Kathleen E. Brody – 026331
Molly Brizgys – 029216
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014
Telephone: (602) 650-1854
Email: **kbrody@acluaz.org**
Email: **mbrizgys@acluaz.org**

Joshua A. Block**
Leslie Cooper**
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, New York 10004
Telephone: (212) 549-2650
E-Mail: **jblock@aclu.org**
E-Mail: **lcooper@aclu.org**
Admitted Pro hac vice

James Burr Shields - 011711
Heather A. Macre - 026625
AIKEN SCHENK RICCIARDI P.C.
2390 East Camelback Road, Suite 400
Phoenix, Arizona 85016
Telephone: (602) 248-8203
E-Mail: **burr@aikenschenk.com**
E-Mail: **ham@aikenschenk.com**

Attorneys for Plaintiff Russell B. Toomey

IN THE UNITED STATES DISTRICT COURT

FOR THE 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; **Ron Shoopman,** in his official capacity as chair of the Arizona Board Of Regents; **Larry Penley,** in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna,** in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour,** in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson,** in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson,** in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler,** in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Gilbert Davidson**, in his official capacity as Interim Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

Case No. 4:19-cv-00035-TUC-RM (LAB)

RESPONSE TO STATE DEFENDANTS' OBJECTION TO REPORT AND RECOMMENDATION (DOC. 46)

Plaintiff, Dr. Russell Toomey, respectfully submits this Response to the State Defendants' Objection to the Magistrate Judge's Report & Recommendation. (Doc. 52).

I. ERISA Exhaustion Does Not Apply to Claims Under Title VII or the Equal Protection Clause.

As explained in Dr. Toomey's Response to the State Defendants' Motion to Dismiss, (Doc. 39, pp. 16-17), plaintiffs suing under Title VII or the Equal Protection Clause do not have to exhaust an employer's internal administrative remedies before filing suit. *See Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir.1997) ("[M]andating exhaustion in [§1983] case would not be consistent with congressional intent."); *Gibson v. Local 40, Supercargoes & Checkers of Int'l Longshoremen's & Warehousemen's Union*, 543 F.2d 1259, 1267 (9th Cir. 1976) ("An employee's Title VII rights are independent of contractual rights. Exhaustion of the latter is therefore not a precondition to a Title VII suit." (citation omitted)); *Fujikawa v. Gushiken*, 823 F.2d 1341, 1345 (9th Cir. 1987) ("[P]laintiffs in Title VII and FLSA actions . . . have a direct right to sue in federal court."). State Defendants do not cite a single case in which courts have required plaintiffs to exhaust a plan's internal grievance procedures before challenging an employer health plan as facially discriminatory under Title VII or the Equal Protection Clause.

Dr. Toomey is not seeking to "recover on a health plan." (Doc. 52, p. 2). He seeks to have the Plan declared *unlawful*. If Dr. Toomey's health plan provided coverage for transition-related surgery, he would have had a claim under ERISA, which provides a

cause of action for a plan beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C.A. §1132. By contrast, courts have recognized that "there is no right to recover under ERISA if the Plan is discriminatory on its face." *Duncan v. State Farm Ins. Cos.*, 896 F. Supp. 543, 547 (D.S.C. 1995); *Ameritech Ben. Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814, 824 (7th Cir. 2000) ("If the plan itself provides for discriminatory practices, such that they do not qualify for benefits under its terms, they cannot prevail on an ERISA claim.").

Like the plaintiffs in other cases challenging facially discriminatory health plans, Dr. Toomey is seeking to have the facially discriminatory Plan declared unlawful. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). As in other discrimination cases, the remedy for that unequal treatment is usually "extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984). But that extension derives from Title VII and the Equal Protection Clause, not from enforcing the terms of the Plan itself.

