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13 UNITED STATES DISTRICT COURT
14 DISTRICT OF ARIZONA

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

20 Plaintiffs,

21 vs.

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

25 Defendant.

No.

**PLAINTIFFS D.H. AND JOHN
DOE'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION**

***ORAL ARGUMENT
REQUESTED***

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1 **I. INTRODUCTION**

2 Plaintiffs D.H and John Doe¹ are transgender teenagers who urgently need male chest
3 reconstruction surgery to alleviate their gender dysphoria. There is broad consensus within the
4 medical community that the surgery is a safe, effective, and medically necessary treatment for
5 many individuals with gender dysphoria, including adolescents. Plaintiffs' treating providers
6 determined that they require the surgery as soon as possible.

7 If not treated properly, gender dysphoria can seriously jeopardize a transgender
8 individual's physical and mental health. Both D.H. and John experience suicidal ideation as a
9 result of being denied medically needed care for their gender dysphoria. D.H. was admitted to
10 psychiatric facilities on account of his distress over being denied care for gender dysphoria on
11 multiple occasions. Both teenagers are forced to self-treat their gender dysphoria by wearing
12 restrictive bindings to reduce the profile of their chests. Plaintiffs' treating providers are very
13 concerned about the many negative health consequences of those binders.

14 Despite these ongoing harms, Arizona Medicaid refuses to cover this critical surgical
15 procedure. Instead, it cites a categorical exclusion for surgical treatment for gender dysphoria,
16 including male chest reconstruction surgery. Ariz. Admin. Code R9-22-205(B)(4)(A). There is
17 no legitimate basis for this exclusion. It is contrary to the prevailing standards of care and violates
18 the Medicaid Act, the Affordable Care Act, and the Equal Protection Clause.

19 Due to the significant harm this exclusion causes D.H. and John, and the irreparable
20 damage the continued denial of coverage will have on their physical and mental health, Plaintiffs
21 move to preliminarily enjoin Defendants from further enforcement of the regulation and order
22 AHCCCS to cover male chest reconstruction surgery for D.H. and John.

23 **II. FACTUAL BACKGROUND**

24 **A. Male Chest Reconstruction Surgery as Treatment for Gender Dysphoria**

25 Gender dysphoria—the clinically significant distress associated with the incongruence
26 between a transgender person's gender identity and assigned sex—is a serious medical condition
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28 ¹ John Doe concurrently filed a separate motion seeking leave to proceed under a pseudonym.

1 often requiring medical interventions. Declaration of Dr. Aron Janssen (“Janssen Decl.”) ¶¶ 28-
2 30, 33-35; Declaration of Loren Schechter (“Schechter Decl.”) ¶¶ 20-22.

3 Because a person’s gender identity is a core component of human identity, treatments for
4 gender dysphoria enable a transgender person to live consistently with his or her gender identity.
5 Janssen Decl. ¶¶ 22-28. The process of undergoing these treatments is called “gender transition”
6 and is guided by well-established, internationally recognized standards of care developed by the
7 World Professional Association for Transgender Health (WPATH). *Id.* ¶¶ 30-36; Schechter Decl.
8 ¶¶ 23-27. Major professional associations of healthcare providers in the United States adopted
9 the WPATH standards, including the American Medical Association, American Psychological
10 Association, the American Academy of Pediatrics, and the Endocrine Society. Janssen Decl., ¶
11 11; Schechter Decl. ¶¶ 31-32.

12 Under the prevailing standards of care, treatments for gender dysphoria in adolescents
13 who have entered puberty generally include mental health services and hormone therapy. Janssen
14 Decl. ¶¶ 33-34; Schechter Decl. ¶ 22. For transgender males, they frequently also include male
15 chest reconstruction surgery. Schechter Decl., ¶¶ 30-34; Janssen Decl. ¶ 35. The first step to
16 getting approved for male chest reconstruction surgery is obtaining a letter from a qualified
17 mental health professional referring the transgender young person for surgery. Schechter Decl.,
18 ¶ 30. The letter details the young person’s psychological functioning, the clinical bases for the
19 surgical referral, and their ability to consent to the procedure. *Id.* Then, they must consult with a
20 surgeon to determine whether they are a good candidate for male chest reconstruction surgery.

21 The surgery is not cosmetic; it is functional. Schechter Decl. ¶ 29. By converting the chest
22 from a female- to a male-appearing chest contour, the surgery alleviates the severe distress
23 experienced by transgender men with female-appearing breasts. *Id.*; Janssen Decl. ¶ 35. As a
24 result of the surgery, a transgender male’s body matches the person’s internal identity, thereby
25 providing enormous psychological relief, and enables them to interact with others and to function
26 in a male identity much more effectively and confidently. Janssen Decl. ¶ 31.

27 The surgery also eliminates the need for a chest binder along with the discomfort and pain
28 associated with it. Janssen Decl. ¶¶ 42-46; Schechter Decl. ¶ 35. This is not an insignificant issue.

