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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Russell B. Toomey,
Plaintiff,

v.

State of Arizona; Arizona Board of Regents, D/B/A University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman,** in his official capacity as chair of the Arizona Board Of Regents; **Larry Penley,** in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna,** in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour,** in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson,** in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson,** in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler,** in his official capacity as Member of the Arizona Board of Regents; **Fred Duval,** in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin,** in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon,** in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

No. 4:19-cv-00035

**PLAINTIFF'S NOTICE
OF ERRATA**

1 Plaintiff Russell B. Toomey files this Notice of Errata to the Plaintiff's Reply Brief
2 (Dkt. No. 180) and Supplemental Declaration of Jordan C. Wall (Dkt. No. 180-2) to
3 correct the record that unredacted copies of the minutes for Exhibit 6 (AZSTATE.011038)
4 and Exhibit 7 (AZSTATE.011046) were re-produced by State Defendants, without
5 redactions, under new bates-numbers on March 22, 2021. These were part of a set of 3,738
6 unredacted documents re-produced under new bates-numbers on March 22, 2021.
7 Plaintiff is still in the process of reviewing these documents, and has continued to use the
8 originally produced versions of these documents, including in depositions, pending
9 completion of that process. The corrected versions of the Plaintiff's Reply Brief and the
10 Supplemental Declaration of Jordan C. Wall accompany this Notice as Exhibits 1 and 2,
11 respectively.

12 This clarification for the record does not affect the arguments made by Plaintiff nor
13 the need for this Court to compel disclosure of the documents withheld pursuant to the
14 deliberative process privilege as laid out in the Motion to Compel (Dkt. No. 168) and
15 Reply (Dkt. No. 180).

16 Dated: April 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021 I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

/s/ Christine K. Wee
Christine K. Wee

EXHIBIT 1

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Russell B. Toomey,

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State of Arizona; Arizona Board of Regents, D/B/A University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as chair of the Arizona Board Of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

No. 4:19-cv-00035

**REPLY MEMORANDUM OF
LAW IN SUPPORT OF
PLAINTIFF’S MOTION FOR
ENTRY OF AN ORDER
COMPELLING THE
PRODUCTION OF
DOCUMENTS**

1 Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified Classes
2 (“Plaintiff”), by and through the undersigned counsel, pursuant to Federal Rule of Civil
3 Procedure 37 and Arizona Local Rule 7.2, hereby submits this memorandum of law in
4 further support of his Motion to Compel (the “Motion” or “Mot.”) (Dkt. No. 168) and in
5 reply to Defendants State of Arizona’s, Andy Tobin’s, And Paul Shannon’s Opposition
6 To Plaintiff’s Motion To Compel (“Opposition” or “Opp.”) (Dkt. No. 176).

7 **THE COURT SHOULD GRANT PLAINTIFF’S MOTION TO COMPEL**

8 State Defendants prove too much. First, the Opposition does little to rebut that the
9 deliberative process privilege may be overcome when the government’s intent is directly
10 at issue. (Mot. 12-16.) State Defendants all but admit that their decision-making process
11 is at issue. (Opp. 11, n. 7.) And this Court has so held. (Dkt. No. 134 at 6, 9.) Yet State
12 Defendants take the absurd position that the very documents they admit “reveal the mental
13 processes, recommendations, and opinions of ADOA’s representatives and attorneys, as
14 well as those of other government entities” (Opp. 8) should not be disclosed because they
15 could not contain evidence of their discriminatory intent because nothing they have
16 produced to date indicates any political animus, so they claim. (Opp. 11-13.) This
17 peculiar argument has no basis in either fact or logic. State Defendants’ productions to
18 date, as well as the recent depositions of Ms. Marie Isaacson and Mr. Scott Bender,
19 increasingly support that State Defendants maintained the Plan’s exclusion on
20 “transsexual surgery” (later, “gender reassignment surgery”) (the “Exclusion”) because of
21 discriminatory views about transgender and gender non-conforming individuals. The
22 withheld documents likely contain the most direct evidence of such animus, so the
23 privilege should be overcome.

