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*Attorneys for Plaintiff Russell B. Toomey*

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

Russell B. Toomey,  
Plaintiff,  
v.  
State of Arizona; Arizona Board of Regents,  
D/B/A University of Arizona, a governmental  
body of the State of Arizona; et al.,  
Defendants.

Case No.19-cv-00035-TUC-RM (LAB)

**MOTION TO CORRECT A  
CLERICAL ERROR IN  
PLAINTIFF’S COUNTERVAILING  
STATEMENT OF FACTS AND TO  
FILE EXHIBIT UNDER SEAL**

1 Plaintiff Dr. Russell B. Toomey, on behalf of himself and the certified classes (“Dr.  
2 Toomey”), submits the following unopposed Motion to Correct a Clerical Error in Plaintiff’s  
3 Countervailing Statement of Facts and to File an Exhibit Under Seal (the “Motion”).

4 A clerical error has come to Dr. Toomey’s attention. A paragraph number was  
5 inadvertently skipped in Dr. Toomey’s Countervailing Statement of Facts to Defendants’  
6 Separate Statement of Facts in Support of Motion For Summary Judgment (Docs. 322 and  
7 330) (“Plaintiff’s Countervailing SOF”).<sup>1</sup>

8 Attached as Exhibit A is a corrected version of Plaintiff’s Countervailing SOF, which  
9 has been redacted (as was the originally filed document) to the extent it cites purportedly  
10 Confidential Information. Pursuant to Local Rule of Civil Procedure 5.6 and the Stipulated  
11 Protective Order (Doc. 165), Dr. Toomey hereby moves this Court for an order directing the  
12 Clerk to file under seal an unredacted copy of Exhibit A, Plaintiff’s corrected Countervailing  
13 SOF. Per Paragraph 9 of the Stipulated Protective Order, “[b]efore any . . . documents which  
14 are designated as Confidential Information are filed with the Court for any purpose, the party  
15 seeking to file such materials must seek permission of the Court to file the materials under  
16 seal.” (Doc. 165)

17 Respectfully submitted this 16th day of December, 2022.

18 ACLU FOUNDATION OF ARIZONA

19 By /s/Christine K. Wee

20 Christine K. Wee

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<sup>1</sup> The clerical numbering error was included in both the redacted version (Doc. 322) and the sealed, unredacted version (Doc. 330) of Plaintiff’s Countervailing SOF.

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certified classes*

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 16, 2022, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

/s/ Christine K. Wee  
Christine K. Wee

# **EXHIBIT A**

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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona, *et al.*

Defendants.

CV-19-00035-TUC-RM

**PLAINTIFF RUSSELL B.  
TOOMEY’S COUNTERVAILING  
STATEMENT OF FACTS TO  
DEFENDANTS’ SEPARATE  
STATEMENT OF FACTS IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

Plaintiff Russell B. Toomey (“Plaintiff” or “Mr. Toomey”) submits the following Countervailing Statement of Facts (“PCSOF”) to Defendant State of Arizona’s (the “State”), Andy Tobin’s, and Paul Shannon’s (collectively, the “Defendants”) Separate Statement of Facts in Support of Motion for Summary Judgment (“Defendants’ SOF”) (Doc. 295).

**Gender Dysphoria and Plaintiff’s Request for Surgery**

1. **Defendants’ Assertion:** Plaintiff Russell B. Toomey, Ph.D. is employed as an Associate Professor at the University of Arizona. (Doc. 86 (Amended Complaint), ¶ 4.)

**Plaintiff’s Response:** Undisputed.

2. **Defendants’ Assertion:** As an employee of the State of Arizona (the “State”), Dr. Toomey is eligible for health coverage through a self-funded health insurance plan (the “Plan”) administered by the Arizona Department of Administration (“ADOA”). (*See id.*, ¶ 1.)

**Plaintiff’s Response:** Undisputed.

3. **Defendants’ Assertion:** In 2018, Dr. Toomey was enrolled in the Plan. (*See id.*, ¶ 33.) In 2018, Dr. Toomey’s health coverage claims under the Plan were administered by BlueCrossBlueShield of Arizona (“BCBS”). (*Id.*)

**Plaintiff’s Response:** Undisputed. However, Plaintiff clarifies that the correct record cite is Doc. 86 (Amended Complaint) ¶¶ 32, 43.

1           4.     **Defendants’ Assertion:** Dr. Toomey is a transgender man who has been  
2 diagnosed with “gender dysphoria.” (*See id.*, ¶¶ 4, 38; Declaration of Ryan Curtis (“Curtis  
3 Decl.”), filed concurrently, at Ex. 1 (Deposition of Russell B. Toomey, Ph.D. (“Toomey  
4 Depo.”)) at 18:11-14.)

5                     **Plaintiff’s Response:** Undisputed.

6           5.     **Defendants’ Assertion:** A transgender man is a natal female who has a male  
7 gender identity. (*See* Doc. 86 (Amended Complaint), ¶ 25.)

8                     **Plaintiff’s Response:** Disputed. The cited paragraph of the amended  
9 complaint states: “Transgender men are men who were assigned “female” at birth, but have  
10 a male gender identity.” The term “natal female” does not reflect current terminology  
11 among health care professionals.

12           6.     **Defendants’ Assertion:** Transgender persons may experience “gender  
13 dysphoria.” (Doc. 86 (Amended Complaint), ¶ 27.) “Gender dysphoria” is the diagnostic  
14 term for the clinically significant emotional distress experienced as a result of the  
15 incongruence of one’s gender identity with their assigned sex and bodily developments  
16 associated with that sex. (*Id.*; *see also* Curtis Decl., Ex. 2 (Deposition of Loren Schechter,  
17 M.D. (“Schechter Depo.”)) at 31:8- 13.) The criteria for diagnosing gender dysphoria are  
18 set forth in the Diagnostic and Statistical Manual of Mental Disorders (“DSM-V”). (*Id.*;  
19 Gender Dysphoria, Diagnostic & Statistical Manual of Mental Disorders, 5th ed. S2H14.)  
20 If a transgender person experiences “gender dysphoria,” he or she may seek medical  
21 treatment, including “gender reassignment surgery.” (Doc. 86 (Amended Complaint), ¶¶  
22 27–28.)

23                     **Plaintiff’s Response:** Undisputed.

24           7.     **Defendants’ Assertion:** In July 2018, Dr. Toomey requested a hysterectomy  
25 from his physician to treat his gender dysphoria. (*See* Doc. 86 (Amended Complaint), ¶ 39  
26 & Ex. G.)

1           **Plaintiff’s Response:** Disputed. The cited paragraph at exhibit of the  
2 Amended Complaint reflects that Dr. Toomey’s physician recommended that he receive a  
3 hysterectomy as a medically necessary treatment for his gender dysphoria, not that Dr.  
4 Toomey “requested” it. *See* Doc. 86 (Amended Complaint), ¶ 39 & Ex. G.

5           8.       **Defendants’ Assertion:** BCBS initially notified Dr. Toomey’s healthcare  
6 provider that the hysterectomy would be “covered 100% after a \$100 co-pay.” (Curtis  
7 Decl., at Ex. 3 (TOOMEY000378–79).)

8           **Plaintiff’s Response:** Undisputed.

9           9.       **Defendants’ Assertion:** On August 10, 2018, after Dr. Toomey contacted  
10 BCBS to notify BCBS that the sought hysterectomy was for the treatment of gender  
11 dysphoria, BCBS denied pre- authorization for the requested hysterectomy based on an  
12 exclusion for “gender reassignment surgery.” (*Id.*; Curtis Decl., Ex. 4 (Transcript of Phone  
13 Call between Plaintiff and BCBS) at 3:7–24; *see also* Doc. 86 (Amended Complaint), ¶ 43  
14 & Ex. G; Curtis Decl., Ex. 5 (Plaintiff’s Amended Initial Discovery Responses (“MIDR”))  
15 at 13:11–14.)

