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14 *State of Arizona, Andy Tobin, and Paul Shannon*

15 UNITED STATES DISTRICT COURT  
16 DISTRICT OF ARIZONA

17 Russell B. Toomey,  
18 Plaintiff,  
19 v.  
20 State of Arizona, *et al.*  
21 Defendants.

CV-19-00035-TUC-RM

**DEFENDANTS STATE OF  
ARIZONA’S, ANDY TOBIN’S, AND  
PAUL SHANNON’S  
CONTROVERTING STATEMENT  
OF FACTS IN SUPPORT OF  
OPPOSITION TO PLAINTIFF’S  
MOTION FOR SUMMARY  
JUDGMENT**

22 Pursuant to LRCiv 56.1, Defendants State of Arizona, Andy Tobin, and Paul  
23 Shannon (collectively, “State Defendants”) submit this controverting statement of facts in  
24 support of their Opposition to Plaintiff’s Motion for Summary Judgment.

25 **I. RESPONSE TO PLAINTIFF’S SEPARATE STATEMENT OF FACTS**

- 26 1. Undisputed
- 27 2. Objection; Rule 703. Dr. Schechter does not have experience or training in  
28 the treatment of mental health conditions. (Doc. 300 (Declaration of Christine Wee (“Wee  
Decl.”)), Ex. 1 (Expert Report of Loren Schechter, M.D. (“Schechter Report”)) at ¶¶ 1, 7–  
8.) Disputed. Some transgender persons experience “gender dysphoria.” (Doc. 86  
(Amended Complaint), ¶ 27.) “Gender dysphoria” is the diagnostic term for the clinically  
significant emotional distress experienced as a result of the incongruence of one’s gender  
identity with their sex as determined at birth and bodily developments associated with that

1 sex. (*Id.*) The criteria for diagnosing gender dysphoria are set forth in the Diagnostic and  
2 Statistical Manual of Mental Disorders. (*Id.*; Gender Dysphoria, Diagnostic & Statistical  
3 Manual of Mental Disorders, 5th ed. S2H14.)

4 3. Objection; Rule 703. Dr. Schechter does not have experience or training in  
5 the treatment of mental health conditions. (Doc. 300 (Wee Decl.), Ex. 1 (Schechter Report)  
6 at ¶¶ 1, 7–8.) Disputed. The World Professional Association for Transgender Health  
7 (“WPATH”) standards are not widely accepted or utilized by all providers, and are designed  
8 to be individualized for each patient. (Declaration of Ryan Curtis (“Curtis Decl.”), filed  
9 concurrently, Ex. A (Deposition Transcript of Russell B. Toomey, Ph.D. (“Toomey  
10 Depo.”)) at 20:6–8; *Id.*, Ex. B (Deposition Transcript of Loren Schechter, M.D. (“Schechter  
11 Depo.”)) at 19:20–20:18, 53:3–14.)

12 4. Disputed. Under the State of Arizona’s healthcare plan (the “Plan”), a service  
13 is “Medically Necessary” if it meets “all of the following criteria: (1) Ordered by a  
14 physician; (2) Not more extensive than required to meet the basic health needs; (3)  
15 Consistent with the diagnosis of the condition for which they are being utilized; (4)  
16 Consistent in type, frequency and duration of treatment with scientifically based guidelines  
17 by the medical-scientific community in the United States of America; (5) Required for  
18 purposes other than the comfort and convenience of the patient or provider; (6) Rendered  
19 in the least intensive setting that is appropriate for their delivery; and (7) Have demonstrated  
20 medical value.” (Doc. 296 (Curtis Decl.), Ex. 6 at AZSTATE.010192–93; *see also* Doc. 86  
21 (Amended Complaint), ¶ 34.)

22 5. Disputed. Under the Plan, a service is “Medically Necessary” if it meets “all  
23 of the following criteria: (1) Ordered by a physician; (2) Not more extensive than required  
24 to meet the basic health needs; (3) Consistent with the diagnosis of the condition for which  
25 they are being utilized; (4) Consistent in type, frequency and duration of treatment with  
26 scientifically based guidelines by the medical-scientific community in the United States of  
27 America; (5) Required for purposes other than the comfort and convenience of the patient  
28 or provider; (6) Rendered in the least intensive setting that is appropriate for their delivery;

1 and (7) Have demonstrated medical value.” (Doc. 296 (Curtis Decl.), Ex. 6 at  
2 AZSTATE.010192–93; *see also* Doc. 86 (Amended Complaint), ¶ 34.)

