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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF ARIZONA**

16 **Russell B. Toomey,**
17
18 Plaintiff,
19
20 v.

CV 19-CV-0035-TUC-RM (LAB)

21 **State of Arizona; Arizona Board of Regents,**
22 **d/b/a University of Arizona,** a governmental
23 body of the State of Arizona; **Ron Shoopman,** In
24 his official capacity as Chair of the Arizona Board
25 of Regents; **Larry Penley,** in his official capacity
26 as member of the Arizona Board of Regents; **Ram**
27 **Krishna,** in his official capacity as Secretary of
28 the Arizona Board of Regents; **Bill Ridenour,** in
his official capacity as treasurer of the Arizona
Board of Regents; **Lyndel Manson,** in her official
capacity as member of the Arizona Board of
Regents; **Karrin Taylor Robson,** in her official
capacity as member of the Arizona Board of
Regents; **Jay Heiler,** in his official capacity as
member of the Arizona Board of Regents; **Fred**
Duval, in his official capacity as member of the
Arizona Board of Regents; **Andy Tobin,** in his
official capacity as Director of the Arizona
Department of Administration; **Paul Shannon,** in
his official capacity as Acting Assistant Director
of the Benefits Services Division of the Arizona
Department of Administration,

PLAINTIFF’S SUPERSEDING
MOTION FOR CLASS
CERTIFICATION

Defendants.

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INTRODUCTION

The State of Arizona provides health care coverage to its employees through a self-funded healthcare plan controlled by the Arizona Department of Administration. (Am. Compl., Doc. 86). The Plan categorically excludes “gender reassignment surgery,” regardless of whether the surgery qualifies as medically necessary to treat gender dysphoria. (Am. Compl, Doc. 86 at pg. 7). Plaintiff Russell B. Toomey, Ph.D., brings a facial challenge to that categorical exclusion under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and the Equal Protection Clause of the Fourteenth Amendment. (Am. Compl., Doc. 86 at pg. 5). On December 23, 2019, this Court denied Defendants’ motion to dismiss Dr. Toomey’s claims and held that Dr. Toomey had stated valid claims for relief under both Title VII and the Equal Protection Clause. (Doc. 69).

Plaintiff respectfully moves the Court for an order certifying this case as a class action under Fed. R. Civ. P. 23(b)(2) and appointing Plaintiff’s counsel as class counsel under Rule 23(g). In support of this Motion, Plaintiff submits his own declaration about his medical claim, as well as information about his connections to the transgender community in Arizona that make him uniquely well-situated to represent the interests of the classes.

BACKGROUND

As an employee of the Arizona Board of Regents, Dr. Toomey is provided healthcare coverage through the State of Arizona’s self-funded healthcare plan controlled by the Arizona Department of Administration. (Am. Complaint, Doc. 86, pg. 1-3). The Plan generally provides coverage for medically necessary care, but the Plan categorically denies all coverage for “[g]ender reassignment surgery” regardless of whether the surgery qualifies as medically necessary to treat gender dysphoria. Transgender individuals enrolled in the Plan have no opportunity to demonstrate that their surgical care to treat gender dysphoria (also known as “transition-related care” or “gender-affirming care” is

1 medically necessary.

2 As a result of the Plan’s categorical exclusion for “gender reassignment surgery,”
3 Dr. Toomey was denied preauthorization for his hysterectomy on August 10, 2018. (Doc.
4 86-7.). The denial was based solely on the Plan’s exclusion for “gender reassignment
5 surgery.”

6 Dr. Toomey challenges the facial validity of the Plan’s “gender reassignment
7 surgery” exclusion, which denies transgender individuals an equal opportunity to
8 demonstrate that their transition-related surgical care is medically necessary. As alleged
9 in the Complaint, Dr. Toomey contends that the “gender reassignment surgery” exclusion
10 facially violates Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause
11 of the Fourteenth Amendment. (Am. Compl., Doc. 86 at pg. 5). On December 23, 2019,
12 this Court denied Defendants’ motion to dismiss Dr. Toomey’s claims and held that Dr.
13 Toomey had stated valid claims for relief under both Title VII and the Equal Protection
14 Clause. (Doc. 69).

15 **Proposed Classes**

16 Pursuant to Federal Rule of Civil Procedure 23(b)(2), Dr. Toomey seeks class-wide
17 injunctive and declaratory relief on behalf of two classes. (Am. Compl., Doc. 86 at pg. 11-
18 12). For purposes of the Title VII claims against the State of Arizona and the Arizona Board
19 of Regents, the first class is defined as:

20 Current and future employees of the Arizona Board of Regents who are or
21 will be enrolled in the self-funded Plan controlled by the Arizona Department
22 of Administration, and who have or will have medical claims for transition-
23 related surgical care.

