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9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 Russell B. Toomey,

12 Plaintiff,

13 v.

14 State of Arizona, *et al.*

15 Defendants.
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No. 4:19-cv-00035

**DEFENDANTS STATE OF
ARIZONA'S, ANDY TOBIN'S, AND
PAUL SHANNON'S OPPOSITION
TO PLAINTIFF'S (SECOND)
MOTION TO COMPEL**

1 Defendants State of Arizona, Andy Tobin, and Paul Shannon (collectively, the “State
2 Defendants”) hereby oppose Plaintiff Russell B. Toomey’s Motion to Compel the
3 production of documents withheld under the attorney-client privilege (the “Motion”), filed
4 May 20, 2021.

5 Plaintiff’s Motion misconstrues the facts and law regarding the attorney-client
6 privilege and waiver, and is wholly inaccurate regarding the nature of communications at
7 issue and the relationship between the Arizona Department of Administration (“ADOA”)
8 and the Governor’s Office. The State Defendants have not waived the privilege—
9 intentionally or unintentionally. Plaintiff incorrectly argues the State Defendants asserted
10 an advice of counsel defense through interrogatory responses and deposition testimony. A
11 proper reading of the interrogatory responses shows there was no such assertion of a defense
12 of advice of legal counsel. Alternatively, Plaintiff argues the State Defendants waived the
13 privilege by disclosing the content of legal advice through the deposition testimony of a
14 *former* ADOA employee or through disclosures to the Governor’s Office. Plaintiff fails to
15 recognize the powers and duties of Arizona’s Governor under Arizona’s Constitution and
16 state law. ADOA and the Governor’s Office easily meet the requirements of the common
17 interest doctrine that expands the scope of the attorney-client privilege.

18 The attorney-client privilege is important for all clients but is critical for
19 governmental entities to seek legal advice without fear of consequences or the apprehension
20 of disclosure. However, Plaintiff’s argument puts the State Defendants in a no-win situation.
21 Plaintiff suggests that because the State Defendants acknowledge they wanted to follow the
22 law, obtained legal advice, and made a decision addressing new non-discrimination rules
23 issued in 2016 under the Affordable Care Act (“ACA”) § 1557,¹ that the State Defendants
24 broadly waived the attorney-client privilege. However, had the State Defendants *not* sought
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26 ¹ ACA § 1557 is codified at 42 U.S.C. § 18116.

1 legal advice about those new rules, Plaintiff certainly would be condemning them for failing
2 to do so. Under Plaintiff's arguments, the State Defendants are damned if they do and
3 damned if they don't. The effect of such reasoning is that government officials will be
4 discouraged from seeking legal counsel, which undermines good public policy and the
5 purpose of the attorney-client privilege.

6 The attorney-client privilege is not overcome. The Court should deny the Motion.

7 **I. THE COURT SHOULD DENY PLAINTIFF'S MOTION TO COMPEL.**

8 Parties may obtain discovery about any *nonprivileged* matter. Fed. R. Civ. P.
9 26(b)(1). Nothing in the Federal Rules of Civil Procedure authorizes a party to demand the
10 production of privileged documents, but that is what Plaintiff seeks. A party may move the
11 Court for an order compelling disclosure or discovery. Fed. R. Civ. Pro. 37. The burden
12 falls on the moving party to demonstrate the non-moving party's objection is unjustified.
13 *Ocean Garden Prod. Inc. v. Blessings Inc.*, No. CV-18-00322-TUC-RM, 2020 WL
14 4284383, at *2 (D. Ariz. July 27, 2020). As the moving party, Plaintiff further bears the
15 burden of identifying (i) the specific documents that are the subject of his motion and (ii)
16 why the State Defendants' assertions of privilege as to those documents are not justified.
17 *See, e.g., Hawkins v. Winkfield*, 219CV1228TLNKJNP, 2021 WL 1193421, *1-2 (E.D. Cal.
18 March 30, 2021). Plaintiff fails in both regards. Plaintiff's Motion does not identify the
19 specific documents at issue. *See id.* ("generalized identification" of the discovery requests
20 is insufficient). And Plaintiff fails to demonstrate that there has been any waiver of the
21 attorney-client privilege. Moreover, the State Defendants demonstrate herein that they have
22 not waived the privilege.

23 **A. The Attorney-Client Privilege.**

24 "The attorney-client privilege is the oldest of the privileges for confidential
25 communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383,
26 389, 101 S. Ct. 677 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961).

1 Its purpose is to “encourage full and frank communications between attorneys and their
2 clients and thereby promote broader public interest in the observance of law and
3 administration of justice.” *Id.* The privilege is necessary because proper legal assistance can
4 only be given when it is free from “consequences or the apprehension of disclosure.” *Id.*
5 (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

6 The privilege is not restricted to clients who are individuals. It applies to clients that
7 are corporations and other entities. *Id.* at 389–90 (citing *United States v. Louisville &*
8 *Nashville R. Co.*, 236 U.S. 318, 336 (1915)); *see also*, *Commodity Futures Trading Comm’n*
9 *v. Weintraub*, 471 U.S. 343, 348 (1985) (inanimate entities can assert the attorney client
10 privilege just as an individual can). Government entities are no different. Under Arizona
11 law, communications between a lawyer for a governmental entity and that entity’s
12 employees or agents are privileged when the communications are for obtaining or providing
13 legal advice. A.R.S. § 12-2234(B). Allowing the government to engage in privileged
14 communications with legal counsel is important. As the Second Circuit explained,

15 In the context of legal advice to government officials, the
16 privilege furthers a culture in which consultation with
17 government lawyers is accepted as a normal, desirable, and
18 even indispensable part of conducting public business.
Abrogating the privilege undermines that culture and thereby
impairs the public interest.

19 *Am. C.L. Union v. Nat’l Sec. Agency*, 925 F.3d 576, 589 (2d Cir. 2019) (internal quotations
20 omitted). The privilege applies with “special force” in the government context because the
21 privilege encourages government officials formulating policies in the public interest to
22 consult with counsel. *Modesto Irrigation Dist. v. Gutierrez*, 1:06-CV00453 OWWDLB,
23 2007 WL 763370 (E. D. Cal. Mar. 9, 2007).