Because Dr. Toomey is not seeking to recover benefits under the Plan, principles of ERISA exhaustion do not apply. In a long line of cases beginning with *Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984), the Ninth Circuit has recognized

a distinction between rights that arise under the terms of the health plan and rights that arise under an independent statute. "On the one hand, exhaustion of internal dispute procedures is not required where the issue is whether a violation of the terms or provisions of the statute has occurred." *Graphic Commc'ns Union, Dist. Council No. 2, AFL-CIO v. GCIU-Employer Ret. Ben. Plan*, 917 F.2d 1184, 1187 (9th Cir. 1990) ((internal quotations marks and brackets omitted). "On the other hand, exhaustion. . . is ordinarily required where an action seeks a declaration of the parties' rights and duties' under the pension plan." *Id.* (internal quotation marks and citation omitted). In drawing that distinction, the Ninth Circuit in *Amaro* relied on "analogous" Supreme Court cases recognizing in the context of collective bargaining agreements that that employees do not need to exhaust internal grievance procedures before filing a statutory claim under Title VII or other federal statutes. *See Amaro*, 724 F. 2d at 752 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)). The Ninth Circuit subsequently explained that "[t]he fundamental premise of *Amaro* is that plaintiffs suing for violation of [a] statutory provision, like plaintiffs in Title VII and FLSA actions, have a direct right to sue in federal court." *Fujikawa*, 823 F.2d at 1345.

Ignoring these cases, the State Defendants rely on *Diaz v. United Agr. Employee Welfare Ben. Plan & Tr.*, 50 F.3d 1478, 1480 (9th Cir. 1995), in which the Ninth Circuit held that when a plaintiff sues "for medical benefits assertedly owed. . . under the Plan," *id.* at 1480, the plaintiff must exhaust those claims through internal appeals even when

the "claims for plan benefits may implicate statutory requirements," *id.* at 1484. (Doc. 52, p. 3). But the Ninth Circuit has subsequently reaffirmed that "as a general rule, exhaustion is not required for statutory claims," and the exhaustion requirement from *Diaz* applies only when the "statutory claim is no more than a 'disguised' benefit claim." *Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1294 (9th Cir. 2014); *accord Traylor v. Avnet, Inc.*, No. CV-08-0918-PHX-FJM, 2009 WL 383594, at *5 (D. Ariz. Feb. 13, 2009) (exhaustion not required when claim "is not brought to enforce the terms of the Plan, but instead seeks to enforce rights granted by ERISA [statute]").

Because Dr. Toomey's claims arise under Title VII and the Equal Protection Clause and he does not seek to enforce the terms of his health plan, ERISA exhaustion does not apply.

II. Even if ERISA Exhaustion Applied, Administrative Remedies Would Be Excused As "Futile" and "Inadequate."

Even if exhaustion requirements applied to claims under Title VII and the Equal Protection Clause, exhaustion would be excused as futile because the Dr. Toomey is challenging the underlying legality of the Plan itself. Defendants concede that Level 1 and Level 2 reviewers have no authority to declare the Plan to be illegal. But they argue that the Independent Review Organization ("IRO") that decides Level 3 appeals can invalidate the clear terms of the Plan under Title VII or the Equal Protection Clause. (Doc. 52, pp. 4-5).

The State Defendants misread the plain text of the Plan. The Plan states that in the course of making a benefits determination, the IRO will consider, *inter alia*, "[t]he terms of your Plan to ensure that the IRO's decision is not contrary to the terms of the Plan, unless the terms are inconsistent with applicable law." (Doc. 1-2, p. 76). That elliptical reference to "applicable law" does not somehow vest the IRO will authority to *decide* questions of law or resolve substantive legal disputes about what the applicable law is. As the Ninth Circuit explained *Amaro*, when "there is only a statute to interpret," then "that is a task for the judiciary." 724 F.2d at 751.[1]

Indeed, the State Defendants' interpretation of the Plan's internal remedies conflicts with the authoritative interpretation provided by Dr. Toomey's network provider, BCBS of Arizona, which advises Plan participants that "BCBS AZ sends the external review to the Arizona Department of Insurance (the 'ADOI'). ADOI decides contact coverage cases and *refers medical necessity cases and issues of medical judgment to an external Independent Review Organization (IRO)*." (emphasis added).[2] In light of BCBS of Arizona's representation that IROs would decide only "medical necessity cases

[1] The State Defendants also assert that the Plan unambiguously vests authority to with the IROs to rule on legal claims because the Plan states that "*[n]o action at law or in equity can be brought to recover on this Plan* until the appeals procedure has been exhausted as described in this Plan." (Doc. 52, p. 4). But Dr. Toomey is not seeking "to recover on this Plan." He is seeking to have the Plan declared illegal.