24 For purposes of the equal protection claims against Andy Tobin and Paul Shannon in their
25 official capacities, the second class is defined as:

26 Current and future individuals (including Arizona State employees and their
27 dependents), who are or will be enrolled in the self-funded Plan controlled
28 by the Arizona Department of Administration, and who have or will have
medical claims for transition-related surgical care.

ARGUMENT

1
2 This is the paradigmatic case for class certification. Dr. Toomey brings a facial
3 challenge to the Plan’s “gender reassignment” exclusion, which applies across the board to
4 all Plan members regardless of medical necessity. A single injunction would provide relief
5 to all class members by lifting the categorical exclusion and allowing class members’
6 claims for transition-related surgery to be evaluated for “medical necessity” under the
7 Plan’s generally applicable standards.

8 **I. The Proposed Classes Meet All the Rule 23(a) Requirements.**

9 **A. Numerosity**

10 “A proposed class satisfies the numerosity requirement if members are so numerous
11 that joinder would be impracticable. There is no fixed threshold, but courts in this circuit
12 generally have held that classes of **40 or more** satisfy the numerosity requirement.”
13 *Valenzuela v. Ducey*, No. CV-16-03072-PHX-DGC, 2017 WL 6033737, at *4 (D. Ariz.
14 Dec. 6, 2017) (internal quotation marks and citations omitted) (emphasis added). A class
15 can also “be certified without determination of its size, so long as it’s reasonable to believe
16 it large enough to make joinder impracticable and thus justify a class action suit.” *Arnold*
17 *Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th
18 Cir. 2014). “Where the exact size of the class is unknown, but general knowledge and
19 common sense indicate that it is large, the numerosity requirement is satisfied.” 1 Alba
20 Cone & Herbert B. Newberg, *Newberg on Class Actions* § 3.3 (4th ed. 2002))

21
22 To establish numerosity, therefore, Dr. Toomey must demonstrate—at most—that
23 it is reasonable to believe based on general knowledge and common sense that (a) at least
24 40 current or future Board of Regents employees will be enrolled in the self-funded Plan
25 and have medical claims for transition-related, (b) at least 40 current or future individuals
26 (including Arizona State employees and their dependents) will be enrolled in the self-
27 funded Plan and have medical claims for transition-related care. In making that showing,
28

1 Dr. Toomey is not limited to evidence that would be admissible under the Federal Rules of
2 Evidence. *Valenzuela*, 2017 WL 6033737, at *4.

3 Numerosity is easily satisfied in this case based on Dr. Toomey's first-hand
4 knowledge and reasonable inferences from demographic data. Dr. Toomey is already
5 personally aware of at least six other employees of the Board of Regents who are unable
6 to receive transition-related surgery because of the challenged exclusion. (Toomey Decl.,
7 Exhibit A, at pg. 4).

8 Demographic data further indicates that the total number of class-members could be
9 over 1,000. As of 2017, the Board of Regents employed 35,614 individuals at Arizona's
10 public universities.¹ As of 2018, approximately 137,700 individuals receive healthcare
11 through the State's self-funded plan.² According to a 2016 study from the Williams
12 Institute, approximately 0.62% of Arizonans identify as transgender.³ Recent surveys
13 further reflect that an estimated 25% to 35% of individuals who identify as transgender or
14 gender non-binary have undergone some form of gender conforming surgery.⁴ And an
15 additional 61% of transgender men and 54% of transgender women reported *wanting* some
16 form of gender conforming surgery in the future.⁵

19 ¹ Arizona Board of Regents, University System Quick Facts, *available at*
20 <https://www.azregents.edu/universtiy-system-quick-facts> (last visited February 13, 2020).

21 ² Arizona Department of Administration Benefits, Health Insurance Trust Fund Annual
22 2017 Report (2018), p. 6, *available at*
23 https://benefitoptions.az.gov/sites/default/files/media/LEGI_HITF_2018_Annual_Report.pdf.

24 ³ Andrew R. Flores et. al., *How Many Adults Identify as Transgender in the United States*
25 (2016), The Williams Institute, *available at*
26 <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

27 ⁴ Ian T. Nolan, et. al., *Demographic and temporal trends in transgender identities and*
28 *gender confirming surgery*, 8 *Translational Andrology and Urology* 3 (2019).

