

1 **Victoria Lopez – 330042**
2 **Christine K Wee – 028535**
3 **ACLU FOUNDATION OF ARIZONA**
4 3707 North 7th Street, Suite 235
5 Phoenix, Arizona 85014
6 Telephone: (602) 650-1854
7 Email: vlopez@acluaz.org
8 Email: cwee@acluaz.org

9 **Joshua A. Block***
10 **Leslie Cooper***
11 **AMERICAN CIVIL LIBERTIES UNION FOUNDATION**
12 125 Broad Street, Floor 18
13 New York, New York 10004
14 Telephone: (212) 549-2650
15 E-Mail: jblock@aclu.org
16 E-Mail: lcooper@aclu.org
17 *Admitted pro hac vice

18 **Wesley R. Powell***
19 **Matthew S. Freimuth***
20 **Jordan C. Wall***
21 **Victoria Sheets***
22 **Justin Garbacz***
23 **WILLKIE FARR & GALLAGHER LLP**
24 787 Seventh Avenue
25 New York, New York 10019
26 Telephone: (212) 728-8000
27 E-Mail: wpowell@willkie.com
28 E-Mail: mfreimuth@willkie.com
E-Mail: jwall@willkie.com
E-Mail: vsheets@willkie.com
E-Mail: jgarbacz@willkie.com

*Admitted pro hac vice

Attorneys for Plaintiff Russell B. Toomey

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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; et al.,

Defendants.

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

**PLAINTIFF’S MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS**

Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified Classes (“Plaintiff”), hereby submits through the undersigned counsel the following Memorandum of Law in support of his Motion For Entry Of An Order Compelling The Production Of Documents (the “Motion”) from the State Of Arizona, Andy Tobin, and Paul Shannon (collectively, the “State Defendants”) in response to Plaintiff’s First Request For Production Of Documents And Tangible Things, dated December 8, 2020 (“Request for Production,” “Request” or “RFP”). This Motion and exhibits hereto are accompanied by the Transmittal Declaration of Christine K. Wee (“Wee Decl.”), and Plaintiff’s LRCiv 7.2(j)-(k) and 37.1 Statement (“Plaintiff’s LRCiv Statement”).

PRELIMINARY STATEMENT

1
2 Plaintiff’s Request for Production seeks documents and information concerning the
3 State Defendants’ rationale for maintaining an exclusion for “gender reassignment surgery”
4 (the “Exclusion”) in the State of Arizona’s self-funded health care plan (the “Plan”). As this
5 Court has previously recognized, documents regarding “the thought processes and state of
6 mind of the decision makers behind the exclusion . . . bear directly on the issue of intent,”
7 which is potentially an “indispensable element of Toomey’s causes of action.” (Doc. 187,
8 p.5)

9 State Defendants have withheld certain documents responsive to Plaintiff’s requests
10 and relevant to the issue of intent on the grounds that these documents are protected from
11 disclosure by the attorney-client privilege. The most recent iteration of the State Defendants’
12 Privilege Log, served on May 10, 2021, asserts the attorney-client privilege with respect to
13 eighty-five documents. (*See Wee Decl. Ex. 9*) Yet, State Defendants have waived attorney-
14 client privilege with respect to legal advice they considered on the legality of the Exclusion,
15 *i.e.*, whether ADOA was required by law to cover gender reassignment surgery. They have
16 done so in two ways.

17 *First*, State Defendants have waived the attorney-client privilege by asserting and
18 relying on legal advice as a defense to the charge that discriminatory intent did not motivate
19 their decision to maintain the Exclusion, effectively placing this legal advice at issue. When
20 a party relies on advice of counsel to defend or explain its conduct, it cannot assert the
21 attorney-client privilege to shield that advice from discovery. *Chevron Corp. v. Pennzoil*
22 *Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992). By (i) using legal advice as an explanation for
23 its rationale for the Exclusion, but (ii) withholding from Plaintiff the advice it allegedly
24 relied on in maintaining the Exclusion, the State Defendants improperly attempt to use
25 advice of counsel as both a sword and a shield. *Id.*

26 *Second*, and alternatively, State Defendants have waived attorney-client privilege by
27 disclosing the substance of the legal advice. Voluntary disclosure of the content of a
28 privileged attorney communication constitutes “waiver of the privilege as to all other such

1 communications on the same subject.” *Weil v. Inv./Indicators, Research and Mgt., Inc.*, 647
2 F.2d 18, 24 (9th Cir. 1981). State Defendants have disclosed the legal advice that was
3 allegedly provided to them regarding the legality of the Exclusion to both (i) the Governor’s
4 Office and (ii) the Plaintiff. Either disclosure is sufficient to effect a waiver.

5 **BACKGROUND**

6 **A. The Factual Disputes At Issue In This Case**

7 Plaintiff alleges that State Defendants’ categorical exclusion of medically necessary
8 gender-affirming surgery from the health plan for state employees violates Title VII and the
9 Equal Protection Clause. In their Joint Status Report dated October 23, 2020, the parties
10 agreed that one of the disputed factual questions in this case is “[w]hether the decision to
11 exclude gender reassignment surgery in the Health Care Plan was actually motivated by a
12 legitimate governmental interest.” (Doc. 128, p. 11) Although Plaintiff argues that the
13 Exclusion is facially discriminatory and violative of Title VII and the Equal Protection
14 Clause (*See* generally Doc. 86), Magistrate Judge Bowman’s Report & Recommendation
15 regarding Plaintiff’s Motion for a Preliminary Injunction also concluded that Plaintiff must
16 prove discriminatory intent by the State Defendants to succeed on his claims. (Doc. 134, pp.
17 6-9) It is unsettled what standard the Court will ultimately apply to Plaintiff’s claims, and
18 therefore discovery about State Defendants’ intent “concerns an indispensable element of
19 Toomey’s causes of action” and such “documents remain relevant.” (Doc. 187, p. 5)

20 **B. Defendants’ Withholding of Documents Based on Attorney-Client Privilege**

21 On December 8, 2020, Plaintiff served his Request for Production on State
22 Defendants. (Wee Decl., Ex. 2) Request Nos. 1, 3, and 9 specifically sought documents and
23 information concerning the Exclusion, and the decision-making behind it. On May 10, 2021,
24 State Defendants furnished their most up-to-date privilege log (“Privilege Log”, Wee Decl.
25 Ex. 9) The Privilege Log withheld eighty-five documents on the basis of attorney-client
26 privilege.

1 **C. State Defendants Affirmatively Place Legal Advice At Issue**

2 ***i. State Defendants’ Interrogatory Responses***

3 Throughout discovery, State Defendants have asserted that they maintained the
4 Exclusion based on advice of counsel about its legality. In June 2020, Plaintiff propounded
5 interrogatories asking State Defendants to “identify and describe all reasons why” the State
6 of Arizona maintains the Exclusion. (Wee Decl., Ex. 4, No. 1) State Defendants responded
7 that:

8 The State of Arizona’s self-funded health plan excludes coverage
9 for gender reassignment surgery because the State concluded,
10 under the law, that it was not legally required to change its health
11 plan to provide such coverage under either Title VII of the Civil
Rights Act or under the Equal Protection clause of the Fourteenth
Amendment to the United States Constitution.

12 (Wee Decl., Ex. 5 at No. 1 (emphasis added)) Thus, State Defendants independently put at
13 issue their understanding of the legality of the Exclusion at the time of decision-making¹ as
14 a rationale for maintaining the Exclusion.²

15 Plaintiff’s Interrogatory No. 4 asked State Defendants to “[i]dentify all persons who
16 participated in formulating, adopting, maintaining, reviewing, approving, or deciding to
17 continue” the Exclusion. (Wee Decl., Ex. 4, No. 4) State Defendants identified six
18 individuals, three of whom are lawyers for the State, indicating that counsel were central to
19 the decision-making regarding the Exclusion. ((Wee Decl., Ex. 5, No. 4)) Plaintiff’s
20 Interrogatory No. 7 asked State Defendants to identify “all research, studies, data, reports,
21 publications, testimony, or other documents considered, reviewed, or relied on by
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23 ¹ State Defendants’ current position that the Exclusion is lawful is distinct from the
24 understanding that the State Defendants had at the time of decision-making, which
25 occurred in 2016. Because the State Defendants have pointed to their alleged
26 understanding that the Exclusion was lawful in 2016 as a rationale for the Exclusion,
27 Plaintiff in fairness must be able to probe the veracity of the legal advice relied upon.

28 ² As Plaintiff is unable to review the State Defendants’ communications with counsel
however, Plaintiff also has reason to be skeptical of State Defendants’ actual
understanding of the legality of the Exclusion, and whether that understanding in fact
motivated the decision to maintain the Exclusion in 2016.

1 Defendants relating to the [] Exclusion. . . .” (Wee Decl., Ex. 4, No. 7) State Defendants
2 listed two memoranda they relied on in making this decision—one from Marie Isaacson to
3 Mike Liburdi, dated August 3, 2016 regarding “Affordable Care Act § 1557,” and another
4 from outside legal counsel Fennemore Craig, P.C. to Marie Isaacson dated July 20, 2016,
5 regarding “Summary and Implications of § 1557 and Transgender Coverage
6 Requirements”—both of which, according to the State Defendants, “are covered by the
7 attorney-client privilege.” (Wee Decl., Ex. 5, No. 7)

8 *ii. Deposition Testimony From State Defendants Witnesses*

9 Plaintiff also inquired about State Defendants’ rationale for the Exclusion in
10 depositions of witnesses disclosed by State Defendants as having knowledge regarding the
11 matter, including in depositions of Ms. Marie Isaacson, Director of the Benefits Service
12 Division of the ADOA from 2015-2018, and Mr. Scott Bender, Plan Administration
13 Manager of the ADOA from 2015-Present.³ When counsel for Plaintiff and the Arizona
14 Board of Regents (“ABOR”) questioned Ms. Isaacson and Mr. Bender regarding the
15 rationale for the Exclusion, both witnesses consistently pointed to advice of counsel as a
16 rationale for maintaining the Exclusion. Indeed, they testified that the key reason for
17 maintaining the Exclusion was because State Defendants were advised that it was lawful.
18 (Wee Decl., Ex. 6 at 31:8-32:8 (testifying that “the deciding factor” for maintaining the
19 Exclusion was “[w]hat was required by law for us to cover,” and that “legal counsel” were
20 among the “group who made the decision”); *id.*, Ex. 7 at 167:12-168:3 (testifying that the
21 “primary reason” for maintaining the Exclusion was that ADOA understood that it was “not
22 required” by law to cover the benefit))

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28 ³ Wee Decl., Ex. 5, No. 2 (identifying, among others, Ms. Isaacson and Mr. Bender as
“persons with knowledge” of “the reasons” for maintaining the Exclusion).

1 **D. State Defendants Voluntarily Disclosed Legal Advice**

2 ***i. Disclosure of Legal Advice to Governor's Office In 2016***

3 As noted above, State Defendants have asserted that they relied on two legal
4 memoranda, dated August 3, 2016 (“August 2016 Memorandum”) and July 20, 2016 (“July
5 2016 Memorandum”), in making the decision to maintain the Exclusion. (Wee Decl., Ex. 5,
6 No. 7) State Defendants identified the August 2016 Memorandum as being submitted to the
7 Governor’s Office. (Wee Decl., Ex. 5, No. 7 (“Memorandum from Marie Isaacson to Mike
8 Liburdi, General Counsel at the Governor’s Office”) Deposition testimony corroborates that
9 both memoranda were shared with the Governor’s Office in 2016. (Wee Decl., Ex. 6 at 39:8-
10 17 (stating that written legal advice was shared with Governor’s Office prior to meeting in
11 2016 where Exclusion was decided on)) Further, Ms. Isaacson disclosed the content of this
12 legal advice to Ms. Christina Corieri, a representative of the Governor’s Office, in telephone
13 calls. (*Id.* at 42:12-18)

14 ***ii. Disclosure of Legal Advice During Isaacson Deposition***

15 Additionally, during her March 26, 2021 deposition, Ms. Isaacson independently
16 broached the subject of the legal advice that ADOA received when asked whether she had
17 made any professional or personal recommendation on whether to maintain the Exclusion.
18 (*Id.* at 18:16-25 (“No. . . . We sought legal counsel regarding what was required.”)) Ms.
19 Isaacson then voluntarily disclosed, without objection from State Defendants’ counsel, the
20 substance of the legal advice provided to State Defendants regarding the Exclusion in 2016.
21 Specifically, Ms. Isaacson disclosed that State Defendants were advised by counsel that
22 “some services” were required to be covered, but gender reassignment surgery in particular
23 was “not required to be covered.” (*Id.* at 19:6-24)

24 **E. Parties Meet And Confer**

25 On April 28, 2021, Plaintiff sent State Defendants a letter advising them that State
26 Defendants had waived attorney-client privilege with respect to legal advice they received
27 regarding the legality of the Exclusion by both (i) placing the legal advice at issue and (ii)
28 disclosing the legal advice. (Wee Decl. Ex. 8) On May 5, 2021, counsel for Plaintiff met and

1 conferred with counsel for State Defendants, who advised counsel for Plaintiff that they
2 disagreed with the arguments raised in Plaintiff’s April 28 letter. (Wee Decl. Ex. 1,
3 Declaration of Jordan C. Wall (“Wall Decl.”) ¶¶ 5-6) During this meet and confer, counsel
4 for Plaintiff also argued that State Defendants’ sharing of legal advice with the Governor’s
5 Office amounted to a waiver. (*Id.* at ¶ 7)

6 On May 10, 2021, State Defendants sent Plaintiff an email, again reiterating that they
7 did not believe any waiver had occurred. (Wee Decl. Ex. 10) State Defendants argued that
8 sharing legal advice with the Governor’s Office did not amount to waiver because such
9 communications were protected by the common interest doctrine. (*Id.*) On May 14, 2021,
10 Plaintiff responded by email, informing State Defendants that it generally disagreed with
11 their positions, and that given the parties’ differences, it expected to seek this Court’s
12 intervention. (Wee Decl. Ex. 12) At a subsequent meet and confer on May 18, 2021, State
13 Defendants agreed that the parties had reached an impasse. (Wall Decl. ¶ 12)

14 ARGUMENT

15 A party “may obtain discovery regarding any nonprivileged matter that is relevant to
16 any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P.
17 26(b)(1); *Ocean Garden Prods. Inc. v. Blessings Inc.*, No. CV-18-00322-TUC-RM, 2020
18 WL 4284383, at *1-2 (D. Ariz. July 27, 2020) (Márquez, J.) (discovery may be compelled
19 when a respondent unjustifiably objects to the production of responsive documents).
20 Attorney-client privilege protects only “confidential communications between attorneys and
21 clients, which are made for the purpose of giving legal advice.” *United States v. Sanmina*
22 *Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020). Because the privilege “impedes full and free
23 discovery of the truth, the attorney-client privilege is strictly construed.” *Weil v.*
24 *Inv./Indicators, Rsch. & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). The burden of
25 establishing attorney-client privilege “rests not with the party contesting the privilege, but
26 with the party asserting it,” as is the case with all evidentiary privileges claimed. *Id.* at 25.
27 One of the elements that the party asserting attorney-client privilege must prove is that it has
28 not waived the privilege. *Id.*; *Sanmina Corp.*, 968 F.3d at 1116.

1 **I. STATE DEFENDANTS HAVE WAIVED ATTORNEY-CLIENT PRIVILEGE**
2 **BY ASSERTING THE ADVICE OF COUNSEL TO DEFEND THEIR**
3 **RATIONALE FOR THE EXCLUSION**

4 The doctrine that “protects attorney-client communications may not be used both as
5 a sword and a shield.” *Melendres v. Arpaio*, CV-07-2513-PHX-GMS, 2015 WL 12911719,
6 at *2 (D. Ariz. May 14, 2015) (quoting *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162
7 (9th Cir. 1992) (internal adjustments omitted)). A party asserting the advice of legal counsel
8 to defend its motivation or intent in taking certain action, cannot then assert the attorney-
9 client privilege to shield that advice from discovery. *Chevron Corp.*, 974 F.2d at 1162-63
10 (finding defendant waived attorney-client privilege by relying on legal advice to support
11 reasonableness of actions). The Ninth Circuit has adopted a three-prong test to evaluate
12 whether a party has waived the attorney-client privilege due to the offensive use of the
13 privilege:

14 First, the court considers whether the party is asserting the
15 privilege as the result of some affirmative act, such as filing suit .
16 . . . Second, the court examines whether through this affirmative act,
17 the asserting party puts the privileged information at issue. . . .
18 Finally, the court evaluates whether allowing the privilege would
19 deny the opposing party access to information vital to its defense.

20 *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999) (internal citations and
21 quotations omitted); *see also Chevron Corp.*, 974 F.2d at 1162-63. Here, all three prongs are
22 satisfied.

23 *First*, State Defendants have affirmatively asserted advice of counsel in defense of
24 their motivation for maintaining the Exclusion. State Defendants affirmatively cited their
25 understanding that ADOA was not required to cover gender reassignment surgery as a
26 rationale for the Exclusion in their response to written discovery. (Wee Decl., Ex. 5 at No.
27 1) State Defendants’ responses to written discovery also assert that counsel was centrally
28 involved in the now-in-question decision-making regarding the Exclusion. (*Id.* at No. 4)
Further, testimony from witnesses identified and offered by State Defendants who were
directly involved in the decision-making on the Exclusion, specifically Ms. Isaacson and

1 Mr. Bender, supports that the legal advice of counsel on the legality of the Exclusion was a
2 predominate, if not the sole, rationale for maintaining the Exclusion. (Wee Decl., Ex. 6 at
3 31:8-32:8; *id.*, Ex. 7 at 167:12-168:3) As such, State Defendants have affirmatively placed
4 legal advice, and their alleged understanding of their legal obligations, front and center in
5 the present dispute over intent.

6 Contrary to the State Defendant’s assertion, (Wee Decl., Ex.10), a party need not
7 formally plead an advice of counsel defense in order to affirmatively place legal advice at
8 issue. Courts in the Ninth Circuit have found that a party can affirmatively place legal advice
9 at issue during discovery through witness testimony or a declaration, where the party—in
10 *substance* if not in form—relies on advice of counsel to defend or explain its actions. *See*
11 *Chevron*, 974 F.2d at 1162-63 (finding that defendant placed advice at issue during
12 discovery when it submitted a declaration saying that its decision to make a particular
13 investment was reasonable because it was made based on advice of counsel); *Melendres*,
14 2015 WL 12911719 at *4 (finding that privileged information was placed at issue by
15 defendant “testifying about its reliance on advice of defense counsel.”) Moreover, the State
16 Defendant’s form-over-substance argument—that a party must plead an advice of counsel
17 defense in order to put legal advice at issue—has been flatly rejected by the Arizona
18 Supreme Court, which reasoned that neither Arizona state nor federal jurisprudence support
19 such a restriction. *See State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1175-77 (Ariz.
20 2000) (citing federal and Arizona case law on waiver of attorney-client privilege and holding
21 that an express advice of counsel defense is not required to waive the privilege).

22 *Second*, State Defendants’ affirmative reliance on legal advice as a rationale for
23 maintaining the Exclusion places otherwise privileged information squarely at issue in the
24 present dispute regarding intent behind the Exclusion. Where a party explains the motivation
25 for its conduct by maintaining that it believed its actions were legal, it affirmatively places
26 its “knowledge of the law and the basis for [its] understanding of what the law requires in
27 issue.” *Chevron.*, 974 F.2d at 1162 (internal quotations omitted).

1 The Ninth Circuit’s decision in *Chevron* is instructive. In *Chevron*, the plaintiff’s
2 claims centered around the defendant’s motivation for entering into an investment,
3 specifically whether the defendant intended to obtain control over plaintiff at the time of the
4 relevant investment. *See id.* at 1157. The defendant asserted—by submitting a declaration
5 during discovery—that its investment was reasonable and not intended to obtain control of
6 the plaintiff “because it was based on the advice of counsel.” *Id.* at 1162-1163. The Ninth
7 Circuit held that, by affirmatively relying on legal advice to explain the intent of its action,
8 the defendant had “put[] at issue the [legal] advice it received,” and thus waived the attorney-
9 client privilege. *Id.*

10 Similarly, State Defendants’ affirmative claim that the Exclusion is non-
11 discriminatory because they understood the Exclusion to be lawful at the time it was
12 implemented based on the advice of counsel necessarily puts at issue the State Defendant’s
13 actual understanding of the lawfulness of the Exclusion at the time of decision-making. *See*
14 *id.* In order to be able to evaluate the veracity of the State Defendants’ allegations regarding
15 their understanding of the law as a rationale for the Exclusion, Plaintiff and the Court must
16 be able to see the advice State Defendants considered in maintaining the Exclusion. State
17 Defendants “cannot invoke the attorney-client privilege to deny [Plaintiff] access to the very
18 information that [Plaintiff]” needs in order to evaluate State Defendants’ purported rationale.
19 *See id.* at 163.

20 *Third*, the information being withheld by State Defendants is vital to the case, as it
21 goes to the heart of State Defendants’ rationale for maintaining the Exclusion. This Court
22 has recently recognized that the issue of State Defendants’ rationale for the Exclusion
23 remains a live and critical one. (Doc. 187, at 5) The information being withheld is especially
24 critical in the present dispute, because State Defendants rely almost exclusively on advice
25 of counsel in explaining their rationale for the Exclusion.⁴ Fairness strongly supports that
26

27 ⁴ State Defendants cite cost as another non-discriminatory basis for maintaining the
28 Exclusion, but the salience of this rationale has been undermined by the State’s own
witnesses. (*See, e.g.,* Wee Decl., Ex. 6 at 31:8-15 (Marie Isaacson testifying that cost

1 State Defendants not be allowed to withhold documents and communications regarding this
 2 legal advice. *See Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545, 557 (D. Ariz.
 3 2011) (finding that out of fairness, a government agency cannot “bolster” a determination it
 4 makes by citing a legal conclusion, “and at the same time claim the attorney-client privilege
 5 in how it arrived at the conclusion.”); *Chevron*, 974 F.2d at 1162-63; *Melendres*, 2015 WL
 6 12911719 at *4; *Amlani*, 169 F.3d at 1196.

7 **II. STATE DEFENDANTS HAVE WAIVED ATTORNEY-CLIENT PRIVILEGE**
 8 **BY DISCLOSING ADVICE OF COUNSEL**

9 Alternatively, State Defendants waived the attorney-client privilege by (1) disclosure
 10 to the Arizona Governor’s Office in 2016 and (2) disclosure during Ms. Isaacson’s March
 11 2021 deposition, without objection from counsel.

12 **A. Waiver By Sharing Legal Advice With Governor’s Office**

13 “[V]oluntarily disclosing privileged documents to third parties will generally destroy
 14 the privilege.” *Sanmina Corp.*, 968 F.3d at 1116 (internal citations omitted). Here, the State
 15 Defendants waived the attorney-client privilege when they voluntarily shared privileged
 16 information with the Governor’s Office regarding the Exclusion, both through sharing the
 17 July 2016 Memorandum and the August 2016 Memorandum, as well as discussing such
 18 advice telephonically and during the October 2016 meeting. State Defendants have
 19 maintained throughout this litigation that the Governor’s Office is a third party, distinct from
 20 ADOA, and even directed Plaintiff to serve a third-party subpoena to obtain documents from
 21 the Governor’s Office. (Wee Decl., Ex. 2 at No. 8, objecting to production of documents in
 22 possession of Governor’s Office) To that end, the State Defendants and the Governor’s
 23 Office retained separate counsel with respect to this litigation—implying that the two
 24 entities understand themselves as separate, with distinct, incongruent interests regarding the

25
 26 was not “the driving factor” in ADOA’s decision, and that instead legal advice that
 27 ADOA was not required to cover gender reassignment surgery was the principal
 28 rationale); *Id.*, Ex. 7 at 167:12-168:3 (Scott Bender testifying that cost was secondary,
 and that advice about what ADOA was required or not required to cover was the primary
 basis of ADOA’s decision))

1 Exclusion.

2 State Defendants have also incorrectly argued that the common interest doctrine
3 protects their sharing of privileged information with the Governor’s Office, preventing any
4 waiver. (Wee Decl., Ex. 10) The common interest doctrine only applies however “when
5 attorneys exchang[e] confidential communications from clients who are or potentially may
6 be codefendants or have common interests in litigation.” *Sapphire Sales Sols., LLC v. Best*
7 *W. Intl., Inc.*, CV-12-01538-PHX-ROS, 2013 WL 12284534, at *2 (D. Ariz. June 27, 2013)
8 (emphasis added). The shared material must also be made in pursuit of some joint strategy—
9 whether written or unwritten. *In re Pac. Pictures Corp.*, 679 F.3d at 1129 (9th Cir. 2012).
10 State Defendants have offered no evidence that either they or the Governor’s Office had
11 contemplated any imminent or potential litigation when they exchanged privileged
12 information evaluating the Exclusion in 2015/16, or even soon after. Ms. Isaacson, who
13 testified that she was present during conversations with the Governor’s office, specifically
14 stated that discussions with the Governor were not related to any lawsuit, but instead
15 concerned “coverage of transgender benefits.” (Wee Decl., Ex. 6 at 72:16-22; *id.* 179:24-
16 180:1) This litigation itself was not filed until much later, on January 3, 2019.

17 Even if litigation had been contemplated, State Defendants’ and the Governor’s
18 Office’s supposed shared interest in the outcome of this litigation alone does not warrant
19 application of the common interest doctrine. *In re Pac. Pictures Corp.*, 679 F.3d at 1129
20 (“[A] shared desire to see the same outcome in a legal matter is insufficient to bring a
21 communication between two parties within this exception”) (citation omitted). There must
22 have been some coordination of strategy in anticipation of litigation at the time the privileged
23 information was shared to permit application of the common interest doctrine. Rather, the
24 privileged material appears to have been shared between principals for the ADOA and the
25 Governor’s Office for the purposes of making changes to the Plan’s design, not for purposes
26 of an existing or imminent lawsuit, and State Defendants—who have the burden of proving
27 that no waiver has occurred—have provided no authority to support that such general
28 policymaking conversations are protected by the common interest privilege. *See Sanmina*

1 Corp., 968 F.3d at 1116 (party asserting privilege has burden to establish that waiver has not
2 occurred).

3 **B. Waiver By Disclosing Legal Advice During Isaacson Deposition**

4 Waiver by disclosure occurs during a deposition when a witness voluntarily discloses
5 legal advice. *See Weil*, 647 F.2d at 24 (finding waiver where party disclosed substance of
6 the legal advice during deposition); *see also Thomas v. F.F. Fin., Inc.*, 128 F.R.D. 192, 192-
7 94 (S.D.N.Y. 1989) (finding subject matter waiver where a party disclosed information
8 about legal representation during deposition). The objective fact of such voluntary
9 disclosure, without objection of counsel, and in the absence of surprise or deception, may
10 be sufficient to rule on the question of waiver. *Weil*, 647 F.2d. at 25 n. 13.

11 During her deposition, Ms. Isaacson forthrightly disclosed some of the content of
12 legal advice received by State Defendants regarding the legality of the Exclusion, *i.e.*, that
13 “some services” had to be covered, but not gender reassignment surgery. (Wee Decl., Ex. 6
14 at 19:6-24) As noted above, Ms. Isaacson independently disclosed this legal advice without
15 prompting from the examining counsel, and without timely objection from counsel. *Id.* This
16 disclosure amounts to waiver. *Sanmina Corp.*, 968 F.3d at 1116. Privilege is not saved, as
17 State Defendants have suggested, by the fact the specific legal advice was not disclosed; it
18 is enough that Ms. Isaacson disclosed the *content* of the attorney-client communications.
19 (See Wee Decl., Ex. 6 at 19:06-24) See *Sanmina Corp.*, 968 F.3d at 1123-24 (holding that
20 “voluntary disclosure of the content of a privileged attorney communication constitutes
21 waiver”) (quoting *Weil*, 647 F.2d. at 24)

22 Because waiver by State Defendants happened via disclosure, it amounted to a waiver
23 “as to all other communications on the same subject.” *Hernandez*, 604 F.3d at 1100. The
24 subject of the disclosed advice was on the legality of the Exclusion, *i.e.*, whether ADOA
25 was required by law to cover gender reassignment surgery. See Wee Decl., Ex. 6 at 19:18-
26 24. Therefore, any privilege claimed over documents containing legal advice regarding
27 whether ADOA was required by law to cover gender reassignment surgery at the time of
28 decision-making has been waived.

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CONCLUSION

For all the reasons discussed above, Plaintiff’s Motion should be granted.
Respectfully submitted this 20th day of May, 2021.

ACLU FOUNDATION OF ARIZONA

By */s/ Christine Wee*

Victoria Lopez - 330042
Christine K. Wee - 028535
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Joshua A. Block*
Leslie Cooper*
125 Broad Street, Floor 18
New York, New York 10004

WILLKIE FARR & GALLAGHER LLP

Wesley R. Powell*
Matthew S. Freimuth*
Jordan C. Wall*
Victoria Sheets*
Justin Garbacz*
787 Seventh Avenue
New York, New York 10019

**admitted pro hac vice*

Attorneys for Plaintiff Russell B. Toomey

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 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

1 **Victoria Lopez – 330042**
2 **Christine K Wee – 028535**
3 **ACLU FOUNDATION OF ARIZONA**
4 3707 North 7th Street, Suite 235
5 Phoenix, Arizona 85014
6 Telephone: (602) 650-1854
7 Email: vlopez@acluaz.org
8 Email: cwee@acluaz.org

9 **Joshua A. Block***
10 **Leslie Cooper***
11 **AMERICAN CIVIL LIBERTIES UNION FOUNDATION**
12 125 Broad Street, Floor 18
13 New York, New York 10004
14 Telephone: (212) 549-2650
15 E-Mail: jblock@aclu.org
16 E-Mail: lcooper@aclu.org
17 **Admitted pro hac vice*

18 **Wesley R. Powell***
19 **Matthew S. Freimuth***
20 **Jordan C. Wall***
21 **Victoria Sheets***
22 **Justin Garbacz***
23 **WILLKIE FARR & GALLAGHER LLP**
24 787 Seventh Avenue
25 New York, New York 10019
26 Telephone: (212) 728-8000
27 E-Mail: wpowell@willkie.com
28 E-Mail: mfreimuth@willkie.com
E-Mail: jwall@willkie.com
E-Mail: vsheets@willkie.com
E-Mail: jgarbacz@willkie.com

**Admitted pro hac vice*

Attorneys for Plaintiff Russell B. Toomey

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,
Plaintiff,

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

v.

**PLAINTIFF’S LRCIV
STATEMENT**

**State of Arizona; Arizona Board of Regents,
D/B/A University of Arizona,** a governmental
body of the State of Arizona; et al.,

Defendants.