24 Second, State Defendants improperly defend their deliberative process privilege
25 claim by relying on details about the withheld documents that are neither reflected in their
26 Privilege Logs, nor otherwise available to Plaintiff or the Court itself. (Opp. 6.) They all
27 but concede therefore that they have failed to assert the privilege with the requisite
28

1 particularity. Even with these additional details, including from the long-sought
2 declaration of the Benefits Director of the ADOA, Mr. Paul Shannon, State Defendants
3 offer only ill-conceived or conclusory arguments supporting that the withheld documents
4 are both predecisional and deliberative. Further, the recent deposition testimony of Ms.
5 Marie Isaacson, the former Benefits Director of the ADOA who oversaw the review of
6 the Exclusion, substantially contradicts many of Mr. Shannon's assertions about the
7 ADOA's deliberations over the Exclusion. Ms. Isaacson testified that there was little to
8 no deliberation within the ADOA about the Exclusion, and that the Arizona Governor's
9 Office was primarily responsible for the decision to maintain the Exclusion. The withheld
10 documents are necessary to resolving these conflicting accounts.

11 Finally, State Defendants have engaged in significant gamesmanship in the
12 assertion of this particular privilege that the Court, in fairness, should not condone. In
13 addition to selectively choosing when to assert the privilege to suit their needs (Opp. 11-
14 12), State Defendants have been overbroad in their assertion of the privilege on behalf of
15 the Governor's Office (and even the Town of Gilbert, Arizona). (Opp. 2, n.1; 7, n. 5.)
16 Coupled with State Defendants' repeated failure to furnish Mr. Shannon's declaration,
17 State Defendants should be deemed to have waived the privilege on fairness grounds.

18 ARGUMENT

19 **I. THE PRIVILEGE SHOULD BE OVERCOME IN ALL EVENTS** 20 **BECAUSE STATE DEFENDANTS' DECISION-MAKING IS** 21 **DIRECTLY AT ISSUE**

22 State Defendants offer no credible rebuttal to the well-established principle that
23 when the government's actions are the "focal point of litigation" this "weighs against
24 upholding the deliberative process privilege." *Thomas v. Cate*, 715 F. Supp. 2d 1012,
25 1028 (E.D. Cal. 2010) (history omitted). They do not contest that the "need for accurate
26 fact-finding" may "override the government's interest in non-disclosure." *F.T.C. v.*
27 *Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Or that courts in the Ninth
28

1 Circuit have consistently overturned the privilege in suits seeking to vindicate civil rights,
2 including under Title VII or the Equal Protection Clause, like here. *See, e.g., Karnoski v.*
3 *Trump*, 926 F.3d 1180 (9th Cir. 2019); *Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273
4 F.R.D. 545 (D. Ariz. 2011). Rather, State Defendants concede that the guiding four-factor
5 test at least partially supports disclosure of the withheld documents. (Opp. 11, n. 7.)
6 And they otherwise offer only ill-conceived or conclusory arguments as to the rest of that
7 test.

8 **A. Factor One: the Relevance of the Evidence**

9 State Defendants argue, disingenuously, that documents about their decision-
10 making process are not relevant here as Plaintiff argues that the Exclusion is facially
11 discriminatory. (Opp. 11.) State Defendants are well-aware that they assert a defense that
12 no animus informed their decision to maintain the Exclusion (Dkt. No. 89 at 28), and that
13 they have previously argued that Plaintiff must prove discriminatory intent. (Dkt. No.
14 144, at 5.) Several ADOA witnesses have attested in depositions that the decision to
15 maintain the Exclusion was made primarily by the Governor's Office. (Ex. 3, Marie
16 Isaacson Transcript at 20:10-17, 324:2-22; Ex. 4, Scott Bender Rough Transcript at 153-
17 54; Ex. 5, Yvette Medina Transcript at 52:25-53:13.) Mr. Shannon claims that almost all
18 the withheld documents reflect exchanges between the ADOA and the Governor's Office
19 that were essential to their decision-making. (Shannon Decl. ¶¶ 5-11.) Nothing could be
20 more relevant to this case than these withheld documents.

21 **B. Factor Two: the Availability of Other Evidence**

22 State Defendants point to their productions as an alternative source of evidence (or
23 lack thereof) of their discriminatory intent. (Opp. 11-13.) This is a red herring. A
24

25 1 State Defendants declined to argue that the other four factors Ninth Circuit courts
26 have recognized also support disclosure (Opp. 13, n. 10), effectively conceding the point.
27 (Mot. 13, 15-17.)
28