24 The privilege is not absolute. There are conditions where the privilege can be
25 overcome including when advice of counsel is used as an affirmative defense, or when the
26 privileged is waived through disclosure. Neither of those has happened in this case.

1 **B. State Defendants Have Not Asserted An Advice of Counsel Defense.**

2 Plaintiff argues that the attorney-client privilege is overcome because the State
3 Defendants have asserted the “advice of counsel defense.” This is not accurate. The State
4 Defendants have not asserted advice of counsel as an affirmative defense in its Answer to
5 the Amended Complaint. (Doc. 89 at 27:9–29:9.) The advice of counsel defense need not
6 be asserted in a pleading, but it must be done through some affirmative act by a party to the
7 case. *U.S. v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999). A court must examine whether
8 the party, “through this affirmative act,” puts the privileged information at issue. *Id.*

9 **1. Interrogatory Responses Did Not Waive the Privilege.**

10 Plaintiff claims the State Defendants affirmatively asserted an advice of counsel
11 defense in responses to Interrogatory Nos. 1, 4, and 7. (Doc. 195 at 4:2-7.) As discussed
12 below, the State Defendants did not affirmatively assert an advice of counsel defense nor
13 did they imply one in any of those responses.

14 “In general, disclosing that legal counsel was consulted, the subject about which
15 advice [was] received, or that action was taken based on that advice, does not necessarily
16 waive the privilege protection.” *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2015
17 WL 12911719, at *3 (D. Ariz. May 14, 2015). In their interrogatory responses, the State
18 Defendants disclosed that legal counsel was consulted and the subject for which advice it
19 received. (Doc. 195-3, Ex. 3 at 3, 5, 7-8.) That is insufficient to waive the privilege. The
20 State Defendants did not state: (i) what the legal advice was; (ii) whether there was any
21 recommendation from legal counsel; (iii) whether they relied upon legal counsel’s advice;
22 (iv) whether actions were based on or justified by legal advice; or (v) what attorneys gave
23 legal advice—whether outside legal counsel, in-house counsel at ADOA or the Governor’s
24 Office, or the Attorney General’s Office. *Id.*

25 In some cases, when the subjective intent of the of a party is at issue, a party may
26 waive the privilege by stating that its decision or actions were justified by the legal advice

1 it received. *Melendres*, 2015 WL 12911719, at *3. Nothing in the interrogatory responses
2 indicate that legal advice justified any decision by the State Defendants. (Doc. 195-3, Ex. 3
3 at 3, 5, 7-8.) An analysis of the State Defendants’ responses cited by Plaintiff demonstrates
4 there was no advice of counsel defense asserted.

5 a. Response to Interrogatory No. 1.

6 Plaintiff incorrectly suggests the State Defendants asserted advice of counsel defense
7 and waived the privilege when explaining why the State Health Plan does not cover gender
8 reassignment surgery. (Doc. 195-3, Ex. 3. at 4:4-14.) The State Defendants did not put the
9 legal advice they received at issue, but only stated what the law was at the time of the
10 decision to expand transgender benefits while continuing to exclude surgeries. The State
11 Defendants did not state what the legal advice was and did not even state that they relied on
12 advice from legal counsel. The State Defendants further stated that the legal advice received
13 is privileged. (*Id.* at 3:17-18.) This was an *assertion* of the privilege, not a *waiver*.

14 Plaintiff wants the privileged communication in hopes of showing discriminatory
15 intent. Plaintiff’s desire does not make the privileged communications discoverable.
16 Plaintiff and the Court need only consider the facts stated in the response to the
17 Interrogatory regarding the status of the law that provided a backdrop to the State
18 Defendants’ consideration of changes to the Health Plan. At that time (in 2016), health plans
19 were not required under Title VII of the Civil Rights Act or the Equal Protection Clause to
20 cover transgender benefits. Discrimination on the basis of sex under Title VII or Equal
21 Protection did not include transgender status. State Defendants’ 2016 decision to expand
22 coverage but keep the exclusion for “gender reassignment surgery” came four years prior
23 to the Supreme Court’s decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731
24 (2020). Even *Bostock* was not dispositive on the issue of transgender benefit coverage.²

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26 ² *Id.* at 1741 (Alito, J., dissenting) (“Healthcare benefits may emerge as an intense
battleground under the Court’s holding.”).

1 ADOA reviewed and *expanded* coverage for transgender services shortly after new
2 rules had been issued by the Office of Civil Rights (“OCR”) of the United States
3 Department of Health and Human Services (“HHS”). HHS issued a final rule implementing
4 non-discrimination provisions under § 1557 on May 18, 2016 (the “2016 Rules”).³ Notably,
5 the 2016 Rules prohibited entities subject to the rules from including categorical exclusions
6 or limitations for health services related to “gender transition.” 45 CFR § 92.207(b)(4)
7 (2016). However, the 2016 Rules did not affirmatively require coverage of any particular
8 procedure or treatment for gender transition-related care. *Id.* at § 92.207(d) (“Nothing in
9 this section is intended to determine, or restrict a covered entity from determining, whether
10 a particular health service is medically necessary or otherwise meets applicable coverage
11 requirements in any individual case”). Further, even if the 2016 Rules required that all
12 transition-related surgeries be covered, they were then being challenged in court to
13 determine if they were valid or whether they exceeded what is meant by “on the basis of
14 sex” under the law.

15 The language of § 1557 is concise. Regarding discrimination on different bases,
16 § 1557 incorporates different federal discrimination laws. *See* 42 U.S.C. § 18116 (A). For
17 discrimination on the basis of sex, § 1557 incorporates Title IX of the Education
18 Amendments of 1972 (20 U.S.C. § 1681 et seq.). *Id.*⁴ Challenges to the validity of the 2016
19 Rules occurring when the State Defendants were considering changes to the State Health
20 Plan focused on whether the 2016 Rules improperly exceeded the scope of what is meant
21 by discrimination on the basis of sex in Title IX.⁵

22 _____
23 ³ *See*, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 96, 31376 (May
18, 2016) (codified at 45 C.F.R. pt. 92).

24 ⁴ Section 1557 does not incorporate Title VII of the Civil Rights Act to define discrimination
“on the basis of sex.”

