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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RUSSELL B. TOOMEY, Plaintiff, v. STATE OF ARIZONA; *et al.*, Defendants.	No. 4:19-cv-00035 **DEFENDANTS STATE OF ARIZONA'S, ANDY TOBIN'S, AND PAUL SHANNON'S RESPONSE TO PLAINTIFF AND THE CLASSES' OBJECTIONS TO REPORT & RECOMMENDATION**

Defendants State of Arizona, Andy Tobin as Director of the Arizona Department of Administration, and Paul Shannon as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration (collectively, the "State Defendants") hereby respond to Plaintiff and the Classes' (collectively "Plaintiffs") Objections To Report And Recommendation (Doc. 135) (hereinafter the "Objection(s)") regarding Plaintiffs' pending Motion for Preliminary Injunction (Doc 115).

The Court should adopt the Magistrate's Report and Recommendation ("R&R") and deny Plaintiffs' pending Motion for Preliminary Injunction for the reasons stated below.

I. A Mandatory Preliminary Injunction is Extraordinary Relief Not Appropriate Here.

The Court's Report and Recommendation ("R&R") (Doc. 134) correctly determined that the Plaintiffs have failed to meet their burden for obtaining a mandatory preliminary injunction which is an extraordinary and disfavored remedy that is not appropriate in this case. As noted in the R&R, "A preliminary injunction is an extraordinary remedy never awarded as a right" and plaintiffs seeking such an injunction must establish a likelihood of success on the merits, that a plaintiff is likely to suffer irreparable harm without such relief, that the balance of all equities tips in plaintiff's favor, and that the injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008). Plaintiffs fail to meet this burden in many ways as noted in the R&R. The Court must consider the extraordinary nature of such an injunction and why an injunction of the nature sought by Plaintiffs is highly disfavored.

A. Plaintiffs seek a *mandatory* injunction—a highly disfavored remedy.

Preliminary injunctions can either be prohibitory, in which a court directs a party to stop taking an action, or they can be "mandatory" in which a court "orders a responsible party to 'take action.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79. The R&R correctly determined that the preliminary injunction Plaintiffs seek is mandatory. Plaintiffs are asking the Court to order the State Defendants to take direct affirmative actions that would result in State Defendants having to (1) effectively change the terms of the Plan to remove the exclusion of gender transition surgery ("Exclusion") and (2) to evaluate on a case-by-case basis, whether a request for gender reassignment surgery is "medically necessary." (Doc 115 at 1:1-9). Moreover, if this injunction is granted, the State would be required to pay for gender transition surgeries determined to be medically necessary. Plaintiffs are not asking the State to stand down on actions it is taking

("prohibitory"), but wants the State to accept and review claims for gender transition surgeries and to pay for such surgeries. That is clearly mandatory.

Moreover, mandatory injunctions are particularly disfavored. They should not be issued unless "facts and law clearly favor the moving party." *Anderson*, 612 F.2d at 1115. There needs to be "extreme or very serious damage" that will result and such injunctions are not issued in doubtful cases or where the injury can be addressed with an award of damages. *Id*. That is not present here.

B. Prohibitory injunctions are allowed for keeping the status quo, but this mandatory injunction would not keep the status quo.

The benefit of a preliminary injunction, when properly granted, is it that it keeps the parties in the same posture they were prior to the lawsuit. *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). It is important to maintain the status quo in cases where it may be impossible for one party to obtain the ultimate relief sought. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1414 (9th Cir. 1984). A mandatory injunction on the other hand "goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly disfavored." *See Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994). As the R&R correctly explained, the injunction sought would *not* be prohibitory and it would not preserve the status quo. Quite the opposite, granting the mandatory injunction sought would shift a significant burden to the State Defendants.

The injunction would result in the Plaintiffs receiving the relief they are requesting-i.e. gender-transition surgeries being paid for by the State—even if the State ultimately prevails. The State would then not be able to recover the costs on behalf of the taxpayers as notably, Plaintiffs have argued that the reason an injunction is necessary is because they cannot afford to pay for gender transition surgeries. Thus, the State Defendants will have won on the merits, but could not be returned to the position they were in prior to the litigation. This is not the status quo and is contrary to the very purpose of preliminary

injunctions. Moreover, nothing regarding the Plaintiffs' claims will be changed if the Motion for Preliminary Injunction is denied. The status quo will be maintained and Plaintiffs would still be able to pursue their claims.