1 A binder is a compressive garment that flattens the chest. Janssen Decl. ¶ 42; Schechter Decl.
2 ¶ 35. Many transgender men without access to male chest reconstruction surgery, in an effort to
3 self-treat, wear a binder for long durations of time. Janssen Decl., ¶ 43. Extended use of a binder
4 causes difficulty breathing and exacerbates preexisting pulmonary conditions like asthma.
5 Schechter Decl. ¶ 35; Declaration of Dr. Andrew Cronyn (“Cronyn Decl.”) ¶ 17. The constant
6 compression causes rashes and stretches the skin and can result in more serious skin conditions
7 such as vitiligo. Schechter Decl. ¶ 35. Wearing a binder over a long period of time also affects
8 surgical outcomes for male chest reconstruction surgery by (i) requiring a larger incision, (ii)
9 necessitating more difficult surgical techniques, and (iii) causing more scarring. *Id.*

10 Finally, excessive binding can result in a vicious Catch-22. Specifically, skin conditions
11 on or around the chest exacerbate a transgender person’s gender dysphoria because they require
12 them to devote attention to and seek medical care for the very part of their body causing them
13 significant psychological distress. Cronyn Decl. ¶ 25.

14 **B. D.H.’s and John’s history of Gender Dysphoria**

15 D.H. and John are seventeen- and fifteen-year-old transgender males on Medicaid.
16 Declaration of D.H. (“D.H. Decl.”) ¶¶ 1-2; Declaration of John Doe (“John Decl.”) ¶¶ 1-2. Both
17 experienced significant psychological distress as they first came to understand that they were
18 male, despite being assigned female at birth. D.H. Decl. ¶¶ 3-4; John Decl. ¶¶ 3-5. This distress
19 intensified at the onset of puberty. D.H. Decl. ¶ 6; John Decl. ¶ 5.

20 Starting at age four, D.H. struggled to express to his mother, Janice, that he is male. D.H.
21 Decl. ¶ 4. Not recognizing the message D.H. was trying to convey, Janice continued treating him
22 as female, which caused D.H. to decompensate psychologically. *Id.* ¶ 4; Declaration of Janice
23 Hennessy-Waller (“Hennessy-Waller Decl.”) ¶ 5. D.H. fervently tried mask or cope with the pain
24 he felt due to the disconnect between his body and his gender identity. D.H. Decl. ¶¶ 6-7. Nothing
25 could contain those emotions for long. At ages eleven, thirteen, fifteen, and sixteen, he required
26 intensive in-patient psychiatric treatment as a result of his distress at being treated as female. *Id.*
27 ¶ 4; Hennessy-Waller Decl. ¶¶ 5, 9, 12.

1 For John, everyone referred to him as a “tomboy,” but the term never really fit. John Decl.
2 ¶ 4. He was not mimicking a boy; he was already a boy. *Id.* At the onset of puberty, as John’s
3 body looked less like that of his male peers, he became unmoored and slipped into a serious
4 depression. *Id.* ¶ 5. During that time, he distanced himself from friends, no longer found joy in
5 the activities he used to love, lost a significant amount of weight, and contemplated suicide as a
6 result of trying to hide and suppress his male identity and his intense discomfort as a result of
7 developing breasts and other female secondary-sex characteristics. *Id.* Fear of rejection kept him
8 from sharing his male identity with those closest to him, especially his grandmother and
9 caretaker, Susan. *Id.* ¶ 6. That delay also prevented John from getting the specialized treatment
10 he desperately needed as his chest continued to develop and his psychological distress intensified.
11 *Id.* ¶ 6-7.

12 At their own times, D.H. and John found the words and courage to disclose that they are
13 transgender to their families. D.H. Decl. ¶ 8; John Decl. ¶ 7. Janice and Susan responded to this
14 news very similarly. They started gathering information and learning about how best to support
15 their child’s health and wellbeing. Hennessy-Waller Decl. ¶ 7; Declaration of Susan Doe (“Susan
16 Decl.”) ¶ 12. This was not a fast or easy process for either Janice or Susan, but they sought and
17 relied on the advice of medical experts to help guide them in making the decisions in D.H.’s and
18 John’s best interests. Hennessy-Waller Decl. ¶ 6; Susan Decl. ¶ 12.

19 After being evaluated by medical and mental health professionals, D.H. and John were
20 diagnosed with gender dysphoria. Reed Decl. ¶ 7; Peck Decl. ¶ 11. At the recommendation of
21 their healthcare providers, D.H. and John started the first, and critical, step of their transitions:
22 “social transition.” Reed Decl. ¶ 8; Peck Decl. ¶ 14. During this stage, individuals change their
23 name, pronouns, clothing, hair, and mannerisms to correspond with those typically associated
24 with their gender identity. Janssen Decl. ¶ 32. Those changes help ensure that a transgender
25 young person is treated consistent with their gender identity throughout their daily life, which is
26 often accompanied by significant improvement in mental health. *Id.*

27 Eventually, D.H. and John also began hormone treatment. Cronyn Decl. ¶ 14; Peck Decl.
28 ¶ 14. D.H. and John have been taking testosterone for more than a year. D.H. Decl. ¶ 13; John

1 Decl. ¶ 9. This treatment helped masculinize their appearance in the same way that it
2 masculinizes the appearance of other boys their age. *See* Janssen Decl. ¶ 34; D.H. Decl. ¶ 13;
3 John Decl. ¶ 9. Both D.H. and John experienced a decrease in their gender dysphoria since
4 starting testosterone treatment. Hennessy-Waller Decl. ¶ 11; Reed Decl. ¶ 9; John Decl. ¶ 9; Peck
5 Decl. ¶ 16. The more masculine appearance of their face and deeper voice also helps ensure that
6 others—including strangers—treat D.H. and John as male. *See* Janssen Decl. ¶¶ 30, 34.