25 ⁵ The purpose of Title IX, when passed into law in 1972, was to establish equal educational
26 opportunities for women and men. *Lothes v. Butler Cnty. Juvenile Rehab. Ct.*, 243 Fed.
App’x. 950, 955 (6th Cir. 2007). Discrimination on the basis of sex under Title IX originally

1 On December 31, 2016, the United States District Court for the Northern District of
 2 Texas granted a motion for preliminary injunction enjoining HHS from enforcing § 1557
 3 prohibitions against discrimination on the basis of gender identity because the definition of
 4 sex under the 2016 Rules exceeded the scope of Title IX. *Franciscan All., Inc. v. Burwell*,
 5 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016). This case and related motions were pending
 6 when the ADOA was evaluating how it would address § 1557. In fact, the day after Texas
 7 District Court’s ruling, the State Health Plan *expanded* transgender benefits to include
 8 hormone and counseling treatment, effective January 1, 2017.⁶

9 There has continued to be uncertainty regarding the validity and enforcement of
 10 § 1557. HHS issued new rules under § 1557 on June 19, 2020. *See* Nondiscrimination in
 11 Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg.
 12 37,160 (June 19, 2020). A few months later, the Federal District Court for the Eastern
 13 District of New York issued a preliminary injunction against the enforcement of those new
 14 rules. *Walker v. Azar*, No. 20CV2834FB SMG, 2020 WL 4749859, at *10 (E.D.N.Y. Aug.
 15 17, 2020). Only recently (May 10, 2021), HHS announced that OCR would begin enforcing
 16 § 1557 and Title IX’s prohibition on discrimination based on sex including discrimination
 17

18 _____
 19 meant male and female under traditional binary concepts of sex that is consistent with a
 20 person’s birth or biological sex. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th
 21 Cir. 2007). For many years, including shortly prior to the ADOA’s decision to modify the
 22 Exclusion, courts held that discrimination on the basis of gender identity was not covered
 23 by Title IX. *See e.g., Johnston v. Univ. Pittsburgh*, 97 F.Supp. 3d 657 (W.D. Penn 2015).

24 ⁶ Other cases challenging the meaning of “on the basis of sex” under Title IX were also
 25 occurring in 2016 when the State Defendants were considering changes to the Exclusion.
 26 On August 21, 2016, the Federal District Court for the District of Northern Texas issued a
 preliminary injunction enjoining the Department of Education from enforcing guidance it
 had issued regarding transgender student access to school facilities including restrooms.
Texas v. United States, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016). The guidance, which
 included gender identity under Title IX protections against discrimination on the basis of
 sex, exceeded the scope and plain meaning of Title IX. *Id.* at 832-33. (“It cannot be disputed
 that the plain meaning of the term sex as used in § 106.33 when it was enacted . . . following
 passage of Title IX meant the biological and anatomical differences between male and
 female students as determined at their birth.”).

1 on the basis of gender identity.⁷

2 In summary, regarding the State Defendants' response to Interrogatory No. 1, it only
3 explained the context behind the State Defendants' 2016 decision as to the scope of their
4 obligations. The State Defendants did not assert an advice of counsel defense, did not state
5 what the legal advice was, did not indicate from whom any advice was received, and did
6 not even state that they relied on advice from legal counsel. There was no waiver. Plaintiff's
7 unexplained skepticism of the "State Defendants' actual understanding of the legality of the
8 Exclusion" is no basis to force a governmental entity to divulge privileged communications.
9 (Doc. 195 at 4, n. 2.) Plaintiff's logic would leave the attorney-client privilege susceptible
10 to the unchecked skepticism of litigants or their counsel.

11 b. Response to Interrogatory No. 4.

12 Plaintiff next asserts that when the State Defendants identified persons who
13 participated in "formulating, adopting, maintaining, reviewing, approving or deciding to
14 continue" the Exclusion, the State Defendants somehow waived the privilege because three
15 of the six people identified were lawyers. The notion is baseless. Plaintiff would have the
16 Court hold that a waiver of privileged communications occurs whenever a party
17 acknowledges that a lawyer was present at a meeting. This simply undercuts the privilege
18 entirely since privileged communications can only occur when the conversation at issue
19 involved the lawyer and his or her client. Indeed, if there were no lawyers listed as being
20 present at the meeting, Plaintiff would have undoubtedly argued that the State Defendants
21 were negligent in making a decision about the 2016 Rules without the assistance of lawyers
22 and would have accused the State Defendants of discriminatory intent for *not* consulting
23 with lawyers about the scope of their obligations. There was no statement in the
24

25 ⁷ See [https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-](https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html)
26 [discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html](https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html) (last
visited June 1, 2021).

1 interrogatory response about any legal advice.

2 Interrogatory No. 4 was also a compound question. A person listed could have been
3 involved in reviewing the Exclusion, but might not have been involved in any other way
4 such as formulating, adopting, maintaining, approving, or deciding anything about the
5 Exclusion. Plaintiff's clearly overreaching argument is no basis for the Court to determine
6 the State Defendants waived the privilege.

7 c. Response to Interrogatory No. 7.

8 Plaintiff argues that the State Defendants asserted an advice of counsel defense and
9 thereby waived the attorney-client privilege by noting that the State Defendants
10 "considered" two memos regarding § 1557. One memo was from outside legal counsel and
11 the other was a memo to legal counsel at the Governor's Office about the memo from
12 outside legal counsel. (Doc. 195-3, Ex. 3 at 7:17–8:1.) The State Defendants did not disclose
13 any legal advice contained therein, did not indicate there was a recommendation from legal
14 counsel, and did not state that the State Defendants relied on any advice of legal counsel.
15 (*Id.*) The input of outside legal counsel was only described as a summary concerning
16 implications of § 1557 and transgender coverage requirements. (*Id.*) The response only said
17 the State Defendants "considered" counsel's summary among various other information
18 ADOA gathered, including information from insurers and other entities regarding their
19 experience providing transgender benefits. (*Id.*) The only other reference to the identified
20 communications was that they are covered by the attorney-client privilege. (*Id.* at 7:22-23.)
21 This was an assertion of the privilege—not a waiver. State Defendant's response to
22 Interrogatory No. 7 is no basis for the Court to determine that the State Defendants have
23 asserted an advice of counsel defense and no reason to conclude the State Defendants
24 waived the privilege.

25 **C. Deponent Testimony Did Not Waive The Privilege.**

26 Plaintiff next argues that deposition testimony of two deponents were affirmative

1 acts by a party resulting in the assertion of the advice of counsel defense and the waiver of
 2 the privilege. This is wrong for two reasons.