Plaintiffs criticize the R&R for omitting a detailed discussion of *Hernandez v. Sessions*, which addressed injunctions that may be prohibitory because they prevent unconstitutional detentions. 872 F.2d 976 (2017). However, Plaintiffs have not demonstrated that there is a Constitutional violation in this case akin to an erroneous detention that was at issue in *Hernandez*. The dispute at issue here is whether a Plan can exclude some treatments for a condition—even if that exclusion only affects individuals with that condition (gender dysphoria) who are transgender. Plaintiffs fall far short of demonstrating that the Exclusion is the sort of clear Constitutional violation that would render an otherwise mandatory injunction as a prohibitory injunction. There is an important difference between an unlawful detention that violates the Constitution and a health plan provision that excludes coverage for gender transition surgeries. Employers are not required to offer health plan coverage and no law requires them to cover all medically necessary procedures or requires plans to cover gender transition surgeries.

C. A preliminary injunction would prematurely grant the relief sought.

The mandatory injunction Plaintiffs want would grant the ultimate relief Plaintiffs seek in this case. That is, the relief sought in Plaintiffs' Motion for Preliminary Injunction is the same relief sought in Plaintiffs' Amended Complaint. *See* Motion for Preliminary Injunction (Doc 115 at 1:1-9) and Plaintiffs' Amended Complaint (Doc 86 at 15:10-15). In both instances, Plaintiffs want (1) Defendants barred from enforcing the Exclusion and (2) an order requiring Defendants to evaluate on a case-by-case basis, whether a request for gender reassignment surgery is "medically necessary." It is highly unusual to grant the moving party the full relief the movant might be entitled to receive if successful at the conclusion of trial. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir.

1963). Courts specifically disfavor preliminary injunctions that "give the movant all the relief it would be entitled to if it prevailed in a full trial. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 n.3 (10th Cir. 2009); *see also*, *Edmo v. Corizon, Inc.*, 935 F.3d (9th Cir. 2019) (due in part to "the nature of the relief requested," an injunction ordering the defendant to perform gender reassignment surgery was a permanent injunction). However, that is exactly what Plaintiffs seek—the ultimate relief now. That is inappropriate and contrary to the very purpose of preliminary injunctions. The Court should deny the Motion for Preliminary Injunction for this reason alone.

II. Plaintiffs Are Unlikely to Succeed on the Merits.

While a preliminary mandatory injunction is highly disfavored and inappropriate in this case, the Motion for Preliminary Injunction should also be denied because Plaintiffs have not demonstrated a likelihood they will succeed on the merits. For the Title VII claim, the R&R correctly determined that Plaintiffs are claiming disparate treatment and the Exclusion is not facially discriminatory, so Plaintiffs must show discriminatory intent but have failed to do so. The R&R also correctly found that Plaintiffs failed to demonstrate they will proceed on their Equal Protection claim because they have not established that any heightened scrutiny is appropriate. Finally, Plaintiffs have not demonstrated that the public interest and the balance of equities favor a preliminary injunction.

A. Plaintiffs failed to demonstrate they will prevail on their Title VII claim.

Based on Plaintiffs' Amended Complaint, this is a disparate treatment case, which requires that the movant show discriminatory intent. Plaintiffs have failed to demonstrate or even allege discriminatory intent.

1. Plaintiffs claim disparate treatment.

Plaintiffs allege that but for the Exclusion, Plaintiffs would be able to have requests for such surgery determined on a case-by-case basis, and that the Plan currently treats

individuals with gender dysphoria differently than other individuals. (Doc 86 at 11:4 – 12:7). Plaintiffs specifically allege that the Defendants "have unlawfully discriminated—and continue to unlawfully discriminate—against Dr. Toomey and members of the proposed class "with respect to the [their] compensation, terms, conditions, or privileges of employment *because of . . . sex*." *Id*. at 12:3-7 (emphasis added).

That allegation falls squarely within the definition of "disparate treatment" established by the Supreme Court. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) ("Disparate-treatment . . . occurs where an employer has 'treated [a] particular person less favorable than others because of' a protected trait"). That is exactly what Plaintiffs allege—that due to their transgender status/gender dysphoria, they are deprived of medically necessary services.

2. Disparate treatment claims require a discriminatory intent.

The R&R correctly found that Plaintiffs failed to show discriminatory intent. When there is a claim for disparate-treatment, the "plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Id*. Plaintiffs have failed to establish that the State Defendants "had discriminatory intent or motive for taking a job-related action" against Defendants on the basis of sex as the Supreme Court required in *Ricci*. *Id*. As the Ninth Circuit explained, this burden is not met by showing that "the employer was merely aware of the adverse consequences the policy would have on a protected group." *Am. Fed'n of State, Cty., & Mun. Employees, AFL-CIO (AFSCME) v. State of Wash.*, 770 F.2d 1401, 1405 (9th Cir. 1985). Plaintiffs have brought forth no evidence or even any suggestion of discriminatory intent in their Amended Complaint, in the Motion for Preliminary Injunction, the Reply, or in the Objection to the R&R. Instead, they argue a showing of intent is not required because the Exclusion is facially discriminatory.