16           **Plaintiff’s Response:** Plaintiff does not dispute the facts in Paragraph 9, but  
17 clarifies that the reason Dr. Toomey informed BCBS about the exclusion was to later avoid  
18 having a large medical bill sent after the surgery, once BCBS realized the reason for the  
19 surgery was for treatment of gender dysphoria. *Wee* Decl., Ex. 29 (Toomey Depo. Tr.) at  
20 26:20-27:6.<sup>1</sup>

21           10.       **Defendants’ Assertion:** Although BCBS denied Dr. Toomey’s request for  
22 pre-authorization, Dr. Toomey could potentially receive coverage for a hysterectomy under  
23 the Plan for other medically-necessary reasons. (*See* Curtis Decl., Ex. 1 (Toomey Depo.)  
24 at 75:14–20, 98:4–8, 121:22–122:2, 168:8–13.)

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26 <sup>1</sup> For references to Exhibits to the Wee Declaration, Exhibits 1-28 refer to the Exhibits filed  
27 alongside Doc. 300, the Wee Declaration accompanying Plaintiff’s Motion for Summary  
28 Judgment, and Exhibits 29-49 refer to the Exhibits attached to the Wee Declaration filed  
concurrently with this PCSOF, and Plaintiff’s Response in Opposition to State Defendants’ Motion  
for Summary Judgment.

1           **Plaintiff's Response:** Disputed. The cited portions of Dr. Toomey's  
2 transcript do not contain any testimony from Dr. Toomey indicating that he has other health  
3 conditions requiring a hysterectomy, and Defendants do not submit any other evidence  
4 supporting their assertions. Nor can Defendants provide this evidence, because Dr.  
5 Toomey does not have any other medical necessity to receive a hysterectomy. *See* Wee  
6 Decl., Ex. 29 (Toomey Depo. Tr.) at 46:25-47:2 (testifying that the pap smear results did  
7 not find pre-cancerous cells); *id.* at 48:17-24 (testifying that he has never had a physician  
8 tell him that he is at a higher risk for cervical cancer as a result of the hormones he is  
9 taking); *id.* at 50:25-51:5 (testifying that the pap smear results did not warrant a  
10 hysterectomy). Additionally, there is no increased risk of ovarian, uterine, or cervical  
11 cancer as a result of masculinizing hormone treatment. *See id.*, Ex. 30 (WPATH Standard  
12 of Care Version 7) at pg. 40 (explaining that gender-affirming hormones for transgender  
13 men does not increase risk of cancer).

14           11.   **Defendants' Assertion:** The Plan provides coverage for hysterectomies for  
15 other conditions and diagnoses, including cancer. (*See generally* Curtis Decl., Ex. 6  
16 (AZSTATE.010093).)

17           **Plaintiff's Response:** Undisputed.

18           12.   **Defendants' Assertion:** Dr. Toomey can receive coverage for a  
19 hysterectomy for all the same medically necessary reasons for which a cisgender female  
20 could receive coverage for a hysterectomy under the Plan. (Curtis Decl., Ex. 1 (Toomey  
21 Depo.) at 75:14–20, 98:4–8, 121:22–122:2.) For example, Dr. Toomey indicated that he  
22 has received abnormal pap smear results, which could justify coverage for a hysterectomy  
23 under the Plan. (*See* Curtis Decl., Ex. 1 (Toomey Depo.) at 40:2–11, 49:25–50:2, 50:20–  
24 24.) In addition, Dr. Toomey may be eligible for coverage for a hysterectomy under the  
25 Plan to treat an increased risk of cervical, uterine, or ovarian cancers due to his long-term  
26 hormone treatment for gender dysphoria. (*See* Curtis Decl., Ex. 1 (Toomey Depo.) at 49:4–  
27 21, 75:1–3).



1           16. **Defendants’ Assertion:** “Covered Expenses” are available to Plan  
2 participants “only if: (1) they are Medically Necessary and not specifically excluded in this  
3 Article or any other Article; and (2) Pre-Certification/Prior Authorization is obtained from  
4 the Plan by the Member or provider, for those services that require Pre-Certification/prior  
5 Authorization.” (*Id.*; *see also id.* at AZSTATE.010186 (“COVERED SERVICE shall mean  
6 a service which is Medically Necessary and eligible for payment under the Plan.”).)

7                   **Plaintiff’s Response:** Undisputed.

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

17                   **Plaintiff’s Response:** Undisputed.

18           18. **Defendants’ Assertion:** The Plan contains several Exclusions and  
19 Limitations. (Curtis Decl., Ex. 6 at AZSTATE.01048–51.)

20                   **Plaintiff’s Response:** Undisputed.

21 **Process for Revising the Plan**

22           19. **Defendants’ Assertion:** ADOA reevaluates its plan design every year.  
23 (Curtis Decl., Ex. 10 (Deposition of Scott Bender (“Bender Depo.”)) at 37:11-23.)

24                   **Plaintiff’s Response:** Undisputed.

25           20. **Defendants’ Assertion:** When reevaluating its plan design, ADOA  
26 considered:

- a. Recommendations from its insurance vendors (Curtis Decl., Ex. 8 (Isaacson Depo.) at 100:1–5; Curtis Decl., Ex. 9 (Shannon Depo.) at 124:1-21; Curtis Decl., Ex. 11 (Deposition Transcript of Kelly Sharritts (“Sharritts Depo.”)) at 56:11–14; Curtis Decl., Ex. 12 (Deposition Transcript of Craig Brown (“Brown Depo.”)) at 178:24- 179:19);
- b. Market trends (Curtis Decl., Ex. 13 (Deposition of Elizabeth Schafer (“Schafer Depo.”)) at 54:8–14; Curtis Decl., Ex. 10 (Bender Depo.) at 41:18–42:7; Curtis Decl., Ex. 14 (Deposition of Yvette Medina (“Medina Depo.”)) at 84:15–85:1);
- c. Interests of the Plan members (Curtis Decl., Ex. 13 (Schafer Depo.) at 54:15–20; Curtis Decl., Ex. 11 (Sharritts Depo.) at 149:25–150:10; Curtis Decl., Ex. 10 (Bender Depo.) at 37:24–38:9);
- d. Cost (Curtis Decl., Ex. 9 (Shannon Depo.) at 124:1-21; Curtis Decl., Ex. 13 (Schafer Depo.) at 53:10-12, 55:9–14, 101:19–102:2; Curtis Decl., Ex. 10 (Bender Depo.) at 37:24–38:9);
- e. Legal requirements (Curtis Decl., Ex. 9 (Shannon Depo.) at 124:1-21); and
- f. Clinical effectiveness (*Id.*).

**Plaintiff’s Response:** Plaintiff does not dispute the facts in Paragraph 20 reflect ADOA’s normal consideration process, but does dispute that the decision to maintain the “Gender Reassignment Exclusion” was based on those considerations. The “deciding factor” for the decision to exclude gender affirming surgery at the Fall 2016 meeting between the ADOA and the Governor’s office where it was decided to maintain the Exclusion was not cost, but: “what was required by law. What was required by law for [the State] to cover.” Wee Decl., Ex. 31 (Isaacson Depo. Tr.) at 31:8-18; *accord id.* 58:4-7 (testifying that it was “not a cost issue” but instead an “issue of whether it was legally required”).