3 6. Disputed. Under the Plan, a service is “Medically Necessary” if it meets “all  
4 of the following criteria: (1) Ordered by a physician; (2) Not more extensive than required  
5 to meet the basic health needs; (3) Consistent with the diagnosis of the condition for which  
6 they are being utilized; (4) Consistent in type, frequency and duration of treatment with  
7 scientifically based guidelines by the medical-scientific community in the United States of  
8 America; (5) Required for purposes other than the comfort and convenience of the patient  
9 or provider; (6) Rendered in the least intensive setting that is appropriate for their delivery;  
10 and (7) Have demonstrated medical value.” (Doc. 296 (Curtis Decl.), Ex. 6 at  
11 AZSTATE.010192–93; *see also* Doc. 86 (Amended Complaint), ¶ 34.) The third-party  
12 insurance administrators utilized by the Arizona Department of Administration (“ADOA”)  
13 in 2018 identified several procedures or treatments that were always considered “cosmetic”  
14 or which are never “medically necessary.” (Curtis Decl., Ex. C (AETTOOM000023–39) at  
15 AETTOOM000031–32; *Id.*, Ex. D (BCBSAZ00002137–52) at BCBSAZ00002140,  
16 BCBSAZ00002148; *Id.*, Ex. E (AZSTATE.153283–96) at AZSTATE.153285–87; *Id.*, Ex.  
17 F (AZSTATE.153297–310) at AZSTATE.153298.)

18 7. Disputed. Under the Plan, a service is “Medically Necessary” if it meets “all  
19 of the following criteria: (1) Ordered by a physician; (2) Not more extensive than required  
20 to meet the basic health needs; (3) Consistent with the diagnosis of the condition for which  
21 they are being utilized; (4) Consistent in type, frequency and duration of treatment with  
22 scientifically based guidelines by the medical-scientific community in the United States of  
23 America; (5) Required for purposes other than the comfort and convenience of the patient  
24 or provider; (6) Rendered in the least intensive setting that is appropriate for their delivery;  
25 and (7) Have demonstrated medical value.” (Doc. 296 (Curtis Decl.), Ex. 6 at  
26 AZSTATE.010192–93; *see also* Doc. 86 (Amended Complaint), ¶ 34.)

27 8. Undisputed.

28 9. Undisputed.

1           10.    Undisputed.

2           11.    Undisputed.

3           12.    Undisputed.

4           13.    Undisputed.

5           14.    Undisputed.

6           15.    Undisputed.

7           16.    Disputed. The Plan defines “Covered Expenses” as “expenses incurred by or  
8 on behalf of a person, if they are incurred after he [or she] becomes insured for these benefits  
9 and prior to the date coverage ends.” (Doc. 296 (Curtis Decl.), Ex. 6 at AZSTATE.010121.)  
10 “Covered Expenses” are available to Plan participants “only if: (1) they are Medically  
11 Necessary and not specifically excluded in this Article or any other Article; and (2) Pre-  
12 Certification/Prior Authorization is obtained from the Plan by the Member or provider, for  
13 those services that require Pre-Certification/prior Authorization.” (*Id.*, Ex. 6 at  
14 AZSTATE.010121; *see also id.*, Ex. 6 at AZSTATE.010186 (“COVERED SERVICE shall  
15 mean a service which is Medically Necessary and eligible for payment under the Plan.”).)  
16 Under the Plan, a service is “Medically Necessary” if it meets “all of the following criteria:  
17 (1) Ordered by a physician; (2) Not more extensive than required to meet the basic health  
18 needs; (3) Consistent with the diagnosis of the condition for which they are being utilized;  
19 (4) Consistent in type, frequency and duration of treatment with scientifically based  
20 guidelines by the medical-scientific community in the United States of America; (5)  
21 Required for purposes other than the comfort and convenience of the patient or provider;  
22 (6) Rendered in the least intensive setting that is appropriate for their delivery; and (7) Have  
23 demonstrated medical value.” (*Id.*, Ex. 6 at AZSTATE.010192–93; *see also* Doc. 86  
24 (Amended Complaint), ¶ 34.) The Plan also contains several Exclusions and Limitations.  
25 (Doc. 296 (Curtis Decl.), Ex. 6 at AZSTATE.01048–51.)