1 significant portion of their approx. 8,000 produced documents consists of administrative
2 documents, like vendor logs, many of which are hundreds of pages long, yet contain only
3 brief and duplicative references to the Exclusion. (Ex. 1, Wall Supp. Decl. ¶ 6.) Further,
4 many of the meeting minutes State Defendants cite (Ex. 1, Wall Supp. Decl. ¶ 7; Ex. 6,
5 AZSTATE.011038; Ex. 7, AZSTATE.011046) do not address the rationale for maintaining
6 the Exclusion. (Ex. 9, AZSTATE.003186 (noting that “[r]eassignment surgery will not
7 be covered” but providing no explanation as to why).) Some documents in fact suggest
8 the possibility of animus by extrapolation. (Ex. 6, AZSTATE.011038, at
9 AZSTATE.011043 (September 2016 minutes noting that majority of Network Providers
10 estimated a low cost of coverage for gender reassignment surgery and would now cover
11 it).) Critically, State Defendants have not produced meeting minutes, if any exist, of the
12 October 2016 meeting during which Ms. Isaacson attested the decision to maintain the
13 Exclusion was made. (Ex. 3, Marie Isaacson Transcript at 47:24 – 48:9; *see also* Ex. 8,
14 AZSTATE.000581 (noting meeting on Wednesday, October 19, to make decision on the
15 Exclusion).) The absence of such important record evidence supports the disclosure of
16 other available evidence of the decision-making process. *Cf. N. Pacifica, LLC*, 274 F.
17 Supp. 2d at 1125.

18 State Defendants argue, absurdly, that given the absence of proof of their
19 discriminatory intent in their productions (so they claim), the withheld documents could
20 not contain such evidence either. (Opp. 12.) This argument fails as a matter of fact and
21 logic. First, as noted above, State Defendants have produced documents supporting
22 potential political animus at play. (Ex. 6, AZSTATE.011038, at AZSTATE.011043; Ex.
23 8, AZSTATE.000581 (Mr. Bender recommending against coverage despite Network
24 Provider advice to the contrary)). Witness testimony bolsters the possibility. (Ex. 3,
25 Marie Isaacson Transcript at 263:14—264:10; Ex. 4, Scott Bender Rough Transcript at
26 154-155.) However, while these documents and testimony may be some source of proof
27 of discriminatory intent, the withheld documents potentially represent the only source of
28

1 certain kinds of proof, most importantly, clear and direct documentary evidence of
2 political animus. (Mot. 14-15.) Second, State Defendants’ argument has no basis in
3 logic. An equally plausible explanation for the supposed absence of evidence of
4 discriminatory intent in documents produced, but within the withheld documents, is that
5 State Defendants have actively shielded incriminating proof through their selective
6 assertion of the deliberative process privilege. (Opp. 11-12.)

7 **C. Factor Three: the Government’s Role in the Litigation**

8 State Defendants concede this factor, and rightly so, as it weighs heavily in favor
9 of disclosure. (Opp. 11, n. 7.) State Defendants are not mere parties to this dispute, as
10 they blithely claim, but rather the focal-point of the litigation, which strongly favors
11 disclosure. *See Thomas*, 715 F. Supp. 2d at 1028.

12 **D. Factor Four: Potential Hindrance of Frank and Independent**
13 **Discussion**

14 State Defendants argue, in conclusory fashion, that disclosure would hinder frank
15 and independent discussion among the members of the ADOA. (Opp. 13.) Neither they,
16 nor Mr. Shannon offer an explanation of how the disclosure of any of the withheld
17 documents would chill deliberation. Mr. Shannon reveals that the withheld documents
18 primarily consist of years-old exchanges between the Governor’s Office and the ADOA
19 regarding transgender benefits, all of which has been forwarded and shared over the last
20 6 years. (Shannon Decl. ¶¶ 5-11.) It is difficult to imagine how disclosure of such old
21 documents could impede the agency’s business. Any potential chilling effect could also
22 be “outweighed” through issuance of a protective order, redaction, restrictions to
23 attorneys’ eyes only, or limited *in camera* review. *Karnoski v. Trump*, C17-1297 MJP,
24 2019 WL 6894510, at *3 (W.D. Wash. Dec. 18, 2019) (history omitted).

1 **II. STATE DEFENDANTS HAVE FAILED TO ESTABLISH THAT EACH**
2 **WITHHELD DOCUMENT IS PREDECISIONAL AND**
3 **DELIBERATIVE**

4 State Defendants’ objections based on the deliberative process privilege are
5 unjustified because: (1) these documents may not be predecisional; and (2) these
6 documents may not be deliberative.

