

1 Brent P. Ray (*pro hac vice* forthcoming)
2 Andrew J. Chinsky (*pro hac vice* forthcoming)
3 KING & SPALDING LLP
353 N. Clark Street, 12th Floor
4 Chicago, Illinois 60654
T: +1 312 995 6333
F: +1 312 995 6330
5 Email: bray@kslaw.com
achinsky@kslaw.com

6 Daniel C. Barr (Bar No. 010149)
7 Janet M. Howe (Bar No. 034615)
8 PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
9 Phoenix, AZ 85012-2788
T: +1 602 351 8085
F: +1 602 648 7085
10 Email: dbarr@perkinscoie.com
jhowe@perkinscoie.com

11 *Counsel for Plaintiffs and the Class*
12 (Additional Counsel on Signature Page)

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.)
26
27
28

No. 4:20-cv-00335-TUC-SHR

**PLAINTIFFS' MOTION TO
TRANSFER CASE TO JUDGE
ROSEMARY MÁRQUEZ**

1 Pursuant to Local Rule of Civil Procedure 42.1, Plaintiffs D.H. and John Doe (“Plaintiffs”)
2 move the Court to transfer this matter to the Honorable Rosemary Márquez to avoid duplication
3 of effort, prevent inconsistent decisions, and promote judicial economy. This action alleges that
4 Arizona Medicaid’s refusal to cover male chest reconstruction surgery—a medically necessary
5 treatment for Plaintiffs’ gender dysphoria—violates Section 1557 of the Patient Protection and
6 Affordable Care Act, the Early and Periodic Screening, Diagnostic and Treatment (“EPSDT”)
7 and comparability requirements of the federal Medicaid Act, and the Equal Protection Clause of
8 the Fourteenth Amendment to the United States Constitution.

9 A case currently pending before Judge Márquez raises substantially similar factual and
10 legal issues. In *Russell B. Toomey, et al. v. State of Arizona, et al.*, No. CV-19-00035-TUC-RM
11 (LAB), the plaintiff alleges that Arizona’s refusal to cover medically necessary surgical treatment
12 for gender dysphoria for individuals enrolled in the state employee health plan is discrimination
13 on the basis of sex and transgender status. *See* Am. Compl., *Toomey*, Dkt. 86, at ¶ 4. Arizona
14 denied coverage for the plaintiff’s surgical care due to a categorical exclusion for “[g]ender
15 reassignment surgery.” Because Judge Márquez is already intimately familiar with many of the
16 factual and legal issues raised—and has issued substantive rulings, including on a motion to
17 dismiss and motion for class certification—and because *Toomey* was filed first, transferring the
18 present action to Judge Márquez is consistent with LRCiv 42.1 and promotes judicial economy
19 and efficiency.

20 **I. BACKGROUND**

21 On August 6, 2020, Plaintiffs D.H. and John Doe—seventeen-year-old and fifteen-year-
22 old transgender Arizona residents enrolled in Medicaid (known as the Arizona Health Care Cost
23 Containment System or “AHCCCS”)—filed a Complaint challenging Arizona’s categorical
24 exclusion of “gender reassignment surgeries,” including male chest reconstruction surgery, a
25 medically necessary treatment D.H. and John urgently need to alleviate their gender dysphoria.
26 *See* Compl., Dkt. 1, at ¶ 1; Ariz. Admin. Code R9-22-205(B)(4)(a). D.H. and John contend that
27 the categorical exclusion violates federal law and is contrary to the broad medical consensus that
28 surgical procedures are safe, effective, and medically necessary. Compl., Dkt. 1, ¶¶ 3-4, 33.

1 Plaintiffs also filed a Motion for a Preliminary Injunctive (“PI Motion”), seeking to preliminarily
2 enjoin Arizona from further enforcement of the regulation and order AHCCCS to cover male
3 chest reconstruction surgery for Plaintiffs. *See* PI Motion, Dkt. 3, at 1.

4 On January 23, 2019, Mr. Toomey filed his lawsuit challenging Arizona’s refusal to
5 provide medically necessary surgical care based on a categorical exclusion for “[g]ender
6 reassignment surgeries” in the self-funded health plan offered to state employees. *See* Compl.,
7 *Toomey*, Dkt. 1, at ¶ 1. Over the last eighteen months, Judge Márquez has denied Arizona’s
8 motion to dismiss and granted plaintiff’s motion for class certification. *See* Order, Dkt. 69; Order,
9 Dkt. 108. One of the classes certified includes beneficiaries—employees and their dependents—
10 of the self-funded plan who have or will seek coverage for surgical care to treat their gender
11 dysphoria. *See* R&R, Dkt. 105; Order, Dkt. 108.

