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13 UNITED STATES DISTRICT COURT
 14 DISTRICT OF ARIZONA
 15

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

20 v.

21 Jami Snyder, Director of the Arizona Health
 Care Cost Containment System, in her official
 22 capacity,
 23 Defendant.

No. CV-20-00335-TUC-SHR

**RULE 26(F) JOINT CASE
 MANAGEMENT REPORT**

24
 25 **I. Parties and the Rule 26(f) Conference**

26 All parties participated in the Rule 26(f) conference held on October 29, 2020. D.H.
 27 and John Doe, and their respective parent/guardians, Janice Hennessy-Waller and Susan
 28

1 Doe, were represented by Brent Ray, Janet Howe, Asaf Orr, and Abigail Coursolle. Jami
2 Snyder was represented by Logan Johnston and Kathryn King.

3 **II. List of all parties.**

4 Plaintiffs are D.H., by and through his mother Janice Hennessey-Waller, and John
5 Doe, by and through his guardian and next friend, Susan Doe.

6 Defendant is Jami Snyder, Director of the Arizona Health Care Cost Containment
7 System (AHCCCS).

8 **III. Parties who have not been served.**

9 All parties have been served and filed responsive pleadings.

10 **IV. Subjects and nature of discovery**

11 *A. Discovery by Plaintiffs and Class*

12 Plaintiffs and the class will need to conduct discovery on the origins, justifications,
13 and governmental interests for Defendant's exclusion of surgical treatment for gender
14 dysphoria and the application of that categorical exclusion to transgender beneficiaries
15 entitled to the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefit.
16 Plaintiffs will also seek discovery related to the number of transgender beneficiaries
17 currently enrolled in AHCCCS, among other issues related to the class certification process.
18 They will also seek to conduct discovery on all defenses raised by Defendant.

19 *B. Discovery by Defendant*

20 Defendant will need to conduct discovery related to class certification issues under
21 Fed.R.Civ.P. 23, including whether Plaintiffs' proposed class is so numerous that joinder
22 of all members is impracticable; whether there are questions of law or fact common to the
23 proposed class; whether the claims of Plaintiffs are typical of the claims of the proposed
24 class; and whether Plaintiffs will fairly and adequately protect the interests of the proposed
25 class.

26 In addition, to ascertain whether Plaintiffs are appropriate class representatives,
27 Defendant will need to conduct discovery related to the merits of Plaintiffs' claims,
28 including the application of the "gender reassignment surgeries" exclusion under the

1 Arizona Administrative Code R9-22-205-B.4 to Plaintiffs and members of Plaintiffs'
2 proposed class, the medical/healthcare background, history, and diagnoses of Plaintiffs and
3 members of Plaintiffs' proposed class, medical/healthcare records of Plaintiffs and
4 members of Plaintiffs' proposed class, Plaintiffs' claim that chest reconstruction surgery is
5 medically necessary for them and the proposed class, and attempts to seek coverage
6 authorization for chest reconstruction surgery by Plaintiffs and members of Plaintiffs'
7 proposed class.

8 If and when a class is certified, Defendants will need to conduct discovery related to
9 the appropriateness of the relief requested for the class. This will include discovery of the
10 above issues from a sampling of proposed class members.

11 *C. Electronically Stored Information*

12 At this time, the parties are not aware of any issues relating to preservation,
13 disclosure, or discovery of ESI. Notwithstanding the foregoing, to the extent ESI contains
14 confidential information, the parties will execute appropriate confidentiality agreements
15 prior to the production of such documents, and/or redact such confidential information prior
16 to production and pending the execution of appropriate confidentiality agreements.