[2] See guide here: https://www.azblue.com/~/media/azblue/files/about/standardappealpacket.pdf

and issues of medical judgment," Dr. Toomey cannot be faulted for concluding that the internal appeals procedure did not provide any opportunity to obtain a legal ruling that the Plan violates Title VII or the Constitution.

Moreover, the State Defendants' assertions lack any factual basis in the reality of how IROs operate. The language contained in the challenged Plan is boilerplate language required by regulations enforcing the Affordable Care Act. *See* 45 C.F.R. §147.136(d)(2)(iii)(B)(5)(iv). Defendants provide no evidence that any IRO has ever interpreted this boilerplate language as providing it authority to rule on legal disputes about the legality of the underlying Plan under Title VII or the Constitution, or that IROs have the practical capability of making such determinations. Indeed, Dr. Toomey is prepared to submit evidence demonstrating that in other cases challenging the legality of similar exclusions of transition-related care, the IROs have expressly refused to consider transgender individuals' Title VII claims as outside the scope of their authority. These questions of fact cannot be resolved in the State Defendants' favor on a motion to dismiss.

In any event, even if an IRO were so empowered, requiring Dr. Toomey and other transgender employees to go through the lengthy exhaustion process would itself be an unequal and discriminatory burden. Before even getting to the point of requesting an IRO, Dr. Toomey would have to complete two levels of internal review, which even the State Defendants concede would be futile. "When the government erects a barrier that

makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). Requiring exhaustion in these circumstances simply places another discriminatory "barrier" to equal treatment on the basis of sex.

III. The "Gender Reassignment Surgery" Exclusion Violates Equal Protection.

In the Ninth Circuit, transgender status is a suspect or quasi-suspect classification that is subject to heightened scrutiny. *See Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018). The State Defendants attempt to distinguish *Karnoski* and evade heightened scrutiny by arguing that the "gender reassignment surgery" exclusion "does not specifically target transgender persons." (Doc. 52, p. 8). But, as other courts have recognized, discrimination based on gender "transition clearly discriminates on the basis of transgender identity." *Stone v. Trump*, 356 F. Supp. 3d 505, 513 (D. Md. 2018); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Excluding medically necessary care based on whether the care is provided for purposes of gender transition is discrimination based on transgender status. *See McQueen v. Brown*, No. 215CV2544JAMACP, 2018 WL 1875631, at *3

(E.D. Cal. Apr. 19, 2018), *report and recommendation adopted*, No. 215CV2544JAMACP, 2018 WL 2441713 (E.D. Cal. May 31, 2018); *Denegal v. Farrell*, No. 15-01251, 2016 WL 3648956, at *7 (E.D. Cal. July 8, 2016); *Norsworthy*, 87 F. Supp. 3d at 1120 (same).[3]

Moreover, the fact that "the gender reassignment surgery exclusion is just one of many different exclusions in the Health Plan," (Doc. 52, p. 8), does not make the gender reassignment surgery exclusion any less discriminatory. State Defendants are free to exclude medical treatments from coverage as long as they do not do so on the basis of a protected characteristic such as race, sex, or transgender status. Thus, "[t]he fact that not all medically necessary procedures are covered . . . does not relieve defendants of their duty to ensure that the insurance coverage offered to state employees does not discriminate on the basis of sex or some other protected status." *Boyden v. Conlin*, 341 F. Supp. 3d 979, 1000 (W.D. Wis. 2018).

Under heightened scrutiny—or any standard of scrutiny—State Defendants' asserted interest in reducing costs is insufficient as a matter of law. Although "a state has a valid interest in preserving the fiscal integrity of its programs" and "may legitimately

[3] In the analogous context of discrimination based on sexual orientation, the Supreme Court has refused to "distinguish between status and conduct" when a particular characteristic is a defining element of a protected class. *See Christian Legal Soc. v. Martinez*, 561 U.S. 661, 689 (2010) (refusing to distinguish between discrimination against gay individuals and discrimination against people who engage in same-sex intimate conduct); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (O'Connor, J., concurring) (explaining that state sodomy ban was unconstitutional because "the conduct targeted by this law . . . is closely correlated with" being lesbian, gay, or bisexual).

attempt to limit its expenditures . . . a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). Concerns about costs are insufficient to "justify gender-based discrimination in the distribution of employment-related benefits" under heightened scrutiny. *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 647 (1975).[4] And even under rational-basis review, the government may not reduce costs by arbitrarily discriminating between two similarly situated groups. *See Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (finding costs concerns cannot justify denying insurance coverage to same-sex couples under rational basis review).

