar* and  
5 *Flack*<sup>11</sup> are also not dispositive, as the federal courts in Minnesota and Wisconsin were  
6 evaluating ACA claims (not Title VII claims), the plans contained a broad exclusion for  
7 transition coverage (not just surgery), and the decisions relied on *Harris* which is now on  
8 appeal. Plaintiff also cites cases from California (*Denegal*, *Norsworthy*, and *McQueen*)  
9 involving prisoners who were completely denied reassignment surgery by the prisons where  
10 they were incarcerated. But in those cases, prisoners were completely deprived of the ability  
11 to undergo medical procedures and express their gender identity while incarcerated; there  
12 were also allegations and evidence of hostility (refusing to allow a plaintiff to change her  
13 name and deliberate indifference to medical needs) and 8th Amendment cruel and unusual  
14 punishment claims.<sup>12</sup>

15 Moreover, Plaintiff has not alleged a discriminatory intent or motive on the part of  
16 the State Defendants, and thus he cannot state a Title VII disparate treatment claim: “A  
17 discriminatory motive may be established by the employer’s informal decisionmaking or ‘a  
18 formal, facially discriminatory policy,’ but ‘liability depends on whether the protected trait  
19 . . . actually motivated the employer’s decision.” *Wood v. San Diego*, 678 F.3d 1075, 1081  
20 (9th Cir. 2012) (affirming dismissal of Title VII claim where plaintiff only alleged “the City  
21 was aware that male employees would disproportionately benefit from the change”).

### 22 **III. PLAINTIFF HAS FAILED TO STATE AN EQUAL PROTECTION CLAIM.**

23 Plaintiff argues discrimination based on transgender status is subject to heightened  
24 \_\_\_\_\_  
25 employer may “require a biologically female employee believed to possess stereotypically  
26 male traits to provide proof of her genitalia or face consignment to the men’s restroom.”  
27 Plaintiff was *required* to have reassignment surgery to use the women’s restroom and was  
28 terminated when she refused to use the men’s restroom. Those facts are not present here.  
<sup>11</sup> Judge William Conley in Wisconsin issued the decisions in both *Flack* and *Boyden*.  
<sup>12</sup> In a Title VII case involving an exclusion denying gender reassignment surgeries, the  
Second Circuit noted, “it is not clear that the denial of benefits, without more, constitutes  
an adverse employment action.” *Mario v. P & C*, 313 F.3d 758 (2d Cir. 2002).

1 scrutiny. But the Supreme Court has not recognized transgender status as a suspect class for  
2 Equal Protection purposes. Plaintiff does not respond to the numerous cases in the Motion  
3 holding that rational basis review applies. (Doc. 24, p.12-14).<sup>13</sup> Plaintiff simply cites his  
4 own cases in arguing that discrimination based on transgender status is subject to heightened  
5 scrutiny, but those cases are inapposite. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014)  
6 (Toomey cited dicta from concurring opinion in same-sex marriage case where transgender  
7 people were not “represented among the plaintiff class”); *F.V. v. Barron*, 286 F.Supp.3d  
8 1131 (D.Id. 2018) (defendants conceded equal protection claims were valid regarding  
9 policy of categorically banning transgender people from amending sex on birth certificates);  
10 *Karnoski v. Trump*, 2017 WL 6311305 (W.D.Wash. 2017) (categorical ban on transgender  
11 individuals in military); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D.Cal. 2015)  
12 (deliberate indifference to medical needs of prison inmate); *SmithKline v. Abbott*, 740 F.3d  
13 471 (9th Cir. 2014) (sexual orientation in jury selection). Thus, rational basis review applies.

