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**UNITED STATES DISTRICT COURT  
FOR THE 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 )  
17 behalf of themselves and all others )  
18 similarly situated, )

19 Plaintiffs, )

20 vs. )

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

23 Defendant. )  
24 )

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

**PLAINTIFFS' REPLY BRIEF IN  
SUPPORT OF MOTION FOR  
CLASS CERTIFICATION**

1 **I. INTRODUCTION**

2 Defendant’s response to Plaintiffs’ Motion for Class Certification was due  
3 January 25, 2021. On that date, Defendant filed a “Motion for Time to Conduct Class  
4 Discovery” that responded to Plaintiffs’ motion, but also improperly sought an extension—  
5 and additional opportunity—to further oppose Plaintiffs’ arguments in support of class  
6 certification.

7 Defendant’s responsive brief offers no justification for delaying or denying class  
8 certification. Plaintiffs—and putative class representatives—meet all the requirements for  
9 certification of an injunctive-only class under Rules 23(a) and 23(b)(2) and bifurcated  
10 discovery will not resolve any issue necessary for this Court to rule on Plaintiffs’ motion.

11 Defendant should not be permitted to circumvent her obligation to timely present her  
12 arguments in opposition to Plaintiffs’ Motion for Class Certification. Defendant provides  
13 no authority to justify her requested relief and filed her motion without any notice to  
14 Plaintiffs, in violation of the meet-and-confer requirement in Local Rule 7.3. The Court  
15 should deny Defendant’s request on that basis alone.

16 For the reasons set forth in Plaintiffs’ motion and in this reply, the Court should  
17 certify the Proposed Class, designate D.H. and John Doe as class representatives, designate  
18 their undersigned attorneys as class counsel, and deny Defendant’s requests for additional  
19 time and class discovery.

20 **II. ARGUMENT**

21 **A. The proposed class satisfies all the requirements of Rule 23.**

22 *1. The proposed class is sufficiently large that joinder is impracticable.*

23 Defendant’s opposition does not undermine the evidence Plaintiffs proffered to  
24 satisfy the numerosity prong. Plaintiffs presented the sworn declaration of Dr. Cronyn, a  
25 physician at El Rio Health Center, that his clinic treats “approximately 250 transgender  
26 youth per year ranging from 4 to 21, and of those patients, more than 40 are transgender  
27 boys who receive their health insurance through AHCCCS and need male chest  
28 reconstruction surgery.” Mtn. for Class Cert., Dkt. 40, at 5. That number does not include

1 class members being treated at other facilities, such as the Gender Support Clinic at Phoenix  
2 Children’s Hospital, or future members of the putative class. This is more than enough to  
3 satisfy numerosity, especially when the relief sought is only injunctive or declaratory. *See*  
4 *Toomey v. Arizona*, 2020 WL 3197647 (D. Ariz. 2020) (“Generally, 40 or more members  
5 will satisfy the numerosity requirement”); *Fraihat v. U.S. Imm. & Customs Enf’t*, 455  
6 F.Supp.3d 709, 736-37 (C.D. Cal. 2020) (“Where the relief sought is only injunctive or  
7 declaratory, the numerosity requirement is somewhat relaxed, and even speculative and  
8 conclusory allegations regarding numerosity are sufficient to permit certification”).

9 Defendant’s claim that AHCCCS received “very few” claims submitted for male  
10 chest reconstruction surgery by putative class members is unpersuasive. The low number  
11 of prior authorization requests for male chest reconstruction surgery by putative class  
12 members is directly related to AHCCCS’s categorical exclusion. That exclusion, at a  
13 minimum, strongly discourages putative class members from seeking prior authorization  
14 for male chest reconstruction surgery. And as a result of the categorical exclusion, there  
15 are also few, if any, surgeons who are qualified to perform this surgery that contract with  
16 AHCCCS, creating an additional barrier to seeking prior authorization. The fact that  
17 AHCCCS has received “very few” claims for male reconstructive surgery is a direct result  
18 of Defendant’s categorical exclusion, and has little, if any, bearing on the number of class  
19 members. Therefore, Defendant’s claim does not contradict Dr. Cronyn’s declaration or  
20 provide a reliable basis for finding that the putative class is too small.

