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13 UNITED STATES DISTRICT COURT
14 DISTRICT OF ARIZONA

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

20 Plaintiffs,

21 vs.

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

25 Defendant.

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

**PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

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1 **I. INTRODUCTION**

2 Plaintiffs are a class of transgender young people in Arizona who depend on the State for
3 health insurance. Unfortunately, Arizona refuses to provide the medically necessary and urgent
4 surgical care these transgender Medicaid recipients require.

5 Plaintiffs herein seek to certify themselves as a class so that injunctive relief for all
6 similarly situated transgender young people in Arizona can be achieved. Plaintiffs meet the
7 requirements of Rule 23(a), and class certification is particularly appropriate when challenging a
8 State’s enforcement of a health-related mandate. *See Toomey v. Arizona*, 2020 WL 3197647 (D.
9 Ariz. 2020) (certifying class challenging an exclusion for “gender reassignment surgery” in a
10 health insurance program for public employees).

11 The Court should certify the class here as well.

12 **II. BACKGROUND**

13 Plaintiffs D.H and John Doe (“Named Plaintiffs”) are transgender minors who receive
14 health coverage through Arizona’s Medicaid program. Declaration of John Doe (“John Decl.”),
15 Dkt. 4, ¶¶ 1–2; Declaration of D.H. (“D.H. Decl.”), Dkt. 5, ¶¶ 1–2. Plaintiffs’ treating health care
16 providers agree that: (i) male chest reconstruction is necessary for treating their gender dysphoria;
17 and (ii) the continued denial of that medically necessary care places Plaintiffs at substantial risk
18 of short- and long-term harm to their health and well-being. Declaration of Dr. Mischa Peck,
19 Dkt. 4-2, ¶¶ 19–21; Declaration of Tamar Reed, Dkt. 5-2, ¶¶ 12–14; Declaration of Dr. Andrew
20 Cronyn (“Cronyn Decl.”), Dkt. 5-3, ¶ 26. But both young men are unable to obtain that surgery
21 because of a coverage exclusion enforced by Defendant Jami Snyder, Director of the Arizona
22 Health Care Cost Containment System (“AHCCCS”). *See* Declaration of Susan Doe (“Susan
23 Decl.”), Dkt. 4-1, ¶ 18; Declaration of Janice Hennessy-Waller (“Hennessy-Waller Decl.”),
24 Dkt. 5-1 ¶¶ 13, 15–16. The coverage exclusion, codified at Ariz. Admin. Code R9-22-205-
25 B(4)(a) (the “Challenged Exclusion”), expressly prohibits Medicaid coverage for “gender
26 reassignment surgeries.” It thus prevents Plaintiffs and all transgender youth in Arizona from
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1 having an equal opportunity to demonstrate that their transition-related surgical care is medically
 2 necessary and thus entitled to coverage by AHCCCS.

3 On August 6, 2019, Plaintiffs initiated this litigation on behalf of themselves and

4 [a]ll transgender individuals under age 21 who are or will be enrolled
 5 in AHCCCS, have or will have a diagnosis of gender dysphoria, and
 6 are seeking or will seek coverage for male chest reconstruction
 7 surgery following a determination by their respective health care
 8 providers that the procedure is necessary to treat their gender
 9 dysphoria.

10 Complaint, Dkt. 1, ¶ 106 (the “Proposed Class”). Plaintiffs’ suit presents a facial challenge to
 11 the Challenged Exclusion on the grounds that it violates the Medicaid Act, the Patient Protection
 12 and Affordable Care Act (“ACA”), and the Equal Protection Clause of the Fourteenth
 13 Amendment. *See id.* ¶¶ 115–126. Plaintiffs moved to preliminarily enjoin enforcement of the
 14 Challenged Exclusion on the same day that they filed suit (*see* Dkt. 3), and that motion is now
 15 pending before the Court.

16 **III. LEGAL STANDARD**

17 “Class actions have two primary purposes: to further judicial economy by avoiding
 18 multiple suits and to protect the rights of persons who might not be able to present claims on an
 19 individual basis.” *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 567 (C.D. Cal. 2008).¹
 20 Certifying a class under Rule 23 is appropriate where, as here, a suit satisfies the criteria set forth
 21 in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation, and where
 22 it “fit[s] into one of the three categories described in” Rule 23(b). *Bateman v. Am. Multi-Cinema,*
 23 *Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). Though “[t]he decision to grant or deny class certification
 24 is within the trial court’s discretion,” *id.*, “[a] plaintiff whose lawsuit meets the requirements of
 25 Rule 23 has a ‘categorical’ right ‘to pursue his claim as a class action.’” *Al Otro Lado, Inc. v.*
 26 *Wolf*, 336 F.R.D. 494, 499 (S.D. Cal. 2020) (quoting *Shady Grove Orthopedic Assocs., P.A. v.*
 27 *Allstate Ins.*, 559 U.S. 393, 398, (2010)). And, “[a] court, when asked to certify a class, is merely

28 ¹ Internal quotations and citations omitted unless otherwise noted.