⁵ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016), *The Report of the 2015 U.S. Transgender Survey*, Washington, DC: National Center for

1 Applying this demographic data, it is reasonable to conclude that *approximately*
2 *221* transgender individuals currently work for the Board of Regents and *approximately*
3 *854* transgender individuals currently receive healthcare through the State’s self-funded
4 Plan. Applying the conservative estimate of individuals who *have* received (25%) or *wish*
5 to receive gender conforming surgery (57%), *approximately 181* such transgender
6 individuals work for the Board of Regents and *approximately 700* such transgender
7 individuals receive healthcare through the State’s self-funded Plan. From this data alone,
8 the Court can easily infer that each of the putative classes has more than 40 members. *See*
9 *Hoffman v. Blattner Energy, Inc.*, 315 F.R.D. 324, 337 (C.D. Cal. 2016) (finding
10 numerosity satisfied where plaintiff identified 23 employees who were actual members of
11 the subclass and presented evidence that there were 1,229 total employees because “it is
12 reasonable for the Court to conclude that there are other employees out of 1,229 who fall
13 within the proposed subclass”); *Williams v. Conway*, 312 F.R.D. 248, 252 (N.D.N.Y. 2016)
14 (reasonable inference that 0.14% of prison population is profoundly deaf because 0.14%
15 of total population is profoundly deaf).
16

17 Moreover, even without a statistical estimate of current class members, joinder
18 would still be impractical because Dr. Toomey seeks declaratory and injunctive relief on
19 behalf of “current and future” employees and State Plan beneficiaries “who have or will
20 have” medical claims for transition-related surgical care. “[C]lasses including future
21 claimants generally meet the numerosity requirement due to the ‘impracticality of counting
22 such class members, much less joining them.’” *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C.
23 Cir. 2019). “[T]he presence of future class members renders joinder inherently impractical,
24 thus satisfying the numerosity requirement’s fundamental purpose.” *Inland Empire-*
25

26
27 Transgender Equality, pp. 105-106, *available at*
28 <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

1 *Immigrant Youth Collective v. Nielsen*, No. EDCV172048PSGSHKX, 2018 WL 1061408,
2 at *7 (C.D. Cal. Feb. 26, 2018).

3 **B. Commonality**

4 The proposed classes also satisfy the requirement of commonality. “In a civil
5 rights suit, ‘commonality is satisfied where the lawsuit challenges a system-wide practice
6 or policy that affects all of the putative class members.’” *Ortega-Melendres v. Arpaio*,
7 836 F. Supp. 2d 959, 989 (D. Ariz. 2011) (quoting *Armstrong v. Davis*, 275 F.3d 849,
8 868 (9th Cir. 2001)), *aff’d*, 695 F.3d 990 (9th Cir. 2012).

9 Dr. Toomey’s claims easily meet that test. He brings a facial challenge that does
10 not depend on whether each individual’s surgery is ultimately proven to be medically
11 necessary. Instead, Dr. Toomey merely seeks declaratory relief and an injunction
12 providing all class members the opportunity to have their claims for transition-related
13 surgery evaluated for medical necessity under the same standards and procedures that the
14 Plan applies to other medical treatments. The denial of that equal opportunity is an injury
15 in fact that can be resolved on a class-wide basis because “[w]hen the government erects a
16 barrier that makes it more difficult for members of one group to obtain a benefit than it is
17 for members of another group,” the “injury in fact” is “the denial of equal treatment
18 resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”
19 *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508
20 U.S. 656, 666 (1993); *see Valenzuela*, 2017 WL 6033737, at *5 (granting class certification
21 in which “the relevant injury is not the denial of driver’s licenses, but the fact that the State
22 imposes requirements on class members that it does not impose on other[s]”); *Wit v. United*
23 *Behavioral Health*, 317 F.R.D. 106, 127 (N.D. Cal. 2016) (granting class certification in
24 challenge to insurance company’s mental health coverage guidelines because “Plaintiffs
25 do not ask the Court to make determinations as to whether class members were *actually*
26 entitled to benefits. Instead, Plaintiffs seek only an order that [the insurance company]
27
28

1 develop guidelines that are consistent with generally accepted standards and reprocess
2 claims for coverage that were denied under the allegedly faulty guidelines.”).

3 **C. Typicality**

4 Under Rule 23(a)(3), the representative party must have claims or defenses that are
5 “typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality is
6 satisfied “when each class member’s claim arises from the same course of events, and each
7 class member makes similar legal arguments to prove the defendants’ liability.” *Rodriguez*
8 *v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (citations omitted). This requirement is
9 “permissive and requires only that the representative’s claims are reasonably co-extensive
10 with those of the absent class members; they need not be substantially identical.” *Hanlon*
11 *v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

12 For all the same reasons that Dr. Toomey’s claims are common to the classes, Dr.
13 Toomey’s claims are also typical of the classes. Dr. Toomey is challenging the blanket
14 exclusion for all “gender reassignment surgery,” and he merely seeks the opportunity to
15 demonstrate that transition-related surgical care is medically necessary. That facial
16 challenge applies equally to every member of the proposed classes regardless of the
17 particular type of transition-related surgery the class member seeks and regardless of
18 whether the class member is ultimately successful in proving that their specific surgery is
19 medically necessary. *See Flack v. Wisconsin Dep’t of Health Servs.*, 331 F.R.D. 361, 369
20 (W.D. Wis. 2019) (certifying class action challenge to Wisconsin’s categorical exclusion
21 of transition-related care from Medicaid plan because “all the claims arise from defendants’
22 enforcing the Challenged Exclusion, and the relief sought simply seeks to allow the class
23 members the right to individually seek treatment based on medical necessity, free from
24 enforcement of the Challenged Exclusion.”).