21 Defendant also manufactures critiques of Dr. Cronyn’s clear statement to suggest  
22 that his declaration “requires testing.” For example, Defendant asserts that because “not all  
23 transgender males need, or will even seek, chest reconstruction surgery” Defendant is  
24 entitled to discovery about the patients referred to in Dr. Cronyn’s statement. Defendant  
25 misses the mark. The patients Dr. Cronyn identified as putative class members are those  
26 patients who fall within the class definition (*i.e.* transgender male AHCCCS beneficiaries  
27 for whom male chest reconstruction surgery is medically necessary), excluding transgender  
28 males being treated at El Rio Health Center who are not covered by AHCCCS or for whom

1 that surgery is not medically necessary. And, to the extent that number includes a few  
2 putative class members who now fall outside the age requirements for EPSDT, that  
3 difference is more than made up by the putative class members currently being treated by  
4 other providers in Arizona and by future class members.

5 Although Defendant suggests joinder of putative class members is practicable, she  
6 fails to account for the future class members who are unknown to both parties. “[T]he  
7 presence of future class members renders joinder inherently impractical thus satisfying the  
8 numerosity requirement’s fundamental purpose.” *Inland Empire-Immigrant Youth*  
9 *Collective v. Nielsen*, No. 17-cv-2048, 2018 WL 1061408, at \*7 (C.D. Cal. Feb. 26, 2018);  
10 *Rivera v. Holder*, 307 F.R.D. 539, 550 (W.D. Wash. 2015) (holding a class of 40  
11 undocumented immigrants was sufficiently numerous, “especially given the transient nature  
12 of the class and the inclusion of future class members”); *Nat’l Ass’n of Radiation Survivors*  
13 *v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986) (“[W]here the class includes unnamed,  
14 unknown future members, joinder of such unknown individuals is impracticable and the  
15 numerosity requirement is therefore met, regardless of class size.”).

16 Thus, Plaintiffs have provided evidence that is more than sufficient to support a  
17 finding that they satisfy the numerosity requirement for class certification under Rule 23.  
18 Defendant’s responsive pleading does not justify a contrary conclusion.

19 2. *Defendant waived all other arguments that could have been made in*  
20 *opposition to Plaintiffs’ Motion for Class Certification.*

21 Pursuant to Local Rule 7.2(c), Defendant had until January 25, 2021 to file and serve  
22 her responsive pleading to Plaintiffs’ Motion for Class Certification. On that date,  
23 Defendant filed a motion for bifurcated discovery as her responsive pleading and made no  
24 arguments contesting Plaintiffs’ ability to satisfy the “commonality,” “typicality” and  
25 “adequacy” requirements for class certification. Courts have repeatedly held that failing to  
26 raise an argument in the pleadings constitutes a waiver of those arguments. *See Pac. Dawn*  
27 *LLC v. Pritzker*, 831 F.3d 1166, 1178 n.7 (9th Cir. 2016) (“But the plaintiffs did not raise  
28 that argument to the district court in their ... opposition to the defendants’ motion for

1 summary judgment, so the argument was waived.”); *Avilez v. Pinkerton Gov’t Servs., Inc.*,  
2 596 F. App’x 579 (9th Cir. 2015) (holding that the defendant waived an “argument by not  
3 raising it in opposition to the motion”); *Allergan, Inc. v. Athena Cosmetics, Inc.*, 2012 WL  
4 12903072, at \*2 (C.D. Cal. 2012) (“To the extent any argument was not made in opposition  
5 to the motion, Athena has not presented grounds for why it could not have been earlier  
6 presented. They are thus waived.”); *Garcia v. GMAC Mortg., LLC*, 2009 WL 2782791, at  
7 \*1 (D. Ariz. 2009) (“If an argument is not properly argued and explained, the argument is  
8 waived.”) (citing LRCiv 7.2(c)). If Defendant had any such arguments, those arguments  
9 could have been raised in that responsive pleading, subject to this Court’s decision on  
10 Plaintiffs’ motion and the request Defendant made for bifurcated discovery in the parties’  
11 Rule 26(f) Joint Case Management Report, *see* Doc. 33, 6–8.