14 “To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection  
15 Clause . . . a plaintiff must show that the defendants acted with an intent or purpose to  
16 discriminate against the plaintiff based upon membership in a protected class.” *Barren v.*  
17 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). It “is the plaintiff’s burden to demonstrate  
18 that a challenged policy lacks rational basis.” *Alexander v. Ca.*, 2012 WL 439498 (E.D. Cal.  
19 2012) (citing *Heller v. Doe*, 509 U.S. 312 (1993)). The State has no obligation to provide  
20 coverage for every procedure an employee desires, whether medically necessary or not.  
21 Plaintiff concedes the government has a valid interest in cost containment, preserving fiscal

22  
23 <sup>13</sup> This case does not involve discrimination based on sex or sex-stereotyping; thus, rational  
24 basis applies. But even if intermediate scrutiny applies, Plaintiff’s claim must fail. *U.S. v.*  
25 *Virginia*, 518 U.S. 515 (1996) (To succeed in intermediate scrutiny, “a party seeking to  
26 uphold government action . . . must establish an exceedingly persuasive justification for the  
27 classification” and “show at least that the classification serves important governmental  
28 objectives and that the discriminatory means employed are substantially related to the  
achievement of those objectives”). This intermediate level of judicial scrutiny recognizes  
that sex “has never been rejected as an impermissible classification in all instances.” *Rostker*  
*v. Goldberg*, 453 U.S. 57, 69 n.7 (1981). As explained in Section III, there is a substantial  
relationship between the exclusion and the State’s important interests in cost-containment.  
*Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015) (“administrative convenience  
and economic cost-saving” are “relevant” to intermediate scrutiny analysis).

1 integrity, and limiting expenditures. (Doc. 39, p.13). Under rational basis review, the  
2 State’s interest in containing health insurance costs justifies the numerous exclusions within  
3 the Plan, including that for gender reassignment surgery. The Court may take judicial notice  
4 of the fact that additional procedures impose extra costs on the State’s health insurance  
5 program. Thus, a rational decision was made not to extend coverage to a number of different  
6 procedures, including the one at issue here.

7 Plaintiff argues costs cannot be used to justify “gender-based discrimination,” but  
8 the exclusion here does not involve gender-based discrimination (see above) and the cases  
9 cited by Plaintiff are inapposite. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (residency  
10 waiting period for public welfare benefits penalized plaintiffs from exercising a  
11 constitutional right to move from state to state); *Califano v. Goldfarb*, 430 U.S. 199 (1977)  
12 (challenge to survivors’ benefits provision that discriminated against female wage earners  
13 by affording them less protection); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (gender-  
14 based distinction of granting survivors’ benefits to widow if deceased was a man, but not if  
15 deceased was a woman); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (statute terminated  
16 eligibility for all health-care benefits of state employees’ same-sex domestic partners).  
17 Because Plaintiff’s Title VII claim fails (see above), the Court should dismiss the Equal  
18 Protection claim as well. *Okwuosa v. Empl. Dev.*, 143 F.App’x. 20, 23 (9th Cir. 2005)  
19 (“Because Okwuosa failed to establish a *prima facie* case of discrimination for purposes of  
20 Title VII, the district court correctly granted summary judgment on Okwuosa’s claim of  
21 unlawful discrimination on the basis of race and national origin under §1983”).<sup>14</sup>

#### 22 **IV. SOVEREIGN IMMUNITY APPLIES.**

23 Toomey argues sovereign immunity does not apply because he is seeking a  
24 “straightforward prospective injunction.” But this is not correct. Plaintiff is asking the Court  
25 to remove the exclusion and “evaluate whether [Toomey’s] surgical care for gender  
26 dysphoria is ‘medically necessary’ in accordance with the Plan’s generally applicable  
27

28 <sup>14</sup> Plaintiff’s citation of language from a Second Circuit dissenting opinion in *Zarda v. Altitude Express, Inc.* does not change this result under Ninth Circuit precedent.

1 standards and procedures.” (Doc. 1, p. 22). Plaintiff has already alleged the surgery is a  
2 “medically necessary hysterectomy prescribed by his physician.” (*Id.* ¶4) Thus, in actuality,  
3 he is not merely seeking “prospective injunctive relief” under *Ex Parte Young*, nor is the  
4 relief sought a mere expenditure of funds ancillary to prospective injunctive relief. *Verizon*  
5 *v. Public. Serv.*, 535 U.S. 635, 645 (2002); *Seminole Tribe v. Fla.*, 517 U.S. 44, 54 (1996).  
6 Toomey is – in essence - seeking a “retroactive award” of a benefit that he claims was  
7 previously wrongfully denied. This retrospective relief is not permissible under *Edelman*.