7 **C. D.H. and John continue to experience significant emotional distress**

8 Each step of their respective transitions helped reduce D.H.’s and John’s gender dysphoria
9 and improve their daily lives. But their treatment is not complete because having breasts—a
10 female-appearing chest—is exacerbating their gender dysphoria. D.H. Decl., ¶¶ 13-14; John
11 Decl., ¶ 10. And self-treating their dysphoria by wearing a binder is no longer effective. D.H.
12 Decl., ¶¶ 9-10, 13-15; John Decl., ¶ 15.

13 Like many transgender males, D.H. and John regularly wear their binders for far longer
14 than the maximum daily time—eight hours—recommended by health care providers. D.H. Decl.,
15 ¶ 11; John Decl., ¶ 13. But the binders provide psychological relief that is essential to their ability
16 to function. D.H. Decl., ¶¶ 7, 11; John Decl., ¶ 14; Cronyn Decl., ¶ 20; Peck Decl. ¶ 15. Removing
17 the binder causes their psychological distress to come flooding back. D.H. Decl. ¶ 11; John Decl.,
18 ¶¶ 14, 15; Cronyn Decl., ¶ 20; Peck Decl. ¶ 15; Janssen Decl. ¶ 43.

19 On occasions when his gender dysphoria is particularly intense, D.H. has worn his binder
20 for several consecutive days without taking it off. D.H. Decl., ¶ 11. But excessive use of the
21 binder is dangerous and restrictive. D.H. Decl., ¶ 9-10; Cronyn Decl., ¶¶ 16-19, 24-25; Janssen
22 Decl. ¶ 43. The binder prevents D.H. from dancing—formerly a major source of psychological
23 relief—because the binder keeps him from breathing in too deeply, making it difficult to engage
24 in any type of physical activity. D.H. Decl., ¶ 10. In fact, D.H.’s primary care provider noted that
25 D.H. is starting to develop asthma as a result of his use of the binder. Cronyn Decl., ¶ 16.

26 Even when worn safely, the binder causes significant psychological distress for both D.H.
27 and John. D.H. Decl., ¶¶ 12, 14; John Decl., ¶ 14-15. The contour of their chest—even with the
28 binder—undermines every other aspect of who they are. At fifteen-years-old, D.H. became

1 consumed with distress again; the appearance of his chest being a major contributing factor.
2 Hennessy-Waller Decl., ¶ 12. D.H. was placed in an intensive psychiatric treatment program for
3 a third time. *Id.* D.H. recovered, but still finds himself in an impossible position: his chest is both
4 the major source of his ongoing psychological distress and the barrier to his return to dance,
5 D.H.'s outlet for relieving that distress. D.H. Decl. ¶ 10.

6 John too experiences significant distress regarding his chest. John cannot look at himself
7 in the mirror or in photographs. John Decl., ¶ 14. He needs layers of clothing to feel comfortable
8 enough to leave his home. *Id.* ¶ 10. John's binder causes debilitating anxiety during regular social
9 interactions among teenage friends. *Id.* ¶ 12. He cannot engage in physical activity in the same
10 way as his peers because the binder restricts his breathing. *Id.* Before going into the pool with
11 friends, he must steel himself for the inevitable questions about why he wears a shirt in the pool
12 and why he can't just take it off and be bare chested like his male peers. *Id.* And, at least once a
13 week, John is kept awake at night by the dysphoria associated with his chest; putting his binder
14 back on is the only way to calm that distress. *Id.* ¶ 14. As a result of his increasing distress, earlier
15 this year John asked Susan if he could start seeing a therapist regularly. Susan Decl., ¶ 16.

16 **D. D.H. and John also experience significant physical discomfort and pain**

17 John is constantly uncomfortable with the appearance of his chest and wears layers of
18 clothing to obscure the contour of his chest. John Decl. ¶ 10. This includes a hooded sweatshirt,
19 which he wears every day, even in the blistering heat of the Arizona summers. *Id.* Those layers
20 of additional clothing make John hot, sweaty, and uncomfortable for large portions of his day.
21 John also has asthma, which in combination with the binder, prevents him from keeping up in
22 his dance classes, an activity he loves. *Id.* at ¶ 12.

23 For D.H., his binder is constrictive and painful. D.H. Decl. at ¶¶ 9-10. That pain and
24 discomfort interferes with D.H.'s ability to fully engage in his schoolwork, particularly
25 homework because the pain is the most intense towards the end of the day. *Id.* D.H.'s treating
26 physician is concerned that this back pain will become severe enough to warrant medication or
27 referrals to additional healthcare services, such as physical therapy or even orthopedic surgery.
28 Cronyn Decl. at ¶ 24.