17 **V. Discovery schedule**

18 *A. Fact Discovery*

19 Plaintiffs' Proposal: Plaintiffs propose that fact discovery on all issues, claims, and
20 defenses begin immediately. Contrary to Defendant's suggestion, there is no need to
21 bifurcate discovery to allow for discovery specific to class certification. It is within the
22 Court's discretion to allow pre-certification discovery, considering need, time required, and
23 the probability that the discovery will lead to facts necessary to determine the existence of
24 a class. *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975). Where all necessary
25 factual issues supporting certification can be resolved without discovery, a pre-certification
26 discovery phase is not required. *Id.* Here, there are no factual issues that require pre-
27 certification discovery, let alone a dedicated five-month discovery period. D.H. and John
28 Doe seek to certify a single Rule 23(b)(2) class limited to injunctive relief. The class

1 challenges AHCCCS’s categorical exclusion of coverage for male chest reconstruction
2 surgery to treat gender dysphoria. The scope of the proposed class significantly simplifies
3 the Rule 23(a) analysis for each prong: numerosity, commonality, typicality, and adequacy
4 of representation. “[C]lasses including future claimants generally meet the numerosity
5 requirement due to the impracticality of counting such class members, much less joining
6 them.” *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019); *see also* 1 Alba Cone & Herbert
7 B. Newberg, *Newberg on Class Actions* § 3.3 (4th ed. 2002) (“Where the exact size of the
8 class is unknown, but general knowledge and common sense indicate that it is large, the
9 numerosity requirement is satisfied.”). Moreover, as the Director of AHCCCS, Defendant
10 is in the best position to collect this information and should not need additional time for
11 discovery into the size of the proposed class. *See Valenzuela v. Ducey*, No. CV-16-03072-
12 PHX-DGC, 2017 WL 6033737, at *4 (D. Ariz. Dec. 6, 2017). Further, because AHCCCS’s
13 categorical exclusion treats all class members the same, the commonality and typicality
14 prongs of the analysis will be streamlined. Finally, as to adequacy of representation, this
15 factor would only require limited discovery, if at all, that could be reasonably completed
16 within Plaintiffs’ proposed discovery schedule.

17 The cases Defendant cites to support her request for bifurcated discovery involve
18 class actions with much more complex certification issues, such as nationwide classes with
19 thousands of potential class members and possible choice of law issues, multiple classes
20 and subclasses, and claims for both injunctive and monetary relief. *See, e.g.*, Second
21 Amended Complaint (Doc. 110) at 46, *Briggs v. Montgomery*, Case No. 2:18-cv-2684 (D.
22 Ariz. Sept. 23, 2019) (defining both a damages and injunctive class); First Amended
23 Complaint (Doc. 19) at 9–12, *Daniel v. Swift Transportation Corp.*, Case No. 2:11-cv-1548
24 (D. Ariz. Oct. 24 2011) (proposing a class with members in all 50 states, including four
25 distinct subclasses). Notably absent from the cases cited by Defendant is *Toomey v.*
26 *Arizona*, Case No. 4:19-cv-35-RM-LAB, a case that raises nearly identical issues of fact
27 and law to those presented by this case. There, the Court rejected the defendants’ proposal
28 for a bifurcated discovery period and ordered the parties to brief the class certification issue

1 to determine if an issue of fact would preclude class certification and require discovery. *See*
2 Order (Doc. 82) at 2, *Toomey v. Arizona*, Case No. 4:19-cv-35 (D. Ariz. Feb. 6, 2020)
3 (deferring decision on defendants’ request for discovery). Less than two weeks after the
4 completion of briefing, the magistrate judge issued a report and recommendation that the
5 Court certify two injunctive classes including all “medical claims for transition-related
6 surgical care,” which was adopted a month later without objection from either party. Report
7 & Recommendation (Doc. 105) at 2, 9, *Toomey v. Arizona*, Case No. 4:19-cv-35 (D. Ariz.
8 May 12, 2020); Order (Doc. 108) at 2 (Jun. 15, 2020) (adopting Magistrate Bowman’s
9 Report & Recommendation). Further, courts have previously granted class certification in
10 challenges to similar exclusions in Medicaid coverage without a pre-certification discovery
11 period. *See, e.g., Flack v. Wisc. Dep’t of Health Servs.*, 331 F.R.D. 361, 368–70 (W.D.
12 Wis. 2019); *Cruz v. Zucker*, 195 F.Supp.3d 554, 563–67 (S.D.N.Y. 2016).