1 **D. Adequacy of Representation.**

2 **1. The class representatives' interests are not antagonistic to the interests**
3 **of the classes**

4 Dr. Toomey is a transgender male who is a tenured professor at the University of
5 Arizona in the department of Family Studies and Human Development. (Decl. of Dr.
6 Russell Toomey, Exhibit A at pg. 3). Dr. Toomey's academic research focuses on the
7 discrimination LGBTQ youth face in their families, schools, and communities and seeks
8 to identify ways to mitigate the association between LGBTQ discrimination and poor
9 health outcomes. (*Id.*). Dr. Toomey is a member of the Transgender Studies Research
10 Cluster at the University of Arizona and serves as a faculty fellow at the University of
11 Arizona's LGBTQ Resource Center. (*Id.*). Dr. Toomey is also deeply connected to the
12 wider transgender community in Arizona. He is on the steering committee of Camp Born
13 this Way, an Arizona camp for transgender youth and their families. (*Id.* at 3-4). He has
14 served on the Board of the Southern Arizona Gender Alliance which provides support,
15 education, resources, and advocacy for Southern Arizona's community of transgender and
16 gender non-conforming individuals. (*Id.* at 4). Given his academic expertise on these
17 issues as well as a deep personal connection to many of the foremost transgender
18 community groups in Arizona, Dr. Toomey is well situated to represent the interests of the
19 classes and to communicate with them about issues in the case.

20
21 As both an employee of the University of Arizona Board of Regents and a
22 participant of the Plan effected by its categorical exclusion of "gender reassignment
23 surgery," Dr. Toomey adequately represents and his interests are aligned with all members
24 of the classes. Because the complaint does not turn on each individual medical treatment
25 but instead turns on the opportunity for each class member to demonstrate that their
26 transition-related care is medically necessary the class members' interests are
27 commensurate with each other.

1 **2. Counsel are well qualified to represent the classes.**

2 Plaintiff’s counsel are experienced class action and civil rights practitioners. The
3 litigation team includes (1) Victoria Lopez, Advocacy and Legal Director of the ACLU of
4 Arizona, who represents classes in three other matters (Exhibit B, Decl. of Victoria Lopez),
5 (2) Christine K. Wee of the ACLU of Arizona, who represents a class in one matter, (3)
6 Joshua Block of the ACLU who has represented several classes challenging discrimination
7 against LGBT people and has represented other transgender individuals in discrimination
8 suits regarding access to transition-related health care (Exhibit C, Decl. of Joshua Block),
9 and (4) Wesley Powell and Matthew Freimuth of Willkie Farr & Gallagher LLP who are
10 experienced class action litigators (on behalf of both plaintiffs and defendants) and have
11 also represented transgender individuals in discrimination suits regarding access to
12 transition-related health care and public facilities (Exhibit D, Decl. of Wesley R. Powell).

13 **II. Dr. Toomey’s Claims Should Be Certified Under Rule 23(b)(2).**

14 Dr. Toomey brings this action on behalf of himself and two classes of similarly
15 situated individuals pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure,
16 which authorizes class actions when “the party opposing the class has acted or refused to
17 act on grounds that apply generally to the class, so that final injunctive relief or
18 corresponding declaratory relief is appropriate respecting the class as a whole.”

19 The key to the (b)(2) class is the indivisible nature of the injunctive or
20 declaratory remedy warranted—the notion that the conduct is such that it can
21 be enjoined or declared unlawful only as to all of the class members or as to
22 none of them. In other words, Rule 23(b)(2) applies only when a single
23 injunction or declaratory judgment would provide relief to each member of
24 the class.

25 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011) (quotation marks and
26 citations omitted). “Civil rights cases against parties charged with unlawful, class-based
27 discrimination are prime examples” of cases suitable for certification under Rule 23(b)(2).
28 *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

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Dr. Toomey’s facial challenge under Title VII and the Equal Protection Clause falls squarely within the scope of Rule 23(b)(2). Through the “gender reassignment surgery” exclusion, Defendants have “acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Rule 23(b)(2). As discussed above, class certification is appropriate because Dr. Toomey challenges the facial validity of the Plan’s “gender reassignment surgery” exclusion, which denies transgender individuals an equal opportunity to demonstrate that their transition-related surgical care is medically necessary. The denial of that equal opportunity is an injury in fact that can be resolved on a class-wide basis. *See Flack*, 331 F.R.D. at 369; *Valenzuela*, 2017 WL 6033737, at *5; *Wit*, 317 F.R.D. at 127.