1 to decide a suitable method of adjudicating the case and should not turn class certification into a
2 mini-trial on the merits.” *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015).

3 **IV. ARGUMENT**

4 **A. The proposed class satisfies the requirements of Rule 23(a).**

5 Each prong of Rule 23(a) is met by the Proposed Class and its counsel. *First*, the number
6 of transgender Medicaid recipients in the Proposed Class is sufficiently large, and joinder of these
7 individuals is not practical. *Second*, the challenged exclusion impacts each member of the
8 Proposed Class in the same way, *i.e.*, because each class member is transgender, Arizona denies
9 medically necessary care. *Third*, the claims of the Named Plaintiffs are typical of those of the
10 Proposed Class, *i.e.*, that Challenged Exclusion causes irreparable harm and should be removed.
11 *Fourth*, counsel for Plaintiffs—two international law firms and two specialized civil rights non-
12 profit groups—is adequate to represent the Proposed Class.

13 1. The size of the Proposed Class exceeds the numerosity requirement and 14 joinder of all class members is impracticable.

15 A proposed class satisfies the numerosity requirement if “joinder of all members is
16 impracticable.” Fed. R. Civ. P. 23(a)(1). “Generally, 40 or more members will satisfy the
17 numerosity requirement.” *Toomey*, 2020 WL 2465707, at *2 (citing *Perez v. First Am. Title Ins.*
18 *Co.*, 2009 WL 2486003, *2 (D. Ariz. 2009)). Plaintiffs “need not identify the precise number of
19 potential class members.” *Id.*; 1 Newberg on Class Actions § 3:13 (5th ed.) (“[I]t is well settled
20 that a plaintiff need not allege the exact number or specific identity of proposed class members.”).
21 “Where the relief sought is only injunctive or declaratory, the numerosity requirement is
22 somewhat relaxed, and even speculative or conclusory allegations regarding numerosity are
23 sufficient to permit certification.” *Fraihat v. U.S. Imm. & Customs Enf’t*, 445 F. Supp. 3d 709,
24 736–37 (C.D. Cal. 2020).

25 Plaintiffs satisfy the numerosity requirement based on Dr. Andrew Cronyn’s first-hand
26 knowledge and personal experience. As set forth in his Declaration in Support of Plaintiffs’
27 Motion for Preliminary Injunction, Dr. Cronyn is a pediatrician based at El Rio Health Center in
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1 Tucson. Cronyn Decl., Dkt. 5-3, ¶¶ 1–3, 9. As co-leader of transgender health within El Rio,
2 Dr. Cronyn is aware that El Rio treats approximately 250 transgender youth per year ranging
3 from ages 4 to 21, and of those patients, more than 40 are transgender boys who receive their
4 health insurance through AHCCCS and need male chest reconstruction surgery. *Id.* ¶ 10. Dr.
5 Cronyn is therefore personally aware of more than 40 individuals who fall within the proposed
6 class definition, which easily satisfies the numerosity requirement even without reference to class
7 members treated at any other health center across the state, including the Gender Support
8 Program at Phoenix Children’s Hospital where John Doe receives care. *See Hoffman v. Blattner*
9 *Energy, Inc.*, 315 F.R.D. 324, 337 (C.D. Cal. 2016) (numerosity satisfied where plaintiff
10 “identified at least 23” other individuals that fell within proposed class).

11 Moreover, “while the number of class members is the most important factor, the ultimate
12 question concerns the practicability of their joinder.” *Valenzuela v. Ducey*, 2017 WL 6033737,
13 at *4 (D. Ariz. 2017). Here, joinder of all class members is impracticable. The class consists of
14 low-income, transgender individuals under age 21 who were diagnosed with a serious medical
15 condition (gender dysphoria) and seek male chest reconstruction surgery, in part, to preserve the
16 privacy of their transgender status. Transgender people also experience disproportionately high
17 rates of harassment and discrimination in all aspects of their lives. Accordingly, many class
18 members “would be reluctant to join a lawsuit that might publicize their circumstances.” *Id.* at
19 *5. Class members are also dispersed throughout Arizona. All of these factors support a finding
20 of impracticability. *Id.*; *see also N.B. v. Hamos*, 26 F. Supp. 3d 756, 769 (N.D. Ill. 2014) (joinder
21 impracticable where “[t]he putative class consists of an extremely vulnerable population because
22 of their youth—in most cases, the plaintiffs would need an adult next friend to initiate suit—
23 severe health issues, and limited financial means, all of which make individual suits
24 impracticable.”).

