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

10 **Russell B. Toomey,**

11 Plaintiff,

12 v.

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;
18 **Bill Ridenour**, in his official capacity as
Treasurer of the Arizona Board of Regents;
19 **Lyndel Manson**, in her official capacity as
Member of the Arizona Board of Regents;
20 **Karrin Taylor Robson**, in her official capacity
as Member of the Arizona Board of Regents;
21 **Jay Heiler**, in his official capacity as Member
of the Arizona Board of Regents; **Fred Duval**,
22 in his official capacity as Member of the
Arizona Board of Regents; **Andy Tobin**, in his
23 official capacity as Director of the Arizona
Department of Administration; **Paul Shannon**,
24 in his official capacity as Acting Assistant
25 Director of the Benefits Services Division of
the Arizona Department of Administration,
26

27 Defendants.
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Case No. CV-19-00035-TUC-RM (LAB)

**RESPONSE TO PLAINTIFF’S
NOTICE OF SUPPLEMENTAL
AUTHORITY IN SUPPORT OF
RESPONSE TO MOTION TO
DISMISS AND RESPONSE TO
MOTION TO STAY FILED BY
DEFENDANTS STATE OF
ARIZONA, GILBER DAVIDSON
AND PAUL SHANNON (DE ##39, 43)**

1 Defendants State of Arizona, Andy Tobin, and Paul Shannon (“State Defendants”)
2 submit this Response to Plaintiff’s Notice of Supplemental Authority (Doc. 45). Plaintiffs
3 cite *Karnoski v. Trump*, 2019 WL 2479442 (9th Cir. June 14, 2019), claiming *Karnoski*
4 supports Plaintiff’s arguments that (i) “discrimination against transgender individuals is
5 subject to heightened scrutiny under the Equal Protection Clause,” and (ii) a stay in *Harris*
6 *Funeral Homes* “would not conserve judicial resources because the exclusion of coverage
7 for ‘gender reassignment surgery’ is independently subject to heightened scrutiny as
8 discrimination based on transgender status.” (Doc. 45, p.3)

9 However, *Karnoski* is distinguishable from this case. In *Karnoski*, the Court was
10 evaluating a federal policy (“2018 Policy”) that solely disqualified transgender persons
11 from military service; on the other hand, that same policy did *not* disqualify non-
12 transgender (cisgender) individuals from military service. Thus, the 2018 Policy in
13 *Karnoski* specifically targeted transgender individuals: “On its face, the 2018 Policy
14 regulates on the basis of transgender persons,” as the policy itself disqualified
15 “transgender persons” from military service. 2019 WL 2479442, *14. Further, the 2018
16 Policy effectively served as an almost complete exclusion of transgender persons from
17 military service: “Beyond the narrow reliance exception, transgender individuals who
18 wish to serve openly in their gender identity are altogether barred from service.” *Id.* at
19 *12, n.15 (the “policy indisputably bars many transgender persons from military service”).
20 Thus, the Court “conclude[d] that the 2018 Policy on its face treats transgender persons
21 differently than other persons, and consequently something more than rational basis but
22 less than strict scrutiny applies” (which was “intermediate scrutiny”). *Id.* at *14-15.

23 Here, in contrast, the Health Plan does not specifically target transgender persons.
24 Indeed, the gender reassignment surgery exclusion is just one of many different
25 exclusions in the Health Plan which apply to various individuals (both transgender and
26 non-transgender) regardless of medical necessity. (Doc. 1, Exh. A, p. 26-27, 55-58, 93)
27 Further, transgender individuals are covered under the Health Plan, and they receive
28 coverage for medically necessary treatments in the vast majority of cases. All persons -
transgender and non-transgender (cisgender) - are subject to numerous exclusions within

1 the Health Plan. And the Health Plan provides coverage for some gender transition
2 services, including mental health counseling and hormone therapy deemed medically
3 necessary by a clinician to treat gender dysphoria. The Health Plan does not eliminate
4 coverage for all gender transition treatment. (*Id.*, Exh. A, p. 26-27, 55-58)

5 Accordingly, in contrast with *Karnoski*, the Health Plan does not specifically target
6 transgender individuals; it does not “regulate on the basis of transgender status” or
7 constitute discrimination or a classification based on transgender status. 2019 WL
8 2479442, *14. Thus, the level of judicial scrutiny set forth in *Karnoski* is not applicable
9 based on the facts presented here.

10 RESPECTFULLY SUBMITTED this 2nd day of July, 2019.

11 **BURNSBARTON PLC**

12
13 By s/C. Christine Burns
14 C. Christine Burns
15 Kathryn Hackett King
16 Sarah N. O’Keefe
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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 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.

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