Pursuant to Local Rule of Civil Procedure 7.2(j)-(k), and 37.1(a), Plaintiff Russell B. Toomey (“Plaintiff”) hereby submits the following statement (“Plaintiff’s LRCiv Statement”) in support of his Motion to Compel Production of Documents (the “Motion”).

FACTUAL BACKGROUND

On June 5, 2020, Plaintiff served his First Set of Interrogatories (“Interrogatories”) upon Defendants State of Arizona, Andy Tobin, and Paul Shannon (hereinafter the “State Defendants”). On September 28, 2020, State Defendants served answers and objections to Plaintiff’s Interrogatories. On January 21, 2021, State Defendants served their First Supplemental Responses to Plaintiff’s Interrogatories.

On December 8, 2020, Plaintiff served his First Request for Production of Documents and Tangible Things (“Request for Production”, “Request”, or “RFP”) upon State Defendants. On January 21, 2021, State Defendants served responses and objections to

1 Plaintiff's Request for Production. Since the time State Defendants served their response to
2 Plaintiff's Request to Produce Documents, State Defendants have provided three separate
3 "final" privilege logs, most recently on May 10, 2021 (hereinafter "Privilege Log"). Per the
4 Privilege Log, State Defendants, without basis, withhold production of [85] documents on
5 the basis, in whole or in part, of the attorney-client privilege.

6 **LRCIV 7.2(J) STATEMENT**

7 On May 5, 2021, and again on May 18, 2021, counsel for the Plaintiff and the State
8 Defendants (collectively, the "Parties") met and conferred by telephonic conference on
9 several topics, including the subject of waiver of attorney-client privilege. At the
10 conferences, Plaintiff reiterated their objections to State Defendants' assertion of the
11 attorney-client privilege, on the basis of waiver. The Parties also engaged in written
12 correspondence regarding the State Defendants' assertion of attorney-client privilege.
13 Counsel are agreed that the Parties had made a sincere effort in good faith to resolve or
14 narrow the dispute concerning State Defendants' waiver of attorney-client privilege, but the
15 Parties have been unable to do so.

16 **LRCIV 37.1 STATEMENT**

17 **1. Plaintiff's Request for Production No. 1**

18 **(1) Request:** "Please produce all documents related to the Plan's current or prior
19 Transgender Healthcare Exclusion, including, but not limited to: (a) all draft
20 and previous version of the Transgender Healthcare Exclusion, including the
21 earliest iteration of the Transgender Healthcare Exclusion, and any attachments
22 or supplement thereto (whether actual or proposed); (b) all documents (to
23 include any formal or informal financial or budgetary or other analyses,
24 actuarial reports, or other reports or memoranda) and communications between
25 Defendants and all internal and external persons (including, but not limited to,
26 any insurance company, any consultant, the Alliance Defending Freedom, the
27 Center for Arizona Policy, or any lobbying or interest group regarding whether
28 any form or transition-related care or the Transgender Health Exclusion should

1 be adopted, modified, retained, or eliminated, and the rationale provided or
2 discussed; (c) all documents and communications with internal and external
3 persons pertaining to Defendants’ initial decision to exclude transition-related
4 or the Transgender Health Exclusion, including minutes or recordings of
5 meetings where coverage for or exclusion of any form of transition-related care
6 was discussed.”

7 **(2) Response:** “The State Defendants object to Request For Production No. 1 on
8 the ground that it is overbroad, unduly burdensome, oppressive, harassing, and
9 seeks to impose unreasonable costs on the State Defendants. The State
10 Defendants further object that the scope of the Request is not proportional to
11 the needs of the case. The State Defendants further object that the Request seeks
12 documents and communications protected by the attorney-client privilege, the
13 work product doctrine, the deliberative process privilege, and other applicable
14 privileges. The State Defendants further object that the Request seeks
15 information protected by the constitutional, statutory and/or common law
16 privacy rights of the Plan beneficiaries. The State Defendants further object to
17 the Request to the extent that it seeks documents not within the possession,
18 custody, and control of the Arizona Department of Administration. Subject to
19 and without waiving the foregoing objections, the State Defendants respond as
20 follows: The State Defendants will produce non-privilege documents
21 responsive to Request For Production No. 1 in the possession, custody, and
22 control of the Arizona Department of Administration. The State Defendants are
23 not in possession, custody, or control of any Health Plan Documents prior to
24 2005.

25 **(3) Deficiency:** State Defendants’ responses and objections are deficient because
26 they improperly cite attorney-client privilege as a basis for withholding
27 documents from production, when such privilege has been waived. First, State
28 Defendants placed their attorney-client communications at-issue by relying on

1 the same as a reasonable basis to maintain the State Defendant’s exclusion of
2 gender reassignment surgery (the “Exclusion”) in the State of Arizona’s self-
3 funded healthcare plan. As such, the interests of fairness preclude State
4 Defendants from withholding any documents relating to the advice received
5 regarding the legality of the Exclusion. Second, State Defendants expressly
6 waived the privilege by disclosing the contents of the same (i) to the Office of
7 the Arizona Governor (the “Governor’s Office”) in 2016 and (ii) to Plaintiff
8 during the deposition testimony of Marie Isaacson, former Director of the
9 Arizona Department of Administrations (“ADOA”) Benefits Services
10 Division. Third, in all events, the privilege should be overcome because the
11 need for accurate fact-finding overcomes the privilege.

12 **2. Plaintiff’s Request for Production No. 3**

13 **(1) Request:** “Please produce all versions and iterations of the Plan’s policies/lists
14 of Exclusions and General Limitations (*e.g.*, Article 9.1 of ADOA’s PPO and
15 EPO Plans, Article 10.1 of ADOA’s HAS Plan) from the years 2010 through
16 present, as well as all documents and communications between Defendants and
17 internal or external persons regarding creating, amending, continuing, or
18 eliminating any exclusion of coverage contained in any version/iteration of the
19 Plan’s Exclusions and General Limitations policy, including, but not limited to,
20 the potential costs of enforcing, amending, or eliminating such coverage, the
21 medical necessity, safety, and efficacy (including whether a procedure is
22 deemed experimental or cosmetic) of excluded treatments and services; or the
23 public health effects of enforcing, amending, or eliminating such excluded
24 coverage. Such documents should include any and all actuarial reports,
25 analyses, or memorandums pertaining to such exclusions of coverage.”

26 **(2) Response:** “The State Defendants object to Request For Production No. 3 on
27 the ground that it is overbroad, unduly burdensome, oppressive, harassing, and
28 seeks to impose unreasonable costs of State Defendants. The State Defendants

1 further object that the Request is vague and ambiguous as to the term “medical
2 necessity.” The State Defendants further object that the Request is not
3 proportional to the needs of the case. The State Defendants further object that
4 the Request seeks information which is duplicative of Request for Production
5 No. 1. The State Defendants further object that the Request seeks information
6 which is neither relevant nor reasonably related to any claim or defense in this
7 matter. The State Defendants further object that the Request seeks documents
8 and communications protected by the attorney-client privilege, the work
9 product doctrine, the deliberative process privilege, and other applicable
10 privileges. The State Defendants further object that the Request seeks
11 information protected by the constitutional, statutory, and/or common law
12 privacy of the Plan beneficiaries. The State Defendants further object to the
13 Request to the extent that it seeks documents not within its possession, custody,
14 and control of the Arizona Department of Administration. Subject to and
15 without waiving the foregoing objections, the State Defendants respond as
16 follows: The State Defendants will produce copies of the Health Plans from
17 2010 to present.”

18 **(3) Deficiency:** State Defendants’ responses and objections are deficient because
19 they improperly cite attorney-client privilege as a basis for withholding
20 document from production, when such privilege has been waived. First, State
21 Defendants placed their attorney-client communications at-issue by relying on
22 the same as a reasonable basis to maintain the Exclusion. As such, the interests
23 of fairness preclude State Defendants from withholding any documents relating
24 to the advice received regarding the legality of the Exclusion. Second, State
25 Defendants expressly waived the privilege by disclosing the contents of the
26 same (i) to the Governor’s Office in 2016 and (ii) to Plaintiff during the
27 deposition testimony of Marie Isaacson, former Director of the ADOA Benefits
28

1 Services Division. Third, in all events, the privilege should be overcome
2 because the need for accurate fact-finding overcomes the privilege.

3 **3. Plaintiff's Request for Production No. 6**

4 **(1) Request:** "Please produce documents sufficient to show, from 2010 to present:
5 (a) the number of hysterectomies paid for by the Plan each year, the medical
6 reason for the surgery, and the individual and aggregate cost of the surgeries;
7 and (b) the number of medically necessary cosmetic or reconstructive surgical
8 procedures paid for by the Plan each year (including but not limited to chest-
9 reconstruction surgery, vaginoplasty, or phalloplasty, or other surgery related
10 to the reproductive or urogenital system) the medical reason for the surgery,
11 and the individual and aggregate cost of the surgeries."

12 **(2) Response:** "The State Defendants object to Request For Production No. 6 on
13 the ground that it is overbroad, unduly burdensome, oppressive, harassing, and
14 seeks to impose unreasonable costs on the State Defendants. The State
15 Defendants further object that the Request is vague and ambiguous as to the
16 terms "medically necessary," "cosmetic," and "reconstructive" procedures. The
17 State Defendants further object that the Request is not proportional to the needs
18 of the case. The State Defendants further object that the Request seeks
19 information which is neither relevant nor reasonably related to any claim or
20 defense in this matter to the extent it is seeking information regarding medical
21 treatment and/or services other than for gender transition surgery. The State
22 Defendants further object that the Request seeks documents and
23 communications protected by the attorney-client privilege, the doctor-patient
24 privilege, the work product doctrine, the deliberative process privilege, and
25 other applicable privileges. The State Defendants further object that the
26 Request seeks information protected by the constitutional, statutory, and/or
27 common law privacy rights of the Plan beneficiaries. The State Defendants
28 further object to the Request to the extent that it seeks documents not within

1 the possession, custody, and control of the Arizona Department of
2 Administration.”

3 **(3) Deficiency:** State Defendants’ responses and objections are deficient because
4 they improperly cite attorney-client privilege as a basis for withholding
5 document from production, when such privilege has been waived. First, State
6 Defendants placed their attorney-client communications at-issue by relying on
7 the same as a reasonable basis to maintain the Exclusion. As such, the interests
8 of fairness preclude State Defendants from withholding any documents relating
9 to the advice received regarding the legality of the Exclusion. Second, State
10 Defendants expressly waived the privilege by disclosing the contents of the
11 same (i) to the Governor’s Office in 2016 and (ii) to Plaintiff during the
12 deposition testimony of Marie Isaacson, former Director of the ADOA Benefits
13 Services Division. Third, in all events, the privilege should be overcome
14 because the need for accurate fact-finding overcomes the privilege.

15 **4. Plaintiff’s Request for Production No. 9**

16 **(1) Request:** “Please produce all document supporting Your responses to
17 Plaintiff’s First set of Interrogatories provided to Defendants on June 5, 2020.”

18 **(2) Response:** “The State Defendants object that Request For Production No. 9 is
19 vague and ambiguous as to what documents “support” the State Defendants’
20 responses. The State Defendants further object to the Request on the ground
21 that it is overbroad, unduly burdensome, oppressive, harassing, and seeks to
22 impose unreasonable costs on the State Defendants. The State Defendants
23 further object that the Request seeks documents and communications protected
24 by the attorney-client privilege, the doctor-patient privilege, the work product
25 doctrine, deliberative process privilege, and other applicable privileges. The
26 State Defendants further object that the Request seeks information protected by
27 the constitutional, statutory, and/or common law privacy rights of the Plan
28 beneficiaries. The State Defendants further object to the Request to the extent

1 that it seeks documents not within the possession, custody, and control of the
2 Arizona Department of Administration. Subject to and without waiving the
3 foregoing objections, the State Defendants respond as follows: The State
4 Defendants have already produced non-privileged documents responsive to
5 Request for Production No. 9 in the possession, custody, and control of the
6 Arizona Department of Administration.”

7 **(3) Deficiency:** State Defendants’ responses and objections are deficient because
8 they improperly cite attorney-client privilege as a basis for withholding
9 document from production, when such privilege has been waived. First, State
10 Defendants placed their attorney-client communications at-issue by relying on
11 the same as a reasonable basis to maintain the Exclusion. As such, the interests
12 of fairness preclude State Defendants from withholding any documents relating
13 to the advice received regarding the legality of the Exclusion. Second, State
14 Defendants expressly waived the privilege by disclosing the contents of the
15 same (i) to the Governor’s Office in 2016 and (ii) to Plaintiff during the
16 deposition testimony of Marie Isaacson, former Director of the ADOA Benefits
17 Services Division. Third, in all events, the privilege should be overcome
18 because the need for accurate fact-finding overcomes the privilege.

19
20 Dated this 20th day of May, 2021.

21
22 ACLU FOUNDATION OF ARIZONA

23 By /s/ Christine Wee

24 Victoria Lopez - 330042

25 Christine K. Wee - 028535

26 3707 North 7th Street, Suite 235

27 Phoenix, Arizona 85014
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AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Joshua A. Block*
Leslie Cooper*
125 Broad Street, Floor 18
New York, New York 10004

WILLKIE FARR & GALLAGHER LLP

Wesley R. Powell*
Matthew S. Freimuth*
Jordan C. Wall*
Victoria Sheets*
Justin Garbacz*
787 Seventh Avenue
New York, New York 10019

**admitted pro hac vice*

Attorneys for Plaintiff Russell B. Toomey

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 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

1 **Victoria Lopez – 330042**
2 **Christine K Wee – 028535**
3 **ACLU FOUNDATION OF ARIZONA**
4 3707 North 7th Street, Suite 235
5 Phoenix, Arizona 85014
6 Telephone: (602) 650-1854
7 Email: vlopez@acluaz.org
8 Email: cwee@acluaz.org

9 **Joshua A. Block***
10 **Leslie Cooper***
11 **AMERICAN CIVIL LIBERTIES UNION FOUNDATION**
12 125 Broad Street, Floor 18
13 New York, New York 10004
14 Telephone: (212) 549-2650
15 E-Mail: jblock@aclu.org
16 E-Mail: lcooper@aclu.org
17 *Admitted pro hac vice

18 **Wesley R. Powell***
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20 **Jordan C. Wall***
21 **Victoria Sheets***
22 **Justin Garbacz***
23 **WILLKIE FARR & GALLAGHER LLP**
24 787 Seventh Avenue
25 New York, New York 10019
26 Telephone: (212) 728-8000
27 E-Mail: wpowell@willkie.com
28 E-Mail: mfreimuth@willkie.com
E-Mail: jwall@willkie.com
E-Mail: vsheets@willkie.com
E-Mail: jgarbacz@willkie.com

*Admitted pro hac vice

Attorneys for Plaintiff Russell B. Toomey

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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; et al.,

Defendants.

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

**DECLARATION OF CHRISTINE K
WEE IN SUPPORT OF
PLAINTIFF’S MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS**

I, Christine K. Wee, submit this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a Senior Staff Attorney at ACLU Foundation of Arizona, licensed to practice law in the State of Arizona, and represent Plaintiff Russell B. Toomey (“Dr. Toomey” or “Plaintiff”).
2. I submit this declaration in support of Plaintiff’s Motion for Entry of an Order Compelling the Production of Documents.
3. I base this declaration on my personal knowledge and on information obtained in the course of the above-captioned matter.
4. **Exhibit 1** as attached to Plaintiff’s Motion is a true and correct copy of Jordan C. Wall’s supplemental declaration, dated May 19, 2021.
5. **Exhibit 2** as attached to Plaintiff’s Motion is a true and correct copy of Plaintiff’s First Request for Production, dated December 8, 2020.

EXHIBIT 1

1 **Victoria Lopez – 330042**

2 **Christine K Wee – 028535**

3 **ACLU FOUNDATION OF ARIZONA**

3707 North 7th Street, Suite 235

Phoenix, Arizona 85014

4 Telephone: (602) 650-1854

5 Email: vlopez@acluaz.org

Email: cwee@acluaz.org

6 **Joshua A. Block***

7 **Leslie Cooper***

8 **AMERICAN CIVIL LIBERTIES UNION FOUNDATION**

125 Broad Street, Floor 18

9 New York, New York 10004

10 Telephone: (212) 549-2650

E-Mail: jblock@aclu.org

11 E-Mail: lcooper@aclu.org

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14 **Matthew S. Freimuth***

15 **Jordan C. Wall***

16 **Victoria Sheets***

17 **Justin Garbacz***

18 **WILLKIE FARR & GALLAGHER LLP**

787 Seventh Avenue

19 New York, New York 10019

20 Telephone: (212) 728-8000

E-Mail: wpowell@willkie.com

E-Mail: mfreimuth@willkie.com

E-Mail: jwall@willkie.com

E-Mail: vsheets@willkie.com

21 E-Mail: jgarbacz@willkie.com

22 **Admitted pro hac vice*

23 *Attorneys for Plaintiff Russell B. Toomey*

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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; et al.,

Defendants.

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

**DECLARATION OF JORDAN C.
WALL IN SUPPORT OF
PLAINTIFF’S MOTION TO
COMPEL 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 Motion For Entry Of An Order Compelling The Production Of Documents, filed with this Court on May 19, 2021, together with this declaration.
3. I base this declaration on my own personal knowledge and on information obtained in the course of the above-captioned matter.
4. On April 28, 2021, Plaintiff served on State Defendants a letter regarding discovery. (Mot. Ex. 8) In that letter, Plaintiff informed State Defendants that State Defendants were improperly withholding certain documents on the basis of attorney-client privilege. Specifically, Plaintiff informed State Defendants that they had waived the

1 attorney-client privilege by (i) putting legal advice received regarding the Exclusion¹ at issue
2 and (ii) disclosing legal advice regarding the legality of the Exclusion² to the Plaintiff during
3 the deposition of Marie Isaacson.

4 5. During a meet and confer held on May 5, 2021, the parties discussed Plaintiff's
5 bases for waiver. Specifically, State Defendants first argued during the May 5, 2021 meet
6 and confer that they did not place the privileged information at-issue. State Defendants
7 stated that the privileged information is not at-issue because State Defendants did not
8 formally cite advice of counsel as an affirmative defense. State Defendants also argued that
9 the attorney-client privilege was not waived because Marie Isaacson allegedly did not have
10 authority to waive any privilege belonging to the State Defendants.

11 6. State Defendants asserted that they did not agree with any of Plaintiffs' asserted
12 bases for waiver.

13 7. During the parties' May 5, 2021 meet and confer, Plaintiff also argued that
14 State Defendants had waived the attorney-client privilege by sharing legal advice with the
15 Arizona Governor's Office in 2016, after State Defendants had held the Arizona Governor's
16 Office out as a separate entity and a non-party to the present litigation.

17 8. On May 10, 2021, State Defendants emailed Plaintiff regarding waiver of the
18 attorney-client privilege, again asserting that State Defendants did not agree with any of
19 Plaintiff's alleged bases for waiver. Regarding waiver by sharing the Arizona Governor's
20 Office, State Defendants maintained that sharing attorney-client privileged information
21 between the State Defendants and the Governor's Office was protected by the common
22 interest doctrine.

23
24
25 _____
26 ¹ Unless otherwise specified, defined terms used in this declaration have the same meaning
27 as those terms defined in the Memorandum of Law In Support of Plaintiff's Motion For
28 Entry Of An Order Compelling The Production of Documents, filed together with this
declaration.

EXHIBIT 2

1 **Victoria Lopez – 330042**
2 **Christine K Wee – 028535**
3 **ACLU FOUNDATION OF ARIZONA**
3707 North 7th Street, Suite 235
4 Phoenix, Arizona 85014
Telephone: (602) 650-1854
5 Email: vlopez@acluaz.org
Email: cwee@acluaz.org

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

12 **Wesley R. Powell***
13 **Matthew S. Freimuth***
14 **Nicholas Reddick***
15 **WILLKIE FARR & GALLAGHER LLP**
787 Seventh Avenue
16 New York, New York 10019
Telephone: (212) 728-8000
Facsimile: (212) 728-8111
17 E-Mail: wpowell@willkie.com
E-Mail: mfreimuth@willkie.com
18 E-Mail: nreddick@willkie.com
19 **Admitted Pro hac vice*

20 *Attorneys for Plaintiff Russell B. Toomey*
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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 FIRST REQUEST
FOR PRODUCTION OF
DOCUMENTS AND TANGIBLE
THINGS**

21 Pursuant to the Federal Rules of Civil Procedure Rule 26 and 34 (together, the "Rules"),
22 Plaintiff Russell B. Toomey, on behalf of himself and the certified Classes, hereby requests the
23 Defendants produce the following documents and tangible things at the offices of Willkie Farr &
24 Gallagher LLP, 787 Seventh Avenue, New York, New York 10019, within 30 days of service
25 hereof.
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27
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DEFINITIONS

1
2 1. The term “communication,” as used herein, means the transmittal of information
3 (in the form of facts, ideas, inquiries, or otherwise), whether orally or in writing, or by any other
4 means or medium.

5
6 2. The terms “concerning,” “relating to,” “referring to,” “arising out of,” and their
7 cognates are to be understood in their broadest sense and each means concerning, constituting,
8 identifying, evidencing, summarizing, commenting upon, referring to, relating to, arising out of,
9 describing, digesting, reporting, listing, analyzing, studying, discussing, stating, setting forth,
10 reflecting, interpreting, concerning, recording, including, negating, manifesting, containing or
11 comprising the subject matter identified.

12
13 3. The terms “describe” and “description,” as used herein, mean to give a detailed
14 written account or representation of the subject matter – including, but not limited to, when used
15 with respect to any act, action, accounting, activity, audit, practice, process, occurrence, occasion,
16 course of conduct, happening, negotiation, relationship, scheme, communication, conference,
17 discussion, development, circumstances, service, transaction, instance, incident, or event – setting
18 forth the following: (a) its general nature; (b) the time and place thereof; (c) a chronological
19 account setting forth each element thereof, what such element consisted of and what transpired as
20 part thereof; (d) the identity (as defined herein) of each person who performed any function or had
21 any role in connection therewith (*i.e.*, speaker, participant, contributor of information, witness,
22 etc.) or who has any knowledge thereof, together with a description of such person’s function, role
23 or knowledge; (e) the identity (as defined herein) of each document that refers thereto or that was
24 used, referred to or prepared in the course of or as a result thereof; and (f) the identity (as defined
25 herein) of each oral communication that was a part thereof or referred thereto.
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1 4. The terms “document” and “documents” shall have the broadest meaning allowable
2 under the Rules and applicable case law, and shall include without limitation, electronically stored
3 information and written, printed, typed, recorded, or graphic matter of every kind and description,
4 both originals and copies and all attachments and appendices thereto. Without limiting the
5 foregoing, the terms “document” and “documents” shall include all agreements, contracts,
6 applications, communications, interoffice or intraoffice correspondence, books, letters, telegrams,
7 telexes, messages, memoranda, records, reports, books, summaries, electronic mail, texts, chats,
8 records of telephone conversations or interviews, summaries or other records of personal
9 conversations, minutes or summaries or other records of personal meetings and conferences,
10 summaries or other records of meetings and conferences, summaries, entries, calendars,
11 appointment books, time records, instructions, work assignments, visitor records, forecasts,
12 statistical data, statistical statements, work sheets, drafts, graphs, maps, charts, tables, marginal
13 notations, notebooks, telephone bills or records, bills, statements and records of obligation and
14 expenditure, invoices, lists, journals, advertising, recommendations, files, printouts, compilations,
15 tabulations, purchase orders, receipts, sell orders, confirmations, checks, letters of credit,
16 envelopes or folders or similar containers, vouchers, analyses, studies, surveys, transcripts of
17 hearings, transcripts of testimony, expense reports, microfilm, microfiche, articles, speeches, tape
18 or disc recordings, sound recordings, video recordings, film, tapes, photographs, punch cards,
19 programs, data compilations from which information can be obtained (including matter used in
20 data processing), and other printed, written, handwritten, typewritten, recorded, stenographic,
21 computer-generated, or electronically stored matter (or printouts thereof), however and by
22 whomever produced, prepared, reproduced, disseminated, or made.
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1 5. “Draft(s)” shall mean any formulation, outline, sketch, conceptualization, or
2 version of a document created prior to the final version of that document.

3 6. The term “factual and/or legal bases” includes, but is not limited to, any and all
4 documents, facts, communications or contentions.

5 7. The terms “identify,” “specify” and “state” mean to refer to the subject matter by
6 providing a detailed account or description of the subject matter, including, but not limited to, the
7 following:
8

- 9 a. when applicable to a document, to set forth in writing at a minimum and in the
10 following order: (i) the name of the document; (ii) the nature of the document (*e.g.*,
11 letter, contract, memorandum) and any other information (*i.e.*, its title, index or file
12 number) which would facilitate in the identification thereof; (iii) the date the
13 document was prepared or created; (iv) the identity of each person who performed
14 any function or had any role in connection therewith (*i.e.*, author, contributor of
15 information, recipient, etc.) or who has any knowledge thereof, together with a
16 description of each such person’s function, role or knowledge; (v) its subject matter
17 and substance, or, in lieu thereof, annex a legible copy of the document to Your
18 answers to these interrogatories; (vi) identification of all persons who are in
19 possession of the original and any copy of the document; (vii) its present location
20 and the identity of its present custodian, or, if its present location and custodian are
21 not known, a description of its last known disposition; (viii) where a document is other
22 than a paper (*i.e.*, computer or recording tape, microfilm disk, microfiche, etc.), a
23 full description of the tangible thing on which the information is recorded, and the
24 device or the devices needed to read or listen to the document; and (ix) if the
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1 document has been destroyed or is otherwise no longer in existence or cannot be
2 found, the reason why such document no longer exists, the identity of the person(s)
3 responsible for document no longer being in existence and the identity of the
4 document's last custodian.

5 b. when applicable to a natural person, to set forth in writing at a minimum and in the
6 following order: (i) his/her full name; (ii) his/her present and/or last known business
7 and residence address and telephone number, or an undertaking that the person may
8 be contacted through responding counsel; (iii) his/her present or last known
9 business affiliation; and (iv) his/her present or last known business position
10 (including job title and a description of job functions, duties and responsibilities);
11

12 c. when applicable to any entity or person other than a natural person, to set forth in
13 writing at a minimum and in the following order: (i) its full name; (ii) the address
14 and telephone number of its principal place of business; (iii) the jurisdiction under
15 the laws of which it has been organized or incorporated and the date of such
16 organization or incorporation; (iv) the identity of all individuals who acted and/or
17 authorized another to act on its behalf in connection with the matters referred to;
18 (v) in the case of a corporation, the names of its directors and principal officers;
19 and (vi) in the case of an entity other than a corporation, the identities of its partners
20 or principals or all individuals who acted or who authorized another to act on its
21 behalf in connection with the matters referred to;
22

23
24 d. when applicable to an oral communication, to set forth in writing at a minimum and
25 in the following order: (i) the date, time, place, manner and substance of such
26 communication; (ii) the identity of all persons who participated in, listened to, or
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1 had access to transcripts or summaries of such communication or copies thereof;
2 (iii) each such person's function, role, or knowledge; and (iv) the identity of all
3 documents which memorialize, commemorate, summarize, record or directly refer
4 or relate, in whole or in part, to such communication.

5 8. The term "including" means "including, but not limited to," and shall not be
6 construed to limit the scope of any definition or request herein.
7

8 9. The term "person" means any natural person, corporation, partnership,
9 proprietorship, association, joint venture, group, governmental or public entity, or any other form
10 or organization of legal entity, and all of their directors, officers, employees, representatives, and
11 agents. The term "person" specifically includes, but is not limited to, any interest or lobbying
12 group, or any employee or representative thereof, such as the Center for Arizona Policy, the
13 Alliance Defending Freedom, the American Legislative Exchange Council, the Christian Medical
14 and Dental Society, and the Franciscan Alliance, Inc.
15

16 10. "Defendants" mean Defendants State of Arizona, Arizona Board of Regents, d/b/a
17 University of Arizona, Ron Shoopman, Larry Penley, Ram Krishna, Bill Ridenour, Lyndel
18 Manson, Karrin Taylor Robson, Jay Heiler, Fred DuVal, Andy Tobin, and Paul Shannon and all
19 of their predecessors and successors in interest, and all of their representatives, attorneys, and
20 agents. The Defendant, State of Arizona, includes the current and prior administrations of the
21 Office of the Arizona Governor, the Arizona Attorney General's Office, as well as current and
22 former members and employees of the Arizona Legislature, in their official capacities.
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24 11. The "Plan" means the State of Arizona's self-funded health plan controlled by the
25 Arizona Department of Administration.
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1 5. If any document requested is withheld on the grounds of privilege or otherwise,
2 You shall provide a log with the following information relating to each document or portion of a
3 document withheld:

- 4 a. the kind of document (e.g., memorandum, letter, notes, etc.);
- 5 b. the date of the document or, if no date appears thereon, the approximate
6 date the document was prepared;
- 7 c. the identity of the author(s);
- 8 d. the identity of the Person(s) to whom the document is addressed;
- 9 e. the identity of any other recipients of the document that appear on the
10 document as having received a copy;
- 11 f. the identity of any attachments to the documents and whether the
12 attachments have been produced;
- 13 g. the subject matter or the information contained in the document;
- 14 h. the nature of the privilege or immunity asserted, including the attorney and
15 client involved, and the grounds for withholding the document; and
- 16 i. the number of pages of the document.
- 17
- 18

19 If You fail to set forth a sufficient factual basis for the assertion of any claim of privilege or
20 protection, then any arguable claim or privilege or protection shall be waived. Compliance with
21 the above instructions is not to be construed as an admission by Plaintiff that such privilege or
22 protection is valid, and Plaintiff reserves their right to challenge any purported claim of privilege
23 or protection.
24

25 6. If You believe that only a portion of a document is protected by an applicable
26 privilege, the non-privileged portion shall be produced with the allegedly privileged portion
27

1 redacted and indicated as such. You shall provide the information set forth in Instruction No. 6 for
2 each such redaction. Any attachment to an allegedly privileged document shall be produced unless
3 You also contend that the attachment is privileged, in which case the information required in
4 Instruction No. 6 shall be provided separately for each such attachment.

5 7. If any documents requested were at one time in existence but no longer are, please
6 so state, specifying in detail for each document: (a) the document type, (b) a specific description
7 of the subject matter of the document, (c) the date upon which the document ceased to exist, (d)
8 the identity of each Person having knowledge of the circumstances under which the document
9 ceased to exist, and (e) the identity of each Person having knowledge or who had knowledge of
10 the contents thereof.

11 8. Each Request for Production set forth herein is a request for the original (or copy
12 when the original is not available) of the final version of such document(s), as well as non-identical
13 copies by reason of notations or markings.

14 9. More than one Request for Production set forth herein may call for production of
15 the same document. The presence of such duplication is not intended and shall not be interpreted
16 to narrow or limit in any way the scope of each individual Request for Production set forth herein.