25 Joinder is also impracticable because Plaintiffs seek relief on behalf of current *and future*
26 transgender individuals who fall within the class definition. “When discussing the practicability
27 of joining future claimants, courts generally state that the numerosity requirements are relaxed
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1 due to the difficulty in determining the number and identity of these future claimants.” 1
2 Newberg on Class Actions § 3:15 (5th ed.); *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019)
3 (affirming certification where there “presumably would be a need to account for minors” who
4 would fall within class definition “in *future years*” (emphasis in original)).

5
6 2. *Commonality is satisfied because the Challenged Exclusion subjects all*
7 *class members to the same categorical ban on gender-confirming*
8 *surgeries.*

9 Rule 23’s commonality requirement is satisfied where the members of a class suffered the
10 same injury such that their claims “depend upon a common contention” that “is capable of
11 classwide resolution.” *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1153 (9th Cir.
12 2016). Not all questions of law or fact at issue in a lawsuit need to be shared among class
13 members to meet the commonality requirement; “[e]ven a single common question of law or fact
14 that resolves a central issue will be sufficient.” *Castillo v. Bank of Am., NA*, 980 F.3d 723, 728
15 (9th Cir. 2020). The Ninth Circuit thus repeatedly holds that “in a civil-rights suit, ...
16 commonality is satisfied where the lawsuit challenges a system-wide practice or policy that
17 affects all of the putative class members,” particularly where, as here, the class seeks only
18 injunctive relief. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (abrogated on other
19 grounds by *Johnson v. California*, 543 U.S. 499 (2005)); *see also Gonzalez v. U.S. Immigration*
20 *& Customs Enf’t*, 975 F.3d 788, 808 (9th Cir. 2020).

21 In keeping with this principle, this Court and others from around the country routinely
22 find the commonality requirement satisfied where the proposed class seeks to challenge the
23 lawfulness of a uniformly enforced Medicaid policy. *See Tinsley v. Faust*, 411 F. Supp. 3d 462,
24 466 (D. Ariz. 2019) (certifying Medicaid subclass challenging AHCCCS’ “uniform, statewide
25 policies and practices”); *Flack v. Wisc. Dep’t of Health Servs.*, 331 F.R.D. 361, 370 (W.D. Wis.
26 2019) (certifying class challenging Wisconsin Medicaid’s categorical exclusion of gender-
27 affirming care for transgender individuals); *B.E. v. Teeter*, 2016 WL 3939674, at *1, 3 (W.D.
28 Wash. 2016) (certifying class challenging Washington’s failure to provide coverage for certain

1 Hepatitis C treatments pursuant to the state Medicaid agency’s published treatment policy); *K.W.*
2 *ex rel. D.W. v. Armstrong*, 298 F.R.D. 479, 487 (D. Idaho 2014) (certifying class challenging the
3 Idaho Medicaid program’s process for allocating funds to developmentally disabled adults);
4 *Wood v. Betlach*, 286 F.R.D. 444, 447 (D. Ariz. 2012) (certifying class challenging federal
5 approval and AHCCCS’ implementation of increased copayments for participants in Medicaid
6 demonstration project).

7 The same is true for proposed classes in suits challenging other governmental policies that
8 discriminate against transgender individuals. *See Toomey*, 2020 WL 3197647, at * 1 (D. Ariz.
9 2020); *Monroe v. Meeks*, 335 F.R.D. 201, 206 (S.D. Ill. 2020) (certifying class challenging
10 policies related to the treatment of gender dysphoria in Illinois state prisons).

11 Plaintiffs and all members of the Proposed Class can trace their injury to a common
12 source, and that injury can be remedied through a single action of this Court. The Challenged
13 Exclusion—“a system-wide practice or policy” enforced by AHCCCS—categorically prohibits
14 “all putative class members” from receiving the male chest reconstruction surgery they need to
15 alleviate their gender dysphoria. *See Armstrong v.*, 275 F.3d at 868; Compl., Dkt. 1, ¶¶ 4, 63–67;
16 Hennessy-Waller Decl., Dkt. 5-1, ¶¶ 13, 15-16; Susan Decl., Dkt. 4-1, ¶ 18. As such, Plaintiffs’
17 suit raises numerous common issues of law, including whether the Challenged Exclusion violates
18 the Medicaid Act’s EPSDT and Comparability Requirements, Section 1557 of the ACA, or the
19 Equal Protection Clause of the Fourteenth Amendment. And any factual disputes that may arise
20 in this litigation will likewise be common to the Proposed Class and not specific to any class
21 member. *See* Compl., Dkt. 1, ¶¶ 115-126. This is so because Plaintiffs’ and class members’
22 inability to receive the surgeries they seek stems not from any circumstances *particular to them*,
23 but instead flows from the *uniform enforcement* of an unlawfully discriminatory policy that
24 applies to *all* transgender individuals under age 21 seeking coverage from AHCCCS for chest
25 reconstruction surgeries necessary to treat their gender dysphoria. *See id.* ¶¶ 4, 63–67; Hennessy-
26 Waller Decl., Dkt. 5-1, ¶¶ 13, 15-16; Susan Decl., Dkt. 4-1, ¶ 18.

