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

13 **Russell B. Toomey,**

14 Plaintiff,

15 v.

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

Case No. CV 19-0035-TUC-RM (LAB)

**REPLY IN FURTHER SUPPORT OF
PLAINTIFF'S SUPERSEDING
MOTION FOR CLASS
CERTIFICATION**

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REPLY IN FURTHER SUPPORT OF
PLAINTIFF'S SUPERSEDING MOTION FOR CLASS CERTIFICATION

Plaintiff Russell B. Toomey, Ph.D., respectfully submits the following Reply in further support of his Superseding Motion for Class Certification. (Pl. Mot., Doc. 88).

I. The Proposed Classes Satisfy All the Rule 23 Requirements, Including “Numerosity.”

As explained in Dr. Toomey’s Superseding Motion for Class Certification (Pl. Mot., Doc. 88 at 3-10), the proposed classes satisfy all the requirements for certification under Rule 23(a) and Rule 23(b)(2). In opposing the motion for class certification, the only requirement that State Defendants dispute is “numerosity.” (Def. Opp., Doc. 99 at 3-7).

To demonstrate “numerosity,” a plaintiff must establish that “the class is so numerous that joinder of all members is impracticable.” Rule 23(a)(1). But the plaintiff does not have to identify the precise size of the proposed class. “Where the exact size of the class is unknown, but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.” 1 Alba Cone & Herbert B. Newberg, *Newberg on Class Actions* § 3.3 (4th ed. 2002)). Moreover, courts in the Ninth Circuit have recognized that the numerosity requirement is further “relaxed” when a proposed class seeks only declaratory and injunctive relief. *See Morgan v. U.S. Soccer Fed’n, Inc.*, No. 2:19-CV-01717-RGK-AGR, 2019 WL 7166978, at *6 (C.D. Cal. Nov. 8, 2019) (collecting cases); *Valenzuela v. Ducey*, No. CV-16-03072-PHX-DGC, 2017 WL 6033737, at *5 n.5 (D. Ariz. Dec. 6, 2017) (citing cases from outside Ninth Circuit).

In the motion for class certification, Dr. Toomey provided three reasons why the proposed classes are large enough that joinder is impracticable. First, Dr. Toomey testified in a declaration that he is personally aware of six other transgender employees of the Arizona Board of Regents “who are ineligible for gender reassignment surgery because of the exclusion” and who “have not made a claim with their insurance because they know it will be denied.” (Toomey Decl., Exhibit A, Doc.88-1 at 3; Pl. Mot., Doc. 88 at 4). Dr.

1 Toomey's declaration also noted that in his personal and professional experience "[m]any
2 individuals do not want to identify publicly as transgender because of fear of stigma or
3 violence." (Toomey Decl., Exhibit A, Doc. 88-1 at 3).

4 The State Defendants argue that Dr. Toomey's declaration does not provide
5 sufficient detail about the basis of his knowledge that other transgender employees "have
6 not made a claim with their insurance because they know it will be denied." (Def. Opp.,
7 Doc. 99 at 5). To remove any doubt, Dr. Toomey has submitted a supplemental declaration
8 clarifying that the six other transgender employees informed him personally that they have
9 not requested surgery for themselves or their dependents who are enrolled in the State's
10 self-funded plan because they know they will be denied coverage. (Toomey Supplemental
11 Decl., Exhibit A). Additionally, Dr. Toomey declared that he knows of more transgender
12 employees at the University of Arizona or Arizona State University who have stated in
13 professional forums he has attended that they have not made requests for coverage for
14 themselves or their dependents enrolled in the State's self-funded plan for transition-related
15 surgery with their insurance because they know they will be denied coverage.
16

17 Second, the motion presented publicly available demographic data regarding the
18 percentage of the Arizona population that is transgender (0.62%), publicly available
19 information from Defendants regarding the number of people employed by the Arizona
20 Board of Regents (35,614), and publicly available information regarding the number of
21 people enrolled in the Arizona's self-funded health plan (137,700). (Pl. Mot., Doc. 88 at
22 4-5). In opposing certification, the State Defendants argue that "not all individuals with
23 gender dysphoria require or even seek treatment." (Def. Opp., Doc. 99 at 5). But in the
24 motion for class certification, Dr. Toomey also presented publicly available data about the
25 percentage of transgender individuals who have received some form of gender affirming
26 surgery (25% to 35%) or who wish to receive gender affirming in the future (61% of
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1 transgender men, 54% of transgender women). (Pl. Mot., Doc. 88 at 4-5). Applying a
2 conservative estimate, publicly available data demonstrates that approximately 181
3 transgender individuals who work for the Board of Regents and approximately 700
4 transgender individuals who receive healthcare through the State’s self-funded plan meet
5 the class definition in that they have or will have medical claims for transition related
6 surgical care. (*Id.*).¹

7 The State Defendants criticize the methodology used to estimate the number of
8 transgender individuals in Arizona. (Def. Opp., Doc. 99 at 6-7). But even if those
9 calculations are off by an order of magnitude, the number of transgender individuals would
10 still be large enough to make joinder impracticable. *Cf. Harris v. Rainey*, 299 F.R.D. 486,
11 490 (W.D. Va. 2014) (certifying class of same-sex couples in Virginia and explaining that
12 defendants criticized the census’s estimate of the number of same-sex couples in Virginia
13 but “even if the census data is off by an order of magnitude, the numerosity requirement is
14 plainly met”).