CONCLUSION

Plaintiff has satisfied all prerequisites to and requirements of Rule 23 and, therefore, respectfully requests that the Court certify the proposed classes, approve the named Plaintiff as a class representative, and appoint Plaintiff’s counsel to represent the classes.

DATED: this 6th day of March, 2020.

ACLU FOUNDATION OF ARIZONA

By Christine K. Wee
Victoria López*
Christine K. Wee

(*admission under Arizona Rule 38(f) pending)

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Joshua A. Block*
Leslie Cooper*

(*admitted *pro hac vice*)

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2020, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties.

/s/ Christine K. Wee
Christine K. Wee

**INDEX OF EXHIBITS TO PLAINTIFF'S
SUPERSEDING MOTION FOR CLASS CERTIFICATION**

TOOMEY V. STATE OF ARIZONA, ET AL
CV 19-CV-0035-TUC-RM (LAB)

INDEX OF EXHIBITS

Exhibit	Description
A.	Declaration of Russell B. Toomey
B.	Declaration of Victoria Lopez
C.	Declaration of Joshua A. Block
D.	Declaration of Wesley R. Powell

EXHIBIT A

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman,** In his official capacity as Chair of the Arizona Board of Regents; **Larry Penley,** in his official capacity as member of the Arizona Board of Regents; **Ram Krishna,** in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour,** in his official capacity as treasurer of the Arizona Board of Regents; **Lyndel Manson,** in her official capacity as member of the Arizona Board of Regents; **Karrin Taylor Robson,** in her official capacity as member of the Arizona Board of Regents; **Jay Heiler,** in his official capacity as member of the Arizona Board of Regents; **Fred Duval,** in his official capacity as member of the Arizona Board of Regents; **Andy Tobin,** in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon,** in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

CV 19-CV-0035-TUC-RM (LAB)

**DECLARATION OF
RUSSELL B. TOOMEY
IN SUPPORT OF PLAINTIFF'S
SUPERSEDING MOTION FOR
CLASS CERTIFICATION**

1 **DECLARATION OF RUSSELL B. TOOMEY**

2 I, **RUSSELL B. TOOMEY**, declare and state as follows:

3 1. I submit this declaration in support of Plaintiff's Motion for Class
4 Certification.

5 2. The following information is within my own personal knowledge. If called
6 as a witness, I would and could competently testify to the facts stated herein.

7 3. I am man who is transgender. This means I have a male gender identity, but
8 the sex assigned to me at birth was female.

9 4. I transitioned to live consistently with my male identity in 2003. Since 2003
10 I have received testosterone as a medically necessary treatment for gender dysphoria. I also
11 received medically necessary chest reconstructive surgery in 2004.

12 5. I am a tenured professor at the University of Arizona in the department of
13 Family Studies and Human Development. I have a master's degree in Human Development
14 and Family Studies from Kent State and a PhD in Family Studies and Human Development
15 from the University of Arizona.

16 6. My academic research focuses on discrimination that LGBTQ youth face in
17 their families, schools and communities and identifying ways to mitigate the association
18 between LGBTQ discrimination and poor health outcomes.

19 7. I am also a member of the Transgender Studies Research Cluster on the
20 University of Arizona campus. This is a group of faculty members whose research focuses
21 on transgender populations, identities and meanings.

22 8. I serve as a faculty fellow at the University of Arizona's LGBTQ Student
23 Resource Center, where I interact with LGBTQA+ students on a weekly basis as well as
24 host transgender caucuses.

25 9. I am also actively involved in the broader transgender community in Arizona.

26 10. I am on the steering committee for Camp Born This Way, which is a camp
27 for Arizona transgender youth and their families. The volunteers are all transgender
28 identified and/or parents of transgender youth.

1 11. I am a former Board member of the Southern Arizona Gender Alliance
2 (“SAGA”). SAGA is a 21-year old group that provides weekly support groups and events
3 throughout the year. SAGA has a private Facebook group of 905 people, who are all
4 transgender-identified people, their partners, or parents of transgender youth. I was a co-
5 facilitator for SAGA’s re-envisioning community forum in November 2018.

6 12. In 2018, my treating physician, Dr. Tiffany Woods Karsten, recommended I
7 receive a hysterectomy as a medically necessary treatment for gender dysphoria.

8 13. As a professor at the University of Arizona, I am provided health coverage
9 through the State of Arizona.

10 14. When she recommended I receive a hysterectomy, Dr. Tiffany Woods
11 Karsten requested precertification of the surgery from my insurance provider so I would
12 not have to pay out of pocket.