8 **V. PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.**

9 Plaintiff concedes he only filed an EEOC Charge against the Board of Regents,  
10 which “consists of ten appointive members.” A.R.S. § 15-1621(A). He did not file a Charge  
11 against the State or DOA - the agency he alleges “exercises control over the terms and  
12 conditions of the Arizona Board of Regents’ health plan” (Doc. 39, p.16). Thus, the State  
13 and DOA were not on notice of Plaintiff’s allegations through the EEOC process, and did  
14 not have the opportunity to review or respond to Plaintiff’s allegations. This flies in the  
15 face of the charge requirements in statute. 42 U.S.C. § 2000e-5(e)(1). Plaintiff argues he  
16 was not required to name the State or DOA based on the principal/agent or “substantially  
17 identical” exceptions in *Sosa v. Hiraoka*. But as explained in *Sosa*, courts do not *always*  
18 invoke the exceptions; courts are just “particularly likely to invoke one of these exceptions  
19 when the initial EEOC charge was filed without the assistance of counsel, since the charging  
20 party may not understand the need to name all parties in the charge, or may be unable to  
21 appreciate the separate legal identities of, for instance, a corporation and its officers.” 920  
22 F.2d 1451 (9th Cir. 1990). But here, Plaintiff filed his EEOC charge *with* the assistance of  
23 counsel, and thus he should have properly named the State (now a defendant).<sup>15</sup> (Doc. 1,  
24 ¶22 and Exh. B); *see also* Exh. 1.<sup>16</sup> Plaintiff failed to exhaust administrative remedies with  
25 respect to the State, and thus his Title VII claim should be dismissed.  
26

27 <sup>15</sup> Plaintiff’s cases, *Karam* and *Ariz. Students’ Ass’n*, are not persuasive as they address an  
28 agency relationship for purposes of sovereign immunity (not for an EEOC Charge).

<sup>16</sup> Exhibit 1 is a public record received from the EEOC. *See* footnote 3 in Motion to Dismiss.

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RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of May, 2019.

**BURNSBARTON PLC**

By     /s/Kathryn Hackett King      
C. Christine Burns  
Kathryn Hackett King  
Sarah N. O'Keefe

**CERTIFICATE OF SERVICE**

I hereby certify that on May 16, 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*

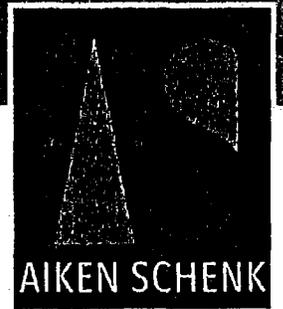
Paul F. Eckstein  
Austin C. Yost  
Perkins Coie LLP  
2901 North Central Avenue, Suite 2000  
Phoenix, Arizona 85012-2788  
[PEckstein@perkinscoie.com](mailto:PEckstein@perkinscoie.com)  
[AYost@perkinscoie.com](mailto:AYost@perkinscoie.com)  
*Attorneys for Defendants Arizona Board of Regents,  
d/b/a 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**

Tel: 602.248.8203  
Fax: 602.248.8840

2390 E. Camelback Rd.  
Suite 400  
Phoenix, AZ 85016



[www.aikenschenk.com](http://www.aikenschenk.com)

September 10, 2018

*Via Electronic and Regular Mail*

Patricia Miner, Enforcement Supervisor  
United States Equal Employment Opportunity Commission  
Phoenix District Office  
3300 North Central Avenue, Suite 690  
Phoenix, Arizona 85012-1848

**Re: Russell Toomey  
EEOC Charge No. 540-2018-04629**

Dear Ms. Miner:

As you know, this Firm represents Mr. Toomey relating to his employment with the Board of Regents of the University of Arizona, including the above referenced EEOC Charge. We would like to request a right to sue notice on this Charge as promptly as possible. Please let us know the most efficient option for doing so.

Please contact us if you have any questions or need additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "James Burr Shields".