26           17.    Undisputed.

27           18.    Undisputed.

28           19.    Undisputed.

1           20. Disputed. ADOA only removed exclusions from the Plan if it was legally  
2 required or if the revision would not increase the cost of the Plan. (*See id.*, Ex. 10 (Bender  
3 Depo.) at 116:24–117:9, 167:12-24.)

4           21. Disputed. ADOA only removed exclusions from the Plan if it was legally  
5 required or if the revision would not increase the cost of the Plan. (*Id.*)

6           22. Undisputed.

7               a. Undisputed

8               b. Undisputed

9               c. Undisputed.

10          23. Undisputed

11               a. Undisputed.

12               b. Objection; Rule 1002. Disputed. In 2014, ADOA removed an  
13 exclusion for laproscopic sleeve gastrectomy based on  
14 recommendations from its insurance administrators. (Curtis Decl., Ex.  
15 G (Deposition Transcript of Marie Isaacson (“Isaacson Depo.”)) at  
16 98:16–99:25, 100:16–101:25.) The laproscopic sleeve gastrectomy  
17 resulted in fewer surgical complications. (*Id.*, 136:16–137:5.) ADOA  
18 completed a cost analysis for coverage of laproscopic sleeve  
19 gastrectomy. (*See id.*, 138:11–14, 190:3–10.)

20               c. Undisputed.

21               d. Objection; Rule 701.

22               e. Objection; Rule 1002. Disputed. From 2015-2021, ADOA removed  
23 only five exclusions for treatments or services from the Plan: 2015—  
24 compression garments for treatment of burns; 2017—manipulations  
25 under anesthesia, counseling and hormone therapy for the treatment of  
26 gender dysphoria; 2018—midwife services; 2021—treatment for  
27 benign gynecomastia. (Doc. 294 (Declaration of Paul Shannon  
28 (“Shannon Decl.”)) at ¶ 5.) ADOA did not remove an exclusion for 3D

1                   mammograms; rather, ADOA’s insurance administrators revised their  
2                   coverage guidelines to recognize 3D mammograms as not  
3                   experimental. (Curtis Decl., Ex. H (Deposition Transcript of Scott  
4                   Bender (“Bender Depo.”)) at 117:10–118:17.) Coverage for 3D  
5                   mammograms did not add cost to the Plan. (*Id.* at 124:5–14.)

6                   f. Objection; Rule 701.

7                   g. Objection; Rule 1002. Disputed. ADOA completed a cost analysis for  
8                   coverage of the new hepatitis-C drug. (*Id.*, Ex. I (Deposition of  
9                   Elizabeth Schafer (“Schafer Depo.”)) at 161:8–162:10.) The hepatitis-  
10                  C drug cures a person from the disease. (*Id.*) As a result, by approving  
11                  the hepatitis-C drug, ADOA significantly reduced the cost of future  
12                  healthcare claims from that member. (*Id.*)

13                  24. Undisputed.

14                  25. Undisputed.

15                  26. Disputed. Transgender persons can receive coverage for medically-necessary  
16                  surgeries under the Plan, including for all the same medically necessary reasons for which  
17                  a cisgender person could receive coverage for a surgery under the Plan. (*See* Doc. 296  
18                  (Curtis Decl.), Ex. 1 (Toomey Depo.) at 75:14–20, 98:4–8, 121:22–122:2, 168:8–13.)

19                  27. Disputed. The term “gender reassignment surgery” encompasses multiple  
20                  surgeries. (*Id.*, Ex. 2 (Schechter Depo.) at 79:24-80:7, 84:22-85:19, 87:1-6.) Many of those  
21                  surgeries would not be performed on a cisgender person. (*See id.*, Ex. 2 (Schechter Depo.)  
22                  at 103:5-9, 105:15-18, 113:15-21.) Many other of those surgeries would not be eligible for  
23                  coverage under the Plan because they are cosmetic. (*See id.*, Ex. 6 at AZSTATE.010149;  
24                  *id.*, Ex. 2 (Schechter Depo.) at 29:8-19, 35:4-10, 35:24-36:5.)

25                  a. Objection; Rule 703. Dr. Schechter testified that gynecologists  
26                  perform hysterectomies. (Curtis Decl., Ex. B (Schechter Depo.) at  
27                  67:12–20.) Dr. Schechter’s only experience with performing  
28                  hysterectomies is in the context of medical research into uterine

1 transplants. (*Id.* at 64:20–67:11.)