17 10. The documents or tangible things produced in response hereto shall be segregated
18 and clearly marked or labeled so as to correspond to the specific production request to which such
19 documents or tangible things are responsive and are being produced. Alternatively, such
20 documents or tangible things shall be produced as they are kept in the usual course of business,
21 including the production of files from which such documents or tangible things are taken.
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1 11. Information shall not be withheld merely because such information is stored
2 electronically (e.g., word processing files, electronic mail, databases, accounting information, and
3 spreadsheets).

4 12. In addition to physical documents or objects, each Request for Production set forth
5 herein specifically calls for the production of electronic or magnetic data responsive to the Request,
6 including data that has been deleted.
7

8 13. Each Request for Production set forth herein calls for the following methods of
9 production:

10 a. *Hard Copy Documents.* (i) All black and white hard copy documents will be
11 scanned and produced in electronic form. The hard copy documents shall be
12 converted to a single page TIFF images and produced following the same protocol
13 set forth herein or otherwise agreed to by the parties. (ii) Images of all file labels,
14 file headings, and file folders associated with any hard copy document will be
15 produced with the images of the hard copy documents. (iii) Document breaks for
16 paper documents shall be based on Logical Document Determination (or “LDD”)
17 rather than on physical document breaks. (iv) The database load file shall include
18 the following fields: BEGBATES, ENDBATES, BEGATTACH, ENDATTACH,
19 CUSTODIAN, REDACTED, and CDVOLUME.
20

21
22 b. *Metadata Fields and Processing.* Each of the metadata and coding fields set forth
23 in **Appendix 1** that can be extracted shall be produced for that document. The
24 parties are not obligated to manually populate any of the fields in **Appendix 1** if
25 such fields cannot be extracted from a document, with the exception of the
26 following: BEGBATES, ENDBATES, BEGATTACH, ENDATTACH, and
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1 CUSTODIAN. The parties will make reasonable efforts to ensure that metadata
2 fields automatically extracted from the documents are correct.

3 c. *TIFFs*. Single page Group IV TIFFs should be provided, at least 300 dots per inch
4 (dpi). Single page TIFF images should be named according to the unique bates
5 number, followed by the extension “.TIF”. Original document orientation should
6 be maintained (*i.e.*, portrait to portrait and landscape to landscape).

7
8 d. *Text Files*. For each document originating in electronic format, a separate text file
9 containing the full text of each document should be provided with a file with the
10 TIFF images and a file with the document metadata. Text of native files should be
11 extracted directly from the native file. The text file should be named according to
12 the unique bates number, followed by the extension “.TXT.” The parties agree that
13 the full text and/or OCR of any document will not be contained within a database
14 load file, but rather as a standalone file with each text file containing the text for an
15 entire single document.

16
17 e. *Database Load Files*. An ASCII delimited data file (.txt, .dat, or .csv) that can be
18 loaded into commercially acceptable database software (*e.g.*, Concordance). The
19 first line of each text file must contain a header row identifying each data field by
20 name. Each document within the database load file must contain the same number
21 of fields as identified in the header row.

22
23 f. *Cross-Reference Image File Registration*. An image load file that can be loaded
24 into commercially acceptable production software (*e.g.*, Opticon, iPro). Each TIFF
25 in a production must be referenced in the corresponding image load file. An
26 exemplar load file format is below.

1 ABC0000001,PROD001,\\IMAGES\001\ABC0000001.tif,Y,,,2
2 ABC0000002,PROD001,\\IMAGES\001\ABC0000002.tif,,,,
3 ABC0000003,PROD001,\\IMAGES\001\ABC0000003.tif,Y,,,1

- 4 g. *Bates Numbering.* All images must be assigned a unique and sequential Bates
5 Number. Each party agrees to use the same Bates Numbering format through its
6 entire production unless a new Bates format is necessary, at which point the party
7 using the new Bates Numbering format will inform the other party of the change.
- 8 h. *Protective Order Designations.* Any document(s) determined by the producing
9 party to fall within the scope of a protective order shall have the appropriate level
10 of designated language (*i.e.*, CONFIDENTIAL, ATTORNEYS’ EYES ONLY,
11 OUTSIDE COUNSEL RESTRICTED, etc.) afforded by the protective order
12 endorsed on each tiff image of said document(s).
- 13 i. *Native File Productions.* The parties agree that when producing a native file, they
14 will include a TIFF image as a placeholder for the file to represent the file in the
15 production set. The TIFF image placeholder for a native file should be branded with
16 a unique Bates number and state “See Native Document” on the TIFF image. The
17 native file should then be renamed to match the Bates number assigned to the
18 document with its original file extension. The filename field produced in the
19 production load file that reflects the original metadata should maintain the original
20 file name. If a native file falls within the scope of a protective order (*see* paragraph
21 (h), above), then the appropriate designation is to be included in the filename along
22 with the assigned Bates number (*i.e.*, ABC000001_CONFIDENTIAL.xls).
- 23 j. *Microsoft Office files, WordPerfect, and other standard documents (e.g., Google*
24 *Docs and PDF documents).* MS Office files, WordPerfect, other standard
25 documents, such as PDF documents, will be converted to single-page TIFF images
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1 and produced consistent with the specifications herein. If the document contains
2 comments or tracked changes, then the TIFF images shall be generated to include
3 the comments or track changes contained in the file.

4 k. *Email and attachments.* E-mail and attachments should be converted to single-page
5 TIFF images and produced consistent with the specifications provided herein.
6 Attachments shall be processed as separate documents, and the text database load
7 file shall include a field in which the producing party shall identify the production
8 range of all attachments of each e-mail.
9

10 l. *Microsoft PowerPoint and other Presentation Files.* The parties shall process
11 presentations (e.g., MS PowerPoint, Google Presently) to include hidden slides and
12 speaker's notes by imaging in a way that both the slide and the speaker's notes
13 display on the TIFF image.

14 m. *Spreadsheets.* The parties shall produce spreadsheets (e.g., MS Excel, Google Trix)
15 in native format where available. *See paragraph (i) above.* If a spreadsheet requires
16 redaction, the parties will use native file redaction applications (e.g., Blackout).

17 n. *Good Cause for Additional Native Files.* If good cause exists to request production
18 of specified files in native format, then the party may request such production and
19 provide an explanation of the need for native file review.
20

21 o. *Other Documents or Data.* If production of certain structured or other electronic
22 data that is not easily converted to static TIFF images, such as databases, CAD
23 drawings, GIS data, videos, audio files, websites, social media, then the parties will
24 meet and confer to discuss an appropriate form of production.
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1 p. *Social media and other web-based content.* The production of social media or other
2 web-based content should be converted to single-page TIFF images and produced
3 consistent with the specifications provided herein. If the social media and/or web-
4 based content cannot be produced in single-page TIFF images, then the parties shall
5 meet and confer to discuss a form of production. Further, the parties will also
6 confer regarding the specific web location of the social media or other web-based
7 content and agree upon the available metadata that can be produced therewith.
8

9 q. *Color Documents.* Parties will produce documents in black and white, unless to do
10 so would alter or obscure the substance of the document. A party may request that
11 a reasonable number of documents be produced in a color format upon review of
12 the other party's production.in single page JPEG format.

13 r. *Redactions.* In the event that a document requires redaction, the parties agree the
14 native file, if applicable, will be excluded from the production. In addition, any
15 redacted text will be omitted from the full text and/or OCR, and any corresponding
16 metadata fields from the production. The TIFF image will readily identify the
17 redactions.
18

19 s. *Production Media.* Documents and electronically stored information ("ESI") shall
20 be produced on optical media (CD or DVD), external hard drives, or via an FTP
21 site, or similar, readily accessible electronic media.
22

23 t. *Encryption.* Industry-standard encryption tools and practices must be used when
24 transferring data between parties. Passwords must be at least 8 characters with a
25 mix of character sets and sent in a separate communication from the encrypted data.
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1 Among other places, You shall search for electronic documents stored on all servers, networks,
2 hard drives, desktop computers, notebook computers, personal digital devices, all back-up storage
3 media or devices, and with any third-party cloud providers. Each responsive Document shall be
4 produced in its entirety. In producing documents, if an identical copy appears in more than one
5 Person's files, You shall either (1) produce each copy or (2) provide the names of each Custodian
6 in the "Custodian" field.

7
8 14. Documents not otherwise responsive to these requests shall be produced if such
9 documents concern the documents that are responsive to the requests or if such documents are
10 attached to documents called for by these requests and constitute routing slips, transmittal
11 memoranda, letters, emails, comments, evaluations, or similar materials.

12
13 15. Your response to these Requests for Production should not be delayed if they cannot
14 be fully complied with by the date set for the presentation of documents for any reason, including,
15 but not limited to, the assertion of any privilege, interposition of any objection, ongoing
16 investigation, or current unavailability of documents. All available documents should be produced
17 on the date set for presentation, and any unavailable documents should be produced as soon as
18 they become available.

19
20 16. These Requests for Production are deemed to be continuing in nature so as to
21 require that You supplement Your response if You obtain or discover additional information or
22 documents between the time of the initial response and the time of hearing or trial herein. This
23 paragraph shall not be construed to alter any obligation to comply with all other instructions in
24 these Requests for Production.

25
26 17. Plaintiffs hereby expressly reserve the right to supplement these Requests for
27 Production and to propound new requests, to the extent permitted by applicable law and rules.

1 18. In construing any request, instruction or definition, the singular form of a word shall
2 include the plural and the plural form of a word shall include the singular.

3 19. The connectives “and” and “or” shall be construed disjunctively or conjunctively
4 as necessary to bring within the scope of the request all documents that might otherwise be
5 construed to be outside of its scope.

6 20. The terms “all” and “each” shall be construed as all and each, as necessary to bring
7 within the scope of the request all information that might otherwise be construed to be outside
8 of its scope.

9 21. Plaintiff is willing to meet and confer in good faith with respect to any objections
10 set forth by You.
11

12
13 **RELEVANT TIME PERIOD**

14 1. The relevant Time Period for these Requests for Production shall be through the
15 date of production, unless otherwise specified.
16

17 **REQUESTS FOR PRODUCTION**

18 **REQUEST FOR PRODUCTION NO. 1:** Please produce all documents related to the
19 Plan’s current or prior Transgender Healthcare Exclusion, including, but not limited to

20 (a) all drafts and previous versions of the Transgender Healthcare Exclusion, including the
21 earliest iteration of the Transgender Health Exclusion, and any amendments or supplements thereto
22 (whether actual or proposed);

23 (b) all documents (to include any formal or informal financial or budgetary or other
24 analyses, actuarial reports, or other reports or memoranda) and communications between
25 Defendants and all internal and external persons (including, but not limited to, any insurance
26 company, any consultant, the Alliance Defending Freedom, the Center for Arizona Policy, or any
27

1 lobbying or interest group regarding whether any form of transition-related care or the Transgender
2 Health Exclusion should be adopted, modified, retained, or eliminated, and the rationale provided
3 or discussed.

4 (c) all documents and communications with internal and external persons pertaining to
5 Defendants' initial decision to exclude transition-related care, as well as any subsequent decisions
6 to adopt, amend, retain, or eliminate any form of transition-related care or the Transgender Health
7 Exclusion, including minutes or recordings of meetings where coverage for or exclusion of any
8 form of transition-related care was discussed.
9

10 **REQUEST FOR PRODUCTION NO. 2:** Please produce all documents and
11 communications between Defendants and internal and external persons relating to and regarding
12 the State of Arizona's decision to join the litigation in the Northern District of Texas bearing Case
13 No. 7:16-cv-00108 (originally filed as *Franciscan Alliance, Inc. et al v. Burwell et al*, later re-
14 designated as *Franciscan Alliance, Inc. et al v. Price et al* and *Franciscan Alliance, Inc. et al v.*
15 *Azar II et al*), and the State of Arizona's participation in that litigation.
16

17 **REQUEST FOR PRODUCTION NO. 3:** Please produce all versions and iterations of
18 the Plan's policies/lists of Exclusions and General Limitations (*e.g.*, Article 9.1 of ADOA's PPO
19 and EPO Plans, Article 10.1 of ADOA's HSA Plan) from the years 2010 through the present, as
20 well as all documents and communications between Defendants and internal or external persons
21 regarding creating, amending, continuing, or eliminating any exclusion of coverage contained in
22 any version/iteration of the Plan's Exclusions and General Limitations policy, including, but not
23 limited to, the potential costs of enforcing, amending, or eliminating such excluded coverage, the
24 medical necessity, safety, and efficacy (including whether a procedure is deemed experimental or
25 cosmetic) of excluded treatments and services; or the public health effects of enforcing, amending,
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1 or eliminating such excluded coverage. Such documents should include any and all actuarial
2 reports, analyses, or memorandums pertaining to such exclusions of coverage.

3 **REQUEST FOR PRODUCTION NO. 4:** Please produce all documents and
4 communications between the Defendants and internal or external persons regarding whether any
5 treatment of gender dysphoria is “Medically Necessary.”

6 **REQUEST FOR PRODUCTION NO. 5:** Please produce all documents and
7 communications between the Defendants and internal or external persons concerning (a)
8 transgender people, (b) gender transition, (c) change of sex, (d) sex reassignment, (e)
9 transsexualism; or (f) gender reassignment.

10 **REQUEST FOR PRODUCTION NO. 6:** Please produce documents sufficient to show,
11 from 2010 to the present:

12 (a) the number of hysterectomies paid for by the Plan each year, the medical reason for the
13 surgery, and the individual and aggregate cost of the surgeries; and

14 (b) the number of medically necessary cosmetic or reconstructive surgical procedures paid
15 for by the Plan each year (including but not limited to chest-reconstruction surgery,
16 vaginoplasty, or phalloplasty, or other surgery related to the reproductive or urogenital
17 system) the medical reason for the surgery, and the individual and aggregate cost of
18 the surgeries.

19 **REQUEST FOR PRODUCTION NO. 7:** Please produce all documents (to include any
20 formal or informal financial or budgetary or other analyses, plans, actuarial reports, or other reports
21 or memoranda) to show (1) the total annual expenses (*i.e.*, the amounts paid by the Plan to medical
22 providers) for all treatment and services provided under the Plan from 2010 to the present,
23 including a cost breakdown of the total expenses for each type of treatment or service; and (2) the
24

CERTIFICATE OF SERVICE

I, Nicholas Reddick, hereby certify that on December 8, 2020 I served the foregoing *Plaintiff's First Request for Production of Documents and Tangible Things* to Defendants via email:

Timothy J. Berg tberg@fclaw.com
Amy Abdo amy@fclaw.com
Ryan Curtis rcurtis@fclaw.com
Shannon Cohan scohan@fclaw.com
FENNEMORE CRAIG, P.C.
2394 E. Camelback Road Suite 600
Phoenix, Arizona 85016

Attorneys for Defendants State of Arizona, Andy Tobin, and Paul Shannon

Paul F. Eckstein PEckstein@perkinscoie.com
Austin C. Yost AYost@perkinscoie.com
PERKINS COIE LLP
2901 N. Central Ave., Suite 2000
Phoenix, Arizona 85012-2788
DocketPHX@perkinscoie.com

Attorneys for Defendants Arizona Board of Regents, d/b/a University of Arizona; Ron Shoopman; Larry Penley; Ram Krishna; Bill Ridenour; Lyndel Manson; Karrin Taylor Robson; Jay Heiler; and Fred Duval

/s/ Nicholas Reddick

EXHIBIT 3

1 FENNEMORE CRAIG, P.C.
 Timothy J. Berg (No. 004170)
 2 Amy Abdo (No. 016346)
 Ryan Curtis (No. 025133)
 3 Shannon Cohan (No. 034429)
 2394 E. Camelback Road
 4 Suite 600
 Phoenix, Arizona 85016
 5 Telephone: (602) 916-5000
 Email: tberg@fclaw.com
 6 Email: amy@fclaw.com
 Email: rcurtis@fclaw.com
 7 Email: scohan@fclaw.com

8 *Attorneys for Defendants*
 9 *State of Arizona, Andy Tobin, and Paul Shannon*

10 UNITED STATES DISTRICT COURT
 11 DISTRICT OF ARIZONA

12 RUSSELL B. TOOMEY,
 13 Plaintiff,

14 v.

15 STATE OF ARIZONA; ARIZONA
 BOARD OF REGENTS D/B/A
 16 UNIVERSITY OF ARIZONA, a
 governmental body of the State of Arizona;
 17 RON SHOOPMAN, in his official capacity
 as Chair of the Arizona Board of Regents;
 18 LARRY PENLEY, in his official capacity
 as Member of the Arizona Board of
 19 Regents; RAM KRISHNA, in his official
 capacity as Secretary of the Arizona Board
 20 of Regents; BILL RIDENOUR, in his
 official capacity as Treasurer of the Arizona
 21 Board of Regents; LYNDEL MANSON, in
 her official capacity as Member of the
 22 Arizona Board of Regents; KARRIN
 TAYLOR ROBSON, in her official
 23 capacity as Member of the Arizona Board
 of Regents; JAY HEILER, in his official
 24 capacity as Member of the Arizona Board
 of Regents; FRED DUVAL, in his official
 25 capacity as Member of the Arizona Board
 of Regents; ANDY TOBIN, in his official
 26 capacity as Director of the Arizona

No. 4:19-cv-00035

**DEFENDANTS STATE OF
 ARIZONA’S, ANDY TOBIN’S, AND
 PAUL SHANNON’S RESPONSES TO
 PLAINTIFF’S FIRST SET OF
 INTERROGATORIES**

1 Department of Administration; PAUL
 2 SHANNON, in his official capacity as
 3 Acting Assistant Director of the Benefits
 Services Division of the Arizona
 Department of Administration,
 4 Defendants.

5
6 Propounding Party: Russell B. Toomey

7 Answering Parties: State of Arizona, Andy Tobin, and Paul Shannon

8 Set No.: One

9 **GENERAL STATEMENT AND OBJECTIONS**

10 1. Defendants object to each interrogatory to the extent that it is vague and/or
 11 ambiguous and agrees to respond to Plaintiff’s interrogatories based solely on their
 12 interpretation of any vague or ambiguous language.

13 2. Defendants object to each interrogatory to the extent that it is overly broad,
 14 unduly burdensome, or oppressive.

15 3. Defendants object to each interrogatory to the extent that it seeks confidential,
 16 proprietary, private, or privileged information and will respond to any such interrogatory,
 17 if otherwise discoverable, after the parties have agreed to a protective order.

18 4. Defendants object to each interrogatory to the extent that it seeks information
 19 that is irrelevant to Plaintiff’s claims or Defendants’ defenses and is not reasonably
 20 calculated to lead to the discovery of admissible evidence.

21 5. Defendants object to each interrogatory to the extent that it requires any action
 22 or response beyond that required by the Federal Rules of Civil Procedure, the Scheduling
 23 Order, or the Local Rules.

24 **ANSWERS TO INTERROGATORIES**

25 **INTERROGATORY NO. 1:** Identify and describe all reasons why the State of
 26 Arizona’s self-funded health plan controlled by the Arizona Department of Administration

1 (the “Plan”) excludes coverage for “[g]ender reassignment surgery” (the “Challenged
2 Exclusion”) including, but not limited to, (a) each and every State or governmental interest
3 that you contend is advanced by the exclusion, (b) a detailed explanation for why you
4 contend that the exclusion furthers that state interest, and (c) all facts in support of your
5 explanation.

6 **ANSWER: The State of Arizona’s self-funded health plan excludes coverage for**
7 **gender reassignment surgery because the State concluded, under the law, that it was**
8 **not legally required to change its health plan to provide such coverage under either**
9 **Title VII of the Civil Rights Act or under the Equal Protection Clause of the**
10 **Fourteenth Amendment to the United States Constitution. Specifically, prior to the**
11 **Supreme Court’s ruling in *Bostock v. Clayton County*, Title VII protections on the basis**
12 **of sex had not been applied to individuals based on their sexual orientation or**
13 **transgender status. Further, rules promulgated by the Department of Health and**
14 **Human Services (“HHS”) regarding nondiscrimination provisions under Section 1557**
15 **of the Affordable Care Act prohibited blanket exclusions of all treatments of gender**
16 **dysphoria, but did not require plans subject to the law to cover all treatments for**
17 **gender dysphoria or gender transition services. The legal advice that the State**
18 **received regarding this issue is covered by the attorney-client privilege.**

19 **The State or governmental interests advanced by the exclusion are cost**
20 **containment and reducing health care costs. The State gathered information from**
21 **private insurers and public entities who did provide coverage for gender reassignment**
22 **surgery in an effort to determine how its own health care costs would be impacted.**
23 **Although the cost estimates varied, they unquestionably showed that removing the**
24 **exclusion for gender reassignment surgery would increase costs and that such**
25 **increases could be significant.**

26 **INTERROGATORY NO. 2: Identify all persons with knowledge of the reasons**

1 why the Plan excludes coverage for “[g]ender reassignment surgery,” and state what each
2 such person knows.

3 **ANSWER: Defendants object to this interrogatory because it seeks information**
4 **covered by the attorney-client privilege. Subject to and without waiving this objection,**
5 **Defendants state that Michael T. Liburdi, the former General Counsel for the Office**
6 **of the Arizona Governor, John M. Fry of the Arizona Attorney General’s Office,**
7 **Nicole A. Ong, the former General Counsel of the ADOA, Christina Corieri, a licensed**
8 **attorney and Senior Policy Advisor Office of the Arizona Governor, Marie Isaacson,**
9 **the former Director of the Benefits Services Division of the ADOA, and Scott Bender,**
10 **the Plan Administrator for the ADOA have knowledge of why the Plan excludes**
11 **coverage for gender reassignment surgery as described in the response to**
12 **Interrogatory No. 1 above. ADOA also received attorney-client privileged legal advice**
13 **from Ryan C. Curtis at Fennemore Craig, P.C., as well as now former Fennemore**
14 **Craig attorney Erwin Kratz.**

15 **INTERROGATORY NO. 3: Identify all persons with knowledge of the genesis,**
16 **formulation, adoption, maintenance, or continuation of (a) the Challenged Exclusion and**
17 **(b) any earlier versions of the exclusion before the current language was adopted, and state**
18 **what each such person knows.**

19 **ANSWER: Defendants object to this interrogatory because it seeks information**
20 **covered by the attorney-client privilege. Subject to and without waiving this objection,**
21 **Defendants state that Michael T. Liburdi, the former General Counsel for the Office**
22 **of the Arizona Governor, John M. Fry of the Arizona Attorney General’s Office,**
23 **Nicole A. Ong, the former General Counsel of the ADOA, Christina Corieri, Senior**
24 **Policy Advisor Office of the Arizona Governor, Marie Isaacson, the former Director**
25 **of the Benefits Services Division of the ADOA, and Scott Bender, the Plan**
26 **Administrator for the ADOA have knowledge regarding the Challenged Exclusion.**

1 ADOA also received attorney-client privileged legal advice from Ryan C. Curtis at
2 Fennemore Craig, P.C., as well as now former Fennemore Craig attorney Erwin
3 Kratz.

4 **INTERROGATORY NO. 4:** Identify all persons who participated in formulating,
5 adopting, maintaining, reviewing, approving, or deciding to continue the exclusion of
6 coverage for “[g]ender reassignment surgery” from the Plan, including any experts
7 consulted, and state what each such person knows.

8 **ANSWER:** Defendants object to this interrogatory because it seeks information
9 covered by the attorney-client privilege. Subject to and without waiving this objection,
10 Defendants state that Michael T. Liburdi, the former General Counsel for the Office
11 of the Arizona Governor, John M. Fry of the Arizona Attorney General’s Office,
12 Nicole A. Ong, the former General Counsel of the ADOA, Christina Corieri, Senior
13 Policy Advisor Office of the Arizona Governor, Marie Isaacson, the former Director
14 of the Benefits Services Division of the ADOA, and Paul Shannon, the Director of the
15 Benefits Services Division of the ADOA participated in these decisions.

16 **INTERROGATORY NO. 5:** Identify all persons who assisted in preparing the
17 answers to these Interrogatories or provided information contained in the answers, and state
18 his or her title, duties, role in preparing the answers, and the interrogatory answer(s) to
19 which he or she provided information or assistance. This identification should also indicate
20 whether the information provided is within his or her knowledge or was obtained from some
21 other person or source; if the information was obtained from another person or source, that
22 person or source should also be identified.

23 **ANSWER:** Defendants object to this interrogatory because it violates the work-
24 product doctrine as set forth in *Hickman v. Taylor*, 329 U.S. 495 (1947). Several courts
25 have held that the work product doctrine covers various aspects of an attorney’s
26 investigation, including the witnesses who were interviewed, how long they were

1 interviewed, and when they were interviewed. *See, e.g., Commonwealth of*
2 *Massachusetts v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 153 (D. Mass. 1986)
3 (holding it was improper to seek disclosure of “the names of persons interviewed by
4 an adverse party’s attorney together with the dates and places of such interviews.”);
5 *Board of Ed. of Evanston TP v. Admiral Heating*, 104 F.R.D. 23, 32 (N.D. Ill. 1984) (to
6 tell plaintiffs whom defendants have interviewed, where and when such interviews
7 took place, and whether or not a record was made is to give plaintiffs no more
8 knowledge of substantive relevant facts, but rather to afford them the potential for
9 significant insights into the defendant lawyers’ preparation of their case and their
10 mental processes); *Besley-Welles Corp. v. Balax, Inc.*, 43 F.R.D. 368, 371 (E.D. Wis.
11 1968) (interrogatory seeking statement as to adverse party’s efforts to locate witnesses
12 goes to attorney’s preparation for trial and comes under the *Hickman* rule that gives
13 an attorney’s work product qualified immunity from discovery); *Uinta Oil Refining*
14 *Co. v. Continental Oil Co.*, 226 F. Supp. 495, 506 (D. Utah 1964) (sustaining objection
15 to interrogatory seeking names of all persons from whom plaintiffs had taken or
16 requested statements, explaining that “[t]he detailed pattern of investigation and
17 exploration in and of itself is not a proper subject for discovery.”).

18 **INTERROGATORY NO. 6:** Identify all public or non-public meetings of
19 Defendants in which the Challenged Exclusion and/or the Plan’s coverage for medical or
20 surgical treatments or services to treat gender dysphoria (or “transition-related care”) was
21 discussed, listing the date of each meeting, the nature of each meeting, and the attendees of
22 the meeting; and identifying any documents or other materials relating to those meetings in
23 Defendants’ custody or control.

24 **ANSWER:** Defendants object to this interrogatory because it seeks information
25 covered by the attorney-client privilege. Subject to and without waiving this objection,
26 Defendants state that the individuals identified in response to Interrogatory No. 2 who

1 were employees of ADOA or the Governor's Office above held meetings and
2 discussions regarding the Plan's surgical treatments or services to treat gender
3 dysphoria between June and November 2016, some of which included the
4 participation of outside counsel from Fennemore Craig, P.C. Defendants possess
5 documents regarding these meetings that will be identified in their privilege log.

6 **INTERROGATORY NO. 7:** Identify all research, studies, data, reports,
7 publications, testimony, or other documents considered, reviewed, or relied on by
8 Defendants relating to the Challenged Exclusion, including identifying the date or
9 approximate date of consideration, review, or reliance by the Arizona Board of Regents
10 ("ABOR") and the Arizona Department of Administration (the "ADOA"); and the ADOA
11 and ABOR employee(s) who considered, reviewed, or relied on such documents and their
12 role(s). A complete answer to this interrogatory should include documents relating to the
13 medical necessity, safety, and efficacy (including whether a procedure is deemed
14 experimental) of excluded treatments and services; the public health effects of enforcing,
15 amending, or eliminating the Challenged Exclusion; and the cost/fiscal impact to ADOA or
16 ABOR of enforcing, amending, or eliminating the Challenged Exclusion.

17 **ANSWER:** Defendants considered a Memorandum from Marie Isaacson to
18 Mike Liburdi, General Counsel at the Governor's Office dated August 3, 2016,
19 regarding Affordable Care Act § 1557, and a Memorandum regarding Non-
20 discrimination—Transgender Coverage and a Memorandum from outside legal
21 counsel at Fennemore Craig to Marie Isaacson dated July 20, 2016, regarding
22 Summary and Implications of § 1557 and Transgender Coverage Requirements. Both
23 of these documents are covered by the attorney-client privilege. Defendants also
24 gathered information and data from insurers and other entities regarding their
25 experience providing transgender benefits, including reassignment surgery. Plaintiffs
26 may ascertain the non-privileged information requested in this Interrogatory from the

1 **documents that Defendants have produced in this action.**

2 **INTERROGATORY NO. 8:** Identify and describe any formal or informal
3 consideration by Defendants of amending or eliminating the Challenged Exclusion,
4 including identifying the date or approximate date of consideration, the ADOA and ABOR
5 employees or offices involved in such consideration and their role(s), the nature of the
6 considered changes, and what (if any) actions were taken by ADOA and ABOR.

7 **ANSWER:** Defendants object to this interrogatory because it seeks information
8 covered by the attorney-client privilege. Subject to and without waiving this objection,
9 Defendants state that they have informally considered amending or eliminating the
10 Challenged Exclusion after Plaintiff filed this action and since the Supreme Court’s
11 decision in *Bostock v. Clayton County*. Paul Shannon, Scott Bender, and Defendants’
12 counsel have been involved in such considerations.

13 DATED this 28th day of September, 2020.

14 FENNEMORE CRAIG, P.C.

15
16 By: s/ Ryan Curtis
17 Timothy J. Berg
18 Amy Abdo
19 Ryan Curtis
20 Shannon Cohan
21 Attorneys for Defendants State of
22 Arizona, Andy Tobin, and Paul
23 Shannon
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2020, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Victoria Lopez
Christine K. Wee
ACLU FOUNDATION OF ARIZONA
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014
vlopez@acluaz.org
cwee@acluaz.org
Attorneys for Plaintiff

Joshua A. Block
Leslie Cooper
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, NY 10004
jblock@aclu.org
lcooper@aclu.org
Attorneys for Plaintiff

Wesley R. Powell
Matthew S. Friemuth
WILLKIE FARR & GALLAGHER LLP
787 Seventh Ave.
New York, NY 10019
wpowell@willkie.com
mfriemuth@willkie.com
Attorneys for Plaintiff

Paul F. Eckstein
Austin C. Yost
PERKINS COIE, LLP
2901 N. Central Ave., Ste. 2000
Phoenix, AZ 85012
PEckstein@perkinscoie.com
AYost@perkinscoie.com
*Attorneys for Defendants Arizona Board of Regents
dba University of Arizona; Ron Shoopman; Larry Penley; Ram Krishna; Bill Ridenour;
Lyndel Manson; Karrin Taylor Robson; Jay Heiler; and Fred Duval*

/s/ Lynn M. Marble

16215076

EXHIBIT 4

1 **Victoria Lopez***
2 **Christine K Wee– 028535**
3 **ACLU FOUNDATION OF ARIZONA**
4 3707 North 7th Street, Suite 235
5 Phoenix, Arizona 85014
6 Telephone: (602) 650-1854
7 Email: vlopez@acluaz.org
8 Email: cwee@acluaz.org

9 **(*admission under Arizona Rule 38(f) pending)**

10 **Joshua A. Block****
11 **Leslie Cooper****
12 **AMERICAN CIVIL LIBERTIES UNION FOUNDATION**
13 125 Broad Street, Floor 18
14 New York, New York 10004
15 Telephone: (212) 549-2650
16 E-Mail: jblock@aclu.org
17 E-Mail: lcooper@aclu.org
18 ****Admitted Pro hac vice**

19 **Wesley R. Powell****
20 **Matthew S. Friemuth****
21 **WILLKIE FARR & GALLAGHER LLP**
22 787 Seventh Avenue
23 New York, New York 10019
24 Telephone: (212) 728-8000
25 Facsimile: (212) 728-8111
26 E-Mail: wpowell@willkie.com
27 E-Mail: mfriemuth@willkie.com
28 ****Admitted Pro hac vice**

Attorneys for Plaintiff Russell B. Toomey

1
2 UNITED STATES DISTRICT COURT

3 DISTRICT OF ARIZONA

4 **Russell B. Toomey,**

5 Plaintiff,

6 v.