13 15. I was informed by my insurance provider, Blue Cross/Blue Shield, that the
14 surgery was denied because of a benefit exclusion for gender reassignment surgery.

15 16. I know of at least six other transgender employees at the University of
16 Arizona or Arizona State University who are ineligible for gender reassignment surgery
17 because of the exclusion. To my knowledge, these employees have not made a claim with
18 their insurance because they know it will be denied.

19 17. In my personal experience with many members of the transgender
20 community, including transgender youth and transgender adults, I have learned that
21 individuals do not want to identify publicly as transgender because of fear of stigma or
22 violence.

23 18. I have studied this phenomenon in my academic research. I contributed to a
24 Williams Institute report on the prevalence of several forms of stigma and discrimination
25 against LGBTQ adults and youth in Arizona. Many transgender individuals also identify
26 as LGBTQ.

27 19. In fact, many people did not necessarily know that I was transgender prior to
28 filing this lawsuit but I had to publicly “come out” again as a result of my public association

1 with this case.

2 20. I have discussed the requirements of being the class representative with my
3 attorneys and I understand the responsibilities and duties of a class representative.

4 I declare under penalty of perjury under the laws of the United States that the
5 foregoing is true and correct.

6 Executed on March 3, 2020.

7

8 /s/ Russell Toomey
9 Russell Toomey

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EXHIBIT B

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman,** In his official capacity as Chair of the Arizona Board of Regents; **Larry Penley,** in his official capacity as member of the Arizona Board of Regents; **Ram Krishna,** in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour,** in his official capacity as treasurer of the Arizona Board of Regents; **Lyndel Manson,** in her official capacity as member of the Arizona Board of Regents; **Karrin Taylor Robson,** in her official capacity as member of the Arizona Board of Regents; **Jay Heiler,** in his official capacity as member of the Arizona Board of Regents; **Fred Duval,** in his official capacity as member of the Arizona Board of Regents; **Andy Tobin,** in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon,** in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

CV 19-CV-0035-TUC-RM (LAB)

**DECLARATION OF
VICTORIA LÓPEZ
IN SUPPORT OF PLAINTIFF'S
SUPERSEDING MOTION FOR
CLASS CERTIFICATION**

1 **DECLARATION OF VICTORIA LÓPEZ**

2 I, **VICTORIA LÓPEZ** declare and state as follows:

3 1. This declaration is submitted in support of Plaintiffs’ Superseding Motion
4 for Class Certification. The facts set forth herein are within my personal knowledge or
5 knowledge gained from review of the pertinent documents. If called upon, I could and
6 would testify competently thereto.

7 2. I am the Advocacy and Legal Director of the American Civil Liberties
8 Union Foundation of Arizona (“ACLU of Arizona”), a nonprofit organization with
9 501(c)(3) tax-exempt status.

10 3. In addition to myself, ACLU of Arizona staff attorney Christine K. Wee
11 and paralegal Gloria Torres are working on this case.

12 4. I am a member in good standing of the Illinois State Bar and my admission
13 to the Arizona State Bar is pending. I am admitted to the U.S. District Court for the
14 Northern District of Illinois, the U.S. District Court for the District of Arizona, and the
15 U.S. Court of Appeals for the Ninth Circuit. I received my Juris Doctor degree from the
16 University of Pennsylvania in 2001. From 2001- 2007, I was an attorney and executive
17 director of the Florence Immigrant and Refugee Rights Project in Arizona. I joined the
18 ACLU of Arizona in 2009 as a staff attorney and later served as Policy and Advocacy
19 Director and Legal Director. From March 2017 through April 2019, I was a senior staff
20 attorney at the ACLU National Prison Project. Since August 2019, I serve as the
21 Advocacy and Legal Director at the ACLU of Arizona where I oversee the litigation
22 program and serve as counsel in ACLU of Arizona matters.

23 5. In my time as an attorney with the ACLU, I have served as counsel in a
24 number of matters involving jail and prison conditions, the First Amendment and
25 immigration enforcement issues. I have served as class counsel in the following cases:
26 *Parsons v. Ryan*, D. Ariz. No. CV-12-00601-PHX-ROS; *Doe v. Nielsen*, D. Ariz. No.
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1 CV-15-00250-TUC-DCB; and *Teneng v. Trump*, C.D. Cal. No. 5:18-CV-01609-JGB-
2 KK.

3 6. My colleague Christine K. Wee is Senior Staff Attorney at the ACLU of
4 Arizona since January 2020. She is a 2001 graduate of Northeastern University School
5 of Law in Boston, Massachusetts, and has civil rights litigation experience as a former
6 public defender in both Massachusetts and New Jersey. Most recently, she was an
7 Assistant Corporation Counsel representing the City of Chicago in complex federal civil
8 rights cases before the U.S. District Court for the Northern District of Illinois, Eastern
9 Division. She is currently counsel in the ACLU of Arizona case, *Doe v. Nielsen*, D. Ariz.
10 No. CV-15-00250-TUC-DCB.