2 b. Undisputed.

3 c. Disputed. Some surgical procedures of the genitalia would not be  
4 performed on a cisgender person. (*See* Doc. 296 (Curtis Decl.), Ex. 2  
5 (Schechter Depo.) at 103:5-9, 105:15-18, 113:15-21.)

6 28. Disputed. Under the Plan, a service is “Medically Necessary” if it meets “all  
7 of the following criteria: (1) Ordered by a physician; (2) Not more extensive than required  
8 to meet the basic health needs; (3) Consistent with the diagnosis of the condition for which  
9 they are being utilized; (4) Consistent in type, frequency and duration of treatment with  
10 scientifically based guidelines by the medical-scientific community in the United States of  
11 America; (5) Required for purposes other than the comfort and convenience of the patient  
12 or provider; (6) Rendered in the least intensive setting that is appropriate for their delivery;  
13 and (7) Have demonstrated medical value.” (*Id.*, Ex. 6 at AZSTATE.010192–93; *see also*  
14 Doc. 86 (Amended Complaint), ¶ 34.)

15 29. Undisputed.

16 30. Objection; Rule 703. Dr. Schechter does not have training or experience with  
17 billing insurers for reimbursement of surgical procedures. (Doc. 300 (Wee Decl.), Ex. 1  
18 (Schechter Report) at ¶¶ 1, 7–8.) Disputed. Certain CPT codes do identify treatments for  
19 transgender individuals. (Curtis Decl., Ex. C (AETTOOM000023–39) at  
20 AETTOOM000030, AETTOOM000033; *Id.*, Ex. E (AZSTATE.153283–96) at  
21 AZSTATE.153285, AZSTATE.153290; *Id.*, Ex. F (AZSTATE.153297–310) at  
22 AZSTATE.153302.) In addition, CPT codes are submitted with ICD-10 diagnosis codes  
23 that identify gender dysphoria as the diagnosis. (*Id.* Ex. C (AETTOOM000023–39) at  
24 AETTOOM000032; *Id.*, Ex. E (AZSTATE.153283–96) at AZSTATE.153291–92; *Id.*, Ex.  
25 F (AZSTATE.153297–310) at AZSTATE.153303.)

26 31. Undisputed.

27 32. Disputed. In the past, both public and private institutions excluded healthcare  
28 coverage for gender dysphoria on the rationale that such treatments were cosmetic or

1 experimental. (*See* Doc. 86 (Amended Complaint), ¶ 3; Doc. 296 (Curtis Decl.), Ex. 1  
2 (Toomey Depo.) at 146:3–13.) At that time, the State copied the plan document and terms  
3 previously provided by its insurance companies, including Cigna. (*Id.*, Ex. 8 (Isaacson  
4 Depo.) at 195:16–20, 197:7–15, 200:11–15.)

5 a. Undisputed.

6 b. Undisputed.

7 c. Undisputed.

8 d. Undisputed.

9 33. Undisputed.

10 34. Undisputed.

11 35. Undisputed.

12 36. Undisputed.

13 37. Undisputed.

14 38. Undisputed.

15 39. Undisputed.

16 40. Objection; Rules 701, 702.

17 a. Objection; Rules 802, 701, 702.

18 b. Objection; Rules 701, 702.

19 c. Undisputed.

20 d. Objection; Rules 701, 702. Disputed. Cost weighed into most  
21 decisions by ADOA. (*Id.*, Ex. 9 (Shannon Depo.) at 128:22–129:22;  
22 *id.*, Ex. 13 (Schafer Depo.) at 83:7-10, 101:19–102:2.) Cost was one  
23 of the most important factors in decisions regarding the Plan. (*See id.*,  
24 Ex. 10 (Bender Depo.) at 56:2–10, 58:4–14; *id.*, Ex. 9 (Shannon Depo.)  
25 at 128:22–129:22.)

26 e. Undisputed.

27 41. Undisputed.

28 42. Undisputed.

