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15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF ARIZONA**

17 D.H., by and through his mother, Janice  
18 Hennessy-Waller; and John Doe, by and  
19 through his guardian and next friend, Susan  
20 Doe, on behalf of themselves and all others  
21 similarly situated,

22 Plaintiffs,

23 vs.

24 Jami Snyder, Director of the Arizona Health  
25 Care Cost Containment System, in her  
26 official capacity,

27 Defendant.

Case No. 4:20-cv-00335-SHR

**MEMORANDUM IN OPPOSITION  
TO PLAINTIFF'S MOTION TO  
TRANSFER TO JUDGE ROSEMARY  
MARQUEZ**

(Assigned to the Honorable Scott H.  
Rash)

28 Defendant submits this opposition to Plaintiffs' Motion to Transfer to Judge Rosemary Marquez. (Doc. 10) Judge Marquez presently presides over *Russell B. Toomey, et al. v. State of Arizona, et al.*, No. CV-19-00035-TUC-RM (LAB) ("*Toomey*"), the other case affected by Plaintiff's Motion to Transfer. Pursuant to LRCiv. 42.1(c), Defendant is filing this response in the case in which she is a party. Pursuant to the same rule, the Clerk's Office should electronically file this response in the *Toomey* case.

1 This Court’s rule is that cases are to be assigned randomly:  
2

3 Unless otherwise provided in these Rules or ordered by the Court, the Clerk  
4 must assign civil cases to Judges within each division by automated random  
5 selection and in a manner so that neither the Clerk nor any parties or their  
6 attorneys will be able to make a deliberate choice of a particular Judge.

7 *See* LRCiv 3.7(a)(1). The random assignment of cases promotes confidence in the  
8 judiciary by eliminating the possibility of judge shopping. Indeed, the rule provides  
9 that neither the Clerk, nor any parties or their attorneys should be able to make a  
10 “deliberate choice of a particular judge.”

11 In a carefully researched article filled with examples of what can go wrong when  
12 the Court steers away from this venerated practice, Professor Katherine A. Macfarlane  
13 argues that the reassignment of related cases to a single judge does serious damage to  
14 public confidence in the judiciary:

15 Even if a motive to choose or influence a case can never be proven, the  
16 suggestion that a case has been steered to a particular judge’s docket for  
17 reasons having nothing to do with efficiency or practicality undermines  
18 confidence in the judiciary’s procedures, which must be neutral at every  
19 stage, even at assignment. This effect—undermining confidence in what  
20 should be a neutral system, especially with respect to who hears what  
21 case—is reason enough to do away with nonrandom case assignment.<sup>1</sup>

22 For this reason, the United States Judicial Conference has consistently stood by its  
23 “longstanding position” favoring the random assignment of federal cases.<sup>2</sup>

24 The issues presented by this lawsuit involve matters that have been addressed by  
25 the legislative and executive branches through the Affordable Care Act, Medicaid Act,  
26

27 \_\_\_\_\_  
28 <sup>1</sup> Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199 (2014). Available at:

<https://repository.law.umich.edu/mjrl/vol19/iss2/1>

<sup>2</sup> *The Third Branch*, UNITED STATES COURTS, [http://www.uscourts.gov/news/TheThirdBranch/07-04-01/Legislation\\_Update\\_Bills\\_Focus\\_on\\_Security\\_Cameras\\_and\\_Patents.aspx](http://www.uscourts.gov/news/TheThirdBranch/07-04-01/Legislation_Update_Bills_Focus_on_Security_Cameras_and_Patents.aspx) (Apr. 2007).

1 and rules promulgated by the U.S. Department of Health and Human Services. Those  
2 legislative and administrative actions have been heavily reported by multiple news  
3 outlets.<sup>3</sup> In these circumstances, it is critical – particularly in light of the separation of  
4 powers - that the judiciary give every appearance of impartiality. Transferring this case to  
5 a division that has already issued an opinion favorable to the position advocated by  
6 Plaintiffs will do damage to the foundation of judicial integrity enshrined in LRCiv 3.7.

7  
8 Moreover, these two cases are not as similar as plaintiffs contend. First, the  
9 applicable statutory framework is different. This case presents three claims under the  
10 Medicaid Act and Affordable Care Act that are not present in *Toomey*.

11 The cases also involve different health plans. *Toomey* involves a health plan that  
12 covers State employees, whereas this case involves a health plan available to the citizens  
13 of Arizona.

14 Finally, and critically, the parties and proposed classes are completely different.  
15 Whereas *Toomey* involves the medical care of adults, this case involves the medical care  
16 of children. And in the arena of gender reassignment surgery, that difference is  
17 significant. The World Professional Association for Transgender Health (WPATH) has  
18 recognized, for a host of reasons, that the care and treatment of transgender children must  
19 be different than the care and treatment of transgender adults. WPATH has published  
20 different standards for the care and treatment of transgender children and adolescents.<sup>4</sup>  
21 Indeed, medicine itself recognizes that pediatric care is a specialty separate and distinct  
22 from the care and treatment of adults. Plaintiffs acknowledge this critical difference by

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23 <sup>3</sup> See, e.g., [https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-](https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-health-protections-reversed-by-trump-administration)  
24 [health-protections-reversed-by-trump-administration](https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-health-protections-reversed-by-trump-administration),  
25 [https://news.bloomberglaw.com/health-law-and-business/transgender-medicare-patients-](https://news.bloomberglaw.com/health-law-and-business/transgender-medicare-patients-face-coverage-barriers-despite-law)  
[face-coverage-barriers-despite-law](https://news.bloomberglaw.com/health-law-and-business/transgender-medicare-patients-face-coverage-barriers-despite-law).

26 <sup>4</sup> Standards of Care for the Health of Transsexual, Transgender, and Gender-  
27 Nonconforming People, pp. 10-21, WPATH, (2012) Available at:  
28 [https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care\\_V7](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf)  
[%20Full%20Book\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf)

1 submitting declarations from specialists in pediatric care and by relying on articles and  
2 medical publications focused on pediatric care.

3 Thus, the central issue of this lawsuit: should the State be required to pay for  
4 transgender reassignment surgery for children, is critically and fundamentally different  
5 than the issue in *Toomey* and the evidence to be considered will also be fundamentally  
6 different than the evidence in *Toomey*. Indeed, one might argue that these lawsuits should  
7 be considered by different divisions of this Court simply to avoid confusion of issues and  
8 conflation of the standards of care.

9 For the reasons stated above, Defendant respectfully urges the Court to reject  
10 Plaintiffs' deliberate attempt to choose a particular judge and deny the motion to transfer.

11 RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of August, 2020.

12  
13 **BURNSBARTON PLC**

14  
15 By /s/ Kathryn Hackett King

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**CERTIFICATE OF SERVICE**

I hereby certifies that on August 25, 2020, I electronically transmitted the foregoing document, using the ECF System for filing and transmittal of a Notice of Electronic Filing and to ECF registrants and e-mailed a copy of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO TRANSFER TO JUDGE ROSEMARY MARQUEZ this August 25, 2020 to the following:

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