1 **E. D.H. and John require male chest reconstruction surgery**

2 In May 2019, following D.H.’s fourth hospitalization, D.H. was evaluated by Dr. Ethan
3 Larson, a surgeon who regularly performs male chest reconstruction surgery on transgender
4 patients. Hennessy-Waller Decl. ¶ 14. Dr. Larson concluded that D.H. was a good candidate for
5 male chest reconstruction surgery and recommended that he proceed with the surgery. *Id.* In light
6 of D.H.’s urgent need for the surgery, Janice decided to seek pre-authorization from AHCCCS
7 for the procedure because privately paying for the procedure was not an option given her income.
8 *See id.* ¶¶13, 16.

9 D.H.’s request for pre-authorization for male chest reconstruction surgery was denied.
10 Hennessy-Waller Decl. ¶ 15. Janice appealed, but the denial was upheld on July 5, 2019. *Id.* The
11 denial of coverage for D.H.’s male chest reconstruction surgery relied upon AHCCCS’s explicit
12 exclusion for surgical treatments for gender dysphoria. *Id.*

13 Although John has the referral letter from his mental health provider, Susan is unable to
14 schedule a surgical consult because she cannot afford the surgery and AHCCCS will not cover
15 it. Susan Decl. ¶ 18.

16 D.H.’s and John’s treating health care providers are all in agreement: without male chest
17 reconstruction surgery, D.H. and John are at substantial risk of short- and long-term harm to their
18 health and well-being. Reed Decl. ¶¶ 12-14; Cronyn Decl. ¶ 26; Peck Decl. ¶ 19-21.

19 **III. ARGUMENT**

20 The Court should issue a preliminary injunction when plaintiffs establish that (a) they are
21 “likely to succeed on the merits,” (b) they are “likely to suffer irreparable harm in the absence of
22 preliminary relief,” (c) “the balance of equities tips in [their] favor,” and (d) “an injunction is in
23 the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1135 (9th Cir.
24 2011); *United Food and Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1123
25 (D. Ariz. 2011). These elements are “balanced” using a “‘sliding scale’ approach,” so that “a
26 stronger showing of one element may offset a weaker showing of another.” *United Food*, 817 F.
27 Supp. 2d at 1118 (quoting *Wild Rockies*, at 1127). For example, when “the moving party
28 demonstrate[s] a very high likelihood of injury . . . , the likelihood of success on the merits may

1 be relaxed” and “an injunction may be granted when ‘serious questions going to the merits were
2 raised’” but “the balance of hardships tips sharply in the plaintiff’s favor.” *Id.* (quoting *Wild*
3 *Rockies*, at 1135).

4 D.H. and John’s claims satisfy each of these elements.

5 **A. Plaintiffs are Likely to Succeed on the Merits of Their Claims**

6 1. *Excluding surgical care for transgender young people violates Medicaid’s*
7 *EPSDT requirements*

8 The fundamental purpose of the Early and Periodic Screening, Diagnostic and Treatment
9 (EPSDT) requirements is to “[a]ssure that health problems are diagnosed and treated early, before
10 they become more complex and their treatment more costly.” Ctrs. for Medicare & Medicaid
11 Servs., State Medicaid Manual § 5010.B. The EPSDT provisions accomplish that objective by
12 ensuring that Medicaid recipients under age 21 receive the “health care they need when they need
13 it.” Ctrs. for Medicare & Medicaid Servs., *EPSDT – A Guide for States* (2014),
14 https://www.medicaid.gov/sites/default/files/2019-12/epsdt_coverage_guide.pdf. Specifically,
15 the EPSDT provisions require state Medicaid agencies to cover any service that is allowable
16 under § 1396d(a) if “necessary . . . to correct or ameliorate” illnesses or conditions regardless of
17 whether the service is covered for adults. 42 U.S.C. §§ 1396d(r)(5), 1396a(a)(10)(A),
18 1396d(a)(4)(B).

19 “The EPSDT obligation is thus extremely broad.” *Katie A., ex rel. Ludin v. L.A. County*,
20 481 F. 3d 1150, 1154 (9th Cir. 2007). And, “there is a very strong inference to be inclusive rather
21 than exclusive” when determining the meaning of “correct or ameliorate.” *Ekloff v. Rodgers*, 443
22 F.Supp.2d 1173, 1180 (D. Ariz. 2006). Further, states must take the proactive step of ensuring
23 that services determined to be medically necessary for a particular beneficiary are actually
24 provided. 42 U.S.C. § 1396a(a)(43)(C); *Katie A.*, 481 F. 3d at 1158-59.

25 Here, the EPSDT provisions require AHCCSS to cover male chest reconstruction surgery
26 for D.H. and John. The procedure is included within the categories of services that must be
27 covered under the Medicaid Act. *See* 42 U.S.C. § 1396d(a)(2)(A) (outpatient hospital services),
28

1 (5)(A) (services furnished by a physician). It is also necessary to “correct or ameliorate”
 2 Plaintiffs’ gender dysphoria. *Id.* § 1396d(r)(5).