13 Moreover, bifurcating fact discovery will lead to duplicative discovery and
14 unnecessarily delay the resolution of this case to the detriment of the health and wellbeing
15 of Plaintiffs and the proposed class members. The parties have already begun to develop
16 the factual record in connection with Plaintiffs’ motion for preliminary injunction, some of
17 which will inform the class-certification analysis. The distinction between subject matter
18 that is appropriate for class-certification discovery under Rule 23 and that which goes to the
19 underlying factual and legal issues raised in Plaintiffs’ complaint is elusive, at best. Thus,
20 two discovery phases will lead to overlapping efforts and likely result in otherwise
21 avoidable discovery disputes.

22 Plaintiffs initially proposed closing fact discovery in mid-April 2021, but in response
23 to Defendant’s suggestion to bifurcate discovery and delay the close of fact discovery by
24 three months, Plaintiffs instead offer to extend their proposed deadlines by six weeks, and
25 thus propose a fact discovery cut-off date of May 27, 2021. That adjusted date splits the
26 difference between the parties’ proposals and provides ample time to conduct discovery on
27 matters related to Defendant’s opposition to Plaintiffs’ forthcoming motion for class
28 certification.

1 Defendant’s Proposal: Defendant proposes that discovery be conducted in two
2 phases: (1) class certification discovery, and (2) merits discovery after the resolution of the
3 class certification issue. Defendant proposes that (a) class certification discovery (limited
4 to Fed.R.Civ.P. 23 issues) be completed by April 1, 2021, and (b) Plaintiffs file a motion
5 for class certification on or before May 1, 2021. After the class certification issue has been
6 decided by the Court, the parties will reevaluate merits discovery and propose new
7 deadlines to the Court for the merits phase of discovery based on the size and complexity
8 of the class.

9 A trial court “must conduct a rigorous analysis to determine whether party seeking
10 class certification has met the prerequisites of Rule 23.” *In re Hyundai & Kia Fuel Econ.*
11 *Litig.*, 881 F.3d 679, 690 (9th Cir.), *reh’g en banc granted sub nom. In re Hyundai And Kia*
12 *Fuel Econ. Litig.*, 897 F.3d 1003 (9th Cir. 2018), and *on reh’g en banc*, 926 F.3d 539 (9th
13 Cir. 2019) (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.
14 2001)). Defendant should be able to challenge Plaintiffs’ assertions regarding class
15 certification, but is unable to fully do so without some discovery (including expert discovery)
16 on class issues such as commonality, typicality, class definition, and adequacy.

17 In the Ninth Circuit, a “class action determination can only be decided after the district
18 court undertakes a ‘rigorous analysis’ of the prerequisites for class certification.” *ABS*
19 *Entm’t, Inc. v CBS Corp.*, 908 F.3d 405, 427 (9th Cir. 2018) (citing *Wal-Mart Stores, Inc. v.*
20 *Dukes*, 564 U.S. 338, 350-51 (2011)).

21 Other judges in the District of Arizona have followed this bifurcated model. *See*
22 *Scheduling Order, Briggs v. Montgomery*, Case No. CV-18-02684-PHX-EJM (D.Ariz.
23 Sept. 12, 2019) (Doc. 106) (“The dates and deadlines contained within this Order pertain
24 only to the class certification phase of this litigation. Discovery will be bifurcated into two
25 phases, the first addressing issues related to certification of the class. . . Subsequently, a
26 second phase of discovery will commence regarding the merits of issues raised in Plaintiffs’
27 Complaint.”); Rule 16 Scheduling Order, *Daniel v. Swift Transportation Corp.*, Case No.
28 CV-11-01548-PHX-ROS (D.Ariz. Jan. 20, 2012) (Doc. 40) (“Phase I discovery will focus

1 upon issues to be addressed by Plaintiffs’ anticipated Motion for Class Certification. Phase
2 II discovery will focus upon the merits of Plaintiffs’ claims.”).