3. The Exclusion is not facially discriminatory.

Instead of demonstrating or even alleging discriminatory intent, Plaintiffs assert that that the Exclusion is facially discriminatory and that therefore, intent is irrelevant. (Doc. 135 at 2:2-10 (citing *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)). Plaintiff's reliance on *Johnson Controls* is misplaced.

In *Johnson Controls*, the employer's policy was clearly facially discriminatory. It banned women from working at certain facilities because lead exposure there could affect a woman's reproductive health. That exposure could also affect men's reproductive health, but men were not banned from working in the same facility. The men had a choice, but female employees had to produce proof that they were not capable of bearing children. *Id.* at 198. The Supreme Court found the policy to be facially discriminatory and did not require a showing of intent.

The Exclusion at issue in this case is not facially discriminatory. The Plan excludes various procedures including gender transition surgeries that apply equally to men and women. Not all gender transition *services* are excluded—just gender transition *surgeries*. The Exclusion does not treat employees differently based on being male or female and is not facially discriminatory in that regard. At most, the exclusion impacts only individuals with gender dysphoria who are seeking gender transition surgery. Not all transgender persons seek surgery, and the Plan provides transition services other than surgery.

While Plaintiffs' cite to *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) to argue that an employer who discriminates against gay or transgender employees necessarily and intentionally applies sex-based rules regardless of the employer's labels or intentions for its conduct (*see* Doc 135 at 1:6-10), *Bostock* does not create a new protected class for

transgender employees.[1] *Bostock* actually relied on the traditional meaning of "sex" as "biological distinctions between male and female." *Bostock*, 140 S. Ct. at 1739. Title VII protects a person from discrimination not because he or she is gay or transgender but because he or she is treated differently based on his or her sex as male or female.

The Exclusion makes no such distinction between men and women as the policy did in *Johnson Controls* and thus is not facially discriminatory.

4. Plaintiffs fail to demonstrate any discriminatory intent.

Plaintiffs do not show any discriminatory intent. Plaintiffs only rely on the incorrect assertion that a showing of discriminatory intent is not required because the Exclusion is facially discriminatory—it is not.

Indeed, the R&R notes that even though the Exclusion, as a practical matter only affects transgender people, that is insufficient to demonstrate discriminatory intent on the basis of sex. (Doc. 134 at 4:19-22, 5:13-6:4). There are other plausible reasons for any plan to exclude gender transition surgery. In the past, such surgeries were excluded due to them being either experimental or cosmetic, but such an exclusion may also exist due to cost or other reasons not based on any discriminatory intent. There are other exclusions in the Plan at issue due to cost or other reasons that are not discriminatory and this exclusion is just another such exclusion.

Even if a policy primarily or exclusively affects transgender people, that is insufficient to demonstrate intent. The R&R relies in part on *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134 (1976). In *Gilbert*, a plan excluded disabilities arising from pregnancy from coverage, which naturally only affected women. *Id.* at 127. The exclusion did not discriminate against all women in general or any women in particular due to their sex.

[1] The Supreme Court did not address discrimination in health plans. Justice Alito's dissent noted that the decision in *Bostock* left many areas unresolved including sports, housing, freedom of speech, and healthcare benefits and referred to Dr. Toomey's case in a footnote. *Bostock*, 140 S. Ct. at 1778-83, n.56.

Rather, the policy merely excluded coverage for a condition that only affected women, but that was insufficient to demonstrate the exclusion was created with any intent to discriminate against women in general. *Id*.

Plaintiffs criticize the R&R's reliance on *Gilbert* because it was decided over forty years ago prior to actions by Congress to expand Title VII protections to pregnancy. Indeed, *Gilbert* was decided at a time when discrimination based on pregnancy was not protected under Title VII. The Pregnancy Discrimination Act of 1978, changed the scope Title VII regarding pregnancy by expanding the meaning of "because of sex" or "on the basis of sex" to also mean because of pregnancy. *See* 42 U.S.C. 2000e(k). Thus, discrimination on the basis of pregnancy is now protected under Title VII, but was not at the time of *Gilbert*. However, that does not mean, as Plaintiffs suggest, that the Supreme Court's decision in *Gilbert* is not applicable to exclusions in benefit plans that may affect only one sex. Rather, it indicates that an act of Congress is the appropriate method of expanding Title VII protections to new groups or traits of individuals. *Gilbert* was superseded by a specific statute expanding protections to pregnancy, but *Gilbert* itself has not been overturned on its merits or reasoning and the Court should not disregard it.