1 Plaintiff also asserts that each of the considerations referenced in Paragraph  
2 20(a)-(f) weighed in favor of eliminating the Exclusion. Specifically:

- 3 a. When ADOA evaluated its Plan design in 2015-16, its insurance vendors  
4 informed ADOA that they were moving toward covering costs of gender  
5 affirming care due to anticipated changes to the Affordable Care Act. Curtis  
6 Decl., Ex. 24 (ADOA Research Summary Chart) at AZSTATE.151712-15.  
7 By the time Dr. Toomey sought gender affirming care in 2018, all of the  
8 third party administrators for the Plan had adopted internal coverage  
9 guidelines recognizing hysterectomies and other gender affirming surgeries  
10 as medically necessary treatment for gender dysphoria. *See* Doc. 86-3 (Ex.  
11 C to Am. Compl.) (Aetna Guidelines); Doc. 86-4 (Ex. C to Am. Compl.)  
12 (BCBS Guidelines); Doc. 86-5 (Ex. E to Am. Compl.) (Cigna Guidelines);  
13 Doc. 86-6 (Ex. F to Am. Compl.) (United Healthcare Guidelines).
- 14 b. Market trends indicated that more states and insurers would cover gender  
15 affirming surgery. *See id.*; Wee Decl., Ex. 32 (Schafer Depo. Tr.) at 170:22-  
16 171:2.
- 17 c. Typically, ADOA removed exclusions when it was in the best interest of  
18 Plan members. Wee Decl., Ex. 31 (Isaacson Depo. Tr.) at 184:11-12. It is  
19 in the best interests of Plan members to cover medically necessary  
20 procedures. *Id.* at 187:20-188:1.
- 21 d. When evaluating whether to remove the Exclusion in 2015-16, ADOA  
22 estimated that the cost would [REDACTED]  
23 [REDACTED] which is “immaterial.” Curtis Decl., Ex. 24 (ADOA Research  
24 Summary Chart) at AZSTATE.151718-19; Wee Decl., Ex. 19 (Barrett  
25 expert report) at ¶¶ 9, 45 (confirming that the estimated cost of covering  
26 gender affirming surgery in 2016 was less than 0.1%, an “amount so small  
27 that it would be considered immaterial from an actuarial perspective”).  
28

1 ADOA’s review of external analyses supported its internal cost projection.  
2 See Wee Decl., Ex. 18 (Williams Institute Cost Report) (concluding that  
3 “Employers report very low costs, if any, from adding transition-related  
4 coverage to their health plans or from actual utilization of the benefit after  
5 it has been added – with many employers reporting no costs at all.”); Curtis  
6 Decl., Ex. 24 (ADOA Research Summary Chart) at AZSTATE.151718-19  
7 (State of Washington reported to ADOA that [REDACTED])

8 [REDACTED]  
9 *id.* (State of Colorado reported to ADOA that it was [REDACTED])

10 [REDACTED]  
11 and that their self-insured plans [REDACTED] Wee Decl., Ex.  
12 33 (email showing the State of Oregon was “pretty confident that the  
13 coverage [of transgender benefits] did not any increase in the premiums.”).

14 e. ADOA does not have a general policy of covering only what is required by  
15 law. Wee Decl., Ex. 31 (Isaacson Depo. Tr.) at Tr.41:14-17. In fact, the  
16 Plan covers services that are not required by law. *Id.* at 41:1-11; *id.*, Ex. 32  
17 (Schafer Depo. Tr.) at 42:20-23. Moreover, ADOA received guidance from  
18 multiple sources that the Exclusion was likely impermissible from a legal  
19 perspective. See *id.*, Ex. 34 (Shannon Depo. Tr.) at 159:17-160:13 (noting  
20 that all of its carriers directed ADOA to remove the Exclusion if it wanted  
21 to comply with section 1557 of the Affordable Care Act); *id.*, Ex. 32  
22 (Schafer Depo. Tr.) at 95:4 – 24 (Mercer advised ADOA that it may be  
23 implicated by section 1557 of the Affordable Care Act); *id.*, Ex. 35 (Cigna  
24 informing ADOA that “[e]xcluding [gender affirming] services will very  
25 likely be considered discriminatory for employers under Title VII of the  
26 Civil Rights Act by the Equal Employment Opportunity Commission  
27 (EEOC”).

1 f. Every major medical organization to address the issue has recognized that  
2 transition-related care is effective, safe and medically necessary for  
3 treatment of gender dysphoria. Am. Compl. ¶ 3.

4 21. **Defendants’ Assertion:** Of these, cost is one of the most important factors.  
5 (See Curtis Decl., Ex. 10 (Bender Depo.) at 56:2–10, 58:4–14; Curtis Decl., Ex. 9 (Shannon  
6 Depo.) at 128:22– 129:22.)

7 **Plaintiff’s Response:** Plaintiff does not dispute the fact that cost may be one  
8 of the factors considered as described in Paragraph 21, but disputes that cost was an  
9 important factor considered by the ADOA when deciding whether to maintain the  
10 Exclusion. *Supra* ¶¶ 20, 20 (d). Christina Corieri, a representative of the Governor’s  
11 Office, does not recall cost being discussed at the Fall 2016 meeting where it was decided  
12 to maintain the Exclusion. Wee Decl., Ex. 36 (Corieri Depo. Tr.) 29-31, 35:1-4. Instead,  
13 the purpose of the Fall 2016 Meeting was to “discuss the ADOA exclusion on gender  
14 reassignment surgery, and making sure that it was compliant with the regulations that came  
15 down under the ACA.” *Id.* at 32:4-7, 34:20-21 (the “purpose of that meeting was to seek  
16 legal advice regarding the exclusion”). Beyond discussion of legal advice, Ms. Corieri  
17 testified that she did not recall “anything else [being] discussed” at the Fall 2016 Meeting.  
18 *Id.* at 34:23-25. In fact, the State did not even prepare an actuarial analysis of the cost issue  
19 until 2019, after this lawsuit was filed. *Id.*, Ex. 37 (Meisner Depo. Tr.) at 142:3-24  
20 (Michael Meisner, ADOA’s current actuary, did not perform a cost analysis for transgender  
21 benefits in 2015, 2016, or 2017, and only performed a cost analysis later, in 2019). Plaintiff  
22 further asserts that the contemplated cost increases were immaterial. *Supra* ¶ 20(d).

23 22. **Defendants’ Assertion:** ADOA conducted annual meetings with the  
24 medical directors of its insurance vendors to discuss potential revisions to the Plan design.  
25 (Curtis Decl., Ex. 10 (Bender Depo.) at 103:12–104:6; Curtis Decl., Ex. 9 (Shannon Depo.)  
26 at 138:16–24.)

27 **Plaintiff’s Response:** Undisputed.  
28

1           23. **Defendants’ Assertion:** On occasion, ADOA will consult with the  
2 Governor’s Office regarding proposed revisions to the Plan. (Curtis Decl., Ex. 8 (Isaacson  
3 Depo.) at 119:11–120:15; Curtis Decl., Ex. 10 (Bender Depo.) at 71:7–11, 81:4–20.)

4           **Plaintiff’s Response:** Plaintiff does not dispute the facts in Paragraph 23,  
5 but clarifies that the occasions in which the Governor’s Office and the ADOA meet with  
6 respect to Plan design and revisions were reportedly infrequent. Mr. Shannon stated that  
7 it “doesn’t happen very often” that he meets with anyone in the Governor’s Office  
8 regarding a coverage decision. Wee Decl., Ex. 34 (Shannon Depo. Tr.) at 89:9-20. Mr.  
9 Bender testified that he could not remember a case where the Governor’s Office got  
10 involved in the decision-making process before the ADOA presented the proposed  
11 coverage change to them. *Id.*, Ex. 38 (Bender Depo. Tr.) at 97:19-22. The ADOA’s Lead  
12 Plan Administrator Yvette Medina could only recall two instances in which the Governor’s  
13 Office proposed Plan language: “same-sex or domestic partners” and “the  
14 nondiscrimination transgender item.” *Id.*, Ex. 39 (Medina Depo. Tr.) at 52:1-21.

15           24. **Defendants’ Assertion:** ADOA did not often remove exclusions from the  
16 Plan. (Curtis Decl., Ex. 10 (Bender Depo.) at 116:24–117:9.)