3 Plaintiffs argue that a bifurcated discovery approach will be to the “detriment of
4 Plaintiffs’ health and wellbeing.” But Plaintiffs elected to bring this lawsuit as a class
5 action, and therefore Defendant has the right to ensure there is sufficient time to conduct
6 class certification discovery, without being required to undertake discovery that may be
7 unnecessary if class certification is denied.

8 If Plaintiffs insist on obtaining relief for themselves and “all others similarly
9 situated” (Complaint at ¶ 1) then Defendant is entitled to know whether the class proposed
10 by plaintiffs meets the requirements of Rule 23. That class includes:

11 All transgender individuals under age 21 who are or will be enrolled in AHCCCS,
12 have or will have a diagnosis of gender dysphoria, and are seeking or will seek
13 coverage for male chest reconstruction surgery following a determination by their
14 respective health care providers that the procedure is necessary to treat their gender
dysphoria.

15 The Complaint makes several factual assertions that are contested by Defendant
16 related to this extraordinarily broad proposed class, including claims that Plaintiffs are
17 adequate representatives (¶ 107), there are at least one hundred potential class members (¶
18 108), and the proposed class satisfies the commonality, typicality and adequacy
19 requirements of Fed. R. Civ. P. 23 (¶109-111). These contested issues can only be resolved
20 by way of a class certification motion – after discovery on these issues is complete. *Kamm*
21 *v. California City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975) (“The propriety of a class
22 action cannot be determined in some cases without discovery;” “To deny discovery in [such
23 cases] would be an abuse of discretion.”); *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304,
24 1313 (9th Cir.1977) (stating that “the better and more advisable practice for a District Court
25 to follow is to afford the litigants an opportunity to present evidence as to whether a class
26 action was maintainable” and that such an opportunity requires “enough discovery to obtain
27 the material”).
28

1 Undoubtedly, if the question of class certification is not resolved before merits
2 discovery commences, the resources of the parties and this Court will be wasted. As just
3 one simple example, if a class is certified, the medical records and needs of a representative
4 sample of class members will need to be produced and examined. On the other hand, if no
5 class is certified, only the Plaintiffs’ medical records and needs will be relevant.

6 Resolving the class certification issue will also focus discovery on what is truly
7 relevant. Again, if this is a case about two individuals, a request for the medical records of
8 “all persons similarly situated” or a request for a list of “all transgender individuals who
9 have applied for chest reconstruction surgery” would be clearly objectionable as
10 disproportionate to the needs of the case. If the class is not defined and certified before
11 merits discovery, then the parties will undoubtedly dispute the appropriate scope of
12 discovery – a dispute that will ultimately require intervention by the Court.

13 Thus, a bifurcated discovery approach will conserve the parties’ and judicial
14 resources by resolving the class certification issue before proceeding with expensive merits
15 discovery.

16 *B. Rule 26(a)(1) Initial Disclosures*

17 The parties exchanged initial discovery disclosures required by Rule 26(a)(1) on
18 November 23, 2020.

19 *C. Deadline to add parties or amend pleadings*

20 The parties agree that the last day for adding parties or amending pleadings without
21 leave is December 21, 2020.

22 *D. Deadline to seek class certification*

23 Plaintiffs’ Proposal: Plaintiffs propose to file their motion for class certification on
24 or before March 19, 2021.

25 Defendant’s Proposal: As noted above, Defendant proposes that Plaintiffs file any
26 motion for class certification on or before May 1, 2021 after Defendant has had the
27 opportunity to conduct discovery as to the appropriateness of class certification.
28

1 *E. Expert discovery*

2 Plaintiffs' Proposal: Plaintiffs propose that parties exchange expert disclosures and
3 reports on May 27, 2021. Then, parties would exchange rebuttal expert disclosures and
4 reports on June 17, 2021. Plaintiffs propose closing expert discovery on July 8, 2021.