James Burr Shields

JBS:ljr

cc: Russell Toomey

Tel: 602.248.8203  
Fax: 602.248.8840

2390 E. Camelback Rd.  
Suite 400  
Phoenix, AZ 85016



www.aikenschenk.com

August 22, 2018

*Via Electronic and Regular Mail*

Patricia Miner ([Patricia.miner@eeoc.gov](mailto:Patricia.miner@eeoc.gov))  
Nancy Draper ([Nancy.draper@eeoc.gov](mailto:Nancy.draper@eeoc.gov))  
United States Equal Employment Opportunity Commission  
Phoenix District Office  
3300 North Central Avenue, Suite 690  
Phoenix, Arizona 85012-1848

**Re: Russell Toomey**  
**EEOC Charge No. 540-2018-04629**

Dear Ms. Miner and Ms. Draper:

Enclosed is a letter Mr. Toomey recently received from BlueCross BlueShield of Arizona denying coverage for a hysterectomy. This letter confirms what Mr. Toomey was told during a phone call with BlueCross BlueShield of Arizona in July 2018, that if a hysterectomy was submitted with a code for Gender Dysphoria, that there would be \$0 in coverage and that the entire procedure would be out of pocket.

Please contact me if you have any questions or need additional information.

Sincerely,

James Burr Shields

JBS:ljr  
Enclosure  
cc: Russell Toomey



An Independent Licensee  
of the Blue Cross and  
Blue Shield Association

August 10, 2018

RUSSELL TOOMEY  
5901 E RYAN PL  
TUCSON AZ 85712

Member ID: SYD850959941 01  
Date of Service: October 1, 2018

Dear Russell Toomey:

Dr. Tiffany Woods Karsten has asked Blue Cross Blue Shield of Arizona (BCBSAZ) to approve you for a laparoscopic total hysterectomy with removal of tubes and ovaries surgery (58571) for your health issue of transsexualism and gender identity disorder (F64.0 and F64.9) at Tucson Medical Center. This is called "precertification." Your benefit plan requires you to get precertification for some services. A BCBSAZ Medical Director has reviewed the health care records your provider submitted.

Based upon that review, we cannot approve this request because the laparoscopic total hysterectomy with removal of tubes and ovaries surgery, for your diagnosis of transsexualism and gender identity disorder is considered a gender reassignment surgery, which is a benefit exclusion. This finding is based on your benefit plan booklet on pages 56 & 57 under the heading of "Exclusions and General Limitations" which states:

**10.1 Exclusions and General Limitations**

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

- Gender reassignment surgery."

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

You have the right to appeal this decision. If you or your doctor chooses to proceed with the appeal process, you may call the appeal line and fax any additional supporting information. Your treating doctor may request an expedited appeal depending on medical urgencies.

Please see the reverse side of this letter for the BCBSAZ appeal and grievance procedures. You may submit your appeal by calling, faxing or mailing your request to:

Medical Appeals and Grievances Department A116  
Blue Cross Blue Shield of Arizona  
P.O. Box 13466  
Phoenix, AZ 85002-3466  
Phone: (602) 544-4938 or (866) 595-5998  
Fax: (602) 544-5601

Russell Toomey  
August 10, 2018  
Page 2

Before appealing, a service determined not to be medically necessary is eligible for a peer to peer (PtoP) discussion. The treating provider may ask for a PtoP discussion. This may be done by calling the Office of the Medical Director at 602-864-4209 within 7 days from the date of this letter. PtoP discussions are not available for benefit exclusions, including, but not limited to:

- Investigational/Experimental decisions
- Out of Network requests for In-Network Level of Benefits
- Medication Doses outside of Federal Drug Administration (FDA) dosing levels

The Clinical Content you are receiving is confidential and proprietary information and is being provided to you solely as it pertains to the claim or the information request at issue. Under copyright law, the Clinical Content may not be copied, distributed, or otherwise reproduced. The Clinical Content is solely for use as a screening guide to assist in determining the medical appropriateness of health care services. All decisions about health care are strictly and solely the obligation and responsibility of a treating health care provider.

You also have the right to reasonable access to the medical records, InterQual medical criteria and any other information BCBSAZ used for this medical necessity benefit determination. BCBSAZ did not rely on any medical records except those furnished by your provider. If you would like a copy of these records or any documentation, please call us at the number above.