- 1           43.    Undisputed.
- 2                    a.    Objection; Rule 802.
- 3                            i.    Objection; Rule 802.
- 4                    b.    Objection; Rule 802.
- 5                            i.    Objection; Rule 802.
- 6                            ii.   Objection; Rule 802.
- 7           44.    Undisputed.
- 8           45.    Undisputed.
- 9           46.    Undisputed.
- 10          47.    Undisputed.
- 11          48.    Undisputed.
- 12          49.    Undisputed.
- 13          50.    Undisputed.
- 14          51.    Disputed. ADOA made the decision to maintain the Exclusion in order to
- 15 minimize increased costs to the Plan and because it believed that the modified exclusion
- 16 was legal.<sup>1</sup> (*Id.*, Ex. 10 (Bender Depo.) at 167:12-24.)
- 17          52.    Undisputed.
- 18          53.    Undisputed.
- 19          54.    Undisputed.
- 20          55.    Disputed. ADOA consults with the Governor’s Office regarding proposed
- 21 revisions to the Plan. (*Id.*, Ex. 8 (Isaacson Depo.) at 119:11–120:15; *id.*, Ex. 10 (Bender
- 22 Depo.) at 71:7–11, 81:4–20.) The Governor’s Office was always involved in determining
- 23 the contribution strategy for the Plan. (Curtis Decl., Ex. G (Deposition Transcript of Marie
- 24 Isaacson (“Isaacson Depo.”)) at 120:1-15.)
- 25                    a.    Undisputed.
- 26                    b.    Undisputed.

27 \_\_\_\_\_

28 <sup>1</sup> Pursuant to this Court’s Order (Doc. 278 (Order granting Motion for Reconsideration)), State Defendants will not argue that their good-faith understanding of the law is a defense in this litigation.

- 1 c. Undisputed.
- 2 56. Objection; Rule 402.
- 3 57. Objection; Rule 402.
- 4 58. Objection; Rule 402. Disputed. Mr. Meisner testified that he relied on several  
5 sources for the 2019 Analysis, including a Pew Research study. (*Id.*, Ex. I (Deposition  
6 Transcript of Michael Meisner (“Meisner Depo.”) at 224:3–229:23.)
- 7 59. Objection; Rule 402.
- 8 60. Objection; Rule 402.
- 9 61. Objection; Rule 402.
- 10 62. Objection; Rule 402.
- 11 63. Objection; Rule 402.
- 12 64. Undisputed.
- 13 65. Undisputed.
- 14 66. Undisputed.
- 15 67. Undisputed.
- 16 68. Undisputed.
- 17 69. Disputed. BCBS initially notified Dr. Toomey’s healthcare provider that the  
18 hysterectomy would be “covered 100% after a \$100 co-pay.” (Doc. 296 (Curtis Decl.), Ex.  
19 3 (TOOMEY000378–79).) On August 10, 2018, after Dr. Toomey contacted BCBS to  
20 notify BCBS that the sought hysterectomy was for the treatment of gender dysphoria, BCBS  
21 denied pre-authorization for the requested hysterectomy based on the Exclusion. (*Id.*, Ex. 3  
22 (TOOMEY000378–79); *id.*, Ex. 4 (Transcript of Phone Call between Plaintiff and BCBS)  
23 at 3:7–24; *see also* Doc. 86 (Amended Complaint), ¶ 43 & Ex. G; Doc. 296 (Curtis Decl.),  
24 Ex. 5 (Plaintiff’s Amended Initial Discovery Responses (“MIDR”)) at 13:11–14.)
- 25 70. Disputed. Dr. Toomey contacted BCBS in order to obtain a denial letter that  
26 could be used as evidence in this litigation. (Curtis Decl., Ex. A (Toomey Depo.) at 62:16–  
27 22.)
- 28 71. Disputed. In 2018, the third-party insurance administrators utilized by ADOA

1 had coverage guidelines to determine when a requested procedure would be covered under  
 2 their insurance plans. (*Id.*, Ex. C (AETTOOM000023–39); *Id.*, Ex. D (BCBSAZ00002137–  
 3 52); *Id.*, Ex. E (AZSTATE.153283–96); *Id.*, Ex. F (AZSTATE.153297–310).) Under the  
 4 Plan, a service is “Medically Necessary” if it meets “all of the following criteria: (1) Ordered  
 5 by a physician; (2) Not more extensive than required to meet the basic health needs; (3)  
 6 Consistent with the diagnosis of the condition for which they are being utilized; (4)  
 7 Consistent in type, frequency and duration of treatment with scientifically based guidelines  
 8 by the medical-scientific community in the United States of America; (5) Required for  
 9 purposes other than the comfort and convenience of the patient or provider; (6) Rendered  
 10 in the least intensive setting that is appropriate for their delivery; and (7) Have demonstrated  
 11 medical value.” (Doc. 296 (Curtis Decl.), Ex. 6 at AZSTATE.010192–93; *see also* Doc. 86  
 12 (Amended Complaint), ¶ 34.)