15
16 Third, the motion for class certification explained that the joinder is inherently
17 impracticable because Dr. Toomey seeks declaratory and injunctive relief on behalf of
18 “current and future” employees and State Plan beneficiaries “who have or will have”
19 medical claims for transition-related surgical care. (Pl. Mot., Doc. 88 at 5-6). However,
20 as Dr. Toomey noted in the motion for class certification (*id.*), courts have held that “the
21 presence of future class members renders joinder inherently impractical thus satisfying the
22 numerosity requirement’s fundamental purpose.” *Inland Empire-Immigrant Youth*
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24 ¹ If the figure is reduced even further to reflect just individuals who report wanting
25 transition-related surgery in the future, then there are approximately 119 transgender
26 individuals who work for the Board of Regents and approximately 461 transgender
27 individuals who receive healthcare through the State’s self-funded plan who meet the class
28 definition.

1 *Collective v. Nielsen*, No. EDCV172048PSGSHKX, 2018 WL 1061408, at *7 (C.D. Cal.
2 Feb. 26, 2018); *see also J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (“[C]lasses
3 including future claimants generally meet the numerosity requirement due to the
4 ‘impracticality of counting such class members, much less joining them.’”); *Rivera v.*
5 *Holder*, 307 F.R.D. 539, 550 (W.D. Wash. 2015) (holding a class of 40 aliens was
6 sufficiently numerous, “especially given the transient nature of the class and the inclusion
7 of future class members”); *Nat’l Ass’n of Radiation Survivors v. Walters*, 111 F.R.D. 595,
8 599 (N.D. Cal. 1986) (“[W]here the class includes unnamed, unknown future members,
9 joinder of such unknown individuals is impracticable and the numerosity requirement is
10 therefore met, regardless of class size.”). The State Defendants do not offer any response
11 to this argument.

12
13 For all these reasons, Dr. Toomey’s declaration, publicly available demographic
14 estimates, and common sense all indicate that it is impracticable—indeed, impossible—to
15 join together in a single action all current and future transgender employees and
16 beneficiaries who have or may have claims for transition-related surgery. This is precisely
17 the type of civil-rights action that Rule 23(b)(2) certification was designed to address. *See*
18 Fed. R. Civ. P. 23 advisory committee’s note (1966) (explaining that “[i]llustrative” of
19 Rule 23(b)(2) class actions “are various actions in the civil-rights field where a party is
20 charged with discriminating unlawfully against a class, usually one whose members are
21 incapable of specific enumeration”).

22 **II. Class Certification Is Necessary to Provide Class-Wide Relief and Protect the** 23 **Class from Mootness.**

24 In the alternative, Defendants also argue that the Court should “exercise its
25 discretion” to deny class certification on the grounds that certification is not “necessary”
26 to provide injunctive relief to the class as a whole. (Def. Opp., Doc. 99 at 8-10). But “there
27 is no requirement that class certification must be ‘necessary.’” Indeed, such a requirement
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1 would effectively eviscerate Rule 23(b)(2), which was specifically designed with the
2 benefits of collective action in mind.” *Californians for Disability Rights, Inc. v. Cal. Dep’t*
3 *of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) (citations omitted); *accord Greater L.A.*
4 *Agency on Deafness, Inc. v. Reel Servs. Mgmt. LLC*, No. CV 13-7172 PSG (ASX), 2014
5 WL 12561074, at *12 (C.D. Cal. May 6, 2014) (“[T]here is no requirement that class
6 certification must be ‘necessary’ – and for good reason at that. If the Court adopted such a
7 ‘necessity’ requirement, it would effectively eviscerate the entire purpose of Rule 23(b)(2),
8 which was specifically designed to benefit collective, rather than merely private, action for
9 equitable relief.”); 2 Newberg on Class Actions § 4:11 (explaining that many courts “have
10 rejected the necessity doctrine outright as being nontextual, noting that a need requirement
11 finds no support in Rule 23 and, if applied, would entirely negate any proper class
12 certifications under Rule 23(b)”).