11 7. ACLU of Arizona paralegal Gloria Torres has been with the organization
12 since 2010. She is involved in all currently pending class action cases in our office and
13 has been involved in several other class action cases that have since concluded.

14 8. I have no conflicts of interest with any members of the class nor, to my
15 knowledge, do any of the other of Plaintiffs' counsel.

16 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
17 is true and correct.

18 Executed on March 3, 2020.

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21 /s/ Victoria López
22 Victoria López
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EXHIBIT C

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Defendants.

CV 19-CV-0035-TUC-RM (LAB)

**DECLARATION OF
JOSHUA A. BLOCK
IN SUPPORT OF PLAINTIFF'S
SUPERSEDING MOTION FOR
CLASS CERTIFICATION**

DECLARATION OF JOSHUA A. BLOCK

I, **JOSHUA A. BLOCK**, declare and state as follows:

1. I represent Plaintiff Russell Toomey and the proposed Class in the above-captioned matter.

2. I am a Senior Staff Attorney at the American Civil Liberties Union’s LGBT Project.

3. I received my J.D. from Yale Law School in 2005, and I clerked for the Hon. Robert D. Sack on the U.S. Court of Appeals for the Second Circuit. I then worked as a litigation associate at a commercial law firm before joining the ACLU in 2010.

4. At the ACLU LGBT Project, I have worked extensively on litigation protecting the rights of transgender people. Among other things, I represent the plaintiff in *G.G. v. Gloucester County School Bd.*, 822 F.3d 709 (4th Cir. 2016), which is the first federal court of appeals decision recognizing the right of transgender individuals to use restrooms consistent with their gender identity. I also represent the plaintiffs in *Stone v. Trump*, No. GLR-17-2459 (D. Md. 2017), a legal challenge to President Trump’s orders banning transgender people from serving in the military.

5. I have particular expertise in protecting access to health care for transgender people, including access to transition-related care for gender dysphoria. I have represented the plaintiffs in challenging health insurance policies that excluding transition-related care in *Robinson v. Dignity Health*, No. 3:16-cv-03035-YGR (N.D. Cal.); *Enstad v. Peace Health*, No. 2:17-cv-01496-RSM (W.D. Wash); and *Bruce v. State of South Dakota*, No. 17-5080 (D.S.D.)

6. I also have experience as class counsel in *Collins v. United States*, No. 10-778C (Ct. Cl.), a class action challenging the military’s policy of cutting in half the separation pay provided to service members discharged pursuant to “Don’t Ask, Don’t Tell,” and *Harris v. Rainey*, No. 5:13-cv-00077 (W.D. Va.), a class action challenging

1 Virginia's ban on marriage for same sex couples.

2 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
3 is true and correct.

4 Executed on March 3, 2020.

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6 /s/ Joshua A. Block
7 Joshua A. Block

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EXHIBIT D

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Defendants.

CV 19-CV-0035-TUC-RM (LAB)

**DECLARATION OF
WESLEY R. POWELL
IN SUPPORT OF PLAINTIFF'S
SUPERSEDING MOTION FOR
CLASS CERTIFICATION**

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3 **DECLARATION OF WESLEY R. POWELL**

4 I, **WESLEY R. POWELL**, declare and state as follows:

5 1. I represent Plaintiff Russell B. Toomey, Ph.D., and the proposed Class in the
6 above-caption matter.

7 2. I am a partner in the litigation department at the law firm Willkie Farr &
8 Gallagher LLP.

9 3. My principle area of practice focuses on complex civil litigation with a
10 particular emphasis on antitrust litigation.

11 4. I am also the Co-Chair of our firm's Pro Bono Practice Group. In that
12 capacity, and over the course of my twenty-five years in private practice, I have led dozens
13 of pro bono cases, including class actions, in the areas of LGBT civil rights, First
14 Amendment, reproductive rights, employment discrimination, *habeas corpus*,
15 immigration, housing, and other matters.