7 **A. Withheld Documents Created After the October 19, 2016 Meeting Are**
8 **Not Predecisional**

9 Ms. Isaacson attested in her deposition that the decision to maintain the Exclusion
10 occurred in a meeting with the Governor’s Office on October 19, 2016. (Ex. 3, Marie
11 Isaacson Transcript at 47:24 – 48:9; *see also* Ex. 8, AZSTATE.000581.) Thereofre,
12 Documents created after October 19, 2016, at least, cannot satisfy the predecisional prong
13 and must be disclosed. *F.T.C.*, 742 F.2d at 1161. (Mot. 9-11.) All but 9 of the 35 withheld
14 documents were created pre-October 19, 2016. (Mot. Ex. 8, Nos. 20, 21, 75, 204-209.)
15 State Defendants falsely argue that Plaintiff conceded that documents dated before
16 December 8, 2016, are predecisional. There has been no such concession. Plaintiff argued
17 that, given the December 8, 2016 email disclosing the ADOA’s stance to vendors, at least
18 documents made after that date could not be considered predecisional.²

19 **B. Documents Withheld on the Basis of an ADOA Recommendation Are**
20 **Not Deliberative**

21 State Defendants have again failed to state with particularity how each of the
22 withheld documents is deliberative. *Cal. Native Plant Soc’y v. U.S. E.P.A.*, 251 F.R.D.
23 408, 413 (N.D. Cal. 2008) (privilege requires sufficient details of “how each documents
24 fits into the deliberative process” further, “[c]onclusory statements that a document is
25 deliberative do not suffice”). Mr. Shannon provides only boilerplate statements that the

26 2 State Defendants’ argument that it is the finalization of the Plan language that
27 matters carries no water. (Opp. 5-6.) The question animating this Motion is not if the
28 Plan’s language itself is discriminatory, but whether the rationale for the Exclusion was
29 discriminatory.

1 withheld documents are “deliberative in nature.” (Shannon Decl. ¶¶ 5, 9, 10, 11, 12.)
2 These are “nothing but a legal platitude asserted in the abstract.” *Unknown Parties*, 2016
3 WL 8199308, at *4.

4 Further, Ms. Isaacson’s deposition testimony contradicts Mr. Shannon’s statement
5 that the withheld documents contain or reflect deliberations at all. Mr. Shannon states that
6 Privilege Log Entry Nos. 20-21 and 75 consist of emails attaching a “memorandum from
7 Ms. Isaacson” to the Governor’s Office with “ADOA’s considerations, opinions and
8 recommendations.” (Shannon Decl. ¶ 9 (emphasis added).) He also claims that Privilege
9 Log Entry Nos. 204-209 are an email chain that “discusses opinions, considerations, and
10 recommendations from ADOA based on the legal advice so that such opinions,
11 considerations, and opinions could be further discussed and deliberated.” (*Id.* ¶ 11
12 (emphasis added).) Yet, Ms. Isaacson attested that she did not make a recommendation
13 to the Governor’s Office on whether to maintain the Exclusion; rather, the ADOA relied
14 almost exclusively on the advice of legal counsel on whether they could or could not
15 maintain the Exclusion. (Ex. 3, Marie Isaacson Transcript at 209:15-210:9.) Ms.
16 Isaacson, as well as other ADOA witnesses, attested that the decision to maintain the
17 Exclusion was made primarily by the Governor’s Office. (Ex. 3, Marie Isaacson
18 Transcript at 20:10-15, 324:2-22; Ex. 4, Scott Bender Rough Transcript at 153-54; Ex. 5,
19 Yvette Medina Transcript at 52:25-53:13.) If Ms. Isaacson and others are to be believed,
20 the withheld documents may not reflect deliberations within the ADOA on whether to
21 maintain the Exclusion. In all events, the contradiction between Mr. Shannon’s
22 declaration and witness testimony only further supports the need for disclosure to insure
23 accurate judicial fact-finding.