14 Even if it were permissible to deny certification based on lack of necessity, this is
15 not a case where injunctive relief for an individual plaintiff will automatically provide relief
16 to the class as a whole. The Ninth Circuit has cautioned that “injunctive relief generally
17 should be limited to apply only to named plaintiffs where there is no class certification”
18 unless broader relief is “necessary to give prevailing parties the relief to which they are
19 entitled.” *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996)
20 (internal quotation marks, citations, and emphasis omitted). Because an injunction
21 requiring Defendants to evaluate Dr. Toomey’s individual claims for transition-related
22 surgery would fully redress his individual injuries, the Court does not have authority to
23 extend the same relief to similarly situated individuals without class certification. *See*
24 *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018), *cert. denied sub nom. Little Sisters*
25 *of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716, 204 L. Ed. 2d 1111
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1 (2019).²

2 Class certification is also necessary to protect the classes' claims from potential
3 mootness. The Supreme Court has repeatedly advised that class certification is
4 "particularly important" to prevent claims from becoming moot. *Gratz v. Bollinger*, 539
5 U.S. 244, 268 (2003); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 n.27
6 (1997). If Dr. Toomey were to accept a job at another employer, or if unexpected events
7 or accidents were to prevent him from being able to continue working at the University of
8 Arizona, then his claims would become moot and the other potential class members would
9 not receive any relief. And if Dr. Toomey prevails in this Court and obtains a permanent
10 injunction, the injunction could be vacated as moot on appeal if Dr. Toomey undergoes
11 surgery without waiting for all appeals to be exhausted.

13 State Defendants assert that Dr. Toomey faces no risk of mootness because he "has
14 already been denied precertification for gender reassignment surgery." (Def. Opp., Doc. 99
15 at 10). But, as this Court explained when denying the State Defendants' motion to dismiss,
16 Dr. Toomey "is not seeking any remedy based on his past denial of coverage but, instead,
17 prospective relief requiring his surgery to be evaluated for medical necessity under the
18 Plan's generally applicable standards and procedures." (Doc. 69 at 7). Indeed, Defendants
19 have previously argued that a claim based on the past denial of coverage would be an
20 improper claim for retrospective relief barred by the Eleventh Amendment. *Id.* Because
21 Dr. Toomey seeks only prospective injunctive and declaratory relief, he bears the risk that
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24 ² By contrast, the only Ninth Circuit case cited by the State Defendants in which class
25 certification was denied as not necessary (Def. Opp., Doc. 99 at 8-9) was a case in which
26 plaintiffs challenged the method in which voting rights were apportioned for elections in
27 a special utility district. *See James v. Ball*, 613 F.2d 180, 181 (9th Cir. 1979), *rev'd on*
28 *other grounds*, 451 U.S. 355 (1981). The only way to provide relief to the individual
plaintiffs was to change the method of apportioning voting rights for everyone.

1 those claims may become moot based on circumstances outside his control.

2 For all these reasons, even if the Court had discretion to deny certification as
3 “unnecessary,” certification is necessary here. *Cf. Gayle v. Warden Monmouth Cty. Corr.*
4 *Inst.*, 838 F.3d 297, 310 (3d Cir. 2016) (“The circumstances in which class[-]wide relief
5 offers no further benefit . . . will be rare, and courts should exercise great caution before
6 denying class certification on that basis.”). The motion for class certification should be
7 granted.
8

9 CONCLUSION

10 Plaintiff’s motion for class certification should be granted.

11 DATED this 29th day of April, 2020.

12 ACLU FOUNDATION OF ARIZONA

13 By /s/ Christine K. Wee

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2020, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court’s electronic filing system or by mail as indicated on the Notice of Electronic Filing.

/s/ Christine K. Wee

Christine K. Wee

EXHIBIT A

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25 the Arizona Board of Regents; **Lyndel Manson**,
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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.

Case No. CV 19-0035-TUC-RM (LAB)

**SUPPLEMENTAL DECLARATION OF
RUSSELL B. TOOMEY**

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SUPPLEMENTAL DECLARATION OF RUSSELL B. TOOMEY

I, Russell B. Toomey, declare and state as follows:

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

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

3. I know of at least six other transgender employees at the University of Arizona or Arizona State University who are ineligible for gender reassignment surgery because of the exclusion. To my knowledge, these employees have not made a claim with their insurance on behalf of themselves or their dependents enrolled in the State's self-funded plan because they know it will be denied.

4. The transgender employees at the University of Arizona or Arizona State University referenced in paragraph 3 above have informed me personally that they have not requested coverage on behalf of themselves or their dependents enrolled in the State's self-funded plan for transition-related surgery with their insurance because they know it will be denied. Further, I know of other transgender employees at the University of Arizona or Arizona State University who have stated in professional forums I have attended that they have not made this request for coverage on behalf of themselves or their dependents enrolled in the State's self-funded plan for transition-related surgery with their insurance because they know they will be denied.

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

DATED this 29th day of April, 2020.

/s/ Russell B. Toomey
Russell B. Toomey