3 **1. Deponents Had No Authority To Waive Attorney-Client Privilege.**

4 When the client at issue is a corporation or other entity, only those in authority to
 5 speak for the entity can assert or waive the privilege. *Commodity Futures Trading Com'n*
 6 *v. Weintraub*, 471 U.S. 343, 348 (1985). Inanimate entities do not speak directly to lawyers,
 7 but act through their agents. *Id.* Likewise, entities cannot directly assert or waive a privilege,
 8 but may do so through individuals “empowered to act on behalf of” the entity. *Id.*⁸ Those
 9 without authority to speak on behalf of an entity cannot waive the privilege. *Id.* As the
 10 United States Supreme Court explained,

11 [W]hen control of a corporation passes to new management,
 12 the authority to assert and waive the corporation’s attorney-
 13 client privilege passes as well. New managers installed as a
 14 result of a takeover, merger, loss of confidence by
 15 shareholders, or simply normal succession, may waive the
 16 attorney-client privilege with respect to communications made
 by former officers and directors. Displaced managers may not
 assert the privilege over the wishes of current managers, even
 as to statements that the former might have made to counsel
 concerning matters within the scope of their corporate duties.

17 *Id.* at 349.

18 No statement by Scott Bender or former ADOA employee Marie Isaacson can waive
 19 the privilege because neither of them have authority to speak on behalf of Defendants Andy
 20 Tobin or Paul Shannon in their official capacities or on behalf of Defendant State of
 21 Arizona. Director Tobin and Mr. Shannon can speak for themselves in their official
 22 capacities, and neither Ms. Isaacson as a former ADOA employee (Declaration of Ryan
 23 Curtis (“Curtis Decl.”), Ex. 14 at 87:19–88:9, filed concurrently, incorporated by reference),
 24 nor Mr. Bender as a benefits manager (Curtis Decl., Ex. 15 at 16:20–17:12) has authority

25 _____
 26 ⁸ As discussed above, governmental entities are not different than corporations or other
 entities when it comes to the attorney-client privilege.

1 to speak on behalf of the State of Arizona.

2 Plaintiff relies almost exclusively on testimony given by former ADOA employee
3 Marie Isaacson. Ms. Isaacson retired from State employment in 2018. (Curtis Decl., Ex. 14
4 at 87:19–88:9.) When she testified at her deposition on March 26, 2021, she was a former
5 employee and had no authority to speak on behalf of the State Defendants. She could not
6 waive the privilege any more than she could assert the privilege. *Smith v. Ergo Sols., LLC*,
7 No. CV 14-382 (JDB), 2017 WL 2656096, at *4 (D.D.C. June 20, 2017). “[A]ny privilege
8 that exists as to a corporate officer’s role and functions within a corporation belongs to the
9 corporation and not the officer.” *U.S. v. Graf*, 610 F.3d 1148, 1159 (9th Cir. 2010) (quoting
10 *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1986)).
11 This all means that after Ms. Isaacson left ADOA, she had no authority to speak on behalf
12 of ADOA. Any authority she had to waive the privilege ended when she left ADOA.

13 **2. No Statements By Deponents Asserted An Advice of Counsel**
14 **Defense.**

15 Even if Ms. Isaacson or Mr. Bender had authority to waive the attorney-client
16 privilege, nothing they said during their depositions asserted an advice of counsel defense
17 or waived the privilege. The Motion mischaracterizes deposition testimony, describing Ms.
18 Isaacson’s and Mr. Bender’s testimony as stating that “legal advice” and “advice about what
19 ADOA was required or not required to cover was the primary basis of ADOA’s decision.”
20 (Doc. 195 at n.4.) The referenced deposition testimony, however, does not contain any
21 reference to “legal advice” or even “advice.” (Doc. 195-3, Ex. 6 at 31:8-13); (Doc. 195-3,
22 Ex. 7 at 167:12–168:3.)

23 Moreover, despite Mr. Bender sitting through a full day of deposition questions,
24 Plaintiff only referred to a few lines of Mr. Bender’s deposition transcript to suggest he
25 asserted an advice of counsel defense on behalf of the State Defendants. (Doc. 195-3, Ex. 7
26 at 167:12–168:3.) Mr. Bender testified, regarding the reasons for maintaining the Exclusion,

1 that “I *believe* there are several reasons, one being cost and the other being we didn’t *feel* it
2 was required for us to include -- or to eliminate the exclusion” (*Id.* (emphasis added).)
3 Mr. Bender made no reference to legal advice or anything definitive about the laws at issue.
4 He only said ADOA *felt* it was not required to cover reassignment surgery. Mr. Bender,
5 recalling in 2021, *beliefs* and *feelings* he may have had five years prior in 2016 about what
6 level of transgender benefits had to be covered is no basis to find that the privilege is waived.

7 **D. The Privilege Was Not Waived Based On Any Voluntary Disclosure.**

8 Plaintiff’s final alternate argument is that the privilege was waived based on
9 voluntary disclosures. First, Plaintiff again asserts that Ms. Isaacson volunteered the content
10 of legal advice during her deposition and thereby waived the privilege for all
11 communications under that subject matter. Second, Plaintiff argues that the privilege was
12 waived by Ms. Isaacson providing a copy of a legal memo the ADOA had received from
13 outside legal counsel to the Governor’s Office. Both of these arguments are flawed.

14 **1. Only Parties Can Waive The Privilege.**

15 Plaintiff once again turns to deposition testimony by Ms. Isaacson to argue that she
16 waived the privilege by divulging the content of the advice of legal counsel.⁹ Plaintiff’s
17 argument is again flawed because Ms. Isaacson is not a party.

18 First, Plaintiff repeatedly mischaracterizes Ms. Isaacson’s deposition testimony to
19 argue that she disclosed “the content” and “the substance of the legal advice provided to
20 State Defendants regarding the Exclusion.” The deposition testimony attached to Plaintiff’s
21 Motion does not support these assertions. Plaintiff states, for example, “Ms. Isaacson
22 disclosed the content of this legal advice to Ms. Christina Corieri, a representative of the
23 Governor’s Office, in telephone calls.” (Doc. 195 at 6:11-13.) Ms. Isaacson actually
24 testified, however, not that she disclosed the content of the legal advice to Ms. Corieri, but

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26 ⁹ Plaintiff makes no reference to any deposition testimony Mr. Bender gave that divulged
the content of legal advice ADOA received regarding the Exclusion.