24 III. STATE DEFENDANTS’S IMPROPER GAMESMANSHIP

25 State Defendants have waived the deliberative process privilege by failing to
26 satisfy their *prima facie* burden by submitting a declaration from the agency head of the
27 ADOA with the requisite particularity. The Court should further consider their
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1 gamesmanship in asserting the privilege in determining whether a waiver has occurred,
2 particularly “the overriding issue of fairness.” *See In re McKesson Gov’t Entities Average*
3 *Wholesale Price Litig.*, 264 F.R.D. 595, 599 (N.D. Cal. 2009) (fairness among factors
4 considered in determining waiver of privilege)

5 First, State Defendants argue that many of the documents they have thus far
6 produced “could have been withheld under the deliberative process privilege.” (Opp. 11-
7 12.) State Defendants are wrong, as the privilege should be overcome in all events, or
8 otherwise fails for reasons set out herein. However, State Defendants’ admitted selectivity
9 in asserting the privilege suggests that they are choosing which documents to disclose to
10 suit their needs, i.e., disclosing supposedly privileged documents that they think help
11 them, but withholding supposedly privileged documents that they think hurt them. Such
12 gamesmanship is troubling as it suggests an attempt to manipulate the evidence available
13 to Plaintiff and the Court. The Court should not condone such behavior.

14 Second, State Defendants have made overbroad assertions of the privilege, which
15 is improper. *See N. Pacifica, LLC*, 274 F. Supp. 2d at 1121 (the privilege is to be “strictly
16 confined within the narrowest possible limits consistent with the logic of its principles”)
17 State Defendants seek two bites at the proverbial apple on the privilege by attempting to
18 assert it also on behalf of the Governor’s Office. (Opp. 2, n. 1.) Yet throughout discovery,
19 State Defendants have refused to comply with Plaintiff’s requests to the extent they
20 implicated the Governor’s Office on the principle that the two are separate entities. (Ex.
21 1, Wall Suppl. Decl. ¶ 5; Ex. 2, State Defendants’ Responses and Objections at General
22 Objection Nos. 8 & 10.) State Defendants appear to wield as both sword and shield the
23 fiction of the separateness of the agencies and instrumentalities of the State of Arizona, a
24 named defendant, when it suits their needs. Such gamesmanship is patently unfair to
25 Plaintiff. The Court should deny State Defendants’ requests on behalf of the Governor’s
26 Office—and any decision on the withheld documents should be deemed final for all parties
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1 involved (including the Governor’s Office).³ The Court should also consider whether
2 fairness supports that State Defendants may share the withheld documents freely among
3 any “governmental” entity, no matter how attenuated,⁴ without waiving the alleged
4 privilege, but in the same breadth, use the legal separateness of such entities to its benefit.⁵

5 Finally, State Defendants’ refusal to produce Mr. Shannon’s declaration
6 constituted another act of gamesmanship. State Defendants are plainly wrong that such a
7 declaration need not be filed outside of motion practice, and even then, only for the benefit
8 of the Court’s review (Opp. 9-10). *See EEOC v. Swissport Fueling, Inc.*, No. CV-10-
9 2101-PHX-GMS, 2012 WL 1648416, at *15 (D. Ariz. May 10, 2012) (noting deliberative
10 process privilege must be raised—not by a cover letter from counsel nor a privilege log—
11 but “by the head of the agency after she has personally considered the material in question”
12

13 3 Additionally, State Defendants’ suggestion that the Court conduct an *in camera*
14 review of all the withheld documents, but only if it is inclined to grant the Motion (Opp.
15 14, n. 11), should be denied. Not only should the deliberative process privilege be
16 overcome in all events for the reasons set forth above, a post-hoc secondary review of all
17 the withheld documents (much like permitting the Governor’s Office a chance to re-
litigate this matter) will only delay the resolution of these documents and the conduct of
discovery, including depositions, which are ongoing.

18 4 Despite the clear distinction between the ADOA as a state executive agency and
19 the Town of Gilbert, Arizona as a municipal corporation, and their admission that State
20 Defendants and Gilbert’s decision-making process do not overlap (Opp. 7, n.5) , State
21 Defendants incredulously assert the privilege on Gilbert’s behalf. Presumably the
22 inclusion of these Gilbert documents on State Defendants’ Privilege Logs, despite having
23 nothing to do with the Exclusion (Shannon Decl. ¶ 12), indicates that they are relevant to
the claims and defenses at issue in this case. State Defendants’ assertion of the privilege
therefore appears intended to shield potentially material information, rather than preserve
some function of their decision-making process.

24 5 Although the U.S. Supreme Court has clarified that the deliberative process
25 privilege applies to “inter-agency or intra-agency” communications among federal
26 governmental agencies, Plaintiff has not found case law addressing this issue in context
27 similar to this dispute. *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532
28 U.S. 1, 2 (2001).