1 Answering any one of the legal questions above, or the factual questions that may
2 accompany them, will “in one stroke” “resolve an issue that is central to the validity of each one
3 of the claims” Plaintiffs and the Proposed Class bring. Accordingly, those claims “depend upon
4 a common contention ... capable of classwide resolution.” *Wal-Mart Stores, Inc. v. Dukes*, 564
5 U.S. 338, 350 (2011).

6 3. *The Named Plaintiffs’ claims are typical of those of the Proposed Class.*

7 Plaintiffs satisfy the typicality requirement of Rule 23(a)(3) because “the claims or
8 defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R.
9 Civ. P. 23(a)(3). “The purpose of the typicality requirement is to assure that the interest of the
10 named representative aligns with the interests of the class.” *Wolin v. Jaguar Land Rover N. Am.,*
11 *LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
12 508 (9th Cir. 1992)). “The test of typicality is whether other members have the same or similar
13 injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
14 whether other class members have been injured by the same course of conduct.” *Id.* There is
15 some overlap between the commonality and typicality requirements of Rule 23(a). *See General*
16 *Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 158, n.13 (1982) (“Both serve as guideposts
17 for determining whether under the particular circumstances maintenance of a class action is
18 economical and whether the named plaintiff’s claim and the class claims are so interrelated that
19 the interests of the class members will be fairly and adequately protected in their absence”).

20 Plaintiffs D.H. and John Doe are typical of the class they seek to represent. The proposed
21 class includes “[a]ll transgender individuals under age 21 who are or will be enrolled in
22 AHCCCS, have or will have a diagnosis of gender dysphoria, and are seeking or will seek
23 coverage for male chest reconstruction surgery” once their health care providers determine that
24 the procedure is necessary to treat their gender dysphoria. Compl., Dkt. 1, ¶ 106. Like all
25 members of the proposed class, D.H. and John are both Medicaid recipients under age 21 who
26 meet the criteria for male chest reconstruction surgery but are unable to receive that surgical
27 treatment because of the Challenged Exclusion.

1 Each of the Named Plaintiffs' claims therefore arises from the same source as the class-
2 wide claim: Defendant's enforcement of the Challenged Exclusion to categorically deny Arizona
3 Medicaid coverage for male chest reconstruction surgery as a medically necessary treatment for
4 gender dysphoria. The legal theories the Named Plaintiffs will advance under Section 1557, the
5 Medicaid Act, and the Equal Protection Clause are identical to those they assert on behalf of the
6 entire class. The Proposed Class seeks the same declaratory judgment: that the Challenged
7 Exclusion violates Section 1557, the Medicaid Act, and the Equal Protection Clause. And they
8 seek the same relief enjoining Defendant from enforcing the Challenged Exclusion based on the
9 policy's illegality.

10 If Plaintiffs succeed in obtaining the class-wide declaratory and injunctive relief they seek,
11 each of them and all members of the Proposed Class will benefit from the elimination of the
12 structural barrier to care currently imposed by the Challenged Exclusion. Granting such relief
13 will not require the Court to adjudicate their individual eligibility for coverage for transition-
14 related care, *i.e.*, whether male chest reconstruction surgery is medically necessary for a particular
15 class member under the prevailing standards of care. Rather, the Named Plaintiffs seek only to
16 have the opportunity for themselves, and for all other similarly situated transgender Medicaid
17 beneficiaries in Arizona, to receive coverage for male chest reconstruction surgery when
18 medically necessary pursuant to the prevailing standards of care, without being subject to an
19 unlawful categorical exclusion.