1 that she simply shared the fact that ADOA engaged legal counsel to research the legal
2 requirements. (Curtis Decl., Ex. 14 at 42:6-18.) Plaintiff later characterizes Ms. Isaacson as
3 “forthrightly disclos[ing] some of the content of legal advice received by State Defendants
4 regarding the legality of the Exclusion . . . without prompting from the examining counsel.”
5 (Doc. 195 at 13:11–15.) Yet the cited portion of Ms. Isaacson’s testimony, which was made
6 in response to questions from examining counsel, does not reference legal advice. (Doc.
7 195-3, Ex. 6 at 19:6–24.)

8 Second, as Plaintiff noted, “[t]he Ninth Circuit has adopted a three-prong test to
9 evaluate whether a *party* has waived the attorney-client privilege.” (Doc. 195 at 8:10-13
10 (emphasis added).) The first prong is that “the court considers whether the *party* is asserting
11 the privilege as the result of some affirmative act.” *Amlani*, 169 F.3d at 1195 (emphasis
12 added). Ms. Isaacson is not a party and was not affiliated with any party once she retired in
13 2018. She cannot waive the privilege on behalf of a party.

14 Plaintiff cites to numerous cases as examples of waiver of the privilege. In each of
15 those cases, parties, who held the privilege, took some action to waive the privilege. *Amlani*,
16 169 F.3d at 1191 (criminal defendant and party to the case, Altaf Amlani, waived the
17 privilege); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1163 (9th Cir. 1992) (defendant
18 and party Pennzoil waived the privilege); *Weil v. Investment/Indicators, Research and*
19 *Management, Inc.*, 647 F.2d 18, 7 (9th Cir. 1981) (“We conclude, therefore, that the Fund
20 [Investment/Indicators] has waived its attorney-client privilege”); *Melendres v. Arpaio*, No.
21 CV-07-2513-PHX-GMS, 2015 WL 12911719, at *2 (D. Ariz. May 14, 2015) (“Defendant
22 Sheriff Arpaio implicitly invoked the defense of advice of counsel by testifying that he had
23 delegated MCSO’s compliance with Preliminary Injunction to “counsel and relied on them
24 to abide by this order”); *State Farm Mut. Auto. Ins. Co., v. Lee*, 13 P.3d 1169 (Ariz. 2011)
25 (“State Farm implicitly asserted the advice of counsel as a defense when it made its claim
26 of good-faith conduct turn on its legal research.”); *U.S. v. Sanmina Corporation*, 958 F.3d

1 1107, 1125 (9th Cir. 2020) (“Sanmina waived the attorney-client privilege when it disclosed
2 the Attorney Memos to DLA Piper”); *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th
3 Cir. 2010) (“the district did not clearly err by concluding that Hernandez waived both
4 privileges as they pertained to the conspiracy claim”).

5 Plaintiff has cited to no authority in which a non-party witness, including a witness
6 who is a former employee, could waive the attorney-client privilege for her former
7 employer. Plaintiff never addresses the fact Ms. Isaacson is a non-party former employee
8 who cannot waive the privilege even though the State Defendants provided contrary
9 authorities to Plaintiff by email on May 10, 2021. (Doc. 195-3, Ex. 12 at p. 2.)

10 **2. Communications With the Governor’s Office Are Attorney-Client**
11 **Privileged Under the Common Interest Doctrine.**

12 Plaintiff next argues that the State Defendants waived the attorney-client privilege
13 by disclosing legal research they received from their counsel to the Governor’s Office.
14 Voluntary disclosure to a third party will generally defeat privilege claims. *Sanmina Corp.*,
15 968 F.3d at 1116. However, Plaintiff’s arguments fail to consider the relationship between
16 ADOA and the Governor’s Office.

17 The Governor has the power and duty under the Arizona Constitution and State law
18 to transact *all* executive business with the officers of Arizona’s government and to supervise
19 the official conduct of *all* executive officers. *See* A.R.S. Const. Art. 5 § 4; A.R.S. § 41-
20 101(A)(1). The Governor appoints the director of ADOA. A.R.S. § 41-701. Suggesting that
21 sharing legal advice ADOA receives about the State Health Plan with the Governor’s Office
22 waives the attorney-client privilege is comparable to suggesting that the United States
23 Secretary of State waives any privilege by sharing information with the White House. While
24 ADOA and the Governor’s Office are separate entities and have their own legal counsel for
25 different matters, that does not mean (as Plaintiff suggests) they are unrelated parties with
26 incongruent interests that defeat the common interest doctrine.

1 The common interest doctrine allows ADOA to share legal advice it receives related
2 to the State Health Plan with the Governor’s Office. The attorney-client privilege covers
3 “common interest” situations and provides “an exception to ordinary waiver rules designed
4 to allow attorneys for different clients pursuing a common legal strategy to communicate
5 with each other.” *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). The
6 common interest privilege is not limited to “joint defense” situations “or even situations in
7 which litigation has commenced.” *See, e.g., U.S. v. Gonzalez*, 669 F.3d 974, 978 (9th Cir.
8 2012) (holding that common interest agreement “may be implied from conduct and
9 situation, such as attorneys exchanging confidential communications from clients who are
10 *or potentially may be codefendants* or have common interests in litigation”) (emphasis
11 added); *see also, e.g., id.* at 980 (noting that there is no requirement that parties asserting a
12 common interest privilege be defendants in the same action, explaining that “parties in
13 separate actions might nonetheless have reasons to work together toward a common
14 objective, and there is no requirement that actual litigation even be in progress”).