3 There is broad consensus within the medical community that male chest reconstruction
 4 surgery is a safe and effective treatment for gender dysphoria. Schechter Decl. ¶¶ 27-30; Janssen
 5 Decl. ¶ 46. Plaintiffs’ treating health care providers determined that the Plaintiffs need the
 6 surgery to alleviate their dysphoria. Reed Decl. ¶¶ 12-14; Cronyn Decl. ¶ 26; Peck Decl. ¶¶ 19-
 7 21; *see also* Schechter Decl. ¶¶ 43-44, 49. That surgery will significantly improve D.H.’s and
 8 John’s ability to function in every aspect of their lives. Reed Decl. ¶¶ 12; Cronyn Decl. ¶¶ 24-
 9 26; Peck Decl. ¶¶ 18-20. By alleviating their gender dysphoria, D.H. and John will be better able
 10 to address the anxiety, depression, and co-occurring mental health issues that have accompanied
 11 their gender dysphoria. Reed Decl. ¶ 13; Peck Decl. ¶ 20. Further, the surgery will relieve D.H.
 12 and John of the pain associated with prolonged use of a binder. D.H. Decl. ¶ 17; John Decl. ¶ 17;
 13 Cronyn Decl. ¶¶ 24-26. It will also prevent the binder from causing any additional health
 14 complications such as skin rashes, irritations, or stretching, or vitiligo or exacerbating existing
 15 conditions, such as asthma. Cronyn Decl. ¶ 23; Schechter Decl. ¶ 35; *see Ekloff*, 443 F.Supp.2d
 16 at 1180 (holding that AHCCCS’s refusal to cover incontinence briefs when necessary to prevent
 17 skin breakdown and “the needless pain of skin sores” violated the EPSDT requirements).

18 2. *Excluding surgical care for transgender people violates Medicaid’s*
 19 *comparability requirement*

20 The Medicaid Act also requires AHCCCS to ensure that the “medical assistance made
 21 available to any [categorically needy] individual . . . shall not be less in amount, duration, or
 22 scope than the medical assistance made available to any other such individual.” 42 U.S.C. §
 23 1396a(a)(10)(B); 42 C.F.R. § 440.240. Federal regulations make clear that states “may not
 24 arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise
 25 eligible beneficiary solely because of the diagnosis, type of illness, or condition.” 42 C.F.R. §
 26 440.230(c).

27 Courts repeatedly hold that the comparability requirement “prohibits discrimination
 28 among individuals with the same medical needs stemming from different medical conditions.”

1 *Davis v. Shah*, 821 F.3d 231, 258 (2d Cir. 2016) (finding state policy covering prescription
 2 orthopedic footwear and compression stockings for beneficiaries with certain listed conditions,
 3 but not for those with equal need for service due to other conditions, violated comparability
 4 requirement); *see also White v. Beal*, 555 F.2d 1146, 1148 (3d Cir. 1977); *Cota v. Maxwell-Jolly*,
 5 688 F. Supp. 2d 980, 993 (N.D. Cal. 2010).

6 With the Challenged Exclusion, however, AHCCCS is doing just that. Male chest
 7 reconstruction surgery is medically necessary for many individuals with gender dysphoria,
 8 including D.H. and John. Reed Decl. ¶¶ 12-14; Cronyn Decl. ¶ 26; Peck Decl. ¶¶ 19-21;
 9 Schechter Decl. ¶¶ 27-30; Janssen Decl. ¶ 46. While AHCCCS refuses to cover the surgery when
 10 necessary to treat gender dysphoria, AHCCCS covers the same services when necessary to treat
 11 other conditions. *See, e.g.*, Arizona Administrative Code R9-22-2004(A)(4); AHCCCS Medical
 12 Policy Manual, § 310-C Breast Reconstruction After Mastectomy (2018),
 13 <https://www.azahcccs.gov/shared/Downloads/MedicalPolicyManual/300/310C.pdf>. The
 14 Western District of Wisconsin recently held that a nearly identical coverage policy violates the
 15 comparability requirement. *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1019
 16 (W.D. Wis. 2019) (finding the categorical exclusion of coverage for “transsexual surgery”
 17 impermissible because it “discriminates on the basis of diagnosis” and permanently enjoining the
 18 State from enforcing the exclusion).

19 The circumstances here are no different. By failing to provide “comparable services for
 20 individuals with comparable needs,” AHCCSS is plainly violating the Medicaid Act. *Cota*, 688
 21 F. Supp. 2d at 993.

22 3. *Excluding surgical care for transgender people violates Section 1557 of*
 23 *the Affordable Care Act*

24 The nondiscrimination provision of the Affordable Care Act prohibits any health program
 25 that receives federal funds from discriminating on the basis on sex, among other protected
 26 characteristics. 42 U.S.C. § 18116(a). Drawing from the statutory language, there are three
 27 elements to a claim under Section 1557: (1) the program is federally funded; (2) the plaintiff was
 28 denied benefits of or otherwise discriminated against by the program based on a protected

1 characteristic—in this case sex; (3) the discrimination was a but-for cause of the plaintiff’s injury.

2 *See id.*

3 As a health program that receives federal funds, AHCCCS must comply with Section 1557
4 of the Affordable Care Act.

5 Discrimination because a person is transgender is discrimination because of sex. *Bostock*
6 *v. Clayton Cnty., Ga.*, --- S. Ct. ---, 2020 WL 3146686 at *7 (Jun. 15, 2020); *see, also, Toomey*
7 *v. Arizona*, Case No. CV-19-00035-TUC-RM, 2019 WL 7172144, at *5 (D. Ariz. Dec. 23, 2019).
8 As the Supreme Court has explained, “it is impossible to discriminate against a person for
9 being . . . transgender without discriminating against that individual based on sex.” *Bostock*,
10 2020 WL 3146686 at *7.