20 The court in *Flack* recently considered a similar class and found that the claims brought
21 by the named plaintiffs were typical of the class. There, the proposed class included "[a]ll
22 transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a
23 diagnosis of gender dysphoria, and who are seeking or will seek surgical or medical treatments
24 or services to treat gender dysphoria." 331 F.R.D. at 368. The Court found typicality easily
25 satisfied there, even though some members of that class may require surgical procedures different
26 from those sought by the named plaintiffs. This was because the named plaintiffs' claims shared
27 "the same essential characteristics as the claims of the class at large." *Id.* at 369 (citing *Lacy v.*
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1 *Cook Cty., Illinois*, 897 F.3d 847, 866 (7th Cir. 2018). The court found that the named plaintiffs’
2 “claims and the relief sought” were not only typical of the proposed class, but “*identical* to those
3 of other class members.” *Id.* “In fact, all the claims arise from defendants’ enforcing the
4 Challenged Exclusion, and the relief sought simply seeks to allow the class members the right to
5 individually seek treatment based on medical necessity, free from enforcement of the Challenged
6 Exclusion.” *Id.* As in *Flack*, the Named Plaintiffs’ claims here arise from the same source, the
7 Challenged Exclusion, and the declaratory and injunctive relief they seek for themselves is
8 identical to those they seek for every other class member. Rule 23(a)’s typicality requirement is
9 satisfied.

10
11 4. *The Named Plaintiffs and their counsel will adequately represent the Proposed Class.*

12 The adequacy requirement of Rule 23(a) involves examination of two issues: (1) whether
13 “the named plaintiffs and their counsel have any conflicts of interest with other class members”
14 and (2) whether the named plaintiffs and their counsel will “prosecute the action vigorously on
15 behalf of the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). In
16 considering whether named plaintiffs have conflicts of interest and will prosecute vigorously on
17 behalf of the class, the typicality and adequacy inquiries are intertwined. *See Wal-Mart*, 564 U.S.
18 at 349, n.5 (commonality and typicality requirements “tend to merge with the adequacy-of-
19 representation requirement”). In considering the latter factor, the Court may consider
20 “competency of counsel.” *Id.* at 1021.

21 Named Plaintiffs’ interests in this lawsuit directly align with those of the proposed class.
22 Plaintiffs assert that the Challenged Exclusion is unlawful and unconstitutional for violations of
23 constitutional rights and statutory protections that are common to all persons in the proposed
24 class, not specific to Plaintiffs themselves. If Named Plaintiffs successfully challenge the
25 lawfulness and constitutionality of the Challenged Exclusion’s ban on “gender reassignment
26 surgeries” and obtain the injunctive and declaratory relief sought, the relief would also benefit
27 all proposed class members in precisely the same way. As discussed above regarding
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1 commonality and typicality, courts routinely find that a shared interest in challenging uniformly
2 enforced state Medicaid policies is sufficient to find that the representative parties will fairly and
3 adequately protect the interests of the class. *See, e.g., Tinsley*, 411 F. Supp. 3d at 483; *Toomey*,
4 2020 WL 2465707, at *4; *Wood*, 286 F.R.D. at 449–50; *Planned Parenthood Arkansas & Eastern*
5 *Oklahoma v. Selig*, 313 F.R.D. 81, 89 (E.D. Ark. 2016) (affirming class certification in case
6 involving Medicaid benefits and finding adequacy requirement met where “class representatives
7 have common interests with the members of the class”).

8 The same has been found in other cases involving a shared interest among proposed class
9 representatives and members in receiving adequate care for the treatment of gender dysphoria,
10 including through Medicaid. *See, e.g., Monroe*, 335 F.R.D. at 206–07 (finding that transgender
11 prisoners with gender dysphoria seeking declaratory and injunctive relief against failure of state
12 agency to provide constitutionally adequate treatment for gender dysphoria met adequacy
13 requirement because they “have the same interest in receiving constitutionally adequate care for
14 the treatment of gender dysphoria,” and further reasoning that the “Court does not see how a
15 variation in medical treatment between different prisoners with gender dysphoria would result in
16 conflicting interests or inadequate representation, as all transgender inmates with gender
17 dysphoria have allegedly been harmed by the same policies and practices implemented”); *Flack*,
18 331 F.R.D. at 369–70 (transgender individuals challenging coverage exclusion for gender
19 dysphoria treatment under Wisconsin Medicaid met adequacy requirement to represent class of
20 transgender Medicaid members because “[c]ertainly, the named plaintiffs are sufficiently
21 interested in the case’s outcome and are not subject to a conflict of interest” because they “all
22 suffer the same injuries and have the same interests as the class members”).

23 The Challenged Exclusion equally violates the same rights and interests of all members
24 of the proposed class of transgender Arizona Medicaid beneficiaries with gender dysphoria,
25 regardless of any individual variations in care they require to treat that condition, because all
26 proposed class members require male chest reconstruction surgery as part of that treatment.
27 There is no reason to believe that Named Plaintiffs would not adequately represent the needs of
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1 the other class members who are being denied access to the same medically necessary surgical
2 care they need to treat their own gender dysphoria.