15 Moreover, the “common interests” to which the privilege extends are not limited to
16 “legal” interests, but may also be “factual or strategic in character.” *See* RESTATEMENT
17 (THIRD) OF THE LAW GOVERNING LAWYERS § 76, cmt. e; *see also, e.g., Hunydee*
18 *v. U.S.*, 355 F.2d 183, 185 (9th Cir. 1965) (affirming that communications may be protected
19 by the common interest privilege, “even though exchanged between attorneys . . . to the
20 extent they concern common issues and are intended to facilitate representation in *possible*
21 *subsequent proceedings*”) (emphasis added). Because the need to protect the free flow of
22 information from client to attorney logically exists whenever multiple parties share a
23 common interest about a legal matter, courts have extended the joint defense or common
24 interest doctrine to numerous relationships among different parties. *In re Grand Jury*
25 *Subpoenas, 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990). This includes
26 parties to *potential* litigation. *Gonzales*, 669 F.3d at 980 (“there is no requirement that actual

1 litigation even be in progress”); *see also United States v. Schwimmer*, 892 F.2d 237, 243–
2 44 (2d Cir. 1989) (“it is therefore unnecessary that there be actual litigation in progress for
3 the common interest rule of the attorney-client privilege to apply”). It also includes related
4 governmental agencies “engaged in a common effort” to fulfill their legal obligations. *See*
5 *Modesto Irrigation Dist.*, 2007 WL 763370 at *16.

6 Plaintiff argues that there is no evidence of any potential litigation surrounding
7 communications between ADOA and the Governor’s Office at the time of the disclosure.
8 This is incorrect.

9 First, as noted above, there were numerous legal challenges to the 2016 Rules
10 occurring when the State Defendants were considering changes to the State Health Plan.

11 Second, litigation against health plans seeking coverage for transgender benefits
12 under § 1557 was not some remote possibility, but was a likelihood the State Defendants
13 had to consider. On June 6, 2016, a transgender man and employee of Dignity Health’s
14 Chandler Regional Medical Center in Arizona filed suit against his employer under Title
15 VII and § 1557 seeking coverage to treat his gender dysphoria.¹⁰

16 Third, and perhaps most importantly, the Court only needs to consider that litigation
17 did in fact occur—this very case. ADOA and the Governor’s Office are right now involved
18 in the litigation brought by Plaintiff with respect to the Exclusion. ADOA’s Director and its
19 Acting Assistant Director of the Benefits Services Division are Defendants in this case and
20 Plaintiff has subpoenaed the Governor’s Office seeking evidence to use in this case. (Doc.
21 161 (Plaintiff’s Notice of Subpoena to the Governor’s Office)). The State Defendants also
22 understand Plaintiff may be filing a third Motion to Compel, this time against the
23 Governor’s Office. It is certainly understandable that ADOA and the Governor’s Office had
24 a common interest, that would have involved considerations about possible litigation, when

25
26 ¹⁰ *Robinson v. Dignity Health d/b/a Chandler Regional Medical Center*, Case No. 4:16-cv-
03035 (N.D. Calif. Filed June 6, 2016)

1 exchanging information in 2016 about transgender benefits.

2 Plaintiff seems to be suggesting ADOA and the Governor's Office should have to
3 demonstrate they had a common interest in this very suit (filed on January 23, 2019 (Doc.
4 1)) when exchanging information in 2016. (Doc. 195 at 12:16-19.) Plaintiff's argument
5 makes no sense. Plaintiff also makes misleading references to testimony by Ms. Isaacson
6 who confirmed she had prior discussions with the Governor's Office that were not about
7 this lawsuit and that she did not specifically discuss costs of litigation. (Doc. 195-3, Ex. 6
8 at 72:16-25; 179:24-180:1.) Neither of those statements indicates there was no
9 consideration about potential litigation.

10 There was no disclosure through deposition testimony by Ms. Isaacson or to the
11 Governor's Office that waived the important privilege.

12 **E. Plaintiff's Motion Fails To State What Documents Plaintiff Demands.**

13 Plaintiff's Motion is further flawed because it does not identify which documents
14 Plaintiff seeks to compel. Plaintiff makes reference to 85 documents on the State
15 Defendants' privilege log dated May 10, 2021, but Plaintiff never identifies which of those
16 documents he purports was improperly withheld. Even if there was a waiver of the attorney-
17 client privilege (there was not), Plaintiff has not explained to which documents such a
18 waiver would apply. Plaintiff's failure makes it impossible for the State Defendants to
19 properly oppose the Motion or for the Court to grant it.

20 **II. CONCLUSION.**

21 For the foregoing reasons, the attorney-client privilege and the common interest
22 doctrine apply to the withheld documents. The Court should deny Plaintiff's Motion to
23 Compel. Alternatively, the Court should review the individual documents that are the
24 subject of the Motion to determine which are still privileged and only order disclosure of
25 those that are not.

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DATED this 3rd day of June, 2021.

FENNEMORE CRAIG, P.C.

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Timothy J. Berg
Amy Abdo
Ryan Curtis
Shannon Cohan
Attorneys for Defendants State of
Arizona, Andy Tobin, and Paul
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18456665

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9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 Russell B. Toomey,
12 Plaintiff,

13 v.

14 State of Arizona, *et al.*
15 Defendants.

No. 4:19-cv-00035

**DECLARATION OF RYAN CURTIS
IN SUPPORT OF DEFENDANTS
STATE OF ARIZONA’S, ANDY
TOBIN’S, AND PAUL SHANNON’S
OPPOSITION TO PLAINTIFF’S
(SECOND) MOTION TO COMPEL**

16
17
18 I, Ryan Curtis, submit this declaration under penalty of perjury pursuant to 28 U.S.C.
19 § 1746 and declare as follows:

20 1. I am a Director at Fennemore Craig, P.C., am licensed to practice law in the
21 State of Arizona, and am lead counsel for Defendants State of Arizona, Andy Tobin, and
22 Paul Shannon (collectively, the “State Defendants”).

23 2. I submit this declaration in support of the State Defendants’ Opposition to
24 Plaintiff’s (Second) Motion to Compel, filed concurrently.

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

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4. Attached as **Exhibit 14** is a true and correct copy of excerpts of the Marie Isaacson Deposition Transcript, dated March 26, 2021.

5. Attached as **Exhibit 15** is a true and correct copy of excerpts of the Scott Bender Deposition Transcript, dated March 31, 2021.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 3rd day of June, 2021.

By: 

Ryan Curtis

18477224

EXHIBIT 14

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 Oranwood Avenue
Phoenix, Arizona 85020
602.266.6535
www.glenne-reporting.com

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

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1 APPEARANCES CONTINUED:

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

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7 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:

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11 PERKINS COIE
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14

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16

17

18 Also present were:

19

20 Michael Noonan, videographer

21 Kim Suciu

22 Stephanie Rosenberg, via videoconference

23

24

25

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
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23

24

25

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.