13 72. Undisputed.

14 73. Undisputed.

15 74. Disputed. ADOA made the decision to maintain the Exclusion in order to  
 16 minimize increased costs to the Plan and because it believed that the modified exclusion  
 17 was legal.<sup>2</sup> (Doc. 296 (Curtis Decl.), Ex. 10 (Bender Depo.) at 167:12-24.)

18 **II. ADDITIONAL FACTS THAT ESTABLISH A GENUINE ISSUE OF**  
 19 **MATERIAL FACT**

20 **A. Gender Dysphoria and Plaintiff’s Request for Surgery**

21 75. If a transgender person experiences “gender dysphoria,” the person may seek  
 22 medical treatment, including “gender reassignment surgery.” (Doc. 86 (Amended  
 23 Complaint), ¶¶ 27–28.)

24 76. In 2018, Dr. Toomey was enrolled in the Plan. (*Id.*, ¶ 33.)

25 77. In 2018, Dr. Toomey’s healthcare coverage claims under the Plan were  
 26 administered by BlueCrossBlueShield of Arizona (“BCBS”). (*Id.*)

27 \_\_\_\_\_  
 28 <sup>2</sup> Pursuant to this Court’s Order (Doc. 278), State Defendants will not argue that their good-faith understanding of the law is a defense in this litigation.

1           78. In July 2018, Dr. Toomey requested a hysterectomy from his physician to  
2 treat his gender dysphoria. (*See id.*, ¶ 39 & Ex. G.)

3           79. Dr. Toomey could potentially receive coverage for a hysterectomy under the  
4 Plan for other medically-necessary reasons. (*See* Doc. 296 (Curtis Decl.), Ex. 1 (Toomey  
5 Depo.) at 75:14–20, 98:4–8, 121:22–122:2, 168:8–13.)

6           80. The Plan provides coverage for hysterectomies for other conditions and  
7 diagnoses, including cancer. (*See generally id.*, Ex. 6 (AZSTATE.010093).)

8           81. Dr. Toomey can receive coverage for a hysterectomy for all the same  
9 medically necessary reasons for which a cisgender female could receive coverage for a  
10 hysterectomy under the Plan. (*Id.*, Ex. 1 (Toomey Depo.) at 75:14–20, 98:4–8, 121:22–  
11 122:2.) For example, Dr. Toomey indicated that he has received abnormal pap smear results,  
12 which could justify coverage for a hysterectomy under the Plan. (*See id.* at 40:2–11, 49:25–  
13 50:2, 50:20–24.) In addition, Dr. Toomey may be eligible for coverage for a hysterectomy  
14 under the Plan to treat an increased risk of cervical, uterine, or ovarian cancers due to his  
15 long-term hormone treatment for gender dysphoria. (*See id.* at 49:4–21, 75:1–3).

16           82. Not all transgender persons want or receive “gender reassignment surgery.”  
17 (*Id.* at 124:16–18; *id.*, Ex. 2 (Schechter Depo.) at 30:12-16, 32:1-12, 39:1–5.)

18           **B. Process for Revising the Plan**

19           83. ADOA reevaluates its plan design every year. (*Id.*, Ex. 10 (Deposition of  
20 Scott Bender (“Bender Depo.”)) at 37:11-23.)

21           84. When reevaluating its plan design, ADOA considered:

- 22           a. Recommendations from its insurance vendors (*Id.*, Ex. 8 (Isaacson  
23 Depo.) at 100:1–5; *Id.*, Ex. 9 (Deposition of Paul Shannon (“Shannon  
24 Depo.”)) at 124:1-21; *Id.*, Ex. 11 (Deposition Transcript of Kelly  
25 Sharritts (“Sharritts Depo.”)) at 56:11–14; *Id.*, Ex. 12 (Deposition  
26 Transcript of Craig Brown (“Brown Depo.”)) at 178:24-179:19);  
27           b. Market trends (*Id.*, Ex. 13 (Schafer Depo.) at 54:8–14; *Id.*, Ex. 10  
28 (Bender Depo.) at 41:18–42:7; *Id.*, Ex. 14 (Deposition of Yvette