12 Both *Toomey* and this case involve identically worded exclusions of coverage for “gender
13 reassignment surgery.” *See* Am. Compl., *Toomey*, Dkt. 86, at ¶¶ 36, 43-44; Compl., *D.H.*, Dkt.
14 1, at ¶ 63. And, both cases are class actions, Am. Compl., *Toomey*, Dkt. 86, at ¶¶ 46-55; Compl.,
15 *D.H.*, Dkt. 1, at ¶¶ 105-114, each including a claim under the Equal Protection Clause, Am.
16 Compl., *Toomey*, Dkt. 86, at ¶¶ 65-81; Compl., *D.H.*, Dkt. 1, at ¶¶ 123-126, and claims under
17 federal civil rights statutes prohibiting discrimination based on sex, Am. Compl., *Toomey*, Dkt.
18 86 (citing 42 U.S.C. § 2000e2(a)(1)); Compl., *D.H.*, Dkt. 1, at ¶ 120 (citing 42 U.S.C. § 18116).
19 In short, in both cases, plaintiffs claim that Arizona has denied transgender individuals medically
20 necessary surgical treatment for their gender dysphoria based on a coverage exclusion that
21 violates federal law and the Constitution.

22 **II. ANALYSIS**

23 “District court judges have broad discretion regarding the assignment or reassignment of
24 cases.” *Badea v. Cox*, 931 F.2d 573, 575 (9th Cir. 1991). Under Local Rule of Civil Procedure
25 42.1(a):

26 When two or more cases are pending before different Judges, a party
27 in any of those cases may file a motion to transfer the case or cases to
28 a single Judge on the ground that the cases: (1) arise from substantially
the same transaction or event; (2) involve substantially the same
parties or property; (3) involve the same patent, trademark, or

1 copyright; (4) call for determination of substantially the same
2 questions of law; or (5) for any other reason would entail substantial
duplication of labor if heard by different Judges.

3 LRCiv 42.1(a). The Local Rules also permit voluntary judicial reassignment of cases “[f]or
4 reasons of judicial economy and the availability of judicial resources.” LRCiv 42.1(e).

5 “A transfer is proper if transferring satisfies any one of the factors provided in LRCiv
6 42.1(a).” *Smith v. Sperling*, No. 11-0722-PHX-PGR, 2011 WL 4101508, at *2 (D. Ariz. Sept.
7 14, 2011) (granting motion to transfer shareholder derivative action to court where related
8 putative securities class action was being adjudicated). Each of the factors provided in Local Rule
9 42.1(a) are “independently sufficient.” *Id.* at *1. In other words, “[a] party who satisfies any one
10 of the factors may file a motion to transfer.” *Id.*

11 Here, at least two of the factors in Local Rule 42.1(a) are satisfied, as is a factor listed in
12 Local Rule 42.1(e). Accordingly, there are multiple independent reasons to transfer the present
13 action to Judge Márquez. *See Smith*, 2011 WL 4101508, at *1. First, the present case and the
14 *Toomey* case before Judge Márquez both “call for determination of substantially the same
15 questions of law”—namely, whether the continued exclusion of coverage for medically necessary
16 surgical care violates federal anti-discrimination laws and the Equal Protection Clause. LRCiv
17 42.1(a)(4). Additionally, the cases “would entail substantial duplication of labor if heard by
18 different Judges,” given the overlapping legal claims and similar underlying facts related to the
19 diagnosis and treatment of gender dysphoria, with which Judge Márquez is already closely
20 familiar. LRCiv 42.1(a)(5). Finally, “[f]or reasons of judicial economy and the availability of
21 judicial resources,” a transfer to Judge Márquez is warranted. LRCiv 42.1(e).

22 **A. The Present Matter Calls for Determination of Substantially the Same**
23 **Questions of Law Raised in *Toomey*.**

24 This case calls for determination of a core question of law that is also raised in *Toomey*:
25 whether Arizona’s exclusion of coverage for “gender reassignment surgeries” constitutes
26 discrimination on the basis of sex in violation of federal anti-discrimination laws and the Equal
27 Protection Clause. *See* LRCiv 42.1(a)(4). Although the two cases involve different health care
28 coverage programs, that factual distinction is not material to those federal claims.

1 Also, a nearly identical set of cases governs the legal analysis for the anti-discrimination
2 claims in both cases. For example, courts regularly rely on the interpretation of Title VII, the
3 claim considered by Judge Márquez in *Toomey*, when considering claims brought under Section
4 1557 of the Affordable Care Act, the claim raised in the instant case. *See, e.g., Prescott v. Rady*
5 *Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098-99 (S.D. Cal. 2017); *Flack v. Wisc.*
6 *Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 948-50 (W.D. Wisc. 2018). Because this case
7 presents legal issues that mirror those raised in *Toomey*, transferring this case to Judge Márquez
8 furthers judicial economy and efficiency, consistent with LRCiv 42.1.