17           **Plaintiff’s Response:** Disputed. First, Plaintiff points to State Defendants  
18 Paragraph 25, which lists out 5 exclusions that have been removed in the last five years.  
19 Additionally, Plaintiff points to the following instances where the ADOA has added  
20 coverage for new medical services, even when they were not legally required to do so and  
21 when doing so would likely have increased cost to the Plan:

- 22           a. A Plan change log produced by State Defendants shows ADOA added coverage  
23 for orthognathic surgery in 2012. Wee. Decl., Ex. 10 (ADOA Plan Change Log  
24 2012) at AZSTATE.111909; *see also id.*, Ex. 39 (Medina Depo. Tr.) at 63:1-  
25 65:21 (confirming that ADOA added coverage for orthognathic surgery in 2012  
26 by removing a prior Plan exclusion).

- 1           b. In the 2013/ 2014 time period, the ADOA added coverage for a type of bariatric  
2           surgery. Wee Decl., Ex. 31 (Isaacson Depo. Tr.) at 98:13-99:3, 100:16-19.
- 3           c. A plan change log produced by State Defendants also shows that the exclusion  
4           for this type of bariatric surgery, called laproscopic sleeve gastrectomy, was  
5           removed from the Plan in 2014. Wee Decl., Ex. 9 (2014 ADOA Change Log)  
6           at AZSTATE.124801. ADOA was not under any legal requirement or mandate  
7           to add coverage for laproscopic sleeve gastrectomy in 2014. Wee Decl., Ex. 31  
8           (Isaacson Depo. Tr.) at 136:16-24.
- 9           d. Between 2017 and 2019, ADOA decided to add coverage for 3-D  
10           Mammography, which was not previously covered under the Plan. See Wee  
11           Decl., Ex. 32 (Schafer Depo. Tr.) at 80:9-81:2; *id.*, Ex. 38 (Bender Depo. Tr.)  
12           at 119:10-120:3; *id.*, Ex. 40 (Sharritts Depo. Tr.) at 114:13-23. ADOA was not  
13           under any legal requirement or mandate to add coverage for 3-D  
14           Mammography. *Id.*, Ex. 38 (Bender Depo. Tr.) at 137:3-8; *id.*, Ex. 2 (Sharritts  
15           Depo. Tr.) at 114:13-23.
- 16           e. In 2018, ADOA added coverage for a new hepatitis-C drug, which was  
17           “extremely expensive.” Wee Decl., Ex. 32 (Schafer Depo. Tr.) at 20:14-20,  
18           161:8-14.

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24           **25. Defendants’ Assertion:** From 2015-2021, ADOA removed only five  
25           exclusions for treatments or services from the Plan, including:

- 26           a. 2015 – compression garments for treatment of burns;  
27  
28           b. 2016 – none:

- 1 c. 2017 – manipulations under anesthesia, counseling and hormone therapy for the  
2 treatment of gender dysphoria;
- 3 d. 2018 – midwife services;
- 4 e. 2019 – none;
- 5 f. 2020 – none; and
- 6 g. 2021 – treatment for benign gynecomastia. (Declaration of Paul Shannon  
7  
8 (“Shannon Decl.”) at ¶ 5.)  
9  
10

11 **Plaintiff’s Response:** Plaintiff does not dispute the facts in Paragraph 25,  
12 but clarifies that in addition to the exclusions listed above, in the time period from 2015-  
13 2021 the ADOA also added coverage for medical services including 3-D mammography  
14 and treatment for hepatitis C. *Supra* ¶ 24 (d)-(e). Additionally, in 2014, just one year prior  
15 to this time period, State Defendants also removed an exclusion for bariatric surgery. *Supra*  
16 ¶ 24(b).

17 26. **Defendants’ Assertion:** ADOA only removed exclusions from the Plan if it  
18 was legally required or if the revision would not increase the cost of the Plan. (*See Wee*  
19 *Decl.*, Ex. 38 (Bender Depo.) at 116:24–117:9, 167:12-24.)

20 **Plaintiff’s Response:** Disputed. First, Defendants have not included any  
21 evidence in their briefing to substantiate that the exclusions they removed since 2016 (*See*  
22 *supra* 25(a)-(g)) were removed solely because they were legally required to do so.  
23 Additionally, Bender testified that “typically” proposals to remove exclusions occur when  
24 there has been a change in the law, but did not state that this was the only reason these  
25 changes were made. *See Curtis Decl.*, Ex. 10 (Bender Depo.) at 116:24–117:9. Moreover,  
26 the record indicates that ADOA does not have a policy of removing exclusions only when  
27 mandated by law. *Wee Decl.*, Ex. 32 (Schafer Depo. Tr.) at 218:20-219:6; *Id.*, Ex. 31  
28

1 (Isaacson Depo. Tr.) at 41:1-13; *see id.*, Ex. 38 (Bender Depo. Tr.) at 130:8-131:3 (stating  
2 it is a “fairly easy decision” to remove an exclusion when all of ADOA’s providers are  
3 aligned that the procedure is “a standard course of treatment” so long as “the cost is  
4 reasonable”); *see also* Wee Decl., Ex. 31 (Isaacson Depo Tr.) at 139:17-25, 184:9-12,  
5 (noting that exclusions are typically removed when they are in the best interest of the plan  
6 and its members and citing that as “the most important factor” for ADOA’s decision to  
7 remove exclusion for bariatric surgery).

8 **History of the Exclusion**

9 **2. Origination of the Exclusion**

10 27. **Defendants’ Assertion:** Prior to 2004, ADOA provided health insurance to  
11 State employees through a fully-insured health insurance plan provided by Cigna. (Curtis  
12 Decl., Ex. 15 (AZSTATE.244065) at AZSTATE.244071.)

13 **Plaintiff’s Response:** Undisputed.

14 28. **Defendants’ Assertion:** In October 2004, the State instituted a self-funded  
15 health insurance plan. (Curtis Decl., Ex. 15 at AZSTATE.244071.)

16 **Plaintiff’s Response:** Undisputed.

17 29. **Defendants’ Assertion:** At that time, the State copied the plan document and  
18 terms previously provided by its insurance companies, including Cigna. (Curtis Decl., Ex.  
19 8 (Isaacson Depo.) at 195:16–20, 197:7–15, 200:11–15.)

20 **Plaintiff’s Response:** Undisputed.

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

25 **Plaintiff’s Response:** Undisputed.

26 31. **Defendants’ Assertion:** In the past, both public and private institutions  
27 excluded healthcare coverage for gender dysphoria on the rationale that such treatments  
28

1 were cosmetic or experimental. (*See* Doc. 86 (Amended Complaint), ¶ 3; Curtis Decl., Ex.  
2 1 (Toomey Depo.) at 146:3–13.)

3 **Plaintiff’s Response:** Undisputed.

4 **3. The 2017 Expansion of Coverage for Transgender Persons**

5 32. **Defendants’ Assertion:** Beginning in September 2015, ADOA contacted its  
6 insurance vendors specifically to research industry standards for coverage of transgender  
7 benefits. (Curtis Decl., Ex. 17 (AZSTATE.000639); *see also* Curtis Decl., Ex. 11 (Sharritts  
8 Depo.) at 45:3- 6; Curtis Decl., Ex. 14 (Medina Depo.) at 119:6-16.)

9 **Plaintiff’s Response:** Undisputed.

10 33. **Defendants’ Assertion:** In 2015, the majority of ADOA’s insurance vendors  
11 did not provide coverage for transgender benefits. (Curtis Decl., Ex. 8 (Isaacson Depo.) at  
12 26:13–17, 29:15–19; Curtis Decl., Ex. 14 (Medina Depo.) at 119:17–120:4; Curtis Decl.,  
13 Ex. 18 (AZSTATE.006325); Curtis Decl., Ex. 19 (AZSTATE.006198); Curtis Decl., Ex.  
14 20 (AZSTATE.006129); *see also* Curtis Decl., Ex. 7 (Deposition of Joan C. Barrett  
15 (“Barrett Depo.”)) at 28:1–6.)