11 The Supreme Court’s analysis in *Bostock* applies to the Affordable Care Act as well.
12 Because the statutory language—and thus, the original public meaning—of Section 1557 is
13 indistinguishable from Title VII, courts rely on the interpretation of Title VII, and other federal
14 sex-discrimination laws, to analyze claims under Section 1557. *See, e.g., Prescott v. Rady*
15 *Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098–99 (S.D. Cal. 2017). In particular,
16 courts have recognized that discrimination against transgender people by excluding coverage of
17 transition-related care violates Section 1557. *See, e.g., Flack v. Wis. Dept. of Health Svcs.*, 395
18 F.Supp.3d 1001 (W.D. Wis. 2019); *Boyden v. Conlin*, 341 F.Supp.3d 979 (W.D. Wis. 2018).

19 By enforcing a categorical exclusion for “gender reassignment surgeries,” AHCCCS
20 discriminates against transgender Medicaid beneficiaries based on sex. That conclusion is plain
21 from the sex-based language of the exclusion, which expressly prohibits surgeries undertaken for
22 the purpose of “gender reassignment.”² The sex-based character of the exclusion is apparent on
23 its face.

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27 ² The exclusion’s use of the word “gender” instead of “sex” is legally insignificant. Courts
28 have used those terms interchangeably to determine whether a defendant’s conduct violated
federal sex-discrimination laws. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011)

1 The exclusion also discriminates based on sex because it applies only to transgender
2 people, who are the only beneficiaries who require gender-reassignment surgeries. The fact that
3 AHCCCS would have provided coverage had D.H. or John needed this surgery for other
4 medically necessary reasons, such as to treat cancer or traumatic injury, but refuses to do so for
5 the treatment of gender dysphoria, demonstrates that the exclusion on its face discriminates based
6 on transgender status and thus on sex.

7 The harm caused to D.H. and John by AHCCCS's refusal to cover their medically
8 necessary male chest reconstruction surgery is equally plain. Unable to afford this medically
9 necessary surgery themselves, D.H. and John have no choice but to delay. Hennessy-Waller Decl.
10 ¶ 16; Susan Decl. ¶ 18. In the meantime, they are exposed to the daily emotional pain of having
11 a body that is inconsistent with who they are, exacerbated by physical pain of wearing a binder
12 to flatten the appearance of their chest. D.H. Decl. ¶¶ 9-12, 14-15; John Decl. ¶¶ 10-15. And,
13 despite their efforts to ensure their appearance accurately presents their male gender identity,
14 both are regularly mistaken for female due to their female-appearing breasts, a particularly
15 painful indignity. D.H. Decl. ¶ 15; John Decl. ¶ 17.

16 For D.H., that psychological distress intensified to the point that he required in-patient
17 intensive psychiatric care due to suicidal ideations. D.H. Decl. ¶ 12. John cannot look at himself
18 in the mirror due to the shame he feels about his body, goes to great lengths to obscure the
19 appearance of chest, even wearing hooded sweatshirts in the summer, and avoids social
20 interaction with peers due to anxiety, and has sought mental health treatment for these symptoms.
21 John Decl. ¶¶ 10, 14.

22 All these significant harms could be avoided if AHCCCS covered this critical, medically
23 necessary care.

24 4. *The Challenged Exclusion Violates the Equal Protection Clause*

25 AHCCCS's categorical exclusion for "gender reassignment surgery" impermissibly
26 discriminates against transgender Medicaid recipients based on sex. That exclusion explicitly
27 disregards the medical necessity of surgical care for transgender people. Governmental action
28 that discriminates based on transgender status is subject to heightened scrutiny. Because

1 discrimination against transgender people is a form of sex discrimination, *Bostock*, 2020 WL
2 3146686 at *7, courts have applied heightened scrutiny to equal-protection claims brought by
3 transgender people. *See, e.g., F.V.*, 286 F. Supp. 3d at 1144; *Norsworthy*, 87 F. Supp. 3d at 1119;
4 *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F. 3d 1034, 1051 (7th Cir. 2017);
5 *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566,
6 572 (6th Cir. 2004).

7 Under heightened scrutiny, the government must have an “exceedingly persuasive
8 justification” for its discrimination. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24
9 (1982) (internal citation omitted). This requires that “the [challenged] classification serve[]
10 important government objectives and that the discriminatory means employed are substantially
11 related to the achievement of those objectives.” *Id.* at 723-24 (citations and internal quotation
12 marks omitted). The justification must also be “genuine, not hypothesized or invented post hoc
13 in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). But, AHCCCS’s
14 categorical exclusion for “gender reassignment surgeries” cannot survive any level of
15 constitutional scrutiny because the exclusion is no more than “a bare desire to harm a politically
16 unpopular group.” *Romer v. Evans*, 517 U.S. 620, 634 (1996).