Sincerely,



Darren Deering, D.O.  
Senior Medical Director

If you are hearing impaired (TDD), please call (602) 864-4823 or (800) 232-2345 ext.4823.

cc: TIFFANY WOODS KARSTEN MD  
839 W CONGRESS ST  
TUCSON AZ 85745

TUCSON MEDICAL CENTER  
5301 E GRANT RD  
TUCSON AZ 85712

Blue Cross Blue Shield of Arizona (BCBSAZ) complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability or sex. BCBSAZ provides appropriate free aids and services, such as qualified interpreters and written information in other formats, to people with disabilities to communicate effectively with us. BCBSAZ also provides free language services to people whose primary language is not English, such as qualified interpreters and information written in other languages. If you need these services, call 602-864-4884 for Spanish and 877-475-4799 for all other languages and other aids and services.

If you believe that BCBSAZ has failed to provide these services or discriminated in another way on the basis of race, color, national origin, age, disability or sex, you can file a grievance with: BCBSAZ's Civil Rights Coordinator, Attn: Civil Rights Coordinator, Blue Cross Blue Shield of Arizona, P.O. Box 13466, Phoenix, AZ 85002-3466, 602-864-2288, TTY/TDD 602-864-4823, [crc@azblue.com](mailto:crc@azblue.com). You can file a grievance in person or by mail or email. If you need help filing a grievance BCBSAZ's Civil Rights Coordinator is available to help you. You can also file a civil rights complaint with the U.S. Department of Health and Human Services, Office for Civil Rights electronically through the Office for Civil Rights Complaint Portal, available at <https://ocrportal.hhs.gov/ocr/portal/lobby.jsf>, or by mail or phone at: U.S. Department of Health and Human Services, 200 Independence Avenue SW., Room 509F, HHH Building, Washington, DC 20201, 1-800-368-1019, 800-537-7697 (TDD). Complaint forms are available at <http://www.hhs.gov/ocr/office/file/index.html>.



**SHERRIE GREER**

---

**From:** NANCY DRAPER  
**Sent:** Monday, August 20, 2018 9:31 AM  
**To:** 'burr@aikenschenk.com'  
**Subject:** Russell Toomey - 540-2018-04629  
**Attachments:** Toomey Russell (charge).pdf

Dear Mr. Burr:

Attached is a copy of the charge for the above referenced for your records.

*Nancy  
Office Automation Assistant  
Equal Employment Opportunity Commission  
3300 N. Central Ave., Suite 690  
Phoenix, AZ 85012*

**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<br><input checked="" type="checkbox"/> EEOC                   | 580.2018.04629                |
| Arizona Civil Rights Division and EEOC<br>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<br><input type="checkbox"/> RETALIATION <input type="checkbox"/> AGE <input type="checkbox"/> DISABILITY <input type="checkbox"/> OTHER (Specify)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |  | EARLIEST LATEST<br>7/19/18 7/19/18<br><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)

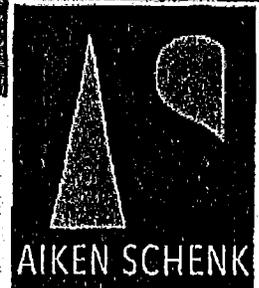
8/15/18

Russell Blake Tramm

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

Tel: 602.248.8203  
Fax: 602.248.8840

2390 E. Camelback Rd.  
Suite 400  
Phoenix, AZ 85016



www.aikenschenk.com

August 15, 2018

**REC'D EEOC**

AUG 15 2018

**PXDO**

*Via Electronic and Regular Mail*

Patricia Miner  
Enforcement Supervisor  
United States Equal Employment Opportunity Commission  
Phoenix District Office  
3300 North Central Avenue, Suite 690  
Phoenix, Arizona 85012-1848

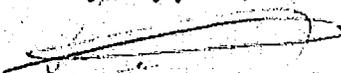
**Re: *Russell Toomey***

Dear Ms. Miner:

Undersigned counsel represents Russell Toomey regarding the enclosed Charge of Discrimination. Mr. Toomey currently resides in Tucson and is therefore submitting his Charge via mail.

Please contact James Burr Shields at Aiken Schenk ([burr@aikenschenk.com](mailto:burr@aikenschenk.com) or 602-248-8203) if you have any questions or need any additional information.

Very truly yours,

  
James Burr Shields  
Heather A. Macre  
Joshua Block, ACLU  
Kathy Brody, ACLU of Arizona

JBS :ljr  
Enclosure  
cc: Russell Toomey