16 **Plaintiff’s Response:** Plaintiff does not dispute the facts in Paragraph 33,  
17 but clarifies that when ADOA reached out to its insurance vendors in 2015, they informed  
18 ADOA that they were moving toward covering costs of gender affirming care due to  
19 anticipated changes to the Affordable Care Act by the end of 2016 or early 2017. Curtis  
20 Decl., Ex. 24 (ADOA Research Summary Chart) at AZSTATE.151712-15; Wee Decl., Ex.  
21 41 (United Healthcare to remove exclusions); *id.*, Ex. 42 (BlueCrossBlue Shield to remove  
22 exclusions); *id.*, Ex. 43 (Cigna to remove exclusions). By the time Dr. Toomey sought  
23 gender affirming care in 2018, all of the third-party administrators for the Plan had adopted  
24 internal coverage guidelines recognizing hysterectomies and other gender-affirming  
25 surgeries as medically necessary treatment for gender dysphoria. *See* Doc. 86-3 (Ex. C to  
26 Am. Compl.) (Aetna Guidelines); Doc. 86-4 (Ex. D to Am. Compl.) (BCBS Guidelines);  
27  
28

1 Doc. 86-5 (Ex. E to Am. Compl.) (Cigna Guidelines); Doc. 86-6 (Ex. F to Am. Compl.)  
2 (United Healthcare Guidelines).

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

7 **Plaintiff’s Response:** Undisputed.

8 35. **Defendants’ Assertion:** ADOA contacted its insurance vendors to research  
9 how the proposed rule would affect that Plan. (Curtis Decl., Ex. 21 (AZSTATE.000637).)

10 **Plaintiff’s Response:** Undisputed.

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

15 **Plaintiff’s Response:** Disputed. ADOA collected information about cost,  
16 but did not consider that information when making its ultimate decision. *See Supra* ¶¶ 20,  
17 21.

18 ADOA’s contemporaneous cost analyses in 2015 and 2016 indicated that  
19 removing the Exclusion *could* add \$130,000-582,000 in annual costs to the Plan, but that  
20 such analysis was an informed estimate and not definitive. *See Infra* ¶ 37. In all events,  
21 this cost was immaterial. *Supra* ¶ 20(d); Wee Decl., Ex. 40 (Sharritts Depo. Tr.) at 123:21-  
22 124:18 (Ms. Sharritts testifying that the cost was “minuscule” as it was “potentially  
23 pennies, to the plan on a per-person basis”); *id.*, Ex. 44 (Brown Depo. Tr.) at 227:6-15 (Mr.  
24 Brown testifying that a \$0.17 - \$0.77 per month per employee increase was not significant);  
25 *id.*, Ex. 38 (Bender Depo. Tr.) at 190:12-191:7 (Plan Administration Manager Scott Bender  
26 testifying that a dollar per month per employee, or 50 cents per month per employee was  
27 “not a high cost[.]”); *id.*, Ex. 31 (Isaacson Depo. Tr.) at 279:9-23 (Ms. Isaacson testifying  
28

1 that Ms. Sharritts’ cost estimate was “not significant,” that it would not “have mattered” to  
2 the ADOA, and that it would not “have been a factor that ADOA considered.”)

3       **37. Defendants’ Assertion:** Providing coverage for transgender benefits under  
4 the Plan would increase costs to the Plan. (*See* Curtis Decl., Ex. 22 (AZSTATE.006095);  
5 Curtis Decl., Ex. 20 (AZSTATE.006129); Curtis Decl., Ex 23 (ABOR-TOOMEY003459);  
6 Curtis Decl., Ex. 7 (Barrett Depo.) at 103:3-6.) ADOA’s contemporaneous cost analyses  
7 indicated that removing the Exclusion would add \$130,000-\$582,000 in annual costs to the  
8 Plan. (Curtis Decl., Ex. 24 (AZSTATE.151707); Curtis Decl., Ex. 22  
9 (AZSTATE.006095).)

10               **Plaintiff’s Response:** Undisputed.

11       **38. Defendants’ Assertion:** It is unknown how many Plan members are  
12 transgender, how many would seek “gender reassignment surgery,” or what specific  
13 surgical procedures transgender Plan participants would seek. (*See* Curtis Decl., Ex. 10  
14 (Bender Depo.) at 158:7–159:1; Curtis Decl., Ex. 24 (AZSTATE.151707).)

15               **Plaintiff’s Response:** Disputed. The ADOA research summary which  
16 Defendants cite shows that in fact, [REDACTED]

17 [REDACTED]  
18 [REDACTED] Curtis Decl., Ex. 24 (AZSTATE.151707). Defendants estimated that the  
19 “utilization estimates range from 1-11 claims per year[.]” *Id.* A report by the Williams  
20 Institute similarly supported this conclusion. Wee Decl., Ex. 17 (Williams Institute Report  
21 and related email)(Sharritts concluding, “it supports a very low utilization and cost  
22 associated with adding this benefit and no real impact.”)

23       **39. Defendants’ Assertion:** ADOA also reviewed whether other states and  
24 governmental entities provided coverage for gender reassignment surgery for their  
25 employees. (Curtis Decl., Ex. 25 (AZSTATE.004345); Curtis Decl., Ex. 8 (Isacson Depo.)  
26 at 60:25-61:4.)

27               **Plaintiff’s Response:** Undisputed.

1           40.   **Defendants’ Assertion:** HHS issued its final rule on Section 1557 on May  
2 18, 2016 (the “2016 Rules”). (Nondiscrimination in Health Programs and Activities, 81  
3 Fed. Reg. 96, 31376 (May 18, 2016) (codified at 45 C.F.R. pt. 92).)

4           **Plaintiff’s Response:** Undisputed.

5           41.   **Defendants’ Assertion:** Again, ADOA contacted its insurance vendors to  
6 research how the 2016 Rules would affect the Plan. (Curtis Decl., Ex. 26  
7 (AZSTATE.005674); Curtis Decl., Ex. 27 (AZSTATE.136334); Curtis Decl., Ex. 28  
8 (AZSTATE.009210).)

9           **Plaintiff’s Response:** Plaintiff does not dispute the facts in Paragraph 41,  
10 but clarifies that ADOA’s insurance vendors informed ADOA that it should remove the  
11 Exclusion to comply with the 2016 Rules. *See* Wee Decl., Ex. 34 (Shannon Depo. Tr.)  
12 at 159:17-160:13 (noting that all of ADOA’s carriers directed it to remove the Exclusion if  
13 it wanted to comply with section 1557 of the ACA); *see also id.*, Ex. 32 (Schafer Depo.  
14 Tr.) at 95:4 – 24 (Mercer, an insurance consultant utilized by the ADOA, advised ADOA  
15 that it may be implicated by section 1557 of the ACA).

16           42.   **Defendants’ Assertion:** ADOA also reviewed publicly available  
17 information about the 2016 Rules, including news bulletins. (Curtis Decl., Ex. 29  
18 (AZSTATE.005677).)

19           **Plaintiff’s Response:** Disputed. In this document one ADOA employee  
20 merely forwards a news bulletin to another ADOA employee with no context or indication  
21 of whether this was considered or reviewed.

22           43.   **Defendants’ Assertion:** ADOA compiled all of this information into a  
23 coverage summary chart. (Curtis Decl., Ex. 24 (AZSTATE.151707).)

24           **Plaintiff’s Response:** Undisputed.

25           44.   **Defendants’ Assertion:** In March and September 2016, ADOA discussed  
26 coverage of gender reassignment surgery with the medical directors of its insurance  
27 vendors. (Curtis Decl., Ex. 30 (AZSTATE.000385); Curtis Decl., Ex. 31  
28

1 (AZSTATE.144146.) This discussion included the cost associated with coverage for  
2 gender reassignment surgery. (*Id.*)

3 **Plaintiff's Response:** Undisputed.