12 By failing to timely raise those arguments Defendant conceded that Plaintiffs met  
13 the remaining requirements for class certification.

14 **B. Defendant’s requests for bifurcated discovery lacks merit.**

15 *1. Defendants’ motion should be denied for failing to comply with Local*  
16 *Rule 7.3(b).*

17 Local rules have the “force of law.” *Hollingsworth v. Perry*, 558 U.S. 183, 191  
18 (2010). They “are binding upon the parties and upon the district court[.]” *Prof’l Programs*  
19 *Grp. v. Dep’t of Commerce*, 29 F.3d 1349, 1359 (9th Cir. 1994); *see also* LRCiv 83.3(c).  
20 A party’s failure to follow the local rules, therefore, warrants striking or denying the party’s  
21 request. *See, e.g., Holmes v. Neilson*, No. CV-17-03910, 2019 WL 357770, at \*2 (D. Ariz.  
22 Jan. 29, 2019) (denying a motion to amend complaint that did not comply with LRCiv  
23 7.1(b)); *Casas v. Comm’r of Soc. Sec. Admin.*, No. CV-16-08082, 2017 WL 2222613, at \*1  
24 n.1 (D. Ariz. May 22, 2017) (striking pages in excess of the page limit); *Armstrong v. D.R.*  
25 *Horton*, No. CV-13-239, 2013 WL 12190470, at \*1 (D. Ariz. Mar. 18, 2013) (striking a  
26 second amended complaint that violated LRCiv 7.1(a)(3)). A departure from the local rules  
27 is justified only if the effect is “so slight and unimportant that the sensible treatment is to  
28

1 overlook it.” *Profl Programs*, 29 F.3d at 1353. Departure is not appropriate where  
2 substantial rights are at stake. *Id.*

3 Under Local Rule 7.3(b), “a party moving for an extension of time, whether by  
4 motion or stipulation, must state the position of each other party. If the moving party’s  
5 efforts to determine the position of any other party are unsuccessful, a statement to that  
6 effect must be included in the motion or stipulation.” Prior to filing its responsive briefing,  
7 Defendant did not ask Plaintiffs to stipulate to an extension, let alone seek Plaintiffs’  
8 position on the requested extension. Her motion therefore omits any reference to Plaintiffs’  
9 position or efforts taken to determine Plaintiffs’ position. Thus, Defendant’s motion  
10 violates the plain language of Local Rule 7.3(b) and should be denied.

11 Defendant’s error was neither slight nor unimportant. Defendant asks for a 104-day  
12 extension to file a response to Plaintiffs’ Motion for Class Certification—a brief that was  
13 due on January 25, 2021. Defendant makes this request even though the Court requested  
14 class certification briefing prior to ruling on Defendant’s request for bifurcated discovery.  
15 Defendant’s failure to comply with Local Rule 7.3(b) also injects confusion into the briefing  
16 schedule, in terms of the proper timing of responses and page limits for those pleadings.  
17 That confusion interferes with the undersigned counsel’s ability to develop a strategy to  
18 effectively respond to Defendant’s filings and protect the interests of the D.H., John Doe,  
19 and the putative class.

20 The Defendant’s failure to seek Plaintiffs’ position also deprives the Court of the  
21 benefit of the parties’ discussion. “Making two sides talk can significantly help focus and  
22 clarify disputes, even when one side still has to file a motion at the end of the day.” *Lopez*  
23 *v. Wells Fargo Bank, N.A.*, No. SACV16-1409AG (KESx), 2016 WL 6088257, at \*2 (C.D.  
24 Cal. Oct. 17, 2016) (discussing California’s similar Rule 7-3 and denying party’s motion  
25 based on the failure to satisfy Rule 7-3’s meet and confer requirement). Consultation  
26 consistent with Local Rule 7.3(b), would have given Plaintiffs the opportunity to consider  
27 Defendant’s request for time and for the parties to discuss Plaintiffs’ significant concerns.  
28 Instead, Defendant seeks to impose a drastic and self-serving solution on Plaintiffs and the

1 putative class without consultation or consideration of the Plaintiffs or Court in violation of  
2 Local Rule 7.3(b).