3 Nor is there any reason to doubt the competency of class counsel. The proposed class is
4 represented by capable and experienced attorneys at the National Center for Lesbian Rights
5 (NCLR), the National Health Law Program (NHeLP), and the law firms of Perkins Coie, LLP
6 and King & Spalding, LLP. Asaf Orr, a Senior Staff Attorney and the Director of the Transgender
7 Youth Project at the NCLR, contemporaneously submits a declaration outlining his, and his
8 team's extensive experience representing transgender minors and their families in a wide range
9 of matters, including both class and individual actions challenging discriminatory treatment and
10 policies in healthcare. Declaration of Asaf Orr, ¶¶ 4–6, attached as Exhibit 1. Additionally,
11 Abigail Coursolle and Catherine McKee from NHeLP were counsel for the plaintiffs in *Flack*
12 and have extensive experience litigating Medicaid cases. Declaration of Abigail Coursolle, ¶¶ 5–
13 6, attached as Exhibit 2.

14 Perkins Coie and King & Spalding are international, Am Law 100 law firms committed
15 to assuring the resources necessary to adequately represent the class. The individual lawyers
16 serving as counsel for the proposed class from both firms have extensive experience litigating
17 class actions, civil rights matters including some on behalf of transgender persons, and healthcare
18 matters involving state Medicaid programs. For example, Brent Ray from King & Spalding is
19 counsel for the plaintiffs in *Monroe*.

20 There is no legitimate basis to challenge the adequacy of Plaintiffs' or proposed class
21 counsel's representation of the class, or to doubt that both Plaintiffs and counsel will vigorously
22 prosecute this action on the class's behalf. Accordingly, Rule 23's adequacy requirement is met.

23 **B. The proposed class satisfies the requirements of Rule 23(b)(2).**

24 Rule 23(b)(2) allows a class action to be pursued where “the party opposing the class has
25 acted or refused to act on grounds that apply generally to the class, so that final injunctive relief
26 or corresponding declaratory relief is appropriate respecting the class as a whole.” In other
27 words, Rule 23(b)(2) certification is appropriate where, as here, “a single injunction or
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1 declaratory judgment would provide relief to each member of the class.” *Wal-Mart*, 564 U.S. at
2 360. “Civil rights cases against parties charged with unlawful, class-based discrimination are
3 prime examples” of the types of cases appropriate for certification under Rule 23(b)(2) (*Amchem*
4 *Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)), since “the primary role of Rule 23(b)(2) has
5 always been the certification of civil rights class actions” (*Parsons v. Ryan*, 754 F.3d 657, 686
6 (9th Cir. 2014)).

7 This case—a civil rights action against a state agency charged with discrimination against
8 transgender individuals as a class—is a “prime example[.]” of the type of case for which Rule
9 23(b)(2) certification is appropriate. *Amchem*, 521 U.S. at 614. By enforcing the Challenged
10 Exclusion, Defendant and AHCCCS are “act[ing and] ... refus[ing] to act on grounds that apply
11 generally to” all transgender youth in Arizona seeking surgical treatment for their gender
12 dysphoria. See Fed. R. Civ. P. 23(b)(2). Accordingly, “a single injunction” prohibiting
13 Defendant and AHCCCS from enforcing the Challenged Exclusion would “provide relief to each
14 member of the class” by allowing them to seek coverage for surgeries medically necessary to
15 treat their gender dysphoria. *Wal-Mart*, 564 U.S. at 360.

16 **V. CONCLUSION**

17 For the reasons explained above, Plaintiffs meet Rule 23’s requirements for certification
18 of a class. The Court should certify the Proposed Class under Rule 23(b)(2) for declaratory and
19 injunctive relief; designate the Named Plaintiffs as class representatives; and designate their
20 undersigned attorneys at Perkins Coie LLP; King & Spalding LLP, the National Center for
21 Lesbian Rights, and the National Health Law Program as class counsel.

1
2 DATED: JANUARY 11, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2021, 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 following CM/ECF registrants:

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I hereby certify that on January 11, 2021, I served the attached document by first class mail on:

The Honorable Scott H. Rash
United States District Court of Arizona, Tucson
405 West Congress Street, Suite 1500
Tucson, Arizona 8585701

s/ Marie van Olffen

138410-0001/150950156.2

Exhibit 1

1 Brent P. Ray (Admitted *pro hac vice*)
 Andrew J. Chinsky (Admitted *pro hac vice*)
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 Email: bray@kslaw.com
 5 achinsky@kslaw.com

6 Daniel C. Barr (Bar No. 010149)
 Janet M. Howe (Bar No. 034615)
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 10 jhowe@perkinscoie.com

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

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

17 Plaintiffs,

18 vs.

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

21 Defendant.

No. 4:20-cv-335-SHR

**DECLARATION OF ASAF ORR IN
 SUPPORT OF PLAINTIFFS'
 MOTION FOR CLASS
 CERTIFICATION**

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1 I, Asaf Orr, declare and state as follows:

2 1. Along with my co-counsel, I represent Plaintiffs D.H. and John Doe and the
3 proposed Class in the above-captioned matter.