4 45. **Defendants' Assertion:** ADOA's consideration of coverage for transgender  
5 benefits was no different than its consideration of other procedures or conditions. (*See*  
6 *Curtis Decl., Ex. 9 (Shannon Depo.) at 231:20–24; Curtis Decl., Ex. 11 (Sharritts Depo.)*  
7 *at 90:24-91:12.*)

8 **Plaintiff's Response:** Disputed. First, the Sharritts testimony cited by  
9 Defendants shows that this process *did* in fact differ from other benefits in that the focus  
10 was on whether maintaining the Exclusion would be discriminatory. *Wee Decl., Ex. 40*  
11 *(Sharritts Depo.) at 90:24-91:12.* Additionally, although ADOA gathered relevant  
12 information as it normally did when analyzing whether to cover a benefit, the information  
13 gathered was not taken into account, because, as described above, all considerations  
14 weighed in favor of the ADOA removing the Exclusion. *Supra* ¶ 20; *see Wee Decl., Ex.*  
15 *38 (Bender Depo. Tr.) at 155:2-9.* (“In the ordinary course of business,” coverage  
16 determinations are made using a “bottom-up” approach, this clearly was not”). The only  
17 factor considered when determining whether to remove the Exclusion was whether  
18 coverage was legally required. *See Supra* ¶¶ 20, 21, 26.

19 The Governor's Office also played an outsized and atypical role in  
20 determining whether to remove the Exclusion. *See Wee Decl., Ex. (Bender Depo. Tr. at*  
21 *155:2-9)* (“in the ordinary course of business, [evaluation of an exclusion] would have been  
22 a bottom-up approach, and this clearly was not”); *id.* at 97:19-22 (testifying that he could  
23 not remember a case where the Governor's Office got involved in the decision making  
24 process before ADOA presented a change to them); *id.* at 161:18-162:9 (stating his belief  
25 that “someone up the food chain from ADOA” from “the governor's office” would have  
26 made the decision to maintain the Exclusion); *id.* at 181:17-23 (testifying that he was not  
27 aware of any other instances in which the Plan covered a medically necessary procedure in  
28

1 some instances but not others); *id.*, Ex. 34 (Shannon Depo. Tr.) at 89:9-20 (confirming that  
2 it “doesn’t happen very often” that he meets with anyone in the Governor’s Office  
3 regarding a coverage decision); *id.*, Ex. 39 (Medina Depo. Tr.) at 52:1-21 (recalling only  
4 two instances in which the Governor’s Office proposed Plan language: “same-sex or  
5 domestic partners” and “the nondiscrimination transgender item”).

6       **46. Defendants’ Assertion:** Ultimately, ADOA decided to expand coverage for  
7 transgender benefits under the Plan—removing the exclusion for hormone therapy and  
8 medical or psychological counseling—effective for the Plan year beginning January 1,  
9 2017. (*See* Curtis Decl., Ex. 6 at AZSTATE.01049.)

10       **Plaintiff’s Response:** Disputed. By State Defendants’ own account, the  
11 State provided coverage for hormone therapy only because they allegedly understood that  
12 such coverage was all that was “legally required.” *See Supra* ¶¶ 20, 21.

13       **47. Defendants’ Assertion:** ADOA made this decision in order to minimize  
14 increased costs to the Plan and because it believed that the modified exclusion was legal.  
15 (*Wee* Decl., Ex. 38 (Bender Depo.) at 167:12-24.)

16       **Plaintiff’s Response:** Disputed. ADOA was aware the cost of removing the  
17 Exclusion from the Plan was immaterial. *Supra* ¶¶ 20(d), 36. Moreover, cost was not a  
18 fact that was considered when determining whether to remove the Exclusion, the only  
19 consideration was whether it was “legally required” to cover the benefits. *Supra* ¶¶ 20, 21.

20       **48. Defendants’ Assertion:** Beginning in plan year 2017, the Plan only excludes  
21 “gender reassignment surgery” and does not exclude counseling or hormone therapy for  
22 gender dysphoria. (Curtis Decl., Ex. 6 at AZSTATE.01049.)

23       **Plaintiff’s Response:** Undisputed.

24       **49. Defendants’ Assertion:** No one at ADOA has expressed a negative opinion  
25 about transgender persons. (Curtis Decl., Ex. 9 (Shannon Depo.) at 98:1–5, 224:12–15,  
26 243:24–244:9; Curtis Decl., Ex. 13 (Schafer Depo.) at 181:9–20, 184:10–185:7, 185:24–  
27 186:6; Curtis Decl., Ex. 10 (Bender Depo.) at 98:19-21, 286:9-14.)

1           **Plaintiff’s Response:** Disputed. First, a limited subset of individuals were deposed  
2 in this litigation, and therefore it is impossible to conclude that “no one at the ADOA has  
3 expressed a negative opinion about transgender persons.” Second, at least one ADOA  
4 employee has insinuated that because the cost of covering transgender benefits was  
5 “minuscule” it “d[id]n’s seem like [there was] an obvious reason not to cover it other than  
6 what the *State feels on it.*” Wee Decl., Ex. 40 (Sharritts Depo. Tr.) at 124:5-9 (emphasis  
7 added). Moreover, in describing conversations regarding whether to cover the exclusion  
8 Sharritts testified that managers at the ADOA were trying to determine whether this  
9 treatment was a personal choice, a matter of opinion, or whether it was actually medically  
10 necessary. *Id.* at 48:3-18; 50:7-19; Tr. 184:3-15. State witnesses also testified that they  
11 perceived political sensitivity surrounding the elimination of the Exclusion due to potential  
12 pressure from voters and policymakers who disapproved of gender transition. *Id.*, Ex. 38  
13 (Bender Depo. Tr.) at Tr. 157:19-25 (agreeing that the decision about covering transgender  
14 benefits “wasn’t an easy decision because of the political considerations around it.”); *Id.* at  
15 156:22-157:3 (noting removing the Exclusion may have been “viewed more along political  
16 lines, if you will, different ideologies. And, obviously, in a political environment, that’s –  
17 many people consider those things.”); *Id.*, Ex. 40 (Sharritts Depo. Tr.) at 169:16-22; *id.* at  
18 170:17-21. Additionally Sharritts also testified that Mr. Meisner was determined to “prove  
19 himself correct in his viewpoints,” and that he “really wanted to show that [gender-  
20 affirming care] w[ere] going to be too costly,” despite the fact that that the State’s 2015-16  
21 analysis “showed otherwise.” *Id.*, Ex. 40 (Sharritts Depo. Tr.) at 97:1-17.

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

26           **Plaintiff’s Response:** Disputed. Ms. Corieri tweeted her personal  
27 disapproval for expanding healthcare for transgender benefits before joining the  
28

1 Governor's office. Wee Decl., Ex. 45 ("advocates now demanding taxpayer dollars for  
2 gender reassignment surgery under Medicare – bet Medicaid is next").

3 **The State's Cost Concerns**

4 51. **Defendants' Assertion:** In 2016, the State had a large budget deficit. (Curtis  
5 Decl., Ex. 33 (FY 2016 JLBC Baseline Summary); *see also* Curtis Decl., Ex. 32 (Corieri  
6 Depo.) at 35:12–36:10.)

7 **Plaintiff's Response:** Undisputed.

8 52. **Defendants' Assertion:** Cost reductions and efficiencies are one of the  
9 State's primary focuses. (Curtis Decl., Ex. 12 (Brown Depo.) at 47:20–49:4.)

10 **Plaintiff's Response:** Plaintiff disputes the facts in Paragraph 52. The  
11 evidence cited by State Defendants does not support this assertion as cost reductions (not  
12 necessarily relating to healthcare), were one of former ADOA Director Craig Brown's  
13 personal goals for the agency, but did not speak for the agency's or State's goals as a whole.  
14 (Curtis Decl., Ex. 12 (Brown Depo.) at 47:20–49:4)

15 53. **Defendants' Assertion:** In 2016, the Plan's expenses exceeded its revenues,  
16 and ADOA had to pay Plan expenses from a reserve fund. (Curtis Decl., Ex. 15  
17 (AZSTATE.24465) at AZSTATE.244074–75)

18 **Plaintiff's Response:** Undisputed.