3 Excusing Defendant's failure to comply with the local rules would cause Plaintiffs  
4 and the putative class significant harm. This Court should deny Defendant's requested  
5 relief.

6 2. *Defendant fails to demonstrate any need for bifurcated discovery.*

7 Discovery is not required before ruling on motions for class certification. *Kamm v.*  
8 *Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975). That is particularly true here, where  
9 Plaintiffs—the party carrying the burden of proof—disclaim any need for precertification  
10 discovery. *See, e.g., ABS Entm't, Inc. v. CBS Corp.*, 908 F.3d 405, 426–27 (9th Cir. 2018)  
11 (denying precertification discovery is an abuse of discretion only when “[t]he propriety of  
12 a class action cannot be determined...without discovery” (quoting *Kamm*, 509 F.2d at  
13 210)); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1092–93 (9th Cir. 2011) (same).<sup>1</sup> Here,  
14 in contrast, Plaintiffs have offered evidence that is more than sufficient to establish the  
15 existence of a certifiable class. The need for precertification discovery is even further  
16 diminished here because Plaintiffs seek to certify a class under Rule 23(b)(2) and any  
17 purported dispute is limited to whether Plaintiffs satisfy the numerosity requirement. *See,*  
18 *e.g., Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004); *Morgan v. U.S. Soccer*  
19 *Fed'n, Inc.*, No. 2:19-CV-01717, 2019 WL 7166978, at \*6 (C.D. Cal. Nov. 8, 2019); *Pole*  
20 *v. Estenson Logistics, LLC*, No. 15-cv-07196, 2016 WL 4238635, at \*5 (C.D. Cal. Aug. 10,  
21 2016) (“The numerosity requirement is ‘relaxed’ when injunctive or declaratory relief is  
22 sought. This is largely because the type of relief sought necessarily implicates judicial  
23 economy where a judgment granting an injunction would avoid duplicative suits brought  
24 by other class members.” (citation omitted)). Thus, Defendant's request for bifurcated  
25 discovery lacks merit.

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28 <sup>1</sup> Plaintiffs were unable to find any Ninth Circuit case where a District Court was found to  
have abused its discretion for denying a defendant's request for precertification discovery.

1 This Court already rejected a similar request for precertification discovery by the  
2 State of Arizona in *Toomey v. Arizona*. There, the plaintiff submitted a declaration that he  
3 knew of six class members, a number he supplemented with estimates using demographic  
4 data to demonstrate the class surpassed the threshold of numerosity. The State of Arizona  
5 contested the reliability of that evidence. The magistrate judge found the estimations  
6 sufficiently reliable and recommended that the Court certify the two proposed injunctive  
7 classes. That recommendation was adopted by the Court without objection from either  
8 party. Report & Recommendation (Doc. 105) at 2, 9, *Toomey v. Arizona*, Case No. 4:19-  
9 cv-35 (D. Ariz. May 12, 2020); Order (Doc. 108) at 2 (Jun. 15, 2020) (adopting Judge  
10 Bowman’s Report & Recommendation). Further, courts have previously granted class  
11 certification in challenges to similar exclusions in Medicaid coverage without  
12 precertification discovery. *See, e.g., Flack v. Wisc. Dep’t of Health Servs.*, 331 F.R.D. 361,  
13 368–70 (W.D. Wis. 2019).