7 **State of Arizona; Arizona Board of Regents,**
8 **d/b/a University of Arizona,** a governmental
9 body of the State of Arizona; **Ron Shoopman,** in
10 his official capacity as chair of the Arizona Board
11 Of Regents; **Larry Penley,** in his official
12 capacity as Member of the Arizona Board of
13 Regents; **Ram Krishna,** in his official capacity as
14 Secretary of the Arizona Board of Regents; **Bill**
15 **Ridenour,** in his official capacity as Treasurer of
16 the Arizona Board of Regents; **Lyndel Manson,**
17 in her official capacity as Member of the Arizona
18 Board of Regents; **Karrin Taylor Robson,** in her
19 official capacity as Member of the Arizona Board
20 of Regents; **Jay Heiler,** in his official capacity as
21 Member of the Arizona Board of Regents; **Fred**
22 **Duval,** in his official capacity as Member of the
23 Arizona Board of Regents; **Andy Tobin,** in his
24 official capacity as Director of the Arizona
25 Department of Administration; **Paul Shannon,** in
26 his official capacity as Acting Assistant Director
27 of the Benefits Services Division of the Arizona
28 Department of Administration,

Defendants.

4:19-cv-00035-TUC-RM (LCK)

**PLAINTIFF'S FIRST SET OF
INTERROGATORIES**

23 Pursuant to the Rules of Practice and Procedure of the United States District Court for
24 the District of Arizona Rule 33 and the Federal Rules of Civil Procedure Rule 26 (together, the
25 “Rules”), Plaintiff Russell B. Toomey, by and through counsel undersigned, hereby requests
26 the Defendants answer the following interrogatories (the “Interrogatories,” and each an
27 “Interrogatory”) in writing and under oath within 14 days of service hereof.
28

DEFINITIONS

1
2 1. The term “communication,” as used herein, means the transmittal of information
3 (in the form of facts, ideas, inquiries, or otherwise), whether orally or in writing, or by any other
4 means or medium.

5 2. The terms “concerning,” “relating to,” “referring to,” “arising out of,” and their
6 cognates are to be understood in their broadest sense and each means concerning, constituting,
7 identifying, evidencing, summarizing, commenting upon, referring to, relating to, arising out of,
8 describing, digesting, reporting, listing, analyzing, studying, discussing, stating, setting forth,
9 reflecting, interpreting, concerning, recording, including, negating, manifesting, containing or
10 comprising the subject matter identified.

11 3. The terms “describe” and “description,” as used herein, mean to give a detailed
12 written account or representation of the subject matter – including, but not limited to, when used
13 with respect to any act, action, accounting, activity, audit, practice, process, occurrence,
14 occasion, course of conduct, happening, negotiation, relationship, scheme, communication,
15 conference, discussion, development, circumstances, service, transaction, instance, incident, or
16 event – setting forth the following: (a) its general nature; (b) the time and place thereof; (c) a
17 chronological account setting forth each element thereof, what such element consisted of and
18 what transpired as part thereof; (d) the identity (as defined herein) of each person who performed
19 any function or had any role in connection therewith (*i.e.*, speaker, participant, contributor of
20 information, witness, etc.) or who has any knowledge thereof, together with a description of
21 such person’s function, role or knowledge; (e) the identity (as defined herein) of each document
22 that refers thereto or that was used, referred to or prepared in the course of or as a result thereof;
23 and (f) the identity (as defined herein) of each oral communication that was a part thereof or
24 referred thereto.

25 4. The terms “document” and “documents” shall have the broadest meaning
26 allowable under the Rules and applicable case law, and shall include without limitation,
27 electronically stored information and written, printed, typed, recorded, or graphic matter of
28 every kind and description, both originals and copies and all attachments and appendices thereto.

1 Without limiting the foregoing, the terms “document” and “documents” shall include all
2 agreements, contracts, applications, communications, interoffice or intraoffice correspondence,
3 books, letters, telegrams, telexes, messages, memoranda, records, reports, books, summaries,
4 electronic mail, texts, chats, records of telephone conversations or interviews, summaries or
5 other records of personal conversations, minutes or summaries or other records of personal
6 meetings and conferences, summaries or other records of meetings and conferences, summaries,
7 entries, calendars, appointment books, time records, instructions, work assignments, visitor
8 records, forecasts, statistical data, statistical statements, work sheets, drafts, graphs, maps,
9 charts, tables, marginal notations, notebooks, telephone bills or records, bills, statements and
10 records of obligation and expenditure, invoices, lists, journals, advertising, recommendations,
11 files, printouts, compilations, tabulations, purchase orders, receipts, sell orders, confirmations,
12 checks, letters of credit, envelopes or folders or similar containers, vouchers, analyses, studies,
13 surveys, transcripts of hearings, transcripts of testimony, expense reports, microfilm,
14 microfiche, articles, speeches, tape or disc recordings, sound recordings, video recordings, film,
15 tapes, photographs, punch cards, programs, data compilations from which information can be
16 obtained (including matter used in data processing), and other printed, written, handwritten,
17 typewritten, recorded, stenographic, computer-generated, or electronically stored matter (or
18 printouts thereof), however and by whomever produced, prepared, reproduced, disseminated, or
19 made.

20 5. “Draft(s)” shall mean any formulation, outline, sketch, conceptualization, or
21 version of a document created prior to the final version of that document.

22 6. The term “factual and/or legal bases” includes, but is not limited to, any and all
23 documents, facts, communications or contentions.

24 7. The terms “identify,” “specify” and “state” mean to refer to the subject matter by
25 providing a detailed account or description of the subject matter, including, but not limited to,
26 the following:

- 27 a. when applicable to a document, to set forth in writing at a minimum and in the
28 following order: (i) the name of the document; (ii) the nature of the document

1 (e.g., letter, contract, memorandum) and any other information (i.e., its title, index
2 or file number) which would facilitate in the identification thereof; (iii) the date
3 the document was prepared or created; (iv) the identity of each person who
4 performed any function or had any role in connection therewith (i.e., author,
5 contributor of information, recipient, etc.) or who has any knowledge thereof,
6 together with a description of each such person's function, role or knowledge; (v)
7 its subject matter and substance, or, in lieu thereof, annex a legible copy of the
8 document to Your answers to these interrogatories; (vi) identification of all
9 persons who are in possession of the original and any copy of the document; (vii)
10 its present location and the identity of its present custodian, or, if its present
11 location and custodian are not known, a description of its last known disposition;
12 (viii) where a document is other than a paper (i.e., computer or recording tape,
13 microfilm disk, microfiche, etc.), a full description of the tangible thing on which
14 the information is recorded, and the device or the devices needed to read or listen
15 to the document; and (ix) if the document has been destroyed or is otherwise no
16 longer in existence or cannot be found, the reason why such document no longer
17 exists, the identity of the person(s) responsible for document no longer being in
18 existence and the identity of the document's last custodian.

- 19 b. when applicable to a natural person, to set forth in writing at a minimum and in
20 the following order: (i) his/her full name; (ii) his/her present and/or last known
21 business and residence address and telephone number, or an undertaking that the
22 person may be contacted through responding counsel; (iii) his/her present or last
23 known business affiliation; and (iv) his/her present or last known business position
24 (including job title and a description of job functions, duties and responsibilities);
- 25 c. when applicable to any entity or person other than a natural person, to set forth in
26 writing at a minimum and in the following order: (i) its full name; (ii) the address
27 and telephone number of its principal place of business; (iii) the jurisdiction under
28 the laws of which it has been organized or incorporated and the date of such

1 organization or incorporation; (iv) the identity of all individuals who acted and/or
2 authorized another to act on its behalf in connection with the matters referred to;
3 (v) in the case of a corporation, the names of its directors and principal officers;
4 and (vi) in the case of an entity other than a corporation, the identities of its
5 partners or principals or all individuals who acted or who authorized another to
6 act on its behalf in connection with the matters referred to;

7 d. when applicable to an oral communication, to set forth in writing at a minimum
8 and in the following order: (i) the date, time, place, manner and substance of such
9 communication; (ii) the identity of all persons who participated in, listened to, or
10 had access to transcripts or summaries of such communication or copies thereof;
11 (iii) each such person's function, role, or knowledge; and (iv) the identity of all
12 documents which memorialize, commemorate, summarize, record or directly refer
13 or relate, in whole or in part, to such communication.

14 8. The term "including" means "including, but not limited to," and shall not be
15 construed to limit the scope of any definition or request herein.

16 9. The term "person" means any natural person, corporation, partnership,
17 proprietorship, association, joint venture, group, governmental or public entity, or any other
18 form or organization of legal entity, and all of their directors, officers, employees,
19 representatives, and agents.

20 10. "Defendants" mean Defendants State of Arizona, Arizona Board of Regents, d/b/a
21 University of Arizona, Ron Shoopman, Larry Penley, Ram Krishna, Bill Ridenour, Lyndel
22 Manson, Karrin Taylor Robson, Jay Heiler, Fred DuVal, Andy Tobin, and Paul Shannon and all
23 of their predecessors and successors in interest, and all of their representatives, attorneys, and
24 agents.

25 11. "You" and "Your" refer to Defendants individually and collectively.
26
27
28

INSTRUCTIONS

1
2 1. If You object to any of the Interrogatories in whole or in part, state with
3 particularity each objection, the basis for it, and the categories of information to which the
4 objection applies. You must respond to any portion of the Interrogatory to which You do not
5 object.

6 2. Each interrogatory shall be answered separately, and Your answer shall set forth
7 verbatim the interrogatory to which it is in response. The answer to an interrogatory shall not
8 be supplied by referring to the answer to another interrogatory unless the answer to the
9 interrogatory being referred to supplies a complete and accurate answer to the interrogatory
10 being answered.

11 3. You are required to answer each interrogatory set forth below, regardless of
12 whether the information is possessed by You or by any successors, assigns, agents, accountants,
13 experts, representatives, attorneys and/or consultants or anyone else acting or purporting to act
14 on Your behalf.

15 4. If You withhold any information or decline to fully identify any person, document
16 or communication in response to any of the interrogatories set forth below on grounds of
17 privilege or pursuant to the work product doctrine, provide the basis for Your claim of privilege
18 or attorney work product and answer the interrogatory to the extent You do not claim a privilege.

19 5. The interrogatories set forth below shall be deemed to be continuing in nature in
20 accordance with Rule 26 so as to require supplementation in the event that You obtain or become
21 aware of any additional information responsive to these interrogatories.

22 6. In construing any interrogatory, instruction or definition, the singular form of a
23 word shall include the plural and the plural form of a word shall include the singular.

24 7. The connectives “and” and “or” shall be construed disjunctively or conjunctively
25 as necessary to bring within the scope of the request all documents that might otherwise be
26 construed to be outside of its scope.

27 8. The terms “all” and “each” shall be construed as all and each, as necessary to bring
28 within the scope of the request all information that might otherwise be construed to be outside

1 of its scope.

2 **RELEVANT TIME PERIOD**

3 The relevant Time Period for these Requests shall be through the date in which the
4 interrogatories are answered, unless otherwise specified.

5 **INTERROGATORIES**

6 **INTERROGATORY NO. 1:** Identify and describe all reasons why the State of
7 Arizona’s self-funded health plan controlled by the Arizona Department of Administration (the
8 “Plan”) excludes coverage for “[g]ender reassignment surgery” (the “Challenged Exclusion”)
9 including, but not limited to, (a) each and every State or governmental interest that you contend
10 is advanced by the exclusion, (b) a detailed explanation for why you contend that the exclusion
11 furthers that state interest, and (c) all facts in support of your explanation.

12 **INTERROGATORY NO. 2:** Identify all persons with knowledge of the reasons why
13 the Plan excludes coverage for “[g]ender reassignment surgery,” and state what each such
14 person knows.

15 **INTERROGATORY NO. 3:** Identify all persons with knowledge of the genesis,
16 formulation, adoption, maintenance, or continuation of (a) the Challenged Exclusion and (b) any
17 earlier versions of the exclusion before the current language was adopted, and state what each
18 such person knows.

19 **INTERROGATORY NO. 4:** Identify all persons who participated in formulating,
20 adopting, maintaining, reviewing, approving, or deciding to continue the exclusion of coverage
21 for “[g]ender reassignment surgery” from the Plan, including any experts consulted, and state
22 what each such person knows.

23 **INTERROGATORY NO. 5:** Identify all persons who assisted in preparing the answers
24 to these Interrogatories or provided information contained in the answers, and state his or her
25 title, duties, role in preparing the answers, and the interrogatory answer(s) to which he or she
26 provided information or assistance. This identification should also indicate whether the
27 information provided is within his or her knowledge or was obtained from some other person or
28 source; if the information was obtained from another person or source, that person or source

1 should also be identified.

2 **INTERROGATORY NO. 6:** Identify all public or non-public meetings of Defendants
3 in which the Challenged Exclusion and/or the Plan’s coverage for medical or surgical treatments
4 or services to treat gender dysphoria (or “transition-related care”) was discussed, listing the date
5 of each meeting, the nature of each meeting, and the attendees of the meeting; and identifying
6 any documents or other materials relating to those meetings in Defendants’ custody or control.

7 **INTERROGATORY NO. 7:** Identify all research, studies, data, reports, publications,
8 testimony, or other documents considered, reviewed, or relied on by Defendants relating to the
9 Challenged Exclusion, including identifying the date or approximate date of consideration,
10 review, or reliance by the Arizona Board of Regents (“ABOR”) and the Arizona Department of
11 Administration (the “ADOA”); and the ADOA and ABOR employee(s) who considered,
12 reviewed, or relied on such documents and their role(s). A complete answer to this interrogatory
13 should include documents relating to the medical necessity, safety, and efficacy (including
14 whether a procedure is deemed experimental) of excluded treatments and services; the public
15 health effects of enforcing, amending, or eliminating the Challenged Exclusion; and the
16 cost/fiscal impact to ADOA or ABOR of enforcing, amending, or eliminating the Challenged
17 Exclusion.

18 **INTERROGATORY NO. 8:** Identify and describe any formal or informal
19 consideration by Defendants of amending or eliminating the Challenged Exclusion, including
20 identifying the date or approximate date of consideration, the ADOA and ABOR employees or
21 offices involved in such consideration and their role(s), the nature of the considered changes,
22 and what (if any) actions were taken by ADOA and ABOR.

23 DATED this 5th day of June, 2020.

24
25 ACLU FOUNDATION OF ARIZONA

26 By /s/ Christine K. Wee

27 Victoria Lopez

Christine K. Wee

3707 North 7th Street, Suite 235

Phoenix, Arizona 85014

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AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
Joshua A. Block
Leslie Cooper
125 Broad Street, Floor 18
New York, New York 10004

WILLKIE FARR & GALLAGHER LLP
Wesley R. Powell
Matthew S. Friemuth
787 Seventh Avenue
New York, New York 10019

Attorneys for Plaintiff Russell B. Toomey

CERTIFICATE OF SERVICE

I, Christine K. Wee, hereby certify that on June 5, 2020 I served the foregoing *Plaintiff's First Set of Interrogatories* to Defendants via email:

Peter C. Prynkiewicz pprynkiewicz@littler.com
Robert S. Oller soller@littler.com
Littler Mendelson PC - Phoenix, AZ
2425 E Camelback Rd., Ste. 900
Phoenix, AZ 85016-2907
*Attorneys for Defendants State of Arizona,
Andy Tobin, and Paul Shannon*

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

/s/ Christine K. Wee

EXHIBIT 5

1 FENNEMORE CRAIG, P.C.
 Timothy J. Berg (No. 004170)
 2 Amy Abdo (No. 016346)
 Ryan Curtis (No. 025133)
 3 Shannon Cohan (No. 034429)
 2394 E. Camelback Road
 4 Suite 600
 Phoenix, Arizona 85016
 5 Telephone: (602) 916-5000
 Email: tberg@fennemorelaw.com
 6 Email: amy@fennemorelaw.com
 Email: rcurtis@fennemorelaw.com
 7 Email: scohan@fennemorelaw.com

8 *Attorneys for Defendants*
 9 *State of Arizona, Andy Tobin, and Paul Shannon*

10 UNITED STATES DISTRICT COURT
 11 DISTRICT OF ARIZONA

12 Russell B. Toomey,
 13 Plaintiff,

14 v.

15 State of Arizona; Arizona Board of Regents
 16 d/b/a University of Arizona, a
 governmental body of the State of Arizona;
 17 Ron Shoopman, in his official capacity as
 Chair of the Arizona Board of Regents;
 18 Larry Penley, in his official capacity as
 Member of the Arizona Board of Regents;
 19 Ram Krishna, in his official capacity as
 Secretary of the Arizona Board of Regents;
 20 Bill Ridenour, in his official capacity as
 Treasurer of the Arizona Board of Regents;
 21 Lyndel Manson, in her official capacity as
 Member of the Arizona Board of Regents;
 22 Karrin Taylor Robson, in her official
 capacity as Member of the Arizona Board
 23 of Regents; Jay Heiler, in his official
 capacity as Member of the Arizona Board
 24 of Regents; Fred Duval, in his official
 capacity as Member of the Arizona Board
 25 of Regents; Andy Tobin, in his official
 capacity as Director of the Arizona
 Department of Administration; Paul
 26

No. 4:19-cv-00035

**DEFENDANTS STATE OF
 ARIZONA’S, ANDY TOBIN’S, AND
 PAUL SHANNON’S FIRST
 SUPPLEMENTAL RESPONSES TO
 PLAINTIFF’S FIRST SET OF
 INTERROGATORIES**

1 Shannon, in his official capacity as Acting
2 Assistant Director of the Benefits Services
3 Division of the Arizona Department of
4 Administration,

Defendants.

5 Propounding Party: Russell B. Toomey

6 Answering Parties: State of Arizona, Andy Tobin, and Paul Shannon

7 Set No.: One

8 **GENERAL STATEMENT AND OBJECTIONS**

9 1. Defendants object to each interrogatory to the extent that it is vague and/or
10 ambiguous and agrees to respond to Plaintiff's interrogatories based solely on their
11 interpretation of any vague or ambiguous language.

12 2. Defendants object to each interrogatory to the extent that it is overly broad,
13 unduly burdensome, or oppressive.

14 3. Defendants object to each interrogatory to the extent that it seeks confidential,
15 proprietary, private, or privileged information and will respond to any such interrogatory,
16 if otherwise discoverable, after the parties have agreed to a protective order.

17 4. Defendants object to each interrogatory to the extent that it seeks information
18 that is irrelevant to Plaintiff's claims or Defendants' defenses and is not reasonably
19 calculated to lead to the discovery of admissible evidence.

20 5. Defendants object to each interrogatory to the extent that it requires any action
21 or response beyond that required by the Federal Rules of Civil Procedure, the Scheduling
22 Order, or the Local Rules.

23 **ANSWERS TO INTERROGATORIES**

24 **INTERROGATORY NO. 1:** Identify and describe all reasons why the State of
25 Arizona's self-funded health plan controlled by the Arizona Department of Administration
26 (the "Plan") excludes coverage for "[g]ender reassignment surgery" (the "Challenged

1 Exclusion”) including, but not limited to, (a) each and every State or governmental interest
2 that you contend is advanced by the exclusion, (b) a detailed explanation for why you
3 contend that the exclusion furthers that state interest, and (c) all facts in support of your
4 explanation.

5 **ANSWER:** The State of Arizona’s self-funded health plan excludes coverage for
6 gender reassignment surgery because the State concluded, under the law, that it was not
7 legally required to change its health plan to provide such coverage under either Title VII of
8 the Civil Rights Act or under the Equal Protection Clause of the Fourteenth Amendment to
9 the United States Constitution. Specifically, prior to the Supreme Court’s ruling in *Bostock*
10 *v. Clayton County*, Title VII protections on the basis of sex had not been applied to
11 individuals based on their sexual orientation or transgender status. Further, rules
12 promulgated by the Department of Health and Human Services (“HHS”) regarding
13 nondiscrimination provisions under Section 1557 of the Affordable Care Act prohibited
14 blanket exclusions of all treatments of gender dysphoria, but did not require plans subject
15 to the law to cover all treatments for gender dysphoria or gender transition services. The
16 legal advice that the State received regarding this issue is covered by the attorney-client
17 privilege.

18 The State or governmental interests advanced by the exclusion are cost containment
19 and reducing health care costs. The State gathered information from private insurers and
20 public entities who did provide coverage for gender reassignment surgery in an effort to
21 determine how its own health care costs would be impacted. Although the cost estimates
22 varied, they unquestionably showed that removing the exclusion for gender reassignment
23 surgery would increase costs and that such increases could be significant.

24 **FIRST SUPPLEMENTAL ANSWER:** At some point prior to 2005, the State of
25 Arizona moved its healthcare coverage for employees to a self-funded health plan. At that
26 time, the State maintained the same plan documents, including the same exclusions, as was

1 utilized by the prior insurance providers. The plan documents included an exclusion for
2 “transsexual surgery including medical or psychological counseling and hormonal therapy
3 in preparation for, or subsequent to, any such surgery.”

4 **INTERROGATORY NO. 2:** Identify all persons with knowledge of the reasons
5 why the Plan excludes coverage for “[g]ender reassignment surgery,” and state what each
6 such person knows.

7 **ANSWER:** Defendants object to this interrogatory because it seeks information
8 covered by the attorney-client privilege. Subject to and without waiving this objection,
9 Defendants state that Michael T. Liburdi, the former General Counsel for the Office of the
10 Arizona Governor, John M. Fry of the Arizona Attorney General’s Office, Nicole A. Ong,
11 the former General Counsel of the ADOA, Christina Corieri, a licensed attorney and Senior
12 Policy Advisor Office of the Arizona Governor, Marie Isaacson, the former Director of the
13 Benefits Services Division of the ADOA, and Scott Bender, the Plan Administrator for the
14 ADOA have knowledge of why the Plan excludes coverage for gender reassignment surgery
15 as described in the response to Interrogatory No. 1 above. ADOA also received attorney-
16 client privileged legal advice from Ryan C. Curtis at Fennemore Craig, P.C., as well as now
17 former Fennemore Craig attorney Erwin Kratz.

18 **INTERROGATORY NO. 3:** Identify all persons with knowledge of the genesis,
19 formulation, adoption, maintenance, or continuation of (a) the Challenged Exclusion and
20 (b) any earlier versions of the exclusion before the current language was adopted, and state
21 what each such person knows.

22 **ANSWER:** Defendants object to this interrogatory because it seeks information
23 covered by the attorney-client privilege. Subject to and without waiving this objection,
24 Defendants state that Michael T. Liburdi, the former General Counsel for the Office of the
25 Arizona Governor, John M. Fry of the Arizona Attorney General’s Office, Nicole A. Ong,
26 the former General Counsel of the ADOA, Christina Corieri, Senior Policy Advisor Office

1 of the Arizona Governor, Marie Isaacson, the former Director of the Benefits Services
2 Division of the ADOA, and Scott Bender, the Plan Administrator for the ADOA have
3 knowledge regarding the Challenged Exclusion. ADOA also received attorney-client
4 privileged legal advice from Ryan C. Curtis at Fennemore Craig, P.C., as well as now
5 former Fennemore Craig attorney Erwin Kratz.

6 **INTERROGATORY NO. 4:** Identify all persons who participated in formulating,
7 adopting, maintaining, reviewing, approving, or deciding to continue the exclusion of
8 coverage for “[g]ender reassignment surgery” from the Plan, including any experts
9 consulted, and state what each such person knows.

10 **ANSWER:** Defendants object to this interrogatory because it seeks information
11 covered by the attorney-client privilege. Subject to and without waiving this objection,
12 Defendants state that Michael T. Liburdi, the former General Counsel for the Office of the
13 Arizona Governor, John M. Fry of the Arizona Attorney General’s Office, Nicole A. Ong,
14 the former General Counsel of the ADOA, Christina Corieri, Senior Policy Advisor Office
15 of the Arizona Governor, Marie Isaacson, the former Director of the Benefits Services
16 Division of the ADOA, and Paul Shannon, the Director of the Benefits Services Division
17 of the ADOA participated in these decisions.

18 **INTERROGATORY NO. 5:** Identify all persons who assisted in preparing the
19 answers to these Interrogatories or provided information contained in the answers, and state
20 his or her title, duties, role in preparing the answers, and the interrogatory answer(s) to
21 which he or she provided information or assistance. This identification should also indicate
22 whether the information provided is within his or her knowledge or was obtained from some
23 other person or source; if the information was obtained from another person or source, that
24 person or source should also be identified.

25 **ANSWER:** Defendants object to this interrogatory because it violates the work-
26 product doctrine as set forth in *Hickman v. Taylor*, 329 U.S. 495 (1947). Several courts

1 have held that the work product doctrine covers various aspects of an attorney's
2 investigation, including the witnesses who were interviewed, how long they were
3 interviewed, and when they were interviewed. *See, e.g., Commonwealth of Massachusetts*
4 *v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 153 (D. Mass. 1986) (holding it was
5 improper to seek disclosure of "the names of persons interviewed by an adverse party's
6 attorney together with the dates and places of such interviews."); *Board of Ed. of Evanston*
7 *TP v. Admiral Heating*, 104 F.R.D. 23, 32 (N.D. Ill. 1984) (to tell plaintiffs whom
8 defendants have interviewed, where and when such interviews took place, and whether or
9 not a record was made is to give plaintiffs no more knowledge of substantive relevant facts,
10 but rather to afford them the potential for significant insights into the defendant lawyers'
11 preparation of their case and their mental processes); *Besley-Welles Corp. v. Balax, Inc.*, 43
12 F.R.D. 368, 371 (E.D. Wis. 1968) (interrogatory seeking statement as to adverse party's
13 efforts to locate witnesses goes to attorney's preparation for trial and comes under the
14 *Hickman* rule that gives an attorney's work product qualified immunity from discovery);
15 *Uinta Oil Refining Co. v. Continental Oil Co.*, 226 F. Supp. 495, 506 (D. Utah 1964)
16 (sustaining objection to interrogatory seeking names of all persons from whom plaintiffs
17 had taken or requested statements, explaining that "[t]he detailed pattern of investigation
18 and exploration in and of itself is not a proper subject for discovery.").

19 **INTERROGATORY NO. 6:** Identify all public or non-public meetings of
20 Defendants in which the Challenged Exclusion and/or the Plan's coverage for medical or
21 surgical treatments or services to treat gender dysphoria (or "transition-related care") was
22 discussed, listing the date of each meeting, the nature of each meeting, and the attendees of
23 the meeting; and identifying any documents or other materials relating to those meetings in
24 Defendants' custody or control.

25 **ANSWER:** Defendants object to this interrogatory because it seeks information
26 covered by the attorney-client privilege. Subject to and without waiving this objection,

1 Defendants state that the individuals identified in response to Interrogatory No. 2 who were
2 employees of ADOA or the Governor’s Office above held meetings and discussions
3 regarding the Plan’s surgical treatments or services to treat gender dysphoria between June
4 and November 2016, some of which included the participation of outside counsel from
5 Fennemore Craig, P.C. Defendants possess documents regarding these meetings that will
6 be identified in their privilege log.

7 **FIRST SUPPLEMENTAL ANSWER:** No meetings were held regarding the prior
8 iteration of the exclusion for gender reassignment surgery. The exclusion was adopted
9 when the State of Arizona transferred its healthcare coverage to a self-funded health plan.
10 However, at that time, the State merely continued the coverages and exclusions utilized by
11 its prior insurance providers. No known meetings were held to discuss the transgender care
12 exclusion until the issuance of Patient Protection and Affordable Care Act (“ACA”) Rule
13 1557.

14 **INTERROGATORY NO. 7:** Identify all research, studies, data, reports,
15 publications, testimony, or other documents considered, reviewed, or relied on by
16 Defendants relating to the Challenged Exclusion, including identifying the date or
17 approximate date of consideration, review, or reliance by the Arizona Board of Regents
18 (“ABOR”) and the Arizona Department of Administration (the “ADOA”); and the ADOA
19 and ABOR employee(s) who considered, reviewed, or relied on such documents and their
20 role(s). A complete answer to this interrogatory should include documents relating to the
21 medical necessity, safety, and efficacy (including whether a procedure is deemed
22 experimental) of excluded treatments and services; the public health effects of enforcing,
23 amending, or eliminating the Challenged Exclusion; and the cost/fiscal impact to ADOA or
24 ABOR of enforcing, amending, or eliminating the Challenged Exclusion.

25 **ANSWER:** Defendants considered a Memorandum from Marie Isaacson to Mike
26 Liburdi, General Counsel at the Governor’s Office dated August 3, 2016 regarding

1 Affordable Care Act § 1557, and a Memorandum regarding Non-discrimination—
2 Transgender Coverage and a Memorandum from outside legal counsel at Fennemore Craig
3 to Marie Isaacson dated July 20, 2016 regarding Summary and Implications of § 1557 and
4 Transgender Coverage Requirements. Both of these documents are covered by the attorney-
5 client privilege. Defendants also gathered information and data from insurers and other
6 entities regarding their experience providing transgender benefits, including reassignment
7 surgery. Plaintiffs may ascertain the non-privileged information requested in this
8 Interrogatory from the documents that Defendants have produced in this action.

9 **FIRST SUPPLEMENTAL ANSWER:** When the State of Arizona transferred its
10 healthcare coverage to a self-funded health plan, it adopted the coverages and exclusions
11 utilized by its prior insurance providers, which included the prior iteration of the exclusion
12 for gender reassignment surgery. No known additional documents were reviewed in
13 relation to the transgender care exclusion until the issuance of ACA Rule 1557.

