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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

D.H., by and through his mother, Janice Hennessy-Waller; and John Doe, by his guardian and next friend, Susan Doe, on behalf of themselves and all others similarly situated, Plaintiffs, vs. Jami Snyder, Director of the Arizona Health Care Cost Containment System, in her official capacity, Defendant.	No. **PLAINTIFFS D.H. AND JOHN DOE'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION** ***ORAL ARGUMENT REQUESTED***

I. INTRODUCTION

Plaintiffs D.H and John Doe[1] are transgender teenagers who urgently need male chest reconstruction surgery to alleviate their gender dysphoria. There is broad consensus within the medical community that the surgery is a safe, effective, and medically necessary treatment for many individuals with gender dysphoria, including adolescents. Plaintiffs' treating providers determined that they require the surgery as soon as possible.

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

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

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

II. FACTUAL BACKGROUND

A. Male Chest Reconstruction Surgery as Treatment for Gender Dysphoria

Gender dysphoria—the clinically significant distress associated with the incongruence between a transgender person's gender identity and assigned sex—is a serious medical condition

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[1] John Doe concurrently filed a separate motion seeking leave to proceed under a pseudonym.

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

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

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

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

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

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

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

B. D.H.'s and John's history of Gender Dysphoria

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

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

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

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

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

1. Excluding surgical care for transgender young people violates Medicaid's EPSDT requirements

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

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

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

(5)(A) (services furnished by a physician). It is also necessary to "correct or ameliorate" Plaintiffs' gender dysphoria. *Id*. § 1396d(r)(5).

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

2. Excluding surgical care for transgender people violates Medicaid's comparability requirement

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

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

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

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

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

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

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

characteristic—in this case sex; (3) the discrimination was a but-for cause of the plaintiff's injury. *See id.*

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

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

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

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

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[2] The exclusion's use of the word "gender" instead of "sex" is legally insignificant. Courts 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)

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

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

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

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

4. The Challenged Exclusion Violates the Equal Protection Clause

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

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

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

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

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

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

1. Irreparable harm is presumed for violations of constitutional rights

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

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

2. AHCCCS' continued denial of care causes irreparable physical and emotional harm

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

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

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

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

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

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

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

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

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

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

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

will far exceed the costs of covering surgery itself. *See, e.g.*, Am. Medical Ass'n & Gay and Lesbian Medical Ass'n, *Issue Brief: Health insurance coverage for gender-affirming care of transgender patients* 3 (2019), *available at*, 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 (W.D. Wis. 2018) (defense expert estimating per member cost of removing gender-confirming care exclusion between $0.04-$0.10 per month); *Flack*, 395 F. Supp. 3d at 1008 ("For purposes of this lawsuit, defendants estimate that removing the Challenged Exclusion and covering gender-confirming surgeries would cost between $300,000 and $1.2 million annually. There is no dispute that these amounts are actuarially immaterial as they are equal to approximately 0.008% to 0.03% of the State's $3.9 billion share of Wisconsin Medicaid's $9.7 billion annual budget").

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

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

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

V. CONCLUSION

The Court should grant the requested injunction.

Respectfully submitted,

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* *Pro hac vice* forthcoming