17 By excluding “gender reassignment surgeries,” AHCCCS categorically denies coverage
18 for medically necessary surgical care required by transgender people, while providing the same
19 surgical care when necessary to treat other medical conditions not associated with transgender
20 people. Pre-authorizations for surgical care required to treat other conditions follow a well-
21 established procedure: assessing the medical necessity of the procedure based on the prevailing
22 standards of care and evidence of need provided by treating healthcare providers. In contrast,
23 AHCCCS does not consider any standards of care or even review documentation of a
24 beneficiary’s medical need for surgical care; coverage is automatically denied because it is being
25 requested for a condition that affects transgender people. This categorical denial even overrides
26 the requirement that AHCCCS cover treatments “necessary . . . to correct or ameliorate” illnesses
27 or conditions for Medicaid beneficiaries under 21, regardless of whether the treatment is covered
28 for adults. 42 U.S.C. § 1396d(r)(5).

1 There is no legitimate—or even rational—basis for that distinction. Indeed, this Court in
 2 *Toomey* denied Arizona’s motion to dismiss finding that a similar exclusion in Arizona’s health
 3 plan for state employees was so devoid of purpose that, “even were the Court to apply rational
 4 basis review to Plaintiff’s Equal Protection claim . . . it is not certain that Plaintiff’s claim would
 5 fail that test.” *Toomey v. Arizona*, 2019 WL 7172144, *8 (D. Ariz. 2019). As a result, D.H. and
 6 John have a strong likelihood of success on their equal protection claim.

7 **B. Plaintiffs will be irreparably harmed in the absence of an injunction**

8 *1. Irreparable harm is presumed for violations of constitutional rights*

9 “It is well established that the deprivation of constitutional rights ‘unquestionably
 10 constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). There
 11 is a presumption of irreparable injury upon a showing of likelihood of success on a constitutional
 12 claim, as “constitutional violations cannot be adequately remedied through damages.” *Am.*
 13 *Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (quotations
 14 omitted). Courts apply this principle to equal-protection claims brought by transgender plaintiffs.
 15 *See, e.g., Edmo v. Corizon, Inc.*, 935 F.3d 757, 798 (9th Cir. 2019) (citing *Nelson v. NASA*, 530
 16 F.3d 865, 882 (9th Cir. 2008)).

17 Thus, the continued enforcement of the Challenged Exclusion in violation of the Equal
 18 Protection Clause—in and of itself—would be sufficient to presume irreparable harm to justify
 19 a preliminary injunction. As detailed above, however, D.H. and John have and will continue to
 20 experience significant harm to their short- and long-term health and well-being.

21 *2. AHCCCS’ continued denial of care causes irreparable physical and*
 22 *emotional harm*

23 Delayed access to medically necessary healthcare services is sufficient to establish
 24 irreparable harm. *Bowen v. City of New York*, 476 U.S. 467, 483-84 (1986) (finding denial of
 25 benefits caused irreparable injury by exposing plaintiffs to “severe medical setbacks or
 26 hospitalization”); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 797 (9th Cir. 2019). In *Edmo*, the Ninth
 27 Circuit held that the continued denial of gender-confirming surgery, and the accompanying
 28 psychological distress and risk to Edmo’s physical health due to prior suicidal ideation,

1 constituted irreparable harm. 935 F.3d at 957. Courts repeatedly hold that serious psychological
2 distress, deterioration of health, and risk of self-harm or suicide are irreparable harms—even
3 when unconnected to a denial of medically necessary care. *Thomas v. Cnty. of Los Angeles*, 978
4 F.2d 504, 512 (9th Cir. 1992); *Chalk v. U.S. Dist. Ct. Cent. Dist. of California*, 840 F.2d 701, 709
5 (9th Cir. 1988); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d
6 1034, 1045 (7th Cir. 2017).

7 Here, further delay of this medically necessary surgery will cause D.H. and John
8 irreparable harm to their physical health, which could have long-lasting implications. Reed Decl.
9 ¶¶ 12-14; Cronyn Decl. ¶¶ 23-24, 26; Peck ¶¶ 19-21. D.H. and John treat their symptoms of
10 gender dysphoria by wearing a binder, which causes pain and discomfort. D.H. Decl. ¶¶ 7, 9-12;
11 John Decl. ¶¶ 11-15. The binder also impairs their ability to engage in physical activity and is
12 exacerbating John's and D.H.'s asthma, which could limit D.H.'s chances of being able to fully
13 return to dancing—an activity that previously brought him significant psychological relief. D.H.
14 Decl. ¶ 10; Cronyn Decl. ¶¶ 17-18, 23; John Decl. ¶ 12. Further, prolonged use of the binder,
15 without which neither D.H. or John would be able to function, can cause significant damage to
16 the skin and tissue on their chest, potentially requiring a larger incision to complete the male
17 chest reconstruction surgery, which would also result in more scarring. Schechter Decl. ¶ 35.

18 The emotional harms D.H. and John will experience absent immediate relief are also
19 irreparable. D.H.'s and John's gender dysphoria will become increasingly debilitating. Reed
20 Decl. ¶¶ 13-14; Cronyn Decl. ¶¶ 23-24; Peck Decl. ¶ 21. To date, there have been very serious
21 consequences for D.H., who required intensive psychiatric treatment on multiple occasions due
22 to suicidal ideation associated with being unable to access medically necessary care for gender
23 dysphoria. D.H. Decl. ¶¶ 4, 12; Hennessy-Waller, ¶¶ 5, 9, 12. John also experienced suicidal
24 ideation when his gender dysphoria spiked at the onset of puberty. John. Decl. ¶ 5. John is already
25 exhibiting the signs of increased psychological distress as a result of not being able to undergo
26 male chest reconstruction surgery. Susan Decl. ¶ 16; Peck Decl. ¶ 21. He also continues to
27 experience significant anxiety in social situations out of fear that the appearance of his chest will
28 cause others to treat him differently and not as male. John Decl. ¶ 15; Susan Decl. ¶ 20. Each of

1 those harms is sufficiently irreparable, but when combined demonstrate the critical importance
2 of injunctive relief for D.H. and John.