1 (emphasis added)); *Unknown Parties*, 2016 WL 8199308, at *5 (agency head and not
2 counsel must assert privilege for public policy reasons); Fed. R. Civ. P. 26(b)(5)(A)(ii)
3 (privilege log must contain sufficient detail to “enable the parties to assess the claim”
4 (emphasis added)). Neither State Defendants nor Mr. Shannon indicate that he conducted
5 his review of the withheld documents before State Defendants asserted the privilege in
6 their January 21, 2021 letter, or anytime near after. (Mot. 5.) Mr. Shannon’s likely post-
7 hoc assertion of the privilege represents merely another instance of gamesmanship, as
8 State Defendants attempt to shore up their improper assertion of the privilege in the first
9 place.

10 **CONCLUSION**

11 For all the reasons discussed above, Plaintiff’s Motion should be granted.

12 Dated: April 8, 2021

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CERTIFICATE OF SERVICE

I, Christine K. Wee, hereby certify that on April 8, 2021, I caused the foregoing document to be served via electronic mail to counsel for Defendants at the following email addresses:

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/s/ Christine K. Wee
Christine K. Wee

EXHIBIT 2

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

RUSSELL B. TOOMEY,

Plaintiff,

v.

STATE OF ARIZONA; ARIZONA BOARD OF REGENTS, D/B/A UNIVERSITY OF ARIZONA, a governmental body of the State of Arizona; RON SHOOPMAN, in his official capacity as chair of the Arizona Board Of Regents; LARRY PENLEY, in his official capacity as Member of the Arizona Board of Regents; RAM KRISHNA, in his official capacity as Secretary of the Arizona Board of Regents; BILL RIDENOUR, in his official capacity as Treasurer of the Arizona Board of Regents; LYNDEL MANSON, in her official capacity as Member of the Arizona Board of Regents; KARRIN TAYLOR ROBSON, in her official capacity as Member of the Arizona Board of Regents; JAY HEILER, in his official capacity as Member of the Arizona Board of Regents; FRED DUVAL, in his official capacity as Member of the Arizona Board of Regents; ANDY TOBIN, in his official capacity as Director of the Arizona Department of Administration; PAUL SHANNON, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

No. 4:19-cv-00035

**SUPPLEMENTAL
DECLARATION OF JORDAN C.
WALL IN SUPPORT OF
PLAINTIFF’S REPLY IN
SUPPORT OF ITS MOTION FOR
ENTRY OF AN ORDER
COMPELLING THE
PRODUCTION OF DOCUMENTS**

I, JORDAN C. WALL, declare as follows:

1. I am a Senior Associate at Willkie Farr & Gallagher LLP, and represent Plaintiff Russell B. Toomey.

2. I submit this declaration in support of Plaintiff’s Reply Motion For Entry Of An Order Compelling The Production Of Documents, filed with this Court on April 8, 2021.

1 3. I base this declaration on my own personal knowledge and on information obtained
2 in the course of the above-captioned matter.

3 4. On February 3, 2021, Plaintiff served on State Defendants a letter regarding
4 discovery, as described in my prior declaration. (Mot. Ex. 1 at 3 ¶8.) In that letter, Plaintiff
5 reminded State Defendants that the State of Arizona is a named defendant to this lawsuit and “[t]he
6 Office of the Arizona Governor, the Arizona Attorney General’s Office, and the Arizona
7 Legislature are agents and instrumentalities of the State of Arizona, and to the extent they have in
8 their possession, custody, and control responsive documents and information, the State Defendants
9 must produce such information.” (Ex. 2., State Defendants’ Responses and Objections)

10 5. During the parties’ February 10, 2021 meet and confer, State Defendants asserted
11 that the Arizona Governor’s Office was a separate and distinct entity for the ADOA, and that if
12 Plaintiff wanted to seek documents Governor’s Office’s possession, Plaintiff would need to issue
13 a subpoena directed thereto. Plaintiff thereafter subpoenaed the Arizona Governor’s Office on
14 February 17, 2021. (Ex. 10, Governor’s Office Subpoena)

15 6. A significant portion of State Defendants’ production to date consists of
16 administrative documents, including vendor logs and other documents, many of which are
17 hundreds of pages long. These documents often include only brief and duplicative references to
18 the gender reassignment exclusion.
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20 7. State Defendants’ productions also include some minutes of meetings involving
21 current and former employees of the ADOA. Many of these minutes provide no clarity regarding
22 the State of Arizona’s rationale for excluding gender reassignment surgery.
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1 I certify under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the foregoing
2 is true and correct.

3
4 Dated: April 8, 2021

5 By /s/ Jordan C. Wall

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