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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

Page 30

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

Page 31

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,

Page 32

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. 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

Page 42

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

Page 43

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

Page 85

1 office manager.
 2 Q. And do you remember the name of that law firm?
 3 A. Bosco & DiMatteo.
 4 Q. Could you spell that first name. I think you
 5 said Bosco.
 6 A. Yes, B-O-S-C-O.
 7 Q. And how long did you work at the Bosco law firm?
 8 Bosco -- And I'm sorry, would you actually spell the last
 9 name as well, DiMatteo.
 10 A. Capital D, I, capital M, A-T-T-E-O.
 11 Q. And how long did you work at Bosco & DiMatteo?
 12 A. I -- I don't know. Four years maybe. I worked
 13 there before I got my degree and after.
 14 Q. And when you're referring to your degree do you
 15 mean your BS or MBA?
 16 A. BS.
 17 Q. And so you worked at Bosco & DiMatteo for about
 18 four years. So until about 1989 or so?
 19 A. No, I started in '83, I think.
 20 Q. Oh, I see. So the four years was inclusive of
 21 your time while you were at Arizona State University?
 22 A. Right.
 23 Q. So you worked at Bosco & DiMatteo till when
 24 exactly?
 25 A. I think August -- August of 1987.

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1 Q. And what did you do after you left their employ?
 2 A. I went to work at the Attorney General's Office.
 3 Q. Was that the Attorney General of the State of
 4 Arizona?
 5 A. Yes.
 6 Q. And how long did you work at the Attorney
 7 General's Office?
 8 A. I'll have to think about it for a minute. Two --
 9 two or three years.
 10 Q. And what did you do in that job?
 11 A. I was the -- My title was administrative
 12 assistant. Basically an office manager for one of the
 13 divisions, the financial fraud division.
 14 Q. And have you kept in touch with anyone you worked
 15 with at the Attorney General's Office?
 16 A. Yes.
 17 Q. Who?
 18 A. Lisa Flores, Cynthia Wolfe. I think those are
 19 the only two.
 20 Q. Have you ever worked with either Ms. Flores or
 21 Ms. Wolfe in a professional capacity since leaving the
 22 Attorney General's Office?
 23 A. Lisa Flores worked for Governor Hull when I
 24 worked at the Department of Administration. And I had
 25 interaction with her in her professional capacity then.

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1 Q. And around what time was that?
 2 A. Late nineties. Mid -- mid nineties.
 3 Q. And did you ever work with Ms. Flores or
 4 Ms. Wolfe in connection with the ADOA's analysis of
 5 whether to cover transgender benefits?
 6 A. No.
 7 Q. And so after you left the Attorney General's
 8 Office -- Was that around 1990?
 9 A. About that time, yes.
 10 Q. Is that when you returned to ASU for your MBA?
 11 A. No, I went to another -- I was working on my MBA
 12 as soon as I finished my bachelor's degree. And I -- when
 13 I left the Attorney General's Office I went to another
 14 position with the State of Arizona.
 15 Q. And what was that position?
 16 A. Personnel analyst.
 17 THE COURT REPORTER: Personnel?
 18 THE WITNESS: Yes.
 19 Q. BY MR. WALL: And was that with a particular
 20 department?
 21 A. I worked at the Arizona Department of
 22 Administration. It was paid for by the Arizona Department
 23 of Transportation. So I was an Arizona Department of
 24 Transportation employee assigned to Arizona Department of
 25 Administration.

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1 Q. And you began working there in around 1990?
 2 A. Yes.
 3 Q. Ms. Isaacson, I think you testified earlier that
 4 you worked at the ADOA for approximately 25 years. Is
 5 that right?
 6 A. Yes.
 7 Q. So you were working at the ADOA continuously from
 8 this job beginning in 1990, until around 2015?
 9 A. 2018 is when I retired.
 10 Q. So about 28 years, or so?
 11 A. There were times where I was employed by AHCCCS
 12 and not the Department of Administration. I was employed
 13 by ADOT when I first started. So I was subtracting that
 14 time out of the time I worked for Arizona Department of
 15 Administration. I was continuously employed by the
 16 Arizona -- by the State of Arizona for almost 31 years.
 17 Q. And what is AHCCCS?
 18 A. The State's Medicaid plan.
 19 Q. And could you tell me what that abbreviation
 20 stands for again?
 21 A. Arizona Healthcare Cost Containment System.
 22 Q. Would you describe yourself as intimately
 23 familiar with the workings of ADOA?
 24 A. Currently?
 25 Q. Let's clarify. Would you describe yourself as

EXHIBIT 15

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
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Min-U-Script® with Word Index

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

RUSSELL B. TOOMEY,
Plaintiff,

vs.

STATE OF ARIZONA; ARIZONA BOARD OF REGENTS, d/b/a UNIVERSITY OF ARIZONA, a governmental body of the State of Arizona; et al.,
Defendants.

4:19-CV-00035

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

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22 (Videoconference appearances.)

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

24 Shannon:

25 FENNEMORE CRAIG, P.C.

By: Ryan Curtis

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(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
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 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 7

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 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 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 if you were shown those documents again
2 today, would you recall them?
3 A. Very likely so.
4 Q. Did you bring anything to that preparation with
5 Mr. Curtis and Ms. Suci?u?
6 A. No.
7 Q. And have you discussed your deposition with
8 anyone else, aside from Mr. Curtis and Ms. Suci?u?
9 A. No.
10 Q. Mr. Bender, what is your understanding of this
11 lawsuit?
12 A. My understanding is that Dr. Toomey is seeking
13 to have his transgender surgery covered. The plan does
14 not cover that. He believes that under Section 1557 or
15 some other avenue that the plan should be covering that
16 service, and the State feels otherwise.
17 Q. So, Mr. Bender, you're aware of Section 1557?
18 A. Yes.
19 Q. And what is -- what is Section 1557?
20 A. It's part of the Affordable Care Act, which
21 addresses discrimination based on race, gender, et
22 cetera, as it relates to employee benefit programs.
23 Q. And what is the relevance of Section 1557 to
24 this lawsuit?
25 A. The relevance would be there is an argument

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1 Mr. Paul Shannon, who is the acting assistant director of
2 the benefit services division of the ADOA.
3 Do you understand that?
4 A. Yes.
5 Q. By "ABOR," I'd be referring to the Arizona
6 Board of Regents, the public universities of Arizona,
7 including Arizona State University, the University of
8 Arizona, and Northern Arizona University.
9 Do you understand that?
10 A. Yes.
11 Q. By "governor's office," I would be referring to
12 the Arizona Governor's Office.
13 Do you understand that?
14 A. Yes.
15 Q. By "plan" I would be referring to the State of
16 Arizona self-funded health plan controlled by the Arizona
17 Department of Administration.
18 Do you understand that?
19 A. Yes.
20 Q. By "transgender benefits," I mean the range of
21 healthcare services or treatments primarily related to
22 the needs of individuals identifying either as
23 transgender or experiencing symptoms of gender dysphoria.
24 Do you understand that?
25 A. Yes.