14 The cases cited by Defendant do not support bifurcating discovery. In *Briggs v.*  
15 *Montgomery* and *Daniel v. Swift Transportation Corporation*, bifurcation was appropriate  
16 because—in contrast to this case—the defendants had the information the plaintiffs needed  
17 to demonstrate the existence and boundaries of the classes and subclasses they sought to  
18 certify. *See* Parties’ Rule 26(f) Joint Scheduling Report (Doc. 97) at 22, *Briggs v.*  
19 *Montgomery*, Case No. 2:18-cv-2684 (D. Ariz. Aug. 13, 2019); Proposed Case  
20 Management Plan (Doc. 31) at 10, *Daniel v. Swift Transp. Corp.*, Case No. 2:11-cv-01548  
21 (D. Ariz. Jan. 3, 2012) (“The parties have agreed to bifurcate discovery.”) The plaintiffs in  
22 those cases also sought to certify at least one class under Rule 23(b)(3), which imposes  
23 additional notice requirements that further necessitate particularized discovery, *see* Fed. R.  
24 Civ. P. 23(c)(2)(B). Second Amended Complaint (Doc. 110) at 46, *Briggs v. Montgomery*,  
25 Case No. 2:18-cv-2684 (D. Ariz. Sept. 23, 2019); First Amended Complaint (Doc. 19) at  
26 13–17, *Daniel v. Swift Transp. Corp.*, Case No. 2:11-cv-1548 (D. Ariz. Oct. 24, 2011).  
27 Unlike *Briggs* and *Daniel*, Plaintiffs have demonstrated, through Dr. Cronyn’s declaration,  
28 that more than forty class members are current patients at El Rio Health Center in Tucson.

1 That number does not account for the class members who are patients at the Phoenix  
2 Children's Hospital's Gender Support Clinic, or elsewhere in the state, let alone future class  
3 members. As previously noted, *see* Section II.A.1, *supra*, this evidence is more than  
4 sufficient to satisfy Plaintiffs' burden on numerosity and Defendant's attempt to impugn  
5 the veracity of this evidence to create a need for discovery has no merit.

6 Bifurcated discovery is also unnecessary because AHCCCS possesses sufficient  
7 information in its own records to independently determine whether a class exists and  
8 address Plaintiffs' arguments. Instead of searching for prior authorization requests for male  
9 chest reconstruction surgery, a more accurate way for AHCCCS to have ascertained the  
10 approximate size of the class is to identify all transgender males, between ages 13-20, that  
11 are receiving treatment for gender dysphoria. That would have demonstrated that Plaintiffs'  
12 have satisfied the numerosity requirement and that the number of class members is  
13 significantly larger than forty. Plaintiffs should not be prejudiced by the delay of bifurcated  
14 discovery because Defendant already has the information she seeks in her possession and  
15 control but has simply failed to adequately search for it.

16 The practical effect of granting Defendant's request would also prejudice Plaintiffs  
17 and the putative class. Time is of the essence in this litigation, which is why Plaintiffs have  
18 filed a motion for preliminary injunction. Granting the relief Defendant seeks would also  
19 allow her to revive arguments she has already waived to oppose Plaintiffs' Motion for Class  
20 Certification, *supra* Section II.A.2. And, in the event the Court orders a bifurcated  
21 discovery, it would also deny Plaintiffs the opportunity to submit a renewed motion for  
22 class certification that incorporates evidence obtained during precertification discovery.  
23 Each of those outcomes alone would substantially affect the rights of Plaintiffs and the  
24 putative class; their combined effect is highly prejudicial.

25 Finally, as evidenced by the discovery requests attached to Defendant's opposition  
26 to class certification, most of the topics Defendant proposes to explore touch on the merits  
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1 of the legal issues presented in this case,<sup>2</sup> not the sufficiency of Plaintiffs' evidence in  
2 support of class certification. *See Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004–05  
3 (9th Cir. 2018) (noting class certification doesn't require reaching the merits of plaintiff's  
4 claims). Bifurcating fact discovery will lead to duplicative discovery and unnecessarily  
5 delay the resolution of this case to the detriment of the health and wellbeing of Plaintiffs  
6 and the proposed class members.

7 **III. CONCLUSION**

8 The Court should certify the Proposed Class under Rule 23(b)(2) for declaratory and  
9 injunctive relief; designate D.H. and John Doe as class representatives; and designate their  
10 undersigned attorneys at Perkins Coie LLP; King & Spalding LLP, the National Center for  
11 Lesbian Rights, and the National Health Law Program as class counsel.

12  
13 Respectfully submitted,

14 DATED: FEBRUARY 1, 2021

**PERKINS COIE LLP**

*/s/ Janet M. Howe*

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28 <sup>2</sup> Several of Defendant's requests also seek information that exceed the limits of Rule 26(b).  
Plaintiffs reserve any and all permissible objections to Defendant's discovery requests.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 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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