9 **B. The Present Matter Will Entail Substantial Duplication of Labor if Heard by**
10 **a Different Judge than *Toomey*.**

11 Local Rule 42.1(a) provides another independent basis for reassigning matters: “[f]or any
12 other reason which would entail substantial duplication of labor if heard by different judges.”
13 LRCiv 42.1(a)(5). There are significant similarities between the factual and legal issues raised in
14 the instant case and those Judge Márquez is already considering in *Toomey*. The factual record
15 in both cases will rely on extensive testimony and record evidence on the relevant the standards
16 of care, including expert reports and medical literature on the safety and efficacy of surgical
17 treatments for gender dysphoria. That foundational information will overlap substantially in both
18 cases as will the information specific to male chest reconstruction surgery for adolescents—the
19 procedure sought by D.H. and John, and a treatment that could be sought by the minor dependents
20 of state employees included as class members in *Toomey*. The origin of and Arizona’s
21 justification for the identical language of both categorical exclusions is likely to result in further
22 factual overlap between the cases.

23 Arizona’s defenses are also likely to be similar in both cases. For example, the State sought
24 to dismiss *Toomey*’s Title VII claim asserting that the categorical exclusion did not discriminate
25 on the basis of sex. The State could make the identical claim in the instant case, which would
26 require the Court to analyze many of the same cases and materials relied upon in the briefing of
27 this issue in *Toomey*.

C. For Reasons of Judicial Economy and the Availability of Judicial Resources, the Petition Should Be Transferred to Judge Márquez.

Reassignment of this matter to Judge Márquez will also further the interests of judicial economy and preserve judicial resources by avoiding inconsistent decisions and needless duplication of labor. LRCiv 42.1(e). Judge Márquez has presided over the litigation in *Toomey* for over eighteen months and already issued significant substantive rulings on claims similar to those raised in the instant matter. With respect to this lawsuit, therefore, Judge Márquez “will not be starting from a blank page.” *Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa, Inc.*, No. CV-12-8030-PCT-DGC, 2012 WL 6101901, at *3 (D. Ariz. Nov. 21, 2012). Judicial economy warrants that Judge Márquez be the judge assigned to hear the instant matter.

III. CONCLUSION

Reassignment of the present matter to Judge Márquez would allow the Court to streamline the determination of substantially similar legal issues, which is particularly urgent given D.H. and John’s pending motion for preliminary injunction, avoid the duplicative expenditure of resources to review or hear virtually identical arguments, avoid the need to duplicate Judge Márquez’s previous efforts with respect to the claims in *Toomey*, and avoid any potentially inconsistent rulings with respect to the same legal issues. For these reasons, judicial reassignment of the present matter to Judge Márquez is warranted here. Plaintiffs respectfully request that the Court grant their motion to transfer and reassign the case to Judge Márquez.

Respectfully submitted,

DATED: AUGUST 11, 2020

PERKINS COIE LLP

/s/ Daniel C. Barr

Daniel C. Barr (Bar No. 010149)
Janet M. Howe (Bar No. 034615)
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, AZ 85012-2788
T: +1 602 351 8085
F: +1 602 648 7085
Email: dbarr@perkinscoie.com
 jhowe@perkinscoie.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Brent P. Ray*
Andrew J. Chinsky*
KING & SPALDING LLP
353 N. Clark Street, 12th Floor
Chicago, Illinois 60654
T: +1 312 995 6333
F: +1 312 995 6330
Email: bray@kslaw.com
achinsky@kslaw.com

Asaf Orr, admitted *pro hac vice*
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
T: +1 415 392 6257
F: +1 415 392 8442
Email: aorr@nclrights.org

Abigail K. Coursolle*
Catherine McKee, admitted *pro hac vice*
NATIONAL HEALTH LAW PROGRAM
3701 Wilshire Boulevard, Suite 750
Los Angeles, CA 90010
T: +1 310 204 6010
Email: coursolle@healthlaw.org
mckee@healthlaw.org

Attorneys for Plaintiffs and the Class

* *Pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2020, I electronically transmitted the attached documents to the Clerk’s Office using the CM/ECF System for filing.

I hereby certify that on August 12, 2020, I sent by hand-delivery the attached documents to the following parties who are not CM/ECF registrants:

Jami Snyder
Director of the Arizona Health Care Cost Containment System
801 East Jefferson Street
Phoenix, AZ 85034

s/ Marie van Olffen

138410-0001/149195849.1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Russell B. Toomey,)	
)	No. CV 19-0035-TUC-RM (LAB)
Plaintiff,)	ORDER GRANTING MOTION
)	TO TRANSFER
vs.)	
State of Arizona, et al.)	
)	
Defendants.)	

Plaintiffs in *D.H. v. Snyder*, CV-20-00335-TUC-SHR, move to transfer the action to this Court because it entails substantially similar questions of law and fact to those at issue here and would thereby avoid duplication of labor and inconsistent determinations. The Court finds transfer is appropriate and will grant Plaintiffs’ Motion pursuant to Rule 42.1 of the Local Rules of Civil Procedure.

IT IS ORDERED:

- (1) Petitioners’ Motion to Transfer is granted.
- (2) The Clerk of Court shall transfer *D.H. v. Snyder*, CV-20-00335-TUC-SHR to this Court.
- (3) All future pleadings and papers submitted for filing shall bear the following case number: CV-20-00335-TUC-RM.

Dated this ___ day of _____, 2020.

Honorable Rosemary Márquez
United States District Judge

138410-0001/149195951.1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28