19 54. **Defendants' Assertion:** In 2017, the Plan's expenses exceeded its revenues,  
20 and ADOA had to pay Plan expenses from a reserve fund. (Curtis Decl., Ex. 34  
21 (AZSTATE.244113) at AZSTATE.244121–23.)

22 **Plaintiff's Response:** Undisputed.

23 55. **Defendants' Assertion:** When there is an increase to the Plan, ADOA must  
24 increase employee premiums. (Curtis Decl., Ex. 8 (Isaacson Depo.) at 331:11–13.)

25 **Plaintiff's Response:** Disputed. It is unclear what "an increase to the Plan"  
26 is. For example, if ADOA removes an exclusion, they may offset any increased costs with  
27 other reductions of benefits instead of increasing premiums. Moreover, Plaintiff asserts  
28

1 that ADOA estimated the cost of removing the Exclusion to be \$.17 to \$.77 per employee  
2 per month, as a cost that was described as immaterial by State Defendant witnesses and  
3 testimony. *Supra* ¶¶ 20(d), 36.

4       **56. Defendants’ Assertion:** Cost weighed into most decisions by ADOA.  
5 (Curtis Decl., Ex. 9 (Shannon Depo.) at 128:22–129:22; Curtis Decl., Ex. 13 (Schafer  
6 Depo.) at 83:7-10, 101:19–102:2.)

7       **Plaintiff’s Response:** Plaintiff disputes this fact to the extent that cost was  
8 not a factor in Defendants’ decision to maintain the Exclusion. *Supra* ¶¶ 20(d), 36.

9  
10       **SEPARATE STATEMENT OF FACTS IN SUPPORT OF DR. TOOMEY’S**  
11       **RESPONSE TO STATE DEFENDANTS’ MOTION FOR SUMMARY**  
12       **JUDGMENT**

13       Dr. Toomey submits the following Separate Statement of Facts (“SSOF”) in support  
14 of its Response in Opposition to State Defendants’ Motion for Summary Judgment. Dr.  
15 Toomey incorporates and relies on Plaintiff’s Statement of Undisputed Material Facts in  
16 Support of Plaintiff’s Motion for Summary Judgment (Doc. 310).

17  
18       **I. THE STATE’S DECISION TO MAINTAIN THE EXCLUSION DEPARTS**  
19       **FROM ORDINARY DECISION-MAKING**

20       **A. The State’s Ordinary Decision-Making Regarding Plan Coverage**

21               1. Ordinary Procedure for Coverage Determinations

22               1. While ADOA’s Plan recommendations are occasionally discussed with the  
23 Arizona governor’s office (the “Governor’s Office”), the Governor’s Office’s approval is  
24 not technically required, and is generally considered to be merely ceremonial. Wee Decl.,  
25 Ex. 32 (Schafer Depo. Tr.) at 28:5-10 (testifying that the Governor’s Office did not have  
26 to approve changes to the plan).

1           2. Under normal circumstances, ADOA makes recommendations for Plan  
2 changes to the Director of the ADOA based on the analysis of professionals within the  
3 Benefits Services Division, and then the Governor’s Office and the joint legislative budget  
4 committee sign off on them. Wee Decl., Ex. 32 (Schafer Depo. Tr. at 24:8-21)(“It’s not  
5 required that [the JLBC] say yes, but it’s a good thing for them to approve any of the  
6 changes you are making to the plan.” If the JLBC “are not happy with the decisions being  
7 made they can make it much more difficult for the benefits department.” For example  
8 “[s]ometimes they put in a new statute or rule and – or they make sure the director of the  
9 department knows that they don’t approve.”)

10           3. “In the ordinary course of business,” coverage determinations are made using  
11 a “bottom-up” approach. Wee Decl., Ex. 38 (Bender Depo. Tr.) at 155:2-9.

12                   2. Ordinary Substantive Considerations

13           4. In assessing whether or not to extend coverage for a benefit or to remove a  
14 prior Plan exclusion, the ADOA Benefit Services Division considers objective criteria  
15 such as (i) estimated cost and (ii) market trends. Wee Decl., Ex. 38 (Bender Depo. Tr.) at  
16 54:24-55:14 (noting that the general process that includes: cost analysis; market analysis;  
17 and consideration of members well-being).

18           5. Benefits Services Division professionals collect cost information from  
19 ADOA’s four third-party administrators which maintain their own fully funded plans, and  
20 which are large repositories for healthcare cost information. Wee Decl., Ex. 34 (Shannon  
21 Depo. Tr.) at 140:1-141:22.

22           a. Blue Cross Blue Shield, Aetna, United Healthcare, and Cigna were the third-  
23 party administrators in 2016, but the administrators sometimes change. Wee  
24 Decl., Ex. 34 (Shannon Depo. Tr.) at 141:15-22.

25           b. Self-funded plans like ADOA’s Plan utilize third-party administrators to  
26 provide operations services, such as claims processing. Doc. 86-1 (2018  
27 EPO Plan) at pg. 69 § 12.1; 12.2.

1           6.       Additionally, cost information is sometimes collected from other self-funded  
2 plans, like the plans of other States that have already adopted the benefit, and accumulated  
3 cost data. Wee Decl., Ex. 31 (Isaacson Depo. Tr.) at 114:10-115:19.

4           7.       Benefits Services Division employees consider market trends: specifically,  
5 whether the trend among other health insurance providers is to cover or to exclude the  
6 benefit. For example:

7           a.       Paul Shannon confirmed that, “[i]f the experts from the fully insured book  
8 of business carriers were recommending that the ADOA cover a certain  
9 benefit, it’s very likely that the ADOA would cover that benefit.” Wee  
10 Decl., Ex. 34 (Shannon Depo. Tr.) at 140:16-20.

11           8.       In particular, the Benefits Services Division looks at the coverage trend  
12 among the fully-funded plans of its third party administrators. Paul Shannon, the current  
13 Benefits Services Division Director, explained that if all of ADOA’s third party  
14 administrators, (e.g. UHC, Blue Cross, and previously Aetna or Cigna), cover a benefit in  
15 their fully funded plans, then the ADOA would “very likely” extend coverage to that  
16 benefit. Wee Decl., Ex. 34 (Shannon Depo. Tr.) at 141:23-142:3.

17           9.       This is particularly true where the projected cost of a benefit is low. As  
18 ADOA Plan Administration Manager Scott Bender testified during his deposition, “where  
19 all four [third-party administrators] are aligned that [a new benefit] is now a standard  
20 course of treatment,” and where the “cost is reasonable,” it is “a fairly easy decision, and  
21 we don’t necessarily need to the [Governor’s Office] or the director [of ADOA] to make  
22 those decisions.” Wee Decl., Ex. 38 (Bender Depo. Tr.) at 130:18-131:3.

23           **A.       The State’s Decision to Maintain the Exclusion in 2016**

24           1.       *ADOA’s Professional Assessment of Objective Criteria in 2015-16*

25           10.       In addition to cost, the ADOA Benefits Services Division also considered  
26 market trends by asking their four third-party administrators whether they would be  
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1 extending coverage. Curtis Decl., Ex. 24 (ADOA Research Summary Chart) at  
2 AZSTATE.151712-15.

3 11. All four third-party administrators confirmed that they would be covering  
4 transgender benefits, including gender affirming surgery. Curtis Decl., Ex. 24 (ADOA  
5 Research Summary Chart) at AZSTATE.151712-15 (reflecting four carriers to remove  
6 exclusions); Wee Decl., Ex. 41 (email correspondence showing United Healthcare to  
7 remove exclusions); *id.*, Ex. 42 (BlueCrossBlue Shield to remove exclusions); *id.*, Ex. 43  
8 (Cigna to remove exclusions).