14 **INTERROGATORY NO. 8:** Identify and describe any formal or informal
15 consideration by Defendants of amending or eliminating the Challenged Exclusion,
16 including identifying the date or approximate date of consideration, the ADOA and ABOR
17 employees or offices involved in such consideration and their role(s), the nature of the
18 considered changes, and what (if any) actions were taken by ADOA and ABOR.

19 **ANSWER:** Defendants object to this interrogatory because it seeks information
20 covered by the attorney-client privilege. Subject to and without waiving this objection,
21 Defendants state that they have informally considered amending or eliminating the
22 Challenged Exclusion after Plaintiff filed this action and since the Supreme Court’s decision
23 in *Bostock v. Clayton County*. Paul Shannon, Scott Bender, and Defendants’ counsel have

24 ...
25 ...
26 ...

1 been involved in such considerations.

2 DATED this 21st day of January, 2021.

3 FENNEMORE CRAIG, P.C.

4

5

By: s/ Ryan Curtis

6

Timothy J. Berg

7

Amy Abdo

8

Ryan Curtis

9

Shannon Cohan

Attorneys for Defendants State of

Arizona, Andy Tobin, and Paul

Shannon

10 COPY of the foregoing e-mailed this
11 21st day of January, 2021 to:

12 Victoria Lopez
13 Christine K. Wee
14 ACLU FOUNDATION OF ARIZONA
15 3707 North 7th Street, Suite 235
16 Phoenix, Arizona 85014
17 *Attorneys for Plaintiff*

18 Joshua A. Block
19 Leslie Cooper
20 AMERICAN CIVIL LIBERTIES
21 UNION FOUNDATION
22 125 Broad Street, Floor 18
23 New York, New York 10004
24 *Attorneys for Plaintiff*

25 Wesley R. Powell
26 Matthew S. Friemuth
Jordan Wall
Victoria Sheets
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
Attorneys for Plaintiff

1 Paul F. Eckstein
Austin C. Yost
2 Perkins Coie LLP
2901 North Central Ave., Suite 2000
3 Phoenix, Arizona 85012-2788
Attorneys for Defendants Arizona
4 *Board of Regents d/b/a University of*
Arizona; Ron Shoopman; Larry
5 *Penley; Ram Krishna; Bill Ridenour;*
Lyndel Manson; Karrin Taylor
6 *Robson; Jay Heiler; and Fred Duval*

7 s/ Ryan Curtis

8 17734350

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26

EXHIBIT 6

In The Matter Of:

Toomey vs.

State of AZ

Marie Frances Isaacson

March 26, 2021

Glennie Reporting Services, LLC

1555 East Oranewood Avenue

Phoenix, Arizona 85020

602.266.6535 Office 877.266.6535 Toll Free

www.glennie-reporting.com office@glennie-reporting.com

Original File 032621MI.txt

Min-U-Script® with Word Index

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

RUSSELL B. TOOMEY,)
)
 Plaintiff,)
)
 vs.) 4:19-cv-00035
)
 STATE OF ARIZONA; ARIZONA BOARD)
 OF REGENTS, D/B/A UNIVERSITY OF)
 ARIZONA, a governmental body of)
 the State of Arizona; et al.,)
)
 Defendants.)

VIDEOTAPED DEPOSITION OF MARIE FRANCES ISAACSON
Via Zoom videoconference
March 26, 2021
8:21 a.m.

Glennie Reporting Services, LLC
1555 East Orangewood Avenue
Phoenix, Arizona 85020
602.266.6535
www.glennie-reporting.com

Prepared by:
Jill Marnell, RPR
Arizona Certified
Reporter No. 50021

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Page 7

1 APPEARANCES CONTINUED:

2 For Defendants State of Arizona, Andy Tobin, and Paul

3 Shannon:

4 FENNEMORE CRAIG

5 By: Ryan Curtis

6 2394 East Camelback Road

7 Suite 600

8 Phoenix, Arizona 85016

9 602.916.5000

10 rcurtis@fclaw.com

11 (via videoconference)

12 For Defendants Arizona Board of Regents, d/b/a University

13 of Arizona; Ron Shoopman; Larry Penley; Ram Krishna; Bill

14 Ridenour; Lyndel Manson; Karrin Taylor Robson; Jay Heiler;

15 and Fred Duval:

16 PERKINS COIE

17 By: Paul F. Eckstein

18 By: Austin D. Yost

19 2901 North Central Avenue

20 Suite 2000

21 Phoenix, Arizona 85012

22 602.351.8000

23 peckstein@perkinscoie.com

24 ayost@perkinscoie.com

25 (via videoconference)

18 Also present were:

19 Michael Noonan, videographer

20 Kim Suciu

21 Stephanie Rosenberg, via videoconference

Page 6

1 VIDEOTAPED DEPOSITION OF MARIE FRANCES ISAACSON

2

3 The deposition of MARIE FRANCES ISAACSON was

4 taken on March 26, 2021, commencing at 8:21 a.m., via Zoom

5 videoconference, before JILL MARNELL, a Certified

6 Reporter, Certificate No. 50021, for the State of Arizona.

7

8 APPEARANCES:

9 For Plaintiff:

10 WILLKIE FARR & GALLAGHER

11 By: Jordan C. Wall

12 By: Victoria A. Sheets

13 By: Justin Garbacz

14 By: Brandon Villa

15 787 Seventh Avenue

16 New York, New York 10019

17 212.728.8000

18 jwall@willkie.com

19 vsheets@willkie.com

20 jgarbacz@willkie.com

21 bvilla@willkie.com

22 (via videoconference)

23 AMERICAN CIVIL LIBERTIES UNION FOUNDATION

24 By: Joshua A. Block

25 125 Broad Street

Floor 18

New York, New York 10004

212.549.2650

jblock@aclu.org

(via videoconference)

21 ACLU FOUNDATION OF ARIZONA

22 By: Christine K. Wee

23 3707 North 7th Street, Suite 235

24 Phoenix, Arizona 85014

25 602.650.1854

cwee@acluaz.org

(via videoconference)

Page 8

1 THE VIDEOGRAPHER: We are on the record.

2 Today's date is March 26, 2021. The time on the video

3 monitor is 8:21 a.m. Here begins Video Number 1 in the

4 deposition of Marie Isaacson in the matter of Russell B.

5 Toomey versus State of Arizona, et al., in the United

6 States District Court District of Arizona, Case Number

7 4:19-CV-00035.

8 The court reporter is Jill Marnell,

9 representing Glennie Reporting Services, 1555 East

10 Orangewood Avenue, Phoenix, Arizona 85020. My name is

11 Michael Noonan. I'm the certified legal video specialist

12 in association with Forensic Video Deposition Services,

13 11111 North Scottsdale Road, Suite 205, Scottsdale,

14 Arizona 85254.

15 This deposition is taking place at the law

16 offices of Fennemore Craig, PC, 2394 East Camelback Road,

17 Suite 600, Phoenix, Arizona, 85016.

18 Counsel will now state their appearance and

19 everyone else appearing remotely for their appearance and

20 affiliations and anyone else attending remotely, beginning

21 with the plaintiff, please.

22 MR. WALL: Good morning. This is Jordan

23 Wall of Willkie Farr & Gallagher. I am joined in the room

24 by my colleagues Victoria Sheets and Justin Garbacz. I'm

25 also joined by my colleague telephonically Brandon Villa.

Page 17

1 some of the emails with Fennemore Craig I know it was
 2 around 2016 or 2015 -- I can't remember the -- all the
 3 emails -- that there was a question regarding our plan and
 4 what we covered with -- what we did and didn't cover with
 5 respect to gender dysphoria.
 6 Q. When you first became aware of the issue -- And I
 7 think it was in 2015. We'll go through the exhibits you
 8 looked at and maybe some others -- what was ADOA's -- what
 9 did ADOA's plan cover by way of coverage for gender
 10 dysphoria?
 11 A. I know we looked at the plan document, but I
 12 think it didn't cover -- It didn't cover anything, I don't
 13 think.
 14 Q. And I think that's right.
 15 And at some point the plan was changed to
 16 cover some services for people with gender dysphoria;
 17 correct?
 18 A. Correct.
 19 Q. And was that done before you got involved in the
 20 issue or after?
 21 A. I'm sorry. I'm not sure I understand what you
 22 are saying.
 23 Q. There -- there's a health plan offered by the
 24 Arizona Department of Administration; correct?
 25 A. Yes.

Page 18

1 Q. Let's call that the plan. Did the plan provide
 2 for any services for gender dysphoria before 2015?
 3 A. Not to my knowledge.
 4 Q. Okay. And so you were in charge of the benefits
 5 under the plan when some services for gender dysphoria
 6 were added to the plan.
 7 A. Yes.
 8 Q. Who else was -- Were you involved in that
 9 decision?
 10 A. Yes.
 11 Q. Did you make it, in effect?
 12 A. No.
 13 Q. Who made it?
 14 A. It was in consultation with our attorneys and the
 15 governor's office and the director's office.
 16 Q. Did you recommend that those services be covered?
 17 A. No.
 18 Q. Do you know --
 19 A. I didn't --
 20 Q. Go ahead. I'm sorry.
 21 A. We sought legal counsel regarding what was
 22 required.
 23 Q. So you were looking at it in terms of what was
 24 required, not in any other sense; correct?
 25 A. Correct.

Page 19

1 Q. And am I correct in assuming that if it wasn't
 2 required the Arizona Department of Administration and
 3 others making the decision weren't going to implement
 4 those other services?
 5 A. I don't know that to be true. I don't know.
 6 Q. Did you determine that it was required to add the
 7 services that were added in 2015?
 8 A. We sought legal counsel and that -- with the
 9 legal counsel's recommendation and meeting with the
 10 governor's office there was a decision made -- a
 11 conclusion made to cover some services.
 12 Q. What services were covered and what services were
 13 not covered?
 14 A. The counseling and hormone therapy were covered.
 15 And surgery was not covered.
 16 Q. Was there an explanation given as to why surgery
 17 was not covered?
 18 A. The -- the discussion -- the discussion was that
 19 the requirement was that some services are going -- are
 20 required to be covered, and the services that we are going
 21 to cover are hormone therapy and counseling.
 22 Q. Was it determined by anyone that surgery was not
 23 required to be covered?
 24 A. Yes.
 25 Q. And who determined that? Your counsel?

Page 20

1 A. I was --
 2 MR. CURTIS: Objection.
 3 THE COURT REPORTER: I'm sorry, who was
 4 that?
 5 MR. CURTIS: That's Ryan Curtis objecting to
 6 the form of the question --
 7 THE COURT REPORTER: Thank you.
 8 MR. CURTIS: -- and advising Ms. Isaacson
 9 not to speak to direct legal counsel received.
 10 Q. BY MR. ECKSTEIN: Did anyone other than counsel
 11 determine that surgery for gender dysphoria was not
 12 required by the law?
 13 A. I would say it was a combination of legal counsel
 14 and the governor's office and the director's office and
 15 the Attorney General's Office.
 16 Q. Did you make that determination yourself?
 17 A. No.
 18 Q. It appears from the documents that I have seen
 19 that your involvement in this issue occurred as early as
 20 September 2015. And let's just take a look at Tab 32. Do
 21 you have the witness book in front of you?
 22 MR. CURTIS: We will need a minute because
 23 we have not opened those until directed --
 24 MR. ECKSTEIN: Okay.
 25 MR. CURTIS: -- so I'm going to open those

Page 21

1 and pass them to her.
 2 MR. YOST: (Sotto voce.)
 3 MR. ECKSTEIN: I'm sorry?
 4 MR. YOST: (Sotto voce.)
 5 MR. ECKSTEIN: Oh, yeah, let's put it up on
 6 the screen.
 7 MR. WALL: Will you be showing these on the
 8 screen, Paul?
 9 MR. ECKSTEIN: Yes, we will. Tab 32.
 10 THE COURT REPORTER: Are we going to mark
 11 this?
 12 MR. ECKSTEIN: I'm going to mark it.
 13 Tab 32. I understand what's happening in this case is we
 14 start with Exhibit 1 in each deposition. That's what the
 15 plaintiff has done; is that correct, Jordan?
 16 MR. WALL: That's correct. And just to
 17 clarify, we will -- we have premarked our exhibits and
 18 submitted them -- transmitted them physically to all the
 19 parties and we'll be using the numbering based on that
 20 premarking.
 21 MR. ECKSTEIN: So --
 22 MR. WALL: So if you want to do a separate
 23 system that's fine, but --
 24 MR. ECKSTEIN: What number do you start
 25 with? 1?

Page 22

1 MR. WALL: That's correct.
 2 MR. ECKSTEIN: And what number do you end
 3 with?
 4 MR. WALL: At the moment we end with 65.
 5 Although we transmitted two exhibits this morning that we
 6 expect to use, to go through 67.
 7 MR. ECKSTEIN: So if I start with
 8 Exhibit 100 do you think that's safe?
 9 MR. WALL: That should be fine.
 10 MR. ECKSTEIN: Okay. So let's mark Tab 32
 11 as Exhibit 100 in the deposition of Marie Isaacson.
 12 Q. BY MR. ECKSTEIN: You see it on the screen,
 13 Marie?
 14 A. I do.
 15 Q. And the bottom email is by you to a Chris
 16 Giammona -- Oh, I'm sorry, that's not the bottom one. If
 17 you turn the page -- if we could turn the page and look at
 18 the very last email in the email string you will see an
 19 email from you to Chanelle Bergren dated September 25,
 20 2015.
 21 A. Yes, I see that.
 22 Q. And in it you write, quote, the claim will be
 23 that the plan is discriminatory, period. What would be
 24 our response? Is this standard to exclude?
 25 You wrote that?

Page 23

1 A. Yes.
 2 Q. And who is Chanelle Bergren?
 3 A. She was the plan administration manager.
 4 Q. Did she answer you?
 5 A. Yes.
 6 Q. And what did she say?
 7 A. Do you want me to read the response?
 8 Q. Yeah. Or if she said anything in addition to
 9 that, let me know.
 10 A. [As read]: Mercer confirmed there are no current
 11 laws which require a plan to cover a -- to cover
 12 transgender benefits. As a result, the plan is not
 13 discriminating when excluding benefit coverage. The
 14 majority of their clients do not offer transgender
 15 coverage. The State of California, State of Oregon, State
 16 of Colorado, State of Washington, and the University of
 17 California do offer transgender benefits. I have provided
 18 links to applicable information below.
 19 Q. Why did you ask that question of Chanelle?
 20 A. Based on the subject line, it looks like I got a
 21 question from the University of Arizona.
 22 Q. Had you been talking to the University of Arizona
 23 about covering surgery for gender dysphoria?
 24 A. Yes.
 25 Q. Do you recall with whom you were talking?

Page 24

1 A. Helena -- I can't remember her last name. Maybe
 2 Rodrigues.
 3 Q. Just one person?
 4 A. There was somebody that worked with her, Staci.
 5 I can't remember Staci's last name. And there was a --
 6 there was an additional person that I -- that I remember
 7 from reviewing the email strings with Ryan Curtis.
 8 Q. You knew from your discussions with the folks at
 9 the University of Arizona that the university was
 10 interested in having ADOA's plan provide better healthcare
 11 coverage for transgender people; correct?
 12 A. Yes.
 13 Q. And they were pushing for basic benefits before
 14 they were implemented; correct?
 15 A. Yes.
 16 Q. And they also were pushing for benefits to cover
 17 transgender gender dysphoria surgery; correct?
 18 A. I think so.
 19 Q. Well, didn't you have a number of meetings with
 20 people at the University of Arizona where they pointed out
 21 that professors and other staff at the University of
 22 Arizona were interested in having that coverage?
 23 A. I wouldn't say -- Well, phone conversations.
 24 There were a number of phone conversations.
 25 Q. Oh, okay. And let's include phone conversations

Page 25

1 with face-to-face conversations. There were a number of
 2 those; correct?
 3 A. Yes.
 4 Q. And they made clear that they wanted coverage for
 5 surgery for gender dysphoria; correct?
 6 A. Yes.
 7 Q. And ultimately, at least while you were at ADOA,
 8 that was not provided; correct?
 9 A. Yes.
 10 Q. Did the University of Arizona folks you talked
 11 with tell you why they wanted to have the coverage for
 12 surgery for gender dysphoria for their professors and
 13 staff?
 14 A. Helena said that there was a meeting with the
 15 U of A president and that there was concern because
 16 there -- transgender studies was offered at the University
 17 of Arizona and there were concerns that our health plan
 18 didn't cover transgender reassignment surgery, didn't
 19 cover it -- didn't cover that at all, and that -- In
 20 particular I remember that there were professors with
 21 children and they were paying for treatment out of pocket
 22 and it was very expensive.
 23 Q. So they made it clear that it was an important
 24 issue.
 25 A. Yes.

Page 26

1 Q. And what did you say in response to those
 2 conversations?
 3 A. Currently not covered by our plan.
 4 Q. Did you tell them ADOA was exploring the
 5 possibility of covering surgery for gender dysphoria?
 6 A. I said we were researching it.
 7 Q. And did you research it?
 8 A. Yes.
 9 Q. And I think the research took place around this
 10 time, starting in September of 2015 and went through -- at
 11 least through November of 2015. We can look at the
 12 documents, and will, as time allows.
 13 What did the research tell you about
 14 coverage for gender dysphoria surgery?
 15 A. I think the majority of our plans said that it
 16 was not covered and, you know, confirmation that some
 17 states did cover it.
 18 Q. So were you looking to see whether other states
 19 covered it to determine whether the ADOA should cover it?
 20 A. I was researching what -- what existed as far as
 21 in the benefits world, reached out to Mercer, reached out
 22 to all of our health plans, trying to gather as much
 23 information as possible about it to help inform a
 24 decision.
 25 Q. Well, one of the things that the ADOA health plan

Page 27

1 covered was gender dysphoria surgery for students at this
 2 time; isn't that correct?
 3 A. Not to my knowledge.
 4 Q. You have no knowledge of whether surgery for
 5 gender dysphoria was covered by any ADOA plan for students
 6 at any of the universities?
 7 A. Not to my knowledge.
 8 Q. Okay. Would that surprise you if that was the
 9 case?
 10 A. Yes.
 11 Q. Why?
 12 A. Because you're talking about the ADOA benefit
 13 plan. You called it the plan.
 14 Q. Yes. What was --
 15 A. And there was --
 16 Q. Go ahead --
 17 A. There was --
 18 Q. -- I'm sorry.
 19 A. There was a disallowance in the plan description
 20 that said it was not covered, it was not a covered
 21 service.
 22 Q. That's for staff and -- and for -- and for
 23 professors. We're talking about students now. And were
 24 the students on the same plan?
 25 A. The DOA benefit -- Oh, students. I'm sorry, I

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1 was thinking of children. No, the students were not
 2 covered by the DOA health plan.
 3 Q. Okay.
 4 A. I was thinking of employees and their children.
 5 Q. Okay. Let's go back. Students are children,
 6 too. And maybe some of them are children of faculty. But
 7 if a student --
 8 There is a plan that provides health
 9 insurance benefits for students; correct?
 10 A. Not through -- not through DOA.
 11 Q. Okay. Do you know who offers that?
 12 A. I am not aware of it.
 13 Q. Okay. So again, would it surprise you that
 14 students actually had cover -- coverage for gender
 15 dysphoria surgery?
 16 A. You're not speaking under the DOA plan, you're
 17 just saying in general?
 18 Q. In general, yeah.
 19 A. I really didn't give it any thought.
 20 Q. At the time you left ADOA the plan offered
 21 insurance from four providers; correct? Four insurance
 22 companies?
 23 A. Yes.
 24 Q. And do you remember the names of those companies?
 25 A. Yes.

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1 Q. Could you tell us what they are?
 2 A. Aetna, Cigna, Blue Cross Blue Shield of Arizona,
 3 and UnitedHealthcare.
 4 Q. Did any of those companies offer surgery --
 5 surgery for gender dysphoria, on any of their commercial
 6 plans or any plans at all?
 7 A. You know, I know we received the emails, but I
 8 don't remember what the response was.
 9 Q. You don't remember whether you could have asked
 10 Aetna, for example, whether they covered gender dysphoria
 11 surgery and what answer they gave you?
 12 A. I remember asking the question of all four plans.
 13 I don't remember which -- what plan responded with what
 14 answer.
 15 Q. Okay. But you do remember that some of the plans
 16 told you, yes, and we do cover gender dysphoria surgery?
 17 A. My biggest recollection is that it was not
 18 covered, the majority of the response was it was not
 19 covered.
 20 Q. Majority. So that -- Was there a minority that
 21 did cover it?
 22 A. I think so. I --
 23 Q. Okay. Well, we can -- we can look at exhibits to
 24 ferret that out.
 25 Do you recall any states offering surgery

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1 for gender -- gender dysphoria under their State plans?
 2 A. Well, just based on the email from Chanelle that
 3 we just looked at, those states do offer transgender
 4 benefits. But I guess based on this I don't know whether
 5 it's surgery or what the benefits are.
 6 Q. Okay. Was one of the issues in determining
 7 whether the plan offered by the Arizona Department of
 8 Administration for employees of the State of Arizona,
 9 which included the faculty and staff at -- at the
 10 universities, based on the cost of that benefit?
 11 A. I would say that in researching it that was one
 12 of the items that we did research, was the cost of the
 13 benefit.
 14 Q. And you determined that the cost was de minimis,
 15 didn't you?
 16 A. As I recall there was a range of costs.
 17 Q. And based on additions to premiums for those who
 18 participated in the plan, what was the range? Cents per
 19 premium.
 20 A. I -- I know we just reviewed that last Sunday,
 21 but I can't -- I don't remember what the range was.
 22 Q. Well, it was as low as three cents. Do you
 23 recall that?
 24 A. I don't recall.
 25 Q. Okay. But you recall that all the additions were

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1 under a dollar per plan.
 2 A. I --
 3 MR. CURTIS: Objection.
 4 MR. ECKSTEIN: Per employee. Per employee
 5 per plan.
 6 THE WITNESS: I -- I -- I don't remember,
 7 Paul.
 8 Q. BY MR. ECKSTEIN: Okay. Well, we'll -- we'll
 9 take a look.
 10 Thinking back, did you believe that the --
 11 the cost that was estimated was -- was too high to justify
 12 providing that benefit?
 13 A. I don't remember that being -- We discussed cost,
 14 but I don't remember that being the driving factor in the
 15 discussion.
 16 Q. What was the deciding factor?
 17 A. What was required by law. What was required by
 18 law for us to cover.
 19 Q. So as you recall it, if the -- Strike that.
 20 As you recall it, the persons making the
 21 decisions were focused on what was legally required. And
 22 if it wasn't legally required, surgery for gender
 23 dysphoria was not going to be offered in the plan.
 24 A. What I recall is that there was a decision that
 25 had to be made, and reaching out to the health plans,

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1 doing research ourselves to -- to gather as much
 2 information as possible to make a decision.
 3 Q. Do you consider yourself part of the group that
 4 made that decision?
 5 A. I would say no.
 6 Q. Who was in the group that made the decision?
 7 A. Legal counsel and the governor's office and the
 8 director's office.
 9 Q. Did you consult with anyone in the legislature,
 10 particularly the Joint Legislative Budget Committee, JLBC,
 11 as to the wisdom of covering surgery for gender dysphoria?
 12 A. No.
 13 Q. Did anyone from the legislature weigh in and tell
 14 you their thoughts?
 15 A. No.
 16 Q. Did you ever hear that anyone from the
 17 legislature had weighed in and given thoughts on that?
 18 A. No.
 19 Q. Was this considered a political issue of any
 20 kind?
 21 A. Not that anyone raised to me, no.
 22 Q. Did you hear secondhand that there was concern
 23 about the politics of including surgery for gender
 24 dysphoria?
 25 A. No.

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1 Q. No one ever told you that it was not politically
2 acceptable to provide that coverage if it wasn't required
3 by law?
4 A. No.
5 Q. None of your discussions with anyone within ADOA
6 or the governor's office indicated that the political heat
7 was not worth it to cover surgery for gender dysphoria?
8 A. Not that I recall.
9 Q. Did you hear it secondhand?
10 A. Not that I recall.
11 Q. Do you believe -- Strike that.
12 Did you believe at the time that there were
13 political costs for expanding the plan to cover surgery
14 for gender dysphoria?
15 A. I don't remember having an opinion about it.
16 Q. Did anyone in ADOA or elsewhere express an
17 opinion to you about that?
18 A. Not that I recollect.
19 Q. You understood, didn't you, that none of the
20 universities -- strike that -- that the University of
21 Arizona -- neither the University of Arizona nor Arizona
22 State University could provide health benefits that
23 covered surgery for transgender people?
24 A. Yes.
25 Q. And why was that?

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1 A. It was an exclusion in the plan.
2 Q. It was also in the statute. Do you recall a
3 statutory provision that said that you had to use the --
4 the State-offered plan?
5 A. I -- I know that the universities had wanted to
6 not use our plan, to have their own plan. And I -- I do
7 recall that there is a statute that said -- now that
8 you're saying it it does refresh my mind that there is a
9 statute that says the universities have to use the DOA
10 plan.
11 Q. But there was one university, Northern Arizona,
12 that came within an exclusion because they had coverage
13 beforehand. They had their own -- their own plan and they
14 were able to provide that coverage. And by "that
15 coverage" I mean coverage for surgery, transgender
16 dysphoria surgery.
17 A. I was aware that U -- that the -- NAU had a
18 grandfathered plan, a Blue Cross Blue Shield plan. I was
19 not aware they covered that.
20 Q. That never came up in your research?
21 A. Not that I recall.
22 Q. Would you describe the reaction of -- How would
23 you describe the reaction of the University of Arizona
24 when you told them that surgery for gender dysphoria was
25 not going to be covered?

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1 A. I don't remember -- I'm assuming I contacted
2 Helena, but I don't remember -- I don't remember her
3 reaction.
4 Q. You don't remember that they were extremely
5 unhappy?
6 A. I'm not surprised if you tell me that, but I
7 don't remember the reaction.
8 Q. Well, you did know that it was a big issue on the
9 University of Arizona campus.
10 A. Yes.
11 Q. They made that clear to you.
12 A. Yes.
13 Q. On more than one occasion.
14 A. Yes.
15 Q. Do you know how many employees of the State of
16 Arizona were covered by the plan when you left in April of
17 2018?
18 A. I don't remember.
19 Q. Approximately?
20 A. I know we had 133,000 lives. That's -- that's
21 what I recall.
22 Q. And do you recall roughly the percentage that
23 were represented by employees at the University of Arizona
24 and Arizona State University?
25 A. No. But I would say it's about 70,000. I'm

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1 just -- I remember for each employee it was about two --
2 two people. So it was about 70,000. And then the
3 universities would have been the other 133 -- Or the
4 difference between 133 and the 70,000 is -- is an
5 approximation.
6 Q. So if I -- my math is correct, more than half of
7 the people covered by the plan were employees of the
8 University of Arizona and Arizona State University;
9 correct?
10 A. I'd say a little bit less than half because it
11 was 70,000 that were State and then 63,000 were ASU,
12 U of A, and NAU.
13 Q. Okay. I got it -- I got it, just reversed.
14 On how many occasions did you have
15 discussions with representatives of the governor's office
16 about coverage for surgery for gender dysphoria?
17 A. I don't know. I don't have an exact number. A
18 few times. Several times.
19 Q. Well, let's start with Tab 36, if you can find
20 that. Should be the last exhibit in the book. And we
21 will mark that as Exhibit 101. We'll call these A --
22 ABOR 100 and ABOR 101.
23 On the screen I'll identify it as a string
24 of emails starting with an email from Erica Emmons dated
25 July 21, 2016. And then the middle item in the string is

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1 an email from Scott Bender to Erica Emmons. And it says
 2 that -- and I'm summarizing -- that you had a meeting with
 3 the governor's office on transgender issues tomorrow,
 4 meaning September 2, 2016, and Scott was asking for
 5 additional information, I guess from Cigna, that would
 6 help you with the meeting.
 7 Is that a fair summary of that?
 8 A. Yes.
 9 Q. You're not listed as getting a copy on that. Do
 10 you recall getting a copy?
 11 A. No.
 12 Q. Is this one of the exhibits you looked at? When
 13 was it, last Sunday you were looking at exhibits, or more
 14 recently?
 15 A. I know that we looked at exhibits with Erica's
 16 name on it. I don't know if this was one of them or not.
 17 Q. Okay. Did you tell Scott that you had this
 18 meeting coming up?
 19 A. Based on the email I'm assuming I did.
 20 Q. Do you recall the meeting?
 21 A. I know that I met with the governor's office. I
 22 can't tell you that I recall this specific meeting, no.
 23 Q. Do you recall more than one meeting with the
 24 governor's office?
 25 A. There's one meeting that sticks out in my mind.

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1 Q. And do you recall when that meeting took place?
 2 A. I don't. I'm assuming it was around 2016, around
 3 this time frame, but I don't really recall.
 4 Q. And why does that stand out?
 5 A. The meeting with the governor's office?
 6 Q. Yes. You said there was one meeting that stood
 7 out and I was asking why that particular meeting, whenever
 8 it took place, perhaps around September of '16, why does
 9 that stick out in your mind?
 10 A. Because that is when the resolution of what we
 11 would cover, in my mind, was made.
 12 Q. Who was in that meeting?
 13 A. I think Christina Corieri, Mike Liburdi, Ryan
 14 Curtis, myself, I think John Fry from the Attorney
 15 General's Office. That's who I recall. Maybe Nicole Ong.
 16 Q. Does Nicole have a last name?
 17 A. Ong, O-N-G.
 18 Q. Okay. And what was her position?
 19 A. She was a general counsel at Arizona Department
 20 of Administration.
 21 Q. Were you the only two employees from ADOA who
 22 were there?
 23 A. I can't remember if the director was there or
 24 not, Craig Brown.
 25 Q. Do you recall what you said at that meeting?

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1 A. No.
 2 Q. Were you asked to give a report on what other
 3 states provided coverage for gender dysphoria surgery?
 4 A. If it's the meeting that I'm recalling, I just
 5 remember talking about advice from legal counsel and --
 6 and, you know, what we need to do moving forward, what
 7 we're going to do moving forward.
 8 Q. And you had met with legal counsel who told you
 9 what was legally required; correct?
 10 A. I don't know if we met or we just communicated
 11 via email or phone. Or both.
 12 Q. And you repeated that to the governor's office
 13 even though counsel were there?
 14 A. No. I think in advance of the meeting -- again,
 15 if it's the same meeting -- I shared the legal advice. It
 16 was written. I shared that with Christina Corieri, maybe
 17 Mike Liburdi, John Fry, Nicole.
 18 Q. And Mike Liburdi was the counsel for the governor
 19 at the time; correct?
 20 A. That's right.
 21 Q. Do you recall how long that meeting lasted?
 22 A. No.
 23 Q. But your recollection is at the end of that
 24 meeting you understood that surgery for gender -- gender
 25 dysphoria was not going to be covered.