3 **C. The balance of equities tips sharply in Plaintiffs' favor**

4 The balance of equities heavily favors D.H. and John's requested relief. When considering
5 a request for preliminary injunction, the "court must balance the competing claims of injury and
6 must consider the effect on each party of the granting or withholding of the requested relief." *Arc*
7 *of Cal. v. Douglas*, 757 F.3d 975, 991 (9th Cir. 2014) (quoting *Amoco Prod. Co. v. Vill. of*
8 *Gambell*, 480 U.S. 531, 542 (1987)). The balance of equities and public interest factors "merge
9 when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

10 D.H. and John provided detailed declarations from their treating providers and medical
11 experts outlining the serious physical and emotional injuries a further delay of this medically
12 necessary surgery would cause. Indeed, both individuals have already suffered greatly due to the
13 denial of medically necessary care caused by AHCCCS's categorical exclusion.

14 On the other hand, AHCCCS cannot show that it will be harmed at all, let alone irreparably
15 so. The government "cannot reasonably assert that it is harmed in any legally cognizable sense"
16 when a court enjoins it from violating the constitution. *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th
17 Cir. 1983); *see also Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014);
18 *Melendres*, 695 F.3d at 1002. Requiring AHCCCS to cover medically necessary care, as required
19 by the Medicaid Act, and in a nondiscriminatory manner, as required by the Affordable Care Act
20 and the Equal Protection Clause, does not harm Arizona.

21 Nor does the cost of complying with the injunction cause the balance of equities to shift
22 in favor of AHCCCS. The Ninth Circuit repeatedly holds that access to medically necessary care
23 for Medicaid recipients and people with disabilities outweighs budgetary concerns. *See, e.g.,*
24 *M.R. v. Dreyfus*, 697 F.3d 706, 737-38 (9th Cir. 2012); *Beltran v. Myers*, 677 F.2d 1317, 1322
25 (9th Cir. 1982); *see also Newton-Nations v. Rogers*, 316 F.Supp.2d 883, 888 (D. Ariz. 2004).

26 In fact, given the experiences of other states who cover male chest reconstruction surgery
27 and other gender-confirming care, it is likely that the cost savings to Arizona from the reduced
28 need for treatment of symptoms and co-occurring conditions associated with gender dysphoria

1 will far exceed the costs of covering surgery itself. *See, e.g.,* Am. Medical Ass’n & Gay and
2 Lesbian Medical Ass’n, *Issue Brief: Health insurance coverage for gender-affirming care of*
3 *transgender patients* 3 (2019), available at, [https://www.ama-assn.org/system/files/2019-](https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf)
4 [03/transgender-coverage-issue-brief.pdf](https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf); *see also* *Boyden v. Conlin*, 341 F. Supp. 3d 979, 990
5 (W.D. Wis. 2018) (defense expert estimating per member cost of removing gender-confirming
6 care exclusion between \$0.04-\$0.10 per month); *Flack*, 395 F. Supp. 3d at 1008 (“For purposes
7 of this lawsuit, defendants estimate that removing the Challenged Exclusion and covering
8 gender-confirming surgeries would cost between \$300,000 and \$1.2 million annually. There is
9 no dispute that these amounts are actuarially immaterial as they are equal to approximately
10 0.008% to 0.03% of the State’s \$3.9 billion share of Wisconsin Medicaid’s \$9.7 billion annual
11 budget”).

12 The cost to AHCCCS of covering the medically necessary care D.H. and John seek will
13 be insignificant, but for D.H. and John, it will relieve them of the significant physical and
14 emotional harms they experience on a daily basis; it will be life-changing and further AHCCCS’s
15 mission to “provide comprehensive, quality health care to those in need.”

16 **IV. THE COURT SHOULD NOT REQUIRE PLAINTIFF TO POST A BOND**

17 The District Court has discretion not to require the moving party to post a bond before
18 granting a preliminary injunction. *Diaz v. Brewer*, 656 F. 3d 1008, 1015 (9th Cir. 2011) (citing
19 *Johnson v. Couturier*, 572 F.3d 1067, 1089 (9th Cir. 2009). The Court should exercise that
20 discretion here. D.H., John, and their families are low-income, and they are seeking to enjoin an
21 unlawful policy that prevents them from obtaining medically necessary treatments they cannot
22 otherwise afford. In these circumstances, a waiver of the security bond requirement is
23 appropriate. *See, e.g., Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005)
24 (“district court has discretion to dispense with the security requirement . . . where requiring
25 security would effectively deny access to judicial review” due to financial hardship).

26 **V. CONCLUSION**

27 The Court should grant the requested injunction.
28

Respectfully submitted,

1
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* *Pro hac vice* forthcoming