5 Defendant's Proposal: Defendant proposes that the parties exchange expert
6 disclosures and reports (limited to Fed.R.Civ.P. 23 issues) on January 15, 2020. Then, the
7 parties would exchange rebuttal expert disclosures and reports on February 28, 2021.
8 Defendant proposes closing expert discovery on Fed.R.Civ.P. 23 issues on March 26, 2021.

9 *F. Dispositive and Daubert Motions*

10 Plaintiffs propose that parties file dispositive and *Daubert* motions on August 5,
11 2021.

12 Defendant's Proposal: Defendant proposes the parties propose deadlines to the Court
13 for merits discovery and the filing of dispositive and *Daubert* motions after the Court has
14 ruled on Plaintiffs' motion for class certification.

15 **VI. Settlement Discussions**

16 Parties have already had preliminary discussions regarding settlement and agree to
17 engage in further settlement discussions by January 4, 2021

18 **VII. Pre-trial and trial schedule**

19 *A. Pre-trial disclosures*

20 Plaintiffs' Proposal: Plaintiffs propose filing pre-trial disclosures on October 4,
21 2021.

22 Defendant's Proposal: Defendant proposes the parties propose deadlines to the Court
23 for merits discovery and the filing of pre-trial disclosures after the Court has ruled on
24 Plaintiffs' motion for class certification.

25 *B. Pre-trial motions*

26 Plaintiffs' Proposal: Plaintiffs propose filing pre-trial motions on October 15, 2021.
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1 Defendant's Proposal: Defendant proposes the parties propose deadlines to the Court
2 for merits discovery and the filing of pre-trial motions after the Court has ruled on Plaintiffs'
3 motion for class certification.

4 *C. Trial*

5 Plaintiffs' Proposal: Plaintiffs propose beginning a non-jury trial on November 8,
6 2021. Plaintiffs anticipate needing between 2.5 and 3 days to present their case in chief.

7 Defendant's Proposal: Defendant proposes the parties and propose deadlines to the
8 Court for merits discovery and trial dates after the Court has ruled on Plaintiffs' motion for
9 class certification. Defendant presently anticipates needing 3 days to present her case in
10 chief.

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1 Dated: December 2, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2020, I electronically transmitted the attached documents to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants.

/s/ Marie van Olffen

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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

Plaintiffs,

v.

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

Defendant.

No. CV-20-00335-TUC-SHR

**[PROPOSED] SCHEDULING
ORDER**

Upon consideration of the parties' Joint Report, it is HEREBY ORDERED:

1. **Initial disclosure:** The parties have exchanged their initial disclosure statements.
2. **Deadline to Amend Pleadings:** The parties may amend pleadings without leave until **December 21, 2020**.
3. **Class Certification:** Plaintiffs should file their motion for class certification on or before _____, **2021**.
4. **Class Discovery:** The parties will complete all class discovery by _____, **2021**.
5. **Fact Discovery:** The parties will complete all fact discovery by _____, **2021**.

1 **6. *Expert witness disclosure:*** The parties shall simultaneously disclose the
2 identify and opinions of experts by _____, **2021**. The parties shall file rebuttal expert
3 disclosures by _____, **2021**. Expert discovery shall be completed by _____,
4 **2021**

5 **7. *Settlement conference or private mediation:*** The parties shall engage in
6 settlement discussions by **January 4, 2021**.

7 **8. *Dispositive and Daubert motions:*** The parties shall file all dispositive and
8 *Daubert* motions by _____, **2021**, with responses to those motions due on _____,
9 **2021**, and replies due on _____, **2021**.

10 **9. *Pre-Trial Disclosures:*** The parties shall file all pre-trial disclosures by
11 _____, **2021**.

12 **10. *Pre-Trial Motions:*** The parties shall file pre-trial motions on _____,
13 **2021**.

14 **11. *Trial:*** A non-jury trial shall begin on _____, **2021** and shall last ___ **days**.

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16 **IT IS SO ORDERED.**

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