- 1 Medina (“Medina Depo.”) at 84:15–85:1);
- 2 c. Interests of the Plan members (*Id.*, Ex. 13 (Schafer Depo.) at 54:15–
- 3 20; *Id.*, Ex. 11 (Sharritts Depo.) at 149:25–150:10; *Id.*, Ex. 10 (Bender
- 4 Depo.) at 37:24–38:9);
- 5 d. Cost (*Id.*, Ex. 9 (Shannon Depo.) at 124:1-21; *Id.*, Ex. 13 (Schafer
- 6 Depo.) at 53:10-12, 55:9–14, 101:19–102:2; *Id.*, Ex. 10 (Bender
- 7 Depo.) at 37:24–38:9);
- 8 e. Legal requirements (*Id.*, Ex. 9 (Shannon Depo.) at 124:1-21); and
- 9 f. Clinical effectiveness (*Id.*).

10 85. Of these, cost is one of the most important factors. (*See id.*, Ex. 10 (Bender  
11 Depo.) at 56:2–10, 58:4–14; *Id.*, Ex. 9 (Shannon Depo.) at 128:22–129:22.)

12 86. ADOA conducted annual meetings with the medical directors of its insurance  
13 vendors to discuss potential revisions to the Plan design. (*Id.*, Ex. 10 (Bender Depo.) at  
14 103:12–104:6; *Id.*, Ex. 9 (Shannon Depo.) at 138:16–24.)

15 87. ADOA did not often remove exclusions from the Plan. (*Id.*, Ex. 10 (Bender  
16 Depo.) at 116:24–117:9.)

17 **C. History of the Exclusion**

18 **1. Origination of the Exclusion**

19 88. Prior to 2004, ADOA provided health insurance to State employees through  
20 a fully-insured health insurance plan provided by Cigna. (*Id.*, Ex. 15 (AZSTATE.244065)  
21 at AZSTATE.244071.)

22 89. That plan document included an exclusion for “transsexual surgery including  
23 medical or psychological counseling and hormonal therapy in preparation for, or subsequent  
24 to, any such surgery.” (*See id.*, Ex. 16 (AZSTATE.010905) at AZSTATE.010973.)

25 90. In October 2004, the State instituted a self-funded health insurance plan. (*Id.*,  
26 Ex. 15 at AZSTATE.244071.)

27 **2. The 2017 Expansion of Coverage for Transgender Persons**

28 91. In 2015, the majority of ADOA’s insurance vendors did not provide coverage

1 for transgender benefits. (*Id.*, Ex. 8 (Isaacson Depo.) at 26:13–17, 29:15–19; *Id.*, Ex. 14  
2 (Medina Depo.) at 119:17–120:4; *Id.*, Ex. 18 (AZSTATE.006325); *Id.*, Ex. 19  
3 (AZSTATE.006198); *Id.*, Ex. 20 (AZSTATE.006129); *see also id.*, Ex. 7 (Deposition of  
4 Joan C. Barrett (“Barrett Depo.”)) at 28:1–6.)

5 92. On September 8, 2015, the United States Department of Health and Human  
6 Services (“HHS”) issued a proposed rule on Section 1557 of the Affordable Care Act  
7 (“ACA”). (Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 92, 54172-  
8 01 (September 8, 2015).)

9 93. ADOA contacted its insurance vendors to research how the proposed rule  
10 would affect that Plan. (Doc. 296 (Curtis Decl.), Ex. 21 (AZSTATE.000637).)

11 94. ADOA also considered the cost of removing the exclusion for transgender  
12 benefits. (*Id.*, Ex. 8 (Isaacson Depo.) at 30:6-13; *Id.*, Ex. 13 (Schafer Depo.) at 102:23–25;  
13 *Id.*, Ex. 11 (Sharritts Depo.) at 78:14-20.

14 95. Providing coverage for transgender benefits under the Plan would increase  
15 costs to the Plan. (*See id.*, Ex. 22 (AZSTATE.006095); *Id.*, Ex. 20 (AZSTATE.006129);  
16 *Id.*, Ex. 23 (ABOR-TOOMEY003459); *Id.*, Ex. 7 (Barrett Depo.) at 103:3-6.) ADOA’s  
17 contemporaneous cost analyses indicated that removing the Exclusion would add \$130,000-  
18 \$582,000 in annual costs to the Plan. (*Id.*, Ex. 24 (AZSTATE.151707); *Id.*, Ex. 22  
19 (AZSTATE.006095).)