4 2. I am a Senior Staff Attorney and Director of the Transgender Youth Project
5 at the National Center for Lesbian Rights (NCLR).

6 3. I received my J.D. from Rutgers School of Law – Newark in 2008, and
7 clerked for the Hon. Virginia A. Long on the Supreme Court of New Jersey. Following my
8 clerkship, I was awarded a Tom Steel Fellowship to represent LGBTQ students in
9 education-related matters at the Learning Rights Law Center in Los Angeles, CA. I joined
10 NCLR as a Staff Attorney in 2012.

11 4. NCLR is a national legal organization committed to advancing the civil and
12 human rights of lesbian, gay, bisexual, and transgender people and their families through
13 litigation, legislation, policy, and public education. NCLR was the first LGBTQ legal
14 organization to start projects focusing on the needs of transgender people and LGBTQ
15 youth.

16 5. I have extensive experience representing transgender young people and their
17 families in a wide range of areas of law. For example, I represented Intervenor and Third-
18 Party Plaintiff Jane Doe, a transgender middle-school student who was denied use of the
19 girls' restroom and persistently referred to by the wrong name, in *Board of Education of the*
20 *Highland Local School District v. U.S. Department of Education*, 208 F. Supp. 3d 850 (S.D.
21 Ohio), *aff'd*, 845 F.3d 217 (6th Cir. 2016). I am also currently representing transgender
22 youth in Arizona who are being denied the opportunity to correct the sex listed on their birth
23 certificate. *Trujillo v. Christ*, Case No. 4:20-cv-00484-TUC-JAS (D. Ariz. 2020).

24 6. I also have significant experience representing transgender people in the cases
25 challenging discriminatory treatment and policies in healthcare. I was counsel in *Prescott*
26 *v. Rady Children's Hospital-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. 2017), the first case
27 to recognize that persistently using the incorrect pronouns when referring to a transgender
28 patient could constitute discrimination under the Affordable Care Act, and in *Calgaro v. St.*

1 *Louis County*, 919 F.3d 1054 (8th Cir. 2019), upholding the constitutionality of a state law
2 that permitted NCLR's client, E.J.K., a transgender teenager living on her own, to consent
3 to treatments for her gender dysphoria. I have also represented transgender people
4 challenging insurance exclusions of treatments for gender dysphoria. *Ketcham v. Regence*
5 *Blue Cross Blue Shield of Oregon*, Case No. 19CV31838 (Multnomah Cnty. Cir. Ct. 2018)
6 (Challenging exclusion for facial feminization surgery for transgender beneficiaries); *Dovel*
7 *v. Pub. Library of Cincinnati & Hamilton Cnty.*, Case No. 1:16-cv-00955 (S.D. Ohio 2016)
8 (Challenging general surgical exclusion for transgender beneficiaries); *Doe v. United*
9 *States*, Case No. 3:16-cv-00640 (S.D. Ill. 2016) (Challenging exclusion for puberty-
10 delaying medication for transgender beneficiaries in Tricare).

11 7. NCLR has committed to assuring the resources needed to represent the class
12 and will continue to work with other class counsel to competently investigate claims and
13 issues as they arise in this case. In addition to the undersigned, there are two attorneys from
14 NCLR working on this case who also have extensive experience litigating cases on behalf
15 of transgender people.

16
17 I declare, pursuant to 28 U.S.C. § 1746 and under the penalty of perjury, that the
18 foregoing statements in this affidavit are true and correct.

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20 Executed this 11th day of January, 2021 in San Mateo County, California.

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Asaf Orr

Exhibit 2

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

13
14 D.H., by and through his mother, Janice
Hennessy-Waller; and John Doe, by his
15 guardian and next friend, Susan Doe, on
behalf of themselves and all others
16 similarly situated,

17 Plaintiffs,

18 vs.

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

21 Defendant.

No. 4:20-cv-335-SHR

**DECLARATION OF ABIGAIL K.
COURSOLLE IN SUPPORT OF
PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

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1 I, Abigail K. Coursolle, declare and state as follows:

2 1. Along with my co-counsel, I represent Plaintiffs D.H. and John Doe and the
3 proposed Class in the above-captioned matter.

4 2. I am a senior attorney at the National Health Law Program (“NHeLP”).
5 NHeLP is a non-profit law firm that provides consultation and co-counseling assistance to
6 legal services, disability rights, and other attorneys nationwide on a range of health issues
7 affecting the poor. NHeLP advocates, educates, and litigates at the federal and state levels,
8 working to ensure that low-income people and underserved communities can obtain the
9 quality care to which they are legally entitled and holding state and federal Medicaid
10 agencies accountable for their programs. NHeLP brings significant expertise in federal
11 Medicaid law and has previously litigated numerous complex cases and class action suits
12 involving Medicaid Act and federal antidiscrimination claims. NHeLP commonly co-
13 counsels cases with law firms and non-profit organizations and has experience in efficiently
14 providing its expertise to the case.