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1 A. Correct.
 2 Q. And was it based on the fact that it was not
 3 legally required?
 4 A. I remember that the discussion was services have
 5 to be covered, not specifically surgery, so you could
 6 cover counseling and hormone replacement therapy -- or not
 7 replacement, hormone therapy, and that that is what we
 8 would cover.
 9 Q. Was hormone therapy covered by -- required by the
 10 law?
 11 A. I don't remember.
 12 Q. Do you remember discussion about that?
 13 A. Like I said, I just remember that the law
 14 requires that services are covered. No specific services
 15 are outlined. That's what I recall the discussion being.
 16 Q. I don't understand that answer. Maybe you can
 17 help me a little bit. When you say no specific services
 18 were -- Did you say out -- outlined or outlawed?
 19 A. What I'm saying is that what I recall is the
 20 discussion of what the law requires is that you cover some
 21 services, plural, related to transgender gender dysphoria,
 22 but nothing -- no specific service is outlined. That's
 23 what I recall the discussion --
 24 Q. Okay.
 25 A. -- being.

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1 Q. Did the plan during the time you had involvement
2 with it cover any services, health services, that were not
3 required by law?
4 A. I don't know. I mean, I'm sure there are
5 services that aren't required by law that were part of the
6 plan description. The plan was adopted from when we were
7 fully insured. So, you know, I'm assuming there are
8 things that are covered that aren't required.
9 Q. Do you recall what they might be?
10 A. I think some plans offered healthy back. You
11 know, that's the one that comes to my mind.
12 Q. But that was not required by law?
13 A. Not to my knowledge.
14 Q. So there was no general policy at ADOA to cover
15 health benefits only if they were required by law; isn't
16 that correct?
17 A. I would say that's correct.
18 Q. Other than coverage for healthy backs, can you
19 recall any other services that were not required by law
20 that were offered in the plan?
21 A. Not off the top of my head, no.
22 Q. You say that this one meeting took place and may
23 or may not have been around this time in September. We'll
24 look at other documents to see if we can pin it down. Do
25 you recall how many times you did meet with the governor's

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1 office on this issue?
2 A. I recall one meeting in the governor's office --
3 specifically one meeting in the governor's office and at
4 least a phone call with Christina Corieri. Those -- those
5 are the two things that I remember.
6 Q. Okay. Do you recall whether the telephone call
7 with Christina was before or after the meeting that we've
8 been talking about?
9 A. I would say there was at least one phone call
10 with her before the meeting.
11 Q. And what was the nature of that call?
12 A. I think we're sharing with her that we had
13 engaged Fennemore Craig to do some research.
14 Q. On the legality, whether it was required by law?
15 A. Yes.
16 Q. Okay. And that was it? That was the
17 conversation?
18 A. As much as I recall, yes.
19 Q. Did you ever meet with the governor on this issue
20 of surgery for gender dysphoria?
21 A. No.
22 Q. Did anyone at ADOA meet with the governor on this
23 issue?
24 A. I don't know.
25 Q. Did anyone at the meeting that you've referenced

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1 at which Mike Liburdi and you and others attended say that
2 they had discussed this matter with the governor?
3 A. Not that I recall.
4 Q. Did anyone there say that the governor had a
5 point of view on this issue?
6 A. Not that I recall.
7 Q. What position did Scott Bender have at the -- in
8 September of '16 at or around the time this meeting took
9 place?
10 A. Plan administration manager.
11 Q. And did he report to you?
12 A. Yes.
13 Q. Let's turn to Tab 26. We'll mark that, if it
14 hasn't been marked, as ABOR Exhibit 102. And if you will
15 go to Bates Page Number 119501 of that exhibit, which is
16 the last -- or the first, the first email in this string.
17 You'll see an email from Nicolette Schultz to Jill
18 Metzinger, with a copy of Christina Corieri.
19 See that?
20 A. Yes.
21 Q. It doesn't appear that you got a copy of that
22 email when it was sent in September of 2016. And I'm
23 looking to see whether you were copied on any of the other
24 emails, but I'm not sure that you were.
25 Do you recall seeing this string of emails

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1 when you were shown documents?
2 A. I do.
3 Q. You do. Okay.
4 Did you recall it before you saw it?
5 A. No.
6 Q. All right. Let's -- let's focus on that very
7 first email which is dated September 1. And it says --
8 and I'm translating generously, or maybe not so
9 generously -- that there was a discussion at the last
10 meeting regarding transgender benefits that Christina
11 Corieri would like to attend a meeting between the ADOA
12 benefit services -- meaning and you and Nicole Ong -- and
13 the Board of Regents.
14 Did such a meeting ever take place?
15 A. I -- I don't remember it.
16 Q. Do you recall meeting -- a meeting with anyone in
17 the governor's office and you, a meeting with the Board of
18 Regents or anyone in any of the universities?
19 A. I don't doubt that it could have taken place but
20 I don't remember it.
21 Q. It's not one that sticks out in your mind?
22 A. No.
23 Q. Did they report one to you?
24 A. No.
25 Q. They, meaning Nicolette. What's her title? What

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1 about, you know, the nature of depositions. I happen to
 2 be a formalist, so you'll just have to bear with me. All
 3 right?
 4 A. Okay.
 5 Q. Now, Ms. Isaacson, would you please state your
 6 full name and address for the record.
 7 A. Marie Frances Isaacson, 501 West Gleneagles
 8 Drive, Phoenix, Arizona, 85023.
 9 Q. And Ms. Isaacson, I believe you said earlier that
 10 you were being represented by Mr. Ryan Curtis today at
 11 this deposition. Correct?
 12 A. I don't think that he's my attorney, no.
 13 Q. But is he appearing on your behalf today?
 14 A. I understood that I'm just a witness.
 15 Q. Do you have any other legal counsel present with
 16 you today during this deposition?
 17 A. No.
 18 Q. And I believe you said earlier that you had been
 19 deposed before. Is that right?
 20 A. Long time ago, yes.
 21 Q. What do you mean when you say long time ago?
 22 A. 30 years or more. 40 years maybe. I -- 30- --
 23 30-some years ago.
 24 Q. And do you recall in what case you were deposed?
 25 A. It was regarding a car accident that I was in.

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1 Q. And where was that car accident?
 2 A. Phoenix, Arizona.
 3 Q. And there was a lawsuit that resulted from that
 4 car accident?
 5 A. Yes.
 6 Q. And where was that lawsuit? And by that I mean,
 7 before what court?
 8 A. I'm assuming Maricopa County Superior Court, but
 9 I don't know.
 10 Q. So although you have been through the gamut of a
 11 deposition already this morning I want to just take a step
 12 back and go over some ground rules for my own sake, but
 13 also yours.
 14 You understand that you are testifying under
 15 oath today; correct?
 16 A. Yes.
 17 Q. And is there any reason you can't give truthful
 18 testimony today?
 19 A. No.
 20 Q. Are there any medical conditions that would
 21 impact your ability to give testimony?
 22 A. No.
 23 Q. And you understand that you need to answer
 24 verbally and clearly for the benefit of the court reporter
 25 as well as myself and others in the room?

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1 A. Yes.
 2 Q. You have done a great job of that thus far so I
 3 don't think we have to belabor it.
 4 Did you bring any documents with you --
 5 A. No.
 6 Q. -- to this deposition?
 7 And you understand that you're not going --
 8 you're not to communicate with anyone else in the room
 9 there with you, which I believe is just Mr. Curtis, as
 10 well as the general counsel from the Arizona governor's
 11 office. Is that right?
 12 MR. CURTIS: Objection; form of the
 13 question.
 14 MR. WALL: You can answer, Ms. Isaacson.
 15 THE WITNESS: I'm sorry, could you repeat
 16 the question.
 17 Q. BY MR. WALL: Sure. And you understand that
 18 during -- while I'm examining you that you're not supposed
 19 to be communicating with anyone else in the room with you.
 20 A. Yes.
 21 Q. And that you're not supposed to be looking at
 22 your phone.
 23 A. Okay. Yes.
 24 Q. You don't have your phone out; correct?
 25 A. No.

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1 Q. So, again, before we get into questioning I just
 2 want to say, you know, if you need a break would you just
 3 let me know? The only thing I ask is that you answer my
 4 question fully before we take that break.
 5 A. Okay.
 6 Q. Ms. Isaacson?
 7 A. Yes.
 8 Q. Okay. Thank you.
 9 Oh, and finally, you have seen a little bit
 10 of this but you understand that your -- rather, I should
 11 say your counsel may object to my questions. You should
 12 give an -- That's fine. He may object. I will instruct
 13 you whether you should answer that question or not or your
 14 counsel may direct you not to answer a question.
 15 A. Understood.
 16 Q. So Ms. Isaacson, at the beginning of your
 17 examination -- or your conversation with Paul, I believe
 18 you said that you were called into the governor's office
 19 to discuss this lawsuit. Is that correct?
 20 A. I was -- There was a discussion in the governor's
 21 office regarding not the lawsuit, but benefits, coverage
 22 of transgender benefits.
 23 Q. And when was that conversation that you're
 24 referring to?
 25 A. 2015 or '16.

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1 Q. And a significant hit would be a half-million
2 dollars?
3 A. Yes. Or more.
4 Q. And would that half-million dollars be per month?
5 A. No. Per event.
6 Q. So when you say per event -- so for instance, if
7 the -- if there's -- Let's take it as a hypothetical. If
8 the plan excludes coverage for a particular claim, and
9 then that claim has been deemed in, a high cost would be
10 if -- if each claim resulted in an additional half-million
11 dollars spent?
12 A. What -- what I was saying is, we would look at
13 high-cost claims for each plan, what would -- what
14 happened significant on that plan during the quarter. And
15 so, to me, a high-cost claim would be \$500,000 for a
16 member. And that could be, as an example, somebody who
17 was a diabetic who didn't take care of -- didn't take
18 their medication, didn't manage their diabetes properly,
19 had to have an amputation because of it, had to have a
20 second amputation because of it, had complications from
21 it. And so there is a significant cost to the plan. Or a
22 rare disease -- treatment of a rare disease. That --
23 that's what I was talking about. I was just trying to
24 answer your question about what I consider high costs.
25 Q. So 500 -- an additional cost of \$500,000 to the

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1 plan per quarter would be a high cost?
2 A. I -- I was saying that I would look at \$500,000
3 on -- on an incident, a member having an incident of
4 \$500,000, I would consider that significant.
5 Q. I see.
6 So if it were a claim -- and we might be
7 using the word "claim" and "incident" synonymously. But
8 an incident for a hundred thousand dollars, you wouldn't
9 consider that a high cost?
10 A. Correct.
11 Q. And would your assessment depend on -- I think
12 you referenced earlier utilization -- on the number of
13 members having that event per designated period?
14 A. Yes.
15 Q. So what utilization would you say would result in
16 a -- in a significant hit to the plan?
17 A. It could be one time. It could be a onetime
18 event. It could be a premature birth. It could be a car
19 accident. It could be a complication from a surgery. It
20 could be a complication from not managing whatever disease
21 you have. So it's not necessary -- it's not necessarily
22 ongoing utilization, although that could be the case, but,
23 you know, someone with a rare cancer. Those types of
24 things. It could be a onetime event, not necessarily a --
25 There are ongoing utilization costs and then there are

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1 onetime costs.
2 Q. And do you know what percentage of the total
3 annual cost of the plan \$500,000 is?
4 A. Very small.
5 Q. If you had to guess what would you say?
6 A. I'm not going to do math here. I don't know.
7 Q. I don't want to force you to do math.
8 Do you know, at the time you were the
9 benefits director, what was the average cost of the plan
10 per year?
11 A. The average cost of the plan per year? The --
12 the whole benefits program was about a billion dollars.
13 So I -- That was everything. That was employee
14 assistance, dental, vision, health plans.
15 Q. So going back again to the ADOA's assessment of a
16 new benefit or a change in coverage, does the ADOA ever
17 consider indirect costs?
18 A. Not that I recall, no.
19 Q. You mentioned plan savings. Would the ADOA
20 consider plan savings --
21 A. Yes.
22 Q. -- when assessing a treatment?
23 A. Yes.
24 Q. What about the cost of, say, litigation risk from
25 denying coverage for treatment?

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1 A. No. That was never discussed.
2 Q. And where would the ADOA get this information
3 from?
4 A. Michael Meisner, our actuary. The plans
5 themselves.
6 Q. So when we're talking about costs there's a
7 tendency to talk about quantitative data. Is there any
8 qualitative data that the ADOA generally considered when
9 assessing new coverage?
10 A. Yes. I would say yes.
11 Q. Can you give me some examples?
12 A. I'll take the gastric sleeve again. The -- the
13 qualitative data on that would have been the outcome for
14 the patient and the quality of the outcome, the -- the --
15 What am I trying to say? The -- the ultimate outcome, I
16 guess. That it achieved its result.
17 Q. And by achieving its -- By the ultimate outcome
18 are you referring to coverage in this instance being in
19 the best interest of the plan and the members, as you
20 stated earlier?
21 A. Yes.
22 Q. Would you turn for me to Exhibit 38 in that
23 binder. It should be behind Tab 38.
24 THE COURT REPORTER: And mark it as 38?
25 MR. WALL: Yes, please. Thank you, Jill.

EXHIBIT 7

In The Matter Of:

Toomey vs.

State of AZ

Scott Bender, Videotaped

March 31, 2021

Glennie Reporting Services, LLC

1555 East Oranewood Avenue

Phoenix, Arizona 85020

602.266.6535 Office 877.266.6535 Toll Free

www.glennie-reporting.com office@glennie-reporting.com

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Min-U-Script® with Word Index

UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA

RUSSELL B. TOOMEY,)
 Plaintiff,)
 vs.) 4:19-CV-00035
 STATE OF ARIZONA; ARIZONA BOARD)
 OF REGENTS, d/b/a UNIVERSITY OF)
 ARIZONA, a governmental body of)
 the State of Arizona; et al.,)
 Defendants.)

VIDEOTAPED DEPOSITION OF SCOTT BENDER

Via Zoom Videoconference
 March 31, 2021
 8:00 a.m.
 Phoenix, Arizona

Glennie Reporting Services, LLC
 1555 East Orangewood Avenue
 Phoenix, Arizona 85020
 602.266.6535
 www.glennie-reporting.com

Prepared by:
 Robin L. B. Osterode
 CSR, RPR
 CA CSR No. 7750
 AZ CR No. 50695

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1 DEPOSITION OF SCOTT BENDER

2 The deposition of SCOTT BENDER, via Zoom

3 Videoconference, was taken on March 31, 2021, commencing

4 at 8:00 a.m., at Phoenix, Arizona, before ROBIN L. B.

5 OSTERODE, RPR, CSR, California Shorthand Reporter

6 No. 7750 and Arizona Certified Reporter No. 50695.

7

8 APPEARANCES:

9 For Plaintiff:

10 WILLKIE FARR & GALLAGHER LLP

11 By: Jordan C. Wall

12 By: Victoria A. Sheets

13 By: Justin Garbacz

14 By: Brandon Villa

15 787 Seventh Avenue

16 New York, New York 10019

17 (212) 728-8000

18 jwall@willkie.com

19 vsheets@willkie.com

20 jgarbacz@willkie.com

21 bvilla@willkie.com

22 (Videoconference appearances.)

23 For Defendants State of Arizona, Andy Tobin, and Paul

24 Shannon:

25 FENNEMORE CRAIG, P.C.

By: Ryan Curtis

2394 East Camelback Road, Suite 600

Phoenix, Arizona 85016

(602) 916-5000

rcurtis@fcflaw.com

(Videoconference appearances.)

Page 5

1 APPEARANCES (Continued):
 2 For Defendants Arizona Board of Regents, d/b/a University
 3 of Arizona; Ron Shoopman; Larry Penley; Ram Krishna; Bill
 4 Ridenour; Lyndel Manson; Karrin Taylor Robson; Jay
 5 Heiler; and Fred Duval:
 6 PERKINS COIE LLP
 7 By: Austin C. Yost
 8 By: Paul F. Eckstein
 9 2901 North Central Avenue, Suite 2000
 10 Phoenix, Arizona 85012-2788
 11 (602) 351-8000
 12 AYost@perkinscoie.com
 13 PEckstein@perkinscoie.com
 14 (Videoconference appearances.)
 15
 16 The Videographer:
 17 Michael Noonan
 18 (Videoconference appearance.)
 19
 20 Also Present:
 21 Kimberly Suci
 22 (Videoconference appearance.)
 23
 24
 25

Page 6

1 THE VIDEOGRAPHER: We are on the record.
 2 Today's date is March 31st, 2021. The time on the video
 3 monitor is 8:05 a.m., standard time. Here begins video
 4 number one in the deposition of Scott Bender, in the
 5 matter of Russell B. Toomey versus State of Arizona, et
 6 al., in the United States District Court, District of
 7 Arizona, case number 4:19-CV-00035.
 8 The court reporter is Robin Osterode
 9 representing Glennie Reporting Services, 1555 East
 10 Orangewood Avenue, Phoenix, Arizona 85020.
 11 My name is Michael Noonan. I'm the certified
 12 legal video specialist, in association with Forensic
 13 Video Deposition Services, 11111 North Scottsdale Road,
 14 Suite 205, Scottsdale, Arizona 85254.
 15 This deposition is taking place at the law
 16 offices of Fennemore Craig, 2394 East Camelback Road,
 17 Suite 600, Phoenix, Arizona 85016.
 18 Counsel will now state their appearance and
 19 affiliations and everyone attending remotely and anyone
 20 else present in the room for the record, please,
 21 beginning with the plaintiffs.
 22 MR. WALL: Good morning. This is Jordan Wall,
 23 from Willkie Farr & Gallagher, on behalf of the plaintiff
 24 Dr. Russell B. Toomey and certified classes. I'm joined
 25 by my colleagues, Victoria Sheets and Justin Garbacz in

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1 the room, and, on remotely, Brandon Villa.
 2 MR. CURTIS: Good morning. This is Ryan Curtis
 3 with Fennemore Craig on behalf of the State defendants
 4 and Andy Tobin and Paul Shannon in their official
 5 capacity. Also in the room with me is Kim Suci,
 6 associate general counsel for the Arizona Department of
 7 Administration.
 8 MR. YOST: Good morning. This is Austin Yost
 9 on behalf of the Arizona Board of Regents. Also with me
 10 remotely is Paul Eckstein.
 11 THE VIDEOGRAPHER: I apologize. Robin, did you
 12 get all that?
 13 THE REPORTER: I did.
 14 THE VIDEOGRAPHER: Would you please swear in
 15 the witness.
 16 THE REPORTER: Before we proceed, I will ask
 17 counsel to agree on the record that there is no objection
 18 to this officer of the court administering a binding oath
 19 to a witness not appearing personally before me.
 20 Please state your agreement on the record.
 21 MR. CURTIS: State defendants have no
 22 objection.
 23 MR. YOST: University defendants have no
 24 objection.
 25 MR. WALL: Plaintiff has no objection.

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1 SCOTT BENDER,
 2 called as a witness herein, having been first duly sworn
 3 by the Certified Reporter to speak the whole truth and
 4 nothing but the truth, was examined and testified as
 5 follows:
 6
 7 THE VIDEOGRAPHER: Please begin when ready.
 8
 9 EXAMINATION
 10 BY MR. WALL:
 11 Q. Good morning, Mr. Bender. How are you?
 12 A. I'm doing well, thanks. How are you?
 13 Q. I'm doing all right.
 14 Would you please state your full name and
 15 address for the record?
 16 A. Yes. Scott Patrick Bender. My address is 893
 17 South Gardner Drive, Chandler, Arizona 85224.
 18 Q. And, Mr. Bender, are you being represented by
 19 Mr. Ryan Curtis today at this deposition?
 20 A. Yes.
 21 Q. And have you ever been deposed before?
 22 A. No.
 23 Q. Have you ever testified at trial?
 24 A. No.
 25 Q. Okay. So I'm going to go over some ground

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1 Q. And that was intended to provide -- to remove
2 the exclusion of medical and psychological counseling and
3 hormone therapy in connection with what had been called
4 transsexual surgery, but still exclude transsexual
5 surgery?
6 A. That's correct.
7 Q. What prompted this change?
8 A. I don't know.
9 Q. Do you know what prompted the ADOA's assessment
10 of whether to maintain this exclusion or modify it?
11 A. No. Whatever conversations Marie had with the
12 governor's office we weren't privy to.
13 Q. Let me clarify, Mr. Bender. I'm not asking
14 what was the reason for the change, not yet, but I'm
15 asking you why was the ADOA looking at this exclusion to
16 begin with?
17 A. Well, the exclusion had always existed. It was
18 anticipation of action under 1557 and the final rules
19 being proposed and what that would look like.
20 Q. And so what was it about 1557 that prompted the
21 ADOA to examine the exclusion of transgender benefits?
22 A. We needed to understand what our obligations
23 would be if we were required to cover the transgender
24 benefits.
25 Q. What was it that the ADOA needed to understand

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1 with respect to Section 1557?
2 A. We needed to understand if we were required to
3 cover all transgender benefits or if it was going to be
4 optional as a self-insured plan. We need to be a
5 compliant plan. And if we're required to cover
6 something, we need to do so. And if we're not, we need
7 to consider whether we should or should not.
8 Q. So the ADOA was assessing the plan's exclusion
9 of transgender benefits, because they needed to
10 understand whether it complied with Section 1557?
11 A. Whether we complied and if we needed to comply.
12 Q. So the ADOA was assessing the plan's exclusion
13 of transgender benefits to understand whether it complied
14 with -- whether it needed to comply with Section 1557,
15 and if so, whether it did comply with Section 1557?
16 A. Correct.
17 Q. The ADOA could have avoided this -- this
18 question by simply removing the exclusion on transgender
19 benefits, couldn't it have?
20 MR. CURTIS: Objection; form of the question.
21 BY MR. WALL:
22 Q. You can answer, Mr. Bender.
23 THE WITNESS: Can I answer?
24 MR. CURTIS: You can answer.
25 THE WITNESS: Yes, we could have just accepted

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1 or deleted the exclusions and absorbed the costs
2 associated with that, for sure.
3 BY MR. WALL:
4 Q. So if the ADOA had removed the exclusion listed
5 in paragraph 16, would there have been any other question
6 about the ADOA's compliance with Section 1557?
7 A. From a compliance standpoint, no. If we
8 voluntarily opted in, there's no compliance issue.
9 Q. So why didn't the ADOA remove the exclusion for
10 all transgender benefits under the plan?
11 A. Can you rephrase?
12 Q. Why didn't the ADOA remove the plan's exclusion
13 of transgender benefits, inclusive of gender reassignment
14 surgery?
15 A. I believe there are several reasons, one being
16 cost and the other being we didn't feel it was required
17 for us to include -- or to eliminate the exclusion for.
18 Q. So the ADOA did not remove the plan's exclusion
19 of gender reassignment surgery because of cost, and it
20 didn't feel it was required to remove that exclusion?
21 A. Those are both reasons. I think, primarily, is
22 we weren't required to, and if we're not required to,
23 then we weren't interested in taking on additional costs
24 in a plan that's already under water.
25 Q. The ADOA's primary reason for not removing the

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1 exclusion of gender reassignment surgery is because it
2 was not required to?
3 A. That's my understanding.
4 Q. But, additionally, the ADOA wasn't interested
5 in taking on additional costs in the plan --
6 A. If we were --
7 Q. -- from providing these services?
8 A. That's correct. If we weren't required to, we
9 weren't going to take on the additional cost.
10 Q. The ADOA wasn't required to provide coverage
11 for counseling services and hormone therapy in connection
12 with transgender -- gender reassignment surgery?
13 MR. CURTIS: Objection; form of the question.
14 BY MR. WALL:
15 Q. You can answer, Mr. Bender, or would you like
16 me to repeat it?
17 A. Can you repeat, please?
18 Q. The ADOA was not required to provide coverage
19 for counseling services and hormone therapy in connection
20 with gender reassignment surgery, was it?
21 A. Not -- that is -- that is correct.
22 Q. But the ADOA still provided coverage for those
23 services?
24 A. Yes.
25 Q. The ADOA was not required to provide 3-D

EXHIBIT 8

WILLKIE FARR & GALLAGHER_{LLP}

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
Fax: 202 303 2000

April 28, 2021

VIA EMAIL

Ryan Curtis, Esq.
Shannon Cohan, Esq.
Fennemore Craig, P.C.
2394 E. Camelback Road, Suite 600
Phoenix, Arizona 85061

Re: *Russell B. Toomey, v. State of Arizona, et al*, No. CV-19-00035-TUC-RM (LAB)

Dear Ryan and Shannon:

We write with respect to the State of Arizona, Andy Tobin, and Paul Shannon's (collectively, the "State Defendants") withholding of documents based on attorney client privilege.

As evidenced by the State of Arizona's Privilege/Redaction log, the State Defendants are withholding communications involving legal advice provided to the State Defendant's regarding the State's self-funded healthcare plan's exclusion for "gender reassignment surgery" (the "Exclusion"). As outlined below, the State Defendants have waived attorney client privilege with respect to legal advice that was considered by the State Defendants in their decision to maintain the Exclusion in two ways: *first*, by affirmatively relying on legal advice as a basis for denying discriminatory intent in this litigation; and *second*, by disclosing the substance of the legal advice to Dr. Toomey and his counsel in the course of Marie Isaacson's March 26th deposition.

I. State Defendants Have Waived The Attorney-Client Privilege By Asserting Legal Advice As A Defense To Claims Of Intentional Discrimination.

When a party relies on advice of counsel as a defense, it cannot assert the attorney-client privilege to shield that advice from discovery. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992); *U.S. v. Kerr*, CR 11-2385-PHX-JAT, 2012 WL 2919450, at *3 (D. Ariz. July 17, 2012). This is

Ryan Curtis, Esq.
Shannon Cohan, Esq.
April 28, 2021
Page 2

particularly true where a party has denied having any improper motive or intent based on their supposed reliance on advice of counsel. *Id.*

Courts in the Ninth Circuit apply a three-pronged test to determine whether a waiver has occurred:

First, the court considers whether the party is asserting the privilege as the result of some affirmative act, such as filing suit. . . . Second, the court examines whether through this affirmative act, the asserting party puts the privileged information at issue. . . . Finally, the court evaluates whether allowing the privilege would deny the opposing party access to information vital to its defense.

United States v. Amlani, 169 F.3d 1189, 1195 (9th Cir. 1999) (citations and quotations omitted); *see also Chevron Corp.*, 974 F.2d at 1162-63 (finding defendant had waived attorney-client privilege by affirmatively relying on legal advice to support the reasonableness of its actions); *see also Melendres v. Arpaio*, CV-07-2513-PHX-GMS, 2015 WL 12911719, at *2 (D. Ariz. May 14, 2015) (finding waiver for all communications, documents referencing such communications, and for all work product used in formulating the advice communicated to Defendants). All three factors support a finding that State Defendants have waived the attorney-client privilege with respect to the decision to maintain the Exclusion.

First, State Defendants have affirmatively asserted, in both their Answer and recent Supplemental Responses to Dr. Toomey's Interrogatory No. 1, the advice of counsel as a principal rationale¹ for maintaining the Exclusion and denying any claim of discriminatory intent. State Defendants' Answer at Affirmative Defenses J and M (Doc. No. 89); State Defendant's Supplemental Responses to Plaintiff's First Set of Interrogatories at Answer to Interrogatory No. 1 (citing "legal advice that the State received" as a basis for maintaining the Exclusion, and specifically, advice from counsel that "it was not legally required to change its health plan to provide [coverage for gender reassignment surgery]. . . .")

Second, State Defendants have unquestionably put the privileged information at issue, both in writing through their Answer and Supplemental Responses, and testimony from key witnesses. During her deposition on March 22, 2021, Marie Isaacson, Director of the Benefits Services Division of the ADOA during 2016, stated that "the deciding factor" for ADOA's decision to exclude gender reassignment surgery was "what was required by law." *See Isaacson Tr.* at 31:16-17. Ms. Isaacson also testified that the final decision was made by a small group, including the Governor's Office and legal counsel. *Id.* at 32:7. Ms. Isaacson testified that she herself, as Director of the ADOA Benefits Services

¹ State Defendants also cite cost as another non-discriminatory basis for maintaining the Exclusion, but the salience of this rationale has been undermined by the State's own witnesses. *See Isaacson Tr.* at 31:13-15 (testifying that cost was not "the driving factor" in ADOA's decision, and that instead legal advice that ADOA was not required to cover gender reassignment surgery was the principal rationale); *Bender Tr.* at 167:12 – 168:3 (testifying that cost was secondary, and that advice about what ADOA was required or not required to cover was the primary basis of ADOA's decision).

Ryan Curtis, Esq.
Shannon Cohan, Esq.
April 28, 2021
Page 3

Division, did not provide an opinion one way or another about coverage, and that the decision was instead based principally on legal advice. *Id.* at 49:8-50:11.

In other words, Ms. Isaacson testified that the advice of counsel regarding whether ADOA was required to cover gender reassignment surgery was front-and-center to ADOA's decision-making over the Exclusion—one of the central issues in this litigation.

Third, the information being withheld by State Defendants is undeniably vital to the case, as it goes to the heart of the State Defendant's rationale for maintaining the Exclusion. The Court has recently recognized that this issue remains a live and critical one in the present dispute. (Doc. No. 187 at 5.) Having asserted legal advice as a defense and a rationale for their decision not to cover gender reassignment surgery, the State Defendants cannot continue to withhold documents and communications regarding that advice. Fairness here requires disclosure.

State Defendants have therefore waived the attorney-client privilege with respect to any documents and communications evidencing legal advice that was relied on by the State Defendants in their decision-making regarding the Exclusion.

II. State Defendants Have Alternatively Waived The Attorney-Client Privilege Through Disclosure.

Separately, the State Defendants have waived privilege with respect to legal advice that was provided to them regarding the Exclusion because the content of this advice was disclosed during Marie Isaacson's March 26, 2021 deposition.

"[I]t has been widely held that voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject." *Weil v. Inv./Indicators, Research and Mgt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981); *cf. Hernandez v. Tanninen*, 604 F.3d 1095, 1100-01 (9th Cir. 2010) (affirming waiver of privilege as to certain subjects, but reversing blanket waiver of all privilege). Such a waiver-by-disclosure can occur during a deposition, when a witness voluntarily discloses legal advice. *See Weil*, 647 F.2d at 24 (holding that party asserting privilege had waived the privilege with respect to legal advice after its director disclosed the substance of the legal advice during deposition); *see also Thomas v. F.F. Fin., Inc.*, 128 F.R.D. 192, 192-94 (S.D.N.Y. 1989) (finding that deponent waived privileged information by disclosure during deposition). The fact that the disclosing party did not "subjectively intend to waive the privilege is insufficient to make out the necessary element of non-wavier." *Weil*, 647 F.2d at 25; *id.* at n.13 ("[W]hen, as here, the privileged communication is voluntarily disclosed without objection by the asserting party's counsel and in the absence of surprise or deception by opposing counsel, it may be unnecessary to look beyond the objective fact of disclosure in ruling on the question of waiver.")