Plaintiffs failed to show intent as required and failed to demonstrate that the exclusion facially discriminates against transgender individuals on the basis of sex. As the R&R noted, Plaintiffs have not provided any evidence that the "the Plan always, or almost always, adopts the standard of care except where transgender individuals are involved, and does not explain when the Plan exclusion was created or the circumstances surrounding its adoption. (Doc. at 6:26 – 7:6).

Because Plaintiffs have not demonstrated any discriminatory intent for their claim for disparate treatment, they fail to demonstrate a likelihood of success on the merits for their Title VII claim.

B. Plaintiffs fail to show the exclusion violates Equal Protection.

Plaintiffs assert that they will prevail on their Equal Protection claim on the basis that the Exclusion is facially discriminatory, lacks any rational basis, and is grounded in sex stereotypes, discomfort with gender nonconformity and gender transition, and moral disapproval of people who are transgender. (Doc. 86 at 13:21 – 14:2).

As addressed above, Plaintiffs fail to demonstrate the Exclusion is facially discriminatory against transgender individuals on the basis of sex. Plaintiffs further fail to provide any evidence at this stage in the case that the Exclusion is based on sex stereotypes, discomfort, or moral objection regarding transgender individuals. Those are bold assertions to make, but the lack of any evidence to support these allegations undermines the granting of a preliminary injunction that is mandatory (rather than prohibitory) in nature.

Further, Plaintiffs have not demonstrated that they are entitled to a heightened scrutiny standard. Neither *Bostock* nor any other case has ruled that transgendered individuals are a suspect or quasi suspect class. In fact, numerous courts have held that transgender persons are not a suspect or quasi suspect class and accordingly apply the rational basis test. *See* State Defendants' Response to the Motion for Preliminary Injunction (Doc. 123 at 10:11-26). Because the Supreme Court in *Bostock* specifically noted that it was not creating a new protected class, *Bostock* does not support applying any heightened standard of review above rational basis. The R&R correctly determined that Plaintiffs are not likely to succeed at this point because the Plan exclusion is not facially discriminatory against all transgender individuals. At this stage in this case, it is premature to grant Plaintiffs' Motion for Preliminary Injunction because Plaintiffs have not demonstrated that the exclusion for gender transition surgeries is not based on some rational basis but instead is grounded on, in Plaintiffs' own terms, sex stereotypes, discomfort with gender nonconformity and gender transition, and moral disapproval of people who are transgender. (Doc. 86 at ¶ 81).

Plaintiffs failed to demonstrate a likelihood that they will succeed on the merits of their Equal Protection claim.

C. The public interest and the balance of equities do not favor a preliminary injunction.

As noted above, and as correctly explained by the R&R, Plaintiffs have not shown that the Exclusion violates either Title VII or the Equal Protection clause. Plaintiffs have similarly provided no information from which the Court can attempt to balance any equities between such things as costs for a single hysterectomy as compared to Dr. Toomey's suffering related to the surgery that has not been performed. Further, Plaintiff has provided no information regarding the size of the Class or the amount of likely surgeries that might be performed.

Finally, it is clear as a general matter that plans may exclude services even when those services are medically necessary. Each allowable exclusion for medically necessary procedures may result in some amount of suffering on the part of the person seeking treatment, but that is part of the balance that plan sponsors are allowed to consider when designing a plan. Plans make many difficult choices designed to make plans affordable (both for participants and the employer/plan sponsor). Forcing plans to cover any procedure, the absence of which may result in some level of suffering for the requesting participant, would result in the courts coopting that responsibility from employers and other plan sponsors that face difficult plan design issues each year. Further, the Court must consider that such an environment may result in employers creating other exclusions, reducing other services, increasing costs of coverage, or eliminating their plans altogether. Those too would result in suffering.

Conclusion

In its motion, Reply, and its Objection to the Magistrate's Report and Recommendation, Plaintiffs want to treat their positions as settled law and be granted all of

the relief they request now, without a full review of the case on the merits. The Plaintiffs' requested injunction would effectively grant the relief Plaintiffs seek without discovery and without consideration of all the evidence on the merits. The R&R correctly determined that this result is improper. The Court should adopt the R&R and deny Plaintiffs' Motion for Preliminary Injunction.

DATED this18th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 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 the following CM/ECF registrants:

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