9 2. *The Governor's Office's Mandate to Maintain the Exclusion*

10 12. ADOA ultimately maintained its Exclusion after a closed-door meeting with  
11 the Governor's Office in the fall of 2016. Wee Decl., Ex. 31 (Isaacson Depo. Tr.) at 19:6-  
12 15, 37:20-40:1, 52:15-24.

13  
14 13. The decision was not based on cost, but on the purported conclusion that  
15 coverage for surgery was not legally mandated. For example:

16 a. Corieri does not recall cost being discussed at the Fall 2016 Meeting. Wee  
17 Decl., Ex. 36 (Corieri Depo. Tr.) 29-31, 35:1-4. Instead, the purpose of the  
18 Fall 2016 Meeting was to “discuss the ADOA exclusion on gender  
19 reassignment surgery, and making sure that it was compliant with the  
20 regulations that came down under the ACA.” *Id.* at 32:4-7, 34:20-21 (the  
21 “purpose of that meeting was to seek legal advice regarding the exclusion”).  
22 Beyond discussion of legal advice, Ms. Corieri testified that she did not  
23 recall “anything else [being] discussed” at the Fall 2016 Meeting. *Id.* at  
24 34:23-25.

25 b. Another ADOA employee testified that ADOA did not make the decision to  
26 maintain the Exclusion, but that it was “communicated to us to implement,”  
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1 from “up the food chain” at the Governor’s Office. Wee Decl., Ex. 38  
2 (Bender Depo. Tr.) at 161:18-162:9.

3 **B. The State’s Bias Against Transgender Individuals and Gender**  
4 **Transition**

5 14. Only transgender individuals can experience gender dysphoria. Wee Decl.,  
6 Ex. 1 (Schechter expert report) at ¶¶ 20-21.

7 15. In 2013, Christina Corieri—who would later announce the Governor’s  
8 Office’s decision to maintain the Exclusion in 2016—posted a tweet saying “advocates  
9 now demanding taxpayer dollars for gender reassignment surgery under Medicare—bet  
10 Medicaid is next.” Wee Decl., Ex. 45 (Corieri Tweet).

11 16. Document production from the Governor’s Office also revealed that Ms.  
12 Corieri subscribes to anti-transgender publications, including ones that deny the existence  
13 of transgender individuals, and that characterize gender affirming surgeries as  
14 “Frankenstein Hack Job[s]” and “Genital Mutilation.” Wee Decl., Ex. 46 (Daily Signal  
15 Articles sent to Christina Corieri); *Id.*, Ex. 47 (Daily Signal Articles sent to Christina  
16 Corieri).

17 17. The decision to maintain the Exclusion appears part of a pervasive state-wide  
18 policy against gender transition. Wee Decl., Ex. 48 (Corieri emails stating, [REDACTED]  
19 [REDACTED] referring to legislation to  
20 end taxpayer funding for gender reassignment surgery); *Id.*, Ex. 36 (Corieri Depo. Tr.) at  
21 112:14-20.

22 18. As ADOA reevaluates the Plan design every year, the State has maintained  
23 the Exclusion through every reevaluation since its institution of the self-funded Plan in  
24 2004 (18 years to date). *See* Doc. 295 (Defendants’ SOF) at ¶ 19; Doc. 89 (Answer to  
25 Am. Compl.) at 2:2-3:4.

26 19. The ADOA’s maintenance of the Exclusion over 18 years coincides with  
27 other State entities’ maintenance of similar exclusions under health plans administered by  
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1 those entities, including by the State’s Medicaid agency, the Arizona Health Care Cost  
2 Containment System (“AHCCCS”), and well as by the State’s Department of Corrections.  
3 Wee Decl., Ex. 48 (Corieri email stating, [REDACTED]  
4 [REDACTED] referring to legislation to end taxpayer funding for gender  
5 reassignment surgery); Wee Decl., Ex. 36 (Corieri Depo. Tr.) at 112:14-20.

6 20. ADOA witnesses testified that, in performing their cost assessment for  
7 transgender benefits in 2015-16, they were pressured from “above” to alter cost  
8 information, so as to hide the fact that coverage for gender affirming surgery would have  
9 an immaterial cost. Wee Decl., Ex. 32 (Schafer Depo. Tr.) at 172:19. Specifically:

10 a. ADOA Plan Administrator Elizabeth Schafer—who was responsible for  
11 collecting and maintaining information about transgender benefits—  
12 testified that she was directed to delete a sentence in ADOA’s cost analysis  
13 that described the cost of coverage as “relatively low.” Wee Decl., Ex. 32  
14 (Schafer Depo. Tr.) at 150:22-152:1.

15 b. Ms. Schafer explained that “someone didn’t want it in black and white” that  
16 the cost of coverage was immaterial. Wee Decl., Ex. 32 (Schafer Depo. Tr.)  
17 at 151:15-152:1.

18 21. ADOA witnesses further testified that the State’s decision-making regarding  
19 the Exclusion was a “sensitive” topic. Wee Decl., Ex. 38 (Bender Depo. Tr.) at 156:7-16.  
20 *Id.* at Tr. 157:19-25 (agreeing that the decision about covering transgender benefits “wasn’t  
21 an easy decision because of the political considerations around it.”); *Id.* at 156:22-157:3  
22 (noting removing the Exclusion may have been “viewed more along political lines, if you  
23 will, different ideologies. And, obviously, in a political environment, that’s – many people  
24 consider those things.” Wee Decl., Ex. 40 (Sharritts Depo. Tr.) at 169:16-22; Tr. 170:17-  
25 21.

26 22. When questioned why the Governor’s Office might directly insert itself in  
27 ADOA’s Plan-related decision-making, Plan Administration Manager Scott Bender  
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1 testified that, except for when a benefit poses significant cost, the Governor’s Office would  
2 generally only be involved where “anyone in leadership has a particular feeling one way  
3 or the other about it.” Wee Decl., Ex. 38 (Bender Depo. Tr.) at 77:3-25.

4 23. Budget Manager Sharritts testified that in 2016 the State “w[as]n’t ready to  
5 make that change [*i.e.* coverage of gender affirming surgery] to the plan.” Wee Decl., Ex.  
6 40 (Sharritts Depo. Tr.) at 169:16-22.

7 24. Sharritts further testified that, because the cost of covering transgender  
8 benefits was “minuscule” it “d[id]n’s seem like [there was] an obvious reason not to cover  
9 it other than what the State feels on it.” Wee Decl., Ex. 40 (Sharritts Depo. Tr.) at 124:5-9.

10 25. Additionally a State witness testified that Mr. Meisner was determined to  
11 “prove himself correct in his viewpoints,” and that he “really wanted to show that [gender-  
12 affirming care] w[ere] going to be too costly,” despite the fact that that the State’s 2015-16  
13 analysis “showed otherwise.” Wee Decl., Ex. 40 (Sharritts Depo. Tr.) at 97:1-17.

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DATED this 16th day of December, 2022.

By: */s/ Christine K. Wee*

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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**Russell B. Toomey,**  
Plaintiff,

Case No.19-cv-00035-TUC-RM (LAB)

v.

**[PROPOSED] ORDER**

**State of Arizona; Arizona Board of Regents,  
D/B/A University of Arizona,** a governmental  
body of the State of Arizona; et al.,

Defendants.

Having reviewed Plaintiff's Motion to Correct a Clerical Error in Plaintiff's  
Countervailing Statement of Facts and to File Exhibit Under Seal, and finding good cause,

**IT IS ORDERED** that the Motion is granted.

**IT IS FUTHER ORDERED** that the Clerk is directed to file under seal an  
unredacted copy of Exhibit A, Plaintiff's corrected Countervailing SOF.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 2022.