Because State Defendants have failed to provide any explanation for treating the costs associated with transition-related surgery differently from the costs associated with other medically necessary treatments, the State Defendants' goal of reducing costs cannot justify the "gender reassignment surgery" exclusion under any standard of scrutiny.

[4] State Defendants do not cite any equal protection case in which a court has held that reducing costs is a constitutionally adequate justification for discriminating between similarly situated groups. Instead, State Defendants cite to a decision applying intermediate scrutiny to burdens on rights under the Second Amendment. (Doc. 52, p. 9) (quoting *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015)). Even in that case, the court said that cost considerations are merely "relevant" and "are not, by themselves, conclusive justifications for burdening a constitutional right under intermediate scrutiny." *Bonidy*, 790 F.3d at 1127. The other case cited by State Defendants is a procedural due process case that did not apply heightened scrutiny at all. *See Harris v. Lexington-Fayette Urban County Gov't*, 685 Fed. App'x 470, 473 (6th Cir. 2017).

IV. Dr. Toomey's Claims Seek Only Prospective Injunctive Relief.

Dr. Toomey's claims for injunctive relief are classic *Ex parte Young* claims that do not implicate sovereign immunity. Despite State Defendants' efforts to mischaracterize Dr. Toomey's claims (Doc. 52, p. 10-11), Dr. Toomey is not seeking a retroactive payment of benefits based on Defendant's denial of coverage in the past. Indeed, he does not seek any monetary remedy at all. The fact that he was denied coverage in the past is irrelevant because Dr. Toomey is not seeking any remedy based on that denial. He is exclusively seeking prospective relief in the form of a non-discriminatory health plan that will cover his *future* surgical care. *See Durham v. Martin*, No. 3:17-CV-01172, 2019 WL 2123262, at *11 (M.D. Tenn. May 14, 2019) ("The request that the plaintiff's right to a state pension and state-provided healthcare be reinstated and that he maintain those benefits going forward seeks prospective relief, regardless of the fact that the relief, if afforded, might cost the State money.").

CONCLUSION

For the foregoing reasons, State Defendants objections to the Magistrate Judge's Report and Recommendation lack merit, and the Motion to Dismiss should be denied in its entirety.

DATED this 16th day of July, 2019.

ACLU FOUNDATION OF ARIZONA

By /s/ Kathleen E. Brody
Kathleen E. Brody
Molly Brizgys
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Joshua A. Block
(*pro hac vice* granted)
Leslie Cooper
(*pro had vice* granted)
125 Broad Street, Floor 18
New York, New York 10004

AIKEN SCHENK RICCIARDI P.C.
James Burr Shields
Heather A. Macre
2390 East Camelback Road, Suite 400
Phoenix, Arizona 85016

Attorneys for Plaintiff Russell B. Toomey

CERTIFICATE OF SERVICE

I hereby certify that on 16th day of July, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a copy was electronically transmitted to the following:

C. Christine Burns christine@burnsbarton.com
Kathryn Hackett King kate@burnsbarton.com
Sarah N. O'Keefe
BURNSBARTON PLC
2201 E. Camelback Rd., Suite 360
Phoenix, AZ 85016
Attorneys for Defendants State of Arizona, Gilbert Davidson, and Paul Shannon

Paul F. Eckstein PEckstein@perkinscoie.com
Austin C. Yost AYost@perkinscoie.com
Perkins Coie LLP
2901 N. Central Ave., Suite 2000
Phoenix, AZ 85012-2788
DocketPHX@perkinscoie.com
Attorneys for Defendants Arizona Board of Regents, d/b/a University of Arizona; Ron Shoopman; Larry Penley; Ram Krishna; Bill Ridenour; Lyndel Manson;Karrin Taylor Robson; Jay Heiler; and Fred Duval

/s/ Joanne Granville