20 96. It is unknown how many Plan members are transgender, how many would  
21 seek “gender reassignment surgery,” or what specific surgical procedures transgender Plan  
22 participants would seek. (*See id.*, Ex. 10 (Bender Depo.) at 158:7–159:1; *Id.*, Ex. 24  
23 (AZSTATE.151707).)

24 97. ADOA also reviewed whether other states and governmental entities provided  
25 coverage for gender reassignment surgery for their employees. (*Id.*, Ex. 25  
26 (AZSTATE.004345); *Id.*, Ex. 8 (Isaacson Depo.) at 60:25-61:4.)

27 98. HHS issued its final rule on Section 1557 on May 18, 2016 (the “2016  
28 Rules”). (Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 96, 31376

1 (May 18, 2016) (codified at 45 C.F.R. pt. 92).)

2 99. Again, ADOA contacted its insurance vendors to research how the 2016  
3 Rules would affect the Plan. (Doc. 296 (Curtis Decl.), Ex. 26 (AZSTATE.005674); *Id.*, Ex.  
4 27 (AZSTATE.136334); *Id.*, Ex. 28 (AZSTATE.009210).)

5 100. ADOA also reviewed publicly available information about the 2016 Rules,  
6 including news bulletins. (*Id.*, Ex. 29 (AZSTATE.005677).)

7 101. In March and September 2016, ADOA discussed coverage of gender  
8 reassignment surgery with the medical directors of its insurance vendors. (*Id.*, Ex. 30  
9 (AZSTATE.000385); *Id.*, Ex. 31 (AZSTATE.144146).) This discussion included the cost  
10 associated with coverage for gender reassignment surgery. (*Id.*)

11 102. ADOA’s consideration of coverage for transgender benefits was no different  
12 than its consideration of other procedures or conditions. (*See id.*, Ex. 9 (Shannon Depo.) at  
13 231:20–24; *Id.*, Ex. 11 (Sharritts Depo.) at 90:24-91:12.)

14 103. Ultimately, ADOA decided to expand coverage for transgender benefits  
15 under the Plan—removing the exclusion for hormone therapy and medical or psychological  
16 counseling—effective for the Plan year beginning January 1, 2017. (*See id.*, Ex. 6 at  
17 AZSTATE.01049.)

18 104. Beginning in plan year 2017, the Plan only excludes “gender reassignment  
19 surgery” and does not exclude counseling or hormone therapy for gender dysphoria. (*Id.*)

20 105. No one at ADOA has expressed a negative opinion about transgender persons.  
21 (*Id.*, Ex. 9 (Shannon Depo.) at 98:1–5, 224:12–15, 243:24–244:9; *Id.*, Ex. 13 (Schafer  
22 Depo.) at 181:9–20, 184:10–185:7, 185:24–186:6; *Id.*, Ex. 10 (Bender Depo.) at 98:19-21,  
23 286:9-14.)

24 106. No one at the Governor’s Office has expressed a negative opinion about  
25 transgender persons. (*See Id.*, Ex. 8 (Isaacson Depo.) at 43:4-6; *Id.*, Ex. 9 (Shannon Depo.)  
26 at 224:16–21, 243:24–244:9; *Id.*, Ex. 32 (Deposition of Christina Corieri (“Corieri Depo.”)  
27 at 55:21–56:8.)

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**D. The State’s Cost Concerns**

107. In 2016, the State had a large budget deficit. (*Id.*, Ex. 33 (FY 2016 JLBC Baseline Summary); *see also id.*, Ex. 32 (Corieri Depo.) at 35:12–36:10.)

108. Cost reductions and efficiencies are one of the State’s primary focuses. (*Id.*, Ex. 12 (Brown Depo.) at 47:20–49:4.)

109. In 2016, the Plan’s expenses exceeded its revenues, and ADOA had to pay Plan expenses from a reserve fund. (*Id.*, Ex. 15 at AZSTATE.244074–75.)

110. In 2017, the Plan’s expenses exceeded its revenues, and ADOA had to pay Plan expenses from a reserve fund. (*Id.*, Ex. 34 (AZSTATE.244113) at AZSTATE.244121–23.)

111. When there is an increase to the Plan, ADOA must increase employee premiums. (*Id.*, Ex. 8 (Isaacson Depo.) at 331:11–13.)

DATED this 26th day of October, 2022.

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