16 5. I have also worked extensively on litigation protecting the rights of
17 transgender people. Among other things, I, along with attorneys from the Transgender
18 Legal Defense & Education Fund, represent the plaintiff Sgt. Anna Lange in *Lange v.*
19 *Houston County, Georgia et al*, No. 5:19-cv-00392 (M.D. Ga.). Sgt. Lange, a Deputy
20 Sheriff in Houston County, Georgia, has sued the County and its Commissioners for
21 categorically excluding gender reassignment and related care for Gender Dysphoria,
22 regardless of medical necessity. Previously, I, along with the Legal Aid Society of New
23 York and the Sylvia Rivera Law Project, represented a class of Medicaid recipients with
24 Gender Dysphoria in *Cruz v. Zucker*, No. 14-cv-4456 (S.D.N.Y. 2016), in challenging the
25 New York State Medicaid Program's blanket exclusion of coverage of medically necessary
26 care for Gender Dysphoria. Plaintiffs prevailed on their claims at summary judgment,
27 resulting in a permanent injunction requiring the New York State Department of Health to
28

1 provide coverage for medically-necessary care to Medicaid-eligible individuals with
2 Gender Dysphoria. I have also filed amicus briefs on behalf of various national education
3 groups in a Supreme Court case, a 9th Circuit case, and an 11th Circuit case involving non-
4 discriminatory restroom access for transgender students. *Gloucester County School Board*
5 *v. G.G.*, No. 16-00273, Entry BL-75 (2016); *Parents for Privacy, et al v. William Barr, et*
6 *al*, Docket No. 18-35708 (9th Cir. 2018), Entry BL-54; *Adams v. School Board of St. Johns*
7 *Co.*, No. 18-13592, Entry BL-96 (11th Cir. 2018).

8 6. I also have extensive experience as class counsel in federal and state
9 litigation. I have represented defendants in dozens of class action antitrust and securities
10 cases. More relevant here, in addition to the *Cruz* class action referenced above, I am
11 currently co-counsel with the Legal Aid Society of New York in two class actions: (i)
12 *Ciaramella et al v. Zucker*, No. 1:18-cv-06945 (S.D.N.Y. 2018), a class action on behalf
13 of a class of thousands of Medicaid-eligible individuals whose expenses associated with
14 certain medically necessary dental care are not reimbursable by New York’s Medicaid
15 program; and (ii) *Diamond v. New York City Housing*, No. 153312/2018 (N.Y. Sup Ct), a
16 class action on behalf of a putative class of current and former residents of public housing
17 developments operated by the New York City Housing Authority (“NYCHA”) challenging
18 NYCHA’s failure to supply adequate heat and hot water to residents during the Winter of
19 2017-2018.

21 7. Matthew Freimuth is a partner in the litigation department at Willkie Farr &
22 Gallagher LLP. I have worked closely with my fellow partner, Mr. Freimuth, for fifteen
23 years.

24 8. Mr. Freimuth’s principle area of practice focuses on complex civil litigation
25 with a particular emphasis on antitrust and intellectual property litigation, including class
26 actions. Mr. Freimuth, along with the Legal Aid Society of New York, challenged
27 in *Alcantara v. Annucci*, No. 2534-16 (Sup. Ct. Albany County), the unlawful conditions
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1 and length of time that individuals convicted of sex offenses are detained in New York
2 prisons. Mr. Freimuth has also litigated a number of prisoners' rights cases and supervised
3 the representation of indigent plaintiffs in divorce and custody matters.

4 9. Willkie Farr is a multinational law firm. Our litigators have experience in
5 various types of litigation, including complex class actions. Additionally, my colleague
6 who is assigned to this case, Nicholas Reddick, recently joined the firm from the
7 Department of Justice Civil Rights Division, where he litigated civil rights cases on behalf
8 of the U.S. Government.

9 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
10 is true and correct.

11 Executed on March 3, 2020.

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13 /s/ Wesley R. Powell
14 Wesley R. Powell
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**UNITED STATES DISTRICT COURT
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Defendants.

CV 19-CV-0035-TUC-RM (LAB)

[PROPOSED]

**ORDER CERTIFYING
CLASS ACTION**

The Court, having considered Plaintiff's Superseding Motion for Class Certification (Doc. ___) pursuant to Fed. R. Civ. P. 23, orders as follows:

The Court certifies this action as a class action with respect to all Plaintiffs' claims for relief on behalf of the following classes and subclasses:

1 For purposes of the Title VII claims against the State of Arizona and the Arizona
2 Board of Regents, the first class is defined as:

3 Current and future employees of the Arizona Board of Regents who are or
4 will be enrolled in the self-funded Plan controlled by the Arizona
5 Department of Administration, and who have or will have medical claims
6 for transition-related surgical care.

7 For purposes of the equal protection claims against Andy Tobin and Paul Shannon
8 in their official capacities, the second class is defined as:

9 Current and future individuals (including Arizona State employees and
10 their dependents), who are or will be enrolled in the self-funded Plan
11 controlled by the Arizona Department of Administration, and who have or
12 will have medical claims for transition-related surgical care.

13 IT IS FURTHER ORDERED that the following counsel be appointed as Class
14 Counsel pursuant to Fed. R. Civ. P. 23(g).

15 DATED this ____ day of _____, 2020.

16 _____
17 Leslie A. Bowman
18 United States Magistrate Judge
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