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1 that self-insured plans, like ours, should cover
2 transgender surgery, and the State feels differently.
3 Fully insured programs certainly do so.
4 Q. The State feels that its health plan should not
5 cover transgender surgeries?
6 A. We have -- the State has the ability to opt in
7 or opt out as a self-insured entity.
8 Q. But it does feel that its plan should not have
9 to cover transgender surgery?
10 A. Correct.
11 Q. So before we go any further, Mr. Bender, I just
12 want to clarify some terminology and language that we
13 might be using today during the deposition. There's a
14 lot of different conflicting terms or synonymous or
15 related terms, so I think it will help us to
16 understand -- to make sure we understand each other
17 clearly.
18 A. Okay.
19 Q. First, I'd like to say that if I refer to the
20 "ADOA," I'm referring to the Arizona Department of
21 Administration; is that all right?
22 A. Yes.
23 Q. And by "State defendants," I'm referring to
24 defendants in this lawsuit, the State of Arizona,
25 Mr. Andy Tobin, who is the director of the ADOA, and

Page 16

1 Q. And by "transsexual surgery" or "gender
2 reassignment surgery," I'm referring specifically to the
3 healthcare services or treatments related to surgery in
4 connection with the experience of gender dysphoria.
5 Do you understand that?
6 A. Yes.
7 Q. By the term "exclusion," I'm referring to the
8 plan's exclusion of transsexual surgery, inclusive of
9 medical and psychological counseling and hormone therapy
10 in connection therewith, up until 2017, as well as the
11 plan's exclusion of gender reassignment surgery following
12 2017.
13 Do you understand that?
14 A. Yes.
15 Q. And then, finally, by "Section 1557," I'm
16 referring to the portion of the Affordable Care Act that
17 we referenced earlier.
18 Do you understand that?
19 A. Yes.
20 Q. Mr. Bender, are you currently employed?
21 A. Yes, I am.
22 Q. By whom?
23 A. By the State of Arizona, Department of
24 (inaudible) --
25 Q. I'm sorry, would you say that again?

Page 17

1 A. By the State of Arizona, Department of
2 Administration.
3 Q. And what's your title in the Department of
4 Administration?
5 A. I'm the plan administration manager.
6 Q. And how long have you held that title?
7 A. Since I was hired in December 2015.
8 Q. And so you've been the plan administration
9 manager since you were hired in December of 2015?
10 A. Correct.
11 Q. And until present?
12 A. Yes.
13 Q. Have you ever held any other position with the
14 Arizona Department of Administration?
15 A. No.
16 Q. Prior to the time -- prior to -- prior to your
17 hiring by the Arizona Department of Administration, did
18 you have any prior positions?
19 A. Yes.
20 Q. All right. Let's start, then -- actually,
21 let's take -- let's start from the earliest and go and
22 work forward, beginning with your education.
23 Mr. Bender, do you have a college degree?
24 A. I do.
25 Q. And from where?

Page 18

1 A. State University of New York at Oswego.
2 Q. And what degree did you receive from the State
3 University of New York?
4 A. It was business administration. A bachelor's
5 in business administration.
6 Q. Did you study any particular area of expertise
7 with respect to business administration?
8 A. I studied a concentration in human resources.
9 Q. And what does a concentration in human
10 resources entail?
11 A. It was -- it fell short of being a major at
12 that time. It's basically focused on the various
13 different disciplines within human resources.
14 Q. What are some of those disciplines?
15 A. Compensation, human resources law, some
16 touching on benefits, a lot of compliance.
17 Q. When you say "touching on benefits," what does
18 that entail?
19 A. This goes back to the mid-'90s, so forgive me
20 if my memory is fuzzy, but just general what are pension
21 plans and healthcare programs and the typical, you know,
22 what are -- what are the various components of a health
23 plan, things like that.
24 THE REPORTER: Mr. Bender -- Mr. Bender --
25 BY MR. WALL:

Page 19

1 Q. So when did you finish that degree at State
2 University of New York?
3 A. 1995.
4 Q. So, to summarize, you received a bachelor of
5 arts?
6 A. Yes.
7 Q. So you received a bachelor of arts from the
8 State University of New York, where you studied business
9 administration. Correct?
10 A. Correct.
11 Q. In that business administration degree, you had
12 a human resources concentration?
13 A. Right.
14 Q. Which included the study of benefits, which
15 included, as you said, things about pension plans and
16 healthcare programs?
17 A. Yes.
18 Q. Do you have any other degrees?
19 A. No.
20 Q. Do you have a master's?
21 A. Actually, no, I have -- I had an associate's
22 degree from a community college and then went to the
23 four-year school.
24 Q. And where -- what community college was that
25 from?

Page 20

1 A. Columbia Green Community College.
2 Q. And when did you receive it?
3 A. 1992.
4 Q. And what did you study?
5 A. Business administration.
6 Q. And were your studies similar to your studies
7 at the State University of New York?
8 A. Very similar. It was more basics, accounting,
9 things like that.
10 Q. When you say "accounting," what exactly did
11 that entail?
12 A. It was basic accounting, accounting 1,
13 accounting 2, corporate finance. Sort of your general
14 business administration program.
15 Q. Did you do anything with respect to actuarial
16 studies?
17 A. No.
18 Q. What about while you were studying at the State
19 University of New York?
20 A. No.
21 Q. Do you understand what I mean when I say
22 "actuarial studies"?
23 A. Yes.
24 Q. What does that entail?
25 A. Study of actuarial science, for --