During her deposition, Ms. Isaacson voluntarily disclosed that ADOA was advised by counsel that "some services" were required to be covered, but gender reassignment surgery in particular was "not required to be covered." *See Isaacson Tr.* at 19:18-24. While State Defendant's counsel made an objection shortly after this testimony, advising Isaacson not to "speak to direct legal counsel received,"

Ryan Curtis, Esq.
Shannon Cohan, Esq.
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Page 4

this did not prevent Isaacson from later confirming that legal counsel had advised ADOA that coverage was “not required by law.” *See id.* at 20:10-15. Ms. Isaacson’s disclosures amounted to a waiver “as to all other communications on the same subject.” *Hernandez*, 604 F.3d at 1100. The subject of the disclosed advice was whether ADOA is required by law to cover gender reassignment surgery.

State Defendants have waived privilege for, and must produce, all documents and communications with counsel regarding the question of whether ADOA was legally required to cover gender reassignment surgery that are being withheld on the basis of the attorney-client privilege.

For the reasons outlined above, State Defendants have waived the attorney-client privilege with respect to any documents and communications with counsel regarding the question of whether ADOA was legally required to cover gender reassignment surgery. Dr. Toomey requests therefore that State Defendants produce as soon as practicable all documents and communications with counsel on this topic that are currently being withheld on the basis of the attorney-client privilege, and furthermore revise their Privilege/Redaction Log, to remove any such documents therefrom.

This letter is not intended to address all of Dr. Toomey’s issues with the State Defendants’ document production or its claims to privilege. Nothing in this letter is intended to waive or limit in any way Dr. Toomey’s rights to raise other issues not stated here.

Please let us know if you have any questions, and if you are able to meet and confer this week or next on the issues raised herein.

Sincerely,

/s/ Wesley R. Powell

Wesley R. Powell
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019-6099

Attachments:

- Excerpts of Isaacson Tr.
- Excerpts of Bender Tr.

cc. Joshua A. Block

Ryan Curtis, Esq.
Shannon Cohan, Esq.
April 28, 2021
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Leslie Cooper
American Civil Liberties Union Foundation
125 Broad Street, Floor 18
New York, NY 10004

Victoria Lopez
Christine K. Wee
ACLU of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014

Matthew S. Freimuth
Jordan C. Wall
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019-6099

Paul F. Eckstein
Austin C. Yost
Perkins Coie LLP
2901 N. Central Ave., Suite 2000
Phoenix, AZ 85012-2788

EXHIBIT 9

State of Arizona Privilege/Redaction Log

No.	DocID/ Beg Bates No.	DocID/ End Bates No.	Date	From/ Author	To	CC	Privilege Type	Subject/ Description
1	EML00006426	EML00006426	6/27/2016	Marie Isaacson	Erwin Kratz; Scott Bender	Rose Bernal; Jennifer Bowling; Gail Goodman; Ryan Curtis	Attorney-Client Communication	RE: Memorandum regarding leave, premiums, termination dates, and ACA Hours of Service (ADOA Benefits questions)
2	EML00006427	EML00006428	6/24/2016	Jennifer Bowling	Marie Isaacson; Scott Bender; Rose Bernal	Jennifer Bowling	Attorney-Client Communication	RE: State of AZ benefit plan forms and documents
3	EML00007337	EML00007337	8/2/2016	Elizabeth Schafer	Marie Isaacson		Attorney-Client Communication	re: draft cover memo 1557 Rule
4, 5	EML00007338	EML00007339	8/2/2016	Elizabeth Schafer	Marie Isaacson	Yvette Medina	Attorney-Client Communication	re: draft cover memo 1557 Rule
6	AZSTATE.005551	AZSTATE.005554	1/13/2017	Marie Isaacson	Nicolette A Schultz		Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	re: plan document updates
7	AZSTATE.246030	AZSTATE.246033	1/13/2017	Nicolette A Schultz	Marie Isaacson		Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	re: plan document updates
8	EML00012642	EML00012644	10/19/2016	Ryan Curtis	Marie Isaacson	Nicole Ong; John Fry; Erwin Kratz	Attorney-Client Communication	ACA 1557 Implementation [FC-Email.FID7081187]
9	EML00012648	EML00012648	10/18/2016	Marie Isaacson	Ryan Curtis	Nicole Ong; John Fry	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
10	EML00012649	EML00012650	10/18/2016	Ryan Curtis	Marie Isaacson	Nicole Ong; John Fry	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
11	EML00012651	EML00012651	10/18/2016	Nicole Ong	Marie Isaacson		Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
12	EML00012656	EML00012656	10/17/2016	Marie Isaacson	Ryan Curtis; John Fry	Nicole Ong; Nicolette A Schultz	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
13	EML00012660	EML00012660	10/17/2016	Marie Isaacson	John Fry; Ryan Curtis	Nicole Ong	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
14	EML00012661	EML00012661	10/17/2016	Fry, John	Marie Isaacson; Ryan Curtis	Nicole Ong	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
15	EML00012662	EML00012662	10/17/2016	Marie Isaacson	Ryan Curtis; John Fry	Nicole Ong	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
16	EML00012663	EML00012663	10/17/2016	Ryan Curtis	Fry, John; Marie Isaacson	Nicole Ong	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]

State of Arizona Privilege/Redaction Log

No.	DocID/ Beg Bates No.	DocID/ End Bates No.	Date	From/ Author	To	CC	Privilege Type	Subject/ Description
17	EML00012664	EML00012664	10/17/2016	John Fry	Marie Isaacson; Ryan Curtis	Nicole Ong	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
18	EML00012665	EML00012665	10/17/2016	Marie Isaacson	Ryan Curtis	John Fry; Nicole Ong	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
19	EML00012676	EML00012676	10/11/2016	Ryan Curtis	Marie Isaacson	John Fry; Erwin Kratz	Attorney-Client Communication	RE: ACA § 1557 - Short update call [FC-Email.FID7081187]
20	EML00012867	EML00012868	8/3/2016	Marie Isaacson	Elizabeth Schafer		Attorney-Client Communication; Deliberative Process Privilege	Draft cover memo 1557 Rule
21	EML00012874	EML00012875	8/2/2016	Marie Isaacson	Elizabeth Schafer, Yvette Medina		Attorney-Client Communication; Deliberative Process Privilege	Draft cover memo 1557 Rule
22, 23	EML00012878	EML00012888	8/1/2016	Marie Isaacson	Yvette Medina; Scott Bender; Elizabeth Schafer		Attorney-Client Communication	FW: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
24	EML00012889	EML00012889	7/27/2016	Nicolette A Schultz	Ryan Curtis; Marie Isaacson	Cindy Shupe; Erwin Kratz	Attorney-Client Communication	RE: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
25	EML00012890	EML00012890	7/27/2016	Ryan Curtis	Marie Isaacson	Cindy Shupe; Erwin Kratz; Nicolette A Schultz	Attorney-Client Communication	RE: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
26	EML00012891	EML00012891	7/27/2016	Marie Isaacson	Ryan Curtis	Cindy Shupe; Erwin Kratz; Nicolette A Schultz	Attorney-Client Communication	RE: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
27	EML00012893	EML00012898	7/26/2016	John Fry	Marie Isaacson		Attorney-Client Communication	Re: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
28, 29	EML00012899	EML00012908	7/25/2016	Marie Isaacson	John Fry	Nicolette A Schultz	Attorney-Client Communication	FW: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
30	EML00012909	EML00012909	7/22/2016	Marie Isaacson	Ryan Curtis	Cindy Shupe; Erwin Kratz	Attorney-Client Communication	RE: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
31, 32	EML00012910	EML00012919	7/22/2016	Ryan Curtis	Marie Isaacson	Cindy Shupe; Erwin Kratz	Attorney-Client Communication	ACA 1557 - Discrimination and Gender Identity
33	EML00013079	EML00013098	5/25/2016	Marie Isaacson	Erwin Kratz		Attorney-Client Communication	FW: Materials regarding our Health Plans
34	EML00014080	EML00014080	11/20/2019	Michael Meisner	Scott Bender	Paul Shannon	Attorney-Client Communication	Re: draft - Gender dysphoria issues to Kate King CONFIDENTIAL 11-20-19 - Invitation to edit
35	EML00014082	EML00014082	11/19/2019	Scott Bender	Paul Shannon	Michael Meisner	Attorney-Client Communication	Re: draft - Gender dysphoria issues to Kate King CONFIDENTIAL 11-20-19 - Invitation to edit
36	EML00014083	EML00014083	11/19/2019	Paul Shannon	Michael Meisner	Scott Bender	Attorney-Client Communication	draft - Gender dysphoria issues to Kate King CONFIDENTIAL 11-20-19 - Invitation to edit
37	EML00014130	EML00014130	10/30/2019	Michael Meisner	Paul Shannon	Scott Bender	Attorney-Client Communication	Re: United Healthcare - Gender Dysphoria Treatment
38	EML00014131	EML00014131	10/29/2019	Paul Shannon	Michael Meisner; Scott Bender		Attorney-Client Communication	Fwd: United Healthcare - Gender Dysphoria Treatment

State of Arizona Privilege/Redaction Log

No.	DocID/ Beg Bates No.	DocID/ End Bates No.	Date	From/ Author	To	CC	Privilege Type	Subject/ Description
39	EML00014160	EML00014160	10/8/2019	Michael Meisner	Scott Bender		Attorney-Client Communication	Re: Toomey v. State of AZ
40	EML00014161	EML00014161	10/8/2019	Scott Bender	Michael Meisner		Attorney-Client Communication	Fwd: Toomey v. State of AZ
41	EML00014186	EML00014186	10/1/2019	Michael Meisner	Scott Bender		Attorney-Client Communication	Re: United Healthcare transgender benefit
42	EML00014196	EML00014196	9/30/2019	Scott Bender	Michael Meisner		Attorney-Client Communication	Fwd: United Healthcare transgender benefit
43	EML00014200	EML00014200	9/26/2019	Scott Bender	Michael Meisner		Attorney-Client Communication	Fwd: United Healthcare transgender benefit
44	EML00014201	EML00014201	9/26/2019	Michael Meisner	Scott Bender		Attorney-Client Communication	Re: United Healthcare transgender benefit
45	EML00014202	EML00014202	9/26/2019	Scott Bender	Michael Meisner		Attorney-Client Communication	Fwd: United Healthcare transgender benefit
46, 47	EML00014215	EML00014216	9/23/2019	Michael Meisner	Scott.Bender; Paul Shannon		Work-Product	Re: Estimated annual costs to included transgender benefits: \$11 million per year
48	EML00014218	EML00014218	9/23/2019	Michael Meisner	Scott.Bender; Paul Shannon		Work-Product	Estimated annual costs to included transgender benefits: \$11 million per year
49	EML00018839	EML00018839					DOCUMENT PRODUCED OFF OF PRIVILEGE LOG	
50	AZSTATE.246049	AZSTATE.246052	1/13/2017	Yvette Medina	Nicolette A Schultz		Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	FW: ACA §1557 Non-Discrimination
51	EML00019822	EML00019822	7/27/2016	Nicolette A Schultz	Ryan Curtis		Attorney-Client Communication	RE: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
52	EML00019823	EML00019823	7/27/2016	Ryan Curtis	Nicolette A Schultz		Attorney-Client Communication	RE: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
53	EML00019824	EML00019824	7/27/2016	Nicolette A Schultz	Ryan Curtis		Attorney-Client Communication	RE: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
54	EML00019825	EML00019825	7/27/2016	Ryan Curtis	Nicolette A Schultz		Attorney-Client Communication	RE: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
55	EML00019829	EML00019829	7/27/2016	Nicolette A Schultz	John Fry		Attorney-Client Communication	RE: Scheduling meeting for ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
56	EML00019830	EML00019830	7/27/2016	Nicolette A Schultz	John Fry		Attorney-Client Communication	RE: Scheduling meeting for ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
57	EML00019831	EML00019836	7/27/2016	John Fry	Nicolette A Schultz		Attorney-Client Communication	Re: Scheduling meeting for ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]

State of Arizona Privilege/Redaction Log

No.	DocID/ Beg Bates No.	DocID/ End Bates No.	Date	From/ Author	To	CC	Privilege Type	Subject/ Description
58	EML00019837	EML00019837	7/27/2016	Nicolette A Schultz	John Fry		Attorney-Client Communication	RE: Scheduling meeting for ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
59	EML00019838	EML00019838	7/26/2016	John Fry	Nicolette A Schultz		Attorney-Client Communication	RE: Scheduling meeting for ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
60	EML00019839	EML00019839	7/26/2016	Nicolette A Schultz	John Fry		Attorney-Client Communication	Scheduling meeting for ACA 1557 - Discrimination and Gender Identity
61	EML00021020	EML00021020	1/8/2016	Michael Bailey	Marc Lamber	Marie Isaacson; Rex Nowlan	Attorney-Client Communication	Authorization for Outside Counsel to Provide Periodic Advice to the Arizoan Department of Administration on Health and Employee Welfare Questions
62	EML00021053	EML00021053	12/11/2019	Scott Bender	Nicole Sornsin; Kimberly Suci; Paul Shannon		Attorney-Client Communication	Gender Reassignment services appeal
63	EML00021133	EML00021133					DOCUMENT PRODUCED OFF OF PRIVILEGE LOG	
64, 65	EML00021178	EML00021179	9/23/2019	Michael Meisner	Scott.Bender; Paul Shannon		Work-Product	Re: Estimated annual costs to included transgender benefits: \$11 million per year
66	EML00021181	EML00021181	9/23/2019	Michael Meisner	Scott.Bender; Paul Shannon		Work-Product	ADOA Estimated annual costs
67	AZSTATE.246062	AZSTATE.246067	2/19/2019	Scott Bender	Paul Shannon		Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	Fwd: FW: ACA §1557 Non-Discrimination
68	EML00021298	EML00021298					DOCUMENT PRODUCED OFF OF PRIVILEGE LOG	
69	EML00021303	EML00021303					DOCUMENT PRODUCED OFF OF PRIVILEGE LOG	
70	AZSTATE.246068	AZSTATE.246072	10/25/2018	Yvette Medina	Scott Bender		Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	Fwd: FW: ACA §1557 Non-Discrimination
71	AZSTATE.246097	AZSTATE.246101	10/25/2018	Yvette Medina	Scott Bender		Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	Fwd: FW: ACA §1557 Non-Discrimination
72	ESI00000686	ESI00000686	7/20/2016	Ryan Curtis	Marie Isaacson		Attorney-Client Communication	Summary and Implications of ACA § 1557 and Transgender Coverage Requirements
73	ESI00000688	ESI00000688	2/5/2019	Paul Shannon	Nicole Sornsin		Attorney-Client Communication	Re: Plan Exceptions
74	ESI00000689	ESI00000689	2/5/2019	Paul Shannon	Nicole Sornsin		Attorney-Client Communication	Re: Plan Exceptions
75	ESI00000690	ESI00000690	8/3/2016	Marie Isaacson	Mike Liburdi		Attorney-Client Communication; Deliberative Process Privilege	Affordable Care Act § 1557, Non-discrimination - Transgender Coverage
76	AZSTATE.246104	AZSTATE.246108	12/15/2016	Marie Isaacson	Christina Corieri	Scott Bender; Nicole Ong	Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	RE: ACA §1557 Non-Discrimination
77							ENTRY NUMBER INADVERTENTLY OMITTED	
78	ESI00000700	ESI00000700	7/20/2016	Ryan Curtis	Marie Isaacson		Attorney-Client Communication	Summary and Implications of ACA § 1557 and Transgender Coverage Requirements

State of Arizona Privilege/Redaction Log

No.	DocID/ Beg Bates No.	DocID/ End Bates No.	Date	From/ Author	To	CC	Privilege Type	Subject/ Description
79	ESI00000701	ESI00000701	7/20/2016	Ryan Curtis	Marie Isaacson		Attorney-Client Communication	Summary and Implications of ACA § 1557 and Transgender Coverage Requirements
80	ESI00000702	ESI00000702	8/1/2016	Marie Isaacson	Yvette Medina; Scott Bender; Elizabeth Schafer		Attorney-Client Communication	FW: ACA 1557 - Discrimination and Gender Identity [FC-Email.FID7081187]
81	ESI00000703	ESI00000703	7/6/2016	Marie Isaacson	Erwin Kratz	Ryan Curtis; Cindy Shupe; Scott Bender	Attorney-Client Communication	RE: The Plan Participation Chart we Discussed [FC-Email.FID7081187]
82	ESI00000772	ESI00000772	7/20/2016	Ryan Curtis	Marie Isaacson		Attorney-Client Communication	Summary and Implications of ACA § 1557 and Transgender Coverage Requirements
83	ESI00000773	ESI00000773	2/5/2019	Paul Shannon	Nicole Sornsin		Attorney-Client Communication	Re: Plan Exceptions
84	AZSTATE.000784	AZSTATE.001365						DOCUMENT PRODUCED IN UNREDACTED FORMAT
85	AZSTATE.001366	AZSTATE.001678						DOCUMENT PRODUCED IN UNREDACTED FORMAT
86	AZSTATE.001679	AZSTATE.001695						DOCUMENT PRODUCED IN UNREDACTED FORMAT
87	AZSTATE.001696	AZSTATE.001778						DOCUMENT PRODUCED IN UNREDACTED FORMAT
88	AZSTATE.001779	AZSTATE.002089						DOCUMENT PRODUCED IN UNREDACTED FORMAT
89	AZSTATE.002090	AZSTATE.002751						DOCUMENT PRODUCED IN UNREDACTED FORMAT
90	AZSTATE.003186	AZSTATE.003188	1/17/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda
91	AZSTATE.003438	AZSTATE.003454						DOCUMENT PRODUCED IN UNREDACTED FORMAT
92	AZSTATE.003466	AZSTATE.003467	1/17/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda
93	AZSTATE.005416	AZSTATE.005418	1/17/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda
94	AZSTATE.005541	AZSTATE.005541	1/26/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda
95	AZSTATE.005547	AZSTATE.005548	1/17/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda
96	AZSTATE.006534	AZSTATE.006536	1/13/2020	Scott Bender	Paul Shannon		HIPAA/Personally Identifiable Information	Fwd: Harmful exclusions from state healthcare plan.msg
97	AZSTATE.006880	AZSTATE.006880	8/23/2017	Rose Bernal	Scott Bender; Erin King; Kayla Stivason		HIPAA/Personally Identifiable Information	FW: Additional Information - Appeal.msg
98	AZSTATE.007001	AZSTATE.007001	8/23/2017	Rose Bernal	Staci Wilson	[REDACTED]	HIPAA/Personally Identifiable Information	RE: Additional Information - Appeal.msg
99	AZSTATE.007002	AZSTATE.007003	8/21/2017	Rose Bernal	[REDACTED]	Staci R. Wilson; Helena A. Rodrigues; Kayla Stivason	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure.msg
100	AZSTATE.007004	AZSTATE.007005	8/1/2017	Staci Wilson	Rose Bernal		HIPAA/Personally Identifiable Information	RE: Transgender coverage - hormone therapy.msg
101	AZSTATE.007006	AZSTATE.007007	8/1/2017	Shannon Daniel	Rose Bernal	Yvette Medina; Scott Bender	HIPAA/Personally Identifiable Information	RE: Transgender coverage - hormone therapy.msg
102	AZSTATE.009655	AZSTATE.009659						DOCUMENT PRODUCED IN UNREDACTED FORMAT
103	AZSTATE.010325	AZSTATE.010325	4/22/2019				HIPAA/Personally Identifiable Information	Report of ADOA transgender services from Aetna
104	AZSTATE.010904	AZSTATE.010904	1/26/2017				Confidential, non-relevant information	Draft meeting Agenda
105	AZSTATE.011038	AZSTATE.011045	9/29/2016				Confidential, non-relevant information	Draft Medical Director Meeting Minutes
106	AZSTATE.011046	AZSTATE.011049	9/28/2016	Eveleth, Ray G <EvelethR@aetna.com>	Scott Bender <Scott.Bender@azdoa.gov>; Yvette Medina <Yvette.Medina@azdoa.gov>	Dash, Jay A.	Confidential, non-relevant information	RE: Medical director meeting.msg
107	AZSTATE.080734	AZSTATE.080738	1/25/2017				HIPAA/Personally Identifiable Information	Session Roster - 2017 Benefits Liaison Training
108	AZSTATE.080739	AZSTATE.080739	1/25/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda

State of Arizona Privilege/ Redaction Log

No.	DocID/ Beg Bates No.	DocID/ End Bates No.	Date	From/ Author	To	CC	Privilege Type	Subject/ Description
109	AZSTATE.083158	AZSTATE.083159	1/17/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda
110	AZSTATE.083937	AZSTATE.083940	6/24/2016	Marie Isaacson	Jennifer Bowling; Scott Bender; Rose Bernal		Attorney-Client Communication	RE: State of AZ benefit plan forms and documents [FC-Email.FID7081187]
111	AZSTATE.083941	AZSTATE.083944	6/24/2016	Marie Isaacson	Scott Bender; Jennifer Bowling; Rose Bernal		Attorney-Client Communication	FW: State of AZ benefit plan forms and documents [FC-Email.FID7081187]
112	AZSTATE.084769	AZSTATE.084769	5/22/2017	Elizabeth Schafer			HIPAA/Personally Identifiable Information	Blue Cross Blue Shield of Arizona member Satisfaction Survey Results
113	AZSTATE.085648	AZSTATE.085649	6/8/2016	Elizabeth Schafer	Scott Bender		Attorney-Client Communication	Re: Transgender benefits
114	AZSTATE.085875	AZSTATE.085875	5/27/2016	Elizabeth Schafer			HIPAA/Personally Identifiable Information	UnitedHealthcare member Satisfaction Survey Results
115	AZSTATE.085877	AZSTATE.085877	5/11/2016	Elizabeth Schafer			HIPAA/Personally Identifiable Information	UnitedHealthcare member Satisfaction Survey Results
116	AZSTATE.088316	AZSTATE.088316	6/28/2018				HIPAA/Personally Identifiable Information	UnitedHealthcare member Satisfaction Survey Results
117	AZSTATE.088872	AZSTATE.088878	8/25/2017	Scott Bender	Mary Cappabianco; Erin Russell; Kayla Stivason; Rose Bernal	Sean Kirwan	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
118	AZSTATE.088879	AZSTATE.088885	8/25/2017	Mary Cappabianco	Scott Bender; Erin Russell; Kayla Stivason; Rose Bernal	Sean Kirwan	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
119	AZSTATE.088886	AZSTATE.088891	8/25/2017	Scott Bender	Erin Russell; Kayla Stivason; Rose Bernal	Sean Kirwan; Mary Cappabianco	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
120	AZSTATE.088892	AZSTATE.088897	8/24/2017	Erin Russell	Kayla Stivason; Rose Bernal	Scott Bender; Sean Kirwan; Mary Cappabianco	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
121	AZSTATE.088898	AZSTATE.088902	8/23/2017	Kayla Stivason	Erin Russell; Rose Bernal	Scott Bender; Sean Kirwan	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
122	AZSTATE.089023	AZSTATE.089026	8/22/2017	Erin Russell	Rose Bernal; Kayla Stivason	Scott Bender; Sean Kirwan	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
123	AZSTATE.094671	AZSTATE.094675	1/25/2017				HIPAA/Personally Identifiable Information	Session Roster - 2017 Benefits Liaison Training
124	AZSTATE.094676	AZSTATE.094676	1/26/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda
125	AZSTATE.095605	AZSTATE.095608	1/13/2017	Marie Isaacson	Nicolette A Schultz		Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	Re: Plan document updates
126	AZSTATE.100639	AZSTATE.100640	6/8/2016	Nicolette A Schultz	Marie Isaacson		Attorney-Client Communication	Re: fyi
127	AZSTATE.129503	AZSTATE.129504	1/31/2020	Scott Bender	Kimberly Suci; Nicole Sornsin; Paul Shannon		Attorney-Client Communication	Fwd: Members' using Hormone Replacement Drug Therapy
128	AZSTATE.129505	AZSTATE.129507	1/13/2020	Paul Shannon	Nicole Sornsin; Kimberly Suci		Attorney-Client Communication	Fwd: Harmful exclusions from state healthcare plan.
129	AZSTATE.129508	AZSTATE.129509	1/7/2020	Kimberly Suci	Paul Shannon	Nicole Sornsin	Attorney-Client Communication	Re: Transgender benefits
130	AZSTATE.129510	AZSTATE.129510	1/7/2020	Paul Shannon	Kimberly Suci		Attorney-Client Communication	Fwd: Transgender benefits
131	AZSTATE.129678	AZSTATE.129681	11/6/2019	Paul Shannon	Nicole Sornsin		Attorney-Client Communication	Re: Harmful exclusions from state healthcare plan.

State of Arizona Privilege/Redaction Log

No.	DocID/ Beg Bates No.	DocID/ End Bates No.	Date	From/ Author	To	CC	Privilege Type	Subject/ Description
132	AZSTATE.129682	AZSTATE.129684	11/6/2019	Nicole Sornsin	Paul Shannon		Attorney-Client Communication	Re: Harmful exclusions from state healthcare plan.
133	AZSTATE.129685	AZSTATE.129687	11/6/2019	Paul Shannon	Nicole Sornsin		Attorney-Client Communication	Re: Harmful exclusions from state healthcare plan.
134	AZSTATE.129688	AZSTATE.129690	11/6/2019	Nicole Sornsin	Paul Shannon	Kimberly Suci	Attorney-Client Communication	Re: Harmful exclusions from state healthcare plan.
135	AZSTATE.129691	AZSTATE.129693	11/6/2019	Paul Shannon	Nicole Sornsin; Kimberly Suci		Attorney-Client Communication	Fwd: Harmful exclusions from state healthcare plan.
136	AZSTATE.129694	AZSTATE.129695	11/6/2019	Scott Bender	Paul Shannon		HIPAA/Personally Identifiable Information	Fwd: Harmful exclusions from state healthcare plan.
137	AZSTATE.129696	AZSTATE.129696	10/25/2019	Paul Shannon	Nicole Sornsin; Kimberly Suci		Attorney-Client Communication	Fwd: Providers and payers get new court ruling on ACA protections for transgender patients
138	AZSTATE.129813	AZSTATE.129814	10/15/2018	Paul Shannon	John Fry		Attorney-Client Communication	Fwd: Interesting Governing article...
139	AZSTATE.129815	AZSTATE.129817	10/10/2018	Paul Shannon	Yvette Medina; Scott Bender		Attorney-Client Communication	Fwd: Request for documentation regarding ADOA's medical coverage
140	AZSTATE.129818	AZSTATE.129819	10/6/2018	John Fry	Paul Shannon		Attorney-Client Communication	RE: Request for documentation regarding ADOA's medical coverage
141	AZSTATE.129820	AZSTATE.129821	10/2/2018	Paul Shannon	John Fry		Attorney-Client Communication	Re: Request for documentation regarding ADOA's medical coverage
142	AZSTATE.129936	AZSTATE.129937	1/13/2020	Noah Munoz	Rose Bernal		HIPAA/Personally Identifiable Information	Fwd: Harmful exclusions from state healthcare plan.
143	AZSTATE.129942	AZSTATE.129942	11/6/2019	Noah Munoz	Scott Bender	Yvette Medina; Rose Bernal	HIPAA/Personally Identifiable Information	Fwd: Harmful exclusions from state healthcare plan.
144	AZSTATE.130286	AZSTATE.130286	8/23/2017	Staci Wilson	Rose Bernal	[REDACTED]	HIPAA/Personally Identifiable Information	Additional Information - Appeal
145	AZSTATE.130407	AZSTATE.130407	8/21/2017	[REDACTED]	Rose Bernal	Staci R. Wilson; Helena A. Rodrigues	HIPAA/Personally Identifiable Information	Appeal Denied
146	AZSTATE.130408	AZSTATE.130409	8/1/2017	Rose Bernal	Staci Wilson		HIPAA/Personally Identifiable Information	RE: Transgender coverage - hormone therapy
147	AZSTATE.130410	AZSTATE.130411	8/1/2017	Rose Bernal	Shannon Daniel	Scott Bender; Yvette Medina	HIPAA/Personally Identifiable Information	FW: Transgender coverage - hormone therapy
148	AZSTATE.136595	AZSTATE.136595	8/1/2017	Staci Wilson	Yvette Medina; Rose Bernal; Scott Bender		HIPAA/Personally Identifiable Information	Transgender coverage - hormone therapy
149	AZSTATE.136602	AZSTATE.136602	6/2/2017	Elizabeth Schafer			HIPAA/Personally Identifiable Information	Blue Cross Blue Shield of Arizona member Satisfaction Survey Results
150	AZSTATE.139839	AZSTATE.139839	4/22/2019	Peter Chiappa			HIPAA/Personally Identifiable Information	Report of ADOA transgender services from Aetna
151	AZSTATE.143577	AZSTATE.143581	1/25/2017				HIPAA/Personally Identifiable Information	Session Roster - 2017 Benefits Liaison Training
152	AZSTATE.143582	AZSTATE.143582	1/26/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda
153	AZSTATE.151751	AZSTATE.151761	2/3/2020				Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	Various notes from Ms. Isaacson
154	AZSTATE.188313	AZSTATE.188313	3/27/2020				HIPAA/Personally Identifiable Information	UnitedHealthcare member Satisfaction Survey Results
155	AZSTATE.189467	AZSTATE.189467	4/6/2020				HIPAA/Personally Identifiable Information	UnitedHealthcare member Satisfaction Survey Results

State of Arizona Privilege/Redaction Log

No.	DocID/ Beg Bates No.	DocID/ End Bates No.	Date	From/ Author	To	CC	Privilege Type	Subject/ Description
156	AZSTATE.190624	AZSTATE.190624	4/10/2020				HIPAA/Personally Identifiable Information	UnitedHealthcare member Satisfaction Survey Results
157	AZSTATE.207655	AZSTATE.207656	8/22/2017	Rose Bernal	Kayla Stivason		HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
158	AZSTATE.207657	AZSTATE.207659	8/22/2017	Kayla Stivason	Erin Russell	Scott Bender	HIPAA/Personally Identifiable Information	FW: Appeal Denied secure
159	AZSTATE.207660	AZSTATE.207662	8/22/2017	Kayla Stivason	Rose Bernal		HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
160	AZSTATE.207663	AZSTATE.207665	8/22/2017	Rose Bernal	Kayla Stivason		HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
161	AZSTATE.207666	AZSTATE.207668	8/22/2017	Kayla Stivason	Rose Bernal	Erin Russell; Scott Bender	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
162	AZSTATE.207669	AZSTATE.207672	8/22/2017	Rose Bernal	Kayla Stivason	Erin Russell; Scott Bender	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
163	AZSTATE.207673	AZSTATE.207676	8/22/2017	Erin Russell	Rose Bernal; Kayla Stivason	Scott Bender	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
164	AZSTATE.207677	AZSTATE.207684	8/25/2017	Scott Bender	Mary Cappabianco; Erin Russell; Kayla Stivason; Rose Bernal	Sean Kirwan	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
165	AZSTATE.207685	AZSTATE.207693	8/25/2017	Erin Russell	Scott Bender; Mary Cappabianco; Kayla Stivason; Rose Bernal	Sean Kirwan	HIPAA/Personally Identifiable Information	RE: Appeal Denied secure
166	AZSTATE.207722	AZSTATE.207724	2/3/2017	Stu Wilbur			Confidential, non-relevant information	Benefits Services Division - Meeting Agenda
167	AZSTATE.235593	AZSTATE.235597	10/29/2020	Rose Bernal	Rose Bernal; Amy Kenney-Hudson		HIPAA/Personally Identifiable Information	2020.10.29
168	EML00007556	EML00007557	10/6/2018	John Fry	Elizabeth Thorson		Attorney-Client Communication	Attorney-Client Privileged Communication
169	EML00012453	EML00012453	1/3/2017	Nicole Ong	Marie Isaacson		Attorney-Client Communication	Federal judge halts transgender protections in Obamacare
170	AZSTATE.246034	AZSTATE.246036	12/15/2016	Marie Isaacson	Christina Corieri	Scott Bender; Nicole Ong	Deliberative Process Privilege - PRODUCED PURSUANT TO COURT ORDER	RE: ACA §1557 Non-Discrimination

EXHIBIT 10

From: Curtis, Ryan <RCurtis@fennemorelaw.com>
Sent: Monday, May 10, 2021 9:27 PM
To: Wall, Jordan
Cc: Eckstein, Paul (Perkins Coie); Yost, Austin C. (Perkins Coie); Wendt, Clair (Perkins Coie); Nyberg, Gina (Perkins Coie); Cohan, Shannon; Abdo, Amy; Berg, Tim; 'Joshua Block'; 'Christine Wee'; Powell, Wesley; Freimuth, Matthew; Sheets, Victoria; Abdalla, Gabriela; Garbacz, Justin
Subject: Toomey v. Arizona - Attorney-Client Privilege [FC-Email.FID11439673]

*** EXTERNAL EMAIL ***

Jordan,

We are writing as follow up to our discussions last week about the attorney-client privilege and whether the privilege has been waived. During our call last week, I explained that State Defendants disagree that there has been any waiver of the privilege. There has been no affirmative defense asserted regarding advice of counsel in the State Defendants' Answer to the Amended Complaint or otherwise. The Response to the First Interrogatory addressed in your letter dated April 28, 2021, noted that ADOA made a decision and also noted that attorney-client communications are privileged. As noted in *Melendres v. Arpaio*, 2015 12911719 (D. Ariz. 2015) (citing *In Re Cnty. Of Erie*, 546 F.3d 222 (2d. Cir. 2008), "In general, disclosing legal counsel was consulted, the subject about which advice of [sic] received, or that action taken based on that advice, does not necessarily waive the privilege." In her deposition, Ms. Isaacson did not say what the legal advice was—only that it was obtained and a decision was made. Further, Ms. Isaacson did not and could not have waived the privilege during her deposition testimony on behalf of the State Defendants. When the client at issue is a corporation or other entity, only those in authority to speak for the entity can assert or waive the privilege. Actions to waive a privilege "must necessarily be undertaken by individuals empowered to act on behalf of the corporation." *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343 (1985). Ms. Isaacson had long since ceased to be an employee of the State when she was deposed. A former employee cannot waive the privilege on behalf of an entity. *Smith v. Ergo Sols., LLC*, 2017 WL 2656096, at *4 (D.D.C. June 20, 2017). The entity controls the attorney-client privilege. The entity asserts it and can waive it, but it must do so through someone with authority. *U.S. v. Graf*, 610 F.3d 1148 (9th Cir. 2010); *Creative Tent Int'l Inc. v. Kramer*, 2015 WL 4638320 (D. Ariz. 2015).

During our call last week, you also raised for the first time whether there was a waiver based on State Defendants' response to Interrogatory #7. That response notes that, among things considered by the State Defendants was a memorandum to Mike Liburdi, General Counsel at the Governor's Office dated August 3, 2016, regarding Affordable Care Act § 1557, and a Memorandum regarding non-discrimination and ACA § 1557 dated July 20, 2016 to Marie Isaacson from outside legal counsel. The response likewise notes that the documents are covered by the attorney-client privilege. This response is not a waiver, but an assertion of the privilege. You seemed to suggest that communication with the Governor's Office constituted a waiver in and of itself. We disagree. For many years, the attorney-client privilege has been extended to cover "common interest" situations. The "common interest" doctrine (also known as the "joint defense" doctrine) provides "an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other." *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). The doctrine enables litigants who share unified interests to exchange privileged communications in order to adequately prepare their cases without losing the protection afforded the privilege. *Id.* The common interest privilege is not limited to "joint defense" situations "or even situations in which litigation has commenced." *See, e.g., U.S. v. Gonalq*, 559 F.3d 974, 978 (9th Cir. 2012) (holding that common interest agreement "may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially

may be codefendants or have common interests in litigation”); *see also, e.g., id.* at 980 (noting that there is no requirement that parties asserting a common interest privilege be defendants in the same action, explaining that “parties in separate actions might nonetheless have reasons to work together toward a common objective, and there is no requirement that actual litigation even be in progress”). Moreover, the “common interests” to which the privilege extends are not limited to “legal” interests, but may also be “factual or strategic in character.” *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76, cmt. e; *see also, e.g., Hunydee v. U.S.*, 355 F.2d 183, 185 (9th Cir. 1965) (affirming that communications may be protected by the common interest privilege, “even though exchanged between attorneys . . . to the extent they concern common issues and are intended to facilitate representation in possible subsequent proceedings”). Because the need to protect the free flow of information from client to attorney logically exists whenever multiple parties share a common interest about a legal matter, courts have extended the joint defense or common interest doctrine to numerous relationships among different parties. *In re Grand Jury Subpoenas*, 89-3 & 89-4, *John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990). This includes parties to *potential* litigation. *Gonalq*, 559 F.3d at 980 (“there is no requirement that actual litigation even be in progress”); *see also United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989) (“it is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply”).

In this case, it is obvious that ADOA and the Governor’s Office have a common legal interest regarding the terms of the health plan. Both could have been named as defendants in litigation potentially to enforce ACA § 1557 or in litigation based on Title VII or Equal Protection claims. Indeed, it has been Plaintiff’s position that both ADOA and the Governor’s Office are subparts of the State of Arizona equally responsible to Plaintiff and the certified classes for the claims at issue. Further, while not a party to this litigation, Plaintiff has certainly involved the Governor’s Office via subpoena, the deposition of Christina Corieri, and its own disputes over discovery directly with the Governor’s Office. Certainly at the time the State Defendants considered the information described in the Response to Interrogatory #7, the State Defendants and the Governor’s Office had a common interest in potential litigation against them. This was also made clear months ago in the State Defendants’ responses to various other interrogatories from Plaintiff.

Ryan C. Curtis, Chair - ERISA & Employee Benefits Practice Group

FENNEMORE.

2394 East Camelback Road, Suite 600, Phoenix, AZ 85016-3429

T: 602.916.5426 | F: 602.916.5626 | M: 480.290.3785

rcurtis@fennemorelaw.com | [View Bio](#)

Admitted in Arizona and Nevada



Fennemore has expanded to California. [Read more here.](#)

CONFIDENTIALITY NOTICE: The information contained in this message may be protected by the attorney-client privilege. If you believe that it has been sent to you in error, do not read it. Please immediately reply to the sender that you have received the message in error. Then delete it. Thank you.

COVID-19: Governors in our markets have deemed law firms essential services. As a result, our offices will be open from 8 am to 5 pm, but most of our team members are working remotely. To better protect our employees and clients, please schedule an appointment before coming to our offices.

EXHIBIT 11

FENNEMORE.

Ryan C. Curtis
Director

Admitted in Arizona and Nevada
rcurtis@fennemorelaw.com

2394 E. Camelback Road, Suite 600
Phoenix, Arizona 85016
PH (602) 916-5426 | FX (602) 916-5626
fennemorelaw.com

May 14, 2021

Victoria Lopez
Christine Wee
ACLU Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
vlopez@acluaz.org
cwee@acluaz.org

Joshua A. Block
Leslie Cooper
American Civil Liberties Union Foundation
125 Broad Street, Floor 18
New York, NY 10004
jblock@aclu.org
lcooper@aclu.org

Wesley R. Powell
Matthew S. Freimuth
Nicholas Reddick
Jordan Wall
Victoria Sheets
Justin Garbacz
Willkie Farr & Gallagher, LLP
787 Seventh Avenue
New York, NY 10019
wpowell@willkie.com
mfreimuth@willkie.com
nreddick@willkie.com
jwall@willkie.com
vsheets@willkie.com
jgarbacz@willkie.com

Re: *Toomey v. State of Arizona, et al.*
Responses and Objections to State Defendants' Discovery Requests

Dear Counsel:

We are writing regarding Plaintiff's April 14, 2021, responses and objections to State Defendants' First Set of Interrogatories and First Set of Requests for Production.

Interrogatory Objections

State Defendants' single interrogatory asked Plaintiff to describe in detail any facts supporting that the Exclusion was created and/or maintained for a discriminatory purpose, and to identify all documents and witnesses who support that the Exclusion was created and/or maintained for a discriminatory purpose. Plaintiff objected to the interrogatory as a premature contention interrogatory. Curiously, Plaintiff cited to Federal Rule of Civil Procedure 33(a)(2), which specifically states that "An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact." It further states that a "court *may* order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." (emphasis added).

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May 14, 2021

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There is no such order in place that justifies Plaintiff's refusal to answer this interrogatory. The case Plaintiff cited to justify its nonresponse explains that generally, such interrogatories need not be answered until discovery is substantially complete. *Core Optical Techs. v. Infinera Corp.*, No. SACV170548AGJPRX, 2018 WL 2684693, at *2 (C.D. Cal. Mar. 7, 2018). However, the court in *Core Optical* still ordered the objecting party to respond to the interrogatory to the best of its ability and to supplement its responses no later than when discovery is substantially complete. *Id.* The objecting party was "equipped to meaningfully respond" based on the discovery that had already occurred. Plaintiff has received numerous documents, discovery responses from State Defendants and ABOR, and has conducted six depositions (nearly all of which were in excess of seven hours including ABOR's questions). Plaintiff is meaningfully equipped to respond to the interrogatory now. If Plaintiff learns of additional grounds during later discovery, Plaintiff may certainly supplement his response. Without an order from the Court that the interrogatory need not be answered, Plaintiff is in violation of Rule 33.

We would be pleased to discuss this with you in the next few days, however, we anticipate that if Plaintiff will not agree to promptly and fully respond to Interrogatory #1, State Defendants will address this through a motion to the Court. Plaintiff cannot simply refuse to respond entirely based on the assertion the interrogatory is a premature contention interrogatory.

Requests for Production

RFP #1:

This request seeks all documents and communications evidencing the harm allegedly suffered by Plaintiff as a result of the Exclusion. Plaintiff declined to produce anything on the basis that Plaintiff is not seeking damages but only injunctive relief and that accordingly, evidence of Plaintiff's harm is irrelevant to any party's claim. The request makes no reference to damages or compensation for some loss or injury. It only references the actual harm—Dr. Toomey's injury, loss, or detriment. Plaintiff cannot refuse to produce documents about harm by unilaterally construing the request as referring to monetary damages rather than the harm for which Dr. Toomey seeks injunctive relief.

Plaintiff also suggests providing any evidence of harm is not necessary because the medical necessity of Dr. Toomey's individual care is not an issue in this case. Plaintiff asserts this because of the Parties' agreement to limit the scope of discovery regarding medical necessity. Specifically, the parties narrowed the issues by agreeing that medical necessity of gender affirming surgery will not be an issue. (Doc. #128 at 11:10-20). But that is wholly unrelated to harm. Request for Production #1 does not address medical necessity of any surgery—it only addresses evidence of Dr. Toomey's harm.

Plaintiff's objections are without merit. Plaintiff must produce documents and communications evidencing harm Plaintiff allegedly suffered due to the Exclusion. If Plaintiff does not claim to have suffered any harm, Plaintiff may so state in response. Likewise, if Plaintiff does not intend to offer any evidence of harm, Plaintiff may state that as well.

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RFP #3:

This request seeks all communications between Plaintiff and any insurance company and/or representative relating to the Exclusion or any healthcare which was denied as a result of the Exclusion. Plaintiff objected and suggests Dr. Toomey has already produced all documents within his custody and control. This response is plainly inadequate as Plaintiff failed to produce any communications between himself and Blue Cross Blue Shield of Arizona (“BCBS”) relating to Plaintiff’s request for a hysterectomy, BCBS’s denial of such request, or the Exclusion.¹ Plaintiff is obligated to produce documents responsive to Request For Production #3.

RFP #5:

This request seeks all documents and communications authored by Dr. Toomey regarding being transgender, transgender health care, transgender discrimination, transgender health care Dr. Toomey has sought and/or received to treat his gender dysphoria, the Plan, the Exclusion, and the denial of his request for gender reassignment surgery. Plaintiff objected to the request as irrelevant and produced nothing, but acknowledged that Dr. Toomey writes extensively about the topics as part of his academic work.

This request is relevant to harm Dr. Toomey allegedly experiences. Additionally, Plaintiff has repeatedly referred to standards of care issued by the World Professional Association for Transgender Health (WPATH), addressed what is commonly accepted in the healthcare as treatments, and argued that Plaintiff and similarly-situated persons are being denied medically necessary care. Dr. Toomey’s writings, as a university professor and Plaintiff in this case, are directly relevant to the extent they directly or indirectly address any of these topics. Plaintiff cannot simply make assertions about standards of care, discrimination transgender individuals experience as a class, and the medical necessity and standards of care for gender dysphoria and expect that they be accepted as true facts if anything he has written professionally or on social media contradicts or otherwise implicates such issues.

We find Plaintiff’s assertions that producing these items is overly burdensome not to be credible. Dr. Toomey’s profile page with the University of Arizona lists numerous publications.² Certainly, if Dr. Toomey needed to obtain these for a professional engagement or opportunity, he could access them. He is seeking relief through the Court and has made affirmative claims against the State and ABOR to provide the coverage he seeks, which comes with the obligation to produce relevant documents. Claims that this is burdensome are also very hollow considering how many documents the State Defendants have reviewed and produced at significant cost and consulted with Plaintiff counsel

¹ Since Plaintiff served its responses and objections, BCBS responded to a subpoena duces tecum issued by the State Defendants and provided responsive documents which include communications with Plaintiff. However, this production does not satisfy Plaintiff’s independent obligation to produce all documents in his possession, custody, and control.

² See https://cals.arizona.edu/fcs/faculty/russell_toomey, last accessed May 14, 2021.

FENNEMORE.

May 14, 2021

Page 4

on numerous occasions to come to compromises for additional searches. The documents and information requested are relevant and proportional to the needs of the case and must be produced.

If you are unwilling to comply with the above requests, let us know your availability for a meet and confer on these issues or on any other matters. This letter is not necessarily a comprehensive summary of State Defendant's issues with Plaintiff's responses and objections to the Interrogatory and Requests for Production, and the State Defendants reserve their right to raise additional deficiencies with Plaintiff's responses. Further, and as you know, we have tentatively scheduled Dr. Toomey's deposition for May 26, 2021. We will need these discovery responses ahead of that deposition with adequate time to review them. Otherwise, we will need to reschedule Dr. Toomey's deposition. Accordingly, please let us know by close of business Monday if Plaintiff will serve supplemental interrogatory responses and produce the documents discussed herein by May 24.

Sincerely,

FENNEMORE CRAIG, P.C.

A handwritten signature in blue ink that reads "Ryan C. Curtis". The signature is written in a cursive style.

Ryan C. Curtis

cc: Paul F. Eckstein
Austin C. Yost
Perkins Coie, LLP
2901 N. Central Ave, Suite 2000
Phoenix, AZ 85012
peckstein@perkinscoie.com
ayost@perkinscoie.com

18419670

EXHIBIT 12

From: Curtis, Ryan <RCurtis@fennemorelaw.com>

Sent: Friday, May 14, 2021 8:19 PM

To: Wall, Jordan <JWall@willkie.com>

Cc: Eckstein, Paul (Perkins Coie) <PEckstein@perkinscoie.com>; Yost, Austin C. (Perkins Coie) <AYost@perkinscoie.com>; Wendt, Clair (Perkins Coie) <CWendt@perkinscoie.com>; Nyberg, Gina (Perkins Coie) <GNyberg@perkinscoie.com>; Cohan, Shannon <scohan@fennemorelaw.com>; Abdo, Amy <amy@fennemorelaw.com>; Berg, Tim <TBerg@fennemorelaw.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; Powell, Wesley <wpowell@willkie.com>; Freimuth, Matthew <mfreimuth@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Abdalla, Gabriela <GAbdalla@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>

Subject: RE: Toomey v. Arizona - Attorney-Client Privilege [FC-Email.FID11439673]

*** EXTERNAL EMAIL ***

Jordan,

Please see the attached letter regarding Plaintiff's responses and objections to State Defendants' prior discovery requests.

Regarding deposition scheduling, Paul Shannon can be available for a deposition on June 18 or 25.

We can take Joan Barrett's deposition on June 24. Please let us know if this works for everyone.

If you have confirmed logistics for how you would like to proceed with Craig Brown's deposition considering his residence in Montana, I can obtain dates for him. As I mentioned last week, he resides in Flathead County, MT, but indicated that he resides about 30 minutes outside of Kalispell, MT, which is the county seat.

Finally, we would be pleased to further discuss in a meet and confer the attorney-client privilege matter addressed below. We did not discuss the issue of any waiver related to State Defendant's interrogatory response #7 related to the Governor's Office as you raised that for the first time during our last meet and confer. We would be interested in discussing on what basis you disagree with the arguments and cases noted in my email below from May 10.

Ryan C. Curtis, Chair - ERISA & Employee Benefits Practice Group

T: 602.916.5426 | F: 602.916.5626 | M: 480.290.3785

rcurtis@fennemorelaw.com

From: Wall, Jordan <JWall@willkie.com>

Sent: Friday, May 14, 2021 3:38 PM

To: Curtis, Ryan <RCurtis@fennemorelaw.com>

Cc: Eckstein, Paul (Perkins Coie) <PEckstein@perkinscoie.com>; Yost, Austin C. (Perkins Coie) <AYost@perkinscoie.com>; Wendt, Clair (Perkins Coie) <CWendt@perkinscoie.com>; Nyberg, Gina (Perkins Coie) <GNyberg@perkinscoie.com>; Cohan, Shannon <scohan@fennemorelaw.com>; Abdo, Amy <amy@fennemorelaw.com>; Berg, Tim <TBerg@fennemorelaw.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; Powell, Wesley <wpowell@willkie.com>; Freimuth, Matthew <mfreimuth@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Abdalla, Gabriela <GAbdalla@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>

Subject: RE: Toomey v. Arizona - Attorney-Client Privilege [FC-Email.FID11439673]

Ryan,

Thank you for the follow-up here. We have reviewed the arguments/cases provided below, and disagree with your positions, including for the reasons stated in our letter of April 28, 2021. Respecting our differences here, we expect that it will be necessary to bring these issues to the Court for consideration.

Thanks,
Jordan

Jordan C. Wall
Willkie Farr & Gallagher LLP
787 Seventh Avenue | New York, NY 10019-6099
Direct: [+1 212 728 8465](tel:+12127288465) | Fax: +1 212 728 9465
jwall@willkie.com | <vCard> | [www.willkie.com bio](http://www.willkie.com/bio)
Pronouns: he, him, his

From: Curtis, Ryan <RCurtis@fennemorelaw.com>
Sent: Monday, May 10, 2021 9:27 PM
To: Wall, Jordan <JWall@willkie.com>
Cc: Eckstein, Paul (Perkins Coie) <PEckstein@perkinscoie.com>; Yost, Austin C. (Perkins Coie) <AYost@perkinscoie.com>; Wendt, Clair (Perkins Coie) <CWendt@perkinscoie.com>; Nyberg, Gina (Perkins Coie) <GNyberg@perkinscoie.com>; Cohan, Shannon <scohan@fennemorelaw.com>; Abdo, Amy <amy@fennemorelaw.com>; Berg, Tim <TBerg@fennemorelaw.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; Powell, Wesley <wpowell@willkie.com>; Freimuth, Matthew <mfreimuth@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Abdalla, Gabriela <GAbdalla@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>
Subject: Toomey v. Arizona - Attorney-Client Privilege [FC-Email.FID11439673]

*** EXTERNAL EMAIL ***

Jordan,

We are writing as follow up to our discussions last week about the attorney-client privilege and whether the privilege has been waived. During our call last week, I explained that State Defendants disagree that there has been any waiver of the privilege. There has been no affirmative defense asserted regarding advice of counsel in the State Defendants' Answer to the Amended Complaint or otherwise. The Response to the First Interrogatory addressed in your letter dated April 28, 2021, noted that ADOA made a decision and also noted that attorney-client communications are privileged. As noted in *Melendres v. Arpaio*, 2015 12911719 (D. Ariz. 2015) (citing *In Re Cnty. Of Erie*, 546 F.3d 222 (2d. Cir. 2008), "In general, disclosing legal counsel was consulted, the subject about which advice of [sic] received, or that action taken based on that advice, does not necessarily waive the privilege." In her deposition, Ms. Isaacson did not say what the legal advice was—only that it was obtained and a decision was made. Further, Ms. Isaacson did not and could not have waived the privilege during her deposition testimony on behalf of the State Defendants. When the client at issue is a corporation or other entity, only those in authority to speak for the entity can assert or waive the privilege. Actions to waive a privilege "must necessarily be undertaken by individuals empowered to act on behalf of the corporation." *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343 (1985). Ms. Isaacson had long since ceased to be an employee of the State when she was deposed. A former employee cannot waive the privilege on behalf of an entity. *Smith v. Ergo Sols., LLC*, 2017 WL 2656096, at *4 (D.D.C. June 20, 2017). The entity controls the attorney-client privilege. The entity asserts it and can waive it, but it must do so through someone with authority. *U.S. v. Graf*, 610 F.3d 1148 (9th Cir. 2010); *Creative Tent Int'l Inc. v. Kramer*, 2015 WL 4638320 (D. Ariz. 2015).

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Ryan C. Curtis, Chair - ERISA & Employee Benefits Practice Group

FENNEMORE.

2394 East Camelback Road, Suite 600, Phoenix, AZ 85016-3429

T: 602.916.5426 | F: 602.916.5626 | M: 480.290.3785

rcurtis@fennemorelaw.com | [View Bio](#)

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EXHIBIT 13

From: Wall, Jordan <JWall@willkie.com>
Sent: Monday, May 17, 2021 1:19 PM
To: 'Curtis, Ryan'
Cc: Eckstein, Paul (Perkins Coie); Yost, Austin C. (Perkins Coie); Wendt, Clair (Perkins Coie); Nyberg, Gina (Perkins Coie); Cohan, Shannon; Abdo, Amy; Berg, Tim; 'Joshua Block'; 'Christine Wee'; Powell, Wesley; Freimuth, Matthew; Sheets, Victoria; Abdalla, Gabriela; Garbacz, Justin
Subject: RE: Toomey v. Arizona - Attorney-Client Privilege [FC-Email.FID11439673]

Ryan,

We have reviewed your letter of May 14, and have at least partial thoughts on some of the issues raised therein. Although we have not heard back from you regarding the below, we propose a comprehensive meet-and-confer tomorrow to address parts of that May 14 letter, as well as the below. 2:00 PM NY / 11:00 AM Arizona would work on our end.

Thanks,
Jordan

Jordan C. Wall
Willkie Farr & Gallagher LLP
787 Seventh Avenue | New York, NY 10019-6099
Direct: [+1 212 728 8465](tel:+12127288465) | Fax: +1 212 728 9465
jwall@willkie.com | <vCard> | [www.willkie.com bio](http://www.willkie.com/bio)
Pronouns: he, him, his

From: Wall, Jordan <JWall@willkie.com>
Sent: Saturday, May 15, 2021 1:27 PM
To: 'Curtis, Ryan' <RCurtis@fennemorelaw.com>
Cc: Eckstein, Paul (Perkins Coie) <PEckstein@perkinscoie.com>; Yost, Austin C. (Perkins Coie) <AYost@perkinscoie.com>; Wendt, Clair (Perkins Coie) <CWendt@perkinscoie.com>; Nyberg, Gina (Perkins Coie) <GNyberg@perkinscoie.com>; Cohan, Shannon <scohan@fennemorelaw.com>; Abdo, Amy <amy@fennemorelaw.com>; Berg, Tim <TBerg@fennemorelaw.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; Powell, Wesley <wpowell@willkie.com>; Freimuth, Matthew <mfreimuth@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Abdalla, Gabriela <GAbdalla@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>
Subject: RE: Toomey v. Arizona - Attorney-Client Privilege [FC-Email.FID11439673]

Ryan,

Thank you for the correspondence. We did not receive your letter until after the close of business on Friday, May 14, Arizona time, and our late evening. Your demand for a response by close of business Monday, May 15, does not allow us time to meaningfully review or consider the arguments raised in your letter. We will therefore respond once we have had a reasonable time to review and discuss.

We will let you know about those dates for Mr. Shannon and Mr. Craig's respective depositions. As for Ms. Barrett, as previously requested, please provide us with a few dates when State Defendants are available to take this deposition as we must consider both her and our own schedules. We will discuss whether the 24th will work in the meantime.

With respect to the waiver argument, we articulated our reasons for believing a waiver has occurred during the parties' meet and confer, which you then asked for time to consider. You have now addressed each of the specific arguments we raised for your consideration in your response below, and disagreed with us on every point. We therefore think this issue is fully developed, and that the parties have personally consulted and made a sincere effort to resolve this dispute, but to no avail.

We are available to further meet and confer about this specific waiver argument on Monday, May 15th however if State Defendants sincerely believe the parties may be able to resolve this dispute. As noted in our discussions about the discovery schedule, time is of the essence here given the relatively short extension of the discovery deadlines, the time it may take to fully brief this matter before the court if necessary, and the potential impact of this dispute on the scheduled depositions. We will not agree to further delay submission of this dispute to the court beyond a meet and confer on Monday absent agreement for expediting any briefing, if motion practice remains necessary.

Thanks,
Jordan

Jordan C. Wall
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787 Seventh Avenue | New York, NY 10019-6099
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From: Curtis, Ryan <RCurtis@fennemorelaw.com>
Sent: Friday, May 14, 2021 8:19 PM
To: Wall, Jordan <JWall@willkie.com>
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*** EXTERNAL EMAIL ***

Jordan,

Please see the attached letter regarding Plaintiff's responses and objections to State Defendants' prior discovery requests.

Regarding deposition scheduling, Paul Shannon can be available for a deposition on June 18 or 25.

We can take Joan Barrett's deposition on June 24. Please let us know if this works for everyone.

If you have confirmed logistics for how you would like to proceed with Craig Brown's deposition considering his residence in Montana, I can obtain dates for him. As I mentioned last week, he resides in Flathead County, MT, but indicated that he resides about 30 minutes outside of Kalispell, MT, which is the county seat.

Finally, we would be pleased to further discuss in a meet and confer the attorney-client privilege matter addressed below. We did not discuss the issue of any waiver related to State Defendant's interrogatory response #7 related to the Governor's Office as you raised that for the first time during our last meet and confer. We would be interested in discussing on what basis you disagree with the arguments and cases noted in my email below from May 10.

Ryan C. Curtis, Chair - ERISA & Employee Benefits Practice Group

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rcurtis@fennemorelaw.com

From: Wall, Jordan <JWall@willkie.com>

Sent: Friday, May 14, 2021 3:38 PM

To: Curtis, Ryan <RCurtis@fennemorelaw.com>

Cc: Eckstein, Paul (Perkins Coie) <PEckstein@perkinscoie.com>; Yost, Austin C. (Perkins Coie) <AYost@perkinscoie.com>; Wendt, Clair (Perkins Coie) <CWendt@perkinscoie.com>; Nyberg, Gina (Perkins Coie) <GNyberg@perkinscoie.com>; Cohan, Shannon <scohan@fennemorelaw.com>; Abdo, Amy <amy@fennemorelaw.com>; Berg, Tim <TBerg@fennemorelaw.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; Powell, Wesley <wpowell@willkie.com>; Freimuth, Matthew <mfreimuth@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Abdalla, Gabriela <GAbdalla@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>

Subject: RE: Toomey v. Arizona - Attorney-Client Privilege [FC-Email.FID11439673]

Ryan,

Thank you for the follow-up here. We have reviewed the arguments/cases provided below, and disagree with your positions, including for the reasons stated in our letter of April 28, 2021. Respecting our differences here, we expect that it will be necessary to bring these issues to the Court for consideration.

Thanks,
Jordan

Jordan C. Wall

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From: Curtis, Ryan <RCurtis@fennemorelaw.com>

Sent: Monday, May 10, 2021 9:27 PM

To: Wall, Jordan <JWall@willkie.com>

Cc: Eckstein, Paul (Perkins Coie) <PEckstein@perkinscoie.com>; Yost, Austin C. (Perkins Coie) <AYost@perkinscoie.com>; Wendt, Clair (Perkins Coie) <CWendt@perkinscoie.com>; Nyberg, Gina (Perkins Coie) <GNyberg@perkinscoie.com>; Cohan, Shannon <scohan@fennemorelaw.com>; Abdo, Amy <amy@fennemorelaw.com>; Berg, Tim <TBerg@fennemorelaw.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; Powell, Wesley <wpowell@willkie.com>; Freimuth, Matthew <mfreimuth@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Abdalla, Gabriela <GAbdalla@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>

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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; et al.,

Defendants.

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

[PROPOSED] ORDER

The Court having reviewed Plaintiff Russell B. Toomey’s Motion Compelling Production of Documents (Doc. _____) and finding good cause,

IT IS ORDERED:

1. Plaintiff’s Motion is GRANTED.

2. State of Arizona, Andy Tobin, and Paul Shannon (“State Defendants”) are hereby compelled to produce all the documents currently withheld on the basis of attorney-client privilege with respect to legal advice they received on the legality of the Exclusion as State Defendants have waived this privilege.

3. State Defendants shall produce the documents above within 14 days of the date of this Order.

Dated this _____ day of _____, 2021.

Leslie A. Bowman
United States Magistrate Judge