15 3. I received my J.D. from the University of California, Los Angeles, in 2009. I
16 am admitted to the Bar in California.

17 4. Prior to joining NHeLP, I was as an Equal Justice Works Justice Fellow at the
18 Western Center on Law and Poverty, where I worked on enforcing California’s safety net
19 law that requires counties in the state to provide basic medical services and cash assistance
20 to their low-income residents.

21 5. Since joining NHeLP in July of 2011, my legal practice has focused on issues
22 related to the Medicaid program, including access to coverage and services. I have
23 participated in several complex track and/or class action cases in the federal district and
24 circuit courts of appeals. The vast majority of these cases concern publicly funded health
25 insurance programs, particularly Medicaid, and include: *Flack v. Wis. Dep’t of Health*
26 *Servs.*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019) (challenging state regulation excluding
27 coverage of gender-affirming care in Medicaid); *Oster v. Lightbourne*, No. C 09-4668 CW,
28 2012 WL 685808, at *6 (N.D. Cal. Mar. 2, 2012), order corrected, No. C 09-4668 CW,

1 2012 WL 1595102 (N.D. Cal. May 4, 2012) (certifying class in case challenging cuts to
2 Medicaid personal care services in California), *J.E.M. et al. v. Corsi*, No. 16-cv-04273-SRB
3 (W.D. Mo. Jul. 21, 2017) (challenging Missouri Medicaid policy that limited access to
4 hepatitis C treatment), *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016 (8th Cir. 2015)
5 (challenging Missouri “navigator” law as preempted by the Affordable Care Act).

6 6. My colleague, NHeLP senior attorney Catherine McKee is also co-counsel in
7 this case. She received her J.D. from the University of California, Berkeley, in 2009 and is
8 admitted to the Bar in California (inactive) and North Carolina. Since joining NHeLP in
9 March of 2014, she has participated in several complex track and/or class action cases in
10 federal courts concerning Medicaid. Recent cases in which she has served as co-counsel
11 include: *Flack v. Wis. Dep’t of Health Servs.*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019),
12 *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019) (challenging HHS’s approval of
13 Kentucky’s Section 1115 Medicaid waiver project); *Gresham v. Azar*, 363 F.Supp.3d 165
14 (D.D.C. 2019) (challenging HHS’s approval of an amendment to Arkansas’s Section 1115
15 Medicaid waiver project); *Philbrick v. Azar*, 397 F. Supp. 3d 11 (D.D.C. 2019) (challenging
16 HHS’s approval of New Hampshire’s Section 1115 Medicaid waiver project); and *Garrido*
17 *v. Dudek*, 658 Fed. Appx. 973 (11th Cir. 2016) (defending against challenge to award of
18 attorneys’ fees in case where court enjoined Florida Medicaid from excluding coverage of
19 behavioral interventions for children with autism spectrum disorders).

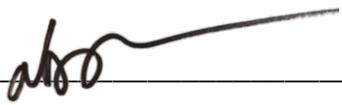
20 7. NHeLP has committed to assuring the resources needed to represent the class
21 and will continue to work with other class counsel to competently investigate claims and
22 issues as they arise in this case. Including the two attorneys appearing as counsel in this
23 case, NHeLP employs 25 practicing attorneys who bring a wealth of experience in Medicaid
24 law and federal non-discrimination laws, including Section 1557 of the Affordable Care
25 Act. NHeLP attorneys have not only engaged in significant litigation in these areas, but
26 have also published hundreds of articles and issue briefs analyzing and explaining these
27 areas of law.

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I declare, pursuant to 28 U.S.C. § 1746 and under the penalty of perjury, that the foregoing statements in this affidavit are true and correct.

Executed this 11th day of January, 2021 in Los Angeles County, California.



Abigail K. Coursolle

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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] ORDER ADOPTING
PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

The Court, having considered Plaintiffs' Motion for Class Certification and the attached declarations, and having found good cause in support thereof, IT IS ORDERED that Plaintiffs' Motion for Class Certification is GRANTED.

IT IS FURTHER ORDERED THAT:

(1) The Court certifies the following class under Rule 23(b)(2):

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

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(2) Plaintiffs’ counsel, Perkins Coie, LLP, King & Spaulding, LLP, the National Center for Lesbian Rights, and the National Health Law Program are appointed Class counsel under Rule 23(g).

IT IS HEREBY ORDERED: